

**IN THE SUPREME COURT  
STATE OF ARIZONA**

Karen Fann, et al.,  
Appellants,  
v.  
State of Arizona, et al.,  
Appellees.

No. CV-21-0058-T/AP  
Court of Appeals No. 1 CA-CV 21-0087  
Maricopa County Superior Court  
No. CV2020-015495 and  
CV2020-015509

**BRIEF OF AMERICANS FOR TAX REFORM  
AND ARIZONA SMALL BUSINESS ASSOCIATION  
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS  
(filed with the blanket written consent of the Parties)**

Gregory W. Falls (AZ Bar No. 011206)  
Craig A. Morgan (AZ Bar No. 023373)  
**SHERMAN & HOWARD L.L.C.**  
201 East Washington Street, Suite 800  
Phoenix, Arizona 85004-2327  
Telephone: (602) 240-3000  
Facsimile: (602) 240-6600  
[GFalls@ShermanHoward.com](mailto:GFalls@ShermanHoward.com)  
[CMorgan@ShermanHoward.com](mailto:CMorgan@ShermanHoward.com)  
*Attorneys for Americans for Tax Reform and  
Arizona Small Business Association*

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Americans for Tax Reform, a 501(c)(4) taxpayer advocacy group (“ATR”), and Arizona Small Business Association, a membership association (“ASBA”) (ATR and ASBA collectively herein “*Amici*”), submit this Brief as *Amicus Curiae* in support of Plaintiffs/Appellants Karen Fann, Russell “Rusty” Bowers, David Gowan, Venden Leach, Regina Cobb, John Kavanagh, Montie Lee, John Pierce, Dr. Francis Surdakowski, No on 208, and Arizona Free Enterprise Club (collectively, “Plaintiffs”).<sup>1</sup> *Amici* are advocates of lower taxes and Arizona small businesses and offer herein their perspectives on a statutory scheme that is ill advised and unconstitutional. For these reasons, *Amici* support Plaintiffs in their requested relief.<sup>2</sup>

### **AMICIS’ STATEMENT OF INTEREST**

ATR is a nonprofit 501(c)(4) taxpayer advocacy group. It is affiliated with Americans for Tax Reform Foundation, a 501(c)(3) research and educational organization. Grover Norquist founded ATR in 1985 at the request of President Reagan. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. The government’s power to control one’s life

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<sup>1</sup> Unless otherwise indicated, *Amici* adopt the defined terms contained in Appellants’ Opening Brief (“Opening Brief”) filed on February 26, 2021.

<sup>2</sup> This Brief is filed with the blanket written consent of the Parties as authorized by ARCAP 16(b)(1)(A). No person or entity other than *Amici* and their counsel provided financial resources for the preparation of this Brief.

derives from its power to tax. ATR believes that power should be minimized and opposes all tax increases as a matter of principle.

The flagship project of ATR is the Taxpayer Protection Pledge, a written promise by legislators and candidates for public office to taxpayers across their state that they will oppose and vote against any and all efforts to raise taxes. ATR began promoting the Taxpayer Protection Pledge on the state-level in the early 1990s. The Taxpayer Protection Pledge is offered to every candidate for state and federal office and to all incumbents. Nearly 1,400 elected officials, from state representative to governor to US Senator, have signed the Taxpayer Protection Pledge.

ASBA is a membership association dedicated to facilitating the connection of preeminent thought leaders and entrepreneurs throughout Arizona to promote success for all. Its focal points include the following:

1. *Effective Small Business Education.* ASBA strives to bring relevant education opportunities to help the everyday business owner improve their business knowledge, solve problems, and ultimately become more successful.
2. *Dynamic Professional Connections.* ASBA understands the value of creating a variety of opportunities for members to meet potential clients in a structured environment. ASBA Signature Events provide business

owners with the opportunity to not only grow their business, but also expand and enhance their existing network and create new professional relationships.

