ARIZONA SUPREME COURT

ARIZONANS FOR SECOND CHANCES, et. al., Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State, Respondents, and MARK BRNOVICH, Arizona Attorney General et. al., Intervenor-Respondent.	Arizona Supreme Court No. CV-20-0098-SA

ATTORNEY GENERAL'S RESPONSE BRIEF

MARK BRNOVICH
Attorney General
State Bar No. 14000

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn (Beau) W. Roysden III
Division Chief

Drew C. Ensign
Deputy Solicitor General
Counsel of Record
Jennifer J. Wright
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Mark Brnovich, Arizona Attorney General

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INTRODUCTION

Petitioners' request for relief from this Court has a fatal flaw: not only does the exclusion of initiative petitions from the E-Qual system not violate the Arizona Constitution, it is *affirmatively mandated* by it. Specifically, a provision of Article IV—unacknowledged by Petitioners—expressly provides that "every sheet of every such petition [*i.e.*, initiative petitions] containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet *was signed in the presence of the affiant*." Ariz. Const. art. IV, Pt. 1 § 1(9) (emphasis added) (hereinafter, "Article IV In-Person Mandate"). This Court has recognized the critical importance of this provision, and further explained that if it becomes "too inconvenient for present-day operation, the remedy is to amend it—not to ignore it." *Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 432 (1991).

Because our Constitution expressly mandates that all initiative signatures be gathered in-person, it explicitly and necessarily prohibits gathering of signatures through the E-Qual system. All of Petitioners' state law claims thus fail under this unacknowledged provision.

The attorney general (the "State") therefore agrees that this Court should accept jurisdiction over a narrow question comprising the proverbial elephant in the room here: whether the Article IV In-Person Mandate *affirmatively prohibits* use of E-Qual for initiative petitions. That pure question of law is exceptionally important, requires no factual development, and is dispositive of all of the state law issues presented here. It also has an easy answer: because Article IV explicitly requires in-person execution of signatures, it cannot simultaneously require that signatures be collected by electronic, non-person exchanges between voters and inanimate objects (*i.e.*, computers). Moreover, because Article IV expressly mandates the exclusion of initiative petitions from E-Qual, the Arizona Constitution's more general guarantees of free speech, due process, and equal protection cannot trump that more specific provision. Put simply, the Arizona Constitution is not at war with itself, and does not implicitly mandate what it explicitly and affirmatively prohibits.

This Court should decline jurisdiction over the remaining issues, however. This Court's original special action jurisdiction is generally reserved for extraordinary circumstances. And the remaining issues in

Petitioners' blanket challenges to "any provision of Arizona law that would preclude the Initiative Proponents' use of E-Qual" (Pet.35) fall short for multiple reasons: (1) they are exceedingly fact-bound and ill-suited for resolution by this appellate court in the first instance; (2) there is no genuine emergency as to Petitioners' non-coronavirus-based claims, which can and should have been brought as early as 2014; and (3) there is no compelling rationale for this Court to hear Petitioners' *federal* claims, given that Petitioners have a fully sufficient alternative remedy: *i.e.*, federal courts remain open to hear such issues and a similar suit is currently pending in district court, *see Arizonans for Fair Elections v. Hobbs*, No. 20-cv-858 (filed Apr. 2, 2020).

If this Court decides to reach the federal issues, Petitioners' skeletal claims fail. Although they attempt to bring freestanding claims under the First and Fourteenth Amendments, all challenges to electoral regulations under the U.S. Constitution are governed by "a single analytic framework"—*i.e.*, the *Anderson-Burdick* framework. *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). Moreover, the Ninth Circuit has expressly rejected the proposition that electoral regulations that treat candidate and initiative petitions differently are

impermissibly content-based. *See Prete v. Bradbury*, 438 F.3d 949, 968 nn.25-26 (9th Cir. 2006). Nor does any court ever appear to have accepted the proposition that distinctions between candidate and initiative petitions are subject to strict scrutiny under the Equal Protection Clause.

Within the *Anderson-Burdick* framework, Petitioners' claims fail because Petitioners have not established that the challenged provisions of Title 19 (the "Acts") impose a "severe burden." As such strict scrutiny does not apply and the Acts are constitutional if they "serve[] [an] important regulatory interest" and are "reasonably related" to that interest. *Prete*, 438 F.3d at 970-71. Petitioners do not even attempt to advance arguments under this "less exacting review" standard. *Id.* at 961.

Petitioners' state constitutional claims similarly fail. To the extent that the Article IV In-Person Mandate does not conclusively and summarily dispose of all of them, they fail for the same reasons that Petitioners' claims under the federal law analogs do. And even if the Article IV In-Person Mandate could even conceivably violate Article IV Section 1 (of which it is a crucial part), the Arizona constitutional and

statutory provisions at issue here do not "unreasonably hinder or restrict" Petitioners' ability to circulate petitions, *Stanwitz v. Reagan*, 245 Ariz. 344, 346 ¶1 (2018). The claim thus fails as a matter of fact, as well as law.

This Court should accordingly accept jurisdiction in part and hold that the Article IV In-Person Mandate bars all of Petitioners' state law claims. And it should deny jurisdiction over the remaining issues, which do not belong in this Court as an original action.

JURISDICTIONAL STATEMENT

This Court has original jurisdiction over "mandamus, injunction and other extraordinary writs to state officers." Ariz. Const. art. VI, § 5(1). This Court's decision to accept jurisdiction is "highly discretionary" here, *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶11 (2006), and, as explained below in Section II, this Court should decline the petition except for resolving whether the Article IV In-Person Mandate precludes use of the E-Qual system for signing initiative petitions.[1]

[1] In light of the Governor declining to afford relief to Petitioners, the State does not renew the primary jurisdiction and exhaustion arguments previously advanced on April 3, 2020, as the Governor

BACKGROUND

A. Arizona's Initiative Process Is Bound by the Arizona Constitution and Title 19 of the Arizona Revised Statutes

Under Arizona's constitution, legislative power is shared in Arizona between the Arizona Legislature and the voters themselves through the initiative process. Ariz. Const. art. IV, Pt. 1 § 1. Arizona's constitution not only provides citizens the power to enact laws, but it provides clear guidelines as to the form and content of initiative and referendum petitions, as follows:

> Every initiative or referendum petition shall be addressed to the secretary of state … and shall contain the declaration of each petitioner, for himself, that he is a qualified elector of the state …, his post office address, the street and number, if any, of his residence, and the date on which he signed such petition. Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed *in the presence of the affiant* and that in the belief of the affiant each signer was a qualified elector of the state, or in the case of a city, town, or county measure, of the city, town, or county affected by the measure so proposed to be initiated or referred to the people.

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appears to have considered the matter. *See* Governor Ducey's April 7, 2020 press conference, *available at* https://azgovernor.gov/governor/video/governor-ducey-health-services-department-director-dr-cara-christ-share-covid-19 (at 51:14).

Ariz. Const. art. IV, Pt. 1 § 1(9) (emphasis added).

The Arizona Legislature is constitutionally required to enact "laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. To that end, the Legislature has enacted a comprehensive set of laws pertaining to the circulation of initiative petitions. As early as 1953, the Legislature began adopting laws regulating initiatives because legislators became concerned initiative proponents were "taking advantage of … uninformed signers … through fraudulent and corrupt practices," instituting a number of reforms to "safeguard [the] right of initiative." 1953 Ariz. Sess. Laws, ch. 82 § 1.

More recently, the Legislature has codified strict construction of the constitutional and statutory requirements for statewide initiative measures and requires persons using the initiative process to strictly comply with the enacted laws. A.R.S. § 19-102.01.

Under Arizona law, before any petitions are circulated, proponents must first file an application and statement of organization. A.R.S. § 19-111(A). An official serial number is then issued by the Secretary of State ("Secretary"), which must be included on each petition sheet and

without which the petition sheet is invalid. A.R.S. §§ 19-111(B), -114(B) -121.01(A)(1)(c). Proponents can use paid[2] or volunteer circulators who, although not required to be a resident of the state, must otherwise be qualified to be an elector. A.R.S. §§ 19-114(A), -118. Paid circulators for statewide initiatives and non-resident circulators must register with the Secretary. A.R.S. §§ 19-118(A), -121.01(A)(1)(h).

Circulators must witness every signature on initiative petitions. Ariz. Const. art. IV, Pt. 1 § 1(9), A.R.S. § 19-112(A). Only the elector may print the elector's name, residential address, and date on the petition, unless prevented by disability. A.R.S. §§ 19-112(A), -115(B). Electors must include their residential address or description thereof, not the post office box, when signing the petition. A.R.S. § 19-121.01(A)(3)(b); Ariz. Op. Atty. Gen. No. I09-001 (Ariz. A.G.) 2009 WL 4883052.

A full and correct copy of the initiative title and text must be attached to each petition signature sheet, failure to do so will result in the entire sheet being rejected. A.R.S. §§ 19-112(B), -121.01(A)(1)(a); *Pedersen v. Bennett*, 230 Ariz. 556, 558 ¶ 8 (2012).

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[2] Paid circulators for initiatives, however, may not be paid based on the number of signatures collected. A.R.S. § 19-118.01.

Circulators must sign a statutorily-prescribed notarized affidavit on each petition signature sheet attesting to not only the circulator's qualifications, but also the manner in which the signatures were collected, including how the addresses were applied. A.R.S. § 19-112(C), (D). Defects in the affidavit invalidate the entire petition sheet. A.R.S. § 19-121.01(A)(1)(d),(e),(f); *Parker v. City of Tucson*, 233 Ariz. 422 (App. 2013). Further, a circulator is statutorily required to "appear or produce documents" pursuant to a subpoena issued due to a challenge. A.R.S. § 19-118(E).

Certain actions by circulators constitute a crime, such as "knowingly misrepresenting the general subject matter of the measure" and using "fraudulent means, method, trick, device, or artifice to obtain signatures[.]" A.R.S. §§ 19-116(B), -119.01(A)(2).

Once collected, initiative petitions must be submitted precisely four months before the general election "after their issuance" or else the petitions are "null and void", however, "in no event shall the secretary of state accept an initiative petition that was issued for circulation more than twenty-four months before the general election at which the measure is to be included on the ballot." A.R.S. § 19-121(D).

Initiative petitions are submitted to the Secretary, who must conduct an initial review to remove ineligible signatures and signature sheets. A.R.S. § 19-121.01. A random sample of 5% of the remaining signatures is then transmitted to the county recorders for more rigorous review. *Id*., A.R.S. § 19-121.02.

The recorders' review is used to estimate the percentage of remaining valid signatures; if the projected percentage of valid signatures is over the threshold, the measure may proceed to the ballot unless challenged in court. A.R.S. §§ 19-121.03, -121.04. If challenged, signatures or petitions may be struck if a challenger proves their invalidity "by clear and convincing evidence." *McClung v. Bennett*, 225 Ariz. 154, 156 ¶7 (2010).

To qualify for the ballot, an initiative petition must be submitted with valid voter signatures totaling 10% of the votes cast for governor in the most recent election for statutory amendments. Ariz. Const. art. IV, Pt. 1 §1. For constitutional amendments, it is 15%. *Id*. For 2020, that equals a minimum of 237,645 and 356,467 respectively.[3]

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[3] *Initiative, Referendum and Recall*, azsos.gov, https://azsos.gov/elections/initiative-referendum-and-recall (last visited April 15, 2020).

B. The Candidate Nominating Process Is Regulated Only By Title 16 of the Arizona Revised Statutes

Arizona's Constitution lacks specific processes or procedures for placing a candidate on the ballot; therefore, nominating petition requirements are purely statutory. The requirements for nominating petitions, in fact, differ significantly from initiative petitions. To start, the number of signatures required for statewide and United States Senate candidates are a small fraction of what is required of statewide initiatives, with candidates needing just one-fourth of one percent of qualified signers in the state. A.R.S. § 16-322(A)(1). Depending on the candidate's party affiliation, in 2020, that equals as few as 3,335 signatures needed to run for statewide office.[4]

Before collecting petition signatures, candidates must file a "statement of interest," but they are not required to obtain a serial number. A.R.S. § 16-311(H). Similar to initiatives, circulators do not need to be residents of the state, but must otherwise be qualified to register to vote in Arizona. A.R.S. §§ 16-315(B)(2), -321(D). Non-

[4] *Running for Statewide Office*, azsos.gov, https://azsos.gov/elections/running-office/running-statewide-office (last visited April 15, 2020).

resident circulators for nominating petitions are required to register with the Secretary. A.R.S. §§ 16-315(D), -321(D).

Nominating petition circulators must "verify that each of the names on the petition was signed in his presence on the date indicated" but there is no requirement that the elector write his own address on the petition sheet. A.R.S. §§ 16-315(D), -321(D). Nominating petition sheets are not required to be notarized, but can simply be signed by the circulator providing the circulator's name and address, with no prescriptive language. A.R.S. § 16-315(B). Further, post office box addresses are permitted in lieu of residential addresses on the nominating petition. A.R.S. § 16-321(E).

Unlike the requirements of A.R.S. § 19-121.01 for initiative petitions, neither the Secretary nor the County Recorder make an initial review of candidate nominating petitions, but rather all signatures are presumptively valid. *Jenkins v. Hale*, 218 Ariz. 561, 562 ¶8 (2008). However, any elector may institute court proceedings within ten days after the filing deadline to challenge signatures or invalidate entire petition sheets. A.R.S. § 16-351. Only after a challenge is initiated will petition sheets be verified by the county recorder, who

must provide evidence and testimony in court. A.R.S. § 16-351(E). A court may keep a candidate name off the ballot only upon "clear and convincing evidence" that an insufficient number of signatures were submitted. *Blaine v. McSpadden*, 111 Ariz. 147, 149 (Ariz. 1974).

C. Adoption and Expansion of "E-Qual" in 2014-2016

In 2014, the Arizona Legislature enacted H.B. 2107 which, permitted "qualified electors to sign a nomination petition … by way of a secure internet portal … up to an amount equal to one-half of the number of required nomination petition signatures", known as "E-Qual." H.B. 2107 51st 2nd Reg. Sess. (2014); A.R.S. § 16-316 (2015).

In 2016, the Arizona Legislature expanded E-Qual to federal offices and permitted *all* required nomination petition signatures to be collected through the secure internet portal for both federal and state offices. H.B. 2050 52nd 2nd Reg. Sess. (2016); A.R.S. §§ 16-316, -318. In addition, E-Qual was permitted to be extended to municipal, county and precinct committeeman offices, but that has not been implemented by the Secretary. H.B. 2049 52nd 2nd Reg. Sess. (2016); A.R.S. § 16-317.

For the upcoming August 2020 primary election, 17% of the approximately 388,000 petitions signatures for federal, state, and

legislative candidate signatures were submitted through E-Qual, according to the State Elections Director. Declaration of Sambo (Bo) Dul, *Arizonans for Fair Elections et. al. v. Hobbs et. al.*, 2:20CV00658, Doc. #78, p. 6 ¶15.

ARGUMENT

I. ARTICLE IV EXPRESSLY MANDATES IN-PERSON EXECUTION OF SIGNATURES FOR INITIATIVE PETITIONS

Petitioners' Article IV claim is precisely backwards: Article IV, by its plain terms, affirmatively *prohibits* non-in-person signing of initiative petitions rather than implicitly mandating it. Article IV, Part 1, Section 1, subsection (9) expressly provides that "every sheet of every such petition [*i.e.*, initiative petitions] containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that *each of the names on said sheet was signed in the presence of the affiant*." Art. IV, pt. 1, § 1(9) (emphasis added).

The very constitutional section that Petitioners rely upon thus demands that all signatures on initiative petitions be witnessed *in person* by the circulator. As such, inclusion of initiative petitions in the

E-Qual system is categorically barred by the Arizona Constitution—not just A.R.S. § 19-112(D).

This Court has stressed the fundamental importance of the Article IV In-Person Mandate previously, explaining that "The framers of the Arizona Constitution included this separate verification requirement to lend authenticity to the signature process. This verification requirement seeks to compel circulators to use reasonable efforts to obtain valid signatures, not just signatures." *Western Devcor*, 168 Ariz. at 432. Furthermore, "[t]he circulator is the only person in the process who is required to make a sworn statement and is, therefore, the person under the greatest compulsion to lend credibility to the process." *Id.* And this Court recently reiterated that "the integrity of the signature collection process is singularly dependent on the probity of circulators." *Stanwitz*, 245 Ariz. at 349 ¶18. But Petitioners propose to replace singularly-important circulators with the computers of the E-Qual process for verifying signatures, fundamentally altering a crucial component of the Arizona constitution as written.

This Court has further explained that "[i]t is not 'nit-picking' to require compliance with the express command of the Arizona

Constitution. If our state constitution contains provisions considered too inconvenient for present-day operation, the remedy is to amend it—not to ignore it." *Western Devcor*, 168 Ariz. at 432. But that is precisely what Petitioners seek to do: quite literally ignoring the Article IV In-Person Mandate in their Petition.

