

ARIZONA SUPREME COURT

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees,

and

THE RESTAURANT ASSOCIATION,

Intervenor-Defendants/
Appellees.

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

Maricopa County Superior Court
Case No.: CV2024-016116

OPENING BRIEF

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Introduction

The Tipped Worker Protection Act provides no protection to tipped workers and reduces tipped workers' minimum wage protection. Its short title is deceptive. Although a short title is not required, when used, the short title cannot be deceptive. The Court must preserve "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." *Griffin v. Buzard*, 86 Ariz. 166, 173, 342 P.2d 201, 205–06 (1959).

Statement of the Case

This matter is an accelerated election law appeal of the trial court's Order entered on August 5, 2024, denying Plaintiffs/Appellants' Application for Preliminary Injunction, the hearing of which had been combined with a hearing on the merits. The Intervenor Restaurant Association's motion to dismiss was also denied by the Trial Court, [Order at 8], no cross-appeal by Intervenors has been filed. Based on representations made by the Secretary of State's Office, this matter must be resolved by August 22, 2024, which is the ballot printing deadline.

Factual Background

Appellant Raise the Wage Arizona (the "Committee") was formed on September 29, 2022 in order to promote the One Fair Wage Initiative. [Order at 2] The Committee first obtained serial number I-01-2024 for the measure and then after

Legislative Council review of that version obtained serial number I-02-2024, which was the version the Committee circulated from November 7, 2022, until petitions were turned in on July 3, 2024. Arizona Secretary of State, *Initiative, Referendum and Recall Applications*, available at <https://apps.arizona.vote/electioninfo/IRR/47> (last visited 8/12/2024). The Initiative's summary of principal provisions provides:

The One Fair Wage Act raises the minimum wage by \$1 over cost of living increases in 2025 and 2026 and leaves cost of living increases in place thereafter. For tipped employees, it raises the minimum wage employers must pay tipped employees regardless of tips employees earn. Currently, employers may count up to \$3 per hour of a tipped employee's tips to offset the employer's minimum wage obligation. The Act gradually reduces the amount of the employer's offset due to tips until the employer is required to pay the full minimum wage and employees keep all of their tips on top of that wage. The Act expands coverage of the minimum wage, removing the small business exception. It explicitly exempts tribal entities as employers for purposes of the minimum wage law, and leaves in place the exemption for the state and federal governments. It makes clear that the state minimum wage applies regardless of the individual's age, status as a learner, apprentice, vocational trainee or other status wherein the individual provides labor, regardless of any benefit to the individual, but the state minimum wage continues to not apply to independent contractors. Defines terms; repeals old version of section 23-362.

Id. Relevant to the instant case, the Initiative would increase the minimum wage for tipped workers to gradually eliminate the subminimum wage that is available for employers to pay tipped workers in certain circumstances. The One Fair Wage Act turned in significantly more than the minimum required number of signatures, but

during the review process the Committee acknowledged that it would not have enough valid signatures to remain on the ballot, and recently agreed to have judgment entered against it. The One Fair Wage Act will not be on the 2024 General Election ballot.

On June 13, 2024, SCR 1040 was filed with the Secretary of State. [SCR 1040 as filed, attached as Exhibit A]. The Tipped Workers Protection Act, *see* SCR 1040, § 2, adds a Section 11 to Article XVIII of the Arizona Constitution, which provides:

For any employee who customarily and regularly receives tips or gratuities from patrons or others, the employer may pay a wage up to twenty-five percent per hour less than the minimum wage established by statute if the employer can establish by the employer's records of charged tips or gratuities or by the employee's declaration for federal insurance contributions act purposes that for each week, when adding tips or gratuities received to wages paid, the employee received not less than the minimum wage plus \$2 for all hours worked. Compliance with this section is determined by averaging tips or gratuities received by the employee over the course of the employer's payroll period or any other period selected by the employer that complies with laws enacted by the legislature.

Id. § 1. The text is dense and requires unpacking. Notably, the amendment does not replace the statutory minimum wage found in Title 23, Article 8. Instead, it creates conditions that will, under some circumstances, supersede the protection found in the statutory minimum wage provisions.

