ARIZONA SUPREME COURT

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

ANSWERING BRIEF

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Introduction

¶1 Four months ago, Appellee Invest in Arizona (Sponsored by AEA and Stand for Children) ("IIA") exercised its fundamental "right to public democracy," *Fann v. State*, 251 Ariz. 425 ¶ 26 (2021), by filing referendum petitions ("Referendum") against sections 13 and 15 of Senate Bill 1828 ("SB 1828"). This appeal arises out of a challenge to the Referendum's validity and raises a simple question: does the fundamental right to refer legislation extend to a bill like SB 1828 that: (1) slashes income tax rates, (2) immediately reduces state revenues, and (3) appropriates no revenue?

¶2 In a well-reasoned decision [IR 52], the trial court correctly held that it does. It dismissed Appellants' remarkable claim that Arizonans have no right to refer SB 1828 to a vote of the people under article IV, part 1, § 1(3) of the Arizona Constitution ("Section 1(3)") because it's somehow "for the support and maintenance" of state government. But more than that, Challengers claim that any legislation related in any way to taxation is exempt from the referendum power because such acts are inherently "for the support and maintenance" of state government.

¶3 Appellants' arguments fail based on the plain language of Section 1(3), as interpreted by this Court 75 years ago. *Garvey v. Trew*, 64 Ariz. 342 (1946). They find no support in a subsequent court of appeals decision holding that a measure that both created a new tax and appropriated the resulting revenue to address a budget shortage – unlike SB 1828 in every way – wasn't referable. *Wade v. Greenlee Cty.*, 173 Ariz. 462 (App. 1992). And they defy all common sense by saying that SB 1828 is "for the support and maintenance" of state government when it will decrease revenue for that purpose.

¶4 For these reasons, the trial court correctly granted IIA's Motion to Dismiss. This Court should affirm.

Statement of the Issues

¶5 This appeal hinges on a single question of law – one requiring the interpretation of the Arizona Constitution – that this Court reviews de novo, *State v. Mixton*, 250 Ariz. 282, 285 ¶ 11 (2021); is a legislative act that appropriates no revenue, slashes income tax rates, and causes an immediate decrease in state revenue an act for the "support and maintenance" of state government, and thus excluded from Arizonans' fundamental right to refer legislative acts?

Statement of Facts and Statement of the Case

¶6 Despite Appellants' half-hearted attempt [at 15-16] to manufacture a fact question, the facts are few and undisputed.

¶7 In 2020, Arizonans approved the Invest in Education Act ("Prop 208") to provide additional resources to Arizona's public schools. Prop 208 imposes an income tax surcharge on income above certain levels for wealthy Arizonans.

¶8 The Legislature responded by passing several bills attacking Prop 208 and education more broadly, including SB 1828. That bill reduces Arizona's income tax brackets to an eventual 2.5% "flat tax" rate. The Joint Legislative Budget Committee's ("JLBC") analysis of SB 1828 and its companion bill projected a significant reduction in income tax liability for Arizona's wealthiest taxpayers. [Supplemental Appendix ("SA") 017-21][1] Governor Ducey touted these bills as "the LARGEST tax cut in state history" that will allow Arizona to "have the lowest flat tax in the country." [SA063]

[1] The JLBC fiscal analysis of SB 1828 is a public record that the trial court properly considered. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012).

¶9 All agree that SB 1828 is a tax cut, and there is no legitimate dispute that JLBC concluded that SB 1828 will immediately reduce state tax revenues. As Appellants highlight [at 15], JLBC told legislators considering their votes on SB 1828 that "[t]o the extent that a reduction in tax liability incentivizes greater investment and generates more economic activity, for example, some of the revenue loss may be offset." [SA017 (emphasis added)]. In other words, JLBC – the Legislature's nonpartisan budgetary arm – forecasts that at most, only "some" of the revenue loss attributable to SB 1828 may be offset at some point. But because the long-term economic effects of the bill are irrelevant to the constitutional question here, the trial court did not consider them. [SA070]

