Strictly Foreclosed: A Call to Remove Strict Compliance for Referenda Following *Surprise*

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INTRODUCTION

In 2022, a new Pew Research Center survey showed that almost two-thirds of Americans favored removing the electoral college and replacing the system with the popular vote.[1] This finding should not come as a surprise; the study and use of direct democracy has "experienced a renaissance" over the past fifty years.[2] As early as the 1978 passage of Proposition 13 in California, ballot measures have become an "increasingly popular form of citizen[ship] participation over the past [five] decades."[3]

Regardless of the relatively recent renaissance, Arizona has long supported the tools of direct democracy—especially initiative and referendum.[4] When Arizona was admitted for statehood, it became the second state in the Union to constitutionally provide the rights of initiative and referendum.[5] Despite the "recent debut" of these measures in American politics, the choice of whether—and more prominently how—to include these provisions in Arizona's constitution became one of the most

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1. *See* Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Sept. 25, 2024), https://www.pewresearch.org/short-reads/2022/08/05/majority-of-americans-continue-to-favor-moving-away-from-electoral-college [https://perma.cc/J9L9-TFD5] (finding 63% of Americans now favor replacing the Electoral College with a popular vote system).

2. Daniel A. Smith & Caroline Tolbert, *The Instrumental and Educative Effects of Ballot Measures: Research on Direct Democracy in the American States*, 7 STATE POL. & POL'Y Q. 416, 416 (2007).

3. *Id.* at 417.

4. ARIZ. CONST. art. IV.

5. Paul F. Eckstein, *The Debate over Direct Democracy at the Arizona Constitutional Convention*, ARIZ. ATT'Y, Feb. 2012, at 32, 33 (noting Arizona became the first state after Oklahoma to include initiative and referendum provisions in its original constitution).

contentious debates at the convention.[6] After lengthy debates, the text of the constitution was clear:

> [T]he people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they also reserve . . . the power to approve or reject at the polls any act, or item, section, or part of any Act, of the Legislature.[7]

The constitutional text is not only clear but is also "in all respects, self-executing."[8] Despite the textual clarity, sixty years later the Arizona Supreme Court found the legislature could add additional requirements to referenda.[9] By doing so, it allowed the legislature to put more stringent demands on getting a referendum to the ballot, effectively taking power from the people, and giving it to the legislature. These heightened restrictions later came to require a referendum's strict compliance with both the constitutional and legislative requirements or risk the referendum's failure.[10] However, to balance the effect of added requirements, the court created a restorable presumption of validity.[11] This presumption allowed referendum measures with technical failures to reach the ballot if a proponent could show the measure complied with the law.[12]

In August 2023, the Arizona Supreme Court in *Voice of Surprise v. Hall* ("*Surprise*") restricted the presumption of validity to the signature portion of the process.[13] Furthermore, the court called into question the constitutionality of restrictions on referenda.[14] Though the court did not go far, it left open the question of as-applied challenges.[15] This decision follows another case decided in the Arizona Court of Appeals which more directly addressed the strict compliance standard, and was granted review but likely settled prior to a decision.[16]

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6. JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 12 (2d ed. 2013) (noting Arizona became the first state after Oregon to embrace initiative, referendum, and recall).

7. ARIZ. CONST. art IV, pt. 1, § 1(1).

8. *Id.* § 1(16).

9. Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1972).

10. *See* Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 697 (Ariz. 1982).

11. *Direct Sellers*, 503 P.2d at 953.

12. *See id.*

13. 533 P.3d 942, 946 (Ariz. 2023).

14. *Id.* at 948.

15. *Id.*

16. Workers for Responsible Dev. v. City of Tempe, 524 P.3d 1161 (Ariz. Ct. App. 2023); *see Minutes*, ARIZ. SUP. CT. 12 (Feb. 28, 2023), https://www.azcourts.gov/Portals/21/PR%20Minutes%202-28-23.pdf [https://perma.cc/HYE9-LAY6]. Despite the court granting certiorari for the case, there is no record of oral argument and no opinion from the Arizona Supreme Court.

While the court seems ready to address as-applied challenges to the strict compliance requirement, it did not inquire as to whether the strict compliance standard is facially unconstitutional. While Arizona court rulings have only required substantial compliance for initiatives,[17] referenda require a heightened standard of strict compliance. Substantial compliance requires the petitions "fulfill[] the purpose of the relevant statutory or constitutional requirements, despite a lack of strict or technical compliance."[18] Strict compliance on the other hand mandates "nearly perfect compliance" to the technical requirements imposed by statutes.[19] These technical requirements can range from minimum font size,[20] to a maximum number of signatures per page,[21] to which corner the serial number needs to be placed in on a petition.[22] By imposing a higher strict compliance standard on referenda, the likelihood a referenda becomes void increases dramatically.[23]

While the Legislature has increased the likelihood of a direct democratic measure to be declared void, it has used the same constitutional authority to refer legislation and to avoid the gubernatorial veto process.[24] In 2024—the most recent election cycle—of the thirteen ballot measures that appeared on the ballot, eleven were legislatively referred.[25] Of the eleven measures, two related directly to ballot measures. Proposition 134 would require the

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17. *See* Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 697 (Ariz. 1982); *see also* Tristany A. Leikem, *The Frankenstein Bill: House Bill 2305 and Direct Democracy*, 55 ARIZ. L. REV. 1213, 1213 (2013) (noting that the Arizona Legislature has passed a law requiring strict compliance for initiative, but no court ruling has authorized that). Despite no court ruling, the Arizona Legislature has, by statute, required the courts to apply the strict compliance standard to initiative measures as well. ARIZ. REV. STAT. ANN. § 19-102.01(A) (2025). As a result, the Arizona Supreme Court has applied the strict compliance standard to initiative measures, but only at the behest of the Legislature and without analysis as to whether that is constitutional. *See* Leibsohn v. Hobbs, 517 P.3d 45, 47 (Ariz. 2022).

18. Feldmeier v. Watson, 123 P.3d 180, 183 (Ariz. 2005).

19. *Workers for Responsible Dev.*, 524 P.3d at 1165.

20. ARIZ. REV. STAT. ANN. § 19-111(A) (2025).

21. *Id.* § 19-121(C); *see also* Van Riper v. Threadgill, 905 P.2d 589, 593 (Ariz. Ct. App. 1995).

22. § 19-111(B).

23. This is true for initiatives as well so long as the court continues to apply strict compliance due to the statutory requirement.

24. *See, e.g.*, Gloria Rebecca Gomez, *GOP Sends More Ballot Measures to Voters, Bypassing Governor's Veto*, AZMIRROR (June 12, 2024), https://azmirror.com/2024/06/12/gop-sends-more-ballot-measures-to-voters-bypassing-governors-veto [https://perma.cc/55MN-R5YZ].

