

IN THE SUPREME COURT OF ARIZONA

AZ PETITION PARTNERS LLC d/b/a
PETITION PARTNERS, an Arizona Limited
Liability Company,

Petitioner/Defendant,

v.

HON. PETER A. THOMPSON, Judge of the
Superior Court of the State of Arizona, in and for
the County of Maricopa,

Respondent Judge,

STATE OF ARIZONA,

Real Party in Interest.

No. CR-22-0154-PR

Arizona Court of Appeals
No. 1 CA-SA 21-0170

Maricopa County Superior Court
No. CR 2020-000467-001

**BRIEF OF *AMICUS CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA
IN SUPPORT OF PETITIONER**

Jared G. Keenan (AZ Bar #027068)
American Civil Liberties Union
Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011-0148
Telephone: (602) 650-1854
jkeenan@acluaz.org

Sarah Brannon
Pro Hac Vice Forthcoming
American Civil Liberties Union
Foundation
915 15th Street, NW
Washington, DC 2005
Telephone: (202) 210-7287
sbrannon@aclu.org

R. Adam Lauridsen (CA Bar #243780)
Catherine Porto (CA Bar #331168)
Amy Philip (CA Bar #346229)
Eleanor Brock (CA Bar #346681)
Pro Hac Vice Admissions Pending
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 397-7188
alauridsen@keker.com
cporto@keker.com
aphilip@keker.com
ebrook@keker.com

Attorneys for *Amicus Curiae* – American Civil Liberties Union of Arizona

TABLE OF CONTENTS

I. INTRODUCTION.....	8
II. STATEMENT OF INTEREST	10
III. ARGUMENT	10
A. The Circulation of Ballot Initiatives is a Vital Form of Political Speech, Entitled to Expansive First Amendment Protections.....	10
1. Ballot Initiatives Have a Deeply-Rooted History as a Vehicle for Direct Democracy.....	10
2. The Ballot Initiative Process Fosters Democratic Values.....	12
3. The Ballot Initiative Process Embodies “Core Political Speech” and is Entitled to Maximal Protection Under State and Federal Law.....	14
B. Restrictions on How Petition Circulators are Paid Constitutes a Severe Burden on First Amendment Rights and Cannot Survive Strict Scrutiny.....	16
1. Under the <i>Anderson-Burdick</i> Framework, Restrictions on Ballot Initiatives Constitute a Severe Burden and Must Be Analyzed Under Strict Scrutiny.....	16
2. Restrictions on How Signature-Gatherers are Paid Do Not Advance a Compelling State Interest and Do Not Meet Strict Scrutiny.....	21
C. Criminalization of Core Political Speech Undermines the Democratic Process	23
IV. CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	17
<i>Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n</i> , 576 U.S. 787 (2015).....	11, 12, 13
<i>Arizonans for Fair Elections v. Hobbs</i> , 454 F. Supp. 3d 910 (D. Ariz. 2020)	12, 21
<i>Buckley v. Am. Const. L. Found., Inc.</i> , 525 U.S. 182 (1999).....	17
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	16
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	17
<i>Cal. Democratic Party v. Jones</i> , 530 U.S. 567 (2000).....	14
<i>Cave Creek Unified Sch. Dist. v. Ducey</i> , 233 Ariz. 1 (2013).....	12
<i>Citizens Against Rent Control v. City of Berkeley</i> , 454 U.S. 290 (1981).....	16
<i>Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n</i> , 518 U.S. 604 (1996).....	22
<i>Fed. Election Comm’n v. Cruz</i> , 142 S. Ct. 1638 (2022).....	22
<i>Feldman v. Ariz. Sec’y of State’s Off.</i> , 843 F.3d 366 (9th Cir. 2016)	14

