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INTEREST OF THE AMICUS CURIAE

Arizona Farm Bureau Federation (“Farm Bureau”) files this brief in support of Appellants Karen Fann et al. (“Fann et al.”) pursuant to Ariz. R. Civ. App. P. 16(b)(1)(A) and with the consent of the parties. Farm Bureau is Arizona’s largest general agriculture advocacy organization with a current membership base consisting of approximately 2,500 farm and ranch families who raise 240+ crops and livestock.

Farm Bureau members produce a variety of agricultural commodities in all 15 counties, including a variety of agriculture and livestock production. According to the 2017 Census of Agriculture, the vast majority of Arizona farms are family farms – 94.7% – and the average net cash farm income in Arizona varies wildly on a county basis from a low of (\$9,333) in Yavapai County to a high of \$317,599 in Yuma County. Family farms typically report their farming income on Schedule F (Profit or Loss from farming), which then flows through to the individual taxpayer’s Form 1040 for calculation of federal income tax. The federally adjusted gross income from a taxpayer’s Form 1040 then flows through to the taxpayer’s Arizona Form 140 as the starting point in calculating the taxpayer’s Arizona income tax. Farm Bureau members are Arizona taxpayers.

Farm Bureau members will be subject to the Proposition 208 additional

income tax on their taxable income in excess of \$250,000 for taxpayers filing individually, and on taxable income in excess of \$500,000 for taxpayers filing jointly or as heads of household. *See* A.R.S. § 43-1013(A). Farm Bureau members are also required to make estimated tax payments in four installments according to the deadlines as set by the Internal Revenue Service (“**IRS**”). *See* A.R.S. § 43-581. For 2021 taxes, the first installment is due within weeks – on April 15, 2021. Taxpayers subject to the requirement to make adequate estimated tax payments are subject to penalties if they fail to make such payments. *See* A.R.S. § 43-581(D).

Accordingly, Farm Bureau has a direct interest in this Court’s interpretation of the statutes and constitutional issues addressed in this case, as its members are subject to the Proposition 208 tax increase with an immediate obligation to pay estimated taxes for the 2021 tax year.

ARGUMENT

I. Proposition 208’s Tax Violates the Arizona Constitution, Article IX, Section 22.

Proposition 208 increases taxes while failing to comply with the requirements for any act providing for a tax increase in state revenues in the form of a tax increase as listed in article IX, section 22 of the Arizona Constitution. Only a small majority (51.7%) of votes cast passed Proposition 208 on November 3,

2020. See *State of Arizona: 2020 General Election*, Secretary of State Katie Hobbs (Nov. 24, 2020), <https://results.arizona.vote/#/ballotmeasure/18/0> (1,675,810 votes out of 3,238,449). This small majority fails to meet the constitutional requirement (Ariz. Const. art. IX, § 22) that tax increases and new taxes imposed by statute be passed by a two-thirds (66.7%) vote of members of both legislative houses. The vote was subsequently certified on November 30, 2020. Proposition 208 imposes a new tax effective January 1, 2021. A.R.S. § 43-1013.

Proposition 208 imposes a new tax via statute rather than by constitutional amendment and is therefore required to be adopted by a two-thirds vote by each legislative house. The Constitution is clear that this two-thirds vote requirement applies to “any act that provides a net increase in state revenue.” Through “[t]he imposition of [a] new tax.” Ariz. Const. Art. IX, § 22.

Proposition 208 is an “act”, both in form and substance. The title of Proposition 208 is “Invest in Education Act” and throughout the text refers to itself as an “act” in Sections 6 (“any provision of this act . . .”) and 7 (“rules to implement this act. . .”). The Supreme Court has held that “[l]egislation, whether by the people or the legislature, is a definite, specific act or resolution.” *Saggio v. Connelly*, 147 Ariz. 240, 241 (1985).

II. Constitutional Changes to the Tax Code Provide Sufficient Advance Notice of Implementation.

When new taxes and tax increases are enacted constitutionally, taxpayers receive sufficient advance notice of the tax code changes and can better formulate a response to the change to avoid financial hardship. Frequent responses to tax increases may include actions to increase revenue, reduce other expenses, relocate or redomicile, close a business, and/or restructure an entity.

Changes to the tax code which conform to Arizona's constitutional requirements provide such advance notice, as the proposed changes work their way through the legislative process of hearings and review, before ultimately achieving the two-thirds vote of each legislative house and subsequent enactment. A recent example of this is Arizona's "Wayfair" legislation, increasing the retail transaction privilege tax base to include certain remote sellers.

When the U.S. Supreme Court decided *South Dakota v. Wayfair, Inc.* on June 21, 2018, states were determined to have the ability to tax out of state sellers with no physical presence in the taxing state on sales of goods shipped to customers in such taxing state. Subsequently, the Arizona legislature and the Governor's office took almost a year to research and draft legislation broadening the Arizona retail tax base to include sales of goods shipped to Arizona customers by out of state (remote) sellers and by marketplace facilitators. The resulting

legislation, H.B. 2757 was signed into law by Governor Ducey on May 31, 2019. Although signed into law in May, it was not effective until October 1, 2019, and even then, provided graduated sales volumes – more than \$200,000 in 2019, \$150,000 in 2020, and \$100,000 in 2021 – giving taxpayers ample time to prepare for and respond to the tax code changes.

