ARIZONA SUPREME COURT

JAIME A. MOLERA, an individual and qualified elector; ARIZONANS FOR GREAT SCHOOLS AND A STRONG ECONOMY, a political action committee, Plaintiffs/Appellees/Cross-Appellants, v. 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, Defendants/Appellant/Cross-Appellee.	No. CV-20-0213-AP/EL Maricopa County Superior Court No. CV2020-007964

OPENING BRIEF OF APPELLANT INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN)

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Introduction

¶1 Arizonans' right to legislate by initiative is fundamental. Or at least it once was. Decades of increased regulation by the Legislature has limited that right and transformed its exercise into a difficult, expensive, and litigious process that frequently leads to disqualification before ballot access. And though courts historically protected this right, they now serve as challengers' primary tool against it. Appellant ("Committee") knows this well; for the second time in as many years, the fate of its attempt to ask Arizonans to provide funding to public schools is in this Court's hands.

¶2 Two years ago, this Court decided *Molera v. Reagan*, 245 Ariz. 291 (2018), and for the first time in its history, removed an initiative measure (the Committee's) from the ballot for violating A.R.S. § 19-102(A). That decision was an outlier: the exception rather than the rule. But it opened a Pandora's Box, as each of the four statewide initiatives that submitted petitions to the Secretary of State this year is the subject of a challenge to its 100-word description.

¶3 Emboldened by *Molera*, Appellees ("Challengers") – supported by the Arizona Chamber of Commerce – brought this case against the

Invest in Education Act ("Initiative"), again challenging its 100-word description ("Description"), as well as how a vendor paid petition circulators. Their challenges to the Description are nothing like those in *Molera*, and instead parrot policy arguments that belong on an editorial page.

¶4 Rather than recognize *Molera*'s limitations and the stark differences between its facts and those before it, the trial court agreed with Challengers on nearly every point. It misapplied *Molera* to hold that the Description omitted five "principal provisions" of the Initiative (in a discussion itself totaling 127 words) and misled voters by accurately using the term "surcharge" to describe the Initiative's surcharge. Even worse, it did so in a 20-page order capped off by gratuitous and insulting rhetoric aimed at the Committee that could be part of a press release written by the Chamber itself.

¶5 The result, if not overturned, would be an unconstitutional and untenable new standard under A.R.S. § 19-102(A): (1) an initiative's "principal provisions" are whatever a challenger can imagine, (2) initiative proponents must limit themselves to simple laws able to be fully described in 100 words or less, and (3) even then, proponents'

descriptions must use language preferred by their opponents in a quintessential example of compelled speech. It is an impossible standard to meet, and conflicts with article IV, pt. 1, § 1 of the Arizona Constitution ("Article IV") and the First Amendment.

¶6 The trial court erred in its restrictive application of A.R.S. § 19-102(A) and *Molera*. It erred in its construction of A.R.S. § 19-118.01(A) as applied to incentive programs used by the Committee's vendor. And it erred by engaging in a speculative attempt to account for Challengers' failure to carry their burden of proof by linking petition signatures with payments in violation of A.R.S. § 19-118.01(A).

¶7 This case calls an important question about the Arizona Constitution: do Arizonans still have "as great as the power of the Legislature to legislate," *State v. Osborn*, 16 Ariz. 247, 250 (1914), as the framers intended? Because the answer to that question must be "yes," this Court should reverse the judgment below and allow Arizonans the chance to vote up or down on the Initiative.

Statement of the Case & Statement of Facts

¶8 In February, the Committee obtained a serial number for the Initiative. [APP1-018] The Description on the Initiative's petitions reads:

> The Invest in Education Act 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.

¶9 The Committee hired AZ Petition Partners, LLC ("AZPP") to collect signatures. [APP1-034-40] AZPP paid circulators based on the number of hours they worked, not based on the number of signatures they collected. [APP3-108-116] It set employees' hourly rates prospectively based on several factors, including performance, effort, and compliance with a "Code of Conduct." [*Id.*] In addition, some circulators earned bonuses, but never for collecting a certain number of signatures. [APP3-117-122]

¶10 The Committee submitted 435,669 petition signatures to the Secretary of State. [APP3-207] Challengers filed their Verified Complaint, requesting that the Court enjoin the Initiative from appearing on the ballot because (1) the Description violated A.R.S. § 19-

102(A), and (2) petition circulators for the Initiative received payments in violation of A.R.S. § 19-118.01(A).

¶11 The trial court permitted Plaintiffs to conduct discovery, including of AZPP. [APP1-003-04] The Committee sought summary judgment on Challengers' claims [APP1-008]; Challengers moved for summary judgment only on the Description. [*Id.*]

¶12 The trial court largely denied both parties' motions. [APP1-012] It insisted that the "legal standard established in *Molera* is an objective, fact-intensive standard." [APP1-009] And it found a fact issue "as to which 'paid circulators' may have obtained signatures in violation of A.R.S. § 19-118.01(A)," meaning that "the number of signatures that may be counted, and the number of signatures which may be in question, cannot be determined as a matter of law." [APP1-015]

¶13 A three-day bench trial followed. Regarding circulator compensation, the parties presented the following relevant evidence:

¶14 "Weekend Warriors": Challengers introduced a post in AZPP's employee application ("App") advertising that employees were eligible for this bonus if they (1) worked at least 5 hours each day of the weekend, and (2) maintained a minimum productivity expectation of 3

"sets" per hour.[1] [APP1-029] AZPP's owner, Andrew Chavez, and one of its managers, Tom Bilsten, testified that the minimum productivity requirement allowed AZPP to deny the bonus to employees who failed to perform their job (collect signatures). [APP3-099-100, 121] Challengers called one circulator, Colby Jensen, at trial and admitted his pay stubs into evidence. Besides Mr. Jensen, Challengers presented no other circulators' pay stubs or testimony to establish that AZPP paid any bonuses. Challengers also failed to present evidence that any circulators (including Mr. Jensen) submitted signatures for the Initiative.

¶15 "Productivity Winners": Challengers introduced an App post announcing one week's four "Productivity Winners." [APP1-033] Mr. Chavez testified that these employees "were never paid" a bonus. [APP3-128-30] Challengers obtained their paystubs through discovery but never introduced them at trial. Challengers also failed to establish that the four employees submitted petitions for the Initiative.