<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005).....	13
<i>Healy v. James</i> , 408 U.S. 169 (1972).....	14
<i>League of Ariz. Cities & Towns v. Brewer</i> , 213 Ariz. 557 (2006).....	12, 20
<i>Limit v. Maleng</i> , 874 F. Supp. 1138 (W.D. Wash. 1994)	22
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995).....	16
<i>Mecinas v. Hobbs</i> , 30 F.4th 890 (9th Cir. 2022)	17
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....	<i>passim</i>
<i>Nader v. Brewer</i> , 531 F.3d 1028 (9th Cir. 2008)	17
<i>Pedersen v. Bennett</i> , 230 Ariz. 556 (2012).....	12, 20
<i>Prete v. Bradbury</i> , 438 F.3d 949 (9th Cir. 2006)	20, 21
<i>Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors</i> , 108 Ariz. 449 (1972).....	12
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	14
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	16
<i>Rubin v. City of Santa Monica</i> , 308 F.3d 1008 (9th Cir. 2002)	18

<i>State v. Osborn</i> , 16 Ariz. 247 (1914).....	20
<i>State v. Stummer</i> , 219 Ariz. 137 (2008)	15, 20
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997).....	14, 17
<i>Whitman v. Moore</i> , 59 Ariz. 211 (1942).....	12

Statutes

A.R.S. § 13-707(A)(1)	23
A.R.S. § 13-802(A).....	23
A.R.S. § 19-118.01.....	<i>passim</i>
A.R.S. § 19-119.01.....	23
2017 Ariz. Legis. Serv. Ch. 52, § 5(A)(2)	21
2017 Ariz. Legis. Serv. Ch. 52, § 5(A)(4)	22

Constitutional Provisions

Ariz. Const. Art. II, § 6	14, 15, 20
Ariz. Const. Art. IV, pt. 1, § 1(2).....	8

Other Authorities

Antonin Scalia, <i>Forward: The Importance of Structure in Constitutional Interpretation</i> , 83 Notre Dame L. Rev. 1417 (2008)	15
Brennan Center for Justice, <i>Poll of Local Election Officials Finds Safety Fears for Colleagues and Themselves</i> (March 10, 2022), available at https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and	24

Brennan Center for Justice, <i>Voting Laws Roundup: May 2022</i> (May 26, 2022), available at https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022	24
Clint Bolick, <i>State Constitutions: Freedom’s Frontier</i> , Cato Sup. Ct. Rev. 15 (2016-2017)	15
David Brancaccio, Alex Schroeder, and Erika Soderstrom, <i>The cost of getting citizen-led initiatives on the ballot has nearly doubled since 2020</i> (Nov. 7, 2022), available at https://www.marketplace.org/2022/11/07/the-cost-of-getting-citizen-led-initiatives-on-the-ballot-has-nearly-doubled-since-2020	19
Henry Noyes, <i>Direct Democracy as a Legislative Act</i> , 19 Chap. L. Rev. 199 (2016)	10, 11
<i>Initiative and Referendum Provisions</i> , Initiative & Referendum Institute, available at http://www.iandrinstitute.org/states.cfm	11
Jenny Roberts, <i>Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts</i> , 45 U.C. Davis L. Rev. 277 (2011)	23, 24
Jocelyn Friedrichs Benson, <i>Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative</i> , 34 Fordham Urb. L.J. 889 (2007)	22
Joshua J. Dyck, <i>New Directions for Empirical Studies of Direct Democracy</i> , 19 Chap. L. Rev. 109 (2016)	11
<i>Making Ballot Initiatives Work: Some Assembly Required</i> , 123 Harvard L. Rev. 959 (2010)	11
Nathaniel Persily, <i>The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West</i> , 2 Mich. L. & Pol’y Rev. 11 (1997)	11
Richard J. Ellis, <i>Signature Gathering in the Initiative Process: How Democratic is it?</i> , 64 Mont. L. Rev. 35 (2003)	18
Stanley G. Feldman & David L. Abney, <i>The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution</i> , 20 Ariz. St. L. J. 115 (1988)	13

States United Democracy Center, *A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration* (May 19, 2022), available at <https://statesuniteddemocracy.org/resources/dcitm-2022/>24

Statewide Ballot Measures Database, Nat’l Conf. St. Legislatures, available at <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx>13

Todd Donovan, Shaun Bowler, David McCuan & Ken Fernandez, *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* (Ohio State Univ. Press 1998)19

