

SUPREME COURT OF ARIZONA

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

Petitioner/Defendant,

v.

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

Respondent Judge,

STATE OF ARIZONA,
Real Party in Interest.

Arizona Supreme Court
No. CR-22-0154-PR

Court of Appeals Division
One
No. 1 CA-SA 21-0170

Maricopa County
Superior Court
CR2020-000467-001 DT

**BRIEF OF *AMICUS CURIAE*
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
IN SUPPORT OF PETITIONER**

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave., 21st Floor
Tucson, AZ 85701
(520) 724-6800
david.euchner@pima.gov

*Attorney for amicus curiae
Arizona Attorneys for Criminal Justice*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
INTRODUCTION	6
INTEREST OF AMICUS CURIAE	6
ARGUMENT	7
I. Criminal prosecutions impose a severe burden on individuals’ ability to exercise their fundamental political speech rights.	7
A. The statute’s criminal penalties severely burden core political speech.	7
B. A.R.S. § 19-118.01(A) can be abused by the party in power to prosecute its political adversaries.	9
II. This Court should resolve this case by holding A.R.S. § 19- 118.01(A) violates the state constitution.	10
A. This Court can promote its constitutional values by deciding this case under the state constitution.	10
B. A.R.S. § 19-118.01(A) violates article 2, section 6.	14
C. The Court should clarify that a generalized interest preventing fraud is insufficient to justify a law under article 2, section 6.	16
III. A.R.S. § 19-118.01(A) is unconstitutionally overbroad in violation of the First Amendment and article 2, section 6.	19
A. A.R.S. § 19-118.01(A)’s regulation of core political speech remains unconstitutionally overbroad even after <i>Molera</i>	19
B. The State does not grapple with the breadth of the statute which it has weaponized in this prosecution.	23
CONCLUSION	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	11
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973).....	24
<i>Buckley v. Am. Const. L. Found., Inc.</i> , 525 U.S. 182 (1999)	8, 17, 18
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	11
<i>Citizen’s United v. Fed. Elec. Comm’n</i> , 558 U.S. 310 (2010).....	17
<i>City of Los Angeles v. Patel</i> , 576 U.S. 409 (2014).....	24
<i>Coleman v. City of Mesa</i> , 230 Ariz. 352 (2012).....	15
<i>Emp. Div., Dep’t Hum. Res. of Or. v. Smith</i> , 494 U.S. 872 (1990).....	8
<i>Fed. Election Comm’n v. Cruz</i> , 142 S. Ct. 1638 (2022).....	18
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	20, 21
<i>Initiative & Referendum Inst. v. Jaeger</i> , 241 F.3d 614 (8th Cir. 2001)	17
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....	17
<i>Mills v. Bd. Of Tech. Registration</i> , 253 Ariz. 415 (2022).....	8

<i>Molera v. Hobbs</i> , 250 Ariz. 13 (2020).....	7, 9, 19, 20, 21, 24
<i>Mountain States Tel. & Tel. Co. v. Corp. Comm’n</i> , 160 Ariz. 350 (1989).....	11, 15, 16
<i>Nebraska Press Ass’n v. Stuart</i> , 427 U.S. 539 (1976).....	13
<i>In re Nickolas S.</i> , 226 Ariz. 182 (2011).....	23, 25
<i>Person v. N.Y. State Bd. of Elections</i> , 467 F.3d 141 (2d Cir. 2006)	17
<i>Phoenix Newspapers v. Jennings</i> , 107 Ariz. 557 (1971).....	13
<i>Phoenix Newspapers v. Super. Ct., Maricopa Cnty.</i> , 101 Ariz. 257 (1966).....	13
<i>Prete v. Bradbury</i> , 438 F.3d 949 (9th Cir. 2006)	17, 22
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980).....	13
<i>Stanwitz v. Reagan</i> , 245 Ariz. 344 (2018).....	18
<i>State v. Baldwin</i> , 184 Ariz. 267 (1995).....	23
<i>State v. Gordon</i> , 161 Ariz. 308 (1989).....	8
<i>State v. Musser</i> , 194 Ariz. 31 (1999).....	24
<i>State v. Stummer</i> , 219 Ariz. 137 (2008).....	8, 14, 15

