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Smart and Safe Arizona

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

Lisa James, a qualified elector and taxpayer; Merilee Fowler, a qualified elector and taxpayer; Todd Griffith, a qualified elector and taxpayer; Dr. Edward Gogek, a qualified elector and taxpayer; Paul Smith, a qualified elector and taxpayer; Dr. Dale Guthrie, a qualified elector and taxpayer; and Sally Schindel, a qualified elector and taxpayer, Plaintiffs, v. Katie Hobbs, in her capacity as Arizona Secretary of State, Defendant. Smart and Safe Arizona, a political action committee, Real Party in Interest.	No. CV2020-008460 **SMART AND SAFE ARIZONA'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument: Aug. 6, 2020, 9:30 AM)** (Assigned to The Hon. James D. Smith)

Introduction

Real Party in Interest Smart and Safe Arizona ("Committee") is entitled to summary judgment on all claims raised in Plaintiffs' Verified Complaint.

Four weeks ago, the Committee submitted more than 428,000 petition signatures for the Smart and Safe Arizona Act ("Initiative") to the Secretary of State. This culminated more than a year of work to develop the Initiative with input from stakeholders throughout Arizona, and to then gather petition signatures while grappling with the effects of a global pandemic. These efforts cost the Committee millions of dollars. And given the hard look our country is now taking at the disproportionate impact of many criminal laws on communities of color and the amount of money spent annually on law enforcement and prisons, the Initiative's goal of legalizing the regulated use and sale of recreational marijuana (and permitting expungement of past marijuana convictions) could not be timelier.

We need not mince words: Plaintiffs ask this Court to throw all those voters' signatures into the trash, and to deprive Arizonans of their fundamental right to legislate by initiative by voting "yes" or "no" on the Initiative. Why? Because they disagree with the Initiative as a matter of policy. [Compl. ¶¶ 2-8] Rather than running a campaign and winning in the marketplace of ideas, they bring a narrow legal claim against the 100-word summary that appears on each of the Initiative's petition sheets. But this case – like three others pending before other judges on this Court raising nearly-identical claims – is an exemplar of the maxim that "if you give someone an inch, they'll take a mile."

Two years ago (and as this Court knows well), the Arizona Supreme Court – for the first time in that court's history – enjoined a statewide initiative measure from appearing on the ballot because of a defect in the measure's 100-word summary. It did so because the summary omitted a "principal provision" of the measure in a confusing way and contained objectively, mathematically incorrect information that "yield[ed] a significant danger of confusion" for petition signers. *Molera v. Reagan*, 245 Ariz. 291, 299 ¶ 33 (2018). And though the court's

holding was exceedingly narrow (the "inch"), Plaintiffs cling to it here to raise nine objections to the summary used on petitions circulated for the Initiative (the "mile"). This case is emphatically not the same. Indeed, Plaintiffs' objections misconstrue the law and the Initiative and rest on irrational assumptions about how reasonable people would interpret the summary.

Proponents of initiative measures in Arizona must do two things to put potential signers of their petitions on notice of the change in law they propose. Most importantly, they must attach a complete copy of the initiative's title and text to each petition sheet to permit a potential signer to review it themselves. Proponents must also summarize in no more than 100 words the measure's "principal provisions" in a manner that (1) "need not be impartial," (2) can "describe the intended effects of the measure in a way that might appeal to prospective voters," (3) does not have to "detail every provision," (4) is not required to "explain all potential effects of a measure," and (5) merely cannot create a "significant danger of confusion." Courts "consider the meaning a reasonable person would ascribe to the description," an objective standard inconsistent with Plaintiffs' claims in this case.[1]

Despite Plaintiffs' claims to the contrary, Arizona law gave the Committee significant latitude in fashioning the 100-word summary that appeared on its petitions. And because the Committee's summary – in just 97 words, summarizing 10,623 words of Initiative text – describes all the Initiative's principal provisions and does not create "significant danger of confusion," Plaintiffs' objections should be dismissed on their merits.

Beyond that, Plaintiffs sat on their rights for weeks before filing this lawsuit. Indeed, they did so while all three later-filed statewide initiatives that submitted signatures to the Secretary of State after this one was filed were sued based on their 100-word summaries. There is no good

[1] Contrary to Plaintiffs' suggestions, the standard governing the 100-word summary does not distinguish between gradations of "substantial" and "strict" compliance. *See Molera*, 245 Ariz. at 294, ¶ 7 (declining to decide whether "strict" or "substantial" rubric applied). Instead, that case applied an "objective standard," which is neither of those things.

excuse for this delay, which will prejudice both the Committee and the Court. Plaintiffs' claims should thus also be dismissed under the equitable doctrine of laches.

