ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Plaintiff/Appellant, v. ARIZONA BOARD OF REGENTS Defendant/Appellee.	Case No.: 1 CA-CV 18-0420 Maricopa County Superior Court Case No.: CV2017-012115

STATE'S OPENING BRIEF

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INTRODUCTION

This appeal arises out of the actions of the Arizona Board of Regents ("ABOR") in setting, collecting, and disbursing public tuition monies, but it also raises fundamental issues about protecting the rule of law and ensuring public officials follow constitutional and statutory commands. The trial court erred in dismissing the Attorney General's First Amended Complaint ("FAC") for lack of jurisdiction, thereby preventing judicial review of ABOR's tuition-related actions. That dismissal should be vacated, and this case remanded for further proceedings.

For the past fifteen years, ABOR raised tuition and mandatory fees for in-state undergraduates as though it were entirely unconstrained by law. Notwithstanding the Constitution's requirement that "the instruction furnished [at Arizona's public universities] shall be as nearly free as possible," Ariz. Const. art. XI, § 6, ABOR's official policy did not even include as a criterion—let alone give primary weight to—the actual cost of instruction when setting tuition. Rather, ABOR looked at other factors, such as students' ability to pay by taking on debt. Using these factors, ABOR increased tuition in lock-step across each of the three universities ***by over 300%***, far in excess of the funding cuts from the Legislature. ABOR also imposed mandatory fees unrelated to instruction and charged higher rates to part-time and online students.

After improperly raising the cost of attendance, ABOR then claimed "unaffordability" as the basis for ignoring yet another law, Proposition 300, which bars classification as an in-state student for students lacking lawful immigration status. *See* A.R.S. § 15-1803. ABOR defied Proposition 300 by classifying certain ineligible students as in-state, and continued this defiance even after this Court's unanimous decision in *State ex rel. Brnovich v. MCCCD*, 242 Ariz. 325 (App. 2017), which was subsequently unanimously affirmed, 243 Ariz. 539 (2018).

This appeal can be resolved on the straightforward ground that § 35-212 authorized the FAC. The Attorney General has "broad power to challenge the expenditure of public funds" under § 35-212, and "'the Attorney General's discretionary power … necessarily includes the authority to press any ethically permissible argument he deems appropriate to aid him in preventing [or recovering] the allegedly illegal payment of public monies[.]'" *State ex rel. Woods v. Block*, 189 Ariz. 269, 274 (1997) (quoting *Fund Manager v. Corbin*, 161 Ariz. 348, 353 (App. 1988)). Count VI of the FAC alleges that ABOR was expending public money contrary to Proposition 300. And because the Attorney General properly brought this Count under § 35-212, he had authority to press the factually related Counts I-V, which also relate to tuition and fees. *See id.* at 273 (Attorney General's standing need only "be linked to some statutory basis").

Additionally, § 41-193(A)(1)-(2) provides an alternative basis for bringing Counts I-VI, and the contrary reading in *Arizona State Land Department v. McFate*, 87 Ariz. 139 (1960), should be revisited and overturned.[1] The *McFate* Court's analysis of § 41-193(A)(2) was incorrect. In 1956, just three years after a critical rewrite of the statutory grant of authority to the Attorney General, the Arizona Supreme Court recognized that as "the 'chief legal officer' of the State," the Attorney General "may, like the Governor, go to the courts for protection of the rights of the people." *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956) (citation omitted). The Legislature thus intended what is now § 41-193(A)(1)-(3) to confer that power on the Attorney General vis-à-vis state and federal court.

That legislative authorization is consistent with the rule adopted by the vast majority of other states, and it serves only to promote the rule of law because "it will be the courts alone who in all such cases make the final decisions and not the Attorney General." *Id.* Put simply, *McFate* incorrectly interpreted § 41-193(A)(1)-(2), contravening the statute's plain language and prior Supreme Court precedent. And stare decisis provides no basis for declining to revisit *McFate*'s incorrect analysis.

[1] This argument, as well as the separate argument in favor of overruling *Kromko*, are included because the Attorney General intends to put these points to the Arizona Supreme Court, including by filing a petition to transfer pursuant to ARCAP 19.

Finally, the Superior Court's dismissal as to Counts I-V should not be affirmed on alternate grounds. First, the claims in this case do not present non-justiciable political questions. The sole case ABOR relies on involved a very specific claim—that a particular dollar-level of tuition was too high and therefore not "as nearly free as possible." *Kromko v. Bd. of Regents*, 216 Ariz. 190, 192 ¶¶9-10 (2007). The claims in Counts I-V materially differ from this because they involve procedural claims or bright-line statutory rules. And even if *Kromko* did apply, it should be overruled. Second, ABOR's claim of legislative immunity fails; even if the tuition-setting process is legislative, ABOR still may be sued in its administrative/executive capacity as the agency implementing that legislation. The Court should therefore vacate and remand for further proceedings.

STATEMENT OF THE CASE

Plaintiff/Appellant State of Arizona *ex rel.* Mark Brnovich, Attorney General ("Attorney General") sued Defendant/Appellee ABOR to enjoin and recover the illegal payment of public monies pursuant to A.R.S. § 35-212. The Attorney General's suit consisted of six counts. *See* R. 16 at 13-19 ¶¶53-97; R. 1 at 13-19 ¶¶54-98. Counts I through V alleged that, in various ways, ABOR had violated the requirement of Article XI, § 6 of the Arizona Constitution that "the instruction furnished [at Arizona's public universities] shall be as nearly free as

possible," as well as statutory provisions in A.R.S. Title 15. R. 16 at 13-18 ¶¶53-91. Count VI alleged that in charging below-cost, in-state tuition to ineligible students under Proposition 300 (thereby paying a subsidy for the education for such students), ABOR had made illegal payments of public monies. *Id.* at 18-19 ¶¶92-97. Furthermore, the Attorney General noted the factually "intertwined" nature of these claims, such that the unlawful subsidy being challenged in Count VI is linked to the underlying tuition and fee-setting policies used by ABOR (and challenged in Counts I-V). R. 16 at 3-4; R. 41(Tr. 3/2/2018) at 20:1-7.

ABOR filed three separate motions to dismiss, each contending the trial court lacked jurisdiction on a distinct ground. *See* R. 13-14 ("MTD 1"); R. 12 ("MTD 2"); R. 10-11 ("MTD 3"). With its response, the Attorney General filed the FAC, which seeks recovery of illegally spent public monies in addition to the purely prospective relief sought in the original complaint. R. 16 at 20 ¶3. He also served written discovery on ABOR, but at ABOR's request the Court stayed discovery pending resolution of the motions to dismiss. *See* R. 25 ("ME: Oral Argument Set"); 02/07/2018 Tr. at 6.

After hearing oral argument on the motions to dismiss and taking the matter under advisement, the trial court granted MTD 1, which challenged the Attorney General's authority to bring any of the claims in the case and was premised on the

foundational assumption that ABOR makes no payment of monies in connection with the tuition setting, collecting, and disbursement process. R. 30, 34. The Court entered a dismissal with prejudice, overruling Plaintiff's objection that rather than "with prejudice," the judgment should be "without leave to amend." R. 36, 38. The Attorney General timely appealed from entry of final judgment. *See* R. 38-39. This Court has jurisdiction. A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

STATEMENT OF FACTS

I. ABOR Is Responsible For Tuition-Setting And Expending Appropriated Funds For Arizona's Public Universities

State law grants ABOR the power to "[f]ix tuitions and fees to be charged" at state universities and "differentiate the tuitions and fees" based on certain criteria, i.e. "between institutions[,] residents, nonresidents, undergraduate students, graduate students, students from foreign countries and students who have earned credit hours in excess of the credit hour threshold." A.R.S. § 15-1626(A)(5). After fixing tuition and fees, ABOR then must seek an appropriation from the Arizona Legislature to fund the programs offered by the universities. *See* A.R.S. § 15-1626(A)(7). Any tuition and fee revenues collected in excess of the amount appropriated by the Legislature is retained in a subaccount for each university, but can only be expended with the ABOR's approval. *See* A.R.S. § 15-1626(A)(5).

