COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANDY BIGGS, ANDY TOBIN, NANCY BARTO, JUDY BURGES, CHESTER CRANDELL, GAIL GRIFFIN, AL MELVIN, KELLI WARD, STEVE YARBROUGH, KIMBERLY YEE, JOHN ALLEN, BRENDA BARTON, SONNY BORRELLI, PAUL BOYER, KAREN FANN, EDDIE FARNSWORTH, THOMAS FORESE, DAVID GOWAN, RICK GRAY, JOHN KAVANAGH, ADAM KWASMAN, DEBBIE LESKO, DAVID LIVINGSTON, PHIL LOVAS, JD MESNARD, DARIN MITCHELL, STEVE MONTENEGRO, JUSTIN OLSON, WARREN PETERSEN, JUSTIN PIERCE, CARL SEEL, STEVE SMITH, DAVID STEVENS, BOB THORPE, KELLY TOWNSEND, MICHELLE UGENTI, JEANETTE DUBREIL, KATIE MILLER, and TOM JENNEY,

Petitioners,

v.

HONORABLE KATHERINE COOPER, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

and

1 CA-SA______________

Maricopa County Superior Court
Case No. CV2013-011699

JANICE K. BREWER, in her official capacity as Governor of Arizona; and THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System

Real Parties in Interest.

PETITION FOR SPECIAL ACTION

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INTRODUCTION

Petitioners are 36 legislators, two constituents, and a taxpayer who challenge the constitutionality of the tax established to fund Arizona's expanded Medicaid program. Unfortunately, in dismissing the lawsuit for lack of standing, the trial court sidestepped what is properly a legal question, dealing a serious blow to a significant voter-enacted constitutional provision designed to curb the power of legislative majorities.

The merits of Medicaid expansion are not at issue here – *that* is a policy question properly left to the political process. But that process must operate within the confines of the Constitution. In holding that 36 legislators whose nullified votes were sufficient to defeat the tax cannot challenge it in court (Decision at 3, attached as Ex. A), the decision below treats the majority not only as legislators but as judges: They get to decide not only whether the constitutional requirement applies but also whether that determination was constitutional. The court held that the legislature (by a bare majority) could simply "vote[] not to require a supermajority," and that legislators whose votes were nullified when the tax became law without the constitutionally required supermajority approval were without recourse. (Ex. A at 1-2.)

Legislators must always make the initial determination of whether a law is constitutional. Indeed, their oath of office obligates them to "support the

Constitution of the United States and the Constitution and laws of the State of Arizona." A.R.S. § 38-231(E). But the courts make the final call. *See Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (2006) (citations omitted) (while "each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions"). The trial court's ruling to the contrary permits a simple majority of legislators to vote to ignore a constitutional supermajority requirement when politically convenient, shielding that vote from legal challenge. (Ex. A at 2.) That is not what Arizona voters intended when they passed this robust protection more than 20 years ago.

Legislators and constituents, suing to protect the integrity of the individual vote and the legislative process, and taxpayer Tom Jenney, suing under the Private Attorney General Statute to prevent the state from spending illegal money, challenge a tax that has gone into effect since the filing of this lawsuit. Thus, Petitioners respectfully request that this Court accept special action jurisdiction over the appeal of the dismissal and order additional briefing on the merits. If the Court declines to consider the merits at this time, Petitioners request that the Court reverse the trial court's ruling on standing and remand for consideration of the merits.

JURISDICTIONAL STATEMENT

On September 12, 2013, Petitioners filed a Complaint seeking to enjoin Respondents Governor Brewer and Director Betlach from enforcing A.R.S. § 36-2901.08 (the Medicaid expansion tax) and to declare that the tax violates (1) Proposition 108's supermajority requirement (Ariz. Const. art. IX, § 22), and (2) the separation-of-powers doctrine (Ariz. Const. Art. III and Art. IV, pt. 1, § 1). Petitioners do not challenge the Medicaid expansion itself. On October 2, 2013, Respondents filed a Motion to Dismiss for lack of standing. On October 8, 2013, the Arizona Hospital and Healthcare Association and other hospitals filed an amicus brief in support of Respondents, representing that they "*support* the legislation" (Amicus Brief at 1, attached as Appendix 1) because they expect to receive financial benefits from Medicaid expansion. (*Id.* at 2, 6-7.) After oral argument, Judge Katherine Cooper dismissed Petitioners' claims on February 10, 2014, ruling that legislators, constituents, and the Private Attorney General taxpayer lacked standing to challenge the unconstitutional tax because "[w]hether a bill is subject to Proposition 108 is determined by the Legislature itself." (Ex. A at 2.) On February 11, 2014, Petitioners filed a timely notice of appeal, which this

Court has jurisdiction over pursuant to A.R.S. § 12-2101(A)(1).[1] Petitioners now file this special action petition.

