

**ARIZONA SUPREME COURT**

MAKE ELECTIONS FAIR,  
an Arizona political action committee,

Plaintiff/Appellee,

v.

Representative BEN TOMA, Senator  
WARREN PETERSEN, Senator  
SHAWNA BOLICK, Senator SONNY  
BORRELLI, Senator SINE KERR,  
Representative TRAVIS  
GRANTHAM, Representative  
TERESA MARTINEZ, and  
Representative QUANG NGUYEN, in  
their official capacities,

Defendants/Appellants,

and

Senator MITZI EPSTEIN, Senator  
BRIAN FERNANDEZ, Senator JUAN  
MENDEZ, Representative LUPE  
CONTRERAS, Representative  
NANCY GUTIERREZ, Representative  
STEPHANIE STAHL HAMILTON,  
and Secretary of State ADRIAN  
FONTES, in their official capacities,

Defendants/Appellees.

No. CV-24-0187-AP/EL

Maricopa County Superior Court  
No. CV2024-018789

**DEFENDANTS/APPELLANTS' OPENING BRIEF**

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Defendants/Appellants Speaker Toma, President Petersen, Senator Bolick, Senator Borrelli, Senator Kerr, Representative Grantham, Representative Martinez, and Representative Nguyen in their official capacities hereby file this Opening Brief.

## **INTRODUCTION**

This case involves a complicated proposed amendment to multiple sections of Article 7 of the Arizona Constitution (I-14-2024) circulated by Plaintiff/Appellee Make Elections Fair (the “Committee”). The Legislative Council (“Council”) analysis of I-14-2024 was prepared by non-partisan staff and unanimously approved by the fourteen bipartisan and geographically diverse Council members.

Nonetheless, the Committee prevailed on its claim that the analysis violated A.R.S. § 19-124(C) based on the placement of a topic sentence near the top of the analysis, combined with the use of “Allow,” “all,” and a “see also” cross reference. APP018. The claim that the Council produced a biased summary by accurately describing necessarily interrelated provisions in a particular order and including an internal cross-reference is detached from § 19-124(C)’s text and this Court’s precedents. Moreover, if committees on either side of a ballot measure can drag the courts into intractable battles over how the Council must order paragraphs, then courts can expect a flood of claims every election cycle.

The sentence of the analysis at-issue here states I-14-2024 would amend the constitution to “1. Allow for the use of voter rankings at all elections held in this

state to determine which candidate received the highest number of legal votes (see also paragraph 4 below).” APP053 lines 7-8. This is an appropriate topic sentence given that I-14-2024 adds “voter rankings” to three different sections of the Arizona Constitution:

- Section 4 amends Article 7, Section 7 on “Highest number of votes received” to state: “THIS SECTION DOES NOT PROHIBIT THE USE OF VOTER RANKINGS TO DETERMINE WHICH PERSON OR PERSONS RECEIVED THE HIGHEST NUMBER OF LEGAL VOTES”;
- Section 5 amends Article 7, Section 10 on “Direct primary election law” to authorize the Legislature to enact “H. ... A PROCESS BY WHICH VOTER RANKINGS ARE USED” if three or more candidates advance from the primary and require the Secretary of State to prescribe this process if the Legislature does not act; and
- Section 6 amends Article 7, Section 11 on “General Elections” to establish specific circumstances under which “C. ... VOTER RANKINGS SHALL BE USED” and states, “VOTER RANKINGS MAY BE USED IN OTHER ELECTIONS AS PROVIDED BY LAW.”

APP046-48.

Despite the complexity of I-14-2024 and the undisputed neutrality of the language used in the analysis, the Superior Court still found a violation of § 19-

124(C). This Court should reverse because the mere ordering of information in an analysis—particularly for a proposed constitutional amendment—cannot be a basis for violating § 19-124(C). A single amendment “logically speaking, should stand or fall as a whole” and therefore must be “*sufficiently interrelated* so as to form a consistent and workable proposition.” *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶8 (2010) (cleaned up, emphasis in original). Given this interrelatedness requirement, it simply cannot be misleading for a ballot analysis to discuss one subject of a proposed amendment before another, especially when multiple provisions in the initiative expressly address that recurring subject (here, voter rankings).

Additionally, the use of “Allow,” “all,” and the “see also” cross reference were reasonable. The cross reference makes clear to the voter that there is more information describing the use of voter rankings later in the analysis. And “[a]llow” and “all” reasonably summarize I-14-2024’s changes related to the use of voter rankings.

If the Committee’s complaints about this unanimously approved analysis rise to the level of a § 19-124(C) violation, then courts will be dragged into rewriting every Council analysis that any party dislikes. “By their very nature, most disputes over ballot proposals are contentious. Thus, proponents and opponents are often dissatisfied with the Council’s analyses. [Courts] cannot settle each of these disputes....” *Ariz. Leg. Council v. Howe*, 192 Ariz. 378, 383 ¶17 (1998).

## STATEMENT OF JURISDICTION

The Court should treat this brief as a petition for special action under Rules 7 and 8 of the Rules of Procedure for Special Actions and ARCAP 10. This Court has jurisdiction under Article VI, § 5 of the Arizona Constitution. *See, e.g., Ariz. for Abortion Access v. Toma*, No. CV-24-0167-AP/EL (Aug. 14, 2024) (“[T]hough [Appellants] filed this matter as an expedited election appeal under ARCAP 10, the Court accepts jurisdiction as a special action....”); *Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 206–07 ¶2 (2013) (treating matter as special action and accepting jurisdiction); *Tobin v. Rea*, 231 Ariz. 189, 193, ¶ 8 (2013) (accepting special action jurisdiction of Superior Court order finding violation of § 19-124(C)). Here, the Council’s analysis relates to a proposed constitutional amendment and will be mailed to every voter in the state, A.R.S. § 19-123(A)(4), making the issue one of statewide importance. And there is no equally plain, speedy, or adequate remedy by appeal or by filing in the Court of Appeals because of the August 29 printing deadline and need for the Council to reconvene if necessary.

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## **QUESTION PRESENTED**

The Superior Court determined that the ordering of two lines in the Council's 65-line analysis and use of "[a]llow," "all," and a "see also" cross reference violated A.R.S. § 19-124(C). Was that determination error, where the two lines neutrally described changes in the initiative to multiple sections of the Arizona Constitution and referred the reader to a later part of the analysis for more information?

## **STATEMENT OF FACTS**

The Council's analysis seeks to concisely, fairly, and impartially give voters information and context that matters to them. It initially provides background on current law. It then contains seven numbered descriptions of proposed changes. Numbered paragraph 1 contains a two-line sentence explaining that the amendment would allow for the use of voter rankings at all elections held in this state, as well as a "see also" cross-reference to a later part of the analysis, which addresses general elections. APP053.

Second, the analysis discusses changes related to the primary. Third, it discusses the possible mechanisms for how many candidates would advance from the primary to the general.

Fourth, it describes the changes to general election procedures. It explains that if two or more candidates advance, the candidate receiving the most votes wins, but if three or more advance, voter rankings "shall be used." It then explains the

Legislature can enact a law on voter rankings, but if it fails to act, the Secretary of State will act.

The analysis's fifth, sixth, and seventh numbered paragraphs describe the changes to prohibit use of public monies for political party elections, discrimination in voting and officeholding, and denying a ballot or restricting a person from selecting a candidate based on political party affiliation.

On July 8, 2024, the Council met to consider the analysis. At that meeting, the Committee's counsel acknowledged that the analysis's substance is "generally quite good" and limited his comments to the order of the analysis's paragraphs.<sup>1</sup> He said that paragraph 1's placement is "potentially confusing to voters" and requested moving it to appear after paragraph 5. The Council unanimously approved the draft without change.<sup>2</sup>

The Committee then filed a verified complaint for special action. The Committee and Defendants/Appellants cross-moved for summary judgment on whether the analysis violates § 19-124(C). APP028, 55. The Superior Court granted the Committee's motion only as to paragraph 1. It concluded that the paragraph selectively emphasizes I-14-2024's voter-ranking provisions and inaccurately suggests the initiative would mandate the use of voter rankings. APP018.

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<sup>1</sup> See Video at 3:14:44, <https://www.azleg.gov/videoplayer/?eventID=2024071002>.

<sup>2</sup> See Video, *supra* n.1, at 3:20:12-3:21:06.

## ARGUMENT

### I. Overview of the Statutory Standard

The Council must “prepare and file with the secretary of state an impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment” for inclusion in the publicity pamphlet. A.R.S. § 19-124(C). The analysis must “provid[e] a fair, neutral explanation of the proposal’s contents and the changes it would make if adopted.” *Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590 (1994). Accordingly, “[t]he language used in the ... analysis ‘must be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring.’” *Tobin*, 231 Ariz. at 194, ¶13 (citations omitted); *see also Healthy Ariz. Initiative v. Groscost*, 199 Ariz. 75, 76 ¶3 (2000) (“[T]he analysis must not mislead.”).

The legal sufficiency of the analysis is a question of law that the Court reviews *de novo*. *Howe*, 192 Ariz. at 383, ¶ 15. The standard of review is “substantial compliance” with § 19-124(C), and “the question is ‘whether reasonable minds could conclude that the Council met the requirements of the law, not whether [courts] believe the judicial system could itself devise a better analysis.’” *Tobin*, 231 Ariz. at 193 ¶11 (citation omitted). The Court’s “‘function is only to ensure that a challenged analysis is reasonably impartial and fulfills the statutory requirements.’” *Id.* at 197 ¶34 (citation omitted).

**II. The Order And Phrasing of Paragraph 1 of the Analysis Does Not Violate § 19-124(C)**

**A. There Is Inherently No Misleading Tendency In Discussing A Constitutional Amendment’s Provisions In Any Particular Order**

The Superior Court found a violation of § 19-124(C) based in part on the Committee’s claim that the analysis described one change proposed by the initiative before discussing other proposed changes. As a matter of law and logic, this cannot support a § 19-124(C) violation. Unlike choosing to vote for one of multiple candidates, a voter has no authority to pick and choose which of the changes proposed in a constitutional amendment to support. Instead, it is an all-or-nothing proposition. A single amendment “logically speaking, should stand or fall as a whole” and therefore must be “*sufficiently interrelated* so as to form a consistent and workable proposition.” *McLaughlin*, 225 Ariz. at 354 ¶8 (cleaned up).

Because of the interrelatedness requirement and the fact that the Council’s analysis accurately summarizes the initiative’s express provisions, *Howe* compels the conclusion that the Council complied with § 19-124(C). 192 Ariz. at 384 ¶22. In *Howe*, there was nothing “inaccurate” or “inherently misleading” in citing the names of Schedule I drugs even if “the drugs named unquestionably evoke serious concerns in the minds of most people.” *Id.* ¶18. Similarly, there can be nothing “inaccurate” or “inherently misleading” in discussing the interrelated provisions of a

constitutional initiative, even if the Committee would prefer they be discussed in a different order.

The Committee’s related argument (APP038) of “understat[ing] material provisions” is flawed because the caselaw focuses on mischaracterizing the *effect* of a change in some way, not the *order* in which changes are discussed. *See Greene*, 180 Ariz. at 591, 593. In *Greene*, the court found that a summary “understates” the law in the sense that it mischaracterized the law and “makes no reference at all to an important provision of the initiative.” *Id.* at 591. This is also consistent with the list of words *Greene* uses—“neither omits, exaggerates, nor understates material provisions of an initiative measure,” which all refer to the use of language that misleads. *Id.* at 593.

In any event, the Council’s analysis here devotes at least 19 lines to discussing changes to the primary election procedures and only 6 lines to discussing voter rankings. This structure can hardly be said to understate something that it devotes *over three times* as much space to discussing.

**B. Even If the Order of Discussion Within an Analysis Could Mislead, This Analysis Is Not Misleading**

The Committee makes two arguments that the order of the Council’s analysis is not impartial: “[v]oter rankings . . . do not go first as a logical matter,” and the analysis discusses “optional changes before required ones.” APP036.

There are logical reasons for addressing the changes related to voter rankings before the extended discussion of primary and general election procedures. As I-14-2024 itself makes abundantly clear, the voter ranking change is a material change in the law that applies to all types of elections. *See* Introduction, *supra*. It also follows logically and naturally from the preceding five lines, which describe how primary and general elections operate under current law, particularly the statement “in the general election, . . . the candidate receiving the highest number of legal votes is declared elected.” APP053. That background language is an almost verbatim recitation of Article 7, § 7. And the initiative’s change related to use of “voter rankings” amends that exact section. Having a brief statement, with a cross-reference flagging further detailed discussion below, flows naturally from the background and “can reasonably be regarded as an attempt to provide necessary and appropriate information to the voting public.” *Howe*, 192 Ariz. at 384 ¶22. There is nothing misleading or biased about this drafting choice.

The Superior Court correctly rejected the Committee’s argument that “required changes” must be described before “optional changes.” APP024. This rule is simply unworkable for a complex and multi-faceted initiative. Paragraph 2(c) of the analysis discusses an optional change about whether a political party may endorse, and it comes before 2(d), which is a mandatory change that there are no write-in candidates for the general election. Paragraph 3(b) also describes optional

rather than mandatory changes, by discussing the option that the Legislature may enact a law. Paragraph 4(c) also describes an optional change by describing what happens if more than two candidates advance to the general. It would be unwieldy (and untethered from the impartiality requirement of A.R.S. § 19-124(C)) to pull out all these so-called “optional” changes for later discussion.

The court also properly rejected the Committee’s argument faulting the analysis for not discussing the proposed changes in the exact order of codification in the Constitution. With one logical and defensible exception, the Council analysis does follow the order of the measure. It was reasonable for the Council to move the discussion about the changes to Article 7, Section 2 to the end of the analysis. Those changes are to provide that the right to hold office and vote shall not be denied or diminished because of political party affiliation or non-affiliation, and a person shall not be denied a ballot or restricted from selecting a candidate based on the person’s political party affiliation or non-affiliation. Given the abstractness of those changes, it is logical to discuss them last—after a voter has read and understands the concrete proposed changes. In fact, the Committee has not and does not take issue with the decision to move that discussion to the end. Given that unobjectionable decision, the next change in order of codification was one of the change relating to “voter rankings” (Article 7, Section 7), and the analysis begins with that change. *See* APP053.

**C. Paragraph 1’s Statement that the Amendment Would “Allow” Voter Rankings in “All” Elections and Its Use of a “See Also” Cross-Reference Are Reasonable**

The Superior Court also found three aspects of numbered paragraph 1 contributed to its conclusion that the sentence was misleading. First, it uses the word “[a]llow” voter rankings when the Committee contends the law is unclear if the constitution already allows voter rankings. Second, it uses the word “all” elections, but voter rankings would not be required if only two candidates advance. Third, it contains a “see also” reference to paragraph 4 of the analysis. These criticisms, however, do meet the high burden of finding that no reasonable person could conclude the analysis was impartial. *See Tobin*, 231 Ariz. at 193 ¶11.

Taking the criticisms in reverse order, the “see also” cross reference helps establish impartiality. This is because it expressly communicates to the voter that paragraph 1 may be further explained by the additional information in paragraph 4. It cannot be misleading to point a voter to more information, particularly where the underlying initiative is complex and contains multiple sections addressing the same subject. The Superior Court’s conclusion that the “see also” cite was designed to nudge the voter to skip over all of the analysis (rather than simply note that more discussion would follow) is speculation and does not meet the high burden for invalidating an analysis.

Similarly, paragraph 1’s use of “all” is reasonable. The court’s criticism was focused on the fact that if only two candidates advance to the general, then there will not be ranked choice voting. But this nuance is directly explained to voters in paragraph 4 of the analysis.

Finally, the use of “allow,” as opposed to “does not prohibit” or some other phrasing, is also reasonable. The plain language of the initiative amends three different sections of Article 7 to add “voter rankings.” And “[a]llow” is a neutral term meaning permit.<sup>3</sup> The Council’s analysis therefore does not use terms like “fail” that would “suggest[] the initiative is flawed” or any other “provocative phrasing.” *Tobin*, 231 Ariz. at 197 ¶¶32-33 (cleaned up). Given the neutral language of “allow,” there is simply no reason for courts to wade into the question of whether Arizona law does or does not permit the use of voter rankings. The initiative proposes changes that would expressly allow—and in some cases, require—voter rankings, and the analysis accurately states this in plain terms.

Ultimately, the legal question this Court must answer is ““whether reasonable minds could conclude that the Council met the requirements of the law, not whether [courts] believe the judicial system could itself devise a better analysis.”” *Tobin*, 231 Ariz. at 193 ¶11 (quoting *Howe*, 192 Ariz. 383 ¶17). In other words, if it was reasonable for a Council analysis to describe something as a change in the law, and

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<sup>3</sup> See <https://www.merriam-webster.com/dictionary/allow>.

it does so in neutral language, then the Court should not go any further. Reviewing only for reasonableness is also consistent with *Greene*. *Greene*'s discussion was based on concrete misstatements of the law, which "crosse[d] well past the blurry line between impartiality and advocacy." 180 Ariz. at 592. The Council's impartial analysis here satisfies A.R.S. § 19-124(C).

### CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's judgment.

RESPECTFULLY SUBMITTED this 16th day of August, 2024.

FUSION LAW PLLC,

By: /s/ Brunn (Beau) W. Roysden III  
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Martinez, and Nguyen in their Official  
Capacities*

**ARIZONA SUPREME COURT**

MAKE ELECTIONS FAIR,  
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Plaintiff/Appellee,

v.

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**DEFENDANTS/APPELLANTS' APPENDIX**

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

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CLERK OF THE COURT

HONORABLE MELISSA IYER JULIAN

A. Delgado

Deputy

MAKE ELECTIONS FAIR

MARY R O'GRADY

v.

BEN TOMA, et al.

BRUNN W ROYSDEN III

RHONDA L BARNES  
ANDREW W GOULD  
KARA MARIE KARLSON  
ANDREW GEORGE PAPPAS  
JUDGE JULIAN  
DOCKET CV TX

**UNDER ADVISEMENT RULING**

**Re: Verified Petition for Special Action  
(Challenge to Publicity Pamphlet Analysis)**

The issue presented in this case is whether the Legislative Council's analysis of Initiative No. I-14-2024 (the "Make Elections Fair Arizona Act" or "Initiative") complies with A.R.S. § 19-124(C). Section 19-124(C) requires the Council to "prepare and file with the secretary of state an impartial analysis" that describes the Initiative and is "written in clear and concise terms." To satisfy this duty, the Council's analysis must be "completely free from any misleading tendency." *Tobin v. Rea*, 231 Ariz. 189, 195, ¶ 18 (2013) (quotations omitted).

