IN THE SUPREME COURT
STATE OF ARIZONA

ANDY BIGGS, et al., Plaintiffs/Appellants, v. THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment Systems, Defendant/Appellee, EDMUNDO MACIAS, et al., Intervenor-Defendants/Appellees.	Arizona Supreme Court No. CV-17-0130-PR Court of Appeals, Division One No. 1 CA-CV 15-0743 Maricopa County Superior Court No. CV2013-011699

INTERVENOR-DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF

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Intervenor-Defendants/Appellees ("Intervenors") submit the following Supplemental Brief and request that the Court affirm the Court of Appeals and Superior Court decisions in this case.

I. INTRODUCTION.

In 1992, voters approved Proposition 108 which amended the state constitution to require a two-thirds vote in each house of the legislature to enact a net increase in state revenue through new or increased taxes, fees or assessments with certain exceptions. Proposition 108 has now been in effect for 25 years yet this is the first case in which its violation has been alleged in a court case.

Perhaps that it is because Proposition 108 has been enormously successful in accomplishing its intended purpose. Not only have there been no statewide tax increases approved by the legislature during that period of time, in virtually every year since 1992 the legislature has implemented a tax reduction of one kind or another. It is estimated but for those tax reductions the state general fund would have almost $4 billion more than it does today. Section III, *infra.* It is odd then that the first challenge under Proposition 108 would occur in the case of an assessment imposed on 74 providers each of whom not only wants the assessment but is eager to pay it. Index of Record ("IR")) 61, ¶ 35. They are eager to pay it because they directly benefit from the assessment. Section VI, *infra.*

The fact is that this is not the first time that the legislature has authorized fees or assessments and left it to the discretion of a state official or board to establish and implement, just as occurred in this case. Section V, *infra*. There was no outrage from minority legislators in those many cases that the will of the people as expressed in Proposition 108 was being violated.

So what makes this case any different? There are any number of explanations ranging from the political to the ideological to the economic. Perhaps it will never be known why legislators chose to wait and use the provision of health care benefits to low income individuals as the test case for Proposition 108.

What is known is that the lives of more than more than 400,000 individuals are literally at risk because of this litigation. That is the number of Arizonans who have become eligible for health care under the AHCCCS program by virtue of House Bill 2010 that was enacted in 2013. *See* Section II, *infra*. That's equal to the combined populations of Yuma, Flagstaff, Prescott, Kingman, Nogales, Sun City, Sierra Vista, Fountain Hills and Queen Creek. http://citypopulation.de/USA-Arizona.html (last accessed September 27, 2017). If the Plaintiffs prevail, it would be the equivalent of removing health-care benefits for every man, woman and child in each of those cities and towns.

This Court now has the benefit of two very strong lower court decisions that applied the clear language of Proposition 108 to conclude that the assessment

authorized by HB 2010 is not a tax and that it meets the criteria for exempting it from the requirement of Proposition 108. The lower court decisions are straightforward, well-reasoned and support the majority of legislators who enacted the assessment in A.R.S. § 36-2901.08. There is little for this Court to do but affirm those decisions.

II. THE IMPACT OF MEDICAID EXPANSION.

This case presents a state constitutional challenge to the hospital assessment that funds Intervenors' healthcare coverage. Intervenors are childless adults with income at 100% and below the federal poverty level and adults with income between 100-133% of the federal poverty level. IR 41.

As of September 2017, there were 317,302 persons in what is often referred to as the Proposition 204 restoration category with income at 100% and below the federal poverty level and 82,205 persons in the adult expansion category with income between 100-133% of the federal poverty level. https://azahcccs.gov/Resources/Downloads/PopulationStatistics/2017/Sep/AHCCCS_Population_by_Category.pdf. These members have stayed relatively stable over the last year. *Id.*

The Intervenors in this case are but four of the 400,000 who desperately need the health care that the Medicaid expansion provides. When the Motion to Intervene was filed, Intervenor Edmundo Macias was a 53 year old male living in

