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# MEMORANDUM

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Date: January 17, 2020

To: The Honorable Chairman and Members  
Pima County Board of Supervisors

From: C.H. Huckelberry  
County Administrator

A handwritten signature in black ink, appearing to be "C.H. Huckelberry", is written over the typed name and title.

Re: **Goldwater Institute Lawsuit Regarding Worldview**

As you will recall, the Goldwater Institute lost the decision in the second major issue of the Worldview litigation in the Court of Appeals. They have petitioned the Supreme Court for review. I have attached a copy of their petition as well the County's response for your information. (Attachments 1 and 2)

The Goldwater petition makes a number of erroneous statements, all of which are factually corrected in Pima County's response.

It is interesting to note that the Goldwater Institute also recently lost in a Court of Appeals decision to reverse the Regional Transportation Authority election in Pinal County. This decision in favor of Pinal County was filed January 16, 2020. (Attachment 3)

CHH/anc

Attachments

c: Jan Leshar, Chief Deputy County Administrator

# ATTACHMENT 1

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

RICHARD RODGERS, et al.

Plaintiffs/Appellants/Cross-  
Appellees,

v.

CHARLES H. HUCKELBERRY, et al.,

Defendants/Appellees/Cross-  
Appellants.

Supreme Court  
No. CV-19-0285-PR

Court of Appeals, Division Two  
Case No. 2 CA-CV 2018-0161

Pima County Superior Court  
Case No. C20161761

**PETITION FOR REVIEW OF OPINION  
OF COURT OF APPEALS**

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Constitutional Litigation at the  
GOLDWATER INSTITUTE**

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**Table of Contents**

Table of Contents ..... i

Table of Authorities ..... ii

Issues Presented for Review ..... 1

Introduction ..... 1

Facts and Procedural History ..... 2

Reasons the Petition Should be Granted ..... 5

I. The “impracticability” exception does not apply where the only  
“impracticability” is the feasibility of an economic development project. .... 6

    A. The law does not allow the County to exempt itself from procurement laws  
    due to economic impracticality. .... 6

    B. Awarding the contracts due to the “five-month head start” was unlawful  
    favoritism. .... 9

II. Pima County’s procurement of services without payment was unlawful. .... 12

III. This case is not moot. .... 13

    A. The Plaintiffs’ injury for past wrongs could still be remedied by a favorable  
    decision. .... 14

    B. This case involves questions of great public importance that are almost certain  
    to recur. .... 16

Conclusion..... 19

## Table of Authorities

### Cases

<i>ARINC Eng'g Servs., LLC v. United States</i> , 77 Fed. Cl. 196 (2007) .....	10
<i>Axiom Res. Mgmt., Inc. v. United States</i> , 564 F.3d 1374 (Fed. Cir. 2009) .....	10
<i>Bd. of Exam'rs of Plumbers of Phoenix v. Marchese</i> , 49 Ariz. 350 (1937) .....	16, 17
<i>Big D Const. Corp. v. Ct. of App.</i> , 163 Ariz. 560 (1990) .....	17
<i>Brown v. City of Phoenix</i> , 77 Ariz. 368 (1954) .....	11, 13
<i>Cardoso v. Soldo</i> , 230 Ariz. 614 (App. 2012) .....	16
<i>Ciulla v. Miller ex rel. Ariz. Highway Dep't</i> , 169 Ariz. 540 (App. 1991) .....	17
<i>Fisher v. Maricopa Cnty. Stadium Dist.</i> , 185 Ariz. 116 (App. 1995) .....	16, 17, 18
<i>Rodgers v. Huckelberry</i> , 450 P.3d 1279 (Ariz. App. Oct. 21, 2019) .	4, 6, 12, 14, 16
<i>Sandblom v. Corbin</i> , 125 Ariz. 178 (App. 1980).....	14
<i>Secrist v. Diedrich</i> , 6 Ariz. App. 102 (1967).....	15
<i>Smith v. Graham Cnty. Cmty. Coll. Dist.</i> , 123 Ariz. 431 (App. 1979).....	15
<i>State v. Super. Ct.</i> , 86 Ariz. 231 (1959).....	17
<i>Turken v. Gordon</i> , 223 Ariz. 342 (2010) .....	14

### Statutes

A.R.S. § 34-602.....	4, 5
A.R.S. § 34-603.....	4, 5
A.R.S. § 34-605(B) .....	1, 2, 3, 12
A.R.S. § 34-606.....	passim
A.R.S. § 41-2503(32).....	4

**Other Authorities**

Ariz. Op. Atty. Gen. No. I96-007, 1996 WL 340788 (1996) .....7

## **Issues Presented for Review**

1. Does [A.R.S. § 34-606](#) let counties disregard Arizona’s statutory procurement requirements as “impracticable” when the alleged “impracticability” is not an urgent necessity, but the Supervisor’s belief that following procurement requirements would be commercially impractical?
2. Did the County violate [A.R.S. § 34-605\(B\)](#) by not entering into a written contract to pay for preconstruction services that it obtained for free for five months?
3. Did the County violate state and county procurement laws by giving the architect and the contractor a five-month head start on the project, then using that head-start as the reason for granting them the contract?

## **Introduction**

Pima County used government-owned property as collateral to obtain a \$15 million loan to design and build a facility for World View (“WV”), a private company. The constitutionality of that expenditure is still being litigated below, but this part of the case concerns the County’s procurement of architecture and contracting services to build the facilities.

Plaintiffs are Taxpayers who argue that the County illegally procured these services from the architect (Swaim) and the contractor (Barker) (collectively “B&S”) for five months without paying for them in violation of [A.R.S. § 34-](#)

[605\(B\)](#). The County later used that “five month ‘head start’,” as the Superior Court called it, [ROA 116](#) ep 4, to justify giving B&S the contract for the project, which taxpayers contend was also unlawful. The County argues that it was not required to follow the procurement process because doing so would be “impracticable” under [A.R.S. § 34-606](#). Taxpayers reply that the County’s interpretation of the “impracticability” exception is legally incorrect.

### **Facts and Procedural History**

WV is a private company that hopes to send tourists and scientific equipment to the stratosphere in high-altitude balloons. In August 2015, County Administrator Huckelberry, hoping to entice WV to locate in Tucson for economic reasons, invited B&S to participate in a series of meetings to design a headquarters and manufacturing facility, and a balloon launch pad, tailor-made to WV’s specifications. About ten meetings occurred between August 2015 and January 2016.

In October 2015, WV told the County it wanted the facilities finished by November 2016.

In January 2016, Huckelberry informed the Board of Supervisors about the project, and recommended it give B&S the contracts to design and build the facility. By that time, their plans were already 30 percent complete. [ROA 112](#) ep 8 ¶ 2. In other words, the County gave B&S a “five month ‘head start’,” [ROA 116](#)

ep 4, with the result that by January 2016, they were in a unique position to complete the project by WV's deadline.

Therefore, at the January 2016 meeting, Huckelberry recommended that the Board invoke the [A.R.S. § 34-606](#) emergency exception to the procurement statutes, and award them the contracts, because: (a) they had done five months of work for free, and (b) that head start meant they alone could finish the project in time.<sup>1</sup> The Board adopted that recommendation.

Taxpayers sued, arguing that the County's procurement of services from B&S violates state procurement laws, which require counties to follow a competitive process for obtaining pre-construction services. The County argued that it was relying on its authority under [Section 34-606](#) to dispense with that competitive process in emergency cases. Taxpayers replied that there was no emergency or impracticability in August 2015, when the procurement began. The impracticability—if any—began when the County learned of WV's deadline, in October 2015.

Taxpayers also argued that the County violated [Section 34-605\(B\)](#) by not paying B&S for services rendered before January 2016, because that statute requires counties to pay for all preconstruction services, pursuant to written

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<sup>1</sup> The project was not completed by November 2016, but was about a month late. WV located there anyway.

contracts. Yet the County has not paid, and has no plans to pay, for those preconstruction services.

The Superior Court ruled against Taxpayers on the theory that Arizona procurement laws only apply to County “agents,” and since Huckelberry is not an “agent,” the procurement laws do not apply to him. [ROA 116](#) ep 4. The court then entered judgment for the County—without addressing Taxpayers’ other arguments.

Taxpayers appealed, arguing that if Huckelberry is not an “agent,” his procurement was still unlawful, because Arizona law only allows “agents” to procure, *see, e.g.*, [A.R.S. §§ 34-602\(B\)-\(E\), 34-603\(A\)-\(C\)](#), and Huckelberry certainly did “procure” B&S’s services. *See* [A.R.S. § 41-2503\(32\)](#) (defining “procurement”). Taxpayers also argued that remand was required, because the Superior Court never addressed their remaining claims.

The Court of Appeals, however, dismissed on mootness grounds. It found that it could not grant relief because the WV facilities have been built. Taxpayers argued that the case is not moot because the County has still not paid for the preconstruction services, and this could be remedied by a court order requiring payment or by declaratory relief. The court rejected that argument on the grounds that it would be “against the taxpayers’ interest in preventing depletion of public funds” to require the County to pay. [Rodgers v. Huckelberry](#), 450 P.3d 1279, 1283 ¶ 18 (Ariz. App. Oct. 21, 2019).

Taxpayers also argued that the case qualifies for an exception to mootness because it involves questions of great importance and is virtually certain to recur. The County’s violations of procurement laws is a matter of statewide importance because its position is that this is the normal way of doing business—and the record substantiates that—making it almost certain that the County will continue procuring in this fashion. The Court of Appeals *agreed* with that, stating “[w]e acknowledge similar circumstances here: a substantial expenditure, a process that may recur, and the possibility of future litigation that could delay completion of a project,” *id.* at 1284 ¶ 19, but still refused to decide the case because Taxpayers had not sought an injunction to bar construction.

### **Reasons the Petition Should be Granted**

Arizona procurement laws require counties to obtain services through a specific procedure. They must advertise and request submission of qualifications from prospective contractors, then make a list of respondents, interview them, and choose based on qualifications, cost, etc. [A.R.S. § 34-603\(C\)\(2\), \(E\)](#). The law forbids counties from obtaining preconstruction architecture and contractor services except through the legally prescribed methods. [A.R.S. § 34-602\(B\)](#).

[Section 34-606 provides](#) an exception by which counties may make “emergency procurements” in cases where “a threat to the public health, welfare or safety exists or if a situation exists that makes compliance with this title

impracticable, unnecessary or contrary to the public interest, except that these emergency procurements shall be made with such competition as is practicable under the circumstances.” In January 2016—after procuring services from B&S for five months without following the rules—the County invoked that exception and awarded the contracts to B&S for two reasons: as a reward for having provided free services, and because that five-month head start made it “impracticable” to hire anyone else. This was unlawful for at least three reasons—all of which warrant this Court’s review.

- I. The “impracticability” exception does not apply where the only “impracticability” is the feasibility of an economic development project.**
  - A. The law does not allow the County to exempt itself from procurement laws due to economic impracticality.**

The County asserted in January 2016 that it was “impracticable” to comply with the procurement requirements because doing so would delay the project past WV’s deadline. [Rodgers](#), 450 P.3d at ¶ 5. But this application of the emergency exception was unlawful.

The County’s position is that [Section 34-606](#) creates *two* exceptions to the procurement requirements: an emergency exception and an impracticability exception. And although it concedes that there was no emergency, [County’s Combined Answering & Cross-Opening Br.](#) (“Cnty’s App. Br.”), ep 57, it contends that *commercial impracticality* satisfies the impracticability factor. It also argues

that courts must defer to the County’s determination of impracticality. *Id.* ep 43–48.

This is both wrong and dangerous. It’s wrong because [Section 34-606](#) must be read as a whole, and doing so reveals that an “impracticability” must rise to the same level of urgent necessity as an emergency. This is proven by the fact that the section refers to both “threat[s] to the public health” and “situation[s] ... that make[] compliance with this title impracticable” as “*these* emergency procurements” (emphasis added)—which grammatically must mean that both circumstances are “emergency” procurements (emphasis added). The section’s first and last sentences do the same thing: the first authorizes counties to make “*emergency* procurements” and the last requires counties to provide a “written determination of the basis for *the emergency*” (emphasis added). Thus, [Section 34-606](#) contemplates only one exception—that is, an “impracticability” so extreme as to be the equivalent of an emergency.

That is also the Attorney General’s opinion. See [Ariz. Op. Atty. Gen. No. I96-007](#), 1996 WL 340788 (1996). In rejecting the argument that impracticability is a standalone exception to the procurement statutes, he stated that the law allows the government to dispense with the procurement requirements “only under emergency conditions that involve a sudden, unexpected, and unforeseen event that jeopardizes the public’s health, welfare, or safety and under circumstances that

make the formal procurement process impracticable, unnecessary, or contrary to the public interest.” *Id.* at \*5.

