

BACKGROUNDER (SEPTEMBER 2013)

CHALLENGE TO UNCONSTITUTIONAL MEDICAID EXPANSION

EXECUTIVE SUMMARY

Supporters of Medicaid expansion propose to fund Arizona's share of the massive new program by charging a "provider tax" to hospitals. But they encountered a roadblock: to shield themselves from one of the most widely abused government powers, Arizonans in 1992 overwhelmingly enacted a constitutional requirement that 2/3 of the legislature approve any tax increase. Expansion advocates were unable to garner that level of legislative support. So instead of complying with the constitution, they ceded to an appointed administrator the power to levy taxes, a job the state's constitution specifically entrusts to the people's representatives. Even worse, this administrator has full discretion to set the amount of the tax and to decide who has to pay and who will be exempt. Attempting to evade the constitution in this way ensures that the true beneficiaries of Arizona's Medicaid expansion are not the people, but the politically connected hospitals who lobbied to line their pockets.

Arizona was built on the principles of self-government. To protect the people from an unaccountable bureaucracy, the Arizona Constitution reserves the lawmaking power to elected legislators, whose decisions are subject to review by the other branches. Ignoring restrictions on the taxing power and yielding control to independent officials eviscerates these checks and balances, inviting uncertainty and paving the way for special interest groups to hijack the lawmaking process.

Arizona has a rich history of sheltering its citizens from federal overreach. Unfortunately, some state lawmakers have sacrificed that tradition—and the state constitution—to stick Arizonans with an unconstitutional tax. The Goldwater Institute is representing legislators whose votes against Medicaid expansion should have defeated the bill but were effectively nullified when the expansion bill became law without the constitutionally required 2/3 approval, their constituents who were denied representation when their senators' and representatives' votes were not counted, and Arizona taxpayers who have been deprived of the protection of constitutional separation of powers.

THE PROBLEM

Last year's Supreme Court ruling on Obamacare effectively made states the ultimate guardians of health care freedom.¹ Although the federal government could tax individuals who did not purchase government-approved health insurance, it could not force states to expand their Medicaid programs from "a program to care for the neediest among us" to "an element of a

¹ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2655 (2012).

comprehensive national plan to provide universal health insurance coverage.”² This ruling empowered states to control their own budgets, reduce federal spending by hundreds of billions of dollars, and halt a critical component of the federal takeover of the health care industry.³

Arizona has a history of resisting federal encroachment on health care freedom. In 2010, voters approved the Goldwater Institute-drafted Health Care Freedom Act, which protects people’s right to make their own health care decisions and prevents federal and state governments from forcing people to participate in a health care system.⁴ Just last year, Arizona rejected a state-funded health insurance exchange, which would have cost Arizona taxpayers millions of dollars each year, fined local businesses that did not offer government-approved health insurance, subsidized private insurance companies, and made the state an accomplice in enforcing Obamacare.⁵

Arizona had similar experience with the federal Medicaid program. Although Medicaid was established in 1965,⁶ Arizona waited to join the program until 1982,⁷ when it established the Arizona Health Care Cost Containment System (AHCCCS). Despite having 17 years’ of data and lessons from other states that had already joined Medicaid, Arizona nevertheless encountered tremendous unanticipated costs. In 2005, for example, the cost of expanding the program exceeded the state’s expectations by almost one billion dollars.⁸ The state’s cost estimates for expansion have been off by about 400 percent *each year*.

² *Id.* at 2606. Medicaid is a means-tested government health insurance program that is jointly funded and managed by the state and federal governments. In 2010, Obamacare increased eligibility for the program from “medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children,” to “the entire nonelderly population with income below 133 percent of the [federal] poverty level.” *Id.* at 2606-607.

³ See Christina Corieri, “Opinion: States Can Save Taxpayers \$609 Billion,” *The Wall Street Journal* (April 30, 2013), http://online.wsj.com/article/SB10001424127887323982704578453250970028838.html?mod=WSJ_Opinion_LEADTop#articleTabs%3Darticle; Corieri, “Ten Reasons to Decline Medicaid Expansion in Arizona,” Letter to Arizona Legislators (March 7, 2013), <http://goldwaterinstitute.org/10-reasons-to-decline-medicaid-expansion>.

