ARIZONA SUPREME COURT

THOMAS P. MORRISSEY, individually, Plaintiff/Appellee, vs. 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 TUBBS-AVAKIAN, 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.	No. CV-19-0271 On Appeal from Gila County Superior Court Case No. CV2019-00287

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

The trial court ruled correctly and this Court should uphold its ruling. The trial court rejected the theory of the proponents of the mayor recall ("Appellants") and the Town Clerk that Payson's "last preceding general election", as described by the Arizona Constitution, was a May election over 17 years ago.

This Court has previously described the essence of a general election, and how it differs from a primary election, from the standpoint of the Arizona Constitution. *Kyle v. Daniels*, 9 P.3d 1043, 1045, 198 Ariz. 304, 306 (2000). In short, candidates are elected at general elections—they are not elected at primary elections.

The trial court correctly chose not to focus on labels, stating that "nomenclature is less important than the function that [the] election served." (APP030). Nonetheless, the trial court did find that the August 2018 election at which the Plaintiff, Mayor Thomas Morrissey ("Morrissey") was elected was described by the Payson Town Code as a primary election. Notwithstanding this, the reality is that under the Payson Town Code, the August 2018 election was correctly described as a general election. (APP033). Payson's elections are nonpartisan, and if at the initial election a candidate secures an outright

majority, the candidate is elected.

The Payson Town Code correctly describes the substance of its different elections, stating that "[i]f at any primary election held as above provided there be any office for which no candidate is elected, then as to such office, the election shall be considered to be a primary election for nomination of candidates, and the general municipal election shall be held to vote for candidates to fill the office." Section 30.07(C)(APP033). This is another way of stating that if a candidate is elected at what would otherwise be a primary election, that election is not a primary election and must be a general election. This is clearly consistent with *Kyle*.

This approach, which inevitably leads to the use of elections that are closer in time to calculate the number of signatures necessary to trigger a recall, is consistent with the Constitution's "purpose…to tie the number of signatures needed to force a recall election to the size of the electorate." (APP030). It also avoids the unanswerable question about what to do in a recall election in a newer municipality in which there has never been a situation embodied by the May 2002 Payson election. That is, an election in which a mayor was elected at a subsequent election held because no candidate had secured an outright majority at the initial election. In such a case, it is impossible to apply the Constitution in the manner that Appellants urge it be applied.

Appellants never really settle on a unifying theme, and their brief is at times contradictory. Appellants point to their erroneous reading of Payson's Town code as determinative, implying the Town could dictate which election counts as the "general election" merely by labeling it such. But later Appellants state that the Constitution's Framers eschewed efforts to let cities and towns decide their own recall provisions.

The trial court gave the most sensible interpretation possible to a constitutional provision that was simply not written with the nonpartisan, top two election procedures that most municipalities follow, in mind. To wit, the "last preceding general election" was the election immediately prior at which Morrissey was elected, rather than the May 2002 election that Appellants point to. This Court should affirm.

STATEMENT OF FACTS AND CASE

Morrissey agrees with most of the Statement of the Facts and Case presented by the Appellants. However, Morrissey disagrees with the characterization of the August 2018 Payson election, at which Morrissey was elected Mayor, as a "primary election". Morrissey asserts that this was a general election.

STATEMENT OF THE ISSUE

The issue in this case is what is the "last preceding general election"

under Ariz. Const. Art. VIII, pt. 1, § 1. This provision of the Arizona Constitution controls which election serves as the basis for measuring the number of "qualified electors", which must be multiplied by 25% in order to arrive at the necessary minimum number of signatures to trigger a recall election of the Mayor of Payson. Morrissey contends it was the August 2018 election, and Appellants and Town Clerk claim it is the May 2002 election.

STANDARD OF REVIEW

Morrissey agrees that because this case involves only a question of law, the standard of review is *de novo*.

LEGAL ARGUMENT

I. THE TRIAL COURT RULED CORRECTLY

A. THE PROPER ELECTION TO USE TO DETERMINE THE NUMBER OF SIGNATURES NECESSARY TO TRIGGER A RECALL ELECTION WAS THE AUGUST 2018 PAYSON MAYORAL ELECTION

Art. VIII, pt. 1, § 1 of the Arizona Constitution, the "Recall Provision", states, in relevant part:

> Every public officer in the state of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office…**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).

At the August 2018 election, there were a total of 5,020 votes for mayoral candidates. This number, multiplied by 25%, yields a result 1,255, the correct number of signatures required to trigger a recall of the Payson Mayor under the Arizona Constitution. The Town Clerk's number of 770 signatures was derived from an election in May of 2002. The Clerk had to go back that far to find a Payson mayoral election at which a candidate was not elected outright at the initial election. (APP024).

