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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ANDY BIGGS, et al., Plaintiffs, vs. JANICE K. BREWER, in her official capacity as Governor of Arizona, et al., Defendants.	**Case No.: CV2013-011699** **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS** Oral argument requested *Hon. Katherine Cooper*

In their Motion to Dismiss (MTD), Defendants Governor Brewer and Director Betlach (Defendants) ignore the constitutional issues that are the focus of Plaintiffs' Complaint and ask this Court to dismiss the case for essentially political reasons. They and their Amici offer pages of policy arguments in favor of transforming Arizona's Medicaid program. But the merits of Medicaid expansion are not at issue here. This case is about whether the tax mechanism established to fund expansion is constitutional. (Compl. pp. 19-20.) At this stage, the only question before the Court is whether Plaintiffs have standing to challenge that tax. [1]

Defendants' entire standing argument essentially hinges on who is the final judge of whether a law passes constitutional muster. Defendants argue that the "legislature itself" determines whether a bill

[1] Defendants' and Amici's embellished "factual backgrounds" (MTD at 2-6; Hospital Ass'n Amicus Br. (Am. Br.) at 2-5) are irrelevant to the questions of whether Plaintiffs have standing and whether the tax that funds the program is lawful.

is subject to Proposition 108's supermajority requirement (MTD 5), while Amici contend that powerful special interest groups should make that call. (Am. Br. 2, 6-8.) But while "each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (2006) (citations omitted). Because Plaintiffs have established solid grounds for standing that are firmly rooted in Arizona law, and because Arizona courts have never squarely addressed these vital and reoccurring constitutional issues, Defendants' Motion to Dismiss should be denied.

I. BACKGROUND

A. Transforming Arizona's Medicaid program. Last year, the Supreme Court held that the federal government cannot force states to dramatically transform Medicaid from a means-tested government insurance "program to care for the neediest among us" into "an element of a comprehensive national plan to provide universal health insurance coverage," encompassing "the entire nonelderly population with income below 133 percent of the [federal] poverty level." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012); (Compl. ¶ 48.) This ruling reinforced the principle that states, who jointly fund Medicaid with the federal government (¶ 47), can control their own budgets, reduce taxpayer obligations to the federal government, and curb the federal government's role within the state. (¶ 48.)

States that choose to participate in the new program will have the medical costs for newly eligible enrollees covered by the federal government–but only until 2016. Pub. L. 111-148 § 2001(a)(3)(B)(1)(A); (Compl. ¶ 49). Of course, Arizona taxpayers will ultimately repay even this temporary federal contribution. States that opt in will also be responsible for administrative costs and medical costs for previously eligible populations. (¶ 49.) The Governor's Office estimates that the new Medicaid program at issue here will cost Arizona $154 million for the first year alone, making this some

of the most expensive "free" money the state has ever received.[2] (¶ 50.) The non-partisan Kaiser Family Foundation projects costs of $3.1 billion during the period of 2014-22, assuming the federal government continues to pay its share of the costs. (¶ 51.) Arizona's share will swell as federal funding declines. (*Id.*)

To fund Arizona's obligations under the new program, proponents opted to charge hospitals a mandatory provider tax. A.R.S. § 36-2901.08 (2013); (Compl. ¶ 52.) Given the risks and expenses associated with expansion, many legislators objected, especially to this new tax. (¶ 54.) But supporters in the legislature rejected accountability mechanisms, such as protecting taxpayers from possible reductions in federal funding, requiring an independent audit to ensure hospitals do not pass the tax on to patients, or annual studies on the program's quality of care.[3]

B. Proposition 108 and separation of powers. In 1992, Arizona voters approved by a majority of over 71 percent (¶ 55) a constitutional requirement to "help restrain growth in state government"[4] by limiting one of government's most frequently abused powers: the power to tax. (¶¶ 55-6.) That provision, Proposition 108, added Article IX, § 22 to the state Constitution. It requires two-thirds of both houses of the legislature to approve *any* "act that provides for a net increase in state revenues," including any new tax, fee, or assessment, or increasing an existing tax, fee, or assessment. (¶ 56); Ariz. Const. art. IX §§ 22(A)-(B). Voters made clear that they meant this to apply broadly, to "make it more difficult to raise taxes" *even if* this makes it "extremely difficult for elected representatives to respond to emergency situations, court directives and federal requirements." (¶ 55); Pub. Pamph. at p. 46.

