COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANDY BIGGS, et al., Plaintiffs/Appellants, v. THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System, Defendants/Appellees, EDMUNDO MACIAS, et al., Intervenor/Defendants/Appellees.	1 CA-CV 15-0743 Maricopa County Superior Court Case No. CV2013-011699

PLAINTIFFS/APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellee Director Tom Betlach essentially asks this Court to ignore basic rules of statutory construction and read the narrow (C)(2) exception to Proposition 108's legislative supermajority requirement so broadly that it would exempt any "imposition of something." (Ans. Br. 16–17.) But Arizonans in 1992 voted by over 71% to limit the legislature's power to impose any "act that provides for a net increase in state revenues," Ariz. Const. art. IX §§ 22(A)-(B), and provided only narrow, carefully specified exceptions. The (C)(2) exception applies solely to "[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." To read this as broadly as Director Betlach and Intervenors ask this Court to do would render Proposition 108 toothless and would undermine the voters' intent to "make it more difficult to raise taxes."[1]

[1] Oddly, Intervenors accuse Appellants of "complain[ing] that giving effect to the plain language of (C)(2) is somehow contrary to the intent of the voters." (Int. Br. 37.) Quite the opposite: it is Intervenors and Director Betlach who, by stretching the (C)(2) exception so broadly as to swallow the rule of Proposition 108—and lead to absurd results—lead to a result that is contrary to the voters' intent. The voters intended 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." (IR.52 ¶ 12.) Intervenors and Director Betlach would interpret (C)(2) as allowing the Legislature to delegate to an unelected official essentially limitless power to impose taxes at will. That is not what the voters intended. Appellants cite to voter intent to further illustrate why

Because A.R.S. § 36-2901.08 (1) establishes a tax that is not collected in exchange for any discrete service or benefit, (2) does not properly "authorize" Director Betlach to collect the tax, and (3) *on its face* limits Director Betlach's discretion to set the amount of the levy, it cannot be exempt from Proposition 108. Thus, the Medicaid expansion tax (A.R.S. § 36-2901.08) violates article IX, § 22 of the Arizona Constitution because it received only a bare majority of legislative votes instead of the constitutionally required two-thirds supermajority vote.

ARGUMENT

I. THIS CASE PRESENTS A PURELY FACIAL CHALLENGE TO THE PROVIDER TAX ADOPTED IN A.R.S. § 36-2901.08

A. Plaintiffs have proven that no circumstances exist under which A.R.S. § 36-2901.08 would be lawful if passed by only a bare majority of legislative votes

The only question in this case is whether the provider tax adopted in A.R.S. § 36-2901.08 is lawful, despite the fact that it received only a bare majority of legislative votes instead of the constitutionally-required two-thirds supermajority vote of both houses. The test for determining whether the provider tax 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" and is not subject to

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the plain language of Proposition 108 should be followed in a holistic way that does not render any part surplusage.

one of the provision's narrow exceptions. Ariz. Const. art. IX, § 22. This is a purely facial challenge, and facts relating to how Director Betlach has chosen to collect or enforce the levy are simply irrelevant to that determination.

Yet Director Betlach and Intervenors continue to conflate the standard of review, insisting that Appellants "must prove that 'no circumstances exist under which the challenged statute would be found valid'" (Int. Br. 15 (citations omitted)), which Intervenors claim is accomplished by considering "the actual implementation of the Hospital Assessment." (Int. Br. 16.) They contend that the tax is constitutional because the hospitals on which the tax is currently imposed either accept Medicaid payments or (according to Director Betlach and Intervenors) receive certain benefits. This is incorrect. Facial unconstitutionality means that a law's unconstitutionality is inherent, rather than depending on the circumstances. A facial challenge "considers only the text of the measure itself, not its application to the particular circumstances," while an as-applied challenge "contemplates analysis of the facts of a particular case . . . to determine the circumstances in which the statute . . . has been applied and to consider whether [it is unconstitutional] in those particular circumstances." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995). This means that a facially unconstitutional law cannot be remedied by happenstance.

