Appeal No. 20-15719

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONANS FOR FAIR ELECTIONS (AZAN), ET. AL.,

*Plaintiff-Appellants,*

v.

KATIE HOBBS, ET AL.,

*Defendant-Appellees.*

On Appeal from the United States District Court of Arizona
No. 2:2020cv00658
The Honorable Dominic W. Lanza

# MOTION FOR LEAVE OF THE GRAND CANYON INSTITUTE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL (DKT. #3)

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No publicly-traded corporation owns more than 10% or more of Amicus' stock.

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Amicus is not a party to this matter.

## FED. R. APP. P. 29(A)(4)(E) DISCLOSURE

No counsel for a party authored this brief in whole or in part. No person other than the Amicus itself has contributed money intended to fund the preparation of this brief.

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# INTRODUCTION

The State of Arizona insists that citizen initiative petitions for the November 2020 election be gathered in public despite the unprecedented COVID-19 pandemic. Because libraries and similar places of public congregation are currently closed and large gatherings are suspended, petitioners seeking to collect signatures would therefore be required to canvass voters door-to-door. This analysis evaluates the economic and health implications of forcing petitioners to collect signatures door-to-door, and whether a superior and safer online system is available.

In addition, records from past Arizona initiative drives with similar signature requirements indicate that, contrary to Federal Judge Dominic Lanza's ruling, the plaintiffs are a "reasonably diligent" campaign committee based on criteria set out in *Nader v. Brewer,* 531 F.3d 1028, 1035 (9th Cir. 2008).

# IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus is a nonpartisan think tank that provides fact-based research and education to decision makers and the public on policies that affect the economic, fiscal, and social future of Arizona. The objective of Amicus is to use an epidemiologic model to highlight the harm to public health and the economy that will arise if petitions are required to be signed in public during a pandemic. This

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amicus brief provides a statistical analysis of the potential health impact of having paid circulators gather signatures at a time when the state government has taken extreme measures to reduce the spread of COVID-19. Further spread of COVID-19 will prolong the dire economic impact that social distancing has already had on the state.

# **ARGUMENT**

1. **Plaintiffs meet the criteria of "reasonably diligent" campaign committees.**

In *Arizonans for Fair Elections v Hobbs*, __ F.Supp.3d __, 2020 WL 1905747 at *11 (D. Ariz. April 17, 2020), Judge Lanza found that " a 'reasonably diligent' committee could have placed its initiative on the November 2020 ballot despite the Title 19 requirements and the COVID-19 outbreak." The judge noted 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." *Id.* He concluded 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." *Id.*

Amicus looked at all citizen initiatives that submitted signatures proposing

constitutional amendments from 2012 to 2018.

**Table 1: Arizona Citizen Initiative Constitutional Amendments**

| Election Year | Proposition # | Name of Prop. | Date Filed | # of Signatures Required | # of Signatures Received | # of Valid Signatures |
|---|---|---|---|---|---|---|
| 2012 | | Open Government Committee | 9/26/2011 | 259,213 | 358,629 | 249,068 |
| 2012 | | Checks and Balances in Government | 3/30/2012 | 259,213 | 282,588 | 183,194 |
| 2018 | 126 | Protect Arizona Taxpayers Act | 3/9/2018 | 225,963 | 413,646, | 276,761 |
| 2018 | 127 | Renewable Energy Standards Initiative | 2/20/2018 | 225,963 | 482,139 | 328,908 |
| 2018 | | Stop Political Dirty Money Amendment | 11/29/2017 | 225,963 | 279,004, | 223,892 |

Source: Arizona Secretary of State.

This data reveals that it is not uncommon for petitions reflecting citizen

initiatives to be filed in February or March of the election year. For numerous

reasons, it is a fair assumption to conclude that petitioners will file their petitions

as quickly as they can upon obtaining a suitable number of signatures – *e.g.* to

provide additional time to obtain additional signatures if an excessive number are

rejected, and to begin campaigning in support of the initiative with the general

public.  Thus, one can conclude that the bulk of the signature-gathering done in support of initiatives such as Checks and Balances in Government and The Protect Arizona Taxpayers Act initiatives was done in early 2012 and 2018, respectively. Moreover, it is worth noting that the standard to be applied is "reasonable diligence," that is, diligence that takes into account the ordinary obstacles that one could expect to encounter during the race to secure sufficient signatures before a deadline.  But the COVID pandemic is no ordinary obstacle.  Numerous commentators have described it as a "black swan" event – that is, one that is "unexpected and hard-to-predict[,] not within the range of normal expectations." *See e.g.* Benjamin Halliburton, *"COVID-19 is a Black Swan,"* Forbes Magazine, March 19, 2020.