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[1] A "set" means a circulator persuades one voter to sign all initiative measures the circulator is carrying. Thus, if a voter signs all initiatives the circulator is circulating, that is considered one "set." If a circulator collected 100 signatures for one measure, and one signature for two other measures the circulator is carrying, that is still only one "set." [APP3-106-07]

¶16 "Show Me the Money" Raffle: Challengers introduced a flyer advertising a raffle where employees could earn "tickets" for turning in sets between January 1, 2020 and February 29, 2020. [APP1-041] Mr. Bilsten, who managed all bonus programs, testified that "Invest in Ed was not part of this program." [APP3-088-89] AZPP's Phoenix office started circulating petitions for the Initiative on February 17, but was unable to distribute petitions to its other offices. [APP3-088-89, 125] AZPP thus did not include the Initiative in the "sets" that made circulators eligible for raffle tickets. [*Id.*] Plaintiffs did not establish that any raffle winners submitted petitions for the Initiative.

¶17 "Du[e]l for the Dollars": Challengers introduced an App post advertising "a competition where two circulators du[e]l head to head and see who can collect more signatures during the week." [APP1-030-32] AZPP implemented this program for two weeks. [APP3-101-03] Of the $3,900,000 AZPP spent on payroll for its circulators while it was circulating petitions for the Initiative, it spent $3,380 (or less than one-tenth of 1%) on these bonuses. [APP3-126-27] Again, Challengers presented no evidence to show which circulators' pay stubs reflect this bonus, nor did they present any evidence that any winners submitted petitions for the Initiative.

¶18 At no point during Challengers' case did they try to identify which circulators' petitions were at issue and which specific petition signatures the trial court should invalidate based on alleged violations of A.R.S. § 19-118.01. Despite the Court's specific guidance that "the number of signatures which may be in question" was a fact issue, Challengers did not mark the Initiative's petition sheets as a trial exhibit and did not try to introduce them belatedly during trial.

¶19 The second half of the trial focused on Challengers' 100-word summary claims. Although the trial court insisted that it must engage in a fact-intensive inquiry regarding Challengers' claims, its ruling is devoid of any reference to the record relating to these claims. This may be because Challengers' witnesses couldn't support Challengers' assertions. By contrast, the Committee's witnesses established that (1) it was accurate for the Description to use the word "surcharge," (2) the surcharge does not apply to "small businesses" and it would have been inaccurate to call out "business income," and (3) the Initiative's "no supplant" and "local revenues" provisions are non-controversial and already embedded in other parts of Arizona law. [APP3-163-69, 170-76, 178-79-81]

¶20 At the close of Challengers' case, the trial court denied the Committee's motion for judgment on partial findings on both of Challengers' claims under Rule 52(c), Ariz. R. Civ. P. [APP3-159-60]

¶21 The trial court then entered judgment against the Committee in a 20-page order. [APP3-202] It held that the Description violated A.R.S. § 19-102(A) by omitting five separate provisions of the Initiative. The trial court also held that the use of the term "surcharge" created a "substantial likelihood of confusion."

¶22 On Challengers' claim regarding circulator compensation, the trial court held that the four incentive programs detailed above violated A.R.S. § 19-118.01 by providing circulators "the opportunity to earn something of value, above and beyond their hourly salary, based in part on the number of signatures gathered." [APP3-193-94]. The trial court noted that "Plaintiffs ha[d] the burden to prove which signatures are invalid because paid circulators had their compensation linked to the number of signatures obtained." [APP3-195] Ultimately, the trial court held that "Plaintiffs . . . failed to prove their second claim of illegality – namely, that there were an insufficient number of valid signatures filed in support of the Initiative." [APP3-199]

¶23 This appeal followed. This Court has jurisdiction under A.R.S. § 19-122 and Rule 10, Ariz. R. Civ. App. P.

Statement of Issues

¶24 This appeal raises five issues:

1. Does the Description comply with A.R.S. § 19-102(A)?
2. Does the trial court's requirement that the Description include five other principal provisions constitute compelled speech or an undue burden on the Committee's First Amendment or Article IV rights?
3. Did the trial court err in holding that "providing any benefit to a petition circulator that hinges on the circulator's gathering of signatures" and payment to circulators based "in part" on the number of signatures collected violates A.R.S. § 19-118.01?
4. Does it violate A.R.S. § 19-118.01 for a petition circulating company to advertise or implement a bonus program that considers productivity, among other eligibility factors?
5. Does the trial court's broad interpretation of A.R.S. § 19-118.01 violate the First Amendment or Article IV?

Argument

I. The Description Complied with A.R.S. § 19-102(A)

¶25 The Description summarized all the Initiative's principal provisions, and did not create a "substantial danger of confusion" by its accurate use of the word "surcharge" to describe the Initiative's surcharge.

¶26 A.R.S. § 19-102(A) requires that initiative proponents provide "a description of no more than one hundred words of the principal provisions of the proposed measure." This "description need not be impartial . . . [n]or must the description detail every provision." *Molera*, 245 Ariz. at 295 ¶ 13 (citations omitted). In other words, the statute does not require a "complete" description; instead, the summary cannot misrepresent or conceal "the thrust of the measure." *Wilhelm v. Brewer*, 219 Ariz. 45, 48 ¶ 13 (2008). It's also relevant that an initiative's sponsor has only 100 words to describe what are often complex changes to law. *Cf. Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 208 ¶ 9 (2013) ("[t]he length and complexity of the initiative, and the [word limit] constraints prescribed in § 19-125(D), are factors in assessing compliance").

¶27 The required description may "describe[] the intended effects of the measure in a way that might appeal to prospective voters." *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 152 ¶ 28 (2013). And because the petition form states that the summary is "prepared by the sponsor of the measure," potential signers of the petition are "warned that the summary description may not be complete or unbiased." *Wilhelm*, 219 Ariz. at 48 ¶ 14.