3. *Essential Support Resources.* Whether a business is a startup or has been operating for decades, ASBA provides access to valuable business resources. These resources include ASBA's partners, its Business Mentor Program, and access to complimentary marketing tools.
4. *Public Policy.* ASBA's public policy mission is to advocate for the Arizona small business community before the Arizona Legislature, Congress, and Arizona cities and towns. ASBA works diligently to advocate for legislation that supports a pro-business agenda and to eliminate legislation that threatens small business.

ASBA's Mission is to foster and empower a thriving Arizona small business community by offering relevant, dynamic, and innovative resources and the highest level of advocacy as the voice of small business in Arizona. ASBA serves its members and community through integrity, respect, and a commitment to their success in achieving meaningful results. Because Proposition 208 has a detrimental effect on small businesses, but not corporations, their opportunities to survive and thrive are adversely impaired.

*Amici* support Plaintiffs in their requested relief and offer the following comments pertinent to this matter.

## LEGAL ARGUMENT

### **I. THE DIFFERENCES BETWEEN A CONSTITUTION AND A STATUTE ARE SIGNIFICANT, NOT ONLY IN THE PROCEDURES REQUIRED TO PASS OR AMEND THEM, BUT ALSO IN THE PROTECTIONS THEY AFFORD ARIZONANS.**

Proposition 208 made its way on to the November 3, 2020 General Election ballot as a statutory initiative because “more than 300,000” eligible Arizona voters were properly solicited and validly signed petition papers for the purpose of placing it there. *Molera v. Hobbs*, 250 Ariz. 13, \_\_\_ ¶ 31 (2020) (“*Molera II*”). “To qualify, the Committee was required to obtain 237,645 valid petition signatures demonstrating support for the measure.” *Id.* at ¶ 2. In other words, Proposition 208 was offered as a statutory initiative, and this Court previously found it had enough support to go before the voters in the 2020 General Election.

Two things are significant about these facts. *First*, Proposition 208 was not offered as an initiative intended for the purpose of amending the Arizona Constitution. “The Initiative is nine pages long and proposes to amend both A.R.S. Title 15 (Education) and Title 43 (Taxation of Income).” *Id.* at ¶ 14. *Second*, even if it had been intended as a constitutional amendment, Proposition 208 did not have sufficient voter support to make it to the ballot. The required 237,645 valid petition signatures was an amount necessary to pass an “Act” or statute, not to



amend the Arizona Constitution, which specifies different numbers of electors for the two different acts:

**(1) Senate; house of representatives; reservation of power to people.** The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

**(2) Initiative power.** The first of these reserved powers is the initiative. Under this power *ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the constitution.*

Ariz. Const. art. IV, Pt. 1 § 1 (emphasis added).

If 237,645 valid petition signatures was the number required to get Proposition 208 on the ballot, then simple mathematics tells us that was ten percent of 2,376,450 qualified electors. Fifteen percent of their number would have been 356,468. The trial court in *Molera II* did not find this many valid petition signatures.

The Secretary of State approved 377,456 signatures, and the trial court estimated that "only 70,080 signatures would be voided." *Molera II* at ¶¶ 2 and 50. That was enough to get on the ballot as a statutory initiative. But it was not enough to amend the Arizona Constitution. And again, Proposition 208 was not offered as a constitutional amendment.

Plaintiffs explain very well in their Opening Brief why 51.7% of the vote was not enough to amend the Arizona Constitution and why a statute alone cannot be such an amendment. Opening Brief at 28 – 40. *Amici* agree with this plain and only plausible reading of the relevant Constitutional provision and unchallenged arithmetic, but need not repeat those arguments here.

It is and should be more difficult to amend our Constitution than it is to pass statutes governing the people within the boundaries of that Constitution. In our Constitution we, among other things, specify the peoples' rights and set boundaries for the Legislature to follow when making laws. When they stray, courts are called upon to judge the validity of those laws, again within the boundaries set by the Constitution. In direct democracy, such as by initiative, the voters are acting in place of the legislature. But they also are constrained within the boundaries of our Constitution. So it has been since formation of the United States before, and since, Arizona statehood.

