SUPREME COURT

STATE OF ARIZONA

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

BRIEF OF ECONOMISTS ELLIOTT POLLACK AND ALAN MAGUIRE AS AMICI CURIAE IN SUPPORT OF REVERSAL

(FILED WITH WRITTEN CONSENT)

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Statement of Interest

Elliott Pollack and Alan Maguire have been leading Arizona economists for decades. They are members of the economic estimates commission ("Commission"), a constitutional body consisting of the director of the department of revenue and two public members appointed by the legislature. Ariz. Const. art. IX, § 17(1); A.R.S. § 41-561(A). The constitution and laws charge the Commission with numerous duties related to economic forecasts and the calculation of expenditure limits, including the aggregate limitation for all school districts at issue in this appeal. *See generally* A.R.S. § 41-561 *et seq.* Mr. Pollack has been a member of the Commission since 1984, and Mr. Maguire has been a member for more than a decade.

As members of the Commission, amici have a direct interest in this appeal, in that Appellees have placed the correctness of their work at issue. In addition, Appellees have raised questions regarding the purpose of the aggregate expenditure limit, the likelihood that Proposition 208 spending will exceed the limit, and the economic impact to Arizona if Proposition 208 (and programs like it) are not exempt from the limit. As Commission members, amici have an objective perspective on each of these questions. Amici also have deep expertise in the Arizona economy, and Mr. Maguire was a principal draftsman of the aggregate limitation and related legislation in 1980. Amici thus believe that their views merit consideration.

Introduction

The aggregate expenditure limitation for school districts was designed to control the growth of school district spending and thereby restrain taxes. It was enacted in 1980, simultaneously with numerous other measures that, while each dealing with a distinct problem or philosophical approach to controlling government spending growth, had a common goal of restraining the size of government and its imposition upon the people.

Consonant with that purpose, the expenditure limitation is subject to numerous exemptions, most of which allow school districts to spend unlimited amounts of *non-tax* revenue. Pertinent to this appeal, one exemption allows districts to spend unlimited amounts of private *grant* revenue which, viewed in light of the purpose of the limitation, can only be construed as revenue from private donations. The constitution gives effect to that purpose by explicitly limiting the grant exemption to revenue "received directly or indirectly from any private agency or organization, or any individual." Ariz. Const. art. IX, § 21(c)(v). The intent of the people could hardly be more clear.

Proposition 208 creates an income tax "surcharge" that is directly funneled through the treasury to local school districts. As such, it plainly delivers local revenues that are not exempt from the aggregate expenditure limitation. If the people had wanted school districts to spend unlimited amounts of tax revenue, they would

not have enacted expenditure limitations in the first place. Proposition 208 is precisely what they wanted to avoid—government expansions that impose considerable tax burdens.

Correctly viewed as non-exempt revenue, funds derived from Proposition 208 will exceed allowable spending within the constitutional expenditure limitation. Except for last-minute budget adjustments attributable to the pandemic, school districts would have exceeded the limit *this year*, without accounting for a single surcharge dollar. Because unspent Proposition 208 revenue does not revert to the general fund, the effect of the new tax will be to drain hundreds of millions of dollars from the Arizona economy—and lock them up in untouchable government bank accounts. Appellees' own finance expert admits that result is inevitable.

To avoid it, Appellees have resorted to attacking the Commission, suggesting (conveniently) that its calculation of the limit is *understated* by hundreds of millions of dollars. That argument depends upon the novel legal proposition that the Commission must independently make "adjustments" to the limit to account for changes in government programs. But the constitution instructs the Commission to make such adjustments only when directed by the legislature, and that is precisely what has happened in the past. Because the legislature has *not* mandated the "adjustments" on which Appellees rely, their attacks on the Commission are ahistorical and legally unfounded.

In sum, amici wish to impress upon the Court three points: (1) tax revenue from programs like Proposition 208 cannot logically be exempt from the school district expenditure limitation; (2) the Commission indisputably has been properly performing its constitutional and statutory functions; and (3) Proposition 208 spending, if permitted, will surely exceed the limit, as properly interpreted and applied by the Commission. These points are vital to a rational, meaningful application of the constitutional expenditure limitations, a matter of importance to the Arizona economy, and to future civic dialogue about programs like Proposition 208. The judgment of the superior court unnecessarily and erroneously calls these points into question.

Argument

I. CONSTITUTIONAL AND STATUTORY BACKGROUND.

The Arizona Constitution imposes an aggregate expenditure limitation upon all school districts. Ariz. Const. art. IX, § 21(2). The expenditure limitation derives from a "base limit" which is "the total amount of expenditures of local revenues of all school districts in fiscal year 1979-1980." A.R.S. § 41-563(C)(1); Ariz. Const. art. IX, § 21(2). The Commission calculates the limitation in each year by adjusting the base limit to reflect changes in the student population and cost of living. *Id.* For perspective, in fiscal year 2020-2021, the aggregate limit was $6,309,587,438. The preliminary limit for fiscal year 2021-2022 is $6,019,638,192, down 4.6% from last year due to lower student enrollment as a result of COVID-19.[1]

Prior to May 1 of each year, the Commission must determine and report to the legislature the limitation for the following fiscal year. A.R.S. § 41-563(C)(3)(c). The legislature, in turn, must transmit the Commission's calculation to the board of education on or before June 1. A.R.S. § 15-911(A). By November 1, the board of education must calculate the amount of total budgeted expenditures for all school districts that are in excess of the limitation, and the share attributable to each school district. A.R.S. § 15-911(D). The legislature has until March 1 to authorize excess

[1] The Commission's reports are available at https://azdor.gov/reports-statistics-and-legal-research/economic-estimates-commission.

expenditures by a vote of two-thirds of the membership of each house. A.R.S. § 15-911(C)(2). If the legislature fails to act, the board of education must direct each district to reduce its expenditures, and each district must then adopt a revised budget for the current fiscal year. A.R.S. § 15-911(E).

II. TAX REVENUE COLLECTED UNDER PROPOSITION 208 IS NOT EXEMPT FROM THE CONSTITUTIONAL EXPENDITURE LIMITATION.

A. Voters Enacted The Expenditure Limitation To Restrain Taxation.

Arizona voters enacted the aggregate expenditure limitation for all school districts in the 1980 special election as Proposition 109, a constitutional amendment referred to the electorate as part of a "legislative tax package."[2] This package was described to voters as "the most drastic, sweeping tax reform program ever undertaken in Arizona."[3]

The 1980 election continued a "tax revolt" that began in 1978, when voters approved Proposition 101 to limit statewide appropriations to seven percent of the state's total personal income.[4] Although Proposition 101 did not directly limit taxation, proponents argued that it would reduce "the ever-increasing state tax

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[2] Ariz. Sec. of State, Publicity Pamphlet for 1980 Special Election 14, *available at* https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10632 (last visited Mar. 22, 2021).

[3] Editorial, *Voter's Choice*, Ariz. Republic, May 29, 1980, at A6.

