SUPREME COURT OF ARIZONA

KAREN FANN, an individual, et al., Plaintiffs/Appellants, v. STATE OF ARIZONA, et al., Defendants/Appellees.	Arizona Supreme Court No. CV 21-0058-T/AP Court of Appeals, Division One No. 1 CA-CV-21-0087 Maricopa County Superior Court No. CV2020-015495 No. CV2020-015509 (Consolidated)

BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS

FILED PURSUANT TO ARCAP 16(b)(1)(B) AND WITH WRITTEN CONSENT OF THE PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS

The Arizona Commerce Authority (the "ACA") is the state's leading economic development organization tasked with growing and strengthening Arizona's economy. Among its primary duties are the recruitment of out-of-state companies to locate and expand their operations in Arizona and working with existing companies to maintain and grow their Arizona operations. As a result, the ACA is vitally interested in laws and policies that promote or hinder economic development. Proposition 208, by significantly increasing taxes, demonstrably hinders the state's economic growth and does so in violation of Article IX, Section 21 of the Arizona Constitution.

INTRODUCTION

In an attempt to avoid the spending limits of Article IX, Section 21 of the Arizona Constitution, Proposition 208 summarily declares that it is exempt from those limits. No party defends this statutory attempt to override constitutionally imposed spending limits. Intervenor-Defendants argue, however, that distributions made pursuant to Proposition 208 constitute a "grant" under the exemption in Article IX, Section 21(4)(c)(v). A distribution under Proposition 208 is not a "grant" for purposes of Article IX, Section 21 as Plaintiffs accurately explain in their Opening Brief. *See* Plaintiff's Opening Brief (February 26, 2021) at 9–17. The ACA writes separately because the grant exemption in Article IX, Section 21 extends only to *private* grants, gifts, aid, or contributions—not "grants" from the state.

Even if "grants" from the state could be exempt, the funds the school districts received under Proposition 208 plainly are not "grants" as that term is commonly understood and used. Bestowing a grant implies a discretionary gift that is typically the result of an application process. Proposition 208's distributions, in contrast, are mandatory.

Holding that Proposition 208's distributions are not "grants" furthers the clear purpose of the voters in adopting Article IX, Section 21, which was to limit spending by school districts so as to reduce the likelihood of continuous tax increases that had preceded the adoption of the spending limit. The voters were concerned about this

continual series of tax increases, in part, as they impair Arizona's ability to attract and retain business that is vital to the economic well-being of the state. Proposition 208 does just the opposite of what the voters intended in Article IX, Section 21.

Although the ACA continues to strongly support education in Arizona, Proposition 208, which was adopted as a statute—not a constitutional amendment—violates Article IX, Section 21. For that reason, the trial court erred in failing to grant Plaintiffs a preliminary injunction to enjoin the implementation of Proposition 208.

ARGUMENT

Proposition 208, passed by voters in 2020, is the largest permanent income tax increase in Arizona history. The express purpose of the surcharge is "to advance public education in this state." A.R.S. § 43-1013(A). The Arizona Department of Revenue must "separately account for revenues collected pursuant to the income tax surcharge" imposed by Proposition 208 and must deposit those revenues into a newly created "student support and safety fund." *Id.* § 43-1013(B); *see also id.* § 15-1281.

Proposition 208 details how funds deposited into the student support and safety fund are to be spent.[1] After subtracting for the costs of administering the fund

[1] The student support and safety fund consists of revenue raised through Proposition 208's income tax surcharge, private donations, and interest on those monies. *Id.* § 15-1281(A).

itself, the remaining funds must be spent as follows:

> (a) 50 percent to school districts and charter schools for the purpose of hiring teachers and classroom support personnel and increasing their base compensation,
>
> (b) 25 percent to school districts and charter schools for the purpose of hiring student support services personnel and increasing their base compensation,
>
> (c) 10 percent to school districts and charter schools for the purpose of providing mentoring and retention programming for new classroom teachers,
>
> (d) 12 percent to the "career training and workforce fund established by § 15-1282," and
>
> (e) 3 percent to the "Arizona teachers academy fund established by § 15-1655."

Id. § 15-1281(D). Monies in the student support and safety fund may not be transferred to any other fund aside from those outlined, do not revert to the state general fund, and do not lapse under A.R.S. § 35-190. *Id.* § 15-1281(A).

