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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ANTHONY FOGLIANO; GARY HINCHMAN; RICHARD LILLY; CATHERINE NICHOLS; AND MOUNTAIN PARK HEALTH CENTER, Plaintiffs, vs. STATE OF ARIZONA; and TOM BETLACH, in his capacity as Director of the Arizona Health Care Cost Containment System, Defendants.	Civil No. 2011-010965 **DEFENDANT TOM BETLACH'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** (Assigned to the Honorable Mark H. Brain)

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Defendant Tom Betlach ("Director"), in his capacity as Director of the Arizona Health Care Cost Containment System ("AHCCCS"), responds in opposition to Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support (the "Motion"). The Motion must be denied because Plaintiffs do not have standing and because Plaintiffs have failed to establish the requirements for injunctive relief.

This Response is supported by the following Memorandum of Points and Authorities, the record of this case, the declarations of Tom Betlach and Linda Skinner, submitted herewith, and any argument presented to this Court on August 3, 2011.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

The State of Arizona is in the midst of one of the worst fiscal crises in its history. The Arizona Legislature has had to cut over $2 billion in expenditures over the past two years and virtually every State program has suffered. Significant and dramatic cuts have been made to education, behavioral health, health care and other vital government services. Programs have been eliminated, salaries have been reduced and employees have lost their jobs. The cuts have been painful but necessary to preserve core government services. Plaintiffs seek injunctive relief to reverse AHCCCS Care enrollment freeze for the population referred to as "childless adults." This freeze, however, is necessary, to not only preserve other core government programs, but also to preserve the AHCCCS program itself.

Before closing the AHCCCS Care program to new enrollment, every reasonable and feasible alternative was implemented to reduce program expenditures. If the AHCCCS Care program were not closed to new enrollment, AHCCCS would be unable to operate the entire program within the funds established by law and appropriated by the Arizona Legislature for the State fiscal year beginning July 1, 2011, and ending June 30, 2012 ("FY 2012"). This in turn would jeopardize federal funding for the entire AHCCCS program thereby causing the Medicaid program in Arizona to effectively end for all other covered Arizonans, including children, the disabled and pregnant women. Thus, the balance of hardships tips sharply in favor of the State and the injunction must be denied.

Additionally, Plaintiffs cannot prevail on the merits. There are no disputed material issues of fact regarding the AHCCCS plan, the legislative mandate AHCCCS is following, or the finite appropriations the Legislature has provided to AHCCCS in the FY 2012 budget. The Director, however, vigorously disputes Plaintiffs' flawed interpretation of Proposition 204 and the Voter Protection Act, their misapplication of Arizona law pertaining to appropriations and separation of powers and the improper conclusions they draw from selected references to the 2000 voter publicity pamphlet and other external

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sources prior to the passage of Proposition 204.

In an audacious effort to create a first lien on all general fund revenues, Plaintiffs are tacitly asking this Court to enter an order that would either (1) inappropriately compel the Legislature to modify other appropriations (such as for education, courts, school facilities, fire suppression, prisons, debt service, and public safety) to pay for the Proposition 204 Expansion Populationm,[1] without regard to whether such an appropriation would cut core government services or (2) require AHCCCS to expend all of its appropriated funds before the end of the fiscal year and consequently lose all federal matching funds for the entire AHCCCS program. For the reasons set forth below, Plaintiffs' request for a preliminary injunction must be denied.

II. BACKGROUND

The voters expanded the AHCCCS program in 2000 by passing Proposition 204. By the initiative's express terms, the voters only appropriated the Arizona Tobacco Litigation Settlement Fund to pay for the expansion in the AHCCCS program. While the initiative required that fund to be supplemented if necessary by "additional sources" of funds, including legislative appropriations, the drafters carefully avoided obligating the Legislature to appropriate undetermined amounts of general fund monies and left to the Legislature the determination of what funding was "available."

It is undisputed that Proposition 204 greatly expanded the number of people AHCCCS covers. One in four individuals receive AHCCCS benefits as a result of Proposition 204.[2] This accounts for 28.9 percent of the lives covered through the

[1] The eligibility level established under Proposition 204 includes "any person who has an income level that, at a minimum, is between zero and one hundred per cent of the federal poverty guidelines." A.R.S. § 36-2901.01(A). This expanded coverage, which includes various groups above the levels in effect prior to the initiative's passage, is referred to herein as the "Proposition 204 Expansion Population." The Proposition 204 Expansion Population includes: childless adults with incomes between zero and one hundred percent of the federal poverty level; parents with incomes from approximately twenty-three percent to one hundred percent of the federal poverty level; and individuals qualifying on the basis of Supplemental Security Income (SSI) with incomes between seventy six and one hundred percent of the federal poverty level. Prior to the passage of Proposition 204, parents and SSI individuals qualified at lower income levels.

[2] *See* AHCCCS Population Highlights, available at http://www.azahccs.gov/reporting/Downloads/PopulationStatistics/2011/May/AHCCCS_

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AHCCCS program as of May 2011 (389,380 of 1,348,035 lives).[3] The additional expense has been substantial and consumes a significant percentage of the annual State budget. Recognizing that existing funding may be inadequate, the voters created a second fund (the Proposition 204 Protection Account) through Proposition 303 in the 2002 general election to cover the expense of the expansion.[4] Collectively, these funds are referred to herein as the "Tobacco Funds." Although the Tobacco Funds are the only specified and appropriated funding sources for the Proposition 204 Expansion Population, for FY 2012, they now account for only 6 percent of the non-federal funds appropriated for the AHCCCS program ($148,579,200 of $2,410,904,600), and only 17 percent of the non-federal funds used to administer the Proposition 204 Expansion Population program ($108,211,300 of $628,387,600).

It is also undisputed that, for FY 2012, the Director has not been given the funds necessary to provide services to the entire Proposition 204 Expansion Population. For FY 2012, the Arizona Legislature appropriated AHCCCS $1,363,735,000 from the State general fund and $114,467,000 from other sources for the administration and operation of AHCCCS. The Legislature also granted AHCCCS expenditure authority for an additional $4,408,635,600 of which $4,182,092,700 are federal matching funds and $108,211,300 of which is from the Tobacco Litigation Settlement Fund. Declaration of Tom Betlach ("Betlach Decl.") at ¶¶ 3-4. This represents a $1,580,385,500 reduction in funding from FY 2011. *Id.* at ¶ 5.

A. Fiscal Year 2012 Budget

In determining the amount of general fund revenue available to fund Proposition 204 for FY 2012, the Arizona Legislature was confronted with multiple, competing

(...continued)
Population_Highlights_May11.pdf (last visited July 8, 2011).

[3] *Id.*

[4] Arizona Secretary of State, Ballot *Propositions & Judicial Performance Review* 387 (Nov. 5, 2002), available at www.azsos.gov/election/2002/Info/pubpamphlet/english/prop303.pdf (last visited July 17, 2011).

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demands for state appropriations that far exceeded the general funds available. Although in previous years the Legislature appropriated supplemental funding beyond the Tobacco Funds to cover expenditures for Proposition 204, such funding was made at a time when revenues were substantially higher and therefore available for such use as determined by the Legislature. As late as 2007, the State of Arizona was en route to setting a fiscal record of $9.5 billion in revenues.[5]

The financial situation in Arizona and the nation, however, took a substantial and dramatic turn for the worse following the record revenues in 2007. By 2010, the State was on the brink of fiscal collapse as a result of the worst economic recession since World War II.[6] Driven by a 34 percent loss in revenue and a projected 65 percent growth in Medicaid spending, state government faced a projected budget shortfall of $1.4 billion in FY 2010 and $3.2 billion in FY 2011.[7] The FY 2011 projected shortfall equaled 32 percent of the projected operating budget for the entire year.[8]

The shift from comfortable budget surpluses to massive deficits did not occur overnight. Shortfalls began to emerge in FY 2008 and FY 2009, as the early effects of the current recession began to be felt. During these first years of budget problems, the State balanced its budget by drawing down the "rainy day" fund ($710 million), sweeping dedicated funds ($1.3 billion), rolling over K-12 payments and other payment deferrals into the next fiscal budget ($887 million), utilizing temporary federal stimulus monies ($2.2 billion), incurring lease purchase obligations ($1.3 billion) and making substantial reductions to the overall budget ($550 million).[9]

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[5] *See The Executive Budget Summary Fiscal Year 2011,* http://www.ospb.state.az.us/documents/2010/FY2011_BudgetSummaryFINAL.pdf (last visited June 18, 2011).

[6] Business Cycle Dating Committee, National Bureau of Economic Research, http://www.nber.org/cycles/sept2010.html (last visited June 18, 2011).

[7] *See The Executive Budget Summary Fiscal Year 2011,* http://www.ospb.state.az.us/documents/2010/FY2011_BudgetSummaryFINAL.pdf (last visited June 18, 2011).

[8] *Id.*

[9] *Id.*

To resolve the FY 2010 and FY 2011 budget deficits, the State took additional steps including, passing a temporary 1 cent sales tax ($918 million, approved by the voters), providing other revenue enhancements ($231 million), reducing the budget ($761 million), taking on additional debt ($750 million), providing payment deferrals ($450 million), and sweeping additional dedicated funds ($488 million).[10]

The fiscal crisis confronting Arizona has resulted in substantial cuts to core government services since peak expenditures in FY 2008. These include an 18 percent reduction in K-12 per pupil spending, a 25 percent cut in university student spending, a 19 percent cut in community college spending, a 37 percent reduction in child care enrollees (18,000 children), a 48 percent reduction in the number of families on cash assistance (19,000 families), reduced state benefits for the seriously mentally ill, a reduction in AHCCCS provider rates, an elimination of most non-federally mandated Medicaid services, a reduction of the number of children in KidsCare (22,900 children), a 12.9 percent reduction of the non-university state employee workforce, and an 18.9 percent overall reduction of payroll costs.[11] Additionally, the State eliminated most general fund support for the Departments of Environmental Quality, Arts, Parks, Mines and Minerals, Water Resources, and Tourism.[12]

Despite these efforts, in January 2011, the State faced a projected FY 2011 deficit of $763.6 million and a FY 2012 projected deficit of $1.147 billion dollars. To resolve these deficits, the State reduced spending another $1.2 billion, including a reduction of university support by 22 percent ($198 million), community college support by 47 percent ($64 million) and employee benefits ($50 million). In addition, the Legislature passed Senate Bill 1619 ("SB 1619"), which reduced the appropriation for the Proposition 204 Expansion Population because there were not funds available to pay for

[10] *State of Arizona FY 2011 Appropriations Report*, pp. BH2-BH3, http://www.azleg.gov/jlbc/11app/FY2011AppropRpt.pdf (last visited June 18, 2011).

[11] *Arizona Economy and Budget, FY 2011 and FY 2012*, http://www.azahcccs.gov/reporting/Downloads/BudgetProposals/FY2012/ArizonaEconomyandBudget.pdf (last visited June 18, 2011).

