

**ARIZONA COURT OF APPEALS
DIVISION ONE**

ANTHONY FOGLIANO; GARY HINCHMAN;
RICHARD LILLY; JACQUELINE DUHAME;
CATHERINE NICHOLS; MOUNTAIN PARK
HEALTH CENTER; JORGE HEREDIA;
TRACY DYKES; THOMAS CASTEEL; AND
BELEN CARTAGENA,

Petitioners,

v.

THE HONORABLE MARK H. BRAIN, Judge
of the SUPERIOR COURT of the STATE OF
ARIZONA, County of MARICOPA,

Respondent,

And

STATE OF ARIZONA; and TOM BETLACH,
in his capacity as Director of the Arizona Health
Care Cost Containment System (“AHCCCS”),

Real Parties in Interest.

No. _____

**Superior Court No. CV 2011-
010965**

PETITION FOR SPECIAL ACTION

DATED: August 18, 2011

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INTRODUCTION

This Special Action seeks expedited review of the trial court's order denying Petitioners' request for immediate injunctive relief. As discussed more fully within, the urgency of this matter, and the devastating injury to the Petitioners and thousands of other individuals who are similarly being denied their legal right to health care, justify this Court's exercise of its special action jurisdiction.

In 2000, Arizona voters initiated and approved a measure to ensure that any Arizonan with income below 100% of the federal poverty level would receive health care coverage. A.R.S. §36-2901.01(A). The measure, listed on the ballot as Proposition 204, was passed by a majority of voters in every single county in Arizona. State of Arizona Official Canvass, General Election 2000, available at www.azsos.gov/election/2000/general/canvass2000GE.pdf at p.17 (last accessed 8/16/2011).

Proposition 204 came two years after Arizona voters had approved a constitutional amendment, known as the Voter Protection Act, to prevent the legislature from enacting legislation that defeated or otherwise frustrated the intent and purpose of voter-approved measures. Ariz. Const., Art. 4, part 1, § 1. The proponents of Proposition 204 undertook the massive task of gathering signatures and campaigning for support of the initiative. They were secure in the belief that if it was approved by Arizona voters, Proposition 204 would not only provide the

needed health care coverage, but would also enjoy the protection of the Arizona Constitution.

And so it did for the next eleven years. Arizonans with incomes less than the federal poverty level received health care benefits through the Arizona Health Care Cost Containment System (“AHCCCS”). Approximately 1.35 million individuals participate in the AHCCCS program. AHCCCS Population Highlights, April 2011 at p. 1, available at http://www.azahcccs.gov/reporting/Downloads/PopulationStatistics/2011/May/AHCCCS_Population_Highlights_May11.pdf (last accessed 8/16/2011). Out of that total, more than 370,000 individuals were eligible for health benefits as a result of Proposition 204 (226,173 adults without dependent children and 123,220 parents). “Proposed Waiver to Rollback the Proposition 204 Population” available at http://www.azahcccs.gov/tribal/Downloads/consultations/meetings/2011/ProposedMOEWaiverSummary1_20_11.pdf (last accessed 8/17/2011)

Now, facing a budget deficit, the state has decided to ignore the mandate in Proposition 204. In the recently concluded legislative season, the legislature enacted Senate Bill 1619 which gives AHCCCS carte blanche authority to deny or terminate coverage for populations covered by Proposition 204. Senate Bill 1619, Fiftieth Legislature, First Regular Session, 2011, Sec. 34(A)(2)) (Excerpts from SB 1619 are the Appendix in Support of Petition for Special Action (“Appendix”)as

Exhibit 1.). Those populations include adults without dependent children and parents with incomes that exceed a certain percentage of the federal poverty level.

In a rule finalized on July 1, 2011, AHCCCS has implemented a freeze on enrollment of adults without dependent children as of July 8, 2011 and, at its discretion, has expressed an intent to exercise the authority conferred by the legislature to terminate coverage for some or all of those individuals if necessary to bring AHCCCS operations within the amount appropriated by the legislature.

Notice of Exempt Rulemaking (“Final Rule”), A.A.R., Vol. 17, No. 29, p.

1345(July 22, 2011)(a copy of the Final Rule is included in the Appendix as

Exhibit 2). AHCCCS expects the freeze alone to reduce enrollment by 17,000 individuals every month and 150,000 in the first year. See “Arizona Health Care Cost Containment System Estimated Impact of Population Freezes,” available at <http://www.azahcccs.gov/shared/Downloads/News/ProjectionsGraph.pdf> (last accessed 8/17/2011).

Proposition 204 was designed to ensure this could not and would not happen. It expressly provides that neither the executive branch nor the legislature could establish a cap on the number of eligible persons who may enroll in the system. A.R.S. §36-2901.01(A). And it also expressly provides that to “ensure” that funding was available, the legislature was affirmatively required to provide the funding through legislative appropriations from other available sources. A.R.S.

§36-2901.01(B).

This Court must do what the trial court failed to do: uphold the law that Arizona voters approved in 2000. If it fails to do so, thousands of Arizonans will be denied health care to which they are legally entitled. If the legislature truly believes that the only way to balance the budget is by reducing eligibility to the Proposition 204 population, then it should make its case to the people of Arizona who approved Proposition 204 in the first place. Absent approval of the voters, the legislature lacks the authority to repeal or amend Proposition 204, either directly or indirectly and the trial court acted in an arbitrary and capricious manner that was contrary to Arizona law when it failed and refused to enforce the express provisions of the voter-approved law.

JURISDICTIONAL STATEMENT

Petitioners brought an action challenging the defendants' actions in superior court on June 27, 2011.¹ On August 10, 2011, Judge Mark Brain issued an order denying the requested relief. A copy of the Order is included in the Appendix as Exhibit 3. Although there is a statutory right to appeal the denial of an injunction, A.R.S. §12-2101(A)(5)(b), this Court has discretion to accept special action

¹ Prior to filing the instant action, counsel for the Petitioners filed a Special Action in the Arizona Supreme Court seeking similar relief on behalf of different Petitioners but against Governor Brewer and Director Betlach. The Supreme Court declined special action jurisdiction on June 24, 2011. *Roach v. Brewer*, CV 11-0151-SA.

jurisdiction to review the denial where there is a need to expedite resolution of the issue. *See City of Phoenix v. Superior Court*, 158 Ariz. 214, 216, 762 P.2d 128, 130 (App. 1988). The questions that may be raised in a special action include, in relevant part, “whether a determination was arbitrary and capricious or an abuse of discretion.” Ariz. R. Proc. Spec. Act., Rule 3(c).

Although the Court’s special action jurisdiction is highly discretionary, it is hard to imagine a case more appropriate for the exercise of that discretion. *League of Arizona’s Cities and Towns v. Martin*, 219 Ariz. 556, 558, ¶4, 201 P.3d 517, 519 (2009). It is not an exaggeration to say that the health care coverage provided by AHCCCS is a lifeline for many of the over 150,000 to 250,000 individuals who will unlawfully be denied health care if the AHCCCS rule is implemented. The Court must act now to ensure that these individuals continue to receive health care benefits that the law requires.

