APPENDIX

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APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

No. CV-18-0080-PR

[Filed February 25, 2019]

SABAN RENT-A-CAR LLC, ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

ARIZONA DEPARTMENT OF REVENUE,
Defendant/Appellant/Appellee/Cross-Appellee,

TOURISM AND SPORTS AUTHORITY,
Defendant-in-Intervention/Appellant/Cross-Appellee.

Appeal from the Arizona Tax Court
The Honorable Dean M. Fink, Judge
The Honorable Christopher T. Whitten, Judge
No. TX2010-001089
REVERSED AND REMANDED

Opinion of the Court of Appeals, Division One
244 Ariz. 293 (App. 2018)
AFFIRMED

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JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE BRUTINEL, and JUSTICES PELANDER, GOULD, and LOPEZ joined. JUSTICE BOLICK authored an opinion concurring in part and dissenting in part.

JUSTICE TIMMER, opinion of the Court:

¶1 Maricopa County imposes a surcharge on car rental agencies to fund a stadium and other sports and tourism-related ventures. The issue here is whether this surcharge violates the dormant Commerce Clause implied by Article I, Section 8, Clause 3 of the United States Constitution or the anti-diversion provision, article 9, section 14 of the Arizona Constitution. We hold that it does not violate either provision.

BACKGROUND

¶2 The legislature created the Arizona Tourism and Sports Authority (the "AzSTA") in 2000 to build and operate a sports stadium, build Major League Baseball spring training facilities, build youth and amateur sports and recreation facilities, and promote tourism. *See* A.R.S. §§ 5-801(4), -802(A), -807 to -809, -815. AzSTA's authority is restricted to counties with populations greater than two million people, meaning it has only ever operated in Maricopa County. *See* § 5-802(A). AzSTA's construction projects are funded solely by taxes and surcharges approved by Maricopa County voters. *See* § 5-802(C). One such voter-approved surcharge is at issue here.

¶3 Soon after the creation of AzSTA, Maricopa County voters passed an initiative that levied a surcharge on car rental companies based on their income derived from leasing vehicles for less than one year. *See* A.R.S. § 5-839(A)–(C) (authorizing voters to levy the surcharge and providing its terms). (The initiative also imposed a tax on hotels. The hotel tax is not at issue here.) The surcharge is the greater of $2.50 per rental or 3.25% of the company's gross proceeds or gross income. § 5-839(B)(1). If the rental is a "temporary replacement" for a damaged or lost vehicle, however, the surcharge is a flat $2.50. § 5-839(B)(2). The state treasurer distributes $2.50 per rental transaction to the Maricopa County Stadium District, which has collected a surcharge in this amount since 1991. *See* § 5-839(G)(1); Act of June 25, 1991, ch. 285, § 10, 1991 Ariz. Sess. Laws 1444, 1451–53 (1st Reg. Sess.) (codified at A.R.S. § 48-4234). The remaining amount, the difference between $2.50 per rental transaction and 3.25% of the company's gross income or proceeds, is distributed to AzSTA. § 5-839(G)(2). Although the surcharge is imposed on car rental companies, they can and do pass its cost on to their customers.

¶4 Plaintiff Saban Rent-a-Car ("Saban") rents vehicles in Maricopa County and has paid the car rental surcharge. Its customers are primarily local residents. In 2009, after unsuccessfully seeking a refund from the Arizona Department of Revenue ("ADOR"), Saban sued ADOR in the tax court and sought refunds and injunctive relief for all similarly situated car rental companies. The tax court certified a class of all individuals or entities that paid the surcharge from September 2005 through March 2008 and allowed AzSTA to intervene as a defendant.

¶5 As it does here, Saban argued to the tax court that the surcharge violates both the dormant Commerce Clause and the anti-diversion provision. On cross-motions for summary judgment, the court agreed with ADOR and AzSTA that the surcharge does not violate the dormant Commerce Clause. It agreed with Saban, however, that the surcharge violates the anti-diversion provision. Consequently, the court granted summary judgment for Saban and ordered ADOR to refund the surcharge payments to class members. The court also authorized ADOR to recoup the refund amounts from AzSTA pursuant to A.R.S. § 42-5029(G).

¶6 Like the tax court, the court of appeals ruled that the surcharge does not violate the dormant Commerce Clause. *Saban Rent-A-Car LLC v. Ariz. Dep't of Revenue*, 244 Ariz. 293, 296 ¶ 2 (App. 2018). But unlike the tax court, the court of appeals concluded that the surcharge also does not violate the anti-diversion provision. *Id.* It therefore reversed the tax court's ruling and remanded for entry of summary judgment in favor of ADOR and AzSTA. *See id.* at 308 ¶ 49.

¶7 We granted review to address these legal issues of statewide importance. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

I. The Dormant Commerce Clause

¶8 We review the constitutionality of the car rental surcharge de novo, as a question of law. *See Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8 (2014). Likewise, "[w]e review questions of statutory construction and grants of summary

judgment de novo." *BSI Holdings, LLC v. Ariz. Dep't of Transp.*, 244 Ariz. 17, 19 ¶ 9 (2018). We presume that a statute not involving fundamental constitutional rights or suspect-classification distinctions is constitutional "and will uphold it unless it clearly is not." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶ 11 (2013).

¶9 The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. By negative implication, states cannot unjustifiably discriminate against or erect barriers to interstate commerce. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994). This implied restraint is known as the "dormant Commerce Clause" and serves to prevent "economic protectionism[,] that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (describing the dormant Commerce Clause's fundamental objective as "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors"). The principles developed under the dormant Commerce Clause to counter economic Balkanization, however, have respected a degree of local autonomy, as favored by the Framers. *See Davis*, 553 U.S. at 338; *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977) (recognizing that "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it" (internal quotation marks omitted)).

¶10 To determine if a law violates the dormant Commerce Clause, courts initially ask whether the law "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." *Or. Waste Sys.*, 511 U.S. at 99 (internal quotation marks omitted). If a law is discriminatory, it will survive only if its proponents "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 100–01 (internal interlineations and quotation marks omitted). Courts have sometimes noted that such scrutiny renders a law "virtually *per se* invalid." *See id.* at 99. If the challenged law is non-discriminatory but incidentally affects interstate commerce, a balancing test is used, and the law will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¶11 Saban argues the car rental surcharge is discriminatory and thus subject to strict scrutiny review. A "discriminatory" tax is one that is "facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of the Treasury*, 490 U.S. 66, 75 (1989). Saban abandons prior assertions that the surcharge is facially discriminatory and unduly burdens interstate commerce, *see Saban*, 244 Ariz. at 303 ¶ 30, 304 ¶ 32, and solely argues the surcharge is "invalid because it was motivated by discriminatory intent, that is, forcing out-of-state visitors [to] pay a special tax that residents are shielded from." ADOR and AzSTA counter that the surcharge was not enacted with a discriminatory intent but,

even if it was, intent alone is an insufficient reason to invalidate the surcharge.

¶12 The car rental surcharge was not enacted with a discriminatory intent, as that term is used in Commerce Clause jurisprudence. Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99. Nothing in the language of the surcharge or in the publicity pamphlet for the initiative enacting the surcharge suggests an intent to treat in-state and out-of-state interests differently or engage in the type of "economic protectionism" at odds with the Commerce Clause. Indeed, the surcharge applies equally to resident and non-resident car rental agencies operating in Maricopa County and is calculated and imposed without regard to their customers' residencies.

¶13 Saban nevertheless argues that discriminatory intent exists because statements in the initiative's publicity pamphlet suggest voters targeted non-resident visitors, who purportedly rent most vehicles offered by car rental agencies, to pay the lion's share of the surcharges. But even if true, this does not evidence an intent that out-of-state visitors be *treated* any differently from residents, as required to be discriminatory. *See id.* The fact that visitors as a group pay most of the surcharges collected by car rental agencies is not "discriminatory."

¶14 The Supreme Court's decision in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1991), is illuminative. There, the Court concluded that Montana's tax on the sale of coal did not violate the dormant Commerce Clause even though most of the tax burden was borne by out-of-state consumers. *Id.* at 618, 636. The Court expressed misgivings

about judging the validity of a state tax on "its 'exportation' of the tax burden out of State," as the challengers there urged. *Id.* at 618. It noted that for purposes of promoting free trade under the Commerce Clause, state borders are "essentially irrelevant" and reasoned that "invalidat[ing] the Montana tax solely because most of Montana's coal is shipped across the very state borders that ordinarily are to be considered irrelevant would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases." *Id.* at 618–19. The Court also disagreed with the challengers' argument that out-of-state consumers should be protected from discriminatory tax treatment, pointing out "there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Id.* at 619.

¶15 Although *Commonwealth Edison* addressed the purported discriminatory effect of Montana's coal tax, the Court's reasoning also reveals the meaning of "discriminatory intent" under the dormant Commerce Clause. Just as a tax that does not differentiate between interstate and intrastate commerce does not have a "discriminatory effect" when the tax burden is borne primarily by out-of-state consumers, those who enacted the tax intending that consequence did not do so with a "discriminatory intent." *Cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270–71 (1984) (stating that the Hawaii legislature acted with discriminatory intent by exempting only certain Hawaiian-made alcohol from alcohol tax to encourage and promote Hawaiian industry). Concluding otherwise would mean the validity of a tax would turn on serendipity: one state's tax that happens to be disproportionately paid by non-residents would be valid, *see*

Commonwealth Edison, 453 U.S. at 618–19, while the same tax in another state would be invalid only because its enactors intended that result. Because the surcharge here, like the Montana coal tax, is imposed even-handedly and does not distinguish between in-state and out-of-state car rental agencies or consumers, any intent by voters that out-of-state visitors ultimately pay most of the surcharge was not "discriminatory."

¶16 Saban argues that the car rental surcharge is like the Maine tax scheme that the Supreme Court invalidated under the dormant Commerce Clause in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). Maine provided a complete property and personal tax exemption for charitable organizations incorporated in the state but only if they did not operate principally for the benefit of non-residents. *Id.* at 568. As a result, a church camp catering mostly to out-of-state campers was required to pay taxes while organizations operating camps attracting mostly Maine residents were exempt. *Id.* at 568–69. The Court found the Maine tax scheme facially discriminatory because it expressly "singl[ed] out camps that serve mostly in-staters for beneficial tax treatment, and penaliz[ed] those camps that do a principally interstate business." *Id.* at 575–76. It also analogized the discriminatory exemption to prohibited special fee assessments charged nonresidents for use of local services, noting "Maine's facially discriminatory tax scheme falls by design in a predictably disproportionate way" on non-residents and has the same "pernicious effect on interstate commerce." *Id.* at 578–80; *see also id.* at 579 n.13 (stating "the [Maine] tax scheme functions by design and on its face to burden out-of-state users disproportionately").

¶17 We disagree with Saban that the car rental surcharge is tantamount to Maine's scheme to disproportionately burden non-residents who used services provided by in-state charitable organizations. The disproportionate burden in *Camps Newfound/Owatonna* referred to the costs placed only on non-residents for using in-state services. *See id.* at 578–79 (explaining that the discriminatory exemption is effectively no different from imposing a penalty on activity). It did not refer to the disparate impact on non-residents that stems solely from the fact that they consume more of the uniformly taxed good or service than in-state consumers. *See id.* at 580 n.13 (distinguishing *Commonwealth Edison* because although non-residents bore most of the Montana coal tax burden by virtue of buying most of the coal, the tax was based on consumption and made no distinctions between resident and non-resident consumers). Like the tax in *Commonwealth Edison*, and unlike the exemption in *Camps Newfound/Owatonna*, the car rental surcharge is imposed uniformly on all car rental agencies, and ultimately on their customers, regardless of the agencies' or customers' residency status.

¶18 Saban also argues that voters acted with discriminatory intent by "exempting" temporary replacement vehicles "as a proxy for an overt exemption for the 'ordinary Arizona citizen.'" *See* § 5-839(B)(2). We disagree. First, temporary replacement vehicles are not exempted from the surcharge. Rather, the surcharge is calculated at $2.50 per vehicle rather than the greater of $2.50 per rental or 3.25% of the company's gross proceeds or gross income, as the surcharge is calculated for other rentals. *See* § 5-839(B)(1)–(2). Second, nothing suggests car rental agencies pass through more than $2.50 per rental to

ordinary renters, thereby suggesting that those renting temporary replacement vehicles are treated more favorably. Indeed, according to its owner, Saban, like other car rental agencies, charges the same surcharge rate to all its customers. Third, the temporary replacement vehicle calculation applies whether the renter is a resident or a non-resident. And because numerous non-residents temporarily relocate to Arizona during the year, it is likely that many non-residents rent temporary replacement vehicles.