[12] *Id.*

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the program in its entirety given significant increases in this Population, current revenue projections, and other required expenditures necessary to operate state government.[13] SB 1619, 2011 Ariz. Sess. Laws, 1st Reg. Sess., ch. 31. Even if a budget balance materializes, the State now owes $2.2 billion in new debt, over $1.1 billion in deferred payments and has $553 million in non Medicaid "suspended" statutory programs. The Legislature will have to prioritize these fiscal pressures against the restoration of Medicaid funding.

B. The AHCCCS Budget

AHCCCS is the State agency that administers the federal Medicaid program in Arizona. Betlach Decl. at ¶ 12. Medicaid is jointly funded by the federal government and the State and, to participate in it, the State submits a "State Plan" to the Center for Medicare & Medicaid Services ("CMS") in the United States Department of Health & Human Services. *Id.*; *see also* 42 C.F.R. § 430.0. Arizona's State Plan is a comprehensive written statement describing the nature and scope of Arizona's Medicaid program and includes assurances to CMS that the State will administer the program in conformity with federal requirements. Betlach Decl. at ¶ 12; *see also* 42 C.F.R. § 430.10.

Upon federal approval of the State Plan, the federal government provides a line of credit against which the State can draw federal funds equal to a percentage of the State's expenditures for the Medicaid program. Betlach Decl. at ¶ 13; *see also* 42 C.F.R. § 430.30. The amount of these federal matching funds ("FMAP") is calculated in accordance with a statutory formula based on the percentage of the State's population that is below the Federal Poverty Level ("FPL").[14] Betlach Decl. at ¶ 13; *see also* 42

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[13] Current budget projections suggest the State may realize revenue growth in excess of the adopted budget. However, cost drivers in the budget including K-12 enrollment, prisoner levels, and capitated populations may also be higher than projected levels. *See State of Arizona May 2011 Revenue Update* www.azleg.gov/jlbc/PreliminaryMayRevenueUpdate.pdf (last visited June 18, 2011).

[14] However, the percentage varies depending on (1) whether the expenditure is for administrative costs or the cost of providing services, (2) what type of administrative or service cost the expenditure is, and (3) what the eligibility status of the person receiving the services. Betlach Decl. at ¶ 13. And for various periods of time and for various other purposes, the Medicaid Act has allowed for increases to the base percentage. *Id.*

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C.F.R. § 433.10. In general, the federal government has historically contributed about 65 percent of the cost of Arizona's program. This federal financial participation ("FFP") is only available to match expenditures of State and local funds that are incurred in a manner consistent with the State Plan. Betlach Decl. at ¶ 13. In other words, unless there are State and local funds available to be spent on the program, federal funds are not available. The program cannot be funded using exclusively federal funds. *Id.*

As stated, for FY 2012, the Arizona Legislature reduced AHCCCS' appropriation by $1,580,385,500, by appropriating AHCCCS $1,363,735 from the general fund and $114,467,000 from other sources. *Id.* at ¶¶ 3-5. But AHCCCS does not have a fungible budget or unlimited discretion on how to use these appropriated funds. Consistent with A.R.S. § 35-173(B), prior to making any expenditure from the appropriation for FY 2012, AHCCCS prepared and submitted to the Arizona Department of Administration an allotment schedule based on AHCCCS' best estimate of the annual requirements of the AHCCCS program that distributes the total appropriation and expenditure authority to cover the entire State fiscal year's operations. *Id.* at ¶ 6. Pursuant to A.R.S. § 35-173(C), AHCCCS plans to request authority from the Arizona Department of Administration to transfer spending authority from one or more of the appropriations for AHCCCS programs to other AHCCCS programs. *Id.* at ¶ 7.

The AHCCCS program is also subject to the proposed reductions in the Governor's Medicaid Reform Plan *Id.* at ¶ 9. Those reductions include elimination of coverage for non-qualified aliens (estimated to reduce expenditures from the general fund by $20 million for FY 2011) and increases in copayments for services that eligible individuals would be required to contribute toward the cost of their care (estimated to reduce expenditures from the general fund by $2.7 million for FY 2011).[15] *Id.*

In addition to the funds appropriated by the Legislature to AHCCCS, the Legislature makes appropriations to the Arizona Department of Health Services and the

[15] Approval from the federal government is required before eliminating coverage for non-qualified aliens or increasing mandatory copayments. That approval, if granted, is not expected to be effective sooner than October 1, 2011. *Id.*

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Arizona Department of Economic Security for the operation of the AHCCCS program. *Id.* at ¶ 11. Each of those agencies contracts with AHCCCS to act as a managed care entity for persons with behavioral health needs and persons with developmental disabilities respectively. Both agencies transfer funds to AHCCCS so that AHCCCS can make capitation payments (essentially insurance premium payments) to both agencies and claim federal matching funds for those payments. However, absent an act of the Legislature, AHCCCS cannot use the transferred funds for any other purpose. *Id.*

There are three primary factors that drive the cost of AHCCCS: (1) eligibility (who the system covers); (2) the scope of benefits (the health care services the system provides); and, (3) provider reimbursement rates (what the system pays health care providers). *Id.* at ¶ 14. To establish a program that can be operated within the appropriations made by the Arizona Legislature and, before a decision was made to prohibit new enrollment for persons otherwise eligible for AHCCCS Care, AHCCCS implemented and continues to implement all other feasible reductions in each of these areas. *Id.* But the extent of reductions in each of these areas is constrained by practical considerations and legal requirements. *Id.*

1. Optional services have been limited or eliminated

The federal government limits the State's ability to reduce the scope of covered services. *Id.* at ¶ 16; *see also* 42 C.F.R. § 440.210. As a condition of receiving federal funds, every state must cover certain services including: inpatient and outpatient hospital services, physician services, services provided by federally qualified health clinics and rural health clinics, laboratory and imaging services, nursing facility services, services to persons under twenty-one, family planning services, the services of a nurse mid-wife, the services of a nurse practitioner, and services of a free-standing birth center. Betlach Decl. at ¶ 16. Each service must be sufficient in amount, scope and duration to meet its intended purpose. *Id.*; *see also* 42 C.F.R. § 440.230.

If the State eliminates a service which is required for federal funding, or limits services beyond what the federal government considers adequate, then the federal

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government will not provide financial support for the AHCCCS program. Betlach Decl. at ¶ 17; *see also* 42 C.F.R. § 430.35. If federal financial support becomes unavailable, the Director is required by State law to suspend the operation of AHCCCS and to inform each provider of health care of that fact. Betlach Decl. at ¶ 17; *see also* A.R.S. § 36-2919. During the suspension, AHCCCS is prohibited from providing any services to any AHCCCS eligible person. Betlach Decl. at ¶ 17.

There are also practical limitations on the State's ability to limit, reduce or eliminate covered services. *Id.* at ¶ 18. Under the Medicaid program, there are a number of services that the State can opt to include in the State Plan and the cost of those services are eligible for federal matching funds. *Id.*; *see also* 42 C.F.R. § 440.225. These optional services include prescription drugs, dental services, home health services, personal care services, hospice care, and physical therapy. Betlach Decl. at ¶ 18.

Working within these constraints, AHCCCS plans to implement changes to the scope of covered services effective October 1, 2011, that are expected to reduce expenditures from the general fund by $40 million for FY 2012. *Id.* at ¶ 15. Those changes include limiting the number of covered inpatient hospital days to 25 days per year, limiting the number of covered hospital emergency department visits to 12 per year or excluding coverage for the non-emergency use of the emergency room, and possibly limiting the number of respite hours per year provided to persons in home and community-based setting who regularly receive personal care services provided by family members or friends. *Id.* AHCCCS has implemented or is implementing all practical and fiscally responsible limitations on services that it can consistent with State and federal law. *Id.* at ¶ 19.

2. Reimbursement to providers has been reduced

Likewise, there are federally imposed limitations on the State's ability to reduce provider reimbursement rates. *Id.* at ¶ 21. The Medicaid Act requires that provider reimbursement rates be sufficient to enlist enough providers so that services are available to AHCCCS eligible persons to the same extent that they are available to the general

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population in the same geographic area. *Id.*; *see also* 42 C.F.R. § 447.204. Federal courts have interpreted the Medicaid Act to require that reimbursement rates established by the State bear a reasonable relationship to efficient and economical costs of providing quality services. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly,* 572 F.3d 644, 651 (9th Cir. 2009). AHCCCS must submit changes to its reimbursement methodologies to the federal government for review and approval under these standards. Betlach Decl. at ¶ 21.

If the State reduces health care provider reimbursement rates in a manner inconsistent with the methodologies in an approved State Plan, then the federal government will not provide federal financial support for the AHCCCS program. *Id.* at ¶ 22. If federal financial support becomes unavailable for any reason, the Director is required by State law to suspend operation of AHCCCS and to inform each provider of health care of that fact. *Id.* During the suspension, AHCCCS is prohibited from providing *any* services to any AHCCCS eligible person. *Id.*

There are also practical limits to the State's ability to reduce provider reimbursement rates. *Id.* at ¶ 23. Health care providers are not required to render services to individual eligible for AHCCCS. *Id.* Simple market forces dictate that health care professionals will simply decline to provide care to AHCCCS eligible persons if reimbursement rates are reduced too far. *Id.* In addition, several states including Arizona have been sued by providers and eligible individuals seeking to enjoin provider rate reimbursement reductions. *Id.*

Working within these limitations, AHCCCS is implementing reductions to health care provider reimbursement rates effective October 1, 2011, that are expected to reduce expenditures from the general fund by $95 million for the State fiscal year ending June 30, 2012. *Id.* at ¶ 20. Those reductions include a general five percent reduction to virtually all provider payments, reductions in capitation payments made to managed care organizations that contract with AHCCCS, reductions in reimbursement for certain prescription drugs dispensed by federally qualified health centers and rural health centers

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to the actual acquisition cost plus a dispensing fee, and reductions in payments for inpatient hospital admissions with extraordinary operating costs per day. *Id.* AHCCCS has implemented or is implementing all practical and fiscally responsible reductions in health care provider reimbursement rates consistent with current market conditions and State and federal law. *Id.* at ¶ 24.

3. The ability to limit or reduce eligibility is constrained by federal law

The remaining cost driver is eligibility. AHCCCS has already taken action to reduce program expenditures by restricting eligibility to the extent permitted by State and federal law. *Id.* at ¶ 25. As of May 1, 2011, AHCCCS closed the Medical Expense Deduction program to new enrollment which effectively eliminates the program on October 1, 2011. *Id.*; *see also* A.A.C.R9-22-1442. This program – subject to the freeze – provides health care coverage to persons with income over 100 percent of the federal poverty level but who have incurred personal financial responsibility for substantial medical costs. Betlach Decl. at ¶ 25; *see also* A.R.S. § 36-2901.04. Freezing the Medical Expense Deduction program is estimated to reduce expenditures from the general fund by $70 million for the State fiscal year ending June 30, 2012. Betlach Decl. at ¶ 25.