The Court should also accept jurisdiction of this case because it significantly impacts the budget for the coming fiscal year. *League of Arizona Cities and Towns*, 219 Ariz. At 558, P4, 201 P.3d at 519 (accepting jurisdiction because case “requires a swift determination because it concerns the state budget for the current fiscal year”). The budget for FY 2012 cuts the AHCCCS program by \$510 million, which is almost half of the state’s total budget deficit; the proposed cuts to the Proposition 204 population will account for at least \$207 million of that

amount and may be even more if the decision is made to terminate eligibility rather than freeze it. If, as Petitioners contend, Proposition 204 prohibits the state from denying coverage to any eligible persons up to 100% of the federal poverty level, then the state's budget will have to be balanced in some other fashion.

Finally, the Petition raises purely legal issues. *See Piner v. Superior Court (Jones)*, 192 Ariz. 182, 185, P10, 962 P.2d 909, 912 (1998). Resolution of the Petition hinges on the enforceability of the language of Proposition 204. There are no material issues of fact in dispute.

STATEMENT OF ISSUES

Whether the trial court erred when it held that the state's obligation to provide AHCCCS coverage to all eligible persons is not enforceable where, in direct contravention of the express language of the voter-approved statute, which is subject to the Voter Protection Act, the legislature has: 1) refused to appropriate supplemental funds to allow AHCCCS to provide that coverage; and 2) directed the AHCCCS director to adopt a rule that caps enrollment.

PARTIES

I. Petitioners

The Final Rule recently adopted by AHCCCS freezes enrollment for adults without dependent children with incomes at or below 100% of the federal poverty level effective July 8, 2011. The Rule also allows for the termination of coverage

for existing AHCCCS members covered by Proposition 204 at the discretion of AHCCCS in order to bring AHCCCS' operating costs within the amount budgeted by the legislature. (Appendix, Exhibit 3, ¶ 5). This presents an immediate threat to the Petitioners, four of whom became "eligible persons" after July 8, 2011 and have been denied coverage and four of whom are current AHCCCS members and whose health depends on their continued participation in the AHCCCS program. Another Petitioner was an initial proponent of Proposition 204 in 2000 and was instrumental to the campaign to secure its approval by Arizona voters. The last Petitioner is one of the largest nonprofit community health centers in the United States whose mission is to provide accessible primary health care to underserved communities in Phoenix, Arizona.

In the court below, the parties spent considerable time addressing the issue of standing; however, as the trial court acknowledged in its Order, at least one of the plaintiffs, Belen Cartagena, clearly qualifies as an "eligible person" under A.R.S. §36-2901.01(A), but has been denied coverage as a result of the state's actions.

Ms. Cartagena is fairly representative of the individuals who, as a result of the legislature's refusal to provide supplemental funding, are being denied AHCCCS even though they are eligible to receive it under the statute. She is a resident of Yuma County and is unemployed. Ms. Cartagena has thyroid cancer

and in early June 2011, her doctors removed her thyroid completely. She received radiation treatment but her doctors do not know if her cancer has spread. She also has depression, Type II diabetes, migraines, gastritis and diverticulitis. Ms. Cartagena received a letter stating her AHCCCS will end July 31, 2011, because her youngest daughter turned 18 in July and, therefore, she is no longer eligible because she has no minor children living with her. Without AHCCCS, Ms. Cartagena cannot afford to pay for her medical treatment or medication. She has no thyroid and she fears that without her thyroid medication, she will become very sick. She is most scared about having no way to continue her cancer treatment, especially if her cancer has spread. Without medications, her other medical conditions will become uncontrollable, she will get very sick and end up in the hospital. She fears every day what will happen to her health without AHCCCS. (See Declaration of Belen Cartegena, included in the Appendix as Exhibit 4).

The other “eligible person” plaintiffs face a similar plight. See e.g. Declarations of Jorge Heredia, Tracy Dykes, and Anthony Fogliano, included in the Appendix as Exhibits 5, 6, and 7, respectively.

II. Real Parties in Interest

A. The State of Arizona.

The State of Arizona is a body politic. Proposition 204 provides that “[a]n eligible person or a prospective eligible person may bring an action in the superior

court against the director of the health care cost containment system administration and this state to enforce this section and section 36-2901.02.” A.R.S. §36-2901.01(C).

B. Tom Betlach.

Mr. Betlach is the Director of the Arizona Health Care Cost Containment System and is responsible for administering that program.

STATEMENT OF FACTS

Arizona voters’ approval of Proposition 204 in 2000 to require health care coverage for all persons living below the poverty level was not an isolated event but occurred in the context of Arizona’s participation in the federal Medicaid program and previous voter efforts to provide health care coverage for poor Arizonans. Therefore, the following statement of facts includes the full context in which the proposition was presented to, and approved by, Arizona voters.

I. History of Proposition 204

A. 1982: Arizona’s Participation in Medicaid

In 1965, Congress established the Medicaid program under Title XIX of the Social Security Act, 42 U.S.C. §1396-1396(v). The Act authorizes a state’s participation in a cooperative federal-state Medicaid program to provide medical assistance to low income persons. It was not until 1982 that Arizona finally agreed to participate in Medicaid through a program called the Arizona Health Care Cost

Containment System (“AHCCCS”). A.R.S. §§36-2901 through 36-2972. In 1982 the United States Department of Health and Human Services (“HHS”) granted Arizona an “experimental, pilot, or demonstration project” waiver, pursuant to 42 U.S.C. §1315(a) (§1115 of the Social Security Act), which permits HHS to waive Medicaid requirements to allow for experimental projects. *See* “Arizona Medicaid Section 1115 Demonstration Project Waiver (Demonstration Approval Period, Oct. 27, 2006 through Sept. 30, 2011), Special Terms and Conditions,” pp. 1-2; available at http://www.azahcccs.gov/reporting/Downloads/1115waiver/AZ_1115Waiver.pdf (last accessed 8/17/2011). The entire AHCCCS program is a demonstration project pursuant to 42 U.S.C. §1315(a) and continues as a predominately managed care program. *Id.*

If a state elects to participate in Medicaid (as all have done), then mandatory coverage is required by the federal government for certain populations including children, the elderly and pregnant women. *See* 42 U.S.C. §1396a(a)(10)(A)(i). Beyond mandatory coverage, states can elect to provide coverage for certain other populations like adults without dependent children and parents with incomes that exceed a certain percentage of the federal poverty level. *See* 42 U.S.C. §1396a(a)(10)(A)(ii) and §1396a(a)(10)(C).

B. 1996: Proposition 203.

In 1996, health care advocates across the state were concerned about the fact that so many low income Arizonans still lacked access to affordable health care. When the Arizona legislature failed to address the problem, they decided to pursue an initiative measure to expand the population covered by the AHCCCS program to 100% of the federal poverty level. The initiative was denominated Proposition 203. Its proponents identified lottery funds as a revenue source to expand the Medicaid population of low income individuals eligible for benefits and drafted legislation to that effect. Proposition 203, available at <http://www.azsos.gov/election/1996/General/1996BallotPropsText.htm> (last accessed 8/17/2011).

