

SUPREME COURT OF ARIZONA

KAREN FANN, et al.,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; et al.,

Defendants-Appellees,

and

INVEST IN EDUCATION et al.,

Intervenors-Defendants-Appellees.

Supreme Court
No. CV-21-0058

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

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

AMICI BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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All parties have given their written consent to the filing of this amici brief.

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INTEREST OF *AMICI CURIAE*¹

Alliance Defending Freedom is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect civil liberties and family values. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before the U.S. Supreme Court, numerous cases before the courts of appeals, and hundreds of cases before federal and state courts across the country, as well as in tribunals around the world.

Alliance Defending Freedom and its over 3,000 allied attorneys regularly defend religious liberty and free speech, “first liberties” that the Arizona Constitution specifically protects. *E.g.*, Ariz. Const. art. 2, §12 (religious liberty) & art. II, § 6 (free speech). Alliance Defending Freedom has a strong interest in ensuring the durability of these and other constitutional protections.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Center for Arizona Policy promotes and defends the foundational values of life, marriage and family, and religious freedom. As a nonprofit advocacy group, Center for Arizona Policy works with state legislators and other elected officials at all levels of government to ensure that public policy promotes foundational principles. Center for Arizona Policy has an interest in protecting citizens' First Amendment right to express their views freely—a bedrock principle of a free society where robust public policy debates can take place.

If Arizona voters can enact laws through initiative in contravention of express constitutional provisions, then every right in the Arizona Constitution is at risk. While Arizonans can always amend their Constitution directly by satisfying the more stringent requirements of article IV, part 1, § 1, this Court should reject the argument that the same can be done *indirectly* via statutory initiative under article XXII, § 14.

INTRODUCTION

The Arizona State Constitution empowers the people to create law by popular vote, rather than through a representative body, by way of initiative. Ariz. Const. art. XXII, § 14. But that power comes with an important limit: “Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people.” *Id.* Because the Arizona Legislature cannot enact a law that conflicts with the Arizona Constitution, neither can the people by way of initiative.

The Arizona Constitution does contain a procedure for the people to amend the document, but that mechanism has a much higher signature threshold than an initiative that merely enacts a law. Ariz. Const. art. IV, part 1, § 1. Whereas a law may appear on the ballot if 10% of qualified electors concur, a constitutional amendment requires 15%, a threshold that is 50% higher. *Id.*

In this case, Proposition 208 appears to conflict with two separate provisions of the Arizona Constitution. However, the people did not amend the Constitution in enacting Proposition 208; they created a law by means of initiative under article XXII, § 14. Allowing an initiated law to override contrary constitutional provisions not only violates article

XXII, § 14's plain text, it places in jeopardy every state constitutional right that Arizonans currently enjoy. Accordingly, the Court should apply the Arizona Constitution's plain language and hold that article XXII, § 14 statutory initiatives cannot override the State Constitution.

ARGUMENT

I. A ruling that a law created by initiative may override provisions of the Arizona Constitution would have potentially devastating consequences to Arizonans' constitutional rights.

Proposition 208, which passed by a narrow majority of voters during the last election, created a law which Plaintiffs allege is in direct conflict with two provisions of the Arizona Constitution. The legal arguments concerning Proposition 208's unconstitutionality are set forth in Plaintiffs' brief and will not be repeated here. But *Amici Curiae* submits this brief to emphasize the important public-policy reasons why a law created by initiative cannot override protections set forth in the Arizona Constitution.

The Arizona Constitution's built-in limitations on initiatives serve an important public policy objective: it is not in the public interest for a mere majority of the public to have the power to strip all individuals of important constitutional freedoms without knowing they are doing so.

Even more so, it would violate the public interest for a mere majority of registered voters who voted on a particular proposition in a particular election – a far smaller segment of the total Arizona population – to have that power.

