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To: Ivan Legler, Prescott Valley Town Attorney

cc: Fatima Fernandez, Prescott Valley Town Clerk

From: Christina Estes-Werther, Partner
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Date: September 12, 2024

Subject: Analysis of A.R.S. §19-142 relating to Signature Calculation for Referendum

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INTRODUCTION

The Town of Prescott Valley (the "Town") has requested a formal legal opinion as to the proper basis of calculating the number of required petition signatures to refer an adopted measure in a townwide referendum under Ariz. Const. art. IV, Pt. 1 § 1 (8) and A.R.S. § 19-142. The following analysis considers legislative history and chronology, the plain language of the statute, and analogous case law to determine the proper number to utilize when determining the number of required petition signatures for a townwide referendum measure. Based on the analysis, we recommend the Town follow the plain language of the statute when calculating the signatures for a referendum, which means utilizing all the votes cast for candidates and any ballot measures that were voted on at the preceding townwide election.

QUESTIONS PRESENTED

(1) Whether the Town should use the "whole number of votes cast" or "ballots cast" to calculate the requisite number of petition signatures required to place a referendum on the ballot.

(2) What is the meaning of the "whole number of votes cast" within Arizona jurisprudence?

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BRIEF ANSWERS

(1) The Town should use the "whole number of votes cast" to calculate the requisite number of petition signatures required to place a referendum on the ballot.

(2) Based on historical analysis and case law, the "whole number of votes cast" means the entire number of votes cast at a townwide race, including all votes cast for Town candidates and Town ballot measures at the last preceding election in which a mayor or councilmen were chosen prior to the submission of the application for a referendum petition.

BACKGROUND

The Arizona Constitution reserves the power of initiative and referendum to "... qualified electors..." of "every incorporated city, town and county as to all [local] matters such incorporated cities, towns and counties are or shall be empowered by general laws to legislate." Ariz. Const. art. IV, Pt. 1 § 1 (8). Under the power of the initiative fifteen percent of the qualified electors may propose measures on such local, city, town or county matters, and ten percent of the electors may propose the referendum on legislation enacted within and by such city, town or county. *Id.* Therefore, for residents to propose a referendum, they must obtain ten percent of the number of "qualified electors" within the Town.

Arizona statute stipulates the basis of the calculation for a city or town referendum. *See* A.R.S. § 19-142(A). Here, the Town must take the "whole number of votes cast at the [townwide] election at which a mayor or councilmen were chosen last preceding the submission of the application for a referendum petition…" *Id.* While the calculation appears straightforward, there has been significant confusion among Arizona cities and towns regarding the meaning of the "whole number of votes cast," with some jurisdiction utilizing "ballots cast" to compute referendum petition signatures. The following analysis will demonstrate how the plain language and the legislative history supports a different interpretation.

ANALYSIS

Although a court will focus on the plain language of the statute and not analyze its legislative history unless the statutory language is ambiguous, based on the decades-long use of a "ballots cast" calculation relied upon by most cities and towns in Arizona, it is essential to review the statutory history of the referendum calculation.

At the outset, it is important to distinguish between the terms "whole number of votes cast" and "ballots cast" and understand their implications. A "ballot" means a paper ballot on which votes are recorded. A.R.S. § 16-444(A)(1). A "ballot cast" refers to the submission of a ballot for an election. Each voter is allowed to cast only one ballot per election. A.R.S. § 16-1016(2). A ballot typically contains several different races or measures. Every contest a voter participates in counts as a separate "vote cast." Thus, a single ballot can contain multiple "votes cast." This underscores the issue within this Memorandum, as the number used to compute

"qualified electors" as required in the Arizona Constitution may be more than the number of actual persons voting in any qualifying election.

