

1 MARK BRNOVICH
2 Attorney General
3 Firm Bar No. 14000
4 Scot G. Teasdale (019330)
5 Jerry A. Fries (011788)
6 Assistant Attorneys General
7 2005 North Central Avenue
8 Phoenix, AZ 85004-1592
9 (602) 542-8382 / (602) 542-8385
10 tax@azag.gov
11 Attorneys for Arizona Department of Revenue

8 **THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9
10 **IN THE ARIZONA TAX COURT**

11 HAROLD VANGILDER; DAN NEIDIG; and
12 ARIZONA RESTAURANT ASSOCIATION,

13 Plaintiffs,

14 v.

15 ARIZONA DEPARTMENT OF REVENUE;
16 PINAL COUNTY; PINAL COUNTY
17 REGIONAL TRANSPORTATION
18 AUTHORITY,

19 Defendants.

Cause No. TX2017-000663

**RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION**

(Assigned to the
Honorable Christopher T. Whitten)

20 Defendant, the Arizona Department of Revenue (“Department”), hereby files this
21 Response to the Motion for Preliminary Injunction filed by Plaintiffs to request that the Motion
22 be denied, or in the alternative, that any injunction be narrowly tailored to prevent interference
23 with normal operations of the Department and with non-party taxpayers. This Response is
24 supported by the following Memorandum of Points and Authorities.

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1 **Memorandum of Points and Authorities**

2 **1. Facts Relevant to Requested Injunction.**

3 **A. Facts Related to the Pinal County Election.**

4 On June 5, 2017, Defendant, the Pinal Regional Transportation Authority (“RTA”),
5 passed Resolution No. 2017-01 (“RTA Resolution”) requesting that Defendant, Pinal County
6 (“County”), schedule and conduct a countywide special election on November 7, 2017
7 regarding: (1) the adoption of a regional transportation plan; and (2) the levy of a transportation
8 excise tax pursuant to A.R.S. § 42-6106. The RTA Resolution stated that the tax was to be
9 levied:

10 at a rate equal to one-half percent (0.005%) of the gross income from the business
11 activity *upon every person engaging or continuing in the business of selling*
12 *tangible personal property at retail*; provided that such rate shall become a
13 variable or modified rate such that when applied in any case when the gross
14 income from the sale of a single item of tangible personal property exceeds ten
15 thousand dollars (\$10,000), the one-half percent (0.005%) tax rate shall apply to
the first ten thousand dollars (\$10,000), and above ten thousand dollars (\$10,000),
the measure of tax shall be a rate of zero percent (0%), pursuant to 42-6106,
needed to fund the Plan.

16 (Emphasis added.)

17 Pursuant to A.R.S. § 48-5314(C), the Pinal County Board of Supervisors (“Board”) was
18 obligated to prepare, print and distribute to households a publicity pamphlet that provided,
19 among other things, a summary of the principal provisions of the issue presented to the voters,
20 including the rate of the transportation excise tax and the form of the ballot. The publicity
21 pamphlet prepared and mailed by the Board (“Pamphlet”), contrary to the RTA Resolution,
22 stated that in addition to the proposed excise tax being applied to the retail classification in
23 A.R.S. § 42-5061, excise taxes would be levied upon *all* transaction privilege tax classifications
24 set forth in A.R.S. Title 42, Chapter 5, Article 2 (A.R.S. §§ 42-5061 through -5076), as well as
25 upon jet fuel taxes under to A.R.S. § 42-5352(A), and on the use or consumption of electricity
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1 or natural gas by customers in Pinal County who are subject to use tax under A.R.S. § 42-5155
2 (collectively, the “Pamphlet Taxes”).

3 In the Pamphlet, tax rates were set forth for all of the tax classifications identified to be
4 applied to the appropriate tax bases, except that the rate for the retail classification was as set
5 forth in the RTA Resolution, a 0.5% rate would apply to the first \$10,000 of income from the
6 sales of a single item of tangible personal property, while the rate on income received on single
7 items above \$10,000 would be 0%.

8 Notwithstanding the description in the Pamphlet stating that the tax would apply to all
9 classifications, the sample ballot set forth in the Pamphlet stated that taxes would be levied only
10 on the retail classification at the 0.5 and 0% rates described in the RTA Resolution. Upon
11 information and belief, the actual ballot measure voted on by county voters (Proposition 417)
12 tracked the Pamphlet’s sample ballot language and stated that it was only applying a tax to the
13 retail classification, excluding revenues on single items over \$10,000 from the tax base. At the
14 November 7 election, voters approved the adoption of a regional transportation plan
15 (Proposition 416) and narrowly approved Proposition 417.

