

ARIZONA SUPREME COURT

KAREN FANN, <i>et al.</i> ,)	No. CV-21-0058-T/AP
)	
<i>Plaintiffs/Appellants,</i>)	Court of Appeals
)	No. 1 CA-CV 21-0087
v.)	
)	
STATE OF ARIZONA, <i>et al.</i> ,)	Maricopa Co. Superior Court
)	No. CV2020-015495
<i>Defendants/Appellees,</i>)	No. CV2020-015509
)	(Consolidated)
INVEST IN EDUCATION)	
(SPONSORED BY AEA AND STAND)	
FOR CHILDREN), <i>et al.</i> ,)	
)	
<i>Intervenor-</i>)	
<i>Defendants/Appellees,</i>)	
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Brief of *amici curiae* Senate Minority Leader Rebecca Rios and House Minority Leader Reginald Bolding

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Senate Minority Leader Rebecca Rios and House Minority Leader Reginald Bolding (collectively “Legislative Democrats”) submit this brief as *Amicus Curiae*¹ pursuant to Rule 16(b)(1)(A), Ariz. R. Civ. App. Proc., and the parties’ Joint Notice Regarding Blanket Consent for Amicus Curiae Briefs dated March 5, 2021. The purpose of this brief is to provide the Court with important context as it considers whether to grant Appellants’ request to reverse the trial court’s rejection of their request to enjoin the enforcement of Proposition 208 and their challenge to the trial court’s ruling on whether a failure to enjoin enforcement would cause irreparable harm.

STATEMENT OF INTEREST

This brief is filed pursuant to Rule 16(b)(1)(A), Ariz. R. Civ. App. Proc., which permits a person to file a brief as *amicus curiae* with written consent of the parties.

Amici Curiae Senate Minority Leader Rebecca Rios and House Minority Leader Reginald Bolding are the respective leaders of the minority caucuses in both chambers of the Arizona Legislature. Senator Rios is the minority leader in the Arizona State Senate, with a caucus of 14 members, and the senator for Arizona’s 27th legislative district for the 55th Legislature. Representative Bolding

¹ No other group or organization sponsored this brief or provided financial resources for the preparation of this brief. *See* Rule 16(b)(3), Ariz. R. Civ. App. Proc.

is the minority leader in the Arizona House of Representatives, with a caucus of 29 members, and one of the two representatives for Arizona's 27th legislative district for the 55th Legislature. The Legislative Democrats participate in the budgeting process, as well as the policy debates surrounding proposed appropriations and revenue bills, and therefore are uniquely positioned to provide insight into the mechanics of that process. The Legislative Democrats respectfully submit this brief to assist the Court in understanding the context in which the legislative budgeting process occurs and the Legislature's ability to accommodate changes to economic variables and new policy.

INTRODUCTION

In this appeal, Appellants request this Court to enjoin enforcement of Proposition 208. The superior court properly denied their motion, and Appellants contest that ruling, arguing that failure to enjoin enforcement of Proposition 208 will result in irreparable harm to the parties.

The Appellants' superior court motion for preliminary injunction contained a declaration by Senator David Gowan and Representative Regina Cobb. APPV1-126-35. This declaration argued that Proposition 208 would "interject chaos and instability into the budgeting and appropriations process." *Id.* The Legislative Democrats respectfully disagree with this assertion and submit this brief to clarify the legislative budgeting and appropriations process.

ARGUMENT

A. The Legislative Budgeting Process is Designed to Account for Uncertainty

The legislative budgeting process regularly deals with changing and unpredictable variables and has processes built-in to account for and adjust to new information. The Legislature regularly holds appropriations committee hearings to deliberate on the amount of general fund dollars to allocate and to decide and act on passing a state budget. Appellants assert that the effective date of Proposition 208 “usurps” the legislative budgeting process. APPV1-126–35 (Gowan and Cobb Declaration). The effective date of Proposition 208 is immaterial to the legislative budget process. An effective date of January 1, 2021 does not usurp the budget process for fiscal year 2022 because the proposition’s impact on Arizona’s economy can be analyzed, forecast, and accounted for in the budgeting process, and adjustments can be made at several points throughout the fiscal year. Any alleged uncertainty about Proposition 208’s effect on revenue does not interject chaos or instability.

