

1 FENNEMORE CRAIG, P.C.
Douglas C. Northup (No. 013987)
2 Timothy Berg (No. 004170)
Patrick Irvine (No. 006534)
3 Carrie Pixler Ryerson (No. 028072)
2394 East Camelback Road, Suite 600
4 Phoenix, AZ 85016-3429
Telephone: (602) 916-5000
5 Email: dnorthup@fclaw.com
Email: tberg@fclaw.com
6 Email: pirtvine@fclaw.com
Email: cryerson@fclaw.com

7 *Attorneys for Defendants*

8 Joseph Sciarrotta, Jr. (No. 017481)
9 Office of Governor Janice K. Brewer
1700 West Washington St., 9th Floor
10 Phoenix, AZ 85007
Telephone: (602) 542-1586
11 Email: jsciarrotta@az.gov

12 *Co-Counsel for Defendant Governor Brewer*

13 ARIZONA SUPERIOR COURT

14 MARICOPA COUNTY

15 ANDY BIGGS, et. al.,

16 Plaintiffs,

17 v.

18 JANICE K. BREWER, in her official
capacity as Governor of Arizona; and
19 THOMAS J. BETLACH, in his official
capacity as Director of the Arizona Health
Care Cost Containment System,

20 Defendants.
21

No. CV2013-011699

**DEFENDANTS' MOTION TO
DISMISS**

(Assigned to the Hon. Katherine Cooper)

[Oral Argument Requested]

22 Disgruntled legislators petition this Court to intervene in the legislative process and
23 “veto” a bipartisan bill they could not defeat through that process. Unsuccessful in
24 mustering a majority of their colleagues to vote against Medicaid restoration, unable to
25 obtain sufficient signatures to refer the legislation to the voters and unwilling to work
26 within the legislature to amend or repeal the bill, they instead ask this Court to intervene

1 in the political process. In so doing, they seek a drastic expansion of the standing doctrine
2 as it exists in Arizona that, if accepted, would result in the possibility of courts being
3 inundated with legislators' lawsuits every time the legislators do not succeed through the
4 legislative process. In the most elementary way, the complaint fails to allege any injury to
5 these Plaintiffs arising out of *Defendants'* conduct. Because none of the Plaintiffs have
6 standing to bring this lawsuit, the Court should dismiss Plaintiffs' Complaint. By doing
7 so, vitally important legislation will be implemented. This legislation will: (1) provide
8 hundreds of thousands with healthcare; (2) honor the will of the voters who twice voted to
9 provide a healthcare safety net for the state's most vulnerable citizens; (3) protect the state
10 budget now and in future fiscal years; (4) safeguard rural hospitals from closing; (5)
11 combat uncompensated care and the hidden health care tax; and (6) maintain and grow
12 jobs in Arizona.

13 **I. FACTUAL BACKGROUND**

14 **A. Proposition 204 and the Impetus for H.B. 2010.**

15 In 2000, Arizona voters passed Proposition 204, an initiative that made Medicaid
16 coverage available to any person who had an income up to 100% of the federal poverty
17 level. *See* A.R.S. § 36-2901.01(A).¹ As a result of the Patient Protection and Affordable
18 Care Act, the federal funding that covers a portion of the Proposition 204 population

19
20 ¹ *See also* Ariz. Sec'y of State, 2000 Publicity Pamphlet, Proposition 204 (2000),
21 *available at* <http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop204.pdf>
22 (last visited Oct. 1, 2013); *see also* Ariz. Sec'y of State, 1994 Publicity Pamphlet,
23 Proposition 200 (1994), *available at* <http://www.azsos.gov/election/1994/General/1994.htm#200> (increasing taxes on tobacco
24 products to provide, among other things, health care services to persons who are indigent,
25 medically needy or low-income) (last visited Oct. 1, 2013). The Court may take judicial
26 notice of public records of state agencies in considering a motion to dismiss without
converting it to a motion for summary judgment. *See* Ariz. R. Evid. 201; *Wang Elec., Inc.*
v. Smoke Tree Resort, LLC, 230 Ariz. 314, 325, ¶ 33, 283 P.3d 45, 56 (App. 2012);
Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC, 224 Ariz. 60, 64, ¶ 13,
226 P.3d 1046, 1050 (App. 2010) (citations omitted); *Tellabs, Inc. v. Makor Issues &*
Rights, Ltd., 551 U.S. 308, 322 (2007).

