ARIZONA SUPREME COURT

ARIZONA FREE ENTERPRISE CLUB, et al., Plaintiffs/Appellants, v. KATIE HOBBS, et al., Defendants/Appellees, 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 Nos. CV2021–011491 CV2021–016143 (Consolidated)

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEY GENERAL MARK BRNOVICH IN SUPPORT OF PLAINTIFFS/APPELLANTS

MARK BRNOVICH
Attorney General
State Bar No. 14000

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn (Beau) Roysden, III
Solicitor General

Michael Catlett
Deputy Solicitor General
Jillian Francis
Assistant Attorney General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-8958
Beau.Roysden@azag.gov
Michael.Catlett@azag.gov
Jillian.Francis@azag.gov

Attorneys for Amicus Curiae Arizona Attorney General Mark Brnovich

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INTEREST OF AMICUS CURIAE

Arizona Attorney General Mark Brnovich submits this amicus brief in support of Appellants, who challenge allowing proposed referendum measure R-03-2021 to appear on the ballot at the upcoming General Election. Under Arizona law, the Attorney General is authorized to enforce provisions of Title 16 "[i]n any election for … statewide initiative or referendum … through civil and criminal actions." A.R.S. § 16–1021. Accordingly, the Attorney General has authority to enforce provisions of Title 16 for the upcoming General Election.

The Attorney General's Office has long concluded that neither tax nor appropriation measures are referable under the Arizona Constitution. *See* Ariz. Att'y Gen. Op. No. I97–007, 1997 WL 566650 (July 17, 1997) (identifying tax measures as those excepted from referendum and disavowing a 1991 Attorney General Opinion concluding only appropriation bills were excluded from referendum). As further discussed below, the Attorney General agrees with Appellants that the proposed referendum is not referable under article VI, part 1, § 1(3) of the Arizona Constitution.

ARGUMENT

Appellants seek to prevent Appellee Invest in Arizona ("IIA") from referring 2021 Ariz. Laws ch. 412, §§ 13, 15 (Senate Bill ("S.B.") 1828). S.B. 1828 replaces Arizona's state income tax brackets and rates to provide a single state income tax rate of 2.5%. Appellants request that the Court reverse the superior court's judgment granting IIA's motion to dismiss and, and in so doing, hold that S.B. 1828 is not referable under the Arizona Constitution. *See* Ariz. Const. art. IV, pt. 1 § 1(3).

The superior court erred at least twice in concluding that S.B. 1828 is referable. First, the superior court misread the constitutional provision and *Garvey v. Trew*, 64 Ariz. 342 (1946) to decide that only appropriations—not tax measures—are exempt from referendum. Second, the superior court alternatively held that even if the "support and maintenance" clause covers tax measures, S.B. 1828 is still referable because the law will purportedly reduce, not raise, tax revenue. Neither the text of the Arizona Constitution nor prior Arizona case law supports the superior court's conclusions. Moreover, this Court should follow the lead of other states correctly holding under their state constitutions that tax measures are non-referable.

I. TAX MEASURES ARE NOT SUBJECT TO REFERENDUM.

The Arizona Constitution reserves power for citizens to reject laws at the polls by referendum. Ariz. Const. art. IV, pt. 1, § 1(1) and (3). To allow exercise of the referendum power, legislative acts are generally not effective until 90 days after *sine*

die. Ariz. Const. art. IV, pt. 1, § 1(3). When an act is successfully referred to the people and will be at issue in the next election, such an act becomes inoperable unless the referendum is defeated at the election. Ariz. Const. art. IV, pt. 1, § 1(5). Two classes of laws are exempt from referendum: "those pertaining to the public peace, health or safety" and those "for the support and maintenance of the departments of the state government, and state institutions." *Garvey*, 64 Ariz. at 349. S.B. 1828 is a tax measure enacted for the support and maintenance of the departments of the state and thus not referable.

