IN THE SUPREME COURT

STATE OF ARIZONA

HAROLD VANGILDER; DAN NEIDIG; and ARIZONA RESTAURANT ASSOCIATION, Plaintiffs/Appellees/ Cross-Appellants, v. ARIZONA DEPARTMENT OF REVENUE, Defendant/Appellee, PINAL COUNTY and PINAL REGIONAL TRANSPORTATION AUTHORITY Defendants/Appellants/ Cross-Appellees.	Supreme Court No. CV-20-0040-PR Court of Appeals, Division One Case No. 1 CA-TX 19-0001 Maricopa County Tax Court Case No. TX2017-000663

SUPPLEMENTAL BRIEF OF APPELLEES/CROSS-APPELLANTS

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INTRODUCTION[1]

The simplest way to resolve this case is the way the Tax Court did: to hold that the Authorizing Resolution was void for failure to comply with A.R.S. § 48-5314(A)(2), with the consequence that the tax is void.

Section 48-5314(A)(2) sets the process for adopting transportation excise taxes. The first step is that the Regional Transportation Authority (RTA) must adopt an authorizing resolution requesting the County Board of Supervisors (Board) to hold an election on the question "of levying a transportation excise tax pursuant to § 42-6106." Such a resolution is jurisdictional, meaning that the Board has no authority to establish a transportation excise tax without first receiving a valid authorizing resolution from the RTA.

But here, the RTA did not comply with the statute. Instead of requesting an election regarding "a transportation excise tax pursuant to § 42-6106," as Section 48-5314(A)(2) mandates, the Authorizing Resolution asked the Board to schedule an election "on the issue of levying a transportation excise tax at a rate equal to one-half percent (0.005% [*sic*]) 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…[etc.]" APP.004—that is, a tax only on retail sales. But such a tax

[1] This brief focuses on the question of whether the tax is a lawful retail-only tax. The $10,000 carve-out discussed in the Petitions for Review is a separate reason why the tax is unlawful. Defendant/Petitioner Arizona Department of Revenue agrees with Taxpayers, that the $10,000 carve-out is unlawful, and is by itself sufficient grounds for reversal. Taxpayers, therefore incorporate all of ADOR's arguments on that issue and confine this Supplemental Brief to the retail-only tax issue.

is not permitted by Sections 48-5314 and 42-6106. Therefore, the Authorizing Resolution was invalid. Because such a resolution is jurisdictional, it failed to authorize the Board to hold an election. Consequently, Proposition 417 is invalid. This may seem like a strict way to read Section 48-5314's requirements, but Arizona law requires "strict adherence to taxation statutes," due to the state's "policy that taxpayers should be afforded every procedural protection provided by the legislature for their benefit." *Braden v. Yuma Cnty. Bd. of Supervisors*, 161 Ariz. 199, 202 (App. 1989).

A second way to resolve this case—assuming the Authorizing Resolution was not void *ab initio*—is to conclude that the steps taken by the Board after it received the Authorizing Resolution were unlawful. Section 48-5314(A)(2) provides that upon receipt of an authorizing resolution, the Board must "place *the* issue on the ballot" (emphasis added), and must print publicity pamphlets that include a "summary of *the* principal provisions of *the* issue presented to the voters," etc. A.R.S. § 48-5314(C)(3) (emphasis added). In other words, the Board was required to place the same tax referred to in the Authorizing Resolution on the ballot. It had no authority to place some *other* tax on the ballot. The County says the Board did just this—i.e., placed a different tax on the ballot than the one called for in the Authorizing Resolution—a general TPT tax, instead of a retail-only tax—and that it accomplished this by adding the word "including" to the language of the Authorizing Resolution. This, it said, changed the retail-only tax proposed in the Authorizing Resolution into a tax on all TPT classifications. *Vangilder v. Ariz. Dep't of Revenue*, 248 Ariz. 254, 261–62 ¶¶ 21-22 (App. 2020). But the Board (a)

had no lawful authority to do that, and (b) did not in fact do that, for grammatical reasons explained below (Section III).

