**IN THE SUPREME COURT OF ARIZONA**

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| JAIME A. MOLERA, an individual and qualified elector; ARIZONANS FOR GREAT SCHOOLS AND A STRONG ECONOMY, a political action committee,<br><br>Plaintiffs/Appellees/Cross-Appellants,<br><br>v.<br><br>KATIE HOBBS, in her official capacity as Arizona Secretary of State; INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN), a political action committee,<br><br>Defendants/Appellants/Cross-Appellees. | Arizona Supreme Court<br>No. CV-20-0213-AP/EL<br><br>Maricopa County Superior Court<br>No. CV2020-007964 |

# OPENING BRIEF ON CROSS APPEAL OF JAIME A. MOLERA & ARIZONANS FOR GREAT SCHOOLS & A STRONG ECONOMY


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## INTRODUCTION

The right to submit an initiative to the people is so important that state law protects the process from abuse. The Arizona Constitution expressly instructs the Legislature to enact "registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. Consistent with the notion that the people have a right to legislate equal to that of the Legislature, this Court has explained that "[j]ust as the legislature must comply with restrictions on its lawmaking powers, so too must the people comply with appropriate regulation of the initiative process." *Molera v. Reagan*, 245 Ariz. 291, 294 ¶ 10 (2018) (citations omitted). Two such regulations are at issue in this case. The first concerns the requirement that initiative sponsors provide voters with a 100-word description of the "principal provisions" of their proposed law. A.R.S. § 19-102(A). This requirement serves the "important purposes of transparency, fairness, and disclosure." *Molera*, 245 Ariz. at 299 ¶ 32.

The second regulation concerns the payment of petition circulators. Petition backers have a constitutional right to employ paid circulators. *Meyer v. Grant*, 486 U.S. 414, 424 (1988). At the same time, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). In Arizona, the Legislature has protected the initiative process by regulating the manner in which petition circulators are paid. Specifically, to eliminate an incentive for fraud that is essentially impossible to detect after the fact, the Legislature prohibited

payment of "money or any other thing of value based on the number of signatures collected." A.R.S. § 19-118.01(A). Where paid circulators do not follow the rules, "[s]ignatures that are obtained by a paid circulator who violates this section are void and shall not be counted in determining the legal sufficiency of the petition." *Id.*

The superior court correctly applied the transparency requirement in Section 19-102(A) by insisting on disclosure of all principal provisions in the "Invest in Education Act" (the "Initiative"). *E.g.*, Order at 5 ¶ 8 (citing *Molera*, 245 Ariz. at 298 ¶ 27). But it made three legal errors regarding the payment of circulators. Those errors create loopholes that are inconsistent with the text of the statute and undermine its purpose. Arizona's policymakers have exercised their "considerable leeway" to protect the initiative process from abuse, and this Court should insist on a faithful application of those laws.

## STATEMENT OF FACTS & THE CASE

This unfortunate waste of resources began when the Committee Defendant applied for a serial number from the Secretary of State on January 13, 2020 and, pursuant to A.R.S. § 19-111(A), included in its application the proposed initiative text and 100-word description. Two years earlier, this Court decided *Molera v. Reagan*, 245 Ariz. 291 (2018), which should have provided ample guidance on how to describe a tax increase, including the importance of who would be taxed and how much their rate would change from current levels. Defendant ignored that counsel and instead chose language even less clear than the description in *Molera*. A second helping hand extended toward Defendant on February 10, 2020, when the

nonpartisan Arizona Legislative Council recommended a variety of changes and identified a crucial provision—one never mentioned in the 100-word description—as "likely unconstitutional." Complaint Exhibit B. Four days later, after making only cosmetic adjustments to their proposal, Defendant refiled with the Secretary of State, who assigned the final version serial number I-31-2020. At that point, the sponsors began circulating the Initiative with the following 100-word description:

> The [Initiative] provides additional funding for public education by establishing a 3.5% surcharge on taxable income above $250,000 annually for single persons or married persons filing separately, and on taxable income above $500,000 annually for married persons filing jointly or head of household filers; dedicates additional revenue to (a) hire and increase salaries for teachers, classroom support personnel and student support services personnel, (b) mentoring and retention programs for new classroom teachers, (c) career training and post-secondary preparation programs, (d) Arizona Teachers Academy; amends the Arizona Teachers Academy statute; requires annual accounting of additional revenue.

Complaint Exhibit A.

**A. Petition Circulation.**

To amass signatures in support of placing the Initiative on the ballot, Defendant hired AZ Petition Partners, LLC ("Petition Partners") to retain petition circulators. By statute, a "paid circulator" is "a natural person who receives monetary or other compensation for obtaining signatures on a statewide initiative or referendum petition or for circulating statewide initiative or referendum petitions for signatures." A.R.S. § 19-118(I)(1). Elsewhere, the law prohibits giving a paid circulator "money or any other thing of value based on the number of signatures collected." A.R.S. § 19-118.01(A). In an attempt to circumvent that rule, Petition

Partners devised a variety of employment agreements with varying dependence on the number of signatures collected. The first iteration included an hourly rate that increased with consecutive weeks of hitting signature quotas expressed as "productivity expectations":

> 4.1 **Hourly Rate**. Employee's initial rate of pay will be $12.00 per hour. After two full pay cycles, and provided that Employee's performance exceeds productivity expectations, Employee will be eligible for a pay increase to $13.50 per hour. After four full pay cycles, and provided that Employee's performance continues to exceed productivity expectations, Employee will be eligible for a further pay increase to $15.00 per hour. To be eligible for a pay rate greater than $15.00 per hour, Employee must be promoted to a Team Lead position. . . .

