

IN THE SUPREME COURT

STATE OF ARIZONA

KAREN FANN, et al.,

Plaintiffs / Appellants,

v.

STATE OF ARIZONA, et al.,

Defendants / Appellees.

INVEST IN EDUCATION, et al.,

Intervenors / Appellees.

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

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

Maricopa County Superior Court
No. CV 2020-015495
2020-015509

**BRIEF OF THE ARIZONA TAX RESEARCH ASSOCIATION AND
ARIZONA CHAMBER OF COMMERCE AND INDUSTRY
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS**

Filed Pursuant to ARCAP 16(b)(1)(A)
with the blanket written consent of the Parties

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INTEREST OF AMICUS CURIAE

The Arizona Tax Research Association (“ATRA”) is a statewide tax policy advocacy organization representing a cross-section of Arizona individuals and businesses. Organized in 1940, ATRA’s mission is to ensure the efficient use of Arizona tax dollars through sound fiscal policies by critically examining governmental activities and expenditures related to taxation policy and procedures. The Arizona Chamber of Commerce and Industry (“ACCI”) is the leading voice of business in Arizona and is committed to ensuring economic growth and prosperity for all Arizonans. The ACCI also houses the Arizona Manufacturers Council, which is the voice of Arizona manufacturing, and is a community of makers dedicated to creating the innovations that safeguard and improve people’s lives and to providing the jobs that anchor Arizona’s economy. The companies participating in these associations represent Arizonans in all business and economic sectors, from manufacturing to healthcare to restaurants and other services, and includes small, medium and large employers. ATRA and ACCI have a strong interest in ensuring that the Arizona Constitution, particularly those provisions designed to protect taxpayer funds, is construed and applied consistent with its plain meaning and purpose. ATRA takes seriously its responsibilities as Arizona’s largest and most respected independent tax policy advocacy organization. Both ATRA and ACCI carefully scrutinize governmental activities and expenditures related to tax

policies and procedures and other issues that impact the business community and the wellbeing of Arizona. ATRA provides uncompromised research and information for taxpayers and policy makers. Both organizations engage in extensive advocacy on behalf of their constituents, and have filed amicus briefs in the Arizona courts on a range of issues that threaten harm to Arizona's businesses and Arizonans' jobs.

Appellees are the proponents of Arizona's Invest in Education Act (the "Act"), which was approved by voters as Proposition 208 in the general election held November 3, 2020. ATRA and ACCI are particularly interested in this case because the Act amends Arizona's statutes to impose a new income tax surcharge (that particularly harms small businesses struggling amidst the pandemic) and to circumvent state education funding limits and requirements in violation of the Arizona Constitution and without the constitutionally required determinations by the legislature.

SUMMARY OF THE ARGUMENT

A.R.S. §§ 15-1281(D) and 15-1285 are unconstitutional because their provisions directly conflict with, and attempt to circumvent, the aggregate school funding limits imposed by Article IX, § 21 of the Arizona Constitution in two ways. First the statutes, as enacted under the Act, contravene constitutional language because they wrongfully attempt to create an express exemption from

constitutionally established limits and because funds allocated thereunder fail to qualify for an exemption from the definition of “local revenues” within the meaning of Arizona Constitution Article IX, § 21(1). Second, the statutes impermissibly abrogate the constitutional prerogative of the Arizona Legislature to make exceptions by super-majority vote to the limits on a year-by-year basis, without a constitutional amendment.

ARGUMENT

I. ARTICLE IX, §21 OF THE ARIZONA CONSTITUTION ESTABLISHES EXPRESS LIMITS ON SCHOOL FUNDING, WHICH CAN BE OVERCOME ONLY BY A TWO-THIRDS SUPER-MAJORITY VOTE OF EACH HOUSE OF THE LEGISLATURE OR BY FORMAL CONSTITUTIONAL AMENDMENT.

Article IX, § 21(1) and (2) of the Arizona Constitution dictates that maximum aggregate expenditures of local revenues must be established each year by the economic estimates commission. Paragraph 2 provides that, “*Aggregate expenditures of local revenues for all school districts shall not exceed the limitation prescribed in this section except... by concurrent resolution, upon [the] affirmative vote of two-thirds of the membership of each house of the legislature.*” For purposes of Article IX, § 21, “local revenues,” are defined as, “*all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district.*” ARIZ. CONST. ART. IX, § 21(4)(c) (emphasis added). While Subsection 4 enumerates several exceptions to this definition, as

discussed more fully below, none of them applies in this case. These constitutional limits cannot be overcome by the passage of a statute, but require a constitutional amendment, which has not happened in this case.