I. Historical Analysis

Legislative history and analysis suggest utilizing the language "whole number of votes cast" rather than "ballots cast." Arizona's referendum statute originated in the 1912 Civil Code, where it read, "[r]eferendum petitions against any ordinance, franchise or resolution, passed by a city council shall be signed by not less than ten (10) per cent *of the voters of said Town*…" Laws 1912, 1st S.S., Ch. 71, § 10 (emphasis added). In 1915, this language was amended to read, "[r]eferendum petitions, against any ordinance; franchise or resolution, passed by a city or town council shall be signed by not less than ten per cent of the electors of said city or town, and the ***whole number of votes cast*** at the city election at which a mayor or councilmen were chosen last preceding the filing of any referendum petition…" Laws 1915, Ch. 12, § 1 (emphasis added). In the referendum context, this is the first time that "the whole number of votes cast" language appeared in the statute. Notably, "ballots cast" has never been used to compute the required number of petition signatures for ballot qualification. References to "ballots cast" pertains to the process of counting *ballots cast* on Election Day (2023 State Elections Procedures Manual at 200), assessing the number of early *ballots cast* to be included in the hand count (A.R.S. § 16-602(F)), the requirement to compare the *ballots cast* at a voting location match with the check-ins on the signature roster (2023 State Elections Procedures Manual at 197), or requiring the counties to report "the number of *ballots cast* by those persons who were eligible to vote a ballot containing federal offices only." Laws 2019, Ch. 282, § 1 (codified as A.R.S. § 16-161(B)). There are no references to "ballots cast" in the context of referenda in the early civil code. This suggests that the appropriate measure for determining the number of required petition signatures is "votes cast" rather than "ballots cast."

Further, it is likely that the legislature was conscious of the difference between "vote cast" and "ballots cast," as they have used both phrases in the same section of an election related law. For example, Section 1237 of the 1928 Civil Code states:

> **Section 1237. Abstract of vote**. At the time the election board prepares the official election returns, it shall also prepare and certify in duplicate upon a blank provided for the purpose, an abstract of the **number of ballots cast** at the election, the number rejected in making the count, and the **number of votes cast** for each person for the several offices, and for or against each proposed constitutional amendment and initiated or referred measure.

Rev.Code 1928, § 1237 (emphasis added).

The quoted section clearly distinguishes between "ballots cast" and "votes cast," indicating that "votes cast" is intentionally used in the context of referendums and initiatives. Therefore, a historical analysis suggests that "ballots cast" is not the correct metric for determining the

number of petition signatures required for a referendum. Additionally, for a referendum, the "form of ballot" statute stipulates that "a 'yes' vote shall have the effect of approving the legislative enactment that is being referred" based on "a majority of votes cast" making it clear that passage is based on the number of "yes" votes received in favor of the measure, not the number of overall ballots cast in that race. A.R.S. § 19-125(D).

II. Statutory Interpretation

A. *Plain Meaning*

Given this historical background, if the Town bases the required number of petition signatures on "votes cast" rather than "ballots cast," any challenge would likely focus on statutory interpretation and the intent of the drafters. Courts "determine the plain meaning of the words the legislature chose to use, viewed in their broader statutory context." *Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, 255 Ariz. 382, 385 ¶ 11 (2023). "Our task in statutory construction is to effectuate the text if it is clear and unambiguous." *BSI Holdings, LLC v. Ariz. Dep't of Transp.*, 244 Ariz. 17, 19 ¶ 9 (2018). Absent ambiguity, courts interpret statutes according to their plain language. *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016). When a statute's plain language is unambiguous in context, it is dispositive. *Shea v. Maricopa County*, 255 Ariz. 116, 120–21 ¶ 19 (2023). Additionally, "[i]n construing a specific provision, [courts] look to the statute as a whole and may also consider statutes that are in *pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." *Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017). However, if more than one reasonable interpretation exists, courts will examine secondary interpretation methods, including the statute's subject matter, historical background, effects and consequences, as well as its spirit and purpose to aid with interpretation. *Romero-Millan v. Barr*, 253 Ariz. 24, 27–28 ¶ 13 (2022).