The legislative process regularly must account for uncertainty. For example, this session, and likely next session, there will be uncertainty regarding the full economic impact of COVID-19 on our economy, whether and to what extent additional stimulus will be enacted by the federal government, how quickly a vaccine will be fully distributed to Arizonans, and many other factors. All these

factors, like the effect of Proposition 208, can be accommodated in the regular legislative process. Further, state agencies provide annual budget requests to the Governor in September each year, and the Governor provided his executive state budget proposal to the Legislature in early January 2021. Nothing in Proposition 208 changed this process or contravened current state statutes directing the annual budgetary process. There will be no need to discard or redo any of the work already completed for this budget cycle.

There is inherent uncertainty in forecasting revenues, as it is dynamic in nature. Tax behavior is necessarily subject to some instability because individuals will make unique microeconomic decisions based on the composition of sales, use, property, income, and other taxes that they face. These decisions will change over time for many reasons. The fact that it may be difficult to estimate or quantify this behavior does not contravene the Legislature's ability and authority to forecast and budget; nor does it differ from the many other variables that impact budget-making.

A few examples of policy changes in recent history that had an impact on revenue and economic performance include Proposition 206 (minimum wage), the extension of Proposition 301 (sales or transaction privilege tax for public education), and the acceptance of the *Wayfair* tax regime (online and out-of-state sales tax collections). Other recent policy changes that will affect the state budget

include federal stimulus dollars and changes to federal-state programs (such as the Arizona Health Care Cost Containment System and the Medicaid federal medical assistance percentage rates), which the Joint Legislative Budget Committee (“JLBC”) must account for in its estimates.

To account for these factors and changes in Arizona’s economy and tax structure, JLBC and the Governor’s Office of Strategic Planning & Budgeting (“OSPB”) both participate in Financial Advisory Committee meetings that occur several times per year at the Legislature. The meetings include university economists, private-sector economists, and the Department of Revenue. These experts weigh in on changes to tax and economic policy that could potentially impact state revenues, which inform the budget forecast and process.

The Legislature can and does use many resources as part of its forecast in creating a three-year budget framework to properly allocate state resources and account for dynamic tax impacts on revenue. Additionally, as part of its forecasting tool, JLBC already prospectively looks at 100 or more variables and economic indicators in Arizona’s economy, some of which include revenue brought in from the myriad tax sources under current statutes. JLBC’s periodic revenue and budget updates readily acknowledge significant caveats in their budget predictions. Uncertain future events can result in differences of hundreds of millions of dollars. JLBC is well-equipped to handle these uncertainties; they are part of the process.

B. The State Budgeting Offices Have Continued to Update and Adapt their Analysis of the Economic Impact of Proposition 208

Both JLBC and OSPB are sophisticated entities, able to account for the potential impacts Proposition 208's surcharge may have on revenue. JLBC is a more than 20-person unit composed of budget directors, fiscal analysts, and economists. OSPB is similar in structure and nature. They have continued to analyze and adjust their analysis of the economic impact of Proposition 208 prior to and during the current legislative session.

In July of 2020, prior to Proposition 208's passage, JLBC created a fiscal note, which is publicly available, that estimated what the revenue impact of Proposition 208 would be for the state budget. *See* Ballot Proposition 208, Invest in Education Act, Fiscal Analysis, Joint Legislative Budget Committee, 1 (July 30, 2020), available at <https://www.azleg.gov/jlbc/20novI-31-2020fn730.pdf>. The July fiscal analysis on Proposition 208 explained that the actual revenue will depend on many factors, and for that reason, JLBC's revenue estimate is speculative and subject to change. *Id.*

Subsequently, JLBC produced a more updated Fiscal Analysis in November of 2020, which stated that the income tax surcharge of Proposition 208 would generate \$827 million in revenue to be deposited into the Student Support and Safety Fund in the first full year of implementation. *See* Ballot Proposition 208, Invest in Education Act, Fiscal Analysis, Joint Legislative Budget Committee, 1

(Nov. 31, 2020), available at <https://www.azleg.gov/jlbc/20novI-31-2020fn730.pdf>.

