COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANDY BIGGS, et al., Plaintiffs/Appellants, v. THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System Defendants/Appellees, EDMUNDO MACIAS, et al., Intervenor/Defendants/Appellees.	1 CA-CV 15-0743 Maricopa County Superior Court Case No. CV2013-011699

PLAINTIFFS/APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case challenges the constitutionality of the Medicaid expansion provider tax adopted as A.R.S. § 36-2901.08, which was imposed without the two-thirds legislative supermajority approval as mandated by article IX, section 22, of the Arizona Constitution. Appellee Director Tom Betlach calls that tax an "assessment" and claims it is exempt from the supermajority requirement because it is "authorized by statute"—that is, because the tax was adopted in the form of a statute, HB 2010. The Superior Court agreed. But that conclusion is incorrect for three reasons, any one of which is reason for reversal.

First, unlike a true fee or assessment, the provider tax is not collected in exchange for any discrete service or benefit, but is a generally applicable levy that all affected hospitals must pay. Second, the "authorized by statute" exemption does not mean, as the Superior Court held (Superior Court Decision, IR.86, pp. 13–16), that all taxes that take the form of a statute are automatically exempted from the supermajority requirement. Such a rule would have the absurd result of allowing the legislature to violate article IX section 22 at will, since all unconstitutional tax statutes are "authorized by statute" in this sense. Rather, that exemption is only available when an administrator sets the amount of a fee or assessment that was authorized by a statute *that has received the constitutionally mandated number of votes*, in this case, a supermajority. The Superior Court's conclusion that it was

bound to apply what it admitted to be an absurd result, IR.86, p. 15, was therefore in error. Finally, the exemption for fees and assessments "not prescribed by formula, amount or limit," Ariz. Const. art. IX, § 22(C)(2), does not depend, as the Superior Court held, IR.86, pp. 15–16, on whether or how the Director actually followed the law when collecting the levy. As a facial challenge, the only relevant question is whether the provider tax is, *on its face*, prescribed in the manner set forth in the Constitution. Because the Director's power to collect the levy is circumscribed by A.R.S. § 36-2901.08 itself and the federal law it expressly incorporates, the exception cannot apply.

STATEMENT OF THE CASE

In September 2013, Appellants, 36 members of the Arizona State Legislature who voted against the Medicaid expansion provider tax, filed a Complaint in Maricopa County Superior Court seeking to enjoin then-Governor Jan Brewer[1] and Director Betlach from enforcing A.R.S. § 36-2901.08 (the provider tax) and to declare that the tax violates Ariz. Const. art. IX, § 22 ("Proposition 108").[2] Twenty-seven members of the House and eleven senators

[1] After Governor Brewer left office, Governor Ducey was dismissed from the lawsuit. (March 2, 2015 Order, IR.39 p. 2.) Director Betlach, the chief enforcement officer responsible for collecting the Medicaid expansion levy, remains in the case.

[2] Two constituents whose representatives voted against the tax also joined the Proposition 108 challenge, and taxpayer Tom Jenney brought a separation-of-powers challenge, Ariz. Const. Art. III; Art. IV, pt. 1, § 1, under the Private Attorney General doctrine. Without reaching the merits of those claims, the trial

voted against the bill. (Complaint, IR.1 ¶ 60), enough to prevent the provider tax from becoming law under the Constitution's supermajority vote requirement for acts that provide for net increases in state revenues. Nevertheless, the tax was signed into and is being enforced as law despite the fact that it did not receive a supermajority approval from either house.

The Superior Court dismissed the Complaint in February 2014 and ruled that the legislators lacked standing. IR.23. This Court accepted special action jurisdiction and reinstated the lawsuit, holding that the legislators have standing to challenge the tax on the basis that "the plaintiff legislators experienced an unconstitutional 'overriding' that 'virtually held [their votes] for naught.'" *Biggs v. Cooper*, 323 P.3d 1166, 1172 ¶ 15 (Ariz. App. 2014) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). The Supreme Court unanimously affirmed, holding that if Proposition 108 applied, "passage of the bill by a simple majority vote effectively negated the plaintiff representatives' votes and they, as a bloc, have therefore alleged a 'particularized' injury sufficient to confer standing." *Biggs v. Cooper*, 341 P.3d 457, 461 ¶ 13 (Ariz. 2014).

This case was then remanded to the Superior Court to determine whether A.R.S. § 36-2901.08, which did not garner a two-thirds supermajority vote in

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court dismissed both sets of plaintiffs for lack of standing (Feb. 10, 2014 Superior Court Decision, IR.23), and the Supreme Court affirmed. *Biggs v. Cooper*, 341 P.3d 457 (Ariz. 2014).

either legislative house, violates Proposition 108's supermajority requirement for "act[s] that provide[] for a net increase in state revenues."[3] Ariz. Const. Art. IX, § 22(A). In April 2015, the Superior Court granted the Arizona Center for Law in the Public Interest's intervention motion. (April 28, 2015 Superior Court Order, IR.49.) All parties filed Motions for Summary Judgment. Following oral argument, on August 26, 2015, Judge Douglas Gerlach denied Legislators' Motion for Summary Judgment and granted Appellee's and Intervenors-Appellee's Motions for Summary Judgment, ruling that the provider tax did not violate the constitutional supermajority requirement. IR.86. Judgment was entered on September 18, 2015. IR.91. On October 13, 2015, Appellants filed a timely notice of appeal, which this Court has jurisdiction over pursuant to A.R.S. § 12-2101(A)(1). IR.93.

[3] This lawsuit challenges only the constitutionality of the provider tax established by House Bill 2010 § 5 (2013) (1st Special Session), *codified at* A.R.S. § 36-2901.08 (PSOF ¶ 2, IR.52), not the current or previous Medicaid expansion. No other provision of H.B. 2010 is at issue in this litigation, and the other unrelated and severable statutes enacted therein will not be affected by the outcome of this lawsuit. *Cf. State v. Prentiss*, 786 P.2d 932, 937 (Ariz. 1989) ("An entire statute should not be declared unconstitutional if the constitutional portions of the statute can be separated.").

