THE FRANKENSTEIN BILL: HOUSE BILL 2305 AND DIRECT DEMOCRACY

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The Arizona Constitution was second in the nation to incorporate direct democracy procedures in its original text. Arizona voters have the constitutionally reserved rights of initiative, referendum, and recall. Traditionally, Arizona courts have evaluated initiative and recall petitions under the standard of substantial compliance, i.e., so long as petitions substantially complied with election requirements, the courts would not entertain postelection challenges to the petition. The Arizona Supreme Court reaffirmed this principle most recently in 2012 with its decision in Pedersen v. Bennett*. But on June 14, 2013, in the last few hours of the legislative session, the Arizona legislature hastily passed House Bill 2305, which, among other things, tightens the standard of judicial review from substantial compliance to strict compliance. In this Note, I argue that this portion of the "Frankenstein" bill, so named because of its piecemeal creation from several "dead" bills, is unconstitutional because it violates separation of powers principles by telling the Supreme Court how to interpret the Constitution, a function that belongs solely to the judiciary. This Note goes on to discuss the implications of this bill, namely the erosion of Arizona's tradition of direct democracy, and then reviews the ongoing direct democracy efforts against H.B. 2305.*

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INTRODUCTION

Arizona's deeply rooted principles of direct democracy can be traced back to the state's constitutional convention, where delegates were chosen only if they promised to include initiative and referendum provisions in the constitution.[1] The Arizona Supreme Court has consistently reaffirmed its commitment to protecting voters' constitutional rights to initiative, referendum, and recall.[2] The Court recently reaffirmed its commitment to liberal direct democracy in *Pedersen v. Bennett*, where it upheld over 200,000 initiative signatures despite the Secretary of State's argument that they were not attached to his office's "official copy."[3] The Arizona Legislature responded to *Pedersen* by passing an omnibus elections bill, House Bill ("H.B.") 2305, just before the end of its regular 2013 legislative session.

H.B. 2305, which some commentators have called the "Frankenstein" bill,[4] amended multiple sections of Arizona election laws.[5] Among other things,[6]

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1. *See* Whitman v. Moore, 125 P.2d 445, 450 (Ariz. 1942); JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 121 (2013).

2. *See* Feldmeier v. Watson, 123 P.3d 180, 183 (Ariz. 2005) (upholding substantial compliance requirement for initiatives); Kromko v. Superior Court, 811 P.2d 12, 19 (Ariz. 1991) (holding that an initiative petition is legally sufficient and need not be removed from a ballot if it substantially complies with Arizona election laws); *see also* Ross v. Bennett, 265 P.3d 356, 359 (Ariz. 2011) (affirming Abbey v. Green, 235 P. 150, 157 (Ariz. 1925) (holding substantial compliance requirement for recall petitions)).

3. *See* Pedersen v. Bennett, 288 P.3d 760 (Ariz. 2012).

4. Hank Stephenson, *Political Groups Try to Keep HB2305 from Becoming Law*, ARIZ. CAPITOL TIMES, July 26, 2013.

5. ARIZ. CONST. art. IV, pt. 1, § 1(3); H.B. 2305, 51st Leg., 1st Reg. Sess., 2013 Ariz. Sess. Laws 939–955. H.B. 2305 was scheduled to become effective in September 2013, but a referendum effort to overturn the law recently was certified for the ballot. Mary Jo Pitzl, *Arizona Election Referendum Qualifies for 2014 Ballot*, ARIZ. REPUBLIC (Oct. 29, 2013), http://www.azcentral.com/news/politics/articles/20131029arizona-election-referendum-qualifies-ballot.html.

6. H.B. 2305 made other significant changes to Arizona election law that are beyond the scope of this Note. *See, e.g.*, H.B. 2305, at § 16-1005(G)–(H) (criminalizing the collection of early ballots for delivery to elections officials by political organizations and volunteers); *id.* § 16-544(L)–(M) (allowing state officials to drop early voters from the

H.B. 2305 removed the Arizona Supreme Court's discretion to determine whether voters have complied with constitutional and statutory provisions when voters exercise their direct democracy rights.[7] Whereas courts could previously allow petitions that substantially complied with initiative and recall procedures, the new law requires courts to strike down petitions unless they strictly comply with those laws.[8]

This new "strict compliance" standard requires a rigid interpretation of the law—where near-trivial technicalities may determine the outcome of a case.[9] H.B. 2305 arguably frustrates Arizona's strong public policy of a liberal direct democracy because it obstructs voters' ability to propose legislation and recall state officials.

Part I of this article examines the history of direct democracy in Arizona, explaining how voters can exercise their constitutionally reserved rights of initiative, referendum, and recall. Part II highlights the recent Arizona Supreme Court decision that reaffirmed Arizona's strong commitment to popular government, and also outlines the creation and content of H.B. 2305. Part III explains why this bill violates separation of powers when it commands the judiciary to change its substantial compliance standard, illustrates the practical and prohibitive effects of H.B. 2305, and addresses the ongoing referendum challenge against the bill. This Note will argue that H.B. 2305 is likely unconstitutional because it violates the separation of powers doctrine by telling the judiciary which standard to use, infringes on voters' constitutional rights, and uproots a constitution grounded in a strong foundation of direct democracy.

I. DIRECT DEMOCRACY IN ARIZONA

A. Initiative, Referendum, and Recall—The Powers Reserved to the People

When the Arizona Constitutional Convention convened in 1910, nine other states had given their voters powers of direct democracy.[10] Arizona became the second state to include initiative and referendum provisions in its original

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Permanent Early Voter List if voters did not use their early ballot in the two previous general elections); *id.* § 16-322 (raising the number of signatures required for third-party candidates to be added to the ballot); *id.* § 19-121(C), (F) (requiring political committees to organize their signature sheets by county, circulator, and notary prior to submission and making it more difficult for the Secretary of State's office to invalidate signatures where the committee performed arm's length background checks on its circulators).

7. H.B. 2305, 51st Leg., 1st Reg. Sess., 2013 Ariz. Sess. Laws. 946, 954 (codified as Ariz. Rev. Stat. Ann. §§ 19-103, 19-201.01).