25. *Ballot Measures 2024 Analyses*, ARIZ. STATE LEGISLATURE, https://www.azleg.gov/ballot-measures-2024-analyses [https://perma.cc/A2W7-9QMX]; *Arizona 2024 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Arizona_2024_ballot_measures [https://perma.cc/WAN7-26BS].

constitutional percentage requirements for statewide ballot measures to be met in each of Arizona's thirty legislative districts.[26] The other related measure, Proposition 136, would allow constitutional challenges, which currently can occur only after being ratified during the election, to be made prior to voting.[27] The legislature's attempt to use the same constitutional provision it attempted to restrict for citizens was rejected by voters pretty handedly.[28]

Despite the fact that the increased restrictions failed at the ballot box, the strict compliance standard was left untouched. But the rationale for a higher level of restriction for referenda should also fail. Although the Arizona Court borrowed the rationale from Minnesota, the strict compliance standard it developed was unique to Arizona.[29] The unique heightened restrictions imposed on referenda should have been foreclosed by the framers' enacting of initiative and referenda in the constitution after lengthy debate.[30] The original argument made for strict compliance—that referenda undermines the will of a representative democracy—models the arguments made at the Arizona convention surrounding the U.S. Constitution's Guarantee Clause.[31] The presumption of validity in the signing portion already looks closer to a substantial compliance standard, and destroying a referendum facially is a departure from previous Arizona Court policy.[32] Even if there would be no facial challenge to the strict compliance standard, several provisions requiring strict compliance could easily create as-applied hardships, as the court seems to recognize in *Surprise*.[33]

Part I of this Note begins by explaining the brief history of initiative and referendum and how Arizona arrived at the strict compliance standard.[34] In Sections I.B and C, the Note then explains the outcome of *Surprise* and the

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26. *Proposition 134*, ARIZ. STATE LEGISLATURE, https://www.azleg.gov/alispdfs/Council/2024BallotMeasures/adopted%20analysis%20Proposition%20134%20SCR1015%20-%202023.pdf [https://perma.cc/U3DU-S8N8].

27. *Proposition 136*, ARIZ. STATE LEGISLATURE, https://www.azleg.gov/alispdfs/Council/2024BallotMeasures/adopted%20analysis%20Proposition%20136%20SCR1041%20-%202024.pdf [https://perma.cc/TQL5-P3EX].

28. Proposition 134 was rejected by 58% of voters, while Proposition 136 was rejected by an even larger 62% of voters. *Arizona 2024 Ballot Measures*, *supra* note 25.

29. *See* Lisa T. Hauser, *The Powers of Initiative and Referendum: Keeping the Arizona Constitution's Promise of Direct Democracy*, 44 ARIZ. ST. L.J. 567, 573–74 (2012).

30. *See infra* Section I.A.

31. *See infra* Section I.B.

32. *See infra* Part I.

33. *See* Voice of Surprise v. Hall, 533 P.3d 942, 948 (Ariz. 2023).

34. *See infra* Section I.A.

resulting state of the law since the decision.[35] After explaining the history and current state of the law, the Note provides four rationales in Part II for overturning the requirement mandating strict compliance.[36] First in Section II.A, this Note evaluates the historical context behind the Arizona Constitution's founding, demonstrating how the heightened standard is contrary to the public policy goals envisioned by the framers.[37] In Sections II.B and C, this Note evaluates two issues in the rationale that led to the strict compliance standard: that the arguments adopted mimic the discussion made by the founders over the Guarantee Clause, and that the arguments create an opportunity for the legislature to choke off the channels of political change.[38] In Section II.D, the Note examines the weaknesses of what the court calls for in *Surprise*—as-applied challenges to the requirements of specific referendums.[39] As a result, the Note concludes that the strongest solution would be to remove the strict compliance standard. By doing so, the court would effectively be returning to a substantial compliance standard, which is what was used for initiative measures prior to 2017.[40]

I. DEVELOPMENT OF STRICT COMPLIANCE AND CURRENT STATE OF THE LAW

At the constitutional convention, Arizona's founders—over contentious debate—chose to include two of the three forms of popular democracy with the only questions being the details of each.[41] At the end, the founders ratified an entire section of Article IV of the constitution aimed specifically at

35. *See infra* Sections I.B–C.
36. *See infra* Part II.
37. *See infra* Section II.A.
38. *See infra* Sections II.B–C.
39. *See infra* Section II.D.
40. *See* Hauser, *supra* note 29, at 572–74. Initiatives have used strict compliance due to § 19-102.01 of the Arizona Revised Statutes which went into effect in 2017. ARIZ. REV. STAT. ANN. § 19-102.01 (2025). The Arizona Supreme Court had never issued a prior ruling, but since the statute the court has applied strict compliance and has not answered the constitutionality of the strict compliance question. *See* Leach v. Hobbs, 483 P.3d 194, 198 n.2 (Ariz. 2021). While the details of overturning the statute are outside the scope of this Note, the court could likely strike down the statutory requirement of strict compliance for violating separation of powers.
41. *See* LESHY, *supra* note 6, at 8–9, 12. Initially, all three forms of popular democracy—initiative, referendum, and recall, were included in the Arizona Constitution. *Id.* at 12. President Taft vetoed the admission of Arizona because its inclusion allowing recall of judges. Jennifer Davis, *Arizona Statehood Anniversary*, LIBR. CONG. BLOGS (Feb. 14, 2022), https://blogs.loc.gov/law/2022/02/arizona-statehood-anniversary [https://perma.cc/C2JB-9QTU]. After, Arizona voters removed the recall portion and Taft signed the bill for statehood on February 14, 1911. *Id.*

initiative and referendum,[42] and the constitution directly separated the two provisions.[43] Initiatives give citizens the power to propose, or initiate, laws and constitutional amendments,[44] whereas referendums give citizens the authority to refer laws enacted by the legislature to the ballot for approval or rejection.[45] The referendum power also provides the legislature with the authority to directly refer legislation to voters for final approval or rejection and bypass a gubernatorial veto.[46]

To file an initiative or referendum that successfully gets onto the ballot, individuals need to undergo several steps.[47] First, groups need to have proper political committees to act as the sponsor before filing an application with the appropriate official.[48] After receiving the appropriate petition and making sure circulators are properly registered, groups can begin collecting signatures for the measure.[49] Groups need to collect the requisite number of signatures by the required deadline before the appropriate official processes the petitions and determines if sufficient signatures were collected to place the measure on the ballot.[50]

Both of these measures, once approved, receive additional protection from the Voter Protection Act. The Voter Protection Act, enacted in 1988 as Proposition 105, amended the state constitution to prevent the legislative and executive branches from restricting ratified ballot measures in two main ways.[51] First, Arizona's constitution now prohibits the Governor from vetoing

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42. ARIZ. CONST. art. IV, pt. 1, § 1.

43. *See id.* § 1(2)–(3).

