STRICT COMPLIANCE, SUBSTANTIAL COMPLIANCE, AND REFERENDUM PETITIONS IN ARIZONA

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In Ross v. Bennett, *the Arizona Supreme Court held that recall petitions must "substantially comply" with constitutional and statutory requirements. Although the only issue before the court was whether the test for recall petitions should be a "substantial compliance" standard, the court's reasoning suggests that the "strict compliance" standard, which requires absolute compliance with all constitutional and statutory requirements, should still be applied to referendum petitions. In this Note, I argue that the strict compliance standard is an inappropriate standard for evaluating referendum petitions. Instead, the court should apply the substantial compliance standard to referendum petitions, which ensures that otherwise valid petitions will not be void for failure to comply with some technical requirement that does not confuse or deceive electors. This standard not only reflects Arizona's respect for direct democracy, but also recognizes the procedural safeguards that already prevent abuse of the referendum process.*

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INTRODUCTION

The Western states were formed on, among other things, the notion that the people's right to directly vote on various measures provided an essential check on the power of government.[1] State constitutional framers included the rights of referendum, initiative, and recall to secure such direct democracy as a permanent right.[2] These rights allow the people to vote directly on laws passed by the legislative body (referendum),[3] proposals for laws initiated by the citizens themselves (initiative),[4] and removal of sitting elected officials from office (recall).[5] An often-overlooked part of this democratic process is the petition process required to put such measures on the ballot for direct democracy to take its course. Given the rights at stake, it is important to review the Arizona Supreme Court's analysis of these rights as recently articulated in *Ross v. Bennett*,[6] and consider the doctrine and implications of procedural hurdles for direct democratic endeavors, particularly as the state approaches the 2012 elections.

In *Ross*, the Arizona Supreme Court held that, in the case of recall petitions, the petitions must "substantially comply" with the Arizona constitutional and statutory requirements for recall petitions.[7] In doing so, the court rejected the

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1. JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 10 (1993).

2. *Id.* at 11.

3. ARIZ. CONST. art. 4, pt. 1, § 1(3); *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509–10 (1990).

4. ARIZ. CONST. art. 4, pt. 1, § 1(2); *see also* Eule, *supra* note 3, at 1510–11.

5. ARIZ. CONST. art. 8, pt. 1, § 1.

6. 265 P.3d 356 (Ariz. 2011).

7. *Id.* at 360 ("[W]e reaffirm our support of *Abbey*'s substantial compliance standard."). For a discussion of *Abbey v. Green*, 235 P. 150 (Ariz. 1925), which first introduced the substantial compliance standard, see *infra* Part I.B. The petition requirements include "the declaration of each petitioner, for himself, that he is a qualified elector [of the jurisdiction affected by the measure to be referred], his post office address, the street and number, if any, of his residence, and the date on which he signed such petition." ARIZ. CONST. art. 4, pt. 1, § 1(9). In addition, each circulator must sign an affidavit affirming that

argument that the recall petitions must strictly comply with the requirements, although the court applies this "strict compliance" standard to referendum petitions.[8] Although the only issue pressed before the court was whether the test for recall petitions should be a "substantial compliance" standard, the court's reasoning suggests that the strict compliance standard should still be applied to referendum petitions.[9] Further, although the court correctly pointed out that the strong tradition of direct democracy in Arizona forces the court to construe recall requirements broadly,[10] the court failed to acknowledge that this same tradition should dictate a similar analysis for referendum petitions.

The strict compliance standard functions as a substantial hurdle for referring laws to the ballot, which in turn inhibits the exercise of direct democracy in Arizona. The same historical tradition that supports the substantial compliance standard in initiative and recall petitions also supports applying that standard to referendum petitions. Part I examines this history of the strict compliance and substantial compliance standards, showing the historical support for substantial compliance and how technical failures can doom referendum petitions. The referendum process is further safeguarded through existing procedural hurdles that offset concerns that the minority can temporarily suspend legislation that might eventually be approved by the public.[11] Part II discusses the safeguards that already exist to prevent the abuse of the referendum process, how applying the substantial compliance standard fits with Arizona's tradition of supporting directly democratic procedures, and how the legislature can exempt legislation from the referendum entirely. Given these constitutional safeguards, the historical tradition, and the legislative exemptions, applying the substantial compliance standard to referendum petitions would promote, rather than inhibit, direct democracy in Arizona.