Trial Exhibit ("Ex.") 57. The employment agreement included as an attachment "Work Hours and Performance and Conduct Standards," which defined "productivity expectations" in terms of signatures obtained:

> **Performance Standards ("PS")**
>
> 1. The minimum productivity expectation is to gather an average of 6-10 valid signatures per hour of work. Company personnel will regularly review Employee's work hours and signature numbers in the Deputy App to assess productivity, and will take remedial action, up to and including termination of employment, if Employee is not meeting minimum expectations.
>
> 2. Company will use the following guidelines for determining whether Employee is meeting or exceeding productivity expectations:
>
>    a. Employees working 30 hours per week are expected to take out at least 20 blank pages per week.
>    b. Employees working 35 hours per week are expected to take out at least 25 blank pages per week.

c. Employees working 40 hours per week are expected to take out at least 30 blank pages per week.

However many blank pages Employee takes out each week, the minimum expectation is that at least 60% of these pages will be full pages when submitted at the end of the week. A "full page" is one on which every signature line is completely and accurately filled out. Employees must aim for a validity rate of 70% or higher each week.

Ex. 57 at Exhibit A. Petition Partners also included their company's "Code of Conduct" requirements. *Id.*

Petition Partners used the foregoing pay scale through December 2019, at which point they adopted a revised policy with six distinct pay grades. Because Defendant did not file the Initiative until February 2020, 7/29/20 AM Tr. at 7, all paid circulators began working under the pay scale announced in December 2019. Advancement through the grades was based on compliance with the code of conduct and the number of signatures collected:

P0 – Petitioner 0
More than 8 signatures per hour with a specific focus on a particular petition (must have prior approval from senior management) and meets all standards in the employee code of conduct = $15/hr.

P1 – Petitioner 1
2.0 – 2.49 sets per hour and meets all standards in the employee code of conduct = $12/hr.

P2 – Petitioner 2
2.5 – 3.49 sets per hour and meets all standards in the employee code of conduct = $13.50/hr.

P3 – Petitioner 3

3.5 – 4.99 sets per hour and meets all standards in the employee code of conduct = $15.00/hr.

P4 – Petitioner 4
5.0 – 6.0 sets per hour and meets all standards in the employee code of conduct = $18.00/hr.

P5 – Petitioner 5
More than 6 sets per hour and meets all standards in the employee code of conduct - $25/hr.

Ex. 58. Petition Partners defined a "set" as "an equal number of signatures on how many petitions [the circulator] ha[s]." 7/28/20 PM Tr. at 72–73.

In response to Covid-19, Petition Partners instituted a similar pay scale on April 5, 2020 for door-to-door circulators. Ex. 58. It was also a tiered, hourly set-requirement pay scale. In June 2020, the pay scale increased to nine tiers, and the wages likewise increased. Unlike the December scale, the April and June scales made no reference to the Petition Partners' employee code of conduct. Exs. 23 & 58. Structurally, the revised scale continued to pay circulators based on the number of signatures they collected:

**AZ Pricing structure**

*****If you don't work 20 hours, you will be paid $15/hr regardless of average*****

Minimum of 2 sets per hour and 20 hours per week to stay on the schedule.

P1- Petitioner 1
2.0-2.49 sets per hour = $13.50/hr

P2- Petitioner 2

2.5-2.9 sets per hour = $15.00/hr

Starting wage (Must have a minimum of 20 hrs/week)
P3- Petitioner 3
3.0-3.9 sets per hour = $20.00/hr

P4- Petitioner 4
4.0-5.49 sets per hour = $25.00/hr

P5- Petitioner 5
5.5-6.49 sets per hour = **$30.00/hr. (Overtime = $45.00/hr.)**

P6- Petitioner 6
6.5-7.49 sets per hour = **$45/hr. (Overtime = $67.50/hr.)**

P7- Petitioner 7
7.5-8.49 sets per hour = **$50/hr. (Overtime = $75.00/hr.)**

P8-Petitioner 8
8.5-9.9 sets per hour = **$65/hr. (Overtime = $97.50/hr.)**

P9- Petitioner 9
10 sets and over per hour = **$75/hr. (Overtime = $112.50/hr.)**

Ex. 23 (Az Pricing structure Updated 6/15/20).

These pay scales applied to all paid circulators. 7/28/20 PM Tr. at 16; 7/29/20 PM Tr. at 27 (these documents "loom[ed] over everybody"). Petition Partners measured "productivity" by the number of sets collected. 7/28/20 AM Tr. at 83–85; 7/28/20 PM Tr. at 53–54; 7/29/20 AM Tr. at 66 (noting their payment scheme was based on a "scale of productivity"). Andrew Chavez, the owner of Petition Partners, called the pay scale a "condition of employment." 7/29/20 AM Tr. at 80.

