IN THE SUPREME COURT
STATE OF ARIZONA

JAIME MOLERA, et al., Petitioners/Appellants, v. MICHELE REAGAN, Respondent/Appellee, and INVEST IN EDUCATION COMMITTEE, Real Party in Interest/Appellee, J.D. MESNARD, et al. Intervenor/Appellant.	Supreme Court No. CV-18-0218-AP/EL Maricopa County Superior Court No. CV2018-010209 **(Expedited Election Matter)**

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF INTERVENORS/APPELLANTS AND IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and occasionally files *amicus* briefs when its or its clients' objectives are directly implicated. The Goldwater Institute seeks to promote the economic freedom essential to a prosperous society, and to enforce provisions of our state Constitution that protect the rights of taxpayers. To this end, the Institute is frequently involved in constitutional litigation involving taxpayer protections, *see, e.g.*, *Leach v. Reagan*, No. CV-18-0205-AP/EL (pending); *Friedman v. Cave Creek Unified Sch. Dist. No. 93*, 231 Ariz. 567 (App. 2013), including cases where taxpayers are at risk from wasteful and foolhardy initiative measures. *See*, *e.g.*, *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533 (2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

The strict compliance standard is plainly constitutional. The Arizona Constitution specifically declares that the provisions governing the initiative process "shall not be construed to deprive the legislature of the right to enact any measure," ARIZ. CONST., art. IV, pt.1, § 1(14), and it *requires* that the Legislature

pass laws to "secure the purity of elections and guard against abuses of the elective franchise." *Id.* art. VII § 12. The statutory requirements for valid initiative petitions, including the strict compliance requirements, are a legitimate exercise of this power. They intrude neither on the powers of the judiciary nor of the initiative and therefore are not a *violation* of separation-of-powers, but an *exercise* of the checks and balances principles that *preserves* the separation of powers. The statute does not redefine any legal meaning, which would be improper, but sets forth a rule to be followed, which is proper. *Cf. State v. Montes*, 226 Ariz. 194, 198 ¶ 17 (2011). It does not intrude on the initiative process, but is an exercise of the legislature's prerogative to preserve the integrity of the legislative system.

Nothing in the Constitution creates a "harmless error" rule with regard to the initiative process—on the contrary, when the Constitution's authors believed a "harmless error" standard appropriate, they said so, as in Article VI § 27. The absence of such a standard in Article IV shows that the Legislature is not barred from requiring that the initiative process be scrupulously followed.

There are good reasons for strict compliance, given the risks involved in the initiative process. This Court should affirm that "the safeguards provided by law against [the initiative's] irregular or fraudulent exercise [must] be carefully maintained." *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5–6 (1972) (quotations and citation omitted).

ARGUMENT

I. THE LEGISLATURE HAS "THE RIGHT TO ENACT *ANY* MEASURE" TO REGULATE THE INITIATIVE PROCESS

A. Regulating the Initiative Process is a Legitimate—Indeed, Mandatory—Legislative Function

Article IV says the initiative and referendum provisions "shall *not* be construed to deprive the legislature of the right to enact *any* measure," with only one exception: the Legislature may not "supersede[]" an adopted initiative. ARIZ. CONST., art. IV, pt.1, § 1(14) (emphasis added). Ordinary rules of construction lead to the conclusion that the Legislature *does* have authority to regulate the initiative process, including by mandating that its rules be followed scrupulously. *Cf. Cox v. Super. Ct. in & for Pima Cnty.*, 73 Ariz. 93, 97 (1951) (so long as Constitution does not forbid Legislature from limiting courts' jurisdiction, it may do so); *Adams v. Bolin*, 74 Ariz. 269, 277 (1952) (applying *in pari materia* to initiative clauses).

The *only* exception to the Legislature's authority is that it may not "supersede" approved initiatives. This "inferentially would leave the Legislature in full possession of all other ordinary constitutional powers," *McBride v. Kerby,* 32 Ariz. 515, 523 (1927), including the power to regulate the initiative process. But that need not be left to inference, because Article VII § 12 specifically

commands the Legislature to "enact[]…laws to secure the purity of elections and guard against abuses of the elective franchise."