I. HISTORY OF STRICT AND SUBSTANTIAL COMPLIANCE IN ARIZONA

Arizona, like many Western states, adopted referendum, recall, and initiative in the early 20th century.[12] Twenty-four states have a referendum provision of some kind, and many states have referendum, recall, and initiative

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each signature was signed in that circulator's presence by someone that the circulator believed was a qualified elector of the jurisdiction affected by the referred measure. *Id.*

8. *See infra* Part I.A.

9. *See Ross*, 265 P.3d at 359–60.

10. *See id.* at 358 ("Given this history, this Court has interpreted constitutional and statutory provisions governing recall liberally to protect the public's right to recall its officials.").

11. *See* Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 696 (Ariz. 1982) ("A small minority of the voters has the power to suspend legislation enacted by the duly elected representatives of the people, legislation that could be supported by the majority of the electors at the subsequent referendum election.").

12. *See State by State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Feb. 4, 2012).

expressly called for in their state constitution.[13] Referendum allows citizens to suspend the implementation of a particular piece of legislation until the public can vote on it at the next election.[14] In order to do this, 5% of the electorate must sign referendum petitions[15] that describe the legislation in question and follow a particular format prescribed by the state legislature.[16]

Arizona is, however, unique in mandating absolute compliance with procedural requirements in order to uphold referendum petitions. While many states construe petition requirements liberally and demand only that petitions substantially comply with the requirements set forth in their state constitutions and applicable statutes,[17] Arizona requires that referendum petitions strictly comply with the requirements laid out in the state constitution. A referendum petition requires the approval of 5% of qualified electors to make it onto the ballot, and requires the name and address, among other requirements, of each individual who signs the petition.[18] Petitions that would be otherwise valid but for technicalities that arguably should not affect their validity, have been found void. [19] This

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13. *Id.* Most of the states with initiative and referendum procedures are Western states that adopted initiative and referendum at about the same time as Arizona. California, for example, first adopted these in 1911, the same year as Arizona. *Id.*

14. ARIZ. CONST. art. 4, pt. 1, § 1(3). "Referendum" is occasionally used to describe the power of the legislature to send legislation to the people. *See id.* art. 4, pt. 1, § 1(15) (using the word "refer" to describe the legislature's power to send legislation to the people). However, in the Arizona Constitution, referendum explicitly refers to the ability of the people to force a popular vote on legislation enacted by the legislature. *Id.* art. 4, pt. 1, § 1(3).

15. *Id.*

16. ARIZ. REV. STAT. ANN. § 19-101 (2011).

17. *See, e.g.*, Porter v. McCuen, 839 S.W.2d 521, 522 (Ark. 1992) ("The initiative and referendum amendment must be liberally construed in order to effectuate its purposes and only substantial compliance with the amendment is required."); Assembly of State of Cal. v. Deukmejian, 639 P.2d 939, 948 (Cal. 1982) ("This court has stressed that technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in 'substantial compliance' with statutory and constitutional requirements."); Loonan v. Woodley, 882 P.2d 1380, 1384 (Colo. 1994) ("Given the similar nature of the right to vote and the right of initiative and referendum, and the common statutory goal of inhibiting fraud and mistake in the process of exercising these rights, we now hold that substantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum."). In fact, most states with referendum use substantial compliance or something similar to evaluate referendum petitions; only Michigan and Maryland use strict compliance. *See* Ferguson v. Sec'y of State, 240 A.2d 232, 235 (Md. 1968) (holding that referendum petitions must strictly comply with the requirements set forth in the Maryland Constitution); Mich. United Conservation Clubs v. Sec'y of State, 630 N.W.2d 376, 380 (Mich. Ct. App. 2001) ("[W]e are cognizant that this Court is required to enforce strict compliance with constitutionally mandated procedures that relate to the exercise of the referendum power."), *rev'd on other grounds*, 630 N.W.2d 297 (Mich. 2001).

18. ARIZ. CONST. art. 4, pt. 1, § 1(9).

19. Western Devcor v. City of Scottsdale, 814 P.2d 767, 770–73 (Ariz. 1991) (technical failure in circulator's affidavit voids referendum petitions despite independent proof of petitions' validity); Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 697 (Ariz. 1982) (failure to attach a copy of the resolution to be referred voids referendum petitions); Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1972)

prevents the very direct democratic participation that the process was created to protect.

