IN THE SUPREME COURT
OF THE STATE OF ARIZONA

ANDY BIGGS, et al. Petitioners, v. THOMAS J. BETLACH, Defendant/Appellee, and EDMUNDO MACIAS; GARY GORHAM; DANIEL McCORMACK; and TIM FERRELL, Intervenor-Defendants/Appellees.	Arizona Supreme Court No. CV-17-0130-PR Arizona Court of Appeals, Division One No. 1 CA-SA 15-0743 Superior Court of Maricopa County Case No. CV2013-011699

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONERS ANDY BIGGS, ET AL.

FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

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Pursuant to Rule 16 of the Arizona Rules of Appellate Procedure, amici curiae Pacific Legal Foundation (PLF) and Howard Jarvis Taxpayers Association (HJTA) respectfully submit this brief in support of Petitioners, Andy Biggs, et al.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Donor-supported PLF, founded in 1973, provides a voice in the courts for mainstream Americans who support limited government, private property rights, individual rights and economic liberty. PLF has a long history of participating in legal actions to protect the interests of taxpayers and the integrity of government by enforcing constitutional, statutory, and regulatory restraints on taxing and spending. PLF has participated as amicus curiae in numerous cases interpreting the scope of voter-enacted limitations on the taxing power. *See, e.g.*, *Schmeer et al. v. Cty. of Los Angeles*, 213 Cal. App. 4th 1310 (2013); *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 937 P.2d 1350 (1997); *Santa Clara Cty. Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 902 P.2d 225 (1995); *Knox v. City of Orland*, 4 Cal. 4th 132, 841 P.2d 144 (1992). PLF also participated in this Court in *Cheatham v. DeCiccio*, 240 Ariz. 314, 379 P.3d 211 (2016), regarding the limitations of Arizona Constitution's Gift Clause.

[1] The undersigned certifies that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties consent to the filing of this brief.

HJTA is a nonprofit public benefit corporation, comprised of over 200,000 individual and corporate California taxpaying members. HJTA was founded by Howard Jarvis shortly after California approved his property tax limitation measure, Proposition 13, in 1978. Since that time, HJTA has regularly participated in litigation to ensure that courts interpret these provisions consistent with the will of the voters in passing them. *See, e.g.*, *Howard Jarvis Taxpayers Ass'n v. City of Fresno*, 127 Cal. App. 4th 914 (2005); *Howard Jarvis Taxpayers Ass'n v. Cty. of Orange*, 110 Cal. App. 4th 1375 (2003); and *Howard Jarvis Taxpayers Ass'n v. State Bd. of Equalization*, 20 Cal. App. 4th 1598 (1993).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Arizona Constitution, like all American state constitutions, places lawmaking authority in the legislative branch of government. A legislative top priority is raising and allocating public funds. For 80 years the citizens of Arizona entrusted their Legislature with this function at its complete discretion. However, the Legislature's repeated decisions to raise taxes did not reflect Arizonans' general views about the appropriate levels of taxation and, in 1992, voters employed their

reserved legislative power[2] to amend their constitution to constrain further tax increases by means of a supermajority vote requirement. Ariz. Const. art. IX, § 22.[3]

Unfortunately, it is the nature of the political beast that such constraints lead to a tug-of-war between government officials who wish to raise revenue for an ever-increasing array of projects and services and the taxpayers who are bound to pay for it. The Medicaid expansion tax, A.R.S. § 36-2901.08, a so-called "assessment" passed on a majority, but not two-thirds, vote, is the latest battle in the ongoing war. This brief provides context for the Court's decision in this case by looking at the nature of governance shared by voters and elected officials, particularly with regard to tax limitations. Voters and taxpayers resent the "creativity" of government officials, validated by court decisions that effectively evade procedural requirements for tax increases. The perennial struggles in California and Michigan offer a caution to this Court, as judicial decisions permitting government to dig into taxpayer pocketbooks in apparent violation of a constitutional provision specifically designed

[2] *Allen v. State*, 14 Ariz. 458, 467, 130 P. 1114, 1118 (1913) ("The people did not commit to the legislature the whole law-making power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes.").

