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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-010209 08/15/2018

HONORABLE JAMES D. SMITH

CLERK OF THE COURT
P. Culp
Deputy

JAIME MOLERA, et al. THOMAS J. BASILE

v.

MICHELE REAGAN J E LA RUE

JAMES E BARTON II
JUDGE J. SMITH

MINUTE ENTRY

Petitioners brought this special action challenging the petitions underlying the "Invest in Education" initiative. Initiative supporters submitted approximately 270,000 signatures; 150,642 valid signatures are required to place the matter on the ballot. Broadly, Petitioners' challenges are:

- Recent legislation requires strict compliance with all initiative statutes. One statute requires petition circulators to check a line on petitions to indicate whether the circulator is paid or volunteer. A third party pre-marked those lines on nearly all petitions, though. That is not strict compliance, so the petitions are invalid. Petitioners do not dispute the accuracy of the paid/volunteer designations, only the propriety of a third party checking those lines.

- The summary description on petitions misleadingly described the marginal income tax rate increase.

- The summary description on petitions omitted mentioning that the initiative repeals inflation indexing of marginal income tax brackets.

The Invest in Education Committee ("Committee") challenged the constitutionality of A.R.S. § 19-121.01, which is the strict compliance statute Petitioners rely on. The Committee also challenged the Secretary of State's decision to invalidate 24,888 signatures for a variety of reasons.

Intervenors are the Speaker of the House of Representatives and the President of the Senate. They appeared and defended the constitutionality of the strict compliance statute. The Secretary of State appeared to defend against the Committee's cross-claim.

A bench trial occurred on August 14, 2018. The Court considered the evidence presented as well as the parties' written and oral arguments.[1]

I. THE CONSTITUTIONAL CHALLENGE TO A.R.S. § 19-102.01.

A. The Statute At Issue And Interpretative Principles.

The Legislature passed legislation creating this statute in 2017:

> A. Constitutional and statutory requirements for statewide initiative measures must be *strictly* construed and persons using the initiative process must *strictly comply* with those constitutional and statutory requirements.
>
> B. The secretary of state shall make available a sample initiative petition that strictly complies with the requirements of section 19-121. Any committee that uses the sample initiative petition provided by the secretary of state shall be presumed to have *strictly* complied with the requirements of section 19-121.

A.R.S. § 19-102.01 (emphasis added). Arizona courts have applied a *substantial compliance* standard to initiatives, though. The statute changes that standard.

The Committee argued that the legislation violates the Arizona Constitution because of the longstanding substantial compliance approach. The Committee acknowledged at trial that the statute is constitutional if the substantial compliance standard originally arose from legislation. Intervenors acknowledged at trial that the statute is impermissible if the substantial compliance standard finds its origins in our Constitution.

Courts review statutes in a manner to "uphold their constitutionality", if possible. *Hall v. Elected Officials' Retirement Plan*, 241 Ariz. 33, 38, ¶ 14, 383 P.3d 1107, 1112 (2016). "We

[1] The Court commends all counsel for the quality of their presentations. These election challenge cases have demanding and short time lines.

presume that a statute is constitutional, and the party asserting its unconstitutionality bears the burden of overcoming the presumption." *Id.* (quotations omitted). "[I]f there are any uncertainties, we must resolve them in favor of constitutionality." *KZPZ Broad., Inc. v. Black Canyon City Concerned Citizens*, 199 Ariz. 30, 36, ¶ 21, 13 P.3d 772, 778 (App. 2000). Interpreting a statute to avoid placing its constitutionality in doubt is a fundamental principle. "It militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247-48 (2012).

Nonetheless,

> When the Constitution conflicts with a statute, the former prevails. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803) (noting "the constitution is superior to any ordinary act of the legislature; [and] the constitution, and not such ordinary act, must govern the case to which they both apply"); THE FEDERALIST No. 78 at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

McLaughlin v. Jones, 243 Ariz. 29, 35, ¶ 25, 401 P.3d 492, 498 (2017) (referring to federal Constitution). Our state Constitution enshrines the separation of powers doctrine. ARIZ. CONST. art. III. "Nowhere in the United States is this system of structured liberty [of separation of powers] more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988). "If the Legislature exceeds its powers in the enactment of a law, the courts, being sworn to support the Constitution, must judge that law by the standard of the Constitution and declare its invalidity." *Allen v. State*, 14 Ariz. 458, 466 (1913).

