

SUPREME COURT OF ARIZONA

KAREN FANN; RUSSELL “RUSTY”
BOWERS; DAVID GOWAN;
VENDEN LEACH; REGINA COBB;
JOHN KAVANAUGH; MONTIE
LEE; STEVE PIERCE; FRANCIS
SURDAKOWSKI, M.D.; NO ON 208
an Arizona political action committee;
ARIZONA FREE ENTERPRISE
CLUB, an Arizona non-profit
corporation,

Plaintiffs/Petitioners,

v.

HON. JOHN HANNAH, Judge of the
Superior Court of Arizona in and for
Maricopa County, in his official
capacity,

Respondent,

and

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/Real Parties in Interest,

INVEST IN EDUCATION
(SPONSORED BY AEA AND
STAND FOR CHILDREN), a political
action committee; DAVID LUJAN,
Intervenors /Real Parties in Interest

Supreme Court Case No. _____

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

PETITION FOR SPECIAL ACTION

Dominic E. Draye (#033012)
GREENBERG TRAURIG, LLP
2375 East Camelback Road
Phoenix, AZ 85016
602.445.8000
drayed@gtlaw.com

Timothy Sandefur (#033670)
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
602.462.5000
litigation@goldwaterinstitute.org

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
400 E. Van Buren, Suite 1900
Phoenix, AZ 85004
602.382.6000
bwjohnson@swlaw.com

Attorneys for Petitioners

TABLE OF CONTENTS

Table of Authorities	2
Introduction	4
Jurisdictional Statement	6
Issue Presented	6
Factual Background	6
Argument.....	8
Conclusion	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arnold v. Ariz. Dep’t of Health Servs.</i> , 160 Ariz. 593 (1989).....	15
<i>Blende v. Stanford</i> , 98 Ariz. 251 (1965).....	6, 9, 11, 12
<i>Circle K Convenience Stores v. Phoenix</i> , 178 Ariz. 102 (App. 1994).....	9
<i>City of Surprise v. Ariz. Corp. Comm’n</i> , 246 Ariz. 206 (2019).....	9
<i>Fann v. State</i> , 251 Ariz. 425 (2021).....	<i>passim</i>
<i>Forty-Seventh Legislature v. Napolitano</i> , 213 Ariz. 482 (2006).....	13
<i>Harbel Oil Co. v. Superior Court</i> , 86 Ariz. 303 (1959).....	9
<i>Jordan v. Jordan</i> , 138 Ariz. 38 (1982).....	9
<i>State Comp. Fund v. Symington</i> , 174 Ariz. 188 (1993).....	13
Statutes	
A.R.S. § 15-1281(D).....	6, 10
A.R.S. § 12-341	15
A.R.S. § 12-348	15
A.R.S. § 12-1840	15
A.R.S. § 12-2030	15

Other Authorities

Ariz. Const. art. VI, § 21.....	8
Ariz. Const. art. IX, § 4.....	5, 13
Ariz. Const. art. IX, § 21(3).....	5
Ariz. R.P. Spec. Act. 1(a).	6
Ariz. R.P. Spec. Act. 3.....	6, 9
Ariz. R.P. Spec. Act. 4(g).	15
Ariz. R. Civ. P. App. 21	15
Ariz. S. Ct. R. 91(e)	8
<i>Executive Budget Proposal by Governor’s Office of Strategic Planning and Budgeting Before the Joint Appropriations Comm., 55th Leg., 2d Reg. Sess. 9:48-11:05 (Ariz. 2022)</i>	<i>14</i>
S.B. 1828, 55th Leg., 1st Reg. Sess. (Ariz. 2021)	14

INTRODUCTION

The only remaining issue in this case has been resolved by stipulation, but the superior court refuses to enter the injunction that this Court’s mandate requires. Because an appellate court’s opinion and mandate define the scope of the superior court’s jurisdiction on remand, special action is appropriate—and, under the circumstances, necessary—to enforce the terms of the remand and bring an overdue conclusion to this litigation.

Almost a year ago, this Court accepted transfer jurisdiction of an urgent appeal involving the largest tax increase in Arizona history. It reversed the superior court on several legal issues and remanded for one, narrow factual question: will Prop. 208 collect revenue that cannot be spent under the aggregate expenditure limitation (“AEL”) in article IX, section 21? *Fann v. State*, 251 Ariz. 425, 440–41 ¶ 54 (2021). Discovery showed that the answer to that question is unequivocally “yes.” As a result, all parties stipulated to two facts that resolve the issue on remand and, consistent with this Court’s mandate, require the entry of a permanent injunction:

- Even without Prop. 208, it is more likely than not that aggregate school district expenditures will exceed the AEL in FY 2023, APP 48¹ ¶¶ 9, 11; and
- Prop. 208 will generate significant revenue in FY 2023, *id.* ¶ 10.

¹ “APP” refers to the sequentially numbered appendix submitted with this filing, pursuant to Arizona Rule of Procedure for Special Action 7(e).

With the entry of that stipulation, the superior court's task changed from the discretionary work of administering a trial to the ministerial duty of entering judgment in Plaintiffs' favor. Yet the superior court has refused to do so, in spite of all parties' request for expedited ruling by January 21 and the State Defendants' subsequent request for expedited consideration. In fact, the superior court conducted a status conference on February 7, 2022 under the mistaken view that there is something left to adjudicate. The court announced an intention to take 60 days to render a decision and teased the possibility of further proceedings to weigh experts' credibility. None of that makes sense in light of the stipulation.

Not only is this stalling an abuse of the remand from this Court, but it now poses serious harm to the State. The other branches of government face a pair of looming deadlines. First, with non-Prop. 208 funds set to exceed the AEL, the legislature must consider whether to increase the AEL for non-Prop. 208 funds. Ariz. Const. art. IX, § 21(3). Second, the Legislature must adopt a budget by July 1. Ariz. Const. art. IX, § 4. These important legislative and executive functions are clouded by uncertainty regarding the fate of Prop. 208 and whether massive sums of money must be sequestered in its segregated fund. What was urgent when this Court accepted transfer a year ago is now on the verge of a crisis.

This Court should accept special action jurisdiction and enter the injunction that is due.

JURISDICTIONAL STATEMENT

Special action jurisdiction exists over this matter because the issue of the superior court's jurisdiction on remand would traditionally have been addressed through writs of mandamus or prohibition. Ariz. R.P. Spec. Act. 1(a) (*Blende v. Stanford*, 98 Ariz. 251, 253 (1965)); *see also id.* Ariz. R.P. Spec. Act. 3(a), (b) (discussing actions in excess of jurisdiction).

ISSUE PRESENTED

1. In light of the parties' stipulation that Prop. 208 will more likely than not result in accumulation of funds that cannot be spent, are Plaintiffs entitled to a declaration that Prop. 208 is unconstitutional and a permanent injunction to enjoin its implementation and enforcement?

FACTUAL BACKGROUND

In the interest of efficiency, Plaintiffs summarize only the salient events and evidence since this Court remanded the case last summer.

Based on the limited record at the preliminary injunction stage, this Court reserved judgment on whether Prop. 208 revenues could be spent without exceeding the AEL. It therefore remanded for a factual determination whether "A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit." *Fann*, 251 Ariz. at 440 ¶ 54. If so, it instructed the superior court to "declare Prop. 208 unconstitutional and enjoin its operation." *Id.*

Discovery on remand left so little doubt as to the accumulation of unspendable funds that the State of Arizona effectively switched sides—stipulating that the answer to the Court’s question was yes. APP 55–59. Even Intervenor admitted that school district revenues will exceed the AEL in FY 2023 *even without* Prop. 208 money, APP 48 ¶¶ 9–11, meaning that every dollar Prop. 208 generates will be “money that cannot be spent without violating the expenditure limit.” *Fann*, 251 Ariz. at 440 ¶ 54.

Quantifying these exceedances rests on projections from neutral government bodies and expert witnesses. Predictably, the parties submitted different estimates, but all projections answer this Court’s remand question in the affirmative. For example, JLBC Staff project that school districts’ spending will exceed the aggregate expenditure limit by \$1,268,027,600 in FY 2023, including an estimated \$368,995,200 in Prop. 208 revenues subject to the AEL. Plaintiffs’ expert projects a \$1,259,729,300 exceedance, including \$420,625,800 in Prop. 208 revenues subject to the AEL. Even Intervenor estimate that Prop. 208 will generate \$288,955,800 in FY 2023 and recognize that spending will exceed the AEL. The estimates differ, but they point to the same answer to this Court’s question on remand: yes, a material amount (in fact, 100%) of Prop. 208 spending that is subject to the AEL will be unspendable. It will simply accumulate in the segregated fund, while inflicting an immediate burden on taxpayers and the State’s other budget priorities.

In response to a motion by Defendant Arizona Department of Revenue (“ADOR”) for expedited consideration, the superior court held a status conference in which it declared that “I will get the decision out when I can get it out, and I hope that the policy makers can figure out how to, you know, how to work around what I’m doing” APP 133. The court indicated that it would take the full 60 days permitted by law, Ariz. Const. art. VI, § 21; Ariz. S. Ct. R. 91(e), and that it might even hold a trial following disposition of the parties’ cross motions for judgment. APP 134. Faced with endless proceedings that reveal a misunderstanding of the issue on remand, Plaintiffs filed this special action.

ARGUMENT

This Court’s remand defines the scope of the superior court’s jurisdiction. And it is narrow. In fact, this Court noted in August that, even without discovery, extant government documents “strongly suggest” that Prop. 208’s spending would more likely than not exceed the AEL. *Fann*, 251 Ariz. at 440 ¶ 53. With the parties’ stipulation that district expenditures will exceed the AEL without any additional money from Prop. 208 (and Prop. 208 will generate revenue), the *only* factual question within the superior court’s jurisdiction is now answered.

Special action jurisdiction is appropriate when “the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion,” or when “the defendant has proceeded or is

threatening to proceed without or in excess of jurisdiction or legal authority.” Ariz. R.P. Spec. Act. 3(a), (b). The need for special action review is all the more apparent in “cases that involve purely legal questions of statewide importance or that require an immediate and final resolution.” *City of Surprise v. Ariz. Corp. Comm’n*, 246 Ariz. 206, 209 ¶ 6 (2019).

“[T]he trial court’s jurisdiction on remand is delimited by the terms of the mandate.” *Harbel Oil Co. v. Superior Court*, 86 Ariz. 303, 306 (1959). Because this restriction is jurisdictional, “the lower court is bound to follow the law set forth in the appellate court’s opinion and to carry out the directions contained in the mandate, whether the lower court agrees or disagrees, approves or disapproves of the opinion and the mandate.” *Jordan v. Jordan*, 138 Ariz. 38, 43 (1982). Among the conduct that this rule proscribes is the addition of issues not remanded by the appellate court. Where that occurs, special action relief is appropriate: “It is a function of mandamus to prevent a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court.” *Blende*, 98 Ariz. at 253; *see generally Circle K Convenience Stores v. Phoenix*, 178 Ariz. 102, 103 (App. 1994) (explaining that special actions encompass traditional writs of mandamus).

Here, this Court’s instructions on remand were straightforward. It noted the limited record before it at the preliminary injunction stage and remanded for the superior court to answer whether “Prop. 208’s direct payments to school districts

under A.R.S. § 15-1281(D)(1), (2), and (3) . . . will in fact exceed the constitutional expenditure limitation.” *Fann*, 251 Ariz. at ¶ 52. Or, in the words of the mandate, the superior court had jurisdiction to “determine whether Prop. 208 revenues will exceed the expenditure limitation on local revenues in article 9, section 21 of the Arizona Constitution.” APP 34. The parties have now answered that question by stipulation (which reflects the overwhelming evidence in the record). As a result, the superior court has nothing to do but issue the injunction, as spelled out in this Court’s opinion.

Despite the stipulated resolution of the sole factual issue before it, the lower court refuses to enter the injunction. It has now been nearly six months since the remand and two months since the parties entered their joint stipulation on December 9, 2021. In that time, the parties have emphasized to the superior court the necessity of an expedited ruling for the sake of budgeting, governmental administration, and comity among the branches of government. The parties also submitted a scheduling proposal designed to ensure a decision by January 21 and even filed their response briefs early to help expedite a ruling. Still, the superior court has given no explanation for why it has not entered a permanent injunction.

If the superior court’s reasons for delay track Intervenor’s Motion for Judgment, then the lower court is “interposing unauthorized obstructions” by adding issues outside the remand. *Blende*, 98 Ariz. at 253. Briefly, Intervenor’s have

attempted to insert three issues well outside the scope of the remand. First, they argue that this Court *sub silentio* changed the burden of proof on remand from the preponderance standard applicable in civil cases generally to a new “certainty” standard based on the following sentence in the Court’s opinion: “we cannot with certainty decide whether Prop. 208 revenues will exceed the expenditure limit.” *Fann*, 251 Ariz. at 440 ¶ 54; APP 103, 117–18. That passing use of the word “certainty” did not change the burden of proof, as this Court knows, and did not expand the scope of the issue on remand.

Second, Intervenor attempt to bootstrap this manufactured new “certainty” standard into irrelevant questions about the *amount* by which districts’ spending will exceed the AEL—but without ever arguing that the facts to which they stipulated, and that answer the limited fact issue on remand, are not true. APP 108–15. Because Intervenor recognize that (1) district spending will more likely than not exceed the AEL before the inclusion of any Prop. 208 money and (2) Prop. 208 will generate funds subject to the AEL, the remaining dickering over whose estimates are more accurate is beyond the scope of this Court’s remand. As in *Blende*, where one party attempted to interject new issues on remand and the trial court went along with it, this expansion of jurisdiction is impermissible and should be corrected by special action. *Blende*, 98 Ariz. at 253; Ariz. R. Proc. Special Actions 3(a), (b).

Finally, Intervenors contend that even though school district revenues will exceed the AEL in FY 2023, other revenue sources will cause the exceedance, not Prop. 208. If that inquiry even makes sense—*i.e.*, which fungible dollar crosses the line and which dollars are simply over the limit because a different dollar crossed the line—it is far afield from this Court’s remand.

The remanded question is whether Prop. 208 will accumulate money that cannot be spent. *Fann*, 251 Ariz. at 440 ¶ 54. If so, Prop. 208’s spending mandate violates article IX, section 21 by requiring spending in excess of the AEL, and its attempt to exempt itself from that constitutional limit is invalid. And because Prop. 208’s taxing provisions cannot be severed from its unconstitutional spending mandate, the law as a whole is unconstitutional. *Id.* at ¶ 43. This Court has already done that analysis. What remains on remand is a simple factual question of whether Prop. 208 funds can be spent. The parties have stipulated that they cannot, and the superior court is not at liberty to explore other topics. Special action relief is appropriate to enforce the scope of the remand.

Plaintiffs and Defendant ADOR have explained on several prior occasions that this case raises legal issues of statewide importance. *See, e.g.*, Pet. for Transfer, *Fann v. State*, No. T-21-003, at 5 (Feb. 26, 2021). Last year, when Plaintiffs sought transfer of their appeal to this Court on grounds of statewide importance, the Governor and Treasurer filed an amicus brief detailing the importance of definitive

resolution. Br. of Amicus Gov. Doug Ducey, *Fann v. State*, No. T-21-003 (Mar. 2, 2021). Those considerations continue to apply with full force. But now the superior court’s delay has itself become a matter of statewide significance.

The subject of this appeal implicates the State’s budget, a familiar topic for extraordinary relief, including special actions. See *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485–86 ¶ 11 (2006) (accepting special action because the case required the Court to “construe the language of the constitution and declare what the constitution requires”). This Court’s solicitude for appeals that might reshape the budget makes sense in a system of divided government and mutual comity among the branches of government. Prompt resolution is needed so “the legislative and executive branches will know where they stand and can take such action as they determine necessary relative to budgetary matters.” *State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993) (accepting special action jurisdiction).

The other branches of government need clarity on whether they must account for a significant source of new earmarked funding that cannot revert to the general fund. The Legislature must adopt a budget for FY 2023 by the end of June. Ariz. Const. art. IX, § 4. But as Governor Ducey’s Budget Director, Matt Gress, testified before the Legislature just last week, that is impossible without knowing the fate of Prop. 208 and its massive tax-and-spend mandate: “There is significant uncertainty that comes along with this ruling hanging out there, and it could mean hundreds of

millions of dollars of shifts in our resource and spending plan. So, the executive cannot commence negotiations with the Legislature, until the 208 issue is resolved.” *Executive Budget Proposal by Governor’s Office of Strategic Planning and Budgeting Before the Joint Appropriations Comm.*, 55th Leg., 2d Reg. Sess. 9:48-11:05 (Ariz. 2022). The central issue is that Prop. 208 funds are earmarked and cannot be used for other purposes. Because personal income taxes in Arizona are capped at 4.5%, the Legislature needs to know whether the bulk of high-income Arizonans’ payments are available for the general fund or sequestered in Prop. 208’s unusable fund. S.B. 1828, 55th Leg., 1st Reg. Sess. (Ariz. 2021). Furthermore, Defendant ADOR must provide tax forms and later process tax returns, a task that varies with Prop. 208’s constitutionality, *vel non*.

None of this is news to the superior court. From the earliest days of the proceeding on remand, the government parties informed the court of their need for a decision by January 21, 2021. APP 23–24 (highlighting that timeline on Sept. 23, 2021), 75–76 (same on Dec. 9, 2021). More recently, ADOR moved for expedited consideration of the parties’ cross-motions for judgment, APP 123–26, which the superior court greeted with a status conference, APP 129–30, and a pledge to take the full 60 days permitted by the Constitution, thus further delaying the discharge of its non-discretionary duty to enter the permanent injunction. APP 134.

Adopting a budget and administering the collection of taxes are key responsibilities of the other branches of government, and the superior court's delay in entering the injunction impairs their ability to perform those functions. Consistent with this Court's long-standing concern for the other branches' constitutional duties, it should accept special action jurisdiction and provide a definitive answer to Prop. 208's vitality without delay.

As required by Special Action Rule 4(g), Plaintiffs hereby claim fees and costs pursuant to Arizona Rule of Civil Appellate Procedure 21, A.R.S. §§ 12-341, 12-348, 12-1840, 12-2030, and the private attorney general doctrine, *see Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989).

CONCLUSION

This Court should grant the Petition because the narrow issue it remanded to the superior court is now resolved by stipulation, yet the lower court refuses to enter an injunction. Its delay is a matter of statewide importance as the Legislature and Governor work to complete a budget for which Prop. 208 has massive implications. It is long past time for this litigation to conclude and a permanent injunction to issue.

//

//

//

Respectfully submitted this 8th day of February, 2022.

/s/ Dominic E. Draye

Dominic E. Draye
GREENBERG TRAURIG, LLP
2375 East Camelback Road
Phoenix, Arizona 85016

/s/ Timothy Sandefur (w/permission)

Timothy Sandefur
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004

/s/ Brett W. Johnson (w/permission)

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petition for Special Action complies with Ariz. R.P. Spec. Act. 7(e). The Petition is double-spaced, utilizes a proportionally spaced typeface of 14 points, and contains 2,888 words utilizing the word count of the word processing system used to prepare the Petition.

By: /s/ Dominic E. Draye

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Petition for Special Action was e-filed with the Clerk of the Arizona Supreme Court via AZTurboCourt on February 8, 2022, and that a copy was served via email and U.S. Mail on this same date, as follows:

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

Steve Tully
Tully Bailey LLP
4533 E. Desert Cove Avenue
Phoenix, AZ 85028
stully@tullybailey.com
Attorneys for Defendant-Real Party in Interest
Kimberly Yee, in her Official Capacity as Arizona State Treasurer

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

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 E. Camelback Road, Suite 200
Phoenix, AZ 85012

danny@aclpi.org

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

Logan Elia
John Sud
Audra Petrolle
Thomas Galvin
Rose Law Group PC
7144 E. Stetson Drive, Suite 300
Scottsdale, AZ 85251

lelia@roselawgroup.com

jsud@roselawgroup.com

apetrolle@roselawgroup.com

tgaltin@roselawgroup.com

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

The Honorable John Hannah
Maricopa County Superior Court
East Court Building
Room 811
101 W. Jefferson Street
Phoenix, AZ 85003

By: /s/ Carolyn Smith

APPENDIX

PETITION FOR SPECIAL ACTION

App. No.	Date Filed	Description	Page Number
1	9/23/2021	Second Supplemental Joint Report	21-32
2	11/9/2021	Mandate Remanding to the Superior Court	33-35
3	12/9/2021	Joint Request for Expedited Case Status Conference	36-43
4	12/9/2021	Joint Fact Stipulation	44-53
5	12/10/2021	Stipulation Regarding Aggregate Expenditure Limitation	54-70
6	12/30/2021	Plaintiffs' Motion for Judgment	71-92
7	12/30/2021	Arizona Department of Revenue's Separate Motion for Judgment and Partial Joinder in Plaintiffs' Motion	93-100
8	12/30/2021	Intervenor-Defendants' Motion for Entry of Judgment of Dismissal	101-121
9	1/25/2022	Arizona Department of Revenue's Request for Expedited Ruling	122-127
10	2/1/2022	Minute Entry Regarding Setting Status Conference	128-130
11	2/7/2022	Hearing Transcript February 7, 2022	131-134

APPENDIX 1

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

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
bwjohnson@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Jonathan Riches (#025712)
Timothy Sandefur (#033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, Arizona 85004
Telephone: (602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Fann et al. Plaintiffs

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

INVEST IN ARIZONA et al.,

Intervenor-Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

**SECOND SUPPLEMENTAL JOINT
REPORT**

(Assigned to the Hon. John Hannah)

Plaintiffs Karen Fann, Russell “Rusty” Bowers, David Gowan, Venden Leach, Regina Cobb, John Kavanagh, Montie Lee, Steve Pierce, Francis Surdakowski, No on 208, and Arizona Free Enterprise Club (collectively, the “Fann Plaintiffs”), Defendants State of Arizona and Arizona Department of Revenue; and Intervenor-Defendants Invest in Arizona (Sponsored by AEA and Stand for Children) and David Lujan hereby provide this Court with notice that the Arizona Supreme Court issued its opinion regarding the Fann Plaintiffs’ appeal of the denial of their Motion for Preliminary Injunction on August 19, 2021. A copy of that opinion is attached as **Exhibit 1** (hereinafter referred to as “Op.”).

