SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-009546 08/18/2016

HONORABLE JO LYNN GENTRY

CLERK OF THE COURT
B. Randhawa
Deputy

SETH LEIBSOHN, et al.

BRETT W JOHNSON

v.

MICHELLE REAGAN, et al.

JAMES DRISCOLL-MACEACHRON

KORY A LANGHOFER

UNDER ADVISEMENT RULING

Oral Argument was held before the Court on August 12, 2016.

The Court has received and reviewed Plaintiff's Application for Order to Show Cause, the Plaintiff's Motion for Preliminary Injunction, Defendant's Response, Plaintiff's Reply, and Defendant's Motion to Dismiss and Plaintiff's Response. The Court also heard arguments of counsel and reviewed the cited case law.

Based on the above, the Court enters the following ruling:

MOTION TO DISMISS

1. Plaintiff's challenge is not authorized by A.R.S. § 19-122(C).

Before considering the merits of the Motion for Preliminary Injunction, the Court will first address Defendant's Motion to Dismiss, filed pursuant to Arizona Rules of Civil Procedure 12(b)(6) because Section 19-122(C) of the Arizona Revised Statutes precludes objections to the legal sufficiency of a petition unless filed pursuant to subsection (A) of the statute. In 2015, Section 19-122(C) was amended. *See* 2015 Ariz. Sess. Law, 1st Reg. Sess., ch. 285, § 8.

The pre-amendment version read:

> Notwithstanding section 19-121.04, if any petition filed is not legally sufficient, the court, in an action brought by any citizen, may enjoin the secretary or other officers from certifying or printing on the official ballot for the ensuing election the amendment or measure proposed or referred. The action shall be advanced on the calendar and heard and decided by the court as soon as possible. Either party may appeal to the supreme court within five days after judgment.

After the 2015 amendment, Section 19-122(C) reads:

> An action that contests the validity of an initiative or referendum measure based on the actions of the secretary of state may not be maintained in any court in this state except as prescribed by this section. A person may not maintain a separate action seeking to enjoin the secretary of state or other officer from certifying or printing the official ballot for the election that will include the proposed initiative or referendum measure and any request to enjoin the certification or printing of the ballot shall be made as a part of an action filed pursuant to subsection a of this section.

Defendant asserts that after the 2015 amendment, an objection to the legal sufficiency of a petition must be brought pursuant to subsection (A).

Plaintiffs counter that the Defendant's Motion misconstrues Arizona's standing requirement. Plaintiffs argue that to withstand a motion to dismiss, the Verified Complaint need only give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved. Plaintiffs argue the motion should be denied because the Verified Complaint provides a clear basis for the claims.

Plaintiffs go on to argue that Defendant's reading of A.R.S § 19-122(C) is incorrect as the right of a party to "request to enjoin" is stated clearly. Plaintiffs say A.R.S § 19-122(C) simply requires that if a party desires to object to whether an initiative complies with applicable law, the party must "request to enjoin" along the same procedural process as required by A.R.S § 19-122(A). Plaintiff's further maintain that the legislative history of A.R.S § 19-122(C) clearly means that the legislature was trying to eliminate two or more suits for the same initiative.

Plaintiffs also claim that they have three claims for relief, only one of which is statutory. The other basis for the standing asserted by Plaintiffs is mandamus since Plaintiff's claims raise the question "[w]hether the defendant . . . is threatening to proceed without or in excess of

jurisdiction of legal authority" by placing the Initiative on the ballot despite major legal and constitutional defects.

As to the Motion to Dismiss, the Court finds that the language of the 2015 amendment to A.R.S § 19-122(C) restricts the right of citizens to challenge an initiative unless they can do so pursuant to subsection A. The Court does not find persuasive Plaintiff's contention that the legislature was simply trying to curtail the filing of multiple suits for the same initiative. A.R.S § 19-122(A) unambiguously limits challenges to those instances where the Secretary of State refuses to accept and file a petition for the initiative or refuses to transmit the facsimiles of a signature sheet or sheets or affidavits, and such is not the case in this instance. Plaintiffs, therefore, may not base the challenge on A.R.S § 19-122(C). Further, Plaintiffs have no standing based on section 19-122(C) because that statute applies only if the Secretary of State refuses to file an initiative petition or transmit signatures for verification: it does not apply if the secretary of state accepts and files a legally insufficient petition.

