

ARIZONA SUPREME COURT

RAISE THE WAGE AZ, an Arizona political action committee; and KRISTEN JOHNSON, KEVIN SMITH, KENNETH HERNANDEZ, and LUPITA MARTINEZ, qualified electors;

Appellants/Appellants,

v.

STATE OF ARIZONA; and ADRIAN FONTES, in his official capacity as Secretary of State;

Defendants/Appellees,

And

THE ARIZONA RESTAURANT ASSOCIATION,

Intervenor-Defendants/Appellees.

Arizona Supreme Court
No. CV-24-0178-AP/EL

Maricopa County Superior Court
Case No. CV2024-016116

ANSWERING BRIEF OF THE ARIZONA RESTAURANT ASSOCIATION

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INTRODUCTION

Appellant Raise The Wage AZ¹ challenges Senate Concurrent Resolution 1040 (“SCR 1040”) on the under Article IV, part 2, section 13 of the Arizona Constitution (“Title Requirement”), alleging that (1) SCR 1040’s title is misleading or fraudulent, (*i.e.*, the “title challenge”), and (2) that SCR 1040 is a “decoy” measure (*i.e.*, the “decoy challenge”) meant to confuse and distract voters regarding the Committee’s now-failed, competing ballot measure—called the “One Fair Wage Act” (or the “Initiative”). ADD-14–15.

The Committee’s claims fail for several reasons. *First*, although The Committee is appealing the denial of its preliminary injunction request, it has not addressed three of the four preliminary injunction factors. This failure is fatal to its appeal. *See Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26 ¶11.

Second, the Committee’s challenge to SCR 1040 is improper because the Title Requirement “do[es] not apply to proposed

¹ Appellants also include individual Plaintiffs, but all Appellants are referred to as the “Committee” for ease of reference.

constitutional amendments submitted by the Legislature to the people.”

Barth v. White, 40 Ariz. 548, 556 (1932).

Third, the Committee’s appeal is also meritless because it brought its title challenge against the wrong title. Specifically, the Committee challenges SCR 1040’s internal reference title (or “short title”) and not its official title. Indeed, when confronted with this failure below, the Committee did not respond, thereby waiving any response on appeal.

Fourth, both the official title as well as the erroneously challenged short title accurately describe the contents of SCR 1040. Any arguments to the contrary are rooted in policy preferences about minimum wage laws, which are nonjusticiable political questions. *See Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 ¶7 (2006).

Fifth, the Committee’s decoy challenge is now moot on appeal because the competing Initiative that SCR 1040 was supposedly meant to detract from failed to garner enough valid signatures to make the ballot. (OB at 2–3.)²

² Appellants’ Opening Brief is cited as “OB ##.”

Sixth, SCR 1040 is not deceptive or a decoy in any way because it is a constitutionally promulgated resolution on the topic of wages with a title that clearly covers the topic it addresses.

STATEMENT OF THE CASE AND FACTS

The Arizona Legislature passed SCR 1040, with the official title “A Concurrent Resolution proposing an amendment to the Constitution of Arizona; amending Article XVIII, Constitution of Arizona, by adding Section 11; relating to wages,” which is contained on the resolution’s title page. (Ex. A to OB, at i) (capitalization omitted). In the body of the resolution’s text, SCR 1040 also contains an internal reference title, the “Tipped Workers Protection Act.” (*Id.* at 1) (capitalization omitted).

The Committee was formed for the purpose of promoting the “One Fair Wage Act” initiative, (I-02-2024). (OB at 1.) As the Committee concedes, the Initiative did not garner enough valid signatures to remain on the ballot this November. (OB at 2–3.)

The Committee sought an injunction from the trial court to prevent SCR 1040’s placement on the November ballot. ADD-13–28. In its First Amended Complaint (“FAC”), the Committee’s claims both

rested on the erroneous assertion that SCR 1040 bore “a deceptive title in violation of the Arizona Constitution, Article IV, part 2, section 13.” ADD-14–15. But now, on appeal, the Committee shifts its argument to one of general deception, attempting to unmoor its claims from the Title Requirement of Ariz. Const. Art. IV, Pt. 2, § 13. (*See generally* OB) (only mentioning the Title Requirement on the fourth from last paragraph of their brief).

