

LAW OFFICE OF THOMAS M. RYAN

565 WEST CHANDLER BLVD., SUITE 210

CHANDLER, AZ 85225

WEBSITE: www.thomasmryanlaw.com

THOMAS M. RYAN

Certified Specialist Injury & Wrongful Death
Arizona Board of Legal Specialization

PHONE: 480-963-3333

ELECTION CHALLENGE VIA HAND-DELIVERY

May 10, 2016

Mark Brnovich, Attorney General
OFFICE OF THE ATTORNEY GENERAL
State of Arizona
1275 W. Washington Street
Phoenix, AZ 85007

Re: Special Election: May 17, 2016
Complainant: Thomas M. Ryan,
Respondent: Michele Reagan, Sec. of State
Issue: Failure to Timely Mail Publicity Pamphlet
Violation: A.R.S. §§19-101.01 &19-123

Dear Mr. Brnovich:

I am a concerned citizen and registered voter here in the State of Arizona. I am a volunteer who acts as a political watchdog when members of government fail in their duties to protect the citizens of this State. Recently, I learned that Arizona Secretary of State, Michele Reagan, by and through her staff and selected vendors, has failed in her duty to timely issue statutorily required Publicity Pamphlets dealing with Propositions 123 and 124¹. Upon information and belief, I allege that there are in excess of 200,000 Publicity Pamphlets that were mailed out only last week. This is a substantial failure and a breach of her primary duty to "secure the purity of elections and guard against abuses of the elective franchise." See Ariz. Const. Art. VII, § 12.

As will be seen below, Arizona law is absolutely clear that (1) the Secretary of State's Office must mail the statutorily required Publicity Pamphlets to the households of all registered voters in the State of Arizona; (2) that this must be accomplished before the start of an election which must occur before the earliest date for receipt of early ballots; (3) that hundreds of thousands of voting households in Arizona were still waiting for their Publicity Pamphlets as recently as last week; (4) that Arizona case and statutory law mandate strict compliance for conducting referendums; and (5) that this failure is substantial and not in strict compliance with Arizona law.

¹ First confirmed by KJZZ reporter Will Stone: <http://kizz.org/content/302795/concerns-build-over-may-17-arizona-election-pamphlet-glitch>

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The remedy for this failure should be as follows: (1) the Special Election must be combined with either the Primary Election scheduled for August 30, 2016, or the General Election scheduled for November 8, 2016; and (2) Early Ballots already submitted should be spoliated and not counted.

OVERVIEW

In 2016, the 52nd Legislature passed House Concurrent Resolution 2001(HCR 2001) to refer the amendment of Arizona Constitution Art.'s X and XI for a special election, and passed Senate Concurrent Resolution 1019 (SCR 1019) to refer the amendment of Arizona Constitution Art. XXIX for a special election. These two referrals are now known as Proposition 123 and 124 respectively. Early voting on these two propositions began on April 20, 2016, and the date for the Special Election is set for May 17, 2016².

On Friday, May 6, 2016, the Secretary of the State Office officially admitted that as of last week 200,000 Publicity Pamphlets were mailed out for the first time to Arizona households³. Since Publicity Pamphlets are mailed to households that may have more than one voter, this means that somewhere between 200,000 and 400,000 voters have not received their statutorily mandated Publicity Pamphlets.

Upon information and belief, the Secretary of State contracted with Trend Offset Printing to print and mail the Publicity Pamphlets⁴. Upon information and belief, Trend Offset Printing either did not receive correct mail merge input from the Secretary of State's office, or failed to oversee Trend Offset Printing's print and mail merge process for the Publicity Pamphlet leading to this devastating lack of Publicity Pamphlets.

As a result of this malfeasance of office, County Recorders throughout Arizona have been receiving multiple complaints of voters who have not received their Publicity Pamphlets. The Secretary of State's office admits this.

LEGAL ANALYSIS

1. STRICT COMPLIANCE REQUIREMENTS

In 2015, our State Legislature enacted A.R.S. §19-101.01 which states:

² <http://www.azsos.gov/elections/elections-calendar-upcoming-events#ec>

³ See footnote 1, *supra*.

⁴ <http://www.trendoffset.com/>

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Legislative Findings and Intent; Strict Compliance

The legislature recognizes that a referendum may overrule the results of determinations made by the representatives of the people and therefore finds and determines **that strict compliance with the constitutional and statutory requirements for the referendum process and in the application and enforcement of those requirements provides the surest method for safeguarding the integrity and accuracy of the referendum process. Therefore, the legislature finds and declares its intent that the constitutional and statutory requirements for the referendum be strictly construed and that persons using the referendum process strictly comply with those constitutional and statutory requirements.** (Emphasis added.)