The County argues that “impracticability,” *as determined by the County itself*, is an exception to the procurement rules, and that commercial impracticality qualifies. That is not only an ungrammatical reading of the statute; it would also create a loophole whereby counties can simply disregard the procurement laws at their discretion. The record shows that Pima County already does so routinely; invoking [Section 34-606](#) *seventy-nine times* in recent years. [ROA 90](#) ep 3 ¶¶ 4–5. And under the County’s deference theory, courts must uphold a county’s decision to exempt itself from the statutory requirements in all but the most extreme circumstances.

Simply put, the County’s position is that the procurement laws are optional.

The purpose of the emergency exception is plain: to allow counties obtain services rapidly when public safety is threatened. If, say, a flood washes out a bridge, this section lets county officials hire a repair crew without delay. But Pima County interprets this provision as allowing it to “make emergency procurements” even where there is *no* urgent necessity or threat to the public, but where circumstances merely render it expensive or difficult to follow the law. Interpreting the exception that broadly renders the statute toothless.

Even if the County’s interpretation were right, however, it cannot apply here, because the procurement began *not* in January 2016, but *in August 2015*, when the planning sessions with B&S began—long before the County learned of WV’s deadline, and when, as the Superior Court found, there *was* no impracticability. [ROA 116](#) ep 3–4.

There are no precedents interpreting the [Section 34-606](#) exception, and given the evidence that the County employs it so often, this Court’s review is necessary to ensure that state procurement statutes are obeyed.

**B. Awarding the contracts due to the “five-month head start” was unlawful favoritism.**

In August 2015, Administrator Huckelberry invited B&S—and only them—to participate in a series of meetings during which they planned the WV project before it was approved, or even considered, by the Board of Supervisors. [ROA 106](#) ep 5 ¶ 1. Then, in January 2016—after B&S completed *one third* of the planning, [ROA 112](#) ep 8 ¶ 2—he informed the Board of the project and recommended it award the contracts to B&S, *because of* the illegal “five-month head start” they had enjoyed. [ROA 112](#) ep 8 ¶¶ 1–5.

Huckelberry gave two reasons for giving B&S the contracts: to reward them for providing free services [ROA 106](#) ep 8–9 ¶¶ 32, 35, and because the head start meant they alone could finish it in time. The Board agreed. The first reason (a reward for free services) is discussed below. The second reason—the fact that

B&S were already a third of the way finished—was an unlawful form of favoritism even aside from any other issue presented here.

Procurement experts call this kind of unlawful favoritism “unequal access to information.” [\*Axiom Res. Mgmt., Inc. v. United States\*](#), 564 F.3d 1374, 1377 (Fed. Cir. 2009); [\*ARINC Eng’g Servs., LLC v. United States\*](#), 77 Fed. Cl. 196, 202–03 (2007). It happens “when a government contractor has access to non-public information . . . that may afford a competitive advantage in subsequent competition for a government contract.” [\*Axiom Res. Mgmt., Inc.\*](#), 564 F.3d at 1377 n. 1 (citation omitted). By inviting B&S to begin designing the project in August 2015, the County loaded the dice, giving B&S an advantage no other firms could have, so that when the project was considered in January 2016, they alone could be awarded the contract.

No Arizona court has yet addressed this issue. But federal courts have set forth a four-part test. See [\*ARINC\*](#), 77 Fed. Cl. at 202-03. They ask: 1) whether the firm that received the contract had access to nonpublic information other firms did not get; 2) whether that information proved competitively useful; 3) whether that information gave the winning firm “an advantage that was unfair”; and 4) whether not having that information prejudiced firms that did not get the contract. *Id.* at 202. All four factors are present here.

For five months, B&S enjoyed access to information about WV’s needs that was not available to any other firm—because no other firms were invited to participate in the planning sessions. The information proved competitively useful to them—indeed, it was the very reason the Board awarded them the contracts. [ROA 101](#) ep 8 ¶ 46; [ROA 106](#) ep 9 ¶ 35. This advantage was commercially advantageous to them because the “head start” was why they got the contracts. An exclusive, invitation-only, five-month head start on a public contract is the definition of unfair.

This was contrary to law and public policy. Yet no Arizona case directly addresses the question, and it is important. If counties can give such “head starts” to their chosen favorites, the entire process of government contracting will be undermined, and officials will engage in precisely the favoritism this Court has condemned. See [Brown v. City of Phoenix](#), 77 Ariz. 368, 377 (1954) (“The letting of contracts for public business should be above suspicion of favoritism.”)

The the County considers its actions to be lawful—indeed, ordinary. Not only does the state’s second-largest county regard it as unremarkable to spend months secretly procuring services from what the Superior Court called “hand-picked” favorites, [ROA 116](#) ep 4, but it invokes the emergency exception to the procurement statutes more than once per month on average. Review is therefore important to ensure that Arizona’s procurement laws are followed.

## II. Pima County’s procurement of services without payment was unlawful.

[Section 34-605\(B\)](#) requires counties to enter into written contracts whereby they pay for preconstruction services. The County did not do that. Between August 2015 and January 2016, it obtained services from B&S without a written contract and for free.<sup>2</sup>

It is illegal to procure services without paying because that encourages favoritism and hinders competition. It leads to a situation where government contracts are awarded, not to the most competitive or qualified firms, but to those with political connections, or who are wealthy enough to provide free services in hopes of later being rewarded with the contract. Such favoritism ultimately harms taxpayers by creating an end-run around the statutory procurement process.

That is what happened here. B&S were lucky enough to be invited by the County to begin designing the project in August 2015—an opportunity no other contractor or architect got. They gave the County five months of free services as “part of their marketing strategy” (in the words of a County official, [ROA 106](#) ep 7 ¶ 27)—i.e., in hopes of getting the contracts in return. And they were, indeed,

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<sup>2</sup> Bizarrely, the court below characterized it as a “conce[ssion]” by Taxpayers “that the county has no contractual obligation to pay ... for pre-award services.” [Rodgers](#), 450 P.3d at 1284 n.4. Far from being a concession, this fact is essential to Taxpayers’ case. The County is, indeed, under no such obligation—and that’s unlawful, because [Section 34-605\(B\)](#) requires the County to “enter into a written contract ... under which the agent shall pay the contractor a fee for preconstruction services.”

awarded the contracts, partly as a reward for these free services. [ROA 106](#) ep 8–9 ¶¶ 32, 35.

It is an abuse of discretion to award government contracts based on loyalty or favoritism instead of merit. In [Brown](#), this Court ruled that Phoenix officials acted illegally when they selected a contractor to lease government-owned land based on “a sense of loyalty ... for past services rendered.” 77 Ariz. at 375–76. The City selected the incumbent lessor instead of a newcomer, even though the newcomer offered to pay more, and without competitive bidding. [Id.](#) at 371. It did not matter that “there [was] no evidence of fraud or corruption on the part of the city council, and that what they did was done openly and above board,” because that did not “cure the evil complained of, i.e., favoritism.” [Id.](#) at 376. Likewise, the Board’s selection of B&S on account of five months of free services was just the sort of “loyalty” [Brown](#) found unlawful.

The County’s position is that acquiring preconstruction services for free and without a written contract was legal, and indeed, unremarkable. This demonstrates that absent action by this Court, the procurement practices at issue in this case will continue.

### **III. This case is not moot.**

The Court of Appeals dismissed on the grounds that the case is moot because the project has been built. That was wrong. This case remains a live

dispute, and, even if it were moot, it presents questions of major importance that are virtually certain to recur—as the Court of Appeals admitted. [Rodgers](#), 450 P.3d at 1284 ¶ 19.

**A. The Plaintiffs’ injury for past wrongs could still be remedied by a favorable decision.**

This case is not moot because the County, contrary to state procurement law, never made a contract to pay for B&S’s pre-construction services, and has no plans to. Taxpayers contend this is unlawful—meaning a live legal dispute remains that could be resolved by a judicial determination.

The court below rejected this argument because “it would be against the taxpayers’ interest in preventing depletion of public funds” to order payment. [Id.](#) at 1283 ¶ 18. Yet this is both false and irrelevant.

First, Taxpayers sought both injunctive *and* declaratory relief, so even if it *were* against their interest to order the County to pay, the court can still grant *declaratory* relief that the County acted unlawfully—which would redress Taxpayers’ injury. Cf. [Sandblom v. Corbin](#), 125 Ariz. 178, 182 (App. 1980) (“declaratory relief can still issue independently of a request or grant of other special relief.”). The Court can award *prospective* relief holding that the County’s actions were unlawful, so as to prevent future recurrences. [Turken v. Gordon](#), 223 Ariz. 342, 351–52 ¶¶ 44, 50 (2010). The court below gave no reason for refusing this, even assuming its conclusion regarding payment was correct.

Second, however, Taxpayers' interest is *not* merely in preventing depletion of public funds, but in ensuring that funds are *lawfully spent*—even if spending money in an *unlawful* way might be cheaper. For example, in [Smith v. Graham Cnty. Cmty. Coll. Dist.](#), 123 Ariz. 431, 432 (App. 1979), the plaintiff sued when a community college district used its own staff to repair facilities, even though the reason it did so was because that was cheaper than following the procurement laws. Yet the court allowed the case to proceed because taxpayers have an equitable interest, not just in saving money, but in seeing that funds are lawfully spent.

Likewise, in [Secrist v. Diedrich](#), 6 Ariz. App. 102 (1967), the taxpayer sued when a school board used its own staff to perform landscaping at schools, instead of going through the procurement process. Having the work done by staff instead of outside contractors was doubtless cheaper, but the court found that taxpayers had standing to challenge “illegal expenditures,” not merely illegal expenditures that *also* cost more money. [Id.](#) at 104.

Third, compliance with the procurement laws—including [Section 34-604\(B\)](#)—*does* save taxpayers money, *in the long run*. Arizona's procurement statutes are designed to prevent favoritism because favoritism harms taxpayers by reducing competition; cronies and favorites are rewarded, and newcomers who cannot afford to provide free services, or lack the political connections to be

invited to participate in secret, back-room meetings, cannot obtain contracts. True, any *particular* instance of favoritism might be cheaper than following the procurement laws. But in the long run, favoritism harms taxpayers and costs more. Taxpayers here have a legally enforceable interest in preventing that.

And because the controversy regarding the non-payment for preconstruction services remains live, the case as a whole remains live. Cf. [\*Fisher v. Maricopa Cnty. Stadium Dist.\*](#), 185 Ariz. 116, 119 (App. 1995) (where dispute over fees remained live, the rest of the moot case remained live).

**B. This case involves questions of great public importance that are almost certain to recur.**

Even if this case were moot, the questions presented “have broad public impact beyond resolution of [this] specific case,” [\*Cardoso v. Soldo\*](#), 230 Ariz. 614, 617 ¶ 6 (App. 2012), and *will*—not just *may*—recur. The Court of Appeals even said so. See [\*Rodgers\*](#), 450 P.3d at 1284 ¶ 19. Yet it declined to decide the case because Plaintiffs did not seek an injunction at an earlier stage. That, however, is not a proper consideration with regard to the importance/recurrence exception to mootness.

The reason for the importance/recurrence exception is that deciding such cases “avoid[s] a multiplicity of appeals,” [\*Bd. of Exam’rs of Plumbers of Phoenix v. Marchese\*](#), 49 Ariz. 350, 353 (1937), and ensures the uniform application of the

law by providing rulings “for the future guidance of the bench and bar.” State v. Super. Ct., 86 Ariz. 231, 234 (1959).

The importance/recurrence analysis does not include *any* consideration of whether a plaintiff sought temporary relief earlier in the case. On the contrary, Arizona courts *frequently* resolve important, recurring questions in cases that have become moot even though the parties failed to seek an injunction at an earlier point. *See, e.g., Marchese, supra; Ciulla v. Miller ex rel. Ariz. Highway Dep’t*, 169 Ariz. 540, 541 (App. 1991); Big D Const. Corp. v. Ct. of App., 163 Ariz. 560, 562–63 (1990); Fisher, 185 Ariz. at 119.

Fisher, supra, involved a dispute over the legality of meetings preparatory to adoption of a tax to finance a baseball stadium. The tax was later adopted, and the government argued that the case was thereby rendered moot. The court found it was not moot because the case was not about the tax, but about the meetings. Id. The government also argued “that the issues ... will not recur because ‘construction of more than one major league baseball stadium ... is very unlikely,’” but the court found that this “mischaracterize[d] the issue ... . The issue likely to recur is not the building of a second stadium but the future use of the ‘legal advice’ exemption to justify [illegal meetings].” Id. at 120. The same applies here: this case challenges the legality of the County’s procurement of preconstruction services and its invocation of the emergency exception; the

completion of building does not moot *that* question. Just as [Fisher](#) qualified for the importance/recurrence exception, so does this case.

