ARIZONA COURT OF APPEALS

DIVISION ONE

PIMA COUNTY, a duly authorized political subdivision of the State of Arizona; and TUCSON UNIFIED SCHOOL DISTRICT NO. 1, a duly authorized school district within Pima County, Arizona, Plaintiffs/Appellees, v. STATE OF ARIZONA, THE ARIZONA DEPARTMENT OF REVENUE, THE ARIZONA STATE BOARD OF EDUCATION, and THE ARIZONA SUPERINTENDENT OF PUBLIC INSTRUCTION, Defendants/Appellants	No. 1 CA-TX 20-0001 Maricopa County Tax Court No. TX2018-000737

PLAINTIFF/APPELLEE PIMA COUNTY'S ANSWERING BRIEF

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INTRODUCTION

Pima County joins in the Answering Brief of Tucson Unified School District ("**TUSD**") but files this brief to make supplemental arguments.

Article IX, Section 18 of the Arizona Constitution ("**Section 18**") limits the total aggregate amount of property taxes that may be levied on a parcel of residential property by the county, school district, community college district, and municipality within which that parcel lies, to 1% of full cash value (the "**1% Limit**"). The only ad valorem taxes levied by those jurisdictions[1] that are exempt from the 1% Limit are taxes levied to pay debt service on bonds or other types of indebtedness, and taxes authorized by voters in an override election. Ariz. Const. art. IX, § 18(2). The property-tax and school-finance statutes label as "secondary" the property taxes that are exempt from the 1% Limit. Other property taxes are "primary." A.R.S. § 15-101(20) and (25); A.R.S. § 42-11001(11) and (16)(a).

Section 18 requires the legislature to "provide by law a system of property taxation consistent with the provisions of this section" (Ariz. Const. art. IX, § 18(8)), and the Legislature did so by enacting § 15-972(E):

> Before levying taxes for school purposes, the board of supervisors shall determine whether the total primary property taxes to be levied for all taxing jurisdictions on each parcel of residential property, in lieu of this subsection, violate article IX, section 18, Constitution of Arizona. … If the board of supervisors determines that such a situation exists, the board shall apply a credit against the primary property taxes due from each such parcel in the amount in excess of article IX, section 18, Constitution of Arizona. Such excess amounts shall also be additional state aid for education for the school district or districts in which the parcel of property is located.

[1] Assessments and taxes levied by special taxing jurisdictions are also exempt, but that exemption isn't relevant for purposes of the legal analysis in this case.

The board of supervisors is required to "apply a credit"— the "**Homeowner Credit**"—to reduce the *school-district* portion of each homeowner's tax bill by any amount by which the *total* taxes of all the various taxing jurisdictions within which that property is located exceed the 1% Limit. The State is then required to provide the school district additional funding—"**Additional**[2] **State Aid**"—in the amount of the credits, in order to backfill the reduction in the school district's tax levy.

TUSD has historically qualified for more of this Additional State Aid than other school districts. The State claims this is due to the expense of TUSD's court-mandated desegregation program. That is completely arbitrary. The fact that the Legislature chose to implement the 1% Limit by providing additional aid to school districts doesn't mean that those districts are solely responsible for total property taxes exceeding that limit. One could just as easily blame the County's budgeted expenses for court services, or the Pima Community College District's personnel expenses. Nevertheless, some members of the Legislature have had a historic hostility to paying TUSD Additional State Aid,[3] and a bill was introduced in 2018 (Senate Bill 1529 ("**SB1529**"), 2016 Ariz. Sess. Laws, ch. 283) that was apparently intended to end that and shift the cost back to TUSD homeowners by eliminating their Homeowner Credits—not by amending § 15-972, however, but by adding a new subsection—subsection L—to § 15-910, which concerns school district *budgets* and has absolutely nothing to do with Additional State Aid.

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[2] In addition to the "additional state aid for education" under § 15-972(E), qualifying school districts in Arizona receive "additional state aid for education" under § 15-972(B), which—under § 15-972(D)—also reduces the tax bill for residential property owners. In fact, the subsection E calculations are applied to the residential-property-tax bills as already reduced under subsection D. The subsection B and subsection E amounts are both "additional state aid for education," but Plaintiffs are here concerned specifically with the subsection E additional state aid.

[3] An earlier attempt to shift funding to local taxpayers was made in 2015. *See* 2015 Ariz. Sess. Laws ch. 15.