I. INTRODUCTION

The circulation of ballot initiatives is a quintessential form of political expression and should be awarded the highest level of First Amendment protections. Arizona, like many states, provides citizens the ability to propose new laws or constitutional amendments. Ariz. Const. Art. IV, pt. 1, §1(2). These initiatives not only give citizens a direct voice in their government but facilitate political association more broadly. The process of passing an initiative involves multiple layers of public debate. Relevant to this case, proponents of a particular policy must first gather enough signatures to get their initiative on the ballot, typically through the use of petition circulators. To gather enough signatures for a given initiative, these circulators might have thousands of face-to-face or phone conversations with individual voters—a process of advocacy and association that the Supreme Court has recognized as “‘core political speech’ for which First Amendment protections is at its *zenith*.” *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (emphasis added).

Because the initiative process and the use of petition circulators embody “core political speech,” laws restricting how signature-gatherers may be paid, such as section 19-118.01 of the Arizona Revised Statutes, constitute a severe burden on First Amendment rights and must survive strict scrutiny. *Id.* In other words, they must be narrowly tailored to a compelling government interest. Section 19-118.01

falls far short of that exacting standard.

Section 19-118.01 makes it a class 1 misdemeanor to “pay or receive money or any other thing of value based on the number of signatures collected on a statewide initiative or referendum petition.” A.R.S. § 19-118.01(A). Even the narrowest reading of this provision—that it only bans per-signature payments—is an impermissible burden on political speech. In particular, section 19-118.01’s criminal penalty provision threatens to deter citizens from exercising their right to participate in the initiative process, despite decades of undisturbed precedent recognizing the significance of that constitutional right. By criminalizing a sacrosanct aspect of political discourse, section 19-118.01 erodes key protections for core aspects of the democratic process.

Accordingly, the Court should hold that section 19-118.01 is facially unconstitutional because it imposes a severe burden on “core political speech” that cannot survive strict scrutiny. The burden created by section 19-118.01 creates a dangerous precedent for criminalizing citizen engagement in elections and voting, which would run afoul of core free speech principles and Arizona’s tradition of enabling its citizens to participate in the legislative process through statewide initiatives.

II. STATEMENT OF INTEREST

The American Civil Liberties Union of Arizona (“ACLU of Arizona”) is a statewide, nonprofit, nonpartisan organization with over 20,000 members throughout Arizona, dedicated to protecting the fundamental liberties guaranteed by the Constitution. The ACLU of Arizona has a strong interest in protecting First Amendment liberties, including the fundamental rights to freedom of speech and political expression, and in ensuring that individuals can engage in the democratic process without fear of criminalization.

III. ARGUMENT

A. **The Circulation of Ballot Initiatives is a Vital Form of Political Speech, Entitled to Expansive First Amendment Protections**

1. **Ballot Initiatives Have a Deeply-Rooted History as a Vehicle for Direct Democracy**

Ballot initiatives are an exercise of direct democracy: a form of governing that allows ordinary citizens to have a say in their government without involving their elected representatives. Although initiatives themselves are a fairly recent invention, the idea that citizens should participate in lawmaking dates from the earliest days of the Republic. During the Colonial period, citizens were invited to propose and veto new laws at town hall meetings. *See* Henry Noyes, *Direct Democracy as a Legislative Act*, 19 Chap. L. Rev. 199, 200 (2016). This approach was then baked into the passage and substance of early state constitutions. For example, the Massachusetts and New Hampshire Constitutions were drafted and

approved by citizens. *Id.*

Contemporary forms of direct democracy took root at the turn of the twentieth century “as part of the Progressive agenda of the era...largely in Western States.” *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 794 (2015); see generally, Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol’y Rev. 11 (1997). The modern tools of direct democracy are the ballot initiative and referendum. The initiative is a positive check on the legislature. It allows people of a state or locality to propose and pass laws by popular vote. The referendum is a negative check. It allows citizens to reject laws enacted by their elective representatives. Both tools enable “ordinary citizens to intervene in the democratic process when their representative officials [are] not carrying out their wishes.” *Making Ballot Initiatives Work: Some Assembly Required*, 123 Harvard L. Rev. 959 (2010). Today, 26 states allow either the initiative or referendum, and 24 states recognize the initiative process.¹

