IN THE COURT OF APPEALS
DIVISION ONE
STATE OF ARIZONA

RICHARD OGSTON, Plaintiff / Appellant, v. ARIZONA DEPARTMENT OF REVENUE, et al. Defendants / Appellees.	Court of Appeals, Div. 1 No. 1 CA-TX 24-0001 Maricopa County Superior Court No. TX2023-000342

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This is a case about the people's right to vote on tax increases—one of the oldest and most important rights in American constitutional history. In Arizona, that right is protected in a variety of ways, including under a statute, A.R.S. § 48-1907(A)(6), which provides that hospital districts may adopt certain types of taxes to fund their operations—as long as voters approve of those taxes. Instead of following this procedure, Hospital District 1 of Yuma County (the "District") recently imposed a secondary property tax *without* first obtaining the required voter approval. It did so by invoking another statute, Section 48-1914, which the District claims is a separate grant of taxing authority—one that does not require voter approval. But Section 1914 is not a grant of taxing power at all. Instead, it lays out financial oversight procedures for the District to follow, as well as detailing *how* to levy a tax *after* that tax has been voter-approved. This tax is therefore unlawful.

When Plaintiff-Appellant Richard Ogston brought a lawsuit for a refund and a declaration that the tax is invalid, the Tax Court granted the District's motion to dismiss, holding that Section 1914 authorized the tax despite the lack of voter approval. That holding erroneously cedes power to the District that was never granted by statute, renders Section 1907(A)(6) a nullity, and misreads the language of both Section 1907(A)(6) and Section 1914. This Court should reverse the Tax

Court's dismissal. Additionally, because there are no material factual disputes and this case turns solely on issues of statutory interpretation, this Court should direct the Tax Court to enter judgment in Appellant's favor.

COMBINED STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Factual Background

The District is a special taxing district and a political subdivision of the State of Arizona, established by Yuma County in 1956 pursuant to Title 48 of the Arizona Revised Statutes to administer the hospital located at 2400 S. Avenue A in Yuma. Order Granting MTD, IR.32 at 1-2; District's Separate Statement of Facts, IR.19 at 1-2 ¶¶ 1, 3. The District owns the hospital and since 1973 has leased it to the Yuma Regional Medical Center ("YRMC"), which runs the hospital. IR.32 at 2; IR.19 at 2 ¶ 3, 5.

As a creature of statute, the District has only those powers specifically granted by law. Section 48-1907 ("Powers of hospital district") authorizes the District to engage in a variety of activities, including to "[a]dopt and use a corporate seal," "[s]ue and be sued," purchase and lease property, administer trusts, "[p]rovide for the operation and maintenance at a single location within the district of a hospital," and—relevant here—"[i]mpose a secondary property tax on all taxable property within the district for the purpose of funding the operation and maintenance of a hospital." A.R.S. 48-1907(A)(1)-(6).

The power to tax, however, is subject to a condition: "Prior to the initial imposition of such a tax a majority of the qualified electors must approve such initial imposition." *Id.* (A)(6). Moreover, "[t]he continued imposition of such a tax must be approved by a majority of the qualified electors at least every five years from the date of the initial imposition." *Id.* There has never been an election in Yuma County approving a secondary property tax to support the District, and prior to 2021, the District never imposed (or sought authorization to impose) such a tax. IR.32 at 2; IR.13 at 2 ¶ 10.

Since 2019, the District has been involved in costly litigation with YRMC over the terms of their agreements, and in 2021, for the first time in its history, the District asked the Yuma County Board of Supervisors ("Board") to impose a secondary property tax to help cover the District's expenses. IR.32 at 2; IR.13 at 2 ¶ 6. It did not seek voter approval. IR.1 at 2 ¶ 13. The Board obliged and levied the tax. *Id.* ¶ 14. The District asked for another secondary property tax in 2022, and the Board again obliged—again, without voter approval. *Id.*; IR.32 at 2.

On July 10, 2023, the District asked for a secondary property tax for the third time. Following its practice in the two previous years, the District sent the Board its 2023-2024 fiscal year budget, along with a cover letter informing the Board that "the District require[d] $1,811,300.00 to be immediately raised by taxation." IR.13 at 2-3 ¶ 11. The letter explained that the District needed this

money "to cover certain of [its] expenses for its administration and defense, in particular for legal fees and public outreach costs" in connection with "two ongoing separate lawsuits" against YRMC and its affiliates. *Id.* at 3 ¶ 12.

