ARIZONA COURT OF APPEALS
DIVISION ONE

ANDY BIGGS, et al., Plaintiffs/Appellants, v. THOMAS J. BETLACH, Defendant/Appellee. EDMUNDO MACIAS; GARY GORHAM; DANIEL McCORMICK; and TIM FERRELL, Intervenor-Defendants/Appellees.	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 APPELLEES

FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

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STATEMENT OF AMICUS CURIAE

¶1 The Arizona Hospital and Healthcare Association ("AzHHA") is Arizona's largest and most influential and only statewide trade association for hospitals, health systems, and affiliated healthcare organizations. Its 72 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 both the quality and accessibility of healthcare in Arizona. AzHHA's long-term vision is simply stated, but difficult to achieve: to make Arizona the healthiest state in the nation.

¶2 AzHHA files this brief as *amicus curiae* in furtherance of both its goal and vision, and because it is uniquely situated to provide a practical perspective on the Hospital Assessment. Indeed, because the Hospital Assessment is paid exclusively by non-exempt hospitals and was enacted for their benefit, Ariz. Sess. Laws 2013, 1st Spec. Sess., Ch. 10 ("H.B. 2010"), § 44(3), the parties' (hospitals none of them) discussions of its scope and effect proceed in the abstract.

¶3 As detailed below, (1) 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. AzHHA submits both of these facts as *amicus curiae* in support of Appellees, and as further proof that the judgment below should be affirmed.

INTRODUCTION

¶4 Controversial as it may be, there is little question that the Patient Protection and Affordable Care Act ("ACA") effected a sea change in nearly every facet of the American healthcare system. Relevant here, and in its attempt to expand coverage through existing administrative infrastructure, the ACA offered states a distinct financial advantage to expand Medicaid coverage using primarily federal funds. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Many states seized on this opportunity, understanding the benefit that would inure to their most vulnerable uninsured citizens and the healthcare systems required by law to provide uncompensated care to that population.

¶5 Arizona was among those states, using this opportunity for "expansion" as the vehicle through which to both restore AHCCCS coverage to the levels set by the passage of Proposition 204 in 2000, *see* A.R.S. § 36-2901.01(A), and to expand AHCCCS eligibility to levels established by the ACA (the "AHCCCS Restoration and Expansion"). This important step was intended to undo the negative effects on the healthcare delivery system as a result of the Legislature's decision to not fully fund AHCCCS beginning in July 2011, and its corresponding mandate that AHCCCS "freeze" the enrollment of childless adults

(the "AHCCCS Freeze"). *See Fogliano v. Brain*, 229 Ariz. 12, 270 P.2d 839 (Ct. App. 2011). To fund the State's share of costs associated with the AHCCCS Restoration and Expansion, the Legislature authorized the imposition of the Hospital Assessment in H.B. 2010.

¶6 With full knowledge that increases in state revenues are generally subject to the supermajority requirements of Article IX, § 22 of the Arizona Constitution, the Legislature carefully crafted H.B. 2010 to comply with an exception to that constitutional provision. Specifically, exempted from the ambit of net increases in revenue that require the approval of a two-thirds supermajority of the Legislature are those "[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." Ariz. Const. art. IX, § 22(C)(2) (the "Fee and Assessment Exception"). The trial court rejected Appellants' facial challenge to the Hospital Assessment, concluding that it satisfied the requirements of the Fee and Assessment Exception, and was properly enacted by a simple majority of the Legislature.

¶7 Appellees' respective Answering Briefs correctly argue that the judgment of the trial court should be affirmed. But in both the trial court and the briefs filed with this Court, the parties have disagreed on two related factual issues that inform Appellants' (incorrect) contention that the Hospital Assessment is a

"tax," and thus that the Fee and Assessment Exception does not apply. AzHHA has unique insight into each.

¶8 First, and no fewer than three times in their Opening Brief ("OB") [at 18, 19, & 25 n.7] and at least once in their Reply [at 14], Appellants 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 for a general public benefit, and thus is more aptly characterized as a tax. But as the trial court held below [IR 86 at 8], that factual claim is not supported by admissible evidence, and in any event, is false in the context of AHCCCS's implementation of the Hospital Assessment.

