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; DAVID LUJAN, an individual,

Intervenor-Defendants-Appellees.

No. CV 21-0058-T/AP

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

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

Appellants' Response to Amici Curiae

Dominic E. Draye (#033012)
GREENBERG TRAURIG, LLP
2375 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 445-8000
drayed@gtlaw.com

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
bwjohnson@swlaw.com
cahler@swlaw.com

Timothy Sandefur (#033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
Telephone: 602.462.5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants' amici mostly retread familiar points. Their effort only confirms two flaws in Intervenors' argument. First, amici make no reference to the rules of statutory construction that bar Intervenors' efforts to recast Proposition 208 funds as "grants, gifts, aid, or contributions" rather than local revenue. They, like Intervenors, cannot explain how the proposed expansion of the grant/gift exception would not swallow article IX, section 22. Second, amici could not be clearer that voters adopted Proposition 208 with the intent that every dollar be spent immediately on what amici characterize as a crisis in education funding. Without that opportunity, voters would not have adopted the tax standing alone, meaning that the taxing and spending provisions of this tax-and-spend measure are not severable from each other.

Amici also follow in Defendants' footsteps by trying to raise procedural hurdles to delay resolution of this case. Their arguments are not new, and they do not explain why this Court should avoid resolving a purely legal dispute over a statute that took effect three months ago. As the State and the Department of Revenue recognize, the Court should "fully adjudicate this case based on the constitutional arguments raised and briefed by Plaintiffs and Intervenor-Defendants." State Br. 10; *see also* Gov. & OSPB Br. ISO Pet. to Transfer, *Fann v. State of Arizona*, T-21-0003-CV (Mar. 2, 2021); Treasurer Joinder in Pet. to

Transfer, *Fann v. State of Arizona*, T-21-0003-CV (Mar. 2, 2021). Amici add nothing to legitimize these long-shot delay tactics.

ARGUMENT

I. PROPOSITION 208 VIOLATES ARTICLE IX, SECTION 21 AND SHOULD BE ENJOINED.

A. Amici Offer No Reason to Stretch the Grant/Gift Exception to Encompass All Appropriations.

Proposition 208's funds fall within the constitutional definition of local revenues—that is, "all monies, revenues, funds, property and receipts of any kind whatsoever." Ariz. Const. art. IX, § 21(4)(c). Amici continue Intervenors' efforts to fit Proposition 208's revenue within an exception for "grants, gifts, aid, or contributions." *Id.* art. IX § 21(4)(c)(v). Their arguments follow a familiar pattern of cherry-picking dictionary definitions that arguably encompass any transfer, while ignoring rules of statutory construction and urging the Court to defer to agency interpretation. None of these approaches is persuasive.

First, Amicus Curiae Arizona School Boards Association (ASBA) repeats several dictionary definitions that the parties have already discussed. *Compare* ASBA Br. 3–4, *with* Appellants' Opening Br. (OB) at 11. Even assuming that dictionary definitions are coextensive with ordinary meaning, each definition ASBA cites contains the word "gift" or some version of "give." *Id.* The word "give" in turn means "to confer the ownership of without receiving a return: make a present of." *Give*, Webster's Third New International Dictionary 959 (1981). The

definitions' uniform references to gift giving confirm the "ordinary meaning" of the term "grant" as "a 'gift-like transfer.'" *Wilmar Trading Pte Ltd. v. United States*, 466 F. Supp. 3d 1334, 1344 (Ct. Int'l Trade 2020). Defining it more broadly to encompass *every* transfer would be inconsistent with ordinary meaning and would swallow the "local revenue" rule in article IX, section 21.

Second, as explained in the reply brief, dictionary definitions are a useful guide to ordinary meaning, but they do not operate in a vacuum. Reply 4–5. The Court's mandate is not to defer to dictionaries, but rather to use them as guides to ordinary meaning. *Jennings v. Woods*, 194 Ariz. 314, 323 ¶ 42 (Ariz. 1999) ("[W]ords and phrases in a statute should be given ordinary meaning . . . ." (quotation omitted)). Ultimately, dictionary definitions are only a starting point for applying the tools of statutory construction and not the end: "We recognize that a dictionary definition may not be conclusive and, because 'context gives meaning,' statutory terms should not be considered in isolation." *State v. Gray*, 227 Ariz. 424, 427 ¶ 9 (App. 2011) (quoting *United States v. Santos*, 553 U.S. 507, 512 (2008))).

