SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2020008460 08/07/2020

HONORABLE JAMES D. SMITH

CLERK OF THE COURT
D. Tapia
Deputy

LISA JAMES, ET AL. JOHN B SHADEGG

v.

KATIE HOBBS, ET AL. KARA MARIE KARLSON

COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE J. SMITH
ROOPALI HARDIN DESAI

MINUTE ENTRY

Under A.R.S. § 19-102(A), a summary of 100 words or fewer must accompany initiative petitions. People may rely on that summary or may read the entire initiative when deciding whether to sign a petition. This is a challenge to the 100-word summary for the "Smart and Safe Arizona Act" Initiative, which would allow recreational marijuana. Petitioners argued the summary omitted principal provisions and was misleading. At 100 words, the summary also cannot include everything—that is why the full Initiative must accompany the petition. This Initiative is 10,623 words. Its summary must be about the length of this paragraph, which is 103 words.

This decision explains why the Court rejects the challenges.[1]

[1] Initiative supporters submitted 420,000 or so signatures—far more than the 237,645 required. Petitioners did not dispute that Initiative supporters have enough signatures.

Our Constitution reserves to the people "the power to propose laws and amendments to the constitution . . . independently of the legislature . . . ." ARIZ. CONST. art. IV, pt. 1 § 1(1). This initiative power 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." *McBride v. Kerby*, 32 Ariz. 515, 525 (1927). "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). "[T]he right of initiative and referendum [is] 'vital,' and one so important to the authors of our constitution that they included sufficient machinery in the constitution to make the right self-executing." *Van Riper v. Threadgill*, 183 Ariz. 580, 582, 905 P.2d 589, 591 (App. 1995). Initiative sponsorship is political speech with First Amendment protection, too. It involves explaining the proposal and "why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (footnote omitted).

Initiative sponsors, however, must "comply with the appropriate regulation of the initiative process." *Molera v. Reagan*, 245 Ariz. 291, 294 ¶ 10, 428 P.3d 490, 493 (2018). And initiative opponents also have rights. They may challenge whether sponsors followed the Constitution and statutes. Courts resolve those disputes. But courts do not decide if initiatives are good or bad. "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, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 153 ¶ 29, 291 P.3d 342, 350 (2013). Many of the points in Petitioners' declarations addressed policy issues best left for voters or elected representatives. The Court appreciates Petitioners' sincerity and passion. Presumably, Initiative sponsors are equally sincere and passionate. Our system, however, does not make the Court the arbiter of those policy disagreements.

Like all election cases, this one moved quickly and involved much work in a compressed timeframe. It is a busy time for the court system and election lawyers, who often have many cases here and in the Arizona Supreme Court simultaneously. A pandemic makes all of this more difficult. The Court commends counsel on their presentations and thanks them for providing materials quickly and in the format requested.

I. LACHES DOES NOT APPLY.

Initiative supporters argued that Petitioners waited too long to file suit. Laches arises when a challenger's "dilatory conduct" leaves an opponent with an unreasonably short time to respond, "jeopardize[s] election officials' timely compliance with statutory deadlines, and require[s] the Court to decide this matter on an unnecessarily accelerated basis . . . ." *McClung v. Bennett*, 225 Ariz. 154, 157 ¶ 15, 235 P.3d 1037, 1040 (2010) (citations omitted).

That is a legitimate concern in election challenges. These cases move quickly—both here and at the Supreme Court. The parties, lawyers, Secretary of State, County Recorders, and judges race against deadlines for printing publicity pamphlets and ballots. Trial judges evaluate issues without law clerks. That can be daunting when the challenges attack hundreds or thousands of individual signatures (*e.g.*, disputing whether the signature matches voter registration) or when a challenger summons hundreds of petition circulators. A challenge in 2018 involved hundreds of petition circulators summoned to testify in a weeklong trial. A challenge this year involves greater than 2400 exhibits for a multiday trial. A challenger's delay may be unreasonable because it is infeasible for supporters to marshal their arguments and evidence in that short time.