Although the text of the Arizona Constitution is utterly plain on this subject, the intention of precluding non-in-person signing of initiative petitions is underscored by the lack of any corresponding provision for nominating petitions. *See generally* Article VII.[5]

Petitioners are thus simply wrong about what Article IV requires. In unambiguous terms, it *mandates* in-person witnessing of signing initiative petitions. Thus, far from mandating inclusion of initiative petitions in the E-Qual system, Article IV actually mandates their *exclusion*.

The State anticipates that Petitioners may attempt to argue that use of the E-Qual system "substantially complies" with the Article IV

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[5] Article VII Section 10, for example, merely provides that "The Legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress."

In-Person Mandate that they have yet to acknowledge. Any such argument would be waived. *See State v. Johnson*, 247 Ariz. 166, 205 n.3 (2019) ("Because [appellant] did not raise the issue in his opening brief, we do not consider it"). In any event, one cannot "substantially comply" with an express requirement by obliterating it. Petitioners' proposal is to vitiate the Article IV In-Person Mandate *in toto*, not substantially comply with it. Non-compliance cannot be considered substantial compliance.

The Article IV-Person Mandate also resolves Petitioners' other state constitutional claims. The Arizona Constitution obviously cannot violate itself. The specific mandate that all initiative petitions be signed in-person thus trumps any contention that the far more general due process, equal protection, and free speech clauses require initiative petitions be included in the E-Qual system. *See*, *e.g.*, *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 199 ¶11 (2001) ("'It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.'" (citation omitted)).

II. THIS COURT SHOULD DECLINE JURISDICTION OVER THE REMAINING ISSUES PRESENTED

The arguments in Section I present a pure question of law, with an exceedingly clear answer, which resolves completely most of the issues presented here. The attorney general therefore agrees that this Court should therefore exercise its jurisdiction to consider that issue.

The remaining issues, however, do not warrant the extraordinary step of this Court accepting original jurisdiction without any prior proceedings in a trial court. That is particularly true as (1) the remaining issues are exceedingly fact-bound, (2) there is no genuine emergency as to Petitioners' non-Covid-19 arguments, and (3) there is no reason for this Court to exercise jurisdiction over Petitioners' federal claims given the availability of federal courts to hear such claims—which are indeed being litigated as this briefing is being written.

A. Petitioners' Claims Are Intensely Factual In Nature

Petitioners are asking this Court to take actions that it is neither designed nor generally inclined to do: act as a factfinder in the first instance for intensely factual issues. This Court generally restricts its special action jurisdiction to cases involving purely legal questions, not where—as here—the issues presented are factually intensive. *See, e.g.*,

Tobin v. Rea, 231 Ariz. 189, 193 ¶8 (2013) (noting that the "petition raises purely legal issues" as a factor in accepting special action jurisdiction) (citing *Cronin v. Sheldon*, 195 Ariz. 531, 533 ¶2 (1999)), and *Hull v. Albrecht*, 192 Ariz. 34, 36 ¶7 (1998) (listing factors for accepting special action jurisdiction, including "a superior court hearing is unnecessary because we can resolve the case on purely legal issues without the aid of fact finding."). That makes perfect sense as this Court is an appellate court, and resolving disputed issues of fact is rarely appropriate in an original action when a trial court would also have jurisdiction. *See Hull*, 192 Ariz. at 36 ¶7.

The question of whether the burden imposed by the Acts (and Article IV, Pt. 1 Sec. 1 (9)) is substantial turns on many issues of disputed fact. For example, it is far from clear based on Petitioners' limited submissions that petition circulation could not be conducted in these circumstances using social distancing and measures like single-use pens and individual signature sheets. Petitioners complain (at 3 ¶4), for example, that "Obtaining petition signatures for an initiative requires personal interaction in close quarters and the exchange of a *petition sheet signed by others*." (emphasis added). But nothing in

Arizona law requires that sheets contain multiple signatures and it is not clear why circulators could not use signature pages with one signature per page, thereby eliminating passing of sheets "signed by others." Petitioners also do not explain why they could not be using this time to communicate with voters—through phones, emails, social media, etc.—to obtain their interest/commitment to sign, and then arrange for actual execution after the pandemic has receded. Although Arizona statutory and constitutional law requires in-person execution of the signatures, that hardly means that Plaintiffs cannot be making productive use of this time to try to secure interest/support from voters.

Respondents should be permitted to test Petitioners' assertions through the ordinary adversarial process in evidentiary hearings. But this Court is not equipped to conduct such proceedings.

Similarly, the burden on Petitioners is a factually intense issue. There are twenty-four months in every election cycle. If current isolation measures extend until May 1, as they are presently scheduled to do, Petitioners will have been impacted by coronavirus approximately 1.5 months (*i.e.*, half of March and all of April)—*i.e.*, a mere 7.5% of the total time to circulate for the 2020 election cycle. In order for that 7.5%

deprivation to "unreasonably hinder or restrict" Petitioners' ability to circulate petitions, *Stanwitz*, 245 Ariz. at 346 ¶1, Petitioners would have to prove facts demonstrating this less-than-ten-percent temporal impact was actually severe.

The question of Petitioners' diligence is also factually intensive, ill-developed, and looms large. Federal courts, for example, considering challenges to initiative regulations apply a test similar to whether "'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (quoting *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008)). Here Petitioners' diligence is far from apparent and (at best for Petitioners) factually complex. Notably, while Petitioner Second Chances has only gathered 66,000 signatures [App.39] and Invest in Ed has gathered only 85,000 [App.40], Safe and Smart Arizona has gathered "approximately 300,000." [App.39]. If Second Chances and Invest in Ed had been as diligent as Safe and Smart Arizona, they might not require any relief. Similarly, it is far from clear that Safe and Smart Arizona needs any relief from this

Court, since it has already gathered substantially more signatures than it needs to qualify for the ballot assuming a reasonable validity rate.

The question of the effect on the State's interest in protecting the integrity of its voting process is also factually intense. Use of E-Qual will eliminate the State's collection of handwriting evidence that can be used for anti-fraud purposes. *E.g.*, A.R.S. § 19-121.01; *Parker v. City of Tucson*, 233 Ariz. 422, 438 ¶47 (App. 2013) (circulators' avowals that each signer wrote his or her own address was found to be false based on examination of the evidence). Similarly, the absence of an in-person circulator who witnesses the signature will deprive the State of an affidavit verified under oath that the signer only provided one signature. Under the E-Qual system, however, a person could "sign" on behalf of their parents and friends as long as they had some minimal pedigree information and the State would have little ability to detect that fraud.

B. There Is No Basis For Hearing Plaintiffs' Non-Covid-19 Claims Now

Many of Petitioners' claims are not coronavirus-specific, and instead challenge the distinction drawn by the E-Qual system between initiatives and nominating petitions generally—*i.e.*, not dependent on

the current pandemic. These distinctions have existed since 2014, and sat unchallenged that entire time. To the extent that Petitioners are bringing claims not dependent on the pandemic, they should have done so earlier, and they have no persuasive claim to this Court's original special action jurisdiction. There is no genuine emergency as to these claims, only a lack of diligence by Petitioners in not bringing them earlier.

C. This Court Should Decline Jurisdiction Over The Federal Claims—Particularly Given The Pending Federal Court Action

There is no emergency that requires this *state* court to accept special action jurisdiction over *federal* issues. The federal courts remain open to hear Petitioners' federal claims. And, indeed, there presently is a suit considering the same federal arguments. *Arizonans for Fair Elections v. Hobbs*, No. 2:20-cv-00658. Petitioners have scant claim to the limited resources of this Court for issues not of Arizona law. And where a party has "a plain, speedy, and adequate remedy" elsewhere, special action is inappropriate. *Neary v. Frantz*, 141 Ariz. 171, 178 (App. 1984) ("The appellant had a plain, speedy, and adequate remedy at law. A cause of action is conferred by 42 U.S.C. § 1983 on

anyone who has been deprived of a constitutional right under color of law. The action may be brought in law or in equity.... Since a petition for special action is an inappropriate vehicle for determining whether Neary's first amendment rights of association and speech were violated, the trial court did not err in excluding evidence that went to this issue.").

Petitioners have failed to explain why an exercise of this Court's highly discretionary jurisdiction is warranted over federal issues that may be litigated before a federal court besides Petitioners expressing a desire for quick relief. Pet.6. Both the Rules of the Supreme Court of Arizona and the Arizona Rules of Procedure for Special Actions demand that Petitioners state the reasons why the relief sought cannot be obtained by initiating an action in a lower or state trial court in the first instance. *See, e.g.*, Ariz. R. Sup. Ct. 1(b)(1) (Petitioner must set forth circumstances why "the writ should issue originally from this court and not from such lower court"); Ariz. R. Spec. Act. 7(b) (Petitioner bears the burden of establishing why the appellate court should hear an "action [that] might lawfully have been initiated in a lower court in the first instance"). For similar reasons, the availability of a federal forum that

is already considering many of the same issues here militates against the need for this Court to accept original special action jurisdiction here.

III. PETITIONERS' FEDERAL CLAIMS FAIL

Although Petitioners assert claims under both the First and Fourteenth Amendments, all of their claims are governed by the *Anderson-Burdick* framework, under which they fail because Petitioners have not established a "severe burden" on their rights.

A. Petitioners' Federal Claims Are Governed By The *Anderson-Burdick* Framework

Federal courts have repeatedly held that *all* constitutional challenges to election regulations are governed by "a single analytic framework"—*i.e.*, the *Anderson-Burdick* framework. *Dudum*, 640 F.3d at 1106 n.15. That includes "First Amendment, Due Process, [and] Equal Protection claims." *Id.*; *accord LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998)). All such claims are "folded into the *Anderson/Burdick* inquiry." *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018).

The *Anderson-Burdick* framework recognizes that "States may, and inevitably must, enact reasonable regulations of parties, elections,

and ballots to reduce election— and campaign—related disorder." *Prete*, 438 F.3d at 961 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Under the *Anderson-Burdick* framework, "an election regulation that imposes a severe burden is subject to strict scrutiny." *Nader*, 531 F.3d at 1035. In contrast, "*Lesser burdens* trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Angle*, 673 F.3d at 1132 (quoting *Prete*, 438 F.3d at 961) (cleaned up). Notably, "voting regulations are rarely subjected to strict scrutiny." *Dudum*, 640 F.3d at 1106.

As explained below, Petitioners fail to establish that the Acts impose a "severe burden" on them. As such, less exacting scrutiny applies—a standard under which Petitioners do not even attempt to argue they can prevail.

B. Petitioners' Attempt To Assert Freestanding First and Fourteenth Amendment Claims Outside Of *Anderson-Burdick* Fails

1. *Anderson-Burdick* Governs All Of Petitioners' Federal Constitutional Claims

Although Petitioners attempt to assert freestanding First and Fourteenth Amendment claims, *see* Petition Section III, that effort runs afoul of the "single analytic framework" that governs here. *Supra* at 25. Indeed, the Ninth Circuit has expressly refused to apply "traditional First Amendment jurisprudence to [the plaintiff's] viewpoint-discrimination and compelled-speech claims challenging an election provision, because—each is folded into the *Anderson/Burdick* inquiry instead." *Soltysik*, 910 F.3d at 449 n.7. That rule is even more applicable here as viewpoint discrimination is a narrower—and more objectionable—sub-species of content-based discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Similarly, that court applied the "single analytic framework" to "both First and Fourteenth Amendment claims" in *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 729 n.7 (9th Cir. 2015). And it "consider[ed] each of the [plaintiff's] constitutional challenges under the

Anderson/Burdick balancing framework"—*i.e.*, their ballot access, freedom of association and equal protection claims—in *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019).

The same result should obtain here. Petitioners' federal challenges (to the extent this Court hears them) should rise or fall entirely under the *Anderson-Burdick* framework.

2. Permitting Freestanding Challenges Would Upend Election Law

Petitioners' arguments—which demand strict scrutiny for all distinctions between nominating and initiative petitions, either as a First Amendment content-based claim or a purported infringement on fundamental voting rights under their Fourteenth Amendment claim—also prove far too much and would require upending election law if accepted. At the most fundamental level, if Petitioners are correct that such distinctions are impermissible discrimination, any state that does not allow initiatives (*i.e.*, most states) would be engaging in the most extreme possible form of such discrimination by denying *all* initiative access to the ballot. Such a ruling would force all states to permit legislation by initiative under the First or Fourteenth Amendments. But that has never been the law.

Other utterly commonplace measures would similarly—and suddenly—be unconstitutional. For example, initiative petitions must be signed by either 10% or 15% of voters in the last gubernatorial election for statutory and constitutional amendments, respectively. Ariz. Const. art. IV, Pt. 1 §2. This is a common-sense distinction that requires greater support where an initiative seeks to effect fundamental change by amending Arizona's constitution, rather than enact a mere statute. But that too would be impermissible content-based discrimination under Petitioners' arguments. So too would Arizona's separate amendment rule for proposed constitutional amendments, *Arizona Together v. Brewer*, 214 Ariz. 118, 121 ¶4 (2007), which distinguishes based on content (*i.e.*, single or multi-subject).

Similarly, unlike initiatives, candidates are only required to obtain signatures from 0.25%-5% of all "qualified signers" (members of that candidate's party and unaffiliated voters). A.R.S. §§ 16-321(F), -322. Many other provisions of Arizona law apply only to candidate petitions or initiative petitions. *See, e.g.*, A.R.S. §§ 19-121.01, -.02 (requiring a spot-check of petitions and signatures by elections officials); A.R.S. § 16-322 (allowing only members of a candidate's political party

or unaffiliated voters to sign candidate petitions). All of these differences—*e.g.*, statutory vs. constitution initiative, candidate vs. initiatives—would likely be impermissibly "content-based" or infringements upon the right to vote demanding strict scrutiny under Petitioners' arguments. But courts have never endorsed such claims. This Court should not either.

C. Petitioners' First Amendment Claim Lacks Merit

Even if Petitioners' could bring an independent claim that the laws at issue were *content-based* regulations of *speech* here, it would fail for two reasons: the laws at issue are not content-based and they do not regulate speech.

First, the laws at issue are not content-based simply because they distinguish between nominating and initiative petitions. The Ninth Circuit considered a strikingly similar argument in *Prete,* which considered a challenge to an Oregon statute (Measure 26) that selectively prohibited paying circulators on a per-signature basis, which "applie[d] only to initiative and referendum petitions, not to recall or candidate sponsorship petitions." 438 F.3d at 968 n.25. The *Prete* plaintiffs—as here—contended that the challenged statute was "subject

to strict scrutiny because it is content-based" because it only applied to initiatives/referenda. *Id.* The Ninth Circuit decisively rejected that contention: "Measure 26 does not regulate what can be said in an initiative or referendum petition, nor does it adopt or reject any particular subject that can be raised in a petition. Therefore, Measure 26 *is not a content-based restriction and strict scrutiny does not apply*." *Id.* (emphasis added). The same result should obtain here.

Second, the laws at issue do not regulate *speech*, but instead regulate the process by which initiatives qualify for the ballot. The Tenth Circuit has recently held that a statute that "merely determines the *process* by which initiative legislation is enacted … is not content-based." *Semple v. Griswold*, 934 F.3d 1134, 1142 (10th Cir. 2019). That is precisely the case for the Acts: they regulate only the process by which initiatives may be placed on the ballot, and apply to all initiatives regardless of content. And Petitioners cite no precedent providing that laws that affect all initiatives equally regardless of subject matter are nonetheless content-based.

D. Petitioners' Fourteenth Amendment Claims Fail

Petitioners have not cited any authority for the proposition that distinctions between candidate and initiative petitions trigger strict scrutiny under the Equal Protection Clause. Numerous laws draw such distinctions, *supra* at 29-30, and none have ever been found unconstitutional on that basis. There is thus no basis for applying strict scrutiny.

Under rational basis review, the State's interests in protecting the integrity of its electoral system, promoting expressive exchanges to ensure measures have sufficient support, and limiting cost all easily provided rational bases for the laws at issue. *See infra* at 39-41.

E. Arizona Law Does Not Impose A "Severe Burden" On Petitioners' Right To Propose Laws By Initiative

Petitioners allege (at 31-32) that the laws at issue "places 'severe restrictions' on the Initiative Proponents' rights." Not so. The laws at issue do not constitute a severe burden—either during this pandemic or after—for six reasons.

First, the epidemic is only likely to affect a small portion of the total election cycle during which Petitioners could collect signatures. The signature gathering period for the 2020 election cycle is about 20

months long.[6] Petitioners appear to use the Governor's March 11 emergency declaration as the relevant starting date of consideration/impact and April 30 as the current end. *See* Pet. at 14; APP-46. Assuming that is the proper starting point,[7] the pandemic has impacted only about 1½ months of the 20-month cycle. Nor do Petitioners provide evidence to establish the impacted period is likely to last longer than that.

Even assuming that coronavirus has completely shut down signature gathering during the March 11-April 30, 2020 window (and there is no evidence that it has), that roughly 1½ months only represent a single-digit percentage of the total time available to collect signatures for the 2020 election cycle (~7.5%). Furthermore, it would barely exceed

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[6] *See* A.R.S. § 19-121(D) ("[I]n no event shall the secretary of state accept an initiative petition that was issued for circulation more than twenty-four months before the general election at which the measure is to be included on the ballot."); *see also Initiative, Referendum and Recall Applications*, Katie Hobbs Secretary of State https://apps.arizona.vote/info/IRR/2020-general-election/18/0 (last visited April 16, 2020) (the earliest application for the current cycle was filed November 13, 2018). The signature gathering period for this cycle is thus from November 3, 2018 (2 years before the November 3, 2020 election) to the July 2, 2020 deadline for submitting initiative petitions.

