

**ARIZONA SUPREME COURT**

ARIZONA SCHOOL BOARDS ) Arizona Supreme Court  
ASSOCIATION, INC., *et al.*, ) No. CV-21-0234-T/AP  
)  
*Plaintiffs/Appellees,* ) Court of Appeals, Division One  
) No. 1 CA-CV 21-0555  
v. )  
)  
STATE OF ARIZONA, *a body politic,* ) Maricopa Co. Superior Court  
) No. CV2021-012741  
*Defendant/Appellant.,* )  
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**LEGISLATIVE DEMOCRATS' *AMICUS* BRIEF IN SUPPORT OF  
APPELLEES' ARIZONA SCHOOL BOARDS ASSOCIATION, ET AL.**

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Rhonda L. Barnes (023068)  
Jane Ahern (034865)  
**Arizona House of Representatives**  
1700 West Washington  
Phoenix, Arizona 85007  
Telephone: 602-926-5848  
[rbarnes@azleg.gov](mailto:rbarnes@azleg.gov)  
[jahern@azleg.gov](mailto:jahern@azleg.gov)  
*Attorneys for Amici*

Lisette Flores (023641)  
**Arizona Senate**  
1700 West Washington  
Phoenix, Arizona 85007  
Telephone: 602-926-4471  
[lflores@azleg.gov](mailto:lflores@azleg.gov)  
*Attorneys for Amici*

Arizona House of Representatives Minority Leader Reginald Bolding and Arizona Senate Minority Leader Rebecca Rios (collectively "Legislative Democrats") submit this brief as *amici curiae* in support of Appellees' Answering Brief pursuant to this Court's order dated October 1, 2021 and with the consent of all parties. The purpose of this brief is to provide the Court with important context for the current dispute based on the policy decisions of the majority in the legislature that crammed numerous substantive policy provisions in the 2021 budget bills in violation of the clear constitutional requirements for single subject and titles.

### **STATEMENT OF INTEREST**

*Amicus Curiae* Representative Bolding is the minority leader in the Arizona House of Representatives with a caucus of 29 members, and one of the two representatives for Arizona's 27th legislative district for the 55th Legislature. Senator Rios is the minority leader in the Arizona Senate, with a caucus of 14 members, and the senator for Arizona's 27th legislative district for the 55th Legislature. As leaders of the minority caucuses in both chambers of the Arizona Legislature, the Legislative Democrats participate in fiscal debates regarding the adoption of a state budget and the specific appropriations of state monies.

The process to procure passage of the 2021 budget was unlike any other employed by the majority in the Legislature over the past many years. The

Legislative Democrats respectfully submit this brief to assist the Court in understanding the context of the budget process in past sessions and how the budget bills passed in the 55th Legislature mark a stark and dangerous deviation from previous legislative sessions in violation of the constitution.

## **ARGUMENT**

### **I. IT IS NOT A POLITICAL QUESTION TO DETERMINE IF THE PROVISIONS INCLUDED IN A BRB ARE ACTUALLY RECONCILING THE BUDGET**

Appellant concedes (at 6) that it is not a political question whether legislation complies with the title and single subject requirements of the constitution. While making that concession, Appellant tries to make a distinction between judicial review of the text and title and judicial review of the policy-making decisions about what appropriations should go in the budget and what other measures are necessary to implement it. The latter Appellant describes as a political question beyond this Court's authority. But the legislative majority chose to tie the challenged BRBs to the feed bill by labeling them as budget reconciliations. It cannot be disputed that the Legislature has sole authority to decide what titles it wants to provide to various pieces of legislation. But once it has made that decision, that title and the provisions within each measure are subject to constitutional restrictions.

When the majority in the legislature chooses to title a particular piece of legislation as "budget reconciliation," the only way a court can determine if the measure complies with the constitutional requirements is to analyze whether it actually reconciles the budget. This is not a political inquiry into the propriety of the policy decisions or a peek into how the legislative "sausage" is made, but rather an appropriate exercise of judicial review of the title and text of the legislation. Accordingly, there is nothing political – or new or unique – about Appellees' arguments regarding the challenged BRBs. The majority in the legislature provided the titles and content, and now those measures must withstand appropriate scrutiny into their constitutional compliance.

## **II. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUEST FOR PROSPECTIVE RELIEF**

Appellant claims (at 19) that the Legislature had no notice that its BRBs could be struck down as a violation of the single subject rule and (at 21) that it believed the courts would not force it to separate the budget measures into several bills. Appellant's assertion is unfounded. This Court provided guidance to the Legislature specifically regarding budget reconciliation measures in *Bennett v. Napolitano*, 206 Ariz. 520 (2003), and subsequent budget measures demonstrate that the Legislature understood this Court's directives and knew how to comply with them.

