

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-015592

08/30/2004

HONORABLE MARK W. ARMSTRONG

CLERK OF THE COURT
C. Danos
Deputy

FILED: 08/31/2004

SERVICE EMPLOYEES INTERNATIONAL
UNION A F L-C I O, et al.

NICHOLAS J ENOCH

v.

JANICE K BREWER, et al.

DIANA L VARELA

JOHN W ACER
JONATHAN WEISSGLASS, PHV
ALTSHUER BERZON NUSSBAUM . .
177 POST ST #300
SAN FRANCISCO CA 94108
BRUCE P WHITE
JILL M KENNEDY
BARBARA J CHISHOLM, PHV
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**UNDER ADVISEMENT RULING
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter was taken under advisement after the hearing held August 25, 2004.

The sole issue remaining for decision is Plaintiffs' First Claim for Relief, which alleges that Initiative Petition #I-03-2004 is legally insufficient because the form of the petition signature sheets filed with the petition violates A.R.S. §19-102(A). Specifically, plaintiffs contend that the Initiative description on the petition signature sheets does not substantially comply with the requirements of A.R.S. § 19-102(A) for two reasons:

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- (1) the Initiative description contains two false assertions, as follows: (i) although the Initiative description limits the identification requirement at polling places to “first-time voter[s],” the proposed Initiative would amend A.R.S. §16-579(A) to read as follows: “Every qualified elector, before receiving his ballot, . . . shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector;” and (ii) although the Initiative description states the Initiative requires “agencies that administer non-federally mandated state and local benefits to . . . report . . . any fraudulent attempts to gain benefits to proper authorities,” the Initiative does not specifically mention fraud; and
- (2) the Initiative description does not include a “principal provision” of the proposed law which, if passed, would establish criminal provisions designed to punish state employees who do not enforce the citizenship verification requirements imposed by other statutory requirements enacted by the proposed law.

Based upon the following findings of fact and conclusions of law, the Court finds that the petition is legally sufficient.

I. FINDINGS OF FACT

1. In June 2003, Kathy McKee, the Chairperson of “Protect Arizona Now” (“PAN”), the Real Parties in Interest in this matter, submitted a proposed initiative petition to the Secretary of State, which was internally titled the “Arizona Taxpayer and Citizen Protection Act.” Upon receipt of PAN’s Initiative petition application, the Secretary of State, as required by A.R.S. § 19-111(B), designated the proposed measure as Initiative Petition #I-03-2004 (“Initiative”) and authorized its circulation for the purpose of collecting signatures from a sufficient number of registered voters to qualify the measure for inclusion on the November 2004 general election ballot.
2. Pursuant to the procedure set forth in A.R.S. § 19-121.04, when the county recorders’ respective verifications of the randomly selected signatures were complete, the Secretary of State officially calculated that PAN’s initiative had obtained 152,177 valid supporting signatures. The Secretary also calculated that in order to qualify for inclusion on the November 2004 ballot PAN’s initiative needed to have 122,612 valid signatures. Having concluded that PAN’s petition had received at least 105% of the requisite number of signatures, the Secretary designated the initiative as Proposition 200, and notified the Governor that the initiative had qualified for placement on the upcoming ballot.
3. The Initiative description found in Exhibit B to the Complaint is the same description that appears on all petition signature sheets filed with the Secretary of State in support of the Initiative. That description includes 98 words and states:

“The Arizona Taxpayer and Citizen Protection Act” amends A.R.S. to require evidence of

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U.S. citizenship when registering to vote in Arizona and proof of I.D. at polling place if first-time voter. This Act also requires legal presence in the U.S. in order to receive public benefits and requires agencies that administer non-federally mandated state and local benefits to verify applicants' identity, and report suspected illegal immigration status to the INS, and/or any fraudulent attempts to gain benefits to proper authorities. This ACT requires cooperation with other state agencies to verify immigration status of applicants for those seeking public benefits.

