IN THE SUPREME COURT

STATE OF ARIZONA

ARIZONA FREE ENTERPRISE CLUB, *et al.*, Plaintiffs/Appellants, v. KATIE HOBBS, in her capacity as the Secretary of State of Arizona, Defendant/Appellee, and INVEST IN ARIZONA (SPONSORED BY AEA AND STAND FOR CHILDREN), a political committee, Real Party in Interest/Appellee.	No. CV-21-0304-AP/EL Maricopa County Superior Court No. CV2021-011491 No. CV2021-016143 (Consolidated)

OPENING BRIEF OF APPELLANTS

Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com
STATECRAFT
LAW • GOVERNMENT • CRISIS MANAGEMENT
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
Counsel for Plaintiffs/Appellants

INTRODUCTION

Because they directly levy a tax, the proceeds of which inarguably are for the "support and maintenance" of state government, the provisions of 2021 Ariz. Laws ch. 412, §§ 13, 15 (Senate Bill 1828) cannot be the subject of a voter-initiated referendum. *See* ARIZ. CONST. art. IV, pt. 1, § 1(3). The Superior Court's conclusion to the contrary is constructed on three errors of law.

First, the Superior Court's assertion that the "support and maintenance" clause exempts from the referendum only budgetary appropriations—as contradistinguished from revenue measures—not only derogates the plain constitutional text (as illuminated by contemporaneous expositions of its original intent), but flies in the face of controlling precedent. *See Wade v. Greenlee County*, 173 Ariz. 462 (App. 1992), *review denied* Feb. 2, 1993. In purporting to effectively overrule a binding authority it deemed "incorrect[]," *see* Index of Record ("IR") 52 at 9, the Superior Court not only transgressed intra-judicial spheres of authority, but contrived a conflict with this Court's opinion in *Garvey v. Trew*, 64 Ariz. 342 (1946). *Garvey*, in fact, never so much as mentioned (let alone purported to decide) the applicability of the "support and maintenance" clause to tax laws.

Second, the Superior Court struggled to evade *Wade* by adopting, in the alternative, an illusory distinction that conditions the referability of a statute upon its forecasted extrinsic effects on General Fund receipts. Not only is this dichotomy

untethered from the constitutional text, but it inevitably entangles the judiciary in a morass of economic theoretics and budgetary prognostications.

Third, even if the Superior Court's "revenue increasing" versus "revenue decreasing" framework were doctrinally sound, its application pivots on factual questions that the Superior Court should not have resolved in adjudicating a motion to dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6).

STATEMENT OF THE ISSUES

1. Did the trial court err in holding that the exemption from the referendum for laws "for the support and maintenance of the departments of the state government and state institutions," ARIZ. CONST. art. IV, pt. 1, § 1(3), applies only to budgetary appropriations, and not to revenue measures?

2. Did the trial court err in holding that, if and to the extent the "support and maintenance" clause does apply to revenue measures, it exempts from the referendum only laws that the trial court projects will increase net revenues over some unspecified period of time?

3. Did the trial court err in holding, when ruling on a motion to dismiss, that sections 13 and 15 of S.B. 1828 will not result in increased net revenues, despite the existence of unresolved factual questions concerning the budgetary effects of those provisions?

STATEMENT OF THE CASE

The First Regular Session of the Fifty-Fourth Arizona Legislature passed, and Governor Ducey signed, Senate Bill 1828, the omnibus appropriations bill for fiscal year 2022. Sections 13 and 15 of the bill impose a "flat" tax of 2.5% on taxable income, which becomes effective if General Fund revenues reach certain specified targets. *See* 2021 Ariz. Laws ch. 412, §§ 13, 15.[1]

Appellee/Real Party in Invest in Arizona (Sponsored by AEA and Stand for Children) (the "Committee") applied for and received from the Secretary of State on July 2, 2021 a petition serial number to refer S.B. 1828 to the ballot in the November 8, 2022 general election. The Secretary of State issued the petition serial number R-03-2021 to the Committee on the same date. The Committee subsequently filed on September 28, 2021 a referendum petition in support of R-03-2021. On or around November 19, 2021, the Secretary concluded that the petition was legally sufficient, and certified the referendum for placement on the November 8, 2022 general election ballot.