Proposition 208 deliberately refers to distributions from the student support and safety fund as "grants." *Id.* § 15-1281(D). For example, Proposition 208 states that "the state treasurer shall transfer all monies in the student support and safety fund . . . as follows: (1) Fifty percent as ***grants*** to school districts and charter schools . . . ." Proposition 208 characterized the distributions as "grants" in an attempt to circumvent Article IX, Section 21 of the Arizona Constitution.

Article IX, Section 21 imposes spending limitations on Arizona school districts and community colleges. Aggregate expenditure limitations for all school

districts are determined each year pursuant to a formula, and the "aggregate expenditures of local revenues for all school districts ***shall not exceed***" that limitation. Ariz. Const., art. IX, § 21(2) (emphasis added).

The spending limitations in Article IX, Section 21 apply to all "local revenues," a term broadly defined to include "all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district or community college district or any of its agencies, departments, offices, boards, commissions, authorities, councils and institutions." Ariz. Const., art. IX, § 21(4)(c). No party disputes that this definition is broad enough to encompass revenues raised pursuant to Proposition 208. The dispute focuses instead on one of the *exceptions* to the definition of local revenues—i.e., the "grant" exception, which reads:

> Any amounts or property received as grants, gifts, aid or contributions of any type except amounts received directly or indirectly in lieu of taxes received directly or indirectly from any private agency or organization, or any individual.

Id. § 21(4)(c)(v). According to Defendant-Intervenors, Proposition 208's distributions are simply "grants" and are therefore excepted from the definition of "local revenues," which in turn excepts the distributions from being subject to the aggregate expenditure limit. This interpretation is flawed.

I. PROPOSITION 208'S DISTRIBUTIONS ARE NOT "GRANTS"; THEY ARE SUBJECT TO THE AGGREGATE EXPENDITURE LIMIT IN ARTICLE IX, SECTION 21.

The "grant" exception does not apply to tax revenues collected and distributed pursuant to Proposition 208 for at least two reasons. First, the grant exception applies only to grants received from *private* entities or individuals. Second, even assuming the grant exception extended to state grants, taxes levied for the benefit of school districts and paid to those districts under Proposition 208 are plainly not "grants."

A. The Grant Exemption Excepts Only *Private* Grants From the Definition of Local Revenues.

The text of the grant exemption illustrates that only private grants, gifts, aid, or contributions are exempt from the definition of local revenues. To illustrate, the grant exception states:

> Any amounts or property received as grants, gifts, aid or contributions of any type except amounts received directly or indirectly in lieu of taxes ***received directly or indirectly from any private agency or organization, or any individual***.

Ariz. Const., art. IX, § 21(4)(c)(v) (emphasis added). The phrase "received directly or indirectly from any private agency or organization, or any individual" modifies "[a]ny amounts or property received as grants, gifts, aid or contributions of any type." As a result, only ***private*** grants, gifts, aid, or contributions are exempt from aggregate expenditure limitations, unless the grant, gift, aid, or contribution was given in lieu of taxes. Indeed, during the drafting of Proposition 208, the Arizona

Legislative Council interpreted Article IX, Section 21(4)(c)(v) this way.[2] *See* Plaintiffs' APPV1-063. The trial court agreed that the Legislative Council's construction was reasonable.[3] *See* Plaintiffs' APPV2-111.

To construe Article IX, Section 21(4)(c)(v) to encompass non-private grants, one would have to read the phrase "received directly or indirectly from any private agency or organization, or any individual" to modify only the phrase, "amounts received directly or indirectly in lieu of taxes." This construction, however, would make Article IX, Section 21(4)(c)(v) redundant and incoherent. To illustrate, the grant exception would be read as follows:

> Any amounts or property received as grants, gifts, aid or contributions of any type ***except amounts received directly or indirectly in lieu of taxes received directly or indirectly from any private agency or organization, or any individual***.

This reading results in redundant use of the phrase "received directly or indirectly." The second use of the phrase "received directly or indirectly" makes sense only if it limits the class of "grants, gifts, aid, or contributions" subject to the exemption from "local revenues." If it modifies "amounts received directly or indirectly in lieu of

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[2] The Legislative Council advised that Proposition 208's attempt "to exempt the additional support for education prescribed by the initiative" from the aggregate expenditure limitation in Article IX, Section 21 was "likely invalid." Plaintiffs' APPV1-063.

[3] The trial court ultimately did not issue an opinion adopting any construction of Article IX, Section 21(4)(c)(v), preferring to await further case development. *See* Plaintiffs' APPV2-111.

taxes," it adds redundancy and ambiguity. Such an interpretation is to be avoided by the Court. *See Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 218, ¶ 16 (2014).

