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

ANDY BIGGS, et al., Plaintiffs, vs. THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System, Defendants, EDMUNDO MACIAS, GARY GORHAM, DANIEL McCORMICK, TIM FERRELL, Intervenor-Defendants.	**Case No.: CV2013-011699** *(Assigned to Hon. Katherine Cooper)*

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Ariz. R. Civ. P. 56, Plaintiffs[1] move for summary judgment, seeking (1) a declaration that the provider tax established by A.R.S. § 36-2901.08 violates Ariz. Const. art. IX, § 22 ("Proposition 108"); and (2) a permanent injunction barring Defendant Arizona Health Care Cost Containment System ("AHCCCS") Director Tom Betlach and his agents and employees from establishing, administering, or

collecting the provider tax, or from otherwise enforcing A.R.S. § 36-2901.08.[2] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). This Motion is supported by the accompanying Statement of Facts ("SOF") and the Memorandum of Points and Authorities set forth below.

MEMORANDUM OF PONTS AND AUTHORITIES

I. STATEMENT OF THE CASE

a. The transformation of the Medicaid program

Three years ago, the U.S. Supreme Court held that the federal government cannot force states to transform their Medicaid programs from a means-tested "program to care for the neediest among us" into "an element of a comprehensive national plan to provide universal health insurance coverage."[3] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012). States may choose to expand their Medicaid programs, but doing so obliges a state to finance a hefty share of the resulting costs right away. The federal government will fund the medical costs of the *newly* eligible enrollees for states that participate in the new program–but only until 2016. Pub. L. 111-148 § 2001(a)(3)(B)(1)(A). And even before then, the state's taxpayers are immediately responsible for administrative costs, as well as the state's portion of Medicaid costs for new enrollees who meet eligibility under the pre-ACA expansion income guidelines. Pub. L. 111-148 § 2001(a)(3)(B)(1)(A).

Even after the promised federal funds, the Governor's Office had initially estimated that

[1] Plaintiffs are 36 Arizona state legislators – nine senators and 27 representatives – who challenge the provider tax on the grounds that their votes were sufficient to defeat it from becoming law under Proposition 108's supermajority requirement. (SOF 1.)

[2] This lawsuit challenges only the constitutionality of the *provider tax* established by House Bill 2010 sec. 5 (2013) (1st Special Session) codified at A.R.S. § 36-2901.08 (SOF 2), not the current or previous Medicaid expansion. No other provision of H.B. 2010 is at issue in this litigation, and the other unrelated and severable statutes enacted therein will not be affected by the outcome of this lawsuit. *Cf. State v. Prentiss*, 163 Ariz. 81, 86, 786 P.2d 932, 937 (1989) ("An entire statute should not be declared unconstitutional if the constitutional portions of the statue can be separated.").

Arizona's Medicaid expansion would cost $154 million during the first year. (SOF 3.) Even if that initial estimate had been accurate, it would have made this some of the most expensive "free" money the state has ever received. The reality is that, as of May 2015, the state's combined enrollments for the Proposition 204 Restoration and the ACA Adult Expansion had already surpassed the state's original enrollment estimate by more than 13 percent. (SOF 4)

Arizona's past experiences with the federal Medicaid program are instructive. Although Medicaid was established in 1965, Arizona did not join until 1982, when it established the Arizona Health Care Cost Containment System ("AHCCCS"). (SOF 5.) Despite being able to learn from 17 years' of other states' experiences with the program, Arizona still encountered tremendous unanticipated costs. When in 2000 the state opted to expand its Medicaid rolls to offer enrollment to childless adults with incomes up to 100% of the federal poverty level ("Proposition 204"), that expansion was supposed to be funded by money from the Arizona tobacco litigation settlement. *Fogliano v. Brain*, 229 Ariz. 12, 14-15, 270 P.3d 839, 841 - 42 (App. 2011). But that fund was unable to meet the "explosive growth" in Medicaid spending that the state experienced. *Id.* In 2005, for example, the cost of expanding the program exceeded the state's expectations by almost $1 *billion*. (SOF 6.) The legislature made up the difference from the general fund—which plunged the state into a "deepening budget crisis." *Fogliano*, 229 Ariz. at 15, 270 P.3d at 842.

