**ARIZONA SUPREME COURT**

| | |
|---|---|
| HAROLD VANGILDER, et al.,<br><br>Plaintiffs/Appellees/<br>Cross-Appellants,<br><br>v.<br><br>ARIZONA DEPARTMENT OF REVENUE,<br><br>Defendant/Appellee,<br><br>PINAL COUNTY, et al.,<br><br>Defendants/Appellants/<br>Cross-Appellees. | No. CV-20-0040-PR<br><br>Court of Appeals<br>No. 1 CA-TX 19-0001<br><br>Arizona Tax Court<br>No. TX2017-000663 |

# DEFENDANT/APPELLEE'S PETITION FOR REVIEW

Mark Brnovich
Attorney General
Firm State Bar No. 14000
Scot G. Teasdale
State Bar No. 019330
Jerry A. Fries
State Bar No. 011788
Lisa A. Neuville
State Bar No. 012285
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004-1592
(602) 542-8382
tax@azag.gov
Attorneys for Arizona Department of Revenue

## INTRODUCTION

Defendant/Appellee the Arizona Department of Revenue ("Department") petitions the Court for review of *Vangilder v. Arizona Department of Revenue*, 1 CA-TX 19-0001 (January 16, 2020) ("Opinion"). The Opinion reversed the tax court's decision and held that (1) the ballot proposition enacting the tax properly applied the tax to all transaction privilege tax classifications—not just the retail classification that alone was disclosed on the ballot, and (2) a county's exclusion of certain retail revenue within the legislatively defined retail tax base by applying a "zero rate" to such proceeds is authorized by A.R.S. § 42-6106 and the larger transaction privilege tax ("TPT") structure. The Department seeks review solely of that second holding, which presents an issue that is both of first impression and of statewide importance.

The Legislature has plainly not granted counties the authority to modify the tax base of the retail TPT classification or any other TPT classifications when a tax is adopted under A.R.S. § 42-6106, and the Opinion creates the very real possibility of an unmanageable patchwork of county-created exemptions under that statute. The Legislature has the sole right to create tax classifications and to define tax bases for both itself and the counties, with the counties' sole authority being (1) whether to levy a tax, and if so, (2) what rate to apply to the legislatively

defined tax base. Whether counties can rewrite the TPT structure when they adopt a transportation excise tax is an issue of statewide importance.

## ISSUE PRESENTED FOR REVIEW

Can a county that adopts a tax under A.R.S. § 42-6106 exempt from the retail-classification tax base a portion of gross income from the sale of a single item of tangible personal property using the artifice of a "zero rate" when the tax base is statutorily defined to include such proceeds and the underlying TPT statutes do not authorize counties to effect such an exemption?

## MATERIAL FACTS

### 1. The Election and the Tax.

Section 42-6106 authorizes the regional transportation authority in any county to levy a transportation excise tax if the qualified electors voting at a countywide election approve it. Subsection B provides that the tax "shall be levied and collected" as follows:

> 1. At a rate of not more than ten per cent [sic] of the transaction privilege tax rate prescribed by section 42-5010, subsection A in effect on January 1, 1990 *to each person engaging or continuing in the county in a business taxed under chapter 5, article 1 of this title*.
>
> 2. At a rate of not more than ten per cent of the rate prescribed by section 42-5352, subsection A.
>
> 3. On the use or consumption of electricity or natural gas by retail electric or natural gas customers in the

> county who are subject to use tax under section 42-5155.
> . . .

(Emphasis added.) Businesses taxed under Title 42, Chapter 5, Article 1 include those sixteen business types or classifications that Title 42, Chapter 5, Article 2 identifies. The classification at issue is "retail," defined as "the business of selling tangible personal property at retail." A.R.S. § 42-5061(A).

The tax at issue adopted a rate of 0.5% for the retail classification but

> 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 42-6106, needed to fund the Plan.

(Electronic Index of Record ["IR"] 26 [Ex. 2].)

Pinal County requested the Department levy and collect the transportation excise tax on all of the TPT classifications. (*Id*. [Exs. 7-8].)[1] The Department complied by publishing tax rate tables on all TPT classifications beginning April 2018 (IR 35, ¶ 3 [Ex. A]) and has since accepted filings and payments of all the tax (*id*. ¶ 6).

