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)

APPELLEES INVEST IN EDUCATION (SPONSORED BY AEA AND STAND FOR CHILDREN) AND DAVID LUJAN'S COMBINED RESPONSE TO AMICUS BRIEFS IN SUPPORT OF APPELLANTS

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Introduction

¶1 Appellees Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan submit this combined response to the briefs submitted in support of Appellants filed by Arizona Business Leaders ("AZBL Brief"), the Arizona Commerce Authority ("ACA Brief"), Americans for Tax Reform and the Arizona Small Business Association ("ATR/ASB Brief"), the Alliance Defending Freedom and Center for Arizona Policy ("ADF/CAP Brief"), Elliott Pollock and Alan Maguire ("Economist Brief"), the American Farm Bureau Federation ("AFB Brief"), and the Arizona Tax Research Association and Arizona Chamber of Commerce and Industry ("ATRA/ACCI Brief").

¶2 Though the briefs filed in support of Appellants differ in scope and approach, one common thread motivates them all: a fundamental opposition to new taxes in any form. In most cases, that policy argument is all the amici offer. But Amici's policy preference – no matter how strongly held or eloquently articulated – is no reason to reverse the trial court's well-reasoned order denying Appellants' request for a preliminary injunction. As a result, there is little else to say about the AZBL Brief,

the ATR/ASB Brief, the ADF/CAP Brief, and the AFB Brief (collectively, the "Policy Briefs").

¶3 Three briefs – the Economist Brief, the ACA Brief, and the ATRA/ACCI Brief (collectively, the "Construction Briefs") – merit more substantive responses. All three quarrel with Appellees' interpretation of article IX, § 21(4)(c)(v) of the Arizona Constitution ("Grant Exception") by urging a new and awkward construction of that clause not advanced by Appellants below. *Cf.* *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84 (1981) ("It is the rule that amici curiae are not permitted to create, extend, or enlarge issues beyond those raised and argued by the parties"). And both the Economist Brief and the ACA Brief challenge Appellees' arguments on ripeness and severability.

¶4 None of these arguments change these simple facts: (1) Appellants' facial challenge to Prop 208 is unripe, (2) the Grant Exception excludes "grants . . . of any type" from the definition of "local revenues" subject to the limitations of article IX, § 21, and (3) Prop 208's direct grants to school districts are a "grant[] of any type" in both name and function. This Court should affirm the trial court's order for the reasons detailed in Appellees' Answering Brief ("AB").

I. The Policy Briefs Are Unhelpful.

¶5 First, the Court need not consider the Policy Briefs or the policy-based sections of the ACA Brief [at 26-31] and Economist Brief [at 30-35]. It's no surprise that groups representing business interests oppose the new tax surcharge imposed by Prop 208; they generally oppose new taxes in any form. And for that reason, arguments that Prop 208 will allegedly harm Arizona's business climate or economy are both wrong and misplaced. They are the same political arguments that many of these amici – and indeed, many Appellants – used in their failed campaign to persuade Arizonans to vote against Prop 208.

II. Appellants' Claims Under Article IX, § 21 Are Unripe.

¶6 Second, the Court should not credit the contentions in the Economist Brief and the ACA Brief that Appellants' claims related to the aggregate expenditure limit imposed by article IX, § 21 ("Expenditure Cap") are ripe. They are not for the reasons discussed in the Answering Brief [at 16-23]. In a few words, however, there is no existing problem with Prop 208's direct grants to school districts and the Expenditure Cap, and existing legislative processes could resolve such an issue. Beyond that, the trial court correctly identified the critical role the Economic

Estimates Commission could play in creating hundreds of millions of dollars of additional space under the Expenditure Cap and the need to receive more information about the role of the Commission and the appropriateness of its failure to adjust the aggregate expenditure limit as required by the constitution. Ariz. Const. art. IX, § 21(5).[1]

A. Appellants' claim that Prop 208 is facially invalid in its entirety is unripe.

¶7 The ACA Brief [at 24-25] says that Appellees' ripeness argument "ignores the fact that Plaintiffs challenge Proposition 208 *in its entirety*" and that "Plaintiffs undoubtedly have a right to challenge the constitutionality of a statute that is currently in effect." In other words, they claim that Appellants "undoubtedly" can now seek the facial

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[1] This is an appeal from the denial of a preliminary injunction. At Appellants' insistence, this case proceeded in the trial court with virtually no ability to develop a record. One issue the trial court identified as needing further factual development was the role of the Economic Estimates Commission. Two of the three members of that Commission have now weighed in through an amicus brief even though the Department of Revenue (in which the Commission operates) is a party to this case. They provide what amounts to their opinions and "testimony" with none of the safeguards that would be present in the trial court. Appellees had no ability to cross examine them or to conduct discovery to dispute their wide-ranging claims. Although these amici state they are "objective," they make several policy arguments that show on many issues they are anything but. [*See, e.g.*, Economist Brief at 34] This is an improper method of resolving a case like this.

invalidation of an entire voter-approved initiative based on allegations that just one of its provisions is unconstitutional despite the existence of legislative processes that would allow the measure to function precisely as intended, even if the Prop 208 funds are considered "local revenues."