In reaching a conclusion on this issue, the Court examined the history of section 19-122(C). That review confirms that the statute applies only when the actions or inactions of the Secretary of State are an issue. *See Carrow Co. v. Lusby*, 167 Ariz. 18, 20, 804 P.2d 747, 749 (1990) (stating that the "development of a statute" can reflect what it is intended to accomplish). Section 19-122(C) is the result of House Bill 2407, passed by the Legislature in 2015. Prior to the 2015 amendment, section 19-122(C) "provide[d] citizens two different types of relief in election matters: . . . an action compelling the [s]ecretary of [s]tate to accept and file an initiative petition or transfer facsimiles of signature sheets for verification in the event" of a refusal to do so, and an action "enjoining the [s]ecretary of [s]tate from printing or certifying a petition" that had been accepted and filed. *Kromko v. Superior Court*, 168 Ariz. 51, 56, 811 P.2d 12, 17 (1991) (italics omitted).

When passing HB 2407, the Legislature struck the part of then-existing section 19-122(C), which permitted "any citizen" to file a court action challenging the "legal[] sufficien[cy]" of any filed petition, including petitions for initiatives. By striking this provision, the Legislature eliminated one of the two types of relief available to citizens, leaving only an action that followed a Secretary of State's refusal to file an initiative petition or transmit signatures for verification.

The Court further examined whether the legislature inserted the same or similar language permitting citizens to challenge a petition's sufficiency in any other statute. The Court found no such change. Thus, whether wittingly or not, the legislature eliminated a means by which initiative petitions can be challenged.

As a result, for plaintiffs' challenge to proceed, the Court must find another basis other than the statutory grant that HB 2407 took away.

2. Plaintiff's claim does not fall within mandamus relief.

Defendants suggest that in addition to the statutory standing, they can proceed by mandamus.

> Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." Mandamus is not available unless the public officer is specifically required by law to perform the act. It applies if the act sought to be compelled is ministerial. A ministerial act permits a public officer "only one course of action on an admitted state of facts." Generally, mandamus is not available if the act of the public officer is discretionary. In some circumstances, mandamus may be used to compel a public officer to perform a discretionary act, but not to exercise that discretion in any particular manner.

See *Blankenbaker v. Marks*, 231 Ariz. 575, 577, ¶ 7, 299 P.3d 747, 749 (App. 2013) (citations omitted).

In other words, a writ of mandamus is appropriate to compel, when there is not a plain, adequate and speedy remedy at law, performance of a non-discretionary act which the law specially imposes as a duty. Here, the Secretary of State has not refused to act. Indeed, the Secretary of State stands ready to certify and approve the printing of the official ballot with the Initiative. Further, Plaintiff points to no ministerial act that permits the Secretary of State but one course of action without any discretion. Mandamus, therefore, does not provide a means by which Plaintiff may challenge the Initiative.

Plaintiff next asserts that the Court, as a matter of discretion, may waive any potential standing issue in cases such as this one, "involving issues of great public importance that are likely to recur." Here, where the legislature has specifically acted to divest the Court of jurisdiction, it would be imprudent to ignore the standing issue.

IT IS THEREFORE ORDERED granting the Motion to Dismiss for all the reasons stated above.

MOTION FOR PRELIMINARY INJUNCTION

In the event the court has improperly interpreted the 2015 amendment to A.R.S § 19-122(C) and Mandamus and given the shortened timeframe for election challenges, the Court rules as follows on the substance of the Motion for Preliminary Injunction.

Plaintiffs sued under A.R.S. §§ 19-122 (A) and (C), seeking a permanent injunction enjoining Defendants from placing the Regulation and Taxation of Marijuana Act (the initiative) on the general election ballot. Plaintiff claims that the initiative is facially deficient and contrary to the Arizona Constitution and law. To succeed on a Motion for Preliminary Injunction under Rule 65 of the Arizona Rules of Civil Procedure, Plaintiffs have the burden of showing 1) a strong likelihood of success on the merits, 2) a possibility of irreparable harm to Plaintiffs, not remedied by damages, if relief is not granted; 3) a balance of hardships favoring the Plaintiff, and 4) in certain cases, advancement of the public interest. *See Smith v. Ariz. Citizens Clean Elections Commission,* 212 Ariz. 407, 410-11 ¶ 10.

1. Substantial Compliance Standard Applies.

The parties do not agree on whether the Defendants shall be held to a standard of strict compliance or substantial compliance. The Court finds that, pursuant to A.R.S. § 19-101.01, substantial compliance with the constitutional and statutory requirements is necessary in the application and enforcement of those requirements. Contrary to Plaintiffs' assertion, A.R.S. 19 § 101.01 unambiguously applies to referendum actions only.