Although Petitioners did not file their complaint for four weeks after supporters filed their petitions, laches does not doom their arguments. They limited their challenge to the 100-word summary's adequacy—a legal issue that does not require developing evidence or finding witnesses. The parties agreed to written presentations and oral argument (which the Court limited to one hour). This ruling also allows a timely appeal to the Arizona Supreme Court.

II. THE 100-WORD SUMMARY REQUIREMENT.

Our Constitution gives legislative power to the Legislature but reserves co-equal power to the people. ARIZ. CONST. art. IV, pt. 1 § 1. One reserved power is via initiatives. The Constitution requires an initiative's full text accompany petitions (*id.* § 1(9)) but does not mention summaries. The Legislature, however, sometimes adds requirements for initiatives to "prevent fraud and abuse of the process, and safeguard to the people their right of initiative and referendum in its original concept." *Arrett v. Bower*, 237 Ariz. 74, 78 ¶ 11, 345 P.3d 129, 133 (App. 2015) (discussing 1953 legislation) (quotations omitted).

The Legislature added a requirement in 1991 that initiative petitions include summaries of "no more than 100 words of the principal provisions of the proposed measure or constitutional amendment." A.R.S. § 19-102(A). Petitions also must include this notice about the summary:

> [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.

Id.

A summary must be accurate; courts reject one that is "fraudulent or creates a significant danger of confusion or unfairness." *Save Our Vote*, 231 Ariz. at 152 ¶ 26, 291 P.3d at 349.

Challengers often contest summaries' adequacy or accuracy. The Court reviews challenged portions of a summary "in context" and "consider[ing] the meaning a reasonable person would ascribe to the description." *Ariz. Chapter of the Assoc'd Gen. Contractors of Am. v. City of Phx.*, 247 Ariz. 45, 48-49 ¶¶ 15, 17, 445 P.3d 2, 5-6 (2019) (in context, "revenues" not reasonably understood to mean new money to city). A.R.S. § 19-102(A) "requires an objective standard for evaluating the description of the actual provisions rather than crediting the drafters' subjective intent." *Molera*, 245 Ariz. at 297 ¶ 27, 428 P.3d at 496.

What are the "principal provisions" of an initiative? That phrase means the most important, consequential, influential, chief, or thing of primary importance. *Id.* at 297 ¶ 24, 428 P.3d at 496. Also, "[t]he description need not encompass minor provisions and may be presented in a biased manner, but it may not create a substantial danger of confusion or unfairness." *Id.* at 299 ¶ 32, 428 P.3d at 498.

Arizona appellate courts twice found 100-word summaries unacceptable. The first time was *Sklar v. Town of Fountain Hills*, 220 Ariz. 449, 207 P.3d 702 (App. 2008). It addressed two referenda summaries. The referenda would have invalidated the town's rezoning ordinances for a specific parcel. But both summaries did not describe the referenda's principal provisions. In fact, the summaries were little more than platitudes. They contained only "subjective opinions . . . . [A] referendum petition is not the appropriate place for the expression of such opinions. This type of partisan positioning should not begin until after a referendum is placed on the ballot." *Id.* at 454 ¶ 18, 207 P.3d at 707.

In *Molera*, supporters of the 2018 Invest in Education initiative promoted it as increasing taxes on high-income citizens to fund education. The description had two errors. First, it omitted that the initiative would eliminate indexing marginal tax rates to inflation. That "would lead to high taxes for most taxpayers, not just those earning $250,000 as stated in the initiative description." 245 Ariz. at 295 ¶ 14, 428 P.3d at 494. "The change in indexing is 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, 428 P.3d at 496. Second, the summary referred to increasing two marginal tax brackets by "3.46% . . . and by 4.46%." *Id.* at 295 ¶ 16, 428 P.3d at 494. But that incorrectly suggested small relative increases. That initiative actually would almost double two marginal rates from 4.54% to 8.0% and from 4.54% to 9.0%. The summary should have referred to absolute increases in marginal rates by 3.46 *percentage points* and 4.46 *percentage points*. *Id.* at 298 ¶ 30, 428 P.3d at 497. "[I]t is one thing to increase someone's taxes by between three and four percent and another to nearly double them." *Id.* ¶ 29.