A. The Superior Court's Reading of *Garvey* Is Untenable.

The superior court incorrectly concluded that *Garvey* construed the support and maintenance clause narrowly to hold that only appropriations—and no other measures—qualify as "support and maintenance." But the Court will search in vein to find any such holding in *Garvey*. There, plaintiff sued after the secretary of state concluded the act at issue was for the support and maintenance of government and refused to file the referendum petition. 64 Ariz. at 345–46. The bill at issue appropriated $50,000 to the Arizona Corporation Commission for expenses incurred ascertaining the fair-market value of property involved in rate-making. *Id.* at 345. Not surprisingly, this Court concluded that the act was an appropriation measure for the support and maintenance of the departments of state government, and thus not referable. *Id.* at 348.

The only issues before this Court in *Garvey* were (1) whether the act was an appropriation for the support and maintenance of state government, and (2) if so, whether a two-thirds vote and an emergency clause were necessary to avoid a referendum. *Id*. at 346. Critically, this Court never considered (because it did not have to) whether other measures supporting state government, like tax measures, are referable. The single sentence the superior court quoted from *Garvey* does not establish that tax measures fall outside of support and maintenance, again because that was not at issue. Thus, because the Court had no occasion to consider the question presented here, at best, the superior court relied on dicta "without force of adjudication." *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81 (1981) ("Dictum [] is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication[and] is not controlling as precedent."). Post-*Garvey*, this Court has not considered whether tax measures qualify as "support and maintenance" (until now of course).

That the holding the superior court unearthed in *Garvey* does not exist explains why the court of appeals, in *Wade v. Greenlee County*, 173 Ariz. 462, 463 (App. 1992), came to the opposite conclusion of the superior court, concluding that tax measures are exempt as "support and maintenance." In *Wade*, the court of appeals faced the same legal question presented here—whether the constitution excepts from the referendum power only appropriation measures or appropriation

and tax measures. *Id.* In answering that question, the court first observed the incongruity in the constitutional text, with the limitation on referenda using "measures for the support of state government" and the limitation on emergency measures using the term "measures to provide appropriations for the support of state government." *Id*. The court of appeals, unlike the superior court here, took the correct textual clue from this incongruity and determined that the limitation on referenda broadly includes tax measures. *Id*. at 463-64.

The court also explained that the history of the constitutional text supports a broad interpretation, as the revision of Article IV from first draft to final constitutional provision evidenced that the founders intended to broaden the concept of support. *Id*. (citing J.S. Goff (ed. 1991), THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 at 1021).

The court of appeals also correctly observed the practical problems with a different interpretation: allowing the referral of a tax measure could disrupt state government by "allow[ing] a small percentage of the electorate, in Arizona 5%, effectively to prevent the operation of government," thereby rendering a tax measure inoperable until the next general election. *Id.* at 463. This risk inherent in the referendum process "has led [the] courts to construe strictly the requirements necessary to require referral." *Id.* at 464 (citing *Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc.*, 134 Ariz. 46 (1982)). Allowing appropriations to go into

effect immediately in an emergency, while not allowing tax measures to do so, also makes logical sense—it gives Arizonans ninety days to adjust to new tax measures, and they will seldom, if ever, need to adjust to new appropriations.

The superior court used a non-existent holding in *Garvey* to create a non-existent conflict with *Wade*. This Court, like in *Wade*, should apply the plain language and history of the "support and maintenance" clause, which is supported by case law from other jurisdictions and practical considerations, and conclude that tax measures are non-referable.

B. Other States Have Broadly Interpreted Analogous Constitutional Provisions.

Arizona is not alone in concluding that tax measures are exempt from referendum. Other states with similar constitutional provisions, Washington, Maryland, and South Dakota[1] included, have broadly interpreted their support and maintenance clauses to include tax measures.

This Court, for example, has previously looked to Washington for guidance. *See Coleman v. Johnson*, 235 Ariz. 195, 198, ¶ 14 (2014) (noting that Washington

[1] *See* Md. Const. art. XVI, § 2 (forbidding referendum power for laws "making any appropriation for maintaining the State Government or for maintaining or aiding in any public institution"); SD. Const. art. 3, § 1 (precluding from referendum laws for the "support of the state government and its existing public institutions"); Wa. Const. Art. II, § 1(b) (referendum power inapplicable to "such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions[.]").

decisions are persuasive when interpreting parallel provisions of Arizona Constitution). Washington has broadly interpreted its "support" provision, which comes close to mirroring Arizona's, to include both appropriation measures and "anything that generates revenue for the state." *Farris v. Munro*, 662 P.2d 821, 827 (1983) (holding a measure is "support" and not referable when "it is designed to produce revenue for the general fund which in turn supports all of existing state institutions"). This broad definition of support includes tax measures. *See Andrews v. Munro,* 689 P.2d 399, 401 (Wash. 1984) (holding timber tax was immune from referendum under support exemption).

