SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011699 08/26/2015

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
C. Keller
Deputy

ANDY BIGGS, et al.

CHRISTINA M SANDEFUR

v.

JANICE K BREWER, et al.

TIMOTHY M HOGAN
ELLEN SUE KATZ
KORY A LANGHOFER
DOUGLAS C NORTHUP

RULING

In 2013, the state legislature passed, and the governor signed into law, House Bill 2010,[1] which increased the number of people eligible for health care insurance benefits provided to low-income earners by the Arizona Health Care Cost Containment System. That act also granted AHCCCS authority to require most Arizona hospitals (and only hospitals) to pay into a dedicated account that was established to assist with the funding of those benefits, while prohibiting the hospitals from passing along the expense attributable to those payments, directly or indirectly, as charges to others.

The plaintiffs in this lawsuit (36 members of the legislature who voted against HB 2010) maintain that the hospital payments are a tax, and as such, HB 2010 is unconstitutional because it failed to receive the two-thirds supermajority vote from each house of the legislature that article IX, section 22 of the state constitution requires, and because HB 2010 otherwise fails to qualify for one of the exceptions that section recognizes. The defendant (Thomas Betlach, who as the

[1] Ariz. Sess. Laws 2013, 1st Spec. Sess., ch. 10, §5.

director of AHCCCS, is responsible for implementing HB 2010) and the intervenor-defendants (four Arizona citizens who participate in the AHCCCS program[2]) maintain that the hospital payments are not a tax but, instead, an assessment that does qualify as an exception recognized by section 22, and thus, the two-thirds supermajority requirement does not apply to HB 2010.

Given the plain language of article IX, section 22, and applying Arizona case law authority to the facts, as they have been established by the record presented here, warrants the conclusion that HB 2010 is not unconstitutional.[3]

The Evolution of HB 2010.

AHCCCS, which is Arizona's Medicaid program, provides health care insurance benefits to qualified persons who earn low incomes. The program is funded jointly by the federal government and the state. Because of a ballot measure that voters approved in 2000 (Proposition 204), the state became obligated to provide health care insurance to persons whose incomes do not exceed 100 percent of the federal poverty guidelines.[4] Funding made available by the federal government when, in 2010, Congress passed the Patient Protection and Affordable Care Act, allowed Arizona an opportunity to make AHCCCS coverage available to hundreds of thousands not previously eligible.[5] Thus, efforts were started in the legislature to pass HB 2010, which extends coverage to persons eligible under the federal Medicaid Act whose household modified

[2] Motion to Intervene as Defendants (4/7/15) at 1.

[3] Although plaintiffs are seeking a determination that only one section of HB 2010 is unconstitutional, namely the part of section 5 that is codified as A.R.S. §36-2901.08 [see Pltfs.' Motion at 2], for ease of reference, this ruling refers throughout to the constitutionality of HB 2010.

In reaching its decision, the court has considered (i) plaintiffs' motion for summary judgment and accompanying statement of facts (both filed 5/14/15), (ii) defendant's motion for summary judgment and accompanying statement of facts (both filed 5/15/15), (iii) intervenor-defendants' motion for summary judgment and accompanying statement of facts (both filed 5/15/15), (iv) plaintiffs' combined response to defendant's and intervenors' motions and the two accompanying controverting statements of fact (all filed 6/5/15), (v) defendant's response to plaintiffs' motion and accompanying statement of facts (both filed 6/5/15), (vi) intervenor-defendants' response to plaintiffs' motion and accompanying statement of facts (both filed 6/5/15), (vii) plaintiffs' reply and accompanying controverting statement of facts (both filed 6/19/15), (viii) defendant's reply and accompanying response to plaintiffs' supplemental statement of facts (both filed 6/19/15), (ix) intervenor-defendants' reply and accompanying response to plaintiffs' supplemental statement of facts (both filed 6/19/15), (x) the brief of amici curiae health care providers (5/22/15), (xi) plaintiffs' response to the amici brief (6/8/15), and (xii) the arguments presented at a hearing held on July 30, 2015.

[4] A.R.S. §36-2901.01(A).

[5] Pub. L. No. 111-148, 124 Stat. 119 (2010).

adjusted gross incomes are greater than 100 percent but do not exceed 133 percent of the federal poverty guidelines.

From the outset, it was understood that, even though the number of those eligible to participate in the AHCCCS program would increase, so too would federal funding,[6] but nevertheless, the state would be required to fund some of the cost because increased federal funding would not be sufficient to cover all of the expense required for the program[7]. To deal with the needed additional funding, HB 2010 provided for what it labeled an assessment, to be paid by (and only by) Arizona hospitals.[8] Responsibility for establishing the amount of the assessment was assigned to the AHCCCS director, who has since based the amount on the number of discharged patients that hospitals report on their Medicare Cost Reports.[9] HB 2010 also assigned to the director the responsibility for collecting the funds and depositing them in a separate account administered by AHCCCS instead of the state's general fund.[10]

From inception through May 2015, HB 2010 allowed well over one-quarter of a million people to receive health care insurance benefits for which they were not eligible previously.[11] As a result, Arizona hospitals have benefited financially because they have experienced a decline in the amount of uncompensated health care that they provide to persons who require medical attention but have no health care insurance.[12]

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[6] Intervenors' Fact State. (5/15/15) at 4, paras. 13-14, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 4-5, paras. 13-14 (conceding the fact and contesting only its relevance); Def's. Fact State. (5/15/15) at 5, para. 13, and Pltfs.' Contr. (to Def's.) Fact State. (6/5/15) at 5, para. 13 (conceding the fact and contesting only its relevance).

[7] Pltfs.' Fact State. (5/14/15) at 2-3, para. 8; Intervenors' Fact State. (5/15/15) at 5, para. 18; see also Intervenors' Fact State. (5/15/15) at 6, para. 24, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 7, para. 24.

[8] Def's. Fact State. (5/15/15) at 4, para. 10, and Pltfs.' Contr. (to Def's.) Fact State. (6/5/15) at 4, para. 10; Intervenors' Fact State. (5/15/15) at 5, 7, paras. 19, 34, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 6, 9, paras. 19, 34. See also note 6.

[9] Pltfs.' Complaint (9/12/13) at 9-10, 14, 18 at paras. 44, 63, 85; Intervenors' Fact State. (5/15/15) at 5-6, paras. 18-19, 29, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 6, 8, paras. 19, 29 (conceding the fact and contesting only its relevance).