44. *Id.* § 1(2).

45. *Id.* § 1(3).

46. *Id.*

47. *See generally* ARIZ. SEC'Y OF STATE, 2023 INITIATIVE & REFERENDUM GUIDE (2022) (describing the detailed requirements for initiatives and referenda to make it on the ballot as well as authority for important dates and requirements and providing samples).

48. *See, e.g.*, *Referendum*, ARIZ. SEC'Y STATE, https://azsos.gov/elections/ballot-measures/initiative-referendum-recall/referendum [https://perma.cc/42NF-KRNY]. The appropriate individual depends on the measure being referred; for state legislative measures or constitutional amendments, groups need to file with the Arizona Secretary of State. *Id.* For local measures, like zoning issues being referred, the appropriate official would be the city clerk. *See* Voice of Surprise v. Hall, 533 P.3d 942 (Ariz. 2023).

49. *See Referendum*, *supra* note 48.

50. *See id.* The timeline for how long a group must file a valid referendum depends on what the group is referring. For local measures, a smaller time window of thirty days may be appropriate for zoning measures. ARIZ. REV. STAT. ANN. § 19-142 (2025). For referring legislation state-wide, the constitution mandates a ninety-day window. ARIZ. CONST. art. IV, pt. 1, § 1(4); *see also infra* notes 112–15 and accompanying text.

51. *See Proposition 105*, ARIZ. SEC'Y STATE (July 21, 1998), https://apps.azsos.gov/election/1998/Info/PubPamphlet/prop105.html [https://perma.cc/2YD7-SBST].

the measure and the legislature from repealing the measure.[52] Secondly, it also restricts the legislature from amending an approved measure or transferring approved funds for the measure unless a supermajority of three-fourths of the legislature approves the change and the change "furthers the purposes" of the approved measure.[53]

Both initiative and referendum enable Arizona citizens to function as legislatures.[54] While initiatives allow for broad discretion and few limitations, the founders employed more restrictions on referenda, largely limiting what could and could not be referred.[55] These restrictions prevented certain measures from being referred, specifically "laws immediately necessary for the preservation of the public peace, health, safety and welfare" or laws "for the support and maintenance of the departments of the state government and state institutions."[56] These constraints were the only limitations provided for referenda in the 1912 Constitution.[57] While the next sixty-six years did not showcase any unusual developments with referenda,[58] the 1970s marked the beginning of the strict compliance standard.

A. Direct Sellers and Cottonwood Development: The Beginning of Strict Compliance

In 1972, *Direct Sellers v. McBrayer* became the foothold for the strict compliance standard implemented a decade later.[59] In *Direct Sellers*, on the day before a law regulating the sale of merchandise to the public through their homes was enacted, petitioners filed petitions containing roughly 30,000 signatures to have the measure referred.[60] Respondents moved to have the

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52. ARIZ. CONST. art. IV, pt. 1, § 1(6)(A)–(B).

53. *Id.* § 1(6)(C)–(D).

54. *See* Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391, 393 (Ariz. 1972). As a result of acting in a legislative capacity, the court has extended the same immunity from judicial interference as the legislature or other law-making bodies. *Id.* (citing State v. Osborn, 143 P. 117 (Ariz. 1914); Williams v. Parrack, 319 P.2d 989 (Ariz. 1957)).

55. ARIZ. CONST. art. IV, pt. 1, § 1(3).

56. *Id.*; *see also* Hauser, *supra* note 29, at 585–86 (articulating four "built-in safeguards to mitigate whatever dangers are posed by the exercise of the right to referendum").

57. *See* ARIZ. CONST. art. IV, pt. 1, § 1.

58. *See* Russell Brown Roush, The Initiative and Referendum in Arizona: 1912-1978 263–64 (May 1979) (Ph.D. dissertation, Arizona State University) (ProQuest) (noting that between 1912, when the constitution was founded, and 1978, popular democracy did not rule Arizona).

59. Direct Sellers Ass'n v. McBrayer, 503 P.2d 951 (Ariz. 1972); *see also* Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc., 653 P.2d 694 (Ariz. 1982) (the first Arizona case to directly mention the strict compliance standard).

60. *Direct Sellers*, 503 P.2d at 952.

petitions declared null and void for failing to comply with the circulator's affidavit requirement.[61] On appeal, the court answered two main questions: first, whether requirements by the legislature are invalid when they add a qualification to a self-executing constitutional provision; and secondly, whether the omission of the affidavit verifying the circulator automatically rendered the petitions void.[62]

In answering the first question, the court found that the legislature is not barred from adding requirements "[i]f such legislation does not unreasonably hinder or restrict the constitutional provision and if the legislation reasonably supplements the constitutional purpose."[63] In answering the second question, the court ruled that failure to comply with the circulator's affidavit requirements does not automatically render the referendum null and void but merely destroys the judicial presumption of validity.[64] The presumption could be restored, in this case, through a showing of "proof that the circulators were in fact qualified electors."[65] Analogizing the referendum to the veto power, the court cited a Minnesota court:

> The right to suspend, and possibly to revoke, as given by the referendum . . . is an extraordinary power which ought not unreasonably to be restricted or enlarged by construction. It must be confined within the reasonable limits fixed by the charter (statute). The charter (statute) prescribes what the petition for referendum shall contain, how it shall be signed, and by whom it shall be verified. These provisions are intended to guard the integrity both of the proceeding and of the petition. *Where a power so great as the suspension of an ordinance or of a law is vested in a minority*, the safeguards provided by law against its irregular or fraudulent exercise should be carefully maintained.[66]

By declaring the power of referendum an extreme power "vested in [the] minority," the court laid the groundwork for heightened restrictions.[67] A decade later in *Cottonwood Development v. Foothills Area Coalition of Tucson* ("*Cottonwood*"), it quoted this same language but went further: "Because this is a great power, *the power of the minority to hold up . . . the wishes of the majority*, the constitution and the statute made pursuant thereto

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61. *Id.*
62. *Id.* at 953.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 953–54 (emphasis added) (quoting AAD Temple Bldg. Ass'n v. Duluth, 160 N.W 682, 684–85 (Minn. 1916)).
67. *Id.*

must be strictly followed."[68] Because of this "extraordinary power," the court reasoned that a literal reading of the requirement is "justified in the context of a referendum," but did not opine on whether such a reading is required for an initiative.[69] Their reasoning became the backdrop for the strict compliance standard. The two cases together allow for the legislature to add requirements to a self-executing portion of the constitution and to require strict compliance with those provisions for the referendum to be considered facially valid.