[3] The initiative constitutional amendment passed with 71.87% of the vote. *Arizona Two-Thirds for Taxes Amendment, Proposition 108*, Ballotpedia (1992), https://ballotpedia.org/Arizona_Two-thirds_For_Taxes_Amendment,_Proposition_108_(1992).

to prevent such assessments serve only to weaken the pillars of the constitutional structure.

ARGUMENT

I

ARIZONA'S CONSTITUTION RESPECTS VOTER AND TAXPAYER PROTECTIONS

As Alexander Hamilton observed, "Money is, with propriety, considered as the vital principle of the body politic." The Federalist No. 30, at 188 (A. Hamilton) (C. Rossiter ed. 1961). Control over the purse strings is one of the most potent tools a government possesses. In this respect, there is little difference between the federal government and state or local governments. Taxpayers have a basic, and compelling, interest in tracking the expenditure of tax revenues. *See Millett v. Frohmiller*, 66 Ariz. 339, 348, 188 P.2d 457, 463 (1948) ("[L]oose control" of public funds would be "wholly foreign" to Arizona's state government.). Taxpayers in Arizona have an additional means of implementing policy—enacting statutes or amending the state constitution via the initiative power. That power was considered so fundamental that Arizona's first constitution included it upon attaining statehood. *See* Ariz. Const. art. IV, pt. 1, § 1(1), (2); *Ruiz v. Hull*, 191 Ariz. 441, 448, ¶ 23 n.6, 957 P.2d 984, 991 (1998) ("The power of the people to legislate is as great as that of the Legislature.").

The inclusion of initiative and referendum powers was "a burning issue" at statehood and "both the delegates and the voters considered its inclusion 'among the

most important' provisions." *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, ¶ 12, 399 P.3d 80 (2017). The framers of Arizona's constitution viewed "direct participation as a way for the public to check the power of elected officials and ensure that the will of the people is never superseded by an elite few." Rebecca White Berch *et al.*, *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 487 (2012). As former Chief Justice Berch noted, "Government accountability, in particular, played a central role in the framers' structuring of our state's financial systems and distinguished those systems from their counterparts in the federal government." Berch *et al.*, *Celebrating the Centennial*, 44 Ariz. St. L.J. at 474.

Consistent with the stature of these provisions, Arizona courts are "mindful of special principles regarding the interpretation and application" of the initiative process and legislation enacted through that process. *Parker v. City of Tucson*, 233 Ariz. 422, 429, 314 P.2d 100, 107 (Ct. App. 2013). "Arizona has a strong policy [of] supporting the people's exercise of" the power granted to them by the constitution "to propose laws through initiative process." *Pedersen v. Bennett*, 230 Ariz. 556, ¶ 7, 288 P.3d 760, 762 (2012).

In 1992, Arizona voters amended the state constitution to constrain their elected representatives' ability to increase taxes. Ariz. Const. art. IX, § 22 (two-thirds vote of both houses of the legislature required to pass any bill that imposes

taxes or "provides for a net increase in state revenues."). Nearly 72% of the electorate approved Proposition 108, reflecting widespread sentiment that they were overtaxed and that the legislature would have to do a better job deciding how to allocate a more reasonable amount of public funds, unless it could muster a supermajority to approve tax increases.[4] *See* Ariz. Sec'y of State 1992 Gen. Election Canvass,[5] Publicity Pamphlet at 47 ("[T]ax increases will only be possible when there is a clear consensus among all Arizonans of the need for the proposed change.").

In this way, the people limited the power of the legislature to pass certain types of laws, much as the Voter Protection Act (VPA) limitations[6] qualified the Legislature's otherwise plenary authority. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6, 308 P.3d 1152, 1157 (2013). When analyzing the extent of the VPA limitations, which constrain legislative authority to modify voter initiatives and referenda with a heightened vote requirement, this Court emphasized that it must interpret an initiative constitutional amendment to effect "the intent of the electorate that adopted it," *id.* at 6-7, 308 P.3d at 1157-58, citing *Jett v. City of Tucson*, 180

[4] *See* Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 Va. Tax Rev. 155, 157 (1996) ("Among all kinds of legislative and judicial decision making, only tax laws seem capable of engendering nearly universal anger, anxiety, paranoia and outright hatred. . . .").
[5] https://www.azsos.gov/sites/azsos.gov/files/pubpam92.pdf
[6] Ariz. Const. art. IV, pt. 1, § 1(6)(B)–(C), (14).