<i>State v. Western</i> , 168 Ariz. 169 (1991).....	19
<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	9, 19, 21, 23, 24
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003).....	20
Constitutional Provisions	
Ariz. Const. art. 2, § 6.....	<i>passim</i>
U.S. Const., amend. I.....	<i>passim</i>
U.S. Const., amend. XIV.....	7
Statutes	
A.R.S. § 13-101(5).....	10
A.R.S. § 13-707.....	8
A.R.S. § 15-507.....	25
A.R.S. § 16-1020.....	25
A.R.S. § 19-118.01.....	<i>passim</i>
A.R.S. § 19-119.01.....	16, 25
Other Authorities	
Associated Press, <i>Arizona woman gets 30 days in jail for collecting 4 ballots</i> , October 13, 2022.....	10
Clint Bolick, <i>The Proper Role of Judicial Activism</i> , 42 Harv. J.L. & Pub. Pol’y 1 (Winter 2019).....	23
Goodwin Liu, <i>State Courts and Constitutional Structure</i> , 128 Yale L.J. 1304 (2018).....	12, 13
Jeffrey S. Sutton, <i>51 Imperfect Solutions: States and the Making of Am. Const. L.</i> (2018).....	11, 12

INTRODUCTION

This case presents the question of whether the State can criminalize an indeterminate number of exercises of core political speech, and then prosecute a business for conduct that does not clearly fall within the boundaries of the law. This Court should not permit this prosecution to go forward for several reasons.

If upheld, this law will place an extreme burden on political speech. Signature-gathering companies, fearing arbitrary prosecution under an imprecise statute, will opt out of the political process rather than risk prosecution or be subject to indeterminate restrictions that would interfere with their ability to effectively run their businesses and promote their desired political topic. This law also invites abuse by elected officials. Whichever political party happens to be in power at the moment can use this law to prosecute people from the other political party.

This Court should also prioritize the state constitutional claims at issue. In doing so, the Court can both (1) explain the scope of free speech in Arizona and (2) promote structural constitutional values. By breathing life into these core state constitutional rights, Arizona can untether itself from uncertainties in federal caselaw and set its own course.

INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give

a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the rights of criminal defendants to be free from prosecutions under vague and overbroad laws for conduct that is core political speech under the First and Fourteenth Amendments to the U.S. Constitution and article 2, section 6 of the Arizona Constitution.

ARGUMENT

I. Criminal prosecutions impose a severe burden on individuals’ ability to exercise their fundamental political speech rights.

A. The statute’s criminal penalties severely burden core political speech.

[A.R.S. § 19-118.01\(A\)](#) burdens core political speech because it regulates how persons and businesses can spread their political message and effect political change through the voter initiative process. This Court has already recognized that, explaining that “by limiting how circulators may be paid, 19-118.01(A) restricts ‘core political speech’. . . .” *Molera v. Hobbs*, [250 Ariz. 13, 24 ¶ 37](#) (2020). And “restrictions on core political speech . . . plainly impose a severe burden” under the

First Amendment. See *Buckley v. Am. Const. L. Found., Inc.*, [525 U.S. 182, 208](#) (1999) (Thomas, J., concurring). Each violation of A.R.S. § 19-118.01(A) is a class 1 misdemeanor, which carries a penalty of up to six months in jail. See [A.R.S. § 13-707\(A\)\(2\)](#). Each offense may run consecutively. *State v. Gordon*, [161 Ariz. 308, 315](#) (1989). The State can charge both the employer and the employee.

