ARIZONA SUPREME COURT

ARIZONA SCHOOL BOARDS ASSOCIATION, INC., et al., Plaintiffs/Appellees, v. STATE OF ARIZONA, a body politic, Defendant/Appellant	Supreme Court No. T-21-0005 Court of Appeals, Division One No. 1 CA-CV 21-0555 Maricopa County Superior Court No. CV2021-012741-000663

STATE OF ARIZONA'S 1) EMERGENCY MOTION TO STAY JUDGMENT OF THE SUPERIOR COURT ENTERED SEPTEMBER 27, 2021 AND 2) REQUEST FOR EXPEDITED BRIEFING SCHEDULE FOR THIS APPEAL

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Pursuant to Arizona Rule of Civil Appellate Procedure 7(c), the State of Arizona (the "State") moves for an emergency stay pending appeal of the Ruling re: Declaratory Judgment ("Ruling") and the Rule 54(b) judgment entered by the Superior Court on September 27, 2021. The State filed a notice of appeal of the Ruling and judgment on September 27, 2021. The State filed a Petition for Transfer of the appeal pending in the Court of Appeals to this Court on September 28, 2021, and also filed an emergency motion to stay. The State is now re-filing that emergency motion to stay in this Court.

As required by Rule 7(c), ARCAP, a stay has been requested from the superior court, but the motion has not yet been ruled upon.

The standard for issuance of a stay of judgment pending appeal is the same as that for issuance of a preliminary injunction. A party seeking a preliminary injunction must establish that (1) there is a strong likelihood of success on the merits, (2) the possibility of irreparable harm that is not remedied by monetary damages, (3) the balance of hardships tips in its favor, and (4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Courts consider the likelihood of success on the merits and the possibility of irreparable harm on a sliding scale, and they will grant an injunction when the balance of hardships tips sharply in the movant's favor with less likelihood of success, and vice versa.

Smith v. Ariz. Citizens Clean Elections Comm'n, 212 Ariz. 407, 411 ¶ 10 (2006). The State satisfies that standard here.

The superior court in this case issued declaratory judgments that have the effect of stopping duly enacted laws of the State of Arizona from taking effect on the general effective date of September 29, 2021. These laws were passed by the Legislature and signed by the Governor and are presumed to be constitutional. As the State explains in detail below, the Plaintiffs' claims fail on the merits for numerous reasons, including that (1) Plaintiffs lack standing to challenge SB 1819; (2) whether budget reconciliation provisions are sufficiently related to the budget or tied to general appropriations is a non-justiciable political question; (3) the challenged budget reconciliation bills satisfy the title and single subject requirements. For each issue, the superior court erroneously rejected the State's arguments and its remedy was to find unconstitutional portions of three bills and the entirety of a fourth, including provisions in that bill that were not even challenged by the Plaintiffs. These issues merit review by this Court and a stay will avoid irreparable harm to the State allow duly enacted laws to take effect.

I. THE ORDER CONSTITUTES IRREPARABLE HARM TO THE STATE AND THE PUBLIC INTEREST AND BALANCE OF EQUITIES TIP SHARPLY IN THE STATE'S FAVOR.

The Order effectively prevent state laws from becoming effective. The State will suffer irreparable harm absent a stay. It is well established that "a state suffers

irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). "[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

When the government is a party to the litigation, the balance of the equities and the public interest factors merge. *Roman v. Wolf*, 977 F.3d 935, 940–41 (9th Cir. 2020). Legislation "is in itself a declaration of public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). And Arizona has a public interest in enforcing its duly enacted laws. *See Abbott*, 138 S. Ct. 2305, 2324 n.17. The Court's ruling and judgment, which declares multiple provisions of duly-enacted state law unconstitutional, alters the delicate balance between the elected branches of government and the courts. The public interest supports a stay pending appeal.

