SUPREME COURT OF ARIZONA

INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN), a political action committee, Appellants/Cross Appellees, v. JAIME A. MOLERA, an individual and qualified elector; ARIZONANS FOR GREAT SCHOOLS AND A STRONG ECONOMY, a political action committee, Appellees/Cross Appellants.	Arizona Supreme Court No. CV-20-0213-AP/EL Maricopa County Superior Court No. CV2020-007964

AMICUS BRIEF OF ARIZONA NON-PROFIT ORGANIZATIONS, INDIVIDUAL QUALIFIED ELECTORS AND FIELD CORPS LLC, IN SUPPORT OF APPELLANTS

(Amici listed on following page)

Filed based on blanket consent of all parties

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INTEREST OF AMICI AND INTRODUCTION

Amici are groups and individual voters who are deeply concerned about protecting Arizonans' constitutional right to propose changes to Arizona law through the initiative process. Amici include non-profit organizations that have supported Arizona initiatives, including the African American Christian Clergy Coalition, Animal Defense League of Arizona, Arizona Advocacy Network, Arizona Interfaith Network, the Humane Society of the United States, and Planned Parenthood Advocates of Arizona and individual qualified electors Rivko Knox, Karen Michael and Stephanie Nichols-Young. They also include Field Corps LLC, a company that circulates petitions and provides other support for initiative efforts.

All amici have supported initiative efforts in Arizona and understand the enormous challenges associated with getting a statewide initiative on the ballot. They understand the significant impact that legislative changes and judicial decisions have on the initiative process. And they recognize that this Court's decision in this case has implications well beyond the initiative at issue here. Thus, they have an interest in protecting the integrity of the initiative process and opposing actions that create unnecessary barriers to

the Peoples' right to make law through initiatives. This amicus brief is filed to protect those interests.

This Court has appropriately placed a high burden on litigants who attempt to invalidate an initiative based on the 100-word description on the petition. It should remain a high burden. This Court has also respected the presumption of validity of petition signatures and the free speech rights of businesses engaged in expressive activity, which the paid circulator statute violates by regulating speech based on its content.

This Court should reject Appellees' arguments that abandon these basic principles. There is no question that the Invest in Education initiative received enough signatures to qualify for the ballot, and this Court should permit voters to consider the initiative at this year's general election.

ARGUMENT

I. This Court should retain its high standard for disqualifying measures based on the 100-word description.

A. The Arizona Constitution's initiative process.

The rights reserved for the People to make laws through the initiative process are among the core principles in Arizona's Constitution. J. Leshy, the Arizona State Constitution 8-9 (2d ed. 2013). The people may propose "any measure" to the voters through an initiative. Ariz. Const. art. 4, Pt. 1,

§ 1(2). As a result, initiatives can be as complex as any piece of legislation that the Legislature may consider. In some ways, statutory initiatives may be even more complex because, although the Constitution places a "single-subject" constraint on the Legislature, it places no such constraint on statutory initiatives.[1] *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 542 ¶¶ 33, 34 (2017).

The Constitution ensures that potential petition signers have information about the initiative by requiring that each petition sheet "be attached to a full and correct copy of the title and text of the measure." Ariz. Const. art. 4, Pt. 1 § 1(9). The Legislature provided potential signers with additional information by requiring that the petition form include a "description of no more than one hundred words of the principal provisions of the proposed measure." A.R.S. § 19-102(A). Recognizing that the brief description drafted by initiative supporters is no substitute for the opportunity to review the measure's text, the Legislature also requires that

[1] All constitutional amendments, whether proposed by the Legislature or by initiative are, however, subject to the same limitations imposed by the separate amendment requirement in Article 21, § 1 of the Arizona Constitution.

the petition form include a notice that the description is prepared by the sponsor and "may not include every provision contained in the measure." *Id.* The notice on the petition also directs signers to make sure that a copy of the title and text of the measure is attached and advises them of their "right to read or examine the title and text before signing." *Id.*

There are, of course, additional requirements to educate voters about an initiative after petitions are filed, such as information provided through the publicity pamphlet. A.R.S. §§ 19-123, -124. And, perhaps more importantly, there are endless opportunities to discuss and debate the merits of any proposal from the moment an initiative application is filed with the Secretary of State.

