ARIZONA SUPREME COURT

ARIZONA FREE ENTERPRISE CLUB, et al., Plaintiffs/Appellees, 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)

BRIEF AMICUS CURIAE OF THE ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST IN SUPPORT OF APPELLEE/REAL PARTY IN INTEREST INVEST IN ARIZONA (SPONSORED BY AEA AND STAND FOR CHILDREN) FILED WITH CONSENT

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INTEREST AND IDENTIY OF AMICUS

The Arizona Center for Law in the Public Interest is a nonpartisan, nonprofit law firm dedicated to defending the civil and legal rights of Arizonans. The Center has a long history of enforcing provisions of our State Constitution including those establishing procedural safeguards pertaining to legislation as well as protecting the right of Arizonans to participate in direct democracy through the initiative and referendum process. *See, e.g.,* *Arizona School Boards Association, Inc. et al., v. Arizona*, CV-21-0234-T/AP, 2022 WL 57291 (2022); *Molera v. Hobbs*, 250 Ariz. 13 (2020); *Hoffman v. Reagan*, 245 Ariz. 313 (2018). The Center believes its expertise and experience will aid this Court in considering this appeal.

INTRODUCTION

The trial court, in a thorough and well-reasoned decision, rejected Appellants' textually untethered arguments that would eviscerate a central pillar of direct democracy that our founders placed in the Arizona Constitution. The right of the people to refer legislative enactments to a vote of the people is subject only to narrow exceptions set forth in Article IV, Part 1, § 1(3). In rejecting Appellants' attempt to deny the people of the right to vote on SB 1828, the trial court followed the language of the Constitution and this Court's dispositive interpretation of the relevant exception as set forth in *Garvey v. Trew*, 64 Ariz. 342, 353 (1946) (support and

maintenance exception "relates wholly to appropriations for support of government function").

The trial court's decision and the Appellees' Answering Brief ably analyze the relevant constitutional text as well as this Court's controlling authority. This brief focuses on (1) the centrality of the right to referendum in the Arizona Constitution and a discussion of how accepting Appellants' interpretation would gut that right and (2) the important role our Constitution confers on the judiciary to ensure that legislative authority is exercised consistent with the procedural rules imposed by the Arizona Constitution.

ARGUMENT

I. Appellants' Argument Would Eviscerate the Referendum Power by Inviting Legislative Gamesmanship.

The initiative and referendum provisions of the Constitution were "perhaps the most prominent feature of the Constitution as originally drafted." JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION at 121 (2nd ed. 2013). The initiative provision has been described as "the means by which voters can correct legislative sins of omission," while the referendum power provides "the means of correcting legislative sins of commission." *Id.* Arizona courts have accorded the people's referendum power significant respect. *See,* e.g. *Lawrence v. Jones,*199 Ariz. 446, 499 ¶7 (2001) (State's strong public policy in favor of the referendum means that right to referendum is to be broadly construed); *see also Crozier v. Frohmiller*, 65

Ariz. 296, 298 (1947) (legislature was never intended to be empowered to restrict the people in exercising the right to referendum); *Orme v. Salt River Valley Water Users' Ass'n*, 25 Ariz. 324, 346-47 (1923) (the Constitution reserves to the people the right to reject or approve any act or part of any act of the legislature); *Sherrill v. City of Peoria*, 189 Ariz. 537, 538 (1997) (referendum and initiative are important legislative tools).

Article IV, part 1, section 1(3) of the Arizona Constitution provides only two limited exceptions to the power of the referendum: (1) those immediately necessary for the preservation of public peace, health, or safety and (2) those for the "support and maintenance of the departments of the state government and state institutions." Section 1(3) limits the former to those that have an emergency clause passed by a two-thirds vote of both houses of the legislature and limits the latter to those that "provide appropriations for the support and maintenance of the state and of state institutions." In controlling language, *Garvey* confirmed this latter exception applies only to laws that relate "wholly to appropriations for support of government function." 64 Ariz. at 353.

This was surely correct. As the trial court noted, the text of the Constitution does not say "tax measures," or measures that "recalibrate tax assessments." It says "appropriations." *See* Ruling Re: Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss at 7.

Appellants argue that the Court should ignore the plain language of the Arizona Constitution and hold that every statue that affects taxes—including those that reduce tax rates without providing any offsetting revenue—could ultimately generate revenue for the "support and maintenance of government." Thus, Appellants argue, all tax measures are immune from the people's power of referendum. Presumably a law that completely eliminated the Transaction Privilege Tax could be said to be "for the support and maintenance" of government because such a law might induce more people to move to Arizona, thus increasing the state's income tax base to support government institutions.

