**ARIZONA SUPREME COURT**

KAREN FANN, an individual; RUSSELL "RUSTY" BOWERS, an individual; DAVID GOWAN, an individual; VENDEN LEACH, an individual; REGINA COBB, an individual; JOHN KAVANAGH, an individual; MONTIE LEE, an individual; STEVE PIERCE, an individual; FRANCIS SURDAKOWSKI, M.D., an individual; NO ON 208, an Arizona political action committee; ARIZONA FREE ENTERPRISE CLUB, an Arizona non-profit corporation,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KIMBERLY YEE, in her official capacity as Arizona State Treasurer; ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona,

Defendants-Appellees,

and

INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN), a political action committee; DAVID LUJAN, an individual,

Intervenor-Defendants-Appellees.

No. CV 21-0058-T/AP

Court of Appeals No. 1 CA-CV 21-0087

Maricopa County Superior Court
No. CV2020-015495
No. CV2020-015509
(Consolidated)

# Appellants' Reply Brief

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## INTRODUCTION

The constitutional defects in Proposition 208 are straightforward. The State—joined by Governor Doug Ducey and Treasurer Kimberly Yee—concur that the legal issues raised in the appeal need immediate resolution. Intervenors' effort to delay resolution through irrelevant "factual issues" fails. This Court can and should conclude that Proposition 208's plain meaning violates the Arizona Constitution. *See Molera v. Hobbs* (*Molera II*), 250 Ariz. 13, 20 ¶ 11 (2020) (expert testimony unnecessary for legal questions).

On its face, the initiative attempts to "exempt" itself from any spending cap, including "article IX, section 21, Arizona constitution." A.R.S. § 15-1285. Intervenors brush this unconstitutional provision aside, repeating an argument that the superior court did not accept—*i.e.*, that an exception in article IX, section 21 for "grants, gifts, aid or contributions" encompasses Proposition 208's mandatory, unqualified transfer. Neither plain meaning nor any relevant canon of construction supports that view. Proposition 208 is simple: with immaterial exceptions, the Proposition transfers money from taxpayers to school districts. That was the bargain presented to voters. And although the State recognizes that the Proposition rises and falls as a whole, State Br. 4, Intervenors now attempt to explain how the ability to spend the full haul from Proposition 208's new tax was somehow not the "inducement" for the act, such that its tenuous majority would have held if voters

had known that hundreds of millions of dollars could not be spent as advertised, IIE Br. 47. That was *not* the bargain presented to voters, and arguing severability to create such a law is inviting "gross judicial legislation." *Millett v. Frohmiller*, 66 Ariz. 339, 343 (1948).

Along the same lines, Proposition 208 is an "act" that provides "a net increase in state revenues." Ariz. Const. art. IX, § 22. The superior court erred in holding that an initiative like the Invest in Education Act cannot be an "act." Intervenors cite a single case purporting to hold otherwise, IIE Br. 50 (citing *Barth v. White*, 40 Ariz. 548 (1932)), but plain meaning and precedent both before and after *Barth* confirms that initiatives are "acts" subject to article IX, section 22, *see* Opening Br. (OB) 31 (collecting cases); *Tillotson v. Frohmiller*, 34 Ariz. 394 (1928). Like many provisions in the Constitution, article IX, section 22 exists to protect individual rights. It does so by prescribing a single path for "any act" that would increase taxes on Arizonans, and that path is purposefully demanding.

This Court has already recognized the importance of this case for Arizona's constitutional structure. The people's initiative power is part of that structure, as are the limitations in article IX. When the people act through statutory initiative rather than constitutional amendment, the Constitution supersedes any policy preference. Proposition 208 needed to be a constitutional amendment. Because it was not, this Court should reverse the decision below and enter the requested injunction.

## ARGUMENT

### I. PROPOSITION 208 VIOLATES ARTICLE IX, SECTION 21 AND SHOULD BE ENJOINED.

#### A. Proposition 208 Cannot Bypass the Constitutional Spending Caps for "Local Revenues."

Article IX, section 21 defines local revenues broadly: "all monies, revenues, funds, property and receipts of any kind whatsoever." Ariz. Const. art. IX, § 21(4). The drafters of Proposition 208 realized that the Constitution's spending limits would debilitate the act, so they included a provision declaring that "monies received by school districts . . . are *not* considered local revenues for the purposes of article IX, section 21, Arizona constitution." A.R.S. § 15-1285(E) (emphasis added). That strategy makes sense, but statutes—whether enacted by the people or the elected legislature—cannot opt out of constitutional provisions.

Everyone who considered article IX, section 21's applicability advised the proposition's backers that the self-exemption was unconstitutional—the Legislative Council, Plaintiffs, and the superior court in *Molera v. Hobbs*, No. CV2020-007964 (Jul. 31, 2020).

Intervenors do not defend the constitutionality of A.R.S. § 15-1285. They now argue instead that it is surplusage because Proposition 208's transfers to school districts fit within the grant/gift exception. IIE Br. 23–39. That argument is unpersuasive.