As in the prior two years, the District did not get voter approval, nor did it propose putting the issue to an election to obtain voter approval. Instead, it asked that the tax be directly imposed without voter approval "pursuant to ARS § 48-1914(A)." *Id.* ¶ 11. As explained in the following sections of this brief, that statute does not vest the District with taxing power, and it certainly does not create an alternative route to bypass Section 1907(A)(6)'s voter approval requirement and impose a tax unilaterally. Instead, Section 1914 establishes procedures for the District's reporting obligations and for determining the *amount* of a tax to levy *where such a tax has already been voter-approved*. Nevertheless, on August 21, 2023, the Board voted again to impose a secondary property tax, T/A # 1069901, to fund the District (the "Tax"). *Id.* ¶ 13.

Appellant is a Yuma County resident and property owner who was assessed the Tax on his 2023 Property Tax Notice. *Id.* ¶¶ 14-16; IR.1 at 1, 3 ¶¶ 2-3, 21. Despite objecting to the legality of the Tax, he timely paid it, and he has paid all other taxes levied and assessed against his property to date. IR.13 at 3 ¶¶ 16-19; IR.1 at 3 ¶¶ 21-23.

II. Procedural Background

On December 14, 2024, Appellant filed a lawsuit against the District, Yuma County, and the Arizona Department of Revenue,[1] seeking a refund of the Tax pursuant to A.R.S. Section 42-11005 and a declaration that the Tax was "of no effect because it was imposed without authority of law." IR.1.

On February 26, 2024, the District moved to dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6), arguing that (1) Appellant's claims were barred under Arizona's notice-of-claim statute, *see* A.R.S. § 12-821.01, and (2) the Tax was not subject to Section 1907's voter approval requirement. IR.9. On April 1, 2024, Mr. Ogston cross-moved for summary judgment in his favor based on a stipulated statement of facts, arguing as a matter of law that Section 12-821.01's notice-of-claim requirements did not apply to his claims and that the Tax *was* subject to voter approval under Section 1907. IR.12; IR.13.

On July 22, 2024, the Tax Court granted the District's motion to dismiss and denied Appellant's cross-motion for summary judgment. IR.32 at 6. The court rejected the District's notice-of-claim argument. *Id.* at 2-3. While it was "undisputed that [Mr. Ogston] never sent a Notice of Claim to the District containing the information set forth in A.R.S. § 12-821.01(A)," the Tax Court

[1] Appellant named the Arizona Department of Revenue as a defendant pursuant to A.R.S. Section 42-11005(C), which requires that "[t]he department shall be a party to any action brought pursuant to this section."

found that his "claims [were] not barred by A.R.S. § 12-821.01," because "Title 42 sets forth specific procedures for seeking a tax refund" and Section 12-821.01's notice-of-claim requirements do not apply to declaratory relief actions unless the requested declaratory "relief is the equivalent of a damages claim"—which was not the case here. IR.32 at 2-3.

Turning to the merits, the Tax Court held that "the District is not operating and maintaining a hospital for purposes of A.R.S. § 48-1907(A)(6) by leasing the Hospital to YRMC," and the District was instead relying on Section 48-1914 for its authority to impose the Tax. IR.32 at 5. It held that "[t]he tax authorized in A.R.S. § 48-1914 encompasses more than 'funding the operation and maintenance of a hospital' referenced in A.R.S. 48-1907(A)(6)," and that because "voter approval is not required for a tax levied under A.R.S. § 48-1914," "the Tax was properly authorized under" that statute. IR.32 at 5-6.

The Tax Court entered final judgment on September 6, 2024, and Appellant filed a timely notice of appeal the same day. IR.35; IR.36; *see* Ariz. R. Civ. App. P. 9(a).[2]

[2] The District filed a timely notice of cross-appeal on September 10, 2024, regarding the Tax Court's rejection of the District's notice-of-claim argument. Pursuant to the parties' stipulation, this Court dismissed the cross-appeal on November 14, 2024.

STATEMENT OF THE ISSUES

(1) Did the Tax Court err as a matter of law in determining that the Tax was authorized under A.R.S. Section 48-1914 despite the lack of voter approval?

