

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, *ex rel.*
MARK BRNOVICH, Attorney General,

Petitioner,

v.

ARIZONA BOARD OF REGENTS,

Respondent.

Case No.:

ORIGINAL PETITION FOR SPECIAL ACTION

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INTRODUCTION

For sixteen years, the Arizona Board of Regents (“ABOR”) has substantially increased in lock-step the price of attendance for in-state undergraduates at Arizona’s public universities (“Universities”). This practice has violated Arizona law, and this original action is instituted to vindicate the rights of all Arizonans, uphold the rule of law, and require ABOR to remain within the bounds of its constitutional and statutory authority. Moreover, under the current state of Arizona law, an original action is possibly the *only* way to obtain judicial review in asserting and obtaining relief on these claims.¹

This Petition raises multiple claims that ABOR has violated its constitutional and statutory mandates. First, the process by which ABOR has increased tuition contravenes the Arizona Constitution’s mandate that “the instruction furnished [at Arizona’s public universities] shall be as nearly free as possible.” Ariz. Const. art. XI, § 6 (the “Tuition Clause”). ABOR nonetheless adopted a tuition-setting process that did not consider the cost of instruction as a factor when setting tuition, but rather looked at other factors such as students’ ability to pay by taking on debt. Subsequently, tuition has skyrocketed at Arizona’s three public universities.

¹ The State has filed a Petition to Transfer and Motion to Consolidate this Original Special Action with existing litigation. *See* Case No. T-19-0002. The relationship between this action and the other litigation is set forth in that Petition to Transfer.

Second, ABOR has imposed higher tuition for part-time and fully online students and mandatory fees unrelated to instruction, all of which are contrary to ABOR's constitutional and statutory mandates. In addition to the Tuition Clause, the applicable statute grants ABOR the power to “[f]ix tuitions and fees to be charged” at state universities and to “differentiate the tuitions and fees” for prescribed categories of students, *i.e.* “between institutions ..., residents, nonresidents, undergraduate students, graduate students, students from foreign countries and students who have earned credit hours exceeding the graduation threshold.” A.R.S. § 15-1626(A)(5). Contrary to this statutory provision, which sets forth the bases on which ABOR may set differing rates and fees, ABOR unlawfully charges students who attend part-time or fully online significantly more. And contrary to the Tuition Clause, ABOR requires students to pay for things other than instruction—athletics, recreation, technology, and health—to access instruction.

For all of these reasons, ABOR has acted unlawfully. This Court should accept original jurisdiction and either grant injunctive, declaratory, and special action relief to end ABOR's unlawful acts or transfer this matter to Superior Court for trial under Rule of Procedure for Special Actions 4(f).

JURISDICTIONAL STATEMENT

This Jurisdictional Statement is divided into: (I) the reasons why this Court should accept jurisdiction; (II) a discussion of other proceedings by the Attorney General against ABOR and why this Petition is not barred by claim preclusion; and (III) the Attorney General's authority to bring the claims in this Petition.

I. Jurisdiction is Proper in this Court

This Court has original jurisdiction to grant injunctive and declaratory relief and extraordinary writs to state officers. Ariz. Const. art. VI, § 5(1); A.R.S. §§ 12-102(A), -1831.² This Court should accept jurisdiction of this Petition for multiple reasons. First, this Court may be the *only* court where the Attorney General currently has authority to bring these claims. Under *State ex rel. Morrison v. Thomas*, the Attorney General has authority under A.R.S. § 41-193(A)(1) to bring an action in this Court to protect the rights of the people. 80 Ariz. 327, 332 (1956). However, under *Arizona State Land Department v. McFate*, the Attorney General lacks similar authority under § 41-193(A)(2) to bring such an action in the Superior Court. 87 Ariz. 139 (1960). Therefore, this Court should accept jurisdiction to

² This Court's jurisdiction under Article VI, § 5(1) is now "granted through a special action petition." *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 121 ¶6 (2013). Alternatively, this Petition is also brought pursuant to Rule 1 of the Rules of the Supreme Court because it seeks declaratory and injunctive relief as well.

vindicate the people’s rights on matters of great public importance in a forum where the Attorney General, the State’s chief legal officer, can bring suit under *Morrison*.

Second, this Court should accept jurisdiction because this case involves a dispute over an important public policy at the highest levels of state government (between the elected “chief legal officer of the state” and the constitutional body with authority to govern the state’s public universities). *See, e.g., State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997) (accepting original jurisdiction where dispute involves separation of powers and a matter of statewide importance); *Rios v. Symington*, 172 Ariz. 3, 5 (1992) (accepting original jurisdiction where case involves a dispute at the highest levels of state government). As Attorney General Napolitano opined, “[f]rom the language of [the Tuition Clause], one can infer that the framers supported an educated citizenry and wished to insure that public education at the university level be available and financially accessible to Arizona residents.” Ariz. Op. Att’y Gen. No. I99-011, 1999 WL 311255, at *2 (May 11, 1999). The Court’s decision on the jurisdictional issues herein also could have implications for future actions by Attorneys General against state officers and bodies to protect the people’s rights.

Third, to the extent ABOR raises concerns about either political question or legislative immunity in its Response to this Petition, those concerns are baseless. The claims asserted herein are not barred by *Kromko v. Arizona Board of Regents*, 216 Ariz. 190 (2007). Moreover, legislative immunity does not apply to the implementation of policies. The State incorporates its briefing in *State ex rel. Brnovich v. Arizona Board of Regents*, No. 1 CA-CV 18-0420, as if fully set forth herein. See Reply Brief at 23-28; Opening Brief at 45-51.

Finally, if the Court concludes that this case should first be factually developed for trial in a lower court, then it should nonetheless accept jurisdiction and exercise its authority to transfer the action to Superior Court for trial under Rule 4(f) of the Arizona Rules of Procedure for Special Actions.

II. The Claims Are Not Barred By Claim Preclusion

ABOR cannot assert the dismissal of the State's prior suit against it as a bar to this action. The State previously filed a case in Superior Court against ABOR. *State ex rel. Brnovich v. ABOR*, Case No. CV2017-012115. ABOR moved to dismiss, and the Superior Court dismissed the complaint with prejudice upon concluding the Attorney General lacked authority under *McFate*, 87 Ariz. 139. The State timely filed a Notice of Appeal to the Court of Appeals. That appeal is *State ex rel. Brnovich v. Arizona Board of Regents*, Case No. 1 CA-CV 18-0420.

The State has filed a Petition to Transfer that appeal to this Court, and to consolidate consideration of the appeal with consideration of this Original Petition. Case No. T-19-0002.

As an initial matter, the Superior Court’s decision to dismiss with prejudice was error. Because the Superior Court’s decision to dismiss was based on jurisdictional grounds, it should not have been with prejudice. *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). If the Court grants the Petition to Transfer and consolidates the pending appeal with this Original Action, then it can vacate the dismissal with prejudice and need not reach claim preclusion at all.

But even if this Court concludes that dismissal with prejudice was permissible, this Original Petition is still not barred by claim preclusion. Arizona applies the “same evidence” test for claim preclusion—for claim preclusion to apply, “no additional evidence” must be “needed to prevail in the second action than that needed in the first.” *Phx. Newspapers, Inc. v. Dep’t of Corr.*, 188 Ariz. 237, 240 (App. 1997); *see also Pettit v. Pettit*, 218 Ariz. 529, 532-33, ¶¶8, 10 (App. 2008). Since the filing of the first action, another school year has come, and

therefore additional evidence is needed to show the ongoing nature of ABOR's improper practices. Moreover, ABOR revised its policies in November 2018 regarding tuition and fees. Therefore, different evidence is needed to establish whether ABOR continues to unlawfully rely on factors other than cost in the setting of tuition. Accordingly, this Petition is not barred by claim preclusion.

III. The Attorney General Has Authority To Bring These Claims

The Attorney General has authority to bring the claims in this Petition pursuant to A.R.S. § 41-193(A)(1). The Attorney General is the “‘chief legal officer’ of the State” and “shall have charge of and direct the department of law.” *Morrison*, 80 Ariz. at 332 (quoting A.R.S. § 41-192(A)). Section 41-193(A)(1) states that 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....” This Court has held under § 41-193(A)(1) that the Attorney General “may, like the Governor, go to the courts for protection of the rights of the people.” *Morrison*, 80 Ariz. at 332. *Morrison* involved an original proceeding in this Court instituted by the attorney general. *Id.* at 329. Therefore, under existing case law, the Attorney General has authority to go to this Court under § 41-193(A)(1) on

relation to the State to vindicate the rights of the people and obtain judicial review of ABOR's compliance with its constitutional and statutory mandates.³

STATEMENT OF THE ISSUES

The Tuition Clause of the Arizona Constitution requires “the instruction furnished” by state universities “shall be as nearly free as possible.” Ariz. Const. art. XI, § 6. Moreover, A.R.S. § 15-1626(A)(5) provides the bases on which ABOR may differentiate tuition. The issues presented in this Petition are:

1. Does ABOR's tuition-setting policy violate the Tuition Clause?
2. Do ABOR's policies that differentiate tuition on grounds not set forth in § 15-1626(A)(5) or fail to differentiate on grounds that are set forth therein violate ABOR's statutory mandate?
3. Does ABOR's policy of charging mandatory fees unrelated to instruction also violate the Tuition Clause?

³ *Morrison's* holding is still good law and has not been overruled. *Arizona State Land Department v. McFate*, 87 Ariz. 139 (1960), involved the Attorney General going to Superior Court under § 41-193(A)(2). *Santa Rita Mining Co. v. Dep't of Property Valuation*, 111 Ariz. 368 (1975), involved an appeal over the express objection of the client agency, who was the sole State party in the trial court. Finally, *Woods* was an original action in this Court, but the Court's opinion indicates the Attorney General did not assert § 41-193(A)(1) or *Morrison* as a basis for coming to court. *See Woods*, 189 Ariz. at 273, 275. To the extent any of these cases stands for the proposition that the Attorney General lacks the power to go to this Court to protect the rights of the people under § 41-193(A)(1), they should be overruled or limited and *Morrison* reaffirmed.

STATEMENT OF FACTS

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

The Arizona Constitution requires that “[t]he university and all other state educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible.” Ariz. Const. art. XI, § 6. Arizona law provides that ABOR shall “[f]ix tuitions and fees to be charged and differentiate the tuitions and fees between institutions and between 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 submit a budget request and 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 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 money appropriated by the Legislature for a university’s use or benefit is 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 Sixteen Years

Since 1987, ABOR policy required the Universities to set in-state tuition at a level that was within the lower one-third of in-state tuition levels in other states. *Kromko*, 216 Ariz. at 191 ¶3. In March 2003, ABOR relaxed this standard, but still required the Universities to set in-state tuition at a level not to exceed the tuition of institutions at the top of the bottom one-third of “senior public universities” in other states. *Id.* at 191 ¶4. When this policy was relaxed sixteen years ago (the 2002-2003 academic year), base tuition and mandatory fees for in-state undergraduates at the Universities was approximately \$2,600 per year. For the 2018-2019 academic year, base tuition and fees for in-state undergraduates is:

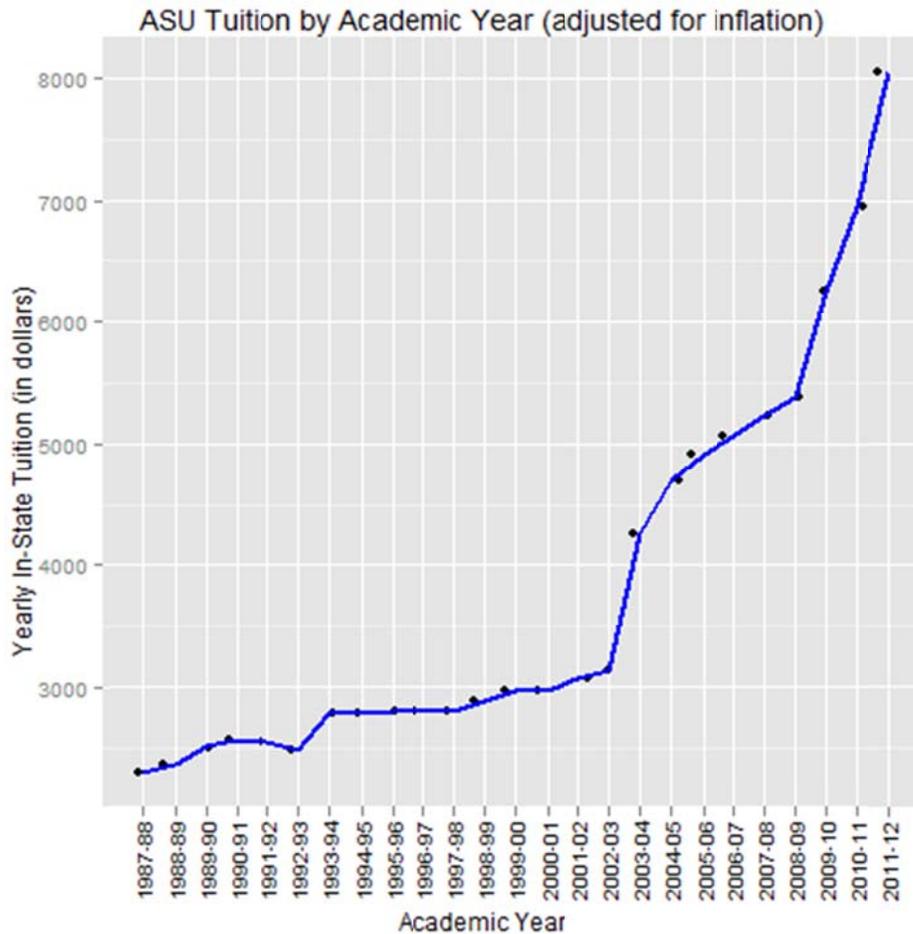
Name of Institution	Resident Tuition and Mandatory Fees for 2018-19	Increase Since 2002-03
University of Arizona Main Campus	\$12,400	377%
Northern Arizona University Flagstaff Campus	\$11,564	345%

Arizona State University All Campuses	\$10,822	316%
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In contrast to the tuition increases, the consumer price index increased only 40% over the same approximate period. Bureau of Labor Statistics, CPI Inflation Calculator, <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1.00&year1=200207&year2=201807> (last visited October 15, 2018). With the inflationary pressures of broad student loan expansion, all public universities mildly outpaced the consumer price index over the same period of time. But the national average tuition for public 4-year institutions climbed slightly over 100% as opposed to Arizona’s increases of more than 300% in the same period. In 2002, Arizona tuition hovered around the 25th percentile nationally. Arizona’s public university tuition now exceeds the 75th percentile nationally.

Similarly, median family income in Arizona increased only 27% over a comparable period (from \$46,723 in 2000 to \$59,480 in 2015). Census Bureau data, available at goo.gl/1Fwh5f (last visited October 18, 2018). This means that ABOR has raised the base tuition and fees for in-state undergraduate students at approximately nine to ten times the rate of inflation and approximately twelve to thirteen times the rate of increase of median family income over the last sixteen

years. Below is a chart that on information and belief shows ASU tuition and fees from 1987 to 2011.



ASU Tuition by Academic Year, Graph of the Week, <http://www.graphoftheweek.org/2011/12/description-arizona-state-university.html> (last visited January 28, 2019).

Simply stated, a student now must take out loans or other aid of approximately 70% of the base in-state tuition and fees to pay what would have to

be paid if ABOR had indexed tuition and fee increases with inflation over the last 16 years.⁴

The Universities operated for over one hundred years at the lower tuition levels, demonstrating that it is not necessary for ABOR to disregard and violate the Tuition Clause's mandate to provide instruction in Arizona. In addition, tuition has increased four times the amount by which state aid to the Universities has been cut since 2008. The State is providing \$390 million less in revenue, but the Universities were charging \$1.5 billion more in 2017 than they were charging in 2008. Alia Beard Rau, As Legislature has cut university funding, tuition revenues have soared, Arizona Republic (Aug. 18, 2017), <http://www.azcentral.com/story/news/politics/arizona-education/2017/05/01/arizona-tuitionhikes-have-generated-1-1-billion-more-universities/307733001/>.

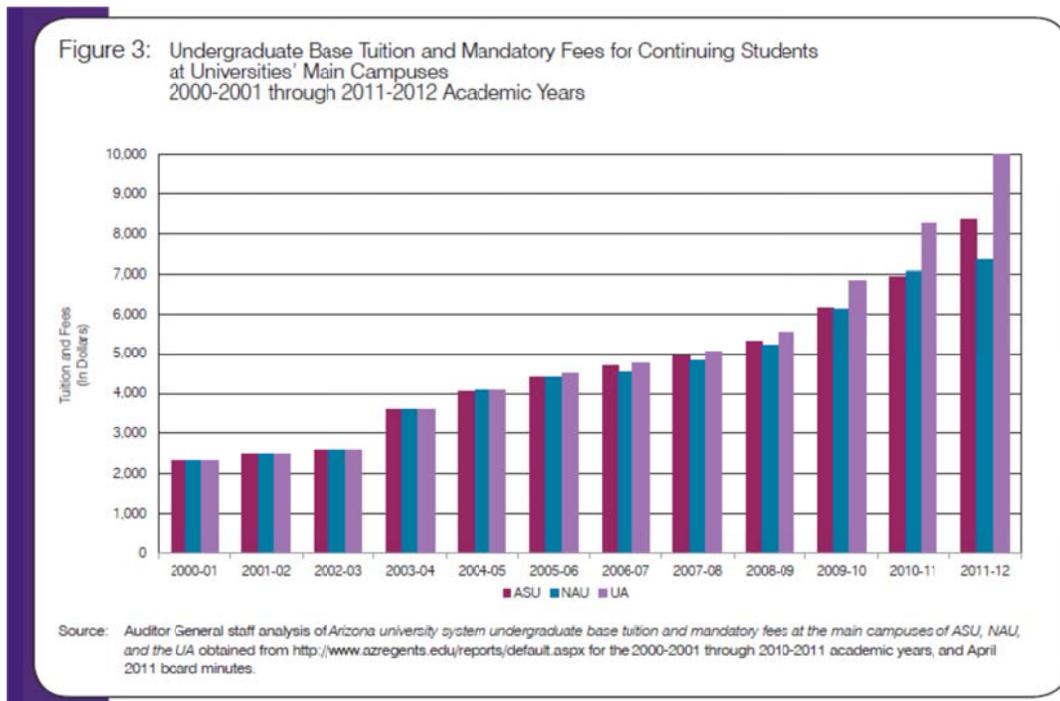
⁴ The above amounts simply reflect tuition and mandatory fees required to attend classes, and do not include amounts for other potential expenses such as room and board. The full cost of attendance per year, including room and board, is \$28,736 at ASU, \$29,950 at UofA, and \$27,266 at NAU. <https://students.asu.edu/standard-cost-attendance#resident>; <https://financialaid.arizona.edu/cost/freshmen>; <https://nau.edu/Finaid/Tuition-Expenses/> (last visited January 28, 2019).

III. ABOR’s Actions Over The Last Sixteen Years Show Either An Express Or De Facto Policy of Setting Tuition Based On An Overall Price Target. In Addition, ABOR Raised Tuition For The Three Public Universities In Lockstep, Preventing Meaningful Competition

As former Arizona Attorney General Janet Napolitano opined, ABOR “has neither statutory nor constitutional authority to raise tuition solely in an attempt to be competitive with other public universities.” Ariz. Op. Att’y Gen. No. I99-011, 1999 WL 311255, at *3 (May 11, 1999). On information and belief, average undergraduate in-state tuition and fees for Arizona residents for the 2004-05 school year was \$4,078, which made Arizona the 35th most expensive state for in-state tuition in the country and 15.8% less expensive than the median state. College Board data, available at <https://trends.collegeboard.org/sites/default/files/cp-2018-Table-5.xlsx> (last visited October 15, 2018). This situation has changed drastically. On information and belief, average in-state tuition and fees for Arizona residents for the 2017-18 school year was \$11,210, making Arizona the 14th most expensive state for in-state tuition in the country and 19.5% more expensive than the median state. *Id.* This annualized 13.5% rate of growth represents the third fastest rate of growth among all fifty states. *Id.*

The fact that tuition was hiked in lockstep across the Universities over a sixteen-year period (as shown in part in the below chart prepared by the Auditor General) means that ABOR acted to prevent meaningful competition based on

price among the Universities, notwithstanding a near quadrupling in price. This was an abuse of ABOR’s statutory position as the single governing board for the three separate institutions and was in direct contravention of the statutory directive that ABOR “differentiate the tuitions and fees between institutions.” A.R.S. § 15-1626(A)(5).



A Questions-and-Answers document on the Arizona Board of Regents—Tuition Setting for Arizona Universities, September 29, 2011, available at https://www.azauditor.gov/sites/default/files/11-11QA_Report.pdf (last visited January 28, 2019).

IV. Based On Available Information, Amounts Charged Are Not Derived From The Actual Cost Of Instruction Less State Appropriations For Instruction

At least three independent reasons show that ABOR's tuition-setting policies do not consider the actual cost of furnishing instruction: ABOR's own policies, multiple mandatory fees other than for instruction, and a comparison to the tuition charged by the community colleges.

ABOR Policy 4-103(D) shows that ABOR examines several factors in setting tuition, none of which is the actual cost of furnishing instruction. In addition, given the Tuition Clause's mandate, many of these factors are simply improper, including price-based factors such as median tuition and fees charged by out-of-state universities and the availability of student financial aid. At 15 credit hours per semester, UofA's in-state tuition and fees is \$415.58/credit hour; ASU's in-state tuition and fees equals \$360.73/credit hour; and NAU's tuition and fees equals \$385.47/credit hour.

Each of the universities also charges several extraneous mandatory fees:

- a. The fees for in-state undergraduate students at the UofA enrolled for 7 or more hours include: Recreation Center Bond Fee -- \$25; Information Technology and Library Fee -- \$267.50; Athletics Fee -- \$50; Student Services Fee -- \$75; and Health & Recreation Fee --

\$212.50. <https://bursar.arizona.edu/tuition/fees> (last visited January 28, 2019).

b. The fees for in-state undergraduate students at ASU enrolled for 7 or more hours include: Resident Surcharge -- \$135; Technology -- \$50; Student Service Facility -- \$75; Student Athletics -- \$75; Student Programs -- \$30; Health & Wellness -- \$55; and Recreation -- \$25. <https://catalog.asu.edu/tuitionandfees/fall18undergraddegreeprogallcampus> (last visited January 28, 2019).

c. The fees for in-state undergraduate students at NAU enrolled for 1 or more hours include: Information Technology Fee -- \$14 per credit/max \$168; Student Activities Fee -- \$25; Health & Recreation Fee -- \$250; and Athletics Fee -- \$75. <https://in.nau.edu/sdas/fall-undergraduate-pledge/> (last visited January 28, 2019).

Upon information and belief, Maricopa County Community Colleges charge \$85 per credit hour for county residents plus a \$15 registration fee per semester. <https://www.maricopa.edu/become-a-student/tuition-paying/tuition-cost-chart> (last visited January 28, 2019). Upon information and belief, Pima Community College charges \$82.50 per credit hour for in-state residents along with a semester processing fee of \$15. <https://www.pima.edu/paying-for-school/costs/fees.html>

(last visited January 28, 2019). Upon information and belief, Coconino Community College charges \$109 per credit hour for in-state residents. <https://www.coconino.edu/tuition-pricing> (last visited January 28, 2019).

The vast differential (public universities charging full-time in-state students up to five times per credit hour for what community colleges charge) is compelling evidence that the cost of furnishing instruction—let alone furnishing instruction “as nearly free as possible”—is not the determinative factor in setting tuition.

V. ABOR’s Actions Have Particularly Hurt Part-Time and Online Students—Those Most Likely To Be Working To Support Themselves As They Pursue A Degree

ABOR has approved tuition schedules at the Universities that charge more per credit hour when a student is taking fewer credit hours. For example, at ASU an in-state student starting as an undergraduate would be required to pay \$925 for 1 credit hour and \$755/credit hour for six credit hours. In contrast, if the student took fifteen credit hours, that student’s base tuition and mandatory fees would be \$360.73/credit hour. In other words, ASU’s charges per credit hour vary by a factor of 2.5 depending on the number of credit hours. *See* ASU data, available at https://students.asu.edu/tuition/breakdown?acad_year=2019&include_summer=0&residency=RES&acad_career=UGRD&admit_term=&admit_level=&acad_level=&honors=0&campus=TEMPE&acad_prog=UGLA (last visited October 15, 2018).

And ASU's full-time tuition and mandatory fees for taking classes online can range from \$12,702 to \$13,902 per year, depending on course of study and number of credits taken. For one year of a 15 credit course load, this amount is \$2,480.10 *more expensive* than the cost of in-state tuition for taking classes on campus or even partially online and partially on campus. "What it costs" available at <https://asuonline.asu.edu/what-it-costs> (last visited January 28, 2019).

The University of Arizona's price per credit hour varies from \$791 if only taking one credit hour to \$415.58 if taking fifteen credit hours. This varies by almost a factor of two. <http://bursar.arizona.edu/students/fees> (last visited January 28, 2019). Northern Arizona University's price per credit varies from \$1155 for one credit hour to \$385.47 each for 15 credit hours. <https://in.nau.edu/sdas/fall-undergraduate-pledge/> (last visited January 28, 2019). This varies by a factor of three.

VI. ABOR Has Failed In, And Indeed Resisted, Assessing Compliance With Its Constitutional Mandate.

The Legislature requires that ABOR produce a report every five years explicitly stating what amount of tuition, if any, is not attributable to the cost of furnishing instruction. A.R.S. § 15-1650.03(A). The first report, issued in December 2017 (the "Report"), fails to comply with the Legislature's command. Rather than analyzing the cost *to students* as distributed across services provided

by the universities, the Report calculates an average cost (expenditure) per student, as derived from existing data that mixes cost of furnishing instruction with other university expenditures. Arizona Board of Regents, Arizona Board of Regents' Cost Study, 3-4 (Dec. 2017), <https://www.azregents.edu/sites/default/files/public/ABOR%202017%20Cost%20Study%20Report.pdf>. At no place in the Report is there a disclosure, as A.R.S. § 15-1650.03(A) requires, of “the amount [of tuition] that is not directly attributable to instructional costs” at each university, thwarting assessment of compliance with the Constitution based on the Report.⁵

ARGUMENT

I. Five Discrete ABOR Practices Violate The Tuition Clause and ABOR's Statutory Mandates

This section details five unlawful practices alleged by the State against ABOR relating to violations of constitutional and statutory mandates. These are: 1) violation of the Arizona Constitution by adopting a policy of setting in-state tuition based on factors other than the cost of furnishing instruction; 2) violation of the Arizona Constitution and statutes by charging part-time students a greater

⁵ The Report claims it was not possible to provide “a comprehensive and isolated review of tuition expenditures.” Report at 16. The Report declined to provide an estimate or average based on the purportedly known percentage of relevant funds that came from tuition.

amount per credit hour; 3) violation of the Arizona Constitution and statutes by charging greater amounts for online instruction than in-person instruction; 4) violation of the Arizona Constitution and statutes by charging residents and nonresidents the same amount for online instruction; and 5) violation of the Arizona Constitution and statutes for charging mandatory fees for athletics, recreation, technology, and health, in order to access instruction.

A. Violation of the Arizona Constitution by adopting a policy of setting in-state tuition based on factors other than the cost of furnishing instruction

ABOR's tuition-setting policy does not comply with the Tuition Clause. Rather than basing tuition on the cost of furnishing instruction, ABOR's formal tuition-setting policy expressly considers at least three factors that are inapposite to, if not incompatible with, reaching a result that is "as nearly free as possible." Those factors include the amounts charged by "peer universities" in other states, the broad availability of student loans and other aid,⁶ and median Arizona income levels. With its unconstitutional tuition-setting policy, ABOR has abandoned its duty to serve as a check on the university presidents, and has engaged in an unprecedented series of lockstep tuition hikes across Arizona's three public

⁶ Loans are a method of paying tuition, they do not offset the cost of furnishing instruction, or the cost ultimately borne by students.

universities that has resulted in a sixteen-year tuition increase of over 300% at each school.

Factors listed in ABOR Policy 4-103(D), to be reviewed by ABOR in assessing tuition proposals, fail to include the cost of furnishing instruction. Instead, these factors (as paraphrased) include

1. The amount of state support;
2. The availability of student financial aid as outlined in the board's financial aid policies;
3. The median of tuition and mandatory fees charged by the university's peers;
4. Other student fees and charges established by each university;
5. The cost of university attendance;
6. Revenues required to service bonded indebtedness;
7. Arizona's median family income levels; and
8. Evidence of student consultation on program fees and differential tuition, including
 - a. Information and feedback from elected student representatives; and
 - b. Consideration of results from student fee referenda or of organized opinion-gathering from students that are likely to be assessed the tuition, mandatory fee, or program fee.
9. Information related to costs and market conditions of the applicable college or school.
10. Information required by ABOR Policy 4-105 - the purpose and cost of the proposed use of the [mandatory] fee and student input on the proposed fee, as well as estimated revenues, proposed use, an estimated cost of such use, and evidence of student consultation.

See Arizona Board of Regents, 4-103 Proposals for Tuition and Fees,

<https://public.azregents.edu/Policy%20Manual/4-103-Proposals%20for%20Tuition>

%20and%20Fees.pdf (last visited January 18, 2019). At best, ABOR Policy Number 4-105(A)(1)'s (November 2018 adopted) reference to "consider[ing] the purpose and cost of the proposed use of the [mandatory] fee" addresses the efficiency of how mandatory fees are dedicated to their stated purpose. Arizona Board of Regents, 4-105 Fees, <https://public.azregents.edu/Policy%20Manual/4-105-Fees.pdf> (last visited January 18, 2019). However, there is no requirement in Policy 4-105 that such mandatory fees are dedicated to the cost of furnishing instruction, nor is there a parallel requirement for tuition charges.

The Tuition Clause requires, at minimum, that ABOR consider the cost of furnishing instruction in setting tuition and mandatory fees. To the extent these other factors would contradict consideration of the cost of furnishing instruction in setting tuition, they are unconstitutional.

B. Violation of the Arizona Constitution and statutes by charging part-time students a greater amount per credit hour

ABOR lacks authority to create additional tuition and mandatory-fee levels based on its own initiative. Instead, statute prescribes a list of permissible differentiations. ABOR shall "differentiate the tuitions and fees between institutions and between 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). These are

the *only* differentiations permitted by statute. See *State v. Maestas*, 244 Ariz. 9, 13 ¶15 (2018) (“we assume the exclusion of items not listed”); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107-111, 428 (2012) (explaining the “Negative-Implication” canon, also called “*expressio unius est exclusio alterius*”). ABOR both currently employs categories of tuition and fee differentiation outside the statutory list and fails to differentiate as required by the statute.

The distinctions justifying tuition pricing disparities listed in A.R.S. § 15-1626(A)(5) do not include number of credits taken during the semester, except insofar as they are “in excess of the credit hour threshold.” On information and belief, the cost of instruction per credit hour is not appreciably different for a full-time student compared to a part-time student at large public universities such as the Universities. In comparison, many Arizona community colleges (such as the Maricopa Community Colleges) charge on a flat per credit hour basis, showing that there is not a high differential in cost in providing a particular course to a part-time versus full-time student.

Charging more for part-time students particularly harms, among others, older students who may be trying to earn a degree while working and raising a family. In addition, on information and belief, such students may in some

instances be less likely to receive scholarships because FAFSA looks at the cost of education per year, and a part time student necessarily pays less per year over a longer number of years.

To the extent that ABOR has approved university policies that charge part-time students higher tuition and fees per credit hour than full-time students, that disparity violates Article XI, Section 6 of the Arizona Constitution and A.R.S. § 15-1626.

C. Violation of the Arizona Constitution and statutes by charging greater amounts for online instruction than in-person instruction

The list of distinctions justifying tuition pricing disparities enumerated in A.R.S. § 15-1626(A)(5) does not include whether instruction is furnished in-person or online. In addition, A.R.S. § 15-1606, which authorizes ABOR and the Universities to offer correspondence classes, makes no mention of charging higher rates for such classes. A.R.S. § 15-1626(A)(6)(d) envisions “tuition rate changes for online programs,” however, while online courses may have had a higher marginal cost of furnishing instruction at their inception, today it is highly likely that online courses are a *less* expensive way to furnish education to a given student. See Alison Bailey, *et al.*, “Make Digital Learning Work,” The Boston Consulting Group, 26-29 (March 2018), <https://edplus.asu.edu/sites/default/files/BCG-Making-Digital-Learning-Work-Apr-2018%20.pdf> (last visited January 18, 2019).

ABOR's present policy simply extracts additional funding from students taking online coursework independent of the "cost of furnishing instruction." ABOR lacks a general authority to tax university attendees, let alone the online subset, and as such these policies are unconstitutional under the Tuition Clause.

At Arizona State University, online tuition is more expensive than in person tuition for fully online in-state students. On information and belief, by charging in-state students higher tuition for online classes, ABOR is forcing students who take those classes to double pay—paying for both the costs of physical facilities as well as the online delivery method.

D. Violation of the Arizona Constitution and statutes by charging residents and nonresidents the same amount for online instruction

The difference between residents and nonresidents is one of the permitted statutory bases for differentiating tuition in A.R.S. § 15-1626(A)(5). To the extent online instruction is subsidized, or insufficiently subsidized relative to constitutional mandate, charging resident and nonresident students the same amount for a given online course deprives in-state students of the statutorily prescribed benefit of differentiating tuition between residents and non-residents.

E. Violation of the Arizona Constitution and statutes by charging mandatory fees for athletics, recreation, technology, and health

Each of the universities, with ABOR's approval, charges a bevy of mandatory fees plainly unrelated to the cost of furnishing instruction. To the extent ABOR wishes to subsidize student attendance at athletic events, it is free to seek an appropriation from the Legislature. It may not, in the alternative, levy mandatory fees funding such attendance. So too with technology fees, health fees, and any others not required for furnishing instruction. ABOR and the universities are of course permitted to offer such services, but not by cross-subsidy from mandatory tuition and fees.

ARCAP 21(A) ATTORNEYS' FEES NOTICE

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

CONCLUSION

For the foregoing reasons, the Court should accept original jurisdiction and grant declaratory, injunctive, and special action relief to end ABOR's unlawful acts. Alternatively, the Court should accept jurisdiction and, under its power pursuant to Rule 4(f) of the Rules of Procedure for Special Actions, transfer this matter to the Superior Court for trial.

RESPECTFULLY SUBMITTED this 28th day of January, 2019.

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