¶8 The ACA Brief ignores that Appellants did not seek only to enjoin the operation of A.R.S. § 15-1285 ("Local Revenues Clause"), even though that is the only provision of Prop 208 their Verified Complaint attacks (one the trial court held has a constitutional construction as an "interpretive aid"). Instead, Appellants' request is much broader, and they asked the trial court to enjoin all of Prop 208. And therein lies the problem with many of their arguments.

¶9 All parties agree that school districts won't receive any Prop 208 funds until FY2022-2023 [*e,g.*, APPV1-058], and even then, there's no evidence that those funds (even if they were "local revenues") would cause school districts to exceed the Expenditure Cap in every fiscal year.[2]

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[2] The Economist Brief mentions [at 4] that the Expenditure Cap adjusted downward by hundreds of millions of dollars for the current fiscal year because of the unprecedented pandemic, and that next year's limit is expected to be exceeded. But it fails to explain that this contemplated overage is also due to a once-in-a-lifetime pandemic. Why? Next year's preliminary calculation of the Expenditure Cap turns on current year enrollment. Presumably many of the tens of thousands of students who

In addition, at least two pending pieces of legislation could have a material impact on Prop 208 and the Expenditure Cap by both decreasing Prop 208's already-speculative revenues and increasing the Expenditure Cap to a more modern baseline. [*See* AB at 17-20] And, as has happened in the past, the Legislature can authorize expenditures in excess of the Expenditure Cap in one-year increments. By asking the Court to enjoin Prop 208 before these processes can even take place, the ACA Brief and Economist Brief essentially ask this Court to read article IX, § 21(3) out of existence. And there may also be hundreds of millions of dollars of space under the Expenditure Cap because of the Economic Estimates Commission's failure to comply with the mandatory provisions of § 21(5). [*See* Section I.B, *infra*]

¶10 This is not a case of a court "wait[ing] to rule on the constitutionality of existing legislation on the chance it may later be changed." [ACA Brief at 25] There's no suggestion here that anything about Prop 208 be "changed," but rather that facial constitutional claims

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did not attend school this year because of the pandemic will return soon. That will raise the Expenditure Cap in the next year.

about Prop 208 as a whole are unripe because there are multiple ways in which Prop 208 can continue to function.

B. The Economic Estimates Commission has a duty to adjust the Expenditure Cap.

¶11 One potentially important piece of Appellees' ripeness argument relates to the trial court's observation – supported by unrebutted expert testimony below [APPV2-032 ¶ 15] – that 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 the cost of significant government functions. The Economist Brief says [at 36] that this "presents an erroneous legal interpretation of the constitution" because "it is the legislature's prerogative to decide that a qualifying 'transfer' has occurred, not the Commission's." This is true, they claim, because such transfers "have historically been mandated by legislation." [*Id.*]

¶12 The Economist Brief asks this Court – on an undeveloped record – to accept an incomplete series of session law citations [Economist Brief at 37 n.47] over the clear language and framework of the constitution, including § 21(5). The framers of that provision included

provisions that assured the Expenditure Cap would change when responsibility for covering the cost of a government function changed.

¶13 Article IX, § 21(5) provides that

> [t]he economic estimates commission shall adjust the amount of expenditures of local revenues in fiscal year 1979-1980, as used to determine the expenditure limitation pursuant to subsection (1) or (2) of this section, to reflect subsequent transfers of all or any part of the cost of providing a governmental function, in a manner prescribed by law.

(Emphasis added.) Section 21's entire framework depends on carrying out this mandatory duty to adjust the limit where appropriate. *See* Ariz. Const. art. II, § 32 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise"); *State ex rel. Morrison v. Nabours*, 79 Ariz. 240, 243 (1955) ("[T]he word 'mandatory' as used in this constitutional provision is defined as a command and hence obligatory"). The Economist Brief claims [at 36-37] that the Commission can only change the Expenditure Cap when explicitly told to do so by the Legislature. The Commission's own actions don't support this claim as just one example reveals. In 1984, the Legislature shifted the responsibility to pay for certified employees' retirement benefits from the State to local school districts. *See* 1984 Ariz. Sess. Laws, ch. 314, HB 2096 (2nd Reg. Sess.). The Legislature adjusted the base limits for districts to

cover these costs. But the legislation was silent on also adjusting the aggregate expenditure limit to account for this change. *Id.*

¶14 Despite the lack of specific legislative direction, the Economic Estimates Commission adjusted the Aggregate Expenditure Limit to account for this change in responsibility to cover the cost of this government function. [*See* **Exhibit 1**[3]] That cost was $97,341,300 in FY 1985. [*Id.*] Had that adjustment not occurred, it would have effectively reduced the Expenditure Limit by hundreds of millions of dollars in today's dollars.

¶15 In the same legislation, the Legislature permitted districts – for a single year – to use funds raised by the capital levy on general maintenance and operation expenses. *See* 1984 Ariz. Sess. Laws, ch. 314, HB 2096 § 5(A)(2)(a) (2nd Reg. Sess.). The Legislature instructed the Arizona Department of Education ("ADE") (not the Commission) that if districts used this authority, ADE should count the transferred funds under the aggregate expenditure limit because the funds were no longer

[3] Counsel for Appellees received this public record on March 25, 2021 from the Economic Estimates Commission in response to a public records request dated two months earlier. These documents are relevant to one of the areas in which the trial court sought more evidence.

being used for items traditionally funded by the capital levy. *Id.* § 5(C). Thus, the same act caused two changes that would affect the Expenditure Cap. In one instance the Legislature directed a change, and in the other the Legislature stayed silent. In both cases, the Expenditure Cap appears to have been altered.

