ARIZONA SUPREME COURT

ANDY BIGGS, et al., Plaintiffs/Appellants, vs. THOMAS BETLACH, Defendant/Appellee. EDMUNDO MACIAS; GARY GORHAM; DANIEL McCORMICK; and TIM FERRELL, Intervenor-Defendants/Appellees.	Arizona Supreme Court No. CV-17-0130-PR Arizona Court of Appeals, Division One No. 1 CA-CV 15-0743 Maricopa County Superior Court No. CV2013-011699

BRIEF OF *AMICUS CURIAE* ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION IN SUPPORT OF RESPONDENTS

FILED WITH WRITTEN CONSENT OF ALL PARTIES

Roopali H. Desai (024295)
D. Andrew Gaona (028414)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1200
Phoenix, Arizona 85004
T: (602) 381-5478
rdesai@cblawyers.com
agaona@cblawyers.com

Ann-Marie Alameddin (023570)
ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION
2800 North Central Avenue, Suite 1450
Phoenix, Arizona 85004
T: (602) 445-4332
aalameddin@azhha.org

Attorneys for Amicus Curiae
Arizona Hospital and Healthcare Association

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STATEMENT OF AMICUS CURIAE

¶1 *Amicus Curiae* Arizona Hospital and Healthcare Association ("AzHHA") is Arizona's largest and most influential statewide trade association for hospitals, health systems, and affiliated healthcare organizations. Its hospital members have united with the common goal of improving healthcare delivery in Arizona, and have tasked the association with being a powerful advocate for issues that impact the quality, affordability, and accessibility of healthcare for the patients, people and communities of Arizona. AzHHA's long-term vision is simply stated, but difficult to achieve: to make Arizona the healthiest state in the nation.

¶2 As it did in the court of appeals, AzHHA files this brief as *amicus curiae* in furtherance of its goal and vision, and because it is uniquely situated to provide information on the real-world impact of the Hospital Assessment from the perspective of its intended beneficiaries: non-exempt hospitals. *See* Ariz. Sess. Laws 2013, 1st Spec. Sess., Ch. 10 ("H.B. 2010"), § 44(3). Petitioners' broad policy arguments and myopic focus on technical distinctions between "fees" and "taxes" fail to account for the economic impact their efforts will have on the Hospital Assessment's payors. This oversight is unfortunate, because the nexus between the Hospital Assessment and the benefit to those responsible for paying it

is precisely the reason that the Hospital Assessment is constitutional, and precisely why the opinion below should be affirmed.

¶3 AzHHA endeavors here to avoid repetition from what is contained in its brief in the court of appeals (the "AzHHA Brief"), and to instead update relevant information, while highlighting several additional legal and practical principles. Below, AzHHA discusses two main points relevant to a proper consideration of the Petition For Review: (1) contrary to Petitioner's repeated assertions, public records establish that all hospitals subject to the Hospital Assessment in fact receive coverage payments from the Arizona Health Care Cost Containment System ("AHCCCS"), and (2) those hospitals realize measurable benefits that can be traced directly to the Hospital Assessment.

INTRODUCTION

¶4 By way of brief and necessary background, this case turns on the constitutionality of the Hospital Assessment, a provision of law carefully-crafted by the Legislature to comply with Article IX, § 22 of the Arizona Constitution. More specifically, while net increases in revenue generally require the approval of a two-thirds supermajority of the Legislature, "[f]ees and assessments that are authorized by statute, but are not prescribed by formula, amount or limit, and are set by a state officer or agency" do not. Ariz. Const. art. IX, § 22(C)(2) (the "Fee and Assessment Exception"). The trial court and court of appeals properly rejected

Petitioners' ***facial*** challenge to the Hospital Assessment, concluding that the Hospital Assessment was constitutionally-enacted by a simple legislative majority. *Biggs v. Betlach*, 242 Ariz. 55 (App. 2017) (the "Opinion").