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[2] Arizona's share will likely be much higher, as its past calculations of Medicaid liabilities have been grossly inaccurate. In 2005, for example, the cost of expanding the program exceeded expectations by almost one billion dollars. *Compare* JLBC Proposition 204 Fiscal Impact Summary (Aug. 17, 2000) at p. 2, *available at* http://www.azleg.gov/jlbc/ballotprop 204.pdf (estimated cost $315 million), *with* AHCCCS Appropriation Hearing Information (March 5, 2009) at p. 23, *available at* http://www.az ahcccs.gov/reporting/Downloads/Legislation/Presentations/FY09AppropriationHearingPresentation.pdf (actual cost over $1.3 billion).

[3] *See* Senate Floor Session Part 7, COW #4 (51st Leg., 1st Reg. Sess., May 16, 2013), *available at* http://azleg.granicus.com/ViewPublisher.php?view_id=21.

[4] Publicity Pamphlet (Nov. 3, 1992) at p. 46, *available at* http://azsos.gov/election/1992/Info/Pub Pamphlet/PubPam92.pdf. "To determine the intent of the electorate, courts . . . look to the publicity pamphlet." *Heath v. Kiger*, 217 Ariz. 492, 496, 176 P.3d 690, 694 (2008).

Defendants' and Amici's policy arguments in favor of the new Medicaid program (MTD 2-5; Am. Br. 2-5) are irrelevant to the issue of whether the chosen funding source complies with the Constitution. Proposition 108 does not yield even "[i]f there is a crisis or emergency, [such as] a great need for the poor." Pub. Pamph. at p. 49. Even in those situations, a two-thirds supermajority must "be found." *Id.*

Unwilling to comply with the law, proponents instead took the unconstitutional path. Defendant Brewer threatened a moratorium on all legislation until expansion passed and made good on this threat by vetoing five unrelated bills. (Compl. ¶ 57.) On the evening of June 12, she called lawmakers into a special session to vote on Medicaid expansion. (¶ 58.) Meeting into the early hours of the morning, proponents still were unable to garner the constitutionally required two-thirds supermajority. (¶ 59.) Expansion advocates therefore sought to circumvent the Constitution by ceding the power to levy taxes to Defendant Betlach, including full discretion to determine who must pay the tax and in what amount. A.R.S. § 36-2901.08; (Compl. ¶¶ 62-3.)

Evading taxpayer protections and stripping the legislature of its taxing authority yields the exact outcome that Arizona's constitutional checks were designated to prevent: consolidating 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 by Defendants themselves at over $108 million during the first six months of expansion.[5] (*See also* Am. Br. 6-7 (detailing Hospital Association's financial benefits from new program.)) Yet despite its constitutional flaws, Defendant Brewer signed the tax into law. (Compl. ¶ 61.)

Plaintiffs are 36 legislators (nine senators and 27 representatives) who voted against the Medicaid tax (¶¶ 4-39) ("Legislator-Plaintiffs"); two constituents whose senators and representatives voted against the tax (¶¶ 40-41) ("Constituent-Plaintiffs"); and Tom Jenney, a taxpayer who brings this

[5] AHCCCS Provider Assessment Summary (Aug. 16, 2013) at p. 1, *available at* http://www.azahcccs.gov/publicnotices/Downloads/AZAssessmentModelDRAF8162013.pdf.

action pursuant to A.R.S. §§ 35-212 and 213 ("Private Attorney General Statutes"). (¶ 42.) Because enough legislators voted against the tax to prevent it from becoming law, Plaintiffs allege that signing that provision effectively nullified the vote of each legislator who voted against it and effectively denied representation to their constituents. (¶¶ 76-77.) Plaintiffs further allege that because § 36-2901.08 impermissibly delegates the taxing power to the AHCCCS Director in violation of the state separation-of-powers clauses, monies collected pursuant to or spent from that assessment are illegal. (¶¶ 78, 90.)

II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE ILLEGAL TAX

Standing in Arizona "is not a constitutional mandate." *Armory Park Neighborhood Ass'n v. Episcopal Comm. Svcs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). Thus, "when addressing questions of standing [courts] are confronted only with questions of prudential or judicial restraint." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, 108 P.3d 917, 919 (2005). Although Arizona courts often require that plaintiffs "allege a distinct and palpable injury," they will nevertheless consider the merits of cases even in the absence of a direct injury if the issues are important. *Sears v. Hull*, 192 Ariz. 65, 69, 71, 961 P.2d 1013, 1017, 1019 (1998).

A. Plaintiff Jenney has standing as Statutory Private Attorney General. A.R.S. § 35-212(A) provides that the "attorney general in his discretion may bring an action in the name of the state to enjoin the illegal payment of public monies," and if, after making a written request, the Attorney General declines to bring an action, "*any* taxpayer of the state may institute the action in his own name and at his own cost with the same effect as if brought by the attorney general." § 35-213(A) (emphasis added). Defendants erroneously contend that Plaintiff Jenney did not comply with these statutory requirements. (MTD 14.) While acknowledging that Plaintiff Jenney alleges he served on the Attorney General a written request to bring this action (MTD 14 (*citing* Compl. ¶ 66)), Defendants appear to contend that Plaintiff Jenney received no response.[6] (MTD 14.) However, on September 13, 2013, the day after

[6] *Austin v. Campbell* only holds that a Plaintiff who *completely fails* to make a written request on the Attorney General before bringing a lawsuit in his own name lacks standing to sue. 91 Ariz. 195, 201-202, 370 P.2d 769, 773-74 (1962). Because Plaintiff Jenney made the written demand (¶ 6), *Austin* has no relevance and Defendants' reliance on that case (MTD 14) is misplaced.

Plaintiff Jenney filed his Complaint, the Attorney General wrote to Jenney, declining to bring an action pursuant to § 35-212 to enjoin the tax, and clearing the way for Jenney to pursue this action.[7]

Defendants also claim that Jenney has not "complied with subsection (B)'s bond requirement." (MTD 14). But subsection (B) does not require a plaintiff to post a bond *prior to filing a complaint*; it simply requires a Plaintiff to "execute a bond payable to the defendant." A.R.S. § 35-213(B). The statute does not prescribe the procedure for posting, or the amount of, such a bond, leaving those matters to the Court's discretion. *Id.* The Private Attorney General Statutes permit a plaintiff both to enjoin illegal payments *and* recover illegally paid money, along with damages. § 35-212(A). The nature of a plaintiff's claim would thus affect the amount of any bond. Arizona courts set bonds at an amount that is reasonable for the given situation. *See Matter of Wilcox Revocable Trust*, 192 Ariz. 337, 341, 965 P.2d 71, 75 (App. 1998) (also noting that injunctions may be enforceable without the posting of a security bond, at the court's discretion). Because Jenney seeks only to enjoin the illegal payment of public monies, Plaintiffs ask the Court to exercise its discretion and order only a nominal bond.

Finally, Defendants seek to narrow the scope of the Private Attorney General Statutes to foreclose challenges to unlawfully collected money, arguing that somehow spending unlawfully collected money is not an illegal expenditure. (MTD 14.) To support their narrow construction, Defendants mistakenly limit the statutory definition of "public monies" to include *only* money "coming into the lawful possession . . . of state agencies." (*Id.* at 13 (quoting A.R.S. § 35-212(B).) Because Plaintiff Jenney's challenge involves money *unlawfully* coming into the state's possession (via the illegal tax), they argue, he lacks standing as Private Attorney General. (MTD 13-14.) There are no grounds for reading the Private Attorney General Statutes so narrowly. A.R.S. § 35-212(B) specifies that the illegal expenditures that a plaintiff may challenge "*include[]* all monies coming into the lawful possession . . .

[7] Letter from Attorney General Horne (Sept. 13, 2013) (attached as Exhibit 1). If this Court declines to take judicial notice of the response, Plaintiffs respectfully request that it allow them to amend their Complaint rather than dismissing the claims. *See* Ariz. R. Civ. P. 15(a).

of state agencies" (emphasis added). "Include" does not mean "limited to."[8] In other words, the Private Attorney General Statutes also permit challenges to money that is lawfully collected but illegally spent. *See Fund Manager PSPRS v. Corbin*, 161 Ariz. 348, 354, 778 P.2d 1244, 1250 (App. 1988) (emphasis added) (as part of statutory power "to seek recovery of public monies illegally paid," plaintiff can "challenge the constitutionality of a [provision] that would permit the retention of public monies *illegally received*"). Jenney can challenge the illegal payment of public monies *regardless of whether* those public monies were legally collected in the first place.

Defendant Betlach will use money collected from the Medicaid tax to fund the state's share of the new Medicaid program. (Compl. ¶ 65). Plaintiff Jenney has alleged that this tax is unconstitutional; therefore spending the tax money to fund the Medicaid program is also necessarily illegal. (¶¶ 78-9, 90-1.) Additionally, Jenney's challenge to Defendant Betlach's authority to *collect* the Medicaid tax is *itself* a challenge to the "illegal payment of public monies." Collecting and administering the Medicaid tax requires the state to spend public money on salaries and administrative costs, and a Private Attorney General may challenge an agency's authority on separation-of-powers grounds even without "specifically challeng[ing] any particular expenditure of funds by" that agency because the "request to prohibit [an agency] from exercising its power . . . necessarily includes a request to prohibit payment for such" exercise of power. *State v. Block*, 189 Ariz. 269, 274, 942 P.2d 428, 433 (1997). Because Plaintiff Jenney complied with the statutory requirements and alleged sufficient facts, he has standing to challenge the payment of public money to collect the illegal tax and the payment of public money collected from the illegal tax.

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[8] The Legislative Bill Drafting Manual (2013-14), which Defendants themselves offer as an authority for statutory interpretation (*see* MTD 5), states conclusively that in Arizona statutes, "'[i]ncludes' or 'including'" means "*not limited to and is not a term of exclusion*." § 5.30, *available at* http://www.azleg.gov/alisPDFs/council/2013-2014%20Bill%20Drafting%20Manual .pdf (*citing* A.R.S. § 1-215(14) (governing definitions of words in "statues and laws of this state")). In fact, the Manual advises drafters against appending "but is not limited to" to the word "includes," because the phrase is "unnecessary, and occasionally confusing . . . Since 'includes' is not exhaustive, the words '*but is not limited to*' are redundant, add nothing and invite misinterpretation." *Id. See also*, Black's Law Dictionary (9th ed. 2009) (include "typically indicates a partial list").

B. Legislator-Plaintiffs have standing to challenge the nullification of their votes.

Legislator-Plaintiffs have standing to challenge the nullification of their votes, an injury that was recently reaffirmed by the Arizona Supreme Court in *Dobson v. State*, 2013 WL 5051457 (Ariz. Sept. 13, 2013). Defendants' attempts to characterize Plaintiffs as seeking a "drastic expansion of the standing doctrine" (MTD 2) or to reduce their claims to mere "political dispute[s]" (*id.* at 15) ignore Arizona case law, the direct injuries alleged by Plaintiffs, and the gravity of the constitutional issues at stake. If this Court were to accept Defendants' position, serious constitutional issues of statewide importance would entirely evade judicial review.

i. Legislator-Plaintiffs have alleged cognizable individual injuries. While Defendants are correct that the legislature must authorize lawsuits that bring claims on behalf of the legislature as a whole (MTD 8), these Legislator-Plaintiffs are alleging *individual* injuries, not institutional injuries.

As Defendants recognize (MTD 8), the first type of legislator standing derives from an institutional injury to the legislative body as a whole. *See Bennett v. Napolitano*, 206 Ariz. 520, 525-27, 81 P.3d 311, 316-18 (2003). In *Bennett*, four legislators challenged the constitutionality of the Governor's exercise of the line-item-veto power, but sued individually–not on behalf of the legislature. *Id.* at 522, 81 P.3d at 313. As the Supreme Court later explained, those legislators lacked standing *as individuals* because "no legislator's vote was nullified"; rather, the injury was "an institutional injury." The four legislators would have had standing to sue on behalf of the legislature "ha[d they] been authorized."[9] *Forty-Seventh Legislature*, 213 Ariz. at 486, 143 P.3d at 1027 (quotations and citations omitted). Here, Defendants argue that because Legislator-Plaintiffs "are acting 'without the benefit of legislative authorization' [they] should not 'be accorded standing to obtain relief on behalf of the

[9] The *Bennett* Court based this institutional standing on *Raines v. Byrd*, 521 U.S. 811 (1997), where six members of Congress challenged the president's line item veto power as infringing on Congress's Article I authority. *Id.* at 816. The Court held that because the individual congressmen "have alleged no injury to themselves as individuals" and their claim was based on "institutional injury," they lacked standing to challenge the Act because they had "not been authorized to represent their respective Houses" in a lawsuit. *Id.* at 829.

legislature.'" (MTD 10 (quoting *Bennett*, 206 Ariz. at 527, 81 P.3d at 318.)) But Plaintiffs do not seek relief on behalf of the legislature. Their injury is not premised on the legislature's *institutional* authority to make law by majority vote, but rather on a legislator's *individual* authority to have his vote valued in the manner prescribed by the Constitution. (Compl. ¶¶ 60, 72, 75-76.)

This injury falls squarely within the second basis for legislator standing in Arizona: standing based on a particularized injury to individual legislators, such as 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.*, *Bennett*, 206 Ariz. at 526-27, 81 P.3d at 317-18; *Forty-Seventh Legislature*, 213 Ariz. at 486-87, 143 P.3d at 1027-28. In *Bennett*, the Arizona Supreme Court adopted individual legislator standing from the United States Supreme Court case *Coleman v. Miller*. *See Bennett*, 206 Ariz. at 526-27, 81 P.3d at 317-18 (citing 307 U.S. 433 (1939)). In *Coleman*, 20 Kansas state senators voted against a bill, and 20 senators voted in favor. *Coleman*, 307 U.S. at 435-36. The Lieutenant Governor cast the deciding vote in favor. *Id.* The Court held that the 20 senators who voted no had standing to challenge the Lieutenant Governor's authority to cast a vote because their "votes . . . have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat" the bill. *Id.* at 438. Thus, *Coleman* stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823 (1997). Here, as in *Coleman*, Legislator-Plaintiffs who voted against the Medicaid tax had enough votes to defeat it under Proposition 108, yet the Governor signed the tax into law. Legislator-Plaintiffs have standing because they "have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438.

The day after Plaintiffs filed their Complaint in this case, the Arizona Supreme Court reaffirmed (and arguably broadened) the doctrine of individual legislator standing. In *Dobson*, 2013 WL 5051457, four members of the Commission on Appellate Court Appointments brought an action "as individual commissioners and not on behalf of the Commission as a whole," *id.* at *2 ¶ 5, challenging a new

"requirement of a supermajority vote to send fewer than five [judicial] nominees to the governor." *Id.* at *3 ¶ 12. Like the Defendants here, the Defendants in *Dobson* argued that the Commissioners lacked standing because they were bringing "organizational claims without authorization from their 'organization.'" *Id.* at *2 ¶ 10. But the Court disagreed because the Commissioners "have identified a particularized injury." *Id.* at *3 ¶ 11. The same is true of Legislator-Plaintiffs here, because their claims do not involve "the collective action of the [legislature], but instead directly alter[] how the votes of individual [legislators] will determine the [legislature's] action." *Id.* at *3, ¶ 12. As in *Dobson*, signing the Medicaid tax into law "render[ed] [the Legislator-Plaintiffs'] opposition . . . ineffective." *Id.* at *3 ¶ 12. But Legislator-Plaintiffs' injuries are even more direct and concrete than those of the commissioners in *Dobson*. Because the Supreme Court made clear that individual Commissioners have suffered a sufficient injury when a supermajority requirement will *dilute future* votes, Legislator-Plaintiffs certainly have standing when failure to apply a supermajority requirement completely *nullified past* votes. There is "no principled basis for distinguishing between a legislator's pre-vote and post-vote interests in the validity and effectiveness of that vote. A procedure that nullifies a legislator's vote is as harmful as one that precludes it. . . .[T]he legislator and [constituents] . . . are unlawfully precluded from participating in the governmental process." *Silver v. Pataki*, 96 N.Y.2d 532, 538 (N.Y. 2001). Defendants' efforts to distinguish *Dobson* from the claims Legislator-Plaintiffs assert here (MTD 10-11) are unpersuasive. It is immaterial that Plaintiffs in *Dobson* were challenging the imposition of a supermajority requirement, while Legislator-Plaintiffs here challenge the *failure* to apply a supermajority requirement. Either way, the injury is the same: nullification of a vote, which is even more pronounced here than in *Dobson*.[10] Unlike the legislators in *Bennett* who lacked standing to sue as individuals because "no legislator's vote was nullified," *Bennett*, 206 Ariz. at 526, 81 P.3d at 317, Legislator-Plaintiffs here have specifically

[10] Equally unconvincing are Defendants' efforts (MTD 7) to compare this case to *Sears*, 192 Ariz. at 69, 961 P.2d at 1017 (citizens challenging Governor's authority to establish gaming compact alleged only generalized grievances of exposure to undesirable conduct, crowding, and criminal activity), and *Day v. Bd. of Regents of Univ. of Arizona*, 44 Ariz. 277, 281, 36 P.2d 262, 264 (1934) (voter challenging requirement of exam and fee for medical professionals did not practice that profession). Here, Legislator-Plaintiffs allege that signing the Medicaid tax into law nullified their individual votes.

alleged that their votes were nullified when the Governor signed the Medicaid tax into law without the requisite two-thirds majority. (Compl. ¶¶ 59-61, 72, 76.)

ii. <u>Legislator-Plaintiffs bring constitutional issues, not political questions</u>. Because standing in Arizona is not a constitutional requirement, even where plaintiffs do not suffer a direct, cognizable injury, Arizona courts will nevertheless hear actions involving *any* of the following: (1) a "dispute at the highest levels of state government, [where] the issues [are] substantial and present[] matters of first impression"; (2) "issues of great public importance that [are] likely to recur"; or (3) a request to "determine the constitutionality of an Arizona statute that ha[s] not previously been interpreted." *Sears*, 192 Ariz. at 71, 961 P.2d at 1019 (quotations and citation omitted). In addition to alleging injuries sufficient to establish standing on their own, *see supra* Section II(b)(i), Legislator-Plaintiffs' claims meet these factors.[11] Nevertheless, Defendants seek to bar Plaintiffs – and important constitutional claims – from court.

Especially in light of *Dobson*, Defendants fail to provide a convincing reason to deny Legislator-Plaintiffs standing. Defendants try to reduce the important constitutional questions in this case to mere "political dispute[s]" (MTD 7-8) and portray Legislator-Plaintiffs as a "disgruntled" "minority" "that was outvoted" yet has the audacity to assert their constitutional rights. (*id.* at 1, 8.) But 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. *See supra* Section I(b). Indeed, the only reason Legislator-Plaintiffs were "outvoted" (MTD 8) is because their votes were not counted as the law requires.

Yet Defendants brazenly assert that whether to apply Proposition 108's supermajority requirement to the Medicaid tax bill before transmitting it to the Governor is a "discretionary decision determined within the legislature by majority vote" (*id.* at 8); and because the majority of legislators

[11] In light of these factors, if this Court finds that Legislator-Plaintiffs have standing to assert their Proposition 108 claim, it should also find that they have standing to assert the separation-of-powers claim. Because Plaintiffs allege that Defendants ceded the taxing power to the Director in an attempt to evade Proposition 108 (Compl. ¶ 2), the claims are inextricably intertwined. However, this Court need not reach the issue of whether Legislator-Plaintiffs have standing to assert the separation-of-powers claim because Plaintiff Jenney has standing to bring both claims. *See supra* Section II(a).

voted against applying Proposition 108, the issue has been conclusively "determined by the legislature itself." (*id.* at 5-6.) But if a majority can conclusively determine that the two-thirds rule does not apply, then the constitutional requirement has no meaning. The courts, not the Legislature, must determine if the constitutional requirement applies. If the legislature passes a bill "without a compliance with the requirements of the constitution . . . [and] such defect or violation appear[s] on the face of the act, or by that which constitutes the record, which can be judicially noticed,[12] the power of the court to determine the question is indisputable." *Cox v. Stults Eagle Drug Co.*, 42 Ariz. 1, 11, 21 P.2d 914, 918 (1933) (citations omitted). "Although each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions." *Forty-Seventh Legislature*, 213 Ariz. at 485, 143 P.3d at 1026 (citations omitted).

Such questions are not nonjusticiable political questions. Courts will not address "issues not susceptible to judicial resolution according to discoverable and manageable standards," for example, a "governor's *decision* whether to exercise a veto and a legislature's *decision* whether to attempt to override a veto." *Id.* (emphasis added). But the constitutional bounds of lawmaking authority are legal, not political questions. *See id.* ("whether the constitution *permitted* the Governor to exercise her veto power" is a legal question) (emphasis added). While a legislative majority's decision not to comply with Proposition 108 may be a political question, whether the Medicaid tax is lawful without approval by the constitutionally mandated supermajority is a legal question. *This case is not a clash over politics or a debate about the merits of Medicaid expansion, but about the very integrity of the legislative process*.[13]

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[12] Using the legislative record to reveal Plaintiffs' futile attempts to convince their colleagues to obey the Constitution (MTD 6 (Exhs. D, E, F)) further demonstrates the need for judicial review.

[13] Defendants' citation to *Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists* for the proposition that there is "no authority . . . that legislators have a protectable interest in . . . challenging the constitutionality of legislation" is deeply misleading. (*See* MTD 10 (quoting 227 Ariz. 262, 280, 257 P.3d 181, 199 (App. 2011).) Defendants fail to mention that even in the narrower context of that case, where legislators sought to intervene in a lawsuit to defend legislation they sponsored, the court held that legislators *do* have a protectable interest in challenging the constitutionality of laws when, as here, their claims involve the "scope of legislative procedure." *Id.* at 280, 257 P.3d at 199 n.20.

Defendants seem to contend that while Proposition 108 precludes the legislature from enacting a measure that increases state revenues without a *two-thirds supermajority*, the legislature can vote to *ignore* that requirement by a *simple majority*. Obviously, a legislative majority cannot vote – by rule or otherwise – to supersede the Constitution. *See U.S. v. Smith*, 286 U.S. 6, 33 (1932). Indeed, it was dissatisfaction with the decisions of bare legislative majorities that prompted the voters to enact Proposition 108.[14]

If this Court dismisses Plaintiffs' claims, the vital constitutional issues at stake will evade review. Defendants admit that "legislators may have standing if the subject of the lawsuit *cannot be challenged by any other party* and will otherwise evade judicial review" (MTD 10), but assert that the Medicaid tax is not "insulated from review because entities subject to [it] could bring a Proposition 108 challenge." (*Id.* at 12.) Yet Amici, Arizona Hospital and Healthcare Association and other hospitals, represent to this Court that they "*support* the legislation" (Am. Br. at 1) because they expect to receive financial benefits from Medicaid expansion. (*Id.* at 2, 6.) Given the financial interests of these interest groups, Plaintiffs are the *only* parties who can challenge the constitutionality of the Medicaid tax and settle these important constitutional questions for future application. Like the Plaintiffs in *Dobson*, "[w]ithout standing to raise the constitutional question in court, [Legislator-Plaintiffs, Constituent-Plaintiffs, and the people of Arizona] would have no means of redress." *Dobson*, 2013 WL 5051457 at *3 ¶ 11. Unless this case goes forward, ceding the tax power to Defendant Betlach paves the way for special interests like Amici–self-described as "Arizona's largest and most influential trade association for hospitals" (Am. Br. 5)–to hijack the lawmaking process. Failing to resolve Plaintiffs' claims creates a perverse incentive for future lawmakers: the more a tax contravenes the Constitution, the more it will be insulated from judicial review.

C. <u>Constituent-Plaintiffs have standing to challenge denial of representation</u>. Finally, Constituent-Plaintiffs have standing because they have alleged concrete injuries unique to them.