As a result of this opinion, the parties have conferred and present the following supplemental joint report. The parties signing below certify that they have again conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters contained in Rule 16(b) and (3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. Each date in the Joint Report includes a calendar month, day, and year. The parties have set forth their agreements below and, where there were disagreements, have briefly set forth their positions.

1. Brief description of the case: Intervenor-Defendants Invest in Arizona (Sponsored by AEA and Stand for Children) and David Lujan are proponents of the “Invest in Education Act,” also known as Proposition (“Prop”) 208. Prop 208 imposes a 3.5% income tax surcharge on certain high earners to provide directed additional resources to Arizona’s public schools, as set forth in Prop 208.

Plaintiffs brought two separate lawsuits challenging the constitutionality of Prop 208. Both lawsuits have been consolidated before the Court. The Fann Plaintiffs brought claims alleging that Prop 208 is facially unconstitutional and sought to enjoin it from being implemented or enforced. The Eco-Chic Plaintiffs likewise sought a declaratory judgment that Prop 208 is facially unconstitutional. The Court denied the Fann Plaintiffs’ motion for preliminary injunction. The Fann Plaintiffs appealed the Court’s denial of their motion for preliminary injunction.

2. **Case Status:** On August 19, 2021, the Arizona Supreme Court issued its opinion affirming this Court’s denial of the Fann Plaintiffs’ request for a preliminary injunction. Op. at 3-4 ¶ 1. However, the Supreme Court held that “the direct funding provision does not fall within the constitutional definition of grants in article 9, section 21 of the Arizona Constitution, and Prop. 208 is therefore unconstitutional to the extent it mandates expending tax revenues in violation of the Education Expenditure Clause.” *Id.* Further, “the remaining non-revenue related provisions of Prop. 208 are not separately workable and thus not severable.” *Id.* The Supreme Court also held that “Prop. 208 does not violate article 9, section 22 of the Arizona Constitution . . . because that clause does not apply to voter initiatives.” *Id.* at 4 ¶ 2.

The Supreme Court remanded the case to this Court to determine whether “Prop. 208’s direct payments to school districts . . . will in fact exceed the constitutional expenditure limitation.” *Id.* at 21 ¶ 52. The Supreme Court further instructed:

If the trial court finds that the tax revenues allocated will not exceed the expenditure limit, then there is no present constitutional violation and Prop. 208 stands. However, if the trial court finds that A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit, it must declare Prop. 208 unconstitutional and enjoin its operation. Moreover, to further clarify this inquiry for the trial court, if any material amount of the Prop. 208 revenue is sequestered in a designated state fund because it cannot be spent due to the expenditure limit, then Prop. 208 in its entirety, is unconstitutional.

Id. at 22-23 ¶ 54. Accordingly, the parties agree to engage in limited expedited discovery on the factual issue identified by the Arizona Supreme Court. The burden of proof remains on Plaintiffs to prove their claims.

Furthermore, the Plaintiffs and the State Defendants concur that this matter should be expedited based on the factual finding that is before the Court. There is a currently a separate action, *Invest in Arizona v. State of Arizona*, CV2021-012451, that is challenging whether certain statutes entered into laws in this past legislative session impinge on

Proposition 208 and, therefore, violate the Voter Protection Act. Pursuant to a stipulation by the parties to that action, the court entered a stay of all proceedings pending the resolution of this case.

Although Plaintiffs believe that sufficient evidence exists now for purposes of the remand, the Intervenor-Defendants seek time for additional data points to become available in order to provide the best information to the Court.

The State Defendants desire that the matter be resolved as quickly as possible, so that the Department and taxpayers have clear direction before Proposition 208 taxes must be paid and collected.

3. Tier: The parties agree this case qualifies as a Tier 2 case and believe the discovery limits are sufficient, except that each side may propound in this action on remand the number of discovery requests allowed for a Tier 2 case without regard to the discovery requests propounded before the appeal to the Arizona Supreme Court. The parties further agree that factual discovery in this matter should be limited and reasonable in light of the fact issue presented by Plaintiffs' remaining claim as identified by the Arizona Supreme Court. If the parties disagree regarding the reasonableness or scope of any discovery, they agree to confer in good faith and can seek the Court's intervention if necessary.

4. Initial Disclosures: The parties exchanged initial disclosure statements on April 12, 2021.

5. Amendments: No party anticipates filing an amendment to a pleading that will add a new party to the case.

6. Close of Discovery: Discovery shall be completed no later than **December 17, 2021**. The last date to propound written discovery will be **November 5, 2021**. The last date to complete depositions will be **December 16, 2021**. The close of discovery date includes completion of all written discovery and depositions, and final supplementation of discovery, including Rule 26.1 Disclosures.

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or on-the-record agreement of the parties.

7. Expert Disclosures (limited to the sole issue of whether the expenditure cap, correctly calculated, will be exceeded):

a. Exchange of supplemental expert disclosures due date: **November 12, 2021.**

b. Exchange of rebuttal expert disclosure due date: **December 3, 2021.**

8. Dispositive Motions: The parties agree that dispositive motions shall be waived.

9. Settlement: The parties do not believe that settlement discussions would be fruitful in this consolidated case that seeks a declaration of unconstitutionality and a permanent injunction of Prop 208.

10. Readiness: This case will be ready for a trial by: **January 12, 2022.**

11. Jury: None of the parties have requested a jury trial, and there is no right to a jury trial.

12. Length of Trial: The estimated length of trial is **one (1)** day.

13. Preference: This case is not entitled to a preference for trial pursuant to any statute or rule.

14. Special Requirements: At a pretrial conference or at trial, a party will not require any accommodation.

15. Scheduling Conference: A scheduling conference is set for **September 28, 2021** at 8:30 a.m.

16. Other Matters: There is a pending Motion for Recusal, filed by the Fann Plaintiffs on September 2, 2021, and served on the parties, Judge Hannah, presiding judge, and court administrator on September 7, 2021. Intervenor-Defendants responded on September 7, 2021 and the Fann Plaintiffs' replied on September 10, 2021.

Position of State Defendants: Although the State Defendants agree to the above schedule, they submit the following statement regarding why they desire a quick resolution. Intervenor Defendants received the statement for the first time in the late afternoon on the date this Statement was due, and have had no ability to substantively address any of the following statements. However, Intervenor Defendants can only state that all parties have agreed to the above schedule, and do not believe this is the place to address the substantive issues described below.

The State Defendants' desire to resolve this matter quickly is driven by the following factors and timeline.

- Although the earliest due date for Arizona individual income tax filers is April 18, 2022, in order to allow Arizona to roughly match the timeline for federal income tax filing (required because an individual's federal adjusted gross income is the starting point for calculating Arizona income tax liability), the Arizona Department of Revenue ("ADOR") must "go live" for the filing season on or around **January 22, 2022**.
- If no determination regarding Prop 208's constitutionality is made before **January 24, 2022**, Arizona income tax forms (and the approximately 40 software vendors that offer electronic filing services for Arizona income tax to taxpayers) will provide for the surcharge. Taxpayers then will be allowed to file and pay the surcharge. Should the surcharge later be determined to be unconstitutional, this would create a tremendous logistical challenge for ADOR to devise a lawful and administratively feasible mechanism for accessing and refunding monies taxpayers have paid toward the surcharge.
 - Among one of the more difficult challenges that would face ADOR is the fact that once monies are deposited into the Student Support and Safety Fund, there is no statutory mechanism allowing the Treasurer to withdraw surcharge monies from the fund to fulfill refunds.

- ADOR also will need to determine whether the onus should be put on taxpayers to amend their returns or if the agency will bear the financial and technical challenges to develop an IT solution to do internal adjustments.
- Devising a workable solution that will not create unreasonable delays in processing refunds for taxpayers will thus be difficult—and increasingly so—the longer it must await a final decision.

Consequently, the State Defendants are amenable to any schedule that can reasonably lead to a merits determination as quickly as possible.

17. Items upon which the parties do not agree: Other than what is specifically stated above, the parties do not have any items regarding which they were unable to reach agreement.

18. Proposed Orders. The parties have lodged a proposed order effectuating this agreement.

DATED this 23rd day of September, 2021.

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

GREENBERG TRAURIG, LLP

By: /s/ Dominic E. Draye (with permission)

Dominic E. Draye
2375 East Camelback Road
Phoenix, Arizona 85016

GOLDWATER INSTITUTE

By: /s/ Jonathan Riches (with permission)

Jonathan Riches
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004

Attorneys for Fann et al. Plaintiffs

BERGIN, FRAKES, SMALLEY &
OBERHOLTZER

By: /s/ Brian Bergin (w/permission)

Brian Bergin
Kevin Kasarjian
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018

*Attorneys to Defendants State of Arizona,
Arizona Department of Revenue, and Carlton
Woodruff, Director of Arizona Department of
Revenue*

COPPERSMITH BROCKELMAN PLC

ARIZONA CENTER FOR LAW IN THE PUBLIC
INTEREST

By: By: /s/ Daniel J. Adelman (w/permission)

Roopali H. Desai
D. Andrew Gaona
Kristen Yost
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004

Daniel J. Adelman
352 East Camelback Road, Suite 200
Phoenix, AZ 85012

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

ORIGINAL of the foregoing served via email this 23rd day of September, 2021:

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

*Attorneys to Defendants State of Arizona,
Arizona Department of Revenue, and Carlton
Woodruff, Director of Arizona Department of
Revenue*

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

*Attorneys to Defendant Kimberly Yee, in her
official capacity as Arizona State Treasurer*

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

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

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

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

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

/s/ Richard A. Schaan

APPENDIX 2

SUPREME COURT OF ARIZONA

KAREN FANN, et al.,	)	Arizona Supreme Court
	)	No. CV-21-0058-T/AP
Plaintiffs/Appellants,)	
	)	Court of Appeals
v.	)	Division One
	)	No. 1 CA-CV 21-0087
STATE OF ARIZONA, et al.,)	
	)	Maricopa County
Defendants/Appellees.	)	Superior Court
	)	Nos. CV2020-015495
	)	CV2020-015509
INVEST IN ARIZONA, et al.,)	
)	
Intervenors/Appellees.)	
)	

MANDATE REMANDING TO THE SUPERIOR COURT

TO: Maricopa County Superior Court, Arizona,
in relation to Cause No. CV2020-015495 AND CV2020-015509

The above entitled and numbered case was presented in your court and was brought before the Court of Appeals, Division One, No. 1 CA-CV 21-0087, in the manner prescribed by law. A petition for transfer was granted by this Court on March 4, 2021.

This Court, having considered the case, filed its opinion on August 19, 2021, affirming the trial court's denial of a preliminary injunction enjoining Prop. 208 and remanding to the trial court for further proceedings to determine whether Prop. 208 revenues will exceed the expenditure limitation on local revenues in article 9, section 21 of the Arizona Constitution.

The time for filing a motion for reconsideration has expired and no motion was filed.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be held

in said case as shall be required to comply with this Court's opinion
(copy attached to this mandate).

IN WITNESS WHEREOF, I set my hand and affix the seal of the
Supreme Court of the State of Arizona this 9th day of November, 2021.



_____/s/
Tracie K. Lindeman
Clerk of the Court

APPENDIX 3

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

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
bwjohnson@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Attorneys for Fann et al. Plaintiffs

Jonathan Riches (#025712)
Timothy Sandefur (#033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, Arizona 85004
Telephone: (602) 462-5000
litigation@goldwaterinstitute.org

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

INVEST IN ARIZONA et al.,

Intervenor-Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

**JOINT REQUEST FOR EXPEDITED
CASE STATUS CONFERENCE**

(Assigned to the Hon. John Hannah)

1 In light of the joint statement of stipulated facts filed by Plaintiffs Karen Fann,
2 Russell “Rusty” Bowers, David Gowan, Venden Leach, Regina Cobb, John Kavanagh,
3 Montie Lee, Steve Pierce, Francis Surdakowski, No on 208, and Arizona Free Enterprise
4 Club (collectively, the “Fann Plaintiffs”), Plaintiffs Eco-Chic Consignment, Inc., Ann
5 Siner, and John Buttrick (collectively, the “Eco-Chic Plaintiffs”), Defendants State of
6 Arizona and Arizona Department of Revenue (collectively, the “State Defendants”); and
7 Intervenor-Defendants Invest in Arizona (Sponsored by AEA and Stand for Children) and
8 David Lujan (collectively, “IIA”), the parties respectfully request an expedited case status
9 conference to discuss the Court’s adjudication of the case.

10 It is the parties’ position that the joint statement of stipulated facts, filed
11 contemporaneously, obviates the need for further depositions. The parties waive their right
12 to an evidentiary hearing on the matter. **As a result, the parties respectfully request that**
13 **this court vacate the evidentiary hearing, and adjudicate this case through motion**
14 **practice.**

15 * * *

16 The parties propose the following briefing schedule:

- 17 1. Simultaneous motions for judgment, maximum 17 pages in length exclusive
18 of any exhibits, due on December 30, 2021;
- 19 2. Simultaneous responses, maximum 17 pages in length exclusive of any
20 exhibits, due on January 13, 2022;
- 21 3. The parties waive replies and oral argument, unless requested by the Court;
22 and
- 23 4. The parties respectfully request a Rule 54(b) signed judgment.

24 * * *

1 **State Defendants’ Position re Timing of Ruling:**

2 As previously noted, the State Defendants desire to resolve this matter quickly,
3 which is driven by the following factors and timeline.

- 4 • Although the earliest due date for Arizona individual income tax filers is April 18,
5 2022, in order to allow Arizona to roughly match the timeline for federal income tax
6 filing (required because an individual’s federal adjusted gross income is the starting
7 point for calculating Arizona income tax liability), the Arizona Department of
8 Revenue (“ADOR”) must "go live" for the filing season on or around **January 22,**
9 **2022.**
- 10 • If no determination regarding Prop 208’s constitutionality is made before **January**
11 **24, 2022,** Arizona income tax forms (and the approximately 40 software vendors that
12 offer electronic filing services for Arizona income tax to taxpayers) will provide for
13 the surcharge. Taxpayers then will be allowed to file and pay the surcharge. Should
14 the surcharge later be determined to be unconstitutional, this would create a
15 tremendous logistical challenge for ADOR to devise a lawful and administratively
16 feasible mechanism for accessing and refunding monies taxpayers have paid toward
17 the surcharge.
 - 18 ○ Among one of the more difficult challenges that would face ADOR is the fact
 - 19 that once monies are deposited into the Student Support and Safety Fund,
 - 20 there is no statutory mechanism allowing the Treasurer to withdraw surcharge
 - 21 monies from the fund to fulfill refunds.
 - 22 ○ ADOR also will need to determine whether the onus should be put on
 - 23 taxpayers to amend their returns or if the agency will bear the financial and
 - 24 technical challenges to develop an IT solution to do internal adjustments.
- 25 • Devising a workable solution that will not create unreasonable delays in processing
26 refunds for taxpayers will thus be difficult—and increasingly so—the longer it must
27 await a final decision.

28 **No party objects to the Court rendering a ruling by January 21, 2022.**

1
2 The parties also respectfully request that the court vacate the remaining dates and
3 obligations from the following orders:

4 1. Minute Entry setting the evidentiary hearing and related deadlines, filed
5 September 30, 2021; and

6 2. Supplemental Scheduling Order setting discovery related deadlines, filed
7 September 28, 2021.

8 DATED this 9th day of December, 2021.

9 SNELL & WILMER L.L.P.

10 By: /s/ Brett W. Johnson

11 Brett W. Johnson
12 Colin P. Ahler
13 Tracy A. Olson
14 One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

15 GREENBERG TRAURIG, LLP

16 By: /s/ Dominic E. Draye (with permission)

17 Dominic E. Draye
18 2375 East Camelback Road
Phoenix, Arizona 85016

19 GOLDWATER INSTITUTE

20 By: /s/ Jonathan Riches (with permission)

21 Jonathan Riches
22 Timothy Sandefur
23 500 E. Coronado Rd.
Phoenix, Arizona 85004

24 *Attorneys for Fann et al. Plaintiffs*
25
26
27
28

ROSE LAW GROUP PC

By: /s/ Logan Elia (with permission)

Logan Elia
John Sud
Audra Petrolle
Thomas Galvin
7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251

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

BERGIN, FRAKES, SMALLEY &
OBERHOLTZER

By: /s/ Brian Bergin (w/permission)

Brian Bergin
Kevin Kasarjian
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018

*Attorneys to Defendants State of Arizona,
Arizona Department of Revenue, and Carlton
Woodruff, Director of Arizona Department of
Revenue*

COPPERSMITH BROCKELMAN PLC

ARIZONA CENTER FOR LAW IN THE PUBLIC
INTEREST

By: By: /s/ Daniel J. Adelman (w/permission)

Roopali H. Desai
D. Andrew Gaona
Kristen Yost
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004

Daniel J. Adelman
352 East Camelback Road, Suite 200
Phoenix, AZ 85012

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

1 ORIGINAL of the foregoing efiled, eserved and
2 emailed this 9th day of December, 2021:

3 Brian Bergin
4 Kevin Kasarjian
5 Bergin, Frakes, Smalley & Oberholtzer
6 4343 East Camelback Road, Suite 210
7 Phoenix, AZ 85018
8 bbergin@bfsolaw.com
9 kkasarjian@bfsolaw.com

7 *Attorneys to Defendants State of Arizona,*
8 *Arizona Department of Revenue, and Carlton*
9 *Woodruff, Director of Arizona Department of Revenue*

9 Stephen W. Tully
10 Tully Bailey LLP
11 4533 E. Desert Cove Avenue
12 Phoenix, AZ 85028
13 stully@tullybailey.com

12 *Attorneys to Defendant Kimberly Yee, in her*
13 *official capacity as Arizona State Treasurer*

14 Roopali H. Desai
15 D. Andrew Gaona
16 Kristen Yost
17 Coppersmith Brockelman PLC
18 2800 North Central Avenue, Suite 1900
19 Phoenix, AZ 85004
20 rdesai@cblawyers.com
21 agaona@cblawyers.com
22 kyost@cblawyers.com

19 Daniel J. Adelman
20 Arizona Center for Law in the Public Interest
21 352 East Camelback Road, Suite 200
22 Phoenix, AZ 85012
23 danny@aclpi.org

22 *Attorneys for Intervenor-Defendants Invest in Education*
23 *(Sponsored by AEA and Stand for Children) and David Lujan*

23 Logan Elia
24 John Sud
25 Audra Petrolle
26 Thomas Galvin
27 Rose Law Group PC
28 7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251
lelia@roselawgroup.com
jsud@roselawgroup.com
apetrolle@roselawgroup.com

1 tgalvin@roselawgroup.com
2 *Attorneys for Plaintiffs Eco-Chic*
3 *Consignment, Inc., Ann Siner, and*
4 *John Buttrick*

5 /s/ Tracy Hobbs
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX 4

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

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
bwjohnson@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Jonathan Riches (#025712)
Timothy Sandefur (#033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, Arizona 85004
Telephone: (602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Fann et al. Plaintiffs

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

INVEST IN ARIZONA et al.,

Intervenor-Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

JOINT FACT STIPULATION

(Assigned to the Hon. John Hannah)

Plaintiffs Karen Fann, Russell “Rusty” Bowers, David Gowan, Venden Leach, Regina Cobb, John Kavanagh, Montie Lee, Steve Pierce, Francis Surdakowski, No on 208, and Arizona Free Enterprise Club (collectively, the “Fann Plaintiffs”), Plaintiffs Eco-Chic Consignment, Inc., Ann Siner, and John Buttrick (collectively, the “Eco-Chic Plaintiffs”), Defendants State of Arizona and Arizona Department of Revenue (collectively, the “State Defendants”); and Intervenor-Defendants Invest in Arizona (Sponsored by AEA and Stand for Children) and David Lujan (collectively, “IIA”) hereby provide this Court with a joint statement of stipulated facts:

1. On August 19, 2021, the Arizona Supreme Court remanded this case to this Court for further proceedings on the Fann Plaintiffs’ claim that Proposition 208 violates article IX, section 21 of the Arizona Constitution, and must be enjoined in its entirety.