Appellee Arizona Restaurant Association (the “Association”) was granted intervention, opposed the Committee’s preliminary injunction application, and filed a separate Motion to Dismiss the Committee’s FAC. *See* ADD-4. After the matter was fully briefed, the trial court denied the Committee’s requested preliminary injunction as well as the Associations’ motion. ADD-8–10. The trial court, viewing this as a pure issue of law, converted the preliminary injunction to a trial on the merits, which resulted in a final judgment against the Committee. ADD-1, 10. The Committee timely appealed.

STATEMENT OF THE ISSUE

Whether the trial court abused its discretion by denying the Committee's preliminary injunction request to remove SCR 1040 from the ballot.

STANDARD OF REVIEW

The Committee mistakenly claims (OB at 5) that the sole standard of review here is *de novo*. The Association agrees that this Court reviews *de novo* the “interpretation and application of constitutional and statutory provisions regarding initiatives.” *Molera v. Reagan*, 245 Ariz. 291, 294 ¶8 (2018). However, the question of whether the trial court was correct to deny the Committee's motion for a preliminary injunction is reviewed for an abuse of discretion. *Molera v. Hobbs*, 250 Ariz. 13, 26 ¶49 (2020). This abuse of discretion standard applies here where the Committee was denied a preliminary injunction seeking to remove SCR1040 from the ballot. *See id.* (applying an abuse of discretion standard of review to the trial court's “refus[al] to preliminarily enjoin the Initiative from the ballot”).

ARGUMENT

A preliminary injunction is “not a remedy favored by the courts, especially because it goes beyond simply maintaining the status quo pending a trial on the merits.” *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). “A party seeking a preliminary injunction must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief.” *Fann v. State*, 251 Ariz. 425, 432 ¶16 (2021).

As an initial matter, the Committee has not briefed the last three preliminary injunction factors; indeed, they have not even cited the preliminary injunction standard in their brief. Consequently, it has waived argument on those factors, and its appeal fails. *See Watahomigie*, 181 Ariz. at 26 ¶11 (“[Courts] will not consider issues not properly briefed.”).

Moreover, for reasons set forth below, the Committee’s claims fail on the merits. This Court should, therefore, affirm the trial court’s denial of the Committee’s preliminary injunction motion, leave SCR 1040 on the ballot, and award the Association its costs on appeal.

I. BOTH OF THE COMMITTEE’S CLAIMS ARE INAPPLICABLE TO CONSTITUTIONAL REFERENDA.

At issue here is the Arizona Constitution’s Title Requirement,³ which provides:

Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be embraced in the title.

Ariz. Const. Art. IV, Pt. 2, §13.

This Court has long held that “constitutional provisions such as sections 13 and 14, part 2, article 4,”—*i.e.*, the Title Requirement—“*do not apply* to proposed constitutional amendments submitted by the Legislature to the people.” *Barth*, 40 Ariz. at 556 (collecting cases from other states to the same effect) (emphasis added). The *Barth* Court conducted a “diligent search” and was “unable to find a single case holding or even suggesting that constitutional limitations of this nature apply to proposed constitutional amendments.” *Id.* There is no reason for this Court to depart from that precedent.

³ This provision also contains the “Single Subject Rule,” but Appellants do not assert a claim under that rule.

The rationale for this rule is evident from the structure and text of the Arizona Constitution, which addresses the requirements for *constitutional* amendments versus *statutory* acts in separate sections.