1 expires on December 31, 2013.² To obtain Medicaid funding for the Proposition 204
2 population and make available to Arizona and the Arizona Health Care Cost Containment
3 System (“AHCCCS”) “essential federal financial participation,” H.B. 2010 (Ariz. Sess.
4 Laws 2013, 1st S.S., Ch. 10) added A.R.S. § 36-2901.07, which defines an “eligible
5 person” to include a person who is eligible under the federal Medicaid Act “and whose
6 household’s modified adjusted gross income” is more than 100% but “equal to or less
7 than” 133% “of the federal poverty guidelines.”³ H.B. 2010 expressly provides that the
8 intent of A.R.S. § 36-2901.07 is to fund the Proposition 204 population: “without these
9 provisions and the resulting available resources, [AHCCCS] would not be able to fulfill
10 the intent and objective of” Proposition 204.⁴ *See id.* Further, in order to receive the
11 federal funds for childless adults, Arizona’s plan had to provide coverage for individuals
12 up to 133% of the federal poverty level.⁵

13 H.B. 2010 also added A.R.S. § 36-2901.08, which authorizes AHCCCS to establish

14
15 ² After Proposition 204 was enacted, to fund Medicaid for childless adults with an income
16 level up to 100% of the poverty level, AHCCCS sought federal funding through a
17 demonstration project under section 1115 of the Social Security Act. The portion of the
18 demonstration project that provides federal funding for childless adults expires on
19 December 31, 2013. *See* Medicaid, State Resource Center, FAQ Medicaid and CHIP
Affordable Care Act Implementation, April 25, 2013 question: Will CMS approve
enrollment caps or periods of ineligibility in section 1115 demonstrations?, *available at*
[http://www.medicaid.gov/State-Resource-Center/FAQ-Medicaid-and-CHIP-Affordable-
Care-Act-Implementation/FAQ-Medicaid-and-CHIP-Affordable-Care-Act-ACA-
Implementation.html](http://www.medicaid.gov/State-Resource-Center/FAQ-Medicaid-and-CHIP-Affordable-Care-Act-Implementation/FAQ-Medicaid-and-CHIP-Affordable-Care-Act-ACA-Implementation.html) (last visited Oct. 1, 2013).

20 ³ *See* Ariz. Sec’y of State, Legislative Bill Search – 2013 Fifty-first Legislature – First
21 Special Session, H.B. 2010, § 5, *available at*
[http://www.azsos.gov/public_services/LegislativeFilings/PDFs/2013/51st_Legislature_1st
Special_Session/CH_10.pdf](http://www.azsos.gov/public_services/LegislativeFilings/PDFs/2013/51st_Legislature_1st_Special_Session/CH_10.pdf) (last visited Oct. 1, 2013) (“H.B. 2010”).

22 ⁴ *Fogliano v. Brain*, 229 Ariz. 12, 19, ¶ 21, 270 P.3d 839, 846 (App. 2011) (holding that
23 204’s supplemental funding provision requires the legislature to provide funding “from
‘any other available sources’” but that “[w]hether the Legislature has done so . . . presents
24 a nonjusticiable political question”).

25 ⁵ December 10, 2012 Letter from the Secretary of Health and Human Services to
26 Governor Brewer, Frequently Asked Questions on Exchanges, Market Reforms and
Medicaid at FAQ 26, *available at*
[http://www.azahcccs.gov/reporting/Downloads/ChildlessAdults/CMS_FAQs_12-10-
2012.pdf](http://www.azahcccs.gov/reporting/Downloads/ChildlessAdults/CMS_FAQs_12-10-2012.pdf) (last visited Oct. 1, 2013).

1 a specific and limited assessment on hospitals (“Hospital Assessment”) to “be used for the
2 benefit of hospitals for the purpose of providing health care for persons eligible for
3 coverage funded by the hospital assessment.” H.B. 2010, § 44(3). The Hospital
4 Assessment supplements Proposition 204’s pre-existing funding sources (*see* A.R.S.
5 §§ 36-778 and 36-2901.02) and includes funds for childless adults, parents, aged, blind,
6 and disabled persons.

