ARIZONA COURT OF APPEALS

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. 1 CA-CV 21-0087

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

Appellants' Opening Brief

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INTRODUCTION

Proposition 208 is a simple law with serious constitutional defects. It purports to transfer money from taxpayers to school districts, but the way in which it would accomplish that mission violates the Arizona Constitution.

Specifically, the initiative—although statutory—purports to exempt itself from the constitutional spending cap in article IX, section 21. It also increases taxes without complying with the procedural requirements for adopting tax increases set forth in article IX, section 22.

The court below misconstrued the text of both Proposition 208 and the Arizona Constitution to avoid granting Plaintiffs' motion for preliminary injunction. It prioritized "history" over statutory text, APPV2-111,[1] and abdicated its duty to interpret the Constitution in favor of following "practical constructions of constitutional provisions and statutes by the other departments of government, *even though erroneous*," APPV2-112 (emphasis added) (quotation omitted). And although disclaiming any political motivation, the court devoted pages to imagining a plan for exerting "political pressure" on the legislature to acquiesce in the policy preferences motivating the initiative's proponents. APPV2-117–18. Whatever the

[1] Record citations in this brief refer to the volume and page in the contemporaneously filed Appendix, pursuant to Arizona Rule of Civil Appellate Procedure 13.1.

merits of those policies, the Arizona Constitution stands as a bulwark against a bare majority (here, 51.7%) doing whatever it wants.

To avoid the unconstitutional results of the superior court's decision, 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"), request this Court reverse the superior court's denial of a preliminary injunction and declare Proposition 208 unconstitutional.

STATEMENT OF FACTS AND THE CASE

I. PERTINENT FACTS

On February 14, 2020, Intervenor-Defendants filed their initiative application with the Secretary of State. APPV1-26–34. That initiative, titled "Invest in Education Act," was assigned serial number I-31-2020 and placed on the ballot as Proposition 208. *Id.* Proposition 208 asked voters to approve a statutory measure implementing a new income tax surcharge to fund additional spending on education. A.R.S. § 41-1013.[2]

More specifically, Proposition 208's new tax of 3.5% of taxable income applies to anyone filing separately with "taxable income in excess of $250,000" or

[2] Unless otherwise noted, all citations are to the provisions of the Arizona Revised Statutes created by or amended by Proposition 208.

those filing jointly with "taxable income in excess of $500,000." *Id.* The monies raised by this surcharge are deposited into a newly established fund called the "student support and safety fund." *Id.*; *see also* A.R.S. § 15-1281. After paying certain administrative fees, the monies in this fund are then spent to hire teachers and support personnel and to increase their base compensation; to provide mentoring and retention programs for teachers; to support the career training and workforce fund; and to support the Arizona teachers academy fund. A.R.S. § 15-1281. The monies generated by the surcharge cannot be used for any other purpose. *Id.* Even the recipient school districts "shall establish a separate local level fund" to segregate Proposition 208 monies. A.R.S. § 15-1284. With the exception of the small percentage of monies that are distributed to districts only after State approval of a grant application, districts automatically receive Proposition 208 monies based on student enrollment. A.R.S. §§ 15-1281(D), 15-1283.

Finally, Proposition 208 provides that "monies received by school districts and career technical education districts pursuant to this chapter . . . are not considered local revenues for the purposes of article IX, section 21, Arizona Constitution" and "are exempt from any budgetary, expenditure or revenue control limit that would limit the ability of school districts or career technical education districts to accept or expend those monies." A.R.S. § 15-1285. This statutory provision expressly attempts to override the Constitution. Its inclusion was no accident; before

certifying the initiative for the ballot, Proposition 208's proponents requested a review from Arizona's Legislative Council, which opined that this provision was "likely invalid" because it conflicted with the spending caps in article IX, section 21. APPV1-62–72. Proponents declined to modify the text of the initiative or to pursue a constitutional, as opposed to a statutory, initiative. *Id.*

Voters approved Proposition 208 on November 3, 2020. Despite the constitutional requirement (Ariz. Const. art. IX, § 22) that any new tax imposed by statute must be implemented by a two-thirds vote of members of both legislative houses, Proposition 208 was adopted by a bare majority of voters (51.7%). *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). The vote was certified on November 30, 2020, and the law became effective on January 1, 2021.

II. PROCEDURAL HISTORY

On November 30, 2020, Plaintiffs filed their Verified Special Action Complaint, asserting claims that the proposition is unconstitutional. APPV1-4–41. Plaintiffs concurrently filed an Application for Order to Show Cause and a Motion for Temporary Restraining Order (with Notice) and Preliminary Injunctive Relief, requesting that the Defendants be enjoined from implementation and enforcement of the proposition. APPV1-42–171. On December 3, 2020, the proponents of

Proposition 208 moved to intervene, which the superior court granted. APPV1-172–84. The same day, the State filed a response stating that pursuant to section 8 of Proposition 208, it would defend the suit, but did not oppose the intervention.

The parties all stipulated that no fact discovery was necessary to resolve the motion for preliminary injunction. APPV1-187. After full briefing on Plaintiffs' Motion for Preliminary Injunction, the Court heard oral argument on December 23, 2020. APPV2-92–94.

The superior court issued a partial decision on January 14, 2021, denying Plaintiffs' request for a preliminary injunction as it pertained to certain claims challenging the so-called "No Supplant" clause in the Proposition. APPV2-95–99. The court reasoned that the "No Supplant" clause only applied to school districts and thus did not restrict the legislature's ability to appropriate general funds. *Id.* (noting that the legislature was permitted to adopt policies offsetting the effects of Proposition 208). That decision is not the subject of this appeal.

Almost a month later, the lower court finally issued the remainder of its ruling, denying Plaintiffs' request for preliminary relief. APPV2-100–20.

On Plaintiffs' article IX, section 21 challenge, the superior court held that although Plaintiffs raised "serious questions," it did not believe that they had shown a likelihood of success on the merits. It so held for two reasons. First, "whether the Proposition 208 monies are 'local revenues' is difficult to answer on the present

record" due to insufficient evidence "about the history of Article IX, Section 21," as well as "its interpretation by the legislature and state administrative agencies." APPV2-110. The court did not explain how these facts would matter to the legal question of whether the funds fall within the constitutional definition of "local revenues." Second, the court concluded that it needed evidence that the increased spending would, in fact, exceed the constitutional caps. APPV2-113. The court declined to consider the various government documents that Plaintiffs provided for judicial notice, which showed that Proposition 208 would immediately exceed the spending limits. *Id.* The court stated that this issue—whether spending would exceed the constitutional caps—was relevant to constitutionality rather than ripeness, which it conceded "can be relaxed." *Id.* The court also held that the other factors for a preliminary injunction did not weigh in Plaintiffs' favor. APPV2-114–19.

On Plaintiffs' article IX, section 22 challenge, the court held that Plaintiffs were not likely to succeed and that the other preliminary injunction factors did not favor an injunction. *Id.* In particular, the court reasoned that section 22's use of the word "act" limited the supermajority requirement "to the legislative process, not to the initiative process." *Id.*

On February 17, 2021, the superior court executed its signed order denying Plaintiffs' motion. APPV2-121–22. Plaintiffs timely appealed. The Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(b).

STATEMENT OF THE ISSUES

The central issue raised by Plaintiffs' appeal is whether the superior court erred by denying Plaintiffs' application for preliminary injunction to prevent enforcement of Proposition 208. Subsumed within this issue are two constitutional questions:

1. Can the Proposition, a statutory initiative, exempt itself from the expenditure limitations for school districts imposed by article IX, section 21 of the Arizona Constitution, and, if it cannot, would rational voters have adopted the Proposition's tax knowing that its revenues could not be spent?
2. Can the Proposition impose a new tax without a supermajority vote of both houses of the legislature, as required by article IX, section 22 of the Arizona Constitution?

STANDARD OF REVIEW

"All legal and constitutional questions are reviewed de novo." *State v. Harrod*, 218 Ariz. 268, 279 ¶ 38 (2008); *Tobin v. Rea*, 231 Ariz. 189, 194 ¶ 14 (2013). Similarly, appellate courts review the denial of a preliminary injunction for abuse of discretion, which exists "if the [trial] court applied the incorrect substantive law." *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492 ¶ 8 (App. 2013).

In the current case, the parties stipulated that no factual development was necessary to resolve the motion for preliminary injunction. APPV1-189.