Proposition 203 was approved by 72% of Arizona voters in the 1996 election. State of Arizona 1996 General Election Canvass, available at <http://www.azsos.gov/election/1996/General/Canvass1996GE.pdf> (last accessed 8/17/2011). However, over the next several years, the purpose and intent of Proposition 203 was frustrated by state officials. The drafters of Proposition 203 had provided that the proposed expansion of the population eligible to receive health care benefits was contingent upon approval from the federal government and receipt of federal matching funds. *See* Proposition 203, Fiscal Analysis at 3 available at <http://www.azsos.gov/election/1996/General/1996BallotPropsText.htm> (last accessed 8/17/2011). State officials responsible for implementing the

proposition and obtaining that approval, however, insisted on capping the number of eligible individuals in the program—something that the Proposition drafters never intended and vociferously objected to. The federal government also objected to the cap and refused to approve Arizona’s application so long as it was included. See Sparer, Michael, *Health Policy for Low-Income People in Arizona*, Occasional Paper No. 32, Urban Institute (Nov. 1999) available at <http://www.urban.org/url.cfm?ID=309274> (last accessed 8/17/2011). Because the state officials remained intransigent, the application was never granted. *Id.*

C. 1998: Voter Protection Act

Unfortunately, the actions of the state officials in disregarding the will of the voters with regard to Proposition 203 was not an isolated incident. By 1998, Arizona voters had gotten so frustrated with the legislature’s obstruction of voter-approved initiatives that they decided to amend the state’s constitution to prohibit it. To ensure that future initiatives were properly implemented, voters approved the Voter Protection Act, a constitutional amendment that allowed the legislature to amend a voter approved initiative only if the amendment furthered the purposes of the amendment and only upon a three-fourths vote of each house of the legislature. Ariz. Const., Art. 4, pt. 1, §1. Application of the Voter Protection Act, however, was prospective only, so it had no application to any actions taken with regard to Proposition 203, which still remained unimplemented.

D. 2000: The Debate Over Proposition 204

Around this same time, Arizona participated with a number of other states in litigation against tobacco companies ultimately resulting in a settlement known as the Arizona Tobacco Litigation Settlement. There was significant debate about how the settlement funds estimated to be \$3.2 billion over 20 years should be used. Health care advocates seized upon the state's indecision and, unable to shake Proposition 203 loose from its bureaucratic limbo, decided to go back to the Arizona voters once again to expand the population of eligible individuals under Arizona's AHCCCS program. In 2000, the same group that had previously initiated Proposition 203 in 1996 took out a new initiative petition identified as Proposition 204. The 2000 Proposition proposed using the Arizona Tobacco Litigation Settlement Fund (instead of lottery funds) to support health care benefits to the expanded population. Proposition 204 available at <http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop204.pdf> (last accessed 8/17/2011).

Having learned their lesson from 1996, this time the sponsors wrote the Proposition so that it would become effective without the need for any state action or federal approval, although proponents cited federal matching funds as a potential source of funding. *Id.*

Other groups believed that the settlement fund was insufficient to support the expanded population so they developed a competing initiative that focused instead on funding numerous health related programs. Their initiative was assigned the number Proposition 200. Proposition 200, 2000 Ballot Propositions Publicity Pamphlet at p. 90 available at <http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop200.pdf> (last accessed 8/17/2011).

The debate over the competing initiatives was intense and vigorous. Critics of Proposition 204 charged that it would be a financial disaster for the state because the language of the Proposition obligated the state to provide health care benefits to the expanded population regardless of whether the Tobacco Settlement funds were sufficient. Proponents of Proposition 204 cited the fact that the state would be able to obtain federal matching funds, but critics pointed out that if federal matching funds were not obtained, the settlement fund would be insufficient to support the population and that general fund monies would have to be used. *See, e.g., Arizona's Working Poor Need Health Care, Anti - 204 Ads Misleading Public*, Arizona Republic B8 (Nov. 3, 2000); Robert Robb, *200 and 204 Both Unsound and Should Go Up in Smoke*, Arizona Republic B9 (Oct. 25, 2000).

Then-Governor Jane Hull expressed concern that if federal funding was not available, the state would be stuck with the bill for an expensive health program. Former Representative Sue Gerard viewed Proposition 204 as “fiscally irresponsible” because “it says we have to implement it, no matter what.” Maureen West, *Health Care Initiatives Divide Leaders Lawmakers, Hull Back Dueling Plans*, Arizona Republic (Oct. 19, 2000).

The Publicity Pamphlet provided to every voter for the 2000 election contained an analysis by the Arizona Legislative Council about Proposition 204. The Pamphlet indicated that Proposition 204 would require Arizona to deposit all of the money it receives over the next 25 years from the Tobacco Litigation Settlement and use it to increase the number of people who are eligible for coverage in the AHCCCS program. The Legislative Council observed that “If Proposition 204 passes, people who earn up to 100% of the federal poverty level will qualify to receive health care under AHCCCS.” According to the Legislative Council, that meant that future legislatures could change the eligibility requirements to allow *more* people to qualify to receive health care under AHCCCS but that the legislature and the AHCCCS administration could not reduce or limit the number of persons who would be able to enroll in AHCCCS. See 2000 Publicity Pamphlet, Analysis of Legislative Council, p. 160 available at

<http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop204.pdf> (last accessed 8/17/2011).

The Proposition 204 Fiscal Impact Summary included as part of the publicity pamphlet discussed the competing ballot proposition, Healthy Children, Healthy Families (Proposition 200), and noted that the competing proposition also fully spent the Tobacco Settlement Funds. According to the Fiscal Impact Summary, if both initiatives were to pass, but Healthy Children, Healthy Families received more votes than Proposition 204, then even though all of the tobacco settlement funds would go to the programs authorized by Proposition 200, Proposition 204 “would still go into effect [and] the entire projected state cost of the program would need to be paid from its general or other revenues.” *Id.*

Therefore, both the Legislative Council Analysis and the Fiscal Impact Summary made it clear that if tobacco litigation settlement funds were insufficient to support the expanded population, then the projected state cost of expanding the AHCCCS eligible population would have to be paid from the state’s general fund or other revenues.

The opponents of Proposition 204 also submitted comments for the Publicity Pamphlet. Arizona’s former Attorney General, Grant Woods submitted his own argument in opposition to Proposition 204. In his argument against Proposition 204, he asked “WHAT HAPPENS WHEN THE TOBACCO MONEY RUNS

OUT? IN 2007, THE TOBACCO MONEY WON'T COVER ALL THE HEALTH CARE COSTS IN PROPOSITION 204 AND THE ARIZONA TAXPAYERS WILL BE LEFT HOLDING THE BILL.” *Id.* at 165. (Caps in original).

The Arizona State Treasurer also weighed in with an argument against Proposition 204 to similar effect. She stated that “by spending 100% of the money, this proposition ensures that future cost increases associated with these vastly expanded programs will have to be funded from other state revenue sources. Since it also prohibits any future plan reductions, it ensures that these programs will require additional funding.” *Id.* (Underline in original). Significantly, the proponents of the Proposition did not challenge this interpretation.

At the time Arizona voters were asked to approve the voter-initiated legislation, nobody thought that the Governor or the legislature had any discretion to decide whether to provide health care benefits to the individuals designated by Proposition 204. It was understood by everyone involved to be a mandatory obligation and that fact was conveyed forcefully to the voting public. It was that fact the opponents of the Proposition prominently used in order to defeat it. Faced with a clear choice, Arizona voters chose to provide health care coverage to persons living below the federal poverty level even if that meant using general fund revenues to do it. Proposition 204 was approved in November 2000 with

63% of Arizona voters supporting it. State of Arizona Official Canvass, 2000

General Election at p. 17 available at

<http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf> (last accessed 8/17/2011).