Here, the Council's analysis selectively emphasizes the Initiative's voter ranking provisions. In so doing, the analysis inaccurately suggests that its enactment would mandate the use of voter ranking to determine the winning candidate in all future elections. This is misleading to voters and, therefore, violates section 19-124(C). As a result, the analysis must be revised.

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**PROCEDURAL HISTORY**

Plaintiff, Make Elections Fair, a political action committee (the “Committee”) filed its Verified Complaint for Special Action together with an Application for Order to Show Cause on July 17, 2024. This Court held a return hearing on the show cause application on July 19, 2024, at which time the parties agreed to proceed on this matter through expedited briefing on cross-motions for summary judgment in lieu of an evidentiary hearing. The parties further agreed that the exhibits attached to the Verified Complaint for Special Action are the only relevant documents needed to adjudicate this matter on the merits so that neither party would be filing a separate fact statement.

The parties’ motion and cross-motion were fully briefed as of August 8, 2024. This Court also considered the Attorney General’s Amicus Curiae Brief in Support of Plaintiff, filed July 30, 2024. This Court heard oral argument on the pending cross-motions on August 9, 2024.

After considering the arguments of the parties and the entire record in this matter, this Court finds, and orders as follows on the merits of the Application and Verified Complaint.

**MATERIAL FACTS**

A. The Initiative

The Committee is an Arizona political action committee that sponsored the Initiative. The Initiative would amend several sections of the Arizona Constitution for the purpose of eliminating “partisan politics” from primary elections and to “provide[] additional flexibility regarding general elections.” (Compl., Ex. 1 at § 2.) First, the Initiative would amend Article VII, section 2 of the Arizona Constitution to provide that Arizona citizens’ right to vote may not be denied on account of “political party affiliation or nonaffiliation,” and to guarantee that no person be “denied a ballot for public office nor be restricted from selecting any candidates for public office based on the person’s political party affiliation or nonaffiliation.” The Initiative next proposes to amend Article VII, section 7 to provide that the section “does not prohibit the use of voter rankings to determine which person or persons received the highest number of legal votes.”

The Initiative would also amend Article VII, section 10 of the Arizona Constitution, requiring changes to the State’s direct primary election law. Among other things, those changes would require that (1) all qualified electors be able to vote in the primary election regardless of the qualified elector’s, or any candidate’s, political party affiliation; (2) that all candidates who qualify for election to an office be placed on the same ballot for the primary election regardless of the candidate’s political party affiliation; (3) that all candidates for an office, regardless of

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political party affiliation, have the same signature requirements to qualify for the primary election ballot; and (4) that all qualified electors be able to sign a candidate nomination petition without regard to the elector's or the candidate's political party affiliation.

The same section of the Initiative—section 5—would prescribe a range of the number of candidates who may advance from the primary to the general election, subject to determination or amendment by the Legislature, the Secretary of State, or the people through initiative or referendum. The next section of the Initiative—section 6—would amend Article VII, section 11 of the Constitution, regarding general elections. The Initiative provides that if the Legislature, the Secretary of State, or the people decide that “only two candidates may advance to the general election for an office to which one candidate will be elected, the candidate who receives the majority of votes cast for that office at the general election is elected.” On the other hand, if the Legislature, the Secretary of State, or the people decide that “three or more candidates may advance from the primary election to the general election for an office to which one candidate will be elected,” then “voter rankings shall be used to determine which candidate is elected for that office at the general election.” The section provides minimum requirements for the voter-ranking process, and authorizes the use of voter rankings “in other elections as provided by law.”

The final substantive section of the Initiative—section 7—prohibits the use of public monies to “administer political party elections,” but makes an exception for a Presidential Preference Election that is open to persons registered as no party preference or independent or with a political party that is not qualified for representation.

B. Duties of Legislative Council

The Council is a statutory agency in the legislative branch of Arizona state government, with professional staff and duties related to “bill drafting, research and other services to the legislature deemed necessary or advisable by the council to improve the quality of legislation.” *See* A.R.S. § 41-1301 to -1307. Its members are Senators and Representatives who are selected to represent all geographic regions of the state and reflect a bipartisan composition. *See* A.R.S. § 41-1301. The Council has multiple duties specific to initiatives, referenda, and proposed constitutional amendments, including optional text review of an initiative or referendum, A.R.S. § 19-111.01, and “prepar[ing] and fil[ing] with the secretary of state an impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment.” A.R.S. § 19-124(C).

After approval and filing with the Secretary of State, the analysis is then printed in the official publicity pamphlet mailed to each voter under the heading “Analysis by Legislative Council.” *See* A.R.S. § 19-123(A)(4). The full text of the proposed amendment, the proponent's “purpose and intent” statement, any “for” and “against” arguments, a descriptive title, and “yes”

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and “no” language are also printed in the publicity pamphlet, so voters have multiple different sources of information from which to make an informed decision. *See* A.R.S. § 19-123(A)(4).

C. Approval of the Initiative’s Draft Analysis

On July 3, 2024, the Council’s staff released draft analyses of 14 referendum and initiative measures, including the Initiative. The Initiative’s analysis was distributed to all ninety members of the Legislature and the attorneys for the Make Elections Fair committee, and also posted on the Council’s website. The Council met on July 8, 2024, to consider the draft analysis.

The Committee’s attorney spoke about the draft analysis at the Council’s July 8<sup>th</sup> meeting. He stated that the “substance” of the analysis was “generally quite good” and limited his comments to the “order” of the analysis. He said that section 1’s placement is “potentially confusing to voters” and requested moving section 1 to after section 5.<sup>1</sup>

The Council ultimately approved the draft analysis without adopting the Committee’s requested change. This lawsuit followed.

Notably, the Council’s members are now divided on whether the analysis should be revised. In response to the Committee’s pending motion for summary judgment, several Council members filed a brief supporting the Committee’s request to revise the analysis. Several other Council members oppose the Committee’s requested changes, and those members filed the pending response and cross-motion. The Council members supporting and opposing the Committee’s requested revision appear to be divided along party lines.

D. Challenged Portions of the Council’s Analysis

The Council’s legislative analysis begins with a description of the existing law governing primary and general elections and then discusses the provisions of the Initiative. The Committee contends that the following portions of the analysis are both misleading and biased:

The Arizona Constitution currently requires the Legislature to enact a direct primary election law for the nomination of candidates for all elective state, county, and city offices, including federal congressional offices. The candidates from each political party who advance from the primary election then face each

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<sup>1</sup> *See* Meeting of the Legislative Council (Jul. 8, 2024) available at <https://www.azleg.gov/videoplayer/?eventID=2024071002> (last visited Aug. 11, 2024).

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other in the general election, where the candidate receiving the highest number of legal votes is declared elected.

Proposition \_\_\_\_ would amend the Arizona Constitution to:

1. Allow for the use of voter rankings at all elections held in this state to determine which candidate received the highest number of legal votes (see also paragraph 4 below).

....

4. Revise the general election procedures as follows: . . . .

....

(c) The Legislature may enact a law to determine the process to be used for voter rankings. If the Legislature does not enact a law on voter rankings, the Secretary of State shall determine the process to be used for voter rankings. At a minimum, the voter rankings process must allow a voter to rank all candidates for an office in order of the voter's preference.

(Compl. at Ex. 3.)

The Committee alleges these portions of the ballot analysis violate section 19-124(C) by: (1) improperly amplifying changes the Initiative allows while understating the Initiative's required changes and (2) erroneously implying that the Initiative will automatically require the use of voter rankings. (Committee Motion at 2.) The Committee seeks an order enjoining the Arizona Secretary of State from including the Legislative Council's analysis in the Publicity Pamphlet for the 2024 election and also seeks an order compelling the Legislative Council to adopt an analysis that complies with section 19-124(C). The Council disputes these claims, asserting that its analysis is neutral, accurate, and "substantially complies" with the statutory requirements.

**LEGAL ANALYSIS**

A. Standard for Statutory Compliance and Judicial Review

A.R.S. § 19-124(C) requires the Council to "prepare and file with the secretary of state an impartial analysis" that describes the Initiative measure "in clear and concise terms." "[T]he purpose of the required analysis is to assist voters in rationally assessing an initiative proposal by providing a fair, neutral explanation of the proposal's contents and the changes it would make if adopted." *Tobin*, 231 Ariz. at 193, ¶ 10 (quoting *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590 (1994)). Arizonans have a "right to expect a completely neutral

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summary, without advocacy or argument.” *Citizens for Growth Mgmt. v. Groscost* (“CGM”), 199 Ariz. 71, 73 ¶ 11 (2000).

To achieve that purpose, “the legislative council [must] eschew advocacy and . . . adopt, instead, an evenhanded assessment that neither omits, exaggerates, nor understates material provisions of an initiative measure.” *Tobin*, 231 Ariz. at 194, ¶ 12 (quoting *Greene*, 180 Ariz. at 593). The analysis also “must be free from any misleading tendency, whether of amplification” or otherwise. *Id.* (quoting *Greene*, 180 Ariz. at 590). Thus, an analysis that “selectively emphasize[s]” one feature of an initiative, even if accurate, may violate section 19-124(C) by “impermissibly advocat[ing] against the measure.” *Id.* at 197, ¶ 33.

Nevertheless, it is not “the prerogative” of the judiciary “to act in place of the agency to achieve that result.” *Greene*, 180 Ariz. at 593. “By their very nature, most disputes over ballot proposals are contentious. Thus, proponents and opponents are often dissatisfied with the Council’s analyses. [Courts] cannot settle each of these disputes. . . .” *Ariz. Leg. Council v. Howe*, 192 Ariz. 378, 383, ¶ 17 (1998) (citation omitted). When reviewing challenges to the Council’s analyses, this Court “do[es] so reluctantly and with reservation.” *Tobin*, 231 Ariz. at 197, ¶ 34. The standard of judicial review is “substantial compliance” and “the question is ‘whether reasonable minds could conclude that the Council met the requirements of the law, not whether [courts] believe the judicial system could itself devise a better analysis.’” *Tobin*, 231 Ariz. at 193 ¶ 11 (quoting *Howe*, 192 Ariz. at 383, ¶ 17).

B. The Selective Emphasis of Voter Ranking in Section 1 is Misleading.

First, the Committee argues that the analysis reflects the Council’s effort to dissuade voters from supporting the initiative by selectively emphasizing the Initiative’s voter ranking provisions in a manner that misleads voters into believing that “the Initiative on its own will automatically require the use of voter rankings.” (Committee Motion at 8.) In response, the Council urges that the sequence or structure of its analysis does not violate the statutory requirements unless the language used in its analysis is also “provocatively phrased.” (Rsp. at 7.) Because the analysis here used neutral language, the Council urges that it complied with its statutory obligations. The Council also asserts that it had “logical reasons” for discussing voter rankings “before the extended discussion of primary election procedures,” making its chosen sequence a matter this Court must defer to under the substantial compliance standard of judicial review. (Rsp. at 11.)

The Court agrees with the Council that the analysis here does not involve the use of “provocative phrasing” when it explains that the Initiative’s enactment would “[a]llow for the use of voter rankings at all elections held in this state to determine which candidate received the highest number of legal votes.” *See Tobin*, 231 Ariz. at 197, ¶ 33. Nor does the analysis’s use of

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the word “allow” instead of the phrase “does not prohibit” render the description inaccurate or biased. When considered in isolation from the remainder of the analysis, the phrasing used in section 1 of the analysis is not inaccurate or misleading.

Similarly, the Court is unpersuaded by the Committee’s argument that section 19-124(C) requires the Council’s analysis to describe the Initiative’s “required” provisions before it discusses things the Initiative merely “permits.” Evaluating statutory compliance does not permit this Court to micromanage the exact sequence or the specific words the Council chooses to use so long as its analysis is neutral, accurate, and easily understood.

But, as the Supreme Court recognized in *Tobin*, “even accurate statements can be misleading, argumentative, ‘tinged with partisan coloring,’ or otherwise lack the impartiality § 19-124[(C)] requires.” *Tobin*, 231 Ariz. at 196, ¶ 30 (citations omitted). This is particularly true where the analysis “selectively emphasizes” a particular initiative provision in a manner that would mislead voters about the impact it would have on existing laws. *See, e.g., Greene*, 180 Ariz. at 591-92 (misleading suggestion that existing law did not allow for control over civil lawsuits); *CGM*, 199 Ariz. at 72-73, ¶¶ 6-7 (“neutral description of current law” was improper as “rhetorical strategy” designed to suggest that Initiative was unnecessary); *Sotomayor v. Burns*, 199 Ariz. 81, 82, ¶ 4 (2000) (description of existing law as requiring “bilingual” instruction was misleading).

Much like the analyses at issue in *Greene*, *Sotomayor*, and *CGM*, the Council’s analysis is misleading. It first discusses that Arizona law currently provides that the candidate who receives the highest number of votes is declared the winner of a general election. The analysis then selectively emphasizes that the Initiative would “amend” the constitution to provide for the use of voter ranking to declare election winners. In so doing, the analysis misleadingly suggests that, if the Initiative is enacted, the candidate who receives the most votes would no longer be declared the victor in “all” Arizona elections. As the Committee points out, this is inaccurate.

Contrary to the analysis’s implication, the Initiative does not require the use of voter ranking in declaring an election winner in all instances. Instead, it allows for the use of voter ranking, but *only* if the Legislature, the Secretary of State, or the people decide to permit more than two candidates to advance from the primary election to the general election. If that never occurs, then the Initiative would effect no change in how the winner of an election is determined. The Council’s emphasis on voter ranking without this “significant contextual information,” renders the analysis misleading. *Tobin*, 231 Ariz. at 195, ¶ 19.

The cross-reference to paragraph 4 where the voter ranking provisions are discussed in further detail is another example of the way in which the analysis selectively emphasizes the voter ranking issue and compounds confusion about the Initiative’s operative provisions. By

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discussing voter ranking first and then directing readers immediately to paragraph 4, the reader is encouraged to skip over several key provisions in the Initiative that explain the circumstances under which more candidates may advance from the primary election and how voter ranking would be utilized in those limited circumstances. The Court finds that this is a “rhetorical strategy” devised to dissuade voters from supporting the Initiative by confusing when and how voter ranking would be used under the Initiative and implying that its use would result in the unfair election of candidates who did not receive the highest number of the votes. Such a strategy is “tinged with partisan coloring” and violates the requirement of neutrality.

In arguing that the Council’s selective emphasis on voter rankings does not violate section 19-124(C), the Council relies heavily on the Arizona Supreme Court’s opinion in *Ariz. Leg. Council v. Howe*, 192 Ariz. 378 (1998). In *Howe*, the Supreme Court upheld the Council’s analysis even though it selectively referenced “heroin, LSD, marijuana and certain analogs of PCP” as examples of the Schedule I drugs doctors could prescribe under the initiative at issue “to relieve the pain and suffering of a seriously ill or terminally ill patient.” *Id.* at 381-82, ¶ 7. In so doing, the Court emphasized that section 19-124 discourages the use of “technical terms” to ensure the analysis can be understood by voters. *Id.* at 384, ¶ 19. Using technical jargon such as “Schedule I substances” or referring to the drugs by their “scientifically complex” chemical compounds “might make the entire analysis incomprehensible” and undermine the primary purpose behind the Council’s analysis. *Id.* at 384, ¶¶ 18-19. Because the Council’s analysis reflected a “good faith effort to choose drugs to list in the analysis that the average voter probably can recognize,” its selective emphasis was not designed to mislead or persuade voters, but was for the proper purpose of helping them understand the initiative more clearly. *Id.*

The selective emphasis of voter ranking is not analogous to the issue presented in *Howe*. Here, the initial reference to voter ranking does nothing to assist the average voter in understanding its import because the specific explanation of when voter ranking could or would be utilized is not discussed until much later in the analysis. If anything, the summary reference to voter ranking being “allowed” to determine election winners makes the analysis *more* confusing as it implies voter ranking would supplant the current system where the person with the majority of votes wins the election. Unlike the analysis at issue in *Howe*, the selective emphasis of voter ranking does not reflect a “good faith effort” to make the Initiative easier to understand.

The Council’s proffered “logical” reason for emphasizing voter ranking at the beginning of its analysis is equally unavailing. The Council asserts that it decided to reference voter ranking first because it is a “material change in the law that applies to all types of elections.” (Rsp. at 11.) But the Arizona Constitution at Article 7, section 7 makes no reference to voter ranking at all. Accordingly, the fact that the Initiative amends that provision to provide that it does not “prohibit” voter ranking is not necessarily a “material change.”

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Even setting aside the issue of whether voter ranking is a material change to the constitution, the voter ranking provision is not the only provision of this Initiative that “applies to all elections.” The Initiative’s nondiscrimination provisions also apply to all elections, but were nevertheless discussed separately at the conclusion of the analysis.

Despite this internal inconsistency, the Council insists that these other provisions were placed last because they are “abstract.” But a provision that precludes voter discrimination on the basis of a person’s political party affiliation or non-affiliation is no more or less “abstract” than a provision that “does not prohibit” the use of voter ranking in declaring election victories. The Council’s post hoc justifications are unpersuasive in demonstrating a good faith or rational basis for the analysis’s selective emphasis of voter ranking at the beginning of the analysis.

The Court finds that the analysis’s emphasis on voter ranking at page 1, lines 7-8 of the analysis reflects the use of an improper rhetorical strategy that is also misleading to voters when considered together with the introductory paragraph and the cross-reference to section 4. In this regard the analysis violates A.R.S. § 19-124(C).

C. Section 4(c) is not Misleading.

The Committee’s motion also asserts that section 4(c) of the analysis is misleading because “it falsely suggests voter rankings will automatically be used if the Initiative passes.” (Committee Motion at 12.) This Court disagrees. Unlike section 1, section 4(c) follows immediately after subsections 4(a) and (b), which explain neutrally and clearly that voter ranking would be used only if “three or more candidates advance to the general election.” Section 4(c) complies with A.R.S. § 19-124(C).

**ORDERS**

**IT IS THEREFORE ORDERED** granting the Committee’s Motion for Summary Judgment, filed July 23, 2024.

**IT IS FURTHER ORDERED** denying the Cross Motion for Summary Judgment, filed by Defendants Toma, Petersen, Bolick, Borrelli, Kerr, Grantham, Martinez, and Nguyen on August 1, 2024.