To paraphrase [Fisher](#), the legality of the County’s procurement is “fundamentally significant because [it] will define just how [counties can procure services]. If [‘loss leaders’ and secret pre-project meetings] are left unexamined by the judiciary, they could handily be expanded until the purpose of the [state’s procurement] law is frustrated.” [Id.](#)

As for the likelihood of recurrence, the record shows that Pima County and B&S regard their actions as an ordinary method of procurement. [ROA 106](#) ep 7 ¶¶ 26–27. Pima County invokes the [Section 34-606](#) more than once per month, for the same reasons as here (timelines; a contractor’s convenient familiarity with a project; speculation that competitive bidding would not be useful). [ROA 90](#) ep 3 ¶¶ 4–5. This will *certainly* happen again.

B&S gave the County free services because they hoped it would give them the contracts in return, [ROA 106](#) ep 7 ¶ 26, which it did. County officials regard this as a typical method of “marketing” for these firms. [Id.](#) ¶ 27. Barker testified that “more than 50 percent” of his company’s County projects are done this way, [id.](#) ep 20 at 52:22, and that it pays off half the time. [Id.](#) at 53:23–24. Therefore it is certain that this will all happen again.

This Court can, of course, decide this case regardless of the Court of Appeals' choice not to do so. Given the importance of the issues involved, and the likelihood of recurrence, this Court should grant the petition.

### **Conclusion**

The petition should be *granted*.

**Respectfully submitted this 19th day of December, 2019 by:**

/s/ Timothy Sandefur

Timothy Sandefur (033670)

Veronica Thorson (030292)

**Scharf-Norton Center for Constitutional  
Litigation at the  
GOLDWATER INSTITUTE**

# ATTACHMENT 2

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

Richard Rodgers, et al.,

Plaintiffs – Petitioners/Cross-  
Respondents,

v.

Charles H. Huckelberry, et al,

Defendants –  
Respondents/Cross-Petitioners.

Supreme Court  
No. CV-19-0285-PR

Court of Appeals, Division Two  
No. 2 CA-CV 2018-0161

Pima County Superior Court  
No. C20161761

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**RESPONSE TO  
PETITION FOR REVIEW**

**AND**

**CROSS-PETITION FOR  
REVIEW**

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PIMA COUNTY ATTORNEY

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Petitioners

## TABLE OF CONTENTS

Issue Presented for Review (Petition for Review).....	6
Issue Presented for Review (Cross-Petition for Review) .....	6
1. Do taxpayers have standing to challenge the award of contracts under A.R.S. Title 34, Chapter 6, even though that chapter was enacted all at once and contains its own penalty and enforcement provisions in A.R.S. § 34-613, which vests enforcement authority in the Attorney General? .....	6
2. Even assuming that the existence of § 34-613’s enforcement mechanism does not preclude a taxpayer challenge, do taxpayers have standing to challenge the award of professional-services contracts under statutes that require firms to be selected based solely on qualifications, rather than price considerations, without contending that the selected firms were unqualified to do the work? .....	7
Issues Presented to, But Not Decided by, the Court of Appeals .....	7
1. The Pima County Board of Supervisors (the “ <b>Board</b> ”) determined that keeping World View’s operations in the County would create economic benefits for County residents; that World View would move its operations elsewhere if the County could not build a facility for it to occupy on a very accelerated basis; and that the accelerated timeline could not be met if they conducted a competitive contract-award process. Did the trial court correctly find that the Board did not abuse its discretion in determining that a competitive process was both “impracticable” and “contrary to the public interest”? .....	7
2. A.R.S. § 34-606 allows a board of supervisors to dispense with a competitive process if conducting such a process would be “impracticable” or “contrary to the public interest.” Did the trial court correctly conclude that the Board’s above findings were sufficient to justify an award under § 34-606? .....	8
3. The Pima County Procurement Code contains a comprehensive remedial procedure under which “[a]n <i>interested party</i> may file a protest regarding <i>any aspect</i> of a solicitation, evaluation, or <i>recommendation for award.</i> ” Pima Cty. Code § 11.20.010(A) (emphasis added). Taxpayers do not qualify as “interested parties,” and did not seek to file a protest. Do they nevertheless have standing to ask a court to determine if the County violated the Code? .....	8

Facts and Procedural History .....	8
Reasons the Petition Should be Denied .....	13
1. The Court of Appeals correctly decided the dispute is moot.....	15
2. The Court of Appeals correctly relied on longstanding caselaw when it refused to ignore the mootness of Taxpayers’ procurement challenge given Taxpayers’ failure to take reasonable steps to avoid mootness despite an “ample opportunity” to do so.....	17
3. No mootness exception applies. A decision from this Court on the merits would be either so narrow as to be essentially useless or so broad as to read § 34-606 out of existence.....	19
4. Conclusion.....	22
Reasons the Cross-Petition Should be Granted (if the Petition is Granted).....	23
1. The Court of Appeals incorrectly concluded that taxpayers can sue to challenge a procurement under A.R.S. Title 34, Chapter 6.....	24
a. Chapter 6 contains its own penalty-and-enforcement scheme for improper awards, which does not include taxpayer lawsuits.....	24
b. Taxpayers challenging procurements based solely on qualifications cannot—without showing that the contract was awarded to an unqualified firm—establish a detrimental impact on their equitable interest in taxpayer money. ....	26
2. This Court should decide under what circumstances taxpayers can sue to challenge a process leading up to a lawful expenditure.....	30
3. Conclusion.....	31
Conclusion .....	31

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<u>Ariz. State Bd. Of Dirs. for Junior Colls. v. Phx. Union High Sch. Dist.</u> 102 Ariz. 69 (1967).....	17
<u>ASH, Inc. v. Mesa Unified School District No. 4</u> 138 Ariz. 190 (App. 1983).....	17, 18, 19
<u>Bennett v. Napolitano</u> 206 Ariz. 520 (2003).....	27, 28, 31
<u>Big D Construction Corp. v. Court of Appeals</u> 163 Ariz. 560 (1990).....	20
<u>Dail v. City of Phoenix,</u> 128 Ariz. 199 (App. 1980).....	16, 26, 29, 30
<u>Ethington v. Wright</u> 66 Ariz. 382 (1948).....	26, 28
<u>Fraternal Order of Police Lodge 2 v. Phx. Emp. Relations Bd.</u> 133 Ariz. 126 (1982).....	20
<u>Henderson v. McCormick</u> 70 Ariz. 19 (1950).....	27, 30
<u>Lancaster v. Arizona Bd. of Regents</u> 143 Ariz. 451 (App. 1984).....	26
<u>Rodgers v. Huckelberry</u> 247 Ariz. 426 (App. 2019).....	passim
<u>Sears v. Hull</u> 192 Ariz. 65 (1998).....	20, 27
<u>Secrist v. Diedrich</u> 6 Ariz. App. 102 (1967).....	27
<u>Sedona Private Prop. Owners Ass’n v. City of Sedona</u> 192 Ariz. 126 (App. 1998).....	15
<u>Smith v. Graham Cty. Comm. Coll. Dist.</u> 123 Ariz. 431 (App. 1979).....	26, 27, 29, 30
<u>State ex rel. Horne v. AutoZone, Inc.</u> 229 Ariz. 358, (2012).....	26
<u>Western Sun Contractors Co. v. Superior Court</u> 159 Ariz. 223 (App. 1988).....	17, 18

**Statutes**

A.R.S. Title 34 ..... 7, 12, 21, 24  
A.R.S. Title 34, Chapter 2..... 24  
A.R.S. Title 34, Chapter 6..... passim  
A.R.S. § 34-606..... passim  
A.R.S. § 34-613..... 7, 24  
A.R.S. § 34-603(C)(1)(a) ..... 7, 28  
A.R.S. §§ 9-462.06(K), 11-642, 35-213(B), 48-3197(A)..... 25  
A.R.S. § 34-605(B) ..... 16

**Rules**

Ariz. R. Civ. App. P. 23(d)(1)..... 6  
Ariz. R. Civ. App. P. 23(d)(3)..... 18, 23, 24  
Ariz. R. Civ. App. P. 23(d)(12)..... 11

**Other Authorities**

Pima Cty. Code § 11.20.010(A)..... 8  
2000 Ariz. Sess. Laws, ch 135, § 10..... 24

**ISSUE PRESENTED FOR REVIEW (PETITION FOR REVIEW)**

Petitioners’ (“**Taxpayers**”) Petition for Review asks this Court to “review” three issues not actually decided by the Court of Appeals. But a petition for review is only supposed to present for review “issues that were decided by the Court of Appeals.” [Ariz. R. Civ. App. P. 23\(d\)\(1\)](#). Issues *not* decided by the Court of Appeals must be “list[ed], separately and without argument.” *Id.* Accordingly, in this Response, Respondents (collectively, “the **County**”) have reframed the issue presented by Taxpayers to correspond with what the Court of Appeals actually decided:

Did the Court of Appeals abuse its discretion by dismissing as moot Taxpayers’ procurement challenge to the award of public contracts that were fully performed before the entry of judgment below, which performance Taxpayers never sought to preliminarily enjoin?

**ISSUE PRESENTED FOR REVIEW (CROSS-PETITION FOR REVIEW)**

If the Court grants Taxpayers’ request to review the Court of Appeals’ holding regarding mootness, it should also review the Court of Appeals’ holding that Taxpayers had standing to bring a procurement challenge under the circumstances of this case; specifically:

1. Do taxpayers have standing to challenge the award of contracts under [A.R.S. Title 34, Chapter 6](#), even though that chapter was enacted all at once and contains

its own penalty and enforcement provisions in [A.R.S. § 34-613](#), which vests enforcement authority in the Attorney General?

2. Even assuming that the existence of [§ 34-613](#)'s enforcement mechanism does not preclude a taxpayer challenge, do taxpayers have standing to challenge the award of professional-services contracts under statutes that require firms to be selected based solely on qualifications, rather than price considerations,<sup>1</sup> without contending that the selected firms were unqualified to do the work?

#### **ISSUES PRESENTED TO, BUT NOT DECIDED BY, THE COURT OF APPEALS**

1. The Pima County Board of Supervisors (the “**Board**”) determined that keeping World View’s operations in the County would create economic benefits for County residents; that World View would move its operations elsewhere if the County could not build a facility for it to occupy on a very accelerated basis; and that the accelerated timeline could not be met if they conducted a competitive contract-award process. Did the trial court correctly find that the Board did not

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<sup>1</sup>Though Taxpayers assert that the procurement laws require counties to select contractors “based on qualifications, cost, etc.” (Pet. ep. 9), the [Title 34](#) statute applicable to the Contracts in this case—which were for design and construction-manager-at-risk services—strictly forbids consideration of price until a firm has been selected. [A.R.S. § 34-603\(C\)\(1\)\(a\)](#). See discussion below at ep. 28-29.

abuse its discretion in determining that a competitive process was both “impracticable” and “contrary to the public interest”?

2. [A.R.S. § 34-606](#) allows a board of supervisors to dispense with a competitive process if conducting such a process would be “impracticable” or “contrary to the public interest.” Did the trial court correctly conclude that the Board’s above findings were sufficient to justify an award under [§ 34-606](#)?
3. The Pima County Procurement Code contains a comprehensive remedial procedure under which “[a]n *interested party* may file a protest regarding *any aspect* of a solicitation, evaluation, or *recommendation for award*.” [Pima Cty. Code § 11.20.010\(A\)](#) (emphasis added). Taxpayers do not qualify as “interested parties,” and did not seek to file a protest. Do they nevertheless have standing to ask a court to determine if the County violated the Code?

### **FACTS AND PROCEDURAL HISTORY**

The relevant facts are few and undisputed.<sup>2</sup> In the fall of 2015, Pima County representatives were meeting with representatives of World View Enterprises, Inc. (“**World View**”), a high-tech aerospace company, regarding the possibility of World

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<sup>2</sup>As noted a bit later, Taxpayers stubbornly continue to misstate some of those facts, despite having had those misstatements pointed out to the Court of Appeals. But when stated accurately the facts are undisputed.

View expanding its operations in Pima County rather than relocating elsewhere. ([ROA 101](#) ¶¶ 7-15, 28, and 38.) A tentative economic-development deal was finally reached at the end of December 2015. ([ROA 101](#) ¶ 35.) A few weeks later, in January 2016, the Pima County Board of Supervisors approved that deal ([ROA 101](#) ¶ 49, [ROA 102](#) ep. 3-4), the likes of which it had not seen before ([ROA 101](#) ¶ 3) and hasn't seen since. As part of that deal, the Board approved two contracts with World View under which the County agreed to design and construct a County-owned building (the "**Facility**") and an adjacent balloon launch pad (the "**Launch Pad**"), lease-sell the Facility to World View over a 20-year term ([ROA 12](#)), and authorize World View to operate the Launch Pad as a limited-purpose public aviation facility ([ROA 13](#)). In order to have the Facility and Launch Pad up and running in time to allow World View to keep its operation headquartered in Pima County, the County also awarded design and construction-manager-at-risk contracts (the "**Contracts**") to Swaim Associates ("**Swaim**") and Barker Morrissey Contracting ("**Barker**"), respectively, under [§ 34-606](#) without following the normal competitive-solicitation process required under [A.R.S. Title 34, Chapter 6](#) ("**Chapter 6**"). ([ROA 101](#) ¶¶ 5, 38-44, and 48.)