ARGUMENT

Proposition 208 violates the Constitution in several ways. The superior court, in the first of its two rulings, construed one of the offending provisions to avoid the constitutional defect by concluding that the "No Supplant" provisions do not restrain the legislature. That leaves two questions of constitutional construction for this Court to review: (1) can a statutory initiative exempt itself from a constitutional restriction, in this case the limit on spending in article IX, section 21; and (2) does the constitutional specification of a single method for raising taxes foreclose other methods? The court below erred in concluding that resolution of these purely legal questions would require weighing various types of evidence. Legislative history, agency interpretations, and hypothetical future appropriations do not undermine Plaintiffs' likelihood of success on the merits of the constitutional issues. This Court

should reverse the decision below and issue an order directing the superior court to enter the preliminary injunction.

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

A. The Spending Provisions Are Unconstitutional.

Proposition 208 violates the Constitution by attempting to declare its own revenues and spending "exempt" from the limitations in article IX, section 21 of the Arizona Constitution. A.R.S. § 15-1285(E). No party has taken the position that Proposition 208's attempted self-exemption from the Constitution is permissible. After all, the Constitution defines "local revenues," which are subject to the spending cap, very broadly: "all monies, revenues, funds, property and receipts of any kind whatsoever." Ariz. Const. art. IX, § 21(4). The revenue generated for school districts by Proposition 208 fits within this definition. As a mere statute, the Proposition may not declare that "monies received by school districts . . . are *not* considered local revenues for the purposes of article IX, section 21, Arizona constitution." A.R.S. § 15-1285(E) (emphasis added).

Rather than defend the constitutionality of the statutory text, Defendants fashioned a new position for purposes of this litigation. Defendants now contend that the mandatory spending established in Proposition 208 fits within one of the narrow exceptions to "local revenues." The exception at issue, which appears in article IX, section 21(4)(c)(v), allows school districts not to count "grants, gifts, aid

or contributions" against their spending caps (the "grant/gift exception"). According to Defendants' new theory, the grant/gift exception applies to the revenues collected by Proposition 208, meaning that these revenues are already exempt from the constitutional spending limit and that A.R.S. § 15-1285(E) was an inert or redundant component of Proposition 208 from the very beginning. APPV2-11.

This is archetypal post-hoc rationalization. *Cf. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) ("[T]he Court has often rejected justifications belatedly advanced by advocates" in favor of "contemporaneous explanations for [a party's] action[s]."). Section 15-1285(E) could just as easily have referred to the grant/gift exception if that exception applied. But it did not. Instead, Section 15-1285(E) refers only to the constitutionally defined term "local revenues" and simply declares that its funds are "exempt"—because without such an exemption, Proposition 208 would violate the spending limits in the Constitution.

Every applicable canon of statutory construction militates against Defendants' effort to use the grant/gift exception to encompass automatic transfers to school districts that are required by statute. Plain meaning, statutory context, anti-superfluousness, and preventing the exception from swallowing the rule all indicate that the grant/gift exemption does not reach Proposition 208.

First, the plain meaning of the word "grant" does not refer to mandatory taxation and spending. *See, e.g., Grant*, Webster's Third New Int'l Dictionary 989 (unabridged 1981) ("something granted; esp: a gift (as of land or a sum of money) usu. for a particular purpose"); *Wilmar Trading Pte Ltd. v. United States*, 466 F. Supp. 3d 1334, 1344 (Ct. Int'l Trade 2020) ("[T]he ordinary meaning of the word . . . grant is a 'gift-like transfer.'"). Permeating these definitions is the idea that a grant entails a discretionary transfer that is not required by law. But Proposition 208's spending is mandatory. It requires that "the State Treasurer *shall* transfer all monies" generated from the tax according to a fixed formula, without any action by districts to meet criteria or otherwise qualify for the transfer. A.R.S. § 15-1281(D) (emphasis added); *cf.* A.R.S. § 15-1283(B) (allocating just 12% to a genuine grant program for which districts must apply). Because the State has no discretion in "transfer[ring] all monies" to school districts, those funds are not "grants, gifts, aid, or contributions."

Second, "it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Adams v. Comm'n on App. Ct. Appointments*, 227 Ariz. 128, 135 ¶ 34 (2011) (citation omitted). Applying the *noscitur a sociis* canon, the fact that "grants" appears alongside other words of voluntary contribution in article IX, section 21(4)(c)(v)—"gifts," "aid," and

"contributions"—confirms that the grant/gift exception does not encompass Proposition 208's unqualified, compulsory transfer of tax revenue from the State to school districts. *See generally Yates v. United States*, 574 U.S. 528, 543 (2015) (applying *noscitur a sociis* cannon).

Context also includes neighboring constitutional provisions. In this instance, article IX, section 21 includes two spending caps—one applicable to school districts, and a second applicable to community college districts. *Compare* Ariz. Const. art. IX, § 21(2) (school districts) *with id.* § 21(1) (community colleges). The community college district expenditure limitation expressly allows for statutory expansions, while the school district expenditure limitation does not. Specifically, the rule for community colleges allows for exceptions to the expenditure limitation as "provided by law," but the provision governing school districts contains no such allowance. In Arizona, when the Constitution authorizes taking an action "by law," it means statutory law. *Shute v. Frohmiller*, 53 Ariz. 483, 488 (1939). And courts "presume that when the legislature uses different wording within a statutory scheme, it intends to give a different meaning and consequence to that language." *Egan v. Fridlund-Horne*, 221 Ariz. 229, 239 ¶ 37 (App. 2009); *see also* Op. Atty. Gen. I01-015 (Jun. 29, 2001) (explaining that legislature may make statutory exceptions to community college spending cap). Because Proposition 208 is a statutory initiative, it requires an authorization akin to the one for community college districts, but the drafters of

Section 21 chose not to duplicate that provision for school district spending. To accomplish what Proposition 208 sought to do, a constitutional amendment was necessary; a statutory initiative was not enough.

Third, courts do not interpret constitutional language in a way that renders it "void, inert, redundant, or trivial." *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949). Under Defendants' interpretation of the grant/gift exception, not only is A.R.S. § 15-1285(E) superfluous, but so are several provisions of the Arizona Constitution that address genuine governmental grants. In fact, the grant/gift exception is sandwiched between two other exceptions that expressly discuss payments from government sources. Article IX, section 21(4)(c)(iv) refers to "grants and aid of any type received from the federal government," and article IX, section 21(4)(c)(vi) exempts "amounts received from the state for the purpose of purchasing land, buildings or improvements." But if Defendants were correct, these provisions would be superfluous, because all of these transfers would already fit within the section 21(4)(c)(v) grant/gift exception. That, of course, cannot be correct. *See Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503 (1991) (applying the anti-superfluousness canon).

Fourth, interpreting the grant/gift exception to encompass payments under Proposition 208 would create an exception that swallows the rule. If the non-discretionary payments under Proposition 208 qualify as "grants," then so does every

other transfer from the State to school districts. After all, the terms "aid" and "contributions" are at least as capacious as "grants" and could, if plucked from context, appear to exempt any funds flowing to school districts. What financial support is not "aid" to the recipient? And what payment is not a "contribution" to the person receiving the funds? Under Defendants' reading of the grant/gift exception, *any* transfer from the State to school districts would be exempt from the definition of local revenues, and the rule embodied in section 21 would disappear. The Supreme Court has described such rule-swallowing exceptions as an "absurdity." *State v. Mata*, 185 Ariz. 319, 336 (1996) (quotation omitted). Defendants offer no limitation on transfers from the State that would *not* qualify as "grants, gifts, aid, or contributions." Their interpretation would erase the voter-approved constitutional limitations on local spending and therefore cannot be correct.

Until the current litigation, no one ever described Proposition 208's funding as anything other than direct and non-discretionary revenue for school districts. The Supreme Court referred to "revenue" seven times in *Molera v. Hobbs* ("*Molera II*"), 250 Ariz. 13 (2020); the initiative's supporters used the same term twice in their 100-word description, *id.* at 20 ¶ 14; and the statutory provision attempting to opt out of the cap is entitled "Local revenues and control limitations; exemption," A.R.S. § 15-1285(E).