Gilbert, Arizona. IR 41. He was a childless adult working part time and financially eligible for AHCCCS. His serious medical conditions included diabetes, arthritis and a developing heart condition and his physician had prescribed several medications for him. If Mr. Macias was not on AHCCCS, he could not afford his medications or see his doctor. Without medication, his diabetes could get worse and other medical complications, including vision loss, losing a limb and severe mood swings would result. *Id.*

Intervenor Gary Gorham was a 61 year old male living in Chandler, Arizona. *Id*. He also was a childless adult, currently unemployed with no income and financially eligible for AHCCCS. He had digestive system complications, blood clots (a history of and currently) and gall stones. He saw a specialist for his digestive problems and his primary care doctor for his other conditions. His doctors prescribed medications for him and he required monthly blood tests. He needed surgery for his gall stones. Without AHCCCS, Mr. Gorham would not have the funds to pay for his doctor visits, prescriptions and blood tests and without medical care, he would end up in the emergency room and require hospitalization. *Id*.

Intervenor Daniel McCormick was a 62 year old male living in Show Low, Arizona. *Id*. at 4-5. He also was a childless adult, currently unemployed with no income and financially eligible for AHCCCS. He had severe spinal stenosis,

bulging and compressed disks and arthritis in his back. He saw his primary doctor and a pain specialist. He received epidural shots, had his nerves frozen to relieve the pain and his doctors were looking into other treatments for him. Without AHCCCS, he would not be able to afford his needed medical care, his pain would be unbearable and he would have no hope of getting better.

Finally, Intervenor Tim Ferrell was a 54 year old male living in Phoenix, Arizona. *Id*. at 5. He was a childless adult, working part-time and financially eligible for AHCCCS. He had chronic obstructive pulmonary disease, high blood pressure, high cholesterol and heart issues. He was seen by a primary doctor and a pulmonologist. His doctors monitored his medical conditions by running tests and prescribed three inhalers and other medications including beta blockers to keep his heart rate slower. If Mr. Ferrell was not on AHCCCS, he could not afford to pay for his medical care. Without his needed medical care, he would end up in the emergency room and have to be hospitalized. *Id.*

Without AHCCCS, Intervenors and the 400,000 other adults whose medical care is funded by the hospital assessment will be denied the medical care, including doctor examinations, prescriptions, medical tests and supplies and surgeries that keeps them healthy and alive.

III. PROPOSITION 108 HAS DONE EXACTLY WHAT IT WAS INTENDED TO DO.

Approved by voters in 1992, Proposition 108 was intended to make it more difficult for the legislature to enact tax increases. The supporters of Proposition 108 wanted to put the brakes on what they called "a decade of unchecked spending and taxation" that had transformed Arizona into "one of the leading tax and spend states in the Nation." Publicity Pamphlet for 1992 Ballot Measures at 48 (argument "for" for Proposition 108 by Tracy Thomas and Sidney Hoff for the Lincoln Caucus), https://www.azsos.gov/sites/azsos.gov/files/pubpam92.pdf. Proposition 108 was intended "to take back control from a run-away tax and spend state legislature." *Id*.

Proposition 108 has certainly done that and then some. Not only have there been no tax increases following voter approval of Proposition 108, in almost every year since 1992 the legislature has implemented a tax reduction. *See* Joint Legislative Budget Report Fiscal Impact of Statutory Changes dated September 2016, https://www.azleg.gov/jlbc/fiscalimpactofstatutorytaxchanges.pdf. The tax reductions implemented since the early 1990s have lowered revenue to the state general fund by about $4 billion in fiscal year 2016, a reduction of approximately 30%. Tax Reductions in Arizona: Effects on Economic Growth and Government Revenue, a Report from the Office of the University Economist, October 2016, Tom Rex, Center for Competitiveness and Prosperity Research, W. P. Carey

School of Business, Arizona State University at 1, https://wpcarey.asu.edu/sites/default/files/taxreductions10-16.pdf.

Those tax cuts have had a significant impact on state spending. For example, in 1991-92, Arizona ranked thirty-fourth in education funding per student, ahead of sixteen other states and 87.7% of the U.S. average. In 2012-13, Arizona had fallen to 48th in education funding per student above only two other states and only 69.5% of the U.S. average, http://azsba.org/wp-content/uploads/2015/09/PC-Funding-Session-1-The-Numbers-Ranking-and-Percentages.pdf.

