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)

COMBINED RESPONSE TO BRIEFS OF *AMICI CURIAE* (1) GOLDWATER INSTITUTE; AND (2) ARIZONA ATTORNEY GENERAL MARK BRNOVICH

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Introduction

The Goldwater Institute ("GI") and Attorney General Mark Brnovich ("Brnovich") filed amicus curiae briefs supporting Appellants' remarkable position that all legislative acts related in any way to taxation are immune from the People's fundamental right to referendum. Both repeat (and sometimes restate) arguments made by Appellants, and IIA will not burden the Court with its own restatements. But both GI and Brnovich urge the Court to reverse the trial court based on constitutional arguments that Appellants don't advance. IIA responds below.

First, GI says the Court should reverse because it's "unclear" what would happen if Arizonans vote "no" on the Referendum because of the Voter Protection Act ("VPA"). It provides various hypotheticals to concoct an alleged "complicated constitutional question," and to support its claim that "the principal of constitutional avoidance counsels against" affirming. In other words, GI asks the Court not to enforce the plain language of Section 1(3) because the Court may later have to determine the VPA's contours when a referendum succeeds. But that's not how the "constitutional avoidance" doctrine works, and the constitutional question presented here has nothing to do with the VPA (or GI's bias

against that constitutional provision that serves to protect the fundamental right to public democracy).

Second, Brnovich and GI contend that permitting courts to look at the immediate effect of a bill that all agree will slash income tax rates and immediately decrease state revenues would violate the separation of powers. But both these facts were judicially discoverable; in fact, the trial court relied on the conclusions reached by the Legislature's nonpartisan budget arm, the same body on which legislators rely when casting votes. Brnovich's and GI's manufactured constitutional crisis is no crisis at all.

This is a simple case with simple facts that this Court's longstanding precedent should decide in IIA's favor. Nothing that either GI or Brnovich says changes this, and this Court should affirm the judgment below.

Argument

I. The VPA Is Irrelevant.

Though the VPA "altered the balance of power between the electorate and the legislature" and is an important limitation on the Legislature's power, *Arizona Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶¶ 6-7 (2009), it has nothing to do with the narrow issue of constitutional interpretation this appeal presents.

Nothing. Yet GI leads off its brief with a five-page [at 3-7] argument that it means everything, and that the very existence of the VPA is reason enough to interpret Section 1(3) to preclude referenda of tax-related measures. And according to GI [at 7], to rule otherwise and allow the People to reject SB 1828 could require this Court to one day address "complicated constitutional question[s]" about the Legislature's power under the VPA after a successful referendum effort, which supports the application of the constitutional avoidance doctrine.

GI's formulation and suggested application of the constitutional avoidance doctrine are just plain wrong. GI cites [at 7] this Court's recent decision in *Garcia v. Butler in & for Cty. of Pima*, 251 Ariz. 191 ¶ 18 (2021) and says that this Court "appl[ied] constitutional avoidance where one possible interpretation of [a] law would raise constitutional problems with a different law." But *Garcia* didn't say that; instead, this Court interpreted a particular statute (A.R.S. § 13-4518) in a way that would "comply with constitutional requirements." That's how constitutional avoidance works in practice; if possible, courts interpret statutes before them in a way that avoids making them unconstitutional. It is not, as GI suggests [at 7], a canon under which courts should pick one

interpretation of a constitutional provision over another because someone says that doing so might someday raise other allegedly "complicated constitutional question[s]" in hypothetical future litigation.

The constitutional question raised in this appeal is narrow; is SB 1828 a referable legislative act? And the Court can and should answer that question based on Section 1(3)'s plain language and its own precedent. It need not engage in a series of "what ifs" to anticipate future constitutional questions that might be raised down the road. As a result, the Court should give no weight to GI's strange reliance on the VPA.

II. Courts Can Determine Whether a Legislative Act Reduces Tax Rates and Revenue.

Next, both GI and Brnovich posit that the separation of powers enshrined in article III of the Arizona Constitution requires this Court to reverse. Wrong again.