But, like the other drivers, there are federally imposed limitations on the State's ability to eliminate eligibility groups or to impose more restrictive eligibility requirements. *Id.* at ¶ 26. Under the Medicaid Act, there are certain eligibility categories that the State must cover under its State Plan as a condition of receiving any federal financial participation for the cost of care for those persons. *Id.*; *see also* 42 U.S.C. § 1396a(a)(10)(i)(IV). Some of these categories have income limits that are above 100 percent of the federal poverty level, including pregnant women (140 percent of FPL) and children under the age of six (133 percent of FPL). Betlach Decl. at ¶ 26. If the State were to eliminate or reduce the income limit for any of the mandatory eligibility groups, then the federal government will not provide federal financial support for the AHCCCS

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program, triggering suspension of the AHCCCS program. *Id.* at ¶ 27.

The Medicaid Act also permits states to include eligible persons in optional eligibility categories or to cover mandatory eligibility categories at income levels above federal minimums. *Id.* at ¶ 28.; *see also* 42 U.S.C. § 1396a(a)(10)(ii). If included in an approved State Plan, the cost of providing care to these persons is also eligible for federal contributions toward those costs. Betlach Decl. at ¶ 28. Arizona has elected in its approved State Plan to cover a number of optional groups with income limits above 100 percent of the federal poverty level. *Id.*

Even with respect to groups that are otherwise considered optional, current federal law prohibits the State from restricting eligibility. *Id.* at ¶ 29. The American Recovery and Reinvestment Act, prohibits States from imposing more restrictive eligibility requirements than the State had in place under its State Plan as of July 1, 2008, as a condition of receiving an increase in the percentage of federal financial participation for the State's Medicaid program. *Id.* In addition, the Patient Protection and Affordable Care Act prohibit States from imposing more restrictive eligibility requirements than the State had in place under its State Plan as of March 23, 2010, as a condition of receiving *any* federal financial support for the State's Medicaid program. *Id.*; *see also* 42 U.S.C. § 1396a(gg). If the State imposes more restrictive eligibility standards than were in place under the approved State Plan as of March 23, 2010, then, again, then the federal government will not provide federal financial support for the AHCCCS program, triggering suspension of the program. Betlach Decl. at ¶ 30.

By letter dated February 15, 2011, the Secretary of the United States Department of Health & Human Services informed AHCCCS that neither the AHCCCS Care nor MED eligibility categories were subject to the prohibition on more restrictive eligibility standards because coverage for those populations are not included in Arizona's State Plan. *Id.* at ¶ 31. Federal financial participation for the cost of covering those two groups derives from a separate agreement entered into under section 1115 of the Social Security Act – an agreement that is also referred to as the waiver agreement or the demonstration

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project. *Id.* As a result, action by the State to restrict or eliminate eligibility for these two categories, if done in a manner approved by CMS, does not result in a loss of all federal financial participation. *Id.*

4. The only remaining cost-saving option is to reduce "AHCCCS Care"

AHCCCS has informed the federal government it will not renew the existing AHCCCS Care program effective October 1, 2011, and has, consistent with the terms of the existing waiver, submitted a phase out plan for federal approval. CMS has approved the phase out plan. *See* CMS Approval Letter (July 1, 2011), attached as Exhibit A and incorporated herein. As part of the phase out plan, AHCCCS will not enroll individuals in the AHCCCS Care program who apply after July 8, 2011. AHCCCS intends to establish a more flexible program, effective October 1, 2011, that will reflect the State's ability to provide services based on the appropriated funds available, however, this proposal is pending CMS approval.

Before closing the AHCCCS Care program to new enrollment, every reasonable and feasible alternative was implemented to reduce program expenditures. Betlach Decl. at ¶ 32. If the AHCCCS Care program were not closed to new enrollment as reflected in the recently adopted rule, AHCCCS would be unable to operate the program within the funds established by law and appropriated by the Arizona Legislature for FY 2012, and the federal funding for the entire AHCCCS program would be in jeopardy. *Id.* at ¶ 33.

III. PLAINTIFFS

Three of the individual plaintiffs are currently eligible for the AHCCCS Care program,[16] and there are no actions pending to discontinue their eligibility.[17] *See*

[16] Plaintiff Fogliano is eligible under a different category based on his receipt of Supplemental Security Income from the Social Security Administration and, as such, is not covered through the AHCCCS Care program.

[17] The eligibility dates and renewal dates for the three individual plaintiffs are as follows: Gary Hinchman (AHCCCS Care eligible effective 12/01/2010 - Renewal due date 11/30/2011); Richard Lilly (AHCCCS Care eligible effective 11/01/2010 - Renewal due date 10/31/2011); Jacqueline Duhame (AHCCCS Care eligible effective 05/01/2010 - Renewal due date 10/31/2011). *See* Skinner Decl. at ¶ 4.

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Declaration of Linda Skinner, ("Skinner Decl.") at ¶ 3. Under AAC R9-22-1443, and the AHCCCS transition ("phase out") plan, no individual who is currently eligible under the AHCCCS Care program will lose eligibility as the result of the July 8, 2011 changes. The rule closes that eligibility category to new enrollment but permits persons who applied prior to July 8, 2011, and who have been determined to have met eligibility criteria prior to that date to continue eligibility.[18] The individual Plaintiffs do not allege they are in any immediate risk of losing eligibility because they are not.

So long as the individual Plaintiffs' circumstances have not changed, they will continue to receive benefits. Skinner Decl. at ¶ 13. None of the individual plaintiffs has a renewal date before October 31, 2011. *Id.* at ¶ 14. Two of the four will receive first requests from AHCCCS for updated information in August of 2011. One will receive notice in September 2011. *Id.* at ¶ 15. As noted, Plaintiff Fogliano is not covered under the AHCCCS Care program.[19] *Id.* And, even if they were not to respond to the initial request, none will receive a notice discontinuing eligibility until October 2011, at the earliest (unless they self-report a change in circumstance that adversely affects eligibility sooner). *Id.* at ¶ 16. In the event any of the individual Plaintiffs in the AHCCCS Care program receive a discontinuance notice due to non-response, the effective date of the notice will be after October 31, 2011. *Id.* at ¶ 17.

IV. LEGAL ARGUMENT

A. Collateral Estoppel Bars Injunctive Relief

Last month the Arizona Supreme Court denied a request for injunctive relief in an identical matter involving the same claims and counsel, but different parties. *Roach v. Brewer*, No. CV-11-0151-SA. The doctrine of collateral estoppel therefore bars the requested injunctive relief. Under the doctrine, if the following conditions are met, a

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[18] *See* AHCCCS, *Notice of Exempt Rulemaking,* http://www.azahcccs.gov/reporting/Downloads/UnpublishedRules/NOERR9-22-1443.pdf.

[19] For the remainder of this Response, "individual Plaintiffs" refers to Plaintiffs Hinchman, Lilly and Duhame only. Plaintiffs Catherine Nichols and Mountain Park Health Center lack standing for the same reasons the individual Plaintiffs lack standing.

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subsequent action will be barred: (1) the issue in question was actually litigated in a previous proceeding; (2) there was a full and fair opportunity to litigate the issue; (3) there was a final decision on the merits; (4) resolution of the issue was essential to the decision; and (5) common identity of the parties. *See Irby Constr. Co. v. Ariz. Dept. of Revenue*, 184 Ariz. 105, 107, 907 P.2d 74, 76 (App. 1995). Arizona permits defensive use of collateral estoppel even if only the first four conditions are present. *Campbell v. SZL Properties*, Ltd., 204 Ariz. 221, 223 ¶ 10, 62 P.3d 966, 968 (App. 2003).

In *Roach*, petitioners filed a Motion for Injunctive Relief alleging the exact same harm based on the exact same issue. The petitioners, the Director, and several other parties, were given a full and fair opportunity to litigate the issue through extensive briefing. *See* Defendant Tom Betlach's Response to Pl. Mot. For TRO, Exhibit 2. On June 24, 2011, the Supreme Court issued its order (the "Order") stating: "IT IS ORDERED granting the motion for expedited consideration. IT IS FURTHER ORDERED that the Motion for Injunctive Relief and the Request for Oral Argument are denied." *Id.* at Exhibit 3. The Supreme Court granted expedited consideration of the Motion for Injunctive Relief, and denied relief without the need to hear oral argument.[20] *Id.* The only fair inference is that the Court found the identical preliminary injunction arguments from those similarly-situated petitioners to be deeply flawed. That the Supreme Court did not explain its reasoning is immaterial in the absence of any significant difference between *Roach* and this Motion. And there is *virtually no difference* between the two sets of pleadings.

It is a longstanding and customary practice of the Court not to decide issues unless required to do so in order to dispose of the matter under consideration. *Vigil v. Herman,* 102 Ariz. 31, 36-37, 424 P.2d 159, 164-65 (1967). The Supreme Court could have declined jurisdiction and, as a result, not been required to address the ancillary preliminary injunction request. Accordingly, the separate and express ruling of the

[20] The Court separately decided to reject the Petition for Special Action without even waiting for the previously scheduled reply brief from the petitioners.

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Supreme Court on an identical request for injunctive relief was a final decision on the merits that fully resolved the issue presented. Because each of the first four conditions for collateral estoppel is met, this subsequent action on the issue of injunctive relief should be barred.

B. Plaintiffs Lack Standing To Bring This Action.

Under Arizona law, a plaintiff must "establish standing, especially in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶16, 81 P.3d 311, 315 (2003). To establish standing, a plaintiff must allege a distinct, palpable and particularized injury. *Id.* The injury must be personal to the plaintiffs to ensure that courts do not "open the door to multiple actions asserting all manner of claims against the government." *Id.* The injury must also be actual harm, that is not "merely . . . speculative." *Klein v. Ronstadt*, 149 Ariz. 123, 124, 716 P.2d 1060, 1061 (App. 1986).

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The individual Plaintiffs each lack standing because their AHCCCS Care benefits are not affected by the freeze they seek to enjoin.[21] Under the rule and the transition ("phase out") plan, no one who is currently eligible has lost eligibility as the result of the July 8, 2011 changes. The individual Plaintiffs could thus only be harmed if their circumstances were to now change (their incomes rise above the federal poverty level), making them ineligible for AHCCCS Care, and then change again (their incomes drop back below the federal poverty level) such that they would have once again been eligible for the program but for the freeze. And, unless an individual Plaintiff self-reports a change in circumstance that adversely affects eligibility sooner, the soonest that any of the individual Plaintiffs will be subject to scheduled renewal, and thus a change in eligibility, is October 31, 2011.[22] Plaintiffs' speculation that they may, at some point, become ineligible for coverage falls short of the requisite standing.

[21] Plaintiff Fogliano additionally lacks standing because he is not covered by the AHCCCS Care program.

[22] Both federal Medicaid regulations and AHCCCS rules require AHCCCS, to re-determine eligibility at least every twelve months. 42 CFR 435.916; AAC R9-22-1414. None of the individual plaintiffs has a renewal date before October 31, 2011.

