

IN THE SUPREME COURT

STATE OF ARIZONA

ANDY BIGGS, et al.

Petitioners,

v.

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

Respondent Judge,

and

JANICE K. BREWER, et al.,

Real Parties in Interest.

Supreme Court

No. CV-14-0132-PR

Court of Appeals, Division One

No. 1 CA-SA 14-0037

Maricopa County Superior Court

Case No. CV2013-011699

**CROSS-PETITIONERS' COMBINED RESPONSE TO *AMICI CURIAE*
BRIEFS OF FIFE SYMINGTON III, ET AL.; ARIZONA HOSPITAL AND
HEALTHCARE ASSOCIATION, ET AL.; AND ARIZONA CENTER FOR
LAW IN THE PUBLIC INTEREST, ET AL.**

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INTRODUCTION

Legislator-Plaintiffs hereby respond to the briefs in support of the Petition for Review of Amici Fife Symington III, et al. (“Symington Amici”), Arizona Hospital and Healthcare Association, et al. (“Hospital Amici”), and Arizona Center for Law in the Public Interest, et al. (“Ariz. Center Amici”).

Amici collectively present what are essentially policy arguments in favor of Medicaid expansion¹ or against any judicial enforcement of Proposition 108. While unpersuasive as reasons to deprive legislators of their constitutionally protected voting rights, they illustrate the dangers of deviating from this Court’s well-established standing jurisprudence. Adopting Amici’s approach would hamper Arizona voters’ ability to curb government power; enable lawmakers to abuse the legislative process to reverse political losses;² and permit a simple majority of legislators to disregard a constitutional supermajority requirement whenever doing

¹ Ariz. Center Amici’s embellished policy arguments in favor of Medicaid expansion, Ariz. Center. Br. 2-7, are immaterial to the question of whether Legislator-Plaintiffs have standing to enforce their constitutional voting rights.

² In this case, those who voted *in favor* of the Medicaid tax “lost a hard-fought political battle,” Symington Br. at 2, because they could not muster enough votes to approve the measure.

so is politically convenient, enabling powerful special interests to shield the constitutional violation from judicial review.

For the reasons set forth below and in the Cross-Petition, this Court should deny the Petition for Review or grant the Cross-Petition for Review and affirm the judgment below on legislator standing.³

ARGUMENT

I. **This Court should not permit special interests to deprive legislators of their standing to enforce the constitutional supermajority requirement**

A. **Legislator-Plaintiffs suffered direct injuries to their voting rights**

In Arizona, standing is not “a constitutional mandate,” but simply a “question[] of prudential or judicial restraint” to ensure that “each party possess an interest in the outcome.” *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Svcs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). Legislator-Plaintiffs easily meet this test in asserting direct, individual injuries. Simply put, Proposition 108 empowers a legislative minority to block a tax from becoming law. Because the Medicaid tax was signed into and is being enforced as law despite its failure to garner the requisite supermajority approval, Legislator-Plaintiffs, “whose votes would have been sufficient to defeat (or enact) a specific legislative Act have

³ Symington Amici incorrectly represent that “the parties agree that this Court should grant review.” Symington Br. 2. Respondents oppose the Petition for Review on the issue of legislator standing and only Cross-Petition for Review on the issue of Private Attorney General standing.

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). In short, legislators have a direct and strong interest in protecting their role in the legislative process and are uniquely situated to enforce the effectiveness of their votes.

