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. CV-17-0130-PR Court of Appeals, Division One No. 1 CA-CV 15-0743 Maricopa County Superior Court Case No. CV2013-011699

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

This case challenges the constitutionality of the Medicaid expansion tax adopted as A.R.S. § 36-2901.08, which was imposed without the two-thirds legislative supermajority approval required by Art. IX, sec. 22, of the Arizona Constitution (also known as "Proposition 108."). Voters added that provision to the Arizona Constitution to constrain government's power to collect money from Arizonans—whether the levy in question be called a "tax," a "fee," an "assessment" or some other term.

The levy challenged here is best characterized as a tax because it is mandatory and imposed to generate revenue for general government services. Pet. Rev. 3–4. The Court of Appeals erred by holding that this is an assessment or fee,[1] akin to the licensing fee at issue in *Jachimek v. State*, 205 Ariz. 632 (App. 2003), whereas this tax is not tied to any benefit or service received by the payer, is not voluntary, and is not based on a hospital's decision to participate in the Medicaid program.

In addition to erroneously holding that the tax is a fee or assessment, the decision below erred by holding that the exception to the supermajority requirement in Section (C)(2) applies here. That holding violates rules of statutory interpretation, thwarts the will of the voters, and leads to the absurd consequence of allowing the legislature to evade the supermajority requirement by merely enacting a statute—by a simple majority—to empower a single official to exact money from the citizenry.

[1] The decision below did not even make a determination with regard to whether the Medicaid levy is a tax, fee, or assessment. Instead, it merely held that the levy is "not a tax." *Biggs v. Betlach*, 242 Ariz. 55 ¶ 13 (App. 2017).

As a consequence of the decision below, a supermajority would be required to enact a new tax, but a bare legislative majority can hand an unelected administrator virtually unlimited power to collect money. In other words, the decision below interprets a narrow exception so broadly that it swallows the rule. That cannot be what the voters intended when they added Section 22 to the Constitution. The decision below must be reversed.

ARGUMENT

I. THE LEVY IMPOSED BY A.R.S. § 36-2901.08 IS NOT EXEMPT FROM THE CONSTITUTIONAL SUPERMAJORITY REQUIREMENT BECAUSE IT IS A *TAX*, NOT A FEE OR ASSESSMENT

Petitioners explain in their Petition why the Medicaid levy is a tax, not a fee or assessment. Pet. Rev. 3–10. That question is sufficient to resolve this case: because Proposition 108 applies to all taxes, the supermajority requirement was applicable here, and the decision below must be reversed on that ground alone.

A. The *May* Factors Do Not Necessarily Govern Here.

In determining that the Medicaid tax is *not* a tax, the court of appeals was guided in part by the factors set forth in *May v. McNally*, 203 Ariz. 425, 430–31 ¶ 24 (2002). *See* Biggs, 242 Ariz. 55 ¶ 8 (citing May, 203 Ariz. at 430–31 ¶ 24). Petitioners incorporate herein their discussion of the May factors set out in their petition for review, and offer these additional observations.

To determine whether a levy is a tax or a fee, May applied 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." *Id.* (citation omitted). However, the plaintiff in *May* was challenging a levy under the First Amendment, not Proposition 108. And in setting forth the factors, this Court acknowledged that whether the levy is a tax or a fee was "not dispositive of the issues" in that case. *Id.* at 430 ¶ 23. The *May* factors were not crafted to address questions under Proposition 108, and was only designed to answer the question of whether a levy qualifies as a tax or fee—not whether it is an assessment. *Id.* at 430–31 ¶ 24. Thus, the *May* factors are not dispositive and need not govern the outcome of this case.

B. The *May* Factors and Other Cases Indicate the Medicaid Tax is a *Tax.*

Although this Court has not designated a test for defining taxes, fees, and assessments under Proposition 108—indeed Proposition 108 itself gives the test for making that determination under subsections (A) and (B)—the *May* factors and other common definitions and tests indicate that the Medicaid levy is a *tax*, not a fee or assessment, and thus required the constitutionally mandated two-thirds legislative supermajority approval.

