IN THE SUPREME COURT OF ARIZONA

KAREN FANN, *et al.*, Plaintiffs/Appellants, v. STATE OF ARIZONA, *et al.*, Defendants/Appellees. INVEST IN EDUCATION (Sponsored by AEA and Stand for Children); and DAVID LUJAN, Intervenor-Defendants/Appellees.	No. CV-21-0058-T/AP Arizona Court of Appeals, Division One No. 1 CA-CV 21-0087 Maricopa County Superior Court No. CV2020-015495 CV2020-015509 (Consolidated)

BRIEF OF AMICI CURIAE POTENTIAL BALLOT INITIATIVE PROPONENTS

James E. Barton II
Jacqueline Mendez Soto
BARTON MENDEZ SOTO PLLC
401 West Baseline Road, Suite 205
Tempe, Arizona 85283
james@BartonMendezSoto.com
jacqueline@BartonMendezSoto.com

Attorneys for Amici Curiae

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Pursuant to ARCAP 16(b)(1)(A), Arizona Advocacy Network, Arizona Wins!, Ballot Initiative Strategy Center, and Living United for Change in Arizona (collectively Potential Ballot Initiative Proponents) hereby file this brief as amici curiae in support of Intervenor-Defendant/Appellee Invest in Education (sponsored by AEA and Stand for Children) (the "Committee").

INTEREST OF AMICI CURIAE

Amici curiae are civic organizations and coalitions committed to state-level policy change through, among other techniques, exercising the state of Arizona's constitutionally enshrined direct-democracy tools. They seek to improve public policy for working families, impacted communities, and others whose voices are not heard by politicians by, among other things, promoting ballot measures that advance their causes.

INTRODUCTION

Arizona's founders provide the following warning introducing our rights our state constitution protect: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."[1] No principle provides greater security of individual rights or more strongly protects the perpetuity of free government for

[1] Ariz. Const. art. II, § 1.

Arizonans than the tools of direct democracy enshrined in its Constitution. While politicians in state government—the natural enemies of citizen power—wage a relentless war on these protections of free government and individual rights, Proposition 208's opponents urge the Court to join in that assault and wrest from Arizonans the power to legislate that they have reserved for themselves—ironically enough through a tortured reading of limitations the citizens placed on state politicians. The undersigned amici ask the Court to decline this invitation and to instead protect the tools Arizona's founders put in place to guard against power hungry politicians who fail to respond to the needs and petitions of their constituents.

ARGUMENT

Proposition 208's political opponents, having failed to disqualify hundreds of thousands of valid signatures to put the question before the voters, and having unsuccessfully argued to Arizonans to vote against desperately needed funding for its struggling education system, now seek to accomplish through a tortured misreading of the law what they could not through political means. Worse, at least two of their tactics also threaten the health of Arizona's bedrock tools of direct democracy. First, by turning the citizen measure limiting the Legislature's ability to raise taxes, they seek to completely remove *the citizen's* authority to raise taxes. Second, they seek to expand the Court's authority to ignore the severability clause passed by

the voters, again employing an up-is-down logic claiming that the Court should do this because the Court cannot be sure the citizens intended to make the clause in question severable, and therefore the Court should ignore the severability clause, which the voters unquestionably voted for. Both amount to a significant, unmerited shift in power that is unsupported by the law or Arizona's historic commitment to direct democracy.

A. Arizona's Historic Commitment to Direct Democracy

Arizonans have never feared Arizonans. Unlike the East Coast founders of our country who feared that "a pure democracy," wherein citizens "assemble and administer the government," would ultimately be "incompatible with personal security or the rights of property,"[2] Arizona's founders, located as one Congressmen put it, in "the wild and woolly and untrammeled West,"[3] put the lawmaking power of the citizens ahead of that of the elected politicians in the State Constitution.[4] Indeed, our founders delayed our entry into the Union because of their insistence on including in our constitution one aspect of direct democracy: recall of judges.

In debating Arizona's admittance into the Union, it became clear that the elitism and distrust of "the power of the rabble" persisted well into the

[2] James Madison, Federalist No. 10
[3] Congressional Record, Vol. XLVII, part 2, at 1246 (Mr. Martin of Colorado).
[4] *Compare* Ariz. Const. Article IV, Part 1 and Ariz. Const. Article IV, Part 2.

twentieth century.[5] The proponent of Arizona's acceptance attempted to rebut the claim that recall of judges would go so far as to mean that Arizona did not have a republican form of government.[6] Our supporters noted that even according to James Madison, in a representative form of government, representatives served for a fixed term or "at the will of the people."[7] Within a republican form of government, an official could be impeached and, they argued, "recall is only an impeachment by the people."[8] When pressed further, the committee unearthed a definition of the republican form of government that would have set well with our state founders, and informs this case today. A republican form of government is one in which "the supreme power resides in the body of the people."[9] While the Congress was convinced, President Taft ultimately vetoed the admission of Arizona into the Union due to this direct democracy provision.[10]

Following President Taft's veto, a conditional resolution was passed allowing Arizona to enter the Union on the condition that it removed recall

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[5] *Annual Publication of the Historical Society of Southern California*, Vol. 9 (1912-1913) ("HSSC") at 150. ("Those opposing the recall held (1) that the independence of judicial officers would be curtailed, (2) that the power of the rabble would influence judicial opinions, and (3) that in time of passion, the safety of the majority would not be secured by the cool deliberation of the minority.")

