IN THE SUPREME COURT

STATE OF ARIZONA

ANDY BIGGS, et al. Petitioners, v. THOMAS J. BETLACH, Defendant/Appellee, and EDMUNDO MACIAS; GARY GORHAM; DANIEL MCCORMICK; and TIM FERRELL, Intervenor-Defendants/Appellees.	Supreme Court No. _____ Court of Appeals, Division One No. 1 CA-CV 15-0743 Maricopa County Superior Court Case No. CV2013-011699

PETITION FOR REVIEW OF OPINION OF COURT OF APPEALS

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Christina Sandefur (027983)
Aditya Dynar (031583)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Petitioners

Table of Contents

Table of Authorities

Cases

Statutes and Regulations

Rules

Constitutional Provisions

Issue Presented for Review

Article IX, Section 22 of the Arizona Constitution requires a two-thirds supermajority vote of both legislative houses for any bill that "provides for a net increase in state revenues." Did the Court of Appeals err by ruling that the Medicaid expansion tax (A.R.S. § 36-2901.08) does not violate Article IX, Section 22 of the Arizona Constitution, even though it received only a bare majority?

Facts and Procedural History

The decision below summarizes the facts and procedural history at ¶¶ 3–4. *Biggs v. Betlach*, __ Ariz. __, 2017 WL 1023545 (App. 2017). The only material facts here, which are not in dispute, are (1) the number of votes A.R.S. § 36-2901.08 received in the Arizona House and the Senate, and (2) the text of A.R.S. § 36-2901.08 and relevant federal law. This Petition is timely.[1]

Reasons the Petition Should Be Granted

This is a case of first impression regarding ARIZ. CONST. art. IX, § 22, which requires a two-thirds supermajority of the state legislature to impose taxes or any other measure that increases state revenues. The decision below permits a bare legislative majority to disregard this provision by the simple expedient of labeling a tax an "assessment" instead. If allowed to stand, this decision will have a massive impact

[1] Petitioners request attorney fees and costs for this Petition, pursuant to the private attorney general doctrine. Ariz. R. Civ. App. P. 21.

on the legislative budgeting process, and will undermine constitutional limits on government power.

At issue is the Medicaid expansion tax, A.R.S. § 36-2901.08, which was imposed without the required two-thirds vote. Appellee Betlach claims the tax is exempt from that requirement because the legislature dubbed it an "assessment" and adopted the tax in the form of a statute. The court below agreed. But that is incorrect for three reasons, any one of which warrants reversal.

First, the Medicaid levy is a tax, not a true fee or assessment, because it is not collected in exchange for any discrete benefit, but is generally applicable: all affected hospitals must pay. Second, even if the levy is a fee or assessment, the Constitution requires a legislative supermajority to *authorize* the Director to collect fees or assessments. The "authorized by statute" exemption to the two-thirds vote requirement (ARIZ. CONST. art. IX, § 22(c)(2)), does *not* mean, as the decision below concluded, that any levy that takes the form of a statute can be passed by simple majority. Finally, the exemption for fees and assessments "not prescribed by formula, amount or limit," *id.*, does not apply, because the tax imposes a formula, amount, and limit. The statute, on its face, expressly limits the Director's power to collect the levy, and *expressly* incorporates *limits* set by federal law. Thus, the (c)(2) exception cannot apply.

The decision below interprets a narrow exception so broadly as to swallow the entire rule. If allowed to stand, it will permit a bare legislative majority to hand an unelected administrator virtually unlimited power to tax, while requiring a *super-majority in both houses* for the legislature to impose the tax itself. That is an absurd result.

This case raises significant constitutional questions of first impression that will have a profound impact on future legislation. This Court should grant the Petition and hold the Medicaid expansion tax unconstitutional.

I. The Medicaid tax is not exempt from the constitutional supermajority requirement because it is a *tax*, not a fee or assessment.

A.R.S. § 36-2901.08 imposes a mandatory, redistributive tax on all health care providers to provide coverage to the public. It is a tax, not a fee or an assessment. Arizona law defines a "tax" as 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 (1937).

A fee, by contrast, is "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. Similarly, an "assessment" is collected to fund a specific improvement and is based on the value of benefits conferred on the specific property liable to pay. *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997). As with a fee, there is a nexus between an assessment and the particular property, area, or payer benefitted by the improvement. *Barry v. School Dist. No. 210*, 105 Ariz. 139, 140–41 (1969).

In deciding whether to classify a levy as a tax or a fee, Arizona courts apply a multi-factor balancing test that considers: "(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 ¶ 24 (2002) (citation omitted). These factors are indicative, not dispositive.[2]

Because the court below improperly determined that the Medicaid levy is not a tax,[3] this Court should grant review and reverse.

