COURT OF APPEALS

DIVISION ONE

THOMAS BLANKENBAKER, D.C., an Arizona licensed chiropractic physician; SHAWN WHERRY, D.C., an Arizona licensed chiropractic physician; EMILIA INDOMNICO, an Arizona resident, Plaintiffs-Appellants, v. CHRISTINA URIAS, in her official capacity as Director of the Arizona Department of Insurance, Defendant-Appellant.	No. 1 CA-CV 11-0626 Maricopa County Superior Court No. CV2011-093099

ANSWERING BRIEF

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INTRODUCTION

Thomas E. Blankenbaker, D.C., Shawn Wherry, D.C., and Emilia Indomenico ("Appellants") seek mandamus relief asserting that A.R.S. § 20-142(A) imposes a mandatory duty on the Director of the Department of Insurance ("Director") to enforce the provisions of A.R.S. § 20-461(B) in a particular manner against Blue Cross Blue Shield of Arizona ("Blue Cross"). Mandamus is an extraordinary remedy. For this reason, settled legal precedent prohibits the use of mandamus to compel an official to perform an act unless the law specifically imposes that act as a mandatory duty to act under a clearly defined set of circumstances. If the actions of a public official are discretionary, mandamus may not control, challenge, or constrain that discretion.

Appellants' request for an order of mandamus requiring the Director to enforce A.R.S. § 20-461(B) against Blue Cross does not meet the basic requirements for mandamus relief. First, assuming (as Appellants do) that Blue Cross violated A.R.S. § 20-461(B), the Arizona statutes do not impose a mandatory duty upon the Director to take an action or respond in a particular manner under the circumstances presented in this case. Second, even if the Director had a mandatory statutory requirement to take an enforcement action every time an entity violated A.R.S. § 20-461(B), the Director first would have to investigate and determine whether Blue Cross actually violated A.R.S. § 20-

461(B). It is improper for Appellants to claim that the Director refused to correct a violation of law when they cannot point to any order or legal determination by the Director setting forth this legal conclusion. Third, even if the Director determined that Blue Cross violated A.R.S. § 20-461(B), A.R.S. § 20-461(B) does not prescribe a specific, requisite action for the Director to take. Finally, it is improper to use mandamus to examine the merits of the Director's discretionary enforcement and application of A.R.S. § 20-461(B).

Because mandamus cannot be used to require that an official's discretion be exercised in a particular manner, this Court should affirm the trial court's dismissal.

STATEMENT OF THE CASE

This case is an appeal from the dismissal of a mandamus action. On July 27, 2011, the Superior Court of Maricopa County issued a Ruling ordering this case dismissed for failure to state a claim. (Index of Record ["IR"] 11.) This Court has jurisdiction over this matter pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(B).

Appellants initiated this action by filing a Verified Statutory Special-Action Complaint against the Director. (IR 2.) Appellants seek issuance of a writ of mandamus, pursuant to A.R.S. § 20-142(A), ordering the Director to enforce the provisions of A.R.S. § 20-461(B) against Blue Cross (IR 2 at ¶¶ 29, 30, 39.)

Specifically, Appellants allege that Blue Cross is committing unfair claim settlement practices and that the Director has refused to take any steps to stop these alleged unfair claim-settlement practices. (IR 2 at ¶¶ 26, 31.) Appellants claim that "the Director has a legal duty to perform a ministerial act, having no discretion in the manner of its performance." (IR 2 at ¶ 40.)

The Director moved to dismiss the Complaint for failure to state a claim under Rule 12(b)(6) of the Arizona Rules of Civil Procedure. (IR 5.) Appellants responded (IR 7), and the Director replied (IR 8). On July 27, 2011, the trial court filed a signed ruling, dated July 22, 2011, granting the Director's Motion to Dismiss. (IR 11.) The trial court concluded that mandamus is not available under the circumstances presented by Appellants because the Director "has discretion to enforce the insurance laws of this state . . . [and t]he law does not impose upon the Director a specific action or requirement to act." (IR 11 at ¶ 2.) Appellants timely filed a Notice of Appeal on August 23, 2011. (IR 14.)

STATEMENT OF FACTS

The "Factual Background" section of Appellants' Opening Brief sets forth various facts alleged in the Complaint, but it also includes several conclusions of law and unwarranted deductions of fact. (Opening Brief ["OB"] 5-13.) For purposes of this Court's review, the Director does not challenge the truth of the Complaint's material allegations; however, the Director does not concede the truth

of Appellants' conclusions of law and unwarranted deductions of fact. Contrary to Appellants' assertions that "[t]hese, then, are the unchallenged facts, as set out in the complaint" (OB 5), the Director challenges and disputes numerous assertions contained in Appellants' "Factual Background" section.

For example, Appellants' "Factual Background" section repeatedly asserts legal conclusions that Blue Cross has discriminated against Appellants in violation of A.R.S. § 20-461(B). (OB 6-13.) Appellants declare as a *fact* the legal conclusion that they are "[d]irectly affected by the discrimination [and] . . . had standing to ask the trial court for a writ of mandamus to compel the Director to require Blue Cross . . . to end the discrimination." (OB 8-9.) They make similar legal conclusions in their "Factual Background" section regarding each of their allegations. (OB 9-13.)

Appellants simply proclaim their own legal conclusion—that Blue Cross violated A.R.S. § 20-461(B)—as though it were an undisputed fact. (OB 7.) Nevertheless, nothing in either Appellants' Complaint or the record indicates that the Director made this legal conclusion. The Director actually determined that Blue Cross did *not* discriminate in violation of A.R.S. § 20-461(B) against Appellants. (IR 5 at ¶8.) The Court should disregard Appellants' legal conclusions disguised as facts.

ISSUE PRESENTED FOR REVIEW

1) Does the broad, general mandate set forth in A.R.S. § 20-142(A) that "[t]he director shall enforce the provisions of this title" give Appellants the right to obtain mandamus relief ordering the Director to enforce, in a particular manner, each of the thousands of statutes contained in Title 20, including A.R.S. § 20-461(B)?

2) Is Appellants' mandamus action, which requests the Court to order the Director to perform an act that she has sole authority to perform, barred by the political question doctrine?

ARGUMENT

I. The Trial Court Properly Dismissed This Case Because Mandamus Is Not Available to Compel the Director to Enforce A.R.S. § 20-461(B) in a Particular Manner.

A. Standard of Review

The Court reviews de novo an order dismissing a complaint for failure to state a claim. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391, ¶ 18, 121 P.3d 1256, 1261 (App. 2005). For this reason, the Director disagrees with Appellants' position that this Court should use an "abuse-of discretion" standard. (OB 4.) Appellants cite *Garcia v. City of South Tucson*, 135 Ariz. 604, 606, 663 P.2d 596, 598 (App. 1983) to support their position; however, the *Garcia* standard applies to appeals relating to a trial court's decision to grant or deny mandamus rather than to appeals involving motions to dismiss. Because this appeal involves a question of

law (whether a legal duty exists), the proper standard of review is de novo. *See McDonald v. City of Prescott*, 197 Ariz. 566, 567, ¶ 5, 5 P.3d 900, 901 (App. 2000).

In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, this Court accepts the Complaint's allegations as true and resolves all inferences in Appellants' favor. *Sw. Paint & Varnish Co. v. Ariz. Dep't of Env'l Quality*, 191 Ariz. 40, 41, 951 P.2d 1232, 1233 (App. 1997), *aff'd in part*, 194 Ariz. 22, 976 P.2d 872 (1999). For purposes of this review, "well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." *Sensing v. Harris*, 217 Ariz. 261, 264, ¶ 2, 172 P.3d 856, 859 (App. 2007) (internal citations omitted). The Court may affirm the dismissal on any basis supported by the record. *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147, 152 n.10, 91 P.3d 990, 995 n.10 (2004).

B. Appellants Are Not Entitled to Mandamus Relief Because No Specific, Mandatory Statute Exists Requiring the Director to Enforce A.R.S. § 20-461(B) in a Particular Manner.