[7] Notably, the Governor did not issue any stay-at-home order until March 30. Doc. 3 at 6 (¶31).

10% if the pandemic continued to shut down circulating efforts for another month after that until May 31 (*i.e.*, ~ 12.5%).

Petitioners do not cite any precedent for the proposition that an impact accounting for less than/around 10% total hindrance is a "severe burden." *See Prete*, 438 F.3d at 967 (holding there was no severe burden where "plaintiffs did not prove that [challenged law] *significantly* limits the available pool of people willing to circulate petitions" (emphasis added)); *accord id.* at 953 n.5. Indeed, it stretches the meaning of "severe" past its breaking point to treat it as such.

Notably, Petitioner Save Our Schools Arizona did not file an application with the Secretary until February 26, 2020. *Initiative, Referendum and Recall Applications*, https://apps.arizona.vote/info/IRR/2020-general-election/18/0. In doing so, it wasted three-fourths of the available time in which it could have been gathering signatures. Lead Petitioner Arizonans For Second Chances, Rehabilitation, And Public Safety was only six days prompter. Petitioner Invest In Education filed on February 14, 2020.

It was *Petitioners' choice*—not the State's—to procrastinate and waste time that might later become critical. Petitioners' delay

absolutely dwarfs the time period that COVID-19 is likely to affect their signature gathering efforts. The First and Fourteenth Amendments do not exist to bail the Petitioners out from their lack of diligence. And while it is certainly true that this pandemic is extraordinary, there are innumerable more-common contingencies (*e.g.*, key staff members quitting, uncommonly bad weather, unexpected cost overruns, lack of public/donor interest) that could have occurred that cumulatively could have had a much greater impact on their ability to gather signatures within the short window Petitioners allotted themselves.

Second, and relatedly, it appears likely that Petitioners could have qualified for the ballot had they exerted reasonable diligence. The Ninth Circuit has explained that the applicable test for considering challenges to initiative regulations is similar to whether "'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Angle*, 673 F.3d at 1133 (quoting *Nader*, 531 F.3d at 1035). Here, one of the Petitioners (Smart and Safe Arizona), has attested that it has "gathered approximately 300,000 signatures" so far. App.39. That notably exceeds the 237,645

signatures it needs by more than 25%, and it is thus quite likely to qualify for the 2020 ballot.

The remaining Petitioners have not submitted any evidence that, had they been as diligent as Smart and Safe Arizona, they would still be in their current predicament. Instead, as of April 1, Save Our Schools had gathered approximately 50,000 signatures. APP044. Second Chances had gathered approximately 66,000 signatures. APP039. Invest in Education had gathered approximately 85,000 signatures. APP040.

Third, the Arizona Constitution has required in-person signatures for initiative petitions for *more than a century*. In that time, a multitude of measures have qualified for the ballot. Petitioners' apparent contention that the unavailability of E-Qual for initiative petitions constitutes a "severe burden" in ordinary/non-pandemic times is thus belied by a century-plus of contrary evidence.

Fourth, Petitioners' evidentiary submissions fall far short of satisfying their burden, or answering obvious questions they beg. Petitioners, for example, never explain why they could not be using this time to communicate with voters—through phones, emails, social

media, etc.—to obtain their interest/commitment to sign, and then arrange for actual execution after the pandemic has receded. Although Arizona statutory and constitutional law requires in-person execution of the signatures, that hardly means that Petitioners cannot be making productive use of this time to try to secure interest/support from voters. Indeed, last week Governor Ducey encouraged voters who wish to sign initiative petitions to download the petition from the proponents' websites and then sign and return the petition by mail, thereby acting as a circulator as well as a signer.[8]

Fifth, the Acts are viewpoint-neutral and even-handed: applying to *all* initiatives regardless of their subject matter or position, which militates against finding a severe burden. The Ninth Circuit explained in *Chamness v. Bowen* that because the challenged regulation was "viewpoint neutral … [that] support[ed] the conclusion that it imposes only a slight burden on speech." 722 F.3d 1110, 1118 (9th Cir. 2013). Similarly, the Ninth Circuit has "repeatedly upheld as 'not severe' restrictions that are generally applicable, even-handed, [and] politically

[8] Governor Ducey's April 7, 2020 press conference, *available at* https://azgovernor.gov/governor/video/governor-ducey-health-services-department-director-dr-cara-christ-share-covid-19 (at 51:14).

neutral." *Dudum*, 640 F.3d at 1106 (cleaned up). The Acts are just that: they apply to *all* initiatives, regardless of the subjects they address and no matter which political groups favor or oppose them, or what messages they are trying to convey.

Sixth, it is notable that the purportedly "severe burden" on Petitioners' First Amendment rights is not *any restriction* on speech, but rather the State's refusal to sanction the elimination of expressive activity that would otherwise occur. Specifically, courts have long recognized that in-person initiative circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). But Petitioners do not argue that the State is seeking to interfere with that expressive activity.

F. The Challenged Acts Satisfy Less-Exacting Review

Because the constitutional and statutory provisions at issue do not impose a severe burden, they comport with the U.S. Constitution if they "serve[] an important regulatory interest" and are "reasonably related" to that interest. *Prete*, 438 F.3d at 970-71. That is plainly true here for four reasons.

First, "'[a] State indisputably has a compelling interest in preserving the integrity of its election process.'" *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). To that end, the State has enacted several statutes to serve that compelling interest. *See*, *e.g.*, A.R.S. §§ 19-112 (requiring a witness who affirms through notarized affidavit); -115 (criminalizing intentionally duplicative or forged signatures); -118 (requiring certain circulators to register); -119.01 (criminalizing certain fraudulent acts by circulators); -121.02 (disqualifying signatures, among other reasons, that don't match the signer's voter registration file). Indeed, this Court has recognized that the requirements imposed on signature gatherers, in particular, "represent[] a reasonable means of fostering transparency ... and mitigating the threat of fraud or other wrongdoing infecting the petition process." *Stanwitz*, 245 Ariz. at 350 ¶21. Moreover, whether these comprehensive laws to prevent, detect, and prosecute fraud are compatible with E-Qual is a factually intensive issue not suited for an original special action in this Court.

Second, the State also has a significant interest in promoting dialogue by requiring proponents of initiatives to individually engage

signers and in so doing provide opportunity for meaningful discussion. Arizona thus specifically requires a circulator be present when the petition is signed with a copy of the measure, facilitating active discussion. Ariz. Const. art. IV, Pt. 1, § 1(9); A.R.S. § 19-112(B). Facilitating those exchanges helps to serve the State's "undeniably … important regulatory interest 'in making sure that an initiative has sufficient grass roots support to be placed on the ballot.'" *Angle*, 673 F.3d at 1135 (citation omitted). Signatures that are the product of expressive exchanges between citizens are more likely to ensure meaningful support than a non-expressive exchange of binary bits with a computer. That is particularly true as the internet is notorious for viral and ephemeral campaigns/memes/etc.

Third, the State also has a substantial interest in containing the enormous costs that Petitioners' proposed remedy would entail. The Secretary—who supports their request—estimates that she will need to hire as many as 60 additional employees even if E-Qual is expanded only to already-registered initiatives, and that it would take weeks to develop and implement the system. AG-APP-14, 16; *Soltysik*, 910 F.3d at 449-50 ("The court may, for instance, consider the increased cost…

when performing the [Anderson-Burdick] balancing test.) (collecting cases); *see State v. Zeitner*, 246 Ariz. 161, 167 ¶24 (2019) ("the state and public's legitimate and substantial interests in ... preserving the state's ... funding").

Fourth, the State has a significant interest in safeguarding the integrity of its initiative process because initiatives, once approved, are extremely difficult to amend or repeal. In 1998, voters approved the Voter Protection Act ("VPA") which amended Arizona's constitution to require three-fourths of both houses of the Arizona Legislature to amend any voter-approved initiative. Ariz. Const. art. IV, Pt. 1, § 1(6)(C). In 2017, the Arizona Legislature found the VPA "impairs the ability of the legislature … to implement changes to or corrective measures for voter-approved initiatives" making the initiative process an "extraordinary power" of which the State has an interest in "safeguarding the integrity and accuracy of the initiative process." 2017 Ariz. Sess. Laws, ch. 151 § 3.

G. Accepting Petitioners' Arguments Would Cause Grave Collateral Consequences

Accepting Petitioners' arguments would also open a Pandora's Box of other potential constitutional challenges. Few, if any, people's lives

have been untouched by coronavirus and virtually everyone could point to activities that have been impaired—including the exercise of constitutional rights. For example, candidates for political office have a right to raise money and U.S. residents have a right to contribute money. *Randall v. Sorrell*, 548 U.S. 230 (2006). But coronavirus has undoubtedly interfered with fundraising efforts—as would be expected without the ability to hold dinners, meetings, and rallies.[9] Undoubtedly that burden is in many cases (unlike here) severe. But that hardly means that political candidates should be able to demand that governments either (1) make up the difference by directly funding their campaigns to make up the shortfalls or (2) must waive or substantially expand contribution limits, so that candidates can raise the money they otherwise would have collected.

Similarly, many political groups often rely on meeting, rallies, and pamphleteering to spread their message—which are obviously less effective now. But that hardly means that they can demand that the government fund alternative speech or allocate channels of

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[9] *See, e.g.*, Maggie Severns & James Arkin, *'It can be catastrophic': Coronavirus tanks campaign fundraising*, Politico (March 20, 2020, 4:30 AM), https://www.politico.com/news/2020/03/20/coronavirus-campaign-fundraising-138381.

governmental speech to alleviate the impacts. In many cases, they simply will have to live with the inevitable diminution of their expressive capacities as an unavoidable—and non-governmentally-caused—result of the pandemic.

In short, hardships abound in this crisis. But that does not mean that Petitioners alone should be excused from generally applicable laws. And it is doubtful that our system of government can tolerate all of the exceptions that would necessarily be required if Petitioners' arguments were accepted and fairly applied to all others impacted by coronavirus.

IV. PETITIONERS' STATE LAW CLAIMS FAIL

A. Petitioners' Section IV Claim Lacks Merit

Plaintiffs' state law claims necessarily fail because the Article IV In-Person Mandate controls. *See supra* Part I. Because Article IV expressly mandates in-person circulation of initiative provisions, that express command controls over Plaintiffs' more-general Article IV burden claim. But even if that were otherwise, this Court considering an Article IV claim looks to whether statutes "unreasonably hinder or restrict" Petitioners' ability to circulate petitions, *Stanwitz*, 245 Ariz. at 346 ¶1. For the same reasons that Petitioners have not established a

"severe burden" under the *Anderson-Burdick* framework, *see supra* at 32-38, the challenged statutes in Title 19 do not "unreasonably hinder or restrict" Petitioners' ability to circulate petitions.

B. Petitioners' Arizona Due Process, Free Speech and Equal Protection Claims Also Fail

Petitioners' arguments under other protections of our Constitution similarly fail because of the Article IV In-Person Mandate. Those more generalized guarantees cannot be extended to contravene Article IV's express requirement of in-person signature execution for initiative petitions. *See*, *e.g.*, *Clouse*, 199 Ariz. at 199 ¶11 ("'It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.'" (citation omitted)).

But even if the Article IV In-Person Mandate were inapplicable, Petitioners' claims fail for the same reasons as their claims under the federal constitutional analogs. *See supra* at 30-32. True, the protections of the Arizona Constitution are sometimes more expansive. But Petitioners do not offer any argument or cite any precedent for why this should be the case here. *See* Pet. at 26-30. Absent any genuine argument for why our Constitution should part ways with the U.S.

Constitution on these issues, this Court should decline to break new ground here. *See*, *e.g.*, *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n. 2, 154 P.3d 391, 393 n. 2 (App.2007) (finding issue waived on appeal because party mentioned it in passing, cited no supporting legal authority, and failed to develop it further); *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.,* 207 Ariz. 95, 122, ¶ 117, 83 P.3d 573, 600 (App.2004).

The court will not consider arguments posited without authority. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.,* 207 Ariz. 95, 122, ¶ 117, 83 P.3d 573, 600 (App.2004); *State v. Meeds*, 244 Ariz. 454, 462 ¶ 21 n. 2 (App. 2018)(a party waives an argument when it fails to offer any significant supporting analysis or citation to authority) (citing *State v. Moody*, 208 Ariz. 424, 452 n.9 ¶ 101 (2004).

Caution is particularly warranted here as Petitioners do not even provide a complete list of laws that they believe should be invalidated. *See*, *e.g.*, Pet.35 (asking for this Court to "enjoin[] the Secretary from enforcing *any provision of Arizona law* that would preclude the Initiative Proponents' use of E-Qual" (emphasis added)). That omission renders reasoned consideration of the constitutionality of an unknown

set of statutory provisions a difficult and perilous task with consequences that are difficult to predict, particularly on this highly expedited timetable. Nor is it unreasonable to demand that, if Petitioners want to enjoin a panoply of Arizona statutory provisions, that they at least explicate a complete list of what provisions they seek to invalidate so that the State can defend them specifically.

V. PETITIONERS' RATIONALE FOR THEIR PROPOSED REMEDY IS ILL-DEVELOPED

Even if Petitioners had established their entitlement to some relief under the U.S. or Arizona Constitutions, their requested injunction is ill-explained and inequitable. Petitioners have not, for example, explained why a pro rata reduction of the signature requirement would not be a more appropriate remedy than use of the E-Qual system. (For example, if evidence established that coronavirus rendered signature gathering half as effective for two months, a 5 percent (0.5 * 2 months / 20 months) pro rata reduction could be ordered.) Moreover, it is far from clear that the numerical thresholds of Article IV—which are designed for the more arduous task of in-person circulation—should be extended without modification if petition circulation can now be performed by mass emails. The Framers of

Article IV—who believed that in-person circulation was essential to lawmaking by initiative—might easily have thought higher thresholds appropriate if the in-person requirement were to be dispensed with.

Similarly, Petitioners have not explained why relaxing the in-person execution requirement—*e.g.*, to permit "virtual presence" through live audio/video transmission—would not remedy their harm more precisely (and in a more narrowly tailored manner). *See, e.g.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (Injunctions "must be narrowly tailored to give only the relief to which plaintiffs are entitled."). Indeed, the Governor issued an Executive Order 2020-26[10] on April 8, 2020, which allows for signers and notaries to meet using the internet and audio-video technology to verify identity during the pandemic. *See supra* at 37. Nor have Petitioners explained why an injunction simply permitting them to apply signatures they have collected for qualifying for the 2022 election would not be sufficient. (That obviously would be a delay, but delays abound to millions of Americans for a myriad of tasks they otherwise could accomplish earlier absent this pandemic.)

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[10] Available at https://azgovernor.gov/file/34508/download?token=kDfAAQxg.

Petitioners' proposed remedy would also be extraordinarily burdensome and problematic. The Secretary—who *supports* Petitioners' request—estimates that petition review could require hiring up to 60 additional employees even if E-Qual is only made available to initiatives that have already registered. AG-APP-17. It is unclear where the funding for such a substantial increase in hiring would come from—particularly where the State suddenly faces an unexpected and considerable budgetary shortfall. And that substantial cost utterly belies Petitioners' "understanding [] that E-Qual can be adapted to be available for their initiative petition signature collection *with relative ease*." Pet.23 (emphasis added). It actually would require a massive and unprecedented undertaking, expanding E-Qual by a full order of magnitude or more in terms of scope and number of signatures processed. And even then the system would be beset by issues of potential fraud, as an amicus brief in the federal district court observed. AG-APP-2–AG-APP-4.

At a minimum, this substantial burden underscores that the balance of harms and public interest disfavor Petitioners' extraordinarily burdensome remedy—particularly where those

expenditures of taxpayer dollars are only "required" because Petitioners failed to exercise greater diligence in beginning their signature-gathering efforts sooner. Petitioners' requested remedy is, in essence, a request for a substantial bailout from the repercussions of their own procrastination.

Moreover, limiting relief to existing petitions invites its own issues. Notably, those measures are overwhelmingly tilted in one ideological direction. It would be ironic, to say the least, if the remedy for the alleged content-based discrimination was more content discrimination: *i.e.*, in favor of initiatives with a particular ideological bent—compounding the peculiarity that the proposed remedy for a supposed First Amendment violation is to facilitate a *reduction* in expressive exchanges. The Court should decline Petitioners' invitation to pick winners and losers under these circumstances.

If E-Qual is to be expanded, it should be done in a manner that does not violate the constitutional protections that Petitioners claim to be vindicating—*i.e.*, it should be made available to all potential

initiatives. What's good for the goose is good for the gander. And it should be done through the legislative process rather than the court.

At a bare minimum, this Court should order additional briefing on the appropriate remedy if it concludes any relief is warranted. Petitioners' filings do not answer critical questions about why the relief they requested is appropriate/equitable and their reply brief will come too late for the State to respond to the rationales first advanced in it.