II. THE STATE IS LIKELY TO PREVAIL ON ITS CLAIMS FOR RELIEF.

A. The Superior Court's Rulings Were Incorrect.

The superior court erred in several significant ways that should be addressed and corrected by this Court. First, the court narrowly defined "budget reconciliation" in a way that requires courts to look behind the language of a bill

and determine if a provision of the bill is "reasonably related" to appropriations. The court set no definable standard for making such a determination, or how the Legislature might go about doing so.

Second, the court refused to recognize that the Constitution does not define what is "necessary" for inclusion in a "budget reconciliation" bill and its attempt to resolve that issue by looking to what is necessary to "effectuate the budget" or other similar descriptions necessarily raise a political question that is left to the Legislature to decide. The State pointed by analogy to the emergency clause provisions of the Arizona Constitution that the courts have specifically held leave the issue of what is "necessary" to the Legislature. *Orme v. Salt River Valley Water Ass'n*, 25 Ariz. 324 (1923). The superior court rejected the analogy, finding without a single citation to authority that what is a "political question" varies depending on whether the Constitution grants or restricts the Legislature's power.

Third, the court struck down SB 1819 in its entirety, but not the other three bills, holding that a violation of the single subject rule of Article IV, pt. 2, Section 13 requires striking the entire bill. This was error, and has the effect of voiding provisions that Plaintiffs did not even challenge. The unchallenged provisions of SB 1819 should have been left in place, and at the very least the judgment should be stayed with regard to them. Although the court analyzed each of the challenged provisions with regard to its being included as a "budget procedure," it did not do

the same for the unchallenged sections.[1] Consequently, the judgment was overbroad.

Fourth, the court's determining that SB 1819 must be struck down in its entirety, but not the three bills, highlights its incorrect application of Section 13. Section 13 provides that "if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." Section 13's title requirement is only triggered if a "subject" is not "expressed in the title." Consequently, to find the challenged provisions of the HB 2898, SB 1825 and SB 1824 violated the title requirement necessarily required that they address a different subject than the title. Which means the bills also violated the single subject requirement. Although the court correctly did not strike down all the provisions of those bills, its failure to do so is evidence of its not correctly applying the Constitution.

These errors, as well as others that the State reserves the right to present after a more complete analysis of the Ruling, justify a stay of the Ruling and judgment entered on September 27, 2021.

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[1] Just as one example, Section 37 of SB 1819 addresses the budget stabilization fund (rainy day fund) and provides that notwithstanding A.R.S. § 35-144, for certain fiscal years the legislature is not required to appropriate monies to or transfer monies from the budget stabilization fund. It is difficult to see how this provision does not fit within the title "budget procedures" in that it addresses a budget subject and provides a procedure relating to a certain fund. Under Section 13, it should not be void because its "subject" is expressed in the title of the act. Yet the Ruling throws it out.

III. THE STATE IS LIKELY TO PREVAIL ON ITS CLAIMS FOR RELIEF.

In addition to the errors in the Ruling cited above, the following more detailed arguments show that this Court should rule for the State and stay the Ruling pending appeal.

A. JUSTICIABILITY

1. Plaintiffs Lack Standing to Challenge SB 1819.

While Arizona's constitution does not contain a "case or controversy" provision analogous to that of the federal constitution, Arizona courts consistently require as a matter of judicial restraint that a party possess standing to maintain an action. *See Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. In Ariz.*, 148 Ariz. 1, 6 (1985); *State v. Herrera*, 121 Ariz. 12, 15 (1978); *Alliance Marana v. Groseclose*, 191 Ariz. 287, 289 (App. 1997). To establish standing, a party must allege a "distinct and palpable injury." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, ¶ 6 (2005). An "allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69 (1998) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). To have standing to challenge the constitutionality of legislation, plaintiffs "must show that *they* have been injured by the alleged . . . violation." *Id.* at 71 (emphasis added); *see also Town of Wickenburg v. State*, 115 Ariz. 465, 469 (App. 1977) ("As a general rule, one party cannot challenge the constitutionality of a

statute by asserting that it offends the constitutional rights of another.").