Article 21 of the Arizona Constitution is titled “Mode of Amending,” and provides, in relevant part, that “[a]ny amendment or amendments to this constitution may be proposed in either house of the legislature.” Ariz. Const. art. XXI, §1. This section also contains what is known as the “Separate Amendment Rule,” *Ariz. Sch. Boards Ass’n, Inc. v. State* (“ASBA”), 252 Ariz. 219, 228 ¶38 (2022), which provides that “[i]f more than one proposed amendment is submitted at any election, the proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately.” Ariz. Const. art. XXI, §1. Notably, Article XXI neither provides a titling requirement, nor mentions the word “title.” Article XXI also does not use the words “act” or “enact”—or any derivative thereof.

Conversely, *acts* or *enactments* of the Legislature are subject to the Single Subject Rule and Title Requirement found in Article IV, part 2, section 13. *See ASBA*, 252 Ariz. at 226 ¶25 (“Section 13 of part 2, titled ‘Subject and title of bills’” provides that “[e]very act shall embrace but one

subject’— the single subject rule — ‘which subject shall be expressed in the title’—the title requirement.” (citation omitted)); *see also Hoffman v. Reagan*, 245 Ariz. 313, 315–16 ¶¶8–12 (2018) (clarifying that section 13 applies to “acts” and “enact[ments]” of the Legislature).

Here, the Legislature referred SCR 1040, a *constitutional amendment*, to the people of Arizona via *concurrent resolution*. This proposed amendment is subject to the Separate Amendment Rule. Ariz. Const. art. XXI, §1. But the Committee has not brought a Separate Amendment challenge. Instead, they challenge SCR 1040 under Article IV, part 2, section 13—the Single Subject Rule and Title Requirements.

The problem for the Committee is that constitutional referenda—submitted via resolution—are not acts or enactments of the Legislature, and therefore not subject to the requirements of section 13. *See Ariz. Const. art. XXI, §1* (never using the words “act” or “enact”); *see also Barth*, 40 Ariz. at 556 (explaining that “the Legislature . . . must submit an amendment *either by an act or joint resolution*” and that neither are “subject to such limitations” as those found in section 13).

Moreover, courts have long resisted conflating the Separate Amendment Rule with the Single Subject Rule. *See Clean Elections Inst.*,

Inc. v. Brewer, 209 Ariz. 241, 244 ¶7 (2004) (“The separate amendment rule of Article 21 differs from the single-subject rule of Article 4.”), *abrogated in part on other grounds by ASBA*, 252 Ariz. at ¶38.

More recent cases, such as *Hoffman*, 245 Ariz. 313, do not alter the *Barth* Court’s holding that constitutional referenda are not subject to section 13. The *Hoffman* Court explained that “when the legislature refers a measure to the voters for their consideration, . . . such a legislative ‘act’ must satisfy the single subject rule.” *id.* at 316 ¶11 (emphasis added). And in *Hoffman*—which specifically involved a *statutory* referendum, *see id.* at 314 ¶1—the Court took great pains to explain how such statutory referenda involve “act[s]” or “enacting,” *id.* at 315–16 ¶¶8–12. But, again, the constitutional referenda here, SCR 1040, was not submitted via an “act” but via *concurrent resolution*, which is distinctly different from an act of the Legislature. *See Barth*, 40 Ariz. at 556 (explaining that “the Legislature . . . must submit an amendment *either* by an act *or* joint resolution” (emphasis added)). Thus, *Hoffman* supports *Barth*’s holding that constitutional referenda submitted via resolution are not subject to the requirements of section 13.

In short, because the Committee's claims are based on the Title Requirement, it has no chance of success in challenging SCR 1040.

II. THE COMMITTEE'S TITLE CHALLENGE CLAIM ALSO FAILS ON ITS MERITS.

A. The Committee Challenged the Wrong Title And Has Waived Any Arguments To The Contrary.

At the trial court, the Association repeatedly argued that the Committee's claims failed because it challenged the wrong title for SCR 1040—*i.e.*, it challenged SCR 1014's internal reference title, and not its official title. ADD-55–62, 82–86. But The Committee *never* responded to that argument. *See* ADD-70–79. Consequently, they have waived any arguments to the contrary on appeal. *Polanco v. Indus. Comm'n of Arizona*, 214 Ariz. 489 ¶6 n.2 (App. 2007).