While it is true that the statutory language occasionally refers to the mandatory transfer as a "grant," merely using that term does not make it so for constitutional purposes. "[S]ubstance controls over form. Courts are not bound by labels." *Anderson v. Valley Union High Sch. Dist. No. 22*, 229 Ariz. 52, 55 ¶ 4 (App. 2012). Even within the four corners of Proposition 208, the references to "grants" in A.R.S. § 15-1281(D) are at war with the preceding sentence, which requires that the Treasurer "*shall* transfer" Proposition 208's funds, and with the exemption in Section 15-1285, the existence of which makes no sense under Defendants' interpretation. The proposition also uses the same term to refer to genuine, applied-for grants in A.R.S. § 15-1283(B). Using "grant" to describe all of these transfers only confirms that Proposition 208's internal labeling does not control the meaning of the constitutional grant/gift exception, where the words should instead carry their ordinary meaning.

The superior court's response to this overwhelming interpretive force is surprising. It declared that it needed evidence of legislative history and agency interpretation before it could interpret the Constitution's grant/gift exception. APPV2-111–12. The court went so far as to quote a century-old case for the proposition that courts should "yiel[d] to policy and expediency in adopting practical constructions of constitutional provisions and statutes by other departments of the government, *even though erroneous*." APPV2-112 (quoting *Clark v. Boyce*, 20 Ariz.

544, 554 (1919) (emphasis added)). This is a scandal. The judiciary has primary and independent responsibility for interpreting legal text. Courts do not defer on questions of constitutional interpretation, *State v. Bush*, 244 Ariz. 575, 599–600 (2018), let alone to "practical constructions" by other branches of government, *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 413 ¶ 40 (2005)—and certainly not "erroneous" ones, *cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478 (2020) ("Oklahoma asks us to defer to its usual practices *instead of* federal law, something we will not and may never do."); *Saguaro Healing LLC v. State*, 249 Ariz. 362, 365 ¶ 10 (2020) ("We do not defer to the agency's interpretation of a . . . statute."). Courts resort to legislative history only if the text is incurably ambiguous, which is not the case here. *See Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268 (1994). Where, as here, ordinary tools of statutory construction resolve the question, nothing further is necessary.

Additionally, based on the briefing in the current case, the superior court's desire for more legislative history or evidence of administrative interpretation makes little sense. If anything, Defendants did as much as they could to argue that the Department of Education treats other funding programs as grants. They submitted an affidavit (despite their stipulation that no discovery was needed) that pointed to several allegedly similar funding programs. APPV2-29–35. But none is on point. The Classroom Site Fund would have violated the spending cap but for a subsequent

constitutional amendment, now codified at article IX, section 21(4)(c)(vi)—which only confirms that the funds at issue here do *not* qualify for the existing exception and are "local revenues" requiring a similar constitutional amendment. The Early Childhood Block Grants and Results-Based Funding are discretionary programs for which school districts receive payment only if they qualify—*i.e.*, traditional grant programs. A.R.S. §§ 15-1251, 15-249.08. These examples are exactly what the superior court claimed to need; they are just unpersuasive and dissimilar. But even if they were comparable to Proposition 208—*i.e.,* formulaic, mandatory tax-and-transfer statutes—they could not change the constitutional definition of local revenues. "[P]ast practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008).

In sum, Proposition 208's revenues are not, as Defendants now argue, already exempt under the Constitution's grant/gift exception. To hold otherwise would contradict the Constitution's plain meaning, render provisions in Proposition 208 superfluous, and result in an expansion of that exception that would swallow the entire section of which it is a small part. No factual evidence is necessary to draw this legal conclusion, and Defendants' infelicitous examples do not overcome the legal arguments.

B. The Controversy Is Ripe.

The superior court questioned Plaintiffs' likelihood of success on the constitutional merits due to its uncertainty whether "spending the money will cause the school districts to exceed the spending limits." APPV2-113. This misgiving transmutes Defendants' ripeness argument into a merits point. *Compare* APPV2-12 *with* APPV2-113–14. Whether or not Proposition 208 will immediately exceed the spending caps has no bearing on whether the initiative's new spending facially qualifies as "local revenues" under article IX, section 21. There is also no reason to doubt that the case is ripe (especially under Arizona's lenient standard) based on judicially noticeable budget statements from the State.

The superior court conflated unconstitutionality with the existence of a live controversy. Facial unconstitutionality means that a law is "unconstitutional in all of its applications." *Simpson v. Miller*, 241 Ariz. 341, 344–45 ¶ 7 (2017) (citation omitted). In this case, that means that the exemption in A.R.S. § 15-1285(E) is unconstitutional whenever applied. It does *not* mean that the exemption must apply every year. The superior court failed to grasp this distinction when it required Plaintiffs to "show Proposition 208 will cause the spending cap to be breached under every conceivable scenario." APPV2-113. On the contrary, Plaintiffs must show that when Proposition 208 breaches the spending cap, the Constitution prohibits the

expenditure, because Section 15-1285's attempt to exempt this spending from the Constitution is *always* invalid.

Exceeding the cap therefore goes only to ripeness, which is a prudential doctrine "analogous to standing." *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 244 ¶¶ 7–8 (App. 2006). At the preliminary injunction stage, the relevant standard is likelihood. *Simms*, 232 Ariz. at 495 ¶ 21 ("If seeking to enjoin future conduct, the movant must also show that it is likely the defendant will engage in the conduct.").

In the current case, the conflict between Proposition 208 and the constitutional limits in article IX, section 21 is more than likely. Plaintiffs identified judicially noticeable documents confirming that Proposition 208 will blow through existing limits, especially when combined with the significant amount of additional financial resources dedicated to the school districts over the last several years. In each of the previous three budget cycles, the caps have increased by about $100 million.[3]

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[3] Economic Estimates Commission, Ariz. Dep't of Revenue https://azdor.gov/reports-statistics-and-legal-research/economic-estimates-commission. In a bizarre statement, the superior court identified a "key factual question" whether the Economic Estimates Commission "has been calculating the expenditure limits correctly." APPV2-114. No party has suggested any reason to think the Commission has *not* calculated the expenditure limits correctly, and the court suggested none. If speculative errors by the Commission are the basis for questioning Plaintiffs' likelihood of success, a preliminary injunction should have issued.

Meanwhile, the Joint Legislative Budget Committee estimates that Proposition 208 will generate $827 million in its first year. Lydia Chew, *JLBC Fiscal Analysis: Ballot Proposition 208* (July 30, 2020), https://www.azleg.gov/jlbc/20novI-31-2020fn730.pdf. And existing spending does not fall sufficiently short of the cap to absorb that windfall. In fact, Defendants' (improper) declarant recognized this very fact in a separate publication, conveniently using the language of preliminary injunctions: "it is very likely that we could exceed the limit next year (FY2021)," before adding a single dollar from Proposition 208. *See* APPV2-64 (noting the fiscal year 2020 budget was under the cap by only $49.3 million); *see also JLBC FY 2021 Appropriations Report*, at 148 (July 2020), https://www.azleg.gov/jlbc/21AR/FY2021AppropRpt.pdf (same).

While the superior court and Defendants might speculate that the legislature could cut baseline funding or take other action in the future to moot the controversy temporarily, no such thing has yet occurred, and the possibility of future mootness does not render a case unripe. *Cf. Glavin v. Clinton*, 19 F. Supp. 2d 543, 547 (E.D. Va. 1998) ("There is always the possibility that settlement or some external event will render a case moot, but that hardly renders the litigation nonjusticiable before that event occurs."). This case is ripe, and the Court should hear it.

C. Without the Ability to Spend Hundreds of Millions of Dollars, Proposition 208's Remaining Provisions Cannot Survive.

Defendants have never claimed that Proposition 208's offending provisions are severable, other than noting that Proposition 208 includes a severability clause. APPV2-12. That clause does not alter Plaintiffs' likelihood of success on the merits for two reasons.

First, severance does not make sense in the context of a law adopted by initiative. The Supreme Court has already noted that hypothesizing as to which provisions would have been sufficiently important to a majority of the electorate is "nearly impossible." *Randolph v. Groscost*, 195 Ariz. 423, 427 ¶ 15 (1999). That is an understatement, and the Court should decline to remake legislation adopted by popular initiative. Second, applying the traditional standards leaves no doubt that a rational electorate would not have adopted a tax that cannot be spent.

i. Severance Is Not Appropriate for Voter-Approved Laws.

Severability asks courts to speculate which portions of a law would have been enacted standing alone and which "are so connected and interdependent in subject matter, meaning, and purpose as to . . . justify the conclusion that the legislature intended them as a whole." *State Comp. Fund v. Symington*, 174 Ariz. 188, 195 (1993). A "serious separation of powers question[]" emerges, however, when the court attempts to determine the relative importance of various provisions within a law. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2366 (2020)

(Gorsuch, J., concurring in judgment); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219–24 (2020) (Thomas, J., concurring in part and dissenting in part). That separation-of-powers problem only gets worse when the legislative body is the people. *Randolph*, 195 Ariz. at 427 ¶¶ 14–15. And Arizona has an even sharper concern for the separation of powers than the federal government, given that its Constitution contains an express separation of powers clause. *See State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997).