Ariz. 115, 119, 882 P.2d 426, 430 (1994), by fairly interpreting the language used and, unless the context suggests otherwise, giving words "their natural, obvious and ordinary meaning." *Id.* at 7 (citations omitted). Moreover, when a provision is ambiguous, the court considers "the history behind the provision, the purpose sought to be accomplished, and the evil sought to be remedied." *Ariz. Chamber of Commerce*, 242 Ariz. 533, ¶ 9, 399 P.3d 80, 84 (citation omitted).

As discussed further below, this careful review of initiative constitutional amendments, such as Proposition 108, serves to balance the roles of both elected officials and the people who have reserved legislative powers, to the benefit of the entire body politic.

II

STATE GOVERNANCE IMPROVES WHEN GOVERNMENT OFFICIALS, VOTERS, AND TAXPAYERS WORK TOGETHER

A. Cooperative Governance Respects the Roles of Institutions, Officials, and Citizens

Arizona's adoption of the initiative constitutional amendment requiring a supermajority vote for tax increases shares a common theme with other states that generated tax revolts: "By putting the spending and taxation limits in state statutes and constitutions, the voters have tied the hands of politicians and implicitly asserted the inadequacy of political checks as the proper response to governmental financial excesses." Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What*

You Pay For" Model of Local Government, 56 Fla. L. Rev. 373, 392 (2004). In other words, a constitutional amendment such as Proposition 108 comes to pass only when the voters and taxpayers believe their elected officials are no longer responsive to their needs. The failure to recognize the concept of popular intent would deny the ability of the people to establish public policy. This denial ultimately submerges the purpose of the initiative process itself—to provide the people with the ability to speak, unfettered by any formal governmental body. Elizabeth A. McNellie, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 Colum. L. Rev. 157, 171 (1989) (citation omitted).

1. Michigan: Balanced Respect for Voter-Initiated Tax Limitations

In 1978, Michigan voters ratified the Headlee Amendment, Mich. Const. art. IX, §§ 25-34, a wide-ranging constitutional amendment that limited the ability of the state legislature to raise taxes and required a supermajority two-thirds vote for property and other tax increases as well as voter approval for certain local tax increases. The initiative constitutional amendment "grew out of the spirit of 'tax revolt' and was designed to place specific limitations on state and local revenues. The ultimate purpose was to place public spending under direct popular control." W*aterford Sch. Dist. v. State Bd. of Edu.*, 98 Mich. App. 658, 663, 296 N.W.2d 328, 331 (1980). *See also, Airlines Parking, Inc. v. Wayne Cty*., 452 Mich. 527, 532, 550 N.W.2d 490, 492 (1996) (The Headlee Amendment was "part of a nationwide

'taxpayers revolt'. . . to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level.").

Local governments in Michigan, as everywhere, tried to work around the constitutional constraints on taxation. In *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998), a property owner sued the city of Lansing on the grounds that the city's storm water "service charges" were disguised taxes that, under the Headlee Amendment, required voter approval. Lower courts declared the "service charge" to be a "user fee," exempt from voter approval under Headlee Amendment, but the state supreme court reversed, holding that the charge was an illegal tax. Key to the court's holding was its respect for the constitutional structure in which the people and their elected representatives share lawmaking power:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."

Bolt, 459 Mich. at 160, 587 N.W.2d at 269 (citation omitted). The court considered all the various definitions of taxes and fees, particularly noting that the mandatory nature of the charge strongly suggested that, whatever its name,

the charge was in fact a tax. *Id.* at 167-68, 587 N.W.2d at 272. The court was also greatly concerned that permitting the storm water management charge to be designated a fee would serve only to encourage "municipalities to supplement existing revenues by redefining various government activities as 'services' and enacting a myriad of 'fees' for those services." *Id.* at 168, 587 N.W.2d at 273. This would "effectively abrogate the constitutional limitations on taxation and public spending imposed by the Headlee Amendment." *Id*.

The *Bolt* approach remains in effect. In *Jackson Cty. v. City of Jackson*, 302 Mich. App. 90, 93, 836 N.W.2d 903, 905 (2013), the court held that a city, "by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge, ran afoul of § 31 of the Headlee Amendment." The court acknowledged that the storm water management charge served both regulatory and revenue-raising functions. *Id.* at 105-06, 836 N.W.2d at 912. However, "the minimal regulatory purpose served by the ordinance and the related management charge is convincingly outweighed by the revenue-raising purpose of the ordinance." *Id*. at 106, 836 N.W.2d at 912. The court called out the city for shifting the "the funding of certain preexisting government activities from the city's declining general and street fund

revenues to a charge-based method of revenue generation," *id.*, at 105, 836 N.W.2d at 912, and struck down the illegally-imposed tax.

The Michigan Supreme Court's decision in *Bolt*, and the subsequent court decisions that followed that approach, did not prevent elected officials from attempting to circumvent the Headlee Amendment's constraints on the taxing power. However, legislators seeking to end-run the prohibition on new or increased taxes have largely met with little success in the Michigan Supreme Court. As such, both the voters and their elected representatives have come to understand what is—and is not—permitted.

2. California: Conflict and Institutional Decay

In contrast to Michigan, California has endured decades of battle between voters and taxpayers who keep amending the state constitution to reduce their tax burdens and government officials and the state judiciary that keep finding new ways to evade the limitations. It is especially unfortunate that California's judicial branch—designed to protect constitutional boundaries—has willingly facilitated elected officials' evasions of constitutional tax limitations. "In numerous judicial opinions, the courts have bent, stretched, or ignored the traditional delineations"

between taxation and other types of fees or assessments. Reynolds, *supra*, 56 Fla. L. Rev. at 395-96.[7]

In response to skyrocketing property taxes caused by significant increases in home valuations and prices, and the failure of governments at any level to provide relief, voters and taxpayers first limited the ability of elected officials to raise taxes in Proposition 13, enacted as an initiative constitutional amendment in 1978, adding article XIIIA to the California Constitution. Quickly upheld by the California Supreme Court in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283 (1978), Proposition 13 restricted the ability of government to impose taxes on property owners without their approval and required increases in state taxes to be approved by a two-thirds vote of the governing body and special local taxes to be approved by a two-thirds vote of the electorate.

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[7] *See, e.g., Carman v. Alvord*, 31 Cal. 3d 318, 334, 644 P.2d 192, 201 (1982) (refusing to apply Proposition 13 to ad valorem taxes or special assessments to pay interest and redemption charges on any indebtedness previously approved by voters); *Pennell v. City of San Jose*, 42 Cal. 3d 365, 375, 721 P.2d 1111, 1118 (1986) (allowing local government to impose cost for public benefit on private parties); *Knox v. City of Orland*, 4 Cal. 4th 132, 144, 841 P.2d 144, 151-52 (1992) (holding levy for maintenance of existing parks is a special assessment and thus not subject to Proposition 13's restriction on special taxes); *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 845, 14 P.3d 930, 940 (2001) (a fee on residential rental property, adopted to fund a program for removal of substandard housing, was not within the scope of Proposition 218).

Elected officials avoided the strictures of Article XIIIA by expanding the definition and use of assessments, fees, and other charges imposed on taxpayers. These "non-tax" taxes were constrained only by "the limits of human imagination." *Citizens Ass'n of Sunset Beach v. Orange Cty. Local Agency Formation Comm'n*, 209 Cal. App. 4th 1182, 1196 (2012) (citing ballot materials). Voters and taxpayers sued, but the courts chose to construe Proposition 13 narrowly, validating existing "assessments" and "fees" and encouraging further creativity to avoid the need for voter approval or a supermajority vote. *See Los Angeles Cty. Transp. Comm'n v. Richmond*, 31 Cal. 3d 197, 208, 643 P.2d 941, 947 (1982) (upholding an unapproved tax on the sale, storage, or use of tangible personal property) and *id.* at 210, 643 P.2d at 948 (Richardson, J., dissenting) (resolving ambiguities in favor of local government allowed it "to *evade* the clear two-thirds voter approval requirement by which the people chose to limit additional or increased tax levies by such government.").

To restore the protections originally thought to have existed in Proposition 13, the voters adopted Proposition 62, a statutory initiative requiring that all new local taxes be approved by a vote of the local electorate. Cal. Gov. Code § 53720-53730 (1986). Because Proposition 62 was only a statute that may not have applied to charter cities, voters and taxpayers sought to enshrine its provisions in the state constitution.

They did so with Proposition 218, the Right to Vote on Taxes Act, which added articles XIIIC and XIIID to the constitution in 1996.[8] The initiative's findings and declaration of purpose stated that "local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself."[9] The electorate specifically intended that Proposition 218 would "protect taxpayers by limiting the methods by which local governments can exact revenue from taxpayers without their consent."[10]

In spite of the changes mandated by Proposition 218, local governments still managed to impose fees and assessments without voter approval. *See, e.g.*,

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[8] Article XIIIC "constitutionalizes Proposition 62 . . . and makes it stronger in its application." Howard Jarvis Taxpayers Association, Annotated Version of Proposition 218 (December 6, 1996) reprinted in California League of Cities Proposition 218 Implementation Guide A-22 (Jan. 1997), quoted in Stacey Simon, Comment, *A Vote of No Confidence: Proposition 218, Local Government, and Quality of Life in California*, 25 Ecology L.Q. 519, 530 (1998).

[9] Voter Information Guide for 1996, General Election, Proposition 218: Text of Proposed Law, § 2, at 108 http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2138&context=ca_ballot_props.

[10] *Id*. The argument in favor of Proposition 218 stated: "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees'. . . . [¶] Proposition 218 will significantly tighten the kind of benefit assessments that can be levied." Voter Info. Guide for 1996, Gen. Election, *Argument in Favor of Proposition 218*, at 76 http://repository.uchastings. edu/cgi/viewcontent.cgi?article =2138&context=ca_ballot_props. It also declared that "Proposition 218 simply gives taxpayers the right to vote on taxes and stops politicians' end-runs around Proposition 13." *Id.* at 77 [*Rebuttal to Argument Against Proposition 218*].

Paland v. Brooktrails Twp. Cmty. Servs. Dist. Bd. of Dirs., 179 Cal. App. 4th 1358, 1362 (2009) (charge imposed on parcels for the basic cost of providing water or sewer service, regardless of actual use, is not subject to ballot approval); *Howard Jarvis Taxpayers Ass'n v. City of San Diego*, 72 Cal. App. 4th 230, 234 (1999) (assessments to provide revenue to defray the costs of services and programs to benefit businesses were not subject to Proposition 218). The final straw was *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 833, 14 P.3d 930, 932 (2001), where the California Supreme Court held that Proposition 218 did not apply to an inspection fee imposed on property owners in their capacity as landlords. Justice Janice Rogers Brown dissented, writing that the voters passed Proposition 13 to "restrict the ability of government to impose taxes and other charges on property owners without their approval," and that since then voters have "witnessed politicians evade this constitutional limitation," and that the message of Proposition 218 is that voters "meant what they said." *Id*. at 848, 14 P.3d at 942 (Brown, J., dissenting). Justice Brown warned that if Proposition 218 was interpreted by courts in deference of government, then "we may well expect a future effort to stop politicians' end-runs around Proposition 13." *Id*. (citations omitted).

As predicted, the voters and taxpayers approved Proposition 26 in 2010, giving voters the right to approve (or not) levies, charges, or exactions imposed by local governments. Proposition 26's findings and declaration stated that local

governments had disguised new taxes as "fees" in order to extract revenue from California taxpayers without abiding by the voting requirements mandated by Propositions 13 and 218.[11] Proposition 26 closed the "loopholes in Propositions 13 and 218," which had allowed the proliferation of state and local taxes disguised as fees without a two-thirds vote of the Legislature or the voters' approval. *Schmeer*, 213 Cal. App. 4th at 1322-23, 1326. In essence, it was designed as draconian measure, a blunt tool that amended California's constitution to define every possible revenue-raising device as a tax needing voter approval or legislative supermajority approval.

