ARIZONA SUPREME COURT

CAVE CREEK UNIFIED SCHOOL DISTRICT; CASA GRANDE ELEMENTARY SCHOOL DISTRICT; CRANE ELEMENTARY SCHOOL DISTRICT; PALOMINAS ELEMENTARY SCHOOL DISTRICT; YUMA UNION HIGH SCHOOL DISTRICT; ARIZONA EDUCATION ASSOCIATION; ARIZONA SCHOOL BOARDS ASSOCIATION; SCOTT HOLCOMB; FRANK HUNTER; and NANCY PUTMAN, Plaintiffs-Appellants, v. DOUG DUCEY, in his capacity as State Treasurer; and STATE OF ARIZONA, Defendants-Appellees.	No. CV-13-0039-PR Court of Appeals No. 1 CA-CV 11-0256 Maricopa County Superior Court No. CV 2010-017113

PETITION FOR REVIEW

Thomas C. Horne
Attorney General
Firm State Bar No. 14000

Kathleen P. Sweeney
State Bar No. 011118
(602) 542-8027
(602) 542-8308 (fax)
solicitorgeneral@azag.gov
Kevin D. Ray
State Bar No. 007485
Jinju Park
State Bar No. 026023
(602) 542-8328
(602) 364-0700 (fax)
EducationHealth@azag.gov
Assistant Attorneys General
1275 W. Washington
Phoenix, AZ 85007

Attorneys for Defendants-Appellees

INTRODUCTION

The State petitions for review of the *Cave Creek Unified School District v. Ducey*, No. 1 CA-CV 11-0256 (Jan. 15, 2013), Opinion ("Op."). The Opinion held that the Constitution's Voter Protection Act ("VPA"), Ariz. Const. art. IV, pt. 1, § 1(6)(A)-(D), (14)-(15) (App. 1), empowers the voters to decline to exercise their own legislative discretion to appropriate certain funds and to instead enact a statute that requires the Legislature to appropriate those funds. Op. ¶¶ 14-19. Under Arizona law, one legislature cannot require a subsequent legislature to take a particular action because only constitutional provisions can restrict the Legislature's plenary legislative discretion. *Higgins' Estate v. Hubbs*, 31 Ariz. 252, 264, 252 P. 515, 519 (1926). Because the people delegated all of the State's legislative power to the Legislature while reserving the concurrent right to legislate themselves, the legislative power that the people exercise through their initiative or referendum powers is the same legislative power that the Legislature exercises. *See Adams v. Bolin*, 74 Ariz. 269, 280-81, 247 P.2d 617, 625 (1952). Before the VPA's enactment, the people were therefore as bound by the prohibition against ordering a subsequent legislature to take a particular action as the Legislature itself was. This petition presents the important question whether the VPA changed that.

This Court has recognized that the VPA "altered the balance of power" between the voters and the Legislature. *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469, ¶ 7, 212 P.3d 805, 807 (2009). It did so, however, only with respect to the matters that it actually addresses. It prohibits the Legislature from eliminating—and from altering except as it allows—measures that the voters have enacted in the exercise of *their* legislative discretion by initiative or referendum. But nowhere does it authorize the voters to order the Legislature by statute to exercise *its* legislative discretion in a particular manner.

Absent a constitutional provision that authorized them to do so, the voters could not restrict the Legislature's plenary legislative discretion by ordering it in A.R.S. § 15-901.01 to appropriate certain funds. The court of appeals' misinterpretation of the VPA as giving the voters that authority is a matter of statewide importance because it will require the Legislature to appropriate substantial sums of money under A.R.S. § 15-901.01 each fiscal year (I.R.A. 33 at 2); it will affect future applications of the VPA in areas that may not be limited to appropriations; and as the trial court noted, it may enmesh the courts in separation of powers issues (I.R.A. 37 at 3 [App. 2]). This Court should therefore grant review and hold that A.R.S. § 15-901.01 is unconstitutional because the voters

lacked the constitutional authority to order the Legislature by statute to make the appropriation that the statute purportedly requires.