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**IT IS FURTHER ORDERED** entering judgment on the Verified Complaint, filed July 17, 2024, as follows:

- (1) The Secretary of State is hereby enjoined from printing the legislative analysis of Initiative No. I-14-2024 in the publicity pamphlet in the form approved by the Legislative Council and attached to the Verified Complaint as Exhibit 3.
- (2) On or before August 29, 2024, the Council is directed to revise its analysis of Initiative No. I-14-2024 to comply with A.R.S. § 19-124(C) to correct the portion found by this order to be misleading to Arizona voters.

The Court expressly determines that, with respect to its ruling herein granting summary judgment and entering judgment on the Verified Complaint for Special Action, there is no just reason for delay. Therefore, the court directs the entry of judgment, making this is a final, appealable order. Ariz. R. Civ. P. 54(b).

**IT IS FURTHER ORDERED** that, within **20 days** of the filing date of this minute entry, counsel for the Committee shall submit a verified statement of taxable costs along with a proposed form of judgment awarding costs. The proposed judgment shall leave a blank space for the amount of costs awarded and shall include Rule 54(c) language. After considering any objections to the cost statement and form of judgment, this Court will enter final judgment in this matter.



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Honorable Melissa Iyer Julian  
Maricopa County Superior Court Judge

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17 Attorneys for Plaintiff

18  
19 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
20  
21 IN AND FOR THE COUNTY OF MARICOPA

22 MAKE ELECTIONS FAIR,  
23 an Arizona political action committee,

24 Plaintiff,

25 v.

26 Rep. BEN TOMA, in his official capacity as  
27 Speaker of the Arizona House of  
28 Representatives; Sen. WARREN  
PETERSEN, in his official capacity as  
President of the Arizona Senate; Sen. MITZI  
EPSTEIN, in her official capacity as an  
Arizona State Senator; Sen. SHAWNNA  
BOLICK, in her official capacity as an  
Arizona State Senator; Sen. SONNY  
BORRELLI, in his official capacity as an  
Arizona State Senator; Sen. BRIAN  
FERNANDEZ, in his official capacity as an  
Arizona State Senator; Sen. SINE KERR, in  
her official capacity as an Arizona State  
Senator; Sen. JUAN MENDEZ, in his  
official capacity as an Arizona State  
Senator; Rep. LUPE CONTRERAS, in his  
official capacity as a member of the Arizona  
House of Representatives; Rep. TRAVIS  
GRANTHAM, in his official capacity as a

No. CV2024-018789

**MOTION FOR  
SUMMARY JUDGMENT**

(Assigned to the  
Honorable Melissa Iyer Julian)

(Oral Argument:  
August 9, 2024, 1:30 p.m.)

1 member of the Arizona House of  
2 Representatives; Rep. NANCY  
3 GUTIERREZ, in her official capacity as a  
4 member of the Arizona House of  
5 Representatives; Rep. TERESA  
6 MARTINEZ, in her official capacity as a  
7 member of the Arizona House of  
8 Representatives; Rep. QUANG NGUYEN,  
9 in his official capacity as a member of the  
10 Arizona House of Representatives;  
11 Rep. STEPHANIE STAHL HAMILTON, in  
12 her official capacity as a member of the  
13 Arizona House of Representatives; and  
14 ADRIAN FONTES, in his official capacity  
15 as Secretary of State of Arizona,

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Defendants.

Legislative Council adopted a ballot analysis for the Make Elections Fair Arizona Act, I-14-2024, that improperly amplifies changes the statewide initiative *allows* and understates changes the initiative *requires*, and erroneously suggests that the initiative will automatically require the use of voter rankings. As a result, the ballot analysis is confusing and misleading, and violates A.R.S. § 19-124(C). The Court should therefore enjoin the Secretary of State from including the Legislative Council analysis in the Publicity Pamphlet for the 2024 election and compel Legislative Council to adopt an analysis that complies with the council’s statutory obligation.

As the text of the Make Elections Fair Arizona Act (the “Initiative”) makes plain, the Initiative is “intended to ensure that all voters are treated equally and all candidates for an office compete according to the same rules; that the People of Arizona freely choose their elected officials, without the controlling influence of partisan politics; and that elected officials are accountable to the People rather than political parties.” [Ex. 1 § 2.]<sup>1</sup> To those ends, the Initiative would amend the Arizona Constitution to “create[] a primary system in which the people may vote for the candidate of their choice, regardless

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<sup>1</sup> For the Court’s convenience, the Committee reattaches to this Motion Exhibits 1–3 to the Verified Complaint. Citations of Exhibit 1 refer to the text of the initiative by section number.

1 of the political party of the voter or the candidate.” [Id.] The Initiative would also  
2 “provide[] additional flexibility regarding general elections.” [Id.] Although every piece  
3 of the initiative measure is integral to the whole, the Initiative’s primary focus is on  
4 nonpartisan primary elections and on treating voters and candidates equally.

5 The ballot analysis that Legislative Council adopted misleadingly suggests  
6 otherwise. After providing background information about the existing law governing  
7 primary and then general elections, the analysis says that “Proposition \_\_\_ would amend  
8 the Arizona Constitution to: 1. Allow for the use of voter rankings at all elections held in  
9 this state to determine which candidate received the highest number of legal votes (see  
10 also paragraph 4 below).” [Ex. 3 at 1.] After that, the analysis describes how the Initiative  
11 would “2. Revise the primary election procedures.” [Id.] The analysis thus elevates  
12 changes the Initiative would *allow* over changes the Initiative would *require*.

13 That Legislative Council chose to amplify the voter-rankings aspect of the  
14 Initiative is clear. That piece of the Initiative does not come first in the Initiative’s text;  
15 the provisions that do forbid denying any person a ballot, the right to hold office, or the  
16 right to vote on account of political party affiliation or nonaffiliation. [See Ex. 1 § 3.] Yet  
17 Legislative Council’s analysis does not lead with those provisions.

18 The voter-rankings piece of the initiative also does not go first in logical order.  
19 The analysis’ background-law summary begins with primary elections and general  
20 elections. That makes sense, because that is how elections work: primaries precede the  
21 general election. But that is not how the body of the Legislative Council’s analysis is  
22 structured. Instead, the analysis addresses voter rankings first, cross-referencing the  
23 analysis’ summary of general election-related changes the Initiative authorizes. [Ex. 3 at  
24 1–2.] The analysis then turns to the primary-related changes, and then back to the general.

25 Perhaps worse still, once the analysis gets to general-election changes, it suggests  
26 the Initiative would automatically require the use of voter rankings. [Id. at 2 ¶ 4(c).] It  
27 would not. The use of voter rankings would be required only if the Legislature, the  
28 Secretary, or the people themselves decided that more than two candidates should

1 advance from the primary to the general election for an office to which one candidate is  
2 to be elected. [Ex. 1 § 6.]

3 A.R.S. § 19-124(C) requires the ballot analysis to be neutral; this ballot analysis  
4 subtly but meaningfully places a thumb on the scale. The Court should not sanction that  
5 effort to mislead the voters.

6 **I. Background**

7 Plaintiff Make Elections Fair (the “Committee”) is an Arizona political action  
8 committee registered with the Secretary of State, and is the sponsor and proponent of the  
9 Initiative. [Verified Compl. ¶¶ 1–2.] The Committee filed its Application for Serial  
10 Number with the Secretary on November 8, 2023. [Ex. 1.]

11 **A. The Initiative.**

12 The Initiative would amend the Arizona Constitution in several interrelated ways.  
13 The first substantive section of the Initiative would amend Article VII, section 2 of the  
14 Constitution to provide that the rights of citizens to vote and hold office shall not be  
15 denied or abridged on account of “political party affiliation or nonaffiliation,” and to  
16 guarantee that no person be “denied a ballot for public office nor be restricted from  
17 selecting any candidates for public office based on the person’s political party affiliation  
18 or nonaffiliation.” [Ex. 1 § 3.]

19 The next section of the Initiative would amend Article VII, section 7 of the  
20 Constitution to provide that the section “does not prohibit the use of voter rankings to  
21 determine which person or persons received the highest number of legal votes.” [*Id.* § 4.]

22 The Initiative would then amend Article VII, section 10 of the Constitution,  
23 requiring changes to the State’s direct primary election law. [*Id.* § 5.] Among other things,  
24 those changes would require that all qualified electors who are otherwise eligible to vote  
25 for an office be able to vote in the primary election regardless of the qualified elector’s,  
26 or any candidate’s, political party affiliation or nonaffiliation; that all candidates who  
27 qualify for election to an office be placed on the same ballot for the primary election  
28 regardless of the candidate’s political party affiliation or nonaffiliation; that all candidates

1 for an office, regardless of political party affiliation or nonaffiliation, have the same  
2 signature requirements to qualify for the primary election ballot for the office; and that  
3 an otherwise qualified elector be able to sign a candidate nomination petition without  
4 regard to the elector’s or candidate’s political party affiliation or nonaffiliation. [*Id.*]

5 The same section of the Initiative—section 5—would prescribe a range of the  
6 number of candidates who may advance from the primary to the general election, subject  
7 to determination or amendment by the Legislature, the Secretary, or the people through  
8 initiative or referendum. [*Id.*]

9 The next section of the Initiative—section 6—would amend Article VII, section  
10 11 of the Constitution, regarding general elections. The Initiative provides that if the  
11 Legislature, the Secretary, or the people decide that “only two candidates may advance  
12 to the general election for an office to which one candidate will be elected, the candidate  
13 who receives the majority of votes cast for that office at the general election is elected.”  
14 [*Id.* § 6.] On the other hand, if the Legislature, the Secretary, or the people decide that  
15 “three or more candidates may advance from the primary election to the general election  
16 for an office to which one candidate will be elected,” then “voter rankings shall be used  
17 to determine which candidate is elected for that office at the general election.” [*Id.*] The  
18 section provides minimum requirements for the voter-ranking process, and authorizes the  
19 use of voter rankings “in other elections as provided by law.” [*Id.*] Other jurisdictions  
20 with open primaries have used voter rankings in general elections to ensure that  
21 successful candidates have a broad base of voter support when more than two candidates  
22 compete against each other for an office. [Verified Compl. ¶ 13.]

23 The final substantive section of the Initiative—section 7—prohibits the use of  
24 public monies to “administer political party elections,” but makes an exception for a  
25 Presidential Preference Election that is open to persons registered as no party preference  
26 or independent or with a political party that is not qualified for representation. [Ex. 1 § 7.]

27 On July 3, 2024, the Committee submitted 584,124 Initiative petition signatures  
28 to the Secretary—far in excess of the 383,923 valid signatures needed to qualify for the

1 November 2024 ballot. [Verified Compl. ¶ 16.] The Secretary’s processing of the petition  
2 signatures is ongoing. [*Id.* ¶ 17.]

3 **B. The ballot analysis.**

4 Also on July 3, 2024, Legislative Council staff released draft analyses of 14  
5 referendum and initiative measures, including the Initiative. [*Id.* ¶ 21 & Ex. 2.]  
6 Legislative Council met on July 8 to consider the analysis and adopted the draft analysis  
7 as the final analysis. [Verified Compl. ¶ 25.]

8 The adopted analysis starts with background information and begins with primary  
9 elections: “The Arizona Constitution currently requires the Legislature to enact a direct  
10 primary election law for the nomination of candidates for all elective state, county and  
11 city offices, including federal congressional offices. The candidates from each political  
12 party who advance from the primary election then face each other in the general election,  
13 where the candidate receiving the highest number of legal votes is declared elected.”  
14 [Ex. 3 at 1.]

15 But the body of the analysis does not proceed in that order, or in the order in which  
16 the Initiative itself proceeds. Instead, numbered **paragraph 1** of the analysis summarizes  
17 the changes the Initiative would authorize (but would not itself require) regarding voter  
18 rankings [*id.* ¶ 1]—the substantive sections that come second and fourth in the Initiative’s  
19 text [Ex. 1 §§ 4, 6].

20 **Paragraphs 2 and 3** of the analysis summarizes the Initiative’s primary focus—  
21 the changes the Initiative requires regarding primary elections. [Ex. 3 at 1–2 ¶¶ 2–3.]

22 **Paragraph 4** (which is cross-referenced in paragraph 1) summarizes the  
23 Initiative’s changes to general election procedures. [*Id.* at 2 ¶ 4.] Subparagraph 4(c) says  
24 “[t]he Legislature may enact a law to determine the process to be used for voter rankings,”  
25 and “[i]f the Legislature does not enact a law on voter rankings, the Secretary of State  
26 shall determine the process to be used for voter rankings” [*id.* ¶ 4(c)]—suggesting that  
27 one way or another, a voter-rankings process *will* be determined and used.

28 **Paragraph 5** then describes the prohibition on using public monies for political

1 party elections. [*Id.* at 2 ¶ 5.]

2 Last, **paragraphs 6 and 7** of the analysis describe the first substantive section of  
3 the Initiative—the nondiscrimination provisions guaranteeing that no citizen will be  
4 denied the right to vote or hold office based on political party affiliation or nonaffiliation,  
5 and that no person will be denied a ballot or be restricted from choosing a candidate based  
6 on the person’s political party affiliation or nonaffiliation. [*Compare* Ex. 3 at 2 ¶¶ 6–7,  
7 *with* Ex. 1 § 3.]

8 **C. This lawsuit.**

9 On July 17, 2017, the Committee filed its Verified Complaint, seeking (1) a  
10 declaration that the ballot analysis Legislative Council adopted violates A.R.S. § 19-  
11 124(C), (2) an injunction prohibiting the Secretary from including the analysis in the  
12 Publicity Pamphlet for the 2024 election, and (3) a writ of mandamus compelling the  
13 Legislative Council to adopt an analysis that complies with the statute.

14 The Court held a return hearing on July 19, 2024, and set an expedited briefing  
15 schedule for the parties’ respective motions for summary judgment. The Committee now  
16 moves for summary judgment on all of its claims.

17 **II. Argument**

18 Summary judgment should be entered for the Committee because the analysis  
19 adopted by Legislative Council is confusing and tends to mislead by understating the  
20 Initiative’s primary focus (establishing nonpartisan primary elections and ensuring that  
21 all voters and candidates are treated equally), amplifying changes that the initiative allows  
22 but does not, of its own force, require (regarding the use of voter rankings), and giving  
23 the misimpression that the Initiative does perforce require the use of voter rankings.

24 **A. Legal standards.**

25 A.R.S. § 19-124(C) requires Legislative Council to “prepare and file with the  
26 secretary of state an impartial analysis of the provisions of each ballot proposal of a  
27 measure or proposed amendment” that describes the measure and is “written in clear and  
28 concise terms.” “[T]he purpose of the required analysis is to assist voters in rationally

1 assessing an initiative proposal by providing a fair, neutral explanation of the proposal’s  
2 contents and the changes it would make if adopted.” *Tobin v. Rea*, 231 Ariz. 189, 193,  
3 ¶ 10 (2013) (quoting *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582,  
4 590 (1994)). To achieve that purpose, “the legislative council [must] eschew advocacy  
5 and . . . adopt, instead, an evenhanded assessment that neither omits, exaggerates, nor  
6 understates material provisions of an initiative measure.” *Id.* at 194, ¶ 12 (quoting *Greene*,  
7 180 Ariz. at 593). The analysis also “must be free from any misleading tendency, whether  
8 of amplification” or otherwise. *Id.* (quoting *Greene*, 180 Ariz. at 590). Thus, an analysis  
9 that “selectively emphasize[s]” one feature of an initiative, even if accurate, may violate  
10 § 19-124(C) by “impermissibly advocat[ing] against the measure.” *Id.* at 197, ¶ 33.

11 “[T]he Council’s analysis [must be] completely ‘free from any misleading  
12 tendency.’” *Id.* at 195, ¶ 18 (citation omitted). That is because “initiative sponsors,  
13 petition signers, and voters have every right to expect a completely neutral summary,  
14 without advocacy or argument.” *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz. 71,  
15 73, ¶ 11 (2000).

## 16 **B. Analysis.**

17 Legislative Council’s analysis for the Initiative fails to comply with A.R.S. § 19-  
18 124(C), because the analysis is neither clear nor impartial. Instead, it understates the  
19 principal focus of the Initiative (establishing nonpartisan primaries), selectively  
20 emphasizes a change the Initiative allows but does not require (regarding voter rankings),  
21 and misleadingly suggests the Initiative on its own will automatically require the use of  
22 voter rankings, which it will not.

### 23 **1. The analysis deliberately amplifies voter rankings.**

24 That the analysis amplifies the Initiative’s voter-rankings aspect is plain on its  
25 face. The first numbered paragraph of the analysis is: “1. Allow for the use of voter  
26 rankings at all elections held in this state to determine which candidate received the  
27 highest number of legal votes (see also paragraph 4 below).” [Ex. 3 at 1 ¶ 1.] The only  
28 reason the analysis leads with voter rankings is to emphasize that part of the Initiative and

1 focus readers' attention on it.

2 No other reason explains it. The Initiative does not begin with voter rankings. Its  
3 first substantive section (§ 3) contains its nondiscrimination provisions, which guarantee  
4 that no person will be denied a ballot or be restricted from voting for a candidate because  
5 of the person's political party affiliation or nonaffiliation. [Ex. 1 § 3.] But the analysis  
6 does not begin by summarizing those provisions. Instead, it places them dead last, at  
7 numbered paragraphs 6 and 7 of the analysis. [Ex. 3 at 2 ¶¶ 6, 7.]

8 Voter rankings also do not go first as a logical matter. The background-law section  
9 of the analysis proceeds logically, beginning with primary elections and then continuing  
10 on to general elections. [Ex. 3 at 1.] But the body of the analysis does not proceed that  
11 way. Instead, it begins with the authorization to use voter rankings (*id.* ¶ 1), then describes  
12 required changes to primary-election procedures (*id.* at 1–2 ¶¶ 2–3), and then describes  
13 changes in general-election procedures (*id.* at 2 ¶ 4). To make matters worse, paragraph  
14 1 of the analysis cross-references paragraph 4, so that the analysis goes from voter  
15 rankings to general elections, to primary elections, and then back to general elections.

16 Not only is that out of sequence procedurally, it is illogical for the additional  
17 reason that it places optional changes before required ones. The Initiative would amend  
18 the Constitution to (a) provide that it “does not prohibit the use of voter rankings to  
19 determine which person or persons received the highest number of legal votes”;  
20 (b) prescribe the use of voter rankings if (and only if) the Legislature, the Secretary, or  
21 the people decide that more than two candidates should advance from the primary to the  
22 general election for an office to which one candidate will be elected; and (c) allow  
23 “[v]oter rankings [to] be used in other elections as provided by law.” [Ex. 1 §§ 4, 6.]

