

**ARIZONA SUPREME COURT**

KAREN FANN, *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)

INVEST IN EDUCATION  
(SPONSORED BY AEA AND  
STAND FOR CHILDREN) and  
DAVID LUJAN,

Intervenor-  
Defendants/Appellees.

**BRIEF OF *AMICUS CURIAE*  
ARIZONA SCHOOL BOARDS ASSOCIATION  
IN SUPPORT OF AFFIRMANCE**

**FILED WITH WRITTEN CONSENT OF THE PARTIES**

Joel W. Nomkin (#011939)  
Austin C. Yost (#034602)  
Kathryn E. Boughton (#036105)  
**PERKINS COIE LLP**  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
Telephone: 602.351.8000  
DocketPHX@perkinscoie.com

Attorneys for *Amicus Curiae*  
Arizona School Boards Association

March 19, 2021

## Table of Contents

	<b>Page</b>
<b>Introduction</b> .....	1
<b>Interests of <i>Amicus Curiae</i></b> .....	2
<b>Argument</b> .....	3
I.    Proposition 208 revenues fit within the definition of “grants.” .....	3
II.   Even if the meaning of “grants” were ambiguous, the Arizona Department of Education’s longstanding practice would weigh heavily in favor of interpreting “grants” to mean transfers of monies for a particular purpose.....	7
<b>Conclusion</b> .....	11

## Table of Authorities

<b>Cases</b>	<b>Page(s)</b>
<i>Bolin v. Super. Ct. In &amp; For Maricopa Cnty.</i> , 85 Ariz. 131 (1958).....	7
<i>Brewer v. Burns</i> , 222 Ariz. 234 (2009).....	7
<i>Lagerman v. Ariz. State Ret. Sys.</i> , 248 Ariz. 504 (2020).....	4, 5
 <b>Statutes</b>	
A.R.S. § 12-910.....	7
A.R.S. § 15-154.01.....	6
A.R.S. § 15-249.08.....	9, 10
A.R.S. § 15-249.12.....	6
A.R.S. § 15-720.01.....	6
A.R.S. § 15-979.....	8, 9
A.R.S. § 15-1281.....	4
A.R.S. § 15-2032.....	6
A.R.S. § 28-2439.02.....	6
A.R.S. § 36-2863.....	6
A.R.S. § 41-1544.....	6
A.R.S. § 41-1545.02.....	6
A.R.S. § 46-343.....	6

**Table of Authorities  
(Continued)**

	<b>Page(s)</b>
<b>Other Authorities</b>	
Ariz. Const. art. IX, § 21.....	1, 3, 8
Arizona Indian Gaming Preservation and Self-Reliance, Proposition 202 (2002), <a href="https://ballotpedia.org/Arizona_Indian_Gaming_Preservation_and_Self-Reliance,_Proposition_202_(2002)">https://ballotpedia.org/Arizona_Indian_Gaming_Preservation_and _Self-Reliance,_Proposition_202_(2002)</a> .....	8
<i>Grant</i> , The American Heritage Dictionary, <a href="https://www.ahdictionary.com/word/search.html?q=grant">https://www.ahdictionary.com/word/search.html?q=grant</a> (last visited Mar. 19, 2021).....	4
<i>Grant</i> , Cambridge Dictionary, <a href="https://dictionary.cambridge.org/us/dictionary/english/grant">https://dictionary.cambridge.org/us/dictionary/english/grant</a> (last visited Mar. 19, 2021).....	3
<i>Grant</i> , Collins Dictionary, <a href="https://www.collinsdictionary.com/us/dictionary/english/grant">https://www.collinsdictionary.com/us/dictionary/english/grant</a> (last visited Mar. 19, 2021).....	4
<i>Grant</i> , Lexico, <a href="https://www.lexico.com/definition/grant">https://www.lexico.com/definition/grant</a> (last visited Mar. 19, 2021).....	4
<i>Grant</i> , Macmillian Dictionary, <a href="https://www.macmillandictionary.com/us/dictionary/american/grant_2">https://www.macmillandictionary.com/us/dictionary/american/gran t_2</a> (last visited Mar. 19, 2021).....	4
<i>Grant</i> , Merriam-Webster, <a href="https://www.merriam-webster.com/dictionary/grant">https://www.merriam- webster.com/dictionary/grant</a> (last visited Mar. 19, 2021).....	3
State of Arizona, Governor’s Office of Strategic Planning & Budgeting, Appropriations Limit Calculation (Feb. 2021), <a href="https://www.azospb.gov/documents/2021/2021%20Appropriation%20Limit%20Calculation.pdf">https://www.azospb.gov/documents/2021/2021%20Appropriation %20Limit%20Calculation.pdf</a> .....	10

