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IN THE SUPERIOR COURT OF ARIZONA
IN THE ARIZONA TAX COURT

HAROLD VANGILDER; DAN NEIDIG; and ARIZONA RESTAURANT ASSOCIATION

Plaintiffs,

vs.

ARIZONA DEPARTMENT OF REVENUE; PINAL COUNTY; PINAL COUNTY REGIONAL TRANSPORTATION AUTHORITY,

Defendants.

Case No. TX2017-000663

MOTION FOR ISSUANCE OF DECLARATORY JUDGMENT

(The Honorable Christopher Whitten)

Pursuant to Ariz. R. Civ. P. 57 and 56, and A.R.S. § 12-166, Plaintiffs hereby move for an issuance of declaratory judgment in their favor. This motion is based on the following memorandum of points and authorities and all other pleadings and papers filed in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case challenges the legality of Pinal County's recently enacted Transportation Excise Tax, on the grounds that it exceeds the County's statutory authority and violates the state and federal constitutions.

The tax in question was approved as Proposition 417 at the November 2017 election. Plaintiffs filed suit December 20, 2017. This Court denied Plaintiffs' motion for temporary injunctive relief, but "[took] no position on whether at trial (most likely on dispositive motion) [the Prop. 417 tax] will be found to conform to A.R.S. § 42-6106." Min. Entry Denying Prelim. Inj., Mar. 23, 2018 at 2 ("Min. Entry"). This dispositive motion for declaratory relief and summary judgment asks the Court to determine whether the tax conforms to that statute and also whether it is constitutional.

STATEMENT OF FACTS

Aiming to raise revenue for infrastructure improvements in Pinal County, Defendant Pinal County Regional Transportation Authority ("County"), acting pursuant to A.R.S. § 42-6106, approved Resolution 2017-01 on June 5, 2017, to refer a transportation excise tax to the voters. *See* Ex. A to Pls.' Compl. ("Compl. Ex. A"). That Resolution said the tax would be levied "at a rate equal to one-half percent (0.005%) [*sic*[1]] of the gross income from the business activity upon *every person engaging or continuing in the business of selling tangible personal property at retail*; provided that such rate shall become a variable or modified rate 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) … the measure of tax shall be a rate of zero percent (0%)." *Id.* at 2 (emphasis added). In other words, Resolution 2017-1 specified that the tax would apply *exclusively to retail sales* of items below $10,000.

[1] This is evidently a scrivener's error. The actual language of Prop. 417 as it appeared on the ballot correctly stated "one-half percent (0.5%)."

The County then distributed to voters a publicity pamphlet and sample ballot for the November 7, 2017 election. That pamphlet stated that "[i]f Proposition 417 is approved," the tax would be levied at a rate of 10 percent of the transaction privilege tax rate on each person engaging or in a business taxed under A.R.S. Title 42, Chapter 5, Article 1.

Compl. Ex. B at 14-15. In other words, the Publicity Pamphlet differed from the wording of Resolution 2017-1, in that it described a tax *not* limited to retail sales of items below $10,000, but levied instead on all classifications specified in Arizona statutes (with, in addition, the aforementioned $10,000 cutoff for retail sales).

The language of Prop. 417 itself, however, took yet a third form. *It* said the tax would be imposed "at a rate equal to one-half percent (0.5%)" on the "gross income from the business activity [of] every person engaging or continuing in the business of selling tangible personal property at retail," up to the $10,000 threshold. *See id.* at 18. *This* was the language voters approved at the special election on November 7, 2017.

Plaintiffs are taxpayer-residents of Pinal County and businesses doing business there, who will be liable to pay the Prop. 417 tax and/or to collect that tax for remittance to the authorities, in cases where the tax applies. Compl. ¶¶ 2–4. They brought this lawsuit seeking declaratory and injunctive relief on the grounds that Prop. 417 violates statutory and constitutional limitations on taxes. *Id.* ¶ 1. Specifically, they allege that substantial uncertainty exists as to what exactly is subject to the tax—retail sales only, which is prohibited by A.R.S. § 42-6106, but which the voters approved; or all tax classifications, as that statute requires, but which the voters did not approve.

Compl. ¶¶ 11–14, 19. The tax is unlawful, either way.

Prop. 417 exceeds the County's authority under A.R.S. § 42-6106 because it purports to tax only retail items, rather than all of the items that the statute mandates be taxed. *Id.* ¶ 24. Second, Prop. 417 essentially attempts to create a new tax classification instead of a variable rate, Compl. ¶¶ 25–26—that is, a classification of sales of single items at below $10,000, which is not authorized by A.R.S. § 42-6106. *Id.* ¶ 25. Finally, Prop. 417 violates the Special Law Clause of the Arizona Constitution and the Equal Protection Clauses of the state and federal constitutions. Compl. ¶¶ 33–39.

On February 22, the County approved Resolution 2018-01, instructing the DOR to begin implementing the tax as of April 1. Ex. 1 to Pls. Mot. for Prelim. Inj. That Resolution instructs DOR to collect "as set forth in the Publicity Pamphlet," or "as set forth in the Election Materials," *id.* at 1–2, and *not* as set forth in the language of Prop. 417. Plaintiffs subsequently sought a temporary injunction to bar enforcement of Prop. 417 pending the outcome of this litigation. The Court denied that motion, while "tak[ing] no position on whether … on dispositive motion … [Prop. 417] will be found to conform to A.R.S. § 42-6106." Min. Entry at 2.

STANDARD OF REVIEW

Declaratory relief is appropriate to determine a party's "rights, status or other legal relations" in cases where rights or relations "are affected by" a statute or ordinance, so long as the party has a concrete interest at stake. *Town of Wickenburg v. State*, 115 Ariz. 465, 468, 565 P.2d 1326, 1329 (App. 1977). Arizona's declaratory relief statute is "remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *Peterson v. Central Ariz. Light & Power Co.*, 56 Ariz. 231, 236, 107 P.2d 205, 208 (1940) (citation omitted). Taxpayers are entitled to seek declaratory relief to challenge the validity of tax laws even if they have not yet paid taxes under those laws. *See, e.g., SolarCity Corp. v. Ariz. Dep't. of Revenue,* 413 P.3d 678, 680 ¶¶ 4–5 (Ariz. March 16, 2018). As discussed below, no exhaustion requirement applies here.