.  It is difficult to conceive of an event from the last century that appeared so suddenly and that imposed such extraordinary social and economic restrictions over such a broad area.  Thus, a comparison of previous initiative filing dates with those here is somewhat of a futile exercise, as the type of "reasonable diligence" that prior petitioners might have exercised – *e.g.* to anticipate possible short-term and localized disruption of signature gathering in small areas due to nearby wildfires, floods, or dust storms – would not have allowed the Plaintiffs here to

avoid the immediate, longstanding, and utterly debilitating statewide disruptions

occasioned by the current pandemic.

**2. The current effective disease Reproduction Rate of COVID-19 in Arizona is near 1, hovering at a level where spread of the virus has been contained by Gov. Ducey's stay-at-home order but at a level where increased societal interaction could result in an exponential increase in the spread of the disease.**

The basic reproduction number, designated as "R0", is the rate at which an

infectious disease spreads under normal circumstances. Health experts and

decisionmakers responsible for public health issues use statistical analysis to

determine the R0 of an outbreak to thereby determine the infectious risk posed. An

R0 above 1 – indicating that each infected person infects more than one other

person – reflects an increasing spread of the disease.  An R0 that is higher than 1

reflects potential exponential growth of the infection – for example, at an R0 of 2

and a 5-day time from contraction to quarantine, a single infected person will cause

the infections of 127 others by the end of one month.  Because there are currently

no preventative medical therapies for COVID-19 (*e.g.* vaccinations, early-onset

treatments), social responses such as distancing measures and quarantines provide

the only effective means to reduce the reproduction rate for the disease.

The Arizona Department of Health Services convened a COVID-19 Modeling Working Group that prepared an unpublished report *Modeling Report 2* with its analysis released in a public presentation on April 22, 2020. (Tim Lant, *et al.*, *Modeling Report 2*. Az. Dept. of Health Services COVID-19 Modeling Working Group 1 (April 20, 2020). (Unpublished report.) (Tim Lant, et al., *Scenarios and Projections for COVID-19 in Arizona*. (Az. Dept. of Health Services COVID-19 Modeling Working Group 1, April 22, 2020) ).

That report examined COVID-19 transmission rates over three time periods:

- **Period 1: March 17 – 24**, a time period where there was general awareness of the COVID pandemic but no specific social responses.

- **Period 2: March 25 - April 7**, a period beginning with the imposition of Governor Ducey's initial social distancing order.

- **Period 3: April 7 - April 20**, a time period beginning seven days after the Governor's "stay at home" order, imposed on March 31.

Based on public health data and the Working Group's analysis, the Grand Canyon Institute estimated the virus' effective reproduction rate "R" as follows:

**Table 2: COVID-19 Effective Reproduction Rate "R"**

|  | Period 1<br>March 17-24 | Period 2<br>March 25-April 7 | Period 3<br>April 7-20 |
|---|---|---|---|
| **Daily Case Growth Rate** | 42% | 13% | 5% |

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| Time for Cases to Double | 1.7 days | 5.3 days | 13.9 days |
|---|---|---|---|
| Effective R Value | 7.5 | 1.65 | 0.85 |
| Cases from 1 infection after 30 days | 205,360 | 50 | 4.5 |

As the table reflects, the practices of social distancing and, especially, imposition of a stay-at-home order appear to be effective ways to reduce the R of COVID-19. Arizona's effective reproduction rate may be still slightly above 1, not 0.85, as the Arizona Department of Health Services' Data Dashboard continues to report growth in new cases consistent with an R=1.05 to 1.1.

Once the R in a population that is subject to a stay-at-home order (Period 3) falls below 1.0, reflects that the spread of the disease has begun to shrink, rather than expand. However, as we are all acutely aware, it is impractical to maintain a stay-at-home order perpetually. It is necessary for the economy to "re-open" and for people to resume some degree of their regular daily activities. This re-opening will, of course, cause the current R to begin to rise again as members of the community come into greater contact with one another, albeit even under social distancing guidelines (*e.g.* Period 2). Thus, although it is essential to resume some degree of economic activity, it is equally critical to attempt to maintain an R value below 1, thereby preventing a second (or subsequent) round of increasing infections.

**3. If the citizens initiatives are forced to send 431 Petition Gatherers out to gather signatures the Effective R Value will increase, jeopardizing the health of Arizonans and delaying efforts to re-open the State's economy.**

Against this backdrop, consider the effect of the District Court's requirement that petition circulators seek signatures via door-to-door canvassing, rather than through E-Qual.

In *Mixing Patterns Between Age Groups Using Social Networks*, researchers noted that based on a study that simulated Portland, Oregon, working age adults have on average 20 contacts with others during a day. (Sara Del Valle *et al.*, *Mixing Patterns Between Age Groups Using Social Networks* (2006) ). Under strict social distancing and stay-at-home orders, it is fair to assume that number drops dramatically. Accounting for sporadic interactions with food delivery, postal workers, and incidental exposure to neighbors, it might be fair to assume that that number falls to as few as 5 contacts per day.