24 In other words, the Initiative, on its own, does not require the use of voter rankings;  
25 it would take an independent choice by the Legislature, the Secretary, or the people to  
26 compel the use of voter rankings. The Initiative does, however, require significant  
27 changes to primary-election procedures, impose nondiscrimination requirements, and  
28 generally prohibit the use of public monies to fund political party elections. [*Id.* §§ 3, 5,

1 7.] It makes no sense for the analysis to emphasize changes the Initiative *could* make over  
2 changes the Initiative *would* make.

3 The only logical conclusion is that the analysis begins with voter rankings because  
4 that is what Legislative Council wanted to emphasize.

5 **2. The analysis is biased, confusing, and misleading.**

6 Legislative Council’s choice to amplify and exaggerate the Initiative’s voter-  
7 rankings aspect results in a biased analysis that will mislead voters, and thus violates  
8 A.R.S. § 19-124(C).

9 As explained, Arizona law “requires the legislative council to produce a neutral  
10 explanation of initiative proposals, avoiding argument or advocacy,” and “free from any  
11 misleading tendency, whether of amplification” or otherwise. *Tobin*, 231 Ariz. at 194,  
12 ¶¶ 12–13 (quotations omitted). Thus, in *Tobin*, our supreme court concluded that a ballot  
13 analysis that “singled out one undefined term for emphasis . . . and flagged a highly  
14 controversial issue” violated the statute even though “the challenged statement [was]  
15 accurate.” *Id.* at 196, ¶¶ 29–30 (cleaned up). The Court concluded that “[t]he rather  
16 obvious purpose” of “the Council’s selective[] emphasi[s]” was “to inject [a] contentious  
17 topic . . . into an already controversial . . . measure and have voters” draw a negative  
18 inference from its inclusion. *Id.* at 197, ¶¶ 32–33.

19 Similarly here, the “rather obvious purpose” of “selectively emphasiz[ing]” the  
20 voter-rankings aspect of the Initiative is to focus voters’ attention on it. Our supreme court  
21 long ago acknowledged the “commonly known and accepted fact that where there are a  
22 number of candidates for the same office, the names appearing at the head of the list have  
23 a distinct advantage.” *Kautenburger v. Jackson*, 85 Ariz. 128, 130–31 (1958). It follows  
24 that the same primacy effect would obtain here, where the item at the top of Legislative  
25 Council’s ballot analysis—voter rankings—would attract voters’ attention to the  
26 exclusion of items lower on the list.

27 The resulting defects in the ballot analysis are at least six-fold. **First**, Legislative  
28 Council’s selective emphasis on, an amplification of, voter rankings means that the

1 analysis it adopted is not “impartial,” “neutral,” or “evenhanded,” as A.R.S. § 19-124 and  
2 the caselaw interpreting it require. The analysis does not “eschew advocacy”; it *is*  
3 advocacy, which Arizona law forbids. *See Tobin*, 231 Ariz. at 194, ¶ 12 (citation omitted).

4 **Second**, “amplif[ying]” the voter-rankings aspect of the initiative will tend to  
5 mislead voters. *See id.*, ¶ 13 (citation omitted). By placing voter rankings first and thus  
6 focusing voters’ attention on that piece of the Initiative, the analysis may mislead voters  
7 into believing that voter rankings are the Initiative’s primary focus. They are not.  
8 Although voter rankings are integral to the Initiative as a whole, the Initiative does not  
9 even require their use (absent an independent choice of the Legislature, the Secretary, or  
10 the people).

11 **Third**, and relatedly, by selectively emphasizing voter rankings, Legislative  
12 Council’s analysis “understates” the true primary focus of the Initiative—reforming  
13 primary elections and treating all voters and candidates fairly and equally. *See id.* at 194,  
14 ¶ 12 (citation omitted). This too may mislead voters by presenting a skewed picture of  
15 what the Initiative would actually do.

16 **Fourth**, the analysis misleadingly suggests that the Initiative alone authorizes that  
17 the use of voter rankings in Arizona. But whether the Arizona Constitution already allows  
18 the use of voter rankings is an open question that no Arizona court has decided; the  
19 Initiative clarifies that Article VII, section 7 of the Constitution “does not prohibit the use  
20 of voter rankings to determine which person or persons received the highest number of  
21 legal votes.” [Ex. 1 § 4.]. So, “[t]his notion” that voter rankings are possible only as a  
22 result of the initiative “is incorrect.” *Greene*, 180 Ariz. at 591. And when a Legislative  
23 Council analysis incorrectly “suggests that no such power currently exists,” it crosses the  
24 line between “impartiality and advocacy.” *Id.* at 592. The analysis here does just that by  
25 implying that the Initiative alone authorizes the use of voter rankings.

26 **Fifth**, placing voter rankings first makes the analysis confusing. As already  
27 explained, leading with voter rankings takes the Initiative’s own provisions out of  
28 sequence and is nonsequential temporally.

1           Additionally, numbered paragraph 1 of the analysis cross-references numbered  
2 paragraph 4: “1. Allow for the use of voter rankings at all elections held in this state to  
3 determine which candidate received the highest number of legal votes (see also paragraph  
4 4 below).” [Ex. 3 at 1 ¶ 1.] The cross-reference is confusing all by itself. But the confusion  
5 is compounded by the fact that a reader cannot understand paragraph 4 (regarding  
6 revisions to general-election procedures) without first reading paragraphs 2 and 3  
7 (regarding required changes to primary-election procedures). Yet paragraph 1 encourages  
8 readers to skip over the intermediate paragraphs and go straight to paragraph 4. That is  
9 confusing by design. And it underscores that the analysis highlights the voter-rankings  
10 piece of the Initiative, which the analysis summarizes in paragraphs 1 and 4.

11           **Sixth**, and perhaps most glaring, the analysis is misleading on its face insofar as it  
12 falsely suggests voter rankings will automatically be used if the Initiative passes. As  
13 explained, paragraph 4(c) says “[t]he Legislature may enact a law to determine the  
14 process to be used for voter rankings,” and “[i]f the Legislature does not enact a law on  
15 voter rankings, the Secretary of State shall determine the process to be used for voter  
16 rankings.” [Ex. 3 at 2 ¶ 4(c).] This paragraph thus leaves the misimpression that the  
17 Initiative perforce will inevitably result in the use of voter rankings. It will not. The  
18 Initiative does not require anyone to use voter rankings or determine the process for voter  
19 rankings *unless* the Legislature, the Secretary, or the people independently choose to  
20 advance more than two candidates from the primary to the general election for an office  
21 to which one candidate will be elected.

22           The analysis, in other words, exaggerates the Initiative’s effect. Section 19-124(C)  
23 forbids this too. In *Sotomayor v. Burns*, 199 Ariz. 81 (2000), for example, the supreme  
24 court concluded that a ballot analysis was “misleading because it suggest[ed] that English  
25 *and* Spanish instruction must be given in all classes” under existing law, when in fact  
26 “state law require[d] schools to ‘provide a bilingual program *or* English as a second  
27 language . . . program,” which would be performed in English. *Id.* at 82, ¶ 4. The Court  
28 therefore ordered that the statement be “deleted or revised.” *Id.* at 83, ¶ 10. Likewise in

1 *Tobin*, 27 Ariz. at 196, ¶ 27, the supreme court held that “[t]he Council’s analysis [did]  
2 not accurately explain . . . [an] initiative’s qualified limitation on adjustment of the sales  
3 tax bases” because “the analysis overstate[d] that limitation and, therefore, tends to  
4 mislead.”

5 A similar problem exists here. The analysis exaggerates or overstates the  
6 Initiative’s limited provisions regarding voter rankings, leaving the false impression that  
7 if the Initiative passes, voter rankings automatically will be used. That is not true.

8 These manifold defects would be troubling in any year. They are particularly  
9 troubling this year, when up to 14 initiatives and referenda could be on the ballot—  
10 including a competing constitutional amendment, referred by the Legislature, that would  
11 enshrine partisan primaries in the constitution. [Verified Compl. ¶ 28.] With so many  
12 measures for voters to assess, it is vital that each analysis be clear and impartial. This  
13 analysis is neither.

14 **III. Conclusion.**

15 The analysis understates the Initiative’s primary focus (establishing nonpartisan  
16 primaries and treating all voters and candidates equally), improperly amplifies voter  
17 rankings, and erroneously suggests the Initiative will automatically require that voter  
18 rankings be used if the Initiative passes. The Court should declare that the analysis  
19 violates A.R.S. § 19-124(C), enjoin the Secretary from including the analysis in the  
20 Publicity Pamphlet, and compel the Legislative Council to adopt an analysis that complies  
21 with the law.

22 RESPECTFULLY SUBMITTED this 23rd day of July, 2024.

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14 was electronically filed and served through  
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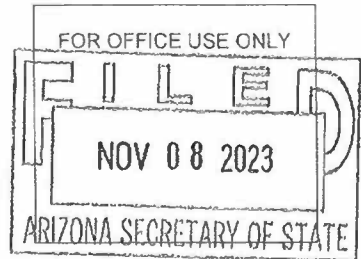
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# **EXHIBIT 1**



STATE OF ARIZONA

Application for Serial Number Initiative Petition A.R.S. § 19-111



The undersigned intends to circulate and file an initiative petition and hereby makes application for the issuance of an official serial number to be printed in the lower right-hand corner of each side of each signature sheet of such petition. Attached hereto is the full title and text, in no less than eight point type, of the measure or constitutional amendment intended to be initiated at the next general election.

Statutory Measure [ ] Constitutional Amendment [x]

Date of Application 11/08/2023 Signatures Required 383,923 Deadline for Filing 07/03/2024 Serial Number Issued I-14-2024

This Constitutional amendment expands choices in primaries. eliminates party-based restrictions on election participation, and applies the same rules to candidates for the same office. It prohibits using public monies for party elections, including presidential preference elections not open to all voters. For primaries for state, county, and Congressional offices, candidates for the same office have the same signature requirements and appear on the same ballot. Everyone eligible to vote for an office may vote for any candidate and sign any candidate petition regardless of party affiliation. Parties may support candidates. Law may allow candidates to list party affiliation, as provided in amendment. For 1-winner races, 2 to 5 candidates may advance to the general, as provided by law. For multi-winner races, additional candidates advance. If 3 or more candidates may advance in 1-winner races, voter rankings are used at the general. If implementing legislation isn't operative by 11/1/2025, Secretary of State decides how many candidates advance and the voter ranking process, if any, subject to legislative modification as provided in the amendment. Legislature may change the number of candidates for an office who advance once every 6 years. Amendment is exempt from revenue source requirement.

Sarah Smallhouse

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Make Elections Fair PAC

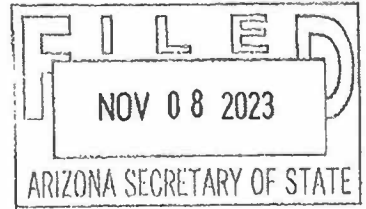
Committee Name 101454 Committee ID No. Sarah Smallhouse Chairperson Chuck Coughlin Treasurer 830 North 4th Avenue Committee Address Phoenix AZ 85003 City State Zip (602) 528-3684 Committee Telephone Number info@makeelectionsfairaz.com Committee E-mail Address

By submitting this Application for Serial Number and checking all boxes below, I acknowledge the following:

- [x] That I have received and will review the accompanying Instructions for Statewide Initiatives, including the Secretary of State's recommended best practices for printing copies of the Statewide Initiative Petition to be circulated. [x] That at the time of filing, I was provided instructions regarding accurate completion of the Statewide Initiative Petition form.

S Smallhouse Applicant Signature

11-7-23 Date



**OFFICIAL TITLE**

**AN INITIATIVE MEASURE**

AMENDING ARTICLE VII, SECTIONS 2, 7, 10 AND 11, CONSTITUTION OF ARIZONA; AMENDING ARTICLE VII, CONSTITUTION OF ARIZONA, BY ADDING SECTION 19; RELATING TO ELECTIONS.

**TEXT OF PROPOSED AMENDMENT**

Be it enacted by the People of the State of Arizona:

**Section 1. Short Title**

This Constitutional Amendment shall be known as the "Make Elections Fair Arizona Act".

**Sec. 2. Purpose and intent**

The Make Elections Fair Arizona Act is intended to ensure that all voters are treated equally and all candidates for an office compete according to the same rules; that the People of Arizona freely choose their elected officials, without the controlling influence of partisan politics; and that elected officials are accountable to the People rather than political parties. To accomplish these goals, this Constitutional Amendment creates a primary system in which people may vote for the candidate of their choice, regardless of the political party of the voter or the candidate. It also provides additional flexibility regarding general elections.

**Sec. 3. Article VII, section 2, Constitution of Arizona, is amended to read:**

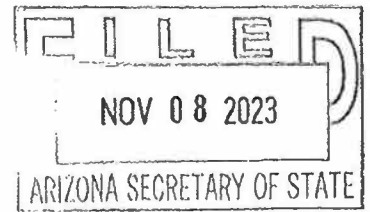
**2. Qualifications of voters; disqualification**

Section 2. A. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or ~~upon~~ ON any question ~~which~~ THAT may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

B. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex OR OF POLITICAL PARTY AFFILIATION OR NONAFFILIATION, and the right to register, to vote and to hold office under any law now in effect, or ~~which~~ THAT may hereafter be enacted, is hereby extended to, and conferred ~~upon~~ ON males and females alike.

C. NO PERSON SHALL BE DENIED A BALLOT FOR PUBLIC OFFICE NOR BE RESTRICTED FROM SELECTING ANY CANDIDATES FOR PUBLIC OFFICE BASED ON THE PERSON'S POLITICAL PARTY AFFILIATION OR NONAFFILIATION.

E.D. No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.



Sec. 4. Article VII, section 7, Constitution of Arizona is amended to read:

7. Highest number of votes received as determinative of person elected; voter rankings

Section 7. In all elections held by the people in this state, the person, or persons, receiving the highest number of legal votes shall be declared elected. THIS SECTION DOES NOT PROHIBIT THE USE OF VOTER RANKINGS TO DETERMINE WHICH PERSON OR PERSONS RECEIVED THE HIGHEST NUMBER OF LEGAL VOTES.

Sec. 5. Article VII, section 10, Constitution of Arizona is amended to read:

10. Direct primary election law

Section 10. A. The Legislature shall enact a direct primary election law that complies with the requirements of this section and that provides for the nomination of candidates for all elective State, AND county, and city offices, AND candidates for United States Senator and for Representative in Congress. ~~Any person who is registered as no party preference or independent as the party preference or who is registered with a political party that is not qualified for representation on the ballot may vote in the primary election of any one of the political parties that is qualified for the ballot.~~

B. ALL QUALIFIED ELECTORS WHO ARE OTHERWISE ELIGIBLE TO VOTE FOR AN OFFICE MAY VOTE IN THE PRIMARY ELECTION REGARDLESS OF THE QUALIFIED ELECTOR'S, OR ANY CANDIDATE'S POLITICAL PARTY AFFILIATION OR NONAFFILIATION.

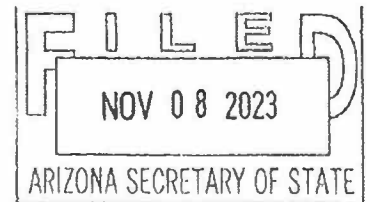
C. ALL CANDIDATES WHO QUALIFY FOR ELECTION TO AN OFFICE SHALL BE PLACED ON THE SAME BALLOT FOR THE PRIMARY ELECTION REGARDLESS OF THE CANDIDATE'S POLITICAL PARTY AFFILIATION OR NONAFFILIATION.

D. ALL CANDIDATES FOR AN OFFICE, REGARDLESS OF POLITICAL PARTY AFFILIATION OR NONAFFILIATION, SHALL HAVE THE SAME SIGNATURE REQUIREMENTS TO QUALIFY FOR THE PRIMARY ELECTION BALLOT FOR THE OFFICE. AN OTHERWISE QUALIFIED ELECTOR MAY SIGN A CANDIDATE NOMINATION PETITION WITHOUT REGARD TO THE POLITICAL PARTY AFFILIATION OR NONAFFILIATION OF THE QUALIFIED ELECTOR OR THE CANDIDATE.

E. THIS SECTION DOES NOT PROHIBIT A POLITICAL PARTY FROM ENDORSING OR OTHERWISE SUPPORTING A CANDIDATE AS PROVIDED BY LAW.

F. IF APPLICABLE LAW ALLOWS A CANDIDATE TO LIST THE CANDIDATE'S POLITICAL PARTY AFFILIATION NEXT TO THE CANDIDATE'S NAME ON THE BALLOT, THE BALLOT MUST ALSO INCLUDE A STATEMENT THAT A CANDIDATE'S POLITICAL PARTY AFFILIATION IS NOT AN INDICATION THAT A CANDIDATE HAS BEEN NOMINATED OR ENDORSED BY THAT POLITICAL PARTY, BUT ONLY REFLECTS THE POLITICAL PARTY REGISTRATION OF THE CANDIDATE.

G. AS PROVIDED BY LAW, FOR ANY OFFICE TO WHICH ONE CANDIDATE IS TO BE ELECTED, NOT FEWER THAN TWO CANDIDATES AND NOT MORE THAN FIVE CANDIDATES MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION. FOR ANY OFFICE TO WHICH TWO CANDIDATES ARE TO BE ELECTED, NOT FEWER THAN FOUR CANDIDATES AND NOT MORE THAN SEVEN CANDIDATES MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION. FOR ANY OFFICE TO WHICH THREE CANDIDATES ARE TO BE ELECTED, NOT FEWER THAN SIX CANDIDATES AND NOT MORE THAN EIGHT CANDIDATES MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION. A CANDIDATE'S POLITICAL PARTY



AFFILIATION OR NONAFFILIATION CANNOT BE CONSIDERED WHEN DETERMINING HOW MANY OR WHICH CANDIDATES ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION.

