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**CLERK SUPREME COURT**

**IN THE SUPREME COURT  
OF THE STATE OF ARIZONA**

RICHARD ROACH, JENNIFER	)	
McGETTRICK, CARMEN FERRARA,	)	No. CV-11-0151-SA
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.	)	

**RESPONSE TO PETITION FOR SPECIAL ACTION**

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## SUMMARY OF ARGUMENT

This case involves fundamental principles of constitutional law. In an audacious effort to create a superior first lien on all Arizona revenues, Petitioners are tacitly asking this Court to order 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 Population, without regard to whether such a compelled appropriation would cut core government services or other vital needs.

The separation of powers doctrine, the Arizona Legislature's power to establish the State's annual budget, and express statutory provisions all preclude Petitioners' requested relief. Although Petitioners have filed their special action against the Governor and Director of the Arizona Health Care Cost Containment System ("AHCCCS"), the actual relief they request can only come from the Arizona Legislature, which is the branch of government constitutionally mandated to appropriate state funds.

The voters expanded the AHCCCS program in 2000 by passing Proposition 204. They only appropriated the Arizona Tobacco Litigation Settlement Fund and (through Proposition 303 in the 2002 general election) the Proposition 204 Protection Account, (collectively, the "Tobacco Funds") to pay for the expansion

in the AHCCCS program.<sup>1</sup> The initiative required the Tobacco Funds to be supplemented if necessary by “additional sources” of funds, including legislative appropriations. The drafters of Proposition 204 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”.

For fiscal year (“FY”) 2012, in the midst of an unprecedented economic crisis, 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 the program in its entirety given significant increases in this Population, current revenue projections, and other required expenditures necessary to operate state government. SB 1619, 2011 Ariz. Sess. Laws, 1st Reg. Sess., ch. 31

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<sup>1</sup> 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.

Petitioners' request must be denied because the Arizona Legislature is not a party in this matter and, even if it were, such relief would intrude upon the primary and plenary power vested to a co-equal branch of government in violation of the separation of powers doctrine set forth in Article 3 of the Arizona Constitution. Moreover, the Petitioners' legal theory is simply incorrect.

### **STATEMENT OF FACTS**

The Governor and AHCCCS Director (the "Director") agree that there are no material issues of fact in dispute, but vigorously dispute the conclusions that Petitioners' draw from selected references to the 2000 voter publicity pamphlet and other external sources in existence prior to the passage of Proposition 204. Given the clear language of A.R.S. § 36-2901.01(B), references to such extrinsic evidence is irrelevant. However, if such information is to be considered, then it is necessary to reference other sources<sup>2</sup> of information that were available to the voters casting votes for or against Proposition 204, including the ballot language that was presented to every voter who cast a vote for or against Proposition 204. Petitioners' characterization of the voters' understanding of the funding requirements of Proposition 204 is contradicted by other statements in the same

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<sup>2</sup> Because statements made by advocates for and against Proposition 204 are not relevant, they are not referenced in the Statement of Facts, but rather appear in Section II(E) of the Argument.

pamphlet and the ballot language itself. *See* Appendix in Support of Petition for Special Action (“Pet. App.”), Ex. 10.

**A. Undisputed Facts**

It is undisputed that the Governor and Director have not been given the funds necessary to provide services to the entire Proposition 204 Expansion Population. The Legislature modified the AHCCCS budget for FY 2012 by over \$500,000,000, which included a reduction of \$207,000,000 for the Proposition 204 Expansion Population. *See* Pet. App., Ex. 4. AHCCCS has established that there is a \$541,000,000 shortfall in funds needed to maintain the status quo in the AHCCCS program. *See* Pet. App., Ex. 2. Petitioners do not maintain that the Governor and Director have funds to provide services to the Proposition 204 Expansion Population nor do they allege that they have improperly expended, or failed to expend, monies that are appropriated.