One academic analysis of James Madison's thinking on this very issue is especially instructive:

James Madison identified two governance challenges for any democracy: First, it must control the "mischiefs of faction"; that is, it must prevent a majority of the people from ganging up on the minority and opportunistically directing benefits to themselves at the minority's expense. Second, it must ensure the loyalty of the rulers to those they rule; in other words, it must address the principal-agent problem that arises when the representatives who are chosen to govern might pursue their own interests instead of the interests of the people

who put them in office (let alone the ones who voted against them). In direct democracy, the second concern is inapplicable--there are no representatives--but, as Madison warned in *Federalist 10*, the first concern about the tyranny of the majority is acute.

D. Theodore Rave, *Fiduciary Voters?*, 66 Duke L.J. 331, 339 (2016) (quoting THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob Ernest Cooke, ed., 1982)) (footnotes omitted).

The term “tyranny of the majority” can be used to argue in favor of many theories critical of majority rule. That is not the point here. We have majority rule, and it works. But it works *only* if we “prevent a majority of the people from ganging up on the minority and opportunistically directing benefits to themselves at the minority's expense.” *Id.* We have a fair and well established way of doing this in Arizona. Our Constitution sets limits on what even the voters can do through initiative.

If he were around today, Madison would say those limits must be honored for effective governance (until changed, which they have not been). Here, less than fifteen percent of the qualified electors and only 51.7% of the voters are insufficient numbers to amend, or in this case ignore, the Arizona Constitution. If this threshold is not met, then our Constitution stands as written.

This Court found in *Molera II* that the 100-word description offered with Proposition 208 was sufficient to qualify the measure for the ballot, unlike a very much similar 100-word description rejected in 2018. *See Molera v. Reagan*, 245

Ariz. 291 (2018) (“*Molera I*”). The constitutionality of Proposition 208, however, expressly was not addressed. “Whether § 15-1284(E) unconstitutionally curtails legislative authority, as the superior court implies, cannot be decided until after its adoption.” *Molera II* at ¶ 25. “But whether article 9, section 21 limits district expenditures despite § 15-1285(1) is undecided and will remain so unless the Initiative is adopted and later challenged. . . . See *Iman v. Bolin*, 98 Ariz. 358, 364–65, 404 P.2d 705 (1965) (‘[E]ven were the measure in conflict with the Constitution, this has no bearing on the right of the people to enact it. The same is true of an act of the legislature.’ (internal citation omitted)).” *Id.* at ¶ 26.

It is unfortunate when the Legislature or sponsors of an initiative intentionally or even negligently offer as new law measures in conflict with the Constitution, leaving to the courts the job of protecting the people. In this case, only 51.7% of the voters adopted a law that cannot pass muster under the Arizona Constitution. Now is the time for this Court to declare it so and our Constitution mandates nothing less.

**II. MUCH OF THE POPULATION, IN ARIZONA AND ELSEWHERE, DOES NOT AGREE THAT MORE TAXATION IS THE ANSWER TO EVERY PROBLEM.**

Increasing the level of taxation on the people is hard to do, and it should be. The appropriate solution to every problem is not to throw more money at it. If a simple majority thinks a substantial tax increase on one segment of the population,

but maybe not them, is a good idea, many others--in this case 48.3% of the voters on Proposition 208--believe it would be a mistake, illegal, or unconstitutional. If we bake the increase into law through an initiative, it will be almost impossible to change things if experience proves we made a mistake. “The [Voter Protection Act] limits the legislature’s power to amend, repeal, or supersede voter initiatives. *See* Ariz. Const. art. 4, pt. 1, § 1(6)(B)–(C), (14).” *State v. Maestas*, 244 Ariz. 9, 13 ¶ 14 (2018). Arizona Voters approved the Voter Protection Act in 1998 “to expressly limit the legislature’s authority to amend measures approved by voters in initiative elections.” *Id.* at 12 ¶ 11 (quotation omitted).

