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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

ARIZONA FREE ENTERPRISE CLUB, et  
al.,

Plaintiffs,

v.

KATIE HOBBS, in her capacity as the  
Secretary of State of Arizona,

Defendants,

and

INVEST IN ARIZONA (SPONSORED BY  
AEA AND STAND FOR CHILDREN),

Real Party in Interest.

No. CV 2021-011491

**MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE OF THE  
GOLDWATER INSTITUTE**

(Assigned to the Hon. Katherine Cooper)

Pursuant to Ariz. R. Civ. P. 7.1(a), 7.1(c)(3 and this Court's authority to regulate its own proceedings, the Goldwater Institute (GI) respectfully requests this Court's permission to file out of time the attached brief amicus curiae in support of Plaintiffs' Motion for Preliminary Injunction. GI moves that the Court summarily grant this motion without oral argument, and that it do so in an expedited manner in order to allow Defendants and Real Party in Interest full opportunity to respond to it.

1 **I. Identity and interest of amicus curiae**

2 The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy  
3 and research foundation devoted to advancing the principles of limited government,  
4 individual freedom, and constitutional protections. Headquartered in Phoenix, GI is well  
5 known throughout Arizona as an advocate for these principles. Through its Scharf-Norton  
6 Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its or  
7 its clients' objectives are directly implicated, and it has appeared in this Court and other  
8 courts representing parties and as an amicus curiae. *See, e.g., Next Level Arcade v. Pima*  
9 *County* No. C20210057 (Pima Cnty. Super. Ct., June 9, 2021); *Englehorn v. Stanton*, No.  
10 CV2017-001742 (Maricopa Cnty. Super. Ct., Aug. 20, 2020); *Fann v. State*, No. CV-21-  
11 0058-T/AP (Az. S. Ct., Aug. 19, 2021).

12 Among GI's priorities is the defense of a responsible and restrained tax policy and  
13 a constitutionally limited initiative and referendum process. *See, e.g., Vangilder v. Ariz.*  
14 *Dep't of Revenue*, No. CV-20-0040-PR (Ariz. S. Ct., pending); *Molera v. Hobbs*, 250  
15 Ariz. 13 (2020); *Molera v. Reagan*, 245 Ariz. 291 (2018). In addition to litigation, GI has  
16 also published important scholarship on taxes in Arizona. *See, e.g., Stephen Slivinski, A*  
17 *New Tax Plan for a New Economy: How Eliminating the Income Tax Can Create Jobs*,  
18 Goldwater Institute Policy Report No. 250, October 29, 2014<sup>1</sup>; Art Laffer, *et al., How to*  
19 *Restructure Arizona's Tax Code: A Smarter, Flatter Tax Plan to Create Jobs*, Goldwater  
20 Institute Policy Report No. 231, Feb. 24, 2009.<sup>2</sup> GI has also participated in litigation and  
21 produced scholarship relating to the scope of the initiative and referendum power. *See,*  
22 *e.g., Arizonans for Second Chances, supra; Reagan, supra.*

23 Given its history and experience with regard to these issues, GI believes its  
24 perspective will aid this Court in considering the Plaintiffs' case and their motion for  
25 preliminary injunction.

26 <sup>1</sup> <https://goldwaterinstitute.org/article/a-new-tax-plan-for-a-new-economy-how-eliminating-t/>

27 <sup>2</sup> <https://www.barnesandnoble.com/w/how-to-restructure-arizonas-tax-code-art-laffer/1113671106>

1 **II. The attached amicus curiae brief will aid the Court in consideration of this**  
2 **case and no party will be prejudiced by granting the motion.**

3 This Court has the inherent authority to regulate its own proceedings and broad  
4 discretion to determine whether or not to allow an appearance by an amicus curiae.  
5 *Schavey v. Royston*, 8 Ariz. App. 574, 575 (1968). Rule 7.1(c)(3) permits this Court to  
6 grant a motion without oral argument based on brief written statements setting forth the  
7 reason for granting the motion.

8 Amici “perform a valuable role for the judiciary” because they “facilitate informed  
9 judicial consideration of a wide variety of information and points of view that may bear  
10 on important legal questions” and help broaden the court’s perspective on issues raised by  
11 the principal litigants. *Connerly v. State Pers. Bd.*, 37 Cal.4th 1169, 1177 (2006)  
12 (citations omitted). That is particularly true in a case that—like this one—involves issues  
13 that are the subject of controversy throughout the state. *City of Flagstaff v. Mangum*, 164  
14 Ariz. 395, 397 (1990). This case involves two issues of fundamental importance to  
15 Arizona: the referendum power and the taxing power. A thorough discussion of these  
16 matters will aid the Court’s resolution of this important controversy.