The difference between the correct amount and that calculated by the Clerk is a significant one, and adhering to the Appellants' and Clerk's theory clearly distorts the Constitution's signature requirements. As it happens, 770 signatures is a mere 15% of the now existing electorate, 5,020, as measured from the most recent mayoral election in 2018, far fewer than the 25% that the Constitution requires.

The Constitution's Framers clearly recognized that the population of the state would grow. That is undoubtedly one of the reasons why the requisite number of signers is not a static number but is based on a percentage, such that the total signatures needed grows with the population. Going back decades in time distorts this percentage by taking a less current number of voters to multiply by 25% to arrive at the requisite number of signers to trigger a recall

election. This defeats the Constitution's goal "to tie the number of signatures needed to force a recall election to the size of the electorate." (APP030).

The trial court also found that the phrase "last preceding" was put there for a reason. And preceding means "immediately before in time or in place." Merriam-Webster's Collegiate Dictionary (10th ed. 2000); www.merriam-webster.com/dictionary/preceding. Going back over seventeen years to find another election simply does not adhere to the Constitution's purpose.

As Appellants state, the right to recall was of very high importance to the Framers of the Arizona Constitution. But this Court, in discussing the thinking behind the Constitution's fairly robust requirement of 25% of the qualified electors, noted that "[t]he purpose of the petition procedure is to avoid the expense of holding recall elections except in those cases where a significant showing of voter interest is demonstrated." *Johnson v. Maehling*, 597 P.2d 1, 4, 123 Ariz. 15, 18 (1979).

The trial court correctly found that the proper election to turn to was the August 2018 election at which Morrissey was elected Mayor, not a May election in 2002.

B. AN ELECTION IN WHICH A CANDIDATE IS ELECTED IS NOT A PRIMARY ELECTION—IT IS A GENERAL ELECTION

As the trial court stated, it is the substance of an election, not its label, that is important:

> [N]omenclature is less important than the function that [August 2018] election served, which was to elect the Mayor. The Town Code could have called the August election a "general election" and the November election a "runoff election" because the August election decides who will be mayor unless no one gets a majority. Indeed, when a candidate gets a majority, they are "declared to be elected ... as of the date of the general election…"

As it is, notwithstanding the trial court's finding on this point, the Payson Town Code actually describes the mechanics of its elections accurately. It states, in relevant part:

> General election nomination. <u>If at any primary election held as above provided there be any office for which no candidate is elected, then as to such office, the election shall be considered to be a primary election for nomination of candidates, and the general municipal election shall be held to vote for candidates to fill the office</u>.
>
> Payson Town Code, Section 30.07(C)(emphasis added)(APP033).

In other words, an election is a primary election if no candidate is elected. But if a candidate is elected, the would-be primary election is instead a general election. The provision above is perhaps written awkwardly but that is the clear import.

As noted, the Arizona Constitution provides for a traditional primary election where candidates are nominated and a November general election where candidates are elected. Ariz. Const. Article VII, Sections 10 and 11. Under this system:

> [t]he primary election serves a different function in our system [than the general election]. It is a competition for the party's nomination, no more, no less, and does not elect a person to office but merely determines the candidate who will run for the office in the general election.

Kyle, 9 P.3d at 1045, 198 Ariz. at 306. Most Arizona municipalities, including Payson's hold nonpartisan elections. The *Kyle* holding, and the rationale adopted by Payson in its Town Code, supports the position that if a person is elected at the first election because he or she attains an outright majority, that election is a general election. If a candidate is not elected, but instead there is a subsequent election to elect a candidate, the first election is a primary election. *Kyle*, 9 P.3d at 1045, 198 Ariz. at 306; Art. VIII, Section 1, Ariz. Const.; Payson Town code Section 30.07.

C. MORRISSEY'S APPROACH IS THE ONLY APPROACH THAT CAN BE APPLIED IN ALL CASES—APPELLANTS ARGUE FOR A METHOD OF CALCULATION THAT CANNOT BE APPLIED IN THE CASE OF A MUNICIPALITY THAT HAS NEVER HAD A SITUATION IN WHICH AN OUTRIGHT MAJORITY WAS NOT ACHIEVED BY A CANDIDATE AT THE INITIAL ELECTION

Though it was raised below, Appellants have never explained what to do with the following conundrum. That is, take the example of a newer municipality with election laws that are the same as Payson's in which a determination of the requisite number of signatures needed to trigger a mayoral recall must be made. In this newer municipality, there has never been a mayoral election that was not decided at the initial election by one of the candidates receiving an outright majority. In such a case, it would be impossible to apply the Constitution in the manner Appellants argue for.

