ARIZONA SUPREME COURT

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

COMBINED ANSWERING BRIEF AND SEPARATE APPENDIX OF APPELLEES INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN) AND DAVID LUJAN

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Introduction

¶1 Proposition 208 qualified for the 2020 ballot after hundreds of thousands of Arizonans signed initiative petitions in the middle of a pandemic and after overcoming a pre-election lawsuit. Then, a majority of Arizonans – more than 1.6 million – approved it at the ballot box.

¶2 Yet the will of the voters is under attack once again. Opponents of Proposition ("Prop") 208 – Appellants here – sued to enjoin the entire measure. The trial court rejected Appellants' request for a preliminary injunction based both on the weakness of their legal claims and the existence of fact questions that only further proceedings can resolve. The trial court was correct, and this Court should affirm.

¶3 Appellants first contend that this Court should enjoin all of Prop 208 based on a claim that one of its provisions – A.R.S. § 15-1285 – violates article IX, § 21 of the Arizona Constitution. This claim is both unripe and legally unsupportable. The trial court properly identified factual issues that precluded finding that Appellants can meet this standard based on the record, even if they were correct on the law. Appellants' claim also fails on the merits because the direct grants to school districts that Prop 208 provides are exempt from the definition of

"local revenues" under the plain language of § 21 because they qualify as a "grant . . . of any type."

¶4 Appellants next ask this Court to hold that article IX, § 22 of the Arizona Constitution either precludes the people from imposing taxes by statutory initiative or requires them to do so with a supermajority. But § 22 applies to the Legislature, not citizen initiatives. Appellants' contrary argument finds no support in § 22's plain language, the history surrounding its adoption, its inconsistency with article IX, § 23, the disfavored implied repeal it would cause, and the importance of the fundamental right to legislate by initiative. The trial court correctly ruled that Appellants' arguments based on § 22 are "too weak to even raise 'serious questions.'"

¶5 Finally, through misleading characterizations of the trial court's order, Appellants challenge the trial court's ruling on irreparable harm, the balance of hardships, and the public interest. None of their challenges have merit. The trial court properly found that these factors do not support enjoining a measure approved by the majority of Arizona voters.

¶6 Since statehood, this Court has recognized the importance that our constitution gives to the people's power to legislate through initiative. Appellants now invite this Court to engage in speculation to overcome their unripe challenge, to overturn established precedent, and to ignore the plain language of the Arizona Constitution, all because they disagree with the people's choice. The Court should not oblige.

Statement of Facts & Statement of the Case

A. The mechanics of Prop 208.

¶7 Prop 208 imposes an income tax surcharge of 3.5% on taxable income over (a) $250,000 for single filers or married persons filing separately, and (b) $500,000 for married and head of household filers. A.R.S. § 43-1013(A). The Department of Revenue must deposit revenues collected under the surcharge into the new Student Support and Safety Fund, A.R.S. § 15-1281 ("Student Support Fund").

¶8 Prop 208 explains how state officials will distribute the new revenue. First, the measure accounts for the costs of its own administration. A.R.S. § 15-1281(B). The Student Support Fund then distributes nearly all remaining funds through targeted grants to school districts and charter schools for specific purposes:

- "Fifty percent as grants to school districts and charter schools . . . for the purpose of hiring teachers and classroom support personnel" and "increasing [their] base compensation," A.R.S. § 15-1281(D)(1);
- "Twenty-five percent as grants to school districts and charter schools . . . for the purpose of hiring student support services personnel" and "increasing [their] base compensation," A.R.S. § 15-1281(D)(2);
- "Ten percent as grants to school districts and charter schools . . . for the purpose of providing mentoring and retention programming for new classroom teachers to increase retention," A.R.S. § 15-1281(D)(3);
- "Twelve percent to the Career Training and Workforce Fund," A.R.S. § 15-1281(D)(4); 15-1282, which becomes "multi-year grants to school districts, charter schools and career technical education districts" to provide career and technical training to high school students, A.R.S. § 15-1283(A); and
- "Three percent to the Arizona Teachers Academy Fund," A.R.S. § 15-1281(D)(5).

¶9 In sum, all funds distributed to school districts through the Student Support Fund are in the form of targeted grants, which the measure exempts from the procurement and solicitation requirements that generally apply to State grants. A.R.S. § 15-1281(E).

¶10 In a separate section, Prop 208 provides that "[n]otwithstanding any other law, monies received by school districts and career technical education districts pursuant to this chapter [] [a]re not considered local revenues for the purposes of article IX, section 21, Arizona Constitution." A.R.S. § 15-1285(1) ("Local Revenues Clause").

B. Appellants sued to subvert the will of the people.

¶11 The same day Prop 208 became law, Appellants sued to enjoin it. They brought four constitutional claims, two of which they advance on appeal. [APPV1-017-19]

¶12 First, Appellants alleged [APPV1-017] that Prop 208 is facially unconstitutional because one provision "attempts to statutorily exempt itself" from the definition of local revenues under article IX, § 21 of the Arizona Constitution. [*Id.*] Appellants also raised a novel claim [APPV1-014] that Prop 208 violates article IX, § 22 of the Arizona Constitution. They requested a preliminary injunction. [APPV1-042-59].

¶13 Before Appellees intervened, Appellants and the State Appellees stipulated [APPV1-187] to waive discovery, to an expedited schedule, not to object to Appellants' standing, and to certain evidence the court should not consider.

¶14 That same day, Appellees moved to intervene, and Appellants opposed. At a hearing the next day [APPV1-183], Appellees explained that they did not join the stipulation, they did not waive discovery, and they believed that Appellants' motion for preliminary injunction raised fact issues. [SA075-80][1] The trial court allowed Appellees to intervene, said they could submit a competing declaration, and required leave of court before any party could seek discovery. [APPV1-183]

¶15 The parties briefed the preliminary injunction motion, and the trial court held oral argument. [APPV2-092-94] After Appellants filed a "request for expedited ruling," the trial court denied Appellants' request for a preliminary injunction on one claim, said it would issue the balance of the ruling soon. [APPV2-095-99] Appellants didn't appeal that order. [OB at 5]

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[1] "SA" refers to Appellees' separate appendix.

C. The trial court denied Appellants' request for a preliminary injunction.

¶16 Later, the trial court issued a 21-page order denying Appellants' requested relief. [APPV2-100-120]

¶17 The trial court held that Appellants' Section 22 claim was "too weak even to raise 'serious questions'" about the merits, and that Appellants didn't satisfy any of the other relevant factors. [APPV2-105-08]

¶18 On the Section 21 claim, the trial court identified three topics on which it needed more factual development:

- The history and purpose of § 21 [APPV2-110; 111];
- How State administrative agencies and the Legislature have interpreted and applied § 21, including the "grant" exception, [APPV2-110; 111-12]; and
- Whether school districts will exceed their spending limits, including evidence about how much money Prop 208 will give school districts and whether the Economic Estimates Commission is calculating the expenditure limits correctly. [APPV2-110; 113; 114]

¶19 Based on this need for factual development, the trial court found that Appellants' prospects of success on their § 21 claim were

"unclear." The Court had concerns about resting its decision solely on arguments of counsel and found that, "at best," Appellants raised "serious questions." [APPV2-114 (emphasis added)] It also held that Appellants fell "considerably short" of establishing the other required factors. [*Id.*]

¶20 Appellants filed a timely notice of appeal. [IR 57] Pending in the trial court is Appellees' Motion to Dismiss. [SA099-112] The parties also filed a joint report agreeing to an expedited schedule with a trial date in June 2021 [SA095], and the trial court denied Appellants' request for a stay pending appeal [SA114].

Statement of Issues

¶21 This appeal raises two issues:

- Did the trial court properly reject a facial constitutional challenge to Prop 208 under article IX, § 21 where any claim under that constitutional provision is unripe, the grants Prop 208 provides fall within § 21's Grant Exception, and Appellants challenged only a single, severable provision that has a constitutional interpretation?
- Did the trial court correctly hold that article IX, § 22 does not limit the people's fundamental right to legislate by initiative based on

that provision's plain language, history, and the presumption against implied repeal?

¶22 The trial court's decision denying a preliminary injunction "will not be reversed absent an abuse of . . . discretion." *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366 ¶ 9 (1999). Courts "review the interpretation of constitutional . . . provisions de novo." *Johnson Utilities, L.L.C. v. Ariz. Corp. Comm'n*, 249 Ariz. 215, 219 ¶ 11 (2020).

Argument

¶23 The trial court found that Appellants were not entitled to a preliminary injunction on their claim that Prop 208 is facially unconstitutional. That ruling should be affirmed.

¶24 Prop 208 "is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute," this Court will uphold it "unless it is clearly unconstitutional." *State v. Arevalo*, 249 Ariz. 370 ¶ 9 (2020). Courts will "interpret a statute to give it a constitutional construction if possible." *Id.* And because Appellants bring facial constitutional challenges, they had to "establish that no set of circumstances exists under which [Prop 208] would be valid." *Id.* ¶ 10

(citation omitted). Appellants failed to make these showings to the trial court, and their arguments on appeal also fail.

I. Prop 208 Is Consistent with Article IX, § 21 of the Arizona Constitution.

¶25 Appellants failed to prove a likelihood of success on their claim that Prop 208 violates article IX, § 21 of the Arizona Constitution ("§ 21") and is facially unconstitutional. Their allegations and arguments turn chiefly on the alleged unconstitutionality of the Local Revenues Clause, which they claim is inseverable from Prop 208. But these arguments ignore the text of Prop 208 and § 21 and suffer from fatal legal flaws.

¶26 On the most basic level, Appellants' claims are unripe, and at the very least, require further factual development. To understand why, and why the trial court wanted additional facts before issuing a final ruling, one must understand the mechanics of § 21.

¶27 Section 21 provides an aggregate expenditure limit. Its provisions are triggered only when certain school district expenditures exceed a defined cap, which adjusts over time. Even when triggered, § 21 and its implementing statutes define a process that allows the cap to be exceeded in one-year increments. And to date, no school district has

received, let alone expended, any direct grants under Prop 208. Beyond that, any claim related to the Expenditure Cap isn't ripe until there's an overspending problem, the existing statutory process proceeds, and the Legislature fails to resolve the issue by concurrent resolution. As the trial court recognized [APPV2-110-14], fact questions exist about the Expenditure Cap, requiring further development of the record. Under these circumstances, a preliminary injunction – and indeed, the entire case – is inappropriate.

¶28 Appellants' claims also fail on the merits. They assume that the funds Prop 208 provides by direct grant to school districts are "local revenues" under § 21. They are not; Prop 208 designated and treated those funds as "grants," and did so appropriately. They are specific funds provided to school districts for specific purposes. Because "grants . . . of any type" are not "local revenues" and the Local Revenues Clause has a constitutional interpretation, the heart of Appellants' argument fails.

¶29 Lastly, and even if the Court determines on an incomplete record that Appellants' claims are ripe and Prop 208's direct grants to school districts are "local revenues" under § 21, the Local Revenues Clause is severable from the rest of Prop 208.

A. The Expenditure Cap, its history, and its application.

¶30 Article IX, § 21(2) of the Arizona Constitution prescribes a formula for calculating an "aggregate expenditure limitation for all school districts" in the State. The State calculates the Expenditure Cap by "adjusting the total amount of expenditures of local revenues for all school districts for fiscal year 1979-1980 to reflect the changes in student population in the school districts and the cost of living, and multiplying the result by 1.10." Section 21 further requires the Economic Estimates Commission to adjust the 1979-1980 base "to reflect subsequent transfer of all or any part of the cost of providing a governmental function." *Id.* § 21(5).

¶31 The term "local revenues" means "all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district," subject to 18 exceptions. *Id.* § 21(4)(c), (d). Appellants claim [at 9] – with no support from the language of § 21 – that the exceptions are "narrow." To the contrary, the exceptions are broad and cover significant revenue sources, including local bonds, federal money, and other sources totaling well over a billion dollars in education

funding every year.[2] One such exception is critical here: article IX, § 21(4)(c)(v) exempts from that definition "[a]ny 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." ("Grant Exception") (Emphasis added). [3]

¶32 Arizonans adopted § 21 at a special election in 1980. The publicity pamphlet said little about § 21. State of Arizona, *Publicity Pamphlet – Sample Ballot, 1980 Special Election*, at 68-77, https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10632/. Voters only had a Legislative Council analysis, along with arguments

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[2] *See, e.g.,* Ariz. Dep't of Education, *Superintendent's Annual Report, FY2020* at 39, https://www.azed.gov/finance/reports.

[3] The last clause of the Grant Exception, "except amounts received in lieu of taxes received directly or indirectly from any private agency or organization, or any individual," refers to certain entities (most notably the Salt River Project) not subject to normal property taxes that instead pay an amount to districts "in lieu of taxes." [APPV2-032-033; *see also* Salt River Project, *2018 Voluntary Contributions in Lieu of Property Taxes and Per Acre Assessments*, https://static1.squarespace.com/static/55314ad4e4b04c1bc645ad3e/t/5be324500ebbe8a69be4287c/1541612624376/Maricopa+County+SRP+In+lieu+Payments+November+2018.pdf (itemizing "in lieu of property taxes" for SRP for Maricopa County School districts)]

"for" and "against" the measure also provided by Legislative Council. The analysis says very little of relevant substance besides noting that a "detailed definition would prescribe what 'local revenues' would be subject to the expenditure limitation." *Id.* at 74. The arguments, however, reveal the "evil" that § 21 sought to remedy: a perception that school districts' levying of property taxes on their local tax base was out of control:

- "School districts levy more property taxes than any other taxing jurisdiction in this state";
- "This proposition would terminate local government's blank check drawn on people's earnings"; and
- "Lack of adequate limitation on total spending by school districts . . . is responsible for the ever-increasing local tax burden. This burden will continue to increase if Proposition 109 fails."

Id. at 76 (emphasis added). Arizonans understood that § 21 would limit school districts' ability to saddle their local tax base with property taxes.

¶33 After the people approved § 21, the Legislature devised a statutory procedure to implement it. Specifically, (1) the State Board of Education is notified of the Expenditure Cap for the following fiscal year,

(2) the board determines the aggregate amount of expenditures of "local revenues" by all school districts for the current year; and (3) if the aggregate expenditures exceed the Expenditure Cap, then the board divides the excess between school districts to determine their pro rata share of the overage. *See* A.R.S. § 15-911. The Legislature may then, with a two-thirds vote in each house, increase the Expenditure Cap "for a single fiscal year." Ariz. Const. art. IX, § 21(3). Without that legislative action "on or before March 5," the statute provides:

> the state board of education shall inform each school district of the amount it is to reduce its expenditures of local revenues, and each school district shall reduce its expenditures of local revenues by the amount [of the excess].

A.R.S. § 15-911(E). In other words, if there is a problem with the Expenditure Cap caused by any source of funds, a statutory process resolves it by affecting school district budgets for the next fiscal year. The Legislature is also free to refer to the voters a measure to exclude additional items from the definition of "local revenues."

¶34 With this background in mind, we turn to Appellants' arguments and why the Court should reject them.

B. Claims under § 21 are unripe.

¶35 Appellants' claims related to § 21 and the Expenditure Cap are unripe. The ripeness doctrine "prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997); *see also Am. Fed'n of State, Cty. & Mun. Emps. v. Lewis*, 165 Ariz. 149, 152 (App. 1990) ("for a justiciable issue or controversy to exist, there must be adverse claims . . . upon present existing facts, which have ripened for judicial determination"). As a result, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). That is exactly the case here.

