

Arizona Supreme Court

Civil Special Action

CV-24-0199-SA

APRIL SMITH, et al. v FONTES/MAKE ELECTIONS FAIR

Appellate Case Information

Case Filed: 22-Aug-2024 Archive on: 16-Sep-2034 (planned)
Case Closed: 16-Sep-2024

Dept/Composition

Side 1. APRIL SMITH, et al., Petitioner

(Litigant Group) APRIL SMITH, et al.

- April Smith
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Attorneys for: Petitioner

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Daniel A Arellano, Esq. (AZ Bar No. 32304)
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Austin T Marshall, Esq. (AZ Bar No. 36582)

Side 2. ADRIAN FONTES, Respondent

(Litigant Group) ADRIAN FONTES

- Adrian P Fontes
AZ Bar No. 22162
[Current Member]

Attorneys for: Respondent

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Side 3. MAKE ELECTIONS FAIR PAC, Real Party in Interest

(Litigant Group) MAKE ELECTIONS FAIR PAC

- Make Elections Fair Pac

Attorneys for: Real Party in Interest

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Mark Kokanovich, Esq. (AZ Bar No. 21168)

Side 4. VOTER REFERENCE FOUNDATION and EXECUTIVE DIRECTOR, GINA SWOBODA, Amicus Curiae

(Litigant Group) VOTER REFERENCE FOUNDATION and EXECUTIVE DIRECTOR, GINA SWOBODA

- Voter Reference Foundation
Gina Swoboda, Voter Reference Foundation

Attorneys for: Amicus Curiae

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CASE STATUS

Sep 16, 2024....Case Closed

Aug 23, 2024....Decision Rendered

Table with 6 columns: PREDECESSOR CASE(S), Cause/Charge/Class, Judgment/Sentence, Judge, Role <Comments>, Trial, Dispo. Rows include MAR CV2024-019846 and MAR CV2024-019880.

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CASE DECISION

23-Aug-2024 DECISION ORDER

* This matter pertains to the Make Elections Fair Arizona Act, serial number I-14-2024, a ballot initiative to adopt an amendment to the Arizona Constitution to reform primary and general elections (the "Initiative"). Plaintiffs challenge placement of th

Filed: 23-Aug-2024

Mandate: 16-Sep-2024

Decision Disposition

Relief Denied

Accepted

Ann Timmer

12 PROCEEDING ENTRIES

1. 22-Aug-2024 FILED: Emergency Petition for Special Action; Certificate of Compliance; Certificate of Service (Petitioners Smith et al.)

Arizona Supreme Court

Civil Special Action

CV-24-0199-SA

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12 PROCEEDING ENTRIES

2. 23-Aug-2024 DECISION ORDER This matter pertains to the Make Elections Fair Arizona Act, serial number I-14-2024, a ballot initiative to adopt an amendment to the Arizona Constitution to reform primary and general elections (the "Initiative"). Plaintiffs challenge placement of the Initiative on the ballot, arguing it lacks a sufficient number of qualified signatures.

The Plaintiffs are required to "prove by clear and convincing evidence that" the total number of actually invalid signatures is sufficient to move the Initiative below the constitutional threshold. See *Leach v. Reagan*, 245 Ariz. 430, 437 ¶ 30 (2018) (rejecting plaintiffs' claim that its political consultants' documents identifying signature deficiencies required the court to shift the burden of proof). To that end, they attempted to introduce summary exhibits at trial that purportedly showed more than 38,000 duplicative signatures on the Initiative's petition sheets. The trial court excluded this evidence as inadmissible under Rule 1006 of the Arizona Rules of Evidence and alternately ruled that, even if admissible, the exhibits did not satisfy Plaintiffs' burden of proof.

On August 21, in an expedited appeal, this Court disagreed with the trial court and concluded that Plaintiffs' exhibits were admissible. Because the trial court had not examined the allegedly duplicative signatures in Plaintiffs' exhibits, we further concluded it erred by finding that the exhibits "categorically failed to approve any duplicate signatures by clear and convincing evidence." We therefore remanded the case to the trial court and directed it to "determine whether the exhibits prove any duplicate signatures by clear and convincing evidence."

The next morning, August 22, the trial court scheduled proceedings to address the Court's remand. Plaintiffs requested a final ruling by the end of the day in their favor. The trial court denied the motion, citing the practical impossibility of determining whether and to what extent the exhibits proved duplicate signatures. See *Smith v. Fontes*, CV 2024-019846, Order at *3 (Aug. 22, 2024) (noting Plaintiffs' counsel "conceded that it could take anywhere between 11 hours . . . and 300 hours . . . to complete the examination" before considering other documents not yet available).

Late in the day on August 22, Plaintiffs filed a special action proceeding here asking for a ruling before the end of the day on August 22 "finding as a matter of law that the Committee lacks a sufficient number of signatures" and striking the measure from the ballot. Plaintiffs contend that the trial court abused its discretion when it denied their request to rule on August 22 before the earliest county deadline to finalize the ballot for printing. They argue the court erred because the Committee had previously stipulated "that Plaintiffs have met their burden by clear and convincing evidence and that the initiative fails to qualify for the ballot."