¶28 First, an initiative's "principal provision" is defined as one that is "'most important, consequential, or influential,' 'chief' [or] 'a matter or thing of primary importance.'" *Molera*, 245 Ariz. at 297 ¶ 24 (citation omitted). But an alleged omission of a "principal provision" can disqualify a petition only if it creates a perception that contradicts its express terms. *Compare id.* ¶ 25 (failure to disclose repeal of indexing of tax brackets to inflation was fatal "because it imposes tax increases on most Arizona taxpayers rather than only the state's wealthiest taxpayers, as the description clearly suggests"), *with Save Our Vote*, 231 Ariz. at 152 ¶ 27 (failure to disclose that proposed "open primaries" measure "would not apply to presidential elections or non-partisan elections is not a fatal omission"), *and Wilhelm*, 219 Ariz. at 48 ¶¶ 14-15

(failure to disclose that measure would extend statute of repose did not "improperly obscure[]" the main substance of the initiative).

¶29 Second, a summary does not comply with A.R.S. § 19-102(A) if its actual text is "fraudulent or creates a significant danger of confusion or unfairness." *Molera*, 245 Ariz. at 295 ¶ 13. The statute "requires an objective standard for evaluating the description of the actual provisions," *id.* at 297 ¶ 27, under which courts must "consider the meaning a reasonable person would ascribe to the description." *Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix* ("*Contractors*"), 247 Ariz. 45, 48 ¶ 15 (2019).

¶30 In short, a summary complies with A.R.S. § 19-102(A) unless it contains objective falsehoods or omissions that conflict with the disclosed "thrust of the measure," *Wilhelm*, 219 Ariz. at 48 ¶ 13.

A. *Molera* Is the Exception, Not the Rule.

¶31 The trial court invalidated the Initiative based on a fundamental misunderstanding of this Initiative compared to *Molera*.

¶32 In *Molera*, the proposed measure amended Arizona's individual tax brackets, and "modifie[d] the inflation indexing of income tax rates" under which tax brackets adjust to account for inflation. 245

Ariz. at 295 ¶ 14. The 100-word summary stated only that it would "rais[e] the income tax rate by 3.46% on individual incomes over a quarter million dollars (or household incomes over half a million dollars), and by 4.46% on individual incomes over half a million dollars (or household incomes over a million dollars)," but did not mention that it would eliminate indexing. *Id.* at 293 ¶ 2.

¶33 First, *Molera* held that the summary's failure to describe that the proposed measure would eliminate "income tax indexing" was "a primary, consequential provision because it imposes tax increases on most Arizona taxpayers rather than only the state's wealthiest taxpayers, as the description clearly suggests." *Id.* at 297 ¶ 25 (emphasis added). It was thus not the mere omission of the change in indexing that was disqualifying. Instead, it was that the summary included "[a] description indicating that other people's taxes will be raised, but not the taxes of most of those signing the petition," which "create[d] a significant risk of confusion or unfairness and could certainly materially impact whether a person would sign the petition." *Id.* And because the question of preserving indexing was not obvious from the face of the Initiative

itself, *Molera* found that "recourse . . . to the measure's text" was no salvation. *Id.* at 298 ¶ 28.

¶34 Second, *Molera* held that the description of the size of the tax increase "also 'creates a significant danger of confusion.'" *Id.* at 298 ¶ 29. More specifically, the summary stated that it would increase taxes on the wealthy "by 3.46% and 4.46%," when "the affected tax rates would actually increase by seventy-six percent and ninety-eight percent, respectively." *Id*. This incorrect statement was "confusing" from a reasonable person's perspective and "so significant that it could materially affect whether a person would sign the petition." *Id.* ¶¶ 29, 30.

¶35 Just a year later in *Contractors*, this Court rejected a challenge to the 100-word description of a municipal initiative and proved that *Molera* is not the blunt instrument that Challengers and the trial court believe it to be. In doing so, the Court encapsulated three fundamental principles under A.R.S. § 19-102(A): (1) courts must analyze a summary in its entirety and in context, (2) initiative proponents are not responsible for "argu[ing] the consequences" or "effects" of an initiative in the limited space they have, and (3) accurate statements in the summary are not actionable. *Contractors*, 249 Ariz. at 49 ¶¶ 17-20.

B. The Summary Does Not Omit "Principal Provisions"

¶36 The trial court erred as a matter of law by finding that the Description omitted five "principal provisions." This error is demonstrated by as 127-word bullet point list of the omitted provisions.

1. The Initiative's percentage distribution of funds is not a principal provision.

¶37 The trial court first held that the Description is deficient because it does not state "[t]he percentages of revenues to be distributed to the enumerated groups," and that "[t]o some reasonable voters, devoting 50% of the money generated by the Initiative directly to teacher salaries may have sounded too rich; to other reasonable voters, devoting 50% of the money raised directly to teacher salaries may have sounded too modest." [APP3-186-87]

¶38 The Description accurately states that the Initiative

> 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

These are the precise areas to which the Initiative will dedicate the revenue it generates, and the Summary makes no inconsistent representation or implication elsewhere about the distribution of the

revenue as between those sources. Indeed, it correctly states that it will provide "additional" funding to those sources. The trial court's speculation about what a "reasonable voter" might believe about the distribution has no basis in any fact presented by Challengers. The percentages set forth in the Initiative are not principal provisions, and this claim must fail.

2. The total increase in the marginal rate of taxation is not a "principal provision."

¶39 Next, the trial court found the Description deficient because it did not state "[t]he amount of the increase in the marginal rate of taxation created by the 'surcharge' on those who are subject to the 'surcharge'" and that "[t]he Arizona Supreme Court directly addressed this in *Molera*." [APP3-186-87]

¶40 The trial court's suggestion that this Court "directly addressed this in *Molera*" defies explanation. The description at issue in *Molera* explicitly stated that it would "raise" income taxes on particular earners by particular percentages, which was problematic because the use of straight percentages to describe the increases was mathematically incorrect.

¶41 In stark contrast, the Description accurately conveyed to voters that the 3.5% surcharge (a correct usage of a straight percentage) would apply to "taxable income" above the identified levels. It "obscure[d]" nothing. Unlike the initiative in *Molera*, which re-wrote Arizona's individual income tax brackets, the Initiative intentionally detached the surcharge from those brackets to avoid the problems discussed in *Molera*, and to leave the task of setting those brackets to the Legislature. A reasonable person knows that income at these high levels is already subject to taxation, and the Description didn't imply otherwise.

