ARIZONA SUPREME COURT

JAIME A. MOLERA, an individual and qualified elector; ARIZONANS FOR GREAT SCHOOLS AND A STRONG ECONOMY, a political action committee, Plaintiffs/Appellees/Cross-Appellants, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State; INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN), a political action committee, Defendants/Appellants/Cross-Appellees.	Arizona Supreme Court No. CV-20-0213-AP/EL Maricopa County Superior Court No. CV2020-007964

BRIEF OF *AMICI CURIAE* KATHY HOFFMAN, TERRY GODDARD AND KRIS MAYES IN SUPPORT OF INVEST IN EDUCATION

FILED WITH WRITTEN CONSENT OF THE PARTIES

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Introduction

The people's initiative power is, and has always been, a fundamental constitutional right in Arizona. The trial court's decision turns that right into a dead letter. It tortures the 100-word summary requirement by imposing an unprecedented and impossible standard divorced from reality. It requires a level of specificity so great, and adopts an interpretation of "principal provision" so broad, that no initiative of any complexity could be summarized in 100 words—and thus no initiative could qualify for the ballot. This Court should reverse the trial court's decision because it unconstitutionally burdens the people's right to exercise the initiative power.[1]

Interests of *Amici Curiae*

This brief is filed on behalf of three people with strong connections to and interests in the Invest in Education initiative and preserving the Arizona Constitution's initiative power: Kathy Hoffman, Terry Goddard and Kris Mayes.

Kathy Hoffman is participating as an *amicus curiae* as a private citizen and not in her official capacity as the Arizona Superintendent of Public Instruction. She has spent her entire career working in public education, fighting tirelessly to elevate the voices of all teachers and students. She stands in solidarity with educators and

[1] To showcase what a 100-word summary allows, the Introduction here is exactly 100 words. There is more that could be said about the contents of this brief. And there is more that Invest in Education could have said to summarize its initiative. But a 100-word summary does not allow for much.

staff through her support of the Invest in Education initiative and her efforts to push for improved pay, adequate school funding, and classroom resources.

Terry Goddard is a former Arizona Attorney General and Mayor of the City of Phoenix. He has seen firsthand the positive effects of the people's initiative power through his involvement with various initiatives and referenda, including a 1981 referendum petition to increase funds for public transportation, a 1982 City of Phoenix initiative that amended the City Charter to establish representation by districts, and the Outlaw Dirty Money initiatives in 2016, 2018 and 2020.

Kris Mayes served as an Arizona Corporation Commissioner from 2003 to 2010, including as its Chairman for two years. She now serves as the Co-Director of the Energy Policy Innovation Council and Director of the Utility of the Future Center. She has personally experienced the value of the initiative power through her advocacy for various initiatives, including Proposition 127: Clean Energy for a Healthy Arizona, in 2018, and The Arizona Solar Energy Freedom Act, in 2016.

Amici curiae share an interest in preserving the initiative power generally and respecting the people's exercise of that power in this case specifically by allowing the Invest in Education initiative to appear on the ballot.[2]

[2] Under Arizona Rule of Civil Appellate Procedure 16(b)(3), *amici curiae* certify that Outlaw Dirty Money has provided financial resources for the preparation of this brief.

Argument

The people's initiative power is a fundamental constitutional right in Arizona. The trial court's interpretation of the 100-word summary requirement is unconstitutional as-applied because it unduly burdens the people's initiative power by imposing an impossible standard. This Court should overturn the trial court's decision, clarify that the 100-word summary requirement is not an invitation for courts to disqualify initiatives based on alleged technicalities or theoretical confusion, and remove this obstacle to Invest in Education appearing on the ballot.

I. The people's power to legislate through initiatives is a fundamental constitutional right in Arizona.

The Arizona Constitution reserves to the people "the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature." Ariz. Const. art. IV, pt. 1, § 1(1). The people's power to propose laws is the "[i]nitiative power." *Id.* § 1(2).

Courts have long recognized that, consistent with the Arizona Constitution's text, the "legislative power of the people is as great as that of the legislature." *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987); *see also State ex rel. Bullard v. Osborn*, 16 Ariz. 247, 250 (1914) (similar). No surprise then that this Court has stressed that the people's initiative power is a "fundamental component" of Arizona's legislative process. *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559 ¶ 9 (2006).