The Arizona Supreme Court has required plaintiffs to satisfy standing requirements even when the dispute involves budget reconciliation bills. *Bennett v. Napolitano*, 206 Ariz. 520 (2003). The court stated in that case: "This court has, as a matter of sound judicial policy, required persons seeking redress in the courts first to establish standing, especially in actions in which constitutional relief is sought against the government." *Id*. at 524, ¶¶ 16, 19. "[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the . . . Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997).

Plaintiffs challenge six provisions of SB 1819, but they have not shown direct harm to themselves from any of those provisions. The challenged sections address the allocation of state resources for several election issues and a provision designed to restrict cities, towns, and counties from expending funds to adopt or enforce ordinances related to COVID-19. None of them are directed at any of the Plaintiffs and they have not alleged more than a "generalized harm that is shared alike by all," which is insufficient. *Sears*, 192 Ariz. at 69. Plaintiffs have not alleged or proven that they will suffer individual, and not generalized, harm if different paper is used for election ballots, the Attorney General defends state election law, the Secretary of State requests state-specific instructions on federal

voter registration forms, the Senate establishes a committee to review audit results, or local governments cannot pass certain ordinances. Plaintiffs have failed to demonstrate a causal nexus between SB 1819 or any individual provision thereof and any specific injury to themselves, and therefore lack standing to challenge SB 1819 as a whole or any of its individual provisions.

2. Whether the Contents of a BRB Are Necessary to Implement or Carry Out Appropriations Is a Political Question.

Courts should refuse, on justiciability grounds, to engage in the exercise of questioning whether a budget bill, or individual provisions therein, is sufficiently related to the budget or sufficiently tied to general appropriations. ASBA would have courts superintend the State budget process by determining after the fact whether provisions contained in BRBs were really necessary for, or related to, budgeting, and the superior court in its Ruling showed itself willing to do so. Not only is there no textual basis for ASBA's proposed restrictions on the budget process, there are strong prudential reasons why the judicial power does not extend to determining whether budgetary measures are sufficiently related or tied to budgeting, thereby rendering it an unreviewable political question.

"'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature of State v. Napolitano*, 213

Ariz. 482, 485, ¶ 7 (2006) (citation omitted); *Brewer v. Burns,* 222 Ariz. 234, 239, ¶ 21 (2009) (internal citation omitted) (questions involving "whether the Legislature should include particular items in a budget or enact particular legislation . . . clearly are political questions"). It is well established that "courts will not consider political matters." *Adams v. Bolin*, 74 Ariz. 269, 285 (1952).

Here, each of the challenged provisions address the operations of the state and various political subdivisions governed by state law, and often substantially funded by appropriated funds. In making appropriations, the Legislature frequently ties funding to substantive rules. ASBA admits that budget reconciliation bills are common and necessary, given the prohibition on including substantive laws in an appropriation bill. There is no requirement that ties between funding and substantive rules be directly referenced in the law, and certainly no requirement that each BRB provision be linked to a line item in the budget. The Legislature (and the Governor through the veto power) is given unfettered discretion in this area. Setting the budget and deciding what is necessary to implement it are uniquely legislative functions, and as such there are no judicially manageable standards through which the Court could superintend the budgeting process.[2] *See*

[2] If the courts rule that "budget reconciliation" must be tied to specific portions of the budget, that will be a new requirement that should be applied only prospectively.

Burns, 222 Ariz. at 239, ¶21.

Whether an act of the Legislature complies with the title and single subject requirement is a different inquiry (addressed in detail below), which requires only a determination of the subject of the title of an act and whether each of the provisions contained therein is germane to that subject. *See State v. Harold*, 74 Ariz. 210, 214 (1952) ("[A] provision in the act which directly or indirectly relates to the subject of the title and having a natural connection therewith is properly included in the body of the act . . . or if it is germane to the subject expressed in the title, it is constitutional."). In other words, what subject is embraced in the title of a BRB and are the provisions contained therein germane to that subject? Although that question is not a political question, the <u>different</u> questions of whether a BRB and each of its constituent parts are sufficiently related to budgeting or tied to an appropriations bill have never been subject to judicial challenge because those issues are the exclusive prerogative of the Legislature. The Court, as in *Burns*, should reject ASBA's invitation to further involve the Court in the legislative budgeting process.

