James E. Barton II, 023888

Jacqueline Mendez Soto, 022597

Daniella Fernandez Lertzman, 037943

**BARTON MENDEZ SOTO PLLC**

401 W. Baseline Road, Suite 205

Tempe, Arizona 85283

480-550-5165

[James@bartonmendezsoto.com](mailto:James@bartonmendezsoto.com)

[Jacqueline@bartonmendezsoto.com](mailto:Jacqueline@bartonmendezsoto.com)

[Daniella@bartonmendezsoto.com](mailto:Daniella@bartonmendezsoto.com)

*Attorneys for Plaintiffs*

ARIZONA suPERIOR COURT

MARICOPA COUNTY

|  |  |
| --- | --- |
| RAISE THE WAGE AZ, an Arizona political action committee; and XXXX, a qualified elector,  Plaintiffs,  v.  STATE OF ARIZONA; and ADRIAN FONTES, in his official capacity as Secretary of State,  Defendants. | No.  **VERIFED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION**  Election Case/Referendum Challenge per A.R.S. § 19-161(B) |

This is a challenge, pursuant to Arizona Revised Statutes, §19-161(B), to the to the form of Senate Concurrent Resolution 1040, enacted by the Fifty-sixth Legislature during the Second Regular Session in 2024 (SCR 1040), as unconstitutionally bearing a deceptive title in violation of the Arizona Constitution, Article IV, part 2, section 13.

**PARTIES**

1. Plaintiff Raise the Wage AZ is a political committee registered with the Arizona Secretary of State as Committee No. 101257 (the “Committee”). The Committee was formed on September 29, 2022, for the purpose of promoting the One Fair Wage Act (serial number I-02-2024) (the “Initiative”), which amends Title 23 of the Arizona Revised Statutes to eliminate the ability of employers to take credit for a tipped workers’ tips in satisfying the employers’ obligation to pay the minimum wage.
2. Plaintiff Raise the Wage AZ has received nearly $2.5 million in in-kind contributions related to signature gathering supporting putting the One Fair Wage Act on the 2024 General Election Ballot, and is currently scheduled to turn-in its signatures in support of the measure on July 3, 2024.
3. Plaintiff XXX is a qualified elector in the State of Arizona and intends to vote in the 2024 General Election.
4. Defendant the State of Arizona is a body politic.
5. Defendant Adrian Fontes is the Arizona Secretary of State, a public officer, and is named as a defendant in this action in his official capacity. The Secretary of State is the officer with whom the Legislative referenda are required to be filed and is named as an indispensable party.

**GENERAL ALLEGATIONS**

***Proposed Changes to Tipped Workers’ Wages***

1. Under current law, employers are permitted to take credit for the tips earned by some tipped workers when the employer calculates its minimum wage obligation as follows:

For any employee who customarily and regularly receives tips or gratuities from patrons or others, the employer may pay a wage up to $3.00 per hour less than the minimum wage if the employer can establish by its records of charged tips or by the employee's declaration for federal insurance contributions act (FICA) purposes that for each week, when adding tips received to wages paid, the employee received not less than the minimum wage for all hours worked. Compliance with this provision will be determined by averaging tips received by the employee over the course of the employer's payroll period or any other period selected by the employer that complies with regulations adopted by the commission.

A.R.S. § 23-363(C).

1. The Initiative was filed with the Arizona Secretary of State on November 7, 2022, and provided the following summary of the measure:

The One Fair Wage Act raises the minimum wage by $1 over cost of living increases in 2025 and 2026 and leaves cost of living increases in place thereafter. For tipped employees, it raises the minimum wage employers must pay tipped employees regardless of tips employees earn. Currently, employers may count up to $3 per hour of a tipped employee's tips to offset the employer's minimum wage obligation. The Act gradually reduces the amount of the employer's offset due to tips until the employer is required to pay the full minimum wage and employees keep all of their tips on top of that wage. The Act expands coverage of the minimum wage, removing the small business exception. It explicitly exempts tribal entities as employers for purposes of the minimum wage law, and leaves in place the exemption for the state and federal governments. It makes clear that the state minimum wage applies regardless of the individual's age, status as a learner, apprentice, vocational trainee or other status wherein the individual provides labor, regardless of any benefit to the individual, but the state minimum wage continues to not apply to independent contractors. Defines terms; repeals old version of section 23-362.