Unsurprisingly, that is exactly what the legislature came to do. In 2015, the Arizona legislature enacted § 19-101.01.[70] That measure used the same reasoning from *Cottonwood*—that a referendum may overrule the representative majority, or the legislature.[71] As such, the legislature "determine[d] that strict compliance with the . . . statutory requirements for the referendum process . . . provides the surest method for safeguarding the integrity and accuracy of the referendum process."[72] Because the legislature expressly declared the measure invalid for any statutory violation with § 19-101.01, any technical failure would void a referendum. This strict compliance standard, originally developed by the court, would now apply to the host of statutory provisions the legislature added for requisite compliance.[73]

B. Voice of Surprise: Strict Compliance and the Presumption of Validity Now

Over four decades after *Direct Sellers*, the court still utilizes the strict compliance standard, and did so in *Surprise*.[74] In *Surprise*, referendum proponents, seeking to refer a local ordinance to the ballot, were required to

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68. Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc., 653 P.2d 694, 696–97 (Ariz. 1982) (emphasis added).

69. *Id.* at 697.

70. ARIZ. REV. STAT. ANN. § 19-101.01 (2025).

71. *Id.*

72. *Id.* Notably, in 2017 the legislature passed a subsequent law requiring strict compliance not only for referendums but also for initiative processes. *Id.* § 19-102.01. Because court precedent of initiative largely utilizes the substantial compliance standard. *See* Hauer, *supra* note 29, at 572–74. The rationale for strict compliance in initiatives largely mirrored the rationale for the referenda requirement, albeit without court requirements for initiatives specifically. *Compare* H.R. 2244, 53d Leg., 1st Reg. Sess. (Ariz. 2017) (initiatives), *with* H.R. 2407, 52d Leg., 1st Reg. Sess. (Ariz. 2015) (referenda). The focus of this Note is on the court-mandated strict compliance for referenda rather than the statutory-mandated requirements; without the court mandate, the statutory requirement likely overreaches into the judicial province to determine "what the law is" and could violate the separation of powers. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

73. For legislative requirements on initiatives and referenda, see §§ 19-101 to -102.01.

74. Voice of Surprise v. Hall, 533 P.3d 942 (Ariz. 2023).

gather 3,114 signatures within thirty days of August 16 when it was first proposed.[75] When Voice of Surprise, a political action committee, filed their initial application, they failed to comply with § 19-111(A)'s requirement to include the text of the ordinance.[76] Recognizing the error in their application, the clerk nonetheless accepted the application without comment.[77] On September 16, Voice of Surprise returned to the clerk's office with 5,432 signatures—all with the ordinance attached and well over the required 3,114 signatures.[78] On October 5, after the thirty-day window had passed, the city clerk rejected all petition sheets based solely on the failure to attach the ordinance in their petition for a serial number.[79]

The court determined that the restorable presumption of validity does not apply in the application for a petition of a serial number.[80] The court further held that the question of whether or not the restorable presumption of validity remained viable was inapposite.[81] "[E]ven assuming the presumption-reinstatement model remains viable in some situations, it does not apply to application errors."[82] Instead, that model, if still valid, would only apply to the signature-gathering process and to requirements to assist whether the signers were qualified electors.[83] The court thus recognized that Voice of Surprise's application was not compliant with the required statute within the necessary timeframe.[84] It recognized that the error was not harmless because "city officials and the public at large remained in the dark" and "[e]xcusing VOS's non-compliance would mean advancing a referendum effort that only substantially complied with [§ 19-101.01]" requiring strict compliance.[85]

The court did note a possible constitutional challenge if the statute creates an undue hardship.[86] However, the court wrote, "VOS does not argue that requiring strict compliance with § 19-111(A)'s mandate to include the text of a challenged ordinance within the application . . . unreasonably hindered or restricted VOS's constitutional right of referendum, making that provision

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75. *Id.* at 944.
76. *Id.* Specifically, the text of the ordinance was not appended to the application as the law mandates. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 945.
81. *See id.* at 946.
82. *Id.*
83. *Id.*
84. *Id.* at 947.
85. *Id.* at 948.
86. *Id.*

unconstitutional *in its application*."[87] Because the parties did not make a hardship argument, the court left the constitutional question of strict compliance for another day.

The court additionally pointed to the § 19-101.01 requirement that courts "strictly apply constitutional requirements for the form and manner of referenda."[88] While the court noted that such a provision may violate separation of powers principles by the legislature imposing a level of review on the court, the court chose not to address it because VOS failed to comply with § 19-111(A), not a constitutional provision.[89]

C. Resulting State of the Law

As a result of *Surprise*, the state of the law for referenda requirements remains questionable. Prior to *Surprise*, the Arizona Court of Appeals addressed the issue of strict compliance where an application had the description and petition in an inverted order.[90] The court noted strict compliance "requires nearly perfect compliance," but determined the statute did not "mandate that the [description] must always precede the [petition]."[91] Thus, the court could not conclude the referendum failed to strictly comply with the statute.[92] The court further stated that the referendum did not alter the meaning or cause additional confusion.[93]

Through *Surprise*, the court has limited the restorable presumption model to only the signature portion and not the application. As a result, applications for referenda are required to strictly comply with all constitutional and statutory provisions.[94] While the court in *Surprise* implies openness to as-applied challenges for constitutional hardship in referendums in future cases,[95] the court should rather overturn the rationale for strict compliance in

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87. *Id.* (emphasis added).
88. *Id.* at 949 n.1.
89. *Id.*
90. Workers for Responsible Dev. v. City of Tempe, 524 P.3d 1161, 1165 (Ariz. Ct. App. 2023).
91. *Id.* at 1165, 1168.
92. *Id.* at 1168.
93. *Id.* (citing Jones v. Respect the Will of the People, 517 P.3d 1188, 1196 (Ariz. Ct. App. 2022).
94. *See* ARIZ. REV. STAT. ANN. § 19-101.01 (2015).
95. *See* Voice of Surprise v. Hall, 533 P.3d 942, 948 (Ariz. 2023) (emphasis added) (writing that the *VOS* did not challenge the statute on the grounds that it created a hardship "making [it] unconstitutional *in its application*").

Direct Sellers and *Cottonwood* and remove the strict compliance requirement in assessing applications for referenda.[96]

II. THE REQUIREMENT FOR STRICT COMPLIANCE SHOULD BE REMOVED

The strict compliance requirement was not an issue in determining referendum compliance prior to *Direct Sellers* in 1972. The reason for this is clear—the framers of Arizona's constitution knew of the benefits and risks associated with direct democracy provisions and chose to explicitly protect those provisions in the constitution.[97] As a result, the principal reason for removing any strict compliance requirement is that the rationale for imposing it in *Cottonwood*—the power of the minority to hold up the will of the majority—is flawed.

In Section II.A, this Note explores the framer's debate and how the heightened restriction on referenda goes against the constitutional intent and text. In Sections II.B and C, the Note further provides two direct flaws in the *Cottonwood* rationale. Firstly, the rationale of wresting control from the legislature is akin to the debate surrounding the U.S. Guarantee Clause at the Founding, which was insufficient to preclude the two provisions of direct democracy. Secondly, the rationale ignores what representation is meant to be and how to properly determine the will of the majority. Lastly, in Section II.D, the Note evaluates the weaknesses of using as-applied challenges instead of rejecting the standard facially.