B. The Constitutional Provisions Regarding Initiatives.

Our Constitution assigns legislative powers to the Senate and House of Representatives. But Arizona also reserved the legislative power of initiative and referendum to "the people." ARIZ. CONST. art. 4, pt. 1, § 1. "A fundamental component of the legislative process in Arizona is the right of the people to offer legislation through the initiative. This legislative power of the people is as great as that of the legislature." *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559, ¶ 9, 146 P.3d 58, 60 (2006) (citations and quotations omitted). Initiatives and referenda arose because

> many of our American Legislatures were suspected, more or less justly, of being guided rather by the selfish wishes of the few than the true good of the many. . . . While initiative and referendum legislation has been known ever since the dawn of popular government, it was not until the early part of this century that it was seriously urged in America as a remedy for the evils above mentioned . . . .

McBride v. Kerby, 32 Ariz. 515, 525 (1927). Though initiatives and referenda did not exist then, the notion of power originating with the people is as old as our republic: "The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people . . . ." THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961).

Our Constitution includes detailed provisions regarding those legislative powers reserved to the people (*i.e.*, initiatives and referenda):

> (2) Initiative power. The first of these reserved powers is the initiative. Under this power ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the constitution.
>
> . . . .
>
> (4) Initiative and referendum petitions; filing. All petitions submitted under the power of the initiative shall be known as initiative petitions, and shall be filed with the secretary of state not less than four months preceding the date of the election at which the measures so proposed are to be voted upon.
>
> . . . .
>
> (9) Form and contents of initiative and of referendum petitions; verification. Every initiative or referendum petition shall be addressed to the secretary of state in the case of petitions for or on state measures, and to the clerk of the board of supervisors, city clerk, or corresponding officer in the case of petitions for or on county, city, or town measures; and shall contain the declaration of each petitioner, for himself, that he is a qualified elector of the state (and in the case of petitions for or on city, town, or county measures, of the city, town, or county affected), his post office address, the street and number, if any, of his residence, and the date on which he signed such petition. Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant and that in the belief of the affiant each signer was a qualified elector of the state, or in the case of a city, town, or county measure, of the city, town, or county affected by the measure so proposed to be initiated or referred to the people.

> . . . .
>
> (16) Self-executing. This section of the constitution shall be, in all respects, self-executing.

ARIZ. CONST. art. 4, pt. 1, § 1. No express text in the Constitution refers to substantial or strict compliance.

C. The Substantial Compliance Requirement For Initiatives.

Our courts "have recognized Arizona's strong public policy favoring the initiative and referendum." *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428, 814 P.2d 767, 769 (1991). Arizona distinguished between initiatives and referenda in terms of judicial review, permitting substantial compliance for initiatives but requiring strict compliance for referenda "to ensure that the constitutional right [of referendum] is not abused or improperly expanded." *Id.* at 428-29, 814 P.2d at 769-70.

Intervenors contended that the substantial compliance standard for initiatives is a statutory creation that the Legislature may alter. Our Supreme Court, however, pointed to the Constitution as the source of the standard:

> The Arizona Constitution reserves to the people the power to propose laws through the initiative process. Arizona has a strong policy supporting the people's exercise of this power. For that reason, courts liberally construe initiative requirements and do not interfere with the people's right to initiate laws unless the Constitution expressly and explicitly makes any departure [from initiative filing requirements] fatal.

Pedersen v. Bennett, 230 Ariz. 556, 558, ¶ 7, 288 P.3d 760, 762 (2012) (citations and quotations omitted). The Supreme Court also pointed to the Constitution as the source of the substantial compliance standard nearly 80 years ago:

> [T]he people themselves deliberately and intentionally announced that, by its adoption, they meant to exercise their supreme sovereign power directly to a far greater extent than had been done in the past, and that the legislative authority, acting in a representative capacity only, was in all respects intended to be subordinate to direct action by the people. . . . [W]hen there is any doubt as to the requirements of the constitution going only to the form and manner in which the power of an initiative should be exercised, every reasonable intendment is in favor of a liberal construction of those requirements and the effect of a failure to

> comply therewith, unless the constitution expressly and explicitly makes any departure therefrom fatal.