¶16 Later, the Legislature abolished the capital levy, and the costs of the functions previously covered by the capital levy now come from a different funding source. Yet the Economic Estimates Commission didn't alter the Expenditure Cap to account for this change, which could create an underestimation by hundreds of millions of dollars. [APPV2-032 ¶ 15][4]

¶17 The Economist Brief attempts to minimize the importance of § 21(5) by claiming [at 38] that its requirement to adjust the limit to

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[4] HB 2096 (Laws 1984, Chapter 314) also proves the folly of the Economist Brief's argument that only the source of funds controls whether § 21's exceptions apply. The source of the capital levy did not change when districts could spend the money raised by the capital levy on maintenance and operations for a limited time. But when school districts used those funds on something other than the types of capital expenses that the capital levy covered when Arizonans adopted § 21, it was determined they no longer fit within the exception. Now the costs of the items previously funded by the capital levy fall within other funding sources. But the Commission has failed to adjust the limit to account for the transfer in the cost of providing this government function. [APPV2-032 ¶ 15]

reflect transfers in the cost of covering government functions applies only if, for example, school districts assume a new responsibility unrelated to education, such as providing road design or police and fire services. The above example about an adjustment of the limit to reflect a change in the responsibility to pay retirement costs for certified teachers – as well as the lack of any textual support in the language of § 21(5) – shows the weakness of this argument.

¶18 The voters who adopted this constitutional amendment understood that the costs of covering government functions could shift over time, and by including § 21(5), made it clear that the Economic Estimates Commission has to adjust the Expenditure Cap to reflect those changes. At a minimum, the trial court was right to want more information and a more developed record to rule on this issue.

¶19 In addition, the Legislature has similarly imposed certain duties on the Commission:

> In the case of a transfer of all or any part of the cost of providing a governmental function, pursuant to article IX, section 20, subsection (4), Constitution of Arizona, or article IX, section 21, subsection (5), Constitution of Arizona, the base limit of political subdivisions, community college districts or school districts, whichever is applicable, shall be adjusted by the commission to reflect the transfer by increasing the base limit of the political subdivision,

> community college district or school district to which the cost is transferred and decreasing the base limit of the political subdivision, community college district or school district from which the cost is transferred by the amount of the cost of the transferred governmental function.

A.R.S. § 41-563(D) (emphasis added). No legislative action is required on an item-by-item basis either in this statute or in § 21(5). That the Legislature directed the Commission in the past to make changes for particular transfers in the context of a different expenditure limit (§ 17(4)) with different instructions to the Legislature [Economist Brief at 37 n.47] does not relieve the Commission of its mandatory duty to do so absent specific legislative direction under § 21(5).[5]

III. The Grant Exception Applies to Prop 208's Direct Grants to School Districts.

¶20 Third, the direct grants Prop 208 provides to school districts qualify under the Grant Exception and are not "local revenues" based on

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[5] The Economist Brief claims that § 17 is "nearly-identical" to § 21. It isn't. *Compare* art. IX, § 17(4) (setting forth detailed instructions and establishing certain principles that the legislature "shall" follow, pertaining to the adjustment of the legislature's appropriations limit), *with* art. IX, § 21(5) (establishing mandatory duty on the Economic Estimates Commission to "adjust . . . the expenditure limit . . . to reflect subsequent transfers of all or any part of the cost of providing a governmental function in a manner prescribed by law"). Thus, the Economist Brief's reliance on Ariz. Op. Atty. Gen. No. I79-227 (Aug. 16, 1979), which predated § 21's adoption, is misplaced.

that provision's plain language and limited legislative history. [AB at 23-28] In various ways, the Construction Briefs push back against this sensible conclusion, but none of their arguments is convincing.[6]

A. Amici's "blue pencil" construction of the Grant Exception must fail.

¶21 The Construction Briefs all settle on an overarching construction of the Grant Exception's plain language not advanced by Appellants below, but that the trial court considered and rejected. The Grant Exception says that "local revenues" for purposes of § 21 do not include "[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." And despite the obvious introduction of a broad exception not offset by any commas, the Construction Briefs

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[6] On this point, the ATRA/ACCI Brief is worth mentioning. Before Arizonans approved Prop 208, the Arizona Tax Research Association ("ATRA") urged them to vote against the initiative because, among other things, "the money [generated by Prop 208] is paid in grants and does not go into base K-12 funding." Ariz. Tax Research Ass'n, *Special Report – Teachers Union Tax Increase Misguided and Cynical*, http://www.arizonatax.org/publication/special-reports/teachers-union-tax-increase-misguided-and-cynical. After failing to persuade Arizonans to vote against Prop 208 because its funds are grants, ATRA now conveniently tries to convince this Court that they aren't grants.

contend that the phrase "received directly or indirectly from any private agency or organization, or any individual" modifies "grants . . . of any type" and thus resolves the question of constitutional construction before the Court.[7]

¶22 As the trial court correctly observed [APPV2-111], amici's preferred reading of the Grant Exception requires the Court to engraft two commas, an inappropriate exercise in constitutional construction. The ACA Brief, for example, declares [at 13] in one breath that "additional commas are not necessary" to reach that result, but in the very next says that "it is useful to envision a comma before the word 'except' and another after the words 'in lieu of taxes." To change the meaning as amici attempt to do, such "envisioning" is not only "useful"; it's essential.