Summary judgment is appropriate where there are no disputes of material fact and where the moving party is entitled to judgment as a matter of law. *Haralambie v. Pima Cnty.*, 137 Ariz. 207, 209, 669 P.2d 984, 986 (App. 1983). There are no disputes of fact in this case, which presents only legal questions, and therefore is appropriate for summary judgment.

ARGUMENT

I. DEFENDANTS ARE VIOLATING ARIZONA LAW BY IMPOSING A TAX THAT VOTERS DID NOT APPROVE.

A.R.S. § 42-6106 provides the *sole* basis for a county to adopt a transportation excise tax. The County derives all its taxing power from this statute. *Arizona Dep't of Revenue v. Arizona Pub. Serv.*

Co., 188 Ariz. 232, 235, 934 P.2d 796, 799 (App. 1997). The statute requires—it uses the word "shall"—first that voters approve the tax, and second, that such a tax be applied uniformly "to each person engaging or continuing in the county in a business taxed under [A.R.S. § 42-5001, *et seq*.]," as well as on other specified tax classifications. Section 42-5001 *et seq.*, in turn, lists the various transaction privilege tax classifications. In other words, A.R.S. § 42-6106 requires that a county transportation excise tax apply in the amounts specified to *all of the classifications*. Counties may not choose what to tax and what not to tax. Thus the tax on *retail sales only*, approved by voters as Prop. 417, is unlawful.

Defendant Arizona Department of Revenue ("DOR") *agrees* with the Plaintiffs on this point. *See* DOR Ans. ¶ 15; DOR Resp. to Mot. for Prelim. Inj. at 9-12 ("DOR Resp."). It argues that "counties … may merely impose a tax rate … upon business income earned within certain *tax classifications created by the Legislature* … as defined in statute … . The only right that counties have is to approve a tax and then adopt a rate to be applied, *taking all other parts of the tax structure unaltered*." *Id.* at 11-12 (emphasis added). Because the County seeks to diverge from the statute and to alter the tax structure adopted by the Legislature, Plaintiffs and DOR are in agreement that the Prop. 417 tax is unlawful.

Seeking to avoid this unlawful interpretation, the County changed its position on the tax after this case was filed. It passed Resolution 2018-1 on February 22, 2018, in which it instructed the DOR to begin collecting the tax *not* in conformity with Prop. 417, but instead to tax all of the statutory classifications, as specified in the Publicity Pamphlet. Mot. for Prelim. Inj. Ex. 1. Resolution 2018-1 very carefully instructed the DOR to follow the description in the Publicity Pamphlet, but this attempted fix was also unlawful. *Id.*

The County cannot rely on the Publicity Pamphlet because its wording is not what voters approved. They only approved a *tax on retail sales below $10,000*. The ballot language stated:

> Do you favor the levy of a transportation excise (sales) tax including at a rate equal to one-half percent (0.5%) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail … ?

Compl. Ex. B at 18. This was consistent with Resolution 2017-1 (Compl. Ex. A at 2), but *not* with the language in the Publicity Pamphlet (Compl. Ex. B) or Resolution 2018-1 (Mot. for Prelim. Inj. Ex. 1).

Altering what the tax is imposed on—from retail sales only to all classifications required by statute—might have cured the problems with Prop. 417, except that voters *did not approve* that. They only approved of a tax on "the business of selling tangible personal property at retail." Compl., Ex. B at 18. And because A.R.S. § 42-6106 requires voter aprpoval, the County's updated instructions to DOR are still unlawful.[2]

Simply put, limiting the tax to just retail sales, as Prop. 417 does, is unlawful because it exceeds the County's statutory authority. As DOR put it in their initial disclosures, the County is required to "tak[e] all other parts of the state's transaction privilege tax structure unaltered." DOR Initial Disclosures at 5, attached hereto as Ex. 1. On the other hand, Resolution 2018-1's instructions to the DOR—to tax in conformity with the statute—is unlawful because that is not what the voters approved in Prop. 417. Under each of the County's proffered interpretations, therefore, Plaintiffs are entitled to declaratory relief because Prop. 417 tax is unlawful.

II. THE COUNTY'S $10,000 CARVE-OUT VIOLATES ARIZONA LAW.

The $10,000 carve-out in Prop. 417 also violates A.R.S. § 42-6106 because it creates what is, in substance, a new tax classification, not a "variable rate."

A variable rate is a rate that varies in relation to some other thing, such as a variable rate mortgage which varies in accordance with an interest rate, or an income tax, which varies with relation to a person's income. *See* BLACK'S LAW DICTIONARY 813, 1553 (6th ed. 1990). For instance, federal regulations define a "variable rate" as a rate that depends on a multiplier, or an average. 26 C.F.R. § 1.860G-1(a)(3). *See also Rubio v. Capital One Bank (USA), N.A.*, 572 F. Supp. 2d 1157, 1164 (C.D. Cal. 2008), (interest rate was not a variable rate where it was "[not] tied to an index or formula.").

Prop. 417 does not vary with anything. It imposes a single 0.5% tax on retail transactions below

[2] The County seeks to characterize this as a "voter confusion" argument, but it is not. County's Resp. to Mot. for Prelim. Inj. at 5–7 ("County's Resp."). This case challenges *the legal authority* of the County to impose the tax in conformity with the objective meaning of the language that the voters approved. Plaintiffs do not contend that voters were misled at all—rather, they contend that voters understood and approved one thing—a thing which A.R.S. § 41-6106 does not authorize—and that the County has now instructed DOR to do something different, something which the voters did not approve.

$10,000. That is not a *variable* rate. It is a flat rate, whereby the tax is 0.5% on items up to $10,000, and zero on any amount above that. This is better seen as a new tax *classification—i.e.,* an effort by the County to establish a classification consisting of "retail items above $10,000." But the County has no authority to create a new tax classification.

Once again, *Defendant DOR agrees with the Plaintiffs* on this point. *See* DOR Ans. ¶ 15; DOR Resp. at 9-12. It states that "counties lack the authority to create their own tax classifications … . The only right given to counties is to adopt rates within limits, but the adopted rate must be a positive rate that results in the levy and collection of taxes against the whole of the applicable statutory base in a given tax period." DOR Resp. at 11-12.