[6] Congressional Record, Vol. XLVII, part 2, page 1245 (Mr. Martin of Colorado).

[7] *Id.*

[8] *Id.*

[9] *Id.* (Mr. Humphreys of Mississippi quoting without citation *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457, 1 L.Ed. 440 (1793) (opinion of Wilson, J.).

of judges from its Constitution.[11] On December 12, 1911 the citizens accepted this compromise, and on February 14, 1912 Arizona became a state.[12] On April 27, 1912, the first act of the Arizona Legislature was to refer an amendment to its constitution to the citizens restoring the right to recall judges.[13] On November 5, 1912, Arizonans approved the Amendment, thereby returning the recall of judges to the Constitution effective December 15, 1912.[14]

Attacks on Arizona's tools of direct democracy are attacks on Arizona's core principles.

B. Arizona Voters Unambiguously Restricted the Legislature and Themselves Differently.

Arizonans have restricted the ability to raise taxes. In 1992, the voters provided the following restriction on the Legislature's raising of taxes: "An act that provides for a net increase in state revenues, as described in subsection B is effective on the affirmative vote of two-thirds of the members of each house of the legislature." Ariz. Const. art. IX, § 22. (Emphasis added.) This amendment describes conditions if the revenue increase is vetoed by the Governor, something that cannot happen to initiative measures, and the publicity pamphlet

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[10] *HSSC* at 153.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Notes for Ariz. Const. art. VIII, Pt. 1 § 1.

arguments focused only on revenue increases passed by the Legislature.[15]

In 2003, the Legislature referred a measure to the voters to limit the voter's ability to raise costs and thereby indirectly raising taxes: "An initiative or referendum measure that proposes a mandatory expenditure of state revenues for any purpose, establishes a fund for any specific purpose or allocates funding for any specific purpose must also provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal." Ariz. Const. art. IX, § 23. (Emphasis added.) The referendum language and the arguments in the publicity pamphlet focused exclusively on the burden it would put on "unfunded mandates," but nowhere was it suggested that the measure would somehow revoke the citizens ability to establish programs through initiative—they would just have to provide a funding source.[16]

Voters approved both the citizen-initiated limit on the Legislature's power to increase taxes, and the Legislature-initiated limit on the citizens' power to increase costs and thus taxes indirectly.

As is well-argued by the Committee below and in its answer before this Court, the two amendments are consistent in using "act" to refer to legislation passed by the Legislature, and "measure" to refer to legislation passed by the

[15] *State of Arizona, Publicity Pamphlet* (2004) at 14-17, https://azmemory.azlibrary.gov/digital/collection/statepubs/id/24380.
[16] *State of Arizona, Publicity Pamphlet* (1992) at 45-50, https://azmemory.azlibrary.gov/digital/collection/statepubs/id/35613.

citizens.[17] Nothing found in the (1) text of the limitation on the Legislature, (2) the publicity around the measure, or (3) the language on the ballot suggested it would apply to citizen measures.[18] Similar attempts to import restrictions on Legislative acts into the analysis of citizen measures have been rejected by this court.[19] The distinction between the treatment of legislative acts and citizen measure is further supported by Article IV, Section 24 of the Arizona Constitution, which requires different enacting clauses for each type of legislation. The rules for legislative acts do not and never have governed the rules for citizen initiative.

If the Court were to nonetheless entertain the notion that Section 22 applies to citizen measures, then the Legislature's referring Section 23 to the voters either meant that (1) the Legislature believed the citizens still had the power to raise taxes because in Section 23 it was requiring them to do so, or (2) the Legislature in requiring the citizens to include a funding source for new programs in their initiatives restored the citizens' power to raise taxes.[20] In either circumstance, the attack levied against Proposition 208 in this case fail.

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[17] *See, e.g.,* Answering Brief ¶¶ 88-103.

[18] *See, e.g.,* "A 'no' vote shall have the effect of continuing to permit the Legislature to increase state revenues by a simple majority vote." *State of Arizona, Publicity Pamphlet* (1992) at 50.

[19] *Arizona Chamber of Commerce v. Kiley*, 242 Ariz. 533, 542 ¶33 (2017) (Single Subject Rule); *Wilhelm v. Brewer*, 219 Ariz. 45, 47, 192 P.3d 404, 406 (2008) (quoting *Meyers v. Bayless*, 192 Ariz. 376, 378, ¶ 10, 965 P.2d 768, 770 (1998)) (no requirement for measure title other that "*some* title").