**Table of Authorities  
(Continued)**

	<b>Page(s)</b>
<i>What is a Mandatory Grant?</i> (June 2, 2016), <a href="https://grantsgovprod.wordpress.com/2016/06/02/what-is-a-mandatory-grant/#:~:text=Mandatory%20grants%20are%20a%20type,defined%20in%20the%20authorizing%20statute.&amp;text=This%20authorizing%20statute%20also%20requires,to%20administer%20the%20grant%20program">https://grantsgovprod.wordpress.com/2016/06/02/what-is-a-mandatory-grant/#:~:text=Mandatory%20grants%20are%20a%20type,defined%20in%20the%20authorizing%20statute.&amp;text=This%20authorizing%20statute%20also%20requires,to%20administer%20the%20grant%20program</a> .....	5

## Introduction<sup>1</sup>

Arizona voters enacted the Invest in Education Act (“Proposition 208”) after finding that “[y]ears of underfunding by the Arizona Legislature” had led to “crisis-level teacher shortages and woefully inadequate support services” throughout Arizona’s public school districts. Proposition 208 § 2(2). Proposition 208 seeks to remedy those shortfalls by transferring monies to school districts and charter schools and by authorizing them to spend those monies for particular purposes. Important here, those transfers fall outside of the aggregate expenditure limitation in article IX, section 21, of the Arizona Constitution because they fit easily within the meaning of “grants”—which are one of the funding sources excluded from the “local revenues” that are subject to the expenditure limitation.

Proposition 208’s transfers of monies to school districts as “grants” are not unique. Arizona’s school districts rely on very similar funding sources every year for over \$100 million of their annual budgets. The Arizona Department of Education (“ADOE”) has long excluded these other grants from the calculation of school districts’ “local revenues” and thus as outside of the constitutional expenditure

---

<sup>1</sup> Under Arizona Rule of Civil Appellate Procedure 16(b)(3), the counsel below certifies that no persons or entities other than members of the sponsoring group or organization provided financial resources for preparing this brief.

limitation. ADOE's longstanding practice confirms that Proposition 208's transfers are likewise exempt from the expenditure limitation.

These other grant programs also highlight the sweeping implications of Plaintiffs' attack on Proposition 208. That attack not only seeks to upset the will of the people in enacting Proposition 208, but it would also jeopardize other essential funding sources that Arizona's cash-strapped school districts have long counted on as being exempt from the expenditure limitation.

The Superior Court's refusal to enjoin Proposition 208 should be affirmed.

### **Interests of *Amicus Curiae***

The Arizona School Boards Association ("ASBA") is a private, nonprofit, and non-partisan organization that provides training, leadership, and essential services to public school governing boards statewide. Its members include more than 240 governing boards, representing nearly one million Arizona students.

The needs of ASBA's members are guided by a set of core beliefs, including two that are especially relevant to ASBA's interest as *amicus* here: first, that the responsibility for student success is shared by students, parents, governing boards, district staff, and the community; and second, that public education funding must be broad-based, stable, and at a level that ensures that all students succeed. ASBA files this brief because those beliefs depend on funding sources like Proposition 208.

## Argument

### I. Proposition 208 revenues fit within the definition of “grants.”

The merits of Plaintiffs’ appeal centers on the meaning of “grants” in article IX, section 21(4)(c)(v), of the Arizona Constitution (“the Grants Exception”).<sup>2</sup> That provision excludes “grants” from the calculation of “local revenues” that are subject to the Arizona Constitution’s “aggregate expenditure limitation.” Ariz. Const. art. IX, §§ 21(2), 21(4)(c)(v). More specifically, the Grants Exception excludes “[a]ny amounts or property received as *grants*, gifts, aid or contributions of any type[.]” Ariz. Const. art. IX, § 21(4)(c)(v) (emphasis added). Revenues received by school districts under Proposition 208 easily qualify for this categorical exception.