ABOR seeks funding for the universities by submitting university-specific budgets to the Legislature. *See* A.R.S. § 15-1626(A)(7). Any monies appropriated by the Legislature for the use or benefit of a university are provided to ABOR. *See* A.R.S. § 15-1664. ABOR is required to expend the appropriations "for the support and maintenance of such institution, buildings and grounds" and "for any other purpose the board deems expedient if not inconsistent with provisions of any appropriations." *Id.*

II. The Tuition And Fees Charged At Arizona's Public Universities Have Skyrocketed Over The Past Fifteen Years

The tuition and fees charged for obtaining instruction at Arizona's three public universities have skyrocketed in the past fifteen years. For the 2002-2003 academic year, ABOR set tuition and mandatory fees for in-state students at approximately $2,600 per year, placing Arizona around the 25th percentile nationally. R. 16 at 4 ¶10; R. 16 at 5 ¶13. But by the 2017-2018 academic year, ABOR had increased tuition and fees for in-state students at all three universities in lock-step, to more than $10,000. R. 16 at 4 ¶11. Not only was this an increase of over 300%, but it placed Arizona's public university tuition above the 75th percentile nationally. R. 16 at 4 ¶11; R. 16 at 5 ¶13. Given the jump from roughly the 25th percentile to above the 75th, it is unsurprising that ABOR's price increases for the average undergraduate in-state tuition and fees between the 2004-

05 and 2016-17 school years were the third highest rate in the entire country, an annualized price growth rate of 14%. R. 16 at 7 ¶21-23. ABOR's own tuition-setting policy 4-101(D) shows that while ABOR examines several factors in setting tuition, none relates to the actual cost of furnishing instruction, and others directly contravene the mandate of making instruction available at a price that is as nearly free as possible. R. 16 at 9 ¶27.

ABOR's nearly 300% increase in tuition costs in Arizona between July 2002 and July 2017 is (1) nearly ten times the corresponding 36% increase in the consumer price index ("CPI"), (2) approximately three times the national average for tuition increases at public four-year institutions (which were roughly a "mere" 100%); and (3) roughly eleven times the 27% increase in median family income in Arizona from 2000 to 2015 (from $46,723 to $59,480). R. 16 at 5 ¶¶12-14.

Indeed, a student now will have to receive loans or other aid of approximately 70% of the base in-state tuition and fees in order to pay what he or she would have had to pay if ABOR had limited tuition and fee increases to CPI-level inflation over the last 15 years. R. 16 at 7 ¶18. And this does not even take into account that with other potential expenses, such as room and board, the full cost ***per year*** for an in-state student is $28,491 at ASU, $28,900 at U of A, and $26,923 at NAU. R. 16 at 7 ¶19.

Not only have public-university tuition and fees in Arizona increased far beyond the rate of inflation in other areas, but ABOR's aggregate tuition revenue has increased by ***four times*** the amount that state aid to universities has been cut since 2008. R. 16 at 6 ¶17. The State is providing $390 million less in revenue, but state universities charged $1.5 billion more than they were charging in 2008. *Id.* And full-time, in-state students at Arizona public universities pay vastly more per credit hour than their counterparts in local community colleges. At 15 credit hours per semester, the average cost of in-state tuition and fees for a full-time student at the universities is $378.65/credit hour; this price is over four times the $90.83/credit hour cost at certain community colleges. R. 16 at 10 ¶¶29-32.

ABOR has also taken steps that make instruction even more unaffordable. ABOR charges substantially greater amounts per credit hour for part-time students. R. 16 at 15 ¶¶ 68-72. ABOR has approved a tuition structure that charges more for online instruction than in-person instruction at ASU for fully online students. R. 16 at 16 ¶¶ 74-81. ABOR has also approved a tuition structure that fails to provide an in-state tuition for fully online students at ASU, even though § 15-1626(A)(5) specifically instructs ABOR to differentiate between residents and nonresidents. R. 16 at 17 ¶¶ 83-86. Finally, ABOR charges mandatory fees for non-instructional items such as athletics, recreation, technology, and health. R. 16 at 18 ¶¶88-91.

III. Citing "Unaffordability" Of Tuition, ABOR Started Providing Subsidies Of Public Monies To Ineligible Students Contrary To Law

By a large majority, Arizona voters enacted Proposition 300 in 2006, which prohibited in-state classification for students who lack lawful immigration status. *See* A.R.S. §§ 15-1803, -1825. In 2013, the Attorney General sued the Maricopa County Community College District ("MCCCD") over MCCCD's policy of providing in-state tuition to students who participated in the federal government's Deferred Action for Childhood Arrivals ("DACA") program. R. 16 at 11 ¶43.

While the litigation between the Attorney General and MCCCD was pending, ABOR announced that DACA students would be eligible for a new "non-resident undergraduate tuition rate for Arizona high school graduates that would be available to eligible students who are not otherwise entitled to in-state tuition," and eventually set that rate at the standard in-state tuition levels. R. 16 at 12 ¶¶45-47. The Court of Appeals later concluded that DACA status alone could not qualify a student as "lawfully present" under Proposition 300 for purposes of receiving in-state tuition benefits. *MCCCD*, 242 Ariz. at 337 ¶35. Disregarding that conclusion, ABOR announced in late June of 2017 that it would continue providing in-state tuition benefits to DACA recipients. R. 16 at 12 ¶¶49, 51.

Although ABOR was free to charge such students the actual cost of instruction (which ABOR itself calculated as 150% of in-state tuition), R. 18 at 3,

ABOR instead elected to defy state law by paying a subsidy to cover the gap between the below-cost, in-state tuition provided to this subset of students who were not "lawfully present" and the actual cost of instruction for such students.

ABOR's justification, offered by its President, was that "for many DACA students [a tuition rate 50% higher than in-state tuition] may prove to be as unaffordable as the full out-of-state tuition rate." R. 18 at 3. But if the in-state tuition rate only had kept pace with inflation over the past fifteen years—rather than rising 300%—those students *would* be able, under ABOR's logic, to afford tuition 50% higher than in-state tuition (because that tuition would be *far* less than current in-state tuition). R. 16 at 5 (citing R. 1 at 4-7 ¶¶10-19, and at 12 ¶51).

Similarly, if ABOR did not require students to bankroll myriad non-instructional university pursuits and activities, through added tuition and mandatory fees untethered from instruction, the cost of accessing four-year college instruction would be significantly less. *Id* at 9 ¶28. Finally, if ABOR had not charged higher rates to part-time and fully online students, then a student also could more easily work and attend part time. R. 16 at 15 ¶71.

Earlier this year, the Supreme Court, like the Court of Appeals, unanimously concluded DACA participation was not sufficient to qualify students for in-state tuition under Arizona law. *MCCCD*, 243 Ariz. at 543 ¶¶17-18. ABOR thereafter

announced it would at last bring its policies into conformance with state law, and it ceased affording in-state tuition to students with DACA status, and began charging them 150% of in-state tuition, which equated to the cost of instruction. R. 32-33.

STATEMENT OF ISSUES

I. Did the trial court err in granting ABOR's MTD 1 and ruling that the Attorney General lacks authority under A.R.S. § 35-212 to bring any of the claims in this action?

II. Alternatively, does A.R.S. § 41-193(A)(1)-(2) provide an independent basis for this action, and should *Arizona State Land Department v. McFate* be overruled?

III. Assuming the Attorney General possesses authority to bring claims under A.R.S. § 35-212 and/or § 41-193(A)(1)-(2), would the grounds raised in ABOR's MTDs 2 and 3 require dismissing certain counts, *i.e.* Counts I-V?

IV. Did the trial court err in dismissing the Attorney General's complaint with prejudice?

STANDARD OF REVIEW

Rule 12 dismissals are subject to *de novo* review. *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶7 (2012) (Rule 12(b)(6) dismissals); *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz Cty.*, 233 Ariz. 460, 462-63 ¶9 (App. 2013) (Rule

12(b)(1) dismissals). Arizona's notice pleading standard requires that state courts "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts" when adjudicating a Rule 12 motion. *Coleman*, 230 Ariz. at 356 ¶9; *see also Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶7 (2008). In addition to pleadings, courts may consider exhibits and public records regarding matters referenced in pleadings in reviewing a Rule 12 motion. *Coleman*, 230 Ariz. at 356 ¶9. "Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Id.* at 356 ¶8.[2]

ARGUMENT

I. The Trial Court Erred In Concluding That The Attorney General Lacks Authority Under Section 35-212 To Bring Any Claim Here

Dismissal of all claims below turned on the misconception that no § 35-212 payment occurs in the setting, collecting, and disbursing of tuition monies and other public monies appropriated by the Legislature to fund the costs of instruction at the universities.

[2] Neither ABOR nor the Court identified a subsection of Rule 12 on which dismissal was granted. Nonetheless, the FAC was dismissed prior to the Attorney General being permitted to take discovery. *See supra* page 5 (discussing order staying discovery request). For purposes of review, whether dismissal was under Rule 12(b)(1) or (6) is inconsequential since ABOR's attack on the Attorney General's authority under § 35-212 hinged on whether the complaint alleged a payment as a matter of law. *See* R. 13 at 2; R. 23 at 1; R. 41 at 7:19-8:19.