¶5 Both below and in the briefs submitted to this Court, the parties have disagreed on two related factual issues that factor heavily into Petitioners' incorrect contention that the Hospital Assessment is actually a "tax." AzHHA has unique insight into each.

¶6 First, and no fewer than four times in their Petition for Review [at 2, 6, 7, and 8] and three times in their Supplemental Brief [at 5, 8, and 9] (and just as they repeatedly did below), Petitioners state in various ways that all Arizona hospitals must pay the Hospital Assessment without regard for whether they receive coverage payments from AHCCCS. This, they say, is proof that the Hospital Assessment is a "tax." That assertion remains unsupported by admissible evidence [IR 86 at 8], and unsurprisingly so because it is false in the context of AHCCCS's implementation of the Hospital Assessment. In consequence, Petitioners' facial challenge to the Hospital Assessment fails [*see* Opinion ¶ 10] because of their failure to carry the heavy burden of "establish[ing] . . . that the law is unconstitutional ***in all of its applications***." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added).

¶7 Second, the quantitative benefits realized by hospitals subject to the Hospital Assessment remain real. As demonstrated by a precipitous drop in costs associated with uncompensated care, hospitals – whether individually or at the system-level – subject to the Hospital Assessment realize a direct benefit from its imposition, a fact that weighs heavily against Petitioners.

ARGUMENT

¶8 The courts below approached the question of whether the Fee and Assessment Exception applies to the Hospital Assessment through the lens of *May v. McNally*, 203 Ariz. 425 (2002), which established a three-factor test for distinguishing between a tax and other revenue sources:

> (1) the entity that imposes the assessment;
>
> (2) the parties upon whom the assessment is imposed; and
>
> (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.

Id. at 430-31 ¶ 24. The scope and benefit of the Hospital Assessment bear on the second and third factors.

I. ALL HOSPITALS SUBJECT TO THE HOSPITAL ASSESSMENT RECEIVE COVERAGE PAYMENTS FROM AHCCCS.

¶9 Petitioners echo before this Court a refrain they have unsuccessfully repeated throughout this litigation:

> the manner in which Director Betlach enforces or collects the [Hospital Assessment] is not at issue in this case. This is a facial

> challenge, not an as-applied challenge. And that statute establishes a tax because, on its face, it applies to all hospitals, without regard to any benefit the hospital might receive.

[Pet. at 6; *see also* Supp. Brief at 5 ("[T]he [Hospital Assessment] is *not* based on a hospital's decision to accept Medicaid[.]")] They thus continue their misunderstanding of not only facial challenges generally, but also the mechanics of the Hospital Assessment and how it is actually imposed.

¶10 The Opinion succinctly dispels Petitioners' argument: "the levy at issue is not necessarily charged to every hospital in the state." [Opinion ¶ 10] Indeed, the "face" of A.R.S. § 36-2901.08(A) says ***absolutely nothing*** regarding the hospitals subject to the Hospital Assessment and expressly permits the AHCCCS Director to provide for any number of exemptions. A ***facial*** challenge to the Hospital Assessment on the ground that it is actually a "tax" thus fails from the outset. After all, Petitioners carried the burden of establishing that the Hospital Assessment "is unconstitutional ***in all of its applications***." *Washington State Grange*, 552 U.S. at 449 (emphasis added), a task at which they failed.

¶11 Beyond that, Petitioners' continued assertion that the Hospital Assessment "applies to all hospitals, without regard to any benefit the hospital might receive" is belied by the simple fact that it is unsupported by a shred of admissible evidence. [IR 86 at 8] That alone is sufficient to dispose of Appellants' arguments regarding the second and third *May* factors.