The activities of a signature gatherer canvassing door-to-door are fundamentally antithetical to efforts to reduce in-person contacts, and thereby maintain a reduced R. It is fair to assume that a gatherer going door-to-door might make 5 contacts per hour in an 8-hour day or 40 contacts in a day, twice that of an average adult in pre- COVID times. And because these contacts necessarily occur at a resident's

doorway, these contacts end up in closer physical proximity than ongoing social distancing guidelines recommend.  As much as the gatherer might desire to maintain a six-foot separation from the voter, and might be able to do so during conversations between the gatherer and voter about the issues, the process of handing the petition to the voter to physically sign and retrieving that petition will unavoidably involve close, hand-to-hand contact.  Moreover, the process of in-person petitioning requires repeated handling, by both voters and gatherers, of physical objects – the petition, pens, clipboards, campaign literature – that have been handled by dozens of others as well, all without the opportunity for effective sanitization between voter contacts.  Far from promoting the strict physical separation that has been shown to reduce the R to as little as 0.85 in Period 3 of the Working Group's study, the practice of in-person canvassing reflects the sort of unrestrained physical contact between individuals characteristic of Period 1, a time when R values were as high as 7.5

Moreover, it is well-recognized that the severity of COVID infections is closely correlated to the age of the infected person, with older people much more likely to suffer serious complications or death.  It is also well-recognized that voter engagement is also closely correlated with age, in that older citizens are more likely to vote and are more engaged in processes antecedent to voting, such as

responding to canvassers and signing petitions.  Thus, the very population most

likely to be interacting in close physical proximity to signature gatherers is the

same population that is the most at-risk from infections that might be transmitted

by the door-to-door movement of those canvassers.  This situation burdens the

signature-gathering process in two distinct ways.  First, voters who might

otherwise wish to participate in the petitioning process might nevertheless choose

not to do so out of fear that physical interaction with the signature gatherer poses

an unacceptable risk of infection.  Notably, the State's refusal to allow electronic

signature gathering gives voters who fear infection no other way to participate in

the petitioning process.  Second, voters who <u>do</u> choose to engage in that process

are <u>actually</u> placed at a greater risk of contracting infection through the

transmission vector of the signature gatherer.

4. **Arizona's E-Qual system for gathering signatures provides a more reliable and secure system than in-person petitions for gathering signatures.**

When an election law is challenged, its validity depends on the severity of

the burden it imposes on the exercise of constitutional rights and the strength of the

stated interests it serves. *Nader v. Brewer,* 531 F.3d  1028, 1035 (9th Cir. 2008).  In

the seminal case of *Anderson v. Celebrezze*, 460 U.S.780, 789 (1983), the Supreme

Court held that, in considering a constitutional challenge to an election law, a court

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must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule."

The State argues that the E-Qual system that allows registered voters to securely sign a candidate's nomination petition is more susceptible to fraud. This claim lacks construct validity. Gathering of signatures in-person is a practice that bears inherent and demonstrable risks of fraud and false identification. Unable to verify every signature on a nominating petition, the State samples only five percent of those signatures, using the analysis of that sample to estimate the total number of valid signatures. It is not uncommon for approximately one-third of the signatures in a petition to be deemed invalid (see Table 1).

In sharp contrast, the E-Qual system (https://apps.azsos.gov/equal/) requires a user signing a petition to log in using their name and birthdate (including year). Then the user must enter either their driver's license (or State ID) number or their voter registration number along with the last four digits of their Social Security number. The E-Qual system then checks the user's data against the state's voter registration system, asking the user to verify their address (with parts of it blocked out). Upon verification of the user's address, the user can enter the system and "sign" a petition. Essentially, the State is witnessing a person's signature, having

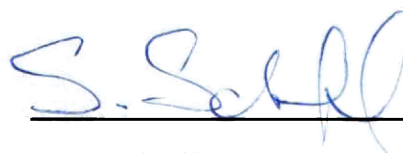BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND REVERSAL

already verified their identity. With the E-Qual system, random sample checking is not necessary. There is minimal risk of fraudulent use of the E-Qual system because the information required of users (*e.g.* driver's license numbers, Social Security numbers) are not publicly-available and are subject to the restrictions on dissemination contained in the Federal Driver's Privacy Protection Act, 18 USC 2721-2725, as adopted in Az. St. § 28-455(A).

## **CONCLUSION**

Given that the E-Qual system provides a well-developed, secure, and more accurate system than paper petitions, and given that the State's insistence on door-to-door canvassing during the COVID-19 pandemic needlessly risks expanding, rather than contracting, infection rates and imposes health risks that unduly burden the interests of both voters and signature gatherers, the Court should provide immediate injunctive relief by enabling initiative campaigns to use the E-Qual System.

Respectfully submitted, April 29th, 2020.

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# CERTIFICATE OF COMPLIANCE

The undersigned certifies that the accompanying brief complies with ARCAP

13, 14, and 16. The brief is double-spaced, utilizes 14-point proportionally spaced

Times New Roman typeface, and contains 2,483 words.

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