Appellants' Complaint fails at a basic level because they seek mandamus to order the Director to perform an act that the law never specifically requires the Director to perform. Appellants cannot cite to any legal directive or express provision of law specifically mandating that the Director must enforce A.R.S. § 20-

461(B) under any particular circumstance against any particular person or entity, including Blue Cross. The only mandatory language Appellants can cite to is the broad, general mandate in A.R.S. § 20-142(A) that "[t]he director shall enforce the provisions of this title." Because no clearly defined statutory directive exists mandating that the Director act under any specific circumstances to enforce A.R.S. § 20-461(B) against Blue Cross, Appellants have no right to demand the relief they request from this Court.

The writ of mandamus is an "extraordinary and expeditious legal remedy which proceeds in every case upon the assumption that the applicant has an immediate and complete legal right to the thing demanded." *Campbell v. Hunt*, 18 Ariz. 442, 448, 162 P. 882, 884 (1917). A court may issue mandamus relief to compel an official to perform an act that the law specifically imposes as a "mandatory duty to act under a clearly defined set of circumstances." *Sensing*, 217 Ariz. at 264, ¶ 8, 172 P.3d at 859; *see also* A.R.S. § 12-2021. A mandamus action is "designed to compel performance of an act the law requires[; therefore,] the general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus." *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11, 961 P.2d 1013, 1016 (1998) (internal citations omitted) (refusing to compel mandamus "if the public officer is not specifically required by law to perform the act").

Mandamus may compel an official to perform a ministerial duty or compel the official to act in a matter involving discretion, "it may not designate how that discretion shall be exercised." *Kahn v. Thompson*, 185 Ariz. 408, 411, 916 P.2d 1124, 1127 (App. 1995). "Ministerial duties are those that permit a public officer only one course of action on an admitted state of facts." *Id.* Mandamus is not "available to compel a public official to perform acts not authorized or required by some plain provision of the law." *Id.*

In situations "when an official has discretion about how to perform a function, mandamus is available 'to require him to act properly,' only if the official abuses that discretion." *Sensing*, 217 Ariz. at 263, ¶ 6, 172 P.3d at 858 (internal citations omitted). Mandamus may not be used to require that an official's discretion be exercised in a particular manner. *Id.* at 264, ¶ 6, 172 P.3d at 859.

1. The Legislature did not intend A.R.S. § 20-461(B) to be a mandatory statute and the general legal directive in A.R.S. § 20-142(A) does not require the Director to exercise her discretion to enforce A.R.S. § 20-461(B).

Appellants maintain that, between A.R.S. §§ 20-142(A) and -461(B), the Director has no discretion in her enforcement of A.R.S. § 20-461(B) against Blue Cross. (OB 17.) They assert that the word "shall" in A.R.S. § 20-142(A) creates a specific, mandatory duty for the Director to enforce all of Title 20, including A.R.S. § 20-461(B), against Blue Cross. (OB 14.) If the Legislature intended to create a mandatory provision for the enforcement of A.R.S. § 20-461(B), it would

have done so. Instead, the Legislature selectively established that only specific provisions of Title 20 would contain mandatory provisions.

"It is a well-established principle of statutory construction that we will not read into a statute something which is not within the express manifest intention of the Legislature as gathered from the statute itself . . . ." *Ariz. Farm Bureau Fed'n v. Brewer*, 226 Ariz. 16, ¶ 17, 243 P.3d 619, 624 (App. 2010) (internal citations and quotation marks omitted). "Where the legislature has used a particular term in one place in a statute and has excluded it in another place in the same statute, a court should not read that term into the provision from which the legislature has chosen to omit it." *Ariz. Dep't of Revenue v. General Motors Acceptance Corp.*, 188 Ariz. 441, 445, 937 P.2d 363, 367 (App. 1996); *see also Luchanski v. Congrove*, 193 Ariz. 176, 179, ¶ 14, 971 P.2d 636, 639 (App. 1998) (applying the statutory interpretive maxim of *expressio unius est exclusio alterius*).

