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.	Supreme Court No. CV-21-0304-AP/EL Maricopa County Superior Court No. CV2021-011491 No. CV2021-016143 (Consolidated)

BRIEF AMICUS CURIAE OF THE GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN SUPPORT OF REVERSAL FILED WITH CONSENT

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Counsel for Amicus Curiae Goldwater Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST AND IDENTITY OF AMICUS

The Goldwater Institute is a nonpartisan public policy foundation dedicated to advancing the principles of economic freedom essential to a prosperous society, and to enforcing provisions of our state Constitution that protect the rights of taxpayers and voters. To this end, GI is frequently involved in litigation involving taxpayer protections, *see, e.g.*, *Vangilder v. Ariz. Dep't. of Revenue*, No. CV-20-0040-PR (Ariz. Sup. Ct. filed Feb. 13, 2020) (pending); *Fann v. State*, 251 Ariz. 425 (2021), as well as cases involving the unintended consequences of the Voter Protection Act. *See Molera v. Reagan*, 245 Ariz. 291 (2018); *Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396 (2020). GI believes its policy expertise and experience will aid this Court in considering this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Among the flaws in the decision below is the Superior Court's failure to consider the interaction of the proposed referendum with the "Voter Protection Act" (VPA), Ariz. Const., art. IV pt. 1 § 1(6). The VPA applies to referenda just as it does to initiatives. *See id.* §1(6)(B), (C). And it effectively forbids the legislature from "repeal[ing]" a referendum, or adopting any law that would have the *effect* of amending that referendum, if that law fails to "further[]" the referendum's "purposes." *Id.* §1(6)(C). In fact, the VPA would also prohibit any

future legislation that is *implicitly* "inconsisten[t]" with the referendum. *Meyer v. State*, 246 Ariz. 188, 192 ¶ 11 (App. 2019).

What exactly that means is unclear, but it seems to mean that if the tax relief bill here were repealed, no future legislature could adopt a law implicitly inconsistent with the purpose of that repeal. The Real Parties in Interest define their purpose as "fully restor[ing] funding to our education system and other infrastructure" by "revers[ing] the flat tax."[1] Assuming that this is the "purpose" of this repeal-referendum, then that, combined with the VPA, would appear to prohibit the legislature not only from adopting any other version of a flat tax—no matter how politically popular—but also from ever adopting a tax bill that might arguably reduce the revenue available to fund state "infrastructure" (a term so broadly defined as to mean virtually anything). That might even include laws that *raise* taxes.

That is an extreme consequence, and there may be better interpretations of the VPA that would avoid that outcome. But there is no need to resolve that here, because the principle of constitutional avoidance is best served by applying the plain-language constitutional limits on the referendum power in this case: the Constitution forbids the referral of laws "for the support and maintenance of the departments of the state." Ariz. Const., art. IV pt. 1 § 1(3). That must include both

[1] *What is Invest in Arizona?*, #Invest in AZ Now.

tax laws and appropriations—for reasons federal courts have articulated in analogous cases. The Superior Court's holding—in defiance of the binding precedent in *Wade v. Greenlee County*, 173 Ariz. 462 (App. 1992)—that tax measures are not included in this constitutional provision, should be reversed because the *Wade* rule is well supported by the Constitution's language and structure.

ARGUMENT

I. Applying the VPA's prohibition on legislation inconsistent to the repeal of a tax cut would be logically incoherent.

The VPA deprives the legislature of authority to repeal not only initiatives, but also referenda. Ariz. Const., art. IV pt. 1 § 6(B). It also prohibits the legislature from *amending* a referendum in a way that fails to further that referendum's purpose. *Id.* § 6(C). And that means the legislature also may not adopt any bill in the future that "impliedly amend[s] or repeal[s]" a referendum "through 'repugnancy' or 'inconsistency.'" *Meyer*, 246 Ariz. at 192 ¶ 11.

It's unclear what it would mean for a law to be "inconsistent with" or "repugnant to" the purposes of this referendum. It seems clear that any future legislation that reinstates the identical tax cut would be barred. *Cf.* *Cave Creek Unified Sch. Dist. v. Ducey* *(Cave Creek II)*, 233 Ariz. 1, 7–8 ¶¶ 24–25 (2013). But *implicit* amendments or repeals are also forbidden. Would that mean future legislation reducing taxes in a manner *similar to* that which the referendum

repudiated could *also* be forbidden—presumably forever—if repeal referenda fall within the VPA?

Suppose a bill were passed reducing the state's "luxury liquor" tax on spiritous liquors from the current $3 to $2, and that this was referred and repealed. Assuming the VPA barred the legislature from ever enacting the same tax reduction later—since that would be an implicit repeal of the repeal—the legislature would presumably also be barred from reducing it to $1. Would it also be prohibited from reducing the tax on gin, while increasing it on brandy? Such a bill would seem to be implicitly *inconsistent* with the referendum. Likewise, a bill that replaced the existing luxury liquor tax with an entirely new system for taxing alcohol—or that raised or lowered the drinking age—or even a bill *increasing* the luxury liquor tax could be implicitly inconsistent with the referendum, too.

