ARIZONA SUPREME COURT

KAREN FANN, *et al.*, Plaintiffs/Petitioners, v. HON. JOHN HANNAH, Judge of the Superior Court, Maricopa County Respondent Judge, and STATE OF ARIZONA, et al., Defendants/Real Parties in Interest, INVEST IN ARIZONA (Sponsored by AEA and Stand for Children), et al., Intervenors/Real Parties In Interest	No. CV-22-0033-SA Maricopa County Superior Court No. CV2020-015495 CV2020-015509 (Consolidated)

RESPONSE TO PETITION FOR SPECIAL ACTION

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Introduction

The Fann Plaintiffs' Petition all-but-demands that this Court exercise discretion reserved for "extraordinary" circumstances to displace the trial court's important fact-finding role and enter final judgment in their favor. What justifies the Fann Plaintiffs' unprecedented request? They're upset that the trial court has yet to rule on the parties' cross-motions for entry of judgment that have been fully briefed for less than five weeks. In other words, a litigant wishes that a trial court would prioritize its case over all others on the docket and act on its preferred schedule.

At issue is a critical question that remains after this Court's decision in *Fann v. State*, 251 Ariz. 425 (2021): whether Proposition 208 should be permanently enjoined. Though this Court declared several provisions of Prop 208 unconstitutional, it refused to enjoin its operation because the "limited record" made it so the Court could not "with certainty decide whether Prop. 208 revenues *will* exceed the expenditure limit." *Id.* ¶ 54. On remand, the parties conducted targeted discovery aimed at creating the necessary record and stipulated to certain underlying facts. Both sides moved for judgment in their favor in filings

that totaled 636 pages with exhibits, 482 (or 76%) of which came from the Fann Plaintiffs. The parties' cross-motions were fully briefed five weeks ago and the trial court has yet to rule. The record's sheer size suggests why that's the case. Just days ago, the trial court assured the parties that "it's being worked on and it will be issued as soon as possible" because "what's important . . . is to give the case due consideration and to decide it as best I can." [A133.]

But that wasn't enough for the Fann Plaintiffs (joined now by the State Defendants and "nominal" Defendant Kimberly Yee), who urge this Court to deprive the trial court the opportunity to give the issue the requisite "due consideration." The Fann Plaintiffs try to shoehorn this case into something resembling one that merits this Court's interlocutory intervention by manufacturing an alleged conflict between this Court's opinion and mandate and the proceedings below when no such conflict exists. They also declare that this issue is of critical state importance because current uncertainty somehow prevents the Legislature from (1) averting catastrophe by raising the aggregate expenditure limit ("AEL") for the current fiscal year or (2) negotiating with the Governor on a budget for FY 2023. Never mind that the Fann Plaintiffs – among them

the Speaker of the House and Senate President – stipulated that no Prop 208 monies will be received or spent this fiscal year, meaning this year's AEL has nothing to do with this litigation. And never mind that the Legislature can negotiate a budget with contingencies.

If, as the Fann Plaintiffs now contend, all that mattered on remand was the parties' factual stipulation, they had no reason to submit 482 pages of briefing and exhibits. As this Court recognized by not deciding it in the first instance, the issue on remand is not simple and deserves the trial court's "due consideration." And the suggestion that the trial court taking the time provided to it under the Arizona Constitution to issue a ruling in this important case is somehow holding Arizona's public schools and the budgetary process hostage is misplaced and insulting.

The Intervenor-Defendants ("IIA") do not oppose this matter's prompt resolution and cooperated at every turn to provide the trial court the record it needs. But this Court's special action jurisdiction is not meant to be used as a legislative negotiating tool, yet that's precisely what the Fann Plaintiffs seek here. This Court should thus decline to accept jurisdiction, or in the alternative, deny the requested relief.

Jurisdictional Statement

There is no compelling reason for this Court to exercise its special action jurisdiction when the trial court assured the parties that its final ruling will come within the next three weeks.

Special action jurisdiction is discretionary, "reserved for 'extraordinary circumstances,'" and unavailable "where there is an equally plain, speedy, and adequate remedy by appeal." *Stapert v. Arizona Bd. of Psych. Examiners*, 210 Ariz. 177, 182 ¶ 7 (App. 2005). The Fann Plaintiffs say only [at 6] that "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." They cite only *Blende v. Stanford*, 98 Ariz. 251 (1965).

In *Blende*, this Court remanded a case to the superior court with instructions to conduct a trial on a specific issue, which the trial court failed to do when it affirmatively "changed the issues" by imposing additional requirements. *Id.* at 252-53. As this Court held, the trial court "incorrectly framed" the triable issues, and thus mandamus relief was appropriate to "prevent [the] lower tribunal from interposing

unauthorized obstructions to enforcement of a judgment of a higher court." *Id.* at 253-54.