E. 2001: Implementation of Proposition 204

Following the approval of Proposition 204, in 2001, the U.S. Department of Health and Human Services (“HHS”) granted permission to Arizona to amend its demonstration project to include individuals with incomes up to 100% of the federal poverty level. Those individuals included adults without dependent children and parents who had previously been excluded from coverage. These individuals have continued as participants under the AHCCCS program until now.

Providing benefits to the expanded population has been regarded as mandatory ever since Proposition 204 became the law. Each and every year since 2000, the state has provided the funding necessary to support eligibility at 100% of the federal poverty level. As recently as last year, the Governor in her State of the State message, recognized that it would take a vote of the people to reconsider Proposition 204 and “roll it back.” Governor Janice K. Brewer, State of the State Address, January 11, 2010 at 13 available at http://azgovernor.gov/dms/upload/SOTS_011110_SOTS2010.pdf (last accessed 8/17/2011).

II. The “Rollback” of Proposition 204

In 2011, the Governor and many in the state legislature began to suggest that the state should balance its budget, in part, by curbing enrollment in AHCCCS in direct contravention of Proposition 204’s mandate.

This effort has involved a multi-step legislative and executive process that began early in the 2011 legislative session when the legislature enacted and the Governor signed Senate Bill 1001 which authorized AHCCCS to request that the federal government waive Arizona’s obligation to provide benefits to individuals up to 100% of the federal poverty level. Senate Bill 1001, Fiftieth Legislature, First Special Session, 2011. The law provides that upon approval of the waiver request, AHCCCS shall adopt rules to determine eligibility within the appropriated funds. If sufficient funds are not available, AHCCCS, with the approval of the federal government, could suspend any program or eligibility for persons covered by the AHCCCS program. *Id.*

Pursuant to Senate Bill 1001, on January 25, 2011, the Governor sent a letter to Kathleen Sebelius, the Secretary of the Department of Health and Human Services. The Governor requested federal permission to make changes to the AHCCCS program, including to terminate eligibility for the 280,000 adults without dependent children and reduce coverage for parents from 100% of the federal poverty level to approximately 50% of the federal poverty level affecting

approximately 30,000 parents, both to be effective October 1, 2011.

www.azahcccs.gov/reporting/Downloads/BudgetProposal/FY2012/AZMOEWaiverAttachment.pdf.

On February 15, 2011, the Secretary responded that a decision by Arizona to eliminate the Proposition 204 population by excluding them from the new demonstration project effective October 1, 2011, would not violate federal maintenance of effort requirements.

www.azahcccs.gov/shared/Downloads/News/Sebeliusletter-JaniceBrewer.pdf.

On March 31, 2011, the Governor submitted an amended waiver proposal to the Centers for Medicare and Medicaid Services (“CMS”) that requested authority to freeze enrollment for adults without dependent children effective July 1, 2011, instead of terminating coverage for that population on October 1, 2011, available at www.azahcccs.gov/reporting/Downloads/1115waiver/WaiverPacket_3_31_11.pdf. The enrollment freeze would be part of AHCCCS’ proposed “phase out” plan for the adults without minor children. AHCCCS estimates that with such a freeze, the number of individuals enrolled would drop by half in fiscal year (“FY”) 2012. *See* www.azahcccs.gov/Shared/Downloads/News/ProjectionsGraph.pdf.

The March 31, 2011, amended waiver request also sought unlimited authority for AHCCCS to set eligibility based on appropriated funds. The amended waiver proposal states that “[w]hile the intent for FY 2012 is to operate

the program under a freeze, the state is seeking the ability to manage the population depending on available funds.” Arizona Waiver and Expenditure Authority Request at 6-7. The amended waiver request also proposed that parents’ eligibility be reduced from 100% of the federal poverty level to 75% effective on October 1. *Id.*

On April 6, the Governor signed various budget bills enacted by the legislature that reduced the appropriation to AHCCCS for FY 2012 by over \$500 million. The budget bill also authorized AHCCCS to adopt rules necessary to implement a program “within available appropriations.” SB 1619 (Appendix, Exhibit 2, Sec. 34(A) and Sec. 34 (A)(2)). Federal approval of the amended waiver request was granted on July 1, 2011 and the new rule became final on that date. The Final Rule provides that effective July 8, 2011 individuals who do not belong to a mandatory or optional group (i.e. the Proposition 204 adults without dependent children) shall be denied eligibility for the AHCCCS program. (Appendix, Exhibit 3, ¶ 15). The rule further provides that based on monthly reviews, the AHCCCS Director may:

1. Delay implementation of the closure of new enrollment;
2. Reopen the program to new enrollment; or
3. Terminate coverage for “some or all persons” eligible for the

AHCCCS Care program, the program name AHCCCS uses to refer to the

Proposition 204 childless adult population. *Id.*, ¶ 9, R9-22-1443(B).

On July 8, 2011, the state began denying enrollment to individuals covered by Proposition 204.

ARGUMENT

Because Proposition 204 was approved by Arizona voters, it cannot be altered by the legislature without satisfying the requirements of the Voter Protection Act. Ariz. Const., Art. 4, Part 1, § 1(6). Specifically, the legislature’s ability to amend voter-approved legislation is limited to amendments that further the purposes of the voter-approved measure and that are approved by at least three-fourths of the members of each house. Ariz. Const., Art. 4, Part 1, § 1(6)(C); *see also Arizona Early Childhood Development & Health Board v. Brewer*, 221 Ariz. 467, 212 P.3d 805 (2009).

As the Arizona Supreme Court observed in *Arizona Early Childhood*, “[t]he Voter Protection Act altered the balance of power between the electorate and the legislature, which share lawmaking power under Arizona’s system of government.” 221 Ariz. at 468, ¶7, 212 P. 3d at 806. In fact, proponents of the Constitutional amendment sought its enactment because they “were concerned that the legislature was abusing its power to amend and repeal voter-endorsed measures.” *Id.*

In this case, instead of directly repealing Proposition 204, the legislature has given AHCCCS the authority to change, reduce or terminate “eligibility” for the

very population the voters sought to cover. Then the legislature used the appropriation process to ensure that there would not be sufficient funds to extend coverage to those individuals. That is precisely the type of abuse that led to the enactment of the Voter Protection Act.

In the court below, the Defendants took the position that the action taken by the legislature is not contrary to the express provisions of Proposition 204. They claim that Proposition 204 only obligates the state to fund the program to the extent that there are “available funds” and that the state’s financial difficulties give them the discretion to determine that no funds are available. The trial court, however, did not base its ruling on that interpretation of Proposition 204. Rather, the trial court held that although the Final Rule “*would likely be unconstitutional if the Voter Protection Act existed in a vacuum,*” AHCCCS could not be required to provide services to the expanded population if the legislature failed to appropriate the necessary funding and the court was without authority to order the legislature to do so. (Order p. 8)(emphasis added).