What guideposts do *Sklar* and *Molera* provide? *Sklar* is straightforward: aspirational advocacy that does not describe the substance is insufficient. This case is not like *Sklar*.

The *Molera* summary's first error contradicted the initiative and could directly affect someone signing a petition. Eliminating inflation indexing would increase nearly everyone's taxes over time, not just wealthy people's taxes. And that was a direct, immediate effect on taxpayers; it was not a possible outcome that hinged on future developments. That made it a principal provision. So direct contradictions and concrete effects (not hypothetical predictions) at odds with the summary cannot survive scrutiny.

The second error in *Molera* was the summary's incorrect description of the relative increase in two marginal tax rates. Again, this contradicted the actual effect of the initiative's language. It was not omitting a principal provision or failing to discuss predicted outcomes flowing from the initiative—it was flat-out wrong. Summary statements that contradict the initiative cannot stand.

A final guidepost: courts recognize the limits of 100 words. The summary need not "completely describe the effects" of passing an initiative; the law "requires only a description of the principal provisions, not a complete description . . . ." *Save Our Vote*, 231 Ariz. at 152 ¶ 27, 291 P.3d at 349. "We have never required an initiative description to explain all potential effects of a measure. . . . The proper forum to argue the consequences of passing the Initiative is in statements of support and opposition, editorials, and the like." *Assoc'd Gen. Contractors*, 247 Ariz. at 49 ¶ 18, 445 P.3d at 6.

Petitioners' papers show the tension between a 100-word summary and a complicated policy issue. Their declarations describing the alleged flaws spanned about 25 pages plus exhibits. Addressing legalizing a previously illegal substance must account for laws touching many parts of life. But if *everything* in an initiative is a "principal provision," then nothing is. Requiring one-paragraph to describe every effect of an initiative could gut citizens' co-equal right to legislate.

The Court applies those principles to this 100-word summary in the next section.

III. PETITIONERS' CHALLENGES TO THE 100-WORD SUMMARY.

This is the Initiative's 100-word summary:

> This Act permits limited possession, transfer, cultivation, and use of marijuana (as defined) by individuals 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 safe 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.

The Initiative is 16.5 single-spaced pages. The Court considers the limit of summarizing that volume in 100 words. When the Secretary of State must summarize measures in 50 words, the Supreme Court accounts for the "length and complexity of the initiative . . . in assessing compliance with that statute [A.R.S. § 19-125(D)]." *Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 208 ¶ 9, 292 P.3d 192, 194 (2013). The Secretary cannot use false or clearly misleading language. But language that is "fairly debatable and potentially subject to differing interpretations" is not clearly misleading. *Id.* at 209 ¶ 12, 292 P.3d at 195. The Court's "task is not to determine whether that is the only, or even the most reasonable, interpretation of the language used." *Id.* That same practicality applies here.

That brings us to Petitioners' challenges. None suggested that the summary directly, objectively contradicted the Initiative like in *Molera*. Often, the challenges turned on predictions that unobvious consequences of the Initiative's language may be important to electors. Those are valid points to raise in opposition statements, advertising, editorials, and the like. A summary's failure to capture every possible outcome of an initiative, however, does not make it misleading. And this Initiative is plain: it wants to legalize recreational marijuana. That is *the* principal provision. It is unlikely electors signing these petitions would be surprised by cascading effects of legalizing a formerly illegal substance (*e.g.*, advertising it, altering DUI laws about it).

