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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

ARIZONA FREE ENTERPRISE CLUB, *et al.*, Plaintiffs, v. KATIE HOBBS, in her capacity as the Secretary of State of Arizona, *et al.* Defendants.	Case No: CV2021-011491 **AMICUS BRIEF OF ARIZONA ATTORNEY GENERAL MARK BRNOVICH IN SUPPORT OF PLAINTIFFS** (Assigned to the Hon. Katherine Cooper)

INTRODUCTION

Plaintiffs in this case seek to prevent Defendant Invest in Arizona ("IIA") from having three tax measures passed during the 2021 legislative session referred to the people. Those three acts are 2021 Ariz. Laws ch. 412, §§ 13, 15 (Senate Bill ("S.B.") 1828); 2021 Ariz. Laws ch. 411, § 4 (S.B. 1827); and 2021 Ariz. Laws ch. 436 (S.B. 1783). S.B. 1828 replaces Arizona's state income tax brackets and rates to provide for a single state income tax rate of 2.5%. S.B. 1827 caps the state tax rate at no more than 4.5%, and S.B. 1783 permits certain small business owners to pay an alternative small business tax and to deduct small business income from their personal gross income..[1]

Plaintiffs request that the Court enjoin IIA from being able to refer these tax measures because each provides for the "support and maintenance" of state government and thus are exempt from referral under the Arizona Constitution. Ariz. Const. art. IV, pt. 1 § 1(3). IIA's primary argument is that the tax measures are not for the "support and maintenance" of state government because the measures will purportedly reduce the amount of revenue that the State receives.

Arizona Attorney General Mark Brnovich agrees with Plaintiffs that IIA is not permitted to refer any of the three tax measures to the People. The original understanding of "support and maintenance" included acts, like the three acts at issue here, that generate state revenue through the imposition of taxes. This reality is borne out by subsequent Arizona case law holding that the limitation on referenda for the "support and maintenance" of government includes tax measures. Persuasive authority—including Attorney General opinions and case law from jurisdictions with identical constitutional provisions—further supports that IIA cannot refer tax measures to the People. Finally, in addition to being factually unsupported, IIA's argument that the acts at issue are not for the "support and maintenance" of government because they

[1] The Attorney General understands that one or more of the referenda may not have obtained sufficient signatures to appear on the ballot. Because the pleadings and motion for preliminary injunction still discuss all three referenda, this amicus brief does as well. The legal analysis contained herein, however, does not turn on whether one, two, or three of the referenda remain active.

will reduce the amount of state revenue would violate the separation of powers and require the courts to engage in guesswork about the future fiscal impact of tax measures, an impossible task. The Court should grant Plaintiffs' requested relief in full.

ARGUMENT

The proposed referenda seek to abolish S.B. 1828, S.B. 1827, and S.B. 1783. The Arizona Constitution prohibits this activity, excluding from referendum any measure that is for the "support and maintenance" of state government. The Court, therefore, should enjoin, or otherwise declare invalid, any referral of those three tax measures.

I. The Right of Referendum in Arizona.

The Arizona Constitution reserves power for citizens to reject laws at the polls by referendum. Ariz. Const. art. IV, pt. 1, § 1(1) and (3). To allow exercise of referendum power, acts passed by the Legislature generally are not effective for 90 days after the close of the legislative session. Ariz. Const. art. IV, pt. 1, § 1(3). When an act is successfully referred to the people and will be at issue in the next election, such an act becomes inoperable until, and if, it is defeated at the election. Ariz. Const. art. IV, pt. 1, § 1(5). Two classes of laws are exempted from the referendum power: "those pertaining to the public peace, health or safety," and those "for the support and maintenance of the departments of the state government, and state institutions." *Garvey v. Trew*, 64 Ariz. 342, 349 (1946).

