Michael K. Jeanes, Clerk of Court
*** Filed ***
02/10/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011699 02/05/2014

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

ANDY BIGGS, et al. CHRISTINA M SANDEFUR

v.

JANICE K BREWER, et al. JOSEPH SCIARROTTA JR.

KORY A LANGHOFER
DOUGLAS C NORTHUP

UNDER ADVISEMENT RULING

The Court has reviewed Defendants' Motion to Dismiss filed October 2, 1013, Plaintiffs' Response filed October 16, 2013, Defendants' Reply filed October 28, 2013, and the Brief of Amici Curiae filed October 22, 2013. Having also considered counsels' December 13, 2013 oral argument and the applicable law, the Court concludes that Plaintiffs lack standing and that Plaintiffs' Complaint must be dismissed.

CLAIMS

The Complaint seeks declaratory and injunctive relief from A.R.S. § 36-2901.08. A.R.S. § 36-2901.08 was part of H.B. 2010, a bill passed by the Arizona Legislature in June, 2013. A.R.S. § 36-2901.08 authorizes AHCCCS to charge hospitals an assessment to help fund Medicaid coverage for childless adults who qualify. The assessment also enables Arizona to continue to receive federal funds for Medicaid coverage for these individuals.

A majority of the House and Senate, respectively, passed H.B. 2010. The bill did not require a supermajority vote. Under Arizona's Constitution, certain measures that raise state revenue, such as tax bills, require a supermajority vote. Article IX Section 22 (also referred to as

"Proposition 108"). Whether a bill is subject to Proposition 108 is determined by the Legislature itself. Here, the Legislature voted not to require a supermajority approve H.B. 2010.

The Complaint alleges that A.R.S. § 36-2901.08 is unconstitutional. Count One challenges the lack of a supermajority vote. It alleges that, because H.B. 2010 was not properly approved, their votes did not count and the new law creates an illegal tax on hospitals. Count Two contends that the law improperly delegates to AHCCCS the ability to establish and collect the assessment in violation of the Arizona Constitution's separation of powers provisions under Articles III and IV.

PARTIES

Plaintiffs are 1) legislators who voted against H.B. 2010 ("Legislators"), 2) constituents of the Legislators ("Constituents"), and 3) a citizen ("Jenney"). None are hospitals. None are subject to the law they challenge.

Defendants are Janice K. Brewer, Governor or Arizona, and Thomas J. Betlach in his capacity as Director of AHCCCS.

STANDING

Before the merits of the claims can be addressed, the Court must first resolve the issue of standing. Defendants contend that the Plaintiffs lack standing to bring this action.

Case law is clear that standing requires a plaintiff "must allege a distinct and palpable injury." *Fernandez v. Takata Seat Belts Inc.*, 210 Ariz. 138, 140, 108 P.3d 917, 919 (2005) (citation omitted). The alleged injury must be specific to the plaintiffs themselves. *Bennett v. Brownlow*, 211 Ariz. 193, 196, 119 P.3d 460, 463 (2005) (citation omitted). An alleged injury shared by a large group of citizens is not sufficient to confer standing. *Sears v. Hull*, 192 Ariz. 65, 60, ¶ 16, 961 P.2d 1013, 1017 (1998).

In a 2003 case involving legislator plaintiffs, the Arizona Supreme Court held that plaintiffs must establish that their alleged injury is "personal, particularized, concrete, and otherwise judicially cognizable." *Bennett v. Napolitano*, 206 Ariz. 520, 524, 81 P.3d 311, 315 (2003). In a more recent Court of Appeals decision, our appellate court reiterated that standing for a legislator plaintiff exists when that person has an "individualized grievance" and is directly affected by the legislation at issue. *Arizona Citizens Clean Elections Commission v. Brain*, No. 1 CA-SA 13-0239, 2013 WL 5761620 (Oct. 24, 2013).

