

**ARIZONA SUPREME COURT**

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

INVEST IN EDUCATION (SPONSORED  
BY AEA AND STAND FOR  
CHILDREN), a political action committee,

Intervenor-Defendants-  
Appellees.

No. CV 21-0058-T/AP

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

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

**Answering Brief by Appellees  
State of Arizona and Arizona  
Department of Revenue**

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## INTRODUCTION

This case comes before this Court as a result of the superior court's denial of Plaintiffs/Appellants' ("Plaintiffs") request for a preliminary injunction suspending the implementation and enforcement of Proposition 208 until Plaintiffs' constitutional challenges have been adjudicated.

The Department of Revenue (the "Department") is an executive agency principally charged with administering and enforcing the tax laws of the State. Its responsibilities include, *inter alia*, providing taxpayers with information and advice on such laws and advising the legislative and judicial branches on its objectives. A.R.S. § 42-5004(A).

The State of Arizona (the "State") and the Department (collectively, the "State Appellees") respectfully request that the Court exercise its discretion in resolving the constitutional questions before it. This will render the need for injunctive relief moot and allow the Department to execute its statutory duties and responsibilities with minimal uncertainty or delay.

Should the Court not fully resolve the constitutional challenges, the State Appellees submit additional information regarding the nature of the anti-junction statute and policy for the Court's consideration in its adjudication.

## STATEMENT OF THE FACTS AND THE CASE

Through the November 2020 general election, Arizona voters approved Proposition 208, a citizen initiative titled the “Invest in Education Act.” Proposition 208 amended A.R.S. Title 15 (Education) and Title 43 (Taxation of Income) and created an income tax surcharge for public education of 3.5% on taxable income in excess of \$250,000 for taxpayers filing individually, or \$500,000 for taxpayers filing jointly or as heads of household. A.R.S. § 43-1013(A). This surcharge must be collected, notwithstanding whether income tax rate brackets found in A.R.S. Title 43 are legislatively “changed, replaced or eliminated.” A.R.S. § 43-1013(C). The revenue collected pursuant to Proposition 208 is to be deposited into a newly-created Student Support and Safety Fund. A.R.S. § 15-1281.

On November 30, 2020, Plaintiffs filed a Verified Special Action Complaint and a Motion for Temporary Restraining Order (With Notice) and Preliminary Injunctive Relief in the superior court. Plaintiffs argued Proposition 208 is unconstitutional and requested a preliminary injunction prohibiting the State and its revenue collection and distribution agencies from taking any action to enforce Proposition 208, levying any surcharge, or appropriating General Fund public monies to pay for costs associated with Proposition 208.

On December 3, 2020, Intervenor-Defendants/Appellees (“Intervenor-Defendants”), who were the proponents of Proposition 208, sought, and were granted, permission to intervene. The parties argued the Motion for Preliminary Injunction on December 23, 2020.

The superior court issued two rulings, on January 14, 2021 and February 9, 2021, denying the Motion for Preliminary Injunction. The superior court signed and filed a Form of Order on February 17, 2021. The following day, February 18, 2021, Plaintiffs filed a notice pursuant to A.R.S. § 12-2101(A)(5)(b) appealing the superior court’s denial of their motion seeking a preliminary injunction. Plaintiffs’ appeal involves only the superior court’s February 9, 2021 ruling. Plaintiffs did not appeal the January 14, 2021 ruling.

### **STANDARD OF REVIEW**

A trial court’s order refusing to issue a preliminary injunction is reviewed for an abuse of discretion and must be affirmed unless the trial judge either made a mistake of law or clearly erred in finding the facts or applying them to the law governing the issuance of preliminary injunctions. *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, ¶ 8 (2020).

### **ARGUMENT**

Plaintiffs’ appeal concerns the superior court’s denial of their request for preliminary injunctive relief suspending the implementation and enforcement of



Proposition 208. Plaintiffs argue two constitutional issues are subsumed within the analysis of whether their request for injunctive relief properly was denied. First, they argue Proposition 208 violates article IX, Section 21 of the Arizona Constitution because it seeks to exempt itself from school district expenditure limitations. Second, they allege Proposition 208 violates the requirement in article IX, section 22 of the Arizona Constitution that any new tax imposed by statute must be implemented by a two-thirds vote of members of both legislative houses.