8. *Id.*

9. *See, e.g.*, W. Devcor, Inc. v. City of Scottsdale, 814 P.2d 767, 773 (Ariz. 1991) (technical failure of circulator's affidavit voids referendum petitions despite independent proof of signature validity).

10. Paul F. Eckstein, *The Debate over Direct Democracy at the Arizona Constitutional Convention*, ARIZ. ATT'Y, Feb. 2012, at 32, 33. When the U.S. Constitution was adopted in 1787, not one of the 13 state constitutions in existence gave its citizens the power of initiative or referendum. *Id.*

constitution.[11] The Arizona Supreme Court has since recognized that "[t]he power of the people to legislate is as great as the power of the Legislature to legislate . . . ."[12]

The initiative and referendum provision of the Arizona Constitution was "perhaps the most prominent feature of the Constitution as originally drafted."[13] These two processes of direct democracy, along with the third process of recall, were heavily influenced by the strong populist sentiment of the convention's members.[14] These methods of popular government had already been adopted by several states; nevertheless, whether Arizona would include these methods in its constitution was "a burning issue."[15] Ultimately, the delegates were chosen based on their willingness to include direct democracy procedures in the constitution, with the result reflected in the ratified document.[16]

Thus, the Arizona Constitution provides for three forms of direct democracy. First, initiatives allow voters to propose new laws or amendments to existing laws and constitutional provisions.[17] Second, referenda give Arizona voters "the power to approve or reject at the polls any act, or item, section, or part of any act, of the Legislature."[18] Finally, recalls allow voters to remove any public official from office.[19] Voters exercise direct democracy rights by petitioning the Secretary of State to place their proposed initiative, referendum, or recall on the ballot.[20]

B. Initiative, Referendum, and Recall—Getting to the Ballot

Arizona's constitution reserves initiative, referendum, and recall powers to the people;[21] however, voters must comply with constitutional and statutory

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11. *Id.*
12. State v. Osborn, 143 P. 117, 118 (Ariz. 1914).
13. LESHY, *supra* note 1, at 121.
14. *Id.*
15. Whitman v. Moore, 125 P.2d 445, 450 (Ariz. 1942); *see also* LESHY, *supra* note 1, at 121.
16. *Whitman*, 125 P.2d at 450; *see also* LESHY, *supra* note 1, at 121.
17. ARIZ. CONST. art. IV, pt. 1, § 1(1). The Constitution states, "the 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." *Id.* Only "qualified electors," however, may exercise the powers of initiative, referendum, and recall. *Id.*; *Id.* art. VIII, pt. 1, § 1.
18. *Id.* art. IV, pt. 1, § 1(1). Some legislative acts, however, cannot be challenged via referendum. Statutes that fall within the "emergency" or "state support" exceptions are effective on the date the Governor signs them. *See id.* § 1(3); LESHY, *supra* note 1, at 125–26 (citing Clark v. Boyce, 185 P. 136 (Ariz. 1919)).
19. ARIZ. CONST. art. VIII, pt. 1, § 1.
20. *See* ARIZ. REV. STAT. ANN. tit. 19, chs. 1, 2.
21. *See* ARIZ. CONST. art. IV, pt. 1, § 1(1); *Id.* art. VIII, pt. 1, § 1; Allen v. State, 130 P. 1114, 1118 (Ariz. 1913) ("The people did not commit to the Legislature the whole lawmaking power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes. In this state the Legislature and the people constitute the lawmaking power.").

procedures before petitions may be placed on the ballot.[22] The drafters of the petition must obtain a sufficient number of signatures. To place a statutory initiative on the ballot, voters must collect signatures of ten percent of voters at least four months prior to the election.[23] Referenda require signatures of five percent of voters[24] and must be filed within ninety days of the final adjournment of the legislative session that passed the measure.[25] Recalls require signatures of twenty-five percent of voters from the candidate's district.[26]

To determine whether petitioners have met the constitutional and statutory requirements to place their measure on the ballot, Arizona courts review initiatives and recalls for substantial compliance, and referenda for strict compliance.[27] Under substantial compliance, Arizona courts liberally construe the

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22. *See, e.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(4) (initiative and referendum petition filing requirements); *id.* art. VIII, pt. 1, § 2 (requiring, *inter alia*, a general statement describing the grounds for demanding recall); ARIZ. REV. STAT. ANN. §§ 19-101(A) (2001), 19-102(A) (1998) (defining forms for petitions, for referenda, and for initiatives); ARIZ. REV. STAT. ANN tit. 19, ch. 2, art. 1 (recall procedures). State law also codifies procedures for filing initiatives and referenda in municipalities, and for challenging legislative referenda. *See* ARIZ. REV. STAT. ANN. tit. 19, ch. 1, art. 4, 5; LESHY, *supra* note 1, at 121.

23. ARIZ. CONST. art. IV, pt. 1, §§ 1(2), (4). This Note focuses on statewide initiatives and referenda, but both may also be introduced for city, town, and county measures. *See id.* art. IV, pt. 1, § 1(8).

24. *See id.* art. IV, pt. 1, § 1(3). Percentage requirements for both initiatives and referenda are calculated using the number of all votes cast in the last gubernatorial election. *Id.* § 1(7). This currently amounts to 86,405 signatures for a referendum for the November 2014 election. *See* Secretary of State Ken Bennett, *Initiative, Referendum, & Recall Handbook*, ARIZ. DEPT. OF STATE: OFFICE OF SEC'Y OF STATE 6 (Nov. 2011). Although five percent seems small in comparison to the initiative and recall requirements of ten and twenty-five percent, the fact that referendum petitioners have less time to collect signatures than initiative petitioners do may justify the disparity in the required percentages. *See* David Potts, Note, *Strict Compliance, Substantial Compliance, and Referendum Petitions in Arizona*, 54 ARIZ. L. REV. 329, 336 (2012).

25. ARIZ. CONST. art. IV, pt. 1, § 1(4). Because laws may be enacted through the legislative session, a legislature fearful of a referendum can wait to pass a controversial bill until the last day of the session, intentionally preventing petitioners from collecting signatures until the ninety-day clock begins. LESHY, *supra* note 1, at 128.