The Arizona Constitution's history only reinforces that the framers intended for the people's initiative power to be a fundamental constitutional right. It is a "notorious fact that the choice of delegates" to the Arizona Constitutional Convention "was fought out primarily upon" the "burning issue" of whether Arizona would follow the example of other states that had included the initiative power in their constitutions. *Whitman v. Moore*, 59 Ariz. 211, 218 (1942), *overruled on other grounds by Renck v. Super. Ct. of Maricopa Cty.*, 66 Ariz. 320 (1947). Arizona ultimately did follow that example and adopted provisions that strongly protect the people's initiative power, *see* Ariz. Const. art. IV, pt. 1, § 1(1), (2), and history "show[s] clearly that it was the opinion of the delegates" to the Arizona Constitutional Convention that the initiative power was among the "most important" constitutional provisions that they adopted, *Whitman*, 59 Ariz. at 218.

Shortly after the Arizona Constitution was ratified, the people took additional steps to safeguard the initiative power, confirming that the people have long understood the initiative power to be a fundamental right. The original Constitution prevented the Governor from vetoing "initiative or referendum measures approved by a majority vote of the qualified electors." Ariz. Const. art. IV, pt. 1, § 1(6) (1910). The people exercised the initiative power to amend that provision in the 1914 election to prevent "the Legislature," in addition to "the Governor," from "repeal[ing] or amend[ing] . . . initiative or referendum measures approved by a

majority of the qualified electors."[3] This amendment bolstered the people's initiative power by barring both the Governor *and* the Legislature from repealing or amending measures passed by initiative.

This history—which confirms beyond doubt that the initiative power is, and has always been, a "fundamental component" of Arizona's legislative process, *League of Ariz. Cities & Towns*, 213 Ariz. at 559 ¶ 9—must be considered in deciding this case because this Court "examine[s] constitutional language" to "effectuate its purpose," *Morrissey v. Garner*, 248 Ariz. 408, 410 ¶ 8 (2020).

II. The trial court's interpretation of the 100-word summary requirement is unconstitutional as-applied because it unduly burdens Invest in Education's ability to exercise its right to legislate through an initiative.

Although the people's initiative power is a fundamental constitutional right, this Court has allowed the Legislature to burden the exercise of that right with "[]reasonable restrictions." *Kromko v. Super. Ct.*, 168 Ariz. 51, 57 (1991). One such restriction is the requirement that initiative petitions include "a description of no more than one hundred words of the principal provisions of the proposed measure." A.R.S. § 19-102(A). That requirement is limited in two ways:

[3] *See* Publicity Pamphlet, 1914 General Election, at 40–42, http://azmemory.azlibrary.gov/utils/getfile/collection/statepubs/id/10521/filename/10812.pdf:U/o23toolbar=1&navpanes=1&search=%22PDF%20(Portable%20Document%20Format)%22 (last visited Aug. 10, 2020).

First, the Legislature did not require "that every feature of a measure be included in the 100-word description." *Wilhelm v. Brewer*, 219 Ariz. 45, 48 ¶ 12 (2008). Instead, "only a description of the principal provisions" is required. *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 152 ¶ 27 (2013). Principal provisions are the "most important, consequential, or influential" provisions. *Molera v. Reagan*, 245 Ariz. 291, 297 ¶ 24 (2018) (citation omitted). A more stringent requirement—like one that would demand a description of *every component* of an initiative in 100 words—would unconstitutionally burden the people's initiative power because it would "unreasonably hinder or restrict" the people's exercise of that power. *See Turley v. Bolin*, 27 Ariz. App. 345, 348 (1976).

Second, 100 words only goes so far, and so an initiative cannot be invalidated unless its description creates "a *substantial* danger of fraud, confusion, or unfairness." *Save Our Vote*, 231 Ariz. at 152 ¶ 28 (emphasis added). This Court has rightly afforded initiatives significant leeway, holding that summaries "need not be impartial," *Molera*, 245 Ariz. at 295 ¶ 13, and need not even be stated in complete sentences, so long as there is "no evidence that any voter was misled or confused," *Wilhelm*, 219 Ariz. at 48–49 ¶¶ 14–15 & n.2. A different requirement—like one that would disqualify an initiative due to *mere technicalities* or because the summary might have caused *theoretical confusion*—would likewise unduly burden the

people's initiative power because it would "unreasonably hinder or restrict" the people's exercise of that power. *See Turley*, 27 Ariz. App. at 348.