As explained in the Petition, taxes are mandatory and imposed by the legislature to generate revenue for general government services; fees are voluntary, are imposed by agencies, and are paid in exchange for benefits or services; and assessments are collected against property or to fund an improvement and are based on the value of benefit, which is distinct to the payer and not something the general public enjoys. Pet. Rev. 3–4.

A.R.S. § 36-2901.08 is a tax because it imposes a mandatory, redistributive tax on hospitals—regardless of whether they accept Medicaid patients or payments—for the purpose of providing health insurance coverage to the members of the public who receive Medicaid coverage.

In determining that the Medicaid levy is not a tax, the court of appeals relied on *Jachimek*, 205 Ariz. 632, which did not involve Proposition 108. But the Medicaid tax at issue here is not like the pawnbroker transaction *fee* at issue in *Jachimek*. In that case, the City of Phoenix charged pawnbrokers its cost (as designated by the Sheriff) of processing a report required by the state. *Id*. at 636 ¶ 15. Here, the *statute* imposes the tax, specifies how much revenue the tax must generate, and requires the Director to report in an ongoing fashion to the legislature before implementing the tax and before changing how it is imposed.[2]

Moreover, unlike in *Jachimek*, where the amount of the fee was tied to the City's cost to file the report, *Id.* ¶ 17, here, the amount of the Medicaid tax levied

[2] The statute declares, "The director *shall establish, administer and collect an assessment* on hospital revenues, discharges or bed days for the purpose of funding the nonfederal share of the costs[.]" A.R.S. § 36-2901.08(A) (emphasis added). Although it gives the Director some circumscribed discretion to determine the amount of the tax, it requires him to submit his proposed formula to a joint legislative committee (and to the federal government) for preapproval, *id*. § 36-2901.08(B) & (D), and specifies in detail how the revenues are to be deposited, and how failure to pay shall be punished. *Id*. § 36-2901.08(F), (G), & (H). Significantly, the statute does *not* allow the Director to set the amount at zero. It also provides detailed instructions as to how much the tax should be, and what should be done with the revenues, and requires ongoing legislative review and approval "[b]efore implementing the assessment, and thereafter if the methodology is modified[.]" *Id*. § 36-2901.08(D).

from each hospital is *not* tied to the cost of any benefit or service a hospital is receiving. Finally, in *Jachimek*, the fee was "voluntary" because it was directly tied to the number of transactions a pawnbroker engaged in, since each transaction placed a burden on the City that the levy set to offset. As the court put it, "If no transaction reports are filed, no fees are required." *Id.* ¶ 16. Here, by contrast, the Medicaid tax is *not* based on a hospital's decision to accept Medicaid or the number of Medicaid patients the hospital receives. If no (or, as in the case of Green Valley Hospital described below, very few) Medicaid patients are seen, the hospital must *still* pay the tax.

Thus, the Medicaid tax in this case is more like the ratepayer tax in *Okeson v. City of Seattle*, 78 P.3d 1279 (Wash. 2003), where the Washington Supreme Court found that city electricity charges were taxes because they were used to pay for street lighting—an "act performed … for the common good of all"—and was not used to fund a "special benefit or profit of the corporate entity" participating in the program. *Id*. at 1285. Despite the fact that the revenues were deposited into a special fund, *id.* at 1286–87, the levy was still a tax because the revenues were used to maintain street lights, which "is a governmental function" because streetlights "operate for the benefit of the general public, and not for the 'comfort and use' of individual customers." *Id*. at 1285. *See also* *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981), *cert denied*, 455 U.S. 909 (1982) (vehicle registration "fees" were actually taxes, because revenues were used for transportation purposes, which benefit the public generally). In other words, even though a small group paid the levy and

the money went into a special fund, that levy was a *tax* because it was used to pay for a general public benefit.

Similarly here, although only hospitals pay the Medicaid tax and the money goes into a special fund, the levy is a tax because it is used to fund the state's portion of the costs of the Medicaid program, which is the government's principal device for providing health care to the poor. For centuries, providing care for the indigent has been regarded in some sense as a government function. *See, e.g.,* Thomas Jefferson, *Notes on the State of Virginia* (1787) in JEFFERSON: WRITINGS 259 (Merrill D. Peterson, ed., 1984) (describing colonial poor laws). The purpose of the Medicaid expansion program was, ostensibly, to serve this function, not to enrich hospitals.

