

IN THE ARIZONA SUPREME COURT

LISA JAMES et al.,)	No. CV-20-0226-AP/EL
)	
Plaintiffs/Appellants,)	
)	Maricopa County Superior Court No.
v.)	CV-2020-008460
)	
KATIE HOBBS, in her official capacity as Arizona Secretary of State; SMART AND SAFE ARIZONA, a political action committee,)	BRIEF OF <i>AMICI CURIAE</i> AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLEES
Defendant/Appellee,)	
)	
and)	
)	
SMART AND SAFE ARIZONA, a political action committee,)	
)	
)	
Real Party in Interest/Appellee.)	
)	

**American Civil Liberties Union
Foundation of Arizona**

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INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union of Arizona (ACLU of Arizona) is a statewide nonpartisan organization with over 20,000 members and the state affiliate of the national American Civil Liberties Union. The ACLU of Arizona is dedicated to protecting the constitutional and statutory rights of everyone, including the right of Arizona voters to propose legislation through the initiative process. The ACLU of Arizona's Smart Justice Campaign is part of a nationwide effort to dramatically reform our criminal legal system by reducing Arizona's prison population by fifty percent while fighting racism in the system to achieve a fairer criminal legal system for all.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amici offer this brief because the Smart and Safe Act ("the Initiative") is

important legislation that voters have the constitutional right to consider, notwithstanding Appellants' challenge to the Initiative's 100-word description. Most of Appellants' claims are wrong as a matter of law derived from an intent to undermine the Initiative rather than to give effect to the language of its proponents. *Calik v. Kongable*, 195 Ariz. 496, 498 ¶10 (1999) ("Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an [initiative], the intent of the electorate that adopted it.") (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994), alteration in *Calik*). As explained below, the Initiative does not suffer the fatal flaw described in *Molera v. Reagan*, 245 Ariz. 291 (2018), where the Court found that initiative drafters misled electors about the scope of a proposed tax increase to induce electors to sign. As such, voters must be allowed to weigh in on this important Initiative in November.

ARGUMENTS

I. Arizona has a "strong policy" of supporting the voter initiative process and allowing voters to weigh in on important initiatives like the Smart and Safe Act.

The Arizona Constitution recognizes the people's power to propose laws independently from the legislature through the process of initiative and referendum. ARIZ. CONST. art. 4, Pt. 1 § 1; *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 8 (2103). Moreover, "Arizona has a strong policy supporting the people's exercise of this power." *Pedersen v. Bennett*, 230 Ariz. 556, 558 ¶ 7 (2012). Yet

Appellants want to prevent voters from exercising their right to weigh in on an important public policy issue based on their opposition to the Initiative. Arizona’s “strong policy” of supporting the voter initiative process demands that voters be allowed to draw their own conclusions about what is best for the state and to effectuate those conclusions at the ballot box.

Undoubtedly, marijuana is the one subject of voter-approved legislation that has received the most pushback from government. Proposition 105, the Voter Protection Act, was largely the result of the Legislature’s repeal of 1996’s Proposition 200 insofar as it permitted medical marijuana. In support of the VPA, then-Attorney General Grant Woods supported VPA: “There is a disturbing trend in Arizona in which citizens pass initiatives by overwhelming margins, only to watch the legislature turn around within months and gut what voters passed. This has occurred on numerous issues, *including drug policy reform*, health care, and the environment.” [Proposition 105 Publicity Pamphlet](#), at 48-49 (emphasis added).

Tellingly, Appellants use the guise of challenging the 100-word summary to raise policy disputes with the Initiative that, in the words of the lower court, “turn[] on predictions that unobvious consequences of the Initiative’s language may be important to electors.” *Ruling* at 6. Our Constitution demands more respect for Arizona voters. ARIZ. CONST. art. 4, Pt. 1 § 1. This is particularly true when, as here, the issue before the voters is one of important public policy touching upon

fundamental liberty interests.

II. Appellants incorrectly claim that various statements in the description are misleading.

The Initiative’s 100-word summary explains that the Initiative “permits limited possession, transfer, cultivation, and use of *marijuana (as defined)* by adults 21 years old or older....” *Ruling* at 5-6 (emphasis added). This statement is both clear and accurate. Nonetheless, Appellants argue that the phrase “marijuana (as defined)” is somehow misleading because “[m]arijuana is currently defined under Arizona law to exclude cannabis, hashish, and other marijuana derivatives that contain significantly higher levels of THC.” Appellant’s claim is inaccurate.

Although the criminal code creates a distinction between “marijuana” and “cannabis,” *compare* A.R.S. § 13-3401(19) *with* A.R.S. § 13-3401(4), Arizona law also defines “marijuana” as “all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant.” A.R.S. 36-2801(10). As the lower court correctly recognized, “[c]riminal law is not the only relevant definition source.” *Ruling* at 7.

More to the point, because the Initiative provides its own definition of marijuana, it is that definition that controls. Last year, this Court addressed a similar challenge to the Arizona Medical Marijuana Act (“AMMA”) by opponents of that voter-approved initiative who also tried to inject confusion into the law by pointing

to the criminal code’s definitions of marijuana and cannabis. In *Jones*, this Court explained, “[b]ecause AMMA specifically defines ‘marijuana,’ we apply the statutory definition and look to *neither the criminal code nor common understanding*.” 246 Ariz. 452, 455 ¶ 8, *citing Enloe v. Baker*, 94 Ariz. 295, 298 (1963) (emphasis added). Just as “AMMA’s definition of ‘marijuana’ stands on its own: it neither cross-references nor incorporates the criminal code definition,” *id.*, so too is the Initiative’s definition here clear and unambiguous.