STATEMENT OF FACTS

I. TRANSFORMING ARIZONA'S MEDICAID PROGRAM

Under the Patient Protection and Affordable Care Act, Pub. L. 111-148, states may choose to expand their Medicaid programs, but doing so obliges a state to fund some of the costs immediately because federal funding is inadequate to cover the program's expenses. IR.86 p. 3. The federal government's funding for medical costs of the newly eligible enrollees will cease this year. Pub. L. 111-148 § 2001(a)(3)(B)(1)(A). Taxpayers of states that adopt the new program are immediately responsible for administrative costs, as well as the state's portion of Medicaid costs for new enrollees who meet eligibility under the pre-ACA expansion income guidelines. *Id.*

Arizona's past predicaments with the federal Medicaid program illustrate the need for proper deliberation and constitutional restraint. Although Medicaid was established in 1965, Arizona did not join until 1982, when it established the Arizona Health Care Cost Containment System ("AHCCCS"). Laws 1981, 4th Sp. Sess., Ch.1, § 11. Despite being able to learn from 17 years' of other states' experiences with the program, Arizona still encountered tremendous unanticipated costs. When in 2000 the state opted to expand its Medicaid rolls to offer enrollment to childless adults with incomes up to 100% of the federal poverty level ("Proposition 204"), that expansion was supposed to be funded by money from the

Arizona tobacco litigation settlement. *Fogliano v. Brain*, 270 P.3d 839, 841–42 ¶ 2 (Ariz. App. 2011). But that fund was unable to meet the "explosive growth" in Medicaid spending that the state experienced. *Id.* at 742 ¶ 3. The legislature made up the difference from the general fund—which plunged the state into a "deepening budget crisis." *Id.*

To address that unsustainable situation, the legislature passed, then-Governor Brewer signed, and the U.S. Department of Health and Human Services approved, a state law retaining coverage for current Medicaid recipients but suspending future enrollment for additional childless-adult enrollees. *Id.* at 842–43 ¶ 5. Counsel for Intervenors in this case filed a lawsuit challenging that suspension. The Court of Appeals unanimously upheld the State's action, refusing to force the legislature to expand Medicaid coverage when funding was unavailable. *Id.* at 841 ¶ 1. The 2000 expansion law, said the court, only directs the legislature to supplement the tobacco funding with "*other available sources*." *Id.* at 846 ¶ 21 (emphasis added). Of course, funding sources that are unlawful are not "available" for the legislature to use.

Despite this history of grossly underestimating costs, less than two years later, Governor Brewer opted to transform the state's Medicaid program yet again, this time extending coverage to the entire nonelderly population with income below 133 percent of the federal poverty level. When federal funding declines this

year, Arizona's obligations will automatically increase. *See* Pub. L. 111-148 § 2001(a)(3)(B)(1)(A).

The new Medicaid program is funded by imposing a new levy on hospitals – thus increasing their overall financial burden – which is used to cover the nonfederal share of the costs of expansion. (A.R.S. §§ 36-2901.08(A), (F), & 36-2901.09(A); IR.52 ¶ 8.) In order to qualify for federal assistance, federal law limits how Arizona can fund its share of these sizeable new costs, requiring among other things that Arizona collect the money without regard to whether hospitals accept Medicaid payments. (42 U.S.C. § 1396b(w), 42 C.F.R. § 433.68; IR.52 ¶ 9) (taxes must be broad-based and uniformly imposed, cannot hold providers harmless, and must be "generally redistributive").

Arizona's new provider tax lacks provisions that would protect taxpayers from reductions in federal funding, audit hospitals to ensure that they do not pass the tax on to patients, or study the program's quality of care annually. It is no wonder that 36 legislators voted against it.

II. PROPOSITION 108: ARIZONA'S CONSTITUTIONAL PROTECTION AGAINST TAXATION

To protect themselves against one of the most easily abused government powers – the power to tax – and to "restrain growth in state government," Arizonans in 1992 voted by over 71% to impose constitutional limits on the

legislature's revenue-raising authority.[4] IR.52 ¶ 11. That provision, Proposition 108, requires a vote by two-thirds of the legislature for any "act that provides for a net increase in state revenues"; that is, for any bill establishing or increasing any tax, fee, or assessment. Ariz. Const. Art. IX §§ 22(A)–(B). Voters approved Proposition 108 in order to "make it more difficult to raise taxes" even when "respond[ing] to emergency situations, court directives and federal requirements", or "[i]f there is a crisis . . . [such as] a great need for the poor." IR.52 ¶ 12.

Then-Governor Brewer threatened a "moratorium" on "sign[ing] additional measures into law" until the legislature approved the "plan for Medicaid," vetoing five unrelated bills. IR.52 ¶ 14. On the evening of June 12, 2013, she called lawmakers into a special session to vote on Medicaid expansion. IR.52 ¶ 15. Meeting in the early hours of the morning, proponents were simply unable to muster sufficient legislative votes to pass the Provider tax by a two-thirds margin. Twenty-seven members of the House and 11 Senators voted against the bill IR.52 ¶ 16, enough to defeat the Provider tax under Proposition 108's supermajority requirement. Rather than accepting defeat or funding the program lawfully, and despite its constitutional infirmities, Governor Brewer signed H.B. 2010 – including the provider tax – on June 17, 2013. IR.52 ¶ 17.

[4] "To determine the intent of the electorate, courts . . . look to the publicity pamphlet." *Heath v. Kiger*, 176 P.3d 690, 694 ¶ 13 (Ariz. 2008).

Expanding Medicaid in Arizona has come at a substantial cost – not just to taxpayers, but to the state's constitutional checks and balances. In an attempt to bypass constitutional protections against taxation, A.R.S. § 36-2901.08 has stripped the legislature of its taxing authority and consolidated power in an unaccountable administrator who is free to play favorites.

STATEMENT OF ISSUES

1) Whether the Medicaid expansion tax (A.R.S. § 36-2901.08) violates article IX, section 22 of the Arizona Constitution because it received only a bare majority of legislative votes instead of the constitutionally required two-thirds supermajority vote of both houses.

ARGUMENT

I. THE PROVIDER TAX ADOPTED IN A.R.S. § 36-2901.08 IS SUBJECT TO THE SUPERMAJORITY REQUIREMENT

Article IX, section 22 of the Constitution requires two thirds of the legislature to approve any "act that provides for a net increase in state revenues," whether it be characterized as a tax, fee, or otherwise. The purpose of this supermajority requirement, which voters adopted as Proposition 108, was "to prevent the legislature from enacting without a super-majority vote any statute that increases the overall burden on the tax and fee paying public." *Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 238 P.3d 626, 632 ¶ 24 (Ariz. App. 2010) (citations and quotations omitted). The voter pamphlet accompanying the proposition made clear

to voters that this restriction would apply regardless of the purpose to which the revenues would be put: the two-thirds vote requirement would "make it more difficult to raise taxes," voters were told, even when "respond[ing] to emergency situations, court directives and federal requirements," or "[i]f there is a crisis . . . [such as] a great need for the poor." IR.52 ¶ 12.