The primary plank in their argument is that certain dictionary definitions of "grant" do not necessarily include an element of discretion or qualification in the awarding of a grant. IIE Br. 24. Intervenors omit the examples accompanying their favored definitions, which confirm the ordinary usage and undermine their rule-swallowing definition: "They'd got a special grant to encourage research." (Collins Dictionary). This expectation that recipients must qualify for grants also matches the only case that either party has cited for an "ordinary meaning" of grant: "[T]he ordinary meaning of the word . . . grant is a 'gift-like transfer.'" *Wilmar Trading Pte Ltd. v. United States*, 466 F. Supp. 3d 1334, 1344 (Ct. Int'l Trade 2020). Intervenors attempt to distinguish *Wilmar* because it interpreted a statutory provision irrelevant to the current case, IIE Br. 27, but that argument is unavailing because *Wilmar* expressly applied the "ordinary meaning" to that provision, just as this Court should do for Proposition 208. Intervenors do not cite any precedent treating a mandatory, unqualified transfer as a grant. Arizona taxpayers who use language in its normal way would be surprised to learn that their taxes were actually grants or gifts instead of the commonly understood "revenue."

In fact, even the definition Intervenors cite from Grants.gov belies their argument: "grants that must be awarded to each *eligible applicant* . . . based on the *conditions* defined in the authorizing statute." *Id.* n.15 (emphasis added).

Proposition 208 does not require an application and does not impose any conditions. It is simple tax revenue.

Even assuming for the sake of argument that some dictionary definitions are consistent with Intervenors' definition, that circumstance would merely shift the analysis to the canons of construction, which weigh unanimously in Plaintiffs' favor. *Saguaro Healing LLC v. State*, 249 Ariz. 362, 364–65 ¶ 13 (2020) (using statutory context to select among dictionary definitions).

First, *noscitur a sociis* confirms that the word "grants" takes meaning from the other words in the list of which it is a part: "gifts, aid, or other contributions of any type." OB 11–12. Intervenors seize on the series qualifier—"of any type"—but do not explain how the variety of permissible gifts (*e.g.,* cash, land, in-kind) changes the meaning. IIE Br. 33; *see generally Ariz. Pub. Serv. Co. v. Town of Paradise Valley*, 125 Ariz. 447, 450 (1980) ("In accordance with the rule of *ejusdem generis*, such terms, as 'other,' 'other thing,' 'others,' or 'any other,' when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described."). Intervenors also assert that Proposition 208's payments are, in fact, discretionary because voters exercised discretion in adopting the statute. IIE Br. 33. But that argument proves too much. Lawmakers always have a choice in adopting new taxes; discretion or criteria-

satisfaction must exist in connection with *spending* the funds in order to fall within the grant/gift exception.

Second, if grants encompassed every payment from the government, then the neighboring exceptions would be superfluous. OB 13. Intervenors respond that those exceptions—for federal grants and for state grants related to capital projects—serve important purposes. IIE Br. 35–38. Exactly. Plaintiffs' point—and the point of the anti-superfluousness canon—is that reading the grant/gift exception as broadly as Intervenors propose would render those provisions unnecessary. *State v. Tarango*, 185 Ariz. 208, 212 (1996). In fact, the neighboring provisions imply that the grant/gift exception exists for private grants.

Third, and related, construing the grant/gift exception as Intervenors advocate would stretch that exception to swallow the rule embodied in article IX, section 21. OB 13–14. Without the limiting construction that Plaintiffs have documented, every payment to a school district could be labeled a "contribution" or "aid." Moreover, drafters of future initiatives could simply use the word "grant" and avoid article IX, section 21. Intervenors are silent on this point.

The tools of statutory construction foreclose the possibility that Proposition 208's transfers to school districts fit within the grant/gift exception. The superior court erred in refusing to issue an injunction on the basis that it needed additional information on legislative history and agency interpretation. APPV2-111–12.

Intervenors argue the merits of legislative history and agency interpretation, IIE Br. 28–32, but their argument is both mistaken, OB 16–17, and irrelevant, *Saguaro Healing*, 249 Ariz. at 365 ¶ 10; *State v. Christian*, 205 Ariz. 64, 66 ¶ 6 (2003) ("When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation.").

The funds that the Treasurer must unconditionally transfer to school districts are "local revenue" subject to the limitation in article IX, section 21. Proposition 208's attempt to exempt itself from that cap is unconstitutional.

**B. The Controversy Is Ripe.**

The superior court overlooked judicially noticeable records that leave no doubt that Proposition 208 will exceed the spending caps in article IX, section 21. APPV2-113. The superior court's conclusion is mistaken, and it has resulted in a tangle of legal doctrines that do not apply. In particular, the superior court misunderstood the issue—whether Proposition 208 will exceed the expenditure limitation—in terms of facial unconstitutionality. *Id.*; OB 18. Intervenors recast this issue as ripeness and elevate it to their leading argument. IIE Br. 16–22. The better analytical lens, however, is potential mootness: current spending nearly reaches the cap, and new spending attributable to Proposition 208 will certainly exceed those limits, *unless* some intervening event occurs. Even the State "request[s] that the

Court fully adjudicate this case based on the constitutional arguments raised and briefed by Plaintiffs and Intervenor-Defendants." State Br. 10.

