

**SUPREME COURT OF ARIZONA**

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.

Arizona Supreme Court  
No. CV-21-0058-T/ AP

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

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

**BRIEF OF *AMICUS CURIAE* KATHY HOFFMAN IN HER OFFICIAL  
CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION**

**Filed based on blanket consent of all parties  
and pursuant to ARCAP 16(b)(1)(B)**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
INTEREST OF AMICUS AND INTRODUCTION.....	5
ARGUMENT.....	6
I.    Because of the teacher crisis, the balance of hardships and public interest weigh against preliminarily enjoining Proposition 208.....	6
II.   The Department of Education will treat Proposition 208 funds as grants, not local revenues under the constitutional expenditure limit.....	9
CONCLUSION .....	11

# TABLE OF AUTHORITIES

## Cases

*Bolin v. Super. Ct.*,  
85 Ariz. 131 (1958).....10

## Statutes and Constitutional Provisions

Ariz. Const. art. V, § 1.....5  
Ariz. Const. art. IX, § 21 .....6, 9, 10  
A.R.S. § 15-251 .....5  
A.R.S. § 15-1281 .....8, 9  
A.R.S. § 15-1285 .....9

## Other Authorities

Ariz. Dep’t of Educ., Superintendent of Public Instruction  
Kathy Hoffman, *State of Education Address*, Feb. 3, 2020,  
<https://www.azed.gov/communications/2020/02/04/superintendent-hoffman-delivers-2020-state-of-education-address>.....6  
Expect More Arizona, *Teacher Pay*,  
<https://www.expectmorearizona.org/progress/indicators/teacher-pay/> .....7

## INTEREST OF AMICUS AND INTRODUCTION

Superintendent of Public Instruction Kathy Hoffman submits this brief as the state official responsible for “superintend[ing] the schools of this state.” [A.R.S. § 15-251\(1\)](#); *see also* [Ariz. Const. art. V, § 1](#). The Superintendent of Public Instruction is responsible for implementing many of Arizona’s education laws and distributing a large amount of its education funding. Superintendent Hoffman has therefore developed significant knowledge regarding the state of education in Arizona and the workings of her Department. She submits this brief to address two issues related to this important appeal that are within her purview.

The first issue is Arizona’s inadequate pay for teachers and the resulting teacher shortage. This teacher crisis is one of the greatest problems facing Arizona schools and Proposition 208 would do a great deal to address it. Accordingly, the balance of hardships and public interest weigh against preliminarily enjoining Proposition 208.

The second issue relates to how the Department of Education will characterize the expenditures authorized by Proposition 208. In keeping with the text of the initiative and historical practice, the Department will treat the expenditures as grants not included within the calculation of the

constitutional expenditure limit, [Ariz. Const. art. IX, § 21](#). The Court may find this fact informative as it considers Appellants' argument that Proposition 208 violates that limit.

## ARGUMENT

### **I. Because of the teacher crisis, the balance of hardships and public interest weigh against preliminarily enjoining Proposition 208.**

Arizona is in the throes of a great crisis regarding its teachers. Even before the pandemic, one in every four teaching positions in Arizona public schools was unfilled or filled by a teacher without proper training, and the problem has only gotten worse since the pandemic began.<sup>1</sup> This is one of the greater problems in Arizona public education today. If every classroom does not have access to a highly-qualified teacher, we cannot expect every Arizona student to succeed.

It may be surprising, but the problem is not that we lack qualified teachers in Arizona. It is that, because Arizona's historically low education funding never fully rebounded from recession-era cuts nor kept pace with

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<sup>1</sup> See Ariz. Dep't of Educ., Superintendent of Public Instruction Kathy Hoffman, *State of Education Address*, Feb. 3, 2020, <https://www.azed.gov/communications/2020/02/04/superintendent-hoffman-delivers-2020-state-of-education-address>.

the rapidly rising costs to provide education, our teachers are the lowest paid in the nation.<sup>2</sup> As a result, thousands of qualified teachers no longer teach. As in the rest of the labor market, one critical way to attract these teachers back into the profession (and to prevent others from leaving) is to pay a competitive salary.

