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IN THE SUPREME COURT
STATE OF ARIZONA

THOMAS E. BLANKENBAKER, D.C., an Arizona licensed chiropractic physician; SHAWN WHERRY, D.C., an Arizona licensed chiropractic physician; EMILIA INDOMENICO, an Arizona resident, Petitioners-Plaintiffs-Appellants, v. GERMAINE MARKS, in her official capacity as Director of the Arizona Department of Insurance, Respondent-Defendant-Appellee.	**Case No. _____** Arizona Court of Appeals Case No. 1 CA-CV 11-0626 Maricopa County Superior Court Case No. CV 2011-093099 Hon. Linda A. Akers (retired) **PETITION FOR REVIEW**

Pardon the Hypothetical Introduction

A chiropractor walks into the Arizona Department of Insurance. The Director, at the reception desk, looks up and says, "Hello." But the chiropractor does not answer, because a neon sign hanging over the reception desk has caught his eye. It says: "The director shall enforce the provisions of this title. A.R.S. § 20-142(A)." "What title?" he asks.

She replies, "Title 20. It deals with insurance. My job is to enforce all of its provisions," she says. "You must be busy," he says. "Not in the slightest," she

laughs, putting down her crossword puzzle. "I enforce what I want and no one can tell me differently. It does not matter if I have the time, money, expertise, and means to enforce a provision. It does not matter that there is no question that someone has violated one of Title 20's provisions and has presented me with proof of the violation. If I want to do nothing, I do nothing."

"But what about mandamus?" he asks. "I have proof that Blue Cross has violated A.R.S. § 20-461(B). That's the statute that forbids insurers from treating chiropractors differently than medical doctors." "I know the statute," the Director replies. "I know it's being violated. I told you that I have the time, resources, and money to enforce the statute. But I won't enforce it." "But you are the only person who *can* enforce it. A.R.S. § 20-461(D) says there's no private right or cause of action. If *you* don't enforce it—when you have the money, time, resources and expertise, and when it's your job—*no one* will enforce it. And insurers will violate the law at will." "Well, take it up with the courts," she says. "I have many other things to do." She looks past him into the otherwise vacant room. "Next!"

Why Grant Review

The Court should grant review because the sole realistic authority to force a recalcitrant state officer to do his or her job is judicial. This is one case, to be sure. But government cannot operate when its executive officers refuse to act when the law requires action. Mandamus is stilted and cranky. But it matters because the

"smooth functioning of government and society depends, to an ever increasing extent, upon prompt execution by officers, boards, commissions and other official agencies of duties given them by law."[1] When an executive officer choses inaction when action is needed and the time, expertise, and resources for action are present—mandamus is all there is. "The object of mandamus is not to supersede legal remedies, but rather to supply the want of them."[2] Mandamus, however, cannot work unless Arizona's courts make it work.

Certainly, executive officers have discretion to do nothing if resources and time are scarce and they must pick and choose among projects. But that is often not the case—and was not the case here. The Director had time, resources, and expertise to enforce the anti-chiropractor-discrimination statute and chose to do nothing. That conduct is an inherent abuse of discretion violating the law and the principles of balanced, responsive government. Petitioners ask this Court to grant review and consider whether substantive relief is warranted.

The Central Issue

Mandatory duty to act. A.R.S. § 20-142(A) requires ADOI's Director to "enforce" Arizona statutes regulating insurers. Blue Cross violated an anti-discrimination statute designed to protect chiropractors. Despite a demand and

[1] Herbert A. Black, II, *Mandamus in New England*, 37(4) B.U. L. Rev. 456 (Fall 1957).

[2] Ralph W. Muxlow, II, *Mandamus—An Expanded Concept*, 8(1) Washburn L.J. 71 (Fall 1968).

despite having resources and time to act, and despite any proof that the Director did not know how to enforce the statute, the Director refused to enforce the statute. Did the trial court and Court of Appeals erroneously refuse to order grant of a writ of mandamus requiring the Director to do her duty?