However, as the following discussion demonstrates, the plain language of the statutes enacted by the voters makes it clear that the state does not have the discretion to deny coverage to eligible individuals and the state’s obligation to provide benefits to *all* qualified individuals is mandatory. Moreover, to the extent the legislature has attempted to limit eligibility by refusing to provide the

supplemental funds mandated by Proposition 204, it has violated both the express provisions of A.R.S. §36-2901.01(B) and the Arizona Constitution. Finally, the trial court's conclusion that notwithstanding the plain language of the statute, the state's obligation to provide supplemental funding is unenforceable is not supported by the law.

I. The Unambiguous Language of Proposition 204 Requires the State to Provide Health Care Benefits to Individuals with Incomes Up to 100% of the Federal Poverty Level.

The plain language of Proposition 204, duly enacted by the voters of Arizona, makes it clear that the state is obligated to provide health care benefits to all individuals with incomes at or below the federal poverty level. As the Supreme Court recently recognized, the “primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate.” *Arizona Early Childhood*, 221 Ariz. at 470, 212 P. 3d 808 quoting *State v. Gomez*, 212 Ariz. 55, 57, ¶11, 127 P.3d 873, 875 (2006). If the language is clear and unambiguous, the Court can apply it without using other means of statutory construction. *See Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

In addition, when construing a statute, the Court must interpret the provisions in the context of the entire statute. *Ariz. Dep't of Econ. Sec. v. Superior Court*, 186 Ariz. 405, 408, 923 P.2d 871, 874 (App. 1996). And, it is also important that the Court “give each word, phrase, clause and sentence meaning so

that no part of the [statute] is rendered superfluous, void, insignificant, redundant or contradictory.” *Patterson v. Maricopa County Sheriff’s Office*, 177 Ariz. 153, 156, 865 P.2d 814, 817 (App. 1993).

In this case, the language of Proposition 204 makes its intent unmistakable and what the state has done directly violates that intent. The voters intended for the state to cover *all* eligible individuals and, if the tobacco settlement funds were not sufficient, then it was up to the state to find another source of funding, including an appropriation by the legislature. This intent is clearly articulated in several different provisions of the legislation. First, in defining eligibility for benefits, the Proposition stated that *any* person whose income fell at or below the federal poverty limit would be entitled to coverage:

For the purposes of § 36-2901, “eligible person” includes any person who has an income level that, at a minimum, is between zero and one hundred percent of the federal poverty guidelines as published annually by the United States Department of Health and Human Services

A.R.S. §36-2901.01 (A). This language alone makes it clear that *any and all* persons who fall within the income limit are eligible and the state is obligated to provide them with health care coverage. However, additional provisions erase any doubt.

For example, the intent to extend coverage to *all* who meet the financial criterion is also evident in the provision that *expressly prohibits* the executive

department and the legislature from establishing a cap on the number of eligible persons who may enroll in the system. A.R.S. §36-2901.01(A) (“Neither the executive department nor the legislature may establish a cap on the number of eligible persons who may enroll in the system.”). This prohibition makes it clear that the state cannot extend services to only a subset of those individuals who are at or below the federal poverty level; rather, it must provide coverage to *all* eligible individuals. Yet, despite this clearly expressed intent, the legislative and executive departments have done exactly what A.R.S. §36-2901.01(A) prohibits them from doing: they have established a cap on an enrollment in the AHCCCS program. They have closed the door to any new applications from the AHCCCS Care population as of July 8, 2011. That means that the maximum number of AHCCCS Care individuals who are eligible was established as of that date. That is a cap on “the number of eligible persons who may enroll in the system” and an explicit violation of the statute.

Finally, the statute provides even further evidence of the voters’ clear intent to obligate the state to provide services to all eligible individuals when it specifically directs the state to provide whatever supplemental funding is necessary to extend coverage to the entire expanded population. Because it was enacted prior to the Revenue Source Rule approved by voters in 2004, Proposition 204 was not required to identify a revenue source for funding the financial obligations

associated with the expansion of the population eligible to receive health care benefits. *See* Ariz. Const., Art. 9, §23. Nevertheless, proponents of the initiative included a provision specifically to “ensure that sufficient monies are available to provide benefits to *all persons* who are eligible pursuant to this section....” A.R.S. §36-2901.01(B)(emphasis added).

Proposition 204 directed that the funding would principally come from the Arizona Tobacco Litigation Settlement Fund but that it “*shall be supplemented as necessary*, by any other available sources *including legislative appropriations* and federal monies.” *Id.* (emphasis added). The funding provision does not grant the state any discretion to withhold or limit funding. In fact, by its very terms, it was included to “ensure” that enough money would be available to provide benefits to “all” eligible persons. It explicitly contemplates the contingency in which tobacco litigation settlement funds would be insufficient to support benefits to the eligible population. If the state is unable to identify any other available funds to make up that shortfall, then under the express terms of Proposition 204, the legislature is obligated to appropriate the necessary funds to provide benefits to *all persons* eligible for health care benefits.

To avoid any uncertainty regarding the mandatory nature of the state’s obligation to provide coverage to all eligible persons and provide supplemental funding to do so, the Proposition 204 proponents also included a broad

enforcement provision. The statute enacted by the voters expressly authorizes “any eligible person or prospective eligible person” to bring an action against the state and the director of AHCCCS in superior court to enforce the provisions of both A.R.S. §36-2901.01 and 2901.02. A.R.S. § 36-2901.01(C). This provision not only specifically gives the superior court jurisdiction to enforce the two sections, but expressly grants it the authority to apply appropriate civil sanctions and equitable remedies. *Id.*

Given this explicit language, the arguments asserted by the Defendants below that inclusion of the phrase that supplemental funds can be obtained from “any other available sources” gives the legislature unfettered discretion to conclude no funds are “available” makes no sense. If that were true, funding would not be “ensured” as Proposition 204 expressly contemplated. Moreover, it would turn the phrase “shall be supplemented” into “may be supplemented.” Such an interpretation is contrary to the plain language of the statute which clearly evidences an intent to create a mandatory obligation on the part of the state.²

Indeed, if the state’s obligation were not mandatory, there would be no need for an

² Although the trial court did not appear to adopt this argument in his determination below, his inexplicable and unexplained interpretation of A.R.S. §36-2901.01(B) was that it “merely contemplates that the Legislature will pass legislation to fund the program.” Order p. 6. The Order makes no effort to explain how the use of term “shall” can be interpreted as anything other than imperative and, as discussed below, ignores entirely the significance of the enforcement provision.

enforcement provision. Yet, one was expressly included to ensure state compliance. A.R.S. §36-2901.01(C)

In sum, the initiated measure in this case, Proposition 204, clearly requires the legislature to supplement the Tobacco Settlement Fund “as necessary” to “ensure” that all persons with incomes at or below 100% of the federal poverty level are provided with healthcare benefits. No matter how you parse the language, the plain meaning of the language in Proposition 204 unmistakably and unambiguously requires the legislature to make up any deficiency in funding with “other available sources including appropriations and federal funds.” And that obligation is fully enforceable in a court of law.

II. The Determination by the Trial Court that Petitioners Were Not Entitled to Relief Was Arbitrary and Capricious and Contrary to the Law

A. The Trial Court Erred as a Matter of Law by Failing to recognize that the legislature’s “power of the purse” is derived from the people and that where the voters have expressed an intent that money be paid for a specific purpose, the legislature cannot thwart that intent.

