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)

RESPONSE OF APPELLANTS TO THE BRIEF OF *AMICUS CURIAE* ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

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

Plaintiffs/Appellants submit this Response to the brief of *amicus curiae* Arizona Center for Law in the Public Interest. The *amicus* advances three primary contentions, all of which can be easily dispatched.

First, the *amicus* frets that if the Court effectuates the plain text of Article IV, Part 1, Section 1(3), which immunizes from voter-initiated referenda all "laws . . . for the support and maintenance of the departments of the state government and state institutions," this exemption "could be stretched to cover *any act* from referral so long as a clever party or attorney articulates a reason that the act might somehow, someday raise revenues for the support of state government." Br. at 5. But as *amicus* itself strenuously argues elsewhere, it remains "this Court's duty to interpret and uphold the state Constitution." *Id.* at 7. Fear of interpretive ambiguities presented by hypothetical statutes that *amicus* conjectures might someday be enacted and become the subject of a referendum effort is not a plausible predicate for avoiding a (fairly easy) application of the constitutional text in the here and now.

Further, the same interpretive fault lines that the *amicus* decries already permeate precedents parsing the distinction between (non-referable) appropriations and (referable) changes to substantive laws within which appropriations are implemented. *See generally Garvey v. Trew*, 64 Ariz. 342, 354–55 (1946). The potential for knotty nuances or conceptual gradations has never deterred the Court from crystalizing constitutional terms. *See generally Rios v. Symington*, 172 Ariz.

3, 6–7 (1992) (refining a comprehensive denotation of the term "appropriation"). Definitional clarity concerning the relationship between the support and maintenance clause and revenue-related laws is attained—as it usually is—by incremental interpretations forged over time and fashioned to specific facts arising in particular cases. For now, it is sufficient to note that no party seriously disputes that sections 13 and 15 of Senate Bill 1828 encapsulate a quintessential and *bona fide* revenue law.

Second, in urging the Court to forecast the future budgetary effects of S.B. 1828, *amicus* points to Article IX, Section 22, which requires a legislative supermajority to enact certain laws providing for a "net increase in state revenues." Preliminarily, the striking textual contrast between Article IV, Part 1, Section 1(3) and Article IX, Section 22, only discredits the *amicus*' broader argument. Had the Framers intended to inoculate from the referendum only laws that cause a "net increase in state revenues," they would have employed precisely that verbal formulation (or some variation of it). Instead, they adopted an expansive exemption enveloping all "laws . . . for the support and maintenance" of the state.

More to the point, Article IX, Section 22 does not demand that courts try their hand at economic prognostication; it expressly enumerates eight types of enactments that *per se* "provide[] for a net increase in state revenues." *See* ARIZ. CONST. art. IX, § 22(B). *Amicus*' imagined scenario in which a future Legislature circumvents the

supermajority requirement by arguing that a tax rate increase "might depress the economy" and thereby decrease net revenues, *see* Br. at 6, is foreclosed by the plain text of subsection (B). *See also Biggs v. Betlach*, 243 Ariz. 256, 258, ¶ 7 (2017) ("Subsection (B) states that th[e] supermajority requirement applies to '[t]he imposition of any new tax' and '[t]he imposition of any new state fee or assessment or the authorization of any new administratively set fee.'"). In short, *amicus*' facially strained analogy to Article IX, Section 22 dissipates entirely upon a closer look.

Third, the *amicus*' invocation of the so-called "revenue source rule"—which requires initiative measures that mandate new spending to "provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal," ARIZ. CONST. art. IX, § 23—fares no better. In *amicus*' circuitous logic, applying the plain text of Article IV, Part 1, Section 1(3)—which on its face bespeaks no distinction between revenue "increasing" and revenue "decreasing" enactments—means that "courts would never be able to determine whether this [revenue source rule] requirement had been met because they would be unable to say whether the levying of increased taxes, provision of fees, or any other measure, would be sufficient." Br. at 6.

But this Court has already disclaimed any role in gauging whether an initiative's revenue source provisions are "sufficient." To the contrary, an initiative need only identify a funding source; whether or to what extent that source actually

succeeds in generating increased revenues is not a matter of judicial cognizance. If an initiative's funding source fails to supply revenues, the Legislature may choose to fill the shortfall (or not), in its discretion. *See Ariz. Chamber of Commerce & Industry v. Kily*, 242 Ariz. 533, 539, ¶¶ 18–20 (2017).

More fundamentally, *amicus*' argument misses the boat. Appellants have never posited that courts are institutionally prohibited from making factual findings that a law will "increase" or "decrease" state revenues. Rather, the point is simply that the judiciary should not gratuitously embrace an elusive and complex distinction that the operative constitutional text neither requires nor recognizes.

CONCLUSION

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

RESPECTFULLY submitted this 19th 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