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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' COMBINED RESPONSE TO DEFENDANT'S AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

(Assigned to Hon. Katherine Cooper)

This case is about whether the tax mechanism established to fund Arizona's Medicaid expansion is constitutional. It is not about the merits of transforming Arizona's Medicaid program – and significantly expanding the state's financial obligations – in exchange for a larger share of temporary federal matching funds. However, the outcome of this case will have far-reaching effects beyond Medicaid. If Defendant and Intervenors are successful in dramatically expanding the exceptions to Proposition 108, they will create a pathway for lawmakers to evade constitutional protections by simply handing over the taxing power to unaccountable administrators, who may then impose exactions on the citizenry without the checks-and-balances that voters intended Proposition 108 to strengthen.

I. This Court should not exempt A.R.S. § 36-2901.08 from Proposition 108's robust protections to award deference to the legislature

As a threshold matter, despite Proposition 108's plain language, both Defendant and Intervenors ask this Court to disregard robust constitutional protections and defer to the legislature – the very body the voters intended to constrain when they enacted Proposition 108.

First, Defendant Betlach suggests that the provider tax should be exempt from the supermajority requirement in order "to promote effective government administration and pragmatic problem solving." Def. MSJ at 10. 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." (PSOF 12.)

Defendant suggests that this Court should "not mechanically appl[y] such provisions," and cites what it characterizes as instances of Arizona courts constructing opportunistic rules so as to "allow[]

government to operate efficiently." Def. MSJ at 11. Whatever the merits of these arguments, these examples mostly 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.

Intervenors, too, urge this Court to defer to the legislature's interpretation of its own powers under Proposition 108, because "the legislature has regularly and repeatedly enacted statutes establishing fees and/or assessments without requiring a supermajority." Int. MSJ at 14. To support that statement, Intervenors rely on an exhibit recycled from Defendant's Petition for Review during the first round of this litigation, purporting to show that "no fewer than 89 fees or other 'net increase[s] in state revenues' were passed by the Arizona Legislature without Proposition 108 language." (ISOF 41; DSOF 18.)

As Plaintiffs previously demonstrated, that exhibit is inaccurate – 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 merely assert should have been subject to Proposition 108. (*See* PSSOF 1.) In reality, well over *half* of those bills were passed by the required two-thirds supermajority. (*See* PSSOF 1.) But in any event, this list is irrelevant to the question of whether the provider tax at issue here violates Proposition 108. At best, Intervenors simply demonstrate that unconstitutional legislation has gone unchallenged in the past, but as Judge Fisher of the Ninth Circuit recently observed, "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). Previous violations only prove the

need for this Court's independent judgment and guidance for Proposition 108's future application.

At an earlier stage of this case, the Supreme Court held that "the legislature may not, by majority vote, be the final arbiter of whether the constitutional provision requiring a supermajority vote applies." *Biggs v. Cooper*, 236 Ariz. 415, 341 P.3d 457, 460 (2014). Courts often give weight to legislative construction of *statutes*, but cannot defer to the legislature's characterization of its *own constitutional limitations*. There is "an inherent danger that legislative bodies might circumvent constitutional constraints" by levying taxes while calling them something else. *Okeson v. City of Seattle*, 78 P.3d 1279, 1286 (Wash. 2003). *See also Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160 (Tenn. Ct. App. 2007) (measure is a tax despite its designation); *Marshall v. Northern Va. Transp. Auth.*, 657 S.E.2d 71, 77 (Va. 2008) (same). Therefore, this Court must determine whether Proposition 108 applies to the hospital tax based on its independent analysis of that tax's attributes and functions.

Proposition 108 requires a supermajority for taxes, fees, and assessments, except for a narrowly defined class of fees and assessments identified in the Subsection 2 exception. To fall within that exception, the levy must possess *all* of the following: it must be (1) a fee or assessment that (2) was not "authorized by statute" in the sense that the exception requires, and (3) is not set by a state officer or agency. Ariz. Const. art. IX § 22(C)(2). Missing just one places a challenged levy outside the narrow exception and requires passage by a supermajority. But here, the provider tax fails *all* three factors.