Consider, for example a city ordinance that bars women from voting in city elections. Such an ordinance would be facially unconstitutional, even if, by some chance, no women happened to live in the town at the time, because there are no circumstances under which such an ordinance can be constitutional. Its unconstitutionality is inherent, as opposed to depending on the circumstances. Another hypothetical example: an ordinance that prohibited any person whose last name begins with "F" from posting an advertising sign would be facially unconstitutional, even if there were no person with such a name in the city, because there are no circumstances under which an ordinance like that could ever be constitutional. *See Falls v. Town of Dyer*, 875 F.2d 146, 147 (7th Cir. 1989) (using this hypothetical).

Here, Director Betlach's enforcement of the levy is irrelevant to the question of whether the statute establishing the levy received the proper number of votes. Appellants do not contend that he has imposed the levy in an unconstitutional manner. They challenge his authority to collect the tax *at all*.

Appellants also do not assert, as Intervenors claim (Int. Br. 15) that "factual context" is irrelevant to a facial challenge. But the facts that Intervenors urge this Court to consider are *irrelevant to the question at bar*. At issue here is whether the legislature's *statute*, not the Administrator's *actions* in enforcing that statute, is subject to Proposition 108 or exempt under (C)(2). The question of whether the

legislature was obligated to comply with article IX § 22, and whether the provider tax is a tax or a fee or assessment, are pure questions of law, not fact. The appropriate factual context is the circumstances under which the legislature passed the provider tax (*i.e.*, how many votes it received). It is undisputed that A.R.S. § 36-2901.08 did not receive a two-thirds supermajority in either house of the legislature.

Intervenors are correct that courts presume a law's constitutionality (Int. Br. 12), but that presumption is *rebuttable*. Courts cannot "violate the people's trust by attempting to subvert their constitution [Proposition 108's supermajority requirement] to any legislative enactment [the simple majority's approval of a provider tax]." *Windes v. Frohmiller*, 38 Ariz. 557, 561 (1931). It is also true that this Court "construes statutory language narrowly to avoid constitutional difficulties." *Wicks v. Motor Vehicle Division*, 184 Ariz. 307, 309 n.5 (App. 1995). But there are no circumstances under which the provider tax adopted in A.R.S. § 36-2901.08 could be narrowly construed to cure the constitutional deficiency that it failed to garner a supermajority vote in *either* house of the legislature. *See Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (courts are "without power to adopt

a narrowing construction of a state statute unless such a construction is reasonable and readily apparent").[2] The provider tax is unconstitutional.

B. Proposition 108 does not contain an "efficiency exception" allowing the legislature to evade Proposition 108's supermajority requirement

Director Betlach urges this Court to exempt the provider tax from the supermajority requirement in order "to promote effective government administration and pragmatic problem solving." (Ans. Br. 33.) But Proposition 108 was enacted to *curb* legislative authority, not to promote it. Seeking protection from excessive taxation and the growth of state government, voters enacted the two-thirds supermajority requirement for taxes, fees, and assessments, "mak[ing] it more difficult to raise taxes" even when "respond[ing] to emergency situations" or "a great need for the poor." (IR.52 ¶ 12.)

Director Betlach suggests that this Court should "not mechanically appl[y] such provisions," and cites what he characterizes as instances of Arizona courts constructing opportunistic rules to "allow[] government to operate efficiently." (Ans. Br. 33–34.) Whatever the merits of these arguments, these examples mostly

[2] Intervenors also note that Proposition 204, a voter-authorized *statute*, permits "the legislature by a simple majority vote" to expand the "eligibility threshold" for the state's Medicaid population. (Int. Br. 3.) That is true, but irrelevant. Appellants do not challenge the Legislature's authority to expand Medicaid program *eligibility* by majority vote, they challenge the unconstitutional imposition of a *new tax* by only a simple majority.

pre-date Proposition 108, and involve laws that are entirely different and have entirely different purposes. Defendant's preferred "public policy" cannot trump voter intent or supersede constitutional provisions. The intent of Proposition 108 was not to increase government flexibility or efficiency, but to require approval of two-thirds of each house before the legislature may impose taxes. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights . . . that [it was] designed to protect the fragile values of a vulnerable citizenry from [an] overbearing concern for efficiency and efficacy.").