Swaim and Barker were familiar with the proposed project because they had worked with World View and County staff to develop a preliminary design and cost estimates in the months leading up to World View's December 23, 2015 decision to

move forward with the project. ([ROA 101](#) ¶¶ 15-20.) Based on that familiarity, and the record-setting tight timeframe for design and construction, the Board awarded the Contracts directly to those firms. ([ROA 101](#) ¶¶ 38-48.) Neither Swaim nor Barker were paid—nor have asked to be paid—for any services provided before the Contracts were awarded. ([ROA 106](#) ¶ 17.)

Taxpayers filed this lawsuit in April 2016, challenging in part the awards to Swaim and Barker. ([ROA 2](#) ¶¶ 82-98.) At that time, World View’s projected occupancy was at least 7 months away. Taxpayers could have sought—but never did seek—a preliminary injunction to halt performance. ([ROA 67](#) ¶ 11.) In the absence of such an injunction, the County honored its contractual obligations. Thus, before the trial court entered judgment on the procurement claims (almost two-and-a-half years later), both Contracts had been performed—Swaim designed the Facility and Launch Pad, Barker built them, and the County paid all sums due under both Contracts. ([ROA 103](#) ep. 2, ¶¶ 6 and 9.) (As an aside, the project was completed under budget ([ROA 103](#) ep. 3, ¶¶ 7-8) and only a month after World View’s requested deadline ([ROA 102](#) ep. 147-154).)

The Court of Appeals dismissed the appeal as moot. *Rodgers v. Huckelberry*, 247 Ariz. 426, 431, ¶ 22 (App. 2019). It noted that it had discretion to decide the appeal, even though moot, but declined to do so, emphasizing that it is “reluctant to grant relief to challengers of public contracts that have been fully performed, . . .

particular[ly] . . . to parties that have not taken appropriate steps to prevent an issue from becoming moot.” [Id.](#) ¶¶ 19-20.

In their Petition, Taxpayers assert several additional facts that they contend support either their position on the merits or as to mootness. Not all of these facts are, in the County’s view, “material to consideration of the issues presented . . . for review” ([Ariz. R. Civ. App. P. 23\(d\)\(12\)](#)). But, since Taxpayers apparently feel they *are*, the Court should be aware that some are outright misstatements of the record—misstatements that the County has attempted more than once to correct<sup>3</sup>:

- Taxpayers assert that County Administrator C.H. Huckelberry “invited [Swaim and Barker] to participate in a series of meetings to design [the Facility and Launch Pad.]” (Pet. ep. 6; *see also* Pet. ep. 13.) This is based—as was a similar statement in the trial court’s ruling—on memoranda from Mr. Huckelberry stating that the County had selected the firms. ([ROA 102](#) ep. 38; *see also* [ROA 106](#) ep. 38.) But the evidence shows it was *not* in fact Mr. Huckelberry who initially invited the firms to participate in discussions regarding a possible deal with World View. Phil Swaim himself—along with the County’s economic-development director—testified that a realtor named

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<sup>3</sup>To paraphrase the late Senator Daniel Patrick Moynihan, Taxpayers are entitled to their own opinions, but not their own facts.

Mike Hammond invited Swaim to participate in those preliminary feasibility discussions. ([ROA 102](#) ep. 114:4-17; *see also* [ROA 102](#) epp. 59:8-60:2; [ROA 106](#) ep. 2-3 ¶ 16.) And Swaim invited Barker to participate. ([ROA 102](#) ep. 91:13-92:2; [ROA 106](#) ep. 3 ¶ 19.) The County noted this in its briefing below, and at oral argument. ([Answering/Cross-Opening Brief](#), ep. 12-13; Audio Recording of Oral Argument held July 24, 2019, at 30:01-30:11, 49:25-50:01.<sup>4</sup>)

- Taxpayers assert that the County has “invoke[ed] [\[§\] 34-606](#) *seventy-nine times* in recent years” (Pet. ep. 12), or “more than once per month on average.” (Pet. ep. 15.) In fact, over a five-year period, the County invoked [§ 34-606](#) only 16 times, or about three times a year on average; the remainder of the procurements cited were not governed by [A.R.S. Title 34](#) but by a similar provision in the Pima County Code applicable to non-[Title-34](#) contracts. ([ROA 90](#) ep. 25-29.) The County noted this in its reply brief below, as well as at oral argument. ([Reply Brief](#) ep. 9-10; Audio Recording of Oral Argument held July 24, 2019, at 19:02-19:15.)

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<sup>4</sup>Audio of the oral argument is available via <https://www.appeals2.az.gov/OA/Rodgers%20v.%20Huckleberry.MP3>.

- Taxpayers assert that Brian Barker testified “that ‘more than 50 percent’ of his company’s *County projects* are done this way [with free services leading up to obtaining a paying contract] and that it pays off half the time.” (Pet. ep. 22 (emphasis added; citations omitted).) But Barker’s testimony, read in context, was clearly about the work his company does in general, not specifically work for the County. (See [ROA 106](#) ep. 20.) Indeed, his company has done very little work for the County at all—around 10 projects, none of this magnitude. ([ROA 106](#) ep. 13.) The County noted this misstatement in its reply brief below, and at oral argument. ([Reply Brief](#) ep. 10; Audio Recording of Oral Argument Held July 24, 2019, at 48:46-49:23.)

### **REASONS THE PETITION SHOULD BE DENIED**

The Petition should be denied because the Court of Appeals soundly exercised its discretion to decline to address a moot challenge to a public contract.

*First*, the Court of Appeals correctly concluded the dispute is moot. Taxpayers’ Complaint challenged only the Board of Supervisors’ award of the Swaim and Barker contracts in January 2016—not the County’s alleged procurement of conceptual-design and cost-estimate services in the fall of 2015—and the full performance of the parties under those contracts mooted that challenge.

*Second*, Taxpayers do not even ask this Court to review the Court of Appeals' actual decision in this case, which was to decline to entertain a moot challenge to public contracts when the challenging parties made no attempt to prevent mootness. Consequently, they don't cite the longstanding caselaw the Court of Appeals relied on to reach that decision, much less argue why that caselaw is wrong or inapplicable, or why this Court should deem the issue of such importance that it should step in and decide it.

*Third*, even if this Court looks past the significant deficiencies in the Petition, and treats Taxpayers' arguments regarding the merits of their underlying procurement challenge as relevant to the reviewability of the Court of Appeals' mootness determination, those arguments are unavailing. Taxpayers have failed to demonstrate that the legal issues raised by their challenge were sufficiently important or likely to recur for the Court of Appeals to decide them despite the mootness of the challenge—much less that those issues are so important that this Court should overturn the Court of Appeals' mootness holding and address those issues for the first time itself. It is undisputed that the County has never before or since used its authority under [§ 34-606](#) on a project *like this one*—an economic-development deal involving the construction of a large facility on an incredibly tight timeframe in order to induce a local company to keep its headquarters in Pima County. A ruling from this Court would either have to be limited to these specific

facts—which may never recur—or be so broad as to read a local government’s discretion under [§ 34-606](#) right out of existence.

The Petition should be *denied*.

**1. The Court of Appeals correctly decided the dispute is moot.**

A claim is moot when, because of the passage of time and changes in circumstances, there is no longer any meaningful relief available, even if the claim is valid. *See, e.g., [Sedona Private Prop. Owners Ass’n v. City of Sedona](#), 192 Ariz. 126, 127, ¶ 5 (App. 1998)*. Taxpayers’ complaint was quite clear—they challenged Pima County’s award of contracts to Swaim and Barker and asked for (1) a declaration that Pima County (not Mr. Huckelberry) violated procurement statutes and ordinances by awarding the Contracts without competition and (2) an injunction “preventing enforcement” of those contracts by the County. ([ROA 2](#) ¶¶ 90, 98; *see also* [ROA 2](#) ep. 18 ¶ D.) Neither form of relief would be meaningful at this point.

First, in terms of the availability of injunctive relief—the Contracts were long ago fully performed and there is no longer anything to enjoin. The Facility and Launch Pad have been completed for several years and all amounts due under the Contracts have been paid. Taxpayers try to avoid this by pointing out that the County failed to pay Swaim and Barker for services rendered prior to the Board’s award of the Contracts in January 2016. But they never amended their complaint to ask the trial court to order the County to pay Swaim and Barker for services provided before

the Contracts were awarded.<sup>5</sup> They brought this issue up only much later in summary-judgment briefing. The trial court understandably did not address that argument (*see generally* [ROA 116](#)), and the Court of Appeals correctly concluded that it would be against the Taxpayers’ interest to seek payment of additional money after performance is complete or to “relieve [Swaim and Barker] of continuing obligations” under the Contracts. [Rodgers](#), 247 Ariz. at 231, ¶ 18.

Nor would declaratory relief be meaningful at this point. Taxpayers argue that their challenge is not moot because it is in their interest to see to it that public money is lawfully spent. (Pet. ep. 18-19.) But Taxpayers don’t have a freestanding interest in asking courts to recognize, in hindsight, every alleged procurement impropriety. [Dail v. City of Phoenix](#), 128 Ariz. 199, 202 (App. 1980). If the availability of such declaratory relief was automatically enough to keep a claim from being rendered moot, the logical consequence would be that full performance *would never* matter. No procurement challenge—indeed, no lawsuit challenging any government expenditure—would be subject to dismissal for mootness, no matter how long the challenging taxpayers sat on their hands. But a declaratory-relief claim is subject to

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<sup>5</sup>In a footnote, Taxpayers contend that the County’s failure to pay for pre-award services is “essential to [their] case” because, they contend, [A.R.S. § 34-605\(B\)](#) requires such payment. (Pet. ep. 16 n.2.) One might wonder why, if this was *essential* to their case, their Complaint asks for no relief with respect to pre-award services and does not once cite [§ 34-605](#).

mootness analysis just like any other. See [Ariz. State Bd. of Dirs. for Junior Colls. v. Phx. Union High Sch. Dist.](#), 102 Ariz. 69, 73 (1967) (“No proceeding will lie under the declaratory judgment acts to obtain a judgment which is advisory only or which merely answers a moot or abstract question; a mere difference of opinion will not suffice.”).

Nor is Taxpayers’ assertion that “*in the long run*” it is cheaper to preclude a prospective contractor’s up-front provision of free services sufficient to avoid a finding of mootness. (Pet. ep. 19-20.) First, they offer no empirical support for that proposition. But more importantly, it confuses mootness—whether a court can grant meaningful relief in a given case—with the public-importance *exception* to mootness, which the County addresses later in this brief.

**2. The Court of Appeals correctly relied on longstanding caselaw when it refused to ignore the mootness of Taxpayers’ procurement challenge given Taxpayers’ failure to take reasonable steps to avoid mootness despite an “ample opportunity” to do so.**

Citing [Western Sun Contractors Co. v. Superior Court](#), 159 Ariz. 223 (App. 1988) and [ASH, Inc. v. Mesa Unified School District No. 4](#), 138 Ariz. 190 (App. 1983), the Court of Appeals emphasized that it is “reluctant to grant relief to challengers of public contracts that have been fully performed,” particularly “to parties that have not taken appropriate steps to prevent an issue from becoming moot.” [Rodgers](#), 247 Ariz. at 431, ¶ 20. This principle was key to the Court of Appeals’ decision to dismiss Taxpayers’ appeal—it applied these cases even while

noting that this case involved “a substantial expenditure, a process that may recur, and the possibility of future litigation that could delay completion of a project.” *Id.* ¶ 19.

One might expect a party asking this Court to review that decision to contend either that the cases relied upon were wrong or were wrongly applied. See [Ariz. R. Civ. App. P. 23\(d\)\(3\)](#) (among the reasons a petition for review may be granted is “that important issues of law have been incorrectly decided”). Yet Taxpayers do not even cite these decisions, much less attempt to explain either why they were wrong when made or were wrongly applied here.

Although not decisions of this Court, [Western Sun](#) and [ASH, Inc.](#) (along with the decision below) together stand for the unremarkable proposition that litigants challenging public contracts who choose not to invoke procedural mechanisms that exist to allow a decision to be made while the controversy is still live do so at their peril. [Western Sun](#) was a special action that made it from bid opening to hearing in the Court of Appeals in a remarkably short time—just one month. 159 Ariz. at 225-26. The Court of Appeals, when accepting special action jurisdiction and providing expedited review, relied on the “peculiar nature of public contracts” and courts’ resultant reluctance “to grant relief where such contracts have been fully performed.” *Id.* at 227. In other words, the challenging bidder in that case had a procedural mechanism by which to obtain expedited and meaningful relief while there was still

a live controversy to resolve and, by availing itself of that mechanism, was able to obtain a ruling on the merits.

