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' REPLY BRIEF

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INTRODUCTION

The Court can resolve this case on two straightforward grounds. First, the Court should reject the Committee's novel argument that the order of discussion in the Legislative Council ("Council")'s analysis of Prop. 140 (the "Analysis") violates § 19-124(C). Until the ruling below, no court has decided that the ordering of paragraphs in an analysis describing a proposed constitutional amendment fails the impartiality standard under § 19-124(C), and for good reason: a proposed amendment must "form a consistent and workable proposition." *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145 149-50 ¶ 12 (2013).

Indeed, the order here is reasonable. Consistent with the plain language of Prop. 140, the Analysis contains a short sentence using neutral language, summarizing the voter rankings provisions. The Committee does not (and cannot) dispute that Prop. 140 amends the Constitution in three separate sections to create a new "voter rankings" system in Arizona's elections. And one of these amendments is second in order of codification (after the amorphous "non-discrimination" amendment, which the Analysis discusses last and which the Committee did not ask to be moved up). The Committee's assertion that this single sentence amounts to a "misleading, advocacy-oriented analysis"— is illogical and unpersuasive.

Second, the Court should reject the argument that the use of a "see also" cross reference, "all," and "allow" render the Analysis misleading. The Analysis is neutral

and provides voters with useful information, in easy-to-understand terms, about a complex and multifaceted proposal.

The Court's "'function is only to ensure that a challenged analysis is reasonably impartial and fulfills the statutory requirements.'" *Tobin v. Rea*, 231 Ariz. 189, 197 ¶34 (2013). If the Committee prevails here, courts will inevitably be dragged into fights over every analysis where any party would prefer things be phrased or ordered in a slightly different way.

ARGUMENT

I. The Analysis Is Impartial and Complies with A.R.S. § 19-124(C)

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

The Opening Brief ("OB") explained, and the Committee does not dispute, that a constitutional amendment must be interrelated "so as to form a consistent and workable proposition." *Save Our Vote*, 231 Ariz. at 149-50 ¶ 12. If the provisions are all "consistent" and "workable," then it cannot be misleading or biased to describe them in any particular order.

The Committee's counterarguments do not overcome this logical corollary. First, the Committee has abandoned its argument that the order in which provisions are discussed is like the order candidates are listed on a ballot. Unlike selecting a candidate, voters cannot pick and choose which provisions of an initiative will become law. OB at 9.

The Committee's argument that there cannot be "different standards for constitutional versus statutory measures" also misses the point. Answering Brief ("AB") at 11. There is a single standard applicable to analyses—"free from any misleading tendency," *Tobin*, 231 Ariz. at 194, ¶13, but the application of that standard must consider the nature of the initiative being analyzed. For a constitutional initiative, it is inherently not misleading to describe provisions in any order because they must all be part of one consistent and workable whole.

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

The Committee argues that the Analysis is misleading because it "discusses voter rankings up front and then sows confusion about when they could be used." AB at 9. The Committee does not, however, offer a persuasive response to the three neutral justifications for the Analysis's order.

Tellingly, the Committee ignores that the initiative expressly addresses voter rankings in three different sections of the Arizona Constitution and does not respond to the Council's argument that it was therefore reasonable for the Analysis to begin with a topic sentence on that point. OB at 3.

The Analysis's topic sentence regarding voter rankings also logically and naturally follows from the end of the background paragraph on current law. OB at 11. The Committee suggests that "[i]t would be logical" to start instead with the provisions relating to primary elections, and the Committee expresses puzzlement

about the Council's motivation to appeal this "drafting choice." AB at 14. The Committee's dissatisfaction with the Analysis does not establish a violation of § 19-124(C). As in *Howe*, "reasonable minds could conclude that the Council met the requirements of the law[.]" *Ariz. Legis. Council v. Howe*, 192 Ariz. 378, ¶ 17 (1998).

Third, the Analysis generally follows the order of codification in the Constitution. After the non-discrimination provision, the next change in order of codification relates to "voter rankings." And the meaning of the nondiscrimination provision by itself is difficult for even lawyers to understand. It was thus reasonable to discuss that change at the end, and the Analysis begins with the next change in order of codification—voter rankings.