¶10 The trial court rightly held that "accepting the factual allegations the Complaint as true, [Appellants'] challenge based on referability fails. SB 1828 does not provide for nor is it tied to any appropriation. It is not required for the support of state institutions. As a result, SB 1828 is not an exempt 'support and maintenance' measure." [SA071]

Argument

I. The Support and Maintenance Exception Applies Only to Certain "Appropriations."

A. This Court has already interpreted the Support and Maintenance Exception.

¶11 Section 1(3) provides that "two separate and distinct classes of acts are exempt from the referendum": (1) "measures immediately necessary for the preservation of the public peace, health or safety," and (2) "measures for the support and maintenance of governmental departments and institutions," which "relates wholly to appropriations for support of government function." *Garvey*, 64 Ariz. at 353 (emphasis added); *see also Orme v. Salt River Valley Water Users' Ass'n*, 25 Ariz. 324, 346 (1923) ("reserved power [of referendum] does not apply to acts requiring 'earlier operation to preserve the public peace, health or safety,' nor to those providing 'appropriations for the support and maintenance of the departments of state and of state institutions'").

¶12 This binding construction of the Support and Maintenance Exception is the only interpretation that makes sense when considering the plain language of Section 1(3), coupled with Arizona's "strong public policy favoring the initiative and referendum" under which "the constitutional right to referendum is to be broadly construed." *Lawrence*

v. Jones, 199 Ariz. 446, 449 ¶ 7 (App. 2001). Appellants' contrary arguments lack merit.

¶13 ***First***, Appellants' interpretation defies the plain text of Section 1(3). Appellants dismiss *Garvey* in one paragraph [at 12], instead arguing that the support and maintenance exception applies to any law that "directly prescribes, reforms or recalibrates tax assessments or rates." [OB at 11] That sweeping language is nowhere in the Constitution or this Court's precedent. Appellants assure the Court [at 6] that their interpretation adheres to "textual truism," yet ask the Court to ignore the word "appropriations" in the second clause of Section 1(3) and assume it is mere "semantic asymmetry" or "a vestigial artifact of the text's metamorphosis" during the drafting process. [OB at 7, 8] But constitutional language can't be brushed off as mere "semantics"; it is precisely what the Court is tasked with interpreting. *See Tumacacori Mission Land Dev., Ltd. v. Union Pac. R. Co.*, 228 Ariz. 100, 102 ¶ 6 (App. 2011) ("When called upon to interpret a constitutional provision, we first examine the provision's plain language").

¶14 Nor is the constitutional language "asymmetrical." While the first clause of Section 1(3) provides a general statement of the core of acts

exempt from the referendum power, it's the second clause that provides the specifics:

> to allow opportunity for referendum petitions, no act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure, except such as require earlier operation to preserve the public peace, health, or safety, or to provide appropriations for the support and maintenance of the departments of the state and of state institutions[.]

What follows from the word "except" is not "tax measures" or even the more general "laws . . . for the support and maintenance of the departments of the state government and state institutions" that appears in the first clause.[2] It is specific to "appropriations for the support and maintenance of the state and of state institutions." Appellants argue [at 7] that the second clause merely "accelerates the effective date of emergency laws and appropriations measures," but they ignore the

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[2] If the framers intended to exempt tax-levying measures from the referendum power, they would have expressly done so; indeed, several other state constitutions do just that alongside exemptions for "appropriations." *See, e.g.*, CAL. CONST. art. II, § 9 (exempting from referendum "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State"); OHIO CONST. Article II, § 1d ("Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect").

language that immediately precedes the accelerated effective date: "to allow opportunity for referendum petitions." Appellants don't suggest that the first clause of Section 1(3) somehow exempts "laws immediately necessary for the preservation of the public peace, health, or safety" from the emergency clause requirements provided in the second clause; why, then, should the construction be any different as to the support and maintenance exception? Appellants have no answer.