Whitman v. Moore, 59 Ariz. 211, 220 (1942), *overruled in part on other grounds*, *Renck v. Superior Ct.*, 66 Ariz. 320, 327 (1947). Our Supreme Court referred to the lack of substantial compliance to exclude an initiative from the ballot in *Kerby v. Griffin*, 48 Ariz. 434, 446-47 (1936). The Court did not point to legislation when describing that analytical standard. The first mention of "substantial compliance" when evaluating petitions of any type may have been *Abbey v. Green*, 28 Ariz. 53, 74 (1925), which addressed recall petitions. Again, the Court did not point to legislation as creating that standard.

Pedersen stated that substantial compliance springs from the Constitution. That standard has existed for at least eight decades. If this Court is correctly interpreting *Pederson*, *Whitman*, and other cases, they are dispositive—they bind this Court. This Court recognizes, however, the great likelihood of an accelerated appeal here. Thus, the Court also addresses other authority that Intervenors cited.

Intervenors pointed to *State ex rel. Bullard v. Osborn*, 16 Ariz. 247 (1914), and argued that the substantial compliance standard sprung from legislation. *Bullard* examined the statute allowing courts to enjoin public officials from including on the ballot initiatives that were "not legally sufficient." But the Court did not determine whether substantial or strict compliance applied. Indeed, those parties agreed "the petition in this instance is regular in form, and is signed by the requisite number of legal voters . . . ." *Id.* at 248. The issue in *Bullard* was the inability to enjoin the Secretary from including the initiative on the ballot because the measure allegedly was unconstitutional—it did not address petition defects at all.

Intervenors acknowledged that Arizona followed Oregon's constitution when crafting our constitutional initiative and referendum provisions. Thus, our courts often consider Oregon decisions. *See, e.g.*, *Cottonwood Dev. v. Foothills Area Coalition of Tucson, Inc.*, 134 Ariz. 46, 49-50, 653 P.2d 694, 697-98 (1982) (looking to interpretations of Oregon law). Oregon courts also relied on their constitution to apply a "liberal construction" or substantial compliance standard. *See, e.g.*, *State ex rel. McPherson v. Snell*, 121 P.2d 930, 934 (Ore. 1942) (liberal construction applies so "this constitutional right of the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake") (quotations omitted). That Oregon court pointed to a 1914 Washington decision for that conclusion (as had Oregon decisions from 1923 and 1930). The Washington court pointed to the self-executing nature of the constitutional initiative and referenda provisions in 1914:

> there is strongly suggested in the language of the Constitution and this law a required liberal construction, to the end that this constitutional right of the people may be *facilitated* and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

State v. Superior Ct., 143 P. 461, 464 (Wash. 1914) (emphasis in original). The Supreme Court of Washington reiterated that position three years later: "all courts that have spoken upon the subject agree that such provisions are to be liberally construed, to the end that these popular legislative rights of the people reserved in the several Constitutions where found may be preserved and rendered effective." *State ex rel. Case v. Superior Ct.*, 166 P. 1126, 1129 (Wash. 1917).[2]

Intervenors also pointed to other jurisdictions with initiative provisions to argue that strict compliance is appropriate. "Other states that guarantee a right of initiative likewise require that it be exercised in a manner that is strictly compliant with applicable laws." [Pre-Hr'g Mem. Cross-Claim Intervenors at 6-7 n.4.] Those out-of-state decisions, however, may not support their argument in all respects. "Although some of this court's decisions have applied a substantial compliance test, these decisions concerned *statutory* requirements for initiative petitions. . . . [S]ubstantial compliance should apply to a challenge that an initiative did not meet a statutory requirement." *Nevadans for Nev. v. Beers*, 142 P.3d 339, 350 (Nev. 2006) (requiring strict compliance with constitutional requirement) (footnotes omitted; italics in original; underlining added). Our Supreme Court rejected the strict compliance aspect of *Beers*. *Pedersen*, 230 Ariz. at 559, ¶ 12, 288 P.3d at 763 (rejecting Secretary's argument based on *Beers* that Court should abandon substantial compliance). In fact, the Nevada Supreme Court confirmed that "a substantial compliance [with statutes] standard accords proper deference to the people's initiative power." *Las Vegas Convention & Visitors Authority v. Miller*, 191 P.3d 1138, 1147 (Nev. 2008). The Massachusetts case that the Intervenors cited also involved strict compliance with that commonwealth's constitution, not a statute. *Anderson v. Attorney Gen.*, 99 N.E.3d 309, 314 (Mass. 2018).