II. A.R.S. § 36-2901.08 is not exempt from the supermajority requirement because it establishes a tax, not a fee or assessment

A. The provider tax is a tax because it is mandatory, is not given in exchange for a benefit, and is not designed to regulate hospitals

Because A.R.S. § 36-2901.08 is a broad, redistributive tax, not a fee or assessment that is

required in exchange for some particular privilege or benefit, it fails the first prong of the Subsection 2 exception and was required to pass by a supermajority in both houses of the legislature.

Intervenors claim that A.R.S. § 36-2901.08 is subject to the supermajority requirement *only* if it establishes a tax. Int. MSJ at 7. This is false, as Proposition 108 applies broadly to any "act that provides for a net increase in state revenues," explicitly including fees and assessments; as well as changes that result in *de facto* levy increases, such as the elimination of exemptions from taxes, fees, or assessments. Ariz. Const. art. IX, § 22(B). Thus, even if this Court were to hold that A.R.S. § 36-2901.08 establishes a fee or assessment, it would still be subject to Proposition 108's supermajority requirement unless it meets *both* of Subsection 2's other elements.

But the provider tax is a tax, not a fee. It is "imposed upon the [hospitals] paying it by mandate of the public authorities, without [their] being consulted in regard to its necessity, or having any option as to its payment," and the levy's "amount is not determined by any reference to the [Medicaid reimbursements] which [the hospital] receives from the government." *See Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 544-45, 68 P.2d 329, 334-35 (1937).

Courts in Arizona and other states have defined a tax as a forced charge, imposition, or contribution that is not dependent upon assent of the person or entity taxed. *Arizona Dept. of Revenue v. Transamerica Title Ins. Co.*, 124 Ariz. 417, 420, 604 P.2d 1128, 1131 (1979); *Hunt v. Callaghan*, 32 Ariz. 235, 257 P. 648 (1927); *McRae v. Cochise Cnty.*, 5 Ariz. 26, 33, 44 P. 299, 300 (1896). *See also Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal.4th 866, 874, 937 P.2d 1350 (1997); *Bolt v.*

Lansing, 587 N.W.2d 264, 269-70 (1998).[1]

Thus the ten percent surcharge on criminal and civil fines in *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002), was a tax, not a fee, because "[i]t was imposed by citizen initiative," rather than by an agency; it was imposed "on a broad range of payers" (people paying civil and criminal fines); and it was imposed "for a public purpose" (to provide public financing to qualifying campaigns). *Id*. at 431, 55 P.3d at 774. So, too, in *Lavis v. Bayless*, 233 F. Supp.2d 1217, 1222 (D. Ariz. 2001), the levy imposed on lobbyists was a tax even though it was "imposed on a narrow class," because its "purpose" was "to raise revenue for an important public benefit."

Intervenors rely on *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), to argue that the hospital levy is a fee rather than a tax. *See* Int. MSJ at 8. But those cases actually support *Plaintiffs'* position.

The pawnbroker transaction payment in *Jachimek* was a fee and not a tax because it was established by a City ordinance, not state statute, and levied only on people who elect to conduct pawnbroker transactions for the purpose of regulating the pawn industry. In other words, "the amount paid per transaction 'bear[s] some reasonable relation to the service to be performed' on the payer's behalf," 205 Ariz. at 637, 74 P.3d at 949 (*quoting Stewart*, 49 Ariz. at 548, 68 P.2d at 336), and is used for "the *regulation* . . . of the parties upon whom the assessment is imposed." *Id.* (*quoting May*, 203 Ariz. at 431, 55 P.3d at 774) (emphasis added).

[1] California courts interpreting that state's analogue to Proposition 108 have ruled that a revenue generating measure is presumptively a tax unless it is shown to be otherwise. *City of San Buenaventura v. United Water Conservation Dist*., 235 Cal. App. 4th 228, 239 (2015). The structure of Proposition 108, which requires a supermajority for all measures that increase revenue except for a narrowly defined class of fees, counsels in favor of adopting the same presumption.

Likewise, in *Stewart*, 49 Ariz. at 550-51, 68 P.2d at 336-37, the Supreme Court held that a payment to receive a water appropriation permit was a fee and not a tax, because it is collected from applicants roughly proportional to the resources needed to investigate, process, and administer permits and determine water rights. And the development charges on new buildings in *Kyrene School Dist.* were fees and not taxes because payers were "receiving the overall benefit of Chandler's water and wastewater systems in exchange for the system development charges," and "[t]he amount charged . . . is in reference to the cost of the systems providing the service"—that service being "the capital cost of the wastewater and water systems spread among its users." 150 Ariz. at 243-44, 722 P.2d at 970-71.

