IN THE SUPREME COURT
STATE OF ARIZONA

ARIZONA SCHOOL BOARDS ASSOCIATION, INC. et al, Plaintiffs/Appellees, v. STATE OF ARIZONA, a body politic, Defendant/Appellant	Arizona Supreme Court No. CV-21-0234-T-A/P Court of Appeals Division One No. 1 CA-CV 21-0555 Maricopa County Superior Court No. CV2021-012741

AMICUS CURIAE CITY OF TUCSON'S BRIEF IN SUPPORT OF PLAINTIFFS/APPELLEES

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INTRODUCTION

The City of Tucson ("**Tucson**") is a municipal corporation, charter city and political subdivision of the State of Arizona, and files this brief as *amicus curiae* under Rule 16(b)(1)(B), Ariz. R. Civ. App. P. Tucson is not a party to this appeal, nor does it control any party to this appeal. No entity other than Tucson contributed financially to the drafting and filing of this brief.

The Complaint in this action was filed in August 2021, by a coalition of individuals and education advocacy groups challenging the constitutionality of several "budget reconciliation bills" ("**BRBs**") passed by the Arizona Legislature in the last legislative session. These bills are extraordinary examples of "logrolling," containing a mishmash of provisions addressing disparate and unrelated subjects – many having nothing to do with anything described in their bill's title, and at least some of which certainly would not have garnered a majority vote if presented in their own separate bills – in violation of the single-subject and title requirements of Ariz. Const. art. 4, pt. 2, §§ 13 and 20.

Several of the provisions challenged by Plaintiffs in this case are of particular interest to Tucson because they impact the ability of local jurisdictions like Tucson to respond to the on-going COVID-19 pandemic, even with respect to matters of purely local concern such as Tucson's ability to establish a COVID-19 vaccination as a condition of employment for its own municipal employees. Specifically:

- Section 39 of SB 1819, the title of which states that it "relat[es] to state budget procedures," prohibits municipalities and counties from making or issuing "any order, rule, ordinance, or regulation related to mitigating the COVID-19 pandemic that impacts private businesses, schools, churches or other private entities, including an order, rule, ordinance, or regulation that mandates using face coverings, requires closing a business or imposes a curfew." 2021 Ariz. Sess. Laws ch. 405, § 39.
- Section 12 of HB 2898, the title of which states that it "appropriate[es] monies" and "relat[es] to kindergarten through grade twelve budget reconciliation," prohibits counties and municipalities – as well as school districts and charter schools – from requiring the use of face coverings by students or staff during school hours and on school property. 2021 Ariz. Sess. Laws ch. 404, § 12.
- Section 13 of SB 1824, the title of which states that it "appropriate[es] monies" and "relat[es] to health budget reconciliation," prohibits this state, and its municipalities and counties, from "establishing a COVID-19 vaccine passport," or requiring "any person to be vaccinated for COVID-19." 2021 Ariz. Sess. Laws ch. 409, § 13, codified as A.R.S. § 36-681.

The last provision – SB 1824, § 13 – is currently the subject of a controversy involving Tucson and its Mayor and Council's adoption of an ordinance on August 13, 2021 (approximately six weeks prior to the effective date of SB 1824), under

which city employees were required, on or before August 24, 2021, to either: (1) secure at least the first dose of an approved COVID-19 vaccine; or (2) submit a request for a medical exemption or an accommodation for a qualifying disability or for a sincerely held religious belief. On September 7, 2021, still several weeks before the effective date of the new legislation, the Office of the Arizona Attorney General, through the Solicitor General, issued Investigative Report No. 21-003 (the "**Report**") in response to a complaint lodged under A.R.S. § 41-194.01 regarding Tucson's ordinance.[1] The Solicitor General concluded in that Report that the Tucson ordinance "does violate" SB 1824, § 13, despite the fact that the legislation wasn't yet in effect, a fact that Attorney General Brnovich had earlier acknowledged in a published Opinion dated August 20, 2021.[2] Under § 41-194.01(B)(1)(a), the Report's finding put at risk a large portion of Tucson's annual state-shared revenues.