¶15 ***Second***, Appellants' reliance on secondary interpretation methods fails. Appellants first cling [at 8] to the fact that during the Arizona Constitutional Convention, the original proposition (Proposition No. 4) containing what is now article IV, part 1, § 1 had the word "appropriations" in the first clause of what is now Section 1(3), but that delegates eventually removed that word (Substitute Proposition No. 4). They say [at 8] this is evidence that "the Framers actually ***repudiated*** the notion that the 'support and maintenance' clause immunizes only appropriations." To read Appellants' version of events and proclamation about the "Framers' intent," one might think that Substitute Proposition No. 4 did nothing other than make this change and that the ultimate exclusion of the word "appropriations" was the subject of debate. But

that's emphatically not the case. Far from merely removing a single word, Substitute Proposition Number 4 made significant structural, substantive, and grammatical changes to the text. [SA028; SA038-55] And there was no substantive discussion among delegates explaining or debating the removal of the word "appropriations" as part of the many changes to the text of article IV. [SA029]

¶16 Appellants also posit that, despite the constitutional text and this Court's interpretation of Section 1(3), the "sentiments of the inaugural Legislature" support a different, broader interpretation. Nonsense. Appellants point [at 10-11] to a few instances of the Legislature including a "'support and maintenance' proviso" when levying new taxes around the time Arizona first achieved statehood. All that tells us is that the Legislature imposed new taxes around the birth of the State, and stated that it found those taxes necessary to raise revenue to fund state operations.[3] There's simply no evidence that either

[3] Of course, this legislative history also pre-dates *Garvey*, and "[t]he responsibility of" interpreting Section 1(3) "is given to the courts—not the legislature." *Arizona Sch. Boards Ass'n, Inc. v. State*, ___ Ariz. ___, 2022 WL 57291, at *4 (2022).

the Legislature or the People historically understood the referendum power to cover any laws related to taxation.

¶17 On the contrary, and since shortly after statehood, the Legislature understood that tax levies were subject to referendum because it passed many such levies with emergency clauses.[4] And as the Attorney General observed three decades ago, "[o]n at least three separate occasions in the past referendum petitions have been taken out that successfully referred to the ballot tax measures enacted by the Arizona Legislature." Ariz. Op. Atty. Gen. No. I90-068, 1990 WL 484076, at *4 (describing these three instances in detail). What's more, this Court "has considered a situation in which a repeal of a tax measure was itself the subject of a successful referendum petition," and "did not question in

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[4] *See, e.g.*, Laws 1912 (1st Spec.Sess.) Ch. 64; Laws 1913 (3rd Spec.Sess.) Ch. 73; Laws 1915 (1st Spec.Sess.) Ch. 4; Laws 1921 (Reg.Sess.) Ch. 157; Laws 1931 (Reg.Sess.) Ch. 2; Laws 1931–1932 (1st Spec.Sess) Ch. 1; Laws 1933 (Reg.Sess.) Ch. 90, § 24; Laws 1935 (Reg.Sess.) Ch. 78; Laws 1936 (1st Spec.Sess) Ch. 2; Laws 1937 (Reg.Sess) Ch. 66; Laws 1937 (1st Spec.Sess.) Ch. 2; Laws 1946 (3rd Spec.Sess.) Ch. 12; Laws 1950 (1st Reg.Sess.) Ch. 59; Laws 1951 (1st Reg.Sess.) Ch. 59; Laws 1952, (2d Reg.Sess.) Chs. 72; 100; 136; Laws 1955 (1st Reg.Sess.) Ch. 22; Laws 1956 (2d Reg.Sess.) Ch. 115; Laws 1956 (3rd Spec.Sess.) Ch. 1; Laws 1957 (1st Reg.Sess.) Ch. 17; Laws 1958 (2d Reg.Sess.) Ch. 39; Laws 1959 (1st Reg.Sess.) Ch. 61; Laws 1962 (2d Reg.Sess.) Ch. 142; Laws 1963 (1st Reg.Sess.) Chs. 60; 84; Laws 1965 (3rd Spec.Sess.) Chs. 2; 3.

any respect the validity of the referendum." *Id.* at n.14 (*citing McBride v. Kerby*, 32 Ariz. 515 (1927)).