The Court of Appeals held that it could selectively ignore the language of the Authorizing Resolution. It held that the law does not *require* the RTA to specify details about a contemplated tax, so the court could ignore the fact that the RTA *did so* here. *Id.* at 259–60 ¶¶ 9-12. But this violated the rule that courts must interpret the Authorizing Resolution so as to give effect to all of its terms. *Moore v. Valley Garden Ctr.*, 66 Ariz. 209, 211 (1947).

The court below also agreed with the County that by inserting the word "including" into the text when it placed the tax on the ballot (as Prop. 417), the Board transformed the tax from the retail-only tax contemplated in the Authorizing Resolution to a tax on all TPT classifications. But the law does not allow the Board to put a different tax on the ballot than what was proposed in the Authorizing Resolution (see Section II below). Nor did the Board actually accomplish that. The County's argument to the contrary violates longstanding rules of construction, especially the rule against expanding the reach of tax laws by "strained construction or implication." *Ariz. State Tax Comm'n v. Staggs Realty Corp.*, 85 Ariz. 294, 297 (1959). It is also ungrammatical. Taxpayers contend that the addition of the word "including" did not transform the tax from a retail-only tax into a tax on all TPT classifications. The County's argument to the contrary depends entirely on implication—i.e., inferring from the word "including" that the Prop. 417 tax applies to all TPT classifications instead of just retail. But courts rely on the "fair meaning" of the text, not "strained construction," *id.*, and the fair

meaning here shows that both the Authorizing Resolution and Prop. 417 specified the same retail-only tax. And because a tax only on retail sales is unlawful under Section 42-6106, the final tax is also unlawful.

The County argues that none of this matters, because the voter education pamphlet cured any potential misunderstanding by voters. However, even assuming *arguendo* that that is true, it is irrelevant, because this case is not about what voters understood or not.[2] This case is about what the RTA and the Board have the legal authority to do. It is the County, not Taxpayers, whose argument demands an inquiry into what voters believed, just as it is the County, not Taxpayers, who resort to arguments based on implication from the word "including," and on "'rules of technical grammar.'" *Vangilder*, 248 Ariz. at 261, ¶ 17 (citation omitted).

Therefore, either (a) the Authorizing Resolution was void *ab initio* because it requested an unlawful retail-only tax, meaning that it failed to give the Board authority to proceed under Section 48-5314—which renders the tax unlawful—or (b) the tax for which the Board sought approval as Prop. 417 was the same retail-only tax proposed in the Authorizing Resolution—and this is unlawful because retail-only taxes are not permitted under Section 42-6106. In any event, the Board could not and did not transform the retail-only tax contemplated by the Authorizing Resolution into a lawful TPT tax prior to the election, as the County

[2] To argue over whether voters were misled would be an election law argument. Plaintiffs have never made such an argument in this case. That is why the County's and *amici*'s argument that this case is a time-barred election law case is irrelevant.

asserts. Thus the decision below must be reversed, and the judgment of the Tax Court reinstated.

ARGUMENT

I. The County—not Taxpayers—argues that the tax in Prop. 417 was different from the tax in the Authorizing Resolution.

It is worth emphasizing at the outset that it is the County, not the Taxpayers, who argue that the tax referred to in the Authorizing Resolution and the tax specified in Prop. 417 were two different taxes. Taxpayers contend that the tax in the Authorizing Resolution and the tax in Prop. 417 are the same—a tax only upon people engaged in the retail sales of tangible personal property—and that such a tax violates the applicable statutes. After all, the Board had no authority to change it from the retail-only tax described in the Authorizing Resolution into anything else. And Sections 48-5314(A)(2) and 42-6106 require that transportation excise taxes apply to all TPT classifications, not just retail sales. Therefore, the tax is unlawful and the Tax Court's ruling was correct.