¶36 Appellants neither alleged nor proved that any school district has received a penny (and therefore could not have spent a penny) under Prop 208. Nor could they; the Department of Revenue has yet to collect revenue from the surcharge, meaning that school districts have no Prop 208 funds in hand. Appellants themselves concede that school districts won't receive any funds until the next fiscal year (*i.e.*, the earliest distribution of funds would begin in the summer of 2022). [APPV1-058]

There's also no evidence that Prop 208 funds will cause school districts to exceed the Expenditure Cap in every fiscal year. Though there are projections about how much revenue Prop 208 might generate once fully implemented, that's only a small part of the story. By way of example:

- Not all revenue generated by Prop 208 could be "local revenues"; a percentage goes to charter schools (not subject to the Expenditure Cap), a percentage goes to the Arizona Teacher's Academy, and a percentage goes to school districts through a grant process that Appellants don't challenge [APPV2-114; *see also* A.R.S. § 15-1281(D)];
- The current state of aggregate district spending and its relationship to the Expenditure Cap is in flux and can change by hundreds of millions of dollars even during a fiscal year; after the trial court denied Appellants' request for a preliminary injunction, the Department of Education ("ADE") reported to legislative leadership that aggregate district spending subject to the Expenditure Cap fell by more than $238 million [SA113[4]] because of declining enrollment

[4] The Court can take judicial notice of this public record that documents Superintendent Hoffman's performance of a statutory duty

and online learning.[5] Whether and how enrollment will rebound following COVID-19, and how that will affect expenditures in future years, is unknown;

- In addition, pending legislation could impact the already-speculative amount of revenue collected by Prop 208. Senate Bill 1783 – already approved by the Senate[6] – would create an "alternate income tax" for pass-through income in an end-run around Prop 208.[7] The bill's "Fiscal Note" projects that its passage would "reduce revenues from [Prop 208] by an estimated $(527.7) million annually"[8];

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under A.R.S. § 15-911. *Jarvis v. State Land Dep't City of Tucson*, 104 Ariz. 527, 530 (1969).

5 *See also* Ariz. Dep't of Education, *FY2021 Distance Learning Base Support Level Adjustments*, https://www.azed.gov/finance/fy2021-distance-learning-adjustments-base-support-level; Ariz. Dep't of Education, Enrollment Report, *2020-2021 School Year*, https://www.azed.gov/accountability-research/data.

6 Arizona Legislature, SB 1783 – Senate Engrossed Version, https://www.azleg.gov/legtext/55leg/1R/bills/SB1783S.htm.

7 Appellees do not concede that SB 1783 complies with the Voter Protection Act.

8 Joint Legislative Budget Committee, Fiscal Note (SB 1783), https://www.azleg.gov/legtext/55leg/1R/fiscal/SB1783.DOCX.pdf.

- Another measure moving through the Legislature would materially impact the Expenditure Cap. SCR 1021 would refer to Arizonans a constitutional amendment that would re-set the base level for the Expenditure Cap to expenditures in fiscal year 2022-2023 (it is now fiscal year 1979-80).[9] This proposal received unanimous, bipartisan support in the Senate Education Committee[10];
- As a school finance expert observed below in unrebutted testimony [APPV2-032 ¶ 15], there may be hundreds of millions of dollars of space under the Expenditure Cap because of the Economic Estimates Commission's failure to adjust it to account for transitions in responsibility for large components of school district spending[11]; and

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[9] Arizona Legislature, SCR 1021 – Introduced Version, https://www.azleg.gov/legtext/55leg/1R/bills/SCR1021P.htm.

[10] Arizona Legislature, Bill History for SCR 1021, https://apps.azleg.gov/billStatus/BillOverview/75135.

[11] Appellants make the curious claim [at 19 n.3] that "[n]o party has suggested any reason to think the Commission has *not* calculated the expenditure limits correctly" despite Mr. Essigs saying exactly that in his declaration [APPV2-033 ¶ 15] and Appellees doing the same in opposing Appellants' request for injunctive relief [APPV2-012 n.4]. The trial court was right to appreciate the seriousness of this issue. Section 21 bases the expenditure limit on a single fiscal year, 1978-1979. Its drafters recognized that, over time, certain governmental functions may shift to

- Appellants introduced no evidence from ADE about how it will treat Prop 208's grants to school districts to calculate the Expenditure Cap. But the trial court considered unrebutted evidence that ADE excludes similar programs – including another grant program created by initiative – from that calculation. [APPV2-111-112; APPV2-031-032]

¶37 Given all these open questions, it's unsurprising that the trial court held it could not rule on Appellants' § 21 claim on this limited record and identified areas on which it required more evidence. [APPV2-110-14] These critical questions are proof that Appellants' claims should be dismissed in their entirety under the ripeness doctrine. At the very least, this Court should first allow the trial court to consider a full record.

¶38 Even if none of this were true, there's yet another reason this case is unripe. Assuming that Prop 208 funds are "local revenues" and that they would cause school districts to exceed the Expenditure Cap down the road, the ripeness doctrine demands that existing legislative

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or from school districts, and the Expenditure Cap must change to reflect those changes. That's why its drafters created a mandatory duty on the part of the Economic Estimates Commission to alter the limit. Yet there is no evidence in the record about any such adjustments, even though some functions have been altered. [APPV2-033 ¶ 15]

processes intended to resolve such issues first proceed. As detailed above, A.R.S. § 15-911 prescribes the calculation of the Expenditure Cap, and how school district budgets must be reduced if the Legislature chooses not to authorize "[e]xpenditures in excess of the limitation" as is its prerogative. Ariz. Const. art. IX, § 21(3).[12] Only if the Legislature refuses to do so in a fiscal year when "local revenues" associated with Prop 208's direct grants to school districts exceed the Expenditure Cap could there be a ripe controversy for a Court to consider.

¶39 On the question of ripeness, Appellants [at 18] accuse the trial court of "conflat[ing] unconstitutionality with the existence of a live controversy," and argue that "[w]hether or not [Prop 208] will immediately exceed the spending caps has no bearing on whether [its] new spending facially qualifies as 'local revenues.'" The only things they cite to support their claim that this dispute is ripe are "judicially noticeable budget statements from the State." [*Id.*]

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[12] The Legislature has authorized overages at least twice since 1980. HCR 2008, 48th Leg., 1st Reg. Sess. (Ariz. 2007), https://azmemory.azlibrary.gov/digital/collection/azsession/id/103/rec/17; HCR 2015, 48th Leg., 2nd Reg. Sess. (Ariz. 2008), https://azmemory.azlibrary.gov/digital/collection/azsession/id/117/rec/19.

¶40 The trial court did not "conflate[]" anything. Instead, it recognized that even if the grants provided by Prop 208 are somehow "local revenues" under § 21 (which they are not for reasons described below), whether Prop 208 is unconstitutional in its entirety depends on open factual questions and future contingent events.

¶41 As for the suggestion [at 18] that "judicially noticeable budget documents" establish the ripeness of this dispute, nothing could be further from the truth. Those documents contain projections now in question because of, among other things, (1) recent reductions in school district expenditures [SA113], (2) pending legislation, and (3) open questions about whether the Economic Estimates Commission has properly adjusted the Expenditure Cap. [APPV2-032 ¶ 15]

¶42 Because Prop 208 could function as contemplated without the Local Revenues Clause, Appellants' claim that the entire measure is facially unconstitutional is unripe. The Court should affirm for this reason alone.[13]

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[13] A hypothetical exposes the weakness of Appellants' arguments. If the Legislature passed an increase to base formula funding (subject to the Expenditure Cap), would the court strike it down in a facial constitutional challenge based on a possibility that the increase would push spending over the Expenditure Cap in any particular budget year,

C. Prop 208 funds are not "local revenues."

¶43 If the Court reaches the merits of Appellants' § 21 claim, Prop 208 doesn't violate § 21 because the funds it provides directly to school districts are grants, which the Grant Exception exempts from the definition of "local revenues" and the Expenditure Cap. *See* Ariz. Const. art. IX, § 21(4)(c)(v).[14]

1. Section 21's plain language controls.

¶44 Before this litigation, no court ever interpreted the Grant Exception. But there's little to interpret; this Court's analysis should begin and end with its plain language. *Circle K Stores, Inc. v. Apache Cty.*, 199 Ariz. 402, 406 ¶ 9 (App. 2001) ("We first examine the plain language of the provision and, if it is clear and unambiguous, we generally subscribe to that meaning"). The plain language of the Grant Exception applies, simply, to all "grants . . . of any type." And if there

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and that the Legislature would not vote to authorize the expenditure? Of course not. The Court should not impose a more severe standard on an initiative.

[14] This was by specific design and was always a part of Prop 208, quickly putting to bed the suggestion – equal parts gratuitous and frivolous – that this argument is "archetypal post-hoc rationalization." [OB at 10]

were any further question, the common definition of "grant" aligns with the funds Prop 208 provides to school districts. *Id.* ¶ 11 (courts "interpret undefined words in a constitutional provision according to their natural, obvious, and ordinary meaning") (citation omitted); *Airport Props. v. Maricopa Cty.*, 195 Ariz. 89, 99 ¶ 36 (App. 1999) (Arizona courts often look to dictionary definitions). A grant is:

- "an amount of money given especially by the government to a person or organization for a special purpose," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/grant;
- "an amount of money that a government or other institution gives to an individual or to an organization for a particular purpose such as education or home improvements," Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/grant.

Prop 208's direct grants to school districts fit these definitions perfectly. They transfer specific amounts of money to specific recipients for specific purposes. Prop 208 labels and treats these as grants, and they in fact function as grants.

¶45 Because this is true, and as the trial court held [APPV2-109], the Local Revenues Clause has a constitutional interpretation. As the

trial court put it, it serves as a "mere interpretive aid." [*Id.*] Beyond designating the Prop 208 funds as grants, the drafters of Prop 208 took the extra step of including the Local Revenues Clause to reinforce applying the Grant Exception and to prevent the Legislature from designating the funds as "local revenues" or inventing a new expenditure limit that would subvert the will of the voters. This is a quintessential example of a "belt and suspenders" approach to statutory drafting and is reason enough to end the inquiry. *Arevalo*, 249 Ariz. ¶ 9 (courts will "interpret a statute to give it a constitutional construction if possible.").

¶46 Appellants [at 11] say that "the plain meaning of the word 'grant' does not refer to mandatory taxation and spending," and that "permeating [the common definition of 'grant'] is the idea that a grant entails a discretionary transfer that is not required by law." They base these proclamations on yet another dictionary definition, and a single case. [OB at 11] Neither is convincing.

¶47 The version of Webster's Dictionary cited by Appellants [at 11] defines grant as "something granted; esp: a gift (as of land or a sum of money) usu. for a particular purpose." The current formulation in the Merriam-Webster Dictionary is similar, and lists as synonyms an

"allocation, allotment, annuity, appropriation, entitlement, subsidy." *See* Merriam-Webster, "grant," https://www.merriam-webster.com/dictionary/grant#synonyms. In other words, a "gift" is just one example, but "grant" could be used interchangeably with "appropriation" or "entitlement." There is no inconsistency between this dictionary definition and Prop 208's direct grants to school districts.

¶48 Also unconvincing is the single excerpted sentence from the only case Appellants cite to suggest that "grant" has a common definition that Prop 208 doesn't satisfy. In *Wilmar Trading Pte Ltd. v. United States*, 466 F. Supp. 3d 1334 (Ct. Int'l Trade 2020), the court considered whether Indonesia provided a "countervailable subsidy" to biofuel producers under the Tariff Act. The Tariff Act defines a "countervailable subsidy" as the provision of a "financial contribution" by a government actor; a "financial contribution," in turn, "can consist of a 'direct transfer of funds,' such as a grant." *Id.* at 1341 (citing 19 U.S.C. § 1677(5)(D)(i)). In that specific context, the court said that it "interpreted 'grant' in accordance with the ordinary meaning of the word: that is, a grant is a 'gift-like transfer.'" *Id.* at 1344 (citation omitted). The court then held

that the "grant" at issue was a "subsidy" rather than a part of the price of the biofuel because the government got nothing in return. *Id.*

¶49 The Court of International Trade's view of the term "grant" under a specific provision of the Tariff Act that determines whether government assistance constitutes a "subsidy" is hardly dispositive. That a grant can be "gift-like" does not mean that it must always meet that characterization. Governments provide "grants" all the time under mandatory parameters set by law,[15] and it would conflict with the plain language of § 21 – "grants . . . of any type" – to qualify grants with a restriction such as "gift-like."

¶50 In the end, Prop 208's direct grants to school districts are "grants" under the plain language of the Grant Exception. "When the language of a provision is clear and unambiguous, we apply it without resorting to other means of constitutional construction." *State v. Mixton*,

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[15] *See, e.g.*, Grants.gov, *What is a Mandatory Grant*, https://grantsgovprod.wordpress.com/2016/06/02/what-is-a-mandatory-grant/#:~:text=Mandatory%20grants%20are%20a%20type,defined%20in%20the%20authorizing%20statute.&text=This%20authorizing%20statute%20also%20requires,to%20administer%20the%20grant%20program ("Mandatory grants are a type of grant that must be awarded to each eligible applicant (generally a government entity) based on the conditions defined in the authorizing statute.").

250 Ariz. 282 ¶ 28 (2021) (citation omitted). That's just what the Court should do here.

2. Voters didn't intend Section 21 to limit grant programs like that in Prop 208.

¶51 If the Court finds § 21 ambiguous, it should look next to "the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought to be remedied." *Cain v. Horne*, 220 Ariz. 77, 80 ¶ 10 (2009) (citation omitted). And applying the Grant Exception to Prop 208's direct grants to school districts aligns with the purpose of § 21 as presented to voters in 1980. *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 471 ¶ 14 (2009) (using publicity pamphlet arguments to divine voters' intent).

¶52 As noted above [§ 1.A, *supra*], voters were told that enacting § 21 would limit school district spending attributed to local property taxes those districts levied. Prop 208's direct grants to school districts are not from local property taxes; they come from a targeted income tax surcharge. Nothing about § 21's history suggests that it should be applied to preclude school districts from spending Prop 208 funds.

3. Prop 208's direct grants are like other excluded state-funded programs.

¶53 Further weighing against Appellants' interpretation of the Grant Exception are other State-funded programs exempted from the Expenditure Cap. These are strong indications of how the Department of Education ("ADE") will treat Prop 208's direct grants to school districts.

¶54 As school finance expert Chuck Essigs explained, ADE "excludes many grants provided by the State from the definition of local revenues" as noted on the "Aggregate Expenditure Report" that school districts must complete each year. [APPV2-031 ¶ 9] These include, for example, the "Instructional Improvement Fund" created by the passage of Proposition 202 in 2002 (A.R.S. § 15-979), as well as "Early Childhood Block Grants" (A.R.S. § 15-1251) and "Result-Based Funding" (A.R.S. § 15-249.08). [*Id.* ¶¶ 9-10]

¶55 Appellants quibble [at 17] with the details of the latter two programs, but ignore the Instructional Improvement Fund. Their silence is telling; the Instructional Improvement Fund falls under the Grant Exception and bears striking similarities to Prop 208. As Mr. Essigs explained, "like the fund created by Proposition 208,"

- The Instructional Improvement Fund is not subject to appropriation, and expenditures from the fund are not subject to outside approval. A.R.S. § 15-979(A).

  […]

- Monies are provided to school districts and charter schools based on student counts. A.R.S. § 15-979(C).

- Specific permitted uses of the fund are set forth by percentage. A.R.S. § 15-979(D), (E).

- Special reporting/accounting provisions are required. A.R.S. § 15-979(F).

[APPV2-031-032 ¶ 10] The Instructional Improvement Fund appears under "Excluded Funds" on the Aggregate Expenditure Report [APPV2-035] and is one of many excluded "State Projects" reported in more detail by school districts [SA087-89]. All evidence suggests that ADE will treat Prop 208's direct grants the same.

¶56 Appellants [at 16] proclaim that the trial court's mere consideration of ADE's interpretation of § 21 in the context of similar grant programs is a "scandal." Hardly. The courts, of course, have ultimate responsibility for interpreting the Arizona Constitution. *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 ¶ 8 (2006). Nothing requires the Court to "defer" to ADE's interpretation of § 21, and the trial court did not purport to do so. [*See* APPV2-111-112 (noting that

the Grant Exception's history and interpretation by the executive and Legislature is "unexplored," and that "[t]he court is unable to evaluate the[] arguments effectively on the existing record")]

¶57 But that doesn't mean an agency interpretation isn't helpful in the judiciary's task of constitutional interpretation. For that reason, it is appropriate for the judiciary to ask about an agency's interpretation of either a statute or constitutional provision with which it has expertise. That's what the trial court did here by looking at the limited record before it, finding a question about the relevance of that interpretation, and inviting the parties to provide more information. This interpretation is one of many things the trial court – and indeed, this Court – "may consider" in interpreting a constitutional provision. *See* *Fairfield v. Foster*, 25 Ariz. 146, 151 (1923) ("[W]here the language is ambiguous, we may consider among other things, the meaning previously given it by co-ordinate branches of the government").