[4] Donald W. Jansen, *Arizona's Constitutional Constraints on the Legislative Powers to Tax and Spend*, 20 Ariz. St. L.J. 181, 193 (1988). *See* Ariz. Const. art. IX, § 17 (amended 1980).

burden," limit "the amount of money which the state can extract from the taxpayer," and "protect the overburdened taxpayer."[5] As two proponents put it, "the taxpayers are presently receiving all the government they can afford."[6]

Despite the passage of Proposition 101, "[t]he tax revolt continued, and by 1980, it was clear that further constitutional limits were being demanded by the people."[7] Thus, the legislature referred to the voters ten additional constitutional amendments, all of which were adopted in the 1980 special election.[8] One set of amendments (Propositions 100-104, 106, and 107) limited the collection of property taxes. The second set (Propositions 105, 108, and 109) created new expenditure limits for counties, cities, towns, school districts, and community college districts, and strengthened the appropriations limit.

Like Proposition 101 two years earlier, the school district expenditure limitation did not directly limit taxation, but was presented to the voters as necessary to curb "the ever-increasing local tax burden."[9] According to its proponents, "[t]his

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[5] Ariz. Sec. of State, Publicity Pamphlet for 1978 General Election 12, 13, *available at* https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10626 (last visited Mar. 22, 2021).

[6] *Id.* at 13.

[7] Jansen, *supra* note 4, at 193.

[8] *See* Propositions 100-109 (1980); Ariz. Const. art. IX, §§ 2, 2.1, 2.2, 2.3, 8, 8.1, 17, 18, 19, 20, 21.

[9] Ariz. Sec. of State, Publicity Pamphlet for 1980 Special Election 76, *available at* https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10632 (last visited Mar. 22, 2021).

proposition would terminate local government's blank check drawn on people's earnings."[10] Proposition 108, which contained essentially-identical limitations for counties, cities, and towns, was likewise described as necessary "to control rampant inflation and avoid excessive dependence on government."[11] In sum, the purpose of the spending limits was to control the growth of government. *See Mountain States Legal Foundation v. Apache County*, 146 Ariz. 479, 480 (App. 1985) (limitations adopted to reduce inflation caused by "unrestricted government spending at all levels").

B. The Grant Exemption Does Not Cover Tax Revenue.

As amended in 1980, the constitution limits "the total amount of expenditures of *local revenues* of all school districts." Ariz. Const. art. IX, § 21(2) (emphasis added). The term "local revenues" is 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." *Id.* art. IX, § 21(4)(c). Because the term "local revenues" includes "virtually all receipts," it is effectively defined by 18 enumerated *exemptions*.[12]

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[10] *Id.*
[11] *Id.* at 66.
[12] Ariz. Op. Atty. Gen. No. I88-017 at 1 (Feb. 4, 1988). Attorney General opinions are available at https://www.azag.gov/opinions and https://azmemory.azlibrary.gov/digital/collection/agopinions/search.

These exemptions are not random; each was designed to achieve a specific economic goal. Consonant with the purpose of the overall "legislative tax package" to reduce the people's tax burden, most of these exemptions provide that school districts may spend an unlimited amount of revenue derived from non-tax sources, including monies from bonds, investments, grants, tuition, fees, property sales, and commercial operations. Ariz. Const. art. IX, §§ 21(c)(i), (c)(ii), (c)(iv), (c)(v), (c)(x), (d)(i), (d)(iii). These exemptions incentivize school districts to reduce their need for tax revenues and, hence, further the electorate's objective to restrain taxation.[13]

The principle motivating each exemption is that revenue from a particular *source* should be exempt, for particular reasons related to the purpose of the legislation. In 1979, for example, the Attorney General opined that revenue would be exempt as federal aid to the extent "traceable to a federal appropriation." Ariz. Op. Atty. Gen. No. I79-091 at 1 (Mar. 28, 1979). The source of exempt revenue that

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[13] The remaining exemptions accomplish various subsidiary objectives. Three "eliminate any problems associated with a double limitation on expenditures." Ariz. Op. Atty. Gen. No. I81-009 at 3 (Jan. 5, 1981). *See* Ariz. Const. art. IX, § 21(c)(vii) (intra-district transfers); (c)(ix) (refunds of expenditures counted against the limit in a prior year); (c)(xii) (contractual payments received from another political entity subject to its own expenditure limit). One exempts money received "in the capacity of trustee, custodian or agent." *Id.* art. IX, § 21(c)(iii). The final six are special cases that prospectively exempt expenditures approved by specific legislative acts. *Id.* art. IX, § 21(c)(vi) (funds received from the state "for the purpose of purchasing land, buildings or improvements"); (c)(xi) (additional property tax approved by special election); (d)(ii) (amounts received from the capital levy "as authorized by law"); (d)(iv) (expenditures "authorized by law" to repair damage to school facilities); (d)(v) (Proposition 301 revenue); (d)(vi) (Proposition 300 revenue).

the framers had in mind for the grant exemption is most logically understood as a *private donation*. Spending money from private donors does not undermine the economic purpose of the legislation, which is to curb spending of local revenues and thereby taxation; indeed, it furthers that goal by reducing the districts' need for tax money.

Appellees' contrary interpretation—that exempt grants may include *state tax dollars* designated for a particular purpose—is based on wordplay, not the purpose of the legislation. If the voters in 1980 had wanted school districts to spend unlimited amounts of *tax money*, they would not have enacted the expenditure limitation in the first place. Indeed, interpreting the constitution in this way would encourage state and local governments to artificially structure spending programs to circumvent the limits—just as the drafters of Proposition 208 appear to have done.[14]

Appellees frequently say that state payments to school districts must be exempt grants, because the exemption refers to grants "of any type." *E.g.*, Ans. Brief ¶ 49 at 27. That misses the mark. Type and source are different concepts. The constitution exempts grants "of any type" because the type of donative transfer

[14] The Attorney General has frequently criticized this practice. *See* Ariz. Op. Atty. Gen. No. I19-004 at 6 (Aug. 19, 2019) (rejecting interpretation that would encourage localities to "circumvent the constitutional spending limits"); Ariz. Op. Atty. Gen. No. I88-017 at 1 (Feb. 4, 1988) ("a political subdivision may not change the character of local revenues to excluded revenues by fiction"); Ariz. Op. Atty. Gen. No. I84-101 at 1 (July 17, 1984) (rejecting interpretation of capital levy exemption that would "wholly circumvent" the "narrow exceptions" to the spending limit).

involved—such as an inter vivos gift, bequest, trust distribution, or in-kind donation—has no significance to the purpose of the limit. The revenue *source*, on the other hand, matters to the limitation scheme. State tax programs are non-exempt because of the source of the money, not the type of transfer, involved.

Appellees attempt to avoid this problem by suggesting that the 1980 amendments were not intended to limit *all* taxation. Plucking publicity references to the "local tax burden" from context, Appellees say that Proposition 109 was intended only to limit "school district spending attributed to local property taxes." Ans. Brief ¶ 32 at 13-14; ¶ 52 at 28. That argument ignores that Proposition 109 was part of a multi-year effort to control the growth of government at all levels. *See Mountain States Legal Foundation*, 146 Ariz. at 480. It also ignores that several of the 1980 amendments specifically limited property taxation; by separately enacting the expenditure limitations, the voters expressed broader concerns.