The issue in Arizona became even more fraught after the 1998 adoption of the Voter Protection Act ("VPA"), because elected lawmakers cannot correct whatever flaws exist in what remains of an initiative after a court strikes its unconstitutional provisions. The risk that severing one provision will result in "impos[ing] on [Arizona], by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that [voters] did not enact" is particularly extreme when any errors in a court's analysis cannot be corrected by the ordinary legislative process. *NFIB v. Sebelius*, 567 U.S. 519, 692 (2012) (four-justice dissent).

As a result, the separation-of-powers threat from severing popular initiatives is two-fold: it presents the already "difficult" "search for 'popular intent,'" *Calik v. Kongable*, 195 Ariz. 496, 500 ¶ 16 (1999) (citation omitted), but with the added consequence that the elected legislature is disabled from adopting legislation on the same topic without a three-fourths majority and in furtherance of the (severed)

initiative's purpose, Ariz. Const. art. I, pt. 1, § 1(6)(B); *Molera v. Reagan* ("*Molera I*"), 245 Ariz. 291, 294 ¶ 9 (2018) ("[W]ith the enactment through initiative of the Voter Protection Act, legislation enacted by the voters is even more consequential, such that the legislature cannot repeal an initiative-enacted law.").

This Court should combine the insights from *Randolph* and *Molera I* and decline to sever where a post-VPA initiative is involved. Erroneous severance in the case of a post-VPA initiative is catastrophic, because the only solution for any error by the court in divining voters' priorities is the herculean effort of proposing a new initiative to eliminate the fragment. *See Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 9 (2013) (discussing the VPA's consequences). The cost and uncertainty of that process is too great to rely on it as a backstop in case a court errs in the "nearly impossible task" of identifying which provisions would have reduced popular support below 50%—a thin 1.8% difference in the present case. The Court should therefore decline to sever voter-adopted legislation.

ii. The Spending Provisions in Proposition 208 Are Not Severable.

"The test is whether or not the legislature [here, voters] would have passed the statute had it been presented with the invalid features removed." *Millett v. Frohmiller*, 66 Ariz. 339, 343 (1948) (citation omitted). Increasing spending on public education was Proposition 208's sole purpose, and it was the only purpose presented to voters. "[A]n informed electorate"—one aware that the heavy taxes

collected would not flow to school districts as designed—would have opted against rather than in favor of Proposition 208. *Randolph*, 195 Ariz. at 427 ¶ 15. If the Court engages in severability analysis, it should recognize that spending all of the money collected was the inducement for the law's narrow passage.

Like most jurisdictions, Arizona requires that two conditions be satisfied before finding severability.[4] First, the remaining fragment of the original statute must be "workable." *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 523 ¶ 24 (2000). Second, the valid and invalid portions must not be so "'intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act.'" *State Comp. Fund*, 174 Ariz. at 195 (quoting *State v. Prentiss*, 163 Ariz. 81, 86 (1990)). For laws enacted by popular initiatives, courts look to ballot language and publicity pamphlets for indications of intent. *Randolph*, 195 Ariz. at 427 ¶ 17. Proposition 208 fails both conditions, though either is sufficient on its own.

[4] The same test applies when, as here, the law includes a severability clause. *Myers*, 196 Ariz. at 522 ¶ 23; *see also Norton v. Superior Court*, 171 Ariz. 155, 158 (App. 1992) ("A severability clause is merely useful, not essential, evidence of legislative intent."). In this case, the severability clause itself speaks in terms of effecting the statutory purpose. APPV1-33–34 (instructing courts "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").

On the first condition, the requirement of a "workable" fragment refers to the law's ability to accomplish its stated purpose without remedial action by lawmakers. A severed law is not operable if "elimination of the invalid portion so destroys the act as to render it incapable of accomplishing the legislative purpose." *City of Auburn v. Quest Corp.*, 260 F.3d 1160, 1180 (9th Cir. 2001). It is not enough that the remaining portion of the law accomplish *something*; it must serve the purpose of the enactment.

Thus the Supreme Court concluded in *Myers* that a provision expanding the role of the Commission on Appellate Court Appointments was unconstitutional—but that it played only a tiny role in the initiative and did not affect the remaining provisions' ability to accomplish the law's purpose. 196 Ariz. at 523 ¶ 24. A decade later, that same initiative met a different severability fate in *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 2292213 (D. Ariz. Jan. 20, 2010), *rev'd on other grounds by McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010). There, the district court examined the provision creating a matching-fund program for political campaigns and concluded that it was *not* severable because, once stricken, "various regulatory changes would be required. . . . The Act, after a limited severance, is not workable absent further action." *Id.* at *11. The court distinguished this provision from the one at issue in *Myers* because in the latter case, severance "did not materially impact the operation of the Act." *Id.*

Here, the spending provisions in Proposition 208 are not severable. Spending additional resources on public education was Proposition 208's single purpose. Its other provisions only make sense in terms of facilitating that goal. Those provisions include a segregated fund for revenues generated by the initiative, specified percentages for spending the money, a prohibition on appropriators "sweeping" or supplanting funds generated by the initiative, and the largest permanent tax hike in Arizona history. All of these serve the purpose of greatly increasing spending. Without the ability to spend, the remaining provisions do not work to "accomplish[] the legislative purpose." *Myers*, 196 Ariz. at 523 ¶ 24.

The second condition asks the court to evaluate the electorate's intentions based on election materials.[5] *Randolph*, 195 Ariz. at 427–28 ¶ 17. The court must determine whether the unconstitutional provision was "so intimately connected as to raise the presumption the legislature would not have enacted one without the other" or whether the unconstitutional provision was "the inducement of the act." *State Comp. Fund*, 174 Ariz. at 195.

[5] The superior court refers to this condition as a "rational basis test." APPV2-116. While the test in *Randolph*, *Myers*, and elsewhere asks courts to assess which provisions standing alone a rational legislature (or electorate) would adopt, it is not the "rational basis test" applicable to substantive due process or equal protection cases.

Proposition 208's ballot summary and pamphlet statements made clear that the initiative's sole purpose was spending additional money on schools: "The law would impose a 3.5% tax surcharge . . . to increase funding for public education." APPV1-117. Indeed, every ballot statement in support of the initiative lauded the increased spending and, to the extent they discussed the tax increase at all, presented it as a tolerable cost in order to secure more spending. No statement advocated the tax increase as a free-standing goal. Applying the methodology from *State Compensation Fund* and *Randolph* confirms that rational voters who cast ballots in favor of Proposition 208 did so to achieve increased spending, not merely to create a new tax that could not be spent as advertised or reallocated to other priorities. Or, as *State Compensation Fund* expressed it, the ability to spend $827 million was the "inducement" for raising $827 million in taxes. Without the ability to spend more money, imposing the tax makes no sense.

In the language of the *McComish* analysis, "further action" would be necessary to revive the initiative's purpose when the unconstitutional exemption from article IX, section 21 is invalidated. 2010 WL 2292213, at *11. And those further measures would be far more serious than the administrative remedies that would have been required in *McComish*. Here, given the VPA, an entirely new initiative would be necessary. The only alternative would be that article IX, section 21(3), which allows a two-thirds majority of both houses of the legislature to adopt

a concurrent resolution to lift the spending caps, but this escape clause works only "for a single fiscal year." Follow-on initiatives and bicameral super-majority legislation (for just one year) are not the hallmarks of a law that functions just as well when the unconstitutional provision is severed. And at least 1.8% of a rational electorate would have felt differently if presented with such a scheme.

The drafters of Proposition 208 chose to set up an enclosed, self-contained system of taxing and spending. This approach might have its advantages, but it precludes severability. Without the ability to spend the revenues that Proposition 208 would generate, the surviving tax, with its impounded proceeds, is irrational and bears no resemblance to the bargain presented to Arizona voters. The offending provisions of Proposition 208 are therefore not severable.

II. PROPOSITION 208'S TAX VIOLATES ARTICLE IX, SECTION 22.

When the people act in a legislative capacity through the initiative process, they have the same powers as the legislature, but they have *only* the same powers—no more. In particular, when "[a]cting in their capacity as lawmakers, the people are bound by the Constitution, the same as the Legislature." *Tillotson v. Frohmiller*, 34 Ariz. 394, 401–02 (1928); *Hernandez v. Frohmiller*, 68 Ariz. 242, 249 (1949) ("The constitutionality of this initiative act must be tested by the same rules that are employed in testing the validity of laws enacted by the legislature.").

This equivalence is explicitly stated in the Arizona Constitution: "Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." Ariz. Const. art. XXII, § 14. In other words, the Constitution limits voters when passing statutory acts by initiative in the same ways that it limits the legislature when that body adopts statutes. Proposition 208 exceeds that lawmaking power.

The Arizona Constitution requires that "*any act*" that imposes a new tax on Arizona residents must receive the "affirmative vote of two-thirds of the members of *each house of the legislature.*" *Id*. art. IX, § 22 (emphasis added). Proposition 208 is an act that imposes a new tax on Arizona residents, but it did not receive a vote in the legislature at all, let alone a supermajority vote. Because Proposition 208 is a *statute*, not a constitutional amendment, it needed to comply with these constitutional limitations. It did not.

A. Because Proposition 208 Imposes a New Tax, It Must Be Adopted by a Two-Thirds Vote in the Legislature, or by a *Constitutional* Rather than *Statutory* Initiative.

Article IX, section 22 imposes an unequivocal requirement for *statutory* tax increases in Arizona: "any act that provides for a net increase in state revenues" must be approved by a two-thirds vote of "the members of each house the legislature." This rule applies not only to acts of the elected legislature, but to "*any act* that

provides a net increase in state revenue." Ariz. Const. art. IX, § 22 (emphasis added). In addition, article XXII, section 14 provides that "[a]ny law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." While these requirements do not apply to a constitutional amendment adopted by ballot initiative, they do apply to any statutory initiative. Therefore, the Constitution limits the statutory imposition of new taxes to those that are (1) passed by the legislature and (2) obtain a two-thirds majority of both houses. Proposition 208 does not satisfy these rules.

i. Proposition 208 is an "act."

Given the plain language of article IX, section 22, the first question is whether Proposition 208 is an "act." It undeniably is. First, Proposition 208 is titled the "Invest in Education *Act*." APPV1-026 (emphasis added). It also calls itself an "act" in Sections 6 ("any provision of this act . . .") and 7 ("rules to implement this act . . ."). The Supreme Court has also directly 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) (emphasis added). Indeed, the Supreme Court has always viewed statutory initiatives as "acts," and described them as such. *See, e.g.*, *Hernandez*, 68 Ariz. at 249 ("The constitutionality of this *initiative act* must be tested by the same rules that are employed in testing the validity of laws enacted by the legislature." (emphasis added)); *Kerby v. Griffin*, 48 Ariz. 434, 446 (1936)

("[A]n *act* approved by the people in a manner contrary to that provided by the Constitution is just as invalid as an act passed by the Legislature in a manner prohibited by constitutional mandates." (emphasis added)).

The superior court, however, rewrote this constitutional requirement to delete the word "any" and insert a limitation to those "acts that require a vote of the legislature." APPV2-103 (quotation marks omitted). It posited that initiatives are not "acts" because the Constitution "labels the legislature's enactments differently from enactments by initiative," which the superior court said are called "measures" rather than "acts." *Id.*

This proposed dichotomy does not withstand scrutiny. First, as noted above, Arizona law has always held that initiatives are "acts." *Saggio*, 147 Ariz. at 241; *Hernandez*, 68 Ariz. at 249; *Griffin*, 48 Ariz. at 446. Second, the Constitution equally refers to legislative enactments as "measures." *See, e.g.*, Ariz. Const. art. V, § 25 (giving the legislature power to "[a]dopt such other *measures* as may be necessary and proper") (emphasis added); *id.* art. IX, § 17(3) (allowing the legislature to override certain rules by supermajority votes "on each *measure*" subject to that rule) (emphasis added); *see also id.* art. V, § 7 (exempting "emergency measures" from certain rules).

In fact, the very provision that sets out the procedure by which the legislature enacts bills refers to "measure," not "act." Ariz. Const. art. IV, § 12 ("Every *measure*

when finally passed shall be presented to the governor for his approval or disapproval." (emphasis added)). In short, there is no legal distinction between "measures" and "acts," nor do initiatives fall into one category while statutes adopted by the legislature fall into the other. Because initiatives are "acts," article IX, section 22, which says that "this section appl[ies] to *any* act that provides for a net increase in state revenues," must apply.

The superior court cited *Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533 (2017), to support its holding that statutory initiatives are not "acts." APPV2-104. But *Kiley* never said, let alone held, any such thing. *Kiley* addressed whether the Single Subject Rule, which applies to acts of the legislature, also applies to statutory initiatives. The Supreme Court held that it does not. 242 Ariz. at 541 ¶ 31. It explained that the Rule was intended to prevent placing legislators or the governor in the position of having to support "a disfavored proposition" in order "to secure enactment of a favored one." *Id.* at ¶ 30. This difference, the *Kiley* Court reasoned, means that the Single Subject Rule does not apply to initiatives. Thus, when *Kiley* stated that "[t]he Rule applies to 'act[s],' which are enacted by the legislature, and does not address initiative or referendum petitions," *id.* ¶ 33, it was

not declaring that initiatives are not "acts."[6] The superior court misread *Kiley* and announced a rule never considered by the *Kiley* Court.

No case in this State or any other has ever held that an initiative is not an act. Proposition 208 is, by its own terms, an act and thus subject to article IX, section 22.

ii. Proposition 208 is a Tax Statute.

Article IX, section 22 "appl[ies] to any act that provides for a net increase in state revenues," through "[t]he imposition of [a] new tax." (emphasis added). Proposition 208 imposes a new tax. A.R.S. § 43-1013. Yet it did not obtain the constitutionally required "affirmative vote of two-thirds of the members of each house of the legislature." Ariz. Const. art. IX, § 22.

The superior court concluded that the voters who adopted article IX, section 22 as a constitutional amendment (via Proposition 108 in 1992), did not intend "to repeal or limit their own, separate co-equal power to increases taxes by initiative." APPV2-103. But the ballot materials advocating for and against what is now article IX, section 22 show that voters intended precisely that.

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[6] The supreme courts of Alaska and Washington also rejecting the application of the Single Subject Rule to initiatives for the same reasons as *Kiley*, and they never suggested that initiatives are anything other than acts. *State v. Miller*, 964 P.2d 1196, 1199–200 (Wash. App. 1998); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985). In fact, the Alaska Supreme Court said that "an initiative is an *act* of direct democracy." *Yute Air*, 698 P.2d at 1181 (emphasis added).

The voter pamphlet accompanying Proposition 108 in 1992 stated that the new article IX, section 22 would *only* allow for taxes that received a two-thirds majority in both Legislative chambers.[7] It said:

LEGISLATIVE COUNCIL ARGUMENTS FAVORING PROPOSITION 108

Proposition 108 will make it more difficult to raise taxes and will end the string of almost annual tax increases during the past decade.

Some analyses rank Arizona as one of the highest taxed states in the nation. This reputation hinders economic development, discourages businesses from moving to this state, promotes migration of businesses from this state and places a competitive disadvantage on businesses remaining here. Growing government draws economic resources away from productive enterprises. Proposition 108 will help restrain growth in state government.

Tax increases are such a threat to taxpayers that they should be approved only with the agreement of two-thirds of our elected representatives. Proposition 108 ensures a board consensus on the necessity of any future tax increases.

According to the Legislative Council, "Tax increases are such a threat to taxpayers that they should be approved *only with* the agreement of two-thirds of our *elected representatives*. Proposition 108 ensures a [broad] consensus on the necessity of any future tax increases." (emphasis added). Thus, the pamphlet made clear to voters that statutory tax increases could only be approved in one way: by a supermajority vote of elected representatives in both houses.

[7] Available at https://azsos.gov/sites/default/files/pubpam92.pdf at 46.

The Legislative Council's Arguments Opposing Proposition 108 also reflected that understanding. The full text appeared as follows:

LEGISLATIVE COUNCIL ARGUMENTS OPPOSING PROPOSITION 108

Ideally, taxes are increased only as a last resort in the face of an actual necessity. This proposition will make it extremely difficult for elected representatives to respond to emergency situations, court directives and federal requirements.

Also, when faced with a budget shortfall the Legislature could choose to shift costs to local governments by a simple majority vote. Such shifting could result in increased taxes at the local level.