Any challenge that aims to require the Town to use "ballots cast" instead of "whole number of votes cast" to compute signature requirements would likely fail because the statute's plain language is clear and unambiguous. As explained above, there is a distinct difference between "votes cast" and "ballots cast." Thus, it would be exceedingly difficult to argue that "whole number of votes cast" means "ballots cast" when it does not appear in the statute. *See also*, *Jones v. Paniagua*, 221 Ariz. 441, 445, ¶ 15 (Ct. App. 2009) ("We hold that A.R.S. § 19-142(A) is clear and unambiguous" when determining which election to use as a basis for referendum signature calculation) (later clarified by the Legislature in Laws 2009, Ch. 114 § 15); *Homebuilders Ass'n of Cent. Arizona v. City of Scottsdale*, 186 Ariz. 642, 646 (Ct. App. 1996) ("The language of A.R.S. § 19–142(A) is clear and unambiguous" when examining the meaning of "qualified electors" to determine the signatures for a referendum).

B. *Interpreting "Votes Cast"*

After determining that it is legally defensible to require proponents of referendum petitions to gather signatures from ten percent of all votes cast, rather than ballots cast, it is important to consider how courts interpret such provisions. The Arizona Supreme Court has

suggested an expansive interpretation of "votes cast" in election contexts. The Arizona Supreme Court case *Kannarr v. Hardy* is illustrative. *See* 118 Ariz. 224 (1978).

In *Kannarr*, the Libertarian Party sought a declaratory judgment to be recognized as a political party in Arizona. *Id.* at 224-25. The party had taken the necessary steps for recognition on the ballot, but Arizona law required that, to maintain this recognition, a new party must receive a certain percentage of the "votes cast" in the general election. *Id.* at 225. Specifically, the statute stated, "A political organization which at the last preceding general election cast for its candidates for state office ... not less than five percent of the total votes cast in the state ... is entitled to representation as a political party on the official ballot for state officers." *See* A.R.S. § 16-201 (1976) (renumbered as A.R.S. § 16-801, as amended). *Id.*

The Supreme Court set out to determine "what did the legislature intend by the term 'total votes cast' in A.R.S. § 16-201. *Id.* The Court states:

> The ingenuity of the human mind is aptly demonstrated by the variety of interpretations which have been placed upon the words "not less than five per cent of the total votes cast" in the parties' pleadings. We find no ambiguity in those words, however. **It has nothing to do with the number of ballots cast, nor with the total votes cast for candidates of a particular party in a limited number of specific races**. According to defendants' exhibit 1, the secretary of state's official canvass of the returns for the November 2, 1976 General Election, a total of three million, eighty-nine thousand, two hundred and five (3,089,205) votes were cast for state officers.[1]

Id. at 225-26 (emphasis added).

The Supreme Court's analysis in *Kannarr* is telling, as it is one of the relatively few instances in which the Supreme Court interprets "total votes cast" for a definition of "qualified electors" that is not confined to a specific race. *See, e.g.*, *Kannarr*, at 225 (counting votes cast for *all* statewide races, including state legislators, corporation commissioners, and mine inspectors) *compare* Ariz. Const. art. IV, Pt. 1 § 1 (7) (defining qualified elector as "[t]he whole number of votes cast for all candidates for governor at the general election last preceding the filing of any initiative or referendum petition on a state or county measure shall be the basis on which the number of qualified electors required to sign such petition shall be computed"); *City of Flagstaff v. Mangum*, 164 Ariz. 395, 401 (1990) (defining "qualified elector" for an initiative as "the entire vote cast for all candidates for mayor at the last preceding general municipal election"). This is important because it is an instance in which "ballots cast" may significantly differ from "votes cast," as there were *many* statewide races on the ballot and the calculation was not based on a single office.

[1] The estimated population of the entire State of Arizona on July 1, 1976 was 2,270,000. 1976 Population Estimates of Arizona.