The petitioners in *Bennett* were the four legislative leaders at the time the opinion was published. Those legislators were put on notice by this Court that budget bills (at the time called omnibus reconciliation bills, or ORBs) must comply with the constitution's single subject requirement, though no party raised that issue directly with this Court. Instead, it was only raised by an *amicus curiae* brief, and thus this Court did not rule directly on the question of whether those ORBs violated the single subject requirement. *Bennett*, 206 Ariz. at 528 ¶ 36. This Court did, however, express concern that a budget bill that potentially violated the single subject rule further implicated the governor's line-item veto authority because it was challenging for the Court to determine what was an appropriation. *Id.* at ¶ 39. In so ruling, this Court emphatically understood that the ORBs must comply with the constitutional requirements for single subject and title.

But this Court did not merely imply this requirement; it provided valuable and clear guidance to the Legislature: "Had the legislature addressed these subjects in separate bills, there would be no need to determine whether they were or were not appropriations. Thus, the problem we face is in part created by apparent non-adherence to the single subject rule in the legislative process." *Id.* This Court was reluctant to rule upon the validity of the governor's vetoes, in part, because "there are also legitimate questions about whether the ORBs themselves are constitutional." *Id.* at ¶ 40. Thus, there can be no serious doubt that BRBs must

comply with the constitution and that the legislative leaders knew this was the requirement.

This conclusion is supported by comparing the actual budget bills that were introduced before and after the *Bennett* decision. In the 2003 legislative session, the one at issue in *Bennett*, the Legislature passed a total of only five budget bills. See Bill Status Inquiry, 2003 – Forty-sixth Legislature – First Regular Session, <https://apps.azleg.gov/BillStatus/SearchChapteredTransmittedTo> (chaptered bills 261-265). Following *Bennett*, which was published just a month before the 2004 legislative session began, the Legislature in 2004 passed a total of 14 budget bills, 11 of which bore the title of BRB and none of which were entitled ORBs.<sup>1</sup> See Bill Status Inquiry, 2004 – Forty-sixth Legislature – Second Regular Session, <https://apps.azleg.gov/BillStatus/SearchChapteredTransmittedTo> (chaptered bills 275-287). Thus, the Legislature received and understood the clear message from this Court in *Bennett*. Rather than attempting to pass more unconstitutional ORBs, the 2004 Legislature broke down the provisions into smaller pieces in order to comply with the constitutional requirements.

The Legislature continued to understand this Court's guidance more than a decade later. For example, in 2015 and 2016, the Legislature passed a total of 12

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<sup>1</sup> Following the 2003 legislative session, the Legislature has never again enacted an ORB. It has only enacted BRBs.

and 14 budget bills, respectively. In fact, in 2016, the Legislature properly differentiated a human services BRB separate from a health BRB, correctly adhering to the single subject mandate of the constitution rather than joining these two together in one bill.

There is nothing particularly unique about budget-related measures that would exempt them from constitutional requirements or court review. They have been susceptible to challenge for many decades and the courts are well equipped to review them just as they would any non-budget related measures.

### **III. THE 2021 BUDGET PROCESS DEMONSTRATES WHY THE SINGLE SUBJECT RULE IS ESSENTIAL FOR OUR DEMOCRACY**

The constitution unambiguously requires that all acts adopted by the Legislature relate to a single subject. There is no discretion or exception based on any exigency, including the garnering of support for the passage of a budget before the end of the fiscal year, provided for in the constitution.

Legislators understand this constitutional mandate and they understand the court guidance that the single subject rule requires budget-related measures to be tied to budget appropriations and not include superfluous substantive policy. For example, in 2016, former State Senator and current State Representative John Kavanagh (a Republican who is currently vice-chair of the House Appropriations Committee), strongly protested the subject matter of proposed floor amendments to the government BRB. His opposition was based on his understanding that the

proposed amendments injected policy into the budget bills. He asserted that it “is bad for the process” to put policy provisions into the budget bills and that the budget should be “about spending money or policy directly related to spending money.” *See* Senate Floor Session, available at

<https://www.azleg.gov/videoplayer/?eventID=2016051180&startStreamAt=5351>.

(Former Senator Kavanagh's comments begin at 1:58 minutes) (May 3, 2016). The Senate did not adopt any of the proposed floor amendments to which Senator Kavanagh objected because they purportedly contained policy not related to the budget.

