IN THE ARIZONA SUPREME COURT

THOMAS P. MORRISSEY, individually, Plaintiff/Appellee, v. LOGAN STAN GARNER, individually and as Chair of Unite Payson; KIM CHITTICK, individually and as Treasurer of Unite Payson; UNITE PAYSON, an Arizona political committee, SADIE JO BINGHAM, in her official capacity as Gila County Recorder; TOMMIE MARTIN, in her official capacity as Gila County Supervisor; TIM R. HUMPHREY, in his official capacity as Gila County Supervisor; WOODY CLINE, in his official capacity as Gila County Supervisor; SILVIA SMITH, in her official capacity as Payson Town Clerk; THOMAS P. MORRISSEY, in his official capacity as Payson Mayor, JIM FERRIS, in his official capacity as Payson Councilmember, CHRIS HIGGINS, in his official capacity as Payson Councilmember, STEVE L. SMITH, in his official capacity as Payson Councilmember, JANELL STERNER, in her official capacity as Payson Councilmember, SUZY TUBBSAVAKIAN, in her official capacity as Payson Councilmember, BARBARA UNDERWOOD, in her official capacity as Payson Councilmember, and TOWN OF PAYSON, ARIZONA, a public entity, Defendants/Appellants.	Arizona Supreme Court No. CV-19-0271 On Appeal From the Gila County Superior Court No. CV2019-00287

APPELLANTS' OPENING BRIEF

Eric H. Spencer (#022707)
Ryan J. Regula (#028037)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
espencer@swlaw.com
rregula@swlaw.com
Attorneys for Defendants/Counter-Claimants/Cross-Claimants/Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This is an appeal about applying the plain language of the Arizona Constitution to protect a bedrock political right greatly prized by the Framers of that charter—the right to recall public officials. The right to recall was so important to the Framers that they risked Arizona's statehood over it. When President Taft blocked Arizona's path to statehood in 1911 over the recall provision in Ariz. Const. Art. VIII, pt. 1, § 1 ("the Recall Provision"), the Framers temporarily complied with Taft's demands to revise it to gain admission to the Union. Yet such was Arizona's ardor for recall, that its voters soon thumbed their nose at Washington in 1912 by putting the Recall Provision back as it was originally drafted.

The Recall Provision empowers Arizona citizens to collect petition signatures from qualified electors and force a recall election. Importantly, our Constitution bases the requisite number of signatures upon the votes cast for that office in the "last preceding general election."

Likewise importantly, Arizona municipalities do not uniformly hold general elections for every office in every election cycle. It is true that for state, legislative, and county officials nominated in partisan primaries, there are always general elections. Thus, for those offices, the "last preceding general election" is always the last election cycle. But Arizona's municipalities are different. Arizona grants cities and towns considerable flexibility in how they structure their nonpartisan electoral

systems. *City of Tucson v. State*, 229 Ariz. 172, 174 (2012) ("The framers of Arizona's Constitution . . . valu[ed] local autonomy" in elections); A.R.S. § 9-821.01. Many municipalities allow a candidate who receives a majority of votes cast in a primary election to be deemed elected, eliminating the need for a general election for that office in that cycle. Thus, municipal general elections can be far less frequent than statewide or county-wide elections. This different municipal practice has been going on since statehood.

The clear language of the Recall Provision, and the well-established practice of municipalities holding general elections less frequently than every cycle, require reversal of the Superior Court's holding that the Town of Payson's 2018 mayoral *primary*—with far more votes cast in it than were cast in Payson's "last preceding general election" for mayor, in 2002—counts constitutionally as a *general election*. The effect of re-writing Arizona's Constitution to mean something different from what it says, as the Superior Court did below, revokes the recall right of the people of Payson on the facts of this case. This Court should reaffirm that the Recall Provision means what it says, and that the right over which our Framers risked statehood still resonates today. To hold otherwise would flout the plain meaning canon and defeat a vital right reserved to the people.