In his decision, the trial court erroneously treated the “power of the purse” as the exclusive domain of the legislature, with the people’s right to appropriate funds through the initiative process relegated to an “obvious exception.” Order, p. 4. This characterization, however, has the analysis backward. As the Arizona Supreme Court has long recognized, when the people have directed that funding be

applied to a particular purpose, the legislature may not thwart that intent. *Windes v. Frohmiller*, 38 Ariz. 557, 3 P. 2d 275 (1931). Although the *Windes* case involved a constitutional provision establishing judges' salaries, the reasoning of the Court in that case is particularly instructive here. First, in response to the argument that the legislature had the exclusive power to make appropriations, the Court observed, "it would be absurd to say that the legislature, which is the creature of the people through their Constitution, could enact a law which would take precedence over constitutional provisions enacted by the people themselves." *Id.* at 561, 3 P.2d at 277. In its opinion, the *Windes* court relied extensively on a Maryland case decided in 1853 where the legislature had failed to appropriate the funds to pay the Comptrollers' salary, which had been approved by the Maryland voters when they included it in their Constitution. That decision, quoted at length in *Windes*, identified the pertinent question:

Have the people given their consent to the payment of the salary of the Comptroller? That they have done so is palpably manifest. They have said he "shall receive an annual salary of two thousand five hundred dollars." They have not merely said he *may claim* such a sum, but, emphatically, that he "*shall receive*" it. It is impossible for human language to be less ambiguous or more positive. The people, in their organic law, -- which is paramount to all other law -- have not only given their consent, but they have imperatively issued their commands that the particular officer "shall receive" it.

38 Ariz. at 563, 3 P. 2d at 277 *quoting Thomas, Comptroller v. Owens, Treasurer*, 4 Md. 189 (1853). The Maryland court also noted that this voter approval satisfied

the constitutional provision that no money should be dispersed without an appropriation. That provision, the Maryland court explained, ““was obviously inserted to prevent the expenditure of the people’s treasure[] without their consent, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation...”” *Id.*

The trial court’s reliance on Arizona’s comparable constitutional provision as a basis for empowering the legislature to override the express will of the voters to violate A.R.S. §36-2901.01(B) by refusing to provide the supplemental funding (Order at 5) is contrary to the fundamental principles established in *Windes*. Here, like the people in Maryland, the Arizona voters have “imperatively” directed that the state “*shall,*” not “*may,*” supplement the Tobacco Settlement Funds if they prove to be insufficient to cover all eligible persons. Thus the voters, who *own* the purse, exercised their ultimate power to direct the spending of its funds when they passed Proposition 204.

Because the Voter Protection Act prohibits the legislature from repealing or amending a voter-approved law and requires that any repeal or amendment be submitted to the voters, the statutes enacted through Proposition 204 are the functional equivalent of constitutional provisions, whether they are codified in the Arizona Revised Statutes or in the Constitution itself. *See Beneficial Loan SOC. v. Haight*, 11 P.2d 857, 861 (Cal. 1932) (“a voter initiated law has the force of a

constitutional provision.”). Because the people have unequivocally directed the state to provide supplemental funding, like the court in *Windes*, this Court should not violate the people’s trust by allowing the legislature to subvert their unambiguous intent.

B. The Trial Court Erred as a Matter of Law by Failing to Recognize that the Legislature’s Actions Were in Effect an Attempt to Amend Proposition 204, Something that is Prohibited by the Voter Protection Act and the Limitations on the Legislature’s Power to Amend or Repeal Statutes Through the Appropriation Process.

In holding that the Legislature’s action did not violate the Voter Protection Act, the trial court ignored the fact that in failing to appropriate the necessary supplemental funding the legislature acted in direct contravention of A.R.S. §36-2901.01(B) and thus, through the appropriation process, effectively amended or repealed that statute as well as A.R.S. §36-2901.01(A). That result is prohibited both by the Voter Protection Act and well-established Arizona case law regarding the limits on what may be legislated in the appropriation process.

In its determination, the trial court observed that, “[a]lthough the Voter Protection Act *prohibits* the Legislature from doing numerous things, it does not require the Legislature to do anything—specifically, it does not require the Legislature to fund programs, nor does it purport to amend Article 9, §5.” It is true that the Voter Protection Act does not require the legislature to provide supplemental funding—A.R.S. §36-2901.01(B), the *voter-approved statute does*

that! What the Voter Protection Act *prohibits* is the repeal or amendment of that statute by the legislature. It has long been recognized in Arizona that “the legislature may not do indirectly what it is prohibited from doing directly.”

Caldwell v. Board of Regents, 54 Ariz. 404, 410, 96 P.2d 401, 403 (1939).

Moreover, as the Arizona Supreme Court admonished in *Caldwell*, “in construing a statute which is alleged to be unconstitutional, it should be scrutinized very carefully, and no matter what its form, *if its true purpose and probable effect is to violate a constitutional provision, it will be held void.*” *Id.* (emphasis added).

Because the constitutional provision authorizing voter initiatives in California has, from its adoption in 1911, restricted the ability of the legislature to take any action on measures enacted by initiative, the courts in that state have frequently had to address the issue of legislation that amounts to an indirect amendment to voter-approved measures. *See generally People v. Kelly*, 222 P. 3d 186 (Cal. 2010)(reviewing history of initiative in California and restraints on legislature to amend voter-approved measures). In particular, these cases have addressed the issue of what, precisely, constitutes an “amendment” to a voter-approved measure. *See, e.g. Franchise Tax Board v. Cory*, 80 Cal.App.3d 772, 145 Cal.Rptr. 819 (1978). In *Cory*, voters had approved a statute regarding campaign expenditures. A subsequent statute had clarified the standards for audits of campaign expenditures and restricted the manner in which audits were to be

conducted. In holding the statute to be an invalid amendment of the voter-approved measure, the *Cory* court defined “amendment” as follows:

An amendment is “. . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, . . .” ...A statute which adds to or takes away from an existing statute is considered an amendment.

80 Cal. App. 3d. at 776 (citations omitted) quoting Sutherland, *Statutory Construction* (4th ed. 1972). Thus, because the statute adopted by the legislature “unquestionably adds to the Act, both by clarifying the standards to be used and by significantly restricting the manner in which audits are to be conducted” the court held that it was an impermissible attempt to amend the Act without voter approval. *Id.* at 777.

Similarly, in *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal.App.4th 1473, 76 Cal.Rptr.2d 342 (1998), California voters had previously required by initiative that insurance rates be rolled back. The legislature subsequently enacted a measure specifying how portions of the rollback were to be calculated. In finding that the legislation amended the initiated law because it took away from the provisions of the initiated law and changed its scope and effect, the court held:.

[T]he legislature cannot indirectly accomplish, via the enactment of a statute which essentially amends any formula adopted to implement

an initiative's purpose, what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions.