Raises occurred at weekly intervals. 7/28/20 AM Tr. at 82 ("I would look at the hours you worked, the approximate sets that you turned in, and we would average

that, say fantastic, thank you for working so hard, we'd like to give you a promotion to the next pay level for the next 7 days going forward."), 85 ("[Y]ou're exceeding expectations, we would want to move you up $30 an hour for the next week moving forward.").

Payment also decreased for circulators who did not collect enough signatures. 7/28/20 AM Tr. at 85 (admitting that circulators would move down a pay grade); 92–93 (recognizing that circulators who collected fewer signatures per hour than required, while not terminated, received less pay). While Defendant claimed that wages and promotions were discretionary, the Petition Partners witnesses admitted that there was no document conferring such discretion. 7/28/20 PM Tr. at 15–18. And, regardless of which pay scale applied and whether it contained a discretionary element or not, Petition Partners in fact always considered the number of sets collected when determining the next week's pay. 7/28/20 PM Tr. at 54, 69.

In addition to the tiered pay scales, Petition Partners instituted several promotional programs, some of which were also based on the number of signatures collected. One of those programs—"show me the MONEY!"—awarded raffle tickets: one ticket for every 20 sets, ten more tickets for 200 sets, and 220 tickets for circulators who turned in 2,000 sets. Ex. 28. Under the "Weekend Warrior" program, circulators received a cash bonus if they agreed to work at least 5 hours on Friday, at least 5 hours on Saturday (and 5 hours on Sunday for extra money), *and* "[m]aintain at least 3 sets per hour." Ex. 29. Finally, they instituted a "Spin the Wheel" Bonus:

> If you work at least 20 hours, maintain at least 3 sets per hour
> AND
> You increase your productivity from the week before… you get 1 spin!
>
> If you work over 30 hours and maintain at least 3 sets, you get 2 spins!!!

Ex. 10-019. Consistent with its documentation, Petition Partners determined eligibility to spin the wheel based on the number of sets that a circulator self-reported during the weekly "turn in" process. 7/28/20 PM Tr. at 105.

The possible rewards on the wheel of prizes were: $10, $20, $25, $50, $100, "Add an hour to your check," and "Double your spin." Ex. 66. The wheel did not include any outcomes that did not confer a prize. In effect, the program was simply a bonus with variable amounts. 7/28/20 AM Tr. at 49 (circulator testimony that he won something every time); *see also* 7/28/20 PM Tr. at 88 (stating that everyone who spun "won at least $10"). Petition Partners paid many of these bonuses in cash and did not track how many circulators were eligible to receive, or did in fact receive, a spin-the-wheel prize. 7/28/20 PM Tr. at 105, 115; 7/29/20 AM Tr. at 20–21.

Each of these programs was based in whole or part on the number of signatures collected. And Petition Partners pushed "productivity" continuously throughout the signature gathering cycle. *See generally* Ex. 10.

As a result of their efforts, Petition Partners collected over 400,000 signatures for the Initiative, over 350,000 of which were obtained by paid circulators. 7/28/20 PM Tr. at 76 (over 400,000 signatures); 7/29/20 AM Tr. at 8 (over 350,000 by paid circulators).[1]

[1] Volunteers collected the remaining 50,000 signatures. *See* 7/29/20 AM Tr. at 42.

### B. The Current Lawsuit.

Outraged by the unlawful payment of circulators and a 100-word description that omitted numerous provisions and misleadingly described others, Plaintiffs brought this suit. Following motions practice and a three-day trial, the superior court rightly determined that the 100-word description was misleading. It reasoned that the 100-word description failed to include five principal provisions, Order at 4–8, and created a substantial risk of confusion by describing a tax increase as a new "surcharge" without mentioning existing tax rates, the proposed new rate, or the percentage increase between the two, *id*. at 8–10. The court noted its frustration with these failures because this Court had identified "*exactly* how IIE could accomplish precisely what IIE seeks to accomplish" less than two years before. *Id.* at 19 n.15.

As to the payment of circulators, the superior court agreed that several payment schemes were improper: "Dual for the dollars," productivity bonuses, the "show me the MONEY!" program, and "Weekend Warrior" bonuses. *Id*. at 12 ¶ 20. The superior court's holding regarding the "Spin the wheel" promotion is difficult to parse. It referred to the same program by its exhibit number when listing unlawful compensation, *id*. (citing Ex. 10-019), but elsewhere stated that it was permissible based on the lack of a "correlation [between] actual number of signatures turned in and a circulator's ability to 'spin the wheel,'" *id*. at 11 ¶ 18. It appears that the court mistook the two exhibits—Exs. 10-019 and 66—as referring to separate programs, when they were actually the same thing.

The court also determined that the hourly baseline salaries—*i.e.*, the tiered pay scales discussed above—were permissible because the wages were applicable

to the upcoming week, even if they were based on the number of signatures collected during the previous week. Order at 11 ¶ 17.