Criminal prosecutions or the threat of criminal prosecutions impose significant burdens on individuals’ and businesses’ ability to exercise their free-speech rights and otherwise conduct their business. Indeed, these prosecutions present severe challenges to business. *Cf. Mills v. Bd. Of Tech. Registration*, [253 Ariz. 415, 424-25 ¶ 30](#) (2022) (noting that threat of enforcement action created “an existing threat to Mills’ right to speak freely about his business, his right to be clearly advised about what type of engineer must be registered, and his right to earn a living”). A criminal prosecution based on the exercise of a fundamental right creates a self-evident severe burden. *State v. Stummer*, [219 Ariz. 137, 145 ¶ 31](#) (2008) (even absent a developed factual record, criminal prosecution by itself established threshold burden on free speech rights); *cf. Emp. Div., Dep’t Hum. Res. of Or. v. Smith*, [494 U.S. 872, 902](#) (1990) (O’Connor J., concurring) (“There is no dispute that [the] criminal prohibition of peyote places a severe burden on the ability of [the Defendant] to freely exercise [his] religion.”).

B. A.R.S. § 19-118.01(A) can be abused by the party in power to prosecute its political adversaries.

If this law is upheld in its current form, the consequences could be dire for Arizona's democracy. People could be subject to potential jail time because of a law that sweeps in too much protected speech, including the speech at issue in this prosecution. The statute is particularly problematic because it is overbroad and indeterminate and has no *mens rea* requirement, thereby creating many unknowing potential violations among signature gatherers and businesses. See [Section III](#), *infra*. This conduct at issue is inherently political speech, meaning that whichever party is in power can use this statute to lock up its political adversaries.

The State here has tried to downplay other potential prosecutions and has characterized them as speculative. But “[t]his prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint.” *United States v. Stevens*, [559 U.S. 460, 480](#) (2010). Just three days after this Court decided *Molera*, the State charged Petition Partners with several misdemeanor counts based on conduct that does not fall within the core prohibition of the statute. See [Section III.A](#), *infra*. The Attorney General has exhibited similar zeal in pursuing a prison term against a so-called “ballot harvester” for admittedly non-fraudulent

activity.¹ Signature gatherers have every reason to expect similar overzealousness in an attempt to deter petitioning in the future, even with a change in which party holds the office. *See* [A.R.S. § 13-101\(5\)](#) (purposes of criminal law include “preventing the commission of offenses through the deterrent influence of the sentences authorized”). This Court should not permit the State to retain such a dangerous political tool in its arsenal while simultaneously requiring a case to proceed to trial.

II. This Court should resolve this case by holding A.R.S. § 19-118.01(A) violates the state constitution.

This Court should resolve this case by deciding the law at issue violates Arizona’s protections on free speech in article 2, section 6 of the Arizona’s Constitution.

A. This Court can promote its constitutional values by deciding this case under the state constitution.

For several reasons, this case presents an ideal vehicle for the Court to lay down a marker and show both that (1) Arizona has stronger constitutional speech protections than the First Amendment and (2) Arizona understands the significant benefits of prioritizing state constitutional claims. Doing so would also promote the development of state constitutional law.

¹ Associated Press, *Arizona woman gets 30 days in jail for collecting 4 ballots*, October 13, 2022, available at <https://news.azpm.org/p/newsc/2022/10/13/213301-arizona-woman-gets-30-days-in-jail-for-collecting-4-ballots>.

There has already been considerable briefing about whether the law violates the First Amendment. The court of appeals' opinion and much of the parties' briefing focus on that issue. Among the federal issues for this Court to consider are (1) whether the *Anderson-Burdick*² framework applies to this type of challenge; (2) the correct level of scrutiny (strict, exacting, or some lesser scrutiny); (3) what federal court precedent is most persuasive; and (4) the role that the statute's criminal penalties should play in determining the burden.