In contrast, in [ASH, Inc.](#), the Court of Appeals dismissed as moot a challenge to the award of a public contract because the competing contractor who brought the challenge failed to seek the appropriate “procedural remedies available to stay performance of the contract” and instead allowed the contract to be fully performed during the appeal process. 138 Ariz. at 192.

The reasoning of these decisions is sound, and Taxpayers do not even attempt to argue otherwise. Procedural rules and statutes allowing for interlocutory injunctive relief exist for a reason—in the context of a challenge to a public contract, to provide parties an opportunity to halt performance long enough for a court to decide whether the challenge has merit. A challenger who chooses not to seek such relief takes the risk that the dispute will become moot while the normal civil-litigation process takes its course. That happened here. The Court of Appeals correctly exercised its discretion to dismiss the appeal.

**3. No mootness exception applies. A decision from this Court on the merits would be either so narrow as to be essentially useless or so broad as to read [§ 34-606](#) out of existence.**

As the Court of Appeals noted, courts will, occasionally, decide a moot question when the circumstances demand it—when, for example, “it is ‘of great

public importance’ and ‘likely to recur,’ or when the issue ‘evade[s] review.’”<sup>6</sup>

Rodgers, 247 Ariz. at 431, ¶ 19 (quoting Sears v. Hull, 192 Ariz. 65, 72 n.9 (1998)).

A classic example in the context of public contracts is the constitutionality of the local bid-preference statute, decided by this Court in Big D Construction Corp. v.

Court of Appeals, 163 Ariz. 560, 563 (1990), even though the parties had settled.

The issue was certain to recur because the statutory bid-preference applied to all municipalities and counties and would affect many future bidders. Id. The 5% bid preference was also costly on large projects, and litigation challenging its application would evade review because it would jeopardize any project’s timely completion.

Id.

Whether the Board acted properly under § 34-606 in this case is not the type of question this Court should decide even though moot. This is not a clean legal question like whether a statute is constitutional. It is not even a question of statutory

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<sup>6</sup>The County is aware of only one reported decision in which this Court has granted review of the Court of Appeals’ decision to dismiss an appeal because it had become moot, Fraternal Order of Police Lodge 2 v. Phx. Emp. Relations Bd., 133 Ariz. 126, 126-27 (1982). The Court agreed the dispute was moot but accepted review because the issue—a City rule barring City employees from electing a new designated authorized union representative while a contract with another such representative was in effect—was important to all City employees and would recur the next time a group sought to force an election. Id. The Court later held the rule invalid because the Phoenix City Council did not adopt it in the manner required under the City’s Charter. Fraternal Order of Police Lodge 2 v. Phx. Emp. Relations Bd., 133 Ariz. 127, 129-30 (1982). The issue here deals with application of a concededly valid statute in a single case—not the validity of a statute or rule.

construction, as the phrase “impracticable, unnecessary or contrary to the public interest” is not a *legal* standard. Whether—for a particular public project—“a threat to the public health, welfare or safety exists or ... a situation exists that makes compliance with [[A.R.S. Title 34](#)] impracticable, unnecessary or contrary to the public interest,” is a policy determination to be made in the first instance by the “agency” carrying out the project; a determination that is necessarily reviewable only for an abuse of discretion. It will depend on all the circumstances of the particular project, including the policy goals the project is meant to further, the relative importance of those goals compared with other policy objectives being pursued by the public body, the potential impact on those goals of following the normal procurement process, and the potential downside of departing from that process. A legal determination in this case that the Board abused its discretion will need to be tightly limited to this case’s specific facts, which means that it will provide no meaningful guidance for future decisions. The only other approach is to try to turn “impracticable, unnecessary or contrary to the public interest” into a legal standard, which will require the Court to retreat to such a high level of generality as to effectively render the statute meaningless.

Taxpayers cite numerous examples of the County’s emergency procurements,<sup>7</sup> saying, “[t]his will *certainly* happen again.” (Pet. ep. 22.) But what is “this”? The County relying in part on preliminary pre-contract services to award contracts to design and build a headquarters for a high-tech company that demands—as a condition of remaining in Pima County—an extraordinarily tight construction schedule? There is *no* evidence *that* is likely to recur. As noted above, Taxpayers’ argument that contractors like Barker do this all the time with the County is based on a mischaracterization of the record. If, by “this,” Taxpayers mean the County relying on contractor familiarity or a compressed project timeframe to directly select contractors, they are surely right that “this” will happen again. But is this Court prepared to say, as a matter of law, either that those factors will *always* or will *never* justify departing from the normal procurement process regardless of the circumstances? Surely not.

#### **4. Conclusion**

Taxpayers like to evoke the imagery of smoky backrooms where bad government officials—damn the law!—hand out taxpayer money like candy to loyal cronies. But that didn’t happen here, and it’s not how Pima County officials conduct business. County and World View representatives worked with qualified firms to

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<sup>7</sup>Though, as noted above, only about 20% of the examples are [§ 34-606](#) procurements.

develop preliminary plans and cost estimates, and when World View pulled the proverbial trigger on the deal, at a point in time that was too late to accommodate normal competitive procurement processes, the Board of Supervisors made the only decision it could that would allow this project to go forward—it awarded the work to those firms. The project came in under budget and essentially on time. All the while, Taxpayers were content not to seek injunctive relief. The case is moot; there is no reason for this Court to reach out and decide it. The Petition should be *denied*.

**REASONS THE CROSS-PETITION SHOULD BE GRANTED**  
**(IF THE PETITION IS GRANTED)**

If this Court grants the Petition, it should grant this Cross-Petition because the Court of Appeals erred in deciding that Taxpayers had standing to challenge the two procurements in this case.

*First*, important issues of law have been incorrectly decided. See [Ariz. R. Civ. App. P. 23\(d\)\(3\)](#). The Court of Appeals held that a taxpayer may challenge an award under [Chapter 6](#) even though (1) [Chapter 6](#) was enacted together with its own remedial scheme, which does not include a taxpayer cause of action; and (2) the qualifications-based competitive process applicable to the services procured here means Taxpayers cannot show or even plausibly argue that their equitable interest in taxpayer money was impacted by what happened here.

*Second*, no Arizona decision (other than the decision below) addresses taxpayer standing in the context of a [Chapter 6](#) procurement. See [Ariz. R. Civ. App. P. 23\(d\)\(3\)](#). Indeed, although there are a couple of Court of Appeals decisions addressing taxpayer challenges to awards under [Title 34, Chapter 2](#), this Court has *never* decided a taxpayer challenge to a procurement under any part of [Title 34](#). Thus, this case provides this Court an opportunity to decide whether taxpayers have standing to challenge [Title 34](#) procurements at all, or at least whether taxpayer standing, assuming it exists, extends—as the Court of Appeals apparently held—to *any* error in a procurement process, even when the resulting expenditure is itself lawful and even when the taxpayer cannot make any plausible connection between the alleged process violation and a resultant depletion of taxpayer money.

- 1. The Court of Appeals incorrectly concluded that taxpayers can sue to challenge a procurement under [A.R.S. Title 34, Chapter 6](#).**
  - a. [Chapter 6](#) contains its own penalty-and-enforcement scheme for improper awards, which does not include taxpayer lawsuits.**

[Chapter 6](#) was enacted all at once in 2000 ([2000 Ariz. Sess. Laws, ch. 135](#), § 10), creating a scheme for the procurement of services using certain alternative project-delivery methods. Included in that scheme is a remedial statute, [A.R.S. § 34-613](#), for [Chapter 6](#) violations by “agents” (basically, units of government, including county boards of supervisors, who must follow [Chapter 6](#) when procuring those services). Under [§ 34-613](#), the Arizona Attorney General can file an action to recover

a civil fine from an agent that violates [Chapter 6](#)'s requirements and can sue to enjoin “pending or threatened” violations of [Chapter 6](#).

Nothing in [Chapter 6](#) provides that a taxpayer can sue to enforce its provisions. And the Legislature’s decision not to include a taxpayer cause of action makes sense, for the same reason that recognizing taxpayer standing in this case makes none—as discussed further below, given the qualifications-based selection procedures in [Chapter 6](#), there is no logical or intuitive connection between a procedural violation and a taxpayer’s interest in safeguarding public money. Nor does a procedural violation—absent some showing of fraud, collusion, improper favoritism,<sup>8</sup> or abuse of discretion—implicate any other public-policy concerns. The Legislature knows how to provide for taxpayer standing when it makes sense (*see, e.g.*, A.R.S. §§ [9-462.06](#)(K), [11-642](#), [35-213](#)(B), [48-3197](#)(A)) but did not do so here. This Court has no authority to subject every judgment call by public body to a legal challenge by a

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<sup>8</sup> As noted above, Taxpayers repeatedly and insistently accuse County officials in this case of acting with “favoritism.” But “favoritism” is “the favoring of one person or group over others *with equal claims*; partiality.” <https://www.dictionary.com/browse/favoritism?s=t> (visited January 2, 2019) (emphasis added). It is related to concepts of “unfairness, nepotism, partisanship, inequity, discrimination.” *Id.* There has been no showing in this case that the Board’s selection of Swaim and Barker arose from any preference for those firms over other design and construction firms; Swaim and Barker were not selected because they were Swaim and Barker, but because they were clearly qualified and were the only firms that could, at the relevant point in time, complete the project in a timely fashion.

single taxpayer when there is already another enforcement mechanism in place. *See State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358, 362, ¶ 19 (2012); *Lancaster v. Arizona Bd. of Regents*, 143 Ariz. 451, 457 (App. 1984) (requiring ABOR to submit a report specifically to the legislature “necessarily precludes private judicial enforcement by third persons who are incidental beneficiaries of the contemplated report”).

- b. Taxpayers challenging procurements based solely on qualifications cannot—without showing that the contract was awarded to an unqualified firm—establish a detrimental impact on their equitable interest in taxpayer money.**

Taxpayer standing is rooted in the taxpayer’s equitable interest in each tax dollar paid. When those taxpayer dollars are “misappropriate[ed],” the taxpayer is “liab[le] to replenish the public treasury for the deficiency,” and therefore can sue to challenge the misappropriation. *Ethington v. Wright*, 66 Ariz. 382, 386 (1948). Thus, this Court has held that a taxpayer may sue to “enjoin the illegal expenditure of municipal funds.” *Id.* And the Court of Appeals has extended the doctrine to allow taxpayers to challenge procurements done in the absence of required price-based competitive bidding, because “[c]ompetitive bidding statutes are specifically designed to protect the pecuniary interest of the [government] by assuring that public works are performed *at the lowest cost.*” *Dail v. City of Phoenix*, 128 Ariz. 199, 202-03 (App. 1980) (emphasis added); *see also Smith v. Graham Cty. Comm. Coll. Dist.*, 123 Ariz. 431, 433 (App. 1979) (taxpayers could challenge decision to use school-

district staff to alter a school building without awarding the work to a licensed contractor through a bidding process); [Secrist v. Diedrich](#), 6 Ariz. App. 102, 104 (1967) (taxpayers permitted to sue school district for performing work without soliciting competitive bids). In [Smith](#), the Court of Appeals even went so far as to hold that a taxpayer challenging a contract let without competitive bidding need not *show* actual pecuniary loss. 123 Ariz. at 434.

It is equally true, though, that taxpayers can't sue merely to impress upon the courts their views of the law; instead, the taxpayer must at least be able to articulate some plausible connection between the putatively illegal conduct and a depletion in taxpayer funds. *See* [Sears](#), 192 Ariz. at 70, ¶ 23. Where the taxpayer can't do that, the taxpayer can't maintain the action.

In [Henderson v. McCormick](#), 70 Ariz. 19, 22-23 (1950) for example, taxpayers attempted to challenge the allegedly unlawful sale of a truck by the Town of Wickenburg to a member of the town council, but the evidence showed that the Town sold the truck for the highest bid it received, and therefore the taxpayers—even if they won—would obtain no more relief than a declaration that the sale violated a statute. This interest, this Court held, was insufficient to confer standing on the taxpayers. *Id.* at 22-23, 25.

