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Memorandum

TO: Glenn Hamer
President and Chief Executive Officer
Arizona Chamber of Commerce

FROM: Dominic E. Draye
Shareholder

DATE: May 20, 2019

RE: Analysis of SB 1451 Proposed Changes to Initiative Ballot Language Procedure

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On behalf of the Arizona Chamber of Commerce (the "Chamber"), you have asked us to provide an analysis of the changes to A.R.S. § 19-125(C) as proposed by SB 1451. We understand that the Chamber plans to provide this analysis to other entities, organizations, or individuals, so it is provided without attorney-client privileged information and advice included. We do not write this letter on behalf of or for any other person or entity than the Chamber. Any other recipient of this memorandum should contact their own counsel to review and interpret the relevant provisions of Arizona law. The Chamber's provision of this memorandum to others is not intended to be and does not constitute a waiver of its attorney-client privilege with respect to these issues.

Background

Section 19-125 of the Arizona Revised Statutes prescribes a method by which the Secretary of State and the Attorney General cooperatively draft ballot language for initiative and referendum measures. The Secretary of State is responsible for drafting (1) "a descriptive title containing a summary of the principal provisions of the measure, not to exceed fifty words" and (2) language indicating the effect of a "yes" or "no" vote on each measure. A.R.S. § 19-125(C). This ballot language, consisting of the descriptive title and the yes/no effects, must be "approved by the

attorney general." *Id*. This procedure establishes a separation of powers between two executive agencies in the formulation of ballot information for voters to review as they mark their ballots.

It is important to note that the ballot language drafting and approval process set forth in A.R.S. § 19-125(D), subject to amendment in SB 1451, is *different* from the publicity pamphlet analysis prepared by the Legislative Council. The ballot measure language prepared pursuant to A.R.S. § 19-125(D) appears on the ballot itself. Separately, under A.R.S. § 19-124(B), the Legislative Council prepares an impartial analysis of each qualifying ballot measure. The analysis is published in the Secretary of State's general election publicity pamphlet.

The Secretary of State and the Attorney General have, as a matter of practice, worked cooperatively to formulate ballot language. They do so against several deadlines, including a federal deadline for mailing ballots to military and overseas voters and an Arizona deadline for mailing early ballots. As a result, ballot language must be finalized by late August or early September in each election year.

In recent election cycles, however, ballot measure advocacy groups have increasingly invoked or threatened to invoke the court system to influence this process. Lawsuits have the potential to delay compliance with the relevant deadlines, interfere with an even-handed approach to drafting, and invite judges to act as "super legislators" in the drafting and formulation of ballot language.

SB 1451 Provides Statutory Clarity
for the Secretary of State and the Attorney General

The amendments proposed in SB 1451 provide clarity that ballot language drafting is a cooperative effort between the Secretary of State and the Attorney General. The amendments emphasize that two statewide elected officials each have and will retain an independent role in drafting descriptive language that will appear on the ballot for voters when they cast their votes on

measures. The amendments simply provide added statutory specificity for the process that already exists. The Secretary of State retains her role as the official who initially drafts the ballot language. At the same time, the Attorney General retains his role as the official tasked with approving the language as drafted or with modifications. If a rewrite is in order, the Attorney General can reject the language, requiring the Secretary of State to prepare another draft. These functions have been in practice for decades. The amendments simply provide additional statutory specificity.

Additionally, the amendments minimize the risk that advocacy groups will launch costly and time-consuming litigation. Advocacy groups have, in the past, initiated lawsuits asking the courts to change ballot language that was drafted by the Secretary of State and approved by the Attorney General. *See Quality Education & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206 (2013) (rejecting initiative committee challenge to ballot language and holding that the language formulated by the Secretary of State and approved by the Attorney General complied with the law).

Indeed, this bifurcated process has been in place and functioned well even when the Secretary of State and the Attorney General have belonged to different political parties. That was the case for twelve years between 1999 and 2011. Just as the elected officials themselves can work together, the staff of both offices are professionals, many of whom are career public servants. Attorneys in both offices are bound by the law and the rules of professional conduct for lawyers. There is no reason to doubt that such cooperation will continue.

SB 1451 Should Not be Further Amended to Encourage Additional Pre-Election Litigation

An amendment to SB 1451 recently proposed by opponents of the bill in its current form, if adopted, will expressly authorize and expand pre-election litigation over ballot measure language in state court. This proposal is ill-advised for several reasons. First, the proposal

establishes a new deadline by requiring that the Secretary of State finalize the language "no later than 45 days prior to printing official ballots." Any deadline of this nature is unworkable because of the way that the Secretary of State's office allocates resources to satisfy existing federal and state deadlines for both ballot measure and candidate qualification.

Second, the proposal establishes a statutory right of action to file a legal claim in court. Codifying a right of legal action such as this opens the courthouse doors for any dissatisfied political group to divert State and county resources in yet another category of litigation. The court system and election officials at both the State and county levels are already stretched thin, in terms of finances and personnel, during the months leading up to the ballot printing deadline.

Third, the proposal does not provide for a standard of review that the courts would use in determining these cases, which heightens the risk that political advocacy groups will attempt to enlist state court judges to use the state judicial system to rewrite ballot language in a manner that favors their political position.