This Court can avoid these difficult questions of federal law by resolving this case under [article 2, section 6 of the Arizona Constitution](#). Doing so would promote federalism values, help Arizona to become a rights leader in this area, and provide a simple resolution to this case. As this Court has previously recognized, "it should resolve questions under the Arizona constitution first, if possible." *Mountain States Tel. & Tel. Co. v. Corp. Comm'n*, [160 Ariz. 350, 356](#) (1989).

Substantial academic work supports this approach. As Judge Jeffrey Sutton has explained in his work on state constitutional law, considering state constitutional claims first "honors the original design of the state and federal constitutions." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of Am. Const. L.*, at 179 (2018); *see also id.* at 174 ("a chronic underappreciation of state constitutional law

² *Anderson v. Celebrezze*, [460 U.S. 780](#) (1983); *Burdick v. Takushi*, [504 U.S. 428](#) (1992).

has been hurtful to state and federal law and the proper balance between state and federal courts in protecting individual liberty.”). As California Supreme Court Justice Goodwin Liu observed in a review of that work, federal and state courts are often “jointly engaged in interpreting shared texts or shared principles within a common historical tradition or common framework of constitutional reasoning.” Goodwin Liu, *State Courts and Constitutional Structure*, 128 *Yale L.J.* 1304, 1311 (2018). As state courts engage in this dialogue with federal courts, “[a] state court should give respectful consideration to federal precedent as well as decisions of other state courts, but it must decide for itself what approach is most persuasive and worthy of adoption as a matter of state constitutional law.” *Id.* at 1331. This Court can promote these important constitutional values by prioritizing state constitutional claims in this case.

Judge Sutton’s work also illustrates good structural reasons for state courts to apply more rigorous enforcement of their constitutional protections than the U.S. Supreme Court (as Arizona has done in this context). For one, “the challenge of imposing a constitutional solution on the whole country at once” may make the U.S. Supreme Court less likely to enforce federal rights. Sutton, *51 Imperfect Solutions*, at 17. By contrast, state courts “face no such problems in construing their own constitutions.” *Id.* In addition, constitutional decisions in Arizona (and many other states) “are generally easier to override by constitutional amendment than federal

constitutional rulings.” Liu, *State Courts and Constitutional Structure*, at 1339. And by rigorously interpreting their state constitutions, state courts can “ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America.” *Id.* at 1314.

This Court has previously used its state constitutional law to be a rights innovator under [article 2, section 6](#). For example, in *Phoenix Newspapers v. Superior Court*, [101 Ariz. 257, 259](#) (1966), this Court held that the Arizona Constitution did not permit a gag order on the press that would prevent them from publishing about trial proceedings until after jury selection. Ten years later, the U.S. Supreme Court followed this Court’s lead and found a similar right in *Nebraska Press Ass’n v. Stuart*, [427 U.S. 539, 570](#) (1976). That same sequence of events happened again with *Phoenix Newspapers v. Jennings*, where this Court held that article 2, section 6 gave the public the right to attend criminal trials, even though that right was not within the First Amendment. [107 Ariz. 557, 559](#) (1971). The U.S. Supreme Court followed this Court’s lead nine years later. *Richmond Newspapers, Inc. v. Virginia*, [448 U.S. 555, 581](#) (1980) (plurality opinion). This Court can and should use this case as an opportunity to vigorously defend free speech protections of core political speech, even if the federal courts have not done so yet.

Deciding this case on state constitutional grounds would also promote the development of state constitutional law. Members of this Court have frequently

discussed the benefits of raising and deciding state constitutional claims before federal constitutional claims. The best way to encourage litigants to raise state constitutional issues is to decide cases on state constitutional grounds, thereby expanding the scope of state constitutional precedent available for litigants to cite. Although the calculus for determining which claims or defenses to raise is complex, the available precedent is one consideration. The reality is that if there are few or no cases to cite on a state constitutional issue, then it is simply easier to prioritize the comparable federal claim. This is particularly true in the lower courts, where claims and defenses get developed, because it is more difficult to prioritize state claims when doing so requires building arguments from first principles. Publishing opinions that resolve cases on state constitutional issues enhances the body of available law and encourages litigants to assert state constitutional issues.