On July 21, 2021, Appellants initiated this action, which was assigned the docket number CV2021-011481. Appellants sought a preliminary injunction

[1] Unless otherwise indicated, the phrase "S.B. 1828," as used in this brief, denotes only sections 13 and 15 of that bill.

prohibiting the Secretary from accepting or certifying any petition filed in support of a referendum on S.B. 1828. *See* IR4.

A second civil action challenging the legal sufficiency of various petition sheets and signatures contained in the petition was filed in the Superior Court on October 15, 2021, and was assigned the docket number CV2021-016143. The Superior Court consolidated the CV2021-011491 and CV2021-016143 proceedings.

Following briefing and oral argument, the Superior Court on December 22, 2021 denied the Appellants' motion for a preliminary injunction and granted the Committee's motion to dismiss the claims in the CV2021-011491 action. *See* IR52. This timely appeal followed. *See* IR53. The CV2021-016143 action remains pending.

STANDARD OF REVIEW

"Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo." *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). Further, construction and application of the Constitution's "support and maintenance" clause presents a pure question of law that this Court examines *de novo*. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 406, ¶ 28 (2020) ("We

review de novo the 'interpretation and application of constitutional and statutory provisions regarding [ballot measures].'" (citation omitted)).[2]

ARGUMENT

I. The "Support and Maintenance" Clause Exempts from the Referendum Laws, Such as S.B. 1828, That Directly Prescribe and Levy Taxes

As the Court of Appeals has recognized, "a tax measure could not be the subject of a referendum" because it intrinsically is "for the support and maintenance" of the government, within the meaning of Article IV, Part 1, Section 1(3) of the Arizona Constitution. *Wade*, 173 Ariz. at 463. Discarding *Wade* as "incorrect[]," IR52 at 9, the Superior Court held instead that the "support and maintenance" clause reaches only budgetary appropriations, citing *Garvey v. Trew*, 64 Ariz. 342 (1946). As an initial matter, *Garvey* never even addressed—and certainly did not adjudicate—the applicability of the "support and maintenance" clause to revenue measures. More fundamentally, *Wade* already considered and rejected the notion that *Garvey* somehow countenances voter-initiated referrals of tax laws. *See Wade*, 173 Ariz. at 463 n.1.

---

[2] Although denials of motions for preliminary relief are reviewed under an abuse of discretion rubric, an error of law—such as the misconstruction of a controlling constitutional or statutory provision—is *per se* an abuse of discretion. *See Fann v. State*, 251 Ariz. 425, ¶ 15 (2021); *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2 (App. 2005).

The Superior Court excused its rebuff of *Wade* by appealing to this Court's authority as the "final arbiter of Arizona constitutional issues." Ruling at 8 (citation omitted). The Superior Court of course is bound by this Court's rulings—but as they are apprehended by, and mediated through, the decisions of the Court of Appeals. *See Tucson Gas & Electric Co. v. Superior Court*, 9 Ariz. App. 210, 212 (1969) (addressing "whether the trial court has the authority to transgress upon the 'obvious intent' of this court and to follow its interpretation of a decision of the Supreme Court. It is our view that it has no such authority.").

Even setting aside *Wade*, however, the Superior Court's analysis remains incorrect. The "support and maintenance" clause by its plain terms transcends appropriations; its expansive language imparts congruent protections to revenue ***collections*** and revenue ***outlays*** alike. Nothing in *Garvey* detracts from this textual truism.