While opposing legislator standing in this case, Amici concede that the relevant federal and state precedents all support “legislator standing . . . to vindicate the rights of legislators *qua* legislators.” Hospital Amici at 9. But these are precisely the injuries Legislator-Plaintiffs raise here. In *Dobson*, plaintiffs defended interests to Commissioners *qua* Commissioners when their opposition votes were rendered ineffective, “directly alter[ing] how the votes of individual commissioners will determine the Commission’s action.” *Dobson v. State*, 233 Ariz. 119, 122, 309 P.3d 1289, 1292 (2013). As in *Dobson*, signing the Medicaid tax into law “render[ed] [the individual legislators’] opposition . . . ineffective,” affecting not “organizational” interests, but their voting rights as legislators *qua* legislators. *Id.* See also *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (legislators have standing when their votes are “virtually held for naught although . . . their votes would have been sufficient to defeat” an act)).⁴

⁴ Ariz. Center Amici attempt to distinguish *Coleman* on the grounds that here, Legislator-Plaintiffs “do not speak as a majority of the legislature.” But legislator standing in *Coleman* was premised on the nullification of *individual* votes, not an

B. One potential plaintiff should not be allowed to determine the rights of other injured parties

Amici suggest that because hospitals may have standing to challenge the Medicaid tax, their refusal to do so should foreclose *any injured party* from challenging the law. *See* Symington Br. at 3 (“the fact that the hospitals can sue but have chosen not to do so severely undercuts, *if not forecloses entirely*, Legislator Plaintiffs’ argument”) (emphasis added); Ariz. Center Br. at 10 (hospitals “are within their rights to decline to challenge the law”). Even if a hospital-initiated lawsuit is possible in theory (albeit unlikely in practice), that is no reason to deny Legislator-Plaintiffs their day in court to enforce *their own unique* interests in the legislative process. As Symington Amici acknowledge, “a plaintiff cannot assert another person’s rights.” Symington Br. 12. Thus, while hypothetical hospital plaintiffs might wish to enforce their interest in being “required to pay an enacted tax or fee,” Hospital Br. at 8, Legislator-Plaintiffs are uniquely situated to

injury to a legislative majority or the legislature as a whole. In *Coleman*, the Lieutenant Governor cast the deciding senate vote in favor of a bill. *Coleman*, 307 U.S. at 435-36. The Court held that the 20 senators who voted “no” had standing to sue 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. Likewise, although sufficient to defeat the Medicaid tax under Proposition 108, Legislators’ votes were nullified when the Governor signed the tax into law.

challenge their vote nullification and are the only parties with standing to enforce their interests in the legislative process. Whether hospitals are “well positioned to assess and, if necessary, challenge health care regulations on behalf of their patients,” Hospital Br. at 4, they are certainly not entitled to determine whether legislators can sue to enforce their voting rights.

In practice, Amici advocate for permitting taxpayers that stand to reap enormous financial benefits from a new program to be the sole determiners of whether legislation passes constitutional muster. Such a holding would create perverse incentives for future lawmakers by encouraging them to design unconstitutional tax measures that will permit special interests to commandeer the legislative process and evade judicial review. Here, hospitals “benefit from the Hospital Assessment,” Hospital Br. 2, because enacting the Medicaid tax allows them to take advantage of federal subsidies, making them “unwilling plaintiffs.” Symington Br. 13. Those hospitals will be time-barred from bringing a constitutional challenge to the tax when the hefty federal subsidies cease after 2016. Pub. L. 111-148 § 2001(a)(3)(B)(1)(A). And the law’s breathtaking delegation of authority to the Director of AHCCCS (Petitioner Betlach) to decide who must pay the tax and in what amount, A.R.S. § 36-2901.08, those who wish to avoid the tax can lobby for an exemption – which the Director can grant for *any reason* – thereby eliminating a potential lawsuit or even mooting a pending

lawsuit. A.R.S. § 36-2901.08(C). The Director has already exempted eight hospitals from paying the tax (including members of Amici), although some are realizing immediate financial benefits from expansion. (See Petition for Special Action (“PSA”), Appendix 3 at 6.)⁵ Legislative majorities and special interests should not be permitted to bar minorities from enforcing their voting rights.