STANDARD OF REVIEW

"This case involves the interpretation of statutory provisions, matters that [this Court] review[s] de novo." *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447 ¶ 9 (2004); *see also Qasimyar v. Maricopa Cnty.*, 250 Ariz. 580, 584 ¶ 6 (App. 2021) ("We review de novo … the tax court's … interpretation of our tax statutes.").

This Court applies "a de novo standard when reviewing a trial court's granting of a motion to dismiss for failure to state a claim." *Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 70 ¶ 7 (App. 2014). It also "reviews de novo whether summary judgment is appropriate." *Glazer v. State*, 237 Ariz. 160, 167 ¶ 29 (2015).

ARGUMENT

I. The Tax violates Section 1907(A)(6)'s voter approval requirement and is therefore invalid.

The Tax Court erred in holding that the District could bypass voter approval by imposing a tax pursuant to Section 48-1914, because Section 48-1914 does not *authorize* the District to tax: it merely sets out *procedures* the District must follow for financial reporting, budget approval, and—assuming the voters have already

approved a tax—calculating and levying that tax. In holding otherwise, the Tax Court's decision (1) erroneously cedes powers to the District that the Legislature did not grant it in statute, (2) renders Section 1907(A)(6) a nullity, and (3) misconstrues Section 1907(A)(6)'s phrase "operation and maintenance of a hospital."

A. The relevant statutes

First, some background. Section 48-1907, which lays out the "[p]owers of [a] hospital district," includes an explicit grant of taxing power:

> A hospital district may … [i]mpose a secondary property tax on all taxable property within the district for the purpose of funding the operation and maintenance of a hospital … that is owned or operated by the district … . Prior to the initial imposition of such a tax a majority of the qualified electors must approve such initial imposition. The continued imposition of such a tax must be approved by a majority of the qualified electors at least every five years from the date of the initial imposition.

A.R.S. § 1907(A)(6).

Section 1914 ("Budget"), which according to the Tax Court authorizes the District to impose a secondary property tax *without* voter approval, does not include an explicit grant of taxing power at all. Instead, it begins with a mandatory reporting provision:

> Annually, not later than July 15, the board of directors shall furnish to the board of supervisors of the county in which the district or any part thereof is located a report of the operation of the district for the past year together with an estimate in writing of the amount of money

> needed to be raised by taxation for all purposes required or authorized by this article during the next fiscal year.

A.R.S. § 1914(A). It then states:

> The board of supervisors of each county where a district or part thereof is located shall thereupon levy upon the taxable property of the district a tax which will, together with other funds on hand or which will accrue during the ensuing fiscal year, exclusive of reserves, provide sufficient funds to meet the financial needs of the district as provided under subsection A.

Id. (B).[3]

In the District's view, these two subsections, taken together, form a grant of taxing power separate and distinct from the taxing power provided in Section 1907(A)(6)—one that is not subject to voter approval as the Section 1907(A)(6) power is. In reality, however, Section 1914 does not independently authorize the District or the Board of Supervisors to impose taxes without voter approval. Instead, it simply sets out the procedures for how a tax should be implemented *assuming voters have already approved it*: the hospital district's board must annually "furnish to the board of supervisors … an estimate in writing of the amount of money needed to be raised by taxation ... during the next fiscal year,"

[3] The remainder of Section 1914, as discussed below, specifies how a hospital district, board of supervisors, and county treasurer are to levy and compute such a tax, handle the proceeds, and (in the case of a district lying in multiple counties) apportion the tax.

and the board of supervisors "shall thereupon levy" a tax sufficient to meet those needs.[4]

B. Any taxing power must be clearly granted by statute.

In determining whether the District had the power to impose the Tax, the Tax Court overlooked several key background principles.

First, as a special taxing district, the District has only those powers specifically granted to it by statute. *See* Facilitec, Inc. v. Hibbs, 206 Ariz. 486, 488 ¶ 10 (2003) (explaining that special districts are "creatures of statute" and therefore "[have] no powers other than those the legislature has delegated to [them]." (citation omitted)). Thus, if the District has any power to tax, that power must be explicitly granted by statute, because "the power to levy a tax is never implied, but must directly and specifically be granted." *Vangilder v. Arizona Dep't of Revenue*, 252 Ariz. 481, 488 ¶ 26 (2022) (citation omitted).