A. The Support and Maintenance Clause Does Not Textually Distinguish Between Revenue Measures and Appropriations Measures

The lodestar of all constitutional questions is the text approved by the people. *See Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994). Here, the dispositive constitutional language defies the Superior Court's attempt to surgically excise only "appropriations" from the referendum process. The error afflicting the Superior Court's construction of Article IV, Part 1, Section 1(3) derives from a conflation of

two distinct and independent clauses of that provision. Section 1(3) states, in relevant part:

> Under this power [of the referendum] the legislature, or five per centum of the qualified electors, may order the submission to the people at the polls of any measure, or item, section, or part of any measure, enacted by the legislature, ***except*** laws immediately necessary for the preservation of the public peace, health, or safety, or ***for the support and maintenance of the departments of the state government and state institutions***; but to allow opportunity for referendum petitions, no act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure, ***except such as require earlier operation to preserve the public peace, health, or safety, or to provide appropriations for the support and maintenance of the departments of the state and of state institutions*** [emphases added]

The second of the italicized phrases—upon which the Superior Court relied heavily—accelerates the effective date of emergency laws and appropriations measures.[3] The actual scope of the referendum power, though, is denoted by the first italicized phrase, which excludes both emergency laws and **all** measures "for the support and maintenance" of the state, not only discrete appropriations. To be sure, the discrepancy engenders something of an "inconsisten[cy]," *Wade* 173 Ariz. at 463, within Section 1(3). But this semantic asymmetry does not license a judicial revision of controlling constitutional language. *See Arizonans for Second Chances*, 249 Ariz. at 406, ¶ 28 (emphasizing that courts must "give meaning to 'each word,

[3] It is undisputed that S.B. 1828 is not an "emergency" law.

phrase, and sentence ... so that no part will be void [sic], inert, redundant, or trivial'").

If anything, the evolution of the text confirms that the Framers actually ***repudiated*** the notion that the "support and maintenance" clause immunizes only appropriations, to the exclusion of revenue laws. As *Wade* noted briefly, *see* 173 Ariz. at 464, the original incarnation of Article IV, Part 1 exempted from the referendum only "appropriations for the support and maintenance of the Departments of State and State institutions," along with emergency measures. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 at 1020 (John S. Goff ed. 1991) (reprinting "Proposition 4"). This proposal, however, was displaced by a substitute endorsed by the Committee on Legislative Department, Distribution of Powers and Apportionment, which augmented the clause to include laws "for . . . the departments of the State Government and State institutions," *id.* at 1025–26, which in turn evolved into the text ultimately adopted by the Convention.[4]

Common sense buttresses the Convention's ultimate drafting decision. While certainly solicitous of the right of referendum, the Framers were acutely aware of its antimajoritarian and disruptive potentialities. *See W. Devcor, Inc. v. City of*

[4] A corollary is that the specific reference to "appropriations" in the second clause of Section 1(3)—governing the effective dates of legislation—likely is a vestigial artifact of the text's metamorphosis during the Convention.

Scottsdale, 168 Ariz. 426, 429 (1991) (noting that this "extraordinary" prerogative "permits a minority to hold up the effective date of legislation which may well represent the wishes of the majority"); *Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc.*, 134 Ariz. 46, 48 (1982) ("This power which is reserved to the people is not without opportunity for abuse.").[5] To that end, they tempered Article IV, Part 1's robust referral mechanism with a categorical exemption of both taxes ***and*** appropriations—which collectively comprise the metaphorical beating heart of the state government organism. While voters may veto substantive laws that structure the framework within which budgetary decisions are made, *see Garvey*, 64 Ariz. at 347, disagreements with the Legislature's chosen mechanisms of raising and appropriating revenues must be mediated through political channels or remedied by an initiative.[6]

---

[5] The maxim cited by the Superior Court that "the constitutional right to referendum is to be broadly construed," IR52 at 4 (quoting *Lawrence v. Jones*, 199 Ariz. 446 (App. 2001)), was adapted from a 1989 legislative pronouncement, not constitutional jurisprudence. *See Lawrence*, 199 Ariz. at 449, ¶ 7 (citing Historical and Statutory Notes, Laws 1989, ch. 10, § 1). The Legislature has since disavowed that instruction. *See* A.R.S. § 19-101.01 (requiring that "the constitutional and statutory requirements for the referendum be strictly construed"). In any event, the trial court's conclusion remains erroneous, regardless of which interpretive canon this Court employs.

[6] Appellants' claims also do not implicate the Legislature's ability to refer its own bills to the electorate, which is not encumbered by the same limitations that attached to voter-initiated referenda. *See* ARIZ. CONST. art. IV, pt. 1, § 1(15).