[1] The Department collects all TPT levied in the state by local taxing jurisdictions, including all counties (A.R.S. § 42-6102) and all cities and towns (A.R.S. § 42-6001), and then distributes those monies to the respective taxing jurisdictions.

In April 2018, Plaintiffs/Appellees/Cross-Appellants Harold Vangilder, Dan Neidig, and Arizona Restaurant Association (collectively "Vangilder") challenged the tax. After briefing and argument, the tax court ruled in Vangilder's favor that the County transportation excise tax was unlawful because it was imposed only on businesses in the retail classification and not on all TPT classifications that A.R.S. § 42-6106(B) sets forth. (IR 41 at 2-3.) The tax court entered final judgment pursuant to Arizona Rule of Civil Procedure 54(c) on November 15, 2018. (IR 56.)

Defendant/Appellant/Cross-Appellees Pinal County ("County") and Pinal Regional Transportation Authority (collectively the "County-Defendants") appealed to the court of appeals. On January 16, 2020, the court of appeals issued an Opinion holding that (1) the tax was properly enacted on all classifications of the TPT, and (2) that the removal of proceeds over $10,000 for single items was valid as a "modified rate" under A.R.S. § 42-6106(C).

## REASONS WHY THE COURT SHOULD GRANT REVIEW

### I. The "Zero Rate" Violates A.R.S. § 42-6106 and in Effect Is an Unlawful Exemption of Proceeds from the Tax Base.

#### A. Exempting Part of the Statutory Tax Base from Tax Is Not a Valid "Modified Rate."

The court of appeals held that failure to apply the adopted tax rate (.5%) to part of the statutorily defined tax base is acceptable as a "modified rate" allowed under A.R.S. § 42-6106(C). (Opinion ¶¶ 23-30.) Not so.

##### 1. The retail classification tax base is defined by statute and cannot be altered by counties.

The tax base of the TPT retail classification used by both the state and counties as defined by the Legislature is defined as "the gross proceeds of sales or gross income derived from the business." A.R.S. § 42-5061(A). "'Gross income' means the gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property or service, or both, and without any deduction on account of losses." A.R.S. § 42-5001(4). "'Gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind or losses, but cash discounts allowed and taken on sales are not included as gross income." A.R.S. §

42-5001(5). The levying statute, A.R.S. § 42-5008, further confirms the nature of the tax as being on the "gross," stating:

> There is levied and there shall be collected by the department, for the purpose of raising public money, privilege taxes measured by the amount or volume of business transacted by 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 this article and article 2 of this chapter.

A.R.S. § 42-5008(A).

While there are numerous statutory deductions from the tax base in A.R.S. § 42-5061, all of these were adopted by the Legislature and apply to county TPT as well as state TPT. The Legislature has never adopted a statutory deduction for gross income over $10,000 for single items, nor has it authorized counties to do so.

The purpose of the County's adoption of a "zero rate" on amounts over $10,000 for a single item is admittedly to exempt such proceeds from the tax. The zero "rate" was simply an artifice by which the County-Defendants pretended to adopt a modified or variable rate under A.R.S. § 42-6106(C) that would result in the levy and collection of taxes under A.R.S. § 42-6106(B). This is in effect and substance an *exemption* of these proceeds from the tax base and the tax authorized under A.R.S. § 42-6106—not a "modified" rate. Such an exemption is not authorized in the state's TPT statutes. A county can no more exempt some proceeds from the retail sale of an individual item than it can exempt from taxation

*all* proceeds earned from the sale of an individual item that is taxable under the retail classification or any one of the other sixteen classifications adopted by the Legislature. Counties have never been given the option to exempt certain income from the legislatively defined TPT tax bases, and none was given the counties in A.R.S. § 42-6106 with respect to the retail classification or any other classification.

The court of appeals states that the Department cites "no authority" for the proposition that the tax base must include amounts paid for single items costing over $10,000. (Opinion ¶ 27.) But the statutory definition of tax base in A.R.S. § 42-5061(A) is precisely such authority. The County has no power to enact a TPT beyond that allowed to it by the state because "any power over taxation possessed by a municipality is delegated by the state legislature. *Home Owners' Loan Corp. v. Phoenix*, 51 Ariz. 455, 77 P.2d 818 (1938); *Home Builders Ass'n of Central Arizona, Inc. v. Superior Court*, 109 Ariz. 404, 510 P.2d 376 (1973)." *City of Tempe v. Prudential Ins. Co. of Am.*, 109 Ariz. 429, 431 (1973).