In a ruling issued September 22, 2021, the trial court in this case rightly recognized that the challenged bills violate the Arizona Constitution's requirements that each bill address only one subject, which must be adequately described in its title; among other things, the court invalidated SB 1819 in its entirety as well as SB 1824,

[1] The Report is available here: https://www.azag.gov/press-release/ag-brnovich-city-tucsons-covid-19-vaccine-mandate-violates-state-law

[2] *See* Ariz. Op. Att'y Gen. No. I21-007 (Aug. 20, 2021); *https://www.azag.gov/sites/default/files/2021-08/I21-007.pdf*

§ 13, and HB 2898, § 12. Though Tucson temporarily paused its enforcement of its vaccine requirement in response to the issuance of the Report, Tucson is now proceeding with disciplinary measures against the employees who failed to comply with it. The controversy under § 41-194.01 thus continues and gives Tucson a distinct and specific interest in the outcome of this litigation.

But Tucson's fundamental concern is much broader than any specific BRB provision. The core issue here is nothing less than democracy and the rule of law, the defense of which should be the first and most sacred duty of any government. The title requirement in Ariz. Const. art. 4, pt. 2, § 13, and the single-subject requirement that is expressed both in that section and Ariz. Const. art. 4, pt. 2, § 20, safeguard the most basic principle of democracy – that of majority rule. If legislators pass a bill without notice of its contents, because of a faulty title, or pass a multi-subject bill to achieve passage of a desired provision even at the cost of approving something they would otherwise vote against, the members of our society cannot be assured that the resulting laws, by which their conduct is governed, were in fact approved by majority of their elected legislators. This is intolerable in a democratic system.

ARGUMENT

1. **This Court cannot read the words "budget reconciliation" out of the bills' titles under the guise of avoiding a "political question," and the challenged provisions do not have any natural relationship to the State's budget process**.

There is no reasonable argument that the challenged provisions in the BRBs are

related to "budget reconciliation" or "budget procedures," as the titles of the BRBs state. The State doesn't even make a serious attempt to argue otherwise. Instead, it wants this Court to simply read those words out of the bills' titles.

The State argues that this Court cannot decide whether the provisions in each BRB are appropriately described as "budget reconciliation"[3] measures, because BRBs are defined by the Joint Legislative Budget Committee as bills that "group statutory changes required to enact the budget by subject area (e.g., health or criminal justice)," and the question of what is "required to enact the budget" is "the exclusive prerogative of the Legislature" (State's Supp. Brief, at 7). Therefore, the argument goes, this Court should just ignore the phrase "budget reconciliation" when it is used in the title of a bill and determine only whether the provisions in the bill relate to "the subject of the bill" as described by the *other* language – in this case, "K-12, Higher Education, Health or Budget Procedures." (State's Supp. Brief, at 8.)

But this Court is not free to "enlarge the scope of [a bill's] title" by ignoring limiting language even when the title would have been sufficiently descriptive without that language. *Taylor v. Frohmiller*, 52 Ariz. 211, 217 (1938). That is particularly true here because, grammatically, the *subject* of each of the challenged BRBs (other than

[3] Oddly, the State applies this argument to SB 1819, even though the phrase "budget reconciliation" isn't even in the title of the bill, because "the Legislature plainly intended it to be a budget reconciliation bill." (State's Supp. Brief, at 8.) Why it is necessary to enlarge the scope of a bill by removing from its title limiting language that isn't in the title to begin with is unclear.

SB 1819) is in fact "budget reconciliation;" the other words – "K-12, Higher Education, Health" – are *adjectives* that further narrow the subject by describing the *part* of the budget to which the bill's provisions supposedly relate. That means that, when the words are given a straightforward reading, "relating to kindergarten through grade twelve budget reconciliation," means that each provision in HB 2898 must relate to the portion of the State budget that appropriates money to fund K-12 education; the same is true for the other BRBs.

The Legislature was not *required* to declare the bills' purpose or goal – "budget reconciliation" – in their titles. *See, e.g.*, *State v. Dixon*, 127 Ariz. 554, 558 (App. 1980) (a sentencing-reform bill did not violate the title requirement just because it failed to state that the sentencing changes it made restricted the availability of 12-person jury trials, which was purportedly the bill's "purpose"). If "K-12," "higher education," and "health" are sufficiently descriptive titles for a bill (they aren't[4]), the legislature could have chosen to leave "budget reconciliation" out of the BRB's titles. But it didn't.