B. The Framers Understood the "Support and Maintenance" Clause to Encompass Revenue Measures, Including Tax Reform Laws

While not dispositive, the sentiments of the inaugural Legislature and its immediate successors can illuminate the contemporaneous public understanding of constitutional provisions. *See Brewer v. Burns*, 222 Ariz. 234, 241, ¶ 33 (2009) (citing rules of the First Legislature, noting that "[l]ong-established practices, accepted by other branches of government, may be relevant in construing constitutional provisions"). In convoking the First Legislature in special session, Governor Hunt enumerated items within its remit, which included "[p]roviding sources of revenue for the support and maintenance of state institutions and departments of state"—fortifying the inference that the "support and maintenance" clause of Article IV, Part 1, Section 1(3) encompasses revenue laws. *See* DUNCAN ARIZONIAN, May 29, 1912 (reprinting proclamation), at APP003.

In the same vein, early sessions of the Legislature repeatedly deployed a "support and maintenance" proviso in various enactments prescribing taxes or tax rates. *See, e.g.*, 1912 Ariz. Laws ch. 22, § 3 (declaring law imposing tax on property of telegraph companies to be "necessary for the support and maintenance of State institutions and Departments of State"), at APP007; 1912 Ariz. Laws ch. 23, § 3 (adding "support and maintenance" clause to railroad tax assessment), at APP010; 1913 Ariz. Laws ch. 73, § 8 (declaring law imposing an annual tax on real and

personal property to be "necessary for the support and maintenance of the Departments of State and State Institutions"), at APP020.

Significantly, the Legislature understood the phrase capaciously to envelope laws that reformed or made more efficient the existing tax code. For example, among the body's first acts was to repeal an extant mining tax in favor of a new property tax regime, which the Legislature determined would "provide funds for appropriations for the support and maintenance of the departments of State and all State institutions." 1912 Ariz. Laws ch. 11, § 2, at APP004. Another statute invoking the "support and maintenance" disclaimer levied a new tax on private car companies, which the Legislature justified not in terms of aggregate revenue increases; rather, it deemed the amendment necessary "for a more equal and uniform system of assessment and apportionment of taxes, and for the efficient collection of State taxes and revenue." 1912 Ariz. Laws ch. 39, § 8, at APP014. In other words, a law that directly prescribes, reforms or recalibrates tax assessments or rates necessarily is "for" the "support and maintenance" of state government, and hence is not referable.

C. *Garvey* Never Held That Revenue Laws Are Referable

In granting itself a dispensation from heeding *Wade* and the authorities undergirding it, the Superior Court invoked this Court's opinion in *Garvey*. But *Garvey* had nothing to do with the referability of revenue measures; rather, the

question confronting the Court was whether the particular statute at issue constituted a (non-referable) appropriation or instead a (referable) substantive change of existing law. *Compare State ex rel. Reiter v. Hinkle*, 297 P. 1071, 1073 (Wash. 1931) (explaining that earlier opinion's references to "appropriations" in discussing equivalent clause "were used by way of illustration, and were not intended to be exclusive" of tax laws). Appellants will not tarry on this point because it needs no further explication; *Garvey* simply did not purport to decide—or even to opine on—whether revenue measures are for the "support and maintenance" of state government.

II. The Support and Maintenance Clause Does Not Distinguish Between "Revenue Increasing" and "Revenue Decreasing" Measures

According to the Superior Court, even if *Wade* controls, it "applies to legislative acts that increase, not reduce, state revenue and, therefore, cannot apply to SB1828." IR52 at 8. Putting aside the textual and historical defects that pervade this interpretive theory of the "support and maintenance" clause, *see supra*, the argument clings to a factually dubious premise—namely, that tax rates bear a perfect positive correlation with aggregate revenues. In reality, the association between taxes and revenues is complex and entwined with an array of confounding variables, including population trends, macroeconomic conditions, and tax rates in neighboring states.