II. **Legislator standing does not open the floodgates for litigation but ensures that Proposition 108 is enforced as the voters intended**

A. **Standing to vindicate voting rights does not enable legislators to challenge all allegedly unconstitutional acts**

Amici’s alarmist and inaccurate portrayal of the Court of Appeals’ ruling below as permitting “all manner of lawsuits by outvoted legislators,” Symington Br. at 7, misstates Legislator-Plaintiffs’ injury. It was the *supporters* of the tax, not Plaintiffs, who “failed to muster enough votes to [pass] the bill in the Legislature,” *id.* at 5, and by asking this Court to leave the enforcement of constitutional limits on legislative power to the discretion of legislative majorities or the Governor (via the veto power), *id.* at 8, it is *Amici*, not Plaintiffs, who seek to reduce constitutional checks on government power to “political dispute[s].” *Id.* at 5.

Moreover, Symington Amici misconstrue the Court of Appeals’ narrow holding

⁵ An updated version of the Assessment Model for fiscal year 2015 shows that the same hospitals will be exempted and will realize even greater financial benefits. AHCCCS Hospital Assessment Summary (4/1/2014), *available at* <http://www.azahcccs.gov/publicnotices/Downloads/AZAssessmentModel1a.pdf> (last visited July 15, 2014)(Excerpts attached hereto as Appendix 1.)

that “legislators have standing to raise the question whether their votes were given the effect to which they were constitutionally entitled.” *Biggs v. Cooper*, 234 Ariz. 515, ___, 323 P.3d 1166, 1172 (App. 2014). The ruling merely recognizes legislators’ standing to challenge a bill when it becomes law despite the fact that their votes were sufficient to defeat it. It does not, as Symington Amici argue, permit legislators to challenge *any* allegedly unconstitutional act, such as legislation that exceeds the scope of a special session, violates the single subject rule, or is a special law. Symington Br. at 7-8. In those cases, legislators would merely assert generalized grievances common to all Arizonans, not voting rights guaranteed specifically to legislators. As Amicus Pacific Legal Foundation observes, Amici’s arguments against legislator standing are actually arguments against judicial enforcement of Proposition 108 *entirely*. Pacific Legal Br. at 22.⁶

B. Curbing the power of legislative majorities is a feature of Proposition 108, not a fault of legislator standing

Similarly, Amici complain that legislator standing to enforce Proposition 108 will “bog down” the ability of legislative majorities to “efficiently . . . address the needs of the State.” Symington Br. at 1. Amici insist that Arizona courts should leave important constitutional issues to the discretion of legislative majorities

⁶ As Arizona taxpayers have standing to assert their rights as taxpayers not to have their tax dollars spent unlawfully, *Maricopa County v. State*, 187 Ariz. 275, 279, 928 P.2d 699, 703 n.7 (App. 1996), they may already file lawsuits challenging the application or misapplication of constitutional supermajority requirements.

where, as here, “a majority in each house of the legislature determined that [the constitutional supermajority] vote was not required.” Ariz. Center Br. at 7. But encumbering legislative majorities is *precisely what voters intended* when they enacted Proposition 108, thus empowering legislative minorities to impose a meaningful check on the power of majorities. (*See* PSA App. 8 at p. 46-7 (Proposition 108 “greatly increase[s] the power of a few legislators who would withhold their support for a tax increase”).)

Nor is the argument that legislators should simply seek to enforce Proposition 108 by “amendment or repeal through the normal legislative process” convincing. Symington Br. at 13. Amici themselves recognize that Legislator-Plaintiffs already worked within the political process, attempting on many occasions to convince their colleagues to obey the Constitution. *Id.* at 4. The fact that these efforts went unheeded, and resulted in the nullification of Legislators’ votes, only demonstrates the need for judicial enforcement of constitutional limits. Moreover, it was a dissatisfaction with the decisions of bare legislative majorities that prompted the voters to enact Proposition 108 in the first place, empowering a minority to block revenue measures. (*See, e.g.*, PSA App. 8 at p. 46-7 (lamenting that without Proposition 108, taxes are “[o]ften . . . enacted by a slim majority”).)