¶42 That the marginal tax rate on taxable income above the levels identified in the Initiative would increase by "77.7%" is irrelevant where the Initiative (1) involves a surcharge that is clearly described, and (2) the Initiative does not alter the otherwise-applicable marginal tax rates. The Committee was not required to catalogue the Initiative's "effects" or relationship to extrinsic law. *See Contractors*, 247 Ariz. at 49 ¶ 18.

3. The Initiative's application to business income is not a "principal provision."

¶43 The third "principal provision" the trial court identified was "[t]he fact that the 'surcharge' would apply to business income that was passed along to . . . filers whose taxable income exceed[s] the threshold."

[APP3-186] According to the trial court, "[f]or this Initiative – one creating a "surcharge" – the income subject to the "surcharge" is a principal provision." [APP3-189]

¶44 The trial court's explanation of this purported defect betrays itself; the Initiative does identify "the income subject to the 'surcharge'"; specifically, "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." It applies to all "taxable income" above those levels.

¶45 The erroneous conclusion of the trial court rests on a baseless premise: that the Committee had a legal obligation to single out just one of many ways that a person might earn "taxable income" that will be subject to the surcharge. Not so; the surcharge applies to "taxable income," no matter how it's earned. A single "small business owner" who reports more than $250,000 in "pass-through" taxable income would be subject to the surcharge, as would a single corporate CEO, a single gambler, or a single investor with income earned from qualified dividends.

¶46 If the Committee had singled out "pass-through business income," that itself would have been misleading and subject to challenge. As the evidence demonstrated, at most, "small business" generates 18.5% of the income that might be subject to the surcharge (an overestimation that doesn't account for the $500,000 threshold for joint filers, among other things). [APP1-042-47][2] Capital gains likewise generate 18.5% of income at those levels, whereas salaries generate 48.5%, but neither of those sources of taxable income were singled out by the trial court. [*Id.*]

¶47 Because the Initiative does not distinguish between sources of "taxable income," the Summary did not have to do so either. That Challengers and their corporate backers prefer this framing of the Initiative is not a reason to conclude that the Description omitted a "principal provision." The embrace of this framework was reversible error.

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[2] Plaintiffs' expert on this issue used faulty math and unfounded "adjustments" arising from "brainstorming exercise[s]" to make claims regarding the surcharge's purported impact on "small businesses." [APP3-138-51] The testimony was unhelpful to Challengers, and the trial court ignored it [APP3-189], only to rule against the Committee anyway.

4. The "no supplant" clause is not a "principal provision."

¶48 Next on the trial court's list of omitted "principal provisions" is "that the Initiative curtails the authority of the Legislature by preventing it from supplanting the revenues raised by the 'surcharge.'" [APP3-186] This clause, the trial court held, was a principal provision because it "limits the power and authority of the Arizona Legislature." [APP3-189]

¶49 When the people of Arizona create a new program through their initiative power, they presume that it will work and will not be subject to legislative interference. If the Legislature simply reduced its appropriation for public education by the amount raised by the Initiative every year, it would be a futile effort. For that reason, the Initiative contains several procedural mechanisms, including a clause stating that "the additional monies received by school districts . . . are in addition to any other appropriation, transfer or allocation of public or private monies from any other source and may not supplant, replace or cause a reduction in other funding sources."[3] At most, this prevents the Legislature from

[3] This is also why the first line of the Description states that the Initiative "provides additional funding for public education." (Emphasis added).

reducing funding based on the new revenue generated by the Initiative. The Legislature retains discretion over the budget process in every other way and could still reduce funding to schools for any other reason. [*See* APP3-168-69]

¶50 Challengers provided no evidence that this provision of the Initiative is important to a reasonable person or conflicts with anything in the Description. In fact, the only evidence related to the "no supplant clause" was that it is a familiar concept in voter-approved tax increases that provide education funding. The Initiative's "no supplant" clause is identical to that approved by voters in 2000 as part of Proposition 301, an act renewed by a super-majority of the Legislature in 2018 without the removal of this imagined limitation on the Legislature. [APP3-166-69; Tr. Ex. 37 & A.R.S. § 42-5029(E) (Prop. 301 "no supplant" provision)].

¶51 There is simply no basis to support the idea that this issue would materially impact whether a reasonable voter would sign the petition. In any event, the "no supplant" clause is not part of the "thrust" of the Initiative, which the Description accurately describes. The "no supplant" language is not a "principal provision."

5. The "local revenues" clause is not a "principal provision."

¶52 Lastly, the trial court held that the Initiative's provision stating that its revenues are "not considered local revenues" under article IX, § 21 of the Arizona Constitution was yet another omitted "principal provision."

¶53 By disclosing to potential signers the revenue-raising mechanism and areas of distribution of additional revenue, the Description adequately described the "thrust" of the measure. It defies common sense to say that in just 100 words – and on top of everything else – the Committee had to explain to voters: (1) the aggregate spending limits prescribed in article IX, § 21, (2) the concept of "local revenues," and (3) the Initiative's statement about "local revenues."

¶54 Here again, Challengers presented no evidence that this information would have made any difference to a reasonable person (nor is it reasonable to assume that a reasonable person understands the intricacies of article IX, § 21). Just as with the "no supplant" clause, the Initiative's "local revenues" clause is identical to that in Proposition 301, and remained in the 2018 legislative renewal of Proposition 301. [APP3-166-69; Tr. Ex. 37 & A.R.S. § 42-5010(G) (Prop. 301 "local revenues"

clause)] If, as the trial court found, a "reasonable" voter might not "appreciate" that local revenue limits exist, then declining to mention that these limits don't apply to the Initiative is not misleading or confusing. [APP3-190]. The "local revenues" clause is not a "principal provision" of the Initiative.