In *Winebrenner v. Salmon*, the Maryland Court of Appeals considered the referability of a gasoline tax and concluded that although the act was not technically an appropriation, it nevertheless constituted an "appropriation for maintaining the State Government" and could not be referred. 142 A. 723, 725 (Md. Ct. App. 1928) (reasoning that maintaining state government "means providing money to enable it to perform the duties which it is required by law to perform"); *see also Dorsey v. Petrott*, 13 A.2d 630, 635 (Md. 1940) (finding it "evident that the Referendum Amendment did not mean to include [] a statute to raise revenues for these specific purposes by a levy of taxes or by the imposition of other fiscal measures").

Likewise, in *State ex rel. Kornmann v. Larson*, the South Dakota Supreme Court considered whether a statute authorizing an excise tax was referable. 138

N.W.2d 1, 3 (S.D. 1965). The court stated unequivocally that the statute was not, stating "[the statute] is a tax measure and the additional revenue from the tax goes into the general fund of the state" and "[i]t is obviously a law for the support of state government." *Id*. at 4.

Other state constitutions, while not identical to Arizona's constitution, expressly provide that tax laws are not subject to referendum.[2] Other states to have confronted the issue have similarly concluded that tax measures are exempt from referendum. *See, e.g., State ex rel. Linn v. Romero*, 209 P.2d 179, 185 (N.M. 1949) (statute increasing gas tax to meet highway department's bond obligation is a law providing "for the payment of the public debt" and therefore not subject to referendum).

Why do so many jurisdictions agree that tax measures should not be referable? For the same reasons expressed by the Arizona Court of Appeals and this Court—"permitting referenda on support measures would allow a small percentage of the electorate, in Arizona 5%, effectively to prevent the operation of government." *Wade,* 173 Ariz. at 463; *see also Cottonwood Dev.*, 134 Ariz. 48 (discussing potential for abuse of referendum power). Other states agree that halting the efficient

[2] *See, e.g.,* Cal. Const., art. II, §9(a) (constitution excludes "statutes providing for tax levies or appropriations for usual current expenses of the State" from referendum); OH. Const. Art. II, § 1d ("Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions … shall not be subject to the referendum.").

operation of government is a powerful concern weighing against permitting such referenda. *See Wilde v. City of Dunsmir*, 470 P.3d 590, 599 (Cal. 2020) ("one of the reasons, if not the chief reason, why the constitution excepts from the referendum power acts of the Legislature providing for tax levies or appropriations[] is to prevent disruption of its operations."); *Vagneur v. City of Aspen*, 295 P.3d 493, 504, ¶ 37 n. 8 (Colo. 2013) ("[T]o subject to referendum 'any ordinance adopted by a city council, whether administrative or legislative, could result in chaos' and bring 'the machinery of government to a halt.'") (internal citations omitted); *see also Bickel v. Nice*, 192 A. 777 (Md. Ct. App. 1937) (exception clause created "to prevent interruptions of government").

II. THE SUPERIOR COURT'S RULING IS INCONSISTENT WITH THE SEPARATION OF POWERS.

The superior court alternatively concluded that even if tax measures are not subject to referendum, S.B. 1828 is referable because the exception applies only to acts that increase, not reduce, state revenue. Because the superior court decided that S.B. 1828 reduces revenue, it found the measure referable.

The separation of powers enshrined in article III of the Arizona Constitution, and the limitations inherent in the judicial function, support a broad reading of the "support and maintenance" clause, ensuring that the judiciary is not saddled with the

impossible task of forecasting the short- or long-term impact of fiscal policy.[3] Not only is the Appellants' proffered interpretation consistent with the constitutional text, it avoids requiring courts to engage in the impossible exercise of forecasting whether a particular piece of legislation raises or reduces revenue. The interpretation the superior court adopted, on the other hand, would require that impossible task.