The limits on school funding found in Arizona Constitution Article IX, § 21 were adopted as a voter-approved constitutional amendment in 1980 as one of several similar limitations designed to protect Arizona citizens from excessive taxation and spending by the state and local government.¹ Article IX, § 21(1) and (2) require that the economic estimates commission determine and publish, prior to May 1 of each year, the aggregate expenditure limitation for all school districts for the following fiscal year, and provides a formula for that calculation. The limitation is the amount which is one hundred ten percent (110%) of baseline “local revenues,” adjusted for changes in student population and cost of living. Pursuant to Article IX, § 21(3), only a two-thirds vote of both houses of the legislature can increase this limitation.

¹ See State of Arizona, Publicity Pamphlet – Sample Bullet, 1980 Special election at 68-77, <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10632>. *Restrictions, Mandates and the Arizona Budget*, David R. Berman, Ph. D., Morrison Institute for Public Policy, (2004); <https://repository.asu.edu/items/8543>. *Constitutional Aggregate Expenditures Limit for K-12 School Districts*, Chuck Essigs, Arizona Association of School Business Officials, https://cdn.ymaws.com/www.aasbo.org/resource/resmgr/chuck/constitutional_aggregate_exp.pdf (last visited Mar. 22, 2021).

II. THE ACT IMPERMISSIBLY ATTEMPTS TO AMEND THE ARIZONA CONSTITUTION.

Arizona Constitution Article XXI provides as *exclusive* methods for amending the Constitution either (i) a vote of the people in a general or special election following the approval of a majority of both houses of the legislature, (ii) the referral to the Secretary of State by qualified electors representing fifteen percent (15%) of the total number of votes for all candidates for governor at the last preceding general election, or (iii) a constitutional convention approved by the people on a Referendum vote at a regular or special election. “When a state statute conflicts with Arizona’s Constitution, the Constitution must prevail.” *Dobson v. State ex rel., Com’n on Appellate Court Appointments*, 233 Ariz. 119, 124, 309 P.3d 1289, 1294 (2013); *see also Windes v. Frohmiller*, 38 Ariz. 557, 561, 3 P.2d 275, 277 (1931).

Enacted by voter initiative number I-31-2020 adding a statute pursuant to Arizona Constitution Article IV, § 1, the Invest in Education Act (the “Act”) added A.R.S. § 43-1013, which imposes an additional income tax of three and one-half percent (3.5%) on income in excess of Two Hundred Fifty Thousand dollars (\$250,000.00) for individuals, and Five Hundred Thousand dollars (\$500,000.00) in the case of married couples filing a joint return (the “Additional Tax”). The Act also added Chapter 10.1 to Title 15 of the Arizona Revised Statutes (§§ 15-1281 through 15-1285 inclusive). A.R.S. § 15-1281(D) requires eighty-five percent

(85%) of the Additional Tax to be comingled with private donations, and together with the interest earned on the collective fund, to be used in the following ways:

- i. First, to defray costs to the State of administering the fund;
- ii. Second, as grants to school districts and charter schools for the purpose of hiring teachers and increasing compensation for teachers and classroom support;
- iii. Third, as grants to school districts and charter schools for the purpose of hiring student support services personnel and increasing base compensation; and
- iv. Fourth, as grants to school districts and charter schools for the purpose of providing mentoring and retention programming for new classroom teachers.

Local revenues are defined as, “*...all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district.*” ARIZ. CONST. ART. IX, § 21(4)(c). Although Subparagraph (4)(c) exempts a number of items of revenue from the definition of “local revenues,” none of those exemptions applies to the Additional Tax or interest with respect to the collective fund to which the Additional Tax must be deposited pursuant to A.R.S. § 15-1281.² A.R.S. § 15-1285(1), as enacted by the Act provides that, “*Notwithstanding any other law, monies received by school districts... pursuant to this chapter [10.1 of A.R.S. Title 15]:*

² It is possible that voluntary contributions referenced in A.R.S. § 15-1281 may be exempt from the definition of “local revenues” pursuant to Arizona Constitution

- i. Are not considered local revenues for purposes of Article IX, Section 21, Arizona Constitution; and*
- ii. Are exempt from any budgetary, expenditure, or revenue control limit that would limit the ability of school districts...to accept or expend those monies.”*

The statutory language is therefore inconsistent with the constitutional provisions. The Act was not adopted as a constitutional amendment pursuant to the provisions of Article XXI of the Constitution, and cannot, therefore, change it. No statute, not even a statute passed by voter referendum, can amend the Arizona Constitution in violation of Article XXI thereof. Moreover, inconsistencies must be resolved in favor of the Constitution. *See Dobson, supra.*