76 Cal.Rptr.2d at 349-350.

Here, the legislature has attempted a similar type of “amendment.” Instead of directly amending A.R.S. §36-2901.01 to either allow the state to impose a cap on beneficiaries or narrow the definition of “eligible person[s],” it attempted to alter the number of individuals who could receive AHCCCS benefits by not appropriating sufficient supplemental funds to allow AHCCCS to provide services to the entire Proposition 204 population. To ensure that the cost savings would come from a change in the definition of eligibility, it directed the Governor to seek a waiver from the federal government and had the Agency promulgate a new “emergency” rule regarding “standards, methods, and procedures *for determining eligibility* necessary to implement a program within the available appropriation.” Arizona Laws 2011, 1st Regular Session, Ch. 31, §34 (emphasis added). To avoid any doubt of its intent to use the appropriation process to effect this alteration of the definition, the legislature specifically provided:

To the extent that monies available for the program established pursuant to this subsection are insufficient to fund all existing programs, the administration, subject to approval by the secretary of the United States department of health and human services, may *suspend any programs or eligibility for any persons or categories of persons established under title 36, chapter 29, Arizona Revised Statutes.*

Arizona Laws 2011, 1st Special Session, Ch. 1 §1(B)(emphasis added). Thus, the legislature authorized the Director to ignore the requirements of A.R.S. §36-2901.01.

The end result of these legislative maneuvers was the current situation where “eligible persons” who are legally entitled under A.R.S. §36-2901.01(A) to receive AHCCCS benefits are denied coverage. As the following discussion demonstrates, this strategy of attempting to effect a substantive change in the law by withholding appropriations has a long history in Arizona that predates the Voter Protection Act. It wasn’t a constitutional way to legislate before the Voter Protection Act limited the legislature’s ability to repeal voter-approved laws, and it certainly isn’t constitutional today.

The trial court’s decision suggests that the Court is completely without power to question decisions made in the appropriation process. (Order at 5). While it is true that the legislature has broad discretion regarding appropriations, that discretion is not without limitation. It is well-established that the legislature cannot use the appropriation process to effect amendments to, or repeal, an existing general law. *See, e.g. State of Arizona v. Angle*, 54 Ariz. 13, 91 P.2d 705 (1939); *Carr v. Frohmiller*, 47 Ariz. 430, 56 P.2d 644 (1936); *Litchfield Elem. School Dist. v. Babbitt*, 125 Ariz. 215, 608 P. 2d 792 (1980). In Arizona, this rule has developed based upon two principal constitutional provisions, the single subject

rule and the prohibition of legislation by reference. Ariz. Const. Art. 4, Pt. 2 §§13, and 14, respectively. In applying the rule, Arizona courts have often times had to address legislation like that presented in this case: a general appropriation bill that purports to simply set forth a specific appropriation but that has the practical effect of amending or repealing a general law. When confronted with such a situation, whether it was intentional (as it is in this case) or inadvertent, the result has been the same. The attempted repeal or amendment is invalid.

For example, in *Carr* the legislature had enacted as part of the general law an Old Age Pension Act (OAPA) which set up a program to pay for the burial of the indigent aged and actually collected and appropriated monies for that purpose. Two years later, in the general appropriations bill, the legislature appropriated only \$275,000 for old age pensions and forbade the State Treasurer from drawing warrants for pensions or burials above this amount, even though as a result of the OAPA there was an additional amount of money available for the purpose. The Court struck down the \$275,000 limit as unconstitutional, holding that the legislature had in effect attempted to amend the OAPA through the appropriation process, something it could not do. 47 Ariz. at 443-444, 56 P. 2d at 649.

A few years later in *Angle*, the Supreme Court considered a slightly different case where the legislature had passed a minimum wage law that resulted in a significant increase in the wages of the plaintiffs, who were state employees. Even

after the statute went into effect, however, the state continued to pay the employees their prior, lower, wage because that was the amount that had been included in the general appropriation passed by the legislature. The Court held that because under the general laws of the state, the employees were entitled to be paid at the higher rate, the legislature could not affect their right to receive that amount by failing to appropriate a sufficient amount. 54 Ariz. at 18, 91 P. 2d at 707. In reaching its decision, the Court set forth the following “rule”:

The general appropriation bill can contain nothing but the appropriation of money for specific purposes, and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only. Any attempt at any other legislation in the bill is void. An attempt, therefore, to repeal the general legislation set up in section 1350, supra, [minimum wage statute] in the general appropriation bill would necessarily be invalid and of no effect.

Id. at 21, 91 P. 2d at 708.

This strict limitation on the legal effect of general appropriation bills is not unique to Arizona. Other states with similar “single subject” constitutional provisions have adopted it as well. *See e.g. State v. Carter*, 27 P. 2d 617 (Okla. 1933)(holding that the legislature could not confer authority upon a public officer that he did not previously possess through a provision in a general appropriation bill) cited with approval in *Litchfield Elem. School Dist.*, 125 Ariz. at 223, 608 P. 2d at 800. In fact, in a case with facts remarkably similar to those presented in this

case, the Washington Supreme Court struck down an attempt by that state's legislature to use the appropriation process to limit the number of individuals who could receive public assistance benefits. *Flanders v. Morris*, 558 P. 2d 769 (Wash. 1977). Although the general statute that authorized public assistance was based solely on need and contained no age limit, the legislature included a provision in its general appropriation bill that limited the assistance for single individuals to those over the age of fifty. *Id.* at 770.

Prior to passing the offending appropriation bill, the Washington legislature had twice tried, unsuccessfully, to amend the general law to impose such a limitation. Those bills, however, had never made it out of committee. Thus, as the court observed, "a law which could not pass on its own merit, under a proper title, became law by being slipped into a 45-page appropriations bill." *Id.* at 772. In holding the provision unconstitutional, the Washington Court explained:

For 37 years, the statutory law of this state has provided for public assistance on the basis of need with no age restriction. The new restriction is clearly an amendment to RCW 74.04.005, adding to the restrictions already enumerated there. However, the statute will never reflect this change but will continue to read as it always has, with no age restriction. One seeking the law on the subject would have to know one must look under an "appropriations" title in the uncodified session laws to find the amendment. The fact that the budget bill is not codified strikes at the very heart and purpose of Const. art. 2, § 37 [prohibition on legislation by reference]

Id. at 189. Thus, the court concluded:

We realize that in certain instances the legislature must place conditions and limitations on the expenditures of monies, but to the extent that such conditions or limitations have the effect of modifying or amending the general law they are unconstitutional enactments. An appropriations bill may not constitutionally be used for the enactment of substantive law which is in conflict with the general law as codified. Hence, we declare the challenged provision a nullity.

Id. at 191.

The legislation at issue in this case not only runs afoul of the rule regarding using the appropriation process to amend or repeal legislation, it also attempts to effect an amendment to a statute that is constitutionally protected from any sort of limiting amendment³ or repeal by the legislature—whether that change is made directly through general legislation or indirectly through the appropriation process. As the foregoing cases demonstrate, the fact that the legislature has attempted to change the definition of “eligible individuals” and impose a cap on the number of individuals covered by AHCCCS through the appropriation process does not shield it from the constitutional restrictions on its power to amend or repeal A.R.S. §36-2901.01. Indeed, the fact that the legislature has attempted to achieve its goal of partial repeal through the appropriation process only makes its legislative action unconstitutional on multiple grounds.