The provider tax at issue here is not like the fees and assessments in those cases. It is *not* levied for the purpose of regulating hospitals. Nor is it contingent upon any voluntary decision by a hospital to accept Medicaid reimbursements. Finally, unlike the fee cases, the provider tax bears *no relation* to the tendering of Medicaid services or receipt of Medicaid reimbursements. Rather, it is a *mandatory* levy based "on hospital revenues, discharges or bed days." A.R.S. § 36-2901.08(A). Indeed, federal and state law *expressly prohibit* a correlation between the provider tax and the Medicaid program. *See* A.R.S. § 36-2901.08(B); 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68(b). The federal government itself considers the levy to be a "tax program" and conditions the disbursement of federal funds on the levy being both "generally redistributive" and "not directly correlated to Medicaid payments." (PSOF 22.) The provider tax, like Intervenors' other tax examples, is imposed on all hospitals regardless of whether they accept Medicaid payments or will benefit from Medicaid expansion, and it is not calculated based on the amount of Medicaid payments they receive. (PSOF 9.) Instead, it is "based on property or income" – here, hospital revenues – which is typical of taxes, *Stewart*, 49 Ariz. at 544-45, 68 P.2d at 334-35, rather

than fees. In short, the tax here is imposed for the express, public, government function "of funding the nonfederal share of the costs" of Arizona's Medicaid expansion program. This is characteristic of a tax, not a fee.[2] A.R.S. § 36-2901.08(A).

The hospital levy at issue here was established by the state legislature when it enacted A.R.S. § 36-2901.08, not by Defendant Betlach, who was delegated the authority to *subsequently set the amount* of the tax.[3] It is imposed on a wide range of providers, regardless of whether they accept Medicaid payments or benefit from the new Medicaid program. And it is assessed for the public 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). The hospitals are taxed by the mandate of public authorities, without their being consulted or having any option or choice as to its payment, and its amount is not determined by reference to any services that they receive from the government in exchange. *Cf. Stewart*, 49 Ariz. at 544-45, 68 P.2d at 334-35. It is therefore a tax.

B. Defendant's and Intervenors' efforts to label the tax as a fee or assessment must fail

Both Defendant and Intervenors try to characterize the mandatory, redistributive provider tax as a levy that falls outside the broad borders of Proposition 108. First, Defendant argues that it does not "increase state revenue" but merely raises money to "fulfill the state contribution requirement" for

[2] Intervenors argue that the public purpose of providing Medicaid coverage to patients is somehow transformed into a private purpose to benefit the hospitals because the revenues from the hospital tax are "deposited into a specially-created fund, and do not revert to the state general fund." Int. MSJ at 11. But while depositing revenues directly into the general fund can be evidence that the levy is collected for a public benefit and is a tax, revenues deposited into special funds are still taxes if, as here, they are "expended to provide 'a general benefit to the public.'" *See Bidart Bros.*, 73 F.3d at 932; *San Juan Cellular*, 967 F.2d at 685.

[3] Although the provider levy at issue here was established by the legislature, the "fact that an assessment is imposed by a non-legislative body is not dispositive" in determining whether it is a tax. *Bidart Bros.*, 73 F.3d at 931. Thus in *Indiana Waste Sys., Inc. v. County of Porter*, 787 F. Supp. 859, 864-65 (N.D. Ind. 1992), a fee for landfills imposed by county board of health was found to be a tax, and in *Butler v. St. of Maine Supreme Judicial Court*, 767 F. Supp. 17, 19 (D. Me. 1991), a jury fee imposed pursuant to administrative order by the Maine Supreme Court was found to be a tax.

Medicaid expansion. Def MSJ at 12. This argument fails for several reasons.

