IN THE SUPREME COURT
OF THE STATE OF ARIZONA

RICHARD ROACH, JENNIFER McGETTRICK, CARMEN FERRARA, JAMES FORS, DR. EVE SHAPIRO, and EL RIO COMMUNITY HEALTH CENTER, Petitioners, v. JANICE K. BREWER, in her capacity as Governor of the State of Arizona, and TOM BETLACH, in his capacity as Director of the Arizona Health Care Cost Containment System, Respondents.	No. CV-11-0151-SA

RESPONSE TO PETITIONERS' MOTION FOR INJUNCTIVE RELIEF

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PETITIONERS' MOTION FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

The Petitioners seek an "immediate" injunction to prevent harm they allege will occur *if* the federal government approves AHCCCS' plan to freeze enrollment in the childless adult "AHCCCS Care" program beginning on July 1, 2011. While 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 fiscal year ("FY") 2012 budget, the Respondents vigorously dispute Petitioners' flawed interpretation of Proposition 204 and misapplication of Arizona law pertaining to appropriations and separation of powers.

Petitioners allege no personal, particularized injury to themselves from the AHCCCS plan they seek to enjoin. Furthermore, they fail to meet the applicable standards for entitlement to preliminary relief because (1) they demonstrate no likelihood of success on the merits of their claims, (2) the relief they seek is legally unavailable, (3) they demonstrate no irreparable injury to themselves, and (4) the public interest does not favor such an injunction. Accordingly, the requested relief should be denied.

I. THIS CASE PRESENTS A NON-JUSTICIABLE, POLITICAL QUESTION

As more fully explained in the Response to Petition for Special Action ("Response") filed today by the Governor and AHCCCS Director Tom Betlach ("Director"), the Arizona Legislature during the last three fiscal years has enhanced revenue where it could, cut the State's budget, deferred payments, and cut programs (including core government services) to cope with an unprecedented fiscal crisis. *See* Response, State of Facts, Section B. One of the programs that can no longer be fully funded is the AHCCCS Care childless adults program, which was added to the AHCCCS program in 2000 by Proposition 204.

The dispositive question at issue in this case is whether the Legislature, which is the sole branch of government entrusted by the Arizona Constitution with the State's power to budget and make appropriations from the general fund, may decide which programs it will fund during a fiscal crisis. As discussed in the Response, this is a political question raising obvious issues of separation of powers. Response, Section II(C)(2). Instead of challenging the Legislature directly, the Petitioners ask the Court to order the executive branch to act as if the Legislature had fully funded the AHCCCS Care program. Their unspoken expectation is to entangle the Court in a political debate by using the requested injunction to force the Legislature to appropriate additional funds for AHCCCS

Care to avoid possible contempt of court by the AHCCCS Director (the "Director"), who would be unable, legally or financially, to comply.[1]

To support this strategy, the Petitioners make a legal argument premised upon the mistaken interpretation that Proposition 204's language created an appropriation mechanism that automatically trumps other State needs and Legislative decision-making, thereby operating regardless of financial circumstances. According to Petitioners, the budget is caught in the gears of Proposition 204, and the Legislature is helpless to stop or adjust its bite. This construction of Proposition 204 is, as discussed below, without any merit, and the Court should view the request for an injunction in the light of the political questions it raises. *See* Response, Section II(C)(2); *Brewer v. Burns*, 222 Ariz. 234, 238, ¶16, 213 P.3d 671, 675 (2009) (a court should abstain from judicial review of the merits if the issue is properly decided by one of the political branches of government).

A controversy is non-justiciable if it involves a political question, i.e. one "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. Arizona Bd. of Regents,*

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[1] The Petitioners frankly argue the result they seek will require that "the State's budget will have to be balanced in some other fashion." Pet., p. 7.

216 Ariz. 190, 192 ¶ 11, 165 P.3d 168, 170 (2007). [citations omitted]. The political question doctrine flows from the principle of separation of powers set forth in Article 3 of the Arizona Constitution. *Mecham v. Gordon,* 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988) (emphasis added). The Petitioners offer no "judicially discoverable and manageable standards" to resolve when funds are available and how they must be allocated by the Legislature, and an injunction would thrust the Court into disputes over these issues whenever the Legislature decides whether to make appropriations. *See* Response, Section II(D).

