IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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 PUTNAM, Plaintiffs/Appellees, v. DOUG DUCEY, in his official capacity as Treasurer, and STATE OF ARIZONA, Defendants/Appellants. ANDREW M. TOBIN, Speaker of the Arizona House of Representatives; and ANDY BIGGS, President of the Arizona State Senate, Intervenors/Appellants.	1 CA-CV 14-0677 Maricopa Superior Court No. CV2010-017113

THE STATE'S REQUEST FOR ORDER CONFIRMING AUTOMATIC STAY; AND ALTERNATIVE, MOTION FOR STAY

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The Appellants-Defendants and Appellants-Special Intervenors (hereinafter collectively "the State")[1] respectfully request an order confirming that through Rule 62(g) of the Arizona Rules of Civil Procedure an automatic stay is in place of

[1] Appellants-Defendants are the State of Arizona and Doug Ducey, Arizona State Treasurer, who is a nominal party. Appellants-Special Intervenors are Andy Biggs, President of the Arizona State Senate and Andy Tobin, Speaker of the Arizona House of Representatives. The Speaker and the President intervened in this action effective on April 2, 2014. (Electronic Index of Record (hereafter, "IR") 66).

the Judgment entered by the Superior Court on August 20, 2014 (IR 91). The automatic stay applies because the Judgment is a "money judgment" ostensibly requiring the State to immediately commence paying hundreds of millions of dollars in new state funding during the current fiscal year despite the fact that the State is already grappling with a large budget shortfall.

In the alternative, the State moves under Rules 6 and 7 of the Arizona Rules of Civil Appellate Procedure for a discretionary stay of the same Judgment pending appeal so that the legislative and executive branches will not be forced to make enormous budget cuts and other policy decisions impacting important state programs that would be unnecessary if the State prevails on appeal.

INTRODUCTION

Though it forces spending by the State this fiscal year of hundreds of millions in previously unappropriated dollars, the partial judgment now on appeal was not issued until well after the Legislature had already passed and the Governor had signed into law the Arizona Fiscal Year 2014-2015 state budget, and even after that budget year was underway. (*See* IR 91). Even the legal rulings on which the Judgment is based were not issued until after the State had commenced operations under this budget. (*See* IR 84 (Under Advisement Ruling filed July 11, 2014)). Now, the state revenues needed to fund even the original budget figures are falling far short of forecasts and Arizona is facing a current-year budget shortfall of $189

million. (*See* Exhibit "1" hereto (Hearing Exh. 141)).[2] Without stay relief (automatic or otherwise), the Superior Court's Judgment drives this year's shortfall to $520 million. (*See* Exhibit "1" at 1, 5-6 (Hearing Exh. 141)). Moreover, there is a projected budget shortfall for the next fiscal year, Fiscal Year 2015-2016, of $667 million. (*Id.*) And without a stay the Judgment could propel the Fiscal Year 2015-2016 shortfall beyond $1 billion. (*Id.*) This impact of hundreds of millions of dollars presents a massive fiscal problem for the State of Arizona. The high cost of the Judgment cannot be addressed this year without significant cuts to the existing state budget priorities, and its implementation in the next fiscal year would require similarly large budget cuts, or substantial tax increases, or both, with no guarantees that the budget could even then be properly balanced as required by the Arizona Constitution. *See generally,* Ariz.Const., art. IX, §§ 3, 4.

Importantly, the calculations of the State's "Base Level" funding inflation adjustment obligations under A.R.S. § 15-901.01 that are disputed in this appeal

[2] The State has attached as exhibits various relevant materials, including certain evidence admitted in a five-day evidentiary hearing in this matter held before the Superior Court October 27-31, 2014, to decide issues related to Plaintiffs' additional demands that the court order the State to distribute many hundreds of millions of dollars in so-called "retroactive" payments related to prior fiscal years. The materials admitted at the evidentiary hearing include a report published by the Arizona Joint Legislative Budget Committee as a result of the Legislature's Financial Advisory Committee's budget update in early October of this year. Those materials were admitted into evidence at the time the Superior Court denied the State's verbal motion for a discretionary stay of the Judgment on the record on October 31, 2014. For clarity, the citations to this material also identifies the exhibit number assigned to it for the evidentiary hearing, noted as "Hearing Exh. 141".

were not before the appellate courts in this case, and they are not the logical extension of the limited, declaratory rulings of this Court and the Supreme Court. Nor was any remedy that would compel spending of public money like that issued in the Superior Court's Judgment previously before the appellate courts or approved by the Supreme Court. Both appellate reviews turned on entirely different legal questions. The Superior Court is the first and only court thus far to address demands from the Plaintiffs-Appellees for orders that both modify by judicial fiat prior legislative enactments and compel the recasting of budget appropriations and release of hundreds of millions of dollars in new appropriations as current and prospective relief (as well as their equally large claim for retroactive relief that remains pending below). (*See* IR 91, at ¶ 6 ("The issue of disbursement for past years, and other issues including attorneys' fees, remain to be decided.")

The Superior Court's decision on these new relief issues could not be more disruptive to Arizona's fiscal house. It amends statute and session law without any legislative action and intrudes deeply into the financial policy of the State, forcing the Legislature and Governor to make policy decisions the Arizona Constitution leaves in their sole discretion. Moreover, it rests on a legal foundation that will not survive appellate scrutiny. In these circumstances, the Judgment compels the type of premature expenditure of public dollars that Rule 62(g) is intended to stay and the State is entitled to a stay of the Judgment pending resolution of the appeal.

Without a stay of the Judgment, the newly elected 52nd Arizona Legislature[3] and Governor will be forced to add hundreds of millions of dollars to the state's current budget obligations and to consider massive cuts in current spending for deserving programs serving vulnerable populations that would be needed to try and balance the state budget. Also, absent a stay local district property taxes may be unnecessarily increased and school districts may initiate large unauthorized expenditures and extensions of credit in reliance on the Judgment that will bind Arizona taxpayers. The impact to the fiscal affairs of the State, its political subdivisions, and its taxpayers cannot be overstated. These drastic impacts should not be forced on the State or its taxpayers without the benefit of a complete appellate process addressing the new issues raised by the Superior Court's Judgment. This Court should therefore recognize the existence of the automatic stay imposed by Rule 62(g), Ariz. R. Civ. P. or, in the alternative, exercise its discretion under Rule 7, Ariz. R. Civ. App. P. to enter a stay of the Judgment.

BACKGROUND

The prior rulings in this case turn on the language of § 15-901.01, Arizona Revised Statutes ("Inflation Provision"), which reads in relevant part:

> For 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 . . . except that the

[3] The incoming 52nd Legislature is comprised of the Members who were elected in the 2014 General Election. The Members will be sworn in on January 12, 2015.

> base level shall never be reduced below the base level established for fiscal year 2001-2002.

Initially, this litigation focused on the question of whether this language creates a binding obligation on the Legislature to increase both the "base level" and the "other components of the revenue control limit." This Court answered this question in the affirmative. *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 345, 295 P.3d 440, 443 (App. 2013). Our Supreme Court granted review in part,[4] affirmed, and remanded the case to the Superior Court "for entry of a declaratory judgment in favor of [the Appellants-Plaintiffs] and further proceedings consistent with this opinion." 233 Ariz. 1, 308 P.3d 1152 (2013). The Supreme Court's mandate issued on January 14, 2014. (IR 52).

Importantly, neither appellate opinion addressed what calculation methodology the State needed to employ to set the annual Base Level inflation adjustment required by A.R.S. § 15-901.01; nor would that issue have been relevant as the appeals were brought on narrow declaratory judgment issues regarding the State's basic obligations to include a Base Level adjustment in each annual budget. As evidenced by this Court's decision at 231 Ariz. 342, 346 n. 4,

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[4] Specifically, the Supreme Court granted review to the question: "Does the Voter Protection Act authorize the voters to require the legislature to increase 'the base level or other components of the revenue control limit' as provided in A.R.S. § 15-901.01?" Arizona Supreme Court, *Minutes: Arizona Supreme Court* (05/29/13) at 10, http://www.azcourts.gov/Portals/21/MinutesCurrent/PRMIN_052903.pdf (last visited 11/17/14).