Despite this, the Arizona Supreme Court expressly found that "total votes cast" does not mean "ballots cast" and includes all statewide votes for all candidates – even the races in which the Libertarian party did not field a candidate – in arriving at the requisite number of which to base the percentage on. This indicates that the Supreme Court expansively interprets "total votes cast," as amici and other parties involved argued for more restrictive counting methods.[2] The Supreme Court rejected these approaches in favor of the *broadest* approach to interpret the "total votes cast." *Kannarr* suggests that the Supreme Court may expansively interpret "votes cast" as it pertains to the referendum statute.[3]

C. *Potential for "Absurd Results"*

Even if the "plain language" of a statute is unambiguous, court will not apply their ordinary meaning if the result is contrary to legislative intent or application of such language results in "impossible or absurd" consequences." *See e.g.*, *Parker v. City of Tucson*, 233 Ariz. 422, 430-31 ¶ 20 (Ct. App. 2013) (citing *Reeves v. Barlow*, 227 Ariz. 38, ¶ 12 (Ct. App. 2011)). In this case, while the plain language of the statute could potentially lead to absurd results, it is unlikely to prevail.

In many local jurisdictions, candidates are elected through an 'at-large' system, where voters can select multiple candidates for the same office. For example, in an at-large election with three open seats, voters can choose up to three candidates. Although this counts as one ballot cast, it results in three votes for the city or town council. Therefore, if 1,000 voters select three candidates in a town council race, there would be 1,000 ballots cast but 3,000 votes cast. If the signature requirement for a referendum petition is based on ballots cast, the proponent would need only 100 signatures, compared to 300 if it were based on votes cast. A court may consider the drafters' intent and find this result 'absurd,' as it imposes an unreasonable restraint on proposing a referendum. This is likely the most significant risk in using the 'whole number total votes cast' metric to calculate signature requirements.

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[2] In the dissent, Chief Justice Cameron argued that the approach adopted by the majority "imposed an unreasonably high vote requirement for access to the ballot." He continues, "[u]nder this formula, a party could actually elect its candidates to some offices (say, state legislature) and still not qualify for automatic ballot recognition at the next election. For example, 150,000 votes might elect a third of the members of the Arizona State Senate. Yet, under this reading, a party reaching such success at the polls would still not be entitled to automatic ballot recognition at the next election. I believe this is a too restrictive interpretation of the statute." 118 Ariz. 224, 227. He continues to analyze all possible readings of "total votes cast" to conclude it means total number of votes cast for state offices for which the party fielded a candidate." 118 Ariz. 224, 228.

[3] There are a few key differences between *Kannarr* and the issue at hand. First, *Kannarr* involved party recognition, whereas this case deals with referendum petition signatures. Second, the statutory language in *Kannarr* referenced "total votes cast," not the "whole number of total votes cast," which will be addressed below. While it's unclear whether a court would interpret the inclusion of "whole number" as altering the calculation method, in our view, it's unlikely.

Any party challenging the hypothetical result above may cite the Arizona Supreme Court case of *Johnson v. Maehling*, 123 Ariz. 15, 17 (1979). In *Johnson*, a group of residents initiated a recall of school board members. *Id*. Pursuant to the Arizona Constitution, "twenty-five percent of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer may petition for recall." *Id*. The two school board members in question had been elected simultaneously in an at-large election, where voters were allowed to vote for two candidates, and each candidate was eligible for either of the two seats. *Id*. The total number of votes cast for all candidates was 2,802. *Id.*

The Court reasoned:

> Were we to apply the language of the constitutional provision literally, as appellants suggest, we would need to count every vote cast for all the candidates for both board positions, and then use that number to compute the number of signatures required to mandate a recall. Twenty-five percent of the votes cast would be 701. Requiring 701 signatures on the recall petitions would, in effect, require nearly half the number of voters who elected Baker and Dennis to sign petitions before a recall election could be held.

Id. at 18.