Procedural History and The Facts

On March 14, 2011, Plaintiffs filed their complaint.[3] The Director filed a Rule 12(b)(6) motion to dismiss for failure to state a claim.[4] The trial court held oral argument on July 21, 2011. In a ruling filed on July 27, 2011, the trial court granted the motion to dismiss, holding that A.R.S. § 20-142(A) "does not impose upon the Director a specific action or requirement to act."[5] Plaintiffs filed a timely notice of appeal on August 23, 2011.[6] The Court of Appeals filed an Opinion affirming the superior court on March 28, 2013. This timely petition followed.

Since the trial court granted a motion to dismiss, the complaint's facts are presumed true.[7] Not only that, the facts are viewed in the light most favorable to the pleader, with all reasonable inferences resolved in the pleader's favor.[8]

The parties: Thomas E. Blankenbaker, D.C., and Shawn Wherry, D.C. (the

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[3] *Ver. Statutory Special-Act. Compl.* (March 14, 2011) ("*Complaint*"), IR 1.
[4] *Defendant's Motion to Dismiss* (April 19, 2011), IR 5.
[5] *Ruling* at 2 (July 27, 2011), IR 11.
[6] *Notice of Appeal* (Aug. 23, 2011), IR 14.
[7] *Hogan v. Wash. Mut. Bank, N.A.*, 261 P.3d 445, 448 ¶ 12 (App. 2011).
[8] *McDonald v. City of Prescott*, 197 Ariz. 566, 567 ¶ 5, 5 P.3d 900, 901 ¶ 5 (App. 2000).

"Doctors") are licensed chiropractic physicians practicing in Maricopa County.[9] Emilia Indomenico ("Indomenico") also lives in Maricopa County, and has regularly received chiropractic treatments from the Doctors.[10]

The basic problem: The Doctors have many chiropractic patients with modest incomes who cannot take full advantage of chiropractic procedures because health-insurance companies, including Blue Cross Blue Shield of Arizona ("Blue Cross"), charge a higher co-payment for chiropractic procedures than the same health-insurance companies charge patients receiving medical or osteopathic procedures for *identical* physical ailments, injuries, and complaints.[11] Indomenico is one of the chiropractic patients harmed by the discriminatory co-payments.[12]

Demands for action: Indomenico, the Doctors, and other chiropractic physicians sent letters to the Director informing her that Blue Cross was imposing a higher co-payment on patients seeking chiropractic procedures than Blue Cross was imposing on patients seeking medical procedures for identical physical ailments, injuries, and complaints. They explained to the Director that Blue Cross was violating Arizona law, specifically, A.R.S. § 20-461(B). They demanded that the Director enforce A.R.S. § 20-461(B)'s anti-discrimination provisions against

[9] *Complaint* at ¶¶ 9-10, IR 1.
[10] *Complaint* at ¶¶ 11-12, IR 1.
[11] *Complaint* at ¶¶ 14-15, IR 1.
[12] *Complaint* at ¶¶ 16-17, IR 1.

Blue Cross.[13] But the Director refused to act.[14]

"Beneficially interested": Under A.R.S. § 12-2021, Indomenico and the Doctors were "beneficially interested" in having the Director enforce A.R.S. § 20-461(B)'s provisions against Blue Cross. Indomenico was "beneficially interested" because lower co-payments for chiropractic procedures through her Blue Cross plan would mean she could more easily afford the chiropractic procedures she wanted and needed. The Doctors were "beneficially interested" because lower co-payments for the chiropractic procedures means that Indomenico, and other present and future chiropractic patients, will procure more of the chiropractic procedures they offer.[15]

Discrimination by playing favorites: As of January 1, 2011, Blue Cross had contracted with American Specialty Health, Inc. ("American Specialty") to manage Blue Cross's chiropractic benefits.[16] Unlike other medical and osteopathic physicians, all out-of-network Blue Cross chiropractic physicians are only allowed to treat patients for five visits before the chiropractic physicians must get pre-authorization for more treatment visits. Blue Cross's in-network chiropractic physicians can work themselves up to looser limits, but still start out at five visits. On the other hand, out-of-network medical physicians and osteopathic physicians

[13] *Complaint* at ¶¶ 18-19, 23-25, IR 1.
[14] *Complaint* at ¶¶ 23, 26, IR 1.
[15] *Complaint* at ¶¶ 35-37, IR 1.
[16] *Complaint* at ¶ 42, IR 1.

