# ARIZONA SUPREME COURT

APRIL SMITH, *et al.*,

Plaintiffs/Appellants,

v.

ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona,

Defendant/Appellee,

and

MAKE ELECTIONS FAIR PAC, a political committee,

Real Party in Interest.

No. CV-24-0199-SA

Maricopa County Superior Court
Nos. CV2024-019846
CV2024-019880
(Consolidated)

**SECRETARY OF STATE RESPONSE REGARDING THE REMEDY**


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Pursuant to this Court's August 29, 2024 Order, nominal party Secretary of State Adrian Fontes provides this Response Regarding the Remedy. The Secretary is not taking a position on whether this measure should be enacted into law. But it is too late to continue litigating whether this initiative qualifies for the ballot given the fact that ballots for more than half the state, and all information relating to this measure for the publicity pamphlet, have already gone to the printer. When a challenger fails to move with the necessary alacrity to successfully challenge enough signatures to remove a measure from the ballot before ballots go to print, the question should be decided by the voters.

## I. The Secretary and Counties Assiduously Complied with the Processes Required by the Arizona Constitution and State Law.

The Arizona Constitution includes an explicit protection for the right to vote, and dedicates an entire article to protect voters and their rights. Ariz. const. art. VII. It also enshrines the right of the people to create law and amend the Arizona Constitution through direct democracy. Ariz. const. art. IV, § 1(1) ("The legislative authority of the state shall be vested in a legislature, . . . but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . . . "). To avail themselves of this right, the people must gather signatures from at least ten percent of the electorate for statutory changes, and fifteen percent for

constitutional amendments. *Id.* at (2). After sufficient signatures are collected, initiative proponents must file them with the Secretary at least four months before the general election. *Id.* at (4). Any initiative submitted pursuant to the Arizona Constitution "shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon . . . " *Id.* at (5).

In addition to the constitutional provisions regarding initiatives, Title 19 is largely dedicated to regulating the initiative process. Of particular significance to the appropriate remedy here is a set of laws adopted in 1977, which codified a mandatory review process for initiatives for the first time. S.B. 1211, 33rd Leg., 1st Sess. (1977). The new law required the Secretary to review all of the submitted sheets for completeness, A.R.S. § 19-121.01, and then provide a random five-percent sample to the county recorders for a thorough review pursuant to A.R.S. § 19-121.02. After this statutory review, the initiative must have a projected validity rate that meets—if not exceeds—the constitutional threshold to be certified for the ballot. A.R.S. § 19-121.04. Unlike candidate nomination petitions which are not subject to review unless challenged, this process ensures all voter-initiated petitions undergo review by elections officials before it reaches the ballot.

All the steps required by the Arizona Constitution and the statutes were completed here, so the Secretary should not be enjoined from canvassing votes for

this initiative. The various governmental entities responsible for the review of this initiative timely complied with their statutory obligations, and many governmental entities, despite their other duties during a time of overlapping primary election and initiative processing deadlines, concluded their review before the statutory deadline. *See, e.g.*, Memo re: Preliminary Results of Secretary of State Review of Initiative I-14-2024 (July 26, 2024) (providing results five days before the Secretary's statutory deadline of August 1); Pima County Certification (Aug. 14, 2024) (reporting the county's validity rate two days before the statutory deadline of August 16). The officials involved, who are responsible for canvassing the final vote, did not mobilize such intense effort, only to have their most important constitutional duty—faithfully tabulating, reporting, and certifying the will of the voters—undermined.

No provision in the Arizona Constitution permits a measure to go to the ballot, and allow millions of voters to vote on it, only for those votes to be invalidated. Neither is there a provision of the Arizona Constitution, nor state law, which would allow the Secretary not to canvass a contest on the ballot. Ariz. const. art. V, § 10; *compare* A.R.S. § 16-648(B) ("The secretary of state . . . shall canvass all proposed constitutional amendments and initiated or referred measures

. . . ”) *with* A.R.S. § 16-650 (providing that the Secretary shall declare elected the person with the most votes “unless enjoined from so doing by an order of court”).