"Substantial compliance" is a concept that was recognized and has been applied repeatedly in cases when compliance with statutory requirements for petitions has been an issue. *E.g., Bee v. Day*, 218 Ariz. 505, 507, ¶¶9-10, 189 P.3d 1078, 1080 (2008); *Kromko*, 168 Ariz. at 59, 811 P.2d at 20. The substantial compliance standard reflects a desire to avoid interference with the voters' constitutional right to initiate laws. *See, e.g. Parker v. City of Tucson*, 233 Ariz. 422, 429, ¶14, 314 P.3d 100, 107 (App. 2013) (holding "Arizona has a strong policy [of] supporting the people's exercise of" the power granted to them by the constitution "to propose laws through initiative process.", quoting *Pedersen v. Bennet, 230 Ariz. 556, ¶ 7, 288 P.3d 760, 762 (2012*). Under the substantial compliance standard, the court overlooks technical violations of the laws pertaining to petitions unless "the omission of information could confuse or mislead electors." *See Bee*, 218 Ariz. at 508, ¶10, 189 P.3d at 1080 (citation and internal quotation marks omitted).

When the Court applies the substantial compliance standard, Plaintiff's challenges fail as to the title and text, the 100-word summary, and the Revenue Source Rule.

1. No strong likelihood of success on the merits.

Plaintiffs seek a preliminary injunction under Rule 65 of the Arizona Rules of Civil Procedure and A.R.S. § 12-1801 for the following reasons:

A. The Initiative violates Article 4, part 1, §1(9) of the Arizona Constitution..
B. The Initiative's signature petition sheets are invalid under the strict requirements of A.R.S. § 19-102(A).
C. The Initiative violates Article 9 § 23 of the Arizona Constitution.

Below, the court addresses and rejects each of these challenges.

A. The Initiative does not violate Article 4, part 1, §1(9) of the Arizona Constitution.

This section requires that the proponent attach a full and correct copy of the title and text of the measure proposed to be initiated or referred to the people to each signature. Plaintiffs claim the Initiative's signature petition sheets are invalid under the strict requirements of A.R.S. §19-102(A). Plaintiffs assert that the modest title, *the Regulation and Taxation of Marijuana Act*, conveys only that the Initiative will legalize, regulate, and tax marijuana. Plaintiffs argue that the Initiative directly and indirectly does much more than its title reveals. Further, Petitioners maintain that the tag line "regulate marijuana in a manner similar to Alcohol" is misleading because the Initiative would actually make marijuana a special, protected substance that cannot possibly be regulated like alcohol. For example, it would:

a. Prevent the State now, and in the future, from creating *per se* driving under the influence of drug laws based on a person testing positive for marijuana.
b. Regulate underage marijuana use and related crimes more leniently than alcohol by making such offenses petty offenses versus class 1 misdemeanors for similar crimes in an alcohol context.
c. Impose certain limitations on marijuana that have no analog to alcohol regulation.
d. Creates a statutory *right* to use marijuana where no similar right exists for alcohol and allows the sale of marijuana only at specially licensed facilities, whereas alcohol can be sold at convenience and grocery stores as well as state-licensed liquor stores.
e. Creates a statutory *right* to possess marijuana accessories i.e. paraphernalia.

Plaintiffs assert that the Initiative impacts so many areas of law that the title is misleading to the point of fraud. Plaintiffs further argue that the Initiative's text itself is incoherent, confusing, and misleading to the point of fraud.

Defendants counter that the title is just that, a title. It is not intended to encompass each and every provision in the Initiative. The title, *Regulation and Taxation of Marijuana Act*, fairly communicates the topic that is being addressed. In addition, the tag line is not misleading and in fact is correct. The Initiative will "regulate marijuana in a manner similar to Alcohol." It does not say that the Initiative will regulate marijuana in a manner that is the same, or identical, as alcohol. It does not say that the Initiative will regulate marijuana in a manner that is analogous to the regulation of alcohol. It says it will be similar.

The Court agrees with Defendant.

THE COURT FINDS that based on the above, Defendant's title substantially complies with the law and the Arizona Constitution. The Court further finds that even if the more stringent strict compliance applies, the Court would reach the same result.

B. The Initiative's signature petition sheets are invalid under the strict requirements of A.R.S. § 19-102(A).

Similarly, Plaintiffs argue the statements in the Summary are either affirmatively false, misleading and/or omit material facts and therefore the Court should find that the Initiative does not strictly comply with A.R.S. §19-102(A). This section requires the form of a petition, presented for signature to the electors, to include a description, prepared by the sponsor, of no more than one hundred words of the principal provisions of the proposed measure. The description may not include every provision contained in the measure. Plaintiff asserts the Initiative proponents interpreted the last section liberally and deliberately omitted numerous principal provisions to obscure the real intent of the law. Plaintiffs maintain that while the petition summary need not be neutral or describe each detail of every provision, there is a limit on how much information a petition summary may omit.