17 The proposed brief is four pages long. It focuses on the question of whether it is  
18 constitutional to refer tax measures through the referendum process, particularly in light of  
19 the so-called Voter Protection Act (VPA), Ariz. Const. art. IV, pt. 1 § 1(6). The brief  
20 argues that expanding the referendum power to allow the referring of tax measures,  
21 combined with the VPA would effectively paralyze tax reform in the state and lead to the  
22 type of chaotic “ballot box budgeting” that has caused havoc in California. The brief  
23 concludes that this was not the intention of the framers of the Arizona Constitution.

24 Amicus believes its experience and policy expertise will aid this Court in  
25 consideration of this case.

26 All parties were informed on October 14, 2021 of Amicus’s intention to file this  
27 motion. Counsel for plaintiffs indicated that they do not oppose it. Counsel for  
28 defendants indicated that they also do not oppose it. Counsel for real parties in interest

1 indicated that they do oppose it. No party will be prejudiced by the granting of this  
2 motion. Because the hearing on the injunction has been set for November 5, there is  
3 sufficient time for all parties to respond to the proposed amicus brief if they wish.  
4 Amicus will not participate in any hearings, and the brief contains nothing relating to any  
5 matter involved in this case beyond those stated above.

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DATED this 14th day of October, 2021.

/s/ Timothy Sandefur  
Timothy Sandefur (033670)  
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**at the GOLDWATER INSTITUTE**

*Attorneys for Amicus Curiae*

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3 system and email to:

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AEA AND STAND FOR CHILDREN),

Real Party in Interest.

No. CV 2021-011491

**BRIEF AMICUS CURIAE OF  
GOLDWATER INSTITUTE IN  
SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

(Assigned to the Hon. Katherine Cooper)

**INTRODUCTION<sup>1</sup>**

Plaintiffs' motion should be granted because legislation for the "support and maintenance of the departments of the state government and state institutions" is exempt from referendum. The framers of Ariz. Const. art. IV pt. 1 § 1(3) did not intend for the referendum to be used to paralyze the operations of government, let alone to prevent tax relief such as is provided by the bills in question. But in 1998, the Constitution was amended to add the so-called Voter Protection Act, Ariz. Const. art. IV pt. 1 § 1(6), which

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<sup>1</sup> The identity and interest of amicus is set forth in the accompanying motion for leave to file.

1 effectively forbids the legislature from “repeal[ing]” a referendum, or from adopting a law  
2 that would have the effect of amending that referendum, if that law fails to “further[] the  
3 purposes” of the referendum.

4 In practice, the VPA transforms even ordinary legislation adopted by initiative—or  
5 the repeal of legislation by referendum—into a type of constitutional amendment,  
6 depriving the legislature of power over whole subject areas. What that would mean in the  
7 context of legislation that reduces taxes is difficult to predict. But it appears that it would  
8 have dramatic implications, curtailing the ability of the people’s elected representatives to  
9 reduce taxes. To permit that—in the face of plain constitutional language to the  
10 contrary—would open the door to the type of “ballot box budgeting” that has done so  
11 much damage to California’s fiscal status. This Court should have nothing to do with it.

12 **I. Allowing referendum of tax cuts, combined with the VPA, would have drastic**  
13 **consequences for the lawmaking process.**

14 Arizona’s referendum power does not extend to laws “for the support and  
15 maintenance of the departments of the state government and state institutions.” Ariz.  
16 Const. art. I pt. 1 § 1(3).

17 This phrase—which was part of the referendum proposal first offered at the  
18 Constitutional Convention, *see* John S. Goff, ed., *The Records of the Arizona*  
19 *Constitutional Convention of 1910* at 1020–21 (1991), can be traced to an amendment to  
20 the Washington State Constitution. As that state’s Supreme Court explained in a 1915  
21 case, the referendum power was first introduced in Oregon, and contained “practically no  
22 limitations.” *State v. Clausen*, 148 P. 28, 30 (Wash. 1915). It let voters repeal anything  
23 except laws “necessary for the immediate preservation of the public peace, health, or  
24 safety.” *Id.* This “unbridled license to refer legislation,” *id.*, resulted in denying funding  
25 for the state university, and leading to other problems that, in the words of one observer,  
26 proved that “if the initiative and referendum are good ... then the Oregon form is not a  
27 good one.” William Bennett Munro, ed., *The Initiative, Referendum, and Recall* 286  
28 (1912).