A. The Framer's Debate and Enactment Should Foreclose a Heightened Standard

The framers of Arizona's constitution were well aware of discussions about direct democracy principles occurring around the country when writing the constitution. Prior to congressional authorization of statehood, the provisions of initiative and referendum were party platforms in Arizona.[98] The provisions first appeared in platforms on the populist ticket and then later

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96. The court would also need to overturn the relevant statutory requirements for strict compliance for referenda and initiative respectively. *See* ARIZ. REV. STAT. ANN. §§ 19-101.01, -102.01 (2025).

97. ARIZ. CONST. art. IV.

98. Charles Foster Todd, The Initiative and Referendum in Arizona 8 (1931) (M.A. thesis, University of Arizona) (on file with the University Libraries, University of Arizona).

in the Republican territorial platform in 1898.[99] Those provisions were discussed again in 1909 and the following year when the provisions were written into the Arizona Constitution.[100] The original provisions were tied directly to several political movements in Arizona, especially labor movements and women's suffrage.[101]

By the time the convention began in September 1910, discussion of direct legislation had been widely discussed and informed the vote for delegates at the convention.[102] Arizona was not the only state to engage in this debate either; Oregon, Oklahoma and South Dakota were also considering the provisions of initiative, referendum, and recall in various ways.[103] As a result of the higher number of Democratic delegates, the provisions' inclusion became almost guaranteed but still remained highly contentious.[104] Because the inclusion of these issues had been such a large part of the delegate selection process, the details of the provisions were what largely remained in question.[105]

Early debate centered on whether the provisions of direct democracy included in the state constitution would violate the Guarantee Clause of the U.S. Constitution.[106] The Guarantee Clause specifically "guarantee[s] to every State in [the] Union a Republican Form of Government."[107] At the time of Arizona's founding, both Oregon and Washington had already addressed this issue.[108] Both states principally rejected that initiative and referendum would violate the Guarantee Clause.[109] In Washington, the court held "it can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people.

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99. *Id.* at 7–8. Significant discussion of initiative and referendum were publicized in letters and newspapers showcasing the strong desire for the provisions to be included. *Id.* In fact, Josephus Barnette described the provisions as "sufficient to meet the demands of those believing in 'full suffrage of the people.'" *Id.* at 10 (quoting Letter from Josephus R. Barnette to G.W.P. Hunt (Mar. 6, 1899)).

100. *Id.* at 11.

101. *Id.* at 8–12, 15–18.

102. *Id.* at 18–22 (noting that the "Code of the People's Rule" by Oregon Senator Jonathan Bourne was widely read at the time, principles of direct democracy lend themselves for political speeches, and the discussion of President Taft's disfavor of the principles in determining ratification of the constitution led to a resounding majority of forty-one of the fifty-two delegates).

103. *Id.* at 18.

104. *Id.* at 24; *see also* LESHY, *supra* note 6, at 8.

105. LESHY, *supra* note 6, at 8–9.

106. Eckstein, *supra* note 5, at 32, 33. The Guarantee Clause and how it impacts the strict compliance standard are further discussed *infra* Section II.B.

107. U.S. CONST. art. IV, § 4.

108. Eckstein, *supra* note 5, at 33.

109. *Id.*

Whether the expression of the will of the people be made directly . . . or through representatives chosen by them is not material."[110] These cases created an inference of validity without violating the Guarantee Clause.[111]

Against this backdrop, the delegates circulated five separate plans for how to implement initiative and referendum in the constitution.[112] The "real division" between the various propositions was in determining what percentage should be required for a referendum or initiative petition to be valid.[113] The agreed upon percentage for passing a constitutional amendment was settled at fifteen percent, while statutory initiatives would require ten percent and referenda on state-wide issues need only five percent.[114] Petitions for initiative and referendum on local issues (including county, city, town or other municipality) required fifteen percent for initiative petitions and ten percent for referenda.[115] The fact that a referendum requires a lower percentage of qualified electors in both state and local issues stands out as evidence that the framers were more worried about measures being directly proposed through initiative processes rather than affirming or denying representative's laws or ordinances.

Despite this rationale, sixty years later the court issued its opinion in *Direct Sellers*.[116] There is no evidence that there was a reason to impose a heightened standard in that case, specifically on referendum petitions. In fact, an analysis of every initiated or referred proposal between 1912 and 1978 found that sixty-six years of experience with initiatives and referenda did not render Arizona "a state ruled by popular democracy nor . . . anarchic or socialistic as the detractors of direct legislation predicted."[117] Any restrictions placed on the direct legislation process were considered to be "strictures designed to discourage the frivolous and irresponsible users and . . . not to inhibit in a substantial way the use of democratic participation by serious proponents of direct legislation."[118] But the strict compliance standard does more than discouraging frivolous and irresponsible users.

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110. Hartig v. City of Seattle, 102 P. 408, 409 (Wash. 1909); *see also* Eckstein, *supra* note 5, at 33 n.14 (noting other cases after ratification of the Arizona Constitutional Convention found that initiative and referendum don't violate the Guarantee Clause).

111. *See* Eckstein, *supra* note 5, at 33.

112. Todd, *supra* note 98, at 26. It should be noted that the original constitution also originally contained a provision for recall, but President Taft vetoed the ratification for statehood until this provision was removed. Eckstein, *supra* note 5, at 36.

113. Todd, *supra* note 98, at 28.

114. ARIZ. CONST. art. IV, pt. 1, § 1(1)–(3).

115. *Id.* § 1(1), (8).

116. *See* Direct Sellers Ass'n v. McBrayer, 503 P.2d 951 (Ariz. 1972).

117. Roush, *supra* note 58, at iii.

118. *Id.* at 156.

Initially, the standard itself did not declare a measure invalid; rather, it allowed for a restorable presumption of validity.[119] This changed when the legislature passed § 19-101.01. While initial technical failure may not have been fatal for a referendum, the statute expressly declares a referendum invalid for any statutory violation.[120]

In *Surprise,* the court further limited a group's process by removing the ability to restore any presumption of validity for the application.[121] The signature portion of referenda should arguably be the most important portion of the process. Maybe that is why one of the greatest discussions in enacting the provisions of initiative and referendum in the constitution centered on how many signatures would be sufficient for an initiative and referendum.[122] Despite this, the court is effectively holding the signature portion to a lower standard than the application itself—a standard that looks a lot more akin to substantial compliance than strict compliance. That substantial compliance standard was largely used for both initiatives and referenda prior to *Direct Sellers*.[123]

The standard of substantial compliance largely safeguards the process in the same way and could work effectively for referendums as well in Arizona.[124] Allowing the restorable-presumption model to be utilized only in the signature portion essentially holds referendum petitions to two separate standards. The first is in the application, where the lack of technical or "nearly perfect compliance"[125] would render an entire application fatal. Then, while signatures are being gathered, it would be sufficient that groups substantially comply with the part of the process that retained the most debate by the founders at the convention. Holding referenda to two separate standards not only creates confusion, but the heightened standard that applies to applications should already be foreclosed by the founders' intentions.