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[7] In making this argument, the Construction Briefs invoke what is sometimes referred to as the "last antecedent" rule of construction. As Scalia and Garner point out, this rule is better known and understood as the "nearest-reasonable-referent canon" under which the modifier "normally applies only to the nearest reasonable referent." A. Scalia and B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, § 20, p. 152 (2012). The question is thus not which is the nearest, but instead which is the nearest "reasonable referent."

¶23 Citing one provision of the 1980 Legislative Council Drafting Manual that said legislators should "[u]se commas sparingly," the ACA Brief goes on [at 13-14] to argue that "[t]he absence of commas is unsurprising." But just five pages later in that same document, Legislative Council explained that the use of the word "except" is a method of "limiting the application of an act," which is precisely why the "except" clause of the Grant Exception must be read together:

> Use of "except" and "provided"
>
> Exceptions are a method of limiting the application of an act. Exceptions and provisos are legally differentiated for purposes of pleadings and proof. The more readily understandable and grammatically simple "except" is preferred in drafting because of the occasional casual use of "provided" as a conjunction. The most preferable approach, however, is the statement: "This article does not apply to . . . ."

Arizona Legislative Bill Drafting Manual (Jan. 1980) at 50, https://azmemory.azlibrary.gov/digital/collection/statepubs/id/38016/ (last visited Mar. 29, 2021). Rather than taking Legislative Council's advice by making its intention clear (*e.g.*, "[t]his paragraph does not apply to amounts received directly or indirectly in lieu of taxes"), the Legislature chose to introduce an exception using the word "except," and the consequence of that decision is that the phrase "received directly or

indirectly from any private agency or organization, or any individual" modifies only the immediately preceding concept, not the broader phrase "grants . . . of any type." *See, e.g.*, *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶ 12 (2011) ("The absence of a comma after the phrase 'labor union' makes a difference").

¶24 The ACA Brief also contends [at 12-13] that Amici's proffered plain language construction makes sense because a contrary result "results in redundant use of the phrase 'received directly or indirectly.'" But its proffered resolution is to "envision" commas where none exist or to simply pretend that the entire "in lieu of taxes" provision does not exist. Appellees believe that "grants of any type" is clear and dispositive. But even if there's ambiguity in that clause, the answer is not to resolve this case, as the Construction Briefs urge, by resolving doubt against upholding Prop 208; indeed, the law is to the contrary. *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020) ("There is a strong presumption in favor of a statute's constitutionality" and "the challenging party bears the burden of proving its unconstitutionality.").

¶25 Similarly, the Economist Brief [at 17] makes several internally inconsistent arguments to convince the Court that the entire

Grant Exception "is quite plainly limited to private donations." First, it concedes (as it must) that the grant exception itself contains an "exception to the exception" that covers "in lieu of tax" payments. It then states that these "in lieu of" payments are made by "certain governmental entities, which are exempt from property tax." [*Id.* (emphasis added)] It claims that Appellees present "a curious interpretation, because private entities are not exempt from property tax and so would not make voluntary contributions in lieu of taxes." [*Id.* at 19-20]. The Economist Brief states that SRP and other special districts that would make "in lieu of" payments are "political subdivisions of the state," and have "never been described as wholly private." [*Id.* at 20]

¶26 If, as the Economist Brief claims [at 17], the Grant Exception is "plainly" limited to private donations, then why is an exception for "in lieu of tax" payments – one that the Economist Brief [at 18-20] says applies only to non-private entities such as SRP – necessary at all? The entire "in lieu of tax" provision would have no application, because, according to the Economist Brief, no private entities pay amounts "in lieu of" taxes.

¶27 The Economist Brief then takes the argument one more (extreme) step further [at 19 and 21] and argues that the Grant Exception should be read as "[a]ny amounts or property received as grants, gifts, aid or contributions of any type . . . received directly or indirectly from any private agency or organization, or any individual." Respectfully, if that is what the drafters intended, that's what the Grant Exception would have said. It isn't, and the Court should not simply read the Grant Exception in a way that ignores half its words.

B. The Grant Exception applies to Prop 208's direct grants and does not exclude tax revenues or other public funds.

1. Several of § 21's exceptions derive from tax revenues.

¶28 The Economist Brief [at 16-21] argues that all the exceptions to § 21's definition of "local revenues" derive from non-tax revenues. This claim is false; several of its exceptions refer to funding sources derived from tax revenues. For example:

- § 21(4)(c)(i) excludes funds received from the issuance of bonds, and the amounts or property collected to make payments for the bonds;
- § 21(4)(c)(xi) excludes ad valorem taxes received to fund overrides;

- § 21(4)(c)(vi) includes state funds provided for purchasing land, buildings or improvements, or for construction;
- § 21(4)(d)(ii) includes funds received from the capital levy;[8]
- § 21(4)(d)(iv) refers to revenues received in the event of destruction or damage to facilities (which could come from a combination of insurance payments and tax sources).