¶9 Second, the benefits realized by hospitals subject to the Hospital Assessment are real and quantifiable. Since the AHCCCS Restoration and Expansion, uncompensated care has dropped by more than 50%, and service delivery models in hospitals throughout Arizona are improving as a result. In sum, hospitals subject to the Hospital Assessment are realizing a benefit from its imposition and are able to better carry out their mission of providing high-quality care and improving health, a fact that weighs heavily against Appellants.

¶10 Appellants come before this Court ***not*** as payers subject to the Hospital Assessment, but rather as current and former legislators dissatisfied with the reach of the Fee and Assessment Exception. That, of course, is their

prerogative, but is not a principled reason to upset the restoration of Arizona's AHCCCS population to the levels approved by voters in 2000 and the dramatic decrease in uncompensated care that followed. In stark contrast, AzHHA speaks on behalf of hospitals subject to the Hospital Assessment, all of which urge this Court to affirm the judgment below.

ARGUMENT

¶11 The question of whether the Fee and Assessment Exception applies to the Hospital Assessment must be approached through the lens of *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (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, 55 P.3d at 773-74. The scope and benefit of the Hospital Assessment bear on the second and third factors, and the parties' disagreement on how those factors inform the analysis must be resolved in favor of Appellees.

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

¶12 Appellants' treatment of the second and third *May* factors suffers from a fatal flaw, in that its most fundamental basis was not supported by admissible

evidence below, and in any event, is demonstrably false. Indeed, Appellants claim that "the [Hospital Assessment] is imposed on *all* hospitals, regardless of whether they accept Medicaid payments or benefit from the new Medicaid program," a fact that they contend "is plain on the face" of A.R.S. § 36-2901.08. [OB at 18-19]

¶13 As a threshold matter, all that is "plain" on the face of A.R.S. § 36-2901.08(A) regarding the hospitals subject to the Hospital Assessment is that the statute itself is silent on that point. Director Betlach [at 43 n.18] makes the point well: "until the Director sets the assessment[,] no hospital has any obligation to pay." As a result, a facial challenge to the Hospital Assessment necessarily requires an examination of how it is actually imposed.[1] Appellants' narrow focus on the language of A.R.S. § 36-2901.08 is thus misplaced, and a proper evaluation of the scope of the Hospital Assessment must look to its actual implementation by AHCCCS in both the Arizona Administrative Code and practice.

¶14 Beyond their misreading of the statute, Appellants also continue to make the assertion that "the [Hospital Assessment] is imposed on *all* hospitals, regardless of whether they accept Medicaid payments" despite their failure to produce admissible evidence in support of that assertion (as was their burden) in

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[1] "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.,* 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).

response to the motions for summary judgment filed below by Appellees. [IR 86 at 8] That alone is sufficient to dispose of Appellants' arguments regarding the second and third *May* factors.

¶15 Finally – and perhaps most importantly – there is ***no*** evidence that the Hospital Assessment, as actually imposed by AHCCCS, is paid by "*all* hospitals, regardless of whether they accept Medicaid payments." In fact, public records[2] prove just the opposite; that 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.[3]

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[2] 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, 456 P.2d 385, 388 (1969) (taking judicial notice of a report issued by the State Land Department); *Adams v. Bolin*, 74 Ariz. 269, 271, 247 P.2d 617, 618 (1952) (taking judicial notice of voter registration information made available by the Secretary of State).

[3] 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).

- 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. *See* AHCCCS, "Payments Associated with the Hospital Assessment SFY 2014 (July 2014 – June 2015)," *linked via* https://goo.gl/6dUtaH.
- The same is projected to be true for fiscal year 2016, where the assessment model promulgated by AHCCCS again demonstrates that ***all*** hospitals that 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.

¶16 As AHCCCS's practice demonstrates, its policy regarding the Hospital Assessment is precisely the opposite of that claimed by Appellants, as hospitals that do not treat AHCCCS patients are ***not*** subject thereto. This exclusion is specifically contemplated in both the authorizing statute, *see* A.R.S. § 36-2901.08(C) (providing that the Director can exclude hospitals based on geography), and the implementing rule, *see* A.A.C. § R9-22-730(I)(7) (excluding high Medicare/out of state patient utilization hospitals).