The provider tax imposes a new levy on hospitals—thus increasing their overall financial burden—and deposits the revenues from that tax into a fund to provide for the state's portion of the costs of Medicaid expansion. IR.52 ¶ 20. The provider tax did not receive a two-thirds supermajority vote in either house of the state legislature. IR.52 ¶ 16. Thus, unless one of the exceptions provided in Art. IX sec. 22 applies, the provider tax is unconstitutional.

In its decision, the court below asserted that Appellants were "urging the court to disregard the presumption of constitutionality that accompanies any legislative act," IR.86 p. 5, but this case does not hinge on the presumption of constitutionality. However strong that presumption may be, it is, as the court admitted, rebuttable. *Id.* More importantly, courts are bound "to ascertain and give effect to the intent and purpose of the framers" of Article IX section 22, "and of the people who adopted it." *McElhaney Cattle Co. v. Smith*, 645 P.2d 801, 804–05 (Ariz. 1982). Courts should especially keep in mind "the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil

sought to be remedied," *id*., and avoid "strain[ing] the common meaning of words." *Id*. at 807.

The court below emphasized what it considered its obligation to defer to the legislature, and to interpret the provider tax as constitutional "unless convinced beyond a reasonable doubt," IR.86 p. 5 (citation and quotation marks omitted). It concluded that it should uphold A.R.S. § 36-2901.08 as constitutional if "the arguments in support of [it] are…fairly debatable." IR.86 p. 19. But this emphasis on deference was misplaced. The heavy presumption of constitutionality to which the court was referring applies to cases involving Due Process or Equal Protection, or other situations in which courts defer to legislative judgment about the *propriety* of a law it has duly enacted. The same presumption does not apply in cases that involve, as this case does, the question of whether the legislature has complied with constitutional provisions that limit the *lawmaking process itself*. Otherwise, lawmakers could vote to ignore the constitutional provisions that were instituted to constrain the legislative process.

The reason for this distinction is found in the basis of deference itself. The reason courts defer to legislative judgments is that "improvident decisions will eventually be rectified by the democratic process." *Vong v. Aune*, 328 P.3d 1057, 1060–61 ¶ 15 (Ariz. App. 2014), *rev. denied* (Nov. 6, 2014), *cert. denied*, 135 S. Ct. 1845 (2015). But in cases involving the rules of that democratic process *itself*, a

"more exacting judicial scrutiny" applies. *Arizona Farmworkers Union v. Agric. Emp't Relations Bd.*, 712 P.2d 960, 964 (Ariz. App. 1985) (quoting *United States v. Carolene Prods. Co*., 304 U.S. 144, 152–153 n.4 (1938)).

That is why the Arizona Supreme Court took a non-deferential approach in an earlier decision in this case. Excessive deference, the Court noted, "would 'eliminate[ ] Article 9, Section 22's ability to act as a limiting provision on the legislature's power.'" *Biggs v. Cooper*, 341 P.3d at 460 ¶ 7 (citation omitted). "[T]he legislature may not," it said, "be the final arbiter of whether the constitutional provision requiring a supermajority vote applies." *Id*. The question of "whether a branch of state government has exceeded the powers granted by the Arizona Constitution" is a question to be answered by a court's independent judgment, not left to the legislature. *Forty-Seventh Legislature of State v. Napolitano*, 143 P.3d 1023, 1026 ¶ 8 (Ariz. 2006).

Indeed, in *Dobson v. State ex rel., Comm'n on Appellate Court Appointments*, 309 P.3d 1289, 1293–94 ¶ 16 (Ariz. 2013), the Court expressly rejected the argument for judicial deference. In that case, the legislature argued that the court should uphold its statute altering the constitutionally prescribed judicial appointment process, "if [that statute] 'reasonably supplement[ed] the constitutional purpose' and '[did] not unreasonably hinder or restrict the constitutional provision.'" *Id*. at 1293 ¶ 14. The Court rejected that argument for

"reasonableness," holding that the precedent on which the legislature relied "did not concern"—as this case does—"legislation that directly conflicted with any constitutional provision." *Id.* In a case like this, which *does* involve such a conflict, such deference is inappropriate. Courts must keep in mind "the important legislative rights reserved in the people—rights which are not to be considered as being subordinate to any legislative rights vested in the legislature." *Id*. at ¶ 15. *See also Windes v. Frohmiller*, 3 P.2d 275, 277 (Ariz. 1931) ("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. This court will not violate the people's trust by attempting to subvert their constitution to any legislative enactment.").

This case is one of straightforward legal interpretation and constitutional procedure: is A.R.S. § 36-2901.08 a tax or a fee or assessment, and if it is a fee or assessment, does one of the listed exemptions apply? In these circumstances, this Court should apply its own independent judgment, not "strain the common meaning of words" in an effort to uphold the legislature's action. *Smith*, 645 P.2d at 804–05.

II. NONE OF THE EXEMPTIONS TO THE SUPERMAJORITY REQUIREMENT APPLIES

Article IX section 22 includes three exemptions from the supermajority requirement. The one relevant here is in subsection (C)(2). It provides that "[f]ees and assessments that are authorized by statute, but are not prescribed by formula, amount or limit, and are set by a state officer or agency," need not receive a supermajority. *All three elements must exist* for the exemption to apply—that is, A.R.S. § 36-2901.08 must be (a) a fee or assessment, (b) authorized by statute, and (c) not prescribed by formula, amount, or limit. The Superior Court concluded that this exception applied. But A.R.S. § 36-2901.08 falls outside the exemption on *all three* counts.

A. The Provider Tax is A Tax, Not A Fee or Assessment

A.R.S. § 36-2901.08 imposes a mandatory, redistributive tax on all providers. Arizona law defines a "tax" as a levy "imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income." *Stewart v. Verde River Irrigation & Power Dist.*, 68 P.2d 329, 334–35 (Ariz. 1937). A fee, by contrast, "is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which

presumably bestow upon him a benefit not shared by other members of society." *Id*. at 335. Similar to a fee, an "assessment" is levied in exchange for a benefit provided – it is a local levy based on the value of benefits conferred on property. *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997). "[A]n assessment differs from a general tax in that an assessment is levied only on property in the immediate vicinity of some local municipal improvement and is valid only where the property assessed receives some special benefit differing from the benefit that the general public enjoys." ASSESSMENT, Black's Law Dictionary (10th ed. 2014) (quoting Robert Kratovil, Real Estate Law 465 (6th ed. 1974)).