1. The Initiative proposes to Arizona voters that the amount of a tipped worker’s tips that an employer may take credit for in calculating the employer’s obligation for paying the worker the minimum wage will be gradually reduced until all workers in Arizona, including tipped workers, are paid the minimum wage.
2. The Initiative accomplishes this by amending paragraph C, which is renumbered paragraph D by the Initiative, as follows:

For any employee who customarily and regularly receives tips or gratuities from patrons or others, the employer may pay ~~a wage up to $3.00 per hour~~ less than the minimum wage AS PRESCRIBED IN THIS SUBSECTION if the employer can establish by its records of charged tips or by the employee's declaration for federal insurance contributions act (FICA) purposes that for each week, when adding tips received to wages paid, the employee received ~~not less than~~ AT LEAST the minimum wage for all hours worked. Compliance with this ~~provision will be~~ SUBSECTION IS determined by averaging tips received by the employee over the course of the employer's payroll period or any other period selected by the employer that complies with regulations adopted by the commission. EXCLUDING ANY TIPS RECEIVED BY THE EMPLOYEE, EMPLOYERS SHALL PAY TIPPED EMPLOYEES AT LEAST:

1. $3.00 PER HOUR LESS THAN THE MINIMUM WAGE DESCRIBED IN SUBSECTION B, ON OR BEFORE DECEMBER 31, 2024.

2. $2.00 PER HOUR LESS THAN THE MINIMUM WAGE DESCRIBED IN SUBSECTION B, ON AND AFTER JANUARY 1, 2025 THROUGH DECEMBER 31, 2025.

3. $1.00 PER HOUR LESS THAN THE MINIMUM WAGE DESCRIBED IN SUBSECTION B, ON AND AFTER JANUARY 1, 2026 THROUGH DECEMBER 31, 2026.

4. THE MINIMUM WAGE DESCRIBED IN SUBSECTION B, ON AND AFTER JANUARY 1, 2027.

Proposed Section 23-363(D).

1. The short title for the Initiative is the “One Fair Wage Act.”
2. The purpose of SCR 1040, as adopted by both chambers of the Arizona Legislature, is: “Subject to voter approval, constitutionally establishes minimum hourly wage requirements for employees who customarily and regularly receive tips or gratuities from patrons or others (tipped employees).” Arizona State Senate, Fact Sheet for S.C.R. 1040 at 1.
3. On June 12, the Legislature transmitted SCR 1040 to the Secretary of State for placement on the 2024 General Election ballot.
4. SCR 1040 proposes a constitutional amendment to Arizona voters that would further reduce the wages that employers may pay some tipped workers from a flat $3 per hour less than the state wage, to twenty-five percent less than the minimum wage with the following section added to Article 25 of the Arizona Constitution:

Section 11. For any employee who customarily and regularly receives tips or gratuities from patrons or others, the employer may pay a wage up to twenty-five percent per hour less than the minimum wage established by statute if the employer can establish by the employer’s records of charged tips or gratuities or by the employee’s declaration for federal insurance contributions act purposes that for each week, when adding tips or gratuities received to wages paid, the employee received not less than the minimum wage plus $2 for all hours worked. Compliance with this section is determined by averaging tips or gratuities received by the employee over the course of the employer’s payroll period or any other period selected by the employer that complies with laws enacted by the legislature.

Proposed Ariz. Const. art. 25, §11.

1. The act may be cited as the “Tipped Workers Protection Act.” SCR 1040, § 2.

***Operation of SCR 1040***

1. The current Arizona minimum wage is $14.35 per hour.
2. An employer can pay a tipped employee $11.35 per hour, if a tipped employee earns at least $14.35 per hour with wages and tips combined.
3. First Example: if an employee works 80 hours in a pay period and earns $240 in tips during that pay period, the employer may pay the employee $11.35 per hour in wages, or $908.00 total, so that the employee’s total compensation is $1,148.00, or $14.35 per hour.
4. The vast majority of tipped workers make more than $5 per hour in tips.
5. Second Example: if in the example above, the employee made $10 per hour in tips, the employee would earn $800 in tips. Thus, the employer may pay the employee $908.00 in wages because in that case, the employee’s wages plus tips total $1708.00, which is $21.35 per hour, and over the minimum wage.
6. Under SCR 1040, in the second example, which represents the typical situation, the employer could pay the tipped worker 25% less than the minimum wage, or $10.76 per hour.
7. The super subminimum wage would be authorized because in that case the total wages, $861.00, plus the total tips, $800.00, is $1661, or $20.76 per hour. Still $2 above the minimum wage, which is what SCR 1040 requires in order to permit paying 25% less than the minimum wage in wages.
8. In the second example, the tipped worker lost $47.00 as compared to current law.
9. If the tipped worker earned only $3 per hour in tips, the scenario described in the first example, the employer would not be able to take advantage of the SCR 1040’s provision authorizing the super subminimum wage of 25% less than the minimum wage.
10. SCR 1040 only applies in situations in which the tips plus the super subminimum wage amount to $2 over the current minimum wage. Thus, SCR 1040 would not apply in any way to the conditions described in the first example.
11. The tipped worker in the first example would be paid under A.R.S. § 23-364, that is, the tipped worker would be paid wages of $908.00, so that the employee’s total compensation is $1,148.00, or $14.35 per hour.
12. In the vast majority of circumstances, tipped workers will make less money under SCR 1040 because the employer’s contribution will go down and the worker’s tips will remain unchanged.
13. Under conditions of extraordinarily low tips, a tipped worker’s compensation will be the same under SCR 1040, as it is under current law.
14. Under no circumstances will the tipped worker make more money under SCR 1040 than under current law.
15. Under the Initiative, the tipped worker would always make more than under current law and more than under SCR 1040.