B. Initiative litigation and the 100-word description.

Opponents of initiatives increasingly turn to the courts to attempt to block initiatives from proceeding to the ballot. While there is, of course, an important role for the courts in ensuring that initiatives meet legal requirements to qualify for the ballot, this Court has historically exercised its judicial review function in a way that respects the importance of the People's constitutional right to initiative.

In the context of the 100-word description on the petition form, this Court has appropriately indicated that a 100-word description invalidates a petition only if "it is fraudulent or creates a significant danger of confusion or unfairness." *Molera v. Reagan,* 245 Ariz. 291, 295 ¶ 13 (2018) (quoting *Save Our Vote, Opposing C-03-2012 v. Bennett,* 231 Ariz. 145, 152 ¶ 26 (2013)). Under this standard, reasonable judgments about what to include in the 100-word description are respected. Otherwise, most any initiative, particularly a complex initiative, is at risk of disqualification. A 100-word description cannot cover all of the potential consequences of a proposal, nor does the statute require that it do so. *See Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix*, 247 Ariz. 45, 49 ¶ 18 (2019) ("We have never required an initiative description to explain all potential effects of a measure.").

Given the labor intensive, expensive work necessary to even attempt to put an initiative on the ballot, a significant risk of disqualification based on a 100-word summary is particularly harmful to the initiative process. Despite an initiative sponsors' best efforts to meet all legal requirements, a court may still disqualify the measure from appearing on the ballot after all petition signatures have been collected based on a faulty 100-word

summary. For many, this is too great a risk to even attempt an initiative effort.

Based on this court's standard, it should be an extreme and rare case that requires disqualification based on the 100-word description. Initiative sponsors have little incentive to push the envelope with a 100-word description and risk jeopardizing the entire initiative effort. They have every incentive to comply with the law so their measure can get on the ballot. On the other hand, initiative opponents have every incentive to press this Court to invalidate petitions when it should not. In the end, too much judicial second-guessing of initiative sponsors' reasonable judgments about a 100-word description is contrary to the law and would severely jeopardize the constitutional right to propose laws through the initiative process.

As Appellant's brief explains, the 100-word description at issue in this case satisfies the statutory requirement in A.R.S. § 19-102(A). Any contrary conclusion in this case disregards the statutory language and context and deviates from this Court's standard that appropriately focuses on whether the description "is fraudulent or creates a significant danger of confusion or unfairness." *Molera,* 245 Ariz. at 295 ¶ 13 (quoting *Save Our Vote, Opposing C-03-2012,* 231 Ariz. at 152 ¶ 26).

C. Judgment calls are necessarily made when drafting 100-word descriptions.

Initiative committees necessarily make judgments about what to include in a 100-word description and may reasonably omit some provisions that some reasonable voters might consider important. After all, not everyone will agree about which are the most important provisions in an initiative. Some provisions may be more important to you than to me. This creates a danger for judicial review. When deciding whether the 100-word description omits a "principal provision," a judge is likely to rely (perhaps unknowingly) on his or her own beliefs about which policies are particularly important. This danger counsels for judicial modesty.

Appellee's arguments illustrate this danger and contrast with past initiatives, which went to the voters although the 100-word descriptions did not include provisions that might have been material to some.

The 100-word description of the 2000 initiative requiring instruction in English immersion programs for non-English speakers did not mention the measure's testing requirements that applied to all students from second grade or higher. *Compare* Initiative description for 1-I-2000 available at https://apps.azsos.gov/election/2000/General/Initiatives.htm *with* 2000

Publicity Pamphlet, Proposition 203, available at https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop203.htm#pgfId-1. Under Appellee's approach, a new mandatory testing requirement for Arizona students might be deemed a "principal provision" of the initiative because it is a change that might affect some reasonable voters' support, even though it is included in a measure that focuses on establishing new requirements for teaching English language learners.