If this Court chooses to resolve these constitutional arguments, the request for injunctive relief becomes moot. Either Proposition 208 does not violate the Constitution and can be implemented and enforced, or it is unconstitutional and cannot be implemented and enforced. The Department, as the State's taxing authority, will administer and enforce the law according to however the matters at issue in this litigation are finally adjudicated. Moreover, parties involved in drafting, advocating and defending the previous legal challenges to Proposition 208 have addressed the constitutional arguments at length in the superior court proceedings and are expected to address such issues in their briefs filed with this Court.

To this end, and for these reasons, this answering brief will be limited to addressing the scope and breadth of Arizona's anti-injunction statute and implications on various tax types, for the Court's consideration should it determine

that injunctive relief is appropriate or that it is necessary to modify the established law against granting tax injunctions.

**I. Statutory and Tax Policy Considerations Disfavor Restricting the Collection of Imposed or Levied Taxes**

Arizona’s anti-injunction statute prohibits a court from issuing an injunction in any action against the State to prevent or enjoin collecting an imposed or levied tax:

A court may not issue an injunction, writ of mandamus or any other extraordinary writ in any action or proceeding against the state, a county or municipality or a state, county or municipal officer to prevent or enjoin:

1. Extending an assessment of the tax roll.
2. Collecting an imposed or levied tax.

A.R.S. § 42-11006. The plain language of this statute is extremely broad and prohibits injunctions, not only involving an assessment of the tax roll but also, against the collection of any imposed or levied tax.

As an example of the breadth of Arizona’s anti-injunction statute, Section 42-1254 provides that a taxpayer may appeal a determination of the State Board of Tax Appeals to the Tax Court. Such appeals can involve income, transaction privilege, use, luxury, and estate taxes. The statute also provides that injunctions may not be issued in these appeals. A.R.S. § 42-1254(D)(1). Although this statute is located in Title 42, which contains general tax administration and enforcement

provisions as well as those specific to various other tax types (*i.e.*, transaction privilege, use, excise, and property taxes), no one would suggest that appeals to the Tax Court involving income taxes are not subject to the anti-injunction clause in A.R.S. § 42-1254(D)(1) merely because it is not located in Title 43 with other state income tax-specific provisions.

As further evidence that A.R.S. § 42-11006 is not limited to any one tax type, the statute provides that a court may not issue an injunction against the State, the county, or a municipality. While the State is charged with providing Arizona counties and local taxing jurisdictions with guidance to ensure uniformity in the application of property taxes, it does not itself collect property taxes outside of ad valorem taxes against the flight property of airline companies and car inventory of private railcar companies pursuant to A.R.S. §§ 42-14255 and 42-14308, respectively. This suggests the legislature intended § 42-11006 to have a broader application than property tax matters. Otherwise, there would be no need to include the State and its officers within the application of § 42-11006.

The anti-injunction statute's broader application also is supported by the history of § 42-11006, the various iterations of which the superior court noted dates back more than 100 years. *See, e.g., Crane Co. v. Arizona State Tax Comm'n*, 63 Ariz. 426, 442 (1945), *overruled on other grounds by Valencia Entergy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565 (1998); *Standard Oil Co.*

*v. Howe*, 257 F. 481 (9th Cir. 1919). “Since 1913, Arizona has statutorily prohibited the courts from enjoining certain tax-related functions delegated to the executive branch of government.” *Church of Isaiah 58 Project of AZ, Inc. v. La Paz County*, 233 Ariz. 460, 464, ¶ 18 (App. 2013); *Yuma County v. Ariz. & S.R. Co.*, 30 Ariz. 27, 20-25 (1926) (discussing 1913 Code prohibition). The policy behind the prohibition against injunctions is in no way logically restricted to only property taxes. Rather, it is based upon “the realization that to so permit injunction would be, at least temporarily, to emasculate all tax measures.” *Id.*, quoting *State ex rel. Lane v. Superior Court (Struckmeyer)*, 72 Ariz. 388, 391-392 (1951).

A.R.S. § 42-204(B) is the predecessor statute to § 42-11006. Plaintiffs noted that this Court previously held that § 42-204(A) applied only to property taxes. *State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993). They argued this necessarily means § 42-11006 must also be limited to property taxes. This argument fails to consider the statutory language in its entirety. Section 42-204(A), which is not included in § 42-11006, clearly restricted the statute’s application only to property taxes.<sup>1</sup> Section 42-204(B), however, included nearly identical language to that found in § 42-11006(2) forbidding injunctions against the

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<sup>1</sup> The operative language in § 42-204(A) is now found in A.R.S. § 42-11004. Plaintiffs’ argument would be meaningful if § 42-11004 were at issue in this case, but it is not.

