IN THE SUPREME COURT

STATE OF ARIZONA

ARIZONANS FOR SECOND CHANCES, REHABILITATION AND PUBLIC SAFETY, et al., Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State, Respondent.	Supreme Court No. CV-20-0098-SA

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF INTERVENORS SPEAKER OF THE ARIZONA HOUSE AND PRESIDENT OF THE ARIZONA SENATE WITH CONSENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute is a nonpartisan public policy and research foundation dedicated to advancing principles of limited government, economic freedom, and individual liberty—including the freedom of parents to choose the schools their children attend and the growth and protection of our economy through a fair, flat, and sensible tax system—through litigation, research papers, and policy briefings. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents parties and participates as *amicus curiae* in this and other courts in cases involving those values. *See, e.g.*, *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533 (2017); *Leach v. Reagan*, 245 Ariz. 430 (2018); *Molera v. Reagan*, 245 Ariz. 291 (2018); *Niehaus v. Huppenthal*, 233 Ariz. 195 (App. 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ask this Court to rewrite the election laws in the middle of a crisis. The Court should decline that request.

Plaintiffs contend that laws prohibiting the use of electronic signatures for initiative petitions are unconstitutional, but their arguments are unpersuasive because there are profound differences between candidate and initiative elections,

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the Institute, its members, or counsel, made any monetary contribution for the preparation or submission of this brief.

especially the applicability of the so-called Voter Protection Act (VPA), which makes it virtually impossible to modify or repeal initiatives, whereas voters can remove candidates from office through ordinary means. This makes it not only rational but critical that rules governing initiatives be stricter than those governing candidates. Nor do laws prohibiting electronic signatures interfere in any way with Petitioners' ability to communicate.

Moreover, the remedy Petitioners request—allowing electronic signatures—is itself unconstitutional, because the Arizona Constitution requires in-person signatures on initiative petitions. That requirement does not affect a person's right to vote or speak—rather, it is the kind of "reasonable, politically neutral regulation[]" that states may impose in order to regulate the electoral process. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

Contrary to the Attorney General's suggestion, the Governor has no authority to issue an executive order enabling Petitioners to disregard the statutory and constitutional prohibition on electronic signatures. Nor should this Court establish the dangerous precedent of altering the initiative process by fiat during an emergency.

ARGUMENT

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

The Constitution sets forth the initiative power in language that plainly contemplates in-person solicitation of signatures on paper. It is incompatible with the relief Petitioners seek for at least two reasons.

First, Article IV, part 1, section 1(9), 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 by the affiant to verify the signature's authenticity. 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*, 59 Ariz. 211, 223 (1942).

Courts in other states where the initiative process includes the same presence requirement have repeatedly held that it can only be satisfied by the affiant's sworn testimony that the signature was made in her actual presence. *See, e.g.*, *Porter v. McCuen*, 839 S.W.2d 521, 523 (Ark. 1992) ("[W]here 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.").[2]

Arizona courts have never allowed petition circulators to disregard the presence requirement. *See, e.g.*, *Harris v. City of Bisbee*, 219 Ariz. 36, 38 ¶ 7 (App. 2008) (alteration of signatures outside signers' presence rendered signatures invalid). Indeed, they have ruled that 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*, 178 Ariz. 464, 467 (App. 1994).

True, some state courts have allowed electronically-executed affidavits in cases involving search warrants, *see, e.g.*, *Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App. 2013); *State v. Bowers*, 915 N.W.2d 161 (S.D. 2018); *State v. Cymerman*, 343 A.2d 825 (N.J. Law. Div. 1975), but none of those cases involved, as this does, a textual, constitutional requirement of in-presence signing—a point all those cases mentioned. *See Clay*, 391 S.W.3d at 103; *Bowers*, 915 N.W.2d at 168 ¶ 24; *Cymerman*, 343 A.2d at 828.

