SUPREME COURT OF ARIZONA

ARIZONA SCHOOL BOARDS ASSOCIATION, INC., et al., Plaintiffs/Appellees, v. STATE OF ARIZONA, a body politic, Defendant/Appellant.	Arizona Supreme Court No. CV-21-0234-T/AP Court of Appeals, Division One No. 1 CA-CV 21-0555 Maricopa County Superior Court No. CV2021-012741-00063

APPELLANT'S RESPONSE TO AMICI

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INTRODUCTION

As amici Bowers, Fann, and Ducey[1] ("Bowers") and Leach, Gowan, and Cobb ("Leach") persuasively explain, this Court should reject Plaintiffs' invitation to suddenly and massively depart from traditional judicial-review principles when it comes to the title and subject requirements for the state budget. Plaintiffs failed to identify any sufficient basis for courts to reject rational-basis review of the Legislature's final product as a whole and instead insert themselves into every year's budget to 1) dissect in isolation which provisions are sufficiently budget-like and which are not and 2) second-guess whether a particular number of BRBs, versus some greater number, sufficiently divides up the myriad topics therein.

The premise that the budget is not heavily scrutinized by the public and the media is simply untrue. Anyone who even casually skims the news knows that the budget process includes some of the most high-profile and politically sensitive legislation our representatives work on each year. *See, e.g.*, Tankersley, *Biden's Entire Presidential Agenda Rests on Expansive Spending Bill*, N.Y.TIMES (Sept. 18, 2021); Fischer, *$12.8B Arizona budget with big tax cut signed by Ducey*, ARIZ. DAILY STAR (July 1, 2021). Many observers thus pay close attention.

[1] Under A.R.S. § 12-1841, Bowers and Fann have a right to be heard. Thus, they were not limited to the arguments presented in the parties' briefs.

Moreover, our constitutional system places many democratic checks on the budgetary process. Legislators absolutely "pull, haul, and trade" to get their priorities included. The budget involves a complex series of negotiations between the legislative and executive branches, the two houses, the leadership and members in each house, and the majority and minority. And dissatisfied voters have clear remedies, including voting for different representatives every two years.[2]

Given that the courts are not part of this political process, they must review the final budget holistically and under rational basis for compliance with title and subject requirements. This neither abandons judicial review nor takes on a parliamentarian role improper for the courts as a separate branch. In contrast, heighted judicial scrutiny would create massive uncertainty and obscure political accountability. The courts should not become the second most powerful legislature at the State Capitol, wielding a final veto where the losing side tries to do through litigation what it didn't have the votes to do through legislation.

[2] At the state level, voters can also use the recall, initiative, and for certain provisions referendum.

ARGUMENT

I. AMICI BOWERS AND LEACH SHOW THAT THE FY2022 BUDGET MEETS THE TITLE AND SUBJECT REQUIREMENTS.

A. Enacting The Annual Budget Is A Legislative Duty, And The Legislature Meets That Duty Through A Feed Bill Accompanied By A Number of Reconciliation Bills.

The constitution vests the Legislature with the duty to enact the annual state budget. *See, e.g.*, Ariz. Const. art. IX, §3 (Legislature shall provide for annual tax sufficient to defray the expenses of the state for each fiscal year); *see also id.* art. IV, pt. 1 §1(3) (exempting bills "for the support and maintenance of" state government from the referendum); *id.* art. IV, pt. 2 §20 (recognizing "general appropriation bill" and "other appropriations"). And the Legislature has authority "to determine its own rules of procedure." *Id.* art. IV, pt. 2 §8; *see also* Bowers Supreme Ct. Br. at 2; Leach Supreme Ct. Br. at 7.

Given Section 20's twin requirements that the general appropriations bill "embrace nothing but appropriations" and "[a]ll other appropriations shall be made by separate bills, each embracing but one subject," the Legislature has long determined that substantive changes accompanying the budget are made through concurrently passed reconciliation bills. After the court's dicta in *Bennet v. Napolitano*, 206 Ariz. 520 (2003), the Legislature changed its process from a few ORBs to eight to ten BRBs. This overall process respects the commands of Section

20. Even Amici Legislative Democrats admit this. *See* Democrats' Br. at 5-6 (acknowledging post-*Bennett* change by Legislature thereby "correctly adhering to the single[-]subject" provision).