Recognizing the limited utility of 100-word summaries, this Court has emphasized time and time again that any potential confusion is ameliorated by informing "signers that the summary [was] prepared by initiative supporters and advis[ing] them to review the entire measure." *Wilhelm*, 219 Ariz. at 48 ¶ 14. The Legislature requires initiatives to include such a notice with every 100-word summary to make plain that the summary "may not include every provision" and to inform signers that they "have the right to read or examine" the full measure before signing it. A.R.S. § 19-102(A).

A 100-word summary only crosses the line when:

- With an *affirmative statement*, "the description lends itself to two sharply divergent interpretations with very different and significant ramifications" so that "the danger of confusion is sufficiently great that it undermines any assurance that the voters received adequate notice of what they were signing," *Molera*, 245 Ariz. at 298 ¶ 31; or
- With an *omission*, it "describe[s] all the sweet and exclude[s] all the bitter," *Kromko*, 168 Ariz. at 60.

But given that the people's initiative power is a "fundamental component" of Arizona's legislative process, *League of Ariz. Cities & Towns*, 213 Ariz. at 559 ¶ 9,

these are necessarily high standards. Because this Court liberally construes initiative requirements, *see Kromko*, 168 Ariz. at 58, it is no surprise that, in Arizona's history, courts have disqualified initiatives or referenda because of deficient 100-word summaries on only two occasions. *See Molera*, 245 Ariz. at 299 ¶ 33 (initiative); *Sklar v. Town of Fountain Hills*, 220 Ariz. 449, 455 ¶ 22 (App. 2008) (referendum).

Invest in Education's 100-word summary fits comfortably within the realm of 100-word summaries that this Court has approved. That summary provides:

> The Invest in Education Act provides additional funding for public education by establishing a 3.5% surcharge on taxable income above $250,000 annually for single persons or married persons filing separately, and on taxable income above $500,000 annually for married persons filing jointly or head of household filers; dedicates additional revenue to (a) hire and increase salaries for teachers, classroom support personnel and student support services personnel, (b) mentoring and retention programs for new classroom teachers, (c) career training and post-secondary preparation programs, (d) Arizona Teachers Academy; amends the Arizona Teachers Academy statute; requires annual accounting of additional revenue.

[July 31, 2020 Order at 3–4].

The trial court held that the use of the word "surcharge" is a misleading way to describe the surcharge that the measure would impose because some voters "may" interpret "surcharge" to mean "a temporary tax." [*Id.* at 8–9]. The trial court also held that this summary is misleading because it omits *five* supposed "principal provisions." [*Id.* at 4–8]. Notably, in describing just these provisions in bullet-point format, the trial court used over 100 words. [*Id.* at 4]. The trial court's interpretation

of the 100-word summary requirement creates an insurmountable hurdle to initiatives and thus unduly burdens the people's initiative power.

For starters, the trial court cited *no evidence* that *any voter* was misled or confused by the use of the word "surcharge." Instead, the trial court speculated that someone, somewhere, "may" interpret the word "surcharge" to mean "a temporary tax." But record evidence confirms that the definition of a "surcharge" is "an additional tax or fee." [July 30, 2020 P.M. Tr. at 61:16–19]. Dictionaries, too, confirm that is a common definition of "surcharge." *See Surcharge*, https://www.merriam-webster.com/dictionary/surcharge (last visited Aug. 10, 2020). The 100-word summary is thus factually accurate, and for that reason, this case is unlike *Molera*, where this Court found a summary to be deficient because:

- Contrary to the description's suggestion that taxes would be raised only on the state's wealthiest taxpayers, taxes would be raised on most Arizona taxpayers, 245 Ariz. at 297 ¶ 25; and
- Contrary to the description's assertion that taxes would be raised on wealthy taxpayers by 3.46% and 4.46%, taxes would be raised on those taxpayers by 76% and 98%, *id.* at 298 ¶ 29.

Nothing in *Molera* or any other case required the trial court to find that the factually correct description here was fatally misleading.