II. The Court of Appeals Held In *Wade v. Greenlee County* That Tax Measures Cannot Be Referred.

The Arizona Court of Appeals has already considered whether tax measures may be referred and answered no. In *Wade v. Greenlee* County, the court correctly held that tax measures fall into the "support and maintenance" exclusion and therefore cannot be referred. 173 Ariz. 462, 463 (App. 1992). There, referendum petitions were filed in response to a one-half cent sales tax enacted by Greenlee County. *Id.* The trial court found that a tax measure could not be the subject of a referendum. *Id.* On appeal, the court of appeals analyzed the Arizona Constitution to determine the scope of the support and maintenance exclusion. The court asked whether that exclusion applies to both tax

and appropriation measures or only appropriation measures. *Id.* Interpreting the constitutional provision broadly, the court concluded that the exclusion applies to both tax and appropriation measures. *Id.*

Not only did the Court believe the language in the Arizona Constitution compelled a broad interpretation, but it concluded that such an interpretation would also best further the purpose behind the exception provision. *Id.* The court feared that allowing the referral of tax measures would disrupt state government by "allow[ing] a small percentage of the electorate, in Arizona 5%, effectively to prevent the operation of government," thereby rendering a tax measure inoperable until the next general election. *Id.* at 463; *see also* Ariz. Const. art. IV, pt. 1, § (5). In the court's words, "[b]ecause any law is ineffective after referendum petitions are filed and until the election, five percent of the electorate could, in the case of support laws, for a period of over a year prevent what a majority would believe to be necessary government programs. The risk of abuse has led our courts to construe strictly the requirements necessary to require referral." *Wade*, at 464 (citing *Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc.*, 134 Ariz. 46 (1982)); *see also Garvey*, 64 Ariz. at 352 ("We cannot believe that the framers of the constitution, or the voters who adopted it, intended to make it possible for a small percentage of the voters to stop the functions of the various departments of government by cutting off their appropriations through the operation of the referendum. This does not make sense.").

Additionally, the *Wade* court found that the history of the constitutional text supported a broad interpretation, as the revision of Article IV from its first proposal to the final constitutional provision suggested an intent to broaden the concept of support. *Id.* (citing J.S. Goff (ed.), The Records of the Arizona Constitutional Convention of 1910 at 1021 (1991)). Finally, the court took homage in the fact that other state constitutions containing similar "support" clauses had been held to apply broadly to measures that "generate revenue for the state." *Id.* (citing *Farris v. Munro*, 662 P.2d 821, 827 (1983); *State ex rel. Botkin v. Morrison*, 249 N.W. 563 (1993)).

Wade's conclusion that tax measures are precluded from referendum under the Arizona Constitution controls this case. Accordingly, IIA should not be permitted to refer S.B. 1828, S.B. 1827, and S.B. 1783.

III. The Attorney General's Office Has Long Concluded That Neither Tax Nor Appropriation Measures Can Be Referred.

The Attorney General's Office has similarly long concluded that tax and appropriation measures are excluded from referendum. In 1997, the Attorney General's Office was asked whether an act that required the transfer of tobacco tax monies to a construction services account to provide funds for the construction of a state health laboratory was referable. *See* Ariz. Att'y Gen. Op. No. I97-007, 1997 WL 566650 (July 17, 1997). In determining whether the measure was subject to referendum, the opinion noted, "Section 8 is not a tax measure, so it is not excluded from referendum on that basis,"—identifying tax measures as those excepted from referendum power. *Id.* Additionally, in a footnote discussing the exceptions to the referendum power, the Opinion disavowed a 1991 Attorney General Opinion that had concluded that "only appropriation bills, as opposed to tax measures, were excluded from referendum." *Id.* at n.3 (citing Ariz. Att'y Gen. Op. No. I91-068, 1990 WL 484076 (July 26, 1990)). The 1997 Opinion confirms that it has long been the view of the Attorney General's Office, through numerous administrations, that the court of appeals' interpretation in *Wade* exempts both tax and appropriation measures from referendum in Arizona. *Id.*

IV. Other Jurisdictions Have Held That Tax Laws Are Exempt From Referendum.

Other states with constitutional provisions identical or similar to Arizona's "support and maintenance" exemption have held that tax measures fall within that exemption. The state constitutions in Maryland, South Dakota, and Washington each contain referendum provisions materially similar to Arizona, which exempt measures for the support or maintenance of state government.[2] The state constitutions in California

[2] *See* Md. Const. Art. XVI, § 2 (forbidding referendum power for laws "making any appropriation for maintaining the State Government or for maintaining or aiding in any

and Ohio, while not identical to Arizona, expressly provide that tax laws are not subject to referendum.[3] State courts in each of those five states have confirmed that tax measures are not subject to referendum.