Strangely, the Economist Brief also contends [at 9 n.13] that most of the exceptions that include tax revenue apply only to "specific legislative acts." No constitutional language supports this supposed distinction.

¶29 The examples above also prove that the Economist Brief's claim [at 9-10] that it is the "source" and not the "use" of the money that is dispositive has no basis in the constitution's language and conflicts with several exceptions, which derive their funds from local taxation (bonds, overrides, capital levy) and state taxation (construction, land, damage to structures, and grants, if the State provides them). Each item impacts taxation.

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[8] *See, e.g.*, 1981 Ariz. Sess. Laws, ch. 1 § 2 (1st Reg. Sess.) (enacting A.R.S. § 15-962(B), (C)).

¶30 In short, the idea that all the exceptions in § 21(4)(c) and (4)(d) are from nontax revenue finds no support in the constitution. If the people had wanted the exceptions to be limited to nontax revenue, they would have said so.[9]

2. Tax revenues can and do create "grants."

¶31 Both the ACA Brief [at 17-21] and the Economist Brief [at 8-12 and 21-23] make the broad and self-serving claim that the Grant Exception does not apply to "tax revenues," or at the very least, "tax revenues levied for the benefit of school districts." Not even the Appellants make this remarkable claim. Though Appellants claim that the Court should "interpret" the grant exception to apply only to "discretionary" grants, even they acknowledge that various state funded grants fall within the grant exception.

¶32 Amici's arguments take various forms, but center on the claim that a mandatory government grant program derived from tax revenues cannot qualify as a "grant." As the ACA Brief [at 19] summarizes this

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[9] The Economist Brief [at 22] claims that if the framers had meant to include public sources of grants they would have used the word "public." But the Grant Exception applies to grants "of any type." There is no basis to claim that "grants . . . of any type" is somehow more limited than "public or private grants."

position, Prop 208's direct grants to school districts "contain none of the hallmarks of a 'grant' as the term is ordinarily used and understood." And as the Economist Brief posits [at 10-11], Appellees' focus on the Grant Exception's broad applicability to "grants . . . of any type" ignores the distinction between the "type" of grant and the source of the money that funds the grant.

¶33 Appellees [AB at 24] provided the Court with dictionary definitions – often consulted to help determine a word's ordinary meaning – that encompass the Prop 208 grants. While some grants provided by private or public entities involve a competitive application process, such a process is not a requirement. Nor would imposing that requirement on the Grant Exception align with its broad application to "grants . . . of any type," a term easily read to include both discretionary and mandatory grants.

¶34 Amici then ignore the specific purposes for which schools must spend Prop 208 funds by claiming they are just like general formula funding, which supports some of the same items such as increasing teacher pay. [Economist Brief at 12-13] Amici again ignore the language and structure of § 21. For example, school districts can spend override

funds on maintenance and operations expenses, including teacher pay. Yet they too fall under an exception to the definition of "local revenues." *See* Ariz. Const. art. IX, § 21(4)(c)(xi). Amici also misunderstand how school districts can spend formula funding. The key attribute of formula funding is that it provides significant flexibility in how districts may choose to allocate it.[10] That differs radically from the specific mandates and accountability provisions of Proposition 208. *See, e.g.*, A.R.S. §§ 15-1281(D), 15-1284. To the contrary, fed up with "years of underfunding" education, "crisis-level teacher shortages," "woefully inadequate support services," the need to "hire [more] counselors," and the other ills set forth in § 2 of Prop 208, the people targeted grants to address those specific issues.[11]

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[10] The Economist Brief misleadingly states [at 15] that districts must apportion state funding "formulaically among operating and capital expenses as set forth on detailed budget forms prescribed by the auditor general." What this overlooks, however, is that districts may shift M&O funds to capital and vice versa when adopting their budgets. *See, e.g.*, Ariz. Auditor Gen., Forms – School Districts, Budget Forms, https://www.azauditor.gov/sites/default/files/SDBUD21.zip (2021EXPBUD.xls, at page 7, and at Instructions, line 40). Thus, as stated above, the hallmark of formula money is its flexibility. *Id.*

[11] The Economist Brief also claims [at 14] that Appellees' construction of the grant exception could call federal Title I money into question because Title I is "hardly a model of specificity." The very source it cites betrays this claim. Congressional Research Service, *The Elementary and*

¶35 Equally inconsistent with the plain language of the Grant Exception is reading into it some limitation on the source of the money that funds a particular grant. Here again, even Appellants agree that both the state government and the federal government provide "grants" to school districts and other public entities, with the money funding those grants coming from tax revenue and other mandatory government extractions. That Prop 208's targeted, direct grants to school districts have their origin in a specific income tax surcharge levied for that precise purpose does not change its character as a grant.