Plaintiffs explain why, having failed to garner the two-thirds or three-fourths majority required by Ariz. Const. art. IX, § 22, Proposition 208 cannot stand. Opening Brief at 28 – 40. They are right. And art. 9, § 22 exists as a result of the voice of the voters and stands as constitutional imprint of their collective desire. It was passed as a constitutional amendment by initiative in the November 3, 1992 General Election. *Biggs v. Cooper*, 234 Ariz. 515, 519 ¶ 6 (App. 2014), *aff’d in part, vacated in part sub nom. Biggs v. Cooper ex rel. County of Maricopa*, 236 Ariz. 415 ¶ 6 (2014). The voice of the people simply cannot be ignored through sleight of hand vis-à-vis the initiative process.

More recently, Arizona voters spoke out against the potential assessment of any “sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other

transaction-based tax, fee, stamp requirement or assessment on the privilege to engage in, or the gross receipts of sales or gross income derived from, any service performed in this state.” Ariz. Const. art. IX, § 25. No majority is enough. The voters simply said no. This amendment, 2018 Proposition 126, was approved by 64% of the vote. State of Arizona Official Canvas, 2018 General Election – Nov. 6, 2018, *available at* <https://azsos.gov/sites/default/files/2018%201203%20Signed%20Official%20Statewide%20Canvass.pdf> (last visited Mar. 20, 2021).

Arizona voters are not alone in their zeal to control sneaky tax reform. Ballot box results show Americans consistently reject tax increases. The past three general election cycles before the most recent one--2018, 2016, and 2014--showed voters nationwide consistently rejecting major tax increase ballot measures:

### **2018**

Washington state carbon tax defeated - For the second time in a row, blue state Washington voters firmly rejected a carbon tax. Initiative 1631 was defeated by a 56.3% - 43.7% margin.

Missouri voters reject gas tax hike - Proposition D, which would have hiked Missouri's gas tax by more than 58%, raising the rate from 17 to 27 cents per gallon, was rejected by more than 54% of Missouri voters.

Utah voters reject gas tax hike - Utah voters sent a clear message to state lawmakers they do not want them to even think about raising the state gas tax. Non-binding Question 1 asked Utah voters if they wanted to advise the legislature to raise the state gas tax. Utah voters rejected the question with more than 65% voting no.

Colorado voters reject personal and corporate income tax hikes - Amendment 73, which would have imposed personal and corporate income tax hikes, was rejected by voters, with 56% voting no.

Colorado voters defeat sales tax increase - Proposition 110, which would have raised the state sales tax, was rejected by voters, with 60% voting no.

Maine voters reject payroll tax hike - Question 1, which would have enacted a payroll tax and non-wage income tax to fund a Universal Home Care Program was rejected by voters, with 62% voting no.

South Dakota voters reject tobacco tax hike - Initiative Measure 25, which would have increased the excise tax on cigarettes, was rejected by voters, with 55% voting no.

## **2016**

Washington state rejects carbon tax - Initiative 732 got rejected by a 58.5% to 41.5% margin. The initiative would have phased in a \$25 per metric ton carbon tax over a period of two years. After reaching \$25 it would have continued to increase by 3.5% plus the rate of inflation until the tax reached \$100.

Colorado rejects payroll and income tax hike – By a 79.9% to 20.3% margin, Colorado voters rejected Amendment 69, a tax increase that would have imposed a 10% payroll tax and a 10% tax on all non-payroll income.

Oklahoma rejects 22% sales tax hike - State Question 779 was rejected by a 59.4% to 40.6% margin. State Question 779 would have hiked the sales tax from 4.5% to 5.5%.

Oregon rejects business tax increase - By a 59.2% to 40.8% margin, Oregon voters rejected Measure 97, which would have implemented a 2.5% gross receipts tax on all corporate sales exceeding \$25 million.