Intervenors also urge this Court to defer to the Legislature's interpretation of the scope of its own powers under Proposition 108. They observe that the Legislature has enacted what they allege are fees and assessments "without Proposition 108 language," (Int. Br. 8.), and rely on an exhibit recycled from Director Betlach's filings in the Motion to Dismiss phase of this case, purporting to show that "89 fees or other 'net increase[s] in state revenues' were passed by the Legislature without Proposition 108 language." (Int. Br. 8.) Appellants have previously demonstrated that that exhibit is inaccurate and inadmissible. It is not a mere duplication of 89 bill summaries that this Court can take judicial notice of, but is Defendant's and Intervenors' own subjective compilation of only 40 distinct bills that they claim, based simply on their own assertion, would otherwise have

been subject to Proposition 108. (IR.74 at 16 ¶ 1.) In reality, well over half of those bills were passed by a two- thirds supermajority. (*Id.*) But no matter: this list is simply irrelevant to the question of whether the provider tax at issue in this case violates Proposition 108. At best, Intervenors' list proves only that unconstitutional legislation has gone unchallenged in the past, but "a challenged law does not become constitutional simply because it has company." *Lopez-Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054, 1079 n.10 (9th Cir. 2013) (Fisher, J., dissenting), *rev'd on reh'g en banc*, 770 F.3d 772 (9th Cir. 2014). Even the Superior Court below rejected this argument, noting that "if the assessment were otherwise unconstitutional, it does not become protected merely because of a long-standing practice that preceded its enactment." IR.86 at 18 (*citing Walz v. Tax Comm'r*, 307 U.S. 664, 678 (1970)). Prior violations only prove the need for this Court's independent judgment and guidance for Proposition 108's future application.

II. THE (C)(2) EXCEPTION DOES NOT EXEMPT THE PROVIDER TAX FROM THE SUPERMAJORITY REQUIREMENT

Because the provider tax imposes a new levy on hospitals—a "net increase in state revenues," Ariz. Const. art. IX, § 22—it is only exempt from the supermajority requirement if it fits into one of the narrow exceptions. The relevant exception provides that "[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," need not receive a supermajority. Ariz. Const. art. IX § 22(C)(2). *All three elements must exist* for the exemption to apply. In other words, A.R.S. § 36-2901.08 must (1) establish a fee or assessment, (2) that was properly authorized by the legislature, and (3) is not circumscribed by formula, amount, or limit. But the provider tax fails on *all three* counts, and therefore the Superior Court's conclusion that A.R.S. § 36-2901.08 is lawful was in error.

A. A.R.S. § 36-2901.08 establishes a tax, not a fee or assessment

Because A.R.S. § 36-2901.08 imposes a mandatory, redistributive tax on all providers, the (C)(2) exception—which explicitly pertains only to fees and assessments—cannot apply.

Director Betlach and Intervenors cannot agree on how to characterize the provider tax—Director Betlach calls it an assessment (Ans. Br. 16), while Intervenors claim it is a fee. (Int. Br. 17–18.) But unlike either a true fee or assessment, the provider tax is not collected in exchange for any discrete service or benefit, but is a generally applicable levy that all affected hospitals must pay.

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 (1937).

Taxes differ from fees, which are "always voluntary" and "bestow upon [the payer] a benefit not shared by other members of society." *Id*. at 545. Intervenors argue (*see* Int. Br. 21) that the provider tax is really a fee because it is similar to the pawnbroker transaction payment in *Jachimek v. State*, 205 Ariz. 632 (App. 2003). But the fee in *Jachimek* was tied to the decision to conduct a pawn business. In other words, "the amount paid per transaction 'bear[s] some reasonable relation to the service to be performed' on the payer's behalf," *Id*. at 637 (quoting *Stewart*, 49 Ariz. at 548), and is used for "the regulation . . . of the parties upon whom the assessment is imposed." *Id.* (quoting *May v. McNally*, 203 Ariz. 425, 431 (2002) (en banc)). Here, by contrast, the provider tax is *not* tied *in any legal way* to the decision to accept Medicaid patients. Followed to its logical conclusion, Intervenors' argument would transform all taxes into exempt fees. After all, the decision to work in Arizona is "voluntary," but it would be absurd to argue that the state income tax is exempt from Proposition 108's supermajority requirement.