To address that unsustainable situation, the legislature passed, then-Governor Brewer signed, and the U.S. Department of Health and Human Services approved a state law retaining coverage for current Medicaid recipients but suspending future enrollment for additional childless-adult enrollees. *Id.* at 15-16, 270 P.3d at 842-43. Counsel for Intervenors in this case filed a lawsuit challenging that suspension. The Court of Appeals unanimously upheld the State's action, refusing to force the legislature to expand Medicaid coverage when funding was unavailable. The 2000 expansion law, said

[3] In 2010, the Patient Protection and Affordable Care Act ("ACA") expanded federal eligibility for the program, which once admitted only "four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children," to "the entire nonelderly population with income below 133 percent of the [federal] poverty level." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2606 - 07.

the court, only directs the legislature to supplement the tobacco funding with "other *available* sources." *Id.* at 19, 270 P.3d at 846 (emphasis added). Of course, funding sources that are unlawful are not "available" for the legislature to use.

Despite this history of grossly underestimating costs, less than two years later Governor Brewer opted to transform the state's Medicaid program yet again, this time extending coverage to the entire nonelderly population with income below 133 percent of the federal poverty level. The non-partisan Kaiser Family Foundation projects that this will cost the state $3.1 billion during the period of 2014-22, assuming the federal government continues to pay its share. (SOF 7.) But federal funding is scheduled to decline, and Arizona's obligations will automatically increase as it does. *See* Pub. L. 111-148 § 2001(a)(3)(B)(1)(A).

The new Medicaid program is funded by imposing a new levy on hospitals – thus increasing their overall financial burden – and "deposit[ing] the revenues collected . . . in the hospital assessment fund" to cover the nonfederal share of the costs of expansion. (SOF 8.) In order to qualify for federal assistance, federal law limits how Arizona can fund its share of these enormous new costs, requiring among other things that Arizona collect the money without regard to whether hospitals accept Medicaid payments. (SOF 9) (taxes must be broad-based and uniformly imposed, cannot hold providers harmless, and must be "generally resdistributive").

Arizona's new Medicaid program is not only expensive, it lacks provisions that would protect taxpayers from reductions in federal funding, audit hospitals to ensure that they do not pass the tax on to patients, or study the program's quality of care annually. Thus it is no wonder that many legislators objected to the bill, especially to the new, unconstitutional tax that is a centerpiece of its revenues. (SOF 10.)

b. Arizona's constitutional protections against taxation

To protect themselves against one of the most easily abused government powers – the power to tax – and to "restrain growth in state government," Arizonans in 1992 voted by over 71% to impose

constitutional limits on the legislature's revenue-raising authority. (SOF 11.)[4] That provision, Proposition 108, requires a vote by two-thirds of the legislature for any "act that provides for a net increase in state revenues;" that is for any for any bill establishing or increasing any tax, fee, or assessment. Ariz. Const. Art. IX §§ 22(A)-(B). Voters approved Proposition 108 in order to "make it more difficult to raise taxes" even when "respond[ing] to emergency situations, court directives and federal requirements", or "[i]f there is a crisis . . . [such as] a great need for the poor." (SOF 12.)