Recognizing that eliminating the Homeowner Credit with no other means to comply with the 1% Limit would result in an illegal tax on TUSD homeowners, Pima County continued to follow the clear language of § 15-972(E) and give taxpayers their Homeowner Credits. But the State, though conceding that Pima County acted properly in giving the Homeowner Credits, has refused to pay TUSD the corresponding Additional State Aid. The result is that TUSD has properly budgeted expenditures for which it has no source of revenue to fund. The State owes TUSD $8,113,188.62 for fiscal year 2018-19 and $4,338,917.38 for fiscal year 2019-20. The amount owed for fiscal year 2020-21 is still being calculated; the preliminary estimate is approximately $1,710,000.

The State's position respects *neither* the clear statutory language of §§ 15-972(E) and 15-910(L), nor the "legislative history" of SB1529.

ARGUMENT

1. Not only is the State's interpretation of § 15-910(L) and 15-972(E) unsupported by the statutory text, it is not even consistent with the apparent legislative intent on which the State's arguments rest.

Under A.R.S. § 15-910(G) through (K), the cost of operating a court-ordered desegregation program is exempt from the budget limits that otherwise apply to school districts. SB1529 added a new subsection to § 15-910—subsection L. Section 15-910(L) provides that, as of FY 2018-19, "subsections G through K of this section apply only if the [school district] governing board uses revenues from secondary property taxes rather than primary property taxes to fund" its court-ordered desegregation program. It goes on to state that "[s]econdary property taxes levied pursuant to this subsection do not require voter approval, but shall be separately delineated on a property owner's property tax statement."

Nothing in § 15-910(L) refers to Additional State Aid or the 1% Limit or § 15-972(E), and SB1529 did not alter § 15-972(E) in any way. Section 15-972(E) is

the only way the Legislature has provided for 1% Limit compliance; Pima County has no authority to make up some *other* scheme for implementing the 1% Limit.[4] And, as explained in the TUSD Answering Brief, the desegregation-program portion of a school district's property tax levy is clearly subject to the 1% Limit. As a result, the State concedes, as it must, that Pima County acted properly in continuing to give TUSD homeowners their Homeowner Credits. It nevertheless tries to argue that the State doesn't have to pay the corresponding Additional State Aid. The problem is that this makes no sense in light of the clear language of § 15-972(E); once there is a Homeowner Credit,[5] the amount of that credit "*shall* be additional state aid for education." Period.

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[4] Arizona counties have only the authority explicitly granted to them by statute or necessarily implied therefrom. *Home Builders Ass'n of Cent. Arizona v. City of Maricopa*, 215 Ariz. 146, 149, ¶ 5 (App. 2007). Though counties are tasked with assessing property and assembling and managing the property-tax bills and collection process, those tasks are ministerial; a board of supervisors has no authority to alter the budget or property-tax levy of the other political subdivisions within the county. *Sanders v. Folsom*, 104 Ariz. 283, 290 (1969). *See also* A.R.S. § 15-992 (requiring the board of supervisors to levy school district taxes on the property in any school district at a rate sufficient to raise the amount needed to meet the budget adopted by the school board); A.R.S. § 42-17253 (town/city council computes its property tax rate, levies its property tax, and transmits that rate to the board of supervisors "on or before the day on which the board of supervisors levies the county tax"); Ariz. Op. Atty. Gen. No. I79-198 (July 20, 1979) (county school superintendent and board of supervisors has no authority to alter a school district's budget).

[5] The State says that TUSD's desegregation expenditures "can no longer be funded by primary taxes and thus cannot be reimbursed by the State under A.R.S. § 15-972(E)." (Opening Brief, at 42.) One of the many ironies here is that, technically, it wouldn't be the secondary desegregation levy that is reduced and then backfilled with Additional State Aid. *That* levy stays intact. Under § 15-972(E), the Homeowner Credit is "appl[ied] … against the primary property taxes due from each such parcel." So the Additional State Aid backfills the *primary* levy. Given that money is fungible, this is a distinction without a difference for taxpayers. But it highlights the irrationality of the scheme proposed by the State.