In deciding whether to classify a levy as a tax or a fee, Arizona courts apply a multi-factor balancing test that considers: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *May v. McNally*, 55 P.3d 768, 773–74 ¶ 24 (Ariz. 2002) (citation omitted). These factors are not dispositive, but indicative. They are meant to help the court distinguish between taxes imposed by the legislature to generate general government revenues, and fees imposed by agencies that provide in exchange certain benefits or services.

The provider tax is a tax under this test.

1. The assessment is imposed by the legislature in the statute

First, the levy was imposed by the state legislature. True, the statute gives the Director a limited authority to set the amount of the tax and to grant exemptions from it, A.R.S. § 36-2901.08(B), but the *levy itself* was created anew and imposed directly by the legislature when it enacted A.R.S. § 36-2901.08.

The Superior Court concluded to the contrary, that the levy is imposed by the Director, because the legislature "merely authorized the assessment and then stepped away." (I.R.86 p. 7). But the challenged statute does not merely *authorize* the assessment, or allow the Director to decide whether or not to impose it. Rather, that statute declares, "The director *shall establish, administer and collect an assessment* on hospital revenues, discharges or bed days for the purpose of funding the nonfederal share of the costs[.]" ARS § 36-2901.08(A) (emphasis added). Although it gives the Director a certain circumscribed discretion to determine the amount of the assessment, it requires him to submit his proposed formula to a joint legislative committee (and to the federal government) for preapproval, A.R.S. § 36-2901.08(B) & (D), and specifies in detail how the revenues are to be deposited, and how failure to pay shall be punished. A.R.S. § 36-2901.08(F), (G), & (H). Significantly, the statute does not allow the Director to set the amount at zero. Nor did the legislature "step away" after imposing the tax: the statute provides detailed instructions as to how much the tax should be, and what should be done with the

revenues, and requires ongoing legislative review and approval "[b]efore implementing the assessment, and thereafter if the methodology is modified." A.R.S. § 36-2901.08(D).

In short, A.R.S. § 36-2901.08 did not merely give the Director the choice of whether to impose a fee and "step away." The statute imposes the provider tax, specified how much revenue the tax should generate, and required the Director to report in an ongoing fashion to the legislature before implementing the tax and before changing how it is imposed.

The provider tax therefore differs from the pawnbroker transaction fee at issue in *Jachimek v. State*, 74 P.3d 944 (Ariz. App. 2003), the case on which the Superior Court most heavily relied. In that case, there was no statute compelling any levy, as there is in this case: the state required pawnbrokers to file certain reports with sheriffs and police departments, and the City of Phoenix imposed a $3 fee for the filing of each such report. The court found that the fee was "not generally imposed by the legislature or the electorate," but "by the City only upon pawnbrokers within its boundaries who file the transaction reports" with "the governmental entity that has been delegated regulatory authority over pawn transaction reports." *Id*. at 948 ¶ 15. Pawnbrokers paid the fee for the service of having their reports filed, rather than to fund general government expenditures.

Here, the legislature has commanded its Director to "establish, administer and collect an assessment on hospital[s]," in order to "fund[] the nonfederal share of the costs" of Medicaid expansion. A.R.S. § 36-2901.08(A). Rather than a service fee established by a government agency, the provider tax is a revenue measure imposed by the state.

2. The assessment is imposed on hospitals regardless of their participation in Medicaid expansion

A levy "imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class," although a levy "upon a narrow class of parties can still be characterized as a tax." *Bidart Bros. v. Cal. Apple Commc'n*, 73 F.3d 925, 931 (9th Cir. 1996). A tax is typically applied to all applicable payers, while a fee is typically charged to specific people who receive a service in exchange, *Stewart*, 68 P.2d at 334–35, but even levies charged only to a narrow class can still qualify as a tax. For example, in *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1076 (La. 1983), the Louisiana Supreme Court found that a levy limited to insurers and not the public at large was nevertheless a tax for purposes of Louisiana's constitutional supermajority requirement because it was charged to a wide range of insurers, including some who would not benefit from the resulting reduction in fire insurance rates.

Here, the provider tax is imposed on *all* hospitals, regardless of whether they accept Medicaid payments or benefit from the new Medicaid program. They are

not paying a fee for a license or for permission to participate in the Medicaid program, but are being assessed to pay for the program's general costs. Moreover, hospitals must pay regardless of whether they accept Medicaid payments or benefit from Medicaid expansion, and without regard to the amount of Medicaid payments they receive. IR.52 ¶ 9 (*citing* 42 U.S.C. § 1396b(w); 42 C.F.R. § 433.68). Rather, the provider tax is "based on property or income." *Stewart*, 68 P.2d at 334–35.

This is plain on the face of the statute, which provides that the assessment "shall" be "collect[ed]…on hospital revenues, discharges or bed days." A.R.S. § 36-2901.08(A). The statute does not specify a narrow class of payers, but exactly the reverse: it requires hospitals to pay unless the Director chooses to exempt them. A.R.S. § 36-2901.08(A), (C). Also, the statute requires the Director to ensure that the levy is not "established or administered in a manner that causes a reduction in federal financial participation" in the expanded Medicaid program, A.R.S. § 36-2901.08(B), and federal law requires Arizona's hospital levy to be: (1) broad-based and uniformly imposed, (2) collected without holding providers harmless from the burden of the tax, and (3) generally redistributive. 42 U.S.C. § 1396b(w); 42 C.F.R. 433.68(b). The federal agency charged with administering Medicaid considers the provider tax to be a tax.[5] U.S. Health and Human Services Director

[5] Appellants have never contended, as the Superior Court implied, IR.86 p. 12–13, that the federal determination here is dispositive. But it is indicative, given that A.R.S. §§ 36-2901.08(B) and 36-2901.07(C) expressly forbid actions that will

Cindy Mann granted the AHCCCS Director's request for a waiver from the federal broad-based and uniformity requirement because Arizona's levy still retained the necessary qualities of a "tax program"—specifically, that "the net impact of the [state's] *tax* is generally redistributive and that the amount of the *tax* is not directly correlated to Medicaid payments." IR.52 ¶ 22 (emphasis added).

In short, the statute imposes a tax on a broad class, "regardless of how much direct or indirect benefit [the paying hospital] may receive from the expenditure of the taxes"; and it is not a fee or an assessment, because it is not levied "directly in proportion to the actual benefit received by the property assessed." *Weller v. City of Phoenix*, 4 P.2d 665, 667 (Ariz. 1931). Nor is it paid in exchange for a specific service or license.