The Fann Plaintiffs speculate [at 10-11] that the trial court may be "interposing unauthorized obstructions" by even considering the arguments raised below by IIA. Beyond that, they claim that the parties' stipulation that "school districts' budgeted expenditures for FY 2023 will more likely than not exceed the AEL without [considering] any revenues from Prop 208" [A-48 ¶ 11] completely resolved the issue on remand. But the parties have divergent legal arguments about the stipulation's import in the broader context of the issues currently before the trial court.

To be sure, one might not appreciate the scope of the issue before the trial court when looking at the Fann Plaintiffs' Appendix because it conspicuously omits all exhibits the parties submitted.[1] And if what the Fann Plaintiffs' say about the parties' factual stipulation were true, why was their Motion for Judgment 17 pages long and why did it attach nearly 300 pages of exhibits? Why was their response to IIA's "Motion for Entry

[1] IIA's Separate Appendix fills these gaps and contains the complete record submitted to the trial court.

of Judgment of Dismissal" 17 pages long with yet another 148 pages of exhibits?

This case is simply not like *Blende*, where the issue on which this Court ordered the trial court to conduct a trial differed from the issue later framed by the trial court. Here, the issue framed by this Court is the only issue the trial court will consider. And the trial court should not have to operate on the Fann Plaintiffs' preferred schedule when both the Arizona Constitution (article VI, § 21) and this Court's rules (Rule 91(e), Ariz. R. Sup. Ct.) set the appropriate standard that the trial court acknowledged it will follow. [A133-34]

The Petition's timing also counsels against this Court exercising its discretionary special action jurisdiction. If the parties' factual stipulation resolved the entire case, then the Fann Plaintiffs needlessly waited weeks before filing the Petition. And on the other side of the coin, the trial court's sixty days will be up in mere weeks, and the trial court could very well enter an order before this Court conferences the matter and issues its own. [*See* A133 ("I just wanted to acknowledge the concern, hear you all out, and tell you that it's being worked on it and it will be issued as soon as possible" (emphasis added).]

Lastly, this Court has exercised special action jurisdiction in the past in cases related to the state budget but that are nothing like the situation here. The Fann Plaintiffs cite [at 13] *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482 (2006) and *State Comp. Fund v. Symington*, 174 Ariz. 188 (1993). But both were original special actions in which there were no disputed facts, and where this Court found "exceptional circumstances" to permit the parties to skip over the trial court. This is not an original special action (the matter is awaiting a decision in the trial court) and there are disputed facts and issues arising out of those facts (as suggested by a record exceeding 600 pages).

There are also no valid "exceptional circumstances." The Fann Plaintiffs disagree because they say the lack of a trial court ruling precludes the Legislature from (1) approving an AEL overage for FY 2022 as it must on or before March 1, 2022, and (2) negotiating a FY 2023 budget with the Governor. Their first contention is meritless and betrayed by the parties' stipulation that "[n]o revenues from Proposition 208 will be budgeted or spent in FY 2022." [A47 ¶ 3.] The AEL for FY 2022 thus has nothing to do with this case or the trial court's decision in

this case, a fact President Fann and Speakers Bowers (both Plaintiffs here) agreed to months ago.[2]

In addition, that the Legislature and Governor both declare that they cannot negotiate a budget until the courts resolve Prop 208's constitutionality is also not a reason to take the extraordinary and unprecedented step urged by the Fann Plaintiffs. The Legislature doesn't have to adopt a budget until June 30, 2022, and the trial court will rule by March 11, 2022. The Legislature will thus have more than three months after the trial court's ruling to work out the details. And in the meantime, it shouldn't be unreasonable to expect the political branches to negotiate a budget with appropriate contingencies. They shouldn't be allowed to demand this Court's intervention to solve their political problems.

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[2] Two days ago, President Fann and Speaker Bowers both sponsored late-introduced measures to authorize an AEL overage for FY 2022 that received unanimous support in the Rules Committees of the Senate and House. *See* Senate Concurrent Resolution 1050 (55th Leg., 1st Reg. Sess.); House Concurrent Resolution 2039 (55th Leg., 1st Reg. Sess.). Yesterday, the House approved HCR 2039 with the requisite supermajority. *See* Ariz. Leg., *Bill History for HCR 2039*, https://apps.azleg.gov/billStatus/BillOverview/77914. The Legislature may thus resolve the issue before the trial court rules or this Court acts on the Petition.

To resolve any doubt, IIA wants this matter promptly resolved and took all steps to cooperate with the Fann Plaintiffs and State Defendants to both expedite and streamline the proceedings on remand.[3] But accepting special action jurisdiction to undermine the trial court's important role would set a dangerous precedent. As a result, this Court should decline jurisdiction.

Issues Presented

In *Fann*, this Court could not determine "with certainty . . . whether Prop. 208 revenues *will* exceed the expenditure limit." 251 Ariz. ¶ 54. The issues – both jurisdictional and the merits – are thus these:

1. Should this Court displace the trial court's fact-finding role and decide in the first instance whether Prop 208 should be permanently enjoined?

[3] Among other things, IIA (1) stipulated to uncontested facts to avoid unnecessary discovery (including the need for expert depositions), (2) agreed to submit this matter to the trial court on written briefs rather than requiring a hearing and potential post-hearing briefing, and (3) submitted its briefs earlier than required to give the trial court as much time as possible.

2. On the record below, did the Fann Plaintiffs carry their burden to establish "with certainty" that "Prop. 208 revenues *will* exceed" the AEL?

3. In *Fann*, did this Court intend to define Prop 208 revenues that will be distributed to school districts as competitive grants under A.R.S. § 15-1283 as "local revenues"?

Factual & Procedural Background

The relevant facts are detailed in the parties' voluminous filings in the trial court. We summarize them below.

In mid-August 2021, this Court published *Fann* and declared certain provisions of Prop 208 unconstitutional and inseverable from the balance of the measure. But the Court refused to enjoin Prop 208 in its entirety because 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. (emphasis added).

As IIA noted below, *Fann* contains a critical inconsistency about whether some percentage of Prop 208's grants to school districts qualify as "local revenues." Paragraph 30 holds that the term "grants" as used in the Grant Exception (article IX, § 21(4)(d)(v)) refers only to private contributions provided to school districts. Yet footnote 8 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 (non-private) monies that go to the Career Training and Workforce Fund to be provided as grants to school districts. *See* A.R.S. §§ 15-1282, 15-1283. Only one of these can be true. This issue needs to be clarified because there are questions about whether funds provided by other state grant programs that distribute "non-private" monies provided by those competitive grant programs are "local revenues."

On remand, the trial court entered a scheduling order with an expedited discovery schedule and set the matter for a one-day evidentiary hearing in early January. [SA001-3] Before many pretrial deadlines came to pass, the parties conferred, stipulated to certain facts, and requested that the trial court vacate the evidentiary hearing and instead decide the issue through motion practice. [A37-40] No party (including IIA) objected to the trial court ruling before January 21, 2022 if possible. [A39]

The parties then submitted competing cross-motions for judgment, with the Fann Plaintiffs and State Defendants asking the trial court to enter a permanent injunction and IIA requesting dismissal. As detailed above, the parties collectively submitted more than 600 pages of briefing and exhibits for the trial court's consideration. The cross-motions were fully briefed on January 10, 2022.

For its part, IIA walked the trial court through the calculation of the AEL for FY 2023 and the uncertainty in making assumptions about the two variables used to determine the AEL (inflation and student counts.). [SA330-332] IIA also described the uncertainty that exists about how much money Prop 208 will generate, particularly given the passage of Senate Bill 1783 in the last legislative session. [SA332-336] Finally,

IIA provided the trial court with information establishing the uncertainty about Prop 208 revenues and school district budgeting. That is, 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 FY 2023, or (3) school districts will include in their FY 2023 budgets given the uncertainty about those funds. [SA336-337.]

As of today's date, the parties cross-motions have been under advisement for only 36 days. At a status conference held just over a week ago, the trial court assured the parties and the public that it had no "ulterior motives," that it is "just trying to get [its] work done here" on a case that's just one of many on its docket that also "require [its] attention." [A133] The trial court also explained that what's "important from my point of view is to give the case due consideration and to decide it as best I can," and that its decision is "being worked on . . . and . . . will be issued as soon as possible." [*Id.*] The Petition followed the very next day, suggesting it was the Fann Plaintiffs' intent to file it all along.

Argument

If the Court accepts jurisdiction and will decide the parties' cross-motions, the parties' factual stipulation is only a small part of the story and the Fann Plaintiffs are not entitled to an order enjoining Prop 208.

For FY 2023, neither Prop 208 nor the revenues its surcharge generates will, in and of themselves, exceed the AEL. Additionally, the Fann Plaintiffs cannot meet their burden to establish anything with certainty as required by the plain language of *Fann*. For these reasons, the Court should dismiss what's left of this case. And to resolve the ambiguity caused by *Fann*'s inconsistent dictates, Arizona's school districts require clarity on the meaning of § 21's "Grant Exception."

I. The Fann 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 FY 2023, 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. In other words, 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. In fact, such an "accumulation" would occur even if Prop 208 hadn't passed.

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. [SA359] 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." [SA359] No one could legitimately claim that each underlying grant statute is unconstitutional and should be permanently enjoined. For the same reason, it cannot be that Prop 208 is unconstitutional in its entirety because other state funding streams will exceed the AEL in a single year (FY 2023).