Prop. 417 purports to tax sales above $10,000 at zero—therefore, Plaintiffs and DOR are in agreement that the tax is unlawful. The $10,000 carve-out is an attempt to modify the retail transaction privilege tax base that is established in state law as "the gross proceeds of sales or gross income derived from the business." A.R.S. § 42-5061(A). Counties have no authority to modify the tax base as defined by the legislature, but only to approve the tax and adopt the rate specified. But A.R.S. § 42-6106(B) specifies that a transportation excise tax "shall be levied and collected" at a rate of "not more than ten percent of the transaction privilege tax rate prescribed by § 42-5010, subsection A." A rate of "zero" will not result in a levy and collection—it is not, in fact, a rate at all—and it is therefore not the type of variable rate contemplated by Section 42-6106.

The $10,000 cutoff is therefore—in DOR's word—"unlawful." Ex. 1 at 7.

III. THE PROP. 417 TAX VIOLATES THE SPECIAL LAW AND EQUAL PROTECTION CLAUSES OF THE STATE CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION

It is not necessary for this Court to address Plaintiffs' constitutional claims, because they are entitled to declaratory judgment on their statutory claims alone. However, if the Court is inclined to address the constitutional arguments, Plaintiffs are entitled to judgment on those questions as well.

The Arizona Constitution forbids "special laws," particularly with regard to the "[a]ssessment and collection of taxes." ARIZ. CONST. art. IV, pt. 2 § 19. A special law is a law that favors one group and disfavors others without adequate justification. *Gallardo v. State,* 236 Ariz. 84, 88 ¶ 10, 336 P.3d

717, 721 (2014). A law is a special law if it (a) lacks a rational relationship to a legitimate objective, ***or*** (b) if it creates a class of beneficiaries that are not similarly situated, ***or*** (c) if the classification is inelastic, so that other individuals or entities can neither enter or leave that class. *Id.* ¶ 11. If a law fails *any* of these three elements, it violates the Special Law Clause. The County's new law fails all of them.

In addition, the Equal Protection Clauses of the state and federal constitutions (ARIZ. CONST. art II § 13; U.S. CONST. amend XIV § 1) forbid the government from differentiating between people without a rational basis for such distinctions. If, as in this case, the classification is "non-suspect," a difference in treatment is unconstitutional if it bears no rational connection to a legitimate government interest. *Fowler Packing Co. v. Lanier,* 844 F.3d 809, 815 (9th Cir. 2016).

A. The $10,000 carve-out violates the Special Law Clause.

It is undisputed that the purpose of the $10,000 carve-out is to exempt sellers of cars, farm equipment, and other high-price items. In 2017, County representatives testified before a state legislative committee in favor of a bill that would have allowed counties to create this sort of $10,000 carve-out. (The Legislature rejected that bill.) At that hearing, County representatives acknowledged that if the tax were applied uniformly to all retail sales in the county, consumers would choose to purchase items elsewhere.[3] The County even admitted in an earlier brief that the purpose of this carve-out is to "ensure[] that consumers will continue to purchase expensive items in Pinal County," instead of "go[ing] to neighboring Maricopa and Pima counties to purchase expensive items," and to prevent businesses from "leav[ing] Pinal County to avoid the tax." County Resp. at 13. This, however, plainly violates the special law rule. The County's admission makes it clear that the carve-out was designed to "favor one person or group and disfavor others." *Gallardo*, 236 Ariz. at 88 ¶ 10, 336 P.3d at 721.

The precedent is clear on this point. In *State v. Levy's*, 119 Ariz. 191, 580 P.2d 329 (1978), the Arizona Supreme Court invalidated a statute that exempted from taxation sales of less than $1,000 to Mexican residents within a 30 mile range of the Mexican border. It found that the tax was a special or

[3] This testimony is available online at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18550&meta_id=384291 and http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18758&meta_id=390378.

local law with regard to taxation, and that there was no rational basis for different treatment. The purpose of the law was to aid businesses that suffered an adverse impact from a change in the peso's value—but that impact was felt by businesses throughout the state, the court noted. *Id.* at 192, 580 P.2d at 330. Although the court "acknowledged that the border businesses have a more acute problem," it declared the exemption an unconstitutional special law because it "does not treat all [businesses] in the same fashion," but was "based on an arbitrary line." *Id.* at 192–93, 580 P.2d at 330–31.

In the same way, the $10,000 threshold does not treat all businesses the same, but arbitrarily selects a carve-out—one that the county admits was designed not to aid all businesses, but, as in *Levy's* to benefit a select class of chosen businesses. Yet the adverse effect of the tax increase in Pinal County is felt by all businesses—just as the adverse impact of the devaluation of the peso was felt by all businesses in *Levy's*. As in *Levy's*, the carve-out arbitrarily exempts some, and not others, in violation of the Special Law Clause.

In *Tucson Elec. Power Co. v. Apache Cnty.*, the court found that a tax violated both the Special Law *and* Equal Protection Clauses because it applied only to mining and utility classifications, not to other classifications. 185 Ariz. 5, 9, 912 P.2d 9, 13 (App. 1995). The county there argued that the distinction was constitutional because mines and utilities "specially benefit from and specially burden society, and therefore may rationally be asked to pay a larger share of the costs of its operation." *Id.* at 13, 912 P.2d at 17. But the court rejected this argument because the county "[had] not established this to be a valid generalization that applies either to *all* utilities and mines, nor established that it does not apply to *other* industrial and commercial entities." *Id.* The county's argument also failed because utilities and mines might have countervailing benefits, such as improving the property value in the district, which would counteract any "burden" on society. The county next argued that mines and utilities were able to pass the burden of the tax on to customers in ways that other property owners could not—but the court found that this, too, was not a rational basis because there were other "enterprises … of all sizes" that were exempted from the tax even though they, too, could presumably pass on the tax to their customers. *Id.* at 14, 912 P.2d at 18. The purported basis for the difference in treatment therefore "[did] not genuinely distinguish them from most taxpayers owning other classes of property." *Id.*

Precisely the same is true here. The county claims its exemption is to prevent consumers from shopping elsewhere and businesses from relocating to keep their prices down—but this is not a genuine distinction. Retailers who sell items below the cutoff amount are just as likely to lose customers as retailers above that threshold. Retailers who sell items, each of which falls below $10,000, but which add up to above that amount, are also denied the special privilege. And because the County is now seeking to collect the tax on all classifications, rather than just retail sales, the rationale for the $10,000 is weakened still further. If the tax applies to restaurants, transient lodging establishments, and commercial leases, they are just as likely to lose business as a result of the tax increase as retailers are—yet they do not enjoy an exemption (at any amount).