Many of Petitioners' arguments hinged on what the summary omitted rather than stated inaccuracies as in *Molera*. Those arguments are more like *Wilhelm v. Brewer*, 219 Ariz. 45, 192 P.3d 404 (2008). That initiative would have created a 10-year warranty on new homes and enhanced homeowners' rights about construction defects. The summary omitted that the initiative would extend the statute of repose on defect claims from eight to 10 years; the challenger argued that made the summary misleading. The Supreme Court disagreed. Excluding the statute of repose extension from the summary "was not fraudulent and did not create confusion or mislead. The proponents included the warning required by the legislature and informed signers that the summary had been prepared by initiative supporters and advised them to review the entire measure." *Id.* at 48 ¶ 14, 192 P.3d at 407.

Last, Petitioners did not supply evidence that the summary actually misled any electors. They did not provide survey data showing that potential electors would interpret the summary inconsistently with the Initiative. Instead, their arguments turned on what hypothetical electors would want to know and how the summary deviated from those predicted desires.

A. Redefining "Marijuana."

The Initiative legalizes a form of cannabis (*i.e.*, extract resin) that is different from "marijuana" under Arizona's criminal laws. Current criminal law treats *cannabis* (including the resin) as a narcotic separate from *marijuana*. A.R.S. § 13-3401(20) (listing 95 substances as "narcotics"). Petitioners argued that the summary is deceptive because it did not specify this change. But the summary began, "This Act permits limited possession, transfer, cultivation, and use of marijuana (*as defined*) . . . ." (Emphasis added.) The Initiative's definitions of "marijuana" and "marijuana concentrate" span greater than 100 words alone, so the summary could not include those complete definitions. [Initiative ch. 28.2, § 36-2059(16) & (17).] The summary did not suggest that the Initiative defined "marijuana" the same as existing criminal law or as a limited portion of the cannabis plant. It informed electors that the Initiative defined the word; the full text of the Initiative accompanied the petitions, too.

Criminal law is not be the only relevant definition source. Resin is part of marijuana under our medical marijuana law. "'[A]ll parts' refers to all constituent elements of the marijuana plant, and the fact the resin must first be extracted from the plant reflects that it is part of the plant." *State v. Jones*, 246 Ariz. 452, 455 ¶ 9, 440 P.3d 1139, 1142 (2019). Electors are not likely to be confused that legalizing recreational marijuana will include resin extract when the *medical* marijuana law allows it.

The Supreme Judicial Court of Massachusetts confronted a similar argument about a marijuana legalization initiative. That Commonwealth requires its Attorney General prepare a "fair, concise" summary. Those plaintiffs challenged the summary because "it does not use the words 'hashish' or 'marijuana concentrate' or otherwise make clear that the proposed act would legalize marijuana with a concentration of THC that exceeds two and one-half per cent." *Hensley v. Attorney Gen.*, 53 N.E.3d 639, 650 (Mass. 2016). That summary was sufficient. "The average voter will understand that marijuana contains a chemical that gives it intoxicating effects (many may know that the chemical is called THC), that marijuana will vary in potency, and that all marijuana—lower potency and higher potency alike—is being proposed for legalization." *Id.* at 651.

Last, materials that *Petitioners* supplied suggest people often associate the extract with marijuana. The Arizona Criminal Justice Commission 2018 Youth Survey referred to "students who used marijuana and marijuana concentrates last 30 days." [Ex. 1, M. Fowler Decl. (07/16/2020).] A Politico article they included asked, "Will states be able to keep up with consumer preferences between concentrates, edibles and extracts?" Ex. 1 at 3, L. James Decl. (07/20/2020).]

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

B. The 16% Excise.

Petitioners argued that the summary failed to disclose that the tax "is fixed and cannot be adjusted in the future except by ballot initiative." [Verified Compl. ¶ 53.] The summary does not mention the excise's fixed nature, so this must be an omitted, principal provision for Petitioners to succeed.

The summary did not suggest that the tax rate was easily modifiable, and Petitioners did not explain why an elector signing would assume otherwise. It seems more likely that someone would interpret 16% to mean 16% rather than, "16% subject to legislative changes." Petitioners did not explain why electors would think the Legislature could modify this part of the Initiative without satisfying the Voter Protection Act (VPA), too. ARIZ. CONST. art. IV, pt. 1 § 1(6)(C). That limit on changing that tax rate is inherent in our Constitution. Petitioners' argument would require disclosing this feature of our Constitution for *any* initiative.