But most importantly, Appellees' argument cannot stand against the plain language of the constitution. In 1980, schools were funded by state and county aid in addition to local property taxes. *See* 1974 Ariz. Sess. Laws 1344, 1380-93; *Sanders v. Folsom*, 104 Ariz. 283, 285-86 (1969) (summarizing school funding regime). Thus, when the voters approved spending limits applicable to "*all* monies, revenues, funds, property and receipts of *any kind whatsoever*," Ariz. Const. art. IX, § 21(4)(c) (emphasis added), they were not referring solely to local property tax

revenue. What they sought to avoid was excessive spending of "all monies . . . of any kind whatsoever" received by a school district, including state aid funded by the income tax, and thereby sought to restrain income taxation as well. The "most drastic, sweeping tax reform program ever undertaken in Arizona" makes no distinction among the *types* of taxation that voters were trying to control.

C. Proposition 208 Is Not Exempt From The Expenditure Limit.

Proposition 208 tax revenue cannot be exempt from the aggregate expenditure limitation under the foregoing principles. Intricate constitutional amendments designed to control the growth of government cannot realistically be subject to a general exemption for state income tax revenue, triggered merely by creative drafting. In Appellees' view, spending programs are always exempt if they merely direct funds to "specific purposes." Ans. Brief ¶ 44 at 23-24. That feature of Proposition 208—the lynchpin of Appellees' argument—may or may not qualify the revenue as a "grant" under cherry-picked dictionary definitions, but it has no relevance, and no economic significance, to the constitutional structure created by the 1978 and 1980 amendments.

A hypothetical illustrates this. The "grants" under Proposition 208 predominately fund teacher compensation and support personnel. A.R.S. § 15-1281(D). The state already funds this spending under existing law—these are "maintenance and operations" expenditures that are subsidized by state equalization

assistance.[15] If the legislature decided to increase state aid by an amount equivalent to that distributed under Proposition 208, funded by tax increases, the economic effect for districts and the public would be the same—but no one would characterize the new revenue as exempt from spending limits. Appellees specifically say that such an increase would *not* be exempt. Ans. Brief ¶ 42 n.13 at 22. There is no justification for treating the same revenue differently for purposes of the expenditure limitation, merely because the *form* of the spending legislation differs.

Aside from lacking economic substance, Appellees' theory begs the question—how "specific" must legislation be in order to qualify as an exempt grant? For example, under Proposition 208, 50% of the student support and safety fund is annually disbursed "for the purpose of [1] hiring teachers and [2] classroom support personnel and [3] increasing base compensation for teachers and [4] classroom support personnel." A.R.S. § 15-1281(D)(1). How to allocate the money among these four different purposes, and how to spend the money to accomplish each individual purpose, is left entirely to each district. Appellees' theory cannot explain

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[15] *See* Ariz. Auditor General, *Fiscal Year 2021 School District Annual Expenditure Budget Forms*, Page 1 (providing for payment of salaries out of the district's maintenance and operations fund), *available at* https://www.azauditor.gov/reports-publications/school-districts/forms (last visited Mar. 22, 2021); Ariz. Dep't of Education, *Annual Report of the Arizona Superintendent of Public Instruction, Fiscal Year 2019-2020* at 39 (Jan. 2021) ("Superintendent's Report") (state provided $3.57 billion to districts' maintenance and operations funds in fiscal year 2019-2020), *available at* https://www.azed.gov/finance/reports (last visited Mar. 22, 2021).

why that particular level of restriction, which leaves the districts with considerable discretion, is constitutionally "specific" enough to warrant an exemption.

Ironically, Appellees' theory could call indisputably-exempt grant programs into question. For example, federal grants under Title I-A of the Elementary and Secondary Education Act ("ESEA") must be used to "improve the performance of all students in a school"—hardly a model of specificity.[16] But more to the point, ESEA does not direct schools *how to spend* the money; for example, "funds might be used to provide professional development services to all of a school's teachers, upgrade instructional technology, or implement new curricula. . . . In general, schools have substantial latitude in how they use Title I-A funds, provided the funds are used to improve student academic achievement."[17] Appellees' theory cannot explain why these non-specific expenditures should be exempt as grants.

Conversely, Appellees' theory cannot explain why state aid that is indisputably *non-exempt* should *not* be treated as a grant. For example, basic state aid to school districts accounted last year for more than $4.6 billion in spending.[18] Appellees state, in passing, that such funding "does not function as a grant." Ans.

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[16] Congressional Research Service, *The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer* 3-4 (Aug. 18, 2020), *available at* https://crsreports.congress.gov/product/pdf/R/R45977 (last visited Mar. 22, 2021).
[17] *Id.*
[18] Superintendent's Report, *supra* note 15, at 14 (line item 5).

Brief ¶ 70 at 38-39. *See also id.* ¶ 42 n.13 at 22 ("base formula funding" is "subject to the Expenditure Cap"). But basic state aid seems to meet Appellees' definition of a grant—it transfers "specific amounts of money to specific recipients [school districts] for specific purposes [supporting the education of students in the district]." Ans. Brief. ¶ 44 at 24.

Indeed, the state calculates basic aid specifically to equalize educational opportunities among districts that are property-rich and property-poor. *Sanders*, 104 Ariz. at 286 (state aid provided "to raise the standards of education to an equal plane throughout the entire state and, similarly, to establish a uniform rate of tax in every school district in the state"); *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233 (1994). And these are not slush funds; districts must apportion them formulaically among operating and capital expenses set forth on detailed budget forms prescribed by the auditor general.[19] Tellingly, the auditor general categorizes equalization assistance as a "grant-in-aid" in its uniform accounting system, the same classification applied to federal grants.[20]

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[19] Ariz. Auditor General, *Uniform Accounting Manual for Arizona County School Superintendents* § III-C-4 ("Uniform Accounting Manual"), *available at* https://www.azauditor.gov/sites/default/files/UAMACSS.PDF (last visited Mar. 22, 2021).

[20] Uniform Accounting Manual, *supra* note 19, § III-C-1 ("Revenues from state sources include unrestricted grants-in-aid such as state equalization assistance").

These considerations illustrate the unworkability of Appellees' argument. The essential distinction among these various programs is simply the *number* of budget line items to which state and federal aid can be directed, an arbitrary distinction of no economic or constitutional significance. Appellees' insistence that these programs would continue to be treated differently under their view of the constitution is based on nothing more than the outcome they wish to achieve. That is a convenient litigation strategy, not an interpretive principle, and is particularly dangerous as applied to constitutional provisions governing billions of dollars in spending. Simply, no one can predict what result Appellees' interpretation will actually have. That injects considerable uncertainty into economic planning.[21]

D. Reading "Grants" To Exclude Tax Revenue Is Compelled By The Text Of The Constitution And Supported By Historical Practice.