A. History of Strict Compliance and Referendum

The strict compliance standard for referendum petitions germinated in *Direct Sellers Association v. McBrayer*.[21] In *Direct Sellers*, Frank Hoeschler and the Direct Sellers Association challenged a law regulating the direct selling of merchandise to the public in their homes.[22] The legislation was to become effective on August 11, 1970—90 days following the adjournment of the legislative session during which it was passed.[23] On August 10, 1970, Frank Hoeschler and the Direct Sellers Association filed a referendum petition with 30,000 signatures to put this legislation on the ballot.[24] The Maricopa County Legal Aid Society filed a special action challenging the referendum petitions on the grounds that the petitioners failed to comply with the circulator's statutory affidavit forms.[25] Because the petition failed to state that the circulators were qualified electors of the State of Arizona—a statutory requirement of referendum—the Arizona Supreme Court held that the "presumption of validity" was destroyed and could be reinstated on proof that the circulators were in fact qualified electors.[26] While the court did not formally introduce a "strict compliance" standard, it did use that technical failure to strike down the "presumption of validity," which prevented the referendum from appearing on the ballot, and so prevented the voters from considering the measure on its merits.[27]

Ten years later, the Arizona Supreme Court formally introduced the strict compliance standard in *Cottonwood Development v. Foothills Area Coalition of Tucson*.[28] In that case, the Foothills Area Coalition of Tucson circulated petitions in an attempt to refer to the ballot a zoning issue in Pima County.[29] The Coalition failed to attach a copy of the resolution that was being referred, which is required by statute.[30] The court held that, because referendum is a "great power," the requirements set forth in the constitution and the statute must be strictly followed,

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(failure to include certification that petition circulators are qualified electors of the State of Arizona destroys presumption of validity for signatures on referendum petition).

21. 503 P.2d 951.

22. *Id.* at 952.

23. *Id.* The Arizona Constitution requires that legislation come into effect 90 days after the legislative session in which it was passed ends to allow time for a referendum. ARIZ. CONST. art. 4, pt. 1, § 1(3).

24. *Direct Sellers Ass'n*, 503 P.2d at 952.

25. *Id.*

26. *Id.* at 953.

27. See Memo from the Ariz. Legislative Council Regarding Constitutional Amendments, Initiative Measures, Referendum Measures, and Salary Commission Recommendations 21 (Jan. 5, 2011), *available at* http://azmemory.lib.az.us/cdm4/item_viewer.php?CISOROOT=/statepubs&CISOPTR=13314&CISOBOX=1&REC=2.

28. 653 P.2d 694 (Ariz. 1982).

29. *Id.* at 696.

30. *Id.* at 697; *see also* ARIZ. REV. STAT. ANN. § 19-121(A)(3) (2011) (requiring that each signature sheet be attached to a "full and correct copy of the title and text of the measure . . . referred by the petition").

keeping the measure off the ballot and out of the hands of the people, contrary to the referendum process's purpose.[31]

More recently, in *Western Devcor v. City of Scottsdale*, a group of voters sought to refer a measure passed by the Scottsdale City Council that rezoned property owned by Western Devcor.[32] The referendum petitions contained affidavits that stated that the circulators believed the signers were "qualified electors of the State of Arizona."[33] Because the affidavit should have said that the circulators believed each signer to be a "qualified elector of the City of Scottsdale," the court found that the petitions were not in strict compliance and, again, the people were prevented from considering the referred measure for technical noncompliance.[34]

As demonstrated by the cases above, the strict compliance standard allows technical failures to doom a referendum effort, even when the petitioners followed the required procedures overall and presumably had valid signatures. In fact, in *Western Devcor*, the referendum petitions followed the statutory example, which included "qualified electors of the State of Arizona" in the language.[35] Further, a random sample of the signatures was checked for validity, and, using that sample as the basis for a projection, the projected number of valid signatures exceeded 105% of the required number.[36] Even when independent evidence suggests that the alleged defect caused no confusion or deception, the court will still, when applying the strict compliance standard, strike down petitions that do not perfectly comply with constitutional and statutory requirements.

B. Substantial Compliance Standard for Recall and Initiative Petitions

The Arizona Supreme Court has forgone the same strict compliance standard for recall and initiative petitions, instead opting for a substantial compliance standard. Interestingly, applying the substantial compliance standard to initiative petitions and the strict compliance standard to referendum petitions interprets the same clause of the Arizona Constitution in two different ways.[37] Recall allows the electorate to remove a public official from office before his or her term is over by collecting enough petition signatures to put the public official