Colorado rejects tobacco tax increase - By a 53.7% to 46.3% margin, Colorado voters rejected Amendment 72, which would have increased the tobacco excise tax by \$1.75 per 20-pack. Additionally,

all other tobacco products, excluding e-cigarettes, would have been taxed at 62 percent of the manufacturer's list price.

Missouri rejects 23 cent cigarette tax increase - Missouri voters rejected Proposition A by 55.3% to 44.7% margin, which would have increased the cigarette tax by 23 cents per pack by 2021. Further, all other tobacco products would have been subject to an additional 5% sales tax.

Missouri rejects 60 cent cigarette tax increase - By a 59.2% to 40.8% margin, Missouri voters rejected Constitutional Amendment 3, which would have raised the cigarette tax by 60 cents per 20-pack in 15 cent increments by 2020. Additionally, an "equity assessment fee" of 67 cents per pack would have been imposed on manufacturers who did not sign the Tobacco Masters Settlement Agreement (TMSA) of 1998.

North Dakota rejects Tobacco Tax Increase - North Dakota voters rejected Initiative Statutory Measure 4 by 61.7% to 38.3%, which would have increased the state tobacco tax from 44 cents to \$2.20 per pack. Also, it would have raised the tax on other tobacco products (including liquid nicotine and electronic vapor products) from 28 percent to 56 percent of the wholesale purchase price.

## **2014**

Massachusetts voters eliminate a gas tax hike on taxpayers - Question 1. In deep blue Massachusetts, voters repealed a law that indexed the state gas tax to inflation by 53% – 47%

Nevada voters defeat a two percent "margin tax" on businesses - Question 3. Voters defeated a proposed two percent "margin tax" on businesses by 80% – 20%. The revenue from the new tax was to be granted to the state's public school districts.

Tennessee voters enshrined a prohibition on state and local income taxes in the state constitution by a vote of 66% – 34%.

Georgia voters passed a state constitutional cap on the state income tax - Amendment A. Voters enshrined in the state constitution a cap on the state income tax at the effective rate on January 1, 2015 by a vote of 74% – 26%. Therefore, the state legislature is



constitutionally prohibited from increasing the state income tax rate any higher.

See *Voters Consistently Reject Tax Increases at the Ballot Box* (March 8, 2019), available at <https://www.atr.org/voters-consistently-reject-tax-increases-ballot-box> (last visited Mar. 20, 2021).

What do these examples have to do with a 3.5% surcharge on high income Arizona taxpayers? They prove this point: Americans generally do not like higher taxes, and any increase must follow the law. Close is not good enough. If it were, then none of our constitutional rights—from free speech and free religious association to due process—would be safe from actions that do not strictly comply with our Constitution. Taxation, like it or not, cannot be treated any differently than any other constitutional provision.

### **III. HIGH TAX RATES ALLEGEDLY RAISE MORE MONEY, BUT DO THEY? THE ECONOMIC IMPACT OF PROPOSITION 208 ON THE STATE OF ARIZONA WILL NOT BE KNOWN UNTIL IT IS TOO LATE.**

“Arizona is not a low tax state. Its top income tax rate is already too high-- just a tad below Massachusetts’. And certainly above the nine states that do not tax wage income, such as Texas, Florida, Tennessee, and Wyoming.” Grover Norquist, *Prop. 208 Would Harm Arizonans, Not Improve Education*, Arizona Capitol Times, September 30, 2020, available at <https://www.atr.org/norquist-arizona-capitol-times-prop-208-would-devastate-small-businesses> (last visited Mar. 20, 2021). “Arizonans know this. An effort to phase down the state income

tax to zero over time was narrowly defeated in the Arizona Senate just last year.”

*Id.*

Proposition 208 gives “the Grand Canyon State the unwelcome distinction of being home to one of the highest income tax rates in the country.” *Id.* Before the election, ATR predicted as follows: “Advertised as the ‘InvestInEd’ initiative, Prop. 208 would do nothing to actually improve education outcomes.” *Id.* “It would not expand parental choice. It would not call for higher standards. It is basically a slush fund for bureaucrats.” *Id.* Unless this Court acts here (and our Constitution compels this Court to do so), time will tell whether these predictions hold true.