Arizona has embraced the initiative from its founding. “[T]he Arizona Constitution ‘establishes the electorate [of Arizona] as a coordinate source of

¹ For a full list of state rules, see *State-by-State List of Initiative and Referendum Provisions*, Initiative & Referendum Institute, available at <http://www.iandrinstitute.org/states.cfm>; see also, Joshua J. Dyck, *New Directions for Empirical Studies of Direct Democracy*, 19 Chap. L. Rev. 109, 109 (2016).

legislation’ on equal footing with the representative legislative body.” *Ariz. Indep. Redistricting Comm’n*, 576 U.S. at 795 (citing *Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors*, 108 Ariz. 449, 451 (1972); *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 4 (2013)). And this provision of initiative power was not an afterthought. Rather, “records of the constitutional convention, together with the language of the [] constitution, show clearly that it was the opinion of the delegates who adopted and signed it that its provisions [regarding initiatives] were among the most important to be found therein.” *Whitman v. Moore*, 59 Ariz. 211, 218 (1942), *overruled on other grounds by Renck v. Super. Ct. of Maricopa Cnty.*, 66 Ariz. 320 (1947); *see also Pedersen v. Bennett*, 230 Ariz. 556, 558 ¶ 7 (2012) (“Arizona has a strong policy supporting the people's exercise of this power.”); *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559 ¶ 9 (2006) (recognizing right to initiative as “fundamental”); *Arizonans for Fair Elections v. Hobbs*, 454 F. Supp. 3d 910, 913 (D. Ariz. 2020) (characterizing the right to enact laws via initiative as “sacrosanct”).

2. The Ballot Initiative Process Fosters Democratic Values

Ballot initiatives reflect two core principles of American democracy. First, citizen-drafted laws underscore that all power flows from the people. Although “[t]he Framers may not have imagined the modern initiative process in which the people of a [s]tate exercise legislative power coextensive with the authority of an

institutional legislature,” the “invention of the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power.”

Ariz. Indep. Redistricting Comm’n, 576 U.S. at 819.

Second, initiatives facilitate the institutional diversity envisioned by our federalist system. “One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’” *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting). Initiatives enable this innovation by allowing citizens to safeguard their state’s unique “values, traditions, and character.” Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 *Ariz. St. L. J.* 115, 117 (1988).

Arizona voters have used the initiative to legislate on a range of issues. Since 2016, the Arizona ballot initiative has been used to set limits on interest rates for medical debt, allocate tax revenues to teacher salaries and schools, prohibit state and local governments from increasing taxes on personal services, and increase the minimum wage. *Statewide Ballot Measures Database*, Nat’l Conf. St. Legislatures, available at <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx>.

3. The Ballot Initiative Process Embodies “Core Political Speech” and is Entitled to Maximal Protection Under State and Federal Law

In addition to its function as a legislative vehicle, the initiative is a critical forum for speech and political association, which are protected at both the state and federal level. On the federal level, political speech is protected by the First Amendment, incorporated to the states by the Fourteenth Amendment. ““While the freedom of association is not explicitly set out in the [First] Amendment,’ ‘the [Supreme] Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment...as an indispensable means of preserving other individual liberties.’” *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 386 (9th Cir. 2016) (citing *Healy v. James*, 408 U.S. 169, 181 (1972); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)). This right includes the ability “to associate...for the advancement of common political goals and ideas,” and “the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

On the state level, speech is protected by Article 2, Section 6 of the Arizona Constitution, which guarantees the right to “freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Ariz. Const. Art. 2, § 6. Although Arizona speech law is underdeveloped, “[t]he encompassing text [of this

provision] indicates the Arizona framers’ intent to rigorously protect freedom of speech,” and Arizona courts “have...stated that Article 2, Section 6 has ‘greater scope than the First Amendment.’” *State v. Stummer*, 219 Ariz. 137, 142–143, ¶ 15, ¶ 17 (2008); *see also*, Clint Bolick, *State Constitutions: Freedom’s Frontier*, *Cato Sup. Ct. Rev.* 15 (2016-2017) (arguing that “state constitutions were intended to be primary, not secondary” sources of “protection of our rights”); Antonin Scalia, *Forward: The Importance of Structure in Constitutional Interpretation*, 83 *Notre Dame L. Rev.* 1417, 1417–18 (2008) (discussing how federalism functions as “double security for individual liberties”).