Currently, A.R.S. § 23-363 (A)-(B) provides an inflation indexed minimum wage for all workers. For tipped workers, however, so long as their tips plus their wages paid by the employer equal the minimum wage, the employer may pay a subminimum wage of \$3 less than the current minimum wage. A.R.S. § 23-363(C). The current minimum wage is \$14.35 per hour. Industrial Commission of Arizona, *Labor Information*, available at <https://www.azica.gov/divisions/labor-department> (last visited 8/12/2024).

Application of Current Law: If a tipped worker makes at least \$3 per hour in tips, the employer can pay the tipped worker as little as \$11.35 per hour. If the tips drop below \$3 per hour, the employer has to make up the difference. So, if a tipped worker receives \$2 per hour in tips, the employer cannot take advantage of the full \$3 less subminimum wage, but could pay the worker as little as \$12.35 per hour.

SCR 1040 allows employers to pay even less to tipped workers. Instead of a \$3 per hour subminimum wage, they can pay employees a super subminimum wage that is 25% less than minimum wage, currently \$10.76 per hour. The employer may only pay this amount if the tipped worker's compensation is \$2 over the minimum wage, currently this super subminimum wage can be applied to tipped workers who earn at least \$5.5875 in tips.

Application of SCR 1040: If the tipped worker earns \$5.59 per hour in tips, the employer may pay the tipped worker as little as \$10.76 an hour. A loss of \$0.59 per hour. Importantly, if this condition is not met, then the employer's obligations will revert to those under Title 23. Nothing in SCR 1040 ever requires the employer to pay \$2 above minimum wage. So, if a tipped worker earns \$4 per hour in tips, the employer may pay as little as \$11.35 per hour to the employee, which is precisely the condition the employee would be in without SCR 1040.

In summary, there are circumstances in which SCR 1040 will reduce the minimum wage protection available to tipped workers. There are other circumstances in which SCR 1040 will leave minimum wage protection for tipped workers exactly where it is. SCR 1040 provides for nothing—no enhanced reporting, education, health and safety requirements, or any other protections—other than reducing the minimum wage payable to tipped workers.

Standard of Review

This case presents a question of constitutional interpretation, which this Court reviews *de novo*.

Statement of the Issue

Did the Trial Court err in permitting a referred amendment to the Arizona Constitution with a deceptive short title to go to the voters?

Argument

A. The Short Title Is Deceptive

The Trial Court wrote, “The question is only whether the Short Title ‘Tipped Workers Protection Act’ puts people on notice as to the contents of the proposed Constitutional Amendment. The Short Title, ‘Tipped Workers Protection Act’ does not imply or promise a raise to the minimum wage.” [Order at 6.] Appellants respectfully disagree. Appellants agree that the title does not necessarily imply or promise a raise in the minimum wage, but it implies or promises that it will provide protection to tipped workers. SCR provides tipped workers no protection.

Minimum wage laws provide protection to workers. From A.R.S. § 23-364, which recognizes the article as providing protections says that it “shall be liberally construed in favor of its purposes and shall not limit the authority of the legislature or any other body to adopt any law or policy that requires payment of higher or supplemental wages or benefits, or that extends *such protections* to employers or employees not covered by this article.” (Emphasis added). As far back as 1939, the Court identified the minimum wage specifically as a protection against fluctuating and uncertain compensation. *State v. Ash*, 53 Ariz. 197, 203 (1939).

Reducing the minimum wage, especially for tipped workers who are particularly susceptible to fluctuating and uncertain compensation, reduces that protection. And the only thing SCR 1040 ever does is reduce the minimum wage

available to tipped workers. Describing that which reduces a protection available to tipped workers as a the “Tipped Workers Protection Act” is deceptive.

B. This Court Has Acted In Similar Situations

The Court is not powerless to prevent the Legislature from placing a measure with a deceptive short title before the voters. In previous instances in which the Court was presented with circumstances that gave rise to the potential for confusion or unfairness or those in which abuses of the electoral franchise and protecting the purity of Arizona elections were at stake, the Court acted.