3. Different exceptions in different expenditure limitations support Appellees' interpretation of the Grant Exception.

¶36 Next, the Economist Brief [at 22-23] compares the Grant Exception to an exception to the state appropriations limit found in article IX, § 17(2)(b)(vi), and says that differences in those provisions are evidence that "the use of the word 'private' in [the Grant Exception] was

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Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer at 1-7 (Aug. 18, 2020) (detailing monitoring, accountability, and use restrictions for recipients of Title I grants), https://crsreports.congress.gov/product/pdf/R/R45977 (last visited Mar. 28, 2021).

intended to exclude public sources" such as tax revenue. There are differences in the two exceptions, but they do not help prove this point.

¶37 It helps to examine the full text of both exceptions:

Grant Exception	**§ 17(2)(b)(vi)**
"Any amounts or property received as grants, gifts, aid or contributions of any type except amounts received directly or indirectly in lieu of taxes received directly or indirectly from any private agency or organization, or any individual."	"Any amounts received as grants, aid, contributions or gifts of any type, except voluntary contributions or other contributions received directly or indirectly in lieu of taxes."

One obvious and important difference is that § 17(2)(b)(vi)'s "except" clause is set off from the rest of the text by a comma, which specifies how it's to be read. This contrasts with the Grant Exception's notable and dispositive lack of punctuation in its "except" clause. [*See* Section III.A, *supra*] Section 17(b)(vi) also uses the term "voluntary" to qualify at least part of its applicability, another item the Grant Exception lacks.

¶38 According to the Economist Brief [at 22-23], § 17(2)(b)(vi)'s omission of the "reference to private sources found in" the Grant Exception "strongly suggests" that the latter's "private source" clause "does not modify the *exception* for contributions in lieu of taxes." It also declares that "there is no reason to believe the exception should mean

something different in each provision." But the two provisions, adopted within two years of each other by Arizona voters, say different things and even bear different punctuation. They are different, and the suggestion that they should be interpreted the same has no merit.

¶39 The Economist Brief also notes [at 23] that § 17's list of exceptions to the definition of "state revenues" doesn't "include a separate exemption for federal grants," and argues that § 21's inclusion of such a separate exemption "indicates that use of the word 'private' in [the Grant Exception] was intended to exclude public sources." But as Appellees explained in their answering brief [at 34-38], § 21's separate federal grant exception is unsurprising in the specific context of education funding and wanting to ensure that a constant and separate stream of revenues from the federal government – a consistent and known source of revenue for education – do not get swept under the umbrella of "local revenues."[12]

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[12] Appellees also explained in their answering brief that the federal exception, art. IX, § 21(4)(c)(iv), contains its own "exception to the exception" that applies to "school assistance in federally affected areas," for example, Impact Aid. This is the equivalent of the "in lieu of taxes" provision of § 21(4)(c)(v). [AB at 35] The Economist Brief tries to create "inconsistency" by looking at a present report for a "random" school district that shows that Impact Aid appears under "Excluded Funds." The Economist Brief, however, ignores that the State's treatment of Impact Aid changed by law after § 21's adoption. *Compare* 1981 Ariz.

4. None of § 21's exceptions are superfluous.

¶40 The ACA Brief [at 21-22] also makes the same "superfluousness" argument as Appellants, though it adds two exceptions to the definition of "local revenues" to the exceptions that are allegedly "superfluous" if Appellees' interpretation of the Grant Exception carries the day. This is so, the ACA Brief explains [at 21], because that interpretation means that "any money transferred by the state for a stated purpose would be a grant."

¶41 First, the mere fact that there may be overlap between various § 21 exceptions does not "render[] [them] merely duplicative"; instead, those separate exceptions "complement[]" one another and "solidify the [constitutional] intent." *Sonitrol of Maricopa Cty. v. City of Phoenix*, 181 Ariz. 413, 420 (App. 1994) (rejecting argument that overlap in statutory categories "renders the two merely duplicative"). That's precisely the case here. [*See* AB at 34-38] And to be clear, Appellees have

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Sess. Laws, ch. 1, § 2 (1st Reg. Sess.) (enacting A.R.S. § 15-973(D) and explaining then existing laws under which equalization aid was reduced for Impact Aid payments) and 1992 Ariz. Sess. Laws, ch. 288 (2nd Reg. Sess.), *with* A.R.S. § 15-973(D). A detailed explanation of Arizona's evolving treatment of Impact Aid following adoption of § 21 is both complicated and unnecessary. When Arizonans adopted § 21, the federal exception was not "inert."

never argued that "any money transferred by the state for a stated purpose would be a grant." Their argument throughout this litigation has been only that Prop 208's direct grants to school districts satisfy the plain language of the Grant Exception. This is true not only because of the "label" Prop 208 affixes to them, but also because they in fact function as "grants" as that term is commonly understood: that is, Prop 208 creates specific funds earmarked for specific purposes, and that the State must distribute to specifically identified recipients according to a specific metric. How other State transfers of funds to schools would fit into the Grant Exception, or other of § 21's exceptions, are not issues before this Court.

