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 14-0037

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.

REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION

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INTRODUCTION

While paying lip service to keeping politics out of the courtroom, *see, e.g.,* Response at 1 (hearing claims would "lure judicial intervention into a political debate"); *id.* at 32 (recognizing standing would "expose[] courts to being perceived as political bodies"), Respondents actually seek to answer jurisdictional and constitutional questions by reference to political prescriptions in favor of transforming Arizona's Medicaid program. *See, e.g.,* Response at 32 ("Court should not . . . "entertain[] political challenges to a piece of legislation that has significant humanitarian and economic ramifications for Arizona").[1] They employ hyperbole and irrelevant "material facts" about the new Medicaid program to

[1] Respondents' "statement of material facts" is replete with misleading exaggerations and inaccuracies. Their vague, bald assertions about the availability of "affordable health insurance" outside state programs, Response 10-11, are immaterial to the question of whether Petitioners have standing. Moreover, Respondents' proffered reason for adopting the new Medicaid program – to fund a previous program that was scaled back, Response at 9 – overlooks the fact that Medicaid expansion vastly exceeds any previous coverage, extending to "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); (Petitioners' App. 4 ¶ 48.) Regardless, a desire to reinstate a prior program and expand Arizona's government health insurance coverage is wholly irrelevant to the jurisdictional and constitutional issues at bar. This is especially true, given that the voters chose to apply Proposition 108's supermajority requirement to *all* revenue measures, even when "respond[ing] to emergency situations, court directives and federal requirements," or when dealing with programs "for the poor." (Petitioners' App. 3 ¶ 55; App. 8 at 46.) As Respondents acknowledge, this Court has explicitly *refused* to direct the legislature to fund health insurance programs. *See* Response at 9 n.5 (citing *Fogliano v. Brain*, 229 Ariz. 12, 19, 270 P.3d 839, 846 (App. 2011)).

resolve the purely legal standing inquiry, Response at 8-14, and urge the Court to scale back Arizona standing jurisprudence to such a degree that critical issues of statewide importance will evade review.

In short, Respondents ask this Court to permit a simple majority of legislators to vote to ignore a constitutional supermajority requirement (Proposition 108) whenever doing so is politically convenient, and render such a violation of the Constitution immune to legal challenges. And they pervert Petitioners' desire for their day in Court – the same opportunity Arizona courts have given similarly situated plaintiffs in prior cases – into a demand to open the courts to anyone with a political axe to grind. *See, e.g.,* Response at 1 ("If Petitioners have standing to challenge H.B. 2010, it is difficult to imagine a law enacted by the legislature that cannot be challenged by individual legislators and constituents generally"); *id.* at 32 (recognizing standing "would open the door for future challenges brought by a minority of legislators who voted against any bill" and "exposes courts to being perceived as political bodies").

Petitioners simply ask this Court to enforce the significant voter-enacted constitutional provision designed to curb the power of legislative majorities, and the Private Attorney General Statute, by accepting special action jurisdiction and reversing the trial court decision on standing.

ARGUMENT

I. **Special action jurisdiction is appropriate.**

Both the standing and constitutional issues are appropriate for special action consideration because their resolution will impact the collection of the now-operative Medicaid tax, the operation of the new Medicaid program, and the legislative budget process. Respondents find this uncompelling because "[m]any appeals decided by this Court through regular appeals affect the state budget." Response at 5 n.3. But in the only case the Respondents cite for this proposition, the parties did not seek special action. *Id.* (citing *Cave Creek Unif. Sch. Dist. v. Ducey*, 231 Ariz. 342, 295 P.3d 440 (App. 2013), *aff'd* 233 Ariz. 1, 308 P.3d 1152 (2013)). In fact, the Arizona Supreme Court has found that cases involving tax and budget issues require "prompt resolution . . . 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); *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). Special action is therefore warranted here.