295 P3d 440, 444 n. 4, the Appellees had requested in their initial pleadings an injunction against disbursements of monies under the Fiscal Year 2010-2011 budget bill and "'an order in the nature of mandamus' requiring the State Treasurer to disburse funds that include the inflation adjustment" but the Plaintiffs-Appellees had allowed those claims to be dismissed and abandoned them on appeal. This Court did not address those claims "as [Appellees] have not raised them on appeal." *Id.* The Supreme Court decision noted that the injunctive and mandamus relief claims were "likewise not before us." *Cave Creek Unified School District v. Ducey*, 233 Ariz. 1, 4 n. 1, 308 P.3d 1152, 1155 n. 1 (2013).

The Remand Proceedings Below

On remand, the Plaintiffs sought far more than the entry of the narrow declaratory relief commanded by the Supreme Court, and instead actively pursued retroactive declaratory and injunctive relief compelling disbursements of hundreds of millions of dollars for prior fiscal years in which the State funded the inflation adjustment for the other component of the Revenue Control Limit, but not the Base Level ("the Retroactivity Claim"). Moreover, Plaintiffs sought relief that was not before the Superior Court the first time around. In addition to the declaratory relief contemplated by the Supreme Court, Plaintiffs initiated demands for additional declaratory and injunctive relief requiring a specific calculation and implementation of a "minimum growth rate" prescribed by the Inflation Provision

("the Reset Claim"). (*See* IR 53 (Plaintiffs' Memorandum of Law Re Remaining Issues), at Attachment "B" ¶¶'s 3, 4 and Exhibit "B")).

For its part, the State has opposed the various types of relief sought by Plaintiffs on remand as outside of the relief contemplated by both this Court and the Supreme Court and as otherwise barred by multiple affirmative defenses and jurisdictional doctrines including but not limited to waiver, estoppel, mootness, the notice of claim requirements of A.R.S. § 12-821.01, the statute of limitations under A.R.S. § 12-821, separation of powers, political question and non-justiciability doctrines, impossibility, inappropriate retroactive application of the appellate rulings, and Plaintiffs-Appellees' inability to meet their burden of proving that the school districts are unable to provide their students an opportunity to learn what is expected by the Arizona state academic standards. (*See, e.g.*, IR 67, 71-73).[5]

Initially, the Superior Court on remand had directed the parties to submit legal memoranda addressing three areas: (1) the jurisdiction of the Superior Court on remand; (2) the affirmative defenses raised by the State; and (3) the proper method for calculating the inflation adjustment required by the Inflation Provision. (IR 65, 67-80.) Within its briefing on these issues, the State contended that the

[5] The State has asserted and elaborated on some of these defenses in its more recent filings against the retroactive relief claims, though such briefing was filed after creation of the Electronic Index of Records, as it was done in association with the October 27-31, 2014 evidentiary hearing and therefore does not appear on the current Index.

Plaintiffs' interpretation of the Inflation Provision is incorrect because it creates a new requirement not contemplated by the voters when they approved the inflation provision—a requirement to fund inflation beyond the statutory minimum growth rate expressed in A.R.S. § 15-901.01.

More specifically, the State established that many of the annual budgets passed in the relevant years have included upward adjustments of the Base Level well in excess of the minimum growth rate required by A.R.S. § 15-901.01 and that those extra, discretionary adjustments are not legally "locked into" the Base Level for future adjustment calculations. The State also explained that A.R.S. § 15-901.01, which expressly states "except that the base level shall never be reduced below the base level established for fiscal year 2001-2002" even allowed and still allows certain downward adjustments in the Base Level, meaning the Court could not declare a minimum Base Level amount that permanently locked in all former increases. Therefore, the current "Base Level" that must be adjusted going forward is, at a minimum, far less than the Base Level used in the Plaintiffs-Appellees', and now the Superior Court's, calculations. Consequently, the annual, prospective adjustment would be hundreds of millions of dollars less per year than the Superior Court has determined.

The Superior Court held a hearing on the Plaintiffs' requests for relief on remand on May 9, 2014. The Superior Court filed on July 11, 2014, its ruling

concerning the relief requested by the Plaintiffs on remand. (IR 84.) The Court ruled against the state on each of the affirmative defenses. (*Id*. at 4-10.) The Court also found that it had jurisdiction to enter declaratory relief, and both prospective and retroactive injunctive relief. (*Id*. at 10-14.) Next, the Court determined that the relief sought by Plaintiffs was consistent with the constitutional separation of powers, conceding only that it "cannot (and will not) tell the Legislature or Treasurer how to fund the adjustments, past or future. . . . Nor can it direct the Governor's veto power." (*Id*. at 12-13.)

The Superior Court also addressed the Plaintiffs' Reset Claim, concerning how inflation should be calculated. The Court agreed with the Plaintiffs that the Base Level can never be reduced, even when the State has funded more than the minimum growth rate required by the Inflation Provision. (IR 84, at 19-21.) This means that the prior Base Levels, already increased beyond the minimum growth rate, must nevertheless be further increased according to the Inflation Provision each year. (*Id*.) Put another way, the Superior Court has concluded that the discretionary amounts that the Legislature has aggregated with other non-discretionary amounts in the annual definitions of "base level" incorporated into the non-voter protected terms of A.R.S. § 15-901 have become permanent portions of the Base Level amount that must be funded in every future year *and* upwardly adjusted per A.R.S. § 15-901.01.

Finally, the Superior Court determined that it would need an evidentiary hearing to assess whether Plaintiffs' request for retroactive relief should be granted. (IR 84, at 18, 20.) In a separate order entered on July 18, 2014, the Superior Court set a five-day evidentiary hearing on the issue of the Retroactive Claim for October 27-31, 2014. (IR 86.) That hearing has occurred, and the parties have filed their post-hearing proposed findings of fact, conclusions of law, and forms of judgment and now await a decision.

After the Superior Court's July 11, 2014 minute entry, the Plaintiffs lodged a Form of Judgment requesting that the Court immediately enter its ruling as to the prospective relief as a judgment under Rule 54(b), Arizona Rules of Civil Procedure. (IR 85.) The State opposed dividing judgment on the Plaintiffs'-Appellants' prospective and retroactive monetary claims, arguing that the legal issues concerning retroactive and prospective relief are inextricably intertwined and that the amount of public money involved (well over $300 million in each prospective fiscal year *and* potentially hundreds of millions more for retroactive relief) is so significant that the Legislature could not respond to the two forms of relief in isolation of each other. (IR 88.) The Superior Court, nevertheless, issued a judgment dividing its ruling on the Reset Claim from the request for retroactive relief (IR 91, 92).

The Judgment of the Superior Court

The Superior Court's Judgment enters both declaratory relief and prospective injunctive relief against the State. First, it declares that "all components of the Revenue Control Limit . . . must be adjusted each year pursuant to A.R.S. § 15-901.01." (*Id*. at 1) Next, it orders that "the base levels for the following fiscal years are or were required to be, and are deemed for all purposes to have been and to be, in the amounts shown:

Fiscal year 2009-2010: $3,357.25

Fiscal year 2010-2011: $3,397.54

Fiscal year 2011-2012: $3,428.11

Fiscal year 2012-2013: $3,496.68

Fiscal year 2013-2014: $3,559.62

Fiscal year 2014-2015: $3,609.45"

(*Id*. at 2.) Base Level amounts are and repeatedly have been enacted by statute in A.R.S. § 15-901 (a non-voter protected provision). They are also incorporated into the annual State budgets enacted into law. More specifically, they form one fundamental component of the calculation of the public school districts' individual, annual Revenue Control Limits (expenditure restrictions) that in turn are the basis of the formula funding for K-12 education that is included in the annual budget legislation. Thus, the Superior Court's Judgment rewrites prior and existing legislation.

In a "belt and suspenders" term, the Judgment simultaneously orders that "the Revenue Control Limit for all school districts for fiscal years 2009-2010 through 2014-2015 ***shall be corrected*** to the extent the Revenue Control Limit for those years was not calculated in accordance with the base-level figures set forth in this judgment." (*Id*. (emphasis added)) This is an order to the legislative and executive branches to pass new legislation that reflects the legislative changes the court has decreed and thereby "corrects" in accordance with the court's legislative directive the numbers used previously, and in this year's budget legislation, for Arizona's education budgets. Finally, the Judgment clarifies that the issues of ordering actual disbursements for *prior* years and attorneys' fees "remain to be decided." (*Id*. at 2-3.)