The Court need not speak any more broadly in this case than addressing the title and subject requirements for the budget and accompanying reconciliation bills, as this is a distinct process both textually and historically. And the Court's review must respect the primacy the Constitution gives to the Legislature when it comes to the state budget, which is inextricably tied to its traditional power of the purse. *See* Ariz. Const. art. IX, §3; *see also id.* art. III.[3]

B. Judicial Review Of Budget Bills For Title And Subject Compliance Must Be Under The Rational-Basis Test.

1. Rational Basis Review Of The Final Product Of The Budget As A Whole Is The Analytically Proper Form of Judicial Review

In a subject or title challenge, Plaintiffs are necessarily not challenging the underlying substance of the laws. Nor are fundamental rights implicated.

[3] Conditioning taxes (and spending) on substantive changes in the law is not improper "logrolling" or "omnibus legislation." It is the fundamental right of the Legislature as the people's representatives going back as far as the Magna Carta, which contained a hodgepodge of topics such as inheritances for those dying in military service, local control for the City of London, and environmental protection (removal of "fish weirs" on the Thames). *See generally Magna Carta Translation*, https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf

Challengers are simply saying the Legislature needed to use some greater number of bills, or different title(s), to do the same thing it did.

The concept is easy enough to grasp when applied to a simple bill that contains a few provisions. A court determines whether there is a rational basis to conclude the various provisions relate (directly or indirectly) to the subject "expressed in the title" or "embraced in the title." Ariz. Const. art. IV, pt. 2, §13; *Hoffman v. Reagan*, 245 Ariz. 316, 316 ¶¶13-14 (2018) (courts interpret "subject" broadly, requiring only that provisions fall "under some one general idea"). The provisions need not relate to each other. *Id.* ¶¶15-16. Provisions that fail this rational-basis review are invalid. If a bill's title contains two different subjects and those subjects are not rationally related, the entire bill *may* fail. *See* Part I(E), *infra*; *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 394 (1923) (surveying early title decisions and concluding that the requirement was violated only when "[t]he titles clearly indicated one thing, and the act thereunder provided for another thing, entirely out of harmony therewith").

Applying the single-subject and title rules to the budget is a similar exercise, but it must start from the premise that the subject being reviewed is the budget, which is necessarily a complex and multi-faceted topic of legislation. Courts' sole question should be: are the feed and reconciliation bills—considered holistically—rationally

related to the overall budget the Legislature is passing? And the challenger's burden to establish that there is no rational basis is a very high one, with the State permitted to offer reasons not in the legislative record. *Heller v. Doe*, 509 U.S. 312. 320-21 (1993) (under rational basis, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record" (cleaned up)).

The lower court's approach, however, transformed the title and subject rules from procedural requirements to substantive ones—essentially prohibiting the Legislature from passing a comprehensive budget and reconciliation package, or alternatively requiring it to be broken up to an unmanageable number of bills or face invalidation. Plaintiffs have identified no historical or textual evidence that these requirements were intended to be wielded for these purposes. *Contra* Bowers Superior Court Br. at 6-7. Indeed, if the framers thought these requirements so fundamental, they would have applied them to the voter initiative—which, after all, is being signed and voted on by citizens who have far less time to study legislation than paid legislators. Leach Amicus Br. at 5; *Ariz. Chamber of Commerce v. Kiley*, 242 Ariz. 533, 541 ¶31 (2017) (All that is constitutionally and statutorily required is

"some title and some text.").[4]

The fact that the budget has to be passed every year further counsels against heightened title-and-subject judicial scrutiny. Cases often take years to resolve through appeal. Challengers will stack up years of budgets in litigation, meaning further uncertainty. *See generally Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587 (2009) (opinion *seven years* into redistricting cycle). After each budget is passed, the new budgetary process starts in mere months, and an election is always less than 2 years away. Judicial review would be slow, cumbersome, and disruptive to this process.

