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.	No. Maricopa County Superior Court Case No.: CV2024-016116

STATEMENT IDENTIFYING APPEAL AS EXPEDITED ELECTION MATTER AND REQUEST FOR INITIAL TELEPHONIC SCHEDULING CONFERENCE

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Pursuant to Rule 10, Ariz. R. Civ. App. P., Plaintiffs/Appellants hereby designates this appeal as an Expedited Election Matter and respectfully requests that this Court set an initial telephonic scheduling conference. The names and contact information of counsel for the parties involved in the appeal are as follows:

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A copy of Plaintiff/Appellants' Notice of Appeal is attached as **Exhibit 1**. A copy of the order from which the appeal is being taken is attached as **Exhibit 2**.

RESPECTFULLY SUBMITTED this 7th day of August, 2024.

BARTON MENDEZ SOTO PLLC

By /s/ James E. Barton II
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EXHIBIT 1

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

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

Plaintiffs,

v.

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

Defendants,

and

THE RESTAURANT ASSOCIATION,

Intervenor-Defendant.

Case No.: CV2024-016116

NOTICE OF APPEAL

(Assigned to Hon. Peter A. Thompson)

Pursuant to A.R.S. § 19-161(B) notice is hereby given that Plaintiffs Raise the Wage AZ, Kristen Johnson, Kevin Smith, Kenneth Hernandez, and Lupita Martinez,

appeal to the Arizona Supreme Court, from the judgment entered in this case on the 6th of August 2024. A copy of the judgment is attached as Exhibit A.

Dated this 7th day of August 2024.

BARTON MENDEZ SOTO PLLC

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ORIGINAL of the foregoing FILED this 7th day of August 2024 with the Clerk of the Maricopa County Superior Court.

COPY of the foregoing transmitted via e-mail to:

Honorable Peter Thompson
MARICOPA COUNTY SUPERIOR COURT
Sarah Umphress, Judicial Assistant
cvj21@jbazmc.maricopa.gov

COPIES electronically served this 7th day of August 2024 using AZ TurboCourt electronic filing service to:

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Exhibit A

Clerk of the Superior Court
*** Filed ***
08/06/2024 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-016116 08/05/2024

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
V. Felix
Deputy

RAISE THE WAGE A Z, et al.

v.

STATE OF ARIZONA, et al.

JAMES E BARTON II

NATHAN T ARROWSMITH

ANDREW W GOULD
KARA MARIE KARLSON
JUDGE THOMPSON
DOCKET CV TX

MINUTE ENTRY

Before the Court are Plaintiffs' Application For Preliminary Injunction and Intervenor Arizona Restaurant Association's Amended Motion To Dismiss Plaintiff's First Amended Complaint. The Court has also received and fully considered the Brief of Amici Curae Speaker Of The Arizona House Of Representatives And President Of The Senate, Plaintiffs' Response To Motion To Dismiss And Amicus Brief, and Intervenor Arizona Restaurant Association's Combined Reply In Support of its Motion To Dismiss And Response To Plaintiffs' Motion For A Preliminary Injunction. The parties have stipulated that the matters before the Court do not require an evidentiary hearing but are submitted to the Court on the record as matters of law. Because the matter is submitted as a matter of law with no discovery or evidentiary hearing sought by the parties and the Court's ruling and any appeal must be resolved prior to the deadline for printing of the November General Election Ballot, the Court has consolidated any final trial on the merits with resolution of the Application For Preliminary Injunction. The parties have not requested oral argument and the Court has concluded that the issues presented have been fully briefed and oral argument will not assist a decision. See Maricopa County Local Rule 3.2(d). The Court now enters its rulings.

Background

The Arizona Legislature passed Senate Concurrent Resolution 1040 ("SCR 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", also referred to by the short title "Tipped Workers Protection Act" and transmitted the Resolution to the Secretary of State for placement on the 2024 General Election Ballot for a vote by the People.

Plaintiff Raise The Wage AZ is a political action committee registered with the Arizona Secretary of State as Committee No. 101257 (Committee), formed on September 29, 2022 for the purpose of promoting the One Fair Wage Act Initiative (I-02-2024), which amends Title 23, Arizona Revised Statutes to gradually phase out the subminimum wage authorized by current law, A.R.S. § 23-363(C). Signatures supporting placement of the One Fair Wage Act Initiative on the 2024 General Election Ballot were filed with the Arizona Secretary of State on July 3, 2024. Raise The Wage AZ opposes SCR 1040 being placed on the November General Election Ballot.

Kristen Johnson, Kevin Smith, Kenneth Hernandez and Lupita Martinez are persons who were previously employed as tipped workers, plan to work as tipped workers in Arizona in the future and are qualified electors who also oppose SCR 1040.

On July 8, 2024, Plaintiffs filed the Complaint and Application For Preliminary Injunction asking this Court to enjoin the State of Arizona and Adrian Fontes, in his official capacity as Secretary of State from placing SCR 1040 on the November General Election Ballot. Plaintiffs' First Amended Complaint alleges the SCR 1040 "bears a deceptive title in violation of the Arizona Constitution, Article IV, part 2, section 13." Plaintiffs seek declaratory relief via a finding that the title "Tipped Workers Protection Act" is deceptive and misleading. In the event of such a finding, Plaintiffs also seek injunctive relief enjoining SCR 1040 from being placed on the November General Election Ballot.

The State of Arizona has filed its Notice that it takes no position on the merits of the claims in Plaintiffs' Complaint or their Application For Preliminary Injunction.

