SUPREME COURT OF ARIZONA

MAKE ELECTIONS FAIR, Plaintiff/Appellee, v. BEN TOMA, et al. Defendants/Appellants,	No. CV-24-0187-AP/EL Maricopa County Superior Court No. CV2024-018789

MAKE ELECTIONS FAIR'S ANSWERING BRIEF

Mary R. O'Grady, 011434
Andrew G. Pappas, 034432
Joshua J. Messer, 035101
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
602-640-9000
mogrady@omlaw.com
apappas@omlaw.com
jmesser@omlaw.com

Attorneys for Plaintiff/Appellee
Make Elections Fair PAC

TABLE OF CONTENTS

Page

INTRODUCTION

Legislative Council's Analysis of the Make Elections Fair Arizona Act, I-14-2024, selectively emphasizes and misleadingly describes the Initiative's voter-ranking provisions. As the superior court found, the Analysis does so as part of a rhetorical strategy to confuse voters and persuade them not to support the Initiative.

The Analysis leads with voter rankings and then immediately directs voters to read about voter rankings again—skipping over the intermediate paragraphs that describe the Initiative's primary-election changes and provide critical context for its voter-ranking provisions. The result, as the superior court recognized, is a confusing and misleading Analysis that violates the statutory mandates of clarity and impartiality.

The Council Republicans[1] fail to show otherwise. They lead by invoking the Constitution's separate-amendment rule, which is the basis for two other challenges to the Initiative pending before the Court but has nothing to do with this case. The Council Republicans also attempt to defend

[1] Plaintiff/Appellee Make Elections Fair (the "Committee") refers to Defendants/Appellants Toma, Petersen, Bolick, Borrelli, Kerr, Grantham, Martinez, and Nguyen as the "Council Republicans."

the rhetorical choices reflected in the Analysis, resting on unpersuasive explanations the superior court rightly rejected.

Finally, the Council Republicans tout (at 4) that the Analysis was "unanimously approved." That is irrelevant to whether it is impartial. Regardless, they fail to mention that their Democratic colleagues now support the Committee's position. [APP021.]

The superior court correctly found the Analysis is biased, misleading, and confusing, and violates A.R.S. § 19-124(C). This Court should affirm.

STATEMENT OF FACTS AND CASE

The Initiative. The Court is familiar with the Initiative, as this is the third appeal filed by the Initiative's opponents in the last two weeks. Nonetheless, the Committee briefly describes the Initiative's provisions, which make a series of interrelated reforms in Article 7 of the Constitution. First, the Initiative amends Article 7, Section 2 to guarantee nondiscrimination based on "political party affiliation or nonaffiliation." [APP045 § 3.]

Relatedly, the Initiative amends Article 7, Section 10 to end partisan primaries. [APP046 § 5.] The changes would allow any qualified elector to vote in a primary regardless of partisan affiliation; require that all qualified

candidates for the same office appear on the same ballot; and prescribe identical signature requirements for all candidates for the same office. [*Id.*]

To accommodate these changes, the Initiative makes additional changes at primary and general elections. The Initiative allows the Legislature (or, failing that, the Secretary) to decide how many candidates advance from the primary to the general election. [APP046–47 § 5.] If the Legislature (or Secretary) decides that more than two candidates advance for an office to which one candidate will be elected, the Initiative requires the use of voter rankings at the general to ensure the ultimate winner enjoys broad electoral support. [APP047–48 § 6.]

The Initiative's final substantive section prohibits the use of public funds to administer political-party elections, except in limited circumstances applicable only to the presidential preference election. [APP048 § 7.]

On Wednesday, July 3, the Committee filed petition sheets to place the Initiative before the People in November.

The analysis. Also on July 3, Legislative Council released draft analyses of 14 ballot measures, including the Initiative, and noticed a Council meeting for the morning of Monday, July 8. At the meeting, the

Committee's counsel used his two minutes to suggest changes to the draft analysis' structure. Legislative Council adopted the draft as its final analysis.