The plain text of the constitution avoids the intractable problems created by Appellees' interpretation.

1. The text exempts only private donations.

Tax legislation is to be "liberally interpreted in favor of the taxpayer." *Sanders*, 104 Ariz. at 288. Liberal interpretation of *tax-limiting* legislation like

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[21] This is a statewide problem. The expenditure limitation for counties, cities, and towns contains identical grant exemption language, raising the possibility that *any* state tax surcharge that directs money to *any* political subdivision could fall within the exemption. *See* Ariz. Const. art. IX, § 20. Practically any government program could be structured that way, effectively nullifying all local expenditure limits.

section 21 necessarily requires a *narrow* reading of its exemptions. *See* Ariz. Op. Atty. Gen. No. I78-283 at 4 (Dec. 21, 1978) (interpreting exemptions narrowly in light of the legislation's purpose "to lessen the tax burden on Arizona taxpayers"); Ariz. Op. Atty. Gen. No. I81-009 at 3 (Jan. 5, 1981) (interpreting federal aid exemption narrowly not to include federally-subsidized rent payments). Particularly under this interpretive framework, the grant exemption cannot be read to authorize unlimited spending of state tax revenues.

Rather, consistent with its purpose to incentivize spending of *non-tax* revenue, the grant exemption is quite plainly limited to private donations:

> 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(c)(v) (emphasis added). The first point evident from these words is that "grants, gifts, aid or contributions" are exempt, *except* for contributions "received directly or indirectly in lieu of taxes." These are "contributions" that certain governmental entities, which are exempt from property tax, may choose to make. *See* A.R.S. § 48-242(A); Ariz. Op. Atty. Gen. No. I78-283 at 6 (Dec. 21, 1978). While the decision to make these contributions is voluntary, "[t]he amount of the contribution is determined in the same manner as the amount of ad valorem taxes are determined." *Dep't of Prop. Valuation v. Salt River Agricultural Improvement*

& Power Dist., 27 Ariz. App. 110, 112 (1976), *modified*, 113 Ariz. 472 (1976); A.R.S. § 48-242(B).

Because voluntary contributions are thus indistinguishable from taxes, this "exception to the exemption" evidences the voters' intention *not* to exempt tax-like revenue. Reading the provision to exempt *actual* tax revenue, like Proposition 208 funds, does not square with that intention. *See Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶ 13 (2011) (words must be "interpreted in context of the accompanying words"). Indeed, the exception for contributions in lieu of taxes was apparently added in response to a 1978 Attorney General opinion. *See* Ariz. Op. Atty. Gen. No. I78-283 (Dec. 21, 1978). The Attorney General had interpreted the "contributions" exemption to the 1978 state appropriations limit broadly enough to include contributions in lieu of taxes, a reading that he acknowledged was "irrational" in view of the purpose of the limit. *Id.* at 6. It also would be irrational—considerably more so—to exempt *actual* tax revenue.

The voters evidenced their intention to exclude taxes and tax-like revenue from the exemptions a second time, in the exemption for federal grants. *See* Ariz. Const. art. IX, § 21(c)(iv). Federal grants "and aid of any type" are exempt from the aggregate expenditure limitation, "except school assistance in federally affected areas." *Id.* This exception is similar to that for contributions in lieu of taxes, in that it covers payments received from the federal government to compensate school

districts "for the loss in revenue" attributed to federally-owned lands that are exempt from tax. *See* 20 U.S.C. § 7702(a)(2). As Appellees say, this exception "serves an equivalent purpose" to the exception for voluntary contributions in lieu of taxes. Ans. Brief ¶ 63 at 35. In view of these two exceptions, the will of the voters not to exempt tax revenue from the expenditure limitation is unmistakable.

But even setting that point aside, the exemption is plainly limited to funds "received directly or indirectly from any *private* agency or organization, or any *individual*." Ariz. Const. art. IX, § 21(c)(v) (emphasis added). Giving these words their "natural, obvious and ordinary meaning," *Apache Cnty v. Southwest Lumber Mills, Inc.*, 92 Ariz. 323, 327 (1962), one must conclude that the provision as a whole should be read, in pertinent part: "Any amounts or property received as grants, gifts, aid or contributions of any type . . . received directly or indirectly from any private agency or organization, or any individual."

In a footnote containing no analysis, Appellees instead read the final clause as part of the *exception* for voluntary contributions in lieu of taxes. Ans. Brief ¶ 31 n.3 at 13. Apparently, Appellees would apply the exception only to amounts received from *private* entities in lieu of taxes. *Id.* That is a curious interpretation, because private entities are not exempt from property tax and so would not make voluntary

contributions in lieu of taxes.[22] Because the hypothetical category, "amounts received . . . in lieu of taxes . . . received directly or indirectly from any private agency or organization, or any individual," is an empty set, the exception as interpreted by Appellees would impermissibly lack meaning. *Morissey v. Garner*, 248 Ariz. 408, 410 ¶ 8 (2020) (court must give meaning "to every word and provision") (quoting *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019)).

Indeed, Appellees say that the exception applies "most notably" to special improvement districts like SRP. Ans. Brief ¶ 31 n.3 at 13. Special districts are "political subdivisions of the state" and enjoy the status of "municipal corporations." Ariz. Const. art. XIII, § 7. In at least some contexts, this Court has fully equated them to public entities. *Adams v. Comm'n on Appellate Court Appointments*, 277 Ariz. 128, 133 ¶¶ 13-16 (2011) (district directors are "public officers" subject to same statutes and rules as county officials). While other cases have expressed less certainty about their legal status, never have they been described as wholly private. Thus, the framers of section 21 would not have used that word to capture entities like SRP in the exception. If anything, use of the word "private" creates an unnecessary risk that SRP would be *excluded* from the exception.

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[22] The list of entities that can make such contributions is limited. *See* A.R.S. § 36-1419(A) (housing authorities); A.R.S. § 48-6254(A) (theme park districts); A.R.S. § 48-242(A) (special improvement districts); A.R.S. § 9-432(A) (political subdivisions).

Because the final clause must mean something, it can only be read as qualifying the subject of the exemption itself: "amounts or property received as grants, gifts, aid or contributions of any type." Thus, only one rational reading of the grant exemption is permissible; it exempts "amounts or property received as grants, gifts, aid or contributions of any type . . . received directly or indirectly from any private agency or organization, or any individual." This cannot include Proposition 208 tax revenue received from the state.[23]

2. Tax money was purposefully excluded from the grant exemption.

Related parts of the constitution "must be read together." *Kilpatrick v. Superior Court*, 105 Ariz. 413, 419 (1970); *Herndon v. Hammons*, 33 Ariz. 88, 92 (1927) ("Different sections or provisions relating to the same subject must be construed together and read in the light of each other"). Where the framers of section 21 intended to exempt revenue from a public source, they plainly said so. *See* Ariz. Const. art. IX, § 21(c)(iv) (grants from the federal government); (c)(vi) (funds received from the state "for the purpose of purchasing land"); (c)(x) ("tuition or fees"

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[23] For sake of completeness, another reading is possible: the final clause could qualify the last antecedent, the word "taxes," but the result would be nonsensical. The "taxes" are amounts that were *not* paid; the person instead made a contribution "in lieu of taxes." Taxes that are not paid cannot be "received." Thus, "the grammatical rule of the last antecedent" must yield to "the clear intent of the legislature," which does not intend absurd or meaningless results. *Town of S. Tucson v. Pima County Bd. of Supervisors*, 52 Ariz. 575, 584 (1938) (declining to adopt "last antecedent" construction).

received "from any *public* or private agency or organization or any individual") (emphasis added); (c)(xi) (ad valorem taxes received pursuant to special election); (d)(v) (Proposition 301 money); (d)(vi) (Proposition 300 money).