Unfortunately, proponents of Medicaid expansion abandoned this constitutional protection for political expediency. Adding insult to injury, they crafted a bill that ceded the power to levy taxes to a single official, Defendant Betlach, and gave him discretion to determine the amount or rate of the tax and to establish modifications or exemptions to the tax. (SOF 13). Then-Governor Brewer threatened a "moratorium" on "sign[ing] additional measures into law" until the legislature approved the "plan for Medicaid," vetoing five unrelated bills. (SOF 14.) On the evening of June 12, 2013, she called lawmakers into a special session to vote on Medicaid expansion. (SOF 15.) Meeting in the early hours of the morning, proponents were simply unable to muster sufficient legislative votes to pass the Provider tax by a two-thirds margin. Twenty-seven members of the House and 11 Senators voted against the bill (SOF 16), enough to defeat the Provider tax under Proposition 108's supermajority requirement. Rather than accepting defeat or funding the program lawfully, and despite its constitutional infirmities, Governor Brewer signed H.B. 2010 – including the provider tax – on June 17, 2013. (SOF 17.)

Evading constitutional protections and stripping the legislature of its taxing authority yields the exact outcome that Arizona's constitutional checks and balances 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. Defendant's department estimates a $407 million gain for Arizona hospitals in Fiscal Year 2015, with an

[4] "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).

estimated 862 hospitals gaining and only three losing. (SOF 18.)

c. This litigation

On September 12, 2013, 36 legislators who voted against the provider tax filed this lawsuit in Maricopa County Superior Court to enjoin then-Governor Jan Brewer and Director Tom Betlach from enforcing the A.R.S. § 36-2901.08 provider tax (not the expansion itself) because it violates Proposition 108's supermajority requirement. (SOF 19; Ariz. Const. Art. IX, § 22.)[5] This Court dismissed the complaint on February 10, 2014 and ruled that legislators lacked standing. The Court of Appeals accepted special action jurisdiction and reinstated the lawsuit, holding that legislators have standing to challenge the tax on the basis that "the plaintiff legislators experienced an unconstitutional 'overriding' that 'virtually held [their votes] for naught.'" *Biggs v. Cooper*, 234 Ariz. 515, 521, 323 P.3d 1166, 1172 (App. 2014) (*quoting Coleman v. Miller*, 307 U.S. 433, 438 (1939)). The Supreme Court unanimously affirmed, holding that if Proposition 108 applied, "passage of the bill by a simple majority vote effectively negated the plaintiff representatives' votes and they, as a bloc, have therefore alleged a 'particularized' injury sufficient to confer standing." *Biggs v. Cooper*, 236 Ariz. 415, 341 P.3d 457, 461 (2014).

The case was remanded to this Court to determine whether A.R.S. § 36-2901.08, which did not pass either legislative house with a two-thirds approval, violates Proposition 108's supermajority requirement for "act[s] that provide[] for a net increase in state revenues." Ariz. Const. Art. IX, § 22.

II. ARGUMENT

a. The provider tax is subject to Proposition 108's supermajority requirement

The test for determining whether an act is subject to Proposition 108 is simple: the act must garner a two-thirds supermajority vote in both houses if it "provides for a net increase in state revenues"

[5] Two constituents whose representatives voted against the tax also joined the Proposition 108 challenge, and taxpayer Tom Jenney brought a separation-of-powers challenge, Ariz. Const. Art. III; Art. IV, pt. 1, § 1, under the Private Attorney General doctrine. Without reaching the merits of those claims, the trial court dismissed both sets of plaintiffs for lack of standing, and the Supreme Court affirmed.

and is not subject to one of the provision's narrow exceptions. Ariz. Const. Article IX, § 22. The "intent of [Proposition 108] was to prevent the legislature from enacting without a super-majority vote any statute that increases the overall burden on the tax and fee paying public." *Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 225 Ariz. 358, 364, 238 P.3d 626, 632 (App. 2010) (citations and quotations omitted). The provider tax does just that, by imposing a new levy on hospitals – thus increasing their overall financial burden – and "deposit[ing] the revenues collected . . . in the hospital assessment fund" to cover the nonfederal share of the costs of expansion. (SOF 20). Because the provider tax did not receive a two-thirds supermajority vote in *either* house of the state legislature (SOF 16), it fell short of the constitutionally required minimum necessary to approve a revenue-raising measure, and is therefore invalid.