The trial court suggested that construing Article IX, Section 21 as limited to private grants would require additional commas in the text. *See* Plaintiffs' APPV2-111. Although additional commas are not necessary, it is useful to envision a comma before the word "except" and another after the words "in lieu of taxes." With the interpretive commas, the exclusion would read as follows:

> Any amounts or property received as grants, gifts, aid or contributions of any type**,** except amounts received directly or indirectly in lieu of taxes**,** received directly or indirectly from any private agency or organization, or any individual.

However, the lack of commas is not dispositive because even without the commas, the only logical reading of the grant exemption is that it applies exclusively to private grants, gifts, aid, or contributions.

The absence of commas is not surprising. The 1980 Arizona Legislative Bill Drafting Manual, which was the edition in place when the constitutional language was proposed, advised legislators to "[u]se commas sparingly." *See* ACA-APP5, The Arizona Legislative Bill Drafting Manual (January 1980) at 45, available at https://azmemory.azlibrary.gov/digital/collection/statepubs/id/38016. Indeed, another constitutional amendment passed at the same time as Article IX, Section 21 includes a similar "except" clause that is not set off from the remainder of

constitutional text by commas, but that plainly constitutes a standalone clause. *See* Ariz. Const., art. IX, § 18(3)(a) ("[T]he value of real property and improvements and the value of mobile homes used for all ad valorem taxes *except those specified in subsection (2)* shall be the lesser of the full cash value of the property or . . . ." (emphasis added)).

Context also demonstrates that the exemption applies only to private grants. The subsection immediately preceding the grant exemption excludes federal grants from the definition of local revenues. Ariz. Const., art. IX, § 21(4)(c)(iv). Construing Section 21(4)(c)(v) to encompass grants, gifts, aid, or contributions *from any source* would render the text of Section 21(4)(c)(iv) superfluous because federal grants would already be exempt under Section 21(4)(c)(v). *Ariz. E. R. Co. v. State*, 19 Ariz. 409, 411 (1918) ("If it can be prevented, no clause, sentence, or word in the Constitution shall be superfluous, void, or insignificant; it being the duty of this court as an expositor to make a construction of all parts of the Constitution together, and not of one part only.").

Similarly, the subsection immediately after the grant exemption excludes "amounts received from the state for the purpose of purchasing land, buildings or improvements or constructing buildings or improvements." Ariz. Const., art. IX, § 21(4)(c)(vi). Construing Section 21(4)(c)(v) to encompass grants, gifts, aid or contributions *from any source* would render the text of Section 21(4)(c)(vi)

superfluous to the extent those funds constitute grants, as they would under Intervenor-Defendants' broad definition of the term "grant." The Court must avoid construing the grant exemption in a manner that renders other constitutional provisions superfluous, which is the inevitable result of construing the provision to apply to grants from any source.

Finally, the history behind Article IX, Section 21 supports construing the grant exemption as limited to private grants. The grant exemption was passed in 1980 as Proposition 109. It was drafted and passed concurrently with Proposition 108, which became Article IX, Section 20 of the Arizona Constitution. Article IX, Section 20 imposes spending limitations on counties, cities, and towns, similar to those Article IX, Section 21 imposes on school districts, and even includes an identical definition of "local revenues," including an identical private grant exemption. *Compare* Ariz. Const., art. IX, § 20(3)(d)(v) *with* Ariz. Const., art. IX, § 21(4)(c)(v).

The publicity pamphlet for Propositions 108 and 109 explains that expenditures of counties, cities, towns, and school districts must be limited to curtail the "ever-increasing local tax burden." *See* ACA-APP27, Publicity Pamphlet – Sample Ballot, June 3, 1980 Special Election at 76, *available at* https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10632. Supporters of the propositions observed that "[s]tate and local government spending ha[d] increased 250% from 1970 to 1979 or an annual increase of almost 11% throughout

the 1970s." ACA-APP17, *id.* at 66. The expenditures limitations were implemented to "terminate government's blank check drawn on people's earnings" and combat the pressure on governing bodies "to increase the burden on the taxpayers of this state." ACA-APP17; *see also* ACA-APP27, *id.* at 76.