¶19 In sum, the voters did not enact the car rental surcharge with a discriminatory intent because they did not intend to treat in-state and out-of-state economic interests differently. As a result, the surcharge does not trigger strict scrutiny review. Because Saban does not assert that the tax court or court of appeals misapplied the *Pike* balancing test, we do not address that issue. And considering our decision, we do not resolve the extent to which discriminatory intent alone can invalidate a tax under the dormant Commerce Clause. We note, however, that as Saban acknowledged at oral argument, a tax must burden interstate commerce in some way to be invalidated under that clause. *Cf. Or. Waste Sys.*, 511 U.S. at 98 (describing dormant Commerce Clause as addressing discrimination against or erection of barriers to interstate commerce).

II. The Anti-Diversion Provision

¶20 The anti-diversion provision, article 9, section 14 of the Arizona Constitution, provides in relevant part as follows:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes.

The parties agree the car rental surcharge is an excise and is unrelated to vehicle registration. The only issue, therefore, is whether the surcharge "relat[es] to [the] . . . operation[] or use of vehicles," which determines whether surcharge revenues must be used for road-related purposes. Resolution of this issue turns on the meaning of "relating to."

¶21 Our primary goal in interpreting the anti-diversion provision is to effectuate the electorate's intent in adopting it. *See Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994). If we can discern the provision's meaning from its language alone, we will apply it without further analysis. *See id.* In doing so, however, we do not apply "[f]ine semantic or grammatical distinctions, legalistic doctrine [or] pars[e] . . . sentences," as doing so "may lead us to results quite different from the objectives which the framers intended to accomplish." *United States v. Superior Court*, 144 Ariz. 265, 275–76 (1985). "Constitutions, meant to endure, must be interpreted with an eye to syntax, history, initial principle, and extension of fundamental purpose." *Id.*; *cf. Heath v. Kiger*, 217 Ariz. 492, 495 ¶ 12 (2008) ("[C]ourts should avoid hypertechnical constructions that frustrate legislative intent." (quoting *State v. Estrada*, 201 Ariz. 247, 251 ¶ 19 (2001)).

¶22 Saban argues that a fee, excise, or tax "relating to" the use or operation of vehicles plainly means one that is "connected to" driving vehicles on Arizona roads. And because the surcharge is passed through to car rental customers and "[c]ustomers rent cars to use them" on Arizona roads, Saban contends the surcharge falls within the anti-diversion provision. But Saban, somewhat anomalously, concedes that "'related to' could have an almost unlimited reach if construed too broadly" and thus must be limited. We accept this concession. As the court of appeals explained, interpreting "relating to" as having any connection to the use or operation of vehicles on the pubic highways would encompass revenues that voters clearly did not intend to be covered, including those from "retail sales or business privilege taxes on car sales, tire sales, car leases and car repairs." *See Saban*, 244 Ariz. at 298 ¶ 10, 301 ¶ 23. Because we cannot discern the meaning of "relating to" from the language of the anti-diversion provision alone, we consider its text in conjunction with the history and purpose of the provision.

¶23 The anti-diversion provision's origins are rooted in the early proliferation of automobiles in the United States, which sparked a need for a more extensive road network. *See* Chad D. Emerson, *All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth*, 75 Tenn. L. Rev. 411, 437–38 (2008). Although state and local governments had traditionally borne the costs of building, improving, and maintaining roads, Congress passed the Federal Aid Road Act in 1916 to provide funding assistance. *See id.* at 432–33, 438. Even so, states, including Arizona, soon looked to new revenue sources, like gasoline taxes, to pay increasing costs rather than raising existing taxes. *See id.* at 438 (stating, for example, that by the end

of the 1920s, every state had adopted a gasoline tax); *Texas Co. v. State*, 31 Ariz. 485, 487 (1927) (addressing Arizona's gasoline tax passed in 1921).

¶24 Congress passed the Hayden-Cartwright Amendment in 1934, which, in part, amended the Federal Aid Road Act by reducing federal aid to states that had imposed taxes on motor-vehicle transportation to fund roads before 1935 but thereafter diverted those tax revenues to non-road-related purposes. *See* Hayden-Cartwright Amendment of 1934, Pub. L. No. 73-393, § 12, 48 Stat. 993, 995 (1934). Specifically, the Amendment provided:

> Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith . . . .

Id. Rather than risk reduced federal funding by failing to devote road-user tax revenues to road uses at less than 1934 levels, "all states have, by custom, statute or constitution, pledged highway user taxes to highway construction." Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice*

Concerning Federally Aided Highway Construction, 122 U. Pa. L. Rev. 1, 8 (1973).

¶25 Arizona reacted to the Hayden-Cartwright Amendment and ensured stable roadway funding by passing the "Better Roads Amendment" referendum in 1952, which added the anti-diversion provision to the state constitution. The publicity pamphlet mailed to all voters contained a "pro" argument from the Arizona Better Roads Committee's chair, who described the provision's purpose as "insur[ing] the expenditure of all revenues derived from road users to road uses only." *See* Ariz. Sec'y of State, 1952 Publicity Pamphlet 3 (1952), http://azmemory.azlibrary.gov/digital/collection/statepubs/id/10641 (hereinafter "Pamphlet"); *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 471 ¶ 14 (2009) (stating publicity pamphlets can be examined to ascertain electorate's intent in passing a measure). He quoted the Hayden-Cartwright Amendment's rationale that diverting such tax revenues would be "unfair and unjust," *see supra* ¶ 24, and noted the importance of not "jeopardiz[ing] federal aid by allowing any diversion of road user taxes to other than road purposes." Pamphlet, *supra*, at 4–5. (The Pamphlet did not contain other arguments.)

¶26 Saban argues that the text, purpose, and history of the anti-diversion provision demonstrate it applies to tax revenues "connected to" use or operation of vehicles on roads, as limited by an historically grounded "benefits theory of taxation." Specifically, the provision applies only to taxes and fees specially imposed on "those who impose wear and tear or otherwise benefit from using the roads."

¶27 ADOR and AzSTA argue that Saban's "benefits theory" limitation is illusory as it would give "relating to"

an unlimited application that voters did not intend. They urge the court of appeals' narrower view that "relating to . . . the . . . use[] or operation of vehicles" refers to "a tax or fee that is a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public thoroughfare." *See Saban*, 244 Ariz. at 302 ¶ 25. We agree with the court of appeals' interpretation.

¶28 First, the provision's text supports a narrower interpretation of the disputed phrase than one meaning "connected to" or benefitting from road usage. The provision applies to two categories of taxes: (a) those "relating to" the "registration, operation, or use of vehicles," and (b) those imposed on fuels and other energy sources used to propel vehicles. *See* Ariz. Const. art. 9, § 14. Registration fees and fuel taxes are "connected to" the use or operation of vehicles. Owners register vehicles to use the roads. And fuel sellers indisputably benefit from their customers' use and operation of vehicles. The explicit mention of registration fees and fuel taxes therefore suggests that tax revenues "relating to . . . the . . . operation, or use of vehicles" encompass a more finite tax class than revenues derived from those with a "connection to" road usage or who benefit from it. Otherwise, as the court of appeals noted, the references to registration fees and fuel taxes would be superfluous. *See Saban*, 244 Ariz. at 298 ¶ 13; *see also Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 218 ¶ 16 (2014) (rejecting proposed interpretation of constitution that would render language meaningless). Interpreting "relating to" as the court of appeals did gives meaning to all terms.

¶29 We are unpersuaded by Saban's assertion that the legislature explicitly mentioned registration fees and fuel

taxes in the Better Roads Amendment referendum simply to remove any doubt they were covered. We presume the legislature avoids redundancy in favor of concision and see no reason to conclude otherwise here. *See City of Phx. v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 147 ¶ 32 (2017). We also disagree with Saban that the legislature demonstrated a penchant for redundancy by referring to revenues from both the "operation" and "use" of vehicles. They are different. The former refers to fees imposed on *drivers* while the latter refers to taxes and fees assessed on *vehicles*. *See, e.g.*, A.R.S. §§ 28-3002(A) (setting fees for driver licenses), -5471(A) (setting vehicle registration fees).

¶30 Second, the anti-diversion provision's history supports the court of appeals' interpretation. The Pamphlet identified non-fuel-related revenues dedicated to roads as "registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts" that are all "derived from road users." *See* Pamphlet, *supra*, at 3. All these taxes and fees are prerequisites for or triggered by the legal use of vehicles on our roads. None are imposed on businesses, like car rental agencies, that merely benefit from the existence of roads.

¶31 Notably, the Pamphlet also stated that adopting the referendum would maintain the status quo as Arizona was then using all road-user taxes for road uses. Pamphlet, *supra*, at 5 ("Arizona is in a particularly favorable position to adopt [the anti-diversion provision] this year, because it is not now diverting its road user taxes . . . [and passage] will entail no change in the source or expenditure of highway revenues."). Yet Arizona had imposed transaction privilege taxes on car rental agencies since 1935 and used those revenues for general purposes. *See Saban*, 244 Ariz.

at 299 ¶ 15 (relating history of transaction privilege tax on car rental agencies). This history suggests that neither the referendum drafter (the legislature) nor voters considered existing taxes on car rental agencies to be "road user taxes" or intended to include such taxes within the provision's ambit.

¶32 Saban agrees that 1952 voters did not intend that the anti-diversion provision apply to transaction privilege taxes on car rental agencies. It nevertheless argues that the car rental surcharge is distinguishable, likening it to the license tax Arizona imposed on common and contract motor carriers of property and passengers in 1952, which the Pamphlet described as a road-user tax that would be subject to the provision. *See* Act of Mar. 18, 1933, ch. 100, §§ 2, 17, 1933 Sess. Laws 472, 473–74, 481–82 (codified at Ariz. Ann. Code §§ 66-502, -518 (1939)); Pamphlet, *supra*, at 3, 5. Specifically, Saban asserts that, like the motor carrier license tax, the surcharge is a "special tax" not imposed generally on all businesses but aimed at "motor vehicle owners and operators of all kinds" who benefit from using Arizona roads. According to Saban, and echoing the Hayden-Cartwright Amendment's vernacular, it would be "unfair and unjust" to impose the surcharge on car rental drivers but divert those revenues from road-related purposes.

¶33 We disagree that the car rental surcharge is more like the motor carrier license tax imposed in 1952 than the 1935 transaction privilege tax imposed on car rental agencies. Payment of the motor carrier license tax was required to legally use vehicles on our roads. *See* §§ 2, 17, 1933 Sess. Laws at 473–74, 481–82. In contrast, the surcharge, like the transaction privilege tax, is imposed on

the business of renting vehicles and is not required to be paid before a rental vehicle can be legally operated on roads. Instead, car rental agencies pay licensing fees, like everyone else, to authorize a vehicle's road usage whether the operator is an employee or a customer. *See* A.R.S. §§ 28-2153(A), -2157 (requiring vehicle registration and payment of registration fees). And car rental drivers pay licensing fees to their home states/countries as a condition for driving on Arizona roads. *See* A.R.S. §§ 28-3151, -3158(B) (requiring driver's license and payment of fee). Additionally, the surcharge is no more aimed at car rental customers than was the 1935 transaction privilege tax. Like the surcharge, the transaction privilege tax could be passed on to car rental customers, yet the tax was not considered a road-user tax and did not fall within the provision.

¶34 That the surcharge is a "special tax" not levied generally on all businesses also fails to distinguish it from the 1935 transaction privilege tax. When enacted, that tax applied to a limited number of businesses. *See White v. Moore*, 46 Ariz. 48, 54–55 (1935) (describing 1935 transaction privilege tax and noting "the Legislature thought best not to impose it on . . . all lines of endeavor but only on . . . certain occupations and businesses"), *superseded by statute as stated in Peterson v. Smith*, 92 Ariz. 340, 342 (1962). Car rental agencies fell within a class of public entertainment and tourist-related businesses, which were taxed at the highest rate. *See id.* at 55–56. Regardless of this "special" treatment, the legislature and voters in 1952 did not consider the tax a road-user tax. Similarly, the anti-diversion provision does not apply to the surcharge, which is part of a taxing plan that imposes a special tax on hotels, simply because it applies only to car rental agencies.

¶35 The court of appeals' interpretation also aligns with the Hayden-Cartwright Amendment, which at least partially drove the Better Roads Amendment. The Hayden-Cartwright Amendment conditioned full federal aid on a state continuing to direct revenues from road-user taxes and fees to road uses. *See supra* ¶ 24. As explained, revenues from the 1935 transaction privilege tax on car rental agencies were never dedicated solely for road purposes. Likewise, directing surcharge revenues, which also derive from taxes imposed on the business of renting vehicles, to non-road purposes does not offend the Hayden-Cartwright Amendment.

¶36 Finally, we agree with ADOR and AzSTA that Saban's "benefits theory" provides no limitation to the term "relating to." If the anti-diversion provision applies to the surcharge, no principled reason exists not to apply it to fees and taxes levied against car sale dealers, automotive repair shops, and the like.