5. Amici's discussion of "past practice" is flawed.

¶42 The Economist Brief claims [at 23-24] that "past practice" suggests that the Prop 208 funds are not grants while relying on a Uniform Reporting System Manual that admittedly does not even apply to school district reporting. [*Id.* at 23-24, n.27] The Uniform System of Financial Records for Arizona School Districts ("USFR")[13] (which does apply to school districts) and the budget forms that districts must use do

[13] https://www.azauditor.gov/sites/default/files/USFR8119.pdf

not support Amici's contentions. To the contrary, grant programs like the Instructional Improvement Fund, Results Based Funding, and many other grant programs are accounted for separately from general formula and M&O funding.[14] *See, e.g.*, USFR at III-7; V-B-2-3.

¶43 The Economist Brief then says [at 24-25] that the Auditor General's views (derived from an inapplicable source) are not binding, but "merit[] consideration." It also says that ADE and the Superintendent of Public Instruction's views from 20 years ago about a different ballot measure deserve consideration. Yet they ignore that for many years, ADE has specifically excluded state-funded grants from "local revenues" under the Expenditure Cap. In any event, Appellees agree that the opinion and practice of the Superintendent are instructive; here, Superintendent Hoffman just informed this Court that ADE will exclude Prop 208 funds from the Expenditure Cap based on Prop 208's

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[14] Taking a few words out of context, the Economist Brief contends [at 29] that Results Based Funding is as general as regular state aid and thus would not satisfy the Appellees' definition of a grant. Wrong again. The Results Based Funding statute, A.R.S. § 15-249.08, mandates how the school districts must use the money (including which of a district's schools may receive the money), contains "no supplant" language, and requires specific accounting and reporting provisions. Contrary to Amici's claim, Results Based Funding fits within Appellees' (and ADE's) view of what constitutes a grant.

plain language and ADE's historical practice. [Brief of Superintendent Hoffman at 9-10] It's unclear why Amici believe that the views of a different Superintendent about a different statute would merit consideration but the views of the current Superintendent about Prop 208 do not.

¶44 The Economist Brief next contends [at 25] that Prop 208 funds must be "local revenues" because various individuals thought that the Classroom Site Fund revenues created by Proposition 301 in 2000 constituted local revenues. But (1) that ballot measure did not explicitly state that it was providing "grants," (2) the Attorney General Opinion that Amici cite [at 25] did not consider either the Grant Exception or the Classroom Site Fund, and (3) we know that ADE has excluded many state-funded "grants" from the definition of local revenues.[15]

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[15] Amici's attempts [Economist Brief at 28] to distinguish the Instructional Improvement Fund are unpersuasive. They rely on Amici's own view that none of the exceptions in § 21 derive from tax revenue. As explained above, this is wrong. The similarities between the initiative that created the Instructional Improvement Fund and Prop 208 are compelling. [*See* AB at 29-30] And Amici's views that the Instructional Improvement Fund fits within the "tuition and fees" exception (§ 21(4)(c)(x)) is novel and unsupported.

¶45 The Economist Brief also proclaims [at 27] that whether ADE excludes many state-funded grants from the Expenditure Cap is "unclear." But the documents in the record – including the unrebutted declaration of school finance expert Chuck Essigs [APPV2-032] – are clear. And even if that were not the case, any lack of clarity only supports the trial court's request for additional factual development before making a final decision on the merits.

¶46 Finally, Amici's argument about what happened with the Classroom Site Fund [Economist Brief at 25-26] only support Appellees' claim that this case is not ripe. When the Legislature discovered what it thought to be a problem with the Expenditure Cap due to its apparent conclusion that these funds were "local revenues," it passed a concurrent resolution allowing spending in excess of the Expenditure Cap for the relevant budget year and referred a measure to the people to create a specific exception in § 21 to resolve the issue going forward. Had someone brought a preemptive suit like Appellants', the legislative process could not have gone forward, and Arizona schools could have missed out on hundreds of millions of dollars in voter-approved funding.

C. Article IX, § 21 sought to restrain unchecked local property taxation.

¶47 As Appellees already detailed [AB at 28], there is nothing inconsistent with interpreting the Grant Exception to cover Prop 208's direct grants to school districts and the people's understanding of the evil being remedied when they adopted § 21. The Construction Amici don't dispute that the limited publicity pamphlet materials for Proposition 108 had a unique focus on decreasing "local tax burden[s]." Nor could they; the Legislature sold § 21 to Arizonans as a way to put a stop to the "ever-increasing local tax burden" and "terminate local government's blank check drawn on people's earnings." (Emphasis added). These unequivocal policy justifications for § 21 should end the inquiry. *See Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 471 ¶ 14 (2009) (using publicity pamphlet arguments to divine voters' intent).

¶48 The ACA Brief [at 15-16] and Economist Brief [at 6-8] urge the Court to look at a measure adopted two years earlier and the nine other taxation measures that appeared on the ballot in the 1980 special election for helpful context. But each of those measures had their own purpose, and in any event, the Construction Briefs cite nothing inconsistent within those other measures. At best, the Economist Brief

[at 8] cites *Mountain States Legal Foundation v. Apache County*, 146 Ariz. 479, 480 (App. 1985), for the proposition that the various limitations imposed on government in 1980 were "adopted to reduce inflation caused by 'unrestricted government spending at all levels.'" But *Mountain States* didn't make a categorical statement about all measures adopted in 1980, and instead was specific to Proposition 107, which is now article IX, § 19 of the Arizona Constitution (and restricts the ad valorem taxes that certain political subdivisions, excluding school districts, can impose). *Id.* Beyond that, the very next sentence from that decision – curiously absent from amici's citation – says that "[t]he rationale underlying the amendment is that excessive spending can be curbed by placing limits on the property taxation powers of local governmental units." *Id.* (emphasis added). If there's anything to take away from that case and the broader context in which the people adopted § 21, it's that there was a singular unifying focus on reining in property taxes imposed by local governments. That, of course, has nothing to do with Prop 208's imposition of a state income tax surcharge to fund targeted direct grants to school districts adopted by a majority of Arizona voters in a statewide election.