Respondents nevertheless argue that speedy resolution of the standing question on appeal is not warranted because Petitioners are not responsible for

paying the Medicaid tax that is the subject of the underlying lawsuit. Response at 4. But there is far more at stake here. The trial court's holding that "[w]hether a bill is subject to Proposition 108 is determined by the Legislature itself" (Petitioners' Ex. A at 2), conflicts 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 v. State*, 233 Ariz. 119 at __, 309 P.3d 1289, 1292-93. Resolving the issue of 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. Moreover, the challenged tax has already gone into effect, *see* A.R.S. § 36-2901.08(A) ("[D]irector shall establish, administer and collect an assessment . . . for the purpose of funding the nonfederal share of the costs . . . that are incurred beginning January 1, 2014"), and if it is eventually struck down, Arizona will have to adopt an alternative, constitutional means of funding or reduce its program. It is therefore

in the best interests of both parties – and everyone affected by the new Medicaid program – for these issues to be resolved now.[2]

Finally, Respondents' suggestions that this Petition is somehow procedurally deficient is incorrect. Response at 4-5 n.1-2, 6-8. First, Petitioners filed both a notice of appeal in addition to their special action petition simply to preserve their right of appeal should this Court decline special action jurisdiction. Petitioners' citations to *Deer Valley Unified Sch. Dist. No. 97 v. Superior Court*, 157 Ariz. 537, 760 P.2d 537 (1988), and *Dioguardi v. Superior Court*, 184 Ariz. 414, 909 P.2d 481 (App. 1995), simply illustrate the propriety of this practice. *Dioguardi* is an example of a court accepting special action jurisdiction while a notice of appeal is pending, 184 Ariz. at 416, 909 P.2d at 483, and *Deer Valley Unified Sch. Dist.* demonstrates the wisdom of filing a notice of appeal in case a court declines special action review. 157 Ariz. at 538, 760 P.2d at 538.

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[2] Respondents' citation to *Neary v. Frantz*, 141 Ariz. 171, 177, 685 P.2d 1323, 1329 (App. 1984), is inapposite. Response at 4. In *Neary*, a teacher sought special action relief in the trial court against a school board for failing to renew his contract. The mere fact that "more time would transpire by pursuing a conventional action" was not *on its own* enough to overcome the fact that the teacher's claims were not urgent and affected only him, and Arizona courts "ha[ve] no power to review the reasons given by a school board for non-renewal of [an individual teacher's] contract[] . . . unless [they] are unreasonable." *Neary*, 141 Ariz. at 177, 685 P.2d at 1329. Here, Petitioners seek review of a decision that denies 39 people their day in court, is at odds with recent Arizona Supreme Court precedent, and will have a significant impact on the entire legislative process – whether or not the merits of the case are addressed.

Petitioners fully complied with Ariz. R. Civ. P. Spec. Act. 7(e). That rule does not require a petitioner to append the full trial court record to his petition as Respondents claim, but only requires a "copy of the decision from which the petition is being taken" and that "[a]ll *references to the record* shall be supported by an appendix of documents in the record before the trial court *that are necessary* for a determination of the issues raised by the petition." Ariz. R. Civ. P. Spec. Act. 7(e). Petitioners' appendix includes all references to the record that they believe are relevant and necessary to resolving the legal issues presented in the petition.[3] Nevertheless, if Respondents are dissatisfied with Petitioners' appendix, the rules allow them to include their own appendix of documents. Ariz. R. Civ. P. Spec. Act. 7(e). Respondents have done so.

Finally, Respondents misconstrue Petitioners' request for supplemental briefing on the merits. Petitioners do not seek a ruling that the trial court "abuse[d] its discretion or act[ed] arbitrarily" with respect to the merits of the case. Response at 7. The trial court, of course, never addressed the merits because it dismissed all

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[3] Respondents' claim that "Petitioners ask this Court to find the trial judge abused her discretion without fully disclosing the arguments made to her," Response at 4, is false. It is true that 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," but under those circumstances, "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) (citations omitted).

claims for lack of standing. Instead, Petitioners made clear that they are simply asking the Court, should it agree that Petitioners have standing, to permit additional briefing on the merits now, rather than remanding it to the trial court. Petition at 7. This Court has "[j]urisdiction to hear and determine petitions for special actions . . . without regard to its appellate jurisdiction." A.R.S. § 12-120.21(A)(4). Thus, Petitioners do not propose to address a decision that the trial court never made, Response at 7, but rather to directly challenge *Respondents'* administration, collection, and expenditure of an illegal tax as "proceed[ing] or . . . threatening to proceed without or in excess of jurisdiction or legal authority." Petition at 7 (quoting Ariz. R. Civ. P. Spec. Act. 3(b)). Petitioners do not seek to "raise an issue without argument" or deprive Respondents of the opportunity to brief the merits. Response at 8. They simply ask that this Court permit Petitioners to submit a petition for review of the merits rather than remanding to the trial court.