The statute itself says the purpose of the levy is to raise funds to "be used for the benefit of hospitals *for the purpose of providing health care for persons eligible for coverage* funded by the hospital assessment." 2013 Ariz. Legis. Serv. 1st Sp. Sess. Ch. 10 (HB 2010) § 44(3) (emphasis added). It also declares that the levy is "intended for the support and maintenance of a state government department and institution," and that it "provides funding to fulfill the intent and objective of [the expanded Medicaid program]. … These monies are integral to the support and maintenance of [the] program[] …" *Id.* § 45.

In other words, just as with the provision of street lights in *Okeson*—or the supervision and rehabilitation of criminals in *Wright v. McClain*, 835 F.2d 143 (6th Cir. 1987),[3] or the provision of voter education and political campaign programs in

[3] In *Wright*, the court found that a law requiring parolees to pay $5 per month into a fund for supervision and rehabilitation was a tax and not a fee, because the

Lavis v. Bayless, 233 F. Supp. 2d 1217, 1221 (D. Ariz. 2001),[4] or the funding of street repairs in Cattanach, 657 F.2d 128—the revenues from the assessment here are devoted to a traditional public purpose: compensating doctors for caring for impoverished patients. This is a general public function, and the levy used to pay for it should therefore be called what it is: a tax.

The court below held that the beneficiaries of the program are the hospitals, and therefore that the levy is more like a fee paid to the government for a specific service, as in Jachimek. *See* Biggs, 242 Ariz. 55 ¶ 11–12. But consider: the manufacturer of fire trucks is paid with tax monies when it delivers a new fire truck to the local fire department, but that does not change the fact that the purpose of tax revenue that funds fire departments is to fight fires—which is a longstanding public,

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revenues went to a general public purpose rather than a specific benefit: "The purposes of the charges are to defray the cost to the general public of monitoring and supervising the behavior of convicted offenders and to compensate, in some measure, victims of criminal misconduct. Those purposes relate directly to the general welfare of the citizens of Tennessee and the assessments to fund them are no less general revenue raising levies simply because they are dedicated to a particular aspect of the commonwealth." *Id*. at 145.

[4] In Lavis, the court found that a levy imposed on lobbyists was a tax, not a fee, even though it was "imposed on a narrow class," 233 F. Supp. 2d at 1222, and despite the fact that the funds were segregated—because the revenues were spent to "provide[] a general benefit to the public, of a sort often financed by a general tax," instead of "more narrow benefits to regulate companies or defray[] the … costs of regulation." *Id*. at 1220 (quotations omitted). The court emphasized that "[t]he fact that revenue is placed in a special fund is not a sufficient reason on its own to warrant characterizing an assessment as a fee. If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial." *Id*. at 1221. Because the revenues were devoted to programs meant to "alleviate" "specific public problems," *id.* at 1222, by funding voter education programs, providing public subsidies to political campaigns, and for other public purposes, the court found that the fee was actually a tax. *Id.* at 1221–22.

government function—and does not mean such taxes should be treated like fees. Likewise, the fact that hospitals receive payment from tax revenues in exchange for providing care to Medicaid recipients does not make the hospitals the *beneficiaries* of Medicaid. The purpose of the Medicaid tax, *as the statute itself declares*, is to pay hospitals "for the purpose of providing health care for persons eligible for coverage," 2013 Ariz. Legis. Serv. 1st Sp. Sess. Ch. 10 (HB 2010), § 44(3), which is a public, not a private, benefit.