[10] Pltfs.' Complaint (9/12/13) at 9-10, para. 44; Intervenors' Fact State. (5/15/15) at 5, 7, paras. 19, 34, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 6, 9, paras. 19, 34.

[11] Def's. Fact State. (5/15/15) at 4, para. 11, and Pltfs.' Contr. (to Def's.) Fact State. (6/5/15) at 4-5, para. 11 (conceding the fact and contesting only its relevance); Intervenors' Fact State. (5/15/15) at 8, para. 37, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 10-11, para. 37 (conceding the fact and contesting only its relevance).

[12] Def's. Fact State. (5/15/15) at 6-7, para. 22, and Pltfs.' Contr. (to Def's.) Fact State. (6/5/15) at 8, para. 22 (conceding the fact and contesting only its relevance).

In addition to labeling the hospital payments an assessment, HB 2010 stated that it was not designed to implement a tax and was not intended to delegate any taxing authority to the AHCCCS director.[13] The plaintiffs insist, however, that none of that matters, i.e., irrespective of any asserted intent or adopted label, whether assessment or fee, the payments by the hospitals are a tax, and as such, HB 2010 could not become law legitimately unless, as required by the state constitution (article IX, section 22), the act commanded the support of at least 40 members of the Arizona House of Representatives and 20 members of the Arizona Senate, which it did not.[14]

The Nature of Plaintiffs' Challenge.

The plaintiffs have asserted a "facial challenge" to HB 2010, which means that they must establish that "no circumstances exist under which the challenged statute would be found valid." *Lisa K. v. Arizona Dept. of Economic Sec.*, 230 Ariz. 173, 177, ¶8, 281 P.3d 1041, 1045 (App. 2012) (applying standard recognized in *United States v. Salerno*, 481 U.S. 739, 745 (1987)). In these cases, the "burden of proof is on the opponent of the statute to show [that the challenged statute] infringes upon a constitutional guarantee or violates a constitutional principle." *State v. Casey*, 205 Ariz. 359, 362, ¶11, 71 P.3d 351, 354 (2003) (citation and internal quotation marks omitted); *accord Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977).[15]

A facial challenge is the "most difficult challenge to mount successfully" [*Salerno*, 481 U.S. at 745], not insignificantly because courts are "instructed" to presume that the challenged statute is constitutional [*Hernandez v. Lynch*, 216 Ariz. 469, 473, ¶14, 167 P.3d 1264, 1268 (App. 2008) (stating that "we are instructed to interpret statutes, if possible, as constitutional" (emphasis added) (citations and internal quotation marks omitted)); *see also State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982) (stating that "[a]n act of the legislature is presumed constitutional")]. As such, "[e]very reasonable doubt is to be resolved in favor of the constitutionality of legislative

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[13] HB 2010, sec. 44(2); see also Intervenors' Fact State. (5/15/15) at 6, para. 23.

[14] Thirty-three members of the House and 19 members of the Senate voted in favor of HB 2010. [Pltfs.' Fact State. (5/14/15) at 4, para. 16]

[15] Challenges to the constitutionality of a statute are asserted as either facial or as-applied challenges. One who asserts a facial challenge contends that a statute always operates in an unconstitutional manner. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). One who asserts an as-applied challenge does not dispute that a law is constitutional as written but contends that its application to a particular person or in a specific set of circumstances is unconstitutional. *Korwin v. Cotton*, 234 Ariz. 549, 559, ¶32, 323 P.3d 1200, 1210 (App. 2014). Sometimes, a challenge "has characteristics of both" facial and as-applied challenges. *Doe v. Reed*, 561 U.S. 186, 194 (2010).

enactments, and before a statute be declared unconstitutional it should clearly appear that it cannot be upheld by any reasonable intendment or presumption." *State v. Double Seven Corp*, 70 Ariz. 287, 293, 219 P.2d 776, 779 (1950) (citations omitted)); *see also Roberts v. Spray*, 71 Ariz. 60, 69, 223 P.2d 808, 813–14 (1950) (stating that "unless [a statute's] invalidity is established beyond a reasonable doubt it will be declared constitutional" (citations omitted)); *Lisa K.*, 230 Ariz. at 177, ¶9, 281 P.3d at 1045 (recognizing that courts "will not declare an act of the legislature unconstitutional unless convinced beyond a reasonable doubt that it conflicts with the federal or state constitutions" (citation and internal quotation marks omitted)).

Plaintiffs' reply memorandum (at 1) amounts to urging the court to disregard the presumption of constitutionality that accompanies any legislative act, notwithstanding its recognition since the country's early years. See e.g., *Gibbons v. Ogden*, 22 U.S. 1, 32 (1824). Leaving aside that the approach plaintiffs urge effectively increases opportunities for judges to overturn legislation based merely on their own substantive policy preferences, the presumption that courts apply when passing on the constitutionality of a legislative act is not, as plaintiffs' argument would have it, mere deference to the legislature. Instead, it is respect for the separation of powers. *See e.g., United States v. Morrison*, 529 U.S. 598, 607 (2000) (recognizing presumption of constitutionality out of "[d]ue respect for the decisions of a coordinate branch of Government"); *State v. Kansas*, 299 Kan. 911, 920, 329 P.3d 400, 408 (2014) (stating that "[t]he separation of powers doctrine requires a court to presume the statute is constitutional"); *see generally The Federalist* No. 51 (James Madison) (Cooke ed., 1961) at 349 (stating that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist the encroachment of others"). The presumption also respects that those who voted in favor of HB 2010, like the governor who signed it into law, are bound by and swear oaths to uphold the state constitution. *Cf. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (recognizing that "Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it"). Thus, the presumption merely amounts to "recogniz[ing] and giv[ing] full weight to the lawmaking power of the legislative branch of the government." *Hernandez v. Frohmiller*, 68 Ariz. 242, 249, 204 P.2d 854, 859 (1949). Moreover, as a practical matter, recognizing a presumption of constitutionality is no more deferential to the legislature than imposing a heightened standard of proof on a plaintiff's fraud or punitive damages claim in a civil case is considered deferential to the defendant. And, in any event, the presumption is rebuttable.[16]

[16] If, in *Biggs v. Cooper*, 236 Ariz. 415, 341 P.3d 457 (2014), our supreme court had intended to limit the applicability of the long line of cases that recognize the presumption of constitutionality (which, in effect, is what plaintiffs' reply (at 1) suggests), the court surely would have said so and not left it to speculation.

Questions Presented.