Unlike tax reform efforts in California as described by the Howard Jarvis Taxpayer Association in its Amicus Brief, Proposition 108 in Arizona has been spectacularly successful at reducing state revenues and spending. The idea that an assessment on 74 hospitals to fund Arizona's Medicaid share is somehow going to change that is absurd.

IV. OPPOSITION TO THE AFFORDABLE CARE ACT IS A BETTER EXPLANATION FOR LEGISLATIVE OPPOSITION TO MEDICAID EXPANSION THAN PROPOSITION 108.

Arizona's legislature has a long history when it comes to providing health care to Arizonans mired in poverty. Even though Medicaid was available in 1965, it took Arizona 17 years to decide it was going to participate and became the last state to do so in 1982. Later, Arizona voters decided that the legislature had not

done enough to support the healthcare needs of low income Arizonans and in 2000 approved Proposition 204.

Proposition 204 increased the eligibility for AHCCCS healthcare benefits to 100% of the federal poverty level and directed that tobacco tax settlement funds along with federal funds and "any other available sources" be used to pay for the increased state share associated with the expanded eligibility. A.R.S. § 36-2901.01(B).

In 2011, following years of tax reductions exacerbated by the recession, the legislature decided it could no longer afford to support the expanded AHCCCS population that voters had mandated in 2000. As a result, the legislature mandated that the Director of AHCCCS freeze enrollment of so-called childless adults in the AHCCCS program. The court of appeals upheld the freeze despite the unconditional increase in eligibility in Proposition 204 because it held that the legislature's decision about whether funding was available was nonjusticiable. *Fogliano v. Brain*, 229 Ariz. 12, 270 P.3d 839 (App. 2011), *review denied* 2012 Ariz. LEXIS 56 (Feb. 15, 2012).

When the opportunity arose under the Affordable Care Act to fund expanded eligibility under Proposition 204, the Director of AHCCCS, Defendant Tom Betlach, characterized it as a "restoration" of healthcare benefits referring to the fact that under the then Governor's plan, the program would again apply to people

who lost coverage when the state froze enrollment. Fernanda Santos, GOP in Arizona is Pushed to Expand Medicaid, N. Y. Times, Mar. 10, 2013, at A11.

Resistance in the Arizona legislature to the Governor's plan to support increased eligibility for healthcare benefits under the Affordable Care Act was fierce. Even though the Governor was a critic of the Affordable Care Act, she was careful to point out that Medicaid had been "here long before Obama health care" and that the expansion of Medicaid had "nothing to do with Obama health care." That distinction was lost on many legislators who are now Plaintiffs in this lawsuit. *See,* for example, Rep. Warren Petersen, Why Conservatives Oppose Expansion of Obamacare, Arizona Capitol Times, May 31, 2013; *see also* Bob Christie and Cristina Silva, Assoc. Press, Arizona Legislature Passes Medicaid Expansion, San Diego Union-Tribune, June 13, 2013 (""The bottom line here is greed," said Sen. Al Melvin, a Tucson Republican who is running for governor and voted against the Medicaid expansion. 'The people who want this know in their hearts that Obamacare is going to collapse under its own weight.').

Despite stiff opposition from within her own party, the Governor pushed forward with her plan to take advantage of Medicaid expansion under the Affordable Care Act. She warned legislators that she would not sign additional measures into law until the issue was resolved and then she followed through on that warning by vetoing five bills that had been sent to her. *Id.*; Mary Jo Pitzl,

Threats, Vetoes Fly as Tensions Rise Over Medicaid Expansion, Arizona Republic, May 24, 2013. The Senate President and a Plaintiff in this lawsuit was "deeply and profoundly disappointed" at the manner in which the Governor had secured approval for AHCCCS expansion under the Affordable Care Act. Arizona Legislature Passes Medicaid Expansion, *supra*. Another legislator accused her of rolling "over her own party because she was throwing a temper tantrum." *Id*. *See also*, Threats, Vetoes Fly as Tensions Rise Over Medicaid Expansion, supra. The minority legislators quickly filed this lawsuit based on Proposition 108 which had scarcely been discussed through the legislative process. That's likely because many of the same legislators who filed this action had previously taken advantage of Proposition 108's exception for assessments and fees authorized by the legislature but which are not prescribed by formula and are set by a state officer or agency.