“[I]t has been well documented that income tax rates are a key determinant of business location and investment.” *Id.* Arizona’s top marginal individual income tax rate of 4.5% was fairly competitive. It now has been nearly doubled to 8%. This gives Arizona the unwelcome distinction of being home to the 10th highest top marginal individual income tax rate in the country (approaching California, New York, and New Jersey). *Id.* “Why would anyone want to invest in Arizona when there are so many other states that would allow them to keep more of their hard-earned money?” *Id.*

Picture this: The owner of a successful small business located in the Bay Area or Greater Los Angeles has grown tired of the overwhelming state regulatory

system in California, her employees are finding it harder and harder to find places to live affordably without commuting hours each day, and the oppressive level of state taxation has become too much to bear. She starts looking for opportunities in other states, among them Arizona. This is not a pie in the sky dream. It is common knowledge this happens almost every day. Teams of people are employed for the sole purpose of helping this business owner, and many others like her, make a successful transition to Arizona. *See, e.g.,* Arizona Commerce Authority, <https://www.azcommerce.com/about-us>. The state has grown and thrived, even during the COVID-19 pandemic, because this hypothetical is real, many times over.

Now, the cost of housing is rising at a very fast pace, longer commutes are a fact of life for many workers as they “drive until they qualify,” and we have added a tax surcharge directed at the business owner and her highly paid employees. Maybe Arizona is not the right place? Nevada is in the desert. It has no income tax. Metro Dallas is a nice place, again with no income tax. Maybe Texas instead? Some contend Proposition 208 will devastate Arizona’s economy, while doing nothing to actually improve education. Time will tell. If Arizona becomes a net exporter of human migration, however, we will need fewer dollars for education, not more.

Should this Court consider the claimed or actual economic effects of a law when deciding whether it is legal or constitutional? Of course not. Policy-makers make policy considering these factors. The duty of the courts is to say what the law is, not what it should be. But the economics again prove this point: Any increase must follow the law. Close is not good enough.

**IV. PROPOSITION 208 IS NOT A TAX ON ONLY THE RICH. IT WILL AFFECT ALMOST EVERYONE.**

The proponents of Proposition 208 offered arguments leading into the election to the effect that a substantial increase in Arizona’s top marginal individual income tax rate would impact only “the rich.” But that is not true. Most businesses operate as sole proprietorships, limited liability companies, S-corporations, and partnerships. Scott Eastman, *Increasing Individual Income Tax Rates Would Impact a Majority of U.S. Businesses*, Tax Foundation (March 19, 2019), available at <https://taxfoundation.org/increasing-individual-income-tax-rates-impact-businesses/>. All of these “organizations” pay individual income taxes as income and expenses are passed through to the owners for income tax purposes. This “pass-through” business income is taxed at the individual level. *Id.* Many businesses whose tax rates have increased due to the surcharge have been struggling now for more than a year due to the COVID-19 pandemic. Higher taxes will affect not only the owners, but also the jobs of employees whose income is not high enough to be surcharged.

ASBA was one of many business groups advocating against Proposition before the 2020 General Election. Its reasons, which remain valid today, included the following:

1. The tax would hurt small businesses.

Small businesses that are individually owned or have a small number of employees that file under the individual tax code could see their tax rate nearly double. That could cause a ripple effect, risking further damage to the state's economy and jobs.

Currently, 58 percent of Arizonans in the private sector work for a business that pays its income taxes via the individual income tax, according to a [report](#) by the Arizona Tax Research Association (ATRA) and research from the nonpartisan [Tax Foundation](#).

2. Proposition 208 does not adjust for inflation.

Unlike current state and federal tax rules, the proposition fails to adjust for inflation, which could sweep more small businesses into higher tax brackets.