The Initiative goes further than the VPA, though. It prohibits the state and municipalities from adding taxes on marijuana sales and operations, other than taxes applying to all businesses or individuals. [Initiative ch. 28.2, § 36-2864(B) & (C).] Even if the Legislature satisfied the VPA, the Initiative apparently prohibits marijuana-specific tax increases. The summary does not mention this part of the Initiative. Again, that is unlike *Molera*, which involved summary statements that contradicted the initiative's effect. Petitioners' argument also seems to suggest that voters may want the Legislature to be able to tax a newly legal product out of existence—that is counter-intuitive and speculative. As Petitioners noted, "The power to tax is the power to destroy." [Pet'rs' Opening Br. at 8:22.][2] Also unlike *Molera*, this "omission" does not negatively affect voters' pocketbooks. Voters who may buy marijuana know the excise will not exceed 16%. Voters who would never buy marijuana will not pay any excise.

It also is not evident that voters would assume a municipality may tax a specific product beyond a State-level levy. For example, our laws prohibit municipalities from taxing firearms or ammunition (other than taxes applying to all personal property). A.R.S. § 13-3108(A). Arizonans are familiar with State law preempting municipalities' ability to tax legal products in a discriminatory manner.

Why would this part of the summary mislead electors? According to Petitioners, electors would assume that the excise will "fund the complete cost of the Initiative's government and

[2] Chief Justice Marshall first used this phrase when explaining why states could not tax a national bank that Congress created. "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create . . . ." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

community programs." [Verified Compl. ¶ 58.] But neither the Initiative nor the summary referred to "complete" funding. In fact, the Initiative only allocates percentages of collected funds to expenditure categories (*e.g.*, 33% to community college districts). [Initiative ch. 28.2, § 36-2856(D).] The Initiative does not purport to provide specified funding to the listed programs. What is more, the funded items exist today: public safety, community colleges, infrastructure, and public health and community programs. An objective elector would not think a new 16% excise on one product could fund all those items that receive funding from other sources now. This argument addresses hypothetical future tax shortfalls; that is an argument for the voters via position statements, editorials, and the like.

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

C. Marijuana DUI.

The summary notes that the Initiative "requires impairment to the slightest degree for marijuana DUIs . . . ." That is the Initiative's language, too. [Initiative ch. 28.2, § 36-2851(3).] It is difficult to label a summary as misleading when it follows the initiative language.

Petitioners argued that is deceptive because current law prohibits operating a motor vehicle "[w]hile there is any drug defined in section 13-3401 or its metabolite in the person's body." A.R.S. § 28-1381(A)(3). Even that argument is incomplete. Arguing that the DUI statute "includes *any* byproduct of a drug listed in § 13-3401 found in a driver's system leads to absurd results." *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345 ¶ 14, 322 P.3d 160, 162 (2014). "Drivers cannot be convicted of the (A)(3) offense based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana." *Id.* at 347 ¶ 24, 322 P.3d at 164. A qualified medical marijuana patient today has an affirmative defense to DUI by showing that the metabolite in his system could not cause impairment. *Dobson v. McClennan*, 238 Ariz. 389, 393 ¶ 20, 361 P.3d 374, 378 (2015).

Moreover, the summary's description of DUI law under the Initiative is accurate; *the Initiative will require impairment to the slightest degree for a DUI.* And the summary does not imply that the Initiative leaves DUI laws unchanged. The Initiative's principal purpose is to legalize recreational marijuana. It is not usual that the Initiative also affects DUI prosecutions under A.R.S. § 28-1381(A)(3). An elector signing a petition to legalize recreational marijuana would more likely be surprised if the Initiative did *not* decriminalize driving with any amount of the metabolite in one's system (just as it is not illegal to drive with the metabolite of alcohol in

one's system).[3] In addition, the change to DUI law is not a principal provision but is a secondary effect of legalizing recreational marijuana. It is infeasible to expect a 100-word summary to detail every cascading effect of an initiative throughout the Arizona Revised Statutes.

