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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015495 02/05/2021

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
LOGAN VINCENT ELIA
STEPHEN W TULLY
DOMINIC E DRAYE
COLIN PATRICK AHLER
TRACY A OLSON
JONATHAN RICHES
TIMOTHY SANDEFUR
KEVIN M KASARJIAN
BRAD L DUNN
DAVID E MCDOWELL
AUDRA ELIZABETH PETROLLE
DAVID ANDREW GAONA
KRISTIN ARREDONDO
JUDGE HANNAH

RULING

Before the Court is the Motion for Temporary Restraining Order (With Notice) and Preliminary Injunctive Relief relating to the Invest in Education Act, enacted by initiative in

November 2020 as Proposition 208. In the motion, plaintiffs Karen Fann *et al.*[1] request a preliminary injunction prohibiting the State of Arizona and its revenue collection and distribution agencies from "taking any action to enforce Proposition 208 . . ., levying any surcharge, or appropriating general fund public monies . . . to pay for costs associated with Proposition 208."

The Court has considered the parties' written submissions in connection with the motion and the oral arguments of counsel. By stipulation of counsel, the Court is addressing this motion as a matter of law. The Court has not attempted to resolve factual disputes between the parties.

On January 13, 2021, the Court ruled on the plaintiffs' motion in part. This ruling addresses the remainder of the motion.

For the reasons set out in the January 13, 2021 ruling and the reasons that follow,

IT IS ORDERED the plaintiffs' request for preliminary injunctive relief is denied.

GENERAL LEGAL PRINCIPLES

Preliminary Injunctive Relief

A party seeking a temporary restraining order with notice or a preliminary injunction must show: (1) a likelihood of success on the merits; (2) the possibility of irreparable harm if relief is not granted; (3) a balance of hardships favoring the moving party; and (4) public policy weighing in favor of injunctive relief. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). Courts apply a sliding scale to assess these factors. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187 ¶¶ 9–10 (2006). This requires "either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and the balance of hardships tips sharply in [the movant's] favor." *TP Racing, L.L.P. v. Simms*, 232 Ariz. 489, 307 P.3d 56 ¶ 21 (App. 2013) (internal quotation marks omitted). On this sliding scale, the stronger the likelihood of success on the merits, the less irreparable harm is necessary (and *vice versa*). *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187 ¶ 10.

Determining the Constitutionality of Statutes

The plaintiffs base their case for enjoining Proposition 208 on the Arizona Constitution. Some general legal principles apply.

[1] The moving plaintiffs do not include the plaintiffs from the case that originated as CV2002-015509 -- Eco-Chic Consignment, Inc., Ann Siner and John Buttrick. The collective term "plaintiffs," as used in this order, therefore refers only to the original plaintiffs in CV2020-015495.

To start with, the courts give substantial deference to legislative enactments. *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm'n.*, 220 Ariz. 587, 208 P.3d 676 ¶ 20 (2009). This is so both because of the respect owed co-equal branches of government, and because courts are neither tasked with making policy nor equipped effectively to do so. *See id.* Because the people's power to legislate by initiative is equal to the legislature's power, initiative measures receive the same judicial deference as conventional legislation. *See Winkle v. City of Tucson,* 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997).

Relatedly, the law presumes the constitutionality of properly enacted statutes. *Gallardo v. State*, 236 Ariz. 84, 336 P.3d 717, ¶ 9 (2014). Like the principle of judicial deference, the presumption of constitutionality applies to citizen-initiated laws and ordinary legislation alike. *See Ariz. Chamber of Commerce & Industry v. Kiley,* 242 Ariz. 533, 539 ¶ 15 (2017). All such statutes "are constitutional unless shown to be otherwise, and when there is a reasonable, even though debatable, basis for the enactment of a statute, [the courts] will uphold the act unless it is clearly unconstitutional." *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm'n*, 220 Ariz. 587, 208 P.3d 676 ¶ 21 (citations and internal punctuation omitted). The presumption of constitutionality requires a statute to be construed in a way that makes the statute constitutional, if possible. *State v. Arevalo*, 249 Ariz. 370, 470 P.3d 644 ¶ 9 (2020). If there is more than one reasonable interpretation of a statute, the judge must choose the one that avoids the constitutional issue. *Id.*

In addition, that a statute might be unconstitutional on some hypothetical set of facts does not justify finding it unconstitutional on its face. "To succeed on a facial challenge, the challenger must establish that no set of circumstances exists under which the statute would be valid. The fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Stanwitz v. Reagan*, 245 Ariz. 344, 429 P.3d 1138 ¶ 19 (2018) (citations and internal punctuation omitted).

Though these general rules apply to all of the plaintiffs' arguments, the arguments rely on different constitutional provision, relate to different aspects of Proposition 208, and implicate different interests of different plaintiffs. The Court therefore will address the plaintiffs' case for a preliminary injunction on each provision separately.

THE PLAINTIFFS' ARGUMENTS

The plaintiffs organize their case against Proposition 208 around four constitutional theories. One of those theories -- that the so-called "no supplant" provision violates Article IX, Section 23(A) (the "Revenue Source Rule") and infringes on the legislature's Article IV powers -- is addressed in the January 13, 2021 ruling. The three remaining arguments, in order of discussion, are: (1) Proposition 208 imposes a new tax in violation of the legislative super-majority

requirement of Article IX, Section 22; (2) Proposition 208's spending provisions violate the school district expenditure limits set out in Article IX, Section 21; and (3) Proposition 208 does not establish an "increased source of revenues" sufficient to cover its costs as required by Article IX, Section 23(A).[2]

The People's Power to Raise Revenue by Initiative

Article IX, Section 22 of the Arizona Constitution provides, "[a]n act that provides for a net increase in state revenues . . . is effective on the affirmative vote of two-thirds of the members of each house of the legislature." The plaintiffs argue that this provision forbids enactment by simple majority vote of statutes that raise taxes. As a result, they say, the part of Proposition 208 that levies an income tax surcharge, codified as A.R.S. section 43-1013, is invalid.