¶58 Considering ADE's interpretation of § 21 in the context of other State-funded (and Expenditure Cap excluded) programs is also important because Appellants' proposed narrow interpretation of the Grant Exception will likely throw the school finance system into chaos.

School districts already starved for resources could see many millions of dollars re-classified as "local revenues," jeopardizing their ability to expend those funds and properly educate their students.

¶59 At the very least, ADE's exclusion of other State-funded grant programs from the Expenditure Cap – including at least one that is strikingly similar to Prop 208 – reinforces the argument that Prop 208's direct grants to school districts aren't "local revenues" under § 21. The trial court did not err by considering that fact, and requesting a more developed record.

4. The canons of statutory construction invoked by Appellants aren't helpful.

¶60 With no textual basis, Appellants repeatedly distinguish what they call "genuine" grants (which they apparently agree are not "local revenues") from "nondiscretionary" grants, which they find to be not "genuine" and which they claim are "local revenues." To justify their position, Appellants invoke several canons of statutory construction. First up [at 11-12] is the *noscitur a sociis* canon, under which "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 135 ¶ 34 (2011) (citation omitted).

Appellants contend that this canon supports their position because the Grant Exception lists "grants" along with "gifts," "aid," and "other contributions," which they say are all "words of voluntary contribution." In other words, Appellants claim discretion is the lynchpin of the term "grant." This Court should reject Appellants' invitation to blue pencil the constitution by inserting the word "discretionary" or "competitive" to limit the Grant Exception. The term "grants . . . of any type" doesn't align with Appellants' narrow view.

¶61 Even if discretion were part of the definition of "grant" (it isn't), Arizona's voters exercised their "discretion" to fund and create a dedicated grant program through Prop 208 by approving it at the polls. While typically it is the Legislature that exercises discretion in creating and funding a grant program, here the voters exercised their discretion in doing so. And Appellants misunderstand how many grant statutes work. The "discretion" often exists in the decision to create the grant, not with the person or entity that fulfills the ministerial act of distributing the grant funds (here the State Treasurer).[16]

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16 *See, e.g.*, A.R.S. § 15-249.08 (Results Based Funding statute). Appellants agree that this is a "traditional grant program." [OB at 17]. Yet the statute establishes mandatory criteria for distributing funds,

¶62 Appellants also contend [at 12-13] that "[c]ontext also includes neighboring constitutional provisions," and point to the other constitutional expenditure limitation in § 21 – applicable to community college districts – that allows the Legislature to make exceptions "by law." It's true that there's a distinction between the two expenditure limits, but a distinction without a difference. Prop 208 does not statutorily create a new exemption category, but fits within the existing Grant Exception.

¶63 Appellants also argue that applying Prop 208's direct grants to school districts under the Grant Exception would render two other exceptions "void, inert, redundant, or trivial": Article IX, § 21(4)(c)(iv), which exempts "grants and aid of any type received from the federal government except school assistance in federally affected areas," and article IX, § 21(4)(c)(vi), which exempts "amounts received from the state for the purpose of purchasing land, buildings, or improvements." As to the former, it's unsurprising that § 21's drafters were careful to separately account for "grants and aid of any type from the federal

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leaving no discretion on the part of the distributor for which districts will receive funds and how much they will receive. *See also* n.14, *supra.*

government" given the large amounts of federal "aid and grants" on which Arizona schools rely. For one district in West Phoenix alone, that amount was $25 million several years ago [APPV2-035]; at the State level, it was more than $1 billion last year.[17] Further, a separate federal grant exception was necessary because of nuances in the way the federal government provides money to certain districts that contain federal or tribal lands. The federal grant exception in § 21(4)(c)(iv) itself contains an exception for "school assistance in federally affected areas." This "exception to the exception" covers, for example, "Impact Aid," which is an important funding source for schools on or near federal, military, or tribal lands that are not subject to state or local property taxes.[18] It serves an equivalent purpose to the "in lieu of taxes" provision in § 21(4)(c)(v). [*See* n.2, *supra*] The federal grant exception is not "inert"; it serves a specific purpose in the broader scheme of protecting school districts' ability to expend huge sums of money every year.

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[17] Ariz. Dep't of Education, *Superintendent's Annual Report FY2020*, at 18, https://www.azed.gov/finance/reports.

[18] *See* U.S. Dep't of Education, *About Impact Aid* https://www2.ed.gov/about/offices/list/oese/impactaid/whatisia.html.

¶64 And as to the school construction and improvements exception in § 21(4)(c)(vi), Appellants' arguments reflect a misunderstanding of Arizona school finance law, particularly as it existed leading up to § 21's adoption. First, Appellants ignore that § 21 covered both school districts and community colleges, even though the funding for these two systems differed significantly. Unlike the system for community colleges, when Arizonans adopted § 21, local property tax levies imposed by school boards funded virtually all school district capital expenses for things like school buildings and major improvements. This did not change until 1998 when the Legislature enacted Students FIRST legislation in response to this Court's decisions holding that Arizona's system for funding the capital needs of public schools was unconstitutionally deficient. *See, e.g.,* *Roosevelt v. Bishop*, 179 Ariz. 233 (1994); *Hull v. Albrecht*, 190 Ariz. 520 (1997).

¶65 The Legislature, in passing Students FIRST, specifically stated in session law that it was assuming the responsibility to pay for capital facilities, which were previously being borne by local district property taxes. 1998 Ariz. Sess. Laws., ch. 1, § 52(A) (5th Spec. Sess.). When it made that change, it also declared that districts were prohibited

from levying property taxes to finance capital facilities financed by the state. *Id*. The Legislature then increased its own state appropriation limitation, art. IX, § 17(4)(c), "to reflect the transference of costs of providing a governmental function to the state." *Id.* § 52(B). Thus, when § 21 was adopted some 18 years earlier, the references to state funded construction and improvements were not geared to school districts.

¶66 Several additional reasons explain why the drafters of § 21 would separately exempt state-funded construction and improvement costs. First, including state-funded construction costs in the statewide aggregate Expenditure Cap would be unfair because of the way the cap works. Only a few out of Arizona's 200-plus districts may experience explosive growth requiring new construction of new schools. If just a few of those districts account for hundreds of millions of dollars of construction expenses, and if those expenses counted toward the Expenditure Cap, it could wreak havoc across Arizona. All school districts in the state would have to reduce their budgets, even if they received none of the construction funds.

¶67 What's more, even today, local property taxation finances a lot of school construction and improvements. The drafters of § 21 included

a bond exception (§ 21(4)(c)(i)) allowing local voters to decide whether to raise their own property taxes. Excluding State-provided capital expenses, just like locally approved funds, is only equitable. Capital construction/improvement expenses provided by the state also do not affect local property taxes, the primary purpose for adoption of Section 21.

¶68 In the end, that a source of funds could qualify under multiple exceptions is unremarkable. Indeed, even under Appellants' narrow definition of "grant," a federal grant or a State grant for a construction project, for example, could qualify under more than one exception.

¶69 Lastly, Appellants argue [at 13-14] that "interpreting the [Grant Exception] to encompass payments under Proposition 208 would create an exception that swallows the rule" because "every other transfer from the State to school districts" would be exempt because all financial support from the State could be classified as "aid" or a "contribution."

¶70 Whether a particular program that is (1) not legislatively designated as a "grant," and (2) does not function as a "grant" by providing specific funds to specific recipients for limited, specific purposes (*e.g.*, the base formula funding that school districts can use for

any purpose) is not before this Court. The parties did not brief – and the trial court did not consider – the definitions of "contribution" and "aid," and whether, as Appellants declare, all State transfers of money could come under those definitions.

¶71 That aside, there is nothing about applying the Grant Exception to Prop 208's direct grants to school districts that would be "absurd" or would destroy existing distinctions between funding sources that aren't "local revenues" and those that are. ADE already draws those distinctions and provides the forms that allow school districts to do the same. [APPV2-035; SA087] If anything, Appellants' constrained reading of "grant" would destroy those distinctions. And that interpretation could have a disastrous effect on existing state grant programs. [*See* ¶¶ 54-55, *supra*]

D. The Local Revenues Clause is severable from the balance of Prop 208.

¶72 For all the reasons discussed above, the grants provided by Prop 208 fit within the Grant Exception, and thus the Local Revenues Clause has a constitutional interpretation. However, even if the Court holds that the Grant Exception doesn't apply to Prop 208's direct grants,

and that the Local Revenues Clause is unconstitutional, that single provision of Prop 208 is severable.

¶73 Appellants argue otherwise, but first [at 21-23] ask this Court to overturn its own precedent by refusing to apply the severability doctrine to initiatives at all, even those like Prop 208 with severability clauses. This is necessary, they say, because of the Voter Protection Act ("VPA"). Appellants' dislike of the VPA is an insufficient reason to overrule several of this Court's prior decisions – including at least one in a post-VPA regime – on which many have relied for decades. And it would fly directly in the face of the fundamental right to legislate by initiative to apply the severability doctrine to the Legislature but not the people.

1. This Court applies – and should continue to apply – the severability doctrine to initiatives.

¶74 This Court has consistently applied the severability doctrine to initiatives and should continue to do so. *See* *Ruiz v. Hull*, 191 Ariz. 441, 459 ¶¶ 67-68 (1998) (finding invalid provision inseverable); *Randolph v. Groscost*, 195 Ariz. 423, 427 ¶ 15 (1999) (severing an invalid provision); *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 522 ¶ 23 (2000) (same). Appellants, in so many words, ask the Court to abandon these precedents, mainly because the VPA limits the

Legislature's authority to revise citizen-approved measures and "[e]rroneous severance" in this area is particularly "catastrophic." In short, Appellants reveal their disdain for Arizona voters by inviting this Court to abandon precedent and subject measures adopted by millions of voters through initiative to greater scrutiny and a greater likelihood of being struck down than laws passed by a "bare majority" of 16 senators and 31 representatives.[19]

¶75 The Court should decline this invitation. "The doctrine of *stare decisis,* which requires [the Court] to give weight to previous decisions addressing the same issue, seeks to promote reliability so that parties can plan activities knowing what the law is." *Galloway v. Vanderpool*, 205 Ariz. 252, 256 ¶ 16 (2003). It's "based upon the value to the rule of consistency, continuity, and predictability." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127 ¶ 17 (2020). As a result, this Court "will overturn long-standing precedent only for a compelling reason." *State v.*

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[19] Appellants repeatedly state that Prop 208 passed with only a "bare majority." Their denigration of a "bare majority" finds no support in law. The concept of majority rule is central to our democracy. For example, legislators who won their races by a slim margin do not become subject to challenge because they were elected by a "bare majority."

McGill, 213 Ariz. 147, 159 ¶ 52 (2006). And here, there is no "compelling reason."

¶76 The VPA limits the power of the Legislature to tinker with voter-approved measures by design. Ariz. Const. art. IV, pt. 1, § 6(A)-(D). The VPA's backers "were concerned that the legislature was abusing its power to amend and repeal voter-endorsed measures," and the VPA's passage thus "altered the balance of power between the electorate and the legislature." *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7 (2009). It's not a "compelling reason" to abandon decades of precedent, particularly because this Court decided *Myers* in the context of an initiative protected by the VPA.

¶77 Whatever separation of powers concerns [OB at 21-22] allegedly exist in the context of the severability doctrine exist both for laws enacted by the Legislature and those enacted by the people. Appellants cite *Randolph* to say that these concerns "only get[] worse when the legislative body is the people," but the cited portion of that case says no such thing. Instead, *Randolph* recognizes only that the severability test differs slightly for citizen initiatives because of fundamental differences in the legislative process.

¶78 At bottom, abandoning the severability doctrine for initiatives would place the people at a significant legislative disadvantage, one inconsistent with the principle that the people have "as great as the power of the Legislature to legislate." *State v. Osborn*, 16 Ariz. 247, 250 (1914). There's no principled or constitutional basis to impose this barrier on the people's exercise of their fundamental right to legislate by initiative.

2. Prop 208 is constitutional without the Local Revenues Clause.

¶79 The severability doctrine can be applied to Prop 208, and that measure handily passes the severability test in *Randolph* without the Local Revenues Clause. Appellants' arguments to the contrary rely on the wrong standard, and in any event, fail on their merits.

¶80 In *Randolph* and *Myers*, this Court adopted a two-part severability test for measures adopted by popular vote, one that differs from the test that applies to acts of the Legislature:

> We will first consider whether the valid portion, considered separately, can operate independently and is enforceable and workable. If it is, we will uphold it unless doing so would produce a result so irrational or absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other.

Randolph, 195 Ariz. at 427 ¶ 15; *see also Myers*, 196 Ariz. at 522 ¶ 23. Because this test is a "variation on the severability test for legislative measures," *id.*, Appellants' reliance on other formulations is inappropriate.

a. Workability.

¶81 Prop 208 is "workable" without the Local Revenues Clause. This is true because that provision is a "mere interpretive aid" that dovetails with applying the Grant Exception and serves a prophylactic purpose. [*See* ¶ 45, *supra*]. But even if the Court disagrees and holds the Grant Exception does not apply, the result is the same. Without the Local Revenues Clause, the Department of Revenue will still collect Prop 208's income tax surcharge, and the State Treasurer can still transfer those revenues. A percentage of those revenues are unaffected by § 21 and will be spent without limitation; even if the Grant Exception does not apply, the balance could be spent subject to the Expenditure Cap. An existing legislative process controls how any spending overages would be handled. *See* A.R.S. § 15-911.

¶82 When considering the question of "workability," consider a hypothetical measure enacted either by the people or the Legislature that

contained all of Prop 208 except (1) the Local Revenues Clause and (2) the designation and treatment of the funds it provides to school districts as grants. Would that measure be "workable"? Of course it would. Such a measure would create a new dedicated revenue source, much of which could be spent without issue, and perhaps some of which could be spent if additional steps were taken to authorize it. As the trial court put it, the "hard part" of having a revenue source [APPV2-117] would be done, and whether external controls or limits on school districts might apply at some unknown point in the future would not make this hypothetical measure any less "workable."

¶83 The same is true here. In Section 6 of Prop 208, the people expressed their will that "[i]f any provision of this act or its application . . . is declared invalid by a court of competent jurisdiction, such invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision." The presence of this clause means that "all doubts are to be resolved in favor of severability," *Myers*, 196 Ariz. at 523 ¶ 25, and that controls the result here. Appellants claim otherwise, citing the severability analysis in an unpublished district court order that discusses severability in a challenge to the "matching

funds" provision of the Clean Elections Act. *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 229221 (D. Ariz. Jan. 10, 2010). But the district court in *McComish* did not consider whether the invalidity of the challenged provisions meant the entire Clean Elections Act was invalid. Instead, its severability discussion turned on whether parts of the challenged statutory provision itself (former A.R.S. § 16-952) could be severed from other parts of that provision. *Id.* at *11 ("[T]he matching funds provision cannot be selectively severed as Defendants propose"). That case thus does not support Appellants' sweeping severability argument.

b. Rational basis.

¶84 Upholding Prop 208 without the Local Revenues Clause does not produce an "irrational or absurd" result. Despite Appellants' claim [at 26 n.5] that this is not any version of the "'rational basis test' applicable to substantive due process or equal protection cases," that's exactly the standard this Court has applied. *Myers*, 196 Ariz. at 523 ¶ 25 ("[T]he people could have selected such a regime and it would have passed the rational basis test for due process violations") (emphasis added). This means that the unsevered portion of Prop 208 must survive if the Court

"can imagine any set of facts which rationally justifies" the law. *State v. Klausner*, 194 Ariz. 169, 172 ¶ 13 (App. 1998).

¶85 Appellants' severability argument rests on speculation that without the Local Revenues Clause, none of Prop 208's money could ever be spent. As the trial court recognized and as set forth above, that is false; there are portions of Prop 208's revenues unchallenged here and that could never be "local revenues." And even if the Grant Exception did not apply, those funds that might be "local revenues" may well be able to be spent in differing amounts each fiscal year depending on the state of the Expenditure Cap and whether the Legislature authorizes additional expenditures beyond the Expenditure Cap (as it has done in the past). There is nothing "irrational" or "absurd" about this.

¶86 These facts dispose of Appellants' belief that "rational voters" would not have approved Prop 208 if it did not contain the Local Revenues Clause. Indeed, without that clause, the measure would still "increase funding for public education" [APPV1-117] as voters were told it would. There's certainly no evidence that "at least 1.8% of a rational electorate would have felt differently." [OB at 28]

¶87 All this highlights the fundamental problem with Appellants' approach to severability. That is, they say [at 26] that "the spending provisions in Proposition 208 are not severable" when they haven't raised any substantive challenge to the measure's "spending provisions," whatever those are. Their sole challenge is to the Local Revenues Clause, which they claim dooms the entire measure. Even if Appellants were correct on the merits (they aren't), the Court should not impose such a harsh and inequitable result because the Local Revenues Clause is severable from the balance of Prop 208.

II. Arizonans May Impose Taxes by Statutory Initiative and Simple Majority Vote.

¶88 The trial court correctly rejected Appellants' claims that article IX § 22 limits the fundamental right to legislate by initiative by either depriving Arizonans of the right to enact statutory tax increases by initiative or requiring supermajority approval of such measures. [APPV2-103-105] Section 22 does no such thing. Appellants' arguments ignore the plain language of that section, and rest on at least two mistaken legal theories: (1) that an initiative petition is an "act" as the Arizona Constitution uses that term, and (2) that all procedural

lawmaking provisions in the Arizona Constitution apply equally to the Legislature and the people.

¶89 Article IX, § 22 provides that "[a]n act that provides for a net increase in state revenues, as described in subsection B is effective on the affirmative vote of two-thirds of the members of each house of the legislature." As Appellants' arguments go, this language – itself adopted by initiative in 1992 – divests the people of the power to enact a tax by statute or requires them to approve statutory tax measures by a two-thirds supermajority. This must be so, they say, because of precedent holding that "the people are bound by the Constitution, the same as the Legislature." [OB at 28 (quoting *Tillotson v. Frohmiller*, 34 Ariz. 34, 401-02 (1928))]. That precedent does not support Appellants' claim.

A. The plain language of § 22 resolves any question about its application to citizen initiatives.

¶90 Appellants' construction of § 22 finds no support in that provision's plain language, the "best reflection" of the intent of the "electorate that adopted it." *State v. Lee*, 226 Ariz. 234, 237 ¶ 9 (App. 2011). There is nothing in the plain language of § 22 to suggest that it restricts the people's ability to tax by initiative.

¶91 To begin, § 22 applies to "[a]n act that provides for a net increase in state revenues," and Appellants posit that an initiative is "undeniably" an act. Not so. Indeed, article IV, part 1, § 1 of the Arizona Constitution – the source of Arizonans' fundamental right to legislate by initiative – doesn't label initiatives as "acts," but "measures." *E.g.*, Ariz. Const. art. IV, pt. 1, § 1(2) (reserving the power to "propose any measure"); *id.* § 1(4) (describing "the measures so proposed to be voted on"); *id.* § 1(5) (stating the effective date for "[a]ny measure or amendment to the constitution proposed under the initiative"); *id.* § 6(A) (Governor's veto power "shall not extend to an initiative measure"); *id.* § 6(A), (B) (limiting Legislature's authority over "an initiative measure"). In stark contrast, article IV uses the term "act" exclusively in the context of the Legislature. *E.g.*, *id.* § 1(1); § 1(3).

¶92 This Court confirmed this dichotomy almost ninety years ago when deciding that two constitutional limitations on "acts" – the Single Subject Rule (Ariz. Const. art. IV, pt. 2, § 13) and a prohibition on amendment "by mere reference" (Ariz. Const. art. IV, pt. 2, § 14) – do not apply to initiative petitions. *Barth v. White*, 40 Ariz. 548, 556 (1932). As

this Court held, "an initiative petition by the people . . . is neither an act nor joint resolution." *Id.*

¶93 Appellants neither cite nor try to distinguish *Barth*. Instead, they say [at 31] that any distinction between "acts" and non-acts "does not withstand scrutiny" because "Arizona law has always held that initiatives are 'acts,'" citing *Saggio v. Connelly*, 147 Ariz. 240 (1985), *Hernandez v. Frohmiller*, 68 Ariz. 242 (1949), and *Kerby v. Griffin*, 48 Ariz. 434 (1936). The only thing that "does not withstand scrutiny" is Appellants' misuse of those authorities.

¶94 In *Saggio*, the court merely said that "[l]egislation, whether by the people or the legislature, is a definite, specific act or resolution." 147 Ariz. at 241. In *Hernandez* – a post-election challenge to an initiative – the court held that "[t]he constitutionality of this initiative act must be tested by the same rules that are employed in testing the validity of laws enacted by the legislature." 68 Ariz. at 249 (citation omitted). And in *Kerby* – a pre-election challenge to the form of a petition – the court said that "an act approved by the people in a manner contrary to that provided by the Constitution is just as invalid as an act passed by the Legislature in a manner prohibited by constitutional mandates." 48 Ariz. at 446.

Though the word "act" appears in Appellants' cherry-picked quotes from these cases, none draws a constitutional distinction between constitutional limitations placed on "acts" and initiative measures as this Court did in *Barth*.

¶95 Appellants' overly simplistic argument about the people's authority is no different than one rejected (most recently) three years ago, again in the context of the Single Subject Rule (Ariz. Const. art. IV, pt. 2, § 13), which states that "[e]very act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." This Court confirmed that this constitutional rule applies exclusively "to 'act[s],' which are enacted by the legislature, and does not address initiative or referendum petitions." *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 542 ¶ 33 (2017) (emphasis added) (citing *Barth*, 40 Ariz. at 556). Grasping at straws, Appellants say that this is irrelevant because three paragraphs earlier, the court said the Single Subject Rule "was intended to prevent 'log-rolling.'" [OB at 32 (citing *Kiley*, 242 Ariz. at 541 ¶ 30)] But they omit the court's preface to its ultimate holding: that prior precedent (including *Barth*) "are . . . supported by the Single Subject Rule's language and placement within

the constitution." *Kiley*, 242 Ariz. at 541-42 ¶ 33; *see also Biggs v. Betlach*, 243 Ariz. 256, 262 ¶ 32 (2017) (recognizing that "[i]n approving section 22, the voters limited the legislature's ability to itself increase state revenues through taxes, fees, or assessments") (emphasis added).

¶96 In short, the plain language of § 22 and this Court's precedent makes clear that it doesn't apply to citizen initiatives. It thus controls, and the Court need not proceed any further.

B. The people did not intend to limit their own power when adopting § 22.

¶97 If the Court finds ambiguity in § 22, there are many other reasons to reject Appellants' interpretation. Most notably, the trial court correctly held that in adopting § 22, the people did not intend "to repeal or limit their own, separate co-equal power to increase taxes by initiative." [APPV2-103] There is simply no evidence that Arizona voters understood that § 22 had anything to do with their constitutional power.

¶98 Appellants correctly look to the publicity pamphlet containing materials related to § 22 (which was Proposition 108 in the 1992 General Election) to attempt to divine the people's intent. *See, e.g.*, *Jett v. City of Tucson*, 180 Ariz. 115, 120 (1994) (publicity pamphlet "contain[ed] nothing to indicate that the amendment was intended to divest the cities"

of certain authority). But what they don't tell the Court is that the word "initiative" appears nowhere in either Proposition 108 or its related materials in the publicity pamphlet, and thus the legislative history provides no support for Appellants' contention that the measure limited that power.

¶99 What the 1992 Publicity Pamphlet proves is that voters understood § 22 as a restriction on the Legislature, not the people. For example:

- The Legislative Council Argument opposing the measure stated that Prop 108 would "greatly increase the power of a few legislators" [APPV1-121];
- Phil MacDonnell, then a candidate for Congress, objected to "the Arizona legislature enact[ing] a series of tax increases" [APPV1-122];
- The officers of the committee that sponsored Prop 108 noted the objection of "some Legislators, who have voted for tax increases" [APPV1-122-123];

- Tracy Thomas and Sydney Hoff of the Lincoln Caucus noted that Prop 108 would "begin to take back control from a run-away tax and spend state legislature" [APPV1-123].

¶100 Appellants' invocation [at 35-36] of the Legislative Council argument opposing the measure fares no better. As noted above, that argument speaks in terms of "increas[ing] the power of a few legislators" with no reference to the people. But Appellants' true focus is on the portion of the Argument explaining that "[i]f the Legislature enacts a tax increase with a two-thirds vote, Proposition 108 would not allow the voters the right to submit the act to a referendum." According to Appellants [at 36], "[i]f voters cannot send constitutionally enacted tax increases to the ballot as a statutory referendum, then the proponents of Proposition 208 could not make an end-run around the requirements of [§ 22] via a statutory initiative."

¶101 Nonsense. Voters cannot send a tax increase approved under § 22 to the ballot-box by referendum because § 22 itself says so. *See* Ariz. Const. art. IX, § 22(A) ("If the act receives such an affirmative vote, it becomes effective immediately on the signature of the governor.") (emphasis added). In other words, § 22 does contain an express limitation

on the people's exercise of one of their rights of direct democracy, just not the limitation Appellants imagine is there. This confirms that the people know how to limit their own power, and they "would have expressly done so" if that was their intent about their power to raise taxes by statutory initiative and a simple majority. *See* *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 327 ¶ 15 (2011).[20]

¶102 At bottom, there is zero evidence that the people intended to hamstring their initiative power by adopting § 22. *See* *Biggs*, 243 Ariz. at 262 ¶ 31 ("[t]he voter pamphlet, notably, is consistent with section 22's focus on constraining the legislature's actions") (emphasis added). Nor does the history after Prop 108's passage support such a contention; in the very next general election, the people approved Prop 200, which imposed a statutory tax on tobacco products with just 50.1% of the vote. Arizona voters then approved at least four additional statutory tax increases by initiative or legislative referral, none with a supermajority. *See* Prop 201 (2006) (levying a tax on cigarettes with 54% of the vote); Prop 203 (2006) (levying a tax on tobacco products with 53% of the vote);

[20] The Revenue Source Rule (Ariz. Const. art. IX, § 23) is also evidence that the people know how to limit their initiative powers.

Prop 200 (2000) (levying a tax on tobacco products with 58% of the vote); Prop 301 (2000) (imposing a new tax rate increment to fund education with 53% of the vote).

C. Interpreting article IX, § 22 to limit the initiative power would lead to a disfavored implied repeal of a constitutional right.

¶103 Not only is the trial court's holding supported by § 22's plain language and legislative history, but also the fact that a contrary result would lead to the implied partial repeal of: (1) a fundamental constitutional right and (2) a separate provision of article IV under which initiative measures "become law when approved by a majority of the votes cast thereon." Ariz. Const. art. IV, pt. 1, § 1(5). "[R]epeals by implication are not favored, and will not be indulged, if there is any other reasonable construction." *S. Pac. Co. v. Gila Cty.*, 56 Ariz. 499, 502 (1941) (citation omitted). Here, there is a "reasonable construction" that avoids that disfavored result: § 22 restricts the power of the Legislature, not the people. This construction is particularly appropriate in the context of a right understood by both this Court and the Legislature to be "fundamental." *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 6 (1972); *see*

also *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559 ¶ 9 (2006).

D. Appellants' "interpretation" of § 22 conflicts with the Revenue Source Rule.

¶104 Interpreting § 22 as Appellants urge also contradicts article IX, § 23, known as the "Revenue Source Rule," which requires an initiative measure "that proposes a mandatory expenditure of state revenues" to "also provide for an increased source of revenues sufficient to cover the . . . costs of the proposal." Thus, the Revenue Source Rule – adopted after § 22 – proves that not only can an initiative measure create a tax or other source of revenue, it must do so to cover the initiative's expenditures. Appellants' urged construction of § 22 would create a "Catch 22" that would essentially preclude any initiative that causes any spending.

E. Article XXII, § 14 confirms the people's power.

¶105 Relatedly, Appellants' contention [at 37-38] that "the superior court . . . essentially rewrote article XXII, section 14 to downplay its significance" is both confounding and wrong. Article XXII, § 14 of the Arizona Constitution ("§ 14") provides that

> [a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people.

The trial court held that this provision did not support Appellant's § 22 arguments because it "deals with the substance of a law, not the procedure for enacting it." [APPV2-105] But the trial court did not stop there, explaining that "for example, neither the legislature nor the people acting in its stead could enact a law making illegal to advocate a tax increase, because the First Amendment would prohibit such a law. But Article IX, Section 22 is not that kind of law." [*Id.*]

¶106 The trial court was correct about the scope of § 14, a constitutional provision that empowers the people by making clear that they can legislate on any substantive matter that the Legislature properly could. *See, e.g.*, *Tillotson*, 34 Ariz. at 406-07 (invalidating an initiative because it improperly delegated legislative power). What § 14 does not do, however, is require that the procedural lawmaking requirements and limitations that apply to the Legislature also apply to the people. Nor has this Court ever understood it to do so; *Barth* and *Kiley* are just two examples of why Appellants' interpretation of § 14 fails.

¶107 As a result, Appellants' examples [at 37-38] that purport to highlight problems with the trial court's "distinction between substantive and procedural protections" are incongruous. Appellants' unremarkable points that the people couldn't pass a statutory initiative that abolished the governor's veto power, eliminated a legislative chamber, or created an ex post facto law in no way support their argument. [OB at 37-38] These examples are clearly outside the Legislature's authority, and thus clearly outside the people's authority as a function of § 14. In stark contrast, § 14 does not mean, for example, that an initiative measure is invalid because it was "not read by sections on three different days" or was not "signed by the presiding officer of each house in open session" as required by article IV, part 2, §§ 12 and 15 of the Arizona Constitution. Those provisions don't apply to the people just as § 22 doesn't.

¶108 Neither *State ex rel. Conway v. Superior Court*, 60 Ariz. 59 (1942) nor *Winkle v. City of Tucson*, 190 Ariz. 413 (1997) says otherwise. [OB at 38-40] *Conway* was a separation of powers case and held that an initiative did not invade the province of the judiciary by altering a court rule related to executions and death warrants. 60 Ariz. at 81-82. This Court explained at the outset that "[w]hen the people act in their

legislative capacity through an initiated measure, they have only the same powers which the legislature would have, and any act so passed is limited by constitutional provisions to the same extent as an act of the legislature." *Id.* at 78. But it did so in the context of holding that an initiative is subject to the same substantive limitations as a legislative act, and that neither can violate the separation of powers. Again, that's consistent with § 14.

¶109 *Winkle* is even less helpful to Appellants. That case involved a pre-election challenge to a municipal initiative, and the court re-stated the proposition that "[t]he legislative power of the people is as great as that of the legislature." 190 Ariz. at 415 (citation omitted). That citation didn't support anything like Appellants' arguments here, but another uncontroversial proposition: courts don't evaluate the substance of an initiative measure before it passes. *Id.* at 415-16.

¶110 Section 14 does not support Appellants' arguments that Prop 208 is invalid under § 22.

F. The trial court correctly rejected Appellants' fallback position that a supermajority must approve initiatives that raise taxes.

¶111 The trial court recognized that the language of § 22 simply does not support an argument that a tax increase adopted by initiative requires a supermajority. [APPV2-104] As the trial court explained, "the courts would have to read that requirement into the law and operationalize it by judicial fiat," and the structure of § 22 conflicts with applying it to an initiative. [APPV2-105] For example, as the trial court continued, § 22 requires an "'affirmative vote of two-thirds of the members of each house of the legislature' to approve a tax increase. How would that translate to the initiative context? Would a two-thirds majority vote be enough to enact an initiative? Or would approval require a "yes" vote of two-thirds of registered voters? Two-thirds of eligible voters?" [APPV2-105]. Section 22 also explicitly allows for a governor's veto, and a threshold for overcoming that veto. These provisions make no sense in the context of the initiative process, which only furthers the inescapable conclusion that § 22 constrains only the power of the legislature, and not the people, to raise taxes.