b. The provider tax is not exempt from Proposition 108's supermajority requirement

A new tax, fee, or assessment must pass the legislature with a supermajority in both houses unless it falls within one of Proposition 108's limited, narrow exceptions:

> 1. The effects of inflation, increasing assessed valuation or any other similar effect that increases state revenue but is not caused by an affirmative act of the legislature.
> 2. Fees and assessments that are authorized by statute, but are not prescribed by formula, amount or limit, and are set by a state officer or agency.
> 3. Taxes, fees or assessments that are imposed by counties, cities, towns and other political subdivisions of this state.

Ariz. Const. art. IX § 22(C).

The provider tax obviously does not fit within Proposition 108's first or third exceptions because it was caused by an affirmative vote of the state legislature (SOF 21) and is "establish[ed], administer[ed], and collect[ed]" by the state's Medicaid Director. A.R.S. § 36-2901.08(A). It is not the product of inflation or imposed by local government.

Thus, this case turns upon whether the provider tax falls within the second exception. It does not, because it is not (1) a fee or assessment, was (2) not "authorized by statute" in the sense that Subsection 2 requires, and (3) is not set by a state officer or agency. Instead, A.R.S. § 36-2901.08 (1) establishes a tax that (2) was not constitutionally authorized by the legislature, and (3) is circumscribed

by state and federal law. It therefore falls outside the Subsection 2 exemption on all three counts.

i. Section 36-2901.08 establishes a tax, not a fee or assessment

A.R.S. § 36-2901.08 levies a mandatory, redistributive tax on all providers. It is not a fee or assessment that is required in exchange for some particular privilege or benefit.

A "tax" is a levy "imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income." *Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 544-45, 68 P.2d 329, 334-35 (1937).

A fee, on the other hand, "is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society." *Id.* at 545, 68 P.2d at 335. Fees can either be "development fees, exacted in return for permits or other government privileges," or "regulatory fees, imposed under the police power." *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997).

Finally, an "assessment" is a local levy based on the value of benefits conferred on property. *Id.* at 1354. "[A]n assessment differs from a general tax in that an assessment is levied only on property in the immediate vicinity of some local municipal improvement and is valid only where the property assessed receives some special benefit differing from the benefit that the general public enjoys." ASSESSMENT, Black's Law Dictionary (10th ed. 2014) (*quoting* Robert Kratovil, *Real Estate Law* 465 (6th ed. 1974)).

In determining whether a levy is mandatory, redistributive, and not assessed based on a burden or benefit, Arizona courts apply a multi-factor balancing test that evaluates: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the

assessment is imposed." *May v. McNally*, 203 Ariz. 425, 430-31, 55 P.3d 768, 773-74 (2002) (*quoting Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)). A.R.S. § 2901.08 establishes a tax under each of these factors.

First, A.R.S. § 36-2901.08 is imposed by the state legislature. A levy "imposed directly by the legislature is more likely to be a tax than an assessment imposed by an administrative agency." *Bidart Bros.*, 73 F.3d at 931. Here, the levy was initially established by the legislature when it enacted A.R.S. § 36-2901.08, not by Defendant Betlach, who only has the authority (circumscribed by state and federal law) to set the *amount* of the tax and determine who is exempt. (SOF 13.)

Second, A.R.S. § 36-2901.08 applies to a wide range of providers, regardless of whether they accept Medicaid payments or benefit from the new Medicaid program. A levy "imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class," although a levy "upon a narrow class of parties can still be characterized as a tax." *Bidart Bros.* at 925. A levy is a tax if it is collected from a party without regard "to the service which he receives from the government." *Stewart*, 49 Ariz. at 544-45, 68 P.2d at 334-35. For example, a levy limited to insurers and not the public at-large was still a tax for purposes of Louisiana's constitutional supermajority requirement because it was charged to a wide range of insurers, including some who would not benefit from the resulting reduction in fire insurance rates. *Audubon Ins. Co. v. Bernard*, 434 So. 2d 1072, 1076 (La. 1983).