---

[2] Although the court below used these factors to determine that the Medicaid levy was an assessment, *Biggs*, at ¶ 8 (Ariz. 2017), the *May* factors were *not* designed to address questions under Section 22 and only answer the question of whether a levy is a tax or fee—not whether it is an assessment. *May*, 203 Ariz. at 430–31 ¶ 24. Thus, the *May* factors are helpful, but not dispositive.

[3] The decision below did not decide whether the Medicaid levy is a tax, fee, or assessment. Instead, it determined that the levy is "not a tax." *Biggs*, at ¶ 13. But Section 22 creates *three* distinct categories: taxes, fees, and assessments, and the

A. The Medicaid tax is imposed by the *legislature* by statute, not created by the Administrator.

First, the levy was imposed by the legislature. Although the statute gives the Director limited authority to set the *amount* of the tax and grant exemptions from it, A.R.S. § 36-2901.08(B), the *levy itself* was created and imposed by the legislature when it enacted A.R.S. § 36-2901.08. The court below reached the contrary conclusion because, "[w]hile the legislature may have authorized the levy through statute, we look to the entity with regulatory authority over the levy for purposes of categorizing it as a tax or assessment." *Biggs*, at ¶ 9.

But the Director did not impose the new Medicaid tax; he was merely tasked with "establish[ing], administer[ing] and collect[ing]" the tax, after it was *created* or *imposed* by statute. That *statute*, A.R.S. § 36-2901.08, established the existence of the tax, specified how much revenue it should generate, provided a formula for calculating it, and required the Director to report in an ongoing fashion to the legislature before implementing it and before modifying the amount.

B. The statute imposes the Medicaid expansion tax on hospitals regardless of their participation in Medicaid expansion.

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

---

distinctions between them have not been explained by an Arizona court. This Court should grant review to clarify these distinctions.

of parties can still be characterized as a tax." *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996). The court below found that the Medicaid levy was not a tax because the Director does "not necessarily charge[] … every hospital." *Biggs*, at ¶ 10. But the manner in which Director Betlach enforces or collects the tax is not at issue in this case. This is a *facial* challenge, not an as-applied challenge. And that statute establishes a tax because, on its face, it applies to all hospitals, without regard to any benefit the hospital might receive.

It is not a fee, because it is not limited to payers who get something in exchange. *Stewart*, 49 Ariz. at 544–45. Although the court below held that the tax "is narrowly applied only to hospitals, and not a broad class of citizens," *Biggs*, at ¶ 10, levies charged to narrow classes can still be taxes. What matters is whether the levy is broad-based and the payer *itself* receives a benefit in exchange. That is why, in *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1076 (La. 1983), a levy that only insurers paid was still a tax for purposes of Louisiana's supermajority requirement: it was charged to a wide range of insurers, including some who would not benefit from the resulting reduction in insurance rates.

So, too, here: the Medicaid tax is imposed on *all* hospitals, regardless of whether they accept Medicaid payments or benefit from the new Medicaid program, and without regard to the amount of Medicaid payments they receive. IR.52 ¶ 9 (*citing* 42 U.S.C. § 1396b(w); 42 C.F.R. § 433.68).

In fact, the Medicaid tax is "based on property or income." *Stewart*, 49 Ariz. at 544–45. This is plain on the statute's face, which provides that the assessment "shall" be "collect[ed] … on hospital revenues, discharges or bed days." A.R.S. § 36-2901.08(A). The statute does not specify a narrow class of payers, but exactly the reverse: it requires hospitals to pay unless the Director exempts them. A.R.S. § 36-2901.08(A), (C).[4]

In short, the statute imposes a tax on a broad class of payers, "regardless of how much direct or indirect benefit they … may receive from the expenditure of the [revenues]." *Weller v. City of Phoenix*, 39 Ariz. 148, 154 (1931). It is not a fee or assessment, because it is not levied "directly in proportion to the actual benefit received by the property assessed." *Id*. Nor is it paid in exchange for a specific service or license.