G. Appellants failed to show a likelihood of success on their § 22 claim.

¶112 In sum, Section 22 does not apply to citizen initiatives, either in whole or in part.[21] Despite § 22, "voters can impose new taxes by majority vote through the initiative process." John D. Leshy, *The Arizona State Constitution*, at 296 (2d. ed 2013).

III. Any New Legal Standard Under § 21 or § 22 Should Apply Prospectively Only.

¶113 If the Court interprets § 21 or § 22 as Appellants suggest, its opinion should apply only prospectively. Whether to do so "is a policy question within this [C]ourt's discretion," and requires an analysis that considers "whether [its] opinion overrules settled precedent, 'establishes a new legal principle . . . whose resolution was not foreshadowed,' or whether '[r]etroactive application would produce substantially inequitable results.'" *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 44 (2010). Here, a narrow interpretation of the Grant Exception could gut school districts of critical support they reasonably relied on. [*See* ¶¶ 54-55, 71, *supra*] The Court's opinion could also invalidate many initiative

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21 *See Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360 (Cal. 1991) (rejecting the arguments peddled by Appellants here in the context of California's analog of § 22).

measures that have levied taxes, including some that have been on the books for decades. [*See* ¶ 102, *supra*] And these would be "substantially inequitable result[s]."

IV. Challengers Were Not Entitled to a Preliminary Injunction.

¶114 The trial court correctly ruled that Appellants didn't meet their burden of establishing entitlement to a preliminary injunction. [APPV2-108; APPV2-114] It held that Appellants' irreparable injury arguments were "unpersuasive" [APPV2-105], they fell "considerably short" of showing that the balance of hardships tips in their favor [APPV2-114], and "public policy" weighed against their request for preliminary relief [APPV2-118-19]. Appellants offer no convincing basis to find that the trial court abused its discretion.

A. The trial court correctly held that Appellants failed to show irreparable harm.

¶115 Taxpayer Appellants contend [at 44] that they will face irreparable harm if they have to pay Prop 208's surcharge, and Legislator Appellants claim [at 45] that their budgeting duties will be challenging because of "uncertainty" surrounding Prop 208. Both arguments lack merit. Legislator Appellants haven't shown a cognizable injury and thus lack standing to enjoin Prop 208. As for Taxpayer Appellants, injunctive

relief is unavailable to them, and even if it were, an injunction isn't necessary to remedy their purely monetary harm.

1. Legislator Appellants haven't shown an injury, let alone an irreparable one.

¶116 Legislator Appellants claim [at 45] that "uncertainty" over the "state budget" causes them irreparable harm. Not so.

¶117 To begin, these five individual Legislators lack standing. They allege "wholly abstract and widely dispersed" harm to the legislative budgeting process, but they "have shown no injury to a private right or to themselves personally." *Bennett v. Napolitano*, 206 Ariz. 520, 526 ¶ 28 (2003). Nor can they "assert standing to litigate claims of injury to the legislature as a whole." *Id.* at 527 ¶ 29.[22]

¶118 Appellants cite [at 45] *Wall v. American Optometric Association, Inc.*, 379 F. Supp. 175, 185 (N.D. Ga. 1974) to suggest that lawmakers suffer irreparable harm if they face uncertainty while waiting for a "final determination of the validity of" a challenged law. That quote

[22] Unlike the bloc of twenty-seven state representatives in *Biggs v. Cooper ex rel. Cty. of Maricopa,* 236 Ariz. 415, 420 ¶ 19 (2014), who "would have sufficed to defeat [the challenged law] if a supermajority was required for enactment" and thus had their votes "effectively nullified," Legislator Appellants have suffered no cognizable injury.

from *Wall* doesn't remotely support Appellants' proposition. There, an optometrist faced irreparable harm from enforcement of new regulations that would upend his optometry practice and "risk[] his very means of earning a living." *Id.* Legislator Appellants face no such risk of injury here.

¶119 Appellants also argue [at 45] that the trial court "discounted" the declaration of two legislators who proclaimed that the mere thought of Prop 208 would cause legislative "chaos." But Appellees submitted a competing declaration of two legislators who pointed out the "sky is falling" nature of those claims. [APPV2-037-40] The trial court weighed that testimony [APPV2-107] and determined that any "uncertainty" about Prop 208 is not "unusually challenging to economic forecasters, especially when compared to variables like the COVID-19 pandemic." Appellants' disagreement with that finding is not a basis for reversal. *See, e.g.*, *Shooter v. Farmer*, 235 Ariz. 199, 201 ¶ 4 (2014) ("The trial court, not this court, weighs the evidence and resolves any conflicting facts . . . and inferences therefrom.") (quotations omitted).[23]

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[23] Appellants incorrectly rely [at 45-46] on A.R.S. § 15-2041(D) to suggest that Prop 208 may impact budgeting decisions that span multiple

¶120 In all events, Appellants cite no legal authority to support their argument [at 45] that lawmakers are irreparably harmed by having to make tough "policy choices" or experiencing administrative challenges. The trial court correctly held [APPV2-115] that these alleged burdens are not "a lawful basis for an injunction."

2. Taxpayer Appellants will suffer no irreparable harm.

¶121 For their part, Taxpayer Appellants mainly argue [at 41] that an "alleged deprivation of a constitutional right" is a per se irreparable harm warranting injunctive relief. There are three problems with this argument.

¶122 First, as detailed above [§§ I-II], Appellants haven't shown that Prop 208 – let alone the taxing provisions of the measure – is unconstitutional. To be sure, certain constitutional deprivations can amount to irreparable harm. But that general principle doesn't apply when, as here, the plaintiff makes only a weak showing on the merits. *See, e.g.*, *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011). Contrary to Appellants' suggestion [at 42] that

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years. That statute deals solely with new school construction projections, which have nothing to do with Prop 208's grants and spending.

their claims are no different than "ongoing violations of a person's free speech or equal protection rights" or "racially discriminatory" government action, not every alleged constitutional violation is the same. Courts don't rubber-stamp the irreparable harm element in every case with a constitutional claim; they "must consider the nature of the constitutional injury before making such a conclusion." *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996); *see also Stevenson v. City & Cty. of San Francisco*, No. 11-cv-04950-MMC, 2016 WL 2993104, at *2 (N.D. Cal. Mar. 29, 2016) (noting that courts have only "presumed" irreparable injury in cases of ongoing violations of First Amendment and privacy rights, not "all constitutional claims").

¶123 Second, Taxpayer Appellants allege only monetary harm. As the trial court correctly found [APPV2-106], purely economic harm generally is not irreparable. *E.g.*, *Fin. Assocs., Inc. v. Hub Props., Inc.*, 143 Ariz. 543, 546 (App. 1984) (injunctive relief unnecessary when "monetary damages would suffice"); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,

weighs heavily against a claim of irreparable harm.") (quotations omitted). This is true even when a plaintiff raises constitutional claims. *Cornejo v. Tumlin*, No. 20-cv-05813-CRB, 2020 WL 4897907, at *3 (N.D. Cal. Aug. 20, 2020) (even assuming the plaintiff could prove constitutional claims, injunctive relief was inappropriate because "the primary harm [he] complain[ed] of [was] economic"); *Johnson v. City of San Francisco*, No. C 09–05503 JSW, 2010 WL 3078635, at *3 (N.D. Cal. Aug. 5, 2010) (same). So too here. The trial court correctly held [APPV2-106] that Taxpayer Appellants have a "straightforward remedy: a tax refund."

¶124 Finally, and even more to the point, a preliminary injunction isn't an available remedy when a taxpayer challenges the legality of a tax. [*See* IR 37; State Appellees' AB] Nor is a preliminary injunction necessary to prevent Taxpayer Appellants' alleged harm. As the trial court found [APPV2-106], "the Department of Revenue will not begin to collect the income tax surcharge until April 15, 2022. That leaves plenty of time, before the tax takes effect, to litigate this case to final judgment." This is even more true now that Appellants have agreed to litigate the entire case by June 2021. [SA095] Appellants argue [at 44] that some

taxpayers "are *required* to make estimated tax payments beginning April 2021." But as the trial court explained, taxpayers can make those "estimated payments based on their 2020 income tax liability, which Proposition 208 does not affect." [APPV2-106 (citing A.R.S. § 43-581(A))]

¶125 No evidence suggests that Taxpayer Appellants will suffer any injury anytime soon, to say nothing of an irreparable injury.

B. The trial court correctly held that the balance of hardships and public interest weigh against an injunction.

¶126 Finally, the balance of hardships and public interest weigh heavily against an injunction.

¶127 Preserving the will of the people is no doubt in the public interest. Appellants argue [at 47] that "public interest strongly favors maintaining the status quo" while they challenge Prop 208. But 1.6 million Arizonans surely disagree. In adopting Prop 208, the people stated [§ 2] unequivocally:

> Years of underfunding by the Arizona Legislature have led to crisis-level teacher shortages and woefully inadequate support services. Additional permanent funding is needed to develop, recruit and retain qualified teachers, hire counselors, close the achievement gap, . . . [and] prepare Arizona students for good jobs[.]"

This finding is well supported. For decades, Arizona has consistently rated at or near the bottom in education funding. Superintendent Hoffman, in her 2020 State of Education address, explained that "years of cuts to education funding" has led to "vast inequities," teacher pay that ranks 49th in the country, and "one out of every four teaching positions unfilled or filled with an underqualified candidate."[24] In short, "our education system is in a state of emergency." *Id.*

¶128 Any new law arguably changes the "status quo," but there is no basis to "delay enforcement of a state law that the court has determined is likely constitutional on the ground that the law threatens disruption of the status quo." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring). And because Prop 208 is presumed constitutional, *Arevalo*, 249 Ariz. ¶ 9, the balance of hardships tips in favor of upholding it. *See Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) ("The presumption of constitutionality . . . is not merely a factor to be considered in evaluating

[24] Ariz. Dep't of Education, *Supt. Hoffman Delivers 2020 "State of Education Address* (Feb. 4, 2020), https://www.azed.gov/communications/2020/02/04/superintendent-hoffman-delivers-2020-state-of-education-address/.

success on the merits, but an equity to be considered in favor of [the government] in balancing hardships.") (Rehnquist, J., in chambers).

¶129 Beyond that, as detailed in State Appellees' Answering Brief (incorporated by reference), the trial court correctly held that the balance of hardships doesn't favor Taxpayer Appellants. For starters, as the trial court found [APPV2-106], "'[i]t is the well-established policy of this state to prevent the validity of a tax from being tested by injunctive means.'" (quoting *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz Cty.*, 233 Ariz. 460 ¶ 17 (App. 2013)). And enjoining Prop 208 now, only to lift the injunction later, "would be a difficult, time-consuming and expensive venture" for the State, "particularly when weighed in contrast to the relatively modest burden on taxpayers who might pay estimated sums that are later refunded." [APPV2-106]

¶130 The public interest and balance of hardships weigh heavily in favor of honoring the will of the people as expressed at the ballot box.

Rule 21(a) Notice

¶131 Appellees seek their attorneys' fees and costs under Section 8 of Prop 208, the private attorney general doctrine, and A.R.S. §§ 12-341 and 12-342.

Conclusion

¶132 This Court should affirm the denial of Appellant's request for a preliminary injunction.

RESPECTFULLY SUBMITTED this 15th day of March, 2021.

COPPERSMITH BROCKELMAN PLC

By /s/ Roopali H. Desai
Roopali H. Desai
D. Andrew Gaona
Kristen Yost

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

By /s/ Daniel J. Adelman
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KAREN FANN, an individual; RUSSELL "RUSTY" BOWERS, an individual; DAVID GOWAN, an individual; VENDEN LEACH, an individual; REGINA COBB, an individual; JOHN KAVANAUGH, 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, vs. STATE OF ARIZONA; KIMBERLY YEE, in her official capacity as Arizona State Treasurer; CARLTON WOODRUFF, Director of the Arizona Department of Revenue; ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona, Defendants.	CV 2020-015495 1 CA-CV 21-0087

Phoenix, Arizona
December 4, 2020

BEFORE THE HONORABLE JOHN HANNAH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Return Hearing)

ORIGINAL

MICHELE KALEY, CSR, RPR
Certified Court Reporter #50512
(480) 558-6620

opportunity to reply. But if you can keep it brief, that will be helpful. Thank you.

MR. GAONA: I will do my best to do that, your Honor. First of all, on behalf of my clients, I must say I resent any implication that they don't take this matter seriously. They take it extremely seriously, which is precisely why we're here today seeking leave to intervene and participate in these proceedings.

With respect to the schedule and whether or not there are fact issues, if there were truly no fact issues, then why are there multiple declarations attached to the preliminary injunction motion? I understand there's been some accommodation reached with respect to the Court not having to consider all of those declarations.

But in my conversation yesterday with Mr. Johnson and Mr. Riches, I was told that the plaintiffs still intended to rely on the declaration of -- the Cobb and Gowan Declaration, which I believe is Exhibit 4 to the Preliminary Injunction Motion, which has some background information about the legislative process that is full of unsupported legal conclusions that exactly track the claims that are made in this case.

If the plaintiffs intend to rely on those

assertions, particularly with respect to trying to demonstrate to the Court why immediate action is necessary, that's inappropriate, and there may be fact issues.

The truth of the matter is the plaintiffs themselves, in their Preliminary Injunction Motion, concede that Prop 208 revenues won't begin to hit school districts until fiscal year 2023, while the Legislature, on January 11th, theoretically, could start work on its budget for fiscal year 2022. There is no need to have as aggressive of a schedule as has been proposed by Plaintiffs, given that admission.

Lastly, your Honor, there are -- there is recent precedent in Arizona for the intervention by a committee. And it's in a case in which Mr. Johnson was involved, another post election challenge to the constitutionality of an initiated measure by the People. That was the *Arizona Chamber of Commerce* case, *242 Ariz. 533*, which has been cited to you. And we have now sent you the reply, your Honor. On page 3, you'll see several other cases that are cited.

There absolutely is precedence for allowing this to happen. The Committee has a keen interest and specialized knowledge with respect to Proposition 208. And given that the State does not oppose and, in fact,

endorses the invention, it is more than appropriate to allow the committee and Mr. Lujan to intervene and be heard in this matter. Thank you.

THE COURT: Thank you. The Motion to Intervene is granted. The -- a couple of things by way of explanation.

First of all, I agree that the Section 8, I believe of the proposition is a statutory expansion of standing, not a provision that displaces what would otherwise be an appropriate intervention under Rule 24.

Second, because of the -- at least in part, because of the obviously political nature of this case, it is one that is, that depends on the advocacy of those who support it. It's not a question of the competency of counsel for the State. I assume that counsel is highly competent. But he is -- also has as a client a political entity that, in which certainly the representatives of that entity have conflicting views.

I don't know that the Governor speaks for the State of Arizona in this situation. But it is, I don't think the representativeness or the -- the capacity to represent adequacy of representation, the bar is a very high bar. And it's -- as such, I think

feel you need to respond to, then you can give me a half-page motion for me to respond to it and file whatever you have to file with that.

MR. JOHNSON: Yes, your Honor.

THE COURT: Okay. All right. That, I think, covers the agenda that you all have set.

Mr. Johnson, do you have something else?

MR. JOHNSON: One more issue. I mean, we think this is legal. I think we've come to a compromise of how the proceedings are going to go. But on the flip side, I don't want -- I would prefer not to be subject to subpoenas and discovery requests and deposition requests in this period of time.

The State and the plaintiffs agreed to waive discovery. We would request an order as such. Obviously, it's just for these preliminary injunctive proceedings.

THE COURT: Defendant Intervenor.

MR. GAONA: Your Honor, still digging -- as we are still digging into whether or not, you know -- I'm sorry -- the specifics, rather, of this declaration from the legislators, I would hope that a competing declaration would be enough.

And as Mr. Johnson said, your Honor could give it whatever weight is appropriate. But I'm not in a

position right now to commit to waive that because we have not had a full opportunity to vet that and figure out whether that will be sufficient.