2. The Supreme Court described this Court’s task as follows:

To the extent they exceed the constitutional expenditure limitations, Prop. 208’s direct payments to school districts under A.R.S. § 15-1281(D)(1), (2), and (3) are unconstitutional, and these provisions are not severable from the remainder of Prop. 208. However, the record before this Court is insufficient to establish whether such payments will in fact exceed the constitutional expenditure limitation.

In a letter to certain legislator-plaintiffs, Superintendent of Public Instruction Hoffman explained that current “aggregate expenditures of local monies for all school districts is \$6,165,430,899 for fiscal year 2020–21,” but the “aggregate expenditure limitation for all school districts [is] \$6,309,587,438,” leaving just a \$144,156,539 gap between school expenditures and their expenditure limit. Thus, if the expenditure limit remains at current levels, Prop. 208’s projected \$827 million in revenues will far outpace its permissible spending, even accounting for Prop. 208 expenditures that are not subject to the expenditure limit. Furthermore, the EEC projects that the expenditure limit amount will decrease by 4.6%, or approximately \$300,000,000. *See* EEC, Feb. 24, 2021 Letter to Governor Ducey, https://azdor.gov/sites/default/files/media/REPORTS_ESTIMATES_2022_SchoolDist-Feb21.pdf. These facts strongly suggest that Prop. 208 will produce far more revenue than it can constitutionally spend. Invest in Education takes a contrary position.

In any event, there is no record before the Court upon which we can make such a determination. Citing a lack of “expertise on school finance,” and the need for an evidentiary hearing, the trial court had no opportunity to determine whether Prop. 208 funds might exceed the expenditure limit. Based on the limited record before us, it appears that Prop. 208 funds *could* likely exceed the constitutional spending limitation placed on school districts. However, we cannot with certainty decide whether Prop. 208 revenues *will* exceed the expenditure limit. Therefore, we remand to the trial court for a

determination of this issue. If the trial court finds that the tax revenues allocated will not exceed the expenditure limit, then there is no present constitutional violation and Prop. 208 stands. However, if the trial court finds that A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit, it must declare Prop. 208 unconstitutional and enjoin its operation. Moreover, to further clarify this inquiry for the trial court, if any material amount of the Prop. 208 revenue is sequestered in a designated state fund because it cannot be spent due to the expenditure limit, then Prop. 208, in its entirety, is unconstitutional. *See Material*, Black’s Law Dictionary (11th ed. 2019) (defining “material” as “[o]f such a nature that knowledge of the item would affect a person’s decision-making; significant; essential”).

Fann v. State, 251 Ariz. 425 ¶¶ 52-54 (2021).

3. No revenues from Proposition 208 will be budgeted or spent in FY 2022. The first year that Proposition 208 revenues could be budgeted or spent by school districts is in FY 2023.

4. The Fann Plaintiffs’, Eco-Chic Plaintiffs’ and ADOR’s position is that the sole question on remand is whether in FY 2023 school district spending will exceed the aggregate expenditure limit (“AEL”) and result in the accumulation of a material amount of Proposition 208 revenues that cannot be spent.

5. The AEL for FY 2023 will be calculated based on two primary variables: the GDP implicit price deflator for CY 2021 (which is updated in May 2022), and the final student population numbers for school district for the 2021-2022 school year (which will not be known until approximately May 2022). Joint Legislative Budget Committee’s (“JLBC”) Staff utilized a GDP implicit price deflator estimate for CY 2021 as of Q2 equal to 3.68% and JLBC has not obtained a more recent estimate. According to Arizona Department of Education (“ADE”), the most recent student population numbers for school district 2021-2022 equals 877,636, which represents a 2.3% increase in the student population numbers compared to the same statistic at the same time last year.

6. ADE has determined that school district spending will exceed the AEL in FY 2022. Specifically, ADE determined that for FY 2022, school district spending subject to the AEL will equal \$7,173,667,189, which will cause a \$1,154,028,997 exceedance over the FY 2022 AEL (\$6,019,638,192). One significant source of the exceedance is that

Classroom Site Fund dollars (often referred to as “Proposition 301” monies), which had not previously counted toward the AEL pursuant to an exception in article 9, section 21(4)(d)(v), now will count toward the AEL. According to the JLBC’s Staff Analysis, this adds approximately \$632 million in FY 2022 and \$660 million in FY 2023 to the total amount of monies provided to school districts that qualify as “local revenues.” The Fann Plaintiffs and Eco-Chic Plaintiffs contend that because the FY 2022 exceedance (\$1.154 billion) is greater than the total Classroom Site Fund (\$632 million), school district spending would still exceed the AEL in FY 2022 and more likely than not exceed the AEL in FY 2023 even if the Classroom Site Fund monies were not included.

7. IIA asserts that monies formerly known as “capital levy” monies should still be exempted from the aggregate expenditure limit under article 9, section 21(4)(d)(ii). If this assertion was accepted, the parties agree that the amounts attributable to the former capital levy would equal roughly \$200 million in FY 2022 and FY 2023.

8. JLBC’s Staff analysis and expert reports put forward by the Fann Plaintiffs, both project that school district spending will exceed the AEL in FY 2023 even without consideration of any revenues from Proposition 208.

9. IIA and ADOR do not contest that, based on current projections, it is more likely than not that school district spending will exceed the AEL in 2023, regardless of whether the amounts attributable to the former capital levy are excluded, and without consideration of any revenues from Proposition 208.

10. There is uncertainty regarding the specific amount of revenue that would be collected pursuant to the Proposition 208 surcharge in calendar year 2021 and in future years. Despite such uncertainty, the parties agree that it is certain that Proposition 208 will generate revenue.

11. Based on current projections, IIA and ADOR do not contest that school districts’ budgeted expenditures for FY 2023 will more likely than not exceed the AEL without consideration of any revenues from Proposition 208.

12. IIA believes that the *Fann* opinion is not clear on the percentage of Proposition 208 revenues that qualify as “local revenues” for purposes of the AEL, and thus for performing the calculation described in the opinion. Paragraph 30 of the opinion holds that the term “grants” as used in the Grant Exception (article IX, section 21(4)(d)(v)) refers only to private contributions provided to school districts. Yet footnote 8 of the opinion says that “[t]welve percent of Prop. 208 monies qualify for the Grant Exception [in addition to the funds that will be distributed to charter schools],” in reference to Proposition 208 monies that go to the Career Training and Workforce Fund to be provided as grants to school districts (*i.e.*, non-private monies). *See* A.R.S. §§ 15-1282, 15-1283. IIA believes clarification by the Supreme Court is warranted on this point. It is the Fann Plaintiffs’, Eco-Chic Plaintiffs’, and ADOR’s position that this issue is not on remand and any alleged ambiguity will not affect the Court’s ability to answer the only question on remand.

13. The parties agree that the trial court may consider these joint statements of fact in rendering its decision.

14. The parties agree that the following non-exclusive list of documents may be considered by the Court in reaching its decision, and that no hearsay objections will be asserted to the following documents:

- a. Steve Schimpp’s Expert Reports;
- b. Gary Liddicoat’s Expert Report;
- c. The proffered opinions of Chuck Essigs, as previously disclosed by Intervenor-Defendants;
- d. November 1, 2021 ADE Letter, FANN004176;
- e. JLBC Staff Analysis, IIE00357-787;
- f. ADE’s November 2, 2021 Average Daily Membership Update, ADE797-803; and
- g. JLBC Deposition transcript excerpts.

DATED this 9th day of December, 2021.

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

GREENBERG TRAURIG, LLP

By: /s/ Dominic E. Draye (with permission)

Dominic E. Draye
2375 East Camelback Road
Phoenix, Arizona 85016

GOLDWATER INSTITUTE

By: /s/ Jonathan Riches (with permission)

Jonathan Riches
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004

Attorneys for Fann et al. Plaintiffs

ROSE LAW GROUP PC

By: /s/ Logan Elia (with permission)

Logan Elia
John Sud
Audra Petrolle
Thomas Galvin
7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251

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

BERGIN, FRAKES, SMALLEY &
OBERHOLTZER

By: /s/ Brian Bergin (w/permission)

Brian Bergin
Kevin Kasarjian
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018

*Attorneys to Defendants State of Arizona,
Arizona Department of Revenue, and Carlton
Woodruff, Director of Arizona Department of
Revenue*

COPPERSMITH BROCKELMAN PLC

ARIZONA CENTER FOR LAW IN THE PUBLIC
INTEREST

By: By: /s/ Daniel J. Adelman (w/permission)

Roopali H. Desai
D. Andrew Gaona
Kristen Yost
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004

Daniel J. Adelman
352 East Camelback Road, Suite 200
Phoenix, AZ 85012

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

ORIGINAL of the foregoing served via email this 9th day of December, 2021:

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

*Attorneys to Defendants State of Arizona,
Arizona Department of Revenue, and Carlton
Woodruff, Director of Arizona Department of
Revenue*

Stephen W. Tully
Tully Bailey LLP
4533 E. Desert Cove Avenue
Phoenix, AZ 85028
stully@tullybailey.com

*Attorneys to Defendant Kimberly Yee, in her
official capacity as Arizona State Treasurer*

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

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

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

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

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

/s/ Abigail Bahorich

APPENDIX 5

Brian Bergin, SBN #016375
Kevin Kasarjian, SBN #020523
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Telephone: (602) 888-7855
Facsimile: (602) 887-7856
bbergin@bfsolaw.com
kkasarjian@bfsolaw.com

*Attorneys for Defendants State of Arizona,
Arizona Department of Revenue*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

**STIPULATION REGARDING
AGGREGATE EXPENDITURE
LIMITATION**

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

(Assigned to the Hon. John Hannah)

INVEST IN EDUCATION et al.,

Intervenor-Defendants.

Defendants Arizona Department of Revenue (“ADOR”), Plaintiffs Karen Fann, Russell “Rusty” Bowers, David Gowan, Venden Leach, Regina Cobb, John Kavanagh, Montie Lee, Steve Pierce, Francis Surdakowski, No on 208, and Arizona Free Enterprise Club (collectively, the “Fann Plaintiffs”), and Plaintiffs Eco-Chic Consignment, Inc., Ann Siner, and John Buttrick (collectively the “Eco-Chic Plaintiffs”) hereby stipulate to the following facts:

The Arizona Supreme Court Opinion

1. On August 19, 2021, the Arizona Supreme Court issued its opinion related to the Fann Plaintiffs’ intermediate appeal. *Fann v. State*, 251 Ariz. 425 (2021). In relevant part, the Court held:

¶ 52 To the extent they exceed the constitutional expenditure limitations, Prop. 208’s direct payments to school districts under A.R.S. § 15-1281(D)(1), (2) and (3) are unconstitutional, and these provisions are not severable from the remainder of Prop. 208. However, the record before this Court is insufficient to establish whether such payments will in fact exceed the constitutional expenditure limitation.

. . . .

¶ 54 . . . Therefore, we remand to the trial court for a determination of this issue. If the trial court finds that the tax revenues allocated will not exceed the expenditure limit, then there is no present constitutional violation and Prop. 208 stands. However, if the trial court finds that A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit, it must declare Prop. 208 unconstitutional and enjoin its operation. Moreover, to further clarify this inquiry for the trial court, if any material amount of the Prop. 208 revenue is sequestered in a designated state fund because it cannot be spent due to the expenditure limit, then Prop. 208, in its entirety, is unconstitutional. . . .

Id. at *11 ¶¶ 52, 54.

JLBC and ADE Calculations

2. The Joint Legislative Budget Committee (“JLBC”) is a non-partisan committee responsible for “ascertaining facts and making recommendations to the Legislature regarding all facets of the state budget, state revenues and expenditures, future fiscal needs, and the organization and functions of state government.” *About JLBC/JCCR*, JLBC, <https://www.azleg.gov/jlbc/aboutjlb.htm>. The State of Arizona and its agencies and

departments regularly rely on JLBC forecasts and estimates in annual budgetary planning, taxation, and appropriations.

3. In September 2021, JLBC released a JLBC Staff Analysis of K-12 Aggregate Expenditure Limit, attached as **Exhibit A**.

4. Exhibit A demonstrates JLBC's conclusion that the income tax surcharge in A.R.S. § 15-1281(D) will result in an accumulation of money that cannot be spent without violating the expenditure limit in FY 2022 and FY 2023 and cannot supplant other sources of education funding.

5. Specifically, for FY 2022, JLBC noted that the Economic Estimates Commission ("EEC") has calculated the Aggregate Expenditure Limit ("AEL") to be \$6,019,979,900. Ex. A. For the same year, JLBC projected that the total amount of estimated expenditures subject to the AEL in FY 2022 will equal \$7,263,934,700 resulting in an AEL exceedance of \$1,243,954,800.

6. Unlike JLBC, ADOR and EEC do not make any further calculations related to school district expenditures apart from setting the preliminary and final AEL.

7. On November 1, 2021, the Arizona Department of Education sent a letter to President Fann, Speaker Bowers, and Chairman Gowan, attached as **Exhibit B**.

8. Generally consistent with JLBC's projection, this letter reported that "the aggregate expenditures of local revenues for all school districts . . . is \$7,173,667,1⁸⁹ for fiscal year 2021-22 Therefore, the aggregate expenditures of local revenues exceed by \$1,154,028,997 the aggregate expenditure limitation for all school districts of \$6,019,638,192, as determined by the Economic Estimates Commission" *Id.*

9. For FY 2023—the first full fiscal year in which Prop. 208 revenues will be realized, JLBC projected that AEL will equal \$6,529,652,600. Ex. A. JLBC also estimated that the total amount of estimated expenditures subject to the AEL in FY 2023 will equal \$7,797,680,200—\$368,995,200 of which is attributable to Prop. 208's income tax surcharge. *Id.*

10. As a result, JLBC projects that, in FY 2023, school district expenditures exceed the AEL by \$1,268,027,600. *Id.* Pursuant to Prop. 208, these monies cannot supplant other sources of educational funding.

11. JLBC explains that, as a result of its “methodology for prior years,” its estimate of the total amount of estimated school district expenditures subject to the AEL does not include the “amounts budgeted for grant programs funded with state monies” even though they likely do not “qualify for exclusion as a grant based on the *Fann* court decision.” *Id.*

12. As such, JLBC concludes that its estimate of the total amount of school district expenditures subject to the AEL and the AEL exceedance is understated.

13. Based on JLBC’s analysis, 100% of the projected \$368,995,200 in revenue from Prop. 208’s income tax surcharge will result in the accumulation of money that cannot be spent. *Id.*

14. Based on these projections and the best available data, Plaintiffs and the ADOR stipulate that it is more likely than not that school district expenditures will clearly exceed the AEL in FY 2023. ADOR reaches this conclusion based on: (a) its routine and regular reliance upon JLBC’s expertise in producing forecasts and estimates involving school district expenditures, which ADOR does not separately produce, and (b) ADOR’s lack of subject matter expertise in school district expenditures.

15. Based on these projections and the best available data, it is more likely than not that a material amount, if not all, of Prop. 208’s revenues will result in the accumulation of money that cannot be spent under the AEL and cannot be offset by other educational funding sources that are not utilized, as required by Prop. 208. ADOR reaches this conclusion based on: (a) its routine and regular reliance upon JLBC’s expertise in producing forecasts and estimates involving school district expenditures, which ADOR does not separately produce, and (b) ADOR’s lack of subject matter expertise in school district expenditures.

ADOR and Taxpayer Interests Favor a Timely Ruling

16. It is in ADOR's, and individual taxpayers', interests to resolve this matter as quickly as possible, but no later than January 21, 2021.

17. Notwithstanding the fact that individual income tax filings are not due until April 18, 2021, ADOR's income tax filing season for FY 2021 will "go live" on or around January 22, 2022.

18. If this Court does not make a determination regarding Prop. 208's constitutionality before January 24, 2022, Arizona income tax forms (and the approximately 40 software vendors that offer electronic filing services for Arizona income tax to taxpayers) will provide for the surcharge.

19. If Arizona tax forms provide for the surcharge, taxpayers then will be allowed to file and pay the surcharge. Should the surcharge later be determined to be unconstitutional, this would create taxpayer confusion and a tremendous logistical challenge for ADOR to devise a lawful and administratively-feasible mechanism for accessing and refunding monies taxpayers have paid toward the surcharge.

20. Among one of the more difficult challenges that ADOR would face is the fact that once monies are deposited into the Student Support and Safety Fund, there is no statutory mechanism allowing the Treasurer to withdraw surcharge monies from the fund to fulfill refunds.

21. ADOR also will need to determine whether the onus should be put on taxpayers to amend their returns or if the agency will bear the financial and technical challenges to develop an IT solution to do internal adjustments.

DATED this 10th day of December, 2021.

BERGIN, FRAKES, SMALLEY &
OBERHOLTZER

By: /s/ Brian Bergin

Brian Bergin
Kevin Kasarjian
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018

*Attorneys to Defendants State of Arizona and
Arizona Department of Revenue*

GREENBERG TRAURIG, LLP

By: /s/ Dominic E. Draye (with permission)

Dominic E. Draye
2375 East Camelback Road
Phoenix, Arizona 85016

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson (with permission)

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

GOLDWATER INSTITUTE

By: /s/ Jonathan Riches (with permission)

Jonathan Riches
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004

Attorneys for Fann et al. Plaintiffs

ROSE LAW GROUP PC

By: /s/ Logan Elia (w/permission)

Logan Elia

David McDowell

Audra Petrolle

Thomas Galvin

7144 East Stetson Drive, Suite 300

Scottsdale, AZ 85251

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

//

ORIGINAL of the foregoing served via
email this 10th day of December, 2021:

Dominic E. Draye
Greenberg Traurig LLP
237 5 East Camelback Road
Phoenix, Arizona 85016
drayed@gtlaw.com

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
Snell & Wilmer LLP
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
bwjohnson@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Jonathan Riches
Timothy Sandefur
Scharf-Norton Center for
The Constitutional Litigation
At the Goldwater Institute
400 E. Coronado Road
Phoenix, Arizona 85004
litigation@goldwaterinstitute.org

Attorneys for the Fann Plaintiffs et al.

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

*Attorneys to Defendant Kimberly Yee, in her
official capacity as Arizona State Treasurer*

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

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

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

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

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

/s/ Hailey Wedemeyer

EXHIBIT A

JLBC Staff Analysis of K-12 Aggregate Expenditure Limit

Key Points

- The Arizona Supreme Court has ruled that most of the monies generated by the 3.5% income tax surcharge created by Proposition 208 shall be classified as "local revenues" that count towards the K-12 aggregate expenditure limit (AEL) established for school districts in the Arizona state constitution.
- The Court ruling stipulated that a lower court shall determine whether school district budgets exceed the AEL. If district budgets exceed the AEL, the Court ordered that the lower court deem the income tax surcharge unconstitutional.
- We understand that the Arizona Department of Revenue will not allocate these surcharge monies until June 2022. As a result, these monies would not affect the AEL until FY 2023.
- The AEL will also be affected by the expiration of Proposition 301. Proposition 301 education sales tax monies were constitutionally exempted from the AEL. Proposition 301 was replaced, however, with a substitute 0.6 cent sales tax established by Laws 2018, Chapter 74. Based on guidance from Legislative Council, the substitute 0.6 cent sales tax monies from Chapter 74 are not exempt from the AEL.
- The Chapter 74 education sales tax goes into effect in FY 2022. As a result, these monies would impact AEL expenditures in both FY 2022 and FY 2023.
- In FY 2022, the JLBC Staff estimates that school districts will budget \$7.26 billion of expenditures that would be included in the AEL. In comparison to the \$6.02 billion limit established in May 2021 by the Economic Estimates Commission (EEC) for FY 2022, the estimated \$7.26 billion of expenditures would result in an AEL exceedance of \$1.24 billion for FY 2022. ADE will compute actual AEL expenditures for FY 2022 by November 1, 2021.
- In FY 2023, the JLBC Staff estimates that school districts will budget \$7.80 billion of expenditures that would be included in the AEL. We also estimate the AEL will increase to \$6.53 billion in FY 2023. The resulting AEL exceedance in FY 2023 would be \$1.27 billion. The EEC will compute the actual AEL for FY 2023 by May 1, 2022 and ADE will compute actual AEL expenditures for FY 2023 by November 1, 2022.

Our analysis is summarized in *Table 1*. Below, we describe our methodology for estimating the AEL in FY 2022 and FY 2023.

FY 2022

- In May 2021, the Economic Estimates Commission determined that the K-12 Aggregate Expenditure Limit (AEL) for school districts will be \$6.019 billion for FY 2022. (see row A)
- ADE will compute the actual district spending counting towards the AEL by November 1, 2021. As a result, the extent to which district budgets exceed or are below the AEL is not yet known.
- To estimate districts' AEL expenditures using spending categories that counted towards the AEL in FY 2021 and earlier years ("Current AEL Components") we incorporated both "Formula Spending" and "All Other" spending.
- We estimate formula spending will reach \$6.32 billion in FY 2022 (see row B) and would consist of the following components:
 - \$5.49 billion of estimated Base Support Level funding for school districts in FY 2022 (A.R.S. § 15-943). This amount assumes district student counts reach 897,993 in FY 2022, or an increase of 40,854 in comparison to FY 2021, consistent with the assumptions of the enacted FY 2022 budget. The actual amount could be different depending on how district enrollment for FY 2022, which is not yet known, compares to the enacted budget assumptions.

Table 1

Projected AEL Spending, FY 2022 and FY 2023

	FY 2021 (Actual)	FY 2022 (Estimated)	FY 2023 (Estimated)
A Aggregate Expenditure Limit ^{1/}	\$ 6,309,587,400	\$ 6,019,979,900	\$ 6,529,652,600
Projected AEL Spending ^{2/}			
<u>Current AEL Components</u>			
B Formula Funding ^{3/}	\$ 5,753,727,200	\$ 6,318,102,100	\$ 6,454,736,700
C All Other ^{4/}	\$ 411,703,700	\$ 313,650,700	\$ 313,650,700
D Subtotal	\$ 6,165,430,900	\$ 6,631,752,800	\$ 6,768,387,400
<u>Additions to the AEL</u>			
F Education Sales Tax Monies ^{5/}	\$ -	\$ 632,181,900	\$ 660,297,600
G Income Tax Surcharge ^{6/}	\$ -	\$ -	\$ 368,995,200
H Subtotal	\$ -	\$ 632,181,900	\$ 1,029,292,800
I Grand Total AEL Expenditures	\$ 6,165,430,900	\$ 7,263,934,700	\$ 7,797,680,200
J Spending Above/(Below) Limit	\$ (144,156,500)	\$ 1,243,954,800	\$ 1,268,027,600

^{1/} FY 2021 and FY 2022 figures represent expenditure limit computed by the Economic Estimates Commission pursuant to A.R.S. § 41-563. FY 2023 represents JLBC Staff estimate, and assumes a calendar year 2021 inflation rate of 3.68% based on forecasts from IHS Markit and FY 2022 district student counts of 897,993 based on the assumptions from the enacted FY 2022 budget.

^{2/} FY 2021 AEL spending total of \$6,165,430,900 was reported by ADE on February 17, 2021 pursuant to A.R.S. § 15-911. FY 2022 and FY 2023 totals are JLBC Staff estimates.

^{3/} Includes school district monies from the Base Support Level (A.R.S. § 15-943), Transportation Revenue Control Limit (A.R.S. § 15-946), District Additional Assistance (A.R.S. § 15-962), and State Aid Supplement funding pursuant to Laws 2015, 1st Special Session, Chapter 1. Excludes \$(86,280,500) in FY 2021 and \$(150,380,500) in FY 2022 and FY 2023 for education sales tax monies that finance Basic State Aid payments. Through FY 2021, ADE excluded these monies from its AEL spending calculation as a result of the constitutional exemption for Proposition 301 monies.

^{4/} FY 2021 "All Other" amount represents AEL expenditures computed by ADE for FY 2021 less formula funding. FY 2022 and FY 2023 estimates assume districts budget for desegregation expenses of \$208,130,400, adjacent ways expenses of \$71,911,400, small school adjustment expenses of \$28,608,900, and \$5,000,000 for other miscellaneous non-formula expenses within district M&O and unrestricted capital funds that are included in AEL calculations. The amount for All Other may not always correspond to non-formula budget amounts because adopted district budgets do not always match the final formula resources the district receives from ADE for that fiscal year.

^{5/} Includes \$150,380,500 of Basic State Aid expenses funded by education sales tax monies plus 78% of Classroom Site Fund (CSF) monies distributed to districts from education sales taxes collected from and after July 1, 2021. Excludes CSF distributions associated with prior year balances and land trust endowment earnings as well as CSF distributions to charter schools. Based on guidance from Legislative Council, the 0.6% sales tax will no longer be exempt from the AEL in FY 2022 because the existing constitutional exemption specifically applies to Proposition 301, which expires in FY 2022.

^{6/} Assumes districts receive 79.8% of income tax surcharge distributions for teacher and classroom support personnel, support services personnel, and teacher retention pursuant to A.R.S. § 15-1281 based on districts' estimate share of Group A and Group B weighted counts for the prior year. Assumes that gross income tax surcharge collections will be \$544,000,000 based JLBC Staff revised fiscal impact estimate after accounting for the impact of SB 1783 (Laws 2021, Chapter 436).

- \$346.7 million for Transportation Revenue Control Limit (TRCL) funding (A.R.S. § 15-946). This is the amount computed by ADE for the August 1, 2021 Basic State Aid payment and is based on district route miles and TRCL from the prior year (FY 2021).
- \$423.9 million for District Additional Assistance (DAA) (A.R.S. § 15-946). This is the amount of DAA funding calculated by ADE for the August 1, 2021 Basic State Aid payment and is based on prior year (FY 2021) student counts.
- \$60.0 million of State Aid Supplemental Funding pursuant to Laws 2015, 1st Special Session, Chapter 1. This is equivalent to districts' share of such funding from FY 2021, which amounts to about 79.9% of the available funds based on districts' share of Group A weighted counts in comparison to charter schools (the AEL does not apply to charter spending).
- "All Other" spending includes non-formula funding that does not qualify for an AEL exclusion, and primarily consists of local property tax levies that are not subject to voter approval. We assume this spending reaches \$313.7 million in FY 2022 based on district-adopted budgets in recent years for desegregation levies (A.R.S. § 15-910) (\$208.1 million), adjacent ways (A.R.S. § 15-995) (\$71.9 million), small school adjustment funding (A.R.S. § 15-949), and \$5 million for all other miscellaneous expenditures with no exclusion (see row C).
- Our Formula Spending and All Other spending estimates result in projected FY 2022 AEL spending of \$6.63 billion (see row D).
- Education sales tax monies are forecast to add another \$632.2 million to AEL spending in FY 2022, including \$150.4 million that fund Basic State Aid payments and \$481.8 million of Classroom Site Fund (CSF) distributions to school districts. The latter figure assumes school districts receive 78.0% of CSF distributions based on their share of Group A weighted counts compared with charter schools. It also assumes that CSF distributions associated with prior-year balances and land trust endowment earnings are excluded. (See row F)
- Proposition 208 income surcharge monies budgeted by school districts are assumed to be \$0 in FY 2022. Since surcharge monies would first be due on taxes paid in the spring of 2022, districts would likely not receive distributions until FY 2023. (See row G)
- The \$6.63 billion of spending on current AEL components plus \$632.2 million of education sales tax monies would result in \$7.26 billion of district expenditures counting towards the AEL. (see row I)
- In total, we project that the \$7.26 billion of district spending will exceed the AEL by \$1.24 billion (see row J).
- Consistent with ADE's methodology for prior years, our estimates continue to assume that district amounts budgeted for grant programs funded with state monies, such as Results-Based Funding and Instructional Improvement Fund monies, are excluded from AEL calculations. According to Legislative Council, it would be very unlikely that such monies would qualify for exclusion as a grant based on the *Fann* court decision. We lack sufficient information, however, about the scope of the impacted programs to make a definitive determination that all such monies should be included. If these monies were added to our calculation, our estimates of district AEL expenditures would increase by approximately \$189 million in FY 2022.

FY 2023

- We estimate that the AEL will grow from \$6.019 billion in FY 2022 to \$6.53 billion in FY 2023. Our estimates assume prior year student counts (FY 2022) of 897,993 based on enacted budget district enrollment assumptions. We also assume inflation from 2 years prior (CY 2021) of 3.68% based on the current IHS Markit Inflation estimate for CY 2021. (see row A)
- We estimate formula spending will reach \$6.45 billion in FY 2023 (see row B) and would consist of the following components:

- \$5.60 billion of estimated Base Support Level funding for school districts in FY 2022 (A.R.S. § 15-943). This amount assumes district student counts reach 893,367 in FY 2022, or a decrease of (4,626) in comparison to FY 2022, consistent with the assumptions of the 3-year spending plan for the enacted FY 2022 budget. The actual amount could be different depending on how district enrollment for FY 2023, which is not yet known, compares to the enacted budget assumptions.
- \$350.2 million for Transportation Revenue Control Limit (TRCL) funding (A.R.S. § 15-946). This amount assumes the \$346.7 million from FY 2022 will increase by \$3.5 million based on the average TRCL increase over the past 5 years.
- \$444.5 million for District Additional Assistance (DAA) (A.R.S. § 15-946). This is based on districts reaching a student count of 897,993 in FY 2022 consistent with the enacted budget assumptions. (DAA is based on prior year student counts).
- \$60.0 million of State Aid Supplemental Funding pursuant to Laws 2015, 1st Special Session, Chapter 1. This is equivalent to districts' share of such funding from FY 2021, which amounts to about 79.9% of the available funds based on districts' share of Group A weighted counts in comparison to charter schools.
- "All Other" spending is assumed to be unchanged from FY 2022. (see row C)
- Our Formula Spending and All Other spending estimates result in projected FY 2023 AEL spending of \$6.77 billion (See row D).
- Education sales tax monies are forecast to add another \$660.3 million to AEL spending in FY 2023. These amounts assume that education sales tax revenues grow by 4.5% in comparison to FY 2022 based on the 3-year spending plan associated with the enacted FY 2022 budget. (See row F)
- Proposition 208 income surcharge monies budgeted by school districts are assumed to be \$368.9 million in FY 2022. We assume that gross income tax surcharge collections will be \$544.0 million based on the JLBC Staff revised fiscal impact estimate after accounting for the impact of SB 1783 (Laws 2021, Chapter 436). Since distributions to charter schools are excluded from the AEL, we further estimate that districts receive 79.8% of income tax surcharge distributions for teacher and classroom support personnel, support services personnel, and teacher retention pursuant to A.R.S. § 15-1281 based on districts' estimate share of Group A and Group B weighted counts for the prior year. (See row G)
- The \$6.77 billion of spending on current AEL components, \$632.2 million of education sales tax monies, and \$368.9 million of income tax surcharge monies would result in \$7.80 billion of district expenditures counting towards the AEL. (see row I)
- In total, we project that the \$7.80 billion of district spending will exceed the AEL by \$1.27 billion (see row J).
- Similar to FY 2022, we continue to assume state-based grant programs are excluded from the AEL in FY 2023.

EXHIBIT B

November 1, 2021

The Honorable Karen Fann
President, Arizona State Senate
1700 West Washington Street, Senate Wing
Phoenix, AZ 85007

The Honorable Russell Bowers
Speaker, Arizona House of Representatives
1700 West Washington Street, House Wing
Phoenix, AZ 85007

The Honorable David M. Gowan
Chairman, Joint Legislative Budget Committee
1716 West Adams Street
Phoenix, AZ 85007

President Fann, Speaker Bowers, and Chairman Gowan:

Please be advised that the aggregate expenditures of local revenues for all school districts, as defined in article IX, section 21, subsection (4), Constitution of Arizona, is \$7,173,667,189 for fiscal year 2021-22 based on original budgets or budget revisions submitted by school districts on or before October 29, 2021.

Therefore, the aggregate expenditures of local revenues exceed by \$1,154,028,997 the aggregate expenditure limitation for all school districts of \$6,019,638,192, as determined by the Economic Estimates Commission pursuant to A.R.S. 41-563.

Sincerely,

Handwritten signature of Kathy Hoffman in black ink.

Kathy Hoffman, MS, CCC-SLP
Superintendent of Public Instruction

APPENDIX 6

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

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
bwjohnson@swlaw.com

Jonathan Riches (#025712)
Timothy Sandefur (#033670)
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, Arizona 85004
Telephone: (602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Fann et al. Plaintiffs

Logan Elia (#025009)
ROSE LAW GROUP PC
7144 E Stetson Dr. Ste 300
Scottsdale, AZ 85251
Telephone: 480-505-3936
docket@roselawgroup.com
lelia@roselawgroup.com

Attorneys for Eco-Chic et al. Plaintiffs

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

INVEST IN ARIZONA et al.,

Intervenor-Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

**PLAINTIFFS' MOTION FOR
JUDGMENT**

(Assigned to the Hon. John Hannah)

I. INTRODUCTION

The Arizona Supreme Court remanded a narrow factual question to this Court: will “Prop. 208’s direct payments to school districts” in fiscal year 2023 “exceed the constitutional expenditure limitation.” *Fann v. State*, 251 Ariz. 425, 440 ¶ 52 (2021). Although the Supreme Court noted that the “facts strongly suggest” that outcome, it asked this Court to confirm the “accumulation of money that cannot be spent.” *Id.* at 440 ¶¶ 53–54. As previously stipulated by all Plaintiffs and Defendant Arizona Department of Revenue (“ADOR”), the overwhelming body of evidence shows that Prop. 208 will generate revenue that cannot be spent due to the expenditure limitations in article IX, section 21. Therefore, Prop. 208 is unconstitutional.

Intervenor-Defendants Invest in Arizona, (Sponsored by AEA and Stand for Children) and David Lujan (collectively, “Intervenor-Defendants”) *do not* dispute the necessary factual predicates for answering this question. They acknowledge that (1) it is more likely than not that the aggregate school district expenditures will exceed the aggregate expenditure limitation in FY 2023, Joint Stip. at 3 ¶¶ 9, 11; and (2) Prop. 208 will generate revenue, *id.* ¶ 10. Combining these predicates leads to the conclusion that Prop. 208 will generate revenue that cannot be spent because of the constitutional limit.

As a logical corollary, Intervenor-Defendants offer no proof that there is enough “room” under the limit to allow the expenditure of all revenue generated by Prop. 208—or even one dollar of that revenue.

To avoid the unescapable conclusion that these factual predicates result in the accumulation of revenues that cannot be spent, Intervenor-Defendants now advance several concepts that ask the Court to ignore the constitutional text and Prop. 208’s language, rewrite the burden of proof applicable in civil cases, and attempt to insert some non-existent “uncertainty” into the Arizona Supreme Court’s direction on remand.

Because the Supreme Court’s expectation was correct, and the facts establish that it is more likely than not that Prop. 208’s revenues will exceed the constitutional expenditure limit and result in the accumulation of money that cannot be spent, Plaintiffs Karen Fann,

Russell “Rusty” Bowers, David Gowan, Venden Leach, Regina Cobb, John Kavanagh, Montie Lee, Steve Pierce, Francis Surdakowski, No on 208, and Arizona Free Enterprise Club (the “Fann Plaintiffs”) and Eco-Chic Consignment, Inc., Ann Siner, and John Buttrick (the “Eco-Chic Plaintiffs”) (collectively the “Plaintiffs”) respectfully request that the Court declare Prop. 208 unconstitutional in its entirety and enjoin its implementation, consistent with the remand instructions from the Arizona Supreme Court.

II. FACTUAL & LEGAL BACKGROUND

A. School District Spending and the Aggregate Expenditure Limitation.

In Arizona, K-12 school districts receive funding from a variety of sources. One major component of school district funding is commonly referred to as “formula funding,” which includes Base Support Level funds, A.R.S. § 15-943, Transportation Support Level funds, A.R.S. § 15-945, and District Additional Assistance funds, A.R.S. § 15-961, among others. State aid from the general fund and certain tax levies also supply formula funding. *See* A.R.S. § 15-971(H); *see also* A.R.S. § 15-973. Outside of formula funding, school districts may obtain funding through a variety of sources, such as “local property tax levies not subject to voter approval, . . . desegregation levies (A.R.S. § 15-910) . . . , adjacent ways (A.R.S. § 15-995) . . . , small school adjustment funding (A.R.S. § 15-949) . . . , [and] other miscellaneous expenditures with no exclusion.” Ex. 1 at IIE00359 (JLBC Report).

In October of each year, each school district calculates the total amount of local revenues it expects to receive for the next fiscal year (“FY”) and submits that amount to the Arizona Department of Education (“ADE”) in a budget. *See, e.g.*, Ex. 2 (Example of FY2022 Budget). Based on individual school district submissions, ADE calculates the estimated aggregate budgeted expenditures for the following FY. *See* Ex. 3 (ADE November 1, 2021 Letter). By November 1 of each year, the Arizona State Board of Education must report “the aggregate expenditures of local revenues” to the “president of the senate, the speaker of the house of representatives, the chairman of the joint legislative budget committee and the governor’s office of strategic planning and budgeting.” *See* A.R.S. § 15-911(B); *see, e.g.*, Ex. 3.

The Arizona Constitution imposes a spending ceiling on school districts' expenditure of "local revenues" known as the aggregate expenditure limitation ("AEL"). *See* Ariz. Const. art. IX, § 21. For the purposes of Section 21, "local revenues" are broadly 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), and "expenditure" is defined as "any amounts budgeted to be paid from local revenues as prescribed by law," *id.* § 21(4)(b). Section 21 exempts twelve categories of expenditures from the definition of "local revenues" including "grants, gifts, aid or contributions of any type except amounts received directly or indirectly in lieu of taxes received directly or indirectly from any private agency or organization, or any individual," *id.* § 21(4)(c)(v) (the "Grant Exception").

Unless a funding source fits into one of these twelve narrowly defined exceptions, school districts must include all revenue in their calculation of budgeted expenditures. Prop. 208 revenues do not fall within any exception; they are counted as local revenues for purposes of the AEL. *Fann*, 251 Ariz. at 435 ¶ 31. In addition to the inclusion of Prop. 208 funds, the requirement to include "all revenues" is compounded in this case by Prop. 208's No Supplant Clause, which requires school districts to incorporate Prop. 208's revenues into their budgets and prohibits offsetting spending reductions. *See infra* Section II.B.

By May 1 of each year, the Arizona Economic Estimates Commission ("EEC") calculates the final AEL for school districts. *See* Ariz. Const. art. IX, § 21(2). To calculate this limitation, the EEC adjusts "the total amount of expenditures of local revenues for all school districts for FY 1979-1980 to reflect the changes in student population in the school districts and the cost of living, and multiplying the result by 1.10." *Id.*; *see, e.g.*, Ex. 4 (EEC Calculation of FY 2022 AEL).

In other words, EEC ascertains two new inputs each year to make this calculation: (1) the estimated student count for the prior FY, and (2) the GDP Implicit Price Deflator for the prior calendar year. *See* Joint Stip. at 2 ¶ 5. For example, to calculate the AEL for school districts for FY 2022, EEC relied on the estimated FY 2021 student count and the calendar year 2020 GDP Implicit Price Deflator. *See* Ex. 4. To calculate the AEL for FY

2023, the relevant inputs are the FY 2022 school district student counts and the calendar year 2021 inflation rate. *See* Ex. 1 at IIE00358 n.1.

State agencies provide the first input. Prior to February 15 of each year, ADE must provide the EEC with “the total estimated statewide number of students determined for the current year.” A.R.S. § 15-238. By October 15 of each year, the Arizona Auditor General must submit a report to the Joint Legislative Budget Committee (“JLBC”), the Governor’s Office of Strategic Planning and Budgeting (“OSPB”), and the EEC concerning its audit of “[t]he full-time equivalent student enrollment reported by each district.” A.R.S. § 15-1466.01(C). EEC relies on data it receives from the Bureau of Economic Analysis to ascertain the second input: the relevant GDP Implicit Price Deflator. *See, e.g.*, Ex. 4.

Once ADE calculates the aggregate budgeted school district spending, it must assess whether the budgeted spending comports with the constitutional spending cap. If the expenditure limitation is exceeded, two outcomes may occur: (1) the State Board of Education (“SBE”) must notify each school district of the amount by which it must reduce its expenditures of local revenues; or (2) the legislature may authorize, by March 1, expenditures in excess of the limitation for the current FY upon a two-thirds vote in both the House of Representatives and the Senate. A.R.S. § 15-911(C).

B. Prop. 208 Was Sold to the Voters as a Stream of Revenue for School Districts that Could Not Be Supplanted.

In 2020, Prop. 208 asked voters to approve a statutory measure implementing an income tax surcharge to serve as a new dedicated source of funding for public schools. A.R.S. § 43-1013. 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 distributed to school districts for the purpose of hiring teachers and support personnel and increasing their base compensation; providing mentoring and retention programs for teachers; supporting the career training and workforce fund; and supporting the Arizona teachers academy fund. A.R.S. § 15-1281. The monies generated by the surcharge cannot be used for any other

purpose and recipient school districts “shall establish a separate local level fund” to segregate Prop. 208 monies. *Id.*; *see also* A.R.S. § 15-1284. With immaterial exceptions, school districts automatically receive Prop. 208 monies based on student enrollment. A.R.S. §§ 15-1281(D), 15-1283.

Prop. 208 expressly sought to establish that its revenue would supplement, not replace, other sources of school district funding:

Notwithstanding any other law, the additional monies received by school districts . . . from the student support and safety fund established by section 15-1281 and the career training and workforce fund established by section 15-1282 are in addition to any other appropriation, transfer or allocation of public or private monies from any other source and may not supplant, replace or cause a reduction in other funding sources.