Even if it were a coin toss, though, this Court's precedent gives the benefit of the doubt to initiatives, not to a challenger's bald assertion that someone might have been confused. *See, e.g.*, *Save Our Vote*, 231 Ariz. at 152 ¶ 28 (requiring a showing of a "*substantial* danger of fraud, confusion, or unfairness") (emphasis added). This is especially true when (as here) the initiative included the required notice that the 100-word summary is, in fact, a summary, and that voters can consult the full petition at any time. *See, e.g.*, *Wilhelm*, 219 Ariz. at 48 ¶ 14. Absent a misrepresentation or misstatement of fact, a trial court should not disqualify an initiative based on alleged technicalities or theoretical confusion in the 100-word summary.

Beyond that, the trial's court holding that Invest in Education somehow needed to include—in addition to the information already described in its summary—*five more* "principal provisions" strays from this Court's case law and from common sense. As shown in the chart below, the provisions that the trial court held needed to be included in the 100-word summary are not "principal provisions."

Omitted Provision	**Explanation**
A detailed breakdown of how the money will be distributed.	The 100-word summary already explains how the money will be distributed.
A detailed explanation that the surcharge could cause a 77% tax increase for some people on the affected income.	The 100-word summary's description of the surcharge accurately describes the effect of the surcharge.

Omitted Provision	Explanation
An explanation that the surcharge could apply to income generated by businesses to the extent that such income "passes through" to become the taxable income of the business owners.	It is well-established that tax increases to individuals' taxable income will apply to business owners who "pass through" their business income to their own individual taxable income.
The Legislature will not be able to reduce other funding to public education to offset the amount that is raised by the surcharge.	This is a political argument that wrongly assumes that the people's initiative power is subservient to the Legislature's power.
The possible effects of the surcharge on school districts' spending limits.	This is too complex to describe in 100 words with everything else, and voters are notified that they "have the right to read or examine" the full measure before signing it. A.R.S. § 19-102(A).

[*See* July 31, 2020 Order at 4–8].[4]

That these provisions are not "principal provisions" is also made evident by this Court's precedent. In *Wilhelm*, for example, this Court considered whether the following summary complied with the 100-word summary requirement:

> Ten-year warranty on new homes. Right to demand correction of construction defects or compensation. Homeowners participate in selecting contractors to do repair work. They can sue if no agreement with the builder. No liability for builders' attorney and expert fees but homeowner can recover these costs. Homeowners can sometimes recover compensatory and consequential damages. Disclosure of builders' relationships with financial institutions. Model homes must reflect what is actually for sale. Right to cancel within 100 days and get

[4] *See also* Invest in Education's Opening Brief (at 16–24).

> back most of the deposit. Prohibiting sellers' agents from participating in false mortgage applications.

218 Ariz. at 48 ¶ 11. The challenger contended that this disjointed and technical description violated the 100-word summary requirement because, among other things, it did not mention that the initiative would have extended "the statute of repose for certain actions." *Id.* This Court rejected the challenge, holding that the description complied with the 100-word summary requirement because the "omission of the proposed extension of the statute of repose . . . was not fraudulent and did not create confusion or mislead." *Id.* ¶ 14. This Court found it significant that, as here, the trial court cited *no evidence* that "any voter was misled or confused" by the omission. *Id.* at 49 ¶ 15 n.2.

Invest in Education's 100-word summary is much clearer and more understandable than the summary that this Court upheld in *Wilhelm*. Applying the trial court's test to the *Wilhelm* summary would surely have resulted in invalidation because the summary used multiple terms (*e.g.*, "consequential damages") that have a far greater chance of confusing voters than the commonly understood term "surcharge." At bottom, endorsing the trial court's standard here would condition the people's initiative power on the creativity of the opposition—who no doubt will be able to identify an omitted provision and an arguably ambiguous term in every summary—and the whim of trial court judges.

As in *Wilhelm*, this Court "should not create an impediment to the exercise of one of our state government's bedrock institutions" just because Invest in Education did not include opponents' talking points and non-material provisions in its 100-word summary. *Winkle v. City of Tucson*, 190 Ariz. 413, 418 (1997). To hold otherwise would be to nullify the people's fundamental constitutional right to exercise the initiative power and the wishes of hundreds of thousands of Arizonans.

Conclusion

The trial court's interpretation of the 100-word summary requirement tramples on the people's fundamental constitutional right to legislate through initiatives. This Court should reverse the trial court's decision and remove this obstacle to Invest in Education appearing on the ballot.

August 10, 2020

Respectfully submitted,

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