Appellee's approach might also have invalidated the 100-word description of the 1996 initiative addressing juvenile justice, which did not mention that the measure eliminated the superior court's exclusive jurisdiction in proceedings involving juveniles or that it limited the discretion of judges to determine whether to transfer some juveniles for prosecution as adults. *Compare* Description of Petition 23-C-96 (available at Arizona State Archives) *with* 1996 Publicity Pamphlet, Proposition 102, available at https://azsos.gov/sites/default/files/1996-ballot-propositions.pdf. But the People were allowed to vote on this measure.

Proposition 202 from 2002 is another example. It established requirements for tribal-state gaming compacts. Because of the length and complexity of the measure, a 100-word description could not possibly

explain every provision that somebody may argue is a principal provision. *Compare* Description of I-14-2002 available at https://apps.azsos.gov/election/2002/General/Initiatives.htm *with* 2002 Publicity Pamphlet, Text of Proposition 202 https://apps.azsos.gov/election/2002/Info/pubpamphlet/english/prop202.htm.

The list could go on. Appellees' arguments in this case risk converting the 100-word description into a substantive limit on the scope of initiatives. If "principal provisions" is taken as broadly as Appellee's suggest, it would be impossible for some initiatives to cover them all in 100 words. And that reality should not prevent the People from voting on initiatives that hundreds of thousands of voters have petitioned to be placed on the ballot.

Our Constitution does not limit the initiative power to measures that can easily be described in 100 words, and an overbroad reading of the requirement for a 100-word description, as urged by Appellees, would unconstitutionally infringe on the right to propose "any measure" through an initiative, Ariz. Const., art. 4, Pt. 1, § 1(2) and the right to petition, Ariz. Const., art. 2, § 5. This Court wisely "do[es] not lightly disturb" the initiative

process. *Molera*, 245 Ariz. at 492 ¶ 1. It should reject the challenge to the Invest in Education initiative.

II. Section 19-118.01 unlawfully regulates speech based on content.

The people have "the power to propose laws." Ariz. Const. art. 4, pt. 1, § 1(1). But collecting enough signatures to "propose laws" is a huge undertaking. As a result, modern initiative campaigns almost invariably rely on paid signature gatherers (often in combination with volunteers) to qualify for the ballot. This is protected First Amendment activity. *See Meyer v. Grant*, 486 U.S. 414, 416 (1988) (prohibition on paid signature gathering violates the First Amendment). It is also protected by the Arizona Constitution. Ariz. Const., art 2, § 5 ("The right of petition . . . shall never be abridged.")

In 2017, the Legislature enacted a statute governing paid signature gathering for initiative and referendum petitions (but not candidate nomination petitions). *See* A.R.S. § 19-118.01. The statute provides that "[a] person shall not pay or receive money or any other thing of value based on the number of signatures collected on a statewide initiative or referendum petition." *Id.* A violation of the statute invalidates the signatures gathered and subjects the violator to criminal penalties,

including up to six months in jail per violation. *See id.* ("A violation of this section is a class 1 misdemeanor."); A.R.S. § 13-707 (Class 1 misdemeanor may be punished by up to six months imprisonment).

Section § 19-118.01 chills the speech of Arizona businesses, including amicus curiae Field Corps, LLC, who are engaged in the constitutionally protected activity of gathering signatures for initiatives and referenda. And it regulates speech based on its content by treating speech related to initiatives differently than speech related to candidates without being narrowly tailored to support compelling government interests. The statute is therefore unconstitutional, and Appellees' challenge based on the statute must fail.

A. The statute regulates speech based on content.

Laws restricting the payment of petition circulators regulate "political expression." *Meyer*, 486 U.S. at 420. This does not prevent the government from regulating petition circulating, but it does create First Amendment limitations on those regulations. *See id.*; *see also Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 286 ¶ 66 (2019) ("A business does not forfeit the protections of the First Amendment because it sells its speech for profit.")