STATEMENT OF FACTS AND CASE

Appellee Thomas Morrissey was elected mayor of Payson in 2018. (10/29/19 Ruling on Under Advisement ("Ruling"), APP019). Payson holds a nonpartisan primary election for town offices and, if no candidate receives a majority of votes cast, the two candidates with the most votes compete in the general election. Payson Town Code § 30.07(A)(3) ("Code"). (Ruling, APP019). If one candidate receives a majority of votes in the primary election, the candidate is declared elected effective as of the date of the general election, but the town does not hold a general election for that office. *See* Code § 30.07(A)(1). (Ruling, APP019). Morrissey received 53.11% of the primary election vote on August 28, 2018, and was declared elected effective November 6, 2018. (Ruling, APP019).

Appellant Unite Payson, a political action committee ("PAC"), took out a recall petition against Mayor Morrissey by filing an Application for Serial Number with the Payson Town Clerk ("Clerk") on August 12, 2019. (Reporter's Transcript 10/28/2019 ("Transcript"), APP142). The Clerk determines the minimum number of petition signatures to recall a public officer pursuant to the Recall Provision and writes that number on the Application. (Transcript, APP142). After consulting with the Arizona League of Cities and Towns about what constitutes the "last preceding general election" at which Payson elected a mayor, the Clerk calculated 25% of total votes for mayor in the 2002 general election (the last time Payson held a general

election for mayor) and wrote "770" on the Application. (Ruling, APP019; Transcript, APP142-43). Unite Payson relied on that number and ultimately filed 970 signatures with the Clerk. (Ruling, APP019; Transcript, APP142, APP148).

The Clerk invalidated 40 signatures pursuant to A.R.S. §§ 19-121.01(A) & 19-208.01(A) and transmitted the remaining 930 signatures to the Gila County Recorder ("Recorder"). (Ruling, APP019; Transcript, APP148). The Recorder invalidated 109 signatures, leaving 821 valid signatures. (Ruling, APP019). Because Unite Payson had more than 770 valid signatures, the Clerk called a recall election for March 10, 2020 pursuant to A.R.S. § 19-209(C)(3). (*Id.*)

Mayor Morrissey sued to enjoin the recall election under A.R.S. § 19-208.04(B) and the Arizona Rules of Procedure for Special Actions. (Ruling, APP019-20, APP022-23). Appellants Unite Payson, Logan Stan Garner (the PAC's chairman), and Kim Chittick (the PAC's treasurer) were named as real parties in interest. (Ruling, APP018). Among other things, Mayor Morrissey argued that because Payson held no general election for mayor in 2018, the minimum number of signatures to recall him should have been 25% of the total votes cast in the 2018 primary election. (Ruling, APP019).

Unite Payson, Garner and Chittick moved to dismiss. Among other things, they argued that the Clerk correctly calculated the signature threshold by using the 2002 general election.

The Gila County Superior Court held a trial on October 28, 2019. (Ruling, APP018-19). The Superior Court issued a Ruling on Under Advisement Action on October 29, 2019, holding, among other things, that the Clerk should have used the 2018 primary election instead of the 2002 general election to base the recall effort, which should have resulted in 1,255 minimum signatures. (Ruling, APP019-025). Since Unite Payson only had 825 valid signatures, under the Superior Court's ruling, the trial court denied the Motion to Dismiss and enjoined the recall election. (Ruling, APP025). The trial court stayed its ruling to preserve the status quo pending this appeal. (Order Granting Motion for Stay Pending Appeal, APP214).

Unite Payson, Garner and Chittick filed notices of appeal to the Supreme Court and Court of Appeals on October 30, 2019. The Supreme Court accepted this case on November 8, 2019; the Court of Appeals deferred accordingly.

This Court has jurisdiction over this appeal pursuant to Ariz. Const. Art. VI, § 5 and A.R.S. § 19-208.04(B).

STATEMENT OF THE ISSUE

Was Payson's "last preceding general election" under Ariz. Const. Art. VIII, pt. 1, § 1 that controls how many signatures are needed to force a recall election of the mayor of Payson: (a) Payson's ***most recent mayoral general election***, held in 2002; or (b) Payson's ***most recent mayoral primary election***, held in 2018, as the Superior Court concluded, by reasoning that "preceding" means right before, so that

2002 does not meaningfully precede 2019 under Ariz. Const. Art. VIII, pt. 1, § 1?

STANDARD OF REVIEW

This legal and constitutional issue is reviewed *de novo*. *See State v. Harrod*, 218 Ariz. 268, 279 (2008).