The challenged description reads as follows:

> The Regulation and Taxation of Marijuana act: (1) establishes a 15% tax on retail marijuana sales, from which the revenue will be allocated to public health and education; (2) allows adults twenty-one years of age and older to possess and to privately consume and grow limited amounts of marijuana; (3) creates a system in which licensed businesses can produce and sell marijuana; (4) establishes a Department of Marijuana Licenses and Control to regulate the cultivation, manufacturing, testing, transportation and sale of marijuana; and (5) provides local governments with the authority to regulate and limit marijuana businesses.

The summary is followed immediately by the statutorily required disclaimer, which reads:

> This is only a description of the proposed measure (or constitutional amendment) prepared by the sponsor of the measure. It may not include every provision contained in the measure. Before signing, make sure the title and text of the measure are attached. You have the right to read or examine the title and text before signing.

Plaintiffs contend the Initiative is defective because the 100-word summary description of the initiative is fraudulent because it does not include many of the "principal provisions of the measure sought to be referred as required by A.R.S. §§ 19-101 (A) and inaccurately describes those provisions that are summarized. A petition signature sheet is invalid if the petition summary "is fraudulent or creates a significant danger of confusion or unfairness." *Save Our Vote, Opposing C-03-2012,* 231 Ariz. 145, 152 ¶ 27, 291 P.3d 342, 349 (2013).

Plaintiffs maintain that the 100-word description is defective because it omits the following:

a. The impact on public safety laws,
b. The impact on Arizona's employment laws,
c. The impact on public benefits laws like Arizona's Cash Assistance or Unemployment Insurance welfare programs,
d. The impact on the rights of private landlords, homeowners' associations (HOAs) and property law generally.
e. The impact on family law in Arizona.
f. The impact on military personnel residing in Arizona.
g. The dramatic impact on Arizona's existing drug laws.
h. The alleged inability of local governments "to regulate and limit marijuana businesses."
i. The alleged creation of a cartel for the sole benefit of a small group of preexisting medical marijuana dispensary owners.

Of note, just the court's above limited description of the alleged defects 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 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. Instead, Plaintiffs simply argue that such a summary creates a risk of confusion and unfairness and threatens the integrity of the initiative process.

Defendant, the Campaign to Regulate Marijuana like Alcohol, opposes the granting of a Preliminary Injunction. Contrary to Plaintiffs' claims, Defendant argues that Plaintiffs will not succeed on the merits. Defendant claims the Initiatives' text and 100-word summary are clear, factually accurate, and meet all legal requirements.

Defendant maintains that, contrary to what Plaintiffs assert, the Court must review the Initiative for *substantial* compliance with the legal requirements and, under that standard, the measure withstands the challenge.

Defendants assert that the 100-word summary accurately describes the principal provisions of the measure and thus complies substantially with A.R.S. § 19-102(A). Moreover, the statutorily required disclaimer appears immediately below the 100-word summary. Defendant points out correctly that a summary of 100 or fewer words necessarily requires the proponent to synopsize and characterize and cannot therefore be subjected to a rigorous standard of review of covering every issue. Defendant argues it made a good faith effort to distill the principal provisions of a lengthy measure to 100 or fewer words and that it took care to craft an evenhanded and objective delineation of the Initiative's primary provisions.

Defendant further asserts that because the Initiative contains some title and some text, it substantially complies with the requirements of the Arizona Constitution, Art. IV, Pt 1, § 1(9). Because the Initiative complies with the Arizona Constitution, Defendant argues that Plaintiff's objection that the Initiative is "misleading and/or confusing" is a test that should not be applied because it is not found in either statute or case law. Defendant claims Plaintiffs are attempting to improperly blend the standard for signature sheets (*signature sheets may be invalid if it includes language that could confuse or mislead potential signers)* to the substance of the measure itself. Defendant argues there is no authority for judicial review and potential nullification. Similarly, Defendant argues that there is no fraud in the Initiative but even if there was, there is no authority for judicial invalidation of the actual text of a ballot measure.

THE COURT FINDS that based on the above, Defendant's 100-word summary substantially complies with the law. The Court further finds that even if the more stringent strict compliance applies, the Court would reach the same result.