There is no dispute that Proposition 204 greatly expanded the number of people AHCCCS covers. As Petitioners acknowledge, one in four individuals receive AHCCCS benefits as a result of Proposition 204. *See* Special Action Petition (“Pet.”) at 1-2. This accounts for 28.9% of the lives covered through the

AHCCCS program as of May 2011 (389,380 of 1,348,035 lives).<sup>3</sup> The additional expense has been substantial and consumes a greater percentage of the annual state budget. Although the Tobacco Funds are the only specified and appropriated funding sources for the Proposition 204 Expansion Population, they now account for only 6% of the non-federal funds appropriated for the AHCCCS program for FY 2011 (\$148,579,200 of \$2,410,904,600), and only 17% of the non-federal funds used to administer the Proposition 204 Expansion Population program (\$108,211,300 of \$628,387,600).<sup>4</sup>

#### **B. Fiscal Year 2012 Budget**

In determining the amount of general fund revenue available to fund Proposition 204, the Arizona Legislature was confronted with multiple, competing demands for state appropriations that far exceeded the general funds available. Although the Legislature previously appropriated enough funding, in addition to 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

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<sup>3</sup> See *AHCCCS Population by Category*, [www.azahcccs.gov/reporting/Downloads/PopulationStatistics/2011/June/AHCCCS\\_Population\\_by\\_Category.pdf](http://www.azahcccs.gov/reporting/Downloads/PopulationStatistics/2011/June/AHCCCS_Population_by_Category.pdf) (last visited June 6, 2011).

<sup>4</sup> The Tobacco Litigation Settlement Fund accounts for 4.5% and the Proposition 204 Protection Account of the Tobacco Products Tax Fund accounts for 1.7%. *Total AHCCCS Spending on FY2004 to FY2011*, <http://www.azleg.gov/jlbc/AHCCCSHistoricalSpending.pdf> (last visited June 6, 2011).

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> The FY 2011 projected shortfall equaled 32 percent of projected operating budget for the entire year.<sup>8</sup>

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

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<sup>5</sup> See *The Executive Budget Summary Fiscal Year 2011*, [http://www.ospb.state.az.us/documents/2010/FY2011\\_BudgetSummaryFINAL.pdf](http://www.ospb.state.az.us/documents/2010/FY2011_BudgetSummaryFINAL.pdf) (last visited June 18, 2011).

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

<sup>7</sup> See *The Executive Budget Summary Fiscal Year 2011*, [http://www.ospb.state.az.us/documents/2010/FY2011\\_BudgetSummaryFINAL.pdf](http://www.ospb.state.az.us/documents/2010/FY2011_BudgetSummaryFINAL.pdf) (last visited June 18, 2011).

<sup>8</sup> *Id.*

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).<sup>9</sup>

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).<sup>10</sup>

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

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<sup>9</sup> *Id.*

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



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.<sup>11</sup> Additionally, the State eliminated most general fund support for the Department of Environmental Quality, Arts, Parks, Mines and Minerals, Water Resources, and Tourism.<sup>12</sup>

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), employee benefits (\$50 million), and the AHCCCS reductions from SB 1619, at issue in the case.<sup>13</sup>

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<sup>11</sup> *Arizona Economy and Budget, FY 2011 and FY 2012*, <http://www.azospb.gov/documents/2011/CMS%20Brief%20Final-4> (last visited June 18, 2011).

<sup>12</sup> *Id.* at 40.

<sup>13</sup> 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](http://www.azleg.gov/jlbc/PreliminaryMayRevenueUpdate.pdf) (last visited June 18, (continued...))