H. IF THE LEGISLATURE DOES NOT ENACT A LAW UNDER SUBSECTION G OF THIS SECTION THAT BECOMES OPERATIVE ON OR BEFORE NOVEMBER 1, 2025, THE SECRETARY OF STATE SHALL DETERMINE THE NUMBER OF CANDIDATES FOR EACH OFFICE WHO MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION, CONSISTENT WITH THE REQUIREMENTS SET FORTH IN SUBSECTION G OF THIS SECTION. IF THREE OR MORE CANDIDATES MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION FOR AN OFFICE TO WHICH ONE CANDIDATE WILL BE ELECTED, AND THE LEGISLATURE HAS NOT PRESCRIBED BY LAW A PROCESS BY WHICH VOTER RANKINGS ARE USED TO DETERMINE WHICH CANDIDATE IS ELECTED TO AN OFFICE AT THE GENERAL ELECTION, THE SECRETARY OF STATE SHALL PRESCRIBE A PROCESS THAT COMPLIES WITH SECTION 11 OF THIS ARTICLE. LEGISLATION MAY AMEND THE SECRETARY OF STATE'S DETERMINATIONS MADE PURSUANT TO THIS SUBSECTION, EXCEPT THAT THE LEGISLATURE MAY NOT MODIFY THE SECRETARY'S DETERMINATION AS TO THE NUMBER OF CANDIDATES THAT MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION LESS THAN SIX YEARS AFTER THE SECRETARY'S DETERMINATION IS MADE. THIS SUBSECTION DOES NOT RESTRICT THE POWER OF QUALIFIED ELECTORS TO CHANGE, THROUGH AN INITIATIVE OR REFERENDUM, THE NUMBER OF CANDIDATES WHO MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION.

I. EACH CANDIDATE FOR OFFICES THAT HAVE PRIMARY ELECTIONS SUBJECT TO THIS SECTION MAY APPEAR ON THE GENERAL ELECTION BALLOT ONLY IF THE CANDIDATE QUALIFIES FOR THE GENERAL ELECTION THROUGH A PRIMARY ELECTION OR, THROUGH A PROCESS PRESCRIBED BY LAW, FILLS A VACANCY CREATED BY THE DEATH OR WITHDRAWAL OF A CANDIDATE WHO IS NOMINATED AT THE PRIMARY ELECTION

J. NOT MORE THAN ONCE EVERY SIX YEARS, THE LEGISLATURE MAY ENACT LEGISLATION CHANGING THE NUMBER OF CANDIDATES WHO MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION FOR AN OFFICE. THIS SUBSECTION DOES NOT RESTRICT THE POWER OF QUALIFIED ELECTORS TO CHANGE, THROUGH AN INITIATIVE OR REFERENDUM, THE NUMBER OF CANDIDATES WHO MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION.

K. THIS SECTION IS NOT SUBJECT TO THE REQUIREMENTS IN ARTICLE IX, SECTION 23.

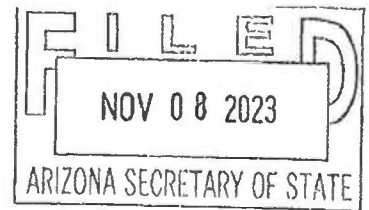
**Sec. 6. Article VII, section 11, Constitution of Arizona is amended to read:**

**11. General elections; date; candidate ranking; definition**

Section 11. A. There shall be a general election of representatives in congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to statehood and biennially thereafter.

B. IF ONLY TWO CANDIDATES MAY ADVANCE TO THE GENERAL ELECTION FOR AN OFFICE TO WHICH ONE CANDIDATE WILL BE ELECTED, THE CANDIDATE WHO RECEIVES THE MAJORITY OF VOTES CAST FOR THAT OFFICE AT THE GENERAL ELECTION IS ELECTED.

C. IF THREE OR MORE CANDIDATES MAY ADVANCE FROM THE PRIMARY ELECTION TO THE GENERAL ELECTION FOR AN OFFICE TO WHICH ONE CANDIDATE WILL BE ELECTED, VOTER RANKINGS SHALL BE USED TO DETERMINE WHICH CANDIDATE IS ELECTED FOR THAT OFFICE AT THE GENERAL ELECTION. THIS PROCESS, AT A MINIMUM, SHALL ALLOW A VOTER TO RANK ALL CANDIDATES FOR AN OFFICE IN ORDER OF THE VOTER'S PREFERENCE. IF A MAJORITY OF VOTES



CAST FOR THAT OFFICE AT THE GENERAL ELECTION DO NOT RANK A SINGLE CANDIDATE AS THE VOTERS' FIRST CHOICE PREFERENCE, THE PROCEDURES SHALL PROVIDE FOR THE TABULATION OF ALL VOTES LEGALLY CAST FOR THAT OFFICE AND TAKE INTO ACCOUNT VOTERS' RANKINGS OF CANDIDATES TO DETERMINE WHICH CANDIDATE IS ELECTED. VOTER RANKINGS MAY BE USED IN OTHER ELECTIONS AS PROVIDED BY LAW.

D. FOR THE PURPOSES OF THIS SECTION, "MAJORITY OF VOTES CAST" MEANS A MAJORITY OF ALL VOTES CAST FOR ALL CANDIDATES FOR A PARTICULAR OFFICE.

E. THIS SECTION IS NOT SUBJECT TO THE REQUIREMENTS IN ARTICLE IX, SECTION 23.

**Sec. 7. Article VII, Constitution of Arizona is amended to add a new Section 19 that reads:**

**19. Prohibition on Expenditure of Public Monies for Political Party Elections**

Section 19. A. EXCEPT AS PROVIDED IN SUBSECTION B OF THIS SECTION, PUBLIC MONIES SHALL NOT BE SPENT TO ADMINISTER POLITICAL PARTY ELECTIONS, INCLUDING, WITHOUT LIMITATION, THE ELECTION OF PRECINCT COMMITTEE OFFICERS, THE PRESIDENTIAL PREFERENCE ELECTION, AND PARTISAN PRIMARY ELECTIONS TO NOMINATE A CANDIDATE FOR PUBLIC OFFICE. THIS SECTION APPLIES TO ALL JURISDICTIONS IN THIS STATE, INCLUDING CHARTER CITIES.

B. PUBLIC MONIES MAY BE USED TO ADMINISTER A PRESIDENTIAL PREFERENCE ELECTION IF ALL PERSONS WHO ARE REGISTERED AS NO PARTY PREFERENCE OR INDEPENDENT AS THE POLITICAL PARTY OF PREFERENCE OR WHO ARE REGISTERED WITH A POLITICAL PARTY THAT IS NOT QUALIFIED FOR REPRESENTATION ON THE BALLOT MAY VOTE IN THE ELECTION OF ANY ONE OF THE POLITICAL PARTIES THAT ARE QUALIFIED FOR THE BALLOT.

**Sec. 8. Severability**

The People of Arizona declare their intention that the provisions of this Constitutional Amendment are severable. If any provision of this Constitutional Amendment is held to be invalid for any reason by a court, the remaining provisions of this Amendment will be severed from the void portion and given the fullest possible force and application.

**Sec. 9. Applicability**

If approved by the voters, this Constitutional Amendment shall apply to elections occurring after July 1, 2026.

**Sec. 10. Legal Defense**

The People of Arizona desire that this Constitutional Amendment be defended if it is challenged in court. They therefore declare that the political committee registered to circulate petitions in support of this Constitutional Amendment, or any of its members, shall have standing to defend this Constitutional Amendment on behalf of and as the agent of the People of Arizona in any legal action brought to challenge the validity of this Constitutional Amendment or any of its provisions.

# **EXHIBIT 2**

PROPOSITION \_\_  
[I - 14 - 2024]

**Make Elections Fair Arizona Act**

**ANALYSIS BY LEGISLATIVE COUNCIL**

**Legislative Council Staff Draft**

1           The Arizona Constitution currently requires the Legislature to enact a direct primary  
2 election law for the nomination of candidates for all elective state, county and city offices,  
3 including federal congressional offices. The candidates from each political party who advance  
4 from the primary election then face each other in the general election, where the candidate  
5 receiving the highest number of legal votes is declared elected.

6           Proposition \_\_ would amend the Arizona Constitution to:

7           1. Allow for the use of voter rankings at all elections held in this state to determine which  
8 candidate received the highest number of legal votes (see also paragraph 4 below).

9           2. Revise the primary election procedures as follows:

10          (a) All candidates who qualify for election to an office would be placed on the same  
11 primary election ballot regardless of each candidate's political party affiliation or nonaffiliation.  
12 Each of the candidates would have the same signature requirement to qualify for the primary  
13 election ballot. A qualified elector would be allowed to sign a candidate nomination petition  
14 without regard to the political party affiliation or nonaffiliation of the qualified elector or the  
15 candidate.

16          (b) All qualified electors eligible to vote for an office would be allowed to vote in the  
17 primary election, regardless of the political party affiliation or nonaffiliation of the qualified  
18 elector or the candidate.

19          (c) A political party may endorse or otherwise support a candidate as provided by law. If  
20 an applicable law allows a candidate's political party affiliation to be listed on the ballot next to  
21 the candidate's name, the ballot must include a statement that the listed affiliation is not an  
22 indication that the candidate has been nominated or endorsed by the listed political party.

23          (d) A candidate for an office that has a primary election may only appear on the general  
24 election ballot if the candidate qualifies through the primary election or fills a vacancy caused by  
25 the death or withdrawal of a candidate who was nominated at the primary election. (A candidate  
26 for an office that has a primary election would no longer be able to appear as a "write-in" candidate  
27 for the general election).

28           3. Provide a range of the number of candidates that may advance from the primary election  
29 to the general election, subject to a determination or amendment by the Legislature, the Secretary  
30 of State or the qualified electors, as follows:

31          (a) If one candidate for an office is to be elected in the general election, two to five  
32 candidates may advance from the primary election. If two candidates for an office are to be elected  
33 in the general election, four to seven candidates may advance from the primary election. If three  
34 candidates for an office are to be elected in the general election, six to eight candidates may

1 advance from the primary election. A candidate's political party affiliation or nonaffiliation cannot  
2 be considered in determining which or how many candidates advance from the primary election.

3 (b) Within those ranges, the Legislature may enact a law to determine the actual number  
4 of candidates that would advance. The number of candidates advancing may differ for each  
5 specific office. If the Legislature does not enact a law that is operative on or before November 1,  
6 2025, the Secretary of State shall determine the actual number of candidates that would advance.  
7 After the initial determination is made by the Legislature or the Secretary of State, the Legislature  
8 may enact a law to amend the actual numbers not more than once every six years. The qualified  
9 electors, however, may amend the actual numbers through the existing initiative or referendum  
10 process at each general election.

11 4. Revise the general election procedures as follows:

12 (a) If two candidates advance to the general election for an office to which one will be  
13 elected, the candidate who receives the majority of votes cast is elected.

14 (b) If three or more candidates advance to the general election for an office to which one  
15 will be elected, voter rankings shall be used to determine which candidate is elected.

16 (c) The Legislature may enact a law to determine the process to be used for voter rankings.  
17 If the Legislature does not enact a law on voter rankings, the Secretary of State shall determine the  
18 process to be used for voter rankings. At a minimum, the voter rankings process must allow a  
19 voter to rank all candidates for an office in order of the voter's preference.

20 5. Prohibit the use of any public monies to administer political party elections (including  
21 precinct committee officer elections and partisan primary elections), except that public monies  
22 may be used to administer a presidential preference election if all persons who are registered as  
23 "no party preference" or independent, or who are registered with a political party that is not  
24 qualified for representation on the ballot, may vote in the presidential preference election of any  
25 one of the parties that is qualified for representation on the ballot.

26 6. Provide that the right of a United States citizen to vote and hold office in this state shall  
27 not be denied or diminished because of political party affiliation or nonaffiliation.

28 7. Provide that a person shall not be denied a ballot or be restricted from selecting a  
29 candidate based on the person's political party affiliation or nonaffiliation.

30 If approved by the voters, Proposition \_\_\_ would apply to elections occurring after July 1,  
31 2026.

# **EXHIBIT 3**

**PROPOSITION \_\_**  
**[I - 14 - 2024]**

**Make Elections Fair Arizona Act**

**ANALYSIS BY LEGISLATIVE COUNCIL**

1           The Arizona Constitution currently requires the Legislature to enact a direct primary  
2 election law for the nomination of candidates for all elective state, county and city offices,  
3 including federal congressional offices. The candidates from each political party who advance  
4 from the primary election then face each other in the general election, where the candidate  
5 receiving the highest number of legal votes is declared elected.

6           Proposition \_\_ would amend the Arizona Constitution to:

7           1. Allow for the use of voter rankings at all elections held in this state to determine which  
8 candidate received the highest number of legal votes (see also paragraph 4 below).

9           2. Revise the primary election procedures as follows:

10          (a) All candidates who qualify for election to an office would be placed on the same  
11 primary election ballot regardless of each candidate's political party affiliation or nonaffiliation.  
12 Each of the candidates would have the same signature requirement to qualify for the primary  
13 election ballot. A qualified elector would be allowed to sign a candidate nomination petition  
14 without regard to the political party affiliation or nonaffiliation of the qualified elector or the  
15 candidate.

16          (b) All qualified electors eligible to vote for an office would be allowed to vote in the  
17 primary election, regardless of the political party affiliation or nonaffiliation of the qualified  
18 elector or the candidate.

19          (c) A political party may endorse or otherwise support a candidate as provided by law. If  
20 an applicable law allows a candidate's political party affiliation to be listed on the ballot next to  
21 the candidate's name, the ballot must include a statement that the listed affiliation is not an  
22 indication that the candidate has been nominated or endorsed by the listed political party.

23          (d) A candidate for an office that has a primary election may only appear on the general  
24 election ballot if the candidate qualifies through the primary election or fills a vacancy caused by  
25 the death or withdrawal of a candidate who was nominated at the primary election. (A candidate  
26 for an office that has a primary election would no longer be able to appear as a "write-in" candidate  
27 for the general election).

28          3. Provide a range of the number of candidates that may advance from the primary election  
29 to the general election, subject to a determination or amendment by the Legislature, the Secretary  
30 of State or the qualified electors, as follows:

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32 candidates may advance from the primary election. If two candidates for an office are to be elected  
33 in the general election, four to seven candidates may advance from the primary election. If three  
34 candidates for an office are to be elected in the general election, six to eight candidates may  
35 advance from the primary election. A candidate's political party affiliation or nonaffiliation cannot  
36 be considered in determining which or how many candidates advance from the primary election.

1 (b) Within those ranges, the Legislature may enact a law to determine the actual number  
2 of candidates that would advance. The number of candidates advancing may differ for each  
3 specific office. If the Legislature does not enact a law that is operative on or before November 1,  
4 2025, the Secretary of State shall determine the actual number of candidates that would advance.  
5 After the initial determination is made by the Legislature or the Secretary of State, the Legislature  
6 may enact a law to amend the actual numbers not more than once every six years. The qualified  
7 electors, however, may amend the actual numbers through the existing initiative or referendum  
8 process at each general election.

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11 elected, the candidate who receives the majority of votes cast is elected.

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13 will be elected, voter rankings shall be used to determine which candidate is elected.

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15 If the Legislature does not enact a law on voter rankings, the Secretary of State shall determine the  
16 process to be used for voter rankings. At a minimum, the voter rankings process must allow a  
17 voter to rank all candidates for an office in order of the voter's preference.

18 5. Prohibit the use of any public monies to administer political party elections (including  
19 precinct committee officer elections and partisan primary elections), except that public monies  
20 may be used to administer a presidential preference election if all persons who are registered as  
21 "no party preference" or independent, or who are registered with a political party that is not  
22 qualified for representation on the ballot, may vote in the presidential preference election of any  
23 one of the parties that is qualified for representation on the ballot.

24 6. Provide that the right of a United States citizen to vote and hold office in this state shall  
25 not be denied or diminished because of political party affiliation or nonaffiliation.

26 7. Provide that a person shall not be denied a ballot or be restricted from selecting a  
27 candidate based on the person's political party affiliation or nonaffiliation.

28 If approved by the voters, Proposition \_\_\_ would apply to elections occurring after July 1,  
29 2026.

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8 *Borrelli, Kerr, Grantham, Martinez, and Nguyen*  
9 *in their Official Capacities*

10 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF MARICOPA**

12 MAKE ELECTIONS FAIR,  
13 an Arizona political action committee,

14 Plaintiff,

15 v.

16 Rep. BEN TOMA, in his official capacity as  
17 Speaker of the Arizona House of  
18 Representatives, *et al.*,

19 Defendants.

No. CV2024-018789

**CROSS-MOTION FOR SUMMARY  
JUDGMENT AND RESPONSE TO  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

(Before the Hon. Melissa Iyer Julian)

Oral Argument set for August 9, 2024, at  
1:30 p.m.

1 **INTRODUCTION**

2 Speaker Toma, President Petersen, Senator Bolick, Senator Borrelli, Senator Kerr,  
3 Representative Grantham, Representative Martinez, and Representative Nguyen in their  
4 official capacities hereby oppose Plaintiff’s Motion for Summary Judgment (“MSJ”) and  
5 cross-move for summary judgment, under Rule 56 of the Rules of Civil Procedure.

6 This Court should reject Plaintiff’s novel challenge to the ordering of 2 lines in a  
7 65-line analysis of a proposed constitutional amendment that was prepared by non-partisan  
8 staff and *unanimously* approved by the fourteen bipartisan and geographically diverse  
9 members of Legislative Council (“Council”). No case law supports this challenge, and if  
10 Plaintiff’s proposed standard were adopted, courts would be dragged into rewriting every  
11 Council analysis that any party dislikes. “By their very nature, most disputes over ballot  
12 proposals are contentious. Thus, proponents and opponents are often dissatisfied with the  
13 Council’s analyses. [Courts] cannot settle each of these disputes....” *Ariz. Leg. Council v.*  
14 *Howe*, 192 Ariz. 378, 383 ¶17 (1998).

15 The analysis here is an effort to concisely, fairly, and impartially analyze a  
16 complicated, multi-faceted proposed constitutional amendment (I-14-2024) and to give  
17 average voters information and context that matters to them. *See* MSJ Exh. 3. The analysis  
18 is one part of the publicity pamphlet, which also contains the full text of the proposed  
19 amendment and other information. *See* A.R.S. § 19-123(A).<sup>1</sup>

20 This Court’s standard of review for the analysis is “substantial compliance” with  
21 § 19-124(C), and “the question is ‘whether reasonable minds could conclude that the  
22 Council met the requirements of the law, not whether [courts] believe the judicial system  
23 could itself devise a better analysis.’” *Tobin v. Rea*, 231 Ariz. 189, 193 ¶11 (2013) (quoting  
24 *Howe*, 192 Ariz. at 383 ¶17). The *Tobin* Court concluded: “‘our function is only to ensure  
25 that a challenged analysis is reasonably impartial and fulfills the statutory requirements.’”  
26 *Id.* at 197 ¶34 (quoting *Howe*, 192 Ariz. at 383 ¶17).