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[2] In some states, absentee ballots must be signed "in the presence of" a notary; courts there have held ballots invalid where the notary fails to attest that they were signed in her actual presence. *Kiehne v. Atwood*, 604 P.2d 123, 133 (N.M. 1979); *Fugate v. Mayor and City Council of Buffalo*, 348 P.2d 76, 79 (Wyo.1959); McCavitt v. Registrars of Voters, 434 N.E.2d 620, 628 (Mass. 1982).

The second way in which the 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.").

Arizona's constitutional initiative process was modeled on an Oklahoma statute that was considered an "improvement" over all previous efforts to fashion an initiative procedure. Robert Owen, ed., *The Code of The People's Rule* 105 (1910). That Oklahoma statute required "each sheet" of a petition to be attached to the initiative text in order to counter the most common criticism of the initiative process: that voters would not know what they were approving. As Justice Wyrick of the Oklahoma Supreme Court has noted, the "each sheet" requirement ensures that "every person contemplating signing the petition has the opportunity to read the full text of the proposed law before signing. If there is any question about the effect of the law or the details … the solicited signatory need only flip the page in order to clarify." *Okla. Indep. Petroleum Ass'n v. Potts*, 414 P.3d 351, 363–64 ¶ 10 (Okla. 2018) (Wyrick, J., concurring). *See also* *Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc.*, 134 Ariz. 46, 49 (1982) ("[I]t is imperative that

petitions 'be attached to a full and correct copy' of the measure to be referred, so that prospective signatories have immediate access to the exact wording.").

Today's technology might have tools that permit something *like* the "each sheet" requirement. But the Constitution's text does not contemplate such technology, and if Arizonans wish to incorporate it into their Constitution, they must do so by amendment, not by complaint to the judiciary. The amendment process would enable a public debate over the risks and benefits of such a procedure, and help ensure that safeguards against fraud are devised sufficient to satisfy the state's electorate. In the meantime, "[t]his court has power to determine … what the Constitution contains, but not what it should contain." *State ex rel. Bullard v. Osborn*, 16 Ariz. 247, 251 (1914) (quoting *State ex rel. Cranmer v. Thorson*, 68 N.W. 202, 203 (S.D. 1896)).

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

Petitioners argue that it violates equal protection—and, more fancifully, freedom of speech—to allow electronic signature gathering for candidates but not initiatives. This is incorrect.

Petitioning for candidates and petitioning for initiatives are two crucially different things, for which different procedures are fully justified. Most significantly, the VPA stringently limits the ability of the people, through their

elected representatives, to repeal or amend an initiative once adopted. Ariz. Const. art. IV, pt. 1 § 1(6)(B), (C), & (D). An elected official can be persuaded to change her mind, can be recalled from office, or can be replaced by another candidate at a subsequent election. The VPA, by contrast, makes the initiative process a one-way street in many respects. Where other laws can be fixed, changed, or repealed, the VPA exempts initiatives from the ordinary legislative process, giving all initiatives—even statutory ones—a kind of super-statutory or para-constitutional status. Even inadvertent errors in an initiative cannot be fixed as they can be in ordinary statutes.[3] The VPA's "one-way ratchet" is strong reason to ensure that procedural safeguards for the initiative process are strictly followed—a consideration not present in the case of candidates.

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 initiative process by adding a fundamentally *un*democratic device that might be termed

[3] As a result, disputes over initiatives are more likely to end up in court instead of being resolved by the ordinary legislative process. *Cf. See, e.g.*, David Gartner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 Ariz. St. L.J. 551, 558 (2019) ("The Voter Protection Act largely explains why *Arizona State Legislature v. Arizona Independent Redistricting Commission* was brought to the United States Supreme Court rather than resolved through ordinary state legislative processes.").

"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).

Molera, 245 Ariz. 291, emphasized this point in holding that even apparently minor procedural rules for initiatives must be followed scrupulously. *Molera* concerned an inaccurate, potentially misleading description of the consequences of a proposed initiative. The measure's proponents argued that the error was insignificant, and that they could clarify their true intentions later, but this Court emphasized the importance of adhering to the 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 298 ¶ 28. Given the difficulty of fixing initiatives afterwards, initiative supporters must "comply with applicable requirements" even where those requirements might seem highly technical. *Id.* at 294 ¶ 11.

