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August 18, 2020

VIA EMAIL

Sambo (Bo) Dul
State Elections Director
Arizona Secretary of State Katie Hobbs

Re: 2020 Ballot Initiatives – Ballot Language

Dear Ms. Dul:

I write further in response to your August 12, 2020 correspondence where you request “the AGO to promptly provide its feedback regarding [the Secretary’s] proposed ballot language for the Invest in Education Act (I-31-2020).” Without conceding that it is required to do so, and reserving the right to require other changes relating to any forthcoming decision by the Arizona Supreme Court, AGO provides the following regarding this potential proposition.¹

Proposition 210 – Invest in Education Act

Like with the other three potential ballot propositions, the AGO has carefully reviewed the proposed language for Proposition 210, along with the Application for Serial Number filed with the Secretary, Analysis By Legislative Council, and Joint Legislative Budget Committee Pamphlet Summary.

¹ The AGO provides this letter pursuant to the Attorney General’s authority under A.R.S. § 19-125(D). The analysis contained herein has been performed by attorneys with the AGO who are separate from the attorneys who represent and advise the Secretary of State’s Office. This is not an attorney-client communication.

In reviewing the proposed language for Proposition 210, we have been primarily guided by A.R.S. § 19-125, which sets forth the form of the official ballot for initiative measures. Specifically, A.R.S. § 19-125(D) provides that the official form of ballot shall include “a descriptive title containing a summary of the principal provisions of the measure, not to exceed fifty words, which shall be prepared by the secretary of state and approved by the attorney general.” Moreover, the official form of ballot shall contain a “yes” clause and a “no” clause, which shall be followed by “a brief phrase, approved by the attorney general, stating the essential change in the existing law should the measure receive a majority of votes cast in that particular manner.” *See* A.R.S. § 19-125(D).

Moreover, the Arizona Supreme Court, in the context of a challenge by an initiative proponent to proposed ballot language, has construed A.R.S. § 19-125(D) as prohibiting the Secretary of State from using “false or clearly misleading language.” *Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 209 ¶10 (2013). Instead, the language used must be “an attempt to provide necessary and appropriate information to the voting public.” *Id.* ¶12. Finally, the “length and complexity of the initiative” are factored in when “assessing compliance with [A.R.S. § 19-125(D).]” *Id.* at 208 ¶9.

The AGO has concluded that the Secretary’s current proposed ballot language for Proposition 210 does not yet comply with the requirements in A.R.S. § 19-125(D), and therefore the AGO will not approve the language as currently drafted. The AGO has taken the time, however, to revise the proposed ballot language to comply with the statutory requirements. Clean and redline documents showing those changes to the language for Proposition 210 are enclosed herewith. Below is a brief explanation of the changes the AGO believes are essential to comply with § 19-125(D). The proposed ballot language for Proposition 210 is approved with the changes as noted.

Proposition 210 – Invest in Education Act

- § 19-125(D) requires that the ballot language provide, “A ‘yes’ vote shall have the effect of _____” and “A ‘no’ vote shall have the effect of _____.” We have revised the draft language for Proposition 210, as we did with the other propositions, to comply with this requirement. This change also resulted in other minor word changes throughout the description.

- As with the other propositions, we have revised the explanation for the effect a “no” vote will have to state simply that a “no” vote will have the effect of retaining existing law regarding the subject matter of Proposition 210. This is consistent with past practice and is the approach most likely to avoid any public confusion about the effect of a “no” vote.
- Both the descriptive title and the “yes/no” language should first and foremost explain the essential change in the law. The essential change in the law to be made by this ballot measure is to apply a 3.5 percentage point tax surcharge on high income earners. The reason for that change is to generate additional funding for public education. Thus, we have switched the order of the descriptive title to explain the essential change in the law—an increase in certain tax rates—first and the reason for, or result of, the change—additional funds for public education—second. This is consistent with past practice² and the Legislative Council’s analysis.
- The descriptive title should not highlight one of several potential uses of the funds generated by the tax surcharge, and therefore we have stricken “including hiring and increasing salaries for teachers, counselors, and other personnel” from the descriptive title. The expected uses of the funds are explained in the “yes” vote section.
- The Arizona Supreme Court has explained that the best practice for articulating an increase in tax rates is to describe the rates in terms of “percentage points.” See *Molera v. Reagan*, 245 Ariz. 291, 298 ¶30 (2018) (“Had they simply changed the wording, saying that the rates applicable to the two high-income categories would be increased by 3.46 and 4.46 percentage *points*, the description would have been much clearer.”). Thus, we have revised the proposed ballot language to express the applicable tax rates and the surcharge in terms of percentage points.
- To adequately explain the essential change in existing law, the proposed ballot language should explain the current tax rate and the resulting tax rate after

² See Proposition 123 (2016), Proposition 204 (2012), Proposition 100 (2010), Proposition 303 (2002).