Relatedly, the County claims that it created the special benefit for high-cost retailers because otherwise the County would lose out on tax revenue. But there is no basis for concluding that retailers or consumers engaged in transactions of single items *below* $10,000, or transactions of multiple items that total more than $10,000, will not also go to Maricopa or Pima Counties. Yet a business owner buying two $5,000 commercial air conditioners from a dealer in Apache Junction does *not* benefit from the exemption, while a business owner buying one $10,000 commercial air conditioner from the same dealer, *does*. Both are equally likely to cross into Mesa to buy an air conditioner there, in order to avoid the additional tax. A person buying a $4,000 ride-on lawnmower at an equipment store in Casa Grande is just as likely to choose, thanks to the increased tax, to buy it in Chandler instead—yet the exemption does not apply in that case. In short, the County has provided no reason to believe that it would lose revenue by imposing a uniform tax on all retailers as state law allows. The County has the burden of "establish[ing] [its tax classifications] to be…valid," *Tucson Elec. Power Co*, 185 Ariz. at 9, 912 P.2d at 13, and it has not done so.

The Special Law and the Equal Protection Clauses can overlap, but they are different— "a statute that does not violate equal protection may still be an invalid special law." *Id.* at 12, 912 P.2d at 16; *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 149, 800 P.2d 1251, 1257 (1990). Indeed, Special Laws are subject to a "heightened" version of the rational basis test. *Id.* Under that test, the government bears the burden of justifying the classification it creates, *Tucson Elec. Power Co*, 185 Ariz.

at 9, 912 P.2d at 13, and that classification must (a) have a rational basis, (b) must classify by population, geography, or time limitations, or otherwise encompass all members of the "relevant" class, *and* (c) must be elastic. *Id.* at 13, 912 P.2d at 17.

In *Town of Surprise*, the Court declared a law that allowed courts to order land de-annexed from certain municipalities invalid under the Special Law Clause, even though it did *not* violate the Equal Protection Clause. 166 Ariz. at 151, 800 P.2d at 1259. Because "[t]he statute was enacted in response to the abuse of the municipalities' power to strip annex," it should have "include[d] all cities where annexation abuses may have occurred." *Id.* Instead, it only applied to 12 cities, and therefore "[did] not apply uniformly to all members of the class. Instead, the statute confer[red] a benefit only on part of the class while immunizing larger cities." *Id.* Here, the $10,000 carve-out is a Special Law in violation of *Town of Surprise.* The relevant class is businesses selling at retail—as specified in Arizona state law. Yet the exemption does not apply to all businesses. Nor does it apply to all transactions above $10,000. Instead, it applies just to transactions of single items above the $10,000 line.

"[A] law may be made special by exempting specifically particular members of the class from what is otherwise general legislation." JOHN M. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 104 (1961). Here, the over-$10,000 exemption is designed to subdivide the relevant class—businesses in retail sales—by adopting an arbitrary $10,000 threshold for the purpose of shielding a narrow class of businesses from the consequences of the tax. That violates the Special Law Clause. While the County may "'legitimately' classify by population" or other factors, any such classifications "must encompass all members of the 'relevant' class." *Tucson Elec. Power Co.*, 185 Ariz. at 13, 912 P.2d at 17 (citation omitted). Just as taxing mining and utility differently than other businesses was unconstitutional—because there was no "rational basis … for insulating similarly situated owners of non-mining and non-utility property from the imposition of such rates," *id.* at 14, 912 P.2d at 18—there is no legitimate basis for limiting this tax at the $10,000 amount.

B. The $10,000 Carve-out Violates the Equal Protection Clauses of the State and Federal Constitutions.

The state and federal Equal Protection Clauses forbid the government—even under rational basis review—from "singling out" some groups over others in order "to favor economically certain constituents at the expense of others similarly situated." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *Fowler Packing Co.*, 844 F.3d at 815. Rational basis is lenient but does not allow the government to arbitrarily grant tax breaks to some favored groups over others. As the Supreme Court explained in a case that struck down a state law that gave tax breaks to in-state businesses and denied them to out-of-state businesses, "[the] aim to promote domestic industry is purely and completely discriminatory, … [and] constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985).

Here, it is undisputed that the $10,000 carve-out was created to confer an economic benefit on some constituents at the expense of others similarly situated. The County says this special treatment benefits the public because otherwise there would be a reduction in tax revenue. This is circular logic, however, and "amounts to little more than an assertion that discrimination may be justified by a desire to discriminate," *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 605 (1976). This theory would allow the government to grant exemptions and special favors in tax law to anyone it chose at any time, without any public justification, on the mere speculation that it might increase revenue—plainly not what the Constitution contemplates. And there is no basis for the County's mere assertion that the carve-out will generate more tax revenue.

The reality is that the County chose the $10,000 cutoff in order to benefit businesses that otherwise would have opposed Prop. 417 at the election.

In *Fowler Packing Co.*, the Ninth Circuit invalidated a California law aimed at remediating under-payment of certain workers, because it included a carve-out that barred a few employers from benefiting from its protections. The court found that this "was a result of 'closed negotiations' between the [state], labor unions … , and employer groups," and was designed "as [a] necessary condition[] to obtain [union] support for the [statute]" in the legislature. 844 F.3d at 814. But "procur[ing] the support

of the [union]" was not a rational basis; it was an "illegitimate purpose." *Id.* at 815. Likewise, here, the County's contention that the special favor granted to sellers of expensive items has only the illegitimate purpose of granting a special favor to a particular interest group.

For the same reason, the $10,000 carve-out violates the Arizona Constitution's Equal Protection Clause. Arizona courts usually construe the state provision as identical with that of the federal Constitution, *see, e.g., State v. Russo*, 219 Ariz. 223, 226 ¶ 7, 196 P.3d 826, 829 (App. 2008), and for that reason, Plaintiffs are entitled to judgment on this cause of action for the reasons already stated.