16 Consistent with the Department’s answer, the Department initially interpreted the tax as
17 only applying to the retail classification since that was the only classification identified in the
18 ballot. However, the County now contends that the scope of the tax is set by the Pamphlet
19 language rather than the ballot language and has demanded in a 2/22/18 resolution sent to the
20 Department (Resolution 2018-01, attached hereto as Exhibit A) that the Department begin
21 collecting the tax on all classifications on April 1, 2018. Since this dispute is an election law
22 issue (at least in part) and beyond the expertise of the Department, and because the Department
23 cannot adjudicate disputes between the parties, the Department intends to comply with the
24 County’s demand by shortly publishing tax rate tables for April 2018 and configuring its
25 computers to accept filings and payments of this disputed tax remitted by taxpayers from all
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1 classifications. The Department’s actions are reflective of the Department’s role as tax
2 administrator and not an endorsement of the County’s position.

3 Plaintiffs now seek a preliminary injunction against the Department to “enjoin
4 Defendant DOR from acting to implement Proposition 417 in accordance with or in response to
5 Resolution 2018-01.” It is not at all clear what specific actions the Department would be
6 enjoined from performing given the breadth of this request.

7 **B. Facts Related to Tax Administration.**

8 The vague and broad requested injunction does not seem to consider how taxes are
9 administered. The only practical way to limit collections would be to avoid publishing rate
10 tables with the tax included (or depublish them if necessary).¹ This would limit reporting and
11 payment of the disputed tax.² A broader injunction against “collection” appears to
12 misunderstand the so-called “collection” process.

13 For transaction privilege taxes, most taxpayers file monthly returns with the Department
14 to report revenues and tax liability and to remit payments. The Department receives these
15 returns³ and the data therein goes into the Department’s computer system. Payments are
16 deposited. The Department’s “collection” activities initially consist of simply receiving and
17 processing returns and payments. As such and as a practical matter, this process cannot be
18 enjoined.

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¹ Electronic return forms typically automatically fill in the rate from the tables. If the tables do
23 not reflect the disputed tax, it is expected that few taxpayers would add it themselves.

24 ² Of course, if the tax is upheld, those who did not collect the tax from customers and remit it
25 may be in a worse situation than if they collected and remitted.

26 ³ Although state law requires taxpayers to file and pay electronically when they have multiple
business locations or if a business has a total annual combined state, county and municipal
transaction privilege tax liability of \$20,000 or more, many small taxpayers continue to file
paper returns.

1 The disputed tax would generally be reported and paid along with other indisputably
2 lawful taxes.⁴ If taxpayers chose to file returns and remit payments attributed to the disputed
3 tax, the Department must still accept filings and payments, even if the tax is being challenged.
4 To do otherwise interferes with taxpayers attempts to comply with their self-determined tax
5 obligations. If a tax is ultimately determined to be unlawful or inapplicable, taxpayers who
6 remitted payments for such tax could of course seek refunds.

7 Assuming amounts for the disputed tax are remitted, it is not a viable option for the
8 Department to send back amounts remitted for the disputed tax pending the litigation. If such
9 amounts could be identified and automatically returned and the tax is later upheld (in whole or
10 part), then the Department's only remedy to recover tax due would be to audit and assess each
11 taxpayer for tax the Department earlier returned.⁵

12 **2. Law and Argument Regarding Requested Injunction.**

13 **A. The Possibility of a Tax Eventually Being Struck Down Does Not Justify** 14 **Injunctive Relief.**

15 Injunctions to prevent or enjoin the Department or any taxing agency from "collecting
16 an imposed or levied tax" are prohibited by A.R.S. §§ 42-11006 and -1254(D)(1). As discussed
17 in *Church of Isaiah 58 Project of Arizona, Inc. v. La Paz County*, 233 Ariz. 460 (App. 2013),
18 however, there are exceptions.

19 The Arizona Supreme Court has recognized a narrow exception to the statutory
20 prohibition against injunctive relief when the challenged taxes have been levied
21 without semblance of authority "and resulting injury cannot be adequately
22 provided by proceedings at law." *Crane Co. v. Ariz. State Tax Comm'n*, 63 Ariz.
426, 445, 163 P.2d 656, 664 (1945), *overruled in part on other grounds by*
Valencia Energy Co. v. Ariz. Dep't of Revenue, 191 Ariz. 565, 959 P.2d 1256

23 ⁴ The Department may be able to identify proceeds attributable to the disputed tax, though some
24 portions of payments are simply coded to unknown taxes if they are not identified as related to a
25 particular tax.

26 ⁵ And if identifying the disputed tax required examining a return, such examination could
arguably be considered an audit that would bar future audits under the one audit rule and any
returned tax might never be recovered.