ARGUMENT

I. THE RECALL PROVISION'S PLAIN LANGUAGE REQUIRES THAT THE THRESHOLD TO RECALL A PUBLIC OFFICER BE CALCULATED USING VOTES CAST IN THE "LAST PRECEDING GENERAL ELECTION," WHICH WAS IN 2002.

A. The Analysis of This Case Necessarily Hinges on the Language and Meaning of the Recall Provision.

The Recall Provision establishes the right to recall any public officer in Arizona, including Payson's mayor. A group seeking to recall a public officer must circulate a recall petition and gather a minimum number of valid signatures in order to place the recall election on the ballot. The Recall Provision provides clear instructions how to calculate that minimum threshold:

> **Such number of said electors** as **shall equal twenty-five per centum 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 by petition, which shall be known as a recall petition, demand his recall.

(emphasis added); *see also* A.R.S. § 19-201(A). Thus, for a mayoral recall, the signature threshold is calculated by taking 25% of the total votes cast for all mayoral candidates in the most recent general election in which a mayor was elected.

Payson last held a general election for mayor in 2002. (Ruling, APP019). The

Clerk could not use the 2018 election in which Mayor Morrissey was himself elected because the town only held a primary election for mayor that year. (*Id.*) The Constitution requires the recall benchmark be based on a "general election," so the Clerk properly used the total votes cast at the last preceding general election for mayor, from 2002, to calculate the minimum threshold to recall Mayor Morrissey. That should end the Court's inquiry. *See Pinetop-Lakeside Sanitary Dist. v. Ferguson*, 129 Ariz. 300, 302 (1981) ("[W]here a constitutional provision is clear, no judicial construction is required or proper."). This Court should reverse.

B. In the Recall Provision, the Phrase "Last Preceding" Is Synonymous With and Necessarily Means "Most Recent."

The Recall Provision specifies that the applicable general election is the "last preceding" one. The plain meaning of "last preceding" means a municipal clerk must use the *most recent* general election where a mayor was elected, as opposed to cherry-picking *any* past general election. *See Jones v. Paniagua*, 221 Ariz. 441, 445 (App. 2009) ("The number of qualified signatures required for a valid referendum petition is based on '[t]he whole number of votes cast at the city or town election at which a mayor or councilmen were chosen *last preceding* the submission of the application for a referendum petition. . . .' [A.R.S. § 19-142(A)]. [T]he provision's plain meaning requires Phoenix to base the referendum signature requirement on the *most recent* mayoral or council election prior to the referendum petition

application[.]") (emphasis added).

Despite neither party raising the issue at trial, the Superior Court attributed separate meanings to the words "last" and "preceding" and concluded that no general election in Payson could satisfy both descriptions:

> The Constitution could have said the "last general election." If it did, the 2002 general election would be the right one because it was the last general election. But the word "preceding" suggests temporal proximity and that word cannot be ignored.

(Ruling, APP024).

The Superior Court's reading is incorrect. The phrase "last preceding general election" appears multiple times in the Constitution. *See* Ariz. Const. Art. VIII, pt. 1, § 1; Art. XII, § 5; Art. XXI, § 1. Meanwhile, the Superior Court's proposed phrase "last general election" never appears in the Constitution. Without both phrases appearing, there is no reason to conclude that "last preceding" was intended to mean something different than "last." *See, e.g., Ahrens v. Kerby*, 44 Ariz. 337, 342-45 (1934) ("electors" and "qualified electors" are synonymous and used interchangeably in the Constitution). This reading was revealed as incorrect when the Superior Court remarkably asserted that "an election from 17 years ago ***cannot reasonably be considered*** 'preceding.'" (Ruling, APP024-25) (emphasis added). Respectfully, because 2002 precedes 2019, it is not possible to consider it otherwise.

C. Ignoring the Phrase "General Election" While Giving Undue Weight to an Interpretation of the Single Word "Preceding" Does Violence to the Constitution's Language.