Finally, technological developments further counsel against adopting new, heightened scrutiny 110 years into statehood. Professional and volunteer media report on the legislative process in a 24-hour news cycle, and bill text is posted on the internet, accessible to all in searchable form. There is also opportunity for legislators to comment on bills, videos of which are posted on the www.azleg.gov website. Legislative staff also prepares fact sheets, which are summaries of legislation. In sum, there has been a democratization of access to information that

[4] Legislative Democrats' complaints about process (including the length of time to review amendments), and the volume and complexity of floor amendments are irrelevant. They also contravene the fully enrolled bill rule.

undercuts any need to elevate a bill's official title to paramount importance.

2. Political Question Bars Heightened Judicial Review

If the Court rejects rational-basis review, then it must recognize that Plaintiffs' heightened-scrutiny claims (*i.e.*, whether individual provisions are sufficiently budget-like and whether a particular number of BRBs sufficiently divides up the myriad topics in the budget) present non-justiciable political questions. OB at 4-7. The question of whether various reconciliation provisions are sufficiently tied to the budget is textually committed to the Legislature's discretion and not subject to judicially manageable standards. *Id.*; *see also* Leach Supreme Court Br. at 12 (citing *Sumner v. New Hampshire SOS*, 136 A.3d 101, 106 (N.H. 2016) (claimed violation of procedural rules non-justiciable)).[5]

This Court has never embraced the idea that it can parse through the feed and reconciliation bills to decide which provisions are budget-like or whether there should have been some different number of reconciliation bills overall. Plaintiffs and their Amici are notably silent about what standards the Court should use other than the unmanageable "I-know-it-when-I-see-it" standard. *See* AB 22-23.

Amicus City of Tucson (at 6-8) and Legislative Democrats (at 2-3) largely

[5] To be clear, the Court need not reach this issue if it adopts rational-basis review of the final product as a whole.

advance a "gotcha" argument that the legislative majority chose the wrong magic words by including "reconciliation" and "procedures" in the BRBs titles. This contravenes the rule that the title requirement cannot be read to impede or embarrass the legislature. *See Hoffman*, 245 Ariz. at 316 ¶14. And as noted above, even casual observers of the budget process know it contains many substantive provisions.

Moreover, *Bennett*'s dicta should not be interpreted as signaling the courts would begin scrutinizing the number of reconciliation bills passed each year. *See* Tucson Br. at 11; Democrats' Br. at 3-6. In *Bennett*, the Court applied a rigorous standing requirement and declined to get involved when the two political branches disagreed over a veto; its discussion of the number of ORBs was an additional reason *not* to get involved. Plaintiffs now want the courts to repeatedly involve themselves by applying heightened scrutiny to subject and title requirements. That finds no support in what the *Bennett* Court actually held.

C. Applying the Rational Basis Test, the FY2021 Budget Meets The Title And Subject Requirements.

The Superior Court's major flaw here was to conclude the "'one general idea' is 'budget reconciliation'" and further conclude this means something narrower for judicial review purposes than whether the provisions are rationally related to the overall budgetary package. (*See* Minute Entry at 7-8.) It made an identical error for

"budget procedures." (*Id.* at 12, 14.) The court then used its perceived narrowness of "budget reconciliation" and "budget procedures" to individually review and invalidate provisions in isolation, including based on lack of support in "the legislative record." (E.g., Minute Entry at 10; see id. at 9-13.) This is an unworkable form of heightened judicial scrutiny that "displac[ed] the Legislature's own discretionary judgments as to what constitutes an articulable 'subject' with the[court's] own." Bowers Superior Court Br. at 9; Leach Supreme Court Br. at 2.