¶37 Justice Bolick's partial dissent accuses us of embarking on a "circuitous journey" that "rewrite[s] constitutional text" to "create[] a loophole" for publicly financed sports stadiums. *See infra* ¶¶ 41–42, 59. Strong words. But they are not backed by rejoinders to our analysis rejecting Saban's "special tax" argument, *see supra* ¶¶ 31–35, despite the fact the dissent adopts Saban's view. *See infra* ¶¶ 49–51 (stating that "a tax is 'relating to' if it is specially directed at the operation or use of vehicles on public highways," and concluding that a surcharge imposed on car rental agencies is such a tax).

¶38 The dissent's effort to ascertain the voters' intent in enacting the anti-diversion provision by parsing language from the Hayden-Cartwright Amendment is unpersuasive.

See infra ¶¶ 45–49. Neither the provision nor the Pamphlet recited (or even mentioned) the language seized on by the dissent, meaning that language almost certainly had no bearing on voters' intent. Also, the provision was not enacted to comply with the Hayden-Cartwright Amendment and obtain federal funding. *See infra* ¶ 49 ("Arizona voters implemented the Hayden-Cartwright Amendment through the anti-diversion clause."). Arizona had already been receiving federal funding for roads at the time the provision was adopted in 1952. *See* Pamphlet, *supra*, at 5. Necessarily, therefore, the state had already complied with the Hayden-Cartwright Amendment by devoting road-user taxes—which did not include the "special" transaction privilege tax placed on car rental agencies—to road uses. Proponents of the provision were driven by the desire to ensure that Arizona continued to devote these tax revenues to road uses. *See* Pamphlet, *supra*, at 5 ("Public policy in Arizona has consistently opposed diversion [of road user taxes to non-road purposes], although there have been constant threats to highway funds in bills introduced from time to time in the legislature.").

¶39 In sum, "fees, excises, or license taxes relating to . . . the . . . operation, or use of vehicles" are ones imposed as a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public road. The surcharge falls outside this definition and therefore does not violate the anti-diversion provision.

CONCLUSION

¶40 For the foregoing reasons, we affirm the court of appeals' opinion. We reverse the tax court's judgment in favor of Saban and remand with directions to enter

judgment in favor of ADOR and AzSTA and for any further required proceedings consistent with our opinion. Finally, we vacate the tax court's refund order.

BOLICK, J., Concurring in Part and Dissenting in Part.

BOLICK, J., concurring in part and dissenting in part.

¶41 The majority today concludes that our constitution's anti-diversion clause, which requires that revenues derived from taxes relating to the operation of motor vehicles must be allocated for public highways, does not apply to a tax relating to the operation of motor vehicles. Because I believe that the best route to a constitutional destination is usually a straight line, I must forsake the majority's circuitous journey. I therefore respectfully dissent from Part II of the majority opinion, while joining the Court's Commerce Clause analysis with some reservations.

Anti-diversion Clause

¶42 If we asked a dozen random non-lawyers whether a rental vehicle tax is related to the operation or use of vehicles on the public highways or streets, chances are excellent that unless they perceived a trick question based on the obvious answer, all twelve would say "of course!" While I do not suggest that a term's obvious meaning is always the legal meaning, when our reading diverges markedly from a provision's ordinary meaning, we should have an exceedingly good reason for reaching that conclusion. Even then, we should hew as closely as possible to the text's plain meaning to help resist the temptation to exceed our constitutional boundaries. Even public objectives of the highest order, including (apparently) the

building of publicly financed stadiums, do not license us to rewrite constitutional text.

¶43 We must presume that the amendment's framers consciously and intentionally chose the words they used. *See Rumery v. Baier*, 231 Ariz. 275, 278 ¶ 15 (2013). Our duty is to give effect to those words. *See id.* In giving effect to the words chosen, we start with the words' plain meaning. *See id.*; *Cain v. Horne*, 220 Ariz. 77, 80 ¶ 10 (2009). All agree that the term "relating to" is quite broad; from that we can only properly infer that the framers intended a broad scope. Thus, when we seek to apply a "limiting principle," we should do so in the manner most consistent with the broad language chosen by the amendment's drafters. *See Cain*, 220 Ariz. at 80 ¶ 10; *cf. Johnson v. State ex rel. Dep't of Transp.*, 224 Ariz. 554, 557 ¶ 15 (2010) (citing with approval to another court's rejection of a narrow interpretation of Federal Rule of Evidence 407 because "this narrow interpretation ignores the literal language of the rule" (internal quotation marks omitted)).

¶44 Instead, the majority construes the term "relating to" in a narrow way that changes its meaning. The Court holds today that "relating to" actually means "triggered by" or a "prerequisite to," *supra* ¶ 39, thereby substituting constitutional text with what the majority determines its authors meant to say. Even under that judicially-constructed rubric, revenues collected from the surcharge here should be allocated to public highways and roadways. And though the term "relating to" as used in the anti-diversion clause is indeed elastic, a linear view of the enactments at issue yields a more straightforward

interpretation that does not necessitate rewriting constitutional language.[1]

¶45 It is undisputed that the anti-diversion clause emanated from Arizona's desire to retain federal highway funding. In the Hayden-Cartwright Amendment, Congress mandated that tax revenues derived from the use or operation of motor vehicles would be dedicated to highway funding. Pub. L. No. 73-393, § 12, 48 Stat. 993, 995 (1934). Then the voters approved article 9, section 14 of the Arizona Constitution to effectuate that command. Many years later, the legislature enacted the current surcharge on rental car companies and allocated the funding to sports authorities. Examining the relevant provisions of these three enactments in close proximity is highly probative.

¶46 The pertinent provision of the Hayden-Cartwright Amendment specifically notes that "it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways." Hayden-Cartwright Amendment § 12. Thus, the Amendment directs states wishing to retain federal highway funding to restrict to highway use revenues derived from

> [s]tate motor vehicle registration fees, licenses, gasoline taxes, and *other special taxes on motor-vehicle owners and operators of all kinds* . . . .

Id. (emphasis added). The italicized words are illuminating, as they contain language that is both limiting and broad.

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[1] I agree with the majority that the Plaintiffs' principal assertion that "relating to" means "connected to" is unpersuasive. *See supra* ¶ 28.

¶47 First, the term "other special taxes" connotes taxes—like registration fees, licenses, and gasoline taxes—that are directed specifically to the use of motor vehicles. The *ejusdem generis* canon supports this reading: where a general term, such as "other special taxes," follows a list of specific terms, the general term should be construed narrowly to "persons or things of the same general nature or class" as the more specific terms. *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶ 13 (2011) (quoting *State v. Barnett*, 142 Ariz. 592, 596 (1984)). Consequently, "other special taxes" should be interpreted narrowly to mean relating to the use of motor vehicles as the terms that precede it are of this nature. Thus, the term "special taxes" would not encompass *general* taxes that included the use of motor vehicles but were not specially directed toward them. The "special taxes" phrasing also shows that the Hayden-Cartwright Amendment only implicates taxes that are directed specifically to a particular project rather than general taxes that go to the general fund. *Tax*, Black's Law Dictionary (10th ed. 2014) (defining special tax as "[a] tax levied for a unique purpose").

¶48 Second, the term "motor-vehicle owners and operators of all kinds" is very broad, and thus is meant to be inclusive, not exclusive. Given the statute's stated purpose, this provision suggests that it is the use of the roads rather than hyper-technical legal distinctions among motor-vehicle owners and operators that should govern the statute's applicability; the effect on the roads is the same regardless.

¶49 In turn, Arizona voters implemented the Hayden-Cartwright Amendment through the anti-diversion

clause, article 9, section 14 of the Arizona Constitution, which provides in relevant part:

> No moneys *derived* from fees, excises, or license taxes relating to registration, *operation, or use of vehicles on the public highways or streets* . . . shall be expended for other than highway and street purposes . . . .

(Emphasis added.)

¶50 This provision should be read *in pari materia* with the Hayden-Cartwright Amendment as the former implements the requirements of the latter and thus each deals with the same subject matter. *See David C. v. Alexis S.*, 240 Ariz. 53, 55 ¶ 9 (2016) ("Statutes that are in pari materia—those of the same subject or general purpose—should be read together and harmonized when possible."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) ("Any word or phrase that comes before a court for interpretation is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire *corpus juris*. . . . Hence laws dealing with the same subject—being *in pari materia* . . .[,] should if possible be interpreted harmoniously."). Indeed, if the constitutional provision did not fully and faithfully follow the federal statute, Arizona would jeopardize federal highway funds—and ironically, the Court's decision today may risk exactly that—which was precisely why it was adopted. *See* Ariz. Sec'y of State, 1952 Publicity Pamphlet 5 (1952), http://azmemory.azlibrary.gov/digital/collection/statepubs%20/id/106 41 ("Why jeopardize federal aid by allowing any diversion of road user taxes . . . ?" (emphasis omitted)); *id.* at 4 (expressly referring to the Hayden-

Cartwright Amendment); *Saban Rent-A-Car LLC v. Ariz. Dep't of Revenue*, 244 Ariz. 293, 299 ¶ 14 (App. 2018) (stating the anti-diversion clause "was enacted in response to federal legislation that conditioned grants of federal highway funds on a state's assurance that revenue 'from State motor-vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds' would be used exclusively for highway purposes" (quoting Hayden-Cartwright Amendment § 12)). In that way, the Hayden-Cartwright Amendment provides definition for the subsequent state constitutional provision.

¶51 Therefore, viewed in this proper context, a tax is "relating to" if it is specially directed at the operation or use of vehicles on public highways. Similarly, the broad terms "use" and "operation" are directed toward the ultimate activity. Again, the text evinces no intent to elevate form over substance—if the vehicles are used or operated on public highways, then any fee or tax specially directed toward that use implicates the anti-diversion clause.

¶52 That leaves the question of whether the car rental surcharge is such a fee or tax. Once again, we do not need to travel beyond the statutory language itself, for it furnishes the plain answer. A.R.S. § 5-839(C) states in relevant part:

> The surcharge applies to the business of leasing or renting . . . *motor vehicles for hire without a driver, that are designed to operate on the streets and highways of this state* . . . .

(Emphasis added.) The italicized language essentially parallels the wording of the anti-diversion clause. The surcharge's plain language illustrates that it only applies when someone rents a "motor vehicle[] . . . without a driver, . . . designed to operate on the streets and highways of this state"; as such, the taxable event is that the renter of the motor vehicle will be driving it on the public roads.

¶53 A straight line can be drawn from the Hayden-Cartwright Amendment to the anti-diversion clause to the statute before us. The "limiting principle" that the majority searches for at great length is supplied by the relevant text of these provisions. The surcharge is a special tax directed toward the use or operation of vehicles on public roads, and the revenues it generates must be allocated to public roads.

¶54 When the relevant constitutional and statutory language resolves the dispute, as it does here, it is with great hazard that we stray beyond it. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 604 ¶ 67 (2017) (Bolick, J., concurring in part and in the result) ("We look first to the language of the provision, for if the constitutional language is clear, judicial construction is neither required nor proper." (quoting *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992))); *accord, e.g.*, *State v. Winegardner*, 243 Ariz. 482, 489 ¶ 29 (2018) (Lopez, J., dissenting in part and concurring in the result) ("In doing so, we glossed over the Rule's plain language to find a much narrower meaning in its legislative history. But our decisions repeatedly emphasize that we should apply plain meaning before resorting to secondary interpretation methods such as legislative history."); *Butler Law Firm, PLC v. Higgins*, 243 Ariz. 456, 459 ¶ 7 (2018); *Brenda D. v.*

Dep't of Child Safety, 243 Ariz. 437, 449 ¶ 45 (2018) (Timmer, J., dissenting in part and concurring in part); *State v. Holle*, 240 Ariz. 300, 302 ¶ 11 (2016).

¶55 The trial court employed a similar analysis and reached the correct result, holding that "the class of taxable transactions is defined by the relationship of those transactions to the rental of cars. That the [surcharge] relates to the use of vehicles on the public highways or streets is plain. Its receipts may therefore be applied only to one or more of the purposes set down by the Constitution. The construction and maintenance of athletic facilities [are] not among those purposes."

¶56 Although we need (and should) not go beyond constitutional and statutory text in resolving this case, this analysis, unsurprisingly, also accords with the drafters' stated intent. As the majority observes, the amendment's drafters admonished that the enactment would not alter the then-current tax system. *Supra* ¶ 31. This reading is consistent with that stated intent: general taxes that affected motor vehicles among other goods or services would be unaffected, while taxes and fees directly applied to motor vehicles or their use or operation would be subject to the amendment's constraints.

¶57 The majority creates an exception to the anti-diversion clause that defeats both its language and intent. That the surcharge is assessed not directly on individuals but on businesses, who pass it on to consumers, is irrelevant in a constitutional provision that focuses on use and operation of motor vehicles on public highways. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (concluding that consumers had standing because "the Special Master proper[l]y determined that 'although the

tax is collected from the pipelines, it is really a burden on consumers'"). More importantly, whether the tax is borne by the owners (the rental car companies) or the operators (vehicle renters) makes no difference from the perspective of effectuating the requirements of the Hayden-Cartwright Amendment, which expressly encompasses both.