The legislature's choice of language leaves no doubt that this statute is intended to apply to the *entire* referendum process. There are no carve outs for a Secretary of State who cannot comply with something as basic as getting the Publicity Pamphlet for a Special Election to *all* households in Arizona with registered voters *prior* to the start of early balloting. The failure to get the Publicity Pamphlet to 200,000 to 400,000 voters is not strict compliance. It is not even substantial compliance.

2. SECRETARY OF STATE'S STATUTORY MANDATE TO TIMELY MAIL PUBLICITY PAMPHLETS TO BE RECEIVED BEFORE THE EARLIEST DATE FOR RECEIPT OF EARLY BALLOTS

The printing, publication and mailing of Publicity Pamphlets is covered by A.R.S. §19-123. Regarding the mandate of timeliness this statute provides in relevant part:

The secretary of state shall mail one copy of the publicity pamphlet to every household that contains a registered voter. The mailings may be made over a period of days but shall be mailed in order to be delivered to households before the earliest date for receipt by registered voters of any requested early ballots for the general election. (Emphasis added.)

See also, *Sherman v. City of Tempe*, 202 Ariz. 339, 45 P.3d 336 (2002). This means that the Arizona Secretary of State had to have the Publicity Pamphlets printed and

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mailed **and received** by **all** households containing registered voters **by April 20, 2016**. The Secretary of State fully admits that literally hundreds of thousands of publicity pamphlets were still being mailed as of last week.

The Secretary of State's office has publicly claimed "Oops! Sorry!" But the fact that there is no evidence of intentional deprivation of a statutory right does not end the inquiry. It is the fact that there was no "strict compliance" or even substantial compliance by the Secretary of State's office "to provide the surest method for safeguarding the integrity and accuracy of the referendum process."

3. THIS COMPLAINT IS TIMELY

I recognize I bring this Complaint as a challenge to the referendum election process and that timeliness is an issue. See *Sherman v. City of Tempe, supra*, which holds in relevant part:

Challenges concerning alleged procedural violations of the election process must be brought prior to the actual election. *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987) (holding that "[p]rocedures leading up to an election cannot be questioned after the people have voted, but ... *must* be challenged before the election is held")(citing *Kerby v. Griffin*, 48 Ariz. 434, 444-46, 62 P.2d 1131, 1135-36 (1936)).

...

Election procedures generally involve "the manner in which an election is held." *Tilson*, 153 Ariz. at 470, 737 P.2d at 1369. For example, the election procedures at issue in *Tilson* related to the manner in which ballot initiatives must be written and described in publicity pamphlets. *Id.* at 471-72, 737 P.2d at 1370-71. Similarly, the complaint in *Kerby* concerned the procedure for printing and circulating publicity pamphlets prior to an election. *Kerby*, 48 Ariz. at 449, 62 P.2d at 1137. This action, which involves the timing of a publicity pamphlet distribution, also concerns proper election procedure.

See *Sherman v. City of Tempe*, 202 Ariz. at 339, 45 P.3d at 342. In short, this Complaint is a challenge to the proper election procedure for these to referenda. The election has not been completed and will not be completed until May 17, 2016. While I recognize the short time left, the Office of the Attorney General can still bring the election challenge and enforce Arizona law.

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When it comes to protecting the rights of citizens to engage in the proper exercise of the elective franchise, the Secretary of State has super-fiduciary duties as mandated by Ariz. Const. Art. VII, § 12. This means it was incumbent upon the Secretary of State's office to notify the Legislature and the citizens of the State of Arizona regarding its failure to timely and properly advise of this monumental failure to properly publish, print and mail the Publicity Pamphlet. Because the Secretary of State failed to honor her fiduciary duties and did not admit to her failure until Friday May 6, 2016, she has made it difficult for ordinary citizens such as myself to properly file a challenge to this Special Election.

CONCLUSION: THE REFERENDA MUST BE RESCHEDULED

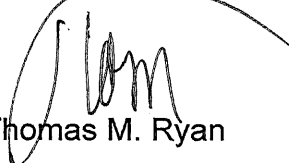
I recognize the political difficulty such an Election Complaint presents to your office. But either the rule of law matters or it does not. The Legislature has asked for, and the Governor has signed into law, a "strict compliance" requirement for all aspects of the referendum process. There is no exception for how the Secretary of State conducts a referendum. There is no exception for accidents, unintentional mistakes or unforced errors by the Office of the Secretary of State.

I do not ask that you cancel the two referenda. Instead, the appropriate remedy is to vacate the current election set to conclude May 17, 2016, and combine the election with either the August 30, 2016 Election (Arizona's Primary Election) or November 8, 2016 Election (Arizona's General Election.) This does leave the problem of Early Ballots already submitted. Sadly, because of the Secretary of State's mis-, mal- and non-feasance of office, those will have to be spoliated.

I recognize there will be anger over this complaint. But such anger, frustration and exasperation should be properly directed to the Office of the Secretary of State for her failure of office.

Very truly yours,

LAW OFFICE OF THOMAS M. RYAN


Thomas M. Ryan