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

D. Limiting Commercial Cultivation.

Petitioners disputed whether the Initiative would limit *commercial* cultivation. The summary begins, "This Act permits limited possession, transfer, cultivation, and use of marijuana (as defined) by adults 21 years old or older[.]" The language is debatable and subject to varying interpretations, which is enough to defeat the argument. And that clause of the summary refers to individuals 21 years old or older; it is not suggesting a limit on commercial cultivation. When read in context, the clause is about individuals' use, etc. After all, individuals—not commercial cultivators—may possess and use marijuana. "When several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) (describing the associated-words canon).

The argument fails even if the clause refers to commercial cultivators. "Limited" is not a term of art, so we consider its ordinary meaning. *See id.* at 69 (describing ordinary-meaning canon). Here, it is "characterized by enforceable limitations prescribed (as by a constitution) upon the scope or exercise of powers." *Limited*, Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/limited (Aug. 7, 2020, 6:17 a.m.). It is accurate to state that the Initiative limits commercial marijuana operations. First, the Department of Health Services must license each entity. [Initiative ch. 28.2, § 36-2850(18).] Second, each licensee is limited to one off-site cultivation facility and one manufacturing/packaging facility. [*Id.*] The Initiative requires the Department to adopt rules regulating licensees and limits the number of marijuana establishments based on medical marijuana pharmacies. [*Id.* § 36-2854.] It allows localities to enact reasonable zoning restrictions for marijuana establishments, limit signage, and regulate operating hours. [*Id.* § 36-2857.] These all are limits.

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[3] Similarly, EtG (the metabolite of alcohol) "can be detected in various body fluids, tissue and hair . . . for up to 80 h[ours] after the complete elimination of alcohol from the body." Radu M. Nanau & Manuela G. Neuman, *Biomolecules and Biomarkers Used in Diagnosis of Alcohol Drinking and in Monitoring Therapeutic Interventions* (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4598755/ (Aug. 6, 2020, 8:52 p.m.).

The result is the same for Petitioners' argument that the summary misleadingly described "limited" marijuana use by people 21 and older. [Appl. Prelim. & Permanent Inj. (filed 07/20/2020) at 10:12-19.] The Initiative restricts the quantity of marijuana adults may possess. [Initiative ch. 28.2, § 36-2852(A).] It creates civil penalties and misdemeanor offenses for violators. [*Id.* § 36-2853.] These also are limits.

Petitioners may believe the Initiative should put more limits on possessing, using, or cultivating marijuana. Those are policy arguments for the voters. That competing policy perspective does not mean the summary violates the law.

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

E. Employer Rights.

The summary reads that the Initiative "protects employer and property owner rights . . . ." Petitioners disputed any protection of employer rights. Perhaps recognizing that the statement is subjective, Petitioners described that language as "stat[ing] as a fact" that the Initiative protects employer rights. [Appl. Prelim. & Permanent Inj. (filed 07/20/2020) at 9:7.] The language is debatable and subject to varying interpretations, which is enough to defeat the argument.

Petitioners argued that the summary is misleading because employers "could not restrict employees from using marijuana outside the workplace nor base discipline solely on a positive test for marijuana or its metabolites." [*Id.* at 9:18-20.] The Initiative describes employers' ability to manage their workplaces and keep them drug-free:

> This chapter:
>
> 1. Does not restrict the rights of employers to maintain a drug-and-alcohol-free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees.
>
> 2. Does not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment.

[Initiative ch. 28.2, § 36-2851.] That language does not preclude employer actions as Petitioners argued. Arizona allows employer to drug test employees, defining "drugs" by referring to federal law. A.R.S. § 23-493(3). The Initiative does not purport to modify Arizona drug testing laws. *See* A.R.S. §§ 23-493 to -493.12.