First, a measure generates a "net increase in state revenues" if it raises money, regardless of whether that money is to be used now or later. The aim of Proposition 108 is "to prevent the legislature from enacting without a super-majority vote any statute that increases the overall burden on the tax and fee paying public." *Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 225 Ariz. 358, 364, 238 P.3d 626, 632 (App. 2010) (citations and quotations omitted). Even if the funds are collected to fulfill a federally imposed requirement, they still increase revenues and are subject to Proposition 108, which includes no exception for laws whereby the state "serv[es] as a pass-through for the monies." Def. MSJ at 12. On the contrary, the monies "pass through" the state only because the state taxes those monies and then spends them. In that sense, all taxes "pass" money "through."

But in any event, there is no such "state contribution *requirement*," as the decision to expand the state's Medicaid program is wholly voluntary. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607-08 (2012). Indeed, Arizona did not choose to join the Medicaid program at all until 17 years after that program was established. Pub. L. 89-97, 79 Stat. 286 (1965); Ariz. Sess. Laws Ch. 1 (1981) (4th Special Session). Past decisions to expand the program have plunged the state into dire financial circumstances. (PSOF 5-7.) It was because the "explosive growth" of that program far exceeded expectations that the Court of Appeals previously upheld the State's suspension of future expanded enrollment when funding was unavailable. *See Fogliano v. Brain*, 229 Ariz. 12, 19, 270 P.3d 839, 846 (App. 2011). This is precisely why the voters passed Proposition 108, which they intended to apply robustly, even when responding to "federal requirements" or "a great need for the poor." (PSOF 12.)

Defendant also 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. Def MSJ at 10. But Defendant ignores at least one key difference between university tuition and the provider tax – university tuition is a *fee*, not a tax, 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, e.g., Weller v. City of Phoenix*, 39 Ariz. 148, 151-52, 4 P.2d 665, 666-67 (1931) (taxes are levied "regardless of the direct benefit accruing to the person or property taxed").

III. A.R.S. § 36-2901.08 is not exempt from the supermajority requirement because Defendant Betlach's authority to set the levy was not properly authorized by the legislature

The parties expend a great deal of time in their briefs arguing that the provider levy is an exempt fee rather than a tax, but even if A.R.S. § 36-2901.08 established a fee or assessment, Defendant Betlach's authority to set and collect the levy is not immunized from the supermajority requirement because it was not first authorized by the legislature as constitutionally required. Ariz. Const. art. IX, § 22(C)(2).

Defendants correctly state that courts must interpret constitutional provisions to "give each word meaning," Def. MSJ at 5-6 (*citing Adams v. Bolin*, 74 Ariz. 269, 275-76, 247 P.2d 617, 621-22 (1952), but that principle once again supports *Plaintiffs'* argument. Were this Court to interpret Subsection 2 as Defendants and Intervenors urge, that ruling would render Proposition 108 toothless and circumvent "the intent of the electorate that adopted it." Def. MSJ at 6 (*quoting Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994)).

Applying Defendant's standard of construction – that each word of a constitutional provision must be given meaning – the provider tax cannot stand because it was not properly "authorized by statute." Ariz. Const. art. IX, § 22(C)(2). A correct interpretation of this phrase must give meaning to the word "authorized," and Proposition 108 explains how new taxes, fees, and assessments must be approved: by a legislative supermajority. Anything short of that requirement is not "authorization," but an invalid attempt to enact a tax or fee without sufficient votes. Only when a levy has been *properly* authorized by the required two-thirds vote may an officer be given power to "set" the "formula, amount or limit" without the subsequent legislative supermajority approval. Ariz. Const. art. IX § 22(C)(2).[4]

For example, the legislature might pass a bill imposing a new levy on people using electricity, but leave it to the Director of the Department of Environmental Quality to determine how much the levy should be. That bill would have to satisfy the supermajority requirement. Once it was enacted, however, the Director's subsequent decisions setting the amount of the authorized levy would not require any further action by the legislature. Proposition 108 requires supermajority approval for the "authorization" of new taxes, fees, and assessments, but it requires no legislative approval of subsequent administrative *implementation* of what the legislature has constitutionally "authorized by statute."

Defendant and Intervenors interpret Subsection 2 differently. In their view, Subsection 2's "authorized by statute" means a bill passed by a bare majority. Thus, to use the electricity example given above, Defendants' interpretation would mean that a bare majority could enact a bill allowing the Director to impose a tax on electricity. But this is an absurd result. It would mean that a supermajority

[4] Indeed, Proposition 108 even 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.

of the legislature must enact any tax bill that specifies a clear calculation formula—but a bare majority is sufficient to give an administrative official power to impose a levy *in the first place*. They contend that not only the *implementation* of a levy, but the very *imposition* of it, may be delegated to an administrator by a bare majority.