To emphasize, the statute does *not* assess hospitals in exchange for participation in the Medicaid program, a license to operate, or any similar benefit. *Nor did the Superior Court find otherwise.* Instead, it found that there was no evidence that there are *at present* hospitals subject to the assessment that do not also participate in the Medicaid program. IR.86 p. 8. But this case is not an as-applied case that depends on particular facts; it is a facial challenge to the statute. A facial challenge asks "whether the law itself is unconstitutional, not…whether

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imperil federal funding, and the federal government, in turn, requires that the levy satisfy certain tax-related criteria.

the application of the law violates" the Constitution. *Hernandez v. Lynch*, 167 P.3d 1264, 1267 (Ariz. App. 2007). To answer that question, courts must look "only [at] the text of the statute itself, not its application to the particular circumstances of an individual." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). The question of whether A.R.S. § 36-2901.08 imposes the levy as a condition of participation in the Medicaid program is a question of law, not a question of fact, and should be answered by reference to the statute itself. *Barry v. Sch. Dist. No. 210 (Phoenix Union High Sch.) of Maricopa Cty.*, 460 P.2d 634, 635–36 (Ariz. 1969). Here, the Superior Court erred by attempting to answer that question of law with a finding of fact.[6]

To better see the Superior Court's error, one can consider an analogy to cases involving the Special Laws Clause, Ariz. Const. Art. IV, pt. 2, § 19. In a case challenging the constitutionality of a law under that Clause, a court must determine whether the law grants benefits to a narrowly defined class of recipients, and

[6] The only material facts here, which are not in dispute, are (1) the number of votes A.R.S. § 36-2901.08 received in the Arizona House and the Senate, and (2) the text of A.R.S. § 36-2901.08 and relevant federal law. The question of whether the legislature was obligated to comply with Art. IX § 22, and whether the provider tax is a tax or a fee or assessment, are both pure questions of law, not fact. The Superior Court conflated legal inferences and legal conclusions presented in Appellants' briefing as facts or lack thereof. Legal arguments presented to urge the court to conclude that Appellants were entitled as a matter of law to a judgment declaring A.R.S. § 36-2901.08 unconstitutional for failing to meet the supermajority requirement does not constitute presentation of a question of *fact*.

whether that class is "elastic"—meaning, whether people can enter or leave the class of beneficiaries, or whether the class of beneficiaries is closed, so that nobody receiving the benefits can lose them, and nobody not getting them can later qualify for them. *See Long v. Napolitano*, 53 P.3d 172, 178 ¶ 14 (Ariz. App. 2002); *Arizona Downs v. Arizona Horsemen's Found.*, 637 P.2d 1053, 1061 (Ariz. 1981). A court that sought to answer these legal questions through a factual finding—concluding, for example, that *at present* all the potential beneficiaries are receiving the benefits—would be committing error, because that is not the proper analysis. The proper analysis would be to look at the statute's language and determine as a matter of law whether the class of beneficiaries *could change under the law* – i.e. whether the class is necessarily elastic or not.

The Superior Court erred in just this way. The question of whether there is a necessary connection between the tax and any benefits accorded under A.R.S. § 36-2901.08 is a question of pure law, and the Superior Court was required to examine the statute itself, *not* to determine whether there are, as a factual matter, any such hospitals right now. This is not the same thing as saying that this case turns on "imaginary" circumstances. IR.86 p. 8. Instead, it simply means that in a facial constitutional challenge, the court must consider the law itself, and not its application in a particular set of circumstances. *Lynch*, 167 P.3d at 1267 ¶ 8. By

relying on the specific circumstances of the particular hospitals involved in this case, the Superior Court used an as-applied analysis rather than a facial analysis.

The cases upon which the Superior Court relied did not do the same, as the court seemed to believe. In *Barry*, the plaintiffs challenged a levy, arguing that it was a special assessment and not a tax. This required the court to determine whether the levy was used to fund a specific improvement that benefitted the property in question. The court answered that question, not with a factual determination, but by reference to the challenged statute. 460 P.2d at 635–636. In *Bidart Bros.*, the court determined whether the challenged levy was a tax or a fee by reference to the statutory language. 73 F.3d at 931–33. In *Hedgepeth v. Tennessee*, 215 F.3d 608, 612–13 (6th Cir. 2000) ("the definition of the term 'tax' is a question of … law" not a question of fact), the court examined the text of the statute to determine, again as a matter of law, who was required to pay the levy and how the funds would be used. *See also Mapleview Estates, Inc. v. City of Brown City*, 671 N.W.2d 572, 574 (Mich. App. 2003) ("Whether the tap-in fees are a 'tax' or a 'user fee' is a question of law that this Court reviews de novo.").

To reiterate, the Superior Court did *not* deny the Appellants' contention that, *as a matter of law*, A.R.S. § 36-2901.08 includes *no necessary connection* between the provider tax and any benefit from the expanded Medicaid program. Instead, it found that, at present, the hospitals in the record happen to both pay and receive

benefits. IR.86 p. 8. But that as-applied finding is essentially irrelevant to the facial challenge presented here, which is whether, as a matter of law, there is a *legally necessary* relationship between the benefits and burdens in the statute. Because there is no such connection, the statute is more likely a tax than a fee under this prong of the three-part test.

3. Revenues from the provider tax are expended for general public purposes, not for the regulation or benefit of the parties who pay

Where funds are collected to provide a general benefit to the public, the underlying charge is more likely to be a tax than a fee—which is paid in exchange for a specific benefit or service—or an assessment, which funds an improvement that benefits the particular payer. *May*, 55 P.3d at 774 (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992)); *Barry*, 460 P.2d at 635–36 (levy is a tax when collected "for purposes which will benefit the public generally"); *Okeson v. City of Seattle*, 78 P.3d 1279, 1286 (Wash. 2003) (when the legislature's intent is to raise revenue for a governmental function rather than to regulate the service for which the cost is levied, the imposed charge is a tax.). In addressing this prong of the three-prong tax-versus-fee test, courts should not be bound by formalism or labels, but look to the substantive use to which the revenue is put. "An examination of the use and purpose of the assessment rather than a cursory review of where the revenue is placed or how the

charge is referred to in the promulgating document is appropriate." *Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1221 (D. Ariz. 2001).