7 **B. H.B. 2010’s Impact on Healthcare in Arizona.**

8 If H.B. 2010 is struck down, at a minimum, healthcare for an estimated 71,000
9 childless adults will end on December 31, 2013.⁶ Many of these individuals have serious
10 medical needs. For example, of the childless adult population, an estimated 4,700 of those
11 individuals who will lose coverage have cancer, 17,000 have some form of mental illness
12 (including an estimated 2,000 individuals with serious mental illness), and 17,000 have
13 heart and circulatory system diseases.⁷

14 In addition, over the next 18 months, hundreds of thousands of individuals will be
15 locked out of affordable health insurance. As of June 2015, AHCCCS will be unable to
16 provide healthcare coverage for the following individuals who will start enrolling in the
17 program beginning January 1, 2014: 148,700 childless adults and 59,000 individuals with
18 income between 100 and 133% of the federal poverty level.⁸

19 ⁶ In December 2013, there will be 71,582 childless adults enrolled in AHCCCS. *See*
20 Excerpt from AHCCCS Budget Request Documentation, attached as Exhibit A, at “AHC
21 Care” population (63,336) and December 2013 IHS Enrollment in the TWG group
(8,246), attached as Exhibit B.

22 ⁷ *See* AHCCCS Profile of Childless Adults by Diagnosis, *available at*
<http://www.azahcccs.gov/publicnotices/Downloads/AdultsSummaryDX41513.pdf> (last
23 visited on Oct. 1, 2013). Notably, these statistics were based on an outdated assessment
24 that only 63,000 childless adults will lose coverage in December 2013. Revised estimates
25 predict that over 71,000 childless adults will not have healthcare in December 2013 if
H.B. 2010 is struck down. *See also* Governor Brewer’s Medicaid Plan Supports Public
Safety, AHCCCS, *available at*
<http://www.azahcccs.gov/publicnotices/Downloads/PublicSafetyPPT.pdf> (last visited Oct.
1, 2013).

26 ⁸ *See* Exhibit A (the June 2015 AHC Care population, 199,810, less than December 2013

1 Finally, H.B. 2010 results in a substantial amount of federal money coming into
2 Arizona's economy. For example, in Fiscal Year 2015, Arizona will receive \$1.6 billion
3 from the federal government.⁹ Such monies will relieve the pressure of uncompensated
4 care on Arizona hospitals and grow Arizona's economy.

5 **C. The Legislature Knowingly Declined to Designate H.B. 2010 as Subject**
6 **to Article IX, Section 22 of the Arizona Constitution.**

7 H.B. 2010 passed the House (by a vote of 33-27) and Senate (by a vote of 18-11)
8 on June 13, 2013. See H.B. 2010, Signature Page. Article IX, § 22 of the Arizona
9 Constitution ("Proposition 108") requires a supermajority vote of the legislature for any
10 "act that provides for a net increase in state revenues" and that "[e]ach act to which this
11 section applies shall include a separate provision describing the requirements for
12 enactment prescribed by this section." Art. IX, § 22(A) and (D). Proposition 108 does
13 not, however, apply to "[f]ees and assessments that are authorized by statute, but are not
14 prescribed by formula, amount or limit, and are set by a state officer or agency." Art. IX,
15 § 22(c)(2). Whether a bill is subject to Proposition 108 during the legislative process is
16 determined by the legislature itself. The Legislative Bill Drafting Manual (2013-14)
17 explains that bill drafters initially must determine whether to include Proposition 108
18 language.¹⁰ H.B. 2010 did not contain such language.¹¹

19 AHC Care population, 63,336, provides a total of 148,689 childless adults that will not
20 have healthcare in the absence of H.B. 2010). See also Excerpt from AHCCCS Budget
21 Request Documentation, attached as Exhibit C (noting that 59,030 individuals with
incomes between 100-133% of the federal poverty level will not be able to receive
coverage by June 2015).

22 ⁹ *Medicaid Expansion: Difficult Choice – Expanding Adult Medicaid Coverage* (Jan. 14,
2013), Office of the Governor, available at
23 http://azgovernor.gov/dms/upload/PR_011413_MedicaidBudgetRec.pdf (last visited Oct.
1, 2013).

24 ¹⁰ See The Legislative Bill Drafting Manual, § 4.16, available at
25 <http://www.azleg.gov/alisPDFs/council/2013-2014%20Bill%20Drafting%20Manual.pdf>
(last visited Oct. 1, 2013).

26 ¹¹ Notably, the Speaker of the House and the Senate President, both of whom are named
Plaintiffs, signed the bill that was transmitted to the Governor for approval. See H.B.