Further, the impact of tax reform legislation on resulting revenues can depend on the time horizon assessed. Tax cuts may induce a short-term diminution of revenues that is more than offset over the long term by their stimulative effect. (Conversely, punitive tax hikes can dissipate revenue streams by disincentivizing productive work.[7]) In assessing the relationship between a tax law and revenues, should the judiciary—applying the Superior Court's framework—surmise its ostensible effects on overall tax receipts over a one-year time frame, a five-year time frame, or some other temporal baseline? And what, exactly, in the constitutional text impels that durational choice? Any conception of the "support and maintenance" clause that pivots on whether a tax statute will "increase" or "decrease" net revenues effectively tasks the Court with computing the optimal tax rate—a question that has long bedeviled even seasoned economists—over an arbitrarily demarcated time period.

Similarly, the "revenue-increasing versus revenue-decreasing" theory invites courts to disentangle the interplay between different provisions of a single tax infrastructure. For example, suppose the Legislature enacts a statute that offsets a reduction of income tax rates with a corresponding increase in the transaction

---

[7] Presumably even the Committee would concede that, at some point, tax rates become so onerous that they deter the economic activity necessary to generate tax revenues.

privilege tax, with the objective of maintaining aggregate revenues roughly at their current level. Under the Superior Court's approach, what would be referrable? The income tax cut only? Both provisions? Neither provision?

Tellingly, two states whose constitutions were forebearers of Arizona's organic law have rejected reliance on budgetary suppositions when determining a tax law's referability. The Supreme Court of Washington held that the cognate provision in its own constitution insulated from a referendum a statute that renewed an existing assessment but incrementally decreased the tax rate, spurning "the[] speculative argument that incremental reductions in the tax rate will reduce revenues." *Andrews v. Munro*, 689 P.2d 399, 401 (Wash. 1984); *see also Kotterman v. Killian*, 193 Ariz. 273, 305, ¶ 128 (1999) ("Washington cases interpreting their constitution are persuasive authority with respect to our constitution"). The South Dakota Supreme Court likewise declined to displace legislative judgments with its own fiscal forecasts, holding that a statute that offset an increase of one tax with a decrease in another was non-referable. As the court observed, in reasoning that engrafts well onto this case, "[t]hough an act may not be intended to produce additional revenues, facts and circumstances nevertheless may render the enactment of such a revenue measure necessary for the support of state government." *State ex rel. Botkin v. Morrison*, 249 N.W. 563, 564 (S.D. 1933); *see also Arizona Together v. Brewer*, 214 Ariz. 118, 125–26, ¶ 26 (2007) (citing the

influence of the South Dakota constitution on certain facets of Arizona's ballot measure process).

A return to the constitutional text conduces a linear and straightforward inquiry. Statutes that, like S.B. 1828, prescribe a tax necessarily generate revenue, and hence innately are "for the support and maintenance" of state government. The actual or prophesized effect of the tax on future net receipts relative to some selected baseline is not a constitutionally germane or judicially cognizable consideration.

III. The Effect of S.B. 1828 on Future Revenues Is a Disputed Fact

Even if the Superior Court were correct that only "revenue increasing" laws are exempt from the referendum, S.B. 1828's budgetary effects are very much controverted. Despite the Superior Court's intimation to the contrary, *see* IR52 at 3, Appellants' counsel made clear that S.B. 1828's impact on net revenues over various time horizons is indeed a disputed fact, and likely would entail expert testimony. Tr. 50:4-17.

In defense of its unilateral resolution of this factual question, the Superior Court rested on the Joint Legislative Budget Committee's ("JLBC") analysis of S.B. 1828, which in return relied on Department of Revenue projections. But the JLBC itself cautioned that the Department's "model is a 'static' rather than a 'dynamic' model" and hence its "estimates do not reflect any offsetting 'dynamic' revenue impact associated with the potential behavioral response of individuals and

businesses to the proposed tax legislation." APP021. More to the point, while the JLBC's analysis may be probative, it is not an infallible or conclusive disposition of an inherently factual proposition. In short, the Superior Court erred by purporting to "resolve factual disputes between the parties on an undeveloped record." *Coleman*, 230 Ariz. at 363, ¶ 46.

CONCLUSION

The Court should reverse the judgment of the Superior Court.

RESPECTFULLY submitted this 5th day of January, 2022.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

Attorneys for Plaintiffs/Appellants