1 (1998); *see also Santa Fe Trail Transp. Co. v. Bowles*, 62 Ariz. 177, 179, 156 P.2d
2 722, 723 (1945) (“If there is some semblance of authority for the imposition of
3 such tax plaintiff’s remedy is to pay the tax under protest, then test its validity by
4 suing for recovery....”).⁷ But an injunction is not available “to restrain the
5 assessment of taxes imposed by law so long as the tax official acts with semblance
6 of authority.” *Lane*, 72 Ariz. at 392, 236 P.2d at 463. The question thus becomes:
7 What constitutes a “semblance of authority”?

8 It is clear that a legally or factually erroneous decision, standing alone, does not
9 establish that a taxing authority acted without semblance of authority. *See Bowles*,
10 62 Ariz. at 180, 156 P.2d at 723 (injunctive relief not available “in all cases where
11 the tax is illegally imposed”). If the rule were otherwise, the prohibition against
12 injunctive relief would be meaningless. Any aggrieved taxpayer could allege that
13 a challenged tax was erroneously assessed or collected, making it “illegal.” *See*
14 *Blubaum v. Cantor*, 21 Ariz. App. 586, 589, 522 P.2d 51, 54 (1974) (prohibiting
15 injunction to test legality of assessor’s actions; “[t]o hold otherwise would be to
16 elevate every erroneous, wrongful or illegal action of the assessor to the status of
17 an act done without ‘semblance of authority’, in effect nullifying the anti-
18 injunction provisions”); *Bowles*, 62 Ariz. at 180, 156 P.2d at 723 (“To hold that
19 injunction is the proper remedy here would be equivalent to saying that injunction
20 would lie in all cases where the tax is illegally imposed.”).

21 233 Ariz. at 464-65, ¶¶ 19-20.

22 The U.S. Supreme Court has also strictly enforced the Federal Anti-Injunction Act, with
23 limited exceptions.

24 The Supreme Court has explained that the principal purpose of the Anti-Injunction
25 Act is to preserve the Government’s ability to assess and collect taxes
26 expeditiously with “a minimum of preenforcement judicial interference” and “to
require that the legal right to the disputed sums be determined in a suit for refund.”
Bob Jones Univ. v. Simon, 416 U.S. 725, 736, 94 S.Ct. 2038, 2045, 40 L.Ed.2d
496 (1974) (citing, *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 82
S.Ct. 1125, 8 L.Ed.2d 292 (1962)).

Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1484-85 (9th Cir. 1990).

The United States Supreme Court now recognizes a single, narrow judicial exception to
the Anti-Injunction Act.

[A]n injunction may be obtained against the collection of any tax if (1) it is “clear
that under no circumstances could the government ultimately prevail” and (2)

1 “equity jurisdiction” otherwise exists, i.e., the taxpayer shows that he would
2 otherwise suffer irreparable injury.

3 *Comm’r v. Shapiro*, 424 U.S. 614, 627 (1976) (quoting *Enochs v. Williams Packing &*
4 *Navigation Co.*, 370 U.S. 1, 7 (1962)).

5 Whether the tax is illegal (in whole or part) will be addressed below. As for the second
6 prong, the Department will leave it to the aggrieved Plaintiffs to make the case of any
7 “irreparable injury.”⁶

8 **B. If Enjoined, What Exactly Should the Department Be Prohibited From**
9 **Doing?**

10 It is not clear what action the Plaintiffs want the Department to refrain from doing. The
11 disputed tax is not one imposed by the Department or by the State. Rather, any injunction
12 directed to illegality of the tax would be better directed to the County and RTA. The
13 Department’s role is simply administration; the State did not levy the tax nor is it actively
14 seeking its enforcement. While an injunction could prevent the Department from publishing
15 new rate tables, this is a curious route to challenge the legality of a tax, and won’t solve the
16 problem of a taxpayer who pays the tax anyway, following the County’s directive. These
17 actions are outside of the Department’s control.

18 Because it is taxpayers who report and remit taxes, it is generally not possible for the
19 Department to avoid “collecting” a tax reported and paid by a taxpayer. In the initial phase of
20 tax administration, the Department is, in essence, simply receiving returns and payments. The
21 Department also has no way of knowing what is reported in a return before it is received by the
22 Department. And, the disputed tax will be reported on returns and paid along with non-disputed
23 taxes, typically in one payment. If taxpayers remit payments attributed to the disputed tax, the
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25 ⁶ The Department does note that, in the tax context, irreparable injury requires more than
26 simply having to pay a disputed tax and seek a refund. To hold otherwise would mean any
taxpayer would be “irreparably harmed.”

1 Department must still accept filings and payments even if the tax is being challenged because
2 most of the taxes being remitted are lawful and are not being challenged.

3 While it may be possible to identify proceeds from the tax mathematically or if reported
4 under a separate code, a process that would be automated and not an audit, the Department
5 must limit its activities in examining returns to avoid triggering the one audit rule in A.R.S. §
6 42-2059. Any order should keep this limit in mind.