The Arizona Restaurant Association (Association) is an organization comprised of "hundreds of restaurant owners and vendors across the State of Arizona who support SCR 1040". The Association's unopposed Motion To Intervene was granted. The Association opposes the Application For Preliminary Injunction and has filed a separate Motion To Dismiss Plaintiffs' Application.

Warren Petersen, as President of the Arizona State Senate, and Ben Toma, as Speaker of the Arizona House of Representatives, each acting in their official capacity, have filed an Amicus Curae Brief in support of SCR 1040 and in opposition to the Application For Preliminary Injunction.

Positions of The Parties

Plaintiffs' Application For Preliminary Injunction argues that SCR 1040 should not be placed on the ballot because the title "Tipped Workers Protection Act" is deceptive to voters. Plaintiffs have only challenged the Short Title "Tipped Workers Protection Act" and not the full Official Title of SCR 1040 as designated by the Secretary of State to be used on the November General Election Ballot related to Proposition 138. They also allege the Amendment itself is misleading and deceptive in its effect. They acknowledge that while the Amendment does ensure that tipped workers still receive at least the current minimum wage, there are circumstances where tipped workers might be paid more under the current minimum wage laws. They also argue that efforts to place their own proposed voter Initiative "One Fair Wage", which they claim to be more favorable to tipped workers than either the current minimum wage laws or the proposed Constitutional Amendment, began before the legislative effort to place SCR 1040 on the ballot. Therefore, Plaintiffs contend that placing the proposed Constitutional Amendment (SCR 1040) on the November General Election Ballot will undermine the sanctity of the election process.

Intervenor Arizona Restaurant Association responds that "Tipped Workers Protection Act" is not the official title of SCR 1040 which will appear on the ballot as Proposition 138. The Association argues the Petition must be dismissed as Plaintiffs' arguments all relate to the "Tipped Workers Protection Act", which is not the Official Title of SCR 1040, nor the title which the Secretary of State has apparently indicated will actually appear on the ballot as Proposition 138. They also assert that, even though only the Official Title of SCR 1040 and not the Short Title will appear on the ballot, neither the Short Title nor the Official Title are misleading, deceptive, or violative of the Arizona Constitution, Article IV, part 2, section 13. They further contend that the Amendment is not deceptive or misleading to voters in its effect because it ensures the minimum wage and offers protection to tipped workers by creating an "economically sustainable minimum wage requirement for employers and employees", which would protect against "elimination of tipped workers' jobs because of additional, statutory-imposed business costs". Finally, the Association argues that the placement of the proposed Constitutional Amendment (SCR 1040) on the ballot comports with Arizona law.

Title of the Proposed Constitutional Amendment

Plaintiffs allege the proposed Constitutional Amendment (SCR 1040) violates Arizona Constitution, Article 4, Part 2, § 13, 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.

Interpreting this single subject requirement, the Supreme Court of Arizona has instructed,

> "The title requirement provides that the single subject expressed in every legislative act "shall be expressed in the [act's] title." *Ariz. Const. art. 4, pt. 2 § 13*. To satisfy this requirement, the "title must be worded so that it puts people on notice as to the contents of the act," *State v. Sutton, 115 Ariz. 417, 419, 565 P.2d 1278, 1280 (1977),* but the "title to an act need not be a complete index to its contents," *State v. Harold, 74 Ariz. 210, 214-215, 246 P.2 178 (1952).* "[A] provision need only 'directly or indirectly relate[ ] to the subject of the title and hav[e] a natural connection therewith' or be 'germane to the subject expressed in the title' to be constitutional." *Manic v. Dawes, 213 Ariz. 252, 256 ¶ 21, 141 P.3d 732, 736 (2006) (quoting Harold, 74 at 214-15, 246 P.2d 178).* In other words, a reasonable person should be expected to know what an act deals with based on its title. *See Versluis, 58 Ariz. at 377-78, 120 P.2d 410.* A violation of the title requirement voids the portion of the act not expressed in the title, but the compliant part of the act survives. Ariz. Const. art. 4, pt. 2, § 13." *Ariz. Sch. Bds. Ass'n, Inc. v. State of Arizona,* 252 Ariz.219, 501 P.3d 731 (2022).

There are two different titles used to refer to SCR 1040; the Official Title and the Short Title. Each of those will be addressed and measured against this standard.

The Official Title for SCR 1040

In referring SCR 1040 to the Secretary of State for placement on the General Ballot, the Arizona Legislature has designed the Official Title of SCR 1040 as, "AMENDING ARTICLE XVIII, BY ADDING SECTION 11, CONSTITUTION OF ARIZONA". The Legislature has also provided the Descriptive Title, "PERMITS EMPLOYER TO PAY UP TO 25% LESS THAN THE MINIMUM HOURLY WAGE FOR EMPLOYEES WHOSE COMPENSATION INCLUDES TIPS OR GRATUITIES FROM PATRONS, BUT ONLY IF THE EMPLOYER CAN ESTABLISH THAT THE EMPLOYEE ULTIMATELY RECEIVED THE MINIMUM WAGE PLUS $2 FOR EVERY HOUR WORKED." The Court considers both the Official Title and Official Description

of SCR 1040 in analyzing Plaintiffs' allegations regarding Arizona Constitution, Article 4, Part 2, § 13.