Likelihood of Success on the Merits

A constitutional provision means what those who drafted and ratified it intended it to mean. When a provision was adopted by constitutional amendment, as Article IX, Section 22 was, the primary focus is on the intent of the electorate that enacted the amendment. *See Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). The best indicator of intent and meaning is the plain language of the provision. *Id.* A court may not depart from the provision's language if the language is clear. *Fairfield v. Foster*, 25 Ariz. 146, 151, 214 P. 319, 321 (1923). Only when the provision has more than one reasonable interpretation does the court refer to other sources to determine the electorate's intent. *See State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 468 P.3d 1200 ¶ 21 (2020).

Measured by these rules, the plaintiffs' interpretation of Article IX, Section 22 has very little chance of success on the merits. Article IX, Section 22 applies to "acts" that require a "vote" of the "legislature." It changes the decision-making rule for such "acts" by requiring a two-thirds vote for approval. As such, it expresses the electorate's intent to make it more difficult for the legislature to increase taxes. But it does not follow that the voters intended, when they enacted Article IX, Section 22, to repeal or limit their own separate, co-equal power to increase taxes by initiative.

Article IX, Section 22 is silent on the topic of popular initiatives. The plaintiffs' position is that the voters implicitly revoked their own power to levy taxes by initiative when they approved Article IX, Section 22. The longstanding rule of construction, however, is that a court will not find a repeal by implication if a provision can reasonably be interpreted to avoid that result. *See, e.g., State Land Dept. v. Tucson Rock & Sand Co.*, 107 Ariz. 74, 77-78, 481 P.2d 867, 870-871

[2] The Eco-Chic plaintiffs allege additional grounds for relief in their complaint. Those theories are not addressed here.

(1971). The principle of "no repeal by implication" is particularly strong where the provision which is claimed to be repealed has deep roots in Arizona history, as the citizen initiative does. *Id.; see Feldmeier v. Watson*, 211 Ariz. 444, 123 P.3d 180 (2005) (Arizona's "strong public policy" favors the initiative and referendum).

The use of the term "act" in Article IX, Section 22 brings the provision's intent into clearer focus. The meaning of the words in our constitution must be drawn from the context in which they are used and considered in light of the document as a whole. *Adams v. Commission on Appellate Court Appointments*, 227 Ariz. 128, 254 P.3d 367 ¶ 34 (2011). A key aspect of context is how other constitutional provisions use the word or phrase at issue. *Id.*, ¶ 20. As the intervenor defendants point out, the Arizona Constitution repeatedly labels the legislature's enactments differently from enactments by initiative. In provisions that apply to the legislature, the constitution uses the term "act". *See, e.g.*, Ariz. Const. art. IV, pt. 1, §§ 1(1), 1(3). Enactment by initiative, on the other hand, are consistently described as "measures." *See id.*, art. IV, pt. 1, §§ 1(2), 1(4), 1(5) & 1(6)(A)-(D). By using the word "act" in Article IX, Section 22, then, the provision's framers indicated their intent that the provision would apply to the legislative process, not to the initiative process.

The Arizona Supreme Court said exactly this, in a case interpreting the "Single Subject Rule" set out in Article IV, Part 2, Section 13. *Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533, 399 P.3d 80 (2017). Article IV, Part 2, Section 13 reads as follows:

> Every *act* shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an *act* which shall not be expressed in the title, such *act* shall be void only as to so much thereof as shall not be embraced in the title.

Id., ¶30 (emphasis added). The issue in *Arizona Chamber v. Kiley* was the same as here: whether a constitutional rule concerning legislation applies to statutes enacted by initiative. The Court held that the single subject rule "applies only to acts by the legislature; it does not apply to initiatives." *Id.*, ¶ 31. In support of its ruling, the Court pointed to the Single Subject Rule's use of the word "act." "The Rule applies to 'act[s],' which are enacted by the legislature, and does not address initiative or referendum petitions. *Cf. Barth v. White*, 40 Ariz. 548, 556, 14 P.2d 743, 751 (1932)] (recognizing that an initiative petition is not an 'act')." *Id.*, ¶ 33. The same logic applies here.

Article IX, Section 22 could easily have been written broadly enough to foreclose tax increases by statutory initiative. An affirmative statement that tax increases "must be enacted" or "may only be enacted" by a two-thirds vote of the legislature would have that effect. So would a prohibition against enactment of tax increases "other than" or "except" by super-majority vote of

the legislature. That Article IX, Section 22 was not written that way indicates it was not meant that way.

The plaintiffs argue that Article IX, Section 22 is subject to Article XXII, Section 14, which says that "[a]ny law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." If the legislature cannot enact a tax increase except by two-thirds majority, the plaintiffs say, the electorate acting by initiative cannot do so either. That argument fails because Article XXII, Section 14 deals with the substance of a law, not the procedure for enacting it. Thus, for example, neither the legislature nor the people acting in its stead could enact a law making illegal to advocate a tax increase, because the First Amendment would prohibit such a law. But Article IX, Section 22 is not that kind of law.

The point is illustrated by the plaintiffs' fallback argument, that a tax increase enacted by initiative should require the approval of a two-thirds supermajority because the electorate is "standing in the shoes of the legislature" in that situation. Motion at 10-11. Perhaps the drafters of Article IX, Section 22 would have thought it a good idea to require a two-thirds majority vote for tax increases by initiative, but they simply did not say that. The courts would have to read that requirement into the law *and* operationalize it by judicial fiat.[3] That would literally be "legislating from the bench." "Courts are not at liberty to impose their views of the way things ought to be simply because that's what must have been intended, otherwise no statute, contract or recorded word, no matter how explicit, could be saved from judicial tinkering." *Kilpatrick v. Superior Court in and for Maricopa County*, 105 Ariz. 413, 422, 466 P.2d 18, 27 (1970).

