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**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.¹ 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

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.

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 sources² 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

² 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).³ 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).⁴

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

³ See *AHCCCS Population by Category*, www.azahcccs.gov/reporting/Downloads/PopulationStatistics/2011/June/AHCCCS_Population_by_Category.pdf (last visited June 6, 2011).

⁴ 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.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 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

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.*

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

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

⁹ *Id.*

¹⁰ *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.¹¹ Additionally, the State eliminated most general fund support for the Department 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), employee benefits (\$50 million), and the AHCCCS reductions from SB 1619, at issue in the case.¹³

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

¹² *Id.* at 40.

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, (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.¹⁴

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).¹⁵ This amount equals roughly 75

(...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.

¹⁴ 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).

¹⁵ *See also AHCCCS Fiscal Year 2011 Original Appropriation*, www.azahcccs.gov/reporting/Downloads/BudgetProposals/FY2011/FY11OriginalAppropriationwithDESandDHS.pdf (last visited June 18, 2011).

percent of the total cost of the program for that year.¹⁶ 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.¹⁷ 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

¹⁶ *AHCCCS Fiscal Year 2011 Original Appropriation*, www.azahcccs.gov/reporting/Downloads/BudgetProposals/FY2011/FY11OriginalAppropwithDESandDHS.pdf (last visited June 18, 2011).

¹⁷ 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, 2011.¹⁸ 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

¹⁸ 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

purpose. These are hardly ministerial functions and therefore cannot be the subject of mandamus relief from either the Governor or Director.¹⁹

The Petitioners also lack standing and the issues raised are not ripe because none of the Petitioners have been affected by any of the proposed reductions in services as of the date of this filing. Those proposed reductions will not be made until after July 1, 2011, and are contingent upon the implementation of a draft rule and approval from the federal government. Pet. App., Ex. 3. For these reasons, this Court should deny special action jurisdiction in this case.²⁰

II. IF THE COURT ACCEPTS SPECIAL ACTION JURISDICTION, THE REQUESTED RELIEF SHOULD BE DENIED.

A. The Requested Relief Cannot Be Obtained From The Governor Or The Director.

1. The Respondents have 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. This Court has further clarified that “no money can be paid out of the state treasury

¹⁹ Moreover, the Petitioners failure to name the Legislature as a party also deprives this Court of special action jurisdiction. The relief requested by Petitioners can only be obtained from the Arizona Legislature through an increased appropriation. This Court’s original jurisdiction extends only to extraordinary writs of mandamus and injunction to *state officers*, not to the Legislature. Ariz. Const. art. 6, § 5; *see also* Rule 3, Ariz. R. Spec. Act.

²⁰ The Governor and Director concede, however, that the Petitioners may acquire standing, and the issues may become ripe, at some point in the future.

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, 319, 235 P.2d 1009, 1010 (1951); *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 Governor and 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. 3, 11, 833 P.2d 20, 28 (1992) (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. 128, 135, 216 P.2d 726, 731 (1950) (absent an appropriation, “the administrative machinery provided for therein cannot function”). The Governor does not have power to alter a legislative appropriation. *Rios*, 172 Ariz. at 10, 833 P.2d at 27. 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.²¹

Rather than challenge the Legislature overtly, the Petitioners instead seek an order requiring the Governor and Director to continue coverage for the Proposition 204 Expansion Population without an appropriation to do so. They fail to acknowledge, however, that the Governor and 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”). Moreover, Petitioners have no right or legal basis to claim an appropriation is required by Proposition 204.

2. A.R.S. § 1-254 precludes Petitioners’ claim.

Section 1-254, Arizona Revised Statutes, precludes Petitioners’ claim. That statute 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*

²¹ 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 or terminate eligibility for persons covered under Proposition 204”) (emphasis added).

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. § 1-254.²² This statute deprives Petitioners of the right to claim that the Proposition 204 Expansion Population must be funded absent a legislative appropriation.²³ *See also* A.R.S. § 36-2903(P) (mirroring the language of A.R.S. § 1-254 in the AHCCCS administration statute).

The legislative history of section 1-254 clearly shows that it was drafted expressly to prevent future public officials, such as the Governor and Director, from being ordered by a court to provide services where the Legislature has not

²² Had the drafters desired that A.R.S. §§ 1-254 and 36-2903(P) not apply to the provisions of Proposition 204, they should 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).

²³ 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.

provided funding necessary to support a court order. According to the Senate Fact Sheet,²⁴ the purpose of A.R.S. § 1-254 is to prohibit the:

expenditure of state monies in excess of legislative 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 Appendix Exhibit A.

Section 1-254 unequivocally was intended to “eliminate 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 Petitioners from making a claim against the Governor and Director where the remedy would require either officer to make

²⁴ 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).

an expenditure that has not been authorized by legislative appropriation for that specific purpose.

The policy behind A.R.S. § 1-254 is further buttressed by the now applicable “Revenue Source Rule,” set forth in Article 9, Section 23 of the Arizona Constitution, which 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. This 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).