Requiring a two-thirds vote would reduce the likelihood of meaningful tax reform or equalization among taxpayers because almost any tax reform measure requires raising some taxes while reducing or eliminating others.

Proposition 108 could greatly increase the power of a few legislators who would withhold their support for a tax increase until their own spending priorities are addressed. The more votes that are necessary, the higher the ultimate tax increase. Rather than holding the line on new government revenue, Proposition 108 could result in increased government spending.

If the Legislature enacts a tax increase with a two-thirds vote, Proposition 108 would not allow the voters the right to submit the act to a referendum. Instead, it would become effective immediately with no recourse for citizens.

According to the Legislative Council, "[i]f the Legislature enacts a tax increase with a two-thirds vote, Proposition 108 would not allow the voters the right to submit the act to a referendum. Instead, it would become effective immediately with no recourse for citizens." Additionally, Proposition 108 included a list of exceptions, and initiatives were not among them. *See* Ariz. Const. art. IX, § 22(C). As the Supreme Court has regularly recognized, "the expression of one or more items of a class and the exclusion of other items of the same class implies the legislative intent to exclude those items not so included." *Sw. Iron Steel Indus. v. State*, 123 Ariz. 78, 79 (1979).

In other words, when voters added article IX, section 22 to the Constitution, they were aware and intended that a statutory change—even a statutory referendum

submitted to the voters—could not bypass the requirements of article IX, section 22. If voters cannot send constitutionally enacted tax increases to the ballot as a statutory referendum, then the proponents of Proposition 208 could not make an end-run around the requirements of article IX, section 22 via a statutory initiative. When the voters adopted that constitutional amendment, they established the *single* means by which "an act that provides for a net increase in state revenues" can be adopted in Arizona: by a supermajority vote of the legislature.

What the U.S. Supreme Court said of the federal Constitution's rules governing lawmaking is equally true of the Arizona Constitution's rules governing tax increases: the Constitution sets forth a "single, finely wrought and exhaustively considered, procedure" for "enact[ing] statutes." *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (citation omitted). In *Clinton*, the Court found that it was unconstitutional for Congress to give the President a line-item veto because the Constitution specifies only one procedure for lawmaking—and that procedure did not include a line-item veto. This, the Court said, was "equivalent to an express prohibition" of the line-item veto. *Id.* at 439. Likewise here: the fact that the Arizona Constitution provides a single, finely-wrought procedure for enacting new taxes—one that was adopted by the voters themselves in the form of a constitutional amendment—and that no other procedure for adopting taxes is provided, means that

other procedures are not allowed. Either new taxes must be adopted by a legislative supermajority, or they must take the form of constitutional amendments.

Of course, the proponents of Proposition 208 could have proposed the measure as a constitutional amendment, in which case article IX, section 22 would not have applied. But they did not do that.

The superior court also essentially rewrote article XXII, section 14 to downplay its significance to this case. That section sets out the Constitution's limitation on statutory initiatives: "Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." The superior court concluded that this provision does not apply because it "deals with the substance of a law, not the procedure for enacting it." APPV2-105. In other words, article XXII, section 14 bars voters from violating substantive constitutional protections, such as free speech protections, but not procedural protections. *Id.* This distinction is untenable.

First, the Constitution includes no such qualification; it makes no distinction between substantive and procedural protections. Second, such a distinction would make no sense. Imagine, for example, if the voters attempted to pass a statutory initiative that made any law passed by the legislature effective without the governor's signature—that is, attempting to repeal article IV, section 12 by a voter-approved statute. That statutory initiative would be invalid under article XXII,

section 14, even though it involves only "procedural" provisions. Or imagine a statutory measure that purported to eliminate the constitutional veto power, Ariz. Const. art. V, § 7, or a statutory measure that attempted to eliminate one of the legislative houses, *id.* art. IV, pt. 1, § 1, or that was an *ex post facto* law, *id.* art. II, § 25. If any of these things were done by statutory initiative, they would still violate the Constitution even though they would exceed "procedural" rather than "substantive" boundaries. The superior court's attempted distinction between substantive and procedural restraints also obscures the fact that both species of restraint serve the common goal of protecting individual liberty. *Cf. Bond v. United States*, 572 U.S. 844, 863 (2014).

Ultimately, the Constitution's text is unambiguous: "*Any* law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." Ariz. Const. art. XXII, § 14 (emphasis added). Because Proposition 208 is an "act" that increases state revenue in one of the ways specified in article IX, section 22, it could only be adopted by legislative supermajority or as a constitutional amendment.

B. To the Extent the Voters *Acted as the Legislature* in Passing Proposition 208, the Act Fails Because It Did Not Receive a Two-Thirds Vote.

In the alternative, if voters stand in the legislature's shoes when voting on a statutory tax increase, they must comply with the supermajority requirement. As the

Supreme Court explained in *State ex rel. Conway v. Superior Court*, "[w]hen the people act in their legislative capacity through an initiated measure, they have only the same powers which the legislature would have, and *any act so passed is limited by constitutional provisions to the same extent as an act of the legislature*." 60 Ariz. 69, 78 (1942) (emphasis added), *overruled in part on other grounds by Adams v. Brolin*, 74 Ariz. 269 (1952); *accord Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997); *Molera I*, 245 Ariz. at 294 ¶¶ 9–11. Maintaining the supermajority requirement not only comports with the logic of article IX, section 22, but it also implements the express language of the Constitution, which provides that the people "shall not" adopt "[a]ny law which may not be enacted by the Legislature." Ariz. Const. art. XXII, § 14. If the people are acting *as the legislature*, then they must comply with the same supermajority rule.

The Supreme Court of the United States read "legislature" to apply to the people when acting through the initiative process in *Arizona State Legislature v. Arizona Independent Redistricting Commission* ("*AIRC*"), 576 U.S. 787, 813–14 (2015). In *AIRC*, voters adopted an initiative that removed redistricting authority from the Arizona legislature. *Id*. at 792. In upholding the initiative, the Court held that "it would be perverse to interpret the term 'Legislature' in the Elections Clause . . . to exclude lawmaking by the people." *Id.* at 820. In this case, article IX, section 22 requires "the affirmative vote of two-thirds of the members of each house of the

legislature" before a new tax statute may become law. If the Court construes "legislature" to encompass the people acting by initiative, then Proposition 208 did not meet, or even approach, the supermajority threshold. It instead passed by only 51.7%. Thus, Proposition 208 also fails under article IX, section 22 for this reason.

III. PLAINTIFFS SATISFIED ALL REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

In addition to their likely (if not certain) success on the merits, Plaintiffs also established the other three requirements for a preliminary injunction: (1) the possibility of irreparable harm if relief is not granted; (2) a balance of hardships favoring the moving party; and (3) public policy weighing in favor of injunctive relief. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Importantly, courts evaluate these factors using a sliding scale, where the stronger the likelihood of success on the merits, the less irreparable harm is necessary (and vice versa). *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410–11 ¶¶ 9–10 (2006).

Here, the sliding scale leads to two possible outcomes, both of which favor injunctive relief. First, because Plaintiffs established "probable success on the merits" of their constitutional claims, *see supra* Parts I & II, they needed to demonstrate only a "*possibility* of irreparable injury"—a threshold easily met here. *Simms*, 232 Ariz. at 495 ¶ 21 (internal quotation marks omitted) (emphasis added). Alternatively, given its holding that Plaintiffs raised "serious questions" on their article IX, section 21 claim, APPV2-114, the superior court erred in not issuing a

preliminary injunction because the "balance of hardships tips sharply" in Plaintiffs' favor. *Simms*, 232 Ariz. at 495 ¶ 21 (internal quotation marks omitted).

A. The Superior Court Erred in Holding that Plaintiffs Did Not Suffer Even a Possibility of Irreparable Injury.

Because Plaintiffs are likely to prevail on their claims that Proposition 208 violates the Constitution, they have also demonstrated, at a minimum, a possibility of irreparable harm from those same constitutional violations. This constitutional injury will continue to accumulate absent a preliminary injunction against the implementation and enforcement of Proposition 208.

The infringement of a constitutional right "unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). The reason is simple: "constitutional violations cannot be adequately remedied through damages." *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (citation omitted); *see also Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 881–82 (9th Cir. 2008), *reversed and remanded on other grounds*, 562 U.S. 134 (2011) (reasoning that even if money damages could be repaid, plaintiffs still have an irreparable injury from the constitutional violation). Thus, "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (citation omitted); *see also Assoc. Gen. Contractors of Calif., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)

("[A]lleged constitutional infringement will often alone constitute irreparable harm." (citation omitted)).