In sum, the plaintiffs' argument that Proposition 208 did not validly enact the income tax surcharge is too weak even to raise "serious questions" that might justify preliminary relief if the other factors weighed strongly in favor of it. The other preliminary injunction criteria nevertheless will be addressed here, to the extent they are relevant, for the sake of a complete record on review and because some factor similarly into the analysis on other substantive issues.

Other Preliminary Injunction Factors

As to the possibility that the plaintiffs will suffer irreparable harm if the courts do not immediately enjoin Proposition 208, the plaintiffs' arguments are unpersuasive. Their assertion that constitutional violations *per se* cause irreparable harm that weighs in favor of a preliminary injunction is too broad even as a summary of the federal cases cited in their papers. Any "injury" caused by the tax surcharge at issue here is purely financial regardless of the ground on which the

[3] An example: Article IX, Section 22 requires an "affirmative vote of two-thirds of the members of each house of the legislature" to approve a tax increase. How would that translate to the initiative context? Would a two-thirds majority vote be enough to enact an initiative? Or would approval require a "yes" vote of two-thirds of registered voters? Two-thirds of eligible voters?

tax might later be held invalid. "Monetary injury is not normally considered irreparable." *Nelson v. National Aeronautics and Space Admin.*, 530 F.3d 865, 881 (9th Cir. 2008), *reversed and remanded on other grounds*, 562 U.S. 134 (2011). And no Arizona authority at all says a plaintiff claiming a constitutional violation has a special right to prejudgment relief.

That the income tax surcharge will not cause "irreparable harm" in the near future is especially clear as to the taxpayer plaintiffs. Because Proposition 208 takes effect on January 1, 2021, the Department of Revenue will not begin to collect the income tax surcharge until April 15, 2022. That leaves plenty of time, before the tax takes effect, to litigate this case to final judgment. During that time, the taxpayer plaintiffs will have only the obligation to make estimated payments based on their 2020 income tax liability, which Proposition 208 does not affect. A.R.S. § 43-581(A). Furthermore, if it turns out that the taxpayers have overpaid, they will have a simple, straightforward remedy: a tax refund.

The balance of hardships does not favor the taxpayer plaintiffs, either. The defendant Department of Revenue points out that, if an injunction is entered now and then lifted after the tax would otherwise have become due, the Department will have to collect the tax through retrospective audits and collection proceedings. That would be a difficult, time-consuming and expensive venture, particularly when weighed in contrast to the relatively modest burden on taxpayers who might pay estimated sums that are later refunded.

A preliminary injunction against the income tax surcharge is also disfavored as a matter of public policy. "It is the well-established policy of this state to prevent the validity of a tax from being tested by injunctive means." *Church of Isaiah 58 Project of Arizona, Inc. v. La Paz County*, 233 Ariz. 460, 314 P.3d 806 ¶ 17 (App. 2013). "A court may not issue an injunction, writ of mandamus or any other extraordinary writ in any action or proceeding against the state, a county or municipality or a state, county or municipal officer to prevent or enjoin . . . collecting an imposed or levied tax." A.R.S. § 42-11006(2). The analogous federal statute has been construed, by the United States Supreme Court, to prohibit injunctive relief from a tax imposed by an allegedly unconstitutional statute. *Bailey v. George*, 259 U.S. 16, 42 S.Ct. 419 (1922).

The plaintiffs argue that Arizona's anti-injunction statute applies only to property taxes because it appears in Title 42, which generally relates to property taxes, rather than Title 43, relating to income taxes. But the plain language of the statute itself states no such limitation. Our Supreme Court has rejected "the contention that titles and physical location of a statute within the code" should limit the application of a statute with an otherwise plain meaning. *Jennings v. Woods*, 194 Ariz. 314, 982 P.2d 274 ¶ 77 (1999). The *Jennings* court observed that the statute at issue there had been "tossed from place to place in the Arizona Revised Statutes like a sailboat in a monsoon." *Id.* The same is true of section 42-11066, which dates back more than 100 years in different versions. *See, e.g., Crane Co. v. Arizona State Tax Comm'n*., 63 Ariz. 426, 442, 163 P.2d

656, 663 (1945), *overruled on other grounds by Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 959 P.2d 1256 (1998); *Standard Oil Co. v. Howe*, 257 F. 481 (9th Cir. 1919).

The legislator plaintiffs, for their part, aver that allowing Proposition 208 to take effect as scheduled will cause irreparable harm by creating "chaos" in the budgeting and appropriations process during the upcoming legislative session. Motion at 15, n.4.[4] They offer a declaration from two other legislators who share this concern. *Id.*, Exhibit 4 (Joint Declaration of Hon. David Gowan and Hon. Regina Cobb) ¶15.[5]

The Court respectfully submits that the legislators' opinion rests on a mistaken factual premise. Proposition 208 has no direct effect on the budget that the Legislature is now creating. This year's session will produce a budget and appropriate funds for the fiscal year that begins on July 1, 2021. As the plaintiffs acknowledge, the Proposition 208 revenue will not even begin to flow until the spring of 2022. Reply at 16. Moreover, to the extent that the plaintiffs' concern is Proposition 208's immediate economic effect, the new law is just one more variable for the experts to factor into their econometric models. The plaintiffs offer nothing that suggests Proposition 208 is unusually challenging to economic forecasters, especially when compared to variables like the COVID-19 pandemic.

More fundamental, however, is that the legislator plaintiffs' alleged injury is not within the power of the judiciary to address. The separation of powers, established in Article III of the Arizona Constitution, prohibits the judiciary from meddling in the workings of the legislative process. *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). Courts have no power to enjoin legislative functions, or to supervise legislative proceedings. *City of Phoenix v. Superior Court of Maricopa County*, 65 Ariz. 139, 144-145, 175 P.2d 811, 814 (1946).