Second, Arizona courts construe tax laws "strict[ly] … against the taxing power," *State v. Superior Ct. for Maricopa Cnty.*, 113 Ariz. 248, 249 (1976); *see also* *Braden v. Yuma Cnty. Bd. of Supervisors*, 161 Ariz. 199, 202 (App. 1989)

[4] This makes sense in light of Section 1907(A)(6)'s requirement that voter approval be renewed "at least every five years." In the interim years between voter approvals, the amounts needed to be raised will no doubt vary; Section 1914 recognizes this and lays out procedures for determining those amounts and levying taxes to cover them.

("[T]axpayers should be afforded every procedural protection provided by the legislature for their benefit.").

Third, courts construe laws involving voting rights broadly "so as to uphold and sustain the citizen's right to vote." *Abbey v. Green*, 28 Ariz. 53, 72 (1925). Because Section 1907(A)(6) conditions a special district's taxing power on voter approval, it gives affected residents a right to vote on a proposed tax before that tax is imposed. The Tax Court erred by giving that statute, which secures voting rights, a cramped construction in favor of a procedural statute that the Legislature never intended to override those rights.

Consistent with the principles above, this Court has held in a variety of other contexts that general grants of authority to government entities cannot satisfy or override specific voter-approval protections.[5] For example, in *City of Casa Grande v. Arizona Water Co.*, this Court considered whether a statutory requirement that a city obtain voter approval before acquiring the assets of a public utility could be satisfied by grants of more "general authority," such as a city charter provision "grant[ing] it general authority to engage in the public utility business." 199 Ariz. 547, 550 ¶ 7 (App. 2001). The Court held that specific voter approval was required despite those other, general grants of authority, reasoning that the "voter approval

[5] That principle applies even more strongly in this case, where Section 1914 does not even grant *general* taxing authority, but rather, requires the District to follow certain procedures when levying a tax pursuant to its Section 1907(A)(6) authority.

… requirement would be eviscerated if a city could satisfy it simply by enacting an ordinance pursuant to a charter provision imposing no such requirement." *Id.* at 551 ¶ 12; *see also, e.g.*, *Town of Marana v. Pima County*, 230 Ariz. 142, 150 ¶ 34 (App. 2012) (holding prior ballot measure authorizing town to construct, purchase, acquire, lease, own, and operate a municipal wastewater and sewer system in general did not satisfy statutory voter approval requirement for "[t]own's actual acquisition of sewer infrastructure in this case").

Likewise, in *Barry v. School District No. 210*, the Supreme Court rejected the argument that a statute authorizing a school board to "include in its annual budget items for … [t]he purchase of sites, improvement of school grounds, erecting, purchasing, improving and furnishing of school buildings and appurtenances" was a separate grant of authority allowing the district to bypass the voter approval requirement in another provision that allowed the board to "[c]onstruct school buildings *when directed to do so by a vote of the district*." 105 Ariz. 139, 141 (1969).

In allowing the District to bypass Section 1907(A)(6)'s specific voter approval requirement by relying on Section 1914's general language about "levy[ing] … a tax which will … provide sufficient funds to meet the financial needs of the district," the Tax Court took precisely the opposite approach from *City of Casa Grande*, *Town of Marana*, and *Barry*. As further explained in the following

section, it gave an unduly narrow construction to a statute guaranteeing the right to vote on a tax, and an untenably broad construction to a procedural statute concerned with financial oversight and the mechanics of levying a tax. That was error, and this Court should reverse.

C. The District's sole property taxing power derives from Section 1907(A)(6).

Section 1907(A)(6) authorizes the District to "[i]mpose a secondary property tax on all taxable property within the district for the purpose of funding the operation and maintenance of a hospital." Critically, this grant of taxing power comes with a condition: "Prior to the initial imposition of such a tax a majority of the qualified electors must approve such initial imposition." *Id.*[6]

This is the *only* secondary property tax power the District can legitimately claim. Aside from the rule against inferring any taxing power, *Vangilder*, 252 Ariz. at 488 ¶ 26, basic principles of statutory construction militate against the idea that the District has a separate power to tax apart from Section 1907(A)(6). First, the context of both statutes makes clear that Section 1907(A)(6) is a grant of taxing power, while Section 1914 is not. Second, the contrary approach advocated by the District would render Section1907(A)(6) a nullity.