4. Exhibit A to the Complaint is the text of the Initiative.
5. Although the Initiative description limits the identification requirement at polling places to "first-time voter[s]," the proposed Initiative would amend A.R.S. §16-579(A) to read as follows: "Every qualified elector, before receiving his ballot, . . . shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector." Compl., Exh. A at 2:52 - 3:3 (capitalization removed).
6. Although the Initiative description states the Initiative requires "agencies that administer non-federally mandated state and local benefits to . . . report . . . any fraudulent attempts to gain benefits to proper authorities," the Initiative does not specifically mention fraud. Compl., Exh. A.
7. Although the Initiative description has no discussion of criminal provisions, the Initiative would amend A.R.S., Title 46, chapter 1, article 3, to add §46-140.01, which would include the following: "Failure to report discovered violations of federal immigration law by an employee is a class 2 misdemeanor. If that employee's supervisor knew of the failure to report and failed to direct the employee to make the report, the supervisor is guilty of a class 2 misdemeanor." Compl., Exh. A at 3:47-50 (capitalization removed).
8. Plaintiffs presented no evidence that any petition signers were misled by the Initiative descriptions on the petition sheets.

II. CONCLUSIONS OF LAW

1. Jurisdiction and venue are proper in this Court.
2. The Arizona Legislature has permitted challenges to the Secretary of State's certification of a ballot initiative and to the legal sufficiency of a petition filed with the Secretary. A.R.S. §19-122(C) provides that, "if any petition filed is not legally sufficient, the court may, in an action brought by any citizen, enjoin the secretary or other officers from certifying or printing on the official ballot for the ensuing election the . . . measure proposed . . ."

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3. Legal sufficiency means a valid petition signed by legal voters and complying substantially with the requirements of the law, *Iman v. Bolin*, 98 Ariz. 358, 404 P.2d 705 (1965), thereby enabling plaintiffs to explore areas where overall, petitions do not comply with the law. *See Kromko v. Superior Court*, 168 Ariz. 51, 811 P.2d 12 (1991).
4. In a challenge, courts have “the duty ‘of ensuring that the constitutional and statutory provisions protecting the electoral process (i.e., the manner in which an election is held) are not violated.’” *Kromko v. Superior Ct.*, 168 Ariz. 51, 57, 811 P.2d 12, 18 (1991) (quoting *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987)).
5. Once initiative petitions are circulated, signed and filed they are presumed valid. *Harris v. Purcell*, 193 Ariz. 409, 973 P.2d 1166 (1988); *Kromko v. Superior Court*, 168 Ariz. 51, 58, 811 P. 2d 12, 19 (1991); *Whitman v. Moore*, 59 Ariz. 211, 125 P.2d 445 (1942).
6. Statutory and constitutional requirements for initiative petitions are liberally construed. *See Meyers v. Bayless*, 192 Ariz. 376, 965 P.2d 768 (1998).
7. Substantial, not necessarily technical, compliance with the law is all that is required for initiatives. *See Kromko v. Superior Court*, 168 Ariz. 51, 58, 811 P. 2d 12, 19 (1991); *Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428, 814 P.2d 767, 769 (1991).
8. The right of initiative shall be broadly construed and a failure to comply with the requirements for initiatives shall not destroy the presumption of validity of signatures, petitions or the initiated measure, unless the ordinance, charter, statute or constitution expressly and explicitly makes a departure from the terms of the law fatal. *See Laws 1989, Ch. 10, § 1; see also Whitman v. Moore*, 59 Ariz. 211, 125 P.2d 445, 450-51 (1942) (reversed in part on other grounds).
9. Arizona’s courts should prohibit an initiative petition from being presented for a popular vote “...when it appears affirmatively that the constitutional and statutory rules in regard to the manner in which initiative and referendum petitions should be submitted have been so far violated that there has been no substantial compliance therewith...” *Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 589, 886 P.2d 1338, 1346 (1994).
10. A.R.S. §19-121(A)(1) requires that petition signature sheets filed with the Secretary of State “be in the form prescribed by law.” A.R.S. §19-102(A) mandates that every petition signature sheet contain a description “of no more than one hundred words of the principal provisions of the proposed measure. . .”
11. Additionally, A.R.S. § 19-102(A) requires that the following text be printed directly below the description of the “principal provisions” of the proposed law by the sponsor of the initiative: “*Notice: this is only a description of the proposed measure (or amendment) prepared by the sponsor of the measure. It may not include every provision contained in the*

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measure. Before signing, make sure the title and text of the measure are attached. You have the right to read or examine the title and text before signing.”