C. The Medicaid Tax is Functioning Like a *Tax*.

The question whether A.R.S. § 36-2901.08 imposes the levy on hospitals as a condition of participation in the Medicaid program is a legal question, not a factual question, and should be answered by reference to the statute itself. *Barry v. School Dist. No. 210 (Phoenix Union High Sch.) of Maricopa Cnty.*, 105 Ariz. 139, 140–41 (1969).[5] This is not an as-applied challenge that depends on particular facts; it is a facial challenge to the statute. Thus, the Court must look "only [at] the text of the

[5] An analogy to cases involving the Special Laws Clause, ARIZ. CONST. art. IV, pt. 2, § 19, is instructive. In a case challenging the constitutionality of a law under that Clause, a court must determine whether the law grants benefits to a narrowly defined class of recipients, and whether that class is "elastic"—meaning, whether people can enter or leave the class of beneficiaries, or whether the class of beneficiaries is closed, so that nobody receiving the benefits can lose them, and nobody not getting them can later qualify for them. *See* *Long v. Napolitano*, 203 Ariz. 247, 253 ¶ 14 (App. 2002); *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 558 (1981). A court that sought to answer these legal questions through a *factual* finding—concluding, for example, that *at present* all the potential beneficiaries are receiving the benefits—would be committing error, because that is not the proper analysis. The proper analysis would be to look at the statute's language and determine *as a matter of law* whether the class of beneficiaries could change under the law—*i.e.*, whether the class is necessarily elastic or not.

statute itself, not its application to the particular circumstances." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). This point is important because the court below erroneously addressed this facial challenge by considering facts about how the law is being applied in practice.[6] As explained in the Petition, at 6–7, there is no necessary connection between the tax and any benefit the hospitals receive—and therefore the Court of Appeals' analogy to the fee in *Jachimek* must fail. The Medicaid levy is *not* paid in exchange for the right to participate in Medicaid.

If this Court *is* inclined to look to the factual circumstances of how A.R.S. § 36-2901.08 is being applied, those circumstances only prove further that it is a tax. For example, *Amicus* Green Valley Hospital opened its doors in May 2015, two years after the statute was enacted.[7] Starting last year, Green Valley Hospital was forced to pay the Medicaid tax, which costs it $600,000 each year.[8] Yet the hospital—located in Green Valley, Arizona, where the average age is 72[9]—overwhelmingly treats *Medicare* patients, which make up about 80 percent of its patients.[10] The

[6] 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. The question of whether the legislature was obligated to comply with Proposition 108, and whether the provider tax is a tax or a fee or assessment, are pure questions of law, not fact.

[7] Stephanie Innes, *Green Valley Hospital to file for Chapter 11 bankruptcy*, ARIZ. DAILY STAR (Mar 31, 2017).

[8] *Id*.

[9] City-Data.com: Green Valley, Arizona. The average Arizona resident age, by contrast, is 37. *Id.*

[10] Innes, *supra*.

hospital sees few *Medicaid* patients and receives vanishingly few *Medicaid* payments.[11] Yet it is still responsible for paying a full share of the Medicaid tax, as the statute prescribes.

Director Betlach and Intervenor-Defendants argue that the Medicaid tax is not a tax at all because many hospitals are benefitting from the sizeable federal subsidies that come with Medicaid expansion. *See* Betlach Resp. Pet. Rev. 11; Macias Resp. Pet. Rev. 1.[12] For those hospitals, the money coming in greatly exceeds the taxes they are paying. The Mayo Clinic, in fact, has received a special exemption from paying the tax at all, although it still collects millions annually in Medicaid subsidies—payments that are subsidized by taxes imposed upon hospitals like Green Valley. IR.54, Ex. 12 at 13. Under A.R.S. § 36-2901.08, Green Valley is forced to pay the Medicaid tax even though it barely treats any Medicaid patients, and its money is being used to benefit other hospitals. *See* Br. of *Amicus* Pacific Legal Found. at 3. That is the definition of a tax.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SECTION (C)(2) EXEMPTION APPLIES HERE

The Court of Appeals erred in holding that it was exempt from the supermajority requirement pursuant to Section (C)(2).

Proposition 108 creates a presumption: a supermajority is required whenever the legislature enacts a law to "provide[] for a net increase in state revenues," unless

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[11] *Id.* (only about seven percent of the hospital's patients are Medicaid patients).

[12] Director Betlach claims he "has applied the Hospital Assessment such that it is only imposed on hospitals that receive a net benefit." *Id.* at 11. The Green Valley example shows this is not true.

one of the narrowly defined exceptions applies. Proposition 108 defines "net increase in state revenues" expansively, to include not just the "*imposition* of any new state fee or assessment," but also "the *authorization* of any new administratively set fee." IR.54, Ex. 8, § (B)(1), (5) (emphasis supplied).

