

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

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**IN THE SUPERIOR COURT OF ARIZONA
IN THE ARIZONA TAX COURT**

HAROLD VANGILDER; DAN NEIDIG; and
ARIZONA RESTAURANT ASSOCIATION

Plaintiffs,

vs.

ARIZONA DEPARTMENT OF REVENUE; PINAL
COUNTY; PINAL COUNTY REGIONAL
TRANSPORTATION AUTHORITY

Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the legality of a county transportation excise tax measure adopted as Proposition 417, which purports to levy a tax pursuant to A.R.S. § 42-6106, but which fails to specify what exactly will be taxed, which results in substantial confusion, necessitating declaratory relief. The tax also exceeds the County's authority under A.R.S. § 42-6106 by creating a new tax classification instead of a variable rate, and violates the Equal Protection Clause by taxing transactions below an arbitrary threshold amount but not above that amount. Finally,

the tax is an unconstitutional special law, because it taxes transactions below a specific dollar amount without a rational justification for the difference in treatment.

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff HAROLD VANGILDER is a resident and taxpayer of Pinal County, where he is responsible for paying property, sales, and other taxes. Plaintiff VANGILDER sustained or will sustain pecuniary loss as a consequence of the Proposition 417 tax and will bear a share of the burden for paying the Proposition 417 tax challenged here. .

3. Plaintiff DAN NEIDIG is a resident and taxpayer of Pinal County, where he is responsible for paying property, sales, and other taxes. Plaintiff NEIDIG is also the owner of On Sight Shooting, a sole-proprietorship retail business located in Pinal County, which regularly sells tangible personal property at prices below \$10,000. He and his business will sustain pecuniary loss as a consequence of the Proposition 417 tax and will bear a share of the burden for paying the Proposition 417 tax challenged here.

4. Plaintiff ARIZONA RESTAURANT ASSOCIATION is a trade association comprised of restaurant businesses that engage in business in, *inter alia*, Pima County. Plaintiff ARIZONA RESTAURANT ASSOCIATION is informed and believes and on that basis alleges that, due to the nature of their business, its members are liable to collect and remit the tax created by Proposition 417 and will sustain pecuniary loss as a consequence of the Proposition 417 tax.

5. Defendant ARIZONA DEPARTMENT OF REVENUE is a state agency responsible for collecting the Proposition 417 tax challenged here. Plaintiffs are informed and believe, and on that basis allege, the Defendant ARIZONA DEPARTMENT OF REVENUE will expend tax dollars executing its statutorily prescribed duty to collect and administer the Proposition 417 tax.

6. Defendant PINAL COUNTY is a political subdivision of the state of Arizona. Plaintiffs are informed and believe, and on that basis allege, the Defendant PINAL COUNTY will expend tax dollars executing its statutorily prescribed duty to collect and administer the Proposition 417 tax.

7. Defendant PINAL COUNTY REGIONAL TRANSPORTATION AUTHORITY is a special taxing district and a political subdivision of the state of Arizona established by Pinal County pursuant to A.R.S. § 48-5301 *et seq.* and is responsible for levying the Proposition 417 tax challenged here. Plaintiffs are informed and believe, and on that basis allege, the Defendant PINAL COUNTY REGIONAL TRANSPORTATION AUTHORITY will expend tax dollars executing its statutorily prescribed duty to collect and administer the Proposition 417 tax and will expend moneys or will oversee the expenditure of moneys raised on account of the Proposition 417 tax.

8. Jurisdiction is proper pursuant to Ariz. Const. art. VI, § 14, and A.R.S. §§ 12-163(B); 12-1831; 12-1801; and 12-124.

FACTS COMMON TO ALL CLAIMS

9. On or about June 5, 2017, the Pinal County Board of Supervisors passed Resolution No. 2017-01, attached hereto as Exhibit A, to place on the ballot an initiative, known as Proposition 417, to impose a transportation excise tax within the county. The Board did so in reliance on the authority granted to the County by A.R.S. § 42-6106.

10. The text of Resolution No. 2017-01 authorizes a “countywide special election....on the issue of levying a transportation excise tax at a rate equal to one-half percent (0.005%) 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 (0.005%) 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%), pursuant to [A.R.S. § 42-6106, needed to fund the Plan.” (Exhibit A at 2.)

11.. A.R.S. § 42-6106 authorizes counties to impose a county transportation excise tax. That statute provides that the tax “shall be levied and collected” at the rates specified in the statute, but subsection (C) of that statute provides that the County “shall collect the tax at a variable rate if the variable rate is specified in the ballot proposition.”