The Superior Court likewise ignored the canon of construction that all words must be read together harmoniously when it so privileged "preceding" that the phrase "general election" was accorded no dignity. *See, e.g., Cain v. Horne*, 220 Ariz. 77, 81, ¶ 10 (App. 2009) ("Each word, phrase, clause, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." (quotation omitted)); *Doe ex rel. Doe v. State*, 200 Ariz. 174, 178 (2001) ("We read statutes as a whole and seek to give meaningful effect to all of their provisions.").

The Superior Court failed to adhere to this canon when it ignored "general election . . . for the office held by such officer" to give precedence and special meaning to "preceding":

> It is true that, under Payson's Town Code, the August 2018 election ***was called a primary election***, not a general election. . . . The August 2018 primary election is not a perfect fit with the term "last preceding general election" in Article VIII, Part 1, Section 1. But it is a better fit that the 2002 [general] election.

(Ruling, APP024) (emphasis added). The August 2018 election wasn't just "called" a primary election. It *was* a primary election. Code § 30.07(A). (Ruling, APP019). The fact that Mayor Morrissey's election was effective *as of* the November 2018 general election, Code § 30.07(A)(1), does not mean the August 2018 primary *became* the general election.

Plain meaning and harmonious construction canons are well-served by reading the Recall Provision to mean the "last preceding general election" was in 2002. By contrast, no principle of statutory construction justifies elevating "preceding" to the point where "general election" is read out of the Recall Provision. This Court should adhere to these first principles and reverse the Superior Court.

II. THE PLAIN MEANING OF THE RECALL PROVISION, REINFORCED BY ITS LONG COEXISTENCE WITH THE VERY METHOD OF ELECTION PAYSON EMPLOYS, SHOULD LEAD THIS COURT TO READ THE "LAST PRECEDING GENERAL ELECTION" TO MEAN PAYSON'S 2002 GENERAL ELECTION.

The plain meaning canon, and the plain meaning of the Recall Provision, should lead this Court to reverse here. "As a general rule of interpretation, clear and unambiguous language is given its plain meaning unless absurd or impossible consequences will result." *Dunn v. Indus. Comm'n of Arizona*, 177 Ariz. 190, 194 (1994). There is nothing absurd or impossible about applying the Recall Provision to municipal elections. Indeed, a result is only "absurd 'if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.'" *State v. Estrada*, 201 Ariz. 247, 251 (2001) (citation omitted). Regardless whether one disagrees with using a 2002 general election to calculate the recall threshold, it is not absurd. To find it absurd in 2019 raises difficult line-drawing questions. As Payson has slowly grown, there is no clear answer as to when 2002 would have become an "absurd"

yardstick. The better rule is to follow the text of the Recall Provision, which raises no such questions.

Arizona's history of fostering differing methods of conducting municipal elections since statehood—while simultaneously using the "last preceding general election" as the recall yardstick —shows that the 2002 general election is the relevant prior election. For one thing, Phoenix framed its new Charter on October 11, 1913 pursuant to Arizona's constitutional "home rule" authority and used the same system Payson uses today:

> At [the] primary election any candidate who shall receive a majority of all the votes cast at such election shall be declared elected to the office for which he is a candidate, and for further election shall be held as to said candidate. . . .

Phoenix City Charter, Ch. XII, § 15 (1913). This is the same electoral structure in Code § 30.07(A) and which many other municipalities across Arizona use. *See also* A.R.S. § 9-821.01(D). The "last preceding general election" formulation has long co-existed with Payson's (and Phoenix's) electoral structure, in which a "last preceding general election" for an office may not have been for a number of election cycles. This informs how the two provisions should be read together and that Unite Payson's reading of the Recall Provision is correct and clearly not absurd.

Moreover, the Framers of Arizona's Constitution considered ***and rejected*** letting municipalities establish their own processes for recall that would have been

autonomous and separate from the Recall Provision. It is important that the amendment that would have done this was defeated. *See* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, 266-67 (John S. Goff ed., 1990). This means the Framers understood that the "last preceding general election" would be applied throughout the state, even as municipalities had a home rule right to structure their elections as they chose, including choosing structures like Payson's.

Finally, there is no issue of workability that renders this interpretation of the Recall Provision absurd. Here, Unite Payson volunteers collected 825 valid signatures, the Recorder verified the signatures, and the Clerk called the election for March 2020. (Ruling, APP019). The system worked. There is no prudential reason to seek to deviate from the Constitution's text.

III. THIS COURT SHOULD REJECT THE SUPERIOR COURT'S PURPOSIVE INTERPRETATION OF THE RECALL PROVISION, WHICH IN THE GUISE OF HEWING TO "REASONABILITY" INSTEAD REWRITES CONSTITUTIONAL LANGUAGE.

The Superior Court was fairly frank in explaining that it was engaged in purposive, rather than textual, interpretation of the Recall Provision. It gave no legal effect to the "last preceding general election" held in 2002, because in its judgment, "[t]he August 2018 primary election . . . ***is more consistent with the Constitution's purpose*** of measuring the number of signatures needed to call a recall by the present size of the electorate. And an election from 17 years ago ***cannot reasonably be***

considered 'preceding.'" (Ruling, APP024-25) (emphasis added).

Yet Arizona's Constitution must be interpreted according to its text, from which any purpose emerges—not by a judicial selection of a "purpose" that drives what the text must be made to mean. *See Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 432 (1991) ("It is not 'nit-picking' to require compliance with the express command of the Arizona Constitution. If our state constitution contains [referendum] provisions considered too inconvenient for present-day operation, the remedy is to amend it—not to ignore it."). The Court of Appeals has wisely cautioned against judicially rewriting town code to create a high and "reasonable" threshold for signatures where a low "general election" voter turnout dictates a low threshold. *Homebuilders Ass'n of Cent. Arizona v. City of Scottsdale*, 186 Ariz. 642, 651 (App. 1996), *as modified* (Mar. 7, 1996). The *Homebuilders Association* opinion specifically approved the Superior Court's prescient analysis, which should likewise animate this Court's ruling:

> The city has chosen to adopt an election procedure which, on occasion, may lend itself to a requirement of extremely low numbers of signatures on referenda petitions when a low voter turn-out occurs at a "general" election.
>
> . . . This concern, however, is no justification for the judiciary to attempt to enforce its own social policy when the language of the statute is clear. The electors and their elected government officials must meet the problem, if there is one, themselves.

> . . . While it may appear unfortunate that 612 signatures could cause the expenditure of time, effort and money this issue has to the taxpayers, the extremely low voter turn-out and the election procedure which the city has adopted has facilitated such a result.

Id. *See also Paniagua*, 221 Ariz. at 446 ("[The city] raises the hypothetical that in a small town with an at-large election, the number of votes needed for a referendum would be greater than in a large city when the votes might be based on a district election. . . . Statutes, however, do not necessarily lead to perfect results in all cases; unless the statute results in absurdity, it is lawful.").

The Superior Court may be right that 1,225 is better than 770 as a threshold, or that it is not very reasonable to employ a 2002 yardstick for a 2019 recall. But that is what the text of the Recall Provision does here. If that rule is not sensible, the remedy is to amend the Recall Provision. Unless and until it is amended, the threshold must be 770.

REQUEST FOR ATTORNEYS' FEES ON APPEAL

Pursuant to Ariz. R. Civ. App. P. 21(a), Appellants request an award of fees and costs incurred on appeal under A.R.S. § 12-2030 and the private attorney general doctrine. *See Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989).

CONCLUSION

The Recall Provision requires that recalls be based on general elections. Payson and municipalities like it hold general elections. But they do not hold general elections in each cycle. This is a normal practice across Arizona, and in no way

justifies any reticence in applying the Recall Provision as it was written.

If one applies Arizona's Constitution according to its plain meaning—without resort to divining purposes divorced from its text or engaging in wide-ranging explorations of supposed reasonability—there is no question that the recall signature threshold here was indeed 770, as Payson's Town Clerk correctly told Unite Payson. This Court should enforce Arizona's Constitution as it was written, so this election can be decided at the ballot box, not in the courtroom, consistent with our Framers' ardor for the citizens' right to pursue recall, enshrined in Art. VIII, pt. 1, § 1.

RESPECTFULLY SUBMITTED this 18th day of November, 2019.

SNELL & WILMER L.L.P.

By: */s/ Eric H. Spencer*

Eric H. Spencer
Ryan J. Regula
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Attorneys for Defendants/Counter-Claimants/Cross Claimants/Appellants

4825-9631-8381