Here, the provider tax is collected for a broad public purpose—to fund Medicaid expansion—not to provide a unique benefit to the hospitals. The statute declares that the provider tax is collected for the "purpose of funding the nonfederal share of the costs" of Arizona's Medicaid expansion program, which is a public government function, and is not used to regulate or benefit the hospitals. A.R.S. § 36-2901.08(A). The statute also holds that the direct beneficiaries are not the hospitals, but the "persons" who are "eligible" for the expanded Medicaid program. *Id.*

True, the hospitals will receive payment for providing care to Medicaid patients under that expanded program, but the fact that the provider tax may *incidentally* benefit the hospitals does not render it a fee or assessment.[7] "Where

[7] The Intervenors argued below that because hospitals are required by law to stabilize emergency room patients regardless of their ability to pay, the expanded Medicaid program funded by the provider tax benefits hospitals rather than patients, and consequently is a fee. But any such benefit is at best indirect, and is not inclusive of all payers. A.R.S. § 36-2901.08 imposes a redistributive tax regardless of whether the hospital accepts Medicaid. Moreover, uncompensated Medicaid only accounts for a fraction of money loss to hospitals—they also lose money due to the provision of charity care, for example—for which the hospitals expect no payment—and bad debt, which constitutes services for which hospitals expected payment but received none, and it does not include Medicaid payments. Meanwhile, the cost of Medicaid services is often calculated at an inflated price, so losses from uncompensated Medicaid could actually be *exacerbated* by expanding Medicaid eligibility. IR.52 ¶¶ 6–7.

the legislation has both regulatory and revenue-raising aspects, emphasis is placed on 'the revenue's ultimate use.'" *Health Servs. Med. Corp. of Cent. N.Y., Inc. v. Chassin*, 668 N.Y.S.2d 1006, 1010 (1998) (quoting *San Juan Cellular*, 967 F.2d at 685). Whether the revenues are spent for general purposes—and therefore are better characterized as a tax—or to provide a discrete benefit to the class of payers is to be determined by the nature of the revenue's ultimate use.

Thus, in *Wright v. McClain*, 835 F.2d 143 (6th Cir. 1987), the court found that a law requiring parolees to pay $5 per month into a fund for supervision and rehabilitation was a tax and not a fee, because the revenues went to a general public purpose rather than a specific benefit: "The purposes of the charges are to defray the cost to the general public of monitoring and supervising the behavior of convicted offenders and to compensate, in some measure, victims of criminal misconduct. Those purposes relate directly to the general welfare of the citizens of Tennessee and the assessments to fund them are no less general revenue raising levies simply because they are dedicated to a particular aspect of the commonwealth." *Id*. at 145.

Likewise, in *Lavis*, the court found that a levy imposed on lobbyists was a tax rather than a fee, even though it was "imposed on a narrow class," 233 F. Supp. 2d at 1222, and despite the fact that the funds were segregated, because the revenues were spent to "'provide[] a general benefit to the public, of a sort often

financed by a general tax,'" instead of "'more narrow benefits to regulate companies or defray[] the…costs of regulation.'" *Id*. at 1220 (quoting *Hexom v. Oregon Dept. of Transp.*, 177 F.3d 1134, 1136 (9th Cir.1999)). The court emphasized that "[t]he fact that revenue is placed in a special fund is not a sufficient reason on its own to warrant characterizing an assessment as a fee. If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial." *Id*. at 1221. Because the revenues were devoted to programs meant to "alleviate" "specific public problems," *id.* at 1222, by funding voter education programs, providing public subsidies to political campaigns, and for other public purposes, the court found that the fee was actually a tax. *Id.* at 1221–22.

And in *Okeson*, 78 P.3d 1279, the Washington Supreme Court found that city electricity charges were actually taxes, because they were used to pay for street lighting—an "act performed [is] for the common good of all"—and was not used to fund a "special benefit or profit of the corporate entity" participating in the program. *Id*. at 1285. Despite the fact that the revenues were deposited into a special fund, *id.* at 1286–87, the levy was still a tax because the revenues were used to maintain street lights, which "is a governmental function" because streetlights "operate for the benefit of the general public, and not for the 'comfort and use' of individual customers." *Id*. at 1285. *See also Schneider Transport, Inc.*

v. Cattanach, 657 F.2d 128, 132 (7th Cir. 1981), *cert denied*, 455 U.S. 909 (1982) (vehicle registration "fees" were actually taxes, because revenues were used for transportation purposes, which benefit the public generally).

Here, the levies are used to fund the state's portion of the costs of the federal Medicaid program, the federal government's principal device for providing health care to the poor. For centuries, providing care for the indigent has been regarded in some sense as a government function. *See, e.g.*, Thomas Jefferson, *Notes on Virginia* (1787) in *Jefferson: Writings* 259 (M. Peterson, ed., 1984) (describing colonial poor laws). The purpose of the Medicaid expansion program was, ostensibly, to serve this function, not to enrich hospitals. The statute itself declares that the purpose of the levy is to raise funds to "be used for the benefit of hospitals *for the purpose of providing health care for persons eligible for coverage* funded by the hospital assessment." HB 2010, Sec. 44(3) (emphasis added). It also declares that the levy is "intended for the support and maintenance of a state government department and institution," and that it "provides funding to fulfill the intent and objective of [the expanded Medicaid program]…. These monies are integral to the support and maintenance of [the] program[]…." *Id*., HB 2010 Sec 45.

In other words, just as with the provision of street lights in *Okeson*, the supervision and rehabilitation of criminals in *Wright*, the provision of voter

education and political campaign programs in *Lavis*, and the funding of street repairs in *Cattanach*, the revenues from the assessment here are devoted to a traditional public purpose: compensating doctors for caring for Medicaid patients.

The Superior Court concluded to the contrary, that the true purpose of the program is to benefit hospitals, because it is meant to help pay for otherwise uncompensated health care. *See* IR.86 at 11–12. But its conclusion is inconsistent with its own holding. The court found that "the assessment produces a reduction in uncompensated health care provided by the hospitals that transcends any other benefit." *Id.* at 11. But the reduction in uncompensated health care is a *public* benefit, like the public benefits at issue in *Okeson*, *Wright*, *Lavis*, and *Cattanach*. A police officer is paid through public funds, but that does not make him the primary beneficiary of revenues that are spent on a police department. The manufacturer of fire trucks is paid with tax monies when it delivers a new fire truck to the local fire department, but the purpose of tax revenue is nonetheless to fight fires—a longstanding government function. The fact that the hospitals receive payment from tax dollars in exchange for providing health care to Medicaid recipients does not make the hospitals the beneficiaries of the program. The purpose of the provider tax, as the statute itself declares, is to pay hospitals "for the purpose of providing health care to persons eligible for coverage." HB 2010, Sec.