II. THE INDIVIDUAL PETITIONERS HAVE SUFFERED NO INJURY AND THEREFORE THEIR CLAIMS ARE NOT RIPE AND THEY LACK STANDING.

The Motion for Injunctive Relief ("the "Motion") raises serious issues of ripeness and standing. The Court should deny the requested injunction because the irreparable harm that is alleged is based upon speculation. Petitioners speculate that the federal government will approve a request to freeze eligibility in the AHCCCS Care program and that they may be adversely affected if a freeze ensues. Consequently, this motion should be denied because Petitioners' claims are not ripe and they lack standing to raise them.

A. The Issue is not Ripe.

Petitioners admit the federal government has yet to decide the Director's request to approve an AHCCCS Care freeze. While it seems likely that approval

will be granted, there is no guarantee. Without such approval, the freeze will not occur. As this Court has noted, the ripeness "doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson,* 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997).

B. The Petitioners Allege No Injury to Themselves.

Petitioners' standing to seek injunctive relief is also premised upon speculation. They do not allege any "palpable injury personal to themselves."

> This court has, as a matter of sound judicial policy, required persons seeking redress in the courts first to establish standing, *especially in actions in which constitutional relief is sought against the government. Sears v. Hull,* 192 Ariz. 65, 71, 961 P.2d 1013, 1019 (1998). In *Sears,* we denied standing to citizens seeking relief against the governor because *they failed to plead and prove palpable injury personal to themselves. Id.* at 69-70, 961 P.2d at 1017-18. A contrary approach would inevitably open the door to multiple actions asserting all manner of claims against the government.

Bennett v. Napolitano, 206 Ariz. 520, 524, ¶16, 81 P.3d 311, 315 (2003) (emphasis added).

The four individuals who receive AHCCCS Care benefits should not be affected by the freeze they seek to enjoin. They could only be harmed *if* their circumstances were to change after the freeze went into effect (their incomes rise above the federal poverty level), making them ineligible for AHCCCS Care, and then change again (their incomes then drop below the federal poverty level) such that they would have been eligible for the program but for the freeze. Given the time required for such multiple changes in circumstances and the procedure for

disenrollment, such a scenario is virtually impossible to occur before September 20, 2011.[2]

As with the plaintiffs in *Sears*, the fact that the Petitioners disagree with actions taken by the government is insufficient to create standing. Otherwise, the Court would be open to injunction requests from anyone desiring to second-guess the executive and legislative branches.

III. EVEN IF THEY HAD STANDING, THE PETITIONERS FAIL TO MEET THE TEST FOR PRELIMINARY RELIEF.

The Motion requests an injunction enjoining the Governor and Director from denying health care benefits to any eligible person as defined in A.R.S.§ 36-2901.01(A), "at least" until September 20, 2011. An injunction is not one of the three writs the special action rules contemplate, i.e. certiorari, mandamus, and prohibition. Ariz.R.P.Spec.Act. Rule 1. Regardless of how the requested relief is classified, however, it should be denied.

A. The Criteria for Preliminary Injunctive Relief

The Motion does not set forth the legal standard Petitioners must meet to be entitled to injunctive relief. The test was recently restated in another case

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[2] As to the other Petitioners, defeated expectations of Dr. Shapiro and El Rio Community Health Center as Proposition 204 proponents are no basis for an injunction. Nor does El Rio allege any irreparable harm it will suffer if some of the persons it serves become ineligible.

stemming from the current fiscal crisis, in which the court of appeals vacated a preliminary injunction against the State:

> 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."

Ariz. Ass'n of Providers for Persons with Disabilities v. State, 223 Ariz. 6, 12 ¶12, 219 P.3d 216, 222 (App. 2009) *stay denied* (2009), *review denied* (2009) (internal citations omitted).

B. The Petition and Motion do not Meet the Criteria for an Injunction.

1. The Petitioners have no Likelihood of Success on the Merits

The Petitioners' legal theory demonstrates neither a "strong likelihood" nor "probable" success on the merits. It does not raise a "serious question" as to the merits. *See Ariz. Ass'n of Providers*, 223 Ariz. at 12 ¶16, 219 P.3d at 222. The arguments establishing that Petitioners are not likely to succeed on the merits are set forth in the Response, but will also be summarized here for the convenience of the Court.

There are two lynchpins to the Petitioners' argument. First is the argument that Proposition 204 binds the State to fund AHCCCS Care "whatever" the

circumstances and regardless whether there are available monies or competing State needs and priorities. Pet. at 33, 38. The apparent theory is that the voters created an unlimited, self-executing, and continuing appropriation that creates a first lien on the entire general fund. Second is the argument that the Governor and Director should act, or may be required to act, without appropriated funds. Both arguments are incorrect.

a. Proposition 204 Does Not Create an Unlimited, Self-executing, Continuing Appropriation from the General Fund.

i. The Plain Language of the Statute Defeats Petitioners' Interpretation.