The wording of A.R.S. § 20-461(B) does not require the Director to perform a ministerial act. In fact, A.R.S. § 20-461(B) contains no specifically defined directives, acts, or circumstances that define what would constitute discrimination in violation of the statute. Section 20-461(B) states:

> Nothing in subsection A, paragraph 17 of this section shall be construed to prohibit the application of deductibles, coinsurance, preferred provider organization requirements, cost containment measures or quality assurance measures if they are equally applied to all types of physicians referred to in this section, and if any

> limitation or condition placed upon payment to or upon services, diagnosis or treatment by any physician covered by this section is equally applied to all physicians referred to in subsection A, paragraph 16[1] of this section, without discrimination to the usual and customary procedures of any type of physician. A determination under this section of discrimination to the usual and customary procedures of any type of physician shall not be based on whether an insurer applies medical necessity review to a particular type of service or treatment.

Consequently, in order to enforce A.R.S. § 20-461(B), the Director must analyze relevant facts and use her discretion and judgment to determine whether or not particular facts constitute "discrimination" in violation of this statute. Even if the Director determines that a particular set of facts constitute discrimination, she must exercise additional discretion and consider whether, under the particular circumstances, it is possible or prudent to take an enforcement action. If the Director decides to take an enforcement action, she must then exercise more discretion and determine what type of enforcement action is appropriate under the circumstances.

Similarly, A.R.S. § 20-461(D) indicates that the Director must exercise discretion in enforcing A.R.S. § 20-461(B):

> Nothing contained in this section 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.

[1] Statute should probably read "paragraph 17."

> It is, however, the specific intent of this section to provide solely an administrative remedy to the director for any violation of this section or rule related to this section.

Clearly, the plain language of A.R.S. § 20-461(D) creates no specific obligation for the Director to perform any definite acts. Instead, it enables the Director to retain her discretion to choose what, if any, enforcement actions she will take and unambiguously establishes that *only* the Director has the authority to establish whether it is appropriate to enforce A.R.S. § 20-461(B) through an administrative action.[2]

In contrast to the discretionary duties in subsections 20-461(B) and (D), the Legislature created a mandatory provision for the Director in A.R.S. § 20-461(E): "The director shall deposit . . . all civil penalties collected pursuant to this article in the state general fund." Because A.R.S. § 20-461(B) contains no similar mandatory provisions, the Legislature clearly did not intend for it to be a mandatory statutory provision.

Mandamus is only appropriate if the Director is "specifically required by law to perform the requested act." *Sensing*, 217 Ariz. at 265, ¶ 12, 172 P.3d at 860; *see*

[2] Appellants argue that A.R.S. § 20-461(B) requires the Director to act "through an administrative remedy." (OB 16-17, 22.) But an administrative remedy is not a specific remedy. An "administrative remedy" is simply "[a] non-judicial remedy provided by an administrative agency." *Black's Law Dictionary* (9th ed. 2009). A "judicial remedy" is "[a] remedy granted by a court." *Id.* Contrary to Appellants' contentions, an "administrative remedy" is a general remedy that allows the Director to choose from several different courses of action.

Sears, 192 Ariz. at 68, ¶ 11, 961 P.2d at 1016 ("Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty."). Because the Legislature did not mandate that the Director bring an action to enforce A.R.S. § 20-461(B), a mandamus action enforcing her to bring such an action is not permitted.

Appellants' arguments regarding A.R.S. § 20-142(A) are virtually indistinguishable from the arguments presented in the mandamus case this Court rejected in *Sensing*. In *Sensing*, the appellants also based their request for mandamus on a general legal directive contained in Phoenix City Code ("Code") § 2-119(a), stating that the Chief of Police "shall be responsible for the enforcement of State laws and City ordinances." 217 Ariz. at 263, ¶ 4, 172 P.3d at 858; *cf.* A.R.S. § 20-142(A) (stating that "[t]he director shall enforce the provisions of this title"). The Court evaluated the general language of the ordinance and determined that the use of the term "shall" in a general legal directive does not impose "a mandatory duty to act under a clearly defined set of circumstances." *Id.* at 264, ¶ 8, 172 P.3d at 859. The Court concluded that the use of the word "shall" in the Code gave the Chief of Police a general duty to enforce the ordinance, "but leaves him with discretion to choose what, if any, enforcement actions will be taken." *Id.*