In terms of remedies, the court found little "guidance about the actual standard to be used" when implementing the statutory command that "[s]ignatures that are obtained by a paid circulator who violates this section are void and shall not be counted in determining the legal sufficiency of the petition." at 13 ¶ 25 & n.13; A.R.S. § 19-118.01(A). The court therefore imported a "fruit of the poisonous tree" test from Fourth Amendment jurisprudence to conclude that only a subset of the signatures collected by offending circulators—specifically, those obtained during a week in which the circulator broke the law—should be disqualified. Order at 13 ¶ 25 & n.13. Neither the "poisonous tree" test nor any suggestion that only a subset of signatures should be disqualified appears in the statute.

Finally, assuming that only a subset of the signatures collected by circulators who violated Section 19-118.01 should be excluded, the court determined that a temporary injunction should not issue. The court recognized that Plaintiffs had justified the injunction on grounds that Defendant did not keep (or produce) records that would enable Plaintiffs to establish the number of invalid signatures under the court's "poisonous tree" rule. *Id*. at 15–16 ¶ 29. But because the programs the court invalidated appeared unlikely to disqualify enough signatures to make the Initiative ineligible for the ballot, the court denied the injunction. *Id.* at 16–17 ¶¶ 30–33.

Defendant promptly appealed, followed by Plaintiffs' cross-appeal. This Court has jurisdiction over this expedited election matter under Ariz. Const. art. VI, § 5 and A.R.S. § 19-122.

## ISSUES PRESENTED

1. Whether the superior court erred in holding that Petition Partners' hourly pay scales and "spin the wheel" promotion did not violate A.R.S. § 19-118.01(A).
2. Whether the superior court erred by holding that A.R.S. § 19-118.01(A) disqualifies only a subset of the "[s]ignatures that are obtained by a paid circulator who violates this section."
3. In the alternative, whether the superior court erred by denying Plaintiffs' request for a temporary injunction.

## STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547 ¶ 8 (2005). A number of undisputed facts comprise the compensation programs in this case. Whether those programs violate A.R.S. § 19-118.01 is a question of law, or at most presents a mixed question of law and fact, which this Court reviews de novo. *See Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114 (1966).

## ARGUMENT

Section 19-118.01(A) is straightforward and encompasses any compensation scheme "based on the number of signatures collected." Other compensation models remain lawful (*e.g.*, hourly pay, incentives for tenure, and bonuses for recruiting others or working on weekends). The superior court was correct in a number of its

holdings applying this statute. *See* Order at 12 ¶ 20. But it made three legal errors: first, concerning the scope of compensation "*based on* the number of signatures collected"; second, limiting the statutory remedy; and third, in the alternative, denying Plaintiffs' request for a temporary injunction.

## I. Petition Partners' Pay Scales and "Spin the Wheel" Promotion Violated Section 19-118.01(A).

In terms of the statute's scope, the superior court correctly interpreted Section 19-118.01(A) to hold unlawful four compensation programs employed by Defendant's circulation vendor, Petition Partners. *Id.* These payments included prizes for the circulator who collected the most signatures in a head-to-head competition, productivity bonuses, signature-based raffle tickets, and hourly bonuses based on minimum signatures. *Id.*; Ex. 10 at 7, 10–13, 19–21; Ex. 28; and Ex. 29. Each payment under these arrangements was "based on the number of signatures collected." But so were two other features of Petition Partners' compensation scheme. First, beginning in December 2019, the company promulgated a pay scale that set hourly pay based on how many signatures a circulator had collected. Exs. 10 & 11. Second, Petition Partners awarded prizes to circulators who gathered more than a threshold number of signatures. The circulators spun a wheel—once or twice, depending on how many signatures they collected—to determine which prize they claimed. Exs. 10-019 & 66. The superior court erred in failing to recognize that these programs paid circulators "based on the number of signatures collected."

Concerning the remedy for violations, Section 19-118.01(A) expressly states the consequences of unlawful payment: "[s]ignatures that are obtained by a paid circulator who violates this section are void and shall not be counted in determining the legal sufficiency of the petition." A.R.S. § 19-118.01(A). The remedy attaches to the circulator—"[s]ignatures obtained by a paid circulator who violates this section . . . ." *Id.* All of the signatures obtained by such circulators thus stand or fall together. The superior court erred in proposing a more complicated remedy that would sift through an offending circulator's signatures to identify a subset of them that "shall not be counted in determining the legal sufficiency of the petition." *Id.* That is not what the statute says, and implementing this alternative remedy would be impracticable on the short timelines for petition challenges. This Court should enforce the simple remedy provided by the Legislature.

### A. Arizona Law Broadly Prohibits Payment "Based on the Number of Signatures Collected."

The superior court correctly rejected Defendant's invitation to rewrite Section 19-118.01(A). Defendant argued that legislative history and other States' policy choices require construing "based on" to mean "per signature." That is not a faithful reading of the law, and the superior court correctly rejected it. Order at 10.

"[T]he best and most reliable ind[icator] of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *State v. Hansen*, 215 Ariz. 287, 289 ¶ 7 (2007). "In giving effect to every word or phrase, the court must assign to the language its usual and commonly

understood meaning unless the legislature clearly intended a different meaning." *Bilke v. State*, 206 Ariz. 462, 464–65 ¶ 11 (2002) (quotation omitted).