A.R.S. § 15-1284(E). This Court held that this provision is “a directive *to* the school districts . . . addressing how they must incorporate the Prop[.] 208 funds into their existing budgets.” Ruling, at 2 (filed January 14, 2021). While the Fann Plaintiffs maintain that the No Supplant Clause unconstitutionally attempts to bind the legislature’s hands and creates an unfunded mandate in violation of article IX, section 23, even the narrower construction that this Court adopted leads to the conclusion that school districts *must* spend, and cannot accumulate without spending, Prop. 208 funds.

Unlike formula funding and other revenue sources that count towards the AEL, Prop. 208 sought to statutorily exempt itself from the constitutional spending cap: “monies received by school districts . . . pursuant to this chapter . . . are not considered local revenues for the purposes of article IX, section 21, Arizona Constitution” and “[a]re exempt from any budgetary, expenditure or revenue control limit that would limit the ability of school districts . . . to accept or expend those monies.” A.R.S. § 15-1285.

C. Plaintiffs’ Challenge to Prop. 208 Established that Prop. 208 Cannot Statutorily Exempt Itself from the Constitution.

After accepting jurisdiction, the Arizona Supreme Court issued its opinion in this case on August 19, 2021. *See generally Fann*, 251 Ariz. 425.

The Supreme Court held that A.R.S. § 15-1285, the provision that attempts to statutorily exempt itself from the Arizona Constitution, is facially unconstitutional. *Id.* at 435 ¶ 31. The Court further held that because Prop. 208 revenues are not exempt from the calculation of the AEL, A.R.S. § 15-1281(D) is unconstitutional “to the extent allocated revenues exceed the expenditure limit” and those unconstitutional provisions are not severable. *Id.* at 435 ¶ 31, 438 ¶ 39. The Court reasoned that the unconstitutional provisions eliminate Prop. 208’s “statutory authority to spend approximately 85% of the funds raised by the tax and placed in the Student Support and Safety Fund (‘Fund’)” and, thus, the Funds are “perennially sequestered—they may not be transferred to any other fund, do not revert to the state general fund.” *Id.* at 438 ¶ 39. As a result, the severance of these provisions “materially impacts the initiative’s operation such that the remainder of Prop. 208 cannot stand on its own.” *Id.* The Court further reasoned that because the “stated purpose of Prop. 208 was to tax high income individuals to raise revenue that would be directly provided to school districts,” it would be absurd to preserve a “statutory provision resulting in tax revenues being impounded with no prospect of being spent or refunded.” *Id.* ¶ 40. In other words, “‘an informed electorate would not have adopted’ the taxing provision without the provision requiring that the money be allocated to schools.” *Id.* (quoting *Randolph v. Groscost*, 195 Ariz. 423, 427 ¶ 15 (1999)).

In holding that Prop. 208’s unconstitutional provisions were not severable from the rest of the initiative, the Court specifically rejected the argument that “the Act may be unconstitutional in some years” and not in others. *Id.* at 438 ¶ 43. To do so would allow the law “to lurch along even though it contains no provision to account for hundreds of millions of dollars in unspent revenues in years in which it is not operational.” *Id.* Simply, “once the measure requires expenditures that we all agree would be unconstitutional, it renders the entire Act incoherent and unworkable and thus unseverable.” *Id.*; *see also id.* at 439 ¶ 50 (“[W]e analyze the legal landscape as it exists, not as the legislature might see fit to change it in the future.”).

D. The Court Remanded the Case to Determine One Narrow Factual Question.

The Supreme Court determined that “based on the limited record before [it], it appears that Prop. 208 revenues *could* likely exceed the constitutional spending limitation placed on school districts.” *Id.* at 440 ¶ 54 (emphasis in original). Indeed, the Court pointed to several neutral factual sources to support its conclusion that Prop. 208 funds would *very likely* result in an accumulation of money that cannot be spent. *Id.* ¶ 53. Specifically, it referenced the Superintendent of Public Instruction’s letter anticipating that school district expenditures for FY 2021 would fall just \$144,156,539 shy of the limit. *Id.* It also referenced EEC’s projection “that the expenditure limit amount will decrease by 4.6% or approximately \$300,000,000,” and JLBC’s projection that Prop. 208 is projected to raise \$827 million. *Id.* Together, “[t]hese facts *strongly suggest* that Prop. 208 will produce far more revenue than it can constitutionally spend.” *Id.* (emphasis added)

Despite this persuasive (albeit limited) record, the Supreme Court remanded the case:

[W]e remand to the trial court for a determination of this issue. If the trial court finds that the tax revenues allocated will not exceed the expenditure limit, then there is no present constitutional violation and Prop. 208 stands. However, if the trial court finds that A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit, it must declare Prop. 208 unconstitutional and enjoin its operation. Moreover, to further clarify this inquiry for the trial court, if any material amount of the Prop. 208 revenue is sequestered in a designated state fund because it cannot be spent due to the expenditure limit, then Prop. 208, in its entirety, is unconstitutional. *See Material*, Black’s Law Dictionary (11th ed. 2019) (defining “material” as “[o]f such a nature that knowledge of the item would affect a person’s decision-making; significant; essential”).

Id. at 440–41 ¶ 54.

E. Experts and State Entities Uniformly Agree That School District Expenditures Will Exceed the AEL in FY 2022 and 2023.

Economic analysts and state entities project, and the parties agree, that the aggregate school district expenditures will more likely than not exceed the AEL in FYs 2022 and

2023. *See* Joint Stip. at 2–3 ¶¶ 6, 9, 11; Ex. 1 at IIE00358; Ex. 5 at 5, 8 (Schimpp Expert Report); Ex. 6 at 4–5 (Schimpp Supplemental Report); Ex. 7 (Schimpp Rebuttal Report).

1. School District Expenditures Will More Likely Than Not Exceed the AEL in FY 2022.

In September of 2021, the non-partisan JLBC Staff, released an Analysis Report of K-12 Aggregate Expenditure Limit (the “JLBC Report”). *See* Ex. 1; Ex. 8 at 68:21–69:9 (JLBC Assistant Director Patrick Moran Deposition Transcripts). This analysis considers the fiscal impact of several factors, four of which are relevant here. *Id.*

First, the JLBC Report incorporates the Arizona Supreme Court’s holding that “most of the monies generated by the 3.5% income tax surcharge created by Prop[.] 208 shall be classified as ‘local revenues’ that count towards the K-12 aggregate expenditure limit . . . established for school districts.” Ex. 1 at IIE00357. As a result of their inclusion, Prop. 208 monies increased the total amount of revenue that counts toward the AEL. *Id.*

Second, the JLBC Report incorporates the fact that Proposition 301 will expire, and that the 0.6 cent sales tax set to replace Proposition 301 (Laws 2018, Chapter 74, effective in FY 2022) will not be exempt from the AEL. *Id.* As a result, the inclusion of Proposition 301 extension revenue increased the total amount of revenue that counts toward the AEL in FY 2022 and beyond. *Id.*

Third, the JLBC Report considers the impact of SB 1783, a new alternate income taxation framework for small business income and concludes that, after incorporating the impact of SB 1783, Prop. 208 revenues subject to the AEL will still amount to at least \$368,995,200 for FY 2023. *Id.* at IIE00358.

Fourth, the JLBC Report considers Legislative Council’s advice that several funding sources, historically classified as “grants,” are “very unlikely” to qualify for an exception to “local revenues” and thus will be subject to the AEL. *See id.* at IIE00359. For instance, several funding sources previously treated as grants, such as the funds classified as “State Projects,” Results-Based Funding, and the Instructional Improvement Fund, will no longer be exempt from the aggregate expenditure calculation. *Id.*; Ex. 8 at 93:10-20. Nevertheless,

JLBC did *not* include these funds in its calculation of local revenues. Ex. 1 at IIE00359. If it had, JLBC’s aggregate school district expenditure calculation and the AEL exceedance calculation would increase by another approximately \$189 million for FY 2022 and a similar amount for FY 2023. *Id.* at IIE00359-60. The inclusion of these mistakenly exempt funds would only amplify JLBC’s conclusion that school district expenditures will exceed the AEL in FY 2022 and FY 2023.

Based on these factors, **JLBC Staff projected that for FY 2022, the aggregate school district expenditures will equal \$7,263,934,700, exceeding EEC’s AEL of \$6,019,979,900 by \$1,243,954,800.** *Id.* at IIE00358. ADOR routinely relies on JLBC Staff projections like this one, based on JLBC Staff’s expertise in producing forecasts and estimates.

The Fann Plaintiffs’ expert, Steve Schimpp, conducted a similar analysis. Mr. Schimpp is a school finance professional with over twenty-five years of experience as an independent analyst for JLBC.¹ For FY 2022, Mr. Schimpp determined that the aggregate school district expenditures will equal *at least* \$6,975,894,200, exceeding EEC’s AEL of \$6,019,979,900 by \$956,256,000. Ex. 6 at 4–5.

On November 1, ADE reported that “school district spending will exceed the AEL in FY 2022. Specifically, ADE determined that for FY 2022, school district spending subject to the AEL will equal \$7,173,667,189, which will cause a \$1,154,028,997 exceedance over the FY 2022 AEL (\$6,019,638,192).” Joint Stip. at 2–3 ¶ 6; Ex. 3.

Notably, ADE’s exceedance (\$1.15 billion) falls between JLBC Staff’s estimated exceedance (\$1.25 billion) and Mr. Schimpp’s more conservative estimated exceedance (\$956 million). Despite these relatively minor differences between such large amounts of spending, all three projections clearly determine that the AEL will more likely than not be exceeded in FY 2022 by a very large margin.

¹ Mr. Schimpp received his PhD in Higher Education with a specialized focus in economics and education finance in 1994 from the University of Arizona. *See* Ex. 5 at 1. He no longer works at JLBC and did not have any part in preparing its report.

2. School District Expenditures Will More Likely Than Not Exceed the AEL in FY 2023.

The parties agree that the “first year that Prop[.] 208 revenues could be budgeted or spent by school districts is in FY 2023.” Joint Stip. at 2 ¶ 4. Thus, the crucial factual inquiry in determining the sole remand question is whether budgeted school district expenditures will exceed the AEL in FY 2023.

“JLBC’s Staff analysis and expert reports put forward by the Fann Plaintiffs, both project that school district spending will exceed the AEL in FY 2023 even without consideration of any revenues from Prop[.] 208.” *Id.* at 3 ¶ 8; *see* Ex. 1 at IIE00358; Ex. 6 at 4–5; Ex. 7.

Specifically, JLBC Staff project that the FY 2023 AEL will equal \$6,529,652,600 and aggregate school district expenditures will equal \$7,797,680,200, resulting in a \$1,268,027,600 exceedance of the AEL in FY 2023. *See* Ex. 1 at IIE00358. This forecasted exceedance of \$1.27 billion includes an estimated \$368,995,200 in Prop. 208 revenues subject to the AEL. *Id.*; *see also* Ex. 8 at 70:1–16.

Similarly, Mr. Schimpp concludes that the FY 2023 AEL will equal \$6,384,965,200, and aggregate school district expenditures will equal ***at least*** \$7,644,694,500, resulting in a \$1,259,729,300 exceedance of the AEL in FY 2023. Ex. 6 at 4–5. Mr. Schimpp calculates FY 2023 Prop. 208 revenues subject to the AEL to equal \$420,625,800. *Id.*

Notably, “IIA and ADOR do not contest that, based on current projections, it is more likely than not that school district spending will exceed the AEL in 2023” Joint Stip. at 3 ¶¶ 9, 11. Moreover, all parties agree that Prop. 208 will generate revenue. *Id.* ¶ 10. Intervenor-Defendant’s own expert estimates that Prop. 208 will generate at least \$288,955,800 in FY 2023. Ex. 9 at IIE000402 (Liddicoat Expert Report). In other words, all parties and all experts in this case agree on the central question on remand: the AEL will be exceeded by an enormous sum in FY 2023, and hundreds of millions of that amount will be Prop. 208 revenues that cannot be spent.

III. LEGAL STANDARDS

A. The Arizona Supreme Court’s Legal Conclusions Are Binding.

The Arizona Supreme Court’s “rul[ing] on a legal question . . . is the law of that case on the issue decided in all subsequent proceedings in both trial and appellate courts provided the facts, issues and evidence remain substantially the same.” *See Kadish v. Ariz. State Land Dep’t.*, 177 Ariz. 322, 327 (App. 1993); *see also Dancing Sunshines Lounge v. Indus. Comm’n of Ariz.*, 149 Ariz. 480, 482 (1986). Here, the relevant legal holding is that Prop. 208 is unconstitutional and its provisions are not severable.

B. Burden of Proof.

Arizona civil cases require that the plaintiff prove their case by a preponderance of the evidence. *See Godwin v. Farmers Ins. Co. of Am.*, 129 Ariz. 416, 418–19 (App. 1981); *see also Harvey v. Aubrey*, 53 Ariz. 210, 213–14 (1939). This standard “requires that the fact-finder determine whether a fact sought to be proved is more probable than not.” *Kent K. v. Bobby M.*, 210 Ariz. 279, 284–85 (2005) (citing *Black’s Law Dictionary* 1201 (7th ed. 1999)). In other words, on remand, this Court must determine whether it is more likely than not that the school district expenditures will exceed the AEL in FY 2023 and thus result in the accumulation of Prop. 208 revenues that cannot be spent.

IV. ARGUMENT

The uncontested evidence and expert analysis leaves no doubt that Prop. 208 will more likely than not generate material revenue in FY 2023 that school districts will not be able to spend constitutionally. As a result, the Arizona Supreme Court’s decision compels a declaration that Prop. 208 is unconstitutional and a permanent injunction against its implementation.

A. FY 2023 School District Spending Will Exceed the AEL by More Than \$1 Billion, Meaning That Prop. 208 Revenue Will Result in the Accumulation of Money That Cannot Be Spent.

Intervenor-Defendants do not contest any of the factual predicates that are necessary to reach this conclusion. They agree that in FY 2023, aggregate school district revenues

will more likely than not exceed the AEL. Joint Stip. at 3 ¶¶ 9, 11. Based on the best available data, the margin of exceedance will be mammoth—likely around one and a quarter billion dollars. *See* Ex. 1 at IIE 00358; Ex. 6 at 4–5.

Intervenor-Defendants also agree that Prop. 208 will generate revenue. Joint Stip. at 3 ¶ 10. Based on the JLBC Report and Mr. Schimpp’s analysis, Prop. 208’s revenues subject to the AEL are projected to equal between \$369 million and \$421 million. *See* Ex. 1 at IIE00358; Ex. 6 at 4–5. Because school district revenues, including the millions of dollars from Prop. 208, will exceed the AEL in FY 2023, none of Prop. 208 revenues can be spent without violating the expenditure limit, and Prop. 208 is unconstitutional. *Fann*, 251 Ariz. at 440–41 ¶¶ 52, 54 (noting that “[t]o the extent they exceed the [AEL], Prop. 208’s direct payments to school districts . . . are unconstitutional” and if a “material amount of the Prop. 208 revenue . . . cannot be spent due to the [AEL], . . . Prop. 208, in its entirety, is unconstitutional”).

Intervenor-Defendants may try to escape these inevitable realities by arguing that school districts may *choose* not to ***budget*** monies that are subject to the expenditure limit, possibly including Prop. 208 monies. In doing so, school districts may attempt to manufacture a budgeted aggregate school district expenditure number that will not exceed the limit. This manipulation is not consistent with the constitutional text or the Supreme Court’s ruling. Section 21 defines “expenditure” to mean “any amounts budgeted to be paid from local revenues as *prescribed by law*.” Ariz. Const. art. IX, § 21(4)(b) (emphasis added). The constitutionally defined term “expenditure” therefore requires school districts to budget any money that they are statutorily mandated to receive, including, for example, Basic State Aid and Prop. 208 revenues. *See, e.g.*, A.R.S. § 15-973(A) (“The state board of education *shall* apportion state aid from appropriations made for that purpose” (emphasis added)); A.R.S. § 15-1281(D) (noting that the “state treasurer *shall* transfer all monies in the student support and safety fund” (emphasis added)). School districts cannot use budgeting gimmicks to rewrite the the constitutional definition of expenditures subject to the AEL.

Similarly, school districts may not escape this reality by attempting an accounting manipulation to not *spend* money from other funding sources so that they can spend Prop. 208 monies. Prop. 208’s No Supplant Clause provides that its funds are “in addition to any other appropriation, transfer or allocation of public or private monies from any other source and *may not supplant, replace or cause a reduction in other funding sources.*” A.R.S. § 15-1284(E) (emphasis added). Notably, this Court ruled that this clause is “a directive to the school districts and charter schools, addressing how they must incorporate the Prop[.] 208 funds into their existing budgets.” Ruling, at 2 (filed January 14, 2021) (emphasis omitted). If, after budgeting all the constitutionally mandated sources of funding, school districts chose not to spend other funds (such as Basic State Aid) in order to spend Prop. 208 revenues, school districts would be supplanting those pre-existing funding sources with Prop. 208 revenues. In other words, if school districts attempt to metaphorically spend Prop. 208 revenues first, doing so would “cause a reduction” in pre-existing school district funding and violate Prop. 208’s own No Supplant Clause. Further, school districts cannot spend Prop. 208 revenues while hoarding *other* revenues in an attempt to evade the AEL because that would directly violate the Supreme Court’s mandate that Prop. 208 is unconstitutional if it results in “the accumulation of money that cannot be spent.” *Fann*, 251 Ariz. at 440–41 ¶ 54.

Because aggregate school district expenditures, including 100% of Prop. 208’s revenues, will more likely than not exceed the AEL in FY 2023, collection of the income tax surcharge “will result in the accumulation of money that cannot be spent without violating the expenditure limit,” and this Court “must declare Prop. 208 unconstitutional and enjoin its operation.” *Id.*

B. The Impact of Other Increased Funding Does Not Save Prop. 208 from Its Unconstitutionality.

Intervenor-Defendants are likely to argue that a relevant issue on remand is whether Prop. 208 revenues are somehow themselves responsible for pushing school district expenditures over the AEL. Specifically, based on disclosures, it appears they will rely on

the recent inclusion of Classroom Site Funds in the AEL calculation to argue that Prop. 208 will not *cause* the exceedance—Classroom Site Funds will. *See* Joint Stip. at 2–3 ¶ 6 (noting that a “significant source of the exceedance [are] Classroom Site Fund dollars (often referred to as ‘Proposition 301’ monies), which . . . will now count toward the AEL” in FYs 2022 and 2023).

The treatment of Prop. 301 monies is irrelevant to the only question on remand. The issue is whether Prop. 208 revenues result in the “accumulation of money that cannot be spent.” *Fann*, 251 Ariz. at 440–41 ¶¶ 53–54. The answer to that question is indisputably yes. The Supreme Court did not ask whether other funding sources will *also* contribute to reaching the AEL (they must); the only question is “whether [Prop. 208] payments will in fact exceed the constitutional expenditure limitation.” *Id.* at 440 ¶ 52; *see also id.* at 438 ¶ 43 (“[O]nce [Prop. 208] requires expenditures that we all agree would be unconstitutional, it renders the entire Act incoherent and unworkable and thus unseverable.”).

Even if this Court were to consider Intervenor-Defendants’ novel theory, the increase in school district spending due to Classroom Site Funds has no bearing on the ultimate conclusions. According to the JLBC’s Staff Analysis, inclusion of Classroom Site Funds adds approximately \$632 million in FY 2022 and \$660 million in FY 2023 to the aggregate amount of school district expenditures subject to the AEL. Ex. 1 at IIE00358. Notably, however, “because the FY 2022 exceedance (\$1.154 billion) is [vastly] greater than the total Classroom Site Fund [revenue in FY 2022] (\$632 million), school district spending would *still* exceed the AEL in both FY 2022 . . . and FY 2023 even if the Classroom Site Fund monies were not included.” Joint Stip. at 2–3 ¶ 6 (Plaintiffs’ assertion) (emphasis added).

C. The Court Need Only Determine Its Factual Findings by the Preponderance of the Evidence.

Even though the Intervenor-Defendants agree that school district expenditures will more likely than not exceed the AEL in 2023, and that Prop. 208 will raise revenue, Joint Stip. at 3 ¶¶ 9–11, they may also attempt to interject a “certainty” requirement that is at odds with the Supreme Court’s ruling and burden of proof applicable in civil cases. Fact

finders apply the preponderance of evidence standard in civil cases. *Harvey*, 53 Ariz. at 213. Requiring certainty to prove Plaintiffs’ case would transform their burden of proof to the “beyond a reasonable doubt standard” applicable in criminal cases, or some other unsupported and newly invented standard that has no basis in law. The Supreme Court certainly did not endorse such a drastic new standard of review for just this one case. It is the job of this Court “to determine whether Prop. 208 revenues will exceed the expenditure limitation on local revenues,” not to wait for certainty until Prop. 208 revenues are actually collected unconstitutionally. *Fann*, 215 Ariz. at 443 ¶ 65.

Nevertheless, even if this Court considers such a “certainty” concept, none of the supposed “uncertainty” in the underlying undisputed facts has any bearing on the ultimate conclusion. For instance, Intervenor-Defendants insist that “[t]here is uncertainty regarding the specific amount of revenue that would be collected pursuant to the Prop[.] 208 surcharge in calendar year 2021 and in future years.” Joint Stip. at 3 ¶ 10. But Intervenor-Defendants do not dispute that Prop. 208 will generate significant revenue. *Id.* Indeed, their own expert report estimates that Prop. 208 will generate at least \$289 million in revenue. Ex. 9 at IIE000402. Accordingly, that report “supports the conclusion that Prop[.] 208 will generate significant revenue and that this revenue will result in the accumulation of money that cannot be spent without violating the AEL.” Ex. 7.

Simply, it does not matter whether Prop. 208 generates \$289 million or some other amount of money. It matters whether Prop. 208’s revenue, whatever the number, will be unspendable. *Fann*, 215 Ariz. at 440–41 ¶ 54. And, under Prop. 208’s own No Supplant Clause, school districts cannot metaphorically put Prop. 208 revenues “first in line” when deciding which monies to spend or budget—as doing so would cause a reduction in other funding by pushing that funding beyond the AEL. As discussed above, and as all parties agree, education spending is already certain to exceed the AEL in FY 2023 by a billion-dollar margin, meaning that all revenue generated by Prop. 208 or monies that would be supplanted under Intervenor-Defendants’ potential theory would be unspendable. Under any definition, 100% is “material.” Thus, Prop. 208 is unconstitutional based on the

Supreme Court’s binding legal determination.

Intervenor-Defendants might also argue that alleged uncertainty surrounding the AEL calculation’s two inputs (estimated student count and inflation) might hinder this Court’s ability to make a factual finding. But the evidence regarding both of these inputs before the Court is overwhelming: student count and inflation data indicate that school district expenditures will substantially exceed the AEL in FY 2023.

On student counts, Intervenor-Defendants suggest that uncertain declines in student count could impact the AEL calculation. Because lower student counts result in lower school district expenditures, Intervenor-Defendants suggest that a drastic decline in student counts (or “average daily membership”) could reduce district expenditures below the AEL. But the evidence shows that such a drastic decline has not and will not occur. The JLBC Report projects that student counts will reach 897,993 in FY 2022, or a 4.76% increase from FY 2021. Ex. 1 at IIE00357. Data released as of November 2021 from ADE is consistent with JLBC’s projection of rising student counts, showing that average daily membership for school districts for FY 2021 is 2.3% higher than the average daily membership for school districts at the same time the previous year. *See* Joint Stip. at 2 ¶ 5; *see also* Ex. 10 at ADE000802 (ADE’s November 1, 2021 ADM Update). No evidence in the record indicates a *significant decline* in student counts for FY 2022 or any year following, let alone a decline of a historically unprecedented and mathematically improbable magnitude to decrease the AEL by \$1.25 billion—the amount necessary to bring expenditures under the projected FY 2023 AEL. Indeed, in order to reduce district expenditures by \$1.25 billion, student counts would have to decline by 186,800 in a single calendar year. Ex. 6 at 7. By way of comparison, even during the unprecedented COVID-19 pandemic that literally shut schools down, student counts “only” declined by 51,568—or less than 28% of the amount that would be required to reduce the AEL by \$1.25 billion. *Id.*; *see also* Ex. 8 at 84:8–15 (“It’s difficult for me to imagine a set of circumstances where – based on our current information [about ADM,] where districts would not be exceeding the AEL in FY 2023”). There is no

reasonable basis to expect a change in student count to materially affect the AEL calculation.

On inflation, Intervenor-Defendants would require historically unprecedented and mathematically improbable, Zimbabwe-like inflation to wipe out the \$1.25 billion exceedance. Importantly, to calculate the AEL for FY 2023, the relevant input is calendar year 2021 inflation rate. Ex. 1 at IIE00358 n.1. JLBC has already calculated that rate through the middle of 2021 as 3.68%. *Id.* As Mr. Schimpp explains, in order for inflation to increase enough to impact the AEL calculation for FY 2023, the United States would need to “experience[] a GDP inflation rate of at least 39.1% for the last six months of the current calendar year (2021) . . . which would exceed historical norms by so large a magnitude as to be essentially impossible.” Ex. 6 at 7–10. Indeed, the largest inflation rate in the *previous 20* years, was 3.14% in 2005. *Id.* at 43. As a result of this analysis, Mr. Schimpp concludes that “[t]he odds of GDP inflation averaging at least 39.1% for the last half of 2021 are nil,” *id.* at 9, and, thus, “it is far more likely than not that Prop[.] 208 monies will not be spendable under the AEL for FY 2023 or in the foreseeable future.” *Id.* at 10. JLBC agrees. Ex. 8 at 89:6–24, 92:4–11 (“Q. With the information you have . . . are there any likely set of circumstances that would cause inflation rates to increase enough to make up for that \$1.268 billion difference? . . . [A.] I think it’s unlikely.”).

V. CONCLUSION

The Supreme Court effectively resolved this case in August. Its remand to this Court presents a narrow question: is it more likely than not that a material amount of Prop. 208 revenues cannot be spent? If so, then this Court must declare Prop. 208 unconstitutional and enjoin its implementation. But the remanded question is not only narrow, it is easy. All parties agree that it is more likely than not that school district expenditures will exceed the AEL in FY 2023, and the evidence presented supports that this exceedance will surpass \$1 billion. That means that all revenue from Prop. 208 will be in excess of the AEL, and all parties recognize that Prop. 208 will generate some amount of revenue. What remains for this Court is a straightforward application of the Supreme Court’s decision.

DATED this 30th day of December, 2021.

GREENBERG TRAURIG, LLP

By: /s/ Dominic E. Draye (with permission)

Dominic E. Draye
2375 East Camelback Road
Phoenix, Arizona 85016

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

GOLDWATER INSTITUTE

By: /s/ Jonathan Riches (with permission)

Jonathan Riches
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004

Attorneys for Fann et al. Plaintiffs

ROSE LAW GROUP PC

By: /s/ Logan Elia (w/permission)

Logan Elia
John Sud
Audra Petrolle
Thomas Galvin
7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251

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

ORIGINAL of the foregoing served via
email this 30th day of December, 2021:

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

*Attorneys to Defendants State of Arizona and
Arizona Department of Revenue*

Stephen W. Tully
Tully Bailey LLP
4533 E. Desert Cove Avenue
Phoenix, AZ 85028
stully@tullybailey.com

*Attorneys to Defendant Kimberly Yee, in her
official capacity as Arizona State Treasurer*

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

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

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

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

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

/s/ Richard A. Schaan

APPENDIX 7

Brian Bergin, SBN #016375
Kevin Kasarjian, SBN #020523
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Telephone: (602) 888-7855
Facsimile: (602) 887-7856
bbergin@bfsolaw.com
kkasarjian@bfsolaw.com

*Attorneys for Defendants State of Arizona,
Arizona Department of Revenue*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KAREN FANN, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants.

No. CV2020-015495

(Consolidated with CV2020-015509)

**ARIZONA DEPARTMENT OF
REVENUE'S SEPARATE MOTION
FOR JUDGMENT AND PARTIAL
JOINDER IN PLAINTIFFS'
MOTION**

ECO-CHIC CONSIGNMENT, INC., et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.,

Defendants,

(Assigned to the Hon. John Hannah)

INVEST IN EDUCATION et al.,

Intervenor-Defendants.

Defendant Arizona Department of Revenue (“ADOR”) hereby submits its separate Motion for Judgment and Partial Joinder in Plaintiffs’ Motion, and respectfully requests that the Court conclude and declare that: (a) it is more likely than not that Proposition 208’s revenues will exceed the constitutional expenditure limit in result in the accumulation of money that cannot be spent; (b) consistent with the remand instructions from the Arizona Supreme Court, Proposition 208 cannot be enforced; and (c) the Arizona Department of Revenue should proceed consistent with these findings and shall not administer or collect Proposition 208’s income tax surcharge.

FACTUAL BACKGROUND

A. The Arizona Supreme Court Opinion

On August 19, 2021, the Arizona Supreme Court issued its opinion related to the Fann Plaintiffs’ intermediate appeal. *Fann v. State*, 251 Ariz. 425 (2021). In relevant part, the Court held:

¶ 52 To the extent they exceed the constitutional expenditure limitations, Prop. 208’s direct payments to school districts under A.R.S. § 15-1281(D)(1), (2) and (3) are unconstitutional, and these provisions are not severable from the remainder of Prop. 208. However, the record before this Court is insufficient to establish whether such payments will in fact exceed the constitutional expenditure limitation.

. . . .

¶ 54 . . . Therefore, we remand to the trial court for a determination of this issue. If the trial court finds that the tax revenues allocated will not exceed the expenditure limit, then there is no present constitutional violation and Prop. 208 stands. However, if the trial court finds that A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit, it must declare Prop. 208 unconstitutional and enjoin its operation. Moreover, to further clarify this inquiry for the trial court, if any material amount of the Prop. 208 revenue is sequestered in a designated state fund because it cannot be spent due to the expenditure limit, then Prop. 208, in its entirety, is unconstitutional. . . .

Id. at *11 ¶¶ 52, 54.

B. JLBC and ADE Calculations

The Joint Legislative Budget Committee (“JLBC”) is a non-partisan committee responsible for “ascertaining facts and making recommendations to the Legislature regarding all facets of the state budget, state revenues and expenditures, future fiscal needs,

and the organization and functions of state government.” *About JLBC/JCCR*, JLBC, <https://www.azleg.gov/jlbc/aboutjlb.htm>. The State of Arizona and its agencies and departments regularly rely on JLBC forecasts and estimates in annual budgetary planning, taxation, and appropriations.

In September 2021, JLBC published a JLBC Staff Analysis of K-12 Aggregate Expenditure Limit (the “JLBC Report”), which demonstrates JLBC’s conclusion that the income tax surcharge in A.R.S. § 15-1281(D) will result in an accumulation of money that cannot be spent without violating the expenditure limit in FY 2022 and FY 2023 and cannot supplant other sources of education funding. The JLBC Report is attached to Plaintiffs’ Motion for Judgment as Exhibit “1” (IIE00357-00360).

Specifically, for FY 2022, JLBC noted that the Economic Estimates Commission (“EEC”) has calculated the Aggregate Expenditure Limit (“AEL”) to be \$6,019,979,900. *Id.* For the same year, JLBC projected that the total amount of estimated expenditures subject to the AEL in FY 2022 will equal \$7,263,934,700 resulting in an AEL exceedance of \$1,243,954,800. *Id.*

Unlike JLBC, ADOR and the Economic Estimates Commission (the “EEC”) do not make any further calculations related to school district expenditures apart from setting the preliminary and final AEL.

On November 1, 2021, the Arizona Department of Education sent a letter to President Fann, Speaker Bowers, and Chairman Gowan (the “ADE Letter,” attached to Plaintiffs’ Motion as Exhibit 3 (FANN004176)).

The ADE letter is consistent with JLBC’s projection, as it reported that “the aggregate expenditures of local revenues for all school districts . . . is \$7,173,667,189 for fiscal year 2021-22 Therefore, the aggregate expenditures of local revenues exceed by \$1,154,028,997 the aggregate expenditure limitation for all school districts of \$6,019,638,192, as determined by the EEC” *Id.*; *See also* Joint Fact Stipulation at ¶6.

For FY 2023—the first full fiscal year in which Proposition 208 revenues will be realized, JLBC projected that the AEL will equal \$6,529,652,600. JLBC also estimated that

the total amount of estimated expenditures subject to the AEL in FY 2023 will equal \$7,797,680,200—\$368,995,200 of which is attributable to Proposition 208’s income tax surcharge. JLBC Report (IIE00357-00360).

As a result, JLBC projects that, in FY 2023, school district expenditures exceed the AEL by \$1,268,027,600. Pursuant to Proposition 208, these monies cannot supplant other sources of educational funding. *Id.*

JLBC explains that, as a result of its “methodology for prior years,” its estimate of the total amount of estimated school district expenditures subject to the AEL does not include the “amounts budgeted for grant programs funded with state monies” even though they likely do not “qualify for exclusion as a grant based on the *Fann* court decision.” *Id.*

As such, JLBC concludes that its estimate of the total amount of school district expenditures subject to the AEL and the AEL exceedance is understated. *Id.*

According to JLBC, 100% of the projected \$368,995,200 in revenue from Proposition 208’s income tax surcharge will result in the accumulation of money that cannot be spent. *Id.*

ADOR’S POSITION

Based on these projections, ADOR submits that it is more likely than not that school district expenditures will clearly exceed the AEL in FY 2023. ADOR reaches this conclusion based on: (a) its routine and regular reliance upon JLBC’s expertise in producing forecasts and estimates involving school district expenditures, which ADOR does not separately produce; and (b) ADOR’s lack of subject matter expertise in school district expenditures.

Based on these projections, ADOR also submits that it is more likely than not that a material amount, if not all, of Proposition 208’s revenues will result in an accumulation of money that cannot be spent under the AEL and cannot be offset by other educational funding sources that are not utilized, as required by Proposition 208. ADOR bases this conclusion on: (a) its routine and regular reliance upon JLBC’s expertise in producing

forecasts and estimates involving school district expenditures, which ADOR does not separately produce, and (b) ADOR's lack of subject matter expertise in school district expenditures.

TIMING CONSIDERATIONS

For reasons stated in previous filings, ADOR reiterates that it is in ADOR's, and individual taxpayers', interests to resolve this matter as quickly as possible, but no later than January 21, 2021.

CONCLUSION AND REQUEST FOR JUDGMENT

For reasons set forth above, ADOR joins in the request for relief articulated in Plaintiffs' Motion and requests that this Court conclude and declare that: (a) it is more likely than not that Proposition 208's revenues will exceed the constitutional expenditure limit in result in the accumulation of money that cannot be spent; (b) consistent with the remand instructions from the Arizona Supreme Court, Proposition 208 cannot be enforced; and (c) the Arizona Department of Revenue should proceed consistent with these findings and shall not shall not administer or collect Proposition 208's income tax surcharge.

DATED this 30th day of December, 2021:

BERGIN, FRAKES, SMALLEY &
OBERHOLTZER

By: /s/ Brian Bergin

Brian Bergin
Kevin Kasarjian
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018

*Attorneys to Defendants State of Arizona and
Arizona Department of Revenue*

FILED this 30th day of December, 2021 through:
Maricopa County Superior Court
www.turbocourt.com

ORIGINAL of the foregoing served via
email this 30th day of December, 2021:

Dominic E. Draye
Greenberg Traurig LLP
237 5 East Camelback Road
Phoenix, Arizona 85016
drayed@gtlaw.com

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
Snell & Wilmer LLP
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
bwjohnson@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Jonathan Riches
Timothy Sandefur
Scharf-Norton Center for
The Constitutional Litigation
At the Goldwater Institute
400 E. Coronado Road
Phoenix, Arizona 85004
litigation@goldwaterinstitute.org

Attorneys for the Fann Plaintiffs et al.

Stephen W. Tully
Tully Bailey LLP
4533 E. Desert Cove Avenue
Phoenix, AZ 85028
stully@tullybailey.com

*Attorneys to Defendant Kimberly Yee, in her
official capacity as Arizona State Treasurer*

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

Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

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

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

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

/s/ Hailey Wedemeyer

APPENDIX 8

Roopali H. Desai (024295)
D. Andrew Gaona (028414)
Kristen Yost (034052)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5478
rdesai@cblawyers.com
agaona@cblawyers.com
kyost@cblawyers.com

Daniel J. Adelman (011368)
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
352 East Camelback Road, Suite 200
Phoenix, Arizona 85012
T: (602) 258-8850
danny@aclpi.org

*Attorneys for Intervenors Invest in Arizona (Sponsored
by AEA and Stand for Children) and David Lujan*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KAREN FANN, <i>et al.</i>,	)	No. CV2020-015495
	)	CV2020-015509
Plaintiffs,	)	(Consolidated)
)	
v.)	
)	
STATE OF ARIZONA, <i>et al.</i>,	)	INTERVENOR-DEFENDANTS'
	)	MOTION FOR ENTRY OF JUDGMENT
Defendants.	)	OF DISMISSAL
)	
ECO-CHIC CONSIGNMENT, INC., <i>et al.</i> ,)	
)	
Plaintiffs,	)	(Assigned to the Hon. John Hannah)
)	
v.)	
)	
STATE OF ARIZONA, <i>et al.</i> ,)	
)	
Defendants.)	
)	
INVEST IN ARIZONA (Sponsored by AEA and Stand for Children); and DAVID LUJAN,)	
)	
Intervenors.)	
)	

Introduction

In November 2020, 1.6 million Arizonans approved Proposition 208 to provide hundreds of millions of dollars in funding to public schools through targeted grants. They also declared that if a court found any provision of Prop 208 unenforceable, the offending provision should be severed to carry out their will. Yet just nine months later, the Arizona Supreme Court adopted an unprecedented interpretation of the Arizona Constitution untethered to its text, declared Prop 208's grant funding structure unconstitutional, and refused to sever the offending provision. *Fann v. State*, 251 Ariz. 425 (2021). It did so in an internally inconsistent opinion that (1) says two different things about which grants qualify as "local revenues" under article IX, § 21 of the Arizona Constitution, and (2) rests on the idea that the Fann Plaintiffs brought an as-applied challenge to Prop 208 when they did no such thing.

The supreme court [¶¶ 52-54] did recognize the limits of the record before it, finding it "insufficient to establish whether [Prop 208's transfers to school districts] will in fact exceed the constitutional expenditure limitation" set forth in article IX, § 21 of the Arizona Constitution ("AEL"). It remanded to this Court for further proceedings to "with certainty decide whether Prop. 208 revenues will exceed the expenditure limit" and "result in the accumulation of money that cannot be spent without violating the expenditure limit."

Plaintiffs' burden to prove to this Court that Prop 208 should be enjoined in its entirety is heavy. It's not enough for Plaintiffs to say or even prove that it's "more likely than not" that Prop 208 revenues "will in fact" exceed the AEL. The supreme court demanded "certainty," and we know nothing about either Prop 208 revenues or the AEL with "certainty." We do not know with certainty the final AEL for fiscal year 2023 ("FY2023"). We do not know with certainty the total amount of school district expenditures subject to the final AEL for FY2023. We do not know with certainty how much money Prop 208's income tax surcharge will raise in FY2023 (or any other year) given the uncertainties (1) in tax revenue projections generally and (2) injected by recent changes in Arizona tax laws aimed directly at undermining Prop 208's impact.

And given this overarching uncertainty, we don't – and can't – know with certainty how (or even if) school districts will budget Prop 208 revenues for FY2023.

More fundamentally, the remand instructions are not tied to a particular date or timeframe, leaving this Court to answer a fundamental question in the first instance. All parties agree that FY 2023 is the first possible year in which any Prop 208 funds could be provided to schools. That should not, however, mean that it is the only year that matters. Will it now be the case that, if in one single year AEL will be exceeded even without considering Prop 208 funds, then Prop 208 will be declared unconstitutional and permanently enjoined? Perhaps such a harsh result is why the supreme court demanded that Plaintiffs make their case with “certainty.” The undisputed facts prove that other state funds provided to public schools (and not Prop 208 funds) will be what “exceeds” the AEL in FY 2023. Because of this reality and the lack of “certainty” in performing the calculation prescribed by the supreme court, Plaintiffs cannot carry their burden. The Court should thus decline to enjoin Prop 208 based on Plaintiffs’ newfound as-applied challenge to its constitutionality.

Relevant Background

I. Prop 208 – An Overview.

Prop 208 imposes an income tax surcharge of 3.5% of taxable income over certain levels for high-income earners. A.R.S. § 43-1013(A). The Department of Revenue (“DOR”) must deposit all revenues collected into a new fund, A.R.S. § 43-1013(B) (“Student Support Fund”).

The Student Support Fund prescribes how the State Treasurer must distribute this new revenue. After covering administrative costs, the Student Support Funds distributes all remaining funds to school districts and charter schools in strict percentages. A.R.S. § 15-1281(D)(1)-(5). This includes a transfer of 12% of the funds to the separately created Career Training and Workforce Fund. A.R.S. § 15-1282 (“Career Training Fund”). Those monies become “multi-year grants” to provide career and technical training to high school students. A.R.S. § 15-1283(A). The Arizona Department of Education (“ADE”) will award grants from the Career

Training Fund based on criteria set forth in rules adopted by the Department.

All funds distributed to school districts through the Student Support Fund and Career Training Fund are in the form of “grants,” which the measure exempts from requirements that otherwise apply to grants from the State. A.R.S. § 15-1281(E). Prop 208 took a “belt-and-suspenders” approach, and further said that “[n]otwithstanding any other law, monies received by school districts and career technical education districts pursuant to this chapter [] [a]re not considered local revenues for the purposes of article IX, section 21, Arizona constitution.” A.R.S. § 15-1285(1) (“Local Revenues Clause”).