## C. The AHCCCS Budget

There are three main “drivers” of cost in the AHCCCS program: eligibility standards, the scope of covered services, and provider reimbursement rates. *See* Pet. App., Ex. 2. AHCCCS has used its best efforts in these three areas to contain costs in order to maximize funds available for the provision of services.<sup>14</sup>

### 1. Optional services have been limited or eliminated.

Most AHCCCS services are a mandatory condition of receiving federal financial participation under the federal Medicaid program. 42 U.S.C. § 1396a(a)(10)(A) (2010). Elimination of mandatory services under Medicaid would result in an estimated loss of \$7,575,127,800 in federal funds for the fiscal year ending June 30, 2011. *See* 42 U.S.C. § 1396b(a).<sup>15</sup> This amount equals roughly 75

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(...continued)

2011). 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.

<sup>14</sup> AHCCCS estimates that the FY11 Appropriation is \$874.0 million smaller than it otherwise would have been due to actions implemented by the agency including provider reductions, benefit modifications, program freeze/elimination, increase cost sharing, and administrative reductions. *See Arizona Economy and Budget FY 2011 and FY 2012*, <http://azahcccs.gov/reporting/Downloads/BudgetProposals/FY2012/AHCCCSBrieftoCMS2-8-11.pdf> (last visited June 18, 2011).

<sup>15</sup> *See also AHCCCS Fiscal Year 2011 Original Appropriation*, [wwwazahcccs.gov/reporting/Downloads/BudgetProposals/FY2011/FY11OriginalAppropriationwithDESandDHS.pdf](http://wwwazahcccs.gov/reporting/Downloads/BudgetProposals/FY2011/FY11OriginalAppropriationwithDESandDHS.pdf) (last visited June 18, 2011).

percent of the total cost of the program for that year.<sup>16</sup> Consequently, AHCCCS has had to limit or eliminate many optional services to preserve the required core of its program. However, the primary optional services, including pharmacy, home and community based services were not cut because AHCCCS determined that such cuts would increase program costs due to the increased demand for other mandatory services that would result from the cuts.

**2. Reimbursement to providers has been reduced.**

Reimbursement to providers has been reduced repeatedly since 2009. Inflationary increases to rates have been suspended and reimbursement for certain extraordinary hospital claims was eliminated.<sup>17</sup> There is a limit, both practically and legally, to how much reimbursement may be cut and AHCCCS cannot be funded by further cuts in provider reimbursement.

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

The remaining cost driver is eligibility. Just as there are mandatory services under Medicaid, Arizona is also required to cover certain populations to receive

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<sup>16</sup> *AHCCCS Fiscal Year 2011 Original Appropriation*, [www.azahcccs.gov/reporting/Downloads/BudgetProposals/FY2011/FY11OriginalAppropwithDESandDHS.pdf](http://www.azahcccs.gov/reporting/Downloads/BudgetProposals/FY2011/FY11OriginalAppropwithDESandDHS.pdf) (last visited June 18, 2011).

<sup>17</sup> *See* HB 2275, 2008 Ariz. Sess. Laws, 2nd Reg. Sess., ch. 288, § 20; HB 2013, 2009 Ariz. Sess. Laws, 3rd Spec. Sess., ch. 10, § 22; HB 2010, 2010 Ariz. Sess. Laws, 7th Spec. Sess., ch. 10, § 25; SB 1619, 2011 Ariz. Sess. Laws, 1st Reg. Sess., ch. 31 §§ 11, 29, 31, 32.

federal financial participation, including the Section 1931 and SSI populations as they existed prior to Proposition 204. *See* 42 U.S.C. § 1396a(a)(10)(A)(i). The State cannot reduce or terminate the eligibility of these groups, except with federal permission, without losing all federal funding. The Affordable Care Act of 2010 includes “maintenance of effort” provisions that, absent federal permission, preclude such reductions or terminations of those populations through January 1, 2014. 42 U.S.C. § 1396a(gg) (2010). To further reduce costs, AHCCCS has requested that the federal government grant a waiver of the maintenance of effort provision to reduce the income limit for parents in the 1931 Expansion population. *See* Pet. App., Ex. 3. None of the Petitioners fall within these populations.