The long line of precedent restraining this Court from nullifying the results of a vote is not elevating form over substance; it is the opposite. Arizonans have an explicit right to “free and equal” elections. Ariz. const. art. II, § 21. “Justice in all cases shall be administered openly and without unnecessary delay.” Ariz. const. art. II, § 11. It is difficult to imagine a more opaque process than one in which voters will be faced with a dozen propositions to vote on, only to find out later that their vote on one of those issues meant nothing, because the Secretary was enjoined from including it in the final canvass. This is the wrong precedent to set, regardless of the circumstances surrounding the election. The repercussions of such a decision is heightened by the already difficult conditions in Arizona, and the concerns that any after-the-fact decision not to tabulate or certify the vote on a measure would create.

The appropriate remedy is simple. Once the ballots have gone to print, it is in the hands of Arizona’s voters. The person contesting an issue (or candidate) can make a case to the voters, but the Courts cannot usurp the voters’ decision once it goes to them. Opponents of any candidate or question on the ballot may recall a candidate, try to elect a different candidate in the next election cycle, or seek to

implement their own measure on the ballot in a future election cycle. What no one has a right to do is deprive Arizona voters of "free and equal" elections, because "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. const. art. II, § 21. This Court should not enjoin the Secretary from carrying out a duty which the Arizona Constitution requires.

### II. Precedent Prohibits a Post-Ballot Printing Injunction to Prevent the Secretary from Canvassing This Measure.

The wisdom of this Court's precedents, which moots proceedings regarding the validity of initiatives after ballots have gone to print, ensures that every vote for every candidate and issue on the ballot is counted, reported, and respected. *See Allen v. State*, 14 Ariz. 458 (1913) (refusing a challenge to a successful referendum against a law enacted by the first Arizona legislature, explaining "we will not annul [the measure] for reasons that might have possessed merit, if urged at the proper time."). This Court should not abandon this hard-earned wisdom.

In 1942, this Court briefly departed from its precedent and allowed a general election to proceed, while litigation to determine the technical validity of the initiative continued. *Whitman v. Moore*, 59 Ariz. 211 (1942) (overruled by *Renck v. Super. Ct. of Maricopa Cnty.*, 66 Ariz. 320 (1947)). The *Whitman* court determined the 1913 *Allen* case was distinguishable because the referendum in *Allen* had not been challenged until after the election. But just five years later, the

Court abandoned its attempt to distinguish *Allen*. "The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the question and went to the polls and voted thereon." *Renck*, 66 Ariz. at 325. The rationale initially forged in *Allen*—by a new Court for a brand new state and re-adopted by *Renck*—continues to provide a reliable rule. This Court has held firm to the precept that 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 then too late to question the legal sufficiency of the petition." *Id.* (*citing Allen*, 14 Ariz. 458).

The appropriate remedy here, now that the ballots and the state's publicity pamphlet have been printed, is to halt further proceedings as moot. The publicity pamphlet not only contains the full text of the initiative, but it will also include the argument advocating for the measure from the Make Elections Fair, PAC and arguments from any person who pays the fee advocating for or against the ballot measure. A.R.S. § 19-124(A). Every household with a registered voter will be receiving these pamphlets either through regular mail or by email prior to the start of early voting. A.R.S. § 19-123(B) & (C). "The mailings may be made over a period of days but shall be mailed in order to be delivered to households before the

earliest date for receipt by registered voters of any requested early ballots for the general election." A.R.S. § 19-123(B). The Secretary of State is also required to hold at least three town hall meetings in at least three different counties to "provide an opportunity for proponents, opponents and the general public to provide testimony and request information." A.R.S. § 19-123(E). After investing their time educating themselves about this ballot measure, it would be wrong for the Arizona electorate later to be told their vote will not be counted.

### III. The Systemic Consequences of Abandoning Precedent.

Election litigants have long been on notice that election cases must be pursued with all "deliberate speed" to avoid the case being mooted by the ballot printing deadline. *See Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993). This is such an ingrained rule that this Court asks the filing officer for the applicable printing deadline as a matter of course in these cases. *See, e.g.*, Order, CV-24-0184 (Aug. 12, 2024) (requiring the Secretary to "file a statement forthwith advising the Court of the last day to decide this matter."). Indeed, all parties to this matter (and the other initiative matters this cycle) repeatedly referred to and stressed that any decision had to be issued by the ballot-printing deadline.