II. Legislator-Plaintiffs have traditional standing to challenge the nullification of their votes and do not seek a waiver.

Legislators have asserted that they voted against the Medicaid tax, that they were successful in that vote (i.e. they garnered more than one-third of each house, which is sufficient to defeat the tax under Proposition 108), but that their votes were nullified by Respondents' signing the bill into – and enforcing it as – law.

Although Respondents make strenuous efforts to distinguish this case from the well-established precedent under which plaintiffs may challenge the dilution of an individual vote that affects the outcome of a government body's course of action, their entire standing argument essentially hinges on *whether legislative majorities are the final judge of whether a law passes constitutional muster*. But the legislature cannot be the judge of its own constitutional limits—and in particular, a *majority* cannot be allowed to decide whether a *supermajority* requirement has been satisfied.

Indeed, Respondents routinely suggest that the democratic process should trump the Constitution. Although Legislators do not assert standing to bring the separation-of-powers claim – only Jenny advances Count II – Respondents nevertheless even imply that H.B. 2010 cannot "improperly delegate[] the legislature's authority" to collect and administer the Medicaid tax to Respondent Betlach because it was "enacted by the legislature itself." Response at 17 n.11. But Arizona courts have long recognized that the Constitution bars the legislature from "delegat[ing] to an administrative body or official not only the power to fix a rate of taxation according to a standard but also the power to prescribe the standard." *S. Pacific Co. v. Cochise Cnty.*, 92 Ariz. 395, 404, 377 P.2d 770, 777 (1963).

Petitioners have made clear that they do not "seek[] a waiver from the courts' ordinary considerations of 'prudential or judicial restraint'" but instead

assert traditional standing, Petition at 16 (quoting *Fernandez*, 210 Ariz. at 140, 108 P.3d at 919). Yet Respondents persist in setting up that straw man and spend two and a half pages addressing an argument Respondents do not make. *See* Response at 31-33. Ironically, in doing so Respondents claim that recognizing legislator standing in this instance would "expose[] courts to being perceived as political bodies," Response at 32, while they simultaneously urge this Court to ignore the constitutional issues that are the focus of this Petition for essentially political reasons.

Respondents also claim that Legislators should not be able to challenge the nullification of their votes in court because they "can simply work to overturn" the program "politically." Response at 33. But the Arizona Constitution itself says that its "provisions . . . are mandatory, unless by *express words they are declared to be otherwise*." Ariz. Const. art. II, § 32 (emphasis added). Proposition 108 includes no such words. Rather, in addition to imposing a supermajority requirement to enact a revenue measure, that provision also includes an explicit requirement that "[e]ach act to which this section applies *shall include* a separate provision describing the requirements for enactment prescribed by this section." Ariz. Const. art. IX, § 22(D) (emphasis added). Far from permitting a simple majority to override the Constitution's supermajority requirements, the Constitution by its own terms also requires that each revenue measure subject to Proposition 108 be earmarked as

such. The fact that a majority of legislators voted against attaching the required language only exacerbates the problem.[4] 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, 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 v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (2006) (citations omitted).

Arizona law clearly permits plaintiffs to challenge the dilution of an individual vote that affects the outcome of a government body's course of action. *See, e.g., Dobson*, 233 Ariz. at __, 309 P.3d at 1292-93 (plaintiffs had standing because their vote was rendered "ineffective unless [they] can secure the support of a two-thirds majority"); *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (legislators have standing because they "have a plain, direct and adequate interest in maintaining the effectiveness of their votes"). Yet again, Respondents go to great

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[4] Respondents cite from the legislative record the futile efforts of the Plaintiffs to convince their legislative colleagues to obey the Constitution. Response at 12-13; Respondents' App. A-24 through A-59. The fact that these efforts went unheeded, and resulted in the nullification of Petitioners' votes, only demonstrates the need for *judicial* enforcement of constitutional limits.

pains to distinguish the *subjects* of these cases (which are immaterial for purposes of standing), Response at 17-22, rather than focusing on the only aspect that is relevant – the parties' *injuries*. Petitioners suffered an individual, particularized injury unique to them when their individual votes were nullified and would have made a difference to the outcome of the vote but for the nullification. *See, e.g., Bennett v. Napolitano*, 206 Ariz. 520, 526-27, 81 P.3d 311, 317-18 (2003); *Forty-Seventh Legislature*, 213 Ariz. at 486-87, 143 P.3d at 1027-28; *accord* Erwin Chemerinsky, Federal Jurisdiction 108 (3rd ed. 1999) (quoting *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) ("a Legislator has standing when the alleged injury consists of a 'withdrawal of a voting opportunity'") Respondents' attempts to limit the holdings of the relevant decisions are not consistent with the case law.