Superintendent Hoffman's letter to Plaintiffs Fann, Bowers, and Gowan proves the point. SA113. It reports that "the aggregate expenditures of local revenues for all school districts" is $6,165,430,899, which is $144,156,539 under the expenditure limitation of $6,309,587,438. *Id.* The crucial number for this case is the approximately $144 million of headroom before spending will hit the cap. Last year, districts were within $49.3 million of the maximum expenditure. APPV2-64.

Looking ahead, the Joint Legislative Budget Committee estimates that Proposition 208 will generate $827 million in revenue. OB 20. And the expenditure limitation is projected to *decrease* by 4.6%, or approximately $300 million. *See* Economic Estimates Commission, February 24, 2021 Letter to Governor Ducey, *available at* https://azdor.gov/sites/default/files/media/REPORTS_ESTIMATES_2022_SchoolDist-Feb21.pdf. With existing spending so close to the cap—$49.3 million last year, and $144 million this year—the injection of $827 million is all but certain to exceed the constitutional limit, meaning that the constitutionality of Proposition 208's self-exemption is ripe for adjudication. Even removing the 12% of funding that actually qualifies under the grant/gift exception and the similar

amount for charter schools' weighted share of students leaves nearly $600 million in new local revenues.[1] These numbers are not even close.

Intervenors attempt to sow doubt as to ripeness by speculating about events that might occur in the future and questioning whether the Economic Estimates Commission has been doing its job correctly. They observe that the legislature has the ability to reduce education spending or alter the expenditure limitation. IIE Br. 17–19. While that may be true, it is not currently the case. At most, Intervenors identify scenarios under which this case *might* become moot in the future.

They also point to a declaration by Charles Essigs positing that "there may be hundreds of millions of dollars of space under the Expenditure Cap." IIE Br. 19 n.11. But neither the declaration nor the briefing identifies *why* such a massive error would exist. Without a compelling reason to conclude that the Commission has been derelict for decades, "'public officials are presumed to have done their duty.'" *Malnar v. Elizabeth*, 236 Ariz. 170, 172 ¶ 8 (2014) (quoting *Verdugo v. Indus. Comm'n*, 108 Ariz. 44, 48 (1972)). The declaration also fails to undermine the

[1] Approximately 17% of Proposition 208's funding goes to charter schools. A.R.S. § 15-1281(D)(1)-(3) (allowing charter schools to participate in 85% of Proposition 208 spending according to the weighted student population in A.R.S. § 15-943); Arizona Department of Education, *Accountability & Research Data*, *available at* https://www.azed.gov/accountability-research/data (calculating charters' enrollment to be approximately 20%).

controversy's ripeness because the declarant himself does not believe it. He has routinely forecasted that spending would exceed the cap, APPV2-64, and just days ago made the same prediction for the upcoming year: "[I]t's not like we're going to be close—we're going to be way over. . . . The schools wouldn't be able to spend the money." Yellow Sheet Report, *Heads Up, Lawmakers*, Arizona Capitol Reports (Mar. 16, 2021).

Proposition 208's tax took effect in January; no subsequent legislation has mooted the case; and the revenue windfall will exceed the expenditure caps.

### C. A Rational Electorate Would Not Have Adopted Proposition 208's Taxes Without the Exemption from Article IX, Section 21.

Proposition 208 presented voters with a simple bargain: impose a new tax, and the revenue will be spent on several education-related categories. That straightforward bargain was the basis for this Court concluding that the Proposition's 100-word description captured the "thrust of the initiative" and thus qualified for the ballot. *Molera II*, 250 Ariz. at ¶ 27. But the radically encumbered spending machinery that results from requiring compliance with article IX, section 21 bears no resemblance to the deal presented to voters.

#### 1. Severance Is Not Appropriate for Voter-Approved Laws.

For three reasons, this Court should decline to engage in severability analysis where popular initiatives are involved. First, severability analysis is inherently an exercise in conjecture that requires courts to act as legislators. Courts entertaining

severance must ask "whether or not the legislature would have passed the statute had it been presented with the invalid features removed." *Millett*, 66 Ariz. at 343. That inquiry necessarily enlists the courts in lawmaking, which offends the separation of powers in article III. OB 21–22 (collecting cases). Second, where popular initiatives are involved, severability analysis entails the "nearly impossible" task of deciding whether "an informed electorate would not have adopted one portion without the other." *Randolph v. Groscost*, 195 Ariz. 423, 427 ¶ 15 (1999). Third, after the Voter Protection Act (VPA), the consequences of an incorrect severance involving an initiative are virtually impossible to correct. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 9 (2013).