In addition to the expansion of categorically eligible parents and SSI recipients, the State added an optional eligibility group, the AHCCCS Care or “childless adult” population, through a demonstration project “waiver” agreement with the federal government. Federal financial participation for this population is not permitted under the Medicaid Act, 42 U.S.C. § 1396, but has been allowed by the Secretary under Section 1115 of the Social Security Act, 42 U.S.C. § 1315. As such, the federal government has informed AHCCCS that the State may eliminate

coverage for this group when the State's current "demonstration project" ends on September 30, 2011.<sup>18</sup> Pet. App., Ex. 3.

The Tobacco Funds are the first sources of funding for the Proposition 204 Expansion Population. Pet. App., Ex. 2. However, for FY 2012, those funds will not even be sufficient to cover two of the three groups represented in the Proposition 204 Expansion Population. Constrained by this shortfall:

AHCCCS will use the other funds appropriated by the Legislature to cover: (1) the remainder of the costs associated with the first two Proposition 204 State Plan expansion categories listed above, (2) the costs associated with other eligibility groups listed in the State Plan that are subject to the MOE [maintenance of effort] requirements unless those requirements are waived by the Secretary, and (3) to fund continuation of the AHCCCS Care program if it is closed to new enrollment.

*Id.*

**4. The 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. Instead of extending the current demonstration project, AHCCCS has asked for waiver authority to cover childless adults at an income level that can be adjusted as

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<sup>18</sup> Communication from CMS indicates that AHCCCS may modify coverage for individuals covered exclusively through the Waiver (e.g., childless adults). *See* Pet. App., Ex. 15 at pp. 5-6.

necessary to maintain a program within State appropriations. Pet. App., Ex. 3. With respect to the persons covered under the current AHCCCS Care program, the plan is to freeze enrollment on July 1, 2011 and establish a more flexible program, effective October 1, 2011, that would reflect the State's ability to provide services based on the appropriated funds available. This plan is conditioned on approval from and, as of the date of this filing, is still being considered by, the federal government. The Director will take no action to implement the freeze until he obtains federal approval.

### **STATEMENT OF ISSUES**

1. Whether this Court has jurisdiction to review the Arizona Legislature's discretionary budget and spending decisions made in deciding which appropriations are available to cover a multitude of competing government obligations and services, including Medicaid coverage for certain individuals.
2. Whether this Court can grant the relief requested even if it accepts jurisdiction.

### **ARGUMENT**

#### **I. SPECIAL ACTION JURISDICTION SHOULD BE DENIED.**

Before reaching the merits of Petitioners' claims, this Court must first consider whether the issues presented are proper for judicial resolution. *Brewer v. Burns*, 222 Ariz. 234, 237 ¶ 6, 213 P.3d 671, 674 (2009). Because this Court's

decision to accept special action jurisdiction is highly discretionary, the Court may refuse to consider this Special Action because: (1) the relief requested is not ministerial in nature, thus not proper for mandamus relief; (2) Petitioners lack standing; and (3) the issues are not ripe. *Id.* at 237 ¶ 7; *see also League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 558 ¶ 4, 201 P.3d 517, 519 (2009) (decision to accept special action jurisdiction is discretionary).

Petitioners' prayer for relief is styled as a request for declaratory and injunctive relief, but is the functional equivalent of a request for a writ of mandamus requiring the Director to maintain present levels of eligibility and benefits under Proposition 204. *See* Rule 3, Ariz. R. Spec. Act. "Mandamus may compel the performance of a ministerial duty or compel the officer to act in a matter involving discretion, but it may not designate how that discretion shall be exercised." *Kahn v. Thompson*, 185 Ariz. 408, 411, 916 P.2d 1124, 1127 (App. 1997).

Here, the Director's function is not merely ministerial and does not permit only one course of action. The Director must comply with the legislative direction to manage the program with the funds appropriated to his agency and he cannot provide services required by Proposition 204 without funds appropriated for that