For this reason, an initiative that proposes a change to the Constitution must satisfy two preconditions. First, it must satisfy a higher signature threshold in order to reach the ballot, a minimum 50% higher than that required for initiated laws. Ariz. Const. art. IV, part 1, § 1. Second, the proposed constitutional amendment must be presented to the voters not as an initiated law but as a “proposed amendment to the constitution,” ensuring voters can make an informed decision. Ariz. Const. art. IV, part 1, § 1; A.R.S. § 19-125(C). Proposition 208 did not propose a constitutional amendment; it created a law. That law must give way if it conflicts with the Arizona Constitution.

In many other contexts, the Arizona Constitution is often the shield that protects citizens’ rights and freedoms from improper legislation. For example, the Victims’ Bill of Rights in Article 2, § 2.1 protected crime victims from statutes which limited their legitimate claims to restitution. *State v. Reed*, 248 Ariz. 72, 78-80, 456 P.3d 453, 459-61 (2020); *State v.*

Patel, 247 Ariz. 482, 485, 452 P.3d 712, 715 (App. 2019). Article 2, § 6 protected individuals who refused to use their artistic talents to create expression that conflicted with their religious beliefs about marriage. *Brush and Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 448 P.3d 890 (2019). And Article 2, § 8 protected an individual from a warrantless search of his cell phone in which he held a legitimate expectation of privacy. *State v. Peoples*, 240 Ariz. 244, 378 P.3d 421 (2016).

Though the power of the people to enact laws through initiative is a constitutional right, it was never designed to be a tool to trample over all other constitutional rights and freedoms. On the contrary, when an initiative comes into conflict with the Constitution, the Constitution wins. *See, e.g., Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533, 399 P.3d 80 (2017). That is why the constitutional initiative provision expressly states that if the Constitution prohibits the Legislature from taking a certain action, then an initiated law cannot take that action either. Ariz. Const. art. XXII, § 14. Should voters choose to use the initiative process to amend the Constitution, there is a procedure in place to do so with heightened requirements. *See, e.g., Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 886

P.2d 1338 (1994). But of course, that was not the procedure that was followed here.

This case is not about the wisdom of increasing tax revenue to benefit teachers, and *Amici Curiae* takes no position on that question. Rather, this case is about using an initiated law to override a state constitutional provision in a manner that even the Legislature cannot. Any initiative that seeks to amend the Constitution must be clearly presented to the voters as such, so that the people can make an informed decision at the ballot box. Relaxing that requirement will necessarily place all of Arizonans' constitutional freedoms at risk.

II. Because Proposition 208 infringes on citizens' constitutional rights, irreparable harm will occur, warranting this Court's immediate intervention.

Injunctive relief is appropriate whenever necessary to stop a law from taking effect which violates constitutional rights. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-70 (2020). This is because any infringement on a constitutional right creates irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”) Plaintiffs need not show a specific loss that has

occurred, or is about to occur, because constitutional violations are inherently injurious.

The United States Supreme Court's recent decision in *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106 (U.S. March 8, 2021), an Alliance Defending Freedom case, is instructive here. There, the Court addressed whether plaintiff Chike Uzuegbunam had standing to sue his college for violating his free speech rights even though he did not allege compensatory damages and the college had already taken remedial action so that the violation was unlikely to occur again in the future. *Id.* at *3. After finding that a clear violation of Uzuegbunam's constitutional rights had occurred, the Court held: "Because every violation of a right imports damage, nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms." *Id.* at *7 (internal citations omitted).

Uzuegbunam experienced past harm, which gave him standing to sue, because *every* violation of an individual's constitutional rights is inherently injurious. So too here. Proposition 208's violations of the Arizona Constitution are ongoing and will continue unless this Court immediately intervenes.

CONCLUSION

To ensure that the Arizona Constitution's protections are vigorously enforced, this Court should apply the Constitution's plain text and hold that an initiated law cannot override state constitutional rights. In addition, the Court should immediately halt the ongoing infringement of constitutional rights and enter a preliminary injunction.

Respectfully submitted this 22nd day of March, 2021.

By: /s/ Tyson C. Langhofer

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