Section (C) of Prop 108 creates three narrow exceptions to the supermajority rule.[13] Relevant here is Section (C)(2), which Director Betlach, and the court below, believe applicable to A.R.S. § 36-2901.08. It holds 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." *Id.* § 22(C).

The central question here is whether "assessments … authorized by statute" refers to an assessment that the legislature *now* chooses to "authorize" by a bill that receives a bare majority—which is what the court below held—or whether it refers (in addition to statutes that predate Proposition 108) to new authorizations *that receive a supermajority*. The court below erred in embracing the first option—holding that any statute purporting to authorize a new assessment *by a bare majority* is exempt from the supermajority requirement merely because it takes the form of a statute. That interpretation broadens the Section (C)(2) exception so much that it makes Proposition 108 essentially ineffective. It also ignores important linguistic clues about Proposition 108's meaning. A better reading of the (C)(2) exception is that the

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[13] The first, Section (C)(1), deals with "effects of inflation … not caused by an affirmative act of the legislature," which is unremarkable and narrow. The third, Section (C)(3), clarifies what is not an increase in state revenues: "[t]axes, fees or assessments that are imposed by counties, cities, towns and other political subdivisions." IR.54, Ex. 8.

legislature may only "authorize" a new assessment *pursuant to Proposition 108's own authorization rule*: that is, by a supermajority. Anything less would be unfaithful to the voter's intent and lead to absurd results.

A. The (C)(2) Exception Applies Only to Assessments That Are "Authorized" By A Supermajority Vote.

As explained in the petition for review, Section (C)(2)'s exception for assessments "authorized by statute" applies to statutes that predate Proposition 108, and to new assessments *that are authorized by a supermajority.* This reading gives effect to all of Proposition 108's provisions, protects the voters' intent, and avoids the absurd result of enabling the legislature to evade the supermajority requirement by merely passing a statute—by a bare majority—for the purpose of evading Proposition 108.

First, a comprehensive reading of the exceptions in Section (C) of Proposition 108 makes clear that the two-thirds requirement was designed to control the legislature, not administrative agencies. Proposition 108 requires a two-thirds supermajority vote when (1) the *legislature* imposes a new tax,[14] fee or assessment[15]; or (2) the *legislature* authorizes a new administratively set fee,[16] or (3) the *legislature* increases a tax or the limit on an existing fee.[17] But it would be an unnecessary hassle to require the legislature to re-enact by a supermajority any *change* in an already existing fee. Thus the three exceptions hold that when state revenue increases by

[14] ARIZ. CONST. art. IX § 22(B)(1).
[15] *Id*. § 22(B)(5).
[16] *Id.*
[17] *Id.* § 22(B)(2), (4).

means *other than legislative action*—such as inflation,[18] or an act of a city,[19] or some action that a state administrator has already been authorized to do[20]—the two-thirds requirement does not apply. To put it differently, when the *legislature* acts to increase revenue, it must do so by two-thirds—but an administrator who has already been *authorized* by the legislature to act alters, increases, or implements a fee or assessment, a two-thirds vote is not needed.[21]

This reading of the (C)(2) exception reinforces Proposition 108's mandate that whenever there is an "affirmative act of the *legislature*" to raise revenue, it must do so by a supermajority (emphasis added). A state officer or agency cannot act to raise revenue until authorized to do so. But once authorized—in this case, by a supermajority vote of the legislature—the officer or agency is free to set, change, or implement assessments or fees without having to seek legislative approval for each new adjustment.

Of course, that means the (C)(2) exception cannot apply here, because this case does not involve an administrator's mere implementation of his existing authority; it is a challenge to legislative action: the adoption of A.R.S. § 36-2901.08, which purports to "authorize" an administrator to set a fee.

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[18] *Id*. § 22(C)(1).
[19] *Id*. § 22(C)(3).
[20] *Id*. § 22(C)(2).
[21] *Id*.

How does the legislature "authorize" an administrator to set a fee? To answer that, we look to Section (B)(5), which says that "the authorization of any new administratively set fee" can only be done by a two-thirds vote.[22] Because A.R.S. § 36-2901.08 did not receive that vote, it cannot "authorize" Director Betlach to act.