Because the FAC includes well-pled allegations that ABOR makes payments of public monies in connection with paying for the instruction of students, the trial court erred in concluding as a matter of law that the Attorney General had not brought claims pursuant to § 35-212. The dismissal turned entirely on ABOR's purported lack of a "payment" of public monies under § 35-212. But it is well-pled—and taken as true—that: (1) ABOR has the statutory authority to expend substantial sums of public money, (2) ABOR does collect and disburse substantial sums of public money in connection with the operation of the universities, and (3) in-state tuition is below the actual costs of providing instruction. The final point is key: given that ABOR is responsible for expending public money for instruction and in-state tuition is below the cost of providing instruction, ABOR necessarily makes payments of public monies to cover the difference between in-state tuition and the cost of instruction. Any such payments for students who lack lawful immigration status are illegal because of Proposition 300.

A. It Must Be The Case That The Attorney General Has Authority To Bring Count VI Under Section 35-212

1. The Attorney General Has Authority Under Section 35-212 To Prevent And Recover Illegal Payments of Public Monies, Which Includes Unlawful Subsidy Payments

Section 35-212 plainly authorizes the Attorney General to bring an action in the name of the State to prevent and recover illegal payments of public money.

Under the version of the statute in effect at the times relevant here, the Attorney General:

> may bring an action in the name of the state to enjoin the illegal payment of public monies . . . or if the monies have been paid, to recover such monies plus twenty per cent of such amount together with interest and costs, including reasonable attorney fees, to be paid to the state treasurer or other appropriate official to the credit of the fund from which the payment was made.

A.R.S. § 35-212(A) (2016); *see, e.g.*, *Woods*, 189 Ariz. at 273-74 (recognizing Attorney General's authority to bring actions under A.R.S. § 35-212).[3]

Courts may look to "established and widely used dictionaries" to determine a word's ordinary meaning, *Stout v. Taylor*, 233 Ariz. 275, 278 ¶12 (App. 2013), and "payment" is a word that carries broad meaning, with the word "pay" commonly understood to mean:

> 1. To give money to in return for goods or services rendered[;] . . . 3. To discharge or settle (a debt or obligation)[;] 4. To bear (a cost or penalty, for example) in recompense[;] 5. To yield as a return[;] 6. To afford an advantage to; profit[;] 7. To give or bestow.

The American Heritage Dictionary of the English Language 1295 (5th ed. 2011). In addition to the broad definition of "pay," the common understanding of the word "subsidy" shows that a subsidy involves a payment. S*ee id.* at 1738 (defining "subsidy" to mean: "1. Monetary assistance granted by a government to a person

[3] The Legislature amended A.R.S. § 35-212 in 2018, but those amendments do not implicate the issues presented in this appeal.

or group in support of an enterprise regarded as being in the public interest[;] 2. Financial assistance given by one person or government to another.").

In fact, the Arizona Court of Appeals has concluded that subsidies qualify as payments in the context of § 35-212. *See McClead v. Pima Cty.*, 174 Ariz. 348 (App. 1992). In *McClead*, two private citizens alleged that § 35-212, via the private attorney general mechanism of § 35-213, gave them standing to allege that health insurance subsidies offered to beneficiaries of Arizona's retirement systems violated various provisions of state and federal law. *Id.* at 351-52. This Court concluded that because "[t]he state pension fund manager is a state agency and the funds it controls constitute public money within the meaning of section 35-212[,]" section 35-212 conferred standing "to challenge post-retirement benefit increases paid from these funds[,]" including health insurance subsidies. *Id.* at 352-53.

2. Count VI Falls Squarely Within The Attorney General's Section 35-212 Authority Given Its Allegation That ABOR Violated Proposition 300 When Expending Public Monies For Higher Education Instruction

The Complaint's allegations bring Count VI squarely within § 35-212's grant of authority to the Attorney General. Count VI alleged that ABOR made illegal payments of public money in connection with students who were illegally afforded below-cost, in-state tuition rates at the state universities. Paragraph 93 of the FAC stated, "[s]tudents who attend any of the Universities and pay only in-

state tuition are receiving a subsidy in the form of expenditure of public monies toward their education." R. 16 at 18 ¶93; *see also* R. 1 at 19 ¶96 (same statement in original complaint). And paragraph 97 of the FAC stated:

> By directing or otherwise permitting the Universities to offer in-state tuition to students who are not "lawfully present" for purposes of eligibility for in-state tuition or other state or local public benefits, ABOR has contravened the express mandates of voter-approved A.R.S. §§ 15-1803(B) and 15-1825(A); failed to collect monies accruing to it or to the State as required by A.R.S. § 35-143; and caused the illegal payment of public monies in violation of A.R.S. § 35-212.

R. 16 at 19 ¶97; R. 1 at 19 ¶98 (same statement in original complaint). Moreover, ABOR has the authority to collect and expend substantial sums of public money in its role as the jural entity for the state universities, and ABOR in fact does so in connection with the operation of the state universities. *See* R. 16 at 10 ¶33 (explaining that the tuition collected by ABOR is spent "for other university pursuits.").[4]

The FAC properly alleged the elements under § 35-212: (1) a payment (2) of public money (3) that is illegal. From these elements follows the Complaint's allegation that ABOR paid public monies to subsidize the below-cost tuition rates for students who cannot receive such public-money subsidies. And again, the fact

[4] ABOR is the sole jural entity involved in this process; the universities are not themselves jural entities. *See, e.g.*, *Krist v. Arizona*, CV17-2524, 2018 WL 1570260, at *2-*3 (D. Ariz. March 30, 2018).

that Count VI focuses on the payment of public monies in contravention of Proposition 300 is key because ABOR's violation of Proposition 300 is what made the subsidy payments illegal. Proposition 300 bars providing public subsidies for higher education instruction to students who lack lawful immigration status. *See* R. 16 at 18-19 ¶94. Moreover, certain students who did not qualify as having lawful immigration status received instruction during the 2017-2018 school year and were assessed (and paid) only in-state tuition, which is below the actual costs of receiving educational instruction at the public state universities. *See* R. 16 at 12 ¶¶48-49. Given that in-state tuition is below the costs of instruction, ABOR made payments to cover the difference between student tuition rates for in-state students and the cost of providing instruction for students receiving those in-state tuition rates, including payment for students who lacked lawful immigration status; this means ABOR made illegal payments of public monies in violation of § 35-212.

3. ABOR Has No Authority Supporting Dismissal Of Count VI Under Rule 12

Dismissal under Rule 12 was inappropriate given that the allegations in the Complaint must be accepted as true at this stage, and ABOR's sole legal citation is inapposite. ABOR argued that § 35-212 did not apply because, notwithstanding the lack of discovery or other factual development, it was plain that no "payment" had occurred in connection with ABOR's public-money subsidization of certain

students' below-cost tuition at state universities. But this assertion, which does not accept the allegations in the Complaint, is insufficient to obtain dismissal at this early stage. *See Coleman*, 230 Ariz. at 356, 361 ¶¶9, 36; *Cullen*; 218 Ariz. at 19 ¶¶6-7 (notice pleading standard).

The sole legal authority ABOR offered in support of its "payment" argument, *Biggs v. Cooper*, 234 Ariz. 515 (App. 2014), has no bearing here. The plaintiff in *Biggs* was looking to prevent a revenue assessment from going into effect, and had not challenged any "traceable and identifiable" expenditure of public money. 234 Ariz. at 522 ¶19. The *Biggs* court dismissed the action precisely because the statutes at issue did "not grant an express expenditure power" to the defendant there. Here, the existence of A.R.S. §§ 15-1626(A)(13) and 15-1664, among other statutes in Title 15, Chapter 13, provide ABOR an "express expenditure power." *Biggs*, 234 Ariz. at 522 ¶19. R. 17 at 3. Thus, as the Attorney General correctly argued below, *Biggs* does not support dismissal.

B. Having Properly Brought An Action Pursuant to Section 35-212 Through Count VI, The Attorney General Also Has Authority To Advance The Claims And Requested Relief In Counts I-V

The Attorney General also has authority to bring the other claims in the FAC given that they are factually related to Count VI and their resolution could well provide an alternative path to resolution of the claim in Count VI. Once the

Attorney General is validly in court with claims that require analyzing the cost of instruction at the state's public universities, tuition rates at those same universities, and ABOR's tuition-setting process, the Attorney General has authority to bring to court these other constitutional and statutory claims, each of which goes to the proper calculation and setting of tuition rates for various categories of students at Arizona's public universities in light of the costs of instruction.