In contrast, no reference to public source appears in the grant exemption. In fact, it conspicuously *omits* the word "public" found in the exemption for tuition and fees, despite using otherwise-identical language. "Where the legislature has used a particular term in one place in a statute and has excluded it in another place in the same statute, a court should not read that term into the provision from which the legislature has chosen to omit it." *Arizona Dep't of Revenue v. General Motors Acceptance Corp.*, 188 Ariz. 441, 445 (App. 1996). *See also Whitney v. Bolin*, 85 Ariz. 44, 47 (1958) ("the enumeration of certain specified things in a constitution will usually be construed to exclude all other things not so enumerated"); *Morissey*, 248 Ariz. at 410 ¶ 8 (omission of "cities" from list of political entities in constitution construed as intentional).

Conversely, the grant exemption to the state appropriations limit (enacted at the same time as section 21) does *not* include the reference to private sources found in the school district grant exemption.[24] *See* Ariz. Const. art. IX, § 17(b)(vi) ("Any amounts received as grants, aid, contributions or gifts of any type, except voluntary

[24] While the appropriations limit was adopted two years earlier than the school district aggregate expenditure limitation, it did not define "state revenues" or any exemptions until it was amended in 1980. *See* note 2, *supra*.

contributions or other contributions received directly or indirectly in lieu of taxes”). That omission evidences two points. First, it strongly suggests that the “private source” clause of the school district exemption does not modify the *exception* for contributions in lieu of taxes. The same exception, unmodified, appears in section 17, and there is no reason to believe the exception should mean something different in each provision. Second, section 17 *also* does not include a separate exemption for federal grants, consistent with its grant exemption not being limited to private sources. The fact that section 21 *does* include a separate federal grant exemption indicates that use of the word “private” in section 21, subsection (c)(v) was intended to exclude public sources. When read in harmony with each other, these related parts of the constitution lead to the conclusion that Proposition 208 tax revenue is not exempt.

3. Historical practice confirms that grants do not include tax money.

Amici are not alone in reading the constitution this way. In its *Uniform Expenditure Reporting System Manual*, the auditor general has explicitly stated that “[g]rants, aid, contributions, or gifts, *from a private agency, organization, or individual*, except amounts received in lieu of taxes,” are exempt from the constitutional expenditure limits.[25] The auditor general promulgated this definition

[25] Ariz. Auditor General, *Uniform Expenditure Reporting System Manual* § VI-18 (Jan. 2016) (emphasis added), *available at*

pursuant to its statutory mandate to "prescribe a uniform expenditure reporting system for all political subdivisions subject to the constitutional expenditure limitations prescribed by article IX, sections 20 and 21, Constitution of Arizona." A.R.S. § 41-1279.07(A).

The auditor general's reading is not binding, but merits consideration. *Bolin v. Superior Court*, 85 Ariz. 131, 136 (1958) (interpreting election provisions of constitution consistently with historical practices of elections department). The legislature granted the auditor general broad powers to "prescribe definitions for terms," and mandated that localities "shall comply" with the auditor general's system. A.R.S. § 41-1279.07(B); A.R.S. § 41-1279.07(G). Failure to comply may be remedied by injunctive relief, criminal sanctions, and withholding of revenue by the treasurer.[26] A.R.S. § 41-1279.07(H); A.R.S. § 41-1279.07(I). Thus, the auditor general's interpretation of the grant exemption has effectively the force of law.[27]

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https://cottonwoodaz.gov/DocumentCenter/View/169/Uniform-Expenditure-Reporting-System-PDF (last visited Mar. 22, 2021).

[26] *See also* Ariz. Op. Atty. Gen. No. I84-153 (Nov. 1, 1984) (summarizing remedies available to the auditor general); Ariz. Op. Atty. Gen. No. I84-072 (May 17, 1984) (same).

[27] School districts do not submit uniform expenditure reports, because their limitation is an *aggregate* one. Nevertheless, the exemptions applicable to school districts are within the scope of the auditor general's mandate, since they appear in section 21 and also bind community college districts, which do submit uniform reports. A.R.S. § 41-1279.07(A). Further, the counties' grant exemption, also within the auditor general's mandate, is identical to that for school districts. Ariz. Const. art. IX, § 20(3)(d)(v).

The department of education—and many others—also likely believed that the grant exemption does not cover state taxing programs, when considering whether tax revenue raised under legislation similar to Proposition 208 could be lawfully spent. In 2000, the legislature created a "classroom site fund" that would be distributed to school districts each fiscal year pursuant to a statutory formula. *See* A.R.S. § 15-977. Like Proposition 208's student support and safety fund, the classroom site fund was to include monies collected from voter-approved tax increases.[28]

On June 29, 2001, the Attorney General issued an opinion that the legislature could not exempt these (or any) funds from the constitutional definition of "local revenues" for purposes of the school district expenditure limitation. Ariz. Op. Atty. Gen. No. I01-015 at 2 (Jun. 29, 2001). Thus, the department of education concluded that classroom site fund monies would exceed the limitation by $122 million, and that a concurrent resolution to exceed the limit was "absolutely necessary" to make the funds flow.[29] *See* Ariz. Const. art. IX, § 21(3) (permitting the legislature to authorize excessive expenditures).

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[28] Ariz. Sec. of State, Publicity Pamphlet for 2000 General Election 172, *available at* https://azmemory.azlibrary.gov/digital/collection/statepubs/id/35611 (last visited Mar. 22, 2021).

[29] *Minutes of the Senate Comm. on Finance*, 45th Leg., 3d Spec. Sess. at 2, 3 (Feb. 28, 2002); *Minutes of the House Comm. on Ways & Means*, 45th Leg., 2d Reg. Sess. at 8 (Feb. 12, 2002).