To summarize, Arizona's substantial compliance standard regarding initiatives arises from our Constitution, not legislation. Under the interpretation offered by Petitioners and Intervenors, legislation requiring strict compliance with every statutory provision regarding initiatives unconstitutionally infringes on separation of powers and fundamental rights under the

[2] Washington's constitution has very similar language regarding initiatives and referenda. WASH. CONST. art. II, § 1. "The Washington Constitution was the model for many of our constitutional provisions, and we thus consider the judicial decisions from Washington persuasive, though not controlling, when we interpret parallel provisions in the Arizona Constitution." *Coleman v. Johnson*, 235 Ariz. 195, 198, ¶ 14, 330 P.3d 952, 955 (2014).

Arizona Constitution. Sound policy reasons may exist for altering the substantial compliance standard, but this Court lacks that authority.

D. Interpreting A.R.S. § 19-102.01 To Avoid Serious Questions Of Constitutionality.

Ample authority directs the Court to try to avoid raising substantial constitutional questions regarding legislation. The Court found in the prior section that A.R.S. § 19-102.01 violates constitutional principles as Petitioners and Intervenors interpret that statute. Nonetheless, the Court will attempt to interpret the statute to avoid constitutional issues. The statute requires strict compliance with constitutional and statutory requirements for initiatives. Arizona has long required strict compliance for referenda. It may be useful to review what strict compliance means regarding referenda. That may provide guidance regarding a permissible interpretation of the statutes at issue.

A.R.S. § 19-102.01 requires strict compliance with all initiative constitutional provisions and statutes. A.R.S. § 19-102(D) arguably requires that petition circulators *personally* check a line indicating their paid or volunteer status: “A circulator of an initiative petition shall state whether he is a paid circulator or volunteer by checking the appropriate line on the petition form before circulating the petition for signatures.” The parties agreed that a third party checked the paid or volunteer line on nearly every petition. Petitioners and Intervenors argued that violated the strict compliance standard and invalidated the petitions. Petitioners and Intervenors did not argue that the checkmarks inaccurately reflected a circulator’s paid or volunteer status. If strict compliance may apply to initiatives, could the Legislature permissibly command invalidating petitions because a third party accurately checked the volunteer or paid lines?

1. The Contours of Strict Compliance.

It appears that the Supreme Court first referred to “strict” compliance in *Cottonwood Development*. Those referendum petitions did not comply because they did not attach the measure’s full text, which the constitution and statute required. Strict compliance was appropriate because referenda allow a minority of voters to delay legislation enacted by the people’s elected representatives. 134 Ariz. at 49, 653 P.2d at 697.[3] Strict compliance requires “nearly perfect compliance with constitutional and statutory referendum requirements . . . .” *Comm. for Preservation of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249, ¶ 6, 141 P.3d 422, 424 (App. 2006).

[3] The Court earlier appeared to apply strict compliance to referendum petitions but did not use that phrase. *Direct Sellers Ass’n v. McBrayer*, 109 Ariz. 3, 503 P.2d 951 (1972).

The Legislature's power to regulate referenda is not unlimited even under a strict compliance standard. Legislation relating to referenda "may not unreasonably hinder or restrict the constitutional provision and must reasonably supplement the constitutional purpose." *Homebuilders Ass'n of Cent. Ariz. v. City of Scottsdale*, 186 Ariz. 642, 649, 925 P.2d 1359, 1366 (App. 1996) (statutory reference to "councilmen" included singular "councilman" when deciding which election set number of signatures needed on petitions in municipalities) (quotations omitted). "Our courts repeatedly have recognized the power of the legislature to regulate the referendum process. If such legislation does not unreasonably hinder or restrict the constitutional provision and if the legislation reasonably supplements the constitutional purpose, then the legislation may stand." *Arrett v. Bower*, 237 Ariz. 74, 78, ¶ 10, 345 P.3d 129, 133 (App. 2015) (requiring serial numbers on all petitions was proper) (citations and quotations omitted).

Interpreting the referenda strict compliance requirement, the Court of Appeals held that petitions with 10 signature lines rather than 15 lines were not invalid. One statute dictating the form of petitions (§ 19-101(A)) said that the petition must contain 15 signature lines. But a second statute (§ 19-121(C)) stated that "[n]ot more than fifteen signatures on one sheet shall be counted." The Court held that 15 lines was a maximum and not a minimum requirement for the form of petition. *Van Riper v. Threadgill*, 183 Ariz. 580, 584, 905 P.2d 589, 593 (1995). No constitutional provision addresses the number of signature lines on petitions.