Legislators

Bennett v. Napolitano, supra., is precedent on point. In *Bennett*, four state legislators sued the Governor, alleging that the Governor's line-item vetoes of certain bills "exceeded her veto authority under the Arizona Constitution." *Bennett*, 206 Ariz. at 522, 81 P.3d at 313. The Court held the legislators lacked standing because they did not allege a "particularized" injury. "When a claim allegedly belongs to the legislature as a whole, four members who bring the action without the benefit of legislative authorization should not, except perhaps in the most exceptional circumstances, be accorded standing to obtain relief on behalf of the legislature." *Id*. at 527, ¶ 29, 81 P.3d at 318. *See also Raines v. Byrd*, 521 U.S. 811 (1997) (congressmen challenging the President's use of the Line Item Veto Act did not have standing "because their alleged injury was not 'particularized' to the individual claimants" and was, at best, "an institutional injury," not authorized by Congress).

In Count 2, Plaintiffs allege that H.B. 2010 improperly delegates the Legislature's authority. At best, they assert an injury to the Legislature as a whole, not a specific injury to themselves. The legislature must authorize lawsuits that bring claims on behalf of the body as a whole. That has not happened here.

In Count 1, Plaintiffs contend that the failure to require a supermajority vote deprived them of their vote. In other words, had there been a supermajority, their "no" vote would have defeated passage. Because there was not, they were simply outvoted. Again, under Arizona law, there is no standing for this claim. The Legislators disagree with something that the legislative branch decided using the legislative process.

Plaintiffs do not challenge the supermajority requirement itself. They are suing because a majority of the Legislature voted not to impose the requirement. In *Dobson v. State, ex rel., Commission on Appellate Court Appointments*, No. CV-13-0225-SA, 2013 WL 5051457 (Sept. 13, 2013), the Arizona Supreme Court held that a group of commissioners had standing to challenge a bill that imposed a supermajority requirement on their judicial selection process. That is not the case here. Plaintiffs do not challenge the supermajority requirement itself. Their claim is just the opposite – that a supermajority should have been required. In addition, their claim concerns a decision that the Legislature as a whole made, not a mandate from another branch of government.

In short, Plaintiffs are a minority group within the Legislature who lost a battle over H.B. 2010. They do not claim a concrete, individual injury. Rather, they seek to overturn the vote of the House and Senate. The Legislature as a whole did not authorize them to bring this action. Like the legislator plaintiffs in *Bennett*, Plaintiffs here lack standing.

Constituents

Constituents Dubreil and Miller allege a denial of effective representation in the voting on H.B. 2010. Like the Legislators, these plaintiffs fail to allege a distinct injury. Constituents are two out of hundreds of voters represented by the Legislators. An injury shared by a large "class of citizens" is not sufficient to confer standing. *Sears*, 192 Ariz. at 60, 961 ¶ 2d at 1017.

Jenney

Jenney seeks standing under the private attorney general statute, A.R.S. § 35-212(A). This statute provides standing to enjoin the "illegal payment of public monies." The issue, however, is not the *payment* of public funds; it is the *collection* of money from hospitals which Plaintiffs characterize as a tax. A tax is not a payment; it is a collection. A.R.S. § 35-212(A) does not apply and cannot confer standing in this case.

Waiver

Plaintiffs ask the Court to waive standing because no one else will bring this case. As a result, the subject of the lawsuit will not be challenged and will evade judicial review. The Court respectfully disagrees that there are no other potential challengers. The hospitals subject to the assessment are proper plaintiffs. The Court finds no authority to waive what our courts have firmly established as a "rigorous" standing requirement.

IT IS HEREBY ORDERED that Plaintiffs lack standing, Defendants' Motion to Dismiss is **GRANTED**, and Plaintiffs' Complaint is dismissed in its entirety.

Pursuant to Rule 54(c), this Order constitutes a final order. There are no other matters pending.

Date: February 7, 2014

/ s / HONORABLE KATHERINE COOPER

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.