The court of appeals considered this a "contorted reading" of Section (C)(2), for two reasons: first, because (C)(2) does not explicitly say "that the initial statute authorizing the fee must be passed by a super majority *before* the (C)(2) exception applies," and second, because the levies specified in Section (C)(2) are "exempt from the entirety of Section 22 of the Arizona Constitution." *Biggs*, 242 Ariz. 55 ¶ 16 (emphasis in original). But these objections misunderstand how Proposition 108 works.

As to the first, while it is true that Section (C)(2) does not *explicitly* say a supermajority is required,[23] it does use the word "authoriz[e]," and Section (B)(5) also uses that word when it says the supermajority requirement *does* apply to "the authorization of *any new* administratively set fee." Where the same word is used in the same statute, it should be interpreted to mean the same thing. *Knoell Bros. Const., Inc. v. State Dep't of Revenue*, 132 Ariz. 169, 171 (App. 1982). It therefore makes more sense to understand "authorized" in Section (C)(2) as referring to a statute that is authorized as required by Section (B)(5) and the rest of Proposition 108.

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22 ARIZ. CONST. art. IX § 22(B)(5).

23 It also does not explicitly say that a bare majority is required; the Court of Appeals simply assumed that. The question here is, which assumption—bare majority or supermajority—makes better sense of Proposition 108's comprehensive scheme. Standard interpretive rules show that the supermajority requirement Petitioners advance makes better sense.

The decision below also ignores the word "any" in Section (B)(5). That Section says that "any new administratively set fee" must receive a supermajority vote. But the decision below holds that if the legislature adopts a statute by a bare majority that purports to allow an administrator to adopt that fee, such a statute is exempt from the supermajority requirement—in other words, some new fees are not subject to the requirement. But that is directly contrary to Section (B)(5)'s command that "*any* new" fee must satisfy the supermajority requirement.

Petitioners' interpretation is the only interpretation that makes sense of Proposition 108 as a whole and applies a consistent meaning throughout to the words "authorized" and "any."

As to the Court of Appeals' second basis for its holding, that, too, must fail. Section (B)(5) says the supermajority rule applies to "the *authorization* of any new administratively set fee." Authorizing a fee is not the same thing as setting or implementing a fee. That is why Section (C)(2) allows a state officer or agency to set or implement a fee or assessment that the legislature has *authorized*. The new Medicaid expansion tax was not *created* by Director Betlach; it could not have been. Instead, it was (purportedly) *authorized* by the legislature. Section (B)(5) explains *how* the legislature *authorizes* an administratively set fee: by a two-thirds supermajority. Because that did not happen, A.R.S. § 36-2901.08 violates Proposition 108. The Court of Appeals' illogical and non-contextual reading has the following result: under its holding, the supermajority requirement does *not* apply to "the authorization of any new administratively set fee"—contrary to Section (B)(5)'s plain language.

A hypothetical example makes the point clear: the legislature might adopt a law allowing the Arizona Department of Environmental Quality to impose a surcharge on electricity, but allowing Department officials to determine how much to charge. Because such a surcharge will result in a net increase in state revenues, that bill must receive a supermajority vote in the first instance, in order to *authorize* the Department to charge the fee. But if the Department later chooses to increase the fee, or to grant an exemption on certain days, the (C)(2) exception provides that no further authorization is required, because the fee is already authorized by state law, not subject to a formula, and is set by an officer or agency. To require subsequent reauthorization would be an unnecessary hassle. Proposition 108 is designed to protect taxpayers by requiring supermajority approval for the "authorization" of new taxes, fees, and assessments, but then allows for the subsequent administrative *implementation* of whatever fees have been constitutionally "authorized by statute."[24]

The Court of Appeals' illogical holding leads to a drastically different result. To use the electricity example, its holding would allow a bare majority to enact a bill allowing the Director to impose a surcharge whenever, on whomever, and in whatever amount she wished. This is an absurd result. The supermajority requirement applies not just to taxes, but to *all* legislation that results in a net increase in state revenues, whatever its form. The decision below allows the legislature to evade the supermajority requirement by simply passing, by a bare majority, any statute creating a fee or assessment.