In fact, the court of appeals did not deny the Petitioners' contention that, *as a matter of law*, A.R.S. § 36-2901.08 includes *no necessary connection* between the tax and any benefit. Rather, it found that the *collection* of the levy is "within the discretion of the director," *Biggs*, at ¶ 10, and that the Director does not happen to

---

[4] The federal agency charged with administering Medicaid considers the provider tax to be a tax. U.S. Health and Human Services Director Cindy Mann granted the AHCCCS Director'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"—specifically, 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." IR.52 ¶ 22 (emphasis added).

charge hospitals that don't treat Medicaid patients. But this was error because this is a *facial* challenge, which asks "whether the law *itself* is unconstitutional, not … whether the application of the law violates" the Constitution. *Hernandez v. Lynch*, 216 Ariz. 469, 472 ¶ 8 (App. 2007) (emphasis added). The court of appeals' *as-applied* finding is essentially irrelevant to the question here, which is whether, as a matter of law, there is a *legally necessary* relationship between the benefits and burdens in the statute. Because there is no such connection, this Court should grant the petition and reverse.

C. Revenues from the Medicaid tax are collected for general public purposes, not for the regulation or benefit of all the parties who pay.

Where funds are collected to provide a general benefit to the public, the charge is more likely to be a tax than a fee (which is paid in exchange for a specific benefit) or an assessment (which funds an improvement that benefits the payer). *May*, 203 Ariz. at 431 ¶ 24; *Okeson v. City of Seattle*, 78 P.3d 1279, 1286 (Wash. 2003) (when legislature's intent is to raise revenue for a government function rather than to regulate service for which the cost is levied, the levy is a tax.). In addressing this prong of the three-prong tax-versus-fee test, courts should not be bound by formalism or labels, but look to the "use and purpose" to which the revenue is put. *Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1221 (D. Ariz. 2001).

Here, the levy is collected for a public purpose—to fund Medicaid expansion—not to provide any specific benefit to hospitals. The statute declares that the tax is collected for the "*purpose* of funding the nonfederal share of the costs" of Arizona's Medicaid program, which is a public government function, and is not used to regulate or benefit hospitals. A.R.S. § 36-2901.08(A) (emphasis added). The statute also holds that the direct beneficiaries are not the hospitals, but the "persons" who are "eligible" for the expanded Medicaid program. *Id.*

Some hospitals will receive payment if they provide care to patients under that expanded program, but the fact that the tax may *incidentally* benefit hospitals 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 Servs. Med. Corp. of Cent. N.Y., Inc. v. Chassin*, 668 N.Y.S.2d 1006, 1010 (1998) (citation omitted).

Here, although only hospitals pay, and the money goes into a special fund, the levy is still a tax because the revenues fund the costs of a broad public program: Medicaid, which is the federal government's principal device for providing health care to the poor. *See, e.g.*, *Wright v. McClain*, 835 F.2d 143 (6th Cir. 1987) (law requiring parolees to pay into a fund for supervision and rehabilitation was a tax, not a fee, because revenues went to a general public purpose rather than a specific benefit); *Lavis*, 233 F. Supp. 2d at 1221 (a levy imposed on lobbyists was a tax rather

than a fee because it "benefit[s] the population at large"); *Okeson*, 78 P.3d at 1285 (electricity charges were taxes because street lighting is "for the common good of all"); *Schneider Transp., Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981) (vehicle registration "fees" are taxes, because revenues are used for transportation purposes, which benefit the public generally). It is well-established that even where a small group pays, and the money goes into a special fund, the levy is still a tax if it is used to provide a general benefit to the public.

The court of appeals held that hospitals benefit from the levy (so that it is more like a fee) because the legislature said the revenue would "be used for the *benefit of hospitals* for the purpose of providing health care." *Biggs*, at ¶ 11 (emphasis added). But while the legislature recognized that hospitals will receive subsidies from Medicaid, the statute does not provide the hospitals with any direct benefits in exchange for the levy. Instead, it says the revenue will be used "*for the purpose of providing health care*." *Id.* (emphasis added).

The Medicaid tax is a mandatory impost, imposed by the legislature and collected and used for public purposes, not any discrete benefit to the payer. Because A.R.S. § 36-2901.08 establishes a tax, not a fee or assessment, Section 22's supermajority requirement must apply, unless the tax fits within an exception. As explained below, no exception applies.

II. Even if it is an assessment, the Medicaid expansion levy is not exempt under the (c)(2) exception.

A. The Medicaid expansion levy is not authorized by statute.

The two-thirds requirement does not apply to fees or assessments that are "authorized by statute, but are not prescribed by formula, amount, or limit." ARIZ. CONST., art. IX, § 22(c)(2). The court below found that this exception applies. That was in error.

Obviously the provider tax is *created* by a statute, because it was part of HB 2010. But this cannot be what was meant by "authorized by statute" in the (c)(2) exception, because that would render the supermajority requirement ineffectual. It would mean the legislature could evade the two-thirds rule by adopting a fee or assessment in a statute that receives a simple majority vote[5]—an absurd result.