No amicus even attempts to respond to the various statutory arguments that Plaintiffs have made. OB 11–14. The string of words in the grant/gift exception, neighboring provisions in section 21, differences between school district and community college district expenditure limitations, and the risk of stretching the grant/gift exception to swallow the rule all support Plaintiffs' common-sense

interpretation of section 21. *Id.* No one—Defendants, Intervenors, or amici—refutes the conclusion drawn from these interpretative tools.

Third, amici repeat the argument that the Department of Education would view Proposition 208's funds as grants based on past practice. ASBA Br. 6–9; Hoffman Br. 9–10. There are two problems with this argument: (1) it wrongly invites deference to an agency interpretation of an unambiguous statute; and (2) it ignores differences between Proposition 208 and the other examples identified.

Courts "owe no deference to [an] agency's conclusions of law." *Day ex rel. Ariz. Dep't of Veterans' Servs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 210 Ariz. 207, 209 ¶ 7 (App. 2005); *see also US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280 (App. 1996) ("[W]e owe no deference to the Commission's interpretation."). Courts rightly defer to agencies' scientific or technical expertise, but constitutional and statutory interpretation is "fundamentally differ[ent]." *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8 (2014). And public policy in Arizona confirms that agency interpretations are not entitled to deference. A.R.S. § 12-910(E).

Indeed, deferring to Superintendent Hoffman's approach to Proposition 208 is especially unwarranted because Proposition 208 is a brand new statute, with no "[l]ong-established [agency] practice[ ]" to consult. *Brewer v. Burns*, 222 Ariz. 234, 241 ¶ 33 (2009); *see also Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz.

419, 430 ¶ 33 (App. 2011) (deference "does not necessarily apply when the agency's interpretation of a particular provision is not longstanding").

Moreover, as economists Elliott Pollack and Alan Maguire point out in their amicus brief (Economists Br. 23–24), even if deference were appropriate here, it would not be deference to the Department of Education, but deference to *the Auditor General*. Under A.R.S. § 41-1279.07(A), the Auditor General is the entity responsible for enforcing the expenditure limitations at issue in this case. *See Foster v. Anable*, 199 Ariz. 489, 491 ¶ 5 (App. 2001) ("[W]e defer to an agency's interpretation of *a statute it is charged with enforcing*." (emphasis added)). And the Auditor General defines "grant" very specifically in its *Uniform Expenditure Reporting System Manual*, as gifts "from a private agency, organization, or individual"—not the ordinary disbursement of tax dollars by the state, as is contemplated by Proposition 208. Economists' Br. 23; *see also* Ariz. Commerce Auth. Br. 11–16.

Additionally, amici's examples of spending programs that the Department does not count as local revenues are distinguishable for reasons Plaintiffs have articulated in this Court and the court below. ASBA Br. 6–9; OB 17. In particular, the Early Childhood Block Grants, Results-Based Funding, Character Education Matching Grant, Mathematics or Science Achievement Grant Program, and Computer Science Professional Development Fund are genuine grants that require

an application and satisfaction of criteria. For example, to claim Results-Based Funding, a school must "meet the eligibility requirements," which include ranking in the top 10% of schools in standardized testing or obtaining "a letter grade designation of A." A.R.S. § 15-249.08. The Character Education, Mathematics or Science Achievement, and Computer Science programs require schools to submit applications and meet other criteria, including that a school adopt curricula in those areas, which the grant money exists to encourage. A.R.S. §§ 15-154.01(A)–(C), 15-249.12(B). The Building Renewal Fund likewise requires a "grant request" and falls within a different exception in section 21 for building projects. A.R.S. § 15-2032; Ariz. Const. art. IX, § 21(4)(c)(vi). Finally, the Instructional Improvement Fund consists of "Tribal contributions paid to the State pursuant to a new compact." A.R.S. § 5-601.02(H); *see also id.* § 15-979. Those funds are correctly identified as "contributions" that the Tribes voluntarily agreed to as part of their bargain with the State. And "contributions" fall within the grant/gift exception. Ariz. Const. art. IX, § 21(4)(c)(v). *See also* Economists Br. 28.

Even if one or more of these programs did not fit within an exception to the definition of local revenues, the solution would *not* be to ignore the Constitution; rather, the funds would simply count toward the expenditure limitation. But the Court need not decide any of those issues, because Proposition 208 is unlike any of these programs. With the exception of 12% of its revenue that funds a genuine grant,

A.R.S. § 15-1281(D)(4), Proposition 208 includes no eligibility criteria, requires no application, and entails no discretion at any level. It is straightforward taxation and spending. Here again, the defect in amici's approach is that it proves too much. If a program with Proposition 208's simple, unqualified transfers to districts fits within the grant/gift exception, then article IX, section 21 is meaningless.