As noted, within the initiative process, initiative circulation—wherein advocates gather signatures in support of their proposed law or amendment—constitutes “core political speech” and is “an area in which the importance of First Amendment protections is ‘at its zenith.’” *Meyer*, 486 U.S. at 420, 425. This is because “circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” *Id.* at 421. Given the importance of the initiative process and robust speech protections in Arizona, laws that burden circulation procedure are particularly suspect.

B. Restrictions on How Petition Circulators are Paid Constitutes a Severe Burden on First Amendment Rights and Cannot Survive Strict Scrutiny

The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits states from enacting laws that “abridg[e] the freedom of speech” guaranteed by the First Amendment. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 336 & n.1 (1995). The petition circulation process represents the highest form of political expression because it necessarily entails “[the] unfettered interchange of ideas for the bringing about of political and social change[] desired by the people.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Restrictions on how petition circulators are paid are a “direct restraint on [the] freedom of expression of [those] desiring to engage in political dialogue concerning a ballot measure.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). Accordingly, restrictions on the petition circulation process are a severe burden on the initiative process and must be analyzed under strict scrutiny.

1. Under the *Anderson-Burdick* Framework, Restrictions on Ballot Initiatives Constitute a Severe Burden and Must Be Analyzed Under Strict Scrutiny

Although “[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process . . . the First Amendment requires [courts] to be vigilant in making those judgments, to guard

against undue hindrances to political conversations and the exchange of ideas.”

Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 191–92 (1999). “To balance these competing concerns, the Supreme Court ‘devised [the *Anderson-Burdick* test] as a ‘flexible standard’ for assessing laws that regulate elections.” *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022) (internal citations omitted). “Under the *Anderson-Burdick* test, a court identifies the ‘character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . and then weighs the injury ‘against the precise interests put forward by the State as justifications for the burden imposed by its rule.’” *Id.* at 902 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Restrictions that impose a “severe burden” are subject to strict scrutiny and “must be narrowly tailored and advance a compelling state interest.” *Timmons*, 520 U.S. at 358. Restrictions on ballot initiatives, which implicate political speech and associational rights protected by the First and Fourteenth Amendments, are often analyzed under strict scrutiny. *See, e.g., Meyer*, 486 U.S. at 420, 425 (using the term “exacting scrutiny” but effectively applying strict scrutiny by noting that the burden the state must justify was “well-nigh insurmountable”); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (analyzing an Arizona law imposing residency requirements for petition circulators under strict scrutiny).

A regulation imposes a severe speech restriction if it “significantly impair[s] access to the ballot, stifle[s] core political speech, or dictate[s] electoral outcomes.” *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002). In *Meyer*, the Supreme Court explained that restrictions on how petition-circulators are paid severely burden First Amendment rights by: (1) “limit[ing] the number of voices who will convey [the initiative’s] message” and “the size of the audience they can reach” and (2) “mak[ing] it less likely that [initiative proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.” *Meyer*, 486 U.S. at 422–23.

Although the narrowest reading of section 19-118.01 only bans per-signature payments (as opposed to prohibiting the use of paid circulators in general), such limits are still unduly burdensome, as the Supreme Court explained in *Meyer*. “The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer*, 486 U.S. at 423–24. Accordingly, the First Amendment protects an initiative proponent’s ability to choose the most efficient means of circulating petitions, including whether to pay petition circulators per signature gathered.