27 <sup>1</sup> For a recent example, *see* Arizona 2022 General Election Publicity Pamphlet at 48-60,  
28 [https://apps.azsos.gov/election/BallotMeasures/2022/azsos\\_2022\\_publicity\\_pamphlet\\_standard\\_english\\_web\\_version.pdf](https://apps.azsos.gov/election/BallotMeasures/2022/azsos_2022_publicity_pamphlet_standard_english_web_version.pdf). The Council’s analysis is on page 50.

1 In addition to challenging the ordering of 2 lines in the analysis, Plaintiff has also  
2 challenged section 4(c) of the analysis as misleading. Plaintiff converts those two  
3 challenges into six grounds for declaring the analysis unlawful. *See* MSJ at 10-13. As  
4 explained below, those six grounds, individually and collectively, do not establish a  
5 violation of § 19-124(C). This Court should therefore deny Plaintiff’s motion, and grant  
6 summary judgment for Defendants.

## 7 **FACTUAL AND PROCEDURAL BACKGROUND**

### 8 **Legislative Council’s Duties**

9 The Council is a statutory body in the legislative branch of Arizona state  
10 government, with professional staff and duties related to “bill drafting, research and other  
11 services to the legislature deemed necessary or advisable by the council to improve the  
12 quality of legislation.” *See* A.R.S. § 41-1301 to -1307. Its members (akin to a board of  
13 directors) are Senators and Representatives who are selected to represent all geographic  
14 regions of the state and reflect a bipartisan composition. *See* A.R.S. § 41-1301.

15 The Council has multiple duties specific to initiatives, referenda, and proposed  
16 constitutional amendments, including optional text review of an initiative or referendum,  
17 A.R.S. § 19-111.01, and “prepar[ing] and fil[ing] with the secretary of state an impartial  
18 analysis of the provisions of each ballot proposal of a measure or proposed amendment,”  
19 A.R.S. § 19-124(C). “The analysis shall include a description of the measure and shall be  
20 written in clear and concise terms avoiding technical terms wherever possible. The  
21 analysis may contain background information, including the effect of the measure on  
22 existing law, or any legislative enactment suspended by referendum, if the measure or  
23 referendum is approved or rejected.” A.R.S. § 19-124(C).

24 After approval and filing with the Secretary of State, the analysis is then printed in  
25 the official publicity pamphlet mailed to each voter under the heading “Analysis by  
26 Legislative Council.” *See* A.R.S. § 19-123(A)(4); *see also* note 1, *supra*. The full text of  
27 the proposed amendment, which in this case includes the proponent’s “purpose and intent”  
28 statement, *see* MSJ Exh. 1; any “for” and “against” arguments; a descriptive title; and

1 “yes” and “no” language are also printed in the publicity pamphlet, so voters have multiple  
2 different sources of information from which to make an informed decision. *See* A.R.S.  
3 § 19-123(A); *see also* note 1, *supra*.

4 **Legislative Council’s Analysis of The Initiative, “I-14-2024”**

5 The Council’s analysis of I-14-2024 initially provides background on current law,  
6 as is expressly permitted under § 19-124(C), and about which Plaintiff does not take issue.  
7 MSJ Exh. 3.

8 The analysis then has seven numbered descriptions of the changes proposed in the  
9 amendment. First, it contains one sentence explaining that the amendment would allow  
10 for the use of voter rankings at all elections held in this state, as well as a cross reference  
11 to a later part of the analysis. Plaintiff’s challenge focuses in large part on the placement  
12 of this section. *See* MSJ at 8-12.

13 Second, the analysis discusses changes related to open primaries and participation  
14 by voters and candidates in one primary regardless of political party. It explains that all  
15 candidates would be on the same primary election ballot, each candidate would have the  
16 same signature requirement, and electors could sign any candidate’s petition regardless of  
17 party affiliation or non-affiliation. It also explains that all qualified electors would be  
18 eligible to vote in the primary. It then explains the provisions related to candidates being  
19 permitted to list their party affiliation, parties being able to endorse candidates, and the  
20 requirement of printing a disclaimer that party affiliation does not indicate the candidate  
21 has been nominated or endorsed by the party. It also explains that candidates for office  
22 would not be able to appear on the general election ballot as write-in candidates.

23 Third, the analysis discusses the possible mechanisms for how many candidates  
24 would advance from the primary to the general election. It explains that this process could  
25 be governed by the Legislature, the Secretary of State, or the qualified electors themselves.  
26 It then describes the ranges of numbers of candidates that would appear on the general  
27 election ballot for each office based on how many candidates are to be elected and explains  
28 that a candidate’s political party affiliation cannot be considered in determining how many

1 candidates advance. It also explains the Legislature may make this determination, but if  
2 the Legislature fails to act, the Secretary of State will make the determination, and there  
3 is a six-year limitation on further action by the Legislature.

4 Fourth, the analysis describes the changes to general election procedures. It  
5 explains that if two or more candidates advance, then the candidate who receives the  
6 majority of votes cast in the general wins, but if three or more advance, then voter rankings  
7 will be considered. It then explains that the Legislature can enact a law on voter rankings  
8 but if the Legislature fails to act, the Secretary of State will act. Plaintiff also challenges  
9 the content of this section. *See* MSJ at 12-13.

10 Fifth, the analysis describes the changes to prohibit the use of public monies for  
11 political party elections. Sixth, it describes the prohibition on discrimination in voting and  
12 officeholding based on political party affiliation. Seventh, it describes that a person shall  
13 not be denied a ballot or restricted from selecting a candidate based on political party  
14 affiliation or non-affiliation.

### 15 **Procedural History of the Approval and this Litigation**

16 After the Council staff prepared its draft analysis on July 3, 2024, the analysis was  
17 distributed to all ninety members of the Legislature and the attorneys for the Make  
18 Elections Fair committee, and also posted on the Council’s website. The Council met on  
19 July 8, 2024, to consider the draft analysis. Mr. Pappas, counsel for the Make Elections  
20 Fair committee, spoke at that meeting.<sup>2</sup> He stated that the substance of the analysis is  
21 “generally quite good” and limited his comments to the order of the analysis. He said that  
22 Section 1’s placement is “potentially confusing to voters” and requested moving Section  
23 1 to after Section 5.

24 The Council *unanimously approved* the staff’s draft with no changes—showing  
25 bipartisan and geographical consensus that the analysis was impartial and met the statutory  
26

27  
28 <sup>2</sup> Mr. Pappas’s comments begin at 3:14:44 on the video recording,  
<https://www.azleg.gov/videoplayer/?eventID=2024071002>.

1 requirements as drafted.<sup>3</sup> Plaintiff then filed its Complaint and moved for summary  
2 judgment, arguing that the Council’s analysis violates A.R.S. § 19-124(C).

3 Two additional legal challenges have since been filed in Maricopa County Superior  
4 Court against I-14-2024 alleging violations of the Arizona Constitution’s separate  
5 amendment requirement in Article 21, § 1. *See Smith v. Fontes*, CV2024-019846; *Arizona*  
6 *Free Enterprise Club v. State*, CV2024-019880.

7 **ARGUMENT**

8 **I. The Legislative Council’s Analysis of I-14-2024 Satisfies the Requirements of**  
9 **A.R.S. § 19-124(C)**

10 **A. Judicial Review Is Governed by Whether Reasonable Minds Could**  
11 **Conclude the Council’s Analysis is Impartial, Not Whether the Court**  
12 **Could Devise A “Better” Analysis**

13 Section 19-124(C) states that the Council shall prepare “an impartial analysis of the  
14 provisions of each ballot proposal of a measure or proposed amendment.” In *Tobin*, the  
15 Arizona Supreme Court stated as follows: “The Council correctly notes that substantial  
16 compliance with § 19–124([C]) is the standard,” and “the question is ‘whether reasonable  
17 minds could conclude that the Council met the requirements of the law, not whether  
18 [courts] believe the judicial system could itself devise a better analysis.’” 231 Ariz. at 193  
19 ¶11 (quoting *Howe*, 192 Ariz. at 383 ¶17). The *Tobin* Court concluded that the court’s  
20 “function is only to ensure that a challenged analysis is reasonably impartial and fulfills  
21 the statutory requirements.” *Id.* at 197 ¶34 (quoting *Howe*, 192 Ariz. at 383 ¶17).

22 *Tobin* recognized that “other principles set forth in [case law] also guide [the  
23 court’s] analysis” related to that ultimate question. *Id.* at 193 ¶11. On such principle is that  
24 an analysis that describes the changes an initiative actually makes will be upheld on the  
25 grounds that it “can reasonably be regarded as an attempt to provide necessary and  
26 appropriate information to the voting public.” *Howe*, 192 Ariz. at 384 ¶22. Thus, the *Howe*  
27 Court reversed the Superior Court and rejected the argument by the committee supporting

28 <sup>3</sup> *Id.* at 3:20:12 to 3:21:06.

1 a referendum related to Schedule I drugs that the drug names selected for listing in the  
2 Council’s analysis were “those that might affect voters.” *Id.* ¶18. The court stated, “citing  
3 those drugs was neither inaccurate nor inherently misleading” even if “the drugs named  
4 *unquestionably evoke serious concerns* in the minds of most people.” *Id.* (emphasis  
5 added).

6 Plaintiff places great reliance on other guiding principles in *Tobin*, but it is  
7 important to read what the case law actually says. Plaintiff argues that “an analysis that  
8 ‘selectively emphasize[s]’ one feature of an initiative” may run afoul of the law. MSJ at 8  
9 (quoting *Tobin*, 231 Ariz. at 197 ¶33); *see also* MSJ at 10 (quoting *Tobin*, 231 Ariz. at  
10 196-97 ¶¶29-33). *Tobin*, however, spoke more narrowly: the legal violation was not  
11 merely “selectively emphasizing” a feature, but rather the fact that the analysis 1) singled  
12 out only one of “many” undefined terms; 2) “referred to that omission as a ‘failure,’  
13 thereby suggesting the initiative is flawed in that respect”; and 3) “overlook[ed] several  
14 Arizona statutes that, at least implicitly” contradicted the analysis’s statements regarding  
15 the undefined term that ran afoul of impartiality. *Tobin*, 231 Ariz. at 197 ¶32 (cleaned up).  
16 The court summed up the problem as “the “inclusion *and provocative phrasing* belie  
17 neutrality.” *Id.* ¶33 (emphasis added). These guideposts provide a much more workable  
18 standard for the Council and courts than Plaintiff’s unbounded “selectively emphasize”  
19 standard. In addition, *Tobin* approved of *Howe*, in which the Council’s analysis selectively  
20 emphasized Schedule I drugs that “unquestionably evoke serious concerns” but was  
21 upheld as impartial. *Howe*, 192 Ariz. at 384 ¶18.

22 Similarly, Plaintiff argues that the Council’s “analysis also ‘must be free from any  
23 misleading tendency, whether of amplification’ or otherwise.” MSJ at 8 (quoting *Tobin*,  
24 231 Ariz. at 194 ¶13); *accord* MSJ at 2, 3, 7, 8, 10, 11, 13. But the actual quote in *Tobin*  
25 and *Greene* is about the “language” and “wording” of the analysis, not the overall analysis.  
26 *Tobin*, 231 Ariz. at 194 ¶13; *accord* *Fairness & Accountability in Ins. Reform v. Greene*,  
27 180 Ariz. 582, 590 (1994) (“language must be free from . . . amplification” (cleaned up)).  
28 Again, focusing on language is a much more workable standard for both the Council and

1 the courts than an unbounded question into whether the analysis, as a whole, somehow  
2 involves “amplification.”

3 In sum, the overall guiding principle for judicial review is not whether the court  
4 could “devise a better analysis,” *Tobin*, 231 Ariz. at 193 ¶11, but rather “only to ensure  
5 that a challenged analysis is reasonably impartial and fulfills the statutory requirements,”  
6 *id.* at 197 ¶34. To avoid being enmeshed in rewriting every analysis, courts must adhere  
7 to the actual requirements in case law.

8 **B. The Council’s Analysis Contains an Impartial Analysis of the Proposed**  
9 **Amendment’s Provisions**

10 **1. There is inherently no bias in discussing the *actual* provisions of**  
11 **an initiative in any particular order**

12 Plaintiff’s primary claim is that the Council’s analysis is biased because it describes  
13 one change proposed by the initiative before discussing other proposed changes. Plaintiff  
14 even attempts to analogize (MSJ at 10) to a candidate election where voters may be more  
15 likely to vote for the first-listed candidate (and thereby not vote for the second and  
16 subsequent listed candidates) for a particular office.<sup>4</sup>

17 Plaintiff’s argument fails as a matter of law and logic. Unlike choosing to vote for  
18 one of multiple candidates listed, a voter has no authority to pick which of the changes  
19 proposed in a constitutional amendment will become law. It is an all-or-nothing  
20 proposition. Given this undeniable fact, Arizona law expressly prohibits the practice of  
21 “logrolling” separate constitutional amendments as a single ballot question for voters. *See*  
22 *Ariz. Const.*, art. 21, § 1 (“If more than one proposed amendment is submitted,” it “shall  
23 be submitted in such a manner that the electors may vote for or against such proposed  
24 amendments separately.”); *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶7 (2010) (“[T]he  
25 separate amendment rule was ‘intended to prevent the pernicious practice of ‘log-rolling’  
26 in the submission of a constitutional amendment’” (citation omitted)).

27 \_\_\_\_\_  
28 <sup>4</sup> This Cross-Motion does not concede that phenomenon exists for candidate elections, but  
whether it does or not is beside the point.

1           Instead, a single amendment “logically speaking, should stand or fall as a whole”  
2 and therefore must be “*sufficiently interrelated* so as to form a consistent and workable  
3 proposition.” *McLaughlin*, 225 Ariz. at 354 ¶8 (cleaned up, emphasis in original). Given  
4 the separate amendment rule, there can be no claim that the Council violated § 19-124(C)  
5 simply by the order in which it discusses the principal provisions in a proposed  
6 constitutional amendment. Instead, all of the provisions must “logically speaking, . . . stand  
7 or fall as a whole.” *McLaughlin*, 225 Ariz. at 354 ¶8.

8           Because of this legal requirement and the fact that the Council’s analysis is  
9 unquestionably discussing actual provisions (not speculating about one of multiple  
10 undefined terms), *Howe* squarely controls Plaintiff’s challenge. 192 Ariz. at 384 ¶22. In  
11 *Howe*, there was nothing “inaccurate” or “inherently misleading” in citing the names of  
12 actual, Schedule I drugs even if “the drugs named unquestionably evoke serious concerns  
13 in the minds of most people.” *Id.* ¶18. Similarly, there can be nothing “inaccurate” or  
14 “inherently misleading” in discussing the actual provisions of the initiative, even if  
15 Plaintiff would prefer that they be discussed in a different order.

16           Challenging the order of the Council’s analysis fails for another well-established  
17 reason. If an initiative does in fact contain two different subjects, it is impossible for courts  
18 to discern a “primary focus.” *See* MSJ at 6. That is simply not a judicially cognizable  
19 inquiry. This is why Arizona courts have repeatedly held that “[a]n act that violates the  
20 single subject rule is void in its entirety because no mechanism is available for courts to  
21 discern the act’s primary subject.” *Ariz. Sch. Boards Ass’n, Inc. v. State*, 252 Ariz. 219,  
22 228 ¶37 (2022) (citing *Litchfield Elementary Sch. Dist. No. 79 of Maricopa Cnty. v.*  
23 *Babbitt*, 125 Ariz. 215, 226 (App. 1980)). As the *Litchfield* court stated, “[a]ny inquiry  
24 into dominant purpose . . . is, in the final analysis, a factual inquiry. Such an inquiry injects  
25 the courts more deeply than they should be into the legislative process.” 125 Ariz. at 226.  
26 Yet this forbidden inquiry is exactly the inquiry that Plaintiff admits is necessary for its  
27 ordering argument to even be adjudicated. Plaintiff relies on the proposition that the  
28 initiative’s proposed changes to primary elections are the “primary focus” of the initiative

1 and therefore should be discussed first. *See* MSJ at 6. There is no such thing as a judicially  
2 cognizable “primary focus” of one subject versus another subject in the same legislation;  
3 all subjects are treated as equally “primary” in the eyes of the law.

4 Finally, Plaintiff’s related argument (at 8, 11) of “understat[ing] material  
5 provisions” is flawed because the caselaw is referring to mischaracterizing the effect of a  
6 change in some way, not the order in which changes are discussed. *See Greene*, 180 Ariz.  
7 at 591, 593. In *Greene*, the court found that a summary “understates” the law in the sense  
8 that it mischaracterized the law and “makes no reference at all to an important provision  
9 of the initiative.” *Id.* at 591. This is also consistent with the list of words *Greene* uses—  
10 “neither omits, exaggerates, nor understates material provisions of an initiative measure.”  
11 *Id.* at 593. Each of those words in this list is about mischaracterizing the effect of a  
12 provision in some way, not about the mere order in which provisions are accurately  
13 discussed. *Cf. In re Drummond*, -- Ariz. --, 543 P.3d 1022, 1028 ¶23 (Ariz. 2024) (“The  
14 associated-words canon, *noscitur a sociis*, is the interpretive method used to ‘avoid  
15 ascribing to one word a meaning so broad that it is inconsistent with its accompanying  
16 words,’ thus avoiding giving legislative acts ‘unintended breadth.’”) (citations omitted).  
17 *Tobin* merely quoted *Greene* on this point. *See* 231 Ariz. at 194 ¶12.

18 In any event, the Council’s analysis here devotes at least *19 lines* to discussing  
19 changes to the primary election procedures and only *6 lines* to discussing voter rankings.  
20 This structure can hardly be said to understate something that it devotes *over three times*  
21 as much space to discussing.

22 **2. Even if the ordering of an analysis could result in bias, no such**  
23 **bias is present here**

24 Plaintiff makes two arguments that the order of the Council’s analysis is not  
25 impartial: that “[v]oter rankings . . . do not go first as a logical matter,” and the analysis  
26 discusses “optional changes before required ones.” *See, e.g.,* MSJ at 9. As discussed  
27 above, arguments regarding order fail to state a cognizable claim for violation of § 19-  
28

1 124(C), but even if they did, Plaintiff’s challenge nonetheless fails based on the Council  
2 analysis and proposed constitutional amendment at issue here.