[6] Moreover, voter approval must be renewed "at least every five years from the date of the initial imposition." *Id.*

1. Context makes clear that Section 1907(A)(6) is a grant of taxing power, while Section 1914 is not.

The fact that Section 1907, which comprehensively addresses the powers and duties of hospital districts, does not authorize them to impose secondary property taxes without voter approval, indicates that such a power does not exist. Consider the structure of Section 1907. It includes a list of activities that hospital districts are authorized to engage in.[7] And Section 1907's title,[8] structure,[9] and scope[10] all make clear that the Legislature intended Section 1907(A)'s list of enumerated powers to be comprehensive. That list includes only one grant of taxing power—the one that requires voter approval. And the fact that the Legislature included only that property taxing power in the list of powers given to hospital districts, and conditioned the exercise of that power on voter approval, implies that the Legislature never intended districts to have any other such power. *See, e.g.*, *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211 ¶ 13 (2019) (explaining that "the expression of one item implies the exclusion of others …

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[7] While districts also derive a handful of powers from authorizations in other provisions from Title 48, Chapter 13, those provisions make it unmistakably clear when they are vesting districts with additional powers not already addressed in Section 1907.

[8] "Powers of a hospital district."

[9] "A hospital district may:" followed by a long list of activities.

[10] Addressing everything from districts' use of corporate seals and status as jural entities, § 48-1907(A)(1–2), to their authority to engage in real estate transactions and trust administration, *id.* (3), (4), to their power to run and contract for various health care facilities and services, *id.* (5), (7), to their taxing power, *id.* (6).

when one term is reasonably understood as an expression of all terms included in the statutory grant or prohibition").

Not only that, but while Section 1907 is the natural and appropriate place to identify the District's taxing powers, Section 1914, would be a particularly *unusual* place to find additional grants of power. No provision in Section 1914 (entitled "Budget") addresses the *powers* of a hospital district at all. Instead, that statute deals with *duties* and *procedures*: specifically, financial oversight obligations, *see* A.R.S. § 1914(A) ("Annually, not later than July 15, the board of directors shall furnish to the board of supervisors … a report of the operation of the district for the past year … ."), as well as the details of how county and district officials should administer a hospital district tax. *See id.* (B) ("The tax shall be computed, entered upon the tax rolls and collected in the same manner as other secondary property taxes in the respective county or counties in which the district … is located. Monies collected on behalf of the district shall be remitted promptly to and shall be handled by the county treasurer… ."); *id.* ("The district shall be governed by the budget limitation laws of the state."); *id.* (C) (establishing how taxes should be apportioned when "a district lies in more than one county"). The title, structure, and scope of Section 1914 therefore make clear that it is *not* a separate grant of taxing power.

Additionally, Section 1914 lacks any of the language the Legislature ordinarily uses when granting powers. Section 1907 uses classic vesting language ("A hospital district may …"), just like other laws that grant powers to taxing districts and other governmental entities. *See, e.g.*, A.R.S. § 48-3214 ("In exercising the powers granted or permitted by law, the [irrigation and water conservation] district may…"). In fact, the phrases "a district may," or "the district may," appear 361 times in Title 48 (Special Taxing Districts). But no such vesting phrase appears in Section 1914, nor does any other vesting language like "the district is authorized." If the Legislature meant to authorize the District to tax without voter approval in Section 1914, it would have done so explicitly.

If the Legislature had intended to vest the District with powers to impose property taxes beyond those described in Section 1907(A), it would have done so clearly, rather than by indirectly *implying* such a power in the middle of a "[b]udget" statute which is otherwise concerned entirely with financial oversight and the procedural minutiae of levying, collecting, and apportioning taxes. This is all the more true because, as explained in the preceding section, "the power to levy a tax is never implied, but must directly and specifically be granted," *Vangilder*, 252 Ariz. at 488 ¶ 26 (citation omitted), and statutes implicating Arizonans' voting rights are construed "so as to uphold and sustain the citizens' right to vote." *Abbey*, 28 Ariz. at 72.

2. A contrary reading would allow the District to bypass Section 1907(A)(6) completely.

If Section 1914 created a separate taxing power as the District argues, that would mean that the District could bypass voter approval whenever it chose—which would render Section 1907(A)(6) superfluous. The Tax Court's decision never addressed this point, which is fatal to the District's broad construction of Section 1914.