B. Amici Confirm that Increased Spending Was Proposition 208's Sole Purpose.

Here, the ability to spend hundreds of millions of dollars on education was not "a small and insignificant part of the Act." *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 524 ¶ 34 (2000). To the contrary, it was the whole point, as several amici explain in detailed policy arguments. Without the ability to *spend* the funds as advertised, no rational electorate would have adopted the other part of the act (namely, a significant new tax) standing alone. Defendants' amici confirm the intuitive point that Proposition 208's "purpose" and "inducement" was increased spending. *State Comp. Fund v. Symington*, 174 Ariz. 188, 195 (1993). That insight, in turn, confirms that Proposition 208's unconstitutional spending provisions are inseverable from the rest of the initiative.

Amicus Save Our Schools devotes pages to analyzing voter intent: "The clear motivation for voter approval of Proposition 208 was to provide urgently needed funding to Arizona's public schools." SOS Br. 5. That "clear motivation" was evident in the "campaign that propelled its passage," *id.* at 6, and "is confirmed by

the arguments supporting the measure in the official ballot pamphlet," *id.* at 8; *see also* Reply 13–14. Amicus Superintendent Hoffman makes the same point in arguing the public-interest factor: "Arizona voters determined that the public interest is served by addressing the teacher pay crisis when they approved Proposition 208." Hoffman Br. 9.

Amici's study of ballot materials and media reports tracks the second prong of the traditional test for severability as well as the severability clause in Proposition 208.[1] Under that test, "the valid portion of the statute will be severed only if it can be determined from the language that the voters would have enacted the valid portion absent the invalid portion." *Ruiz v. Hull*, 191 Ariz. 441, 459 (1998) (citing *State Comp. Fund*, 174 Ariz. at 195). The search for voter intent looks to publicity pamphlet statements in support of an initiative. *Randolph v. Groscost*, 195 Ariz. 423, 427–28 ¶ 17 (1999). In this case, the initiative's severability clause also focuses on voter intent. It instructs reviewing courts to apply severability "to give the maximum effect to the intent of this act" and to construe "the provisions of this act . . . so as to give effect to the intent thereof." APPV1-33–34; *see also* OB 24 n.4.

---

[1] Plaintiffs focus here on the second prong because that is where amici contribute to the parties' existing arguments. Plaintiffs maintain that severability is always inappropriate for initiatives and that Proposition 208 fails on both prongs of the alternative test.

Amici correctly show that pamphlet statements supporting Proposition 208 and the law's own "[f]indings and declaration of purpose" focus on the importance of dramatically increasing education spending. SOS Br. 7–8. As documented, these statements repeatedly argue that Arizona is spending $800 million less on education than it did in the past and advocate adoption of Proposition 208 as a remedy for perceived under-spending on education. APPV1-85–86, APPV1-91, APPV1-99, APPV1-101. As in *Ruiz*, "the record is devoid of evidence that the voters would have enacted" a severed version of the initiative. 191 Ariz. at 459 ¶ 67.

Only one amicus attempts to argue that voters intended to impose a stand-alone tax. Initiative Proponents Br. 9–11. That brief does not respond to the other amici in terms of ballot materials, but instead repeats Intervenors' point that "it is not irrational or absurd for those voters [*i.e.*, the 51.7% who supported Proposition 208] to also support a lesser amount going to that purpose." *Id.* at 10–11. But "a lesser amount" was not on the ballot, and Proposition 208's tax collects the full $827 million. A rational electorate does not impose an $827-million tax burden in order to spend only $49 million (or $144 million or $0). Reply 9. If there were two tax provisions—one to fund constitutional spending and another to fund the amount for which the self-exemption from article IX, section 21 is necessary—then severing the former would make sense. But there is just one tax here, and the share of its revenue that might be available for spending before hitting the expenditure limitation will

change every year. There is no way to sever Proposition 208 in order to bring its taxation in line with its constitutional spending, absent engaging in "gross judicial legislation." *Millett v. Frohmiller*, 66 Ariz. 339, 343 (1948).