The Analysis starts with background information and begins with primary elections. [APP053.] But the body does not proceed in that order, or in the order in which the Initiative proceeds. Instead, **paragraph 1** refers to voter rankings and directs the reader to **paragraph 4**, which also refers to voter rankings [*id.* ¶ 1]—describing the substantive sections that come second and fourth in the Initiative [APP046–48 §§ 4, 6].

Paragraphs 2 and **3** summarize changes the Initiative requires regarding primary elections. [APP053–54 ¶¶ 2–3.]

Paragraph 4 (cross-referenced in paragraph 1) summarizes changes to general-election procedures, and suggests that one way or another, a voter-rankings process will be determined and used. [APP054 ¶ 4.]

Paragraph 5 then describes the prohibition on using public monies for political party elections. [APP054 ¶ 5.]

Paragraphs 6 and **7** describe the Initiative's first substantive section, its nondiscrimination provisions. [APP045 § 3.]

This lawsuit. On July 17, the Committee sued, seeking (1) a declaration that the Analysis violates § 19-124, (2) an injunction prohibiting the Secretary

from including the Analysis in the publicity pamphlet, and (3) a writ of mandamus compelling Legislative Council to adopt an impartial analysis.

The Committee and the Council Republicans cross-moved for summary judgment, and the superior court heard argument on August 9. On August 12, the court granted the Committee's motion and entered a Rule 54(b) judgment for the Committee. This appeal followed.

STATEMENT OF THE ISSUE

An analysis under A.R.S. § 19-124(C) must be "completely 'free from any misleading tendency.'" *Tobin v. Rea*, 231 Ariz. 189, 195 ¶ 18 (2013) (quoting *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590 (1994)). The superior court found the Analysis here is misleading in multiple ways. Did the court correctly conclude the analysis violates § 19-124(C)?

STANDARD OF REVIEW

The Court "review[s] the trial judge's legal conclusions *de novo*." *Tobin*, 231 Ariz. at 194 ¶ 14 (quotation omitted).

ARGUMENT

I. Governing law.

Section 19-124(C) requires Legislative Council to "prepare and file … an impartial analysis of the provisions of each ballot proposal of a measure

or proposed amendment" that describes the measure and is "written in clear and concise terms." "[T]he purpose … 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 *Greene*, 180 Ariz. at 590). 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." *Id.* 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 § 19-124(C) by "impermissibly advocat[ing] against the measure." *Id.* at 197 ¶¶ 32–33. That is because "initiative sponsors, petition signers, and voters have every right to expect a completely neutral summary, without advocacy or argument." *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz. 71, 73 ¶ 11 (2000) ("*CGM*").

II. The Analysis violates § 19-124(C).

The superior court correctly found "the Council's analysis selectively emphasizes the Initiative's voter ranking provisions" and, "[i]n so doing, …

inaccurately suggests that its enactment would mandate the use of voter ranking to determine the winning candidate in all future elections." [APP018.] Because "[t]his is misleading to voters," the analysis "violates section 19-124(C)" and "must be revised." [*Id.*]

The court noted the Analysis discusses voter rankings up front and then sows confusion about when they could be used. "Contrary to the analysis's implication, the Initiative does not require the use of voter ranking in declaring an election winner in all instances"; rather, "*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" do the voter-ranking provisions apply. [APP024] The court continued:

> 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 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.

[APP024–25.] The court rightly identified this approach as "'rhetorical strategy'" that "is 'tinged with partisan coloring' and violates the requirement of neutrality." [APP025.]

III. The Council Republicans' arguments to the contrary all fail.

A. Section 19-124 forbids advocacy for all analyses.

In a brief that repeatedly professes their impartiality (at 6, 15), the Council Republicans begin their critique of the superior court's decision by pointing (at 9) to the Constitution's separate-amendment rule—a rule that has nothing to do with this case but is at the heart of two consolidated cases seeking to kick the Initiative off the ballot altogether, *see* case no. CV-24-0184-AP/EL. Based on that rule, the Council Republicans argue the order of analysis "cannot support a § 19-124(C) violation" because a constitutional amendment "is an all-or-nothing proposition" whose facets "must be '*sufficiently interrelated* so as to form a consistent and workable proposition.'" OB9 (quoting *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 8 (2010)).[2]

[2] The Arizona Free Enterprise Club ("AFEC") made the same argument in its opening brief in CV-24-0184-AP/EL, claiming (at 23) the Committee's challenge here "underscor[ed] the lack of interrelatedness" because "the order of discussion should have been irrelevant given that … the Initiative makes just one single amendment."