As the superior court noted, the language of this statute is "not ambiguous." Order at 10. Indeed, "based on" indicates a broad connection between two things, as numerous courts have recognized. *See, e.g., United States v. Ellison*, 664 F. App'x 507, 510 (6th Cir. 2016) ("based in meaningful part on"); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) ("arising from"); Webster's Third New International Dictionary 180 (1986) ("used as a base or basis for"). Section 19-118.01(A) thus applies to any payment that arises from or is dependent upon the number of signatures collected. And a payment is "based on" the number of signatures even if it is also based on other factors—the statute does not include anything to indicate a special, exclusive meaning of "based on." *See, e.g., U.S. ex rel. Lindenthal v. Gen. Dynam. Corp.*, 61 F.3d 1402, 1409 (9th Cir. 1995) (stating that "based on" includes actions "based in any part on"); *Sierra Club v. E.P.A.*, 356 F.3d 296, 306 (D.C. Cir. 2004) (rejecting the argument that "based on" means "sole basis").

Replacing the statute's "based on" language with a per-signature requirement or interpreting it narrowly to mean "sole basis" would undermine its effectiveness as a fraud-prevention measure. The signature-collection industry could easily circumvent a per-signature rule by, for example, offering bonuses at 25 signatures, 30 signatures, 35, 40, and so on—similar to what Petition Partners did here. *See, e.g., In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 37–38 ¶ 15 (Okla. 2006) (describing several methods of basing compensation on signatures

collected); *Wolfe v. Brown*, 432 P.3d 1121, 1127 (Or. Ct. App. 2018) (noting that combining an hourly wage with a minimum-signature requirement produced "a close correlation between the number of signatures circulators gathered and the circulators' pay"). A "sole basis" rule would not solve the incentive for circulators to cut corners and submit signatures that are inaccurate, ineligible, or provided by someone other than the purported signer.

Defendant has no textual response. In the superior court, it resorted instead to an argument from "legislative history" and "intent." This Court, however, has made clear that it is "inappropriate" for courts to "delve into the legislative history of a statute that is unambiguous on its face and then proceed to rewrite it in accordance with [the court's] view of what the Legislature probably intended but poorly expressed." *Hahn v. Indus. Comm'n of Ariz.*, 227 Ariz. 72, 76 ¶ 17 (App. 2011); *see also Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 559 ¶ 22 (2018). Even if it were appropriate to consider, legislative history confirms the plain meaning of the text. Section 19-118.01's proponents noted that payment "based on the number of signatures collected" incentivized fraud and slovenly signature collection. *See generally* http://azleg.granicus.com/MediaPlayer.php?view_id =13&clip_id=19169. The drafters of Section 19-118.01 thus intended to prevent all improper incentive payment schemes, which is exactly what they did in the text of the statute they enacted.

### B. Petition Partners' Pay Scales Unlawfully Set Compensation Based on the Number of Signatures Collected.

Unlike compensation based solely on time worked or some other neutral criterion, Petition Partners paid circulators different hourly rates based on the number of signatures they collected. The superior court incorrectly approved this structure because Petition Partners adjusted hourly wages for the upcoming week, Order at 11 ¶ 17, overlooking the fact that forward-looking rates can still be based on the number of signatures collected—in this case, collected the week before. As long as a circulator knows that the pay scale for the following week varies with the number of signatures collected this week, the incentives targeted by Section 19-118.01 persist. As a matter of text and logic, prospective wages based on past signature collections are "based on the number of signatures collected."

Before December 2019, Petition Partners paid largely by the hour, but nevertheless instituted "performance standards" including "productivity expectations" based on circulators returning 60% of the mandatory sheets as "full pages." Ex. 57 at Exhibit A. That pay scale is not before the Court. The revised pay scale in December 2019—which was in effect when the Initiative began circulating—tightened the connection between signatures and pay by instituting a scheme that adjusted circulators' compensation each week. 7/28/20 PM Tr. at 17 (stating the pay could be adjusted after the first "turn in"), 57–58 (subsequent adjustments possible each week). It did so according to a payment schedule that paid different wages based on two things: (1) how many signatures a given circulator collected and (2) compliance with the company's code of conduct. Ex. 58. The

December pay schedule, along with the April door-to-door and June schedules, all included signature-based wages and "applie[d] to everybody." Exs. 23 & 58; 7/28/20 PM Tr. at 16.

Petition Partners' manager, Tom Bilsten, testified that his company tracked the number of signatures collected and used that information to "have a conversation with each circulator when they turned in about their productivity in analyzing their ability to get promoted for the next week coming up." 7/28/20 AM Tr. at 82. Unsurprisingly, "productivity" referred to the number of signatures a circulator turned in. 7/28/20 AM Tr. at 83–85. And it was this "productivity" that determined pay: "I would look at the hours you worked, the approximate sets that you turned in, and we would average that, say fantastic, thank you for working so hard, we'd like to give you a promotion to the next pay level for the next 7 days going forward." 7/28/20 AM Tr. at 82.

In failing to recognize that the pay scales were "based on the number of signatures collected," the superior court appeared to focus on the general ability of employers to increase wages based on productivity: "Like any other employer, if an employee (a petition circulator) previously has performed job responsibilities well and in accordance with company policy, an employer is within its right to exercise discretion and increase future hourly compensation." Order at 11 ¶ 17. But signature-gatherers are not "[l]ike any other employer" because signature collection must comply with Section 19-118.01.