In sum, this Court can avoid the complicated doctrinal issues associated with the First Amendment challenge, promote federalism values, and more efficiently resolve this case by applying strict scrutiny to the regulation under article 2, section 6 and holding it invalid. It should do so.

B. A.R.S. § 19-118.01(A) violates article 2, section 6.

“Both the First Amendment and Article 2, Section 6 protect speech from abridgment by the government.” *Stummer*, 219 Ariz. at 142 ¶ 14. Under [article 2, section 6](#), “Every person may freely speak, write, and publish on all subjects, being

responsible for the abuse of that right.” That is, “the plain text of the article directly grant[s] every Arizonan a broad free speech right” that has “greater scope than the first amendment.” *Mountain States*, 160 Ariz. at 354-55. “The encompassing text of Article 2, Section 6 indicates the Arizona framers’ intent to rigorously protect freedom of speech.” *Stummer*, 219 Ariz. at 142 ¶ 15. Recognizing these critical differences between the federal and state constitutions, this Court has frequently scrutinized state regulations of speech in a more rigorous manner than would be required under the federal First Amendment. *Id.*; see also *Coleman v. City of Mesa*, 230 Ariz. 352, 359 ¶ 23 (2012) (surveying approaches and deciding tattoo artists are engaged in pure speech entitled to full protection).

In particular, in *Mountain States*, this Court rejected a similar argument to the one the government offers here. There, the Corporation Commission argued that an order prohibiting one company from paying another company to relay its message to customers was simply a “reasonable regulation” and asserted “that its order [did] not significantly infringe on [their] right of free speech.” *Mountain States*, 160 Ariz. at 356. In striking down the order under the Arizona Constitution, this Court explained that “[a]lthough we may need to balance competing constitutional rights, such as the right to a fair trial and the right of free speech, we avoid, where possible, attempts to erode constitutional rights by balancing them against regulations serving governmental interests.” *Id.* at 357. The Court went on to state that “[t]he framers of

our constitution did not give our judges authority to censor speech or decide how much speech the constitution allows.” *Id.* These arguments apply with full force in this case, where the government is claiming a regulatory interest in preventing fraud.

Moreover, this case presents an even stronger case for strong free speech protection because of the criminal penalties in the statute and the fact that it regulates core political speech. Regardless of the level of scrutiny, the State here must therefore show, at a minimum, that its proposed regulation is the “least restrictive means” to advancing its interest in preventing fraud. The State cannot do so for several reasons. For one, existing laws already criminalize signature fraud, which is a less restrictive means than regulating speech that *may* cause fraud. *See* [A.R.S. § 19-119.01](#). And, at a minimum, the State could potentially pass a law limited to prohibiting per-signature payments. Simply put, [§ 19-118.01](#) is not the type of law that should be upheld under a least restrictive means test, especially when considering the constitutional right at issue.

C. The Court should clarify that a generalized interest preventing fraud is insufficient to justify a law under article 2, section 6.

The State falls back on the argument that the law should be upheld because it is a “reasonable regulation” supported by the State’s generalized interest in promoting election integrity. In support, the State does not rely on any First Amendment or Arizona constitutional case law. But the U.S. Supreme Court has never accepted that type of generalized rationale in connection with a free speech

challenge, and for good reason. Allowing a generalized interest in protecting election integrity to justify a burden on core political speech would enable significantly more intrusions into the area of core political speech. *Cf. Citizen’s United v. Fed. Elec. Comm’n*, [558 U.S. 310, 334](#) (2010) (rejecting a similar argument in part because of “primary importance of speech itself to the integrity of the election process.”). This Court should not weaken its Arizona free speech jurisprudence by accepting this rationale, especially when the U.S. Supreme Court has never done so.