Similarly, ordinary legislatively-created statutes are subject to a complicated process before being adopted—including committee hearings, Legislative Council drafting, rules committees, gubernatorial approval—which helps ensure that laws are crafted with input from all stakeholders and are both prudent and consistent with other relevant statutes. The initiative process includes none of these steps, and results in legislation that is in many ways unalterable and 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 in the case of an initiative, no such options are available. It therefore makes sense to impose strict rules on initiatives before the fact, and to impose more stringent requirements on initiative petitions than on candidate petitions. *See also* *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 6 (1972) (upholding strict requirements of A.R.S. § 19-112—which imposes an in-person affidavit requirement—out of concern that without them, "a small minority of voters" could use the referendum process to "prevent a law from going into effect for any number of years after its enactment.")

As for Petitioners' contention that it violates the First Amendment to permit electronic petitions for candidates but not initiatives, the constitutional and statutory requirements for initiative petitions do not limit anyone's right to speak.[4]

[4] 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 would easily satisfy. *See, e.g.*, *San Francisco Forty-Niners v. Nishioka*, 89 Cal. Rptr. 2d 388, 396–97 (Cal. App. 1999) ("An initiative petition fits the definition of expressive activity in a nonpublic forum…. The initiative petition … is not a handbill or campaign flyer—it is an official election document subject to various restrictions by the Elections Code. ... The 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.").

By Petitioners' logic, it would also be unconstitutional to require that petitions be signed *at all*, or to require that they be filed four months before an election, or to require a certain number of signatures—since these procedural requirements all limit Petitioners' "speech" just as much as the actual-signature requirement does.

The admissibility of electronic signatures for candidate petitions but not initiative petitions is also not a content-based speech restriction because it is not triggered by the content of any expression. A law is content-based when it applies "based on the message" or "because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). But the signature and actual presence requirements apply to all initiatives without regard to their content—to "yes" and "no" campaigns alike—and the distinction between candidates and initiatives is not based on message. A candidate who favors Proposition X and one who opposes it can both qualify *with* electronic signatures—whereas neither Proposition X nor Proposition not-X may use do so. The electronic/non-electronic distinction is simply not triggered by the content of any message.

III. The Governor has no authority to issue an executive order permitting electronic signatures on initiatives.

The Attorney General has suggested that the Governor could resolve this matter by issuing an executive order permitting electronic signature-gathering. *See*

Proposed Intervenor Attorney General's Pre-Telephonic Status Conference Memo at 1. However, the Governor has no such authority.

The Arizona Emergency Management Act contemplates different types of emergencies, and gives the Governor different powers accordingly. During *war* emergencies, he may suspend the "provisions of any statute prescribing the procedure for conduct of state business" if "strict compliance" with those procedures would "prevent, hinder or delay mitigation of the effects of the emergency." A.R.S. § 26-303(A)(1). But *non*-war emergencies such as epidemics are covered by Section 26-303(E), which does *not* permit the Governor to suspend statutes. Instead, that section allows the Governor to "exercise … all police power vested in the state by the constitution and laws." Not only does this not empower the Governor to suspend statutes—meaning he is denied such authority by an *excluio alterius* reading—but, on the contrary, it expressly *subordinates* his authority to "the constitution and laws."

And while the Governor can also "make, amend and rescind orders, rules and regulations," A.R.S. § 26-307(A), in non-war emergencies, the constitutional provisions and statutes governing elections are not "orders," "rules," or "regulations." The prohibition on electronic signatures for ballot initiatives is found in Sections 16-316(B) and 16-318(B). These specifically provide that while electronic signatures are permitted for candidate petitions, they are not permitted

for initiative petitions. Consequently, any executive order purporting to allow electronic signatures would amount to a suspension of a statute, and the Governor has no such authority to do so in non-war emergencies such as this.