12. In October 2017, Defendant PINAL COUNTY REGIONAL TRANSPORTATION AUTHORITY distributed to Pinal County voters a voter information pamphlet, attached hereto as Exhibit B, which stated, inter alia, that “If Proposition 417 is approved ... the Transportation Excise Tax would be levied and collected:

- At a rate of ten percent of the transaction privilege tax rate...to each person engaging or continuing in the County in a business taxed under A.R.S. Title 42, Chapter 5, Article 1. Such rate would be applied generally as follows:

- o 1/2 of 1% for the following business classifications identified in A.R.S. Title 42, Chapter 5, Article 2:

- Transporting classification;
- Utilities classification;
- Telecommunications classification;
- Pipeline classification;
- Private car line classification;
- Publication classification;
- Job printing classification;
- Prime contracting classification;
- Amusement classification;
- Restaurant classification;
- Personal property rental classification;
- Retail classification and amounts equal to retail transaction privilege tax due pursuant to A.R.S. Section 42-5008.01;

- o 11/20 of 1% for the following business classifications ... :

- Transient lodging classification;

- Online lodging marketplace classification;
- o 5/16 of 1% for the mining classification...;
- At a rate of ten percent of the rate prescribed by A.R.S. Section 42-5352(A), relating to the jet fuel excise tax; and
- On the use or consumption of electricity or natural gas by retail electric or natural gas customers in the County who are subject to the use tax under A.R.S. Section 42-5155 ...”

Exhibit B at 14-15.

13. The text of Proposition 417 itself states that it “lev[ies] ... 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[.]”

14. Thus the voter information pamphlet is inconsistent with the text of Proposition 417 and Resolution 2017-01 (authorizing the election), in that the pamphlet states that the tax will be levied on a number of different classifications, while the text of the proposition and Resolution 2017-01 state that it will be collected only on the retail sale of tangible personal property.

15. The voter information pamphlet also provided voters with a projection of estimated revenues from the tax should voters approve Proposition 417. *See* Exhibit A at 16. This projection was based on a “revenue forecast” provided to the County by Elliott Pollack & Company in 2017. The revenue forecast and the voter information pamphlet state that Defendant PINAL COUNTY

REGIONAL TRANSPORTATION AUTHORITY estimates the revenues from the Proposition 417 tax to be \$640,000,000—\$17,105,074 in 2018, and will be \$35,392,642 in 2019, etc. *Id.* at 15-16.

16. Plaintiffs are informed and believe, and on that basis allege that these estimates are based on the assumption that the Defendants will collect the tax on all classifications listed in the voter information pamphlet, and that these numbers do *not* reflect anticipated revenues in the event that the tax is imposed only on the retail sale of tangible personal property as authorized by the proposition and Resolution 2017-01.

COUNT ONE: DECLARATORY RELIEF

A.R.S. § 12-1831

17. Plaintiffs incorporate the allegations in paragraphs 1–16 above.

18. Real and substantial controversy exists over what activities are subject to the Proposition 417 tax.

19. The ballot pamphlet states that the tax shall be collected on tax classifications listed on pages 13–14 of the pamphlet, and this language is identical to the language that appears in A.R.S. § 42-6106(B). Also, the calculations provided in the “revenue forecast” and provided to voters on page 16 of the pamphlet are based on the assumption that all those classifications will be taxed. However, the language that appeared on the actual ballot presented to voters states that the tax will be imposed only on the retail sale of tangible personal property. That language also does not state whether restaurants selling food to customers qualifies as the retail sale of tangible personal property.

20. Plaintiffs are therefore now harmed and, unless enjoined or otherwise prohibited by this Court, will continue to be harmed by Defendants’ enforcement of Proposition 417 and collection of the transportation excise tax, because they face substantial uncertainty as to what activities are subject to the tax, and whether they are required to charge their customers tax. They will incur substantial costs to set

up systems to ensure accurate collection of the tax, and therefore require guidance that only declaratory relief can provide about what transactions are subject to the transportation excise tax. Plaintiffs are informed and believe and on that basis allege that they will also suffer loss of sales and business goodwill if there is uncertainty about what transactions are subject to the transportation excise tax.

21. Plaintiffs have no plain, speedy, and adequate remedy at law. Accordingly, Plaintiffs are entitled to declaratory relief detailing the precise classifications, activities, etc., that are subject to the Proposition 417 tax.

COUNT TWO: ILLEGAL *ULTRA VIRES* TAX

A.R.S. § 42-6016

22. Plaintiffs incorporate the allegations in paragraphs 1–21 above.

23. The County’s authority to level a transportation excise tax is provided by A.R.S. § 42-6106. That provision does not allow the County to adopt new classifications of taxable property or activity. Instead, it provides that the County may collect a tax at a “variable rate” if specified in the proposition and that the tax “shall be levied and collected” at the rates and upon the businesses, undertakings, and consumption of fuels specified in A.R.S. § 42-6106(B).

24. The tax proposed by Proposition 417 adopts a new classification in violation of A.R.S. § 42-6106, which provides that a transportation excise tax shall be levied upon the business classifications listed in A.R.S. §§ 42-5010(A) and 42-5352(A), and on the use or consumption of electricity or natural gas by retail electric or natural gas customers in the county. Proposition 417, however, states that the tax will be levied only on the sale of tangible personal property at retail. Plaintiffs are informed and believe, and on that basis allege, that A.R.S. § 42-6106 does not allow Defendants to levy a tax solely on the sale of tangible personal property at retail. Consequently, Proposition 417 exceeds the County’s authority under A.R.S. § 42-6106.