⁴ Ariz. Const. art. XXVII § 2. Various versions of HCFA are now law in 17 states.

⁵ Christina Sandefur, *Key Points on Health Insurance Exchanges*, Goldwater Institute Policy Report (Nov. 15, 2012), <http://goldwaterinstitute.org/article/key-points-health-insurance-exchanges>.

⁶ Pub. L. 89-97, 79 Stat. 286 (1965).

⁷ Ariz. Sess. Laws Ch. 1 (1981) (4th Special Session).

⁸ Arizona’s Prop. 204 expansion was projected to cost \$315 million, Joint Legislative Budget Committee, *Arizona Ballot Proposition 204 Publicity Pamphlet Fiscal Impact Summary* (Aug. 17, 2000) at p. 2, available at <http://www.azleg.gov/jlbc/ballotprop204.pdf>, but the actual cost that year was over \$1.3 billion. AHCCCS Appropriation Hearing Information (March 5, 2009) at p. 23, available at <http://www.azahcccs.gov/reporting/Downloads/Legislation/Presentations/FY09AppropriationHearingPresentation.pdf>.

Obamacare asks states to adopt Medicaid's greatest expansion yet. For the first three years of the new program, the federal government vows to cover the medical costs for newly eligible enrollees.⁹ But of course, Arizona taxpayers will be among those on the hook to repay this "free" federal money. Even with the pledged federal funds, the Governor's Office expects expansion to cost the state \$154 million for the first year alone,¹⁰ making this some of the most expensive "free" money the state has ever received. The Kaiser Family Foundation estimates that the state could be on the line for \$3.1 billion during the period of 2014-2022, and that's assuming the federal government keeps its end of the bargain.¹¹ Arizona's share will swell as federal funding declines.

To fund Arizona's obligations, proponents opted to charge hospitals a mandatory provider tax.¹² To qualify for funding, federal law requires Arizona to collect the tax from hospitals without regard to whether they accept Medicaid payments.¹³ Fortunately, the Arizona Constitution requires 2/3 of both houses of the legislature to approve tax increases.¹⁴

Given the risks and expenses associated with expansion, many legislators were skeptical of signing on, especially without additional protections for Arizona taxpayers. Even with these concerns, supporters in the legislature rebuffed all attempts to inject common-sense accountability into the Medicaid program, such as protecting Arizona taxpayers against a reduction in federal funding, requiring an independent audit to ensure hospitals do not pass the cost of expansion on to patients, and employing an annual study on the AHCCCS program's quality of care.¹⁵

Determine to implement Medicaid expansion without any of these safeguards, proponents instead embraced underhanded and even unconstitutional tactics. Gov. Jan Brewer threatened a moratorium on all legislation until expansion passed both houses, and made good on this threat by vetoing five unrelated bills.¹⁶ On June 12, the Governor surprised some lawmakers by calling them back to the capitol for an evening special session, demanding that Medicaid expansion be

⁹ Pub. L. 111-148 § 2001(a)(3)(B)(1)(A).

¹⁰ Office of Governor Janice K. Brewer, *The Executive Budget Recommendation, FY 2014 and FY 2015: Medicaid Expansion* (January 2013) p. 5, http://azgovernor.gov/dms/upload/PR_011413_MedicaidBudgetRec.pdf.

¹¹ John Holahan, et al., *The Cost and Coverage Implications of the ACA Medicaid Expansion: National and State-by-State Analysis*, Kaiser Commission on Medicaid and the Uninsured (November 2012) p. 8, <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8384.pdf>.

¹² A.R.S. § 36-2901.08 (2013).

¹³ See 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68 (taxes must be broad-based, uniformly imposed, cannot hold providers harmless, and "generally redistributive").

¹⁴ Ariz. Const. art. IX § 22.

¹⁵ Christina Corieri, "A Lesson in Making a Bad Bill Worse," Goldwater Institute Blog (May 23, 2013), <http://goldwaterinstitute.org/blog/lesson-making-bad-bill-worse>.