1 Significantly, during the legislative process, attempts to add Proposition 108
2 language to the bill were raised, debated and rejected at least three times. In May 2013,
3 when the Senate considered S.B. 1492, which was the precursor to H.B. 2010, President
4 Biggs (a Plaintiff) proposed an amendment to include Proposition 108 language. *See*
5 Exhibit D.¹² The amendment failed. *Id.* During the special session in June, both the
6 House and Senate voted down amendments that would have added Proposition 108
7 language to H.B. 2010 or its Senate equivalent, S.B. 1009. *See* Exhibits E and F. These
8 are the votes that Plaintiff legislators now seek to overturn in this Court. Plaintiffs had the
9 opportunity to designate H.B. 2010 as subject to Proposition 108 during the legislative
10 process, failed in their efforts to do so, and now ask the Court to trump the legislature’s
11 decision.

12 **II. PLAINTIFFS LACK STANDING TO BRING THIS LAWSUIT.**

13 The Arizona Supreme Court “has, as a matter of sound judicial policy, required
14 persons seeking redress in the courts first to establish standing, especially in actions in
15 which constitutional relief is sought against the government.” *Bennett v. Napolitano*, 206
16 Ariz. 520, 524 ¶ 16, 81 P.3d 311, 315 (2003) (citation omitted) (“*Bennett*”). “A contrary
17 approach would inevitably open the door to multiple actions asserting all manner of
18 claims against the government.” *Id.*

19 Although Arizona’s Constitution has no counterpart to the federal “case or
20 controversy” requirement, Arizona’s standing requirement is nonetheless “rigorous,”
21 requiring that “a plaintiff must allege a distinct and palpable injury.” *Fernandez v. Takata*

22
23 2010’s Signature Page. Their certifications plainly and unequivocally show that passage
24 of the bill complied with the rules of each chamber and reflect the official decision of each
25 chamber of the legislature not to apply Proposition 108. *See* Ariz. Const., Art. 4, pt. 2, § 8
26 (“Each house, when assembled, shall ... determine its own rules of procedure.”).
Compliance with legislative rules may not bar a challenge to a bill by an outside party, but
it should bind the very members of the legislature who make the rules.

¹² *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 269 n. 5, 872 P.2d 668, 673 n. 5 (1994)
(minutes of legislative committee hearing are appropriate for judicial notice).

1 *Seat Belts Inc.*, 210 Ariz. 138, 140 ¶ 6, 108 P.3d 917, 919 (2005) (citation omitted). The
2 alleged injury must be particularized to the plaintiffs themselves. *Bennett v. Brownlow*,
3 211 Ariz. 193, 196, ¶ 17, 119 P.3d 460, 463 (2005) (citation omitted). Injury “that is
4 shared alike by all or a large class of citizens generally is not sufficient to confer
5 standing.” *Sears v. Hull*, 192 Ariz. 65, 60, ¶ 16, 961 P.2d 1013, 1017 (1998). Absent
6 standing, “courts generally decline jurisdiction.” *Karbal v. Arizona Dept. of Revenue*, 215
7 Ariz. 114, 116 ¶ 7, 158 P.3d 243, 245 (App. 2007) (citation omitted).

8 Plaintiffs do not allege, because they cannot, that they are subject to the
9 assessment. Long ago the Arizona Supreme Court established that “only those who are
10 affected in some manner by a statute may question its constitutionality.” *See Day v. Bd. of*
11 *Regents of Univ. of Arizona*, 44 Ariz. 277, 281, 36 P.2d 262, 264 (1934) (constitutionality
12 of statute requiring certain individuals to take an exam and pay a fee could only be
13 challenged by those individuals). As in *Day*, the entities directly and solely subject to the
14 terms of the statute in question are noticeably absent from this suit. This simple fact
15 precludes a challenge from these Plaintiffs. *See id.*

16 Based on the Complaint’s allegations, the Plaintiffs fall into three groups for
17 standing purposes: (1) legislators who voted against H.B. 2010 (“Legislators”) (*see*
18 *Compl.*, ¶¶ 4-42); (2) constituents of legislators who voted against H.B. 2010
19 (“Constituents”) (Dubreil and Miller, *see Compl.*, ¶¶ 40-41); and (3) a citizen purporting
20 to file a private attorney general action (Jenney, *see Compl.*, ¶ 42). Each groups’ lack of
21 standing is addressed below.