are *not* required to get any pre-authorization to see their patients with the same conditions after the fifth visit, and are *not* required to start with a five-visit limit and then work up to looser in-network limits.[17]

Standing: The discrimination between different types of physicians violates A.R.S. § 20-461(B).[18] Under that law, the Director cannot play favorites. She cannot allow discrimination against chiropractic physicians and in favor of medical physicians and osteopathic physicians.[19] Directly affected by the discrimination, Plaintiffs had standing to seek mandamus to compel the Director to require Blue Cross and its agents to end the discrimination.[20]

Coverage discrimination. Through action the Director approved (directly or indirectly), the ADOI sanctioned Blue Cross's hiring of American Specialty to manage Blue Cross's chiropractic benefits.[21] The Director approved that despite the fact that American Specialty has a long, well-known history of limiting chiropractic-treatment programs to less than 12 visits per episode of care.[22] American Specialty had done that regardless of objective and subjective findings, with an estimated average range of 6.5 visits per episode of care and treatment.[23]

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[17] *Complaint* at ¶¶ 43-45, IR-1.
[18] *Complaint* at ¶ 46, IR-1.
[19] *Complaint* at ¶ 47, IR-1.
[20] *Complaint* at ¶ 48, IR-1.
[21] *Complaint* at ¶ 50, IR-1.
[22] *Complaint* at ¶ 51, IR-1.
[23] *Complaint* at ¶ 52, IR-1.

Chiropractic professional guidelines, however, almost universally recommend 25 visits as a reasonable dose for a chiropractic patient.[24] American Specialty only allowed two procedures per visit, although the standard is four procedures per visit.[25] American Specialty hampered, or effectively banned, chiropractors from ordering advanced imaging and other necessary diagnostic methods.[26]

The Director knew about the discrimination described in the complaint, or should have known about it, but did nothing substantive to end it, in violation of A.R.S. § 20-461(B).[27] The Petitioners had standing to seek mandamus to compel the Director to force Blue Cross and its agents to end the discrimination.[28]

Legal Argument

1. The Director has the duty to enforce the anti-discrimination statute.

A.R.S. § 20-142(A) orders that the Director "*shall enforce*" Title 20's provisions. "Shall" is a slippery word that can have as many as eight different meanings.[29] But Arizona courts ordinarily interpret "shall" to mean a provision is mandatory.[30] Thus, "shall" shows "a mandatory intent."[31]

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[24] *Complaint* at ¶ 53, IR-1.
[25] *Complaint* at ¶ 54, IR-1.
[26] *Complaint* at ¶ 55, IR-1.
[27] *Complaint* at ¶ 56, IR-1.
[28] *Complaint* at ¶ 57, IR-1.
[29] Bryan A. Garner, *Dictionary of Modern Legal Usage* 939 (2nd ed. 1995).
[30] *In re Maricopa County Superior Court No. MH 2003-000240*, 206 Ariz. 367, 369 ¶ 7, 78 P.3d 1088, 1090 ¶ 7 (App. 2003).
[31] *Matter of Appeal in Navajo County Juvenile Action No. JV-94000086*, 182

This Court has held that a "mandatory statute" must be "literally construed and strictly applied," especially for statutory provisions that are "designated to safeguard substantial rights."[32] A.R.S. § 20-142(A) is a mandatory statute meant to safeguard the substantial rights of Arizona citizens who seek reasonable health-insurance-covered access to chiropractic treatment—as Title 20 guarantees.

Specifically, Title 20's A.R.S. § 20-461(B) explains that insurers commit an unfair claim-settlement practice by failing to apply deductibles or co-payments to *all* types of physicians, "without discrimination to the usual and customary procedures of any type of physician." Under A.R.S. § 20-142(A), the Director must enforce all provisions of Title 20, including A.R.S. § 20-461(B). Indeed, the statutorily declared "*specific intent*" is to provide "an administrative remedy to the director for any violation of this section or rule related to this section."[33]

Despite the Legislature's "specific intent" to provide "an administrative remedy" to the Director for any violation of A.R.S. § 20-461(B), the Director did nothing. Despite A.R.S. § 20-142(A)'s mandate that the Director "*shall enforce* the provisions" of Title 20, the Director did nothing. The Director presented no proof that she was confused about *how* to enforce the anti-discrimination statute. Of course, since the Director was attacking the complaint through a motion to

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Ariz. 568, 570, 898 P.2d 517, 519 (App. 1995).