The court below quoted *State v. Superior Court,* 143 P. 461, 464 (Wash. 1914), but seems to have missed the significance of the quoted passage, which says that it is *proper* to require a compliance that is strict enough "to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." In setting rules for the initiative process, and requiring that those rules be carefully followed, the Legislature is acting to guard against fraud and mistake. Courts accord substantial deference to such regulation of the initiative process. *Cf. Ariz. Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 211 Ariz. 337, 364 ¶ 110 (App. 2005).

Obviously the Legislature may regulate elections generally. Article IV anticipates the Legislature implementing the initiative process; for example it requires a "canvass," ARIZ. CONST. art. IV, pt. 1, § 1(13), permits voting only by "qualified electors," *id.* § 1(2), and requires petition circulators to execute "affidavit[s]." *Id.* § 1(9). The Legislature has authority to determine the method of canvassing voters, or which voters are "qualified," or to set forth the form and contents of a valid affidavit—all to discharge its Article VII duty to secure the purity of elections.

"Given its constitutional underpinnings, the right to petition is inherent and absolute. This does not mean, however, that such a right is not subject to reasonable regulation. Quite the contrary, reasonable regulations on the right to vote and on the petition process are necessary to ensure ballot integrity and a valid election process." *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 843 (Fla. 1993). A.R.S. § 19-102.01 is designed to accomplish that purpose. And because it does not impair the right to vote, it is subject to rational basis scrutiny. *Arizona Indep. Redistricting Comm'n*, 211 Ariz. at 345–49.

The requirements at issue here plainly have a rational connection to preserving the purity of elections and guarding against abuses. The requirement that petition circulators indicate whether they are paid helps police against fraud and helps inform voters, who may be more likely to sign petitions circulated by volunteers than by those paid to gather signatures. In this year's election, for example, Arizona Public Service has published advertisements urging voters not to sign petitions that they contend are circulated by "felons." Todd Shepherd, *Steyer-Funded Petition Accused of Employing Felons to Gather Signatures*, WASH. FREE BEACON, May 22, 2018. Whatever the merits of this claim, it indicates substantial public interest in the identity of petition gatherers. Last year, the state prohibited pay-by-signature petitioning, out of concern that it encouraged fraud. Mary Jo Pitzl, *Arizona Gov. Doug Ducey Signs Bill Banning Pay-Per-Signature for*

Initiative Petitions, ARIZ. REPUBLIC, Mar. 23, 2017. These concerns are rational, and a requirement that petition circulators *personally* attest whether or not they are paid is plainly adapted to accomplish the purposes of ensuring the purity of elections and guarding against abuse. The applicable rational basis review does not let courts loosen the strictness of the statutory requirement.

Nor is the burden particularly severe. As the court observed last week in *Leach v. Reagan*, CV2018009919, Op. at 12 (Aug. 16, 2018), there is no dispute that strict compliance in *referenda* is constitutionally valid, so it would be illogical to hold that it is a severe burden on a fundamental right in the *initiative* context. It's not hard for petition circulators to check off a box on a form. On the contrary, that's easy. And although it may seem drastic to disqualify signatures for failing to do so, that fault must be assigned to the party that fails to follow such simple rules.

B. The Initiative Process is Liable to Abuse

The initiative process was designed as a check against legislative abuses, but can itself be abused. "Generally minority rights lose in ballot initiatives," David Schultz, *Liberty v. Elections: Minority Rights and the Failure of Direct Democracy*, 34 HAMLINE J. PUB. L. & POL'Y 169, 183 (2013), and our system "is very much based on distrust of majorities," Erwin Chemerinsky, *Challenging Direct Democracy,* 2007 MICH. ST. L. REV. 293, 295 (2007). The authors of the state and federal constitutions recognized that although "the people commonly

intend the PUBLIC GOOD," they do not "always *reason right* about the *means* of promoting it." THE FEDERALIST NO. 71 at 482 (Alexander Hamilton) (J. Cooke, ed., 1961). Thus they devised checks-and-balances to prevent legislation motivated "by some irregular passion, or some illicit advantage, or…the artful misrepresentations of interested men." *Id.* NO. 63 at 425 (James Madison).