26. ARIZ. CONST. art. VIII, pt. 1, § 1. An officer cannot be recalled until he has held office for at least six months, but a legislator may be recalled five days after the first session of his election. *Id.* § 5. To illustrate the signature requirement, an estimated 560,856 votes would be needed to recall Senator John McCain and 16,920 votes to recall a State House District 8 Representative for the November 2014 election. *See* Secretary of State Ken Bennett, *2014 Initiatives, Referendums & Recalls*, ARIZ. DEPT. OF STATE: OFFICE OF SEC'Y OF STATE 1 (last updated Sept. 11, 2013), http://www.azsos.gov/election/2014/General/Initiatives.htm.

27. Kromko v. Superior Court, 811 P.2d 12, 18–19 (Ariz. 1991) (initiative); Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 696–97 (Ariz. 1982) (referendum); Abbey v. Green, 235 P. 150, 157 (Ariz. 1925) (recall). Based on Arizona's history supporting direct democracy, a strong argument can be made that the Arizona Supreme Court should never have required referenda to comply strictly with constitutional

initiative requirements "so as not to interfere with the people's right to initiate laws 'unless the Constitution expressly and explicitly makes any departure [from initiative filing requirements] fatal.'"[28] Referenda are held to the higher standard of strict compliance because a small minority of petitioners may "suspend legislation enacted by the duly elected representatives of the people," and thus safeguards against misuse must be maintained.[29] The Court recently, in *Pedersen v. Bennett*, addressed the issue of what actions may satisfy substantial compliance.

II. INTERPRETING THE CONSTITUTION: THE ARIZONA JUDICIARY VERSUS THE ARIZONA LEGISLATURE

A. Reaffirming Direct Democracy: Pedersen v. Bennett

In *Pedersen v. Bennett*, the Arizona Supreme Court reaffirmed Arizona's strong policy supporting the people's right to participate directly in democracy.[30] In the summer of 2011, Arizona education groups formed the Quality Education and Jobs Committee (the "Committee"), led by Ann-Eve Pedersen, to place an initiative on the ballot (later to be known as Proposition 204) extending a temporary, 1-cent sales tax increase from 2010 that was set to expire in 2013.[31] The Committee submitted more than 290,000 signatures to Secretary of State Ken Bennett's office—over 117,000 more than required.[32] Any joy the education coalition may have felt after submitting its signatures was quashed the next day when Bennett's office rejected the signatures.[33]

The Secretary of State's office defended its rejection of the signatures, pointing to the fact that when the Committee submitted its proposal for circulation, it unintentionally submitted two different versions of the proposed law: a full text version (on CD) and an incomplete paper version that omitted fifteen lines of text on the twelfth page of the fifteen-page, single-spaced document.[34] Interestingly, the Secretary scanned the incomplete paper version, posted it on his website, and

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and statutory provisions. *See* Potts, *supra* note 24, at 342–43. It is beyond the scope of this Note to fully address this issue.

28. Pedersen v. Bennett, 288 P.3d 760, 762 (Ariz. 2012) (quoting *Kromko*, 811 P.2d at 19).

29. *Cottonwood Dev.*, 653 P.2d at 696–97 (citing Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391 (Ariz. 1972); Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953–54 (Ariz. 1972)); *see also* W. Devcor v. City of Scottsdale, 814 P.2d 767, 770 (Ariz. 1991).

30. *See Pedersen*, 288 P.3d at 762.

31. Jeremy Duda, *Arizona Committee Forms to Push 1-Cent Sales Tax Extension*, ARIZ. CAPITOL TIMES, Feb. 17, 2012; Jeremy Duda, *Looming Fiscal Crisis in Arizona Forces Disparate Education Groups to Work on New Tax*, ARIZ. CAPITOL TIMES, Sept. 13, 2011.

32. Jeremy Duda, *Group Files Ballot Beasure for 1-Cent Sales Tax Hike in Arizona*, ARIZ. CAPITOL TIMES, March 9, 2012; Luige del Puerto, *State Elections Officials in Arizona Reject Sales Tax Initiative Signatures*, ARIZ. CAPITOL TIMES, June 26, 2012.

33. *See* del Puerto, *supra* note 32.

34. Pedersen v. Bennett, 288 P.3d 760, 761 (Ariz. 2012).

declared that to be the official copy.[35] Only 278 people viewed the online version with no signatures attached.[36] Meanwhile, over 290,000 people viewed a hard copy of the full text version and signed the attached petition sheet.[37] Nonetheless, when the Committee submitted its over 290,000 signatures, Secretary of State Bennett's office invalidated the petition sheets, claiming they "were not attached to a full and correct copy of the initiative measure filed with the Secretary of State's office" as required by state law.[38] Thus, the Committee did not have enough valid signatures to qualify the initiative for the ballot.[39]

Pedersen and the Committee were quick to respond, noting that Arizona courts evaluate and protect voter initiatives under a substantial compliance standard.[40] Pursuant to Arizona Revised Statute section 19-122(A), Pedersen and the Committee challenged Secretary Bennett's decision by applying for a writ of mandamus in superior court.[41] Judge Robert Oberbillig found that the Secretary of State's office acted arbitrarily in rejecting the initiative and granted Pedersen and the Committee's writ.[42] The Secretary appealed directly to the Supreme Court, and on August 14, 2012, the Court affirmed the Superior Court's grant of the writ (in time for the November election).[43] The Supreme Court issued an opinion explaining its order on December 5, 2012.[44]

In affirming the writ, the Court relied on Arizona's policy supporting voters' power to propose laws via the initiative process.[45] Noting that the Arizona Constitution required only that "a full and correct copy of the title and text" of an initiative be attached to "[e]ach sheet containing petitioners' signatures," the Court rejected Secretary Bennett's argument that the copy attached to each petition must

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*; *see also* del Puerto, *supra* note 32. State law requires petition signature sheets to be "attached at all times during circulation to a full and correct copy of the title and text of the measure or constitutional amendment proposed or referred by the petition." ARIZ. REV. STAT. ANN. § 19-112(B) (2009).

39. del Puerto, *supra* note 32.