If Section 1914 were a separate authorization to impose a tax, then the District could impose a tax any time it wished, simply by "furnish[ing] the board of supervisors … with an estimate in writing of the amount of money needed to be raised by taxation *for all purposes required or authorized by* [Title 48, Chapter 13, Article 1] during the next fiscal year." A.R.S. § 1914(A) (emphasis added). In fact, because Title 48, Chapter 13, Article 1 encompasses everything a hospital district can lawfully do, interpreting Section 1914 as giving the District a separate taxing power would mean that the District could impose a tax *for any purpose*, without obtaining voter approval, simply by presenting its budget to the board of supervisors. That, of course, would render Section 1907(A)(6)'s grant of taxing power, and its accompanying voter approval requirement, completely ineffectual surplusage. It would also render superfluous other provisions that address the procedures the District must follow when imposing taxes. *See* A.R.S. §§ 48-1910(C) (addressing transaction privilege taxes and requiring voter approval),

1912(B) (addressing the procedures for levying taxes to service bonds once the voters authorize a bond).

That cannot be right. Courts "must avoid interpreting a statute so as to render any of its language mere 'surplusage.'" *Herman v. City of Tucson*, 197 Ariz. 430, 434 ¶ 14 (App. 1999); *see also City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 238 ¶ 10 (2019) ("If possible, we give meaning 'to every word and provision so that no word or provision is rendered superfluous.'" (citation omitted)). And interpreting Section 1914 as creating a second, voter-free taxing power would also violate the fundamental principle that the government may not "do indirectly what it is prohibited from doing directly"— i.e., impose a tax without voter approval. *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 352 ¶ 30 (App. 2013) (citation omitted).

Because the Tax Court's interpretation of Section 1914 as allowing the District to bypass voter approval renders Section 1907(A)(6) and other provisions entirely null, and allows the District to do what is expressly prohibited elsewhere in statute, it is erroneous and should be reversed.

D. The Tax Court's overly narrow construction of "operation and maintenance" does not save the Tax.

In concluding that Section 1914 rather than Section 1907 governed the District's authority to impose the Tax, the Tax Court observed that Section 1907(A)(6) (and its voter approval requirement) applies only to taxes for "the

purpose of funding *the operation and maintenance of a hospital* … that is owned or *operated by* the district or to pay costs of an ambulance service contract entered into pursuant to this section." A.R.S. § 1907(A)(6) (emphasis added). IR.32 at 5. The court then said that because "[t]he District has never directly operated or maintained the Hospital," but instead contracts with YRMC, which oversees the hospital's operations, the Tax—which was imposed "to fund the District's operating expenses and legal fees related to the YRMC Litigation"—was *not* for "the operation and maintenance of a hospital" within Section 1907(A)(6)'s meaning. Thus, the court said, the tax was not subject to Section 1907(A)(6)'s voter-approval requirement. *Id.* at 2, 6.

That reasoning is flawed on two counts. First, it depends on an artificially narrow reading of the term "operation and maintenance," which is inconsistent with statute as well as recent Supreme Court precedent. Second, even if the Tax were not for the "operation and maintenance of a hospital," that would mean that the Tax wasn't authorized at all—not that it's exempt from an explicit voter-approval provision.

1. The Tax is for the "operation and maintenance of a hospital."

"Operation and maintenance" of an enterprise is not limited to running that enterprise on an in-person, front-line, day-to-day basis. Rather, in its ordinary meaning, "operation and maintenance" of something includes the administrative

and other costs an entity may incur while providing that thing. The Supreme Court recently addressed this very issue in *City of Phoenix v. Orbitz Worldwide Inc.*, which concerned the taxation of online travel companies ("OTCs"). 247 Ariz. 234. That case involved a municipal privilege tax on travel "brokers," defined as "every person engaged in the business of operating a hotel." *Id.* at 239 ¶ 15 (alterations adopted, citation omitted). The municipal code did "not define what it means to 'operate' such locations," and a group of OTCs argued that they did not "operate" hotels because they did "not own the hotels or rooms they advertise; they [simply] contract with the hotels to list rooms available for rent" on the OTCs websites. *Id.* at 280 ¶ 14, 237 ¶ 2.

The Supreme Court disagreed. The "ordinary meaning" of "operate," it held, was "to put or keep in operation," *id.* at 240 ¶ 18 (citation omitted), which includes not just proprietors or owners of hotels, but anyone engaged in "business activities that are central to keeping brick-and-mortar lodging places functional or in operation." *Id.* This includes OTCs, which "facilitate" the transaction and "receive compensation" when a customer books a hotel. *Id.* ¶ 19.