The drafters of Proposition 204 knew how to craft a continuing appropriation. They created a continuing appropriation of a special tobacco litigation settlement fund properly dedicated to provide funding for Proposition 204's expansion of the AHCCCS program. But when they came to the general fund, they did nothing of the kind. The pertinent statute, A.R.S. § 36-2901.01(B), provides:

> To ensure that sufficent [sic] monies are available to provide benefits to all persons who are eligible pursuant to this section, funding shall come from the Arizona Tobacco Litigation Settlement Fund established by §36-2901.02 and shall be supplemented, as necessary, by any other *available* sources *including legislative appropriations* and federal monies.

(Emphasis added)

By contrast to the special Tobacco Litigation Settlement Fund provision, the provision relating to other available sources does not create a continuing or self-

executing appropriation. Section 36-2901.01(B) is not authority mandating appropriations, but instead it clearly requires someone to determine what other sources are available. Among these may be *legislative* appropriations; i.e. funds that future Legislatures may determine are necessary *and* available to be appropriated for this purpose. If the initiative had itself created a self-executing, continuing appropriation of any and all additional funds, the reference to future legislative appropriations as a possible other available source would be redundant.

The initiative might have attempted to be as broad as Petitioners' present interpretation. But the drafters did not require the use of "all" other funding sources, did not require the use of general fund monies "notwithstanding any other law," did not require that revenue be raised to provide funds if needed, and did not set a maximum amount or sum certain the general fund must contribute. Proposition 204 delegated issues over the availability of supplemental funding to future Legislatures.

Petitioners do not even discuss, let alone explain, the word "available" as used in the initiative. The word does ***not*** mean "whatever" funds there may be. It means sources that are "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). The statute is clear that sources of supplemental funding must be available

and *legislative* appropriation was one possible source. A legislative appropriation is one made by the Legislature. *Rineer v. Leonardo,* 194 Ariz. 45, 46, ¶7, 977 P.2d 767, 768 (1999) ("[w]here the statutory language is clear, we ascribe plain meaning to its terms.").

ii. Extrinsic Evidence Should Not Be Considered But Also Does Not Support Petitioners' Interpretation.

There is no basis or need, as a matter of statutory construction, to go beyond the language of the statute, especially when the Petitioners offer no competing construction of the phrase "available sources." But if one did look further, neither the ballot the voters read when they cast their votes nor the arguments of Proposition 204's proponents supports the Petitioners. As more fully set forth in the Response, the initiative's proponents offered no hint of the open-ended obligation the Petitioners now read into Proposition 204. *See* Response, Section II(E). To the contrary, the initiative's proponents argued there was more than enough money from the Tobacco Litigation Settlement Fund and that Proposition 204 would not raise taxes, would not "break the bank," would be fully funded by the Tobacco Litigation Settlement Fund, and would even leave money for other uses by the Legislature. *Id.*

Given such hopes, the drafters had no need to try to bind future legislatures to create the sort of open-ended, all-consuming obligation the Petitioners now assert. To the contrary, the drafters' use of the word "available" and the phrase

"legislative appropriations," in obvious contrast to the creation of the continuing special fund appropriation they did create, demonstrates the Petitioners' interpretation of the initiative is unfounded.

iii. Petitioners' Interpretation would Render Proposition 204 Unlawful.

Moreover, the Petitioners' interpretation runs afoul of a host of constitutional provisions, statutes, and cases interpreting the appropriation power. Among these are:

- Ariz. Const. art. 9, § 5 provides "[n]o money shall be paid out of the State treasury, except in the manner provided by law," which this Court clarified in *Cockrill v. Jordan*, 72 Ariz. 318, 319, 235 P.2d 1009, 1010 (1951), by holding "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*" (emphasis added);
- *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 488, ¶25, 143 P.3d 1023, 1029 (2006), concluding that a statute may obligate the state to make payments, but absent setting aside any sum of money from the public revenue, the statute is not an appropriation;
- *Rios v. Symington*, 172 Ariz. 3, 6, 833 P.2d 20, 23 (1992): "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." (*citing Hunt v. Callaghan*, 32 Ariz. 235, 239, 257 P.648, 649 (1927));

- *Crane v. Frohmiller*, 45, Ariz. 490, 500, 45 P. 2d 955, 960 (1935), holding that legislation that creates a "blank check upon the general fund" is "unconstitutional, invalid, and of no effect whatsoever;"
- 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;"
- A.R.S. § 35-154 makes it illegal for the Director to authorize providing care for which he cannot pay and subjects him to personal liability if he were to do so; and
- A.R.S. §§ 35-154, 35-197, and 35-301 make it illegal to spend money not appropriated.