Moreover, there is nothing in the documents to suggest that the pay scales were discretionary with respect to the number of signatures collected. The pay scales

themselves make no reference to discretion, and there is no evidence that Petition Partners ever refused to pay a circulator the higher wage to which his signature haul entitled him, absent a violation of the employee conduct code. For example, when asked if raises were automatic, Mr. Bilsten responded only with an example of "people who were combative, who were rude" and whom he therefore "wasn't going to promote." 7/28/20 PM Tr. at 54–55. Mr. Chavez gave similar examples of circulators who presented themselves poorly or were impolite. 7/29/20 AM Tr. at 67, 70–77. But all of these examples represent violations of the conduct code, which is the other basis for raises listed in the December pay schedule. Ex. 57 at Exhibit A. The later schedules, however, made no reference to the code of conduct. And neither witness identified anything other than the code of conduct that would confer discretion; Mr. Bilsten acknowledged that he could not identify a document or policy that made the pay schedules discretionary. 7/28/20 PM Tr. at 15–18.

Whatever considerations factored into determining whether a circulator complied with Petition Partners' code of conduct (for the December scale), they do not change the fact that compensation was always based on the number of signatures collected—even under the December scale. When asked whether, in addition to circulators' conduct, he "also considered the productivity of a circulator," Mr. Bilsten responded, "Absolutely. We are in the signature gathering business." 7/28/20 PM Tr. at 54. And in response to a clarifying question asking whether Petition Partners considered the signatures collected in one week when setting compensation for the next week, he responded "Yes." *Id.* The mere fact that compensation was based on at least one other factor (the conduct code) does not

obviate the fact that it was also "based on the number of signatures collected." The superior court's legal misstep was assuming that an action could be "based on" only one factor.

Further, nothing in Section 19-118.01(A) creates a loophole for "prospective" payments based on the number of signatures collected the week before. And for good reason. Allowing employers to avoid payment rules by simply making the payment prospective would render the rules meaningless. As if the weekly adjustment in this case did not create sufficient incentive to collect more signatures, an employer could set a new wage every morning—or every hour—based on the number of signatures collected previously. The statute creates no such opening. Rather than confining themselves to the text of the statute, Defendant finds its "prospective payment" exception in an Oregon administrative ruling, which the Ninth Circuit noted in *Prete v. Bradbury*, 438 F.3d 949, 952 n.1 (9th Cir. 2006). Oregon Administrative Rule 165-014-0260 sanctions "adjusting salaries prospectively relative to a circulator's productivity . . . provided no payments are made on a per signature basis." Not only is this rule foreign to Arizona, it does not even appear in the statute in Oregon. In fact, it is plainly unfaithful to the text of the Oregon law, but that issue—like the "prospective payment" concept generally—is of no moment for resolving this case under Arizona law.

None of this is to say that circulator contracts cannot reward good behavior and hard work; the statute simply precludes one metric—the number of signatures collected. Initiative sponsors and circulator companies are free to reward circulators who work longer hours, work in a less desirable area, or who obtain a higher valid-

signature rate. Unlike payment "based on the *number* of signatures collected," A.R.S. § 19-118.01(A) (emphasis added), rewarding validity rate eliminates the incentive for fraud. A circulator who ensures that each signature of five is lawful (100% validity rate) would earn more than a circulator who rushes to obtain twenty signatures of which only five are valid (25% validity rate). This example illustrates the immateriality of how many signatures each circulator obtained because the person with fewer overall signatures—and an identical *number* of valid signatures—receives higher compensation. No raw number of additional signatures can cause an increase in pay. This model also aligns the interests of circulators with those of officials like the Secretary of State who must later test a sample of signatures for validity.

Employers can also use raw numbers for other purposes, including providing instruction or investigating work habits. While a strict minimum quota for keeping a job—a "thing of value"—would violate the statute, supervisory programs likely do not. For example, a circulator returning low numbers could be shadowed or supervised by another circulator. 7/28/20 AM Tr. at 90–91. If they were in fact skipping work, taking long breaks, or ineffective for other reasons, then a resulting termination would not be based on the number of signatures collected but on the failure to follow company policy. *See* 7/28/20 AM Tr. at 89 (circulators failed to show up for work and discontinued collection), 90 (termination for intoxication); *id.* (termination for fraud—lying about their reporting logs). All of these options demonstrate that Defendant's policy arguments alleging that Section 19-118.01 forces petition companies to pay circulators who in fact do no work are misplaced.

*See* 7/28/20 PM Tr. at 82–83 (noting that circulators who did not work 40 hours, when they claimed to, "were breaking the code of conduct. They were lying to us").

Innovative circulator companies can also develop a range of compensation programs to give their employees the best incentives while still complying with Section 19-118.01. These could include referral programs, overtime pay, and bonuses for working on the weekend. The one thing they may not do, however, is pay "money or any other thing of value based on the number of signatures collected." A.R.S. § 19-118.01(A). The "Weekend Warrior" program provides a prime example because it could have based compensation solely on weekend hours worked. But by adding the requirement that circulators "[m]aintain at least 3 sets per hour to qualify," Petition Partners converted what otherwise would have been a lawful payment program into an illegal one. The crucial question—does collecting some number of signatures confer a thing of value?—is answered in the affirmative.