Likewise, in this case, the District "operates" a hospital regardless of whether it directly runs the hospital itself or simply "facilitate[s]" it by "contract[ing]" with a third party (as it does with YRMC). *Id.* at 240-41 ¶¶ 21-22. Indeed, the District is not merely a property manager generically leasing out

County real estate. It is a *hospital district*. The entire reason it was established was to provide hospital services to Yuma residents, whether directly or by contracting with third parties. Thus, for example, the District's contract with YRMC includes the following terms that specifically provide for the operation and maintenance of a hospital:

- YRMC "shall operate the Hospital Facilities as a hospital and health care facility."
- YRMC "shall use and occupy the Hospital Facilities for the purposes of operating a hospital and health care facility and for ancillary or support facilities."
- YRMC must "keep and maintain the Hospital Facilities in good, sanitary and neat order, condition and repair, and in as reasonably safe condition as their operating condition will permit."

IR.21 at 7 § 6.1, 9 § 8.1.

Hospital districts are in the business of operating and maintaining hospitals, and when the Legislature enumerated those districts' powers in Section 1907, it authorized them to impose taxes for that purpose—subject to voter approval. It makes no difference whether a particular expense is attributable to the *direct* or the *indirect* operation of a hospital. Were it otherwise, government entities could easily evade the voter approval requirement by contracting with private parties to "operate" entities, then levying taxes without voter approval to fund those private parties—as the District has done here. While the Tax Court stated (without

explanation) that it did "not find *Orbitz* persuasive given the different factual and statutory issues presented here," IR.32 at 4, *Orbitz* is directly on point. Because the municipal tax code in that case did not define "operate," the Supreme Court gave that term its ordinary meaning—just as "operation and maintenance" bears its ordinary meaning here, where the relevant statutes do not define it. While the term "operation and maintenance" is not *identical* to "operate," it encompasses *more* (not only operation, but also "maintenance") and in the context of a comprehensive statute authorizing the District to (among other things) impose taxes to cover its expenses, its meaning is at least as broad as the meaning of "operate" in *Orbitz*'s travel broker tax provision.

It is also significant that Section 1907 uses an impersonal grammatical construction in "the operation and maintenance of a hospital." Had the Legislature intended to exempt districts from the voter-approval requirement whenever they hired some third party to do the direct oversight and maintenance, it could have said so, for example, by declaring that districts could tax "to operate and maintain" a hospital. Instead, it chose to authorize taxes for "the purpose of *funding the operation and maintenance of* a hospital"—regardless of who actually does the day-to-day operating and maintaining. The language thus contemplates and applies to situations wherein a district uses funding to hire someone else to operate and

maintain.[11] *See* *Anoke v. Twitter, Inc.*, 325 Cal. Rptr. 3d 612, 616 (App. 2024) ("[W]hen the Legislature elects to use passive voice for some statutory requirements and active voice for others, that contrast may reflect the Legislature's intent that some actions must be personally taken by the actor while others need not be." (citations omitted)).

Rather than following *Orbitz*, the Tax Court relied on *Atchison, Topeka & Santa Fe Railway Co. v. Arizona Dep't of Revenue*, 162 Ariz. 127 (App. 1989), which held that a hospital district "lacked authority" to impose a tax because it did not "operate" the facility in question. *Id.* at 137. But the Tax Court's reliance on *Atchison* was misplaced for several reasons.

First, as *Atchison* discusses at length, prior to 1984, Section 1907(A)(6) only authorized hospital districts to impose taxes "the operation and maintenance of a hospital … *that is owned* ***and*** *operated by the district.*" *Id.* at 131-32, 134, 136. That language has since been amended in the statute, which now allows districts to either operate hospitals directly or contract with third parties to do so. *See* S.B. 1316, 1989 Ariz. Legis. Serv. 254 (1989) (changing "owned ***and*** operated" to "owned ***or*** operated" in Section 1907(A)(6)). Because the Legislature amended the statute to allow districts to operate hospitals directly, but *did not otherwise amend*

[11] Contrast the impersonal "for the purpose of funding the operation and maintenance of a hospital" with the subsequent phrase "that is owned or operated *by the district*." A.R.S. § 1907(A)(6).

the statute to distinguish between the taxing powers of a district that operates its hospital directly and one that contracts for the operation of its hospital, Section 1907(A)(6) remains the only grant of taxing power relevant to the Tax here.[12]

Second, *Atchison* actually directly contradicts the District's argument, as it confirms that a hospital district must comply with Section 1907(A)(6)'s voter approval requirement to impose a secondary property tax. *See id.* at 136 n.4 ("[A]ny hospital district may impose a secondary property tax so long as the district complies with the provisions of § 48-1907(6).").