To be clear, this Court's earlier order in the expedited appeal ruled simply that Plaintiffs' summary exhibits were admissible. We did not and could not determine whether the exhibits satisfy Plaintiffs' burden. That is a matter for the trial court to determine in the first instance as a factual matter, and we directed the trial court to undertake that review. Also, the Committee is entitled to hold Plaintiffs to their proof and contest the terms and conditions of any purported stipulation.

There is no statutory directive that a court resolve an election challenge like this one before the ballot printing deadline. Regardless, this Court, and indeed the trial court, has consistently endeavored to resolve initiative challenges before the ballot printing deadline, notwithstanding the burden such expedited proceedings place on the parties, attorneys, and court personnel. We also recognize the desire for certainty. But the courts' role is to dispense justice. Courts cannot be forced to rule rashly to meet a ballot printing deadline or provide the parties with certainty.

As of this moment, the Initiative has not been enjoined and will appear on the ballot, assuming the ballots are indeed printed in the early morning hours of August 23. But this does not end the matter. The trial court must continue with determining whether the Initiative is supported by a sufficient number of qualified signatures. This determination should be made as expeditiously as possible to provide the parties and the public certainty. If the court rejects Plaintiffs' challenge, the voters will decide whether the Initiative should be enacted into law. If the court disqualifies the Initiative, the court should issue an injunction precluding any votes for the measure from being counted. Under these condensed circumstances, this result is the most appropriate way to enable the parties to present their evidence for a proper adjudication in an expedited manner.

Having issued its remand to the trial court, and the matter of determining whether there are sufficient signatures to qualify the Initiative for the ballot yet to be decided, the Court declines Plaintiffs' request to further limit or dictate the proceedings.

Therefore, upon consideration en banc,

IT IS ORDERED accepting special action jurisdiction but denying relief. (Hon. Ann A. Scott Timmer)

3. 28-Aug-2024 FILED: Motion for Reconsideration; Certificate of Service (Real Party Make Elections Fair)
4. 29-Aug-2024 RECEIPT No.: 2024-00240 ; \$280.00, Authorization: 8828317345798947, Applied to: APRIL SMITH, et al. - Class A Filing Fee (\$280.00) Paid for: APRIL SMITH, et al. - By nCourt LLC

5. 29-Aug-2024 The Clerk of the Supreme Court having been authorized by the Supreme Court to order any party to file a response at the direction of a Supreme Court staff attorney,

IT IS ORDERED that Petitioners Smith, et al. shall file a response to the motion for reconsideration on or before 4:00 p.m. September 6, 2024.

IT IS FURTHER ORDERED no extensions of time shall be granted absent extraordinary circumstances. Tracie K. Lindeman, Clerk)

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12 PROCEEDING ENTRIES

- 6. 6-Sep-2024 FILED: Secretary of State Response Regarding the Remedy; Certificate of Service (Respondent Secretary of State)
- 7. 6-Sep-2024 FILED: Petitioners' Response to Motion for Reconsideration; Certificate of Service (Petitioners Smith et al.)
- 8. 6-Sep-2024 FILED: Brief of Amicus Curiae Voter Reference Foundation and it's Executive Director, Gina Swoboda; Certificate of Service; Certificate of Compliance (Amicus Curiae Voter Reference Foundation)
- 9. 6-Sep-2024 FILED: Voter Reference Foundation's Motion to File Amicus Curiae Brief (Amicus Curiae Voter Reference Foundation)
- 10. 9-Sep-2024 FILED: Notice of Errata [Page 7-8 Incorrect Statement]; Certificate of Service (Amicus Curiae)
- 11. 16-Sep-2024 Pending before the Court is Real Party in Interest's Motion for Reconsideration, Respondent's Response Regarding the Remedy, Petitioners' Response to Motion for Reconsideration, which additionally seeks to strike the Respondent's response, and the Voter Reference Foundation's Motion to File Amicus Curiae Brief. The full Court having considered the briefing,

IT IS ORDERED granting Voter Reference Foundation's Motion to File Amicus Curiae Brief.

IT IS FURTHER ORDERED denying Petitioners' request to strike Respondent's Response.

IT IS FURTHER ORDERED that, to the extent that the Motion for Reconsideration seeks reconsideration of the Court's August 23, 2024 Decision Order directive that "[i]f the [trial] court disqualifies the Initiative, the court should issue an injunction precluding any votes for the measure from being counted," the motion is granted. That statement is vacated. This order is without prejudice to Petitioners requesting such an injunction or similar remedy in the trial court, in the event the trial court determines that the Initiative does not have sufficient signatures to qualify for the November ballot. Likewise, this order does not preclude Real Party in Interest from arguing in the trial court that Arizona courts lack the authority to grant such a remedy under Arizona law. These issues, if raised, should be decided in the first instance by the trial court and would benefit from full briefing and argument.

IT IS FURTHER ORDERED that, to the extent the Motion for Reconsideration seeks a dismissal of the Petitioner's underlying § 19 122(C) action on mootness grounds in the first instance, the motion is denied without prejudice to Real Party in Interest raising such issue for the trial court's consideration. (Hon. Ann A. Scott Timmer)

-----CASE STATISTICALLY TERMINATED-----
- 12. 16-Sep-2024 MANDATED TO SUPERIOR COURT

Mandate and Copy of Decision Order Sent to Superior Court