The Opinion notes that A.R.S. § 42-5061 "contains countless deductions, exemptions, and exclusions, and none of them are treated as creating a new TPT classification." (Opinion ¶ 27.) The Department *never* argued that the tax was an attempt to create a new classification. Further, while there are many "deductions, exemptions, and exclusions" these were created by the *Legislature* and not by the counties. The Legislature can adopt whatever deductions or exemptions it wishes.

Counties cannot. The court of appeals got it exactly wrong when it ruled that counties can exempt certain income from taxation because the Legislature can do so.

### B. Exempting Revenues from "Single Items" Over $10,000 Is Inconsistent with the TPT.

It is axiomatic that the TPT is a gross revenue tax, not a tax on individual sales.

> Arizona levies "privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities." A.R.S. § 42-5008(A) (2006). The transaction privilege tax is akin to a sales tax with two differences: (1) the transaction privilege tax is levied on gross receipts instead of individual sales, and (2) the transaction privilege tax is levied on the seller, whereas a sales tax may be levied directly upon the buyer. *See Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973) (the transaction privilege tax is imposed on gross revenues instead of on individual transactions);

*Rigel Corp. v. State*, 225 Ariz. 65, 67, ¶ 12 (App. 2010).

This principle that the TPT is a tax on the "gross" revenue of a business has been repeatedly confirmed. *See, e.g., Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 588, ¶ 17 (App. 2000) (taxing intangible "membership program" revenues of a retailer, i.e. the "business of selling tangible personal property at retail"), and *City of Phoenix v. Ariz. Rent-A-Car Sys., Inc.*, 182 Ariz. 75, 76 (App. 1995) (taxing refueling charges as part of the gross revenue of a rental business).

There is no precedent for county-created exemptions from the tax base. In enacting A.R.S. § 42-6106, the Legislature did not intend to upend the TPT structure at the whim of county electors or boards.

The Opinion says that

> 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.

(Opinion ¶ 28.) The Opinion misstates the Department's arguments. The Department argued that *if* the tax was only on the retail classification,[2] this violated the requirement that the tax be on all classifications in A.R.S. § 42-6106(B). The "retail only" argument had nothing to do with the exemption of proceeds from the

[2] The Department did not argue at the court of appeals or tax court that the tax only applied to the retail classification, viewing this as an election law issue for Plaintiffs to argue and the courts to decide, but that *if* it was only on retail, this was illegal. AB at 26-27.

retail tax base. And, again, the "lack of authority" claim (Opinion ¶ 27) ignores the statutes at issue as the pertinent authority cited.[3]

The Opinion rejects the idea that a zero rate is "not a tax." (Opinion ¶ 28.) But a zero-rate "tax" raises no money and is not intended to raise money or act as a tax. Section 42-6106(B) specifically states that the tax shall be one that is "levied and collected." "The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *Biggs v. Betlach*, 243 Ariz. 256, 259, ¶ 15 (2017). A "zero rate" "tax" is not a tax at all, raises no revenue, and hence operates as an exemption or deduction—*i.e.*, not a *tax*. The "zero rate" at the state level in the Commercial Lease classification (Opinion ¶ 28) resulted from the phase out of a State tax that left the classification in place for the counties that had taxes on that classification. In 1994, the Legislature chose to phase out the state's TPT on commercial leases over six years. (SB 1441, 2nd Reg. Sess. 1994.)[4] The rates were as follows:

---

[3] As for the claim that no cases were cited, there simply are no cases on point. A Westlaw search for "modified rate" and "sales tax" under for All States found only one case—a New Jersey case irrelevant to the issue. *Am. Trucking Ass'ns., Inc. v. State*, 180 N.J. 377 (2004). There simply are no cases for what a "modified rate" means in the context of a sales tax.

[4] The Opinion misstates that the zero rate was adopted in 1997 citing the recodification of the statutes in 1997 Ariz. Sess. Laws, ch. 150, § 75 (1st Reg.