The superior court rejected this well-established principle on the grounds that no Arizona case has expressly adopted it. APPV2-105–06. That is true in a literal sense, but it is incomplete. For starters, Arizona law recognizes that injuries are irreparable if money damages cannot remedy them. *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 65 ¶¶ 10–11 (App. 2011). That condition is automatically met for constitutional violations: a person's right to be free from infringements on constitutional rights cannot be remedied through money alone. *See, e.g.*, *Am. Trucking Ass'n, Inc.*, 559 F.3d at 1059. No one would suggest, for example, that ongoing violations of a person's free speech or equal protection rights should be allowed to continue so long as that individual could recover damages later. The same applies to the superior court's suggestion that individuals paying an unconstitutional tax can be fully reimbursed by a refund. APPV2-106. The point of enjoining unconstitutional laws is *not* simply the monetary aspect of the injury. To take a more glaring example, no one would suggest that the availability of a future refund forecloses injunctive relief from a tax that is racially discriminatory. Money does not fully compensate for constitutional violations; injunctive relief is therefore not only appropriate but necessary.

Further, the superior court's effort to create a higher threshold for showing irreparable harm in state court than in federal court would turn Arizona law on its head. Arizona's standard for injunctive relief is lower than its federal counterpart. Whereas federal courts require a *likelihood* of irreparable harm, in Arizona such harm need only be *possible*. *Compare Shoen*, 167 Ariz. at 63 (requiring a showing that irreparable harm is possible), *with Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (requiring a showing that irreparable harm is likely). In fact, Arizona has expressly declined to follow the federal rule. *IB Prop. Holdings, LLC*, 228 Ariz. at 64 ¶¶ 6–8. Because Arizona's preliminary injunction standard is intentionally more relaxed than its federal counterpart, it makes no sense for the superior court to deny the existence of an irreparable harm from constitutional violations on the grounds that only federal courts, and not Arizona courts, have expressly stated as much. That approach inverts the two standards.

Moreover, while all Plaintiffs continue to suffer irreparable harm from an unconstitutional initiative, the harm from Proposition 208 is particularly grave for two groups of Plaintiffs: (1) the Taxpayer Plaintiffs who are subject to Proposition 208's unconstitutional income tax surcharge; and (2) the Legislator Plaintiffs who must attempt to cope with the uncertainties created by the unconstitutional measure.

i. The Taxpayer Plaintiffs Suffer a Discrete, Constitutional Harm from Proposition 208.

Starting January 1, 2021, taxpayers have the continuing duty to budget—either through withholdings, estimated payments, or otherwise—their projected tax obligation under the new law. *See, e.g.*, A.R.S. §§ 43-401, 43-581. Some taxpayers, including some Plaintiffs, are *required* to make estimated tax payments beginning April 2021. *See* A.R.S. § 43-581(A). The Taxpayer Plaintiffs face these obligations even though the Constitution is supposed to protect them, at all times, from being subject to new statutory taxes that do not receive a two-thirds vote, Ariz. Const. art. IX, § 22, or being forced to finance spending that exceeds constitutional restraints, *id.* § 21.

As discussed, the superior court discounted the harm to taxpayers on the ground that the unconstitutional tax could be refunded later. APPV2-106. However, a refund would not change the fact that these taxpayers had been wrongly subjected to an unconstitutional tax in the first place. Arizona taxpayers should not be forced to subsidize funds that, as a constitutional matter, cannot be collected or spent on the possibility that the State might give the money back at some future time. For the same reasons, the superior court erred in brushing aside Plaintiffs' harm because it will not happen in the "near future." *Id.* Plaintiffs felt the harm from Proposition 208's unconstitutional tax the day it became effective.

ii. The Legislator Plaintiffs Continue to Suffer a Discrete, Constitutional Harm.

The ongoing, constitutional injury to the Legislator Plaintiffs arises from uncertainty with respect to the state budget—uncertainty that will persist until they receive a final "determination of the validity of the statute so that [they can] . . . conform to the law." *Wall v. Am. Optometric Ass'n, Inc*., 379 F. Supp. 175, 185 (N.D. Ga. 1974). Whether or not the State is obliged to collect and distribute almost a billion dollars in taxes has significant consequences for the budget as well as other policy choices to mitigate the harm to Arizona's economy. This uncertainty is unworkable and will continue to constitute irreparable harm unless the Court provides clarity. *Id.*; *see also* APPV1-126–35 (Gowan and Cobb Declaration detailing the uncertainty that Proposition 208's effective date injects into the already finalized 2021 state budget).

The superior court discounted the irreparable harm of lost legislative days and inferior policymaking in both practical and legal ways—both of which were flawed. As a practical matter, the court erred in finding no harm because "Proposition 208 revenue will not even begin to flow until the spring of 2022," and therefore it "has no direct effect on the [2021] budget." APPV2-107. This is incorrect. Proposition 208 does not exist in a silo until April 2022 when revenues "begin to flow." Legislative appropriations encompass items that span several years, and budgets must take these multi-year commitments into consideration. *See, e.g.,* A.R.S. § 15-

2041(D) (setting a legislative budgeting formula for the school facilities board to consider average daily membership projections over a span of two years and projections of new pupils over a span of five to eight years).

The superior court's legal error was even worse. It sought to disqualify the legislative harm altogether by *sua sponte* arguing that separation of powers prevents it from addressing this injury. APPV2-107. In particular, the superior court relied on *Winkle*, 190 Ariz. at 415 and *City of Phoenix v. Superior Court*, 65 Ariz. 139, 144–45 (1946), for the proposition that "the Arizona Constitution[] prohibits the judiciary from meddling in the workings of the legislative process" and that courts lack the "power to enjoin legislative functions, or to supervise legislative proceedings." APPV2-107. Neither case supports the superior court's attempt to avoid making a decision here.

Winkle concerned a *pre-election* challenge to a voter initiative on preemption grounds. 190 Ariz. at 414. There, the Supreme Court held that principles of separation of powers prevented it from weighing in on the validity of the proposal until after it became law, because doing so would otherwise prematurely enjoin a legislative function. *Id.* at 415, 418. *City of Phoenix v. Superior Court* applied the "legislative function" rule to a municipality. 65 Ariz. at 144–45. Like *Winkle*, the rule applies to the act of legislating itself, because although the legislature "is liable to commit errors which may be fatal to its action [] that does not take away its power

to act." *Id.* The superior court's reliance on *Winkle* and *City of Phoenix v. Superior Court* is misplaced in the current case, because it is a *post*-election challenge to the constitutionality of a statutory change (Proposition 208) that is already complete. The Court will not interrupt any ongoing legislative activity by deciding the constitutional questions presented.

The superior court erred in concluding that Plaintiffs lacked even a possibility of irreparable injury. An unconstitutional tax and an impaired ability to conduct the State's legislative work are more than sufficient in light of Plaintiffs' certain success on the merits. A preliminary injunction should issue.

B. The Superior Court Erred in Finding that the Balance of the Hardships Did Not Tip in Plaintiffs' Favor.

When a government entity is a party to a lawsuit, it is appropriate to "consider the balance of equities and the public interest together." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).[8] The superior court erred in finding that the balance of equities and public interest favored the State.

The public interest strongly favors maintaining the status quo until the constitutionality of Proposition 208 can be adjudicated on the merits. "[I]t is always

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[8] *Flynn v. Campbell*, 243 Ariz. 76, 80 ¶ 9 (2017) ("Although a federal court's interpretation of a federal procedural rule is 'not binding in the construction of our rule,' we recognize its instructive and persuasive value and that 'uniformity in interpretation of our rules and the federal rules is highly desirable.'" (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 304 (1990))).

in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

The superior court erroneously dismissed the public interest in avoiding constitutional violations because this case relates to taxes and, according to the superior court, injunctions against taxes are not permitted. APPV2-106 (citing A.R.S. § 42-11006 and *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz County*, 233 Ariz. 460, 464 ¶ 17 (App. 2013)). But that was error: there is no legal barrier to injunctive relief here.