The Arizona Constitution's framers were familiar with the dangers of citizen-lawmaking—highly controversial in their day—and sought to design what one framer called "a safe and operative initiative and referendum, containing such details as will guard our legislature." THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 at 194 (John S. Goff, ed., 1991).

They did so by reserving the initiative to the people *without* depriving the Legislature of authority to pass "any" statute, and requiring the Legislature to ensure the "purity" of elections. What this Court said of referenda in *McBrayer*, 109 Ariz. at 5-6, also applies here: the initiative power is "so great" that it "must be confined within the reasonable limits fixed by [statute]. The [statute] prescribes what the petition for [initiative] shall contain, how it shall be signed, and by whom it shall be verified" in order "to guard the integrity both of the proceeding and of the petition."

II. "STRICT COMPLIANCE" IS AN *EXERCISE*, NOT A VIOLATION, OF SEPARATION OF POWERS

A. Strict Compliance, Like Regulating Courts' Jurisdiction, is the Checks and Balances System in Action

The Superior Court asserted that strict compliance violates the separation of powers, although its reasoning is not clear. Op. at 7. It meant either that the Legislature, in enacting this requirement, imposed a legal standard of review, which is supposed to be a judicial function—or that the initiative process itself is one of the powers that is separated from the legislative, executive, and judicial branches, so that for the Legislature to limit that process violates separation of powers. Either theory is unpersuasive.

The strict compliance rule does not interfere with the judicial power. While the Legislature may not "make a substantive change in the governing law"—meaning it cannot redefine legal concepts by fiat—it may legislate by setting forth new rules and duties. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). In other words, courts determine the *meaning* of the law, but the Legislature adopts, repeals, or alters the law that courts interpret. While "the line" between these two "is not easy discern," the Legislature "must have wide latitude in determining where it lies." *Id.* at 519-20. And A.R.S. § 19-102.01 does not cross that line. Instead, it specifies how the initiative process shall be undertaken. It does not alter the definition of any legal concept, but legislates a rule (as required by Article VII

§ 12) and requires that it be scrupulously followed. That's plainly within the Legislature's constitutionally reserved "right to enact any measure." ARIZ. CONST., art. IV, pt.1, § 1(14).

This does not violate separation of powers; it's an instance of the proper *operation* of separation of powers. By way of analogy, consider *Montes*, 226 Ariz. 194, which involved the Legislature's response to this Court's ruling in *Garcia v. Browning*, 214 Ariz. 250 (2007), that the state's self-defense statute did not apply to crimes occurring before a certain date. *Id.* at 254 ¶ 20. The Legislature then enacted a law declaring that it *did* so apply. *Montes*, 226 Ariz. at 195 ¶ 4. This Court ruled that this "does not violate separation of powers" because it did not "disturb[] vested rights, overrul[e] a court decision, or preclude[e] judicial decision-making." *Id.* at 196 ¶ 11. Nor was it "a legislative attempt to 'retroactively nullify' this Court's interpretation" of existing law. *Id.* at 197 ¶ 15.

Similarly, A.R.S. § 19-102.01 did not nullify any previous judicial determination of the law's meaning, or preclude judicial decision-making. Rather, it set forth the statutory mechanism for qualifying initiatives for consideration by voters, and defining the obligations of initiative campaigns.

As to any potential separation-of-powers issues regarding the initiative process *itself*, the initiative power is included in Article IV, not a separate article, which means that the Constitution contemplates that power *not* as "a fourth and

autonomous branch of government," Owen Tipps, *Separation of Powers and the California Initiative*, 36 GOLDEN GATE U. L. REV. 185, 187 (2006), but as part of the same legislative power that the Legislature enjoys. The separation-of-powers clause in Article III refers to only three branches; it does not call the initiative a separate branch.