Further, the fact that the Plaintiffs disagree with actions taken by the government is insufficient to create standing. *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16, 961 P.2d 1013, 1017 (1998). Otherwise, the Court would be open to injunction requests from anyone desiring to second-guess the executive and legislative branches. Plaintiffs' argument that A.R.S. § 36-2901.01(C) otherwise gives them standing is also unpersuasive. Though section C gives them standing to enforce the provisions of Proposition 204, it does not create standing where it is otherwise lacking for purposes of injunctive relief. Furthermore, as discussed below, the Director has not reduced or capped eligibility requirements but was instead forced to act within his appropriations. And, A.R.S. §§ 1-254[23] and 36-2903(P) deprive Plaintiffs of standing to argue the Director has a duty to expend state monies in excess of the appropriation he has been provided by the Arizona Legislature.

C. A.R.S. § 12-1802 Prohibits An Injunction Against The Director

Sections 12-1802(4) and (6), Arizona Revised Statutes, state that an "injunction shall not be granted . . . [t]o prevent enforcement of a public statute by officers of the law for the public benefit [or] [t]o prevent the exercise of a public or private office in a lawful manner by the person in possession." Exceptions to this rule have only been recognized when public officials "act illegally, exceed their statutory authority, or arbitrarily or unreasonably exercise their discretion." *Wallace v. Shields*, 175 Ariz. 166, 173, 854 P.2d 1152, 1159 (App. 1992).

In this case, the Director has enacted a rule to freeze eligibility and, subject to federal approval, create a more flexible form of the childless adult program to reflect available funding provided by the Arizona Legislature. SB 1001, 2011 Ariz. Sess. Laws, 1st Spec. Sess., Ch 1., § 1. Legislative acts are presumptively constitutional and the court must construe them, if possible, to give them a constitutional meaning. *Jackson v.*

[23] A.R.S. § 1-254 provides that, "[n]o statute may be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation made for that specific purpose".

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Tangreen, 199 Ariz. 306, 309, ¶ 5, 18 P.3d 100, 103 (App. 2000). Plaintiffs have not challenged the session law with which the Director is complying. Consequently, the Director's actions are presumptively legal, and an injunction is barred by A.R.S. § 12-1802(4) and (6).

D. Plaintiffs Fail To Establish The Standards For A Preliminary Injunction

Notwithstanding the above, if this Court is to consider the merits of the Motion, or if standing no longer remains an issue because of changed factual circumstances, the Court still should deny Plaintiffs' request for injunctive relief for failing to establish the requisite standards. The standard for issuing an injunction was recently stated in another case stemming from the current fiscal crisis, in which the court of appeals vacated a preliminary injunction against the State. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶12, 219 P.3d 216, 222 (App. 2009), *review denied* (2009). In that case the court held that a party seeking a preliminary injunction traditionally must establish four criteria:

> (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction. A court applying this standard may apply a "sliding scale." In other words, "the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] 'the balance of hardships tip[s] sharply' in favor of the moving party."

Id. Plaintiffs fail to meet these standards.

1. The Irreparable Harm From Granting a Preliminary Injunction Is Greater Than Any Threatened Harm to Plaintiffs.

As discussed above, Plaintiffs have demonstrated no likely threat to themselves from the freeze in enrollment in AHCCCS Care. Unless an individual Plaintiff self-reports a change in circumstance that adversely affects eligibility, the soonest that any of the individual Plaintiffs will be subject to scheduled renewal, and thus a change in eligibility, is October 31, 2011. The federal cases Plaintiffs cite to support their alleged

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irreparable harm are inapposite. In *Massachusetts Ass'n of Older Americans v. Sharp*, preliminary injunctive relief was ordered because the plaintiffs' Medicaid benefits were terminated and the court found that they were likely to succeed on the merits of their claim that such termination violated the federal regulations. 700 F.2d 749, 751-52 (1st Cir. 1983). Likewise, in *Caldwell v. Blum*, a threat of irreparable harm was found only after the court concluded that the plaintiffs had demonstrated a likelihood of success on the merits and because the plaintiffs were being denied benefits. 621 F.2d 491, 498 (2nd Cir. 1980). In this case, any injury to the individual Plaintiffs is purely speculative, and must be balanced against the Plaintiffs' likelihood of success on the merits.

Nor do these cases support Plaintiffs' claims that the balance of harm tips in Plaintiffs' favor. In *Massachusetts Ass'n of Older Americans*, the defendant alleged nothing more than "a remote possibility of injury." 700 F.2d at 754. And, in *Caldwell*, the defendant "made no showing of hardship." 621 F.2d at 498-99. If an injunction is granted here, the State and quite possibly the entire Arizona Medicaid Program will be irreparably harmed. If AHCCCS is enjoined from implementing the freeze on new AHCCCS Care applicants, then it will run out of funding during FY 2012, and it will not be able to fund its other federally-required programs. This will put AHCCCS in breach of its obligations to the federal government, which will place in jeopardy the State's receipt of federal financial support for the AHCCCS program, an amount in excess of $8 billion. The only way to prevent this harm would be through a supplemental appropriation by the Legislature. However, as discussed *infra*, neither the court, nor the executive branch can force the Legislature to act.

To illustrate this principle, last month the Governor called the Legislature into an emergency special session for the sole purpose of making a minor statutory change to extend federally-funded unemployment aid for as many as 45,000 Arizona families in need, while keeping nearly $3.5 million a week flowing into the local economy.[24]

[24] *Proclamation of Governor Janice K. Brewer calling a Third Special Session of the Fiftieth Legislature of the State of Arizona*, July 8, 2011, http://azgovernor.gov/dms/upload/PR_060811_SessionCallProc.pdf (last visited July 11, (continued...)

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Although there was no State cost, and no future State obligation, the Legislature, acting within its constitutional discretion, adjourned in less than a week without taking any action.[25] As a result, thousands of Arizonans lost federal extended unemployment assistance. There is no guarantee that the Legislature will act any differently in response to a court injunction imposed on the Director in this case.[26] Should the court enjoin the Director from freezing enrollment in AHCCCS Care and the Legislature refuse to provide a supplemental appropriation in response, the entire AHCCCS program will cease to operate in the midst of the fiscal year and the State, and all people AHCCCS serves, will be irreparably harmed. A.R.S. § 36-2919 (providing for the suspension of AHCCCS if federal monies are denied, not renewed or become unavailable for any reason).

2. Plaintiffs have no Likelihood of Success on the Merits

Plaintiffs' legal theory demonstrates neither a "strong likelihood" nor "probable" success on the merits. Nor does it raise a "serious question" as to the merits. Plaintiffs argue that, by promulgating the rule, the Director violated the Voter Protection Act and Proposition 204. Both arguments are incorrect because the Legislature acted in accordance with Proposition 204 when appropriating the Tobacco Funds and using its discretion in appropriating additional monies. As such, the Voter Protection Act is not implicated. And, the Director is merely acting in accordance with legislative appropriations.

a. The Legislature Acted Within Its Plenary Power In Determining The Amount Of Funds "Available" For Additional Funding Under A.R.S. § 36-2901.01(B).

(...continued)
2011).

[25] *Statement of Governor Janice K. Brewer,* June 13, 2011, http://azgovernor.gov/dms/upload/PR_061311_SSAdjournment.pdf (last visited July 11, 2011).

[26] Indeed, just months ago, SB 1519 was introduced during the 2011 First Regular Session to eliminate all federal matching funding for Medicaid in Arizona. Thus, it is not only uncertain that the Legislature would provide supplemental funding to AHCCCS in response to an injunction, it is conceivable that the Legislature could eliminate the entire AHCCCS program through separate legislation.

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In an effort to ensure that monies would be available to pay for the expanded population, Proposition 204 provided that the entire Tobacco Litigation Settlement Fund would be appropriated to the program and *that only those funds would be continuously appropriated.* A.R.S. §§ 36-2901.01(B), 36-2901.02(E)(4). The voters went on to provide that those funds "shall be supplemented, as necessary, by any other *available* sources including legislative appropriations and federal monies." A.R.S. § 36-2901.01(B) (emphasis added). Proposition 303 subsequently added additional continuously appropriated funds earmarked for the Proposition 204 Expansion Population. A.R.S. §§ 36-770, 36-778.

The voters purposefully did not obligate the Legislature to appropriate future unknown general fund revenues because such a requirement would have been unenforceable, at least with respect to funds other than the Tobacco Funds. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 253-54, 204 P.2d 854, 862 (1949) ("There is no legal method of compelling [t]he legislature to act."). In the past, the Legislature appropriated additional general fund revenues to pay for costs in excess of funds appropriated through the Tobacco Funds when it determined such funds were available. However, for FY 2012, in accordance with A.R.S. § 36-2901.01(B), the Legislature determined that no general fund monies were available.

(1) Section 36-2901.01(B) does not appropriate monies other than the Tobacco Litigation Settlement Fund

The citizens cannot by initiative obligate the Legislature to annually appropriate an unknown amount of general fund money every year. *Hernandez*, 68 Ariz. at 253-54, 204 P.2d at 862. Even if such a requirement were constitutional, A.R.S. § 36-2901.01(B) does not impose such an obligation on the Legislature.

In their arguments, Plaintiffs' focus only on subsection A of A.R.S. § 36-2901.01 and fail to read subsection A in context with subsection B. Rules of statutory construction, however, require both sections to be read in conjunction. *See Adams v. Comm'n on App. Ct. Appointment*, No. CV-10-0405-SA, 2011 WL 2688803, at *4, ¶ 20

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(July 8, 2011) (the meaning of a law cannot be identified without considering its context). A complete reading of the language regarding supplementing the Tobacco Funds for the Proposition 204 Expansion Population shows that such funds could come from "other sources" such as "federal monies" or "legislative appropriations." This language makes clear that A.R.S. § 36-2901.01(B) is not an appropriation, but rather sets forth an example of how the Legislature may fund the program in the future if the Tobacco Funds are insufficient *and* the Legislature determines that general fund revenue is otherwise "available" to make such an appropriation.

Plaintiffs' interpretation of A.R.S. § 36-2901.01(B) disregards the "federal monies" and "other sources" language of the statute. *See Bilke v. State*, 206 Ariz. 462, 464 ¶ 11, 80 P.3d 269, 271 (2003) ("[a] statute is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.") (internal citations omitted). The clause "other available sources including legislative appropriations" is recognition that the statute is precatory and therefore requires further action, such as a subsequent legislative appropriation.

Plaintiffs appear to argue that Proposition 204 creates a non-legislative self-executing appropriation of some kind, but the only such appropriation recognized by Arizona courts is an appropriation made in the Arizona Constitution itself. *See Crozier v. Frohmiller*, 65 Ariz. 296, 299-300, 179 P.2d 445, 447-48 (1947) (authorizing the Secretary of State to incur an expenditure for the voter publicity pamphlet without a legislative appropriation because the constitutional language directing the Secretary was "self-executing"); *see also Millett v. Frohmiller*, 66 Ariz. 339, 347, 188 P.2d 457, 463 (1948) (the real test for determining whether a self-executing appropriation exists is whether the people have expressed an intention for money to be paid for such a purpose in the constitution itself).

Proposition 204 neither amended the Arizona Constitution nor established an appropriation other than for the Tobacco Funds. *See Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 269, 782 P.2d 1160, 1162 (1989) (declining to accept

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jurisdiction because the applicable constitutional provisions were not "self-executing").[27] Thus, Proposition 204 did not create a constitutional appropriation that deprives the Legislature of the ability to determine the availability of general fund revenue through future appropriations.