The U.S. Supreme Court has not weighed in on a First Amendment case in the petition-circulator context in more than twenty years. Although some federal circuit courts and district courts have held that lesser scrutiny or a burden-balancing framework applies to certain regulations of payments to petition circulators, the U.S. Supreme Court has never done so. *Compare Meyer v. Grant*, [486 U.S. 414, 420](#) (1988) (striking down Colorado’s ban on paying petition circulators); *Buckley*, [525 U.S. at 205](#) (applying strict scrutiny and striking down restrictions on petition circulator registration); *with Prete v. Bradbury*, [438 F.3d 949, 955](#) (9th Cir. 2006) (applying a balancing test); *Person v. N.Y. State Bd. of Elections*, [467 F.3d 141, 143](#) (2d Cir. 2006) (balancing interests of the state); *Initiative & Referendum Inst. v. Jaeger*, [241 F.3d 614, 617-618](#) (8th Cir. 2001) (same).

Given the U.S. Supreme Court’s consistent application of strict or exacting scrutiny to laws regulating election expenditures, it probably would disapprove the

less exacting review used by federal circuit courts to restrictions on petition circulator expenditures. *See Buckley*, 525 U.S. at 208 (Thomas, J., concurring) (“I suspect that when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a ‘severe burden.’”). Notably, the U.S. Supreme Court has frequently *rejected* restrictions on campaign expenditures where, as here, a different criminal law directly regulates potential fraud or corruption. *See, e.g., Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1652 (2022) (“greet[ing] the assertion of an anticorruption interest here with a measure of skepticism” because campaign contributions “are already regulated in order to prevent corruption or its appearance”); *Buckley*, 525 U.S. at 205 (invalidating petition circulator law and noting that Colorado “retains an arsenal of safeguards” to protect against fraud in the signature process, including laws that “mak[e] it criminal to forge initiative-petition signatures.”). This Court should reject the State’s assertion of a generalized interest here under the considerably more protective Arizona constitution.

To the extent that Arizona law could be read to support upholding laws based on a generalized assertion in preserving election integrity or preventing fraud, this Court should clarify that such an interest is insufficient in the free speech context. *Cf. Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶ 14 (2018) (discussing reasonable regulation of initiative process). If it is not enough under the less protective First

Amendment, it should not be enough under article 2, section 6. This Court should hold that the law is not justified by a compelling government interest and strike it down.

III. A.R.S. § 19-118.01(A) is unconstitutionally overbroad in violation of the First Amendment and article 2, section 6.

A. A.R.S. § 19-118.01(A)'s regulation of core political speech remains unconstitutionally overbroad even after *Molera*.

Typically, when raising a facial constitutional challenge to a statute, a litigant may have to show that the statute has no legitimate applications. But “[i]n the First Amendment context,” there is “a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks and citations omitted).

This Court has applied a similar test in evaluating free speech overbreadth claims. *State v. Western*, 168 Ariz. 169, 173 (1991) (holding ordinance overbroad even though there were some constitutional applications where “the ordinance criminalizes what the first amendment unquestionably protects . . .”). It noted the Supreme Court’s guidance that “where a vague statute ‘abuts upon sensitive area[s] of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the

unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (brackets in original). *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

A.R.S. § 19-118.01(A), by its terms, prohibits a person from “pay[ing] or receiv[ing] money . . . based on the number of signatures collected on a statewide initiative or referendum petition.” This Court interpreted the phrase “based on” such that the statute “is violated if the compensation paid to a circulator for collecting signatures is dependent on or calculated by, in whole or in part, the number of signatures collected during the compensation period.” *Molera*, 250 Ariz. at 24 ¶ 35.