Because the people cannot by initiative create any law the legislature could not have lawfully created, Ariz. Const. art. 22, § 14, the initiative steered clear of

these varied pitfalls and did not create an unlimited black hole in the State's budget that would have been "of no effect whatsoever." Petitioners' insistence to the contrary has no support in the facts or the law.

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). There is no likelihood the Petitioners can succeed on the merits by arguing the initiative says what it does not.[3]

2. The Requested Relief is Legally Unavailable

Petitioners do not dispute that $478,000,000 was cut from the AHCCCS Medicaid budget this year. Pet. Ex. 4, "Detailed List of General Fund Changes by Agency." The Petitioners do not suggest that the Director has other funds with which to pay for the services the injunction would require. The Petitioners surely realize the Director may not authorize services without an appropriation of the

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[3] Nor can the Petitioners maintain that Proposition 204 has been repealed or amended, since neither is true. Nor have funds dedicated to Proposition 204 been diverted, as *in Arizona Early Childhood Development and Health Board v. Brewer*, 221 Ariz. 467, 212 P.3d 805 (2009). The Legislature has simply determined it has insufficient funds in FY 2012 to appropriate a supplement for AHCCCS Care in the amount Petitioners would like. No permanent cap on the number of persons who may be enrolled has been created. The most the Petitioners can say at this point is that a freeze on eligibility will temporarily limit enrollment, but this simply reflects the fact the initiative does not contemplate authorizing services the State cannot pay for when other sources of funds are not "available."

funds needed to pay for them. "Payment to [employees authorized by statute] can be made only if there is an actual and proper appropriation. Obligations incurred in the absence of such are null and void rendering the officials incurring them liable on their bonds." *Millett v. Frohmiller*, 66 Ariz. 339, 344-45, 188 P.2d 457, 461 (1948). Thus, for the Petitioners to challenge the Governor and Director *as if* they have the funds that have not been appropriated makes no sense.

The Legislature is giving Proposition 204 the only reasonable construction its plain language and the State's financial condition permit by commanding the Director to maintain the AHCCCS program within available appropriations, SB1001, 2011 Ariz. Sess. Laws, 1st Spec. Sess., ch. 1, §§ 1 and 2, and to manage AHCCCS within available appropriations "notwithstanding any other law." Pet. App., Ex. 1, Senate Bill 1619, § 34(A). The Petitioners may disagree with the Legislature's choice, but they have no claim against the Director and the Governor, who are doing exactly what they have been required to do by seeking authority to freeze eligibility and create a more flexible form of the childless adult program to reflect available funding.

Thus, even if there were a legal basis for the relief the Petitioners seek, asking the Court to order the Director to provide services for which he cannot pay (i.e. to do so with funds that are not available) is meaningless. Nor can the Court direct the Legislature to appropriate funds for AHCCCS Care, since "[t]here is no

legal method of compelling the legislature to act." *Hernandez v. Frohmiller*, 68 Ariz. 242, 253-254, 204 P.2d 854, 862 (1949). Without an appropriation, the agency cannot use State funds, and a state officer cannot be compelled to create an obligation against the State. *Eide v. Frohmiller*, 70 Ariz. 128, 135, 216 P.2d 726, 731 (1950). Without an appropriation, it would be illegal for the Director to authorize providing care for which he cannot pay, and he would be personally liable for doing so. A.R.S. §35-154. The relief requested is therefore not even a lawful option.

The dilemma faced by the Director is similar to the situation in *Arizona Ass'n of Providers for Persons with Disabilities,* which considered the State's suspension of certain medical care services funded by State monies that had been reduced as a result of the budget crisis. 223 Ariz. at 15, ¶ 28, 219 P.3d at 225. The court stated:

> Although Plaintiffs argue, and the superior court found, that an ISP [Individual Support Plan] creates an entitlement to the services specified in that document, we have found no legal authority establishing in the individual the right to receive services consistent with an ISP without regard to the State's ability to afford those services. To the contrary, a number of statutes in Title 36 make clear that the provision of any service is contingent on appropriations and other funding. [Footnote omitted.] . . . ¶29 *Simply put, under Arizona law, an ISP does not entitle a developmentally disabled person to services that the Division lacks the funds to provide.* [Footnote omitted] Therefore, contrary to Plaintiffs' contention, state law does not render illegal the Division's decision to suspend state-only services to the developmentally disabled.