California's tax initiatives demonstrate voter frustration with their government's inability to control increasing tax burdens. Instead of respecting the will of the voters, state and local governments read exceptions into the initiatives in order to avoid the requirements for imposing new taxes. The courts endorsed this practice. This not only fostered resentment in the voters, it created a more complex legal regime for distinguishing between taxes and non-taxes.[12]

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[11] Voter Info. Guide for 2010, Gen. Election, *Proposition 26: Text of Proposed Law* § 1, at 114 http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2304&context=ca_ballot_props.

[12] Even the California Legislative Analyst's Office acknowledges that the "various taxes and charges on a California property tax bill are complex and often not well understood." *Understanding California's Property Taxes* (Nov. 29, 2012), http://www.lao.ca.gov/reports/2012/tax/property-tax-primer-112912.aspx.

B. The Constitution Does Not Award Points for Creativity

Revenue-seeking legislators do not lack creativity in devising novel ways to circumvent constitutional limitations on their financial plans. Because limitations on the taxing power (as well as limitations on public debt) exist in many state constitutions, scholars have traced the evolution of special assessments, fees, and the formation of special districts as methods that have overtaken general taxation as the preeminent revenue-raising device. *See* Reynolds, 56 Fla. L. Rev. 373. These alternatives are "almost dizzying in their complexity, their variety, and in their sheer volume." *Id.* at 378. While some states, like California, create incentives for such creativity by upholding taxes recharacterized as something else, many other courts firmly clamp down on such evasions as detrimental to the constitutional structure of the state.

In *Samis Land Co. v. City of Soap Lake*, 143 Wash. 2d 798, 23 P.3d 477 (2001), the Washington Supreme Court invalidated a standby utility charge as impermissible tax. The court was deeply concerned by the "inherent danger that legislative bodies might circumvent constitutional constraints, such as the all-important tax uniformity requirement or the one percent ceiling, by levying charges that, while officially labeled 'regulatory fees,' in fact possess all the basic attributes of a tax." *Id.* at 805, 23 P.3d at 482. Moreover, the court was bound to maintain sharp distinctions between fees and taxes because, otherwise, "virtually all of what now

are considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a 'police fee.'" *Id.* at 806, 23 P.3d at 482 (internal quote marks omitted). Courts are bound to strike down invalidly adopted taxes even when the result leads to "difficult and complex issues." *Wash. State Dept. of Revenue v. Hoppe*, 82 Wash. 2d 549, 561, 512 P.2d 1094, 1101 (1973).

In *State v. City of Port Orange*, 650 So. 2d 1, 4 (Fla. 1994), the Florida Supreme Court "recognize[d] the revenue pressures upon the municipalities and all levels of government in Florida" and understood the city's "creative effort in response to the need for revenue." However, the court was bound to apply the provision of Florida's Constitution that limits ad valorem millage available to municipalities, art. VII, § 9, Fla. Const., and exempts homesteads from taxation in certain circumstances and up to stated limits. Art. VII, § 9, Fla. Const.; Art. X, § 4, Fla. Const. The court held the utility revenue bonds violated these constitutional provisions and could not be "circumvented by such creativity."

Regardless of the form of a statute, this Court must look to the "substance of what it does and . . . not countenance subterfuge to evade the intent of our fundamental law." *Cerajewski v. McVey*, 225 Ind. 67, 71, 72 N.E.2d 650, 651 (1947). *See also Bethlehem Steel Corp. v. Bd. of Ed. of City Sch. Dist. of Lackawanna*, 44 N.Y.2d 831, 834, 378 N.E.2d 115, 116 (1978) (per curiam) ("[T]his court has

been constrained to strike down legislative measures in palpable evasion of those constitutional provisions designed to limit the taxing powers of local subdivisions of the State."); *Bacon v. Kent-Ottawa Metro. Water Auth.*, 354 Mich. 159, 176, 92 N.W.2d 492, 500 (1958) ("it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, . . ."); *Bigler v. Greenwood*, 123 Utah 60, 68, 254 P.2d 843, 847 (1953) (Government "should not be permitted to accomplish by artifice, subterfuge or indirection what the law will not permit it to do openly and directly.").