One limitation imposed by the First Amendment is that the government may not "restrict expression because of its . . . content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (citation omitted). A law regulates speech based on its content if it "applies to particular speech because of the topic discussed." *Id.* For example, an ordinance that regulates signs differently depending on whether they are religious, "Ideological," and "Political" is a content-based regulation of speech. *Id.* at 159-160, 164. "A law may also be content-based 'if its manifest purpose is to regulate speech because of the message it conveys.'" *Brush & Nib*, 247 Ariz. at 292 ¶ 96 (citation omitted).

Content-based regulations of speech are generally void. Just as a city cannot regulate religious and political signs differently, *see Reed*, 576 U.S. at 164, 171, the state may not regulate petition circulators differently depending on the topic they discuss (e.g., environmental policy versus education policy, or candidate nominations versus initiatives).

But that is what § 19-118.01 does. The statute applies only to "initiative or referendum petition[s]," A.R.S. § 19-118.01, and not to candidate nomination petitions. If the circulator and voter discuss an initiative, the statute applies. If they discuss a candidate, it does not. Under *Reed,* that makes the statute a content-based regulation of speech.

Indeed, Justice Thomas, who authored *Reed*, concluded years earlier that a law is content-based if it "does not apply to those who circulate candidate petitions, only to those who circulate initiative or referendum proposals." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 209 (1999) (Thomas, J., concurring) (explaining that a Colorado law requiring petition circulators to wear badges was a content-based regulation of speech). Judge Bolton of the District of Arizona recently reached the same conclusion. *See Miracle v. Hobbs*, 427 F. Supp. 3d 1150, 1159 (D. Ariz. 2019) (because A.R.S. § 19-118(E) "distinguishes between nomination-petition and initiative-petition circulators," it is a "content-based regulation that implicates th[e] First Amendment"). The same reasoning applies to § 19-118.01.[2]

[2] In *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), the Ninth Circuit rejected the argument that a restriction on paid signature gathering was content-based because it applied to initiative-petition circulators but not candidate-petition circulators. *See id.* at 968 n.25. But *Prete* was decided before *Reed*, which clarified the law regarding content-based regulations of speech. This Court should follow Justice Thomas's concurrence in *Buckley*, which is consistent with current First Amendment principals, not footnote 25 of *Prete*.

This conclusion is further supported by the heavy criminal penalties imposed for a violation of § 19-118.01, when compared with the total absence of any regulation of paid signature gathering for candidate nomination petitions. *See Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (statutes prohibiting day labor solicitation were "classic examples of content-based restrictions" in part because of the "the disproportionate sanctions they impose for traffic problems arising from day labor solicitation").

B. The statute fails strict scrutiny.

Content-based laws must satisfy strict scrutiny. *Reed*, 576 U.S. at 163-64. Thus, § 19-118.01 is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Id.* at 163. Moreover, the content-based "discrimination itself [must be] necessary to serve a substantial governmental interest." *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003) (citation omitted).

Appellees may contend that the statute is justified by the state's interest in preventing fraud. But even if they could show that the statute prevents fraud, they cannot show that the statute is narrowly tailored to prevent fraud. Like the badge requirement in *Buckley*, the statute "burdens

all circulators, whether they are responsible for committing fraud or not." 525 U.S. at 210 (Thomas, J., concurring).

Moreover, Appellees cannot show that the statutory "discrimination itself " – i.e., the distinction the statute draws between initiative-petition circulators and candidate-petition circulators – "is necessary to serve" the interest of preventing fraud. *Arizona Right to Life*, 320 F.3d at 1009 (citation omitted). Candidate nomination petitions can be fraudulent, too. *See, e.g., Brousseau v. Fitzgerald*, 138 Ariz. 453, 454 (1984). If the Legislature wanted to enact a content-neutral regulation to combat fraud by all signature gatherers, that would be one thing. But the Legislature cannot use the guise of regulating fraud to enact a content-based regulation of political speech.

CONCLUSION

This Court should reverse the trial court and permit the Invest in Education initiative to appear on the 2020 general election ballot.

RESPECTFULLY SUBMITTED this 10th day of August, 2020.

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