C. The Initiative does not violate Article 9 § 23 of the Arizona Constitution.

The third claim on which Plaintiffs assert they are likely to prevail is that the Initiative violates the Revenue Source Rule in the Arizona Constitution. This rule requires an "initiative or referendum measure that establishes a fund for any specific purpose . . . . must also provide for an increased source of revenues sufficient to cover the entire *immediate* and *future* cost of the proposal.

Here, the Initiative would establish a "Marijuana Fund" that will, in time, pay for the Initiative but for immediate funding, takes money from the "Medical Marijuana Fund". Plaintiffs assert that A.R.S. § 19-101.01 requires strict compliance with the election law statutes and the Arizona Constitution and so a pre-election challenge is appropriate.

As to the Revenue Source Rule, Defendants correctly point out that the issue is not ripe. See *League of Ariz. Cities and Towns v. Brewer*, 213 Ariz. 557, 560, ¶ 15, 146 P.3d 58, 61 (2006). In *League of Ariz. Cities*, the Arizona Supreme Court held that courts are prohibited from adjudicating claims founded in the Revenue Source Rule prior to a ballot measure's adoption by the voters.

Defendant further argues correctly that even if the matter were ripe, such a claim would fail on its merits because the Initiative's funding is to be appropriated entirely from the special Medical Marijuana Fund established pursuant to Ariz. Rev. Stat. § 36-2817, not the General Fund. The funding source is present in the Initiative itself.

Defendant also correctly point that even if the Initiative violates the Revenue Source Rule, the constitutional provision contains its own enforcement mechanism so the remedy sought by the Plaintiffs would be unwarranted and inappropriate. *See* Ariz. Const. art IX, § 23(B). This section says that "If the identified revenue source provided pursuant to subsection A in any fiscal year fails to fund the entire mandated expenditure for that fiscal year, the legislature may reduce the expenditure of state revenues for that purpose in that fiscal year to the amount of funding supplied by the identified revenue source."

In response, Plaintiffs concede that if the standard of review is substantial compliance, their challenge under the Revenue Source Rule is premature.

THE COURT FINDS that based on the above, Plaintiff's challenge under the Revenue Source Rule is not ripe. The Court further finds that even if the more stringent strict compliance applies, the Court would reach the same result. Further, even if ripe, Plaintiff's claims still fail as the Initiative provides for a qualifying funding source and any shortfall would be addressed under Ariz. Const. art IX, § 23(B).

The Court, having found that the standard is substantial compliance, cannot therefore consider a challenge under this provision.

II. Plaintiffs maintain that the Arizona electorate will be irreparably injured if the Initiative is placed on the ballot.

Plaintiffs maintain that if the injunction is not granted, an unconstitutional and illegal initiative will be placed on the ballot and Arizona voters will have to assess and vote on the Initiative without the statutorily required information. If the Initiative is approved by voters, the Legislature cannot amend or modify it. As a result, Arizona's statutes and regulations would contradict themselves. Money damages will be unable to assuage this predicament and there is no other appropriate remedy at law to resolve these concerns.
Contrary to Plaintiff's assertion that they will suffer irreparable injury if the measure is placed on the ballot, Defendant counters that Plaintiffs will suffer no injury.

The initiative's text speaks for itself. At oral argument, both sides acknowledged their confidence in the ability of the voters to read and discern the merits of the Initiative.

III. The balance of hardships tips sharply in Plaintiffs favor.

There will be limited detriment to the Initiative if a preliminary injunction is granted. An injunction would mean that the Initiative would be deferred to any future election once it complies with Arizona law. The added time would allow the proponents to revise the flaws and work with concerned groups to assuage fears about its goals.

A Preliminary Injunction will severely impede the Defendant's constitutionally and statutorily secured right of initiative and will engender considerable logistical and practical burdens if the measure is not placed on the 2016 ballot due to the enormous financial and organizational costs of amassing the hundreds of thousands of signatures necessary to ensure placement on the statewide ballot.

Contrary to the assertions of both parties, the balance of hardships in this instance do not appear to tip sharply in favor of either party.

IV. Public policy and fairness to the electorate favor the injunction given the extensive changes to state laws and public policies.

Plaintiffs assert that public policy demands the Initiative be kept off the ballot because it is facially unconstitutional and will only confuse voters due to the misleading summary and due to its incoherent and inconsistent text.

Again, both sides acknowledged their confidence in the ability of the voters to read and discern the merits of the Initiative.

IT IS THEREFORE ORDERED granting the Defendants' Motion to Dismiss for all the reasons stated above.

No matters remain pending in this action. This is a final appealable order. Ariz. R. Civ. P. 54(c).

/S/ Hon. Jo Lynn Gentry

HONORABLE JO LYNN GENTRY
JUDGE OF THE SUPERIOR COURT