Moreover, Appellants’ suggestion that marijuana derivatives “contain significantly higher levels of THC” is both inaccurate and misleading. As this Court knows from the briefing in *Jones*, many medical marijuana patients in Arizona – including children who use medical marijuana to treat such debilitating conditions as cerebral palsy, Dravet Syndrome, epilepsy, and a variety of other seizure disorders – use marijuana derivatives with significantly *lower* levels of THC. For example, Carla Dassie, whose declaration was attached to ACLU of Arizona’s *amicus* brief on behalf of qualifying patients and caregivers, is the mother of Ashley Dassie, an 11-year-old who suffers from a rare brain malformation called Schizencephaly, which caused her to suffer seizures since she was six months old. Pursuant to AMMA, Ashley started using CBD oil and her parents immediately noticed improvements in her sleeping, eating, and cognition. Once Ashley’s seizures were controlled with CBD oil, tinctures *low in THC* were added to her CBD intake and

Ashley improved even more. Appellants unsubstantiated claim that all marijuana derivatives contain higher levels of THC is fearmongering masquerading as legal argument.

Appellants also challenge what it refers to as a “shifting” of the burden of proof regarding driving under the influence of marijuana. Surprisingly, Appellants fail to cite the case that actually discusses the burden of proof for prosecutions under A.R.S. § 28-1381(A)(3) for having marijuana in the bloodstream. In *Dobson v. McClennen*, 238 Ariz. 389 (2015), this Court held that medical marijuana patients can raise an affirmative defense to violating § 28-1381(A)(3) by establishing that the amount of marijuana in the bloodstream was nonimpairing. The Initiative here would simply remove marijuana or its metabolites as a basis for convicting a person under § 28-1381(A)(3) and instead require the government to prosecute only those drivers who are actually impaired to the slightest degree under § 28-1381(A)(1). Not only does the Initiative clearly spell this out, but the description also states this in no uncertain words. Appellants’ argument is unpersuasive.

Appellants also express concern that voters are misled by the fact that possession of marijuana by persons under age 21 will be reduced from felony to misdemeanor status. Nothing could be further from the truth. This would bring marijuana in line with alcohol, which is entirely legal for persons over age 21 to possess but is punishable as a misdemeanor when possessed by persons under age

21. A.R.S. § 4-244(41) (unlawful “for a person under twenty-one years of age to have in the person's body any spirituous liquor.”); § 4-241(L), (M), (N) (penalizing attempts to possess alcohol by age misrepresentation or soliciting another to purchase). Appellants would have this Court believe that electors who are otherwise inclined to oppose the Initiative were induced to sign the petition because they believed that 20-year-old adults could still be punished as felons. The argument is absurd.

Finally, Appellants justify their claim that fixing the excise tax at 16% is confusing because “the power to tax is the power to destroy.” Plaintiffs’ MSJ at 8.¹ It is the height of irony that Appellants should cite this two-century-old adage to support their argument, because in reality it completely undermines their argument. Perhaps it would be permissible for the Legislature to increase the excise tax to 17%, but without any restriction on its power the Legislature could increase the excise tax to 1,000% or higher—thereby destroying marijuana availability for all but the extremely wealthy. Such a tax hike would not “further the purpose” of the initiative. *State v. Maestas*, 244 Ariz. 9, 13-14 ¶¶ 19-23 (2018) (while Arizona Medical Marijuana Act allowed colleges to take marijuana-related actions to preserve federal

¹ This quote originates from *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819), where Chief Justice Marshall opined: “An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”

funding, it did not permit the Legislature to re-criminalize marijuana possession on college campuses).

III. The Initiative will have the effect of reducing overcriminalization as well as disparities based on race in policing and punishing drug offenses.

Currently, Arizona is the only state that classifies the first-time, simple possession of any amount of marijuana as a felony. A.R.S. § 13-3405(B)(1). *Compare, e.g.*, Ind. Code § 35-48-4-11(c) (designating simple possession offense a felony only if “the person has a prior conviction for a drug offense” and possesses more than a threshold amount). Such a policy has wreaked havoc of communities throughout the state and has costs taxpayers millions of dollars. Indeed, drug prosecutions account for the largest number of criminal cases in the state² and 43 percent of all drug arrests in Arizona are for the simple possession of marijuana.³ Worse, Arizona’s Draconian marijuana laws affect communities of color hardest. For example, Black people in Arizona are three times more likely to be arrested for marijuana possession than white people, even though Black and white people use

² *See e.g.* Maricopa County Attorney’s Office, Data Dashboard, available at: <https://www.maricopacountyattorney.org/419/Data-Dashboard> (last visited August 13, 2020) (showing drug prosecutions accounting for almost 42% of all prosecutions in Maricopa County in 2019).

³ American Civil Liberties Union, “A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform,” at 51 (2020), available at: https://www.aclu.org/sites/default/files/field_document/tale_of_two_countries_racially_targeted_arrests_in_the_era_of_marijuana_reform_revised_7.1.20_0.pdf (last visited August 13, 2020).

marijuana at the same rate. *Id.* at 5, 51. And, on average, Hispanic people in Maricopa County are sentenced to longer periods of incarceration for simple marijuana possession than their Black and white counterparts, while Black people consistently receive longer prison, jail, and probation sentences for the charge of personal possession of drug paraphernalia (including marijuana paraphernalia) than white or Hispanic people.⁴

CONCLUSION

Amici ask this Court to affirm the trial court ruling and allow the Initiative to be included on the ballot.

RESPECTFULLY SUBMITTED this 13th day of August, 2020.

By /s/ David J. Euchner

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⁴ American Civil Liberties Union of Arizona, “The Racial Divide of Prosecutions in the Maricopa County Attorney’s Office,” at 4-5 (2020), available at: https://www.acluaz.org/sites/default/files/7.16embargofinal_the_racial_divide_2020.pdf (last visited August 13, 2020).