¶58 Even so, clearly it is the vehicle renters, as vehicle operators, and not the rental car companies that are the ultimate object of the surcharge, as the arguments in favor of adoption of the surcharge in the voter pamphlet repeatedly emphasized. *See, e.g.*, Ariz. Sec'y of State, 2000 Publicity Pamphlet Sample Ballot for the Tourism & Sports Authority 10 (2000) [hereinafter 2000 Publicity Pamphlet], https://ia601408.us.archive.org/31/items/PubPamp2000_201902/Pub%20Pamp%202000.pdf ("The tax burden will fall primarily on visitors to the County."); *id.* at 12 ("[V]isitors to the region, through a modest increase in the cost of hotel and rental car use, will absorb a large portion of the cost . . . ."); *id.* at 14 ("Finally, the financing created by this proposition will be born[e] almost entirely by the out of state visitors."); *id.* at 16 ("But the best part of the proposal is that it will cost Arizona residents next to nothing. As much as 95% of the new hotel and car rental taxes will be borne by visitors to our state."); *id.* at 17 ("All of these benefits to our communities can be provided with the passage of Proposition 302 without increasing taxes paid by local residents, and *without negatively impacting the car rental and hotel industries*." (emphasis added)). The prescient forecast by those in favor of shifting the burden of paying for AzSTA tourism projects to rental car users themselves played out exactly as planned, as the trial court found, which shows precisely why the surcharge violates the anti-diversion clause. *See supra* ¶ 3 (noting the

rental car companies pass the surcharge on to the vehicle renters). The surcharge is imposed on rental car users for their road use; thus, its revenues must be earmarked for road use projects only. Because they are not, the surcharge violates the anti-diversion clause.

¶59 The Court has created a loophole that allows the legislature and those seeking its favor to divert funding from highways to other purposes, without the pesky inconvenience of constitutional amendment. For the foregoing reasons, and with great respect to my colleagues, I dissent on this issue.

Dormant Commerce Clause

¶60 I agree with my colleagues that the statute does not violate the "dormant" Commerce Clause, as presently construed by the U.S. Supreme Court.[2] However, I find in the record more evidence than my colleagues of an intent to place the predominant economic burden of this tax on out-of-state consumers, who after all are much more likely to rent cars in Arizona for non-replacement purposes (for

[2] The Commerce Clause effectuated one of the major purposes of our federal constitution, which was to prevent parochial trade barriers erected by states favoring their own domestic industries, thereby ensuring to all the abundant benefits of free trade. *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979). It did so by vesting in Congress, rather than the states, the power to regulate interstate commerce. This application of the Commerce Clause is far from dormant, as wine-lovers, among others, can attest. *Granholm v. Heald*, 544 U.S. 460 (2005).

which more-favorable terms apply on the statute's face) than Arizona residents.[3] And, pertinent to the political equation here, out-of-state visitors are unable to vote to protect their economic interests, so they represent an appealing revenue source.

¶61 "[A] tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66, 75 (1989). In *Commonwealth Edison Co. v. Montana*, the Court rejected a Commerce Clause claim against a facially nondiscriminatory tax that disproportionately burdened out-of-state businesses as the Court reasoned the tax was related to activities and benefits taking place inside the state. 453 U.S. 609, 618–29 (1981). By contrast, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Court struck down a differential tax burden that "penalize[d] the principally nonresident customers of businesses catering to a primarily interstate market." 520 U.S. 564, 576 (1997).

¶62 As a result, this question is very close. Plaintiffs have argued this case as one of discriminatory intent, and indeed the statute is facially nondiscriminatory and has been applied in a nondiscriminatory way. The U.S. Supreme Court has not invalidated state policies solely on the basis of discriminatory intent. *But cf. S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593–96 (8th Cir.

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[3] One quote from the publicity pamphlet in particular sums it up with admirable candor: "[T]he best part of the proposal is that it will cost Arizona residents next to nothing. As much as 95% of the new hotel and car rental taxes will be borne by visitors to our state." 2000 Publicity Pamphlet, *supra*, at 16; *see also supra* ¶ 58 (collecting quotes evincing discriminatory intent).

2003) (invalidating a constitutional amendment on the basis of "discriminatory purpose"). Given the Supreme Court's conflicting precedents and that it has not yet provided significant guidance on how to treat a Commerce Clause claim based on discriminatory intent, I join the majority in denying relief on that claim.

APPENDIX B

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-TX 16-0007

[Filed March 13, 2018]

SABAN RENT-A CAR LLC, et al.,
Plaintiffs/Appellees/Cross-Appellants,

v.

ARIZONA DEPARTMENT OF REVENUE,
Defendant/Appellant/Appellee/Cross-Appellee,

TOURISM AND SPORTS AUTHORITY,
Defendant-in-Intervention/Appellant/Cross-Appellee.

Appeal from the Arizona Tax Court
No. TX2010-001089
The Honorable Dean M. Fink, Judge
The Honorable Christopher T. Whitten, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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OPINION

Judge Diane M. Johnsen delivered the opinion of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Maria Elena Cruz joined.

JOHNSEN, Judge:

¶1 A class of car-rental companies sued to invalidate a surcharge enacted to build sports facilities to be owned by the Arizona Tourism and Sports Authority ("AzSTA"). The car-rental companies argued the surcharge is invalid both under Article IX, Section 14 of the Arizona Constitution and under the Dormant Commerce Clause implied by the United States Constitution. The tax court ruled the surcharge was invalid under the Arizona Constitution (but

not under the Dormant Commerce Clause) and ordered a refund.

¶2 For reasons explained below, we reverse the tax court's order granting summary judgment to the car-rental companies under the Arizona Constitution and direct entry of judgment in favor of the Arizona Department of Revenue ("ADOR") and AzSTA on that claim. We affirm the judgment in favor of ADOR and AzSTA under the Dormant Commerce Clause. Because we conclude the surcharge is not invalid under either constitutional provision, we reverse the tax court's refund order.

FACTS AND PROCEDURAL BACKGROUND

¶3 AzSTA is a "corporate and political body" the legislature created in 2000. Ariz. Rev. Stat. ("A.R.S.") § 5-802 (2018).[1] By statute, AzSTA's "boundaries" are those "of any county that has a population of more than two million persons," meaning (then and now) Maricopa County. A.R.S. § 5-802(A). The legislature directed AzSTA to build and operate a "[m]ultipurpose facility" — a stadium/events center — that could accommodate a professional football team, a college bowl game, and "other sporting events and entertainment, cultural, civic, meeting, trade show or convention events[.]" A.R.S. §§ 5-801(4) (2018) (defining "multipurpose facility"), -804(A) (2018), -807 (2018), -815 (2018) (powers of AzSTA). The legislature also granted AzSTA the power to contract to host the Super Bowl and college football national championship and playoff games and to build Major League Baseball

[1] Absent material revision after the relevant date, we cite the current version of a statute or rule.

spring-training facilities and youth and amateur sports and recreational facilities. A.R.S. §§ 5-808 (2018), -809 (2018).

¶4 Although AzSTA may charge for use of its facilities, it cannot levy taxes or assessments to build those facilities. A.R.S. § 5-802(C). Instead, the legislature authorized Maricopa County voters to approve taxes to fund AzSTA's construction projects. *See id.* Among the taxes the legislature authorized voters to impose is the one challenged here: A surcharge on the gross proceeds of car-rental businesses. *See* A.R.S. § 5-839(B) (2018). Maricopa County voters approved the car-rental surcharge authorized by § 5-839 in November 2000, just months after the legislature established AzSTA.[2] As authorized, the surcharge is the greater of 3.25 percent "of the gross proceeds or gross income from the business" or $2.50 per car rental, payable by the car-rental business, not the customer. A.R.S. § 5-839(B)(1). If a customer rents a vehicle as a "temporary replacement" for another vehicle, the surcharge charged the car-rental company is a flat $2.50. *See* A.R.S. § 5-839(B)(2).[3]

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[2] This court already has denied two challenges to the tax. In *Long v. Napolitano*, 203 Ariz. 247, 251-53, ¶¶ 2-9 (App. 2002), we ruled that § 5-839 did not violate provisions of the Arizona Constitution unrelated to the provision at issue in this case. *See id.* at 253, ¶¶ 10-11. In *Karbal v. ADOR*, 215 Ariz. 114, 117, ¶ 11 (App. 2007), a car-rental customer raised some of the same arguments made here against the surcharge, but we ruled that the customer lacked standing because the surcharge is imposed on the car-rental companies, not the customers.

[3] The first $2.50 collected for each car-rental transaction goes to the Maricopa County stadium district; the remaining revenues go to AzSTA. *See* A.R.S. §§ 5-801(1), -839(G)(1), (2). The legislature also authorized Maricopa County to tax hotels at up to 1 percent of room sales to support AzSTA. A.R.S. § 5-840 (2018).

¶5 In August 2009, Saban Rent-A-Car, Inc. sought a refund of amounts it had paid under § 5-839, claiming the surcharge violated Article IX, Section 14 of the Arizona Constitution and the Dormant Commerce Clause implied by the U.S. Constitution. After ADOR denied the refund and that decision was upheld on administrative review, Saban challenged the ruling in the tax court, seeking injunctive relief and a refund on behalf of a class of all similarly situated car-rental companies. The court granted AzSTA leave to intervene as a defendant, then certified a class of all businesses that paid the surcharge from September 2005 through March 2008.

¶6 After discovery, the tax court ruled on cross-motions for summary judgment that although the surcharge did not violate the Dormant Commerce Clause, it was invalid under Article IX, Section 14 of the Arizona Constitution. The court ruled that ADOR would have to refund the tax to class members but could recoup the amount of the refund, over time, from AzSTA pursuant to A.R.S. § 42-5029(G) (2018). The court granted ADOR's motion for entry of judgment pursuant to Arizona Rule of Civil Procedure 54(b), leaving the amount of the refund to be determined.

¶7 We have jurisdiction of the parties' various appeals and cross-appeal from the Rule 54(b) judgment pursuant to Article VI, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(A)(6) (2018). *See Empress Beauty Supply, Inc. v. Price*, 116 Ariz. 34, 35 (App. 1977) (Rule 54(b) appropriate

when "the only question remaining to be resolved is the amount of recovery") (quotations omitted).[4]

DISCUSSION

A. Standard of Review.

¶8 We review *de novo* the grant of a motion for summary judgment. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15 (App. 2007). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Although a party ordinarily may not appeal an order denying summary judgment, *see, e.g.*, *Fleitz v. Van Westrienen*, 114 Ariz. 246, 248 (App. 1977), the court of appeals may review the denial of a motion for summary judgment if the superior court denied the motion on a point of law, *Strojnik v. Gen. Ins. Co. of America*, 201 Ariz. 430, 433, ¶ 11 (App. 2001).

B. Article IX, Section 14 of the Arizona Constitution.

¶9 In relevant part, Article IX, Section 14 of the Arizona Constitution states:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall

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[4] *Empress Beauty Supply* interpreted A.R.S. § 12-2101(G), which since was renumbered to A.R.S. § 12-2101(A)(6) without substantial change. *See Empress Beauty Supply*, 116 Ariz. at 35; H.B. 2645, 50th Leg., 1st Reg. Sess., Ariz. Laws 2011, Ch. 304, § 1.

> be expended for other than highway and street purposes . . . .

Under this provision, revenues collected from certain "fees, excises, or license taxes" may be spent only for "highway and street purposes." ADOR and AzSTA concede the surcharge authorized by A.R.S. § 5-839 is an excise tax. *See also Karbal v. ADOR*, 215 Ariz. 114, 116, ¶¶ 9-10 (App. 2007). Therefore, if the surcharge is a tax "relating to registration, operation, or use of vehicles on the public highways or streets," it violates Section 14 because its proceeds are spent on sports and recreation facilities, not highways and streets.

¶10 Relying on dictionary definitions, Saban argues the phrase "relating to" in Section 14 broadly sweeps up any tax "having connection with or reference to the operation or use of vehicles on the public highways." To be sure, the phrase "relating to" is inherently indeterminate. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes [its scope] would never run its course, for 'really, universally, relations stop nowhere.'" (quoting H. James, *Roderick Hudson* xli (New York ed., World's Classics 1980)) (alteration in original omitted)). For that reason, as Saban conceded at oral argument, without some limiting principle, Section 14 would encompass not only the car-rental surcharge at issue here but also a broad range of taxes that Arizona does not now funnel to highways—including retail sales or business privilege taxes on car sales, tire sales, car leases and car repairs.