Article IX, section 22 of the state constitution requires "the affirmative vote of two-thirds of the members of each house of the legislature" for passage of any act that "provides for a net increase in state revenues" by, among other things, "[t]he imposition of any new tax" or "[t]he imposition of any new state fee or assessment or the authorization of any new administratively set fee." By its express terms, however, section 22 does not require a two-thirds vote for every legislative act that produces a net increase in state revenues. As relevant here, section 22 recognizes an exception for "[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."[17]

Accordingly, the inquiry here must address two questions:

- Is the money paid by the hospitals into the separate fund that AHCCCS administers an assessment instead of a tax?

- If the money paid by the hospitals is an assessment, does the exception apply?

If the answer to either question is "no," HB 2010 does not pass constitutional muster.

1. Tax or Not?

"Whether an assessment should be categorized as a tax or a fee generally is determined by examining three factors: '(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.'" *May v. McNally*, 203 Ariz. 425, 430-31, ¶24, 55 P.3d 768, 773-74 (2002) (quoting *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)). Applying those factors here compels the conclusion that the hospital assessment is not a tax.

a. The assessing entity.

The AHCCCS director determines which hospitals are assessed and establishes the amount of each hospital's assessment.[18] In that respect, this case aligns with *Jachimek v. State,*

[17] Section 22(C) establishes two additional exceptions. Neither is relevant here.

[18] Intervenors' Fact State. (5/15/15) at 5, paras. 18-19, and Pltfs.' Contr. (to Intervenors') Fact State. (6/5/15) at 6, paras. 18-19.

in which the City of Phoenix imposed a transaction fee on pawnbrokers who operated within the city limits. 205 Ariz. 632, 636, ¶15, 74 P.3d 944, 948 (App. 2003). There, while concluding that a fee was not a tax, the court recognized that, as here, "the fee is assessed by the governmental entity that has been delegated regulatory authority" in the matter and not "by the legislature or the electorate." *Id.*, 74 P.3d at 948.

In their motion (at 5) and in their complaint[19], plaintiffs concede that the AHCCCS director, and not the legislature, establishes the amount of the assessment and determines any modifications or exemptions. Despite that, the motion later maintains (at 9), while relying on *Bidart Bros.*, that the assessment is actually imposed by the legislature. *Bidart Bros.* merely observes, however, that "[a]n assessment imposed directly by the legislature is more likely to be a tax than is an assessment imposed by an administrative agency." 73 F.3d at 931 (emphasis added). Here, the legislature did not impose the assessment directly but, instead, merely authorized the assessment and then stepped away, leaving it to the director to determine what hospitals are assessed and in what amounts. In contrast, *Bidart Bros.* treated with an assessment, the amount of which, initially, was established and imposed by the California legislature. Cal. Food & Agric. Code §75630(b). But even then, the court concluded that, because a commission created by the legislature could (not unlike what the AHCCCS director is able to do here) adjust the amount without the legislature's approval [Cal. Food & Agric. Code §75630(d)], the assessment was not a tax. *Id.*[20]

b. The assessed parties.

It is undisputed that the assessment here is imposed only on Arizona hospitals that are not exempted, and those hospitals are not permitted to pass along the expense, directly or indirectly, to patients or anyone else.[21] Moreover, like the pawnbroker fee in *Jachimek*, the assessment here is transaction-based, i.e., each hospital's assessment is based on (and only on) the number of discharged patients that it experiences, [22] irrespective of the hospitals' income or the value of the services provided to those patients. See *Jachimek*, 205 Ariz. at 636, ¶17, 74 P.3d at 948.

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[19] See note 9.

[20] Elsewhere, plaintiffs' reply memorandum (at 8-9) contends that, because the assessment is a tax, delegating responsibility for establishing the amount to the AHCCCS director was improper. That contention, however, assumes what must be demonstrated, namely that the assessment is a tax. Otherwise, in none of plaintiffs' memoranda is there a showing that the delegation somehow means that HB 2010 is unconstitutional even if the assessment is not a tax.

[21] See note 8; see also A.R.S. §36-2901.08(G).

[22] See note 9.

Plaintiffs' motion (at 9) insists that, because payment of the assessment is required and not voluntary, it must be recognized as a tax. Substantially the same argument, however, was rejected in *Jachimek*. 205 Ariz. at 636, ¶16, 74 P.3d at 948. The decision to operate a hospital, just like the decision to conduct business as a pawnbroker, is voluntary, which "includes the voluntary decision to comply with the legally imposed regulations and fees associated with" operating a hospital. *Id*. at 636, ¶16, 74 P.3d at 948. In other words, merely because conditions are imposed in connection with conducting business as a hospital does not make those conditions involuntary any more than a person's employment becomes involuntary when the employer requires the employee to accept a salary that is less than what that employee would like to be paid. And here, as in *Jachimek*, "[i]n exchange for complying with the[] fees and regulations," the hospitals "receive[] a privilege not given to others," namely the right to be compensated for providing health care services that otherwise would not be compensated. 205 Ariz. at 636, ¶6, 74 P.3d at 948.[23]

Plaintiffs' motion further maintains (at 9) that the assessment must be deemed a tax because it is imposed on Arizona hospitals, even if they do not "accept Medicaid payments or will [not] benefit from Medicaid expansion." [See also Pltfs.' Fact State. (5/14/15) at 3, para. 9] In none of plaintiffs' memoranda or fact statements, however, is any evidence identified establishing that any such hospital actually exists. Accordingly, plaintiffs' contention is ineffective for either of two reasons. First, facial challenges to the constitutionality of statutes fail when based on "hypothetical or imaginary cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted). Second, the motion's purported fact amounts to no more than "an unsworn and unproven assertion in a [legal] memorandum," which is insufficient to support a summary judgment motion. *Prairie State Bank v. Internal Revenue Service*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.lA (App. 1987); *Borbon v. City of Tucson*, 27 Ariz. App. 550, 551, 556 P.2d 1153, 1154 (1976) ("Summary judgment cannot be granted on the basis of [unverified and unsupported] statements of fact in the moving party's brief even though they are uncontroverted by an opponent").

The court remains mindful that plaintiffs' motion asserts only a facial and not an as-applied challenge. But, plaintiffs' motion and other memoranda seemingly overlook that a facial challenge is not license to predicate arguments on asserted facts for which no evidentiary support is offered. *See Lisa K*., 230 Ariz. at 178, ¶11, 281 P.3d at 1046.[24]

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[23] See note 12.

[24] Even if plaintiffs' motion had identified some hospitals that do not participate in the AHCCCS program but are, nevertheless, forced improperly to pay the assessment, that alone is insufficient to support a facial challenge. In those circumstances, the solution is to invalidate the impermissible assessments instead of throwing out the statute altogether. Treating the issue in that manner is consistent with the well-settled principles that courts should avoid

c. The assessment's use.