Similar to the use of the term "shall" in *Sensing*, the use of the term "shall" in A.R.S. § 20-142(A) does not affect the Director's discretion to choose what, if any, enforcement actions should be taken. As in *Sensing*, A.R.S. § 20-142(A)'s use of the term "shall" provides a general, discretionary enforcement duty for the Director to enforce Title 20, which cannot be compelled by mandamus. Mandamus cannot be used to override the Director's discretion to compel her to enforce A.R.S. § 20-461(B) against Blue Cross solely on the basis of the general legal directive in A.R.S. § 20-142(A).

2. A.R.S. § 20-461(B) does not prescribe a ministerial act, the Director has the right and duty to exercise her discretion in enforcing it.

Appellants' Complaint alleges that "the Director has a legal duty to perform a ministerial act, having no discretion in the manner of its performance." (IR 2 at ¶ 6.) It is impossible for the Director to enforce A.R.S. § 20-461(B) without exercising some discretion; therefore, A.R.S. § 20-461(B) does not require a ministerial act. The Arizona Supreme Court has defined the general distinction between ministerial and judicial acts: "where the duty to be performed is described by law with such certainty that nothing is left to the exercise of discretion or judgment, the act is ministerial, but, where it requires discretion or judgment to determine whether the duty to act exists or not, it is judicial." *Bryant v. Bryant*, 40

Ariz. 519, 521, 14 P.2d 712, 713 (1932). The courts generally consider the distinguishing test to be the necessity of the exercise of judgment or discretion. *Id.*

Appellants cite to *Biaett v. Phoenix Title & Trust Co.*, 70 Ariz. 164, 168, 217 P.2d 923, 926 (1950) to support their assertion that A.R.S. § 20-142(A) must be "literally construed and strictly applied" because it is "a mandatory statute meant to safeguard the substantial rights of Arizona citizens who seek reasonable health-insurance-covered access to chiropractic treatment." (OB 13-14.) The *Biaett* court found that the rules regarding proper service of a pleading were intended to safeguard specific, substantial rights. *Biaett*, 70 Ariz. at 168, 217 P.2d at 926. Unlike the specific rules relating to service of process, the provisions of A.R.S. § 20-142(A) provide a general duty for the Director to enforce all provisions of Title 20. There are 1,378 statutes in Title 20. It defies logic to argue that every single statute, section, and subsection contained in Title 20 is intended to safeguard "substantial rights," or that the Director must enforce each in a manner satisfactory to Appellants.

In contrast, using the test set forth in *Bryant*, the service of a summons is a ministerial act because it is not judicial in its nature. 40 Ariz. at 521, 14 P.2d at 713. That is, the law plainly describes the duty to be performed by an officer during service of a summons and the officer is given no discretion as to his right or duty to perform it. *Id.*

If the Director is not specifically required to perform a duty or has any discretion as to what should be done, Appellants may not employ a writ of mandamus. *Graham v. Moore*, 56 Ariz. 106, 109, 105 P.2d 962, 964 (1940). Because it is impossible for the Director to enforce A.R.S. § 20-461(B) without using discretion, A.R.S. § 20-461(B) is not a ministerial statute subject to mandamus for its performance.

3. Law enforcement and regulatory activities are generally considered discretionary and inappropriate for mandamus relief.

Even where a law contains mandatory language, law enforcement and regulatory activities are generally considered discretionary and inappropriate for mandamus relief. *Sensing*, 217 Ariz. at 263, ¶ 7, 172 P.3d at 858 (citing *Ackerman v. Houston*, 45 Ariz. 293, 296, 43 P.2d 194, 195 (1935)) (declining to order county attorney to file a complaint for perjury); *People v. District Court*, 632 P.2d 1022, 1024 (Colo. 1981) (noting that the discretion of the district attorney "extends to the power to investigate and to determine who shall be prosecuted and what crimes shall be charged"). In addition, the United States Supreme Court rejected the argument that mandatory language in a state law affords the police no discretion. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61, 125 S. Ct. 2796, 2805-06 (2005) (explaining that mandatory statutes cannot be interpreted literally for a number of reasons, including their legislative history, insufficient resources,

and sheer physical impossibility). In another case, the Supreme Court noted that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Chicago v. Morales*, 527 U.S. 41, 62 n.32, 119 S. Ct. 1849, 1862 n.32 (1999).