So the Court cannot read "budget reconciliation" out of the BRB's titles in an

[4] There isn't room to explore that issue in this brief, but Tucson submits that, while a title can be broad – for example, "relating to Workers' Compensation," allowing a title that simply says "health" would render the title and single-subject requirements nugatory. *See, e.g.*, *In re Lewkowitz*, 69 Ariz. 347, 353–54 (1950), vacated on other grounds 70 Ariz. 325 (bill title "attorneys at law" did not give notice that the bill contained a provision relating to disbarment of attorneys).

attempt to make them constitutional, any more than it can read words out of statutes for the same purpose. *See First Nat. Bank of Arizona v. Superior Ct. of Maricopa Cty.*, 112 Ariz. 292, 295, (1975) (court cannot rewrite a statute "to conform to the constitutional mandates"). Which means that the challenged provisions must be struck down because they have no natural connection to the State's budget process. *See In re Miller*, 29 Ariz. 582, 591 (1926) (a bill's provisions must have a "logical or natural connection" to one another and it cannot "embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other").

Amici Arizona House Speaker Russell Bowers, Arizona Senate President Karen Fann, and Governor Douglas A. Ducey, in a brief filed in the trial court, characterized a budget reconciliation measure as a substantive enactment with which an appropriation is "intertwined," or that is a condition precedent for an appropriation. Logically, that means they are changes without which an appropriation cannot be put into effect – for example, creation of a new commission for which funding has already been appropriated. Whether a particular provision has that close relationship with a specific appropriation is something that this Court can determine and the State should be able to demonstrate. If, on the other hand, the State is correct that this Court cannot make that determination because "budget reconciliation" means whatever "the

Legislature"[5] wants it to mean at any point in time, then those words clearly cannot alert anyone to the contents of the bill and the provisions still fail.

2. The appropriate remedy for a bill that violates the single-subject requirement, whether or not it also violates the title requirement, is invalidation of the entire bill.

A bill can violate both the single-subject and title requirements, or neither of them, or only one of them. When a bill violates only the title requirement, the remedy – specified by the constitutional provision itself – is severance of the provisions not described by the title. The Court of Appeals has held – rightly, Tucson submits – that when a bill violates only the single-subject requirement, meaning that the bill addresses multiple subjects that are all adequately described in the title, the bill as a whole must fail. *Litchfield Elementary Sch. Dist. No. 79 of Maricopa Cty. v. Babbitt*, 125 Ariz. 215, 227 (App. 1980) ("Since the enactment in question is infected by reason of the combination of its various elements rather than by any invalidity of one component, the otherwise salutary principle of severance and partial savings of valid portions does not apply.").

The question here is whether severance is an adequate remedy when a bill violates both requirements, as the bills at issue in this case – or at least SB 1819 – do. Tucson submits it is not adequate and that the entire bill must be invalidated when it

[5] Given the logrolling problems with the bills, the notion that "the Legislature" actually approved any specific provision in the BRBs, or their titles, is an iffy proposition.

violates the single-subject requirement regardless of whether the bill complies with the title requirement. The same rationale that was applied in *Litchfield* applies just as strongly when a bill that violates the single-subject requirement also violates the title requirement. Given the multiplicity of subjects addressed in the challenged BRBs, any assumption that a majority of legislators would have voted in favor of any one of them is pure speculation. *Id*. ("We do not believe … that courts should speculate as to what might or might not have been in terms of the political process."); *see also Hoffman v. Reagan*, 245 Ariz. 313, 316, ¶ 14 (2018) ("The single-subject requirement is meant to prevent 'log-rolling,' or combining different measures into one bill so that a legislator must approve a disfavored proposition to secure passage of a favored proposition.")

3. The bills that are challenged in this case are simply particularly egregious examples of a practice that this Court has previously indicated is constitutionally unacceptable; there is no legitimate basis to limit a holding that the bills violate the Constitution to prospective application.