40. *Id.*; *see also* Kromko v. Superior Court, 811 P.2d 12, 19 (Ariz. 1991).

41. *Pedersen*, 288 P.3d at 760; ARIZ. REV. STAT. ANN. § 19-122(A) (2010); *see also* Luige del Puerto, *1-Cent Sales Tax Backers in Arizona Go to Court to Put Measure on Ballot*, ARIZ. CAPITOL TIMES, June 27, 2012.

42. Order at 3, Pedersen v. Bennett, CV2012-009618, 3 (Maricopa Cnty. Sup. Ct. July 18, 2012). In a brief hearing, Judge Oberbillig called the case "silly," said it was the Secretary of State's fault for choosing the wrong version of the initiative, and noted that the Secretary had the ability to correct the error but refused to do so. He also posed this rhetorical question: "So the Secretary of State's office doesn't recognize human error and 290,000 signatures are invalid?" Josselyn Berry, *Sales-Tax Supporters in Arizona Cheer Court Ruling*, ARIZ. CAPITOL TIMES, July 18, 2012.

43. *See* ARIZ. REV. STAT. ANN. § 19-122(A) (permitting direct appeal to the Supreme Court); *Pedersen,* 288 P.3d at 760.

44. *Pedersen,* 288 P.3d at 760; *see also* Jeremy Duda, *Arizona Supreme Court Upholds Sales Tax Initiative*, ARIZ. CAPITOL TIMES, Aug. 14, 2012.

45. *Pedersen,* 288 P.3d at 762.

be the "official" text of the initiated act in order for the signatures to be valid.[46] The Court also refused to apply Secretary Bennett's "new test that would make any substantive difference between the filed version and the circulated version fatal to an initiative."[47] In addition, the Court reaffirmed its "longstanding" standard of substantial compliance, noting that it "strikes the appropriate balance between protecting our voters' right to initiate laws and the integrity of the election process."[48] In its substantial compliance review, the Court took intent into account, noting that the clerical error of the Committee was made without "intent to defraud or deceive," and that the Secretary of State had sufficient notice (over one month) to correct the error before his deadline to craft official ballot language and produce the publicity pamphlet.[49]

After prevailing in court, Pedersen and the Committee's initiative was placed on the ballot as Proposition 204, but it faced a well-funded opposition and voters ultimately rejected it.[50] Nevertheless, before the final votes were in, Secretary Bennett and Republican state legislators were already hinting at election "reforms."[51]

B. Post-Pedersen*: A Legislative History of H.B. 2305*

By February 2013, state lawmakers had introduced more than 30 election-related bills.[52] Representative Eddie Farnsworth proposed H.B. 2305 at the request of Secretary of State Bennett.[53] In its original form, H.B. 2305 put new guidelines in place for petition circulators, created a rebuttable presumption of validity where the circulator has undergone a background check, and required petitioners to better organize their signature sheets prior to submission.[54] In addition, Senator Michele Reagan's Senate Bill ("S.B.") 1264 codified Secretary of State Bennett's argument from *Pedersen* by "stipulating that the version of a proposed bill that's stamped by the Secretary of State's Office is the official version, and is the only version that

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46. *Id.* at 762–63; *cf.* Ross v. Bennett, 265 P.3d 356, 358–60 (Ariz. 2011) (declining to alter the substantial compliance standard in the recall context).

47. *Pedersen,* 288 P.3d at 762.

48. *Id.* at 763.

49. *Id.* at 763–64.

50. *See* Luige del Puerto, *Opposition to 1-Cent Sales Tax Initiative in Arizona Shows Short List of Contributors*, ARIZ. CAPITOL TIMES, Sept. 28, 2012; Evan Wyloge, *"Yes" and "No" Campaigns on Arizona's Prop 204 Collect Nearly $2M in October*, ARIZ. CAPITOL TIMES, Oct. 25, 2012; Staff, *Arizona Election Losers Explain What Went Wrong*, ARIZ. CAPITOL TIMES, Nov. 12, 2012; Evan Wyloge, *Sales Tax Hike in Arizona Was Squashed by Enthusiastic Opposition Among GOP*, ARIZ. CAPITOL TIMES, Jan. 22, 2013.

51. Beyond *Pedersen*, the Secretary and Republican legislators lamented the Arizona 2012 general election because election officials and staff did not finish counting ballots until two weeks after Election Day. Evan Wyloge & Hank Stephenson, *Clamoring For a Fix, Arizona Politicians Take Aim at Election Reform*, ARIZ. CAPITOL TIMES, Nov. 26, 2012.

52. Jeremy Duda, *Arizona Lawmakers Push Election Overhaul—Target Early Voting, Contributions, Signature Gathering*, ARIZ. CAPITOL TIMES, Feb. 1, 2013.

53. *Id.*

54. *Id.*

can be used to collect signatures."[55] S.B. 1264 also proposed applying strict compliance to initiatives, referenda, and recalls.[56] Reagan claimed legislative intent would be clarified by mandating that the judicial standard of strict compliance be applied to all forms of direct democracy.[57]

As some of the proposed bills languished at the capitol, the "essential portions" from each, as identified by elections officials, were incorporated into H.B. 2305[58]—thus, Frankenstein was created, but did not yet live. After six cancelled committee meetings, elections officials were unsure whether their "must-haves" would ever become law.[59] In the final hours of its legislative session, however, the Arizona Senate passed H.B. 2305.[60] The 16-13 vote that passed H.B. 2305 came after the Senate initially voted against the bill.[61] Ultimately, Republican Senator Steve Pierce changed his vote in the eleventh hour to pass the bill after facing tremendous pressure from outside forces, including an official from the National Republican Congressional Committee.[62] Thus, an omnibus Frankenstein was given life, changing election law and the nature of direct democracy in Arizona.

