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 No. CV2017-012115

STATE'S REPLY BRIEF

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INTRODUCTION

This appeal presents purely legal questions that fundamentally impact the rule of law and judicial review in Arizona state government. The Superior Court's dismissal for lack of jurisdiction must be reversed for two independent reasons. First, A.R.S. § 35-212 authorizes all counts (Counts I-VI) of the First Amended Complaint ("FAC"). Second, A.R.S. § 41-193(A)(2) independently authorizes Counts I-VI. By dismissing the FAC, the Superior Court improperly thwarted judicial review of ABOR's actions.

ARGUMENT

I. Section 35-212 Authorizes The State's Suit

A. The State May Challenge Unlawful Subsidy Payments As "Payments" Under § 35-212

The FAC alleges an illegal payment of public monies pursuant to A.R.S. § 35-212. *See, e.g.*, R.16 at 18-19 ¶¶93, 97. Those allegations more than suffice to withstand a Rule 12 motion and permit the case to proceed to discovery. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012); *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶7 (2008).

Indeed, the State's allegations plainly identify the nature of the illegal payments at issue here. Paragraph 93 of the FAC states, "[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. And paragraph 97 states:

> 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 (emphasis added). ABOR (at 11-13) would have the Court read this paragraph as if it alleged only that ABOR failed to collect monies, but the plain language demonstrates otherwise.

Alleging unlawful subsidy payments is sufficient to fall within § 35-212. Common meaning and this court's case law demonstrate that a subsidy payment is a type of payment, even when made to a third party rather than the ultimate beneficiary. *See* OB15-16.[1] The allegations here do not involve an abstract subsidy or mere debt forgiveness but rather the ***actual payment of public monies***. ABOR never explains or cites to authority how it can be otherwise, instead deflecting this analysis by assuming that DACA-eligible students must receive a *direct* payment from ABOR to trigger a § 35-212 illegal payments claim. *See* AB11-12.

[1] "OB" refers to Opening Brief; "AB" to Answering Brief; and "R." to the Record.

But the direct/indirect distinction is legally irrelevant for § 35-212 purposes. A claim under A.R.S. § 35-212 does not require that an "illegal payment" *only* be a circumstance in which persons directly received money to which they were not entitled; it also could be that an otherwise legal payment was illegal under the circumstances. That is what the State has alleged here; ABOR did not make direct payments to DACA-eligible students, but in providing subsidized, below-cost tuition, ABOR ***pays*** the difference to the universities with public monies for the universities to provide educational services to ineligible students. Governing law prohibits "any other type of financial assistance that is subsidized or paid in whole or in part with state monies." A.R.S. § 15-1825(A). To the extent in-state tuition does not cover cost, ABOR pays the difference to the universities out of public monies. Those are the payments at issue in this § 35-212 complaint. *See* OB10-11, 14.

Arizona case law also supports this straightforward logic. Nothing about the phrase "illegal payment" in A.R.S. § 35-212 necessitates that illegality be premised on who received a direct payment. The State cited *McClead v. Pima County*, where the alleged illegal payment was a retirement benefit subsidy. 174 Ariz. 348 (App. 1992). It is true in *McClead* that the subsidy recipients received direct payments, but that factual distinction from this case does not cut against the State here. The alleged illegality in *McClead*, which this Court accepted for standing

purposes, concerned the nature of the subsidy payment, not the recipient. *See id.* at 353 (Plaintiffs' claims depended "upon the structure and funding of the public retirement plans and upon the post-retirement benefits involved").

Moreover, in *State ex rel. Woods v. Block*, the Arizona Supreme Court considered dispositive for § 35-212 standing purposes that the Attorney General challenged the underlying legality of whether payments could be made at all by an agency whose creation allegedly violated the separation of powers. 189 Ariz. 269, 275 (1997). The connection between this analysis and an illegal-payments analysis under § 35-212 is completely logical; if an agency empowered by the Legislature to spend money is actually unconstitutional, then any expenditure by that agency is illegal. Likewise in *Fund Manager v. Corbin*, this Court reached the same conclusion in a constitutional challenge regarding the procurement code. 161 Ariz. 348, 353-54 (App. 1988).[2]

B. ABOR Is Not Entitled To A Mootness Ruling On Appeal

ABOR cannot avoid a remand based on mootness. AB9-10. ABOR's argument completely elides that the FAC sought not just injunctive relief but also ***recovery*** of funds illegally paid. *See* R.16 at 20 ¶3. Thus, even if the trial court

[2] Finally, *Biggs v. Cooper* does not support dismissal. There, the payment side of the equation was not alleged to be illegal, only the collection side, and the *Biggs* Court affirmed dismissal because no "express expenditure power" even existed. *Biggs v. Cooper*, 234 Ariz. 515, 522 ¶19 (App. 2014) (quoting A.R.S. § 36-2901.08(A)). Here, the State *is* challenging the payment side of the equation, and *identified* ABOR's express expenditure power. OB19.