[32] *Biaett v. Phoenix Title & Trust Co.*, 70 Ariz. 164, 169, 217 P.2d 923, 926 (1950).

[33] A.R.S. § 20-461(D) (emphasis added).

dismiss, she had no right to present evidence. Nor did the trial court have any right to dismiss the complaint on the basis that the "law does not impose upon the Director a specific action or requirement to act."[34]

In fact, the law requires the Director to enforce the anti-discrimination statute through an administrative remedy. There is a "specific action" and there is a "requirement." If the Director's defense was that she did not know how to enforce the anti-discrimination statute, she had the burden of establishing that fact in a summary-judgment proceeding or in an evidentiary hearing or trial. The Legislature's "specific intent" was "to provide solely an administrative remedy to the director for any violation" of the anti-discrimination statute and other insurance statutes.[35]

All that was before the trial court was the question of whether the Director has any duty to act. Petitioners would have relished suing Blue Cross and its minions directly. But the Legislature expressly directed that "[n]othing" in A.R.S. § 20-461 "is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state."[36] Indeed, the "specific intent" of the statute was "to provide solely an administrative remedy to the director for any violation" of A.R.S. § 20-461 or of any rule related to it.

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[34] *Ruling* at 2 (July 27, 2011), IR-11.
[35] A.R.S. § 20-461(D).
[36] *Id*.

Because private parties cannot enforce the anti-discrimination directive of A.R.S. § 20-461(B), the Director alone has the duty to act. And the Director must act unless lacking the time or resources to act—or unless there has been no violation. Otherwise, no one will have the right and power to enforce the anti-discrimination provision, and Blue Cross and other unscrupulous insurers can do whatever they want to discriminate against chiropractors and their patients.

The fundamental point is simple: Doing nothing is not an option. After all, even when an official has discretion on *how* to perform an executive function, mandamus is available to require that official to act properly if the official abuses discretion. Since the insurance statutes require the Director to act, doing nothing is itself acting improperly—is itself an abuse of discretion. And mandamus is available to force action.[37]

2. This is not a question of a lack of resources or time to enforce the statute. This is also not a question of whether Blue Cross violated the anti-discrimination statute. The Director conceded that there are time and resources to support action and that the violations occurred.

At the July 21, 2011 hearing, the attorney representing the Director admitted that the Director was not making an argument that she could not enforce the anti-discrimination statute because of a lack of resources or because the Director was

[37] *See Arizona State Highway Comm'n v. Superior Court*, 81 Ariz. 74, 79, 299 P.2d 783, 786 (1956); *Yes on Proposition 200 v. Napolitano*, 215 Ariz. 458, 465 ¶ 12, 160 P.3d 1216, 1223 ¶ 12 (App. 2007).

"swamped with too much work."[38] Far from it.

Instead, the Director's lawyer represented the Director had "actually made a determination that Blue Cross Blue Shield is not in violation of [A.R.S. §] 20-461."[39] The Director's lawyer insisted that the Director was the "only person" who could determine if Blue Cross had violated the anti-discrimination statute and that the Plaintiffs were "asking this Court to second-guess" the Director's determination that there had been no violation.[40] The Director's attorney concluded: "The director has made a reasonable exercise of her discretion. She has reviewed the facts, and it is improper to use mandamus for this purpose. We should not be examining the merits of her determination."[41]

That she-has-made-a-determination-of-no-violation claim, however, was an improper argument. After all, the Director filed a motion to dismiss—*not* a motion for summary judgment. A Rule 12(b)(6) motion to dismiss *admits* the complaint's allegations.[42] The Director could not refute the complaint's facts in a motion to dismiss—much less at a motion-to-dismiss hearing. The complaint's detailed factual allegations established that Blue Cross had violated the anti-discrimination

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[38] *Transcript of Proceedings* at 14:16-21 (July 21, 2011), Appx. to Opening Brief.

[39] *Id*. at 14:21-22.

[40] *Id*. at 14:24-25.

[41] *Id*. at 15:3-6.