The people did not commit to the legislature the whole law-making power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes." *Allen v. State*, 14 Ariz. 458, 467, 130 P. 1114, 1118 (1913). The enactment of an initiative like Proposition 208, then, "is part of the legislative process." *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). So is the legislature's response to the measure, its effort to reconcile its own policy priorities with the people's priorities and to integrate existing laws with the law enacted by the people. A major initiative like Proposition 208 probably does make the

[4] The Court assumes here that the legislator plaintiffs have standing to sue. The other parties have not raised the issue.

[5] The parties stipulated that this declaration, and a similar one submitted on behalf of the intervenor defendants, would be considered for purposes of this motion notwithstanding that there has been no evidentiary hearing.

legislature's policy-making job more complex and time-consuming. But that is not a problem a court can remedy.

In short, the preliminary injunction factors other than "likelihood of success on the merits" do not support the plaintiffs' request to enjoin Proposition 208's tax provisions. Accordingly, there would be no basis for preliminary relief from the income tax surcharge even if the plaintiffs had a real chance of success on the merits.

The School District Expenditure Limits

Article IX, Section 21 of the Arizona Constitution imposes expenditure limits on Arizona's public school districts. The constitution requires an "economic estimates commission" to determine an annual "aggregate expenditure limitation" for all school districts in the state for the upcoming fiscal year. Ariz. Const. art. IX, sec. 21(2). The spending limits are determined by a formula keyed to expenditures of "local revenues" in fiscal year 1979-1980, updated to reflect changes in the number of students and the cost of living. *Id.* "The aggregate expenditures of local revenues for all school districts shall not exceed" the limits determined pursuant to the formula. *Id.* The legislature may authorize additional spending on an annual basis by "affirmative two-thirds vote" of each house. Ariz. Const. art. IX, sec. 21(3).

The issue at bar is whether provisions of Proposition 208 that prescribe spending of the new revenue violate Article IX, Section 21. Proposition 208 requires the state treasurer to collect the Proposition 208 revenue in a "Student Support and Safety Fund." A.R.S § 15-1281(A). After paying the State's costs of implementing, administering and enforcing Proposition 208, the treasurer must distribute eighty-five percent of the remaining money to school districts and charter schools for the purpose of hiring more teachers, classroom support personnel and student support services personnel, increasing the base compensation of those school employees, and funding mentoring and retention programming for new teachers. A.R.S. § 15-1281(D)(1)-(3). The plaintiffs challenge the constitutionality of these expenditures.[6]

Proposition 208 directly addresses Article IX, Section 21. The relevant section says:

A.R.S. § 15-1285. Local revenues and revenue control limitations; exemption

[6] It appears undisputed that the spending limits will not apply to the remaining fifteen percent of the Proposition 208 funds. Most of that money (twelve percent of the total Proposition 208 revenue after expenses) will be distributed by the Department of Education through a grant program that (all seem to agree) will not be subject to the expenditure limits. *See* A.R.S. §§ 15-1281(D)(4), 15-1282 & 15-1283. The rest will go to post-secondary educational institutions for teacher training. *See* A.R.S §§ 15-1281(D)(5) & 15-1655.

> Notwithstanding any other law, monies received by school districts and career technical education districts pursuant to this chapter:
>
> 1. Are not considered local revenues for the purposes of article IX, section 21, Arizona constitution.
>
> 2. Are exempt from any budgetary, expenditure or revenue control limit that would limit the ability of school districts or career technical education districts to accept or expend those monies.

This provision, applied literally, would exempt the Proposition 208 money from the constitutional expenditure limits.

The plaintiffs argue that "no legislation can exempt itself from the provisions of the Arizona Constitution." Motion at 3. They point out that Article IX, Section 21 was enacted as a statute, not a constitutional amendment. They accuse the drafters of Proposition 208 of attempting a "workaround" of the constitution.

Likelihood of Success on the Merits

The plaintiffs are plainly right when they say that all Arizona statutes, no matter how enacted, must comply with the Arizona Constitution. The constitution itself says as much. Ariz. Const., Art. XXII, Sec. 14 ("Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people.") If section 15-1285 was intended as a declaration of law that would shield Proposition 208 from constitutional scrutiny, it is indeed invalid. The intervenor defendants do not seriously argue otherwise.

The intervenor defendants instead treat section 15-1285 essentially as an interpretive aid, an expression of the drafters' intent that the Proposition 208 funds would not count toward the constitutional expenditure limits. But they recognize that the intent of Proposition 208's drafters is not dispositive. The issue is what the voters who enacted Article IX, Section 21 intended.

Concerning the application of Article IX, Section 21 to Proposition 208, the intervenor defendants make two main arguments. First, they argue that the Proposition 208 monies do not count toward the expenditure limits because they not "local revenues." Second, they argue that, even if the Proposition 208 monies do count toward the expenditure limits, they will not cause the school districts to breach those limits.

The plaintiffs have not shown, so far, that they are likely to defeat both these arguments. The first question, whether the Proposition 208 monies are "local revenues," is difficult to answer

on the present record. The parties have yet to present critical information about the history of Article IX, Section 21 and its interpretation by the legislature and state administrative agencies. The second question, whether the spending limits will be exceeded, is a factual issue. An evidentiary hearing will be necessary for both a real-world estimate of the spending limit for the fiscal year in which the school districts will actually receive the money, and a reliable assessment of the amount of money that the school districts will receive as a result of the income tax surcharge.

Likelihood of Success on the Merits: "Local Revenues"

"Local revenues" is a defined term in Article IX, Section 21. Ariz. Const. art. IX, sec. 21(4)(c). The text of Subsection 4(c) starts out as follows:

> "Local revenues" includes all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school district . . . except . . .

Subsection (4)(c) then goes on to list twelve separate "amounts," "amounts or property" or "*ad valorem* taxes," "received" or "accumulated" from various sources under various circumstances, that are excepted from the definition of "local revenues." Subsection (4)(d) lists six more "items" of similar character that are "excluded from local revenues of school districts."

In support of the proposition that the Proposition 208 funds are not "local revenues," the intervenor defendants rely on the exception that applies to "grants." The relevant provision (the "grants exception") covers:

> [a]ny amounts or property received as 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.

Ariz. Const. art. IX, sec. 21(4)(c)(v). Proposition 208 consistently refers to the monies distributed from the Student Support and Safety Fund as "grants." *See, e.g.*, A.R.S. § 15-1281(D)(1)-(3) (directing Treasurer to distribute monies in the Student Support and Safety Fund "as grants to school districts and charter schools"). That label reflects the intention of Proposition 208's drafters to shield the measure's spending from the revenue limits by invoking the grants exception.

The plaintiffs counter that what matters is the substance of what Proposition 208 does, not the labels it uses. That is mostly true as far as it goes, but again – as with the Proposition 208 provision that says the monies are not "local revenues -- it is just the starting point of the discussion. The real issue is how to interpret the grants exception.

The language of the grants exception can be construed in several different ways. Lack of internal punctuation makes the text confusing. During the drafting of Proposition 208, the Arizona Legislative Council ("ALC") opined that the grants exception applies only to "private grant monies." Motion, Exhibit 1 (Arizona Legislative Council Memo, February 10, 2020). This interpretation depends on imaginary commas inserted into the constitutional text, before the word "except" and before the words "in lieu of." Set off this way, the "except" clause" in the grants exception (the exception to the exception, so to speak) refers to "amounts received directly or indirectly in lieu of taxes."

Though the ALC's construction of the grants exception's text is reasonable, neither of the primary parties endorses it. Those parties instead focus on the meaning of the word "grant." Relying on a dictionary definition of "grant," the plaintiffs argue that the grants exception applies to "discretionary or voluntary transfers" but not "mandatory or statutorily-fixed expenditures." Reply at 1. Combining a different definition of "grant" with a broader perspective on Arizona's school financing laws, the intervenor defendants say "grants" are "special-purpose funds," Response at 6-7, which they characterize as one of several kinds of "non-formula education funds" that do not count as "local revenues." Reporter's Transcript 12/23/2020 at 39. Both of those interpretations are also plausible.

Because there is more than one reasonable way to read the text of the grants exception, it will be necessary to "look beyond the bare words of the provision to discern its intended effect," considering its context, purpose and history. *See Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). But there is little of that material in the record. For example, no one has cited or referred to the ballot materials that explained the expenditure limits when the public approved them. The Court could track down those materials and take judicial notice, but it would be preferable for the parties to weigh in on what they mean before any conclusions are drawn.

Another unexplored aspect of the grants exception's history is how the provision has been interpreted and applied by the legislative and executive branches of the state government. When a provision's language is ambiguous, a court

> may consider, among other things, the meaning previously given it by co-ordinate branches of the government . . . . Particularly is this true with constitutional provisions, for, since broad subjects must be covered therein with few words, it is impossible for their framers to state explicitly every detail or shade of meaning intended.

Fairfield v. Foster, 25 Ariz. 146, 151, 214 P. 319, 321 (1923) (citation omitted). Prior construction of a constitutional provision weighs especially heavily "if that construction has been acquiesced in for many years." *Id.* at 151-152, 214 P. at 321. The actions of the legislative and executive

branches in those situations deserve weight because legislators and executive branch officials, like judges, act "under the responsibilities of their official oaths . . . to keep within the letter and the spirit of the Constitution." *Clark v. Boyce*, 20 Ariz. 544, 554, 185 P. 136, 141 (1919). Moreover, from a less academic perspective

> to reverse a construction put on a constitutional provision by a department charged with its execution, after it has received such practical construction for any length of time, would be to occasion great injury to those who would be affected by such a change; and it is to avoid such injustice that courts have often yielded to policy and expediency in adopting practical constructions of constitutional provisions and statutes by the other departments of the government, even though erroneous; and in view of these considerations, in all cases where there is doubt as to the meaning of such provision or statute, the courts will adopt and follow contemporaneous and practical construction by the other departments.

Id. at 556, 185 P. at 141 (citation omitted).

The intervenor defendants here allege that several state revenue streams devoted to education are accounted for by the Arizona Department of Education as "grants" that do not count toward the aggregate expenditure cap. Response at 7. They present an expert's declaration that those funding sources -- some of which were created by the legislature -- operate like Proposition 208. *Id.*, Exhibit 1 (Declaration of Charles "Chuck" Essigs). They argue that both the fact of those enactments and the Department of Education's practice of not counting them toward the spending limits support their reading of the grants exclusion. The plaintiffs, however, contest the expert's opinion. The plaintiffs distinguish the other programs on the ground that none of them is "a dedicated, mandatory revenue-and-expenditure rule as Prop. 208 is." Reply at 4.

The Court is unable to evaluate these arguments effectively on the existing record. The Court has no expertise in school finance. The lawyers are advocates, not experts. Declarations and advocacy are not enough to enable the Court to understand what the parties are saying.

The facts at issue on this point are what some courts have referred to as "legislative facts," as distinguished from "adjudicative facts." *Kenyon v. Hammer*, 142 Ariz. 69, 84-85, 688 P.2d 961, 976-977 (1984). It is within a court's discretion to ask litigants to establish such facts by introducing evidence through "regular channels." *See* Fed. R. Evid. 201 Advisory Committee Notes (1972 proposed rules). The Court is likely to do that here, to shed light on whether the Proposition 208 "grants" should be treated as "local revenues" that will count toward the constitutional expenditure limits.

Likelihood of Success on the Merits: The Spending Cap Calculation

If that the plaintiffs succeed in showing that the Proposition 208 "grants" are "local revenues" subject to the Article IX, Section 21 spending limits, and that A.R.S. §15-1285 is unenforceable to the extent it says otherwise, the plaintiffs will then have to establish that spending the money will cause the school districts to exceed the spending limits. The dollar amounts that the school districts will receive and the amounts they will be permitted to spend, at any given point in time, are classic "adjudicative facts" that require presentation of evidence tested in the adversary process. So far the parties have offered only back-of-the envelope calculations that are wholly inadequate even for a preliminary adjudication.

The plaintiffs cannot sidestep this issue by characterizing it as merely a "prudential" issue of "ripeness." Reply at 5. Uncertainty as to whether Proposition 208 will violate the spending limits does not just raise the question whether the controversy is too hypothetical to warrant litigation. It bears fundamentally on whether the plaintiffs can show a constitutional violation in the first place. As noted above, a facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exists under which the statute would be valid. *See Stanwitz v. Reagan*, 245 Ariz. 344, 429 P.3d 1138 ¶ 19. Here that means the plaintiffs must show Proposition 208 will cause the spending caps to be breached under every conceivable scenario. The courts do not have discretion to relax this requirement in the way that case-and-controversy requirements like standing and ripeness can be relaxed.

Nor does the fact that the issue arises at the preliminary injunction stage lower the bar that the plaintiffs must clear. Again, a threshold showing that Proposition 208 will cause a violation of the expenditure limits is required for a facial challenge to Proposition 208's spending provisions. Even at the preliminary injunction stage, the plaintiffs must demonstrate that their evidence *will rule out any realistic possibility* of a result other than a violation of the expenditure limits. The plaintiffs say they can prove "it is very likely that we could exceed the limit." Reply at 5.[7] But even that would leave open more than a *de minimis* possibility of *not* exceeding the limit. As such, it would be insufficient to show that Proposition 208 is facially unconstitutional.

As proof that the expenditure limits will in fact be exceeded, the plaintiffs so far have offered only a couple of reports appended to their moving papers. They say the Court should take "judicial notice" of facts like the projected increase of the expenditure limits over time. Reply at 5. But judicial notice is for facts that are "not subject to reasonable dispute." Ariz. R. Evid. 201.

[7] The authority cited by the plaintiffs for this proposition actually has nothing to do with Proposition 208. The defense expert wrote the article in 2019, a year before Proposition 208's enactment. The quoted statement about the expenditure limits addresses the current (2020/2021) fiscal year, on which the measure has no effect. *See* Reply, Exhibit 1 ("Updates from Chuck [Essigs]," Yavapai County Education Services Agency, Vol. 14, No. 12, December 2019).

The economic and fiscal analysis relating to the expenditure limits is reasonably debatable, in a number of ways.

One key factual question is whether the responsible state agency (the Economic Estimates Commission) has been calculating the expenditure limits correctly. The intervenor defendants argue that the calculation must be updated to reflect statutory changes that have shifted school district funding sources. Response at 8, n. 4. Their expert declares that "[t]his single required adjustment could change the Expenditure Limit calculation by hundreds of millions of dollars per year." *Id.*, Exhibit 1 (Essigs declaration) ¶15. The defendants have to flesh out this argument, and the plaintiffs have to respond to it, to enable the Court to assess it reliably.

Another unknown is the amount of money that school districts will be in a position to spend because of Proposition 208. The plaintiffs cite the Joint Legislative Budget Committee fiscal analysis that projects $827 million in revenue. Rely at 5. But that figure must be discounted for the fifteen percent of Proposition 208 expenditures that are not direct grants. It also must be reduced to account for the share of the remaining money that is earmarked for charter schools and therefore (to the Court's understanding) not subject to the constitutional spending limits. There is no evidence at all in the record on the latter point.

Moreover, the Joint Legislative Budget Committee itself described its revenue estimate as "speculative and subject to change." Motion, Exhibit 2 (Arizona 2020 General Election Publicity Pamphlet) at 136. The JLBC, like the plaintiffs here, emphasized possible negative economic effects of Proposition 208 (high-income taxpayer flight, lower business investment) that could reduce Proposition 208 revenues. The intervenor defendants made a different kind of point at oral argument, when they suggested that the widespread adoption of on-line instruction during the pandemic will cause a reduction in state education funding. That, they say, will create "space under the spending cap" that could be filled by Proposition 208 money.

When the factual questions about the real-world effect of Proposition 208 are considered together with the legal questions about the meaning of Article IX, Section 21, the plaintiffs' prospects of success on the merits, on their challenge to the constitutionality of Proposition 208's "mandatory grant" provisions, are unclear. The Court concludes that plaintiffs have at best raised "serious questions." That means they must show the balance of hardships "tips sharply in [their] favor" in order to get a preliminary injunction. *TP Racing, L.L.P. v. Simms*, 232 Ariz. 489, 307 P.3d 56 ¶ 21 (App. 2013). They fall considerably short of that mark.

Other Preliminary Injunction Factors

The preliminary injunction factors other than the merits (possibility of irreparable harm if relief is not granted, balance of hardships favoring the moving party, and public policy) weigh

against the request for interim relief from Proposition 208's spending commitments for some of the same reasons that they weigh against interim relief from the income tax surcharge. The fact that the plaintiffs bring a constitutional challenge gives them no special right to pre-judgment relief. "Uncertainty" at the legislature and "waste of legislative days" is not a lawful basis for an injunction. Those considerations are applicable to the spending dispute as well as the tax dispute.

As to the spending limits specifically, the plaintiffs say that Proposition 208 will cause the State irreparable harm because officials will be "forced to choose between violating their oath of office and refusing to comply with the challenged law." Reply at 5, quoting *Board of Ed. Of Central School Dist. No. 1*, 392 U.S. 236, 241 n. 5 (1968). At oral argument the plaintiffs asserted that the spending caps "exist to limit the amount of revenue that the State transfers to school districts." Proposition 208 directs the state treasurer to transfer funds to school districts "on or before June 30 and December 31 of each year." *See* A.R.S. § 15-1281(D). Putting these pieces together, the Court understands the plaintiff to be arguing that state officials who comply with section 15-1281(D) will violate Article IX, Section 21.