Likewise, Ariz. Center Amici arguments that Arizona should “take full advantage of the increased available federal funding,” Ariz. Center Br. at 5, “[t]he

benefits of restoring and expanding [Medicaid] to the state as a whole and to low-income Arizonans specifically have been well documented,” *id.* at 6, and “the restoration of Medicaid benefits is legally required,” *id.* at 2,⁷ are policy opinions about the Medicaid expansion program and are wholly irrelevant to the questions of whether the funding mechanism is constitutional and whether Legislator-Plaintiffs have standing to challenge the nullification of their votes against the tax. Moreover, they are not appropriate reasons for denying Legislator-Plaintiffs standing and undermining judicial enforcement of Proposition 108, as the voters intended that provision to apply even when “respond[ing] to emergency situations, court directives and federal requirements,” (PSA App. 8 at p. 46), or “[i]f there is a crisis . . . [such as] a great need for the poor.” (*Id.* at p. 49.)

Finally, Amici argue that this Court should deny Legislator-Plaintiffs standing to enforce their voting rights because the purpose of Proposition 108 is “to protect Arizona taxpayers” rather than legislators. Hospital Br. at 5, 8. But this is true of *any* constitutional limit on legislative power. Indeed, structural limits on government power “enhance[] freedom, *first by protecting the integrity of the*

⁷ As Amici acknowledge, Ariz. Center Br. 3, the Court of Appeals has explicitly refused to direct the legislature to expand health insurance coverage when funding is unavailable. *Fogliano v. Brain*, 229 Ariz. 12, 19, 270 P.3d 839, 846 (App. 2011). Moreover, Medicaid expansion vastly exceeds the Proposition 204 coverage that was scaled back, 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, 2575 (2012).

governments themselves, and second by protecting the people, from whom all governmental powers are derived.” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (emphasis added) (holding that individuals *in addition to governments* have standing to enforce constitutional limits on government power). By enacting Proposition 108, voters sought not only to protect specific taxpayers by “mak[ing] it more difficult to raise taxes” (PSA App. 8 at p. 46), but also to protect the people generally by “restrain[ing] growth in state government.” *Id.* The mechanism by which the voters sought to achieve this end is by altering the process by which a revenue measure becomes law, thus curbing the power of legislative majorities by empowering a minority of legislators to block tax increases. Ariz. Const. art. IX §§ 22(A)-(B). Legislator-Plaintiffs now seek to enforce the prerogative the voters bestowed upon them, and “by protecting the integrity of the [legislative process, they are] protecting the people.” *Cf Bond*, 131 S. Ct. at 2364.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Review or, alternatively, grant the Cross-Petition for Review and affirm the judgment below with respect to legislator standing.

Dated: July 16, 2014

Respectfully submitted,

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**Scharf-Norton Center for Constitutional
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INSTITUTE**

APPENDIX 1

Assessment Basis:

Patient Discharges

Assessment Rate Inputs	SFY 2015
Urban Acute Provider	387.00
Non-CAH Rural Acute Provider	387.00
Freestanding Children's Provider	0.00
CAH	387.00
LTAC Provider	96.75
Small Psychiatric Providers and AZ State Hospital	0.00
Large Psychiatric Provider	96.75
Freestanding Rehabilitation Provider	0.00
Pediatric-Intensive General Acute Hospitals	309.50
Medium Pediatric Intensive General Acute Hospitals	348.25
Psychiatric Sub-Provider	96.75
Rehabilitation Sub-Provider	0.00
Short Term Specialty Hospital	0.00
High Medicare/Out-of State Patient Utilization Hospital	0.00

Assessment Unit Threshold	29,000
Assessment Unit Rate Above Threshold	38.75

State Assessment Summary	SFY 2015
Total Assessments	233,093,405
State Share of Coverage Payments	232,962,600
Assessments Net of State Share	130,805

Hospital Net Gain/Loss Summary	SFY 2015
Total Projected Coverage Payments ⁽¹⁾	640,474,275
Estimated Net Gain/Loss	407,380,871
Number of In-State Hospitals with Estimated Gain	89
Number of In-State Hospitals with Estimated Loss	3
Number of In-State Hospitals with \$0 Gain or Loss	5
Number of In-State Hospital Systems with Estimated Loss	0

Note: (1) Model includes one new urban acute hospital whose benefit from the Medicaid expansion is not expected to increase aggregate statewide projected coverage payments; to avoid duplication this provider's projected benefit has been removed from aggregate statewide projected coverage payments.