determines on remand that injunctive relief is inappropriate, the illegal payment claim remains justiciable. *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶11 (App. 2013) (claims remain justiciable when a remedy is still available); *Bank of New York Mellon v. DeMeo*, 227 Ariz. 192, 193-94 ¶8 (App. 2011) (mootness arises when "action by the reviewing court would have no effect on the parties"). ABOR's brief makes no mention of this and ignores the necessary conclusion that even if the Arizona Supreme Court has settled the legality of offering in-state tuition to DACA students, ABOR, at a minimum, must account for the public monies it paid to provide educational services to ineligible students in violation of Proposition 300.

In addition, voluntary cessation—particularly *after* suit is filed—does not automatically moot possible injunctive relief. OB24 n.6 (citing *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486 (App. 1981)).[3] And even if ABOR has repealed the specific policy at issue, whether to impose an injunction, or what such an injunction's appropriate scope would be, is not

[3] ABOR's misleading claim that it "publicly announced before the AG filed his Complaint that it would abide by the Arizona Supreme Court's decision in [*MCCCD*]" glosses over that in this same announcement, made in June 2017 (approximately eight months before the Arizona Supreme Court decided to hear the case), ABOR confirmed that it would ignore this Court's opinion, which reached the same conclusion the Arizona Supreme Court ultimately reached. AB9.

something that should be decided by this Court in the first instance when reviewing a Rule 12 dismissal.[4]

Finally, this case presents an issue of significant importance that should overcome any potential mootness. *See London v. Broderick*, 206 Ariz. 490, 492 ¶7 (2003) (Arizona courts may decide important and potentially recurring issues notwithstanding mootness).

C. Because § 35-212 Authorizes Count VI, The State May Also Bring Counts I-V

The State also properly brought FAC Counts I-V. Once the State properly pleads a § 35-212 claim, other factually related claims are authorized. That is the Arizona Supreme Court's straightforward conclusion in *Woods*. *See* 189 Ariz. at 273 (requiring only that Attorney General's "[s]tanding … ***be linked*** to some statutory basis" (emphasis added)). And it is a sensible conclusion that allows a court to review the underlying cause(s) of an alleged illegal payment and grant

[4] The Court should exercise its general discretion to allow the trial court to conduct a fact-specific inquiry into mootness of the State's § 35-212 claim. Notwithstanding the unlawful in-state tuition policy itself, discovery could provide further insight into how subsidies were provided (or still may be provided) to students ineligible for those benefits. *See Del Rio Land, Inc. v. Haumont*, 110 Ariz. 7, 9 (1973) (reversing dismissal for mootness when "there are disputed fact issues which must be tried"); *Babbitt*, 128 Ariz. at 486 (Courts should "look at factors which indicate proof of likelihood to engage in future violations" when determining whether injunctive relief is appropriate). Moreover, although *State v. MCCCD*, 243 Ariz. 539 (2018), concluded in-state tuition could not be offered to DACA students, that decision does not preclude ABOR from implementing other policies that offer improper education-related subsidies.

appropriate relief. Failing to recognize it in this case would narrow significantly the State's ability to seek review over the stewardship of public money.

Here, Counts I-V are intertwined with Count VI because resolving them could, by extension, also resolve Count VI. ABOR never engages with this argument, attempting to dispose of it by merely reasserting arguments on mootness and § 35-212. But as the opening brief explained, resolving every count of the State's complaint turns on a single question: what is the actual cost of furnishing instruction to students? *See* OB22-24.[5] Answering that question not only will determine whether and how much ABOR pays in providing in-state tuition, it will show that if subsidies are being paid to cover expenses that violate the Arizona Constitution's "nearly free as possible" clause, eliminating those expenses would resolve, at least in part, the problem raised in Count VI by reducing the amount of subsidy payments needed to provide educational services to in-state students. OB22-24. At a minimum, whether a claim will aid the Attorney General in preventing or recovering an illegal payment should proceed beyond the Rule 12 stage if an illegal payment is well-pled.

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[5] Because ABOR seeks to dispute on appeal the State's allegations (which the Court must take as true at this stage), it is worth noting that the cost study ABOR cites to show it considers cost when setting tuition, *see* AB3, nonetheless confirms that the average cost of instruction decreased between 2008 and 2016, at which time ABOR continued to push through rapid and dramatic tuition increases. *See* R.16 at 4-6 ¶¶10-15; Arizona Board of Regents, *Arizona Board of Regents' Cost Study*, 11 (Dec. 2017), https://www.azregents.edu/sites/default/files/public/ABOR%202017%20Cost%20Study%20Report.pdf.