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[24] ARIZ. CONST. art. IX § 22(C)(2).

Why does Section (C)(2) not explicitly *reiterate* the supermajority requirement when it refers to fees "authorized by statute"? Simple—because there is one other class of statutes that authorize fees or assessments but are exempt from the supermajority requirement: laws that predate Proposition 108. Because Proposition 108 was not intended to force the legislature to *reauthorize* already existing fees or assessments, Section (C)(2) simply declares that fees "authorized by statute"—either because they were already on the books or, because they satisfy the supermajority requirement for authorization—are exempt. For revenue bills postdating Proposition 108's enactment—such as A.R.S. § 36-2901.08— *authorization* requires a supermajority. The reason Section (C)(2) does not expressly re-state the supermajority requirement is because Proposition 108 assumes the reader has already read Section (B)(5), and seen that authorization of "*any* new administratively set fee" requires a two-thirds vote.

B. The Court of Appeals' Decision Leads to Absurd Results Contrary to the Voters' Intent.

Reading the narrow exemption in Section (C)(2), as the court below did, to mean that the legislature may impose a levy by simple majority, so long as it does so by statute, is illogical. Specifically, it commits the fallacy of begging the question, a point that was put well by the Wisconsin Supreme Court in another context, when it said that such an interpretation would be akin to telling the legislature it must not violate the supermajority requirement "'unless [it] pass[es] a statute for that purpose.' In other words, 'You shall not do the wrong, unless you choose to do it.'" *Pauly v. Keebler*, 185 N.W. 554, 556 (Wis. 1921) (citation omitted).

Taking the other (C)(2) factors into consideration, the consequences of the decision below are even more unreasonable, because it means that a *super*majority of the legislature must enact any tax bill that includes a *specific* calculation formula, but a *bare* majority can give an unelected administrator power to impose a levy of *unspecified* amount in *the first instance*.[25] This interpretation means that any tax law passed by elected legislators must receive a supermajority vote—but a bare majority can relinquish to an unaccountable, appointed bureaucrat the power to impose levies that "are not prescribed by [any] formula."[26] Thus any bill imposing, say, a levy of 2.175% on all electricity use in excess of 1100 kWh per month, would have to garner a supermajority—but a bill declaring that "the Department shall have authority to impose whatever fee it chooses on whatever it decides" would be effective upon a bare majority. Such an interpretation creates a perverse incentive for lawmakers to evade constitutional constraints and cede discretion to unaccountable administrators, thereby encouraging *less* responsible and *less* accountable lawmaking—the opposite of what voters intended.

The decision below therefore fails every test of statutory interpretation. It does not give effect to every word of Proposition 108. It frustrates, rather than advances,

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[25] The Medicaid tax also does not fit within the (C)(2) exception because, as set forth in the Petition for Review, it is "prescribed by formula, amount, or limit." Pet. Rev. 13–14. The statute *expressly* limits the Director's discretion in a number of ways. The assessment is explicitly made subject to approval by the federal government to prevent any reduction of federal funding; provides factors the Director should consider when determining modifications; requires legislative preapproval of the assessment and any alteration in the method of its calculation; and forbids assessments at all if federal assistance falls below a specified amount.

[26] ARIZ. CONST. art. IX § 22(C)(2).

the voters' intent. It reads the word "authorize" differently in different sections. It disregards the context—whereby all acts that provide for net increases in state revenues are presumptively covered by the supermajority requirement. It leads to absurd results and to consequences that are bad for public policy.

The purpose of this supermajority requirement 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 ¶ 24 (App. 2010) (citations and quotations omitted). The voter pamphlet accompanying the proposition made clear to voters that this restriction would apply regardless of the purpose to which the revenues would be put: the two-thirds vote requirement would "make it more difficult to raise taxes," voters were told, 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.54, Ex. 8 at 46, 49. It is plain that voters did not intend the outcome reached by the Court of Appeals here.

CONCLUSION

Petitioners respectfully request that this Court reverse the decision below and hold that the Medicaid expansion tax, which received only a bare majority of legislative votes instead of the constitutionally required two-thirds supermajority in both houses, is unconstitutional.

Respectfully submitted this 2nd day of October, 2017 by:

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