22 **A. Legislators Lack Standing.**

23 As the Supreme Court recognized in a previous case that rejected standing by
24 individual legislators, “[w]ithout the standing requirement, the judicial branch would be
25 too easily coerced into resolving political disputes between the executive and legislative
26 branches, an arena in which courts are naturally reluctant to intrude.” *Bennett*, 206 Ariz.

1 at 525, ¶ 20, 81 P.3d at 316 (“Concern over standing is particularly acute when, as here,
2 legislators challenge actions undertaken by the executive branch.”) (citation omitted).
3 The general rule applies even more strongly here where the plaintiffs seeking judicial
4 intervention are a disgruntled faction within the legislature that was outvoted by a
5 bipartisan coalition.

6 The Arizona Supreme Court recognized a narrow exception to the strict limit
7 required by *Bennett* in *Forty-Seventh Legislature of the State of Arizona v. Napolitano*,
8 213 Ariz. 482, 486-87, ¶¶ 14-18, 143 P.3d 1023, 1027-28 (2006). The court held that
9 “the Legislature has alleged a particularized injury to the legislative body as a whole[]”
10 and noted that both the House and Senate “authorized the . . . Legislature to challenge the
11 Governor’s item veto . . . , making it clear that the Legislature as a body intended to
12 challenge the Governor’s action.” *Id.*

13 In contrast, Plaintiffs here are acting against the will of bipartisan majorities in both
14 chambers. Whether to include Proposition 108 language in a bill is a discretionary
15 decision determined within the legislature by majority vote. Plaintiffs lost the political
16 battle on H.B. 2010, including whether Proposition 108 applied, and now ask this Court to
17 grant them the outcome they failed to win through the political process. There is simply
18 no legal basis for Legislators, in lieu of a person who can claim actual injury, to bring
19 claims aimed at declaring H.B. 2010 unconstitutional.

20 **1. Count 2: Legislators Do Not Have Standing to Assert that H.B.**
21 **2010 Improperly Delegates Legislative Authority to AHCCCS.**

22 Count 2 alleges an improper delegation of legislative authority. *See* Compl., ¶¶ 81-
23 90. Again, only a minority of legislators are Plaintiffs. They do not allege any individual
24 harm, but instead allege an institutional injury to the legislature as a whole. *Bennett v.*
25 *Napolitano* is binding authority that requires the dismissal of Count 2.

26 In *Bennett*, four state legislators sued the governor, alleging that the governor’s

1 line-item vetoes of certain bills “exceeded her veto authority under the Arizona
2 Constitution.” *Bennett*, 206 Ariz. at 522, ¶ 3, 81 P.3d at 313. Concluding that the
3 legislators did not have standing to challenge the vetoes, the Arizona Supreme Court
4 explained that “[w]hen a claim allegedly belongs to the legislature as a whole, four
5 members who bring the action without the benefit of legislative authorization should not,
6 except perhaps in the most exceptional circumstances, be accorded standing to obtain
7 relief on behalf of the legislature.” *Id.* at 527, ¶ 29, 81 P.3d at 318.

8 In reaching its decision in *Bennett*, the Arizona Supreme Court relied on *Raines v.*
9 *Byrd*, 521 U.S. 811 (1997). *Raines* involved a challenge to the Line Item Veto Act, which
10 gave the President the ability to use a line-item veto. *Bennett*, 206 Ariz. at 525, ¶ 23, 81
11 P.3d 316 (citing *Raines*). The plaintiffs in *Raines* alleged that the Line Item Veto Act
12 “reduced the ‘effectiveness’ of their votes and injured them in their official capacity as
13 members of Congress.” *Bennett*, 206 Ariz. at 526, ¶ 24, 81 P.3d 317 (citing *Raines*). The
14 Court held that the members did not have standing “because their alleged injury was not
15 ‘particularized’ to the individual claimants and was not sufficiently ‘concrete’ to justify
16 judicial intrusion into a dispute between legislative and executive branches.” *Bennett*, 206
17 Ariz. at 526, ¶ 24, 81 P.3d at 317 (citing *Raines*). Indeed, the Court observed that the
18 members’ alleged harm was “based on a loss of political power, not loss of any private
19 right” and “that the injury claimed was, at most, an institutional injury,” which was
20 precluded because Congress had not authorized the members’ lawsuit. *Id.* (citing *Raines*).

21 Similar to *Bennett* and *Raines*, Legislators’ alleged injury is a loss of legislative
22 and political power. Unlike those cases, Legislators’ alleged injury is not caused by the
23 acts of another branch of government, but by their colleagues in the legislature who
24 disagreed with them. Such an injury, even assuming *arguendo* that it occurred, is not
25 particular to the individual Legislators and is too attenuated to support standing. *Raines*,
26 521 U.S. at 825-26 (characterizing the legislators’ injury, which was insufficient to

1 support standing, as the “abstract dilution of institutional legislative power”). Indeed,
2 Legislators here actually seek to overturn the institutional power of their own chambers by
3 alleging that legislation that was debated, voted upon and passed by a bipartisan majority
4 improperly delegates the legislature’s own authority. *See also Planned Parenthood*
5 *Arizona, Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 280,
6 ¶ 64, 257 P.3d 181, 199 (App. 2011) (“[N]o authority has been cited for the proposition
7 that legislators have a protectable interest in . . . challenging the constitutionality of
8 legislation.”). Legislators are acting “without the benefit of legislative authorization” and
9 should not “be accorded standing to obtain relief on behalf of the legislature.” *Bennett*,
10 206 Ariz. at 527, ¶ 29, 81 P.3d at 318. In accordance with well-established precedent, the
11 Court should dismiss Count 2.

12 **2. Count 1: Legislators Do Not Have Standing to Assert that H.B.**
13 **2010 Violates Proposition 108.**

14 Proposition 108’s supermajority requirement does not change the Arizona Supreme
15 Court’s general rule that individual legislators lack standing. The rare circumstances
16 when courts allow standing to individual legislators typically involve one of two
17 situations, neither of which is present in this case. First, standing may exist when
18 legislators are *challenging a supermajority requirement itself* as causing the
19 “nullification” of their individual votes, which is distinct from a challenge based on
20 whether a supermajority vote should apply to a particular bill. Second, legislators may
21 have standing if the subject of the lawsuit *cannot be challenged by any other party* and
22 will otherwise evade judicial review.

23 **a. Standing is not established by failure of the legislature**
24 **itself to require a supermajority for a particular bill.**

25 In *Dobson v. State, ex rel., Commission on Appellate Court Appointments*, No. CV-
26 13-0225-SA, 2013 WL 5051457 (Sept. 13, 2013), the Arizona Supreme Court

1 distinguished *Bennett* and held that four commissioners of the Commission on Appellate
2 Court Appointments (“Commission”) had standing to challenge a bill by the legislature
3 that directed the Commission to submit five names to the governor for appellate
4 appointments, “unless an applicant is rejected by two-thirds vote of the Commission, in
5 which case it may submit fewer than five names.” *Id.* at *1, ¶ 1. The commissioners
6 alleged that the bill violated the Arizona Constitution’s directive that the Commission
7 submit “not less than three” nominees to the governor. *Id.*

8 The Supreme Court agreed there was standing because the bill required the
9 commissioners “as individuals, to execute directives they believe run afoul of their
10 constitutional obligations as Commission members.” *Id.* at *3, ¶ 11. Also, the
11 commissioners alleged injury from the bill’s “requirement of a supermajority vote to send
12 fewer than five nominees to the governor” supported standing because it “rendered a
13 commissioner’s opposition to a candidate ineffective unless the commissioner can secure
14 the support of a two-thirds majority.” *Id.* at *3, ¶ 12. Thus, the commissioners challenged
15 the supermajority requirement that the legislature imposed upon them on the basis that it
16 nullified their votes. In other words, *Dobson* involved the legislature’s attempt to change
17 the voting rules for another branch of government, namely the Commission, which is
18 within the judicial branch.

19 In stark contrast, here, a segment of the Legislature is complaining about
20 something the body as a whole did (or did not do) to a bill during the legislative process,
21 namely include Proposition 108 language in H.B. 2010. Legislators are not challenging
22 the supermajority requirement itself but rather the legislature’s internal deliberations and
23 decision not to impose such requirements on a particular bill (H.B. 2010). *On three*
24 *occasions*, legislators rejected attempts to amend the bill to include Proposition 108
25 language. For these plaintiffs, those votes are conclusive.

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

b. H.B. 2010 will not evade judicial review if the Court dismisses the lawsuit for lack of standing.

