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 MCCORMICK; 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 Maricopa County Superior Court Case No. CV2013-011699

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

FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

Dated: July 6, 2017

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IDENTITY AND INTEREST OF AMICI CURIAE

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

Donor-supported PLF is the oldest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country, including many in Arizona, support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Washington, D.C., Washington State, and Florida.

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 v. Cty. of Los Angeles*, 213 Cal. App. 4th 1310

[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, its members, or its counsel made a monetary contribution to its preparation or submission. Petitioner and Intervenors consent to the filing of the brief. Appellee does not oppose the filing of the brief.

(2013); *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866 (1997); *Santa Clara Cty. Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220 (1995); *Knox v. City of Orland*, 4 Cal. 4th 132 (1992); *Carman v. Alvord*, 31 Cal. 3d 318 (1982). PLF's litigation experience will assist this Court by explaining the importance of preserving the voters' right to vote on taxes.

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 voters approved his property tax limitation measure, Proposition 13, in 1978. Since that time, HJTA has repeatedly sponsored and supported successful ballot initiatives, including Proposition 62 in 1986 and Proposition 218 in 1996. 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).

Green Valley Hospital is a hospital located in Green Valley, Arizona, about 29 miles south of Tucson. The Hospital's mission is to deliver the highest quality of healthcare to its surrounding communities and to become the finest community-based regional hospital in Southern Arizona. The Hospital is required to pay the charge at

issue in this case. On April 26, 2017, the Hospital requested that the Arizona Health Care Cost Containment System (AHCCS) provide an exemption from the Hospital Assessment provision of A.R.S. § 36-2901.08. The Hospital argued that an exemption was appropriate and necessary because it did not receive any benefit from the Medicaid expansion, but still owes a substantial amount to provide for the expansion. For example, the Fiscal Year 2017 assessment for the Hospital is $773,520 and the projected benefits are only $147,443. On May 5, 2017, Amy Upston, the Hospital Finance Administrator of the AHCCS, responded that the AHCCS would not be able to provide an exemption without rulemaking.

ARGUMENT

I

THIS COURT SHOULD GIVE EFFECT TO THE VOTERS' INTENT IN PASSING PROPOSITION 108 AND CLEARLY DEFINE THE WORD "TAX"

Article IX, Section 22, of the Arizona Constitution, requires a 2/3 vote of both houses of the state legislature for any bill that imposes taxes or "provides for a net increase in state revenues." This 2/3 voting requirement was added to the Constitution in 1992 with the passing of Proposition 108. *See* Arizona Secretary of State, Publicity Pamphlet for the November 3, 1992 General Election at 45 (Publicity Pamphlet).[2]

[2] https://www.azsos.gov/sites/azsos.gov/files/pubpam92.pdf

In 1992, Arizona had some of the highest tax rates in the nation and Proposition 108 was overwhelmingly passed by the electorate. *See* Arizona Secretary of State, 1992 General Election Canvass;[3] Publicity Pamphlet at 46. The initiative came after a "string of almost annual tax increases during the past decade." Publicity Pamphlet at 46. In response, voters sought control over these increasing tax burdens and passed Proposition 108 to ensure "tax increases will only be possible when there is a clear consensus among all Arizonans of the need for the proposed change." *Id.* at 47. This purpose should guide this Court in interpreting the provisions of Article IX, Section 22.

In this case, however, Defendant and Intervenors argue for a narrow definition of the word tax, in conflict with the voter's goal in passing Proposition 108. Intervenors' Response at 8 (citing *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 926 (9th Cir 1996)); *Bidart Bros.*, 73 F.3d at 930 (rejecting "broad" test for the definition of "tax" under the Tax Injunction Act). Furthermore, both Defendant and Intervenors would place the determination of what constitutes a tax with the legislature, the very body which Article IX, Section 22 is intended to control. Intervenors' Response at 8; Betlach Response at 8-9. This approach does not hold the legislature accountable for

[3] https://www.azsos.gov/sites/azsos.gov/files/canvass1992ge.pdf

tax increases as Proposition 108 intended and leads to uncertainty about what constitutes a tax, what constitutes a fee, and what constitutes an assessment.[4]

This uncertainty is demonstrated by the fact that Defendant and Intervenors cannot agree on the nature of the charge at issue. While Director Betlach calls the charge an "assessment," Intervenors consistently call the charge a "fee." *Compare* Betlach Response at 8, *with* Intervenors' Response at 2. While this distinction may appear trivial, it is important that this Court give clear meaning to every term in Article IX, Section 22, of the Arizona Constitution. Without clear direction, the state legislature and citizens will be unable to know the nature of a proposed charge until after it is levied.