II. In Addition, § 41-193(A) Authorizes The State's Suit

Section 41-193(A)(2) independently authorizes FAC Counts I-VI, and *McFate v. Arizona State Land Department*, 87 Ariz. 139 (1960), should be overruled.[6] In 1953, following a vote of the people, the Legislature amended the Attorney General's powers and duties to add for the first time that 1) the Attorney General is "chief legal officer of the state" and 2) he may, "when [he] deem[s] necessary," prosecute any proceeding in which the state or an officer is a party or has an interest. A.R.S. §§ 41-192(A), -193(A)(2). The latter addition textually equated the Attorney General's power with the Governor's longstanding power to have such actions "prosecute[d]." Only three years later, the Arizona Supreme Court held that this statutory authority meant that the Attorney General "may, like the Governor, go to courts for the protection of the rights of the people." *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956).

ABOR never disputes that *Morrison* remains good law and interpreted "prosecute" in § 41-193(A)(1) as including "institut[ing]" an action. 80 Ariz. at 332. Nor does ABOR dispute that *Morrison*'s interpretation is consistent with the role of attorneys general in the majority of other states. Finally, ABOR never disputes that the contrary interpretation would allow officials to ignore the constitution and other laws—something perfectly illustrated by this case.

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[6] This section is included because of the Petition to Transfer. *See* OB25 n.7.

Instead, ABOR relies on *stare decisis* based on *McFate*. But *McFate*'s interpretation of § 41-193(A)(2) is contrary to the plain meaning of "prosecute." And none of the policy concerns *McFate* identified produce an absurd or unconstitutional result—the high burden for ignoring a statute's plan text. *McFate* must be overruled, and the instant case presents a proper vehicle.

A. The Plain Language Supports The State's Interpretation That A.R.S. §§ 41-192, -193 Authorize FAC Counts I-VI

Together, §§ 41-192(A) and -193(A)(2) authorize FAC Counts I-VI. Courts look to plain language as the "best indicat[or]" of legislative intent and, when the language is clear, "apply it unless an absurd or unconstitutional result would follow." *Premier Physicians Grp. v. Navarro*, 240 Ariz. 193, 195 ¶9 (2016). Section 41-192(A) states, "[t]he attorney general shall have charge of and direct the department of law and shall serve as chief legal officer of the state." And § 41-193(A) states, "[t]he department of law shall … 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."

1. "Prosecute" in § 41-193(A)(2) includes instituting an action

The plain language of "prosecute," as applied to civil proceedings, includes instituting actions and is not confined to pursuing a remedy after proceedings are otherwise instituted. The State has set forth extensive supporting authority for this.

OB28-29 & n.9. It also cites attorney-general-powers cases that conclude "prosecute" includes instituting actions. OB34; *State v. Exxon Corp.*, 526 F.2d 266, 270-71 & n.16 (5th Cir. 1976) (citing *Black's Law Dictionary* and cases spanning 1911 to 1971); *State v. Valley Sav. & Loan*, 636 P.2d 279, 281 (N.M. 1981) (unanimous; citing 1948 case interpreting "prosecute"). ABOR completely failed to address these cases and the authorities cited by them. Instead, ABOR argues 1) the State did not provide precedent "at the time the statute became law," *i.e.* from 1953; and 2) the State ignored Arizona cases on point. AB29. Neither argument has merit.

First, in 1953, the meaning of "prosecute" included instituting an action—just as it does today. When interpreting § 41-193(A)(1), which includes the identical word "prosecute," *Morrison* stated, "***it follows from [§ 41-193(A)](1)*** that the Attorney General is the proper state official ***to institute*** the action. In doing so he acts as the 'chief legal officer' of the State." 80 Ariz. at 332 (emphasis added). Coming only three years after the amendments, *Morrison* is an excellent indicator of what "prosecute" meant in 1953.

Also, at the relevant time, Arizona courts frequently cited *Black's Law Dictionary* and *Webster's New International Dictionary of the English Language*, both of which support the State's interpretation. *See State v. Dickens*, 66 Ariz. 86, 92 (1947) (citing *Black's* for the definition of "prosecute"); *Marquez v. Rapid*

Harvest Co., 89 Ariz. 62, 66 (1960) (citing both). *Black's* definition at the time included:

> PROSECUTE. … To "prosecute" an action is not merely to commence it, but includes following it to an ultimate conclusion.
>
> PROSECUTION. … The term is also frequently used respecting civil litigation; and includes every step in an action from its commencement to its final determination.

Black's at 1450-51 (3d ed. 1933); *accord Black's* at 1385 (Revised 4th ed. 1968). And *Webster*'s definition at the time included:

> Prosecute: … *Intransitive*: … 2. *Law.* To institute and carry on a legal suit or prosecution….
>
> Prosecution … 2. *Law.* a The institution and carrying on of a suit or proceeding in a court of law or equity….