II. Plaintiffs Brought Facial – Not As-Applied – Challenges to Prop 208.

Several weeks before Prop 208 became law, the Eco-Chic Plaintiffs filed their (unverified) Complaint but did not seek a preliminary injunction (and in fact, they do not seek an injunction). Counts I and II of their Complaint contained various arguments this Court rejected in its June 11, 2021 ruling on Intervenor-Defendants’ Motion to Dismiss. As for article IX, § 21 (“§ 21”) and the AEL, Count III of the Eco-Chic Plaintiffs’ Complaint [¶¶ 86-95] articulated a facial challenge to Prop 208.

For their part, the Fann Plaintiffs filed their Verified Complaint and Motion for Temporary Restraining Order (With Notice) and Preliminary Injunctive Relief (“PI Motion”) the day Prop 208 became law. Their Verified Complaint also contained various arguments this Court rejected in its June 11, 2021 ruling on Intervenor-Defendants’ Motion to Dismiss. And about § 21 and the AEL, the Fann Plaintiffs made clear throughout these proceedings that their constitutional claim was facial, not as-applied. [See Verified Complaint, ¶¶ 3, 35–40, 56–61; PI Motion at 1, 3–7; *see also* 2/5/2021 Order at 14 (characterizing Fann Plaintiffs’ challenge as facial).] Even on appeal from this Court’s ruling denying the PI Motion, the Fann Plaintiffs “did not cast [their] arguments . . . as an as-applied challenge.” *Fann*, 251 Ariz. 425 ¶ 77 (Timmer, J., concurring in part and dissenting in part).

This Court denied the PI Motion. It found open fact questions that precluded a ruling on

whether Prop 208's revenues fell into a constitutional exception defining the "local revenues" that count toward the AEL. [*See* 2/5/2021 Order.] And it further found the record incomplete on whether "Proposition 208 will cause a violation of the expenditure limits," a necessary component of the Fann Plaintiffs' "facial challenge to Proposition 208's spending provisions." [*Id.*] The Fann Plaintiffs appealed this Court's order in part.

III. The Arizona Supreme Court's Opinion.

Over the summer, the supreme court issued a long and internally inconsistent opinion affirming this Court's denial of the PI Motion, but declaring that several portions of Prop 208 are unconstitutional.

First, after acknowledging that § 21's "Grant Exception" is "subject to two competing" and "plausible interpretations," the supreme court chose neither.¹ Instead, in one part of its opinion, it chose the narrowest possible interpretation that no party advanced: the word "grants" means only "private, non-governmental voluntary contributions" to school districts. *Fann*, 251 Ariz. 425 ¶¶ 21-30.² The court then explained that because "A.R.S. § 15-1285 incorrectly characterizes the allocated monies in order to exempt Prop. 208 from the Education Expenditure Clause, it is facially unconstitutional", and "A.R.S. § 15-1281(D) is also unconstitutional to the extent allocated revenues exceed the expenditure limit." *Id.* ¶ 31.

The supreme court continued by holding that this provision could not be severed from the balance of Prop 208. *Id.* ¶¶ 38-41. It arrived at this result only by turning a well-established body of severability precedent on its head, and "effectively creat[ing] and [] resolv[ing]" an as-applied

¹ As the supreme court summarized, the Fann Plaintiffs did not argue that only private contributions could be considered grants. Instead, they argued that a "grant entails a discretionary transfer that is not required by law" and "does not refer to mandatory taxation and spending." *Fann*, 251 Ariz. 425 ¶ 26. In their opening brief on appeal [at 11], the Fann Plaintiffs conceded that a portion of Prop 208 funds were "a genuine grant program" even under their definition.

² As explained in more detail below, in another part of the opinion [n.8], the supreme court expressly found that some Prop 208 moneys qualify under the grant exception, even though they are not "private, non-governmental voluntary contributions."

challenge to Prop 208 that the Fann Plaintiffs didn't bring. *Id.* ¶¶ 75-78 (Timmer, J., concurring in part and dissenting in part); *see also id.* ¶ 79 ("Today's decision marks a departure from our previous decisions"); *id.* ¶ 80 ("The likelihood of successful as-applied challenges should not be used as a backdoor pathway for declaring an entire initiative unconstitutional and void").

Despite these jurisprudential contortions, the supreme court affirmed this Court's denial of the PI Motion because it said the record was "insufficient to establish whether [Prop 208's revenue transfers] will in fact exceed the constitutional expenditure limitation." *Id.* ¶ 54. The supreme court remanded the matter with these instructions:

Based on the limited record before us, it appears that Prop. 208 funds could likely exceed the constitutional spending limitation placed on school districts. However, we cannot with certainty decide whether Prop. 208 revenues will exceed the expenditure limit. Therefore, we remand to the trial court for a determination of this issue. If the trial court finds that the tax revenues allocated will not exceed the expenditure limit, then there is no present constitutional violation and Prop. 208 stands. However, if the trial court finds that A.R.S. § 15-1281(D) will result in the accumulation of money that cannot be spent without violating the expenditure limit, it must declare Prop. 208 unconstitutional and enjoin its operation.

Id. ¶ 54 (emphasis added). The supreme court did not specify the relevant timeframe for this Court to consider in performing these remaining tasks.

The supreme court's opinion also contains a critical inconsistency about whether some percentage of Prop 208's grants to school districts qualify as "local revenues." As noted above, Paragraph 30 of the opinion holds that the term "grants" as used in the Grant Exception (article IX, section 21(4)(d)(v)) refers only to private contributions provided to school districts. Yet footnote 8 of the opinion says that "[t]welve percent of Prop. 208 monies qualify for the Grant Exception [in addition to the funds that will be distributed to charter schools] . . . ,," which can refer only to Prop 208 monies that go to the Career Training and Workforce Fund to be provided as grants to school districts (*i.e.*, non-private monies). *See* A.R.S. §§ 15-1282, 15-1283. Only one of these can be true, and this issue needs to be clarified because it impacts other state grant programs that distribute "non-private" monies. Without clarification, there will be open

questions about whether the funds provided by those programs are “local revenues” and how those funds will impact the AEL.

IV. Calculating the AEL.

The supreme court’s remand instructions require the Court to consider both the AEL and projected school district spending subject to the AEL. All parties agree that no revenues from Proposition 208 will be budgeted or spent in FY 2022 [Joint Factual Stipulation (“JFS”) ¶ 3], meaning FY 2023 is the first possible year in which Prop 208 revenues could be at issue. The AEL for FY 2023 will be calculated based on two variables: the GDP implicit price deflator for CY 2021 (updated in May 2022), and the final student population numbers for school district for the 2021-2022 school year (which will not be known until around May 2022). [*Id.* ¶ 5.]

On the first variable, the Joint Legislative Budget Committee’s (“JLBC”) Staff used a GDP implicit price deflator estimate for CY 2021 as of Q2 equal to 3.68%. [JSF ¶ 4.] But based on trends set forth in the data source used by JLBC and elsewhere, “it is likely that actual inflation for the year 2021 will be greater than 3.68%.” [See **Exhibit 1** (Expert Report of Gary Liddicoat) at 11.] If that occurs, the FY 2023 AEL will increase, perhaps materially.

On the second variable, the Arizona Department of Education (“ADE”) recently reported that the student population for school districts for the 2021-2022 school year equals 877,636, which represents a 2.3% increase in the student population numbers compared to the same statistic at the same time last year. [JFS ¶ 4.] But those numbers are not final and will not be final until around May 2022. [*Id.*] Beyond that, there is significant uncertainty surrounding student population numbers in the wake of an unprecedented drop in enrollment last year because of COVID-19. As school finance expert Chuck Essigs explains,

Regarding the AEL, final ADM figures will not be available until the spring. At this time, according to ADE, districts have regained approximately half of the students that were “lost” during FY 2021 due to the pandemic. However, it remains unclear how many of those students will return prior to the end of the year as the pandemic continues to evolve. For example, there is no data from which one can determine whether some of the children who have not returned to school have been

affected by the surge involving the Delta variant. It is also unknown whether additional students will attend now that vaccines are available for school-aged children. Charlie Martin from ADE recently reported that ADM typically increases about 0.5 percent between November 1 and the final ADM count. However, it is unknown whether this number will be exceeded this year due to the unique issues surrounding the pandemic.

[**Exhibit 2** (Expert Disclosure of Chuck Essigs) at 9.]

The AEL is also not currently being calculated correctly by the Economic Estimates Commission (“EEC”). As Mr. Essigs explains, the current calculation disregards adjustments such as changes in funding sources for costs formerly filled by the “capital levy.” [*Id.*] The parties agree that if the EEC made this adjustment as required by § 21, the amounts attributable to the former capital levy would equal roughly \$200 million in FY 2022 and FY 2023. [JFS ¶ 7.]

ADE recently stated that budgeted school district expenditures exceed the AEL in FY 2022. According to ADE, for FY 2022, school district spending subject to the AEL will equal \$7,173,667,189, which will cause a \$1,154,028,997 exceedance over the FY 2022 AEL (\$6,019,638,192). One significant source of the exceedance is that Classroom Site Fund dollars (often called “Proposition 301” monies), which had never counted toward the AEL under an exception in article 9, § 21(4)(d)(v), now will count toward the AEL. According to an analysis performed by JLBC’s Staff (discussed below) [**Exhibit 3** (“JLBC Analysis”)], this adds about \$632 million in FY 2022 and \$660 million in FY 2023 to the total amount of monies provided to school districts that qualify as “local revenues.” [JFS ¶ 6.]

Both the JLBC Analysis and expert reports put forward by the Fann Plaintiffs project that school district spending will exceed the AEL in FY 2023 even without consideration of any revenues from Proposition 208. [JFS ¶ 8] Based on current projections, school district spending will likely exceed the AEL in 2023, even if the amounts attributable to the former capital levy are excluded, and without consideration of any revenues from Proposition 208. [JFS ¶ 9.] In other words, other state funding sources that now qualify as “local revenues”—not Prop 208—

will likely push school district budgeted expenditures over the AEL.

FY 2022 and FY 2023 are outliers when considering the AEL alongside budgeted school district expenditures. FY 2022 is the only year out of the last ten years in which the AEL has been exceeded. Since 2012, the following table shows that in nine of the ten years, there was more than \$140,000,000 of “room” under the cap; in eight of the ten years there was more than \$300,000,000 under the cap; and in seven of the ten years there was more than \$600,000,000 under the cap:

Limit Versus Statewide Budget Expenditure			
2012	6,352,279,842	4,865,757,930	(1,486,521,912)
2013	5,645,147,679	4,880,372,972	(764,774,707)
2014	5,754,191,463	5,074,002,889	(680,188,574)
2015	5,760,676,111	5,080,850,973	(679,825,138)
2016	5,944,447,487	5,045,100,795	(899,346,792)
2017	5,946,051,805	5,327,424,799	(618,627,026)
2018	6,074,782,120	5,375,208,959	(672,573,161)
2019	6,111,700,981	5,794,434,132	(317,266,849)
2020	6,202,831,559	6,153,498,027	(49,333,532)
2021	6,309,587,438	6,165,430,899	(144,156,539)

These numbers illustrate the danger of assuming that the economy of this year and last will continue to produce a trend under which there will be never space under the AEL to accommodate the expenditure of revenues from Prop 208. [See **Exhibit 2** at 9-10]

V. JLBC’s Speculative Projections.

After the supreme court released its opinion, Senate President Karen Fann – lead Plaintiff here – directed JLBC to produce a report (which ultimately became the JLBC Analysis) with projections related to the AEL and school district expenditures in response to the supreme court’s opinion in this case. [**Exhibit 4** (Excerpts from Rule 30(b)(6) Deposition of JLBC (Moran)) at V1 11:16-22.] JLBC staff who prepared the report (1) knew it was for potential use in this litigation, (2) knew that President Fann and Speaker Bowers (along with other members of the Republican caucus) were Plaintiffs in that litigation, and (3) serve at the pleasure of legislative

leadership, including President Fann and Speaker Bowers. [*Id.* 24:13-27:1.]

Though the JLBC Analysis contains the projections requested by President Fann for use in this litigation, those projections are anything but certain. JLBC concedes that there will be no certainty about how school district spending for FY 2023 will correlate with the applicable AEL until November 2022. [**Exhibit 4** at 18:2-9.] This makes sense when considering that EEC will not compute the final AEL for FY 2023 until May 1, 2022, final inflation figures for calendar year 2021 will not be available until May 2022, and ADE will not produce its statutory report on budgeted expenditures until November 1, 2022 (which JLBC concedes could be subject to change). [*See id.* at 34:11-35:10.] But in any event, JLBC projects that regular formula spending along with several other state funding sources (desegregation expenses, and adjacent ways expenses, among others) will cause school district expenditures in FY 2023 to exceed the AEL without considering Classroom Site Fund dollars or Prop 208 revenues. [*Id.* at 39:19-40:13.]

There are, of course, many reasons for uncertainty in an analysis that was created in the summer of 2021, but which tries to project specific revenue streams for FY 2023. Any time one projects future events – particularly in the midst of an unprecedented pandemic – there will be some uncertainty.³ But the JLBC Analysis contains much more uncertainty than usual because it must try to account for the passage of Senate Bill 1783 (“SB 1783”). SB 1783 – now codified mainly at A.R.S. § 43-1701, *et seq.* – “creates an alternative income tax” structure for certain income that would “no longer be subject to the Proposition 208 surcharge” as it was when Prop 208 passed. [**Exhibit 5** at 11:20-13:14.] All agree that SB 1783 will decrease Prop 208’s annual revenues from the \$836 million figure originally projected by JLBC and ADOR. The question no one can answer with any level of certainty is by how much.

JLBC realized the limitations of its analysis. It specifically cautioned readers that its fiscal

³ JLBC fiscal notes usually rest on a series of assumptions and uncertainty that “depend[] on the level of data availability or the complexity of the proposal.” [**Exhibit 5** (Excerpts from Rule 30(b)(6) Deposition of JLBC (Brown)) at 16:4-17:10]

notes and projections about Prop 208 revenues in the wake of SB 1783 should be “interpreted cautiously” because the legislation involved “complexities” and “data limitations.” [*Id.* at 40:18-42:5.] Indeed, JLBC explained that “this fiscal impact should be interpreted . . . more cautiously than other analys[e]s given the data limitations.” [*Id.* at 46:3-6.] Even more uncertainty stems from JLBC’s failure to account for any changes in taxpayer behavior in response to SB 1783 (*i.e.*, whether taxpayers might restructure corporate entities to benefit from the bill). [*See id.* at 42:13-45:24; *see also* **Exhibit 1** at 8-9 (noting the difficulties in predicting taxpayer behavior in response to major tax legislation like SB 1783).] SB 1783’s impact on Prop 208 projections may also be understated because the JLBC Analysis excluded certain taxpayers (with annual incomes of \$200,000 to \$500,000) who will be subject to the surcharge. [**Exhibit 1** at 5.]

Another significant source of uncertainty about SB 1783’s impact on Prop 208 revenues arises out the bill’s definition of “Arizona small business gross income.” Under that definition, only some income that can be claimed on the Internal Revenue Service’s “Schedule D” qualifies as “small business” income. *See* A.R.S. § 43-1701(3)(b) (noting the category “[i]ncludes any amount reported on schedule D, capital gains and losses, that is recognized with respect to either the taxable disposition of an ownership interest in any entity other than a publicly traded entity, or the taxable disposition of capital assets used in connection with a trade or business activity, including goodwill and going concern value”). Thus, although only some of Schedule D income qualifies under SB 1783, JLBC had no data from which to determine what amount of income might be affected. As JLBC explained, “[t]he concern regarding the Schedule D language was that the provision said Schedule D then added a variety of qualifiers after that language. . . that did not point to specific portions of the Internal Revenue Code.” [**Exhibit 5** at 19:8-13; *see also id.* at 20:10-12 (“[I]t was unclear about which items on the Schedule D would be available to be included under the alternative -- alternate income tax.”); *id.* at 44:9-10 (noting that the Schedule

D issue was “a significant challenge in doing this analysis”).]⁴

More specifically, within JLBC “there was some confusion about the taxable disposition of capital assets that are used in [connection] with a trade or business activity.” [*Id.* at 22:6-23:9.] And “there is a specific item in IRS reporting that deals with capital gains with passthrough entities” that originally prompted JLBC to present two scenarios; one including that item from Schedule D, and one excluding it. [*Id.* at 23:11-21.] JLBC later abandoned this two-track approach because of the “speculative nature of passthrough gains and losses” [*id.* at 71:17-72:2], and provided a final projection that excluded this item from Schedule D under which SB 1783 would impact Prop 208 revenues by around \$292 million. Under JLBC’s approach, Prop 208’s projected annual revenues thus fell from the original projection of \$836 million to a projected \$544 million (a drop of 35%). Even here, JLBC noted this was a “back of the envelope” analysis.

There are several problems with JLBC’s approach to SB 1783 and the AEL beyond those discussed above. First JLBC failed to justify its decision to exclude the “passthrough gains and losses” category from its projections. And including that category reduces Prop 208’s projected revenues by \$410 million; under that inclusive approach, Prop 208’s annual revenues would fall from the original \$836 million to \$426 million (a drop of 49%). [**Exhibit 1** at 6.]

Second, JLBC relied on ten-year-old capital gains data capturing all federal tax filers, not just those in Arizona, from 2012.⁵ [**Exhibit 5** at 68:5-25.] Beyond the dataset not being Arizona-specific, “it is unclear whether the conclusions drawn from data based on 2012 tax filings can be applicable to a tax environment almost ten years later,” even if the 2012 data is the most recent released by the IRS. [**Exhibit 1** at 6.] This makes even more sense after looking at the volatility

⁴ Even ADOR doesn’t know “the percentage [or amount] of capital gains income reported on IRS form schedule D attributable to Arizona taxpayers” that would fall qualify under SB 1783 [See **Exhibit 6** (State Defendants’ Responses to Intervenor-Defendants’ Second Set of Requests for Admission), Responses to RFAs 11 and 12.]

⁵ 2012, of course, was just a few years after the Great Recession, and the economy had not yet fully recovered from that significant event. [See **Exhibit 5** at 66:11-67:5.]

of capital gains data over the last five years for which there is data (2008-2012). During that period, (1) “[t]otal net capital gains ranged from \$37 billion to \$639.9 billion, likely reflecting the impact of the Great Recession,” (2) “passthrough gains and losses ranged from \$61.5 billion to \$291.3 billion,” and (3) “[p]assthrough gains and losses as a share of total gains ranged from 45.5% to 166.1%.” *Id.* This volatility injects further uncertainty into JLBC’s projection.

Lastly, and as discussed above, JLBC’s use of 3.68% as the GDP implicit deflator likely causes its projections about the AEL to be understated. [Exhibit 1 at 11.] The Federal Reserve recently summarized the predictions of economic forecasters that predict “current-quarter headline CPI inflation [will] average 4.6 percent, up from 2.6 percent in the last survey” and “[h]eadline PCE inflation over the current quarter will be 4.0 percent, up 1.4 percentage points from the previous estimate.” See Federal Reserve Bank of Philadelphia, *Fourth Quarter 2021 Survey of Professional Forecasters* (Nov. 15, 2021), <https://www.philadelphiafed.org/surveys-and-data/real-time-data-research/spf-q4-2021>.⁶

VI. Lack of Knowledge Regarding Prop 208 Revenues & School District Budgeting.

Finally, and projections aside, no one knows the actual amount of Prop 208 revenues that (1) will be collected for tax year 2021, (2) will be distributed to school districts in FY2023, or (3) school districts will include in their FY2023 budgets given the uncertainty about those funds.

As of now, and as of the date identified by ADOR as necessary for this Court to issue its decision, ADOR will have no idea how much it will collect from Prop 208’s income tax surcharge for tax year 2021. ADOR won’t even have “preliminary revenue calculations” until

⁶ The AEL increases based on the actual rate of inflation as established in the GDP implicit price deflator. Ariz. Const. art. IX, §§ 21(2), (4)(a)(i). Yet the State’s funding formula is increased by the lesser of actual inflation or 2%. When inflation exceeds 2%, more room under the cap will be created because the AEL grows faster than spending.

The volatility of inflation in this pandemic era is unprecedented. The Fann Plaintiffs will likely argue that inflation would have to reach implausible levels to create enough space under the AEL. Intervenor-Defendants do not dispute this when considering this variable in isolation. But this variable is just one of many factors that create significant uncertainty.

December 2022, and later “will assemble calculations and other information . . . reflecting revenue status as of June 2023.” [Exhibit 7 (State Defendants’ Response to Intervenor-Defendants’ Second Set of Non-Uniform Interrogatories), Resp. to Interrogatory No. 3.]

Relatedly, ADOR has transferred no funds to the Student Support Fund and also has no idea how much it will transfer to the Student Support Fund for potential use by school districts in FY2023. [Exhibit 6, Responses to RFAs 8-10.] As a result, and however much Prop 208 ultimately raises from tax year 2021, there is no “certainty” about how much of those revenues will ultimately be transferred to school districts for potential use in FY2023.