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31. *Cottonwood Dev.*, 653 P.2d at 697.
32. 814 P.2d 767, 768–69 (Ariz. 1991).
33. *Id.* at 770.
34. *Id.*
35. *Id.* at 770–71. Since *Western Devcor*, the example has been amended to point out that "qualified electors of Arizona" should be changed to fit the particular jurisdiction where the referendum is occurring. ARIZ. REV. STAT. ANN. § 19-112(D) (2011).
36. *Western Devcor*, 814 P.2d at 772.
37. ARIZ. CONST. art. 4, pt. 1, § 1(9) ("Every initiative or referendum petition shall be addressed to the secretary of state in the case of petitions for or on state measures . . . and shall contain the declaration of each petition, for himself, that he is a qualified elector of the state."). No distinction is made between initiatives and referenda in that section. *Id.*

to the electorate for a vote.[38] Initiative, meanwhile, allows for the electorate to propose a legislative measure and put it on the ballot.[39]

The court first introduced this substantial compliance standard in *Abbey v. Green*.[40] In *Abbey*, a judge challenged the sufficiency of recall petitions after a recall election on the grounds that it did not fully comply with the recall statute.[41] The Arizona Supreme Court held that the petitions and election were in "substantial compliance with the law," and upheld the recall election results.[42]

This is also the standard that the Arizona Supreme Court applied in *Ross v. Bennett*.[43] In *Ross*, the court upheld applying the substantial compliance standard to recall petitions and used that standard to evaluate alleged deficiencies in the recall petitions.[44] Likewise, the court applied this standard to initiatives, noting that "substantial compliance means that the petition as circulated fulfills the purpose of the relevant statutory or constitutional requirements, despite a lack of strict or technical compliance."[45]

The cases that led the court to develop the strict and substantial compliance standards demonstrate that they function in vastly different ways to implement virtually the same petition requirements for each type of direct-democracy measure. In each of the cases applying the strict compliance standard to referendum petitions, technical failures prevented the electorate from considering what otherwise was a valid use of the democratic processes provided for in the Arizona Constitution. Alternatively, where the substantial compliance standard applied, technical errors were overlooked to allow the initiative and recall processes to function as they were intended.

Part II below discusses the court's reasoning for applying the stricter standard to referendum petitions and the historical and procedural arguments that challenge the court's reasoning. The referral power was reserved for the people in order to provide a check on governmental powers. This history is as well documented as that of recall petitions, which the court found persuasive in overlooking the petitions' technical defects in *Ross*. Additionally, multiple procedural protections exist to counter the court's second argument, which focused on the minority's ability to stop implementation of laws passed by a majority of a legislative body. These two factors together provide a basis for analyzing referendum petitions under the substantial compliance standard in order to promote direct democratic participation where possible.

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38. *Id.* art. 8, pt. 1, § 1.
39. *Id.* art. 4, pt. 1, § 1(2).
40. 235 P. 150 (Ariz. 1925).
41. *Id.* at 152.
42. *Id.* at 157.
43. 265 P.3d 356 (Ariz. 2011).
44. *Id.* at 358–62 (upholding the substantial compliance standard and using it to evaluate whether the petition complied with the genuineness requirement, the circulator's oath complied with the constitutional requirement, and the grounds for recall stated in the petition complied with the constitutional requirement).
45. Feldmeier v. Watson, 123 P.3d 180, 183 (Ariz. 2005).

II. ARGUMENTS FOR SUBSTANTIAL COMPLIANCE FOR REFERENDUM PETITIONS

In *Ross*, the court discussed its reasoning for applying the strict compliance standard to referendum petitions, and why such an approach is not appropriate for recall petitions.[46] The court essentially argued that the referendum process allows a minority of voters to impose its will on the majority because the process inherently suspends implementation of legislation pending a vote by the entire electorate.[47] Additionally, the court noted that the history of the recall process—as an important right of the people—warranted a reduced level of scrutiny in order to allow the exercise of direct democracy if at all possible.[48] However, the bases for these arguments can be applied alternatively to argue that substantial compliance is the appropriate standard for referendum petitions.

A. Procedural and Structural Safeguards

The court's arguments for maintaining the stricter standard for referendum petitions are countered by additional procedural protections that tip the scales in favor of applying the substantial compliance standard to all direct-democracy processes. The court compares the recall process to the referendum process, arguing, "unlike the referendum process, the recall process does not allow a minority of voters to suspend a decision supported by the majority."[49] The higher number of signatures required for a recall petition represents a built-in protection against abuse of the recall process.[50] Because referendum only requires 5% of the electorate while the recall process requires 25% of the electorate, referendum does not have the same built-in protection,[51] and referendum petitions must therefore strictly comply with constitutional requirements or otherwise be voided.