¹⁶ Mary Jo Pitzl, "Threats, vetoes fly as tensions rise over Medicaid expansion," *Arizona Republic* (May 24, 2013), http://www.azcentral.com/news/politics/articles/20130523brewer-vetoes-senate-bills-medicaid-moratorium.html?nclick_check=1.

fast-tracked to approval.¹⁷ In moves reminiscent of Obamacare’s passage through Congress several years ago, proponents voted to suspend rules requiring the expansion bill to go through committees before being considered by the full legislature.¹⁸ Meeting into the early hours of the next morning, proponents still were unable to garner the support necessary to meet the constitution’s supermajority requirement to approve tax increases.

Instead, they attempted to dodge the constitutional requirement by surrendering the legislature’s taxing power to the unelected AHCCCS director.¹⁹ Their reasoning: if they renamed the tax an “assessment” and assigned control to an appointed official, it could escape the ambit of a legislative supermajority requirement.

Unfortunately, evading taxpayer protections and stripping the legislature of its taxing authority yields the exact outcome that Arizona’s constitutional checks and balances were intended to prevent: the consolidation of power in an unaccountable bureaucrat who is free to play favorites. It ensures that the true beneficiaries of Arizona’s Medicaid expansion are not the people, but the politically connected hospitals who lobby for tax exemptions and stand to line their pockets with reimbursements—estimated to be over *\$108 million* during the first six months of expansion.²⁰

THE LAW

Over 20 years ago, Arizonans enacted a constitutional requirement designed to shield themselves from one of the most widely abused government powers: the power to tax.²¹ That provision, known as Prop. 108, requires 2/3 of both houses of the legislature to approve “an act that provides for a net increase in state revenues,” including, among other things, any new tax or fee or to increase an existing tax or fee.²² The Court of Appeals recently affirmed this provision’s broad purpose of “prevent[ing] the legislature from enacting without a super-majority vote any statute that increases the overall burden on the tax and fee paying public.”²³ The provider tax unquestionably enlarges state revenues and increases tax burdens on Arizonans.

¹⁷ Ben Giles, “Lawmakers Prepare to Adjourn as Medicaid Expansion Moves Toward Approval,” *Arizona Capitol Times* (June 11, 2012), <http://azcapitoltimes.com/news/2013/06/11/az-gov-jan-brewer-calls-special-session-on-budget-medicaid/>.

¹⁸ *Id.*

¹⁹ A.R.S. § 36-2901.08 (2013).

²⁰ AHCCCS, *Provider Assessment Summary* (Aug. 16, 2013) p. 1, <http://www.azahcccs.gov/publicnotices/Downloads/AZAssessmentModelDRAF8162013.pdf>; See also Christina Corieri, “Medicaid Expansion Will Line Hospitals’ Pockets,” Goldwater Institute Blog (May 8, 2013), <http://goldwaterinstitute.org/blog/medicaid-expansion-will-line-hospitals-pockets>.

²¹ See Ariz. Const. art. IX § 22 (1992).

²² Ariz. Const. art. IX §§ 22(A), (B).

²³ *Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 225 Ariz. 358, 364, 238 P.3d 626, 632 (App. 2010).

However, Medicaid expansion—and the provider tax that funds it—passed both houses with little more than a simple majority, falling short of the constitutionally required minimum necessary to approve a new tax.²⁴ Twenty-seven members of the House and eleven senators voted against expansion, enough to defeat the tax under Prop. 108. Despite this deficiency, the governor signed expansion and the provider tax into law,²⁵ effectively nullifying the votes of those legislators who opposed it and denying representation to their constituents.

Prop. 108 has a narrow exception for “fees and assessments that are authorized by statute, but are not prescribed by formula, amount or limit, and are set by a state officer or agency,” which only requires the normal majority vote.²⁶ Thus, proponents tried to sidestep Prop. 108’s protections by removing the tax power from the legislature and surrendering it to the AHCCCS director, along with the discretion to set the amount of the tax and to decide who has to pay and who will be exempt.

Arizona courts have never interpreted this exception. However, if it were construed broadly to encompass the provider tax, the exception would swallow the rule. The provider tax is not a fee paid or assessment charged in exchange for a privilege or benefit. It is by definition a broad-based, mandatory tax levied on hospitals regardless of whether they receive Medicaid payments.²⁷ As Rep. John Kavanagh (R-23) warned, “calling a tax an assessment doesn’t make it any less a tax. It just makes it a hidden tax.”²⁸

Proponents lament that subjecting the provider tax to the supermajority requirement makes expansion unfeasible, but it is precisely when contemplating politically and emotionally charged issues that constitutional protections are needed most. Voters enacted Prop. 108 to “make it more difficult to raise taxes” even when legislators are “respond[ing] to emergency situations, court directives and federal requirements.”²⁹ As Sen. Kelli Ward (R-5) observed, Prop. 108 “protect[s] hard-working Arizona tax-payers from taxation without representation.”³⁰

In their attempt to make an end-run around Prop. 108 by abdicating the taxing authority to an appointed administrator, proponents ignored an even more fundamental constitutional principle: separation of powers.