Intervenors ignore the foregoing three-part argument and rely entirely on *stare decisis*. IIE Br. 40–43. But the conditions for that doctrine are not met. This Court has heard just a single case involving severability of initiatives since the VPA became effective: *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516 (2000). And *Myers* did not ask the Court to consider the issue, meaning that *stare decisis* is irrelevant because the issue has not been decided. *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 333 (1955) ("We shall therefore consider the problem raised on this appeal as one of first impression and not governed by the doctrine of stare decisis."). As for pre-VPA cases analyzing initiatives for severability, the VPA effected a significant change, "and the doctrine of stare decisis

should not require a slavish adherence to authority where new conditions require new rules." *Goldman v. Kautz*, 111 Ariz. 431, 432 (1975). This Court has already recognized the VPA's "new conditions" in *Cave Creek* and the "nearly impossible" task of severability for initiatives in *Randolph*. Combining those insights is far from revolutionary.

Finally, refusing to sever initiatives does not impair the people's ability to legislate. IIE Br. 43. Severability only occurs after the act of legislation is complete. And, as discussed, the exercise of deciding which provisions in a law would have passed standing alone *arrogates* the legislative power rather than respecting its separate assignment to the people and their elected representatives. OB 21–22.

**2. The Exemption from Article IX, Section 21 Is Not Severable.**

Severability requires (1) that the remaining portion of the law be "workable" in the sense of "form[ing] a complete act within itself," *Millett*, 66 Ariz. at 343, and (2) the valid and invalid portions must not be so "intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act," *State Comp. Fund v. Symington*, 174 Ariz. 188, 195 (1993) (quotation omitted).

On the first prong, a tax that continues to vacuum up revenue without the ability to spend it is not a workable law. It is half of a law, which is exactly how Proposition 208 was drafted and marketed. Intervenors offer two responses. First,

they contend that some of the revenue can be spent. IIE Br. 44. While it is true that 12% of the funds go to a genuine grant program, that does not make the severed law operable. To the contrary, it only underscores how broken and incomplete the statute as a whole is after severing Section 15-1285.

Intervenors then assert that "perhaps some of [the revenue] could be spent if additional steps were taken to authorize it." *Id.* at 45. The "additional steps" that Intervenors have in mind are two-thirds votes in both houses of the legislature for "a single fiscal year." Ariz. Const. art. IX, § 21(3). Setting aside the absurdity of voting for a law that depends on that contingency, the argument itself is a concession that Proposition 208 is *not* workable after severance. It depends on (heroic) "further action" by the legislature. *McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213 *11 (D. Ariz. Jan. 20, 2010). Identifying other legislation that could blaze a path around an unconstitutional provision demonstrates only that *those hypothetical laws* are workable; it does not help the severed unconstitutional law.

On the second prong, the ability to spend nearly a billion dollars a year on education was the "inducement" of the act, and the new taxes to raise that money would never have been enacted without the ability to spend it. *State Comp. Fund*, 174 Ariz. at 195. As this Court explained in another severability analysis, funds in a standalone spending bill (*i.e.*, not general appropriations) "are clearly wedded to the use for which they are prescribed." *Millett*, 66 Ariz. at 343. That connection is

especially clear in the ballot materials supporting Proposition 208, which touted the initiative's massive increase in spending. OB 27; APPV1-85–101.

Intervenors respond that voters would have supported the severed legislation because "the measure would still 'increase funding for public education.'" IIE Br. 47 (quoting voters' pamphlet APPV1-117). But a meager increase in funding is not what voters intended. Their intent, gleaned from election materials, *Randolph*, 195 Ariz. at 427 ¶ 15, was to use the money generated by the new tax to increase spending by over $800 million. That was the univocal message of ballot statements supporting the initiative. *E.g.*, APPV1-87 ("Proposition 208 will invest almost $1-billion [sic] into our classrooms"). Even that argument won only 51.7% support. "[H]ad it been presented with the invalid features removed," Proposition 208 would not have passed. *Millett*, 66 Ariz. at 343.

In their brief response on the second prong, Intervenors attempt to alter the legal standard to mirror the familiar rational basis test. IIE Br. 46. They rely on a passing statement in *Myers* that the law "would have passed the rational basis test for due process violations." *Myers*, 196 Ariz. at 523 ¶ 25. *Myers* did not, however, adopt the due-process test, and no case before or since has even referenced it. Moreover, Intervenors' attempt to disqualify severability cases involving acts of the legislature is inapt. *Id.* at 44. Initiative cases expressly borrow the test from non-

initiative cases and cite the latter routinely. *See, e.g.*, *Randolph*, 195 Ariz. at 427 ¶ 14 (quoting *State Comp. Fund*, 174 Ariz. at 195).

The version of Proposition 208 that would result from severing its exemption from article IX, section 21 bears little resemblance to the law that voters narrowly approved. Had they been presented with the statute Intervenors now try to impose on them, rational voters would not have adopted it.

## II. THE ARIZONA CONSTITUTION BARS VOTERS FROM DOING BY INITIATIVE ANYTHING THE LEGISLATURE CANNOT DO.

Appellees argue that article IX, section 22 does not apply for two reasons: (1) initiatives are not "acts," and (2) the Constitution's procedural limitations regarding the adoption of statutes do not "apply equally to the Legislature and the people." IIE Br. 48–49. These arguments are unpersuasive.