In the most recent legislative session, during the vote on HB2898 (the K-12 Education BRB), State Senator Christine Marsh expressed her feeling of impotence at having to review and understand the multiple substantive policy provisions that were included in a last-minute amendment to the bill. She shared that less than 90 minutes prior to third reading (when the bills are passed out of their respective chambers), she had received a 15-page amendment concerning many pieces of legislation that had previously failed earlier in the legislative session. She called the process “twilight zone ridiculous” and referenced the “dead” policy bills inserted into the BRB as “frightening.” *See* Senate Floor Session, available at

<https://www.azleg.gov/videoplayer/?eventID=2021061059&startStreamAt=2234>

(Senator Marsh's comments begin at 1:46 minutes) (June 30, 2021).



The unusual process followed for the 2021 budget measures provides a clear example of why Arizona's founders included single subject and title requirements in our constitution. By adding unrelated, substantive policy into the budget bills, the legislative majority circumvented the normal legislative process, kept the members and the public in the dark, and forced members to vote on a hodgepodge of policy ideas with little time to understand the impact of what they were voting on. It was truly a disservice to democracy.

#### **IV. THE ARIZONA LEGISLATURE KNOWS HOW TO COMPLY WITH THE SINGLE SUBJECT RULE**

In the years that followed *Bennett*, the Legislature broke down the BRBs into narrow categories with only one subject per bill, with only provisions that were necessary to implement the budget and did not include unrelated policy provisions. For example, the 2005 BRB for criminal justice, HB2776, was comprised of 15 sections, four of which amended or added statutory changes, while the remainder were session law provisions that explained legislative intent regarding payment for adult probation programs, transfer of funding for adult probation to Maricopa County, and use of existing funds. *See* HB2776, available at <https://www.azleg.gov/legtext/47leg/1R/laws/0300.pdf>. These provisions were necessary to carry out the state budget and did not include superfluous and unrelated policy matters. The Legislature knows how to comply with the

constitution and the *Bennett* ruling, but this most recent legislative session, it simply chose not to.

This year's budget was extraordinary in both content and procedure. After the meeting of the House Appropriations Committee on May 25, 2021, nearly a month passed before the bills were finally passed. This is time that the legislators could have offered their substantive policy ideas in separate legislation that would have complied with the single subject and title requirements and which could have been openly debated by the public and members. But instead, after a month of false starts and closed-door negotiations, to which Legislative Democrats were not invited, members rapidly began to receive floor amendments on June 21st for a final budget that they would vote on just three days later. Instead of the kinds of technical changes or final tweaks that may be anticipated, these floor amendments contained drastic new pieces of policy, unrelated to any specific spending provisions in the Feed Bill or BRBs that had gone through their respective appropriations committees in May. For example, the Cobb Floor Amendment to HB2896, the Health BRB, contained 11 pages of new language regarding COVID-19 policies for local jurisdictions and schools. *See* Cobb Floor Amendment to HB2896, available at

[https://www.azleg.gov/legtext/55leg/1R/adopted/H.2896FloorCOBB2\\_merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2896FloorCOBB2_merged.pdf).

This kind of substantive and controversial policy should have been a standalone

bill that received scrutiny by the public and other members, rather than being tacked onto the budget. Moreover, the bill's title was not changed to reflect any of the COVID-19 provisions that the floor amendment added to the bill.

Three amendments to HB2891, the Budget Procedures BRB (which was substituted by SB1819 in the final vote), made significant changes to the process of elections procedures and elections audits, changed the scope of the Attorney General's legal authority, and preempted localities from imposing certain COVID-19-related public health regulations. None of those newly added provisions is reflected in the bill's title and Legislative Democrats are at a complete loss for how they relate to "budget procedures." *See* Hoffman Floor Amendment to HB2891, available at

[https://www.azleg.gov/legtext/55leg/1R/adopted/H.2891FloorHOFFMAN2\\_Merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2891FloorHOFFMAN2_Merged.pdf); Cobb Floor Amendment to HB2891, available at

[https://www.azleg.gov/legtext/55leg/1R/adopted/H.2891FloorCOBB4\\_Merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2891FloorCOBB4_Merged.pdf);

Kavanagh Floor Amendment to HB2891, available at

[https://www.azleg.gov/legtext/55leg/1R/adopted/H.2891FloorKAVANAGH\\_Merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2891FloorKAVANAGH_Merged.pdf). Not only were members forced to vote on policies unrelated to any specific

spending provision from the BRB they had seen in the House Appropriations

Committee, but they were also forced to do so with just a few hours to review and

understand the implications of the added policy.