1. Cases Interpreting Section 35-212 Have Concluded That Once Properly In Court, The Attorney General Has Broad Discretion To Advance Arguments In Support Of His Case

The Attorney General has "broad power to challenge the expenditure of public funds" under § 35-212, and "'the Attorney General's discretionary power … necessarily includes the authority to press any ethically permissible argument he deems appropriate to aid him in preventing the allegedly illegal payment of public monies or in recovering public monies alleged to have been illegally paid.'" *Woods*, 189 Ariz. at 274 (quoting *Fund Manager*, 161 Ariz. at 353).

In both *Woods* and *Fund Manager*, the Attorney General was permitted to argue that legislative acts were unconstitutional, even though there was no freestanding statutory authority empowering the Attorney General to assert that legislation is unconstitutional. In both cases, the Court concluded that the Attorney General enjoyed broad discretion to present all relevant arguments once he was

properly in court. *See Woods*, 189 Ariz. at 273 (requiring only that Attorney General's "[s]tanding ... be ***linked*** to some statutory basis" (emphasis added)).

These opinions are entirely consistent with the established concept that the Attorney General has broad powers to manage litigation once in court to protect the public interest, including even seeking the invalidation of a statute. Indeed, *Fund Manager* specifically tied its analysis to the role of the Attorney General as chief legal officer. 161 Ariz. at 354 ("[A]s 'chief legal officer of the state,' the Attorney General also has a duty to uphold the Arizona and United States Constitutions" and therefore the Attorney general may "attack[] the constitutionality of an Arizona statute in the process of exercising his specific statutory powers.").

Arizona State Land Department. v. McFate, which was the primary authority relied on by ABOR and the Superior Court here, is not to the contrary. *McFate*'s analysis is limited to whether the Attorney General may institute an action in the first place. 87 Ariz. at 148. *Woods* and *Fund Manager*, decided after *McFate*, recognize the Attorney General's broad authority and discretion once a case is properly initiated pursuant to statute. Because Claim VI was statutorily authorized by § 35-212, *Fund Manager* and *Woods*—not *McFate*—govern here.

2. Counts I-V Are Factually Related To Count VI's Section 35-212 Claim, And Resolution Of The Claims In Counts I-V Is A Different Path To (At Least Partially) Resolving The Illegal Payment Identified in Count VI

Because the Attorney General properly brought Count VI pursuant to § 35-212, he had authority to press the factually related claims in Counts I-V, all of which go to tuition and fee setting at Arizona's public universities. All counts turn on judicial analysis of how costs of instruction are factored into ABOR's tuition setting, collection, and disbursement process. Put simply, in order to determine whether ABOR is paying an illegal subsidy for the Count VI analysis, a factual inquiry of the actual costs of furnishing instruction to students must be made. The core factual inquiry on Counts I-V is the same.

The intertwined nature of the FAC's claims also must be understood in light of the remedial nature of § 35-212, which in many ways is the main statutory grant empowering the Attorney General to take action in response to illegal draws on the public fisc. If § 35-212 is not read broadly, consistent with that critical remedial purpose, there is essentially no means under current law for the Attorney General—the State's chief legal official and the people's elected representative—to protect the public fisc from illegal harms unless a more specific statute applies.[5]

[5] For example, A.R.S. § 35-143 imposes personal liability on persons or officers responsible for collecting public money who fail to do so. But that statute is silent

Thus, concluding that § 35-212 does not apply here cannot be the correct reading of the law given the structure of the State's government, the division of powers provided by the Arizona constitution, and the utmost importance of the public fisc to public officers.

Moreover, resolving even some of the core tuition questions raised in Counts I-V would likely resolve the illegal subsidy payment problem through a resetting of the entire tuition regime. If the Attorney General possesses the power to directly challenge an allegedly unlawful payment, that power also should encompass claims that could lead to the same result as an injunction against the illegal payment, albeit through a different means of relief. The courts in *Woods* and *Fund Manager* recognized that § 35-212's scope necessarily included arguments that if accepted could indirectly end an illegal expenditure. *Fund Manager*, 161 Ariz. at 354; *see also Woods*, 189 Ariz. at 274. And that is case with the claims here: if ABOR's tuition and fee setting policies are unlawful, revising those policies to properly account for the cost of instruction and the constitutional mandate for instruction to be as nearly free as possible may well

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as to who may initiate an action to enforce it. Under ABOR's proposed reading of § 35-212, the Attorney General (or a private citizen in the Attorney General's capacity) could not enforce this law because no payment would be at issue. Indeed, ABOR's reading renders the statute a nullity because no mechanism would exist to enforce it.

lower tuition for all students, possibly resulting in tuition set at levels even lower than the rate that was provided to certain students via the illegal subsidy payment.

In sum, ending an illegal subsidy payment to a particular subset of students in the course of rethinking the tuition setting process does not require that the same set of students must be targeted for exorbitant tuition raises; instead, all students could see a tuition reduction while the illegal subsidy is eliminated. Indeed, this would resolve the exact problem that ABOR identified as the basis for providing the illegal subsidy payment in the first place: that tuition for students who lack lawful immigration status is too high and unaffordable. *See* R. 18 at 3 ("The reality is that [not charging DACA students in-state tuition means] most DACA students will have to end or seriously curtail their college education because they will not be able to afford attendance at our universities").[6]

II. Alternatively, Section 41-193(A)(1)-(2) Provides An Independent Basis For Bringing Counts I-VI, And *McFate* Should Be Overruled

In addition to the above-detailed basis for bringing Counts I-VI under § 35-212, the Court should revisit *McFate*'s interpretation of § 41-193(A)(2) and

[6] While ABOR voluntarily ceased its policy of offering in-state tuition to those without lawful immigration status *after* the Attorney General filed suit in this matter, that change does not preclude injunctive relief. *See State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486 (App. 1981) ("It is apparent that voluntary cessation of the questioned practices will not automatically moot the injunctive remedy. This is especially so when the practices are discontinued subsequent, rather than prior, to commencement of the litigation.").

conclude that § 41-193(A)(1)-(2) provides an independent basis for the Attorney General to go to court and assert ***all*** Counts in the FAC.[7] Subsections 41-193(A)(1)-(3) provide authority for the Department of Law, under the Attorney General's direction, to represent the State in both Arizona and federal courts. As the Supreme Court recognized in 1956 in *Morrison*, a mere three years after the important revision of the statutory provisions empowering the Attorney General, the correct interpretation of these statutes is the one that is consistent with the plain language—as "the 'chief legal officer' of the State," the Attorney General "may, like the Governor, go to the courts for the protection of the rights of the people." *Morrison*, 80 Ariz. at 332. Section 41-193(A)(1)-(2) provides an independent basis for Counts I-VI and ground for reversing the trial court's dismissal.

A. As The Supreme Court Recognized In *Morrison*, The Legislature Expanded the Attorney General's Duties By Statute In 1953, Confirming That The Attorney General Has Authority To Go To Court To Protect The Rights Of The People

Following a vote by the people to create a Department of Law under the control and direction of the Attorney General "to properly administer the legal affairs of the state," the Legislature rewrote the Attorney General's statutory duties

[7] Counsel acknowledges that the Court of Appeals cannot overrule *McFate*; as noted already above, this subsection is included because the Attorney General intends to put these points to the Arizona Supreme Court, including by filing a petition to transfer pursuant to ARCAP 19.

in 1953. *See* 1939 Code § 4-606 (1954 supp.) (reproducing SCR). Most significantly, that revision added two key phrases that had not existed previously in the statutes describing the Attorney General's duties—that the Attorney General "***shall serve as chief legal officer of the state***," 1939 Code § 4-609(a) (1954 supp.) (emphasis added), and that the Department of Law shall:

> 1. Prosecute and defend in the supreme court all causes in which the state or an officer thereof in his official capacity is a party; 2. at the direction of the governor ***or when deemed necessary by the attorney general***, prosecute and defend any cause in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest; 3. represent the state in any action in a federal court….

Id. § 4-607(a) (1954 supp.) (emphasis added).[8] These provisions are now codified at A.R.S. §§ 41-192(A) and 41-193(A)(1)-(3) (with the sole change of substituting "proceeding" for "cause" in two places).

In *Morrison*, the Arizona Supreme Court—citing those exact provisions a mere three years after their enactment—held that the Attorney General "may, like the Governor, go to the courts for the protection of the rights of the people." 80 Ariz. at 332. *Morrison* involved a license denial by the State Liquor Board. The license applicant appealed to the Superior Court, which reversed the liquor board. Without the liquor board's consent, the Attorney General then filed a writ in the

[8] The prior version only referenced the governor and did not contain the language "when deemed necessary by the attorney general"; that language was specifically added by the Legislature in the 1953 rewrite. *See* 1939 Code 4-502(2).

Arizona Supreme Court. The Court concluded that the Attorney General acted within his authority in filing that writ without consent. *Id.* at 332. *Morrison* has never been overruled, and is still good law. Given *Morrison*'s proximity to the Legislature's 1953 amendments, that decision is a highly reliable indication of the amendments' meaning.

B. Post-1953, The Plain Statutory Language Is Clear—Contrary To *McFate*'s Analysis, Section 41-193(A)(1)-(2) Empowers The Attorney General To Initiate Actions In State Court

The *McFate* Court's cramped construction of § 41-193(A)(2) was erroneous in light of the plain language of § 41-193(A)(1)-(2) and the interpretation *Morrison* gave shortly after the 1953 amendments were passed. The Arizona Supreme Court recently stated that courts "interpret statutes 'to give effect to the legislature's intent.' A statute's plain language best indicates legislative intent, and when the language is clear, we apply it unless an absurd or unconstitutional result would follow." *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶9 (2016) (citations omitted).

Subsections 41-193(A)(1)-(2) state: "the department of law shall: 1. Prosecute and defend in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party; 2. At the direction of the governor or when deemed necessary by the attorney general, prosecute and defend

any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest."

In analyzing § 41-193(A)(2), *McFate* placed great weight on the word "prosecute" as not encompassing the Attorney General "initiat[ing]" or "commenc[ing]" an action, *see* 87 Ariz. at 145-46, but that interpretation is contrary to the plain meaning of the word "prosecute." The definition of "prosecute" includes:

> "1. Law a. To initiate or conduct a criminal case against: *prosecute a defendant for murder*. b. To initiate or conduct (a civil case or legal action): *prosecute a lawsuit for libel*. c. To initiate or conduct legal proceedings regarding (an offense, for example): *prosecute drug possession*."

The American Heritage Dictionary of the English Language 1414 (5th ed. 2011); *see also Black's Law Dictionary* 1341 (9th ed. 2009) ("1. To commence and carry out a legal action <because the plaintiff failed to prosecute its contractual claims, the court dismissed the suit>.").[9]

[9] *See also, e.g.*, *Lesnow Bros. v. United States*, 78 F. Supp. 829, 831-32 (Ct. Cl. 1948) ("The meaning of the word 'prosecute' not only in its ordinary definitive sense but by the interpretation of many courts, includes the commencement or institution of suits."); *State v. Dawson*, 119 P. 360, 364 (Kan. 1911) ("The word "prosecute" implies the commencement, as well as the continuance, of a proceeding, and the term is so used in common speech, as well as in legal parlance…"); *W. Elec. Co. v. Pickett*, 118 P. 988, 990 (Colo. 1911) ("The Standard Dictionary defines 'prosecute': 'To bring suit against, in a court, for redress of wrong or punishment of a crime…"); *Inhabitants of Clinton v. Heagney*, 55 N.E. 894, 894-95 (Mass. 1900) ("As applied to proceedings upon the civil side of a

Moreover, the Court in *McFate* failed to acknowledge that the meaning of "prosecute" in § 41-193(A)(1) already had been determined in *Morrison* as encompassing the commencement of a proceeding (consistent with the word's ordinary meaning). *See McFate*, 87 Ariz. at 147-48; *Morrison*, 80 Ariz. at 332 (noting that (A)(1) uses "prosecute" and stating "[s]ince we have already decided above that the State under these circumstances has the right to apply for a writ of certiorari in this court it follows from [subsection] (a)(1) that the Attorney General is the proper state official to ***institute*** the action. In so doing he acts as the 'chief legal officer' of the State." (emphasis added) (citing *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 222 (N.J. 1952)).

McFate's artificially narrow construction of "prosecute" is also internally inconsistent even as to just (A)(2) itself. *McFate* concluded that the Governor can authorize the Attorney General to institute an action, 87 Ariz. at 148, but the word "prosecute" in § 41-193(A)(2) modifies both the Governor and Attorney General's powers. *McFate* does not explain how the single word "prosecute" in (A)(2) means two different things—*i.e.*, it includes instituting an action at the direction of the Governor but not the Attorney General. *See also MCCCD*, 242 Ariz. at 329-30

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court, the ordinary meaning of the word 'prosecution' includes the institution of a suit, and is not confined to the mere pursuit of a remedy after proceedings have been instituted.").

¶¶8-11 (noting Attorney General properly brought action to enforce state statute at the direction of the Governor); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute, ... a presumption surely at its most vigorous when a term is repeated within a given sentence.").

Finally, *McFate*'s construction of "prosecute" does not make sense in context of the other language of the subsection. The statute states "***when*** deemed necessary by the attorney general, prosecute and defend any proceeding[.]" A.R.S. § 41-193(A)(2). The use of the word "when" in this clause suggests that the timing of initiation for an action is tied directly to the Attorney General's discretion, meaning the Attorney General has authority to initiate an action at the time of his choosing. *See Brewer v. Burns*, 222 Ariz. 234, 239 ¶27 (2009) ("Dictionary definitions of 'when,' both contemporary and historical, signal a point in time related to the occurrence of a specific event.").

C. Secondary Interpretive Factors Similarly Show That Section 41-193(A)(1)-(2) Empowers the Attorney General To Initiate Actions In State Court, And *McFate*'s Policy Concerns Are Unavailing

Even if § 41-193(A)(2) were ambiguous—which it is not—secondary factors also support interpreting the statute as providing authority for the Attorney General to bring actions in state court on behalf of the State. "When a statute is ambiguous,

[courts] determine its meaning by considering secondary factors, such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Premier Physicians Grp.*, 240 Ariz. at 195 ¶9. "When possible, [courts] seek to harmonize statutory provisions and avoid interpretations that result in contradictory provisions." *Id.* Here, the secondary factors support the plain language interpretation.

McFate's policy arguments are also unavailing. The fundamental logical error in *McFate* was to take pre-1953 Arizona cases that say the Attorney General has the powers the Legislature gives to the office, and then rely on those pre-1953 cases to conclude that the Legislature *cannot* by statute give the office a statutory power equivalent to the common-law power to go to court for the protection of the rights of the people, all while failing to recognize that attorneys general do in fact have such powers in the vast majority of states and that a plain language reading of § 41-193(A)(1)-(2) is constitutionally proper. *See McFate*, 87 Ariz. at 143-48.

1. The *Morrison* Court's Reading Of Section 41-193(A)(1)-(2)—That The Attorney General May Initiate Actions For The Public When He Deems It Necessary—Is Supported By Context, Subject Matter, Historical Background, Effects and Consequences, and Spirit and Purpose

As discussed above, the pertinent statute was amended in conjunction with the creation of a department of law under the direction and control of the Attorney

General "to properly administer the legal affairs of the state." 1939 Code § 4-606 (1954 supp.). In doing so, the Legislature specifically *expanded* the language of § 41-193(A)(2) to add "when deemed necessary by the attorney general."

The Legislature also specifically added to § 41-192(A) that the Attorney General is the "chief legal officer of the state." In Arizona law and the law of other states, "chief legal officer" is a recognized term of art used in conjunction with common-law powers. *See, e.g.*, *Shute v. Frohmiller*, 53 Ariz. 483, 492 (1939) (discussing common-law history of attorney general as "chief law officer" and "chief legal representative of the crown"); *see also State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976) ("[I]t is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in any litigation or quasijudicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest." (quotation omitted)). All of these points show that the purpose and effect of the 1953 amendments were to broaden the Attorney General's powers, including to make him "chief legal officer of the state." *See United States v. San Jacinto Tin Co.*, 125 U.S. 273, 280 (1888) (in discussing common-law powers of the U.S. Attorney General, stating "though it has been said that there is no common law of the United States, it is still quite true that when acts of congress

use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law).

And it was completely reasonable for the Legislature to confer a statutory power on the Attorney General to go to court to protect the rights of the people congruent with the power to do so at common law because the vast majority of state attorneys general have exactly this power. *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 645 n.47 (W. Va. 2013) (identifying 35 states that recognize common-law powers, 8 that do not, and 6 for which it could not find a definitive ruling); Committee on the Office of Attorney General, Nat'l Ass'n of Attorneys General, *Common Law Powers of State Attorneys General* 26-27 (1980) (identifying 35 states that have common-law powers, 8 that do not, and 8 not decided); Emily Myers, *State Attorneys General Powers and Responsibilities* 29 & n.12 (3rd ed. 2013) ("Although each jurisdiction varies in the extent to which the attorney general's common law authority is recognized, cases affirming the attorney general's uses of those traditional powers are legion.").[10]

[10] This is consistent with the Arizona Supreme Court concluding that a county sheriff has common-law powers, *Merrill v. Phelps*, 52 Ariz. 526, 530 (1938), and the Arizona Constitution uses equivalent language when describing county sheriffs' powers as it does when describing those of the Attorney General. *Compare* Ariz. Const. art. XII, § 4, with *id.* art. V, § 1(C).