### A. Statutory Initiatives Are Acts.

The superior court's theory—that section 22 only applies to "acts" and that initiatives are not "acts"—lacks any basis in the law. Both the text of the Constitution and the decisions of this Court refer to statutory initiatives interchangeably as "acts" and "measures" and also refer indiscriminately to the acts of the legislature as both "acts" and "measures." OB 31–33; *see also Myers*, 196 Ariz. at 524 ¶ 34; *Saggio v. Connelly*, 147 Ariz. 240, 241 (1985); *Hernandez v. Frohmiller*, 68 Ariz. 242, 249 (1949); *Kerby v. Griffin*, 48 Ariz. 434, 446 (1936). Oregon and Oklahoma—the two States on which the Arizona Constitution's

initiative provisions were modeled—also refer to initiatives as both "measures" and "acts." *Christ v. Myers*, 123 P.3d 271, 273 (Or. 2005); *Edmondson v. Pearce*, 91 P.3d 605, 610 (Okla. 2004).

Intervenors point to examples in article IV where the Constitution refers to initiatives as "measures," but Plaintiffs do not deny that initiatives are sometimes called "measures." The point is that initiatives are also "acts," and that Arizona law recognizes no substantive distinction between "acts" and "measures." For example, article IV, part 1, section 1 twice refers to *legislatively* adopted legislation as "measures." Constitutional text does not support the dichotomy advanced by the superior court and picked up by Intervenors on appeal.

Case law supports the same conclusion. Intervenors' reliance on *Barth v. White* is misplaced. That case held that the Single Subject Rule does not apply to proposed initiatives for amending the Constitution. *Barth*, 40 Ariz. at 556–57. The Court reasoned by comparing the initiative process to the legislative process. The legislature is not required to follow the Single Subject Rule when it proposes a constitutional amendment. The Court found that fact important because the legislature must submit proposed amendments "either by an act or joint resolution," and legislative acts and resolutions *are* required to follow the Single Subject Rule, meaning that amendments are an exception despite originating as legislative acts or resolutions. *Id.* at 556. Based on this exception for amendments that originate in

the legislature, the Court reasoned that an "initiative petition" "is neither an act nor joint resolution," so it made all the more sense to conclude that initiative petitions proposing constitutional amendments are also exempt from the Rule, just as amendments proposed by the legislature are. *Id.* That was all *Barth* said. In other words, *Barth* did not concern the question whether initiatives are or are not "acts," and it did not concern statutory initiatives at all. It concerned *petitions* for putting *constitutional amendments* on the ballot. The Intervenors are therefore quoting dicta—out of context—as if it decided a question that was not even before the Court. The same applies to the superior court's reading of *Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533 (2017); *see* OB 32.

In sum, there is no legal basis for the purported distinction between "acts" and "measures." Arizona law refers to laws created by the legislature and laws adopted by initiative interchangeably as "acts" and "measures."

### B. Section 22 Applies to "Any Act," Which Includes Those Created by Initiative.

By its own terms, article IX, section 22 restricts the adoption of new taxes. That provision applies to "*any* act" that "provides for a net increase in state revenues." It includes a discrete list of exceptions in section 22(c) (*e.g.*, increased fees, accounting for inflation), but that list does not include popular initiatives. Under the *expressio unius* canon, therefore, initiatives fall within the general rule. *State v. Maestas*, 244 Ariz. 9, 13 ¶ 15 (2018) ("[W]hen the legislature (or voters)

expressly prescribes a list in a statute (or initiative), 'we assume the exclusion of items not listed.'" (citation omitted)).

Section 22 creates "a single, finely wrought and exhaustively considered, procedure" for adopting acts that increase state revenues. *Clinton v. City of New York*, 524 U.S. 417, 439–40, (1998) (citation omitted)). The specification of that specific, single procedure for creating taxes is "equivalent to an express prohibition" on any alternative method for doing the same. *Id.* at 439. Section 22 is also both more recent and more specific than the general initiative power in article I, part 1, and therefore takes precedence. *See In re Estate of Winn*, 214 Ariz. 149, 152 (2007). These basic tools of interpretation undermine the superior court's attempts to sidestep the plain text of article IX, section 22.

Additionally, the Arizona Constitution—unlike the constitution of any other State—expressly subjects the initiative power to the same boundaries that the legislature must observe. Article XXII, section 14 provides that "[a]ny law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." Or, as this Court expressed it soon after statehood, initiatives "[have] no more sanctity than [laws] . . . passed by the Legislature. [Their] validity must be tested by the same constitutional rules as an act of the Legislature." *Tillotson*, 34 Ariz. at 402. Among those "constitutional rules" is the requirement of bicameral supermajorities for any act that raises revenue.