The hospital assessment is maintained in a separate account, not in the state general fund, under the control of the AHCCCS director, and is used only to make up the difference between the additional costs brought on by HB 2010 and the amount of federal funding that the state receives.[25] Plaintiffs do not dispute that, as a result, the hospitals have experienced a "significant[]" economic benefit, namely the decline in the amount of uncompensated health care services that they provide.[26] Thus, the record establishes as a matter of undisputed fact that the assessment here operates in a way that secures a benefit for the hospitals much as the fee in *Jachimek* benefited the pawnbrokers. See *Jachimek*, 205 Ariz. at 637, ¶22, 74 P.3d at 949.

Apart from that, the facts here mirror the facts in *In re Head Money Cases*, 112 U.S. 580 (1884), on which *Bidart Bros.* relied when concluding that an assessment was not a tax. In *Head Money*, "the Supreme Court found that an assessment upon ship owners" (here, an assessment on hospitals) "for each immigrant brought into the United States" (here, for each patient discharged from a hospital) that "was used to care for immigrants" (here, that was used to provide health care benefits for low-income earners), and from which the ship owners (here, the hospitals) derived a benefit, "was not a tax" even though (unlike here) "the money was paid into the general funds of the treasury" but (like here) did not go to support the general operations of the government. *Bidart Bros.*, 73 F.3d at 932-33. And, even if one were to characterize the ship owners' (and the hospitals') benefit as "indirect," that does not alter the outcome. *Id*.

Moreover, in circumstances that closely parallel those here, a school district, over its objection, was required to pay wastewater and water system development fees into dedicated accounts maintained by the City of Chandler, the purposes of which were to assist with funding the expense attributable to the systems' maintenance, development, and debt-service. *Kyrene Sch. Dist. No. 28 v. City of Chandler*, 150 Ariz. 240, 242, 722 P.2d 967, 969 (App. 1986). Rejecting the contention that the fees yielded no specific benefit for the school district, the court recognized that the district received "the overall benefit of . . . water and wastewater services from Chandler." *Id.* at 244, 722 P.2d at 971. In reaching its conclusion, the court also rejected the same argument that plaintiffs' response (at 6) urges here, and held "that when the distinction between tax and fee in

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constitutional issues when a narrower result is available [*e.g.*, *Washington State Grange*, 552 U.S. at 450 (stating that "[e]xercising judicial restraint in a facial challenge frees the Court . . . from unnecessary pronouncement on constitutional issues" (citation and internal quotation marks omitted))], and when, as here, that narrower result would not materially affect the ability of the statute to operate [*see e.g., I.N.S. v. Chadha*, 462 U.S. 919, 934 (1983)].

[25] See notes 7, 10.

[26] See note 12.

[*Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 68 P.2d 329 (1937)] is applied in this case, the result is a fee and not a tax." 150 Ariz. at 242, 722 P.2d at 969.

Plaintiffs' reply memorandum (at 7) attempts to refute the contention that a reduction in uncompensated health care operates as a benefit to Arizona hospitals by relying on what purports to be an analysis undertaken by an Arkansas-based special interest group, whose mission is to influence public policy,[27] regarding the effect of Medicaid expansion on hospitals in that state.[28] Because plaintiffs' reply is unsupported by any deposition testimony or declaration explaining how the purported experience in Arkansas is comparable or otherwise relevant to what has transpired in Arizona, as presented, the analysis amounts to both an unsworn statement and a document offered for the truth of the matters asserted in it. As such, the Arkansas analysis warrants no consideration. *See e.g., Scottsdale Ins. Co. v. Monares,* 153 Ariz. 9, 11, 734 P.2d 106, 108 (App. 1986) (affidavit that contained hearsay "was properly disregarded"); *Prairie State Bank,* 155 Ariz. at 221 n.1A, 745 P.2d at 968 n.lA ("an unsworn and unproven assertion in a memorandum" is not a fact that a court may consider when ruling on a summary judgment motion).[29]

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[27] See http://www.advancearkansas.org/about-the-institute.

[28] Pltfs.' Contr. (to Def's.) Fact State. (6/5/15) at 10, para. 4 & Ex. 17.

[29] An objection to the consideration of the Arkansas analysis was preserved in Defendants' Response to Plaintiffs' Supplemental Statement of Facts (6/19/15) at 2, para. 4. Even without the objection or a motion to strike, the court may, on its own motion, decline to consider inadmissible evidence when treating with a summary judgment motion. *E.g., Pulliam v. United Airlines, Inc.*, No. 2:10-cv-01406-MMD-GWF, 2012 WL 3025087, at *1 (D. Nev. July 24, 2012) (denying motion to strike: "[A] motion to strike is unnecessary because the Court is already obliged to disregard any inadmissible evidence in the affidavit and declaration"); *see also Walls v. Tennessee CVS Pharmacy*, No. 3:12-cv-1152, 2014 WL 1846223, at *5 n.4 (M.D. Tenn. May 8, 2014) (disregarding statement of party opposing summary judgment as inadmissible even though moving party "does not appear to dispute [it]"); *cf. Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991) (affirming dismissal: "Although [defendant] did not file a motion to dismiss pursuant to Rule 12(b)(6), the district court was authorized to consider the sufficiency of the complaint on its own initiative"). (Citations here to unpublished opinions are permitted by Ariz. R. S. Ct. 111(d).)

In any event, although the Arkansas analysis appears as Exhibit 17 in one of the controverting statements of fact that accompanies plaintiffs' response memorandum, it is cited for the first and only time in plaintiffs' reply (at 7). That amounts to introducing new evidence with a reply, which does not permit an opposing party a fair opportunity to respond [*e.g., Ferguson v. City of Phoenix,* 931 F. Supp. 688, 696 (D. Ariz. 1996)], and thus, for that reason as well, that evidence may not be considered [*Wells Fargo Bank v. Allen*, 231 Ariz. 209, 214 n.3, ¶20, 292 P.3d 195, 200 n.3 (App. 2012) (stating that it is "improper to introduce new evidence with the reply memorandum")].

Plaintiffs' Exhibit 16 [Pltfs.' Contr. (to Def's.) Fact State. (6/5/15) at 9, para. 3 & Ex. 16] also does not assist the analysis here. First, none of plaintiffs' memoranda cite to it, thus effectively conceding its insignificance. In any event, no deposition testimony or declaration establishes its relevance, and beyond that, on its face the exhibit's relevance is problematic because it recites data collected only before HB 2010 became law.

The motion (at 10-11) goes on to urge that the assessment is a tax because it is collected "to provide a general benefit for the public" and only "incidentally" benefits the hospital. Unlike, for example, *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000), where evidence established that a renewal fee was dedicated to both a highway fund and the state general fund, *Lavis v. Bayless*, 233 F.Supp.2d 1217 (D. Ariz. 2001), where evidence established that a fee imposed on lobbyists was intended to alleviate "eight specific public problems," *Wright v. McClain*, 835 F.3d 143 (6th Cir. 1987), where evidence established that an assessment on parolees was used to promote the general welfare of the state's citizens by compensating crime victims, and *Schneider Trans., Inc. v. Cattanach*, 657 F.2d 128 (7th Cir. 1981), where evidence established that vehicle registration fees were used for state highway construction – all cases on which the motion relies – in none of plaintiffs' three statements of fact is there any reference to, much less supporting evidence of, the asserted public benefit that overcomes the undisputed benefit that the hospitals receive here, leaving the motion, yet again, predicated on an unsworn and unproven factual assertion that may not be considered. *E.g.*, *Prairie State Bank*, 155 Ariz. at 221 n.1A, 745 P.2d at 968 n.lA.

To be sure, plaintiffs' motion (at 10) and reply (at 5) do contend that the assessment produces a public and not a specifically targeted benefit because it assists with the funding of the AHCCCS program's expansion. That contention, however, confuses the concepts of means and ends. Assisting with AHCCCS funding is a means to an end, but not the end itself. Thus, the question: who benefits because the assessment assists with the funding of Medicaid expansion? As explained above, given the record here, it is undisputed that the assessment produces a reduction in uncompensated health care provided by the hospitals that transcends any other benefit,[30] and that is sufficient to survive plaintiffs' challenge, even though others may benefit, or other benefits may result, because of the assessment. *Jachimek*, 205 Ariz at 637, ¶¶19-22, 74 P.3d at 949; *see also Bidart Bros.*, 73 F.3d at 932-33; *Kyrene Sch. Dist.*, 150 Ariz. at 244, 722 P.2d at 971.

Although section 45 of HB 2010, under the heading "Intent," refers to "the support and maintenance of a state government department" and goes on to say that the assessment is intended to assist in fulfilling the specific commitment required by A.R.S. §36-2901.01(A), as explained, those expressions leave this question unanswered: who (or what) benefits because the assessment allows that department to operate and that commitment to be fulfilled? If the benefit to be recognized is more substantial than the reduction in the cost of care that the hospitals have experienced because insurance benefits have been provided to thousands of people whose care was previously uncompensated, it is neither demonstrated in any of the plaintiffs' memoranda

[30] See note 12.

nor found elsewhere in the record. Moreover, to interpret HB 2010 in a way that emphasizes the reduction in uncompensated care as the overriding benefit is to adhere to the principle that statutes are to be construed, when reasonably possible, in a way that preserves their constitutionality. *E.g., Schecter v. Killingsworth*, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963) (stating that "[w]here differing constructions of a statute are possible, it is our duty to construe it in such a manner that it will be constitutional"); *see also* 2A Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutory Construction* §45:11 (7th ed. 2012-13) (stating that "[c]ourts have found that a 'strained construction' is desirable if it is the only construction that will save an act's constitutionality" (numerous citations omitted)).

In any event, that the assessment benefits the hospitals more than anyone or anything else is confirmed by plaintiffs' own motion (at 5), which insists that the hospitals, and "not the people" are the "true beneficiaries of Arizona's Medicaid expansion." (Emphasis added) As such, plaintiffs have conceded the point in a way that should end any debate about whom the assessment truly benefits. *E.g.*, *May*, 203 Ariz. at 431, 55 P.3d at 774 (stating that an assessment is not a tax when used in a way that benefits the payor). [31]

Independent of that, plaintiffs' motion (at 10) urges the court to recognize the assessment as a tax because the director of the federal government's Health and Human Services Department treats the assessment in that manner. First, merely because the assessment may be considered a tax for federal purposes does not necessarily make it a tax for state purposes. *See Bidart Bros.*, 73 F.3d at 929. Second, it should go without saying that, in matters that pertain to the interpretation of this state's statutes, Arizona courts are not required to defer to what an out-of-state bureaucrat thinks, says, or does. *Cf. Baker v. General Motors Co.*, 522 U.S. 222, 233-34 (1998) ("The Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with subject matter concerning which it is competent to legislate" (citation and

[31] Plaintiffs' motion (at 5) states in full: "[HB 2010] ensures that the true beneficiaries of Arizona's Medicaid expansion are not the people, but the politically connected hospitals who lobby for tax exemptions and stand to line their pockets with reimbursements." The court exercises its discretion to treat the assertion that the hospitals are the "true beneficiaries" of HB 2010 as a binding factual admission. *E.g., Baxter v. MBA Group Ins. Trust Health & Welfare Plan*, 958 F.Supp.2d 1223, 1232-33 (W.D. Wash. 2013) (granting defendant's cross-motion for summary judgment: "[T]he Court exercises its discretion and treats Plaintiff's admission in his motion for summary judgment as a binding judicial admission" (citing *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) (holding that courts "have discretion to consider a statement made in briefs to be a judicial admission . . . binding on . . . the trial court") and *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) ("A court can appropriately treat statements in briefs as binding judicial admissions of fact")); *see also Borbon v. City of Tucson*, 27 Ariz. App. 550, 551, 556 P.2d 1153, 1154 (1976) (recognizing admissions in a brief on summary judgment as "functionally equivalent to admissions on file" (citation and internal quotation marks omitted)).

internal quotation marks omitted)); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (same).[32]

d. Conclusion.

When measured against the standard adopted in *May*, the record that has been presented here warrants the conclusion that the assessment does not qualify as a tax. 203 Ariz. at 430-31, ¶24, 55 P.3d at 773-74; *see also Jachimek*, 205 Ariz at 636-37, ¶¶13-22, 74 P.3d at 948-49.

2. Exception or Not?

Even when a new assessment does not qualify as a tax, that does not end the inquiry. A new assessment that failed to receive two-thirds support from both houses of the legislature may yet be unconstitutional unless it qualifies under one of the exceptions identified in article IX, section 22(C). Here, that means (as contemplated by subsection C(2)), that the assessment must be (i) "authorized by statute," (ii) "not prescribed by formula, amount or limit," and (iii) "set by a state officer or agency."

a. "Authorized by statute."