Rejecting precedent in this case will create perverse incentives for challengers to timely file a challenge but move only as quickly as needed to get to

a final decision by some amorphous time in the future, regardless of whether the ballots or the publicity pamphlet have already gone to print.

The litigants here had the tools with which to pursue this case and have a final decision before the ballot-printing deadline. The challengers presented testimony to the trial court that they used 1,200 workers, who reviewed all the signatures the Committee filed with the Secretary against a part of the voter file, utilizing a total of 61,000 labor hours to accomplish this task in a month. CV2024-019846, ME Day 4 at 2 (Aug. 15, 2024). In addition, the challengers hired expert witnesses, and the parties in interest engaged in proceedings before a special master. *Id.* In short, the initiative challengers had the tools to complete the work in the necessary time frame, and the work was in fact completed (twice, counting the proceedings in *Turley v. Fontes*, CV2024-022057).

The challengers have not been able to fully exhaust their appellate remedy because one category of challenged signatures was remanded for further proceedings; but they have had multiple opportunities to make their case before the ballots (and publicity pamphlet) went to print. Simply put, the challengers failed to carry their burden within the timeline allowed.

The challengers' burden cannot equitably be shifted onto all of Arizona's voters, which is what an order enjoining the Secretary from certifying the full

canvass after the voters have spoken, would do. This Court has the power to discourage delay tactics by litigants that will confuse and ultimately disenfranchise voters, by hewing to this Court's century of precedent and the Arizona Constitution. This approach leaves the ultimate authority with the voters if a final judicial resolution cannot be reached before ballots go to print, as Arizona's founders desired. The pace of this litigation is a woefully insufficient reason to jettison one hundred years of this Court's precedent and manufacture a new rule allowing the judiciary to decide whether to respect the will of the voters.

The problem with continuing litigation after the ballot printing deadline is illustrated by the current procedural posture of this case. At a status conference on September 3, the parties continued to discuss additional briefing and additional factual development which had yet to occur. Two additional status conferences have been set, one regarding an order for a special master to review factual matters, at 4:00 p.m. on September 4, and the other to set deadlines for briefing separate legal arguments, at 1:30 p.m. on September 7. CV 2024-09846, ME at 2 (Sept. 3, 2024). The final deadlines to entirely resolve the proceedings have yet to be established, but there was a brief mention at the September 3 status conference that the trial court proceedings could take up to a month. Uniformed and Overseas Absentee Voter Act ("UOCAVA") ballots are due to those voters by September

21, A.R.S. § 16-543(A), and early voting for all Arizona voters begins on October 9, A.R.S. § 16-542(C). If proceedings at the trial court take a month, then UOCAVA voters will have had their ballots for more than a week, and the rest of Arizona's voters will be on the cusp of the start of early voting, with no definitive answer as to whether a vote on this initiative will be counted.

Arizona has a strong public policy of favoring certainty and finality in elections. Arizona's election officials fulfilled their statutory duties by verifying hundreds of thousands of petition signatures within the unforgiving statutory deadlines. The Secretary of State reviewed nearly 600,000 petition signatures and verified the petition circulators on these petitions within twenty business days from I-14-2024 initiative alone. The County Recorders had even less time, only fifteen days, to verify the 5% random sample.

In stark contrast, this litigation has been going on for weeks and there is no end in sight. The challengers here must be held to the well-known expedited timeframes that other litigants face in election cases. With only a few weeks before the General Election, and days before ballots will be in the hands of UOCAVA voters, Arizonans need certainty and finality on whether their votes will count. This Court should follow precedent and the Arizona Constitution. Once

the ballots and publicity pamphlet go to print, the initiative must be in the hands of the voters, not the courts.

## CONCLUSION

Given the far-reaching implications of this Court potentially enjoining the canvass, the Secretary requests this Court to reconsider its previous ruling and affirm the principle that once the ballots have gone to print, any challenge must end.

Respectfully submitted this 6th day of September, 2024.

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