As Brnovich puts it [at 9-10], the separation of powers "support[s] 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." For its part, GI claims [at 10] that "there is no judicially manageable distinction between tax laws that *increase* taxes and those that *reduce* taxes." GI also cites [at 10-11]

unrelated federal case law arising under the U.S. Constitution's "Origination Clause" holding that "the question of whether or not a bill increases revenue is a nonjusticiable political question." But it is not a separation of powers violation for the judiciary to use the same resources as the political branches to find that a bill like SB 1828 dramatically lowers tax rates and will immediately decrease state revenue.

Arizona's separation of powers doctrine "ensures sufficient checks and balances to preserve each branch's core functions." *San Carlos Apache Tribe v. Superior Ct. ex rel. Cty. of Maricopa*, 193 Ariz. 195, 211 ¶ 37 (1999). Both GI and Brnovich suggest this doctrine is implicated if courts make long-term projections about whether a particular tax decrease will "trickle down" and ultimately lead to a revenue increase.

Even if that were true, that's not what the trial court here did, and it's not what this Court must do to affirm. There's no need to reach any of these issues if this Court simply reaffirms its controlling interpretation of Section 1(3) because SB 1828 doesn't contain an "appropriation." *Garvey v. Trew*, 64 Ariz. 342, 35 (1946).

Beyond that, the trial court made no findings about the long-term economic impacts of SB 1828. It had no reason to, finding instead that,

unlike the tax in *Wade v. Greenlee Cty.*, 173 Ariz. 462 (App. 1992), 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.] The trial court also held that Appellants offered no "evidence or argument that referring it to the ballot will impair government operations." [*Id.*] None of these conclusions required any findings from the trial court about the bill's effect over various long-term time horizons.

As Appellants concede, the long-term effects of tax cuts like those in SB 1828 are "unknowable" [SA060.] That's why the trial court rejected any suggestion that it needed to make such findings; all that mattered was that the "parties agree[d] that the immediate effect of SB 1828 and its companion bills will be to reduce income tax revenue to the State." [SA063 (emphasis added).] And the trial court was on solid factual footing, relying – as did the parties – on an analysis provided by the Legislature's nonpartisan budget arm concluding that only "some of the revenue loss may be offset" at some unknown point in the future. [SA017 (emphasis added).] These findings don't violate the separation of powers.

Relatedly, the political question doctrine provides that a claim is non-justiciable "when there is a textually demonstrable constitutional

commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351 ¶ 17 (2012) (cleaned up). But no matter what federal cases may have held under the Origination Clause [GI at 10-11], whether a legislative act raises revenue is not a "political question" in Arizona. As amicus curiae Arizona Center for Law in the Public Interest notes [at 6-7], courts makes such determinations when applying both article IX, § 22 and article IX, § 23 of the Arizona Constitution. *See, e.g.*, *Biggs v. Betlach*, 243 Ariz. 256, 259 ¶¶ 11-24 (2017) (deciding whether an "assessment" was a tax increase that required supermajority approval); *Arizona Chamber of Com. & Indus. v. Kiley*, 242 Ariz. 533, 540 ¶¶ 21-26 (2017) (evaluating whether an initiative required a "mandatory expenditure of state revenues").

At bottom, neither the separation of powers nor the political question doctrines favor the reversal of the trial court's judgment. The Court shouldn't credit amici's contrary arguments.

Conclusion

Both GI and Brnovich purport to come before this Court in protection of Arizonans' rights. Yet their arguments urge the derogation of the broad and fundamental right to "public democracy," *Fann v. State*, 251 Ariz. 425 ¶ 26 (2021), here in the form of a referendum power that should allow the public to second-guess the Legislature's harmful decisions about taxation. Their arguments fail to convince, and this Court should affirm the judgment below.

RESPECTFULLY SUBMITTED: January 19, 2022.

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