I. <u>This Court should accept jurisdiction over the dismissal</u>. This Court has jurisdiction over special actions seeking relief from a trial court ruling that was "arbitrary and capricious or an abuse of discretion." Ariz. R. Civ. P. Spec. Act. 3(c); *see also* A.R.S. § 12-120.21(A)(4). For the following reasons, this Court should exercise its discretion to accept this special action.

Special actions are appropriate where there is no "equally plain, speedy, and adequate remedy by appeal or if a case presents an issue of first impression and one of statewide importance that is likely to recur."[2] *State v. Bernstein*, 317 P.3d 630 (Ariz. App. 2014), *as amended* (Feb. 6, 2014) (citations and quotations omitted); Ariz. R. Civ. P. Spec. Act. 1(a). Since this lawsuit was filed, the challenged tax – and the new Medicaid program it funds – have gone into effect. *See* A.R.S. § 36-2901.08(A) ("[D]irector shall establish, administer and collect an

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[1] Appellants request attorney fees and costs for this appeal pursuant to A.R.S. § 12-341, 12-348, 35-213, and the private attorney general doctrine.

[2] Plaintiffs filed a notice of appeal in addition to filing this Petition to preserve their right of appeal. Filing a notice of appeal does not prevent parties from also seeking special action relief. *See, e.g., Deer Valley Unified Sch. Dist. No. 97 v. Superior Court*, 157 Ariz. 537, 538, 760 P.2d 537, 538 (1988) (Court of Appeals stayed regular appeal when party sought special action relief); *Dioguardi v. Superior Court*, 184 Ariz. 414, 416, 909 P.2d 481, 483 (App. 1995) (accepting special action jurisdiction when party filed both notice of appeal and special action petition).

assessment . . . for the purpose of funding the nonfederal share of the costs . . . that are incurred beginning January 1, 2014”).[3] The Arizona Health Care Cost Containment System (AHCCCS), which administers Arizona’s Medicaid program, has already issued a plan for collecting the tax.[4] Unless exempted by the Director, taxpayers will start paying the unconstitutional tax. And if that tax is eventually struck down, Arizona will have to adopt an alternative and constitutional means of funding or reduce its program. Thus, a “prompt resolution is needed so that the legislative and executive branches will know where they stand and can take such action as they determine necessary relative to budgetary matters.” *State Comp. Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993) (citations omitted) (“Timely resolution . . . would not be promoted by requiring [petitioners] to proceed through the trial and appellate courts, nor are such proceedings necessary because the [case] turns solely on legal issues”); *accord League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558, 201 P.3d 517, 519 (2009) (special action appropriate when outcome of lawsuit will affect the state budget). The urgency will only be exacerbated as tax payments and program enrollment increase with time.

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[3] *See also* Letter from HHS Director Cindy Mann to AHCCCS Director Tom Betlach, Jan. 14, 2014, (approving Arizona’s Medicaid tax) (attached as App. 2).
[4] AHCCCS Hospital Assessment Summary: Proposed Model for CMS Review (Sept. 20, 2013), (attached as App. 3).

Furthermore, because this special action encompasses a dismissal based on jurisdictional issues, it does not require the resolution of factual issues. The significant legal issues at bar, however, have broad implications for future cases in the state. The questions of whether state legislators and constituents have standing to challenge the nullification of their vote and a taxpayer can challenge illegal expenditures under the Private Attorney General Statutes (A.R.S. §§ 35-212 and 213) are purely legal and of great statewide importance, which make them well suited for a special action. *E.g., League of Ariz. Cities & Towns*, 219 Ariz. at 558, 201 P.3d at 519; *Piner v. Superior Court*, 192 Ariz. 182, 185, 962 P.2d 909, 912 (1998). Whether a bare legislative majority can disregard a constitutional provision that Arizona voters designed to *limit* majority power will have an immediate and substantial effect on budget measures, the legislative process, and the power of voters to curb government power. Uncertainty will persist until resolution. *See Jackson v. Schneider*, 207 Ariz. 325, 327, 86 P.3d 381, 383 (App. 2004) (resolution of issues likely to recur justifies acceptance of special action jurisdiction).

II. **This Court should also accept jurisdiction over the merits.** Since Petitioners filed this lawsuit, the new Medicaid tax and program have gone into effect. *See supra* Section I. Even if this Court resolves the standing issue swiftly in Petitioners' favor, the case will be remanded to the trial court for consideration of

the merits. The longer the delay in resolution, the greater the impact on Arizona taxpayers. Thus, in the interest of a speedy resolution, Petitioners request that this Court also accept jurisdiction over the merits of this case and order additional briefing.