***The 2024 General Election Ballot***

1. SCR 1040 has been referred to the Arizona Secretary of State to be placed on the 2024 General Election ballot.
2. The Initiative will also appear on the 2024 General Election ballot.
3. The Initiative has been in circulation since November 7, 2024, and is proposing an increase in the wages paid to tipped workers, and uses the title One Fair Wage.
4. SCR 1040 was referred to the ballot only in June 2024 and uses the title Tipped Workers Protection Act.
5. Nothing in SCR 1040 provides any protection to tipped workers.
6. Having two measures on the ballot—one that increases wages paid to tipped workers and one that decreases wages paid to tipped workers—is likely to lead to voter confusion.

**FIRST CLAIM FOR RELIEF – DECLARATORY JUDGMENT**

1. Plaintiffs incorporate the allegations set forth above as though fully set forth herein.
2. Article 4, pt. 2 § 13 of the Arizona Constitution provides that, “Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.”
3. This section of the Constitution applies with equal force to Legislative referenda as to any other act of the Legislature.
4. The title of SCR 1040 that will be provided to voters is materially misleading, such that it creates a substantial danger of fraud, confusion, and unfairness, in violation Article 4, pt. 2, § 13.
5. The title of a legislative bill “may not be deceptive or misleading” and “must state the subject of the legislation with sufficient clarity to enable persons reading the title to know what to expect in the body of the act.” See Arizona Bill Drafting Manual 2023-2024 at p. 9.
6. SCR 1040’s title is misleading to the point of fraud, and creates a significant danger of electorate confusion and unfairness, because it is likely to mislead voters to believe that it will protect tipped workers, when in fact, it exploits tipped workers by subjecting them to an even lower minimum wage than the current subminimum wage that they can be paid and by adding it to the constitution.
7. Arizona Courts recognize a cause of action for intentionally engaging in voter confusion. *Griffin v. Buzard*, 86 Ariz. 166, 173, 342 P.2d 201, 205–06 (1959) (“The courts must be alert to preserving the purity of elections and its doors must not be closed to hearing charges of deception and fraud that in any way impede the exercise of a free elective franchise.”)
8. *Griffin* dealt with a decoy candidate of the same name as another candidate for office being run for the sole purpose of creating voter confusion, as with SCR 1040’s deceptive title.
9. This cause of action exists in the initiative and referendum context as well. *Leach v. Reagan*, 245 Ariz. 430, 437 ¶ 29, 430 P.3d 1241, 1248 (2018) (recognizing this cause but holding that the “[i]nitiative's title is not deceptive.”)
10. Plaintiffs are entitled to a Declaration that SCR 1040 is sufficiently deceptive to the point of fraud, and creates a significant danger of electorate confusion and unfairness, and thereby violates Article 4, pt. 2 § 13 of the Arizona Constitution.

**SECOND CLAIM FOR RELIEF – INJUNCTION**

1. Plaintiffs incorporate the allegations set forth above as though fully set forth herein.
2. Under Section 19-161(B), Arizona Revised Statutes, and as provided above, SCR 1040 is not legally sufficient.
3. Because HCR 2060 is not legally sufficient, Plaintiffs are entitled an injunction that enjoins the Secretary of State from certifying HCR 2060 for the 2024 General Election.

**WHEREFORE**, Plaintiffs requests that the Court make the following:

1. A Declaration that SCR 1040 violates Article 4, pt. 2 § 13 of the Arizona Constitution;
2. An Order enjoining the Arizona Secretary of State from certifying SCR 1040 for placement on the 2024 General Election Ballot;
3. An award of costs and reasonable attorneys’ fees pursuant to the private attorney general doctrine;
4. Further relief as the Court deems necessary and appropriate.

RESPECTFULLY SUBMITTED this 19th of June 2024.

**BARTON MENDEZ SOTO PLLC**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

James E. Barton II

Jacqueline Mendez Soto

Daniella Fernandez Lertzman

401 W. Baseline Road, Suite 205

Tempe, Arizona 85283

*Attorneys for Plaintiffs*

**VERIFICATION**

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, declare, as permitted by Ariz. R. Civ. P. Rule 80(c), as follows:

1. I represent ONE FAIR WAGE a plaintiff in this case;
2. I have read the Verified Complaint and know its contents;
3. To the best of my knowledge, information and belief, the statements made in it are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 2024

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_