Arizonans should have their say – one way or another – on the Initiative, and to grant Plaintiffs' requested relief would deprive them of that opportunity. Their right to legislate by initiative is, after all, fundamental.

Relevant Facts

There are few facts relevant to the disposition of this case. The Initiative is seventeen-pages long, totals 10,623 words of new statutory language, and relates to the legalization of the limited use, sale, possession, and personal cultivation of recreational marijuana. Given the Initiative's length, we will not try to summarize it here and refer the Court to its entire text. [SOF ¶ 1, Ex. 1] Atop all the petitions was the following 100-word summary [SOF ¶ 2]:

> This Act permits limited possession, transfer, cultivation, and use of marijuana (as defined) by adults 21 years old or older; protects employer and property owner rights; bans smoking in public places; imposes a 16% excise tax on marijuana to fund public safety, community colleges, infrastructure, and public health and community programs; authorizes state and local regulations for the sale and production of marijuana by a limited number of licensees; requires impairment to the slightest degree for marijuana DUIs; transfers monies from the Medical Marijuana Fund; permits expungement of some marijuana violations; and prescribes penalties for violations.

This summary was made public on September 26, 2019 when the Committee applied for a petition serial number with the Secretary of State. [*Id.* ¶ 3] The Committee filed its petition sheets with the Secretary on July 1, 2020, almost three weeks before Plaintiffs filed this action. [*Id.* ¶ 4] The three other statewide initiatives that submitted petitions this election cycle did so after this Initiative, and lawsuits under A.R.S. § 19-122(C) challenging their respective 100-word summaries were filed on July 10, 2020 and July 16, 2020. [*Id.* ¶ 5]

Argument.

I. Plaintiff's Claims Are Barred by Laches.

The equitable doctrine of laches "seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice," *Lubin v. Thomas,* 213 Ariz. 496, 497 ¶ 10 (2006), and Plaintiffs check off all the boxes.

"Over the last 25 years, the Arizona Supreme Court has repeatedly cautioned that litigants should bring election challenges in a timely manner or have their requests for relief denied on the basis of laches." *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922 (D. Ariz. 2016) (citation omitted). Plaintiffs sue under A.R.S. § 19-122(C), which does provide a statute of limitations. *Transportation Infrastructure Moving Arizona's Econ. v. Brewer* ("*TIME*"), 219 Ariz. 207, 213 ¶ 33 (2008). But "a party may not unreasonably delay in bringing such actions," and courts have not allowed them to proceed "when [the] delay in filing . . . is unreasonable." *Id.* And "time is of the essence because disputes concerning election and petition issues must be initiated and resolved, allowing time for the preparation and printing of absentee voting ballots." *Harris v. Purcell*, 193 Ariz. 409, 412 (1998) (citation omitted)

Plaintiffs unreasonably delayed in bringing this action, and that delay caused prejudice. "Fundamental fairness is the *sine qua non* of the laches doctrine," and in the context of an election dispute such as this, courts must "consider fairness . . . to those devoting effort and funds to place a proposition on the ballot, and fairness to the thousands of citizens who signed petitions and collected the signatures." *Harris*, 193 Ariz. at 414 ¶ 24.

To determine whether delay was unreasonable, a court considers the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence in preparing and advancing his case." *Arizona Libertarian Party*, 189 F. Supp. 3d at 923. Plaintiffs were on notice of the claim raised in their Verified Complaint approximately 10 months ago and sat on their rights for weeks even after the Committee filed its petitions sheets. To be sure, delay alone cannot support the laches defense; rather the Court

should "examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge" to "determine whether delay by the challenging party was unreasonable." *Id.* at 412 ¶ 16. And here, there is no reasonable justification, particularly because other litigants challenging other initiatives beat Plaintiffs to court by ten days. In litigation relating to ballot measures, ten days may as well be a lifetime.[2]

As the Arizona Supreme Court has explained, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," and "[t]he effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to file an election challenge 'places the court in a position of having to steamroll through the delicate legal issues in order to meet the deadline for measures to be placed on the ballot.'" *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (citation omitted). Late filings, such as Plaintiffs', "deprive judges of the ability to fairly and reasonably process and consider the issues ... and rush appellate review, leaving little time for reflection and wise decision making." *Id.* (citation omitted). Beyond this prejudice to the Court itself, there is also prejudice to the Committee. *Cf. Mathieu v. Mahoney*, 174 Ariz. 456, 458-59 (1993) (noting that a "had more than a month to prepare its case"). This case could already be well on its way to a decision at this point, but is now just beginning.