¶11 Nevertheless, Saban cites *Landon v. Indus. Comm'n of Ariz.*, 240 Ariz. 21 (App. 2016), for the proposition that we should look no farther than the dictionary in interpreting the words"relating to" in Section 14. The issue in *Landon* was whether the discharge of an injured employee fell within a provision of the Workers' Compensation Act concerning workers "terminat[ed] from employment for reasons that are unrelated to the industrial injury." *Id.* at 24, 25-26, ¶¶ 5-7, 15. We consulted dictionaries for the plain meaning of "related," namely "connected" to or "associated" with. *Id.* at 26, ¶ 16 (citing *Black's Law Dictionary* (10th ed. 2014) and *Webster's II New College Dictionary* (3d ed. 2005)). But we also considered the purpose of the legislation and applied common principles of statutory construction, including the rule that "when statutory provisions relate to the same subject matter, they should be construed together and reconciled whenever possible, in such a way so as to give effect to all the statutes involved." 240 Ariz. at 25, 26, ¶¶ 12, 17 (quotation omitted).

¶12 We must use these and other like principles to discern whether Section 14 encompasses the car-rental surcharge. *See Travelers Ins.*, 514 U.S. at 656 ("We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives [of the statute]."); *RSP Architects, Ltd. v. Five Star Dev. Resort Communities, LLC*, 232 Ariz. 436, 438, ¶ 8 (App. 2013) (phrase "relating to" in Prompt Payment Act, A.R.S. § 32-1129(A)(1) (2018), does not encompass every relationship or connection with the referenced term: "Common sense . . . tells us there must be some bounds to the breadth of the statute."). We look to the "context, subject matter, effects and consequences, reason and spirit

of the law" and try to construe it "in the context of related provisions and in light of its place in the statutory scheme." *RSP*, 232 Ariz. at 438, ¶ 9; *see Landon*, 240 Ariz. at 26, ¶ 17. And, in interpreting a voter-approved measure, we seek to give effect to "'the intent of the electorate that adopted it.'" *State v. Maestas*, 242 Ariz. 194, 197, ¶ 11 (App. 2017) (quoting *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6-7, ¶ 21 (2013)).

¶13 Applying those principles here, the broad interpretation Saban urges would render multiple phrases in the provision superfluous — a result that we must seek to avoid. *See RSP*, 232 Ariz. at 439, ¶ 13. Section 14 expressly applies not only to excise taxes "relating to registration, operation, or use of vehicles on the public highways or streets" but also to such levies on "fuels or any other energy source used for the propulsion of vehicles on the public highways or streets." Saban's broad construction of "relating to" would render the fuels provision irrelevant because fuel used to propel a vehicle is related to use or operation of a vehicle. The same is true with respect to Section 14's express reference to "registration." A vehicle's registration is related to its use on public streets; one may not legally drive a vehicle that is not registered. Because a broad interpretation of "relating to" deprives these other terms of any effect, the text of Section 14 itself reveals that we should not construe "relating to" in its broadest possible sense.

¶14 Turning to the purpose of the provision, Section 14 was enacted in response to federal legislation that conditioned grants of federal highway funds on a state's assurance that revenue "from State motor vehicle registration fees, licenses, gasoline taxes, and other special

taxes on motor-vehicle owners and operators of all kinds" would be used exclusively for highway purposes. H.R. 8781, 73rd Cong., Ch. 586, § 12, 48 Stat. 993, 995 (1934) (enacted). In an official publicity pamphlet mailed before the 1952 election, at which Section 14 was approved, voters were informed that 21 states had adopted similar "anti-diversion" laws to ensure and preserve eligibility for federal highway funds. *See State of Ariz. Initiative & Referendum Publicity Pamphlet, Proposed Amendment to the Constitution* at 4 (1952).[5]

¶15 Significantly, the pamphlet assured voters that passage of Section 14 would "entail no change in the source or expenditure of highway revenues." But at the time, Arizona already was collecting a statewide excise tax on car-rental business revenues. That tax was enacted in 1935 — 17 years before voters enacted Section 14. *See* S.B. 118, 12th Leg., 1st Reg. Sess., Ariz. Laws 1935, Ch. 77, art. 2, § 2(f)(2) (encoded as Ariz. Code Ann. § 73-1303(f)(2) (1939)) (subsequently encoded as A.R.S. § 42-1314 (1959), H.B. 41, 24th Leg., 1st Reg. Sess., Ariz. Laws 1959, Ch. 11, § 1) (repealed by S.B. 1038, 27th Leg., 1st Reg. Sess., Ariz. Laws 1985, Ch. 298, § 11); A.R.S. §§ 42-5008 (2018), -5071 (2018); *see also Alvord v. State Tax Comm'n*, 69 Ariz. 287, 289 (1950) (recounting history of Arizona's business

[5] Citing *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403 (2005), Saban argues we may not use the voter pamphlet in interpreting Section 14. But the majority in *Phelps* held the constitutional provision at issue there was so plain it required no interpretation. *Id.* at 405, ¶ 10. We may rely on voter pamphlets to determine the electorate's intent when necessary to resolve ambiguity. *See, e.g.*, *Calik v. Kongable*, 195 Ariz. 496, 500-01, ¶¶ 17-19 (1999); *Laos v. Arnold*, 141 Ariz. 46, 47-48 (1984). Such a pamphlet assists us in ascertaining an "interpretation . . . consistent with the purpose" of the measure "as communicated to the people of Arizona." *Cave Creek Unified Sch. Dist.*, 231 Ariz. at 351, ¶ 25.

privilege tax on car-rental services). From the inception of that statewide car-rental business tax, and at the time Section 14 was adopted, proceeds from the tax were not reserved for highway uses but went instead to the state's general fund. Ariz. Code Ann. § 73-1303 (1939) (providing for tax for "the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments" and "to aid in defraying the necessary and ordinary expenses of the state and counties"); *see also* Ariz. Code Ann. § 73-1303 (Supp. 1952) (same). The pamphlet sent to voters in 1952 did not mention the then-existing car-rental business tax, even while telling voters of other existing taxes that would fall within Section 14's scope: "[S]tate gasoline and diesel taxes, registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts."

¶16 Further, echoing the federal statute's focus on "motor-vehicle owners and operators," the pamphlet told voters that the purpose of the constitutional measure was "to INSURE THE EXPENDITURE OF ALL REVENUES DERIVED FROM ROAD USERS TO ROAD USES ONLY." Consistent with that focus on tax collections from road users, Arizona puts into its Highway Fund the proceeds of fees or taxes that must be paid in order to legally drive on public roads — motor carrier taxes, vehicle registration and in lieu fees and driver's license fees.[6]

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[6] According to information provided by *amicus* Arizona Department of Transportation, the revenue sources of the Arizona Highway Fund for each year since 2000 have been "Motor Vehicle Fuel Tax Revenues," "Motor Vehicle Registration Fee Revenues," "Motor Carrier Tax Revenues," "Motor Vehicle Operators' License Fees and Misc. Fees

¶17 By contrast, as respects the surcharge at issue here, the relationship between the *business of renting vehicles* and the "*operation, or use of vehicles* on the public highways or streets" (emphasis added) is attenuated in at least two ways. First, the surcharge is not imposed on the road user (the driver-customer), but instead is imposed on the car-rental business, regardless of its own usage of vehicles on public highways or streets (and regardless of whether it chooses to pass along the surcharge to its customers). Second, the taxable event that triggers the surcharge is the *rental of a vehicle*, not its *operation or use*. While most every car-rental transaction will result in the customer using the car on public highways or streets, the surcharge is imposed regardless of whether, how much or how often the customer drives the car.

¶18 Ohio appellate courts have issued three decisions addressing a nearly identical constitutional provision. *See generally State v. Curry*, 97 Ariz. 191, 194-95 (1965) (consulting decisions interpreting similar statutory language in other states).[7] In the first case, *Ohio Trucking Ass'n v. Charles*, 983 N.E.2d 1262 (Ohio 2012), the state supreme court considered whether its anti-diversion

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and Revenues," and "Motor Vehicle License (In Lieu) Tax Revenues." *See Sources of Revenues Deposited in the Arizona Highway User Revenue Fund and Arizona Highway Fund, Fiscal Year 2000 Through Fiscal Year 2016* (July 13, 2016), https://www.azdot.gov/docs/default-source/businesslibraries/hurf-annual-disclosure-file-2016.pdf?s fvrsn=10.

[7] The Ohio Constitution provides that "[n]o moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than" highway and related purposes. Ohio Const. art. XII, § 5a.

constitutional provision applied to fees assessed on certified abstracts of motor vehicle records. The court rejected a strict plain-language approach to "relating to":

> At an extreme level, at the furthest stretch of its indeterminacy, there is no doubt that fees for certified abstracts are related to the registration of vehicles on public highways. We are not convinced that this extreme view of "relating to" is logical; we know that it is not compelled by the language of [the constitutional provision] or the objectives of the amendment.

Id. at 1267, ¶ 15 (quotation omitted). The court concluded that certified abstract fees were not sufficiently related to "registration, operation, or use" of vehicles because the abstract fees were "not *necessary* to the general motoring public" and "not *triggered by* the registration, operation, or use of a vehicle on the public highways." *Id.* at 1267, ¶ 16 (emphasis added).

¶19 In another case decided a day later, the same court held that a business tax on gross receipts from the sale of motor-vehicle fuel fell within the scope of the constitutional provision. *Beaver Excavating Co. v. Testa*, 983 N.E.2d 1317, 1319-20, ¶ 1 (Ohio 2012). The tax at issue there, like the AzSTA surcharge, was a privilege tax paid by businesses, not a tax paid directly by motorists. After considering the words "relating to" "according to [their] plain and ordinary meaning given in the context of political discussions and arguments, in order to carry out the intention and objectives of the people," *id.* at 1325, ¶ 30 (quotation omitted), the court concluded that the "text and history" of the provision showed it was intended to apply "broadly" to business privilege taxes "derived from the

sales of motor-vehicle fuel" — not solely to transactional taxes imposed directly on fuel sales, *id.* at 1325-27, ¶¶ 30, 33-36.

¶20 Although *Beaver Excavating* supports Saban's position that the anti-diversion measure may encompass a business privilege tax, the case says little about the meaning of "relating to the registration, operation, or use of motor vehicles." The tax at issue there was imposed on fuel, which Ohio and Arizona's anti-diversion provisions both explicitly mention in a separate clause without any words of limitation. Further, whether framed as a business tax or a sales tax, a tax on motor-vehicle fuel directly relates to the operation or use of a motor vehicle.

¶21 The third Ohio case, *Fowler v. Ohio Dep't of Pub. Safety*, ___ N.E.3d ___, No. 16AP-867, 2017 WL 3263761 at *6, ¶ 21 (Ohio Ct. App. Aug. 1, 2017), considered a "financial responsibility reinstatement fee" imposed on motorists ticketed for driving without insurance. The court concluded the fee was not "related to" vehicle registration, operation or use because it was not required of all motorists as a prerequisite to driving, *see id.* at *5-*6, ¶¶ 18-19, and because it was not "trigger[ed]" by registration, operation or use of a vehicle but rather by a lack of insurance, *id.* at *6, ¶ 19. The court acknowledged an undeniable relationship between the fee and motor vehicle registration, but found that relationship was "too attenuated" to fall within the scope of the Ohio provision. *See id.*

¶22 Under the reasoning of these cases, an anti-diversion provision applying to fees or taxes "relating to . . . operation[] or use" of vehicles on public highways and streets only encompasses fees and taxes generally imposed on all who operate or use vehicles on public highways and

streets, meaning fees or taxes that are a prerequisite to legally operating or using a vehicle on a public thoroughfare or that are triggered by operation or use of a vehicle on a public thoroughfare.[8]

¶23 These general principles are reflected in the categories of taxes the publicity pamphlet told Arizona voters would be subject to Section 14, and those that voters reasonably understood would not. All of the non-fuel revenue sources the pamphlet stated would be encompassed by the constitutional provision — "registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts" — are prerequisites to the legal operation or use of a vehicle on a public highway or are triggered by such operation or use of a vehicle. *See* ¶ 16 *supra*. The surcharge authorized by A.R.S. § 5-839 lacks any such nexus to operation or use of a vehicle. Setting aside the fact that the surcharge is imposed on car-rental businesses, not on car-rental customers, it goes without saying that one need not rent a vehicle to legally operate or use that vehicle on an Arizona street; moreover, the surcharge is not triggered by operation or use of a vehicle, but rather by a rental transaction. Consistent with that conclusion, as stated, we infer that when voters enacted Section 14 in 1952 knowing

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[8] Other out-of-state cases the parties cite are less helpful because the anti-diversion provisions in those cases do not use the phrase "relate to" or "relating to." *See Thrifty Rent-A-Car Sys., Inc. v. City & County of Denver*, 833 P.2d 852, 856 (Colo. App. 1992) (provision applied to "proceeds from the imposition of any license, registration fee, or other charge with respect to the operation of any motor vehicle upon any public highway in this state") (alteration omitted); *Wittenberg v. Mutton*, 280 P.2d 359, 362 (Or. 1955) (provision applied to "proceeds from any tax or excise levied on the ownership, operation or use of motor vehicles").

that Arizona already imposed a statewide car-rental tax, they understood that Section 14 would not constrain the state's use of the proceeds of that existing revenue source.[9]

¶24 Our analysis also is informed by the principle that "statutes must be given a sensible construction which will avoid absurd results." *Sherman v. City of Tempe*, 202 Ariz. 339, 343, ¶ 18 (2002) (citing *Sch. Dist. No. 3 of Maricopa County v. Dailey*, 106 Ariz. 124, 127 (1970)). Acknowledging that Section 14's reach is not limitless, Saban asserts we should construe the provision so that it "reach[es] no further than A.R.S. § 5-839." That contention disregards the duty of a court that is interpreting a legal provision to strive to discern and apply sound principles of general applicability in accordance with the intent of those who enacted the provision. Saban offers no principled rule of textual interpretation that would invalidate the surcharge here without invalidating many other vehicle-related taxes that Arizona never has earmarked for highway purposes — including taxes on motor vehicle sales and leases, auto repairs, sales of automobile-related equipment and parts, and everything else that might be said to be "related to" use of motor vehicles. Voters approved Section 14 more

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[9] Saban argues § 5-839(C) echoes the language of Section 14 in that it authorizes a surcharge on the business of renting "motor vehicles . . . that are designed to operate on the streets and highways of this state." Surely the lawmakers who enacted the statute did not intend the surcharge to fall within Section 14 – its purpose is to fund AzSTA facilities, not to benefit the Highway Fund. That being said, and accepting that the car-rental surcharge applies only to the renting of vehicles to be used on public thoroughfares, as stated above, the surcharge is imposed not on the *user* of those public thoroughfares but on the business that rents a vehicle to the user. Nor is it a tax that one must pay to legally operate a vehicle on a public thoroughfare or that is triggered by operation of a vehicle on a public thoroughfare.

than 60 years ago. We cannot ignore that so far as we know, at no time since then have they, the legislature or the executive branch seriously suggested that the provision might be or should be interpreted to sweep so broadly.