And even if the Committee had not waived the argument below, it has cited no case on appeal that stands for the proposition that it can assert a title challenge against the wrong title. Indeed, this similar briefing failure below lead the trial court to conclude that “[i]f voters are not presented with that Short Title, then analysis of the Short Title is actually moot.” *See* ADD-7 (only analyzing the claim against the short title in the alternative). In short, this Court may deny the Committee's appeal on this basis alone.

In any event, it is indisputable that the Committee has challenged the wrong title. This Court recently explained that our State Legislature “has employed the California Format [for the titling of bills] since 1990.” *ASBA*, 252 Ariz. at 227 ¶32. This “‘California Format’ of legislative titling,” generally “enumerates by title and section number every individual statute added or amended by the bill and is augmented with a generalized description of a bill's subject matter.” *Id.*

A good example of this California Format of titling can be found in *ASBA* itself. *See id.* at 223 ¶¶6–9. There, the Court provided the titles for each of the challenged bills:

HB 2898 is titled: “An Act Amending [Statutes Listed by Number]; Appropriating Monies; Relating to Kindergarten through Grade Twelve Budget Reconciliation.”

SB 1824 is titled: “An Act Amending [Statutes Listed by Number]; Appropriating Monies; Relating to Health Budget Reconciliation.”

SB 1825 is titled: “An Act Amending [Statutes Listed by Number]; Appropriating Monies; Relating to Budget Reconciliation for Higher Education.”

SB 1819 is titled: “An Act Amending [Statutes Listed by Number]; Appropriating Monies; Relating to State Budget Procedures.”

Id. (alterations original).

This is the exact format used by the Legislature to title SCR 1040. *See* (Ex. A to OB, at i.) Specifically, the title page of SCR 1040 provides: “A Concurrent Resolution proposing an amendment to the Constitution of Arizona; amending Article XVIII, Constitution of Arizona, by adding Section 11; relating to wages.”

Therefore, the Committee wrongly claim that the “Tipped Workers Protection Act”—which is the internal reference title included in the text of the bill itself—is the official title. (OB at 1). Indeed, it is self-evident that there is a distinction between the title page—where the *official title* is contained—and the text of the bill itself, where the Legislature might an internal reference title. Thus, it comes as no surprise that claims under the Title Requirement have involved challenges to the official title located on the first page of the act. *See, e.g., Hoffman*, 245 Ariz. at 314¶2 (challenging HCR 2007’s official title); *State v. Sutton*, 115 Ariz. 417, 419 (1977) (same effect); *ASBA*, 252 Ariz. at 223¶¶6–9 (same effect).

Finally, after this case was initiated, the Secretary of State provided the legislative ballot language for SCR 1040, which confirms that SCR 1040 bears the “official title” of “Amending Article XVIII, By Adding Section 11, Constitution of Arizona.” ADD-106. Yet the

Committee continues to errantly bring a challenge against SCR 1040's short title. (OB at 1.)

B. Both The Official Title And The Erroneously Challenged Short Title Accurately Describe SCR 1040.

“When examining whether an act complies with” the Title Requirement, Arizona courts “construe the questioned legislation liberally in favor of finding it constitutional.” *Manic v. Dawes*, 213 Ariz. 252, 256 ¶21 (App. 2006); *see also Litchfield Elem. Sch. Dist. v. Babbitt*, 125 Ariz. 215, 224 (1980) (“Constitutional provisions of this nature should be interpreted liberally so as not to impede or embarrass the legislature in its business.”). And a court “must be convinced beyond a reasonable doubt that the constitutional provision has been violated” before declaring a challenged act void. *Manic*, 213 Ariz. 256 ¶21.