III. A.R.S. § 15-1285 DIRECTLY CONTRADICTS ARIZONA CONSTITUTIONAL REQUIREMENTS.

A. A.R.S. 15-1285(1) Contravenes the Constitutional Definition of “Local Revenues.”

By its express terms, these restrictions of the Act violate the provisions of Article IX, § 21 in two ways. First, clause A.R.S. §15-1285(1)(ii) constitutes an overt attempt to override the strict limitations that Article IX, § 21 of the Arizona Constitution imposes on educational funding. While some similar constitutional spending limitations allow for statutory alteration, *see e.g.,* 2001 Ariz. Op. Atty. Gen. No. I01-015 (June 29, 2001) 2001 WL 34674375, this constitutional language

Article IX, § 21(4)(c)(v) to the extent those voluntary contributions are not made in

vests in a super-majority of the legislature the sole power to override those limitations. Further, while one statute can repeal another through “repugnancy” or “inconsistency,” *see, e.g., UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333, 26 P.3d 510, 516 (2001); *Ariz. State Tax Comm’n v. Reiser*, 109 Ariz. 473, 479, 512 P.2d 16, 22 (1973), a statute cannot amend the Constitution in this case. Second, the portion of Additional Tax required to be disbursed to school districts pursuant to A.R.S. § 15-1281(D) constitute “*monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district*,” which the constitutional language considers in calculating the funding limitation. When interpreting constitutional provisions, this Court has indicated that its “primary purpose is to effectuate the intent of those who framed the [constitutional] provision” and that it will not depart from the plain language unless that intent is unclear. *See Cain v. Horne*, 220 Ariz. 77, 80, 202 P.3d 1178, 1181 (2009) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994)); *Fairfield v. Foster*, 25 Ariz. 146, 214 P. 319 (1923). The broad constitutional language regarding school funding limits is clear and cannot be limited by statute in the manner proposed by the Act. Arizona voters approved the constitutional amendment adding the school funding limits to Article IX, § 21 to protect Arizona’s citizens from unchecked government spending. Now in a time

lieu of taxes.

when voices from outside of Arizona seek to influence local issues such as these changes to our school funding limits, this Court stands as the final protector of Arizona's unique local interests and the Arizona Constitution.

B. Arizona Constitution Article IX, Section 21 Does Not Offer an Exemption to the Definition of “Local Revenues” for Funds Allocated Under A.R.S. 15-1281(D).

None of the exemptions to the definition of “local revenues” found in Arizona Constitution, Article IX, § 21, paragraph 4 applies to allocations under A.R.S. § 15-1281(D). The drafters of Proposition 208 apparently sought to remove disbursement of the Additional Tax from this definition by calling the disbursements “grants” in A.R.S. §15-1281(D), presumably to qualify for the exemption provided in Article IX, § 21(4)(c)(v). That provision exempts from the definition of “local revenues” “...*any amounts or property received as grants, gifts, aid or contributions of any type....*” However, by its express terms, that provision limits exempted amounts to amounts “...*received directly or indirectly from any **private agency or organization, or any individual***” (*emphasis added*). (Id.) This language requires both that the exempt funds be from a private source and that they be in the nature of a donative or voluntary transfer and not in lieu of taxes.

This interpretation supports the original constitutional objective to separate tax revenues (expenditures of which the drafters of the constitution intended to

limit) from revenue from federal grants or other non-tax sources (expenditures of which the drafters did not intend to limit). The goal of these limits was to protect the Arizona citizenry from egregious tax burdens while allowing school districts to benefit fully from non-tax revenues.

This interpretation also is the natural reading of the exemptions provided by Arizona Constitution Article IX, § 21(4)(c)(iv) and (v). Appellees and other proponents of the Act would have the Court adopt a construction that exempts from “local revenues” any transfer of funds or property from any source that carried the nomenclature of “grant.” However, if Subsection (v) applied to all “grants, gifts, aids or contributions” except those made by private donors in lieu of taxes, then all other grants would be excepted from local revenues by operation of Subsection (v), including grants from federal agencies. There would thus be no need for Subsection (iv)’s exemption because it would already be subsumed within Subsection (iv). Similarly, if the four types of amounts listed in Subsection (v) were disjunctive with no modifiers applying to the first three, then Subsection (iv) would similarly be superfluous. As noted above, this Court is reticent to depart from the plain language of the Constitution and should not do so in this case.

Funds to be disbursed to school districts pursuant to A.R.S. § 15-1281(D) are not grants within the plain meaning of the constitutional exception to the definition of local revenues. Despite the clever language of A.R.S. 15-1281(D)

stating that funds are to be transmitted to school districts “as grants,” these funds are not given by private organizations or individuals as donative non-tax transfers. They originate from taxes imposed on certain Arizona taxpayers by A.R.S. § 43-1013 and thus cannot be properly characterized as being derived from any kind of donative transfer from a private source. Simply put, A.R.S. § 15-1281(D) mandates the allocation of revenues collected from the Additional Tax to school districts. Those allocations constitute “local revenues” under the broad, inclusive language of Constitution Article IX, § 21(4) because they do not satisfy the conditions of any available exemption. In fact, those allocations and the taxes that the statute imposes to fund them constitute exactly the kind of tax and spending abuses that Arizona voters sought to avoid by adopting the constitutional limitations in the first place. Because appropriations of the Additional Tax will exceed the limitations permitted under the Arizona Constitution, and because expenditures in excess of the established limitation are not permitted absent the approval by a super-majority of each house of the legislature, A.R.S. § 15-1285 is in direct conflict with Constitution Article IX, § 21(3), and is, accordingly, unconstitutional.

C. Allowing A.R.S. §§ 15-1281(D) and 15-1285 to Remain in Force Would Abrogate the Constitutionally Appointed Legislative Power of the State Legislature.

Arizona Constitution Article IV, § 1(1) provides that, “*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.*” Added by voter approved constitutional amendment, Arizona Constitution Article IX, § 21(2) sets forth the annual limits on school funding except as provided in Article IX, § 21(3). That constitutional language vests exclusively in a super-majority of the legislature the authority to make exceptions to school funding limits on a year-by-year basis, and no school district or other governing board of a political subdivision may authorize expenditures in excess of the limit. This exception to the funding limits is much narrower than other funding limit exceptions found in the Arizona Constitution. *See e.g., 2001 Ariz. Op. Atty. Gen. No. 101-015 (June 29, 2001), 2001 WL 3464375.* A.R.S. § 15-1285(1) expressly seeks to abrogate this constitutionally delegated legislative power by statute. While in Arizona the legislature and the people share legislative authority, this Court has determined that, in deciding

whether a statute passed by voter initiative must be respected, “*the relevant question is whether the Arizona Constitution precludes the voters from enacting the statutory directive.*” *Cave Creek Unified Sch. Dist. et. al. v. Ducey*, 233 Ariz. 1, 5, 308 P.3d 1152, 1156 (2013). In this case, the Arizona Constitution vests in a super-majority of both houses of the legislature exclusive authority to make exceptions to school funding limits on a year-by-year basis. No blanket exception or override is permitted. The super-majority requirement and the fact that a decision to increase the limits must be made one year at a time, indicate that the voters intended increases to be carefully considered and somewhat difficult to accomplish. The legislature should be free to make those decisions with respect to all local revenues derived from taxes paid by the people of Arizona in order to protect the people from excessive taxation as the voters intended. The statutes created by Proposition 208 overtly infringe on that authority and this attempt of its proponents to avoid the higher standards required for a constitutional amendment thwarts the will of the people and should be rejected.³ Moreover, Arizona Constitution Article XXI provides the exclusive means for amending its provisions, and the Act does not qualify as a constitutional amendment. As noted

³ The Proposition 208 proponents were advised by the Arizona Legislative Council’s office in advance of the likely need of a constitutional amendment for this purpose.

earlier, inconsistencies between statute and the Constitution must be resolved in favor of the Constitution.

CONCLUSION

For the foregoing reasons, the Amici urge the Court to invalidate the provisions of A.R.S. §§ 15-1281(D) and 15-1285 and uphold the school funding limits adopted by the people in Arizona Constitution Article IX § 21.

Respectfully submitted on March 22, 2021.

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REGINA COBB, an individual; JOHN
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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,

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in her official capacity as
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WOODRUFF, Director of the Arizona
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**CERTIFICATE OF
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CERTIFICATE OF SERVICE

The undersigned, on behalf of *amicus curiae* Arizona Tax Research Association and Arizona Chamber of Commerce and Industry, hereby certifies that on this 22nd day of March, 2021, two copies of the Brief of Amicus Curiae in Support of Appellants were sent via U.S. Mail, postage pre-paid, addressed to the following:

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BRIEF - Amicus Curiae: BRIEF OF THE ARIZONA TAX RESEARCH ASSOCIATION AND ARIZONA CHAMBER OF COMMERCE AND INDUSTRY AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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