This conflicts with the purposes of Proposition 108 and would encourage *less* responsible and accountable lawmaking, the opposite of what voters intended. This interpretation would mean that any tax bill would have to receive a supermajority vote—but a bare majority would suffice to relinquish to an unaccountable, appointed administrator the power to impose levies that "are not prescribed by any formula"! Defendant's interpretation would obviously benefit Defendant, but it would create a perverse incentive for lawmakers to evade constitutional constraints by encouraging the legislature to cede discretion to unaccountable administrators.

In sum, Defendant's interpretation is inconsistent with the language and purpose of Proposition 108. As the Wisconsin Supreme Court once put the point in another context, such an interpretation would be akin to saying to the legislature that it may not violate the supermajority requirement "'unless you pass 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).

Defendant's interpretation fails his own standard of construction, because it renders the word "authorized" a nullity. Subsection 2 exempts "[f]ees and assessments that are *authorized by statute*, but are not prescribed by formula, amount or limit, *and are set by a state officer or agency*." Ariz. Const. art. IX § 22(C)(2) (emphasis added). To permit a new levy to circumvent Proposition 108 simply because the statute was "charging the . . . Director with the responsibility of establishing" it, Def. MSJ at 7-8, would

render meaningless the requirement that the levy be "authorized," and would mean that the exemption would apply to assessments that are simply *created* by statute.

IV. Defendant's authority under A.R.S. § 36-2901.08 is not exempt from the supermajority requirement because it is circumscribed by state and federal law.

Finally, Defendant argues that the levy should be allowed to circumvent Proposition 108 because "the Director is not bound to a formula" in setting the amount of the tax. Def. MSJ at 8 n.5. To make this argument, Defendant relies on Plaintiffs' allegations that A.R.S. § 36-2901.08 improperly delegated to Defendant legislative powers in violation of Arizona's constitutional separation-of-powers doctrine. But the question of whether an administrator is improperly exercising *legislative* powers for purposes of complying with the Constitution's separation-of-powers requirements is different from whether that administrator's authority is constrained for purposes of Proposition 108. As Defendant himself notes, only the latter question is currently before this Court. Def MSJ at 2.

While H.B. 2010 delegates to Defendant a troubling amount of authority to "establish, administer and collect" the provider tax and to set the "method for determining the assessment, the amount or rate of the assessment, and modifications or exemptions from the assessment," the levy is nevertheless "prescribed by formula, amount [and] limit" by state and federal law as far as Proposition 108's Subsection 2 is concerned. Ariz. Const. art. IX § 22(C); (PSOF 13). Indeed, the state's funding depends on Defendant remaining within the confines of those limits. Under federal law – which is incorporated by state law, A.R.S. § 36-2901.08(B) – Defendant Betlach must follow a *formula* that is "generally redistributive," 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68; (PSOF 22); must collect an *amount* that is no more than six percent of a hospital's net patient revenues, and the revenue collected by the tax must be

no more than 25% of the state's Medicaid share, 42 C.F.R. § 433.68(f)(3)(i); and he must abide by *limits* such as not holding providers harmless and not correlating the amount of the tax to a hospital's Medicaid payments. 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68; (PSOF 22). These are not merely illusory restrictions, but genuine limits that restrict Defendant's discretion to set the tax and jeopardize the state's receipt of federal funds if Defendant fails to operate within these strict constraints. Defendant himself admits to as much, noting that A.R.S. § 36-2901.08 even requires him to "present the methodology to the joint legislative budget committee for review" and prohibits him from collecting the tax when federal funding drops below a certain level. *See* Def. MSJ at 7. Thus, the tax is "prescribed by a formula" for purposes of Subsection 2.

V. CONCLUSION

Defendant's and Intervenors' construction of Proposition 108's limited Subsection 2 exception would do long-term damage to the Constitution, creating a large loophole in the name of political expediency and rendering this important voter-enacted provision toothless. For the reasons stated above, Defendant's and Intervenors' Motions for Summary Judgment should be DENIED.

DATED: June 5, 2015

Respectfully submitted,

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