7 Sequestering and holding the tax in dispute may be a more suitable approach than
8 limiting collections. Once the amounts of the disputed tax has been determined by the
9 Department's computers⁷, these funds could be held either at the state or county level, not to be
10 spent unless and until this litigation is resolved.⁸ This would best be accomplished through an
11 agreement between the County, RTA and Plaintiffs, but if not, a properly tailored order to this
12 effect would be acceptable to the Department and would not interfere with administration.

13 **3. Law and Argument Regarding Validity of the Tax.**

14 **A. Do the Inconsistencies Between the Ballot and the Pamphlet Invalidate** 15 **Proposition 417, Rendering All Taxes Thereunder Void?**

16 The Department has no expertise or role in election law issues, and leaves that dispute
17 between Plaintiffs and the County and RTA. The Department does note that those election law

18 ⁷ Normally, if a tax was added to the county rate, an amount of tax remitted that corresponds to
19 that rate could be easily determined mathematically and remitted to the appropriate agency,
20 such as the RTA. However, the attempted alteration of the retail tax base may make
21 ascertaining the correct amount of tax more difficult unless it is remitted under a separate
coding on returns.

22 ⁸ The Department does not want to end up having to pay refunds to taxpayers on funds already
23 distributed to and spent by the RTA. Under a similar tax scheme, in which taxes were levied
24 by county electors for the benefit and use of a special district (the Arizona Sports and Tourism
25 Authority), this Tax Court, after invalidating the tax, ruled that the State of Arizona was
26 responsible for paying all refunds. (See page 3 of Tax Court's 7/28/15 minute entry ruling in
Saban v. Arizona Department of Revenue, TX2010-001089). If the tax at issue is invalidated,
the Department will not be able to backcharge future taxes remitted to the RTA unless a new
tax is enacted. The State and its taxpayers should not be liable for the payment of tax refunds
on taxes levied and spent by a political subdivision of the State.

1 issues do seem material to the question of whether classifications other than retail are properly
2 being taxed. The Department will brief other issues that are tax-related.

3 **B. Does the Tax Apply to Classifications Other Than Retail?**

4 Relying on the ballot language, the Department interpreted the tax as being imposed
5 only on the retail classification with some proceeds excluded from this tax base. This tax base
6 is established by A.R.S. § 42-5061 and the pertinent definitions of “gross proceeds of sales” or
7 “gross income” are found in A.R.S. §§ 42-5001(4) and (5). The County and RTA however
8 contend that the tax also applies to all other classifications as identified in the pre-election
9 publicity pamphlet (the “Pamphlet Classifications”), and have instructed the Department to
10 begin collecting tax on all of these classifications. In the absence of a court order and pursuant
11 to County Resolution 2018-01 (Exhibit A), the Department will modify its tax tables, made
12 available to Pinal County taxpayers to notify them of their TPT liabilities, to state that RTA
13 taxes have been levied on all of the Pamphlet Classifications effective April 1, 2018.

14 While the Department will leave to the County and RTA the task of defending their tax,
15 the Department does note that tax statutes must be clear.

16 In the interpretation of statutes levying taxes it is the established rule not to extend
17 their provisions, by implication, beyond the clear import of the language used, or
18 to enlarge their operations so as to embrace matters not specifically pointed out.
19 In case of doubt they are construed most strongly against the government, and in
favor of the citizen.

20 *Gould v. Gould*, 245 U.S. 151, 153 (1917) (internal cites omitted). The law is essentially the
21 same in Arizona.

22 We have fully considered the rule of statutory construction that statutes imposing
23 taxes will be most strongly construed against the government and in favor of the
24 taxpayer or citizen. *Alvord et al. v. State Tax Commission*, Ariz., 213 P.2d 363;
25 *Rodenbough, Ex’r, v. United States*, 3 Cir., 25 F.2d 13, 57 A.L.R. 1091; and that
26 any doubts as to their meaning are to be resolved against the tax authority and in
favor of the taxpayer. *General Petroleum Corporation of California v. Smith et
al.*, 62 Ariz. 239, 157 P.2d 356, 158 A.L.R. 364.

1 *Arizona Tax Comm'n v. Dairy & Consumers Co-op. Ass'n*, 70 Ariz. 7, 18 (1950).

2 If the tax is defined by the ballot language, it facially applies only to the retail
3 classification and not any other classifications. If the tax is defined by the Pamphlet language,
4 then the tax encompasses all classifications. The language of both the ballot and the Pamphlet
5 are clear, and the question is which language is legally operative as the law enacted by
6 Proposition 417.⁹ Because the Department is simply the administrator of the tax system and the
7 tax at issue is a county tax, those disputes are between the county and the aggrieved persons
8 challenging the tax.

