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)

REPLY BRIEF OF APPELLANTS

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Plaintiffs/Appellants submit this Reply to the Answering Brief of Real Party in Interest/Appellee Invest in Arizona (Sponsored by AEA and Stand for Children) (the "Committee").

I. Revenue Measures Are "Laws . . . For the Support and Maintenance" of the State and Thus Immune from Voter-Initiated Referenda

The Committee entreats the Court to perform reconstructive surgery on Article IV, Part 1, Section 1(3), transplanting the word "appropriations" from an unrelated provision into the operative clause, thereby displacing the broad formulation chosen by the Framers and ratified by the electorate.

To recount, Section 1(3) provides that voters may refer legislative enactments to the ballot,

> 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; provided, that no such emergency measure shall be considered passed by the legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative, and shall be approved by the affirmative votes of two-thirds of the members elected to each house of the legislature, taken by roll call of ayes and nays, and also approved by the governor [emphasis added]

In other words, "laws" that are "for the support and maintenance" of state government cannot be referred via the petition process. In insisting that "laws"

actually means only "appropriations," the Committee advances four spurious rationales.

First, the Committee speculates that "[i]f the framers intended to exempt tax-levying measures from the referendum power, they would have expressly done so." Ans. Br. at 7 n.2. The obvious rejoinder, of course, is that if the Framers had intended to exclude only "appropriations" from the referendum, they would have expressly done so in the first clause of Section 1(3)—precisely as they had in an earlier iteration of the provision that the Constitutional Convention ultimately discarded. *See* Op. Br. at 8.[1] Instead, the Framers opted for the more capacious rubric "***laws*** . . . for the support and maintenance" of the state, which envelopes *both* revenue measures *and* appropriations.

Second, the Committee decries Appellants for supposedly "ask[ing] the Court to ignore the words 'appropriations' in the second clause of Section 1(3)." Ans. Br. at 6. To the contrary, Appellants urge the Court to honor the plain text of both clauses, which entails effectuating the dispositive semantic distinctions that distinguish them from each other. Courts "presume a word or phrase bears the same meaning throughout a text." *Fann v. State*, 251 Ariz. 425, ¶ 60 (2021). A

[1] The Committee's observation that the substitute proposition "made significant structural, substantive, and grammatical changes to the text," Ans. Br. at 9, actually strengthens the interpretive inference that the Framers purposefully disavowed the original draft's constricted prototype of the "support and maintenance" clause.

corollary of this canon is that when the Constitutional Convention employed variable phrasing in independent constitutional clauses, courts must "presume those distinctions are meaningful and evidence an intent to give a different meaning and consequence to the alternate language." *State v. Harm*, 236 Ariz. 402, 407, ¶ 19 (App. 2015) (addressing statutory construction).

The second clause of Section 1(3) states that "appropriations for the support and maintenance" are effective immediately. Appellants agree that in any dispute concerning the effective date of an appropriation (which this case does not present), that language means what it says. It does not, however, purport to control the question now confronting the Court: what types of enactments are altogether immune from voter initiated-referenda? The answer to that query is supplied by the first clause of Section 1(3), which instructs that all "laws"—not merely "appropriations"—that are "for the support and maintenance" of the state enjoy such protection. To be sure, the word "laws" includes "appropriations," but the term also embraces enactments (such as SB 1828) that levy taxes, which, like appropriations, are "for the support and maintenance" of public institutions.

Third, the Committee contends that recognizing the structural independence of the two clauses implies that the first clause "somehow exempts 'laws immediately necessary for the preservation of the public peace, health, or safety' from the emergency clause requirements in the second clause." Ans. Br. at 12. Not so. The

third clause of Section 1(3) (which follows the second semicolon) provides that no emergency measure "shall be considered passed" unless it includes the required verbiage and is approved by a legislative supermajority. In other words, the first clause of Section 1(3) exempts emergency measures from the referendum, the second clause accelerates their effective date, and the third clause prescribes the procedural prerequisites that denote valid "emergency" legislation in the first place. Each provision encapsulates a self-contained directive; the Court need not (as the Committee urges) play a game of judicial Scrabble—excising and transposing selected words from one clause to another—to implement the text as a coherent whole.

Fourth, because lobbing derisive epithets is easier than engaging evidence on its own terms, the Committee summarily decrees as "[n]onsense," Ans. Br. at 9, copious legislative usages of the phrase "support and maintenance" in revenue measures adopted during the early days of statehood. But there is no more probative manifestation of original understanding than repeated deployments of a distinctive term of art to describe enactments that are substantively identical to S.B. 1828. *See McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290 (1982) ("When the words of a

constitutional provision are not defined within it, the meaning to be ascribed to the words is that which is generally understood and used by the people.").[2]

II. ***Garvey* Is Irrelevant to This Case**

In a fleeting moment of candor, the Committee admits that *Garvey v. Trew*, 64 Ariz. 342 (1946), "factually did not involve the question 'whether revenue measures are for the 'support and maintenance' of state government.'" Ans. Br. at 11. Exactly. A case that "did not involve the question" at the crux of this dispute (*i.e.*, the referability of tax levies) necessarily cannot control its disposition. Indeed, the language in *Garvey* to which the Committee clings does not even constitute *dicta*; the *Garvey* Court did not opine gratuitously on the issue of whether tax laws are referable—it never even adverted to the matter ***at all***.[3]

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[2] The Committee emphasizes that some of these laws also contained an emergency clause. But emergency measures and "support and maintenance" laws are not mutually exclusive classifications, and inclusion of an emergency clause ensures that non-budgetary components of the legislation also are protected from a referendum.

[3] Notably, litigants in Washington similarly misread a precedent of that state's highest court, prompting the tribunal to clarify that the earlier opinion's references to "appropriations" did ***not*** imply that tax measures were referable. *See Reiter v. Hinkle*, 297 P. 1071, 1073 (Wash. 1931) (explaining that "[s]tautes levying taxes are laws for the 'support of the state government and its existing public institutions' to the same or even a greater extent than are appropriations bills.").

III. The Budgetary Effects Of S.B. 1828 Are Factual Questions

As they did in the trial court, Appellants maintain that the extrinsic effect of S.B. 1828 on net revenues is irrelevant and not amenable to judicial resolution—but if the Court disagrees, Appellants are entitled to an opportunity to make the requisite factual showing on remand.

The Committee responds that the "long-term" impact of S.B. 1828 is immaterial in light of its ostensible "immediate" revenue reductions. Ans. Br. at 17. Section 1(3), however, imparts neither doctrinal significance nor definitional clarity to the Committee's contrived temporal dichotomy. The Committee's invention also eludes easy application, and engenders intractable questions for which the Committee offers no answers. What durational length, exactly, defines the "immediate" term? (Indeed, application of the new tax rate prescribed by S.B. 1828 is contingent upon the future attainment of certain General Fund revenue thresholds). How is a court to divine the "immediate" revenue effect—and, by extension, the referability—of a tax law that staggers variable adjustments to rates over a period of years? Likewise, what is the "immediate" consequence for revenue generation of a law that slaps a punitive 95% tax rate on earned income?

The Court can and should eschew the morass to which these questions beckon and instead confirm that Section 1(3)—as illuminated by contemporaneous usages of the operative constitutional language—means what its plain language bespeaks:

measures, such as S.B. 1828, that levy taxes are "laws . . . for the support and maintenance" of state government, and thus are not referable.

CONCLUSION

For the reasons stated herein and in the Opening Brief, the Court should reverse the judgment of the trial court.

RESPECTFULLY submitted this 19th day of January, 2022.

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