Similarly, the provider tax at issue in this case is imposed on *all* hospitals regardless of whether they accept Medicaid payments or will benefit from Medicaid expansion, and it is not calculated based on the amount of Medicaid payments they receive. (SOF 9.) Instead, it is "based on property or income," *Stewart*, 49 Ariz. at 544-45, 68 P.2d at 334-35; specifically, it is levied based "on hospital revenues, discharges or bed days." A.R.S. § 36-2901.08(A).

Moreover, Arizona law requires Defendant Betlach to ensure that the levy is not "established or administered in a manner that causes a reduction in federal financial participation," A.R.S. § 36-2901.08(B), and federal law requires Arizona's hospital levy to be: (1) broad-based and uniformly

imposed, (2) collected without holding providers harmless from the burden of the tax, and (3) generally redistributive. 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68(b). Indeed, it is unquestionably a tax in the eyes of the federal agency charged with administering Medicaid. U.S. Health and Human Services Director Cindy Mann granted Defendant Betlach's request for a waiver from the federal broad-based and uniformity requirement because Arizona's levy still retained the necessary qualities of a "tax program"; namely, that "the net impact of the [state's] *tax* is generally redistributive and that the amount of the *tax* is not directly correlated to Medicaid payments." (SOF 22) (emphasis added).

In other words, A.R.S. § 36-2901.08(B) establishes a tax precisely because it is collected from a broad class, "regardless of how much direct or indirect benefit [a hospital] may receive from the expenditure of the taxes"; and it is not an assessment, because it is not levied "directly in proportion to the actual benefit received by the property assessed." *Weller v. City of Phoenix*, 39 Ariz. 148, 154, 4 P.2d 665, 667 (1931).*See also State v. Moenter*, 124 N.E. 70, 72 (Ohio 1918) (an assessment is "levied with reference to special benefits to the property assessed") (quotations and citations omitted).

Finally, the broad public purpose of A.R.S. § 36-2901.08 is consistent with the nature of a tax. Where funds are collected to provide a general benefit to the public, the underlying charge is a tax. *May*, 203 Ariz. at 431, 55 P.3d at 774 (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992)). The provider tax is collected for the express "purpose of funding the nonfederal share of the costs" of Arizona's Medicaid expansion program – a public government function – not to regulate or benefit the hospitals. A.R.S. § 36-2901.08(A). *See Okeson v. City of Seattle*, 78 P.3d 1279, 1286 (Wash. 2003) ("When the legislature's intent is to raise revenue for a governmental function rather than to regulate the service for which the cost is levied, the imposed charge is a tax."); *Barry*, 105 Ariz. at 140-41, 460 P.2d at 635-36 (levy is a tax when collected "for purposes which will benefit the public generally").

An assessment, by contrast, "is levied only against specific property *which is the property benefited* by the improvement." *Id.* at 140-41, 460 P.2d at 635-36 (emphasis added); *accord, Campbell*

v. Orchard Mesa Irr. Dist., 972 P.2d 1037, 1040 (Colo. 1998) (taxes are collected "for general governmental purposes," while an assessment "benefits specific landowners"). The fact that the provider tax may *incidentally* benefit the hospitals it is collected from does not render it a fee or assessment. "Where the legislation has both regulatory and revenue-raising aspects, emphasis is placed on 'the revenue's ultimate use.'" *Health Services Med. Corp. of Cent. New York, Inc. v. Chassin*, 175 Misc. 2d 621, 668 N.Y.S.2d 1006, 1010 (1998) (quoting *San Juan Cellular*, 967 F.2d at 685). Thus a Seattle levy on electric utility ratepayers to defray costs of providing them with streetlights was found to be a tax despite the fact that the levy was paid by ratepayers and not the public at large, because its *primary* purpose was to fund a public benefit, not to regulate streetlights. *See, e.g.*, *Okeson*, 78 P.3d at 1286.