Finally, while an "assessment" is not as clearly defined under Arizona law as "tax" and "fee," it is similar to a fee in that an "assessment" is levied in exchange for a benefit provided to the payer. Specifically, an assessment is a local levy based on the value of benefits conferred on property. *Sinclair Paint Co. v. State Bd. of*

Equalization, 937 P.2d 1350, 1354 (Cal. 1997). There is a nexus between the property benefitted by local improvement and the assessment funds. *Barry v. Sch. Dist. No. 210*, 105 Ariz. 139, 140 (1969). *See also* ASSESSMENT, Black's Law Dictionary (10th ed. 2014) (quoting Robert Kratovil, Real Estate Law 465 (6th ed. 1974)) ("[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.").

Director Betlach urges this Court to read the term "assessment" broadly to include "any imposition, *including* taxes." (Ans. Br. 16.) While Director Betlach is correct that in some contexts, the term "assessment" is used broadly to refer to all levies, *id.*, that obviously cannot be the case here, because the Proposition 108 refers separately to taxes, fees, and assessments. If this court were to adopt Director Betlach's reading that "assessment" is a broad term that encompasses any "imposition of something," then Proposition 108's separate use of the terms "tax," "fee," and "assessment" would be meaningless. Courts must, of course, "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of [legislatures].'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (citations omitted). Proposition 108 treats the terms "tax," "fee," and "assessment" separately

and distinctly. This Court should give each of these terms effect. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Oddly, Defendant Betlach claims that Appellants' definition of "assessment" is inconsistent with Proposition 108 as a whole, because Proposition 108 applies to state actions, and not to impositions of political subdivisions of the state. (Ans. Br. 17 (citing Ariz. Const. art IX, § 22(C)(3).)) But Appellants' definition is not inconsistent with the state voting to *authorize* a political subdivision to collect an assessment, or the state *itself* collecting a levy on property. Moreover, exceptions are often redundant to enforce or clarify the rule. The fact that both the (C)(2) and (C)(3) exceptions would exempt a local levy from the supermajority requirement does not make Appellants' interpretation improper. On the contrary, it strengthens Appellants' argument. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting"); *see, e.g., State v. Carouthers*, 714 S.W.2d 867, 870 (Mo. App. 1986) (definitions in the statute "are redundant and evidence the legislative intent to insure that the statute covers every conceivable activity possible with controlled substances"); Michael Kent Curtis, *No State Shall Abridge* 183 (1986) ("Lawyers say everything at least

twice."). It is Director Betlach's insistence that "assessment" merely means "tax" or "fee" that clashes with the plain language of Proposition 108.

Director Betlach's effort to substitute policy arguments for legal ones, to thwart a plain reading of Proposition 108, fall short. He argues that Proposition 108 should not apply to the provider tax because many hospitals (which stand to benefit handsomely from the federal subsidies that come with the program that this tax will fund) do not object to the tax. (Ans. Br. 18.) But there is no "willing payer" exception to Proposition 108's supermajority requirement. Hospitals are not interested in enforcing the voters' intent, or protecting taxpayers. They are (understandably and properly) interested in their bottom lines. The Constitution, however, specifies rules from which the Legislature may not deviate, even if certain powerful political interests would find such deviation convenient. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.").

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*, 203 Ariz. at 430-31 (citation omitted). These factors are not dispositive, but indicative.

The provider tax is a tax under this test. First, the *levy itself* was created anew and imposed directly by the legislature when it enacted A.R.S. § 36-2901.08. A levy "imposed directly by the legislature is more likely to be a tax than an assessment imposed by an administrative agency." *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996). Here, the levy was initially established by the legislature when it enacted A.R.S. § 36-2901.08, not by Defendant Betlach, who has only the authority (circumscribed by state and federal law) to set the amount of the tax and to determine who is exempt. A.R.S. § 36-2901.08(A), (C).

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." *Bidart Bros.* 73 F.3d at 925.

Intervenors claim because a rule was enacted to exclude some hospitals from the levy, it is a fee. (Int. Br. 25.) But a levy "upon a narrow class of parties can still be characterized as a tax." *Bidart Bros.* 73 F.3d at 931. 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).