The State asserts that "[n]o Arizona court has ever applied the single-subject requirement to invalidate a BRB, and thus, the Legislature has for decades relied upon BRBs and Omnibus Reconciliation Bills ('ORBs') as vital tools to carry out its democratic duties." (State's Supp. Brief, at 19-20.) Therefore, the State argues, this Court, if it concludes that any of the challenged bills or bill provisions violate the

Constitution – regardless of whether severance is proper[6] – should apply its analysis only prospectively and not invalidate any of the bills or bill sections challenged here. It is, quite frankly, disturbing that the State, in its briefing, so readily refers to "democratic duties" and "the democratic process" (State's Supp. Brief, at 21), when the practice of logrolling is, as discussed in the previous section of this brief, a perversion of the democratic process. That aside, its assertion that this Court has not considered the constitutionality of a bill similar to those challenged here is also inaccurate, and its assertion that this year's BRBs were legislative business-as-usual is highly questionable.

This Court addressed the application of the single-subject requirement to an ORB in *Bennett v. Napolitano*, 206 Ariz. 520, 528-529, ¶¶ 36-40 (2003), finding that Governor Napolitano's abuse of her line-item veto power, which prompted that lawsuit, was at least in part a reaction to the ORB's obvious violation of the single-subject requirement. The State – apparently unconstrained by any need for consistency – asserts both that, based on *Bennett*, "the Legislature … believed that the courts would not upset the legislative budgeting process by forcing it to separate out BRBs into many separate bills," and that – to the contrary – the Legislature reacted to *Bennett* by doing just that, enacting 8 to 10 BRBs in subsequent years rather than

[6] Some of the State's prospective-application argument focusses on the invalidation of an entire bill based on a single-subject violation, but it also refers to "outlawing BRBs in part or in whole" (State's Supp. Brief, at 21).

the 3 ORBs that it used prior to *Bennett*. (State's Supp. Brief at 20, n.1, and 21.) Obviously, the fact that the Legislature started using more so-called reconciliation bills after *Bennett* indicates that *Bennett*'s import was understood. If the Legislature at times – and most particularly in its last session – failed to break those bills up *enough*, that doesn't indicate understandable confusion about its constitutional duty, but rather a failure to fulfill it.

And the Legislature's abuse of the single-subject requirement was particularly egregious this year. Consider that the three ORBs mentioned in *Bennett* (2003 Ariz. Sess. Laws ch. 263, 264, and 265) totaled 198 pages, while the four bills challenged in this lawsuit total 359 pages; there are 231 pages in HB 2898 alone. If the four additional BRBs (2021 Ariz. Sess. Laws ch. 403, 407, 411, and 413) are added in, the total increases to 452 pages. Obviously, the mere number of pages isn't necessarily a reliable indicator of the number of subjects addressed. But it is certainly suggestive. This Court should hesitate to limit its constitutional analysis to prospective application based on an assumption about legislative practices may have little basis in reality; this is supported by the Amicus Curiae Brief filed below by House Minority Leader Reginald Bolding and Senate Minority Leader Rebecca Rios.

Finally, the State's assertion that invalidating any of the challenged bills will upset "potentially scores of BRBs and ORBs passed in the last several decades" (State's Supp. Brief, at 21) is speculative and histrionic. As the above-referenced

amicus curiae brief makes clear, the scope of any past abuses of the single-subject and title requirements almost certainly pales next to this year's BRBs.

CONCLUSION

The State wants this Court to rubber stamp legislative abuses that violate basic concepts of representative democracy under the theory that subjecting the challenged BRBs to constitutional scrutiny would invade the province of the Legislature. But doing that would be an abdication by this Court of its "most essential constitutional duty." *State v. Arevalo*, 249 Ariz. 370, 381, ¶ 42 (2020) (Justice Bolick, concurring); *see also State Bd. of Control v. Buckstegge*, 18 Ariz. 277, 285 (1916). Deference would be particularly inappropriate in this context because the title and single-subject requirements are not limits on the substantive authority of the Legislature, but on its process. This Court cannot defer to "the Legislature" when the very problem here is that we cannot be sure which provisions in the badly titled and logrolled bills would actually have been approved by the Legislature if presented in separate bills.

This Court should affirm the trial court ruling.

RESPECTFULLY SUBMITTED this 15th day of October 2021.

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