In contrast, *attaching* a referendum summary description to petitions did not strictly comply with the requirement to "[i]nsert a description". *Comm. for Preservation*, 213 Ariz. at 250, ¶ 9, 141 P.3d at 425. That was partly because the petition stated that the summary description may not include every provision and directed signers to look for the "attached" full text of the measure. *Id.* ¶ 10. "[T]he legislature's directive that the full text of the referendum be 'attached' further demonstrates that it intended the word 'insert' to have its plain meaning—placement of the description into the text of the petition." *Id.* The Constitution requires attaching "a full and correct copy of the title and text of the measure" to the petition. ARIZ. CONST. art. 4, pt. 1, § 1(9). The Constitution does not, however, require including a summary on the petition.

In *Western Devcor*, the referenda petitions did not strictly comply. The constitutional provisions and statutes required petition circulators to verify their belief that signers were qualified electors of the city, town, or county that the referendum affected. Those petitions, however, referred to circulators' belief that signers were qualified electors of the State. 168 Ariz. at 429, 814 P.2d at 770. The Constitution requires that verification. ARIZ. CONST. art. 4, pt. 1, § 1(9).

Finally, the Supreme Court suggested that referendum petitions would not outright fail under strict compliance if the circulator's affidavit omitted some words:

> [T]he failure to include the words, "a qualified elector of the State of Arizona," in the circulator's affidavit does not make the signatures appearing on the petitions null and void, but merely destroys their presumption of validity, which presumption may be reinstated on proof that the circulators were in fact qualified electors.

Direct Sellers Ass'n, 109 Ariz. at 5, 503 P.2d at 953.

2. Applied to the "Paid" or "Volunteer" Designation.

Assuming that the Legislature can in some way mandate strict compliance with initiative provisions, the same standard that applies to referenda must apply to initiatives. That is, any legislation regarding initiatives cannot unreasonably hinder or restrict the constitutional provision; such legislation also must reasonably supplement the constitutional purpose. If the Court (1) applied a strict compliance standard and (2) interpreted the statutes to require invalidating petitions because of accurate pre-made marks on the paid/volunteer line, that would unreasonably hinder or restrict the Constitution's initiative provisions. It also would not reasonably supplement the constitutional purpose. The Constitution does not require disclosing paid/volunteer status for circulators, so voiding petitions based on who marked a line likely violates our Constitution. The lines were marked, thereby providing information to signers and the Secretary. Moreover, requiring that circulators personally check the line does not address eliminating fraud or preventing mistakes by signers.

Our Supreme Court for decades has pointed to our Constitution as the basis for substantial, not strict, compliance regarding initiatives. Legislation cannot fundamentally change that right reserved to the people. It seems that the constitutional limit on the Legislature's power under a statute like § 19-102.01 is (at most) to require strict compliance with (1) constitutional provisions or statutes directly implementing those provisions or (2) statutes directly protecting against voter fraud or misinformation. Strict compliance with the paid/volunteer marking of § 19-102(D) as Petitioners advocate is outside of those limits.

Cases describing strict compliance with petition statutes also support this decision. Petitions in other cases did not comply when they failed to (1) provide information regarding the measure to signers or (2) include all information regarding signatures' validity in the format the Constitution and statutes commanded. The alleged defects here regarding pre-marking the paid/volunteer lines do not fall into those categories. Indeed, Petitioners do not dispute that the petitions complied in all respects with the paid/volunteer information regarding font size, placement on the petition, language used, etc. A third party accurately pre-marking the

paid/volunteer line is not enough to render the petitions null and void even if strict compliance applies.

II. ADEQUACY OF INITIATIVE DESCRIPTION.

Initiative petitions must include descriptions of "no more than 100 words of the principal provisions of the proposed measure or constitutional amendment." A.R.S. § 19-102(A). The Court of Appeals described the same language in the referendum statute:

> The plain meaning of "principal" includes "most important, consequential, or influential," "chief," and "a matter or thing of primary importance." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 987 (11th ed. 2007). *See also Ariz. Coll. of the Bible, Inc. v. Dep't of Econ. Sec.*, 119 Ariz. 542, 544, 582 P.2d 188, 190 (App.1977) (defining "principal" as "chief, leading, most important or considerable; primary; original"); *Belin v. U.S.*, 313 F. Supp. 715, 716 (M.D. Pa.1970) (stating "[t]he word 'principal' means 'chief,' 'main,' or 'most important.'") (citation omitted).