By presenting calculations of wages under the proposed Constitutional Amendment, Plaintiffs acknowledge that SCR 1040 seeks to do exactly what the Official Title proposes; it, "permits [an] employer to pay up to 25% less than the minimum hourly wage for employees whose compensation includes tips or gratuities from patrons, but only if the employer can establish that the employee ultimately received the minimum wage plus $2 for every hour worked". Plaintiffs then present various scenarios and calculations of minimum wages for tipped workers under different circumstances. Those illustrations show that Plaintiffs acknowledge that SCR 1040 intends to change the calculation of wages for tipped workers as the wording provides. The wording on its face is not deceptive or misleading as to how wages would be calculated. The language of the Official Title appearing on the ballot is neither deceptive or misleading in describing the calculation of minimum wages for tipped workers. The Official Title and Official Description of SCR 1040 which will appear on the ballot, do exactly what they say they will do. The official designated title for SCR 1040 meets this standard established by Arizona Constitution, Article 4, Part 2, § 13. It is "worded so that it puts people on notice as to [its] contents, "and "directly . . . relate[s] to the subject of the title." *Ariz. Sch. Bds. Ass'n, Inc. v. State of Arizona,* 252 Ariz.219, 501 P.3d 731 (2022).

The Short Title, "Tipped Worker Protection Act"

Plaintiffs focus their arguments alleging voters will be misled or deceived on the short title "Tipped Workers Protection Act". It is important to note that the Short Title "Tipped Worker Protection Act" is not the actual title or description the Arizona Secretary of State has indicated will be placed on the General Ballot. If voters are not presented with that Short Title, then analysis of the Short Title is actually moot. However, it is the principal thrust of Plaintiffs' arguments related to possible deception or misleading of voters. Therefore, the Court will address it as well.

Plaintiffs' Petition provides various scenarios calculating the minimum wage a tipped worker would earn under various circumstances. Plaintiffs contend the scenarios presented show there are no circumstances under which SCR 1040 can be applied to show a tipped worker would be entitled to more than the current minimum wage under existing law. Therefore, in their view, SCR 1040 does not protect tipped workers. In response, the Association points out that Plaintiffs are actually arguing that the Short Title for SCR 1040 is deceptive or misleading because it does not increase minimum wage. The Association's position is that the short title "Tipped Workers Protection Act" neither states or implies an increase in minimum wage as the purpose of the Act. Plaintiffs' own calculations demonstrate that SCR 1040 will not decrease the current minimum wage. The deception they allege comes from circumstances wherein, while being paid at least minimum wage, a tipped worker could receive less under the proposed Amendment than under

current minimum wage laws. In the Association's view, SCR 1040 protects the minimum wage for tipped workers while also "creating an economically sustainable minimum wage requirement for employers and employees" which they contend will "prevent elimination of tipped workers' jobs because of additional, statutory-imposed business costs".

Because the language of the Official Title of SCR 1040 as indicated to appear on the ballot as Proposition 138 is clear about changing the calculation for minimum wages of tipped workers there is no confusion concerning the effect of the proposed Constitutional Amendment. 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.

The plain language of the proposed Constitutional Amendment states clearly and unambiguously that it "permits [an] employer to pay up to 25% less than the minimum hourly wage for employees whose compensation includes tips or gratuities from patrons, but only if the employer can establish that the employee ultimately received the minimum wage plus $2 for every hour worked". The political views of whether the goal of tipped worker protection is best accomplished by adopting or rejecting the proposed Amendment should not be conflated with rejection of the proposed Amendment before it even appears on the ballot. The language of the Short Title does not mislead or deceive the reader as to the contents or meaning of the language of the proposed Amendment. As stated above, according to the Secretary of State it will be the Official Title of SCR 1040 adopted by the Legislature and not the Short Title that will actually appear on the General Ballot as Proposition 138. However, even if the Short Title were used in association with the proposed Amendment, it is not deceptive or misleading nor does it fail to apprise the voters of the subject matter in the proposed Constitutional Amendment.

Integrity Of The Election Process Argument

According to Plaintiffs, SCR 1040 is "sufficiently deceptive to the point of fraud and creates a significant danger of electorate confusion and unfairness" in violation of Article 4, pt. 2 § 13 such that placing SCR 1040 on the ballot will impede the exercise of a free elective franchise. The Court disagrees. As discussed above, this Court has found that the proposed Constitutional Amendment SCR 1040 is neither misleading, deceptive nor fraudulent.

Additionally, Plaintiffs allege that the timing of their Initiative relative to SCR 1040 proves that SCR 1040 is a decoy measure meant only to confuse voters and inhibit passage of Plaintiffs' own proposed voter Initiative "One Fair Wage" seeking to raise the minimum wage in Arizona. They argue that efforts on their Initiative were underway before the Legislature formulated SCR 1040. In support of their position, they cite *Griffin v Buzard*, 86 Ariz. 166, 342 P.2d 201 (1959).

In *Griffin*, the Supreme Court of Arizona found the Superior Court erred in dismissing an election contest where one candidate, A.P. (Jack) Buzard, recruited a decoy candidate William A. (Bill) Brooks, a then political unknown, to be a candidate to split the vote likely to go with Buzard's well known and long-established political opponent, William T. (Bill) Brooks. The ploy worked and Buzard was elected. The differences between *Griffin* and this case are compelling. Buzard committed voter fraud by recruiting a decoy candidate with no political experience, altering his name to closely match his opponent, and then circulating nominating petitions on behalf of the candidate with the sole intent of splitting the vote for his well-established political opponent. In contrast, this case involves opposing ballot referrals, one by the Legislature and one by a Political Action Committee. Each has its own completely different title, a different approach to minimum wage policy and stated means of achieving its purpose. Both ballot referrals are the process of legitimate, recognized procedures for placing a referral on the ballot. Far from voter fraud, the legislative process used for SCR 1040 is created by the Arizona Constitution. There is no allegation that the proper process was not followed. The timing of which competing measure qualified for the ballot first is also inapposite to a determination that its purpose is to create voter confusion and destroy the integrity of the election process. If such were the case, then SCR 1040 which was placed on the ballot first would preempt placement of the "One Fair Wage" Initiative. While stated in terms preserving the integrity of the election process, Plaintiffs have failed to cite to specific authority which would permit this Court, or any court, to remove an Initiative or proposed Legislative Constitutional Amendment because it interferes with or makes passage of a competing ballot measure more or less likely. Placement of the proposed Constitutional Amendment (SCR 1040) on the November General Election Ballot will not undermine the sanctity of the election process. In fact, it is part of the democratic process enshrined in the Arizona Constitution with choice being left to the voters.