B. <u>CONSTITUTIONALITY</u>

When reviewing the constitutionality of a law, courts "begin with a strong presumption that laws are constitutional. Indeed [courts] have a duty to construe statutes in harmony with the constitution if it is possible to reasonably do so. Thus,

a party challenging constitutionality bears a heavy burden of establishing that the legislation is unconstitutional." *Martin v. Reinstein*, 195 Ariz. 293, 301–02, ¶ 16 (App. 1999) (citations omitted); *Hoffman v. Reagan*, 245 Ariz. 313, 316, ¶ 13 (2018) (accord); *Biggs v. Betlach*, 243 Ariz. 256, 258, ¶ 9 (2017) ("When the statute in question involves no fundamental constitutional rights or distinctions based on suspect classifications, we presume the statute is constitutional and will uphold it unless it clearly is not.").

1. The Challenged Bills Satisfy the Title Requirement.

With regard to Section 13 challenges, courts should liberally construe the word "subject" "so as to allow the legislature full scope to include in one act all matters having a logical or natural connection." *Litchfield Elementary Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 224 (App. 1980) (quoting *Johnson v. Harrison*, 47 Minn. 575, 577 (1891)); *Hoffman*, 245 Ariz. at 316, ¶ 14 (accord); *State v. Wagstaff*, 161 Ariz. 66, 69 (App. 1988), *approved as modified*, 164 Ariz. 485 (1990) (accord). "The one-subject rule does not prohibit a plurality of topics, only a disunity of subjects. The mere fact that a bill embraces more than one topic is not fatal as long as a common purpose or relationship exists between the topics." *State ex rel. Ohio Civ. Serv. Emps. Assn. ("OCSEA") v. State*, 2016-Ohio-478, ¶¶ 16–17, 146 Ohio St. 3d 315, 319 (citations omitted); *Hoffman*, 245 Ariz. at 316, ¶ 14. Courts will "invalidate statutes as violating the one-subject rule only when they

contain a manifestly gross and fraudulent violation." *OCSEA*, 2016-Ohio-478 at ¶ 17, 146 Ohio St. 3d at 319 (citation and internal quotations omitted).

"Subject" is not defined in the Constitution, but the Court of Appeals described it in *Litchfield*:

> '(S)ubject' . . . is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. All that is necessary is that the act should embrace some one general subject: and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.

Litchfield, 125 Ariz. at 224 (quoting *Johnson*, 47 Minn. at 577).

"[T]he title to the act may be broad in scope, thereby giving notice of a broad range of legislation." *Sample v. Sample*, 135 Ariz. 599, 603 (App. 1983) (finding that the House Bill being challenged "reasonably sets forth in its title the legislation to be found in it so that there is no surprise."). Arizona courts,

> have uniformly held that [the nature and purpose of title requirement] was to prevent the inclusion of subjects in an act which might not reasonably be expected to be found therein under the title; that it would be given a liberal construction and not a narrow and constrained one for the purpose of nullifying legislation, and that it did not need to be a synopsis or complete index of the subjects found in the act, but that any provision directly

> or indirectly relating to the subject expressed in the title, having a natural connection with and not being foreign thereto, was proper.

State ex rel. Conway v. Versluis, 58 Ariz. 368, 377 (1941) (citations omitted). No Arizona court has ever held that the individual provisions within a bill need to relate to each other; rather, each provision of a bill need only be germane to the subject contained in the title of the bill, even where the title is broad. It is well established that "the title to an act need not be a complete index to its contents." *Harold*, 74 Ariz. at 214 (citing *Taylor v. Frohmiller*, 52 Ariz. 211). Each provision of an act need only relate directly or indirectly to the subject of the title and have a "natural connection therewith." *Id.* When a subject of a bill is not included in the title, the Constitution makes clear that the remedy is to only void the portions not listed. *See* Section 13 ("[S]uch act shall be void only as to so much thereof as shall not be embraced in the title"). Ariz. Const., art. IV, pt. 2, § 13.