The State filed its Notice of Appeal from the Judgment on September 10, 2014. The same day, the State filed a Notice of Automatic Stay informing the Superior Court and the parties that an automatic stay of the Judgment was in effect through Rule 62(g) of the Rules of Civil Procedure. After Plaintiffs moved for a determination that an automatic stay was not in effect (IR 97), the Superior Court ruled on October 6, 2014, that its Judgment "is enforceable and not subject to a stay, absent stay relief from the appellate courts." (IR 111.) Throughout the rest of October the parties conducted discovery and otherwise prepared for the five day

evidentiary hearing on the Retroactive Claim. (*See, e.g.,* IR 104 - minute entry on pre-hearing discovery issues.)

At the conclusion of the hearing on retroactive relief, on October 31, 2014, the State moved for a discretionary stay of the Court's Judgment pending appeal. (Exhibit "2" hereto (excerpts of hearing transcript for October 31, 2014) at 155-157). The Court denied the motion from the bench (*id*.) and on November 12, 2014 issued an Order *Nunc Pro Tunc* confirming the denial of the motion. (Exhibit "3" hereto).

On December 2, 2014, the parties submitted competing proposed findings of fact and conclusions of law and forms of judgment related to the hearing on retroactive relief. That matter is now under advisement with the Superior Court.

Impact of the Judgment on the State Budget

Arizona's fiscal year runs from the first day of July to the last day of June. Ariz. Const. art. IX, § 4. In January of each year the Legislature begins consideration of legislation that will ultimately constitute the State's annual budget for the fiscal year beginning in July. As noted above, the Supreme Court issued its decision on September 26, 2013. At that time the Legislature was not in session and the State's budget for Fiscal Year 2013-2014 ("Fiscal Year 2014") had already been adopted for over three months. *See* Journal of the House of Representatives, 51st Leg., 1st Reg. Sess. at p. 373 (2013) (the 51st Legislature adjourned its first

regular session on June 13, 2013); Arizona State Legislature, *Bill Status Inquiry: HB 2001* (51st Leg., 1st Spec. Sess.) (the general appropriation bill for fiscal year 2014 was enacted on 6/13/2013 and signed on 6/17/2013), http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/1s/bills/hb2001o.asp&Session_ID=111 (last visited 11/19/14)).

The mandate of the Supreme Court issued on January 14, 2014. (IR 52.) By that time, the Legislature was again in session and consideration of the State's annual budget for Fiscal Year 2014-2015 ("Fiscal Year 2015") was underway. The Legislature adopted the State's annual budget for Fiscal Year 2015 on April 8th, 2014. *See* Arizona State Legislature, *Bill Status Overview: H.B. 2703* (51st Leg. 2nd Reg. Sess., 2014), http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/bills/hb2703o.asp&Session_ID=112 (last visited 11/18/14). The Governor signed the budget on April 11, 2014.[6] *Id*. Pursuant to the Arizona Constitution, the general appropriation bill became effective immediately with the Governor's signature. Ariz. Const., art. IV, pt. 1, § 1 ¶ 3. The enacted budgets for both Fiscal Years 2014 and 2015 included inflation adjustments for both the Base Level and the other components of the Revenue Control Limit required by A.R.S. § 15-901.01. The Plaintiffs contend, however, that the funding is still inadequate under the theory that once a prior Base Level has been enacted it can never by

[6] The Governor vetoed certain appropriations in the budget. None of the vetoes are relevant to this case.

reduced, even if it was enacted at a level higher than the minimum growth rate required by A.R.S. § 15-901.01.

The hearing before the Superior Court on remand took place almost a month later on May 9, 2014. (IR 81.) The Superior Court took the matter under advisement and filed its ruling - the first substantive legal ruling in this case since the Supreme Court's decision in September of 2013 - 63 days later, on July 11, 2014. (IR 84.) By that time the State's new fiscal year was underway. As discussed above, the Superior Court rebuffed the State's request to keep any court-ordered relief against the State together in the same judgment and reduced its ruling as to current and prospective relief (but not as to retroactive relief) to a signed Judgment on August 21, 2014. (IR 91-92.)

The Judgment was entered 52 days into the current fiscal year - Fiscal Year 2014-2015. The express terms of the Judgment require $317 million of unbudgeted spending in the current fiscal year. And it further requires at least $326 million in additional state spending for Fiscal Year 2015-2016 and beyond. (*See* Exhibit "1" hereto at 1, 5-6 (Hearing Exh. 141).

The State believes that the Judgment qualifies as a money judgment, subject to automatic stay under Rule 62(g), Ariz. R. Civ. P. during the pendency of this appeal. If, however, this Court concludes that this Judgment is not the equivalent of a money judgment, this Court should enter a discretionary stay pending appeal.

Billions of dollars of public spending, and the State's budgeting process for this year and the foreseeable future, depend upon the outcome of this appeal. Under these circumstances the requirements for a discretionary stay are easily met.

ARGUMENT

I. The Judgment is Subject to an Automatic Stay Through Rule 62(g) of the Rules of Civil Procedure.

The Judgment is automatically stayed until the conclusion of this appeal because it must be considered a money judgment against the State. Rule 62(g), Ariz. R. Civ. P., reads:

> Money judgments against the state or agency or political subdivision thereof, are automatically stayed when an appeal is filed. Judgments against the state or agency or political subdivision thereof other than money judgments are not automatically stayed when an appeal is filed, but as to them, no bond can be required if a stay is ordered.

Ariz. R. Civ. P. 62(g). A money judgment conveys a right on a party "to have monies released." *City of Phoenix v. Johnson*, 220 Ariz. 189, 193, 204 P.3d 447, 451 (App. 2009). The distinction between non-monetary relief and a money judgment is that between an "order to do, rather than an order to pay. . . ." *Kelley v. Arizona Dept. of Corr.*, 154 Ariz. 476, 479, 744 P.2d 3, 7 (1987) (addressing prior version of Rule 62(g) - quotation omitted). The rule makes it clear that the State should not be directed to expend public monies unless all appeals are final.

A. The Judgment Was Intended to, and Does, Attempt to Operate as An Order Amending Existing Legislation and Ordering the Legislative and Executive to Appropriate and Pay Public Monies.

The Judgment is an order to pay. Paragraph 6 of the Judgment makes this clear. First, it requires the Legislature to reset the "base level" in A.R.S. § 15-901 for the current fiscal year, and in the budget legislation that incorporated that Base Level as part of the K-12 education appropriation. The Base Level is a per-pupil dollar amount in Arizona's education-funding "equalization" formula. *See* A.R.S. § 15-901. Resetting the Base Level amount results in more public monies being appropriated to K-12 Education through operation of the formula.[7] Such formula adjustments also increase the budget spending authority for school districts, resulting in a larger expenditure of public monies, and perhaps an increase in the property taxes assessed at the local, district taxpayer level. Second, by expressly declining to order disbursements for any prior budget years, the Judgment strongly

[7] The only agency of Arizona State Government with authority to change the language of state statute is the Legislature. To the extent the Judgment attempts to amend the statutes and budget session law via judicial pronouncement, or requires the Legislature to enact specific laws, it is a violation of the constitutional separation of powers. To the extent the Judgment is a directive to other agencies or actors within State Government to act as though the definition of "base level" is different than the one in enacted law it likewise violates the separation of powers by requiring the expenditure of public monies without legislative authorization. *See* discussion *infra*.

implies an immediate obligation for the State to indeed "disburse" monies for the current fiscal year. (IR 92, at ¶ 6.)

Using the Superior Court's "reset" Base-Level figures from its Judgment, the disbursement would require increased General Fund expenditures of public monies for K-12 Education of approximately $317 million in this fiscal year, and at least $326 million in each fiscal year thereafter. (*See* Exhibit "1" hereto, at 1, 5-6). Ordering that the Base Level numbers in statute and budget legislation "are deemed for all purposes to have been and to be" specified numbers, the Superior Court has, by declaration, amended the relevant enacted legislation; and, by further ordering that "the Revenue Control Limit for all school districts for fiscal years 2009-2010 through 2014-2015 ***shall be corrected*** [by the State] to the extent the Revenue Control Limit for those years was not calculated in accordance with the base-level figures set forth in this judgment" the Superior Court has further ordered the State to act in accordance with its legislative amendments, increase the Revenue Control Limit calculations that form a large part of each school districts' annual expenditure capacity, *see* A.R.S. § 15-947(C), and appropriate monies from the date of the Judgment accordingly to fund that extra budget capacity.