Signature-gathering is one of the most burdensome and expensive parts of the ballot initiative process. *See, e.g.*, Richard J. Ellis, *Signature Gathering in the*

Initiative Process: How Democratic is it?, 64 Mont. L. Rev. 35, 57 (2003) (“The main hurdle that most initiative proponents face is finding enough people willing and able to dedicate a large number of hours to gathering signatures.”); Todd Donovan, Shaun Bowler, David McCuan & Ken Fernandez, *Contending Players and Strategies: Opposition Advantages Initiative Campaigns*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES, at 97 (Ohio State Univ. Press 1998) (“Signature gathering has now become the single-largest expense for many proponents’ campaigns...”). Restrictions on how signature-gatherers can be paid—such as prohibiting pay-per-signature payments—infringes on First Amendment protections by preventing initiative proponents from “select[ing] what they believe to be the most effective means” to circulate petitions. *Meyer*, 486 U.S. at 423–24. Prohibiting pay-per-signature is particularly limiting, as it is one of the most productive and cost-effective ways to gather signatures. *See, e.g.*, David Brancaccio, Alex Schroeder, and Erika Soderstrom, *The cost of getting citizen-led initiatives on the ballot has nearly doubled since 2020*, Marketplace.org (Nov. 7, 2022), available at <https://www.marketplace.org/2022/11/07/the-cost-of-getting-citizen-led-initiatives-on-the-ballot-has-nearly-doubled-since-2020> (noting that advocates of pay-per-signature find it to be cost effective and that banning pay-per-signature makes the petition circulation process more difficult, tedious, and costly). Prohibiting per-

signature payments reduces the financial incentives that drive productivity and effectiveness in the petition circulation process. As a result, the prohibition could reduce the pool of petition circulators in Arizona which would not only make the signature-gathering process far more burdensome and expensive, but also reduce the likelihood that petition circulators will be able to obtain enough signatures and put initiatives on the ballot.

Although the Ninth Circuit held that an Oregon law banning per-signature payments did not severely burden First Amendment rights in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), that case is distinguishable in several ways. First, as noted above, the Arizona Constitution provides robust free speech protections that are even broader than those protected by the First Amendment and the Oregon Constitution. *See Stummer*, 219 Ariz. at 142–43, ¶ 15, ¶ 17 (Arizona courts “have...stated that Article 2, Section 6 has ‘greater scope than the First Amendment.’”). As such, “core political speech” merits maximal protections. *Meyer*, 486 U.S. at 420. This is heightened by the importance of the ballot initiative process in Arizona. Indeed, this Court has consistently recognized that the power of the people of Arizona “is as great as the power of the Legislature to legislate.” *State v. Osborn*, 16 Ariz. 247, 250 (1914); *see also Pedersen*, 230 Ariz. at 558 ¶ 7 (“Arizona has a strong policy supporting the people's exercise of this power.”); *League of Ariz. Cities & Towns*, 213 Ariz. at 559 ¶ 9 (recognizing right

to initiative as “fundamental”); *see also Arizonans for Fair Elections*, 454 F. Supp. 3d at 913 (characterizing the right to enact laws via initiative as “sacrosanct”).

Second, section 19-118.01, unlike the Oregon law at issue in *Prete*, imposes criminal penalties which enhances the severity of the burden on First Amendment rights. *See Meyer*, 486 U.S. at 425 (explaining that the burden the state must overcome to justify a criminal law is “well-nigh insurmountable”). Finally, the government in *Prete* presented “evidence of the actual existence of fraud and forgery in the initiative process,” whereas no such showing was made in this case (as discussed below). *Prete*, 438 F.3d at 969. The imposition of criminal penalties based on an anticipated (but unsubstantiated) threat of fraud constitutes a severe burden on core political speech and associational rights, especially in light of Arizona’s robust free speech protections and its long-held reverence for the ballot initiative process.

2. Restrictions on How Signature-Gatherers are Paid Do Not Advance a Compelling State Interest and Do Not Meet Strict Scrutiny