This suggests that a separation-of-powers analysis is not even valid in this context. Because the Legislature has the same lawmaking power as the people, laws regulating the initiative process should be viewed as internal matters within the legislative branch, like rules of procedure for floor debates, and thus beyond judicial cognizance except where constitutionally forbidden. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892) (legislature's internal procedures are beyond judicial review).

Even if the initiative process were a separate "branch" to which separation-of-powers applied, legislative regulation of the process does not *violate* separation of powers; it is an *example* of separation-of-powers, similar to the Legislature's authority to regulate the jurisdiction of the courts. ARIZ. CONST. art. VI §§ 1, 5, 6. *See Cox*, 73 Ariz. at 97 ("unless the constitution has prohibited the legislature from enlarging the appellate jurisdiction of the superior court, it has, in exercising the sovereign power of the state, the power to enlarge but not diminish such appellate jurisdiction."). That power is "an important part of the constitutional scheme of

checks and balances, which was intended to maintain an equilibrium of power among the coordinate branches." Heather P. Scribner, *A Fundamental Misconception of Separation of Powers: Boumediene v. Bush*, 14 TEX. REV. L. & POL. 90, 108 (2009).

Of course, as with all checks-and-balances authority, there is a countervailing power: the people may use the initiative and referendum to eliminate the Legislature's actions in regulating the initiative and referendum process. Indeed, they have done so in the past—in 1998, they enacted the Proposition 108 to limit the Legislature's power regarding initiatives (in ways not applicable here). And the people may replace legislators when dissatisfied.

Just as the Legislature's power to regulate jurisdiction is important to ensure that courts do not intrude on legislative authority, its power to regulate the initiative process is valuable for preserving the Legislature's constitutionally protected autonomy, ensuring the orderly administration of law, and protecting freedom, which is the purpose of all separation-of-powers mechanisms. *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014). The Arizona initiative process "contain[s] such details as will guard our legislature." Goff, *supra*. It allows the Legislature to protect its prerogatives *vis-à-vis* the initiative and referendum by preserving the Legislature's "right to enact any measure," ARIZ. CONST., art. IV, pt.1, § 1(14), including regulating the initiative process. Checks and balances

ensures that each branch can protect its own turf from the overreaching of others—and the same applies to the Legislature's relationship to the initiative process.

Thus to the extent that the Superior Court imagined that the strict compliance rule violates separation of powers by limiting the power of initiative, that was in error.

B. Where the Constitution's Authors Intended "Harmless Error" to Apply, They Said So

The Superior Court viewed *substantial* compliance as equivalent to a harmless-error rule, and concluded that initiative proponents should be allowed a mulligan now and then. But the Constitution's framers were familiar with "harmless error" rules, and knew how to employ them when they believed proper. Article VI § 27 creates a harmless error rule; it provides that "No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." No similar wording appears in Article IV. That implies that the initiative process was *not* designed with a "technical error" exception in mind. *Adams*, 74 Ariz. at 274–75 (Constitution should be read as a comprehensive whole).

The creation of a "harmless error" rule here would have deleterious consequences. It would allow courts discretion to decide, without check or balance, what kinds of errors are significant and what are not, opening the door to

biases that would have a disproportionate effect on the citizen-lawmaking process. That was one reason a California court refused to apply a harmless error rule in *Assembly of State of Cal. v. Deukmejian*, 30 Cal. 3d 638, 649 (1982).

In that case, the petition gatherers failed to instruct signers to provide their residential addresses, and later argued that the court should deem this error harmless and qualify the signatures anyway. The court refused because "[f]ar from being a mere technical shortcoming," the error "goes to the very heart of [the requirement's] purpose—to enable the clerk to ensure that petitions have been signed by those entitled to do so." *Id*. at 648. Although the campaign "assert[ed] that they have substantially complied" with the requirement, the court found that "'*[s]ubstantial compliance ... means actual compliance* in respect to the substance essential to every reasonable objective of the statute.'" *Id*. at 649 (citation omitted; emphasis added).

CONCLUSION

The decision of the Superior Court should be *reversed*.

Respectfully submitted August 23, 2018 by:

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