1           The Oregon experience persuaded voters in Washington that the referendum should  
2 be limited to avoid enabling “reckless and irresponsible agitation” to disrupt the  
3 legislature from making important financial decisions. *Clausen*, 148 P. at 31. Michigan,  
4 Colorado, Arizona, and other states copied this limit on the referendum power, barring  
5 repeal of laws for the support and maintenance of state institutions.

6           What qualifies as a law for support and maintenance is largely, though not entirely,  
7 a matter of legislative discretion. *Warner v. White*, 39 Ariz. 203, 212–14 (1931). Tax  
8 measures fall within the class of laws exempt from the referendum power, *Wade v.*  
9 *Greenlee Cnty.*, 173 Ariz. 462, 463–64 (App. 1992), in part because the exemption applies  
10 not only to appropriations, but to “support,” and that includes tax measures. Moreover,  
11 the courts are not in a position to distinguish, for purposes of the exemption, between  
12 measures that reduce taxes and measures that increase them. By way of analogy, federal  
13 courts have concluded that laws that *reduce* taxes are nonetheless “bill[s] for raising  
14 revenue” for purposes of Article I § 7 of the federal Constitution, because it would be  
15 impracticable for courts to apply any contrary rule; laws often reduce some taxes while  
16 increasing others, so courts would be forced to determine whether a tax measure in the  
17 aggregate reduced revenues or increased them—which courts are ill-equipped to do. *See*  
18 *Armstrong v. United States*, 759 F.2d 1378, 1381–82 (9th Cir. 1985). They are likewise  
19 ill-equipped to distinguish between bills that reduce taxes and are therefore not “support,”  
20 from laws that increase them and therefore are “support.” The better rule is that all  
21 legislation relating to taxes, that fund the operation of state departments, fall within the  
22 exemption to the referendum power.

## 23 **II. The VPA makes the referral of tax measures especially untenable.**

24           This conclusion is strengthened by the existence of the VPA. It forbids the  
25 legislature from “repeal[ing] a referendum measure,” or “amend[ing] a referendum  
26 measure ... unless the amending legislation furthers the purposes of such measure.” Ariz.  
27 Const. art. IV pt. 1 § (1)6. That prohibition on amendments applies not only to *explicit*  
28



1 amendments, but also to any legislation that is “inconsisten[t]” with the referendum.  
2 *Meyer v. State*, 246 Ariz. 188, 192 ¶ 11 (App. 2019).

3 Presumably this would mean that no future legislature could adopt legislation  
4 “inconsistent” with the repeal of the tax relief at issue here. Given the double-negative, it  
5 is hard to foresee exactly what that would mean, but it seems to mean the legislature could  
6 never adopt legislation that reduces taxes in a manner similar to the way the referendum  
7 repudiated. If the legislature were to reduce the income tax by ten percent, and that was  
8 successfully referred, could the legislature in the next session reduce the income tax by  
9 five percent? Could it reduce income taxes in some brackets by twenty percent, and  
10 increase it in other brackets by thirty percent, in such a way that total revenue remained  
11 unchanged?

12 It should be immediately clear why the VPA enormously complicates the questions  
13 raised in this case.

14 In *Molera v. Reagan*, 245 Ariz. 291, 294 ¶¶ 9-10 (2018), the Supreme Court  
15 cautioned that the consequences of the VPA were good reason to apply a careful judicial  
16 scrutiny to any purported exercise of the direct democracy provisions. “[W]ith the  
17 enactment through initiative of the Voter Protection Act,” it warned “legislation enacted  
18 by the voters is even more consequential [than before],” and for that reason, it was  
19 important that the judiciary enforce the “regulation[s] of the initiative process” established  
20 in the Constitution.

## 21 CONCLUSION

22 The Plaintiffs’ preliminary injunction motion should be granted.

23  
24 DATED this 14th day of October, 2021.

25 /s/ Timothy Sandefur  
26 Timothy Sandefur (033670)  
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28 **at the GOLDWATER INSTITUTE**

*Attorneys for Amicus Curiae*

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Real Party in Interest.

No. CV 2021-011491

**[PROPOSED] ORDER GRANTING  
LEAVE TO FILE BRIEF AMICUS  
CURIAE OF THE GOLDWATER  
INSTITUTE**

(Assigned to the Hon. Katherine Cooper)

Pursuant to Ariz. R. Civ. P. 7.1(a), 7.1(c)(3) and this Court's inherent authority to regulate its own proceedings, the motion of the Goldwater Institute to appear as amicus curiae and to file a brief amicus curiae, is hereby granted.

**DATED:** \_\_\_\_\_, 2021

\_\_\_\_\_  
Hon. Katherine Cooper, presiding