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

ANDY BIGGS, et al.,

Plaintiffs,

vs.

THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System,

Defendants,

EDMUNDO MACIAS, GARY GORHAM, DANIEL McCORMICK, TIM FERRELL,

Intervenor-Defendants.

Case No.: CV2013-011699

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Assigned to Hon. Katherine Cooper)

I. The legislature cannot be the final arbiter of whether the constitutional supermajority requirement applies to the provider tax.

A common theme throughout Defendant's and Intervenors' briefs is that this Court should obediently yield to the legislature's assertion that the provider tax was immune from the constitutional mandate that all taxes receive a supermajority vote in the legislature and, more broadly, seek a rule of deference that would deprive Proposition 108 of any meaningful strength.

First, Defendants and Intervenors both rely upon the presumption of constitutionality typically afforded to legislative enactments. Def. Resp. at 2; Int. Resp. at 2. But that presumption is misplaced here because "the legislature may not . . . be the final arbiter of whether the constitutional provision requiring a supermajority vote applies." *Biggs v. Cooper*, 236 Ariz. 415, 418, 341 P.3d 457, 460 (2014). When courts defer to legislative judgments it is because those judgments are subject to remedy through the legislative process. *See, e.g., Vong v. Aune*, 235 Ariz. 116, 119-20, 328 P.3d 1057, 1060-61 (App. 2014), *rev. denied* (Nov. 6, 2014), *cert. denied*, 135 S. Ct. 1845 (2015). But deference is inappropriate when the legislature violates the rules of that process and the constitutional limits on its own powers. *Cox v. Stults Eagle Drug Co.*, 42 Ariz. 1, 14, 21 P.2d 914, 918 (1933). As Plaintiffs have noted, the legislature's characterization of its *own* constitutional limits – especially when the limits in question were specifically enacted by voters to curb the legislature's authority – do not deserve the same deference given to laws enacted through the constitutionally prescribed legislative process. Such deference would make the legislature the sole judge of the extent of its own powers. Pls. MSJ at 12; Pls. Comb. Resp. at 1-3. "To determine whether a branch of state government has exceeded the powers granted by the Arizona Constitution" is a judicial question, not a question to be relegated to the legislature. *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (2006).

Next, Defendant claims (without foundation) that the hospitals "have no objection" to paying the tax because many benefit financially from the new Medicaid program, implying that the Constitution

should not apply as forcefully in such cases. Def. Resp. at 4. But the question in this case is not whether the provider tax is a good idea, but whether it is constitutional. Constitutional restrictions on legislative authority cannot be waived by the legislature itself, especially in collusion with special interests who benefit from the unconstitutional act. Indeed, Defendant's, Intervenors', and *Amici*'s insistence that hospitals benefit financially from the provider tax only proves the need for meaningful judicial enforcement of Proposition 108. The reason Arizona has an independent judiciary is to ensure lawmakers do not conspire with politically influential special interests to violate constitutional constraints—particularly in a case where the legislature seeks to delegate its taxing power to an administrative officer who is not accountable to voters.

It should go without saying that ensuring meaningful democratic control over the taxing power has historically been the single most important issue in constitutional government in the United States. It was precisely because taxes were being imposed in this country by a body of people unaccountable to the voters that the American Revolution began. Since then, the people have consistently sought to impose meaningful constitutional and democratic constraints on the taxing power. Proposition 108 does just that. Here, the legislature has attempted to evade that constitutional rule and give the power to impose taxes—and determine their amount—to a single official who is not answerable to the voters. That offends two centuries of American constitutional tradition. Whether indirect beneficiaries of that law "have no objection" to it is simply irrelevant.