9 **C. Can Counties Exclude Revenues from the Retail Classification Tax Base?**

10 Prior to the enactment at issue for every county-imposed transaction privilege tax,
11 counties have simply imposed a rate to be added to the state tax rate, and then applied as a
12 combined rate to the same tax base.

13 See https://www.azdor.gov/Portals/0/TPTRates/03012018_RateTable.pdf.

14 Therefore, the structure chosen for the tax on retail, exempting income that is part of the tax
15 base at the county level, is new and novel. Whether this is lawful is an issue of first impression.

16 The tax base in the retail classification is the “gross proceeds of sales or gross income”
17 of the business. A.R.S. § 42-5061. Definitions for these terms are found in A.R.S. §§ 42-
18 5001(4) and (5) and read:

19 4. “Gross income” means the gross receipts of a taxpayer derived from trade,
20 business, commerce or sales and the value proceeding or accruing from the sale of
21 tangible personal property or service, or both, and without any deduction on
account of losses.

22 5. “Gross proceeds of sales” means the value proceeding or accruing from the sale
23 of tangible personal property without any deduction on account of the cost of
24 property sold, expense of any kind or losses, but cash discounts allowed and taken
on sales are not included as gross income.

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26 ⁹ Assuming of course that the inconsistencies between Pamphlet and ballot do not void the entire Proposition.

1 The county’s attempt to exclude revenues from single items in excess of \$10,000 from
2 the tax base seeks to remove from the tax base income that would be otherwise taxed under the
3 retail classification. Counties cannot unilaterally redefine the retail classification to tax things
4 not within the classification. Similarly, the attempt to exclude proceeds is not consistent with
5 the statutory definitions of “gross income” and “gross proceeds of sales.”

6 The County is expected to defend the “zero rate” on single items over \$10,000 as a
7 “variable” rate allowed under A.R.S. § 42-6106. However, the attempt to apply a positive rate
8 to part of the base and a zero rate to part of the base has the effect of excluding part of the tax
9 base from taxation and is best understood as an attempt to modify the tax base by only taxing
10 part of the tax base.

11 A county’s right to tax and the scope of that tax is wholly dependent upon the authority
12 given it by the State.

13 [t]he power of taxation under the constitution inheres in the sovereignty of the
14 state and may be exercised only by the legislature except where expressly
15 delegated to political subdivisions of the state or to municipal corporations. The
16 authority of municipalities to levy a tax must be made clearly to appear and
doubts, if any, as to the power sought to be exercised must be resolved against the
municipality;

17 *City of Phx. v. Ariz. Sash, Door & Glass Co.*, 80 Ariz. 100, 102, *opinion amended on reh’g*, 80
18 Ariz. 239 (1956).

19 In particular, counties lack the authority to create their own tax classifications. Instead,
20 under several statutes, including A.R.S. § 42-6106, counties or their electors may merely
21 impose a tax rate, not to exceed statutory maximum rates, upon business income earned within
22 certain tax classifications created by the Legislature. The county’s rate is then applied to the
23 state’s transaction privilege tax classifications (areas of business being taxed) with the tax base
24 being that as defined in statute (typically gross income or gross revenue from the business in
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1 the classification, less statutory deductions).¹⁰ The only right that counties have is to approve a
2 tax and then adopt a rate to be applied, taking all other parts of the tax structure unaltered. The
3 only right given to counties is to adopt rates within limits, but the adopted rate must be a
4 positive rate that results in the levy and collection of taxes against the whole of the applicable
5 statutory base in a given tax period.¹¹

6 Under A.R.S. § 42-6106(A), qualified electors within a county may levy a tax at rates no
7 higher than a certain percentage of the rate levied by the State. Under A.R.S. § 42-6106(B)(1),
8 the taxes “shall be levied and collected” at a rate of “not more than ten per cent of the
9 transaction privilege tax rate prescribed by section 42-5010, Subsection A”¹² If a county
10 adopts a tax and sets a rate, the Department applies the combined state transaction privilege tax
11 and county excise rates to the transaction privilege tax bases established by state law, applying
12 them as a single combined rate in the classification. See tax rate table at
13 <https://www.azdor.gov/Portals/0/TPTRates/08012017RateTable.pdf>.

14 **D. The Tax at Issue Does Not Violate Equal Protection.**

15 “[T]he equal protection clauses of the 14th Amendment and the state constitution have
16 for all practical purposes the same effect.” *Westin Tucson Hotel Co. v. State Dep’t of Revenue*,
17 188 Ariz. 360, 366 (App. 1997). “An equal protection challenge to a legislative tax
18 classification can succeed only if the taxpayer can demonstrate that the classification is not
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20 ¹⁰ “The transaction privilege tax . . . is an excise tax on the privilege or right to engage in an
21 occupation or business in the State of Arizona. . . . It is not a tax upon the sale itself nor upon
22 the property sold.” *Ariz. Dep’t of Revenue v. Mountain States Tel. & Tel. Co.*, 113 Ariz. 467,
23 468 (1976) (internal cites omitted). “The tax is not upon sales, as such, but upon the privilege
24 or right to engage in business in the State, although measured by the gross volume of business
25 activity conducted within the State.” *Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250
(1973).