The scope of A.R.S. § 19-118.01(A) remains broad and unclear even after *Molera*. This Court recognized the remaining uncertainty in its opinion by stating a lottery that premised eligibility based on obtaining a certain number of signatures would be “be a closer question” without answering whether it would violate the statute. *Molera*, 250 Ariz. at 26 ¶ 43. That uncertainty creates a “threat of enforcement of an overbroad law [that] may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). A few examples illustrate the difficulty of determining what conduct falls within the statute’s ban after *Molera*:

- Could a signature-collection business give raises for every person that obtained a minimum number of signatures?

- Could it give a flat raise to the top 10% of signature gatherers, regardless of the hours they worked or the individual number of signatures they gathered?
- Could it give raises to everyone except for the lowest 25% of signature gatherers, regardless of the number of signatures each person gathered?
- Could it give a flat bonus to the top 10% of signature gatherers?
- Could it give a flat bonus to all but the bottom 10% of signature gatherers?
- Could it fire all signature gatherers that do not meet a certain threshold of signatures?

Under *Molera*, many of these payment options could potentially fall within the statute’s prohibitions because they are payments that are “dependent on or calculated by, in whole or in part, the number of signatures collected during the compensation period.” [250 Ariz. at 24 ¶ 35](#). Banning an indefinite number of potential payment methods imposes a significant burden on the signature collecting businesses because they do not know what conduct is prohibited. Worse, any conceived standard would be so imprecise “[that it] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.” *Grayned*, [408 U.S. at 108-09](#). The statute will cause many signature gathering businesses to refrain from otherwise constitutionally protected forms of signature payment. The statute accordingly contains “a criminal prohibition of alarming breadth” that requires this Court’s intervention. *See Stevens*, [559 U.S. at 474](#).

Given this residual ambiguity in the statute, the State is incorrect when it asserts (Supp. Br. at 22, 23, 25) that the statute prohibits only *one* form of payment

like the Oregon law at issue in *Prete*. Cf. *Prete*, 438 F.3d at 952 n.1, 962, 967; (explaining that a ban on “paying discretionary bonuses based on reliability, longevity and productivity” would violate the First Amendment, as would a ban on “minimum signature requirement[s].”).³ Indeed, the State *in this very case* is prosecuting Petition Partners for two types of payment that do not involve a direct dollar-for-signature payment that was prohibited in *Prete*. Defendant’s Supp. Br. at 14 n.6 & 7. And the State has conceded that Petition Partners has not engaged in paying circulators on a per-signature basis. *Id.* at 14, n.5. (State’s agent concluding that no “circulator was paid solely per signature”). Neither of these forms of payment are akin to the narrow ban on per-signature payments upheld by the Ninth Circuit.

Perhaps the statute would not be unconstitutionally overbroad under the federal First Amendment if it banned only per-signature payments (e.g., for every signature, the collector gets \$1). Here, by contrast, the statute prohibits any type of payment “based on” the number of signatures gathered. As demonstrated above, a narrow construction of “based on” does not solve the overbreadth problem.

³ Notably, the Oregon Secretary of State issued an administrative rule delineating the law’s scope: “Allowable practices include: paying an hourly wage or salary, establishing either express or implied minimum signature requirements for circulators, terminating circulators who do not meet the productivity requirements, adjusting salaries prospectively relative to a circulator's productivity, and paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis.” *Prete*, 438 F.3d at 952 n.1.

“Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature’s domain.” *In re Nickolas S.*, [226 Ariz. 182, 186 ¶ 18](#) (2011); *see also Stevens*, [559 U.S. at 481](#). That is because “doing so would constitute a serious invasion of the legislative domain . . . and sharply diminish [the Legislature’s] incentive to draft a narrowly tailored law in the first place.” *Stevens*, [559 U.S. at 481](#).⁴ Conforming the statute to constitutional limits “requires rewriting, not just reinterpretation” and so this Court should find it is unconstitutionally overbroad. *See id.*

