Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
Matthew Miller (033951)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs

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 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** (The Honorable Christopher Whitten)

I. THE INJUNCTION CAN BE TAILORED TO SATISFY THE CONCERNS OF THE DEPARTMENT OF REVENUE

The Department of Revenue ("DOR") expresses concern that its participation in the collection of the unlawful Proposition 417 tax is limited to publishing rate tables with the tax included, receiving and processing returns, and inputting the data from those returns into its computer system, as well as receiving and tracking payments. DOR's Resp. to Pls.' Mot. for Prelim. Inj. ("DOR Resp.") at 4-5. This Court, however, can easily tailor an inunction to address such concerns. It is undisputed that the DOR begins its activities to implement a transportation excise tax in response to a formal request from the county—in this case,

Resolution 2018-1. Plaintiffs seek to enjoin any such implementation.

Further, DOR's suggestion that the funds be placed in a sequestered account, with an order against expenditure until resolution of this case, does not address the Plaintiffs' primary concern, which relates to uncertainty and the costs they will suffer in efforts to comply with the tax in question. Every step in the compliance process is costly and fraught with risk. Plaintiffs must determine whether to collect the seemingly unlawful tax from their customers, change the prices for their goods and services, and remit the collected amounts to the Defendants, all while facing legal penalties for failing to comply with tax law. Even the DOR says it "does not want to end up having to pay refunds to taxpayers." DOR Resp. at 8 n.8. The cleanest way to avoid all these problems is for the Court to issue an order essentially postponing collection until this case can be resolved.

The appropriate injunction is straightforward: Plaintiffs request that the Court enjoin the DOR from (1) publishing rate tables with the tax included (or mandating that they be depublished if they have already been published), (2) receiving or processing returns relating to Proposition 417, and (3) inputting information from such returns into its computer system.

II. PLAINTIFFS FACE IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION

The DOR appears to misunderstand the nature of Plaintiffs' potential injury. This is not a question of taxpayers being forced to pay a tax and then recover it later in a refund proceeding if they prevail. Rather, this motion is concerned with *maintaining the status quo* until this Court can address the merits of the complaint. If that status quo is not maintained, Plaintiffs will suffer irreparable injury in terms of incalculable monetary damages, loss of business opportunities, confusion over their legal obligations and rights.

There is now great uncertainty and confusion as to *what* is taxable and when and how under

Proposition 417. As the briefing makes clear, the County has instructed the DOR to collect a tax on something the voters did not approve—*i.e.*, all classifications required by A.R.S. § 42-6106—rather than on the thing voters did approve (retail sales), but which the County has no authority to tax under A.R.S. § 42-6106. This creates uncertainty as to how Plaintiffs can comply with their obligations; uncertainty that is compounded by the costs and legal consequences of either complying or failing to comply, with the law. This significant legal uncertainty is itself grounds for temporary injunctive relief to maintain the status quo.

It is *not* true, as the County claims, that the only injury the Plaintiffs potentially face is "monetary in nature." Pinal County and Pinal Reg'l Transp. Auth.'s Resp. to Mot. for Prelim. Inj. ("County Resp.") at 15. First, a temporary injunction is appropriate even in cases where a party faces monetary injury, if it is difficult to estimate the potential monetary harm. *Hayois v. Salt River Valley Canal Co.*, 8 Ariz. 285, 290, 71 P. 944, 945 (1903); *see also Danielson v. Local 275, Laborers Int'l Union of N. Am.*, 479 F.2d 1033, 1037 (2nd Cir. 1973) ("Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate."); *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App. 2000) ("An award of damages may be deficient if the nature of the Doctors' losses makes damages difficult to calculate."); *Trans Pac. Leasing Corp. v. Aero Micronesia, Inc.*, 26 F. Supp. 2d 698, 710 (S.D.N.Y. 1998) ("The legal remedy of damages is inadequate if damages would be difficult to estimate or if a monetary award would not remedy the damage caused."). The Plaintiffs (and the plaintiffs in *Homebuilders Ass'n of Cent. Ariz., et al., v. Arizona Dep't of Revenue, et al.,* No. TX2018-000902) face significant uncertainty about their obligations and potential legal liabilities if the Defendants begin collecting the tax before this Court is able to resolve the matter.

Second, the loss of potential business opportunities is itself an irreparable injury for injunctive relief purposes "because of the difficulty in determining how many sales were lost and what the profit

on each such lost sale would have been. Thus damages are said to be speculative and unascertainable ... [and] therefore irreparable." *Zimmerman v. D.C.A. at Welleby, Inc*., 505 So. 2d 1371, 1373 (Fla. Dist. Ct. App. 1987). *See also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc*., 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries, such as damage to … [business] goodwill" are irreparable injury); *Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) ("damage to ongoing customer relationships, loss of customer goodwill … , and loss of business opportunities" are irreparable injuries).

Plaintiffs face uncertainty about their legal obligations and potential liabilities under Proposition 417 and Resolution 2018-1. Plaintiffs' efforts to satisfy these legal obligations—including potentially collecting taxes that are not applicable to their businesses, and/or changing their prices and losing business opportunities unnecessarily—are precisely the sort of irreparable injury for which injunctive relief is appropriate. An injunction will maintain the status quo until this case can be resolved on the merits. Such an act is a routine exercise of a court's equitable powers, to give the Court time to weigh all the legal questions. It ought to do so here.

III. THE ANTI-INJUNCTION ACTS DO NOT APPLY

The DOR asserts that this Court is barred from issuing an injunction under A.R.S. §§ 42-11006 and 42-1254(D)(1). This is incorrect for at least three reasons. First, as discussed in Plaintiffs' Motion for Preliminary Injunction, A.R.S. § 42-11006 applies only to property taxes, and specifically, only to the levying or collection of an assessed property tax. Proposition 417 is not a property tax, so the statute cannot apply. Second, Plaintiffs do not seek to enjoin the levying or collection of an assessed tax, but seek to enjoin the DOR from taking action in response to Resolution 2018-1 on the grounds that it is unlawful. Finally, even A.R.S. § 42-11006 does not apply where a tax is imposed without semblance of authority—which is the case here. The tax that Resolution 2018-1 seeks to impose was not approved by

the voters and therefore lacks any semblance of authority. The tax also exceeds the County's taxing authority under A.R.S. § 42-6106. Therefore, A.R.S. § 42-11006 simply does not apply.

Nor does A.R.S. § 42-1254(D)(1), which is specifically limited to cases in which an appeal has been taken to this Court after a decision by the Arizona Board of Tax Appeals. That is not the case here. That statute is therefore inapplicable.

Finally, the DOR asserts that an injunction is barred by the *federal* Anti-Tax Injunction Act, 28 U.S.C. § 1341. But that law is obviously inapplicable, since it applies only to the jurisdiction of federal courts—specifically federal *district* courts—and this is not a federal district court. *Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1219 (D. Ariz. 2001) (Section 1341 "requires taxpayers to proceed to state court to challenge disputed state taxes"). Indeed, it would be unconstitutional for Congress to interfere with the jurisdiction of a state court in a case involving a purely state-law matter like this.

IV. THIS IS NOT A "VOTER CONFUSION" CASE

The County argues that this case is "essentially a challenge to the procedure by which the Special Election was held." County Resp. at 5-6. This is simply false. Nothing in Plaintiffs' complaint or motion papers involves anything relating to the procedure by which the election was held. The complaint relates solely to the lawfulness of the Proposition 417 tax. The County's effort to portray this as a case about "contemporaneous voter confusion" is simply misleading. County Resp. at 6. This case is about the legality of the tax. This motion is about maintaining the status quo until the Court can decide the merits.

As to the County's effort to claim that voters approved a tax on all classifications, County Resp. at 7-9, the text of Proposition 417 belies that argument. The language voters approved states as follows: "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; 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 ... [etc.]" County Resp., Ex. 2 at 18 (emphasis added). This language plainly authorizes a tax on retail sales only. The word "including"—*on which the County hinges its entire argument*—plainly refers to the alleged variable rate, not to the imposition of a tax on the various classifications provided in A.R.S. § 42-6106.

This was reinforced by the plain grammar of the question page, which stated "Do you favor the levy of a transaction privilege (sales) tax for regional transportation purposes, *including at a variable or modified rate*, in Pinal County?" County Resp., Ex. 2 at 19 (emphasis added). In other words, what was being "included" by the word "including" was the purported variable rate—*not* the various other taxes mandated by A.R.S. § 42-6106. The discrepancy between the language on the ballot, which taxes only retail sales at a (so-called) variable rate, and the language in the Publicity Pamphlet, which taxes all of the required classifications, is further highlighted by the language of Resolution 2018-1, which took great care to instruct the DOR to impose the tax *in compliance with the Publicity Pamphlet*, rather than in compliance with Proposition 417. Pls.' Mot. for Prelim. Inj., Ex. 1 at 2.

This discrepancy matters because the County is now in the position of arguing two equally untenable positions: That the tax should be imposed on all classifications, as listed in the Publicity Pamphlet, but which the voters did not approve. Or the tax should be imposed on retail sales of items below $10,000, which the voters approved, but which is not authorized by statute. Both of these options are illegal, but this is not the place to resolve the merits of these problems. Rather, it is to demonstrate that this Court should issue the requested injunction to maintain the status quo until those merits can be fully fleshed out.

CONCLUSION

The motion should be *granted*.

RESPECTFULLY SUBMITTED this 20th day of March, 2018 by:

/s/ Timothy Sandefur_____
Timothy Sandefur (033670)
Matthew Miller (033951)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 20th day of March, 2018, with a copy delivered via the ECF system to:

MARK BRNOVICH
Attorney General
Scott G. Teasdale
Jerry A. Fries
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004-1592
tax@azag.gov
scot.teasdale@azag.gov
jerry.fries@azag.gov
Attorneys for Defendant Arizona Dept. of Revenue

Joseph A. Kanefield
Chase Bales
Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
kanefieldj@ballardspahr.com
balesc@ballardspahr.com
Attorneys for Defendants Pinal County and
Pinal Regional Transportation Authority

Chris Keller
Chief Civil Deputy
Office of the Pinal County Attorney, Kent Volkmer
P.O. Box 887
Florence, Arizona 85132
Chris.Keller@PinalCountyAZ.gov
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/ Kris Schlott