In light of this purpose and history, it would make little sense to exempt ***state*** grants, gifts, aid, or contributions to counties, cities, towns, or school districts from the aggregate expenditure limitations—assuming that a state "gift" is even possible. The purpose of the aggregate expenditure limitations is to curb spending and reduce the burden on taxpayers. That purpose is entirely subverted if the state, as here, can tax its citizens and then transfer those funds to school districts under the guise of a "grant."

As illustrated above, both the text and the purpose of the grant exemption demonstrate that only *private* grants fall within the provision's exemption. Because the exemption does not encompass state grants, it has no application to funds distributed pursuant to Proposition 208. The argument that taxes levied for the benefit of school districts pursuant to Proposition 208 are exempt from the aggregate expenditure limitation in Article IX, Section 21 should be rejected, and Proposition 208's *statutory* attempt to override *constitutional* text is unconstitutional.

B. Tax Revenues Levied For the Benefit of School Districts Are Not "Grants."

Even assuming the grant exemption extended to non-private grantors (it does not), tax revenues levied for the benefit of school districts under Proposition 208 are not "grants" as that term is generally understood. The term "grant" is not defined in Article IX, thus, it must be interpreted according to its plain and ordinary meaning. *See* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). As Plaintiffs correctly state, the plain meaning of the word "grant" does not refer to mandatory taxation and spending. *See* Plaintiffs' Opening Brief at 11. Rather, the word "grant" entails a voluntary or discretionary transfer of funds to be used for a particular purpose.[4] *See, e.g.*, "Grant," Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/grant (defining "grant" as "something granted, especially: a gift (as of land or money) for a particular purpose"); *see also Simpson v. Owens*, 207 Ariz. 261, 273, ¶ 35 (App. 2004) (courts may reference well-known and reputable dictionaries in construing laws).

[4] Intervenor-Defendants suggest that "Arizona's voters exercised their 'discretion' to fund and create a dedicated grant program through Prop 208 by approving it at the polls." *See* Intervenor-Defendants' Combined Answering Brief and Separate Appendix of Appellees Invest in Education and David Lujan (March 15, 2021) at 33. This argument illustrates the sweeping nature of Intervenor-Defendants' position, as, under this logic, *all* statutory expenditures would be considered grants awarded at the discretion of voters or the legislature.

Grants also generally include an application process whereby would-be grantees must establish their eligibility to receive such funds, as well as discretion on the part of the party giving or distributing the grants. *See* Grants 101, Grants.Gov, https://www.grants.gov/learn-grants/grants-101.html ("The grant process follows a linear lifecycle that includes creating the funding opportunity, applying, making award decisions, and successfully implementing the award."); "Government Grant," Investopedia, https://www.investopedia.com/terms/g/government-grant.asp ("Government grants aren't just bestowed: they must be applied for. Getting a government grant is an extremely competitive process."); "Grant (money)," Wikipedia, https://en.wikipedia.org/wiki/Grant_(money)#cite_ref-1 ("In order to receive a grant, some form of 'Grant Writing' often referred to as either a proposal or an application is required.").

The Arizona School Board Association in its amicus brief cites some grant programs administered by the ACA as examples of "mandatory" grants. Brief of Amicus Curaie Arizona School Boards Association at 6 n. 4. They are not. For example, the Association claims that the Competes Fund grants are an example of a mandatory grant. The Association relies on the language in A.R.S. § 41-1545.02(A) that states, "[t]he monies shall be paid, by grant . . . ." However, just because the transfer of grant funds is mandatory once awarded does not mean that the grant itself is mandatory for every applicant. The Competes Fund is a highly competitive

process; not every project or every program will qualify and Competes Fund grants are not awarded to every eligible applicant. In any event, the Association overlooks the preceding sentence, which provides, "The chief executive officer ***may negotiate*** the award of monies from the Arizona competes fund." A.R.S. § 41-1545.02(A) (emphasis added); *see also* A.R.S. § 41-1545.01(C) (monies are to be invested and divested only "on notice from the chief executive officer"). The Association's reliance on the ACA's Job Training Fund as evidence of a mandatory grant is similarly misplaced. The ACA's rules for the Job Training Fund, issued under the authority of A.R.S. § 41-1005(A), requires a competitive process. *See* ACA-APP29, "Arizona Job Training Program – Program Rules & Guidelines," *Arizona Commerce Authority*, *available at* https://www.azcommerce.com/media/1542854/job-training-rules-4-6-18.pdf.