In short, Plaintiffs' unreasonable delay in suing prejudices both the Court and the Committee. Laches thus precludes their claims.

II. A Summary Violates A.R.S. § 19-102(A) Only If It Contains Objective Falsehoods or Omissions that Obscure "the Thrust of the Measure."

A.R.S. § 19-102(A) requires that initiative proponents place on their petition sheets "a description of no more than one hundred words of the principal provisions of the proposed

[2] Also, because this Initiative was first to file with the Secretary of State, it is already close to final certification. Indeed, the Secretary of State may certify the Initiative for the ballot prior to this Court's issuance of a ruling and any appeal that may follow.

measure." This "description need not be impartial . . . [n]or must the description detail every provision." *Molera v. Reagan*, 245 Ariz. 291, 295 ¶ 13 (2018) (citations omitted). In other words, the statute does not require the provided summary to be a "complete" description of the measure; instead, it cannot misrepresent or conceal "the thrust of the measure." *Wilhelm v. Brewer*, 219 Ariz. 45, 48 ¶ 13 (2008).

The summary need not be impartial and may "describe[] the intended effects of the measure in a way that might appeal to prospective voters." *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 152 ¶ 28 (2013). And because the petition form states that the summary is "prepared by the sponsor of the measure" and "may not include every provision contained in the measure," potential signers of the petition are "warned that the summary description may not be complete or unbiased," *Wilhelm*, 219 Ariz. at 48 ¶ 14. "[I]f electors ha[ve] questions as to the entire nature and scope of the measure, they easily" can refer to the measure's full text, which is attached to each petition sheet. *See Kromko v. Superior Court*, 168 Ariz. 51, 60 (1991).

First, an initiative's "principal provision" is defined as one that is "'most important, consequential, or influential,' 'chief' [or] 'a matter or thing of primary importance.'" *Molera*, 245 Ariz. at 297 ¶ 24 (citation omitted). But alleged omissions can disqualify a petition only if they create a perception that contradicts its terms. *Compare id.* ¶ 25 (failure to disclose repeal of indexing of tax brackets to inflation was fatal "because it imposes tax increases on most Arizona taxpayers rather than only the state's wealthiest taxpayers, as the description clearly suggests"), *with Save Our Vote*, 231 Ariz. at 152 ¶ 27 (failure to disclose that proposed "open primaries" measure "would not apply to presidential elections or non-partisan elections is not a fatal omission"), *and Wilhelm*, 219 Ariz. at 48 ¶¶ 14-15 (failure to disclose that measure would extend statute of repose was not fatal because it did not "improperly obscure[]" the main substance of the initiative). And courts must keep in mind that an initiative's sponsor has only 100 words to describe what are often complex changes to law. *Cf. Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 208, ¶ 9 (2013) (when considering legal sufficiency of descriptions of

initiative measures appearing on the ballot, "[t]he length and complexity of the initiative, and the [word limit] constraints prescribed in § 19-125(D), are factors in assessing compliance").

Second, a summary does not comply with § 19-102(A) if its actual text is "fraudulent or creates a significant danger of confusion or unfairness." *Molera*, 245 Ariz. at 295 ¶ 13. The statute "requires an objective standard for evaluating the description of the actual provisions," *id.* at 297 ¶ 27, under which courts must "consider the meaning a reasonable person would ascribe to the description." *Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix* ("*Contractors*"), 247 Ariz. 45, 48 ¶ 15 (2019).

In sum, a summary complies with § 19-102(A) unless it contains objective falsehoods or omissions that conflict with the disclosed "thrust of the measure." *Wilhelm*, 219 Ariz. at 48 ¶ 13. Without these conditions, courts allow the people to pass judgment at the ballot box.