Resolving these questions would require an inquiry into the referendum's "purpose"—to discourage drinking? To subsidize social programs? That is always a complicated inquiry, but far more so when dealing with tax legislation which has a large number of goals. And it is vastly more complicated when dealing with a repeal, because while a proposed law is a specific entity that can have a particular purpose or purposes, a *repeal* is a negative—it is a naught—and therefore has a literally infinite number of "purposes."

The logical puzzle becomes even harder with income tax laws such as SB1828, which not only levy dollar amounts on certain income levels, but require adjustments based on changes in the consumer price index, and provide for future changes in tax rates based on the amount of revenue received. Under SB1828, tax rates are set at one level, but then shift to different amounts when state income reaches a certain threshold. Would future legislation that adopts a similar mechanism be prohibited as implicitly repugnant to the repeal of SB1828? Would the repeal of SB1828 implicitly forbid any flat tax in the future? Or any tax reduction at all?

No Arizona court has addressed these questions.[2] *Cave Creek Unified Sch. Dist. v. Ducey (Cave Creek I)* suggests the answer is yes. That case involved a statute adopted by referendum which required the legislature to annually adopt legislation to "increase the base level *or* other components of the revenue control limit." 231 Ariz. 342, 345 ¶ 1 (App. 2013). Despite this disjunctive language, the Court of Appeals relied on "the background, purpose, and implementation" of the referendum to hold that "the intent of…the electorate…is not represented in [this] plain language," and that, instead of "or," the legislature was required to increase the base level *and* other components. *Id.* at 350 ¶ 21. Otherwise, the court said, the legislature might "undermine the purpose of the measure" by increasing one

[2] And because no state has a VPA like Arizona's, no other state court has, either.

but not the other, which would "contravene what the voters intended." *Id.* at 351–52 ¶ 28. This Court affirmed, holding that to increase one thing but not the other could not be "harmonized" with the goal of the referendum. *Cave Creek II*, 233 Ariz. at 7 ¶ 24.

Applying that reasoning to this situation suggests that a referendum-repeal of SB1828 could implicitly bar an *enormous* swathe of future tax legislation—theoretically even forbidding any tax reduction ever, or even a tax *increase*, if it were high enough to drive income earners out of Arizona, thereby decreasing revenue. That is because the Real Parties in Interest identify the purpose of the referendum as "fully restor[ing] funding to our education system and other infrastructure" by "revers[ing] the flat tax."[3] Thus, if successful, this Court's reasoning of *Cave Creek II* suggests that the combination of the VPA with the referendum-repeal of SB1828 would forbid the legislature from ever altering the tax structure in a way that reduces the amount of funding available for state schools or "other infrastructure," which, of course, would be any tax cut whatsoever, as well as any increase that fell on the wrong side of the Laffer Curve. Even a reduction in the state *property* taxes—approximately half of the revenues of which are spent on schools—would seem impliedly inconsistent with the purposes of this repeal-referendum, since it could plausibly be described as "impliedly

[3] *What is Invest in Arizona?*, #Invest in AZ Now.

amend[ing]" it "through 'repugnancy' or 'inconsistency'" with the goal of funding "other infrastructure." *Meyer*, 246 Ariz. at 192 ¶ 11.

That is a truly extreme proposition. A better reading of the VPA may be that it does not apply to repeal-by-referendum at all, because such an interpretation would unwarrantably deprive the legislature of its fundamental powers into the indefinite future, violating the anti-entrenchment principle, *cf. United States v. Winstar Corp.*, 518 U.S. 839, 871–74 (1996), and because it is hard to reconcile with the VPA's language, which refers to amendments that further the purpose of "such measure," whereas a repeal by referendum is arguably not a "measure" but a nullity.

But that is a complicated constitutional question, and therefore the principle of constitutional avoidance counsels in favor of a decision that will avoid such consequences. *Garcia v. Butler in & for Cnty. of Pima*, 487 P.3d 256, 260–61 ¶ 18 (Ariz. 2021) (applying constitutional avoidance where one possible interpretation of law would raise constitutional problems with a different law). Such avoidance can be best accomplished by applying Section 1(3)'s plain-text prohibition against any referendum of tax measures. *King v. Alabam's Freight Co.*, 40 Ariz. 363, 371–72 (1932) (interpretation that avoids extreme results is to be preferred); *Sweis v. Chatwin*, 120 Ariz. 249, 253 (App. 1978) (same).

In *Molera v. Reagan*, 245 Ariz. 291 (2018), this Court cautioned that the consequences of the VPA's interaction with the rules for initiatives were good reason to apply careful judicial scrutiny to any purported exercise of the Constitution's direct democracy provisions. "[W]ith the enactment through initiative of the Voter Protection Act," it warned, "legislation enacted by the voters is even more consequential [than before]," and for that reason, it was important that the judiciary enforce the "regulation[s] of the initiative process" established in the Constitution. *Id.* at 294 ¶¶ 9–10. Here, the best way to reconcile the direct democracy provisions with the VPA is to conclude that the referendum power, as the Constitution itself says, does not encompass laws "for the support and maintenance of departments of the government"—including those that reduce taxes. Ariz. Const., art. IV pt. 1 § 1(3).