Thus, for current and prospective purposes the Judgment is an order to pay. Read otherwise, the Court's Judgment would be an illogical nullity – requiring the

Legislature and Governor to act on its demand that the legislative calculations be changed, but requiring no appropriations ever be made to comply with those changes. In fact, because there previously existed no appropriation actions whatever that authorized distribution of expenditure of the "reset" Base Level numbers, what the Superior Court has done is not just to require the State to pay out public monies, but it has actually required the Legislature and Governor to undertake the appropriations process that is a constitutional prerequisite to public spending. *See* Ariz. Const. art. IX, § 5 ("No money shall be paid out of the state treasury, except in the manner provided by law."); *and see Cockrill v. Jordan*, 72 Ariz. 318, 319, 235 P.2d 1009, 1010 (1951) ("[Art. IX, § 5] has been construed to mean that no money can be paid out of the state treasury unless the legislature has made a valid appropriation for such purpose and funds are available for the payment of the specific claim.").[8]

The Judgment also may have other budgetary fallout that will force substantial additional tax burdens on local property tax taxpayers. Some districts in Arizona are known as "non-state-aid districts" because almost their entire annual budget capacity, under the Arizona state equalization funding formula, is paid out of local property taxes. *See, e.g.*, A.R.S. § 15-971. That means when

[8] Though the Plaintiffs-Appellees' claims for retroactive relief have not been decided, should they be granted they will also constitute an order to pay, meaning they would be automatically stayed by Rule 62(g).

such districts' budget capacity calculations are increased, they may require the local county tax officials to levy additional local property taxes. *See* A.R.S. § 15-992. Thus, it is likely that such districts will now take the position that their authorized budget capacity has been amended and that they will be entitled to impose additional tax burdens on their local taxpayers to pay for that extra capacity. While this year's tax assessments may be practically impossible to amend, next year's assessments are certainly in jeopardy.

Moreover, the state law allows districts to obtain maintenance and operation budget overrides through a vote of their local district voters. *See* A.R.S. §§ 15-481, 15-482, 15-947. When approved, the overrides last for seven years, and the amount of the override is established as a percentage of the district's Revenue Control Limit budget capacity. The override is paid for by levies against the local district property taxpayers. A.R.S. §§ 15-481, 15-482. As of this date, there are over 90 districts in Arizona with maintenance and operations overrides in place and continuing through next fiscal year (2015-2016) and/or beyond.[9] If the districts construe the Superior Court's Judgment to have recalculated their budget capacities by adding the additional Base Level inflation adjustment, they will also seek to have their override levies adjusted upward at the expense of their local taxpayers.

[9] These numbers may be confirmed through official state records found at https://www.ade.az.gov/Budget/EntitySelection.asp.

Finally, because the budget capacity for each district that is based in large part on the Revenue Control Limit formula, *see* A.R.S. § 15-947(A, C), establishes how much the district may spend in public dollars for the year, and many districts have access to financing by issuance of warrants that essentially act as public payment commitments against future revenues, *see* A.R.S. §§ 15-304, 15-321(G), districts may take the Superior Court's order mandating adjustment of their Revenue Control Limit calculations as authorization to enter into spending commitments through warrants or other financing even if no additional appropriated monies are distributed by the State. Of course, to the extent such commitments are valid, either the State's General Fund or local district property taxpayers will ultimately be exposed for satisfaction of the commitments, perhaps with extra financing charges attached. Thus, the Judgment creates multiple scenarios under which payments of public monies might be compelled or caused. And, at a minimum, it creates the risk of creating chaotic and inconsistent applications both at the state level and among the over 230 Arizona school districts that will be difficult to predict, let alone manage.

In its Minute Entry ruling on the Rule 62(g) automatic stay, the Superior Court stated that its Judgment was not subject to an automatic stay because "Plaintiffs cannot execute on it as they could a judgment for a sum of money." (IR 111.) In the same order, however, the Court asserted that the "Judgment is

enforceable and not subject to stay, absent stay relief from the appellate courts." (IR 111.) This attempted distinction - between "execution" and "enforceability" - is untenable. Orders triggering payments are money judgments. If the Judgment requires the State of Arizona to pay out public monies now - and both the Superior Court and the Plaintiffs-Appellees believe it does - it is automatically stayed pending final resolution of the appeal.

The Plaintiffs have publicly indicated their belief that the Judgment requires immediate payment by the State. After the Judgment was entered, counsel for the Plaintiffs' was quoted in the Arizona Republic saying that the State "need[s] to start giving the schools the money now. . . ." (Exhibit "4" (Arizona Republic, *Judge to state: Pay up $317 million to schools* (Aug. 21, 2014), http://www.azcentral.com/story/news/arizona/politics/2014/08/21/arizona-must-boost-education-funding-judge-rules/14391251/ (last visited 9/17/2014)). Counsel for the Plaintiffs also answered affirmatively a verbal question from Special Intervenors' counsel about whether Plaintiffs contended that the Judgment included injunctive relief requiring disbursement of funds. (*See* IR 105, at 1, 4). Thus, the Plaintiffs have plainly contended that the Judgment contains immediately effective injunctive relief that entitles Arizona public school districts to obtain certain increased funding in the current fiscal year and thereafter.

The assertion that the Judgment is a mere declaratory judgment that is not yet subject to execution in a way that compels expenditure of public monies is also inconsistent with the Superior Court's original Under Advisement Ruling and with its Minute Entry granting the Plaintiffs' Rule 54(b) Motion.

- The Court's Under Advisement Ruling entered on July 11, 2014, rejected the State's argument that only declaratory relief was appropriate. It went on to grant equitable injunctive relief imposing its own reset of the Base Level to the amount requested by the Plaintiffs and ordering that the State "shall . . . correct[]" the Revenue Control Limit numbers it has used in setting annual K-12 appropriations this year and will use for the future. (IR 84, at 22-23).
- The Minute Entry deciding Plaintiffs' 54(b) Motion purports to "fully resolve … resetting the base level. . . ." (IR 92, at 2). In the context of Rule 54(b), this Court disagreed with the State's request for a unified judgment saying the "preference for one judgment for budgeting reasons . . . does not bar entry of a final Judgment now. . . ." (*Id.*)

There is little doubt that if the State does not shortly comply with the Plaintiffs' expectations for additional Fiscal Year 2014-2015 funding Plaintiffs will seek to enforce the Judgment as if it grants them injunctive relief requiring disbursements and not just a declaration regarding the state of the law.

B. Rule 62(g) is Not Limited to Traditional Damages Judgments.

The Superior Court's Minute Entry holding that Rule 62(g)'s automatic-stay provision does not apply reasoned that the Judgment is "not a judgment for damages. Plaintiffs cannot execute on it as they could a judgment for a sum of money." (IR 111 (Minute Entry 10/07/14)). The Superior Court is wrong to view Rule 62(g) as applicable only to traditional, executable judgments for money damages. Nothing in the automatic-stay provision limits its reach to pure claims for damages, and the purpose of the rule would not be served by such a narrow interpretation. Instead, the rule focuses on whether a government entity has been required to pay money and whether the judgment has put public monies at risk of expenditure while the appeal proceeds. Here, both are true.

In an illustration of the broader reach of Rule 62(g), this Court has applied Rule 62(g)'s automatic stay to another area where private plaintiffs maintained constitutionally-based money claims against the government. In *Pima County v. McCarville, ex rel. County of Pinal*, this court concluded that Rule 62(g) applies by its terms to stay the enforcement of the money judgment for litigation expenses from an inverse condemnation proceeding. 224 Ariz. 366, 369, 231 P.3d 370, 373 (App. 2010). This court noted that if the government's appeal was successful there would be "the possible difficulty of recovering public funds used to pay litigation expenses. . . ." *Id.* Similarly, here, if the Superior Court's Judgment is

an order to "pay", absent a stay, hundreds of millions of dollars of public money will leave the State Treasury, and other substantial sums will leave the treasuries of other units of government before the State's appeal is resolved. Moreover, if the school districts construe the Judgment as authorization to increase their spending, local and state revenues may become obligated. Rule 62(g) clearly forbids such results. There is no doubt that the Rule is intended to protect the public fisc from disbursements of any kind until a final appellate adjudication has been made. A declaratory or injunctive order that, if enforced, would require disbursement of public monies of the State or authorize public expenditures is a money judgment for purposes of Rule 62(g).