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119. *Direct Sellers*, 503 P.2d at 953; *see also* Harris v. City of Bisbee, 192 P.3d 162, 166 (Ariz. Ct. App. 2008) ("Consistent with [the public policy of supporting referendum] our courts have held that, unless the failure to comply strictly with a statutory requirement is expressly made fatal, that failure 'does not make the signatures appearing on the petitions null and void, but merely destroys the presumption of validity." (citations omitted)).

120. ARIZ. REV. STAT. ANN. § 19-101.01 (2025).

121. *See* Voice of Surprise v. Hall, 533 P.3d 942, 948 (Ariz. 2023).

122. *See* Foster Todd, *supra* note 98, at 28.

123. Feldmeier v. Watson, 123 P.3d 180, 183 (Ariz. 2005).

124. *See* David Potts, Comment, *Strict Compliance, Substantial Compliance, Referendum Petitions in Arizona*, 54 ARIZ. L. REV. 329, 336 (2012) (noting that substantial compliance for referendum would fulfill the procedural and structural safeguards people argue necessary in the process).

125. Workers for Responsible Dev. v. Tempe, 524 P.3d 1161, 1165 (Ariz. Ct. App. 2023).

B. The Guarantee Clause Argument Mimics the Rationale for Strict Compliance

The argument to initially pose a higher standard on referendum provisions also imitates the arguments made at the founding on whether the provisions defy the Guarantee Clause of the U.S. Constitution. Specifically, the rationale imposing strict compliance, that the "power of the minority to . . . hold up the wishes of the majority," mimics the argument interpreting the Guarantee Clause, that direct democratic provisions of initiative and referendum take the legislative power outside the will of the representative people and thereby violate the republican form of government.[126]

Notably, at the time of the convention, the framers were aware of this debate occurring in other states around the nation. At the time, state courts had already heard arguments against the Guarantee Clause.[127] In addition to state courts hearing arguments on the issue and reaching opinions that the forms of direct democracy do not violate the Guarantee Clause, the United States Supreme Court was set to decide the same. The Court heard an appeal from an Oregon state court decision in 1909, and the Court's opinion was issued five days after Arizona was admitted for statehood on February 19, 1912.[128] The Court avoided the question there, finding that the issue was a non-justiciable political question.[129] Instead of determining whether the decision was within the province of the Court, it found that it was up to Congress to determine whether a state had a proper form of government when admitting it.[130]

Although unaware that this would be the holding of the Supreme Court, the delegates at the constitutional convention were aware of the possibility. When discussing one of the proposals for including direct democracy in the state constitution, twelve of the fifty-two delegates spoke on it.[131] Principally, three of the four in opposition made the argument that "the provision was unconstitutional under the Guarantee Clause because a republican form of

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126. *See* Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 697 (Ariz. 1982).

127. *See* Kadderly v. City of Portland, 74 P. 710, 714 (Or. 1904); Hartig v. City of Seattle 102 P. 408, 409 (Wash. 1909).

128. Eckstein, *supra* note 5, at 36.

129. *Id.*

130. *See* Pac. States Tel. & Gas v. Oregon, 223 U.S. 118, 147 (1912). The Supreme Court has consistently rejected challenges under the Guarantee Clause as nonjusticiable political questions. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849). A more recent suggestion, albeit in dicta, recognizes that this categorical rule may be too inflexible to be appropriate. *See* New York v. United States, 505 U.S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

131. Eckstein, *supra* note 5, at 34.

government meant a representative form of government, not a government that allowed . . . direct democracy."[132] With a quarter of the individuals addressing the protection of the Guarantee Clause and the effect of direct democracy provisions on a representative democracy, the delegates were well aware of the issue.

Nevertheless, Arizona's founders chose to include both initiative and referendum provisions in the state constitution.[133] Not only did they include these provisions directly, but one of the dominant overall themes of the convention was giving power to the people.[134] The framers recognized the need for flexibility and permitting an activist government.[135] They believed that "if the citizenry sufficiently controlled the government, social justice could be accomplished."[136] The initiative and referendum provisions included in the state constitution captured this "cardinal tenant" in the best way by allowing the people to have a direct role in the government.[137]

Thus, the argument that referendums somehow subvert the will of the majority should be precluded; the framers were already aware of the arguments that direct democracy provisions could potentially detract from a representative democracy and the "will of the majority." Choosing to still include the provisions—with restrictions—meant that despite the risks or arguments against these provisions, the framers believed the benefits they provided to society outweighed any risks. The strict compliance standard stresses a heightened restriction on referendums because of the risks to upholding the "wishes of the majority."[138] Because the framers were aware of this same issue in discussing the Guarantee Clause at the convention and chose to include the provisions anyway, that rationale creating a heightened scrutiny should not stand.

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132. *Id.* The three speaking against the direct democracy provisions as violating the Guarantee Clause were Samuel Kingan of Pima County, William Fennimore Cooper of Pima County, and Edmund Wells of Yavapai County. *See id.* at 34 n.28. The fourth individual speaking against the proposal was Edward Doe of Cochino County. All four individuals later refused to sign the Arizona Constitution.

133. ARIZ. CONST. art IV, pt. 1, § 1(1).

134. LESHY, *supra* note 6, at 10.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 697 (Ariz. 1982).

C. The Will of the Majority Is Best Reflected by the People Directly, Rather than the Legislature

The argument adopted in *Direct Sellers*, and made even stronger in *Cottonwood*, relies on the assumption that the legislative act initially posed, in fact, represents the will of the majority. Certainly, giving the legislature complete authority to make law does have a certain appeal as it is better able to be informed on constitutional and political rationale than a typical voter.[139] But this rationale does create some problems. For starters, it is difficult to conclude that a legislative body can fully represent the will of the majority.[140] Furthermore, the rationale is undermined by the argument that the real will of the majority would be better represented by the actual majority. The weaknesses in this argument further demand the removal of the strict compliance standard.