Furthermore, clearly defining the distinction between taxes, assessment, fees, and other types of government-imposed charges will give effect to the voters' purpose in passing Proposition 108. Vague definitions subvert the intent of the voters and invite increasing litigation. Ultimately, the people may have to resort to new propositions, and more constitutional amendments, in order to achieve the result they

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[4] Additionally, Defendant and Intervenors focus on the fact that the charge is imposed on one group and the revenue is directed toward one purpose. *See* Betlach Response at 10-14. But that is not the defining characteristic of a tax. Many taxes are imposed on one group of citizens for a specific purpose. For example, school districts impose property taxes on one group of citizens (property owners) for a specific purpose (funding schools). Likewise, focusing on the purported beneficiaries of the charge does not provide clear insight because, in this case, not all hospitals that pay the charge receive benefits. *See* Identity and Interest of Amici Curiae, *supra*.

originally intended. As laid out below, California's complicated history with its tax initiatives provides a clear example of the negative consequences of carving out exceptions to constitutional requirements for imposing new taxes. In order to avoid similar consequences, this Court should grant review and clearly define the terms of Article IX, Section 22, of the Arizona Constitution.

II

CALIFORNIA'S EXPERIENCE DEMONSTRATES THE NEED TO GIVE EFFECT TO THE VOTERS' INTENT AND CLEARLY DEFINE THE DEFINITION OF A TAX

Like Arizona, voters in California have passed several initiatives in response to ever-increasing tax burdens. In 1978, the voters approved Proposition 13, which amended the California Constitution to limit property tax increases. Unfortunately, state and local governments ignored the intent of the voters in amending the constitution, and began labeling taxes by different names in order to avoid the limits on imposing new taxes. The voters responded by passing new initiatives with new limits, but governmental officials still found loopholes. California's history shows what happens when governments ignore the limits of their taxing authority and courts endorse that practice.

A. The California Tax Revolt Begins with Property Taxes

In 1978, California taxpayers challenged the ability of local governments to increase property taxes without voter approval by passing Proposition 13. *See* Julie K.

Koyama, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 Pac. L.J. 1333, 1337 (1991) (prior to Proposition 13, local governments generally had the power to impose any taxes and fees by a vote of their governing bodies). Prior to Proposition 13, local governments took full advantage of their power to increase property taxes, and California taxpayers were burdened with the some of the highest property taxes in the nation. *See* U.S. Dep't of Commerce, Bureau of the Census, *Governmental Finances in 1976-77*, at 64, table 25 (1978) (showing only Alaska, Massachusetts, and New Jersey had higher per capita property taxes than California).[5] In fact, "California property taxes exceeded the national norm by approximately 52 percent." Stacey Simon, *A Vote of No Confidence: Proposition 218, Local Government, and Quality of Life in California*, 25 Ecology L.Q. 519, 538 n.120 (1998) (citing David O. Sears & Jack Citrin, *Tax Revolt: Something for Nothing in California* 21 (1982)).

As taxes rose, so did the anger of property owners. Dramatic increases in housing prices, coupled with automatically increasing assessed valuations and higher property taxes, led more and more taxpayers to seek relief. *See* William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & Pol. 607, 625 (1996) ("California housing prices exploded—there is no better word for it—during the 1970s."). Local governments, however, failed to ease the financial burden on property owners by

[5] http://www2.census.gov/govs/pubs/govt_fin/1977_govt_fin.pdf

simply reducing the applicable tax rates on assessed value. Fischel, *supra*, at 626. Similarly, the Legislature failed to pass any form of tax relief, and the state budget surplus grew to "unprecedented amounts." John S. Throckmorton, *What Is a Property-Related Fee? An Interpretation of California's Proposition 218*, 48 Hastings L.J. 1059, 1060 (1997). The unresponsiveness of both state and local elected representatives to effectively deal with staggering tax burdens angered voters across the board.

Proposition 13 added article XIIIA to the California Constitution, imposing important limitations upon the assessment and taxing powers of state and local governments. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 218 (1978). Proposition 13 also limited ad valorem tax rates, requiring that increases in state taxes and special taxes imposed by local governments be approved by a two-thirds vote of the governing body. Thus, like Arizona voters in 1992, when California voters passed Proposition 13 in 1978, they sought to restrict the ability of government to impose taxes and other charges on property owners without their approval.

B. Local Governments Thwarted the Voters' Mandate by Passing Taxes Disguised as Fees and Assessments

Although California voters made their intent clear when they passed Proposition 13, local governments soon found ways to exploit perceived loopholes in the measure. Proposition 13's basic one-percent limit in art. XIIIA, § 1, did not mention "special assessments"; it only mentioned ad valorem property taxes. And the two-thirds vote provision in art. XIIIA, § 4, only mentioned "special taxes"; it did not refer to "assessments" or "special assessments." Consequently, local governments avoided the requirements of Proposition 13 by expanding the definition of assessments, fees, and other charges imposed on taxpayers.