CONCLUSION

This Court should accept jurisdiction over the issue of whether the Article IV In-Person Mandate prohibits the use of the E-Qual system for initiative petitions and hold that it does. It should either decline jurisdiction on the remaining issues or hold that they fail on the merits.

RESPECTFULLY SUBMITTED this 17th day of April, 2020.

MARK BRNOVICH
Attorney General
State Bar No. 14000

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn (Beau) W. Roysden III
Division Chief

/s/ Drew C. Ensign
Drew C. Ensign
Deputy Solicitor General
Jennifer J. Wright
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Mark Brnovich, Arizona Attorney General

ARIZONA SUPREME COURT

ARIZONANS FOR SECOND CHANCES, et. al., Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State, Respondents, and MARK BRNOVICH, Arizona Attorney General et. al., Intervenor-Respondent.	Arizona Supreme Court No. CV-20-0098-SA

ATTORNEY GENERAL'S APPENDIX

MARK BRNOVICH
Attorney General
State Bar No. 14000

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn (Beau) W. Roysden III
Division Chief

Drew C. Ensign
Deputy Solicitor General
Counsel of Record
Jennifer J. Wright
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Mark Brnovich, Arizona Attorney General

ATTORNEY GENERAL'S APPENDIX TABLE OF CONTENTS

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350
Lee Miller, # 012530
John D. Wilenchik, #029353
admin@wb-law.com
Attorneys for Amicus Curaie
Arizona Republican Party

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizonans for Fair Elections (AZAN), an Arizona nonprofit corporation; Arizonans Fed Up with Failing Healthcare (Healthcare Rising AZ), an Arizona nonprofit corporation; and Randi L. Turk, an individual;

Plaintiffs,

v.

Katie Hobbs, Arizona Secretary of State, Edison Wauneka, Apache County Recorder; David Stevens, Cochise County Recorder; Patty Hansen, Coconino County Recorder; Sadie Jo Bingham, Gila County Recorder; Wendy John, Graham County Recorder; Sharie Miheiro, Greenlee County Recorder; Richard Garcia, La Paz County Recorder; Adrian Fontes, Maricopa County Recorder; Kristi Blair, Mohave County Recorder; Doris Clark, Navajo County Recorder; F. Ann Rodriguez, Pima County Recorder; Virginia Ross, Pinal County Recorder; Suzanne Sainz, Santa Cruz County Reorder; Leslie Hoffman,

Case No. 2:20-cv-00658-DWL

AMICUS CURAIE BRIEF
BY ARIZONA REPUBLICAN PARTY

Yavapai County Recorder; and Robyn Pouquette, Yuma County Recorder; all in their official capacities,

Defendants.

The Arizona Republican Party ("Amicus") hereby files this Amicus Brief for the benefit of the Court.

The Plaintiffs' request implicates extremely grave security concerns, as detailed below, and should be denied for that as well as the numerous other reasons that follow.

I. Introduction

The E-Qual (also known as "e-sign") system is currently available for candidates for statewide and legislative offices, as well as federal offices, in compliance with A.R.S. §§ 16-316, -318. Plaintiffs correctly point out that the Arizona legislature required the Secretary of State to make the E-Qual system available to candidates for local (municipal) elections as well ("candidates for city or town office, county office and the office of precinct committeeman"). However, Defendant Hobbs has failed to do so, in over a year since her election.

II. E-Qual is Highly Susceptible to Fraud

As a practical matter, the e-Qual system is highly susceptible to fraud. It has also never been used on the scale that Plaintiffs ask for.

First, for an initiative petition, the legislature has provided that signatures must be made in the presence of a circulator, who must then verify in the presence of a notary and under penalty of perjury that "each individual printed the individual's own name and address and signed this sheet…in my presence on the date indicated and I believe that each signer's name and residence address or post office address are correctly stated and that each signer is a qualified elector of the state of Arizona…and that at all times during circulation of this signature sheet a copy of the title and text was attached to the signature sheet." A.R.S. § 19-112(D).

On the other hand, the only "authentication" in the e-Qual system is that the user must enter a voter's name along with a corresponding driver's license number and street address. The system then checks whether the name matches the given driver's license number and street address (in the MVD system); and that is it. Whoever provided the name, driver's license number and address is shown a menu of all petitions that the voter associated with that address would be qualified to sign. The person clicks the petitions they want to "sign," clicks submit, and they are done.

The risk of fraud in that system is obvious. The system is premised on the false notion that only the voter will have access to their own driver's license number—but as any good private investigator knows, a person's name, address and driver's license number are all public record at the DMV. Anyone can easily acquire a list of Arizona voter names and driver's license numbers and addresses from the DMV and enter that information to sign petitions, or even write a program that does so automatically. And as discussed below, the e-Qual system has been so underused in reality, that an actual voter is extremely unlikely to ever actually log into the system and notice that someone signed a petition for them, i.e. to ever uncover the fraud.

The e-Qual system has never undergone a full third-party security review, because the number of signatures that are actually collected using e-Qual has historically been very small, on average between two and three percent of all signatures collected. Until 2017, there was even a statutory percentage limit (50%) on the number of signatures that a candidate could collect using e-Qual.[1] And in practice, federal and state candidates (i.e., the only possible current users of e-Qual) have obtained no more than ten percent (10%) of their signatures via e-Qual. Statewide candidates (and especially legislative candidates, who need only around one to two thousand

[1] *See* the 2016 bill amending A.R.S. § 16-316, "FEDERAL OFFICERS AND EMPLOYEES—NOMINATIONS—SIGNATURES," 2016 Ariz. Legis. Serv. Ch. 176 (H.B. 2050)(WEST).

signatures to qualify) typically obtain an even smaller percentage, and an even smaller number of actual e-Qual signatures (fewer than one hundred each).

However, Plaintiffs ask the Court to allow them to collect, in some cases, approximately two hundred thousand signatures electronically using the e-Qual system. Instead of between two and three percent, the percentage of signatures collected using e-Qual would jump to around fifty percent. The legislature has already found that initiatives, referenda and recalls are more susceptible to fraud, and the eQual system clearly is. There is no time for the Court to order or receive a robust security valuation – and frankly there is no need for one anyway, since the problem with the current system is so obvious (and shocking). Even if Secretary Hobbs and/or her office represent that they do not believe that this is a problem, the simple straight facts above beggar a different conclusion. Finally, the fact that the Office of the Secretary of State has not implemented e-Qual even for local candidates, as it was statutorily required to do, raises serious questions about its ability to actually do so here for propositions, even if it were appropriate to do so.

III. Plaintiffs Fail to Show an Unconstitutional Burden

The Plaintiffs—who have been described by media as "left-leaning" groups seeking to promote initiative(s) to increase public funding for candidates for office[2]—cannot demonstrate that the statutory protections against voter fraud found in A.R.S. § 19-112(A), *inter alia* constitute an unconstitutional burden on free speech, in light of the COVID-19 virus and the Governor's Executive Order(s). First, the Governor's "Stay home, Stay healthy, Stay connected" order (Executive Order 2020-18), which provided that "all individuals in the State of Arizona shall limit their time away from their place of residence or property," specifically exempts

[2] *See e.g.* Laurie Roberts, " 'Fair elections' group risks looking like a flaming pile of hypocrisy":
https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2019/11/04/arizonans-fair-elections-wants-use-unfair-election-tactics/4125405002/

"conduct[ing] or participat[ing] in Essential Activities" including "[e]ngaging in constitutionally protected activities such as speech and religion, and any legal or court process provided that such is conducted in a manner that provides appropriate physical distancing to the extent feasible." *See* Sections 2(a), 4(e) of Executive Order 2020-18.[3] Therefore, the Executive Order strictly does not affect the collection of signatures, which Plaintiffs agree is generally a constitutionally protected activity and an exercise in free speech. Second, as the Executive Order notes, the Center for Disease Control has recommended that people "maintain physical distancing of at least six feet from any other person." *Id.*, at Section 5. Although Plaintiffs recite in their Motion a number of statutes and restrictions for collecting initiative signatures, the basic restriction that they appear to be complaining about (or at least, that they could genuinely complain about) is the requirement in A.R.S. § 19-112(A) that "[e]very qualified elector signing a petition shall do so in the presence of the person who is circulating the petition and who is to execute the affidavit of verification." However, qualified electors can still sign an initiative petition "in the presence" of a circulator, and while maintaining a distance of six feet. For example, a person standing at a kiosk can leave their clipboard on a table six feet away, and ask people to sign from a distance. The pen being used can be sanitized. Precautions like this are being taken in every other sector of society, and initiative circulators can certainly cope as well.

The statutory requirement, as Plaintiffs correctly point out, is designed to prevent fraud. While the legislature has specifically authorized candidates for office to collect signatures online (including statewide offices, 16-316; municipal offices, 16-317; and federal offices, 16-318), it has not authorized the proponents of initiatives, referenda, and recall petitions to do so. Following the doctrine of *expressio unius*, it must be assumed that this choice was deliberate, and that the legislature has attributed to initiatives, referenda, and recall petitions—which are often advanced by opaque groups like the Plaintiffs—a greater risk of fraud than candidate

[3] Which can be accessed at: https://azgovernor.gov/sites/default/files/eo_2020-18_stay_home_stay_healthy_stay_connected_1.0.pdf

petitions, for which a clearly-identified natural person is ultimately responsible. Further, the standard of review for challenges to candidate petitions is "substantial compliance,"[4] whereas the legislature has specifically provided for a "strict compliance" review for initiatives, referenda, and recall petitions. *See* A.R.S. § 19-102.01 ("Constitutional and statutory requirements for statewide initiative measures must be strictly construed and persons using the initiative process must strictly comply with those constitutional and statutory requirements"); *see also* § 19-201.01 (providing for strict review of recall petitions); § 19-101.01 (referenda). This again sends a clear signal that the legislature has determined a need for stronger qualifying requirements for initiatives, referenda and recall petitions, than for candidates. Given that half of the States in the United States do not even allow for initiatives,[5] it is certainly within the province of the State of Arizona to create and define its own level of comfort with how initiatives are conducted and qualified, and how much security is needed in order to prevent fraud. The State's interest in preventing fraud is high, and the actual burden placed on circulators is comparatively low. While circulators may complain of people not being willing or interested in signing petitions, this burden is strictly not caused by any State regulation or statute, but rather by the virus (or fear of the virus) itself.

It is more than reasonable for the State to require basic protections against fraud, including that a natural person verify that the voter actually signed the petition; and the national recommendations and precautions to prevent the spread of disease by staying six feet away from

[4] *See e.g. Bee v. Day*, 218 Ariz. 505, 506, 189 P.3d 1078, 1080 (2008)(discussing "substantial compliance" caselaw with respect to candidate petitions); *Marsh v. Haws*, 111 Ariz. 139, 140, 526 P.2d 161, 162 (1974)(in which the Arizona Supreme Court applied "substantial compliance" to a candidate petition, even though no statute expressly stated that substantial compliance would suffice).

[5] For a list of the twenty-five (25) states that do allow some form of initiative, see https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx

other people, which every other sector of society has coped with, does not place such a special burden on circulators that it implicates federal constitutional concerns.

IV. "Mandatory" Injunctions are Disfavored; "*Pullman*" Abstention Applies

In general, the Plaintiffs' request to have a federal judge direct Secretary Hobbs on how to allocate her office's resources, and to instruct her on what systems to make available and to whom (in contravention of state law), is in the nature of a mandatory injunction, which is "particularly disfavored." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). A request for the Court to order a party to take affirmative action is treated as a "mandatory injunction." *Id.* A "mandatory injunction "goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored." *Id.* "The "district court should deny such relief 'unless the facts and law clearly favor the moving party. In plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Id.* (internal citations omitted). The Plaintiffs' request also raises issues with respect to the separation of powers,[6] not to mention federal abstention from state affairs, given the state constitutional and legislative policies at issue here. There is also a case that is currently pending in front of the Arizona Supreme Court requesting the same relief, "*Arizonans for Second Chances et al. v. Hobbs*," case no. CV-20-0098-SA.[7] In that case, as here, the Plaintiffs ask the Arizona Supreme Court to "(1) order[] the Secretary to allow them to collect initiative petition signatures for their respective already-filed measures through E-Qual, and (2) enjoin[] the Secretary from enforcing any provision of Arizona law that would preclude the Initiative Proponents' use of E-Qual."[8] The Plaintiffs in that case cite the same federal authority

[6] "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170, 2 L. Ed. 60 (1803).

[7] The current docket in that matter can be viewed at: https://apps.supremecourt.az.gov/aacc/appella/ASC/CV/CV200098.PDF

[8] See page 34 of the Special Action petition is attached as Exhibit "A" hereto.

cited to this Court, including *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Democratic Nat'l Comm. v. Bostelmann* (which was recently overruled by the United States Supreme Court, see at bottom), as well as Arizona constitutional provisions on initiatives (article IV, part 1, section 1(2) of the Arizona constitution) and other related state authorities. The deadline for briefs in that case has already been set for later this month (with the final deadline for all briefs, including amicus briefs and responses thereto, on April 27, 2020). Under the "*Pullman*" abstention doctrine, this Court should abstain from the exercise of federal jurisdiction when "a federal constitutional issue…might be mooted or presented in a different posture by a state court determination of pertinent state law." *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983). "Policies justifying abstention include the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. Central to all of these concerns are principles of comity and federalism." *Id.* (internal quotation marks and citations omitted). The exercise of *Pullman* abstention is discretionary with the Court, so long as "traditional abstention requirements" are met. *Id.* Here, the Arizona Supreme Court's determination regarding Arizona statutory and constitutional rights and restrictions has the potential to moot out or change the posture of the questions before this Court. Specifically, the Plaintiffs in the Arizona Supreme Court matter ask that court to make determinations about the countervailing state interests and state law policies, especially with respect to the state constitutional and statutory provisions on initiatives, that could affect or even moot out a ruling of this Court. After all, the right to file an initiative petition is one granted only by the state constitution and statutes, and half of states in the United States do not even provide for it—casting further doubt on the federal constitutional magnitude of the relief that Plaintiffs request here.

V. Plaintiffs' authority was recently overruled, in a relevant decision

Finally, the Court should be mindful that one of the cases that Plaintiffs cite to at page 10 of their brief in support of their Motion, *Democratic Nat'l Comm. v. Bostelmann*, was overruled

by the United States Supreme Court on Monday. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). In a *per curiam* decision, the United States Supreme Court cautioned that it "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, 2020 WL 1672702, at *1 (U.S. Apr. 6, 2020); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct. 9 (2014). The Supreme Court also criticized the district court's "unusual" orders in that case regarding an election (there, an order that required otherwise invalid, late-cast votes to be counted). The Court criticized the district court for "fundamentally alter[ing] the nature of the election." *Id.*

Here, even though Defendant Secretary of State Hobbs was required to give municipal/county candidates access to the E-Qual system over a year ago, she failed to do so and the deadline for municipal/county candidates to submit their nomination petitions has already passed. It would be unfair for the Court to make a special exemption for these special-interest groups alone, especially when the legislature has clearly expressed a policy favoring online signatures for candidates – which the Secretary of State's office did not allow – and against allowing online signatures for initiatives, which Plaintiffs now ask for. In light of the fact that local candidates for office clearly had to make do without online access, and were able to do so; and (2) the fact that other sectors of society have been able to accommodate the Governor's order and basic health/sanitary protections, including the courts, without implicating extraordinary constitutional concerns, the Plaintiffs' request is unnecessary and on top of that, unfair. The issues that Plaintiffs raise could have been raised well in advance of the current COVID-19 problem, and their request is really a "dark horse" to implement something that these kinds of groups have been requesting for some time, and the Arizona legislature has clearly rejected. Given the very serious fraud risk in widespread use of the e-Qual system, such as it is,

and the Court's inability to hear or properly address these issues before the election, among the other reasons given above, the request should be denied.

RESPECTFULLY SUBMITTED this 10th day of April, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ *John "Jack" D. Wilenchik*

Dennis I. Wilenchik, Esq.
Lee Miller, Esq.
John D. Wilenchik, Esq.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004
admin@wb-law.com
Attorneys for Amicus Curaie
Arizona Republican Party

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically transmitted the foregoing document to the Clerk of the Court through the CM/ECF system, which will send a Notice of Electronic Filing to all CM/ECF registrants for this matter.

By: /s/Christine M. Ferreira

Roy Herrera (#032901)
herrerar@ballardspahr.com
Daniel A. Arellano (#032304)
arellanod@ballardspahr.com
Jillian L. Andrews (#034611)
andrewsj@ballardspahr.com
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400
Facsimile: 602.798.5595
Attorneys for Defendant Katie Hobbs, Arizona Secretary of State

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizonans for Fair Elections (AZAN), an Arizona nonprofit corporation; Arizonans Fed Up with Failing Healthcare (Healthcare Rising AZ), an Arizona nonprofit corporation; and Randi L. Turk, an individual,

Plaintiffs,

vs.