The County takes a different and more complicated view. It says that the wording of an authorizing resolution can be entirely ignored, and that the Board did in fact ignore the wording of this Authorizing Resolution—and actually changed the tax from the retail-only tax proposed in that Resolution into a tax on all TPT classifications, by adding the word "including" to the text.

In its brief, the County studiously avoids quoting the language of the Authorizing Resolution. That language is as follows: the Resolution specified a tax "at a rate equal to one-half percent (0.005% [*sic*]) of the gross income from the business activity upon every person engaging or continuing in the business of

selling tangible personal property at retail." APP.004. The County claims that because an authorizing resolution "is not required to include any specific information about the tax," Cnty.'s Resp. at 8, the Board was free to ignore the fact that the Authorizing Resolution in this case actually *did* include specific information about the tax—that is, it specified a tax only on retail sales of personal property. The County then claims that because the Board inserted the word "including" in the text of Prop. 417, what voters approved was *not* the retail-only tax specified in the Authorizing Resolution, but a tax on all TPT classifications.

Therefore, notwithstanding their denials, the County's legal argument logically depends on the premise that the tax in Prop. 417 and the tax in the Authorizing Resolution are two different things. If the tax in Prop. 417 was the *same* tax specified in the Authorizing Resolution—a tax only on retail sales—then it is void for violating Sections 48-5314(A)(2) and 42-6106, and judgment should be for Taxpayers. On the other hand, if the tax was different, then the Court must determine whether the Board had lawful authority to put a different tax on the ballot than what was referenced in the Authorizing Resolution. As explained in Section II, no such authority exists. Finally, if the Board does have that authority, the Court must determine whether adding the word "including" accomplished this. As explained in Section III, it did not.

II. The County *could* not place a different tax on the ballot than was called for in the Authorizing Resolution.

The Court of Appeals held that the text of the Authorizing Resolution could be selectively disregarded. Because Section 48-5314 does not require an RTA to

specify the details of a tax in an authorizing resolution, the fact that it did so here should be ignored, and the words of the Authorizing Resolution should be interpreted as if they "simply asked the Board to put a transportation excise tax on the County ballot." *Vangilder*, 248 Ariz. at 259 ¶ 10. The problem is that this ignores what the RTA actually said. In short, the Court of Appeals rendered the phrase "at a rate equal to one-half percent (0.005% [*sic*]) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail" ineffectual surplusage—and proceeded as if the Authorizing Resolution requested a transportation excise tax without specifying retail-only. That was reversible error for at last three reasons:

A. An Authorizing Resolution must be must be interpreted according to regular rules of legal interpretation.

An Authorizing Resolution is not a mere piece of paper, but a jurisdictional document—a formal legal instrument promulgated by a government agency and adopted by elected officials, which gives the Board authority it otherwise does not have: to hold an election on a transportation excise tax. Like a statute, an ordinance, or even a private contract, therefore, such a resolution must be read according to standard rules of interpretation, including the rule that every word should be given effect, and no provision rendered meaningless. *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003) (applying this rule to a statute); *Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277 (App. 1993) (to a contract); *In re Estate of Porini*, No. 1 CA-CV 11-0766, 2012 WL 5928275 *1 ¶ 8 (Ariz. App. Nov. 27, 2012) (to a trust); *Schilling v. Tempert*, No. 1 CA-CV 12-0505 EL,

2012 WL 4893221 *3 ¶ 15 (Ariz. App. Oct. 16, 2012) (to a resolution by a county board). *See also Moore*, 66 Ariz. 209 at 211 ("courts must" interpret "constitutions, statutes, charters, and similar instruments … [to] give effect to each and every provision").

This rule is especially important here, because an authorizing resolution is jurisdictional. The Board has no authority to adopt a transportation excise tax without first receiving a valid authorizing resolution from the RTA.

Moreover, the RTA chose the language of this Authorizing Resolution quite deliberately. We know this because back in 2016—a year before the events at issue here—it adopted an authorizing resolution (Resolution No. 2016-01[3]), that did *not* specify a retail-only tax. *That* resolution asked the Board to hold an election on "the issue of levying a half-cent transportation excise tax, pursuant to A.R.S. 42-6106," which is the language required by Section 48-5314(A)(2).