IV. Sudden changes to election laws in the midst of a crisis—and by the courts—are a terrible idea.

The history of democracy teaches no lesson more clearly than this: altering election laws in the midst of a crisis is extremely foolhardy. It is a proposition 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.*, Thomas Flores & Irfan Nooruddin, *Elections in Hard Times: Building Stronger Democracies in the 21st Century* 3-4 (2016); Edward Szekeres, *Hungary 'No Longer A Democracy' After Coronavirus Law*, Balkan Insight, Mar. 31, 2020. In the United States, by contrast, the legal and constitutional institutions of democracy have been followed even in the worst catastrophes, such as civil war. *See, e.g.*, James McPherson, *Battle Cry of Freedom: The Civil War Era* 804-06 (1988). Arizona even held its regular gubernatorial election in 1918, during some of the darkest months of 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.

Petitioners cite four cases as standing for the proposition that the Court can use its injunction powers to rewrite the electronic signature statutes. Pet. at 31-32. These cases are easily distinguishable.

The first, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1320819 (W.D. Wis. Mar. 20, 2020), has already been essentially abrogated *sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020), on the grounds that the injunction in that case exceeded constitutional limits—just as the relief Petitioners seek here would exceed the limits of the state Constitution.

The second, *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016), involved the Governor's refusal to exercise the power *granted him by statute* to postpone an election because of a hurricane. *See id.* at 1257 (noting that "the state already allows the Governor to suspend or move the election date."). Arizona law, by contrast, does not allow the Governor to postpone an election or to alter the constitutional or statutory signature-gathering rules. Also, Petitioners are not asking for a mere postponement, but for a fundamental change in the way initiative campaigns are run.

Similarly, in *Ga. Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016), the plaintiffs sought an extension of the voter registration deadline because county offices were closed by an emergency. Again,

this case does not involve a mere postponement, but a proposed overhaul of the constitutional rules for qualifying initiatives for the ballot. Also, in *Deal*, the county's failure to grant the extension arguably violated federal law, *see id.* at 1345, whereas there is no such violation at issue here. (See above, Section II). And the preliminary relief granted in *Deal* did not allow anyone to vote who was not otherwise qualified to vote, or let them vote on anything they could not otherwise have voted on—whereas Petitioners are asking this Court to change the rules in ways that would put something on the ballot that is not lawfully qualified to be there.

Finally, *In re Holmes*, 788 A.2d 291 (N.J. App. Div. 2002), involved the validity of already-cast ballots which were not received within the statutory deadline because a terrorist attack shut down the post office. This case, by contrast, does not involve counting ballots *at all*. It involves the question of whether the constitutional and statutory procedures for qualifying an initiative can be rewritten by courts. *Holmes* ordered the already-cast ballots to be counted because doing so "'[will] not affect the integrity of the electoral process.'" *Id.* at 295 (citation omitted). But the relief Petitioners seek here would rewrite the electoral process, without input from the legislature or voters.

Perhaps most importantly, *Bostelmann*, *Scott*, *Deal*, and *Holmes* all involved the right to vote, which is a fundamental constitutional right—whereas this case

involves the procedural requirements for placing something on the ballot and "[t]here is no constitutional right to place an invalid initiative on the ballot." *City of San Diego v. Dunkl*, 103 Cal. Rptr. 2d 269, 273 (Cal. App. 2001).

Whatever the merits of allowing electronic signatures for initiative campaigns, it is deeply imprudent to ask the judiciary (or the Governor) to rewrite election laws, especially in a time a crisis. Emergencies are precisely when critically important constitutional democratic procedures should be strictly adhered to. Such moments are when people are least likely to dispassionately weigh the costs and benefits of election rules affecting the indefinite future, or to account for potential consequences of the rules they create in haste.

That is even more true of an effort to invoke the aid of *courts* to alter the rules without a full deliberation by all stakeholders or a vote by elected representatives. As Justice Jackson warned in the midst of another national crisis, executive emergency powers may not be susceptible to judicial second-guessing, but a court decision which upholds an extreme or undemocratic action in the heat of a crisis can be "a far more subtle blow to liberty" because it "lies 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 dispensed with in times of emergency.

CONCLUSION

The Petition should be *denied*.

Respectfully submitted this 14th day of April 2020 by:

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