Third, the Committee recycles its argument that analyses must describe mandatory changes before optional ones. AB at 14-15. But the complexity of Prop. 140 is such that it makes many mandatory and optional changes throughout. The Superior Court properly rejected this test as unworkable. OB at 11-12.

C. The Committee Has Not Shown that the Use of a "See Also" Cross-Reference or the Words "Allow" and "All" Were Unreasonable

The OB explained (at 13) that despite the Committee's challenge to it, the "see also" cross reference helps establish impartiality because it communicates that more information on voter rankings will appear later. Neither of the two most obvious drafting alternatives would be preferable. First, eliminating the "see also" reference would have reduced the accessibility of the information to voters. Voters would lose

the benefit of a cue that more information and explanation was coming. The other alternative, moving the entire discussion of voter rankings first, would have been attacked as over-emphasizing or amplifying voter rankings. In other words, there is nothing the Council can do to satisfy the Committee short of discussing the provisions in the Committee's preferred order. But this usurps the Council's role, and there is no legal requirement to do this. *See* Parts I(A)-(B), *supra*.

The Superior Court's order contained only speculation that a voter would skip over paragraphs of analysis merely because of a "see also" reference. The Committee still offers nothing other than speculation, and its main argument is to try to shift the burden to the Council to justify that the cross reference is *not* misleading. AB at 16-17. But it is the Committee's burden to show that the mere use of a "see also" reference was misleading. *Tobin*, 231 Ariz. at 193 ¶11, 197 ¶34.

Finally, the Opening Brief explained why the use of "allow" and "all" were not misleading. The Answering Brief does not seriously argue that the use of the word "allow" was improper. The Committee also only briefly attacks the use of "all" elections in that paragraph. In sum, the Committee does not seriously dispute that both drafting choices, which use neutral terms, were reasonable.

II. Response to Attorney General ("AG") Amicus Brief

A. The AG's Ordering Arguments Fail for the Same Reasons

The Attorney General's arguments fare no better. The AG argues that discussing voter rankings first amplifies potential controversy and "injects" that "contentious topic" into an "already controversial measure." Amicus Br. at 5. This argument is illogical because the Analysis is not injecting anything—voter rankings appear in the text of Prop. 140 in three different places. The Analysis merely contains a topic sentence addressing "voter rankings" using neutral language. And the AG never explains why voter rankings is any more controversial than any other changes. The Analysis properly limits itself to actual changes made by Prop. 140, and discusses them in neural language. OB at 9 (citing *Howe*, 192 Ariz. at 384 ¶¶18, 22.

B. The AG's Own Actions Approving Prop. 140's Descriptive Title Contradict Its Arguments Here.

The AG insists that placing a sentence regarding "voter rankings" first was an improper rhetorical strategy and cites writing/style guides. Amicus Br. at 4-5. But if the Analysis's order alone is grounds to find it misleading, the AG has committed the same infraction by approving Prop. 140's descriptive title. *See* A.R.S. § 19-125(D). That descriptive title states first that "All primary election candidates for a given office will have the same signature requirements for ballot qualification."[1]

[1] Page 9, Ballot_Language_2024_GE_approved_by_AG_TOC_2024-07-31_FINAL.pdf (azsos.gov)

Does the AG contend that the uniform nominating signature requirement is "a primary effect" of the initiative compared to introducing "voter rankings" into Arizona law in three different constitutional sections? The signature requirements also do not appear first in the text of Prop. 140, so the AG must believe it is legally appropriate to depart from that order without running afoul of § 19-125(D).

In sum, the AG's brief does not offer any helpful perspective, information, or argument on the narrow legal issue in this case. The Council's Analysis of Prop. 140 is neutral, fair, and reasonable, and comports with § 19-124(C) and this Court's precedents.

CONCLUSION

The Court should accept jurisdiction and grant relief.

RESPECTFULLY SUBMITTED this 23rd day of August, 2024.

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