This Court has repeatedly held that “the ‘title must be worded so that it puts people on notice as to the contents of the act,’ . . . but the ‘title to an act need not be a complete index to its contents’.” *ASBA*, 252 Ariz. at 226 ¶26 (citation omitted). In fact, “a provision need only directly or indirectly relate to the subject of the title and have a natural connection therewith or be germane to the subject expressed in the title to be constitutional.” *Id.* (citation omitted) (cleaned up). At bottom, “a

reasonable person should be expected to know what an act deals with based on its title.” *Id.* (citation omitted). SCR 1040 does just that.

1. SCR 1040’s official title is not misleading. Again, the official title of SCR 1040 is “A concurrent resolution proposing an amendment to the Constitution of Arizona; amending Article XVIII, Constitution of Arizona, by adding Section 11; relating to wages.” *See supra* §II.A.

This title accurately identifies the contents of SCR 1040, which contains an amendment to the Arizona Constitution relating to wages—namely providing a compensation structure that mutually benefits tipped workers and the businesses that employ them.

In fact, the Committee explicitly acknowledges that SCR 1040 amends the wage structure in Arizona. (*See* OB at 3–5.) They even take it a step further, detailing how, through mathematical calculations, SCR 1040 amends the minimum wage in Arizona. (OB at 4–5.) The Committee’s acknowledgments and calculations only serve to demonstrate that the provisions of SCR 1040 amend wages in Arizona, which is accurately reflected in SCR 1040’s official title.

The title is thus constitutional because it is “worded so that it puts people on notice as to [its] contents,” and “directly . . . relate[s] to the

subject of the title.” See *ASBA*, 252 Ariz. at 226 ¶ 26 (cleaned up and citations omitted)..

2. The internal reference title, “Tipped Workers Protection Act,” is not misleading. The Committee effectively concedes that SCR 1040’s short title relates to wages and tipped workers. (OB at 4–5.) The Committee’s remaining argument is essentially that SCR 1040 is not effective at increasing wages and that their competing Initiative is better. (OB at 3–5.) But that is a matter of political effectiveness, not constitutional propriety, which is not the province of courts to decide. See *Napolitano*, 213 Ariz. at 485 ¶ 7. The Committee’s argument about SCR 1040’s efficacy therefore demonstrates that it is challenging the *effect* of the measure and not the adequacy of its *title*, which is “part of the legislative or political process and, before adoption, is not subject to this court’s review.” See *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 587 (1994).

What’s more, the Committee is wrong that SCR 1040 is somehow misleading. *First*, the short title of SCR 1040 is the “Tipped Workers *Protection Act*” (emphasis)—and not the “Tipped Workers’ *Wage Increase Act*.” SCR 1040’s title does not purport to *increase the wages of*

tipped workers. *Second*, SCR 1040 protects tipped workers' *wages* by setting them at two dollars more than the minimum wage, (*see* Ex. A to OB, at 1), and protects tipped workers' *jobs* by allowing employers to operate and hire at economically sustainable levels. The Committee studiously ignores this economic reality.

In sum, SCR 1040's short title puts people on notice that it relates to tipped workers' wages, thereby allowing "a reasonable person" to know what the "act deals with based on its title." *ASBA*, 252 Ariz. at 226 ¶26.

III. THE COMMITTEE'S DECOY CLAIM IS NOW MOOT AND THE COMMITTEE LOSES THAT CLAIM IN ANY EVENT.

A. The Committee's Decoy Claim Has Become Moot On Appeal.

"It is well settled that an appellate court will not consider a case which is moot." *Del Rio Land, Inc. v. Haumont*, 110 Ariz. 7, 9 (1973). Here, the Committee acknowledges that that their competing ballot Initiative did not garner enough valid signatures to remain on the ballot. (OB at 2–3.) Yet it summarily asserts that the "potential for [SCR 1040] to take advantage of potential confusion is not eliminated by the [Initiative's] failure to qualify for the ballot." (OB at 8.) But the Committee fails to explain—or even address—how their claim is not moot. (*See generally* OB.) Simply put, if there is only one ballot measure

regarding wages on the ballot, then that measure cannot be mistaken for another. The Committee’s claim is indeed moot, and this Court need not consider it.