¶18 In short, Appellants' claim [at 11] that *Garvey* "had nothing to do with the referability of revenue measures" is baseless and ignores the plain language of that decision. *Garvey* gave meaning to both clauses of Section 1(3) and held that the Support and Maintenance Exception "relates wholly to appropriations for support of government function." 64 Ariz. at 353. That *Garvey* factually did not involve the question "whether revenue measures are for the 'support and maintenance' of state government" [OB at 12] does not change the binding nature of its interpretation of Section 1(3) and its limited definition of the scope of legislative acts exempt from the otherwise-broad referendum power.

¶19 The trial court correctly held that "Section 1(3) narrowly applies only to 'appropriations for support of government function,'" and "SB 1828 does not appropriate funds." [SA068] Under *Garvey*, its judgment should be affirmed on this ground alone.

B. *Wade* ignored this Court's precedent and was incorrect.

¶20 Next, Appellants rely heavily on a two-page court of appeals opinion that disregarded this Court's precedent in a brief footnote.

Appellants cite *Wade* for the proposition [at 5] that "a tax measure . . . intrinsically is 'for the support and maintenance'" of state government under Section 1(3). But *Wade* improperly failed to apply *Garvey*, declaring without analysis that this Court merely "assumed that only appropriation measures were excepted from referendum." 173 Ariz. at 463 n.1.[5] Like Appellants, the court of appeals failed to give meaning to Section 1(3)'s second clause, which specifies the only two classes of laws not subject to the referendum power, and the way one of them is exempt (*i.e.*, an emergency clause and a supermajority vote in the Legislature). Accepting *Wade*'s interpretation would lead to the absurd result that the first clause of Section 1(3) somehow exempts "laws immediately necessary for the preservation of the public peace, health, or safety" from the emergency clause requirements in the second clause.[6]

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[5] *State v. Smyers*, 207 Ariz. 314, 318 n.4 (2004) ("The courts of this state are bound by the decisions of this court and do not have the authority to modify or disregard this court's rulings.").

[6] In addition, the parties in *Wade* conceded that Section 1(3) applied to the county referendum at issue, despite Section 1(3)'s textual application to only the "state." 173 Ariz. at 463. But a county is not the "state," and that concession may conflict with this Court's recent decisions, *see, e.g.*, *Arizona Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix*, 247 Ariz. 45, 48 ¶¶ 8-14 (2019) (statute referencing "statewide"

¶21 Beyond that, Appellants' (and *Wade*'s) reliance on Washington and South Dakota cases is misplaced. [OB at 14-15] Unlike the Arizona Constitution, the Washington and South Dakota constitutions do not reference "support and maintenance" followed by a specific reference to "appropriations" for that support and maintenance in describing which acts are not referrable. [SA030-31 (comparison of text of Arizona and Washington constitutions); SA010 (full text of South Dakota constitution)] Appellants' suggestion [at 12] that Washington has an "equivalent clause" in its constitution is misleading, and overlooks this fundamental difference. And it's simply not the case that Arizona courts defer to Washington and South Dakota cases when the text of the relevant constitutional provisions is materially different as it is here. *See Kotterman v. Killian*, 193 Ariz. 273, 291-92 ¶¶ 68, 70 (1999) ("[W]hile Washington's judicial decisions may prove useful, they certainly do not control Arizona law," and because the states "were founded under markedly different historical circumstances," it "is difficult, if not impossible, to apply the intent of one group of constitutional framers to

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initiatives doesn't apply to local initiatives), and is yet another reason to be skeptical of *Wade*.

another operating at a different time and place").

¶22 Beyond that, Appellants' citation [at 12] to *Reiter v. Hinkle*, 297 P. 1071, 1073 (Wash. 1931) as somehow indicative of this Court's intent in *Garvey* is doubly wrong. That decision not only interpreted a meaningfully different constitutional provision, but also came nineteen years after the adoption of the Arizona Constitution (meaning the delegates didn't consider it) and fifteen years before *Garvey* (meaning this Court neither adopted nor cited it). *See Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 409–10 ¶ 28 (2005) (decisions from other jurisdictions "are considerably less persuasive when they are issued *after* Arizona adopted the provision and particularly when, as here, the two states have taken divergent paths in interpreting their constitutional provisions"). This Court has interpreted Section 1(3) which, unlike the Washington Constitution, expressly limits the support and maintenance exclusion to "appropriations for the support and maintenance" of state institutions. Neither *Wade* nor out-of-state courts can alter that holding.