Webster's at 1987 (2d ed. 1947).[7] ABOR's contention that in 1953 "prosecute" excluded commencing or instituting an action is thus simply incorrect.

Second, the two cases ABOR and *McFate* cite to show "prosecute" and "commence" are not synonymous actually *support* the State's position. *See* AB23. The cases quote statutes of limitations requiring an action be "commenced and prosecuted" within a certain time. *W.T. Rawleigh Co. v. Spencer*, 58 Ariz. 182, 184 (1941); *Forbach v. Steinfeld*, 34 Ariz. 519, 520 (1928). But the statutes' use of both words proves the State's point. Because "prosecution" "includes every

[7] Excerpts from all three dictionaries are provided in a Supplemental Appendix filed with this Reply Brief.

step in an action from its commencement to its final determination," *see Black's* at 1450-51 (3d ed.), the statutes could not just use "prosecuted" and instead had to state the action must be both "commenced *and* prosecuted" to make clear that mere institution was insufficient.

For ABOR's statutory construction to be correct, it must establish that a statute's use of "prosecute" alone *excludes* commencing an action, and no party has cited a case from Arizona or elsewhere—other than *McFate*. And if the Legislature intended for "prosecute" in § 41-193(A)(2) to exclude commencing an action, it easily could have said: prosecute and defend "any proceeding after commencement" or "any proceeding pending…" But it did not because that was not its intent. *See McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290-91 (1982) ("'[I]t is difficult to believe [the Legislature] would have attempted to carry [its intent] into effect in such an uncertain and doubtful manner, when [it] could have done so easily and naturally'").

2. The statute appropriately limits its scope by requiring "the state or an officer thereof is a party or has an interest," and that scope is met here.

Section 41-193(A)(2)'s text appropriately limits the statute's scope by requiring that the proceeding be one "in which the state or an officer thereof is a party or has an interest." *Morrison*, which involved an original proceeding in the Arizona Supreme Court, concluded that the Attorney General may go to court in

cases involving "matters of state concern," *i.e.* the "rights of the people." 80 Ariz. at 329, 331-32. It provided two examples: issuing liquor licenses apparently in excess of a statutory quota and developing state lands for mineral purposes. *Id.* at 330-31. *Morrison*'s reasoning proceeded in two steps. First, because the State has an interest in such matters, it is an appropriate party and is not precluded from being a party by its agent's non-action. 80 Ariz. at 331. Second, when the State is an appropriate party, the Attorney General is authorized to bring the action. *Id.* at 332. The court stated: "it follows from [§ 41-193(A)](1) that the Attorney General is the proper state official to institute the action. In doing so he acts as the 'chief legal officer' of the State." *Id.* Therefore, contrary to ABOR's argument, the statute does not confer an "omnibus power to file suit" or to "initiate actions whenever he sees fit," AB20-21, but rather a power to go to court and bring a case involving a matter of state concern.[8]

[8] ABOR also attempts (at 24-25) to distinguish *Morrison* based on the party status of the Superintendent of Liquor Licenses in the lower court. But, as noted, that was not the court's reasoning. *Morrison* focused on the State's "interest" and "h[e]ld" that interest could not be negated by "the non-action of its agent" the Superintendent. *Id.* at 330-31. ABOR also fails to note that *Morrison* interpreted (A)(1), and the instant case involves (A)(2), which contains the additional language "or has an interest"—making it even clearer that the State or an officer need not otherwise be a party. Finally, assuming arguendo that ABOR's citations (at 24) are helpful for the scope of when "an officer" "has an interest," they are inapposite to determining the Legislature's intent by "the state" having an interest, which *Morrison* has interpreted conclusively.

Here, the FAC's counts undoubtedly involve such a proceeding. First, the Arizona voters enacted a law that in-state tuition and other higher-education subsidies not be provided to those without lawful immigration status, and the FAC alleges ABOR violated that law. Second, the Arizona constitution establishes a uniform public school system including universities, and it requires that "the instruction furnished shall be as nearly free as possible." Ariz. Const. art. XI, § 6. Statutes further impose legal limits on ABOR's tuition-setting powers. *See* A.R.S. § 15-1626(A). The FAC alleges that ABOR violates both the constitution and its governing statutes.

B. Secondary Factors Also Support The State's Interpretation

Even if § 41-193(A)(2) were ambiguous, secondary factors also support interpreting it as authorizing the Attorney General to institute actions on behalf of the State. OB30. Such factors include, "the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." OB31 (quoting *Premier Physicians Grp.*, 240 Ariz. at 195 ¶9).

1. The relevant portions of the statutes were amended in 1953; the State's interpretation gives the amendments effect while ABOR's interpretation renders them meaningless

Following the people's vote 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 amended the Attorney General's statutory duties and

powers in 1953. OB25-26. It specifically expanded them by adding to § 41-192(A) that the Attorney General is "chief legal officer of the state" and adding "when deemed necessary by the attorney general" to § 41-193(A)(2). The State's interpretation is consistent with these amendments' spirit and purpose, gives them effect, and makes more sense in context. OB31-33.

