

Arizona Supreme Court

Civil Election Appeal

CV-24-0187-AP/EL

MAKE ELECTIONS FAIR v BEN TOMA et al

Appellate Case Information

Case Filed: 13-Aug-2024 Archive on: 28-Aug-2034 (planned)
Case Closed: 28-Aug-2024

Dept/Composition

Side 1. MAKE ELECTIONS FAIR PAC, Plaintiff/Appellee

(Litigant Group) MAKE ELECTIONS FAIR PAC

- Make Elections Fair Pac

Attorneys for: Plaintiff/Appellee

Mary R O'Grady, Esq. (AZ Bar No. 11434)
Andrew G. Pappas, Esq. (AZ Bar No. 34432)
Joshua J. Messer, Esq. (AZ Bar No. 35101)

Side 2. BEN TOMA, et al., Defendant/Appellant

(Litigant Group) BEN TOMA, et al.

- Ben Toma
- Warren Petersen
- Shawwna Bolick
- Sonny Borrelli
- Sine Kerr
- Travis Grantham
- Teresa Martinez
- Quang Nguyen

Attorneys for: Defendant/Appellant

Brunn W Roysden, III, Esq. (AZ Bar No. 28698)

(Litigant Group) MITZI EPSTEIN, BRIAN FERNANDEZ, JUAN MENDEZ

- Mitzi Epstein
- Brian Fernandez
- Juan Mendez

Attorneys for: Defendant/Appellant

Elizabeth Higgins, Esq. (AZ Bar No. 28273)

(Litigant Group) LUPE CONTRERAS, NANCY GUTIERREZ, STEPHANIE STAHL HAMILTON

- Lupe Contreras
- Nancy Gutierrez
- Stephanie Stahl Hamilton

Attorneys for: Defendant/Appellant

Rhonda L Barnes, Esq. (AZ Bar No. 23068)

(Litigant Group) ADRIAN FONTES

- Adrian P Fontes
AZ Bar No. 22162
[Current Member]

Attorneys for: Defendant/Appellant

Kara Karlson, Esq. (AZ Bar No. 29407)
Karen J Hartman-Tellez, Esq. (AZ Bar No. 21121)
Kyle R Cummings, Esq. (AZ Bar No. 32228)

Side 3. ARIZONA ATTORNEY GENERAL, Amicus Curiae

(Litigant Group) ARIZONA ATTORNEY GENERAL

- Arizona Attorney General's Office

Attorneys for: Amicus Curiae

Alexander W Samuels, Esq. (AZ Bar No. 28926)
Nathan Arrowsmith, Esq. (AZ Bar No. 31165)
Joshua G. Nomkin, Esq. (AZ Bar No. 39213)

CASE STATUS

Aug 28, 2024...Case Closed

Aug 28, 2024...Decision Rendered

PREDECESSOR CASE(S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
MAR CV2024-018789			Melissa Iyer Julian, Judge on PC		

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CASE DECISION

28-Aug-2024 DECISION ORDER

* The Court en banc has considered the briefs of the parties and amicus curiae and the record in this matter. Initially, though Appellants filed this matter as an expedited election appeal under ARCAP 10, the Court accepts jurisdiction as a special acti