C. The Summary's Accurate Use of "Surcharge" Did Not Create a "Substantial Danger of Confusion."

¶55 Beyond the litany of alleged omitted "principal provisions," the trial court also held that the Summary's use of the word "surcharge" "created a substantial likelihood of confusion for a reasonable voter." [APP3-190-91] The trial court asserted, without citation to a single fact in the record, that

> [a]lthough the use of the term "3.5% surcharge on taxable income" may be perfectly understood by some Arizona voters to be permanently adding 3.5 percentage points to the taxation rate – an increase [of] 77.7% in the tax rate on taxable income above the threshold – other[] reasonable Arizona voters may understand a "surcharge" to mean a temporary tax, or to mean a modest 3.5% increase of the existing tax rate.

¶56 The term "surcharge" in the summary does not "create a significant risk of confusion or unfairness." The summary explains that the Initiative "[e]stablishes a 3.5% surcharge on taxable income" above a

certain annual household income. That's exactly what the Initiative does by establishing a surcharge on taxable income above the stated levels. Moreover, a "surcharge" is, by definition, an "additional charge, tax, or cost." Black's Law Dictionary (11th ed. 2019) (emphasis added); see also Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/surcharge ("surcharge" is "an additional tax, cost, or impost"). This is how reasonable people understand that term. *See State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 241 ¶ 24 (App. 2010) ("[T]o glean the plain meaning of the words, we may consult a dictionary for definitions."). It's also consistent with A.R.S. § 5-839, an existing Arizona statute that uses the term "surcharge" to mean an additional tax. This Court, in fact, had no difficulty analyzing that "surcharge" as a tax in a recent opinion. *See Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89 (2019).

¶57 The trial court's belief that the Committee should have used some other term – one that it and Challengers favor politically – is irrelevant. Because the use of the word "surcharge" was accurate and

mirrored the term used in the Initiative itself, it cannot be "confusing" as a matter of law. *Contractors*, 247 Ariz. at 49 ¶ 19.[4]

¶58 The trial court also read the word "surcharge" in isolation, ignoring the explanation that immediately follows: the "surcharge" applies to "taxable income" above certain levels for certain filers. "Read in context, a reasonable person would know" that because the referenced "surcharge" relates to "taxable income," it imposes another tax. *Contractors*, 249 Ariz. at 49 ¶ 17.

¶59 Even if this were a factual question, the trial court's conclusion was still in error. Indeed, there is no evidence in the record suggesting this word was confusing to anyone, to say nothing of a "reasonable Arizonan." Professor John Swain, a tax law expert, testified that the Description's use of the term "surcharge" was accurate and not confusing. [APP3-173-75] David Lujan, who helped draft the Initiative, testified that the term "surcharge" is accurate. [APP3-170-72] And

[4] After Plaintiffs' expert stated that "surcharge" was a term that he has "never" used, he acknowledged that he referred to the Initiative as a "new tax surcharge" in publicity documents he authored in an attempt to get reasonable Arizona voters to reject the Initiative at the ballot. [APP3-152-54]. Again, the "expert" testimony was not helpful to Challengers, yet the trial court ignored it in favor of ruling against the Committee on this issue anyway.

Challengers' own public opinion study, which the trial court conspicuously did not credit, demonstrated that nearly every Arizonan polled understood the word "surcharge" to mean either a new or additional tax. [APP3-177-78]

¶60 Lastly, the trial court's belief that *Molera* provided a roadmap about "how to phrase the proposed tax increase" proves its fundamental misunderstanding of that decision and the Initiative. [APP3-190-91] The problem in *Molera* was not that the Initiative didn't appropriately "phrase" the tax increase; the problem was that its actual terms misstated the degree of the tax increase in a confusing manner (*i.e.*, using the word "percent" instead of "percentage point"). To say the Committee didn't follow this Court's roadmap is inaccurate and disingenuous. The word "surcharge" is accurate and does not present a "substantial danger of confusion."

D. Expanding A.R.S. 19-102(A) Would Violate the United States and Arizona Constitutions.

1. The First Amendment.

¶61 The trial court's application of A.R.S. § 19-102(A) violated the Committee's First Amendment rights because: (1) it amounts to compelled speech; and (2) it unreasonably burdens core political speech.

¶62 Although A.R.S. § 19-102(A) is facially content-neutral,[5] the trial court applied it to "mandate speech that a speaker would not otherwise make," which "necessarily alters the content of the speech." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 292 ¶ 100 (2019) ("When a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law" and is thus subject to strict scrutiny); *cf. Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200-01 (1999) (compelling circulators to disclose their identity while they circulated petitions violated First Amendment). The State's interests are served by requiring that 100-word summaries cannot be fraudulent or misleading. But the trial court required much more than that. Its ruling mandates that initiative proponents include words proposed by opponents (or the court) or face disqualification. This isn't "narrowly tailored" to further any State interest.

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[5] The Ninth Circuit has held that Nevada's "single-subject and description-of-effect requirements" are facially valid "prerequisites" to circulating petitions, but the initiative proponents in that case failed to show that these requirements were "applied in a discriminatory manner." *PEST Comm. v. Miller*, 626 F.3d 1097, 1108 (9th Cir. 2010). Unlike *PEST*, here the trial court applied § 19-102(A) in a discriminatory manner by requiring the Committee to include content in its summary beyond what the statute requires.

¶63 The trial court's interpretation of § 19-102(A) also unreasonably burdens the Committee's "core political speech." *Meyer v. Grant*, 486 U.S. 414, 423 (1988) (citation omitted). The right to advocate for and circulate initiative petitions "is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). If the summary is not fraudulent or misleading, initiative proponents have the right to decide how they want to express "the merits of the proposed change." *Meyer*, 486 U.S. at 422.

¶64 The Committee had no opportunity for a pre-circulation review of its 100-word summary (which was filed on February 14).[6] Instead, after the Committee gathered hundreds of thousands of signatures, spent millions of dollars, and submitted its petition sheets, the trial court did a post-hoc review of the summary and discarded every signature. It did so because the summary did not use the court's preferred wording and failed to include words the Challengers proposed. This paternalistic interpretation of § 19-102(A) cannot justify the burden on the Committee's speech. *Cf. Brown v. Hartlage*, 456 U.S. 45, 60 (1982)

[6] Unlike *PEST*, where the initiative summary was a pre-circulation requirement that opponents had to challenge within 15 days after the initial petition application was filed. 626 F.3d at 1100-01.