Federal authority addressing similar questions confirms that declaratory and injunctive orders that would require a governmental agency attempting to comply with the orders to disburse public monies are the equivalent of a money judgment. This issue has arisen frequently where a party seeks to avoid the exclusive jurisdiction of the U.S. Court of Federal Claims. A claim that would "result in the United States eventually being obliged to pay out money" is the functional equivalent of a money judgment for jurisdictional purposes. *Matthews v. United States,* 810 F.2d 109, 111, (6th Cir. 1987); *see A.E. Finley & Assocs. v. United States,* 898 F.2d 1165, 1167 (6th Cir. 1990); (holding that "one cannot circumvent exclusive jurisdiction in the Claims Court by suing simply for declaratory or

injunctive relief in a case where such relief would be the equivalent of a judgment for money damages".); *Chelsea Cmty. Hosp., SNF v. Michigan Blue Cross Ass'n.*, 630 F.2d 1131, 1136 (6th Cir. 1980) (holding that "the exclusiveness of the Court of Claims's jurisdiction may not be defeated by couching a prayer for a money judgment in terms of a request for injunctive or declaratory relief" (footnote and citation omitted)); *Carter v. Seamans*, 411 F.2d 767, 777 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970) ("That the complaint is cast in terms of a declaratory judgment cannot alter the fact that what in substance is sought is a money judgment against the United States . . ."); *J.C. Products, Inc. v. United States*, 608 F. Supp. 92, 95 (W.D. Mich. 1984) ("I am also convinced that to grant plaintiff the injunctive and declaratory relief requested would be equivalent to a money judgment against the United States in excess of $10,000."). Likewise here, where the Superior Court has confirmed its intent is to ensure that the State distributes monies associated with the current and future fiscal years either by "deeming" the legislation containing Base Level calculations to be amended or by ordering that the State recalculate all Revenue Control Limit calculations currently in effect, the judgment is, for all functional, legal purposes a money judgment. By ruling that the automatic stay does not apply to its Judgment that demands recalculation of existing budget commitments and therefore requires the expenditure of hundreds of

millions of dollars to satisfy those commitments, the Superior Court has exalted form over substance and ignored the gravamen of Rule 62(g).

II. Even If An Automatic Stay Is Not In Effect By Rule, This Court Should Issue A Discretionary Stay Of The Judgment.

A party seeking a discretionary stay on appeal must establish (1) a strong likelihood of success on the merits; (2) irreparable harm if the stay is not granted; (3) that the harm to the requesting party outweighs the harm to the party opposing the stay; and (4) that public policy favors the granting of the stay. *Smith v. Arizona Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-11, 132 P.3d 1187, 1190-91 (2006). These factors should be weighed on a sliding scale where "the moving party may establish *either* [] probable success on the merits and the possibility of irreparable injury; *or* [] the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party." *Id*. (quotation omitted - emphasis added). The greater the showing of irreparable harm, the less a movant is required to show a strong likelihood of success on the merits. *Id*. This case presents a massive change in the financial *status quo* affecting the whole of state government. The standard for a discretionary stay pending appeal is easily met.

A. The State is Likely to Succeed on the Merits and There Are Obvious Serious Questions Presented That Should Be Addressed Before the Status Quo is Changed.

On remand, the Plaintiffs-Appellees are attempting to secure court-ordered payments of public monies – relief far beyond what was imagined in the earlier

appellate rulings in this matter. When it originally reviewed this case, this Court declined to consider the dismissed and abandoned mandamus and injunctive relief claims, and even refused to issue certain direct declaratory relief.

> Appellants ask us to find that the legislature's decision to eliminate the inflation adjustment requirement for the base level component of the revenue control limit constitutes an amendment of a voter-approved statute and thus conclude that H.B. 2008 violates the VPA. We decline to make that determination, however, because what we say now has no bearing on what occurred in relation to the funds that were spent under the state's budget for fiscal year 2010–2011. *See supra* note 5. Instead, we simply recognize that in recent years the legislature has been operating under a mistaken interpretation of its responsibilities under § 15–901.01.

Cave Creek Unified Sch. Dist. v. Ducey, 231 Ariz. 342, 346 n. 4, 352, 295 P.3d 440, 444 n. 4, 450 (App. 2013). Plaintiffs-Appellees did not seek review of this holding, and the Supreme Court granted review to a different issue. 233 Ariz. 1, 308 P.3d 1152 (2013); *and see* note 4, *supra*. Moreover, the Supreme Court specifically declined to address injunctive or declaratory relief. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 4 n.1, 308 P.3d 1152, 1155 n. 1 (2013) ("The superior court also denied Cave Creek's request for injunctive and mandamus relief. The court of appeals did not address those rulings because they were not raised on appeal. [] Those issues likewise are not before us.").

Plaintiffs-Appellees now seek far more coercive remedies—court-directed funding for the past, present, and future. (*See* IR 53 - Pls. Memo re: Remaining Issues at pages 3-9.) The extreme remedies sought by Plaintiffs-Appellees, which

the Superior Court has now ordered in part in its Judgment, cannot withstand appellate review. Beyond the fact that Plaintiffs-Appellees have waived any claims to such relief, are estopped from seeking it, and have failed to properly preserve such monetary claims by serving the required notice of claim under A.R.S. § 12-821.01, the Superior Court does not have jurisdiction to enter the injunctive relief in its Judgment.[10] The very fact that the Judgment edits existing legislation and compels appropriation of enormous sums in a time of budgetary crisis means it performs a legislative policy-making function, forever imposing new terms upon multiple legislative enactments and favoring one area of public funding over all others. This aptly demonstrates the political question/separation of powers problems with the relief Plaintiffs demand. Moreover, the constitutional Voter-Protection Act terms anticipate declaratory relief, not court-directed funding decisions by which the courts will impose detailed appropriation demands on the Legislature and Governor.

Additionally, the Plaintiffs-Appellees' and Superior Court's interpretation of the Inflation Provision wrongly requires inflation of discretionary funding that is not required by any voter-protected law. In so doing, it improperly forces the

[10] This motion does not catalogue or discuss all dispositive defenses raised below or on appeal, but provide examples of the multiple layers of jurisdictional, procedural and substantive defects in the claims for which the Judgment provides relief. The State's briefing in this appeal may explore additional deficiencies, as well.

Legislature to not only permanently "lock-in" discretionary additions earlier legislatures made to the Base Level that far exceeded the minimum inflationary growth factor contemplated upon the passage of Proposition 301 (approving the enactment of A.R.S. § 15-901.01), but also requires the Legislature to inflate all such discretionary additions annually.

1. The Plaintiffs-Appellees Waived Their Injunction and Mandamus Claims and Are Estopped from Pursuing Them.

As briefed in detail to the Superior Court, the Plaintiffs waived their injunction and mandamus claim, and are estopped to bring them on remand. (IR 67, 80). In summary, the Superior Court originally dismissed by final judgment the injunctive and mandamus claims that the Plaintiffs now claim have come back alive and entitle them to ordered monetary relief. (IR 39). After having had those claims formally dismissed, the Plaintiffs entirely abandoned them on appeal, causing both this Court and the Supreme Court to note that the matters were not part of the appeal issues before them. *See Cave Creek Unified Sch. Dist.*, 233 Ariz. at 4 n.1, 308 P.3d at 1155 n.1 (holding that the Plaintiffs' mandamus and injunctive claims were not addressed by the Court of Appeals and "likewise are not before us."); *Cave Creek Unified Sch. Dist.*, 231 Ariz. at 346 n.4, 295 P.3d at 444 n. 4 (noting Plaintiffs' requests below for injunction and for "'an order in the nature of mandamus' requiring the State Treasurer to disburse funds that include the inflation adjustment" and explaining that "[w]e do not address these claims, as

Appellants have not raised them on appeal."). Thus, the claims were abandoned and waived. *See, e.g., Schabel v. Deer Valley Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived."); *accord ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 292 n. 1, 246 P.3d 938, 943 (App. 2010) (finding that plaintiffs waived claim for breach of good faith by not challenging the trial court's decision).