First, the "anti-injunction" provisions of A.R.S. § 42-11006 are specific and exclusive to property law. Section 42-11006 is found in Title 42, Chapter 11, which governs *property* tax, not *income* tax. Income tax laws are separately located in Title 43, which contains no similar limit on injunctions. The superior court shrugged off this distinction, stating that "titles and physical location of a statute within the code" should not limit the application of a statute with an otherwise plain meaning. APPV2-106 (quoting *Jennings v. Woods*, 194 Ariz. 314 ¶ 77 (1999)). This logic would allow courts to disregard statutory structure entirely. But Arizona courts regularly do the opposite, relying on the title and physical location of a statute in the code when interpreting statutes. *See, e.g., In re Adam P.*, No. 1 CA-JV 19-0272, 2020 WL 438192, at *1 (Ariz. Ct. App. Jan. 28, 2020); *Estate of Hernandez v. Arizona Bd. of Regents*, 177 Ariz. 244, 250 (1994).

When read in context, A.R.S. § 42-11006's plain meaning restricts its application only to property taxes. Specifically, it prevents courts from entering an injunction against "[e]xtending an assessment on the tax roll" or "[c]ollecting an imposed or levied tax." A.R.S. § 42-11006; *see also* A.R.S. § 42-11001 (defining "roll" as "the assessment and tax roll," a concept specific to property tax). The ordinary meaning of "tax roll" is "a record of the *properties* in a taxing district that includes the taxes due and paid on each property and is sometimes combined with a record of assessed values." *Tax Roll*, Merriam-Webster, https://www.merriam-webster.com/legal/tax%20roll (emphasis added). Because Section 42-11006 first qualifies the relevant taxes as those on "the tax roll," the plain meaning of the statute clearly indicates that it applies to property, *not* income taxes.

At the very least, the statute is susceptible to reasonably different meanings. In this circumstance, courts will "consider secondary interpretation methods." *BSI Holdings v. Ariz. Dep't of Transp.*, 244 Ariz. 17, 19 ¶ 9 (2018) (looking to similar or differing meanings of the word "day" in other statutes). And "where an ambiguity exists," rules of "statutory construction allow [this court] to look at the title . . . of the law." *State v. Barnett*, 142 Ariz. 592, 597 (1984). Here, the title and heading of Title 42, Chapter 11 is but another guiding factor confirming that Section 42-11006 is limited to property taxes.

The superior court's reliance on *Jennings* to disregard statutory structure is misplaced. In *Jennings*, the court observed that the specific statute at issue had "been tossed from place to place in the Arizona Revised Statutes." 194 Ariz. at 329 ¶ 77. There is no evidence that A.R.S. § 42-11006 has experienced the same turbulent history. To the contrary, it was created in 1997 as a result of the Legislature's effort to recodify tax statutes related to "property, transaction privilege, use and luxury taxation and tax administration." Senate Fact Sheet, S.B. 1130, 43d Leg., 1st Reg. Sess. (1997). The bill adopting Section 42-11006 repealed and replaced what was previously A.R.S. § 42-204. *Id.* Not only did the anti-injunction statute remain in Title 42, but it consistently referred to "tax rolls" and other property tax concepts. *Compare* A.R.S. § 42-204 (1996), *with* A.R.S. § 42-11006. Moreover, the legislature purposefully moved the provision in question *into* the chapter related to property taxes in 1964. A.R.S. § 42-204 (1964).

Precedent is no less damning to the superior court's treatment of Section 42-11006. Neither the superior court nor Defendants has ever identified a case in which Section 42-11006 or its predecessor applied to income taxes. *See, e.g., Church of Isaiah*, 233 Ariz. at 464 ¶ 17 (applying A.R.S. § 42-11006 to property tax challenge); *Drachman v. Jay*, 4 Ariz. App. 70 (1966) (applying A.R.S. § 42-204, to a challenge to the extension of an assessment of the tax roll); *State ex rel. Lane v. Superior Court*, 72 Ariz. 388, 392 (1951) (applying predecessor provision to the

carrier license tax, a type of property tax). The Supreme Court "considered and rejected the state's contention that A.R.S. § 42-204(A)" applies to other types of taxes; rather it "applies *only* to property taxes." *State Comp. Fund*, 174 Ariz. at 192 (emphasis added). Because the operative text from the former A.R.S. § 42-204(B) mirrors that in Section 42-11006, the holding in *State Compensation Fund* is fatal to the identical claims in this case.

Finally, even if A.R.S. § 42-11006 applied to erroneously levied income taxes (it does not), it would not prevent a meritorious challenge to the constitutionality of a tax. The superior court erroneously dismissed this possibility by citing a 1922 case applying the *federal* anti-injunction statute, which the Supreme Court of the United States has subsequently limited. *See* APPV2-106 (citing *Bailey v. George*, 259 U.S. 16 (1922)). Reliance on the federal anti-injunction statute is misplaced. Its purpose is to "require[] taxpayers to proceed to *state court* to challenge disputed state taxes." *Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1219 (D. Ariz. 2001) (emphasis added). That objective favors Plaintiffs' position, not Defendants'. Even if the federal statute were relevant, federal courts "now recognize[] a single, narrow judicial exception to the Anti-Injunction Act" that tracks the preliminary injunction standard for constitutional challenges: the anti-injunction rule is inapplicable if (1) "the Government's [position] is baseless," and (2) "the taxpayer shows that he would otherwise suffer irreparable injury." *Church of Scientology of Cal. v. United States*,

920 F.2d 1481, 1485–86 (1990) (citations omitted). In Arizona, a similar rule requires that the government act with at least a "semblance of authority" even where Section 42-11006 applies. *Church of Isaiah*, 233 Ariz. at 464–65 ¶ 19. Because Proposition 208 is unconstitutional and Plaintiffs will continue to suffer an irreparable injury, this exception applies. *United States v. Bigley*, No. 2:14-CV-0729-HRH, 2019 WL 3944614, at *2 (D. Ariz. Aug. 21, 2019) (reasoning that unconstitutionality suffices to prove the first prong of the test).

As compared to Plaintiffs' hardship from of an ongoing violation of the Constitution, the State will suffer at most only a minimal hardship if the law is temporarily enjoined pending adjudication on the merits. In fact, an injunction spares the State from implementing Proposition 208, which it is obliged to do using general fund resources that would be reimbursed later. A.R.S. § 15-1281(B). But that investment will become an unreimbursed up-front expense if and when the law is declared unconstitutional. In ignoring this burden, the superior court instead suggested that the State would suffer a burden if it had to collect the tax retroactively. APPV2-106. But under the superior court's own logic, the tax does not require administration by the State until April 2022. *Id.* And there is nothing to suggest that the burden of administering a tax is different in the future.

Despite demonstrated harms and interests favoring an injunction, the superior court suggested that this case presents "premature" political questions that should be

solved by the legislature. APPV2-117–18. It is not up to the legislature, however, to fix an unconstitutional statutory initiative. And the sole questions presented to this Court are ones of constitutionality, which "traditionally fall[] to the courts to the courts to resolve." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 8 (2006). Even the superior court acknowledged that "the case does involve a real legal dispute concerning the application of the Arizona Constitution." APPV2-118.

When the public interest in preserving the Constitution and Plaintiffs' constitutional harms are considered, the balance of hardships tips sharply in Plainitffs' favor.

IV. REQUEST FOR COSTS AND ATTORNEYS' FEES.

Plaintiffs move for costs and attorneys' fees pursuant to ARCAP 21, A.R.S. §§ 12-341, 12-348, 12-1840, 12-2030, and the private attorney general doctrine as established by *Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 609 (1989), because the rights sought to be vindicated here benefit a large number of people, require private enforcement, and are of societal importance.

CONCLUSION

Proposition 208 violates the Arizona Constitution in several ways. Because the merits of this constitutional challenge are clear, Plaintiffs need show little else in the way of irreparable harm, balance of hardships, and public interest. Yet each of those factors also favors an injunction to protect Plaintiffs and, more importantly, to

vindicate the importance of Arizona's Constitution, which cannot abide violations on the casual promise that the State will later refund what it has taken in violation of its fundamental law. The Court should reverse and remand with instructions to enter the requested injunction.

RESPECTFULLY SUBMITTED this 26th day of February, 2021.

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CERTIFICATE OF SERVICE

I certify that the original of the foregoing Appellant's Opening Brief was e-filed with the Clerk of the Arizona Court of Appeals, Division One, via AZTurboCourt, and a copy was sent via AZTurboCourt e-service to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Opening Brief complies with ARCAP 23(c). The Brief is double-spaced, utilizes a proportionally spaced typeface of 14 points, and contains 12,619 words utilizing the word count of the word processing system used to prepare the Brief.

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