The plaintiffs are not in a position to make that argument. None of them are state officials who will suffer the alleged injury. The state official who is responsible for handling the Proposition 208 money, the state treasurer, is a defendant who opposes the motion for preliminary injunction. The plaintiffs have no standing to speak on her behalf.[8]

The plaintiffs' argument is not well taken in any event, because it misstates who is subject to the spending limits. Article IX, Section 21 governs the actions of school districts, not state agencies. It limits "the aggregate expenditures of local revenues for all *school districts*," Ariz. Const. Art. IX, § 21(2), and "expenditures by [each] *school district*," Ariz. Const. Art IX, § 21(7) (emphasis added). It says nothing about how the State handles funds. In practice (as best the Court can tell from the limited record), state officials are responsible for determining the aggregate expenditure limit and the share of that sum that each district may spend. Response, Exhibit 1 (Declaration of Charles "Chuck" Essigs), Attachment 1 (Aggregate Expenditures Report for Fiscal Year 2019, Alhambra School District). Nothing in the record, however, indicates that the state treasurer has ever claimed authority to enforce the spending limits by turning off the money spigot, let alone taken responsibility by actually trying to do that.

That Article IX, Section 21 governs how school districts spend money, as opposed to how the State handles money, negates the plaintiffs' claim of immediate harm and tips the balance of

[8] "Standing" to bring suit is a different issue. Again the Court again assumes, for present purposes, that the plaintiffs have standing to sue. There is precedent for citizen taxpayer standing to enjoin expenditures of funds for allegedly unconstitutional purposes. *See, e.g., Ethington v. Wright*, 66 Ariz. 382, 386-387, 189 P.2d 209, 212-213 (1948).

hardships away from them. No breach of the expenditure limits will happen until an actual school district expenditure either puts a district over its spending limit or puts the school districts collectively over the aggregate limit. Neither the school districts collectively nor any district individually will be at risk of reaching that point until well into the 2022-2023 fiscal year. Until then, *no one* will be deprived of the constitutional right not to have the spending limits exceeded.

The plaintiffs' argument for a preliminary injunction against the Proposition 208 "mandatory grants" also presumes that the whole of the measure will stand or fall together. The plaintiffs address the question whether the measure should continue in effect during the litigation without trying to distinguish the spending mandate's practical effects and policy implications from those of the tax law changes. But if Proposition 208 is severable and the tax provisions are valid, the tax will remain in place even if the spending provisions are enjoined. In that scenario, of course, the tax by definition will not cause legally cognizable "harm" to the plaintiffs or anyone else. Only the spending provisions will matter for the preliminary injunction analysis.

Recognizing that the logic of some of their argument depends on the severability of Proposition 208, the plaintiffs make the case that the measure is not severable. Motion at 4-7; Reply at 6. A final decision on the issue will require more detailed briefing. So far, though, the law does not appear to favor the plaintiffs' position.

Proposition 208 itself says that its proponents intended it to be severable to the maximum extent possible. The section entitled "severability" declares, "[i]f any provision of this act or its application to any person or circumstance is declared invalid by a court of law, such invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application." Initiative Measure, Prop. 208, § 6, approved election Nov. 3, 2020, eff. Nov. 30, 2020. What that declaration means, when it frames the issue in terms of whether a provision "can be given effect," is explained in case law. The basic questions are whether the law would be workable without the unconstitutional portion and, if so, whether it would pass a rational basis test. *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 1 P.3d 706 ¶ 25 (2000).

With respect to the portions of Proposition 208 that would remain intact if the challenged spending provisions were held invalid -- the taxes, the "career training and workforce" program and the Arizona Teachers Academy -- the workability test is clearly met. Those provisions would function on their own without any additional statutes or regulations. The only substantial issue is whether that arrangement would pass a rational basis test.

The rational basis test does not require much. A statute will be upheld against a rational basis challenge if it has "any conceivable rational basis to further a legitimate governmental interest." *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 555, 637 P.2d 1053,

1058 (1981). It is necessary only that a court "can imagine any set of facts which rationally justifies" the law. *State v. Klausner*, 194 Ariz. 169, 978 P.2d 654 (App. 1998).

Applying the rational basis test as articulated in cases like *Klausner*, Proposition 208 stripped of its "mandatory grant" provisions probably passes the test. It would be rational for the electorate to pursue the goal of better funding for public education by using its legislative power to do the hard part -- the tax increase -- even if the money cannot be spent immediately. As previously noted, the Proposition 208 money can flow all the way to the school districts before the spending limits block it. If the amounts that end up unspent are significant, they will accumulate quickly in the "separate local level funds" established at the school district level pursuant to A.R.S. § 15-1284(A). The resulting political pressure from the school districts and their advocates could well motivate the legislature, sooner or later, to let the districts access the money.

There would be straightforward ways for the legislature to reconstitute Proposition 208 in the event that the "mandatory grant" provisions of Proposition 208 were declared unconstitutional. One possibility is a concurrent resolution authorizing expenditures in excess of the constitutional limits, upon an affirmative vote of two-thirds of the membership of each house of the legislature pursuant to article IX, section 21(3).[9] Another is a referendum referring to the electorate a constitutional amendment to make explicit that the Proposition 208 revenues are not subject to Article IX, Section 21. The legislature took that exact step in 2002, enabling voter approval of a measure that amended Article IX, Section 21 by adding to the list of "local revenues" exclusions the revenues derived from a sales tax increase enacted two years earlier. Laws 2002, H.C.R. 2002 (Prop. 104), approved election Nov. 5, 2002, eff. Nov. 25, 2002 (now Ariz. Const. art. IX, §21(4)(d)(v)).

If the legislature were to decide against authorizing increased expenditures by concurrent resolution or referring the matter to a referendum, the proponents of Proposition 208 could run an initiative to amend the constitution. The plaintiffs would say that they should have done that as part of Proposition 208. But there is nothing in Article IX, Section 21, or anywhere else in the Arizona Constitution, which dictates the timing of a modification of the expenditure limits in relation to a revenue increase. In other words, an amendment that enables school districts to spend more money does not have to be approved at the same time as the law that generates the money.