Finally, Defendant and Intervenors urge this Court to create an "efficiency" exception to Proposition 108, arguing that because they believe the Medicaid expansion program has "fiscal and human benefits," the tax that funds it should be exempted from the supermajority requirement. Def. Resp. at 13 n.10. Intervenors advocate for a relaxed interpretation and deference to the legislature to allow for "flexibility under some circumstances" – presumably, those circumstances Intervenors or the bare legislative majority considers worthy. Int. Resp. at 10. But voters did not include an "efficiency" exception when they enacted Proposition 108. On the contrary, the supermajority requirement for acts

that raise revenue "make[s] it more *difficult* to raise taxes." (PSOF 12) (emphasis added). It does not make the legislature's ability to raise revenue more "flexible." Far from promoting efficiency, this extra check on the legislature's power is universal, tying the legislature's hands 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." (PSOF 12.) If the legislature could circumvent the requirement whenever it believes "the circumstances demand it," Int. Resp. at 10, this protection would be meaningless.

What the U.S. Supreme Court has said of the federal Constitution is equally true of the Arizona Constitution: "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983); *see also Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (Constitution "recognizes higher values than speed and efficiency…[and was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

II. The legislature cannot evade Proposition 108's supermajority requirement merely by labeling the mandatory, redistributive provider tax a "fee" or "assessment."

Defendant rightly concedes that Proposition 108 applies to *any* "net increase in state revenue," whether denominated a tax, fee, or assessment, but Defendant then argues that the nature of the provider tax is irrelevant to whether the supermajority requirement applies. Def. Resp. at 2-4. But because A.R.S. § 36-2901.08 is a *tax* and not a fee or assessment, the Subsection 2 exemption cannot apply in any event, and it is unnecessary for the Court to determine whether the additional factors in Subsection 2 apply.

The Subsection 2 exception for certain kinds of fees and assessments—which does not exempt taxes–pertains to adjustments by state officers or agencies that enjoy broad authority to collect levies. Once the legislature has granted an administrative agency power to impose a fee or assessment (and such grants must receive a supermajority vote in the first instance), subsequent implementations or changes to

those fees or assessments do not need further legislative action. Subsection 2 was *not* meant to allow the legislature to give an unelected official power to impose taxes in the first instance, as the provider tax does, and certainly not by a bare majority. Such an interpretation would render Proposition 108 worse than ineffectual: it would enable a bare legislative majority to hand over to an unelected administrative official the decision of whether and how much to tax—even though the legislature would need a supermajority to impose that same tax itself. Such a reading is irrational and contrary to precedent.

The legislature cannot delegate to another branch of government—least of all an unelected administrator—the quintessential legislative power: the power to tax. *See Southern Pacific Co. v. Cochise Cnty.*, 92 Ariz. 395, 404, 377 P.2d 770, 777 (1963) (legislature cannot "delegate to an administrative body or official not only the power to fix a rate of taxation according to a standard but also the power to prescribe the standard"). *See also* Ariz. Const. art. IV, Pt. 1, § 1 ("The legislative authority of the state shall be vested in a legislature, consisting of a senate and a house of representatives."); art. IX, § 1 ("The power of taxation shall never be surrendered, suspended or contracted away."). Indeed, the Arizona Supreme Court struck down a previous delegation of the power to set a Medicaid tax. *Cochise Cnty. v. Dandoy*, 116 Ariz. 53, 567 P.2d 1182 (1977) (en banc) (giving administrator power to set the amount of Medicaid appropriation with only a $60,000,000 ceiling is an unconstitutional delegation of the tax power). Thus, if the provider levy is a tax, the inquiry ends there, and the legislature's refusal to comply with the supermajority requirement renders it unconstitutional.

Defendant and Intervenors complain that Plaintiffs' cases differentiating between taxes, fees, and assessments do not involve Proposition 108, Def. Resp. at 4, or are from other states. Int. Resp. at 2-3. This is true – the question before this Court is one of first impression, and no Arizona court has construed the terms "taxes," "fees," and "assessments" in Proposition 108. Thus, the Court must look to

the relevant authority – Arizona case law construing the terms, and case law from other jurisdictions, including those construing Proposition 108's analogs.[1]

In Arizona, taxes are defined as levies that are mandatory and not calculated based on the service received, *Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 544-45, 68 P.2d 329, 334-35 (1937), whereas fees are voluntary and related to the benefit received by the paying entity, *id.* at 545, 68 P.2d at 335, and assessments are levied against property that is specially benefitted by the improvement they fund. *Barry v. School Dist. No. 210 of Maricopa Cnty.*, 105 Ariz. 139 140-41, 460 P.2d 634, 635-36 (1969). Arizona courts have employed the test articulated in *May v. McNally*, 203 Ariz. 425, 430-31, 55 P.3d 768, 773-74 (2002), to determine whether a levy is mandatory, redistributive, and not assessed based on a burden or benefit. The Florida Supreme Court has put the point especially well, holding that "the distinction between taxes and fees" is that in the case of fees, there is some "nexus" between the payment and benefits conferred, but no such nexus is present with taxes:

> [T]here is no requirement that taxes provide any specific benefit. . . . Fees, by contrast, must confer a special benefit on feepayers in a manner not shared by those not paying the fee. . . . [T]he power of . . . tax[ation] should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax.

Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 135 (Fla. 2000) (citations omitted).

Here, the levy is mandatory and there is no nexus between the payment and any direct benefits that might accrue to the payer. The levy is a tax, not a fee. Under A.R.S. § 36-2901.08, the payers are the hospitals. But the revenue is not raised to directly benefit or regulate the payers, but expressly for the, public, government function "of funding the nonfederal share of the costs" of Arizona's Medicaid expansion program. A.R.S. § 36-2901.08(A). There is no direct relationship between the charge and the purpose of the levy – in other words, the provider tax bears no relation to the tendering of Medicaid

[1] *Barber v. Ritter*, 196 P.3d 238, 249 (Colo. 2008) (surcharge not a "fee" immune from voter approval requirement because it does not "finance a particular service utilized by those who must pay the charge"); *City of San Buenaventura v. United Water Conservation Dist.*, 185 Cal. Rptr. 3d 207, 214 (2015) (revenue generating measure presumptively a tax unless shown to be otherwise).

services or the receipt of Medicaid reimbursements. *See* A.R.S. § 36-2901.08(B); 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68(b); (PSOF 22.)[2]

The cases on which Defendant and Intervenors rely to argue that the hospital tax is only a fee – *May, Stewart, Jachimek v. State*, 205 Ariz. 632, 74 P.3d 944 (App. 2003), and *Kyrene Sch. Dist. No. 28 v. City of Chandler*, 150 Ariz. 240, 722 P.2d 967 (App. 1986) – actually support Plaintiffs' position. Pls. Resp. at 5-7. These cases say that a levy is presumed to be a tax unless the payer receives a direct benefit in exchange for paying that levy. *See Stewart*, 49 Ariz. at 550-51, 68 P.2d at 336-37 (payment for water appropriation permit collected from applicants roughly proportional to the resources needed to investigate, process, and administer permits and determine water rights was a fee); *Kyrene School Dist.*, 150 Ariz. at 243-44, 722 P.2d at 970-71 (levy on payers "receiving the overall benefit of Chandler's water and wastewater systems in exchange for the system development charges," where "[t]he amount charged . . . is in reference to the cost of the systems providing the service" was a fee). *See also Bidart Bros.*, 73 F.3d 925 (levy on apple producers for the purpose of promoting apple sales was a fee); *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (1998) ("a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.'") (citations omitted). Defendants nevertheless try to argue that the hospital tax is a voluntary fee because "[h]ospitals voluntarily engage in the provision of medical care." Def. Resp. at 8. But the levy is not collected to regulate that activity. It is collected to fund Medicaid expansion. A true *fee* must have a nexus: it must relate both in nature and amount to "'to the service to be performed [by the government]' on the payer's behalf." *Jachimek*, 205 Ariz. at 637, 74 P.3d at 949 (citation omitted). Here, the amount collected does not – and by law *cannot* – bear any relation to the activity of providing Medicaid services. Intervenors argue that the federal waiver from the federal broad-based and uniformity requirements weighs in favor of construing the provider tax to be a fee, but the federal government

[2] Defendant argues that the provider tax "relates to the services provided" and is therefore a fee. Def. Resp. at 8. But the provider tax is collected "on hospital *revenues*, discharges or bed days," A.R.S. § 36-2901.08(A) (emphasis added), all related to income, *not* to Medicaid payments or services.

granted that waiver because the provider tax still retained the necessary qualities of a "tax program"; namely, that "the net impact of the [state's] tax is generally redistributive and that the amount of the tax is not directly correlated to Medicaid payments." (PSOF 22).

Like a tax – but unlike a fee or assessment – A.R.S. § 36-2901.08 is a mandatory, redistributive levy. It is collected without regard to a hospital's decision to accept Medicaid reimbursements and without a relationship to the provision of Medicaid services or acceptance of reimbursements. *See* A.R.S. § 36-2901.08(B); 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68(b); (PSOF 9, 22.) The funds are collected for the public purpose "of funding the nonfederal share of the costs" of Arizona's Medicaid expansion program for patients. A.R.S. § 36-2901.08(A). Such a program is a typical example of the "public purposes" funded by taxes. The payers receive no special benefit, permit, license, or asset in exchange for paying the levy. The hospitals must pay it based on revenue or the number of beds, and not for the purpose of regulating the provision of services. It is a run-of-the-mill tax, not a fee.

Intervenors argue that because hospitals are required by law to stabilize emergency room patients regardless of their ability to pay, the expanded Medicaid program – funded by the provider tax – benefits hospitals rather than patients, and consequently is a fee. But again, any such benefit is at best indirect, and is not inclusive of all payers. A.R.S. § 36-2901.08 imposes a redistributive tax regardless of whether the hospital accepts Medicaid. Moreover, uncompensated Medicaid only accounts for a fraction of money loss to hospitals – they also lose money due to the provision of charity care, for example—for which the hospitals expect no payment – and bad debt, which constitutes services for which hospitals expected payment but received none, and it does not include Medicaid payments. (Resp. to Def. SOF, PSSOF 4.) Meanwhile, the cost of Medicaid services is often calculated at an inflated price, so losses from uncompensated Medicaid could actually be *exacerbated* by expanding Medicaid eligibility. *Id.*

Defendants' suggestion that A.R.S. § 36-2901.08's unconstitutionality is cured by Defendant Betlach's application and enforcement of the tax—which Defendant claims he "crafted . . . with a focus on minimizing hospital losses across the system," Def. Resp. at 6—is also unpersuasive. Defendant's

application of the hospital levy is entirely irrelevant to whether the law purporting to *authorize* that tax is constitutional.[3] "While administrative interpretation may save an ambiguous statute, it cannot cure a facially invalid statute." *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5, 32 (2001). *C.f. Hernandez v. Lynch*, 216 Ariz. 469, 472, 167 P.3d 1264, 1267 (App. 2007) ("A facial constitutional challenge requires an inquiry into whether the law itself is unconstitutional, not into whether the application of the law violates a particular individual's rights.") (citations omitted). *The only question before this Court is whether the legislative majority's adoption of the tax under A.R.S. § 36-2901.08 is constitutional.*

Nor does the fact that not every Arizonan receives Medicaid render the purpose of the tax any less a "general public purpose" of the sort funded by taxes. *Jachimek*, 205 Ariz. at 635, 74 P.3d at 947. Not everyone receives benefits from public schools and police departments, but they are "public purposes" funded by taxes, not special benefits paid for by fees. Louisiana's levy on insurers to pay a percentage of premiums for the Firefighters' Retirement System was held to be a tax subject to that state's constitutional supermajority requirement even though the levy only directly benefitted firefighters, because the state Supreme Court found that strengthening the Retirement System could improve the quality of public fire protection. *Audubon Ins. Co.*, 434 So. 2d 1072, 1074-75 (La. 1983).The bottom line is simple: the provider tax is not a fee, because it does not have the constitutionally required "nexus" to special benefits conferred by the state in exchange for payment. Instead, it is a tax taken to fund public services—the expanded Medicaid program. The Subsection 2 exemption cannot apply.