So to the extent the Court would like to consider that, we'd ask you to reserve your judgment on that. And we can coordinate with Mr. Johnson and the State and perhaps report back to you on Monday.

THE COURT: Well, I was going to say, we could deal with that under the expedited Discovery Dispute Resolution Procedure.

If you feel that it's necessary to take discovery, then you don't even need -- actually, if you want to, you can, you can file one of those brief statements. That would probably be the best. If you filed one of those brief statements of a discovery dispute, then get me on the phone and we'll just resolve it quickly.

MR. JOHNSON: Yes, your Honor.

MR. GAONA: Thank you, your Honor.

THE COURT: Okay. So the order is that the -- no discovery will be initiated by any party during the briefing schedule absent a decision from the Court. The Court will entertain an expedited discovery dispute request to address that issue.

Okay. Anything else from the plaintiffs?

C E R T I F I C A T E

I, MICHELE KALEY, do hereby certify that the proceedings had upon the hearing of the foregoing matter are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED this 4th day of December, 2020.

/S/_____
MICHELE KALEY, RPR
CERTIFIED COURT REPORTER
CERTIFICATE NO. 50512

Clerk of the Superior Court
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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KAREN FANN, *et al.*, Plaintiffs, v. STATE OF ARIZONA, *et al.*, Defendants.	No. CV2020-015495 CV2020-015509 (Consolidated) **INTERVENORS' NOTICE OF FILING OF DEMONSTRATIVE EXHIBITS – AND – NOTICE OF CITATION TO SUPPLEMENTAL AUTHORITY** (Assigned to The Hon. John Hannah)
ECO-CHIC CONSIGNMENT, INC., *et al.*, Plaintiffs, v. STATE OF ARIZONA, *et al.*, Defendants.	
INVEST IN EDUCATION (Sponsored by AEA and Stand for Children); and DAVID LUJAN, Intervenors.	

Intervenors Invest in Education (Sponsored by AEA and Stand for Children) hereby give notice that the demonstrative exhibit displayed during the oral argument held on December 23, 2020 are attached hereto as Exhibit A for the Court's reference.

During that same argument, Intervenors referred to several other publicly available items that it submits as supplemental authority relevant to the Court's consideration of Plaintiffs' request for a temporary restraining order and preliminary injunction:

- A School District Annual Expenditure Report for the Alhambra Elementary School District for FY2019, a public record which is available at https://www.ade.az.gov/sfsinbound/GeneralUpload/147665.xls (at Sheet 6);
- A recent report regarding public school deficits, *see* Austin Faust, KJZZ.ORG (Dec. 20, 2020), *available at* https://kjzz.org/content/1644860/arizona-public-charter-schools-face-budget-deficit; and
- A recent meeting of the Senate Special Standing Committee on Finance, the video of which is available at http://archive-media.granicus.com:443/OnDemand/azleg/azleg_c01a67fa-de3e-4d34-9dc3-6a10f7b347db.mp4.

RESPECTFULLY SUBMITTED this 23rd day of December, 2020.

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/s/ Sheri McAlister

Exhibit A

AZ Dept. of Ed. Prepares Aggregate Expenditure Reports for Every School District
Example: Alhambra Elementary District – Report for FY 2019

[Ex. 1, Attachment 1 to IIE Response]

SA086

SAIS BUDGAGD — **Arizona Department of Education** — CTDS 07-04-68-000

Aggregate Expenditures Report for Fiscal Year 2019
Alhambra Elementary District

Description	Detail	Total
Budgeted Expenditures		
Maintenance and Operation Fund	71,797,912	
Unrestricted Capital Fund	8,356,734	
Other Funds	21,865,306	
Classroom Site Fund	12,730,972	
Instructional Improvement Fund	620,000	
Federal Projects Funds	25,594,798	
State Projects Funds	650,000	
Total Applicable Budgeted Expenditures		141,615,722
Excluded Funds		
Classroom Site Fund	12,730,972	
Instructional Improvement Fund	620,000	
Federal Projects Funds	25,594,798	
State Projects Funds	650,000	
Other Funds (except Adjacent Ways, Impact Aid Revenue Bonds)	20,485,306	
Total Excluded Funds		60,081,076
Excluded Sources		
Budget Balance Carry-Forward (M&O)	2,903,515	
Performance Pay Unexpended Budget Balance	0	
Unrestricted Capital Unexpended Budget Balance	1,475,075	
Levy Overrides		
Maintenance and Operation Override	9,665,187	
Special Program Override	0	
Unrestricted Capital Override	5,000,000	
Tuition Revenues	60,000	
Earnings on Investments	10,895	
Debt Service (included in GBL)	0	
Total Excluded Sources		19,114,672
Applicable Budgeted Expenditures		**62,419,974**
Reduction Factor		0%
District's at Risk Budgeted Expenditures		**0**
Percentage over the limit multiplied by the applicable budgeted expenditures of the district.		
Total Statewide Applicable Expenditures		**5,880,714,632**
Funding For Five (5) Additional Days, pursuant to A.R.S. §42-5029(E)(5)		86,280,500
Statewide Expenditures Reduced by the Additional Days Funding		**5,794,434,132**
Constitutional Limit		**6,111,700,981**
Budgeted Expenditures Over Limit (Under Limit)		**(317,266,849)**
Percentage Over the Limit, Reduction Factor		-5.4%

Pursuant to A.R.S. §15-911, and as of October 29 2018, the aggregate budgeted expenditures of local revenues for FY 2018-19 DO NOT EXCEED the constitutional expenditure limit.

Excluded Funds		
Classroom Site Fund	12,730,972	
Instructional Improvement Fund	620,000	
Federal Projects Funds	25,594,798	
State Projects Funds	650,000	
Other Funds (except Adjacent Ways, Impact Aid Revenue Bonds)	20,485,306	
Total Excluded Funds		60,081,076

Aggregate Reports are Derived From School District Annual Expenditure Budget

https://www.ade.az.gov/sfsinbound/GeneralUpload/147665.xls (Sheet 6)

ISTRICT NAME ALHAMBRA **COUNTY** MARICOPA **CTD NUMBER** 070468000 **VERSION** Adopted

Instructions

SPECIAL PROJECTS

			FTE		TOTAL ALL FUNCTIONS		
	FEDERAL PROJECTS		Prior FY	Budget FY	Prior FY	Budget FY	
1.	100-130 ESEA Title I - Helping Disadvantaged Children	6000	123.00	123.00	13,899,822	14,899,822	1.
2.	140-150 ESEA Title II - Prof. Dev. and Technology	6000	6.00	6.00	1,263,889	1,263,889	2.
3.	160 ESEA Title IV - 21st Century Schools	6000	0.00	0.00	150,000	150,000	3.
4.	170-180 ESEA Title V - Promote Informed Parent Choice	6000	0.00	0.00	0	0	4.
5.	190 ESEA Title III - Limited Eng. & Immigrant Students	6000	13.68	13.68	1,108,118	1,208,118	5.
6.	200 ESEA Title VII - Indian Education	6000	0.00	0.00	45,000	45,000	6.
7.	210 ESEA Title VI - Flexibility and Accountability	6000	0.00	0.00	0	0	7.
8.	220 IDEA Part B	6000	98.62	98.62	2,612,744	2,712,744	8.
9.	230 Johnson-O'Malley	6000	0.00	0.00	25,000	25,000	9.
10.	240 Workforce Investment Act	6000	0.00	0.00	0	0	10.
11.	250 AEA - Adult Education	6000	0.00	0.00	0	0	11.
12.	260-270 Vocational Education - Basic Grants	6000	0.00	0.00	0	0	12.
13.	280 ESEA Title X - Homeless Education	6000	0.00	0.00	45,000	45,000	13.
14.	290 Medicaid Reimbursement	6000	0.00	0.00	0	0	14.
15.	374 E-Rate	6000	0.00	0.00	1,000,000	1,000,000	15.
16.	378 Impact Aid	6000	0.00	0.00	0	0	16.
17.	300-399 Other Federal Projects (Besides E-Rate & Impact Ai	6000	16.50	16.50	3,859,295	4,245,225	17.
18.	Total Federal Project Funds (lines 1-17)		257.80	257.80	24,008,868	25,594,798	18.
	STATE PROJECTS						
19.	400 Vocational Education	6000	0.00	0.00	0	0	19.
20.	410 Early Childhood Block Grant	6000	0.00	0.00	0	0	20.
21.	420 Ext. School Yr. - Pupils with Disabilities	6000	0.00	0.00	0	0	21.
22.	425 Adult Basic Education	6000	0.00	0.00	0	0	22.
23.	430 Chemical Abuse Prevention Programs	6000	0.00	0.00	0	0	23.
24.	435 Academic Contests	6000	0.00	0.00	0	0	24.
25.	450 Gifted Education	6000	0.00	0.00	0	0	25.
26.	456 College Credit Exam Incentives	6000	0.00	0.00	0	0	26.
27.	457 Results-based Funding	6000	0.00	0.00	90,000	250,000	27.
28.	460 Environmental Special Plate	6000	0.00	0.00	0	0	28.
29.	465-499 Other State Projects	6000	16.50	16.50	400,000	400,000	29.
30.	Total State Project Funds (lines 19-29)		16.50	16.50	490,000	650,000	30.
31.	Total Special Projects (lines 18 and 30)		274.30	274.30	24,498,868	26,244,798	31.

	INSTRUCTIONAL IMPROVEMENT FUND (020)		Prior FY	Budget FY	
1.	Teacher Compensation Increases	6000	420,000	420,000	1.
2.	Class Size Reduction	6000	0		2.
3.	Dropout Prevention Programs (M&O purposes)	6000	0		3.
4.	Instructional Improvement Programs (M&O purposes)	6000	560,000	200,000	4.
5.	Total Instructional Improvement Fund (lines 1-4)		980,000	620,000	5.

OTHER FUNDS

			Prior FY	Budget FY	
1.	050 County, City, and Town Grants	6000	2,679,510	50,000	1.
2.	071 Structured English Immersion (1)	6000	0	0	2.
3.	072 Compensatory Instruction (1)	6000	0	0	3.
4.	500 School Plant (2)	6000	250,000	250,000	4.
5.	510 Food Service	6000	9,897,516	10,887,268	5.
6.	515 Civic Center	6000	600,000	600,000	6.
7.	520 Community School	6000	1,200,000	1,200,000	7.
8.	525 Auxiliary Operations	6000	25,000	50,000	8.
9.	526 Extracurricular Activities Fees Tax Credit	6000	150,000	200,000	9.
10.	530 Gifts and Donations	6000	200,000	250,000	10.
11.	535 Career & Tech. Ed. & Voc. Ed. Projects	6000	0	0	11.
12.	540 Fingerprint	6000	5,000	10,000	12.
13.	545 School Opening	6000	0	0	13.
14.	550 Insurance Proceeds	6000	800,000	800,000	14.
15.	555 Textbooks	6000	70,000	70,000	15.
16.	565 Litigation Recovery	6000	25,000	25,000	16.
17.	570 Indirect Costs	6000	2,500,000	2,500,000	17.
18.	575 Unemployment Insurance	6000	200,000	200,000	18.
19.	580 Teacherage	6000	0	0	19.
20.	585 Insurance Refund	6000	1,500,000	1,500,000	20.
21.	590 Grants and Gifts to Teachers	6000	0	0	21.
22.	595 Advertisement	6000	0	0	22.
23.	596 Career Technical Education	6000	0	0	23.
24.	639 Impact Aid Revenue Bond Building	6000	0	0	24.
25.	650 Gifts and Donations-Capital	6000	0	0	25.
26.	660 Condemnation	6000	0	0	26.
27.	665 Energy and Water Savings	6000	0	593,038	27.
28.	686 Emergency Deficiencies Correction	6000	0	0	28.
29.	691 Building Renewal Grant	6000	0	300,000	29.
30.	700 Debt Service	6000	0	1,000,000	30.
31.	720 Impact Aid Revenue Bond Debt Service	6000	0	0	31.
32.	Other _____	6000	0	0	32.
	INTERNAL SERVICE FUNDS 950-989				
1.	9___ Self-Insurance	6000	0	0	1.
2.	955 Intergovernmental Agreements	6000	0	0	2.
3.	9__ OPEB	6000	0	0	3.
4.	9___ _____	6000	0	0	4.

(1) From Supplement, line 10 and line 20, respectively.
(2) Indicate amount budgeted in Fund 500 for M&O purposes _____

SA087

SA088

STATE PROJECTS

19.	400 Vocational Education
20.	410 Early Childhood Block Grant
21.	420 Ext. School Yr. - Pupils with Disabilities
22.	425 Adult Basic Education
23.	430 Chemical Abuse Prevention Programs
24.	435 Academic Contests
25.	450 Gifted Education
26.	456 College Credit Exam Incentives
27.	457 Results-based Funding
28.	460 Environmental Special Plate
29.	465-499 Other State Projects
30.	Total State Project Funds (lines 19-29)
31.	Total Special Projects (lines 18 and 30)

Detail of Excluded Funds – State Projects

- Code 435 (A.R.S. § 15-1241)
  - Fund created by legislature; comprised of legislative appropriations and private gifts
- Code 450 (A.R.S. § 15-779.03)
  - Fund created by legislature; leg approps
- Code 456 (A.R.S. § 15-249.06)
  - Fund created by legislature; leg approps
- Code 457 (A.R.S. § 15-249.08)
  - Fund created by legislature; leg approps
- Codes 465-499 (catch-all for other state projects)
  - A.R.S. § 15-154.01: Character Education Matching Grant
  - A.R.S. § 15-249.07: Broadband Expansion Fund
  - A.R.S. § 15-249.09: Early Literacy Program Fund

Detail of Excluded Funds – Instructional Improvement Fund

INSTRUCTIONAL IMPROVEMENT FUND (020)

1. Teacher Compensation Increases
2. Class Size Reduction
3. Dropout Prevention Programs (M&O purposes)
4. Instructional Improvement Programs (M&O purposes)
5. Total Instructional Improvement Fund (lines 1-4)

Like Prop 208 Funds, the Instructional Improvement Fund:

Code 020 (A.R.S. § 15-979)

- Fund created by Prop 202 (Indian Gaming **voter initiative**)
- "No supplant" clause
- Money provided to schools for specific purposes
- Money provided based on student counts
- Special reporting and accountability provisions
- **Not** included in the "Federal Projects" line for ADE reporting purposes.
- Prop 202 Funds ≈ Prop 208 Funds: Excluded Funds

Detail of Excluded Funds – "Other Funds"

SA090

OTHER FUNDS

1. 050 County, City, and Town Grants
2. 071 Structured English Immersion (1)
3. 072 Compensatory Instruction (1)
4. 500 School Plant (2)
5. 510 Food Service

Code 072 (A.R.S. § 15-756.11)

- "Statewide Compensatory Education Fund"
- Fund created by legislature
- Grant program for compensatory education

These are **State Grants** that are **Excluded** from the Aggregate Expenditure Limit

Excluded Funds	
Classroom Site Fund	12,730,972
Instructional Improvement Fund	620,000
Federal Projects Funds	25,594,798
State Projects Funds	650,000
Other Funds (except Adjacent Ways, Impact Aid Revenue Bonds)	20,485,306

SA091

INSTRUCTIONAL IMPROVEMENT FUND (020)		Prior FY	Budget FY
1. Teacher Compensation Increases	6000	420,000	420,000
2. Class Size Reduction	6000	0	
3. Dropout Prevention Programs (M&O purposes)	6000	0	
4. Instructional Improvement Programs (M&O purposes)	6000	560,000	200,000
5. Total Instructional Improvement Fund (lines 1-4)		980,000	620,000

STATE PROJECTS					
19. 400 Vocational Education	6000	0.00	0.00	0	0
20. 410 Early Childhood Block Grant	6000	0.00	0.00	0	0
21. 420 Ext. School Yr. - Pupils with Disabilities	6000	0.00	0.00	0	0
22. 425 Adult Basic Education	6000	0.00	0.00	0	0
23. 430 Chemical Abuse Prevention Programs	6000	0.00	0.00	0	0
24. 435 Academic Contests	6000	0.00	0.00	0	0
25. 450 Gifted Education	6000	0.00	0.00	0	0
26. 456 College Credit Exam Incentives	6000	0.00	0.00	0	0
27. 457 Results-based Funding	6000	0.00	0.00	90,000	250,000
28. 460 Environmental Special Plate	6000	0.00	0.00	0	0
29. 465-499 Other State Projects	6000	16.50	16.50	400,000	400,000
30. Total State Project Funds (lines 19-29)		16.50	16.50	490,000	650,000
31. Total Special Projects (lines 18 and 30)		274.30	274.30	24,498,868	26,244,798

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KAREN FANN, *et al.*, Plaintiffs, v. STATE OF ARIZONA, *et al.*, Defendants.	No. CV2020-015495 CV2020-015509 (Consolidated) **RULE 16 JOINT REPORT**
ECO-CHIC CONSIGNMENT, INC., *et al.*, Plaintiffs, v. STATE OF ARIZONA, *et al.*, Defendants.	(Assigned to the Hon. John Hannah)
INVEST IN EDUCATION (Sponsored by AEA and Stand for Children); and DAVID LUJAN, Intervenors.	