44(3). It is the Superior Court, not the Appellants, who has "confuse[d] the concepts of means and ends." IR.86 p. 11.

The provider tax is a mandatory impost, imposed by the legislature and collected regardless of its impact on the individual provider, and used for public purposes, not for any discrete public service or benefit. Because A.R.S. § 36-2901.08 establishes a tax and not a fee or assessment, Article IX section 22's supermajority requirement must apply, unless the tax fits within one of the exceptions. As explained below, no such exception applies.

B. The Provider Tax Was Not "Authorized By Statute"

Even if the provider tax were a fee or assessment, however, it is still not "authorized by statute" as required by subsection (C)(2).

Obviously the provider tax is *created* by a statute, because it was part of HB 2010, which was a statute. But this cannot be what was meant by (c)(2)'s reference to "authorized by law," because such an interpretation would render the supermajority requirement itself ineffectual, leading to absurd results. It would mean that any time the legislature adopted a fee or assessment by simple majority vote, it would automatically be exempt from the constitutional supermajority requirement, simply because it took the form of a statute. Such an interpretation is absurd. As the Wisconsin Supreme Court once put the point in another context, such an interpretation would be akin to saying to the legislature that it must not

violate the supermajority requirement "'unless [it] pass[es] a statute for that purpose.' In other words, 'You shall not do the wrong, unless you choose to do it.'" *Pauly v. Keebler*, 185 N.W. 554 (Wis. 1921) (citation omitted). Such an interpretation fails to give effect to every word of Art. IX section 22, or to enforce the will of the electorate that adopted it, which is what the Court must do. *Adams v. Bolin*, 247 P.2d 617, 621 (Ariz. 1952); *Jett v. City of Tucson*, 882 P.2d 426, 430 (Ariz. 1994).

The important word in subsection (c)(2) is "*authorized* by statute." A fee or assessment is *authorized* by statute not any time the legislature enacts a statute, but when the legislature *properly* enacts a statute that imposes a fee or assessment. A statute that is invalid, for whatever reason, cannot *authorize* action. Rather, authorization requires that the statute comply with all constitutional and legal standards. In most cases, a bare majority is all that is required to authorize something. But Art. IX section 22 requires something more of any law that results in a net increase to state revenues: such bills must be approved by a supermajority. Anything short of that is not "authorization," but only an invalid attempt to enact a fee or assessment without sufficient votes. Just as a bill that receives the votes of fewer than a majority of legislators, or that is vetoed by the governor, cannot *authorize* something, so a levy that receives less than a supermajority is not authorized.

The (C)(2) exception, in turn, allows administrators to set, change, or enforce assessments or fees after they have been authorized. It declares that a supermajority is not required when a fee or assessment (a) is *authorized* by statute, but (b) is not prescribed by any formula, amount or limit, and (c) is set by a state officer or agency. In other words, once a levy has been *properly* authorized—by the requisite two-thirds vote—an officer can "set" the amount of that fee or alter the formula by which it is calculated, without having to go back to the legislature for further supermajority approval. Ariz. Const. art. IX § 22(C)(2).[8]

A hypothetical example makes the point clear: the legislature might adopt a law allowing the Arizona Department of Environmental Quality to impose a surcharge on electricity, but allowing Department officials to determine how much to charge.[9] Because such a surcharge will result in a net increase in state revenues, that bill must receive a supermajority vote in the first instance, in order to *authorize* the Department to charge the fee. Afterwards, however, if the

[8] Indeed, Art. IX sec. 22 explicitly applies to changes in "exemption[s] from a *statutorily prescribed* state fee or assessment." Ariz. Const. art. IX, § 22(B)(6) (emphasis added). If the legislature authorizes a fee or assessment to be *administratively prescribed*, however, then a supermajority vote is not required for the administrator to make those subsequent adjustments after initial legislative approval.

[9] Obviously charges imposed by statutes that predate Art. IX sec. 22—such as tuition charges at the University of Arizona, (Plaintiffs' Controverting Stmt. Of Facts in Resp. to Defs' Stmt of Facts, and Plaintiffs' Suppl. Stmt. Of Facts, IR.72 ¶ 15 & p. 9–10)—are grandfathered in. *See* Ariz. Const. art. IX, § 22(B).

Department chooses to increase the fee, or to grant an exemption on certain days, the (C)(2) exception provides that no further authorization is required, because the fee is authorized by state law, not subject to a formula, and is set by an officer or agency. To require subsequent reauthorization would be an unnecessary hassle. Art. IX sec. 22 is designed to protect taxpayers by requiring supermajority approval for the "authorization" of new taxes, fees, and assessments, but then allows for the subsequent administrative *implementation* of whatever fees have been constitutionally "authorized by statute."

The Superior Court interpreted Subsection (C)(2) differently. It held that "authorized by statute" means "*any* statute," IR.86 p. 14, even if that statute receives only a bare majority. This means—to use the electricity example—that a simple majority could enact a bill allowing the Director to impose the surcharge. But this is an absurd result. The supermajority requirement applies not just to taxes, but to all legislation that results in a net increase in state revenues, whatever its form. If, as the court below declared, the exception applies whenever a fee is "authorized by *any* statute," IR.86 p. 14 (emphasis added), then the legislature could easily evade the supermajority requirement by simply passing, by a bare majority, any statute authorizing a fee or assessment.

In fact, the consequences of such a holding are even more unreasonable, because it would mean that a supermajority of the legislature must enact any tax

bill that includes a *specific* calculation formula, but a bare majority could give an administrative official power to impose a levy of *unspecified* amount in *the first instance*. This interpretation would mean that any tax bill would have to receive a supermajority vote—but a bare majority would suffice to relinquish to an unaccountable, appointed administrator the power to impose levies that "are not prescribed by any formula." Thus, any bill imposing a levy of, say, 2.175% on all electricity use in excess of 1100 kWh per month, would have to receive a supermajority—but a bill declaring that "the Department shall have authority to impose whatever fee it chooses on whatever it decides" would be effective on a bare majority. Such an interpretation creates a perverse incentive for lawmakers to evade constitutional constraints and cede discretion to unaccountable administrators, thereby encouraging *less* responsible and *less* accountable lawmaking, the opposite of what the voters intended.

The court below felt compelled to adopt this reading because it feared that doing the opposite would mean "revis[ing]" Art. IX sec 22 "in ways that conform to [the court's] views of what is reasonable." IR.86 p. 15. But no such consequence would follow. On the contrary, courts are expected to interpret constitutional language reasonably, to give effect to every word in the enactment and to ensure that the will of the voters is effectuated. *State v. Estrada*, 34 P.3d 356, 359 (Ariz. 2001).