MATERIAL FACTS

In 2000, the Legislature passed Senate Bill 1007. 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1. The Legislature referred portions of S.B. 1007 to the voters as Proposition 301 in the 2000 general election. *See* Proposition 301 (App. 3). Following voter approval, section 11 was codified as A.R.S. § 15-901.01 (App. 4), which provides in part as follows:

> If approved by the qualified electors voting at a statewide general election, . . . [f]or fiscal year 2006-2007 and each fiscal year thereafter, the legislature shall increase the base level or other components of the revenue control limit by a minimum growth rate of either two percent or the change in the GDP price deflator, as defined in § 41-563, from the second preceding calendar year to the calendar year immediately preceding the budget year, whichever is less, except that the base level shall never be reduced below the base level established for fiscal year 2001-2002.

The "revenue control limit" is a component in the formula by which the State provides equalization assistance to school districts. *See* A.R.S. §§ 15-901(A)(12), -941 through -954, -971. It consists of the base-revenue and the transportation-revenue control limits. A.R.S. § 15-901(A)(12).

In October 2010, the Plaintiffs sued the State and the State Treasurer (collectively, "the State") claiming that the Legislature's 2010-2011 education

budget reconciliation bill, 2010 Ariz. Sess. Laws, 7th Spec. Sess., ch. 8 ("H.B. 2008") (App. 5), did not include the inflation adjustment that they believed section 15-901.01 mandated. (I.R.A. 1.)

Plaintiffs interpreted the phrase "the legislature shall increase the base level or other components of the revenue control limit" in section 15-901.01 to require the Legislature to annually adjust all components of the revenue-control limit for inflation. (*See* I.R.A. 23 at 5.) They contended that H.B. 2008 violated section 15-901.01 because it had increased only the transportation revenue-control limit component and had not increased the base-level component for fiscal year 2010-2011. (*See id.*) They further contended that this violated the VPA because the voters had enacted section 15-901.01 by referendum. (*Id.* at 5-6.)

Plaintiffs requested a declaratory judgment stating that section 15-901.01 required the Legislature to adjust all components of the revenue control limit for inflation annually. (I.R.A. 23 at 8.) The State opposed this request. (I.R.A. 33.)[1]

The trial court found that while some portions of Proposition 301 were self-executing appropriations, section 15-901.01 was not. (I.R.A. 37 at 2-3 [App. 5].) It observed that instead of appropriating any funds themselves in section15-901.01,

---

[1] Pursuant to A.R.S. § 12-1841, the Speaker of the House of Representatives and the President of the Senate filed a brief opposing Plaintiffs' request (I.R.A. 20) and participated in oral argument (I.R.A. 37).

the voters had instead directed the Legislature to do so. (*Id.* at 3.) It concluded that the voters could not validly order the Legislature by statute to make the appropriation that Plaintiffs contended section 15-901.01 mandated. (*Id.* at 2.) It therefore ruled that the Legislature's failure to make the appropriation did not violate the VPA and granted the State's motion to dismiss. (*Id.* at 2, 4; I.R.A 39.)

The court of appeals reversed, holding as follows: the VPA authorized the voters to order the Legislature by statute to appropriate funds (Op. ¶¶ 14-19); section 15-901.01 required the Legislature "to provide for annual inflationary increases" in each of the revenue-control limit's components; and interpreting section 15-901.01 as permitting the Legislature to do anything less would violate the VPA (*id.* ¶ 1). It therefore reversed and remanded for entry of declaratory judgment in Plaintiffs' favor. (*Id.* ¶ 37.)

ISSUE PRESENTED FOR REVIEW

Does the VPA authorize the voters to decline to exercise their own legislative discretion to appropriate certain funds and to instead enact a statute that requires the Legislature to appropriate those funds?

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

1. Is A.R.S. § 15-901.01 an appropriation?[2]

2. Did H.B. 2008 violate the VPA?[3]

REASONS WHY THE COURT SHOULD GRANT REVIEW

Before examining how the VPA "altered the balance of power" between the voters and the Legislature, it is important to understand the nature of the power that the Legislature received from the people and the differences between the people's constitutional authority and their statutory authority with respect to the Legislature. Our Constitution did not grant the Legislature only specifically delineated legislative authority, but instead conferred *all* of the State's legislative power on it by providing that "[t]he legislative authority of the state shall be vested in the legislature," Ariz. Const. art. IV, pt. 1, § 1(1). *Earhart v. Frohmiller*, 65 Ariz. 221, 224, 178 P.2d 436, 438 (1947). While conferring all the State's legislative power upon the Legislature, the people reserved to themselves a concurrent right to legislate through the Constitution's initiative and referendum provisions. Ariz.

