ARIZONA SUPREME COURT

KAREN FANN, *et al.*, Plaintiffs/Appellants, v. STATE OF ARIZONA, *et al.*, Defendants/Appellees. INVEST IN EDUCATION (Sponsored by AEA and Stand for Children); and DAVID LUJAN, Intervenor-Defendants/Appellees.	No. CV-21-0058-T/AP Arizona Court of Appeals, Division One No. 1 CA-CV 21-0087 Maricopa County Superior Court No. CV2020-015495 CV2020-015509 (Consolidated)

INTERVENOR-DEFENDANTS/APPELLEES' SECOND NOTICE REGARDING TRIAL COURT PROCEEDINGS

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Attorneys for Appellees Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan

Appellees Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan give notice that on June 14, 2021, the trial court entered an order in this matter dismissing all claims brought by Appellants with the exception of their claim arising under article IX, § 21 of the Arizona Constitution. [*See* **Exhibit 1**]

RESPECTFULLY SUBMITTED this 17th day of June, 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 Appellees Invest in Education (Sponsored by AEA and Stand for Children) and David Lujan

EXHIBIT 1

Clerk of the Superior Court
*** Electronically Filed ***
06/14/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015495 06/11/2021

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
JOHN SUD
STEPHEN W TULLY
JUDGE HANNAH

RULING

Before the Court is Intervenor/Defendants' Rule 12(b)(6) Motion to Dismiss. The Court has read and considered the motion, the separate responses filed by plaintiffs Karen Fann, *et al.* (the "Fann plaintiffs") and plaintiffs Eco-Chic Consignment, Inc. *et al.* (the "Eco-Chic plaintiffs") and the Intervenor Defendants' reply, in the context of the record in this case. The Intervenor Defendants have withdrawn the portion of the motion directed at the First Claim for Relief in the Fann plaintiffs' Verified Special Action Complaint and Count Three of the Eco-Chic plaintiffs' Complaint, both of which allege that the Invest in Education Act (enacted in 2020 as Proposition 208) violates article IX, section 21 of the Arizona Constitution.

Still at issue on the motion are the Fann plaintiffs' Second, Third and Fourth Claims for Relief and the Eco-Chic plaintiffs' Counts One and Two, alleging that Proposition 208 is unconstitutional in various other ways. As to all of those claims, the motion will be granted. All fail as a matter of law.

THE PEOPLE'S POWER TO TAX THEMSELVES BY INITIATIVE

The plaintiffs aver that the income tax surcharge provisions of Proposition 208 are invalid for at least three distinct reasons. The Eco-Chic plaintiffs' Count One alleges that article IX of the Arizona Constitution confers the power to tax on the legislature alone, without "reserving" any of that power to the people. Both the Eco-Chic plaintiffs' Count One and the Fann plaintiffs' Second Claim for Relief allege that the income tax surcharge violates article IX, section 22, which requires a two-thirds vote of the legislature to approve a tax increase. The Eco-Chic plaintiffs further allege in Count One that the Proposition 208 provisions meant to prevent the legislature from undoing the income tax surcharge violate article IX, section 1, which prohibits the legislature from "surrendering" its taxation powers.

The claim that that the Arizona Constitution gives Arizona's citizens no power to tax themselves through initiative is defeated by the plain text of the document. "Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Ariz. Const. Art. XXII, § 14. It could hardly be clearer that the people of Arizona reserved to themselves the authority to exercise all of the legislature's powers, including the power of taxation. They have deployed that authority repeatedly through Arizona history. *See* Intervenor-Defendants' Motion at 10-11 (citing examples).

The claim that the Proposition 208 tax increase is invalid absent supermajority approval by the legislature was rejected as a matter of law on the Fann plaintiffs' application for preliminary injunction. The Fann plaintiffs' objections to that ruling, Fann Plaintiffs' Response at 11-15, do not warrant reconsideration. That the words "act" and "measure" are used interchangeably in some judicial opinions, or even a few times in the Constitution itself, does not make it any more plausible that the voters silently revoked their own power to levy taxes by initiative when they approved Article IX, Section 22. That a constitutional provision other than article IX, section 22 was at issue in *Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533, 399 P.3d 80 (2017), does not diminish the persuasive force of the case's holding that the word "acts" refers to legislation, not initiative petitions. That other states' courts "have rejected the notion that initiatives are anything other than acts," Fann Plaintiffs' Response at 13, n. 3, does not compel our courts to interpret our constitution that way. *See Arizona Chamber of Commerce & Industry v. Kiley*, 242 Ariz. 533, 399 P.3d 80 ¶ 32. And the second sentence of article 22, section 14 ("Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people") is irrelevant because it address only the content of initiatives, not the process by which initiatives are enacted.