Furthermore, the statute cannot be an appropriation because it does not reference a certain sum nor does it authorize the Director to use money other than the Tobacco Funds. "An appropriation is the setting aside from the public revenue of a *certain sum of money* for a specified object, in such a manner that the *executive officers of the government are authorized to use that money*, and no more, for that object, and no other." *Rios v. Symington*, 172 Ariz. at 6, 833 P.2d at 23 (emphasis added) (*citing Hunt v. Callaghan*, 32 Ariz. 235, 239, 257 P. 648, 649 (1927)). Although no specific language is necessary, in order for an act to be an appropriation, it must include a "certain sum," a "specified object" and "authority to spend." *Id.* at 7, 833 P.2d at 24.

In *Rios*, the court examined several acts that were and were not appropriations. In examining an act that did not specify in a fiscal year a sum certain, the court clarified that an act may still be an appropriation so long as the specific amount can be ascertained at any given time or can otherwise be made certain. *Id.* at 8, 833 P.2d at 25; *see also Eide v. Frohmiller*, 70 Ariz. 128, 133, 216 P.2d 726, 730 (1950). The specific act the court examined authorized the creation of a fund financed by local governments. *Rios,* 172

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[27] The voters know how to expressly provide for an appropriation in the Arizona Constitution. *See* Ariz. Const. art. 1, pt. 2, § 1(18) (setting aside an appropriation of $6 million dollars to the Arizona Independent Redistricting Commission for its initial round of redistricting following the 2000 census).[28] There are certain obligations established in the Arizona Constitution that must be funded by the Arizona Legislature every fiscal year. *See, e.g.*, Ariz. Const. art. 9, § 3, ("[t]he legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the state for each fiscal year."). These include expenditures to fund the operation of the judicial branch, the kindergarten through university education system, prisons, and mine regulation. See Ariz. Const. art. 6, §§ 1, 33 (establishing judiciary and fixing judicial salaries); Ariz. Const. art. 11, § 1 (establishing public school system); Ariz. Const. art. 22, § 15 (establishing correctional and other institutions); and Ariz. Const. art. 19 (establishing mine inspector). These expenditures are not only required to preserve the public peace, health, and safety, and to provide for the support and maintenance of the departments of the State and of State institutions, they are superior to any other obligation created by law.

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Ariz. at 8, 833 P.2d at 25. Although the act did not address a specific sum to be used, the amount in each fund could be ascertained and made certain when necessary. *Id.*

Here, the enabling legislation at issue only references the Tobacco Litigation Settlement Fund, a fund with a specific balance that can be ascertained at all times. This fund was established through Proposition 204 as A.R.S. § 36-2901.02, and consists of "all monies that this state receives pursuant to the tobacco litigation master settlement agreement . . . and interest earned on these monies." A.R.S. § 36-2901.02. It has but one use and that use is specifically directed in the statutes in Proposition 204. Moreover, *only* the Tobacco Litigation Settlement Fund is continuously "appropriated" pursuant to the express language of Proposition 204 drafters. A.R.S. § 36-2901.02(E)(2) and (4). Similarly, A.R.S. § 36-770 establishes the continuously appropriated Tobacco Products Tax Fund. This law directs monies into the Proposition 204 Protection Account, which are then allocated for the Proposition 204 Expansion Population.

In contrast, the use of "any other available sources" in A.R.S. § 36-2901.01(B), is not a certain amount, does not include language from which an ascertainable amount can be determined, and does not designate what sources must be available to fund the Proposition 204 Expansion Population. If "[t]here is no method by which the amount attempted to be appropriated can be made certain" and the "amount attempted to be appropriated resides wholly within the realm of speculation" then there can be no appropriation. *Eide*, 70 Ariz. at 133, 216 P.2d at 730; *see also Rios*, 172 Ariz. at 6-7, 833 P.2d at 23-24. Therefore, A.R.S. § 36-2901.01 is not an appropriation under *Eide* or *Rios*. *See also Crane v. Frohmiller*, 45 Ariz. at 498, 45 P.2d at 959 (a promise to appropriate is not an appropriation and cannot be deemed to require an appropriation).

The fundamental requirement that a sum certain be ascertained in order to qualify as an appropriation is necessary to provide future Legislatures the ability to budget for the future needs and requirements of the State in an unencumbered and unrestrained manner. Committing future Legislatures to fund a program whose future costs could consume the budget or come at the expense of other constitutional funding obligations necessary to

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protect the public health, safety and welfare,[28] would also run afoul of the principle that one Legislature cannot bind another. *See Ariz. Tax Comm'n v. Dairy & Consumers Coop. Ass'n*, 70 Ariz. 7, 13, 215 P.2d 235, 239 (1950); *Frohmiller v. J. D. Halstead Lumber Co.*, 34 Ariz. 425, 429, 272 P. 95, 96 (1928); *Higgins' Estate v. Hubbs*, 31 Ariz. 252, 264, 252 P. 515, 519 (1926).

Plaintiffs appear to argue that Proposition 204 implicitly requires the Legislature to make such an appropriation. However, this interpretation is improper because the Legislature cannot pass a law that exposes the State to unlimited liability. Legislation that creates a "blank check upon the general fund" is "unconstitutional, invalid, and of no effect whatsoever." *Crane*, 45 Ariz. at 500, 45 P. 2d at 960.

In *Cockrill v.* Jordan, 72 Ariz. 318, 319, 235 P.2d 1009, 1010 (1951), the Court held:

> There are certain definite and well-defined rules to test the validity of appropriations. No rule is better settled than that to constitute a valid appropriation payable out of the general fund the Act must fix a maximum limit as to the amount that can be drawn under it. If this was not the law there would be no limit to the amount of money that could be drawn thereunder and the public treasury would be wholly unprotected against claims of an undetermined amount. Furthermore the state government would never be able to ascertain with any degree of certainty where it stood financially.

(internal citations omitted).

The Arizona Constitution itself prohibits the people from passing any law by initiative that the Legislature cannot pass. Ariz. Const. art. 22, § 14 ("[a]ny law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people"). Any theory that the initiative created a general, continuing appropriation fails for lack of a "certain sum" and a "maximum limit" of an obligation by which future legislatures are to be bound.[29]

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[29] Plaintiffs' citation to California case law regarding initiatives are not on point. *Shaw v. People ex rel. Chiang*, involved a California initiative that appropriated a certain sum, calculated by formula, of retail sales revenue to support public transportation. 175 Cal.App 4th 577, 587-88 (Cal. App. 3d 2009). The Director acknowledges that an initiative can bind future legislatures if they contain a valid, self-executing appropriation.

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Proposition 204 also fails the third requirement of the *Rios* test for establishing an appropriation to fund the Proposition 204 Expansion Population beyond the Tobacco Funds because it does not provide any express authorization to the Director to make such an expenditure. An appropriation must not only set aside a certain sum of money from the public revenue, it must also authorize the executive officer "to use that money." *Rios*, 172 Ariz. at 6, 833 P.2d at 23. As established, the Director does not have authority to supplement the Tobacco Funds until and unless there are "legislative appropriations [or] federal monies." A.R.S. § 36-2901.01(B).

(2) The Legislature has discretion under A.R.S. § 36-2901.01(B) to determine whether to appropriate additional funding for expenditures not covered by the Tobacco Funds

In pointing this court only to subsection A, Plaintiffs intentionally fail to establish how the word "available," as set forth in A.R.S. § 36-2901.01(B), can be interpreted to require the Legislature to annually appropriate an undetermined amount of funding to pay for the Proposition 204 Expansion Population. The word "available" does *not* mean "any" or "all" revenues that are deposited in the general fund. "Available" means "able to be used or obtained; at someone's disposal." *Available Definition,* Oxford English Dictionary, http://oxforddictionaries.com/definition/available?region=us (last visited June 14, 2011); *see also State v. Wise*, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983) (court may refer "to an established, widely respected dictionary for the ordinary meaning" to ascertain a word's meaning.); A.R.S. § 1-213 ("[w]ords and phrases shall be construed according to the common and approved use of the language."). Thus, the determination of whether general fund revenues are available to be used or obtained to supplement the Tobacco Funds is solely within the discretion of the Legislature to decide.

Contrary to the Plaintiffs' implication, A.R.S. § 36-2901.01(B) does not require

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However, when there is not a valid, self-executing appropriation, future legislatures cannot be bound. Otherwise, the Court would be concluding that Ariz. Const. art. 22, § 14 is without meaning.

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the Legislature to raise taxes or sell State resources to *create* a source of "available" funds. Nor does it create an obligation to fund the Proposition 204 Expansion Population "notwithstanding any other law,"[30] or require such funding even if the Legislature determines that other funding obligations are necessary to protect the public health, safety and welfare.[31] The plain reading of the statute is that the Tobacco Funds may be supplemented, if the Legislature decides that other sources of funding are available for that purpose.

Initiatives are presumed to be constitutional, and "where alternative constructions are available, the court should choose the one that results in constitutionality." *Ruiz v. Hull*, 191 Ariz. 441, 448, ¶ 25, 957 P.2d 984, 991 (1998). Plaintiffs' construction of A.R.S. § 36-2901.01(B) gives no meaning to the word "available" as a limitation on the obligations created by Proposition 204. In fact, Plaintiffs are asking the Court to instead interpret Proposition 204 as creating a first lien and an open-ended black hole in the State budget that sweeps up all State funds, regardless of other State needs or priorities, until its purposes are served. As discussed, such a construction would render the initiative unconstitutional. Moreover, such an interpretation is not supported by the text of the statutes, ballot language or publicity pamphlet presented to voters prior to the 2000 election.

Taken to its logical conclusion, if the Court were to follow the Plaintiffs' wishes for judicial intervention to command appropriations, the Legislature would then have to constantly appropriate or re-allocate funds to satisfy the changing number of Proposition

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[30] In addition to failing to circumscribe the mandate of A.R.S. § 1-254, the drafters could have sought to encumber every possible source of State funds and make other State needs secondary until Proposition 204 was fully funded. For example, since at least two years before Proposition 204 the Legislature has routinely ensured that the counties provide their allocation to the AHCCCS program with a comprehensive proviso that: "If the monies the state treasurer withholds are insufficient to meet that county's funding requirement as specified in subsection A of this section, *the state treasurer shall withhold from any other monies payable to that county from whatever state funding source is available an amount necessary to fulfill that county's requirement.*" HB 2004, 1998 Ariz. Sess. Laws 1998, 4th Spec. Sess., Ch. 5, § 5(B) (emphasis added).

[31] *See supra* note 22.

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204 Expansion Population participants every fiscal year. This Court would then be asked to constantly monitor and compel the Legislature to appropriate funds to cover a continuously fluctuating population. Such a result is not only unwieldy, it crosses the line that separate the two branches. It also demonstrates why an appropriation has to be plainly authorized, certain, and for a specified sum. Otherwise, there is no certainty in the budget process.

