

SUPREME COURT OF ARIZONA

MAKE ELECTIONS FAIR,

Plaintiff/ Appellee,

v.

BEN TOMA, et al.,

Defendants/ Appellants.

Arizona Supreme Court
No. CV-24-0187-AP/EL

Maricopa County
Superior Court
No. CV2024-018789

**THE ATTORNEY GENERAL'S AMICUS BRIEF IN SUPPORT OF
PLAINTIFF/APPELLEE MAKE ELECTIONS FAIR**

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INTRODUCTION

Arizona voters are entitled to a “clear,” “concise,” and “impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment.” [A.R.S. § 19-124\(C\)](#). A compliant analysis allows Arizonans to “rationally assess[] an initiative proposal” with “a fair, neutral explanation of the proposal’s contents and the changes it would make if adopted.” [Tobin v. Rea, 231 Ariz. 189, 193 ¶ 10 \(2013\)](#) (citation omitted).

The Legislative Council did not comply with these requirements here. As the superior court held, the Council’s analysis “selectively emphasizes a particular initiative provision in a manner that would mislead voters about the impact it would have on existing laws.” APP009 (cleaned up). The Attorney General writes to (I) emphasize that the Council’s analysis deprives Arizona voters of a neutral explanation, a matter of statewide concern; and (II) show that the analysis misleadingly suggests that the Make Elections Fair Arizona Act (“Initiative”) resolves an ongoing policy debate, which it does not.

ARGUMENT

I. The Council’s analysis fails the impartiality requirement.

Arizonans have a “right to expect a completely neutral summary,

without advocacy or argument.” *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz. 71, 73 ¶ 11 (2000). Here, contrary to that principle, the “obvious conclusion to be drawn from the Council’s description,” *see id.* at 72 ¶ 6, is that voter rankings would be a primary effect of the Initiative, when that is simply not the case. The Initiative creates an open primary system and provides “additional flexibility regarding general elections.” APP014. But even if the Initiative passes, voter rankings might never be used. *See* APP016–17. Because the Council’s description is not free from “misleading tendency” and “amplification,” it violates A.R.S. § 19-124(C). *See Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590 (1994).

Despite what the analysis implies through “selective emphasis,” APP010, voter rankings are not the Initiative’s primary focus. The Initiative “does not prohibit the use of voter rankings,” but it also would not require them unless certain conditions are met. *See* APP015. Proposed article VII, § 10(G) states that “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.” Proposed article VII, § 11(C) requires that “voter rankings shall be used” only 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 “voter rankings may be used in other elections as provided by law.” APP017. Put differently, voter rankings are not automatic upon enactment of the Initiative—additional legislative or executive action is required before voter rankings could be used. The use of voter rankings is simply a *possible* future scenario.

Nonetheless, the analysis emphasizes voter rankings in its first paragraph describing the effect of the Initiative, stating that the Initiative would permit “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).” APP018. Paragraph 4(c) then cements the misunderstanding that the Initiative *requires* the use of voter rankings by implying that someone *must* enact a process 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.” APP019 (emphasis added). A process for voter rankings is required *only* if a future law provides that three or more candidates may advance to the general election for an office to which one will

be elected. APP016–17. Without such law, no voter rankings are required and neither the Legislature nor the Secretary must prescribe a process for voter ranking. Yet the analysis “clearly suggests” that voter rankings are inevitable. *Healthy Ariz. Initiative PAC v. Groscost*, 199 Ariz. 75, 76 ¶ 4 (2000).

Placing the issue of voter rankings in the first analytical paragraph is “rhetorical strategy” that “is not impartial.” *Citizens for Growth Mgmt.*, 199 Ariz. at 73 ¶ 6. In doing so, the analysis defies an axiomatic rule of writing—lead with the key point. *See, e.g.*, Bryan A. Garner, *The Redbook* § 26.4(a) (3d ed. 2013) (“Place important items closer to the beginning, ahead of less important ones.”) (Legislation, rules, and regulations); *id.* § 15.3(a) (“State the gist of your business quickly. The worst thing you can do is to spend a few paragraphs explaining the background”) (Business correspondence); *id.* § 16.1(b) (“Always state the purpose of your e-mail within the first few sentences.”) (E-mail messages); *id.* § 17.1(c) (“Start on the first page with an issue statement that almost any reader could understand”) (Research memos); William Strunk, *The Elements of Style* 17 (1st ed. 1920) (structure should permit the reader “to discover the purpose of each paragraph as he begins to read”); Erika Suffern, *Don’t Bury the Lede*, MLA Style Center (Mar. 23, 2017), <https://style.mla.org/dont-bury-the-lede/> (“[A] story should *lead*

with the *lede*.”). This is not a question of “whether the judicial system could have written it better.” *Citizens for Growth Mgmt.*, 199 Ariz. at 73 ¶ 12. By giving voter rankings top billing, the analysis conveys that their implementation is the key issue for decision and incorrectly suggests that voter rankings are an inevitable consequence of the Initiative. See *Tobin*, 231 Ariz. at 194 ¶ 13.