However, this analysis fails to recognize the vastly different timeframes that these challenges face. The shortened timeframe for referendum represents a built-in protection against abuse of the referendum process. The court correctly notes that referendum petitions require fewer signatures than initiative petitions[52] and recall petitions.[53] But gathering that number of signatures is even more difficult because of the compressed timeframe.[54] Rather than having as many as 20

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46. *Ross*, 265 P.3d at 358–59.
47. *Id.* at 359–60.
48. *Id.* at 360.
49. *Id.*
50. *Id.*
51. *See id.*
52. *Compare* ARIZ. CONST. art. 4, pt. 1, § 1(3) (requiring 5% of the electorate for referendum), *with id.* art. 4, pt. 1, § 1(4) (requiring 10% of the electorate for initiatives).
53. *Ross*, 265 P.3d at 360; *see also* ARIZ. CONST. art. 8, pt. 1, § 1 (requiring 25% of the electorate to sign recall petitions to hold a recall election).
54. TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 93 (2d ed. 2010) ("Although [the number of signatures required for a referendum petition] is a much smaller number than is required for initiatives, the shorter signature-collection period (ninety days) makes this task relatively difficult.").

months to gather signatures for an initiative,[55] referendum seekers only have 90 days after the end of the legislative session.[56] In order for the electorate to refer a legislative act, 5% of the electorate needs to sign a petition to put the matter on the ballot.[57] As a result, even though a referendum petition only requires half the signatures that an initiative petition requires, those signatures must be collected at a faster rate.[58]

In fact, this signature-gathering problem makes it difficult even for initiative petitions to appear on the ballot. In the past four election cycles, no citizens' initiative has gathered the requisite number of signatures to place the initiative on the ballot without hiring paid circulators.[59] For example, the medical marijuana initiative, which was the only citizens' initiative to make the ballot in 2008, was bankrolled by a special interest group in Washington, D.C.[60] Conversely, a citizens' initiative to stop issuing tickets from photo-enforcement cameras failed without the support of outside funding.[61]

While recall petitions face a similar timeframe to referendum,[62] there are crucial distinctions between these two measures that still make the referendum

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55. Kevin Kiley, *With Voter Initiatives, Powerful Reign*, ARIZ. REPUBLIC, Aug. 21, 2010, at A1.

56. ARIZ. CONST. art. 4, pt. 1, § 1(3). This does not mean that there are necessarily only three months to collect signatures, as a bill could be passed early in the legislative session and not go into effect until three months after the legislative session ends. Still, the timeframe that referendum petitions must deal with is shorter than the timeframe that recalls face and significantly shorter than the timeframe initiatives face. Note that the 90-day delay between the end of the legislative session and the enactment of legislation is in place expressly to allow the electorate to, if so desired, organize a referendum. *Id.* ("[T]o allow opportunity for referendum petitions, no act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure.").

57. *Id.*

58. The number of signatures necessary for a referendum or initiative petition is determined as a percent of the number of people who voted in the last gubernatorial election. *Id.* art. 4, pt. 1, § 1(7) ("The whole number of votes cast for all candidates for governor at the general election last preceding the filing of any initiative or referendum petition on a state or county measure shall be the basis on which the number of qualified electors required to sign such petition shall be computed."). In the 2010 gubernatorial election, approximately 1.7 million people voted. *See Arizona – Election Results 2010*, N.Y. TIMES, http://elections.nytimes.com/2010/results/arizona (last visited Feb. 4, 2012). To refer a state legislative act to the people, then, requires 5% of 1.7 million, or 85,000. An initiative petition, however, requires 10%, or 170,000. However, those 85,000 signatures necessary for a successful referendum must be collected within 90 days after the expiration of the legislative session. ARIZ. CONST. art. 4, pt. 1, § 1(3). Conversely, an initiative petition has up to 20 months to collect signatures. Kiley, *supra* note 55, at A1. As a result, because the referendum petition requires half the signatures of an initiative petition in much less than half the time, those signatures must be collected even faster.

59. Kiley, *supra* note 55.

60. *Id.*

61. *Id.*

62. *Compare* ARIZ. REV. STAT. ANN. § 19-203(B) (2011) ("A recall petition shall not be accepted for such verification if more than one hundred twenty days have passed

timeframe a safeguard against abuse. First, a referendum drive faces a hard deadline: Once the legislation goes into effect, referendum is no longer available.[63] Further, that deadline is set not by the group seeking the referendum, but by the end of the legislative session.[64] Conversely, the deadline set by recall petitions is determined by the day that the application for the recall petition is submitted.[65] This allows the leaders of a recall drive to prepare and plan how they will collect enough signatures prior to filing an application for a recall petition. In addition, a failed recall petition does not mean that recall is impossible; the group simply needs to file a new application for a recall petition and has a second opportunity to collect enough signatures.[66] No such second chance exists for a failed referendum petition. As a result, even though recall petitions and referendum petitions have similar timeframes, the hard deadlines and limited opportunity to make the ballot provide a safeguard against abuse of the referendum process.