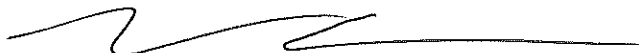
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application of the tax surcharge. This is consistent with the Analysis By Legislative Council.

- In line 4 of the Secretary's draft of the "yes" description, "jointly" should be "separately" because the \$250,000 threshold applies to those who are married but filing separately.
- The "yes" description should make reference to "non-administrative support personnel," rather than "school personnel," because the former is the term used in the proposed law.
- The final sentence in the "yes" description should be revised to make clear that the proposed law would increase the dollar amount of scholarships through the Arizona Teachers Academy. As drafted, it is unclear whether the amount or number is increasing.

Thank you for your attention to this matter. As you review the proposed changes to Proposition 210, please do not hesitate to reach out to me if you have any questions or concerns.

Sincerely,



Michael S. Catlett
Deputy Solicitor General

MSC

Enclosure

Proposition 210

DESCRIPTIVE TITLE

THE LAW WOULD IMPOSE A 3.5 PERCENTAGE POINT TAX SURCHARGE ON TAXABLE ANNUAL INCOME OVER \$250,000 FOR SINGLE PERSONS OR MARRIED PERSONS FILING SEPARATELY, OR \$500,000 FOR MARRIED PERSONS FILING JOINTLY OR HEADS OF HOUSEHOLDS, TO INCREASE FUNDING FOR PUBLIC EDUCATION.

A "YES" vote shall have the effect of imposing a 3.5 percentage point income tax surcharge, in addition to the existing 4.5 percentage point income tax rate (for a total tax rate of 8 percentage points), on taxable annual income over \$250,000 for single persons or married persons filing separately, or \$500,000 for married persons filing jointly or heads of household to provide additional funds for public education ; creating a new fund to direct the additional revenue to hiring and increasing salaries for teachers and other non-administrative support personnel, career training and higher education pathway programs for high school students, and the Arizona Teachers Academy; and increasing the dollar amount of scholarships available through the Arizona Teachers Academy.

A "NO" vote shall have the effect of retaining existing law on income tax rates and funding for public education.

Proposition 210

DESCRIPTIVE TITLE

THE LAW WOULD IMPOSE A 3.5 PERCENTAGE POINT TAX SURCHARGE ON TAXABLE ANNUAL INCOME OVER \$250,000 FOR SINGLE PERSONS OR MARRIED PERSONS FILING SEPARATELY, OR \$500,000 FOR MARRIED PERSONS FILING JOINTLY OR HEADS OF HOUSEHOLDS, TO INCREASE FUNDING FOR PUBLIC EDUCATION, INCLUDING HIRING AND INCREASING SALARIES FOR TEACHERS, COUNSELORS, AND OTHER PERSONNEL, BY IMPOSING A 3.5% TAX SURCHARGE ON TAXABLE ANNUAL INCOME OVER \$250,000 FOR SINGLE PERSONS OR MARRIED PERSONS FILING SEPARATELY, OR \$500,000 FOR MARRIED PERSONS FILING JOINTLY OR HEADS OF HOUSEHOLDS.

A "YES" vote ~~will~~ shall have the effect of imposing a 3.5 percentage point income tax surcharge, in addition to the existing 4.5 percentage point income tax rate (for a total tax rate of 8 percentage points), on taxable annual income over \$250,000 for single persons or married persons filing separately, or \$500,000 for married persons filing jointly or heads of household to provide additional funding for public education ~~by imposing a 3.5% income tax surcharge on taxable income over \$250,000 annually for single persons or married persons filing jointly, or \$500,000 annually for married persons filing jointly or head of household filers;~~ creating a new fund to direct the additional revenue to hiring and increasing salaries for teachers and other ~~school non-administrative support~~ personnel, career training and higher education pathway programs for high school students, and the Arizona Teachers Academy; and increasing the dollar amount of scholarships available through the Arizona Teachers Academy.

A "NO" vote ~~will~~ shall have the effect of retaining existing law on income tax rates and funding for public education ~~impose no new tax surcharge on taxable annual income over \$250,000 for single persons or married persons filing jointly, or \$500,000 for married persons filing jointly or head of household filers; create no new additional funding for public education; and leave the Arizona Teachers Academy statute unchanged.~~