²⁴ See Bill Status Overview: HB 2010, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/51leg/1s/bills/hb2010o.asp&Session_ID=111. The final Senate vote was 18 in favor (20 were required under Prop. 108), and the final House vote was 33 in favor (40 were required under Prop. 108).

²⁵ *Id.* (Governor signed HB 2010 on June 17, 2013).

²⁶ Ariz. Const. art. IX § 22(C)(2).

²⁷ A.R.S. § 36-2901.08(B); 42 U.S.C. § 1396b(w); 42 C.F.R. § 433.68.

²⁸ Arizona House, floor speech in favor of Kavanagh #1 Floor Amendment to H.B. 2010, available at http://azleg.granicus.com/ViewPublisher.php?view_id=21.

²⁹ See Arizona General Election Publicity Pamphlet (Nov. 3, 1992) p. 46, <http://azsos.gov/election/1992/Info/PubPamphlet/PubPam92.pdf>.

³⁰ Arizona Senate, floor speech in favor of Biggs #2 Floor Amendment to S.B. 1492, http://azleg.granicus.com/ViewPublisher.php?view_id=21.

The state of Arizona was founded on the principles of self-government. To protect its citizens from an unaccountable bureaucracy, Arizona’s constitution divides government power into three distinct branches, which check and balance each other to protect individual liberty from concentrated power.³¹ The Arizona Constitution goes a step further than its federal counterpart, explicitly declaring that these powers must remain “separate and distinct.”³² The lawmaking power is reserved to the people’s representatives to protect Arizonans from the unchecked decisions of an unaccountable bureaucracy.³³ Thus, the legislature cannot delegate to another branch of government—or an unelected bureaucrat—an essentially legislative power³⁴ such as the power to tax.³⁵ Indeed, the Arizona Supreme Court struck down a previous delegation of the power to set a Medicaid tax.³⁶

The current expansion bill violates the separation-of-powers provisions by relinquishing the taxing power to the AHCCCS director, empowering the director to set the amount and decide who will be exempt.³⁷ Yielding control to an unelected bureaucrat and insulating the director’s decisions from legislative oversight eviscerates constitutional checks and balances, paving the way for special interest groups such as hospitals to hijack the lawmaking process. Legislators are beholden to their constituents. Bureaucrats have no such accountability.

Proponents of Medicaid expansion have forsaken Arizona’s constitution to foist upon Arizonans an expensive and unworkable federal program. Because Arizona courts have never squarely addressed these Prop. 108 and delegation issues, the expansion bill could set a dangerous precedent that extends far beyond Medicaid expansion. The Goldwater Institute is representing Arizonans and their representatives who are asking the courts to preserve the democratic protections enshrined in the Arizona Constitution.

³¹ Ariz. Const. art. III (“The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, And no one of such departments shall exercise the powers properly belonging to either of the others”).

³² *Id.*

³³ Ariz. Const. art. IV, Pt. 1, § 1 (“The legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives”).

³⁴ *State ex rel. Woods v. Block*, 189 Ariz. 269, 276-77, 942 P.2d 428, 435-36 (1997) (citations and quotations omitted) (law violates separation of powers if “one branch of government is exercising the powers properly belonging to either of the others”).

³⁵ *See S. Pacific Co. v. Cochise Cnty.*, 92 Ariz. 395, 404, 377 P.2d 770, 777 (1963) (legislature cannot “delegate to an administrative body or official not only the power to fix a rate of taxation according to a standard but also the power to prescribe the standard”).

³⁶ *Cochise Cnty. v. Dandoy*, 116 Ariz. 53, 567 P.2d 1182 (1977) (en banc) (giving administrator power to set the amount of Medicaid appropriation with only a \$60,000,000 ceiling is an unconstitutional delegation of the tax power).

³⁷ A.R.S. § 36-2901.08(A)-(C). Although § 36-2901.08(C) lists several factors that the Director may consider in determining exemptions (size of hospital, specialty services available to patients, and geographic location of hospital), the Director is not required to consider these – or any – factors.

CASE LOGISTICS

Plaintiffs

The plaintiffs are:

- 9 state senators and 27 state representatives who voted against Medicaid expansion and would have defeated the provider tax under Prop. 108, but whose votes were effectively nullified when the expansion bill became law without the constitutionally required 2/3 approval
- Jeanette Dubreil (Legislative District 22) and Katie Miller (Legislative District 14), constituents who were denied representation when their senators' and representatives' votes were not counted
- Tom Jenney, an Arizona taxpayer acting as private attorney general to enforce constitutional separation of powers

Defendants

The defendants are:

- Tom Betlach, the Director of AHCCCS, who is responsible for enforcing and collecting the provider tax
- Governor Janice K. Brewer, whose office oversees administration of the AHCCCS program

Court

Maricopa County Superior Court

Judge

TBD

Relief sought

The legislators, their constituents, and taxpayers are asking the court to enjoin collection of the provider tax and declare that it violates the state constitution's Prop. 108 and separation-of-powers clauses.

Date filed

September 12, 2013

THE LEGAL TEAM

- **Clint Bolick** is the Goldwater Institute Vice President of Litigation. He was named as a Lawyer of the Year in 2003 by *American Lawyer* magazine and in 2009, *Legal Times* named Bolick one of the "90 Greatest D.C. Lawyers in the Past 30 Years." Bolick

received one of the freedom movement's most prestigious awards, the Bradley Prize, in 2006 for advancing the values of democratic capitalism. He has argued and won cases in the United States Supreme Court, the Arizona Supreme Court, and state and federal courts from coast to coast. He has won landmark precedents defending school choice, freedom of enterprise, and private property rights and challenging corporate subsidies and racial classifications. Before joining the Goldwater Institute, Bolick was co-founder of the Institute for Justice and later served as president of the Alliance for School Choice. He also has assisted policy activists in several states to establish litigation centers based on the Goldwater Institute model. He is the author of several books, most recently with Gov. Jeb Bush, *Immigration Wars: Forging an American Solution*. In addition to his work at the Goldwater Institute, Bolick serves as a research fellow with the Hoover Institution.

- **Kurt Altman** is a Senior Attorney for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. Before joining the Institute, Altman operated a private litigation and appellate practice, focusing on criminal law in both state and federal courts. Previously, Altman spent a number of years as an Assistant U.S. Attorney for the District of Arizona, leading investigations and conducting trial in Federal District Court. As a member of the Department of Justice, Altman earned the Director's Award, the highest honor bestowed upon Department of Justice lawyers, for his efforts in the first capital prosecution in Federal District Court for the District of Arizona. Additionally, he has twice received the Federal Bureau of Investigation Director's Award for his tireless efforts on behalf of FBI-conducted investigations. Since 1994, Altman has served as lead counsel in hundreds of jury trials throughout Arizona. Because of his unique background, Altman has been a featured lecturer and teacher at numerous seminars and centers where he has been able to share his experiences with attorneys from around the country. He is a graduate of Wake Forest University School of Law, in Winston-Salem, NC.
- **Christina Sandefur** is a staff attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. Sandefur litigates in defense of economic liberty, private property, free speech, and taxpayer rights and is the lead attorney on the Institute's challenge to the federal health care law. She recently won a major victory for Arizona taxpayers when the court of appeals held that government cannot spend bond money on unapproved purposes when voters authorized the funds for specific projects. Sandefur is a frequent guest on national and local television and radio shows. Before joining the Institute, Sandefur worked to advance liberty as a law clerk at the Pacific Legal Foundation in California and a research intern and author at the Michigan-based Mackinac Center for Public Policy. She earned her J.D. *summa cum laude* from Michigan State University College of Law, where she served as notes editor of the Michigan State Law Review and president of the MSU Federalist Society. Sandefur graduated *magna cum laude* from Hillsdale College with a B.A. in history and political economy and completed an honors thesis on the economic history of the U.S. Postal Service.