But § 19-124(C) has nothing to do with the separate-amendment rule. The Council Republicans cite no case suggesting otherwise. When AFEC moved to consolidate the two separate-amendment cases with this one, the superior court refused, explaining that this case doesn't "involve[] any common legal issues" with the others. [7/31/24 M.E. at 1.] The court got it right. The requirement that Legislative Council's analyses be impartial and clear applies to *all* ballot measures. That a constitutional amendment's provisions must be topical and interrelated, *Ariz. Together v. Brewer*, 214 Ariz. 118, 121 ¶ 6 (2007), says nothing about whether an analysis that selectively emphasizes some provisions is misleading.

The Council Republicans (at 9–10) contend otherwise based on *Arizona Legislative Council v. Howe*, 192 Ariz. 378 (1998), and *Greene*, 180 Ariz. 582. Both decisions are unavailing. Neither suggests Legislative Council is held to different standards for constitutional versus statutory measures—the Council Republicans' principal claim here (at 9). In fact, *Greene* involved a constitutional measure, and the Court invalidated Legislative Council's analysis because "[i]t was advocacy—argument." So too here. Whether an analysis "subjectively minimizes [an] important effect" of an initiative by describing it less than "frank[ly]," *id.*, or by burying and encouraging readers

to skip over it (as the Analysis does here regarding the Initiative's primary-election changes), it has the same pernicious effect of giving the voters a distorted picture of what the initiative does. That is true however many lines the analysis devotes to one feature or another if, as here, the Analysis uses advocacy-oriented rhetorical strategy. *See* OB10.

Howe does not aid the Council Republicans either. Unlike there, 192 Ariz. at 384 ¶¶ 18–19, the issue here isn't whether the Analysis properly uses illustrative examples. *See* OB9. The issue is whether the Analysis selectively emphasizes one aspect of the Initiative to mislead voters and advocate for or against the Initiative. "Unlike the analysis in *Howe*," the superior court explained, "the selective emphasis on voter ranking does not reflect a 'good faith effort' to make the Initiative easier to understand"; "[i]f anything, the summary reference to voter ranking" in paragraph 1 "makes the analysis *more* confusing." [APP025.]

B. The analysis is structured to advocate.

Legislative Council may not employ "rhetorical strategy" that renders its Analysis "not impartial." *See CGM*, 199 Ariz. at 73 ¶ 6. And the Court repeatedly has recognized in this context that structure is part of rhetoric. *Id.* (analysis that "attempts to persuade the reader at the very outset" that the

initiative "is unnecessary" is "not impartial"); *Tobin*, 231 Ariz. at 195 ¶ 18 (by failing to provide "explanatory context … in the first paragraph … the analysis 'attempts to persuade the reader at the very outset' that the initiative is contrary to his or her financial interests'").

The Council Republicans' defense of their rhetorical strategy fails in any event. They insist (at 11) "[t]here are logical reasons for addressing the changes related to voter rankings" first and attempt to identify two. Neither is persuasive.

First, they say (at 11), "[t]he voter ranking change is a material change in the law that applies to all types of elections." But as the superior court explained, "[e]ven setting aside whether the issue of voter ranking is a material change to the constitution," it "is not the only provision of this Initiative that 'applies to all types of elections.'" [APP026.] The Initiative's nondiscrimination provisions also apply to all types of elections. [APP045 § 3.] Those provisions are the Initiative's first substantive provisions, but the Analysis places them dead last, in paragraphs 6 and 7. [APP054 ¶¶ 6–7.]

The Council Republicans attempt to justify this bottom billing (at 12) by arguing it was "logical to discuss [these provisions] last" because of "the abstractness of those changes." Yet the Council Republicans have never said

what is "abstract" about provisions forbidding discrimination based on voters' or candidates' party affiliation—presumably because they aren't abstract. The superior court rejected these "post hoc justifications" too. [APP026.]