Unsurprisingly, the problems associated with inadequate teacher pay extend to other school workers as well. This includes the classroom aides, bus drivers, food service personnel, and other workers without whom a school could not function.

The funding situation has also prevented schools from hiring necessary personnel that support students' safety and well-being. The School Safety Program is a state-funded grant that places school counselors, school social workers, School Resource Officers, and Juvenile Probation Officers in selected schools to contribute to safe school environments that are conducive to teaching and learning. Last year, the Department of Education received about 900 applications from schools to fund these school safety

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<sup>2</sup> See Expect More Arizona, *Teacher Pay*, <https://www.expectmorearizona.org/progress/indicators/teacher-pay/>.

positions but was able to fund only about 400 of those.

Proposition 208 would be an important step in addressing these problems. Its revenues would be deposited in a Student Support Fund (except for modest amounts for state administration). See [A.R.S. § 15-1281\(A\), \(B\), \(D\)](#). Seventy-five percent of the moneys in this fund would be provided “as grants to school districts and charter schools” to hire educators and increase their compensation. [A.R.S. § 15-1281\(D\)\(1\), \(2\)](#). Another ten percent would support grants for “mentoring and retention programming for new classroom teachers to increase retention.” [A.R.S. § 15-1281\(D\)\(3\)](#). The remaining funds would be used to support career training and workforce development and to support the Arizona Teachers Academy. [A.R.S. § 15-1281\(D\)\(4\), \(5\)](#).

Of course, the wisdom of Proposition 208 is irrelevant to its constitutionality. But at this stage of the litigation, the question is not only whether Proposition 208 is constitutional, but whether, under the traditional four-factor test, it should be subject to a preliminary injunction. The superior court and the Appellees have aptly explained why Appellants would suffer no hardship absent a preliminary injunction, such that the balance of hardships and the public interest weigh against preliminary relief. Simply



put, the legislator Plaintiffs do not have a cognizable injury from having to legislate in the face of uncertainty, and the taxpayer plaintiffs will not have to pay the Proposition 208 surcharge until 2022. None of them would be harmed if the Court declines to issue a preliminary injunction. In contrast, Arizona's schoolchildren would be harmed by a preliminary injunction. A preliminary injunction would tell our children's teachers that they are not going to get the compensation that Arizona voters decided is needed to attract and retain quality teachers. Arizona voters determined that the public interest is served by addressing the teacher pay crisis when they approved Proposition 208. Accordingly, the balance of hardships and public interest weigh against issuing a preliminary injunction.

**II. The Department of Education will treat Proposition 208 funds as grants, not local revenues under the constitutional expenditure limit.**

Proposition 208 states that its revenues are "not considered local revenues for the purposes of article IX, section 21, Arizona constitution."

[A.R.S. § 15-1285\(1\)](#). That is because Proposition 208 funds are "grants" to school districts, [A.R.S. § 15-1281\(D\)](#), and under the constitutional expenditure limit, grants are not local revenues. [Ariz. Const. art. IX, § 21](#).

The Department of Education has implemented this constitutional provision

for years by identifying which state-funded programs should be treated as grants for the purpose of the constitutional expenditure limit.

In the proceedings below, the parties contested whether the Department of Education would treat Proposition 208 funds as grants. The superior court stated that it was “unable to evaluate these arguments effectively on the existing record,” and it expressed interest in receiving further evidence and information on this issue. APPV2-111-112. The superior court’s interest in the Department’s position reflects this Court’s statement that “the construction placed upon the Constitution by administrative officers of the state is not binding, but certainly such construction should be considered in the interpretation of the Constitution by this court.” *Bolin v. Super. Ct.*, 85 Ariz. 131, 136 (1958).

Consistent with the plain language of Proposition 208 and historical practice, the Department would treat Proposition 208 revenues as grants when calculating local revenues for the constitutional expenditure limit, [Ariz. Const. art. IX, § 21](#). Superintendent Hoffman respectfully suggests that the Court should come to the same conclusion. Accordingly, the Court should reject Appellants’ argument that Proposition 208 should be preliminarily enjoined based on the concern that it might someday run afoul

of the constitutional expenditure limit.

## CONCLUSION

Superintendent Hoffman respectfully requests that this Court affirm the superior court's denial of the request for a preliminary injunction.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

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