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

F. Reducing Penalties For Underage Marijuana Possession.

Petitioners argued that the summary is misleading because it referred to "limited" use by people over 21 but omitted that the Initiative reduces penalties for younger people illegally possessing marijuana. The summary did not say anything about penalties for underage possession. Thus, Petitioners' argument hinges on the penalty reduction being a principal provision of the Initiative that the summary omitted.

The Initiative does not legalize marijuana use or possession by people under 21. In fact, it includes penalties for underage possession. Yes, minors possessing marijuana now may face charges that are more serious. It is not confusing or misleading to electors, however, that an initiative legalizing recreational marijuana likewise affects the criminal treatment of minors in possession. Petitioners never explained why an elector would expect the Initiative to have another outcome.

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

G. Effectively Deregulating Medical Marijuana Dispensaries.

Petitioners contended that the summary was deficient because it did not describe the Initiative's effect on medical marijuana dispensaries.

The Initiative would create a "dual licensee" structure that lets medical marijuana dispensaries avoid some regulations that otherwise apply to medical marijuana operations. [Initiative ch. 28.2, § 36-2858(D)-(G).] The summary is silent about this aspect of the Initiative; unlike *Molera*, this summary does not say anything inaccurate about this part of the Initiative. Thus, Petitioners effectively argued that the dual licensee components are principal provisions that the summary must address. That is difficult to reconcile with the Initiative, which focuses on legalizing recreational marijuana, not revamping medical marijuana regulation.

These arguments also look to potential effects of the Initiative. "Such amendments will also impact the thousands of patients who rely on the medicinal use of marijuana by removing the medical director and other requirements in place under the AMMA to protect them." [Pet'rs' Opening Br. at 14:10-12.] First, the Initiative would not "remove" medical directors; any dual licensee may still have a medical director. Second, Petitioners' comparing this situation to the

across-the-board tax increases in *Molera* in inapt. About 245,500 of Arizona's 7.3 million residents—or 3.3%—hold medical marijuana cards. This change affects that small subset of the population and only those who may be concerned about buying marijuana from a vendor with a medical director as opposed to a general, commercial vendor. Any medical marijuana cardholder may continue buying from a dispensary that meets stringent requirements; the Initiative does not foreclose that option. That is much different from the tax increases affecting nearly all taxpayers in *Molera*. Third, the arguments hinges on policy considerations for the voters.

The summary is not fraudulent nor does it create a significant danger of confusion or unfairness because it does not "disclose the potential for deregulation of medical marijuana . . . ." [Verified Compl. ¶ 87.]

H. Advertising Marijuana.

Petitioners argued that the summary fails to disclose that it may allow marijuana advertising that reaches minors. But the summary does not include anything about the Initiative on this front. It is silent on the topic. Advertising must be a "principal provision" of the Initiative for this argument to succeed. It is not.

At best, advertising is a secondary aspect of legalizing recreational marijuana. Voters will not be surprised that sellers may advertise a now-legal product if the Initiative passes. Advertising for adult products is everywhere, from medical marijuana billboards to condom commercials to ubiquitous beer advertisements. The Initiative will require age verification for direct advertising (common in this era of smart phones and social media). [Initiative ch. 28.2, § 36-2859(C).] It prohibits selling or advertising marijuana products that imitate children's food or drink brands "or otherwise advertise marijuana or marijuana products to children." [*Id.* § 36-2860(A)(3).] Petitioners' argument that the lack of sufficient restrictions for "indirect forms of advertising such as television, radio, newspapers and magazines, billboards, online or social media" is one for the voters. [*See* Verified Compl. ¶ 89.]

The summary is not fraudulent nor does it create a significant danger of confusion or unfairness because it does not describe "the Initiative's implications for marijuana advertising . . . ." [Verified Compl. ¶ 91.]

I. Taxing Household Cultivation.[4]

[4] Petitioners' Opening Brief did not include this argument but their Verified Complaint and application for injunction did.