Moreover, the court must decline Plaintiffs' invitation to order the Director to use the funds he has been appropriated to pay for the Proposition 204 Expansion Population while the claim for a permanent injunction is pending. Not only would such an order violate A.R.S. § 35-173, it would put all federal matching funds in jeopardy. If an injunction is granted, at some point during the fiscal year, the appropriated funds will run out and the entire AHCCCS program will risk losing all federal funding.

By contrast, the Legislature has appropriately read A.R.S. § 36-2901.01(B) to require supplementation of the Tobacco Funds only with "available" funds as determined by the Legislature after balancing other competing issues of importance.[32] The Director has been commanded by the Legislature to manage AHCCCS within available appropriations "notwithstanding any other law." SB 1619, 2011 Ariz. Sess. Laws, 1st Reg. Sess., Ch. 31, § 34(A). More specifically, he was expressly directed to implement a program "within the monies available" from the Tobacco Funds and such other funds as may be "made available" *either* from legislative appropriations or federal funds. SB 1001, 2011 Ariz. Sess. Laws, 1st Spec. Sess., Ch. 1, § 1. If those sources are insufficient, the Director is permitted to suspend eligibility or programs. Thus, when funds are not available, the Director's job is to do exactly what he is doing: seek federal authority to manage the program with the funds that are available, which may include freezing, limiting, or terminating expanded populations not required to be covered as a condition of receiving Medicaid funds for the core program for the categorically eligible.

[32] *See supra* note 22.

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b. Proposition 204 Does Not Give The Director The Power To Spend Money That Hasn't Been Appropriated.

(1) The Director has no power to alter an appropriation

The Arizona Constitution mandates that "[n]o money shall be paid out of the state treasury, except in the manner provided by law." Ariz. Const. art. 9, § 5. The Arizona Supreme Court has further clarified that "no money can be paid out of the state treasury unless the legislature has made a valid appropriation for such purpose and funds are available for the payment of the specific claim." *Cockrill v. Jordan*, 72 Ariz. 318 at 319, 235 P.2d at 1010; *see also* A.R.S. § 36-2903(P) (limiting AHCCCS spending for health care to the amount appropriated or authorized by A.R.S. § 35-173 for all health care purposes). Thus, the Director cannot legally provide services to every person eligible to be part of the Proposition 204 Expansion Population unless the Arizona Legislature has made an appropriation to cover such expenses.

The power to appropriate funds is "*exclusively* a legislative function." *Rios v. Symington*, 172 Ariz. at 11, 833 P.2d at 28 (emphasis added); *see also LeFebvre v. Callighan*, 33 Ariz. 197, 204, 263 P. 589, 591 (1928) ("all power to appropriate money for public purposes . . . rests in the legislature."). And, until the Legislature appropriates necessary funds, a "program cannot function." *Cochise County v. Dandoy*, 116 Ariz. 53, 56, 567 P.2d 1182, 1185 (1977) (Medicaid program delayed by failure of Legislature to appropriate funding); *see also Eide v. Frohmiller*, 70 Ariz. at 135, 216 P.2d at 731 (absent an appropriation, "the administrative machinery provided for therein cannot function"). Accordingly, any relief in this case must come from the Arizona Legislature, which has determined that due to other vital public policy needs, additional funds for the Proposition 204 Expansion Population are not available.[33]

[33] Petitioners recognize that the Legislature is the only party that can provide for an appropriation necessary to cover the Proposition 204 Expansion Population. *See* Pet., p. 27 ("AHCCCS has now proposed to meet *the legislature's requirement* to implement the program within the available funding"); p. 30 ("the *Legislature* has given AHCCCS the authority to change, reduce of terminate eligibility for persons covered under Proposition 204") (emphasis added).

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Rather than challenge the Legislature *overtly*, Plaintiffs instead seek an order requiring the Director to continue coverage for the Proposition 204 Expansion Population without an appropriation to do so. They fail to acknowledge, however, that the Director cannot provide services without legislative authorization through an appropriation. *See* A.R.S. §§ 35-154, 35-301 and 35-197 (making it illegal to spend money not appropriated); *Millett v. Frohmiller*, 66 Ariz. 339, 344-45, 188 P.2d 457, 461 (1948) ("[o]bligations incurred in the absence of [an appropriation] are null and void rendering the officials incurring them liable on their bonds").

(2) A.R.S § 35-173 precludes the Director from offering services in the absence of an appropriation.

Any suggestion that the Director can spend AHCCCS' limited appropriation on the Proposition 204 Expansion Population regardless of the Legislature's budget is wrong and would be illegal. Under A.R.S. 35-173, State agencies are required to have an allotment schedule, approved by the Department of Administration, that "distribute[s] the available spending authority to cover the entire fiscal year's operations." A.R.S. § 35-173(B).

The Executive retains "discretion to exercise his judgment not to spend money in a wasteful fashion, provided that he has determined reasonably that such a decision will not compromise the achievement of the underlying legislative purposes and goals." *Rios,* 172 Ariz. at 12, 833 P.2d at 29 (*citing Opinion of the Justices,* 375 Mass. 827, 836, 376 N.E.2d 1217, 1223 (1978)). Finding that a lump sum reduction was not an improper delegation of a legislative function contrary to Article III of the Arizona Constitution, the Arizona Court of Appeals, in *Arizona Ass'n of Providers for Persons with Disabilities v. State*, stated: "[i]t is well established that an executive agency has discretion to allocate a lump-sum appropriation as it sees fit. The same discretion necessarily applies in implementing a mandated emergent budget reduction driven by unanticipated revenue shortfalls." 223 Ariz. 6, 16-17, 219 P.3d 216, 226-27 (App. 2009) (internal citations omitted). Thus, AHCCCS is statutorily required to budget and spend based on a full year

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plan, as opposed to spending down its entire appropriation in less time and hoping that the Legislature will cover any shortfall mid-way through the fiscal year.

(3) A.R.S. § 1-254 precludes Plaintiffs' interpretation of Proposition 204.

A.R.S § 1-254 provides that, *"[n]o statute may be construed to impose a duty* on an officer, agent or employee of this state to discharge a responsibility *or to create any right* in a person or group *if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation made* for that specific purpose" (emphasis added). Proposition 204 was passed by the voters subject to the restrictions of A.R.S. § 1-254.[34] A.R.S. § 36-2903(P) similarly prohibits AHCCCS from spending more than it was appropriated for each fiscal year. These statutes deprive Plaintiffs of the right to claim that the Proposition 204 Expansion Population must be funded absent a legislative appropriation.[35]

The legislative history of section 1-254 clearly shows that it was drafted expressly to prevent future public officials, such as the Director, from being ordered by a court to provide services where the Legislature has not provided funding necessary to support a court order. According to the Senate Fact Sheet,[36] the purpose of A.R.S. § 1-254 is to prohibit the:

> expenditure of state monies in excess of legislative

[34] Had the drafters desired that A.R.S. §§ 1-254 and 36-2903(P) not apply to the provisions of Proposition 204, they would have inserted the standard "notwithstanding any other law" language in each statute added by the measure. *See Calik v. Kongable*, 195 Ariz. 496, 499, 990 P.2d 1055, 1058 (1999) (interpreting the phrase "notwithstanding any law to the contrary" literally). Accordingly, the voters are presumed to have been aware of this pre-existing law when passing Proposition 204. *Ariz. State Bd. Of Dirs. for Junior Colls. v. Phoenix Union High Sch. Dist. Of Maricopa Cnty.*, 102 Ariz. 69, 72, 424 P.2d 819, 822 (1967) (rules of statutory construction presume the legislature is aware of existing law).

[35] In *Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 594, 775 P.2d 521, 522 (1989), this Court said, in dicta, that the "Legislature must fund whatever programs it has required." However, *Arnold* is inapplicable to this case because it did not consider whether an appropriation was made or the propriety of the Legislature's funding. And, *Arnold* was decided before the Legislature enacted A.R.S. § 1-254.

[36] *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 559, 105 P.3d 1163, 1178 (2005) (consideration of legislative fact sheets is appropriate to determine legislative intent).

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> appropriations made for a specific purpose and [to] prohibit[] construal of any statute so as to impose a duty on an officer, agent, or employee of the state to discharge a responsibility or to create a right in a person or group if the discharge or right requires an expenditure of state monies in excess of [the] amount authorized by appropriation for that specific purpose.

Senate Fact Sheet, S.B. 1143, 42nd Leg., 1st Reg. Sess. (Ariz. 1995), attached as Exhibit B and incorporated herein.

Section 1-254 unequivocally "eliminate[s] ambiguity in the law by clearly asserting the primacy of the appropriation process . . . thus assuring a sitting legislature maximum flexibility in allocating financial resources to various programs in the context of revenue constraints which confront a sitting legislature in any given fiscal year." Senate Fact Sheet, S.B. 1143, 42nd Leg., 1st Reg. Sess. Moreover, A.R.S. § 1-254 was made *specifically applicable to AHCCCS*, among other departments and programs. *Id.; see also* A.R.S. § 36-2903(P). Consequently, A.R.S. § 1-254 precludes Plaintiffs from making a claim against the Director where the remedy would require either officer to make an expenditure that has not been authorized by legislative appropriation for that specific purpose.

(4) The Revenue Source Rule precludes Plaintiffs' interpretation of Proposition 204.

The policy behind A.R.S. § 1-254 is further buttressed by the "Revenue Source Rule," set forth in Article 9, Section 23 of the Arizona Constitution. This rule requires that any initiative measure that proposes a mandatory expenditure of state revenues provide for an increased source of non-general fund revenues sufficient to cover the costs of the initiative. The rule allows the Legislature to reduce the established funding source in "any fiscal year" where the identified revenue source "fails to fund the entire mandated expenditure." Ariz. Const. art. 9, § 23(B). The Revenue Source Rule thus applies to FY 2012. In this case, the Legislature appropriately reduced the supplemental general funds because the dedicated Tobacco Funds were insufficient and there were no additional general funds to cover the entire Proposition 204 Expansion Population

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(5) The doctrine of impossibility precludes Plaintiffs' interpretation of Proposition 204.

Because the Director cannot make expenditures in excess of the funds appropriated to him, the doctrine of impossibility also prohibits the relief Plaintiffs seek. This principal was recently recognized by the Arizona Court of Appeals in *Arizona Ass'n of Providers for Persons with Disabilities v. State,* 223 Ariz. at 15, ¶ 28, 219 P.3d at 225, where the court considered the State's suspension of certain medical services that were funded by State monies that had been reduced as a result of the budget crisis. The court stated, "we have found no legal authority establishing in the individual the right to receive services. . . without regard to the State's ability to afford those services." *Id.* at 15, ¶¶ 28-29, 219 P.3d at 225. Consequently, "state law does not render illegal the Division's decision to suspend state-only services to the developmentally disabled." *Id.*

Similarly, the Proposition 204 Expansion Population services are creatures of state law contingent on there being sufficient monies in the Tobacco Funds and a supplemental discretionary legislative appropriation from additional available funds or federal monies. *See Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1345 (D.C.Cir. 1996) ("if money is not available, it need not be provided, despite a Tribe's claim that the [federal law] 'entitles' it to the funds"). When, as here, a plaintiff seeks an order requiring a state official to perform an act the plaintiff contends is required by law, the Arizona Supreme Court has recognized a defense of impossibility in a mandamus action. *See Maricopa Cnty. v. State*, 126 Ariz. 362, 363, 616 P.2d 37, 38 (1980) (upholding correction director's refusal to accept the transfer of prisoners from county jails because the prison system was crowded and he was trying to comply with a federal court order).

