

SUPREME COURT OF ARIZONA

MAKE ELECTIONS FAIR,) Arizona Supreme Court
) No. CV-24-0187-AP/EL
 Plaintiff/Appellee,)
) Maricopa County
 v.) Superior Court
) No. CV2024-018789
 BEN TOMA, et al.,)
)
 Defendants/Appellants.)
) **FILED 08/28/2024**
)
 _____)

DECISION ORDER

The Court en banc has considered the briefs of the parties and amicus curiae and the record in this matter.¹

Initially, though Appellants filed this matter as an expedited election appeal under ARCAP 10, the Court accepts jurisdiction as a special action because there is no statutory basis to treat this matter as an election appeal, although it perhaps falls under ARCAP 10(d)(1). See ARCAP 10, Comment 1; *Tobin v. Rea*, 231 Ariz. 189, 193 ¶ 8 (2013) (citing Ariz. R.P. Spec. Act. 1(a), 4(a), 7(b)).

Therefore,

IT IS ORDERED that the Court accepts special action jurisdiction to decide this matter.

Pursuant to A.R.S. § 19-124(C), the Legislative Council ("Council") must write an "impartial analysis" of each initiative

¹ Justice Clint Bolick has recused himself from this case. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Rebecca White Berch, Justice (Retired) of the Arizona Supreme Court, was designated to sit on this matter until it is finally determined.

measure that will appear on the general election ballot for inclusion in the publicity pamphlet the Secretary of State sends to registered voters before the election. This analysis “assist[s] 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)).

The Initiative is entitled the “Make Elections Fair Arizona Act.” See *Make Elections Fair Arizona Act*, Initiative No. I-14-2024, § 1 (2024) (hereafter “Initiative”). It proposes to amend the constitution to “create[] a primary system in which people may vote for the candidate of their choice, regardless of the political party of the voter or the candidate” and “provide[] additional flexibility regarding general elections.” See Initiative, § 2. Thus, the Initiative proposes an interrelated series of election reform amendments, including changes to article 7, section 2 (prohibiting partisan discrimination); section 7 (allowing voter rankings); section 10 (enacting nonpartisan direct primary elections); and section 11 (dictating who advances to the general elections).

The legislative analysis begins with the following text:

ANALYSIS BY LEGISLATIVE COUNCIL

1 The Arizona Constitution currently requires the Legislature to enact a direct primary
2 election law for the nomination of candidates for all elective state, county and city offices,
3 including federal congressional offices. The candidates from each political party who advance
4 from the primary election then face each other in the general election, where the candidate
5 receiving the highest number of legal votes is declared elected.
6 Proposition ___ would amend the Arizona Constitution to:
7 1. Allow for the use of voter rankings at all elections held in this state to determine which
8 candidate received the highest number of legal votes (see also paragraph 4 below).
9 2. Revise the primary election procedures as follows:
10 (a) All candidates who qualify for election to an office would be placed on the same
11 primary election ballot regardless of each candidate's political party affiliation or nonaffiliation.
12 Each of the candidates would have the same signature requirement to qualify for the primary
13 election ballot. A qualified elector would be allowed to sign a candidate nomination petition
14 without regard to the political party affiliation or nonaffiliation of the qualified elector or the
15 candidate.

. . . .

Each numbered paragraph in the Initiative explains proposed revisions to our election procedures.

The trial court concluded that two aspects of the analysis were misleading. First, "The analysis [] 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 under the Act "the candidate who receives the most votes would no longer be declared the victor in 'all Arizona elections.'" Second, the cross-reference to paragraph 4 (where voter rankings in general elections are discussed) "direct[s] readers immediately to paragraph 4," encouraging the reader to skip over the provisions that explain the changes to the primary and general elections. This, the court concluded, is a prohibited "rhetorical

strategy” devised to dissuade the voters from supporting the Initiative “by confusing when and how voter ranking would be used.” See *Tobin*, 231 Ariz. at 194 ¶ 13 (“Employing ‘rhetorical strategy’ in the crafting of wording of the analysis . . . is not compatible with the statute’s impartiality requirement.”). For these reasons, the court enjoined the Secretary of State from printing the analysis in the publicity pamphlet and directed the Council “to revise its analysis to comply with A.R.S. § 9-124(C) to correct the portion found by this order to be misleading to Arizona voters.” This special action followed.