In conclusion, Plaintiffs have not demonstrated a basis to enjoin SCR 1040 from being presented to the voters of Arizona on the General Election Ballot.

IT IS ORDERED denying Plaintiffs' Request For Declaratory Relief.

Motion To Dismiss

As a general policy matter, Rule 12(b)(6) motions to dismiss are not favored under Arizona law. *State ex. rel. Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983). The narrow question presented by a motion to dismiss for failure to state a claim is whether facts alleged in a complaint are sufficient "to warrant allowing the plaintiff to attempt to prove its case." *Id.* at 363, ¶46, 284 P.3d at 874 (emphasis added). Dismissal is permitted only when a "plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 954 P.2d 580 (1998) (emphasis added). Moreover, a motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true *Acker v. CSO*

Chevira, 188 Ariz. 252, 934 P.2d 816 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler,* 101 Ariz. 282, 419 P.2d 66 (1966)], view those facts "in the light most favorable to the nonmoving party" [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 326 P.3d 335 (App. 2014)], and "indulge [the nonmoving party] all reasonable inferences" that the pleaded facts permit [*Cullen v. Auto–Owners Ins. Co.*, 218 Ariz. 417, 189 P.2d 344 (2008)].

The parties have agreed that this case does not involve a dispute of fact but is solely a matter of law for the Court. They have submitted the decision to the Court based upon the briefing and record in the docket.

In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient. *Id.* "Courts look only to the pleading itself" when adjudicating a Rule 12(b)(6) motion. *Id.* A complaint's exhibits, or public records regarding matters referenced in a complaint, are not "outside the pleading," and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion. *See Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC,* 224 Ariz. 60, 226 P.3d 1046 (App.2010).

The Court has fully considered all arguments, points and authorities presented by the parties. However, Plaintiffs have stated a claim sufficient to survive a Motion To Dismiss pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure. For the reasons set forth above,

IT IS ORDERED denying Intervenor Arizona Restaurant Association's Amended Motion To Dismiss Plaintiffs' First Amended Complaint filed July 8, 2024.

Application For Preliminary Injunction

A party seeking a preliminary injunction must establish: "(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 hardship favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief." *Fann v. State*, 251 Ariz. 425, 493 P.3d 246 (2021). The crucial factor is relative hardship, which requires the movant to show either "1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and the balance of hardships tips sharply in the [movant's] favor." *Schoen v. Schoen,* 167 Ariz. 58, 804 P.2d 787 (1990). (*citation and internal quotation marks omitted*). "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger."

Fann, 251 Ariz. at 432 (quoting *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187 (2006)).

"The scale is not absolute but sliding." *Smith v. Ariz. Citizens Clean Elections Comm'n,* 212 Ariz. at 410. The moving party may establish either (a) probable success on the merits and the possibility of irreparable harm, or (b) the presence of serious questions and that the balance of hardships tips sharply in the party's favor. *Id.* at 411; *see also Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6 (App. 2009).

Likelihood Of Success On The Merits

The analysis of the issues presented demonstrates that Plaintiffs have failed to show a likelihood of success on the merits of their claims. The nature of an election case and timing between the filing of an election challenge, appeal and timely placement of an initiative on the ballot mean the hearing and decision of the preliminary injunction is actually the final decision on the merits at the trial court level. Because the Court has found that Plaintiffs have failed to prevail at this level, their likelihood of success has been eliminated as a consideration in their favor.

Possibility Of Irreparable Harm If The Relief Is Not Granted

The second prong under consideration is the possibility of irreparable harm. However, this must be combined with the analysis of likelihood of success on the merits. The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. In this instance, the individual named Plaintiffs have submitted no evidence to demonstrate any alleged personal harm, let alone irreparable harm. Raise The Wage AZ has argued that placement of SCR 1040 on the ballot will make passage of its own "One Fair Wage" Initiative more difficult to pass. This is not cognizable, let alone irreparable harm. In addition, the argument that opposing SCR 1040 as a ballot measure would require expenditure of funds does not constitute irreparable harm. The combination of likelihood of success on the merits and possibility of irreparable harm runs counter to Plaintiffs.

Balance Of Hardship Favors The Party Seeking Injunctive Relief

The balance of hardship factors is a continuation of the analysis above. Whether injunctive relief is granted or not, either party will have the right to appeal this decision to the Supreme Court of Arizona. Other than the arguments that permitting SCR 1040 to be placed on the ballot will make it more difficult for Raise The Wage AZ to pass its own Initiative and possibly spend funds to oppose SCR 1040, there are no other articulated hardships raised by Plaintiffs. The balance of hardships does not favor Plaintiffs in this analysis.

Public Policy Favors Granting The Injunctive Relief

Public policy favors keeping ballot initiatives on the ballot. *See League of Ariz. Cities & towns v. Brewer,* 213 Ariz. 557, 146 P.3d 58 (2006). Plaintiffs argue that their efforts to keep SCR 1040 from the November 2024 General Election Ballot are based on a desire to keep elections pure. That purpose is embodied in the established rules and requirements set out in Arizona's Constitution, the Arizona Revised Statutes and case law. Those considerations have been examined in this decision. Absent a violation of those standards, public policy favors keeping an initiative on the ballot.