Moreover, the narrow declaratory decisions of this Court and the Supreme Court did not somehow revive the finally dismissed, non-appealed, and legally distinct claims for injunctive and mandamus relief. Therefore, the injunctive and mandamus claims the Superior Court has issued relief under were abandoned and waived and provide no grounds for the relief issued in the Judgment.

2. The Claims Are Barred by Failure to Comply With A.R.S. § 12-821.01.

There is no dispute that the Plaintiffs failed to serve any notice of claim under A.R.S. § 12-821.01 in connection with their demands for orders compelling distributions of hundreds of millions in public funds. The Superior Court's rationale for rejecting this defense was waiver by the Defendants and Special-Intervenors. (*See* IR 84). However, the case was first dismissed on a motion to dismiss before any answer was required. (IR 39). And, as noted in the opinions of this Court and the Supreme Court in this matter, the Plaintiffs-Appellees failed to

pursue the dismissed injunction and mandamus claims on appeal. Moreover, the Special-Intervenors appeared only as amici curiae in the initial proceedings, and did not move to intervene and obtain an order allowing their intervention until after remand. (IR 20, 59, 60). At that time they immediately filed an answer and properly preserved the notice of claim and associated statute of limitations defense. (See IR 60, at ¶ 36). Given these circumstances, in which the Plaintiffs-Appellees had abandoned their monetary claims on appeal, it was not necessary that anyone, let alone an amicus participant, pursue defenses under A.R.S. § 12-821.01. Such issues would simply not have been relevant to the purely declaratory issues before the appellate courts. Thus, the Superior Court's conclusion that the Defendants, and particularly the Special-Intervenors, somehow waived the notice of claim defense by not pursuing it during the appellate process ignores the procedural background and substantive claims in play. The defense was properly preserved, therefore, and must be addressed.

3. The Relief Sought is Barred by Constitutional Separation of Powers and Political Question Considerations.

The State further correctly noted for the superior court that the types of orders the Plaintiffs demand unlawfully impose upon exclusive constitutional powers of the legislative and executive branches and therefore are barred jurisdictionally by constitutional separation of powers, political question or justiciability doctrines. It is one thing for the courts to declare, as the Supreme

Court did here, that the Legislature had been acting under a mistaken interpretation of how A.R.S. § 15-901.01 works. As it is fundamentally the courts' duty to interpret the law, such declarations fall squarely in the courts' jurisdiction. It is a far different thing to issue a directive order that itself rewrites multiple legislative enactments going back over several years[11] to substitute alternative numbers and demands that the State immediately "correct" all legislative appropriation determinations to which such numbers apply, including those by which public monies are currently being distributed. The latter creates a judicial priority for such obligations above all other competing fiscal needs and policies of the State which is ostensibly enforceable through the courts' contempt powers.

One need only consider the implications of enforcing the Superior Court's Judgment as written to see such issues play out. Right now, the State faces a massive budget deficit which will grow even larger next year. That means the state policymakers are already faced with making very difficult choices about what programs to cut or curtail to balance the budget. Yet, the Superior Court's Judgment would make funding the extra $300 million-plus this year and next an absolute budgetary requirement whose alteration, delay or reprioritization would

[11] The legislative history of A.R.S. § 15-901 reveals it has been amended in multiple years to state prior years' "base level" numbers, and certainly the Base Level numbers have a played a role in all relevant prior years' budget bills. The Judgment, by "deeming" the new numbers incorporated in prior legislation has modified all these prior acts of legislation.

be subject to contempt sanctions. The Judgment is essentially mandating that the $300 million-plus increase in funding this year and next become a super-priority funding obligation of the State and force cuts elsewhere.

Compliance, however, may be extremely difficult. The Superior Court has just heard voluminous testimony about how difficult balancing the state budget in times of revenue shortfalls has become because so much of the budget is subject to federal maintenance of effort requirements and because many, many deep cuts that had to be made to address the unprecedented deficits of the Great Recession have never been restored, leaving little, if any, room for discretionary budget adjustments. Moreover, as the fiscal year is almost half over, it can be assumed that something approximating half of the revenues anticipated for this year have already been committed and spent; and given the deficit forecasts, it is likely that an even greater percentage of the actual revenues Arizona will receive this year have been spent. Other ongoing budget commitments, like the existing K-12 funding, may be programmed for budgets on which other state government entities have relied and entered contracts (i.e., for teachers, staff, contracted services).

Given a General Fund budget with such built-in adjustment limitations, it may simply not be possible for the Legislature to find a way, mid-fiscal year, to fully abide by the Superior Court's directives. It would be especially impossible to do so without having to make dramatic cuts in other priority services, including

those that may be tied to federal maintenance of efforts requirements and whose reduction threatens Arizona with losing millions, if not billions, in future federal aid. If the Legislature and Governor were to decide that the other state programs that would have to go to make immediate compliance with the Superior Court's order possible were too important, or that the risks to critical federal funding such cuts might invite were too dangerous, enforcement of the Superior Court's judgment would require the courts to force enactment of policy decisions the legislative and executive branches of government deemed imprudent or unduly damaging to their citizens.

Those are lines, however, that the Arizona Constitution does not allow the courts to cross. *See, e.g., Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 243, 877 P.2d 806, 816 (1994); Ariz. Const., art. III; art. IV. The Arizona courts have long recognized that "[t]he Arizona Constitution entrusts some matters solely to the political branches of government, not the judiciary." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351 ¶ 16, 275 P.3d 1267, 1271 (2012); *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192-93 ¶ 12, 165 P.3d 168, 170-71 (2007). In fact, separation of powers policy embodied in Article III of the Arizona Constitution has been described as one of the strongest embodiments in the country of the separation of powers principles. *See Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 586, 886 P.2d 1338,

1342 (1994). Where the law entrusts questions to a different branch, or the issue presents a political question, the Court is not entitled to intrude on such "non-justiciable" matters. *See Ariz. Indep. Redistricting Comm'n*, 229 Ariz. at 351 ¶¶ 17-18, 275 P.3d at 1271. Yet, such intrusion into political questions is precisely what enforcement of the Superior Court's judgment would require. It far exceeds the constitutional limits of the courts' authorities.

4. The Voter-Protection Act Determines the Effectiveness of Enacted Legislative Acts and Does Not Authorize the Superior Court to Enter Prospective Injunctive Relief.

The Voter-Protection Act amends Article IV of the Arizona Constitution, which establishes the Legislative power. Article IV vests the "legislative authority of the state" in the Legislature. Ariz. Const. Art. IV pt. 1, § 1 (1). This authority vested in the Legislature is plenary. It "is measured by the power of absolute sovereignty except as limited by the state constitution and the constitution and laws of the Federal Government." *State v. Harold*, 74 Ariz. 210, 218, 246 P.2d 178, 183 (1952); *Earhart v. Frohmiller*, 65 Ariz. 221, 178 P.2d 436 (1947); *Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 42 P.2d 619 (1935). The Voter Protection Act created a new limitation in the Arizona Constitution.

> Now the legislature cannot repeal "an initiative [or referendum] measure approved by a majority of the votes cast thereon." Ariz. Const. art. 4, pt. 1, § 1(6)(B). Nor may it amend or supersede a voter-approved law unless the proposed legislation "furthers the purposes" of the initiative or referendum measure and is approved by a three-

> fourths vote in the House of Representatives and Senate. Ariz. Const. art. 4, pt. 1, § 1(6)(C), (14).

Cave Creek Unified Sch. Dist. v. Ducey, 233 Ariz. 1, 4, 308 P.3d 1152, 1155 (2013). In other words, legislative acts that repeal voter-protected laws are null and void because the Legislature does "not have the power" to effect repeals. Ariz. Const. art. IV, pt. 1 § 1 (6) (C).

Similarly, legislative acts that amend, supersede, or appropriate or divert funds from, voter-protected laws are also void. *Id*. at § 1(6) (C), (14). The Voter-Protection Act clarifies that that the Legislature does not have the authority to "enact any measure" that supersedes voter-approved laws "in whole or in part." *Id*. § 1 (14). Because the Legislature does not have the authority to "enact the measure" it has no legal effect. The remedy anticipated by the Voter-Protection Act is a judicial declaration that the legislative enactment is null and void. The Voter-Protection Act does not grant the judicial branch authority to fashion a remedy other than a declaration that a challenged act is without legal effect – and specifically does not grant authorization to impose overriding appropriation obligations.