Indeed, while Appellants' suggest that "support and maintenance of government" refers only to tax and appropriations legislation, the logic of Appellants' argument suggests that the exception applies to any measure that might someday raise revenue. Certainly, if the Court were to ignore the word "appropriations" in Section 1(3), the support and maintenance exception would logically apply beyond taxes to legislation that changed state fines or fees, or imposed new fines or fees. If the exception applies to the "Legislature's chosen mechanisms of raising and appropriating revenues," [Appellants' Opening Brief at 9], it might well apply to any act whose purpose was to stimulate the economy. For instance, a law creating a department of tourism would be immune from referendum because increasing tourism could generate revenue to support state government. In

this way, the exception 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. A law that lowers the speed limit for all state highways to 50 miles per hour could be "for the support and maintenance of government" because it could increase the issuance of speeding tickets and thus increase the fine revenue from these tickets.

Rather, in keeping with this Court's prior precedent and the text of the Constitution, this limitation on the referendum power should apply only to measures that "provide appropriations for the support and maintenance of the state and of state institutions." This interpretation of Article IV, Section 1(3) remains true to the text of the provision and affirms the Arizona Constitution's commitment to direct democracy.

II. Not Only are Arizona Courts Capable of Evaluating the Impact of Tax Measures on State Revenues, They are Required to do so Under the State Constitution.

Even if this Court were to overturn *Garvey* and hold that laws that increase taxes for the support of government functions cannot be referred, such a ruling would not apply to SB 1828, which provides a significant tax cut.

Appellants argue that *any* legislation that changes tax law is immune from referral because courts are not competent to discern whether any particular change will increase or decrease revenue. This argument ignores the judiciary's central role

in interpreting and enforcing the Constitution. Indeed, in at least two different provisions, the Arizona Constitution requires courts to determine whether a proposed statute raises or lowers revenue.

Article IX, Section 22 of the Arizona Constitution requires that an act that provides for a "net increase in state revenues" be passed by a two-thirds vote of the legislature. If a simple majority of the legislature enacts a statute that increases tax *rates*, one could argue that this might depress the economy and ultimately would not provide a "net increase in state revenues." Thus, one could argue a simple majority was sufficient and no two-thirds vote was required. Under Appellants' argument, courts would never be able to determine whether such an act runs afoul of Section 22 because the court could not determine the ultimate effect of the rate change.

Similarly, Article IX, Section 23 requires that any initiative or referendum that proposes a mandatory expenditure of state revenues, establishes a fund for a specific purpose, or otherwise allocates state funding must provide for an increased source of revenues sufficient to cover the cost of the proposal. Under Appellants' argument, courts would never be able to determine whether this 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.[1]

[1] The corollary to this argument is that an initiative or referendum that carries significant costs could be paired with a tax *decrease*, based on an argument that the tax cut would grow the economy and produce revenue to pay for the measure. Thus,

If accepted, Appellants' argument would cripple this Court's duty to interpret and uphold the state Constitution. This Court has recently reiterated its central role as the arbiter of the State Constitution in the case of *Arizona School Boards Association, Inc. et al., v. Arizona.* There, this Court stated that whether the state legislature had abided by the Constitution's single subject and legislative title requirements "implicate[s] [the] court's core constitutional authority and duty to ensure that the Arizona Constitution is given full force of effect." *Arizona School Boards Association, Inc. et al., v. Arizona*, CV-21-0234-T/AP, 2022 WL 57291 at ¶ 22. This Court continued, "the responsibility of determining whether the legislature has followed constitutional mandates that expressly govern its activities is given to the courts—not the legislature." *Id.* (citation omitted).

Just as courts are capable of determining whether a measure is subject to Article IX, § 22 because it provides for a "net increase in state revenues," or § 23 because it provides "an increased source of revenues," so too are the courts competent to determine that a significant tax decrease does not fall within the limited exception of Article IV, Part 1, § 1(3).

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an initiative to provide full-day kindergarten in the states' public schools, for instance, could satisfy Section 23 by cutting property taxes statewide. Under Appellants' arguments, the courts could not determine whether such a measure complies with the Constitution because courts are not competent to make such an evaluation.

CONCLUSION

Appellants' argument that the tax provisions contained in SB 1828—provisions that decrease the income tax liability for every state taxpayer—are immune to referral because they are for the support and maintenance of government is neither factually nor legally sound. If Appellants have their way, a cunning party or attorney would be able to shield any act from referral simply by contriving a way that the measure raises state revenue and therefore supports state government. This would reduce the referendum power to a nullity and would render the judiciary unable to discharge other duties which are set to it by the Arizona Constitution. This Court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 14th day of January, 2022.

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

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