Considering the possibility of either combination of probable success on the merits and the possibility of irreparable harm, or the presence of serious questions and that the balance of hardships, the Court concludes that Plaintiffs have failed to establish a basis for injunctive relief by enjoining the Secretary of State from placing SCR 1040 on the General Ballot for the November 2024 Election. Therefore,

IT IS ORDERED denying Plaintiffs' Application For Preliminary Injunction filed July 8, 2024.

THE COURT FINDS that Plaintiffs' claim for Declaratory Relief having been denied and Plaintiffs' Application For Preliminary Injunction having been denied, that no further matters remain pending and judgment is entered pursuant to Rule 54(c), Arizona Rules of Civil Procedure.

DATED this 5th day of August 2024.

/ s / HONORABLE PETER A. THOMPSON

HONORABLE PETER A. THOMPSON
JUDICIAL OFFICER OF THE SUPERIOR COURT

EXHIBIT 2

Clerk of the Superior Court
*** Filed ***
08/06/2024 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-016116 08/05/2024

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
V. Felix
Deputy

RAISE THE WAGE A Z, et al.

JAMES E BARTON II

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DOCKET CV TX

MINUTE ENTRY

Before the Court are Plaintiffs' Application For Preliminary Injunction and Intervenor Arizona Restaurant Association's Amended Motion To Dismiss Plaintiff's First Amended Complaint. The Court has also received and fully considered the Brief of Amici Curae Speaker Of The Arizona House Of Representatives And President Of The Senate, Plaintiffs' Response To Motion To Dismiss And Amicus Brief, and Intervenor Arizona Restaurant Association's Combined Reply In Support of its Motion To Dismiss And Response To Plaintiffs' Motion For A Preliminary Injunction. The parties have stipulated that the matters before the Court do not require an evidentiary hearing but are submitted to the Court on the record as matters of law. Because the matter is submitted as a matter of law with no discovery or evidentiary hearing sought by the parties and the Court's ruling and any appeal must be resolved prior to the deadline for printing of the November General Election Ballot, the Court has consolidated any final trial on the merits with resolution of the Application For Preliminary Injunction. The parties have not requested oral argument and the Court has concluded that the issues presented have been fully briefed and oral argument will not assist a decision. See Maricopa County Local Rule 3.2(d). The Court now enters its rulings.

Background

The Arizona Legislature passed Senate Concurrent Resolution 1040 ("SCR 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", also referred to by the short title "Tipped Workers Protection Act" and transmitted the Resolution to the Secretary of State for placement on the 2024 General Election Ballot for a vote by the People.

Plaintiff Raise The Wage AZ is a political action committee registered with the Arizona Secretary of State as Committee No. 101257 (Committee), formed on September 29, 2022 for the purpose of promoting the One Fair Wage Act Initiative (I-02-2024), which amends Title 23, Arizona Revised Statutes to gradually phase out the subminimum wage authorized by current law, A.R.S. § 23-363(C). Signatures supporting placement of the One Fair Wage Act Initiative on the 2024 General Election Ballot were filed with the Arizona Secretary of State on July 3, 2024. Raise The Wage AZ opposes SCR 1040 being placed on the November General Election Ballot.

Kristen Johnson, Kevin Smith, Kenneth Hernandez and Lupita Martinez are persons who were previously employed as tipped workers, plan to work as tipped workers in Arizona in the future and are qualified electors who also oppose SCR 1040.

On July 8, 2024, Plaintiffs filed the Complaint and Application For Preliminary Injunction asking this Court to enjoin the State of Arizona and Adrian Fontes, in his official capacity as Secretary of State from placing SCR 1040 on the November General Election Ballot. Plaintiffs' First Amended Complaint alleges the SCR 1040 "bears a deceptive title in violation of the Arizona Constitution, Article IV, part 2, section 13." Plaintiffs seek declaratory relief via a finding that the title "Tipped Workers Protection Act" is deceptive and misleading. In the event of such a finding, Plaintiffs also seek injunctive relief enjoining SCR 1040 from being placed on the November General Election Ballot.

The State of Arizona has filed its Notice that it takes no position on the merits of the claims in Plaintiffs' Complaint or their Application For Preliminary Injunction.

The Arizona Restaurant Association (Association) is an organization comprised of "hundreds of restaurant owners and vendors across the State of Arizona who support SCR 1040". The Association's unopposed Motion To Intervene was granted. The Association opposes the Application For Preliminary Injunction and has filed a separate Motion To Dismiss Plaintiffs' Application.

Warren Petersen, as President of the Arizona State Senate, and Ben Toma, as Speaker of the Arizona House of Representatives, each acting in their official capacity, have filed an Amicus Curae Brief in support of SCR 1040 and in opposition to the Application For Preliminary Injunction.

Positions of The Parties

Plaintiffs' Application For Preliminary Injunction argues that SCR 1040 should not be placed on the ballot because the title "Tipped Workers Protection Act" is deceptive to voters. Plaintiffs have only challenged the Short Title "Tipped Workers Protection Act" and not the full Official Title of SCR 1040 as designated by the Secretary of State to be used on the November General Election Ballot related to Proposition 138. They also allege the Amendment itself is misleading and deceptive in its effect. They acknowledge that while the Amendment does ensure that tipped workers still receive at least the current minimum wage, there are circumstances where tipped workers might be paid more under the current minimum wage laws. They also argue that efforts to place their own proposed voter Initiative "One Fair Wage", which they claim to be more favorable to tipped workers than either the current minimum wage laws or the proposed Constitutional Amendment, began before the legislative effort to place SCR 1040 on the ballot. Therefore, Plaintiffs contend that placing the proposed Constitutional Amendment (SCR 1040) on the November General Election Ballot will undermine the sanctity of the election process.