Additionally, the Arizona Constitution exempts two types of legislation from referendum altogether: emergency legislation and appropriations. The emergency legislation exclusion provides that emergency measures required to "preserve the public peace, health, or safety, or to provide appropriations for the support and maintenance of the departments of the state and of state institutions" can go into effect immediately. A section of the measure must state why it is necessary that the measure go into effect immediately and two-thirds of the members of each house of the legislature must approve the measure.[67] Acts passed in this manner go into effect immediately.[68] Therefore, although it is more difficult to pass legislation that avoids referendum, it is certainly not impossible and emergency measures are one way that the majority can prevent a minority of voters from hijacking the legislative process.[69] In fact, even if legislation has been

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since the date of submission of the application for recall petition[.]"), *with* ARIZ. CONST. art. 4, pt. 1, § 1(3) ("[T]o allow opportunity for referendum petitions, no act passed by the legislature shall be operative for ninety days after the close of the legislature enacting such measure.").

63. *See* ARIZ. CONST. art. 4, pt. 1, § 1(3).

64. *Id.*

65. ARIZ. REV. STAT. ANN. § 19-203(B) (2011).

66. In fact, the recall statute contemplates such a possibility. *See id.* § 19-202(B). There is only one restriction:

> After one recall petition and election, no further recall petition shall be filed against the same officer during the term for which he was elected unless the petitioners signing the petition first, at the time of application for the subsequent recall petition, pay into the public treasury from which such election expenses were paid all expenses of the preceding election.

Id.

67. ARIZ. CONST. art. 4, pt. 1, § 1(3).

68. *See* Indus. Comm'n v. Frohmiller, 140 P.2d 219, 223 (Ariz. 1943). Note that, if the Governor vetoes the legislation, the act goes into effect the day the veto is overridden by a three-fourths vote. Clark v. Boyce, 185 P. 136, 145 (Ariz. 1919) (Cunningham, C.J., concurring).

69. Because this emergency legislation goes into effect immediately, it cannot be referred. *See* LESHY, *supra* note 1, at 94. The only option then available to the electorate

referred to the electorate, the legislature can effectively override a referral attempt if it then passes a conflicting emergency measure.[70] As a result, it is unlikely that a referendum petition could suspend legislation supported by a vast majority of the electorate.

Emergency legislation exclusions to override potential referendum challenges have been used with some success in other states. For example, in Idaho, the emergency provision of the Idaho Constitution was used to immediately implement a right-to-work law.[71] In *Idaho State AFL-CIO v. Leroy*, the Idaho Legislature overrode a gubernatorial veto to enact a "right to work" bill and designated the bill as an "emergency bill," meaning that it was effective immediately.[72] The plaintiffs claimed that the immediate enactment of this legislation impaired their constitutional right of referendum.[73] The Idaho Supreme Court held that the judiciary could not second guess what constitutes an emergency, so the challenge on those particular grounds failed.[74]

Arizona's referendum provision in the state constitution is, in fact, even more robust than Idaho's. While Idaho reserves the right of referendum to the people, it is not self-executing, so the legislature must pass legislation allowing for referendum.[75] Further, the emergency provision of the Idaho Constitution refers only to when legislative acts go into effect generally and not specifically because of referendum.[76] Even with these differences, though, Idaho provides an example

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would be an initiative petition to change the law, but this would not prevent the law from going into effect. *See* ARIZ. CONST. art. 4, pt. 1, § 1(3).

70. LESHY, *supra* note 1, at 95 ("If a nonemergency measure is enacted and subsequently challenged through the referendum process, the legislature may enact a different, conflicting measure as an emergency act. If this new measure effectively repeals the measure subject to the referendum challenge, the referendum election is voided because its object—the earlier statute—has disappeared.").

71. Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1130 (Idaho 1986).

72. *Id.*

73. *Id.* at 1131.

74. *Id.* at 1133.

75. This is not true in Arizona, where referendum is self-executing under the constitution. *Compare* IDAHO CONST. art. III, § 1 ("The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection."), *with* ARIZ. CONST. art. 4, pt. 1, § 1(3) ("The second of these reserved powers is the referendum. Under this power . . . five per centum of the qualified electors, may order the submission to the people at the polls any measure, or item, section, or part of any measure enacted by the legislature . . . ."), *and* ARIZ. CONST. art. 4, pt. 1, § 1(16) ("This section of the constitution shall be, in all respects, self-executing.").