12. Petition proponents may not include material on petitions in “any form” they desire. *Kromko*, 168 Ariz. at 59, 811 P.2d at 20 (emphasis in original). Petitions should not contain information that is “affirmatively false or fraudulent.” *See id.* at 60, 811 P.2d at 21. In *Kromko*, the initiative opponents presented witnesses who testified they were misled by the title on the petition. The Supreme Court stated that:

We need not determine whether Miller met his burden in this case. Even if he did, the testimony of the electors allegedly duped by short titles, without more, did not require the trial judge to invalidate the challenged petition, but placed upon Kromko the burden of showing that the petition was nevertheless valid. [citation omitted] We believe Kromko submitted sufficient to overcome Miller’s attack and to demonstrate validity. The record before the trial judge indicated that Kromko’s petition substantially complied with election statutes mandating, in addition to sufficiency of petition form, the absence of fraud in the circulation process. That is all the law requires to reject a legal sufficiency challenge pursuant to § 19-122(C)...

13. Plaintiffs contend that PAN’s description does not substantially comply with the requirements of A.R.S. § 19-102(A) for two reasons: (1) the description contains two false assertions, as follows: (i) although the Initiative description limits the identification requirement at polling places to “first-time voter[s],” the proposed Initiative would amend A.R.S. § 16-579(A) to read as follows: “Every qualified elector, before receiving his ballot, . . . shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector;” and (ii) although the Initiative description states the Initiative requires “agencies that administer non-federally mandated state and local benefits to . . . report . . . any fraudulent attempts to gain benefits to proper authorities,” the Initiative does not specifically contain a fraud requirement; and (2) the Initiative description does not describe a “principal provision” of the proposed law which, if passed, would establish criminal provisions designed to punish state employees who do not enforce the citizenship verification requirements imposed by other statutory requirements enacted by the proposed law. Specifically, plaintiffs contend that although the Initiative description has no discussion of criminal provisions, the Initiative would amend A.R.S., Title 46, chapter 1, article 3, to add § 46-140.01, which would include the following: “Failure to report discovered violations of federal immigration law by an employee is a class 2 misdemeanor. If that employee’s supervisor knew of the failure to report and failed to direct the employee to make the report, the supervisor is guilty of a class 2 misdemeanor.”
14. With respect to the first of the allegedly inaccurate statements, the Initiative description states that the proposed measure would require “proof of I.D. at polling place if first-time voter.”

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In fact, the Initiative, if enacted, would require proof of identification from all individuals voting at polling places. Compl. at Exh. A at 2:52 - 3:6.

15. This is the most significant of the alleged inaccuracies since registered voters asked to sign the petition may have believed that the Initiative would not be unduly burdensome insofar as the description only represents that identification would be required for “first-time voter[s].” However, that is purely speculative, no evidence was presented as to such confusion, and there is nothing before the Court indicating that the inclusion of the expression at issue was “affirmatively false” or “designed to defraud potential signatories.” Accordingly, despite the inclusion of the expression “if first time voter” in its description of the proposed law, the description “substantially complies” with the requirements of A.R.S. § 19-102(A). This is particularly true when considering the language in context. The Initiative description provides that the new law would “require evidence of U.S. citizenship when registering to vote in Arizona and proof of I.D. at polling place if first-time voter.” In fact, only first-time voters will be required to provide proof of U.S. citizenship. That part of the sentence was accurate. However, proof of I.D. would be required for every vote. That part of the sentence was not completely accurate. It appears that the Initiative proponents attempted to stuff too much information into one sentence. Again, however, no evidence was presented that anyone was misled, and when considered in context and in light of the 100-word limitation, the Court cannot find that this inaccuracy rises to the level of “fraud, confusion and unfairness” that would require disqualification of the entire Initiative effort. *See Kromko*, 168 Ariz. At 60, 811 P.2d at 21.
16. The second alleged inaccuracy in the Initiative description is its assertion that the Initiative will “require[] agencies that administer non-federally mandated state and local benefits to . . . report . . . any fraudulent attempts to gain benefits to proper authorities.” Nothing in the Initiative would require such agencies to report fraudulent attempts to gain benefits. *See* Compl., Exh. A. The Initiative’s only reporting requirement is that “all employees of the state and its political subdivisions . . . make a written report to federal immigration authorities for any violation of federal immigration law by any applicant for benefits and that is discovered by the employee.” Compl., Exh. A at 3:43-46 (capitalization removed). A violation of federal immigration law is not necessarily equivalent to “any fraudulent attempts to gain benefits.”
17. The Initiative description of a reporting requirement for “fraudulent attempt to gain benefits” is not fatal to the entire Initiative effort. Although, as stated above, a violation of federal immigration law may not be equivalent to “any fraudulent attempts to gain benefits,” this is not the type of inaccuracy that rises to the level of “fraud, confusion and unfairness” necessitating disqualification from the ballot. *See Kromko*, 168 Ariz. At 60, 811 P.2d at 21. And, again, no evidence was presented that anyone has been misled.
18. Further, the alleged inaccuracies of the Initiative’s description are tempered by the signers’ option of reviewing the entire text of the Initiative, as well as the “Notice” on the petition