¶12 Above all, and even if the Court were to do Petitioners' work for them (which it should not), there is ***no*** evidence that the Hospital Assessment, as currently imposed by AHCCCS, is paid by "all hospitals," or that it applies without regard for a hospital's receipt of AHCCCS coverage payments. In fact, public records[1] prove just the opposite and soundly defeat Petitioners' constitutional challenge. That is, each hospital subject to the Hospital Assessment receives revenue via coverage payments from AHCCCS:

- From January 2014 to September 2014, all acute hospitals that paid an assessment also received "coverage payments" from AHCCCS. *See* AHCCCS, "Revenue Associated with the Hospital Assessment, January 2014 – September 2014," *linked via* https://goo.gl/5OlAeW.[2]
- That ***all*** hospitals paying the assessment were also receiving AHCCCS coverage payments was clear by the next available data point, that is, AHCCCS's report on Hospital Assessment payments for fiscal year 2015.

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[1] The Court may take judicial notice of the records of a state agency. *See, e.g., Jarvis v. State Land Dep't*, 104 Ariz. 527, 530 (1969) (taking judicial notice of a report issued by the State Land Department).

[2] Two long term acute care facilities ("LTACs") paid small assessment amounts during that limited time period without receiving AHCCCS coverage payments due to a restriction on the total number of days a member could spend in a hospital. This restriction was lifted during the final quarter of 2014 in a rule change that – though unrelated to the Hospital Assessment – more freely permitted hospitals to discharge patients to LTACs. *See* 20 A.A.R. 1956 (Aug. 1, 2014).

See AHCCCS, "Payments Associated with the Hospital Assessment SFY 2014 (July 2014 – June 2015)," *linked via* https://goo.gl/6dUtaH.

- The same was true for fiscal years 2016 through 2018, where the assessment models promulgated by AHCCCS again demonstrate that ***all*** hospitals that paid (or will pay) the Hospital Assessment will receive AHCCCS coverage payments. *See* AHCCCS, "AHCCCS Hospital Assessment SFY 2016 Summary (Assessment Model)" at 4-6, *linked via* https://goo.gl/868qyG; AHCCCS, "AHCCCS Hospital Assessment SFY 2017 Summary (Summary by Provider) at 5-7, *linked via* https://goo.gl/VVz2Dj; AHCCCS, "AHCCCS Hospital Assessment SFY 2018 Summary (Summary by Provider)" at 4-6, *linked via* https://goo.gl/ezYPMX.

Notably, it is no accident that each hospital or healthcare system paying the Hospital Assessment receives a net benefit for doing so. Rather, it is the product of AHCCCS's carefully-prescribed formulas, which account for different types of hospitals (behavioral health, urban acute, critical access, long term acute care) and set a lower assessment rate for select hospital classifications and their respective discharge rates. *See* AHCCCS, "AHCCCS Hospital Assessment SFY 2018 Summary (SFY 2018 Summary – Assessment Basis)" at 1, *linked via* https://goo.gl/ezYPMX (showing 2018 assessment rates ranging from $0 to $483).

¶13 In brief, AHCCCS imposes the Hospital Assessment only on those hospitals that receive coverage payments, which is contemplated both by its authorizing statute and implementing rules. To the extent the Court considers it relevant to the *May* factors, Petitioners did not and cannot establish that the Hospital Assessment is paid by "all hospitals," or that it is imposed without regard for whether a particular hospital receives AHCCCS coverage payments.

II. THE HOSPITAL ASSESSMENT PROVIDES A BENEFIT TO ITS PAYORS.

¶14 A proper analysis of the second and third *May* factors involves a fundamental truth with which Petitioners do not quarrel; the Hospital Assessment is intended to benefit (and in fact does benefit) hospitals. *See* Opinion ¶ 11. The Hospital Assessment is perhaps the quintessential example of legislative intent aligning perfectly with practical reality, as the imposition of the Hospital Assessment correlates ***directly*** to a dramatic decrease in the uncompensated care those hospitals provide. This direct benefit to hospitals paying the Hospital Assessment strongly supports the conclusion that it is not a "tax."