On occasion, in exceptional circumstances, courts have allowed legislators who otherwise lack standing to challenge statutes if the subject of the lawsuit *cannot* be challenged by any other party and will evade judicial review. In *Dobson*, for example, the Arizona Supreme Court noted that if the commissioners did not have standing, they “would have no means of redress.” *Dobson*, 2013 WL 5051457, *3, ¶ 11.

Here, H.B. 2010 would not be insulated from review because entities subject to the Hospital Assessment could bring a Proposition 108 challenge. Further, there is a political solution available to Legislators. Legislators can simply work to overturn politically the Medicaid restoration. As the United States Supreme Court recognized in *Raines*, denying standing to individual legislators “neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).” 521 U.S. at 829. The same is true here. Therefore, as directed by the Arizona Supreme Court, this Court should not allow itself to be “easily coerced into resolving [a] political dispute” by allowing Legislators to bring their political battles to court. *Bennett*, 206 Ariz. at 525, ¶ 20, 81 P.3d at 316 (citing *Raines*).

B. Constituents Lack Standing.

The Complaint alleges no facts giving rise to standing for Plaintiff-Constituents Dubreil and Miller. Under Arizona’s “rigorous” standing requirement, an alleged injury must be “distinct and palpable” in order to give rise to standing. *Fernandez*, 210 Ariz. at 140, ¶ 6, 108 P.3d at 919. The injury must be particularized to the plaintiffs themselves rather than one shared by “a large class of citizens.” *Sears*, 192 Ariz. at 60, ¶ 16, 961 P.2d at 1017 (citation omitted).

1 Analogous to the plaintiff in *Day*, Constituents Dubreil and Miller face no
2 possibility of ever having to pay the Hospital Assessment. See H.B. 2010, § 5 (“A
3 hospital shall not pass down the cost of the assessment on to patients . . .”). The injury
4 apparently alleged here—effective denial of representation by their political
5 representatives—is neither “distinct and palpable” nor particularized to Dubreil and
6 Miller. If the Court concludes that standing to challenge a law’s constitutionality is found
7 with such tenuous allegations of injury, every constituent whose legislator voted against
8 an allegedly unconstitutional bill would have standing. Lacking any allegation of injury
9 particularized to Constituents, they have no standing.

10 **C. Plaintiff Jenney Lacks Standing Under A.R.S. § 35-213.**

11 Plaintiff Jenney also lacks standing to sue. The Complaint alleges that he “brings
12 this action pursuant to A.R.S. §§ 35-212 and 213.” Compl., ¶ 42. Generally, A.R.S. § 35-
13 212 permits the Attorney General to “bring an action in the name of the state to enjoin the
14 *illegal payment of public monies . . .*” (emphasis added). A.R.S. § 35-213 allows a
15 taxpayer to bring the same challenge, provided certain requirements are met, namely: (1)
16 the Attorney General fails to initiate an action 60 days after the taxpayer makes a written
17 request for the Attorney General to do so; and (2) the taxpayer “execute a bond payable to
18 the defendant” that meets certain conditions.¹³

19 By its language, A.R.S. § 35-212(A) only permits an action “to enjoin the illegal
20 *payment of public monies . . .*” (emphasis added). “Public monies” is defined as “all
21 monies coming into the lawful possession, custody or control of state agencies . . .

22 _____
23 ¹³ Defendants assume that the allegation that Plaintiff Jenney pays property tax is meant to
24 qualify Jenney as a taxpayer under A.R.S. § 35-213. If, however, Plaintiffs intend to
25 assert that Jenney has standing to maintain this action by virtue of his status as a taxpayer,
26 they are misguided. Although Defendants dispute Plaintiffs’ mischaracterization of the
Hospital Assessment as a “tax,” even when a bona fide tax is at issue, a plaintiff lacks
taxpayer standing if he is not subject to the tax. See *Karbal*, 215 Ariz. at 116-17, 158 P.3d
at 245-46.

1 irrespective of the source from which, or the manner in which, the monies are received.”
2 A.R.S. § 35-212(B). In other words, A.R.S. § 35-212 permits challenges to stop state
3 agencies from paying out monies that the agency lawfully possesses. Jenney is not
4 bringing such a challenge. Rather, Jenney alleges that AHCCCS’s *collection*, not
5 payment, of monies through the Hospital Assessment is unlawful. The statute has no
6 application here. *See State v. Arellano*, 213 Ariz. 474, 477, ¶ 9, 143 P.3d 1015, 1018
7 (2007) (“When a statute is clear and unambiguous, we apply its plain language and need
8 not engage in any other means of statutory interpretation.”) (citation omitted).