Thereafter, the legislature proposed two constitutional amendments to permanently exempt the new tax monies from the expenditure limitation.[30] In support of the amendments, the Arizona Education Association, the Arizona Association of School Business Officials, the Arizona School Boards Association, Governor Hull, and the superintendent of public instruction all agreed that the new tax revenue, absent the proposed amendments, "would go unused" because it would exceed the expenditure limitation.[31] The amendments passed, and the classroom site fund is now specially exempt. Ariz. Const. art. IX, § 21(d)(v) and (vi). No one took the position that the amendments were unnecessary because the spending was already exempt as a grant.[32]

While not binding, the views of the legislature, the superintendent, the department of education, and the governor may be considered. *Fairfield v. Foster*, 25 Ariz. 146, 151 (1923) (interpreting the constitution, courts "may consider among other things, the meaning previously given it by co-ordinate branches of the government"); C*arpio v. Tucson High School District No. 1 of Pima County*, 21 Ariz. App. 241, 244 (1974) (legislature's interpretation has persuasive value),

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[30] Ariz. Sec. of State, Publicity Pamphlet for 2002 General Election 19-20, *available at* https://azmemory.azlibrary.gov/digital/collection/statepubs/id/35612 (last visited Mar. 22, 2021).

[31] *Id.* at 20-23.

[32] *Minutes of the House Comm. on Ways & Means*, 45th Leg., 2d Reg. Sess. at 6-7 (Mar. 19, 2002).

vacated on other grounds, 111 Ariz. 127, 524 (1974). Each of these likely believed that state tax dollars used to fund education were not exempt from the limitation in 2002.

Appellees say that *their* interpretation is supported by past practice, citing several state grant programs that, they claim, the department of education ("ADE") excludes from the aggregate expenditure limitation. Ans. Brief ¶¶ 53-55 at 29-30. *See also* Brief of Amicus Curiae Arizona School Boards Association (3/19/21) ("ASBA Brief") at 8-9. The cited evidence is unclear; it consists only of numbers on an "Aggregate Expenditures Report" that the Alhambra Elementary District submitted to ADE last year. *See* APPV2-035; SA087-89. What these numbers mean, and how they prove ADE's position, is not explained, except in conclusory fashion.

Taking Appellees at their word—that amounts listed under the "Excluded Funds" portion of the report are not included in the limits calculation—leads to confusing and inconsistent results. For example, Appellees affirmatively state that federal impact aid is *not* exempt from the expenditure limit. Ans. Brief ¶ 63 at 35. Yet, reviewing a report from a random district that receives impact aid—the Sacaton Elementary District—reveals that such aid is listed under "Excluded Funds" and

would therefore be *exempt* under Appellees' reading of the report.[33] These inconsistencies cast doubt on Appellees' argument.

More to the point, the program examples given by Appellees do not prove their argument. Appellees highlight the "instructional improvement fund," which is nothing like Proposition 208. It consists of "monies deposited pursuant to §§ 5-601.02(H)(3)(a)(i) and 5-601.02(H)(3)(b)(i), and interest earned on those monies." A.R.S. § 15-979(A). These are "contributions" that Indian tribes have contractually agreed to pay "for the benefit of the public" in consideration of the state incurring costs to regulate Indian gaming, and in exchange for "substantial exclusivity covenants." A.R.S. § 5-601.02(H); A.R.S. § 5-601.02(I)(6)(b)(vii)(a), (b).[34]

Thus, unlike Proposition 208 funds, instructional improvement fund monies are *not* tax revenues, but commercial revenue that is exempt as "amounts received

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[33] *Compare* Sacaton Elementary District, *Aggregate Expenditure Report for Fiscal Year 2019* (showing expenditures of $11,836,508 in "federal projects funds" under "excluded funds" portion of report), *available at* http://www.ade.az.gov/SFSInbound/4449/Reports/2019_BUDGAGD_4449_1031201872319.PDF (last visited Mar. 22, 2021), *with* Sacaton Elementary District, *Fiscal Year 2019 Expenditure Budget*, page 6, lines 7-24 (reporting $11,836,508 in "federal projects funds" including $9,500,000 in "impact aid"), *available at* https://www.ade.az.gov/Budget/SubmittedFileStatus/SubmittedFileStatus.asp?NS=True&DR=5&FY=2019&TVR=&RPP=1&PC=&Subm=True&btnSubmit=++++Go%21++++ (last visited Mar. 22, 2021).

[34] *See also* Ariz. Auditor General & Ariz. Dep't of Education, *Uniform System of Financial Records for Arizona School Districts* § III-6 (Jan. 2021) (account for instructional improvement fund monies "accounts for monies received from gaming revenue"), *available at* https://www.azauditor.gov/reports-publications/school-districts/manuals-memorandums (last visited Mar. 22, 2021).

as . . . fees directly or indirectly from any public or private agency or organization." Ariz. Const. art. IX, § 21(x). Even if ADE exempts these amounts as grants (which has not been established), the department would have an arguable basis for doing so, because the money originates from a commercial source. Either way, treating this fund as exempt proves that *source* matters under the constitution. Excluding funds received from the commercial operations of an Indian tribe controls government expansion. Excluding Proposition 208 tax revenue does not.

Appellees also focus on the "Results-Based Funding Fund." Ans. Brief ¶¶ 53-55 at 29-30. This is a state program funded by legislative appropriations. A.R.S. § 15-249.08(A). This program does not obviously qualify under Appellees' definition of a grant. Funds from the program must be used for "strategies to sustain outcomes for students at that school." A.R.S. § 15-249.08(D). How this amounts to a "specific purpose" any more "specific" than basic state aid is not explained. *See* Ans. Brief ¶ 44 at 23-24. Whether or not ADE treats these funds as exempt bears little relation to Appellees' interpretation of the constitution.

In sum, there is no compelling evidence that limiting the grant exemption to private sources will upset any settled practice, let alone "throw the school finance system into chaos." Ans. Brief ¶ 58 at 31-32. Aside from the instructional improvement fund (which is plainly exempt as commercial revenue), the state programs referenced in the Answering Brief and in the ASBA Brief collectively

account for approximately $73 million in state spending last year, or 1.2% of total state appropriations for school districts. Superintendent's Report, *supra* note 15, at 14. Including federal aid, county aid, and property tax revenue, in addition to state aid, school districts reported total revenue of $10.2 billion in fiscal year 2019-2020. *Id.* at 4. The state programs referenced by Appellees thus account for 0.7% of total school district revenue. Even assuming that ADE presently treats *all* of these programs as exempt under an erroneous interpretation of the grant exemption, faithfully applying the constitution to 0.7% of total revenue will hardly cause "chaos" in the budget process.

Indeed, Appellees' "chaos" argument seems inconsistent with their argument that this dispute is unripe. *See* Ans. Brief ¶¶ 35-42 at 16-22. Including the instructional improvement fund, they claim that approximately $110 million in annual spending is attributed to state programs that are presently treated as exempt. ASBA Brief at 10. If moving $110 million to the "non-exempt" column will cause "chaos" because districts will exceed the limit, then surely more than $800 million in new spending under Proposition 208 will do the same. It is to that point that amici now turn.

III. PROPOSITION 208 CANNOT DELIVER ON ITS PROMISES TO ARIZONA.

Proposition 208 revenue will almost certainly cause school district spending to exceed the constitutional limit in the near term, meaning that hundreds of millions

of taxpayer dollars will be locked up in government back accounts, unable to be spent. Perhaps recognizing the negative consequences of such an outcome for the state, Appellees have suggested, conveniently, that the limit as calculated by the Commission might be *understated* by hundreds of millions of dollars. That argument fundamentally misunderstands the Commission's role.