The claim that an initiative like Proposition 208 cannot "usurp the legislature's power to tax nor . . . compel legislative surrender of that power," Eco-Chic Plaintiffs' Response at 12, makes little sense in light of the Voter Protection Act ("VPA"). The Voter Protection Act forbids

legislative repeal of laws enacted by initiative, Ariz. Const. art. IV, pt. 1, § 6(B), and requires a three-fourths legislative majority to amend those laws or to redirect funds that they generate. Ariz. Const. art. IV, pt. 1, §§ 6(C)-(D). Because the VPA imposes *constitutional* limits on the legislature's authority, the VPA's application to Proposition 208 cannot possibly violate "the constitutional mandate that the legislature never surrender its power to tax" as claimed by the Eco-Chic plaintiffs. Eco-Chic Plaintiffs' Response at 16. The plaintiffs' bald assertion that the VPA "cannot have been intended" to limit the legislature's authority to amend taxes enacted by Proposition 208 – in effect, that the VPA does not mean what it says – underscores the futility of their argument.

For those reasons,

IT IS ORDERED, pursuant to Civil Rule 12(b)(6), dismissing Count One of the Eco-Chic plaintiffs' Complaint and the Second Claim for Relief in the Fann plaintiffs' Verified Special Action Complaint for failure to state a claim upon which relief can be granted.

THE REVENUE SOURCE RULE

The plaintiffs claim that Proposition 208 violates the so-called "Revenue Source Rule," set out in the Arizona Constitution at Article IX, section 23. The Fann plaintiffs stated this cause of action as their Third Claim for Relief. In the ruling on the application for preliminary injunction, the claim was found to lack merit. The Intervenor Defendants requested its dismissal in the motion at bar. Intervenor/Defendants' Motion at 9. The Fann plaintiffs did not respond to that section of the motion. The Fann plaintiffs' Third Claim for Relief is therefore subject to summary dismissal. *See* Ariz. R. Civ. P. 7.1(b)(2) (court may summarily grant a motion if the opposing party does not file a responsive memorandum).

Though the Eco-Chic plaintiffs did not refer to the Revenue Source Rule in their complaint, they cite it in their opposition to the motion to dismiss. They mostly try to explain away the obvious contradiction between their argument that the people have no power to tax themselves by initiative, on the one hand, and the Revenue Source Rule's mandate that a spending proposal enacted by initiative must "provide for an increased source of revenues" other than the state general fund, on the other. Eco-Chic Plaintiffs' Response at 13-14. Their explanation is not persuasive. The drafters of article IX, section 23 plainly understood the initiative power as encompassing the power of taxation. The Court shares that understanding.

Accordingly,

IT IS ORDERED, pursuant to Civil Rule 12(b)(6), dismissing the Third Claim for Relief in the Fann plaintiffs' Verified Special Action Complaint for failure to state a claim upon which relief can be granted.

THE SEPARATION OF POWERS

The plaintiffs allege that Proposition 208 unconstitutionally limits the legislature's constitutional authority in a variety of ways. The Fann plaintiffs, in their Fourth Claim for Relief, take the position that Proposition 208's "no supplant" provision, codified at A.R.S. section 15-1284(E), conflicts with the legislature's authority to appropriate general funds "for public schools," Ariz. Const. art. IV, pt. 2, § 20, and (by supermajority vote) to "divert" revenues generated by initiative measures. *Id.*, art. IV, pt. 1 § 6(D). The Eco-Chic plaintiffs similarly attack the "no supplant" provision, in their Count Two, as one aspect of a broader claim that Proposition 208 unconstitutionally delegates legislative authority to the executive branch and restricts the legislature's taxation and spending powers going forward.

The claim based on Proposition 208's "no supplant" provision was denied on the application for preliminary injunction because the provision is most reasonably interpreted as a directive to the recipients of the Proposition 208 money (school districts and charter schools) rather than the legislature. The Fann plaintiffs do not re-urge the claim in their response to the motion to dismiss.[1] The Eco-Chic plaintiffs argue that they should be permitted to support the claim with evidence of "legislative facts" demonstrating "the intent of the electorate," Eco-Chic Plaintiffs' Response at 14-15, but they do not say what that evidence might be or how it might change the outcome of what is ultimately a decision on an issue of law.

The claim that Proposition 208 unconstitutionally delegates legislative authority to the executive is too insubstantial to survive a motion to dismiss. The "non-delegation doctrine" has essentially been moribund since the 1930's. *See Gundy v. United States*, 139 S.Ct. 2116, 2129 (2019) (opinion of Kagan, J.). The lone relevant Arizona case, *Tillotson v. Frohmiller*, 34 Ariz. 394, 271 P. 867 (1928), addressed an almost comically broad initiative measure that purported to empower an executive agency ("the Board of Control") to create and operate everything from enterprises relating to natural resources on public lands to a state banking system to a printing plant for school books, "whenever, in the judgment of the Board of Control it shall be for the best interest of the state." *Id.* at 397, 271 P. at 868. Even more glaring, the funding provision was a blank-check appropriation "out of the general fund of the state treasury [of] a sufficient amount to carry

[1] The Fann plaintiffs do request memorialization of the Court's interpretation of the "no supplant" provision in the final judgment on the merits. The Court is inclined to grant that request, but a final ruling will be deferred until the entry of judgment.

out and put into effect the provisions of this act." *Id.* Perhaps because the measure was so extreme in its lack of detail, the *Tillotson* court held the measure invalid without really even articulating a principle that could be generalized to other cases.

Proposition 208 is not remotely similar. Proposition 208 specifies the details of the income tax surcharge, explicitly states the purpose of the tax and directs when and how the funds are to be spent to achieve that purpose. The plaintiffs do not explain why these provisions amount to an unconstitutional delegation of legislative authority. They offer only a declaration that that Proposition 208 vests school districts and charter schools with discretion that "belongs to the legislature." Eco-Chic Complaint ¶ 71. That conclusory statement is not sufficient to state a valid claim for relief.

Finally, the Eco-Chic plaintiffs' Count Two claim that Proposition 208 infringes the legislature's taxing and spending authority fails for the same reason that their similar allegations fail in Count One. The claim rests on the premise that the Arizona Constitution somehow places the legislature on a higher or more powerful plane than the people acting by initiative. It doesn't.

> Under our constitution, *the people did not grant to the legislature plenary law-making power.* They reserved to themselves the powers of initiative and referendum. Ariz. Const. art. 4, Pt. 1 § 1. The legislative power of the people is as great as that of the legislature. See Ariz. Const. art. 22, § 14. The people's power to legislate by initiative is co-equal with the power of the legislature.

Tilson v. Mofford, 153 Ariz. 468, 470, 737 P.2d 1367 (1987) (emphasis added). Moreover, the legislature is not powerless in the face of Proposition 208. Even "mandatory" provisions, like the requirement in A.R.S. § 43-1013 for collection of the income tax surcharge regardless of changes in the income tax brackets, can be amended so long as the legislature abides by the Voter Protection Act. That is to say, the Arizona Constitution *limits* the legislature's power in relation to initiative measures. Those limits, by definition, are not a basis for holding Proposition 208 unconstitutional.

IT IS THEREFORE ORDERED, pursuant to Civil Rule 12(b)(6), dismissing Count Two of the Eco-Chic plaintiffs' Complaint and the Fourth Claim for Relief in the Fann plaintiffs' Verified Special Action Complaint for failure to state a claim upon which relief can be granted.

ATTORNEYS' FEES

The Intervenor Defendants' request for attorneys' fees is premature. The issue of fees will be addressed at the close of the litigation, after the remaining substantive issues have been resolved.