First, *Dobson* does not, as Respondents claim, turn on the fact that "an act imposes a supermajority requirement that has not previously existed" or that "the legislature[] attempt[ed] to change the voting rules for another branch of government." Response at 18. Indeed, the *Dobson* Court noted that the law in question "does not concern the impact of another branch of government on the collective action of the Commission." *Dobson*, 233 Ariz. at __, 309 P.3d at 1292. Instead, the Court focused on the fact that the law "directly alters how the votes of individual commissioners will determine the Commission's action." *Id.* In both

Dobson and the instant case, the injury is the same: *dilution or nullification of an individual vote*, which is even more pronounced here than in *Dobson*.[5]

Moreover, Respondents incorrectly characterize *Coleman* as "showing that the action . . . was authorized by the chamber itself," Response at 20, rather than a claim brought by individual legislators. That assertion is belied by the *Coleman* Court itself, which explicitly held that "at least the *twenty senators* whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy" that confers standing. *Coleman*, 307 U.S. at 446. 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). ("There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged

[5] Respondents are incorrect that Petitioners are "complaining about something the [legislative] body as a whole did (or did not do)." Response at 18. A legislative majority has no authority to ignore Proposition 108's requirements, which only recognize legislative enactments by a supermajority, so their actions cannot be properly attributed to the "body as a whole."

here") *Id.* at 826.[6] The injury here, of course, falls into the first category of diluted or nullified votes, thus investing plaintiffs with standing to challenge the majority's illegal actions.

Respondents also continue to assert that the harm suffered by Legislators and Constituents "was not caused by Defendants' conduct." Response at 32. But Respondent Brewer signed the constitutionally deficient bill into law. Moreover, the executive branch (especially the Director of the Arizona Health Care Cost Containment System, Respondent Betlach), is responsible for collecting and administering the new Medicaid tax. (Petitioners' App. 4 ¶¶ 43-44, 62-65, 85, 87-89.) Petitioners seek an injunction to prevent Respondents from "establishing, administering, or collecting the provider tax, or from otherwise enforcing A.R.S. § 36-2901.08." (Petitioners' App. 4 at p. 20.) When seeking to enjoin enforcement of an unconstitutional law, it is proper to sue those responsible for 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).

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[6] Additionally, the *Bennett* Court did not "limit[] *Coleman* to its unique facts," Response at 20, but rather compared the injury in *Coleman* ("vote [that] had . . . been nullified by illegal interference within the legislative process") with plaintiffs' injury in *Bennett* ("no legislator's vote was nullified" but the "injury is wholly abstract and widely dispersed"). *Bennett v. Napolitano*, 206 Ariz. 520, 526, 81 P.3d 311, 318 (2003) (quotations and citations omitted).

Finally, Petitioners agree with Respondents when they are asserting that their standing does not depend on whether hospitals – or anyone else – can also sue. Response at 2 ("The issue is not whether anyone has standing to challenge H.B. 2010; rather, it is whether *these* Petitioners have standing to do so"). 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. Thus, special action jurisdiction – and a reversal of the trial court's dismissal – is warranted.

III. Jenney has standing as Statutory Private Attorney General.

Petitioner Jenney has standing as statutory private attorney general because he seeks to "enjoin the illegal payment of public monies," A.R.S. § 35-212(A), both the payment of illegally collected tax money to fund Medicaid expansion and the payment of public money to collect and administer the illegal tax.

As a preliminary matter, Respondents claim that Jenney has not complied with "the bond requirement" for Private Attorney General claims. Response at 26. But the Private Attorney General Statute 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, § 35-212(A), *and* recover illegally paid money, along with damages. § 35-213(B). The nature of a plaintiff's claim would thus affect the amount of any bond. Arizona courts set bonds at an amount 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, he has asked the trial court to exercise its discretion and order only a nominal bond. Because his claims were dismissed, the court did not address the amount of the bond.