II. The Support and Maintenance Exception Doesn't Apply to Tax Cuts.

¶23 Lastly, even if this Court overturned *Garvey* and held that the Support and Maintenance Exception extends beyond appropriations,

Appellants' claim still fails. *Wade* does not support Appellants' broad theory [at 11] that Section 1(3) exempts any measure that in any way "prescribes, reforms or recalibrates tax assessments or rates." *Wade* says no such thing, and its holding is limited to its unique facts. There, "Greenlee County, faced with declining receipts from conventional revenue sources, enacted with legislative authority a one-half cent sales tax to fund existing county programs," and citizens circulated and gathered referendum petitions to try to send the measure to the ballot. 173 Ariz. at 463. On those facts, the court of appeals agreed with the trial court that the measure could not be referred. It found convincing the policy arguments that "[p]ermitting referenda on support measures would allow a small percentage of the electorate . . . to prevent the operation of government" and "for a period of over a year prevent what a majority would believe to be necessary government programs." *Id.*

¶24 As the trial court explained [SA070], even applying *Wade*, SB 1828 differs from the *Wade* taxing measure in every material way. And contrary to Appellants' contention [at 16] that the trial court "resolve[d] factual disputes between the parties on an undeveloped record," the trial court made no findings about the long-term economic impacts of SB 1828.

The trial court correctly held that, unlike the new tax in *Wade*, SB 1828 (1) does not impose a new tax "to raise money to address a budget deficit" and (2) "is not necessary for government to continue to operate." [SA070] Nor did Appellants offer any "evidence or argument that referring it to the ballot will impair government operations"; tax rates will stay at their current (higher) rates, and state government will continue to function. [*Id.*] None of these conclusions required any findings about the bill's "impact on net revenues over various time horizons," the only "fact question" Appellants claim is in dispute. [OB at 15[7]]

¶25 Despite now claiming this fact is in dispute, Appellants' counsel conceded below that the long-term effects of tax cuts are "unknowable," and Appellants offered no evidence suggesting otherwise. [SA060 ("our position is that's unknowable and, therefore, a question the Court should never address"); SA059 ("if we had many months and

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[7] Appellants [at 14] cite *Andrews v. Munro*, 689 P.2d 399 (Wash. 1984), to say that courts shouldn't engage in "budgetary suppositions" to decide whether a measure is referable. But the legislative act in *Andrews* renewed an expiring tax, meaning that the revenue source would have at least temporarily disappeared pending a referendum. *Id.* at 400. And the court also determined that the measure at issue "had the clear purpose of raising revenue" that otherwise wouldn't exist. *Id.* at 401. The facts of this non-binding decision thus differ materially from those here and, in any event, support IIA.

unlimited budgets for experts to come in and talk to your Honor about it, we would not know the answer with a higher level of confidence than we have today")] In all events, the trial court made clear that it "need not engage in a factual inquiry regarding the long-term effects of tax cuts on the General Fund," [SA070] because the "parties agree that the immediate effect of SB 1828 and its companion bills will be to reduce income tax revenue to the State." [SA063] (emphasis added)]. The trial court correctly held that *Wade* "does not apply to SB 1828." [SA071]

Rule 21(a) Notice

¶26 IIA requests an award of its attorneys' fees and costs under the private attorney general doctrine and A.R.S. §§ 12-341 and 12-342.

Conclusion

¶27 The trial court correctly applied this Court's precedent and held that SB 1828 doesn't appropriate funds, isn't necessary to support State institutions, and thus is subject to a referendum. This Court should affirm.

RESPECTFULLY SUBMITTED: January 14, 2022.

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