9 Even if A.R.S. § 35-212 applied, Jenney has failed to comply with its requirements.
10 Rather than wait 60 days after requesting that the Attorney General take action as required
11 by subsection (A) of that statute, Jenney alleges only that he served on the Attorney
12 General “a request . . . stating his desire to institute an action in his own name and with
13 the same effect as if brought by the attorney general” on September 11, 2013—the day
14 before the Complaint was filed. Compl., ¶ 66 and p. 20 (filed on September 12). Jenney
15 also failed to allege that he complied with subsection (B)’s bond requirement. *See*
16 *generally* Compl. These failures to comply with the statutory requirements are fatal to his
17 claims. *See Austin v. Campbell*, 91 Ariz. 195, 201, 370 P.2d 769, 773 (1962) (holding that
18 court exceeded its jurisdiction in entering judgment against a defendant for whom a § 35-
19 213(a) request was not made because it “is a jurisdictional requirement”).

20 **D. The Court Should Not Waive the Standing Requirement.**

21 Courts should address “the merits of a case in the absence of a particularized injury
22 ‘only in exceptional circumstances,’” *Bennett*, 206 Ariz. at 527, ¶ 31, 81 P.3d at 318
23 (citation omitted). Indeed, “[t]he paucity of cases in which we have waived the standing
24 requirement demonstrates both our reluctance to do so and the narrowness of this
25 exception.” *Id.* (citation omitted). In *Bennett*, the court explained that it was “reluctant to
26 become the referee of a political dispute,” noting that its “general disinclination to enter

1 political controversy” was “heightened by the fact that petitioners . . . represent only four
2 of ninety members of the legislative.” *Id.* at 527, ¶¶ 32-33, 81 P.3d at 318.

3 Just as the court in *Bennett* declined to “referee” a political dispute, this Court
4 should not bypass the standing requirement to referee here by entertaining political
5 challenges to a piece of legislation that has significant humanitarian and economic
6 ramifications for Arizona. Like the plaintiffs in *Bennett*, Legislators comprise a minority
7 on the losing end of the political process, asking the Court to interject itself to overturn a
8 law that they were unable to defeat in that process. Such facts should heighten this
9 Court’s disinclination to wade into these political waters. Thus, waiver of the standing
10 requirement is not appropriate here.

11 **III. CONCLUSION**

12 Defendants’ implementation of H.B. 2010 does not cause Plaintiffs a particularized
13 injury. Legislators do not take issue with another branch of government, but only with the
14 bodies to which they belong—the House and Senate. If Legislators were granted standing
15 in this lawsuit, when a future amendment to change the voting requirements for a
16 particular bill fails, or a presiding officer rules such a provision is not required, a legislator
17 would have standing to seek court review of those intra-house decisions. Courts cannot,
18 and should not, become involved in internal, legislative disputes. Any challenge to H.B.
19 2010’s constitutionality under Proposition 108 must be bought by a proper party, not
20 Plaintiffs. Defendants respectfully request that the Court dismiss Plaintiffs’ entire
21 Complaint due to a lack of standing.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED this 2nd day of October, 2013.

FENNEMORE CRAIG, P.C.

By /s/ Douglas C. Northup
Douglas C. Northup
Timothy Berg
Patrick Irvine
Carrie Pixler Ryerson
Attorneys for Defendants
Governor Janice K. Brewer and
Director Thomas J. Betlach

- and -

Joseph Sciarrotta, Jr.
Office of Governor Janice K. Brewer
Co-Counsel for Defendant Governor
Janice K. Brewer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ELECTRONICALLY FILED
on the 2nd day of October, 2013, with
the Clerk of the Maricopa County
Superior Court using AZTurboCourt.

COPY transmitted via eFiling system to:

The Honorable Katherine Cooper
Maricopa County Superior Court
101 W. Jefferson St., Room 514
Phoenix, AZ 85003-2243

COPY hand delivered this 2nd day of October, 2013, to:

Clint Bolick
Kurt Altman
Christina Sandefur
Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute
500 E. Coronado Road
Phoenix, AZ 85004
Attorneys for Plaintiffs

/s/ Phyllis Warren