25 ¹¹ County rates can vary for different periods, such as adopting a tax rate of 0.2% for the first
26 year of the tax, increasing to 0.3% for the next year, etc.

26 ¹² A.R.S. § 42-5010 sets forth the rates applicable to many state transaction privilege tax
classifications.

1 rationally related to any conceivable legitimate governmental purpose.” *US West Commc’ns,*
2 *Inc. v. City of Tucson*, 198 Ariz. 515, 525, ¶ 40 (App. 2000).

3 A legislative classification ‘may be based on rational speculation unsupported by
4 evidence or empirical data,’ *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315,
5 113 S. Ct. 2096 (1993), and will survive rational basis review unless the court is
6 convinced beyond a reasonable doubt that the legislative classification is wholly
unrelated to any legitimate legislative goal. The burden is on the challenging party
to demonstrate that there is no conceivable basis for the disparity in treatment.

7 *Id.* at 525-26, ¶ 40. Classifications created by different application of tax laws to different
8 taxpayers survive an equal protection challenge if the court can “infer a set of facts
9 underpinning the classifications that the [governmental entity] might rationally have believed
10 and that was rationally related to furthering a plausible governmental interest.” *Aida Renta Tr.*
11 *v. Dep’t of Revenue*, 197 Ariz. 222, 237, ¶ 46 (App. 2000). Raising revenue for public
12 purposes and limiting adverse business impacts are legitimate purposes that provide a rational
13 basis for the law.

14 **E. The Tax Is Not a Special Law.**

15 The limiting of taxes to only certain revenues is not a violation of the constitution as
16 special legislation. “A law is special and, therefore, unconstitutional if it ‘applies only to
17 certain members of a class or to an arbitrarily defined class which is not rationally related to a
18 legitimate legislative purpose.’” *State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993).
19 “A law does not constitute special legislation if (1) there is a rational basis for the classification;
20 (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the
21 class is flexible, allowing members to move into and out of the class.” *Id.* at 193.

22 Here, it is not clear what classification is challenged as a special law. If it is the limit on
23 the retail tax base, there is a rational basis for taxing only lower priced items under the retail
24 classification, which is to prevent customers of expensive items (cars) from purchasing out of
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1 the area, damaging local business.¹³ The contention that this is to lessen political resistance
2 from retailers who could be impacted is irrelevant to rational basis considerations. If the
3 complaint is applying the tax only to retail, while this may be inconsistent with state tax law,
4 choosing to only tax one broad category of businesses, and not another, does not render a tax a
5 “special law.”

6 The Arizona Constitution does not require that every person pay the same rate or that all
7 income be equally taxed. Tax codes are replete with differential treatment, deductions and
8 exemptions, and broad swaths of business, notably many service businesses, are not taxed
9 under the transaction privilege tax. Notably, this state has excluded many items from tax,
10 resulting in an unequal burden between taxpayers selling at retail. *See* A.R.S. §§ 42-5061(A)
11 and (B). Never was exempting certain proceeds from the transaction privilege tax held
12 unconstitutional as a “special law.” Notably, cities are expressly allowed to exclude from
13 Model City Tax Code taxes amounts of income on single items over specified dollar amounts.
14 *See* Option V at https://modelcitytaxcode.az.gov/models/Appendix_III.htm. While no such
15 express authorization exists for counties, there does not appear to be a constitutional conflict
16 with such a taxation scheme if statutorily authorized.

17 The retail classification encompasses all retailers as members of the relevant class –
18 retailers. One moves in by doing business selling tangible personal property at retail, and if the
19 problematic classification is the \$10,000 cut off, the cut off applies to every retailer, and
20 retailers would “move in and out” of this class based on the sales prices of items. This law,
21 whatever its other problems, is nothing like the legislation that directed discriminatory taxes
22 against a limited set of mines and utilities or the tax imposed on only one insurance company
23 held to be special laws in *Tucson Electric Power Co. v. Apache County*, 185 Ariz. 5 (App.
24 1995) and *State Compensation Fund v. Symington*, 174 Ariz. 188 (1993), respectively. These

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26 ¹³ The Department’s argument regarding this not being a “special law” does not address
whether the retail classification are lawful under A.R.S. § 42-6106. *See* paragraph 2(B) above.