223 Ariz. at 15, ¶¶ 28-29, 219 P.3d at 225 (emphasis added).

The same logic applies in this case. The services at issue are contingent on there being money to pay for them. The lack of those funds is undisputed.

3. These Petitioners have not Demonstrated they are Threatened with Irreparable Injury by the Freeze.

As discussed above with respect to standing and ripeness, the Petitioners have demonstrated no likely threat to themselves from the contemplated freeze in enrollment in AHCCCS Care.

4. 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. While individual injury may occur if the freeze is implemented, corresponding injury will occur if the State must defund other programs to pay for AHCCCS Care. No one has suggested a viable way for 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*, 713 F.2d 1432, 1437 (9th Cir. 1983), "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." On the one hand, the Governor and the Director cannot provide care without funds; on the other hand, they are acting to maintain the federally required core of the AHCCCS program (serving over 1,000,000 people) in the face of extreme financial difficulty.

Furthermore, the public interest is not served by issuing an injunction that will result in the Director being in direct violation of numerous statutes making him civilly and criminally liable for altering appropriations or spending money that has not been appropriated. *See, supra*, A.R.S. §§ 35-154, 35-197, and 35-301. Also, the public interest is not served by an injunction that also would result in casting aside an Arizona statute specifically enacted to prevent the very situation now before the Court. A.R.S. § 1-254.

Finally, there is a public interest in the certainty of the budgetary process. Petitioners seek judicial relief that would impose an additional financial burden on the State equal to $207 million. Petitioners' Motion for Injunctive Relief, p. 6. As suggested in *Sears, supra*, it does not serve that interest if individuals delay and confuse that process by taking political disagreements to the courts.

C. *Mandamus* is not Appropriate

If the theory of Petitioners' request for an injunction is in the nature of a *writ of mandamus* to require the Director to perform a duty required by law as to which he allegedly has no discretion, the request must be denied because it is factually

and legally impossible for the Governor and Director to find hundreds of millions of dollars with which to pay for the services the requested injunction contemplates. *See Maricopa Cnty. v. State*, 126 Ariz. 362, 363, 616 P.2d 37, 38 (1980). Moreover, the Governor and Director are exercising their discretion in dealing with the appropriations provided by the Legislature.

D. The Injunction does not Serve as a Writ of Prohibition

Conversely, if the theory is that the injunction is in the nature of a writ of prohibition to prevent the Director from "proceeding in excess of legal authority," the Motion ignores the fact that the Director is proceeding *in compliance with* the Legislature's specific command that he implement the AHCCCS program within the monies available to the program in the Tobacco Litigation Settlement Fund, legislative appropriations, and federal funds. SB 1001, 2011 Ariz. Sess. Laws, 1st Spec. Sess., ch. 1. The declaratory judgment the Petition for Special Action proposes would logically have to invalidate the session law, but Petitioners do not request such relief in their Petition or as an element of the injunctive relief they seek between now and September 20.

E. The Injunction Would Upset Rather Than Preserve the Status Quo.

One of the purposes of preliminary relief is to maintain the current status quo. Here, the status quo includes the Legislature's directives to AHCCCS to do what it is doing. The session laws requiring the Director to manage the program

within available appropriations were not challenged by the Petitioners. These laws and the fiscal crisis which caused them are the status quo. To ask for an injunction that will make more people eligible for AHCCCS Care, especially without suggesting a source of available funds, preserves nothing and interferes with the pending attempts to preserve the program with a realistic view of the funding that is "available."

CONCLUSION

Injunctive relief should be denied because the Petitioners lack standing to seek it, the issues raised are not ripe and involve a political question, and the requested injunctive relief is legally and factually unavailable. The Petitioners show no likelihood of success on the merits, since the initiative did not contemplate covering more people than the State can pay for and left the determination of what supplemental funds the State could afford to the Legislature. The Governor and Director have acted appropriately in complying with the Legislature's direction to manage the program within available appropriations.

For all these reasons, the Motion for Injunctive Relief should be denied.

RESPECTFULLY SUBMITTED this 21st day of June, 2011.

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CERTIFICATE OF FILINGS AND SERVICE

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