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sheets that states only that the “description” was prepared by the sponsor and may not contain all provisions of the Initiative.¹

¹ This conclusion is supported by the recent discussion by Judge Margaret Downie in her decision in *Clean Elections v. Brewer*, CV2004-012699, July 29, 2004 (aff’d by Arizona Supreme Court on other grounds in opinion to be released), as follows:

“The petition signature sheets contain the following description of the Initiative:

‘No Taxpayer Money for Politicians proposes an amendment to the Arizona Constitution that would prohibit taxpayer money from being given to politicians for their political campaigns. Currently, politicians can spend our taxpayer money to fund their campaigns. In 2002 this cost Arizona taxpayers almost \$13 million. In many cases, this money was spent to fund “dirty trick” campaigns and hire political cronies. With severe budget cutbacks an unfortunate reality, this \$13 million is better spent on education, health care for seniors, and other essential services. Taxpayer money should not be spent on political campaigns.’

“A.R.S. § 19-102(A) enumerates certain requirements for initiative petition signature sheets. It requires, inter alia, ‘a description of no more than one hundred words of the principal provisions of the proposed measure or constitutional amendment.’ Plaintiffs contend that the description of the Initiative printed on the petition signature sheets fails to comply with statutory requirements and is instead “an inaccurate, highly inflammatory and misleading political argument that misrepresents both the Citizens Clean Elections Act and the effect of the Initiative.’ Verified Complaint, 19.

“A.R.S. § 19-102(A) does not expressly require an impartial or neutral description of initiatives on petition signature sheets. In other election-related contexts, however, our legislature has clearly articulated such a requirement. A.R.S. § 19-124, for example, provides: ‘Not later than sixty days preceding the regular primary election the legislative council, after providing reasonable opportunity for comments by all legislators, shall prepare and file with the secretary of state an impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment. The analysis shall include a description of the measure and shall be written in clear and concise terms avoiding technical terms wherever possible. The analysis may contain background information, including the effect of the measure on existing law . . . [emphasis added]’

“The fact that our legislature specifically required an impartial rendition in one context, but failed to mandate the same in the current context, is significant. Perhaps the legislature believed that the impartial analysis dictated by A.R.S. § 19-102(A) sufficiently ameliorates any deficiencies in the underlying petition descriptions. Or perhaps the legislature deemed it appropriate to differentiate between the function of election petitions and ballots. It is also relevant to note that A.R.S. § 19-102(A) requires that the following language appear on all petition signature sheets: ‘Notice: this is only a description of the proposed measure (or constitutional amendment) prepared by the sponsor of the measure. It may not include every provision contained in the measure. Before signing, make sure the title and text of the measure are attached. You have the right to read or examine the title and text before signing.’

“The legislature may have believed that this additional language was sufficient to alert would-be petition signers about the limitations of and possible deficiencies in the general description. While this court might agree that the majority rationale in *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214 (Alaska 1993), is the better rule, it is not the court’s role to substitute its judgment for that of the legislature.

“Plaintiffs’ request for relief on this basis is denied.”