This Court can exercise special action jurisdiction to hear cases where "the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority." Ariz. R. Civ. P. Spec. Act. 3(b). Petitioners assert that because the Medicaid tax was not properly approved according to Proposition 108, and because A.R.S. § 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. (Complaint at ¶¶ 78, 90, attached as App. 4.) By collecting and administering the Medicaid tax and using that money to fund the state's new Medicaid program, A.R.S. §§ 36-2901.09(A); 36-2901.08, Respondents Governor Brewer and Director Betlach are acting without legal authority.

As with the standing question at issue in this Petition, the merits of this case are appropriate for special action review because they present purely legal questions whose resolution is of statewide importance. *League of Ariz. Cities & Towns*, 219 Ariz. at 558, 201 P.3d at 519. Moreover, the claims at issue here – whether the Medicaid tax flouts Proposition 108 and the separation-of-powers

doctrine – present constitutional questions of first impression and will have significant impact on future legislation. *Id.* (challenge to appropriations bill proper for special action).

For the foregoing reasons, this Court should also accept jurisdiction over the merits of this case and order supplemental briefing on the constitutional claims. *See* Ariz. R. Civ. P. Spec. Act. 7(d) (Court may order submission of additional memoranda and may accelerate procedures "as the court deems appropriate").

STATEMENT OF ISSUES

(1) Whether the trial court abused its discretion in dismissing the Proposition 108 claim (Count I) of 36 legislators, who were individually injured by the nullification of their votes, thereby ruling that "[w]hether a bill is subject to Proposition 108 is determined by the Legislature itself."

(2) Whether the trial court abused its discretion in dismissing the Proposition 108 claim (Count I) of two constituents, who were denied full and fair representation when their legislators' votes were nullified.

(3) Whether the trial court abused its discretion in dismissing the Proposition 108 and separation-of-powers claims of Private Attorney General taxpayer Tom Jenney, who challenges both the payment of illegally collected money to fund Medicaid expansion and the payment of public monies to administer and collect the illegal tax.

(4) Issues to consider if supplemental briefing is granted on the merits:

a. Whether A.R.S. § 36-2901.08, which did not pass either legislative house with a two-thirds approval, violates Article IX, Section 22 of the Arizona Constitution (Proposition 108), which requires two-thirds supermajority approval for "act[s] that provide[] for a net increase in state revenues." (Count I)

b. Whether A.R.S. § 36-2901.08, which empowers the AHCCCS Director to levy, set the amount of, and exempt chosen taxpayers from paying the Medicaid tax, impermissibly delegates legislative power in violation of Article III; Article IV, Part 1, Section 1; and the separation-of-powers doctrine of the Arizona Constitution. (Count II)

STATEMENT OF MATERIAL FACTS

I. Transformation of state Medicaid program funded by new tax.

The U.S. Supreme Court's ruling 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,"[5] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012); (App. 4 ¶ 48), reinforced the

[5] Medicaid expansion encompasses "the entire nonelderly population with income below 133 percent of the [federal] poverty level." *Id.*

principle that states, who jointly fund Medicaid with the federal government (*Id.* ¶ 47), can control their own budgets, reduce taxpayer obligations to the federal government, and curb the federal government's role within the state. (*Id.* ¶ 48.) Opting to expand its Medicaid program, on the other hand, obliges a state to finance a hefty share of the bill from the inception. (*Id.* ¶ 47.)

To fund Arizona's financial obligations under the new program, proponents of expansion opted to charge hospitals a mandatory provider tax. A.R.S. § 36-2901.08 (2013); (App. 4 ¶ 52.) Given the risks and expenses associated with expansion, many legislators objected, especially to this new tax. (*Id.* ¶ 54.) However, 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.[6]

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); (App. 4 ¶ 49). As federal taxpayers, Arizona taxpayers will ultimately repay even this temporary federal contribution and will be immediately responsible for administrative costs and medical costs for

[6] *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.

previously eligible populations. (App. 4 ¶ 49.) The Governor's Office estimates that the new Medicaid program will cost Arizona $154 million during this first year alone, and there is good reason to believe that figure is significantly undervalued.[7] (*Id.* ¶ 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. (*Id.* ¶ 51.)[8] Arizona's share will swell as federal funding declines. (*Id.*)

II. <u>Medicaid tax flouts constitutional limits on power</u>. In 1992, over 71 percent (*Id.* ¶ 55) of Arizona voters approved Proposition 108, a constitutional requirement to "make it more difficult to raise taxes" (*Id.* ¶ 55; Publicity Pamphlet (Nov. 3, 1992) at p. 46, attached as App. 8),[9] and "restrain growth in state government" (App. 4 ¶¶ 55-6; App. 8 at p. 46), even when "respond[ing] to emergency situations, court directives and federal requirements," (*Id.* ¶ 55; App. 8 at p. 46), or "[i]f there is a crisis . . . [such as] a great need for the poor." (App. 8 at

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[7] The state's past projections of its 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, attached as App. 5 (estimated cost $315 million), *with* AHCCCS Appropriation Hearing Information (March 5, 2009) at p. 23, attached as App. 6 (actual cost over $1.3 billion).

[8] 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 (Nov. 2012) at p. 8, attached as App. 7.

[9] "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).

p. 49.) To accomplish this end, voters empowered a minority of legislators to block any "act that provides for a net increase in state revenues." (App. 4 ¶ 56); Ariz. Const. art. IX §§ 22(A)-(B). In other words, proponents of establishing or increasing any tax, fee, or assessment must garner two-thirds support in both houses of the legislature before that measure can become law. *Id.*

Unfortunately, proponents of Medicaid expansion abandoned this voter-enacted protection for political expediency. Governor Brewer threatened a moratorium on all legislation until expansion passed and made good on this threat by vetoing five unrelated bills. (App. 3 ¶ 57.) On the evening of June 12, she called lawmakers into a special session to vote on Medicaid expansion. (*Id.* ¶ 58.) Meeting into the early hours of the morning, proponents still were unable to garner the constitutionally required two-thirds supermajority. (*Id.* ¶ 59.) Expansion advocates therefore sought to circumvent the Constitution by ceding the power to levy taxes to Director Betlach, including full discretion to determine who must pay the tax and in what amount. A.R.S. § 36-2901.08; (App. 4 ¶¶ 62-3.)

Evading taxpayer protections and stripping the legislature of its taxing authority yields the exact outcome that Arizona's constitutional checks were designed to prevent: consolidating power in an unaccountable administrator 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 Respondents themselves at over $108 million during the first six months of expansion. (App. 3 at p. 1; *see also* App. 1 at 6-7 (detailing Hospital Association's financial benefits from new program).) Yet despite its constitutional flaws, Governor Brewer signed the tax into law, nullifying the votes of the legislators who opposed it and ceding the taxing power to an unelected administrator.[10] (App. 4 ¶¶ 61.)

III. **Legislators, constituents, and taxpayer file lawsuit to enjoin unconstitutional taxes and expenditures**. On September 12, 2013, Petitioners filed a lawsuit in Maricopa County Superior Court to enjoin Governor Brewer and Director Betlach from establishing, administering, or collecting the Medicaid tax, or from otherwise enforcing A.R.S. § 36-2901.08 because it violates Proposition 108 and the separation-of-powers doctrine of the Arizona Constitution. (App. 4 at pp. 19-20.) The 36 legislators – nine senators and 27 representatives who voted against the Medicaid tax (*id.* ¶¶ 4-39) – are joined by two constituents, whose

[10] It is true that Petitioners' votes were counted in the sense that they were tallied and recorded. But they were not *constitutionally* counted. Twenty-seven members of the House and eleven senators voted against the bill, enough to prevent the Medicaid tax from becoming law under Proposition 108's supermajority requirement. (App. 4 ¶ 60.) Because Respondents nevertheless signed the bill into law and are collecting the tax, it is as if Petitioners' votes had been ignored, invalidated, or never cast. This inflicts a substantial injury on the individual legislators and their constituents.

senators and representatives voted against the tax. (*Id.* ¶¶ 40-41.) Together, they challenge the tax for violating Proposition 108, since it failed to garner a two-thirds supermajority approval.[11] Because enough legislators voted against the tax to prevent it from becoming law, Petitioners allege that signing that provision into law effectively nullified the vote of each legislator who voted against it and denied representation to their constituents. (*Id.* ¶¶ 76-77.)

Taxpayer Tom Jenney brings this action pursuant to the "Private Attorney General Statute," which permits a taxpayer to step into the shoes of the Attorney General to pursue an injunction against the "illegal payment of public monies."[12] A.R.S. §§ 35-212, 213; (*Id.* ¶ 42.) In addition to violating Proposition 108, Jenney further alleges that because A.R.S. § 36-2901.08 impermissibly delegates the

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[11] The decision below mistakenly attributes Count II (separation of powers) to the legislator and constituent plaintiffs. (Ex. A at 3.) However, legislators and constituents only suffer direct, particularized injuries from the nullification of legislative votes. As such, they only assert standing under Count I (Proposition 108).

[12] Tom Jenney is a Maricopa County property taxpayer. (App. 4 ¶ 42). On September 11, 2013, Jenney caused to be hand delivered a request to Attorney General Tom Horne pursuant to A.R.S. §§ 35-212 and 213, stating his desire to institute an action in his own name and with the same effect as if brought by the attorney general, to enjoin the illegal payment of public monies that will result from the unconstitutional provider tax. (App. 4 ¶ 66; Letter from Jenney to Attorney General Horne (Sept. 11, 2013) attached as App. 11.) On September 13, 2013, the day after Plaintiff Jenney filed his Complaint, the Attorney General wrote to Jenney, declining to bring an action pursuant to A.R.S. § 35-212 to enjoin the tax, and clearing the way for Jenney to pursue this action. (Letter from Attorney General Horne to Jenney (Sept. 13, 2013) attached as App. 12.)

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. (App. 4 ¶¶ 78, 90.)

The trial court dismissed Petitioners' claims for lack of standing, holding that "[w]hether a bill is subject to Proposition 108 is determined by the Legislature itself." (Ex. A at 2.) Although the Constitution requires supermajority approval for bills that raise revenue, the court held that because a majority of legislators "voted not to require a supermajority approv[al]" (*id.*), the tax "did not require a supermajority vote." (*Id.*)

The court held that constituents also lacked standing because their injury – "denial of effective representation" when their legislators' votes were nullified – is "shared by a large 'class of citizens.'" (*Id. at* 4.) Finally, in a cursory dismissal of Jenney's claims, the court declared that the Medicaid tax "is not a payment" for purposes of the Private Attorney General Statute, so Jenney lacked standing to sue. (*Id.*) The trial court dismissed the lawsuit in full, and Petitioners timely appealed the decision.

ARGUMENT

I. Standard of review. In special actions reviewing a trial court decision, petitioners "must establish that the superior court's ruling is arbitrary, capricious, or an abuse of discretion. . . . Misapplication of law or legal principles

constitutes an abuse of discretion" and appellate courts "review the trial judge's legal conclusions *de novo*." *Tobin v. Rea*, 231 Ariz. 189, 194, 291 P.3d 983, 988 (2013).

In Arizona, standing is not "a constitutional mandate." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svcs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). 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), and will consider the merits of cases even in the absence of a direct injury if the issues are of public importance, *Sears v. Hull*, 192 Ariz. 65, 69, 71, 961 P.2d 1013, 1017, 1019 (1998).

II. All Petitioners suffered injuries sufficient to bestow "traditional" standing. As a preliminary matter, the trial court mistakenly asserts that "Plaintiffs ask the Court to waive standing because no one else will bring this case." (Ex. A at 4.) None of the Petitioners seeks a waiver from the courts' ordinary considerations of "prudential or judicial restraint." *Fernandez*, 210 Ariz. at 140, 108 P.3d at 919. Instead, each Petitioner "allege[s] a distinct and palpable injury." *Sears*, 192 Ariz. at 69, 71, 961 P.2d at 1017, 1019.

The trial court was also incorrect in ruling that hospitals subject to the tax, instead of Petitioners, are the "proper plaintiffs" and "potential challengers" to the tax. (Ex. A at 4.) Petitioners in this case defend different interests and suffer

different injuries than hospitals. Hospital plaintiffs would complain of financial injuries, while legislator and constituent Plaintiffs suffer from vote nullification, which damages the integrity of the legislative process. Both are cognizable injuries in Arizona and confer standing. And Jenney need not suffer a direct harm at all – the Private Attorney General Statute confers standing to challenge illegal payments irrespective of injury. *See generally* A.R.S. § 35-213 (requiring only that taxpayer bringing action to enjoin illegal payment of public monies make a written request of the attorney general and execute a bond payable to defendant).

Furthermore, the likelihood that a hospital will challenge the Medicaid tax is slim at best. Amici, a large coalition of the Arizona Hospital and Healthcare Association and other hospitals, represented in a trial court brief that they "*support* the legislation" (App. 1 at 1) because they expect to receive financial benefits from Medicaid expansion. (*Id.* at 2, 6.) Those with sufficient political muscle who do not benefit can seek exemptions, and the Director can even exercise his discretion to exempt any remaining hospitals wishing to challenge the tax, thereby eliminating a potential lawsuit or even mooting a pending lawsuit. A.R.S. § 36-2901.08(C). Indeed, the Director's plan already exempts eight hospitals from paying the tax, despite the fact that some of them will realize immediate financial benefits from expansion. (*See* App. 3 at p. 6 (listing hospitals that will not be responsible for paying the tax in 2014)).