The record is clear that Petition Partners' pay scales, just like its productivity bonuses and other programs, were "based on the number of signatures collected." Indeed, despite Defendant's best effort to characterize it differently, even Mr. Bilsten acknowledged it was "a set [of signatures] model." 7/28/20 PM Tr. at 72–73. This Court should reach the same conclusion and reverse the superior count on the specific issue of the Petition Partners pay scales.

### C. The "Spin the Wheel" Program Unlawfully Compensated Circulators Based on the Number of Signatures Collected.

Petition Partners also instituted a "spin the wheel" promotion that was simply a bonus program with variable bonus amounts. Participation, however, was based

on the number of signatures collected. Ex. 10-019. While the spins introduced an element of chance as to how much money a person would win, everyone who earned the right to spin won some amount of money. *See* Ex. 66 (listing the possible result as: $10, $20, $25, $50, $100, "Add an hour to your check," and "Double your Spin"); 7/28/20 AM Tr. at 49 (circulator's testimony that he won money each time, paid in cash). Most importantly for Section 18-119.01(A), the program required minimum signature collection, which appeared explicitly in the advertisement: 60 sets (20 hours x 3 sets) for one spin; 90 sets (30 hours x 3 sets) for two spins.

The "spin the wheel" program was directly "based on the number of signatures collected." Not only did it include a minimum number to participate, but it granted an additional spin for circulators who turned in 90 signatures rather than 60. In fact, it is analytically indistinguishable from the "Weekend Warrior" and "show me the MONEY!" programs that the superior court concluded were illegal. Order at 12 ¶ 20; Exs. 28 & 29. The "Weekend Warrior" program required that circulators "[m]antain at least 3 sets per hour to qualify." Ex. 29. And the "show me the MONEY!" program provided one raffle ticket per 20 sets, and increased the number of additional raffle tickets per 20 sets collected with additional tickets at 200 signatures (and then again at 2,000). Ex. 28. The same signature-dependence infected the "spin the wheel" program. Yet the "spin the wheel" promotion was even more widespread—Mr. Bilsten testified it was their most popular, 7/28/20 PM Tr. at 20—making its legality, *vel non,* central to the resolution of this case.

Given the similarity to other offending programs, the superior court's order contains an inherent contradiction that can only be explained as one arising from

confusion or the break-neck pace of election cases. The court concluded that Ex. 10-019 constituted an offending program, but that exhibit *was* the "spin the wheel" program. The court's conclusion that there "was no correlation [between] actual number of signatures turned in and a circulator's ability to 'spin the wheel,'" Order at 11 ¶ 18, must have arisen from a mistaken belief that Exs. 10-019 (with the full text description) and 66 (showing just the wheel without text or a minimum requirement) represented different programs. In reality, Ex. 66 was simply a blow-up of the wheel to which Ex. 10-019 applied.

Just like the "Weekend Warrior" and "show me the MONEY!" programs, the "spin the wheel" program was "based on the number of signatures collected."

## II. Section 19-118.01(A) Disqualifies All "[s]ignatures that are obtained by a paid circulator who violates this section."

Section 19-118.01(A) provides a remedy for violations of its terms. To discourage infractions and eliminate any fraudulent signatures, the statute disqualifies "[s]ignatures that are obtained by a paid circulator who violates this section." A.R.S. § 19-118.01(A). It is not limited to a subset of those signatures, and it is not confined to the specific timeframe in which the circulator profited from the unlawful payment scheme. The statutory remedy, which reflects a policy judgment about deterrence, attaches to the circulator and disqualifies whatever signatures he collected. Instead of applying the statute as written, the superior court crafted a variation on the "fruit of the poisonous tree" doctrine from Fourth Amendment jurisprudence, which no party advocated and which has no basis in election-law precedent. Order at 13 ¶ 25 & n.13. That improvisation was based on

a perceived lack of "guidance about the actual standard to be used," *id.*, which this Court should now provide.

The superior court began its analysis by noting that "Plaintiffs have overcome the presumption of validity." Order at 13 ¶ 25. But the court then imported a time limit on which signatures to disqualify, reasoning that "the taint of the improper payment is purged" after a week. *Id.* In a lengthy footnote, the court explained that it devised the limiting principle because the statute did not expressly state that it applies to "'all' signatures." *Id.* n.13. But in the absence of a statutory basis for confining Section 19-118.01(A) to a subset of signatures obtained by improperly compensated circulators, the natural reading of the language is that all such signatures are disqualified. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) (stating the court should not elaborate unprovided-for exceptions to a text). Had the Legislature included language to indicate that it intended not to count only "tainted" signatures, then the superior court's effort to devise a standard for drawing lines would be commendable. But the Legislature included no such limitation.[2] As a result, the inquiry is whether a given signature was "obtained by a paid circulator who violates this section." A.R.S. § 19-118.01(A). If it was, then the second half of the provision applies, and the

[2] The superior court stated that "[t]he Legislature enacted A.R.S. § 19-118.01(A) to invalidate only the signatures of a 'paid circulator' and not all signatures of ***the person paying*** the circulator." Order at 12–13 ¶ 22. Plaintiffs agree. If Petition Partners improperly paid only one circulator, Plaintiffs agree that not all signatures collected by Petition Partners would be disqualified. But all signatures collected by that circulator would be disqualified. This result aligns with the statute's plain text.

signature is "void and shall not be counted in determining the legal sufficiency of the petition." *Id.*

Calibrating remedies to achieve a desired level of deterrence is a policy judgment to be made by the Legislature. If it seems severe not to count all signatures obtained by an improperly paid circulator, then that is a matter for legislative correction. This Court should confirm that the unambiguous text of the statute neither requires nor allows augmentation by the judiciary.

## III. Alternatively, the Superior Court Should Have Entered a Temporary Injunction to Allow Discovery of How Many Circulators Were Paid Unlawfully.

The superior court noted that Plaintiffs bore the burden to prove which signatures were invalid. Order at 13 ¶ 23 (citing *Kromko v. Superior Court*, 168 Ariz. 51, 58 (1991)). And it concluded that while Plaintiffs raised a persuasive policy argument regarding the need for a temporary injunction pending discovery, they had not demonstrated a strong likelihood of success on the merits because the number of signatures that would be invalidated was insufficient to bar the Initiative from the ballot. *Id.* at 16–17 ¶¶ 30–33. But Plaintiffs' likelihood of success on the merits is tied to Defendant's failure to maintain sufficient records. After Plaintiffs successfully proved that payment plans were illegal, Defendants, not Plaintiffs, should bear the burden of proving that the circulators who were improperly paid collected too few ballots to enjoin the Initiative. *See Parker v. City of Tucson*, 233 Ariz. 422, 432 ¶ 24 n.9 (App. 2013) ("[A] party with superior knowledge about and access to evidence regarding certain facts should bear the burden of producing that

evidence, rather than charging the adverse party with the task of proving a negative.").

The superior court recognized the incomplete nature of the evidence. Order at 14–16 ¶¶ 27–29. The best that Defendant produced was a general payroll showing that 146 circulators received a bonus the court concluded was improper—with no record as to how many signatures they collected and despite the fact Defendant acknowledged several of its bonus payments were made in cash. Indeed, the lack of proper record-keeping was a theme during trial. 7/28/20 PM Tr. at 113–14 (noting Petition Partners destroyed or failed to keep records of cover sheets identifying how many signatures were collected by each circulator); 7/29/20 AM Tr. at 20–21 (noting there were no real records identifying who spun the wheel); 7/29/20 PM Tr. at 38 (stating Plaintiffs would have to check each signature sheet located at the Secretary of State's office). A temporary injunction is necessary to determine how many signatures would be disqualified under any combination of unlawful payment practices.

Further, the court's back-of-the-envelope calculations that allegedly established a low probability of success on the merits, were overly conservative. For example, though the court found the "show me the MONEY!" program illegal, Order at 12 ¶ 20, it based its "success on the merits" calculus on only those circulators for whom Defendant provided a paystub showing a bonus was paid. The court did not consider circulators who received raffle tickets—*i.e.*, a "thing of value"—but who did not win. Section 19-118.01(A) is not limited to monetary bonuses, but extends to any "thing of value," which includes raffle tickets. 7/29/20 AM Tr. at 15. Lottery

tickets, for example, cost money because the *chance* to win is a thing of value. By focusing only on bonuses that appeared in paystubs, the court also omitted circulators who received non-monetary bonuses. So, too, those records failed to show cash payouts—as most of the "spin the wheel" bonuses were.[3]

If this Court were not to conclude that the hourly baseline program was invalid—which would invalidate over 350,000 signatures and moot the likelihood of success issue—a temporary injunction is necessary for Defendant to produce records sufficient for Plaintiffs to establish which circulators were improperly compensated in violation of Section 19-118.01(A). To allow otherwise would reward Defendant for failing to keep proper records—despite Plaintiffs having already met their burden of defeating the presumption of legality.

## CONCLUSION

This Court should reverse the superior court's order regarding the Petition Partners pay scales and "spin the wheel" bonuses. The Court should then exclude signatures collected by paid circulators who violated Section 19-118.01(A). In the event illegality is not established for one or more payment methods, the Court should enter a temporary injunction enjoining the Initiative's placement on the ballot pending further discovery.

[3] Because of the court's inconsistent rulings regarding the "spin the wheel" program, and because it focused only on payroll stubs, the court did not include in its calculation the improper payments made according to Ex. 10-019. That omission, by itself, justifies the temporary injunction even if no other programs are deemed improper.

Respectfully submitted this 7th day of August, 2020.

By */s/ Dominic E. Draye*

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## CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

___X__ A brief, and is submitted under Rules 10 and 14(a)(5)

_____ An accelerated brief, and is submitted under Rule 29(a)

_____ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

_____ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

_____ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief to which this certificate is attached uses type of at least 14 points, is double-spaced, and contains 7,452 words.

3. The document to which this Certificate is attached does not exceed the word limit set by the Court.

*/s/ Dominic E. Draye*
Dominic E. Draye