As confirmed by a library of dictionaries, a “grant” simply means a transfer of money for a particular purpose. *See, e.g.:*

- *Grant*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/grant> (last visited Mar. 19, 2021) (defining “grant” as “something granted,” especially “a gift (as of land or money) for a particular purpose”);
- *Grant*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/grant> (last visited Mar. 19, 2021) (defining “grant” as “an amount of money given especially by the government to a person or organization for a special purpose”);

---

<sup>2</sup> Plaintiffs’ claims are not ripe for the reasons explained in Appellees Invest in Education and David Lujan’s Answering Brief. This brief addresses the merits issues only out of precaution, in the event that this Court chooses to address them.



- *Grant*, Collins Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/grant> (last visited Mar. 19, 2021) (defining “grant” as “an amount of money that a government or other institution gives to an individual or to an organization for a particular purpose such as education or home improvements”);
- *Grant*, Lexico, <https://www.lexico.com/definition/grant> (last visited Mar. 19, 2021) (defining “grant” as “[a] sum of money given by a government or other organization for a particular purpose”);
- *Grant*, Macmillian Dictionary, [https://www.macmillandictionary.com/us/dictionary/american/grant\\_2](https://www.macmillandictionary.com/us/dictionary/american/grant_2) (last visited Mar. 19, 2021) (defining “grant” as “an amount of money that the government or an organization gives you for a specific purpose and does not ask you to pay back”); and
- *Grant*, The American Heritage Dictionary, <https://www.ahdictionary.com/word/search.html?q=grant> (last visited Mar. 19, 2021) (defining “grant” as “[s]omething granted, especially a giving of funds for a specific purpose”).

A transfer of money for a particular purpose is exactly what Proposition 208 accomplishes. It specifically sets out how revenues deposited into its Student Support and Safety Fund must be distributed to school districts and charter schools. *See, e.g.*, A.R.S. § 15-1281(D)(1) (50% for “hiring teachers and classroom support personnel” and “increasing base compensation” for them); *id.* § 15-1281(D)(2) (25% for “hiring student support services personnel” and “increasing base compensation” for them); *id.* § 15-1281(D)(3) (10% for “mentoring and retention programming for new classroom teachers”); and so on. This Court thus need go no further to conclude that Proposition 208 revenues fit within the Grants Exception. *See Lagerman v. Ariz.*

*State Ret. Sys.*, 248 Ariz. 504, 507 ¶ 13 (2020) (“If a statute is subject to only one reasonable interpretation, we apply it without further analysis.”) (citation omitted).

In arguing otherwise, Plaintiffs contend that a “grant entails a discretionary transfer that is not required by law,” and “[b]ecause the State has no discretion in ‘transfer[ring] all monies’ to public school districts, those funds are not ‘grants, gifts, aid, or contributions.’” [Plaintiffs’ Opening Brief (“Op. Br.”) at 11]. Plaintiffs’ premise and conclusion are both wrong.

**First**, Plaintiffs’ discretionary/mandatory distinction not only ignores the dictionary definitions above, but it ignores standard usage as well. “Grants” commonly entail mandatory transfers of monies. As one United States Government publication puts it: “Mandatory grants are a type of grant that must be awarded to each eligible applicant (generally a government entity) based on the conditions defined in the authorizing statute.”<sup>3</sup>

The Arizona Legislature likewise rejects Plaintiffs’ attempt to exclude mandatory transfers from the meaning of “grants.” In the education area alone,

---

<sup>3</sup> Grants.gov, *What is a Mandatory Grant?* (June 2, 2016), <https://grantsgovprod.wordpress.com/2016/06/02/what-is-a-mandatory-grant/#:~:text=Mandatory%20grants%20are%20a%20type,defined%20in%20the%20authorizing%20statute.&text=This%20authorizing%20statute%20also%20requires,to%20administer%20the%20grant%20program>.

