ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General Plaintiff/Appellant, v. ARIZONA BOARD OF REGENTS; JOHN P. CREER, Assistant Vice President for University Real Estate Development at Arizona State University; EDDIE COOK, in his official capacity as MARICOPA COUNTY ASSESSOR; ROYCE T. FLORA, in his official capacity as MARICOPA COUNTY TREASURER, Appellees/Respondents.	Case No. 1 CA-TX 20-0003 Maricopa County Superior Court No. TX2019-000011

STATE'S OPENING BRIEF

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INTRODUCTION

This appeal involves the dismissal of an action challenging an Arizona Board of Regents ("ABOR") property transaction that will unlawfully usurp property tax revenue and gift millions to a private company.

On February 28, 2018, ABOR entered into an Option to Lease and Escrow Instructions ("Option Agreement") with Omni Tempe, LLC, an affiliate of the Omni Hotels Management Corporation (collectively, with all affiliates, "Omni"), related to constructing a new, four-diamond hotel and conference center in Tempe. The transaction between Omni and ABOR ("Omni Transaction") expressly seeks to shelter millions of dollars from the property tax rolls for decades by having ABOR take bare legal title in return for contractual "payments in lieu of taxes," which the parties agreed to reduce dollar-for-dollar for any property tax Omni actually pays.

There is no limiting principle to ABOR's position on the tax scheme here—ABOR maintains it can lawfully take title to any property in Arizona and remove it from the tax rolls in exchange for contractual "payments in lieu of taxes" to ABOR (diverting monies from local schools/governments). The First Amended Complaint ("FAC") challenges this transaction's unlawful property tax aspects.

Evading property tax is not the only unlawful aspect of the Omni Transaction—the deal also unlawfully gifts public monies and property to Omni.

ABOR waived its formal policy requiring a public auction, instead agreeing to sell prime downtown Tempe land directly to Omni for substantially less than nearby parcels. ABOR also agreed to pay the full cost of construction—up to $19.5 million—for a new private conference center. ASU's Executive VP testified to the Legislature that "the university will own" the conference center, which "will be a university asset," and the university will have "a right to use the conference center." However, it was not publicly disclosed until the FAC that ASU's rights are limited to only seven free days per year (subject to availability), and ASU must pay for any food and beverage. It was also not publicly disclosed that ABOR gave Omni an option to buy the property for only $10. ABOR also agreed to pay millions to construct parking spaces for Omni's exclusive use.

The Attorney General's Office ("AGO") learned about these aspects of the deal on March 9, 2019, when Omni provided a copy of the Option Agreement after an Omni-requested call on February 25, 2019, where Omni-related personnel told AGO that they were concerned the deal violated the Gift Clause. Count IV of the FAC challenges these unlawful payments of public monies under A.R.S. § 35-212.

As set forth herein, the Court should vacate the trial court's judgment (including fees and costs), enter summary judgment for the AG on the timeliness of Count IV, and remand for further proceedings.

STATEMENT OF THE CASE

On January 10, 2019, the Attorney General ("AG") sued ABOR to challenge the Omni Transaction. The AG's original complaint contained three counts. Count I sought declaratory and injunctive relief that the Omni Transaction cannot be used to exempt the Hotel and Conference Center from property taxes.[1] Count II sought *quo warranto* relief that ABOR cannot exercise the franchise the State granted it to enter the Omni Transaction. Count III sought *quo warranto* and declaratory relief that ABOR was acting *ultra vires* because state law does not permit it to enter the Omni Transaction. *See generally* Index of Record ("R.") 1.

ABOR filed four motions to dismiss. R.10-14. ABOR contended the AG lacks authority to bring Counts I-III and failed to exhaust administrative remedies. R.10-11. ABOR also claimed Count I fails to state a claim because it "unlawfully requests that tax-exempt state property be taxed." R.13-14. Finally, ABOR claimed Counts II-III present non-justiciable political questions. R.12.

On April 3, 2019, the AG responded to those motions, R.19, and filed a First Amended Complaint ("FAC") under Rule 15(a)(1)(B), R.17-18. The FAC added Count IV against ABOR and John Creer ("Creer"), ASU's VP for University Real Estate Development, for illegal payment of public monies under § 35-212. R.17

[1] All land, buildings, and improvements included in the Omni Transaction are referred to herein as the "Hotel and Conference Center."

¶¶162-170; *see also* R.25. ABOR filed a fifth motion to dismiss challenging Count IV as time-barred, failing to state a claim under § 35-212, and failing to join a necessary party (Tempe). R.24. Creer joined ABOR's motion and argued that the claim independently failed to state a claim against him in his individual capacity. R.28.