Furthermore, even if legislatures were a likely representation of "the will of the majority" at the time of the country's founding, the same cannot be said for when Arizona entered statehood. It is certainly true that at the time of the country's founding, state legislatures were recognized as the voice of "the majority" in both elector selection for the Electoral College and U.S. Senators.[141] Prior to the mid-1800s, electors were commonly selected by state legislature, with a minority of states allowing eligible voters to decide electors.[142] But that process has largely been abandoned. Now, electors are normally selected by state party conventions and voted on by the people when they cast votes for their preferred presidential and vice presidential

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139. *See* George Washington, First Inaugural Address (Apr. 30, 1789). George Washington believed that legislatures should have "supreme authority in constitutional as well as political decision making" and that "only legislatures could make constitutional decisions" or engage the public in a constitutional dialogue. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 41–42 (Craig Joyce ed., 2004). The notion that legislatures alone could act was directly overturned by the Court in *Marbury*. *See id.* at 42. Despite this, legislatures still have a responsibility for interpreting and enforcing the constitution. *Id.*

140. Recognizing a legislative body to represent the "will of the majority" is interesting in theory but largely does not reflect the reality of elections. As the Condorcet voting paradox makes clear, "after an election . . . it is impossible to make a coherent statement about what the will of the people was." WARD FARNSWORTH, THE LEGAL ANALYST 145 (2007).

141. *See* CLIFF SLOAN & DAVID MCKEAN, THE GREAT DECISION 13 (2009) (recognizing that during the election of 1800, eleven of the sixteen states had the legislature select electors for the electoral college with the other five states having electoral selection be done directly by eligible voters); U.S. CONST. art. I, § 3 (providing the choosing of Senators to be "by the Legislature thereof").

142. Sarah Pruitt, *How Are Electoral College Electors Chosen?*, HISTORY (Nov. 4, 2024), https://www.history.com/news/electors-chosen-electoral-college [https://perma.cc/NU9W-V6EZ]; *see also* SLOAN & MCKEAN, *supra* note 141, at 13.

candidates.[143] Additionally, while legislatures were initially the constitutionally approved method for the selection of U.S. Senators, that section was overturned with the Seventeenth Amendment, ratified only a year after Arizona became a state in 1913.[144] Both of these occurred well prior to the strict compliance standard and should thus certainly be evidence that the will of the majority is represented by the actual majority.

Of course, a representative democracy stresses the notion of popular control.[145] But the judiciary has long been concerned with the threat of a majority having the authority to simply outvote a minority.[146] The representative form of government, in some ways, derives from the "continuing conflict between interests of 'the rulers' on the one hand, and those of . . . 'the people'[] on the other."[147] This contrast has required the courts to act counter-majoritarian to protect the interests of the minority, declaring the laws of the elected branches as unconstitutional.[148] John Hart Ely directly points to the Court outwardly stating their consideration of minority interests and argues that courts, in the protection of minority interests and even more broadly, should focus their review on "whether the opportunity to participate . . . has been unduly constricted."[149]

For starters, Ely notes that a representative democracy was more than merely a practical fix to the issue of the citizenry showing up and personally participating in the legislative process.[150] Of course, even if the representative democracy was designed for that purpose, allowing direct democracy in key areas would be another solution to that issue. More broadly, the purpose of the courts, according to Ely, is to step in when virtual representation for groups is not being provided.[151]

Certainly, the founding of the country was centered on the notion of procedural rights, and that rationale came through in the Constitution.[152] The Constitution, as Ely points out, is almost entirely focused on the procedural

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143. Pruitt, *supra* note 142.

144. U.S. CONST. amend. XVII (providing for Senators to be "elected by the people thereof").

145. JOHN HART ELY, DEMOCRACY AND DISTRUST 76–77 (1981).

146. *Id.*

147. *Id.* at 77.

148. *See, e.g.*, O'CONNOR, *supra* note 139.

149. ELY, *supra* note 145, at 75–77.

150. *Id.* at 77–78.

151. *Id.* at 84–85.

152. *See id.* at 89–90; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added) ("That to secure these rights [of life, liberty, and pursuit of happiness], Governments are instituted *among Men*, deriving their just powers *from the consent of the governed* . . . .") (emphasis added).

and structural planning of the government.[153] Perhaps this is the rationale for why the Bill of Rights was to be included in a separate document.[154] Ely takes this further to argue that even the Bill of Rights is primarily focused on helping to "make our government *processes* work."[155]

This specifically applies to the right to vote. Ely argues that voting cases "involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."[156] Certainly, allowing legislatures to maintain the status quo when people desire change would create representative issues. When the legislature not only maintains the status quo but, through their control, "chokes off the channels of political change," malfunction is likely to occur.[157]

Allowing the legislature to enact measures to detract from creating legislation undoubtedly has the potential to choke off the channels of political change.[158] Of course, frivolous referenda may have some issues, including

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153. ELY, *supra* note 145, at 90. Ely makes a point to note that even sections designed for what appears to be substantive results (such as treason, prohibitions of titles of nobility, and the Ex Post Facto and Bill of Attainder clauses) are rather more concerned with process than substance. *Id.*

154. *See* THE FEDERALIST NO. 84, at 433 (Alexander Hamilton) (Ian Shapiro ed., 2009) (claiming that a list of individual rights was "far less applicable" to the Constitution, "which is merely intended to regulate the general political interests of the nation").

155. ELY, *supra* note 145, at 93–94 (emphasis added). Ely makes this claim based on the fact that the Bill of Rights are structured as negative rights rather than positive. *See id.* Notably, the Arizona equivalent of the First Amendment goes further to provide for a positive right without a state action clause, which could mean Arizona's founders were focused not merely on process but also on substance. *See* ARIZ. CONST. art. II, § 6.

156. ELY, *supra* note 145, at 117. Interestingly, Ely also relies on the notion that choking off the political channels is notably an issue when it comes to the First Amendment. *Id.* at 105–16. The Court has acknowledged that signing a referendum petition does invoke First Amendment rights, especially because of the long history and public tradition of voting and legislating. *See* Doe v. Reed, 561 U.S. 186, 219–28 (Scalia, J., concurring).

157. ELY, *supra* note 145, at 103. Ely calls for a visible legislative process as one of the key solutions to this issue. *See id.* at 125. Certainly, referenda and direct democracy are the most visible and transparent forms of legislating, as it is the people directly legislating.

158. The strongest response to this in support of strict compliance is likely the inability of the legislature to change the measure due to its protection by the Voter Protection Act; indeed, the state legislature adopts this rationale in imposing strict compliance for initiatives. *See* H.R. 2244, 53d Leg., 1st Reg. Sess. § 3(A)(4) (Ariz. 2017). *See generally supra* notes 52–53 and accompanying text (explaining the Voter Protection Act). But this argument is inapt for two reasons. First, the notion of the will of the majority adopted in *Direct Sellers* occurred in 1972, more than two decades before the Voter Protection Act was enacted. But more fundamentally, Proposition 105 was ratified by a majority of Arizona voters in the 1998 election, which better reflects "majority will." *See Arizona Proposition 105, Prohibit Legislative Alteration of Ballot*

time delays, but the threat of a subversion of the will of the people is largely protected by other procedural safeguards to ensure that it does not get out of control.[159] Furthermore, any risks to the referendum for the rationale of strict compliance fail utterly when compared to the initiative, which the court has only held to require substantial compliance.[160]

This also becomes more confusing when looking at the split that the court created in *Surprise* by allowing a rebuttable presumption for the signature portion but not the application portion.[161] By allowing a lower standard for the signature portion, it expresses that somehow the application itself subverts the "will of the majority" more than the actual signing by electors. This argument defies what the provisions as a whole are meant to do—give power directly to the people as embodied in the constitution. Allowing a heightened standard specifically on the application does not accomplish the framers' intent and does little to uphold the will of the majority.