("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.").

2. Article IV.

¶65 In addition, expanding A.R.S. § 19-102(A) to fit the trial court's rubric would violate Article IV. That provision guarantees the people's reserved power to legislate by initiative, and when interpreting it, the Court should "take . . . into consideration" the importance of this power to our framers and the voters who overwhelmingly approved it. *Whitman v. Moore*, 59 Ariz. 211, 218 (1942).

¶66 The Legislature can enact legislation implementing Article IV if: (1) it does not "unreasonably hinder or restrict the constitutional provision," and (2) "reasonably supplement[s] the constitutional purpose." *Turley v. Bolin*, 27 Ariz. App. 345, 348 (1976). Here, expanding *Molera* and A.R.S. § 19-102(A) beyond their narrow scope to require initiative proponents such as the Committee to summarize initiative measures in a way that would satisfy the political desires of their opponents would violate Article IV.

II. AZPP's Circulator Incentive Programs Complied with Section 19-118.01.

¶67 The trial court also erred in its interpretation of A.R.S. § 19-118.01 by holding that four of AZPP's incentive programs violated that statute. Those portions of its judgment should be reversed.

A. The Trial Court Misconstrued A.R.S. § 19-118.01.

¶68 A.R.S. § 19-118.01(A) 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 . . . petition." Read literally, that statute would effectively ban paid petition circulation; after all, collecting some "number of signatures" is inherent in a contract with a petition circulation vendor and in the job of being a paid circulator.

¶69 But that statute does not – and constitutionally cannot – ban paid circulation or preclude the use of productivity standards or performance metrics to determine eligibility for incentive programs. Yet that is how the trial court interpreted A.R.S. § 19-118.01 by holding that it bars any compensation that "hinges on the circulator's gathering of signatures" [APP1-014], is "in part, based on the number of signatures collected" or was "linked to the number of signatures obtained." [APP3-193, 195 (emphasis added)] All formulations add words to the statute,

and place new and undue burdens on the right to circulate initiative petitions.

¶70 ***First***, the plain language of A.R.S. § 19-118.01(A) does not preclude the use of signature collection goals as a factor in offering incentives. Here, circulators were not "pa[id] . . . based on the number of signatures collected" simply because AZPP required minimum productivity goals as one factor for eligibility.

¶71 ***Second***, the trial court's broad reading of A.R.S. § 19-118.01 finds no basis in the Legislature's "clearly expressed legislative intent" in enacting the statute. *State v. Estrada*, 201 Ariz. 247, 251 ¶ 19 (2001) ("[W]e will not employ a 'plain meaning interpretation [that] would lead to . . . a result at odds with the legislature's intent.'") (citations omitted).

¶72 "[W]hen the sponsors of a bill and the very committees considering that bill tell [the Legislature] and the public what they intended to accomplish with a specific provision of that bill, such expressed intentions can be useful to clarify any ambiguity in the meaning of the enacted legislation." *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 513 (1996). Here, legislative intent is clear; the Legislature intended to ban the practice of paying per signature. *See* 2017 Ariz. Legis.

Serv. Ch. 52 (HB 2404) (noting that "states have enacted prohibitions on payment per signature," and expressing a preference for "circulators paid by the hour"). This aligned with testimony on the bill:

- In a House Government Committee meeting (at 28:40), Rep. Leach (the bill's strident sponsor) testified that he introduced the bill to "end the process of paying circulators per signature";[7]

- In a House Rules Committee meeting (at 14:25), a rules attorney explained that the bill imposed only a "restriction against petition circulators being paid on a per signature basis";[8]

- In a Senate Judiciary Committee meeting, Rep. Leach testified that under the bill, "[y]ou cannot pay for signatures by the signature" and that it imposed a "ban on payment per signature" (at 15:00), and continued (at 28:25) by explaining "you can still pay circulators . . . you can contract with them. You just can't pay per signature";[9]

- The Senate Committee of the Whole rejected an amendment offered by Sen. Mendez (at 57:02) to amend the legislative finding to apply equally "in the candidate petition context," and in debating that amendment, Sen. Quezada stated (at 58:20, 59:25) that the bill sought to impose a ban on paying "by the signature."[10]

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[7] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18788

[8] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18888

[9] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=19169

[10] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=19241

Based on these statements, the trial court's construction of the statute goes far beyond the Legislature's "clearly expressed" intent; § 19-118.01(A) allows contracting with and paying circulators using arrangements other than "payment per signature."

¶73 ***Third***, this legislative history also disposes of another fundamental issue with the trial court's interpretation: it leads to a host of absurd results. *State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 101 ¶ 13 (2014) ("Statutes should be construed sensibly to avoid reaching an absurd conclusion."). As noted above, every arrangement for paid circulation "hinges on" gathering signatures and is "in part [] based" on a "number of signatures collected." If that's the standard, an initiative's sponsor could not, for example, contract with a vendor to gather X number of signatures at Y price without violating § 19-118.01(A). Indeed, no agreement with a vendor could mention the number of signatures, requiring that parties agree to commercially unreasonable contracts. The same is true of a petition circulating vendor and its employees.

¶74 A "result is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion." *Estrada*, 201 Ariz.

at 251 ¶¶ 17-18. The results suggested by the trial court's interpretation are just that; limiting the reach of § 19-118.01(A) to the Legislature's "clearly expressed intent" avoids such absurdity.

¶75 ***Fourth***, interpreting § 19-118.01(A) to align with its clear legislative history and to permit incentives that use productivity as one criteria for eligibility is also the only constitutional interpretation of that statute, and "[w]henever possible a statute should be construed as to render it constitutional." *State v. Locks*, 91 Ariz. 394, 396 (1962); Legislative history makes plain that § 19-118.01(A) was narrowly tailored to align with Oregon's per-signature prohibition (upheld by *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006)), a prohibition that permits the incentive programs at issue.