1 cases turned on attempts to target a tax on only one or a few taxpayers who could not escape it,
2 rather than broadly taxing a large number of taxpayers. The tax, whether on retail or all
3 classifications, is broad and generally applicable.

4 **4. Conclusion.**

5 The requested injunction is too broad and imprecise to be granted and is targeted to the
6 wrong part of the government, the Department. If the Court denies Plaintiffs' Motion for
7 Preliminary Injunction and revenue on the disputed taxes begins being collected on April 1,
8 proceeds from the disputed tax should be held and not spent so as to allow for a pool of funds to
9 be created to pay refunds if the Plaintiffs ultimately prevail in their claims that all or any part of
10 the taxes collected are unlawful.

11 DATED this 19th day of March, 2018.

12 MARK BRNOVICH
13 Arizona Attorney General

14 /s/ Scot G. Teasdale
15 Scot G. Teasdale
16 Jerry A. Fries
17 Assistant Attorneys General
18 Attorneys for Arizona Department of Revenue
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20 ORIGINAL of the foregoing e-filed with the
21 Court this 19th day of March, 2018.

22 COPY of the foregoing e-delivered
23 this 19th day of March, 2018, to:

24 Honorable Christopher Whitten
25 Judge of the Arizona Tax Court
26 125 West Washington, Suite 201
Phoenix, AZ 85003

1 COPY of the foregoing electronically served through
2 Turbocourt this 19th day of March, 2018, to:

3 Timothy Sandefur
4 Matthew Miller
5 Scharf-Norton Center for Constitutional
6 Litigation at the Goldwater Institute
7 500 East Coronado Road
8 Phoenix, AZ 85004
9 litigation@goldwaterinstitute.org
10 Attorneys for Plaintiffs

11 Joseph A. Kanefield
12 Chase Bales
13 Ballard Spahr, LLP
14 One East Washington Street, Suite 2300
15 Phoenix, Arizona 85004-2555
16 kanefieldj@ballardspahr.com
17 balesc@ballardspahr.com
18 Attorneys for Defendants Pinal County and
19 Pinal Regional Transportation Authority

20 Chris Keller
21 Chief Civil Deputy
22 Pinal County Attorney's Office
23 P.O. Box 887
24 Florence, Arizona 85132
25 Chris.keller@pinalcountyAZ.gov
26 Attorney for Pinal County

William J. Sims, III
Sims Murray, Ltd.
3101 North Central Avenue, Suite 870
Phoenix, Arizona 85012
wjsims@simsmurray.com
Attorney for Pinal Regional Transportation Authority

/s/ Sylvia Luevano
#6899250

EXHIBIT A

RESOLUTION NO. 2018-01
PINAL REGIONAL TRANSPORTATION AUTHORITY

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE PINAL REGIONAL TRANSPORTATION AUTHORITY (1) REAFFIRMING THE CORRECTNESS AND ACCURACY OF THE ELECTION MATERIALS PREPARED BY THE PINAL COUNTY, ARIZONA BOARD OF SUPERVISORS PURSUANT TO SECTION 48-5314, ARIZONA REVISED STATUTES, AND (2) REAFFIRMING THAT THE TRANSPORTATION EXCISE (SALES) TAX DESCRIBED THEREIN THAT WAS APPROVED BY A MAJORITY OF THE QUALIFIED ELECTORS VOTING AT THE COUNTYWIDE ELECTION ON NOVEMBER 7, 2017, MUST BE COLLECTED AT A VARIABLE RATE AND/OR A MODIFIED RATE PURSUANT TO SECTION 42-6106(C), ARIZONA REVISED STATUTES, AS EXPRESSLY DESCRIBED IN THE BALLOT PREPARED IN CONNECTION WITH SUCH ELECTION AND THE PUBLICITY PAMPHLET RELATED THERETO

WHEREAS, the Pinal Regional Transportation Authority (the “**Pinal RTA**”) is an Arizona special taxing district, duly formed and existing, pursuant to Section 48-5302, *et seq.*, Arizona Revised Statutes (“A.R.S.”), for the purposes of coordinating multi-jurisdictional cooperation in transportation planning, improvements and fund-raising as a municipal corporation through taxation and bonding, with the public’s input and voter approval; and

WHEREAS, A.R.S. Section 42-6106 directs the Arizona Department of Revenue (“**ADOR**”) to collect a transportation excise tax (the “**Transportation Excise Tax**”) if (i) the qualified electors of the county in which the regional transportation authority is established approve the Transportation Excise Tax and (ii) the regional transportation authority levies the Transportation Excise Tax; and

WHEREAS, on June 5, 2017 the Pinal RTA adopted a twenty-year comprehensive multimodal transportation plan (the “**Plan**”) and requested the Board of Supervisors of Pinal County, Arizona (the “**County**”) to call a Special Election (the “**Election**”) of the qualified electors at a countywide election regarding the approval of the Plan and the levy of the Transportation Excise Tax pursuant to A.R.S. Section 42-6106 needed to fund the Plan; and