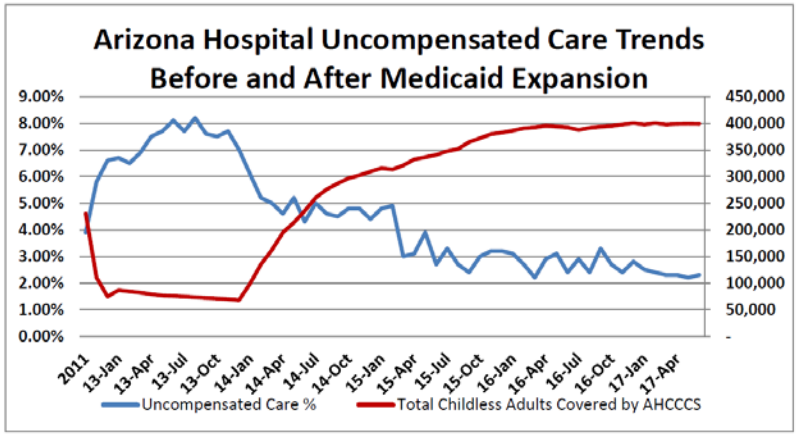
¶15 As Director Betlach explains [Supp. Brief at 12-13], the ACA provided Arizona with the opportunity (which it embraced) to tap into an enhanced federal Medicaid match rate for the population affected by the AHCCCS Restoration and Expansion. This enhanced match allows AHCCCS to assess hospitals at a much lower rate than would otherwise be possible. Coupled with the

reduction in uncompensated care, this lower assessment creates an overall net benefit for hospitals because AHCCCS coverage payments exceed the amount of the assessment paid. Without the enhanced match rate, the reverse might well be true, to hospitals' detriment.

¶16 There can be no serious question that nationwide, the cost of uncompensated care absorbed by hospitals and healthcare systems is in steady decline as a result of the ACA, with the bulk of the decrease occurring in states – like Arizona – that expanded their Medicaid populations. One study that closely examined uncompensated care from 2013-2015 nationwide found that it decreased by $6.2 billion in Medicaid expansion states alone. THE COMMONWEALTH FUND, *The Impact of the ACA's Medicaid Expansion on Hospitals' Uncompensated Care Burden and the Potential Effects of Repeal (*May 2017), *linked via* https://goo.gl/vkeTti. Put another way, the estimates comparing expansion and non-expansion states "suggest that Medicaid expansion cut every dollar that a hospital spent on uncompensated care by 41 cents between 2013 and 2015." *Id.*[3]

[3] As the Henry J. Kaiser Foundation similarly-found over a smaller time period, "[a]nalysis of the Medicare Cost Report data for 2013 and 2014 shows overall declines in uncompensated care from $34.9 billion to $28.9 billion in 2014 nationwide. Nearly all of this decline occurred in expansion states[.]" Peter Cunningham et al., HENRY J. KAISER FOUNDATION, *Understanding Medicaid Hospital Payments and the Impact of Recent Policy Changes* (June 9, 2016), *linked via* https://goo.gl/58Lz2E.

¶17 Arizona is no different; the level of uncompensated care decreased radically in the wake of the AHCCCS Restoration and Expansion and the imposition of the Hospital Assessment. The freeze of AHCCCS enrollment for childless adults in 2011 prompted a spike in uncompensated care provided by Arizona hospitals, as the percentage reported on Uniform Accounting Reports jumped from 3.4% in 2010 to 6.6% in 2013 (an increase of ***94%***). With this dramatic increase in mind, the numbers associated with the AHCCCS Restoration and Expansion speak for themselves; the percentage of uncompensated care provided by hospitals fell by more than half between December 2013 (the month ***before*** the AHCCCS Restoration and Expansion and Hospital Assessment took effect), and December 2015, and the downward trend has continued since[4]:



4 These figures are based on surveys AzHHA conducts on a monthly basis of all Arizona hospitals for certain financial benchmarks, one of which was considered by the trial court. [IR 56, Ex. 22]

¶18 This decrease translates into hundreds of millions of dollars of savings in once-uncompensated care, a related increase in average hospital operating margin, and improvements in service-delivery models for patients throughout Arizona. [*See* AzHHA Brief ¶¶ 22-24] More specifically, the AHCCCS Restoration and Expansion allowed Arizona's healthcare system to stabilize in a way that allowed for the healthcare delivery system to proactively reinvest in (1) improving healthcare by reducing readmissions and hospital-acquired conditions, and (2) strategies to improve population health such as behavioral/physical health integration. This helps hospitals carry out their most fundamental mission; to provide high-quality healthcare to patients at the right time in the right clinical setting. The AHCCCS Restoration and Expansion and the Hospital Assessment intended to help pay for it thus benefit hospitals on paper, in practice, and in principle.

¶19 From a hospital perspective, this reality is more efficient and sustainable than triaging resources to cover immediate spiraling uncompensated care costs, as was required at an elevated level prior to the AHCCCS Restoration and Expansion. Paying the Hospital Assessment allows non-exempt hospitals to realize savings at the system-level, has a net measurable financial benefit to its payors, and improves the provision of healthcare services. Hospital systems are thus "receiving the overall benefit of [the Hospital Assessment]" in exchange for

their payment thereof. *Kyrene Sch. Dist. No. 28 v. City of Chandler*, 150 Ariz. 240, 243 (App. 1986).

III. IF THE COURT REVERSES AND ANNOUNCES A NEW CONSTITUTIONAL RULE, PROSPECTIVE-ONLY APPLICATION IS APPROPRIATE.

¶20 Finally, the numbers discussed at length above make clear that a reversal of the Opinion and a holding that the Hospital Assessment was unconstitutional would have immediate, devastating financial consequences for Arizona's hospitals and healthcare systems. More than 400,000 Arizonans would lose their health insurance, many will return to seeking care in emergency departments, and four years of remarkable decreases in uncompensated care would come to a sudden halt and quickly regress. These are not mere abstractions; hospitals and healthcare systems that employ tens of thousands of Arizonans would again see critical investments in the healthcare delivery system be triaged to providing emergency services. In short, Arizona hospitals and the people, patients, and communities served by Arizona hospitals will all suffer.

¶21 The Legislature enacted the Hospital Assessment with the Fee and Assessment Exception in mind, and in reliance on the case law applying that provision. And both hospitals and patients now have an acute interest in ensuring the continued survival of the AHCCCS Restoration and Expansion. It is no exaggeration to say that overruling these extant cases and applying a new

constitutional rule to the detriment of those groups could result in an immediate crisis in both public health and statewide hospital finance.

¶22 If the Court is inclined to reverse the Opinion, and in light of this reality, its own opinion should apply only prospectively. Whether to do so "is a policy question within this [C]ourt's discretion," and requires an analysis that considers "whether [its] opinion overrules settled precedent, 'establishes a new legal principle ... whose resolution was not foreshadowed,' or whether '[r]etroactive application would produce substantially inequitable results.'" *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 44 (2010). Here, the Court's opinion would satisfy each of these requirements, and there are perhaps no more "substantially inequitable results" than stripping more than 400,000 Arizonans of their health insurance and forcing hospitals and healthcare systems (like AzHHA's members) to most immediately bear the financial effect.

CONCLUSION

¶23 Because the Hospital Assessment was properly authorized by a simple majority of the Legislature, the Opinion below should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of October, 2017.

COPPERSMITH BROCKELMAN PLC

By /s/ Roopali H. Desai
Roopali H. Desai
D. Andrew Gaona

ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION
Ann-Marie Alameddin

Attorneys for Amicus Curiae
Arizona Hospital and Healthcare Association