Likewise, Arizona courts have determined that state regulatory agencies' enforcement of laws should be considered discretionary and are not appropriate for mandamus relief. *See Wesley v. State*, 117 Ariz. 261, 263, 571 P.2d 1057, 1059 (App. 1977) (finding that "the enforcement of liquor laws and regulations is not unlike law enforcement generally and is thus not subject to mandamus by a court for its performance"). The Director is entitled to use her discretion to decide whether a particular action constitutes a violation of Title 20 and whether such violation warrants an enforcement action given all of the circumstances relating to the case. Some circumstances the Director may consider include, but are not limited to, the availability of limited resources and personnel, strength of the evidence, and clarity of the applicable laws. The Director cannot enforce A.R.S. § 20-142(A) without using her discretion.

4. The Director did not abuse her discretion in failing to bring an enforcement action against Blue Cross.

Appellants argue that "doing nothing is itself acting improperly—is itself an abuse of discretion." (OB 19.) Appellants cite no case law supporting the proposition that the Director's decision not to enforce a statute constitutes an abuse

of discretion warranting mandamus. Indeed, this argument is inconsistent with *Sensing*. 217 Ariz. at 265, ¶ 14, 172 P.3d at 860 (stating that it is not an abuse of discretion for mandamus purposes merely because law enforcement officers do not enforce a law or ordinance). The Director's decision not to implement an administrative action is a discretionary decision, which the Legislature entrusted to the Director.

Appellants also urge that, even if the Director has discretion on whether or how to act, the Director's failure to conduct "an adequate investigation" into Appellants' allegations constitutes an abuse of discretion. (OB 23.) Appellants support this position by citing to various cases reviewing judicial and administrative enforcement actions. (OB 23.) Cases cited by Appellants, such as *Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, ¶ 3, 452, 631 P2d 1107, 1110 (App. 1981), are inapplicable since the Director has not taken an administrative enforcement action in the present case that could be considered an "unreasoning action, without consideration and in disregard for facts or circumstances."

If the Director decided not to investigate a complaint, her decision would not constitute an abuse of discretion warranting mandamus. There is no mandatory statutory duty for the Director to investigate Appellants' allegations. In fact, according to A.R.S. § 20-142(C), the "director *may* conduct examinations and investigations of insurance matters . . . as the director deems proper." (emphasis

added). The Director's decision to investigate an insurance matter is entirely discretionary and therefore not subject to mandamus relief.

C. Appellants' Arguments That Blue Cross Violated A.R.S. § 20-461(B) Should Be Disregarded As Unwarranted Deductions of Fact and Conclusions of Law Intended to Usurp the Director's Discretion.

Appellants' entire case hinges on their own unwarranted deductions of fact and legal conclusions that Blue Cross violated A.R.S. § 20-461(B). Appellants argue as though it is a foregone conclusion—that it is "undisputed" that Blue Cross committed violations of A.R.S. § 20-461(B). (OB 14.) Appellants are even so bold as to state that the "Director has conceded . . . that the violations occurred." (OB 19.) This simply is not the case. Appellants justify these patently false statements by declaring that "the complaint's detailed factual allegations established that Blue Cross violated the anti-discrimination statute"; therefore, "[f]or purposes of the motion to dismiss the violation was indisputable." (OB 21.) Essentially, Appellants argue that, for purposes of a motion to dismiss, this Court should accept both Appellants' factual and legal allegations as admitted by the Director. The Director does not concede the truth of any unwarranted factual allegations or conclusions of law.