Arizona statutes are full of mandatory transfers that the Legislature regards as “grants.” Examples abound:

- The Character Education Matching Grant Program, *see* A.R.S. § 15-154.01(C) (ADOE “*shall* administer the program and distribute the state matching grant monies.”) (emphasis added);
- The Computer Science Professional Development Program Fund, *see* A.R.S. § 15-249.12(B) (ADOE “*shall* distribute grants on a first-come, first-served basis.”) (emphasis added);
- The Mathematics or Science Achievement Grant Program, *see* A.R.S. § 15-720.01(B) (“The state board of education *shall* award mathematics or science achievement grants to school districts and charter schools[.]”) (emphasis added); and
- The Building Renewal Grant Fund, *see* A.R.S. § 15-2032(B) (“The school facilities board *shall* distribute monies from the fund based on grant requests from school districts to fund primary building renewal projects.”) (emphasis added).<sup>4</sup>

**Second**, even if a “grant” were a discretionary transfer, the relevant exercise of discretion would be the people’s (or the Legislature’s) decision to create the grant

---

<sup>4</sup> Grant programs with mandatory transfers are not unique to the education context but exist in other fields as well. *See, e.g.*, The Don’t Tread On Me Special Plates Fund, A.R.S. § 28-2439.02(C), (E)(1) (“The Arizona tea party committee *shall* establish a grant program to distribute fund monies” and “the state treasurer *shall* invest and divest monies in the fund.”) (emphasis added); The Arizona Competes Fund, A.R.S. § 41-1545.02(A) (“The monies *shall* be paid, by grant, for the purposes of [supporting Arizona business development].”) (emphasis added); *see also* The Justice Reinvestment Fund, A.R.S. § 36-2863(C), (D); The Arizona Job Training Fund, A.R.S. § 41-1544(A), (H), (I); The Family Caregiver Grant Program Fund, A.R.S. § 46-343(C).

program in the first place. Arizona’s voters weren’t *required* to pass Proposition 208.

Their decision to do so was a *choice* of democracy at work.

**II. Even if the meaning of “grants” were ambiguous, the Arizona Department of Education’s longstanding practice would weigh heavily in favor of interpreting “grants” to mean transfers of monies for a particular purpose.**

Were this Court to conclude that the meaning of “grants” is ambiguous, it should look for clarification to ADOE’s longstanding practice of excluding funding sources similar to Proposition 208 from the calculation of school districts’ “local revenues.”

Arizona courts regularly consider administrative interpretations of ambiguous constitutional provisions. *See, e.g., Bolin v. Super. Ct. In & For Maricopa Cnty.*, 85 Ariz. 131, 136 (1958) (“We realize that the construction placed upon the Constitution by administrative officers of the state is not binding, but certainly such construction should be considered in the interpretation of the Constitution by this court.”). Likewise, “[l]ong-established practices, accepted by other branches of government, may be relevant in construing constitutional provisions.” *Brewer v. Burns*, 222 Ariz. 234, 241 ¶ 33 (2009).<sup>5</sup>

---

<sup>5</sup> Consideration of administrative practice should not be confused with judicial or *Chevron* deference. This Court need not defer to an administrative agency’s practice or interpretation. *See* A.R.S. § 12-910(E). But it may and should *consider* longstanding administrative practice or interpretation when interpreting ambiguous constitutional provisions. *See, e.g., Bolin*, 85 Ariz. at 136.

As applied here, ADOE has long excluded funding sources much like Proposition 208 from the calculation of school districts’ “local revenues” under article IX, section 21. [APPV2-030–APPV2-034 (Declaration of Charles “Chuck” Essigs) (“Essigs Decl.”) ¶¶ 9–12]. To take two examples discussed in the briefing below, ADOE excludes from that calculation monies that school districts receive from the Instructional Improvement Fund and the Results-Based Funding Fund. [*Id.*]. The similarity of those funds to Proposition 208 is striking:

**The Instructional Improvement Fund.** Like Proposition 208:

- Arizona voters approved the Instructional Improvement Fund when they enacted Proposition 202 in 2002, *see* Arizona Indian Gaming Preservation and Self-Reliance, Proposition 202 (2002), [https://ballotpedia.org/Arizona\\_Indian\\_Gaming\\_Preservation\\_and\\_Self-Reliance,\\_Proposition\\_202\\_\(2002\)](https://ballotpedia.org/Arizona_Indian_Gaming_Preservation_and_Self-Reliance,_Proposition_202_(2002)) (last visited Mar. 19, 2021);
- ADOE administers the Instructional Improvement Fund, *see* A.R.S. § 15-979(A);
- ADOE “shall” pay monies from the Instructional Improvement Fund to school districts; *see* A.R.S. § 15-979(C);

- The amount of monies that each school district receives from the Instructional Improvement Fund depends on the number of students in each school district, *see id.*; and
- The Instructional Improvement Fund authorizes school districts to spend the monies that they receive in specified percentages and for particular purposes, *see* A.R.S. § 15-979(D), (E).