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters contained in Rule 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. Each date in the Joint Report includes a calendar month, day, and year.

1. **Brief description of the case:**

Intervenor-Defendants Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan are proponents of the "Invest in Education Act," also known as Proposition ("Prop") 208. Prop 208 imposes a 3.5% income tax surcharge on certain high earners to provide directed additional resources to Arizona's public schools, as set forth in Prop 208.

Plaintiffs brought two separate lawsuits challenging the constitutionality of Prop 208. Both lawsuits have been consolidated before the Court. The Fann Plaintiffs brought claims alleging that Prop 208 is facially unconstitutional and sought to enjoin it from being implemented or enforced. The Eco-Chic Plaintiffs likewise sought a declaratory judgment that Prop 208 is facially unconstitutional. The Court denied the Fann Plaintiffs' motion for preliminary injunction.

All parties have filed or had an opportunity to file substantive briefs arguing the legal merits of their claims and defenses in connection with the preliminary injunction hearing. The parties agree that it is important to resolve the case sooner rather than later and to obtain finality.

Following are the issues in this consolidated case:

First, the Fann Plaintiffs allege that Prop 208 violates article IX, section 21 of the Arizona Constitution. Intervenor-Defendants dispute this and argue that Prop 208 funds are not "local revenues," but are "grants" and thus exempt from the definition of "local revenues."

Second, the Fann Plaintiffs allege that Prop 208 violates article IX, section 22 of the Arizona Constitution by imposing a tax without a supermajority vote. Intervenor-Defendants dispute this and argue that article IX, section 22 applies to "acts" of the Legislature, not to citizen initiatives.

Third, the Fann and Eco-Chic Plaintiffs claim that Prop 208's "no supplant" clause violates article IX, section 23 and article IV of the Arizona Constitution. Intervenor-Defendants dispute this and argue that the clause does not require the expenditure of monies from the general fund. The Fann Plaintiffs, Intervenor Defendants, and State Defendants agree that no further litigation is required on these claims. The Eco Chic Plaintiffs disagree.

Finally, the Eco-Chic Plaintiffs allege that Prop 208 violates article IX of the Arizona Constitution and infringes Legislative authority. Intervenor-Defendants dispute this and argue that the people retained co-equal power with the Legislature, including the power to tax and spend.

2. **Case Status:** Every defendant has been served. The parties have stipulated that Defendant Yee is a nominal party. The State Defendants have answered. Intervenor-Defendants intend to respond to the complaints no later than February 19.

3. **Tier:** The parties agree this case qualifies as a Tier 2 case and believe the discovery limits are sufficient. The parties further agree that factual discovery in this matter should be limited and reasonable in light of the narrow fact issues presented by Plaintiffs' claims.[1] If the parties disagree regarding the reasonableness or scope of any discovery, they agree to confer in good faith and can seek the Court's intervention if necessary.

4. **Initial Disclosures:**[2] The parties agree to exchange Initial Disclosures on or before **February 26, 2021**.

---

[1] Both the Fann Plaintiffs and the Eco-Chic Plaintiffs believe discovery is unnecessary and contend that the issues raised are purely legal issues for the Court. By participating in limited discovery, Plaintiffs are not waiving any defenses or conceding that there are fact issues in dispute.

[2] The Fann Plaintiffs intend to appeal the Court's order denying their motion for preliminary injunction. As such, the Fann Plaintiffs do not believe a discovery schedule is appropriate at this time until the appellate court(s) have an opportunity to resolve the purely legal issues raised by the motion for preliminary injunction and to assist this Court in setting parameters for any actually necessary discovery in this matter. The Fann Plaintiffs also disagree with Intervenor Defendants' statements below regarding the chances of the Supreme Court accepting jurisdiction or resolving this case in its entirety.

5. **Amendments:** No party anticipates filing an amendment to a pleading that will add a new party to the case.

6. **Close of Discovery*:*** Plaintiffs and Defendants agree that discovery shall be completed no later than **April 30, 2021**. The last date to propound written discovery will be **March 30, 2021**. The last date to complete depositions will be **April 30, 2021**. The close of discovery date includes completion of all written discovery and depositions, and final supplementation of discovery, including Rule 26.1 Disclosures.

7. **Expert Disclosures*:***

A. Identification of areas of expert testimony by any party: **February 26, 2021.**

B. Deadline for expert disclosure: **March 26, 2021**.

C. Rebuttal expert disclosure due date: **April 12, 2021.**

8. **Dispositive Motions*:*** Dispositive motions will be due by **May 14, 2021**.

9. **Settlement:** The parties do not believe that settlement discussions would be fruitful in this consolidated case that seeks a declaration of unconstitutionality and a permanent injunction of Prop 208.

10. **Readiness:** This case will be ready for trial by **June 8, 2021** and, due to various already-scheduled vacations of counsel, the parties request that the evidentiary hearing/trial be set on June 8, 2021, June 9, 2021, or June 10, 2021.

Intervenor Defendants disagree with the Fann Plaintiffs' desire to delay entry of a discovery schedule in this matter. The Fann Plaintiffs anticipate appealing the order despite the fact that this case will be ripe for the entry of final judgment in less than four months under the schedule set forth in this Report. To the extent this appeal is a "special action appeal," whether the Supreme Court will exercise its discretionary special action jurisdiction on the facts of this case is highly questionable. Even if the Supreme Court accepts jurisdiction, any decision it issues is unlikely to resolve this case in its entirety given the factual questions identified in the Court's February 9, 2021 Order. The proceedings in this Court should continue, and a discovery schedule is appropriate to ensure the expedient final resolution of Plaintiffs' claims and potential appellate review on a full record.

11. **Jury:** None of the parties have requested a jury trial, and there is no right to a jury trial.

12. **Length of Trial:** The estimated length of trial is **one (1)** day.

13. **Preference:** This case is not entitled to a preference for trial pursuant to any statute or rule.

14. **Special Requirements:** At a pretrial conference or at trial, a party will not require any accommodation.

15. **Scheduling Conference:** The parties request a Rule 16(d) scheduling conference to discuss the status of this case and implementation of the scheduling order in light of the Fann Plaintiffs' intent to file an appeal of the Court's denial of a preliminary injunction.

16. **Other Matters:** Currently pending before this Court is the Fann Plaintiffs' motion for a signed order. Other than the status of this motion and the effect, if any, of the Fann Plaintiffs' intention to file an appeal, there are no matters that the parties wish to bring to the court's attention that may affect management of this case.

17. **Items upon which the parties do not agree:** Other than what is specifically stated above, the parties do not have any items regarding which they were unable to reach agreement.

Respectfully submitted this 16th day of February, 2021.

COPPERSMITH BROCKELMAN PLC

By /s/ Roopali H. Desai
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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KAREN FANN, *et al.*,

Plaintiffs,

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STATE OF ARIZONA, *et al.*,

Defendants.

ECO-CHIC CONSIGNMENT, INC., *et al.*,

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STATE OF ARIZONA, *et al.*,

Defendants.

INVEST IN EDUCATION (Sponsored by AEA and Stand for Children); and DAVID LUJAN,

Intervenors.

No. CV2020-015495
CV2020-015509
(Consolidated)

INTERVENOR-DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

(Assigned to The Hon. John Hannah)

Introduction

Just over three months ago, 1.6 million Arizonans approved the passage of the Invest in Education Act, also known as Proposition ("Prop") 208, a citizen initiative related to education funding. After an unsuccessful political campaign, Plaintiffs in these consolidated cases sued, and allege that Prop 208 is facially unconstitutional on several meritless grounds.

The Fann Plaintiffs moved for an emergency TRO and preliminary injunction to prevent "Defendants from taking any action to implement or enforce" Prop 208. The Court rejected that request, holding that Plaintiffs are unlikely to succeed on the merits of their claims. It did so "as a matter of law" and without "attempt[ing] to resolve factual disputes between the parties." [2/9/21 Order at 2] For many of the same reasons already discussed by the Court at length, Plaintiffs fail to state a claim upon which relief can be granted.

First, Plaintiffs' claim that Prop 208 violates article IX, § 21 of the Arizona Constitution rests on a flawed premise. As the Court already held [2/9/21 Order at 10], A.R.S. § 15-1285(1) – the only provision of Prop 208 discussed by Plaintiffs in this context – is a mere "interpretive aid." It does not and cannot "amend" article IX, § 21, and the Intervenor Defendants don't argue otherwise. This alone disposes of this claim. But even assuming A.R.S. § 15-1285(1) is invalid, the balance of Prop 208 is not facially unconstitutional. The Department of Revenue will keep collecting Prop 208 funds and the State Treasurer will keep transferring them to school districts which might be subject to expenditure limitations and a longstanding statutory procedure for dealing with those limitations if a hypothetical series of events were to happen. That doesn't mean Prop 208 violates article IX, § 21. In any event, no school district has yet spent Prop 208 funds, so any potential claim related to article IX, § 21 is not ripe.

Second, as the Court already held [2/9/21 Order at 4-6], article IX, § 22 of the Arizona Constitution applies to the Legislature, not to citizen initiatives. Plaintiffs' claims to the contrary find no support in that provision's plain language, the history surrounding its adoption, the

disfavored implied repeal it would cause, and the importance of the fundamental right to legislate by initiative in our constitutional scheme.

Third, Prop 208 doesn't violate the article IX, § 23 of the Arizona Constitution. The Court already rejected Plaintiffs' "arbitrary distinction" between a "new" tax and an "increase" to an existing tax. [2/9/21 Order at 21]

Fourth, Prop 208's "no supplant" clause does not violate either article IX, § 23 or article IV of the Arizona Constitution for reasons already explained by the Court. [1/14/21 Order] Plaintiffs' expansive construction of the "no supplant" clause is a strawman untethered to its plain language, and that clause doesn't require the expenditure of monies from the general fund.

Finally, Prop 208 doesn't infringe or "surrender" any taxing or spending power of the Legislature. The people retained co-equal power with the Legislature, including the power to tax and spend, and to suggest otherwise ignores both the Constitution and controlling precedent.

Because Plaintiffs fail to state a claim upon which relief can be granted, this case should be dismissed under Rule 12(b)(6), Ariz. R. Civ. P.

Relevant Background

Prop 208 imposes an income tax surcharge of 3.5% of taxable income over (a) $250,000 for single filers or married filers who file separately, and (b) $500,000 for married and head of household filers. A.R.S. § 43-1013(A). The Department of Revenue must deposit all revenues collected under the surcharge into the new Student Support and Safety Fund, A.R.S. § 43-1013(B) ("Student Support Fund").

The Student Support Fund prescribes how the State Treasurer must distribute this new revenue. First, and as required by the Revenue Source Rule, the measure accounts for the costs of its own administration. A.R.S. § 15-1281(B). The Student Support Fund then distributes all remaining funds in the form of grants to school districts, charter schools, and certain funds. A.R.S. § 15-1281(D).

The State Treasurer must transfer some monies from the Student Support Fund to the separately created Career Training and Workforce Fund. A.R.S. § 15-1282 ("Career Training Fund"). Those monies become "multi-year grants to school districts, charter schools and career technical education districts" to provide career and technical training to high school students. A.R.S. § 15-1283(A). Like the Student Support Fund before it, all funds distributed to districts through the Career Training Fund are "grants."

In a separate section, Prop 208 provides that "[n]otwithstanding any other law, monies received by school districts and career technical education districts pursuant to this chapter [] [a]re not considered local revenues for the purposes of article IX, section 21, Arizona Constitution. A.R.S. § 15-1285(1) ("Local Revenues Clause").

Argument

Dismissal is appropriate under Rule 12(b)(6) "when "the plaintiff should be denied relief as a matter of law given the facts alleged.'" *Hogan v. Washington Mut. Bank, N.A.*, 230 Ariz. 584, 586 ¶ 7 (2012) (citation omitted).

As the Court already explained [2/9/21 Order at 3], Prop 208 "is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional." *State v. Arevalo*, 249 Ariz. 370 ¶ 9 (2020). Because of this strong presumption in favor of constitutionality, courts will "interpret a statute to give it a constitutional construction if possible." *Id.* And because Plaintiffs raise facial constitutional challenges, they must "establish that no set of circumstances exists under which [Prop 208] would be valid." *Id.* ¶ 10 (citation omitted).

For the reasons below, Plaintiffs cannot carry this heavy burden and fail to state a claim upon which relief can be granted.

I. Plaintiffs' claims related to article IX, § 21 of the Arizona Constitution must fail.

First, Plaintiffs' claim that Prop 208 violates article IX, § 21 of the Arizona Constitution [Fann Compl. ¶¶ 55-60; Eco-Chic Compl. ¶¶ 86-93] rests on a flawed premise. Plaintiffs seek

"[a] declaration . . . that Proposition 208 violates article IX, section 21 of the Arizona Constitution" and an injunction "prohibiting Defendants from taking any action to implement or enforce Proposition 208." [Fann. Compl. Request for Relief at A, D] They focus myopically on the Local Revenues Clause, which this Court has already noted does not (and cannot) do what Plaintiffs claim it does.

Plaintiffs also ignore longstanding procedures prescribed by the Legislature that dictate what would occur if (1) funds generated by Prop 208 are "local revenues" and (2) spending those funds would cause school districts to exceed the aggregate expenditure limit. And they overlook that nothing in Prop 208 purports to require school districts to spend funds in a manner contrary to law. Because Plaintiffs do not (and cannot) argue that Prop 208's operative provisions (*i.e.*, the tax it imposes and its direction about how recipients can use its revenues) are themselves unconstitutional, they do not state a claim upon which their requested relief – the facial invalidation of Prop 208 in its entirety – can be granted.[1] Beyond that, any claim under article IX, § 21 is unripe because Prop 208 funds have neither been collected by the State nor spent by school districts.

A. Plaintiffs' claims misconstrue article IX, § 21.

Article IX, § 21– adopted by legislative referendum in 1980 – prescribes a formula for the calculation of an "aggregate expenditure limitation for all school districts" in the state. Ariz. Const. art. IX, § 21(2). A set formula determines the aggregate expenditure limitation ("Expenditure Cap"), which then controls the amount of "local revenues" that school districts can spend. *Id.* Local revenues, in turn, are defined to include "all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district,"

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[1] This argument is distinct from the factual issues the Court identified in its February 9, 2021 order. As the Intervenor Defendants noted in their response to the Fann Plaintiffs' request for a preliminary injunction, Plaintiffs' factual claims related to article IX, § 21 are incorrect. But regardless, even if one assumed for the sake of argument that the Prop 208 funds are "local revenues," that would not support Plaintiffs' claims that Prop 208 is facially unconstitutional.

subject to a long list of exceptions. *Id.* § 21(4)(c), (d). As the Court already noted [2/9/21 Order at 16-17], the Expenditure Cap limits the amount of "local revenues" that school districts can expend, not what they can collect and hold.