Proposition 208 is a simple law. It does not create a new department, regulate an industry, or change how state government does business. It collects revenue through a new tax and sends that money back out to be spent on education. Voters who approved Proposition 208 did so for the purpose of increasing spending. There is not one scrap of electioneering material to suggest that their intent was to impose a tax burden far in excess of the amount that could be spent. Indeed, the very existence of A.R.S. § 15-1285 confirms the intent to spend all of the funds. Without that, the tax alone fails to serve "[t]he clear motivation for voter approval of Proposition 208." SOS Br. 5.

II. THE PLAIN TEXT OF ARTICLE IX, SECTION 22 REQUIRES STATUTORY TAX INCREASES TO OBTAIN A SUPERMAJORITY VOTE IN THE LEGISLATURE.

Defendants' amici have almost nothing to say on the plain meaning of article IX, section 22. Only the Potential Initiative Proponents respond, taking Intervenors' flawed "implied repeal" argument one step further. *See* Reply 20–21. According to the Initiative Proponents, applying article IX, section 22 in this case would impose an "absolute prohibition on the citizens ever enacting programs that require state funding." Initiative Proponents Br. 8. This is not true.

Section 22 prohibits "any" statutory increase in state revenues unless it (a) receives a supermajority vote in both houses of the legislature or (b) falls within one of the specified exceptions in article IX, section 22(c). Those exceptions include not only local taxes, fees, and assessments, but also "[f]ees and assessments that are authorized by statute, but are not prescribed by any formula, amount, or limit, and are set by a state officer or agency." This Court has interpreted that exception expansively. *Biggs v. Betlach*, 243 Ariz. 256, 258–61 ¶¶ 11–24 (2017). Also, section 22 obviously does not apply to tax increases that are adopted as constitutional amendments. Arizona voters have adopted taxes by constitutional amendment before, *e.g.*, Ariz. Const. art. IX, § 15, and nothing bars them from doing so again, *id.* art. I, pt. 1, § 1(5).

As explained in Plaintiffs' Reply Brief (at 22–23), many of the same insights undermine the argument that the Revenue Source Rule in section 23 is somehow incompatible with section 22. To the contrary, the two provisions are entirely consistent. Section 23 says that any initiative that would require expenditures "must also provide for an increased source of revenues." An increased source of revenues in an initiative, however, could take the form of a tax, fee, or assessment imposed by a political subdivision, or a statewide fee or assessment that is not prescribed by any formula, amount, or limit, and is set by a state officer or agency. It could also take the form of spending cuts, in which case it would not be subject to section 22.

In any of these cases, it would be exempt from the supermajority vote requirement, pursuant to the specific enumeration in section 22(c). Such an increased source of revenues could also take the form of a constitutional amendment, in which case it would again be exempt from section 22. The proponents of Proposition 208 chose a different path, but they cannot pretend that it was the only option available in order to claim an irreconcilable conflict within the Constitution.

Courts strive to harmonize constitutional provisions whenever possible. *Circle K Stores, Inc. v. Apache Cty.*, 199 Ariz. 402, 410 ¶ 26 (App. 2001). As Plaintiffs have shown, the Court can easily "harmonize [sections 22 and 23] and avoid interpretations that result in contradictory provisions." *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016). Section 22 bars statutory tax increases by initiative, but leaves voters free to seek other means of increasing revenue, including constitutional amendments.

Finally, Amici's suggestion that Plaintiffs are arguing against "Arizona's tools of direct democracy" is at best a red herring. Initiative Proponents Br. 2. Plaintiffs are arguing *in favor* of the enforcement of ballot initiatives that amended the Arizona Constitution. Voters adopted article IX, section 22 as Proposition 108 in 1992, and they adopted the spending limitation in article IX section 20 as Proposition 108 in 1980. The voters' decision to amend the Constitution—which the backers of Proposition 208 decided not to do—deserves respect and judicial

enforcement. Respecting the will of the voters and the tradition of Arizona's initiative process requires this Court to enforce section 22 (and section 20) against a statutory initiative that does not comply with its terms.

III. THE REMAINING FACTORS CONTINUE TO FAVOR RELIEF.

Amici present a number of policy arguments for increased spending on public education. Like Intervenors, however, no amicus can demonstrate how even the most compelling policy argument could outweigh the Constitution. *See* Reply 26–29. What remains are an untenable extension of the anti-injunction act and assertions that lost legislative days and violations of constitutional rights are inconsequential. Neither argument has any merit.

A. The Anti-Injunction Act Does Not Apply.

Amicus Professor Scharff, like the Department of Revenue in its Answering Brief, argues that the anti-injunction act, A.R.S. § 42-11006, bars the courts from enjoining enforcement of Proposition 208. But as Plaintiffs explained in their Opening Brief, that argument stretches the statute beyond its textual and historical scope. OB 48–49. Section 42-11006 bars individual taxpayers from contesting property taxes assessed, imposed, or levied on specific pieces of property. It does not extend to facial challenges to the constitutionality of an income tax.

As an initial matter, Professor Scharff argues against a "limited reading" of A.R.S. § 42-11006. This argument is admittedly contingent on ignoring the statute's

placement in the property tax chapter and its reference to the "tax roll," which Amicus agrees is "unmistakably the language of the property tax." Tax Prof. Br. 11–13. Further, this Court considers a statute's location as part of the context for understanding its application. *See, e.g., Adams v. Comm'n on App. Ct. Appointments*, 227 Ariz. 128, 135 ¶ 34 (2011) ("These arguments are not persuasive because they seek to interpret 'public office' without considering the context in which it appears within § 1(3) and the way in which this phrase has otherwise been interpreted under Arizona law."); *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 250 (1994) ("All three statutes are in chapter 3 of title 4. The chapter is entitled 'Civil Liability of Licensees and Other Persons' . . . . These headings at least indicate that the legislature intended the first article . . . to apply to transactions other than sales and the second article.").

Beyond its decisive concession on reading Section 42-11006 in context, the brief offers an incomplete reading of legislative history. Tax Prof. Br. 9–15. In particular, it misses two points that illustrate the legislature's intent to limit the anti-injunction act to property tax assessments.

First, when A.C.A. § 73-841 was re-codified for inclusion in Title 42, the legislature moved it *into* the property tax chapter. Tax Prof. Br. APP005. If the legislature, while relocating this provision, had intended it to be a "general"

provision applicable to all types of taxes, lawmakers could easily have situated it in Chapter 1. *Id.* at APP004.

Second, although Amicus cites the 1956 version of A.R.S. § 42-204, she glosses over the 1964 amendment, which changed the statute to apply more specifically to property taxes. *See* A.R.S. § 42-204 (1964). Instead of generally applying to any action "to prevent or enjoin the collection of any tax levied," *see* A.C.A. § 73-841; A.R.S. § 42-204 (1956), the 1964 (and subsequent versions) of A.R.S. § 42-204 applied to any action "to prevent or enjoin *the extending upon the tax roll of any assessment* made for tax purposes, or the collection of any tax imposed or levied." (emphasis added).

Amicus downplays this amendment as an "extension" of the general anti-injunction act to encompass property taxes, Tax Prof. Br. 13, but this interpretation contradicts Amicus's own legislative history. If, as Amicus contends, the pre-1964 versions already applied to all varieties of taxes, the inclusion of the "tax roll" qualifier in 1964 would be surplusage, and courts avoid reading statutes in ways that render their terms unnecessary. *See City of Phx. v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 239 ¶ 16 (2019). Instead, the addition of the "tax roll" language represents a limitation on the statute's applicability, consistent with its new home in Title 42, Chapter 11 (then Chapter 2). In focusing solely on pre-reform legislative history, Amicus misses this valuable insight on the law's scope.

Not only does the amicus brief ignore post-reform legislative direction, but it also ignores this Court's post-reform direction in *State Compensation Fund*, 174 Ariz. at 192, which explained that A.R.S. § 42-204 "applies only to property taxes." Instead, Amicus relies heavily on pre-1964 cases interpreting A.C.A. § 73-841. Tax Prof. Br. 8–11 (citing *State ex rel. Lane v. Superior Court*, 72 Ariz. 388 (1951), to argue that Section 73-841 did not apply exclusively to property taxes); *see also id.* at 10–11 (relying on *Crane Co. v. Arizona State Tax Commission*, 63 Ariz. 426, 447 (1945), for the proposition that Section 73-841 could apply to sales taxes). This argument simply applies the wrong statute at the wrong time. Notably, Amicus does not cite a single case that applies the narrower A.R.S. § 42-11006 or A.R.S. § 42-204 to anything *but* a property tax.

In sum, nothing in Professor Scharff's brief refutes Plaintiffs' reading of post-reform text, case law, and legislative history. Each of those authorities supports the conclusion that the anti-injunction act does not apply here.