[14] *See, e.g.*, Pub. Pamph. at p. 46-7 (recognizing that without Proposition 108, taxes are "[o]ften . . . enacted by a slim majority" and that the supermajority requirement "could greatly increase the power of

Plaintiffs allege that they live within Legislative Districts 22 and 14; that they oppose the Medicaid tax; and that their senators and representatives (all plaintiffs to this lawsuit) voted against the tax. (Compl. ¶¶ 40-41). They further allege that "[b]ecause enough legislators voted against H.B. 2010 to prevent it from becoming law . . . signing H.B. 2010 into law effectively denied representation to the constituents of those legislators who voted against H.B. 2010." (¶ 17). Constituent-Plaintiffs' injuries are "distinct and palpable" and "particularized" (MTD 12) because, as in the case of the Legislator-Plaintiffs, their injuries derive from the fact that their Legislators' votes, though in total sufficient to defeat the tax, were effectively nullified. (Compl. ¶¶ 77-8.) Constituent-Plaintiffs' injury does not derive from the mere fact that their "legislator[s] voted against an allegedly unconstitutional bill" as Defendants claim (MTD 13), but rather that their legislators' votes *were not counted at all*.[15] That injury is unique and limited to the constituents whose legislators' votes were nullified.

Defendants cite no cases for the proposition that constituents lack standing when asserting they have been denied full and fair representation in the state legislature. In fact, such injury is cognizable even under the more rigorous standing requirements imposed on federal courts. For example, a New Jersey state senator and her constituents had standing to sue the state party caucus for merely excluding the senator from deliberations. *Ammond v. McGahn*, 390 F. Supp. 655 (D.N.J. 1975), *rev'd on other grounds*, 532 F.2d 325, 329 (3d. Cir. 1976). The court held that even though the senator "was not barred from voting on the floor of the New Jersey Senate, her exclusion from the Caucus *could* vastly diminish her efficacy as an elected representative." *Id.* at 660 (emphasis added). This exclusion in turn "created two classes of voters. One . . . whose Senators could effectively participate fully in the legislative

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a few legislators who would withhold their support for a tax increase"). *See also supra* Section I(b).

[15] Defendants' straw man contention that Constituent-Plaintiffs are not subject to the Medicaid tax (MTD 13) is irrelevant, as Constituent-Plaintiffs do not assert taxpayer standing. Nevertheless, Defendants' claim that Constituent-Plaintiffs will be unaffected by the provider tax is erroneous. Although the law purports to prohibit hospitals from passing the Medicaid tax to patients, A.R.S. § 36-2901.08(G), supporters of expansion rejected attempts to require an independent audit to ensure hospitals bear the full burden of the tax. *See supra* Senate Floor Session Part 7, COW #4 (51st Leg., 1st Reg. Sess., May 16, 2013), *available at* http://azleg.granicus.com/ViewPublisher.php?view_id=21. Moreover, taxpayers ultimately will bear the burden of the program's cost as federal taxpayers.

process and another class whose Senator could participate only to a limited degree." *Id.* Here, the "classes of voters" are more deeply drawn, as Constituent-Plaintiffs allege more than the mere *possibility* that their representatives' efficacy would be diminished: their representatives' votes were effectively nullified. (Compl. ¶¶ 76-77.) *See also Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977) (reaching merits of constituent voters' challenge to House committee appointments); *Parker v. Merlino*, 646 F.2d 848, 851, 855 (3d Cir. 1981) (assuming standing but concluding that legislators did not violate rights of constituent plaintiffs by terminating debate).

Conclusion and Request for Relief

Defendants' claim that hearing this case will somehow contravene the "will of the voters" (MTD 2) is astonishingly ironic. Voters never had a say on this new Medicaid program. (MTD 1; Am. Br. 4-5.) But they did make one thing absolutely clear: by enacting Proposition 108, they sought to increase the legislative majority vote required to raise taxes and expand government. *See supra* Section I(b). Defendants have brazenly ignored the constitutionally enacted will of Arizona voters. Plaintiffs have alleged injuries that are palpable, particularized, and within the authority of this Court to consider. Defendants' Motion to Dismiss should be denied.

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Respectfully submitted,

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