II. The Council’s language misleadingly amplifies potential controversy.

By describing voter rankings at the outset and implying that they are mandatory, the Council’s analysis “inject[s] the contentious topic of” voter rankings “into an already controversial” measure. *Tobin*, 231 Ariz. at 197 ¶ 33. Improper amplification of voter rankings places the Initiative “at the heart of Arizona’s heated debate about” a voting method that the Initiative does not require. *Citizens for Growth Mgmt.*, 199 Ariz. at 72–73 ¶¶ 6–7.

Indeed, the legislative and executive branches have publicly clashed about voter rankings. In 2023, the governor vetoed bills that would have prohibited it. See APP020–21. The Council’s analysis places that controversial subject front-and-center even though it may never come to pass.

The legislative record shows the depth of the “heated debate” about

ranked-choice voting. Legislators have deliberated on whether the voting method “is a threat.” *See Voting; Elections; Tally; Prohibition*, S.B. 1265, 56th Leg., 1st Reg. Sess. (2023) (Statement of Sen. Kern)¹; *but see id.* (Statement of Sen. Sundareshan) (“[T]here is nothing to be afraid of with this kind of a system.”)². They have contemplated its various purported purposes. *See Voting; Elections; Tally; Prohibition*, H.B. 2552, 56th Leg., 1st Reg. Sess. (2023) (Statement of Sen. Mendez) (“This demonizing of ranked-choice voting is only evidence that this body is aware that voters are tired of extremist legislators and are looking for proven ways to advance candidates with broad support.”)³; *Voting; Elections; Tally; Prohibition: Hearing on H.B. 2552 Before the H. Mun. Oversight & Elections Comm.*, 56th Leg., 1st Reg. Sess. (2023) (Statement of Rep. Heap) (“The purpose of this is that the political class hates primaries. . . . The purpose is to make voting intentionally more difficult and

¹ <https://www.azleg.gov/videoplayer/?eventID=2023021138&startStreamAt=11910> at 3:21:13

² <https://www.azleg.gov/videoplayer/?eventID=2023021138&startStreamAt=11910> at 3:24:48

³ <https://www.azleg.gov/videoplayer/?eventID=2023041014&startStreamAt=1476> at 26:25

more opaque so that we get less control.”⁴ Legislators have argued that “[r]anked-choice voting is extremely controversial.” *Voting; Elections; Tally; Prohibition: Hearing on H.B. 2552 Before the Sen. Elections Comm., 56th Leg., 1st Reg. Sess. (2023) (Statement of Sen. Kavanagh).*⁵ Some simply state, “Ranked-choice voting bad. Don’t like it.” *Voting; Elections; Tally; Prohibition: Hearing on S.B. 1265 Before the H. Republican Caucus, 56th Leg., 1st Reg. Sess. (2023) (Statement of Rep. Kolodin).*⁶ But regardless, legislators have “heard a lot recently in the last few months about ranked-choice voting.” *Voting; Elections; Tally; Prohibition: Hearing on H.B. 2552 Before the Sen. Elections Comm., 56th Leg., 1st Reg. Sess. (2023) (Statement of Rep. Smith).*⁷

The point is not that any of these views is right or wrong. Whether the Initiative is good or bad policy is beside the point. For all initiatives—controversial and mundane; popular and unpopular; good policy and bad—

⁴ <https://www.azleg.gov/videoplayer/?eventID=2023021078&startStreamAt=4539> at 1:35:33

⁵ <https://www.azleg.gov/videoplayer/?eventID=2023031077&startStreamAt=1823> at 47:44

⁶ <https://www.azleg.gov/videoplayer/?eventID=2023041011&startStreamAt=1144> at 19:25

⁷ <https://www.azleg.gov/videoplayer/?eventID=2023031077&startStreamAt=1823> at 31:20

Arizonans have a “right to expect a completely neutral summary, without advocacy or argument.” *Citizens for Growth Mgmt.*, 199 Ariz. at 73 ¶ 11. The Council failed to provide that.

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 16th day of August, 2024.

KRISTIN K. MAYES, ARIZONA
ATTORNEY GENERAL

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