In Arizona and other states, "chief legal officer" is a term of art used in conjunction with common-law powers. OB32 (collecting cases). When statutes use terms from the common law, the terms are supposed to be used with reference to their meaning in that law. OB32-33. And that is exactly what *Morrison* did—when quoting § 41-192(A) as stating that the Attorney General is "chief legal officer of the state" and may thus go to court to protect the people's rights, the court cited a case addressing common-law powers. 80 Ariz. at 332 (citing *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 222 (N.J. 1952)). In contrast to this well-established canon of construction, ABOR offers an interpretation that effectively excises these words from the statute and makes the amendment meaningless.

Second, by also adding "when deemed necessary by the attorney general" to § 41-193(A)(2), the Legislature further confirmed the Attorney General's authority to go to court. The word "when" refers to a specific point in time, supporting the conclusion that § 41-193(A)(2) is tied to the Attorney General's discretion to bring

an action, not merely to continue it after it has otherwise been instituted. OB30 (citing *Brewer v. Burns*, 222 Ariz. 234, 239-40 ¶27 (2009)). ABOR never engages with this argument.

Moreover, by adding language to § 41-193(A)(2), the Legislature expressly equated the Attorney General's authority with the Governor's longstanding authority to have "prosecute[d]" actions in which the State is a party or has an interest. OB29 (citing authority that the same word should have the same meaning in a statute). ABOR disagrees, stating the Governor's authority comes solely from the Arizona Constitution's "take care" clause. But that is a very awkward interpretation when tracked-through and viewed in light of the statute's history for two reasons: (1) it means pre-1953 (when the statute referenced only the Governor), the Legislature for some unexplained reason codified only the Governor's power to prosecute litigation after commencement and left the power to initiate litigation to the constitutional language alone (with no corresponding statute); and (2) that the Legislature used the word "prosecute" to accomplish this when the plain meaning of "prosecute" encompasses initiating a suit. *See supra* page 12 (citing *McElhaney*, 132 Ariz. at 290-91). The much more natural reading is that when the Legislature codified the Governor's power to "prosecute," it included every step of litigation, from commencement to final determination, consistent with the plain meaning of "prosecute." And when the 1953 amendment

gave the Attorney General the same power, it conferred a congruent power that included initiating actions.

Finally, ABOR relies (at 27-28) on a passage in *Woods* that involved neither §§ 41-192 nor -193. *Woods* analyzed only whether "the Arizona Constitution itself grants [the Attorney General] independent standing." 189 Ariz. at 273; *see also id.* at 275. Thus, as ABOR concedes, those statutes' relevance as presented in this appeal was not raised or analyzed in *Woods*.

2. The vast majority of states follow the rule that the Attorney General may go to court to protect the rights of the people, and taking a contrary interpretation would thwart a key check on the actions of executive branch officials

The State's interpretation is also supported by the practical effects and consequences of the plain-language interpretation versus the alternative. It was completely reasonable for the Legislature to confer a statutory power on the Attorney General to go to court to protect the people's rights congruent with the power to do so at common law because the vast majority of states have conferred exactly this power (either by statute or case law). OB33 & OB Appendix 19, 38. And it is particularly imperative that the Attorney General be able to go to court where constitutional rights are involved. The people adopted the Arizona Constitution 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, which would avoid the check the people intended. OB35. ABOR never addresses this concern.

3. *McFate*'s contrary policy concerns cannot overcome the plain language of the pertinent statutes

The above discussion shows that *McFate* was not based on the text of §§ 41-192(A), -193(A). Instead, it was based on other concerns: 1) rendering portions of other statutes superfluous; 2) interfering with the Governor's powers, and 3) interfering with the Attorney General's role as legal advisor to state agencies. OB35-36. But none of these concerns warrants the misreading in *McFate*.

First, the State demonstrated that its interpretation does not render meaningless the other statutes cited in *McFate*. OB36. The State set forth multiple reasons why a general power to go to court in § 41-193(A)(2) would not render other statutes surplus (as argued in *McFate*). These include that the statutes cited by *McFate* 1) authorize penalties/damages, 2) divide authority between the Attorney General and other actors (county attorneys, taxpayers/claimants, and legislative officers), and 3) impose time limits. *Id.* ABOR does not dispute this. Instead it offers additional statutes as a post-hoc justification for *McFate*. But the additional statutes ABOR cites (at 20-21) are not rendered surplus for the same three reasons the State previously identified. In addition, some allow the Attorney General to participate in what otherwise could be only private actions (i.e. not "matters of state concern" or involving the "rights of the people" under *Morrison*).

Finally, applying the surplusage canon to different statutes passed over multiple decades is a uniquely poor fit for attorney general powers, as that office traditionally has possessed myriad powers not always precisely defined. OB36.

Second, the plain language of §§ 41-192(A) and -193(A)(1)-(3) does not unconstitutionally infringe on the Governor's "take care" powers under Article V, § 4 of the Arizona Constitution. *Morrison* addressed this concern directly by stating that 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; *see also* OB37-38 (collecting cases establishing judicial review of executive's actions when they contravene constitutional or statutory duties).

Third, the plain language interpretation should not be rejected for fear of interfering with the Attorney General's role as legal advisor. OB39-41. The Attorney General's Office is not the same as a private law firm for purposes of imputing conflicts—something even *McFate* recognized. OB39. Any concerns may be addressed by screens and using other counsel as situations require.

* * *

McFate's fundamental error was to use pre-1953 Arizona cases stating the Attorney General has the powers given by the Legislature to conclude the Legislature could not have meant to confer a statutory power equivalent to the

common-law power to go to court to protect the people's rights, all while failing to recognize that a plain-language reading of § 41-193(A)(1)-(2) is neither absurd nor unconstitutional and that attorneys general have such a power in the majority of other states. OB31.

C. *Stare Decisis* Cannot Save *McFate*'s Incorrect Interpretation

McFate's erroneous construction cannot be upheld based on *stare decisis*. As a preliminary matter, because *McFate*'s reasoning was not based on statutory language, it should be analyzed as case of constitutional interpretation (of the "take care" clause) or legal ethics (the Attorney General's legal-advisor role), not pure statutory construction. OB41. ABOR places great weight (at 19) on the fact that the Legislature amended § 41-193(A) twice after *McFate*. But given *McFate*'s reasoning, it is unlikely the Legislature would think it could change the court's analysis by amending the statute. Instead, it is the court's duty to correct its own erroneous constitutional and legal-ethics reasoning. OB41; *see also* OB44 (citing *Lowing v. Allstate Ins.*, 176 Ariz. 101, 106 (1993) (concluding legislative acquiescence was inapplicable)).

But even analyzing *McFate* as a statutory-construction case, it still should be overruled. OB42-44. The Arizona Supreme Court set forth five factors for determining if *stare decisis* requires adherence to a prior statutory interpretation. OB42 (citing *Lowing*, 176 Ariz. at 107, and other cases). All of the factors are met.

First, as explained in Section II(A), the § 41-193(A)(2)'s language does not compel *McFate*'s construction, and in fact *McFate*'s analysis directly contravenes the statute's plain language. Second, as discussed in Section II(B), *McFate*'s analysis did not further the policies of the 1953 amendments to the Attorney General's duties, but rather rendered the people's and Legislature's votes meaningless. Third, *McFate* was based on an incorrect interpretation of the constitutional "take care" clause and on legal ethics concerns that can be accommodated through screens and using other counsel as needed, rather than a bright-line rule directly at odds with the statute's plain language. Fourth, by overruling *McFate* the court returns to *Morrison*, which the plain language of § 41-193(A)(1)-(2) supports, is more contemporaneous to the key 1953 statutory amendments, and is better reasoned particularly as to promoting the rule of law. Fifth, this case's facts show that, unbound by judicial review, ABOR has acted as if it is unconstrained by law, dramatically increasing tuition in lock step across all three public universities, and ignoring the voter-imposed mandate of Proposition 300, even in the face of a unanimous Court of Appeals decision that the proposition's prohibition applied.[9]

[9] Overruling *McFate*'s construction of § 41-193(A)(1)-(2) would not disrupt the lines of case law stating the Attorney General lacks common-law powers, which actually involve two narrow holdings: 1) the Legislature by statute can authorize state agencies to use counsel other than the Attorney General, and 2) the Attorney

D. The State Adequately Preserved This Argument

Perhaps sensing that it cannot win on the merits or *stare decisis*, ABOR asserts that even though the State specifically set forth in its response to the Motion to Dismiss in Superior Court that it would seek to overturn *McFate* if this case comes before the Arizona Supreme Court (R.17 at 3 n.2), the State nonetheless "waived" the argument by not "arguing" that the Superior Court should overturn Supreme Court precedent. AB 16-17. "Arguing" that the Superior Court should overturn an Arizona Supreme Court case would have been futile, a conclusion the Arizona Supreme Court has relied on in deciding to hear such arguments. *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, 226 Ariz. 387, 389 ¶8 (2011) (considering whether a case should be overturned even though it was not presented <u>at all</u> to the Court of Appeals and noting the Court of Appeals was bound by precedent and therefore unable to hear the argument).[10]

Moreover, the State adequately preserved the argument. "The concept of waiver is based on two factors: fair notice and judicial efficiency." *Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 479 (1986). Fair notice is satisfied and arguments

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General has no common-law powers in the criminal context. OB43-44 & nn.14-15. The State takes no position on those lines of cases in this appeal.