This Court similarly understands that even when the government must address pressing, complex, and difficult problems, its solutions must comply with the state constitution. In a decision invalidating the so-called "lease back agreement" that was actually a purchase agreement for the Phoenix Civic Auditorium and Convention Center, this Court quoted extensively from other state supreme courts that had nullified government actions that sought to circumvent constitutional limitations on taxing or spending authority. Among them:

> We recognize the housing problem with which the state is confronted. Nevertheless, we can not permit the exigency of the situation to override the constitutional safeguard against improvidence and the integrity of the state's economy. We can not resort to dexterity of judicial thinking in order to assist the state in its problem. We can not close our eyes to what is actually being attempted. When we strip the

> plan down to fundamentals, we find that it is not a leasing arrangement between landlord and tenant, but the installment purchase by the state of certain buildings and facilities with state moneys raised by taxation, far in excess of the constitutional limitation.

City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n, Inc., 99 Ariz. 270, 282, 408 P.2d 818, 826 (1965), quoting with approval *State ex rel. Wash. State Bldg. Fin. Auth. v. Yelle*, 47 Wash. 2d 705, 715, 289 P.2d 355, 360 (1955). The bottom line was that whether the agreement was labeled a "lease" or not, its substance was that of a purchase agreement that violated both constitutional and statutory debt limitations. *City of Phoenix*, 99 Ariz. at 288, 408 P.2d at 830.

Judicial refusal to enforce taxing and spending limits, especially those enacted by initiative, generates anger and frustration among the voters and taxpayers. It can be difficult for the people to "reconvene" to amend or clarify a law if a court interprets it contrary to the voters' intent. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107, 109 (1995). Yet, as the California experience proves, voters "are sensitive to government attempts to circumvent taxing limitations and may clamp down even harder if they perceive that it is happening again." Simon, *supra*, at 545.

CONCLUSION

The courts frequently are called upon to invalidate legislative acts—acts of the people's representatives—that violate state constitutional limitations. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), judicial review has been woven

into our constitutional fabric. *McLaughlin v. Jones in and for Cty. of Pima*, __P.3d __, 2017 WL 4126939 *5, ¶25 (Ariz. Sept. 19, 2017) ("When the Constitution conflicts with a statute, the former prevails."). Elected officials pushing the boundaries is not a recent phenomenon, but some courts seem to have lost the will to enforce constitutional limitations. When voters and taxpayers have little faith in the judiciary to put a stop to legislative overreach, they become increasingly jaded about their governing institutions. A perpetual tug of war between voter-initiated restrictions on the government's taxing power and the government's attempt to circumvent those restrictions is unhealthy for our system of government and places the judiciary as the arbiter.

As Missouri Supreme Court Justice Holstein lamented when a majority of that court redefined a tax as a user fee to avoid a voter approval requirement in the state constitution,

> The majority admits that the Hancock Amendment prohibits some revenue increases by political subdivisions without voter approval. Article X, § 22(a) describes those that are prohibited with specificity, i.e., taxes, licenses and fees. To deny those words their ordinary meaning is to thwart the intent and will of the people from whom all constitutional authority is derived. Judges are not philosopher kings, free to do what we consider good and wise. *We are servants of a sovereign people, restrained by a Constitution of the people's making. To nullify a vital word endangers the entire constitutional fabric upon which we all rely.*

Keller v. Marion Cty. Ambulance Dist., 820 S.W.2d 301, 311 (Mo. 1991) (Holstein, J., dissenting) (emphasis added). Government agencies, aided by

judicial imprimaturs of approval, will continue to tax residents over their repeated disapproval and initiative-driven measures to make it stop.

Arizona can and must do better. The Medicaid expansion tax, A.R.S. § 36-2901.08, should be declared to be what it is: a tax. The decision below should be reversed.

DATED: October 4, 2017.

Respectfully submitted,

By /s/ James S. Burling
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