Third, as discussed in the following section, *Atchison* implies that if the Tax falls outside Section 1907(A)(6), then the Tax is not authorized *at all*, and is void—not that Section 1914's budget provisions impliedly authorizes the District to bypass the voters and impose the Tax anyway.

In sum, "operating" or "maintaining" a hospital includes contracting with a third party for the operation and maintenance of that hospital.

[12] Indeed, the Legislature has amended Section 1907 at least six times (and Section 1914 twice) since 1981, in addition to other amendments and reorganization of Chapter 13, Article 1. Despite repeatedly revisiting these provisions, it never added language supporting the supposed distinction between "operation and maintenance" taxes and other taxes that underpins the District's argument.

2. If the Tax were not for the operation and maintenance of a hospital, then it isn't authorized at all.

Even if the Tax were not for the operation and maintenance of a hospital, the upshot would not be that the District is free to impose it without voter approval. Rather, that would mean that the Tax is not authorized *at all*, because it falls outside of the only relevant grant of taxing power. *See Atchison*, 162 Ariz. at 137.

Section 1907 allows districts to impose taxes "for the purpose of funding the operation and maintenance of a hospital" or similar health care facilities—and for no other purpose. The District cannot use this Section to impose a tax for other activities: for example, to build roads or operate schools or erect memorials. Thus, if the Tax Court were correct that the District here is not engaged in the operation and maintenance of a hospital, the logical conclusion would be that the Tax is *ultra vires* and thus entirely invalid. The Tax Court, however, committed the *non sequitur* of declaring that the tax was not for operation and maintenance, and consequently that voter approval was not required and the tax was valid. That was error.

Indeed, as a matter of common sense, it is difficult to imagine that the Legislature would impose stringent voter-approval requirements on special hospital districts when they raise money for their core statutory purpose (running a hospital), and then exempt them from that requirement when they wish to raise money for any *other* reason.

II. Appellant is entitled to summary judgment.

In addition to reversing the Tax Court's dismissal, this Court should direct the Tax Court to enter judgment in Appellant's favor. While "[a]n order denying summary judgment is generally not appealable or reviewable on appeal from a final judgment," this Court "may review the order if the denial was based on purely legal grounds." *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, 590 ¶ 8 (App. 2021); *see also Ryan v. Napier*, 245 Ariz. 54, 59 ¶ 14 (2018). When an appellant prevails in such an appeal and the issues are purely legal, the appellate court typically vacates the trial court's erroneous grant of summary judgment and "direct[s] [it] to enter summary judgment in favor of [the appellant]." *Callan v. Bernini*, 213 Ariz. 257, 264 ¶ 35 (App. 2006).

This is appropriate here, as the issues are purely legal. Appellant cross-moved for summary judgment in the Tax Court based on a stipulated statement of facts. In addition to stipulating to those facts and simply arguing against Appellant's motion as a matter of law, the District also "request[ed] entry of summary judgment for [itself] on all counts of [Appellant's] Complaint," IR.18 at 18, confirming that there are no material factual disputes and the issues here are purely legal ones. *See Bentley v. Building Our Future*, 217 Ariz. 265, 270 ¶ 11 (App. 2007) ("When cross-motions for summary judgment have been filed, this court may evaluate the cross-motions and, if appropriate, remand with instructions

that judgment be entered in favor of the appellants."). In sum, no additional factual development is needed on remand, and when this Court resolves the appeal, all that will remain is to enter judgment for the prevailing party.

Therefore, for the same reasons the Court should reverse the Tax Court's dismissal, it should also direct the Tax Court to enter judgment in Appellant's favor on remand.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Tax Court's dismissal of Appellant's claims and direct the Tax Court to enter judgment in favor of Appellant on all counts.

NOTICE UNDER RULE 21(A)

Appellant requests costs and attorney fees pursuant to A.R.S. Sections 12-341 and 12-348 and the private attorney general doctrine.

Respectfully submitted December 17, 2024 by:

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STATE OF ARIZONA

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Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Opening Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 6,434 words, excluding table of contents and table of authorities.

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