A. *Molera* and Its Limitations.

Plaintiffs' arguments are built exclusively on *Molera*. There, the proposed measure amended Arizona's individual tax brackets, and "modifie[d] the inflation indexing of income tax rates" under which tax brackets adjust to account for inflation. *Molera*, 245 Ariz. at 295 ¶ 14. The measure also set new income tax brackets and raised the highest marginal rate by either 3.46 or 4.46 percentage points. The 100-word summary stated only that it would "rais[e] the income tax rate by 3.46% on individual incomes over a quarter million dollars (or household incomes over half a million dollars), and by 4.46% on individual incomes over half a million dollars (or household incomes over a million dollars)," but did not mention that it would eliminate indexing. *Id.* at 293 ¶ 2.

First, the Court held that the summary's failure to describe that the proposed measure would eliminate "income tax indexing" was "a primary, consequential provision because it imposes tax increases on most Arizona taxpayers rather than only the state's wealthiest taxpayers, as the description clearly suggests." *Id.* at 297 ¶ 25 (emphasis added). It was not the mere omission of the change in indexing that was disqualifying. Instead, it was the fact that the

summary included "[a] description indicating that other people's taxes will be raised, but not the taxes of most of those signing the petition," which "create[d] a significant risk of confusion or unfairness and could certainly materially impact whether a person would sign the petition." *Id.* And because the question of preserving indexing was not obvious from the face of the Initiative itself (that Initiative itself was confusing on this point), the Court found that "recourse . . . to the measure's text" was no salvation. *Id.* at 298 ¶ 28.

Second, the Court held that the description of the extent of the tax increase "also 'creates a significant danger of confusion.'" *Id.* at 298 ¶ 29. More specifically, the summary stated that it would increase taxes on the wealthy "by 3.46% and 4.46%," when "the affected tax rates would actually increase by seventy-six percent and ninety-eight percent, respectively." *Id.* This objectively incorrect statement was "confusing" from a reasonable person's perspective and "so significant that it could materially affect whether a person would sign the petition." *Id.* ¶¶ 29, 30.

Molera's limitations revealed themselves shortly after publication. In *Contractors*, 247 Ariz. at 48-49 ¶ 16, the Arizona Supreme Court rejected three challenges to this summary:

> This initiative measure amends the City Charter to terminate construction of all future light rail extensions and redirect the funds toward infrastructure improvements. Revenues from terminating light rail extensions other than the South Phoenix extension will fund infrastructure improvements throughout the City. Revenues from terminating the South Phoenix light rail extension will fund infrastructure improvements in South Phoenix (defined as South Mountain Village plus the area between Seventh Street, Seventh Avenue, Jefferson Street and the Salt River). A Citizens Transportation Committee will solicit public input, make recommendations to the City Council regarding infrastructure improvements, and review transportation expenditures.

First, the challengers argued that the summary's "references to 'revenues' falsely suggest that terminating light rail extensions would generate income." *Id.* at 49 ¶ 17. But because the first sentence of the summary used the word "redirects," this challenge could not stand; "[r]ead in context, a reasonable person would know that the 'revenues' mentioned in the succeeding sentences refer to the redirected funds." *Id.* (emphasis added).

Next, the challengers posited that a "statement that funds will be redirected from light rail extensions is misleading because only funds controlled by the City of Phoenix can be redirected; regional and federal funding for light rail in Phoenix would purportedly cease if the Initiative passes." *Id.* ¶ 18. On this point, the court reiterated that it has "never required an initiative description to explain all potential effects of a measure," and that "the proper forum to argue the consequences of passing the Initiative is in statements of support and opposition, editorials, and the like." *Id.* (citation omitted) (emphasis added).

Lastly, the challengers claimed that the summary was "misleading because it proposes to redirect 'light rail extension[]' funds to 'infrastructure improvements' but fails to reveal that 'infrastructure improvements,' as defined in the Initiative, excludes repairs to light rail." *Id.* ¶ 19. The court dismissed this challenge because it was inaccurate; "the Initiative d[id] not, in fact, eliminate funding for upkeep of the existing light rail system." *Id.* ¶ 20.

Contractors teaches three fundamental principles under § 19-102(A): courts must analyze a summary in its entirety and in context, initiative proponents are not responsible for "argu[ing] the consequences" or "effects" of an initiative in the limited space they have, and accurate statements in the summary are not actionable. 249 Ariz. at 49 ¶¶ 17-20.

B. Plaintiffs' Challenges to the 100-Word Summary Fail as a Matter of Law.

With these principles in mind, we address each of Plaintiffs' nine arguments below. All fail as a matter of law.