II. The Fann Plaintiffs Failed to Carry Their Burden to Establish "Certainty" About Prop 208 Revenues and the AEL.

Second, the Fann 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 the Fann Plaintiffs' request for permanent injunctive relief against Prop 208 in its entirety.

In *Fann*, this Court explained 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). The Fann 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." Black's Law Dictionary, "Certainty," (11th ed. 2019); *see also* "Certain," Dictionary.com, https://www.dictionary.com/browse/certain ("free from doubt or reservation; confident; sure").

This Court thus did not "*sub silentio* change[] the burden of proof" [Pet. at 11]; it did so explicitly. And there is nothing unusual about a burden of proof more stringent than a preponderance of evidence in civil cases; many civil claims require heightened burdens of proof for policy reasons specific to each claim. *See, e.g.*, *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 104 ¶ 14 (App. 2017) (defamation plaintiff must establish claim with "convincing clarity" to defeat summary judgment); *Powers v. Guar. RV, Inc.*, 229 Ariz. 555, 562 ¶ 27 (App. 2012) (fraud "must be proved by clear and convincing evidence") (quotations omitted); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332 (1986) (because a "more stringent standard of proof" is appropriate when assessing punitive damages, they "should be awardable only upon clear and convincing evidence of the defendant's evil mind"); *In re Harber's Est.*, 104 Ariz. 79, 88 (1969) (spouse must prove the validity of a disputed postnuptial agreement "by clear and convincing evidence").

As detailed at length below, there is nothing "indubitable," "certain," or "free from doubt" about Prop 208 revenues and the AEL for FY 2023. To summarize:

- There is no "certainty" about the AEL for FY 2023, as we don't know the final student population for the 2021-22 school year or the final GDP implicit deflator for CY 2021. [SA330-332]
- 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. [SA332-336]
- There is no "certainty" on the amount of Prop 208 revenues that will ultimately be transferred to school districts for potential use in FY 2023, as ADOR will not have final figures on tax collections attributable to Prop 208 until 2023. [SA336-337]
- There is no "certainty" about how much school districts will budget for Prop 208 revenues for FY 2023 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 Prop 208 for FY 2023.[4] [*Id.*]

[4] The timing surrounding the potential spending of Prop 208 revenues is crucial. ADOR has transferred no funds to the Student Support Fund and has no idea how much it will transfer to the Student Support Fund for potential use by school districts in FY 2023. Yet school districts must adopt final budgets by July 2022, A.R.S. § 15-905, months before there

The Fann Plaintiffs ignore the importance of this final point. They claim [at 10:4-6] that the "crucial factual inquiry" is "whether budgeted school district expenditures will exceed the AEL in FY 2023." But the actual question is whether Prop 208 expenditures will exceed the AEL in FY 2023. *Fann*, 251 Ariz. ¶ 54. If – through no fault of their own – districts will have insufficient information about Prop 208 revenues to responsibly budget expenditures from those funds in FY 2023, then the Fann Plaintiffs can't carry their burden to show such expenditures will cause an exceedance of the AEL. If districts don't budget and spend Prop 208 dollars until FY 2024, that adds yet another year of uncertainty about both inflation and student population figures. At bottom, there is

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will be any information from which to discern the amount of Prop 208 revenues that might be distributed to school districts in FY 2023. As IIA's school finance expert explained [*see* SA337; SA382-383]:

> 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.

no evidence that proves with certainty that school districts will budget any Prop 208 revenues for FY 2023.

Recognizing this evidentiary problem, the Fann Plaintiffs framed their arguments on remand around 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 not what this Court required of them.

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

III. *Fann* Requires Clarification.

Lastly, IIA, the education community, and the State require clarification from this Court on the precise scope of § 21's "Grant Exception" as interpreted in *Fann*. As discussed above, paragraph 30 says that the term "grants" as used in the Grant Exception 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 this Court resolves this irreconcilable conflict could upend several grant programs that the Arizona Department of Education considered to fall under § 21's "Grant Exception."[5] [*See* SA388 (noting that including those grants as "local revenues" would increase school district budgeted expenditures subject to the AEL by $189 million).]

Rule 4(g) Notice

IIA seeks its attorneys' fees and costs incurred in responding to the Petition under Section 8 of Prop 208, the private attorney general doctrine (*see, e.g.*, *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 8 ¶

[5] For example, only a subset of districts receive Results-Based Funding grants. Yet if these grants qualify as "local revenues" in a year in which expenses exceed 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's why this Court stated in footnote 8 that certain of Prop 208's grants to school districts would not count toward the AEL. But this conflicts with paragraph 30.

26 (2013)), A.R.S. § 12-341 and 12-342, and any other applicable statute or equitable doctrine.

Conclusion

For all these reasons, this Court should decline to accept jurisdiction, or in the alternative, deny the requested relief.

RESPECTFULLY SUBMITTED this 16th day of February, 2022.

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