The Court then found, "[i]n the present case, 2,802 votes were cast for all the candidates for both offices. Since two offices were being filled, we divide 2,802 by two, which results in 1,401 votes being considered as cast for each office. Applying the constitutional provision to this number of votes, we find that 25 percent, or 351 signatures, would be needed to mandate a recall election." *Id*.

This suggests that when electors can vote for more than one candidate, the total votes cast should be divided by the number of open seats. For example, if 100 ballots were cast in an election with two open seats and 180 total votes cast, *Johnson* suggests dividing 180 by two and then applying the percentage to that value to determine the correct number of petition signatures required.

However, it is unlikely a court would apply this requirement to referendums. The specific language in the recall provision of the Arizona Constitution differs from the referendum provision in A.R.S. § 19-142. The recall provision states, "[s]uch number of said electors as shall equal twenty-five percent of the number of votes cast at the last preceding general election for all of the candidates for the *office held by such officer*." Ariz. Const. art. VIII, Pt. 1 § 1 (emphasis added). This is limited to a specific office (e.g., school board) and uses the singular "officer," indicating that only one person is being recalled, not two or more. Therefore, dividing the vote in this context makes more sense than it would in the referendum context.

In contrast, the Arizona Constitution dictates that the "ten percent of the electors may propose the referendum on legislation enacted within and by such Town…" and the referendum

statute requires the "whole number of votes cast at a [townwide] election at which a mayor or councilmen were chosen," which arguably refers to the entire number of votes cast in the election, not a specific office or single race. Therefore, it is unlikely that the Town Clerk has authority to divide the total votes cast by the number of seats to determine the base number for calculating petition signatures.[4]

D. *Possible Ambiguity in "Whole"*

A potential ambiguity lies in the use of the word "whole." In Arizona law, some provisions refer to the "whole number of votes cast," while others simply use "votes cast." *Compare* A.R.S. § 19-142 ("whole number of votes cast") with A.R.S. § 16-801 (regarding party representation: "...one and one-third per cent of the total votes cast for governor..."). While this may suggest ambiguity, we believe "whole" reasonably refers to all votes cast in the entire election where a mayor or council members were chosen – not just the votes cast for the mayor and council members in that specific race. *But see*, Ariz. Const. art. IV, Pt. 1 § 1 (7) ("The whole number of votes cast for all candidates for governor at the general election last preceding the filing of any initiative or referendum petition on a state or county measure shall be the basis on which the number of qualified electors required to sign such petition shall be computed.")

While the terms "whole number of votes cast" and "votes cast" are used inconsistently in Arizona law, this inconsistency is likely immaterial to a legal challenge. It would be difficult to argue that the inclusion or omission of "whole" alters the statute's plain meaning in a way that supports interpreting the provision as "ballots cast." Even if the statute were considered ambiguous, courts would look to secondary interpretation methods, such as the statute's subject matter and historical context, both of which, as discussed above, likely support the interpretation being argued above.

CONCLUSION

Based on the factors described, it is reasonable to base the signature count for referendum petitions on the "whole number of votes cast" in the Town's most recent election for mayor or council members, rather than on "ballots cast." This includes the entire number of votes cast since no exception exists in the statute to exclude the votes cast for ballot measures at the most recent election. The Town's current referendum calculation must be based on July 30, 2024 primary election by totaling the total votes cast for qualified candidates who ran for the four council seats and the votes cast for the Town's ballot measure (Proposition 474).

The plain language of the statute is clear; however, if the court found it ambiguous, the historical context and statutory interpretation support that "ballots cast" has not been authorized to calculate signatures for referendum. While this may create signature requirements that

[4] Additionally, there is no constitutional or statutory authority that permits a city or town to create or implement a formula to divide the whole number of votes cast for a referendum measure unlike A.R.S. § 19-143, which allows a city or town to adopt an ordinance for initiatives that "provides for an alternative basis for computing the number of necessary signatures."

fluctuate based on the turnout at each townwide election, it is ultimately the role of the Legislature to address whether the plain language of the statute requires an amendment to lower the minimum signature requirement.