Estrada involved an initiative that mandated probation for people convicted of personal possession of certain drugs. The question before the court was whether the initiative also required probation for persons convicted of possessing drug paraphernalia. The initiative made no reference to drug paraphernalia. Nevertheless, the court noted, "[f]rom time to time…we encounter circumstances in which the plain text of a statute, because of ambiguity or outright silence, fails to give effect to the legislature's obvious intent. As importantly, we interpret and apply statutory language in a way that will avoid an untenable or irrational result." *Id.* at 360. The court found that, while the language of the initiative was not, technically speaking, ambiguous, "even where statutory language is 'clear and unambiguous,' [a court] will not employ a 'plain meaning interpretation [that] would lead to…a result at odds with the [voters'] intent.'" *Id.* at 360 (citation omitted). It would have been unreasonable to suppose that voters had meant to impose heavier penalties on those convicted of possessing paraphernalia than those convicted of possessing actual drugs. *Id.* at 357–58. Indeed, such a result would have been "transparently absurd." *Id.* at 361. But the court's "primary objective in construing a ballot initiative is to place a reasonable interpretation on 'the intent of

the electorate that adopted it.'" *Id.* at 2 359 (citation omitted).[10] The court therefore refused to interpret the initiative in that way.

The same concerns apply here. By interpreting the (c)(2) exception for fees that are authorized by statute as applying to *any* statute—thereby allowing the legislature to impose nonspecific fees and assessments by bare majority—is a result at least equally absurd. In enacting Art. IX section 22, the voters intended to restrict the legislature's capacity to adopt any law that resulted in a net increase in state revenues, the only exception being fees or assessments *authorized by law*. To allow the legislature to "authorize" itself to ignore the supermajority requirement, as the decision below does, is a transparently absurd result plainly at odds with the voters' intent and the holistic reading of Proposition 108.

[10] The Superior Court expressed great skepticism about consulting the voter information pamphlet regarding Proposition 108, because it is "a debatable proposition at best" whether "voters became familiar with what [the pamphlet] said," because doing so would "require[] a voter to wade through 44 pages," and because "trying to determine 'legislative [*i.e.*, voter] intent' is 'to entertain a myth.'" IR.86 p. 16 n.39 (citations omitted). But it is well established that courts consult the publicity pamphlet when interpreting such initiatives. *See, e.g., Arizona Early Childhood Dev. & Health Bd. v. Brewer*, 212 P.3d 805, 809 ¶ 14 (Ariz. 2009); *Heath*, 176 P.3d at 694 ¶ 13; *State v. Gomez*, 127 P.3d 873, 877 ¶ 20 (Ariz. 2006); *see also Silicon Valley Taxpayers' Assn. v. Garner*, 156 Cal.Rptr.3d 703, 706-707 (Cal. App. 2013). The pamphlet is relevant here because it shows that voters did not anticipate any such broad exceptions to the supermajority requirement as created by the decision below and because voters were aware that the supermajority requirement would apply even to laws enacted in a crisis or emergency, or out of a great need for the poor." IR.52 ¶ 12.

C. The Provider Tax Is "Prescribed By Formula, Amount, Or Limit"

Finally, the hospital levy is "prescribed by formula, amount, or limit." The statute expressly limits the Director's discretion in a number of ways. The assessment is expressly made subject to approval by the federal government to prevent any reduction of federal funding, provides factors the Director may consider when determining modifications, requires legislative preapproval of the assessment and any alteration in the method of its calculation, and forbids assessments at all if federal assistance falls below a specified amount. These simply are a formula and a limit.

Most importantly, the Director must administer the tax in accordance with federal law, *see* A.R.S. § 36-2901.08(B), and federal law requires Arizona's hospital levy to be: (1) broad-based and uniformly imposed, (2) collected without holding providers harmless from the burden of the tax, and (3) generally redistributive. 42 U.S.C. § 1396b(w); 42 C.F.R. § 433.68. Federal law also requires Arizona to collect the tax from hospitals without regard to whether they accept Medicaid payments. *Id*. (taxes must be broad-based and uniformly imposed, cannot hold providers harmless, and must be "generally redistributive"). Federal law also caps Arizona's tax at no more than six percent of a hospital's net patient revenues, and the revenue collected by the tax can amount to no more than 25 percent of the state's Medicaid share. 42 C.F.R. § 433.68(f)(3)(i).

The Superior Court found that this did not constitute a formula, amount, or limit, but its holding again reflects an attempt to answer a legal question with a factual finding. It found that there was "no evidence…that the discretion given the director when setting assessment amounts has been, *in fact*, affected by federal requirements. That leaves the contention no more than a theoretical possibility…." IR.86 p. 16–17. But this simply means that, *under current circumstances*, it just so happens that the statutory limits on the Director's discretion have not been breached—that is, that the provider tax has not exceeded six percent of a hospital's net patient revenues, and has not amounted to more than 25 percent of the state's Medicaid share. Such findings are irrelevant to a facial challenge, which looks to "the law itself," and "not…[to] the application of the law. *Lynch*, 167 P.3d at 1267.

The question presented here is not, as the court below believed, whether the Director's discretion happens to have yet been affected by the federal requirements that—because they are mandated in ARS § 36-2901.08[11]—limit his discretion. The Director is not free to choose the amount of the assessment, but must design the assessment in such a way as to satisfy the detailed criteria in the statute, as well as

[11] The Superior Court also held that the limit imposed on the Director is imposed by *federal* law, but that the "formula, amount, or limit" provision in section (c)(2) refers exclusively to *state* law. This is an effort to "expand on the plain text of that section by reading into it words that are not there." IR.86 p. 13. That section refers simply to "formula, amount, or limit," not to "*state* formulae, amounts, or limits." In any event, the federal limits are incorporated expressly in ARS 36-2901.08, and *are* therefore mandated "by an Arizona authority." IR.86 p. 17.

to comply with federal Medicaid requirements. This portion of the (C)(2) exception therefore also does not apply.

NOTICE UNDER RULE 21(a)

Appellants request attorney fees and costs for this appeal pursuant to A.R.S. §§ 12-341, 12-348, 35-213, and the private attorney general doctrine.

CONCLUSION

By enforcing the provider tax despite its failure to garner the constitutionally mandated legislative supermajority, Director Betlach has forsaken Arizona's Constitution to foist upon Arizonans an unlawful tax. For the reasons stated above, Appellants respectfully request that this Court REVERSE the trial court decision.

Respectfully submitted January 19, 2016 by:

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