A. Proposition 208 Will Waste Resources By Amassing Revenue That Cannot Be Spent.

Under Arizona law, "[o]n or before November 1 of each year, the state board of education shall determine and report to the president of the senate, the speaker of the house of representatives and the chairman of the joint legislative budget committee the aggregate expenditures of local revenues . . . for all school districts for the current year." A.R.S. § 15-911(B). In January 2021, the joint legislative budget committee ("JLBC") reported the board's computation that budgeted expenditures would exceed the aggregate limitation by $138,863,800 in fiscal year 2020-2021.[35]

Because Proposition 208 funds are not yet available to school districts, current expenditures were projected to exceed the limit without taking into account a single surcharge dollar. Further, because the constitutional spending cushion has shrunken

[35] Joint Legislative Budget Committee, *Fiscal Year 2022 Baseline Book* 188 (Jan. 2021), *available at* https://www.azleg.gov/jlbc/22baseline/22BaselineSingleFile.pdf (last visited Mar. 22, 2021).

consistently for the past several years, the projected overage is likely to grow. The gap between spending and the limit shrank from $672.6 million in fiscal year 2017-2018, to $317.3 million in 2018-2019, and to $49.3 million in fiscal year 2019-2020, before evaporating this year.[36] Thus, it is unlikely that any of the $827 to $940 million in *additional* Proposition 208 revenue will be available for school districts to spend at any time in the near future.[37]

Appellees suggest that these figures are inaccurate, because ADE reported last month that revised revenue numbers were significantly below the limit due to "declining enrollment and online learning." Ans. Brief ¶ 36 at 17-18. Granted, government orders in a once-in-a-lifetime pandemic largely shuttered in-person learning (and everything else) last year. As a result, more than a third of districts reported 100% distance-learning enrollment in January 2021; approximately half reported more than 90%.[38]

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[36] *Compare id. with* Joint Legislative Budget Committee, *Fiscal Year 2020 Appropriations Report* 170 (Jun. 2019), *available at* https://www.azleg.gov/jlbc/20AR/FY2020ApropRpt.pdf (last visited Mar. 22, 2021).

[37] *See* Joint Legislative Budget Committee, *Ballot Proposition 208 Invest in Education Act Fiscal Analysis* ("JLBC Analysis"), *available at* https://www.azleg.gov/jlbc/20novI-31-2020fn730.pdf (last visited Mar. 22, 2021).

[38] Ariz. Dep't of Education, *FY2021 Distance Learning Base Support Level Adjustments* (Dec. 17, 2020), *available at* https://www.azed.gov/finance/fy2021-distance-learning-adjustments-base-support-level (last visited Mar. 22, 2021).

Because districts receive less state funding for pupils enrolled in distance learning, revenues decreased by approximately $266 million from the original budgets.[39] These unusual events do not suggest a deviation in the trend toward exceeding the limit. What is most remarkable about them is that, even in the midst of catastrophe, the space under the limit ($144 million) is *still* nowhere close to what it was just three years ago ($672 million).[40]

Notably, the Commission's preliminary estimate for the 2021-2022 expenditure limit is approximately $290 million *less* than this year's limit, due to lower student enrollment.[41] Particularly in view of that fact, and the governor's recent executive order reinstating in-person instruction in most districts effective March 15, 2021, expenditures remain virtually certain to exceed the limit next year, by a large margin, without regard to Proposition 208—as Appellees' finance expert, Chuck Essigs, recently reported to the *Arizona Capitol Times*.[42]

Unspent Proposition 208 funds "do not revert to the state general fund." A.R.S. § 15-1281(A). Thus, what was billed as the "Invest in Education Act" will

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[39] *Id.* (sum of column K, "DL Adjustment"). *See also* SA113.
[40] *See* SA113 (reporting an expenditure limitation of $6,309,587,438, and revised budgeted expenditures of $6,165,430,899, for a difference of $144,156,539).
[41] Report from the Commission to Hon. D. Ducey, Hon. K. Fann, & Hon. R. Bowers (2/24/21), available at https://azdor.gov/sites/default/files/media/REPORTS_ESTIMATES_2022_SchoolDist-Feb21.pdf (last visited Mar. 22, 2021).
[42] Executive Order 2021-04; Yellow Sheet Report (3/16/21) at 2.

likely invest little in anything. Rather, it will drain resources out of the Arizona economy, making them un-spendable. First interpreting the state appropriations limit more than 40 years ago, the Attorney General rightly opined that the accumulation of tax dollars "which cannot constitutionally be spent" is "an absurd result." Ariz. Op. Atty. Gen. No. I78-283 at 6 (Dec. 21, 1978).

At the same time, Arizona now has a top marginal income tax rate (the most important tax statistic for economic development) that is higher than all but eight other states.[43] Previously, our top marginal rate was 39th highest in the nation.[44] Such a dramatic change will predictably slow economic growth. While voters were entitled to decide that these are acceptable tradeoffs for better education funding, Proposition 208 will *not* increase education funding, without difficult yearly fixes by the legislature (requiring a two-thirds vote of the membership of each house) or a constitutional amendment.[45]

Perversely, Proposition 208 could have negative effects on education funding over time, as slower growth and taxpayer migration shrink the tax base on which the

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[43] Tax Foundation, *State Individual Income Tax Rates and Brackets for 2021* (2/16/21), available at https://taxfoundation.org/publications/state-individual-income-tax-rates-and-brackets (last visited Mar. 22, 2021); JLBC Analysis, *supra* note 37, at 4.

[44] *Id*.

[45] Ariz. Const. art. IX, § 21(3). Appellees state that legislative overrides have been successful only twice in 40 years. Ans. Brief ¶ 38 at 21 n.12.

funding system depends.[46] The tax filers impacted by Proposition 208 already account for 24% of the income taxes paid in Arizona, so a small change to that base could disproportionately reduce total collections. Again, voters could have decided to accept that risk to secure immediate funding, but no such funding will materialize. In sum, because Proposition 208 runs afoul of the constitutional expenditure limitation, it will inflict all of its unintended harms on Arizona, but deliver none of the promised goods.

B. The Commission Has Been Correctly Calculating The Expenditure Limitation.

Appellees seek to avoid the likely outcomes described above by changing the rules of the game. They argue that "there may be hundreds of millions of dollars of space under the Expenditure Cap because of the Commission's failure to adjust it to account for transitions in responsibility for large components of school district spending." Ans. Brief ¶ 36 at 19. Then, in a footnote, Appellees say that the Commission has a "mandatory duty" to adjust the expenditure limit to reflect the transfer of "governmental functions . . . to or from school districts." *Id.* n.11. Crediting the same argument, the superior court opined that a "key factual question"

[46] *See* JLBC Analysis, *supra* note 37, at 1, 4-5 (noting impacts to general fund if taxpayers leave or shift income out of the state, and "reduced business investment"). Notably, JLBC's analysis did not account for the loss of high-income taxpayers who would otherwise have moved *to* Arizona, but will now stay away.

is whether the Commission "has been calculating the expenditure limits correctly." APPV2-114.