The nature of assessments 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). Special districts increased assessments by more than 2400% in 15 years; cities raised benefit assessments by almost 10 times their original amount. *Id.* at 1195; *see* Cal. Const. art. XIIIA, § 4 (only cities, counties, and "special districts" are subject to the two-thirds voter requirement). Specific examples included: (1) "A view tax in Southern California—the better the view of the ocean you have the more you pay"; (2) "In Los Angeles, a proposal for assessments for a $2-million scoreboard and a $6-million equestrian center to be paid for by property owners"; (3) "In Northern California, taxpayers 27 miles away from a park

are assessed because their property supposedly benefits from that park"; (4) "In the Central Valley, homeowners are assessed to refurbish a college football field."[6]

Lawsuits challenged the validity of increases imposed after Proposition 13 had become the law, and without seeking voter approval. But the courts construed Proposition 13 narrowly, holding that it did not pertain to (1) benefit assessments, or (2) taxes levied for a specific purpose. Simon, *supra*, at 526-29.

In *Los Angeles Cty. Transp. Comm'n v. Richmond*, the Los Angeles County Transportation Commission imposed an unapproved tax on the sale, storage, or use of tangible personal property in Los Angeles County. 31 Cal. 3d 197, 199, 208 (1982). A plurality of the California Supreme Court approved the tax, holding that the term "special districts" was ambiguous, and did not apply to the commission. *Id.* at 201 (plur. opn. of Mosk, J.). The dissent noted that 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." *Id.* at 210 (Richardson, J., dissenting).

After *Richmond*, local governments continued to evade Proposition 13's requirements. In *City & Cty. of San Francisco v. Farrell*, the voters approved, by a simple majority, a local tax on businesses that was to be used for general fund

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[6] Voter Information Guide for 1996, General Election, *Argument in Favor of Proposition 218*, 76 (1996); http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2138&context=ca_ballot_props.

purposes. 32 Cal. 3d 47, 51 (1982). *Farrell* upheld the tax, concluding that Proposition 13's requirement that "special taxes" must be approved by two-thirds of voters did not apply to taxes paid into the general fund. *Id.* at 57. Justice Richardson again dissented, arguing that the majority's interpretation of "special tax" would allow local government to "easily circumvent" Proposition 13's limitations. *Id.* at 57-58 (Richardson, J., dissenting). He was prescient. *See Rider v. Cty. of San Diego*, 1 Cal. 4th 1, 10 (1991) (noting that since *Richmond*, government created numerous agencies to raise taxes and avoid Proposition 13's "special districts" requirement); *Knox v. City of Orland*, 4 Cal. 4th at 140-41, 145 (charge levied against real property for the maintenance of public parks was a "special assessment" not subject to Proposition 13); *Greene v. Marin Cty. Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277, 284 (2010) (local governments can impose "special assessments" without a two-thirds majority vote). These decisions, combined with continuing attempts by local governments to evade the requirements of Proposition 13, shifted the focus of taxpayer anger from high taxes to a distrust of government.

C. Voters Attempted To Close the Special Tax/Assessment Loophole

Because courts refused to interpret Proposition 13 in accord with the voter's intentions, voters had to resort to new voter initiatives to restore the protections originally thought to have existed in Proposition 13. In November, 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act. 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." Voter Information Guide for 1996, General Election, *Proposition 218: Text of Proposed Law*, § 2, at 108. Proposition 218 was specifically "intended to protect taxpayers by limiting the methods by which local governments can exact revenue from taxpayers without their consent." *Id.*

The voters advanced two goals with Proposition 218. First, the voters continued the battle to vote on increased taxes, assessments, fees, and charges by closing the special taxes/assessment loophole. ("In general, the intent of Proposition 218 is to ensure that **all taxes and most charges** on property owners are subject to voter approval." Legislative Analyst's Office, *Understanding Proposition 218*, ch. 1, at 2 (Dec. 1996) (emphasis added)).[7] Secondly, the voters' expressed their growing lack

[7] http://www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.html

of confidence in government by exerting more control over government spending and decision making. *See, e.g.*, Simon, *supra*, at 538-39; *Understanding Proposition 218*, *supra*, ch. 1[8] ("Proposition 218 changes the governance roles and responsibilities of local residents and property owners, local government, and potentially, the state.").

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

In *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 833 (2001), 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

[8] http://www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.html

voters "meant what they said." *Id.* at 848 (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). She was right.

D. Proposition 26—Expanding Voter Protections

The continued failure of courts to give effect to the voters' intent in passing Proposition 218 once again required those voters to respond at the ballot box. On November 2, 2010, California voters approved Proposition 26 in order to secure the right of the people to vote on levies, charges, or exactions imposed by local governments. The Findings and Declaration of Purpose explained 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. Voter Information Guide for 2010, General Election, *Text of Proposition 26*, § 1, at 114 (2010).[9] 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 v. Cty. of Los Angeles*, 213 Cal. App. 4th at 1322-23, 1326.