The amendments to the K-12 Education BRB (HB2898) were particularly extreme in terms of the sheer volume of new policy introduced on the day of the vote. The Burges Floor Amendment prohibited a school district or charter school from requiring a student or teacher to receive a COVID-19 vaccine or to wear a face covering in order to participate in in-person instruction. *See* Burges Floor Amendment to HB2898, available at [https://www.azleg.gov/legtext/55leg/1R/adopted/H.2898FloorBURGES2\\_Merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2898FloorBURGES2_Merged.pdf). This amendment also added new language on a completely unrelated topic: requiring the State Board of Education to include a comparative discussion of political ideologies in social studies curriculum. *See id.* During the debate on the House floor, Representative Jennifer Pawlik called these changes "unprecedented;" noting that, "in the latest amendment we received right before COW started, it would be the Freedom Schools that would be developing this [new] curriculum." *See* House Floor Session, available at <https://www.azleg.gov/videoplayer/?eventID=2021061045> (Representative Pawlik's comments begin at 2:37:01) (June 25, 2021). Another floor amendment to HB2898 inserted expansive language prohibiting schools from teaching concepts related to race, ethnicity, or sex that would make an individual feel discomfort, guilt, or psychological distress because of their race, ethnicity, or sex; or that "academic achievement or meritocracy are racist or sexist or were created by a

particular race, ethnic group, or sex to oppress others." *See* Cobb Floor

Amendment to HB2898, available at

[https://www.azleg.gov/legtext/55leg/1R/adopted/H.2898FloorCOBB3\\_Merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2898FloorCOBB3_Merged.pdf).

The hodgepodge of unrelated policy regarding instruction on sexism, racism, and political ideology spilled into the subsequent Cobb #5 Floor Amendment, which

added further restrictions on instruction that "presents any form of blame or

judgment on the basis of race, ethnicity or sex." *See* Cobb Floor Amendment to

HB2898, available at

[https://www.azleg.gov/legtext/55leg/1R/adopted/H.2898FloorCOBB5\\_Merged.pdf](https://www.azleg.gov/legtext/55leg/1R/adopted/H.2898FloorCOBB5_Merged.pdf).

Again, none of these added provisions related to budget reconciliation and none are reflected in the bill's title.

Unlike previous sessions, this year's BRBs saw an unprecedented number of long and/or complex floor amendments. One such example was Senator Michelle Ugenti-Rita's five-page floor amendment to the Budget Procedures BRB, which related to a public health emergency even though the introduced bill had no section related to the current process for a state of emergency. *See* Ugenti-Rita Floor

Amendment to SB1819, available at

<https://www.azleg.gov/legtext/55leg/1R/adopted/S.1819FloorUGENTI-RITA2.pdf>.

Compare the unconventional process employed this year on budget amendments with previous legislative sessions. From 2016-2020, no BRB was amended with

more than one floor amendment. In fact, in 2020, only two of the ten budget measures were amended. Compare that to the 2021, when four of the budget measures were amended with multiple floor amendments, including SB1819 which was amended with four substantive policy floor amendments.

Furthermore, in years prior, it took approximately three days, on average, for budget bills that passed through their respective appropriations committees to then go through Rules, Caucus, and be debated and voted on the floor. In this case, the process took nearly a month before the budget bills introduced in their respective committees proceeded to be debated and voted by the legislature. That gave the majority members in both chambers plenty of time to enact their policy priorities in compliance with the constitution.

### **CONCLUSION**

This year's extraordinary budget process resulted in patently unconstitutional logrolling of budget bills. Driven by sharply divided majority caucuses and extremely small majorities, the House and Senate enacted BRBs that failed to reconcile the budget but rather capitulated to the policy demands of a handful of members who refused to vote for any budget bills unless their pet projects were included. This left Legislative Democrats in the dark, along with the public, until moments before floor debate and a quickly followed third read on the measures. This year's budget process and bills are precisely what our constitution prohibits.

The Legislature knows how to craft an appropriate budget; it has done so successfully for many years, but it did not even come close this year. Accordingly, Legislative Democrats respectfully request that this Court affirm the trial court and find these challenged measures unconstitutional.

RESPECTFULLY SUBMITTED this 15th day of October 2021.

**Arizona House of Representatives**

By: /s/ Rhonda Barnes  
Rhonda L. Barnes (023068)  
Jane Ahern (034865)  
Arizona House of Representatives  
1700 West Washington  
Phoenix, Arizona 85007  
Telephone: 602-926-5848  
rbarnes@azleg.gov  
jahern@azleg.gov  
*Attorneys for Amici*

**Arizona Senate**

/s/ Lisette Flores (with permission)  
Lisette Flores (023641)  
1700 W. Washington Street  
Phoenix, Arizona 85007  
Telephone: 602-926-4471  
lflores@azleg.gov  
*Attorney for Amici*