---

[2] The State argued that A.R.S. § 15-901.01 was not an appropriation. (State's Answering Brief ["AnBr."] at 23-31.) The court of appeals found it unnecessary to resolve this issue. Op. n.6.

[3] The State argued that H.B. 2008 did not violate the VPA. (AnBr. at 58-59.) The court of appeals found it unnecessary to resolve this issue. *See* Op. ¶¶ 30-32.

Const. art. IV, pt. 1, § 1(2), (3) (App. 1). This Court has summarized the relationship between the Legislature's and the people's legislative power as follows:

> It is often said that all power resides in the people and that the power of a state legislature is a delegated power. In the sense that governments derive their just powers from the consent of the governed, such observation is of course true. But it does not follow that the delegated legislative power is circumscribed or restricted otherwise than by constitutional prohibition, nor that the power delegated to a state legislature is a power to legislate only within a restricted, circumscribed, described or narrow field.
>
> Initially the people have all legislative power. By [Ariz. Const. art. IV, pt. 1, § 1(1)], they delegated not *some* or *part* of their legislative power, but *all* legislative power, reserving only to the electors [a] concurrent right to propose laws and amendments and to approve or reject legislative enactments. The language of the section is clear, complete and concise.
>
> By these statements we do not suggest that the legislative authority is wholly untrammeled and unrestricted. Except as legislation may be prohibited by or repugnant to other provisions of the Constitution or the Federal Constitution and laws, the authority of the Legislature is absolute, and the delegation by the people was a complete and absolute delegation, with a reservation, not of part of such authority, but of a concurrent right of proposal and (by referendum) a right of veto.

Adams, 74 Ariz. at 280-81, 247 P.2d at 625 (citation omitted).

Our Legislature therefore has all the legislative power that our Constitution does not prohibit and that the states did not surrender to the federal government.

Home Accident Ins. Co. v. Indus. Comm'n, 34 Ariz. 201, 208, 269 P. 501, 503 (1928). Rather than being the voters' agents, who are required to enact legislation in accordance with the voters' directives, the legislators are the voters' representatives, who have plenary legislative discretion to address any subject within the scope of civil government subject only to state or federal constitutional limits. *Earhart*, 65 Ariz. at 224, 178 P.2d at 437-38; *Gherna v. State*, 16 Ariz. 344, 353, 146 P. 494, 498 (1915). This discretion includes the power to determine what the law will (and will not) be. *See Peters v. Frye*, 71 Ariz. 30, 35, 223 P.2d 176, 179 (1950). It also includes the discretion, absent constitutional restrictions, to act or not to act as it deems best with respect to any particular matter. *Home Accident*, 34 Ariz. at 208, 269 P. at 503.

One of the Legislature's most important prerogatives is its authority to determine how state funds should be prioritized and spent. *See Crane v. Frohmiller*, 45 Ariz. 490, 500-01, 45 P.2d 955, 960 (1935). Absent constitutional restrictions, the discretion to determine the items for which public money should be expended and the relative amounts that should be allocated to particular budget items is committed to the Legislature. *See Prideaux v. Frohmiller*, 47 Ariz. 347, 357-58, 56 P.2d 628, 632 (1936).

Plaintiffs conceded in their Reply Brief that before the VPA's enactment, the voters had no constitutional authority to require the Legislature to obey commands in voter-enacted statutes. (*See* RBr. at 2-3.) Nothing in the VPA changed that. The VPA repeatedly states that "the Legislature shall not have the power" to take certain specified actions. It (1) prohibits the Legislature from repealing measures that the voters have enacted by initiative or referendum, Ariz. Const. art. IV, pt. 1, § 1(6)(B), and (2) restricts the Legislature's ability to amend such measures, *id.* § 1(6)(C); to divert or to appropriate funds that such measures have created or have allocated to a specific purpose, *id.* § 1(6)(D); or to adopt any measure that wholly or partially supersedes such measures, *id.* § 1(14). It thus prohibits the Legislature from eliminating measures that the voters have enacted in the exercise of *their* legislative discretion and from altering such measures except as its provisions allow. Nowhere does it provide that the voters shall have the power to restrict the plenary legislative discretion that our Constitution has vested in the Legislature by declining to exercise their own legislative discretion to appropriate funds (or to take any other legislative action) and instead ordering the Legislature by statute to exercise *its* legislative discretion to appropriate the funds (or to take some other action).