However, the Arizona Constitution's provision is differently worded, and Plaintiffs contend it is more protective than the federal version. It states that "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." ARIZ. CONST. art. II § 13. That is plainly violated by Prop. 417. It grants to those corporations or classes of citizens purchasing single items above $10,000 a benefit which is not available to corporations or consumers who buy lower-cost items, or items that, put together, total more than $10,000.

In *Gila Meat Co. v. State*, 35 Ariz. 194, 276 P. 1 (1929), the Supreme Court held invalid a tax on slaughterhouses that operated differently based on where the slaughterhouses were located. The court found that this violated the Arizona Constitution's equal privileges and immunities requirement because it was not based on "'some principle which may reasonably promote the public health, safety or welfare.'" *Id.* at 199, 276 P. at 3 (citation omitted). The government may create different tax classifications, of course, but "'when any trade, occupation, or profession is selected for taxation, the tax levied upon it … must be equal and uniform.'" *Id.* at 201, 276 P. at 3 (citation omitted). Prop. 417 likewise lacks the required uniformity, and applies to some retail sales rather than others, based not on total sale amount, or the type of purchase, but on an arbitrary line designed to favor some businesses over others.

Prop. 417's $10,000 threshold does not exist to advance the County's legitimate interest in infrastructure improvement, but instead was tailored to avoid political opposition from powerful businesses, precisely as with the statute in *Fowler Packing*. It is invalid for the same reason.

IV. DECLARATORY JUDGMENT IS APPROPRIATE HERE

A. Declaratory Judgment is Available to Adjudicate the Legality of Taxes Before They Are Paid

Taxpayers are entitled to bring declaratory judgment actions to challenge the validity of a tax before they pay the tax. *See, e.g., Pimalco, Inc. v. Maricopa Cty.*, 188 Ariz. 550, 553, 937 P.2d 1198, 1201 (App. 1997); *Scottsdale Princess P'ship v. Department of Revenue*, 191 Ariz. 499, 501, 958 P.2d 15, 17 (App. 1997). In *SolarCity Corp.* 413 P.3d 678, 680, ¶¶ 4-5 (Mar. 16, 2018), for instance, the Arizona Supreme Court ruled in favor of plaintiffs who brought such an action. There, two solar power companies argued that the state could not tax their solar panels, and they brought a declaratory judgment action. *SolarCity Corp. v. Arizona Dep't of Revenue*, 242 Ariz. 395, 399-400 ¶¶ 5–10, 396 P.3d 631, 635–36 (App. 2017). They "argued that the tax court could enter summary judgment …because the issues presented in the complaint were purely legal and no genuine issues of material fact existed, *id*. at 400–01 ¶ 11, 396 P.3d at 636–37. The Department subsequently agreed that the case was proper for summary judgment—as it does in this case—and also moved for summary judgment. *Id.* There is no barrier to declaratory judgment here.

B. Exhaustion of Administrative Remedies Would be Futile

Even if the Plaintiffs would ordinarily be required to exhaust administrative remedies by paying the tax and then seeking a refund through the administrative procedure, that requirement is excused in this case by the doctrine of futility. *Estate of Bohn v. Waddell*, 174 Ariz. 239, 248, 848 P.2d 324, 333 (App. 1992) ("the exhaustion requirement is inapplicable when the administrative process would be useless or futile under the circumstances."). Here, it would plainly be futile to pay and seek a refund, because all of the legal issues present here—the statutory and constitutional validity of the tax—have already been addressed by both the County Defendants and the DOR. Their legal positions have been made clear in their briefs and "nothing would be gained by consuming the time and energy of counsel and the court by procedural shadow-boxing." *Tolg v. Grimes*, 355 F.2d 92, 97 (5th Cir. 1966). The County takes the position that Plaintiffs' legal arguments are incorrect; the DOR appears to join in some of those arguments, but has stated that it will enforce Prop. 417 unless this Court orders otherwise.

Additionally, there is no specialized expertise relevant to this case that necessitates an agency hearing. Plaintiffs' arguments are matters of statutory and constitutional interpretation, which are judicial, not administrative functions. As the Court of Appeals put it in another tax case, DOR's expertise "is not its constitutional knowledge but its ability to determine whether the Plaintiffs complied with the statutory requirements. The 'special competence' of an agency is its ability 'to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.'" *Moulton v. Napolitano*, 205 Ariz. 506, 514 ¶ 23, 73 P.3d 637, 645 (App. 2003) (citation omitted). This case involves no factual questions, and there is no dispute regarding compliance with statutory requirement. Rather, this is an ordinary case of statutory and constitutional interpretation.

Nothing would be gained by requiring the Plaintiffs to undergo administrative proceedings, which would only delay matters and increase costs.

CONCLUSION

Plaintiffs' motion should be granted.

RESPECTFULLY SUBMITTED this 12th day of April, 2018,

/s/ Timothy Sandefur
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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 12th day of April, 2018, with a copy delivered via the ECF system to:

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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE ARIZONA TAX COURT

HAROLD VANGILDER; DAN NEIDIG; and ARIZONA RESTAURANT ASSOCIATION, Plaintiffs, v. ARIZONA DEPARTMENT OF REVENUE; PINAL COUNTY; PINAL COUNTY REGIONAL TRANSPORTATION AUTHORITY, Defendants.	Cause No. TX2017-000663 **DEPARTMENT'S INITIAL DISCLOSURE STATEMENT** (Assigned to the Honorable Christopher T. Whitten)

Defendant, the Arizona Department of Revenue (the "Department"), hereby submits its initial disclosure statement pursuant to Rule 26.1, Ariz. R. Civ. P. This disclosure is made without the benefit of discovery having been conducted, without disclosure or discovery of the basis for Plaintiffs' claims, and is subject to change and supplementation as the case develops.