Filed:	28-Aug-2024	Mandate:	28-Aug-2024
Decision Disposition			
Reversed			

Ann Timmer

16 PROCEEDING ENTRIES

1. 13-Aug-2024 FILED: Defendants/Appellants' ARCAP 10 Statement and Request for Scheduling Conference; Certificate of Service; Exhibits (Appellants Toma, et al.)
2. 13-Aug-2024 On August 13, 2024, Defendants/Appellants Speaker of the House Ben Toma and President of the Senate Warren Petersen, et al., filed "Defendants/Appellants' ARCAP 10 Statement and Request for Scheduling Conference." In lieu of a telephonic scheduling conference, Court staff has consulted with counsel for Appellants and Plaintiff/Appellee Make Elections Fair, a political action committee. Court staff has been informally advised that the publicity printing deadline is August 29, 2024. The parties have advised that no transcripts will be required. IT IS FURTHER ORDERED the Secretary of State shall file a statement forthwith advising the Court of the last day to decide this matter. The parties may likewise file a notice advising of any other timing concerns. Upon consideration of this matter and agreement of the parties, IT IS ORDERED Appellants will file their opening brief (no more than 3,000 words) no later than 4:00 p.m. on Friday, August 16, 2024. IT IS FURTHER ORDERED that any amicus brief (no more than 1,500 words) will be filed no later than 9:00 a.m. on Monday, August 19, 2024. The parties give blanket consent to the filing of amicus briefs. Any amicus brief not meeting the requirements of ARCAP 16(b)(1)(C) will be summarily stricken by the Court. IT IS FURTHER ORDERED Appellee will file its answering brief (no more than 3,000 words) responding to the opening brief and any amicus briefs no later than 4:00 p.m. on Wednesday, August 21, 2024. IT IS FURTHER ORDERED Appellants may file their reply brief (no more than 1,500 words) responding to the answering brief and amicus briefs no later than 4:00 p.m. on Friday, August 23, 2024. If Appellants elect not to file a reply brief, they will file a notice to that effect as soon as possible. Due to the expedited nature of these proceedings, the parties are encouraged to utilize shorter briefs and file their pleadings before their deadlines if possible. IT IS FURTHER ORDERED briefs will be in a legible 14-point font, double-spaced, and will include all arguments the parties wish to present to the Court. They may be filed in memorandum format (no tables of contents or authorities). IT IS FURTHER ORDERED in addition to filing briefs with the Clerk of the Supreme Court (with filing and service through AZTurboCourt), all filings are also to be sent by email to all the parties as required by Rule 10(h), Arizona Rules of Civil Appellate Procedure, and to SACrtdocs@courts.az.gov and Court staff when filed. This matter will be considered without oral argument. Justice Bolick has recused himself from consideration of this matter. (Hon. William G. Montgomery)
3. 14-Aug-2024 Justice Bolick is recused and will not participate in the above captioned matter. Therefore, pursuant to Article 6, Section 3 of the Arizona Constitution, IT IS ORDERED that the Honorable Rebecca White Berch, Justice (Retired) of the Arizona Supreme Court, is designated to sit on the case until it is finally determined. (Hon. Ann A. Scott Timmer)
4. 14-Aug-2024 FILED: Notice Regarding Printing Deadline; Certificate of Service (Appellant Fontes)
5. 13-Aug-2024 FILED: Record
6. 16-Aug-2024 FILED: Defendants/Appellants' Opening Brief; Certificate of Service; Certificate of Compliance (Appellants Toma, et al.)
7. 16-Aug-2024 FILED: The Attorney General's Amicus Brief in Support of Plaintiff/Appellee Make Elections Fair; Certificate of Service; Certificate of Compliance (Amicus Attorney General)
8. 16-Aug-2024 FILED: Appendix; Certificate of Service (Amicus Attorney General)
9. 16-Aug-2024 FILED: (Copy of) Order (ASC) Filed 8/13/24 (Amicus Attorney General)
10. 21-Aug-2024 FILED: Make Elections Fair Answering Brief; Certificate of Service; Certificate of Compliance (Appellee Make Elections Fair)

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| 11. | 21-Aug-2024 | FILED: Legislative Democrats' Answering Brief; Certificate of Service; Certificate of Compliance (Appellants Contreras et al./Epstein, et al.) |
| 12. | 23-Aug-2024 | FILED: Defendants/Appellants' Reply Brief; Certificate of Service; Certificate of Compliance (Appellants Toma, et al.) |