25. The tax proposed by Proposition 417 is also not levied pursuant to a variable rate, because it provides only for a single 0.5% rate of tax on sales of personal property up to \$10,000, and then provides that there shall be no tax on transactions above that amount. This is not a variable rate. Plaintiffs are informed and believe, and on that basis allege, that A.R.S. § 42-6106 does not allow Defendants to levy a tax solely on the retail sales of tangible personal property below \$10,000. Consequently, Proposition 417 exceeds the County's authority under A.R.S. § 42-6106.

26. Unless enjoined or otherwise prohibited by this Court, Plaintiffs will be harmed by Defendants' enforcement of Proposition 417 and collection of the transportation excise tax; that tax exceeds the County's statutory authority because (1) it establishes a classification, (2) it does not establish a variable rate, and (3) purports to apply exclusively to retail transactions instead of applying to the classifications and at the amounts mandated by A.R.S. § 42-6106(B).

27. Plaintiffs have no plain, speedy, and adequate remedy at law. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief and/or a writ of prohibition preventing enforcement of the Proposition 417 tax.

COUNT THREE: EQUAL PROTECTION

ARIZ. CONST. ART. II SECT. 13

28. Plaintiffs incorporate the allegations in paragraphs 1–27 above.

29. Proposition 417 establishes a separate classification whereby a single item is taxed up to \$10,000, while any amount above that is not taxed. Items priced below \$10,000 are taxed up to their full value, even if a single sale involving multiple items below \$10,000 per item exceeds in total \$10,000. This distinction is not rationally related to any legitimate government objective.

30. In addition, Arizona's Constitution forbids the enactment or enforcement of any law granting to any individual or entity special privileges or immunities. Arizona Courts have explained that

this provision provides the same protections guaranteed by the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment forbids the government from “draw[ing] lines for the purpose of arbitrarily excluding individuals,” and particularly from granting special legislative dispensations or exemptions for the purpose of obtaining political support from the beneficiary of the legislation. *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016).

31. Plaintiffs are informed and believe, and on that basis allege that the exemption for sales of items above \$10,000 was included in Proposition 417 to exclude from taxation sales of items that exceed that value solely for the purpose of obtaining political support for Proposition 417 from business entities in Pinal County that typically sell goods for more than that price.

32. Plaintiffs have no plain, speedy, and adequate remedy at law. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief and/or a writ of prohibition preventing enforcement of the Proposition 417 tax.

COUNT FOUR: SPECIAL LAW CLAUSE

ARIZ. CONST. ART. IV, PT. 2, SECT. 19

33. Plaintiffs incorporate the allegations in paragraphs 1–32 above.

34. Article 4, part 2, section 19 of the Arizona Constitution provides, “No local or special laws shall be enacted in any of the following cases,” including “(9) Assessment and collection of taxes.”

35. Proposition 417 enacts an impermissible special law unless “(1) the classification is rationally related to a legitimate governmental objective, (2) the classification is legitimate, encompassing all members of the relevant class, and (3) the class is elastic, allowing members to move in and out of it.” *Town of Gilbert v. Maricopa Cnty.*, 213 Ariz. 241, 246 ¶ 14, 141 P.3d 416, 421 (App. 2006).

36. In order to secure the stated governmental objectives of Proposition 417—specifically the effectuation of the Regional Transportation Plan—the classification consisting of single items exceeding \$10,000 does not encompass all transactions of the relevant class, namely all sales of tangible personal property at retail.

37. The classification consisting of single items exceeding \$10,000 is not elastic, allowing other items to move in and out of it. Proposition 417 does not allow items priced below \$10,000 to be aggregated to meet the \$10,000 threshold.

38. For all the foregoing reasons, Proposition 417 constitutes a special law in violation of Ariz. Const. art. 4, pt. 2, § 19 (9).

39. Plaintiffs have no plain, speedy, and adequate remedy at law. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief and/or a writ of prohibition preventing enforcement of the Proposition 417 tax.

REQUEST FOR RELIEF

¶ Wherefore, Plaintiffs pray for a judgment against Defendants as follows:

A. For a declaration from this Court that the transportation excise tax imposed by Proposition 417 is ultra vires, void, and of no effect because it exceeds Defendants' authority as provided by A.R.S. § 42-6106;

B. For a preliminary and permanent injunction forbidding Defendants from enforcing Proposition 417 or collecting the transportation excise tax imposed thereby;

C. For a writ of prohibition forbidding Defendants from enforcing Proposition 417 or collecting the transportation excise tax imposed thereby;

D. For an award of taxable costs under A.R.S. §§ 12-348, 12-166, and 12-1840;

E. For attorney fees pursuant to A.R.S. § 12-348 and the private attorney general doctrine;

F. For any other such relief as this Court deems fair and just.

RESPECTFULLY SUBMITTED this 20th day of December, 2017 by:

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