But in *this* Authorizing Resolution, it consciously chose different wording. This time, it specified "a transportation excise tax at a rate equal to one-half percent (0.005% [*sic*]) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail." APP.004. The fact that it chose this language instead of the language it used only a year earlier proves that the RTA knows how to adopt an authorizing resolution that "simply ask[s] the Board to put a transportation excise tax on the County ballot," when it wants to, *Vangilder*, 248 Ariz. at 259 ¶ 10—and that it

[3] The Court can and should take judicial notice of this resolution under Rule of Evidence 201.

decided *not* to do that in this Authorizing Resolution. That choice should be given legal effect. *Conway v. State Consol. Pub. Co.*, 57 Ariz. 162, 166 (1941) ("If it appears the lawmaking body intended a change, we cannot ignore such intention."); *cf. Sell v. Gama*, 231 Ariz. 323, 328 ¶ 21 (2013) (when legislature chose different wording than usual, the wording it chose must be given effect); *Roubos v. Miller*, 214 Ariz. 416, 420 ¶ 20 (2007) (legislature chose not to create statutory exemptions as in other statutes, so that omission must be given effect).

The Court of Appeals disregarded all of these interpretive rules. Instead, it gave legal effect to *some* parts of the Authorizing Resolution, while rendering other parts ineffectual. It held that the Resolution was good enough to give the Board jurisdiction, and to begin the process whereby an election can proceed under Section 48-5314—and was therefore not void *ab initio*—but that the wording specifying a retail-only tax could be treated as surplusage. That holding violated the rule against "constru[ing] one provision" of the Authorizing Resolution "so as to render another provision meaningless." *Norman v. Recreation Ctrs. of Sun City, Inc.*, 156 Ariz. 425, 428 (App. 1988). In other words, the court below gave effect to one part of that Resolution while rendering other parts "void, inert, redundant, or trivial." *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949).

That was reversible error. The Authorizing Resolution asked the Board to place only one thing on the ballot: a retail-sales tax. That language must be given legal effect. Either it rendered the Authorizing Resolution void *ab initio*—because Section 48-5314(A)(2) requires an authorizing resolution to specify "a transportation excise tax pursuant to § 42-6106"—and therefore "invalidate[d] the

original proceedings as a matter of law," *Henningson, Durham & Richardson v. Prochnow*, 13 Ariz. App. 411, 416 (1970), or it bound the Board, so that the Board could only place that *same* retail-only tax on the ballot. Either way, the Court of Appeals was not free to give effect to *some* words of the Authorizing Resolution while ignoring others.

Remarkably, the County not only ignores the words of the Authorizing Resolution in its argument, but actually misrepresents them to this Court. On page 14 of its Response to the Petition, the County said: "the Resolution requested the Board to schedule an election on 'the issue of levying ***a transportation excise tax, pursuant to A.R.S. 42-6106.***'" (County's emphasis). But this quoted language does not appear at all in the Authorizing Resolution! Nor does the County cite the page of the Appendix where the Resolution actually appears. The Court can find that Resolution on page APP.004, and it does *not* use the words the County puts in quotation marks, boldface, and italics. Quite the opposite; it says "the issue of ***levying a transportation excise tax at a rate equal to one-half percent (0.005% [sic]) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail***." (emphasis added). The Authorizing Resolution did *not* request an election on the issue of levying a tax compliant with Section 42-6106, as the County claims. Instead, it requested an election on a retail-only tax. That language must be respected, not ignored—or rewritten.

Laws for implementing taxes must be strictly complied with, *Braden*, 161 Ariz. at 202, and must be construed strictly "against the taxing power." *State v.*

Tex. Indep. Oil Co., 95 Ariz. 216, 220 (1964) (citation omitted). For the court below to disregard the Resolution's language was therefore legal error.