¶25 In sum, contrary to Saban's contention, Section 14's text, context and history teach that the voters did not intend it to encompass every tax or fee in any way "relating to" vehicles. Instead, we conclude Section 14 applies to a tax or fee that is a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public thoroughfare. By that reasoning, we hold it does not apply to the surcharge enacted pursuant to A.R.S. § 5-839.

C. The Dormant Commerce Clause.

1. General principles.

¶26 Saban cross-appeals the superior court's rejection of its challenge to the surcharge under the Dormant Commerce Clause implied by the United States Constitution. The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. "[T]he Commerce Clause . . . reflected a central concern of the Framers that[,] . . . in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Accordingly, "[a]lthough the Clause is framed as a positive grant of power to Congress, [the U.S. Supreme Court has] 'consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when

Congress has failed to legislate on the subject.'" *Comptroller of Treasury of Maryland v. Wynne*, ___ U.S. ___, ___, 135 S. Ct. 1787, 1794 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). The concern of the Dormant Commerce Clause is with "economic protectionism[,] that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quotation omitted). Here, Saban argues the surcharge violates the clause because it targets non-Arizona residents who rent vehicles when they visit the state.

¶27 A threshold question under the Dormant Commerce Clause is whether the activity alleged to be unconstitutionally burdened is part of interstate commerce. Interstate commerce includes the provision of goods or services aimed primarily at out-of-state visitors. *See Heart of Atlanta Motel, Inc. v. United State*s, 379 U.S. 241, 256 (1964) ("transportation of passengers in interstate commerce"); *Exec. Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1525-26 (11th Cir. 1986) (limousine business primarily used by airport patrons); *Op. of Justices to the House of Representatives*, 702 N.E.2d 8, 12 (Mass. 1998) (car-rental business). Saban submitted evidence on summary judgment that a significant majority of the customers of class members Avis, Hertz and Budget — 87%, 72.3% and 80%, respectively — are out-of-state residents. It does not matter, for purposes of the Dormant Commerce Clause, that the surcharge is not imposed directly on travelers from out of state, but rather is paid by businesses whose revenues derive from transactions with those travelers. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 580 (1997) ("no

analytic difference" when "the discriminatory burden is imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-[resident] customer"); *Heart of Atlanta*, 379 U.S. at 258 ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (citation omitted). Accordingly, the car-rental business in Arizona is part of interstate commerce.

¶28 That being said, the Dormant Commerce Clause is not violated whenever a state taxes a service primarily used by non-residents. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing . . . business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). Thus, "interstate commerce may be made to pay its way." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). A tax is not invalid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279.

¶29 As framed on appeal, the only question under *Complete Auto* is whether A.R.S. § 5-839 impermissibly discriminates against interstate commerce. *See Complete Auto*, 430 U.S. at 279. In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). In that inquiry, "a fundamental element . . . [is] the principle that 'any notion of discrimination assumes a comparison of

substantially similar entities.'" *Davis*, 553 U.S. at 342-43 (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997))). Thus, a law is discriminatory if it "impose[s] disparate treatment on similarly situated in-state and out-of-state interests." *Tracy*, 519 U.S. at 298, n.12. Discriminatory laws are almost always *per se* invalid; they may survive a constitutional challenge only if they serve a legitimate local interest other than economic protectionism and there is no reasonable nondiscriminatory alternative. *See Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951).[10]

2. Facial discrimination.

¶30 Saban first argues the surcharge violates the Dormant Commerce Clause because it discriminates on its face against interstate commerce. "State laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Camps Newfound*, 520 U.S. at 575 (quoting *Fulton Corp. v. Faulkner,* 516 U.S. 325, 331 (1996)) (internal quotation omitted). But there is no discrimination evident on the face of the surcharge or its statutory authority, A.R.S. § 5-802: The tax is imposed on all car-rental business revenues generated in Maricopa County, whether or not they are derived from transactions with customers who live in Arizona.

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[10] *Per se* discrimination is the only issue here. ADOR and AzSTA do not contend the surcharge can survive if it is *per se* discriminatory; Saban does not contend the surcharge is invalid under any lesser standard. *See Oregon Waste Sys.*, 511 U.S. at 99 ("nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits'") (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)).

¶31 Saban argues, however, that the surcharge falls within what it calls a category of "facial discrimination-by-proxy" decisions by the Supreme Court that, according to Saban, "involve[] regulations that, while not drawn explicitly along state lines, contained language that either plainly was intended to serve as a neutral proxy for that demarcation or that impelled the Supreme Court to scrutinize the design or predictable effect of the tax scheme." But the two cases Saban cites both involve explicit facial discrimination. In the first, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court struck down a Hawaii tax on liquor sales. The text of the statute plainly discriminated along state lines: It specifically exempted "[o]kolehao manufactured *in the State*" and "fruit wine manufactured *in the State* from products grown *in the State*." *Matter of Bacchus Imports, Ltd.*, 656 P.2d 724, 726, n.1 (Haw. 1982), *rev'd sub nom. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (quoting Haw. Rev. Stat. § 244-4 (6), (7)) (emphasis added); *see also Bacchus Imports*, 468 U.S. at 265. In the second case, *Camps Newfound*, the Court struck down a Maine tax exemption that excluded charitable institutions "conducted or operated principally for the benefit of persons who *are not residents of Maine*." 520 U.S. at 568 (emphasis added). Neither case supports Saban's argument for "facial discrimination-by-proxy."

3. Discriminatory effect.

¶32 Even when no discrimination is evident on the face of a state provision, it may violate the Dormant Commerce Clause if its effects discriminate against non-residents. "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its

name may be, will in its practical operation work discrimination against interstate commerce." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201-02 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)). Saban argues the surcharge is discriminatory because it falls disproportionately on out-of-state residents, who make up the majority of car-rental customers in Arizona.

¶33 Because three-quarters or more of the customers of the plaintiff class are non-Arizona residents, it is undeniable that, to the extent class members pass along the surcharge to their customers, non-residents bear the main burden of the surcharge. The Supreme Court, however, has expressly rejected the notion "that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 618-19 (1981). The issue is whether non-residents bear a greater burden than *similarly situated* residents. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *see also, e.g.*, *Commonwealth Edison*, 453 U.S. at 617-18 (Montana coal tax imposed on all customers at same rate was permissible even though 90% of revenues were collected from non-resident customers); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963) ("[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."). Under this analysis, the surcharge does not discriminate in its effect on non-residents: It is imposed at the same rates on all car-rental revenues, whether those revenues are generated

from transactions with residents or transactions with non-residents.[11]

¶34 Saban argues the surcharge here is not unlike the tax struck down for its discriminatory effect in *W. Lynn Creamery*, 512 U.S. 186. But the tax at issue there -- a facially neutral tax imposed even-handedly on both in-state and out-of-state milk producers -- burdened out-of-state interests in a predictably disproportionate way because it was coupled with a subsidy that effectively refunded the tax to in-state milk producers, but not to out-of-state milk producers. *Id.* at 199, n.16. Here, no subsidy or other like measure reimburses an Arizona resident (or Arizona car-rental company) for the surcharge when a resident rents a car — a distinction that renders *W. Lynn Creamery* inapposite.

¶35 By Saban's reasoning, all taxes on goods and services used primarily by out-of-state residents would be suspect. But courts routinely uphold "tourism" taxes; as long as such taxes do not distinguish between in-state and out-of-state residents, it is irrelevant whether the overall burden of the tax falls mostly on visitors to the state. *See, e.g.*, *Youngblood v. State*, 388 S.E.2d 671, 672, 673 (Ga. 1990) (hotel tax used to help finance domed stadium; law "imposes an equal tax on residents of the state as well as nonresidents"); *Geja's Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1214, 1219-20 (Ill. 1992) (restaurant tax); *Second St. Properties, Inc. v. Fiscal Court*

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[11] Saban contends the lower rate the surcharge imposes on revenues from temporary-replacement rentals (i.e., cars rented on a short-term basis to replace damaged or stolen cars) discriminates against non-residents, who are less likely to rent replacement vehicles and more likely to rent vehicles for vacations or other visits to Arizona.

of Jefferson County, 445 S.W.2d 709, 711, 716 (Ky. 1969) (hotel tax to fund tourist and convention commissions); *Hunter v. Warren County Bd. of Supervisors*, 800 N.Y.S.2d 231, 233, 235 (App. Div. 2005) (tax on hotel room revenues); *Travelocity.com LP v. Wyo. Dep't of Revenue*, 329 P.3d 131, 151, ¶¶ 91-94 (Wyo. 2014) (same). By the same token, the lower rate charged on revenues from temporary-replacement rentals, which does not distinguish between residents and non-residents, is similar to residency-neutral exceptions in other tourism taxes that have been upheld. *See, e.g.*, *Paustian v. Pa. Convention Ctr. Auth.*, 3 Pa. D. & C.4th 16, 17, 20, 28-31 (Com. Pl. 1988), *aff'd sub nom. Paustian v. Pa. Convention Ctr. Auth.*, 561 A.2d 1337 (1989) (hotel tax exempted those renting a room for 30 days or more; "the classification is rational and those within the class are treated equally").

¶36 In the end, although the car-rental surcharge falls mostly on revenues generated by transactions with non-Arizonans, that is true only because non-Arizonans rent most of the cars. Saban has provided no evidence that the surcharge has an impermissible discriminatory effect.

4. Discriminatory purpose.

¶37 Saban also argues the surcharge is invalid because it purposefully discriminates against interstate commerce. Citing *Bacchus Imports*, Saban contends that a discriminatory purpose, by itself, may invalidate a law. *See* 468 U.S. at 270 ("Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce."). As further support, Saban cites *Amerada Hess Corp. v. Director, Div. of Taxation, N.J.*

Dep't of Treasury, 490 U.S. 66, 75-76 (1989), in which the Court said of *Bacchus Imports* that "because the exemption [in that case] was motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry, the exemption was invalid."

¶38 Notwithstanding the *dictum* in *Amerada Hess*, however, the tax invalidated in *Bacchus Imports* expressly discriminated on its face in favor of liquor produced in the state. *See* ¶ 31 *supra*. And Saban cites no case in which the Supreme Court has invalidated any measure on Dormant Commerce Clause grounds solely based on discriminatory intent. Nevertheless, some circuit courts of appeals have concluded that discriminatory purpose alone may be a sufficient ground on which to invalidate a measure under the Dormant Commerce Clause. *See, e.g.*, *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 594, 597 (8th Cir. 2003) (striking down voter-approved measure when "pro-con" statement sent to voters before the election was "brimming with protectionist rhetoric"); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 337, 338, 340 (4th Cir. 2001) (bill's sponsor stated it addressed "large volume of out of state waste" coming into Virginia, and governor declared the state "has no intention of becoming the nation's dumping grounds"); *SDDS, Inc. v. S.D.*, 47 F.3d 263, 268, 272 (8th Cir. 1995) (ballot materials stated that "South Dakota is not the nation's dumping grounds"); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995) (statute's stated purpose was "the need to maintain and preserve as a valuable State resource the mining of coal in Illinois").

¶39 If discriminatory purpose may be enough by itself to invalidate a state tax under the Dormant Commerce

Clause, the question is the nature and amount of the evidence required to prove such purpose, issues as to which the Supreme Court has not laid out clear guidance. *See Hazeltine*, 340 F.3d at 596.[12] In examining the evidentiary basis for the "purpose" of a measure challenged on equal-protection grounds, however, the Court has noted that: (1) it will assume that a law's *stated* purpose is its actual purpose; (2) the proper inquiry is into the law's "principal purposes"; and (3) it "will not invalidate a state statute . . . merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 463, n.7, 471, n.15 (1981) (law whose actual purpose is permissible is not invalid merely because some legislators defended it with protectionist rhetoric).

¶40 At issue in *Clover Leaf Creamery* was a state law that banned the sale of milk in certain plastic containers. *Id.* at 458. Although proponents argued the measure was aimed at promoting conservation, the challengers contended the real purpose of the law was to promote local "dairy and pulpwood industries," *id.* at 460, a contention supported by a statement by the law's chief legislative proponent chiding a colleague for letting "the guys in the

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[12] "[T]he Supreme Court 'never has articulated clear criteria for deciding when proof of a discriminatory purpose and/or effect is sufficient for a state or local law to be discriminatory. Indeed, the cases in this area seem quite inconsistent.'" *Puppies 'N Love v. Phoenix*, 116 F. Supp. 3d 971, 987 (D. Ariz. 2015) (quoting E. Chemerinsky, *Constitutional Law, Principles and Policies* 444-45 (4th ed. 2011)), *superseded by statute*, A.R.S. §§ 44-1799.10 to -1799.11 (2018), *as recognized and vacated by Puppies 'N Love v. Phoenix*, No. CV-14-00073-PHX-DGC, 2017 WL 4679258, at *6 (D. Ariz. Oct. 18, 2017).

alligator shoes from New York and Chicago come here and tell you how to run your business," Brief for Respondents, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), 1980 WL 339367 at *30 (cited in *Clover Leaf Creamery*, 449 U.S. at 463, n.7). Another legislator supporting the bill said:

> I don't think there is anything the matter with supporting the timber industry which is our third largest employer in the state. I think in fact that is one of our responsibilities to keep a healthy economy in the state rather than importing petrochemicals and importing plastic bottles from Chicago or wherever they are manufactured certainly the natural resources aren't from here.

Id. at 30-31.

¶41 The Supreme Court acknowledged these statements, but nonetheless refused to invalidate the law based on an improper protectionist purpose. The Court remarked that the lawmakers' protectionist statements were "easily understood, in context, as economic defense of an Act genuinely proposed for environmental reasons," *Clover Leaf Creamery,* 449 U.S. at 463, n.7, and concluded that "the principal purposes of the [law] were to promote conservation and ease solid waste disposal problems." *Id.*

¶42 As noted, the Arizona legislature enacted A.R.S. § 5-839 in 2000. According to the evidence offered on summary judgment and in the public record, the measure was proposed by a gubernatorial task force based on a report titled, "Arizona Tourism Retention and Promotion." According to the report, although the task force's original mission was to study how to pay for a new stadium to house

the Arizona Cardinals and to maintain the Fiesta Bowl's "status as a 'Top-Tier' bowl," after considering "additional threats to the State's tourism tax base," the task force broadened its mission "to include the protection and promotion of Arizona's tourism industry and Cactus League[,] and directed that any capital finance plan to build a stadium also include resources to promote tourism retention." The report asserted that a new stadium would generate $800 million annually and that Arizona would not be allowed to host another Super Bowl without a new stadium. The report also stated that $200 million in annual revenues generated by the Cactus League were at risk because other warm-weather cities were offering new spring-training facilities to lure Major League Baseball teams away from Arizona. Pursuant to the Governor's reported directive "that the funding package minimize the impact on the average Arizona resident," the task force estimated that under the legislation it proposed, 85-90% of the car-rental and hotel assessments would be paid by visitors to Arizona.

¶43 At the sole legislative committee hearing on the bill that authorized AzSTA and its funding sources, members of the Governor's task force spoke on behalf of the measure, as did representatives of the Arizona Cardinals, the Fiesta Bowl and the Cactus League. The committee also heard words of support from the Arizona Office of Tourism, the Valley Hotel & Resort Association and from a representative of Enterprise Leasing, a car-rental company that has opted out of the present class action.

¶44 At the urging of a lawmaker who cited a desire to minimize the bill's "impact to residents," a House committee amended the proposed legislation to explicitly

exempt vehicle rentals to Arizonans. *See* S.B. 1220, 44th Leg., 2d Reg. Sess., *Committee on Program Authorization Review*, Minutes of Meeting (March 9, 2000) page E-11 (considering S.B. 1220). Other committee members opposed the exemption out of concern for its constitutionality; one warned that "certain nonresidents cannot be targeted." *Id.* at E-12. Ultimately, the resident exemption was stricken from the bill before it became law.

¶45 Notwithstanding Saban's arguments to the contrary, the statements recited above are even less probative of a discriminatory purpose than the comments at issue in *Clover Leaf Creamery*. The statements in that case were made in support of the challenged law; the comments by the Arizona lawmakers concerned an amendment — an exemption for Arizona residents — that the legislature ultimately rejected. We cannot conclude a statute that is neither discriminatory on its face nor in its effect is rendered unconstitutional simply because lawmakers considered and dismissed a protectionist amendment at some point in the legislative process. Nor is it proper to impute protectionist intent to legislators who correctly inform their peers of the constitutional limits to their power. *See also generally* Julian Cyril Zebot, *Awakening A Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 Minn. L. Rev. 1063, 1086 (2002) (invalidating statute based on purported discriminatory purpose when other legitimate purposes may exist "is a direct affront to state sovereignty, for it fails to respect legitimate state policymaking.").

¶46 Saban also cites as evidence of discriminatory intent a single sentence in the pamphlet sent to Maricopa County

voters before the election on the surcharge. In the middle of the second page of the 22-page pamphlet, voters were told that "the surcharge on car rentals targets visitors to the State (and includes an exemption for 'replacement vehicles' for vehicles undergoing repair or similarly unavailable on a temporary basis)." We often look to election materials to discern the purpose of a voter-approved law. *See* ¶ 14 *supra*. But the language Saban cites is only one sentence in a lengthy document that broadly describes the purposes of the surcharge -- to promote tourism; to build a "multipurpose facility" for professional football, college bowl games and other events, including college basketball tournament games and trade shows and concerts; to build and renovate Cactus League facilities; and to develop youth and amateur sports and recreational facilities. Guided by the Supreme Court's demonstrated reluctance to strike down a law based on isolated statements evidencing protectionist motives, we are not persuaded that the statement Saban cites proves discriminatory intent sufficient to invalidate the surcharge.

¶47 In addition, Saban points to the Governor's task force report and comments by task force and AzSTA members to the effect that the surcharge was created so that visitors to Arizona would pay most of the cost of the new AzSTA-owned facilities. Assuming for purposes of argument that these non-legislative statements may bear on the issue, they merely highlight that the facilities to be built with the surcharge were intended to spur tourism and its resulting positive effects on the Arizona economy. As noted, proponents of AzSTA and the surcharge argued that the new facilities would attract visitors to the state, who would spend large amounts not only on rental cars but on hotels, food and beverage and other recreational activities.

Saban cites no authority for the notion that the Dormant Commerce Clause is offended by a tax on tourism activities when the proceeds of the tax are used to build facilities to attract tourists.[13] Because the car-rental surcharge funds construction of facilities that benefit non-residents who visit Arizona to attend events at those facilities, we are not persuaded that the comments Saban cites are anything other than legitimate discussion about whether services those non-residents purchase should be taxed to fund those facilities.

¶48 In sum, A.R.S. § 5-839 and the resulting car-rental surcharge are not discriminatory on their face; nor do they cause any discriminatory effects on interstate commerce. Finally, assuming *arguendo* that a state tax that is non-discriminatory on its face and in its effect may be invalid solely based on a discriminatory purpose, Saban has not demonstrated that the challenged surcharge has a discriminatory purpose that violates the Dormant Commerce Clause.

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[13] Nor does Saban argue that the surcharge is unconstitutional because it is not fairly related to the promotion of tourism. *See Complete Auto*, 430 U.S. at 279. Saban repeatedly asserts that the surcharge was designed to pay for a new stadium for the Arizona Cardinals, suggesting that the proceeds of the surcharge have been spent primarily for the benefit of local sports fans. It offered no evidence, however, to support the proposition that (even apart from the multiplier effect of tourism dollars on the state's economy) the facilities built by the surcharge benefit local sports fans more than the out-of-state fans of professional and college football and Major League Baseball, concert-goers, trade-show visitors and others who use those facilities when they visit Arizona.

CONCLUSION

¶49 We conclude that the car-rental surcharge authorized under A.R.S. § 5-839 is not invalid under Article IX, Section 14 of the Arizona Constitution, and reverse the tax court's ruling on summary judgment to the contrary, including its award of attorney's fees and costs. We affirm the superior court's ruling that the surcharge is not unconstitutional under the Dormant Commerce Clause. Accordingly, we vacate the superior court's refund order, direct entry of judgment in favor of ADOR and AzSTA and remand for any further required proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089

[Filed June 17, 2014]

HONORABLE DEAN M. FINK	CLERK OF THE COURT S. Brown Deputy
SABAN RENT-A-CAR L L C, et al.	SHAWN K AIKEN
v.	
ARIZONA DEPARTMENT OF REVENUE, et al.	KIMBERLY J CYGAN TIMOTHY BERG WILLIAM H KNIGHT KEVIN M GREEN

UNDER ADVISEMENT RULING

Following oral argument on May 7, 2014, the Court took Defendant and Defendant-Intervenor's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment under advisement. Additionally, following the oral argument on May 7, 2014, the Court has read and considered Plaintiffs' Supplemental Citation of Legal Authorities Addressing Points Raised During Oral Argument on May 7, 2014, Defendants' Objections to

Plaintiffs' Supplemental Citation of Authorities filed May 13, 2014, and Plaintiffs' Reply thereto filed May 27, 2014.

This matter involves a challenge to a tax as unconstitutional under provisions of both the state and federal constitutions.

The Court begins by determining how the Arizona Sports and Tourism Authority (AzSTA) "tax," which A.R.S. § 5-839(A) calls a "car rental surcharge," is to be categorized. Broadly, it is an excise tax. *Gila Meat Co. v. State*, 35 Ariz. 194, 197 (1929); *Arizona Farm Bureau Federation v. Brewer*, 226 Ariz. 16 ¶ 36 (App. 2010). More specifically, the Court of Appeals described it as "akin to" a transaction privilege tax, "more similar to [a] transaction privilege tax[] than to [a] sales tax[]." *Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 116 ¶ 9 and section A heading (App. 2007). It is a tax on the business activity of renting cars, *id.* at 116 ¶ 10. However, it is a tax of a very peculiar kind, because, although the surcharge falls on the business, the amount of the surcharge depends on the customer's reason for renting the car. A.R.S. § 5-839(B)(1) sets the rate at 3¼ percent of the gross proceeds with a $2.50 minimum; however, subsection 2 sets it at a fixed $2.50 if the vehicle is intended as "a temporary replacement motor vehicle" if the vehicle it is replacing is lost or under repair. (Arithmetically, the rates diverge when the total charge reaches approximately $77.00.) The Court is not familiar with any other statute taxing the privilege of conducting identical transactions differently based solely on the customer's reason for entering into them, which may explain the equivocal language used by the Court of Appeals. *Karbal* was decided on the narrow ground that the plaintiff lacked standing, and did not examine whether the

tax contravenes the Arizona Constitution or the Interstate Commerce Clause. It also did not address whether, and if so on what ground, the business may challenge the tax, though it cited *Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 461-62 (1995), to the effect that it may.

There is some basis, both in the statutory text and in the legislative history,[1] for treating the AzSTA tax as an amalgamation of two distinct taxes. Prior to its enactment, there was a flat $2.50 tax on all car rental transactions, with the proceeds going to the Maricopa County Stadium District. A.R.S. § 5-839(G) preserves the Stadium District's entitlement to the first $2.50 of each rental, with the remainder of the 3¼ percent surcharge distributed to AzSTA. The official publicity pamphlet, at page 4, also distinguished between the Stadium District and AzSTA portions. The surcharge can therefore be seen as a $2.50 Stadium District tax on all car rental transactions and a 3¼ percent minus $2.50 AzSTA tax on car rental transactions not involving temporary replacement. However, while this may be conceptually neater – two taxes each at a fixed rate with only one dependent on the customer's motivation as against one tax at a variable rate dependent on the customer's motivation – it does not affect the legal analysis, and there is no statutory authorization to sever the AzSTA portion from the Stadium District portion should that be necessary.