Most recently, in 2003, this Court denied taxpayer standing to four legislators who challenged the governor's use of line-item veto. [Bennett v. Napolitano](#), 206

Ariz. 520, 522, ¶ 3, 527, ¶ 30 (2003). Although the legislators challenged the legality of the legislative *process*, they did not claim that “funds affected by the vetoes [were] to be spent for an illegal or unconstitutional *purpose*.” *Id.* at 527, ¶ 30 (emphasis added). Accordingly, the Court rejected the legislators’ reliance on *Ethington* and rejected their taxpayer-standing argument. *Id.*

Here, the County argued to the Court of Appeals that Taxpayers could not, even if they won on the merits, vindicate their interest in taxpayer money because the services procured—architect and construction-manager-at-risk services—are procured based on qualifications, not price. Indeed, price-based bidding is *prohibited* when acquiring these services under the normal competitive process—only qualifications may be considered at the competition stage. [A.R.S. § 34-603\(C\)\(1\)\(a\)](#). And Taxpayers never argued that Swaim or Barker were unqualified.

The Court of Appeals rejected this argument, concluding that, “[w]hether a competitive process focuses on price or qualifications, the taxpayer has an equitable interest in enforcing it to maximize value received for money spent.” *Rodgers*, 247 Ariz. at 430, ¶ 13. But the distinction in the statutes between quality and price is more stark than the Court of Appeals recognized. Under the statutory process, the agent must select the winner based solely on qualifications; only after that occurs can the agent negotiate a price with the winning firm. *See* [§ 34-603\(C\)\(1\)\(a\)](#), (E). If the firm’s price is unacceptable, the agent must either terminate negotiations and

move to the next-highest-qualified firm or terminate the entire procurement. Thus, qualifications and price are never considered together. It is possible, perhaps even likely—following the normal process to the letter—that the winning firm will charge a higher price, maybe substantially higher, than would the next-most-qualified firm. So a taxpayer can't show—or even plausibly argue—that following the process would have “maximize[d] value received for money spent.”

The Court of Appeals also thought it unimportant that Taxpayers did not argue Swaim or Barker were unqualified, finding “no principled reason to require a taxpayer alleging an expenditure violating a merit-based procurement process to show lack of qualifications to establish standing, when a taxpayer alleging an expenditure violating a price-based competitive process need not make a corresponding showing of pecuniary loss.” [Rodgers](#), 247 Ariz. at 430, ¶ 14. It is true that, under the Court of Appeals' decision in [Smith](#), 123 Ariz. at 434, a taxpayer need not show pecuniary loss when a price-based competitive-bidding process is not followed. As the Court of Appeals later explained, this is because, “[i]f bids are not taken it is difficult to demonstrate whether there may have been a lower bidder.” [Dail](#), 128 Ariz. at 203. But, because the selection process is cost based, it's necessarily true that *if* there had been an auction, and *if* a lower bid had been submitted by a responsive and responsible bidder, the cost to the public would have been lower. When the selection process is not cost based, there is *no* basis to imagine,

much less assume, that the cost would have been lower (or the “value” higher) had the process been followed to the letter.

As the County argued below, a taxpayer *might* have standing to challenge a qualifications-based process by showing that an unqualified firm was selected because that could result in a substandard product, which might eventually lead to a depletion of taxpayer money to repair or rebuild it. Standing on that basis would tolerate the same level of attenuation present in [Smith](#)—a showing of actual loss would be unnecessary in light of the logical connection between the process violation and a potential depletion of taxpayer money.

But if the taxpayer is not even required to show that the selected firm is unqualified, the connection to taxpayer money—the equitable justification for recognizing taxpayer standing—becomes nonexistent. Under the Court of Appeals’ opinion, a taxpayer can sue *even though* (1) the normal process to be followed would not necessarily have resulted in a lower price *and* (2) the agent ended up using a qualified firm, therefore presumably ending up with a quality product. Under this rule, what is a taxpayer doing other than expressing “a general desire to enforce the law”? [Dail](#), 128 Ariz. at 202.

**2. This Court should decide under what circumstances taxpayers can sue to challenge a process leading up to a lawful expenditure.**

This Court long ago held that merely alleging that a local government violated the law is not enough to confer standing. [Henderson](#), 70 Ariz. at 23. And, more

recently, this Court rejected taxpayer standing to challenge a process violation independent of the legality of the resulting expenditure. *Bennett*, 206 Ariz. at 522, ¶

3. But, under a line of decisions by the Court of Appeals, leading up to and culminating in the one below, taxpayers can challenge any government action so long as an expenditure of taxpayer money is involved, even if the alleged impropriety is only procedural.

### **3. Conclusion**

This Court has not decided a significant taxpayer-standing case in 70 years. Only it can decide whether the Court of Appeals, in extending taxpayer standing to procurement challenges—even when, as here, there is no plausible argument that the government would have saved taxpayer money had it followed the normal competitive process—has properly applied this Court’s precedents.

If the Court grants the Petition, it should *grant* the Cross-Petition.

### **CONCLUSION**

This Court should *deny* the Petition, but if it grants it, it should also *grant* the Cross-Petition.

RESPECTFULLY SUBMITTED January 3, 2020.

BARBARA LA WALL  
PIMA COUNTY ATTORNEY  
By: /s/ Andrew L. Flagg \_\_\_\_\_  
Regina L. Nassen  
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Deputy County Attorneys

# ATTACHMENT 3

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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HAROLD VANGILDER, et al., *Plaintiffs/Appellees/Cross-Appellants,*

*v.*

ARIZONA DEPARTMENT OF REVENUE, *Defendant/Appellee/Cross-Appellee,*

PINAL COUNTY, et al., *Defendants/Appellants/Cross-Appellees.*

No. 1 CA-TX 19-0001  
FILED 1-16-2020

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Appeal from the Arizona Tax Court  
No. TX2017-000663  
The Honorable Christopher T. Whitten, Judge

**REVERSED IN PART; AFFIRMED IN PART**

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VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

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**OPINION**

Presiding Judge Kenton D. Jones delivered the Opinion of the Court, in which Judge James B. Morse Jr. and Judge Diane M. Johnsen joined.

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**J O N E S**, Judge:

¶1 In 2017, Pinal County voters simultaneously approved Proposition 416 (Prop 416) to adopt a regional transportation plan and Proposition 417 (Prop 417) to enact an excise tax to fund the plan. In this appeal, Appellants, Pinal County (the County) and the Pinal Regional Transportation Authority (the RTA), appeal from the tax court's order invalidating the excise tax, and Cross-Appellants (collectively, Vangilder) challenge the court's order denying their request for an award of attorneys' fees. The Arizona Department of Revenue (ADOR) joins Vangilder in asserting the tax is invalid but joins Appellants in defending Prop 417's constitutionality and opposing Vangilder's claim for fees.

¶2 We find the Prop 417 tax to be valid. The RTA's authorizing resolution does not change the substance of the question posed to and approved by the voters; the tax, by its terms, applies across all transaction privilege tax (TPT) classifications; and the tax includes a valid, constitutional modified rate as applied to the retail sales classification. Accordingly, we reverse the order invalidating the tax. Because Vangilder is no longer the successful party in the tax court, we affirm the denial of his request for attorneys' fees.

**FACTS AND PROCEDURAL HISTORY**

¶3 The RTA is a public improvement and taxing subdivision of the State of Arizona established by the Pinal County Board of Supervisors (the Board) in 2015 to coordinate multi-jurisdictional transportation planning, improvements, and funding. *See* Ariz. Rev. Stat. (A.R.S.) § 48-5302<sup>1</sup> (governing the establishment of a regional transportation authority). Arizona law authorizes the RTA to formulate a plan for transportation projects and propose an excise tax to pay for them. *See generally* A.R.S. §§ 48-5309, -5314. By statute, a county transportation excise tax must be

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<sup>1</sup> Absent material changes from the relevant date, we cite a statute's current version.

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

“approved by the qualified electors voting at a countywide election.”  
A.R.S. § 42-6106(A); *see also* A.R.S. § 48-5314(F).

¶4 In June 2017, the RTA adopted the Pinal County Regional Transportation Plan (the Plan), which identifies key roadway and transportation projects to be developed over the next twenty years. In the same resolution (the June Resolution), the RTA asked the County to schedule a special election on the Plan and 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 . . . needed to fund the Plan.” The June Resolution further stated that the tax rate upon retail sales would be a “variable or modified rate,” in that the tax would apply only to the first \$10,000 in gross income from the sale of any single item of tangible personal property, effectively capping the tax at \$50 per item.

¶5 Before the election, and as directed by A.R.S. § 48-5314(C), the Board printed a publicity pamphlet describing Prop 416 and Prop 417 (the Pamphlet). The RTA “ratified, confirmed, approved and adopted [the Pamphlet] in the form presented” in October 2017 (the October Resolution). The Pamphlet detailed the planned transportation projects and explained that they could be completed only if voters approved the excise tax in Prop 417. As relevant here, the Pamphlet further explained:

If Proposition 417 is approved by the voters, the Transportation Excise Tax would . . . be assessed on the same business transactions that are subject to the State of Arizona transaction privilege (sales) tax [(TPT)], but at a rate equal to 10% of the State tax . . . . [T]he Transportation Excise Tax rate will generally be 0.5% or 1 cent on each \$2 o[f] State taxable items.

The Pamphlet identified each of the sixteen business classifications subject to the TPT and detailed the rates at which the transportation excise tax would apply to each class.<sup>2</sup> *See* A.R.S. §§ 42-5061 to -5076. With respect to

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<sup>2</sup> The TPT is a tax “on the privilege or right to engage in an occupation or business in the State of Arizona” and applies at varying rates to “the gross receipts of the seller’s business activities.” *CCI Europe, Inc. v. ADOR*, 237 Ariz. 50, 52, ¶ 9 (App. 2015) (citations omitted); *see also* A.R.S. § 42-5008(A) (levying a privilege tax “for the purpose of raising public money” that is “measured by the amount or volume of business transacted by

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

the retail sales classification, the Pamphlet described the same two-tiered structure outlined in the June Resolution. The Pamphlet estimated that revenues from the tax across all business classifications would total approximately \$640 million over twenty years – the precise amount needed to fund the projects detailed within the Plan.

¶6 The question ultimately posed to the voters was stated in both the Pamphlet and official ballot:

**PROPOSITION 417**  
**(Relating to County Transportation Excise (Sales) Taxes)**

Do you favor the levy of a transportation excise (sales) tax including at a rate equal to one-half percent (0.5%) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail; provided that such rate shall become a variable or modified rate such that when applied in any case when the gross income from the sale of a single item of tangible personal property exceeds ten thousand dollars (\$10,000), the one-half percent (0.5%) tax rate shall apply to the first ten thousand dollars (\$10,000), and above ten thousand dollars (\$10,000), the measure of tax shall be a rate of zero percent (0.0%), in Pinal County for twenty (20) years to provide funding for the transportation elements contained in the Pinal Regional Transportation Plan?

Do you favor the levy of a transaction privilege (sales) tax for regional transportation purposes, including at a variable or modified rate, in Pinal County?

YES \_\_\_\_\_

NO \_\_\_\_\_

(A “YES” vote has the effect of imposing a transaction privilege (sales) tax in Pinal County, including at a variable or modified rate, for twenty (20) years to provide funding for the

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persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by [Arizona statutes]).

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

transportation projects contained in the Regional Transportation Plan.)

(A “NO” vote has the effect of rejecting the transaction privilege (sales) tax for transportation purposes in Pinal County.)

In November 2017, Pinal County voters approved both the regional transportation plan set out in Prop 416 and the transportation excise tax set out in Prop 417.

¶7 The following month Vangilder filed a complaint to enjoin ADOR, the County, and the RTA from collecting and/or enforcing the tax, alleging it was invalid and unconstitutional.<sup>3</sup> The tax court resolved competing motions for summary judgment in Vangilder’s favor but denied his request for an award of attorneys’ fees under the private attorney general doctrine. The parties timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

## DISCUSSION

### I. The Prop 417 Tax is Valid.

¶8 Resolution of this appeal requires us to determine the scope and legality of the tax enacted by the voters via Prop 417. The interpretation and application of a voter-approved measure present questions of law we review *de novo*. See *Ariz. Citizens Clean Elections Comm’n v. Brain*, 234 Ariz. 322, 325, ¶ 11 (2014).

#### A. The Authorizing Resolution Does Not Invalidate the Tax.

¶9 Vangilder first contends the tax is invalid because the June Resolution described a tax on “the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail.” See *supra* ¶ 4. Thus, Vangilder

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<sup>3</sup> Like the tax court, we decline to consider whether Harold Vangilder, as a consumer of goods and services, has standing to challenge the validity of the tax, because the other plaintiffs who joined him in filing the complaint operate businesses clearly subject to the TPT. See *Karbal v. ADOR*, 215 Ariz. 114, 116-18, ¶¶ 11, 16-17 (App. 2007) (holding a customer lacked standing to challenge an excise tax because “[t]he legal incidence of the transaction privilege tax is on the seller”) (citing *J. C. Penney Co. v. ADOR*, 125 Ariz. 469, 472 (App. 1980)).