[9] http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2304&context=ca_ballot_props

Prior to the adoption of Proposition 26, voters repeatedly sought to limit the authority of local governments to impose financial burdens on the public. But local governments found ways to thwart the will of the voters by disguising taxes as fees and assessments. Proposition 26 is the latest attempt to put an end to such tactics.

California's tax initiatives demonstrate voter frustration with the 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 and adopted the exceptions put in place by state and local governments. This not only fostered resentment in the voters, it created a more complex legal regime for distinguishing between taxes and non-taxes.

Like California in the 1970s, Arizona voters in 1992 were saddled with some of the nation's highest tax burdens when they decided to amend their constitution to limit taxation. Also like California, the government has sought to exploit perceived loopholes in order to increase taxes. In deciding whether to grant review, this Court should consider California's experience in order to learn from its mistakes. In order to give proper respect to the intent of the voters, this Court should grant review to clarify the difference between taxes, fees, and assessments.

CONCLUSION

This Court has issued relatively few decisions interpreting the word "tax," especially in the context of Article IX, Section 22. Without clear guidance on how to interpret the constitutional provisions, lower courts may continue to narrow the definition of tax and subvert the will of the public. This, in turn, will require the voters to reaffirm their intentions with new voter initiatives, like in California. This Court can avoid such confusion and backlash by granting review.

DATED: July 6, 2017.

Respectfully submitted,

By /s/ James S. Burling
JAMES S. BURLING

Attorney for Amici Curiae
Pacific Legal Foundation, the
Howard Jarvis Taxpayers Association,
and Green Valley Hospital

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Civil Appellate Procedure 14, I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, HOWARD JARVIS TAXPAYERS ASSOCIATION, AND GREEN VALLEY HOSPITAL IN SUPPORT OF PETITIONERS ANDY BIGGS, ET AL., uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 3,482 words.

DATED: July 6, 2017.

s/ James S. Burling
JAMES S. BURLING

CERTIFICATE OF SERVICE

This is to certify that I have on this 6th day of July, 2017, filed a true and correct copy of the foregoing with the Clerk of the Court using AZTurboCourt electronic filing system.

Participants in the case who are registered AZTurboCourt users will be served by the electronic filing system. Participants who are not registered will receive a copy of the foregoing via United States Mail, postage prepaid:

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/s/ James S. Burling
JAMES S. BURLING

Mr. James S. Burling
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Re: *Biggs v. Betlach*, No. CV-17-0130-PR

Dear Mr. Burling:

Consent is hereby

☒ granted to Pacific Legal Foundation, the Howard Jarvis Taxpayers Association, and the Green Valley Hospital to participate as amicus curiae in support of Petitioners Andy Biggs, et al., before the Arizona Supreme Court in the above-titled case.

☐ withheld.

DATED: 6/21/17.

Attorney for Petitioners

From: Tawnda Elling
To: Jim Burling; Jeffrey W. McCoy; Incoming Lit
Subject: FW: Biggs v. Betlach, Ariz. Supreme Court No. CV-17-0130-PR
Date: Thursday, June 22, 2017 4:18:06 PM
Attachments: 117062218521201357.png
117062218521201557.png
117062218521201757.png
117062218521201957.png
117062218521202157.png

3-1510

Consent from counsel for Appellee

From: DNORTHUP@FCLAW.com [mailto:DNORTHUP@FCLAW.com]
Sent: Thursday, June 22, 2017 3:52 PM
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Subject: RE: Biggs v. Betlach, Ariz. Supreme Court No. CV-17-0130-PR

We do not oppose your filing an amicus brief.

Douglas C. Northup, Director

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From: Tawnda Elling [mailto:tae@pacificlegal.org]
Sent: Wednesday, June 21, 2017 12:48 PM
To: NORTHUP, DOUG; BERG, TIM; IRVINE, PAT; RYERSON, CARRIE PIXLER
Subject: Biggs v. Betlach, Ariz. Supreme Court No. CV-17-0130-PR

Dear Counsel:

Attached is a letter requesting consent to file an amicus brief in the above-referenced case.

Mr. James S. Burling
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Re: *Biggs v. Betlach*, No. CV-17-0130-PR

Dear Mr. Burling:

Consent is hereby

☒ granted to Pacific Legal Foundation, the Howard Jarvis Taxpayers Association, and the Green Valley Hospital to participate as amicus curiae in support of Petitioners Andy Biggs, et al., before the Arizona Supreme Court in the above-titled case.

☐ withheld.

DATED: 6/21/2017.

s/Joy E. Herr-Cardillo

Attorney for Intervenor-Defendants/Appellees