In contrast, Proposition 208's distributions contain none of the hallmarks of a "grant" as the term is ordinarily used and understood. They are mandatory, not discretionary. *See* A.R.S. § 15-1281(C) (providing that the state treasurer "shall transfer all monies in the student support and safety fund" as outlined). Nor must school districts apply or compete for Proposition 208 revenues.[5] The transfer of tax

[5] In fact, Proposition 208 expressly exempts its funding provisions from statutory requirements generally applicable to government grants. Government grants in Arizona are governed by Title 41, Chapter 24 of the Arizona Revised Statutes. A.R.S. § 41-2702 provides that "[s]tate governmental units shall award any grant in accordance with the competitive grant solicitation requirements of this

revenues is automatic. Proposition 208 simply does not operate as a grant program in the ordinary sense of the word.

To be sure, the text of A.R.S. § 15-1281(C) refers to the distribution of Proposition 208 revenues as "grants." Intervenor-Defendants, who participated in drafting Proposition 208, appear to concede that use of the word grant in A.R.S. § 15-1285 was an intentional drafting decision aimed at shoehorning distribution of the tax revenue generated by Proposition 208 into the constitutional exemption of "grants" from spending limitations. *See* Intervenor-Defendants' Combined Answering Brief at 23 & n.14 (stating that use of the word "grant" in Proposition 208 was "by specific design"). In any event, "substance controls over form" and "[c]ourts are not bound by labels"—especially labels created "by specific design." *Anderson v. Valley Union High Sch., Dist. No. 22*, 229 Ariz. 52, 55, ¶ 4 (App. 2012).

Intervenor-Defendants' argument that Proposition 208 distributions are "grants" (instead of "taxes or local revenues") focuses exclusively on the transfer of Proposition 208 tax revenues from the state to the school districts, as opposed to taxes from taxpayers being transferred directly to schools. *See* Intervenor-

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chapter," and sets forth requirements related to the submission and review of grant applications. A.R.S. § 41-2703 sets forth procedures for waiving normal solicitation and award procedures under certain circumstances, but still requires that grant solicitations and awards foregoing the traditional application process remain competitive to the extent practicable under the circumstances. Proposition 208 exempts its school funding provisions from all of these statutory requirements applicable to government grants. A.R.S. § 15-1281(E).

Defendants' Combined Answering Brief at 23–27. The elephant in the room, however, is the unavoidable fact that funds distributed to school districts under Proposition 208 originate from taxpayers and are mandatorily distributed. Under Proposition 208, taxpayers certainly do not voluntarily give their money to school districts rather they pay a tax imposed and collected by the state. Any reading of Article IX, Section 21(4)(c)(v) that would include taxes levied for the benefit of school districts within the definition of "grants" simply ignores that reality. The fact that the tax revenues generated for school districts by Proposition 208 make a pit stop in the state's coffers on their way to schools cannot transform those tax revenues into grants.

Intervenor-Defendants' broad definition of the exemption for grants would swallow the spending limit rule and make the other exemptions to the rule superfluous. Under their interpretation, any money transferred by the state for a stated purpose would be a grant. There would then be no need for at least three of the other exemptions from definition of local revenues in Article IX, Section 21(4) that relate to funding received for a specific purpose. *See* Ariz. Const., art. IX, § 21(4)(c)(vi) (exempting "amounts received from the state for the purpose of purchasing land, buildings or improvements or constructing buildings or improvements"); Ariz. Const., art. IX, § 21(4)(d)(iv) (exempting "amounts received for the purpose of funding expenditures authorized in the event of destruction of or

damage to the facilities of a school district as authorized by law"); *id.* § 21(4)(d)(v) (exempting "revenues derived from an additional state transaction privilege tax rate increment for educational purposes that was authorized by the voters before January 1, 2001"). Again, construing Article IX, Section 21(4)(c)(v) to render these provisions surplusage violates basic tenets of constitutional interpretation.

Finally, and as noted above, the fundamental purpose of section 21 was to curtail increasing tax burdens. Construing "grants" to include taxes raised for the benefit of school districts would be directly contrary to that purpose. The Court should reject Intervenor-Defendants' attempt to expand the definition of "grants" to include the mandatory taxing and spending provisions of Proposition 208.

C. A.R.S. § 15-1285 Is Not Severable.

Plaintiffs correctly argue that Proposition 208's improper attempt to exempt tax revenues raised for the benefit of school districts from constitutional spending limitations is not severable from the rest of the Proposition, and that Proposition 208 must be enjoined in its entirety. In determining whether a legislative measure begun by initiative is severable, the Court first asks, "whether the valid portion, considered separately, can operate independently and is enforceable and workable." *Randolph v. Groscost*, 195 Ariz. 423, 427, ¶ 15 (1999). If it is, the Court will uphold it "unless doing so would produce a result so irrational or absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other."

Id.; *see also Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 522, ¶ 23 (2000).

The plain purpose of Proposition 208 was to tax high-earning individuals to raise revenue that could then be spent by school districts for specified purposes. Leaving the tax in place while severing the invalid attempt to exempt taxes raised from the aggregate spending limitation is neither workable nor rational. Proposition 208 does little to foster its purpose of providing increased support for school districts if revenue raised under the act cannot be spent. It defies logic to suggest that voters would have voted for a tax increase expected to generate $827 million in its first year alone if that revenue could not be spent by its intended recipients. *See* Plaintiffs' Opening Brief at 20 (collecting authorities). For fiscal year 2020, budgeted expenditures for school districts collectively were only $49.3 million below the aggregate expenditure limit, and statewide school districts expenditures were expected to exceed the aggregate expenditure limitation for fiscal year 2021. *See* Plaintiffs' APPV2-64.[6] With school districts already operating at or near aggregate expenditure limits, the reality is that all or a substantial portion of Proposition 208's expected revenues cannot be spent. Leaving the taxing provisions

[6] *See* ACA-APP44, JLBC FY 2021 Appropriations report (July 2020) at 148, https://www.azleg.gov/jlbc/21AR/FY2021AppropRpt.pdf.

in place when the revenues cannot not be spent is irrational, and clearly contrary to the voters' intent. Proposition 208 should be enjoined in its entirety.

D. Plaintiffs' Claims Are Ripe.

Intervenor-Defendants contend that Plaintiffs' facial challenge to Proposition 208 is not ripe because school districts have not yet received or spent Proposition 208 tax revenues. *See* Intervenor-Defendants' Combined Answering Brief at 16. This argument ignores the fact that Plaintiffs challenge Proposition 208 *in its entirety*. "Ripeness is closely related to standing in that enforcement of the principle 'prevents a court from rendering a premature judgment or opinion on a situation that may never occur.'" *In re Estate of Stewart*, 230 Ariz. 480, 484, ¶ 11 (App. 2012). Proposition 208's income tax surcharge went into effect on December 31, 2020. A.R.S. § 43-1013(A). Plaintiffs undoubtedly have a right to challenge the constitutionality of a statute that is currently in effect. *See Winkle v. City of Tucson*, 190 Ariz. 413, 418 (1997) ("If and when an initiative passes, a court may then determine whether its contents are preempted . . . or rendered invalid by any state law or constitutional clause then existing.").

Similarly, Intervenor-Defendants postulate that future circumstances may be such that school district spending will not exceed the aggregate spending limitation, either because school expenditures will decrease or further legislative action would increase the spending cap. Again, this argument misses the mark. The mere

possibility that the expenditure of Proposition 208 revenue might not exceed spending limitations does not strip litigants of their right to mount a facial challenge to the constitutionality of a statute that is currently in place and having real world impacts on Plaintiffs and other Arizonans. There is always the possibility that intervening legislation or other circumstances will impact pending court proceedings. But courts do not wait to rule on the constitutionality of existing legislation on the chance it may later be changed. *See Glavin v. Clinton*, 19 F. Supp. 2d 543, 547 (E.D. Va. 1998), *aff'd sub nom. Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316 (1999) ("Congress may always moot out a controversy by passing new legislation, but that fact does not shield agency action from judicial review.").

Finally, despite Intervenor-Defendants' efforts to inject factual disputes into this case, the issue presented is purely legal. Proposition 208's *statutory* attempt to override *constitutional* spending limits is facially invalid. *See State v. Fell*, 249 Ariz. 1, 3 ¶ 6 (App. 2020) ("But, of course, statutes must conform with the mandates of our state constitution."). No further factual development is necessary for the Court to find that Proposition 208's blatant attempt to subvert constitutional spending limits is invalid, and the case is ripe for review. *See Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 581 (1985) (holding that a case was ripe where it raised pure issue of law requiring no further factual development).

II. ARTICLE IX, SECTION 21 REPRESENTS THE PUBLIC'S VIEW THAT CONTINUAL TAX INCREASES WILL NEGATIVELY IMPACT ARIZONA'S ECONOMY.

As explained above, Article IX, Section 21's spending limit reflects a general Arizona voter policy against higher taxes. *See* ACA-APP27, June 3, 1980 Special Election Publicity Pamphlet, Legislative Council Arguments Favoring Proposition 109 (Article IX, Section 21) (explaining how the lack of an adequate limitation on total spending by school districts and community colleges is responsible for the "ever-increasing" local tax burden); *see also* ACA-APP47, November 4, 1986 General Election Publicity Pamphlet, Legislative Council Arguments Opposing Proposition 101, at 12 (cautioning that "[r]aising the limit may raise your taxes"); ACA-APP47, November 4, 1986 General Election Publicity Pamphlet, Legislative Council Arguments Opposing Proposition 101, at 13 (warning that "this Proposition allows more spending of both state and local tax money by school districts").[7]

[7] Intervenor-Defendants misconstrue Article IX, Section 21 as being concerned only with increases in *local* property taxes. *See* Intervenor-Defendants' Combined Answering Brief at 28. Although high local property taxes were certainly a major impetus for Article IX, Section 21, the definition of local income under Article IX, Section 21 is by no means limited to property taxes or even taxes levied by local governments. *See* Ariz. Const., art. IX, § 21(4)(c) (defining "local revenues" to include "*all* monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district" (emphasis added)). Further, and as noted previously, the pamphlet materials related to Article IX, Sections 20 and 21 belie any argument that these constitutional amendments were aimed at curtailing only local property taxes.

One of the reasons behind the public's reluctance to increase taxes is that higher taxes negatively impact economic development by making Arizona less competitive than neighboring states, as one Arizona voter explained in 1992 in reference to another tax limiting initiative:

> Some analyses rank Arizona as one of the highest taxed states in the nation. This reputation hinders economic development, discourages businesses from moving to this state, promotes migration of businesses from this state and places a competitive disadvantage on businesses remaining here.

ACA-APP52, November 3, 1992 General Election Publicity Pamphlet, Legislative Council Arguments Favoring Proposition 108 (Article IX, Section 22), at 46.[8]

This is not merely one voter's opinion, but it is supported by decades of research. According to the Tax Foundation, twenty-six studies regarding the empirical relationship between taxes and economic growth were conducted between 1983 and 2012. *See* William McBride, *What Is the Evidence on Taxes and Growth?*, Tax Foundation (Dec. 18 2012), https://taxfoundation.org/what-evidence-taxes-and-growth/. Of those twenty-six studies, all but three[9] found that taxes have a negative effect on economic growth even after controlling for various factors such as

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[8] In addition to Article IX, Section 21, Sections 20 and 22 of Article IX are additional examples of constitutional amendments reflecting the general voter policy to keep taxes low in Arizona. The clear motivation behind these amendments was to make it more difficult to raise taxes, in part to keep Arizona competitive in attracting and retaining business.

[9] The three outliers were from studies performed before 1997.

government spending, business cycle conditions, and monetary policy. *Id.* The studies that distinguish between types of taxes found that corporate income taxes are the most harmful, followed closely by personal income taxes. *Id.*

The findings from these studies are illustrated by significant real-world examples. Within the last year, numerous big-name technology companies have left California, which has one of the highest income tax rates in the nation,[10] and have relocated to states with lower or no income taxes. *See* Andrew Osterland, *Pandemic Heats Up State Tax Competition to Attract Businesses and Residents*, CNBC (Feb. 8, 2021, 8:01 AM), https://cnb.cx/36T4thr (explaining that "[m]ost experts expect more people and businesses will choose to locate where they can pay lower taxes," citing tech-companies Oracle and Hewlett Packard's relocation from California's Silicon Valley to Houston, Texas (which has no income tax) as "the most prominent examples"); *see also* Jessica Bursztynsky, *Palantir to Relocate Headquarters from Silicon Valley to Colorado*, CNBC (Aug. 19, 2020, 4:58 PM), https://cnb.cx/3iU0JQa (discussing the relocation of data analytics software company Palantir Technologies from California to Denver, Colorado, which has a flat income tax rate of 4.63%).

[10] As of this year, California's top income tax rate is 12.3%, with Arizona's new top rate of 8% not far behind.