A. States With Materially Similar Constitutional Provisions Have Interpreted Their "Support" Provisions as Precluding Tax Measures From Referendum.

When reviewing how other state courts have interpreted their constitutions, perhaps no state is more important to Arizona than Washington. Arizona courts have often looked to Washington courts for guidance in interpreting provisions similar to its state constitution. *See Coleman v. Johnson*, 235 Ariz. 195, 198, ¶ 14 (2014) (noting Washington Constitution "was the model for many of our constitutional provisions," and thus Washington decisions are persuasive when interpreting parallel provisions of Arizona Constitution). Here, article II, section 1(b) of the Washington Constitution provides that the referendum power may not be utilized for "such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions[.]" Thus, Washington, much like Arizona, has two exceptions to the referendum power: (1) laws promulgated as part of an emergency measure and (2) laws promulgated in support of state government and its existing public institutions. *Washington State Farm Bureau Federation v. Reed*, 115 P.3d 301, 304 (Wash. 2005) (citing *Farris v. Munro*, 662 P.2d 821 (1983)). And much like *Wade*, Washington has broadly interpreted the "support" provision to include both appropriation measures and "anything that generates revenue

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public institution, not exceeding the next previous appropriation for the same purpose"); SD. Const. Art. 3, § 1 (precluding from referendum laws for the "support of the state government and its existing public institutions"); Wa. Const. Art. II, § 1(b) (precluding from referendum laws for the "support of the state government and its existing public institutions").

[3] *See* Cal. Const., art. II, §9(a) (constitution excludes "statutes providing for tax levies or appropriations for usual current expenses of the State" from referendum); OH. Const. Art. II, § 1d ("Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions … shall not be subject to the referendum.").

for the state." *Id.* (citing *Farris*, 662 P.2d at 827) (a measure is "support" and not referable when "it is designed to produce revenue for the general fund which in turn supports all of existing state institutions.").

This broad definition of support includes tax measures. In *Andrews v. Munro*, the Washington Supreme Court held that the Timber Tax Act was immune from referendum under the support exemption. 689 P.2d 399, 401 (Wash. 1984). There, the act at issue proposed a yearly *reduction* in the timber tax from 6.5% to 5% to occur over five years. *Id.* at 400. The supporters of the referendum wanted to keep the tax rate at 6.5% and, like IIA here, argued that because the act at issue reduced the timber tax rate, it could not be necessary for the "support" of government. *Id.* at 401. The Washington Supreme Court squarely rejected that argument, finding that the act's purpose was still to raise revenue necessary for the support of state government. *Id.*

Other states have also interpreted their "support and maintenance" clauses broadly. The Maryland constitution excludes from referendum acts "making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution[.]" Md. Const. Art. XVI, § 2. In *Winebrenner v. Salmon*, the Maryland court of appeals considered the referability of a gasoline tax. 142 A. 723 (Md. Ct. App. 1928). The court concluded that although the act at issue was technically not valid as an appropriation because it was enacted prior to the Budget Bill, it nevertheless constituted an "appropriation for maintaining the State Government" and could not be referred to the people. *Id.* at 725. In so holding, the court reasoned that maintaining state government "means providing money to enable it to perform the duties which it is required by law to perform." *Id.*

Also, in *State ex rel. Kornmann v. Larson*, at issue was whether a statute authorizing an excise tax upon certain services and professions was referable. 138 N.W.2d 1, 3 (S.D. 1965). The South Dakota Constitution exempts from the power of referendum "such laws as are necessary for the support of the government and its existing public institutions." *Id.* The court stated unequivocally that the statute at issue

was a tax measure excluded from referendum—"[the statute] is a tax measure and the additional revenue from the tax goes into the general fund of the state. It is obviously a law for the support of state government." *Id.* at 4.