The better reading is that the (c)(2) exception applies when the legislature has *already* authorized an official (by a two-thirds vote) to collect a levy—and then, when the official *changes the amount*, no subsequent two-thirds vote is required.

---

[5] The court of appeals rejected this argument in part because it rightly recognized that under its interpretation, "not every fee or assessment passed by a simple majority is exempt from Section 22," since some might fail to meet the *other* factors, such as being prescribed by formula, amount or limit, and thus fall outside the exemption. *Biggs*, at ¶ 17. But Petitioners do not contend that, under the decision below, a statute passed by a bare legislative majority will *always* evade the Constitution. They simply observe that the decision construes the "authorized by statute" requirement so broadly that *every* fee and assessment will meet it.

This interpretation makes sense of Section 22 as a whole, and gives the word "authorized" a consistent meaning throughout.[6] Reading that Section as a whole, a two-thirds vote is needed whenever there is an "affirmative act[] of the legislature" to raise revenue, which happens (1) when the *legislature* imposes a new tax,[7] fee, or assessment[8]; or (2) when the *legislature* authorizes a new administratively-set fee,[9] or (3) when the *legislature* increases a tax or the limit on an existing fee. But when an *administrator* imposes or increases a fee or assessment pursuant to an *existing* authorization, a two-thirds vote is not needed.[10] In other words, when the *legislature* acts, it must do so by two-thirds vote. When, however, revenue increases by other means (*e.g.*, by inflation[11] or an act of a city[12]), the two-thirds requirement does not apply. Likewise, when an administrator has authorization to act, his acts are then exempt from the two-thirds requirement.[13] But an administrator cannot act to set a levy until *authorized* to do so by a legislative act—which requires two-thirds vote.[14]

---

6 Note that Section 22(B)(5) says the two-thirds rule applies to "the *authorization* of any new administratively set fee." The word "authorize" should mean the same thing throughout. *Cf. M'Culloch v. Maryland*, 17 U.S. 316, 343–44 (1819) (word "necessary" means the same throughout Constitution).

7 ARIZ. CONST. Art. IX, § 22(b)(1).

8 *Id.*, § 22(b)(5).

9 *Id.*

10 *Id.*, § 22(c)(2).

11 *Id.*, § 22(c)(1).

12 *Id.*, § 22(c)(3).

13 *Id.*, § 22(c)(2).

14 *Id.*, § 22(b)(5).

This common-sense reading of the (c)(2) exception allows administrators to set, change, or enforce assessments or fees after they have been *authorized*, without having to seek legislative approval for each adjustment.[15]

The decision below, however, says that any statute (passed by a bare majority) that purports to authorize the assessment of a levy by an administrator qualifies for the (c)(2) exception. That means any tax bill would have to receive a supermajority vote—but a bare majority could relinquish to an unaccountable administrator the power to impose levies that "are not prescribed by any formula." That creates a loophole that *removes* checks and balances, and *reduces* limits on administrative power—contrary to the will of voters who created Section 22.

The (c)(2) exception must be construed consistently with Section 22's purpose of curbing legislative authority. This Court should grant review and reverse.

B. The Medicaid expansion tax is not exempt because it is "prescribed by formula, amount, or limit."

Finally, the (c)(2) exception does not apply because the levy is "prescribed by formula, amount or limit." The statute prescribes factors for the Director to consider when determining modifications, requires legislative preapproval of the assessment

[15] Indeed, Art. IX, § 22 explicitly applies to changes in "exemption[s] from a *statutorily prescribed* state fee or assessment." ARIZ. CONST. art. IX, § 22(b)(6) (emphasis added). If the legislature authorizes a fee or assessment to be *administratively prescribed*, however, then a supermajority vote is not required for the administrator to make adjustments after initial legislative approval.

and any alteration in the method of its calculation, and forbids assessments entirely in specified circumstances.

The statute also requires the Director to administer the tax in accordance with federal law. Federal law requires that the tax be collected without regard to whether hospitals accept Medicaid payments (42 U.S.C. § 1396b(w); 42 C.F.R. § 433.68), caps Arizona's tax at no more than 6% of a hospital's net patient revenues (42 C.F.R. § 433.68(f)(3)(i)), and says that the revenue collected can amount to no more than 25% of the state's Medicaid share. *Id*.

These simply *are* formulae, amounts, and limits.

Conclusion

The petition should be *granted.*

Respectfully submitted this 17th day of April, 2017 by:

/s/ Christina Sandefur
Christina Sandefur (027983)
Aditya Dynar (031583)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE