SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-010965 08/10/2011

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

ANTHONY FOGLIANO, et al. COPY TIMOTHY M HOGAN

v.

STATE OF ARIZONA, et al. KEVIN D RAY

PETER A GENTALA
JOSEPH KANEFIELD

RULING MINUTE ENTRY

This matter came before the Court on August 3, 2011 for a hearing on plaintiffs' motion for a preliminary injunction. At the beginning of the hearing, the parties indicated and stipulated that: (1) they did not intend to present further evidence, but instead wanted the Court to accept as uncontested the facts set forth in the various affidavits on file; (2) they wished to proceed as to all of the plaintiffs (including those named in the First Amended Verified Complaint, filed on July 29, 2011); and (3) they wished to proceed as to both the requests for preliminary and permanent injunctive relief, treat the hearing as a trial on the merits, and have the Court issue a final judgment on all of plaintiffs' claims following the hearing. The Court accepted these stipulations. Having considered the parties' papers and arguments, the Court issues this ruling. The Court finds and concludes as follows.

INTRODUCTION

> The moral test of government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadows of life, the sick, the needy and the handicapped.

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Arnold v. Dept. of Health Services, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989) (quotations omitted).

It is beyond debate that our current economic times are trying at best. In sunnier times roughly a decade ago (2000, to be exact), and obviously with the above sentiment in mind, Arizona's voters passed Proposition 204 (also known as "Healthy Arizona"), which expanded healthcare through AHCCCS to Arizonans with incomes at or below the federal poverty guidelines.[1] *See* A.R.S. §§ 36-2901.01 and 36-2901.02. Proposition 204 funded this program by establishing the Arizona Tobacco Litigation Fund, and in addition, provided that these funds "shall be supplemented, as necessary, by any other available sources including legislative appropriations and federal moneys." A.R.S. § 36-2901.01(B).

Funding from the Arizona Tobacco Litigation Fund proved insufficient, and the Legislature has traditionally supplemented these funds to cover the Proposition 204 population. Earlier this year, the Legislature changed course. It passed, and the Governor signed into law:

- A number of budget bills, which effectively reduced AHCCCS' overall funding from the State by more than $1.5 billion for the fiscal year beginning on July 1, 2011. *See* Declaration of Tom Betlach (filed July 18, 2011) at ¶¶ 3-5.

- Senate Bill 1619, which authorized AHCCCS to "adopt rules necessary to implement a program within available appropriations." 2011 Ariz. Sess. Laws, 1st Reg. Sess., Ch. 34. *See also* Senate Bill 1619, Ch. 38 (indicating the Legislature's intent for AHCCCS to implement a program within the available budget if the federal government did not grant a waiver).

- Senate Bill 1001, which instructed AHCCCS to apply for a waiver of federal funding requirements, and allowed AHCCCS to suspend any programs or eligibility for any persons or categories of persons on approval of the waiver if insufficient money is available to fund the entire program. Senate Bill 1001, Fiftieth Legislature, First Special Session, 2011.

AHCCCS followed through with a request for waiver and issued Rule R9-22-1443, Arizona Administrative Code, which denies coverage to a portion of the Proposition 204 population, requires AHCCCS to review its estimated expenditures "at least monthly," and allows AHCCCS

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[1] AHCCCS is the agency that administers the federal Medicaid program in Arizona. Sources of funding for AHCCCS include the Arizona Tobacco Litigation Fund, other appropriations from the Legislature, and significant funds from Medicaid. Mr. Betlach's Declaration indicates, at paragraph 13, that the federal government has historically contributed about 65% of the cost of Arizona's program. The federal government attaches numerous requirements to its funding of AHCCCS, and the loss of those funds would, in practical terms, be a disaster for AHCCCS and, in turn, Arizona's citizens.

to reopen the Proposition 204 program if it appears that funding is available. The waiver was approved, at least in part. The upshot is that AHCCCS has frozen enrollments and otherwise cut back from offering services as envisioned by Proposition 204, notwithstanding Proposition 204's provisions that the Legislature "may change the eligibility threshold [to be] even more inclusive," but may not "establish a cap on the number of eligible persons who may enroll in the system." A.R.S. § 36-2901.01(A). This lawsuit tests whether these actions are constitutional.

THE PARTIES AND CLAIMS

Plaintiffs Anthony Fogliano, Gary Hinchman, Richard Lilly, Jacqueline Duhame, Jorge Heredia, Tracy Dykes, Thomas Casteel, and Belen Cartagena are people who allege that they are entitled to healthcare under Proposition 204 as written, but will not receive that healthcare due to the recent legislation. Plaintiff Catherine Nichols was a chief proponent for Proposition 204. Mountain Central Health Center is a community health center that provides services for low-income people who need healthcare, including those receiving care under Proposition 204.

The parties spent a fair amount of their briefs debating whether particular plaintiffs have standing.[2] At the oral argument, however, the parties stipulated that at least one plaintiff (Belen Cartagena) has standing to assert the legal claims set forth in this matter (but differed on whether other plaintiffs have standing--a dispute that the Court noted, and the parties conceded, is irrelevant because one plaintiff with standing is enough). The Court accepted this stipulation, and notes that Ms. Cartagena became ineligible for AHCCCS on July 31, 2011 under the new rules because her daughter reached age 18 (under the statutes and rules, people with dependent children are treated differently than people without dependent children). If Proposition 204 were fully funded, Ms. Cartagena would continue to receive healthcare through AHCCCS, but under the current statutes and rules, she will not receive heathcare through AHCCCS.

Defendants are the State of Arizona and Tom Betlach, the Director of Arizona Health Care Cost Containment System (AHCCCS).

Plaintiffs seek two forms of relief. First, they seek a declaration that the actions noted above are unconstitutional, and in that regard, they rely heavily on Proposition 105 (1998), also known as The Voter Protection Act. *See* Ariz. Const., art. 4, pt. 1, §1(6). Second, they seek an injunction requiring AHCCCS to provide care to those at or below the federal poverty guidelines (including each plaintiff except Catherine Nichols and Mountain Central Health Center).

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[2] Proposition 204 contained a provision regarding standing that on its face is extraordinarily broad, and allows an action to be brought by "an eligible person or a prospective eligible person." A.R.S. § 36-2901.01(C).

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LEGAL ANALYSIS

> [T]he Legislature commands the power of the purse. With regard to that power, the language of our Constitution is plain. The lawmaking power vests solely in the Legislature, *see* Ariz. Const. art. 4, Pt. 1, § 1, and ordinarily public funds may be expended only by legislative authority. *See* Ariz. Const. art. 4, Pt. 2, § 20 (appropriation bills); Ariz. Const. art. 9, § 5 (power to contract debts); *see also LeFebvre v. Callaghan*, 33 Ariz. 197, 204, 263 P. 589, 591 (1928) ("Under our system of government, all power to appropriate money for public purposes or to incur any indebtedness therefore . . . rests in the legislature."). The Legislature, in the exercise of its lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect.

Rios v. Symington, 172 Ariz. 3, 5-6, 833 P.2d 20, 22-23 (1992). To be sure, the Legislature does not have the sole power over the purse, but exceptions are rare.

One such exception is for appropriations that are "self-executing." For example, in *Crozier v. Frohmiller*, 65 Ariz. 296, 179 P.2d 445 (1947), the Court held that the Secretary of State could incur expenditures for a voter publicity pamphlet without a legislative appropriation because the constitutional language directing the Secretary to act was self-executing. The 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. *Millett v. Frohmiller*, 66 Ariz. 339, 347, 188 P.2d 457, 463 (1948). Notably, the Arizona Supreme Court has held that the recall expense provisions of the Arizona Constitution are not self-executing (the text of the Constitution requires laws regarding such payments to be enacted). *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 269, 782 P.2d 1160, 1162 (1989).

Another obvious exception is that the people themselves, through the initiative process, can appropriate funds. Indeed, they did so here—Proposition 204 effectively allocates the Arizona Tobacco Litigation Fund to healthcare. And, through another proposition enacted after Proposition 204, the Constitution now requires propositions containing mandatory expenditures to provide for a source of revenue outside the state general fund. Ariz. Const. art. 9, § 23.[3]

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[3] This requirement comes from Proposition 101, which became effective on December 1, 2004, *after* Proposition 204. Accordingly, Proposition 204 cannot be judged under its standards. At the same time, Proposition 101 did express the people's intention that the Legislature be allowed to limit expenditures for a proposition if the funding sources identified by the proposition fall short. *See* Ariz. Const. art. 9, § 23(B).