V. THE LEGISLATURE HAS EXCEPTED NUMEROUS ASSESSMENTS AND FEES FROM THE APPLICATION OF PROPOSITION 108.

If the proponents of Proposition 108 had wanted to completely prohibit the legislature from taking any action that would provide for a net increase in state revenues, they could have easily done so. Instead, Proposition 108 specifies three categories of net increases in state revenues to which it would not apply. One of those categories is for fees and assessments "that are authorized by statute, but are

not prescribed by formula, amount or limits, and are set by a state officer or agency." Ariz. Const., Art. 9, § 22(C).

Since the passage of Proposition 108, the Arizona legislature has enacted numerous statutes establishing fees or assessments under this exception. In fact, over a recent six year span (2007 through 2012), no fewer than 89 fees or other "net increase[s] in state revenues" were passed by the legislature without Proposition 108 language requiring passage by a legislative supermajority. IR 61, ¶ 42. In accordance with the rules of the legislature, each of these bills was reviewed by the House and Senate Rules Committees, respectively. IR 82 at 4. The Rules Committee has the responsibility to "consider the bill and proposed amendments thereto for constitutionality and proper form…" Arizona Senate Rule 7(C)(5).

Prior to the approval of the hospital assessment, bills authorizing new fees were routinely and openly drafted or amended in a manner to avoid the supermajority requirement of Proposition 108. For example, in April 2009, one of the bills being considered by the Rules Committee, HB 2143, which authorized loan originator license fees, contained a Proposition 108 enactment clause, "which will be remedied by a floor amendment to remove the fixed dollar amount." IR 82 at 5 quoting Arizona House of Representatives 49th Legislature-First Regular Session Committee on Rules, Minutes of Meeting Monday, April 20, 2009, available at

https://www.azleg.gov/legtext/49leg/1R/comm_min/House/042009%20RULES.pdf (last accessed September 27, 2017). According to the Minutes, the Rules attorney advised the Committee that "it is the opinion of rules counsel that these measures, *with these amendments* are constitutional and in proper form." *Id*. (Emphasis added). The bill was, indeed, amended on the floor to change the fee amounts from "one hundred dollars" and "twenty dollars" to "an amount to be determined by the Superintendent" and the Proposition 108 enactment provision was struck. *Id*. quoting McClain's Substitute Floor Amendment, House of Rep. Amendments to HB 2143, available at https://www.azleg.gov/legtext/49leg/1R/comm_min/House/042009%20Rules.pdf (last accessed September 27, 2017). After the amendment, the bill passed overwhelmingly in both Houses and was signed by the Governor. Bill Status Overview, HB 2143, available at https://apps.azleg.gov/BillStatus/BillOverview/25608 (last accessed September 27, 2017).

The Plaintiffs have previously tried to downplay the significance of the prior practice of the legislature by claiming that the 80 plus fees enacted under the exception in recent years were contained in *only* 40 bills, and that approximately half of those bills received more than a two-thirds vote. IR 71 at 2. However, for purposes of understanding the legislature's interpretation of the exception, the final

vote tallies are irrelevant. What is significant is the absence of any provision in the bills themselves addressing the two-thirds majority requirement. Article 9, § 22, subsection D expressly states that "[e]ach act to which this section applies shall include a separate provision describing the requirements for enactment prescribed by this section." Ariz. Const., Art. 9, § 22(D). The absence of any such provision in the bills in question establishes that the legislature had concluded that the proposed legislation fell within the exception and was not subject to a supermajority requirement.

It is clear that the Plaintiff legislators' view of Proposition 108 is flexible. For 89 fees and assessments, Proposition 108 provided an exception. But when expansion of healthcare benefits for low income individuals under the Affordable Care Act was the issue, suddenly the exception in Proposition 108 was unavailing. Whether the opposition is politically or ideologically motivated is beside the point. What is clear is that it is not legally justified and certainly not consistent with past legislative practice.