[10] ABOR cites *Woods* to support its wavier argument. But *Woods* was an original action in the Arizona Supreme Court; the Attorney General did not raise the issue of overruling *McFate* in the Supreme Court itself. That case says nothing about whether a party must ask a lower to overrule an Arizona Supreme Court case to preserve the issue if it ultimately reaches that court.

are preserved for review even if an argument is "minimally" raised. *See Town of Marana v. Pima Cty.*, 230 Ariz. 142, 149 ¶30 (App. 2012) (claim preserved when mentioned in a footnote in a supplement to a brief); *accord*, *Estate of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, 437 ¶26 (App. 2011). Because the State raised it in the Superior Court and expressly reserved the right to argue it on appeal, there is no doubt ABOR had fair notice of the State's intention to challenge *McFate*.

III. The Trial Court's Dismissal Cannot Be Affirmed In Part On Alternative Grounds

A. MTD 2 Fails Because *Kromko* Does Not Bar This Case

As the State explained (OB46-47), *Kromko v. Arizona Board of Regents*, 216 Ariz. 190 (2007), is limited to "whether a tuition increase for a particular academic year violated the Arizona Constitution." In response, ABOR offers (at 29-30) a smattering of selective dicta to suggest that the Arizona Supreme Court's political-question holding reaches more broadly: *i.e.*, beyond challenges to particular tuition levels to encompass all conceivable claims based on Article XI, § 6. Not so.

ABOR's cherry-picked snippets cannot escape the *Kromko* Court's express characterization of its own holding: "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." *Id.* at 195, ¶23 (emphasis added). ABOR's attempt to smuggle in additional holdings contravenes the court's explicit

disavowal that any such other holdings exist. And although the State explicitly cited this language (at 46-47), ABOR only addresses it in an unrelated footnote (at 35 n.17)—which tellingly omits the critical "we hold only" language that is fatal to its instant arguments.

The court's limitation on its holding is underscored by its statement that the claim presented was "*only that* the total amount of tuition charged for the 2003–04 academic year was excessive." *Id.* at 192, ¶10 (emphasis added). ABOR's reading of *Kromko* is thus doubly dubious: it is premised on the Arizona Supreme Court (1) deciding an issue that was expressly *not* presented (2) to reach a holding it explicitly *denied* making. This revisionist recasting of *Kromko*'s holding cannot withstand any scrutiny.[11]

B. Even if *Kromko* Controlled Here, It Should Be Overruled

If, however, ABOR's expansionist reading of *Kromko* were correct, then *Kromko* should be overruled. As explained previously (OB47-50), *Kromko* is something of a judicial aberration. It is the first—and to date *only*—instance in which the Arizona Supreme Court has found a question non-justiciable due to the

[11] ABOR repeatedly (at 28, 29 n.13) attempts to bolster its implausible reading of *Kromko* by advancing insinuations premised on the prior legal positions taken by a previous Attorney General. But ABOR cites no legal authority that permits an Attorney General to bind forever his successors to his legal positions. Indeed, the Arizona Constitution mandates regular elections and term limits precisely so voters can change officeholders and their legal positions. The Attorney General is thus not bound by his predecessor's position in *Kromko*.

purported absence of judicially manageable standards. OB48. In *every* political-question decision since *Kromko*, the Arizona Supreme Court repeatedly has found standards sufficiently manageable to render the questions justiciable. *See*, *e.g.*, *State v. Maestas*, 244 Ariz. 9 (2018); *Arizona Indep. Redistricting Comm'n ("AIRC") v. Brewer*, 229 Ariz. 347 (2012); *Brewer v. Burns*, 222 Ariz. 234 (2009). Indeed, every Arizona Supreme Court decision cited by ABOR in defense of *Kromko* (at 32-33) actually rejected invocation of political-question doctrine. *See id.*; *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482 (2006).

There is no reason that the Arizona Constitution's "nearly free as possible" language is any less susceptible to judicially manageable standards than the "general and uniform public school system" and "furthers the purposes of such measure" constitutional language in *Meastas*, 244 Ariz. at 11-12 ¶¶7-12, the "neglect of duty" and "gross mismanagement" language of *AIRC*, 229 Ariz. at 351-55 ¶¶16-35, the "when finally passed" language of *Burns*, 222 Ariz. at 238-39 ¶¶16-22, and "item of appropriation of money" language of *Napolitano*, 213 Ariz. at 484-85 ¶¶6-9. For example, while public schools could be "uniform" (or not) in *innumerable* different dimensions that would challenge judicial manageability, the "nearly free as possible" language requires analysis of a single data point (tuition) on a single spectrum (*i.e.*, actually free to infinitely expensive). Nor is the textual commitment to ABOR in the Nearly Free Clause any stronger than that to the

Legislature from the General and Uniform Clause or the commitment of removal power to the Governor in *ARIC*.