Here, there is no dispute that the title of each of the challenged bills includes the names of each statute amended in the bill. Moreover, those titles include the following:

HB 2898	**APPROPRIATING MONIES; RELATING TO KINDERGARTEN THROUGH GRADE TWELVE BUDGET RECONCILIATION**
SB 1825	**APPROPRIATING MONIES; RELATING TO BUDGET RECONCILIATION FOR HIGHER EDUCATION**

SB 1824 **APPROPRIATING MONIES; RELATING TO HEALTH BUDGET RECONCILIATION**

SB 1819 **APPROPRIATING MONIES; RELATING TO STATE BUDGET PROCEDURES**

Three of the bills specifically pair the phrase "budget reconciliation" with a specific subject: "Kindergarten through Grade Twelve," "Higher Education," and "Health." The fourth bill refers only to "Budget Procedures," but its short title also includes "budget reconciliation," indicating that the Legislature plainly intended it to also be a budget reconciliation bill. In each case, ASBA's claim can only succeed if the challenged provisions have no direct or indirect relation to the subject listed in the title, i.e. the "one general subject" or "one general idea" of the bill's named subjects: K-12, Higher Education, Health or Budget Procedures. Each challenged provision meets that standard.

ASBA admits that budget reconciliation bills are an ordinary and necessary part of the legislative process because "it is often necessary to make statutory and session law changes to effectuate the budget." It goes too far, however, when it essentially argues that every provision in the bill must be tied to a line item of a general appropriation bill. The Constitution does not impose such a narrow restriction. As noted above, "any provision directly or indirectly relating to the subject expressed in the title, having a natural connection with and not being foreign thereto, was proper." *Versluis*, 58 Ariz. at 377.

Budget reconciliation bills ("BRBs" or "ORBs") have been used by the Legislature for decades. They are rarely challenged, probably because all participants in the legislative process seek to benefit from them on occasion. They are not, however, without controversy. *See Bennett*, 206 Ariz. at 520. Consequently, if anything, the phrase "budget reconciliation" does not act to narrow or particularize the subject of the bill, but should put legislators and the public on notice that the bill's contents could be broad, although limited to the topic usually paired with the term "budget reconciliation"—in this case, K-12, Higher Education, Health and Budget Procedures.

The State budget funds education, health and many other activities, and the Legislature must have broad discretion in regulating how those funds are to be spent, or not spent. As discussed above, what is necessary to include in a budget reconciliation bill is a political question that courts should not address. In any event, putting aside ASBA's narrow definitions, each of the challenged provisions fit within the subject of its title.

HB 2898: K12. ASBA challenges only three of the one hundred twenty sections of HB 2898, sections 12, 21 and 50.[3] Sections 12 and 21 each add a statute to Title 15 of A.R.S., which is entitled Education. Each addresses the operations of

[3] "The number of provisions in an enactment is not determinative of its compliance with the single subject rule." *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 352 (1999).

K-12 schools, including whether public monies can be spent to teach certain curriculum and whether public and charter schools funded by the Legislature can condition employment or attendance on wearing face coverings or obtaining vaccination, thereby potentially reducing overall enrollment and funding and making it more difficult to retain or hire staff. Section 50 authorizes the Attorney General to bring an action to recover monies spent in violation of Section 21, and is therefore a proper budget reconciliation provision, regulating how to recoup misspent education funds. The subject of all three provisions is germane to K-12 education. That is sufficient to satisfy the title provision of Section 13.