Katie Hobbs, Arizona Secretary of State; Edison Wauneka, Apache County Recorder; David Stevens, Cochise County Recorder; Patty Hansen, Coconino County Recorder; Sadie Jo Bingham, Gila County Recorder; Wendy John, Graham County Recorder; Sharie Miheiro, Greenlee County Recorder; Richard Garcia, La Paz County Recorder; Adrian Fontes, Maricopa County Recorder; Kristi Blair, Mohave County Recorder; Doris Clark, Navajo County Recorder; F. Ann Rodriguez, Pima County Recorder; Virginia Ross, Pinal County Recorder; Suzanne Sainz, Santa Cruz County

No. CV-20-00658-PHX-DWL

DECLARATION OF SAMBO (BO) DUL

Recorder; Leslie Hoffman, Yavapai County Recorder; and Robyn Pouquette, Yuma County Recorder; all in their official capacities,

Defendants.

SAMBO (BO) DUL declares as follows:

1. I am the State Elections Director in Secretary of State Katie Hobbs' Office. In this role, I oversee the Election Services Division in the Department of State. I have served in this role since January 2019. I am providing this declaration to explain how certain candidates can currently use the Secretary of State's E-Qual system to collect nomination petition signatures electronically and how the E-Qual system can be adapted to allow voters to electronically sign petitions for statewide ballot initiatives if the Court were to order such access in light of the current pandemic and public health emergency.

2. Federal, statewide, and legislative candidates file their required nomination documents with the Secretary of State's Office. In addition to a statement of interest, nomination paper, and, if applicable, financial disclosure statement, candidates must file the statutorily required number of nomination petition signatures by the applicable deadline in order to qualify to appear on the ballot. Candidates may collect petition signatures using printed petition forms or electronically using E-Qual.

3. Pursuant to A.R.S. §§ 16-316 and 16-318, the Secretary of State's E-Qual system allows for qualified voters to sign nomination petitions for federal, statewide, and legislative candidates through a secure internet portal that properly verifies the voter's identity. Candidates may choose to use E-Qual in addition to or instead of collecting signatures on hard-copy petition forms.

4. The Secretary of State's Office has been working on developing access to E-Qual for county, city, town, and precinct committeeman candidates pursuant to A.R.S. § 16-317, but this is a complicated and time-intensive project that requires building a new portal similar to the Secretary of State's Candidate Portal for local jurisdictions that can

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

interface with each local jurisdiction's election management system, building a new and separate administrative system for local jurisdictions to manage their candidates and electronic petitions, training and on-boarding local jurisdictions as administrative system users, providing help desk support to these users, ensuring the system correctly determines which registered voters are eligible to sign which local candidate petitions, and understanding and meeting local jurisdiction requirements for petitions which may be different than state-level requirements. Our office had initially planned to begin early testing of this functionality after the November 2020 General Election. However, in light of the current public health emergency, we have been working to develop an interim solution that does not have the full functionality that we had planned, but would at minimum enable certain nonpartisan city and town candidates, who must file their petition signatures by July 6, 2020, to collect signatures electronically through E-Qual.

5. Therefore, currently, only federal, statewide, and legislative candidates can use E-Qual. In order to use E-Qual to collect signatures electronically, these candidates must first create an account in the Secretary of State's Candidate Portal. Candidate Portal enables candidates to create an E-Qual petition, upload nomination paperwork electronically, and populate their online profile, which will be displayed on the Secretary of State's Elections website once the candidate qualifies for the ballot. When a candidate clicks "Create E-Qual Petition" in Candidate Portal, the candidate is prompted to review and approve the information in the petition caption.

6. Once a candidate has created their E-Qual petition, the candidate can circulate the weblink to voters to sign the petition. An eligible voter may also access a candidate's E-Qual petition by going directly to the E-Qual website and viewing the available petitions for that voter to sign.

7. When a candidate is ready to file their nomination paperwork, the candidate will log-in to their Candidate Portal account, "close out" their E-Qual petition, print the petition, and sign the front page which contains a circulator statement. The printed E-Qual petition lists each signer's printed name, actual residence address, date of signing, and voter

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

identification number and enters "/S/" followed by the voter's first name and last name into the signature field. The candidate must print and file the E-Qual petition and signed cover page by the filing deadline for their E-Qual signatures to apply to their total signature count.

8. Registered voters who wish to sign a petition electronically through E-Qual must first authenticate their identity by entering into the log-in screen the voter's first and last name and date of birth, and either: (i) the voter's Arizona driver's license number, or (ii) voter identification number *and* last four digits of the voter's Social Security number. The information provided must match the voter's registration record in order for the voter to be able to log in to E-Qual and sign petitions electronically.

9. In addition to verifying the voter's identity by authenticating the voter's identifying information at log-in, E-Qual interfaces with the statewide voter registration system—the Arizona Voter Information Database (AVID)—to verify the voter's eligibility to sign specific petitions. E-Qual interfaces with AVID to verify the voter's registration status and assigned districts, and to identify the petitions the voter is eligible to sign. If E-Qual is unable to authenticate eligibility because the person is not registered to vote or their registration status does not make them a qualified signer, a notification message is displayed and they will not be able to access the system.

10. Because E-Qual verifies the voter's identity and that the voter is properly registered, resides in the correct district to be qualified to sign a particular petition, and is otherwise eligible to sign that petition, E-Qual signatures can generally be counted as valid without further review by the filing officer or the County Recorder unless a court challenge is filed and the specific signature is challenged.

11. If the Court were to grant the relief the Plaintiffs request in this case and order the Secretary of State's Office to allow them to use the E-Qual system to electronically collect signatures for statewide initiative petitions, our office currently estimates that we would be able to develop and implement this functionality in about four weeks.

12. Based on discussions with our IT Department, I understand that it is feasible

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

to create a statewide initiative petition in E-Qual. The layout of the E-Qual page for a statewide initiative would be populated with data about the initiative, including the full title and text, that is already captured by the Secretary of State's Election Management System when an initiative committee applies for and is issued a petition serial number. That same information is also already currently displayed on the Secretary of State's website at https://apps.arizona.vote/info/IRR/2020-general-election/18/0.

13. Once we create a statewide initiative petition in E-Qual, we can provide a weblink to that initiative petition, which the committee and voters can use to access and sign the petition. We would also provide user credentials to the initiative committee, which would allow the committee to manage their E-Qual petition similar to how candidates can manage their petitions in E-Qual. The user credential would allow the initiative committee to log in to a website to view how many and which voters signed their petition, and, when the committee is ready to file the petition, close out the E-Qual petition and print a circulator coversheet and PDF list or CSV file of the first and last name, residential address, date of signing, and voter identification number for each voter who signed the initiative's E-Qual petition. The list of E-Qual signers and signed coversheet could be filed with the Secretary of State's Office along with any signatures collected on hard-copy petition sheets. Once the petition is closed out and the list or CSV file of signers is created, voters can no longer sign the petition nor can the petition be re-opened.

14. In terms of technical functionality, allowing statewide ballot initiatives to collect signatures through E-Qual would not be very different from what we already have built in E-Qual for statewide candidates to collect signatures through the system. Any registered voter who is eligible to sign a statewide candidate's petition would be eligible to sign a statewide ballot initiative petition. Similarly, petitions for both statewide candidates and statewide ballot initiatives are filed with the Secretary of State's Office, so we would not need to develop functionality or procedures for providing administrative system access to another filing officer or accommodating multiple different local jurisdiction's rules and requirements within the E-Qual system, which is currently only

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

built to accommodate state-level requirements.

15. However, while implementing the technical functionality would be a one-time requirement that is feasible, maintenance and support of a large number of individual E-Qual petitions for statewide ballot initiatives may present significant workload and infrastructure challenges. For example, in the 2020 candidate filing period, 226 candidates filed nomination petitions with the Secretary of State's Office and qualified for the ballot. Over half filed fewer than 1,000 signatures and, all together, the 226 candidates filed approximately 388,000 signatures, only about 17% of which were E-Qual signatures. Statewide initiative petitions, however, have a much higher signature requirement: 237,645 for a statutory initiative and 356,467 for a constitutional initiative for 2020. Therefore, we anticipate needing to bring on additional webservers to support the expanded workload, and the more statewide initiatives there are collecting signatures on E-Qual, the more additional workload the system will need to support. In addition to the infrastructure demands, each additional statewide initiative with an E-Qual account will require staff time to on-board the new initiative committee and provide troubleshooting and support as issues arise with specific petitions. The more initiative petitions there are with E-Qual accounts, the higher the demands for such support will be, and the higher the burden for our staff.

16. Therefore, to avoid imposing an undue burden on the Secretary of State's Office, if the Court were to permit initiative petitions to collect signatures using E-Qual this year, the Secretary of State's Office requests the Court limit this relief to committees that have already filed for a petition serial number at the filing of this lawsuit, and thereby have already taken steps and expended resources in an effort to qualify for the ballot this year. Initiative committees that have not yet filed for a petition serial number do not have such equitable factors in their favor and may more fairly be asked to wait until the next election cycle to circulate their petitions through traditional means.

17. Further, if the Court were to permit initiative petitions to collect signatures using E-Qual, the Secretary of State's Office requests the Court also require initiative committees to submit, upon creation of the E-Qual petition, all signatures collected on

Eallard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

paper petition sheets up to that date, and, notwithstanding A.R.S. § 19-121(B), permit such committees to submit one supplemental filing, including E-Qual and traditional signatures, by the July 2, 2020 filing deadline. Such a staggered submission would enable our staff to process the paper petition sheets in a manner that complies with current public health recommendations on social distancing and allow us to complete processing in a timely manner despite reduced staffing in the office due to COVID-19. In accordance with public health recommendations, the Secretary of State's Office, including the Election Services Division, has transitioned most of our staff to teleworking, particularly staff whose age or underlying health conditions put them at higher risk of serious illness from COVID-19, staff who live with individuals who are at higher risk, and staff who lack childcare alternatives after the announcement of statewide school closures.

18. Receipt of the hard-copy petitions, de-stapling each petition sheet from the title and text, initial review of petition sheets for deficiencies that disqualify an entire sheet and separating those wholly-disqualified sheets from the sheets that need to be scanned into the petition review software for review of individual signature lines, bates numbering all sheets, and scanning all sheets into the system are all labor and time intensive tasks that cannot be done remotely. If all petitions sheets are filed at once on or near the July 2, 2020 deadline, the Secretary of State's Office anticipates needing up to 60 staff, including temporary staff, in our office at once, in close proximity to each other and contrary to public health recommendations, to timely process the petitions within the statutory 20-day period.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 10th day of April, 2020.

Sambo Dul

SAMBO (BO) DUL

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

ARIZONA SUPREME COURT

ARIZONANS FOR SECOND CHANCES, et. al., Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State, Respondents, and MARK BRNOVICH, Arizona Attorney General et. al., Intervenor-Respondent.	Arizona Supreme Court No. CV-20-0098-SA

ATTORNEY GENERAL'S NOTICE OF DECISION IN RELATED CASE

MARK BRNOVICH
Attorney General
State Bar No. 14000

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn (Beau) W. Roysden III
Division Chief

Drew C. Ensign
Deputy Solicitor General
Counsel of Record
Jennifer J. Wright
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Mark Brnovich, Arizona Attorney General

NOTICE

The Attorney General hereby provides notice that the United States District Court for the District of Arizona has issued its Order dismissing plaintiffs' complaint without prejudice in *Arizonans for Fair Elections v. Hobbs*, No. 20-cv-858 (filed Apr. 2, 2020), for lack of subject matter jurisdiction (attached). As part of that order, the district court considered a federal claim substantially similar to many of the claims at issue here in considerable depth. *See* Order at 12-25. The court concluded that "Plaintiffs have not demonstrated a likelihood of success on the merits or even a substantial question going to the merits." Order at 25.

Based on the district court's dismissal, the action is no longer pending in that court.

RESPECTFULLY SUBMITTED this 17th day of April, 2020.

MARK BRNOVICH
Attorney General
State Bar No. 14000

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn (Beau) W. Roysden III
Division Chief

/s/ Drew C. Ensign
Drew C. Ensign
Deputy Solicitor General
Jennifer J. Wright
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Mark Brnovich, Arizona Attorney General

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizonans for Fair Elections, et al., Plaintiffs, v. Katie Hobbs, et al., Defendants.	No. CV-20-00658-PHX-DWL **ORDER**

INTRODUCTION

In Arizona, the people's right to enact laws via the initiative process is sacrosanct. This right has been enshrined in Arizona's constitution since Arizona's inception, and the debate over whether to adopt it was the "burning" and "most important" question raised during Arizona's constitutional convention. *Whitman v. Moore*, 125 P.2d 445, 450 (Ariz. 1942).

The relevant provisions appear in Article IV of the Arizona constitution. Among other things, Article IV provides that "the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature" and that "[u]nder this power ten per centum of the qualified electors shall have the right to propose any measure." *See* Ariz. Const., Art. IV, Part 1, § 1(1), (2). Additionally, and most relevant here, Article IV contains detailed requirements concerning the "[f]orm and contents of initiative and referendum petitions" and "verification." *Id.* §1(9). Those requirements include the following:

> Every initiative or referendum petition . . . shall contain the declaration of each petitioner, for himself, that he is a qualified elector . . . , his post office address, the street and number, if any, of his residence, and the date on which he signed such petition. ***Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant*** and that in the belief of the affiant each signer was a qualified elector . . . .

Id. (emphasis added). In other words, the rule in Arizona for over 100 years has been that an initiative proponent must (1) submit a "sheet" containing the signatures of the qualified electors who have agreed to support the initiative, and (2) submit an affidavit from the signature gatherer (also known as the circulator) certifying that he or she was physically present when each qualified elector's signature was obtained.

Although these requirements arise from the constitution, the Arizona Legislature has enacted statutes that reaffirm and effectuate them. Under A.R.S. § 19-112(A), "[e]very qualified elector signing a petition shall do so in the presence of the person who is circulating the petition and who is to execute the affidavit of verification." Under A.R.S. § 19-112(C), "[t]he person before whom the signatures, names and addresses were written on the signature sheet"—that is, the circulator—"shall subscribe and swear before a notary public that each of the names on the sheet was signed and the name and address were printed by the elector and the circulator on the date indicated . . . ." Finally, under A.R.S. § 19-121.01, the Arizona Secretary of State must disregard any signature sheets that aren't accompanied by the required circulator affidavit and disregard any entries on particular sheets in which "the signature of the qualified elector is missing." *Id.* § 19-121.01(A)(1)(d), (A)(3)(a).

Enter the coronavirus. In this lawsuit, the plaintiffs—a pair of ballot measure committees that hope to place initiatives on the ballot for the November 2020 election, plus an individual Arizona voter who wishes to sign the committees' initiative petitions (collectively, "Plaintiffs")—argue that the COVID-19 pandemic has effectively eliminated

their ability to comply with Arizona's rules requiring in-person signature gathering for initiative petitions. Plaintiffs further note that Arizona has already created a system (known as "E-Qual") for obtaining electronic signatures from qualified electors and authorizes the use of that system in one specific context—by candidates for statewide and legislative offices who are gathering signatures for candidate nominating petitions. Thus, Plaintiffs seek a declaration that "the provisions governing the signature-gathering requirements for initiative measures under Title 19, Chapter 1 of the Arizona Revised Statutes, violate the First and Fourteenth Amendments to the United States Constitution during the state of emergency caused by the COVID-19 pandemic" as well as an injunction requiring the Secretary of State "to allow the electronic submission of signatures through E-Qual . . . during the state of emergency in Arizona caused by the COVID-19 pandemic" and precluding Arizona's various county recorders "from striking signatures based solely on their submission in electronic form." (Doc. 1 at 20-21.)

Now pending before the Court is Plaintiffs' motion for temporary restraining order ("TRO"), which essentially seeks the same injunctive relief sought in the complaint. (Doc. 2.) As explained in more detail below, this motion will be denied and this action will be dismissed due to a lack of jurisdiction.

First, Plaintiffs' complaint and moving papers do not challenge Arizona's *constitutional* provisions governing the initiative process. Instead, Plaintiffs only seek to challenge the Arizona *statutes* requiring in-person signature gathering. This approach raises serious doubts about whether the requested relief would even redress Plaintiffs' alleged injuries—as noted, the Arizona constitution has always required in-person signature verification. During the TRO hearing, Plaintiffs attempted to belatedly address this issue by arguing that the solicitation of electronic signatures through the E-Qual system could be deemed "substantial compliance" with Article IV of the Arizona constitution. Not only does this argument seem questionable, but Plaintiffs are effectively asking a federal court to make a guess about an unsettled question of state law and then, based on that guess, overturn a century-old state-law election rule. This outcome would be distressing from a

federalism perspective and is precluded by both (1) the rule requiring a party invoking a federal court's subject matter jurisdiction to establish a likelihood of redressability, not the mere possibility of redressability, and (2) the rule requiring a party seeking a TRO—which is an extraordinary remedy never awarded as a matter of right—to clearly demonstrate that the requested relief is necessary to avoid irreparable injury.