1. The summary accurately references "marijuana (as defined)."

Plaintiffs first quarrel with the summary's statement that the Initiative "permits limited possession, transfer, cultivation, and use of marijuana (as defined)." They say [¶¶ 39-46] that this is "deceptive and creates a significant danger of confusion" because it does not provide details about how the Initiative defines marijuana, and most notably, that the Initiative's definition includes extracted resin. According to Plaintiffs, because current Arizona law

separately defines "marijuana" and "cannabis" and prescribes different penalties for producing and possessing them, not explaining as much in the summary was a fatal omission.

Not so. The summary accurately used the term "marijuana," which the Initiative specifically defines in a definition that itself totals 119 words. But more than that, the summary includes the "(as defined)" qualifier to signal to a potential reader that if they desire more details, they were free to refer to the attached text for further information. *Kromko*, 168 Ariz. at 60 ("[I]f electors ha[ve] questions as to the entire nature and scope of the measure, they easily" can refer to the full text of the initiative). Far from "obscur[ing]" the thrust of the Initiative, the summary uses the exact term set forth in the Initiative. The "thrust" of the Initiative is the legalization of marijuana, and reasonable people would believe that it would be all forms of marijuana. Plaintiffs present no evidence to the contrary, other than the Plaintiffs' self-serving declarations. But the statements of self-professed anti-marijuana advocates are hardly a measure of what reasonable Arizonans would believe, to say nothing of what reasonable Arizonans know about the current criminal code's bifurcated definitional structure.

Plaintiffs' true objection is to the "effects" and "consequences" of the Initiative's substance: that it goes further than Plaintiffs believe it should. But arguments of that sort belong in editorial pages, not in this Court.

The summary's use of a defined term from the Initiative with a specific "(as defined)" qualifier was not misleading or confusing. This claim should be dismissed.

2. The summary accurately describes the standard for marijuana DUIs.

The summary truthfully states that the Initiative would "require[] impairment to the slightest degree for marijuana DUIs." Notably, Plaintiffs do not contend that this is a misrepresentation of the Initiative's terms. That implicit admission alone extinguishes their claim; a factually accurate statement in the summary is not actionable as a matter of law. *See Contractors*, 247 Ariz. at 49, ¶ 20; *contrast Molera*, 245 Ariz. at 297, ¶ 25 (noting that summary's representation that proposed tax increase would cover only high earners was

objectively inaccurate). Plaintiffs counter only that the effect of this Initiative provision is to "reduce the standard of culpability" for marijuana DUIs [Compl. ¶¶ 49-50]. Even if this characterization is correct, it is irrelevant; the 100-word summary need not outline the "potential effects of a measure" or how it may affect other existing laws. *See Contractors*, 247 Ariz. at 49, ¶ 18. The summary truthfully and unambiguously disclosed the legal standard it would impose with respect to marijuana DUI liability; nothing more was required.

3. The summary accurately describes the 16% excise tax.

Plaintiffs' attack on the summary's description of the excise tax contemplated by the Initiative suffers from two related defects, one factual and the other legal. First, Plaintiffs' insistence that the proposed 16% excise tax "is fixed and cannot be adjusted in the future except by ballot initiative" [Compl. ¶ 53] is itself not entirely true. Voter-enacted statutes <u>are</u> subject to legislative revision pursuant to the so-called Voter Protection Act, provided that the amendment garners at least a three-fourths majority in each house and "furthers the purpose of" the initiative. *See* Ariz. Const. art. IV, pt. 1, § 1(6)(C). Whether some imagined future proposed adjustment to the Initiative's excise tax rate would or would not satisfy these criteria is a wholly speculative exercise that the 100-word summary need not (and indeed should not) undertake. Any "interpretation or application of the [Initiative] will be considered by this court only after the [measure] is adopted and the issue is presented by litigants whose rights are affected." *Tilson v. Mofford*, 153 Ariz. 468, 473 (1987); *cf. Winkle v. City of Tucson*, 190 Ariz. 413, 417 (1997) (questions concerning potential impact of state law on proposed municipal initiative were not ripe for judicial review unless and until the measure was adopted).