"[T]he methodology whenever a right that the Arizona Constitution guarantees is in question [is to] first consult our constitution." *Mountain States Tel. & Tel. Co. v.*

[1] Voter pamphlets are relevant legislative history for measures enacted by the people. *Calik v. Kongable*, 195 Ariz. 496, 500 ¶ 17-18 (1999).

Arizona Corp. Comm., 160 Ariz. 350, 356 (1989). Article 9 § 14 of the Arizona Constitution requires that "[n]o moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets" be used for any but specified highway-related purposes. As has been seen, the AzSTA surcharge is an excise; *Gila Meat*, *supra*. The clause therefore applies to it. The Department does not argue that the rental of cars falls outside the scope of the constitutional provision: not only does A.R.S. § 5-839(C) limit the surcharge to "the business of leasing or renting for less than one year motor vehicles for hire without a driver, that are designed to *operate on the streets and highways of this state*" (emphasis added), but obviously no customer would go to the trouble and expense of renting a car only to leave it in the parking lot. Instead, it argues that, under Arizona law, the transaction privilege tax is levied, not on the sale of a good or service, but on the privilege of conducting such a sale. *Arizona State Tax Comm. v. Southwest Kenworth, Inc.*, 114 Ariz. 433, 436 (App. 1977). This argument fails for at least one and perhaps two reasons. The Court of Appeals in *Karbal*, *supra* at 116 ¶ 9, indicated that the AzSTA tax is neither a true transaction privilege tax nor a true sales tax, though more akin to the former; the general rule governing pure transaction privilege taxes thus may not apply to it. Even if it does, the Constitution restricts the use not only of taxes *on* vehicles, but of taxes *relating to* vehicles. The Arizona courts have not defined "relating to," either generally or in relation to this clause. But the constitutional language plainly includes more than just a tax whose incidence falls directly on the vehicle or its use. The required nexus between the motor vehicle and the tax is that some relationship exists to connect them. The case law holding

that transaction privilege tax is a tax not on the underlying sale but on the right to conduct the transaction does not hold that the tax is unrelated to the underlying sale. Here, indeed, the distinction falls apart: the class of taxable transactions is defined by the relationship of those transactions to the rental of cars. That the AzSTA tax relates to the use of vehicles on the public highways or streets is plain. Its receipts may therefore be applied only to one or more of the purposes set down by the Constitution. The construction and maintenance of athletic facilities is not among those purposes.

Turning to the federal constitutional challenge, and beginning with the standing of these plaintiffs to bring it although the tax does not discriminate against them, the Court begins with the proposition that an unconstitutional tax is an illegal tax, and that its collection is consequently illegal. A.R.S. § 42-11005(A) allows an action to recover an illegally collected tax. Such a suit can be maintained only by the taxpayer; that the customer does not pay a transaction privilege tax was the rationale of *Karbal*, *supra* at 116-17 ¶ 11. But the statute does not limit the taxpayer's right to recover to those taxes whose illegality is targeted at him personally. The Department's argument to the contrary would create, where a tax is targeted at one group but collected from another, a transaction privilege tax exception to the commerce clause.[2] On a more general level, in Arizona law, standing may be found when there exists a "distinct and palpable injury" to the plaintiff. *Sears*

[2] Nor is it evident that the commerce clause is the only constitutional provision that could be circumvented. To take one possible example, a TPT on car rentals to racial minorities would surely be invalid under the equal protection clause even if the rental company paying the tax was not itself a racial minority.

v. Hull, 192 Ariz. 65, 69 ¶ 16 (1998). There is enough in the record to reach that threshold. In addition, standing can be waived in exceptional circumstances. Such cases must be ones involving issues of great public importance that are likely to recur, *id.* at 71 ¶ 25, and in which the parties are able to sharpen the legal issues presented, *id.* at 71 ¶ 24. The Court has no hesitation in finding that the AzSTA surcharge is indeed an issue of great public importance and that the parties are fully capable of and motivated to present the legal issues (as confirmed by the heft of their briefing).

To determine the extent to which the surcharge burdens customers from out of state over Arizona customers, the Court ordered additional development of the factual record. The results are, it must be said, surprising. The Court's initial impression was that the replacement-vehicle exemption would work in a discriminatory manner, favoring in-state residents over out-of-state residents with no rational basis to do so. Were that the case, the Court might very well have found the surcharge to violate the federal constitution. But in practice, the exemption from the surcharge does not seem to have made a significant difference simply because the car rental companies are charging the same rate to all customers regardless of their reason for renting. As Mr. Saban explained in his December 9, 2013 affidavit, the burden of proof the Department has placed on the companies is so onerous that to charge a customer the lower replacement-car rate and then document his entitlement to it would be prohibitively expensive. Thus, the Court is faced with the reverse of the typical commerce clause challenge: instead of a facially neutral tax being discriminatory as applied, the tax here is, at least arguably,

facially non-neutral but applied in a nondiscriminatory manner.

The Court can find no support for the proposition that discriminatory intent standing alone violates the commerce clause. The Supreme Court has held that a finding of economic protectionism can be made on the basis of either discriminatory purpose or discriminatory effect. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984). But the surcharge is not protectionist in nature. It does not seek to deter or impede interstate commerce; on the contrary, the promise of palatial sports facilities can only be realized by maximizing the amount that can be extracted from visitors without keeping them away. Thus, the situation here differs from that in *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (striking down constitutional provision excluding out-of-state corporations from owning farms), and *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001) (striking down statute prohibiting importation of out-of-state garbage), both dealing with laws protectionist in nature. The Commerce Clause also prohibits taxing interstate commerce at a disproportionate rate with a consequent lack of relationship to services provided by the government. "A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 289 n.15 (1977). This language does not suggest that a "tailored tax" is subject to strict scrutiny regardless of whether it produces any effect, but rather the opposite, that to invalidate such a law requires proof of discriminatory effect. Due to the manner in which the AzSTA surcharge is being applied in practice by the car rental companies, the Court cannot find in it a commerce

clause violation. It is true that the formal incidence of the tax on the car rental companies rather than their customers does not insulate the tax from the purview of the commerce clause, provided that the customer pays indirectly. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 580 (1997) (incidence of tax makes no analytic difference). But the Supreme Court in that case expressly found that the economic incidence of the tax fell at least in part on the out-of-state customers. *Id.* Here, that simply has not happened: the companies have imposed the same tax on in-state and out-of-state renters, and on replacement-car and non-replacement car, customers alike. The economic incidence of the tax has fallen exclusively on the car rental companies, and its incidence on them raises no commerce clause issue. Perhaps recognizing the lack of discriminatory effect created by the surcharge, Plaintiffs belatedly raise a challenge to the tax on car rentals as a whole: because most car renters are from out of state, a tax on rental cars is discriminatory even without the differential rate for replacement cars. This would raise an entirely new issue requiring litigation from scratch. The Court does not believe it is appropriate at this late date. Nor does the Court find persuasive support for such an argument in relevant case law.

Nevertheless, the Court finds that A.R.S. § 5-839 violates Article 9 § 14 of the Arizona Constitution, in that it imposes an excise tax relating to registration, operation, or use of vehicles on the public highways or streets whose proceeds are applied to purposes not permitted by the constitutional text.

Accordingly,

IT IS ORDERED granting Plaintiffs' Cross-Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Defendants' Motion for Summary Judgment.

IT IS FURTHER ORDERED directing Plaintiffs to lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs by July 18, 2014.

APPENDIX D

ARIZONA REVISED STATUTES

5-801. Definitions

In this chapter, unless the context otherwise requires:

1. "Authority" means the tourism and sports authority.

* * *

4. "Multipurpose facility" means any facility that is suitable to be used to accommodate professional football franchises, major college football bowl sponsors, other sporting events and entertainment, cultural, civic, meeting, trade show or convention events or activities and may include a stadium, on-site infrastructure, parking garages and lots and related commercial uses within the facility.

* * *

5-802. Formation of authority

A. The tourism and sports authority is established. The boundaries of the authority are the boundaries of any county that has a population of more than two million persons.

* * *

C. The board of directors and the authority do not have the power to levy or otherwise impose any tax or assessment, other than charges for the use of facilities owned by the authority. The qualified electors residing in the authority may levy a tax or surcharge for the fiscal needs of the

authority as provided by this chapter, but the board of directors has no independent authority to impose or collect a tax or assessment. Subject to that limitation, the authority is considered to be a tax levying public improvement district for the purposes of article XIII, section 7, Constitution of Arizona.

* * *

5-807. Constructing and operating multipurpose facility

A. The authority shall construct, finance, furnish, maintain, improve, operate, market and promote the use of a multipurpose facility and do all things necessary or convenient to accomplish those purposes. One or more site hosts shall provide the land, infrastructure and parking facilities associated with the multipurpose facility. The authority shall own the multipurpose facility, subject only to liens and other security interests of record. The authority may own or lease the land on which the multipurpose facility is located.

* * *

5-808. Major league baseball spring training facilities; local financial participation

A. From monies in the cactus league promotion account established by section 5-837, the authority may:

1. Acquire land or construct, finance, furnish, improve, market or promote the use of existing or proposed major league baseball spring training facilities that are located in the authority and other structures, utilities, roads, parking areas or buildings necessary for full use of the training facilities for sports and other purposes.

2. Do all things necessary or convenient to accomplish those purposes.

B. Monies in the cactus league promotion account:

1. May be used for the purposes of:

(a) Attracting major league baseball spring training operations to locations in the authority.

* * *

5-809. Community youth and amateur sports and recreational facilities; local financial participation

A. From monies in the youth and amateur sports facilities account established by section 5-838, the authority may:

1. Acquire land or construct, finance, furnish, maintain, improve, operate, market or promote the use of community youth and amateur sports facilities, recreational facilities and other community facilities or programs that are located in the authority.

2. Do all things necessary or convenient to accomplish those purposes.

* * *

5-815. Intercollegiate football national championship and playoff games

A. The authority shall enter into a special use agreement for the sole purpose of hosting at the multipurpose facility an intercollegiate football national championship game or playoff games. The authority may only contract for this purpose with a nonprofit community based organization

that has extensive experience in operating or managing intercollegiate football bowl games in this state.

* * *

5-839. Car rental surcharge

A. The qualified electors residing in the authority, by majority vote at an election held in the authority, may levy and, if levied, the department of revenue shall collect a car rental surcharge beginning on the first day of the first month beginning ninety days after the election to levy the surcharge. The surcharge shall be in effect for three hundred sixty months.

B. The rate of the surcharge is:

1. Three and one-fourth per cent of the gross proceeds or gross income from the business or two dollars fifty cents on each lease or rental, whichever is more.

2. In the case of a person who leases or rents the motor vehicle as a temporary replacement motor vehicle, two dollars fifty cents on each lease or rental. For the purposes of this paragraph, "temporary replacement motor vehicle" means a vehicle loaned by a motor vehicle repair facility or dealer or rented by a person temporarily to use while the vehicle that it is replacing is not in use because of breakdown, repair, service, damage or loss.

C. The surcharge applies to the business of leasing or renting for less than one year motor vehicles for hire without a driver, that are designed to operate on the streets and highways of this state and that are primarily intended

to carry not more than fourteen passengers, regardless of whether the vehicle is registered or licensed in this state.

D. The surcharge does not apply to the lease or rental of a motor vehicle:

1. To an automobile dealership, a repair facility, an insurance company or any other person that provides that vehicle at no charge to a person whose own motor vehicle is being repaired, adjusted or serviced.

2. Used in an employee vanpool arrangement for a group of at least seven but not more than fourteen passengers including a driver who meets all of the following conditions:

(a) The driver operates the motor vehicle for the purpose of commuting between the driver's residence and place of employment.

(b) The driver operates the motor vehicle under a prearranged schedule for transporting the passengers between their residences and place of employment.

(c) The driver's operation of the motor vehicle is voluntary and not required as a work responsibility or condition of employment.

(d) The driver receives no compensation other than free transportation between the driver's residence and place of employment, plus limited personal use of the motor vehicle consisting of not more than twenty per cent of the mileage use of the motor vehicle for either:

(i) Purposes other than transporting passengers between their residences and place of employment.

(ii) Travel between the passengers' residences and place of employment in which passengers transported constitute less than one-half of the adult seating capacity of the motor vehicle, not including the driver.

E. The surcharge is not taxable under section 42-5071.

F. Unless the context otherwise requires, section 42-6102 governs the administration of a surcharge imposed under this section, which shall be reported on a form prescribed by the department of revenue. The department of revenue shall require a report of the number of lease or rental transactions and shall transmit that number to the state treasurer.

G. Each month the state treasurer shall distribute revenues collected pursuant to this section as follows:

1. Transmit an amount equal to two dollars fifty cents on each lease or rental transaction to the county stadium district established in the county in which the authority is located pursuant to title 48, chapter 26 for deposit in the county stadium district fund. The board of directors of the county stadium district may pledge all or part of these monies to secure district bonds or financial obligations under title 48, chapter 26.

2. Pay the remainder of the monies collected during the month to the authority for deposit in the tourism revenue clearing account established by section 5-835.