**The Results-Based Funding Fund.** Like Proposition 208:

- ADOE administers the Results-Based Funding Fund, *see* A.R.S. § 15-249.08(A);
- ADOE “shall” distribute monies from the Results-Based Funding Fund, *see* A.R.S. § 15-249.08(B);
- The amount of monies that each school district receives from the Results-Based Funding Fund depends on the number of students in each school district, *see id.*; and
- The Results-Based Funding Fund authorizes school districts to spend the monies that they receive for particular purposes, *see* A.R.S. § 15-249.08(D).

ADOE’s exclusion of these two funds from the “local revenues” calculation should weigh heavily in this Court’s assessment of Proposition 208, which so closely parallels the basic structure of those funds.

Indeed, given that similarity, Plaintiffs’ attack on Proposition 208 is tantamount to an assault on these and other funding sources that school districts have counted on as being excluded from the Arizona Constitution’s aggregate expenditure limitation. That exclusion has been essential to school district funding across the state. The Instructional Improvement Fund and the Results-Based Funding Fund alone amount to over \$110 million of school districts’ budgets *each year*. See State of Arizona, Governor’s Office of Strategic Planning & Budgeting, Appropriations Limit Calculation, at 22 (Feb. 2021), <https://www.azospb.gov/documents/2021/2021%20Appropriation%20Limit%20Calculation.pdf>.<sup>6</sup>

Plaintiffs argue that the Results-Based Funding Fund is distinguishable because it is a “discretionary” program. [Op. Br. at 17]. But the Results-Based Funding Fund is no more discretionary than Proposition 208. Just like Proposition 208, the Results-Based Funding Fund requires ADOE to transfer monies to school districts. See A.R.S. § 15-249.08(B) (ADOE “*shall* distribute monies” from the fund.) (emphasis added). In trying to isolate Proposition 208 from what Plaintiffs describe as “traditional grant programs,” Plaintiffs miss the crucial commonality—

---

<sup>6</sup> This year, the Instructional Improvement Fund amounts to \$50.9 million of school districts’ annual budget, and the Results-Based Funding Fund amounts to \$68.6 million. See State of Arizona, Governor’s Office of Strategic Planning & Budgeting, Appropriations Limit Calculation, at 22 (Feb. 2021), <https://www.azospb.gov/documents/2021/2021%20Appropriation%20Limit%20Calculation.pdf>.

both Proposition 208 and the Results-Based Funding Fund allow school districts to spend monies for particular purposes. Beyond that, Plaintiffs' Opening Brief doesn't even try to distinguish Proposition 208 from the Instructional Improvement Fund, even though that fund was highlighted in the briefing below.<sup>7</sup> Yet ADOE's practice of excluding that Fund from school districts' "local revenues" and the constitutional expenditure limitation applies with full force to Proposition 208.

### **Conclusion**

Plaintiffs give no good reason to overturn the people's decision to help address the funding crisis faced by Arizona's public schools. The plain meaning and common usage of the term "grants," combined with ADOE's historic practice for similar funding sources, all confirm that Proposition 208's transfers of revenues to school districts are exempt from the Arizona Constitution's aggregate expenditure limitation. For these and the other reasons set out in Appellees Invest in Education and David Lujan's Answering Brief, this Court should affirm the denial of Plaintiffs' request for a preliminary injunction.

---

<sup>7</sup> See, e.g., APPV2-011 (Intervenor-Defs.' Resp. in Opp'n to Pls.' Mot. for TRO & Prelim. Inj.) (citing Essigs Decl. ¶¶ 9–13); SA086–SA091 (Intervenors' Notice of Filing of Demonstrative Exs. & Notice of Suppl. Authority).



March 19, 2021

Respectfully submitted,

**PERKINS COIE LLP**

By: s/ Joel W. Nomkin

Joel W. Nomkin

Austin C. Yost

Kathryn E. Boughton

2901 North Central Avenue, Suite 2000

Phoenix, Arizona 85012-2788

Attorneys for *Amicus Curiae*

Arizona School Boards Association