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19. Plaintiff's second contention is that the Initiative description on the petition signature pages does not inform potential signers that the Initiative would create two new Class 2 misdemeanors for state and local employees who fail to make a written report to federal authorities about immigration law violations, and who fail to direct subordinate employees to make such a report. *See* Compl., Exh. A at 3:47-50. A Class 2 misdemeanor is punishable by a jail sentence of up to four months and a fine of up to \$750. *See* A.R.S. §§ 13-707, 13-708.
20. PAN has suggested that the failure to mention criminal liability in the Initiative description may be disregarded because the Initiative "is simply repeating a State law which has been in existence since 1939," and thus is not creating new criminal liability. PAN Resp. at 4-5 (citing A.R.S. § 46-140). A comparison of A.R.S. § 46-140 to the proposed Initiative reveals several differences. For example, existing law requires public employees to report violations or attempted violations of the State's *welfare provisions*, *see* A.R.S. § 46-140(A), while the Initiative would require a report "for any violation of federal immigration law by any applicant for benefits." Compl., Exh. A at 3:44-45. Further, existing law applies only to "a person employed under [the Welfare] title" who "interviews or consults" a welfare applicant or recipient, A.R.S. § 46-140(A), while the Initiative would apply to all employees of "[a]n agency of this state and all of its political subdivisions, including local governments," regardless of whether they interview or consult the individual at issue, Compl., Exh. A at 3:29-31. Additionally, A.R.S. § 46-140(A) currently requires a report to the State, but the Initiative would require a report to "federal immigration authorities," Compl., Exh. A at 3:44.
21. A.R.S. § 19-102(A) does not expressly require the sponsor of an initiative petition to include "every" provision of the proposed law but must only describe the "principal provisions" thereof.² Similarly, in light of the statutory 100-word limitation, reasonable choices may have to be made by initiative proponents.
22. In *Kromko*, 168 Ariz. at 60, 811 P.2d at 21, the Supreme Court cited *Clark v. Jordan*, 60 P.2d 457, 459 (Cal. 1936), for the proposition that a title "describ[ing] all the sweet and

² The Court notes that A.R.S. § 19-124(B) specifically requires that prior to any election in which an initiative measure is to be voted upon, the legislative council must prepare:

"...an impartial analysis...[which] shall include a description of the measure and shall be written in clear and concise terms avoiding technical terms wherever possible. The analysis may contain background information, including the effect of the measure on existing law, or any legislative enactment suspended by referendum, if the measure or referendum is approved or rejected."

The difference between the description that an initiative petition sponsor must prepare pursuant to A.R.S. § 19-102(A) and the description that the legislative council must prepare pursuant to A.R.S. § 19-124(B) is significant. Clearly, the legislature is evidencing an intent that the description of a certified ballot measure include significantly more unvarnished detail than the description of a proposed initiative petition.

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exclud[ing] all the bitter” would be deficient. *Clark v. Jordan* held petition signature pages to be invalid where the descriptive title on the pages failed to disclose that the proposed initiative would impose new taxes, a provision the court found was significant and was “the one thing that would cause [an elector] to hesitate” 60 P.2d at 459. The failure to include the new misdemeanors in the Initiative description in the instant case does not rise to that level when considered in context, in light of the 100-word limitation, in light of the notice provided to all signers, in light of the fact that the full text of the Initiative was available for review by signers, and in light of the fact that related misdemeanor liability already exists in A.R.S. § 46-140.

23. The failure to describe some provisions of a proposed law within the description printed on signature sheets, does not necessarily rise to the level of “fraud, confusion, and unfairness” sufficient to invalidate a certified initiative petition. *Kromko*, 168 Ariz. at 60, 811 P.2d at 21. Such is the situation in this present case. Even though the description of the proposed law included on the initiative petition signature sheets does not mention addition of proposed A.R.S. § 46-140.01, in the context of the proposed law, the description nonetheless “substantially complies” with the requirements of A.R.S. § 19-102(A). The Initiative proponents have reasonably argued that the new criminal provisions merely add an enforcement scheme to the principal provisions of the proposed law.

III. CONCLUSIONS AND ORDERS

Based on the foregoing findings of fact and conclusions of law,

THE COURT FINDS the description of the proposed initiative submitted by PAN and included on the petition initiative signature sheets substantially complies with the requirements of A.R.S. §§ 19-101(A), 19-101(B), and 19-111(A).³

THE COURT FURTHER FINDS that the Secretary of State correctly concluded that the initiative measure entitled “The Arizona Taxpayer Protection and Relief Act” complied with the statutory and constitutional requirements for its inclusion on the upcoming ballot.

IT IS THEREFORE ORDERED denying Plaintiffs’ request for relief.

IT IS FURTHER ORDERED adopting and incorporating herein the findings, conclusions and orders contained in the Court’s August 25, 2004, minute entry order.

IT IS FURTHER ORDERED that each side shall bear their own costs and attorneys’ fees.

³ The Court would note that, although the defense of laches was ruled out at the last hearing, the Initiative description was in the public domain for about 13 months before this challenge was filed. See Findings of Fact, para. 1, above.

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IT IS FURTHER ORDERED that this is a final, appealable order of the Court.

/s/ The Honorable Mark W. Armstrong

THE HONORABLE MARK W. ARMSTRONG