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13. 28-Aug-2024 The Court en banc has considered the briefs of the parties and amicus curiae and the record in this matter. Initially, though Appellants filed this matter as an expedited election appeal under ARCAP 10, the Court accepts jurisdiction as a special action because there is no statutory basis to treat this matter as an election appeal, although it perhaps falls under ARCAP 10(d)(1). See ARCAP 10, Comment 1; Tobin v. Rea, 231 Ariz. 189, 193 ¶ 8 (2013) (citing Ariz. R.P. Spec. Act. 1(a), 4(a), 7(b)). Therefore,
- IT IS ORDERED that the Court accepts special action jurisdiction to decide this matter.
- Pursuant to A.R.S. § 19–124(C), the Legislative Council (“Council”) must write an “impartial analysis” of each initiative measure that will appear on the general election ballot for inclusion in the publicity pamphlet the Secretary of State sends to registered voters before the election. This analysis “assist[s] voters in rationally assessing an initiative proposal by providing a fair, neutral explanation of the proposal’s contents and the changes it would make if adopted.” Tobin, 231 Ariz. at 193 ¶ 10 (quoting Fairness & Accountability in Ins. Reform v. Greene, 180 Ariz. 582, 590 (1994)).
- The Initiative is entitled the “Make Elections Fair Arizona Act.” See Make Elections Fair Arizona Act, Initiative No. I-14-2024, § 1 (2024) (hereafter “Initiative”). It proposes to amend the constitution to “create[] a primary system in which people may vote for the candidate of their choice, regardless of the political party of the voter or the candidate” and “provide[] additional flexibility regarding general elections.” See Initiative, § 2. Thus, the Initiative proposes an interrelated series of election reform amendments, including changes to article 7, section 2 (prohibiting partisan discrimination); section 7 (allowing voter rankings); section 10 (enacting nonpartisan direct primary elections); and section 11 (dictating who advances to the general elections).
- The legislative analysis begins with the following text:
- ...
- Each numbered paragraph in the Initiative explains proposed revisions to our election procedures.
- The trial court concluded that two aspects of the analysis were misleading. First, “The analysis [] selectively emphasizes that the Initiative would ‘amend’ the constitution to provide for the use of voter ranking to declare election winners,” and “misleadingly suggests” that under the Act “the candidate who receives the most votes would no longer be declared the victor in ‘all Arizona elections.’” Second, the cross-reference to paragraph 4 (where voter rankings in general elections are discussed) “direct[s] readers immediately to paragraph 4,” encouraging the reader to skip over the provisions that explain the changes to the primary and general elections. This, the court concluded, is a prohibited “rhetorical strategy” devised to dissuade the voters from supporting the Initiative “by confusing when and how voter ranking would be used.” See Tobin, 231 Ariz. at 194 ¶ 13 (“Employing ‘rhetorical strategy’ in the crafting of wording of the analysis . . . is not compatible with the statute’s impartiality requirement.”). For these reasons, the court enjoined the Secretary of State from printing the analysis in the publicity pamphlet and directed the Council “to revise its analysis to comply with A.R.S. § 9 124(C) to correct the portion found by this order to be misleading to Arizona voters.” This special action followed.
- To obtain relief, the Council must establish that the trial court’s ruling is arbitrary, capricious, or an abuse of discretion. Ariz. R.P. Spec. Act. 3(c); Tobin, 231 Ariz. at 194 ¶ 14. The court abused its discretion if it misapplied the law. See id. Because this matter concerns an issue of law with no disputed facts, we review the court’s ruling de novo. See id.
- We must uphold the Council’s legislative analysis if it “substantially complied” with § 19 124(C). See id. at 193 ¶ 11. Our review requires an objective analysis. See id. Thus, we ask, “whether reasonable minds could conclude that the Council met the requirements of the law, not whether [we] believe the judicial system could itself devise a better analysis.” Id. (quoting Ariz. Legislative Council v. Howe, 192 Ariz. 378, 383 ¶ 17 (1998)). Our role here is “only to ensure that a challenged analysis is reasonably impartial and fulfills the statutory requirements.” Id. at 197 ¶ 34 (quoting Howe, 192 Ariz. at 383 ¶ 17). We unanimously conclude that the Council’s analysis substantially complies with § 19 124(C). The analysis, including the first numbered paragraph, accurately describes the Initiative. Notably, the Initiative proposes to amend the current constitutional requirement that the person or persons with the most votes is declared elected by adding that this requirement “does not prohibit the use of voter rankings to determine which person or persons received the highest number of legal votes.” See Initiative, § 4. The Council’s analysis in the first numbered paragraph therefore accurately describes this provision by stating that the Initiative would amend the constitution to “[a]llow for the use of voter ranking at all elections held in this state to determine which candidate received the highest number of votes.”
- We disagree that the first numbered paragraph’s reference to the fourth numbered paragraph of the analysis was an improper rhetorical device that encouraged voters to “skip over” provisions describing proposed changes to the primary and general election procedures. The first numbered paragraph refers the voter to the fourth numbered paragraph to obtain details about what the proposed amendment requires in some general election procedures concerning voter ranking. The reference concerns a feature of the Initiative, does not attempt to persuade the voter about the merits of voter ranking, and does not imply that other aspects of the analysis are unimportant. Thus, this description is unlike ones in cases where we found the Council had used rhetorical strategy to draft a description favoring one side or the other. See, e.g., Tobin, 231 Ariz. at 196 ¶¶ 26-27 (finding that a description tended to mislead by overstating a “qualified limitation on adjustment of the sales tax base”); Citizens for Growth Mgmt. v. Groscost, 199 Ariz. 71, 72-73 ¶ 6 (2000) (characterizing Council’s description as “attempt[ing] to persuade the reader at the very outset that present laws adequately address the perceived problems the initiative seeks to remedy” and disallowing this “rhetorical strategy” as not impartial).
- Finally, we disapprove the trial court’s finding that the Council’s choice in ordering its description of Initiative provisions misleads voters by selectively emphasizing the voter ranking aspects of the proposed constitutional amendments rather than the changes to primary election procedures. The analysis describes the changes in separately numbered, short paragraphs, which permits an interested voter to understand the proposed amendments. It is not for the courts to decide what aspects of the Initiative are most important and deserving of description in the analysis’ initial paragraphs. See Tobin, 231 Ariz. at 193 ¶ 11.

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Therefore,

IT IS ORDERED reversing the trial court's order finding that the analysis as presented violates A.R.S. § 19-124(C)'s impartiality requirement and enjoining the Secretary of State from printing the legislative analysis of Initiative No. I-14-2024 in the publicity pamphlet in the form approved by the Legislative Council in the form attached hereto.

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

IT IS FURTHER ORDERED that the Clerk of Court shall issue the mandate forthwith. (Hon. Ann A. Scott Timmer)

14. 28-Aug-2024 ----CASE STATISTICALLY TERMINATED----

15. 28-Aug-2024 MANDATE TO THE SUPERIOR COURT

Issued Mandate and Copy of Decision Order to Trial Court

16. 29-Aug-2024 RECEIPT No.: 2024-00236 ; \$140.00, Authorization: 8388505359140236, Applied to: MAKE ELECTIONS FAIR - Class B Filing Fee (\$140.00) Paid for: MAKE ELECTIONS FAIR PAC - By nCourt LLC