3       There are logical reasons for putting a brief (*i.e.*, two-line) discussion of the change  
4 related to use of voter rankings before the extended discussion of primary election  
5 procedures. The voter ranking change is a material change in the law that applies to all  
6 types of elections. It also follows logically and naturally from the preceding five lines  
7 about how the primary and general elections work, particularly the statement “in the  
8 general election, . . . the candidate receiving the highest number of legal votes is declared  
9 elected.” MSJ Ex. 3 at 1. That background language is an almost verbatim recitation of  
10 Article 7, § 7. And the initiative’s change related to use of “voter rankings” amends that  
11 exact section. Having a brief statement, with a cross-reference flagging further discussion  
12 below, therefore flows naturally from the background and “can reasonably be regarded as  
13 an attempt to provide necessary and appropriate information to the voting public.” *Howe*,  
14 192 Ariz. at 384 ¶22. There is nothing misleading or biased about this drafting choice.

15       Second, Plaintiff attempts to create a new rule that “required changes” must be  
16 described before “optional changes.” MSJ at 9. But Plaintiff undermines this argument by  
17 failing to identify additional “optional changes” discussed throughout the analysis.  
18 Part 2(c) of the analysis discusses an optional change about whether a political party may  
19 endorse, and it comes before 2(d), which is a mandatory change that there are no write-in  
20 candidates for the general election. Section 3(b) also describes optional rather than  
21 mandatory changes, by discussing the option that the Legislature may enact a law.  
22 Section 4(c) also describes an optional change by describing what happens if more than  
23 two candidates advance to the general. It would be unwieldy to pull out all of these so-  
24 called “optional” changes for later discussion. There is simply no support for Plaintiff’s  
25 argument that putting optional changes before required changes is biased.

26       Third, Plaintiff implicitly faults the Council’s analysis for not discussing the  
27 proposed changes in order of codification in Article 7 of the Constitution. But with one  
28 logical and defensible exception, the Council analysis did follow the order of the measure.

1 It was reasonable for the Council to move the discussion about the changes to Article 7,  
2 Section 2 to the end of the analysis. Those changes are to provide that the right to hold  
3 office and vote shall not be denied or diminished because of political party affiliation or  
4 non-affiliation, and a person shall not be denied a ballot or restricted from selecting a  
5 candidate based on the person’s political party affiliation or non-affiliation. Given the  
6 abstractness of those changes, it is logical to discuss them last—after a voter has read and  
7 understands the concrete changes being made. In fact, Plaintiff has not and does not take  
8 issue with the decision to move that discussion last. Given that unobjectionable decision,  
9 the next change in order of codification was the change relating to voter choice (Article 2,  
10 Section 7), and the analysis begins with that change. *See* MSJ Ex. 3 at 1.

11 **3. The analysis’s statement that the initiative would allow voter**  
12 **ranking is a reasonable description of the change, and this Court**  
13 **must not issue an improper advisory opinion**

14 Plaintiff argues that “the analysis misleadingly suggests that “the Initiative alone  
15 authorizes the use of voter rankings” because this is an “open question that no Arizona  
16 court has decided.” MSJ at 11. This argument fails for both legal and factual reasons.

17 Most simply, Plaintiff’s argument mischaracterizes the statement in the analysis.  
18 The plain language of the initiative adds a sentence to Article 7, Section 7 that says “[t]his  
19 section does not prohibit the use of voter rankings to determine which person or persons  
20 received the highest number of legal votes.” MSJ Ex. 1 at 2. The Council’s analysis in  
21 turn simply says that the initiative will: “Allow for the use of voter rankings at all elections  
22 held in this state to determine which candidate received the highest number of legal votes  
23 (*see also* paragraph 4 below).” “Allow” is a neutral term meaning permit.<sup>5</sup> And “voter  
24 rankings” is the term that the initiative itself uses. *See* MSJ Ex. 1 at 2. The Council’s  
25 analysis therefore does not use terms like “fail” that would “suggest[] the initiative is  
26 flawed” or any other “provocative phrasing.” *Tobin*, 231 Ariz. at 197 ¶¶32-33 (cleaned  
27 up). Given the neutral language of the analysis, there is simply no reason for the court to

28 <sup>5</sup> *See* Merriam-Webster, *Allow*, <https://www.merriam-webster.com/dictionary/allow>.

1 wade into the question of whether Arizona law does or does not permit the use of voter  
2 rankings in elections. The initiative proposes a change, and the analysis describes it.

3 But there is a second, deeper problem with Plaintiff’s argument. Under the  
4 separation of powers and standing requirements, this Court must not issue an advisory  
5 opinion about how “open” or not open (*see* MSJ at 11) the law is on a particular topic in  
6 the context of adjudicating a challenge to compliance with § 19-124(C). This fundamental  
7 principle was articulated by the Court of Appeals explaining why it would not review the  
8 correctness of an Attorney General opinion. *See Yes on Prop 200 v. Napolitano*, 215 Ariz.  
9 458, 465 ¶¶15-16 (App. 2007) (“If ... a mandamus action could be brought to challenge  
10 the opinions of the Attorney General, upon such challenges, courts would effectively  
11 become direct legal advisors to the government. The courts would be compelled to decide  
12 previously unsettled legal questions as a necessary preliminary to determining whether the  
13 Attorney General’s opinion on various matters were an abuse of discretion. This would be  
14 an inappropriate usurpation by the courts of responsibility assigned to the Attorney  
15 General and, in our view, a violation of the separation of powers.”).<sup>6</sup>

16 *Yes on Prop 200*’s reasoning as to Attorney General opinions applies with equal  
17 force to Plaintiff’s argument (MSJ at 11) that the Council’s analysis implicitly misstates,  
18 as a legal matter, how open or not open of a question Arizona law is on a particular topic.  
19 Answering that question would be a textbook advisory opinion as to proposed legislation.<sup>7</sup>

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20 <sup>6</sup> Other cases discuss this concept as an aspect of standing. This Response and Cross-Motion  
21 raises both justiciability issues. Plaintiff has no standing to seek a declaration that current  
22 Arizona law permits the use of voter rankings in elections—because no such law has been  
23 enacted, and Plaintiff therefore has not suffered a concrete and particularized injury. *See*  
24 *Ariz. Creditors Bar Ass’n, Inc. v. State*, -- Ariz. --, 549 P.3d 205, 209 ¶12, 211 ¶22 (Ct. App.  
25 2024) (The declaratory judgment statute “does not permit courts to act as legislators by  
26 setting policy or issuing advisory opinions—standing is still required. ... Here, the  
27 Judgment Creditors request an advisory opinion about how the Saving Clause works in a  
28 particular situation neither they nor the Defendants face.” (citing *Mills v. Ariz. Bd. of Tech.*  
*Registration*, 253 Ariz. 415, 423, ¶ 25 (2022)); *see also Bennett v. Brownlow*, 211 Ariz.  
193, 196 ¶16 (2005) (Standing ensures courts “refrain from issuing advisory opinions.”)).

<sup>7</sup> Note that other state’s courts have reached differing opinions about whether their  
constitutions permit ranked-choice voting. *Compare Opinion of the Justices*, 162 A.3d 188,  
211 ¶68 (Me. 2017) (concluding “Ranked-Choice Voting Act conflicts with the Maine  
Constitution”), *with Kohlhaas v. State*, 518 P.3d 1095, 1120 (Alaska 2022) (concluding  
ranked-choice voting system did not violate Alaska Constitution).



1 overall structure, and case law on constitutional amendments says that all provisions of a  
2 proposed amendment must “stand or fall as a whole.” There is therefore no such thing as  
3 improper “amplification” by discussing actual provisions of a proposed amendment in any  
4 particular order. The MSJ’s third ground of “understat[ing] material provisions” is simply  
5 the flip side of “amplification.” In addition, the discussion of the changes to primary  
6 elections spans 19 lines of the analysis (following only 2 lines about use of voter rankings).  
7 *See* MSJ Ex. 3 at 1. There is no “amplification” or “understating” occurring in the  
8 analysis. The MSJ’s fourth ground is that Arizona law already permits the use of voter  
9 rankings, but that fails to show that the analysis’s discussion was not reasonable, and the  
10 Court’s review should not go any further than that. Fifth, the order is not confusing.  
11 Section 1 of the analysis is a single sentence with a cross reference. Section 2 of the  
12 analysis proceeds to discuss the changes to primary elections. Plaintiff offers no concrete  
13 argument of how this is confusing. Sixth, the analysis is not misleading as to 4(c) given  
14 that it is part of a larger discussion in 4(a) and (b).<sup>9</sup>

15 **II. If the Court Rules in Favor of Plaintiff, It Should Enter 54(b) Language and**  
16 **Defer Adjudication of Attorneys’ Fees.**

17 Given the time-sensitive nature of this challenge, and the need for prompt appellate  
18 review, the Court should resolve Plaintiff’s challenge with a partial final judgment and  
19 Rule 54(b) language. This will allow the parties to immediately appeal, if appropriate.  
20 There is no reason to delay final judgment in order to adjudicate attorneys’ fees. Moreover,  
21

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22  
23 <sup>9</sup> The Attorney General’s amicus brief merely rehashes Plaintiff’s arguments. The Attorney  
24 General has no statutory role (or expertise) with respect to A.R.S. § 19-124(C). Instead, the  
25 Attorney General’s focus is on reviewing and approving the “descriptive title” and yes/no  
26 language prepared by the Secretary of State, which is also printed for voters’ information  
27 in the publicity pamphlet, and which appears on the ballot itself. *See* A.R.S. § 19-125(D);  
28 *see supra* note 1. By assigning the task of preparing an analysis to Legislative Council,  
rather than these other state officers, the law clearly envisions distinct roles. Contrary to the  
Attorney General’s attacks, the Council’s analysis here was an effort to concisely, fairly,  
and impartially analyze a complicated, multi-faceted proposed constitutional amendment.  
It was unanimously approved by its fourteen bipartisan and geographically diverse  
members. Voters will get the benefit of and have access to the Council’s impartial analysis,  
as well as the Secretary and Attorney General’s different contributions.

1 such a fee determination could later become moot for a variety of reasons. It would  
2 therefore conserve the Court and parties' resources to enter Rule 54(b) language.

3 **CONCLUSION**

4 For the foregoing reasons, this Court should deny Plaintiff's MSJ and enter  
5 judgment in favor of Defendants. If the Court does rule the analysis violates § 19-124(C),  
6 it should enter Rule 54(b) language and defer adjudication of attorneys' fees.

7 RESPECTFULLY SUBMITTED this 1st day of August, 2024.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 1, 2024, I electronically transmitted the attached  
3 document to the Clerk’s Office using the TurboCourt System for filing and transmittal of  
4 a Notice of Electronic Filing to the following TurboCourt registrants:

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19 IN AND FOR THE COUNTY OF MARICOPA

20 MAKE ELECTIONS FAIR,  
21 an Arizona political action committee,

22 Plaintiff,

23 v.

24 Rep. BEN TOMA, in his official capacity  
25 as Speaker of the Arizona House of  
26 Representatives; et al.,

27 Defendants.

No. CV2024-018789

**REPLY IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

**- AND -**

**RESPONSE TO CROSS-MOTION  
FOR SUMMARY JUDGMENT**

(Assigned to the  
Honorable Melissa Iyer Julian)

(Oral Argument:  
August 9, 2024, 1:30 p.m.)

1 Like the analysis that Legislative Council produced, the Council Republicans'<sup>1</sup> Cross-  
2 Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment  
3 ("Cross-Motion") is an exercise in misdirection. The Council Republicans twice, in bold italics,  
4 tout that the analysis was approved "unanimously." [Cross-Mot. at 2, 5.] Yet Legislative  
5 Council's Democratic members support the *Committee's* motion for summary judgment. And  
6 even if the analysis had bipartisan support, that would not diminish A.R.S. § 19-124's  
7 requirement that the analysis be impartial and clear.

8 To avoid the fact that this analysis is instead biased, misleading, and confusing, the  
9 Council Republicans contrive arguments based on the Arizona constitution's separate-  
10 amendment rule, single-subject rule, and separation of powers—limitations that are entirely  
11 inapposite here yet echo claims made by the plaintiffs seeking to invalidate the Initiative in two  
12 other lawsuits the Court already declined to consolidate with this one.

13 When the Council Republicans do get to what matters, all their arguments fall short.  
14 Unable to satisfy the standards the caselaw articulates, they argue only the words of an analysis  
15 must not mislead, not the analysis as a whole—an unsupported and implausible distinction. As  
16 for the analysis they adopted, they cannot explain why an analysis that amplifies one aspect of  
17 the Initiative over others, and misleadingly describes what the Initiative actually does, complies  
18 with the statutory obligation to produce an impartial and clear analysis. That is because it  
19 doesn't. The Committee's Motion should be granted, and the Council Republicans' Cross-  
20 Motion should be denied.

21 **I. Argument.**

22 **A. The analysis is biased, misleading, and confusing.**

23 As the Committee explained in its Motion, the analysis violates A.R.S. § 19-124(C)  
24 because it improperly amplifies and exaggerates the voter-rankings aspect of the Initiative and,  
25 as a result, is biased, confusing, and misleading.

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26  
27 <sup>1</sup> As shorthand, this brief refers to Speaker Toma, President Petersen, Senator Bolick,  
28 Senator Borrelli, Senator Kern, Representative Grantham, Representative Martinez, and  
Representative Nguyen collectively as the "Council Republicans." All other capitalized  
terms are used in the same way here as in the Committee's Motion.

1           The analysis *amplifies* voter rankings in at least two ways. First, the analysis highlights  
2 voter rankings by placing them first. [Mot. at 8.] The analysis puts voter rankings up front even  
3 though they do not go first in the Initiative or as a logical matter. [*Id.* at 9–10.] Instead, the  
4 obvious purpose of putting voter rankings first is to focus voters’ attention on them—much like  
5 voters tend to focus on candidates whose names appear first on a ballot. [*Id.* at 10 (citing  
6 *Kautenburger v. Jackson*, 85 Ariz. 128, 130–31 (1958).] As the Attorney General explained,  
7 “[p]lacing the issue of voter rankings in the first analytical paragraph is ‘rhetorical strategy’ that  
8 ‘is not impartial.’” [AG’s Br. at 5 (quoting *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz.  
9 71, 73 ¶ 6 (2000).]

10           Second, the analysis highlights voter rankings by cross-referencing paragraph 4 in  
11 paragraph 1. Paragraph 1 reads: “1. Allow for the use of voter rankings at all elections held in  
12 this state to determine which candidate received the highest number of legal votes (see also  
13 paragraph 4 below).” [Ex. 3 at 1 ¶ 1.] Paragraph 4, in turn, describes (and overstates) the  
14 circumstances in which voter rankings would be used. [*Id.* at 2 ¶ 4.] The reader who follows  
15 the cross-reference thus begins by reading about voter rankings in paragraph 1, then reads about  
16 them again in paragraph 4—skipping over the paragraphs in between that describe required  
17 changes to primary elections. [Mot. at 12.] This, too, is rhetorical strategy aimed at amplifying  
18 voter rankings, focusing voters’ attention there, and thus diverting voters’ attention away from  
19 the Initiative’s primary focus.

20           The analysis also *exaggerates* the Initiative’s voter-rankings aspect in at least two ways.  
21 First, paragraph 1 suggests the Initiative alone would “[a]llow for the use of voter rankings at  
22 all elections held in this state to determine which candidate received the highest number of legal  
23 votes . . . .” [Ex. 3 at 1 ¶ 1.] Yet no Arizona court has decided whether the Constitution *already*  
24 allows the use of voter rankings, and the Initiative merely clarifies that the Constitution “does  
25 not prohibit” their use “to determine [who] received the highest number of legal votes.” [Mot. at  
26 11 (quoting Ex. 1 § 4).]

27           Second, paragraph 4(c) exaggerates the Initiative’s effect by suggesting that voter  
28 rankings will automatically be used if the Initiative is approved. [Mot. at 12.] It reads:

1 (c). The Legislature may enact a law to determine the process to be used for  
2 voter rankings. If the Legislature does not enact a law on voter rankings, the  
3 Secretary of State shall determine the process to be used for voter rankings.  
At a minimum, the voter rankings process must allow a voter to rank all  
candidates for an office in order of the voter’s preference.

4 [Ex. 3 at 2 ¶ 4(c).] Paragraph 4(c) thus implies that the use of voter rankings is inevitable if the  
5 Initiative is approved. But it is not. The Initiative requires a voter-rankings process to be  
6 determined and used *only if* the Legislature, the Secretary, or the people themselves decide that  
7 more than two candidates should advance from the primary to the general election for an office  
8 to which one candidate will be elected. [Ex. 1 § 6.]

9 Because the analysis amplifies and exaggerates the voter-rankings aspect of the  
10 Initiative, the analysis is biased, confusing, and misleading. [Mot. at 10.] But § 19-124(C)  
11 requires an “impartial analysis” that “[describes] the measure” and is “written in clear and  
12 concise terms.” As the Court explained in *Tobin v. Rea*, this means “the Council’s analysis  
13 [must be] completely ‘free from any misleading tendency.’” 231 Ariz. 189, 195 ¶ 18 (quoting  
14 *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590 (1994)). And this  
15 means that the analysis may not “amplif[y]” or “exaggerate[]” or “selectively emphasize[]”  
16 particular features of an initiative because doing so amounts to forbidden advocacy. *Id.* at 194–  
17 97 ¶¶ 12, 32–33. The analysis here does all these things, so it violates § 19-124(C).

18 **B. The Council Republicans’ arguments to the contrary all fail.**

19 **1. The analysis as a whole may not amplify or mislead.**

20 The Council Republicans’ arguments in defense of the analysis all fail. For starters, they  
21 challenge the applicable legal standards, contending (at 7) the test is whether “the ‘language’  
22 and ‘wording’ of the analysis” amplifies or misleads, not whether “the overall analysis” does.  
23 But the case law requires the whole analysis not to be misleading. In *Tobin*, for example, the  
24 Court found that an analysis violated § 19-124(C) because “[t]he Council’s analysis is not  
25 completely ‘free from any misleading tendency.’” 231 Ariz. at 195 ¶ 18 (quoting *Greene*, 180  
26 Ariz. at 590). Similarly in *Healthy Arizona Initiative PAC v. Groscost*, the Court explained that,  
27 “to comply with [A.R.S. § 19-124], *the analysis* must not mislead.” 199 Ariz. 75, 76 ¶ 3 (2000)  
28 (emphasis added). *Greene* likewise looked for “[a] disinterested *analysis*” and determined

1 “[t]he *adopted analysis* subjectively minimize[d] [an] important effect” of the initiative there.  
2 180 Ariz. at 592 (emphases added). The Supreme Court has repeatedly made clear that the  
3 whole analysis must not mislead in any way.