To avoid this outcome, the superior court created (and Intervenors advance) a second dichotomy: between "procedural" and "substantive" restrictions on legislation. APPV2-105; IIE Br. 58–61. Again, text and precedent do not support the dichotomy. Article XXII, section 14 draws no such distinction. And *Tillotson* struck down a law adopted by initiative because it violated the Constitution's nondelegation rule—a "procedural" rather than "substantive" limitation on legislation. That initiative gave the Board of Equalization power to tax, free of legislative oversight. *Tillotson*, 34 Ariz. at 399. But the Constitution assigns legislative power to the people and their representatives, meaning that "[t]he people cannot by an initiated law, any more than the Legislature can by an act passed by it, delegate their powers to make laws to an agent or executive or administrative body. Acting in their capacity as lawmakers, the people are bound by the Constitution, the same as the Legislature." *Id.* at 401–02.

The substantive/procedural dichotomy also leads to logical inconsistencies. Intervenors admit, for example, that the voters could not adopt an initiative "that abolished the governor's veto power, eliminated a legislative chamber, or created an ex post facto law," because those things "are clearly outside the Legislature's authority, and thus clearly outside the people's authority as a function of § 14." IIE. Br. 60. But the legislature also has no power to adopt a tax without a supermajority vote of both houses—that is just as "clearly outside" its authority. Intervenors'

counter-examples of procedural requirements that do not apply to initiatives do not suggest otherwise. *Id.* (noting that an initiative need not be read on three days or signed by the presiding officer). These requirements are inapplicable to initiatives *not* because they are procedural, but under the familiar doctrine that the specific controls the general. Article IV, part 2 contains rules specific to the legislature; article IX, section 22 applies to "any act."

Because the constitutional text is sufficient to resolve the question, there is no need to consider voters' intent in adopting article IX, section 22. *State v. Kemmish*, 244 Ariz. 314, 316–17 ¶ 10 (App. 2018). But, as Plaintiffs showed in their Opening Brief, voters were well aware that they were limiting the means by which taxes could be imposed when they adopted Proposition 108 in 1992. OB 33–36.

Intervenors say this is "[n]onsense," but their argument actually reinforces Plaintiffs' position. IIE Br. 55. They admit that section 22 "does contain" a limitation on direct democracy by implicitly preventing voters from using the referendum power to alter tax increases approved by two-thirds of the legislature. *Id.* This limitation arises from section 22's statement that a tax increase "becomes effective immediately upon the signature of the governor." But if the "effective immediately" clause implicitly limits the referendum power, then the other provisions of section 22—including the requirement in the very next sentence that "any act" increasing state revenue receive "the affirmative vote of two-thirds of the

members of each house of the legislature"—must also be sufficient to limit the initiative power. Intervenors cannot pick and choose which sentences in section 22 they will recognize based on a desire to salvage Proposition 208.

In short, Intervenors admit that "[v]oters cannot send a tax increase approved under § 22 to the ballot-box by referendum because § 22 itself says so" through the "effective immediately" clause. IIE Br. 55. But section 22 also precludes voters from adopting statutory tax increases. The legislative supermajority requirement "itself says so."

This insight also disposes of Intervenors' effort to resist section 22 because it would work an "implied partial repeal" of the initiative power. *Id.* at 57. They do not explain why an "implied partial repeal" of the referendum power is acceptable but the same impact on initiatives is not. Moreover, this argument misunderstands section 22's limitation on the initiative process. That limitation relies not only on article IX, section 22, but also on article XXII, section 14. The latter provision has been part of the Constitution since 1912, just like the initiative power, and this Court has interpreted it to limit initiatives since statehood. *See Tillotson*, 34 Ariz. at 401–05.

Equally time-tested is the practice of limiting future (statutory) initiatives by constitutional amendment. In 2010, when voters amended the Declaration of Rights to forbid discrimination and guarantee a secret ballot in unionization votes, they

bound themselves to the mast and limited future statutory initiatives on those topics. Ariz. Const. art. II, §§ 36, 37. Indeed, whenever voters amend the Constitution, they work an "implied partial repeal" to the same extent as article IX, section 22. Finally, because the effect of the prior amendment does not require overruling precedent and was fully briefed in the superior court, this case does not warrant the Court exercising its discretion to make the "policy" choice to apply it only prospectively, as Intervenors suggest in a last-ditch argument. *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 44 (Ariz. 2010); IIE Br. 63.

### C. The Revenue Source Rule Does Not Override Article IX, Section 22.

Intervenors assert that under the Revenue Source Rule (article IX, section 23(A)), initiatives "must" create new taxes whenever they mandate spending. IIE Br. 58. This is incorrect. That Rule requires that initiatives "provide for an increased source of revenues sufficient to cover the . . . costs" of mandatory spending. Revenues can be increased in many ways, however. For example, they can come from increasing certain types of fees, which are expressly exempt from section 22. *See Biggs v. Betlach*, 243 Ariz. 256, 258 ¶ 3, 261 ¶ 24 (2017). Revenue can also come from reducing spending in other areas. And voters can create new taxes by initiatives that amend the Constitution. Any such amendment would be exempt from the Revenue Source Rule, and from article IX, section 22, (as well as article IX,

section 21, discussed above). But Proposition 208 is not a constitutional amendment; it is an unconstitutional statute.