HB 2010 is the only statute that authorizes the hospital assessment. That, plaintiffs' motion maintains (at 12-13), is fatal. [See also Pltfs.' Response at 10] The motion contends that, although subsection C(2) states that the assessment must be "authorized by statute," what that really means is that the assessment must be "authorized by some other statute" that received a two-thirds vote in both houses of the legislature.

None of the parties, whether in their legal memoranda (see note 3) or during the July 30 hearing, have maintained that anything in article IX, section 22 is ambiguous. Thus, what plaintiffs would have this court do is expand on the plain text of that section by reading into it words that are not there. Typically, that invites outcries about the judicial usurpation of legislative authority. In any event, courts have been cautioned to resist doing what the plaintiffs urge. *See Home Builders Ass'n v. City of Scottsdale*, 187 Ariz. 479, 483, 930 P.2d 993, 997 (1997) (stating that "where the language of a statute is clear and unambiguous, courts are not

[32] Plaintiffs' motion (at 12) also relies on a statement from one of the plaintiffs that describes the assessment as a "hidden tax." [See also Pltfs.' Fact State. (5/14/15) at 5, para. 23] Leaving aside that the substance of the statement is genuinely disputed, which would typically invite the motion's denial [*e.g., Koory v. Western Cas. & Sur. Co.*, 153 Ariz. 412, 416, 737 P.2d 388, 392 (1987)], statements of that nature are not helpful because they are merely conclusions [*e.g., Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment")].

warranted in reading into the law words the legislature did not choose to include"); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (rejecting an interpretation that "would have [the court] read an absent word into the statute" because such an interpretation "would result not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court" (citation and internal quotation marks omitted, second and third alterations in original)).[33]

In contrast to plaintiffs and their contention that "authorized by statute" means authorized by another statute, the defendant and intervenors would have "authorized by statute" mean authorized by a statute. As explained above, the "another" (or "some other") interpretation departs from the plain text of subsection C(2) to a far greater extent then the "a" interpretation does. And, it is generally understood that "a" means "any." *E.g., The American Heritage Dictionary of the English Language* 1 (4th ed. 2000) (defining "a" as "[a]ny"); *Webster's Third New International Dictionary* 1686 (1993) (recognizing that the ordinary meaning of the word "a" includes "any"). Thus, subsection C(2), reasonably construed as written, means "authorized by any statute."[34]

Plaintiffs' response (at 10) and reply (at 9) maintain that it is "absurd" and "illogical" to interpret subsection C(2) in that way. But, even if that were true, that should not matter when the plain and (as plaintiffs have stipulated) unambiguous text of subsection C(2) refers to a statute, and nothing more – not a "previously enacted" or "some other" statute, but merely to a statute, period. After all, history is replete with examples of laws that, as written, allowed consequences that were not anticipated.[35] And if, as written, section 22 leaves open the door for legislation that plaintiffs disapprove, it is not the court's duty to recraft that section under the pretense of interpretation in a way that comports with their view of what is appropriate. Indeed, it is the court's duty *not* to do so. *Arizona City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334, 230 P.3d 713, 717 (App. 2010) (stating that "[n]either trial judges nor appellate courts may rewrite our constitution or statutes"); *see also Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The

[33] Although the cases cited above pertain to statutory construction, they are equally applicable to constitutional interpretation. *See State ex rel. Morrison v. Nabours*, 79 Ariz. 240, 245, 286 P.2d 752, 755 (1955) (treating "fundamental rules of Constitution and statutory construction" in the same way); 2A *Sutherland Statutory Construction* §45:11 (recognizing that "it is well settled that courts interpret a Constitution the same way they interpret any other written law")).

[34] See also *Lincoln West Partners, L.P. v. Department of Housing Preservation and Development*, 179 Misc.2d 271, 277, 684 N.Y.S.2d 744, 749 (1998) (rejecting argument that the word "a" does not mean "any" as "contrary to [the word's] plain meaning"); *BP Am. Prod. Co. v. Madsen*, 53 P.3d 1088, 1092, ¶8 (Wyo. 2002) (stating that "[i]n a statute, 'a' usually means 'any'" (citations omitted)).

[35] See e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 450 (1991) (identifying numerous statutes whose plain meaning later led to their revision).

role of th[e] court is to apply the statute as it is written – even if we think some other approach might accor[d] with good policy") (citation and internal quotation marks omitted, second alteration in original)); *Nixon v. Missouri Mun. League,* 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) (recognizing that the "avoidance of unhappy consequences" is an inadequate basis for interpreting a text) (cited with approval in *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 413, ¶40, 111 P.3d 1003, 1013 (2005)).

To be sure, the absurd-result principle does allow courts to disregard the plain meaning of a constitutional provision or statute. *E.g., Ruth v. Industrial Comm'n*, 107 Ariz. 572, 576, 490 P.2d 828, 832 (1971) (stating that "[a]n absurd construction of a constitutional provision should be avoided"). But, application of that principle, which is what plaintiffs' memoranda, in effect, urge, places "extraordinary power[]" in the hands of judges because it allows them to revise laws in ways that conform to their views of what is reasonable.[36] Accordingly, although the principle can be easily invoked, as plaintiffs do here, it should be seldom applied. In words that remain appropriate today, Chief Justice John Marshall said: "[I]f . . . the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowninshield,* 17 U.S. (4 Wheat.) 122, 202–03 (1819). The absurdity posited by plaintiffs' memoranda falls well short of one that "all mankind, without hesitation" would recognize.[37]

Finally, plaintiffs' motion maintains (at 5) that anything other than plaintiffs' interpretation of subsection C(2) is inconsistent with the will of the voters. In support of that contention, the motion refers to the publicity pamphlet that was issued in 1992 when section 22 appeared on the ballot as Proposition 108. Because nothing said in section 22 is ambiguous, however, whatever the publicity pamphlet said is not relevant to the inquiry here. *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994) (stating that when a constitutional provision is "clear and unambiguous, . . . [n]o extrinsic matter may be shown to support a construction that would vary its meaning. In short, judicial construction is neither necessary nor proper"); *Jones v. Paniagua*, 221 Ariz. 441, 446-47, ¶19 & n.5, 212 P.3d 133, 138-39 & n.5 (App. 2009) (finding reliance on constitutional and legislative history unnecessary to interpret statutory and constitutional provisions given their plain meaning). Yet, even if the pamphlet

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[36] Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 The American Univ. L. Rev. 127, 128 (1994).