By dismissing Petitioners' claims, the trial court permits the vital constitutional issues at stake to evade review. Given the financial interests of the hospitals who profit from Medicaid reimbursements, Petitioners are the *only* parties who can realistically challenge the constitutionality of the Medicaid tax and settle these important constitutional questions in this case and for future application. "Without standing to raise the constitutional question in court, [Legislator-Plaintiffs, Constituent-Plaintiffs, and the people of Arizona] would have no means of redress." *Dobson v. State of Arizona*, 233 Ariz. 119, __, 309 P.3d 1289, 1292 (2013). Unless this case goes forward, ceding the tax power to Director Betlach paves the way for special interests like Amici–self-described as "Arizona's largest and most influential trade association for hospitals" (App. 1 at 5)–to hijack the lawmaking process.

III. Legislator-Plaintiffs have standing because of the nullification of their votes. The decision below raises the bar to seek judicial review in conflict with the state Supreme Court's recent affirmation that plaintiffs can challenge the dilution of an individual vote that affects the outcome of a government body's course of action. *Dobson*, 233 Ariz. at __, 309 P.3d at 1292-93. In dismissing the legislators' claim, the trial court held that "[w]hether a bill is subject to Proposition 108 is determined by the Legislature itself." (Ex. A at 2.) But when Arizona voters enacted Proposition 108 over 20 years ago, they intended to "make it more difficult

to raise taxes” and “restrain growth in state government” even in “emergency situations” or when dealing with programs “for the poor.” (App. 3 ¶ 55; App. 8 at 46.) The trial court ruling eviscerates this important protection, enabling simple majorities to usurp the legislative process even where the Constitution explicitly forbids it. When the voters implemented a supermajority requirement to “take back control from a run-away tax and spend state legislature” (App. 6 at 48), they couldn’t have intended that it would apply only if that state legislature – by a *simple majority* – chose to comply. And when they empowered minorities to block revenue measures, they couldn’t have imagined that those individuals would be without recourse to enforce that protection. Dismissing legislators’ claim because “[t]he Legislature as a whole did not authorize them to bring this action” (Ex. A at 3), the trial court is requiring a disenfranchised minority seeking judicial intervention to first obtain permission from the opposing majority. By this logic, it would be appropriate for a majority of legislators to vote not to comply with the three-fourths supermajority requirement of the Voter Protection Act, which prevents the legislature and governor from altering voter-enacted laws without supermajority approval from both houses. Ariz. Const. art. IV, § 1(6)(B)-(D). Subjecting constitutional protections to the whims of democratic majorities reduces them to mere “parchment barriers against the encroaching spirit of power.” *See* The Federalist No. 48 at 305 (James Madison) (C. Rossiter, ed. 1999). In essence,

the trial court's decision says that a majority can deprive a protected minority of both their constitutional safeguards and their day in court.

While the trial court correctly notes that the legislature must authorize lawsuits that bring claims on behalf of the legislature *as a whole* (Ex. A at 3), these legislators are alleging *individual* injuries (App. 4 ¶¶ 7-11), which are "particularized to the individual claimants." *Bennett v. Napolitano*, 206 Ariz. 520, 526, 81 P.3d 311, 317 (2003) (citations and quotations omitted). The court's use of *Bennett* as authority to support dismissal is misplaced, as that case involved legislative standing for *institutional* injuries to the legislative body. (Ex. A at 3.) In *Bennett*, four legislators challenged the constitutionality of the Governor's exercise of the line-item-veto as an encroachment on the legislative power, but sued individually–not on behalf of the legislature. 206 Ariz. 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." *Forty-Seventh Legislature*, 213 Ariz. at 486, 143 P.3d at 1027 (citations and quotations omitted). The four legislators would have had standing to sue on

behalf of the legislature as a whole "ha[d they] been authorized."[13] *Id.* (quotations and citations omitted).

Plaintiffs in *Bennett*, *Forty-Seventh Legislature*, and *Raines* did not dispute that the bills in question were properly passed by the legislature. Instead, those cases dealt with encroachments on duly enacted, final legislative decisions. As such, those injuries were institutional in nature and required authorization by the legislature as a whole to challenge. Here, legislators do not seek relief on behalf of the legislature as a whole. Their claim is that the law was not properly enacted to begin with because their individual votes – which were sufficient to defeat the tax under Proposition 108 – were nullified. 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. (App. 4 ¶¶ 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

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[13] 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. Here, legislators allege individual injuries.

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 addition to institutional standing, the *Bennett* Court also discussed and adopted individual legislator standing, which it gleaned from the United States Supreme Court case *Coleman v. Miller*. *See Bennett*, 206 Ariz. at 526-27, 81 P.3d 317-18. In *Coleman*, 20 Kansas state senators voted against a bill, and 20 senators voted in favor. *Coleman v. Miller*, 307 U.S. 433, 435-36 (1939). 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*, 521 U.S. at 823. Here, as in *Coleman*, legislators who voted against the Medicaid tax had enough votes to defeat it under Proposition 108, yet the Governor signed the tax into law. Legislators have

standing because they "have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438.