The Arizona Court of Appeals is, therefore, hardly alone in its conclusion that the state constitution precludes referendum of tax measures. Other courts addressing similar constitutional provisions facing this issue have concluded that tax measures are exempt referendum. *See also State ex rel. Linn v. Romero*, 209 P.2d 179, 185 (NM. 1949) (statute increasing gas tax to meet highway department's bond obligation is a law providing "for the payment of the public debt" and therefore not subject to referendum); *Dorsey v. Petrott*, 13 A.2d 630, 635 (Md. 1940) (finding it "evident that the Referendum Amendment did not mean to include within the purview of its operation a statute to raise revenues for these specific purposes by a levy of taxes or by the imposition of other fiscal measures. The act for these purposes and moneys so procured are, therefore, an act and a fund for the maintenance of the State Government; and, so, the act is excepted from the Referendum Amendment").

B. Other States Have Concluded that Tax Measures Are Excluded From Referendum To Preserve the Operation of Government.

As discussed in *Wade*, "permitting referenda on support measures would allow a small percentage of the electorate, in Arizona 5%, effectively to prevent the operation of government." 173 Ariz. at 463. A number of courts have concluded that halting the efficient operation of government is a powerful concern weighing against permitting such referenda.

In addressing whether new water rates were categorized narrowly as "fees" and therefore subject to referendum, or more broadly as "taxes" and excluded from referendum,[4] the California Supreme Court stated that "one of the reasons, if not the

[4] California's constitution exressly provides that referendum power does not lie for "tax levies." Cal. Const., art. II, §9(a) (constitution excludes "urgency statutes, statutes calling elections, and *statutes providing for tax levies or appropriations for usual current expenses of the State*" from referendum) (emphasis added).

chief reason, why the constitution excepts from the referendum power acts of the Legislature providing for tax levies or appropriations[] is to prevent disruption of its operations." *Wilde v. City of Dunsmir*, 470 P.3d 590, 599 (Cal. 2020). Other courts have similarly recognized the harm that the referendum power can cause by interrupting government operations. *See also Vagneur v. City of Aspen*, 295 P.3d 493, 504, ¶ 37 n. 8 (Colo. 2013) ("[T]his court has long recognized that to subject to referendum 'any ordinance adopted by a city council, whether administrative or legislative, could result in chaos' and bring 'the machinery of government to a halt.'") (internal citations omitted); *Bickel v. Nice*, 192 A. 777 (1937) ("the actuating purpose of the excepting clause [in referendum provision] was to prevent interruptions of government"); *State v. Pyle*, 226 N.W. 280, 281 (S.D. 1929) ("[I]f we are to have a stable and efficient government, some laws may be needed to meet emergencies and to control and govern the daily operations of the government that should go into effect immediately or sooner than would be possible[.]"). As *Wade* recognizes, this concern is particularly stark when it comes to legislative acts providing for the support and maintenance of state government. Thus, Arizona's founders saw fit to ensure that such acts would not be subject to referral. IIA's position, which would put a major portion of Arizona's tax structure on hold for months, is inconsistent with the language and policy behind the "support and maintenance" exception.

V. This Court Should Not Interpret The Support Exemption To Apply Only To Acts That Raise Revenue.

It seems IIA would have the Court interpret the support and maintenance exception as applying only to those provisions that would result in more revenue for the state. IIA appears to take the over-simplistic position that the tax measures at issue will result in less revenue because they reduce the applicable tax rates. This interpretation is inconsistent with the separation of powers and would require the Court to engage in the impossible exercise of forecasting the fiscal impact of tax measures.

This interpretation would run afoul of the separation of powers. The determination of the appropriate tax rate for the State of Arizona is for the elected

branches, not the courts or even the People. *See Brewer v. Burns,* 222 Ariz. 234, 239, ¶ 21 (2009) (issues concerning whether the Legislature should include particular items in a budget or enact particular legislation are nonjusticiable political questions); *Mesnard v. Campagnolo*, 251 Ariz. 244, ¶ 42 (2021) (Bolick, J. concurring) ("[I]t is beyond the judicial power to second-guess the legislature's methods and actions."); *Fogliano v. Brain ex rel. Cty. of Maricopa*, 229 Ariz. 12, 20, ¶ 25 (App. 2011) ("[W]e are ill equipped to inquire into and second-guess the complexities of decision-making and priority-setting that go into managing the State's budget and appropriations made pursuant to budgetary decisions."). Tax laws in particular should not be subject to referendum because the Legislature, not the people, are properly suited to know the financial needs of the state. *See e.g., Pyle*, 226 N.W. at 281 ("[T]he people could not know the financial needs of the state to be supported by tax levies and tax laws nor the revenues available for appropriation.") (internal citation omitted). This holds true even when the Legislature enacts a law to decrease the tax rate—the referability of a measure should not depend upon its impact to net revenue, and no Arizona authority calls for such a conclusion.