But Appellees' contention presents no factual questions—it presents an erroneous legal interpretation of the constitution. As previously discussed (*supra* at page 5), the Commission annually calculates the expenditure limit by adjusting the 1979-1980 base limit to account for changes in the cost of living and the student population. But "[i]n the case of a transfer of all or any part of the cost of providing a governmental function," the base limit also may be adjusted "to reflect the transfer by increasing the base limit of the [political subdivision] to which the cost is transferred and decreasing the base limit of the [political subdivision] from which the cost is transferred by the amount of the cost of the transferred governmental function." A.R.S. § 41-563(D); Ariz. Const. art. IX, § 21(5). For two reasons, the superior court erred in finding a disputed factual question under section 21(5).

First, the constitution provides that adjustments should be made "in a manner prescribed by law"—meaning it is the legislature's prerogative to decide that a qualifying "transfer" has occurred, not the Commission's. Ariz. Const. art. IX, § 21(5); Ariz. Op. Atty. Gen. No. I87-081 at 1 (June 4, 1987) (section 21 "is not self-executing"). Consistent with the text, adjustments to account for transferred

governmental functions have historically been mandated by legislation.[47] In fact, the Attorney General has opined that the Commission *cannot* adjust the state appropriations limit, under a nearly-identical provision, absent authorizing legislation. Ariz. Op. Atty. Gen. No. I79-227 (Aug. 16, 1979). In sum, the Commission performs mathematical calculations; it does not investigate changes to government programs or exercise judgment as to what the limit should be.

In the superior court, Appellees presented no evidence that the legislature has directed the Commission to adjust the base limit to reflect "transitions in responsibility for large components of school district spending," Ans. Brief ¶ 36 at 19, and indeed it has not. Thus, Appellees have not raised a factual question about the accuracy of a particular calculation but, rather, would have the Court hold that the Commission, as a matter of law, must investigate and independently judge whether a qualifying "transfer" has occurred somewhere in the government and, if so, how to account for it. That fundamentally misunderstands the Commission's role.

[47] *E.g.*, 1991 Ariz. Sess. Laws 1593-94; 1991 Ariz. Sess. Laws SS4-19-20; 1992 Ariz. Sess. Laws 1505; 1993 Ariz. Sess. Laws 1749; 1994 Ariz. Sess. Laws 2459; 1995 Ariz. Sess. Laws 2350; 1996 Ariz. Sess. Laws 2057; 1997 Ariz. Sess. Laws 2978; 1998 Ariz. Sess. Laws 2278; 1998 Ariz. Sess. Laws 2390; 1999 Ariz. Sess. Laws 634; 2000 Ariz. Sess. Laws 356; 2002 Ariz. Sess. Laws 1704; 2003 Ariz. Sess. Laws 1305; 2004 Ariz. Sess. Laws 1092; 2005 Ariz. Sess. Laws 1512; 2006 Ariz. Sess. Laws 1505; 2010 Ariz. Sess. Laws 1287; 2011 Ariz. Sess. Laws 364; 2013 Ariz. Sess. Laws 1323.

The superior court's failure to reject this incorrect legal argument, under the guise that it raised a factual question, was error.

Second, the constitution *does not permit* an adjustment to reflect "transitions in responsibility for large components of school district spending." Ans. Brief ¶ 36 at 19. Rather, there must be a "transferred governmental function" in order to activate the adjustment provisions. A.R.S. § 41-563(D). When a qualifying transfer takes place, the base limit increases for the political subdivision that assumes the function, and decreases for the political subdivision that transfers the function. *Id.* Thus, an upward adjustment of "hundreds of millions of dollars" for all school districts would be permissible only if school districts were to assume new governmental functions—for example, maintaining the roads within their boundaries, or providing police and fire services. *See* Ariz. Op. Atty. Gen. No. I19-004 at 2 (Aug. 19, 2019) (limit may be adjusted "for any transfer of government programs").

But Appellees showed no such transfer. Rather, they pointed only to statutory changes in "school district funding sources." APPV2-114. Specifically, they argued that certain capital expenses previously funded by county levy are now funded in part by state aid. APPV2-033 ¶ 15. The division of responsibility between the state and the county for funding school districts bears no relation to the *functions* that districts must perform. How districts are *funded*, and what *functions* districts must

perform, are separate questions. For example, when asked to opine whether "the withdrawal of federal funding to Arizona counties, cities, and towns" activated the adjustment provision, the Attorney General answered no; "withdrawal of federal funds does not affect the computation or adjustment of expenditure limitations." Ariz. Op. Atty. Gen. No. I88-019 at 1 (Feb. 12, 1988). Similarly, that school districts now get their money in different proportions from the state and the county than they did in 1979 should not increase their expenditure limitation, because they have not assumed *functions* from another political entity.

In an unrelated section of their brief, Appellees give an example of an historical adjustment to the state appropriations limit that, ironically, confirms both of amici's constitutional points. *See* Ans. Brief ¶¶ 64-65 at 36-37 (discussing Students FIRST legislation). In 1998, the state "assum[ed] financial responsibility for the costs associated with the construction of capital facilities" for school pupils, and prohibited school districts from levying secondary property taxes to pay for such facilities. 1998 Ariz. Sess. Laws 2490. Accordingly, the legislature directed the Commission to increase the state appropriations limit, but made no change to the school district expenditure limitation. *Id.* at 2491.

This episode confirms *both* of the points discussed above pertaining to the correct interpretation of the adjustment provisions. First, the legislature decides when to make an adjustment, and directs the Commission to act; the Commission

does not act *sua sponte* in these matters. Second, changes in funding sources do not affect the school district expenditure limitation.

Notably, Arizona's school funding system is complex, and changes nearly every year. If every recalibration in funding sources required an adjustment to the base limit, stakeholders would demand adjustments constantly. But, despite holding open meetings under Arizona law, amici have never received such a demand. Thus, what the superior court characterized as a "key factual question" is not a factual question at all, nor is it reasonably debatable as a legal matter. The Commission has correctly performed its statutory function, calculating an aggregate school district expenditure limitation that spending under Proposition 208 will surely exceed.

Conclusion

Exempting Proposition 208 tax revenue from the constitutional spending limit is inconsistent with the text, purpose, and historical application of section 21, and would inject considerable uncertainty into school finance planning. Correctly treated as non-exempt, Proposition 208 tax revenue will be un-spendable absent difficult legislative fixes. The Court should confirm these points as a matter of law.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

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Disclosure of Sponsor

Pursuant to Ariz. R. Civ. App. P. 16(b)(3), the undersigned states that no third person or entity is sponsoring this brief, and that no third person has provided financial resources for the preparation of the brief.

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The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 9,348 words according to the word count of the word processing system used to prepare the brief. The brief to which this Certificate is attached does not exceed the word limit that is set by Ariz. R. Civ. App. P. 14(a)(4).

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Certificate of Service

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