B. SCR 1040 Is Clearly Not A Decoy.

Despite the mootness issue, the Committee continues to insist that this case is like *Griffin v. Buzard*, 86 Ariz. 166 (1959). Not so.

Griffin dealt with an election contest, challenging the results of a Democrat primary election for the Arizona Corporation Commission. *Id.* at 168. There, the election was between two candidates: (1) A. P. (Jack) Buzard, and (2) William T. (Bill) Brooks. *Id.* at 172. But Mr. Buzzard, attempting to appropriate Mr. T. Brooks’ goodwill and name recognition, found a similarly named man—William. A. (Bill) Brooks—to run for the same office. Mr. A. Brooks, however, (1) “had never before been a candidate for public office”; (2) “was not eligible for the office to which he was purportedly a candidate”; and (3) had previously gone by a different name. *Id.* Yet Mr. Buzzard convinced this “diversionary candidate” to run and even circulated nominating petitions for him—all with the goal of splitting the race three ways and allowing Mr. Buzzard to win with a

plurality of the vote. *Id.* at 172–73. Mr. Buzzard’s plan succeeded, and Mr. T. Brooks contested the election pursuant to statute.

The Committee here relies on the penultimate paragraph of *Griffin* for the proposition that their case should not be dismissed. (*See* OB at 7) (“The courts must be alert to preserving the purity of elections and its doors must not be closed to hearing charges of deception and fraud that in any way impede the exercise of a free elective franchise.” (citation omitted)). This truism does not save the Committee’s case.

Griffin is entirely different from this case. Specifically, *Griffin* did not (1) address Arizona’s Title Requirement; (2) involve ballot measures; or (3) concern constitutional amendments or competing legislation. *See generally* 86 Ariz. 166. It is a remarkable proposition to compare the Legislature submitting an amendment to the people on the topic of wages—via constitutionally prescribed processes—to the alleged voter fraud of *Griffin* simply because the Committee also wanted to pass an initiative on the topic of wages.

The Committee’s reliance on *Reagan* and *Hobbs* is similarly misplaced. (OB at 8–9.) Both of those cases involved challenges to the 100-word description of statutory initiatives, not—as here—title

challenges to a constitutional referendum. *Hobbs*, 250 Ariz. at 18 ¶1. And, as with *Griffin*, both those challenges were rooted in statutory requirements, contrary to the Committee's contentions. *See id.* (explaining that both *Reagan* and *Hobbs* involved challenges under A.R.S. § 19-102(A) to the 100-description). Thus, both cases are also inapposite.

This claim, therefore, fails on the merits as well.

IV. THE COMMITTEE CANNOT SATISFY THE REMAINING INJUNCTIVE FACTORS, NOR HAVE THEY ATTEMPTED TO DO SO.

As explained, *supra* at 6, the Committee has not briefed the three remaining preliminary injunction factors, which should result in summary dismissal. *See Watahomigie*, 181 Ariz. at 26 ¶11.

Regardless, the Committee cannot satisfy the remaining injunctive factors. *First*, as argued throughout this brief, the Committee is not harmed by SCR 1040 because, among other things, SCR 1040 is not unconstitutional. *See, e.g., Fann*, 251 Ariz. 432, ¶ 16. *Second*, the Committee failed to provide evidence below of how their purported hardship outweighs that of the Association. ADD-11. *Third*, public policy in Arizona favors keeping ballot initiatives on the ballot. *See League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 561–62 ¶24 (2006). Thus,

all injunctive factors weigh against the Committee.

CONCLUSION

For the forgoing reasons, this Court should affirm the trial court. Further, pursuant to Ariz. R. Civ. App. 21, the Association hereby requests its costs for this appeal.

RESPECTFULLY SUBMITTED this 16th day of August 2024.

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