By adopting a completely superficial analysis of the legislature’s actions *vis á vis* the Voter Protection Act, and ignoring entirely the limitations on the

³ Plaintiffs recognize that there is a limited exception under the Voter Protection Act that allows for amendment under circumstances not present here.

legislature to effect substantive changes through the appropriation process, the trial court failed utterly to give full effect to that Act as well as the other long-established Constitutional restraints on legislative abuse.

C. The Trial Court Erred as a Matter of Law by Ignoring the fact that Proposition 204 By Its Express Terms Specifically Grants the Court Jurisdiction to Enforce A.R.S. §36-2901.01(B) and Authorizes the Court to Impose Civil Sanctions and Equitable Remedies.

In its decision, the trial court concludes that because A.R.S. §36-2901.01(B) is not a “self-executing authorization,” that it is unenforceable. Order, p.6. This conclusion, however, confuses enforceability with available remedies. As Petitioners conceded below, the obligation to provide supplemental funding does not contain the requisite specifics to qualify as an appropriation *per se*. This would be legally significant if, for example, there was a question as to whether it could be the subject of a line item veto, *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 143 P.3d 1023(2006)(holding that statute which created a state obligation to pay certain payments to separating employees was not itself an appropriation subject to the line item veto), or if the Petitioners sought a mandamus ordering the treasurer to pay a specific amount claimed. *Cockrill v. Jordan*, 72 Ariz. 318, 235 P. 2d 1009 (1951)(holding that statute requiring state to pay lessee the value of improvements upon termination of lease did not, in itself, constitute an appropriation that would allow payment out of the general fund).

The statute at issue here creates an obligation on the part of the state. The fact that the obligation is not in the form of a self executing appropriation does not render it unenforceable. A statute that directs the legislature to make an appropriation as opposed to making the appropriation itself is hardly unusual. The Arizona Revised Statutes are replete with similar directives. *See, e.g.* A.R.S. §45-612 (A)(“Each year the legislature shall appropriate sufficient monies to the department to cover all costs of administration and enforcement of this chapter.”); A.R.S. § (“The legislature shall, in its general appropriation measure and in accordance with the budget laws of the state, make an appropriation for the operation of the commission and department, the appropriation to be payable from game and fish funds.”); A.R.S. §26-306.01(C) (“The legislature shall appropriate for each of the following two fiscal years the amount necessary to develop, maintain and support the state plan, after hearing the recommendation under subsection B of this section. The monies shall be appropriated to the nuclear emergency management fund established by section 26-306.02.”); A.R.S. §36-1201(A)(10)(“A person may bring a complaint against any state agency that violates this section pursuant to title 41, chapter 6, article 6 or 10, as applicable. In addition to any costs or fees awarded to a person resulting from a complaint of a violation of this section, the agency shall revert the sum of five thousand dollars from its general fund operating appropriation to the state treasurer for deposit in

the state general fund for each violation that is upheld by an administrative law judge or hearing officer. The legislature shall appropriate monies that revert under this section to a similar program that provides direct services to children.”)

Just as the foregoing statutes create an obligation on the part of the legislature to take specific action in the appropriation process, A.R.S. §36-2901.01(B) creates a similar obligation to determine the amount of supplemental funds necessary to cover the expanded population and provide them—whether from another source of funding or through an appropriation of the general fund. The only option not available to the legislature is the one it chose here—refuse to provide the necessary funds.

In its ruling, the trial court also asserted that “the Court lacks the authority to make the Legislature fund Proposition 204.” Order at 6. As support for this proposition, the Order quotes *dicta* from *Hernandez v. Frohmiller*, 68 Ariz. 242, 253-54, 204 P. 854, 862 (1949) where the Court gratuitously speculated on the general enforceability of a provision—in a statute that it had already determined was unconstitutional for other reasons—that required the legislature to appropriate 1% of the payroll of the state’s service. Order at 6.

The lower court’s reliance on *Brewer v. Burns*, 222 Ariz. 234, 239, 213 P. 3d 673, 676 (2009) for the same proposition is similarly misplaced. Like *Brewer*, this case does not involve the Court in a “political question”; the “political

question” of what to include in the budget was already answered by the voters in 2000 when they passed Proposition 204 and commanded the legislature to cover the expanded AHCCCS population. As the Arizona Supreme Court observed in *Rios v. Symington*, “[t]he legislature , in the exercise of its lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect.” 172 Ariz. 3, 5-6, 833 P. 2d 20, 22-23 (1992). Here, the voters established the policies and priorities when they enacted A.R.S. §§36-2901.01 and 2901.02. They reinforced them when they directed the legislature to appropriate the necessary funds. Moreover, as to the more pertinent issue of whether the Court can compel the legislature to act, it is notable that while the Supreme Court in *Brewer* declined, given the unique circumstances, to grant the requested relief and order the legislature to present the budget bill to the Governor by a specific date, that decision was made as an exercise of the Court’s equitable discretion. It never questioned that it had the authority to enter such an order had circumstances been different and only declined to do so because the legislature had indicated that it would present the bill to the Governor a mere week later. 222 Ariz. at 242 ¶¶40-42, 239, 213 P. 3d at 679.

Moreover, the trial court completely ignored the fact that A.R.S. §36-2901.01 not only establishes the state’s obligation, but also expressly gives the Court jurisdiction to enforce it. In Arizona, the Constitution specifically grants the

legislature the authority to “direct by law in what manner and in what courts suits may be brought against the state.” Ariz. Const. Art. 4, Pt. 2, §8. Here, in exercising their legislative power, the voters enacted a statute that specifically authorizes an action against the state to enforce the provisions of Proposition 204. A.R.S. §36-2901.01(C). As part of that enforcement authority, the statute authorizes the Court to apply appropriate equitable remedies. *Id.* In the face of this explicit statutory authority, the trial court’s reliance upon questionable and inapplicable case law to conclude that the legislature’s obligation to fund the Proposition 204 population was unenforceable is simply unsupportable. *See e.g. Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998)(affirming trial court order prohibiting state from distributing funds to Arizona’s public school system until legislature adopted a funding system that complied with the constitutional requirements). Simply allowing the legislature to blatantly act in defiance of a voter-approved and constitutionally protected mandate is an abuse of discretion.

CONCLUSION

Petitioners request that the Court:

1. Declare that Proposition 204 requires the provision of health care benefits to any “eligible person” as that term is defined in A.R.S. §36-2901.01(A) including any person who has an income that, at a minimum, is between zero and one hundred percent of the federal poverty level;

2. Enjoin the State and the Director of the Arizona Health Care Cost Containment System from taking any further action to either deny benefits to eligible persons or terminate coverage for eligible persons;

3. Award Petitioners their costs and attorneys fees pursuant to the private attorney general doctrine. *See Arnold v. Dep't of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989).

DATED this 18th day of August, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7(e) of the Arizona Rules of Special Actions, I certify that the body of the attached Petition appears in proportionally spaced type of 14 points, is double-spaced using a Roman font, and contains 10,476 words from the Introduction to the Conclusion.

Timothy M. Hogan

CERTIFICATE OF FILINGS AND SERVICE

The original and seven copies of the foregoing were filed by delivery to the Clerk, Arizona Supreme Court, 1501 West Washington Street, Phoenix, Arizona 85007 and that two copies of the Petition for Special Action were served on August 17, 2011 by hand-delivery to the following:

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