In the context of candidate elections, this Court considered an allegation that a decoy candidate had been run to interfere with an election for Corporation Commission. Despite there being no statutory justification disqualifying a candidate as a decoy candidate, the Court overturned the lower court’s dismissal of the action writing:

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. The contestors are entitled to an opportunity to prove their charges. The judgment of the lower court is reversed with directions to reinstate the election contest and proceed to trial.

Griffin v. Buzard, 86 Ariz. 166, 173, 342 P.2d 201, 205–06 (1959). This case stands generally for the proposition that the Court has the power to intercede on the people’s behalf when a fraud on the electorate is being perpetrated. *See also, Brousseau v. Fitzgerald*, 138 Ariz. 453, 456, 675 P.2d 713, 716 (1984) (“To allow the integrity of the nominating petition process to be violated ... without any sanction other than the

inconvenience of showing that the signatures were in fact authentic would render the circulation requirement meaningless and possibly lead to additional falsehood and fraud by others.”). *Griffin* also applies to the facts of the case before the Court because SCR 1040 is plainly an attempted decoy measure targeted at the One Fair Wage Act. As an initiative measure that actually did provide enhanced minimum wage protection, specifically for tipped workers, was circulating for nearly eighteen months, the potential for the Tipped Worker Protection Act to take advantage of potential confusion is not eliminated by the One Fair Wage Act’s failure to qualify for the ballot.

The Court’s opinion in *Molera v. Reagan* instructs the case at hand. 245 Ariz. 291, 428 P.3d 490 (2018). In that case, initiative proponents described a change in a tax rate from 4.54% to a new rate of 8.00% as a “raising the income rate by 3.46%.” *Id.* at 293 ¶ 2, 428 P.3d at 492. The Court found that signers might understand that the value of the percentage points to be increased by 3.46%, thinking that the rate was being changed from 4.54% to 4.69% (the product of multiplying the initial tax rate by a factor of 1.0346 as opposed to adding 3.46% to the current tax rate); thus, “[t]he petition’s description of the magnitude of the tax increase on wealthy taxpayers also ‘creates a significant danger of confusion.’” *Id.* at 298 ¶ 29, 428 P.3d at 497 (quoting *Save our Vote v. Bennett*, 231 Ariz. 145, 152 ¶ 26, 291 P.3d 342, 349 (2013)).

The Court held that the danger of confusion due to this phrasing was sufficiently great to disqualify hundreds of thousands of citizen signatures in order to protect the purity of Arizona elections. As in the *Griffin* case, there is no explicit statutory authorization for the Court to police the petition summaries for being deceptive or confusing. But the Court was nonetheless compelled to recognize its authority to do so for the sake of protecting the sanctity of the franchise.

Furthermore, as demonstrated in *Molera v. Hobbs* the following election cycle, it was not necessary to include the percentage descriptions at all. 250 Ariz. 13, 20–21 ¶¶ 18-20, 474 P.3d 667, 674–75 (2020). In that case, the Trial Court misunderstood the earlier decision to mandate that initiative proponents describe all quantitative changes in terms of a percentage adjustment. *Id.* This was wrong. Just as legislative acts are not required to have short titles, initiative summaries are not required to use percentages to quantify the magnitude of every change they are making. That said, if either tool is employed, it cannot be done in a deceptive manner.

C. Deceptive Titles Are Not Exempt from Evaluation

Although the Court has never found there to be a violation threatening the integrity of the electoral system based on a deceptive title, it has considered such challenges. *See, e.g., Leach v. Reagan*, 245 Ariz. 430, 437 ¶ 29 (2018) (holding a title that accurately reflect the effect of the measure was not deceptive). This

evaluation is anchored to the requirement that measures include a title. When considering a legislative referendum, that requirement is found here: “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. 4, pt. 2, § 13. The requirement addresses the need to inform. *In re Lewkowitz* states that

the title is sufficient if it is not productive of surprise and fraud, and is not calculated to mislead the legislature or the people, but is of such character as fairly to apprise legislators, and the public in general, of the subject matter of the legislation, and of the interests that are or may be affected thereby, and to put anyone having an interest in the subject matter on inquiry

70 Ariz. 325, 331-32 (1950).

To satisfy the title requirement, the provisions must be directly or indirectly related to the subject of the title and have a natural connection or be germane to the subject expressed in the title. *Ariz. Sch. Bds. Ass’n, Inc. v. State*, 252 Ariz. 219, 226 ¶ 26 (2022) (“ASBA”). “In other words, a reasonable person should be expected to know what an act deals with based on its title.” *Id.* (citation omitted).