Prop 208 included the Local Revenues Clause, A.R.S. § 15-1285(1), which states that Prop 208 moneys are not "local revenues for the purposes of article IX, section 21, Arizona constitution." As this Court already noted, the Intervenor Defendants do not argue that this provision, alone, exempts Prop 208 funds from the Expenditure Cap; instead, it is "essentially an interpretive aid." [2/9/21 Order at 10] As the Intervenor Defendants have explained, the grants provided by Prop 208 fit within an exception to the definition of "local revenues," no matter what the Local Revenues Clause says. But the drafters of Prop 208 took the extra step of including this language to reinforce that point and prevent the Legislature from trying to designate the funds as "local revenues" or invent a new limit to subvert the will of the voters (as Plaintiffs now seek to do).

The Local Revenues Clause is the singular focus of Plaintiffs' factual allegations related to their claims under article IX, § 21. [*See* Fann Compl. ¶¶ 56-59; Eco-Chic Compl. ¶¶ 91-93 (both citing A.R.S. § 15-1285)] Their claim has nothing to do with Prop 208's provisions levying an income tax surcharge or dictating how school districts are required to spend the new funds it will generate.

B. Plaintiffs fail to state a claim that Prop 208 violates article IX, § 21.

To begin, Plaintiffs' claim that the Local Revenues Clause is an unconstitutional attempt to amend article IX, § 21 must fail because there is a constitutional construction: it is a mere "interpretive aid." [2/9/21 Order at 10]; *Arevalo*, 249 Ariz. ¶ 9 (2020) (courts will "interpret a statute to give it a constitutional construction if possible."). That is reason enough to dismiss this entire claim given the requested relief; a "[a] declaration . . . that Prop[] 208 violates article IX, § 21 of the Arizona Constitution" and an injunction "prohibiting Defendants from taking any

action to implement or enforce Prop[] 208." There are simply no grounds to do either of these things given the constitutional construction discussed above.

Even if the Court were to overlook this fundamental flaw and invalidate the Local Revenues Clause, the only result would be that Prop 208 funds received by school districts might be "local revenues" under article IX, § 21. That's it. The Department of Revenue will keep collecting the funds, and the State Treasurer will keep transferring them to school districts, charter schools, and other recipients under Prop 208. And even if the Department of Education determines those funds are "local revenues" and their actual expenditure will cause school districts to exceed the Expenditure Cap in a particular fiscal year, then constitutional and statutory processes that predated Prop 208 would come into play.

To implement the Expenditure Cap, the Legislature devised a procedure under which: (1) the state board of education is notified of the Expenditure Cap for the following fiscal year, (2) the board determines the amount of expenditures in excess of the Expenditure Cap, and (3) the board divides the excess between school districts to determine their pro rata share of the overage. *See* A.R.S. § 15-911. The Legislature may then, with a two-thirds vote in each house, vote to increase the Expenditure Cap "for a single fiscal year." Ariz. Const. art. IX, § 21(3). Without that legislative action "on or before March 5," the statute provides:

> the state board of education shall inform each school district of the amount it is to reduce its expenditures of local revenues, and each school district shall reduce its expenditures of local revenues by the amount [of the excess]. The governing board of each school district shall on or before April 1, after it gives notice and holds a public meeting . . . , adopt a revised budget for the current year which shall not exceed the previously adopted budget for the current year less the amount which the state board of education specifies for reduction in expenditures of local revenues. Not later than April 4, the budget as revised shall be submitted electronically to the superintendent of public instruction.

A.R.S. § 15-911(E). In other words, if there is a problem with the Expenditure Cap caused by any source of funds, a statutory process resolves it by affecting school district budgets for the

next fiscal year. Because Prop 208 does not purport to require school districts to spend Prop 208 funds contrary to the Expenditure Cap, there's simply nothing unconstitutional about any of this.

For this reason, the Fann Plaintiffs' bare allegation [¶ 60] that the Local Revenues Clause isn't severable from Prop 208 is both irrelevant and meritless. Prop 208 itself declared [§ 6] that "[i]f any provision of this act or its application to any person or circumstance is declared invalid by a court of law, such invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application." The test is "whether the valid portion can operate without the unconstitutional provision and, if so, [courts] uphold it unless the result is so absurd or irrational that one would not have been adopted without the other." *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 522 ¶¶ 23, 25 (2000) (holding under a similar severability clause that "all doubts are to be resolved in favor of severability").

Prop 208 can plainly "operate" without the Local Revenues Clause; its income tax surcharge will continue, the State Treasurer will transfer the funds it generates, and recipients of the funds will spend them absent some prohibition. Beyond that, there's nothing "irrational" about Prop 208 if the Local Revenues Clause isn't effective, a test satisfied – as this Court held [2/9/11 Order at 17] – if the Court "can imagine any set of facts which rationally justifies" the law. *State v. Klausner*, 194 Ariz. 169, 172 ¶ 13 (App. 1998).

Indeed, Prop 208's continued operation without the Local Revenues Clause is rational; it levies an important new tax to generate funds for education, many funds it generates will never be "local revenues" because they go to charter schools or flow to school districts through application-based grant programs. And even if funds that go to districts were to be considered "local revenues," they would accumulate and could be spent by school districts up to a limit (with the Legislature retaining the constitutional authority to authorize the expenditure of all those funds each fiscal year if the Expenditure Cap is a barrier). [*See also* 2/9/2021 Order at 18-19] In short, "the valid portions of the Act considered separately can operate independently and are workable." *Myers*, 196 Ariz. at 523 ¶ 24.

C. A claim that Prop 208 violates article IX, § 21 is unripe.

Plaintiffs do not allege that a single school district has spent Prop 208 funds in a way that might impact the Expenditure Cap. Nor could they; it simply hasn't happened, and Plaintiffs – citing the Joint Legislative Budget Committee [Motion at 16] – concede that this won't happen until at least the next fiscal year. On these facts, there is simply no ripe, justiciable dispute related to the Expenditure Cap.

The ripeness doctrine "prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997); *see also* *Am. Fed'n of State, Cty. & Mun. Employees v. Lewis*, 165 Ariz. 149, 152 (App. 1990) ("[i]n order for a justiciable issue or controversy to exist, there must be adverse claims asserted by the plaintiff upon present existing facts, which have ripened for judicial determination"). As a result, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Yet that is exactly the case here; Plaintiffs' claims hinge on contingent events that might happen down the road (*i.e.*, Prop 208 funds – rather than something else – causing school districts to exceed the Expenditure Cap). Unless that happens, Plaintiffs' claims are not ripe, and they fail to state a claim upon which relief can be granted.

II. Article IX, § 22 of the constitution doesn't apply to citizen initiatives.

Next, Plaintiffs' claim that article IX, § 22 of the Arizona Constitution either "prevents the imposition of a new tax by statutory initiative" or requires the people to approve new statutory taxes by a two-thirds supermajority must fail. [Fann Compl. ¶¶ 41-43; Eco Compl. ¶¶ 49-51] Plaintiffs' arguments rest on mistaken legal theories which this Court already rejected. [2/9/21 Order at 4-5] Indeed, after extensive briefing, the Court held that "Plaintiffs' argument that Proposition 208 did not validly enact the income tax surcharge is too weak to even raise 'serious questions.'" [*Id.* at 6]

The issues raised (and rejected) in Plaintiffs' claims under § 22 are pure issues of law. There's no need for factual development. For the reasons set forth in the Intervenor Defendants' response to the Fann Plaintiffs' Motion for Temporary Restraining Order (With Notice) and Preliminary Injunctive Relief ("Response") [at 9-13] and the Court's February 9, 2021 order [at 4-6], Plaintiffs fail to state a claim under § 22 on which relief can be granted.

III. Prop 208 does not violate the Revenue Source Rule.

Plaintiffs' claims that Prop 208 violates article IX, § 23 ("Revenue Source Rule"), which requires the precise sort of revenue increase that Prop 208 accomplishes with an income tax surcharge, also fail for reasons already detailed by the Court. [2/9/2021 Order at 20-21] As the Court held, Plaintiffs "have no chance of prevailing" on their claim [Fann Compl. ¶ 45] that by using the term "increased source of revenue," the Constitution allows only increases in "existing taxes," but not the imposition of a "new" tax. [2/9/21 Order at 20 ("whether an initiative funds itself by creating a new revenue stream or augmenting an existing one makes no difference")]

Similarly, the Court already rejected Plaintiffs' arguments that the inclusion of the "no supplant clause" in A.R.S. § 15-1284(E) somehow creates an unfunded mandate that violates the Revenue Source Rule. [*See* Fann Compl. ¶¶ 46-47; Eco Compl. ¶ 76] As the Court already held [1/14/21 Order at 2-3], this clause limits what school districts and charter schools may do with the new money they receive. It is not directed at the Legislature and doesn't infringe on legislative power under article IV. [*See also* Response at 16-17] This constitutional interpretation of the "no supplant" clause resolves these claims. *Arevalo*, 249 Ariz. ¶ 9 (2020) (courts will "interpret a statute to give it a constitutional construction if possible.")

Again, the issues raised (and rejected) in Plaintiffs' claims under the Revenue Source Rule are pure issues of law for which no factual development is required. For all the reasons set forth in the Response and the Court's orders rejecting the Fann Plaintiffs' request for preliminary injunctive relief, Plaintiffs fail to state a claim under Section 23 on which relief can be granted.

IV. Prop 208 does not violate article IV.

In addition, the Court's previous orders also dispose of Plaintiffs' alternative argument that the "no supplant" clause also violates article IV of the Arizona Constitution. [Fann Compl. ¶¶ 48-52; Eco Compl. ¶ 76] This argument too rests on an implausible interpretation of A.R.S. § 15-1284(E) under which "the already-enacted 2020 general appropriations bill becomes an appropriations *mandate*" that can never be reduced, and interpretation rejected by the Court. [1/14/21 Order at 2-3] For that same reason, Plaintiffs' article IV challenge to the "no supplant" clause fails to state a claim upon which relief can be granted.

V. Prop 208 adheres to article IX of the Constitution.

Relatedly, article IX of the Arizona Constitution doesn't exclusively reserve the power of taxation to the Legislature, nor is allowing voters to impose taxes through an initiative [Eco Compl. ¶¶ 44-48] an unconstitutional "surrender" of the "power of taxation" [*id.* ¶¶ 52-55]. The Eco Plaintiffs' claims to the contrary border on the frivolous.

A core principle of the Arizona Constitution is that the people have "as great as the power of the Legislature to legislate." *State v. Osborn*, 16 Ariz. 247, 250 (1914); *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987). Indeed, article XXII, § 14 of the Arizona Constitution provides that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." That is, if the Legislature has the power to legislate in an area, so too do the people. *Cave Creek Unified Sch. Dist. v. Ducey* ("*Cave Creek II*"), 233 Ariz. 1, 4 ¶ 8 (2013) (citation omitted) ("The legislature and electorate "share lawmaking power under Arizona's system of government.").

This fundamental principle disposes of the Eco Plaintiffs' other article IX claims; that is, the people had the right to tax when the Arizonans adopted the Constitution, and there was nothing to "surrender" to any third party under article IX, § 1. That is why the people have exercised the power to tax through ballot measures for decades. *E.g.*, Prop 203 (2006) (levying

tax on cigarettes and other tobacco products)[2]; Prop 201 (2006) (levying tax on cigarettes)[3]; Prop 303 (2002) (levying tax on tobacco products)[4]; Prop 301 (2000) (imposing tax rate increment to fund education)[5]; Prop 200 (2000) (levying tax on tobacco products)[6]; Prop 200 (1994) (levying tax on tobacco products)[7]; Prop 300-301 (1946) (imposing license tax on motor vehicle fuel).[8] The Eco Plaintiffs' article IX claims lack merit and fail to state a claim upon which relief can be granted.

VI. Prop 208 does not infringe on any legislative authority.

For similar reasons, Prop 208 doesn't improperly "delegate [the Legislature's] plenary discretion over expenditures to the executive branch" [Eco. Compl. ¶¶ 65-71] or "unconstitutionally prohibit[] the Legislature from ever changing or modifying" the income tax surcharge it imposes [Eco Compl. ¶¶ 72-74] The Eco Plaintiffs' allegations to the contrary are a baseless misrepresentation of the function of Arizona's government.

First, the power to spend, like the power to tax, isn't an exclusive power of the Legislature. The people hold that same power. Ariz. Const. art. XXII, § 14; *see also* *Osborn*, 16 Ariz. at 250; *Tilson*, 153 Ariz. at 470. And Prop 208 doesn't "vest[] significant discretion over the expenditure of money to the executive" by giving school districts some leeway in how to allocate grants they receive. [*Id.* ¶¶ 66-69] School districts aren't "the executive"; they are political subdivisions of the State. *Amphitheater Unified Sch. Dist. No. 10 v. Harte*, 128 Ariz. 233, 234 (1981). The

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[2] https://apps.azsos.gov/election/2006/info/PubPamphlet/english/Prop203.htm.

[3] https://apps.azsos.gov/election/2006/info/PubPamphlet/english/Prop201.htm.

[4] https://apps.azsos.gov/election/2002/Info/pubpamphlet/english/prop303.htm.

[5] https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop301.htm#pgfId-1.

[6] https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop200.htm#pgfId-1.

[7] https://azsos.gov/sites/default/files/1994-ballot-propositions.pdf.

[8] https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10638.

"executive" is "the governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction." Ariz. Const. art. V, § 1(A).

Next, that the Legislature may have trouble modifying Prop 208's 3.5% income tax surcharge is not an unconstitutional bug, but an intended feature of the Voter Protection Act ("VPA"), Ariz. Const. art. IV, pt. 1, § 6(A)-(D). Any impairment of the Legislature's power over initiated measures is purposeful; when enacting the VPA, the people were concerned with precisely the legislative mischief about which the Eco Plaintiffs complain. *See Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7 (2009) (VPA's backers "were concerned that the legislature was abusing its power to amend and repeal voter-endorsed measures"; passage of the VPA thus "altered the balance of power between the electorate and the legislature . . ."). Count 2 of the Eco Plaintiffs' Complaint fails.

Conclusion

For the reasons detailed above, the Court should dismiss Plaintiffs' claims in their entirety and award the Intervenor Defendants their fees and costs under Section 8 of Prop 208, the private attorney general doctrine, and A.R.S. § 12-341.

RESPECTFULLY SUBMITTED this 19th day of February, 2021.

COPPERSMITH BROCKELMAN PLC

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February 19, 2021

The Honorable Karen Fann
President, Arizona State Senate
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The Honorable Russell Bowers
Speaker, Arizona House of Representatives
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The Honorable David M. Gowan
Chairman, Joint Legislative Budget Committee
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President Fann, Speaker Bowers, and Chairman Gowan:

Please be advised that the aggregate expenditures of local revenues for all school districts, as defined in article IX, section 21, subsection (4), Constitution of Arizona, is $6,165,430,899 for fiscal year 2020-21 based on original budgets or budget revisions submitted by school districts on or before February 17, 2021. This is $283,020,347 lower than the aggregate expenditures of local revenues for all school districts based on original budgets or budget revisions submitted by school districts on or before October 23, 2020.

Therefore, the aggregate expenditures of local revenues do not exceed the aggregate expenditure limitation for all school districts of $6,309,587,438, as determined by the Economic Estimates Commission pursuant to A.R.S. 41-563.

Sincerely,
Kathy Hoffman

Kathy Hoffman, MS, CCC-SLP
Superintendent of Public Instruction

Clerk of the Superior Court
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

INVEST IN EDUCATION et al.,

Intervenor-Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

[PROPOSED] ORDER GRANTING PLAINTIFFS KAREN FANN, ET AL.'S MOTION TO STAY PROCEEDINGS PENDING APPEAL

This Court has reviewed Plaintiffs Karen Fann et al.'s Motion to Stay Proceedings Pending Appeal, and good cause appearing, therefore,

IT IS ORDERED granting Plaintiffs' Motion and staying all proceedings in this case, including all discovery deadlines, pending resolution of Plaintiffs' appeal of this Court's Order denying its Motion for Temporary Restraining Order (with Notice) and Preliminary Injunctive Relief.

DATED this _____ day of _____, 2021.

By: _____
The Honorable John Hannah

eSignature Page 1 of 1

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Proposed Order Denied

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Proposed Order Denied

John Hannah Date: 3/5/2021
Judicial Officer of Superior Court

ENDORSEMENT PAGE

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