Second, Plaintiffs have not, in any event, demonstrated a likelihood of success or even serious questions going to the merits of their First and Fourteenth Amendment-based claims. This is not the first time a litigant has attempted to invoke those provisions to challenge state laws governing the signature gathering process for initiative petitions. Under Ninth Circuit law, such a challenger must show that the law creates a "severe burden" on the ability to successfully place an initiative on the ballot, and burdensomeness is gauged in part by assessing whether a "reasonably diligent" initiative committee could have succeeded despite the law. Here, although it is undeniable that the COVID-19 pandemic is currently wreaking havoc on initiative committees' ability to gather signatures, it is undisputed that some Arizona initiative committees (including one of the committees in this case) had gathered enough signatures to qualify before the pandemic took hold. It is also undisputed that the two committees in this case didn't start organizing and gathering signatures until the second half of 2019, whereas some of their counterparts began organizing as early as November 2018. Finally, although it is impossible to predict how the pandemic will play out in the coming weeks and months, it is possible that conditions will abate to the point that in-person signature gathering again becomes viable before the July 2020 submission deadline for signatures. On this record, Plaintiffs have not demonstrated that Arizona law creates a severe burden that would prevent a reasonably diligent initiative committee from placing its proposed initiative on the ballot. And because Plaintiffs failed to make this showing, the challenged laws are subject to a relaxed form of scrutiny that is easily satisfied by Arizona's interests in preventing fraud and promoting political speech and civic engagement.

Third, in large part because of the considerations discussed above, the Court does

not believe the issuance of a TRO would properly balance the equities or be in the public interest. Although Plaintiffs are correct that the COVID-19 pandemic constitutes an "extraordinary circumstance[]" that has resulted in "profound" dislocations (Doc. 2 at 10-11), it is also a profound thing for a federal court to rewrite state election laws that have been in place since the 1910s. The difficulty is underscored by the arguments made by some of the defendants in this case who don't oppose the relief sought by Plaintiffs. Those state and local officials have identified an array of granular policy choices this Court would need to make in order to effectively implement that relief. Such an approach would raise significant separation of powers and federalism concerns and run afoul of the Ninth Circuit's exhortation that, "[w]hile we are mindful that federal courts have a duty to ensure that national, state and local elections conform to constitutional standards, we undertake that duty with a clear-eyed and pragmatic sense of the special dangers of excessive judicial interference with the electoral process." *Soules v. Kauaians for Nukoli Campaign Comm.*, 849 F.2d 1176, 1182-83 (9th Cir. 1988).

BACKGROUND

A. The Parties

The three Plaintiffs in this action are (1) Arizonans for Fair Elections (AZAN) ("AFE"), a non-profit corporation that was formed to promote a ballot initiative known as the Fair Elections Act, (2) Arizonans Fed Up with Failing Healthcare (Healthcare Rising) ("HRAZ"), a non-profit corporation that was formed to promote a ballot initiative known as the Stop Surprise Billing and Protect Patients Act, and (3) Randi Turk, "a qualified elector within the State of Arizona who would like to sign the petitions supported by the Committee Plaintiffs but has not yet done so." (Doc. 1 ¶¶ 3-5.)

The defendants named in the complaint are Katie Hobbs, Arizona's Secretary of State ("the Secretary), and the county recorders from Arizona's 15 counties. (Doc. 1 ¶¶ 6-7.) However, after the Secretary made public statements suggesting she would not oppose Plaintiffs' requests, the state of Arizona ("the State"), represented by the Arizona Attorney General, moved to intervene. (Doc. 46.) That motion was granted over Plaintiffs'

opposition. (Docs. 59, 61.)[1]

B. Procedural History

On April 2, 2020, Plaintiffs filed their complaint and motion for a TRO. (Docs. 1, 2.) In support of their motion, Plaintiffs filed declarations from four individuals: (1) Anabel Maldonado, a campaign manager for AFE (Doc. 3); (2) Jessica Grennan, a campaign manager for HRAZ (Doc. 4); (3) Randi Turk, the individual Plaintiff (Doc. 5); and (4) Christopher Gallaway, an employee of a company that "provides campaign-related services to clients seeking to place initiatives on the ballot for voting by the electorate" (Doc. 79).

That same day, four different initiative committees filed a corrected petition for special action in the Arizona Supreme Court that raises claims and requests similar to those presented here. *See Arizonans for Second Chances Rehabilitation & Safety et al. v. Hobbs*, No. CV-20-0098-SA.[2]

On April 10, 2020, the State filed a corrected response to the TRO motion. (Doc. 77.) In support of the response, the State provided an affidavit that had been filed by one of the plaintiff-committees in the state-court action. (Doc. 77-1 at 3-8.)

Between April 7-13, 2020, some of the officials named as defendants in the complaint also filed responses to Plaintiffs' motion. In a nutshell, the county recorders from Pinal and Navajo Counties oppose the TRO request (Docs. 65, 72), the county recorder from Pima County "agrees with Plaintiffs that electronic signature gathering for initiative petitions should be temporarily allowed during the pendency of COVID-19 restrictions" (Doc. 53), the Secretary likewise "does not oppose the narrow relief sought by Plaintiffs for this election year," and "[i]ndeed . . . believes that such relief would further

[1] The Speaker of the Arizona House of Representatives and the President of the Arizona Senate also moved to intervene (Doc. 60) but their request was denied (Doc. 75).

[2] The State has also intervened in the state-court action, the Supreme Court has issued a schedule that calls for briefing to be completed by April 27, 2020, and the Supreme Court has announced no oral argument will be held. The docket is available at https://apps.supremecourt.az.gov/aacc/appella/ASC/CV/CV200098.pdf.

the public interest by protecting public health while facilitating continuity of democratic processes," but "requests that the Court place certain limitations on the relief to minimize administrative burden under the current circumstances" (Doc. 78), and the county recorders from Maricopa, Yuma, Mohave, and Santa Cruz Counties "take no position" on the merits of Plaintiffs' request (Docs. 62, 67, 73, 85).

Additionally, between April 10-14, 2020, the Court authorized the filing of amicus briefs by the Arizona Republican Party (Doc. 86), the Arizona Free Enterprise Club (Doc. 87), and the Goldwater Institute (Doc. 92).

On April 14, 2020, the Court held a telephonic hearing on the motion for a TRO. (Docs. 90, 102.) The bulk of the argument was provided by counsel for Plaintiffs and the State, and counsel for the Secretary and the Maricopa County recorder also provided remarks. (*Id.*) Media organizations and members of the public were allowed to listen to the hearing telephonically. (Doc. 68.)

On April 16, 2020, the State conditionally moved to certify certain questions to the Arizona Supreme Court. (Docs. 99, 100.) Specifically, the State requested that, if the Court determined this case turned on whether signatures gathered through E-Qual would "substantially comply" with the Arizona constitution, the Court certify that issue to the Arizona Supreme Court. (Doc. 100 at 2.) The State further requested that, if the Court found that certain provisions of the Arizona constitution violated the First and Fourteenth Amendments, it certify the question of whether those provisions could be severed from the rest of the constitution. (*Id.* at 2-3.) Plaintiffs oppose the certification request, arguing that both questions are unnecessary to resolve their motion. (Doc. 101).

ANALYSIS

I. Standing

The State asserts that Plaintiffs lack standing to pursue this action. (Doc. 77 at 3-4.) Specifically, the State argues that Plaintiffs have only sought to enjoin the statutory provisions in Title 19 governing signature collection but have not challenged the provisions of Article IV of the Arizona constitution that, by and large, impose the same requirements.

(*Id.*) In the State's view, this creates a standing problem—even if Plaintiffs succeed in arguing that Title 19 is unconstitutional, the Arizona constitution would stand and Plaintiffs' injury would not be redressed. (*Id.*)[3] During oral argument, Plaintiffs responded by acknowledging that they are not challenging Article IV of the Arizona constitution but arguing that the requested relief would still redress their injury because, once Title 19's requirements are stripped away, the Arizona courts would be free to conclude that gathering electronic signatures via E-Qual during a pandemic qualifies as "substantial compliance" with Article IV's requirements.

Plaintiffs' arguments are unavailing. "A litigant must demonstrate . . . a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement." *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 79 (1978). Thus, "[t]o establish redressability, a plaintiff must show that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992)). Here, it is entirely speculative that Arizona courts would conclude that gathering electronic signatures through the E-Qual system constitutes "substantial compliance" with Article IV's requirements.

As an initial matter, it is not entirely clear that Arizona courts would apply a "substantial compliance" standard in this context. It's true that Arizona courts have frequently stated that "[w]hen considering challenges to the form of initiative petitions, Arizona courts follow a rule of substantial compliance." *Wilhelm v. Brewer*, 192 P.3d 404, 405 (Ariz. 2008). The origin of this standard dates back to 1914, when the Arizona Supreme Court decided *Arizona v. Osborn*, 143 P. 117 (Ariz. 1914). The plaintiffs in that case sought to prevent an initiative from being placed on the ballot by invoking a statute

[3] Several amici make variants of the same argument. (Doc. 87 at 2 ["The elephant in the room is the Plaintiffs' failure to discuss the Arizona Constitution, and . . . the E-Qual system . . . cannot be instituted in a manner that is in compliance with the Arizona Constitution's provisions on the right to initiative itself."]; Doc. 92 at 5 ["[T]he relief Plaintiffs request would violate the Arizona Constitution, which expressly requires in-person signature gathering for initiatives."].)

that authorized courts to enjoin the secretary of state from certifying an initiative "[o]n a showing that any petition is not legally sufficient." *Id.* at 117. In addressing whether the challenged petition was "legally sufficient," the court examined the statutory law of states with similar initiative procedures and concluded that the words "legally sufficient" in the statute indicated "the Legislature meant to describe a valid petition, signed by legal voters, and complying substantially, not necessarily technically, with the requirements of the law." *Id.* at 118 (quoting *Oregon v. Olcott*, 125 P. 303, 304 (Ore. 1912)).

Osborn has served as the foundation for the Arizona courts' subsequent application of the "substantial compliance" standard. *Kromko v. Superior Court*, 811 P.2d 12, 19 (Ariz. 1991) ("The term 'legal sufficiency, as used [in a statute], requires substantial, not necessarily technical, compliance with the requirements of the law.") (quoting *Osborn*); *Feldmeier v. Watson*, 123 P.3d 180, 183 (Ariz. 2005) (citing *Kromko*); *Wilhelm*, 192 P.3d at 405 (citing *Feldmeier*). However, it appears that no case applying that standard expressly rooted it in the Arizona Constitution. Some, like *Osborn*, instead focused on statutory interpretation. *Kromko*, 811 P.2d at 19. Thus, whether substantial compliance survives as the applicable standard may be called into question by the Arizona Legislature's enactment in 2017 of A.R.S. § 19-102.01, which requires strict compliance with statutory and constitutional requirements. It is notable that the Arizona Supreme Court has, thus far, avoided answering that question. *Stanwitz v. Reagan*, 429 P.3d 1138, 1142 (Ariz. 2018) ("As our decision does not turn on whether the Committee strictly complied with § 19-118(C), we need not determine the constitutionality of the strict compliance requirement of § 19-102.01(A)."). *See also Morales v. Archibald*, 439 P.3d 1179, 1181 (Ariz. 2019).

But even assuming that "substantial compliance" survives as the applicable standard in Arizona, it is entirely speculative that the Arizona courts would deem the gathering of electronic signatures via E-Qual to be substantially compliant with Article IV's requirements. Again, the text of Article IV requires an initiative proponent to submit an "affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant . . . ." Ariz. Const., Art. IV,

Part 1, § 1(9). The Arizona courts have repeatedly commented upon the importance and significance of this physical-presence requirement. *See, e.g.*, *Stanwitz*, 429 P.3d at 1143 ("[W]e note that the Arizona Constitution specifically envisions a signature verification requirement . . . and this Court has observed that '[t]he circulator is the only person in the process who is required to make a sworn statement and is, therefore, the person under the greatest compulsion to lend credibility to the process.'") (citation omitted). Thus, even though the "substantial compliance" standard allows Arizona courts to overlook "technical" errors and "errors in petition formalities" if they do not undermine "the purposes of the relevant statutory or constitutional requirements," *Wilhelm*, 192 P.3d at 405, it is difficult to see how non-compliance with the physical-presence requirement could be disregarded under these standards. *Cf. Porter v. McCuen*, 839 S.W.2d 521, 523 (Ark. 1992) (rejecting request "not to impose too rigid a standard of compliance with the requirement that signatures be obtained 'in the presence' of the person circulating the petition" and concluding "that where the signatures are gathered in areas and places while the canvasser is neither physically or proximately present . . . substantial compliance is lacking").

One final point is worth emphasizing. Whether the use of E-Qual could be deemed substantially compliant with Article IV's requirements is a pure question of state law. It is also a question the Arizona Supreme Court may be asked to decide in the coming weeks in the parallel lawsuit noted above.[4] These circumstances amplify the federalism concerns

[4] Although two amici suggest the Court should abstain from hearing this case under the *Pullman* abstention doctrine (Doc.86 at 7-8; Doc. 92 at 7), Plaintiffs and the State both asserted during oral argument that *Pullman* abstention is unwarranted. The Court agrees. "*Pullman* abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy that is properly before it," *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (citation omitted), and the Ninth Circuit has emphasized that *Pullman* abstention is particularly inappropriate in cases—like this case—involving First Amendment challenges. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 528 (9th Cir. 2015) ("It is rarely appropriate for a federal court to abstain under *Pullman* in a First Amendment case.") (citation omitted). Additionally, although it might theoretically be possible to certify the "substantial compliance" question to the Arizona Supreme Court, *see generally Doyle v. City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009) ("[W]e could simply abstain from deciding this case under the *Pullman* doctrine . . . [but] certification is appropriate in *Pullman*-type abstention cases . . . ."), there is no need to pursue certification here because the unsettled nature of the question alone is enough to prevent Plaintiffs from meeting their burden of establishing a likelihood of redressability

that would flow from ruling in Plaintiffs' favor on a TRO request. *Cf. M.S.*, 902 F.3d at 1090 (acknowledging that "[t]he interaction between the federalism limits on a district court's remedial power . . . and a district court's power in general to order prospective relief against state executive officials . . . remains an open and contentious area of the law" but concluding that "where, as here, a plaintiff sues state officials seeking intrusive affirmative relief that is incompatible with democratic principles and where there is no basis for the district court to invoke its equitable power, such relief would also violate principles of federalism").

II. Merits

Plaintiffs' failure to establish redressability means this action must be dismissed due to a lack of subject matter jurisdiction—an outcome that, in turn, means Plaintiffs' TRO request must be denied as moot. *See, e.g.*, *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79, 83 (D.D.C. 2008) ("[B]ecause the court determines that the plaintiffs lack standing, the court . . . denies as moot the plaintiffs' motion for a preliminary injunction."). Nevertheless, to provide a complete record in the event of appellate review, the Court will proceed to analyze the merits of the TRO request.

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quotation omitted). *See also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."). A plaintiff seeking a preliminary injunction must show that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm without an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. "But if a plaintiff can only

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and, relatedly, a likelihood that the requested relief is necessary to avoid irreparable harm. Indeed, the parties have not identified any precedent supporting the issuance of a certified question in the middle of a TRO proceeding and such an approach would seem self-defeating—the whole point of a TRO is that the plaintiff needs immediate relief. That is why the law places such a heavy burden on the party seeking a TRO and authorizes the issuance of a TRO only in cases presenting a clear entitlement to relief.

show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quotation omitted). Under this serious-questions variant of the *Winter* test, "[t]he elements . . . must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Lopez*, 680 F.3d at 1072.

Regardless of which standard applies, the movant "carries the burden of proof on each element of the test." *Envtl. Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000). Further, there is a heightened burden where a plaintiff seeks a mandatory preliminary injunction, which should not be granted "unless the facts and law clearly favor the plaintiff." *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1441 (9th Cir. 1986). A court should not issue such an injunction "unless extreme or very serious damage will result." *Marlyn Nutraceuticals v. Mucos Pharma Gmbh & Co.*, 571 F.3d 873, 878-89 (9th Cir. 2009). They "are not issued in doubtful cases." *Id.*

A. **Likelihood of Success**

1. Appropriate Standard

It is necessary to begin by identifying the correct test governing Plaintiffs' claims. The State argues, and Plaintiffs seem to agree, that the *Anderson*/*Burdick* framework supplies the relevant test.[5] That framework is a flexible approach that balances the severity of the restriction against the government's purported interest. *Dudum v. Arntz*, 640 F.3d 1098, 1105-1106 (9th Cir. 2011). Severe restrictions trigger strict scrutiny, but less-than-severe restrictions only require the government to demonstrate "important regulatory interests." *Id.*

The State cites *Dudum* as establishing that "*all* constitutional challenges to election regulations are governed by" the *Anderson*/*Burdick* framework. (Doc. 74 at 8.) *Dudum*,

[5] This framework draws its name from *Anderson v. Celebreeze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

however, focused specifically on "[r]estrictions on voting," 640 F.3d at 1105,[6] and the Ninth Circuit has suggested in subsequent decisions that ballot access regulations (and, in particular, regulations governing the signature gathering process for initiative petitions) raise unique issues that aren't present in pure voting restriction cases. *Angle v. Miller*, 673 F.3d 1122, 1130 (9th Cir. 2012) ("Although . . . a district-by-district system of counting *votes* in a statewide election would violate equal protection, . . . district-by-district counting of *signatures* obtained to qualify an initiative for the ballot [does not] present[] the same problem. Votes and petition signatures are similar in some respects, but ballot access requirements and elections serve different purposes.") (citations omitted). Thus, before turning to the parties' specific arguments, it is helpful to begin by summarizing the two most analogous Ninth Circuit decisions involving challenges to state laws governing the signature gathering process for initiative petitions.

First, *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), involved a challenge to an Oregon law that "prohibit[ed] . . . payment to electoral petition signature gatherers on a . . . per signature basis." *Id.* at 951. The plaintiffs argued this law violated the First Amendment but the district court rejected their challenge and the Ninth Circuit affirmed. *Id.* The court began by noting that, although "the circulation of initiative and referendum petitions involves core political speech," state regulation in this area is "inevitabl[e]" and "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Id.* at 961 (citations and internal quotation marks omitted). Thus, the court held that the plaintiffs' First Amendment challenge was governed by the same general test later articulated in *Dudum*: severely burdensome regulations must pass strict scrutiny, but less burdensome regulations trigger less exacting review. *Id.* As for the first part of this test—whether the law created a "'Severe' or 'Lesser' Burden"—the court concluded it created a lesser burden because, among other things, (1) the

[6] Specifically, *Dudum* involved a challenge to San Francisco's practice, following the its adoption of the instant runoff voting method, to restrict the number of rankings on each ballot to three. 640 F.3d at 1100-02. The *Dudum* plaintiffs argued this limitation was unconstitutional because it had the practical effect of disenfranchising certain voters and/or diluting certain votes. *Id.* at 1107-14.

declarations proffered by the plaintiffs to illustrate the supposed difficulty of gathering signatures under the law were based on "unsupported speculation" (*id.* at 964-65), and (2) at least one referendum petition qualified for the ballot after the enactment of the law and it had a relatively low signature error rate (*id.* at 966-67). This finding, in turn, meant that the challenged law was only subject to "less exacting review," and the court concluded that Oregon's "important regulatory interest in preventing fraud and its appearances in its electoral processes" was sufficient to insulate the law from constitutional challenge. *Id.* at 969-71.[7]

Next, *Angle* involved a challenge to a Nevada law that required the proponents of a ballot initiative to obtain signatures from at least 10% of the registered voters in each of Nevada's congressional districts. 673 F.3d at 1126-27. The plaintiffs argued this law violated the First Amendment but the district court rejected this claim and the Ninth Circuit affirmed.[8] *Id.* at 1127. The court analyzed the claim under the same test it had applied in *Prete*—that is, an initial assessment of whether the regulation resulted in a "severe burden[]" on the plaintiffs' First Amendment rights, then the application of either strict scrutiny or "less exacting review" depending on the outcome of that assessment. *Id.* at 1132.

During the first step of that analysis, the court noted that "restrictions on the initiative process" have the potential to create two different types of First Amendment burdens: first, they can "restrict one-on-one communication between petition circulators and voters," and second, they "can make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.* (citations and internal quotation

[7] The *Prete* court also noted that Oregon law (like Arizona law) requires that "[p]etition circulators must certify that the signatures on the petitions were obtained in the presence of the circulator . . . ." *Id.* at 969 n.26.

[8] The plaintiffs in *Angle* also raised an unsuccessful equal protection challenge to the Nevada law, *id.* at 1127-32, but it is unnecessary to summarize the Ninth Circuit's equal protection analysis because this case does not involve an equal protection challenge. The absence of an equal protection claim also distinguishes this case from *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003), which invalidated an Idaho law governing the signature requirements for initiative petitions on equal protection grounds.

marks omitted). The court concluded the first category was inapplicable because the challenged Nevada law "does not restrict one-on-one communication between petition circulators and votes" and indeed "likely *increases* the total quantum of speech on public issues, by requiring initiative proponents to carry their messages to voters in different parts of the state." *Id.* at 1132-33 (citation and internal quotation marks omitted). As for the second category, the court stated that the test was whether a "reasonably diligent" initiative campaign could have secured a place on the ballot despite the challenged regulation. *Id.* at 1133 (citing *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008)). Although the plaintiffs had submitted declarations asserting that the regulation would inhibit their ability to place initiatives on the ballot, the court concluded these affidavits were "too vague, conclusory and speculative" and also noted that the plaintiffs had failed to present evidence that "other initiative proponents have been unable to qualify initiatives for the ballot as a result of the [challenged law]." *Id.* at 1133-34. Given this backdrop, the court applied less exacting scrutiny and concluded the law passed constitutional muster because it was supported by important regulatory interests—Nevada's interests in ensuring state-wide support for initiatives and avoiding voter confusion. *Id.* at 1134-36.

In sum, under *Prete* and *Angle*, Plaintiffs bear the initial burden of showing that the challenged provisions of Title 19 impose a severe burden on their First Amendment rights. Such a burden may take the form of an impediment on their ability to engage in one-on-one communication or a limitation on their ability to actually earn a place on the ballot. If Plaintiffs demonstrate the existence of severe burden, strict scrutiny applies, but if not, a relaxed degree of scrutiny applies. *See also Ariz. Green Party v. Reagan*, 838 F.3d 983, 985 (9th Cir. 2016) ("Ballot access litigation follows a common pattern. The scrutiny courts employ . . . turns on the severity the law imposes on . . . First and Fourteenth Amendment rights. The plaintiff bears the burden of showing the severity of the burden on those constitutional rights; evidence that the burden is severe, de minimis, or something in between, sets the stage for the analysis by determining how compelling the state's interest must be to justify the law in question."); *id.* at 988 ("This is a sliding scale test,

where the more severe the burden, the more compelling the state's interest must be, such that a state may justify election regulations imposing a lesser burden by demonstrating that the state has important regulatory interests.") (quotation omitted).[9]

2. Whether The Burden Is Severe

As noted, initiative-related regulations can create two different types of First Amendment harms: (1) they can inhibit one-on-one communication with voters, and/or (2) they can interfere with the proponents' ability to secure a place on the ballot. Although Plaintiffs focus primarily on the second type of harm in their complaint and moving papers,[10] some portions of the complaint can be interpreted as alleging the first type of harm. (*See, e.g.*, Doc. 1 ¶¶ 85-87 [arguing that "[t]he First Amendment is at the core of petition circulation . . . because it involves interactive communication concerning political change," that such "advancement of beliefs and ideas[] is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment," and that "[t]he Secretary's strict enforcement of A.R.S. § 19-112 . . . unduly burdens the public's right to engage in political speech during the COVID-19 pandemic").

To the extent Plaintiffs intended to allege the first type of harm, their claim is unavailing. The in-person signature requirements of Title 19 affirmatively promote speech. *See, e.g., Angle*, 673 F.3d at 1132-33 (stating that Nevada's signature requirements "likely *increase*[*d*] the total quantum of speech on public issues, by requiring initiative proponents to carry their messages to voters in different parts of the state"). To the extent Plaintiffs aren't currently able to engage in face-to-face interaction with qualified electors, that's the fault of the COVID-19 pandemic, not the Title 19 requirements. It's only when a state law bars certain individuals from serving as petition circulators that the first category of First Amendment harm might arise. *Compare Meyer v. Grant*, 486 U.S. 414, 422-23 (1986)

[9] In any event, the level of review is something more than rational basis. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (en banc).

[10] *See, e.g.*, Doc. 1 ¶ 78 ("Absent injunctive relief, Plaintiff[s] will suffer irreparable injury . . . [because] it is impossible for Plaintiffs [to] obtain signatures during the pandemic to qualify their measure for the ballot."); Doc. 2 at 14 ("The injury to the Plaintiffs is the Plaintiffs not being able to obtain the required number of signatures by the July 2, 2020 deadline . . . .").

(holding that a Colorado law was unconstitutional in part because "it limits the number of voices who will convey appellees' message and the hours they can speak").

Plaintiffs' arguments concerning the second category of harm present a closer call. Plaintiffs contend they were forced to stop collecting signatures in mid-March 2020 due to the outbreak of the pandemic. At the time of cessation, AFE had collected 110,033 signatures (Doc. 3 ¶ 29) and HRAZ had collected 273,786 signatures (Doc. 4 ¶ 17). During this election cycle, Arizona law requires at least 237,645 valid signatures—meaning that HRAZ has already collected more than the minimum number—but Plaintiffs have submitted a declaration from Christopher Gallaway, their professional organizer, who avers that, "[i]n my experience, ballot initiative committees should obtain one and a half to two times the number of required signatures to account for signature sheets that may be eliminated and signatures that may be stricken for deficiencies. In this case, it means that [Plaintiffs] should obtain between 356,468 to 475,290 signatures." (Doc. 79 ¶ 27.) Mr. Gallaway also states in his declaration that, but for the COVID-19 outbreak, his firm "could have gathered an average of 160,000 signatures per initiative campaign" during the period between March 11, 2020 and April 30, 2020, which is period of time during which government entities have ordered or recommended social distancing. (*Id.* ¶ 47.) Finally, Plaintiffs and Mr. Gallaway all state in their respective declarations that it is impossible as a practical matter to gather any new signatures while the various government orders remain in effect. (Doc. 3 ¶¶ 31-33; Doc. 4 ¶¶ 19-25; Doc. 79 ¶¶ 35-46.)

In response, the State offers four reasons why the burdens on Plaintiffs arising from Title 19's signature-gathering requirements shouldn't be considered severe. (Doc. 77 at 5-9.) Three of those arguments are unpersuasive. First, the State argues that Plaintiffs haven't *really* shown that it's impractical to keep gathering in-person signatures in the present environment because "[n]one of the Plaintiffs[']] declarants appear to consider genuinely measures such as using single-use signature sheets, social distancing, or scheduling petition signing in advance at prepared and sanitary locations. Perhaps those measures would be sufficient. Perhaps not. But Plaintiffs bear the burden of proof, and

their declarations are simply too thin a reed to satisfy it." (*Id.* at 6.) The Court appreciates the State's emphasis on the burden of proof, but Plaintiffs' averments on this point are compelling and consistent with common sense. The fact the TRO hearing was held telephonically, pursuant to a recent General Order postponing most court hearings in the District of Arizona and requiring that all others be held "in the safest manner possible" and "scheduled and conducted by video teleconference or telephone to the extent possible" (D. Ariz. G.O. 20-17), underscores this point.

Second, the State contends that, because the challenged Title 19 requirements "are viewpoint-neutral and even handed[,] applying to *all* initiatives regardless of their subject matter or position," this viewpoint neutrality "militates against finding a severe burden." (Doc. 77 at 8.) The problem with this argument is that it conflates First Amendment principles that apply in other contexts with the specific inquiry required under *Angle*—whether the burden created by the challenged regulation should be considered "severe" because it "make[s] it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot." 673 F.3d at 1132.[11] *Angle* itself involved a viewpoint-neutral law, yet the Ninth Circuit didn't suggest that a different or less stringent test applied due to its neutrality.

Third, during oral argument, the State asserted—in response to a hypothetical question about whether a pandemic that persisted across an entire election cycle could be considered a severe burden—that "it's important to note that there's no constitutional right to make laws by petition at all. And, in fact, most states do not do so. So if that were actually the case, Arizona would for that election cycle simply become like most other states in not having an opportunity to law make by initiative." (Doc. 102 at 42-43.) This argument, like the previous one, is foreclosed by *Angle*, which repeatedly emphasized that, although a state is not required to allow its citizens to enact legislation through the initiative

[11] The case cited by the State in support of its viewpoint-neutrality argument, *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013), involved a constitutional challenge to a California law that "eliminat[ed] party primaries and general elections with party-nominated candidates, and substitute[ed] a nonpartisan primary and a two-candidate runoff." *Id.* at 1112.

process, a state that chooses to make that process available must not restrict it in an unconstitutional manner. *See, e.g.*, 673 F.3d at 1127-28 (although a "state may decline to grant a right to legislate through ballot initiatives . . . when a state chooses to give its citizens the right to enact laws by initiative, it subjects itself to the requirements of the Equal Protection Clause") (citations and internal quotation marks omitted); *id.* at 1133 (although "[t]here is no First Amendment right to place an initiative on the ballot . . . we assume that ballot access restrictions . . . trigger strict scrutiny[] when they significantly limit the ability of initiative proponents to place initiatives on the ballot"); *id.* at 1133 n.5 ("The state's power to ban initiatives thus does not include a lesser power to restrict them in ways that unduly hinder political speech").

The State's final argument—diligence—has more force. The State notes that Plaintiffs could have begun organizing and gathering signatures in November 2018 (as at least one other initiative committee did) yet didn't file the necessary registration paperwork with the Secretary until August 20, 2019 (HRAZ) and October 30, 2019 (AFE), thereby wasting between 45% and 55% of the 20-month election cycle. (Doc. 77 at 5-7 & nn.3, 6.) In contrast, the State notes that the government-issued social distancing guidelines arising from the COVID-19 pandemic, which came into effect on March 11, 2020, will cover only 7.5% to 12.5% of the election cycle, depending on whether they remain in effect through April 30, 2020 or May 31, 2020. (*Id.*) And the States notes that a different committee, which is serving as one of the plaintiffs in the state-court lawsuit, had already gathered around 300,000 signatures by the time of the pandemic outbreak. (*Id.* at 7, citing Doc. 77-1 at 5 ¶ 5.) Given all of this, the State concludes: "It was *Plaintiffs' choice*—not the State's—to procrastinate and dither away time that might later become critical. Plaintiffs' delay absolutely dwarfs the time period that COVID-19 is likely to affect their signature gathering efforts. . . . [I]t appears likely that Plaintiffs could have qualified for the ballot had they exerted reasonable diligence." (*Id.* at 6-7.)

The Court agrees with the State that, on this record, Plaintiffs have not established that the Title 19 requirements create a "severe burden" on the ability to place an initiative

on the ballot. As noted, "the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' initiative proponents can gain a place for their proposed initiative on the ballot." *Angle*, 673 F.3d at 1133 (quotation omitted). The party challenging the regulation bears the burden of establishing severity. *Reagan*, 838 F.3d at 989. "Speculation, without supporting evidence," is insufficient to demonstrate that the statutory scheme results in a severe burden. *Angle*, 673 F.3d at 1134; *Prete*, 438 F.3d at 964 (rejecting "unsupported speculation" as insufficient to demonstrate severe burden).

Here, a "reasonably diligent" committee could have placed its initiative on the November 2020 ballot despite the Title 19 requirements and the COVID-19 outbreak. It is notable that Plaintiffs' declarations fail to provide any explanation (let alone justification) for why they waited so long to begin organizing and gathering signatures. The State has presented evidence that at least one Arizona initiative committee began that process in November 2018, yet the two committees in this case waited until the second half of 2019, thereby missing out on essentially a year's worth of time to work toward the 237,645 signature cutoff.[12] Moreover, notwithstanding that delay, one of the Plaintiffs was able to gather over 270,000 signatures—much more than the amount required under state law, albeit not enough to provide the buffer recommended by Mr. Gallaway—in the few months it was operating, and a different Arizona committee was able to gather around 300,000 signatures during the same abbreviated timeframe. All of this strongly suggests that, had Plaintiffs simply started gathering signatures earlier, they could have gathered more than enough to qualify for the ballot before the COVID-19 pandemic started interfering with their efforts.

[12] The Court recognizes there may be sound reasons for an initiative committee to delay the ramp-up process until the latter part of the election cycle and that it may be the norm for committees to engage in such delay. The difficulty here is that Plaintiffs haven't proffered any *evidence* of those reasons and norms in their declarations. (Doc. 102 at 33 [Plaintiffs' acknowledgement that "we haven't provided evidence that it's typical"].) It's hornbook law that the party seeking a TRO bears the burden of establishing a clear entitlement to relief, and *Prete* and *Angle* emphasize that, even outside the TRO context, the party raising a constitutional challenge to a state electoral law must present non-speculative evidence in support of its claim that the law creates a severe burden.

This analysis, to be clear, should not be interpreted as a criticism of Plaintiffs. They are hardly the only members of our community who failed to anticipate and plan for a once-in-a-century pandemic. But the relief they are seeking in this case is profound—the displacement of a bedrock component of Arizona law. Such laws should not be wantonly overturned, and that is why courts (including the Ninth Circuit) require parties raising constitutional challenges to state ballot access laws to show not only that *they* have been thwarted by the law, but that a reasonably diligent party would have been thwarted, too. Thus, in *Prete*, the Ninth Circuit rejected the challenge to Oregon's law in part because a different referendum campaign was able to "qualif[y] for the . . . Oregon ballot, *after* the passage of [the challenged law]"—an outcome that "weighs against plaintiffs' claim." 438 F.3d at 967. Similarly, in *Angle*, the Ninth Circuit rejected the challenge to Nevada's law in part because the plaintiffs "have not presented any evidence" that "other initiative proponents have been unable to qualify initiatives for the ballot as a result of the [challenged law]." 673 F.3d at 1134.[13]

Finally, the Court is unpersuaded by Plaintiffs' citation of three decisions in which other courts issued emergency injunctive relief in an attempt to address unanticipated electoral dislocations. As an initial matter, none of those decisions were issued by courts in the Ninth Circuit and none applied the Ninth Circuit standards addressed above. Additionally, each is distinguishable for other reasons.