The Council Republicans' "all elections" justification is further undermined by the fact that the Initiative's prohibition on using public monies to administer political-party elections also applies across the board, with an exception for a presidential preference election under limited circumstances. [AP048 § 7.] Yet the Analysis doesn't describe these provisions first; it summarizes them in paragraph 5. [APP054 ¶ 5.]

The Council Republicans' second justification (at 11) for leading with voter rankings is that doing so "follows logically and naturally from" the background-law statement that "in the general election, … the candidate receiving the highest number of legal votes is declared elected." It would be logical to structure the Analysis as the background section (like candidate elections themselves) is structured, beginning with the primary. It also defies belief that the Council Republicans would litigate this dispute all the way up to this Court if this were merely a "drafting choice." OB11. Even if it were, it would resolve none of the other defects in the Analysis, the confusion it

sows, or the misleading impression the Analysis creates about the Initiative. [*See* APP024–25.]

The Council Republicans (at 11) dispute that "'required changes' must be described before 'optional changes.'" They miss the point. Required changes should go first to accurately describe what the Initiative does. As the Attorney General explained (at 3), and the superior court found [APP024], whereas the Initiative necessarily requires changes to primary-election procedures, the use of voter rankings would be required *only if* the Legislature, the Secretary, or the People chose to advance more than two candidates from the primary to the general election for an office to which one candidate is to be elected. Leading with that contingent change—as the Analysis does in paragraph 1, cross-referencing paragraph 4—fails to clearly or accurately describe the Initiative. That is true regardless of whether, as a general matter, § 19-124(C) requires an analysis to proceed in a particular sequence. [APP024.]

C. A misleading, advocacy-oriented analysis is not reasonable.

Last, the Council Republicans argue (at 14) that because the Analysis is cast in "neutral" terms, its emphasis on voter rankings—leading with

them in paragraph 1, and then immediately directing the reader to read about voter rankings again in paragraph 4—was "reasonable." It was not.

"[E]ven 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. As the superior court recognized, "[t]his 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." [APP024 (collecting cases).]

The court correctly concluded that is what the Analysis does: it "selectively emphasizes that the Initiative would 'amend' the constitution to provide for the use of voter ranking to declare election winners" and "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." [APP024.] Contrary to the Council Republicans' argument (at 14), that the Analysis doesn't use "provocative phrasing" does not compensate for the fact that it selectively emphasizes and misleads.

The Council Republicans also defend (at 13–14) the choice to begin the Analysis with a generalized statement about voter rankings in paragraph 1 and then direct the reader to paragraph 4 for more "nuance." They claim (at

13) this actually "helps establish impartiality." But the superior court saw this gambit for exactly what it is: a "'rhetorical strategy'" that "encourage[s] the reader 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." [APP025.] The Council Republicans (at 13) dismiss this finding as mere "speculation," but they do nothing to dispel it. Nor can they. Why else would they lead with voter rankings and then divide the description in two, burying in between the primary-election changes that drive whether voter rankings will be used at all? Doing so, as the superior court correctly concluded, "does nothing to assist the average voter" and instead "makes the analysis *more* confusing," all as part of a "'rhetorical strategy' devised to dissuade voters from supporting the Initiative." [APP025.]

An advocacy-oriented rhetorical strategy is not "reasonable." It is impermissible, as this Court has explained repeatedly. *See, e.g.*, *CGM*, 199 Ariz. at 72–73 ¶ 6; *Tobin*, 231 Ariz. at 197 ¶ 33.

REQUEST FOR ATTORNEYS' FEES

Pursuant to ARCAP 21 and A.R.S. §§ 12-341, 12-342, 12-348(A)(4), and 12-2030, the Court should award the Committee its costs and attorneys' fees on appeal.

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 21st day of August, 2024.

OSBORN MALEDON, P.A.

By /s/ Andrew G. Pappas
Mary R. O'Grady
Andrew G. Pappas
Joshua J. Messer
2929 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012

Attorneys for Real Party in Interest
Make Elections Fair PAC