To avoid that little problem, the State skips any actual textual analysis in favor of a bald appeal to "legislative intent." Ignore the statutory language; skip to the end, assume that the intended *result* of SB1529 was to relieve the State of its obligation to pay TUSD Additional State Aid, and then just make that happen. There are two problems with that. First of all, consideration of legislative intent is a text-based interpretive tool, not an excuse to ignore the statutory language and re-write the law to achieve a perceived desired result. *See Progressive Cas. Ins. Co. v. Estate of Palomera-Ruiz*, 224 Ariz. 380, 383, ¶ 13 (App. 2010). "In the interpretation of legislation, we aspire to be 'a nation of laws, not men.' This means (1) giving effect to the text that lawmakers have adopted and that people are entitled to rely on, and (2) giving no effect to law-makers' unenacted desires." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 29 (2012). The intent of a legislative enactment needs to be gleaned from the language of the enactment itself—not extraneous materials, and *certainly* not remarks of individual legislators. *Hounshell v. White*, 219 Ariz. 381, 388, ¶ 24 (App. 2008); *see also In re Adam P.*, 201 Ariz. 289, 291, ¶¶ 12–13 (App. 2001) (refusing to consider an argument based on legislative fact sheets where the statute was clear); *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 13 (App. 2007) (statements of individual legislators are "'entitled to little, if any, weight'") (quoting *Coal. For Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 227 (9th Cir. 1992)); *City of Tucson v. Woods*, 191 Ariz. 523, 528, (1997) ("[A] single member of the legislature is not able to testify regarding the intent of the legislature in passing a law.")).

Secondly, however, even if this Court were inclined to ignore the actual language of the legislative enactment in favor of achieving some desired *result* based on fact sheets and the remarks of individual legislators, the State's interpretation of SB1529 doesn't do that. By preserving the Homeowner Credit, the State's

interpretation avoids the 1% Limit constitutional problem,[6] but it creates the situation in which TUSD has found itself for the last two years—operating at an ever-increasing deficit because it can properly *budget* expenditures, including expenditures for its court-mandated desegregation program, for which there is no corresponding source of revenue—and there is no evidence that this was intended or contemplated by anyone.

The drafters of SB1529 apparently thought that, since § 15-972(E) gives residential property taxpayers a credit in the amount by which the "total *primary* property taxes to be levied for all taxing jurisdictions on each parcel of residential property, in lieu of this subsection, violate article IX, section 18, Constitution of Arizona" (emphasis added), calling the tax for desegregation funding a "secondary" tax would lower the total "primary" taxes to below the 1% Limit, thus eliminating the Homeowner Credit. And it is the elimination of the Homeowner Credit that would then eliminate the corresponding Additional State Aid under § 15-972(E). SB1529, in other words, wasn't intended to defund desegregation programs; it wasn't intended to allow districts to budget for expenditures they can't fund. It was intended to simply *reallocate* the responsibility for paying the Additional State Aid amount to district homeowners. And to ensure that district governing boards would be able to levy the new secondary tax without any impediments, § 15-910(L) exempts the tax from voter-approval requirements.

Senator Farley, for example, remarked, during the Senate Appropriations Committee Meeting on May 1, 2018, that the bill "*won't affect the desegregation programs*" but would "just shift the funding that were helping with some of those

[6] Contrary to the State's assertions in its Opening Brief, no one has argued that what the Legislature actually did is unconstitutional. If SB1529 did what some of the legislators *thought* it would do—deprive TUSD homeowners of their Homeowner Credits—*that* would have been an unconstitutional *result*, but it wouldn't render any specific language unconstitutional.

desegregation programs from the State to the property owners in those districts." (ROA 24, at ep. 12:8:11.) And the bill summaries likewise indicate that desegregation expenses would be funded from a secondary levy with no necessity of voter approval:

> *Arizona Department of Education*
>
> a. Requires, effective July 1, 2018, all tax levies for desegregation to be in the form of a secondary property tax, rather than a primary property tax.
>
> b. Clarifies these levies do not require voter approval. (Sec. 2,13)
>
> c. Requires desegregation levies to be separately delineated on a property tax statement. (Sec. 2)

May 07, 2018, Ariz. Comm. Report. 2018 AZ S.B. 1529 (NS).

> Shifts, retroactive to July 1, 2018, funding for school district expenses relating to desegregation from the primary property tax levy to the secondary property tax levy. Secondary property taxes levied for this purpose would not require voter approval but must be separately delineated on a property owner's property tax statement.

May 03, 2018, Ariz. Senate Fact Sheet, 2018 Reg. Sess. S.B. 1529.