The interpretation would also be impossible to implement in practice. IIA would apparently require the Court to determine whether a reduction in tax rates will result in more or less revenue for the State. How would the Court possibly go about doing so? Any such analysis would require the Court to make multiple assumptions about future economic activity and how Arizona citizens, past and future, might adjust spending and investment based on lower tax rates. Even selecting what time period to apply to such an analysis would be problematic. IIA's position will result in much judicial speculation on matters that courts are ill equipped to handle.

In fact, the premise of IIA's apparent argument—that tax cuts always result in less government revenue—is incorrect. In the early 1960's, President Kennedy proposed large tax rate reductions, which Congress passed after his assassination. In the four years following the tax cut, the federal government's revenue increased by 8.6% annually. Arthur B. Laffer, The Laffer Curve: Past, Present, and Future, Heritage Foundation (June 1, 2014), http://www.heritage.org/taxes/report/the-laffer-curve-past-present-and-

future. Similarly, in August 1981, Congress passed and President Reagan signed the Economic Recovery Tax Act, which enacted phased-in tax rate cuts across all federal tax brackets. While federal government revenue had steadily declined between 1979 and 1983, between 1983 and 1986 federal income tax revenue increased annually by 2.7%. *See id.* And several other countries have seen significant economic growth after passing a flat tax rate, like Arizona did during the 2021 legislative session. *See id.* The notion that lower tax rates will often result in higher government revenue has been visually depicted by the well-known Laffer curve.

Closer to home, in the 1990s, Arizona made aggressive cuts to income tax rates and continued to make small cuts in the mid-2000s. Despite those rate reductions, Arizona's individual income tax produced 185% more revenue in 2019 than in 1991, even adjusted for inflation. Further, Arizona's real Gross Domestic Product (GDP) growth was 176% between 1987 and 2016, far outpacing the national growth rate of 100.4%. None of Arizona's growth in revenue, real GDP, or population would have been possible without Arizona's low tax environment. Sean McCarthy, Invest In Ed Tax Increase Misguided & Cynical at p. 1, Arizona Tax Research Association (2020), http://www.arizonatax.org/sites/default/files/publications/special_reports/file/special_report_income_tax_initiative_8-3-20.pdf.

Other courts have wisely refused to engage in speculation about the economic relationship between tax rates and government revenue. In *Andrews v. Munro*, discussed *supra*, the tax act at issue decreased the tax rate from 6.5% to 5% over a five-year period. 689 P.2d at 400. Proponents of the referendum, which stayed the tax rate at 6.5%, argued that such an act decreasing the tax rate could not be "necessary for the support of government" due to the act's tax reduction. *Id.* at 401. In holding that the act was not referable, the court stated, "We do not speculate whether the lowering of the tax rate from 6.5 percent to 5 percent between 1984 and 1988 would lessen or increase the support of state government. Such a venture on the part of this court is both inappropriate and irrelevant." *Id.*

Refusing to engage in that venture was an appropriate exercise in judicial restraint. The Court should similarly refuse here. Because the Arizona Legislature

levied taxes to support the state government, the tax measures at issue—S.B. 1828, S.B. 1827, and S.B. 1783— are immune from referendum. *See Barenblatt v. U.S.*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").

CONCLUSION

Real Party in Interest's attempt to refer S.B. 1828, S.B. 1827, and S.B. 1783, is contrary to the Arizona Constitution, article IV, pt. 1 § 1(3). The Court should, therefore, grant the relief Plaintiffs request.

Respectfully submitted this 1st day of October, 2021.

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I hereby certify that the foregoing document was e-filed this 1st day of October, 2021, via TurboCourt.

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