SB 1825: Higher Education. ASBA challenges only part of one of the seventeen sections of SB 1825, section 2. Section 2 adds two statutes to Title 15 of A.R.S., which is entitled Education, including A.R.S. § 15-1650.05. That statute addresses the operations of the Board of Regents, a public university or a community college, including whether those state-funded entities may condition attendance or employment on wearing face coverings, obtaining a vaccination, or undergoing testing, thereby potentially reducing overall enrollment and making it more difficult to retain or hire staff and requiring the State to increase future funding. Each subject of the statute is germane to higher education, so the bill's title satisfies the title provision of Section 13.

SB 1824; Health. ASBA challenges only two of the thirty-six sections of

SB 1824, sections 12 and 13. Section 12 amends a statute in Title 36, A.R.S., which is entitled Public Health and Safety, and clarifies whether vaccines subject to emergency use authorization can be required for school attendance and the conditions under which the Department of Health may require a vaccination for school attendance, which both bear on the circumstances under which public funds can be expended to mandate certain public health measures. Section 13 adds a new Article 4.2 to Chapter 6, Title 36, prohibiting local governments from requiring a COVID-19 vaccination or requiring that businesses require proof of vaccination. Such health mandates require public funds to defend or enforce and thus are germane to public funding for health and safety. Each statute relates directly to an issue of health and safety, so the bill's title satisfies the title provision of Section 13.

SB 1819: Budget Procedures. ASBA challenges only six of the fifty-two sections of SB 1819, section 4, 5, 33, 35, 39 and 47. "Budget procedures" is a less well-understood subject than K-12, Higher Education, or Health. Nevertheless, a bill entitled "budget procedures;" for budget reconciliation has been a part of the annual budget process for many years. *See, e.g.,* Laws 2006, ch. 346; Laws 2007, ch. 259; … Laws 2019, ch. 267; Laws 2020, ch. 56. Budget procedures means procedures other than specific appropriations to regulate and direct how state money can and cannot be spent, and the management and accountability of those

monies. These provisions can apply to many different agencies and even political subdivisions, but they still fall within the subject "budget procedures." Each of the challenged provisions regulate how state monies are spent and how state officers conduct their business.

Section 4:	Use of budget funds by the Arizona Game and Fish Department to provide assistance with voter registration; voter registration events and database; annual reports to the Legislature of certain information.
Section 5:	Spending public monies on antifraud ballot paper; vendor certification; antifraud measures.
Section 33:	Directing which state officer shall expend state resources in defending state election laws and intervening in actions challenging election laws.
Section 35	Directing the Secretary of State, an office funded by the state budget, to expend state resources notifying a federal body of certain information.
Section 39:	Directing certain political subdivisions to not spend public funds or resources to enact or enforce certain regulations impacting private businesses.
Section 47:	Establishing a special committee consisting of senate members that will be funded from the state budget.

A title need not be a synopsis or complete index of an act, and any provision directly or indirectly relating to the subject is proper. Applying that test, the challenged provisions of all the bills are valid.

2. SB 1819 Satisfies the Single Subject Rule and the Requirements of Section 20.

ASBA's challenge to SB 1819 under the single subject rule and Section 20

also fails. Again, a single subject challenge fails unless a provision of a bill does not relate to the subject reflected in the title of the bill; the subject of the provision need not relate to the subject of every other provision of a bill. *See OCSEA*, 2016-Ohio-478, ¶¶ 16–17, 146 Ohio St. 3d at 319. And "[t]he number of provisions in an enactment is not determinative of its compliance with the single subject rule." *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 352 (1999). Thus, while SB 1819 includes fifty-two sections, that does not mean it addresses more than the single subject included in its title: budget procedures. As explained above, each of the provisions of the bill embrace the "one general subject" and "one general idea" of "budget procedures." The fact that each section on its own might also be described as addressing another topic, such as election law or health policy, does not preclude them from also fitting within the "budget procedures" title. Therefore, SB 1819 does not violate the single subject rule.

C. REMEDY

1. To the Extent a Court Finds a Violation of the Single Subject Rule, It Should Sever Those Subjects of the BRB Unrelated to the Title.

As explained, the BRBs are consistent with the single subject rule because their provisions each relate to the subject contained in the BRBs' title. If the Court disagrees, however, the appropriate remedy is to sever the offending portions of the pertinent BRB, such that the BRB then complies with the single subject rule.

The Arizona Constitution unambiguously provides that "if any subject shall be embraced in an act which is not expressed in the title, such act shall be void *only as to so much thereof as shall not be embraced in the title*." Ariz. Const., art. IV, pt. 2, § 13 (emphasis added). Thus, even if a Court concludes that a particular provision of one of the BRBs is not germane to the subject of its title, the proper remedy is to sever that provision and allow the remainder of the BRB to stand.

Even without that clear constitutional severance provision, severance would be appropriate. The Arizona Supreme Court has adopted a rule that "if part of an act is unconstitutional and by eliminating the unconstitutional portion the balance of the act is workable, only that part which is objectionable will be eliminated and the balance left intact." *Randolph v. Groscost*, 195 Ariz. 423, 427 (1999) (quoting *State v. Coursey*, 71 Ariz. 227, 236 (1950)).[4] To do so, the Court looks to the text, history, and structure of the act to glean whether the "valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement for the act." *Randolph*, 195 Ariz. at 427 (quoting *McCune v. City of Phoenix*, 83 Ariz. 98, 106 (1957).

ASBA argues, and the superior court accepted, that the only appropriate remedy for violating the single subject rule is to strike down the entire bill, citing

[4] The Court recently affirmed that this rule also applies to voter initiatives. *Fann v. State*, 2021 WL 3973232 (Ariz. 8/19/2021).

Litchfield, 125 Ariz. at 226. While the Court of Appeals did so in that case, for at least three reasons the decision does not foreclose a future court from severing where circumstances permit. First, *Litchfield* is inconsistent with the constitutional provision requiring severance.

Second, *Litchfield* is inconsistent with the Supreme Court's severance framework. Rather than attempt to glean whether the Legislature would have passed the appropriations bill at issue, the Court of Appeals simply concluded that whether logrolling occurred is a factual inquiry that would inject the court too deeply into legislative and political process. But that same thing could be said—including by the Court just last month in *Fann*—whenever a court is asked to glean whether an act would have passed without an unconstitutional provision. But the Supreme Court has refused to nullify its severance doctrine in such a fashion, and there is nothing unique about single subject challenges that should exempt them in all cases from severance. As the Supreme Court stated in *Harold*: "It is not claimed and, of course, could not logically be claimed that the entire act is vitiated even if it be true that the act contains matters unrelated to the subject embraced in the title." *Harold,* 74 Ariz. at 213.

Third, the real issue in *Litchfield* was that the Court of Appeals, after conducting a detailed analysis, could not identify a primary purpose linking the unchallenged portions of the bill. That is not the situation here, where each of the

challenged bills embrace a primary purpose and subject—primary education, higher education, healthcare, and budget procedures. There is nothing in the structure or history of the BRBs suggesting that the Legislature would not have passed them in the absence of any provision going beyond those single subjects. ASBA attempts to point to legislators "holding hostage" the budget reconciliation bill by withholding their vote unless the bills included certain provisions. But there is no evidence that those legislators disagreed with or opposed any of the other provisions in the BRBs. In other words, there is no evidence that legislators in the majority (or the Governor) were logrolled into voting in favor of provisions they did not actually support because provisions they did support were later thrown in. Thus, not only does severance exist here, it is easily applied—any offending provision should be severed.

This Court would not be the first to apply severance in a single subject challenge. The Ohio Supreme Court has also done so, holding that "the appropriate remedy when a legislative act violates the one-subject rule is generally to sever the offending portions of the act 'to cure the defect and save the portions' of the act that do not relate to a single subject." *OCSEA*, 2016-Ohio-478, ¶ 22, 146 Ohio St. at 320. The court explained that "[w]hen an act contains more than one subject, the court may determine which subject is primary and which is an unrelated add-on." *Id.* Severance will not apply only where the court is unable to

"carve out a primary subject by identifying and assembling what it believes to be key or core provisions of the bill at issue." *Id.* As explained herein, that is not the current situation.

2. If the Court Finds that the BRBs Violate the Single Subject Rule, Such a Ruling Should Only Apply Prospectively.

No Arizona court has ever applied the single subject rule to BRBs, and thus the Legislature for decades has relied upon BRBs and Omnibus Reconciliation Bills ("ORBs") as vital tools to carry out its democratic duties. Thus, should courts conclude that BRBs are susceptible to single subject challenge, and that any of the BRBs here violate the single subject rule, the court should only apply such ruling prospectively, thereby allowing the BRBs at issue in this case to stand. "Whether an opinion will be given prospective application only is a policy question within this court's discretion." *Fain Land & Cattle Co. v. Hassell,* 163 Ariz. 587, 596 (1990); *Turken v. Gordon*, 223 Ariz. 342, 351, ¶ 44 (2010). Prospective application is appropriate where newly articulated standards or widely misunderstood standards have caused parties to perform in a certain manner. The factors used when considering prospective application are:

> 1. Whether the decision establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed;
>
> 2. Whether retroactive application will further or retard operation of the rule, considering the prior history, purpose, and effect of the rule;

> 3. Whether retroactive application will produce substantially inequitable results.

Fain Land & Cattle Co., 163 Ariz. at 596 (concluding that new holding regarding legislative authority would apply only prospectively).

It is indisputable that, for decades and on many occasions, the Legislature has used BRBs and ORBs to complete the budgeting process. *See Bennett*, 206 Ariz. at 520. Despite that repeated use, the Arizona Supreme Court has never defined or foreshadowed the legal principles applying to BRBs or otherwise analyzed their constitutionality under the single subject rule. Quite the opposite actually. In *Bennett*, the Court refused to address the application of the single subject rule to ORBs, leaving in place provisions that arguably violated the single subject rule. It is hardly surprising, then, that the Legislature subsequently believed that the courts would not upset the legislative budgeting process by forcing it to separate out BRBs into many separate bills.

If courts are now concerned that legislative use of BRBs may someday result in logrolling, outlawing BRBs on a forward-looking basis addresses that concern, and the Legislature will adjust its practices accordingly. But applying a new single subject requirement retroactively, thereby upsetting not just the 2021 budgeting process but potentially scores of BRBs and ORBs passed in the last several decades, would do nothing to address a future logrolling concern. Potentially upsetting scores of BRBs and ORBs, with no warning, would be highly inequitable

to the democratic process in Arizona over the last several decades. Thus, should courts impose the dramatic shift in the legislative process that ASBA seeks, it should do so only prospectively. *See Turken*, 223 Ariz. at 351 ("We today overrule no prior decision. But we recognize that the consideration prong of the *Wistuber* test has been widely misunderstood during the past two decades and that our cases have never squarely addressed that issue.").

IV. REQUEST FOR EXPEDITED BRIEFING SCHEDULE FOR THIS APPEAL.

The State further requests that the Court establish an expedited briefing schedule for this appeal. To that end, the State proposes that its Opening Brief be due on October 5, 2021; Appellees' Answer Brief be due on October 12, 2021; and any Reply Brief be due on October 18, 2021. This schedule will shorten the amount of time that a stay will need to be in effect and, in the event the Court denies a stay, permit the parties to obtain resolution of this appeal on an expedited basis.

CONCLUSION

For the above reasons, this Court should stay the effect of the Ruling pending appeal. Alternatively, it should stay the effect of the ruling with regard to unchallenged provisions of SB 1819, which is all of the sections except Sections 4, 5, 33, 35, 39 and 47. The State further requests that the Court grant an expedited briefing schedule in this matter.

RESPECTFULLY SUBMITTED this 29th day of September, 2021.

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