Under the superior court's interpretation, Arizona courts will be required to determine whether a reduction in tax rates will result in more or less revenue for the State. Any such revenue analysis would require the court to make multiple assumptions about future economic activity and how Arizonans might adjust spending and investment based on lower tax rates. The court would also be required to compare Arizona's fiscal policy with that in other states and forecast how differences might impact population growth. Even selecting an appropriate time period to apply would be problematic. And there are other potential difficulties. For example, how should courts handle a bill that raises the tax rate in one provision and offsets that increase in another?

In fact, the superior court's interpretation, if adopted, will require the Court to speculate *in this appeal*. To affirm on the superior court's alternative ground, the Court will need to affirm the superior court's factual finding that S.B. 1828 will

[3] This case also will have no impact on the People's ability to enact tax measures through the initiative process.

decrease revenue (a disputed fact, as Appellants note). Reviewing that finding would require the Court to engage in the impossible exercise of forecasting the fiscal impact of S.B. 1828 over an indeterminate time period. There is no manageable standard for doing so.

Under the superior court's interpretation, revenue analysis will always be required because it is not true that tax cuts necessarily result in less government revenue. For example, in the early 1960's Congress passed large tax rate reductions. In the four years following the tax cuts, the federal government's revenue increased by 8.6% annually. Arthur B. Laffer, The Laffer Curve: Past, Present, and Future, Heritage Foundation (June 1, 2014), *available at* http://www.heritage.org/taxes/report/the-laffer-curve-past-present-and-future. Similarly, in August 1981, the Economic Recovery Tax Act was implemented, which enacted phased-in tax rate cuts across all federal tax brackets. While federal government revenue had steadily declined between 1979 and 1983, between 1983 and 1986 federal income tax revenue increased annually by 2.7%. *See id.* And several other countries have seen significant economic growth after passing a flat tax rate. *See id.* The notion that lower tax rates will often result in higher government revenue has been visually depicted by the well-known Laffer curve.

Closer to home, in the 1990s, Arizona made aggressive cuts to income tax rates and continued to make small cuts in the mid-2000s. Despite those rate

reductions, Arizona's individual income tax produced 185% more revenue in 2019 than in 1991, even adjusted for inflation. Between 1987 and 2016, Arizona's real Gross Domestic Product (GDP) growth was 176%, far outpacing the national growth rate of 100.4%. None of Arizona's growth in revenue, real GDP, or population would have been possible without Arizona's low tax environment. *See* Sean McCarthy, Invest In Ed Tax Increase Misguided & Cynical at p. 1, Arizona Tax Research Association (2020).[4]

Other courts have wisely refused to engage in speculation about the economic relationship between tax rates and government revenue. In *Andrews v. Munro*, the timber tax act at issue decreased the tax rate from 6.5% to 5% over a five-year period. 689 P.2d at 400. Proponents of the referendum, which stayed the tax rate at 6.5%, argued that such an act decreasing the tax rate could not be "necessary for the support of government" due to the act's tax reduction. *Id*. at 401. In holding that the act was not referable, the Washington Supreme Court stated, "We do not speculate whether the lowering of the tax rate from 6.5 percent to 5 percent between 1984 and 1988 would lessen or increase the support of state government. Such a venture on the part of this court is both inappropriate and irrelevant." *Id*.

Refusing to engage in that venture was an appropriate exercise in judicial

[4] *available at* http://www.arizonatax.org/sites/default/files/publications/special_reports/file/special_report_income_tax_initiative_8-3-20.pdf.

restraint. Because the Arizona Legislature levied taxes to support the state government, S.B. 1828 is immune from referendum.

CONCLUSION

IIA's attempt to refer S.B. 1828 is contrary to article IV, pt. 1 § 1(3) of the Arizona Constitution. The Court should grant the relief Appellants request.

Respectfully submitted,

Mark Brnovich
Attorney General

/*s/Michael Catlett*
Joseph A. Kanefield
Chief Deputy and Chief of Staff
Brunn (Beau) W. Roysden III
Solicitor General
Michael Catlett
Deputy Solicitor General
Jillian Francis
Assistant Attorney General

Attorneys for Amicus Curiae Arizona Attorney General Mark Brnovich