C. The Frankenstein Bill: H.B. 2305

The final version of H.B. 2305 incorporated Senator Reagan's S.B. 1264, applying the judicial standard of strict compliance to initiatives, referenda, and recalls.[63] Governor Jan Brewer signed H.B. 2305 into law on June 19, 2013.[64] As codified at Arizona Revised Statute section 19-103, the relevant portion of the new law states:

> The legislature finds and determines that strict compliance with the application and enforcement of the constitutional and statutory requirements for both the initiative and referendum process provide the surest method of safeguarding the integrity and accuracy of the

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55. *Id.*
56. *Id.*
57. *Id.*
58. Ben Giles, *Arizona Election Bills Face Further Problems in Conference Committee*, ARIZ. CAPITOL TIMES, Apr. 24, 2013.
59. Ben Giles, *When Bills Get Hung Up, Is It Policy or Personal?*, ARIZ. CAPITOL TIMES, May 13, 2013.
60. Cristina Silva, *Arizona Senate Passes Election Overhaul Bill*, ARIZ. CAPITOL TIMES, June 13, 2013.
61. *Id.*
62. *Id.*
63. Duda, *supra* note 52; Hank Stephenson & Ben Giles, *Legislature Finishes Annual Session*, ARIZ. CAPITOL TIMES, June 14, 2013.
64. H.B. 2305, 51st Leg, 1st Reg. Sess., 2013 Ariz. Sess. Laws 955; Jeremy Duda, *Third Parties in Arizona Would Face Major Hurdle Under Election Bill*, ARIZ. CAPITOL TIMES, June 17, 2013; Jeremy Duda, *Arizona Gov. Brewer Signs Election Overhaul Bill*, ARIZ. CAPITOL TIMES, June 19, 2013 [hereinafter Duda, *Brewer Signs*]; Reid Wilson, *Arizona Election Reform Bill Likely To Be on 2014 Ballot*, WASH. POST (Sept. 14, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/13/arizona-election-reform-bill-likely-to-be-on-2014-ballot/?print=1.

> initiative and referendum process. Therefore, the legislature declares that the constitutional and statutory requirements for the initiative and referendum be strictly construed and that persons using either the initiative or referendum process strictly comply with those constitutional and statutory requirements.[65]

A virtually identical paragraph was added to require strict compliance for recall petitions as well.[66] Thus, the law effectively erases longstanding Arizona precedent construing the constitutional and statutory requirements of the initiative and recall process to require only substantial compliance and replaces it with a strict compliance standard.

Additionally, H.B. 2305 legislatively overrules *Pedersen* by declaring that the "time-and-date marked" text accompanying the application for a petition, referendum, or recall constitutes the "official copy."[67] Any signatures not accompanying the official copy of the text are invalid.[68] This type of legislative overruling is concerning, and the legislative command to evaluate all petitions under a strict compliance standard is arguably unconstitutional. Unless H.B. 2305 is struck down by a constitutional challenge, or by referendum in November 2014, initiative and recall petitioners will feel the practical effects of H.B. 2305's strict compliance mandate because it will be more difficult to submit petitions.

III. THE IMPLICATIONS OF H.B. 2305'S IMPLEMENTATION

H.B. 2305 offends Arizona's constitution and longstanding public policy favoring a liberal direct democracy. First, the addition of strict compliance for initiatives and recalls violates the Arizona Constitution by challenging the separation of powers between the judiciary and the legislature and by disrupting the balance of power between the legislature and the people. Second, strict compliance allows petitions to be invalidated on near-trivial technical grounds. Third, the stringent standard unnecessarily raises the bar that voters must meet, as the number of signatures voters must gather to place their initiative and recall proposals on the ballot already poses a significant challenge. Fourth, unless the referendum effort against H.B. 2305 succeeds, initiative and recall petitioners will be hard pressed to successfully place their petition on the ballot.

A. Is H.B. 2305 Constitutional?

H.B. 2305 disrupts the balance of power between the judiciary and the legislature because it usurps the judiciary's settled interpretation of the Arizona

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65. ARIZ. REV. STAT. ANN. § 19-103 (2013).

66. *Id.* § 19-201.01 (2013).

67. *See id.* §§ 19-111(B) (2008), 112(B) (2013).

68. *See id.* §§ 19-111, 112, 121, and 121.01 (2013). The recall process was similarly amended to require circulation of the "official copy" with all signature sheets. *See* ARIZ. REV. STAT. ANN. §§ 19-202.01, 203 (2013); *see also* Duda, *Brewer Signs*, *supra* note 64.

Constitution, an area that is the sole province of the courts.[69] Arizona courts alone have the power to declare what the Constitution requires and are solely responsible for determining whether a branch of state government has exceeded its constitutional powers.[70] Although the legislature may pass clarifying legislation in response to a court's interpretation of statutes, it may not reverse a judicial decision by construing or amending a statute in a way that "usurps the function of the Court and is tantamount to annulling a judicial judgment."[71] Similarly, the Legislature may enact laws that do not directly conflict with any constitutional provision, but it cannot legislatively overrule the Court's interpretation of the Constitution.[72]

One may argue that, rather than contradicting the Constitution, H.B. 2305 only creates procedural rules regulating the execution of constitutional provisions. Such legislation would be permissible so long as it "reasonably supplements the constitutional purpose" and "does not unreasonably hinder or restrict the constitutional provision."[73] An example of a permissible regulation is the Arizona statute requiring circulators of referendum petitions to be qualified electors.[74] However, Arizona courts have struck down legislation that alters procedure already provided in the Constitution.[75]

In *Turley v. Bolin*, a statute required initiative petitions to be filed with the Secretary of State's office not less than five months before an election; however, the Constitution states that such petitions will be filed "not less than four

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69. *See* ARIZ. CONST. art. III ("The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive and Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); *Id.* art. VI, § 1 ("The judicial power shall be vested in an integrated judicial department . . . ."); State v. Youngblood, 844 P.2d 1152, 1156 (Ariz. 1993) ("It goes without saying that just as the United States Supreme Court is the final arbiter of federal constitutional issues, this court is the final arbiter of Arizona constitutional issues."); Sw. Gas Corp. v. Ariz. Corp. Comm'n, 818 P.2d 714, 718 (Ariz. Ct. App. 1991) ("[I]n the symmetry of a multi-branched government, there must be one final arbiter of what the constitution says and what the law is. That final power and that final responsibility rests upon the courts.").

70. Ariz. Indep. Redistricting Comm'n v. Brewer, 275 P.3d 1267, 1274–75 (Ariz. 2012); Forty-Seventh Legislature v. Napolitano, 143 P.3d 1023, 1026 (Ariz. 2006).