Second, and more fundamentally, the Voter Protection Act has been a fixed premise of <u>all</u> statutory initiatives for more than two decades. Initiative proponents need not – and, given the constraints of the statutory 100-word ceiling, could not – catalogue the measure's potential relationship to other extrinsic statutes or constitutional provisions. *See id.* at 472-73 (neither

initiative nor publicity pamphlet was required to describe how proposed constitutional amendment initiative might impact other provisions of the constitution).

4. There is nothing misleading about the description of the 16% excise tax.

Plaintiffs' next gripe that the summary "does not disclose that household cultivation [of marijuana] is not susceptible to the excise tax" [Compl. ¶ 61] is fatuous. Of course the excise tax does not apply to household cultivation; by definition, excise levies have traditionally applied only to commercial transactions and enterprises. *See generally* A.R.S. Title 42, Chapters 5-6. No reasonable person would assume that an excise tax would attach to a personal, non-commercial activity undertaken inside one's own home. Section 19-102(A) does not demand that initiative sponsors expend their allotted 100 words on explaining the obvious. *See Molera*, 245 Ariz. at 295 ¶ 13 ("Nor must the description detail every provision, as the statutorily required disclaimer acknowledges."). And beyond that, neither the summary nor the Initiative make any quantitative representation regarding the scope of the Initiative's "alleged revenue producing aspects," and Plaintiffs adduce no facts supporting the idea that "home cultivation will result in materially reduced tax income for the state." [Compl. ¶¶ 65-66] Nor could they, because recreational marijuana is currently not taxed in Arizona; any additional tax revenue that will inure to the state after the Initiative passes will definitionally be an increase.

5. The summary accurately describes its protection of employer rights.

The summary's representation that the Initiative "protects employer rights" is corroborated by the plain text of the measure. The proposed new A.R.S. § 36-2851 explicitly affirms that the initiative "does not restrict the rights of employers to maintain a drug-and-alcohol-free workplace" and "does not require an employer to allow or accommodate the use of, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment." A statement in the summary that recites nearly verbatim the text of the initiative itself is, by definition, legally sufficient. *See Contractors*, 247 Ariz. at 49, ¶¶ 19-20

(summary's statement that the measure would fund "infrastructure improvements" was not actionable because it accurately reflected the text of the measure itself).

Plaintiffs conspicuously do not (and could not) identify any provision of the Initiative that actually abridges employers' rights, thereby rending the summary false. *Contrast Molera*, 245 Ariz. at 297, ¶ 25 (summary's affirmative representation that only high income individuals would pay tax rate increase was inconsistent with the initiative's text, which would have increased taxes on most taxpayers). Rather, they pronounce that it is "unclear" whether or to what extent the Initiative may permit, for example, drug tests, and forecast that the issue "would have to be litigated by employers." [Motion for Preliminary Injunction at 9] Speculative predictions concerning how the Initiative's terms may or may not be interpreted and applied in hypothetical future circumstances, however, embody precisely the type of "potential effect" that the summary is not required to anticipate and predict. *Contractors*, 247 Ariz. at 49, ¶ 18; *cf. Tilson*, 153 Ariz. at 473 (questions concerning "the interpretation or application of" a proposed initiative "will be considered by this court only after the amendment is adopted and the issue is presented by litigants whose rights are affected," and need not be addressed in the initiative or in the publicity pamphlet).

6. The summary accurately describes the Initiative's limited authorization for cultivation.

Plaintiffs next fault the summary for stating that the Initiative "permits limited . . . cultivation . . . of marijuana." [Compl. ¶ 74]. They reason that "[u]nder the Initiative, a commercial licensee is permitted to cultivate an ***unlimited*** amount of marijuana. [*Id.* ¶ 75, emphasis in original]. This argument refutes itself. The very fact that commercial cultivation is conditioned on the Department of Health Services' issuance of a license – which are available in strictly limited quantities and contingent upon the prospective licensee's compliance with a stringent series of prerequisites and regulation by the Department – by definition constitutes a "limit" on cultivation. Indeed, the representation demanded by Plaintiffs, *i.e.*, that the Initiative

would authorize "unlimited" commercial cultivation, is objectively false. The Initiative would permit commercial cultivation of marijuana only by a restricted number of licensed businesses and in limited quantities by individuals in their home. These provisions incontrovertibly impose a "limit" on cultivation.

7. The Initiative's effects on medical marijuana dispensaries are not "principal provisions."

Plaintiffs' objection [at ¶¶ 82-91] that the summary fails to itemize how the Initiative may affect regulations imposed by the Arizona Medical Marijuana Act ("AMMA") falls flat for two reasons.