Moreover, from a practical standpoint, the type of harm that the anti-injunction act and its "common law tradition" seek to avoid is not at issue here. As explained in *Drachman v. Jay*, 4 Ariz. App. 70, 73 (1966), the anti-injunction act is designed to prevent equitable claims against "a single year's assessments for a single piece of property." In contrast, it does *not* bar injunctive relief to enjoin "future assessments" or cases in which a lack of injunctive relief would result in a

"multiplicity of actions." *Id.* (citations omitted). Here, Plaintiffs do not challenge any individual property assessment. Rather, they seek to enjoin application of an unconstitutional law. *See, e.g.*, *State v. Cull*, 32 Ariz. 532, 544 (1927) (reasoning that an injunction may be applied to assessment "where the assessment is under an unconstitutional statute, or on unconstitutional principles"). This kind of broad, pre-implementation challenge to Proposition 208's income tax surcharge prevents courts from becoming flooded with a multiplicity of suits from taxpayers later challenging their personal tax liability. What is more, when Plaintiffs filed their suit on the day Proposition 208 became law (November 30, 2020), they asked for expedited relief to enjoin an income tax surcharge that had yet to become effective, which is a textbook case of seeking relief against "future assessments."

Finally, Amicus admits that "[p]rior to filing a tax return, taxpayers can seek declaratory relief." Tax Prof. Br. 7. Plaintiffs are seeking just that, APPV1-17–19. Even if Section 42-11006 prevented this Court from issuing an injunction (it does not), declaratory relief remains available. *See* A.R.S. §§ 12-1831, 12-1838 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."). Thus the anti-injunction act does not bar this case.

B. Amici Do Not Undercut Plaintiffs' Showing of Irreparable Harm.

The preliminary injunction standard requires Plaintiffs to demonstrate a "*possibility* of irreparable injury." *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 495

¶ 21 (App. 2013) (internal quotation marks omitted) (emphasis added). Plaintiffs easily clear that threshold. While some amici quibble over impossibilities, none seriously challenge that the legislative, taxpayer, and organizational plaintiffs have met the minimum threshold—demonstrating, at the very least, the possibility of irreparable harm.

First, the Legislative Plaintiffs suffer irreparable harm from wasted legislative days spent making contingencies for Proposition 208 in the absence of an injunction. That time—an irreplaceable resource—could be spent addressing other important legislative issues affecting Arizonans. The Legislature is, of course, capable of completing a contingent budget while Proposition 208's unconstitutionality is looming. But even Amici Senator Rios and Representative Bolding admit that Proposition 208's uncertain impact on the budget could force a special session to redo the legislature's work. Rios & Bolding Br. 10.

One reason this outcome is so likely, as explained in Plaintiffs' Reply (at 24–25), is that Proposition 208 does not allow for funds to revert back to the General Fund, which prevents use of Proposition 208's revenues to pay refunds when the law is ultimately invalidated. *See* A.R.S. § 15-1281(A). This defect creates more than the possibility of consuming legislative days because it burdens the State with potentially "hundreds of millions of dollars as additional refund monies owed to taxpayers must come from the General Fund." Gov. & OSPB Br. ISO Pet. to

Transfer, *Fann v. State of Arizona*, T-21-0003-CV, at 12–13 (Mar. 2, 2021). Amici Senator Rios and Representative Bolding's citation to the Office of Strategic Planning and Budget is hard to explain when that body expressly urged this Court to accept the transfer of this case from the Court of Appeals for the purpose of providing immediate resolution. *Compare* Rios & Bolding Br. 7, *with* Gov. & OSPB Br. 6.

Second, Taxpayer Plaintiffs have shown that Proposition 208 will cause them irreparable harm. Notably, no amicus responds to Taxpayer Plaintiffs' fundamental constitutional harms. Nor has anyone—amici, Defendants, or Intervenors—explained why this Court should not recognize this harm when its federal counterparts do. OB 41–42; Reply 25–26.

In addition, Taxpayer Plaintiffs are entitled to prospective injunctive relief because they must make financial arrangements now in order to prepare for the financial burden that will be imposed on them in the future. *Cf. Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 690–92 (M.D. Pa. 2011). By the time this case reaches oral argument, the Taxpayer Plaintiffs' "future" financial burden will have come to fruition as their first quarterly payments are due mid-April.

Finally, Organizational Plaintiffs are harmed by the implementation of Proposition 208. Plaintiff No on 208 was organized for the sole purpose of opposing

passage of the initiative and campaigned against it during the 2020 general election. Like the Potential Initiative Proponents' description of their interests and the harm they will suffer if this case does not go their way, Initiative Proponents' Br. 1, No on 208's organizational purposes will be irreparably harmed by implementation of Proposition 208. Amici only confirm the Organizational Plaintiffs' irreparable harm.