First, in *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016), the plaintiffs sought a TRO requiring an emergency extension of Florida's voter registration deadline because "[j]ust five days before that deadline . . . Hurricane Matthew bore down and unleashed its wrath on the State of Florida. Life-threatening winds and rain forced many Floridians to evacuate or, at a minimum, hunker down in shelters or their homes." *Id.* at 1254. The district court concluded that because "Florida's statutory

[13] For these reasons, Plaintiffs' contention that they "lost the opportunity to collect up to 160,000 signatures between March 11, 2020, and April 30, 2020" due to the combination of Title 19 and the COVID-19 responses (Doc. 79 ¶ 47) misses the mark. Even assuming that 160,000 figure is accurate, a reasonably diligent campaign wouldn't have needed to put all of its eggs in the March/April basket.

framework would categorically deny the right to vote" to those who failed to register before the hurricane, it amounted to a severe burden that warranted strict scrutiny. *Id.* at 1257.

Second, Plaintiffs cite *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1320819 (W.D. Wis. 2020). There, the plaintiffs sought a TRO extending the date by which individuals could register to vote electronically, rather than in-person, in light of the COVID-19 pandemic. The court, relying on *Florida Democratic Party*, found that the existing voter registration deadline presented an "excruciating dilemma that will soon be faced by eligible voters . . . [to] either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote." *Id.* at *5. The court concluded that the dilemma presented "an undue burden" and that Wisconsin's proffered reasons for maintaining the deadline were insufficient to justify it. *Id.* at *5-*6.

The key difference between those cases and this one is that *Florida Democratic Party* and *Bostelmann* were both voting restriction cases, while this is a ballot access case. As discussed above, the overarching standard is the same, but the key distinction comes in how courts analyze whether a severe burden is present. When assessing whether a state law presents a severe burden on ballot access, courts in the Ninth Circuit look to whether a reasonably diligent initiative proponent would have been able to get the issue on the ballot despite the law. Regulations on the right to vote, in contrast, do not apply the "reasonably diligent" standard. *See, e.g., Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1023-1027 (9th Cir. 2016); *Dudum*, 640 F.3d at 1105-07. *See also Angle*, 673 F.3d at 1130 ("Votes and petition signatures are similar in some respects, but ballot access requirements and elections serve different purposes."). Notably, neither *Florida Democratic Party* nor *Bostelmann* examined whether a reasonably diligent voter would have already registered by the time the respective crises struck.[14]

[14] Additionally, Plaintiffs fail to cite recent decisions by other federal courts in Wisconsin denying similar claims for relief. *Taylor v. Milwaukee Election Comm'n*, 2020 WL 1695454, *9 (E.D. Wisc. 2020) (denying motion for preliminary injunction to postpone the Wisconsin election in light of the COVID-19 pandemic: "[I]t appears that tomorrow morning, those who have not yet voted will face a grim choice: go out to the polling places (the ones that are open) and risk being exposed to the virus or spreading it

Plaintiffs' final case is *Faulkner v. Va. Dep't of Elections*, CL-20-1456 (Va. Cir. Ct. 2020). There, a Virginia trial court enjoined enforcement of a Virginia statute requiring a political candidate to gather a certain number of signatures in order to appear on the 2020 primary ballot. *Id.* at 3. The court found that, in light of the ongoing COVID-19 pandemic, the statute imposed a "significant" burden and was therefore subject to strict scrutiny. *Id.* at 2-3. Absent from the court's order, however, is any discussion of whether a reasonably diligent candidate would have acquired enough signatures in spite of the statute. *Id.* Regardless of the reason for that omission, this Court is bound by Ninth Circuit law, which requires an examination of what a reasonably diligent proponent would have accomplished in the same circumstances.

3. Important Regulatory Interest

"Because [Plaintiffs] have not shown that [Title 19] imposes severe burdens, the state need show only that the rule furthers an important regulatory interest." *Angle*, 1134-35. Additionally, the State need not demonstrate that the rule is narrowly tailored to promote that interest. *Dudum*, 640 F.3d at 1114 ("[W]e emphasize that the City is *not* required to show that its system is narrowly tailored . . . . [W]hen a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests.").

The Supreme Court has recognized that Arizona (like other states) "indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the function of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). Here, the provisions of Title 19 are clearly aimed at maintaining the integrity of the initiative process. The Arizona Legislature has declared that "strict compliance with the constitutional and

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to their friends and neighbors, or forego one of the most sacred rights of citizenship—the right to have a say in the governance of their communities, their state and their nation. 'Extraordinary' is a feeble description of the circumstances that appear to be leading to that choice. But this court must hold . . . that this federal court does not have the authority 'to act as the state's chief health official' by making the decision that needs to be made to put the health and safety of the community first. . . . The court DENIES the plaintiffs' motion for preliminary injunction.").

statutory requirements for the referendum process and in the application and enforcement of those requirements provides the surest method for *safeguarding the integrity and accuracy* of the referendum process." A.R.S. § 19-101.01 (emphasis added). It has made the same finding with respect to the initiative process. *Id.* § 19-102.01(A). And the Arizona Supreme Court has held that Title 19's regulation of signature gatherers "represents a reasonable means of fostering transparency . . . and mitigating the threat of fraud or other wrongdoing infecting the petition process." *Stanwitz,* 429 P.3d at 1144.

Plaintiffs do not appear to seriously contest this point. They acknowledge the State's interest in "ensur[ing] that the hundreds of thousands of required signatures on the ballot come from qualified electors." (Doc. 2 at 12.) Further, they don't argue that Title 19's requirements would fail under a standard of review below strict scrutiny. (*Id.* ["Under ordinary circumstances, requiring [in-person] gathering of signatures would provide somewhat of a burden, but it could arguably be justified by the State's interest in preventing fraud . . . ."].) Thus, it would seem that all agree that the State has an important regulatory interest that satisfies the second component of the analysis. *See also Prete*, 438 F.3d at 969 (Oregon's law restricting use of paid signature gatherers was supported by Oregon's "important regulatory interest in preventing fraud and its appearances in its electoral processes").[15]

Finally, the State also argues that Title 19's requirements further the "significant interest in promoting dialogue by requiring proponents of initiatives to individually engage signers and in doing so provide opportunity for meaningful discussion." (Doc. 77 at 10.) Although neither party has cited any case addressing whether this interest qualifies an important regulatory interest for purposes of the *Prete/Angle* framework, common sense

[15] Given this conclusion, the Court need not resolve amicus's contention that the E-Qual system would be worse than the Title 19 requirements at preventing fraud (Doc. 86 at 2 ["E-Qual Is Highly Susceptible To Fraud"]) or Plaintiffs' rejoinder during oral argument that E-Qual may be better than the Title 19 requirements at preventing fraud. As noted, when an electoral rule doesn't create a severe burden, the state isn't required to show that it constitutes the best way to promote the regulatory interest at issue. *Dudum*, 640 F.3d at 1114 (if relaxed scrutiny applies, "there is no requirement that the rule is the only or the best way to further the proffered interests").

suggests it should qualify and Plaintiffs' counsel did not dispute, during oral argument, that it should qualify.[16]

4. Conclusion

For the reasons stated above, Plaintiffs have not demonstrated a likelihood of success on the merits or even a substantial question going to the merits. This failure, standing alone, requires the denial of their request for a TRO.

B. **Irreparable Injury**

"A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of preliminary relief. Mere possibility of harm is not enough." *Enyart v. Nat. Conference of Bar Exam'rs*, 630 F.3d 1153, 1165 (9th Cir. 2011) (citation omitted).

The Court has already determined that Plaintiffs lack standing because it is speculative, as opposed to substantially likely, that the relief sought in their complaint would actually redress their injuries in light of their failure to challenge Article IV of the Arizona constitution. This means Plaintiffs also cannot demonstrate they will likely suffer irreparable injury in the absence of a TRO. *Cf. Hispanic Affairs Project v. Perez*, 141 F. Supp. 3d 60, 67 n.6 (D.D.C. 2015) ("Whether the requested injunctive relief can redress plaintiff Llacua's injuries . . . dovetails with consideration of the showing of irreparable harm . . . .").

Additionally, putting aside the Article IV issue, it is unclear whether each committee's inability to gather in-person signatures during the pandemic will cause it to fail to secure a place on the November 2020 ballot. As for AFE, it only gathered 110,333 signatures before March 11, 2020—which is only 46% of the required minimum figure of 237,645 and only 31% of the "buffer" figure of 356,468 provided by Mr. Gallaway—and the Court is dubious of Plaintiffs' assertion that AFE would have gathered 160,000

[16] Instead, Plaintiffs' counsel disputed the State's contention that shifting to electronic signature gathering through the E-Qual system would result in less speech, arguing that E-Qual would result in meaningful exchanges of speech, too. But again, "there is no requirement that the rule is the only or the best way to further the proffered interests." *Dudum*, 640 F.3d at 1114.

additional signatures during the March/April timeframe. The only evidence Plaintiffs have proffered in support of this anticipated increase in AFE's collection rate is the assertion in Mr. Gallaway's declaration that "[b]y the week of February 22, 2020, FieldWorks, on behalf of each Ballot Initiative Committee, was in full swing gathering signatures and ahead of schedule to meet the goals for obtaining a sufficient number of signatures." (Doc. 79 ¶ 32.) This assertion is conclusory and lacks foundation. The Court has no basis for understanding what it means for a committee to be "in full swing" or why gathering only 31-46% of the required signatures during the first 16 months of a 20-month collection cycle could nevertheless be considered "ahead of schedule." On these facts, Plaintiffs have not demonstrated that it is likely, as opposed to merely possible, that but-for the COVID-19 pandemic, AFE would have gathered at least 237,645 signatures, and perhaps as many as 356,468 signatures, by the July 2, 2020 cutoff and therefore qualified for the November 2020 ballot.

As for HRAZ, the issue is that it had already gathered 273,786 signatures before the COVID-19 restrictions came into force. This is tens of thousands more than the required minimum figure. Although the Court appreciates Mr. Gallaway's observation that prudent ballot initiative committees "should" obtain additional signatures, above and beyond the required figure, to account for the possibility that some of the signatures will be deemed invalid and stricken, this is not the same thing as cognizable evidence establishing a likelihood that HRAZ's 273,786 signatures will prove insufficient. It would be inappropriate to issue a TRO based on speculation concerning its necessity. *Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").[17]

[17] The Court appreciates the difficulty of demonstrating irreparable harm in this context—a committee with too few signatures cannot establish it, and neither can a relatively better-off committee that is seeking preliminary injunctive relief in an abundance of caution. But this difficulty is a function of the TRO standards, which rightly recognize that because "[a] preliminary injunction is an extraordinary and drastic remedy," one "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez*, 680 F.3d at 1072.

Finally, as for Ms. Turk, although the Court has already stated that it agrees with Plaintiffs' contention that the COVID-19 pandemic is currently interfering with the committees' ability to gather in-person signatures *en masse*, it doesn't follow that an injunction is required so Ms. Turk can personally sign the committees' petitions. There is plenty of time between now and July 2, 2020 for Ms. Turk to make arrangements, while adhering to social distancing requirements, to sign each committee's petition in the presence of a circulator.

C. **Balance of Equities**

"[D]istrict courts must give serious consideration to the balance of equities." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (citation omitted). In doing so, courts must consider "all of the competing interests at stake." *Id.*

Plaintiffs' arguments concerning the balance-of-equities factor are all predicated on the assumption that the challenged provisions of Title 19 create a severe burden on Plaintiffs' First Amendment rights and will preclude Plaintiffs from qualifying for the November 2020 ballot. (Doc. 2 at 13-15.) But as discussed above, that assumption is unfounded.

On the other hand, a state "suffers an irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. For Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). Additionally, it is significant that Plaintiffs are seeking to enjoin the State's election rules midway through the election cycle. The Supreme Court has repeatedly instructed courts to exhibit caution when faced with such requests. *See, e.g.*, *Purcell*, 549 U.S. at 4 ("Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases . . . .").

At bottom, the balance-of-equities factor weighs against issuing a TRO.

D. **Public Interest**

When considering whether to grant preliminary injunctive relief, courts must

consider the requested injunction's impact on the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138-39 (9th Cir. 2009). When a proposed injunction is narrow and limited to the parties, the public interest "will be at most a neutral factor in the analysis." *Id.* at 1139. "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequence, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.*

Here, Plaintiffs seek an injunction that would apply to all "initiative and petition proponents and supporters." (Doc. 2 at 2.) Thus, the injunction they seek extends to the public at large.

The public interest weighs against issuing such a TRO. Although the public has a strong interest in enacting laws through the initiative process, and although the Court is loathe to take any action (or inaction) that would expose Arizonans to an increased risk of harm during these challenging times, the signature requirements Plaintiffs seek to displace have been a part of Arizona's constitutional and electoral landscape for over a century. These requirements reflect a considered judgment, which has stood the test of time, about how best to prevent electoral fraud and promote civic engagement. The public has a strong interest in the continued adherence to such requirements, even during challenging times.

The State has also explained that, due to unique features of Arizona law, it is extremely difficult to amend a law that was enacted via the initiative process. (Doc. 77 at 10.) This underscores the public's interest in adhering to a sound initiative process, with time-tested procedures to prevent fraud and promote civic engagement, in every election, not just every election except this one.

Finally, although Plaintiffs' complaint and moving papers suggest it would be easy for the Court to simply decree that the use of the E-Qual system is now permissible for initiative-related signature gathering, other parties paint a different and more complicated picture. For example, the Secretary (who supports Plaintiffs' request) included in her response to the TRO motion a "request[] that the Court place certain limitations on the relief to minimize the administrative burden under the current circumstances," including

"specify[ing] whether the 5% sample of signatures required by A.R.S. § 19-121.01(B) to be randomly drawn from all signatures submitted for a petition should include E-Qual signatures or only those signatures submitted on a hard-copy petition sheet." (Doc. 78 at 2, 8.) During oral argument, the Secretary's counsel explained that further clarification was needed on this issue because there are two ways to draw the random sample but, if E-Qual signatures are considered presumptively valid, "it could make sense from a policy perspective" to require that samples be drawn only from the hard-copy signature sheets. (Doc. 102 at 61.) In response to this argument, counsel for the Maricopa County recorder (who takes no position on Plaintiffs' request) argued the Court shouldn't consider E-Qual signatures to be presumptively valid and instead should require the sample to be drawn from both sets of signatures. (*Id.* at 64-65.)

A consistent theme in this order is that Plaintiffs' request raises significant federalism and separation-of-powers concerns. This exchange underscores those concerns. The people of Arizona, through their elected representatives (or, perhaps, through the initiative process), should be the ones making policy choices about how to draw signature samples and whether to treat signatures generated through the E-Qual system as presumptively valid. The Court does not, in any way, fault the Secretary or the recorders for seeking clarification on those issues—it is appropriate and prudent to seek clarity so elections can run smoothly—but a federal judge should not be making those choices on the fly as part of a TRO proceeding. The public's interest in having such policy choices made through appropriate channels is an additional factor weighing against relief.

Accordingly, **IT IS ORDERED** that:

(1) Plaintiffs' complaint (Doc. 1) is **dismissed without prejudice** due to a lack of subject matter jurisdiction.

(2) Plaintiffs' motion for a TRO (Doc. 2) is **denied as moot**.

(3) The motion for reconsideration filed by the House Speaker and Senate President (Doc. 82) is **denied as moot**.

(4) The State's conditional motion to certify questions to the Arizona Supreme

Court (Docs. 99, 100) is **denied as moot**.

(5) The Clerk of Court shall terminate this action and enter judgment accordingly.[18]

Dated this 17th day of April, 2020.

Dominic W. Lanza
United States District Judge

[18] Although it might be appropriate, under other circumstances, to afford a plaintiff who has failed to establish standing an opportunity to amend the complaint in an attempt to cure the deficiency, Plaintiffs made clear during oral argument—and reaffirmed in a post-argument filing—that their intention is to challenge the Title 19 requirements without challenging Article IV of the Arizona constitution. (Doc. 101 at 1 ["Plaintiffs have not challenged Article IV, Part 1, Section 1(9). . . . The Court does not need to rule on the application of Arizona's Constitution to E-Qual to decide this case. Nor have Plaintiffs asked it to do so."]; Doc. 102 at 22 [Plaintiffs' confirmation during oral argument that the "omission from [Plaintiffs'] moving papers and complaint [of] any challenge to the constitutional provisions within the Arizona Constitution . . . was intentional"].). Thus, granting leave to amend would be futile. *Cf. Carrico v. San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011) ("Appellants' principal argument is that the allegations of their amended complaint are sufficient to confer standing . . . . [T]hey do not . . . propose any specific allegations that might rectify their [lack of standing] . . . . Accordingly, we deny leave to amend as futile."). Additionally, because the dismissal of the complaint (like all dismissals based on a lack of jurisdiction) is without prejudice, Plaintiffs could re-file suit if a future decision by the Arizona Supreme Court in the parallel case changes the state-law landscape concerning redressability.