IN THE SUPREME COURT
OF THE STATE OF ARIZONA

ANDY BIGGS, et al., Petitioners, v. HON. KATHERINE COOPER, Respondent Judge, and JANICE K. BREWER, in her official capacity as Governor of Arizona; THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System, Real Parties in Interest.	No. CV-14-0132-PR Arizona Court of Appeals, Division One No. 1 CA-SA 14-0037 Superior Court of Maricopa County Case No. CV2013-011699

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF CROSS-PETITIONERS ANDY BIGGS, ET AL.

JAMES S. BURLING, Ariz. Bar No. 009039
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorney for Amicus Curiae
Pacific Legal Foundation

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Atkinson, Troy L., *The Future of Guinn v. Legislature*, 4 Nev. L.J. 566 (2004) 7-8

Derr, Jason A., *Raines, Raines Go Away: How Presidential Signing Statements and Senate Bill 3731 Should Lead to a New Doctrine of Legislative Standing*, 56 Cath. U. L. Rev. 1237 (2007) 20

The Federalist (J. Cooke ed., 1961) 4-5, 9

Frost, Amanda & Lindquist, Stefanie A., *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719 (2010) 8

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INTEREST OF AMICUS CURIAE

The interest of Amicus Pacific Legal Foundation is set forth in the accompanying motion for leave to file.

INTRODUCTION

Supermajority requirements are common in American constitutions. They protect the rights of minorities in the legislature by increasing their relative voting power and encouraging greater deliberation and negotiation. As such, the legislative majority has little incentive to enforce—and everything to gain—by ignoring or evading supermajority requirements. Nor does the governor have a strong incentive to enforce supermajority requirements in opposition to the will of the majority. Judicial enforcement is thus crucial if the constitutional supermajority requirement is to have any real force. The legislature cannot be entrusted with unreviewable power to decide whether to obey that requirement.

The deprivation of individual legislators' voting power is a particularized injury to those members, sufficient to warrant the Cross-Petitioners' standing to sue. Where legislators' unique legislative rights have been infringed within the enactment process, they have standing to sue. *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009). Under Arizona's prudential standing requirements, when a change in the lawmaking process causes an injury to legislators *as* legislators, affecting their constitutional obligations and prerogatives *as* participants in that process, they have

standing to vindicate their constitutionally protected rights under the supermajority requirement. *Dobson v. State ex rel., Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 122, 309 P.3d 1289, 1292 (2013). Lawmakers do not have standing in cases where their votes were duly counted, but the effectiveness of the enacted legislation is impaired by a later event. *Fumo*, 972 A.2d at 497. That was the situation in *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003), upon which the Petitioners and their amici rely. But that is not what happened here. Here, the injury occurred *within* the lawmaking process. The members of the legislative minority, whose votes would have been sufficient to defeat the legislation, were deprived of their individual participatory rights. No alternative to legislative standing—such as waiting for the hospitals (who actually *benefit* from the unconstitutional tax) to sue—present the question in a better form for judicial resolution. Since this case does not seek an advisory opinion, it is ripe and not moot, and the issues will be fully developed by true adversaries, *cf. Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985); the decision below was correct and the Petition for Review should either be denied, or the Cross-Petition should be granted and the decision below affirmed.

ARGUMENT

I

MINORITY LEGISLATORS SHOULD HAVE STANDING TO BRING SUIT WHERE LEGISLATORS IGNORE CONSTITUTIONAL SUPERMAJORITY REQUIREMENTS

A. Constitutional Supermajority Requirements Are Crucial, Traditional Protections for the Rights of Legislators and Their Constituents

Since at least 1787, American constitutions have used supermajority requirements to protect dissenters or minorities, and to increase the amount of deliberation and negotiation that must go on before particularly important types of laws are passed. The federal Constitution requires supermajorities for impeachment (U.S. Const. art. I, § 3, cl. 6), approval of treaties (U.S. Const. art. II, § 2, cl. 2), expelling members of Congress (U.S. Const. art. I, § 5, cl. 2), or overriding vetoes (U.S. Const. art. I, § 7, cl. 2-3). Even ratification required approval of nine of the 13 states. U.S. Const. art. VII.

As John O. McGinnis and Michael B. Rappaport, the nation's leading experts on supermajority rules, observe in *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703 (2002), "the inclusion in the Constitution of express supermajority decisionmaking rules clearly indicates that the Framers embraced supermajoritarianism," *id.* at 711, and they did so because such rules reduce the

likelihood of special-interest legislation, *id.* at 734-35, and reduce the impact of partisanship. *Id.* at 739-40. Supermajority requirements help prevent the passage of laws that might be hard to repeal if they are later deemed unwise, *id.* at 740-41, and encourage greater deliberation and broader consensus on controversial or complex legislation. *Id.* at 741. Supermajority requirements strike an effective balance between "'that extreme facility [of majority rule] which would render the Constitution too mutable; and that extreme difficulty [of unanimity], which might perpetuate its discovered faults.'" *Id.* at 786 (quoting *The Federalist* No. 43, at 296 (James Madison) (J. Cooke ed., 1961)).

The principal beneficiaries of supermajority requirements are unpopular groups or minorities who hold relatively little political influence, and who must form coalitions with other groups to protect their interests in the legislative process. By increasing the relative value of each vote in the legislature, these requirements expand the voting power of constituents whose representatives may hold the deciding vote, and thus increase their bargaining power in negotiations and deliberations between legislators.

Consider a hypothetical legislature of 90 members, in which the Whig party holds 55 votes, and the remainder is divided between 30 Tories and 5 Labor members. Given how few Labor members hold office, they would have little hope of obtaining concessions from other members under simple majority vote—indeed, the Whigs

would not need to give any concessions, since they hold the majority. But under a 2/3 voting requirement, the voting power of either the Tory or Labor blocs would be increased *vis-à-vis* the Whigs, and the Labor members, who represent an exceptionally small minority, could demand that the Whigs give consideration to a Labor issue in exchange for supporting the legislation that requires 60 votes to pass. Thus while supermajoritarianism is hardly a cure-all, it can help "achieve[] the fundamental goals that [James] Madison envisioned for constitutionalism: '[t]o secure the public good and private rights against the danger of . . . faction, and at the same time to preserve the spirit and the form of popular government.'" *Id.* at 722 (quoting *The Federalist* No. 10, *supra*, at 61 (James Madison)).

Proposition 108 was intended to empower the minority of legislators, as a check against perceived present and future abuses of the taxing power. Such checks have often been criticized—and, naturally enough, these criticisms typically come from the majority or its representatives—as "undemocratic." But supermajority requirements are *intended* to slow the democratic process and to require broader consensus, in order to protect minorities whose legitimate interests are often threatened by majority rule. Indeed, a constitution itself is "undemocratic" in this sense, as *all* constitutional rules, procedural or substantive, inherently limit the majority's power to do as it pleases. As the U.S. Supreme Court has observed, "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights . . . that [it

was] designed to protect the fragile values of a vulnerable citizenry from [an] overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). The same is true of supermajority restrictions on legislative procedure. They "reinforce the view that the Constitution's core objective was not to employ democracy but to promote republicanism—a system of government that channels popular consent in a manner conducive to the public good." McGinnis & Rappaport, *supra*, at 725.

B. Supermajority Requirements Are Intended to Restrict Majority Power, and Will Most Often Be Challenged or Subverted by Majorities

Legislative majorities will often find it in their interest to ignore, subvert, or challenge supermajority requirements. But this Court must enforce those requirements, even where—*especially* where—outspoken political majorities want them relaxed. The Constitution, not any particular legislative majority, represents the true will of the people; it—and not today's political expediency—must bind the courts. *See Stapleford v. Houghton*, 185 Ariz. 560, 562, 917 P.2d 703, 705 (1996) ("The people chose to adopt the provisions of the [Constitution] . . . . Just as the legislature cannot circumvent the will of the people, neither can this court . . . . [T]he court must adhere to the constitutional language.").