VI. THE ASSESSMENT IMPOSED BY THE DIRECTOR OF AHCCCS IS NOT A TAX BUT IS INSTEAD A FEE OR ASSESSMENT THAT IS EXEMPT FROM THE APPLICATION OF PROPOSITION 108.

The two lower courts that have considered the tax issue thoroughly analyzed it under the criteria established in *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002). That analysis will not be repeated here.

However, it is worth emphasizing that the assessment imposed by the Director was sought by the provider hospitals because it provides a direct financial benefit to them. The legislature confirmed that purpose when it required AHCCCS to provide annual reports to the legislature and Governor's office "on the change in uncompensated hospital costs experienced by hospitals in this state and hospital profitability during the previous fiscal year." A.R.S. § 36-2903.08(A).

The Plaintiffs themselves have admitted 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." IR 51. They even cited AHCCCS' estimates of a $407 million gain for Arizona hospitals in fiscal year 2015. *Id*. at 5-6.

Of course, once the Plaintiffs realized that their tax argument is undermined if the hospitals are the "true beneficiaries" of Medicaid expansion, they dropped that argument and now claim that low income individuals were the intended beneficiaries all along. But the Plaintiffs cannot change the facts that they have cited. Nor can they change the fact that it was the hospitals who sought the assessment and willingly pay it so that they may benefit financially. The only way the Court could possibly construe this as a tax is if it ignores those facts.

Assuming the assessment is what it says it is, the assessment falls within the plain language of the exception in Article 9, § 22(C)(2). The hospital assessment

was authorized by statute but is not prescribed by a formula, amount or limit and is set by the Director of AHCCCS. That should be the end of it.

Plaintiffs maintain that voters could not have meant to exclude assessments that fit these criteria because to do so would mean that state officers or agencies would have unconstrained authority to impose fees and assessments in any amount. Whether that is true of any fee or assessment ever authorized by the legislature is a good question but it is certainly not true in this case. A.R.S. § 36-2901.08 requires the Director to establish and collect an assessment on hospital revenues, discharges or bed days for the purpose of funding the non-federal share of the costs that are not covered by the Proposition 204 protection account and the Arizona Tobacco Litigation Settlement Fund. A.R.S. § 36-2901.08(A). The Director's authority under this section is not unconstrained and is limited to establishing an assessment sufficient to pay the non-federal share of the costs for Medicaid expansion.

Moreover, the Plaintiffs' concern would still exist even if the Court interpreted the exception in the manner urged by the Plaintiffs. According to the Plaintiffs, any fee or assessment that is authorized by statute, but not prescribed by formula, amount or limit and which is set by a state officer or agency is still subject to the requirements of § 22 even though § 22(C) explicitly says that the section does not apply to such fees and assessments. Plaintiffs nevertheless contend that the initial authorization of such a fee and assessment is subject to § 22(A) and (B)

and must receive an affirmative vote of two-thirds of the members of each house. But even if Plaintiffs are correct and the initial fee or assessment is authorized by a supermajority, the state officer or agency would still have the unbounded discretion to later increase that fee or assessment which is exactly what the Plaintiffs say they are complaining about.

Of course, that's the problem with trying to make sense out of language that is not there. Proposition 108 very clearly and in unmistakable terms provides that it "does not apply to" fees or assessments authorized by statute, not prescribed by formula and which are set by a state officer or agency. Ariz. Const., Art. 9, § 22(C). It is clear that the proponents of Proposition 108 now wish it said something else, but it doesn't. Rather than trying to divine what the proponents meant, the Court is better served by relying on the clear language of the constitutional provision and holding that the hospital assessment is exempt from the application of § 22.

CONCLUSION

The requirements of Article 9, Section 22 do not apply to the hospital assessment. The Court should affirm the lower court decisions and uphold the will of a majority of legislators to extend healthcare benefits to 400,000 Arizonans.

DATED this 2nd day of October, 2017.

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