> (a) Four and one-half per cent from and after December 31, 1992 through June 30, 1993.
> (b) Four per cent from and after June 30, 1993 through June 30, 1994.
> (c) Three per cent from and after June 30, 1994 through June 30, 1995.
> (d) Two per cent from and after June 30, 1995 through June 30, 1996.
> (e) One per cent from and after June 30, 1996 through June 30, 1997.
> (f) Zero per cent from and after June 30, 1997.

*Id.* It is disingenuous to refer to the "zero rate" as constituting a tax. When the Legislature eliminated the state tax on commercial leases, it retained the classification in the statutes to allow counties to continue to levy and collect the tax if they chose to do so. https://azdor.gov/sites/all/themes/az_dor/pdf/ratetables/199407.pdf. Indeed, five counties chose to do so after the state tax was phased out (https://azdor.gov/sites/all/themes/az_dor/pdf/ratetables/07012017RateTable.pdf) and several still do (https://azdor.gov/sites/default/files/media/TPT_RATE TABLE_022020.pdf). There are no reporting or payment obligations unless there is a positive tax rate applied to that classification by a county. https://azdor.gov/transaction-privilege-tax/commercial-lease. The court's justification that the County can levy a zero-rate tax because the state has done so is contrived and without any legal support once the facts underlying the state's "zero commercial lease tax rate" is understood. The state's zero rate was merely to

---

Sess.). The phase out of the State tax on commercial leases began in 1994. *See* SB 1441, 2nd Reg. Sess. 1994.

effectuate a phased repeal of the state tax on that classification, with an eventual repeal when the rate reached zero.

### 1. Allowing counties to adopt independent TPT structures will create chaos.

Allowing counties to adopt and apply different "rates" (plural) or "zero rates" to a classification's tax base, or to exempt parts of the tax base of a classification from a tax using a "zero rate" under A.R.S. § 42-6106 has the potential to create chaos in tax administration and flies in the face of the unified state/county TPT system created by the Legislature. There are fifteen counties and sixteen TPT classifications which a county could adopt multiple tax rates and exemptions under that statute. Each change in a county rate to part of the tax base in a classification requires a separate reporting classification, with part of the tax base reported separately for each multiple rate applied within a divided classification. For Pinal County, there are now two tax rates and two separate reporting classification numbers for the one retail classification, and two tax bases reported from the now-divided classification. If each county starts "doing its own thing" as to taxing or not taxing part of the tax base, compliance and administration burdens will expand dramatically—not just for the Department, but also for taxpayers who (like those currently in Pinal County) will face divided classifications and tax bases.

If a large county, like Maricopa or Pima, adopted a similar scheme, say a tax that taxed the first $100 of any transaction at .2%, the next $400 at .4%, and all amounts above $500 at 0%, chaos would result given the hundreds of thousands, if not millions, of transactions over $100 that take place every year in Maricopa County. The Legislature has *never* permitted counties to create a hodgepodge TPT structure, one that exempts from taxation certain or all income from individual transactions, income that is plainly taxable under a legislatively defined tax base. Rather, every statute that allows counties to apply a TPT requires them to simply "ride along" with the existing state-defined TPT classifications and take the tax base as so defined in state statutes. *See* A.R.S. §§ 42-6103, -6105, -6106, -6107, -6108, -6108.01, -6109, -6109.01, -6111, and -6112. The *only* authority that counties have when adopting a TPT under any of these statutes is to adopt a rate to be combined with the state rate in a particular classification.

### C. No Other County Has Ever Attempted What County-Defendants Are Trying to Do with the TPT Structure.

Before the County voters approved the tax, the TPT tax bases for county TPT were identical with that of the state and there as one combined state/county rate applied to each classification. (IR 35, ¶ 2.) When counties adopted a TPT rate, this resulted in a combined state/county rate that applied to the same tax

base,[5] simplifying compliance for taxpayers and enforcement for the Department, both of which only had to determine the one tax base per classification and then apply one combined rate to that base. (*Id.*)

The Opinion notes that cities are allowed to exempt proceeds similarly (Opinion ¶ 29), but this is under a separate taxing system the Model City Tax Code[6] under which cities are expressly given the option. If the Legislature wishes to allow this, it may. No such option exists in A.R.S. § 42-5061 and to imply that one exists in A.R.S. § 42-6106(A) is to allow counties to write their own tax laws.