One cannot logically credit a legal theory that requires use of an election that may or may not have ever taken place as the baseline election. This leaves Plaintiff's interpretation as the only logically supported way to measure the 25%. Morrissey's interpretation yields an approach that can actually be applied in all cases. And only this interpretation fulfills the Constitution's purpose of tying the number of recall signatures needed to the size of the electorate at the time of the recall, not the size of the electorate decades in the past.

II. THE APPELLANTS' VARIOUS LEGAL THEORIES ARE UNAVAILING

A. THE APPELLANTS' APPLICATION OF THE RULES OF STATUTORY CONSTRUCTION IS INCORRECT

Though the Appellants try to describe their position as hewing most closely to the text of the Arizona Constitution, it is the Appellants who attempt to turn fundamental rules of statutory construction on their head.

The Appellants are correct in stating that "[e]ach word, phrase, clause, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." *See, e.g., Cain v. Horne*, 220 Ariz. 77, 81, ¶ 10 (App. 2009) (quotation omitted). But after stating the law correctly, the Appellants proceed to misapply it.

Appellants state that the "phrase 'general election' was accorded no dignity" by the trial court, and state that the trial court somehow elevated certain parts of the Recall Provision over other parts. (Opening Brief, p. 9). This is a misreading of the trial court's ruling and completely misapplies the rules of statutory construction.

The role of the Courts is not to rate certain parts of the Constitution as superior to others but to give effect to its provisions as a whole. *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."). And it is the Appellants

who seek to read out parts of the Arizona Constitution. The trial court was correct that that the phrase "last preceding" was put there for a reason, and preceding clearly indicates something that is close in time, if not right before. (APP030). *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, 432 P.3d 925, 927 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.")

The case cited by Appellants, *Jones v. Paniagua*, sheds no light on the resolution of this matter one way or another. 212 P.3d 133, 137, 221 Ariz. 441, 445 (App. 2009). This case decided whether the Phoenix City Charter conflicted with A.R.S. § 19–142(A), which provides: "The 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 against an ordinance, franchise or resolution shall be the basis on which the number of electors of the city or town required to file a referendum petition shall be computed."

The *Jones* case had nothing to do with the issue here, which involves the interpretation of the Recall Provision.

B. APPELLANTS "PLAIN MEANING" ARGUMENT IS FATALLY FLAWED BECAUSE "PLAIN MEANING" AS APPLIED TO THE FACTS OF THIS CASE IS A DEAD END

Appellants claim that "the plain meaning canon, and the plain meaning of the Recall Provision, should lead this Court to reverse." (Opening Brief, p. 10). This argument is untenable.

The Arizona Constitution, and its Recall Provision, are not perfectly tailored for modern municipal elections. In providing for a traditional primary election at which candidates are nominated and a November general election where candidates are elected, Article VII, § 11 of the Constitution, titled "General elections; dates" states: "There shall be a general election of representatives in congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year."

Clearly an election in May 2002 is hardly a great fit for the text of the Recall Provision, which again, uses the phrase "last preceding general election." Ariz. Const. Art. VIII, Pt. 1, § 1. To be sure, an election in August of 2018 is not an election occurring "on the first Tuesday after the first Monday in November" either. But as the trial court noted, while perhaps not a perfect fit for "last preceding general election", the August 2018 election, at which

Mayor Morrissey was elected, clearly more closely approximates the critical phrase than does a May election over seventeen years ago.

Appellants ironically point to City of Phoenix Charter, when the City of Phoenix Charter describes two elections—"Mayor and Council Elections", and "Runoff Elections" Phoenix City Charter, Chapter XII, Sections 15 and 16. A "Runoff Election" only occurs if no candidate receives an outright majority at the initial election.

As alluded to above, if one follows the Appellants' logic, if the Town of Payson had simply changed the label of its elections, that would have been determinative[1]. That is, if Payson called its August election the general election, and any follow up election a "run-off", then through mere labeling, the August 2018 would have been the general election.

This Court should reject Appellants' label-focused approach, which, because it misreads the Payson Code, is not even correct in applying the proper label. And as the trial court stated, labels are largely irrelevant because it is the substance of the election that counts. General elections are the elections at which candidates are elected. *Kyle*, 9 P.3d at 1045, 198 Ariz. at 306. The

[1] Appellants claim that "the August 2018 election wasn't just called a primary election. It was a primary election. [Payson Town] Section 30.07(A)(1)." (Opening Brief, p. 9).

August 2018 election is the proper election from which to calculate the number of signatures needed to force a recall election.