II. This Court should enforce the *Wade* rule.

The Superior Court's conclusion that laws relating to taxation are not laws "to provide appropriation for the support and maintenance of the departments of the state," pursuant to Article IV pt. 1 § 1(3), depends on its refusal to follow *Wade*. This Court should reverse, and enforce the *Wade* rule.

First, the Superior Court appeared to believe that "*Wade* is not the controlling authority" because it was issued by the Second Division of the Court of Appeals. *See* Op. at 10. But "*all* trial courts in the state" are bound by decisions of

the Court of Appeals, "regardless of the division." *State v. Patterson*, 222 Ariz. 574, 579 ¶ 16 (App. 2009). The decision below should be reversed **for that reason alone.**

Second, the *Wade* rule is well-reasoned and consistent with the longstanding principles of separation of powers.

For one thing, it is a better reading of the Constitution's language: "*Support* is a broader term embracing both the acquisition and allocation of funds." *Wade*, 173 Ariz. at 463 (emphasis added).[4] If Section 1(3) only barred referenda of expenditures, but not tax laws, as the Superior Court said, then it would use the phrase "[laws] appropriating funds." Instead, it refers to laws "for the support and maintenance of the departments of the state government and state institutions." This also differs from the wording elsewhere in Section 1(3) that postpones the effective date of legislation (to allow for referenda), *except* for laws that "provide appropriations for the support and maintenance." This latter wording shows that where the framers meant to use the phrase "provide appropriations," they knew how to do so—and they did not do so in the provision that limits the referendum

[4] Washington State—from whose Constitution Arizona copied its referendum provision—has likewise concluded that "support is not limited to appropriation measures; if it generates revenue for the state it is deemed support." *Farris v. Munro*, 662 P.2d 821, 827 (Wash. 1983). *See also State ex rel. Kornmann v. Larson*, 138 N.W.2d 1, 4 (S.D. 1965) (tax law is "obviously a law for the support of the state government" for purposes of limitation on referendum).

power. If this difference in wording has any legal significance, it is to ban the referendum of laws "for the support and maintenance"—which is a *broader* class of laws than those that merely "provide appropriations." What laws fall within the broader class that do not fall within the narrower class? The only possible answer is: revenue legislation—i.e., tax laws.

Second, there is no judicially manageable distinction between tax laws that *increase* taxes and those that *reduce* taxes. Federal courts reached that conclusion in an analogous situation in the 1980s, when, in the wake of the TEFRA,[5] several lawsuits were filed challenging its constitutionality because it originated in the Senate instead of the House of Representatives as the federal Constitution requires. The bill had started in the House as a tax-cutting measure, but the Senate had amended the bill by transforming it into a tax-increasing bill. *See* *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985). The plaintiffs argued that the Origination Clause, which requires "[a]ll bills for *raising* revenue" to start in the House, U.S. Const. art. I § 7 (emphasis added), applies to legislation that *increases* taxes, not legislation that cuts them. But the courts refused to countenance that distinction, holding that the question of whether or not a bill increases revenue is a nonjusticiable political question. *See, e.g.*, *Tex. Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 165–68 (5th Cir. 1985); *Armstrong v. United*

[5] The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248 (1982).

States, 759 F.2d 1378, 1381–82 (9th Cir. 1985); *Wardell*, 757 F.2d at 205. Instead, they said, all bills *relating to* revenue fall within that provision.

The Fifth Circuit explained that, given the "fluctuations in national income and corresponding shifts in revenue yields," it would be impossible to find a judicially enforceable principle with which to differentiate revenue-increasing bills from revenue-reducing bills. *Tex. Ass'n of Concerned Taxpayers, Inc.*, 772 F.2d at 166. That is particularly true of bills that reduce some taxes while increasing others, or that alter the treatment of debt simultaneously with a change in the tax structure, etc. "The same bill may have an effect of increasing revenue under certain economic conditions and decreasing revenue under others." *Id.* Indeed, a bill that "raised" revenue one year might reduce it the next year. Also, the Ninth Circuit added, "members of Congress may differ over whether a proposed revenue bill or amendment will 'increase' or 'decrease' taxes overall," and it will rarely be possible to objectively determine who is right. *Armstrong*, 759 F.2d at 1381. Such considerations persuaded federal courts that to interpret "bills for raising revenue" as bills *relating to* taxes, rather than specifically to those that actually increase the government's income. *Id.*

The same principles apply even more strongly here, given that Section 1(3) does not use the word "raising," but instead bars referenda of laws "for the support and maintenance" of state departments—wording that is not confined to laws that

increase government income. Laws that establish taxes or generate state revenue *at all* are for the "support and maintenance" of the government, even if they generate less revenue than the laws of past years. The *Wade* rule is well-grounded and should be maintained.

CONCLUSION

The judgment of the Superior Court should be *reversed.*

Respectfully submitted this 12th day of January 2022 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE