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SUPREME COURT OF ARIZONA

APRIL SMITH, et al., Petitioners, v. ADRIAN FONTES, Respondent, MAKE ELECTIONS FAIR PAC, Real Party in Intertest/Respondent.	Arizona Supreme Court No. CV-24-0199-SA Maricopa County Superior Court Nos. CV2024-019846 CV2024-019880 (Consolidated)

PETITIONERS' RESPONSE TO MOTION FOR RECONSIDERATION

PRELIMINARY STATEMENT

This Court has never held that an action contesting the validity of an initiative is moot once ballots are printed. Instead, the firmly held rule since at least 1947 has been that a challenge becomes moot only once the measure is adopted at the election. *Renck v. Superior Court*, 66 Ariz. 320, 325–28 (1947).

The motion for reconsideration presents no occasion for the Court to revisit its nearly 80-year-old holding in *Renck*. If the Committee wishes to stop the Superior Court from continuing to hear the case, it is free to file its own special action—not seek reconsideration of an order in a ***different*** special action ***denying*** Plaintiffs' requested relief. Or it may argue mootness in any appeal from the eventual judgment. Whatever it chooses to do, this is neither the time nor the place to call for disturbing decades-old precedent.

What the Committee really asks for is a license to run out the clock. Since the outset, it has litigated this case in the hopes that the ballot printing deadline would serve as a buzzer to immunize its plainly defective initiative from further scrutiny. But Petitioners are entitled to their day in court. The Committee is not entitled to a free pass.

ARGUMENT

I. There is nothing to reconsider.

The Court's August 23, 2024 Decision Order accepted special action jurisdiction but ultimately ***denied*** relief, declining "Plaintiffs' request to further limit or dictate the proceedings." Decision Order at 5.

There is nothing to reconsider. Should the Court ***grant*** relief, or perhaps ***strenuously*** deny it? What the Committee seeks is affirmative relief in ***its*** favor, despite never having filed a special action petition of its own. If it wants to stop the Superior Court from even hearing the case, it needs to file its own special action requesting as much. *See Renck*, 66 Ariz. at 322–23 (petitioner filed writ of prohibition to prevent the Superior Court from continuing to exercise jurisdiction over initiative challenge after measure had been adopted at the election). If the Committee wants Plaintiffs' claims dismissed as moot, it should ask the Superior Court for such relief in the first instance, and it can raise the issue in any eventual appeal from the judgment.

Simply put, the Court cannot, as a procedural matter, grant the Committee the affirmative relief it seeks in the form of reconsideration of an order ***denying*** special action relief to Plaintiffs.

II. A challenge to an initiative is not mooted until the measure is adopted at the election.

On the merits, the Committee's arguments are squarely foreclosed by *Renck*, 66 Ariz. 320. There, the plaintiffs challenged an initiative proposing a constitutional amendment, but the election passed and the measure was adopted while the litigation was ongoing. After the election, Renck intervened in support of the initiative and asked that the complaint be dismissed. When the trial court declined to do so, Renck applied for a writ of prohibition to this Court, asking to prevent the Superior Court from exercising jurisdiction over the case.

The Court granted relief, prohibiting the trial court from proceeding further with the case. *Id.* at 328. Critically, the Court held that the mooting event was not, as the Committee would have it, the mere printing of the ballots. Rather, it was the ***adoption*** of the measure at the election. *See id.* at 325 ("Once . . . the subject matter of the petition has been placed upon the ballot ***and thence adopted at a regularly held election of the people***, it is too late to question the legal sufficiency of the petition." (emphasis added)); *id.* at 327 ("Once the measure has been placed upon the ballot, voted upon ***and adopted by a majority of the electors***, the matter becomes political and is not subject to further

judicial inquiry as to the legal sufficiency of the petition originating it." (emphasis added)); *id.* at 328 ("[T]he matters under review by [the trial court] became moot with the adoption of the measure by the people and its incorporation into the Constitution by the Governor's proclamation."). This could hardly be dicta when the Court repeated it three times in the opinion.

None of the Committee's cases are to the contrary. They deal either with candidate petition challenges or election contests in which the appearance on the ballot of one candidate relative to another matters to the results, *see Hunt v. Superior Court*, 64 Ariz. 325 (1946), *Rapier v. Superior Court*, 97 Ariz. 153 (1964), or laches, *see Harris v. Purcell*, 193 Ariz. 409 (1998); *Mathieu v. Mahoney*, 174 Ariz. 456 (1993); *Kromko v. Superior Court*, 168 Ariz. 51 (1991); *Korte v. Bayless*, 199 Ariz. 173 (2001). None holds that a challenge to the validity of an initiative is moot once ballots are printed.

This Court's decision in *Save Our Public Lands Coalition v. Stover*, 135 Ariz. 461 (1983) is not to the contrary. That case dealt with the prior statutory signature review scheme, where if the review of the random sample determined that the projected number of valid signatures was

less than 95% of the required minimum, the measure would not qualify for the ballot. If the projection came within 95% to 105% of the minimum number of signatures, the county recorders had to verify every signature. When the initial review projected the number of valid signatures below 95%, the proponents of the initiative successfully challenged Maricopa County's certification, bringing the projection above 95% and entitling them to review of every signature by the county recorders. But the trial court found that there was not enough time to verify every signature before ballot printing. This Court held that in this range, "the basic presumption of validity should attach." *Id.* at 464. More specifically, "[i]f the time pressures are such that the county recorders cannot verify every signature before the date the election ballots must reach the printers, all doubts as to the validity should be resolved in favor of sustaining the signatures, and the initiative should be placed on the ballot." *Id.*

All that meant is that the proponents of the initiative in that case should not be penalized by the counties' inability to review every signature before ballot printing through no fault of the proponents. *Save Our Public Lands Coalition* did not involve a challenge to the validity of the initiative. So it had no occasion ever to hold that a ***challenge*** to the

validity of an initiative is foreclosed or mooted once ballots are printed. The case does not address mootness at all, and it has no bearing on the question here.

Also, no part of the Arizona Rules of Civil Appellate Procedure dictates that an appeal designated as an expedited election matter becomes moot once ballots are printed. These are rules of procedure; they do not (and cannot) mandate substantive outcomes. The rules allow for direct appeals to the Arizona Supreme Court in certain election cases if "the issue otherwise would become moot before Supreme Court review," ARCAP 10(d)(1)." That hardly requires a substantive finding of mootness. And while the parties must address "[a]ny pending deadlines that might affect the schedule for briefing or disposition of the appeal, such as the deadline for printing ballots or a publicity pamphlet, or the date of the election," ARCAP 10(g)(1), that too, does not dictate a finding of mootness if ballots are printed—if it did, requiring the parties to address "the date of the election," *id.* would be superfluous.

True, the courts endeavor to decide election cases before the printing of ballots. That is why the Court's prior scheduling orders asked the parties to address the ballot printing deadline. But as the Decision

Order makes clear, no statute or case requires that the case be decided before the ballot printing deadline on the penalty of mooting the challenge.

Nor would an injunction precluding any votes for the measure from being counted violate the Arizona Constitution. Voters are not disfranchised by not having their votes counted for a measure that was never eligible in the first place. By the Committee's logic, holding ballot measures to be substantively invalid after their adoption—something the courts unquestionably have the power to do—would likewise disfranchise voters. It is telling that the Committee does not cite a single case in support of this argument. Those courts that have considered related arguments have rejected them. *See Costa v. Cortes*, 142 A.3d 1004, 1022 (Pa. Commw. Ct.) (holding that legislative resolution moving a ballot measure from one election to another "in no way disenfranchised voters who had no right to vote on the Proposed Constitutional Amendment 1 in the first place and who were only able to vote because of insufficient measures to fully advise voters that Proposed Constitutional Amendment 1 was not before the electorate on the April 2016 Ballot), *aff'd*, 145 A.3d 721 (Pa. 2016).

Whether the injunction could extend to the Secretary is for the trial court to decide in the first instance, including, if necessary, by allowing amendment to add necessary county defendants. In any event, it is notable that courts in other jurisdictions allow enjoining the counting or canvassing of votes for ballot measures that are invalidated after ballot printing. *See, e.g., Martin v. Humphrey*, 558 S.W.3d 370, 379 (Ark. 2018) ("[T]he circuit court did not abuse its discretion when, in order to enforce its finding, it issued a writ of mandamus prohibiting Secretary Martin from counting, canvassing, or certifying the votes for or against Issue No. 1."); *Montanans for Just. v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006) ("County administrators are instructed not to count the votes for CI–97, CI–98 and I154 to the extent that this is technically feasible. If the votes must be counted, they will have no force or effect."); *Schweickart v. Powers*, 613 N.E.2d 403, 411 (Ill. App. 1993) ("The injunction in this case merely delays the counting of ballots until a decision can be determined on the merits. . . . Here, the court's decision to grant the injunction was within its discretion because the injunction preserves the last uncontested status of the election by halting the counting of ballots until a final determination can be made. Without the

injunction, the election would proceed and, as previously discussed, plaintiffs would be deprived of an effective remedy.").

A final note on policy. The Committee's position since the very first status conference has been that the challenge would be moot once the ballot printing deadline passed. It is clear that they expected the ballot printing deadline as a get-out-jail-free card. Allowing ballot printing to function as such would cement the perverse incentive the Committee thought it could avail itself of here: delay and fight overwhelming evidence of invalidity in the hopes of running out the clock. Allowing the challenge to proceed does not provide challengers with similar incentives for gamesmanship, as they may face viable laches defenses if they engage in unreasonable delay. The policy of the courts, as Decision Order recognized, is to dispense justice. The Court should allow Plaintiffs their day in court.

III. The Court should strike the Secretary's response.

The Court should strike the Secretary's "Response Regarding the Remedy" filed September 6, 2024. Under ARCAP 22(d), "[a] party may not file a response to a motion for reconsideration unless requested by the appellate court to do so . . . ." The Court's August 29, 2024 order

directed the Smith Petitioners to respond to the Committee's Motion for Reconsideration, not the Secretary. The Secretary's Response, therefore, is procedurally improper. But even if the Court does not strike the Secretary's Response, the Court should take judicial notice that the Secretary has made a contradictory argument in the ongoing *Kirkland v. Way* case in Superior Court, saying the Secretary should be ordered to disregard votes cast for an allegedly ineligible candidate. *See* Arizona Secretary of State's Brief Re: Remedy, Kirkland v. Way, CV2024-022463 (Ariz. Super. Ct.) ("For the foregoing reasons, if the Court determines that Way does not meet the constitutional and statutory requirements for candidates for the Legislature, consistent with A.R.S. § 16-343(D), the Court should order that votes for Way not be attributed to him and that only the votes cast for eligible candidates, both the two printed on the ballot and those who comply with the requirements to run as write-ins, be included or attributed to candidates in the county and state canvasses of the November 5, 2024 General Election.").

CONCLUSION

For the foregoing reasons, the Court should deny the motion for reconsideration and strike the Secretary's Response.

RESPECTFULLY SUBMITTED this 6th day of September, 2024.

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