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. Intervenors try to avoid this principle by arguing that because federal law requires all hospitals to treat emergency room patients regardless of ability to pay, Medicaid expansion—funded by the provider tax—benefits all hospitals. What matters here is that the provider tax *is not calculated based on the amount of Medicaid payments* hospitals receive. (I.R.52 ¶ 9.) Instead, it is "based on property or income" (a characteristic of a tax, not a fee), *Stewart*, 49 Ariz. at 544–45; specifically, it is levied based "on hospital revenues, discharges or bed days." A.R.S. § 36-2901.08(A).[3] True, under Intervenors' explanation, some hospitals that do not treat Medicaid patients or accept Medicaid payments might derive some undefined, incidental benefit from the tax. But some hospitals may also suffer from the tax since it increases the costs of doing business. By this logic, no levy could ever be considered a tax, as one could always point to *some* distant benefit an entity is receiving as a result of a tax.

[3] Intervenors argue that the amount of the levy is not based on income. (Int. Br. 28.) But the statute explicitly provides that the levy will be collected based "on hospital revenues," A.R.S. § 36-2901.08(A), which is income. It is true that the statute *also* permits the levy to be based on "discharges or bed days," *id.*, but that is still a measure of income because it is transaction-based and, more importantly, it is not related to the purpose of the tax (i.e. it is not collected based on discharged *Medicaid* patients).

For purposes of a facial challenge, 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, 625, 668 N.Y.S.2d 1006, 1010 (1998) (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992)). Thus in *Okeson v. City of Seattle*, 78 P.3d 1279, 1286 (Wash. 2003), a Seattle levy on electric utility ratepayers to defray the costs of providing them with streetlights was found to be a tax despite the fact that the levy was paid by ratepayers and not by the public at large, because its primary purpose was to fund a public benefit, not to regulate streetlights.

Here, the legislature created the provider tax 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). Whether hospitals paying the tax *also* benefit at any given time is not relevant to this facial challenge, which seeks to determine whether the statute the legislature passed, on its face, was subject to the supermajority requirement.

Even the federal agency charged with administering Medicaid considers the provider tax to be a tax.[4] 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).

Third, revenues from the provider tax are expended expressly and primarily for general *public* purposes, not for the regulation or benefit of the parties who pay. Nor is the levy collected in relation to any benefit the paying parties might receive. Where funds are collected to provide a general benefit to the public, the underlying charge is more likely to be a tax than a fee, which is paid in exchange for a specific benefit or service, or an assessment, which funds an improvement that benefits the particular payer. *May*, 203 Ariz. at 431(citing *San Juan Cellular*, 967 F.2d); *Barry*, 105 Ariz. at 140-41 (levy is a tax when collected "for purposes which will benefit the public generally").

[4] Appellants have never contended, as the Superior Court implied, (IR.86 p. 12–13), that the federal determination here is dispositive. But it is indicative, given that A.R.S. §§ 36-2901.08(B) and 36-2901.07(C) expressly forbid actions that will imperil federal funding, and the federal government, in turn, requires that the levy satisfy certain tax-related criteria.

Director Betlach erroneously argues that the provider tax should be considered an exempt fee because, like the example of "university tuition" in the Proposition 108 publicity pamphlet, an administrator sets the amount of the levy. (Ans. Br. 31–32.) But Director Betlach ignores at least one key difference between university tuition and the provider tax: university tuition is a *fee because it is collected in direct exchange for a service provided and benefit received*—specifically, education. That is why it is paid by students, who receive that benefit. In contrast, the provider tax is a mandatory, redistributive levy that hospitals must pay, regardless of whether or not they receive any benefit. *See Weller v. City of Phoenix*, 39 Ariz. 148, 151–52 (1931) (taxes are levied "regardless of the direct benefit accruing to the person or property taxed").

B. The provider tax was not "authorized by statute," but rather was established in violation of the law

Even if the provider tax *were* a fee or assessment, it is still not exempt under subsection (C)(2) from the supermajority vote requirement because it was not "authorized by statute."