It is noteworthy that when interpreting "prosecute" in § 41-193(A)(1), *Morrison* specifically cited to a case addressing common-law powers. 80 Ariz. at 332 (citing *Driscoll*, 86 A.2d at 222). Indeed the word "prosecute" has long been used in connection with attorney general powers and understood to include the authority to commence an action. *State of Fla.*, 526 F.2d at 270-71. The canonical description of attorney general common-law powers uses the word "prosecute" in the sense of bringing civil actions. *People v. Miner*, 2 Lans. 396 (N.Y. App. Div. 1868) ("1st. To prosecute all actions, necessary for the protection and defense of the property and revenues of the crown."), *cited in Commonwealth ex rel. Minerd v. Margiotti*, 188 A. 524, 526 (Pa. 1936).

The Fifth Circuit has repeated this power, and stated "there is no doubt the common law power of the Attorney General extends" to "the power to initiate suit." *State of Fla.*, 526 F.2d at 270-71. And the New Mexico Supreme Court, which has long held that their attorney general has no common law powers, nonetheless construed "prosecute" in a statute similar to A.R.S. § 41-193(A)(1) as including the power to "initiate civil lawsuits when, in his judgment, the interest of the state is in need of protection." *State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 636 P.2d 279, 281 (N.M. 1981) ("Inherent in the attorney general's duty to 'prosecute' is the power to initiate civil lawsuits when, in his judgment, the interest

of the state is in need of protection."). The *Morrison* Court similarly understood the 1953 Arizona amendments as broadly authorizing the Attorney General to go to court for the protection of the rights of the people in a manner consistent with common-law powers, including initiating lawsuits.

Finally, it is imperative that the Attorney General be able to come to court where constitutional rights are involved. The Arizona constitution was adopted by the people as a check on their elected representatives, and if specific legislation were required to permit the Attorney General to enforce those rights, the Legislature and Governor may decline to provide it and thereby possibly avoid the check on their powers that the people intended. Indeed, the *Woods* and *Fund Manager* courts allowed the Attorney General to attack the constitutionality of laws even though there was no specific statutory authorization for the Attorney General to do so. *See Woods*, 189 Ariz. at 274; *Fund Manager*, 161 Ariz. at 354.

2. *McFate*'s Contrary Policy Concerns Are Erroneous And Certainly Do Not Overcome The Plain Statutory Language And Secondary Interpretation Factors

As is clear from the foregoing, *McFate's* erroneous analysis is animated not by the text of § 41-193(A)(2) but other concerns. *McFate* identified three concerns that drove its reading of § 41-193(A)(2): (1) rendering portions of other statutes surplus, (2) interfering with the Governor's powers, and (3) interfering with the

Attorney General's role as legal advisor to state agencies. None of these concerns is sufficient to contravene the plain language of the statute or overcome the secondary factors supporting the plain-language interpretation.

a. The plain language interpretation of Section 41-193(A)(2) should not be rejected based on surplusage

McFate's first concern was that "prosecute" could not include instituting actions because that would "render meaningless" other statutes that specifically authorize the Attorney General to go to court. 87 Ariz. at 145. As a preliminary matter, the whole notion of "surplusage" in the context of different statutes specifying attorney general powers is a poor fit because the attorney general has a historical role and some of the duties are provided more specifically, while others are not. *See, e.g.*, *Ex Parte Young*, 209 U.S. 123, 160-61 (1908) ("The duties of the Attorney General, as decided by the Supreme Court of the State of Minnesota, are created partly by statute and exist partly as at common law."). Consistent with the role of the Attorney General as chief legal officer of the State, it is reasonable for the Legislature to add § 41-193(A)(1)-(3), a general statute authorizing the Attorney General to go to court, while also specifying in particular statutes that the Attorney General may enforce them (especially in the context of authorizing

penalties or dividing authority between the Attorney General and County Attorneys). *McFate*'s cited examples are not to the contrary. 87 Ariz. at 144-45.[11]

b. The plain language interpretation of Section 41-193(A)(2) does not unconstitutionally infringe on the Governor's powers

As for *McFate*'s second concern, while the Governor has "take care" powers under Article V, § 4 (as in many of the states that have common-law attorney general powers), the Legislature is not unconstitutionally infringing on those powers by permitting the Attorney General to bring an action to court for a determination. The Governor indisputably has power to appoint and remove officers and to instruct officers within the scope of their duties. *See* Ariz. Const. Art. V, § 4; *see also Ahearn v. Bailey*, 104 Ariz. 250, 253 (1969). But if officers are acting outside the bounds of the law, then they are not exercising discretion, and it is proper for the Courts to so hold. *See Arnold v. Arizona Dep't of Health*

[11] For example, the *quo warranto* statute differentiates between the Attorney General, County Attorney, and a claimant. A.R.S. §§ 12-2041 to -2045. The recovery of monies illegally paid statute provides for a penalty and differentiates between the Attorney General and a taxpayer. A.R.S. §§ 35-211 to -215. The recovery of escheats statute differentiates between the Department of Law and a County Attorney. A.R.S. § 41-193(C). And the statute relating to claims of unconstitutionality, differentiates between the Attorney General, Speaker of the House, and President of the Senate; it also makes clear their different options (intervening, filing briefs, or choosing not to participate). A.R.S. § 12-1841. Finally, the statutes relating to rehearing of Corporation Commission decisions provide strict time limits. A.R.S. §§ 40-253 to -254. Thus, none of the statutes is actually rendered meaningless by a general power to go to court in § 41-193(A).

Servs., 160 Ariz. 593, 601 (1989) ("We hold that the trial court merely set forth in its order duties already mandated by the legislature. The trial court did not create duties for the defendants—it held that the legislature had created the duties. It is an appropriate judicial function to determine whether the legislature has created a duty and whether the duty has been breached.").

And the courts have acted to restrain the executive when it attempts to act outside its legal bounds. *See, e.g.*, *Williams v. Superior Court*, 108 Ariz. 154, 158 (1972) (noting public officials may be enjoined from acts that are beyond their powers); *Litchfield Elementary Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 220-21 (App. 1980) (noting that governor lacks authority to unilaterally make legislative decisions, and reviewing governor's actions for whether they are consistent with the constitution and statutes). The *Morrison* Court addressed exactly this point when it said its holding would not make the Attorney General a "dictator" because "it will be the courts alone who in all such cases make the final decisions and not the Attorney General." 80 Ariz. at 332.

The alternative is that the Governor or other executive-branch officials can simply decline to follow the law, which would promote executive supremacy at the expense of the other branches, the people, and the rule of law. *See Perdue v. Baker*, 586 S.E.2d 606, 610 (Ga. 2003) ("giving both the Governor and the

Attorney General the responsibility for enforcing state law ... provides a system of checks and balances within the executive branch so that no single official has unrestrained power to decide what laws to enforce and when to enforce them").[12]

c. Finally, the plain language interpretation should not be rejected for fear of interfering with the Attorney General's role as legal advisor

With respect to preserving the attorney-client relationship (*McFate*'s third policy concern), there are better ways to do so than to create a blanket rule, contrary to § 41-193(A)(1)-(2)'s plain language, that the Attorney General cannot go to court for the protection of the rights of the people absent separate statutory authorization. The relationship between the Attorney General and a client agency is already different than that of a private attorney and client. For example, *McFate* specifically recognized that the Attorney General's Office can have attorneys on both sides of the "v." in litigation—something that is not even a *consentable* conflict in private practice. *McFate*, 87 Ariz. at 145 (citing with approval *State ex rel. Conway v. Hunt*, 59 Ariz. 256 (1942)); *see also* Justin G. Davids, *State*

[12] *See also Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 365 (Ky. 2016) ("Because the Attorney General is the chief law officer of the Commonwealth, he is uniquely suited to challenge the legality and constitutionality of an executive or legislative action as a check on an allegedly unauthorized exercise of power."); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628 (S.C. 2002) ("[T]he Attorney General can bring an action … when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.").

Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers, 38 Colum. J.L. & Soc. Probs. 365, 413 (2005) ("As part of her duties, the attorney general should be able to sue state officers in order to represent the public interest, without violating the client-attorney relationship with those officers."). Similarly, the Attorney General's Office, with proper procedures, can serve as both prosecutor and advisor to an independent decision-maker in an administrative proceeding. *See Horne v. Polk*, 242 Ariz. 226, 234 ¶27 (2017); *Turf Paradise, Inc. v. Ariz. Racing Comm'n*, 160 Ariz. 241, 245-46 (App. 1989).

But on top of this, there has been a major statutory development since *McFate* that further undermines its rationale. In 1989 the Legislature added a provision that permits the Attorney General to appoint outside counsel when he "determines that he is disqualified from providing judicial or quasi-judicial legal representation or legal services on behalf of any state agency in relation to any matter." *See* 1989 Ariz. Sess. Laws Ch. 95, § 1 (1st Reg. Sess.) (now codified at A.R.S. § 41-192(E)). Therefore, the appropriate response to the concern of protecting an agency's attorney-client relationship is the use of screens and outside

counsel on a case-by-case basis, not a judge-made exception stripping the Attorney General of his statutory power to come to court to protect the rights of the people.[13]

D. *McFate* Should Not Be Upheld Based On Stare Decisis

As the previous discussion has shown, there are compelling reasons to doubt *McFate*'s interpretation of the Attorney General's statutory powers under § 41-193(A)(1)-(2)—indeed, that interpretation is contrary to the plain language. And that interpretation can properly be overruled under the Arizona Supreme Court's decisions discussing stare decisis. As a preliminary matter, *McFate* should be understood as a case about interpreting constitutional provisions (*i.e.*, the Governor's "take care" powers under Article V vis-à-vis the other constitutional officers) and court-made rules relating to legal ethics, not statutes; it should therefore be held to a lower threshold for being overruled under stare decisis. *See State v. Hickman*, 205 Ariz. 192, 201 ¶38 (2003) (recognizing courts are more willing to overrule decisions involving court rules or constitutional interpretation).

[13] *Santa Rita Mining Co. v. Dep't of Prop. Valuation*, similarly can be resolved as a legal ethics case pre-dating the adoption of § 41-192(E), rather than a case about the Attorney General's powers to go to court. 111 Ariz. 368 (1975). There, the Arizona Supreme Court ordered the Court of Appeals to dismiss an appeal that the Attorney General filed over the specific objection of his client agency, the Department of Property Valuation. In the situation where a client agency specifically objects to taking an appeal, the appropriate course could be for the Attorney General to provide the agency its own outside counsel for the appeal. *See* A.R.S. § 41-192(E). But that issue is beyond the scope of this case, and was not addressed in *McFate*, where the Attorney General sought to bring his own action, not to appeal over the objection of a client agency.

But even analyzing *McFate* as a case of pure statutory interpretation, it still should be overruled. The Arizona Supreme Court has set forth five factors that it considers when determining if stare decisis requires adherence to a prior interpretation of a statute: 1) whether the language of the statute compels the interpretation reached in the previous case, 2) whether the interpretation being overruled advanced the policies of the statute, 3) whether the precedent being overruled is the result of clear analysis or persuasive reasoning, 4) whether by overruling precedent, the court returns to an earlier case that is better supported and reasoned, and 5) whether the facts of this case demonstrate that the interpretation being overruled was imprudent and unjust. *See Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 107 (1993) (discussing *Wiley v. Indus. Comm'n of Ariz.*, 174 Ariz. 94, 103 (1993)); *see also Garza v. Swift Transp. Co.*, 222 Ariz. 281, 286 ¶26 (2009). All five factors weigh in favor of overruling *McFate* here.

First, as explained above in Section II(B), the language of § 41-193(A)(2) does not compel the *McFate* court's conclusion, and in fact that court's analysis directly contravenes the plain language of the statute. Second, as discussed above in Section II(C), the *McFate* court's analysis did not further the policies of the 1953 amendments to the Attorney General's duties, but rather ignored them entirely. Third, *McFate* was not the product of clear analysis and persuasive

reasoning regarding § 41-193(A)(2), but rather an interpretation of the constitutional "take care" provision and legal ethics that is incorrect and can be accommodated through screens and outside counsel rather than a bright-line rule that is directly at odds with the statute's plain language. Fourth, by overruling *McFate*, the Court returns to the earlier case of *Morrison*, which is supported by the plain language of § 41-193(A)(1)-(2), more contemporaneous to the key 1953 statutory amendments, and better reasoned, particularly as to promoting the rule of law. Fifth, the facts of this case show that, unbound by judicial review, ABOR has acted as if it is unconstrained by law, dramatically increased tuition in lock-step across all three universities, and ignored the voter-imposed mandate of Proposition 300, even in the face of a unanimous Arizona Court of Appeals decision confirming the applicability of Proposition 300's mandate.

It is also important to note that overruling *McFate* on its construction of § 41-193(A)(1)-(2) would not disrupt the lines of case law stating that the Attorney General has no common-law powers. *See Shute*, 53 Ariz. at 488 (original Arizona case stating Attorney General has no common-law powers). The Arizona cases involving the question of the Attorney General's common-law powers stand for two narrow holdings. First, the Legislature by statute can authorize state agencies

to use counsel other than the Attorney General.[14] Second, the Attorney General has no common-law powers in the criminal context.[15] Interpreting § 41-193(A)(1)-(3) as statutorily authorizing the Attorney General to go to court for the protection of the rights of the people will not disrupt these cases.

Finally, in addition to the foregoing factors, legislative acquiescence is not applicable here. Because *McFate*'s decision was based on constitutional interpretation of the "take care" clause and legal ethics, it is unlikely that the Legislature would think it could change the result through future legislation. *See also Lowing*, 171 Ariz. at 106 (rejecting legislative acquiescence "in the absence of some affirmative indication that the legislature considered and approved of [the court's construction]").

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[14] *See Shute*, 53 Ariz. 483 (Colorado River Commission had authority to employ other counsel); *Indust. Comm'n v. Sch. Dist. No. 48*, 56 Ariz. 476 (1941) (Industrial Commission had power to employ attorney both to advise it and to bring its litigation); *State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184 (1942) (State Auditor could use her deputy to represent her in court as long as no money was paid for that purpose; interpreting language of statute). *But see Hudson v. Kelly*, 76 Ariz. 255, 266 (1953) (holding legislature could not eliminate all of the duties of a constitutional office).

[15] *See Westover v. State*, 66 Ariz. 145, 149-151 (1947) (Governor (or Legislature) may properly instruct Attorney General to assist county attorney in particular prosecution); *Smith v. Superior Court*, 101 Ariz. 559 (1967) (Superior Court judge could not order Attorney General to bring prosecution); *State v. Duran*, 118 Ariz. 239, 243 (App. 1978) (Attorney General could prosecute case when called on by county attorney); *Gershon v. Broomfield*, 131 Ariz. 507 (1982) (Attorney General has no power to subpoena witnesses and documents before state grand jury without prior consent of the grand jury).

The Supreme Court of Appeals of West Virginia's opinion in *State ex rel. Discover Financial Services, Inc. v. Nibert* provides significant persuasive authority for overruling *McFate*. The court overruled prior case law that said West Virginia's attorney general retained no inherent common law powers. 744 S.E.2d at 645-46. In doing so, the Court was "mindful that the doctrine of stare decisis instructs us to be cautious in deciding whether to overrule precedent," but concluded there was clear judicial error in its prior decision. *Id.* at 646. And that error, which is strikingly similar to what occurred in Arizona, was the "conclusory [determination] that the phrase 'as prescribed by law,' … meant that the only powers the Office of Attorney General possessed were those expressly granted by the Legislature." *Id.* (citations omitted). The court recognized that the above-cited constitutional language has been interpreted in other states "to mean that [the attorney general] has such common law powers as have not been specifically repealed by statute." *Id.* (citation omitted). This Court similarly should recognize the error of statutory construction in *McFate* and correct that clear judicial error.

III. The Trial Court's Dismissal Cannot Be Affirmed In Part (As To Counts I-V) On Alternative Grounds

The trial court did not rule on ABOR's other two motions to dismiss (MTD 2 and MTD 3), and the arguments put forward by those motions do not provide alternative grounds for affirming the dismissal in part, i.e. as to Counts I-V.

See State v. Steinle, 239 Ariz. 415, 419 ¶17 (2016). Note that neither MTD 2 nor MTD 3 sought dismissal of Count VI.