3. The doctrine of impossibility precludes the requested relief.

Because the Governor and Director cannot make expenditures in excess of the funds appropriated to them, the doctrine of impossibility also prohibits the relief Petitioners 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. 6, 15, ¶ 28, 219 P.3d 216, 225 (App. 2009), *review denied* (2009), 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 not entitlements, but rather 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, this 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).

The Petitioners argue that the Governor and Director have violated A.R.S. § 36-2901.01(A) by establishing a cap on the number of eligible persons who may enroll in the system. Pet. at 32. This is incorrect both factually and legally. The

Director has prudently moved to limit the program temporarily to reflect the funds that have been appropriated to AHCCCS.

This Court has drawn a clear distinction between an “obligation imposed by a statute with an appropriation to fulfill the obligation.” *Forty-Seventh Leg. 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 as an appropriation. 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. *See Pet.* at 32.

The Governor and Director, by temporarily freezing enrollment and seeking permission to manage enrollment to reflect the availability of funds, are 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.” Laws 2011, 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 Petitioners. *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).

B. 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).

In ensuring that sufficient monies would be available to provide benefits 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 revenues because such a requirement would have been unenforceable. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 253-54, 204 P.2d 854, 862 (1949), discussed *infra*, at Section II(C)(2). The Legislature has 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.

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

Although it has been established that the citizens cannot by initiative obligate the Legislature to annually appropriate an unknown amount of general fund money every year, *Hernandez*, 68 Ariz. at 242, 204 P.2d at 862, even if such a requirement was constitutional, A.R.S. § 36-2901.01(B) does not impose such an obligation on the Legislature.

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 the federal government 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. Otherwise, Petitioners are asking the Court to disregard the federal monies or the “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.

Petitioners appear to argue that Proposition 204 created a non-legislative appropriation of some kind, but the only such appropriation recognized by this Court 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 jurisdiction because the applicable constitutional provisions were not “self-executing”).²⁵ Thus, Proposition 204 did not create a constitutional appropriation

²⁵ 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).²⁶ The language

(continued...)

that deprives the Legislature 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 Governor or 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.” *Rios*, 172 Ariz. 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 even if the Legislature did not specify in a fiscal year a sum certain 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

(...continued)

financed by local governments. *Rios*, 172 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.” *Id.* 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),(4). Similarly, A.R.S. § 36-770 establishes the continuously appropriated Tobacco Products Tax Fund (which directs monies into the Proposition 204 Protection Account, which is allocated for the Proposition 204 Expansion Population).

In contrast, the use of “any other available sources” in A.R.S. § 36-2901.01(B)(2), 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. “There 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.” *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*, 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).²⁶

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 protect the public health, safety and welfare²⁷, would also run afoul of the principle that one Legislature cannot bind

²⁷ 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 required to preserve the public peace, health, and safety, and to provide for the support and

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another. See *Arizona Tax Commission v. Dairy & Consumers Co-op. Ass'n*, 70 Ariz. 7, 13, 215 P.2d 235, 239 (1950); *Frohmler 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).

Petitioners 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), this 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).

(...continued)

maintenance of the departments of the State and of State institutions and are superior to any other obligation created by law.

The Arizona Constitution 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.

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 Governor or 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, neither the Director nor the Governor has the 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.

The Petitioners 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.); *see also* 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 Petitioners’ implication, A.R.S. § 36-2901(B) does not require the Legislature to raise taxes or sell State resources to *create* a source of “available” funds. Nor does not it create an obligation to fund the Proposition 204 Expansion Population “notwithstanding any other law,”²⁸ or require such funding

²⁸ 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* (continued...) ”

even if the Legislature determines that other funding obligations are necessary to protect the public health, safety and welfare. 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, 957 P.2d 984, 991 (1998). The Petitioners’ 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, Petitioners are asking the Court to instead interpret Proposition 204 as creating a superior 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, this position 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. *See infra* Section II(E).

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that county from whatever state funding source is available an amount necessary to fulfill that county’s requirement.” Laws 1998, 4th Spec. Sess., ch. 5, § 5(B) (emphasis added).

Taken to its logical conclusion, if the Court were to follow the Petitioners' 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 204 Expansion Population participants every fiscal year. The courts 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. *See infra* Section II(C). 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.

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.²⁹ The Director has been commanded by the Legislature to manage AHCCCS within available appropriations "notwithstanding any other law." Pet. App., Ex. 1, Senate Bill 1619, § 34A. 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

²⁹ *See supra* note 23.

appropriations or federal funds. SB 1001, 2011 Ariz. Sess. Laws, 1st Spec. Sess., ch. 1. If those sources are insufficient, the Director is permitted to suspend eligibility or programs. Thus, when funds are not available, the Governor's and Director's jobs are to do exactly what they are 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.

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

1. The Legislature is vested with the power of the purse.

Although Petitioners ask for relief against the Governor and Director, the relief they seek can only be obtained by directing the Legislature to appropriate more money to fund services for 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 this constitutional task 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), this