## III. PLAINTIFFS SATISFIED ALL REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

As discussed above, the superior court erred in its construction of the Arizona Constitution and therefore underestimated Plaintiffs' likelihood of success on the merits. *Ariz. Public Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 8 (2020) (noting that a "mistake of law" is an abuse of discretion). In fact, the State recognizes that this Court is capable of resolving the entire case on the constitutional arguments presented by Plaintiffs and Intervenors. State Br. 10. Plaintiffs agree. But even if, as the superior court held, Plaintiffs' claims raise only "serious questions" on the constitutional merits, APPV2-114, Plaintiffs are still entitled to a preliminary injunction.

### A. Plaintiffs Have Made a Sufficient Showing of Irreparable Harm.

#### 1. Legislator Plaintiffs.

As a threshold matter, Intervenors argue for the first time on appeal that the five individual legislators lack standing. IIE Br. 65. This Court generally "will not consider a question not first raised in the trial court," *Dombey v. Phoenix Newspapers. Inc.*, 150 Ariz. 476, 482 (1986) (quotation and citations omitted); *State ex rel. Horne v. Campos*, 226 Ariz. 424, 429 ¶ 18 (App. 2011) ("[B]y failing to timely object, the State can waive an adverse party's lack of standing."), and it

should decline to do so here. Even if the Court were to consider the issue, the legislators have standing and have shown irreparable harm.

Standing in Arizona is a matter of "prudential or judicial restraint," and it applies "to insure that our courts do not issue mere advisory opinions, that the case is not moot, and that the issues will be fully developed by true adversaries." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 6 (1985). Those conditions are amply satisfied. Specifically, the Legislator Plaintiffs, due to their constitutional positions and authority, have an official stake in the consequences flowing from Proposition 208's passage. Legislator Plaintiffs take an oath to uphold the Arizona Constitution. A.R.S. § 38-231. However, Proposition 208 requires immediate steps to finance its implementation, which it then promises to reimburse at a later date. A.R.S. § 15-1281. It therefore forces the Legislator Plaintiffs to violate their oath by forcing them to appropriate funds that will be used for the implementing costs of an unconstitutional law. This injury satisfies the standing requirement. *See Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968) (reasoning that individual legislators' "in the position of having to choose between violating their oath" creates a "personal stake in the outcome." (internal quotation marks and citations omitted)).

Additionally, the Legislator Plaintiffs met their burden to demonstrate that they will suffer irreparable harm. In particular, Proposition 208 does not allow the

monies collected under its new tax to revert to the general fund, which means that they are not available to cover any tax refunds. See A.R.S. § 15-1281(A). This structural defect creates uncertainty in the legislature's budget, which must account for "potentially . . . hundreds of millions of dollars as additional refund monies owed to taxpayers must come from the General Fund." Governor Ducey & OSPB Br. ISO Pet. to Transfer, *Fann v. State*, T-21-0003-CV, at 12–13 (Mar. 2, 2021). The longer Proposition 208 remains in effect, the more onerous this liability and the task of budgeting around it becomes. In the meantime, the legislature must determine how to craft a budget that is prepared for potentially hundreds of millions of dollars in refunds from the general fund.

**2. Taxpayer Plaintiffs.**

Taxpayer Plaintiffs have shown that Proposition 208 will cause irreparable harm. Neither Intervenors nor the State denies that constitutional deprivations can amount to irreparable harm. Intervenors instead revert to arguing that Plaintiffs are unlikely to succeed on the merits. IIE Br. 67. As detailed above, that argument is mistaken.

Intervenors also argue that even if taxpayers suffer a constitutional harm, the "nature of the constitutional injury" is unserious because the injury's monetary aspect could later be addressed through a refund. *Id.* at 68. This argument falls flat. "[C]onstitutional violations cannot be adequately remedied through damages." *Am.*

*Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (citation omitted); *see also Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 881–82 (9th Cir. 2008), rev'd on other grounds, 562 U.S. 134 (2011). This is because, even if monetary reimbursement is possible, Plaintiffs still suffer an underlying irreparable injury from the constitutional violation itself. *Id.*; OB 41–44. Moreover, as explained supra Section III.A.1., the structure of Proposition 208 does not allow refunds. As a result, even if Taxpayers are refunded, those refunds will come at the expense of other important budgetary priorities.

**B. The Balance of Hardships and Public Interest Tip in Plaintiffs' Favor.**

Neither Intervenors nor the State respond to the fundamental point that protecting the Constitution is always in the public interest. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Instead, Intervenors attempt to cloak themselves in the "will of the voters" and make policy arguments for additional funding for public education. But no amount of policy argumentation can outweigh the Constitution, and voters can only change the State's fundamental law through a constitutional amendment, which Proposition 208 was not.

Intervenors also argue that because any new law will change the status quo, there is no basis to delay enforcement of Proposition 208. The cases they cite, however, uniformly stand for the proposition that there is no reason to stay the enforcement of a *valid* law. *Planned Parenthood of Greater Tex. v. Abbott*, 571 U.S.