AHCCCS Hospital Assessment
Summary by Provider

Proposed Model for CMS Review
04/01/2014 Model

Assessment Basis: Patient Discharges

Sorted by Provider Type and then by Hospital Name in alphabetical order

Medicare Provider ID	Hospital Name	Provider Type	Hospital System	Estimated Hospital Net Gain/Loss - SFY 2015		
				Assessment Amount	Total Projected Coverage Payments	Estimated Net Gain/Loss
30065	BANNER DESERT MEDICAL CEN	Pediatric-Intensive General Acute Hospitals	Banner Health	9,482,544	18,268,261	8,785,717
30006	TUCSON MEDICAL CENTER	Medium Pediatric Intensive General Acute Hospitals	TMC Healthcare	10,314,125	18,317,245	8,003,120
30013	YUMA REGIONAL MED CENTER	Medium Pediatric Intensive General Acute Hospitals	Yuma Regional Medical Center	4,520,633	13,101,926	8,581,292
30022	MARICOPA MEDICAL CENTER	Medium Pediatric Intensive General Acute Hospitals	MIHS	6,629,200	44,075,468	37,446,268
30087	SCOTTSDALE HEALTHCARE - SHEA	Medium Pediatric Intensive General Acute Hospitals	Scottsdale Healthcare	7,447,326	6,709,513	(737,814)
30089	BANNER THUNDERBIRD MEDICA	Medium Pediatric Intensive General Acute Hospitals	Banner Health	10,323,113	18,193,083	7,869,970
30118	YRMC EAST	Medium Pediatric Intensive General Acute Hospitals	Yavapai Regional Medical Center West Can	1,504,440	3,587,203	2,082,763
30105	BANNER HEART HOSPITAL	Short Term Specialty Hospital	Banner Health	-	1,968,576	1,968,576
30107	ARIZONA SPINE AND JOINT	Short Term Specialty Hospital	Arizona Spine and Joint Hospital	-	16,264	16,264
30108	SURGICAL SPECIALTY HOSP	Short Term Specialty Hospital	Surgical Specialty Hospital of Arizona	-	137,530	137,530
30112	AZ ORTHOPEDIC SURGICAL HO	Short Term Specialty Hospital	Orthopedic & Surgical Specialty Company	-	921,024	921,024
30131	ORTHOPEDIC AND SPINE INPATIENT SURGI	Short Term Specialty Hospital	O.A.S.I.S. hospital, Partners are CHW and U	-	0	-
N/A	Cancer Treatment Centers of America - Western Regional Medical	Short Term Specialty Hospital	Cancer Treatment Centers of America - Wes	-	0	-
N/A	FREEDOM PAIN HOSPITAL	Short Term Specialty Hospital	FREEDOM PAIN HOSPITAL	-	0	-
30103	MAYO CLINIC HOSPITAL	High Medicare/Out-of State Patient Utilization Hospita	Mayo	-	2,601,196	2,601,196
Total Border Providers				-	14,574,841	14,574,841
Total Out of State Providers				-	1,318,351	1,318,351
New Hospital Adjustment					(425,078.00)	(425,078.00)
Total				233,093,405	640,474,275	407,380,871
State Share of Coverage Payments						232,962,600
Assessment Net of State Share:						130,805

Note: (1) New hospital whose benefit from the Medicaid expansion is not expected to increase aggregate statewide projected coverage payments; to avoid duplication this provider's projected benefit has been removed from aggregate statewide projected coverage payments.