



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>June 8, 2016</p>	<p>No. I16-007 (R16-012)</p> <p>Re: Potential Liability of State Board of Investment for Complying with Proposition 123</p>
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To: The Honorable Jeff DeWit
Arizona State Treasurer

Questions Presented

Does the State Board of Investment or individual Board members (the “Board”) face potential liability for complying with the distribution requirements of Proposition 123 in light of pending and potential future legal challenges to the propriety of those requirements based on provisions of Arizona’s Enabling Act? In addition, does the Board face any liability for making distributions to charter schools pursuant to Proposition 123?

Summary Answer

No, the Board does not face liability, personal or otherwise, for acting in compliance with the law—including Proposition 123—because Arizona’s public officials have a duty to obey laws unless a court enjoins a law or declares it unconstitutional. The Board cannot ignore the constitutional amendment created by Proposition 123, including the provisions related to continued distribution of monies to charter schools.

Background

Proposition 123 amended Arizona’s constitutional provisions relating to school funding based on our state trust lands; the provisions of Proposition 123 were effective upon electorate approval, and made retroactive “to from and after June 30, 2015.” 2015 Ariz. Sess. Laws, 1st Spec. Sess., ch. 1, §§ 8, 10. With the recent Proposition 123 amendments incorporated, Article X, section 7 of the Arizona Constitution clearly prescribes the forthcoming distribution requirements:

G. The board of investment shall determine the amount of the annual distributions required by this section and allocate distributions pursuant to law. The annual distribution from the permanent funds:

[. . .]

2. For fiscal years 2015-2016 through 2024-2025, shall be six and nine-tenths percent of the average monthly market values of the fund for the immediately preceding five calendar years, except that in fiscal year 2015-2016, the distribution made from the permanent state school fund shall be \$259,266,200.

Ariz. Const. art. X, § 7(G)(2).

Specific constitutional provisions can create affirmative duties for public officials. *Jennings v. Woods*, 194 Ariz. 314, 320 (1999) (constitutional holdover provision provides an affirmative duty for corporation commissioner to remain in office until qualified successor is appointed). Arizona’s public officials have the duty to obey laws unless a court enjoins them or declares them unconstitutional. *See Button v. Nevin*, 44 Ariz. 247, 257 (1934) (“Public officials . . . have but one duty, and that is to enforce the law as it is written, and, if the effect of their action is disastrous, the responsibility is upon the Legislature and not upon them.”).

Qualified immunity protects government officials from personal liability insofar as their conduct does not invade clearly established statutory or constitutional rights known to reasonable

persons. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012). It represents a broad shield that ensures ample protection to all but the plainly incompetent or those who knowingly violate the law. *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

With regard to charter schools, such schools in Arizona have received monies from the state land trust fund for 21 years. *See generally* 1994 Ariz. Legis. Serv., 9th Sp. Sess., Ch. 2, § 2 (H.B. 2002) (authorizing the establishment of charter schools in Arizona, to be funded indirectly from state land trust proceeds routed through the general fund); *see also* 2000 Ariz. Legis. Serv., 5th Sp. Sess., Ch. 1, § 16 (S.B. 1007) (using money from the state land trust fund to create the Classroom Site Fund, which funds district and charter schools on equal terms). Proposition 123 does not change the class of permissible recipients or beneficiaries of state land trust fund monies; rather, Proposition 123 amends the formula and amounts of distributions from the state land trust.

Analysis

Even if the Board believes that a current or potential legal challenge to Proposition 123 is or would be well-founded and likely to prevail,¹ it still is required to comply with the law. Proposition 123 amends the portion of the Arizona Constitution that the Board is entrusted to enforce. If there were a clear contradiction between Proposition 123 and another applicable law such that compliance with both was a “physical impossibility,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963), then the Board might have to choose which law to follow. That is not the case here. This situation is akin to *Austin v. Campbell*, 91 Ariz. 195 (1962), where the Arizona Supreme Court held that the state auditor was not liable for authorizing per diem payments for legislators under a statute later determined unconstitutional.

¹ *Arguendo*. Beyond the observation of presumptive validity, this Opinion does not address the merits of any legal challenge to Proposition 123.

The Court based its conclusion upon the fundamental point that citizens, including state officials, are entitled to rely on a statute as an “operative fact which cannot be ignored.” *Id.* at 203. Noting that courts presume such acts constitutional, the Court stated that “No penalties should be visited upon the citizenry for doing likewise.” *Id.*

In addition, qualified immunity protects the Board’s members from liability because it protects government officials’ conduct performed in compliance with the law, or absent a demonstration that such conduct violates “clearly established” law. *al-Kidd*, 131 S. Ct. at 2083 (citation omitted).

Finally, with regard to charter schools as specific beneficiaries, the Proposition 123 amendments do not alter the trust’s beneficiaries. Charter schools have received monies from these trust funds for 21 years. Proposition 123 does not compel the Board to overturn more than two decades of pattern and practice in this area due to the nature of the beneficiary.

Conclusion

The Board does not face liability, personal or otherwise, for acting in compliance with the law as it stands currently. Arizona’s public officials have a duty to obey laws unless a court enjoins them or declares them unconstitutional.

John R. Lopez IV
Solicitor General