Sklar v. Town of Fountain Hills, 220 Ariz. 449, 453, ¶ 13, 207 P.3d 702, 706 (App. 2008) (some citations omitted). The petition also must specify:

> [T]his is only a description of the proposed measure . . . 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.

A.R.S. § 19-102(A). These petitions included this statutory language.

Our Supreme Court explained that "[d]escriptive information included on petition signature sheets will not invalidate the petitions unless it is fraudulent or creates a significant danger of confusion or unfairness." *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 152, ¶ 26, 291 P.3d 342, 349 (2013). The opponents to that measure argued that the description did not "completely describe the effects" of the proposition. "Section 19–102(A), however, requires only a description of the principal provisions, not a complete description, and the accompanying disclaimer expressly notes that the description might not include all the provisions in the measure." *Id.* ¶ 27. The Court also acknowledged that supporters typically prepare summaries to appeal to voters. "[T]hat fact does not mean the signature sheets failed to substantially comply with the statutory requirements." *Id.* ¶ 28.

In *Wilhelm v. Brewer*, 219 Ariz. 45, 192 P.3d 404 (2008), the challenger argued that the summary improperly omitted that the proposal would extend the statute of repose for certain claims. Signers would have to read the entire initiative attached to the petition to see that effect on the statute of repose. The challenger contended "that by omitting the section from the summary and placing it in the back of the text, the proponents sought to mislead voters." *Id.* at 48, ¶ 12, 192 P.3d at 407 (footnote omitted). The Court found that the summary was not misleading. The petition properly cautioned signers that the initiative's supporters prepared the summary. It also advised signers to read the entire measure.

Here, Petitioners' first challenge the summary's description of the tax increase. The summary stated that the initiative "rais[es] the income tax rate by 3.46% on individual incomes over a quarter million dollars . . . and by 4.46% on individual incomes over half a million dollars . . . ." In *absolute* terms, the statements are correct—the marginal rates increase from 4.54% to 8.0% (a delta of 3.46 percentage points) and from 4.54% to 9.0% (a delta of 4.46 percentage points). Petitioners argued that the description misleadingly omits the *relative* increase in the marginal rates. That is, the top marginal tax brackets are increasing by approximately 76.2% ($3.46 \div 4.54 = 0.762$) and 98% ($4.46 \div 4.54 = 0.982$).[4]

Petitioners pointed to survey results suggesting that responding voters were confused when asked "whether an increase from $1,000 to $2,000 in taxes on $10,000 of income corresponds to a tax rate increase of (a) 10%, (b) 50%, (c) 100%, or (d) some other percentage." [Pet'rs' Pre-Hr'g Mem. at 12:18-21; *see* Ex. 4 at 8.] As framed, however, the survey conflated marginal tax rates with overall tax liability. Tax liability varies among people with the same income due to exemptions, deductions, and tax planning. A more accurate question here would have asked respondents to compare two marginal tax *rates* (*e.g.*, "If the tax rate increased from 2% to 3%, would you describe that as (a) a 1% increase, (b) a 50% increase, or (c) something else"). Additionally, the survey was telephonic, requiring respondents to keep track of a series of numbers read to them. Petition signers had the summary and full text in written form. While the survey used a valid methodology, it likely does not address the salient issues. *See* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 373 (3d ed. 2011) ("the content and execution of a survey must be scrutinized whether or not the survey was designed to provide relevant data on the issue before the court.").

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[4] The potential dual interpretation of percentages is one reason the language of finance typically refers to "basis points" (1 bps equals a change of 0.01%) instead of percentage differences. Petitioners argued that the summary here should have referred to raising the tax rate by "3.46 percentage points" and "4.46 percentage points" to be accurate. While that likely would be more precise, the existing summaries are not fatally misleading without that verbiage.

The initiative's supporters framed the description in a manner that is accurate and not misleading. It is not fraudulent nor does it create a danger of confusion or unfairness. The description undoubtedly is intended to appeal to potential voters as well. But the petitions directed signers that the supporters prepared the summary and to read the entire measure attached to the petition.

Similar reasoning defeats the second challenge to the 100-word description. Petitioners argued that the description is fatally flawed because it does not mention the potential end to indexing tax brackets for inflation. The Court assumes it is correct that the initiative's language has that effect. But the statute requires only a description of the "principal provisions." Petitioner's argument is akin to the challenge in *Wilhelm* that our Supreme Court rejected.

The challenged initiative nearly doubles the marginal income tax rates on a tiny percentage of taxpayers to increase education funding across the state; the entire financial burden falls on those taxpayers. The measure also may affect inflation indexing for tax rate thresholds. It is not the Court's role to opine whether that is good or bad policy. "If a ballot measure meets the statutory and constitutional requirements to appear on the ballot, its wisdom as a policy matter is for the voters to decide." *Save Our Vote*, 231 Ariz. at 153, ¶ 29, 291 P.3d at 350.

IV. THE COMMITTEE'S CHALLENGE TO SIGNATURE EXCLUSIONS.

The Committee challenged the Secretary's decisions invalidating 24,888 signatures. The Secretary selected a random sample of 5% of the petition sheets submitted for verification. That process led to the Secretary invalidating many petition sheets.

A. Sheet No. 11-16132.

The Committee applied for and received serial number I-17-2018 for this initiative. All petition sheets must display the serial number. A.R.S. §§ 19-121(A)(2) & 19-121.01(A)(1)(c). The Secretary invalidated this petition sheet because the serial number was missing or incorrect. The Committee argued that this issue affected eight signatures.

The Committee withdrew this claim on August 14, 2018.

B. Circulator Affidavit Violations.

The Secretary rejected 579 petition sheets because the circulator affidavits were incomplete, unsigned, or modified. *See* A.R.S. §§ 19-112(D), 19-112(F), & 19-121.01(A)(1)(d); Verified Cross-Claim (filed August 3, 2018) (at 2:10-5:13) (listing sheet nos.). The Committee argued that this issue affected 3580 signatures.

Several circulators apparently did not include complete addresses in their verifications. The statute states that the "affidavit shall be in the following form," which points to strict compliance. A.R.S. § 19-112(D). As for address information, it directs the circulator to provide: "(Residence address, street and number of affiant, or if no street address, a description of residence location)". *Id*. The Committee argued that circulators satisfied the statute if the provided only their street and number. It contended that the statute allows for (1) the residence address, (2) the street and number, or (3) a description of the residence location if no address. That is an untenable interpretation of the statute. The first clause is one mechanism of the residence address, including street and number. The second clause is the second mechanism of a description of the residence location if a circulator does not have a street address.

The Secretary argued that full addresses are important. First, the Secretary must ensure that out-of-state circulators are properly registered. The Secretary cannot identify a circulator from outside of Arizona if the *only* address information is along the lines of "123 Main Street." Complete addresses also allow challengers to locate circulators to obtain necessary information. *See* A.R.S. § 19-118 (allowing service of subpoenas on circulators).

The Court rejects the Committee's challenge to the Secretary rejecting these petitions.

C. Notary Seal Violations.

The Secretary rejected 15 petition sheets because the notary seal was not properly affixed. *See* A.R.S. § 19-121.01(A)(1)(e); Verified Cross-Claim (filed 08/03/2018) (at 6:6-14) (listing sheet nos.). The Committee argued that this issue affected 134 signatures.

The Committee withdrew this claim on August 14, 2018.

D. Other Notary Violations.

The Secretary rejected 34 petition sheets because the notary's signature, notarization date, or other required information was missing. *See* A.R.S. § 19-121.01(A)(1)(3). The Committee challenged one petition's rejection (no. 08-02169), which it argued affected four signatures.

The Committee withdrew this claim on August 14, 2018.

E. Circulator Registration Violations.

The Secretary rejected 2097 petition sheets because the circulators had not registered. *See* A.R.S. §§ 19-118(A) & 19-121.01(A)(1)(h); Ex. A, Verified Cross-Claim (filed August 3,

2018) (20-page exhibit listing sheet nos.). The Committee argued that this issue affected 21,162 signatures.

"Paid circulators" must register with the Secretary before circulating statewide petitions:

> [A]ll paid circulators must register as circulators with the secretary of state before circulating petitions pursuant to this title. . . . The secretary of state shall establish in the instructions and procedures manual issued pursuant to section 16-452 a procedure for registering circulators and shall publish on a website maintained by the secretary of state all information regarding circulators that is required pursuant to this section.

A.R.S. § 19-118(A). At the time, a paid circulator was "a natural person who receives monetary or other compensation that is based on the number of signatures obtained on a petition or on the number of petitions circulated that contain signatures." A.R.S. § 19-118(F)(1). The Secretary must remove petition sheets "on which the circulator is required to be registered . . . and the circulator is not properly registered at the time the petitions were circulated." A.R.S. § 19-121.01(A)(1)(h).

The Committee argued that its paid circulators received hourly compensation, not compensation based on the number of signatures or petitions circulated. The Secretary conceded that she lacks contrary information. Thus, the Committee argued that the statute did not require the circulators to register.

The situation is confusing because the Legislature earlier criminalized per-signature payments for signature gathering. But the Legislature did not simultaneously update the paid circulator registration statute, so that statute continued referring to circulators paid per signature. The Legislature amended the statute to include hourly paid circulators, but that amendment took effect August 3, 2018. 2018 Ariz. Sess. Laws, Ch. 320; *see generally* READING LAW: THE INTERPRETATION OF LEGAL TEXTS 261 ("A statute presumptively has no retroactive application."). The Secretary undoubtedly was in a difficult position. Materials that her office published instructed: "where a circulator is compensated hourly and did not voluntarily register with the Secretary of State, the circulator should select 'paid circulator' on the front of the petition form and include a notation such as 'hourly' or 'paid hourly.'"[5]

As they existed at the time, A.R.S. § 19-118(A) and A.R.S. § 19-118(F)(1) required only circulators paid per signature to register with the Secretary. The legislative gap made the

[5] Ariz. Sec'y of State, *Petition Circulation Training Guide* (May 2018) https://azsos.gov/sites/default/files/Petition%20Circulator%20Training%20Guide%20May%2001%202018.pdf (at 2 n.16) (Aug. 14, 2018, 7:59 p.m.).

Secretary's job difficult, if not impossible, because circulators paid hourly could check "paid" but not register with the Secretary. Fortunately, this gap only applies to this 2018 election cycle. The statutes' plain language, however, did not require the Committee's circulators paid by the hour to register. Intervenors argued that one legislator's comments showed an intent to encompass all types of paid circulators with the registration requirement, the Court cannot expect the public to know what one or multiple legislators say; the text is what governs.

The Court accepts the Committee's challenge to the Secretary rejecting these petitions. The Secretary cannot reject the 2097 petition sheets on Exhibit A to the Verified Cross-Claim (filed August 3, 2018) due to lack of paid circulator registration. This does not prohibit excluding those petitions or signatures on them for other reasons.

* * *

IT IS ORDERED that A.R.S. § 19-102.01 unconstitutionally violates Arizona's separation of powers doctrine and infringes on the people's reserved power to legislate via initiative (at least as Petitioners and Intervenors have argued for the statute's application).

IT IS FURTHER ORDERED that interpreting A.R.S. § 19-102.01 with A.R.S. § 19-102(D) to avoid serious constitutional questions prohibits invalidating petitions even under a strict compliance standard based solely on a third party pre-marking the paid/volunteer lines.

IT IS FURTHER ORDERED rejecting the Committee's challenge to the Secretary's decision regarding petition sheets on which circulators did not include their full addresses. [*See* Verified Cross-Claim (filed August 3, 2018) (at 2:10-5:13) (listing sheet nos.).]

IT IS FURTHER ORDERED granting the Committee's requested relief regarding petition sheets the Secretary rejected because the circulators had not registered. The Secretary cannot reject the petition sheets on Exhibit A to the Verified Cross-Claim (filed August 3, 2018) due to lack of paid circulator registration. This does not prohibit excluding those petitions or signatures on them for other reasons.

IT IS FURTHER ORDERED denying Secretary Reagan's Motion for Summary Judgment (filed August 10, 2018) to the extent it requested relief inconsistent with this decision.

IT IS FURTHER ORDERED denying any relief requested in pending motions that this decision does not address (other than requests for fees and costs).

Election challenge cases have accelerated time lines. Here, Petitioners requested an award of fees and costs in their petition. The Committee requested fees and costs in its cross-

claim. Obviously, the Court cannot address those requests before printing deadlines pass. Thus, the Court finds no just reason for delay and enters this judgment under Arizona Rule of Civil Procedure 54(b).

DATED this 15 day of August, 2018.

/ s / JAMES D. SMITH

JAMES D. SMITH
JUDGE OF THE SUPERIOR COURT