The legislature’s purported justification for enacting section 19-118.01 is to “protect[] the integrity of the initiative process through the prevention of fraud” which “is a significant state interest.” 2017 Ariz. Legis. Serv. Ch. 52, § 5(A)(2). However, the legislature failed to offer concrete evidence of fraud arising from the use of per-signature payments. Instead, it offered general language from a law

review article from 2007, which states that “[t]here is some consensus among scholars, practitioners, and even some courts that the practice of paying canvassers based on the number of signatures they collect is directly linked to high levels of fraud in the signature-gathering process.” 2017 Ariz. Legis. Serv. Ch. 52, § 5(A)(4) (citing Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 Fordham Urb. L.J. 889, 923 (2007)). This vague and generalized statement without any factual details fails to satisfy the “proof of fraud” or “actual threat to citizens’ confidence in government” needed to justify infringing upon First Amendment freedoms. *See, e.g., Limit v. Maleng*, 874 F. Supp. 1138, 1140–41 (W.D. Wash. 1994) (striking down a statute prohibiting per-signature payments because the State failed to show “actual proof of fraud stemming specifically from the payment per signature method of collection.”). When restrictions on speech are imposed to prevent “an anticipated harm,” the government “must do more than ‘simply posit the existence of the disease sought to be cured.’” *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1652–53 (2022) (citing *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 618 (1996)). The Arizona legislature failed to do so here.

Additionally, prohibiting pay-per-signature payments is not the least restrictive means through which the state can prevent fraud in the election process. There are several other provisions of Arizona law that protect the integrity of the

initiative process without infringing upon First Amendment rights, most notably A.R.S. § 19-119.01, which explicitly prohibits “petition signature fraud.” Because the petition circulation process requires “the expression of a desire for political change and a discussion of the merits of the proposed change,” restrictions on how petition circulators are paid are distinguishable from other administrative regulations on the ballot initiative process, such as affidavit and age-limit requirements. *Meyer*, 486 U.S. at 421.

In light of the scant evidence connecting payment-per-signature to fraud in the initiative process and the various ways that the Arizona legislature could have protected the integrity of elections without infringing on free speech, section 19-118.01 does not survive strict scrutiny.

C. Criminalization of Core Political Speech Undermines the Democratic Process

Section 19-118.01 poses a heightened threat to First Amendment rights because it imposes the risk of *criminal* penalties for violations of subsection (a). These penalties include a sentence of up to six months in jail and a fine up to \$2,500 for individuals. A.R.S. §§ 13-707(A)(1), -802(A). It is well-documented that even so-called “low-level” misdemeanor convictions carry severe, lifelong collateral consequences for the convicted individual. *See generally*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277 (2011). Among other things, a misdemeanor

conviction can severely hamper an individual's ability to secure employment, housing, and education—such that the misdemeanor affects not only the individual convicted but also that individual's family members and community. *See id.*

Injecting threats of onerous criminal penalties into such a core area of political speech jeopardizes far more than Arizona's ballot initiative process. On a broader scale, criminalization of political participation touches upon every aspect of our democratic system. Criminalizing democratic and electoral participation seizes power from voters and invites partisan manipulation and interference in the administration of elections. *See generally* States United Democracy Center, *A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration* (May 19, 2022), available at <https://statesuniteddemocracy.org/resources/dcitm-2022/>. At the same time, these penalties sow distrust in elections and those who win them, by lending credence to widely criticized theories of widespread election fraud. *See id.*; *see also* Brennan Center for Justice, *Voting Laws Roundup: May 2022* (May 26, 2022), available at <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022>. And finally, draconian criminal-penalty provisions constrict electoral officials' ability to effectively do their jobs by infusing their daily tasks with criminal exposure. *See* Brennan Center for Justice, *Poll of Local Election Officials Finds Safety Fears for Colleagues and Themselves* (March 10,

2022), available at <https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and>. This Court can prevent such risks, and protect Arizonans’ longstanding right to legislate by initiative, by declaring that Section 19-118.01 is facially unconstitutional.

IV. CONCLUSION

For the reasons stated above, the Court should find A.R.S. § 19-118.01 facially unconstitutional.

Respectfully submitted, this 23rd day of December, 2022.

	<p>By /s/ Jared G. Keenan</p> <hr/> <p>Jared G. Keenan American Civil Liberties Union Foundation of Arizona</p> <p>Sarah Brannon American Civil Liberties Union Foundation</p> <p>R. Adam Lauridsen Catherine Porto Amy Philip Eleanor Brock Keker, Van Nest & Peters LLP</p> <p><i>Attorneys for Amicus Curiae American Civil Liberties Union of Arizona</i></p>
--	---