The Resolution violated Section 48-5314(A)(2) because it sought a tax *not* "pursuant to Section 42-6106," as that section requires, but on retail sales only. And because the Resolution is jurisdictional, its invalidity deprived the Board of authority to proceed. Just as courts "cannot, and will not, rewrite [a] statute to save it," *State v. Arevalo*, 470 P.3d 644, 650 ¶ 20 (Ariz. Sept. 1, 2020), so the Board could not, and this Court cannot, overlook the fatal flaw in the Authorizing Resolution by ignoring its words or rewriting it through interpretation.

B. Arizona statutes do not contemplate the Board placing a different tax on the ballot than was called for in the Authorizing Resolution.

Counties "have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature," *Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 395 (1949), and no statute empowers the Board to ignore the language of an authorizing resolution or to change it before putting it on the ballot. On the contrary, the statute specifies that when an RTA sends a Board of Supervisors an authorizing resolution, the Board must "place ***the*** issue on the ballot," A.R.S. § 48-5314(A)(2) (emphasis added), not some other issue, and prepare a pamphlet "concerning ***the*** ballot question," which must contain "[a] summary of ***the*** principal provisions of ***the*** issue presented to the voters, including the rate of ***the*** transportation excise tax, the number of years ***the*** tax will be in effect," etc. A.R.S. § 48-5314(C)(3) (emphasis added). It has no statutory power to place a *different* kind of tax on the ballot. If that were what the statute meant, it

would have said "place *an* issue" on the ballot. (Taxpayers discussed this in detail in their Petition for Review at 8-13.)

The Board's choice to deviate from the Authorizing Resolution, by adding the word "including," cannot be indulged under the theory of substantial compliance, because procedures for adopting taxes must be *strictly* complied with. *Braden*, 161 Ariz. at 202–03. Nor can it be deemed harmless error, because the County says the word "including" substantively transformed the tax from a narrowly-limited, retail-only tax into another, far broader kind of tax on all TPT classifications. This was no trivial change. Such an extraordinary legal step must be based on some statutory grant of authority. Yet there is none.

C. Allowing the Board to place a different tax on the ballot than what is contemplated in the Authorizing Resolution would be undemocratic and unjustifiable.

It would be contrary to public policy for county officials, upon receipt of an authorizing resolution that specifies one, narrow tax—after having publicized that fact—to change the tax into a different, far broader tax before the election, by adding just one word ("including"), so that voters end up approving a score of taxes on entirely different things than what was originally contemplated. That would be "a surprise switcheroo," like changing the wording of a proposed regulation prior to approval, which would be contrary to public policy. *Envtl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996–97 (D.C. Cir. 2005). For one thing, it is impossible to determine whether members of the RTA would have approved the broader tax. It would be unsound and unlawful to let the RTA adopt a resolution seeking to tax, say, cheesemakers—and then for the Board to add the

single word "including," and, when voters approve it, tax all manufacturers of dairy products, because that "incudes" cheesemakers. Members of the RTA's board might have voted differently on the authorizing resolution if they had known that all dairies would be subject to the tax.

To emphasize: this case is not about whether voters were confused.[4] Instead, it is about whether the Board could ignore the language in the Authorizing Resolution specifying a retail-only tax, and instead put a tax on the ballot that applies to all TPT classifications. Taxpayers submit that it had no such authority—for four reasons: (1) because the Authorizing Resolution is jurisdictional (meaning the Board has no authority to adopt a tax absent a valid authorizing resolution); (2) because no such power is given by statute; (3) because Section 48-5314 refers to "the" tax being placed on the ballot; and (4) because such a power would contradict the long-settled policy "of requiring strict adherence to taxation statutes." *Braden*, 161 Ariz. at 202. Therefore, the Prop. 417 tax is, and must be, the same retail-only tax specified in the Authorizing Resolution.