Intervenor Arizona Restaurant Association responds that "Tipped Workers Protection Act" is not the official title of SCR 1040 which will appear on the ballot as Proposition 138. The Association argues the Petition must be dismissed as Plaintiffs' arguments all relate to the "Tipped Workers Protection Act", which is not the Official Title of SCR 1040, nor the title which the Secretary of State has apparently indicated will actually appear on the ballot as Proposition 138. They also assert that, even though only the Official Title of SCR 1040 and not the Short Title will appear on the ballot, neither the Short Title nor the Official Title are misleading, deceptive, or violative of the Arizona Constitution, Article IV, part 2, section 13. They further contend that the Amendment is not deceptive or misleading to voters in its effect because it ensures the minimum wage and offers protection to tipped workers by creating an "economically sustainable minimum wage requirement for employers and employees", which would protect against "elimination of tipped workers' jobs because of additional, statutory-imposed business costs". Finally, the Association argues that the placement of the proposed Constitutional Amendment (SCR 1040) on the ballot comports with Arizona law.

Title of the Proposed Constitutional Amendment

Plaintiffs allege the proposed Constitutional Amendment (SCR 1040) violates Arizona Constitution, Article 4, Part 2, § 13, 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.
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> Interpreting this single subject requirement, the Supreme Court of Arizona has instructed,
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> "The title requirement provides that the single subject expressed in every legislative act "shall be expressed in the [act's] title." *Ariz. Const. art. 4, pt. 2 § 13*. To satisfy this requirement, the "title must be worded so that it puts people on notice as to the contents of the act," *State v. Sutton, 115 Ariz. 417, 419, 565 P.2d 1278, 1280 (1977),* but the "title to an act need not be a complete index to its contents," *State v. Harold, 74 Ariz. 210, 214-215, 246 P.2 178 (1952).* "[A] provision need only 'directly or indirectly relate[ ] to the subject of the title and hav[e] a natural connection therewith' or be 'germane to the subject expressed in the title' to be constitutional." *Manic v. Dawes, 213 Ariz. 252, 256 ¶ 21, 141 P.3d 732, 736 (2006) (quoting Harold, 74 at 214-15, 246 P.2d 178).* In other words, a reasonable person should be expected to know what an act deals with based on its title. *See Versluis, 58 Ariz. at 377-78, 120 P.2d 410.* A violation of the title requirement voids the portion of the act not expressed in the title, but the compliant part of the act survives. Ariz. Const. art. 4, pt. 2, § 13." *Ariz. Sch. Bds. Ass'n, Inc. v. State of Arizona,* 252 Ariz.219, 501 P.3d 731 (2022).

There are two different titles used to refer to SCR 1040; the Official Title and the Short Title. Each of those will be addressed and measured against this standard.

The Official Title for SCR 1040

In referring SCR 1040 to the Secretary of State for placement on the General Ballot, the Arizona Legislature has designed the Official Title of SCR 1040 as, "AMENDING ARTICLE XVIII, BY ADDING SECTION 11, CONSTITUTION OF ARIZONA". The Legislature has also provided the Descriptive Title, "PERMITS EMPLOYER TO PAY UP TO 25% LESS THAN THE MINIMUM HOURLY WAGE FOR EMPLOYEES WHOSE COMPENSATION INCLUDES TIPS OR GRATUITIES FROM PATRONS, BUT ONLY IF THE EMPLOYER CAN ESTABLISH THAT THE EMPLOYEE ULTIMATELY RECEIVED THE MINIMUM WAGE PLUS $2 FOR EVERY HOUR WORKED." The Court considers both the Official Title and Official Description

of SCR 1040 in analyzing Plaintiffs' allegations regarding Arizona Constitution, Article 4, Part 2, § 13.

By presenting calculations of wages under the proposed Constitutional Amendment, Plaintiffs acknowledge that SCR 1040 seeks to do exactly what the Official Title proposes; it, "permits [an] employer to pay up to 25% less than the minimum hourly wage for employees whose compensation includes tips or gratuities from patrons, but only if the employer can establish that the employee ultimately received the minimum wage plus $2 for every hour worked". Plaintiffs then present various scenarios and calculations of minimum wages for tipped workers under different circumstances. Those illustrations show that Plaintiffs acknowledge that SCR 1040 intends to change the calculation of wages for tipped workers as the wording provides. The wording on its face is not deceptive or misleading as to how wages would be calculated. The language of the Official Title appearing on the ballot is neither deceptive or misleading in describing the calculation of minimum wages for tipped workers. The Official Title and Official Description of SCR 1040 which will appear on the ballot, do exactly what they say they will do. The official designated title for SCR 1040 meets this standard established by Arizona Constitution, Article 4, Part 2, § 13. It is "worded so that it puts people on notice as to [its] contents, "and "directly . . . relate[s] to the subject of the title." *Ariz. Sch. Bds. Ass'n, Inc. v. State of Arizona,* 252 Ariz.219, 501 P.3d 731 (2022).

The Short Title, "Tipped Worker Protection Act"

Plaintiffs focus their arguments alleging voters will be misled or deceived on the short title "Tipped Workers Protection Act". It is important to note that the Short Title "Tipped Worker Protection Act" is not the actual title or description the Arizona Secretary of State has indicated will be placed on the General Ballot. If voters are not presented with that Short Title, then analysis of the Short Title is actually moot. However, it is the principal thrust of Plaintiffs' arguments related to possible deception or misleading of voters. Therefore, the Court will address it as well.