Unable to offer any case law to support their proposition that Jenney lacks standing, Respondents attempt to distort the Private Attorney General Statute's purpose to limit the types of illegal payments a plaintiff can challenge. Respondents argue that a private attorney general may only challenge a narrow class of payments that are otherwise "likely to evade review if the attorney general or private attorney general does not have standing." Response at 26-27 n.18. But Arizona law already gives taxpayers the right to challenge expenditures of their own tax dollars on unlawful purposes, without distinguishing between what Respondents categorize as illegal collections and illegal payments. *See Maricopa*

County v. State, 187 Ariz. 275, 279, 928 P.2d 699, 703 n.7 (App. 1996) ("A taxpayer has standing to challenge the validity of a state taxing statute in a declaratory judgment action based on his liability to replenish the deficiency caused by the statute's operation"); *Dail v. City of Phoenix*, 128 Ariz. 199, 202, 624 P.2d 877, 880 (App. 1980) ("to have standing a taxpayer must be able to demonstrate a direct expenditure of funds that were generated through taxation, an increased levy of tax, or a pecuniary loss attributable to the challenged transaction of a municipality"); *accord Turken v. Gordon*, 220 Ariz. 456, 461, 207 P.3d 709, 714 (App. 2008), *rev'd on other grounds*, 223 Ariz. 342, 224 P.3d 158 (2010) (Arizona courts consistently have conferred broad taxpayer standing to challenge unlawful governmental expenditures).

The Private Attorney General Statute simply extends standing to *any* state taxpayer who wishes to challenge illegal payments – not just those whose taxes are directly responsible for repaying the illegally spent funds. A.R.S. § 35-213(A). In other words, the Private Attorney General does not require that the plaintiff have *his own* tax dollars misappropriated – indeed, it does not require that he suffer an injury *at all*. *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). It is true that sometimes direct taxpayers and private attorney general plaintiffs will *both* have

standing to sue – the first because of a direct injury, the second because of the statute. That is no reason to limit the Private Attorney General statute as Respondents advocate. As Respondents themselves recognize, one party's standing does not depend on whether another also has standing. *See* Response at 2.

Respondent Betlach will use money collected from the unconstitutional Medicaid tax to fund the state's share of the new Medicaid program. (Petitioners' App. 4 ¶ 65). Thus, Jenny's effort to enjoin illegal expenditures is both a challenge to Respondent Betlach's (1) illegal funding of the new Medicaid program with the unlawfully collected Medicaid tax, *and* (2) illegal expenditure of public monies to collect and administer the Medicaid tax. (Petitioners' App. 4 ¶¶ 65, 90.) In other words, he challenges both the illegal payment of the unlawfully collected tax money to fund the new Medicaid program (¶¶ 78-9, 90-1) because money unlawful when acquired is unlawful when spent, *and* the illegal payment of public monies to administer and collect the new Medicaid tax.

Respondents' effort to distinguish *State v. Block* is unconvincing, because that case specifically authorizes challenges of the latter type. In *Block*, the Arizona Supreme Court recognized standing in a challenge to an agency's authority on separation-of-powers grounds 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). Jenney does not, as Respondents claim, seek to convert "a collection of monies [into] a 'payment' of monies . . . simply because such collection may require added labor and administrative costs." Response at 29. Instead, he challenges the constitutionality of both Respondent Betlach's power to collect a new tax and his newly delegated authority to administer that tax with full discretion to determine who must pay and in what amount, A.R.S. § 36-2901.08; (Petitioners' App. 4 ¶¶ 62-3). As in *Block*, his "request to prohibit [Respondent Betlach] from exercising [his] power . . . necessarily includes a request to prohibit payment." *Block*, 189 Ariz. at 274, 942 P.2d at 433.

In fact, Respondents' arguments to the contrary were considered – and rejected – in *Block*. *See id.* at 279, 942 P.2d at 438 (Martone, J, dissenting). Just as Respondents themselves contend, Response at 28-9, Justice Martone lamented the *Block* decision because he wished to limit the Private Attorney General Statute to actions "enjoining the illegal payment of public monies directly," and argued that the separation-of-powers challenge in *Block* to the "expenditure of funds [in exercising a government function] is merely an indirect by-product of a declaration of unconstitutionality" and "too attenuated to support a claim under § 35-212." *Id.* But the *Block* Court resolved these arguments in plaintiff's (and thus Jenney's) favor, allowing a taxpayer to "bring an action to challenge the constitutionality of

any state agency even if the taxpayer has no personal stake in the outcome." *Id.* (describing the Private Attorney General Statue as clarified by *Block*).