1. Rule 26.1(a)(1): The factual basis of each of the Department's claims or defenses.

The complaint in this action names the Department because the Department is charged with collecting (receiving) and paying to the State Treasurer all tax monies lawfully due under Proposition 417 for distribution by the Treasurer to the Regional Transportation Authority ("RTA"). A.R.S. § 42-5029. To administer the tax, the Department will have to prepare and publish new rate tables and configure its computer systems to process returns reporting the new tax. For TPT, compliant taxpayers file returns with the Department reporting revenues and tax liability and remit payments. The Department receives these returns, some of which are filed electronically[1], and the data in returns goes into the Department's computer system. Payments are of course deposited. No examination necessarily takes place and the Department is, in essence, simply passively receiving returns and payments. This process cannot be enjoined as the Department's role in receiving returns and payments is essentially passive. To enjoin it would seem to require refusing or blocking return filing and refusing payments. Because returns and payments would presumably concern taxes which are not at issue or in dispute, perhaps along with disputed taxes, an injunction against the Department is not practically possible. The Department has no way of knowing what is in a return before it is filed. Even if the tax is ruled unlawful, if taxpayers remit payments attributed to it, the Department must still accept filings and payments, as it is obligated to allow taxpayers to make filings and payments as they see fit.

Enjoining the Department from assessing taxes during audits is also problematic. If a Pinal County retailer were audited in the future, before a final resolution of this case, should the Department not apply the tax or purported tax? If it did not apply it and the tax is ultimately upheld, the Department would have not performed its duty, and the one audit rule would

[1] State law requires taxpayers to file and pay electronically when they have multiple business locations, or, in 2017, a business has a total annual combined state, county and municipal transaction privilege tax liability of $20,000 or more.

prevent reexamination and collection of taxes due. Conversely if it did assess a disputed tax, the taxpayer could protest, and the collection would be delayed while the legal issues present in this case were resolved. If the tax is finally determined to be void, an erroneous assessment would be modified, but if upheld, the assessment would be proper.

2. Rule 26.1(a)(2): The legal theory on which each of the Department's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities.

A. The Department Is Not Liable for the Payment of Any Refunds that May Be Ordered.

Given that the State of Arizona did not levy any of the taxes at issue and that it will receive none of the revenue, the State's interest in this case would ordinarily be relatively limited. That is not true, however, for two reasons. First, under a similar tax scheme, one in which taxes were levied by county electors for the benefit and use of a special district (the Arizona Sports and Tourism Authority), the Arizona Tax Court, after invalidating the tax, ruled that the State of Arizona was 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). That lawsuit is currently on appeal, and if an appellate court reverses and holds the tax to be lawful, the refund issue will be moot and the appellate court will presumably not decide whether the State is liable for refunds, thereby leaving it an open issue for possible litigation in this case.

As a matter of law, the State is not and should not liable for the refunds of any taxes (or interest thereon) that it neither levied nor received, taxes that were levied and received by another taxing entity in the state for which the Department merely serves as a collector of the tax monies. (See authorities cited in the Department's 8/28/15 Motion for Reconsideration filed with the Arizona Tax Court in TX2010-001089.)

B. The Exclusion of Income From the Retail TPT Classification Tax Base Appears to Be Unlawful.

The second area of concern to the Department is the RTA's attempt to modify the retail TPT tax base, defined in A.R.S. § 42-5061(A) as "the gross proceeds of sales or gross income derived from the business." Section 42-6106(C) states that with respect to a transportation excise tax adopted by county electors, the "department shall collect the tax at a variable rate if the variable rate is specified in the ballot proposition." Here, the county purports to be able to exclude proceeds from the tax base. This raises the question of whether this is lawful.

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

> [T]he power of taxation under the constitution inheres in the sovereignty of the state and may be exercised only by the legislature except where expressly delegated to political subdivisions of the state or to municipal corporations. The 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.

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

In particular, counties lack the authority to create their own tax classifications. Instead, under several statutes, including A.R.S. § 42-6106, counties or their electors may merely impose a tax rate, not to exceed statutory maximum rates, upon business income earned within certain tax classifications created by the Legislature. The county's rate is then applied to the state's TPT classifications (areas of business being taxed), with the tax base being that as defined by statute (typically gross income or gross revenue from the business in the classification, less statutory deductions).[2] Counties have no apparent right to modify the tax

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[2] "The transaction privilege tax is an excise tax on the privilege or right to engage in an occupation or business in the State of Arizona. It is not a tax upon the sale itself nor upon the property sold." *Ariz. Dep't of Revenue v. Mountain States Tel. & Tel. Co.*, 113 Ariz. 467, 468 (1976) (citation omitted). "The tax is not upon sales, as such, but upon the privilege or right to

base as defined by the Legislature in any particular classification, and this holds true for transportation excise tax under A.R.S. § 42-6106. The only rights that counties/their electors have are to approve a tax and then adopt a rate to be applied, taking all other parts of the state's transaction privilege tax structure unaltered.

As generally noted above, all TPT classifications generally use some definition of gross income or revenue as the tax base or starting point to determine the tax base against which tax rates are applied. For example, one taxable classification under which county electors may levy a tax under A.R.S. § 42-6106(B)(1) is the "retail classification." The retail classification is defined as "the business of selling tangible personal property at retail." A.R.S. § 42-5061(A). The tax base for the retail classification is "the gross proceeds of sales or gross income derived from the business." *Id.*

A.R.S. § 42-5075, on the other hand, sets the tax base for the prime contracting classification at "sixty-five percent of the gross proceeds of sales or gross income derived from the business." Whether to tax the revenue of a particular business, and what revenue to tax, is the Legislature's prerogative. Nothing in A.R.S. § 42-6106 permits county electors to alter the many legislatively-defined tax bases referenced in that statute by excluding certain income or certain transactions or portions of certain transactions from that base. Rather, the electors are authorized to approve a rate, one that may vary over time, to be applied to the same statutory base against which the State applies its rates, no more and no less. In the case of the retail sales classification, the statutory base is the gross income of the business. A.R.S. § 42-5061(A).

A.R.S. § 42-6106 itself specifically contemplates that the rate approved by county electors when approving a transportation excise tax is to be applied to the entire TPT base as defined by statute, providing that the tax approved by the qualified electors within a county under A.R.S. § 42-6106(A) "shall be levied and collected" at a rate of "not more than ten per

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engage in business in the State, although measured by the gross volume of business activity conducted within the State." *Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250 (1973).

cent of the transaction privilege tax rate prescribed by section 42-5010, subsection A . . . ." A.R.S. § 42-6106(B). Because a 0% rate applied to certain portions of the applicable statutory tax base will not result in a levy and collection, that "rate" (in truth, an exemption of certain parts of the statutory tax base, or perhaps a creation of a new classification with a new tax base) is not a type of variable rate contemplated or permitted under A.R.S. § 42-6106(C).