B. The State does not grapple with the breadth of the statute which it has weaponized in this prosecution.

The State continues to argue (at 4-7) that Petition Partners must meet a “no-set-of-circumstances” test to succeed in their overbreadth challenge to the law. That argument misunderstands the entire point of the overbreadth doctrine. Indeed, by definition “an overbroad statute is one designed to burden or punish activities which are not constitutionally protected but includes within its scope activities which are protected by the First Amendment.” *State v. Baldwin*, [184 Ariz. 267, 269](#) (1995). An

⁴ *See also* Clint Bolick, *The Proper Role of Judicial Activism*, [42 Harv. J.L. & Pub. Pol’y 1, 6](#) (Winter 2019) (“Another reason judges should never rewrite statutes is for the sake of individual inquiry. If a person wants to find and obey the law, she ought to be able to look at a statute and know what it means; she should not have to turn to a judicial decision to see how judges have rewritten words that in fact do not appear in the statute.”).

overbreadth challenge, therefore, is “a second type of facial challenge” distinct from a typical no-set-of-circumstances challenge. *Stevens*, 559 U.S. at 473.

The State is correct that a statute is not susceptible to an overbreadth challenge merely because “one can conceive of some impermissible applications. . . .” State Supp. Br. at 4 (citing *State v. Musser*, 194 Ariz. 31, 32 ¶ 6 (1999)). But in its analysis of facial challenges, “the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct.” *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2014). A.R.S. § 19-118.01(A) is not that kind of statute. As explained above, the statute may have one permissible application (a prohibition on per-signature payments) but has several potential impermissible applications—two of which are at issue in this prosecution (lotteries premised on signature count, and head-to-head employee challenges). See [Section II.B](#), *supra*.

The State argues (at 6) that the statute cannot be overbroad because this Court has already placed a limiting interpretation on it. But that argument misses the mark. The case the State relies upon, *Broadrick v. Oklahoma*, involved an overbreadth challenge where the challengers sought to demonstrate overbreadth of the statute based on applications that the state attorney general had definitively said were *outside* the scope of the statute. 413 U.S. 601, 617-18 (1973). Here, by contrast, Petition Partners seeks to demonstrate overbreadth through the indictment and other related applications of the statute that could be invoked after *Molera*. A limiting

interpretation resolves an overbreadth challenge only if the statute is no longer overbroad.

This Court addressed an “undeniably overbroad” statute in *Nickolas S.* that sought to criminalize speech that “‘abuse[d]’ a teacher or other school employee ‘on school grounds’ or while the teacher or employee is ‘engaged in ... his duties.’” 226 *Ariz. at 185 ¶ 15* (quoting A.R.S. § 15-507). This Court adopted a narrowing construction that applied the statute only to “fighting words” unprotected by the First Amendment, *id. at 186 ¶ 18*, in part because the juvenile did not argue against such a construction. But “fighting words” and “abuse” are not the same thing; thus, while stating that it would not rewrite a statute to preserve its constitutionality, that is exactly what it did. Saving the statute was particularly unnecessary in light of the recognition that several other statutes regulated the activity in that case. *Id. at 184-85 ¶ 9* (citing statutes and noting Nickolas was not charged with those offenses).

Several other statutes protect the public from fraudulent practices in signature gathering. For example, both *A.R.S. § 19-119.01* (petition signature fraud) and *§ 16-1020* (petition forgery), like *§ 19-118.01*, are class 1 misdemeanor offenses.

The State simply does not confront the difficult problems created by the statute, and that is because it has brought a criminal prosecution based on protected First Amendment conduct. The Court should find the statute unconstitutionally overbroad and strike it down in its entirety.

CONCLUSION

The Court should strike down A.R.S. § 19-118.01 in its entirety as facially unconstitutional and remand to the superior court with instructions to dismiss.

RESPECTFULLY SUBMITTED this 23rd day of December, 2022.

By /s/ David J. Euchner
David J. Euchner
Attorney for amicus curiae
Arizona Attorneys for Criminal Justice