III. Public Policy Favors Stability in the Tax Code.

Taxpayers generally are sensitive to income tax certainty, at both the federal and state levels of government. In years in which change is foreseen, such as an election year or a year in which litigation of a tax issue is expected to be decided, any number of economists, analysts, accountants, attorneys, and political pundits all run various scenarios and projections of prospective tax changes to better guide taxpayers. In any given year, tax professionals draft policy statements and advisory papers in favor of tax code stability to benefit taxpayers, legislatures, government agencies, and other interested parties.

The Association of International Certified Professional Accountants (**Association**) is a combined organization of 650,000 members, including the American Institute of Certified Public Accountants (**AICPA**), the world’s largest member association representing the CPA profession, with more than 418,000 members and the Chartered Institute of Management Accountants. The AICPA is responsible for setting ethical standards for its members as well as U.S. auditing

standards for private companies; nonprofit organizations; and federal, state, and local governments. The Association has issued several concept statements including Tax Policy Concept Statement 1: Guiding principles of good tax policy: A framework for evaluating tax proposals (“**Tax Policy 1**”). Tax Policy 1 was most recently updated in 2017 and provides an objective framework to analyze proposals to change tax rules and tax systems based on twelve principles.

Proposition 208 as enacted does not meet the Tax Policy 1 public policy guidelines of (1) equity and fairness, (2) certainty, (3) convenience of payment, (4) effective tax administration, (5) information security, (6) simplicity, (7) neutrality, (8) economic growth and efficiency, (9) transparency and visibility, (10) minimum tax gap, (11) accountability to taxpayers, and (12) appropriate government revenues.

By not accounting for Arizona’s small business owners whose business income flows through to their individual income tax returns and who have reportable “income” from their business entity without necessarily having a corresponding cash distribution, the tax increase lacks equity and fairness, certainty, neutrality, and economic growth and efficiency and instead fosters uncertainty.

While some small business owners have the cash flow or reserves to issue a distribution to cover the additional taxes owed, many do not. This is particularly

true of agricultural operations, which tend to be highly leveraged and operate under extremely narrow margins. While income tax uncertainty is difficult for any taxpayer to plan and budget for, it is particularly difficult for farmers and ranchers.

In the case of farmers and ranchers, many suffered a loss of income in 2020 due to decreased demand from schools, restaurants, and other commercial entities, but unlike manufacturers who could store excess product, furlough employees and shutter offices, farmers and ranchers could not wait to harvest highly perishable products until the market recovered and could not reduce the expenses of feeding and caring for their animals. While some of them may show a return to profitability in 2021, those profits may already be owed to banks and other creditors. There simply may not be any available funds to distribute to the individual farm owners to pay additional taxes.

Farming and ranching operations are inherently unpredictable due to commodity market fluctuations and environmental challenges. Farming machinery and equipment requires large capital expenditures and then complicated depreciation treatment for federal and state income tax calculations. Tax code uncertainty adds an additional layer of volatility to an already uneven income stream, which can be particularly fatal for Arizona's farmers and ranchers. Most farmers and ranchers rely on three-to-five-year business strategies to effectively coordinate a financial and tax plan to assist them in remaining profitability and

allowing for future growth and stability. This planning gives farmers and ranchers the confidence and information needed to invest in new equipment, livestock, and land expansion, based on the true cost of such investments after accounting for profit margins, purchase price of potential acquisitions, financing costs, and tax effects, including deductions and exemptions from taxable income.

The IRS recognizes the difficulties farmers and ranchers face with respect to the potential tax burdens caused by volatility of their profits and losses, where a farming taxpayer may end up with a loss or minimal profits in one year and then swing wildly to a large profit in the following year. The IRS eases this burden by allowing farmers to complete a Schedule J, as part of their Form 1040, allowing them to make a farm income averaging election. Such election allows a farmer to average their income over a three-year period ending with the current filing year and to use the portion of lower tax brackets left unused in prior less profitable years on some of the income in the current higher profit year. The taxpayer can then be taxed in a lower bracket as though the income had been received evenly throughout the three-year period, providing more income tax certainty to the farmer. The Proposition 208 tax offers no such relief to taxpayers with fluctuating incomes. As a result, the security and stability of our food supply system is at risk.

CONCLUSION

Arizona's agricultural industry needs consistent and constitutional

implementation of tax code changes. Farmers and ranchers particularly need tax code stability due to the volatility of the commodities markets and the uneven income streams inherent to family farming. Allowing a small majority of votes cast to enact sudden tax increases without complying with Arizona's constitutional requirements threatens affected taxpayers, especially family farms, with economic hardship, financial instability, and potentially impairing the ability to meet mortgage and other debt obligations typically paid out of taxable income.

Farm Bureau requests that this Court reverse and remand with instructions to enter Appellants' requested injunction.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

THE CAVANAGH LAW FIRM, P.A.

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