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

contends “voters were asked to approve a tax that applied *solely* to retail sales” in violation of A.R.S. § 42-6106(B), which requires the county transportation excise tax be imposed upon all TPT classifications. We disagree with both the factual premise and the legal import of Vangilder’s argument.

¶11 First, A.R.S. § 48-5314(A) required the RTA to adopt a twenty-year regional transportation plan and then “[r]equest by resolution certified to the county board of supervisors that the issue of levying a transportation excise tax . . . be submitted to the qualified electors at a countywide special election or placed on the ballot at a countywide general election.” The RTA is not authorized to enact a tax and the June Resolution did not purport to do so. Nor did the June Resolution ask the voters to enact the tax. It simply asked the Board to put a transportation excise tax on the County ballot. Thus, “[t]he most that can be said for” the June Resolution is that it “demand[ed] an election . . . at which the electorate would be asked to decide whether [the tax should be enacted].” *See Saggio v. Connelly*, 147 Ariz. 240, 241 (1985).

¶11 Second, although Vangilder relies on *Braden v. Yuma County Board of Supervisors*, 161 Ariz. 199 (App. 1989), to argue the RTA’s failure to properly describe the tax in the June Resolution invalidates the tax, *Braden* does not apply. There, a county board of supervisors attempted to levy an assessment to build a bridge within a flood control improvement district. *Id.* at 200. The relevant statute “required as a prerequisite” that the board first adopt a resolution specifying its intention to undertake a flood control project before imposing an assessment for the project. *Id.* at 203-04. The board had not enacted such a resolution before it approved the bridge and the related assessment, and thus, had not given the required notice of its intentions. *Id.* at 204. Accordingly, the *Braden* court invalidated the assessment because the board’s failure to comply with the statute did not “afford[] the landowner an opportunity to be heard on the necessity and wisdom of the proposed improvement.” *Id.*; *see also Henningson, Durham & Richardson v. Prochnow*, 13 Ariz. App. 411, 416 (1970). By contrast, nothing in the statutory scheme at issue here, governing passage of a county transportation excise tax, suggests the RTA’s resolution was required to or intended to provide the public with notice of the details of the proposed tax. *See generally* A.R.S. § 48-5314(A)(2) (describing the process for referring a transportation excise tax to the voters).

¶12 In fact, A.R.S. § 48-5314(A)(2) only required the authorizing resolution to be sent to the Board — not that it be posted, distributed to the voters, or otherwise publicized. Unlike the statute in *Braden*, the statute

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

applicable to the county transportation excise tax contemplates that the full and final details of a proposed tax – including “the rate of the transportation excise tax” – will be contained within a publicity pamphlet that is mailed to voters before the election. A.R.S. § 48-5314(C). The Board did just that here; the Pamphlet containing the details of the tax, along with the form of the proposal to be stated on the ballot, gave the public proper notice of the particulars of the Prop 417 tax, and governs the scope and content of the tax.

**B. The Prop 417 Tax Applies to All TPT Classifications.**

¶13 Vangilder and ADOR argue that the tax is invalid because they read Prop 417 to describe a tax that applies only to retail sales in violation of A.R.S. § 42-6106(B)(1). We again disagree.

¶14 When construing a voter-approved measure, “[o]ur primary objective . . . is to place a reasonable interpretation on ‘the intent of the electorate that adopted it.’” *State v. Estrada*, 201 Ariz. 247, 250, ¶ 15 (2001) (quoting *Foster v. Irwin*, 196 Ariz. 230, 231, ¶ 3 (2000)). We begin by examining the plain language of the measure, *see Am. Bus Lines, Inc. v. Ariz. Corp. Comm’n*, 129 Ariz. 595, 598 (1981), “giv[ing] the words used ‘their natural, obvious and ordinary meaning’ unless the context suggests otherwise,” *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 537, ¶ 9 (2017) (quoting *Brewer v. Burns*, 222 Ariz. 234, 239, ¶ 26 (2009)); *see also* A.R.S. § 1-213 (“Words and phrases shall be construed according to the common and approved use of the language.”). If the measure is subject to only one reasonable meaning, “[w]e apply the provision as written.” *Kiley*, 242 Ariz. at 537, ¶ 9 (citing *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 470, ¶ 10 (2009)).

¶15 The Prop 417 Pamphlet and ballot asked Pinal County voters:

Do you favor the levy of a transportation excise (sales) tax **including at a rate** equal to one-half percent (0.5%) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail; provided that such rate shall become a variable or modified rate such that when applied in any case when the gross income from the sale of a single item of tangible personal property exceeds ten thousand dollars (\$10,000), the one-half percent (0.5%) tax rate shall apply to the first ten thousand dollars (\$10,000), and above ten thousand dollars (\$10,000), the measure of tax shall be a rate

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

of zero percent (0.0%), in Pinal County for twenty (20) years to provide funding for the transportation elements contained in the Pinal Regional Transportation Plan?

Do you favor the levy of a transaction privilege (sales) tax for regional transportation purposes, including at a variable or modified rate, in Pinal County?

(Emphasis added.). Voters were then advised: “A ‘YES’ vote has the effect of imposing a transaction privilege (sales) tax in Pinal County, including at a variable or modified rate, for twenty (20) years to provide funding for the transportation projects contained in the Regional Transportation Plan.”

¶16 Vangilder argues the phrase “including at a rate,” emphasized in the quoted language above, established and limited the scope of the tax to “person[s] engaging or continuing in the business of selling tangible personal property at retail” only. Under this interpretation, however, the descriptive phrase “including at a rate” could be deleted entirely from the proposal, such that the voters were said to be asked: “Do you favor the levy of a transportation excise (sales) tax [] 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?” While Vangilder’s interpretation is not entirely untenable, it renders the phrase “including at a rate” meaningless, in contravention to the general rule of construction that “each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial.” *Adams v. Bolin*, 74 Ariz. 269, 276 (1952) (citing *City of Phx. v. Yates*, 69 Ariz. 68, 72 (1949)).

¶17 The entire sentence can be given meaning if we read the question as: “Do you favor the levy of a transportation privilege (sales) tax . . . in Pinal County?” Under this interpretation, the phrase that begins with the word “including” and continues through the explanation of the tiered-rate structure for the retail sales classification provides one example of what the proposed tax would include. This interpretation aligns with the phrasing of the ballot question and the Pamphlet’s explanation of the effect of a “YES” vote – both of which use commas to set off the phrase “including at a variable or modified rate [as applied to retail sales].” See *supra* ¶ 15. Adding a comma before the word “including” in the body of the initial long paragraph on the ballot would more clearly demonstrate an intent to set that phrase apart, but we have long held “that strict rules of technical grammar will not be resorted to to defeat the plain purpose of the statute.” *Adams*, 74 Ariz. at 276 (citing *Mahoney v. Maricopa Cty.*, 49 Ariz.

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

479, 492 (1937)); *cf. City of Phx. v. Butler*, 110 Ariz. 160, 162 (1973) (explaining that the average voter may still be able to understand the intended meaning of words even if “[t]he choice of words to be used on a ballot might be clearer”).

¶18 Reading all portions of the initiative together, *cf. Indus. Comm’n v. C & D Pipeline, Inc.*, 125 Ariz. 64, 67-68 (App. 1979) (“[I]t is a fundamental principle of statutory construction that a statute should be considered as a whole.”) (citations omitted), there is but one reasonable interpretation of Prop 417 as it appeared on the ballot. We thus conclude that “including” modifies “transportation excise (sales) tax,” and the remainder of the phrase describes the retail-sales component of a broader tax.

¶19 Vangilder correctly observes the ballot did not identify any of the other fifteen business classifications to which the tax would apply. But generally applicable tax rates — that is, those not variable or modified — are not required to be specified on the ballot itself. *See* A.R.S. § 48-5314 (detailing ballot requirements for a regional transportation excise tax). And, pursuant to statute, a “transportation excise (sales) tax” is a tax that applies across all TPT classifications. *See* A.R.S. § 42-6106(B) (describing the conditions under which the transportation excise tax “shall be levied and collected”).

¶20 Additionally, the Pamphlet the Board sent to voters before the election clearly advised that the “transportation excise tax” would “be assessed on the same business transactions that are subject to the State of Arizona transaction privilege (sales) tax.” The Pamphlet specifically identified each of the business classifications subject to the TPT and then specified the rate that would apply to each classification, including the tiered-rate structure proposed for retail sales. Thus, even if the scope of the tax was not clear from the ballot alone, secondary principles of construction support the conclusion that the tax was to apply to all business classifications. *See Jett v. City of Tucson*, 180 Ariz. 115, 119-20 (1994) (recognizing the value of “a publicity pamphlet to apprise the voters of the purpose and intent behind the [ballot proposition]” in ascertaining its intended effect); *accord Calik v. Kongable*, 195 Ariz. 496, 500, ¶ 16 (1999); *Laos v. Arnold*, 141 Ariz. 46, 48 (1984).

¶21 For these reasons, we reject Vangilder’s suggestion that construing the proposition to apply to TPT classifications other than retail sales would extend the tax to “something not specifically covered by the language” of the proposition, *Corp. Comm’n v. Equitable Life Assurance Soc’y*

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

of U.S., 73 Ariz. 171, 178 (1951), and “gather new objects of taxation by strained construction or implication,” *Ariz. State Tax. Comm’n v. Staggs Realty Corp.*, 85 Ariz. 294, 297 (1959). There is nothing strained in the application of the ordinary meaning of the word “including” to signal that the description of the retail-sales component that followed was merely part of a non-exhaustive list of business classifications to which the proposed tax would apply. See A.R.S. § 1-215(14) (“‘Includes’ or ‘including’ means not limited to and is not a term of exclusion.”); *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (“[T]he term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.”); accord *United States v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005); and *P.R. Maritime Shipping Auth. v. Interstate Commerce Comm’n*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981).

¶22 “[T]he courts will not strain, stretch and struggle to uncover hidden taxable items,” *State Tax Comm’n v. Miami Copper Co.*, 74 Ariz. 234, 243 (1952) (citing *Alvord v. State Tax Comm’n*, 69 Ariz. 287, 292 (1950)), but such efforts are not required here. When considered as a whole, Prop 417 can only be reasonably read to have proposed a transportation excise tax across all TPT classifications, in accordance with A.R.S. § 42-6106(B).

**C. The Tiered-Rate Structure for Retail Sales is a Permissible “Modified Rate” Within the Meaning of A.R.S. § 42-6106(C).**

¶23 Vangilder and ADOR argue the Prop 417 tax’s tiered-rate structure for retail sales is not a permissible “variable or modified rate” within the meaning of A.R.S. § 42-6106(C). That section directs ADOR to “collect the tax at a variable rate if the variable rate is specified in the ballot proposition [and] at a modified rate if approved by a majority of the qualified electors voting.” *Id.*

¶24 Vangilder contends that a modified rate is one that changes an existing rate, but he cites no authority supporting this contention. Because the term “modified rate” appears nowhere else in Arizona’s tax code, we will apply the “natural, obvious, and ordinary meaning as understood and used by the people.” *Circle K Stores, Inc. v. Apache Cty.*, 199 Ariz. 402, 406, ¶ 11 (App. 2001) (citing *Airport Props. v. Maricopa Cty.*, 195 Ariz. 89, 99, ¶ 35 (App. 1999)). “[R]eference to established, respected dictionaries is appropriate in determining the commonly accepted meaning of words.” *Sierra Tucson, Inc. v. Pima Cty.*, 178 Ariz. 215, 220 (App. 1994) (citing *State v. Wise*, 137 Ariz. 468, 470 (1983)).

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

¶25 The *New Oxford American Dictionary* 1124 (3d ed. 2010) defines “modified” as the adjective form of the verb “modify,” to “make partial or minor changes to (something), typically so as to improve it or to make it less extreme.” *Black’s Law Dictionary* (11th ed. 2019) likewise defines modify as “[t]o make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness[;] . . . [t]o make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate.” These definitions are broad in scope and, as applied to “rate,” would include almost any type of change to the rate but particularly one that, as here, lessens its burden upon the taxpayer.

¶26 Further support for a broad construction of the term “modified” can be found in the legislative history of the transportation excise tax scheme. When the legislature chose to allow the creation of regional transportation authorities, it acknowledged that counties the size of Pinal County “possess unique characteristics,” including “[u]nique transportation related funding needs generated by the area’s land use, topography and environmental quality . . . unmet by any existing transportation-specific funding mechanisms.” 1990 Ariz. Sess. Laws, ch. 380, § 1 (2nd Reg. Sess.). The legislature then determined these needs could be met only through “certain unique strategies,” *id.*, including imposition of an excise tax at a variable or modified rate, *see* A.R.S. § 42-6106(C) – an option not specified for any other type of county excise tax, *see* A.R.S. §§ 42-6103 (general excise tax), -6105 (transportation excise tax in counties with a population of 1.2 million persons or more), -6107 (transportation excise tax for roads), -6108 (hotel tax), -6109 (jail facilities excise tax), -6110 (electricity tax), -6111 (capital projects tax), -6112 (judgment bonds tax).

¶27 Vangilder and ADOR nonetheless suggest that the Prop 417 tax’s tiered-rate structure is invalid because the County lacks the power “to modify the legislatively defined tax base in any particular classification.” *See Maricopa Cty. v. S. Pac. Co.*, 63 Ariz. 342, 347 (1945) (“The authority to levy a tax must be derived from a statutory grant of power.”). They argue a county that chooses to enact an excise tax must impose the same tax rate on all income earned within any particular business classification, and the decision to impose a zero percent rate upon retail sales of a single item of personal property over \$10,000 effectively created an impermissible tax classification. They cite no authority to support their assertion, and nothing in the plain language of A.R.S. § 42-6106 or the legislative history supports such a limitation.<sup>4</sup> In fact, as ADOR acknowledges, the law governing

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<sup>4</sup> We are aware the legislature considered but did not pass a bill that would have expressly approved the tiered-rate structure Pinal County

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

Arizona's TPT contains countless deductions, exemptions, and exclusions, and none of them are treated as creating a new TPT classification. Nor is the use of the singular term "rate" within A.R.S. § 42-6106 (directing the transportation excise tax be collected "[a]t a rate") determinative; when interpreting statutes, "[w]ords in the singular number include the plural" and vice versa. A.R.S. § 1-214(B).

¶28 ADOR next argues that the tax rate on income above \$10,000 from the retail sale of any one item is effectively zero, and "is not a tax at all, because zero is not a rate." Thus, ADOR contends the Prop 417 tax violates the statutory mandate that a transportation excise tax "*shall be levied and collected*" across all business classifications. A.R.S. § 42-6106(B) (emphasis added). ADOR again cites no authority to support this assertion. Moreover, its position is inconsistent with the legislature's decision to impose a zero percent tax rate upon the commercial lease classification — a tax that has been in effect for more than twenty years. *See* 1997 Ariz. Sess. Laws, ch. 150, § 75 (1st Reg. Sess.) (adopting a zero percent rate for commercial lease classification, now codified at A.R.S. § 42-5010(A)(4)). If the legislature sought to prohibit the voters from approving certain types or levels of modification to the county transportation excise tax rate, the legislature could and should have done so.

¶29 Finally, ADOR, which collects all TPTs imposed by the cities, towns and counties in Arizona, argues the tiered-rate structure is confusing and will create "administrative chaos" in implementation. ADOR's fear of imminent havoc is unpersuasive. More than twenty Arizona cities and towns, including Phoenix and Glendale, have adopted the Model City Tax Code, which allows for an identical tiered-rate structure for retail sales.<sup>5</sup> *See*

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voters passed. "[L]egislative history and historical background of *an enacted statute* provides guidance in ascertaining the intent of the legislature[, but] this principal has no application to *proposed, but unenacted, legislation.*" *City of Flagstaff v. Mangum*, 164 Ariz. 395, 401 (1990) (citing *Dupnik v. MacDougall*, 136 Ariz. 39, 42 (1983), and *State v. Barnard*, 126 Ariz. 110, 112 (App. 1980)) (emphasis in original). Therefore, "[w]e will not speculate on the intent of the legislature in failing or refusing to adopt clarifying amendments." *Id.*

<sup>5</sup> The Arizona cities that have adopted a tiered-rate structure for retail sales include: Apache Junction, Avondale, Benson, Casa Grande, Coolidge, Douglas, Eagar, Eloy, Glendale, Globe, Goodyear, Page, Phoenix, Pinetop-Lakeside, Quartzsite, Safford, San Luis, Superior, Thatcher, Tolleson, Wickenburg, Willcox, and Yuma. *See City Profile, Model City Tax Code,*

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

Ariz. Model City Tax Code § 460(d), [http://www.modelcitytaxcode.az.gov/articles/S4\\_460.htm](http://www.modelcitytaxcode.az.gov/articles/S4_460.htm). Moreover, a constitutional tax must be applied as written regardless of the difficulties ADOR may encounter in its administration. See *ADOR v. Ormond Builders, Inc.*, 216 Ariz. 379, 389, ¶¶ 44-45 (App. 2007).

¶30 Accordingly, we conclude that the tiered rate within the transportation excise tax approved via Prop 417 does not violate A.R.S. § 42-6106(C) and does not render the tax invalid.<sup>6</sup>

**D. The Modified Rate Does Not Violate the U.S. or Arizona Constitutions.**

¶31 Vangilder argues the tiered-rate structure for retail sales in the Prop 417 tax violates constitutional equal protection guarantees and constitutes an illegal special law. We review constitutional challenges *de novo*. See *Gallardo v. State*, 236 Ariz. 84, 87, ¶ 8 (2014). In doing so, we presume a measure is constitutional unless proven otherwise beyond a reasonable doubt. See *J. C. Penney*, 125 Ariz. at 472 (citing *Shaw v. State*, 8 Ariz. App. 447, 452 (1968)).

¶32 The U.S. and Arizona Constitutions guarantee equal protection of the law. See U.S. Const. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); Ariz. Const. art. 2, § 13 (“No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.”). “[F]or all practical purposes,” the equal protection analysis is the same under the Arizona and U.S. Constitutions. *Valley Nat’l Bank of Phx. v. Glover*, 62 Ariz. 538, 554 (1945).

¶33 A tax statute is not unconstitutional simply because it does not impose an identical burden on all taxpayers; “if there is a rational basis for the classification, there is no constitutional infirmity.” *State v. Levy’s*, 119 Ariz. 191, 192 (1978). “In determining whether a statute meets the

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(Nov. 18, 2019), [https://www.modelcitytaxcode.az.gov/City\\_profiles/City\\_profiles.htm](https://www.modelcitytaxcode.az.gov/City_profiles/City_profiles.htm).

<sup>6</sup> Because we conclude the tiered-rate structure for retail sales is a modified rate authorized within A.R.S. § 42-6106(C), we need not and do not address the parties’ arguments regarding the meaning of “variable rate.”

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

rational basis standard, [courts] must first ascertain whether the challenged legislation has a legitimate purpose and then determine if it is reasonable to believe that the classification will promote that purpose.” *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 566 (1990) (citations omitted). Rational basis review “is especially deferential in the context of classifications made by complex tax laws.” *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); accord *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¶34 Vangilder asserts the County proposed the tiered-rate structure for retail sales at the urging of businesses that sell high-priced retail items, such as cars, farming equipment, and recreational vehicles, who feared the transportation excise tax would drive buyers to neighboring counties to make their high-dollar purchases.<sup>7</sup> The County, however, has a legitimate interest in encouraging sales and other economic activity within its jurisdiction. See *State ex rel. ADOR v. Dillon*, 170 Ariz. 560, 569 (App. 1991) (recognizing a “legitimate governmental interest in raising revenues”); cf. *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 560 (1978) (“[A] government may validly ‘foster what it conceives to be a beneficent enterprise.’”) (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 512 (1937)). A partial reduction in the tax rate upon certain business transactions is a rational way to encourage sales and promote economic activity. See *Levy’s*, 119 Ariz. at 191-92 (finding no equal protection violation in a statute exempting TPT upon sales under \$1,000 to Mexican residents with proper documentation within thirty miles of the Mexican border where its purpose was to “bring back business to the areas”); see also *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581-82 (1977) (noting a use tax “eliminat[es] the incentive to make major purchases in [s]tates with lower sales taxes”).

¶35 For example, without the tiered-rate structure, an Apache Junction resident in the market for a \$500,000 motor home could avoid paying \$2,500 in Pinal County TPT by driving a short distance to buy the same motor home in the Phoenix metropolitan area. The County could reasonably believe that this resident is unlikely to spend the time, gas, and

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<sup>7</sup> Vangilder asserts that the Prop 417 tax grants consumers purchasing single high-dollar items a benefit not available to those buying lower-cost items. But “[t]he legal incidence of the transaction privilege tax is on the seller.” *J. C. Penney*, 125 Ariz. at 472. The retailer may choose to pass the cost on to consumers, see *Ariz. State Tax Comm’n v. Garrett Corp.*, 79 Ariz. 389, 393 (1955), but that choice confers no legal rights on the consumer, *Karbal*, 215 Ariz. at 118, ¶ 18. Therefore, we only consider the application of the Prop 417 tax on retailers.

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

energy to travel out-of-county, however, if the tax applies only to the first \$10,000 of the sale and totals only \$50. In addition, retailers who lose high-dollar sales to neighboring counties might decide to relocate outside the County, causing a further decrease in revenue. Moreover, the tiered-rate tax does not differentiate between the locations of business or types of tangible property offered for sale; it applies equally to all retailers. *See Gila Meat Co. v. State*, 35 Ariz. 194, 202 (1929) (invalidating tax upon slaughterhouses that varied by location because the tax was not equal and uniform). Accordingly, we conclude the tiered-rate structure for retail sales adopted within Prop 417 is rationally related to a legitimate government purpose and does not violate equal protection.<sup>8</sup>

¶36 The Arizona Constitution also prohibits enactment of any “local or special laws [regarding the] . . . [a]ssessment and collection of taxes.” Ariz. Const. art. 4, pt. 2, § 9. A statute is not a special law if: “(1) there is a rational basis for the classification; (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the class is flexible, allowing members to move into and out of the class.” *State Comp. Fund v. Symington*, 174 Ariz. 188, 193 (1993) (citing *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 148-49 (1990), and *Ariz. Downs v. Ariz. Horsemen’s Found.*, 130 Ariz. 550, 557-58 (1981)). “If one of these three requirements is not met, the legislation is invalid.” *Id.* (citing *Republic Inv.*, 166 Ariz. at 149).

¶37 The first prong of the special-law test “is identical to that required for equal protection analysis.” *Gallardo*, 236 Ariz. at 88, ¶ 12. We have already determined that the County had a rational basis to treat sales of high-priced retail items differently. *See supra* ¶ 34. The Arizona Constitution also requires the classification be legitimate and flexible. *Republic Inv.*, 166 Ariz. at 148, 150. Vangilder concedes these points through his silence. Moreover, the tiered-rate structure applies equally to all retailers selling single items of tangible personal property over \$10,000, and

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<sup>8</sup> Although Vangilder contends the tiered-rate structure was in fact proposed “to avoid political opposition from powerful businesses,” he fails to meet his burden, as “the one attacking tax legislation[,] to negate every conceivable basis which supports it.” *Tucson Newspapers, Inc. v. City of Tucson*, 172 Ariz. 378, 384 (App. 1992) (quotation omitted).

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

there is no restriction on who can join or leave the class.<sup>9</sup> Therefore, Prop 417 is not an unconstitutional special law.

**II. Vangilder is Not Entitled to an Award of Attorneys' Fees.**

¶38 In his cross-appeal, Vangilder argues the tax court abused its discretion in denying his request for an award of attorneys' fees under the private attorney general doctrine. *See Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 353, ¶ 34 (App. 2013) (explaining the private attorney general doctrine permits a discretionary award of fees to a party that has vindicated an important public right) (citing *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989)). Because we reverse the court's order granting relief to Vangilder, he is not eligible for an award of fees. Therefore, the order denying fees is affirmed.

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<sup>9</sup> Vangilder raises several arguments for the first time in his reply brief that need not be considered. *See Deutsche Bank Nat'l Tr. Co. v. Pheasant Grove L.L.C.*, 245 Ariz. 325, 330, ¶ 17 n.5 (App. 2018) (citing *Tucson Estates Prop. Owners Ass'n v. McGovern*, 239 Ariz. 52, 55, ¶ 11 n.4 (App. 2016)). Nonetheless, he cites no authority to support his suggestion that we should compare the effects of the tax on retailers to its effects on businesses that are not similarly situated — i.e., those subject to tax under a different classification. Nor are we persuaded that the \$10,000 single-item cap is arbitrary. As detailed in ¶ 35, the \$10,000 limit is designed to result in a \$50 maximum tax — an amount deemed *de minimis* enough to discourage purchasers of high-dollar items from leaving the County to avoid the tax. Finally, that the County could have crafted the excise tax to encompass other high-dollar transactions, such as those involving multiple items totaling \$10,000, to a similar end, is immaterial; the County is not required to choose the most effective means of achieving its goals so long as the means it chooses has some conceivable rational basis. *See State v. Hammonds*, 192 Ariz. 528, 532, ¶ 15 (App. 1998) (citing *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 491 (1977)).

VANGILDER, et al. v. PINAL COUNTY, et al.  
Opinion of the Court

CONCLUSION

¶39 The tax court's order invalidating the Prop 417 tax is reversed, and its order denying Vangilder's request for attorneys' fees and costs is affirmed.



AMY M. WOOD • Clerk of the Court  
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