These facts also inform a third crucial factor: there is no way to predict how much school districts will budget for Prop 208 revenues for FY2023, budgets that must be completed before anyone has any idea how much Prop 208 will generate. A.R.S. § 15-905. As the Court may recall, the AEL doesn’t limit the amount of “local revenues” a school district receives, but the money it budgets and spends [Exhibit 4 at 30:12-25.] As a result, a school district could receive monies that qualify as “local revenues” under § 21, but not include them in its budget. [*Id.* at 31:2-7.] But beyond that, and as school finance expert Chuck Essigs explains:

It is likely that school districts will not have clear information by the time . . . they propose and adopt their budgets in June and July 2022. For example, a district could not responsibly commit to raises of a certain level when negotiating teacher contracts for FY 2023 when they do not have reliable information about how much Proposition 208 will generate for their district. Instead, districts are likely to budget little if anything from Proposition 208 for FY 2023, and then – when the amount is known – districts will carry forward their Proposition 208 allocations and make them available in FY 2024.

[Exhibit 2 at 11-12⁷.] There is thus no evidence to suggest (or even a reasonable basis to assume) how school districts will budget Prop 208 revenues for FY2023.

⁷ The timing of tax collections and school district budgets is critical to Mr. Essigs’ conclusion. Though many taxpayers file at the initial deadline in mid-April, all taxpayers can get an automatic extension until mid-October. Thus, when districts must complete their budgets for FY 2023 (in July 2022), there will be no information on which to budget potential FY 2023 Prop

Argument

Plaintiffs are not entitled to an order enjoining Prop 208. For FY2023, neither Prop 208 nor the revenues its surcharge generates will, in and of themselves, exceed the AEL. Additionally, Plaintiffs cannot meet their burden to establish anything with certainty as required by the plain language of *Fann*. For these reasons, the Court should enter a judgment of dismissal against Plaintiffs and in favor of the Intervenor-Defendants.

Further, to resolve the ambiguity caused by the opinion's inconsistent dictates, ADE and Arizona's school districts require clarity on the meaning of § 21's "Grant Exception." Without clarity, one cannot calculate the effect of *Fann* on the AEL. There is now conflicting guidance that affects not only the required calculation for Prop 208, but also other critical state grant programs that all believed did not qualify as "local revenues" until the supreme court issued conflicting statements in paragraph 30 and footnote 8 of its opinion.

I. Plaintiffs Cannot Prove Causation.

First, the undisputed facts prove that Prop 208 revenues will not cause an "exceed[ence of] the expenditure limit": other sources of state funding will.

The parties agree that in FY2023, school district budgeted expenditures will likely exceed the AEL even if the amounts attributable to the former capital levy are excluded, and without consideration of any revenues from Proposition 208. [JFS ¶ 9.] In other words, and as detailed above, other state funding sources that now qualify as "local revenues" will push school district budgeted expenditures over the AEL (and thus "exceed" it), not Prop 208 revenues. Similarly, those other state funding sources "will result in the accumulation of money that cannot be spent without violating the expenditure limit" (from a host of sources, including the Classroom Site Fund), not Prop 208 revenues. These are the only things we know about Prop 208 and the AEL with "certainty," and they dispose of Plaintiffs' request for injunctive relief.

208 revenues. While projecting into FY 2023 is tenuous for all the reasons discussed above, adding another year into the analysis would add even more uncertainty into the equation.

It makes no sense to say that Prop 208 is unconstitutional based on unrelated revenue streams. For example, JLBC projects that basic formula funding alone will cause an exceedance of the AEL in FY 2022. No one would claim that Arizona's entire school funding formula is unconstitutional. Further, because of the inconsistency in the supreme court's opinion described above, JLBC projects that roughly \$189 million in state grants (including Results-Based Funding) will now be included as "local revenues." No one could legitimately claim that each underlying grant statute is unconstitutional and should be permanently enjoined. For the same reason, it makes no sense to claim that Prop 208 is unconstitutional in its entirety because other state funding streams will exceed the AEL in the single year FY 2023.

II. Plaintiffs Can't Carry Their Burden to Establish "Certainty" About Prop 208 Revenues and the AEL.

Second, Plaintiffs cannot establish anything about Prop 208 revenues and the AEL with "certainty," and thus cannot carry their burden. This is another ground on which this Court should deny Plaintiffs' request for permanent injunctive relief against Prop 208 in its entirety.

The supreme court explained in *Fann* that it could not "with certainty decide whether Prop. 208 revenues will exceed the expenditure limit" and thus "remand[ed] to the trial court for a determination of this issue." *Fann*, 251 Ariz. 425 ¶ 54 (emphasis added). Plaintiffs must therefore establish all relevant facts with "certainty," where "certainty" means "[t]he quality, state, or condition of being indubitable or certain, esp. upon a showing of hard evidence" or "[a]nything that is known or has been proved to be true." "Certainty," Black's Law Dictionary (11th ed. 2019); *see also* "Certain," Dictionary.com, <https://www.dictionary.com/browse/certain> ("free from doubt or reservation; confident; sure").

As detailed at length above, there is nothing "indubitable," "certain," or "free from doubt" about Prop 208 revenues and the AEL for FY2023. To reiterate the background provided above:

- There is no "certainty" about the AEL for FY2023, as we don't know the final student population for the 2021-22 school year or the final GDP implicit deflator for CY 2021;

- There is no “certainty” about Prop 208 revenues for tax year 2021, as there are large open questions about how much will be collected because the passage of SB 1783 and other changes in Arizona tax laws will have a material impact on initial projections;
- There is no “certainty” on the amount of Prop 208 revenues that will ultimately be transferred to school districts for potential use in FY2023, as ADOR will not have final figures on tax collections attributable to Prop 208 until 2023; and
- There is no “certainty” about how much school districts will budget for Prop 208 revenues for FY2023 because they will have no concept of the funds that will be available, and the unrebutted expert testimony is that districts are likely to budget little if anything from Proposition 208 for FY 2023.

On these facts, Plaintiffs cannot carry their burden. Recognizing this, the Fann Plaintiffs frame their arguments on remand around the concept of it being “more likely than not” that Prop 208 revenues “will exceed the expenditure limit” and “result in the accumulation of money that cannot be spent without violating the expenditure limit.” Perhaps. But the Fann Plaintiffs’ framing concedes that they can’t carry their burden, and proving these things by a mere preponderance of the evidence is emphatically not what the supreme court required of them. To enjoin Prop 208 based on Plaintiffs’ reformulation of the burden of proof would thus violate the “universal rule that the trial court is absolutely bound by the decision and mandate of an appellate court.” *Tovrea v. Superior Ct.*, 101 Ariz. 295, 297 (1966).

Because Plaintiffs cannot carry their heavy burden, the Court should deny their request for an injunction and enter an order of dismissal.

III. The Supreme Court’s Instructions to this Court are Internally Inconsistent.

Lastly, the Intervenor-Defendants and the education community require clarification from the Arizona Supreme Court on the precise scope of § 21’s “Grant Exception” as interpreted in *Fann*. As discussed above, Paragraph 30 of the opinion holds that the term “grants” as used in the Grant Exception (article IX, section 21(4)(d)(v)) refers only to private contributions provided

to school districts. Yet footnote 8 of the opinion says that “[t]welve percent of Prop. 208 monies qualify for the Grant Exception [in addition to the funds that will be distributed to charter schools],” which can refer only to Prop 208 monies that go to the Career Training and Workforce Fund to be provided as grants to school districts (*i.e.*, non-private monies). Both holdings cannot be true, and how the supreme court resolves this irreconcilable conflict could upend several state grant programs that ADE previously considered to fall under § 21’s “Grant Exception.”⁸ [See **Exhibit 3** at 3 (noting that including those grants as “local revenues” would increase the school district budgeted expenditures subject to the AEL by \$189 million).]

Conclusion

Plaintiffs’ challenge to Prop 208 proves a sad reality in our State; our current leadership will do everything in its power to interfere with (1) the People’s fundamental right to legislate, and (2) any effort to provide public schools with the resources necessary to improve a system that crumbled on its watch. Intervenor-Defendants cannot do anything about the supreme court’s decisions about the scope of the Grant Exception, the severability of the Local Revenues Clause, or deciding an as-applied constitutional challenge that no party brought. But they can establish, as they do above, that Plaintiffs cannot carry their burden on the undisputed facts. The Court should decline to enjoin Prop 208 and dismiss this case.

//

//

//

//

⁸ For example, only a subset of districts receive Results-Based Funding grants. Yet if these grants pushed the budgeted expenditures of all districts over the AEL, every district would have to reduce their budgeted expenditures even if most districts received none of the Results Based Funding grants. The idea that already-starved school districts would have to reduce their budgets because other districts received discretionary grants is absurd. Perhaps that is why the supreme court stated in footnote 8 that certain grants that Prop 208 would provide to school districts would not count toward the AEL. But this conflicts with paragraph 30 of the opinion.

RESPECTFULLY SUBMITTED this 30th day of December, 2021.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona

Roopali H. Desai
D. Andrew Gaona
Kristen Yost

**ARIZONA CENTER FOR LAW IN THE
PUBLIC INTEREST**

By /s/ Daniel J. Adelman

Daniel J. Adelman

*Attorneys for Intervenors Invest in Arizona
(Sponsored by AEA and Stand for Children)
and David Lujan*

ORIGINAL efiled and served via electronic
means this 30th day of December, 2021, upon:

Dominic E. Draye (drayed@gtlaw.com)
Greenberg Traurig, LLP
2375 East Camelback Road
Phoenix, AZ 85016

Brett W. Johnson (bwjohnson@swlaw.com)
Colin P. Ahler (cahler@swlaw.com)
Tracy A. Olson (tolson@swlaw.com)
Snell & Wilmer L.L.P.
400 East Van Buren, Suite 1900
Phoenix, AZ 85004-2202

Jonathan Riches (litigation@goldwaterinstitute.org)
Timothy Sandefur
Goldwater Institute
500 East Coronado Road
Phoenix, AZ 85004
Attorneys for Fann Plaintiffs

Brian Bergin (bbergin@bfsolaw.com)
Kevin Kasarjian (kkasarjian@bfsolaw.com)
Bergin, Frakes, Smalley & Oberholtzer
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Attorneys for State of Arizona

Stephen W. Tully (stully@tullybailey.com)
Tully Bailey LLP
4533 East Desert Cove Avenue
Phoenix, Arizona 85028
Attorneys to Defendant Kimberly Yee

Logan Elia (lelia@roselawgroup.com)
Audra Petrolle (apetrolle@roselawgroup.com)
Thomas Galvin (tgalvin@roselawgroup.com)
John Sud (jsud@roselawgroup.com)
Rose Law Group pc
7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251
Attorneys for Eco-Chic Plaintiffs

/s/ Diana J. Hanson

APPENDIX 9

Brian Bergin, SBN #016375
Kevin Kasarjian, SBN #020523
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Telephone: (602) 888-7855
Facsimile: (602) 888-7856
bbergin@bfsolaw.com
kkasarjian@bfsolaw.com
*Attorneys for the State of Arizona and
the Arizona Department of Revenue*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE COUNTY OF MARICOPA**

KAREN FANN, *et al.*,

Plaintiffs,

vs.

STATE OF ARIZONA, *et al.*,

Defendants.

Case No. CV2020-015495

(Consolidated with CV2020-015509)

**ARIZONA DEPARTMENT OF
REVENUE'S REQUEST FOR
EXPEDITED RULING ON PENDING
CROSS MOTIONS FOR JUDGMENT**

ECO-CHIC CONSIGNMENT, INC., *et al.*,

Plaintiffs,

v.

STATE OF ARIZONA, *et al.*,

Defendants.

(Assigned to the Hon. John Hannah)

INVEST IN EDUCATION (Sponsored by
AEA and Stand for Children); and DAVID
LUJAN,

Intervenors.

1 Defendant Arizona Department of Revenue (“ADOR”) respectfully requests that the
2 Court issue a ruling, at its earliest opportunity, regarding the following motions:

- 3 (a) Plaintiffs’ Motion for Judgment filed December 30, 2021;
4 (b) Arizona Department of Revenue’s Separate Motion for Judgment and Partial
5 Joinder in Plaintiff’s Motion filed December 30, 2021;
6 (c) Intervenor-Defendants’ Motion for Entry of Judgment of Dismissal filed
7 December 30, 2021;
8 (d) Plaintiffs’ Response to Intervenor-Defendants’ Motion for Entry of Judgment
9 of Dismissal filed January 10, 2022;
10 (e) Arizona Department of Revenue’s Response to Intervenor-Defendants’
11 Motion for Entry of Judgment of Dismissal and Partial Joinder in Plaintiffs’
12 Response filed January 10, 2022; and
13 (f) Intervenor-Defendants’ Consolidated Response in Opposition to Plaintiffs’
14 and State Defendants’ Motion for Judgment filed January 10, 2022.

15 The parties submitted their respective motions for judgment and responses in
16 accordance with the briefing schedule established by this Court’s December 15, 2021
17 Minute Entry.¹

18 Throughout those filings including, but not limited to, the Parties’ Joint Request for
19 Expedited Case Status Conference filed December 9, 2021, ADOR explained the significant
20 duties and responsibilities that ADOR must fulfill in the near term and how its appropriate
21 course of action will be plotted, in large part, according to this Court’s ruling on the pending
22 matters. For those reasons, the parties’ proposed, and observed, a truncated briefing
23 scheduling and ADOR respectfully requested that this Court rule on, or before January 21,
24 2022.

25
¹ All parties subsequently submitted their respective response briefs three days earlier than
the initially anticipated date of January 13, 2022.

1 While no ruling issued on, or before, January 21, 2022, ADOR remains hopeful that
2 this Court still can issue a ruling at its earliest opportunity, as the calendar remains a
3 significant issue for ADOR and individual taxpayers.

4 In the absence of a ruling, ADOR has published Arizona income tax forms for the
5 2021 tax year that include provisions for the Proposition 208 surcharge, and has instructed
6 vendors who provide electronic tax filing (“E-File”) services to allow customers to file and
7 remit the same. As a result, taxpayers soon will begin remitting funds on account of the
8 Proposition 208 surcharge, and ADOR will collect that revenue. The longer the fate of
9 Proposition 208 remains unresolved, the more surcharge revenue ADOR will receive from a
10 larger body of taxpayers. If, after the passage of additional time, this Court ultimately
11 determines that Proposition 208 is unconstitutional, it will be more difficult for ADOR to
12 devise a lawful, and administratively-feasible, mechanism for accessing and refunding
13 monies to taxpayers.

14 ADOR is required to deposit Prop 208 surcharge revenues into the Student Support
15 and Safety Fund (the “Fund”). If that surcharge is determined to be unconstitutional,
16 ADOR will need to evaluate and establish a refund mechanism for the relevant taxpayers.
17 Doing so will be complex and difficult after monies have been distributed to the Fund, as
18 there is no statutory means for ADOR to access surcharge once they have been deposited.
19 This task will require a substantial commitment of time and resources and this burden will
20 continue to grow as the parties await a ruling.

21 Moreover, should this Court conclude that Proposition 208 is unconstitutional,
22 ADOR also will need to determine whether the onus should be put on taxpayers to amend
23 their returns, through paper submissions that must be manually processed by ADOR.
24 Alternatively, ADOR will bear the financial and technical challenges attendant to
25 developing a unique IT solution to make appropriate internal adjustments and establish
credits and refunds for designated taxpayers. Moreover, under that scenario, returns
received before the end of March 2022 likely will be placed into suspense, rather than

1 processed, which will lead to increased taxpayer confusion and an inevitable escalation of
2 customer service calls. Devising a workable solution that will not create unreasonable
3 delays in processing refunds for taxpayers also will be difficult—and increasingly so—the
4 longer ADOR must await a final decision.

5 For these reasons, ADOR respectfully requests that this Court issue a ruling on the
6 parties' motions for judgment at the Court's earliest opportunity.

7 DATED this 25th day of January 2022.

8 **Bergin, Frakes, Smalley & Oberholtzer, PLLC**

9 /s/ Brian M. Bergin

10 Brian M. Bergin

11 Kevin M. Kasarjian

12 4343 East Camelback Road, Suite 210

13 Phoenix, Arizona 85018

14 *Attorneys for the State of Arizona, and the*
15 *Arizona Department of Revenue*

16
17
18 FILED this 25th day of January, 2022 through:
19 Maricopa County Superior Court
www.turbocourt.com

20 ORIGINAL of the foregoing served via
21 email this 25th day of January, 2022:

22 Dominic E. Draye

23 Greenberg Traurig LLP

24 237 5 East Camelback Road

25 Phoenix, Arizona 85016

drayed@gtlaw.com

1 Brett W. Johnson
2 Colin P. Ahler
3 Tracy A. Olson
4 Snell & Wilmer LLP
5 One Arizona Center
6 400 E. Van Buren, Suite 1900 Phoenix,
7 Arizona 85004-2202
8 bwjohnson@swlaw.com
9 cahler@swlaw.com tolson@swlaw.com

10 Jonathan Riches
11 Timothy Sandefur
12 Scharf-Norton Center for
13 The Constitutional Litigation
14 at the Goldwater Institute
15 400 E. Coronado Road
16 Phoenix, Arizona 85004
17 litigation@goldwaterinstitute.org Attorneys
18 for the Fann Plaintiffs et al.

19 Stephen W. Tully
20 Tully Bailey LLP
21 4533 E. Desert Cove Avenue
22 Phoenix, AZ 85028
23 stully@tullybailey.com
24 Attorneys to Defendant Kimberly Yee, in her
25 official capacity as Arizona State Treasurer

By: /s/ Hailey Wedemeyer

APPENDIX 10

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

KAREN FANN, et al.

BRETT W JOHNSON

v.

STATE OF ARIZONA, et al.

BRIAN M BERGIN

DANIEL J ADELMAN
ROOPALI HARDIN DESAI
JOHN SUD
STEPHEN W TULLY
JUDGE HANNAH

STATUS CONFERENCE SET

The Court having received Arizona Department of Revenue's Request for Expedited Ruling on Pending Cross Motions for Judgment, filed January 25, 2022,

IT IS ORDERED setting a virtual Status Conference on **February 7, 2022 at 10:30 a.m.** in this division.

HONORABLE JOHN HANNAH
JUDICIAL OFFICER OF THE SUPERIOR COURT
EAST COURT BUILDING
COURTROOM 811
101 W. JEFFERSON
PHOENIX, AZ 85003
(602) 372-0759

Please note that the Court is utilizing a virtual platform called Court Connect. An auto-generated e-mail has been sent to local counsel of record. If for some reason you did not receive the e-mail, please advise the Court. You may join the hearing using the following link: <https://tinyurl.com/jbazmc-cvj07>, or you may appear via telephone by calling 1-917-781-4590, conference ID# 75956374#. For further information, please visit: <https://superiorcourt.maricopa.gov/court-connect/>

This is a **30 minute proceeding**. The Court will determine if more time is needed. If there is a failure to appear, the Court may make such orders as are just, including granting the relief requested by the party who does appear.

NOTE: All court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

APPENDIX 11

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

KAREN FANN, et al.)	
)	
)	
vs.)	
	)	No. CV 2020-015495
)	
STATE OF ARIZONA, et al.)	
)	
)	
)	
_____)	

Phoenix, Arizona
February 7, 2022

BEFORE: The Honorable John R. Hannah, Jr.
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Status Conference)
(Virtual appearances)

Marylynn LeMoine, RMR, CRI
Certified Reporter #50441

1 MR. ADELMAN: It is, Judge.

2 THE COURT: Okay.

3 All right. Well, I'm frankly just trying
4 get my work done here. There are a lot of litigants
5 who -- whose case may not be drawing as much attention
6 but who require my attention just like this one does, so
7 there are no ulterior motives.

8 I hear what everybody is saying. I will
9 get the decision out when I can get it out, and I hope
10 that the policy makers can figure out how to, you know,
11 how to work around what I'm doing because really, what's
12 important from my point of view is to give the case due
13 consideration and to decide it as best I can, so that's
14 what I'm doing.

15 And I don't think there is really anything
16 else for me to say at this point. I just really -- I
17 just wanted to acknowledge the concern, hear you all
18 out, and tell you that it's being worked on it and it
19 will be issued as soon as possible, so thank you,
20 everybody, for being here today.

21 MR. JOHNSON: Your Honor, if I may just
22 real quick, I do apologize. I appreciate how you said
23 as soon as possible.

24 Is there any estimate that you might be
25 able to provide?

1 THE COURT: No. I have a 60-day -- as you
2 know, I have a 60-day limit unless I order further
3 proceedings, which I'm not likely to at this point.

4 I've gone back and forth, and it's -- I
5 don't think oral argument would help me. I do have some
6 issues with the fact that this has been submitted to me
7 on the papers as a motion for entry of judgment, but yet
8 the parties are arguing about the credibility of the
9 experts.

10 It's -- I can't -- I'm not going to be in
11 a position to make credibility judgments without having
12 a hearing, but -- so it's not likely that I'm going to
13 do something that restarts the clock, but I think the
14 deadline is 60 days from January 10th, and you know,
15 that's -- that's the only real deadline that -- that I
16 have. Beyond that, as soon as can I is the best I can
17 tell you.

18 Okay. Thank you, folks. That's all for
19 today.

20
21 (Whereupon, the proceedings were
22 adjourned.)

23
24
25 * * *