The Nevada Supreme Court unwisely disregarded these principles in *Guinn v. Legislature of the State of Nevada*, 71 P.3d 1269 (Nev. 2003), when it ordered the

state legislature to ignore the Nevada Constitution's supermajority requirement for tax increases (Nev. Const. art. 4, § 18), on the theory that this requirement was holding up a tax increase that the majority favored. The governor, having failed to obtain enough votes in the legislature to raise taxes, sought a writ of mandate to force them to do so. The court issued the writ, ordering lawmakers to suspend the supermajority requirement and to proceed under simple majority rule. *Id.* at 1272. The court later claimed that it had not meant to "eliminate the two-thirds requirement," *Guinn v. Legislature of the State of Nevada*, 76 P.3d 22, 32 (Nev. 2003), but just to "balance" it with the need for revenue, *id.* at 31—yet it reiterated its order that the legislature "suspend the supermajority rule," *id.* at 32, because it was being "used by a few to challenge the majority's budget decisions." *Id.* at 31. That, of course, was precisely what the rule was designed to do.

Unsurprisingly, the *Guinn* decision was widely denounced as an absurd effort to rationalize a politically motivated judgment in which the justices purported to excuse lawmakers from their unambiguous constitutional obligations. *See, e.g.*, *Nevada Supreme Court Sets Aside a Constitutional Amendment Requiring a Two-Thirds Majority for Passing a Tax Increase Because It Conflicts With a Substantive Constitutional Right*, 117 Harv. L. Rev. 972, 975 (2004) (decision "jeopardize[d] the integrity of procedures that are central to the separation of powers in a free republic"); Troy L. Atkinson, *The Future of Guinn v. Legislature*, 4 Nev. L.J.

566, 570 (2004) (decision was explicable only "by political motivations" which "backfired"). The state's Chief Justice, who authored the opinion, resigned shortly afterwards when it became clear she would not win reelection. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719, 736 (2010), and within a few years, the court quietly acknowledged its error and overruled the case. *Nevadans for Nevada v. Beers*, 142 P.3d 339, 348 (Nev. 2006).

Guinn serves as a cautionary tale: when supermajority requirements are attacked, it will typically be by powerful political *majorities*, who, because they are majorities, will bring to their complaints an illusion of democratic legitimacy. Yet arguments for subverting supermajority requirements in the name of "preserving the democratic process," *Guinn*, 76 P.3d at 32, are specious. First, because the very purpose of such requirements—indeed, of constitutions themselves—is to limit majority power and to empower minorities, and second, because Proposition 108 and other supermajority requirements are inserted into the Constitution *by the people*, who are a higher authority than any legislative majority. *See Windes v. Frohmiller*, 38 Ariz. 557, 561-62, 3 P.2d 275, 277 (1931) ("'The sovereign people speak in the language of their Constitution. Their will . . . is the will of the sovereign itself. The Legislature may speak but only within the limitations of the fundamental law. The courts may interpret and administer the law, but only in keeping with . . . the

Constitution.'" (quoting *State v. Osborne*, 14 Ariz. 185, 191, 125 P. 884, 887 (Ariz. 1912))).

Courts that enforce a supermajority requirement, even in the face of majority opposition, are in fact *serving* democratic values, since they are complying with the will of the people expressed in the Constitution, instead of the will of a transient legislative majority. *Id.*; *see also The Federalist* No. 78, *supra*, at 521-30 (Alexander Hamilton). Moreover, when courts enforce constitutional limits on the democratic process, even where doing so is unpopular, they *strengthen* the democratic process. Courts "play[] an important role in perfecting, rather than frustrating, the democratic process," and help "advance[] the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression . . . [and] facilitat[ing] a representation of minorities in government." *Watkins v. U.S. Army*, 875 F.2d 699, 720 (9th Cir. 1989). "Allowing the intensity of political will" to justify deviations from the supermajority requirement "would radically undermine the representation-reinforcing policies" that underlie both that requirement and the concept of judicial review. *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 999 (9th Cir. 2002).

C. The Elected Branches Deserve No Deference in Cases Involving the Applicability of Supermajority Requirements

Given their incentive to undermine supermajority requirements, the political branches cannot be safely trusted to enforce those requirements on their own. Arizona

courts typically defer to the political branches when "the democratic process" can be relied upon to "rectif[y]" any "improvident decisions," *Vong v. Aune*, No. 13-0423, 2014 WL 2191072, at *3 (Ariz. Ct. App. May 27, 2014) (quoting *FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 314 (1993)), but they *cannot* defer on questions regarding constitutional limits on the legislature. To do so would give the legislature unlimited discretion to determine its own authority, which this Court cannot accept. *See State ex rel. Burns v. Di Salle*, 176 N.E.2d 428, 432 (Ohio 1961) ("[I]t is the proper prerogative of the judiciary, under a written constitution, to pass upon the constitutionality of acts of the Legislature . . . . If it were not so, indeed, written constitutions would be of little or no value; for[] the Legislature [would] be[] the sole judge of its own powers." (citation and quotation marks omitted)). Moreover, relaxing the legislature's constitutional boundaries disrupts the democratic process by which improvident decisions might otherwise be rectified.

This Court does not leave it to the legislature to decide for itself whether it has exceeded its constitutional boundaries—whether those boundaries are procedural or substantive. *Brewer v. Burns*, 222 Ariz. 234, 239, 213 P.3d 671, 676 (Ariz. 2009); *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (Ariz. 2006). Judicial vigilance is especially necessary where the elected branches have strong incentives to undermine the Constitution, and few democratic or political restraints check its doing so.

The legislative majority has few incentives to enforce the supermajority requirement. It will always be in the interest of the legislative majority to minimize or evade that requirement, and will never be in its interest to enforce it vigilantly. While the minority has a strong interest in seeing it enforced, it can do little to protect its prerogatives within the legislature, since it will necessarily be outvoted by the same majority which has the strongest interest in undermining the minority's constitutional privileges. As the D.C. Circuit has observed, where a minority of legislators "claim[s] the right to block termination with only one-third plus one of their colleagues," there is "no way that such a minority can even force a resolution to the floor, let alone pass it. To pretend that effective remedies are open to [them] is to ignore that . . . [this] would [require] them to block termination *with a minority*." *Goldwater v. Carter*, 617 F.2d 697, 703 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) (emphasis added). *See also Note: Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 Harv. L. Rev. 1741, 1756 (1999) ("[T]he one-third minority remains a minority, meaning that it probably is not able to persuade the Senate to authorize a lawsuit.").

Nor does the Governor have a strong interest in enforcing the requirement by, for instance, vetoing legislation passed by fewer than two thirds. *Cf.* Brief of Fife Symington III, et al., at 8. First, as in this case, the Governor is likely to favor legislation that is supported by the bare majority, or at least would have little reason

to veto such a bill solely to serve the interests of the legislative minority. Even if that were not so, the Governor has little incentive to rigorously enforce the supermajority requirement when a legislative majority desires otherwise. This is precisely why the Constitution does not leave it to the political branches to enforce constitutional restrictions on the legislative process. *See Cox v. Stults Eagle Drug Co.*, 42 Ariz. 1, 14, 21 P.2d 914, 918 (1933) (allowing legislation that did not receive constitutionally required supermajority vote to stand "is no more nor less than saying that the Legislature is not bound by constitutional mandates directed to it and that a measure may become law whether it receives the required vote or not").

Finally, the ordinary political process is unlikely to ensure that the supermajority requirement is followed. The Petitioners argue that "repeal and referendum are the remedies" for the constitutional violation here. Petition at 10. But violation of the supermajority requirement harms the *minority*, and the *minority* cannot be expected to pass a repeal or referendum, which require a *majority* vote. The Petitioners' argument is disingenuous because it throws the minority—which has been deprived of constitutional protections against the majoritarian political process—on the mercy of the very majoritarian process which they were supposed to be protected against. *Goldwater*, 617 F.2d at 703.

The Petitioners' view that the legislative majority should be free to decide for itself whether a bill is subject to the supermajority requirement is obviously untenable.

Petition at 3 ("any dispute as to whether a supermajority is required . . . is decided by majority vote"). If the *majority* can decide without any checks or balances whether a bill must be passed by a supermajority, then the majority will always have an incentive to answer *no*. To give the majority unreviewable power to decide when the Constitution imposes restraints on its own power is to make the legislative majority the judge in its own case. *Stults Eagle Drug Co.*, 42 Ariz. at 13-14, 21 P.2d at 918; *cf. Terrell v. Town of Tempe*, 35 Ariz. 120, 123, 274 P. 786, 787 (1929) (government may not be the judge in its own case).

Even if the legislature did have an incentive to enforce the supermajority requirement, this Court would still be obliged to enforce it. In an analogous federal case, *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the U.S. Supreme Court held that courts must enforce the Origination Clause, which requires that bills for raising revenue originate in the House of Representatives, even if the House itself already has strong institutional incentives to protect its prerogative under that Clause. *Id.* at 392-93. The Constitution's limits on legislative procedure are the supreme law of the land, and all legislation Congress passes "must comply with all relevant constitutional limits. A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment." *Id.* at 397. *See also id.* at 396-97 ("[T]he principle that the courts will

strike down a law when Congress has passed it in violation of such a command" is "well settled.").

This Court regularly enforces other constitutional limits on legislative procedure. In *State v. Fridley*, 126 Ariz. 419, 420, 616 P.2d 94, 95 (Ct. App. 1980) (per curiam), the court enforced the constitutional requirement that laws be passed by both houses. In *Stults Eagle Drug Co.*, 42 Ariz. at 13-14, 21 P.2d at 918, and *State ex rel. La Prade v. Cox*, 43 Ariz. 174, 182, 30 P.2d 825, 828 (1934), it enforced superamajority requirements. In *City of Sierra Vista v. Dir., Arizona Dep't of Envtl. Quality*, 195 Ariz. 377, 381, 988 P.2d 162, 166 (Ct. App. 1999), it enforced the provision barring amendment of laws by mere reference to their titles. These and other cases demonstrate that Arizona courts cannot and do not leave it to the legislature to decide whether to comply with constitutional restrictions on legislative procedure. Instead, the courts must enforce those restrictions. *In re Am. W. Airlines, Inc.*, 179 Ariz. 528, 535, 880 P.2d 1074, 1081 (1994) ("Under our constitution, the power . . . [of] taxation . . . is legislative, but the responsibility to enforce the constitution's limits is judicial.").

II

THE JUDICIARY SHOULD STRICTLY ENFORCE SUPERMAJORITY REQUIREMENTS

Because violations of the supermajority requirement will typically be championed by the majority, which has little incentive to ensure compliance with such requirements, it is crucial that the judiciary enforce this constitutional check on the political branches. Affirming the legislators' standing in these circumstances would satisfy Arizona's prudential standing test and would serve the public interest far better than leaving Proposition 108 claims to taxpayer litigants alone. Judicial enforcement of Proposition 108 would not improperly involve the courts in the legislative process, as the Petitioners and their amici contend, but would be an ordinary discharge of the judiciary's duty to enforce constitutional limits. *In re Am. W. Airlines*, 179 Ariz. at 535, 880 P.2d at 1081.

A. When Legislatures Violate Constitutional Supermajority Requirements, No Person Is Better Situated to Seek Enforcement of the Constitution Than Legislators Whose Voting Power Has Been Undermined

Petitioners argue that legislators lack standing because their interest is not sufficiently personal and because "a proper plaintiff" could sue. Petition at 5. But members of the legislative minority are the direct, intended beneficiaries of the supermajority requirement, are the persons primarily responsible for ensuring compliance with that requirement, and are present on the scene if and when that

requirement is violated. They are better situated than any other person to bring suit for a violation. In *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919, this Court explained that standing is a matter of "prudential or judicial restraint," intended "to insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries." These standards are all satisfied by legislator standing in this case. "[G]iven all the circumstances in the case," they have a legitimate interest in an actual controversy, and judicial economy and administration will be promoted by their participation. *Id.*

As the Pennsylvania Supreme Court has summarized, "standing had been granted to legislators in cases asserting claims that their unique legislative powers [have] been infringed," such as "where an individual legislator alleged a deprivation of his right to vote to override a veto, [or] where state senators . . . challenged an illegal tie-breaking vote cast by a lieutenant governor," but not in cases where "legislators' votes [have] been duly counted but . . . the effectiveness of the legislation had been impaired by some subsequent event." *Fumo*, 972 A.2d at 497. This case plainly falls into the first category.

Petitioners' reliance on *Bennett*, 206 Ariz. 520, 81 P.3d 311, is misguided. In *Bennett*, legislators challenged what they considered an improper use of the line-item veto power. This Court found that they lacked standing because they had no individual interest at issue in the case; their votes had already been counted, and the

bill had passed and gone to the governor's desk. Their role as legislators was then finished. The alleged injury had occurred after that, when "legislative action on the bills was complete." *Id.* at 526, 81 P.3d at 317. Because the alleged injury had not affected their constitutional prerogatives as participants in the legislative process, they had not been harmed in their capacity as legislators. *Id.* at 526-27, 81 P.3d at 317-18. The dispute was thus a political conflict between the governor and the legislature, which could be resolved by ordinary political means, and which harmed the legislators only in the same sense that it harmed everyone else in the state. *Id.*

The situation here is completely different. The injury occurred *in* the legislative chamber, *during* the process, and it deprived the Cross-Petitioners of a specific interest not shared with the general public: namely, their role as participants under the supermajority rule. That interest is unique to them because they, and they alone, have the right to participate in the legislative process; they were deprived of that right by the majority's decision to evade the supermajority requirement by claiming that the requirement did not apply. That is *not* a political conflict between different branches that can be remedied by the political process—it is a constitutional violation that harms the minority legislators, and they are entitled to legal redress.

This case is more like *Dobson*, 233 Ariz. 119, 309 P.3d 1289, in which the plaintiffs asserted injuries that distinctly affected their *participatory* rights within the process: the violation of the supermajority requirement in that case altered how their

votes would affect the Commission's actions, and thus affected "their constitutional obligations as Commission members." *Id.* at 122, 309 P.3d at 1292. The change in procedural rules caused an injury *inside* the process, and harmed the Commission members *qua* Commission members. So, too, in this case, the violation of the supermajority requirement took place *within* the procedure of enactment, and distinctly affected the Cross-Petitioners *qua* legislators, and *qua* members of the minority who are the intended beneficiaries of the supermajority requirement.

Another instructive case is *Gutierrez v. Pangelinan*, 276 F.3d 539 (9th Cir. 2002), in which the Court of Appeals held that the governor of Guam had standing to challenge a Guam Supreme Court decision that altered the method by which bills were signed or vetoed. The Guam Constitution did not specify whether a bill passed by the legislature, but left unsigned by the governor, would automatically become law or would be "pocket vetoed." The governor, believing a bill would automatically become law, failed to sign; but the Guam Supreme Court concluded that it had been pocket vetoed. *Id.* at 542-43. The Ninth Circuit ruled that the governor had standing to challenge this—even under the more stringent requirements of Article III—because the lower court's decision had "nullifi[ed]" his "asserted prerogative" to allow bills to become law without his signature. *Id.* at 546. Likewise, here, the legislative majority's refusal to comply with Proposition 108 nullified the prerogative that initiative granted to the legislative minority. It allowed legislation to be enacted

which, under the constitutional procedure, ought to have failed. The Cross-Petitioners' injury is specific to their role in the legislative process, and not the sort of injury suffered by the general public.

Affirming legislative standing under these circumstances would serve the prudential considerations underlying state standing doctrine. Members of the disenfranchised minority are distinctly harmed by the evisceration of their rights under Proposition 108; the majority benefits from that violation. Thus it would be futile to require the majority to sue, or to require the legislature as an institution to sue, *cf. Bennett*, 206 Ariz. at 527, 81 P.3d at 318, because the majority that controls the legislature would have no interest in authorizing such a lawsuit. *Goldwater*, 617 F.2d at 703.

Although members of the public may *also* have standing to challenge violations of the supermajority requirement, that is not a good reason to limit standing exclusively to them. Members of the public may face procedural and practical obstacles in doing so. Taxpayers are typically barred from seeking injunctive relief against the imposition of a tax. They must usually pay the tax first and sue later, *State Tax Comm'n v. Superior Court*, 104 Ariz. 166, 168, 450 P.2d 103, 105 (1969), which can substantially reduce the likelihood of such suits. This is why the law prefers pre-deprivation over post-deprivation remedies whenever possible. *Tripati v. State, Arizona Dep't of Corr.*, 199 Ariz. 222, 226-27, 16 P.3d 783, 787-88 (Ct. App. 2000);

Johns v. Ariz. Dep't of Econ. Sec., 169 Ariz. 75, 79-80, 817 P.2d 20, 24-25 (Ct. App. 1991). In any event, "private lawsuits may arise too late to be effective" in enforcing the rights of legislators. Jason A. Derr, *Raines, Raines Go Away: How Presidential Signing Statements and Senate Bill 3731 Should Lead to a New Doctrine of Legislative Standing*, 56 Cath. U. L. Rev. 1237, 1266 (2007). And delays can "lead to a gap of knowledge between the branches as to whether . . . [their] actions are constitutional," *id.*, a matter on which prompt clarification is always in the public interest.

Finally, an unconstitutional tax increase can be structured in such a way as to deter lawsuits from taxpayers who might otherwise seem best situated to sue. That occurred in this case: the Petitioners' argument that the tax "can be challenged by any person required to pay [it]," Petition at 9, is disingenuous because the tax here is paired with subsidies for the hospitals that pay the tax. The hospitals therefore support the legislation, and have even filed an amicus brief in support of the Petitioners in which they admit that they "would *benefit*" from the unconstitutional tax. Brief of Arizona Hospital and Healthcare Association, et al., at 2 (emphasis added).

Arizona's prudential standing doctrine is intended to avoid the issuance of advisory opinions, to ensure that cases are ripe and not moot, and to guarantee that the issues will be fully developed between true adversaries. *Armory Park*, 148 Ariz. at 6,

712 P.2d at 919. These standards are easily met here. It is undisputed that the decision would not be advisory, that the case is ripe, and that the dispute is not moot. Finally, the parties here are true adversaries, because they differ as to the constitutionality of the tax, and allowing the legislative majority to evade the supermajority requirement would significantly diminish the Cross-Petitioners' ability to participate in the legislative process. Legislator standing is appropriate here.

B. Judicial Enforcement of Supermajority Requirements Does Not Implicate Separation of Powers Concerns

Petitioners and their amici raise the specter that legislator standing would involve the courts in a host of ordinary political disputes and "lead to all manner of lawsuits by outvoted legislators." Brief of Fife Symington III, et al., at 7. This exaggeration misrepresents the nature of the standing argument at issue here. The legislator plaintiffs do not complain that they were "outvoted," but that they were unconstitutionally deprived of the protections of Proposition 108, which requires that tax bills receive a supermajority vote. The legislature violated that law by claiming that the tax was not subject to Proposition 108 and then passing it by a bare majority.[1]

Although Petitioners and their amici claim they oppose legislator standing, their arguments do not actually show that legislators lack standing, but would instead lead

[1] As the California Court of Appeal once noted, calling a tax a fee or an assessment does not mean it is not a tax. "[That] argument brings to mind the old riddle: If you call a tail a leg, how many legs does a dog have? The answer is four; calling a tail a leg does not make it one." *Jordan v. DMV*, 75 Cal. App. 4th 449, 465 n.6 (1999).

to the conclusion that courts should not enforce constitutional limits on legislative procedure *at all*. For example, Amici Fife Symington, et al., list a number of hypothetical situations in which courts might be called upon to enforce the supermajority requirement, purportedly showing that the decision below will open the floodgates to litigation about whether certain bills must be passed by a supermajority. *Id.* at 7-8. They note that "emergency measures" or bills that amend voter initiatives must receive supermajority votes, so that the decision below "would inevitably lead to lawsuits" over whether those requirements have been violated. *Id.* at 7. And they conclude that the decision below will "adversely impact the legislative process," *id.* at 9, and reduce the need for negotiation and compromise among legislators.

Yet these are arguments, not against standing, but against judicial enforcement of constitutional limits on the legislative process. The same consequences would follow if *any* plaintiff sought judicial enforcement of a supermajority requirement, because in any case challenging the constitutionality of an alleged "emergency measure," or seeking enforcement of the Voter Protection Act (VPA) or the Single Subject Rule, the court would have to decide questions that affect the legislative process in the same ways. Yet courts have enforced these and other limits on the legislative process. In *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6, 308 P.3d 1152, 1157 (2013), the court invalidated the legislature's attempt to divert funds from a program in violation of the VPA, notwithstanding that financial appropriations

are a quintessential legislative prerogative, because "when . . . the legislature deviates from a voter-approved law, the VPA's constitutional limitations apply and qualify the legislature's otherwise plenary authority." *Id.* Nor have courts hesitated to entertain Single Subject Rule challenges, *Manic v. Dawes*, 213 Ariz. 252, 256-57, 141 P.3d 732, 736-37 (Ct. App. 2006), or "emergency measure" challenges. *Stults Eagle Drug*, 42 Ariz. at 13-14, 21 P.2d at 918; *La Prade*, 43 Ariz. at 182, 30 P.2d at 828.

The alleged threat to the legislative process does not prove that courts should abstain from such cases, let alone that legislators lack standing. Legislators have standing if they can assert that a particularized injury resulting from an alteration in how votes are counted, such that their votes—which otherwise could have defeated the legislation in question—are practically nullified. *Dobson*, 233 Ariz. at 122, 309 P.3d at 1292; *Fumo*, 972 A.2d at 497. These standards are met here.

As to reducing the need for negotiation and compromise, the opposite is true: rigorously enforced supermajority requirements *increase* negotiation and compromise. McGinnis & Rappaport, *supra*, at 740-41. The supermajority requirement forces the majority to obtain votes from the minority party, whom it might otherwise safely ignore—and thus forces the majority to negotiate and deliberate with that part of the legislature which otherwise would have little chance of advancing their constituents' interests. If the majority can safely disregard the Constitution's supermajority requirement without judicial checks and balances, there will be less willingness to

make compromises in the legislative process. There is little incentive for concession and compromise when the majority can simply declare that the supermajority requirement does not apply, and enact legislation it otherwise could not pass. *Cf.* Brief of Fife Symington III, et al., at 9-10.

Legislative standing in this case does not threaten the legislative process or unduly involve the courts in that process. On the contrary, it would ensure that the constitutional rules are followed. To deprive legislators—who are in the best position to assert their constitutionally protected rights under Proposition 108—of the right to do so would enable bare majorities to undermine constitutional protections that the people themselves imposed, and would harm the public interest.

CONCLUSION

The Court should *deny* the Petition, or grant the Cross-Petition and *affirm the judgment below.*

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Respectfully submitted,

By /s/ James S. Burling
JAMES S. BURLING

Attorney for Amicus Curiae
Pacific Legal Foundation