Because the VPA is not ambiguous in this respect, examining the ballot materials that accompanied it is unnecessary. Nevertheless, all the arguments in those materials characterize it as being intended to protect the voters' will by prohibiting the Legislature from nullifying measures that the voters have enacted. *See Publicity Pamphlet*, Proposition 105 (App. 6). There is no mention in those arguments or in the Legislative Council's analysis of expanding the voters' power by requiring the Legislature to obey voter-enacted statutory commands that it take particular actions. *See id.*

If the voters believed that such a provision was necessary to implement their will, they could have included it in the VPA or elsewhere in the Constitution. They did not do so. And the concern that Plaintiffs expressed below—that the Legislature could somehow thwart the voters' will unless such a requirement exists—ignores the fact that not only do the voters have complete authority to enact measures and to make appropriations themselves, but the VPA prohibits the Legislature from repealing those measures or from altering or superseding them except as it allows.

The court of appeals stated that the State's argument would render section 15-901.01 meaningless by enabling the Legislature to "ignore the inflation adjustment provision altogether." Op. ¶ 18. It also concluded that the Legislature

was "required to follow the will of the people as expressed through the powers of initiative and referendum" as exemplified by section 15-901.01. *See id.* In doing so, it failed to recognize that the Legislature does not have to comply with the voters' will as expressed in a statutory order if, as the State contends, the voters lacked the constitutional authority to issue that order.

The court of appeals also thought it immaterial whether the voters had appropriated any funds in section 15-901.01. It stated that "[r]egardless of whether § 15-901.01 constitutes an actual appropriation, this case hinges on whether the voter-approved statute requires the legislature to follow the statutory provisions." Op. n.6. In doing so, it begged the question. It failed to recognize that the appropriation issue was crucial because if the voters had exercised their legislative discretion and had themselves made an appropriation in section 15-901.01, the VPA would have prohibited the Legislature from eliminating that appropriation or from altering it except in the limited way that the VPA allows.

The court of appeals erroneously stated that the State had relied "solely" on *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949), for the proposition that "while the people can by *constitutional* amendment properly direct the legislature to exercise its discretion in a particular manner, the voters cannot do so through a *statutory* provision enacted by initiative or referendum." Op. ¶ 16. The

State, however, also relied on the cases discussing the nature of the Legislature's authority (*see* AnBr. at 32-48, 54-55) and on the fact that nothing in the VPA's plain language (*id.* at 41-44, 55) or that of any other constitutional provision (*id.* at 31, 40, 43, 55) empowers the voters to restrict the Legislature's plenary legislative discretion by ordering it by statute to make a specific appropriation or enactment. The court of appeals did correctly note that the State's cases predated the VPA's adoption. Op. ¶ 15 n.7. But the VPA did not invalidate the principles that those cases established, including the principle that only a constitutional provision can restrict the Legislature's otherwise plenary discretion. *Home Accident*, 34 Ariz. at 208, 269 P. at 503. And neither the Plaintiffs nor the court of appeals have identified any constitutional provision—in the VPA or elsewhere—authorizing the restriction that section 15-901.01 purports to impose on the Legislature's discretion.