A. MTD 2 Fails Because The Arizona Supreme Court's *Kromko* Decision Does Not Bar This Case

1. The Narrow Claim In *Kromko* Differs From The Claims Here

This Court should recognize the distinct nature of the Attorney General's claims here and decline to affirm as to Counts I-V based on *Kromko v. Arizona Bd. of Regents*, 216 Ariz. 190 (2007). *Kromko* resolved a precise, narrow question about whether a tuition increase for a particular academic year violated the Arizona Constitution. The relevant claim in *Kromko* asserted that ABOR had violated the Arizona Constitution merely by raising tuition. *See id.* at 191 ¶5. The Court noted expressly that the student plaintiffs had not challenged the legality of ABOR's tuition-setting policies or that ABOR had failed to follow its own procedural rules. *Id.* at 192 ¶9. The Court thus characterized the claim as alleging "only that the total amount of tuition charged for the 2003–04 academic year was excessive and thus violated the 'as nearly free as possible' provision in Article XI, Section 6, of the Arizona Constitution." *Id.* at 192 ¶10. This precise, narrow question is what the *Kromko* Court considered "at issue" and decided was an unreviewable political question. *Id.* at 192 ¶9; *see also id.* at 195-96 ¶22 ("Our holding that the issue

presented in this case is non-justiciable is not a determination that the 2003–04 level of tuition is constitutional"); *id* at 195 ¶23 ("we hold only that other branches of state government are responsible for deciding *whether a particular level of tuition* complies with Article XI, Section 6" (emphasis added)).

In contrast, the FAC alleges that ABOR's tuition-setting policies do not properly account for the actual cost of providing instruction and therefore violate the Constitution's requirement that instruction be provided "as nearly free as possible." *See* Ariz. Const. art. XI, § 6; R. 16 at 4 ¶8 and 14 ¶60. The FAC also challenges ABOR's policy of requiring unrelated mandatory fees to access instruction and charging more to part-time and online students. The allegations in the FAC are thus not based on any particular tuition amount but rather go to the process and what factors are appropriate to consider (or must be considered) in setting tuition levels, and whether those factors were properly considered by ABOR. These allegations are demonstrably distinct from the claim the Arizona Supreme Court concluded presented a non-justiciable political question in *Kromko*.

2. If *Kromko* Does Apply, Its Political Question Analysis Is Infirm And Should Be Reconsidered

Kromko was a significant expansion of Arizona courts' willingness to decline review over constitutional claims as non-justiciable political questions, and (to the extent it applies here) it should be reconsidered. *See State v. Maestas*, 244

Ariz. 9, 17 ¶35 (2018) (Bolick, J., concurring) (extensively discussing *Kromko;* stating that "in an appropriate case, I would reexamine the prudential requirement of our political question doctrine to determine whether it comports with our constitutional design"). Under its broadest reading—which ABOR aggressively has advanced—*Kromko* is not an exercise of judicial modesty but rather judicial abdication.

In concluding that a particular tuition-rate increase lacked justiciability, the *Kromko* Court framed a "political question" as one with "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Kromko*, 216 Ariz. at 192 ¶11. Though *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶7 (2006), was the first Arizona case to include "discoverable and manageable standards" as part of the political question analysis, *Kromko* was the first, and thus far only, Arizona case to conclude that the courts could decline review a constitutional question because of "a lack of judicially discoverable and manageable standards." *See Kromko*, 216 Ariz. at 194 ¶21.

Kromko's expanded bases for rendering constitutional questions non-justiciable does not comport with the separation of powers established by the Arizona Constitution. The Arizona Constitution expressly commands that neither

of the legislative or executive branches "shall exercise the powers properly belonging to" the judiciary. Ariz. Const. art. III. In Arizona, "the judiciary construes the law" and when a question of constitutional power arises, the courts typically will "consider the matter and determine whether [the question] falls on the one side or the other of the dividing line between constitutional and unconstitutional delegation of power." *Giss v. Jordan*, 82 Ariz. 152, 161 (1957); *see also State v. Wagstaff*, 164 Ariz. 485, 487 (1990). Therefore, courts should exercise their constitutional duty to say what the law is, and not dismiss based on a prudential, "discoverable and manageable standards" prong unless absolutely necessary.

For all of the reasons identified in the complaint, the claims asserted in this case do not lack judicially discoverable and manageable standards. First, Count 1 is a procedural rather than substantive challenge to tuition setting. Even for legislative tasks, Arizona Courts will review whether the relevant legislative body has followed a constitutionally or statutorily required procedure. *See Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 595, ¶¶19-20 (2009); *Residential Util. Consumer Office v. Arizona Corp. Comm'n*, 240 Ariz. 108, 111 ¶10 (2016). Here, the Complaint alleges that ABOR's procedure does not consider cost, notwithstanding the constitutional requirement. Similarly,

Counts II-V are not based on a particular tuition level being too high, but rather on ABOR failing to provide in-state tuition, failing to differentiate tuition, or charging mandatory fees that improperly condition receipt of instruction on paying for things unrelated to instruction. Counts I-V therefore present justiciable questions.

B. MTD 3 Fails Because Legislative Immunity Is Not Available To ABOR Under The Complaint's Alleged Facts And Relief

ABOR's legislative immunity assertion plainly fails because the FAC does not challenge ABOR's legislative function; rather the complaint challenges ABOR's *implementation* of policies. Legislative immunity does not shield ABOR from suit related to its non-legislative functions, such as its administrative function of implementing policies, even if the previous enactment of those policies were legislative in nature. Indeed, it is well-established that a government agency or officer can be sued in an official capacity to challenge the constitutionality of a legislative act that the agency or officer is merely implementing. *See, e.g.*, *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 121 ¶5 (2013) (asking the Court "to declare [legislative enactment] unconstitutional and to enjoin [defendant agency] from applying the statute"); *see also Gallardo v. State*, 236 Ariz. 84, 87 ¶8 (2014) (same); *Ariz. Minority Coal.*, 220 Ariz. at 595 ¶¶19-20 (reviewing, even after concluding that IRC's enactment was a legislative act).

Moreover, Arizona courts have repeatedly reviewed challenges to legislative action related to public money expenditures, such as the one challenged here. *See, e.g.*, *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7-8 ¶25 (2013) (state law that lacked required inflation adjustment violated the Voter Protection Act); *League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556 (2009) (provision in budget bill was challenged as contrary to Arizona constitutional mandate); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233 (1994) (action seeking a declaration that the Legislature's statutory scheme for funding public education was unconstitutional); *Arnold*, 160 Ariz. at 593 (suit against state and county to compel them to provide mental healthcare to class of indigent chronically mentally ill); *Carpio v. Tucson High Sch. Dist. No. 1*, 111 Ariz. 127 (1974) (action seeking a declaration that the State must provide free textbooks to high school students).

Because the Complaint seeks determinations about the lawfulness under Arizona's constitution and statutes of certain ABOR policies and procedures that are also implemented by ABOR, those claims are squarely within the judicial authority to review. Legislative immunity does not immunize ABOR from judicial scrutiny for *implementation* of these policies and procedures, whether previous enactment of those policies was legislative in nature or not.

IV. The Trial Court Erred By Dismissing The Attorney General's Complaint With Prejudice

The Superior Court also erred in entering its judgment of dismissal with prejudice. MTD 1 raised only jurisdictional challenges (the Attorney General's authority to come to court), and the trial court expressly did not reach the merits of the claims in the FAC. Therefore, dismissal with prejudice was inappropriate. *See generally Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1332-33 (Fed. Cir. 2009) (collecting extensive case law from the various federal courts of appeal that a dismissal for lack of standing generally should be without prejudice); *Vidales v. Huth*, No. 1 CA-CV 14-0406, 2015 WL 2384039, at *3 ¶18 (Ariz. Ct. App. May 14, 2015) ("[B]ecause Hooty's motion to dismiss was based solely on the complaint's procedural defects and did not raise any substantive challenges, there was no substantive basis upon which the complaint could properly be dismissed with prejudice."); *Backora v. Balkin*, 14 Ariz. App. 569, 570 (1971) ("The assumption of jurisdiction was necessary or the trial court would have been without authority to enter its order dismissing the plaintiff's complaint with prejudice."). Instead, the trial court should have dismissed without leave to amend. *See generally Flynn v. Johnson*, 3 Ariz. App. 369, 373 (1966) (noting availability of dismissal without leave to amend).

ARCAP 21(A) ATTORNEYS' FEES NOTICE

The Attorney General requests reasonable attorneys' fees and costs for this appeal pursuant to A.R.S. §§ 12-348.01 and 35-212.

CONCLUSION

Counts I-VI of the FAC were authorized by A.R.S. § 35-212. In addition, Counts I-VI of the FAC were authorized by A.R.S. § 41-193(A)(2). For the foregoing reasons the Superior Court's judgment of dismissal should be vacated, and this case should be remanded for further proceedings.

RESPECTFULLY SUBMITTED this 24th day of October, 2018.

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