[37] See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 238 (2012) (stating that application of the absurdity principle is not an appropriate means to overcome "a drafter's failure to appreciate the effect of certain provisions").

were somehow relevant, what plaintiffs' motion identifies as "the publicity pamphlet" are merely three snippets excerpted from statements appearing there.[38] Reliance on fragments of this type does not assist in matters of constitutional interpretation. *Cf. New England Power Co. v. New Hampshire***,** 455 U.S. 331, 342 (1982) (recognizing that reliance on "fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards").[39]

b. "Not prescribed by formula, amount or limit."

Plaintiffs' response (at 12-13) and reply (at 9-10) maintain that the amount set by the AHCCCS director is constrained by federal law, and thus, contrary to subsection C(2), the assessment is, in fact, "prescribed by . . . [a] limit." Here again, plaintiffs have presented no evidence establishing that the discretion given the director when setting assessment amounts has

[38] See Pltfs.' Fact State. (5/14/15) at 3, para. 12. Plaintiffs' motion (at 5) quotes from three separate statements that appear in the publicity pamphlet, one of which was submitted by a partisan urging support of Proposition 108, and another that is clearly taken out of the context in which it was presented because it appears among the Legislative Council's reasons for opposing the proposition.

[39] Relying on statements in a publicity pamphlet to inform the interpretation of a constitution is surely even less reliable than resorting to typical but usually unreliable legislative history when trying to ascertain the meaning of a statute. See e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (explaining why legislative history is not a "reliable source[] of insight into legislative understanding"); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring) (objecting to the use of legislative history because it can be and frequently is cited to support almost any proposition). Indeed, statements appearing in a publicity pamphlet hardly warrant any more consideration when interpreting a constitution than op-ed columns, Internet blogs, and letters to the editor. In any event, to say that the publicity pamphlet here reflects the will of the voters assumes that the voters became familiar with what it said, which is a debatable proposition at best. See Anthony Downs, *An Economic Theory of Democracy* 245 (1957); see also Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 2, 12 (1971). Reaching the material in the publicity pamphlet regarding Proposition 108 first required a voter to wade through 44 pages that pertained to eight other propositions. [See http://www.azsos.gov/sites/azsos.gov/files/pubpam92.pdf] Voters who read that far found, for the most part, a series of statements from Proposition 108 supporters urging passage. Thus, to treat the publicity pamphlet as voter-will demands the assumption that the passage of Proposition 108 was attributable to at least a majority of the voters subscribing to what those statements said, which, empirically, is neither supported nor supportable, meaning that the assumption is based only on speculation. See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239, 239-42 (1992) (explaining that collections of individuals cannot have intent, and thus, trying to determine "legislative intent" is "to entertain a myth"). Fairly considered, a publicity pamphlet is helpful, if at all, because of what it does not say and not because of what it does say. See *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290-91, 645 P.2d 801, 805-06 (1982) (declining to rely on what was said in publicity pamphlet). *McElhaney* is the only authority regarding publicity pamphlets that is cited in *Heath v. Kiger*, which also declined to rely on such a pamphlet in a matter of statutory construction. 217 Ariz. 492, 496, 176 P.3d 690, 694 (2008).

been, in fact, affected by federal requirements.[40] That leaves the contention no more than a theoretical possibility, which is not sufficient to support a facial challenge. *Washington State Grange*, 552 U.S. at 450 (recognizing that hypothetical cases are insufficient to sustain facial challenges); *Croft v. Governor of Texas*, 562 F.3d 735, 749 (5th Cir. 2009) (stating that the court "should not allow speculative fears to creep into our [facial challenge] analysis"). In any event, absent evidence to the contrary, plaintiffs' contention regarding the limit that federal law has purportedly imposed on the assessments established by director Betlach must be disregarded as an unproven factual assertion. *E.g., Prairie State Bank,* 155 Ariz. at 221 n.1A, 745 P.2d at 968 n.lA.

Apart from that, and contrary to settled rules of statutory construction, plaintiffs' argument zeros in on the "formula, amount, or limit" language of subsection C(2) while ignoring what surrounds it. *E.g., State Farm Mut. Auto. Ins. Co. v. White,* 231 Ariz. 337, 342, ¶19, 295 P.3d 435, 440 (App. 2013) (stating that courts "do not consider words in isolation when interpreting statutes" (citation and internal quotation marks omitted)). Subsection C(2) consists of three clauses. It is stating the obvious to recognize that "authorized by statute" in the first clause refers to, and only to, an act of the Arizona legislature, and "set by a state officer or agency" in the third clause refers to, and only to, Arizona officials and Arizona agencies. Nothing in the plain text of subsection C(2) allows one to conclude that, as plaintiffs' urge, the middle clause, unlike the two clauses in whose company it sits, reaches beyond Arizona. Instead, fairly read, "formula, amount, or limit," as with the other two clauses in subsection C(2), implicates only Arizona, meaning formulae, amounts, and limits prescribed by an Arizona authority.

c. "Set by a state officer or agency."

No party maintains that the amount of the assessment is set by anyone other than the AHCCCS director.[41]

d. Conclusion.

Article IX, section 22 recognizes an exception to the two-thirds voting requirement for an assessment that is authorized by an Arizona statute, that is not prescribed by a formula, amount, or limit imposed by the legislature or any other Arizona authority, and that is set by a state officer or agency. HB 2010 satisfies those three requirements.

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[40] Indeed, on the record here, it is undisputed that director Betlach has not allowed any purportedly imposed federal constraints to affect how the assessments have been set. [Def's. Resp. to Pltfs.' Fact State. (6/5/15) at 6-7, paras. 7-9, and Pltfs.' Contr. Fact State. (6/19/15) at 3-4, paras. 7-9 (conceding the facts and contesting only their relevance)]

[41] See note 9; see also Pltfs.' Motion at 5.

Additional Issues.

1. Other Fees.

In support of the contention that the assessment is not a tax, the intervenors' motion (at 14-15) relies on examples of fees that the legislature has approved without a supermajority, the imposition and collection of which are said to be indistinguishable from the assessment here.[42] That evidence, however, does not lend itself to consideration on summary judgment because, as plaintiffs' response (at 2) establishes, the nature of that evidence does not prove a fact that, at least on the record here, is undisputed. Moreover, if the assessment were otherwise unconstitutional, it does not become protected merely because of a long-standing practice that preceded its enactment. *See e.g., Walz v. Tax Commisioner*, 307 U.S. 664, 678 (1970).