The court of appeals cited *Arizona Early Childhood* in rejecting the State's argument, stating that there, this Court "determined that a *statutory* provision adopted by *initiative* prohibited the legislature from using the funds contrary to the purpose of the initiative." Op. ¶ 17. That case has no bearing here. It is distinguishable because the voters appropriated much of the money to be deposited into the early childhood development and health fund themselves. *See* A.R.S. §§

8-1181, -1182, 42-3371, -3372. Although "state" monies could also be deposited into the fund, *see* A.R.S. §§ 8-1181(A), -1182(A), (B), -1183, the initiative did not order the Legislature to appropriate any such monies or to take any other action, *see* Proposition 203 (2006) (App. 6). It therefore did not raise the same issue that section 15-901.01 does. The Court simply applied the VPA to protect the monies that the voters had actually appropriated (and the other monies that had been deposited into the fund) in accordance with the VPA's and the initiative's terms. *See* 221 Ariz. at 470-72, ¶¶ 9-19, 212 P.3d at 808-10. The VPA would have similarly protected the funds at issue here if the voters had appropriated them themselves instead of ordering the Legislature to do so.

The court of appeals also stated that the State had acknowledged that the VPA can "impact the choices" that the Legislature can make in exercising its discretion but had argued that the VPA cannot "restrict" legislative discretion. Op. ¶ 18. It characterized this as "a distinction without legal significance." *Id.* The State did not say that the VPA cannot "restrict" legislative discretion. It argued that only constitutional provisions can restrict the Legislature's discretion (AnBr. at 31, 35-41, 47-48, 55), and it acknowledged that the VPA does so (*id.* at 41-43). It further acknowledged that "[i]n protecting the measures that the voters have enacted in the exercise of their legislative discretion, the [VPA] may impact the

choices that the Legislature can make in exercising its legislative discretion." (*Id.* at 43.) Thus, for example, if the voters had appropriated funds themselves in section 15-901.01 instead of trying to order the Legislature to do so, the VPA would have protected that appropriation and would have restricted any choices that the Legislature might make with respect to those funds. The court ignored the State's point: that *absent a constitutional provision that authorizes them to do so*, the voters cannot restrict the Legislature's otherwise plenary discretion by ordering it *by statute* to exercise its discretion in a particular manner. (AnBr. at 38-40, 43, 46-48, 55.) As the State noted, neither the VPA nor any other constitutional provision authorizes the voters to impose such a restriction. (*Id.* at 31, 40-44, 55.)

The court of appeals also stated that the Legislature had recognized the voters' authority to require it "to expend state revenues or to allocate funds for certain purposes" by enacting the Revenue Source Rule, Op. ¶ 19 n.8, and by acknowledging that it had to fund at least one of the revenue-control limit's components, Op. ¶ 18. It also noted that the Legislature had drafted section 15-901.01 and had referred it to the voters for their approval. Op. ¶ 19. It stated that "it would be illogical to conclude" that the Legislature could do so only to then disregard the voters' decision, especially when it was presumed to know that referring the statute to them would trigger the VPA's "heightened consequences."

Id. But the fact that both the Legislature and the voters may have mistakenly believed that the VPA authorized the voters to order the Legislature by statute to appropriate funds or to take particular actions does not establish the VPA's proper interpretation as a matter of law. The VPA cannot protect a statute that the voters had no power to enact—whether the voters enacted that statute by initiative or by referendum.

The court of appeals also relied on *Fogliano v. Brain*, 229 Ariz. 12, 270 P.3d 839 (App. 2011). Op. ¶¶ 12-14. In *Fogliano*, the court acknowledged the argument that the State is making here, but did not squarely address it. 229 Ariz. at 18 n.8, ¶ 15, 270 P.3d at 845 n.8. It instead noted that the State had acknowledged that the VPA had "altered the balance of power" between the voters and the Legislature and that voter-enacted appropriations could '"impact the choices that the Legislature can make in exercising its legislative discretion.'" *Id.* As explained above, neither of these acknowledgments on the State's part is inconsistent with or requires rejection of the State's argument.

The VPA protects the power that the voters already had by insulating the laws that they actually enact from certain incursions by the Legislature. Neither by its terms nor by implication does it expand the voters' power by authorizing them

to limit the Legislature's discretion by requiring it in voter-enacted statutes to make appropriations or enact laws not of its own choosing.

CONCLUSION

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

Respectfully submitted this 13th day of March, 2013.

Thomas C. Horne
Attorney General

/s/Kathleen P. Sweeney
Kathleen P. Sweeney
Kevin D. Ray
Jinju Park
Assistant Attorneys General
Attorneys for Defendants-Appellees