71. Dobson v. State *ex rel.* Comm'n on Appellate Court Appointments, 309 P.3d 1289, 1293 (Ariz. 2013) (quoting Windes v. Frohmiller, 3 P.2d 275, 277 (Ariz. 1931)); LESHY, *supra* note 1, at 115 (quoting Martin v. Moore 143 P.2d 334, 335 (Ariz. 1943) (striking down as unconstitutional legislation that effectively overruled Supreme Court's interpretation of the Excise Revenue Act of 1935)).

72. *See* Pedersen v. Bennett, 288 P.3d 760, 763 (Ariz. 2012).

73. *Dobson*, 309 P.3d at 1293 (citing Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1971)).

74. Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1971).

75. *Dobson*, 309 P.3d at 1293.

months" before an election.[76] The court held that the statute was unconstitutional because it unreasonably hindered or restricted the constitutional provision.[77] The court reasoned that the statute must be "considered in the context of the important legislative rights reserved in the people—rights which are not to be considered as being subordinate to any legislative rights vested in the legislature."[78]

Similarly, in *Dobson v. State* ex rel. *Commission on Appellate Court Appointments*, the legislature passed H.B. 2600, directing the Commission on Appellate Court Appointments to submit "the names of at least five persons" to the Governor for appointment to fill a judicial vacancy; however, the Arizona Constitution directs the Commission to submit "not less than three" nominees.[79] Relying on *Turley*, the Court in *Dobson* held that the statute was unconstitutional because it directly conflicted with the Arizona Constitution.[80] The Court stated that the statute did not "reasonably supplement" the Constitution, but rather fundamentally changed the constitutionally prescribed balance of power between the Commission and the Governor.[81] The Court explained that H.B. 2600 increased the Governor's discretion while narrowing the "commissioners' constitutionally granted discretion to nominate no more than three candidates whom they determine best meet the constitutionally mandated selection criteria."[82] Moreover, the Court found, "the legislature has no authority to statutorily mandate procedures inconsistent with Arizona's Constitution."[83]

In light of *Turley* and *Dobson*, H.B. 2305 unconstitutionally usurps the judiciary's power to choose between strict and substantial compliance in determining whether initiative, referendum, and recall petitions constitutionally and statutorily comply. In reviewing claims that one branch has usurped the powers of another, Arizona courts consider "(1) the essential nature of the power exercised; (2) the Legislature's degree of control in exercising the power; (3) the Legislature's objective; and (4) the practical consequences of the action."[84] Viewed in light of these factors, H.B. 2305 is unlikely to pass constitutional muster.

First, the essential nature of the power at issue is judicial.[85] It is the judiciary's duty—not the legislature's— to declare what the Constitution requires; inherent in that power is the ability to choose the standard under which it will

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76. Turley v. Bolin, 554 P.2d 1288, 1290 (Ariz. Ct. App. 1976) (quoting ARIZ. CONST. art. IV, pt. 1, § 1(4)).

77. *Id.* at 1291 (citing *Direct Sellers Ass'n*, 503 P.2d at 953).

78. *Id.* at 1293.

79. *Dobson*, 309 P.3d at 1289 (quoting ARIZ. CONST. art. VI, §§ 36–37; H.B. 2600, 55th Leg., 1st Reg. Sess., 2013 Ariz. Sess. Laws, 211–12).

80. *Id.* at 1293.

81. *Id.*

82. *Id.*

83. *Id.*

84. San Carlos Apache Tribe v. Superior Court *ex rel.* Cnty. of Maricopa, 972 P.2d 179, 195 (Ariz. 1999).

85. *See id.* at 196 ("The essential nature of the power exercised in § 45-258 is judicial.").

review constitutional provisions. In choosing between strict or substantial compliance, the Court exercises its exclusive power to interpret the Arizona Constitution's direct democracy provisions. By requiring strict compliance for all forms of direct democracy, the Legislature mandates a particular form of constitutional interpretation, thus encroaching upon the Court's well-established power. In *Pedersen*, the Court exercised its power of constitutional interpretation by reaffirming a substantial compliance standard for initiatives.

Second, by mandating that the Court use the Legislature's preferred interpretation of the Constitution's direct democracy provisions, the Legislature in H.B. 2305 took complete control of the Court's function of interpreting the Constitution. Third, the Legislature's objective, quite evidently, was to overrule *Pedersen*—by mandating strict compliance with constitutional requirements rather than substantial compliance, the Legislature compels a different result from that reached by the Court in *Pedersen*.[86] Fourth, by mandating a stricter standard of compliance than that chosen by the Court, H.B. 2305's practical effect is to strip the Court of its settled interpretation of the Arizona Constitution and to make it more difficult for initiatives and recalls to make it to the ballot.[87] Significantly, Arizona's historic public policy favoring direct democracy was precisely what guided the Court in *Pedersen* to adhere to its use of the substantial compliance standard.[88]

In addition to disrupting the balance of power between the judiciary and the legislature, H.B. 2305 disrupts the balance of power between the people and the legislature. *Turley* recognized that the lawmaking rights of voters are not subordinate to those of the legislature.[89] Like the statute at issue in *Turley*, H.B. 2305 unreasonably disrupts the balance of power between the legislature and the people by making it more difficult for voters to exercise their reserved rights of direct democracy. Although the Secretary of State will not have the discretion that substantial compliance provided, he still has discretion to determine which technicalities fail to meet the strict compliance standard. Thus, one person may still invalidate the will of hundreds of thousands of voters based on technicalities, and courts, rather than being able to exercise reasoned judgment, must now uphold the invalidation of petitions based on technical minutiae. H.B. 2305 usurps the power of the people by giving the Secretary greater discretion and justification to invalidate petitions and placing more obstacles in the paths of voters seeking to exercise their constitutional rights, all in complete disregard of Arizona's tradition of liberal direct democracy.

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86. *See infra* Part III.B.

87. *Id*.