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Plaintiffs contend that the Voter Protection Act applies. That Act placed numerous prohibitions in the Constitution:

- The Governor cannot veto an initiative or referendum measure. Ariz. Const. art. 4, part 1, § 1(6(a)).
- The Legislature cannot repeal an initiative or referendum measure. Ariz. Const. art. 4, part 1, § 1(6(b)).
- The Legislature cannot amend an initiative or referendum measure unless such an amendment furthers the purposes of the measure and the Legislature acts through a supermajority. Ariz. Const. art. 4, part 1, § 1(6(c)).
- The Legislature cannot appropriate or divert funds created or allocated to a specific purpose by an initiative or referendum measure unless the appropriation or diversion of funds furthers the purposes of the measure and the Legislature acts through a supermajority. Ariz. Const. art. 4, part 1, § 1(6(d)).
- The Legislature cannot supersede any initiative or referendum measure unless the superseding measure furthers its purposes and the Legislature acts through a supermajority. Ariz. Const. art. 4, part 1, § 1(14).

These provisions must be read in conjunction with Article 9, § 5 of the Arizona Constitution, which provides, in part, "No money shall be paid out of the State treasury, except in the manner required by law." "This has been construed to mean that no money can be paid out of the state treasury unless the legislature has made a valid appropriation for such purpose and funds are available for the payment of the specific claim." *Cockrill v. Jordan*, 72 Ariz 318, 319, 235 P.2d 1009, 1010 (1951). Although the Voter Protection Act *prohibits* the Legislature from doing numerous things, it does not *require* the Legislature to do anything—specifically, it does not require the Legislature to fund programs, nor does it purport to amend Article 9, § 5.

AHCCCS' rule, which reduced the eligible AHCCCS population, would likely be unconstitutional under the Voter Protection Act if it existed in a vacuum. It does not, of course, exist in a vacuum; instead, it merely reflects the reality imposed by the lack of funding existing in light of the current budget provided to AHCCCS. Indeed, at oral argument, plaintiffs expressly disclaimed any notion that defendant Betlach is guilty of malfeasance and conceded that he is doing the best he can to provide healthcare to the Proposition 204 population with the funding he has been given—he is not, for example, diverting funds to other programs or refusing to spend funds given to him, nor is anyone diverting the tobacco funds to other purposes.

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It is beyond doubt that AHCCCS cannot provide the services envisioned by Proposition 204 without the money to do so. And Proposition 204's statutory requirement that the funding "shall be supplemented, as necessary, by any other available sources including legislative appropriations and federal moneys," *see* A.R.S. § 36-2901.01(B), merely contemplates that the Legislature will pass legislation to fund the program. This is not a self-executing provision: Proposition 204 enacted statutes, but did not amend the Constitution, and the Voter Protection Act does not impose an enforceable duty on the Legislature to fund Proposition 204. Simply put, the Court lacks the authority to make the Legislature fund Proposition 204. *Hernandez v. Frohmiller*, 68 Ariz. 242, 253-54, 204 P.854, 862 (1949) ("It is the constitutional duty of the legislature without specific direction to make all necessary appropriations to pay the expenses of state agencies. There is no legal method of compelling the legislature to act."); *Brewer v. Burns*, 222 Ariz. 234, 239, 213 P.3d, 673, 676 (2009) ("the issue here is not whether the Legislature should include particular items in a budget or enact particular legislation. Such issues... clearly are political questions.").

Plaintiffs cite *Arnold v. Dept. of Health Serv.*, 160 Ariz. 593, 775 P.2d 521 (1989) as an example to follow in urging that defendants be ordered to provide healthcare under Proposition 204. *Arnold*, however, arose out of far different circumstances—there, the Legislature appropriated "millions of dollars every year," and the record contained "extensive testimony about how the money appropriated by the legislature could be put to the use required by the statutes." *Id.* at 602, 775 P.2d 530. Here, in contrast, and as noted above, plaintiffs admit that defendant Betlach is doing the best he can with the funds available, but insufficient funds are available.

Similarly, plaintiffs cite the trilogy of school funding cases: *Roosevelt v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), *Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d 1141 (1997) and *Hull v. Albrecht*, 192 Ariz. 54, 960 P.2d 634 (1998). These cases are also distinguishable There, the courts prohibited the State from spending money in an unconstitutional fashion (that is, one which did not result in a general and uniform public school system); they did not order the Legislature to appropriate money.

CONCLUSION

Plaintiffs are not entitled to affirmative relief along the lines they seek. The Legislature does not have an enforceable duty to fund Proposition 204, and the scope (and limits) of defendant Betlach's duty is to continue to ensure that his agency is providing healthcare to the extent possible under Proposition 204 within the limits of the funding provided to him. For these reasons,

IT IS ORDERED entering judgment in favor of defendants and denying relief to plaintiffs on all of their claims.

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IT IS FURTHER ORDERED signing this minute entry as a final, appealable judgment.

/S/ MARK H. BRAIN

JUDGE MARK H. BRAIN
ARIZONA SUPERIOR COURT
MARICOPA COUNTY

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.

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