In this case, the Supreme Court held that a particular funding bill (HB 2008) that did not include an inflation adjustment for the Base Level "violated the VPA's express limitations on legislative changes to voter-approved laws." *Cave Creek Unified Sch. Dist.*, 233 Ariz. at 7-8, 308 P.3d at 1158-1159. The result of this

holding, according to the terms of the Voter-Protection Act, is a judicial declaration of the invalidity of HB 2008 - not court-ordered expenditures of public money.

In the only other case where the Arizona Supreme Court found that a legislative act was in violation of the Voter-Protection Act - *Arizona Early Childhood Development & Health Board v. Brewer* - the Court nullified an appropriation from a fund created by the voters in 2006. The Court disagreed with the State's argument that the express terms of the voter-protected law permitted the appropriation. 221 Ariz. 467, 470, 212 P.3d 805, 808 ¶ 5 (2009). As a result, the Court went on to hold that the appropriation "diverted" money from a voter-protected source. *Id*. at ¶ 18. The appropriation was reversed. *Id*. at ¶¶ 18-19.

By contrast here, the Superior Court's Judgment does not stop at finding that the enacted budget legislation is inconsistent with the voter-protected Section 15-901.01 and declaring it void. It goes on to judicially force an amendment of a non-voter protected statute, A.R.S. § 15-901, to define the Base Level in ways the Court believes the Legislature and Governor should have enacted, over a series of years, and to further force recalculations that form the basis of appropriation enactments for this year and all future years. Nothing in the Voter-Protection Act provisions authorizes these incursions into the legislative domain.

The Constitution therefore prevents the Legislature for repealing voter-protected laws. It also strictly limits the Legislature's ability to amend or supersede them or appropriate away revenues that have been generated by them.[12] And it allows the courts, upon a finding that a legislative enactment amends or supersedes a voter-protected law without the requisite three-fourths vote or does not further the voter-protected measure's purpose, to treat the measure as though it was never enacted, because the Legislature "does not have the power" to enact it. Ariz. Const. art. IV, pt. 1, § 1 (14). Both this Court and the Supreme Court entered relief consistent with the Voter Protection Act. The relief the Superior Court entered in its Judgment, however, rewrites state law and directs distribution of hundreds of millions in new funding from the public treasury. It exceeded the court's jurisdiction under the Voter Protection Act.

5. Proposition 301's Inflation Provision Requires a "Minimum Growth Rate" and the Legislature has Discretion to Modify Base Level Amounts as Long as That Growth Rate is Maintained.

The State is additionally likely to succeed on the merits of its appeal - and presents serious questions on the merits - because nothing in A.R.S. § 15-901.01 requires the Legislature to fund the base level above and beyond the "minimum

[12] This is not a situation in which the legislation attempted to divert monies that had been raised and assigned to a particular purpose by a voter protected act. Instead, the monies at issue would have to be found within the general revenues of the State, or, in the case of "non-state-aid districts", would have to be generated anew from local property taxpayers.

growth rate" contemplated by the statute. Again, the relevant portion of the Inflation Provision reads:

> For 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 per cent 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. A.R.S. § 15-901.01.

This Inflation Provision language includes two express limitations on the Legislature's ability to change the definition of "base level" used in the growth rate calculation. First, the base level must be increased "by a minimum growth rate." Second, the base level "shall never be reduced below the base level established for fiscal year 2001-2002." A.R.S. § 15-901.01. The base level for that fiscal year was $2,621.62. Currently, the base level for fiscal year 2014-15 is $3,373.11. A.R.S. § 15-901(B)(2). As long as the minimum growth rate is observed and the base level is not reduced below the 2001-02 level, the Legislature can remove prior discretionary funding from the Base Level.

It was undisputed below - and the Superior Court acknowledged - that the State has funded the Base Level in some fiscal years beyond the minimum growth rate required by the voter-protected statute. (IR 84 at 20.) Further, it is clear that the Inflation Provision of Proposition 301 (i.e. Section 15-901.01) does not set a

specific Base Level, instead it requires the Legislature to apply a minimum growth to the initial Base Level over time.

The Plaintiffs' position is unlikely to succeed on appeal because it asserts that a non-voter protected statute, A.R.S. § 15-901(B)(2), is fully subject to the requirements of the Voter Protection Act. The definition of "Base Level" in A.RS. § 15-901 was enacted well before the enactment of Proposition 301. It was changed multiple times before Proposition 301 was approved by the voters and it has been changed multiple times since. And it has been changed by a simple-majority vote of the Legislature multiple times since the enactment of Proposition 301. *See* A.R.S. § 15-901 (WEST) (Editor's and Revisor's Notes - detailing revisions to the statute). The Inflation Provision does not require specific Base Levels be maintained in A.R.S. § 15-901, or that the State be forever bound by adjustments in any given year that exceed the minimum growth rate. Nowhere do the terms of A.R.S. § 15-901.01 say that once the Legislature enacts a definition of "Base Level" anywhere in state law that exceeds the minimum growth rate the State must thereafter assume the Base Level for all future years must continue to include these discretionary additions.

When a voter-protected statute refers to a statute that was not enacted directly by the voters, the relevant question is the voters' intent. *Arizona Citizens Clean Elections Comm'n v. Brain* ("*Clean Elections*"), 234 Ariz. 322, 325, 322

P.3d 139, 142 (2014). In its recent decision in *Clean Elections*, our Supreme Court interpreted a voter-protected statute, A.R.S. § 16-941(B), that cross-referenced specific political campaign contribution limits, which were already established in law, and reduced them by 20%. *Id*. at pp. 323 ¶ 3, 325 ¶ 13. The plaintiffs in *Clean Elections* argued that the reference in the voter-protected statute to the contribution limits had the effect of voter-protecting them and rendered them unchangeable by the Legislature. *Id*. at 324 ¶ 6. The Supreme Court disagreed.

The Court instead held that the reference and percentage reduction of the contribution limits that existed in law outside of the voter-protected statute was a formula, and that only the formula, not the contribution level it cross-referenced, was voter protected. *Id*. at 328 ¶ 28. For the Court, the primary evidence of the voters' intent to establish a formula was the use of a percentage.

> [T]he voters used a percentage for calculating contribution limits for nonparticipating candidates. Application of a percentage to a given amount is characteristic of a formula. *See* Random House Webster's Unabridged Dictionary 753 (2d ed.2001) (defining "formula" in part as "a set form of words ... for indicating procedure to be followed"). Had voters intended to fix static contribution limits, they could have easily and clearly done so by specifying dollar amounts.

Id. at 325-6 ¶ 15.

Like the language of the voter-protected statute reviewed by the Supreme Court in the *Clean Elections* decision, Section 15-901.01 establishes that the voters

intended to establish a formula - not to lock in any and all changes to the Base Level as defined in the non-voter protected provisions of A.R.S. § 15-901. The provision requires the Legislature only to "increase the base level or other components of the revenue control limit by a minimum growth rate of either two per cent or the change in the GDP price deflator . . . whichever is less. . . ." A.R.S. § 15-901.01. Like the contribution limits in the *Clean Elections* decision, the Base Level and Revenue Control Limit existed in statute at the time the voters added Section 15-901.01, and they remained subject to Legislative discretion. Section 15-901.01 could have read differently. It could have used language that would bind the Legislature to specific Base Levels, or prohibited any future reductions in Base Level amounts previously fixed by legislation. If that were the case it would be clear that the voters intended to prevent the Legislature from ever changing a Base Level. Instead, the voters adopted language that requires only a "minimum growth rate." There is no evidence that the voters actually intended to require a "minimum growth rate" *and* a requirement that Base Levels, once set, could never be changed. Yet, that is precisely the conclusion that underpins the Superior Court's recalculations of the Base Levels for A.R.S. § 15-901.