The court of appeals concluded that A.R.S. § 42-6106(A) allows multiple rates (including the zero rate) to different parts of the tax base of a given classification under the principle that "the singular includes the plural" in A.R.S. § 1-214. (Opinion ¶ 27.) The court misapplies this general principle to mean that when a county is authorized to adopt a "rate," this allows the tax base to be divided into fractions and taxed at multiple rates in the same period. Apparently, under this view, a county adopting a TPT "rate" could divide the tax base into an unlimited number of fractions with different "rates." This is a misapplication of A.R.S. § 1-214, which cannot and does not override the plain language of A.R.S. §

[5] The TPT return would have one line for "retail" with a tax base reported, multiplied by the combined state/county rate. https://azdor.gov/forms/tpt-forms/tpt-2-transaction-privilege-use-and-severance-tax-return-filing-periods-beginning-or.

[6] https://modelcitytaxcode.az.gov/articles/4-460.htm.

42-6106 and the TPT statutory framework found in A.R.S. § 42-5001 *et seq.*, an expansive statutory scheme that plainly does not allow counties to create their own tax bases.

## CONCLUSION

For the foregoing reasons, this Court should grant review and reverse the court of appeals' Opinion.

Respectfully submitted this 19th day of March, 2020.

Mark Brnovich
Attorney General

*/s/ Scot G. Teasdale*
Scot G. Teasdale
Jerry A. Fries
Lisa A. Neuville
Assistant Attorneys General
Attorneys for Arizona Department of Revenue

IN THE

# ARIZONA COURT OF APPEALS

**DIVISION ONE**

---

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

---

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

**REVERSED IN PART; AFFIRMED IN PART**

---

COUNSEL

Goldwater Institute, Phoenix
By Timothy Sandefur, Matthew Robert Miller
*Co-Counsel for Plaintiffs/Appellees/Cross-Appellants*

Mooney Wright & Moore, P.L.L.C, Mesa
By Paul J. Mooney
*Co-Counsel for Plaintiffs/Appellees/Cross-Appellants*

Arizona Attorney General's Office, Phoenix
By Scot G. Teasdale, Jerry A. Fries, Lisa A. Neuville
*Counsel for Defendant/Appellee/Cross-Appellee*

Pinal County Attorney's Office, Florence
By Christopher C. Keller
*Co-Counsel for Defendant/Appellant/Cross-Appellee Pinal County*

Ballard Spahr L.L.P., Phoenix
By Joseph A. Kanefield, Brian Schulman, Chase Bales
*Co-Counsel for Defendants/Appellants/Cross-Appellees Pinal County and Pinal Regional Transportation Authority*

Fennemore Craig, P.C., Phoenix
By Patrick Irvine, Taylor Burgoon
*Co-Counsel for Defendants/Appellants/Cross-Appellees Pinal County and Pinal Regional Transportation Authority*

Sims Mackin, Ltd., Phoenix
By William J. Sims
*Co-Counsel for Defendant/Appellant/Cross-Appellee Pinal Regional Transportation Authority*

Rose Law Group, P.C., Scottsdale
By Evan Bolick, Johathan Udell
*Amicus Curiae for Pinal Partnership Inc.*

Dickson Wright P.L.L.C., Phoenix
By Scott A. Holcomb, Vail C. Cloar
*Amicus Curiae for Town of Queen Creek*

Fitzgibbons Law Office, P.L.C., Casa Grande
By Denis M. Fitzgibbons
*Amicus Curiae for City of Maricopa and City of Coolidge*

Florence Town Attorney's Office, Florence
By Clifford L. Mattice
*Amicus Curiae for Town of Florence*

The Cavanagh Law Firm, P.A., Phoenix
By James G. Busby, Jr., Karen C. Stafford
*Amicus Curiae for Arizona Tax Research Association and The Arizona Free Enterprise Club*

---

**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.

---

**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[1] (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

---

[1] Absent material changes from the relevant date, we cite a statute's current version.

"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.[2] *See* A.R.S. §§ 42-5061 to -5076. With respect to

---

[2] 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

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

---

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]").

> 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.[3] 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

---

[3] 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)).

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.

**¶10** 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

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

> 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.

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*

*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)).

**¶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.[4] In fact, as ADOR acknowledges, the law governing

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

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.[5] *See*

---

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.*

[5] 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,

Ariz. Model City Tax Code § 460(d), 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.[6]

### 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

---

(Nov. 18, 2019), https://www.modelcitytaxcode.az.gov/City_profiles/City_profiles.htm.