C. APPELLANTS' ABSURDITY ARGUMENT IS A NONSEQUITER AND THE TRIAL COURT DID NOT "REWRITE THE CONSTITUTION

It is true that in interpreting a statute, Arizona courts apply the plain meaning of a law "unless application of the plain meaning would lead to impossible or absurd results…" *TP Racing, L.L.L.P. v. Simms*, 307 P.3d 56, 60, 232 Ariz. 489, 493 (App. 2013). But the problem with this argument from Appellants is that the trial court never concluded that the statute was absurd and thus the court had to give it a meaning at odds with its plain language.

The Appellants claim that trial court engaged in "purposive…interpretation" and "gave no legal effect to the phrase 'last preceding general election'" merely because the trial court disagreed with its theory that the "last preceding general election" was a May election more than 17 years ago. (Opening Brief, p. 12). It is obvious from the trial court's ruling that the Court's sole objective was to give meaning to the Recall Provision that was consistent with the intent of the drafters. That is what courts are supposed to do. *See, e.g., Employment Sec. Commission of Ariz. v. Fish*, 375 P.2d 20, 22, 92 Ariz. 140, 142 (1962)("[T]he object of statutory interpretation is to determine the meaning and intent of the legislature.")

The Arizona Constitution was not really written with "top two" elections in mind, where candidates are often elected at the first election. Instead, it was written from the statewide standpoint, where there is a partisan primary (at which no candidates are actually elected) followed by a November general election.

Appellants primarily cite *Homebuilders Ass'n. of Cent. Arizona v. City of Scottsdale* for the proposition that a statute producing a relatively low signature requirement in the referendum realm is not grounds for "distorting the statutory requirements." 925 P.2d 1359, 1368, 186 Ariz. 642, 651 (App. 1996).

Appellants' argument on this front misunderstands the trial court's ruling, and its correct application of the Arizona Constitution. The trial court did not use the relatively low number of signatures required if the May 2002 election were used as a reason for ignoring the Recall Provision. Instead, the trial court merely pointed out that the Arizona Constitution's recall scheme contemplates the use of an election close in time, which the May 2002 election is not.

Homebuilders involved a question of particular statutory construction that is not even close to the issue in this case—the *Homebuilders*' question was

whether to use the February 1994 election or the March 1994 election as the baseline election. *Id.*

The trial court properly interpreted the Recall Provision, and this Court should affirm.

III. CONCLUSION

For the foregoing reasons, Morrissey asks that this Court affirm the ruling of the trial court.

RESPECTFULLY SUBMITTED this 26th day of November, 2019.

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APPENDIX

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IN THE SUPERIOR COURT
OF
Gila County, State of Arizona

10/29/2019
HON. RANDALL WARNER V GUADIANA
Visiting Judge Judicial Assistant

THOMAS P. MORRISSEY, individually, Plaintiffs, **vs.** **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 TUBBS-AVAKIAN, in her official capacity as Payson Councilmember, BARBARA UNDERWOOD, in her official capacity as Payson Councilmember, and TOWN OF PAYSON, ARIZONA, a public entity,** Defendant.	**CV201900287**

RULING ON UNDER ADVISEMENT ACTION

Plaintiff Thomas Morrissey, the Mayor of the Town of Payson, filed this lawsuit to challenge a recall election. Defendant Unite Payson (with related Defendants Garner and Chittick), filed a Motion to Dismiss, and Defendants Garner and Chittick filed a Counterclaim/Cross-Claim. At a hearing on

October 28, 2019, the court took evidence and heard argument. It makes the following findings and conclusions.

I. FINDINGS.

A. Background.

Thomas Morrissey was elected Mayor of Payson in 2018. Under the Payson Town Code, a nonpartisan primary election is held for mayor and, if no candidate receives a majority, the two candidates with the most votes compete in the "general or runoff election." *See* Payson Town Code § 30.07(A)(3). But if one candidate receives a majority at the primary election, the candidate is declared elected as of the date of the general election and no further election is held. *See* Payson Town Code § 30.07(A)(1). Morrissey received 53.11% of the vote in the primary election on August 28, 2018, and so was declared elected as of the general election.

Unite Payson initiated a recall of Mayor Morrissey in 2019. The Town Clerk researched the issue and determined that 770 signatures were needed to force a recall election under Arizona law. That number is 25% of the votes for mayor in the 2002 general election, which was the last time a general election for mayor was necessary in Payson. Under Arizona's Constitution, the number of signatures needed to force a recall is 25% "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.