[42] *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989).

statute. For purposes of the motion to dismiss, the violation was indisputable.

Notably, the Director's lawyer never stated that the Director did not know *what* to do, or that she was exercising her discretion to choose one course of enforcement action in preference to another. Instead, the Director's lawyer simply argued that the Director was content to do nothing—despite having the time and resources to act—and despite her statutory duty to act.

In the end, the Director's lawyer argument was that, in the Director's opinion, she had no duty to act. As the Director's lawyer concluded: "But she has no duty. There's no requirement in the statutes, in the law, that she has to do anything here. There is nothing that requires her to take action even if they did violate [A.R.S. § 20-] 461."[43]

If true, that is wrong. It would be wrong for a key state official with the *sole* statutory right and power to enforce the anti-discrimination statute to refuse to act, even if Blue Cross has undeniably violated the anti-discrimination statute—which it did. If one of our major state executive officers is so heedless of her statutory duty, mandamus is required. Mandamus is the remedy because Petitioners have a right to relief, the Director has a "legal duty to do the thing" that the Plaintiffs seek to compel her to do, and "there is an absence of another adequate remedy."[44]

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[43] *Transcript of Proceedings* at 16:5-8 (July 21, 2011), Appendix to the Opening Brief.

[44] *Sines v. Holden*, 89 Ariz. 207, 209, 360 P.2d 218, 219 (1961).

3. The "political-question doctrine" plays no part in this case.

The motion to dismiss argued that the political-discretion doctrine meant that the Director need do nothing. The motion to dismiss suggested that A.R.S. § 20-142(A)'s requirement that the Director "shall enforce" the provisions of Title 20 is only a "traditional general duty" that the Legislature "imposes" on the Director.[45] But A.R.S. § 20-142(A)'s command that the Director "shall enforce" Title 20's statutes is more than mere a wish or a hope that the Director will, when she feels like it, enforce Title 20's statutes. It is a direct command.

The political-question doctrine might come into play if the Title 20 statutes gave any discretion to the Director on whether or not to act. But the Title 20 statutes offer no discretion for the Director to do nothing. The Director *must* act by an administrative remedy against Blue Cross and its agents. That is the combined impact of A.R.S. § 20-142(A) and A.R.S. § 20-461(D).

Even if the Director has discretion on whether or not to act, or on how to act, the Director has no right to abuse whatever discretion she has by acting arbitrarily, capriciously, or without conducting an adequate investigation into the facts to support making an intelligent decision. No state judicial officer can act that way and avoid condemnation for abuse of discretion. Arizona courts have regularly held that review of executive actions for arbitrary and capricious action rests on a

[45] *Motion to Dismiss* at 7:15-16 (April 19, 2011), IR 5.

search for "unreasoning action, without consideration and in disregard for facts and circumstances."[46] That description fits the Director's conduct which is based on unreasoning action, a lack of consideration, and a disregard for facts proving that Blue Cross deliberately violated the anti-discrimination statute.

Conclusion

The Director has a duty to enforce Arizona insurance statutes. The Director, however, refused to do that. The Director has the resources and time to institute an administrative remedy against Blue Cross for its violations of the law, but refuses to do anything, claiming she has no duty to do anything. The trial court and Court of Appeals incorrectly held the Director has discretion to do nothing. She does not. The Director has the duty to act.

Whenever an executive officer has acted arbitrarily by not acting at all when action is needed and where the means exist to act, as the Director has done here, mandamus is available to force action.[47] As Lord Mansfield wrote long ago, mandamus "was introduced to prevent disorder from a failure of justice" and "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."[48]

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[46] *Petras v. Arizona State Liquor Bd.*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).

[47] Ray Jay Davis, *Arizona Administrative Mandamus*, 9(1) Ariz. L. Rev. 1, 8 (Summer 1967).

[48] *Id*. at 25 (quoting *Rex v. Barker*, 97 Eng. Rep. 823 (K.B. 1762)).

Petitioners ask this Court to grant review and consider whether mandamus is available to require a state executive officer to do what the law says she must do.

DATED this 29th day of April, 2013.

KNAPP & ROBERTS, P.C.

/s/ David L. Abney, Esq.
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Attorney for Petitioners-Plaintiffs-Appellants

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 3,452 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

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