The \$827 million revenue projection was based on Department of Revenue modeling that relied on 2016 tax return data adjusted for filer and income growth. *Id.* at 2. The analysis included the possible impact of increasing high-income tax rates on taxpayer migration and included a study which found minimal migration impacts in an analysis from New Jersey. *Id.* at 4. JLBC was able to project the revenue impact using the Department of Revenue modeling and make subsequent adjustments. That is what the office is designed to do.

Further, even if there are unaccounted fluctuations, the Legislature is more than capable of holding additional hearings and directing JLBC to do additional analysis. The process outlined by Appellants is merely the custom and practice of the Legislature. For the most part, it is not a statutorily mandated process, unlike the requirements for state agencies. *See, e.g.*, A.R.S. § 35-111; A.R.S. § 35-113; A.R.S. § 35-118 (setting forth statutory deadlines and requirements for agency budget requests and the Governor's budget proposal, but not requirements for the Legislature). Rather, legislative budgeting and appropriations are fluid processes, and they are necessarily flexible to account for changes in economic factors. *See* A.R.S. § 35-114. When those factors change, that does not render the entire process meaningless.

Even if major economic changes occur that affect the budgeting process, the Legislature can be called into special session by the Governor to amend the enacted budget and account for changes in revenue. In fact, it has done so multiple times before, including during and after the Great Recession in 2009 and 2010, when the state entered multiple special sessions to adjust the appropriated level of funds for state agencies as tax revenues dropped due to reduced economic activity because of the housing crisis.

C. The Legislative Process is not Usurped by the Passage of Proposition 208

Proposition 208 does not attempt to subvert the legislative appropriations process. The Arizona Constitution envisions the equal power of the electorate to pass laws, and the Legislature must adapt and comply with the will of the people as expressed in initiative and referendum measures that Arizona voters approve. Such measures have often included taxing and spending provisions like Proposition 208.

Balancing conflicting budgetary needs is part of the budgeting process. Representative Cobb and Senator Gowan complained to the trial court in their declaration that “Proposition 208 does not take into consideration that teacher pay raises and the Additional Assistance restorations are growing faster than enrollment and inflation.” APPV1-126–35. But Proposition 208 has nothing to do with the district additional assistance restorations, which the Legislature has actively cut and underfunded since it was established. The fact that Proposition 208

places additional considerations on the Legislature should not be misunderstood as a subversion of the process.

Finally, the argument that Proposition 208 does not create a revenue source is false. Appellants allege that Proposition 208 violates the Revenue Source Rule because it does not create an increased source of revenues. *See* Ariz. Const. Art. IX, § 23. This is not true. Proposition 208 imposes a surcharge on certain high-income earners precisely to cover the costs of the proposal, and JLBC projections estimate Proposition 208 to generate \$827 million for exactly that purpose.

D. The Enforcement of Proposition 208 will not Cause Irreparable Harm

Proposition 208 has not, and will not, cause “chaos” in the legislative budgeting process. The Legislature is now three months into the session and Proposition 208 has not altered or impeded any step of the process. The Governor released his office’s Executive Budget in January of 2021 and the House and Senate Appropriations Committees have continued to meet and deliberate on revenue and spending bills. All budget processes will still proceed according to the timelines outlined in statute. The Legislature continues to utilize JLBC and OSPB to prepare a baseline budget and an estimate of the state’s available financial resources. At no time has Proposition 208 undercut the Legislature’s ability to develop a comprehensive state budget.

As the legislative session progresses, it serves to further illustrate the lack of disruption and chaos predicted by Appellants in their request for injunctive relief. JLBC has been able to reasonably project the revenue that will be generated by Proposition 208 and has met as needed to present its estimates and analysis. The Governor has submitted his executive budget based on agency requests. The Legislative Appropriations Committees have continued to meet and hear bills. The Legislature has, despite Appellants' claims, been able to perform all of its obligations with respect to developing a state budget, thereby proving that the legislative budgeting process is able to account for taxpayer unpredictability, changing social and economic variables, and new policy – just as it was designed to do.

CONCLUSION

For the reasons set forth above, the Legislative Democrats respectfully request that the Court affirm the trial court's decision below.

RESPECTFULLY SUBMITTED this 22nd day of March 2021,

**Minority Leader Rebecca Rios And
House Minority Leader Reginald
Bolding**

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