[6] 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."

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.[7] 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

---

[7] 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.

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.[8]

**¶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 a 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

---

[8] 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).

there is no restriction on who can join or leave the class.[9] 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.

---

[9] 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)).

## 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
FILED: AA

Mark Brnovich
Attorney General
Firm State Bar No. 14000
Scot G. Teasdale
State Bar No. 019330
Jerry A. Fries
State Bar No. 011788
Lisa A. Neuville
State Bar No. 012285
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004-1592
Telephone: (602) 542-8382
tax@azag.gov
Attorneys for Defendant/Appellee

**ARIZONA SUPREME COURT**

| | |
|---|---|
| HAROLD VANGILDER, et al.,<br><br>Plaintiffs/Appellees/<br>Cross-Appellants,<br><br>v.<br><br>ARIZONA DEPARTMENT OF REVENUE,<br><br>Defendant/Appellee,<br><br>PINAL COUNTY, et al.,<br><br>Defendants/Appellants/<br>Cross-Appellees. | No. CV-20-0040-PR<br><br>Court of Appeals<br>No. CA-TX 19-0001<br><br>Arizona Tax Court<br>No. TX2017-000663<br><br>**CERTIFICATE OF COMPLIANCE** |

Pursuant to ARCAP 23(g)(3), I certify that the Petition for Review to which this certificate is attached uses proportionally spaced type of 14 points, is double-

spaced using a roman font, and contains 3,499 words, which does not exceed the word limit set by ARCAP 23(g)(2).

Dated this 19th day of March, 2020.

*/s/ Scot G. Teasdale*
Scot G. Teasdale
Jerry A. Fries
Lisa A. Neuville
Assistant Attorneys General

Mark Brnovich
Attorney General
Firm State Bar No. 14000
Scot G. Teasdale
State Bar No. 019330
Jerry A. Fries
State Bar No. 011788
Lisa A. Neuville
State Bar No. 012285
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004-1592
Telephone: (602) 542-8382
tax@azag.gov
Attorneys for Defendant/Appellee

**ARIZONA SUPREME COURT**

| | |
|---|---|
| HAROLD VANGILDER, et al.,<br><br>Plaintiffs/Appellees/<br>Cross-Appellants,<br><br>v.<br><br>ARIZONA DEPARTMENT OF REVENUE,<br><br>Defendant/Appellee,<br><br>PINAL COUNTY, et al.,<br><br>Defendants/Appellants/<br>Cross-Appellees. | No. CV-20-0040-PR<br><br>Court of Appeals<br>No. CA-TX 19-0001<br><br>Arizona Tax Court<br>No. TX2017-000663<br><br>**CERTIFICATE OF SERVICE** |

On March 19, 2020, I electronically filed Defendant/Appellee's Petition for Review with the Clerk of the Arizona Supreme Court's Clerk using the

AZTurboCourt system. The same day, I e-served the Petition for Review through the AZTurboCourt system on Plaintiffs/Appellees/Cross-Appellants' attorneys and Defendants/Appellants/Cross-Appellees' attorneys as follows:

Timothy Sandefur
Matthew Miller
Scharf-Norton Center for Constitutional
Litigation at the Goldwater Institute
500 East Coronado Road
Phoenix, AZ 85004
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs/Appellees/Cross-Appellants

Paul J. Mooney
Mooney, Wright, Moore & Wilhoit, PLLC
1201 South Alma School Road, Suite 16000
Mesa, AZ 85210
pmooney@azstatetaxlaw.com
Attorneys for Plaintiffs/Appellees/Cross-Appellants

Patrick Irvine
Fennemore Craig, PC
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016
pirvine@fclaw.com
Attorneys for Defendants/Appellants/Cross-Appellees

Chris Keller
Chief Civil Deputy
Pinal County Attorney's Office
P.O. Box 887
Florence, Arizona 85132
chris.keller@pinalcountyAZ.gov
Attorneys for Defendant/Appellant/Cross-Appellee Pinal County

William J. Sims, III
Sims Murray, Ltd.
3101 North Central Avenue, Suite 870
Phoenix, Arizona 85012
wjsims@simsmurray.com
Attorneys for Defendant/Appellant/Cross-Appellee Pinal Regional Transportation Authority

By: */s/ Sylvia Luevano*