Director Betlach argues that his collection of the provider tax is "authorized by statute" because A.R.S. § 36-2901.08 purports to empower him to administer the tax, and it is a statute. (Ans. Br. 18.) But, to repeat, Appellants do not challenge Director Betlach's *administration* of the levy. This is a facial challenge to A.R.S. §

36-2901.08. Director Betlach's argument that "authorized by statute" simply "means that the agency was expressly authorized by the legislature to set the fees and assessments" (Ans. Br. 19) misunderstands Appellants' claim and makes no sense in this context. Director Betlach essentially argues that any time the legislature adopts a fee or assessment by simple majority vote, it is automatically exempt from the constitutional supermajority requirement, simply because it takes the form of a statute. But this would render the supermajority requirement toothless. *Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). It would also have the absurd result of meaning that under Proposition 108, the legislature—the body closest and most accountable to the people—is required to muster a supermajority vote to impose a new tax, fee, or assessment, but if the legislature relinquishes that same power to an unelected *administrator*, who lacks democratic accountability, Proposition 108's supermajority protections do not apply at all. Such a construction would create a perverse incentive for lawmakers to evade constitutional constraints by ceding discretion over the power to tax to unaccountable administrators. That was plainly not what the voters intended.

Thus, Director Betlach misses the point when he argues against Appellants' plain reading of the (C)(2) exception, contending that his decisions should be

exempt from Proposition 108 because he is "accountable to all three branches of government." (Ans. Br. 24.) Whether or not that is true, the issue is not the Director's accountability to the Legislature, but the *Legislature's accountability to the people*, who explicitly limited the Legislature's authority to create new revenue raising opportunities except by a supermajority vote. The Legislature cannot evade that strict supermajority requirement by simply delegating its revenue raising authority away to an unelected administrator without proper supermajority authorization.

Director Betlach accuses Appellants of "argu[ing] that the decisions of an appointed administrator were not intended to be exempt from Proposition 108." (Ans. Br. 24.) But Appellants hold just the opposite: that the "authorized by statute" language was created specifically to exempt *administrative* decisions from Proposition 108's legislative supermajority requirement. Many levies by administrators are exempt from Proposition 108, once a supermajority of the Legislature authorizes administrators to impose those assessments or fees.

Director Betlach's effort (Ans. Br. 20) to manufacture an ambiguity by overlapping section (C)(2) with sections (B)(5) and (B)(4) is unnecessarily confusing. Section B(5) provides that the supermajority requirement *does* apply to, among other things, "[t]he imposition of any new state fee or assessment or the authorization of any new administratively set fee." Section (C)(2) provides that the

supermajority requirement does *not* apply to fees and assessments that are authorized by statute. The most natural reading of this is that, once a fee is authorized by a legislative supermajority, as required by Section (B)(5), and so long as the rest of (C)(2)'s elements are met (fee not prescribed by formula, amount, or limit, etc.), no subsequent supermajority action by the Legislature is necessary. Thus the Legislature *could have* constitutionally imposed a fee or assessment on hospitals by delegating to Director Betlach the power to impose that fee or assessment, if a supermajority had authorized this under (B)(5). Once that had been done, (C)(2) would have exempted any fee he imposed. That constitutional route was not taken here.[5] But because A.R.S. § 36-2901.08 was *not* authorized by the constitutionally required two-thirds legislative supermajority, Director Betlach has no authority to even collect the levy, much less make adjustments.

Director Betlach admits that under his interpretation, exempting a fee or assessment from the supermajority protection "requires the legislature by statute to give up control of setting the assessment." (Ans. Br. 22.). The Court should be

[5] Indeed, Ariz. Const. 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 those subsequent adjustments after initial legislative approval.

absolutely clear what this means. If this Court were to accept Director Betlach's interpretation, the Legislature could easily evade the supermajority requirement simply by passing, by a bare majority, any statute that authorizes a fee or assessment. This creates all the undemocratic disincentives mentioned above, and plainly contradicts the will of the voters. It would allow the legislature to "authorize" itself to ignore the supermajority requirement, and would render Proposition 108 ineffectual. Director Betlach tries to sidestep this inescapable conclusion by dismissing the phrase "authorized by statute" as redundant and meaningless; simply a reiteration that legislatures cannot delegate their power. (Ans. Br. 19.) But this Court need not distort Proposition 108's plain language in a way that leads to absurd results that are clearly at odds with voter intent. Instead, this Court should read the "authorized by statute" language in (C)(2) consistently with the rest of Proposition 108.