Indeed, holding to the contrary would have troubling implications. This Court, relying on the rule "that doubtful tax statutes should be given a strict construction against the taxing power," has said that government "may not

[4] The County objected to Plaintiffs' citation to Pinal County news articles (*see* Pet. Rev. at 12 n.5) that told voters the tax would only be on retail sales. But this Court can take judicial notice of the existence of such articles pursuant to Rule of Evidence 201. *See also* Rose Law Group, *New Roads & Freeways For Pinal County Drive Toward November Ballot* (attorneys for pro-Prop. 417 group stating that "if voters approve, the sales tax in Pinal County would be increased by half a cent, with exceptions for the first $10,000 of large purchases such as vehicles and farm equipment," and making no reference to non-retail TPT classifications).

establish traps for taxpayers." *Tex. Indep. Oil Co.*, 95 Ariz. at 220. But letting the Board put a different tax on the ballot than the one proposed in an authorizing resolution would do just that. Courts cannot rewrite laws to save them, *Arevalo*, 470 P.3d at 650 ¶ 20, and cannot rewrite the language of the Authorizing Resolution (through a broad interpretation of the word "including") to transform the tax on retail sales into a tax on all TPT classifications that the RTA itself may never have considered.[5]

Similar questions were presented in *Prochnow* and *Braden*. *Prochnow* concerned certain drainage improvements undertaken by a county. After the contractor submitted a proposal, the county adopted a "Resolution of Intention" approving that proposal, as the law required, but the proposal was later determined to be fatally flawed. 13 Ariz. App. at 414. It was revised, but then the county failed to approve a new Resolution of Intention. *Id.* at 415. The court found that this "invalidate[d] the original proceedings as a matter of law," because an accurate resolution is "jurisdictional to the board's subsequent ordering the work to be performed," and "all statutes governing improvement districts are to be strictly complied with." *Id.* at 416. Similarly, *Braden* involved a county's creation of a flood control district preparatory to construction of a bridge, but the board failed to mention the bridge in the authorizing resolution. 161 Ariz. at 200. Affected

[5] The County says the RTA approved the ballot pamphlet and thereby retroactively approved a tax on all TPT classifications. Cnty.'s Resp. at 14. But no Arizona law provides for or requires the RTA to approve a ballot pamphlet, or permits a retroactive approval. Given the strict-compliance rule, no such after-the-fact approval by the RTA of the Board's rewording of the RTA's original resolution could satisfy the requirements of Section 48-5314.

property owners sued, arguing that this rendered the subsequent assessment to fund bridge construction invalid. The court agreed, citing the rule that taxpayers have "the right 'to insist upon the observance of every form prescribed by statute which will in the least tend to protect [them].'" *Id.* at 203 (citation omitted).

The court below distinguished *Prochnow* and *Braden*, but its reasoning was fallacious. It said the reason the resolutions in those cases were jurisdictional was because those resolutions were intended to inform voters, whereas under Section 48-5314, an authorizing resolution is not. But even if that is true, an authorizing resolution under Section 48-5314 is still jurisdictional—just for a different reason. It is jurisdictional because the legislature chose not to let counties of this size impose transportation excise taxes without first receiving a valid authorizing resolution from an RTA. Therefore the Authorizing Resolution here was just as much a jurisdictional requirement as the resolutions at issue in *Prochnow* and *Braden*, and the same conclusion should follow: the Authorizing Resolution's failure to adhere to the law rendered it void *ab initio*, thus failing to authorize the Board to proceed.

Moreover, it is simply not true that an authorizing resolution is not meant to inform voters. First, the language of an authorizing resolution is essential to informing and getting the votes of *members of the RTA's own board*. They might have voted differently had they contemplated a tax on all TPT classifications. And in any event, the *entire* statutory process for adopting transportation excise taxes was designed to inform voters. The legislature created that process carefully, allocating responsibilities between the RTA and the Board in ways it thought

would inform voters, balanced with other considerations. In concluding that the first sentence of Section 48-5314(A)(2) was not meant to inform voters (even though that sentence expressly refers to voters), but the rest of the statute was, the Court of Appeals essentially rewrote that statute, so that compliance with some provisions must be strict, but compliance with other provisions can be substantial. Such a conclusion is not only unprecedented, but contrary to Arizona's rule that taxpayers are entitled "'to insist upon the observance of every form prescribed by statute which will in the least tend to protect [them].'" *Braden*, 161 Ariz. at 203 (citation omitted). In short, the Authorizing Resolution, like the resolutions in *Prochnow* and *Braden*, was jurisdictional, and its noncompliance with A.R.S. § 48-5314(A)(2) could not be retroactively cured by the Board.

III. The County *did* not place a different tax on the ballot than was called for in the Authorizing Resolution.

Even if the Board had authority to change the tax before putting it on the ballot, its addition of the word "including" failed to accomplish this.

First, the County—not Taxpayers—bears the burden of proving that the addition of the word "including" transformed the tax from a tax on retail sales into a tax on all TPT classifications. "This court has repeatedly held that the rule of statutory construction is that statutes imposing taxes will be most strongly construed against the government and in favor of the taxpayer." *City of Phoenix v. Borden Co.*, 84 Ariz. 250, 252–53 (1958). That presumption in favor of taxpayers means courts will not interpret tax laws based on "strained construction or implication," Staggs Realty, 85 Ariz. at 297, and will not "'strain, stretch and

struggle' to uncover hidden taxable items." *State Tax Comm'n v. Miami Copper Co.*, 74 Ariz. 234, 243 (1952) (citation omitted). In short, even if Taxpayers' and the County's interpretation of Prop. 417 were equally plausible, the Court should rule for Taxpayers.

Yet the County's argument rests *entirely* on "strained construction [and] implication." *Staggs Realty*, 85 Ariz. at 297. Its position is that the single word "including" *impliedly* transformed the tax into a tax on all TPT classifications.

This argument is also ungrammatical. Recall that the Authorizing Resolution referred to:

> "a transportation excise tax at a rate equal to one-half percent (0.005% [*sic*]) 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…[etc.]" APP.004.

And the wording that appeared on the ballot as Prop. 417 was:

> "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…[etc.]" APP.024 (emphasis added).

In both versions, the target of the tax remains the same: the tax is "upon" persons engaged in the business of selling at retail. What is being "included" in the second version is the "rate equal to one half-percent (0.5%) of the gross income." This was implicit in the first version, and "including" makes it explicit in the second, but both quotations still refer to the same thing: a tax "upon" retail sales. This is the "fair meaning" of Prop. 417, meaning that it does not depend on sophisticated rules of technical grammar. *Staggs Realty*, 85 Ariz. at 297.

The County, by contrast, argues that by adding the word "including," the Board changed the tax "upon" retail sales into a tax on all TPT classifications, ***plus*** a tax at a specified rate on retail sales. But this is not what the word "including" normally means. It does not mean "plus" or "as well as" or "also"—it means "encompassing" or "incorporating." Thus "a tax of one kind, including the rate of 5%" does not ordinarily mean "a tax of one kind and also a tax of a different kind at 5%." Only by stretching and straining—i.e., by implication—can the County argue that "including" expanded Prop. 417 to encompass all TPT classifications.

To use an analogy: if one saw an advertisement selling "tickets in the front row for tonight's performance of *Swan Lake*," one would understand it to mean that the seller was offering tickets only to that performance. And if one saw an advertisement for "tickets *including* in the front row for tonight's performance of *Swan Lake*," an ordinary reader of English would still assume that the seller was only offering tickets to tonight's *Swan Lake,* not any other show. The word "including" here simply means that some are front-row tickets and some are not.

True, one might be persuaded by sophisticated rules of technical grammar that the seller is also offering tickets for other ballets—but that is not the "fair meaning." *Staggs Realty*, 85 Ariz. at 297. No ordinary user of English would assume that. Instead, an ordinary person would think the tickets are all for tonight's performance of *Swan Lake,* and that the "including" phrase refers to the fact that some tickets are in the front row and some are not—i.e., "tickets *including in the front row* for *Swan Lake*." The same reasoning applies here: the word "including" in Prop. 417 created a parenthetical phrase; it did not transform the nature of the

tax from a tax on retail sales to a tax on all TPT classifications. Instead, Prop. 417 means exactly what it says: 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*," APP.024 (emphasis added)—which is to say, a tax confined to retail sales, just as the Authorizing Resolution said.

The County argues that this interpretation violates the rule against making the word "include" into a term of exclusion, Cnty.'s Resp. at 17, but that is not true. The Taxpayers' argument uses the word "include" correctly: what is being included is the half-percent rate. The County also says that Taxpayers violate the last antecedent rule, but that is a red herring, because the question is not what the word "including" modifies—it's what the word "including" *means*. The County says that the word did not just modify the preceding phrase, but *utterly transformed* the paragraph's meaning—by implication. Among other things, that theory ignores the word "upon." In both the Authorizing Resolution and Prop. 417, the tax is "*upon* every person engaging or continuing in the business of selling tangible personal property at retail." The addition of the word "including" cannot be read as changing this. If, as this Court has said, "[t]he last antecedent rule…will not be applied where the context or clear meaning of a word or phrase requires otherwise," then the County's argument must fail. *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 165 Ariz. 31, 34 (1990).

Finally, the County complains that Taxpayers do not base their argument on the publicity pamphlet. But reference to publicity pamphlets is only proper when

there is a dispute over voter intent, or where some "circumstance…would require [courts] to give a meaning to the words used other than that commonly employed." *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290 (1982). That is not the case here. This case is not about voter intent. It is about whether Prop. 417's tax on retail sales is lawful, given that Section 42-6106 prohibits such a thing.

Even if voter intent were at issue, however, the publicity pamphlet would be only one element of the Court's analysis. The Court would also consult "the statute's context, historical background, effects and consequences, and purpose and spirit." *State v. Kemmish*, 244 Ariz. 314, 316 ¶ 10 (App. 2018). Among other things, this means it would have to consult the Authorizing Resolution's wording, that Resolution's contrast with the 2016 authorizing resolution, as well as the grammatical considerations referred to above and the public policy consequences of allowing a Board to employ the "switcheroo" tactic of inserting the word "including" in order to change a proposed tax into a different tax. Those considerations overwhelmingly militate for reversal.

CONCLUSION

The judgment of the Court of Appeals should be *reversed* and the Tax Court's judgment for Plaintiffs/Appellants Vangilder, et al., reinstated.

Respectfully submitted this 7th day of October 2020 by:

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IN THE SUPREME COURT

STATE OF ARIZONA

HAROLD VANGILDER; DAN NEIDIG; and ARIZONA RESTAURANT ASSOCIATION, Plaintiffs/Appellees/ Cross-Appellants, v. ARIZONA DEPARTMENT OF REVENUE, Defendant/Appellee, PINAL COUNTY and PINAL REGIONAL TRANSPORTATION AUTHORITY Defendants/Appellants/ Cross-Appellees.	Supreme Court No. CV-20-0040-PR Court of Appeals, Division One Case No. 1 CA-TX 19-0001 Maricopa County Tax Court Case No. TX2017-000663

CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 23(k) of the Ariz. R. Civ. App. P. and this Court's September 17, 2020 Order Granting Petition for Review, I certify that the body of the attached Petition for Review appears in proportionally spaced type of 14 points, is double spaced using a Roman font, and does not exceed 20 pages, excluding the table of contents and table of citations.

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ARIZONA DEPARTMENT OF REVENUE,

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PINAL COUNTY and PINAL REGIONAL TRANSPORTATION AUTHORITY

Defendants/Appellants/
Cross-Appellees.

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Maricopa County Tax Court
Case No. TX2017-000663

CERTIFICATE OF SERVICE

The undersigned certifies that on October 7, 2020, she caused the attached Supplemental Brief of Appellees/Cross-Appellants to be filed via the Court's Electronic Filing System and electronically served a copy to:

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