First, the potential interplay between the Initiative and the AMMA with respect to dual licensees (*i.e.*, dispensaries authorized to sell both medicinal and recreational marijuana products) is not a "principal provision," A.R.S. § 19-102(A), of the measure itself. Initiative petitions are presumed valid when filed, and a challenger bears the burden of affirmatively proving its legal insufficiency. *See generally Leach v. Reagan*, 245 Ariz. 430, 437, ¶ 30 (2018); *Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 15 (1998) ("[O]nce initiative petitions are circulated, signed and filed, they are presumed valid."). While some provisions may be so obviously integral to an initiative that they are "principal" as a matter of law, the burden presumptively is on the plaintiff to affirmatively establish that a given clause is so important to prospective signers' evaluation of the measure that it was must be included in the 100-word summary. Plaintiffs' failure to buttress with factual evidence their intuitively unpersuasive argument that this minor provision of the Initiative is among the "most important, consequential, or influential," *Molera*, 245 Ariz. at 297 (internal citation omitted), defeats their claim. *See Wilhelm*, 219 Ariz. at 49 n.2 (emphasizing that the "plaintiffs submitted no evidence that any voter was misled or confused by any of the issues raised" in connection with the 100-word summary (internal quotation omitted)); *Kromko*, 168 Ariz. at 59 (noting that plaintiff had provided extrinsic evidence of voter confusion, but adding that even such a showing would not necessarily disqualify initiative).

The set of self-serving declarations appended to Plaintiffs' Motion for a Preliminary Injunction do not even come close to discharging that burden. All are essentially essays declaiming the reasons why the affiants oppose the Initiative *as a matter of policy*. To establish that the intersection of the Initiative with the AMMA somehow constituted a "principal provision," however, Plaintiffs would have had to adduce evidence that voters who otherwise would have signed the petition would have changed their minds had they known about its potential impact on AMMA regulations for dual licensees. The "because we said so" of Plaintiffs' declarants – all of whom clearly oppose the liberalization of marijuana laws for personal or ideological reasons – that this-or-that provision is a "principal" component of the Initiative does not constitute credible *factual* evidence of the summary's legal insufficiency. *See generally Florez v. Sargeant*, 185 Ariz. 521, 527 (1996) (deeming affidavit "conclusory, and without value" for purposes of resolving motion for summary judgment).

Second, because initiative proponents necessarily are constrained by the statutory 100-word ceiling, an alleged omission is actionable only if it "improperly obscures" the omitted provision. *Wilhelm*, 219 Ariz. at 48, ¶ 15. Accepting as true Plaintiffs' characterization of the Initiative as abrogating certain AMMA restrictions, this effect is wholly consistent with the obvious "thrust of the measure," *id.* at 48, ¶ 13 – *i.e.*, a substantial liberalization of the laws governing the cultivation, sale and use of marijuana. Its omission from the summary thus has no bearing on the summary's legal sufficiency.

8. The Initiative does not allow advertising to children, and its advertising provisions are not "principal provisions."

Plaintiffs' criticism that the summary "fail[s] to disclose the Initiative's implications for marijuana advertising" to minors [Compl. ¶ 91] fares no better. The express terms of the Initiative in fact prohibit any direct or individualized advertising of marijuana to individuals under the age of twenty-one, and further declare that it is unlawful to "advertise marijuana or marijuana products to children." [SOF ¶ 6] And while Plaintiffs hypothesize that the Initiative

may result in other forms of advertising reaching minors, they can point to no language in the text of the measure itself that authorizes or ordains that outcome. *Contrast Molera*, 245 Ariz. at 296-97, ¶¶ 22-28 (finding that text of the measure affirmatively repealed inflation indexing of all tax brackets and that summary's misrepresentation that only wealthy individuals' taxes would be increased was thus fatal to its validity). Whatever advertising may or may not occur as a result of the Initiative's enactment is exactly the kind of extrinsic "effect" that the 100-word summary is not required to ponder. *See Contractors*, 247 Ariz. at 49, ¶ 18 (summary's reference to the repurposing of light rail "funds" without mentioning that some of those "funds" might be forfeited if the initiative is enacted did not make summary false or misleading).