Whether to exclude portions of a taxpayer's income from TPT is the prerogative of the Legislature. More directly, what to include and what not to include in the tax base of a tax classification is solely a legislative function, an example of which is the Legislature's decision to set the tax base for the prime contracting classification at 65% of gross income as noted above. Many classifications, particularly the retail classification, have many deductions or exemptions that apply equally to the state and county taxes applicable thereto. There is no provision for adding something to, or subtracting from, those tax bases on a county-by-county basis.

This conclusion is further consistent with the language in A.R.S. § 42-6106(B)(1) that provides that the tax approved by electors "shall be levied and collected" at a *rate* (singular) to be applied "to each person engaging or continuing in the county in a business taxed under chapter 5, article 1 of this title" (emphasis added). At any given time, under this language, one rate must apply and be applied to all of the revenue in the statutory base. The variable language in A.R.S. § 42-6106(B)(1) can only be interpreted to mean a rate (singular) that varies over time, and not two or more rates that simultaneously vary by transaction amount or transaction type.[3]

For these reasons, A.R.S. § 42-6106 does not permit counties to adopt zero rates or two or more rates to be applied to portions of individual sales within a particular classification.

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[3] For example, electors could not approve a tax to be levied against some businesses within the retail classification and not against others, or, as in this case, approve a rate structure that taxes only a portion of a business' gross income as opposed to its entire gross income as specifically required under A.R.S. § 42-5061(A).

Rather, the rate must be one that is be applied to the statutory tax base reported during a period, with the tax base for the retail classification (and most other taxable classifications) described as "the gross proceeds of sales or gross income derived from the business."

Because the Legislature has defined the tax base in all applicable classifications, and because the Legislature has not given counties the authority to modify those tax bases—whether on a transaction-by-transaction basis or otherwise—a zero rate applied to part of the taxable revenue from individualized transactions is unlawful. Counties must accept the tax base for what it is, with its only decisions being whether to levy a tax and what positive rate to apply to the statutory base, subject to statutory caps on the rates. Because the rate adopted by electors under A.R.S. § 42-6106 must be a positive rate that results in the levy and collection of taxes against a statutory base defined by the Legislature, the electors' decision not to tax (i.e., to exempt from taxation) all revenue above $10,000 earned from any single transaction in the retail classification appears to be unlawful.

C. Whether the Irregularities in the Election Process Void the Ordinance Is Also an Issue.

The Department is not empowered to adjudicate election law disputes relating to tax measures that have passed, or to adjudicate constitutional disputes. Nevertheless, the apparent facts of this case do indicate that the ballot language did not match either the Pamphlet or the RTA Resolution. The Department expects these issues will be litigated by Plaintiffs and the County in this case. As a general matter of tax law, courts "liberally construe statutes imposing taxes in favor of taxpayers and against the government." *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, ¶ 10 (2004). As such, if the ballot language controls the scope of the tax, it does not appear to apply to any classification other than retail. The Department reserves its rights to determine whether this tax applies to any given taxpayer and classification during any subsequent audit or processing of any refund claim related thereto and will not necessarily agree with the position of the RTA and county in any such determination.

D. Administrative Procedures Have Not Been Followed.

Our Supreme Court has recognized a public policy that discourages suits for the refund of taxes even when illegally collected. *Univar Corp. v. City of Phx.*, 122 Ariz. 220, 223 (1979); *S. Pac. Co. v. Cochise Cty.*, 92 Ariz. 395, 406 (1963). At common law, taxes voluntarily paid could not be recovered. *S. Pac. Co.*, 92 Ariz. at 406. Accordingly, where parties have statutory recourse to an administrative agency that has authority to grant appropriate remedies, they must scrupulously follow the statutory procedures. *Estate of Bohn v. Waddell*, 174 Ariz. 239, 245 (App. 1992).

When a taxpayer fails to exhaust its administrative remedies, the superior court lacks jurisdiction to consider the claim. *See Univar Corp.*, 122 Ariz. at 223; *Mountain View Pioneer Hosp. v. Emp't Sec. Comm'n,* 107 Ariz. 81, 85 (1971) ("when a party fails to exhaust all his administrative remedies . . . the trial court is without jurisdiction . . . ."); *Williams v. Bankers Nat'l Ins. Co.*, 80 Ariz. 294 (1956); *Oliver v. Ariz. Dep't of Racing,* 147 Ariz. 83 (App.1985).

Failure to first litigate refund claims at the Department generally deprives the tax court of jurisdiction. In *Waddell*, federal pensioners sued the Department in tax court seeking a refund, claiming that it was unconstitutional for Arizona to impose a tax on federal pensions while allowing an exemption from tax for Arizona pensions. This legal position was ultimately adjudicated to be correct. However, the Arizona Court of Appeals dismissed the suit, finding that the taxpayers had failed to exhaust their administrative remedies. "We hold that the tax court lacks jurisdiction over any claim for refund of taxes that has not been first properly presented to the Department of Revenue." *Id.* at 245. Thus, as a general principle, a mere claim that a tax is illegal does not allow for taxpayers to bypass administrative review.

A party's failure to resort to and exhaust administrative remedies deprives the superior court of jurisdiction to hear the party's claim. *McNutt v. Dep't of Revenue of State of Ariz.*, 196 Ariz. 255, 265 (App. 1998).

E. The Anti-Injunction Act May Preclude Injunctions, but if Not, Injunctions Must Be Narrowly Targeted.

A.R.S. § 42-11006 prohibits injunctions against the Department or any taxing agency from "collecting an imposed or levied tax." There are exceptions, as discussed in *Church of Isaiah 58 Project of Arizona, Inc. v. La Paz County*, 233 Ariz. 460, 464-66, ¶¶ 19-22 (App. 2013). Nevertheless, along with other problems, should the court enjoin collections in some manner, and be overruled, taxpayers to whom the tax applied who did not comply or who were prevented from complying by the Department refusing filings or payments might face penalties. Courts should be very careful as enjoining the Department can also impinge on the right of taxpayers to make their own risk assessments and determine whether the best approach is to pay and seek a refund or to simply not comply if they are confident that the tax is unlawful.