A recent lawsuit filed in the United States Supreme Court by the State of New Hampshire further illustrates the economic advantages resulting from low income tax rates. On October 19, 2020, New Hampshire filed a Motion for Leave to File a Bill of Complaint ("Motion for Leave") in the United States Supreme Court alleging that Massachusetts' newly enacted tax regulation—which subjects nonresident-earned income received for services performed outside of Massachusetts to Massachusetts' income tax—violates the United States Constitution's due process and commerce clauses. *See generally* ACA-APP93–135, Brief in Support of Motion for Leave To File Bill of Complaint, *New Hampshire v. Massachusetts*, No. 220154 (2020). Throughout its briefing, New Hampshire repeatedly emphasized the important role its income tax policy has played in bringing people and businesses into the state, which, in turn, has benefitted its overall economy:

> For decades, New Hampshire has made the deliberate policy choice to reject a broad-based personal earned income tax or a general sales tax. . . . New Hampshire's sovereign policy choice has had profound effects. It has resulted in, on average, higher per capita income, lower unemployment, and a competitive edge in attracting new businesses and residents. In other words, it has helped create a "New Hampshire Advantage" that is central to New Hampshire's identity. It is through this advantage that New Hampshire successfully distinguishes itself as a sovereign and competes in the market for people, businesses, and economic prosperity.

ACA-APP60–61, Bill of Complaint ¶¶ 2–3, *New Hampshire v. Massachusetts*, No. 220154 (2020). Like New Hampshire, which relies on its tax policy to keep itself economically competitive, Arizona voters similarly implemented the school district

spending cap in Article IX, Section 21 to prevent heightened taxes that hinder economic development in the State.

A recent study conducted by the American Enterprise Institute ("AEI") confirms a direct correlation between a state's income tax rate and its ability to attract and retain businesses and individuals within its borders. AEI analyzed the driving factors behind America's top ten inbound and top ten outbound states in 2019, which revealed that state income taxes play a significant role. *See* Mark J. Perry, *Top 10 Inbound vs. Top 10 Outbound US States in 2019: How Do They Compare on a Variety of Measures?*, AEI (Nov. 18, 2020), https://www.aei.org/carpe-diem/top-10-inbound-vs-top-10-outbound-us-states-in-2019-how-do-they-compare-on-a-variety-of-tax-burden-business-climate-fiscal-health-energy-housing-costs-and-economic-measures/. According to AEI's study, which utilized data from the Tax Foundation and U.S. Census Bureau, the average top individual income tax rate in the top ten inbound states was 3.5% in 2019 compared to an average top income tax rate of 7.1% in the top 10 outbound states. *Id.*; *see also* Osterland, *supra* (explaining that four out of five of the of the highest outbound states ranked in the bottom five for business tax climate in 2021 by the Tax Foundation).

Arizona was the number one inbound state in 2018 and 2019, during which its highest income tax rate was 4.54% in 2018 and 4.5% in 2019. *See* Perry, *supra*.

According to a study by the Tax Foundation, this ranked Arizona as the fifth lowest income tax state in the nation, thereby rendering Arizona very competitive among neighboring states for attracting and retaining business and industry. *See* Janelle Cammenga & Jared Walczak, *Arizona Proposition 208 Threatens Arizona's Status as a Destination for Interstate Migration*, Tax Foundation (Oct. 14, 2020), https://taxfoundation.org/arizona-proposition-208-education-funding/. Prop 208's substantial increase from 4.5% to 8% for the top tax bracket has moved Arizona to the eighth highest of all 50 states, making it an outlier in its region. *Id.* Indeed, Arizona's 8% top income tax rate is higher than the average top rate of the top ten outbound states (7.1%). *See* Perry, *supra*. In contrast, Arizona's neighboring states—New Mexico, Colorado, Utah, and Nevada—all have top income tax rates of under 5% (with Nevada having no income tax).

Ultimately, Arizona's ability to attract and retain business and industry is severely handicapped by Prop. 208's unlawful tax increase. A tax increase such as this is precisely what the voters sought to prevent when they amended the Constitution to implement a spending cap on school districts. If this Court were to hold that Prop. 208 lawfully raises education funds through increased taxes (that by the plain terms of Article IX, Section 21, cannot be spent), the Court would be violating the will of the voters, which is to keep taxes low to maintain Arizona's competitive status in attracting people and businesses to this state.

CONCLUSION

Given that Proposition 208's distributions will violate the aggregate expenditure limit in Article IX, Section 21 and are not exempt from such through the grant exemption, the Court should vacate the order of the trial court denying a preliminary injunction and remand this matter with instructions to enter the preliminary injunction as requested by Plaintiffs.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

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