A.R.S. § 36-2901.08 establishes a tax despite the fact that revenues from that tax are placed into a special hospital assessment fund rather than the state's general fund. Although depositing revenues directly into the general fund can be evidence that the levy is collected for a public benefit, the reverse is not true. *See Bidart Bros.*, 73 F.3d at 932 (levies "that are segregated from general revenues are 'taxes' . . . if expended to provide 'a general benefit to the public'"); *San Juan Cellular*, 967 F.2d at 685.

Levies on parolees were deemed taxes in *Wright v. McClaim*, 835 F.2d 143, 144-45 (6th Cir. 1987), even though they were earmarked for the Corrections Department budget, because they were used to defray the costs of monitoring parolees and to compensate victims, purposes that served the general welfare. Likewise, in *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981), vehicle registration "fees" were actually taxes despite being deposited in segregated funds because they were used for transportation purposes, which benefit the public. *See also Lavis v. Bayless*, 233 F. Supp.2d 1217, 1222 (D. Ariz. 2001) (levy imposed on lobbyists was a tax even though it was "imposed on a narrow class," because its "purpose" was "to raise revenue for an important public benefit"). Here, the provider tax is used to fund Arizona's Medicaid program, so the funds "relate directly to the general welfare of the citizens," and are "no less general revenue raising levies simply because they are dedicated to a particular aspect of the [state]." *Hedgepeth v. Tennessee*, 215 F.3d 608, 613 (6th Cir.

2000).

The state labels A.R.S. § 36-2901.08 as a "hospital assessment," but the "characterization . . . by the imposing body has no dispositive effect or talismanic significance." *Lavis*, 233 F. Supp.2d at 1220. Because there is "an inherent danger that legislative bodies might circumvent constitutional constraints" by levying taxes but calling them something else, the Court cannot defer to the government's characterization of its own levy, but must instead make the determination based on its independent analysis of the levy's attributes and functions. *Okeson*, 78 P.3d at 1286. *See also Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160 (Tenn. Ct. App. 2007) (measure is a tax despite its designation); *Marshall v. Northern Va. Transp. Auth.*, 657 S.E.2d 71, 77 (Va. 2008) (same). As Plaintiff Rep. John Kavanagh (R-23) warned while the bill was being considered, "calling a tax an assessment doesn't make it any less a tax. It just makes it a hidden tax." (SOF 23.)

The provider tax is a mandatory impost, imposed by the legislature and collected regardless of its impact on the individual provider, and used for public purposes. Because § 36-2901.08 establishes a tax and not a fee or assessment, Proposition 108's supermajority requirement must apply.

ii. Section 36-2901.08 was not properly authorized by statute

Even if the levy were a fee or assessment, Defendant Betlach's authority to set the provider tax would not immunize it from the supermajority requirement because the levy was not authorized by the legislature as required by Subsection 2.

Subsection 2 exempts from the supermajority requirement "[f]ees and assessments that are *authorized by statute*, but are not prescribed by formula, amount or limit, and are set by a state officer or agency." Ariz. Const. art. IX § 22(C)(2). Although obviously A.R.S. § 36-2901.08 is a statute, that is not what Subsection 2 means. Instead, that provision exempts administratively established fee and assessment amounts, only after such fees or assessments have been properly authorized by the legislature. Arizona's Constitution prescribes how the legislature must authorize any new fee or assessment: by a two-thirds supermajority vote of both houses. Ariz. Const. art. IX § 22(A). In other

words, the exception in Subsection 2 only kicks in *after* an administrative fee or assessment has been duly authorized by the required legislative supermajority. Once that has occurred, then any subsequent adjustments to that fee or assessment that an officer or agency makes do not require additional supermajority approval.