The more sinister implication of this attack is the rank deception that it imputes onto the Legislature's referring Article IX, Section 23 to the voters. The opponents of Proposition 208 in effect suggest that when the Legislature referred the measure to the voters, it was not merely referring a requirement that any new programs enacted through initiative also include a revenue source—that is, the Revenue Source Rule—but was in fact an absolute prohibition on the citizens ever enacting programs that require state funding because they would be (1) required to include a funding source and (2) powerless to include a funding source due to the limitations found in Section 22. Because citizens unquestionably had the right to enact programs like this before the Revenue Source Rule was referred to them, this reading means that the Legislature was referring a repeal of the right of citizens to enact new programs through the initiative process. It is certainly true that repeal by implication is generally disfavored, but in this case the repeal would be the product of willful deception of the voters, literally tricking them into turning their prior limitation on the Legislature into a complete repeal of their own authority. There is no reason for the Court to adopt this reading legislation by Trojan Horse reading of the Revenue Source Rule.

C. The Court Should Respect Proposition 208's Severability Clause

The opponents of Proposition 208 hope to reverse the will of Arizona

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[20] *State of Arizona, Publicity Pamphlet* (2004) at 14-17.

voters by following a strained argument that the Committee cannot provide a clarification about the treatment of Proposition 208 funds, with a strained argument that striking this clarification from the measure cannot be severed from the rest of the measure despite the voter approved severability clause. The Amici here focus on only the dangers of expanding the exception to honoring a voter approved severability clause.

As a preliminary matter, the Court should maintain the *Randolph-Myers* test for severability in context of an initiative measure:

> We will first consider whether the valid portion, considered separately, can operate independently and is enforceable and workable. If it is, we 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.[21]

Next, analysis of the Clean Elections case cited by Proposition 208's opponents helpfully illuminates how the rule has been applied. In that case, the issue was not whether the matching funds provision could be severed from the measure—the Clean Elections system remains in force in Arizona today—but whether portions of the matching funds provision could be severed away, while leaving other matching funds intact.[22] The federal court in *McComish* applied the

[21] *Randolph,* 195 Ariz. 423, 427 ¶ 15 (1999); *Myers,* 196 Ariz. 516, 522 ¶ 23 (2000)

[22] *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *10 (D. Ariz. Jan. 20, 2010).

Randolph-Myers test and concluded that, given various regulatory changes would be required, eliminating some matching funds—those related to individual spending—but allowing others to stand—those triggered by independent committee expenditures—would not be workable.[23]

Proposition 208's opponents ask this Court in this case, what would have amounted to eliminating the entire Clean Elections system over a defect in the matching funds provision in *McComish*. Indeed, the matching funds were a major funding source for participating candidates. [24] Once the U.S. Supreme Court struck down matching funds, participating candidates had access to only 1/3 of the funds that were ultimately available to them prior to the decision.[25] This is very analogous to the situation in Proposition 208 should the Court determine that the grant definition is somehow unenforceable. The supporters of Clean Elections would have preferred the candidates have access to the full amount of funds originally designated—which included matching funds—but the courts saw no reason to find that it would be irrational or absurd for voters to also support a lesser amount going to participating candidates. Likewise, Proposition 208 supporters would prefer all of the funds collected to support education immediately be distributed for that purpose, but it is not irrational or

[23] *Id.* at *11.

[24] *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 729–30 (2011) (explaining the operation of matching funds and cap at twice the original grant).

absurd for those voters to also support a lesser amount going to that purpose. What is more, the money will not vanish, but will remain in place for a future Legislature—one that responds to the petitions of its constituents perhaps—to take action that will distribute the funds. If reducing the maximum candidate grant by 67% in Clean Elections did not make it so unworkable that the matching funds provision could not be severed, it is difficult to see how potentially requiring action from a future Legislature makes severing the grant provision of Proposition 208 unworkable.

It will always be the case that a measure's supporters would prefer that none of its provisions be held unenforceable. Thus, under the rule proposed by the opponents of Proposition 208, no provision is severable because the Court cannot know for sure if the voters would have still supported the measure. This upside-down reasoning, if adopted by the Court, will jeopardize the viability of Arizona's initiative system because every flaw will become a measure's Achille's heel. While this serves the interests of those who seek to deprive Arizonans of the Constitutionally enshrined power of initiative, it is inconsistent with the core values of the State.

CONCLUSION

For the foregoing reasons, the Court should uphold the ruling of the superior court and thereby leave in place the citizens' initiative power, one of our

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[25] *Id.*

"fundamental principles [] essential to the security of individual rights and the perpetuity of free government."[26]

Respectfully submitted this 22th day of March, 2021.

/s/ James E. Barton II

Attorneys for Amici Curiae

[26] Ariz. Const. art. II, § 1.