The problem, of course, is that Section 18 doesn't use the terms "primary" and "secondary." The additional tax *is* subject to the 1% Limit absent voter approval, and hence to § 15-972(E) Homeowner Credits. The State, by conceding that but nevertheless insisting on the elimination of the corresponding Additional State Aid both creates an unintended result—unfunded but properly budgeted expenditures—*and* ignores the clear statutory language.

2. The State is asking this Court to enact a law that the Legislature clearly did not.

The State wants this Court to make its own law: one that accomplishes *part* of the apparent intent behind SB1529—getting rid of Additional State Aid—while continuing to include the desegregation portion of a school district's levy in the § 15-972(E) calculation *of Homeowner Credits* because doing otherwise would result in an unconstitutional tax. To reach that convoluted result, this Court must re-write the last sentence of § 15-972(E) to make school districts with court-mandated desegregation programs ineligible for Additional State Aid, despite no textual support for such an exemption.

As noted, the result under that approach is that a school district can *budget* for the expenses of a desegregation program outside otherwise-applicable budget limits, but it will face a revenue shortfall if the 1% Limit is exceeded for any of its resident homeowners. But never fear, the State says; the school district can still levy a tax to collect the necessary funding from its homeowners so long as it first gets voter approval in a special Section-18-tax-limit override election. Which raises yet another problem. There is no existing statutory mechanism for such a special override election. The existing override statute (A.R.S. § 15-481) allows a district to exceed its *budget* limits, and § 15-910(L) makes it clear that a district's desegregation program is exempt from statutory budget limits without the necessity of voter approval so long as the district levies a "secondary" tax to fund the program and lists that tax separately on tax bills. TUSD has done that. If it *nevertheless* must get voter approval directly under Section 18 in order to fund those properly budgeted expenditures, some new mechanism is needed. And, since Section 18 isn't self-enacting, the Court, in addition to rewriting § 15-972(E), apparently must now enact a whole new Section-18-override election scheme, or broaden the scope of § 15-481, to cure the problem caused by its rewrite of § 15-972(E).

This Court cannot re-write a statute—or create a whole new one—to avoid constitutional problems, much less to achieve a result that the Court thinks the legislature intended but failed to enact. *In re Nickolas S.*, 226 Ariz. 182, 186, ¶ 18 (2011) ("Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature's domain.").

CONCLUSION

In the end, the Court is left with a choice among several relatively unappealing interpretations of SB1529. One is that the bill deprives TUSD homeowners of their Homeowner Credits. The district would still get funding for its budgeted expenditures, but the funding would come from TUSD homeowners rather than from the State as Additional State Aid. That appears to have been how the bill was understood by at least a few individual legislators. The problem is that the Homeowner Credits are the only tool the Legislature has provided for compliance with the 1% Limit; getting rid of the credit results in TUSD Homeowners being subjected to an unconstitutional tax.

A second interpretation is the one offered by the State: the Homeowner Credits remain, but the State nevertheless needn't pay TUSD any Additional State Aid. That avoids the above unconstitutional result, but it just doesn't work with either the statutory text or the apparent legislative intent. The Legislature didn't modify § 15-972(E) in any way and, under that provision, the amount of Homeowner Credits given "*shall be additional state aid for education;*" once the 1% Limit is exceeded, and the credit is given, there is no way to avoid the resulting Additional State Aid. Nor is this interpretation actually consistent with legislative intent even if one assumes that the sources from which the State infers that intent are legitimate; instead of shifting the Additional State Aid to TUSD homeowners, it just creates a

budget shortfall for TUSD, and there is no evidence that anyone foresaw or intended that result.

The third interpretation is the one urged by Pima County and TUSD: § 15-910(L) authorized the levy of a non-voter-approved secondary tax for a district's desegregation-program expenses, which must be listed separately on tax bills, but this doesn't impact the calculation of Homeowner Credits and corresponding Additional State Aid under § 15-972(E). This interpretation is consistent with the statutory language and the 1% Limit, and it retains some effect for § 15-910(L), albeit not enacted a great deal. But something is better than nothing, and it doesn't render any of the *language* superfluous.[7] Of the three possible interpretations, this one must be preferred.

Pima County requests an award of attorney fees under A.R.S. § 12-348.01.

RESPECTFULLY SUBMITTED September 7, 2020.

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[7] The "surplusage" canon is a canon of textual interpretation, not an invitation to ignore statutory language in favor of some notion of "legislative intent." Not one word of § 15-910(L) is rendered inoperative or superfluous.