Since Petitioners filed this lawsuit, the Arizona Supreme Court has actually strengthened the doctrine of individual legislator standing. In *Dobson*, 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," 233 Ariz. at __, 309 P.3d at 1291, challenging a new "requirement of a supermajority vote to send fewer than five [judicial] nominees to the governor." *Id.* at 1292. Like the Respondents here, the defendants in *Dobson* argued that the Commissioners lacked standing because they were bringing "organizational claims without authorization from their 'organization.'" *Id.* But the Court disagreed because the Commissioners "have identified a particularized injury." *Id.* The same is true of legislators 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.* As in *Dobson*, signing the Medicaid tax into law "render[ed] [the individual legislators'] opposition . . . ineffective." *Id.*

The trial court distinguished *Dobson* from this case because unlike the Commissioners in *Dobson*, the legislators here "do not challenge the supermajority requirement itself." (Ex. A at 3.) That is true – Petitioners challenge a tax that is

being enforced as law despite its *failure* to garner a constitutionally required supermajority approval. But the *subjects* of the lawsuits are immaterial for purposes of standing, which focuses on the parties' *injuries*. In both *Dobson* and the instant case, the injury is the same: nullification of a vote, which is even more pronounced here than in *Dobson*. Because the Supreme Court made clear that individual Commissioners have suffered a sufficient injury when a supermajority requirement will *dilute future* votes, legislators certainly have standing when failure to apply a supermajority requirement completely *nullified past* votes. "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, 755 N.E. 2d 842, __ (2001). 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 318, legislators here have specifically alleged that their votes were nullified when the Governor signed the Medicaid tax into law without the requisite two-thirds majority. (App. 4 ¶¶ 59-61, 72, 76.)

According to the trial court, because a majority of legislators voted against applying Proposition 108, "the bill did not require a supermajority vote." (Ex. A at 1.) But if a majority can conclusively determine that the two-thirds rule does not apply, then the constitutional requirement has no meaning. Defending their

assertion that the legislature itself determines whether a bill is subject to Proposition 108, Respondents note that the "Legislative Bill Drafting Manual (2013-14) explains that bill drafters *initially* must determine whether to include Proposition 108 language." (Motion to Dismiss at 5, attached as App. 9 (citing Legislative Bill Drafting Manual (2013-14) § 4.16)) (emphasis added). Of course, bill drafters make the initial determination about *every* aspect of *every* bill, since they are the first to put pen to paper.[14] But the courts, not the Legislature, must make the final determination of whether a constitutional requirement applies. *Forty-Seventh Legislature*, 213 Ariz. at 485, 143 P.3d at 1026 (citations omitted) ("Although each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions"). 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. In fact, to ensure that every tax measure is properly considered, the voters specifically required that each revenue measure subject to Proposition 108 be earmarked as such. Ariz.

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[14] In fact, the same Legislative Bill Drafting Manual also requires bill drafters to make an initial determination and include similar language when drafting legislation subject to Proposition 105 (the Voter Protection Act), which requires a three-fourths supermajority approval to amend voter-enacted laws. *See* Legislative Bill Drafting Manual (2013-14) § 3.2 at p. 24, attached as App. 10 ("The drafter must . . . determine if a statutory section is subject to the Proposition 105 requirements for enactment," and "the drafter must use the [proper] lead-in language"). By Respondents' logic, a bare legislative majority could also vote to exempt a bill from the Voter Protection Act.

Const. art. IX, § 22(D) ("Each act to which this section applies *shall include* a separate provision describing the requirements for enactment prescribed by this section") (emphasis added). That requirement is not discretionary. The fact that a majority of legislators voted against attaching the required language only makes the law more deficient. If Petitioners "were simply outvoted" as the decision below declares (Ex. A at 3), it was only because their votes were *not counted as the Constitution requires*.

The result of the decision below is 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). It was dissatisfaction with the decisions of bare legislative majorities that prompted the voters to enact Proposition 108, empowering a minority to block revenue measures. (*See, e.g.,* App. 8 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 a few legislators who would withhold their support for a tax increase").) By holding that those minorities lack standing to challenge the nullification of this power, the trial court committed reversible error.