C. The Director's collection of the provider tax is "prescribed by formula, amount, or limit"

Intervenors argue that the tax is not "prescribed" because the dictionary defines the word "prescribe" to mean "to write beforehand" like "prescription or treatment or to be set down as a rule or direction." (Int. Br. 39.) But this definition actually supports *Appellants'* position.

As explained above, whether or how the Director followed the law when collecting the levy is irrelevant. This is a facial challenge to the constitutionality of the provider tax. It is *precisely* what the legislature "wrote beforehand" that is relevant here. The "rule or direction" set forth by A.R.S. § 36-2901.08 itself expressly limits the Director's discretion.

A.R.S. § 36-2901.08 provides just what Intervenors say it must—"rule[s] or direction[s]"—factors that the Director may consider when determining modifications. It also makes clear that the levy must be administered in accordance with federal standards to prevent any reduction of federal funding. It further forbids the Director from levying the tax at all if federal assistance falls below a specified amount. A.R.S. § 36-2901.08(E). These are plainly limits. The Director has no authority to exceed them. And they were "writ[ten] beforehand" by the legislature "to be set down as a rule or direction."[6]

[6] Defendant Betlach argues that Appellants' separation-of-powers challenge to his broad authority to establish, collect, and modify the provider tax belies the claim that A.R.S. § 36-2901.08 places limits on his authority for purposes of the (C)(2) exception. (Ans. Br. 26.) But that alternate claim (which was dismissed on standing grounds and not before this Court) simply challenged the legislature's unconstitutional delegation of the power to set the tax to Director Betlach. It did not allege that the amount of the levy is not circumscribed *at all*.

Appellants do not "attempt to incorporate federal law," as Director Betlach argues. (Ans. Br. 30.) Rather, A.R.S. § 36-2901.08 *itself* establishes that he must administer the tax in accordance with federal law. *See* A.R.S. § 36-2901.08(B).

Nor does it matter whether the federal government might waive some of the limits, as Intervenors claim. (Int. Br. 40.) A facial challenge looks to "the law itself" and "not…[to] the application of the law." *Hernandez v. Lynch*, 216 Ariz. 469, 472 (App. 2007). At issue here is whether the challenged statute includes a formula, amount or limit. It does.

Director Betlach is not free to choose the amount of the assessment outside of the constraints placed on his discretion. He must design the assessment in such a way as to satisfy the detailed criteria in A.R.S. § 36-2901.08, which includes administering the tax in accordance with federal law. 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"); (IR.52 ¶ 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). Finally, 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).[7]

True, some of these limits might be alterable if special permission is sought and received from some higher authority. But the very fact that A.R.S. § 36-2901.08 requires the Director to seek special exception from the statutory limits proves that the statute limits his authority. The (C)(2) exception cannot apply where the levy is "prescribed by . . . limit."

CONCLUSION

The decision of the Superior Court should be reversed, with instructions to enter judgment for Appellants.[8]

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[7] Director Betlach argues that the 80 percent limitation is a condition on enactment and does not affect the amount of the levy when it is in effect. (Ans. Br. 29.) But this is nevertheless a "limit" on the Director's authority to collect the provider tax. A.R.S. § 36-2901.08 specifies that under certain conditions, the Director may not collect a levy at all, which is tantamount to setting the "amount" of the levy at zero when certain conditions are (or are not) met.

[8] Director Betlach's opposition to Appellants' request for attorneys' fees under Rule 21(a) is premature. That rule requires a "party that intends to claim attorneys' fees incurred on appeal" to provide notice in the opening brief. Appellants are not arguing but simply preserving their request under the well-established practice of awarding fees under the Private Attorney General Doctrine to "a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private

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enforcement; and (3) is of societal importance." *Arnold v. Ariz. Dept. of Health Servs.*, 160 Ariz. 593, 609 (1989). The Arizona Supreme Court granted a similar award when members of the Commission on Appellate Court Appointments successfully challenged an unlawful legislative enactment. *Dobson v. State*, 233 Ariz. 119, 124 (2013). Thus, the request is proper but argument is premature before this Court makes a determination on the merits.