Unite Payson collected and submitted 970 signatures. The Town Clerk invalidated 40 signatures and submitted the remaining 930 to the County Recorder. The County Recorder invalidated 109, leaving 821 valid signatures. Because Unite Payson had more than 770 signatures, the Town Clerk called a recall election for March 10, 2020.

Mayor Morrissey filed this special action and injunctive lawsuit to challenge the recall election on two grounds. First, he argues that a number of petition sheets must be invalidated because one or more electors on them did not write their own addresses in violation of A.R.S. § 19-205(A). *See Parker v. City of Tucson*, 233 Ariz. 422, 438, 314 P.3d 100, 116 (App. 2013) (entire signature sheet is invalidated if elector did not print their own address and the circulator's affidavit says they did). Second, he argues that the number of signatures needed to force a recall election is not 770, but 1,255. The latter is 25% of the votes cast for mayor in the 2018 primary election. Mayor Morrissey argues that, because no general election was held in 2018, the number of signatures needed should be measured by the election in which he was elected.

Defendants Garner and Chittick filed a Counterclaim/Cross-Claim seeking to rehabilitate invalidated signatures.

B. Findings On Mayor Morrissey's Claim.

At the evidentiary hearing, Mayor Morrissey proved that a number of electors did not write their own addresses. Several of those had someone write their address for them due to a physical infirmity. Three did not have that excuse. They are: sheet 7, line 14; sheet 32, line 5; and sheet 32, line 6. There are 15 signatures on sheet 7 and 5 signatures on sheet 32.

The legal consequence of these facts is discussed below.

C. Findings on The Counterclaim/Cross-Claim.

At the evidentiary hearing, Defendants Garner and Chittick sought to rehabilitate a number of signatures invalidated by the Town Clerk or the County Recorder. On these issues, the court finds as follows.

The signature on sheet 77, line 8 was invalidated because the date was illegible. The court finds the date of August 30, 2019 to be legible.

Three signatures were invalidated because the signature did not match the voter registration signature: sheet 37, line 1; sheet 4, line 6; and sheet 82, line 11. The court finds each of these was properly signed by the elector.

A number of signatures were invalidated because they have a "Payson" address but are not within Payson's town limits. The court finds that these signers did not reside in the Town of Payson and so are not qualified electors.

39 signatures were invalidated because they contained a day and a month but no year. The recall petitions were only circulated in 2019. Based on that and other signatures on the same sheet, those 39 signatures were all made in 2019.

The legal consequence of these facts is discussed below.

II. LEGAL CONCLUSIONS: SIGNATURE CHALLENGES.

A. Mayor Morrissey's Signatures Challenge Is Not A Valid Challenge Under A.R.S. § 19-208.04.

Mayor Morrissey seeks to invalidate petition sheets because one or more of the electors on those sheets did not write their own address. Under the *Parker* case, if a circulator states in the affidavit that all electors on a sheet wrote their own address, and some did not, the affidavit is false and the entire sheet is invalidated. *Parker*, 233 Ariz. at 438, 314 P.3d at 116. As discussed above, the court finds that two petition sheets totaling 20 signatures contained addresses written by someone other than the elector. Thus, if Mayor Morrissey can assert this claim, these 20 additional signatures are invalid.

This number does not include petition sheets on which electors had someone else write their address due to a physical infirmity. Arizona law allows this, so signatures cannot be disqualified on this basis. *See* A.R.S. § 19-115(B); A.R.S. § 19-206(B).

Relying on A.R.S. § 19-208.04(B), Unite Payson argues that Mayor Morrissey may not assert this challenge under Arizona law. That statute says:

> If an elector wishes to challenge the number of signatures certified by the county recorder under the provisions of section 19-208.02, he shall, within ten calendar days after the receiving officer has notified the governor and

> the county recorders of the number of certified signatures received by him, commence an action in the superior court for a determination thereon. The action shall be advanced on the calendar and heard and decided by the court as soon as possible. Either party may appeal to the supreme court within ten calendar days after judgment.

A.R.S. § 19-208.04(B). The Supreme Court recently held that this provision is the exclusive basis on which an elector may challenge petitions. *See Morales v. Archibald*, 246 Ariz. 398, 401, 439 P.3d 1179, 1182 (2019). Under this provision, an elector may only challenge signatures for reasons the County Recorder could have disqualified them under A.R.S. § 19-208.02. So the question is: Could the County Recorder have disqualified signatures on the ground Mayor Morrissey alleges? A close reading of the relevant statutes shows that the County Recorder could not.

A.R.S. § 19-208.02(A) requires a county recorder to determine the number of petition signatures that must be disqualified for the reasons set forth in A.R.S. § 19-121.02(A). A.R.S. § 19-121.02(A), in turn, lists several reasons for disqualifying signatures, only one of which arguably applies here: "For the same reasons any signatures or entire petition sheets could have been removed by the secretary of state pursuant to § 19-121.01, subsection A, paragraph 1 or 3." A.R.S. § 19-121.02(A)(11).

So subsections (A)(1) and (A)(3) of A.R.S. § 19-121.01 must be examined. Nothing in subsection (A)(1) arguably applies here. The only part of subsection (A)(3) that could apply is (A)(3)(f), which requires invalidating signatures if "the ***petition circulator*** has printed the elector's first and last names or other information in violation of § 19-112." (Emphasis added.)

This is similar to what Mayor Morrissey proved here, but not the same. He proved that some electors who signed petitions did not write their own addresses. This is a violation of Arizona law. *See* A.R.S. § 19-205(A) ("the elector so signing shall write, in the appropriate spaces following the signature, his residence address"). But A.R.S. § 19-121.01(A)(3)(f) does not allow disqualifying a signature on that basis. That provision only applies if "the petition circulator" prints the elector's name or other information, not if someone else like a spouse or a friend does. In other words, there is a legal requirement that electors write their own addresses, but no legal redress if someone else does.

It is peculiar that the statutes impose a requirement on petition signatures but do not allow a county recorder to invalidate them on that basis. But that is what the statute's plain language says and the court is required to follow it. Mayor Morrissey's signature challenge does not fall under A.R.S. § 19-121(A)(3)(f), so it is not a valid challenge under A.R.S. § 19-208.04(B).

B. <u>Mr. Garner and Ms. Chittick Can Rehabilitate Signatures</u>.

Mayor Morrissey argues that the Counterclaim/Cross-Claim is an untimely signature challenge. A.R.S. § 19-208.04(B) requires that a legal challenge to signatures be filed in superior court within 10 calendar days after notification. Thus, had Mr. Garner and Ms. Chittick filed their own lawsuit to challenge disqualified signatures, they would have had to comply with the 10-day requirement. But A.R.S. § 19-208.04(B) does not preclude them from rehabilitating signatures as a defense to Mayor Morrissey's challenge.

On the merits, the court makes the following legal conclusions. First, 4 signatures were rehabilitated based on the court's findings above.

Second, signatures that include a day and month but no year are invalid. A.R.S. § 19-121.02(A)(2) required the County Recorder to invalidate signatures if "[n]o date of signing is provided." A day and a month are not a complete date. Without a year, there is no date.

Mr. Garner and Ms. Chittick point out that the date was obvious given that petitions were only circulated in 2019. They also point out that, according to the Secretary of State's handbook, a date and month with no year is sufficient for an initiative or referendum petition. But the statutes do not require or authorize the County Recorder to infer the correct date when a complete date is not written. Although it is obvious here—there is no question the signatures were made in 2019—it will not be obvious in all cases. The better interpretation of A.R.S. § 19-121.02(A)(3) is that a "date of signing" means a complete date. *See also* A.R.S. § 19-201.01 ("the constitutional and statutory requirements for recall be strictly construed and that persons using the recall process strictly comply with those constitutional and statutory requirements").

Finally, Unite Payson argues that people with a Payson address may sign petitions, and their signatures should not be invalidated if their address turns out not to be within the Town limits. The fact that the Post Office allows people outside Town limits to use a "Payson" address does not make them qualified electors of the Town of Payson. *See* Ariz. Const. Art. VIII, pt. 1, § 1 (public officer subject to recall by qualified electors of the district); A.R.S. § 16-121(defining "qualified elector"). If someone does not live within the Town limits, they are not a qualified elector, not eligible to vote in Town elections, and may not sign recall petitions for Town mayor.

C. Number of Valid Signatures.

Based on the above, Mayor Morrissey has not invalidated any additional signatures and Mr. Garner and Ms. Chittick have rehabilitated four. Thus, the total number of valid signatures is 825.

III. LEGAL CONCLUSIONS: NUMBER OF SIGNATURES REQUIRED.

A. Mayor Morrissey Can Challenge the Number Of Signatures Required By Special Action.

In addition to challenging the number of valid signatures, Mayor Morrissey challenges the number of signatures required to force a recall election under the Constitution. He argues that the Town Clerk should have used the 2018 primary election rather than the 2002 general election to determine the 25% required to force a recall election. Unite Payson argues that Mayor Morrissey cannot bring this challenge because it is not authorized by A.R.S. § 19-208.04(B).

A.R.S. § 19-208.04(B) governs challenges to recall petitions. As the Supreme Court held in *Morales*, only petition challenges authorized by A.R.S. § 19-208.04(B) may be asserted in court. 246 Ariz. at 401, 439 P.3d at 1182. But that statute does not preclude the target of a recall from challenging its legality, which Mayor Morrissey may do by way of special action.

Article 6, Section 18 of Arizona's Constitution authorizes the court to issue writs of mandamus, certiorari, and prohibition. Under the Rules of Procedure for Special Actions, a special action is used provide relief that previously was obtained by writ of prohibition, mandamus, or certiorari. Ariz. R. P. Spec. Act. 1(a). A special action may be brought where a public officer has proceeded in excess of legal authority, and a "person who previously could institute an application for a writ of mandamus, prohibition, or certiorari may institute proceedings for a special action." Ariz. R. P. Spec. Act. 2(a)(1), 3(b).

That is what Mayor Morrissey seeks. He alleges that the Town Clerk exceeded her legal authority by incorrectly interpreting the Constitution's 25% requirement. He seeks an order prohibiting the recall election from going forward. Were there no A.R.S. § 19-208.04(B), Mayor Morrissey could clearly do this under the special action rules, so the question is whether the statute precludes that remedy.

It does not. A.R.S. § 19-208.04(B) addresses challenges to signatures, and *Morales* holds that an elector may only assert petition challenges that are authorized by the statute. 246 Ariz. at 401, 439 P.3d at 1182. But nothing in the statute suggests it precludes the target of a recall election from challenging its legality.

By all accounts, the Town Clerk here acted in good faith and did everything reasonable to determine the right number of signatures required under the Constitution. But imagine some other town clerk decided only 10 signatures were needed to force a recall election. Or imagine a recall election was called without any petitions having been filed at all. Under United Payson's interpretation, A.R.S. § 19-208.04(B) would bar any legal challenge by the target of the recall election. Nothing in the statute—which, by its terms, is designed to authorize petition challenges—suggests it was intended to immunize recall elections from any other legal challenge by the target of the recall.

A recall election may only be called if the requirements of Article VIII, Part 1, Section 1 of the Constitution are met. If a recall election goes forward based on fewer signatures than the Constitution requires, it is an unconstitutional election despite the Town Clerk's and Unite Payson's good faith. A.R.S. § 19-208.04(B) cannot be interpreted to preclude Mayor Morrissey from challenging the election on that basis.

B. <u>The Number of Signatures Required To Force A Recall Is Measured By The August 2018 Election</u>.

Turning to the merits, Article VIII, Part 1, Section 1 of the Constitution states:

> Every public officer in the state of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole state. 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). The Constitution must be interpreted according to its plain meaning when possible. *US West Communications, Inc. v. Arizona Corp. Com'n*, 201 Ariz. 242, 258, 34 P.3d 351, 354 (2001). But here the plain meaning yields no answer because there was no "last preceding general election." The last general election was 17 years ago, and the preceding election was the 2018 primary. So, as between the two, which election best fits the meaning of "last preceding general election" as contemplated by the Constitution?

The goal of interpreting a constitutional provision is to effectuate its intent as expressed in its language, while remaining true to the objectives it was meant to accomplish. *Saban Rent-a-Car LLC v. Arizona Department of Revenue*, 246 Ariz. 89, 95, 434 P.3d 1168, 1174 (2019). The purpose of Article VIII, Part 1, Section 1 is to tie the number of signatures needed to force a recall election to the size of the electorate. In a large election like one for governor, a large number of signatures is needed; in a smaller election like that for Payson's mayor, a smaller number of signatures is needed. The provision does this by measuring the number of votes needed by the votes cast at the "last preceding general election" for that office.

The term "preceding" is important. The Constitution could have said the "last general election." If it did, the 2002 general election would be the right one to use because it was the last general election. But the word "preceding" suggests temporal proximity, and that word cannot be ignored. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, 432 P.3d 925, 927 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous."). "Preceding" implies something "immediately before in time or in place." *See* Merriam-Webster's Collegiate Dictionary (10th ed. 2000); www.merriam-webster.com/dictionary/preceding. This temporal proximity is necessary to effectuate the purpose of measuring the number of required signatures by the present size of the electorate. Without it, the number of signatures needed could be measured by the electorate in 2002, 1992, or 1982, when it was much different from what it is now.

It is true that, under Payson's Town Code, the August 2018 election was called a primary election, not a general election. But its nomenclature is less important than the function that election served, which was to elect the Mayor. The Town Code could have called the August election a "general election" and the November election a "runoff election" because the August election decides who will be mayor unless no one gets a majority. Indeed, when a candidate gets a majority, they are "declared to be elected . . . as of the date of the general election."

The "last preceding general election" contemplated by the Constitution appears to be one that follows a partisan primary, as happens in statewide elections. *See, e.g., Kyle v. Daniels*, 198 Ariz. 304, 306, 9 P.3d 1043, 1045 (2000) ("the primary election . . . is a competition for the party's nomination, no more, no less, and does not elect a person to office but merely determines the candidate who will run for the office in the general election"). Payson's primary is different, and Article VIII, Part 1, Section 1 does not appear to have considered "top two" elections like it, which are the final election unless no candidate receives a majority.

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 than the 2002 election. It 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."

As a matter of law, the number of signatures required to force a recall election is 1,225, which is more than the 825 valid signatures Unite Payson submitted. For that reason, the relief Mayor Morrissey requests must be granted and the recall election must be enjoined.

IV. ORDERS.

Based on the foregoing,

IT IS ORDERED denying the Motion to Dismiss.

IT IS FURTHER ORDERED granting the relief requested, and enjoining the recall election set for March 10, 2020.

This minute entry disposes of all outstanding claims and issues in this case. To facilitate an accelerated appeal, and because no further matters remain pending, the court signs this minute entry as a final judgment entered pursuant to Ariz. R. Civ. P. 54(c).

Randall Warner
Judge of the Superior Court

10/29/19
Date

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Payson, Arizona Code of Ordinances

§ 30.07 COUNCIL ELECTIONS.

(A) *Primary election.*

(1) Any candidate for the office of mayor or town council who receives a majority of the votes cast at that election for that office shall be declared to be elected to the office for which the person is a candidate effective as of the date of the general election, and no further election shall be held as to such candidate. For the purposes of this division , the majority of votes cast are determined by A.R.S. § 9-821.01(D) (1-3):

(a) Calculating the total number of actual votes cast for all candidates for an office whose names were lawfully on the ballot for that office.

(b) Dividing the sum reached pursuant to division (A)(1)(a) above by the number of seats to be filled for the office.

(c) Dividing the number reached pursuant to division (A)(1)(b) above by two and rounding that number to the highest whole number.

(2) If more candidates receive a majority of votes cast than there are seats for the offices to be filled, from among those candidates who receive a majority of votes cast, the candidates who receive the highest number of votes equal to the number of seats to be filled for the office shall be declared elected to that office. (A.R.S. § 9-821.01(E))

(3) If at the primary election no candidate receives the majority of votes cast or the number of seats to be filled for the office is more than the number of candidates who receive a majority of votes cast, of the candidates who did not receive a majority of votes cast, the number of candidates who advance to the general or runoff election shall be equal to twice the number of seats to be filled for the office and the candidates who received the highest number of votes for the office shall be the only candidates at the general or runoff election. (A.R.S. § 9-821.01(F))

(4) If more than one candidate received an equal number of votes and that number was the highest number of votes for the office, then all candidates receiving the equal number of votes shall be candidates at the general or runoff election. The candidates equal in number of seats to be filled for the office who receive the highest number of votes at the general or runoff election shall be declared elected to that office. If two or more candidates receive an equal number of votes for the same office and a higher number than any other candidate, the candidate who shall be declared elected shall be determined by lot in the presence of the candidates. (A.R.S. § 9-821.01(F))

(B) *Non-political ballot.* Nothing on the ballot in any election shall be indicative of the support of a political party for any candidate. (`82 Code, § 2-3-2)

(C) *General election nomination.* If at any primary election held as above provided there be any office for which no candidate is elected, then as to such office, the election shall be considered to be a primary election for nomination of candidates, and the general municipal election shall be held to vote for candidates to fill the office. Candidates to be placed on the ballot at the general municipal election shall be those not elected at the first election, shall be equal in number to twice the number to be elected to any given office or less than that number if there be less than that number named on the primary election ballot. Persons who receive the highest number of votes for the respective offices at the first election shall be the only candidates at the second election, provided that if there be any person who, under the provisions of this section,

would have been entitled to become a candidate for any office except for the fact that some other candidate received an equal number of votes therefor, then all persons receiving an equal number of votes shall likewise become candidates for the office. (`82 Code, § 2-3-3)

(D) *Election to office*. The candidates equal in number to the persons to be elected who receive the highest number of votes shall be declared elected. (`82 Code, § 2-3-4)

(E) *Candidate financial disclosure*. Each candidate for town office shall file a financial disclosure statement when the candidate files a nomination paper. The statement shall contain such information as required by resolution of the Council. (`82 Code, § 2-3-5)

(Ord. 202, passed 11-22-83; Am. Ord. 836, passed 9-19-13; Am. Ord. 838, passed 9-19-13; Am. Ord. 904, passed 9-13-18)