¶76 In assessing the constitutionality of limitations placed on the payment of initiative petition circulators, there is effectively a "spectrum." *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 385 (6th Cir. 2008). On one end is *Meyer v. Grant*, 486 U.S. 414 (1988), where the Supreme Court held that a wholesale ban on paying petition circulators violated the First Amendment. And on the other end is *Prete*, where the Ninth Circuit upheld Oregon's constitutional restriction – as interpreted

in an administrative rule – barring the practice of paying circulators per signature. In *Prete*, the restriction was nearly identical to § 19-118.01(A):

> It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. []

Or. Const., art. IV, § 1b (emphasis added). Despite its facially broad sweep, an administrative rule tempered the provision by explaining that "payment cannot be made on a per signature basis," "[e]mployment relationships that do not base payment on the number of signatures collected are allowed," and the provision permits "paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis." *Prete*, 438 F.3d at 952 n.1 (emphasis added). And in holding that this restriction did not violate the First Amendment, the Ninth Circuit stressed that it only "prohibits one method of payment" and "does not prohibit adjusting salaries or paying bonuses according to validity rates or productivity." *Id.* at 962, 968; *see also Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615-16 (8th Cir. 2001) (upholding ban on paying circulators based on "the number of signatures obtained," which it described as "per signature" payments).

¶77 When considering this "spectrum," the Sixth Circuit struck down an Ohio law (with a criminal overlay) providing that "[n]o person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked." The court held that though petitioners are not "constitutionally guaranteed an endless variety of means, when their means are limited to volunteers and to paid hourly workers who cannot be rewarded for being productive . . . they carry a significant burden in exercising their right to core political speech." *Deters*, 518 F.3d at 386-87 (emphasis added).[11]

¶78 So too here. To interpret § 19-118.01(A) to preclude any consideration of signature gathering productivity in paying circulators would "significant[ly] burden" the Committee's exercise of the "right to core political speech" in the form of petition circulation. The Legislature considered the Ninth Circuit's decision in *Prete* when enacting HB 2404. Rep. Leach mentioned it by name when testifying to the Senate Judiciary

[11] *See also* *Indep. Inst. v. Gessler*, 936 F. Supp. 2d 1256, 1276 (D. Colo. 2013) (ban on payment per signature violated by the First Amendment); *On Our Terms '97 PAC v. Sec'y of State of State of Maine*, 101 F. Supp. 2d 19, 26 (D. Me. 1999) (prohibiting payment of circulators "based on the number of signatures collected" violated the First Amendment); *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 475 (S.D. Miss. 1997) (similar); *Limit v. Maleng*, 874 F. Supp. 1138, 1140 (W.D. Wash. 1994) (similar).

Committee (at 19:36),[12] as did a rules attorney during a House Rules Committee Meeting when explaining (at 13:25-14:02) that HB 2404's "restriction against petition circulators being paid on a per signature basis" was likely constitutional because it is "similar enough to [*Prete*]."[13] Consistent with *Prete*, § 19-118.01 must be read to permit the incentive programs at issue.

¶79 ***Finally***, the Court should resolve any residual doubt about the proper, constitutional interpretation § 19-118.01(A) in favor of the Committee under the rule of lenity and principles of due process. On top of prescribing the disqualification of signatures gathered in violation of § 19-118.01(A), the statute has a criminal element. And if "a statute is subject to more than one interpretation, the rule of lenity requires that doubts be resolved in favor of the defendant and against imposing the harsher punishment." *State v. Anderson*, 199 Ariz. 187, 193 (App. 2000). Paying or receiving a bonus payment with baseline productivity requirements should not subject a petition circulation vendor and its

[12] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=19169

[13] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18888

employees to criminal sanction. Yet that is the result urged by the trial court and Challengers here, one the Court can avoid as described above.

B. The Incentive Programs Identified by the Trial Court Complied with Section 19-118.01.

¶80 Neither the law nor the evidence supports the trial court's conclusion that four of AZPP's incentive programs violate A.R.S. § 19-118.01. As detailed above, none of the programs identified by the trial court involved payment "based on the number of signatures collected." Rather, AZPP advertised certain productivity minimums to ensure that it was not defrauded by circulators who simply logged hours without attempting to do their job (which, of course, is to collect some "number of signatures").

¶81 Indeed, Challengers' only evidence (and the only evidence the trial court cites) for the claim that these four programs violate the statute are the contest advertisements. [APP3-194] But these advertisements did not require employees to collect a certain number of signatures; they set baseline productivity expectations that "allowed [AZPP] the discretion on whether or not to put good or bad employees into the

program." [APP3-121][14] As the trial court acknowledged, AZPP was "within its right" to increase hourly rates for employees who "performed job responsibilities well" or decrease hourly rates "for employees who have failed to perform their job responsibilities." [APP3-193] The same is true when deciding whether an employee is eligible for a bonus.

¶82 Beyond that, the trial court ignored that § 19-118.01(A) requires proof that a person actually "pa[id] or receive[d]" something of value. The trial court thus erred in finding that an advertisement for a bonus program violated the statute.

C. The Trial Court's Interpretation of A.R.S. § 19-118.01 Would Violate the United States and Arizona Constitutions.

¶83 As explained above, interpreting § 19-118.01 to prohibit any consideration of "the number of signatures" when establishing criteria for incentive programs for circulators would violate the First Amendment. *E.g.*, *Prete*, 438 F.3d at 962, 968. It would also "unreasonably hinder" Article IV and would not "reasonably supplement" that fundamental constitutional right. *Turley*, 27 Ariz. App. at 348.

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[14] Moreover, the only circulator Challengers called at trial testified that his Weekend Warrior bonus was not "conditioned in any way on the number of signatures [he] collected." [APP3-085]

D. The Trial Court's Findings in Paragraphs 27, 31, and 32 Are Clearly Erroneous.

¶84 The trial court correctly held that "Plaintiffs' burden is to prove which circulators were improperly paid" [APP3-194], and "which signatures are invalid because paid circulators had their compensation linked to the number of signatures obtained" [APP3-195].[15] The trial court also conceded as it must that Plaintiffs failed to "introduce[] actual records in evidence" to invalidate any signatures.[16] [APP3-198] Despite that failure, the trial court engaged in a fantastical exercise that entailed speculating about the number of circulators who may have received unlawful bonuses and the possible number of signatures those circulators might have collected. These findings were *dicta*, but even so, they were unsupported by the evidence and should be vacated.

