IN THE SUPREME COURT

STATE OF ARIZONA

ANDY BIGGS, et al. Petitioners, v. HONORABLE KATHERINE COOPER, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, and JANICE K. BREWER, et al., Real Parties in Interest.	Supreme Court No. CV-14-0132-PR Court of Appeals, Division One No. 1 CA-SA 14-0037 Maricopa County Superior Court Case No. CV2013-011699

RESPONDENTS' SUPPLEMENTAL BRIEF

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Pursuant to this Court's August 27, 2014 Order, Legislator-Plaintiffs submit this Supplemental Brief.[1] Because the issue of standing to challenge vote nullification has been thoroughly briefed in their Response to the Petition for Review and Combined Response to the *Amici Curiae* Briefs, Legislator-Plaintiffs will not duplicate the contents of those submissions. Instead, they simply offer this brief to clarify Petitioners' misapprehension of the direct injury suffered by individual legislators and to elaborate on the damage to the integrity of the legislative process that will result if a simple majority of legislators may disregard a constitutional supermajority requirement when politically convenient.

I. Legislator-Plaintiffs have standing because they suffered direct, individual injuries in their capacities as participants in the legislative process.

The linchpin of Petitioners' case is their purported distinction between what occurs within the legislative process and what occurs outside of it. *See* Petition for Review ("Pet. Rev.") at 7-8; Response to Brief *Amicus Curiae* of Pacific Legal Foundation ("Resp. PLF Br.") at 1. In other words, Petitioners argue that legislators have standing to sue *only if* an injury is inflicted by "a different branch of government" *outside of* the legislative process, such as where an outside party

[1] This brief refers to Petitioners/Special Action Real Parties in Interest Governor Brewer and Director Betlach as "Petitioners" and Respondents/Cross-Petitioners/Special Action Petitioners Legislators as "Respondents" or "Legislator-Plaintiffs."

changes the rules for the legislative forum. Pet. Rev. at 7-8. But this distinction makes no sense in the context of a measure that was designed for the specific purpose of constraining the legislative process. Proposition 108's aim is to protect Arizonans from government growth and new taxes by empowering a minority in the legislature to block tax increases. (Appendix 4 to Petition for Special Action ("PSA App. 4") ¶¶ 55-6; PSA App. 8 at p. 46). Proposition 108 functions by protecting minority votes, and when those protections are disregarded, legislators suffer cognizable injuries as participants in the legislative process.

Thus, the ordinary rules of standing should apply – the party who is most directly injured should be the one to bring the case. Here, the parties most directly injured are the legislators who lost their individual voting power. This Court has recognized standing where individual members' votes were nullified and would have made a difference to the outcome of the vote but for the nullification. *See, e.g.*, *Dobson v. State*, 233 Ariz. 119, 122, 309 P.3d 1289, 1292 (2013); *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 486-87, 143 P.3d 1023, 1027-28 (2006); *Bennett v. Napolitano*, 206 Ariz. 520, 526-27, 81 P.3d 311, 317-18 (2003).

Petitioners inappropriately relegate cases like *Dobson* to authorizing legislator standing only when someone outside the legislature imposes new voting rules. Pet. Rev. at 7 (*citing Dobson*, 233 Ariz. 119, 309 P.3d 1289). It is true that legislators lack standing when their votes were duly counted and the otherwise

properly enacted legislation was subsequently altered by a discrete action. *See Bennett*, 206 Ariz. 520, 81 P.3d 311 (*individual* legislators lacked standing to challenge constitutionality of Governor's line-item veto when individual votes had been properly counted and thus any injury affected the *institutional* interests of the legislative body as a whole). But legislators have standing where, as here, they have an individual interest at issue in the case and have suffered particularized injuries. Thus, Plaintiffs had standing in *Dobson* and *Coleman* because they challenged "illegal interference *within* the legislative process" that injured the individual plaintiffs *in their capacities as participants* in that process. *Bennett*, 206 Ariz. at 526, 81 P.3d at 317 (citing *Coleman v. Miller*, 307 U.S. 433, 446 (1939)) (emphasis added). Conversely, plaintiffs lacked standing in *Bennett* and *Raines* because their votes were properly counted and "no legislator's vote was nullified," *Forty-Seventh Legislature*, 213 Ariz. at 486, 143 P.3d at 1027 (citations and quotations omitted), so they had "alleged no injury to themselves as individual[]" participants in the legislative process. *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

The injury that conferred standing in *Dobson* – and here – "does not concern the impact of another branch of government on the collective action of the [legislative body]," but rather "alter[ed] how the votes of individual[s] . . . will determine the [full body's] action." *Dobson*, 233 Ariz. at 122, 309 P.3d at 1292. Here, plaintiffs' injuries are not premised on the legislature's *institutional* interest

in protecting its collective will from outside interference (as in *Bennett*, *Forty-Seventh Legislature*, and *Raines*), but rather on a legislator's *individual* interest in having his vote valued in the manner prescribed by the Constitution (as in *Coleman* and *Dobson*).

Rejecting Legislator-Plaintiffs' standing because "the enacted law does not apply to [Legislator-Plaintiffs] personally," Resp. PLF Br. at 1, Petitioners misapprehend the relevant injury for which Legislator-Plaintiffs seek recovery. Legislator-Plaintiffs do not allege that they were injured by the application of the Medicaid tax to them; instead, they were injured when a tax that *they were successful in defeating* was nevertheless signed into law and enforced by the executive branch, causing "an unconstitutional 'overriding' that 'virtually held [their votes] for naught.'" *Biggs v. Cooper*, 234 Ariz. 515, __, 323 P.3d 1166, 1172 (App. 2014) (*quoting Coleman*, 307 U.S. at 438)).

Moreover, Petitioners are wrong that "there was no outside interference in the legislative process." Pet. Rev. at 8. Petitioners perpetuate the falsehood that Legislator-Plaintiffs were harmed "by their legislative colleagues" and not by "Defendants' actions." Resp. PLF Br. at 1. But Respondent Brewer signed the constitutionally deficient bill into law, and the Director of the Arizona Health Care Cost Containment System ("AHCCCS") Petitioner Betlach is collecting and administering the unlawful Medicaid tax. (PSA App. 4 at ¶¶ 43-44, 62-65, 85, 87-

89). Because enough legislators voted against the tax to prevent it from becoming law, signing that provision into (and enforcing it as) law effectively nullified the vote of each legislator who voted against it. Thus, by seeking an injunction to prevent Petitioners from "establishing, administering, or collecting the provider tax, or from otherwise enforcing A.R.S. § 36-2901.08," (PSA App. 4 at p. 20), Legislator-Plaintiffs are seeking to restore their "constitutional right to have their votes count a certain amount." *Biggs,* 234 Ariz. at __, 323 P.3d at 1172. A plaintiff pursuing an injunction against an unconstitutional law sues the party enforcing that law. *E.g. Coleman,* 307 U.S. 433 (legislator plaintiffs sued the Secretary of State to decertify the improperly enacted constitutional amendment even though the Secretary of State was not responsible for the deficiencies). Here, Petitioners are responsible for both enforcing the deficient law and causing the deficiency.

II. Departing from precedent to deny Legislator-Plaintiffs standing would inflict long-term damage on the integrity of the legislative process.

If the most directly injured parties (here, individual legislators whose votes were nullified) cannot challenge the unlawfully enacted tax, no one will be able to sue. That departure from traditional standing law treats legislative majorities not only as legislators but as judges: They get to decide not only whether a constitutional limit on their authority applies but also whether that determination

was constitutional. Lawmakers cannot – and should not – be the judges of their own powers.

Hospitals, self-proclaimed financial beneficiaries of Medicaid expansion, Hospital Br. at 2, are at best "unwilling plaintiffs." Symington Br. at 13. [2] Imposing the new Medicaid tax affords them access to massive federal subsidies. If and when that relationship no longer proves beneficial, hospitals can evade the tax by lobbying for an exemption – which the Director of AHCCCS (Petitioner Betlach) can grant for *any reason* – thereby eliminating a potential lawsuit or even mooting a pending lawsuit. A.R.S. § 36-2901.08(C). Indeed, Petitioner Betlach has already exempted eight hospitals from paying the tax, even though some are already benefitting financially from the new subsidies. *See* PSA App. 3 at 6. These self-motivated special interests have no vested interest in upholding the integrity of the legislative process but stand to benefit greatly by its attrition.[3] Given the financial interests of the hospitals who profit from Medicaid subsidies, Legislator-Plaintiffs are the only parties who can realistically challenge the constitutionality of the Medicaid tax and settle the important constitutional questions in this case and for

[2] Respondents refer to Brief of *Amici* Fife Symington III, et al. as "Symington Br." and Brief of *Amici* Arizona Hospital and Healthcare Association, et al. as "Hospital Br."

[3] Moreover, because the Court of Appeals barred state taxpayer Tom Jenney from challenging the Medicaid tax under the Private Attorney General Statute, this vital constitutional question will otherwise evade review.

future application. "Without standing to raise the constitutional question in court, [Legislator-Plaintiffs and the people of Arizona] would have no means of redress." *Dobson*, 233 Ariz. at 122, 309 P.3d at 1292.

Apart from depriving Legislator-Plaintiffs of their constitutionally protected voting rights in *this* case, deviating from this state's well-established standing jurisprudence invites confusion for future litigants and sets a dangerous precedent for future lawmakers. Petitioners would deny individual legislators their day in court simply because they are legislators, flouting the traditional rule that those who suffer direct, individual injuries may seek recourse in court. Because there is no principled reason why legislative majorities and special interests should be permitted to bar minorities from enforcing their voting rights, there is no principle stopping *any* majority from curtailing minority rights in the future.

Even worse, such a carve-out from the traditional standing rules would encourage powerful special interests to enlist shrewd politicians and devise unconstitutional tax measures that would evade review, enabling special interests to commandeer the legislative process for their own benefit. Denying individual legislators standing to enforce their voting power dilutes the robustness of voter-enacted Proposition 108, allows legislative losers to determine by fiat that they had prevailed, and will ensure that constitutional limits on legislative supermajorities

are left to the mercy of the very parties the constitutional provisions were designed to limit.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Response to the Petition for Review, this Court should affirm the unanimous judgment below with respect to legislator standing.

Dated: September 16, 2014.

Respectfully submitted,

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