To obtain relief, the Council must establish that the trial court’s ruling is arbitrary, capricious, or an abuse of discretion. Ariz. R.P. Spec. Act. 3(c); *Tobin*, 231 Ariz. at 194 ¶ 14. The court abused its discretion if it misapplied the law. See *id.* Because this matter concerns an issue of law with no disputed facts, we review the court’s ruling de novo. See *id.*

We must uphold the Council’s legislative analysis if it “substantially complied” with § 19-124(C). See *id.* at 193 ¶ 11. Our review requires an objective analysis. See *id.* Thus, we ask, “whether reasonable minds could conclude that the Council met the requirements of the law, not whether [we] believe the judicial system could itself devise a better analysis.” *Id.* (quoting *Ariz. Legislative Council v. Howe*, 192 Ariz. 378, 383 ¶ 17 (1998)). Our role here is “only to ensure that a challenged analysis is

reasonably impartial and fulfills the statutory requirements.'" *Id.* at 197 ¶ 34 (quoting *Howe*, 192 Ariz. at 383 ¶ 17).

We unanimously conclude that the Council's analysis substantially complies with § 19-124(C). The analysis, including the first numbered paragraph, accurately describes the Initiative. Notably, the Initiative proposes to amend the current constitutional requirement that the person or persons with the most votes is declared elected by adding that this requirement "does not prohibit the use of voter rankings to determine which person or persons received the highest number of legal votes." See Initiative, § 4. The Council's analysis in the first numbered paragraph therefore accurately describes this provision by stating that the Initiative would amend the constitution to "[a]llow for the use of voter ranking at all elections held in this state to determine which candidate received the highest number of votes."

We disagree that the first numbered paragraph's reference to the fourth numbered paragraph of the analysis was an improper rhetorical device that encouraged voters to "skip over" provisions describing proposed changes to the primary and general election procedures. The first numbered paragraph refers the voter to the fourth numbered paragraph to obtain details about what the proposed amendment *requires* in some general election procedures concerning voter ranking. The reference concerns a feature of the Initiative, does not attempt to persuade the voter about the merits of voter ranking,

and does not imply that other aspects of the analysis are unimportant. Thus, this description is unlike ones in cases where we found the Council had used rhetorical strategy to draft a description favoring one side or the other. See, e.g., *Tobin*, 231 Ariz. at 196 ¶¶ 26-27 (finding that a description tended to mislead by overstating a “qualified limitation on adjustment of the sales tax base”); *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz. 71, 72-73 ¶ 6 (2000) (characterizing Council’s description as “attempt[ing] to persuade the reader at the very outset that present laws adequately address the perceived problems the initiative seeks to remedy” and disallowing this “rhetorical strategy” as not impartial).

Finally, we disapprove the trial court’s finding that the Council’s choice in ordering its description of Initiative provisions misleads voters by selectively emphasizing the voter ranking aspects of the proposed constitutional amendments rather than the changes to primary election procedures. The analysis describes the changes in separately numbered, short paragraphs, which permits an interested voter to understand the proposed amendments. It is not for the courts to decide what aspects of the Initiative are most important and deserving of description in the analysis’ initial paragraphs. See *Tobin*, 231 Ariz. at 193 ¶ 11.

Therefore,

IT IS ORDERED reversing the trial court’s order finding that the analysis as presented violates A.R.S. § 19-124(C)’s impartiality

requirement and enjoining the Secretary of State from printing the legislative analysis of Initiative No. I-14-2024 in the publicity pamphlet in the form approved by the Legislative Council in the form attached hereto.

IT IS FURTHER ORDERED that the Secretary of State print the Council's analysis as submitted.

IT IS FURTHER ORDERED that the Clerk of Court shall issue the mandate forthwith.

DATED this 28th day of August, 2024.

_____/s/_____
ANN A. SCOTT TIMMER
Chief Justice

TO:

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