¶17 In sum, and to the extent the Court considers it relevant to the *May* factors, Appellants cannot establish that the Hospital Assessment is paid by "*all* hospitals, regardless of whether they accept Medicaid payments."

II. THE HOSPITAL ASSESSMENT PROVIDES A NET BENEFIT TO ITS PAYERS.

¶18 As Appellants admitted below, hospitals throughout Arizona are the "true beneficiaries" of the Hospital Assessment. [*See* IR 86 at 12 n.31] And benefit they have, as the AHCCCS Restoration and Expansion and imposition of the Hospital Assessment correlate directly to a dramatic decrease in the uncompensated care those hospitals are obligated to provide. This direct benefit to hospitals paying the Hospital Assessment strongly supports the conclusion that it is not a "tax."

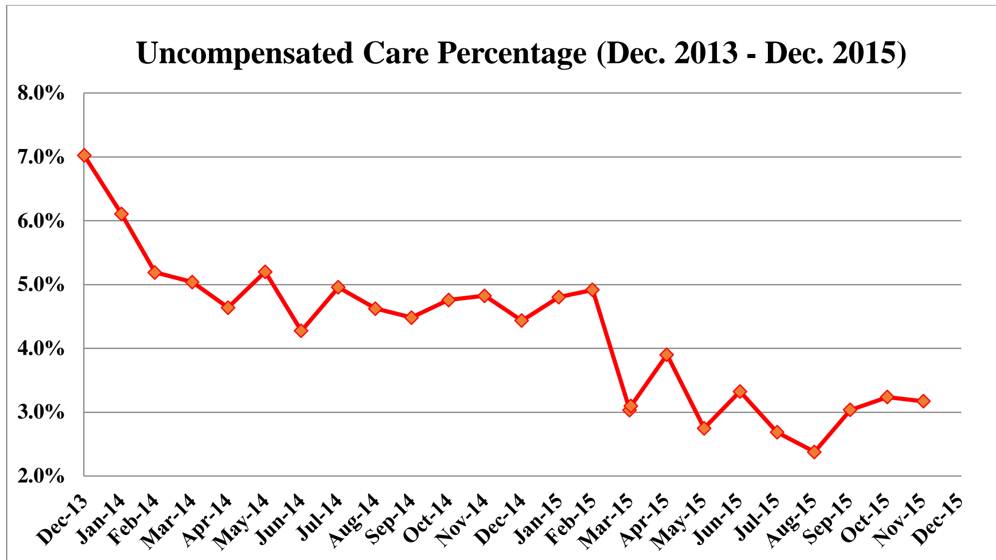
¶19 Nationwide, the cost of uncompensated care absorbed by hospitals and healthcare systems is in steady decline as a result of the ACA, and in particular, the incentives it provides to states to expand the Medicaid-eligible population. In 2014 alone, the U.S. Department of Health and Human Services estimated that uncompensated care costs would be $5.7 billion lower than they would have been absent the ACA, with $4.2 billion of the total amount tied to Medicaid-expansion states. *See* U.S. Dep't of Health & Human Svcs. ASPE Issue Brief, "Impact of Insurance Expansion on Hospital Uncompensated Care Costs in 2014," *linked via* https://goo.gl/maJl3l.

¶20 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 AHCCCS Freeze prompted a spike in

uncompensated care provided by Arizona hospitals, as the percentage reported on Uniform Accounting Reports jumped from 3.9% in 2011 to 6.6% in 2013 (an increase of nearly ***60%***). With this background, 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, at a lower percentage than that realized even before the AHCCCS Freeze[4]:

Month/Year	Percentage		Month/Year	Percentage
Dec. 2013	7.0%		Dec. 2014	4.4%
Jan. 2014	6.1%		Jan. 2015	4.8%
Feb. 2014	5.2%		Feb. 2015	4.9%
Mar. 2014	5.0%		Mar. 2015	3.0%
Apr. 2014	4.6%		Apr. 2015	3.1%
May 2014	5.2%		May 2015	3.9%
June 2014	4.3%		June 2015	2.7%
July 2014	5.0%		July 2015	3.3%
Aug. 2014	4.6%		Aug. 2015	2.7%
Sep. 2014	4.5%		Sep. 2015	2.4%
Oct. 2014	4.8%		Oct. 2015	3.0%
Nov. 2014	4.8%		Nov. 2015	3.2%
			Dec. 2015	3.2%

4 These figures are based on surveys AzHHA conducts on a monthly basis of all Arizona hospitals for certain financial benchmarks. The response rate is normally around 75%. One such survey was before the trial court in its consideration of the parties' motions for summary judgment. [IR 56, Ex. 22]



¶21 As a practical matter, these decreases translate into hundreds of millions of dollars of savings in once-uncompensated care. The payment of the Hospital Assessment allows hospitals to realize those savings at the system-level, and thus has a net measurable benefit to its payers. In the parlance of Arizona case law distinguishing between taxes and other forms of revenue, hospital systems are "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, 722 P.3d 967, 970 (Ct. App. 1986); *see also Jachimek v. State*, 205 Ariz. 632, 636 ¶ 22, 745 P.3d 944, 948 (Ct. App. 2003) (pawnbroker transaction fee not a tax because it was imposed "on a limited group to fund appropriate services and associated regulatory activity for that group").

¶22 Finally, the decrease in uncompensated care absorbed by hospitals has real-world effects on hospital service delivery models that, while difficult to

measure, are no less important. Indeed, the AHCCCS Freeze in July 2011 started an alarming trend for many of AzHHA's hospital members. Impoverished patients once eligible for AHCCCS coverage were forced to seek expensive uncompensated emergency care that may have been avoided with proper preventative care and maintenance. This increase in uncompensated care – beyond affecting the hospitals' bottom lines and the burden on their emergency departments – also had the distinctly negative effect of limiting patients' abilities to access follow-up care recommended by emergency department physicians.

¶23 Viewed from the perspective of a hospital service delivery model, the post-freeze influx of uninsured patients into emergency departments was dangerously circular. Common readmissions of this vulnerable patient population to emergency departments was counterproductive, and presented the near-uniform risk of poor patient outcomes. As a result, the AHCCCS Restoration and Expansion was critical, and its effects are obvious. In addition to the decrease in uncompensated care described above, hospitals report that:

- Waiting lists for screenings through hospital charity care programs have decreased in length by half in some cases, as AHCCCS-eligible patients receive those screenings in the normal course of patient treatment;

- Patients with coverage through AHCCCS are more likely to utilize preventative healthcare services (*e.g.*, screenings and checkups) instead of waiting until their condition necessitates emergency care;
- Patients with greater access to behavioral health services through AHCCCS are more likely to follow through on provider recommendations, including important medication regimens; and
- Hospitals can now devote more resources designated for charity care to other worthy patients and causes.

¶24 Simply put, Appellants' argument regarding the "benefit" they claim hospitals must realize for the Hospital Assessment to not be considered a tax rests on the incorrect assumption that Arizona hospitals exist solely to make money. But this myopic view of the relevant "benefit" overlooks an important component of the broader mission of those hospitals, many of which are non-profit and exist for the benefit of the communities they serve.[5] The mission of hospitals, regardless of tax status, is to provide high-quality healthcare at the right time in the

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[5] AHCCCS admissions to Arizona hospitals have also seen a significant increase in the wake of the AHCCCS Restoration and Expansion and the Hospital Assessment. Those numbers – provided to the Arizona Department of Health Services and collated by IntelliMed, a third-party data service – show that between the fourth quarter of 2013 and the first quarter of 2014, AHCCCS admissions were up 10%. When comparing 2013 totals to 2014 totals, AHCCCS admissions increased by 17.8%. While there is no reported data yet for the second half of 2015, trends suggest that total AHCCCS admissions will materially exceed the 2014 figures.

right setting, which is essential to support a good quality of life for Arizonans. The Hospital Assessment helps hospitals achieve this mission. In this context, each of the developments discussed above contributes to the improvement of service delivery models, the effects of which emanate throughout hospitals and the patient populations they serve. As a result, the AHCCCS Restoration and Expansion and the Hospital Assessment intended to help pay for it benefit hospitals on paper, in practice, and in principle. Appellants' misguided attempt to disrupt this reality must fail.

CONCLUSION

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

Respectfully submitted this 22nd day of April, 2016.

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