Plaintiffs' Petition provides various scenarios calculating the minimum wage a tipped worker would earn under various circumstances. Plaintiffs contend the scenarios presented show there are no circumstances under which SCR 1040 can be applied to show a tipped worker would be entitled to more than the current minimum wage under existing law. Therefore, in their view, SCR 1040 does not protect tipped workers. In response, the Association points out that Plaintiffs are actually arguing that the Short Title for SCR 1040 is deceptive or misleading because it does not increase minimum wage. The Association's position is that the short title "Tipped Workers Protection Act" neither states or implies an increase in minimum wage as the purpose of the Act. Plaintiffs' own calculations demonstrate that SCR 1040 will not decrease the current minimum wage. The deception they allege comes from circumstances wherein, while being paid at least minimum wage, a tipped worker could receive less under the proposed Amendment than under

current minimum wage laws. In the Association's view, SCR 1040 protects the minimum wage for tipped workers while also "creating an economically sustainable minimum wage requirement for employers and employees" which they contend will "prevent elimination of tipped workers' jobs because of additional, statutory-imposed business costs".

Because the language of the Official Title of SCR 1040 as indicated to appear on the ballot as Proposition 138 is clear about changing the calculation for minimum wages of tipped workers there is no confusion concerning the effect of the proposed Constitutional Amendment. 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.

The plain language of the proposed Constitutional Amendment states clearly and unambiguously that it "permits [an] employer to pay up to 25% less than the minimum hourly wage for employees whose compensation includes tips or gratuities from patrons, but only if the employer can establish that the employee ultimately received the minimum wage plus $2 for every hour worked". The political views of whether the goal of tipped worker protection is best accomplished by adopting or rejecting the proposed Amendment should not be conflated with rejection of the proposed Amendment before it even appears on the ballot. The language of the Short Title does not mislead or deceive the reader as to the contents or meaning of the language of the proposed Amendment. As stated above, according to the Secretary of State it will be the Official Title of SCR 1040 adopted by the Legislature and not the Short Title that will actually appear on the General Ballot as Proposition 138. However, even if the Short Title were used in association with the proposed Amendment, it is not deceptive or misleading nor does it fail to apprise the voters of the subject matter in the proposed Constitutional Amendment.

Integrity Of The Election Process Argument

According to Plaintiffs, SCR 1040 is "sufficiently deceptive to the point of fraud and creates a significant danger of electorate confusion and unfairness" in violation of Article 4, pt. 2 § 13 such that placing SCR 1040 on the ballot will impede the exercise of a free elective franchise. The Court disagrees. As discussed above, this Court has found that the proposed Constitutional Amendment SCR 1040 is neither misleading, deceptive nor fraudulent.

Additionally, Plaintiffs allege that the timing of their Initiative relative to SCR 1040 proves that SCR 1040 is a decoy measure meant only to confuse voters and inhibit passage of Plaintiffs' own proposed voter Initiative "One Fair Wage" seeking to raise the minimum wage in Arizona. They argue that efforts on their Initiative were underway before the Legislature formulated SCR 1040. In support of their position, they cite *Griffin v Buzard*, 86 Ariz. 166, 342 P.2d 201 (1959).

In *Griffin*, the Supreme Court of Arizona found the Superior Court erred in dismissing an election contest where one candidate, A.P. (Jack) Buzard, recruited a decoy candidate William A. (Bill) Brooks, a then political unknown, to be a candidate to split the vote likely to go with Buzard's well known and long-established political opponent, William T. (Bill) Brooks. The ploy worked and Buzard was elected. The differences between *Griffin* and this case are compelling. Buzard committed voter fraud by recruiting a decoy candidate with no political experience, altering his name to closely match his opponent, and then circulating nominating petitions on behalf of the candidate with the sole intent of splitting the vote for his well-established political opponent. In contrast, this case involves opposing ballot referrals, one by the Legislature and one by a Political Action Committee. Each has its own completely different title, a different approach to minimum wage policy and stated means of achieving its purpose. Both ballot referrals are the process of legitimate, recognized procedures for placing a referral on the ballot. Far from voter fraud, the legislative process used for SCR 1040 is created by the Arizona Constitution. There is no allegation that the proper process was not followed. The timing of which competing measure qualified for the ballot first is also inapposite to a determination that its purpose is to create voter confusion and destroy the integrity of the election process. If such were the case, then SCR 1040 which was placed on the ballot first would preempt placement of the "One Fair Wage" Initiative. While stated in terms preserving the integrity of the election process, Plaintiffs have failed to cite to specific authority which would permit this Court, or any court, to remove an Initiative or proposed Legislative Constitutional Amendment because it interferes with or makes passage of a competing ballot measure more or less likely. Placement of the proposed Constitutional Amendment (SCR 1040) on the November General Election Ballot will not undermine the sanctity of the election process. In fact, it is part of the democratic process enshrined in the Arizona Constitution with choice being left to the voters.

In conclusion, Plaintiffs have not demonstrated a basis to enjoin SCR 1040 from being presented to the voters of Arizona on the General Election Ballot.

IT IS ORDERED denying Plaintiffs' Request For Declaratory Relief.