¶85 This Court may set aside a trial court's factual findings if they "are clearly erroneous or not supported by substantial evidence."

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[15] Challengers do not appeal from these holdings.

[16] Plaintiffs failed to mark as trial exhibits or enter into evidence the very petition sheets that they claim contain signatures of paid circulators. This Court has affirmed the denial of injunctive relief in a petition sufficiency challenge that disputed the validity of certain circulators and signatures because plaintiffs failed to admit petition sheets into evidence. [*See* *Save our Vote, Opposing C-03-2012*, No. CV-12-0301-AP/EL (Mem. Decision, Sep. 6. 2012)] This is no different.

Nordstrom, Inc. v. Maricopa Cty., 207 Ariz. 553, 558 ¶ 18 (App. 2004). A trial court's "purely speculative inferences or conclusions do not constitute substantial evidence," *Dodd v. Boies*, 88 Ariz. 401, 404 (1960). Here, the trial court made two clearly erroneous factual findings.

¶86 ***First***, the trial court clearly erred in finding that, based on a review of "Exhibit 67, Plaintiffs have proven that the weekly compensation of 146 circulators included improper payments for signatures through an Offending Program." [APP3-196] Exhibit 67 is AZPP's "Payroll Prep Sheets" that list employees' names, the number of hours worked, and notes for other payments, such as reimbursements, payroll discrepancy corrections, or bonuses. [APP3-090-94, 130-34] The "bonuses" noted on the Payroll Prep Sheet reflect many payments, such as reimbursements for mileage or other expenses, referral bonuses, or compensation for collecting candidate signatures. [*Id.*] The Payroll Prep Sheets include circulators and office employees. [APP3-097-98]

¶87 At trial (or in deposition before trial), Plaintiffs did not ask any witnesses to explain, clarify, or confirm the notes suggesting a payment next to the employees' names on the Payroll Prep Sheets. Nor did Plaintiffs introduce evidence that any specific circulator (besides Mr.

Jensen) received any payments. Both Mr. Bilsten and Mr. Chavez testified that the Payroll Prep Sheets were not final documents and thus included errors and inaccurate descriptions of payments. [APP3-095-96, 132-35] But the trial court still found – without citing any evidence – that "Plaintiffs have proven that the weekly compensation of 146 circulators included improper payments for signatures through an Offending Program." [APP3-196] This was clear error.

¶88 The trial court clarified that certain of AZPP's bonuses do not violate § 19-118.01(A), such as "retention and recruitment / referral bonuses." [APP3-193] Yet the trial court assumed that (1) all individuals on the Payroll Prep Sheets were paid circulators who submitted signatures for the Initiative; and (2) various "bonuses" listed on the Payroll Prep Sheets were paid under one of the four "Offending Programs."

¶89 In reality, many individuals on the Payroll Prep Sheets never circulated petition sheets for the Initiative. Others were never paid a bonus through "an Offending Program." To take just a few examples, the trial court counted these as illegal bonuses:

2817	Ford	Dillon	961.5 bonus- production
	Ford	Dillon	334 production
2817	Ford	Dillon	267.5 production
	Ford	Dillon	368.5 production
2817	Ford	Dillon	475 production

[APP2-014, 38, 48, 53, 59; APP3-196-97] The trial court speculated that "production" reflects an "Offending Program," with no testimony or other evidence to support that inference. But Dillon Ford was not even a circulator. [APP3-002-83][17] The trial court's finding that the Payroll Prep Sheets – alone – somehow prove which circulators were paid which bonuses on which dates is unsupported by the record. *Hodai v. City of Tucson*, 239 Ariz. 34, 40 ¶ 14 (App. 2016) (trial court clearly erred in making factual finding not supported by the documents that the court relied on).

[17] *See also* Ariz. Sec'y of State, *Circulator Registrations*, https://apps.azsos.gov/apps/election/circulatorportal/Home/Search. Even if some individuals on the Payroll Prep Sheets were registered circulators, there is no evidence in the record that any of them collected signatures for the Initiative. Many registered circulators who didn't collect any signatures for the Initiative appear to be included in the trial court's count.

¶90 Plaintiffs could have (and should have) presented evidence to prove the nature of every payment listed on the Payroll Prep Sheets and prove that the payment recipient submitted petition sheets for the Initiative.[18] Plaintiffs obtained through discovery every circulator's pay stub that reflected a bonus, yet they only called one circulator as a witness. Plaintiffs also deposed and called at trial AZPP's representatives, but did not ask a single question about any pay stubs or notes on the Payroll Prep Sheets. [APP3-134-35]

¶91 ***Second***, the trial court clearly erred in finding that the alleged 146 illegal bonus payments "would have yielded 70,080 void signatures." [APP3-198] The trial court came up with this number by assuming that "each circulator": (1) "worked full time (a 40 hour week)"; and (2) "obtained the maximum number of signatures every hour (12 per hour)." [*Id.*]

¶92 But these assumptions directly contradict the evidence presented at trial. First, the Payroll Prep Sheets list the exact number of

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[18] If this Court were to adopt or give weight to the trial court's unconventional approach, it would essentially be shifting the burden in petition sufficiency challenges to the challenged party to prove a negative. This would require overturning decades of precedent placing the burden on initiative challengers.

hours worked, which is often far less than 40. [APP2-002] The trial court should not have speculated about the number of hours each person worked. Second, the trial court fabricated the number of signatures that "each circulator" obtained every hour. This is inexplicable because the trial court asked Mr. Chavez "what would be the high end" of signatures a circulator might collect per hour, and he responded, "I think ten is probably fair."[19] [APP3-136-37] Because the trial court's calculation was "plainly contradicted by the record," it must be set aside. *Himes v. Safeway Ins. Co.*, 205 Ariz. 31, 37 ¶ 16 (App. 2003).

¶93 The Court should vacate paragraphs 27, 31, and 32 of the trial court's order.

Conclusion

¶94 For these reasons, the erroneous provisions of the trial court's judgment should be vacated.

[19] This also assumes that every person identified on the Payroll Prep Sheets circulated or submitted petitions for the Initiative, and the evidence at trial made clear that is not the case. [APP3-097]

RESPECTFULLY SUBMITTED this 7th day of August, 2020.

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