It is illogical to assume that the voters intended to permanently "lock-in" and require upward adjustment from any and all discretionary additions to the annually enacted Base Level number. After all, assume a set of years starting with

Fiscal Year 0001. The legislative session for Fiscal Year 0002 might decide to increase the Base Level under A.R.S. § 15-901 by 25%, even though A.R.S. § 15-901.01 required only a 2% adjustment. Under the Superior Court's analysis, the voters enacting Proposition 301 intended that such discretionary, non-mandated adjustments become forever locked into the Base Level for every year going forward, meaning that the real adjustment mandated in Fiscal Year 0003 is not just 2% or less of the sum of the Base Level from 0001 and its Fiscal Year 0002 2% inflation adjustment mandated by A.R.S. § 15-901.01, but actually over 27% of what the Base Level was in Fiscal Year 0001. This contradicts the concept of a "minimum growth rate" and in fact subjects the taxpayers to entirely unpredictable growth rates. It does not square with either the language or the intent of A.R.S. § 15-901.01.

The Plaintiffs-Appellees' arguments concerning the reset also will not succeed on appeal because they also do not account for why the plain language of Proposition 301 permits the Legislature to change Base Levels within the parameters of a minimum growth rate. Outside of voter-protected statutes, the Legislature has plenary authority to enact laws. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5, 308 P.3d 1152, 1156, ¶ 13 (2013). Our Supreme Court recognizes that this authority is at its apex in the realm of fiscal policy. *See Rios v. Symington*, 172 Ariz. 3, 6, 833 P.2d 20, 23 (1992) ("The Legislature, in the

exercise of its lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect."). It is, therefore, within the discretion of the Legislature to make adjustments to the Base Level so long as the voter-protected mandate of a minimum growth rate is followed. The Plaintiffs-Appellees' arguments on remand with regard to their Reset Claim - arguments that were never addressed by the appellate courts - will not be successful on appeal.

While this litigation has been ongoing for over four years, the Court should bear in mind that only one judge has ever passed upon the Plaintiffs-Appellees' Reset Claim. At the very least, that issue entails serious questions going to the merits that should be fully addressed on appeal before disrupting the *status quo* and imposing tremendous burdens on the state budget.

B. The State Faces Irreparable Harm.

1. The Current Budget Crisis Means Compliance with the Judgment Forces Restructuring of Services and State Priorities.

The State is now in the middle of its fiscal year. The budget for Fiscal Year 2014-2015 was passed by the Legislature and signed into law by the Governor by April 11, 2014, some four (4) months before entry of the Judgment. The budget went into effect on July 1, 2014, over a month and a half before the Court filed the Judgment. The only way for the State to "comply" with the Judgment would be

for the Legislature to convene and rework in very material ways a budget that is already predicted to be subject to a substantial deficit of $189 million this year and over $660 million next year. (*See* Exhibit "1" hereto (Hearing Exh. 141)). Adding the Judgment obligations pushes those deficits north of $500 million this year and around a billion dollars for Fiscal Year 2015-2016. (*See id.*)

The shortfalls in this current fiscal year and the next cannot be closed without dramatic changes in economic policy and appropriation decisions. The Arizona Constitution significantly limits the ability of the Legislature to enact new taxes - making new revenues at best a complicated and uncertain process. *See Generally*, Ariz. Const. art. IX, § 22 (requiring a two-thirds vote for any act that results in a "net increase in state revenues").[13] Nor could new revenue sources practically be secured for this year in any event. This all means that a Fiscal Year 2014-2015 "adjustment" to comply with the Judgment would most likely require the State to consider hundreds of millions in cuts to other programs or other options that could worsen the deficit situation. Even more massive cuts would be shortly required to navigate the billion dollar deficit the Judgment would cause for the fiscal year commencing this next July.

[13] Recent testimony in this case also confirms: (1) that the deficits faced this year and next that will more than eclipse the amount of money in the State's Budget Stabilization Fund; and (2) that that fund is statutorily restricted and could not be used to fund amounts of "recalculated" Base Level funding without legislative and executive action in any event.

The Judgment - which the Superior Court has characterized as currently "enforceable" (IR 111) – therefore requires the State to act to adjust the Base Level for this year's budget, entailing an enormous fiscal impact on the current State budget. Adjustments of hundreds of millions could require cuts to critical state services whose beneficiaries can never recover them, may impact jobs of state employees and those contractors and service providers relying on state spending for their livelihood, and could put critical state economic development and infrastructure programs on hold ensuring that Arizona's climb out of the Great Recession is aggressively forestalled. And, if the State is required to divert hundreds of millions to school district budgets those monies will be spent and not recoverable for the taxpayers should the appeal prove such distributions inappropriate. Clearly, many levels of irreparable harm are threatened here which can be avoided by a stay.

2. The Judgment Inflicts Irreparable Harm By Displacing Laws Enacted by the Elected Representatives of the People.

The irreparable harm inquiry must include consideration of the ordinary constitutional lawmaking process. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012) (Roberts, C.J.) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Coal. for Econ.*

Equity v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."). Here the Judgment requires the modification of statutes enacted by the Legislature and signed by the Governor. The Superior Court's Judgment requires new laws and new appropriations of public money. These mandated changes to enacted law constitute irreparable harm - particularly when the legal issues have not yet been the subject of appellate review.

3. Plaintiffs Will Not Be Harmed by the Entry of a Stay.

The Plaintiffs have not demonstrated that they will be harmed by a stay. Indeed, the Plaintiffs stand to be harmed if the *status quo* is not maintained pending appeal. If the State is forced to immediately appropriate over $300 million in new monies for the ongoing fiscal year it will only be able to do so through reductions to other non-voter-protected spending. That will come at a cost services across the whole of state government. And because K-12 education is some 41% of the State's General Fund budget it is utterly unrealistic to expect that it will not share in some of the necessary reductions from funding items that are not part of the reset mandated by the Judgment. Moreover, if the Judgment is changed on appeal the Plaintiffs will be placed in the difficult position of receiving additional inflation funding only to have it subsequently removed. These scenarios

demonstrate that even the Plaintiffs benefit from a final answer on the reset issue before the *status quo* is altered and the State undertakes changes in policy.

4. Public Policy Favors Granting the Stay.

Initially this case was about the interpretation of the Inflation Provision and its applicability to the Legislature. Now, on remand, the Plaintiffs-Appellees seek to turn it into court-compelled public spending. But the remedy sought by Plaintiffs-Appellees, and ordered by the Superior Court in its Judgment, is fundamentally incompatible with Arizona's frame of government. The Constitution requires that "[n]o money shall be paid out of the state treasury, except in the manner provided by law." Ariz. Const. art. IX, § 5. This means that no money can leave the State Treasury without "a valid appropriation for such purpose and funds are available for the payment of the specific claim." *Cockrill v. Jordan*, 72 Ariz. 318, 319, 235 P.2d 1009, 1010 (1951). Moreover, neither the Treasurer nor any other officer or employee of Arizona has authority to distribute public money that has not yet been appropriated by the Legislature. *See* A.R.S. § 35-154 ("No person shall incur, order or vote for the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allotment."); § 1-254 ("No statute may be construed to impose a duty . . . to . . . require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation made for that specific purpose."). Legislative

authorization is the *sine qua non* of the authority to make expenses of public money. As the Supreme Court has explained, the "disbursing officers of the state may not pay" even valid claims against the state "in the absence of an appropriation therefor." *Crane v. Frohmiller*, 45 Ariz. 490, 501, 45 P.2d 955, 960 (1935). The Judgment is at odds with Arizona public policy concerning appropriations of public money through the legislative process.

The Judgment also clashes with the public policy of the State concerning the judicial award of public monies through litigation. As discussed above, money judgments against the State are automatically stayed pending appeal. *See supra* § I (discussing Rule 62(g), Ariz. R. Civ. Pro). Putting aside Plaintiffs-Appellees' and the Superior Court's resistance to Rule 62(g)'s automatic stay applying here, it cannot be denied that Rule 62(g) clearly demonstrates the fundamental policy of the State: public money should not be disgorged by court order until all appeals are final. The automatic stay remains an ultimate backstop. Even if the Judgment is not so immediate an order to trigger the automatic stay - any attempt to execute would trigger the stay. The Judgment is either immediately enforceable or it is not. If it is immediately enforceable Rule 62(g) applies. If it is not immediately enforceable, it cannot be executed or otherwise carried out without the Rule applying. Payment of public monies is only appropriate when a final legal resolution has been established on appeal.

CONCLUSION

This Court should advise the parties by order that an automatic stay is in effect pending the State's appeal. Alternatively, this Court should enter a discretionary stay.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

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