88. Pedersen v. Bennett, 288 P.3d 760, 762 (Ariz. 2012).

89. Turley v. Bolin, 554 P.2d 1288, 1291 (Ariz. Ct. App. 1976) (citing Whitman v. Moore, 125 P.2d, 445, 450–51 (Ariz. 1942), *overruled on other grounds by* Renck v. Superior Court, 187 P.2d 656 (Ariz. 1947)).

B. The Practical Effects of Strict Compliance

Under a strict compliance standard, minor technicalities can effectively halt all three forms of direct democracy in Arizona. Trivial issues such as state-mandated page margins[90] or whether a voter included his or her middle initial when signing a petition[91] can cause petitions to be disqualified when regulated under a strict compliance standard.[92] Petitioners seeking to introduce legislation, stop legislation, or remove a public official from office now face substantial procedural hurdles.[93]

Courts' prior treatment of referenda, which were subject to the strict compliance standard before H.B. 2305, may portend the future of Arizona initiatives and recalls. Under the strict compliance standard, courts have invalidated several referenda for arguably trivial technicalities.[94] For example, in *Western Devcor v. City of Scottsdale*, a group of voters attempted to refer a Scottsdale City Council measure that rezoned property owned by Western Devcor.[95] The petitions contained affidavits stating that the circulators believed that the signers were "qualified electors of the State of Arizona," but the affidavits should have stated that the circulators believed that the signers were "qualified elector[s] of the City of Scottsdale."[96] As a result, the Court found that the petitions did not strictly comply with constitutional and statutory provisions.[97] Even though a random sample of signatures suggested that the referendum contained a sufficient number of signatures to refer the measure, under the strict compliance standard, the Court prevented voters from referring the measure to the ballot.[98]

Similarly, if courts enforce H.B. 2305, many more initiatives and recalls will likely fail as a result of technicalities. Under the strict compliance standard, direct democracy petitions will fail wherever human error exists. For example, if *Pedersen* had been decided under H.B. 2305, the 290,000-plus signatures attached to the full version of the initiative would have been invalidated because they were not attached to and circulated with the Secretary of State's official copy.[99] The combination of the strict compliance standard and official copy requirement mean

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90. ARIZ. REV. STAT. ANN. § 19-121(A)(5) (2013).

91. *Id.* § 19-112 (2013).

92. Wilson, *supra* note 64.

93. *See* Potts, *supra* note 24, at 331.

94. This is because, prior to H.B. 2305, referenda were already subject to the strict compliance standard. *See* Cottonwood Dev. v. Foothills Area Coal. of Tucson, 653 P.2d 694, 697 (Ariz. 1982); Potts, *supra* note 24, at 332.

95. 814 P.2d 767, 768–69 (Ariz. 1991); Potts, *supra* note 24, at 331.

96. *W. Devcor*, 814 P.2d at 770; *see also* ARIZ. CONST. art. IV, pt. 1, § 1(9); ARIZ. REV. STAT. ANN. § 19-112 (2013), *amended by* H.B. 2305, 51st Leg, 1st Reg. Sess., 2013 Ariz. Sess. Laws. 947–49.

97. *W. Devcor*, 814 P.2d at 770.

98. *Id.* at 773.

99. *See* ARIZ. REV. STAT. ANN §§ 19-112(B) (2013), *amended by* H.B. 2305, 51st Leg., 1st Reg. Sess., 2013 Ariz. Sess. Laws. 947–49; Pedersen v. Bennett, 288 P.3d 760, 763 (Ariz. 2012).

that now, under this strict regime, when a petitioner discovers a mistake in the proposed text, her only immediate recourse is to file a new application and text, receive a new official serial number, and use the new time-and-date-marked text to collect signatures.[100] As the *Pedersen* example illustrates, under H.B. 2305, if voters want their petitions to make it onto the ballot, they must ensure error-free petitions by taking greater precautions, putting in more man-hours, and spending more money to prepare their petitions and collect signatures.

C. Just Another Barrier to Entry

Before H.B. 2305 changed the standard from substantial to strict compliance, voters met with small measures of success in placing initiatives on the ballot. Since 1970, 16% of initiatives have made it onto the ballot, and only half of the initiatives on the ballot passed—for an overall success rate of 8%.[101] Similarly, roughly 19% of referenda have made it on the ballot.[102]

Indeed, in the four election cycles prior to 2010, no voters' initiative collected the required number of valid signatures (more than 100,000) without paying outside companies or individuals to collect them.[103] As a result, petition companies, which charge anywhere from $100,000 to more than $1 million, have become a vital part of Arizona's direct democracy process.[104] If voters or groups cannot afford to hire circulators, it is unlikely that volunteers alone will successfully gather the required number of valid signatures.[105] For example, "[s]upposing a paid circulator can get two signatures every five minutes, which organizers admit is high even for professionals, it would still take about 6,390 man-hours to get the required number of signatures for an initiative—about three times as much as one full-time employee works in a year."[106] Because of the time-consuming task of collecting signatures, low-budget initiative groups using volunteers have come up short by thousands of signatures; consequently, initiatives are more likely to succeed if backed by powerful or well-funded groups.[107]

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100. ARIZ. REV. STAT. ANN. §§ 19-111(B) (2013), 19-112(B) (2013).

101. David R. Berman, *Initiative Reform in Arizona: Exploring Some Ideas*, MORRISON INST. FOR PUB. POL'Y AT ARIZ. STATE UNIV. 2 (May 2013). Groups completed 425 initiative petitions, 64 of which made it to the ballot; subsequently, voters approved only 32 of those. *Id.*

102. Since 1990, 31 referenda have been proposed, and only six of those have made it onto the ballot. Hank Stephenson, *Political Groups Try To Keep H.B. 2305 from Becoming Law*, ARIZ. CAPITOL TIMES, July 26, 2013. Nevertheless, voters did approve all six. *Id.*

103. Kevin Kiley, *Arizona Ballot Initiatives More Successful with Professional Help*, ARIZ. REPUBLIC (Aug. 21, 2010), http://www.azcentral.com/arizonarepublic/news/articles/20100821arizona-ballot-initiatives-signature-collection.html.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