Correctly recognizing that *Kromko* has become a jurisprudential outlier, Justice Bolick quite properly has called for reevaluation of *Kromko*. *See Maestas*, 244 Ariz. at 17 ¶35 (2018) (Bolick, J., concurring). ABOR tellingly ignores this.

Kromko's practical consequences also warrant overruling it. ABOR's response to *Kromko*'s judicial retreat is unmistakable: it has raised tuition in lock-step across all three public universities in a manner far outstripping inflation—over *300%* since 2002 (nearly *ten times* inflation). *See* OB7-9. ABOR's tuition-setting actions lack any subtlety and are presented in stark terms: following *Kromko*, ABOR intends to—and has—set tuition at what the market will bear.

Similarly, overruling *Kromko* is warranted based on changed factual circumstances. In *Kromko*, the Supreme Court assumed that ABOR Policy Manual §4-104 would operate to constrain tuition increases by ABOR meaningfully and limit in-state tuition to the bottom third of universities. 216 Ariz. at 195, ¶ 23. But the subsequent decade has proven that factual premise demonstrably false: tuition has skyrocketed and is now in the *top quartile*. OB7-8. *Kromko*'s mistaken belief—*i.e.*, that tuition would remain in the bottom third nationally despite its holding—further supports overruling *Kromko*.

Because "[d]evelopments since [*Kromko*], both factual and legal, have … 'eroded' the decision's 'underpinnings,'" *Kromko* should be overruled. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2482 (2018).

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

As the State has explained previously, "Legislative immunity does not immunize [governmental policies] from judicial scrutiny for *implementation* of these policies and procedures, whether previous enactment of those policies was legislative in nature or not." OB51 (emphasis added). ABOR (at 37-38) notably does not dispute this bedrock legal principle and also does not cite a *single* decision extending legislative immunity in that context. Instead, ABOR only disputes that this action involves a challenge to implementing a governmental policy. That is baseless.

ABOR notably does not cite any portions of the FAC in making its no-challenge-to-implementation contention. Yet the FAC is replete with allegations that application of ABOR's policies violated the Arizona Constitution. *See*, *e.g.*, R.16 at 2:23-25 ("ABOR *unlawfully charges* students…"); at 15 ¶¶67-72 (alleging that ABOR unlawfully "*charge[s]* part-time students higher tuition…"); at 16-17 ¶¶73-81 (same for "*charging* in-state students higher tuition for online classes…"); at 17 ¶¶82-86 (same for "*charg[ing]* in-state and out-of-state students the same amount for online instruction…") (all emphases added).

Moreover, ABOR's instant immunity arguments prove far too much. For example, ABOR argues (at 39) it enjoys immunity because it "sets tuition as part of a budget-making process." But under that logic, if the Arizona Legislature budgeted $100 million to create an official "Church of Arizona," that expenditure would be immune from judicial challenge. That cannot be the law. *See*, *e.g.*, *Minority Coal. v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587 (2009) (reviewing constitutionality of Redistricting Commission action even after concluding that it "acts as a legislative body").

Nor does legislative immunity apply where a claim is predicated on unconstitutional legislative processes. For example, if a town council passes an ordinance with clear racial animus, a challenge to its implementation based on the equal protection clauses of the U.S. and Arizona Constitutions is entirely appropriate. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Accepting ABOR's arguments would upend settled law by rendering that discriminatory intent by legislators immune from judicial review.[12]

[12] The absence of legislative immunity here is underscored by the Court of Appeals decision in *Kromko*, which squarely and unanimously rejected ABOR's invocation of legislative immunity. *Kromko v. Arizona Bd. of Regents*, 213 Ariz. 607, 613-16, ¶¶24-39 (App. 2006). ABOR itself acknowledges (at 40 n.19) that holding, but argues that the Arizona Supreme Court vacated it. But that court only vacated the Court of Appeals' opinion in part. *Kromko*, 216 Ariz. at 195, ¶¶25-26.

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

The Superior Court erred in entering its judgment of dismissal with prejudice. OB52. MTD 1 raised only jurisdictional challenges (*i.e.*, 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. *Id.* (collecting cases). ABOR's contrary arguments do not squarely address the actual procedural history of this case, which is a dismissal for lack of authority. AB40-41. ABOR cites to Rule 41(b) of the rules of civil procedure, but that rule expressly carves out dismissal for "lack of jurisdiction." That is precisely what the Superior Court appeared to hold in this case, and therefore it should have used—as the State properly requested—the alternative of dismissal "without leave to amend." *See* OB52.

CONCLUSION

For the foregoing reasons the Superior Court's judgment of dismissal should be vacated, and all claims in the FAC should be remanded for further proceedings.

RESPECTFULLY SUBMITTED this 28th day of January 2019.

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