Without an annual inflation adjustment, Proposition 208 goes from bad to worse. Ten years from now, \$250,000 won't have the same buying power as it does today, yet more taxpayers will find themselves falling into Proposition 208's new 8 percent income tax rate.

3. Voter initiatives are nearly impossible to amend.

If Proposition 208 passes, it will be nearly impossible to alter, even in the case of some unintended negative consequence.

Once passed by voters, it takes a three-fourths vote by the state Legislature to change a voter initiative. Then, any changes made to the act must further its purpose. So, even if lawmakers had the votes to amend the law, it likely would result in costly court challenges.

4. Undermines Arizona’s pro-business environment.

Under the weight of this proposed tax increase, Proposition 208 would punish the enterprising small business owners who create thousands of jobs and power the Arizona economy.

Despite their claims to the contrary, Proposition 208’s authors demonstrate a shocking lack of understanding of how small business owners ensure sustained operations by reinvesting in their business and storing up working capital.

Victoria Harker, *Arizona’s Small Business Community Opposes Prop. 208 in a Big Way*, Chamber Business News (September 15, 2020), available at

<https://chamberbusinessnews.com/2020/09/15/arizonas-small-business-community-opposes-prop-208-in-a-big-way/> (last visited Mar. 20, 2021)

(quotations omitted).

“Left out of the script is that Proposition 208’s tax increase on small business would deliver such a shock to state revenues that future education funding would be put at tremendous risk. Also left out is that early childhood, community colleges, and universities are left with peanuts.” *Id.* ASBA believes “the Invest in Ed initiative puts all the burden squarely on the backs of individuals and small businesses while giving a free pass to corporations.” Victoria Harker, *Arizona Small Business Advocate Calls for No Vote on Prop. 208*, Chamber Business News (October 27, 2020), available at <https://chamberbusinessnews.com/2020/10/27/arizona-small-business-advocate-calls-for-no-vote-on-prop-208/> (last visited Mar. 20, 2021).

These arguments were made before the election, and 51.7% of the voters still thought Proposition 208 was a good idea. So, are *Amici* crying sour grapes? Not at all. It appears that 48.3% of the voters thought Proposition 208 was a bad idea and voted against it. In other words, close to half the voters said yes, and close to half of them said no, for good reasons. That margin of vote simply is not enough to amend the Arizona Constitution or in this case merely ignore it. Again: close is not good enough.

### CONCLUSION

With incredible foresight, Arizona voters recognized in 1992 that we would face difficult budget issues in the years to come. They were right. Pre-pandemic, education funding was a hot button item. It has become even hotter during the pandemic as we have watched children and schools struggle with adapting to and implementing new ways of learning. But not everyone agrees on how we should raise the funds necessary for education or how we should spend them. Indeed, only 51.7% of the Arizona voters, a bare simple majority, agreed we should substantially raise taxes on only a segment of the population--high income individuals and small businesses, which the voters likely did not even know or understand--and mandate under a statute protected by the Voter Protection Act how and where those funds will be spent.

Circumstances like this are where the foresight of the 1992 voters serves us best. They said we need to try harder. If we cannot get two-thirds or three-fourths of the Legislature, or that same percentage of the voters, to agree on new or higher taxes and a plan for spending them, we need to go back to the drawing board and start over--try again because we can do better. Consistent with the law, that is what this Court should order. The arguments of Appellants are well taken.

Respectfully submitted: March 22, 2021.

**SHERMAN & HOWARD L.L.C.**

By: */s/ Gregory W. Falls*  
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Gregory W. Falls (AZ Bar No. 011206)  
Craig A. Morgan (AZ Bar No. 023373)  
201 East Washington Street, Suite 800  
Phoenix, Arizona 85004-2327  
GFalls@ShermanHoward.com  
Telephone: (602) 240-3000  
Facsimile: (602) 240-6600  
*Attorneys for Americans for Tax Reform and  
Arizona Small Business Association*