76. IDAHO CONST. art. III, § 22 ("No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."). Conversely, Arizona's referendum provision specifically contains an emergency provision detailing what the legislature must do to pass emergency legislation. ARIZ. CONST. art. 4, pt. 1, § 1(3) ("[N]o such emergency measure shall be considered passed by the legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative,

for Arizona to follow: Potential referendum challenges can be prevented by enacting emergency legislation that is supported by two-thirds of the legislators of each house.[77] This structural protection mitigates damage that could be done by a small interest group in attempting to suspend legislation, as legislation with significant legislative support can avoid a referendum entirely.

Finally, appropriations for the support and maintenance of a department or institution are completely exempt from referendum. Though the language is slightly ambiguous,[78] the court clarified its meaning in *Garvey v. Trew*.[79] In *Garvey*, the Arizona state legislature had passed a bill directing the Arizona Corporation Commission to determine the property value of all the public utility companies in the state to help set rates.[80] The legislature appropriated $50,000 to the Corporation Commission to do this.[81] The Arizona Supreme Court held that because this was an appropriation "for the support and maintenance of a department or institution," it was exempt from referendum.[82]

This appropriations exception to the referendum process further mitigates the concern that small interest groups could undermine popularly enacted legislation. Because appropriations are not subject to referendum, interest groups cannot disrupt government function merely by filing referendum petitions against appropriations bills.[83]

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and shall be approved by the affirmative votes of two-thirds of the members elected to each house of the legislature, taken by roll call of ayes and nays, and also approved by the governor[.]").

77. In Arizona, like in Idaho, the determination that an emergency exists is an "exercise of legislative discretion not reviewable by the judiciary." City of Phx. v. Landrum & Mills Realty Co., 227 P.2d 1011, 1013 (Ariz. 1951). The legislature, then, can insulate any legislation from a referendum so long as it declares that a particular piece of legislation is emergency legislation, explains why it is needed to preserve public peace, health, or safety, and approves the legislation by a two-thirds majority in both houses of the legislature. ARIZ. CONST. art. 4, pt. 1, § 1(3). This two-thirds requirement provides a safeguard against abuse of the emergency provision by the legislature, but also ensures that popular legislation cannot be suspended by a special interest group if that legislation receives sufficient legislative support.

78. ARIZ. CONST. art. 4, pt. 1, § 1(3) ("[N]o act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure, except such as require earlier operation to preserve the public peace, health, or safety, *or to provide appropriations* for the support and maintenance of the departments of the state and of state institutions[.]" (emphasis added)).

79. 170 P.2d 845 (Ariz. 1946). The essential holding of *Garvey* is that "no such emergency measure" refers to preserving "the public peace, health, or safety" and does not include appropriations measures. *Id.* at 851 ("We are satisfied that the framers of the constitution and the people who voted for its adoption understood and intended that appropriations for the support and maintenance of the departments of the state government and state institutions were not to be subject to the referendum.").

80. *Id.* at 847.

81. *Id.* at 845.

82. *Id.* at 851.

83. LESHY, *supra* note 1, at 95.

B. The Historical Argument

In addition to the procedural arguments above, the *Ross* court goes on to argue that the substantial compliance standard is appropriate given Arizona's "strong devotion to recall as a progressive process."[84] Though this argument is used to support the idea that substantial compliance is more appropriate than strict compliance for recall (not to argue for the difference between referendum and recall), the same argument can be made for referendum. In fact, just as President Taft threatened that he would not approve statehood if the recall provision was not changed,[85] he also warned against referendum and initiative measures, saying that Arizona would turn its law into a "zoological garden of cranks."[86]

In fact, referendum and initiative were, when discussed at the constitutional convention, inseparable.[87] Debates over initiative and referendum always involved both measures, such as whether referendum and initiative would apply to cities and counties[88] or whether referendum and initiative violated the Guaranty Clause of the U.S. Constitution.[89] Further, the 10% requirement for initiative petitions and the 5% requirement for referendum petitions were

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84. Ross v. Bennett, 265 P.3d 356, 360 (Ariz. 2011).