The Court should follow the persuasive reasoning in the Bowers brief that "the title of each BRB fully discharged its constitutional purpose: it (1) accurately represented that the bill is a 'budget reconciliation' measure—i.e., substantive policy amendments upon which the Legislature has chosen to condition funding appropriations, (2) identified the specific subject matter area implicated, and (3) itemized, by title and section number, each and every statute that the BRB would amend." Bowers Supreme Ct. Br. at 11. And the use of eight BRBs was certainly a rational way to divide up the myriad topics a majority of the legislators in each house and the governor demanded be included in the budget to secure passage. Finally, even if the court were inclined to scrutinize the subjects in the titles of the BRBs, K-12 Education, Higher Education, and Health are rational ways to break off chunks of the budget for reconciliation purposes.

As to the Budget Procedures BRB, the Legislature is necessarily going to have to have some sort of catch-all BRB for things that do not fit in the major BRBs. The question of how broad or narrow that catch-all should be must be reviewed only for rational basis in light of the budget package of bills as a whole. This is because it is a necessary "component of a budget process that submits to the constraints of the Single Subject Rule" by splitting the reconciliation up to a reasonable number of bills. Bowers Superior Ct. Br. at 9.

D. Retroactive Application Of Heightened Scrutiny Would Create Chaos For Years

Although it should be rarely used, this Court has discretion to imbue a ruling with only prospective effect. *See* Bowers Supreme Court Br. at 16-18 (citing *Hartford Acc. v. Aetna*, 164 Ariz. 286, 293 (1990)). Retroactive application of Plaintiffs' proposed heightened subject-and-title scrutiny would be nothing short of an asteroid crashing into the A.R.S. and causing a mass-extinction event of unknowable proportions. Nothing could so unpredictably and comprehensively upend statutes throughout the A.R.S. as retroactively applying a new requirement for budgeting to decades of state budgets.

It would also be fundamentally unfair to the Legislature, which adopted the BRB process in response to dicta from *Bennett* and has been continuously using it

without challenge for 18 annual budgets. As discussed above, *Bennett* could not originally be read as indicating a judicial appetite for heightened scrutiny of the budget, and it certainly cannot be read that way after 18 uninterrupted years of budgeting.

The Legislature, all of State government and its political subdivisions, and the public generally have relied on the lawfulness of the state budgets. If the Court decides to shift its jurisprudence, the Legislature should be given an opportunity to adjust its processes in response, and prospective application is the best way to provide that. *See, e.g.*, *Campbell v. White*, 856 P.2d 255, 262-63 (Okla. 1993) ("[W]e give a prospective effect to our holding to avoid needless disruption to the operation of state agencies.").

E. Portions of SB1819, If Invalid, Are Severable

The Superior Court misread *LitchField Park* to foreclose severability. But the Constitution itself demands severability when Article 4, part 2, section 13 is violated. The Court in *Litchfield Park* did not consider that provision, instead concluding that "the act is in clear violation of article 4, part 2, section 20," which does not contain a severability requirement. 125 Ariz. 215, 225 (App. 1980). *Litchfield Park* never mentions the Constitution's severability language—because it was not at issue. Amicus City of Tucson never grasps this distinction. City of Tucson Amicus at 9-

10. Because Plaintiffs only challenge certain provisions in SB1819, if found unconstitutional, those provisions should be severed, as constitutionally required.

II. HB2898 DOES NOT VIOLATE EQUAL PROTECTION

Several amici assert that HB2898 violates equal protection because it does not prohibit private schools from imposing mask mandates. This argument cuts against Plaintiffs' title argument—the Legislature doesn't fund private schools and, therefore, rationally decided not to include any such prohibition in HB2898. Nothing in HB2898 prohibits children from masking in school. Treating public and charter schools as a classification different from private schools is not irrational; the Constitution and multiple provisions of A.R.S. already do so. Ultimately, the right Plaintiffs and their amici seek is a *substantive* right to attend public or charter schools where classmates are *required* to wear face coverings and/or undergo mandatory vaccination for COVID-19. There is no fundamental right to do so, and it is not irrational for the Legislature to ensure parents in publicly-funded schools can choose and that it does not want to fund public mandates.

CONCLUSION

The trial court's Ruling should be reversed.

DATED this 20th day of October, 2021.

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