Motion To Dismiss

As a general policy matter, Rule 12(b)(6) motions to dismiss are not favored under Arizona law. *State ex. rel. Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983). The narrow question presented by a motion to dismiss for failure to state a claim is whether facts alleged in a complaint are sufficient "to warrant allowing the plaintiff to attempt to prove its case." *Id.* at 363, ¶46, 284 P.3d at 874 (emphasis added). Dismissal is permitted only when a "plaintiff would not be entitled to relief under <u>any interpretation of the facts</u> susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.,* 191 Ariz. 222, 954 P.2d 580 (1998) (emphasis added). Moreover, a motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true *Acker v. CSO*

Chevira, 188 Ariz. 252, 934 P.2d 816 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler,* 101 Ariz. 282, 419 P.2d 66 (1966)], view those facts "in the light most favorable to the nonmoving party" [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 326 P.3d 335 (App. 2014)], and "indulge [the nonmoving party] all reasonable inferences" that the pleaded facts permit [*Cullen v. Auto–Owners Ins. Co*., 218 Ariz. 417, 189 P.2d 344 (2008)].

The parties have agreed that this case does not involve a dispute of fact but is solely a matter of law for the Court. They have submitted the decision to the Court based upon the briefing and record in the docket.

In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient. *Id.* "Courts look only to the pleading itself" when adjudicating a Rule 12(b)(6) motion. *Id.* A complaint's exhibits, or public records regarding matters referenced in a complaint, are not "outside the pleading," and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion. *See Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC,* 224 Ariz. 60, 226 P.3d 1046 (App.2010).

The Court has fully considered all arguments, points and authorities presented by the parties. However, Plaintiffs have stated a claim sufficient to survive a Motion To Dismiss pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure. For the reasons set forth above,

IT IS ORDERED denying Intervenor Arizona Restaurant Association's Amended Motion To Dismiss Plaintiffs' First Amended Complaint filed July 8, 2024.

Application For Preliminary Injunction

A party seeking a preliminary injunction must establish: "(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 hardship favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief." *Fann v. State*, 251 Ariz. 425, 493 P.3d 246 (2021). The crucial factor is relative hardship, which requires the movant to show either "1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and the balance of hardships tips sharply in the [movant's] favor." *Schoen v. Schoen,* 167 Ariz. 58, 804 P.2d 787 (1990). (*citation and internal quotation marks omitted*). "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger."

Fann, 251 Ariz. at 432 (quoting *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187 (2006)).

"The scale is not absolute but sliding." *Smith v. Ariz. Citizens Clean Elections Comm'n,* 212 Ariz. at 410. The moving party may establish either (a) probable success on the merits and the possibility of irreparable harm, or (b) the presence of serious questions and that the balance of hardships tips sharply in the party's favor. *Id.* at 411; *see also Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6 (App. 2009).

Likelihood Of Success On The Merits

The analysis of the issues presented demonstrates that Plaintiffs have failed to show a likelihood of success on the merits of their claims. The nature of an election case and timing between the filing of an election challenge, appeal and timely placement of an initiative on the ballot mean the hearing and decision of the preliminary injunction is actually the final decision on the merits at the trial court level. Because the Court has found that Plaintiffs have failed to prevail at this level, their likelihood of success has been eliminated as a consideration in their favor.

Possibility Of Irreparable Harm If The Relief Is Not Granted

The second prong under consideration is the possibility of irreparable harm. However, this must be combined with the analysis of likelihood of success on the merits. The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. In this instance, the individual named Plaintiffs have submitted no evidence to demonstrate any alleged personal harm, let alone irreparable harm. Raise The Wage AZ has argued that placement of SCR 1040 on the ballot will make passage of its own "One Fair Wage" Initiative more difficult to pass. This is not cognizable, let alone irreparable harm. In addition, the argument that opposing SCR 1040 as a ballot measure would require expenditure of funds does not constitute irreparable harm. The combination of likelihood of success on the merits and possibility of irreparable harm runs counter to Plaintiffs.

Balance Of Hardship Favors The Party Seeking Injunctive Relief

The balance of hardship factors is a continuation of the analysis above. Whether injunctive relief is granted or not, either party will have the right to appeal this decision to the Supreme Court of Arizona. Other than the arguments that permitting SCR 1040 to be placed on the ballot will make it more difficult for Raise The Wage AZ to pass its own Initiative and possibly spend funds to oppose SCR 1040, there are no other articulated hardships raised by Plaintiffs. The balance of hardships does not favor Plaintiffs in this analysis.

Public Policy Favors Granting The Injunctive Relief

Public policy favors keeping ballot initiatives on the ballot. *See League of Ariz. Cities & towns v. Brewer,* 213 Ariz. 557, 146 P.3d 58 (2006). Plaintiffs argue that their efforts to keep SCR 1040 from the November 2024 General Election Ballot are based on a desire to keep elections pure. That purpose is embodied in the established rules and requirements set out in Arizona's Constitution, the Arizona Revised Statutes and case law. Those considerations have been examined in this decision. Absent a violation of those standards, public policy favors keeping an initiative on the ballot.

Considering the possibility of either combination of probable success on the merits and the possibility of irreparable harm, or the presence of serious questions and that the balance of hardships, the Court concludes that Plaintiffs have failed to establish a basis for injunctive relief by enjoining the Secretary of State from placing SCR 1040 on the General Ballot for the November 2024 Election. Therefore,

IT IS ORDERED denying Plaintiffs' Application For Preliminary Injunction filed July 8, 2024.

THE COURT FINDS that Plaintiffs' claim for Declaratory Relief having been denied and Plaintiffs' Application For Preliminary Injunction having been denied, that no further matters remain pending and judgment is entered pursuant to Rule 54(c), Arizona Rules of Civil Procedure.

DATED this 5th day of August 2024.

/ s / HONORABLE PETER A. THOMPSON

HONORABLE PETER A. THOMPSON
JUDICIAL OFFICER OF THE SUPERIOR COURT