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[9] The plaintiffs describe Subsection 3 as a "one-time fix," Reply at 5, implying that the reference to "a single fiscal year" means the legislature can authorize only one one-year override. The Court disagrees with that interpretation. Subsection 3 is most sensibly read to permit as many overrides as the legislature sees fit, in one year-increments. Though it is arguably grammatically possible that the phrase "for a single fiscal year" means "once," that construction makes no practical sense because it would foreclose the possibility of another override *ever*, no matter the circumstances or the number of years between overrides.

Proposition 104, was enacted after the fact in 2002, under almost the circumstances that exist now. The only difference appears to be that (according to the plaintiffs' attorney) the current legislature opposes that step.

That brings up one final point, relating to the question whether public policy weighs in favor of enjoining Proposition 208's mandatory spending pending the outcome of this case. The Arizona Supreme Court has said plainly that a court should not become "the referee of a political dispute," especially when political actors have not yet "exercised available political means" to settle the dispute. *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003); *see also Forty–Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487 ¶ 17, 143 P.3d 1023, 1028 (2006) (failure to exercise political remedies is a `prudential concern' that weighs in favor of denying standing, but does not require it)." Though the context of those observations was a discussion of a court's prudential authority to waive standing requirements, the same considerations apply to the question whether a preliminary injunction should issue here.

There is no question that the fundamental dispute in this case is political. The citizens on one side have policy views that differ from those of the legislators and citizens on the other side. Both sides obviously went out of their way to avoid making out-and-out policy arguments for which a court is obviously the wrong forum. Even so, the plaintiffs could not help but insist that Proposition 208 would "endanger[] the food supply" and "lower the caliber of . . . medical services" in Arizona, Motion at 15 n. 5 & 6; and the defendants could not refrain from responding that Proposition 208 would address an "emergency" in Arizona's public schools caused by "years of underfunding in the Arizona Legislature." Response at 22. A court cannot possibly take sides in that kind of debate.

The case does involve a real legal dispute concerning the application of the Arizona Constitution to Proposition 208. The constitutionality of a statute is a proper subject of litigation even if the issue has political implications. Based on the facts presented by the parties thus far, there is a fair likelihood that this case eventually will result in a decision on the constitutionality of Proposition 208.

But whether it is appropriate for a decision to be made *now* is a very different question. The political dialogue between the Arizona Legislature as the elected representatives of the people of Arizona, and the Arizona electorate exercising its lawmaking authority, is just beginning. That process will take time. It may or may not result in an agreement that works the perceived kinks out of Proposition 208. In the meantime, however, it is not in the public interest for a judge to cut the conversation short or alter its course by prematurely enjoining the law.

To summarize: the plaintiffs have failed to show irreparable harm from Proposition 208's spending provisions; the balance of hardships does not tip in the plaintiffs' favor; and public policy

does not favor preliminary relief. Both sides will have something to say on the merits of the question whether Proposition 208 violates the Article IX, Section 22 spending limits, but that is not enough to warrant a preliminary injunction on that ground.

The Revenue Source Rule

Article IX, Section 23(A) of the Arizona Constitution, known as the Revenue Source Rule, provides:

> An initiative or referendum measure that proposes a mandatory expenditure of state revenues for any purpose, establishes a fund for any specific purpose or allocates funding for any specific purpose must also provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal. The increased revenues may not be derived from the state general fund or reduce or cause a reduction in general fund revenues.

The plaintiffs maintain that the Revenue Source Rule requires an initiative to provide for funding through an existing "source of revenue." Because Proposition 208 relies on a "new tax" as opposed to increased revenues from an existing "source," they say, the measure violates the Revenue Source Rule.

The plaintiffs' argument is unconvincing. The words used in Article IX, Section 23 must be given "their natural, obvious and ordinary meaning" unless the context suggests otherwise. *Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533, 399 P.3d 80 ¶9 (2017). The word "source" means "a person or thing from which something comes into being or is derived or obtained." The American Heritage Dictionary of the English Language, 5th Edition (2011). Thus Article IX, Section 23 requires an initiative measure to "derive" or "obtain" its funding from something other than existing revenues. The "increased" revenues must be enough to "cover the entire immediate and future costs of the proposal." But whether an initiative funds itself by creating a new revenue stream or augmenting an existing one makes no difference.

This interpretation of the Revenue Source Rule is confirmed by the rule's second sentence There the rule specifies that the "increased revenues" needed to pay the cost of an initiative may not be "derived" (sourced) from the general fund or covered by reducing a general fund appropriation. The implication is that "increased revenues" are those generated by the initiative or referendum measure in addition to those that the state already collects. There is no requirement that the "increased revenues" come from an existing source.

Moreover, if a constitutional provision is unclear, the courts can consider "the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought

to be remedied." *Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533, 399 P.3d 80 ¶9 (citation and internal punctuation omitted). The purpose of Article IX, Section 23 is to prevent initiative measures that impose unfunded mandates or reallocate existing appropriations. *Id.*, ¶¶ 13-14. An arbitrary distinction between new revenue from existing taxes, on the one hand, and new taxes, on the other, does not further that purpose. The distinction should not be read into the rule just because it is grammatically possible.

The discussion of the Revenue Source Rule in *Arizona Chamber of Commerce & Industry v. Kiley* does not support the plaintiffs' argument either. The issue in the case was whether the initiative measure that increased the minimum wage included an appropriate revenue source for the costs of implementing and enforcing the increase. The Court held that the measure satisfied the Revenue Source Rule by imposing new civil penalties on employers who failed to pay earned sick time to employees. *Id.*, ¶ 18. No one suggested that these new penalties were not an appropriate "source of revenues,"

For those reasons, the plaintiffs have no chance of prevailing on their argument that the Proposition 208 income tax surcharge is not a sufficient revenue source for purposes of Article IX, Section 23(A). It is therefore unnecessary to review the other preliminary injunction criteria again.