2. Amicus Brief.

The court regrets its failure at the July 30 hearing to acknowledge the contribution of the intriguing argument presented in the amicus brief filed on behalf of the Arizona Hospital and Healthcare Association, Abrazo Health Care, Banner Health, HonorHealth, and Dignity Health. Although objections to consideration of the brief were filed on plaintiffs' behalf, those objections do not warrant disregarding the brief.[43]

The amicus brief maintains that what it labels the "Enrolled Bill Rule" compels the rejection of plaintffs' constitutional challenge. That rule, or doctrine, which originated in *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892), "concerns the nature of the evidence the Court [may] consider in determining whether a bill had actually [been] passed" by legislative authority. *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (citation and internal quotation marks omitted, first alteration in original). From that, the amicus brief urges (at 9), mere passage of HB 2010 (and its signing by the governor) is "dispositive" because it constitutes "conclusive evidence" that the statute is constitutional. If

[42] See also Intervenors' Fact State. (5/15/15) at 9-10, paras. 41-49; Def's. Fact State. (5/15/15) at 6, para. 18.

[43] Plaintiffs' response to the amicus brief asserts (at 2) two objections: the brief introduces an issue not addressed by either the defendant or intervenors, and the brief fails to comply with Ariz. R. Civ. P. 7.1(a). Those objections are both procedural, and plaintiffs waived them by consenting to the brief's filing. [See Unopposed Motion for Leave to File Brief of Amici Curiae (5/15/15)] In any event, the case authority on which plaintiffs' objection relies regarding an issue otherwise unaddressed by the parties pertains to efforts by amici to introduce new issues on appeal that, unlike here, the trial court was not allowed an opportunity to consider. And, Rule 7.1(a) hardly supports an objection here: after leave to file the amicus brief was granted, plaintiffs were allowed a fair opportunity to file a response, which they did and which the court has read.

that were a correct application of the *Field* doctrine, however, then, for example, a bill permitting employers to discriminate on the basis of race would be constitutional so long as passage of the bill complied with the legislature's established procedures.

The distinction that the amicus brief seemingly would draw is that the two-thirds vote requirement in article IX, section 22, unlike, for example, the due process clause of the state constitution (article II, section 4), is merely a "procedural" requirement, much like, for example, the legislature's practice of requiring a bill to be reported out of committee before final passage can occur. But, as a constitutional provision, section 22 is more than procedural. It is a substantive limitation on the legislature's authority in the same way that, for example, the legislature may not require an act to become effective immediately without a two-thirds vote of each house. *Cox v. Stults Eagle Drug Co.*, 42 Ariz. 1, 13, 21 P.2d 914, 918 (1933), *overruled on other grounds by State ex rel. La Prade v. Cox*, 43 Ariz. 174, 182, 30 P.2d 825, 828 (1934); *see also* 2A *Sutherland Statutory Construction* §45:11 (recognizing that "the legislature is free to implement legislation" "[u]nless a constitution expressly . . . restricts the actions of the legislative branch").

Further cautioning against the manner in which the amicus brief would have the *Field* doctrine applied here is the record of the United States Supreme Court. Since at least the end of World War II, despite having numerous opportunities to do so, that court has never rejected a constitutional challenge by relying on *Field*. Indeed, in *Clinton v. New York*, the court declared the Line Item Veto Act unconstitutional while citing *Field*. 524 U.S. 417, 448 (1998).

The brief's alternative contention (at 12) that, because HB 2010 is an enrolled bill, the court must "give very significant weight to the determination by the Arizona State Legislature that [the bill] was duly approved by its members," does not require consideration here. HB 2010 receives a presumption of constitutionality without regard to the "Enrolled Bill Rule."[44]

Summing Up.

The plain text of article IX, section 22, and the standard by which Arizona's appellate courts have determined whether a tax, as opposed to a fee or assessment, has been imposed by a governing authority, meant that, to survive constitutional scrutiny, HB 2010 was required to negotiate a precisely defined path, and it did. But, whether one agrees with that conclusion is, in a significant, substantive sense, beside the point. That is because, by any reasonable standard, the arguments in support of HB 2010 are, at a minimum, fairly debatable, and as such, the long-recognized and well-settled presumption in favor of constitutionality dictates the outcome. *E.g.*,

[44] See text accompanying notes 15-16.

Ramos, 133 Ariz. at 6, 648 P.2d at 121 (finding statute constitutional when "there is a reasonable, even though debatable, basis for [its] enactment").[45]

IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is denied.

2. The motions for summary judgment filed on behalf of the defendant and the intervenor-defendants are granted.

3. The court will contact the parties' attorneys to schedule a telephonic conference regarding a briefing schedule in connection with the intervenors' claim for attorney's fees (which appears to be the only unresolved issue in the case). Meanwhile, the deadlines set forth in Ariz. Rs. Civ. P. 54(f)(1) and 54(g)(2) are suspended, to be set by court order after the conference.

[45] Numerous Arizona appellate court decisions in addition to *Ramos* have recognized the principle that a statute will be treated as constitutional when there is "a reasonable, even though debatable," basis for enactment of the statute, "unless it is clearly unconstitutional" (emphasis added). Among others, see *State v. Rose*, 231 Ariz. 500, 514, ¶68, 297 P.3d 906, 920 (2013); *State v. Arnett*, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978), *State v. Murphy*, 117 Ariz. 57, 61, 570 P.2d 1070, 1074 (1977); *Standhardt v. Superior Court*, 206 Ariz. 276, 286, ¶32, 77 P.3d 451, 481 (App. 2003); and *In re Brandon H.*, 195 Ariz. 387, 388, ¶8, 988 P.2d 619, 620 (App. 1999). The phrase "clearly unconstitutional" that appears in those, and other decisions, is redundant, because if a statute is "clearly" unconstitutional, the issue is not, to a reasonable person, debatable. *See The American Heritage Dictionary of the English Language* 468 (4th ed. 2000) (defining "debatable" as "open to dispute: questionable"); *cf. City of Tempe v. Roser*, 24 Ariz. App. 118, 120, 536 P.2d 239, 241 (1975) (defining "fairly debatable" to mean when "reasonable minds differ"); *United States v. Smith*, 793 F.2d 85, 89-90 (3d Cir. 1986) (defining "fairly debatable" to include "'debatable among jurists of reason'" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 894 n.4 (1983))); *United States v. Bayko*, 774 F.2d 516, 522 (1st Cir. 1985) (defining "fairly debatable" as "a standard which is more rigorous than the old 'frivolous' test but less rigorous than the . . . requirement that the question be 'close'" (citing *United States v. Handy*, 761 F.2d 1279, 1282-83 (9th Cir. 1985))).