This interpretation is the only plausible one, "considering the [constitutional provision] as a whole and giving harmonious effect to all of its sections." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 183, 181 P.3d 219, 230 (App. 2008). Proposition 108 says that a supermajority approval is required for "[t]he *imposition* of any new tax" and "[t]he *imposition* of any new state fee or assessment," and a supermajority vote is required for the "*authorization* of any new *administratively* set fee," presumably because legislative approval is not required for subsequent administrative *implementation* of what the legislature has constitutionally authorized. Ariz. Const. art. IX, § 22(B)(1), (5) (emphasis added). For example, if the legislature passes a law requiring the payment of a fee for hunting licenses, that initial authorization must comply with the supermajority requirement. Subsequent action by a state agency setting the fee at $100 does not require an additional two-thirds vote under Subsection 2. Likewise, since A.R.S. § 36-2901.08 purports to authorize the hospital levy, it must receive a two-thirds vote.

To hold otherwise – to construe this exception so broadly as to encompass A.R.S. § 36-2901.08 – would cause the exception to swallow the rule. It is unlikely that Arizonans were so concerned about increased financial burdens and the growth of state government that they required the *legislature* – the body closest and most accountable to the people – to impose a new tax, fee, or assessment by a supermajority; but if the legislature relinquishes that same power to an *appointed administrator* - who is accountable to no one – Proposition 108's supermajority protections do not apply. Such a construction would create a perverse incentive for lawmakers to evade constitutional constraints by encouraging them to cede discretion to unaccountable administrators, rendering Proposition 108's robust protections not only toothless, but counterproductive. That provision was intended to increase effective voter

control over tax increases, not to diminish it.

iii. Defendant's authority under A.R.S. § 36-2901.08 is circumscribed by state and federal law

Finally, regardless of whether A.R.S. § 36-2901.08 establishes a tax, fee, or assessment, the tax still does not come within the Subsection 2 exception. That Section only exempts fees and assessments that are "not prescribed by formula, amount or limit." Ariz. Const. art. XI, § 22(C)(2). But the Provider tax is limited by state and federal law. To avoid creating a large loophole, this exception should be construed narrowly.

Despite Defendant Betlach's broad authority to "establish, administer and collect" the provider tax and to set the "method for determining the assessment, the amount or rate of the assessment, and modifications or exemptions from the assessment," the amount of the levy is circumscribed by state and federal limits. (SOF 13.) The statute terminates Defendant Betlach's authority to collect the tax altogether if federal funding declines below 80 percent. A.R.S. § 36-2901.08(E). Also, Defendant Betlach must administer the tax in accordance with federal law, *see* A.R.S. § 36-2901.08(B), and federal law requires Arizona's hospital levy to be: (1) broad-based and uniformly imposed, (2) collected without holding providers harmless from the burden of the tax, and (3) generally redistributive. 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68. Federal law also requires Arizona to collect the tax from hospitals without regard to whether they accept Medicaid payments. *Id.* (taxes must be broad-based and uniformly imposed, cannot hold providers harmless, and must be "generally redistributive"); (SOF 22) ("the net impact of the [state's] tax [must be] generally redistributive and that the amount of the tax is not directly correlated to Medicaid payments"). Federal law also caps Arizona's tax at no more than six percent of a hospital's net patient revenues, and the revenue collected by the tax can amount to no more than 25% of the state's Medicaid share. 42 C.F.R. § 433.68(f)(3)(i).

III. CONCLUSION

By enacting and enforcing the provider tax, Defendants have forsaken Arizona's Constitution to foist upon Arizonans an expensive and unworkable federal program, despite Proposition 108's universal application, even when "respond[ing] to emergency situations" or "a great need for the poor." (SOF 12.) Accordingly, Plaintiffs' Motion for Summary Judgment should be GRANTED.

DATED: May 14, 2015

Respectfully submitted,

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