1061 (2013). Intervenors cannot continue to rely on the presumption that Proposition 208 is constitutional when Plaintiffs have shown that it is unconstitutional. *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020) (explaining that the challenger bears the burden of overcoming the presumption of constitutionality). Indeed, this Court has recognized that the presumption of constitutionality is not unlimited and will "not rewrite a statute to save it." *Id.*

The State rests its public-interest argument on the assumption that the anti-injunction act applies to all taxes. Specifically, Defendants advance four arguments for applying Section 42-11006. Not one is persuasive.

First, Defendants argue that the plain language of the anti-injunction statute is "extremely broad" and thus must include all kinds of taxes. State Br. 5–6. But Section 42-11006 includes a constraint to "extending an assessment on the tax roll"—a decidedly narrow reference to property taxes. In an attempt to broaden the statute's scope, Defendants point to an entirely different statute, A.R.S. § 42-1254, to argue that because this statute applies to income taxes, A.R.S. § 42-11006 should too. But Section 42-1254 is located in Title 42, Chapter 1: Administration of Taxation. In contrast, Section 42-11006 is located in Title 42, Chapter 11: Property Tax. It therefore makes sense that Section 42-1254 is broad enough to encompass the administration of taxes other than property tax. The same is not true of Section 42-11006.

Second, the State argues that Section 42-11006's application to a "state, county or municipality" proves that the anti-injunction statute applies beyond property taxes because the State collects only limited types of property taxes. State Br. 6. Defendants' argument undercuts itself. If the State is engaged in even limited collection of property taxes, then its inclusion in Section 42-11006 is consistent with Plaintiffs' point that Section 42-11006 applies to property taxes.

Third, Defendants cite *Church of Isaiah 58 Project of Arizona, Inc. v. La Paz County*, 233 Ariz. 460, 464 ¶ 18 (App. 2013), and *Yuma County v. Arizona. & S.R. Co.*, 30 Ariz. 27 (1926), to support the long-standing history of the anti-injunction act and that choosing not to apply it here would "emasculate all tax measures." State A.B. at 7; IIE A.B. at 72. Both cases, however, applied the anti-injunction act to property taxes. More broadly, even assuming that the anti-injunction act applied to income taxes, the test from *Church of Isaiah* would not prohibit an injunction against Proposition 208. That case held that the anti-injunction act is inapplicable where the tax is imposed with no "semblance of authority." *Church of Isaiah*, 233 Ariz. at 464 ¶ 19. It is hard to imagine a clearer example of a law lacking a semblance of authority than an unconstitutional one. *See, e.g.*, *Findlay v. Bd. of Sup'rs of Mohave Cnty.*, 72 Ariz. 58, 63 (1951) ("If the law be unconstitutional, then the acts [taken under it] have no support, and are, therefore, void and of no force or effect." (citation

omitted)). Not only do these cases fail to extend Section 42-11006 to income taxes, but they dispose of the issue in Plaintiffs' favor.

Fourth, as a defensive point, Defendants argue that this Court's limitation of Section 42-11006's predecessor, A.R.S. § 42-204, to property taxes in *State Compensation Fund*, should not control because that case discussed only subsection (a) of the earlier statute, and the anti-injunction provision now codified in Section 42-11006 was located in subsection (b). This argument oversimplifies the reasoning in *State Compensation Fund*. That case rested its interpretation of Section 42-11006 on a tax court case interpreting Section 42-204 in its entirety: *RCJ Corp. v. Ariz. Dep't of Revenue*, 168 Ariz. 328, 331 (Tax. 1991). In *RCJ Corp.*, the tax court explains that "Section 42-204 contemplates claims for relief from any inappropriate *property taxation*. It addresses applications for injunctive relief, and authorizes a refund for taxes illegally collected." *Id.* (emphasis added). *State Compensation Fund* did nothing to narrow the tax court's construction, which should continue to control.

Statutory construction confirms that the anti-injunction act does not apply to income taxes. Even if it did, an unconstitutional law would lack any "semblance of authority." Either way, Defendants do not identify a public interest that militates against the issuance of an injunction that would protect Plaintiffs' constitutional rights and affirm the primacy of the Arizona Constitution.

## CONCLUSION

Proposition 208 was a statutory initiative that should have been a constitutional amendment. Its unconstitutionality has never been clearer. The State is therefore correct to ask that this Court "provide certainty in a timely manner for both the Department and Arizona taxpayers." State Br. at 10. To that end, the Court should enter the requested injunction as soon as practicable and issue an opinion soon thereafter.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellants' Reply Brief complies with ARCAP 23(c). The Brief is double-spaced, utilizes a proportionally spaced typeface of 14 points, and contains 6,974 words utilizing the word count of the word processing system used to prepare the Brief.

By: */s/ Dominic E. Draye*

## CERTIFICATE OF SERVICE

I certify that the original of the foregoing Appellants' Reply Brief was e-filed with the Clerk of the Arizona Supreme Court via AZTurboCourt on March 22, 2021, and that a copy was served via AZTurboCourt e-service on this same date, as follows:

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