85. *Id.* at 358. It is worth noting that President Taft's major concern was not about recall generally, but about the recall of judges, which he viewed as impeding upon the independence of the judiciary. *See* Special Message from William H. Taft, President of the United States, to the House of Representatives, Returning Without Approval House Joint Resolution No. 14 (Aug. 15, 1911), *available at* http://www.archives.gov/legislative/features/nm-az-statehood/taft-veto.html (vetoing a house resolution to admit the territories of New Mexico and Arizona as states into the union). Of course, while Arizona did take judicial recall out of the constitution in order to obtain statehood, they reinstated the judicial recall in the next election in a landslide. LESHY, *supra* note 1, at 18.

86. LESHY, *supra* note 1, at 6.

87. *See* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 1025 (John S. Goff ed., 1991) (introducing both initiative and referendum into the constitution through the same proposition).

88. Albert Baker, for example, argued against an early version of the referendum and initiative provisions of the constitution, arguing that it was "not broad enough" and did "not give the people in certain localities an opportunity to use the initiative and referendum." *Id.* at 176.

89. In fact, this was a major Republican argument against initiative and referendum. At the time of the constitutional convention, a case was before the U.S. Supreme Court that would decide whether Oregon's initiative and referendum provisions in its constitution violated the Guaranty Clause by not being republican in form as contemplated by the U.S. Constitution. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, *supra* note 87, at 207. In Arizona, the Republican argument failed and both referendum and initiative were adopted into the Arizona Constitution. *Id.* at 751. In the Oregon case, the Supreme Court eventually held that whether or not a state violated the Guaranty Clause was a nonjusticiable political question. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–50 (1912).

determined the same day.[90] In fact, the 5% requirement for referendum petitions received more support than the 10% requirement for initiative petitions.[91]

Based on the history of initiative and referendum and how these measures were considered at the Arizona Constitutional Convention, it is incongruous to apply different standards to these petitions. Given historical adherence to populism and safeguards against abuse inherent in the constitution, the substantial compliance standard should be applied to both types of petitions.

CONCLUSION

The Arizona Constitution provides for referendum, initiative, and recall. These direct-democracy measures were controversial, and their inclusion in the constitution even threatened Arizona's bid for statehood.[92] The framers nevertheless included these provisions. While referendum potentially grants a minority of the electorate the power to "hold up the effective date of legislation which may well represent the wishes of the majority,"[93] this power is subject to numerous safeguards against abuse. Emergency measures and appropriations are exempt from referendum entirely, and any referendum must so outrage the public that 5% of the electorate signs referendum petitions in the small window of time before the legislation is enacted. In exchange for this risk that a minority of the electorate could hold up otherwise popular legislation, the legislation is actually tested to find out if it represents the wishes of the majority. Referendum, in fact, eliminates the need to guess whether the measure "may well represent" the voters' wishes.

This great power, granted to the electorate by the Arizona Constitution,[94] should not be undermined by a technical failure. And that is what strict compliance does: It defeats referendum petitions not because there are not enough signatures, not because signatures are fraudulent, and not because the signatures were not collected in a timely fashion. Rather, strict compliance defeats otherwise valid referendum petitions because the petition says "qualified electors of Arizona" instead of "qualified electors of Scottsdale."[95]

Substantial compliance is a more appropriate standard for referendum petitions. While some may argue that referendum can suspend the implementation of popular legislation, this suspension is only temporary, and, in exchange for that suspension, the electorate actually expresses its will by voting for or against that particular measure on the ballot. This concern is further mitigated by structural protections against this abuse in the Arizona Constitution: a shortened timeframe

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90. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, *supra* note 87, at 197.

91. *Id.* After a proposed 8% requirement for initiative petitions failed miserably, the 10% requirement for initiative petitions passed 35–16. *Id.* The 5% requirement for referendum petitions then passed 41–11. *Id.*

92. *See supra* notes 85, 89.

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

94. ARIZ. CONST. art. 4, pt. 1, § 1(3).

95. Western Devcor v. City of Scottsdale, 814 P.2d 767, 770–71 (Ariz. 1991).

to collect signatures, the emergency provision, and the appropriations exclusion. Further, substantial compliance more accurately reflects the respect that the constitution and the court have given directly democratic measures. The Arizona Supreme Court, then, should adopt the substantial compliance standard for referendum petitions. This would ensure that this measure of direct democracy is not impeded by technical failures when, generally, the petitions comply with constitutional requirements. Applying the substantial compliance standard to referendum petitions allows the constitutional safeguards to play their part while simultaneously protecting the electorate's right to vote directly on legislation. *Ross v. Bennett* correctly held that strict compliance was the inappropriate standard for evaluating recall petitions; the court should hold the same for referendum petitions.