The 16% excise would not apply to household cultivation. The summary is silent on the topic. The lack of an excise on household cultivation must be a "principal provision" of the Initiative for this argument to succeed. It is not. Indeed, it would be odd to require the summary to describe something the Initiative does *not* do.

Petitioners argued that silence is misleading. But it is not clear why an elector would believe an "excise tax" covered home cultivation and use. Whether considering everyday sources like Merriam-Webster or Investopedia, or technical sources, governments levy an excise on selling goods or services. Our law typically refers to excises as affiliated with transaction privilege (*i.e.*, sales) taxes. *E.g.*, A.R.S. §§ 42-5015, 42-6001(A). The title of Chapter 5, Title 42 of the Arizona Revised Statutes is "Transaction Privilege and Affiliated Excise Taxes." Our Supreme Court reiterated that an excise is a "tax on the privilege or right to engage in an occupation or business . . . ." *City of Phx. v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 238 ¶ 13, 448 P.2d 275, 279 (2019) (quotations omitted). "An excise is a tax imposed on the manufacture, marketing, sale, or consumption of certain commodities . . . or on the conduct of certain trades or occupations." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE, *Tax* 879 (3d ed. 2011). It would be unusual for an elector to believe an excise applied to household cultivation and consumption.[5]

Petitioners also argued that forgoing taxing home cultivation "will result in materially reduced tax income for the state." [Verified Compl. ¶ 65.] That is an argument about a consequence of the Initiative, not a description of a principal provision. It also turns on some assumptions. First, that many people will grow the maximum amount of plants allowed. Second, those who grow will be successful enough that they will not buy commercially available product. Third, these successful home growers forgo buying enough commercial marijuana to affect the tax revenue a voter believed the State would receive. Maybe more relevant, the summary description did not promise certain levels of tax revenue. So even if many households cultivate marijuana and avoid taxed transactions that does not make the description misleading.

This aspect of the summary is not fraudulent nor does it create a significant danger of confusion or unfairness.

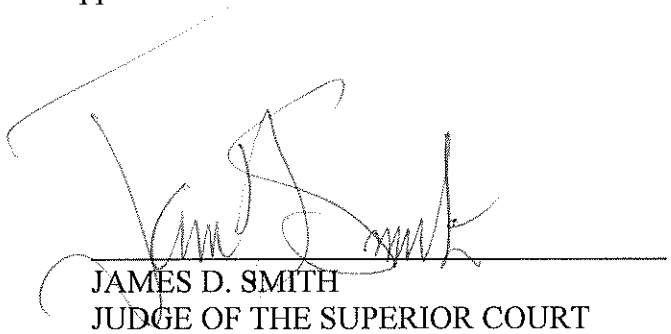
IT IS ORDERED denying Petitioners' request to enjoin the Secretary of State from including the Initiative on the 2020 general election ballot. This moots Initiative sponsors' summary judgment motion.

[5] Similarly, Title 4 of the Arizona Revised Statutes does not apply to "[b]eer produced for personal or family use that is not for sale." A.R.S. § 4-226(5). Excluding household cultivation from the excise is comparable.

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 timelines. *See* A.R.S. § 19-122 (challenges to initiatives and referenda). The Court cannot address requests for fees and costs before printing deadlines pass. Also, orders granting or denying injunctions are appealable. A.R.S. § 12-2101(A)(5)(b). The Court signs this order so all involved know it is this Court's order on Petitioners' injunction application.

Under A.R.S. § 19-118(F), a party must file a notice of appeal within five calendar days after entry of judgment. The Supreme Court may dismiss a belatedly prosecuted appeal, such as one filed on the last day of the statutory deadline. *See McClung v. Bennett*, 225 Ariz. 154, 235 P.3d 1037 (2010). Special procedural rules govern expedited appeals in election cases. Ariz. R. Civ. App. P. 10.



JAMES D. SMITH
JUDGE OF THE SUPERIOR COURT