Applying Arizona's sliding scale for the preliminary injunction factors leaves no doubt that an injunction should issue in this case. *Simms*, 212 Ariz. at 410–11, ¶¶ 10–11.

CONCLUSION

Apart from policy arguments, amici offer little new in defense of Proposition 208. In addition, those amici do nothing to overcome arguments presented by amici in support of Plaintiffs. This latter group joins Treasurer Yee, Governor Ducey, and OSPB in supporting the expeditious resolution of this appeal's issues of statewide importance. They also confirm that Proposition 208 is unconstitutional for the reasons explained in Plaintiffs' earlier briefs. This Court should enjoin its enforcement.

RESPECTFULLY SUBMITTED this 29th day of March, 2021.

GREENBERG TRAURIG, LLP

By: */s/ Dominic E. Draye*
Dominic E. Draye
2375 East Camelback Road
Phoenix, Arizona 85016

SNELL & WILMER L.L.P.

By: */s/ Brett W. Johnson (w/permission)*
Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

GOLDWATER INSTITUTE

By: */s/ Timothy Sandefur (w/permission)*
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004

Attorneys for Plaintiffs-Appellants

PARTY CONTACT INFORMATION

Brian Bergin
Kevin Kasarjian
Bergin, Frakes, Smalley & Oberholtzer
4343 East Camelback Road, Suite 210
Phoenix, AZ 85018
bbergin@bfsolaw.com
kkasarjian@bfsolaw.com

Attorneys to Defendants-Real Parties in Interest
State of Arizona and Arizona Department of Revenue

Steve Tully
Bradley L. Dunn
Hinshaw & Culbertson, LLP
2375 East Camelback Road, Suite 750
Phoenix, AZ 85016
stully@hinshawlaw.com
bdunn@hinshawlaw.com

Attorneys to Defendant-Real Party in Interest
Kimberly Yee, in her official capacity as Arizona
State Treasurer

Roopali H. Desai
D. Andrew Gaona
Kristen Yost
Coppersmith Brockelman PLC
2800 North Central Avenue, Suite 1900
Phoenix, AZ 85004
rdesai@cblawyers.com
agaona@cblawyers.com
kyost@cblawyers.com
Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

Attorneys for Intervenor-Defendants-Real Parties in Interest Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan

Logan Elia
David McDowell
Audra Petrolle
Thomas Galvin
Rose Law Group PC
7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251
lelia@roselawgroup.com
dmcdowell@roselawgroup.com
apetrolle@roselawgroup.com
tgalvin@roselawgroup.com

Attorneys for Plaintiffs Eco-Chic Consignment, Inc., Ann Siner, and John Buttrick

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Appellants' Response to Amici Curiae was e-filed with the Clerk of the Arizona Supreme Court via AZTurboCourt on March 29, 2021, and that a copy was served via AZTurboCourt e-service on this same date, as follows:

Brian Bergin
Kevin Kasarjian
Bergin, Frakes, Smalley & Oberholtzer
4343 E. Camelback Road, Suite 210
Phoenix, AZ 85018
bbergin@bfsolaw.com
kkasarjian@bfsolaw.com
Attorneys to Defendants-Real Parties in Interest
State of Arizona and Arizona Department of Revenue

Bradley L. Dunn
Steve Tully
Hinshaw & Culbertson, LLP
2375 E. Camelback Road, Suite 750
Phoenix, AZ 85016
stully@hinshawlaw.com
bdunn@hinshawlaw.com
Attorneys for Defendant-Real Party in Interest
Kimberly Yee, in her Official Capacity as Arizona State Treasurer

Roopali H. Desai
D. Andrew Gaona
Kristen Yost
Coopersmith Brockelman PLC
2800 N. Central Avenue, Suite 1900
Phoenix, AZ 85004
rdesai@cblawyers.com
agaona@cblawyers.com
kyost@cblawyers.com

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 E. Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org
Attorneys for Intervenor-Defendant-Real Parties in Interest Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan

Logan Elia
David McDowell
Audra Petrolle
Thomas Galvin
Rose Law Group PC
7144 E. Stetson Drive, Suite 300
Scottsdale, AZ 85251
lelia@roselawgroup.com
dmcdowell@roselawgroup.com
apetrolle@roselawgroup.com
tgalvin@roselawgroup.com
Attorneys for Plaintiffs Eco-Chic Consignment, Inc., Ann Siner, and John Buttrick