D. As-Applied Challenges Are Insufficient

Surprise does leave open the possibility for as-applied challenges to referendum enforcement.[162] While this is of note, these challenges will likely prove costly and hard fought. This is especially true given the second part of the *Surprise* ruling requiring clerks to provide the application, even if they are aware that the application for a petition violates strict compliance.[163]

As a result of this outcome, it is unlikely that applications and petitions would be challenged prior to the substantial expense of collecting signatures. The state constitution already mandates a specific limited time frame for receiving signatures—from a maximum of ninety days for constitutional

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Initiatives Amendment (1998), BALLOTPEDIA, https://ballotpedia.org/Arizona_Proposition_105,_Prohibit_Legislative_Alteration_of_Ballot_Initiatives_Amendment_(1998) [https://perma.cc/4999-JEWJ].

159. *See* ARIZ. CONST. art. IV, pt. 1, § 1; *see also* Potts, *supra* note 124, at 342–43; Hauser, *supra* note 29, at 585–86.

160. *See* Potts, *supra* note 124, at 336–41. As noted earlier, the legislature has mandated strict compliance for initiative measures as well through statute, but the court did not apply that standard to initiatives prior. *See* Leibsohn v. Hobbs, 517 P.3d 45, 47 (Ariz. 2022) (applying strict compliance to an initiative due to the statutory requirement).

161. *See* Voice of Surprise v. Hall, 533 P.3d 942, 945 (Ariz. 2023).

162. *Id.* at 948.

163. *Id.* at 948–51. The Court determined that the clerk had no basis for rejecting a petition on this ground and that rejecting applications were required to be authorized by either statute or constitutional provision. *Id.*

amendments to as short as thirty days for local ordinances.[164] It is possible—even likely—that some groups, like the third party who challenged the referendum in *Surprise*, will wait until after signatures have been collected and filed with the clerk before making efforts to invalidate them.[165] Because it frequently would require a judicial determination, given the lack of statutory authorization to invalidate, parties would additionally incur substantial legal costs. Even local measures can assume state-wide importance for political groups.[166]

Because of the heightened costs of election challenges through an as-applied lens, there are two alternatives. First, the legislature could impose sweeping legislation allowing a clerk to invalidate an application. This could pose significant challenges as it would require a clerk to make judicial-like determinations at the time of processing an application as to what is and is not valid. While a clerk can certainly count and determine specific inconsistencies in forms,[167] that is insufficient for a wide variety of things dealing with the application.

The other alternative is to remove the strict compliance requirement for technical application requirements that do not change the signer's understanding. Holding the application to a lower standard or allowing the restorable presumption would be decent alternatives. The best course of action, however, is to find that the strict compliance standard creates hardships that should be facially unconstitutional. Requiring costly litigation for a serial number placed in the wrong corner,[168] wrong font size,[169] or being 201 words in describing the provision,[170] hinders the ability that the framers

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164. *Compare* ARIZ. CONST. art. IV, pt. 1, § 1(4), *with* ARIZ. REV. STAT. ANN. § 19-142 (2025).

165. *See Voice of Surprise*, 533 P.3d at 951.

166. In *Surprise*, dealing with a local zoning ordinance, Arizona Cities and Towns, Arizona Free Enterprise Club, and the Center for Arizona Policy action all filed amicus briefs with the Arizona Supreme Court. Brief of Amicus Curiae League of Arizona Cities and Towns in Support of Respondents, Voice of Surprise v. Hall, 533 P.3d 942 (Ariz. 2023) (No. CV-23-0117-PR), 2023 WL 4489320; Brief of Amici Curiae Arizona Free Enterprise Club and Center for Arizona Policy Action, Voice of Surprise v. Hall, 533 P.3d 942 (Ariz. 2023) (No. CV-23-0117-PR), 2023 WL 4494932.

167. *See* ARIZ. CONST. art. IV, pt. 1, § 1(10) (directing the secretary of state to place a petition on the ballot if it complies with the form and content of art. IV, pt. 1, § 1(9) but not dealing with the application); ARIZ. REV. STAT. ANN. §§ 19-101(E), -114(B), -121 (2025) (all giving the clerk direction on how to process the petitions, count signatures, and determine if there is a sufficient number of signatures).

168. ARIZ. REV. STAT. ANN. § 19-111(B) (2025).

169. *Id.* §§ 19-111(A), -112(B).

170. *Id.* § 19-111(A).

initially intended—giving power to the people through forms of direct democracy.

III. CONCLUSION

The Arizona Framers envisioned strong public engagement in resolving political disputes. This engagement would facilitate solving social issues through activism while allowing flexibility.[171] They envisioned the ability of the public to engage meaningfully with laws and act as legislators at times through the provisions of initiative and referendum.[172] They were aware of arguments against the provisions, both through the Guarantee Clause and through the detractions of anarchism or a state ruled by popular demand.[173] Yet, after sixty-six years of these provisions being enshrined and self-executing in the state, the Arizona Supreme Court in *Direct Sellers* decided to heighten the standard for referendum petitions to require strict compliance.

This heightened standard relies on the assumption that the will of the majority would not be upheld by a form of direct democracy. That rationale resembles the same arguments made for not including the referendum and initiative made at the convention in the first place. Its rationale is belied by the framers in the writing of the 1912 Constitution. Instead, they determined that the ability of the people to legislate is necessary, and the ability to refer laws through referendum should have limited restrictions. Yet with *Surprise*'s ruling, the court has created a new schism in referendums, dissecting the process between the application and the actual signing; requiring two separate standards by allowing a restorable presumption for only the latter portion; inviting costly as-applied challenges instead of facially declaring a better standard of review; and limiting the power of the people to engage meaningfully in direct democracy.

The answer to these problems is to overturn *Direct Sellers* and *Cottonwood* and to strike down § 19-101.01[174] mandating strict compliance for referenda. Instead, the court should allow for *substantial* compliance with the laws—permitting a liberal construction of the constitutional and statutory provisions. By doing this, the court would effectively be enshrining the text and the intent of article IV, section 1 of the Arizona Constitution.

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171. *See* LESHY, *supra* note 6, at 8–10.

172. *See supra* Section II.A.

173. *See supra* Section II.B.

174. The court should also strike down § 19-102.01 mandating strict compliance for initiative measures.