IV. <u>Jenney has standing as Statutory Private Attorney General</u>. The trial court also erred in holding that Jenney lacks standing to challenge the Medicaid tax under the Private Attorney General Statute, which permits "any taxpayer of the state" after making a written request upon the Attorney General to "institute [an] action in his own name and at his own cost" to "enjoin the illegal payment of public monies." A.R.S. §§ 35-213(A), 212(A). The Court incorrectly classifies Jenney's claims as challenges to "the *collection* of money from hospitals" rather than "the *payment* of public funds." (Ex. A at 4.) But Jenney challenges illegal payments: both the expenditure of illegally collected tax money to fund Medicaid expansion and the payment of public money to collect and administer the illegal tax. (App. 4 ¶¶ 65, 90.)

First, Jenney challenges the use of illegal tax money to fund the new Medicaid program. Quite simply, money unlawful when acquired is unlawful when

spent.[15] Director Betlach will use money collected from the unlawful Medicaid tax to fund the state's share of the new Medicaid program. (App. 4 ¶ 65). Jenney has alleged that this tax is unconstitutional; therefore spending the tax money to fund the Medicaid program is also necessarily illegal. (*Id.* ¶¶ 78-9, 90-1.)

Additionally, Jenney's challenge to Director 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 Jenney

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[15] In the trial court, Respondents argued that for purposes of the Private Attorney General Statute, "public monies" consists *only* of money "coming into the lawful possession . . . of state agencies." (App. 9 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 contended, he lacks standing as Private Attorney General. (*Id.* at 13-14.) But there are no grounds for construing the law 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 . . . of state agencies" (emphasis added). "Include" does not mean "limited to." (*See* App. 10 ("'includes' or 'including'… mean[s] *not limited to and is not a term of exclusion*"); A.R.S. § 1-215(14) (same); Black's Law Dictionary (9th ed. 2009) (include "typically indicates a partial list").)

alleged sufficient facts to challenge the unlawful payment of public money to collect the illegal tax and the unlawful payment of public money collected from the illegal tax, the trial court was incorrect to dismiss his claims for lack of standing.

V. **Constituents have standing to challenge denial of representation.**

Finally, the trial court held that constituents lack standing because they are "two out of hundreds of voters represented by the Legislators." (Ex. A at 4.) But sharing injuries with a large group of peers would not deprive plaintiffs of standing so long as they have alleged concrete injuries unique to them. For example, if the legislature were to impose a round-the-clock curfew on every woman in Arizona, surely any woman would have standing to challenge such a law, despite the fact that millions also suffer the same injury. Here, constituents allege that their senators and representatives (all plaintiffs to this lawsuit) voted against the tax (App. 4 ¶¶ 40-41), and 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." (*Id.* ¶ 77). Constituents' injuries are "distinct" (Ex. A at 4) because, as in the case of the individual legislators, their injuries derive from the fact that their legislators' votes, though in total sufficient to defeat the tax, were effectively nullified. (*Id.* ¶¶ 77-8.) Constituents' injury does not derive from the mere fact that their "legislator[s] voted against an allegedly unconstitutional bill" as Respondents

claim (App. 9 at 13), but rather that their legislators' votes, while cast and tallied, *counted for nothing*. That injury is unique and limited to the constituents whose legislators' votes were nullified.

Neither Respondents nor the trial court provide any authorities that refute constituent standing when asserting a denial of full and fair representation in the state legislature. Even federal courts have invalidated restrictions on legislative participation that creates "classes of voters." *See, e.g., Ammond v. McGahn*, 390 F. Supp. 655, 660 (D.N.J. 1975), *rev'd on other grounds*, 532 F.2d 325, 329 (3d. Cir. 1976) (determining, without addressing standing, that party caucus could not exclude state senator from deliberations because it "created two classes of voters. One . . . whose Senators could effectively participate fully in the legislative process and another class whose Senator could participate only to a limited degree"). Here, the "classes of voters" are more deeply drawn, as constituents allege more than the mere *possibility* that their representatives' efficacy would be diminished: their representatives' votes were effectively nullified. (App. 4 ¶ 17.) *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) (reaching merits of constituents' claim against lawmakers for terminating debate).

CONCLUSION

Imagine a football game in which the players on one team also serve as the referees, with the power to change the outcome of the game. That is exactly what happened here, with a ruling that allowed the legislative losers to determine by fiat that they had prevailed. Petitioners ask that the referees – the courts – be restored to their vital role in ensuring that the rules are enforced.

Petitioners have alleged injuries that are palpable, particularized, and within the authority of Arizona courts to consider. If the trial court's decision is allowed to stand, it will eviscerate a vital voter-enacted protection and require constitutionally protected minorities to seek permission from opposing majorities in order to seek judicial review of a violation. In the interest of swiftly resolving this critical issue of statewide importance, Petitioners respectfully request that this Court accept jurisdiction, reverse the trial court decision on standing, and order supplemental briefing on the merits.

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