Plaintiffs argue that the Director violated A.R.S. § 36-2901.01(A) by establishing a cap on the number of eligible persons who may enroll in the system. This is incorrect both factually and legally. The Director has prudently acted in a way to continue operations within the funds that have been appropriated to AHCCCS. The Arizona Supreme Court has drawn a clear distinction between an "obligation imposed by a statute

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with an appropriation to fulfill the obligation." *Forty-Seventh Leg. of State v. Napolitano*, 213 Ariz. 482, 488 ¶ 25, 143 P.3d 1023, 1029 (2006). "The utmost that can be claimed for the act under consideration is that it pledges the good faith of the state to the making of an appropriation." *Crane v. Frohmiller*, 45 Ariz. 490, 498, 45 P.2d 955, 959 (1935). While Proposition 204 may include an obligation to refrain from restrictions on eligibility, that language cannot be construed in a vacuum or as an appropriation or an inviolate mandate. In other words, the obligation to "extend coverage to all who meet the financial criterion" assumes the existence of the funds needed to pay for services set forth in A.R.S. § 36-2901.01(B). To the extent A.R.S. § 36-2901.01(A) uses mandatory language, the mandate must be interpreted by the extent of the funding to effectuate it.

The Director, by temporarily freezing enrollment and seeking permission to manage enrollment to reflect the availability of funds, is acting in accord with the (1) the authorized appropriations (including the Tobacco Funds) and (2) the Legislature's repeated direction to manage the program in FY 2012 within available appropriations "notwithstanding any other law." SB 1001, 2011 Ariz. Sess. Laws, 1st Spec. Sess., Ch. 1, §§ 1 and 2; SB 1619 § 34(A). The Director has left open the option of lifting the freeze if funds become available. There has been no repeal or amendment of A.R.S. § 36-2901.01(A), as suggested by the Plaintiffs and therefore no violation of the Voter Protection Act. *See Pima Cnty. by City of Tucson v. Maya Const. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988) (the court will not presume an intent to repeal an earlier statute unless the new statute clearly requires the conclusion that such was the intent of the legislature).

c. The Requested Relief Violates The Separation Of Powers Doctrine Set Forth In Article 3 Of The Arizona Constitution

(1) <u>The Legislature is vested with the power of the purse</u>

Although Plaintiffs ask for relief against the Director, the relief they seek can only be obtained by directing the Legislature to appropriate more money to fund services for

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the Proposition 204 Expansion Population than it determined were otherwise available for FY 2012. Thus, this Court is being asked to revisit the FY 2012 budget and second-guess the Legislature. The Court should refrain from encroaching upon tasks constitutionally assigned to the Legislature.

The Separation of Powers clause of the Arizona Constitution expressly prohibits one branch of government from intruding into or "exercis[ing] the powers properly belonging to" another branch. Ariz. Const. art. 3. In *League of Arizona Cities & Towns v. Brewer*, 213 Ariz. 557, 559 ¶ 8, 146 P.3d 58, 60 (2006), the Arizona Supreme Court noted that "[w]e have consistently interpreted this clause to require the judiciary to refrain from interfering with the legislative process."

The Legislature has broad powers to decide how state funds are prioritized and used. Ariz. Const. art. 4, pt. 2, § 20; s*ee also Whitney v. Bolin*, 85 Ariz. 44, 47, 330 P.2d 1003, 1004 (1958) ("the power of the legislature is plenary and unless that power is limited by express or inferential provisions of the Constitution, the legislature may enact any law which in its discretion it may desire"); *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 519-20, ¶ 10, 1 P.3d 706, 709-10 (2000) (legislature's powers are limited only by prohibitions in the state and federal constitutions). When a legislative enactment is challenged, the courts "must find that the [a]ct is clearly prohibited by either the Federal Constitution or the Constitution of Arizona in order to hold it invalid." *Earhart v. Frohmiller*, 65 Ariz. 221, 225, 178 P.2d 436, 438 (1947).

The Arizona Constitution assigns the task of budgeting exclusively to the Legislature:

> Under our system of government, all power to appropriate money for public purposes or to incur any indebtedness therefor . . . rests in the Legislature." (quoting *LeFebvre v. Callaghan,* 33 Ariz. 197, 204, 263 P. 589, 591 (1928)). The Legislature, in the exercise of its lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect.

Rios, 172 Ariz. at 6, 833 P.2d at 23; *see also Prideaux v. Frohmiller*, 47 Ariz. 347, 357-

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58, 56 P.2d 628, 632 (1936).

The Arizona Legislature is required to establish an annual budget commencing on the first day of July each year to set forth the necessary ordinary expenses of the State. Ariz. Const. art. 9, §§ 3, 4; *see also* Ariz. Const. art. 4, pt. 2, § 20 (establishing the requirements of the general appropriations bill). The Arizona Supreme Court has noted the significance of the budget bill in relation to all other legislation. In *Sellers v. Frohmiller*, 42 Ariz. 239, 246, 24 P.2d 666, 669 (1933), the general appropriations bill was described as "not in the true sense of the term legislation," but rather "merely a setting apart of the funds necessary for the use and maintenance of the . . . state government already in existence and functioning." Moreover, budget legislation becomes effective immediately and is not subject to referendum because of the necessity of passing appropriations legislation every year. *See* Ariz. Const. art. 4, pt. 1, § 1(3); Ariz. Const. art. 4, pt. 2, § 20. This means that once the budget is passed, it is not to be revised by the people or the courts.

Because the power to appropriate money for public purposes rests exclusively with the Legislature, this Court should refrain from interfering with the legislative process by ordering the Director to spend in excess of the appropriation provided to AHCCCS by the Legislature, which is the only effective way for the Plaintiffs to obtain the relief they seek.

Plaintiffs' argument that the legislation enacted by Proposition 204 is "constitutional" in nature or is entitled to some standing superior to other legislation by virtue of the Voter Protection Act is a position inconsistent with the Arizona Constitution and must be rejected. The Voter Protection Act as set forth in Article 4, Part 1, Section 1(6) of the Arizona Constitution does not require the Legislature to fund coverage for the entire Proposition 204 Expansion Population. The Voter Protection Act simply limits the ability of the Legislature to amend or repeal A.R.S. §§ 36-2901.01 and 36-2901.02. It does not imbue the content of the legislation with any special meaning. To the contrary, the Arizona Constitution explicitly puts legislation enacted by initiative

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on par with all other legislation. Ariz. Const. art. 22, § 14 ("Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people."). Plaintiffs' interpretation of A.R.S. § 36-2901.01 conflicts with this principle and Legislature's fundamental constitutional and discretionary authority to budget for the "necessary ordinary expenses of the state each fiscal year" as provided in Article 9, Section 3 of the Arizona Constitution.

The Court must interpret constitutional provisions to avoid a conflict whenever possible. *Ruiz v. Hull*, 191 Ariz. at 448 ¶ 24, 957 P.2d at 991; *see also Adams v. Comm'n on App. Ct. Appointment*, No. CV-10-0405-SA, 2011 WL 2688803, at *4, ¶ 20 (the meaning of a law cannot be identified without considering its context); *Kilpatrick v. Superior Court (Miller),* 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970) (recognizing that "constitutions must be construed as a whole and their various parts must be read together"); *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452-53 (1953) (noting that "no constitutional provision is to be construed piece-meal, and regard must be had to the whole of the provision and its relation to other parts of the Constitution"). Any such conflict, however, is easily resolved because the Legislature did not repeal or amend any portion of A.R.S. § 36-2901.01(B) in passing the FY 2012 budget when it determined how much general fund revenue, in addition to the continuously appropriated money from the Tobacco Funds, was available to further fund the Proposition 204 Expansion Population.

Plaintiffs' citation to *Arizona Early Childhood Development & Health Board v. Brewer*, 221 Ariz. 467, 212 P.3d 805 (2009), is unhelpful. That case involved a challenge to the Legislature's sweep of $7 million of interest on tobacco tax funds that were set aside by the voters in 2006 to fund the Early Childhood Initiative. The Arizona Supreme Court held that sweeping the interest, earned on money already appropriated, into the general fund violated Article 4, Part 1, Section 1(6)(D) of the Arizona Constitution, because the act diverted monies (appropriated money and the interest

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earned on it) that were expressly dedicated to the program without a three-fourths vote of each house and not in furtherance of the measure's purpose. *Id.* at 471-72 ¶¶ 17-18, 212 P.3d at 809-10. That case is wholly inapposite because Petitioners do not allege that the Legislature or Director swept or diverted any funds that were specifically appropriated to fund the Proposition 204 Expansion Population.

(2) The Legislature's determination of what funds were "available" under A.R.S. § 36-2901.01(B) presents a nonjusticiable political question

Relief also should be denied because Plaintiffs raise a nonjusticiable political question. The Arizona Supreme Court recently noted that "[e]ven if a case is within a court's subject matter jurisdiction and is timely brought by a party with standing, a court should abstain from judicial review of the merits if the issue is properly decided by one of the 'political branches' of government." *Brewer v. Burns*, 222 Ariz. 234, 238, ¶16, 213 P.3d 671, 675 (2009). This guiding principle was further articulated by the Court in *Rios*:

> [I]t would be a serious mistake to interpret our acceptance of jurisdiction in this cause as a general willingness to thrust the Court into the political arena and referee on [an annual] basis the assertions of the power of the executive and legislative branches in the appropriations act . . . [F]uture attempts to invoke this Court's jurisdiction on similar grounds will be viewed with great circumspection."

Rios, 172 Ariz. at 5, 833 P.2d at 22 (*quoting Brown v. Firestone*, 382 So.2d 654, 671 (Fla. 1980)).

A controversy is nonjusticiable if it involves a political question, "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Kromko v. Ariz. Bd. of Regents,* 216 Ariz. 190, 192 ¶ 11, 165 P.3d 168, 170 (2007) (citations omitted). The political question doctrine springs from the fundamental separation of powers requirement under Article 3 of the Arizona Constitution, which provides that the departments (branches) of our state government "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." *Id.; see also Mecham v. Gordon,* 156 Ariz. 297, 300, 751 P.2d 957,

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960 (1988) ("Nowhere in the United States is [separation of powers] more explicitly and firmly expressed than in Arizona.").