“collection of any tax imposed or levied.” The §42-204(B) language was not at issue, addressed, or limited in the *State Comp. Fund* decision.

The application of § 42-11006 is similar to that of the Federal Anti-Injunction Act, which bars injunctions against the collection of all taxes, including federal income taxes. *We the People Foundation, Inc. v. U.S.*, 485 F.3d 140, 142-143 (D.C. Cir. 2007). Plaintiffs cite to a different federal anti-injunction statute, the Tax Injunction Act codified at 28 U.S.C. § 1341, and to case law interpreting that statute, and argue that the purpose of Tax Injunction Act is to require taxpayers to proceed to state court to challenge disputed state taxes. That may be true, but the separate Federal Anti-Injunction Act applicable to the issues in this case is found at 26 U.S.C. § 7421. The Tax Injunction Act is not applicable to the issues involving Proposition 208.

## **II. Practical Considerations Exist with Determining How to *Temporarily* Stem Tax Payment and Collection Activities**

The Department’s initial “collection” activities in 2021 will consist simply of receiving withholding and estimated tax payments. The processing of 2021 tax returns will not begin until 2022. ST-APP-18.<sup>2</sup> Even if the Court determines that injunctive relief is proper, this collection process cannot practicably be enjoined without impacting other tax payment and collection functions, as taxpayers

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<sup>2</sup> Record citations refer to the page in the State’s contemporaneously filed Appendix.

effectively pay the surcharge as an undefined portion of their withholding and income tax liabilities: these liabilities are only defined when they subsequently file their income tax returns. *Id.* If a taxpayer remits payments that the taxpayer later reports as attributable to the surcharge, the Department must accept those filings and payments, even if the surcharge is being challenged. *Id.* Any other approach by the Department would impermissibly and unreasonably interfere with taxpayers' attempts to comply with their self-determined tax obligations. *Id.*

To examine the dilemma more specifically, the Department cannot prevent taxpayers from voluntarily making payments toward the surcharge through payroll withholding or voluntary estimated income tax payments. ST-APP-17. The only way to discourage taxpayers' payment of the surcharge would be for the Department to forbear from publishing new Withholding Election Forms (Arizona Form A-4) that provide an increased withholding percentage option to account for the surcharge. ST-APP-18. However, even if the option is not explicitly provided as a printed choice on the Arizona Form A-4, the Department could not prevent a taxpayer from opting to withhold more from their paychecks or from submitting an increased amount with their estimated quarterly tax payments. *Id.*

If Proposition 208 ultimately is determined to be unlawful, any tax payments made by a taxpayer, either through payroll withholdings or estimated payments, would be applied to the taxpayer's total tax liability for 2021. Any taxpayer who

overpaid their liability would have a sufficient and complete remedy available through the refund process. *Id.* However, in administering these refunds, the Department will necessarily draw such monies from the State's General Fund. *See* Brief of Amici Curiae Governor Douglas A. Ducey and the Office of Strategic Planning & Budgeting at pp.11-12.

### **CONCLUSION**

The State Appellees request that the Court fully adjudicate this case based on the constitutional arguments raised and briefed by Plaintiffs and Intervenor-Defendants. This will provide certainty in a timely manner for both the Department and Arizona's taxpayers. Should the Court determine that a full resolution of the case on the merits is not proper at this time, the State Appellees pray that the Court carefully and cautiously consider a decision to grant injunctive relief in light of the statutory and policy considerations discussed and the impact any change to existing state law against tax injunctions may pose to all state tax types.

RESPECTFULLY SUBMITTED this 15th day of March, 2021.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2021, I electronically filed the Appellee's Answering Brief with the Arizona Supreme Court through the Court's AZ TurboCourt e-filing system.

I further certify that copies of the foregoing were e-served the same day via AZ TurboCourt to:

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that the foregoing Appellee's Answering Brief complies with Rules 4(b) and 14(a) of the Arizona Rules of Civil Procedure. The Brief is double-spaced, utilizes a proportionally spaced typeface of 14 points, and contains 2,129 words utilizing the word count of the word processing system used to prepare the Brief.

By: /s/ Brian Bergin