IV. Prop 208's Severability Clause Should Control.

¶49 Finally, even if the Court determines that the Local Revenues Clause is unconstitutional, that provision can be severed from the balance of Prop 208, as was the people's express intent. [*See* AB at 39-48] Unlike Appellants, the ACA Brief [at 22] recites and purports to apply the correct legal standard. But it makes the same faulty assumptions as Appellants: that (1) voters would have never approved Prop 208 without the Local Revenues Clause, and (2) "that all or a substantial portion" of Prop 208's revenues can never be spent.

¶50 As to the ACA Brief's and Appellants' claim about what voters would or would not have approved, they engage in the sort of rampant speculation that they elsewhere suggest violates the separation of powers. In any event, no speculation is necessary when, as here, the people clearly expressed their intent: "[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." [Prop 208, § 6] This clause means that "all doubts are to be resolved in favor of severability." *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516,

523 ¶ 25 (2000). For all the reasons set forth in Appellees' Answering Brief [at 44-48], there is plenty of "doubt" here, and no evidence that Arizonans would have voted differently on Prop 208 if they knew that some of the revenue it generates would be subject to the Expenditure Cap.

¶51 Like Appellants before it, the ACA Brief's severability argument rests on speculation that without the Local Revenues Clause, school districts could spend none of Prop 208's money. This is false. 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). School districts could also spend the money if the Economic Estimates Commission is held to task and makes the adjustments described above, or if pending legislation alters either Prop 208's revenues or the Expenditure Cap.

¶52 It is neither "absurd" nor "irrational" for Arizona voters to approve a permanent, dedicated funding source for public education with the understanding that their elected representatives would honor their

will and take all steps necessary to see it carried out. This is particularly true when they've done so in the past; not only has the Legislature approved multiple Expenditure Cap exceptions, but it has also referred a constitutional amendment to the voters to exclude voter-approved tax revenue from the definition of "local revenues" when it believed a more permanent fix was required. Even if Prop 208 funds do not fit within the Grant Exception (they do), there's no reason to deprive the Legislature (and future legislatures) of the opportunity to take these steps again, and there is thus no reason to ignore the people's will by refusing to sever the Local Revenues Clause from Prop 208.

Conclusion

¶53 This Court should affirm the trial court's denial of Appellants' requested preliminary injunction.

RESPECTFULLY SUBMITTED this 29th day of March, 2021.

COPPERSMITH BROCKELMAN PLC

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D. Andrew Gaona
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ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

By /s/ Daniel J. Adelman
Daniel J. Adelman

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Exhibit 1

Exhibit 1

J. ELLIOTT HIBBS
CHAIRMAN
ROBERT EGGERT
MEMBER
KENNETH M. ROSS, JR.
MEMBER

Economic Estimates Commission

CAPITOL BUILDING
1700 W. WASHINGTON
PHOENIX, ARIZONA 85007

BRUCE BABBITT
GOVERNOR

April 30, 1984

The Honorable Bruce Babbitt
Governor, State of Arizona

The Honorable Stan Turley
President of the Senate

The Honorable Frank Kelley
Speaker of the House

Gentlemen:

Pursuant to Section 21, Article 9 of the Constitution, the Economic Estimates Commission is submitting the final aggregate expenditure limit for fiscal year 1984-85 for public schools. The limit is computed as shown below:

1983-84 Student Population / 1978-79 Student Population	X	1983 GNP Implicit Price Deflator / 1978 GNP Implicit Price Deflator	X	1979-80 Aggregate Base Limit	=	1984-85 Final Aggregate Expenditure Limit for All School Districts

$$\frac{492,300}{490,754} \times \frac{215.63}{150.42} \times \$1,020,150,533 = \text{1984-85 Final Aggregate Limit}$$

$$1.0032 \times 1.4335 \times \$1,020,150,533 = \$1,467,065,424$$

This amount represents a 12.3% increase over the final 1983-84 aggregate expenditure limit of $1,306,651,886. The final limit includes an adjustment of $97,341,300 for the transfer of teachers' retirement funding from the state to local school districts pursuant to H.B. 2096 as signed by the Governor on April 30, 1984.

Respectfully submitted,

ECONOMIC ESTIMATES COMMISSION

J. Elliott Hibbs, Chairman Robert Eggert, Member Kenneth Ross, Member

djb
cc: Senator S.H. "Hal" Runyan, Chairman
Senate Appropriations Committee
Representative John Wettaw, Chairman
House Appropriations Committee
Senator Jones Osborn, Minority Leader
Representative Art Hamilton, Minority Leader