The "Factual Background" section of Appellants' Opening Brief declares as "unchallenged facts" several conclusions of law and unwarranted deductions of fact. (OB 5.) Appellants repeatedly allege *as facts* the legal conclusions that Blue

Cross employed "discriminatory co-payments," "discriminatory practices," "coverage discrimination," and "discriminatory designations," in violation of A.R.S. § 20-461(B). (OB 6-13.) Appellants go so far as to assert that it is an *unchallenged fact* that the "[t]he Director knew about the coverage 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)." (OB 5, 10.) Statements such as these, which litter Appellants "Factual Background," are clear examples of conclusions of law and unwarranted deductions of fact that this Court should set aside when considering the appropriateness of the Director's motion to dismiss. *See Folk v. City of Phoenix*, 27 Ariz. App. 146, 150, 551 P.2d 595, 599 (App. 1976) (setting aside conclusions of law and unwarranted deductions of fact while testing a motion to dismiss).

Appellants' arguments that the Director "did nothing," despite the undisputed violations, and that the "Director had a duty to end the discrimination" also rely upon unwarranted deductions of fact and conclusions of law. (OB 12-16.) These arguments are based upon an assumption that it has already been established that the Director made a finding of discrimination.[3] Appellants' assertions simply

[3] Nothing in Appellants' Complaint indicates that the Director has issued a legal finding that Blue Cross is discriminating in violation of A.R.S. § 20-461(B). So long as the Director has not found that Blue Cross violated A.R.S. § 20-461(B), she is precluded by law from taking an enforcement action against Blue Cross. In fact, if the Director simply issued an administrative order without reviewing

exclude the possibility that the Director could have concluded that Blue Cross did not violate A.R.S. § 20-461(B). Aside from the fact that these statements assume Appellants' unproven allegations that the alleged discrimination actually exists, these arguments also assume that the Director has a mandatory duty to take action whenever Appellants believe that an entity has violated any part of Title 20. Appellants' unwarranted deductions of fact and conclusions of law should be set aside.

II. The Director's Discretion to Enforce A.R.S. § 20-461(B) Is a Political Question That Is Inappropriate for Judicial Review.

A. Standard of Review

Whether a dispute involves a political question should be reviewed de novo. *Arakaki v. Lingle*, 477 F.3d 1048, 1056 (9th Cir. 2007).

B. The Court Cannot Tell the Director How to Exercise Her Discretionary Enforcement Authority Without Intruding on Her Executive Authority.

This writ of mandamus is inappropriate because Appellants request that the judiciary intervene on their behalf to control the actions of an agency that is part of the executive branch of the government. Because the Director's enforcement of A.R.S. § 20-461(B) against Blue Cross is discretionary, the issue of enforcing the

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evidence and making the legal determination that Blue Cross violated the law, her administrative order could be overturned as being illegal, arbitrary, capricious, or involving an abuse of discretion. *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994).

statute is a political question that is not appropriate for judicial resolution. "'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of the government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards. *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (2006).

In *Sensing*, 217 Ariz. at 265, ¶ 9, 172 P.3d at 860, this Court held that requesting it to order the police chief to exercise his authority to enforce a particular ordinance involved a political question that was inappropriate for judicial resolution. The Court will not substitute its subjective judgment for that of an executive as to how the executive should perform his discretionary responsibilities. *See id.* ("'[A]t best, we would be substituting our subjective judgment of what is reasonable under all the circumstances for that of . . . the very branches of government to which our Constitution entrusts this decision.'") (quoting *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 194, ¶ 21, 165 P.3d 168, 172 (2007)); *see also Galuska v. Kornwolf*, 142 Wis.2d 733, 741, 419 N.W.2d 307, 311 (App. 1987) ("Were we to hold that mandamus lies to compel a sheriff to exercise this traditional and general duty, we then run the serious risk of undertaking the task of constant or recurring supervision over daily activities of the police.").

If the Court were to order mandamus in cases such as the one at hand, the Court could easily find itself undertaking the task of constantly supervising the daily activities of the Director or other officials in the executive branch of the government. Appellants' proper remedy, if any, would be to seek legislative changes regarding the application and enforcement of the unfair claim settlement practices statute they allege Blue Cross is violating.

CONCLUSION

Based upon the foregoing, this Court should affirm the trial court's decision to dismiss this case.

Respectfully submitted this 26th day of January, 2012.

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