WHEREAS, on June 21, 2017, the Board of Supervisors of Pinal County, Arizona called the Election regarding the approval of the Plan and the levy of the Transportation Excise Tax; and

WHEREAS, in connection with the Election the Board of Supervisors of the County caused to be prepared the Publicity Pamphlet and Sample Ballot (collectively, the “**Election Materials**”); and

WHEREAS, the Election Materials clearly describe all the categories of transaction privilege tax categories (the “**Sales Tax Categories**”) that would be the subject of the Transportation Excise Tax as set forth in the Publicity Pamphlet and

WHEREAS, on October 5, 2017, the Board reviewed the Election Materials and affirmed that the Election Materials described a variable rate and/or modified rate pursuant to Section 42-6106(C) and authorized the application of the Transportation Excise Tax on all Sales Tax Categories; and

WHEREAS, on November 7, 2017, a majority of the qualified electors of Pinal County approved the Plan and the Transportation Excise Tax as set forth in the Election Materials.

NOW, THEREFORE, BE IT RESOLVED by this Board that in light of the clear approval of the Plan and Transportation Excise Tax:

Section 1. Levy of Tax. That a transportation excise tax as provided in A.R.S. Section 42-6106 be levied and collected at the rates specified in A.R.S. Section 42-6106 (B) and as set forth on pages 14 and 15 of the Publicity Pamphlet, attached as Exhibit A; provided, however, that with respect to application of such tax to the business classification described in A.R.S. Section 42-5010 (A)(1)(I), such transportation excise tax shall be levied and collected at a variable or modified rate, as specified in the ballot proposition relating to the Transportation Excise Tax and approved by a majority of the qualified electors voting, such that when applied in any case when the gross income from the sale of a single item of tangible personal property exceeds ten thousand dollars (\$10,000), a one-half percent (0.5%) tax rate shall apply to the first ten thousand dollars (\$10,000), and above ten thousand dollars (\$10,000), the measure of tax shall be a rate of zero percent (0.0%).

Section 2 Collection. That the ADOR is authorized and directed to begin collection of the Transportation Excise Tax at the rates specified in Paragraph 1 of this Resolution on April 1, 2018 and to continue collection until March 31, 2038.

Section 3 Escrow Account. That the Executive Director of the Pinal RTA is hereby instructed to open an interest bearing escrow account ("**Escrow Account**") at a federally insured financial institution located in Pinal County for the deposit of collections of the Transportation Excise Tax as and when collected and shall deposit all transmitted taxes and withhold distribution from said escrow account until final judgment is entered by the Superior Court of the State of Arizona in Arizona Tax Court cases TX2017-000663 and TX2018-000902.

Section 4. Delivery of Resolution to ADOR. The Pinal RTA Executive Director shall transmit a certified copy of this Resolution to the ADOR Director with a direction that the ADOR Director cause the Transportation Excise Tax described in this Resolution to be collected in the manner provided by law and that the proceeds of tax such less any administrative expenses, be transmitted to

the Pinal RTA to implement the Plan. A certified copy of this Resolution shall be provided to the Pinal County Board of Supervisors and shall also be recorded in the office of the County Recorder of Pinal County, Arizona

Section 5. Additional Acts. The officers and agents of the Pinal RTA are hereby authorized and directed to do all such acts and things and to execute and deliver all such documents on behalf of the Pinal RTA as may be necessary to carry out the terms and intent of this resolution.

PASSED AND ADOPTED by the Board of Directors of the Pinal Regional Transportation Authority this 22nd day of February, 2018.

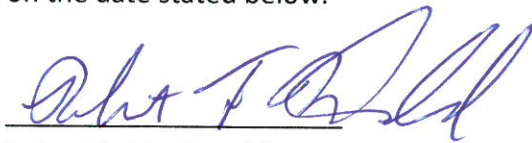


Dave Waldron
Pinal Regional Transportation Authority
Board Chair

Certification:



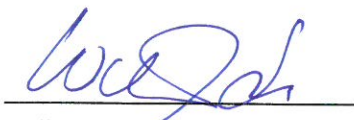
the Executive Director of the Pinal RTA, hereby certifies and attests that he has access to the official records of the Board of the Pinal RTA, and that the foregoing Resolution was duly adopted by the Board of the Pinal RTA on February 22, 2018 at a duly noticed and public meeting, and that this Resolution has not been altered or amended and remains in full force and effect on the date stated below.



Robert F. MacDonald
Pinal Regional Transportation Authority
Executive Director

Date: 02/22/18

Approved as to form:



William J. Sims
Pinal Regional Transportation Authority
Attorney