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

> The Supreme Court has explained that the principal purpose of the Anti-Injunction Act is to preserve the Government's ability to assess and collect taxes 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 California v. United States, 920 F.2d 1481, 1484-85 (9th Cir. 1990).

The 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) "equity jurisdiction" otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury.
>
> *Commissioner v. Shapiro,* 424 U.S. 614, 627, 96 S.Ct. 1062, 1070, 47 L.Ed.2d 278 (1976) (quoting *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962)).

Church of Scientology of California, 920 F.2d at 1485.

F. The Taxes at Issue Do Not Violate Equal Protection.

"[T]he equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." *Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 366 (App. 1997). "An equal protection challenge to a legislative tax classification can succeed only if the taxpayer can demonstrate that the classification is not rationally related to any conceivable legitimate governmental purpose." *US West Commc'ns, Inc. v. City of Tucson,* 198 Ariz. 515, 525 (App. 2000).

> A legislative classification 'may be based on rational speculation unsupported by evidence or empirical data,' *F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315, 113 S. Ct. 2096 (1993), and will survive rational basis review unless the court is 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.

US West Commc'ns, Inc., 198 Ariz. at 525-26. Classifications created by different application of tax laws to different taxpayers survive an equal protection challenge if the court can "infer a set of facts underpinning the classifications that the [governmental entity] might rationally have believed and that was rationally related to furthering a plausible governmental interest." *Aida Renta Trust v. Dep't of Revenue,* 197 Ariz. 222, 237 (App. 2000). Raising revenue for public purposes and limiting adverse business impacts are legitimate purposes that provide a rational basis for the law.

G. The Law Is Not a Special Law.

The limiting of taxes to only certain revenues is not a violation of the constitution as special legislation. "A law is special and, therefore, unconstitutional if it 'applies only to certain members of a class or to an arbitrarily defined class which is not rationally related to a legitimate legislative purpose.'" *State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993).

"A law does not constitute special legislation if (1) there is a rational basis for the classification; (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the class is flexible, allowing members to move into and out of the class." *Id.* at 193.

Here, it is not clear what classification is challenged as a special law. If it is the limit on the retail tax base, there is a rational basis for taxing only lower priced items under the retail classification, which is to prevent customers of expensive items (cars) from purchasing out of the area, damaging local business.[4] The contention that this is to lessen political resistance from retailers who could be impacted is irrelevant to rational basis considerations. The Arizona Constitution does not require that every person pay the same rate or that all income be equally taxed, and tax codes are replete with differential treatment, deductions and exemptions. Notably, cities are expressly allowed to exclude from Model City Tax Code taxes amounts of income on single items over specified dollar amounts. See Option V at https://modelcitytaxcode.az.gov/models/Appendix_III.htm. While no such express authorization exists for counties, there does not appear to be a constitutional conflict with such a taxation scheme if statutorily authorized.

The Plaintiffs have not clearly identified what "classification" they challenge and why. Regardless, the law is not special legislation. The retail classification encompasses all retailers as members of the relevant class, retailers. As to the ability to move in and out, that is obvious; one moves in by doing business selling tangible personal property at retail, and if the problematic classification is the $10,000 cut off, the cut off applies to every retailer, and retailers would "move in and out" based on the size of sales. This is nothing like the legislation that directed discriminatory taxes against a limited set of mines and utilities or the tax imposed on only one insurance company held violative in *Tucson Elec. Power Co. v. Apache County*,

[4] The Department's argument is this regard in no way concedes that the .5 and 0% rates approved by voters in the retail classification are lawful under A.R.S. § 42-6106 for the reasons set forth in paragraph 2(B) above.

185 Ariz. 5 (App. 1995), and *State Comp. Fund v. Symington*, 174 Ariz. 188 (1993), respectively. Whatever classifications it applies to, the tax is broad and generally applicable. Notably, this state has excluded many items from tax, resulting in an unequal burden between taxpayers selling at retail. *See* A.R.S. § 42-5061(A) and (B). Never was exempting certain proceeds from the transaction privilege tax held unconstitutional as a "special law."

3. **Rule 26.1(a)(3): The name, address and telephone number of each witness whom the Department expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony.**

None.

4. **Rule 26.1(a)(4): The name and address of each person whom the Department believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess.**

Elaine Smith, c/o Arizona Attorney General. Ms. Smith is an employee of the Department of Revenue who can testify about the process to program the system to allow for the tax to be remitted to the Department.

5. **Rule 26.1(a)(5): The name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements.**

Testimony at the Legislature was given in the prior legislative session seeking a change in law to allow the exclusion of proceeds from the retail tax base in county taxes. This bill did not pass. *See* H.B. 2156 (53rd Legislature, 1st Reg. Sess.). Statements were made at hearings on this bill.

http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18550&meta_id=384291 and http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18758&meta_id=390378.

6. **Rule 26.1(a)(6): The name and address of each person whom the Department expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert.**

None.

7. **Rule 26.1(a)(7): A computation and measure of each category of damages alleged by the Department, the documents and testimony on which such computation and measure are based, and the name, address and telephone number of each witness whom the Department expects to call at trial to testify on damages.**

Not applicable.

8. **Rule 26.1(a)(8): The existence, location, custodian and general description of any tangible evidence, documents or electronically stored information that the Department plans to use at trial, including any material to be used for impeachment.**

Other than the election documents referenced in Section 1 above, and those documents disclosed below, no other documents that may be used at trial have been ascertained at present.

9. **Rule 26.1(a)(9): The existence, location, custodian, and general description of any tangible evidence, documents or electronically stored information that may be relevant to the subject matter of the action.**

1. RTA Resolution.
2. Pamphlet.
3. Proposition 417.
4. Board Resolution.

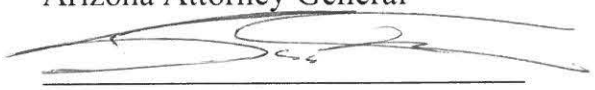
   (All parties have the foregoing documents, so copies are not provided.)

5. H.B. 2156 (53rd Legislature, 1st Reg. Sess.).

   See https://apps.azleg.gov/BillStatus/BillOverview/68644?SessionId=117.

DATED this 5th day of March, 2018.

MARK BRNOVICH
Arizona Attorney General



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