Respondents protest that under the standing doctrine articulated in *Block*, a Private Attorney General taxpayer could challenge any illegal government action so long as it requires expenditures of public money. Response at 29. But this is hardly an *expansion* of Arizona's standing jurisprudence. The common law already permits plaintiffs to challenge the direct expenditure of *their* tax dollars to fund unlawful activities. *Maricopa County v. State*, 187 Ariz. 275, 279, 928 P.2d 699, 703 n.7 (App. 1996). The Private Attorney General Statute simply empowers the Attorney General to allow "*any* taxpayer of the state" to bring a legal challenge to the unlawful exercise of power "with the same effect as if brought by the attorney general." A.R.S. § 35-213(A) (emphasis added). That is exactly what happened here when Attorney General Horne declined to bring his own challenge to the new Medicaid tax. (*See* Petitioner's App. 12 (Letter from Attorney General Horne to Jenney).)

IV. Constituents have standing to challenge denial of representation.

Finally, the Constituents have suffered a particularized, legally cognizable injury stemming from denial of representation, and not, as Respondents repeatedly claim, merely a generalized political grievance. Respondents' challenge to Constituents' standing rests solely on their erroneous assertion that if these plaintiffs have

standing, “every constituent whose legislator voted against an allegedly unconstitutional bill would have standing.” Response at 30. This is incorrect. As Petitioners have explained, Petition at 29-30, they do not assert that legislators’ or constituents’ injuries derive merely from the fact that an unconstitutional bill was enacted. *That* would be an injury “shared by ‘a large class of citizens.’” Response at 30 (quoting *Sears v. Hull*, 192 Ariz. 65, 69, 961 P.2d 1013, 1017 (1998)). Instead, the Legislators’ and Constituents’ injury derives from the fact that some legislators’ votes were not given full effect as required by the Constitution, and thus some constituents were not properly represented.

Petitioners’ claims are simple and particularized: legislators voted against a bill, their votes were sufficient to defeat the bill under Proposition 108, but their votes were drained of their effect when the bill was enacted into law. Because their legislators’ votes were nullified, constituents were denied representation. (App. 4 ¶¶ 40-41, 77-8.)

Respondents cannot cite any cases establishing that constituents lack standing when asserting they have been denied full and fair representation in the state legislature. Thus, they instead contend that in the cases Petitioners cite, the parties did not challenge standing and the courts rendered decisions on the merits. Response 30 (citing *Ammond v. McGahn*, 390 F. Supp. 655 (D.N.J. 1975); *Parker v. Merlino*, 646 F.2d 848, 851 (3d Cir. 1981); *Davids v. Akers*, 549 F.2d 120 (9th

Cir. 1997)). But that is just Petitioners' point in citing those cases: no one contested standing. Even in federal courts, which impose much more rigorous standing requirements, constituent standing due to the injury of being denied representation is not suspect.

Constituents were denied representation in both houses when their legislators' votes were rendered void. That injury is not shared by every Arizonan or even every constituent. It is unique, and limited to those constituents whose legislators' votes were nullified. Thus, Constituents have standing to assert their Proposition 108 claim.

CONCLUSION

Respondents' alarmist insistence that Petitioners want to expand or to eradicate Arizona's standing requirements is patently false. The Petitioners' standing assertions are a routine application of long-established Arizona law. It is the Respondents who would "fundamentally change the law of standing in Arizona," Response at 34, by denying scores of Arizonans their day in court and leaving important *constitutional* issues to the mercy of legislative majorities—indeed, the very majorities the constitutional provisions were written to limit—and to powerful special interests. The decision below is contrary to well-established law, *see, e.g., Dobson*, 233 Ariz. 119, 309 P.3d 1289, and *Block*, 189 Ariz. 269, 942 P.2d 428, and if left unchanged, will seriously diminish a significant voter-

enacted constitutional provision designed to curb the power of legislative majorities. It will also allow Respondents to collect, spend, and administer an illegal tax that has gone into effect since the filing of this lawsuit. Petitioners respectfully request that this Court accept jurisdiction, reverse the trial court decision on standing, and permit additional briefing on the merits so that this case can be resolved as expeditiously as possible.

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