The Court should note that while SCR 1040 attempts to amend the Arizona Constitution, it is also an act of the Legislature, and must comply with Section 13 of

Article 4, Part 2 of the Arizona Constitution, just like literally “[e]very act of the Legislature.”

A title that is deceptive fails to satisfy this requirement in the same way that an initiative summary that is deceptive fails to satisfy the requirement found in Title 19 to “(Insert a description of not more than two hundred words of the principal provisions of the proposed measure or constitutional amendment.)” A.R.S. § 19-102(A).

SCR 1040’s short title: The Tipped Worker Protection Act tells voters that the act provides protection for tipped workers. It does the opposite. It offers *no* protection to tipped workers and reduces an important protection for those very workers. This Court has in the past disqualified measures for the ballot that create a similar danger of confusion or unfairness, even in the face of millions of dollars spent and hundreds of thousands of signatures from qualified electors gathered in support of putting a particular measure before the voters. It should once again protect the sanctity of Arizona’s electoral process and prevent SCR 1040 from being referred to the Arizona voters.

Conclusion

For the above reasons, this Court should reverse the lower court’s ruling and find that SCR 1040’s deceptive Short Title creates a substantial danger of confusion

or unfairness and must be enjoined from placing it on the November 2024 General Election Ballot.

RESPECTFULLY SUBMITTED this 13th day of August, 2024.

BARTON MENDEZ SOTO PLLC

By /s/ James E. Barton II

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EXHIBIT A

House Engrossed Senate Bill

~~permanent school fund; distribution; uses~~
(now: tipped workers; wages)

State of Arizona
Senate
Fifty-sixth Legislature
Second Regular Session
2024

SENATE CONCURRENT RESOLUTION 1040

A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE XVIII, CONSTITUTION OF ARIZONA, BY ADDING SECTION 11; RELATING TO WAGES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it resolved by the Senate of the State of Arizona, the House of
2 Representatives concurring:

3 1. Article XVIII, Constitution of Arizona, is proposed to be
4 amended by adding section 11 as follows if approved by the voters and on
5 proclamation of the Governor:

6 11. Tipped workers; wages

7 SECTION 11. FOR ANY EMPLOYEE WHO CUSTOMARILY AND
8 REGULARLY RECEIVES TIPS OR GRATUITIES FROM PATRONS OR OTHERS,
9 THE EMPLOYER MAY PAY A WAGE UP TO TWENTY-FIVE PERCENT PER HOUR
10 LESS THAN THE MINIMUM WAGE ESTABLISHED BY STATUTE IF THE
11 EMPLOYER CAN ESTABLISH BY THE EMPLOYER'S RECORDS OF CHARGED
12 TIPS OR GRATUITIES OR BY THE EMPLOYEE'S DECLARATION FOR
13 FEDERAL INSURANCE CONTRIBUTIONS ACT PURPOSES THAT FOR EACH
14 WEEK, WHEN ADDING TIPS OR GRATUITIES RECEIVED TO WAGES PAID,
15 THE EMPLOYEE RECEIVED NOT LESS THAN THE MINIMUM WAGE PLUS \$2
16 FOR ALL HOURS WORKED. COMPLIANCE WITH THIS SECTION IS
17 DETERMINED BY AVERAGING TIPS OR GRATUITIES RECEIVED BY THE
18 EMPLOYEE OVER THE COURSE OF THE EMPLOYER'S PAYROLL PERIOD OR
19 ANY OTHER PERIOD SELECTED BY THE EMPLOYER THAT COMPLIES WITH
20 LAWS ENACTED BY THE LEGISLATURE.

21 Sec. 2. Short title

22 This act may be cited as the "Tipped Workers Protection
23 Act".

24 2. The Secretary of State shall submit this proposition to the
25 voters at the next general election as provided by article XXI,
26 Constitution of Arizona.

PASSED BY THE HOUSE APRIL 3, 2024.

PASSED BY THE SENATE MARCH 12, 20224.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JUNE 13, 2024.