Still, even a well-financed campaign does not guarantee success, as even groups that hire paid circulators still fail. Fraudulent signatures collected by paid circulators in 2008 led to petitions being thrown out completely.[108] And measures that make it to the ballot still have to spend money campaigning for votes. Given that the sheer number of signatures already required poses a significant obstruction to voter petitions, strict compliance adds another barrier to placement on the ballot that will likely result in a trend of even fewer voter petitions succeeding. Significantly, one group, the Protect Your Right to Vote Committee, has collected enough signatures to place a referendum against H.B. 2305 on the November 2014 ballot.[109]

D. Referendum: Will Strictly Complying Restore Substantial Compliance?

Just as Proposition 204 united diverse groups, H.B. 2305 brought together Democrats, Latino activist groups, Libertarians, Greens, Labor, and Women's groups.[110] Soon after the passage of H.B. 2305, these groups formed the Protect Your Right to Vote Committee.[111] Organizers were tasked with collecting 86,405 signatures within a 90-day window ending on September 12, 2013 so as to refer H.B. 2305 to the ballot.[112] People familiar with the petition process estimated the cost of collecting the signatures would be between $300,000 and $500,000.[113] Not to be outdone, Senator Reagan, who sponsored measures included in H.B. 2305, launched the campaign committee Protect Our Secret Ballot to combat the referendum drive.[114] Robert Mayer and Arizona GOP counsel Lee Miller created Stop Voter Fraud in late July, which also campaigned against the referendum.[115]

With nine days left before the deadline, the Protect Your Right to Vote Committee had almost collected and verified the 86,405 signatures required to place the referendum on the ballot.[116] The Committee had originally set a goal of collecting 120,000 signatures in order to provide a cushion against invalid signatures.[117] Ultimately, they collected more than 146,000 signatures.[118]

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108. Berman, *supra* note 101, at 6; *see also Laws Governing Petition Circulators*, NAT'L CONFERENCE OF STATE LEGISLATURES, (Nov. 15, 2012), http://www.ncsl.org/legislatures-elections/elections/laws-governing-petition-circulators.aspx.

109. Hank Stephenson, *Referendum Effort Against HB2305 Has Enough Signatures to Make the 2014 Ballot*, ARIZ. CAPITOL TIMES, Oct. 23, 2013.

110. Jeremy Duda, *Election Bill Foes Join Forces, Eye Referendum*, ARIZ. CAPITOL TIMES, June 28, 2013.

111. Jeremy Duda, *Backers of Elections Bill Create Committee to Head Off Challenge*, ARIZ. CAPITOL TIMES, July 15, 2013.

112. Duda, *supra* note 110.

113. *Id.*

114. Duda, *supra* note 111.

115. Stephenson, *supra* note 102; *see also* Luige del Puerto & Hank Stephenson, *Arizona Elections Law Supporters Start Second Committee to Defend It*, ARIZ. CAPITOL TIMES, July 25, 2013.

116. Jeremy Duda, *Election Law Referendum Organizers Say They're 'On Track,' Opponents Skeptical*, ARIZ. CAPITOL TIMES, Sept. 3, 2013.

117. *Id.*

As with other referenda, which were unaffected by H.B. 2305, the referendum was subject to the strict compliance standard.[119] After the first round of verification by the Secretary of State's office, 139,161 of the signatures survived.[120] The Secretary's office invalidated 237 petition sheets, thus disqualifying 2,362 signatures for various technicalities, including petitions lacking circulator affidavits, circulators not indicating whether they were paid or volunteer, and others.[121] On October 29, 2013, the Secretary of State certified the referendum for the 2014 ballot after more than 110,000 signatures were declared valid.[122] Although the number of valid signatures significantly exceeded the 86,405 required and had an unprecedented 81.6 percent validity rate, the antireferendum effort may challenge the referendum in court.[123] As a result of the successful referendum, the implementation of H.B. 2305 will be delayed until voters have their say in 2014.[124]

CONCLUSION

While a large portion of H.B. 2305 is centered on the provisions concerning the permanent early voter list and third-party candidates, the two paragraphs changing the initiative and recall process to require strict compliance are at least equally as important.[125] The Arizona Constitution specifically provides voters these rights as part of its democratic process.[126] As a whole, H.B. 2305 undermines the direct democracy principles on which Arizona was founded by creating undue burdens on voters seeking to exercise their constitutional rights. Further, the law violates separation of powers principles by impermissibly overruling the Arizona Supreme Court's decision to apply substantial compliance when interpreting constitutional provisions regarding the initiative and recall process.[127] Still, voters do have correcting mechanisms in the form of a referendum and judicial review to undo the legislation's effect, one of which has already been utilized.

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118. Hank Stephenson, *Election Law Opponents in Arizona Claim 146,000 Signatures, Say They Will Force Referendum*, ARIZ. CAPITOL TIMES, Sept. 11, 2013.

119. Jeremy Duda, *Hess: H.B. 2305 Referendum Has 130,000 Signatures*, ARIZ. CAPITOL TIMES, Sept. 4, 2013.

120. Hank Stephenson, *Secretary of State Knocks 2,300 Signatures from H.B.2305 Referendum Effort*, ARIZ. CAPITOL TIMES, Oct. 8, 2013.

121. *Id.*

122. Pitzl, *supra* note 5.

123. *Id.*

124. Reid Wilson, *Arizona Election Law Will Be Put to Statewide Vote*, WASHINGTON POST (Oct. 30, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/30/arizona-election-law-will-be-put-to-statewide-vote/.

125. *See, e.g.*, *Arizona Illustrated*, (KUAT 6 television broadcast Aug. 2, 2013), *available at* http://playpbs.azpm.org/video/2365057892/.

126. *See* ARIZ. CONST. art. IV, pt. 1, § 1; ARIZ. CONST. art. VIII, pt. 1.

127. *See, e.g.*, Pedersen v. Bennett, 288 P.3d 760, 763 (Ariz. 2012); Ross v. Bennett, 265 P.3d 356, 359 (Ariz. 2011); Feldmeier v. Watson, 123 P.3d 180, 183 (Ariz. 2005); Kromko v. Superior Court, 811 P.2d 12, 18–19 (Ariz. 1991); Abbey v. Green, 235 P. 150, 157 (Ariz. 1925).