4 That must be the rule, because the razor-thin distinction the Council Republicans try to  
5 draw between the analysis and its words makes no sense. The words comprise the analysis; that  
6 is how written text works. Simply put, “[t]o comply with Ariz.Rev.Stat. § 19-124[(C)], the  
7 Council’s analysis must be impartial; this means that the language must not mislead.”  
8 *Sotomayor v. Burns*, 199 Ariz. 81, 82 ¶ 5 (cleaned up). The Council Republicans don’t even  
9 attempt to explain how it could be otherwise. Nor do they attempt to explain how “focusing on  
10 language is a much more workable standard” than scrutinizing “the analysis, as a whole,” to  
11 see if it misleads by amplification. [Cross-Mot. at 7–8.] Indeed, such an approach is contrary to  
12 the case law. If the Council Republicans were right that only an analysis’ words must be  
13 accurate, an analysis could never fail by “omitting” a provision, *but see Tobin*, 231 Ariz. at 195  
14 ¶ 18, or by “understat[ing] the power already vested in the legislature,” *but see Greene*, 180  
15 Ariz. at 591. The Council Republicans’ approach does not and should not apply.

## 16 **2. Selective emphasis is an independent problem.**

17 The Council Republicans also suggest that “selectively emphasiz[ing]” one feature of  
18 an initiative is problematic only if that selective emphasis is combined with “provocative  
19 phrasing.” [Cross Mot. at 7 (quoting *Tobin*, 231 Ariz. at 197 ¶¶ 32–33).] That is not the law.  
20 The fact that both factors were present in *Tobin* in no way suggests that “‘singl[ing] out one . . .  
21 term for emphasis’” or “‘flag[ging]’ a ‘highly controversial’ issue” or “selectively  
22 emphasiz[ing]” one feature of an initiative is permissible absent “provocative phrasing.” *Tobin*,  
23 231 Ariz. at 196–97 ¶¶ 29, 32–33.

24 The Council Republicans also argue (at 7) that “these guideposts”—selective emphasis  
25 combined with provocative phrasing—“provide a much more workable standard for the  
26 Council and courts than Plaintiff’s unbounded ‘selective emphasize’ standard.” But apart from  
27 their say-so, the Council Republicans make no effort to explain how “provocative phrasing”  
28 somehow is a more “[ ]bounded” standard than “selective emphasis,” alone or in combination.

1 Both require a degree of judgment, but that is true of the Court’s role in examining the  
2 impartiality of the analysis as a whole.

3 Finally, the Council Republicans (at 7) suggest the Supreme Court blessed “selective  
4 emphas[is]” in *Arizona Legislative Council v. Howe*, 192 Ariz. 378 ¶ 19 (1998). It did not.  
5 There, the Court “[could] not say that the Council’s use of [illustrative drug] names most easily  
6 recognized by voters is, as a matter of law, so overemphasized as to be misleading, inaccurate,  
7 lacking in neutrality, or argumentative,” where “the chemical names of almost all the other  
8 Schedule I substances would have no meaning whatsoever to the overwhelming majority of  
9 voters because they are scientifically complex names of chemical compounds unknown to most  
10 lay people.” *Howe*, 192 Ariz. at 384 ¶¶ 18–19. Unlike in *Howe*, the issue here isn’t whether the  
11 analysis properly uses illustrative examples; the issue is whether the analysis selectively  
12 emphasizes one aspect of the Initiative to mislead voters and advocate for or against the  
13 Initiative.

14 **3. The analysis amplifies voter rankings by putting them first.**

15 The Council Republicans next contend (at 8–10) the analysis cannot be faulted for  
16 amplifying voter rankings by putting them first. Each of their arguments fails.

17 a. The Council Republicans first take aim (at 8) at the Committee’s analogy to the  
18 widely recognized primacy effect for ballots—what the Supreme Court described as the  
19 “commonly known and accepted fact that where there are a number of candidates for the same  
20 office, the names appearing at the head of the list have a distinct advantage,” *Kautenberger*, 85  
21 Ariz. at 130–31. The Committee explained that the same principle applies here; the item  
22 appearing at the head of the analysis—voter rankings—would attract voters’ attention. [Mot. at  
23 10.] The Council Republicans respond with two non sequiturs. First, they say (at 8) that the  
24 analogy is inapt because “[u]nlike choosing to vote for one of multiple candidates listed, a voter  
25 has no authority to pick which of the changes proposed in a constitutional amendment will  
26 become law.” They miss the point. The point is that voters—the same people who will receive  
27 the publicity pamphlet containing the analysis—tend to focus on what comes first. That means  
28 that here, voters will tend to focus on the paragraph 1 of the analysis, which then directs them

1 to paragraph 4. Both those paragraphs describe voter rankings, leaving voters with the  
2 misimpression that voter rankings are the Initiative’s predominant focus or effect. That is how  
3 the analysis amplifies voter rankings and why it is a problem.

4 b. The second non sequitur is the Council Republicans’ reliance (at 8–9) on the separate  
5 amendment rule in Article 21, section 1 of the Constitution, which they say means “there can  
6 be no claim that the Council violated § 19-124(C) simply by the order in which it discusses the  
7 principal provisions in a proposed constitutional amendment.”

8 Section 19-124(C) has nothing to do with the separate amendment rule. The statutory  
9 requirement that Legislative Council’s analyses be impartial and clear applies to all ballot  
10 measures. Indeed, when the Court denied the Arizona Free Enterprise Club’s motion to  
11 consolidate two separate-amendment cases with this case, the Court recognized that “[t]he issue  
12 in this matter is an isolated legal matter regarding the legality of the initiative summary to be  
13 used in the publicity pamphlet under A.R.S. § 19-124,” and this case does not “involve[] any  
14 common legal issues” with the separate-amendment cases. [7/31/24 M.E. at 1.] The Court had  
15 it right—the legality of Legislative Council’s analysis has nothing to do with the separate  
16 amendment rule.

17 Even if it did, the Council Republicans’ argument would make no sense. That a  
18 constitutional amendment’s provisions must be topical and interrelated, *Ariz. Together v.*  
19 *Brewer*, 214 Ariz. 118, 121 ¶ 6 (2007), says nothing about whether an analysis amplifying some  
20 provisions and downplaying others is impermissibly misleading.

21 c. The Council Republicans also seek refuge (at 9–10) in the constitutional “single  
22 subject rule” for legislative enactments. They claim that courts faced with a single-subject  
23 challenge cannot “discern the act’s primary subject,” yet “this forbidden inquiry is exactly the  
24 inquiry that Plaintiff admits is necessary for its ordering argument to even be adjudicated.”  
25 [Cross-Mot. at 9 (quoting *Ariz. Sch. Bds. Ass’n, Inc. v. State*, 252 Ariz. 219, 228 ¶ 37 (2022)).]  
26 The Council Republicans are wrong at least twice over.

27 First, like the separate-amendment rule, the Constitution’s single-subject rule has  
28 nothing to do with whether the Council’s analysis complies with § 19-124(C). Second, courts

1 do examine initiative language to determine whether Legislative Council analyses  
2 “understate[,]” *Green*, 180 Ariz. at 591, or amplify, *Tobin*, 231 Ariz. at 194 ¶ 13, particular  
3 provisions. In other words, courts have no trouble discerning when a ballot-measure analysis  
4 unfairly emphasizes particular aspects of an initiative.

5 d. Turning back to the legality of the analysis, the Council Republicans argue (at 9)  
6 “there can be nothing ‘inaccurate’ or ‘inherently misleading’ in discussing the actual provisions  
7 of the initiative, even if Plaintiff would prefer that they be discussed in a different order.” Not  
8 so. In *Tobin*, for example, the Court explained that “even accurate statements can be misleading,  
9 argumentative, ‘tinged with partisan coloring,’ or otherwise lack the impartiality § 19-124[(C)]  
10 requires.” 231 Ariz. at 196 ¶ 30 (citation omitted). The Court concluded the Council’s analysis  
11 violated § 19-124 because it “selectively emphasized” the fact that the initiative left one term  
12 undefined when others were too. *Id.* at 197 ¶ 32. Similarly, here the analysis’ selectively  
13 emphasized one aspect of the initiative over the others. The analysis here, as in *Tobin*, is  
14 misleading and amounts to “impermissibl[e] advoca[cy].” *Id.* ¶ 33. It therefore violates § 19-  
15 124(C).

16 e. Next, the Council Republicans dispute (at 10) that the analysis understates the  
17 Initiative’s required changes to primary-election procedures. They say (at 10) that “[i]n *Greene*,  
18 the court found that a summary ‘understates’ the law in the sense that it mischaracterized the  
19 law” and omitted part of it, which “is also consistent with the list of words *Greene* uses—  
20 ‘neither omits, exaggerates, nor understates material provisions of an initiative measure.’” The  
21 *noscitur a sociis* canon the Council Republicans cite (at 10) has no application here. It is a canon  
22 of construction applicable to statutes, *In re Drummond*, 543 P.3d 1022, 1028 ¶ 23 (Ariz. 2024),  
23 not judicial decisions. Regardless, *Greene* supports the Committee’s position. Whether an  
24 analysis “subjectively minimizes [an] important effect” of an initiative by describing it less than  
25 “frank[ly]” (as in *Greene*, 180 Ariz. at 592), or by burying and encouraging readers to skip over  
26 it (as the analysis does here), it has the same pernicious effect of giving the voters a distorted  
27 picture of what the initiative does. That is true irrespective of how many lines the analysis  
28 devotes to one feature or another if, as here, the analysis uses advocacy-based rhetorical

1 strategy.

2 **4. The analysis is structured to advocate.**

3 a. The apparent sum of these arguments, in the Council Republicans’ view, is that  
4 “arguments regarding order fail to state a cognizable claim for violation of § 19-124(C).”  
5 [Cross-Mot. at 10-11; *see also id.* at 15 (“There is therefore no such thing as improper  
6 ‘amplification’ by discussing actual provisions of a proposed amendment in any particular  
7 order.”)]. They cite no case that says that, none of their arguments actually points in that  
8 direction, and their position violates basic legal and rhetorical principles.

9 The Supreme Court explained in *Tobin* that “‘rhetorical strategy that tends to favor one  
10 side over the other’” is “impermissibl[e]” for ballot-measure analyses. 231 Ariz. at 195 ¶ 22.  
11 Structure is a critical piece of rhetorical strategy and, as the Attorney General explained, “[i]t is  
12 an axiomatic rule of writing to lead with the key point.” [AG’s Br. at 5 (collecting authorities).]  
13 And as the Court recognized in *Citizens for Growth Management*, stacking the deck up front  
14 amounts to a rhetorical strategy. There, the analysis “attempt[ed] to persuade the reader at the  
15 very outset that present laws adequately address the perceived problems the initiative seeks to  
16 remedy,” and “[t]he obvious conclusion to be drawn from the Council’s description—before  
17 the voter has a chance to read word one about the proposal itself—is that the [initiative] is  
18 unnecessary.” *Citizens for Growth Mgmt.*, 199 Ariz. at 73 ¶ 6. The analysis’ structure, in other  
19 words, was part of the problem because it was part of a “rhetorical strategy [that] is not  
20 impartial.” *Id.* So too here.

21 b. The Council Republicans’ defense of the structure they chose also falls short. They  
22 contend (at 11) “[t]here are logical reasons for putting” voter rankings first and attempt to  
23 identify two. Neither is persuasive.

24 First, they say (at 11), “[t]he voter rankings change is a material change in the law that  
25 applies to all types of elections.” Setting aside whether this is actually “a material change in the  
26 law,” it is not the only Initiative provision “that applies to all types of elections.” The Initiative’s  
27 nondiscrimination provisions also apply to all types of elections. [Ex. 1, § 3.] Those provisions  
28 are the first substantive provisions of the Initiative’s text, but they don’t go first in the analysis.

1 Instead, the analysis places them dead last, in paragraphs 6 and 7. [Ex. 3 at 2 ¶¶ 6–7.] The  
2 Council Republicans attempt to justify this bottom-of-the-list placement (at 12) by arguing it  
3 was “logical to discuss [these provisions] last” because of “the abstractness of those changes.”  
4 But the Council Republicans never say what is “abstract” about provisions forbidding the denial  
5 or abridgment of the right to vote or hold office on account of political party affiliation or  
6 nonaffiliation, and guaranteeing that no person be denied a ballot or restricted from selecting  
7 candidates for public office based on the person’s political party affiliation or nonaffiliation—  
8 presumably because they are not abstract.

9 The Council Republicans’ “all elections” justification is further undermined by the fact  
10 that the Initiative’s prohibition on using public monies to administer political party elections  
11 also applies across the board, with an exception for a presidential preference election under  
12 limited circumstances. [Ex. 1 § 7.] Yet the analysis doesn’t describe these provisions first; it  
13 summarizes them in paragraph 5. [Ex. 3 at 2 ¶ 5.]

14 The Council Republicans’ second justification (at 11) for leading with voter rankings is  
15 that doing so “follows logically and naturally from” the background-law statement that “in the  
16 general election, . . . the candidate receiving the highest number of legal votes is declared  
17 elected.” It defies belief that the Council Republicans would litigate this dispute if this were a  
18 simple “drafting choice.” [Cross-Mot. at 11.] But even if it were, it would resolve none of the  
19 other defects in the analysis, the confusion it sows, or the misleading impression the analysis  
20 creates about what the Initiative actually does.

21 c. The Council Republicans also contend (at 11) that the Committee “attempts to create  
22 a new rule that ‘required changes’ must be described before ‘optional changes.’” Not so.  
23 Fulfilling the statutory requirement to describe what the Initiative actually does, A.R.S. § 19-  
24 124(C), is the reason why required changes should go before permitted ones in a ballot-measure  
25 analysis. As both the Committee and the Attorney General have pointed out, whereas the  
26 Initiative alone requires changes to primary-election procedures, the use of voter rankings  
27 would be required *only* if the Legislature, the Secretary, or the people themselves chose to  
28 advance more than two candidates from the primary to the general election for an office to

1 which one candidate is to be elected. [See Mot. at 9; AG’s Br. at 4 (“using voter rankings is  
2 simply a *possible* future scenario”)] Leading with that contingent change—as the analysis does  
3 in paragraph 1, cross-referencing paragraph 4—fails to clearly or accurately describe the  
4 Initiative.

5 **5. The Committee does not seek an advisory opinion.**

6 As the Committee has explained, the analysis fails to accurately describe the Initiative  
7 for the additional reason that it misleadingly suggests that the Initiative alone authorizes the use  
8 of voter rankings. [Mot. at 11.] The Council Republicans respond (at 12–13) that the Committee  
9 “mischaracterizes the statement in the analysis” and seeks “an advisory opinion” about voter  
10 rankings under Arizona law. Neither is true.

11 The analysis says the Initiative would “amend the Arizona Constitution to: 1. Allow for  
12 the use of voter rankings at all elections held in this state to determine which candidate received  
13 the highest number of legal votes . . . .” [Ex. 3 at 1 ¶ 1.] The Committee pointed out that what  
14 the Initiative actually does is clarify that the Constitution “does not prohibit the use of voter  
15 rankings to determine which person or persons received the highest number of legal votes.”  
16 [Ex. 1 § 7.] The Council Republicans say (at 12–13) that the analysis uses “neutral language,”  
17 “[t]he initiative proposes a change, and the analysis describes it.” The problem is, there is a  
18 difference between the change the Initiative proposes (clarifying what the Constitution does not  
19 prohibit) and the change the analysis describes (allowing voter rankings for the first time).

20 Recognizing this problem does not require the Court to “wade into the question of  
21 whether Arizona law does or does not permit the use of voter rankings in elections,” much less  
22 require an “advisory opinion about how ‘open’ or not open” Arizona law is on that question.  
23 [Cross-Mot. at 13.] The Committee pointed out that no Arizona case has resolved that question,  
24 and the Council Republicans cite none. The Council Republicans do cite (at 13 n.7) cases from  
25 other jurisdictions that have split on the question of what their constitutions permit in terms of  
26 voter rankings. The point here is simply that no Arizona court has decided what our constitution  
27 permits on that question; the Initiative would clarify what the Constitution does not prohibit;  
28 and the analysis converts that clarification into an authorization.

1 This is the problem addressed in *Greene*. There, the analysis described a provision of  
2 the proposed amendment as allowing “people or their elected representative to control” civil  
3 actions. 180 Ariz. at 591. This implied that, under the current state of the law, “Arizonans and  
4 their legislature presently cannot control civil actions in any way.” *Id.* But the Supreme Court  
5 had “never held that the constitution precludes all statutory regulation or control of civil  
6 lawsuits,” and the ballot-measure analysis was misleading as a result. *Id.* at 591–92. The same  
7 is true here—no court in Arizona has ever held that voter rankings cannot be implemented under  
8 current law, and it is misleading to imply as much. Consequently, the analysis must be revised.  
9 *Id.* at 592–93.

10 **6. Paragraph 4(c) falsely suggests voter rankings are inevitable.**

11 Finally, the Council Republicans dispute that paragraph 4(c) of the analysis falsely  
12 suggests that the use of voter rankings is inevitable if the Initiative passes. They argue (at 14)  
13 that “4(c) is not an island,” and that the Committee “ignores that 4(c) immediately follows 4(a)  
14 and 4(b) which provide the exact context Plaintiff claims as missing.” What the Council  
15 Republicans ignore is that, even read together with paragraph 4(b), paragraph 4(c) is  
16 misleading. That is because nothing in 4(c) explains that voter rankings are required *only if* 4(b)  
17 occurs. Combined with the statement in paragraph 1 that the Initiative would “[a]llow for the  
18 use of voter rankings at all elections held in this state,” and its cross-reference to paragraph 4,  
19 paragraph 4(c) leaves the misimpression that “the process to be used for voter rankings” will be  
20 determined one way or another, by the Legislature or the Secretary. That is not true, and it is  
21 why paragraph 4(c) impermissibly exaggerates the Initiative’s effect, much like in *Sotomayor*  
22 and *Tobin*. [See Mot. at 12–13.]

23 **II. Conclusion**

24 The Court should declare that the analysis violates § 19-124(C), enjoin the Secretary  
25 from including the analysis in the publicity pamphlet, and compel the Council to adopt the  
26 impartial analysis the law requires. The Committee does not object to the Council Republicans’  
27 request (at 15) to enter a partial final judgment with Rule 54(b) language and defer the  
28 determination whether the Committee is entitled to attorneys’ fees.

1 RESPECTFULLY SUBMITTED this 8th day of August, 2024.

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