III. The legislature cannot evade Proposition 108's supermajority requirement by improperly delegating its revenue-raising authority to Defendant Betlach.

But even if the provider levy is an assessment or a fee, as Defendant and Intervenors claim, it would still not be exempt from Proposition 108 unless it met *all* of the remaining factors of the

[3] Had the provider levy been properly authorized by a legislative supermajority, Defendant Betlach's subsequent *application* of the levy – including "amend[ing] the assessment twice since its adoption," Def. Resp. at 12, would be an exempt act under Subsection 2. But the legislature did not constitutionally

Subsection 2 exception. But Defendant Betlach's authority to collect and enforce the provider tax was not "authorized by statute" as constitutionally required, nor is it free from limits. Subsection 2 exempts from the supermajority requirement administrative revenue raising actions – "[f]ees and assessments . . . set by a state officer or agency" – that have been constitutionally authorized by the legislature – "authorized by statute" – but conferred to the administrator's discretion – "not prescribed by formula, amount or limit." Ariz. Const. art. IX, § 22(C)(2). Thus, Defendant's acts to "establish modifications or exemptions" to the levy, Def. Resp. at 7, and "amend[] the assessment twice since its adoption," Def. Resp. at 12, are actions that would have been exempted by Subsection 2 *if the initial establishment of the levy had been "authorized" by a supermajority*. Otherwise, a simple majority could ignore Proposition 108's supermajority requirement by voting to cede the taxing power to unaccountable administrators. It is illogical to assume that voters intended to allow the legislature to empower an unelected official to do what the legislative majority itself cannot do: tax without supermajority authorization.

The proper reading of Subsection 2 is that the legislature may, *by supermajority vote*, "authorize" an administrative agency to impose an assessment, and leave it to the agency to fill in the details or modify the amount later. This interpretation gives effect to all the words in the law, is consistent with the purpose of Proposition 108, and creates no loopholes that the legislature might use to evade its obligations. It is, despite Defendant's claims, Def. Resp. at 11-13, perfectly consistent with the other language of Proposition 108, which requires a supermajority for "*authorization* of any new administratively set fee" but not for the subsequent administrative setting, modifying, or amending of that fee. Ariz. Const. art. IX, § 22(B)(5) (emphasis added).

IV. The legislature cannot evade Proposition 108's supermajority requirement by ignoring the real limits that constrain Defendant Betlach's authority to collect the tax.

Defendant and Intervenors argue that Defendant's authority to set the provider tax is not "prescribed by formula, amount or limit," yet they both ignore the real limits placed on Defendant and the list of factors with which he must comply in setting the tax—factors listed on page 7 of Defendant's

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"authorize" Defendant to act as required by Subsection 2.

Motion for Summary Judgment—which amount to a formula. The detailed statutory restrictions on Defendant's determination of the amount to be required include getting federal approval—but approval can only be given if the tax is (1) collected without holding providers harmless from the burden of the tax and generally redistributive 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68; (2) collected regardless of whether the hospitals accept Medicaid payments, 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68; (3) no more than six percent of a hospital's net patient revenues, 42 C.F.R. § 433.68(f)(3)(i); and generating revenue of no more than 25% of the state's Medicaid share. *Id.* This is a formula, amount, and limit.

In footnote 12 of his response, Defendant gives a hypothetical example of a "limit" that would render Subsection 2 inapplicable: if a law were to provide that "the director shall impose on each hospital a fee of no more than $10,000," he notes, then the statute would impose a "limit" that would take the provider tax outside the Subsection 2 exemption. Def. Resp. at 14 n.12. But the law includes a provision that does essentially that: federal law, which is incorporated into Arizona's Medicaid expansion law by the requirement of federal approval, provides that Defendant Betlach may impose on each hospital a levy of no more than six percent of a hospital's net patient revenues. 42 C.F.R. § 433.68(f)(3)(i). Defendant therefore essentially concedes that there are "limits" on his discretion that render Subsection 2 inapplicable.

For the reasons stated above and in their original Motion, Plaintiffs' Motion for Summary Judgment should be GRANTED.

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Respectfully submitted,

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