9. The summary does not omit "principal provisions" regarding criminal violations and penalties.

The last gasp of Plaintiffs' complaint entreats the Court to toss out the Initiative because "the Summary fails to disclose that the Initiative reduces the criminal penalties for underage use and possession of marijuana" [Compl. ¶ 94]. In fact, the summary explicitly alerts readers that it "prescribes penalties for violations" of marijuana laws. This representation is an objectively correct and neutrally phrased depiction of the Initiative's text, and hence is legally sufficient as a matter of law. *See Contractors*, 247 Ariz. at 49, ¶¶ 19-20. Prospective signers who were specifically interested the Initiative's effect on the penalties for particular marijuana offenses could "easily have referred to the 'full and correct' copies" of the measure attached to the petition sheet. *Kromko*, 168 Ariz. at 60. Further, the reduction of criminal penalties for marijuana offenses is the self-evident "thrust of the measure." *Wilhelm*, 219 Ariz. at 48 ¶ 13. The notion that a reader of the summary – which discloses in its opening sentence that it "permits limited possession, transfer, cultivation, and use of marijuana" – would have been surprised to learn that the Initiative pares back criminal sanctions for some marijuana-related offenses is implausible. In short, the Committee had no obligation to "detail every provision," *Molera*, 245 Ariz. at 295, ¶ 13, by cataloguing various penalties for a sundry array of potential offenses. The summary's

statement that the Initiative "prescribes penalties for violations" is entirely accurate, and Plaintiffs' claim accordingly founders.

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More fundamentally, the defect in Plaintiffs' theory transcends their dissatisfaction with any given element of the summary. To paraphrase Plaintiffs, this case is a cautionary example of what happens when the opponents of a ballot initiative try to shoehorn personal policy preferences into neutral legal principles. [*See* Motion for Preliminary Injunction at 2] A careful reading of Plaintiffs' complaint and supporting materials compels only one obvious conclusion: Plaintiffs are implacably opposed to marijuana legalization, and no 100-word summary the Committee could compose would ever satisfy them. As noted above, mollifying only one of Plaintiffs' nine objections (*i.e.*, detailing the Initiative's complete definition of the term "marijuana") would consume more words than are allotted for the entire summary. And any revisions to the summary that the Committee might have made would have encountered yet another series of captious complaints by Plaintiffs, whose singular objective is to avoid the possibility that Arizona voters may decide to liberalize the state's marijuana laws.

This litigation strategy may be unfortunate, but it is not novel. In 2016, another group of anti-legalization activists sued to enjoin the ballot placement of a different marijuana-related initiative, lobbing a similar laundry-list of grievances with the measure's 100-word summary. This Court was not persuaded. Although not a binding authority, the Court opined, in words that resonate now:

> Of note, just the court's above limited description of the alleged defects [in the summary] is 106 words, which exceeds the maximum allowed. Plaintiffs do not suggest what portions of the 96-word description that defendants used should be changed and deleted to accommodate the additional materials Plaintiffs believe should be include[d] in a 100-word or less description.
>
> In short, Plaintiffs demonstrated no ability to prepare a summary that would comply with the 100-word limit and with their objections. Plaintiffs, nonetheless, persist in asserting that omitting these provisions from the summary along with what they consider misstatements about the provisions that were included makes

> the summary fraudulent. Plaintiffs' position is in essence that the summary should have more fully described what the initiative will do but do not explain how they could do it better.

Leibsohn v. Reagan, No. CV2016-009546, Under Advisement Ruling, Aug. 19, 2016 at pp. 8-9, *aff'd* Ariz. Supreme Ct. No. CV-16-0203-AP/EL, Decision Order, Aug. 31, 2016. [SOF ¶ 7, Ex. 5]

The same observation engrafts easily onto this case. The Committee's summary was clearly worded, factually accurate, and embodied a good faith effort to distill the principal provisions of the Initiative within the confines of the statutory 100-word limit. Plaintiffs have every right to air their criticisms of the Initiative, but "[t]he proper forum to argue the consequences of passing [a ballot measure] is in the statements of support and opposition, editorials, and the like"—not the courtroom. *Contractors*, 247 Ariz. at 49, ¶ 18. The Court accordingly should reject Plaintiffs' attempt to advance political ends by judicial means, and affirm Arizonans' right to make their own laws.

Conclusion

For the foregoing reasons, the Court should enter summary judgment for the Committee and dismiss Plaintiffs' claims in their entirety.

RESPECTFULLY SUBMITTED this 27th day of July, 2020.

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