Anni L. Foster
Nicole Ong Coyler
Office of Governor Douglas A. Ducey
1700 W. Washington Street, Floor 9
Phoenix, AZ 85007
afoster@az.gov
ncoyler@az.gov
Attorneys for Amicus Curiae Governor Douglas A. Ducey and the Office of Strategic Planning and Budgeting

Otto S. Shill
Jimmie W. Pursell, Jr.
Lauren R. Smith
Jennings, Strouss & Salmon, P.L.C.
1 East Washington Street, Suite 1900
Phoenix, AZ 85004
oshill@jsslaw.com
jpursell@jsslaw.com
lsmith@jsslaw.com
Attorneys for Amicus Curiae Arizona Tax Research Association and Arizona Chambers of Commerce and Industry

Mary R. O'Grady
Joshua D. Bendor
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012
mogrady@omlaw.com
jbendor@omlaw.com
Attorneys for Amicus Curiae Kathy Hoffman in Her Official Capacity as Superintendent of Public Instruction

Gregory W. Falls
Craig A. Morgan
Sherman & Howard L.L.C.
201 E. Washington Street, Suite 800
Phoenix, AZ 85004-2327
gfalls@shermanhoward.com
cmorgan@shermanhoward.com
Attorneys for Amicus Curiae Americans for Tax Reform and Small Business Association

James E. Barton II
Jacqueline Mendez Soto
Barton Mendez Soto PLLC
401 West Baseline Road, Suite 205
Tempe, AZ 85283
james@bartonmendezsoto.com
jacqueline@bardonmendezsoto.com
Attorneys for Amici Curiae Potential Ballot Initiative Proponents

Timothy J. Berg
Emily Ward
Bradley J. Pew
Taylor Burgoon
Fennemore Craig, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, AZ 85016
tberg@fennemorelaw.com
eward@fennemorelaw.com
bpew@fennemorelaw.com
tburgoon@fennemorelaw.com
Attorneys for Amicus Curiae Arizona Commerce Authority

Aaron T. Martin
Martin Law & Mediation PLLC
2415 East Camelback Road, Suite 700
Phoenix, AZ 85016
aaron@martinlawandmediation.com
Attorneys for Amici Curiae Arizona Business Leaders

Joel W. Nomkin
Austin C. Yost
Kathryn E. Boughton
Perkins Coie LLP
2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
docketPHX@perkinscoie.com
Attorneys for Amicus Curiae Arizona School Boards Association

Gregory B. Iannelli
Bryan Cave Leighton Paisner LLP
Two North Central Avenue, Suite 2100
Phoenix, AZ 85004
gregory.iannelli@bclplaw.com
Attorneys for Amici Curiae Elliott Pollack and Alan Maguire

Rhonda L. Barnes
Jane Ahern
Benjamin Bryce
Arizona House of Representatives
1700 West Washington
Phoenix, AZ 85007
rbarnes@azleg.gov
jahern@azleg.gov
bbryce@azleg.gov

Lisette Flores
Arizona Senate
1700 West Washington
Phoenix, AZ 85007
lflores@azleg.gov
Attorneys for Amici Curiae Rebecca Rios and Reginald Bolding

Giselle C. Alexander
The Cavanagh Law Firm, P.A.
1850 North Central Avenue, Suite 2400
Phoenix, AZ 85004
galexander@cavanaghlaw.com
Attorneys for Arizona Farm Bureau Federation

Susan M. Freeman
Gregory Y. Harris
Bruce E. Samuels
Lewis Roca Rothgerber Christie LLP
201 East Washington Street, Suite 1200
Phoenix, AZ 85004
sfreeman@lewisroca.com
gharris@lewisroca.com
bsamuels@lewisroca.com
Attorneys for Amici Curiae Save Our Schools Arizona, Education Law Center, and the Southern Poverty Law Center

Tyson Charles Langhofer
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260
tlanghofer@adflegal.org
Attorney for Alliance Defending Freedom and Center for Arizona Policy

Erin Adele Scharff
111 East Taylor Street
Phoenix, AZ 85004
erin.scharff@asu.edu
Attorney for Amicus Curiae Tax Professor Erin Scharff

By: */s/ Dominic E. Draye*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellants' Response to Amici Curiae complies with ARCAP 14(a)(4). The Response is double-spaced, utilizes a proportionally spaced typeface of 14 points, and contains 5,709 words utilizing the word count of the word processing system used to prepare the Response.

By: */s/ Dominic E. Draye*