Here, the power to budget is constitutionally committed to the Legislature and the responsibility to allocate appropriated funds is committed to the Executive. There are no judicially discoverable and manageable standards for resolving a dispute involving the manner in which the Legislature decides what general fund monies are available for competing public policy issues or how AHCCS allocates the funds appropriated among its various programs. In distinguishing the facts at issue in *Brewer v. Burns*, this Court drew an analogy to the exact situation presented here in noting that such a scenario would present a nonjusticiable political question. 222 Ariz. at 238, 213 P.3d at 675. The Court said, "[t]he issue [in *Brewer v. Burns*] is not whether the Legislature should include particular items in a budget or enact particular legislation. Such issues ... clearly are political questions." *Id.* at 239 ¶ 21, 213 P.3d at 676 (*citing Forty-Seventh Leg. of State v. Napolitano*, 213 Ariz. 482, 485 ¶ 7, 143 P.3d 1023, 1026 (2006)).

The Arizona Supreme Court long ago concluded that it has no legal method of compelling the legislature to create an appropriation. *Hernandez v. Frohmiller*, 68 Ariz. at 253-54, 204 P.2d at 862. In *Hernandez*, the Court found a 1948 citizen initiative ordering the Legislature to annually appropriate a sum not less than one per cent of the preceding fiscal year payroll to fund a newly created civil service board to be a "waste of printer's ink." The Court found that it is the "constitutional duty of the legislature without specific direction to make all necessary appropriations to pay the expenses of state agencies." *Id.* at 253, 204 P.2d at 862. Importantly, the Court held that "[t]here is no legal method of compelling the legislature to act" to make such an appropriation as directed by the citizen initiative. *Id.* at 254, 204 P.2d at 862; *see also Reinhold v. Bd. of Supervisors of Navajo Cnty.*, 139 Ariz. 227, 232, 677 P.2d 1335, 1340 (App. 1984) ("neither may the judiciary encroach upon the legislative function, and budgeting matters are a part of such a function").

Even if this Court takes the unprecedented step of examining the Legislative

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budget and orders the Legislature to re-appropriate general fund revenue or orders the Executive to reallocate certain appropriations, there are no judicially discoverable and manageable standards to apply in making such determinations. The Arizona Supreme Court reached this conclusion in *Kromko,* when it was asked to determine whether a tuition increase by the Board of Regents (part of the Executive branch) violated the constitutional requirement that university education be "as nearly free as possible." 216 Ariz. at 190, 165 P.3d at 168. The Court ultimately abstained because the issue was a political question that would have required it either to question discretionary budget and spending decisions delegated to the Board or question whether the Legislature should appropriate more funding so as to make university education less expensive. *Id.* at 194-95, ¶¶ 22-23, 165 P.3d at 172-73.

Here, the Plaintiffs do not challenge the Director's expenditure of monies he has been authorized by law to spend. Rather, because they do not challenge the absence of an appropriation adequate to their agenda, they question whether the Legislature acted within the scope of its discretionary budget and spending powers in determining which general funds were "available" to supplement the Tobacco Funds to cover the Proposition 204 Expansion Population. As in *Kromko*, there are no "judicially discoverable and manageable standards" available for the Court to intervene and decide when and what specific funds are "available" and how they should be appropriated by the Legislature or allocated by AHCCCS. *See Rios*, 172 Ariz. at 6, 833 P.2d at 23 ("The Legislature, in the exercise of its lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect.")

d. The Express Wording Of The Proposition 204 Ballot Language And Extrinsic Evidence Support The Legislature's Actions

Plaintiffs argue that the voters, when passing Proposition 204, intended to obligate the Legislature to appropriate an unknown amount of funds each year to cover all Proposition 204 Expansion Population expenses not covered by the Tobacco Funds. This argument is based primarily on selected references to the voter publicity pamphlet and

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other external references. Pet. at 21-23, 38. Such references, however, are irrelevant when interpreting A.R.S. § 36-2901.01(B), because its language clearly and unambiguously provides the Legislature the discretion to determine whether general fund revenue is "available" to cover such expenditures. *State v. Wagstaff*, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990) (if a statute is not ambiguous, it must be interpreted according to its plain meaning); *State v. Sweet*, 143 Ariz. 266, 269, 693 P.2d 921, 924 (1985) (the best and most reliable index of a statute's meaning is its language); *see supra* Section IV(D)(2)(a)(ii).

Notwithstanding the above, the various contrary and non-binding opinions in the voter publicity pamphlet did not clearly inform the voters about what would happen if the Tobacco Funds proved to be insufficient. *Healthy Ariz. Initiative PAC v. Groscost*, 199 Ariz. 75, 79 ¶ 16, 13 P.3d 1192, 1196 (2000) (Martone, J., dissenting) (The voter publicity pamphlet describing Proposition 204 "fails to advise the voter of the possibility that the tobacco settlement fund will be inadequate to fund this new mandate."). The Proposition 204 ballot language, which every voter read, expressly provided that *only* the Tobacco Funds would be used to fund the Proposition 204 Expansion Population.

Section 19-125(D), Arizona Revised Statutes, requires that the official ballot for an initiative include a summary of the principal provisions of the measure, prepared by the Secretary of State, including the effects of "yes" and "no" votes. Specifically, the ballot language must consist of "a brief phrase, approved by the attorney general, stating the *essential* change in the existing law should the measure receive a majority of votes cast in that particular manner." (emphasis added). For Proposition 204, the "yes" language expressly provided that the proposition would be funded only "with tobacco litigation settlement money." Ariz. Sec'y of State 2000 Publicity Pamphlet at 159-66, attached as Exhibit 9 to the Motion.[37] The ballot language did not reference the general fund or suggest that funding other than Tobacco Funds would be required. Nor did it

[37] Also available at www.azsos.gov/election/2000/info/pubpamphlet/english/prop204.pdf.

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remotely suggest that Proposition 204 would create a superior first lien on the general fund that "earmarked" a substantial portion of the fund in perpetuity at the expense of all other state funded programs if the Tobacco Funds became insufficient. *Id.*

Thus, the language that every voter read before casting a vote for or against Proposition 204 did not warn of, let alone suggest, the "essential change [to] existing law" that the Plaintiffs now claim to have been made by the initiative. *See* A.R.S § 19-125(D). The language certainly did not suggest that voters were actually choosing to affirmatively mandate that other vital public policy spending such as education, court administration, prisons, fire suppression, and public safety were being subjected to inferior budgetary status and that the Proposition 204 Expansion Population funding was to be the top spending priority in Arizona in perpetuity. Had this been the understanding of the voters, the measure may very well have been defeated.

Similarly, in the Proposition 204 publicity pamphlet, the proponents offered no discussion of what might happen if supplemental funds might be unavailable. In fact, the only discussion of "available" funds was from proponents who suggested that the Tobacco Funds would cover the entire cost and there would be money leftover in the fund to pay for other optional programs:

- "Any monies left from the Tobacco Litigation Settlement after implementation of Healthy Arizona would be available for other health needs."
- "[T]his initiative will produce federal matching funds (a return of our tax dollars) and leave settlement money to be spent for other programs."
- *[W]e have the funds available without raising taxes* to do what Arizona voters have already demanded." (comment of Marion Levett) (emphasis in original).

Ariz. Sec'y of State 2000 Publicity Pamphlet at 159-66, attached as Exhibit 9 to the Motion.

Surprisingly, the proponents of Proposition 204 distributed campaign literature that avowed Proposition 204:

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- would be "fully funded by Arizona's share of the Tobacco Settlement"
- would leave "plenty of Tobacco Settlement funds for other healthcare programs in the future"
- would be an "economically painless choice for Arizona"
- would "use[] no state tax money" and "not raise taxes"

See Healthy Arizona Initiative 2 campaign materials, attached as Exhibit C and incorporated herein; *see also Calik v. Kongable*, 195 Ariz. at 500, ¶ 17, 990 P.2d at 1059 (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48.19 (5th ed. 1992)) (Informative materials on a proposed law made available to the public are considered relevant legislative history for purposes of construction of a measure after its enactment.) These proponents even went so far as to assure voters that "taxes will not need to be raised to cover the program" and "not only does Prop. 204 not 'break the bank' as some have said, but leaves money for other healthcare programs." Exhibit C.

It is unwarranted to conclude from the ballot language, the voter publicity pamphlet or the proponents' own campaign literature that the voters intended to impose a far-reaching and undisclosed budgetary impact as now advocated by Plaintiffs. Absent any affirmative argument from the proponents, including textual support, that the initiative would bind the State to fund Proposition 204 whatever the consequences, there is no basis to ascribe such intent to the voters and the Plaintiffs' efforts to do so should be rejected.

3. Injunctive Relief would not be in the Public Interest.

The requested relief would not be in the public interest, as it would impose a burden on all Arizona taxpayers to spend monies that do not exist, thereby forcing a reduction in the provision of other State needs and services and, more importantly, put all federal matching funds for AHCCCS in jeopardy. While individual injury may occur if the freeze is implemented, such injury is not likely to happen to any of the individual Plaintiffs and would be *de minimis* by comparison to the budget chaos that will ensue and

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the loss of all federal monies for AHCCCS that will occur. Ironically, any relief an injunction would provide to childless adults who wish to enroll after July 9, 2011, would likely be nullified later in the FY 2012, if the Director is unable to fund the other federal obligations under AHCCCS and the federal government in turn refuses to provide federal support for the AHCCCS program.

No one has suggested a viable way, given the current lack of funds, to avoid injuring someone. Even if viable alternatives existed, the decision as to which alternatives, if any, should be implemented clearly presents a political question within the exclusive purview of the legislative branch. Whose injury weighs more heavily than another's is a matter of speculation. As the Ninth Circuit noted in *Lopez v. Heckler*, "the government's interest is the same as the public interest. The government must be concerned not just with the public fisc but also with the public weal." 713 F.2d 1432, 1437 (9th Cir. 1983). Here, the Director cannot provide the care at issue without funds and he is acting to maintain the federally required core of the AHCCCS program (serving over 1,000,000 people) in the face of extreme financial difficulty as directed by the Legislature.

Furthermore, the public interest is not served by issuing an injunction that forces the Director to violate numerous statutes making him civilly and criminally liable for altering appropriations or spending money that has not been appropriated. *See* A.R.S. §§ 35-154, 35-197, and 35-301. In addition, the public interest is not served by an injunction that would cast aside A.R.S. § 1-254, a law specifically enacted to prevent the very situation now before the Court. Finally, there is a public interest in the certainty of the budgetary process. As suggested in *Sears v. Hull*, it does not serve that interest if individuals delay and confuse that process by taking political disagreements to the courts. 192 Ariz. at 72, ¶ 29, 961 P.2d at 1020.

V. CONCLUSION

Plaintiffs' request for injunctive relief against the Director should be denied because the Plaintiffs lack standing to seek it and have failed to establish the applicable

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standards for obtaining an injunction. The Director has acted appropriately in complying with the Legislature's direction to manage the AHCCCS Care program within available appropriations and the request for an injunction should be denied so as not to put federal funding for the entire AHCCCS program in jeopardy.

DATED this 18th day of July, 2011.

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CERTIFICATE OF SERVICE

I certify that on this 18th day of July, 2011, I electronically transmitted a PDF version of Defendant Tom Betlach's Response to Plaintiffs' Motion for Preliminary Injunction to the Office of the Clerk of the Superior Court, Maricopa County, using the CM/ECF System, for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants:

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