

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

HONORABLE MELISSA IYER JULIAN

CLERK OF THE COURT
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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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 8th 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 5.¹

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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.”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-018789

08/12/2024

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.



Honorable Melissa Iyer Julian
Maricopa County Superior Court Judge