The trial court dismissed Counts I-III, concluding the AG lacks authority to bring them and they also fail to state valid claims. R.41 at 2-5. The court denied ABOR's motion to dismiss Count IV on limitations grounds, holding that the claim's accrual date was a factual issue requiring discovery. *Id.* at 6. Later, the court denied ABOR's remaining grounds in Motion 5 (failure to state a claim and failure to join Tempe), and also denied as moot certain portions of ABOR's Motions 1-4. R.47 at 1-2. The court, however, dismissed Count IV against Creer, holding that the AG was attempting to retroactively apply a new statute imposing personal liability. *Id.* at 2-3. ABOR answered. R.48.

Over the AG's objections, the parties engaged in one-sided discovery limited to the accrual question. The trial court permitted ABOR to request thousands of pages of internal AG emails and take a 30(b)(6) deposition of the AG's Office, but refused to permit the AG to review relevant documents in ABOR's official file regarding its negotiation of the Omni Agreement. R.67 at 2-4.

At the conclusion of discovery, the AG and ABOR filed cross-motions for summary judgment on the timeliness of Count IV. R.71, 73. The trial court denied the AG's motion and granted summary judgment in favor of ABOR, concluding the FAC did not relate back to the original complaint and, as a matter of law, the AG's Gift Clause claim accrued more than a year before the FAC and was not tolled. R.92.

ABOR and Creer sought attorneys' fees and costs. R.93. Over the AG's objection, R.100, the trial court awarded ABOR and Creer $979,758.00 in attorneys' fees and $2,356.62 in costs. R.105, 106. Final judgment was entered on February 5, 2020. R.105. The AG timely appealed. R.107. This Court has jurisdiction. A.R.S. §§ 12-120.21(A)(1), -2101(A)(1).

STATEMENT OF FACTS[2]

A. ABOR's Status and Powers Relating To Real and Personal Property.

The Arizona Constitution calls for the establishment of a "uniform public school system," including universities. Ariz. Const. art. XI, § 1. Arizona law grants ABOR certain enumerated powers to govern public universities. *Id.* § 2; *see also* A.R.S. §§ 15-1625, -1626.

[2] Sections A-D of this Statement relate to the trial court's dismissal rulings and are therefore taken from the FAC. Section E of this Statement relates to the trial court's summary judgment ruling and is primarily taken from the AG's CSOF.

ABOR requires legislative authorization to resort to sources of funding beyond charges to students and income from state trust land. *See Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 262 (1935). Consistent with that restriction, the Arizona Legislature has acted at least three times to expand ABOR's powers to hold property or confer tax benefits. *See* A.R.S. §§ 15-1636, 15-1637, 48-4202(C).

Nowhere, however, does Arizona law allow ABOR to rent out its purported tax-exempt status to private developers. The opposite is true: Arizona law allows ABOR only to "[p]urchase, receive, hold, make and take leases and long-term leases of and sell real and personal property for the benefit of this state and for the use of the institutions under its jurisdiction." A.R.S. § 15-1625(B)(4) (emphasis added). And in any event, the Legislature could not confer power on ABOR to violate the Arizona Constitution, including Article IX, § 2(12)-(13); any such unbounded power regarding taxation would also violate non-delegation.

B. ABOR Is Trading on its Tax Status Through Commercial Real Estate Development.

Without obtaining legislative authorization, ABOR has entered a series of leaseback transactions with the express aim of shielding private commercial developments from property taxes. For example, ABOR leased approximately 20 acres of ABOR land along Tempe Town Lake for a commercial office development known as Marina Heights (tenants include State Farm Insurance).

R.17 ¶¶55-60. ABOR holds no more than bare legal title to the leased property, which would otherwise be subject to *ad valorem* taxes. *Id.* The lease even contains a backup plan for preferential tax treatment: if the arrangement is declared unlawful, the lessee can force Tempe to take title and instead impose preferential lease excise taxes in lieu of property taxes. *Id.*

ABOR also owns approximately ten acres of real property at the southeast corner of Mill Avenue and University Drive. *Id.* ¶¶61-68. In June 2016, ABOR authorized ASU to enter into a 99-year lease of 1.9 acres of the property for the private development of a senior living facility known as Mirabella, which is currently under construction. *Id.* Upon completion, ABOR will take title to the newly constructed improvements, removing them from the tax rolls, and will receive a "payment in lieu of taxes." *Id.*

Unlike property taxes, these types of *contractual* payments do not go to local schools and other local government (but rather go entirely to ABOR), they are less than what would be due in property tax, and may not be protected like taxes in the event they need to be collected. *Id.* ¶83.

C. The Omni Transaction Is Structured as a Lease to Evade Property Taxes.

ABOR now seeks to have more of the property at University and Mill developed into a private hotel and conference center, with a development budget of approximately $123 million. *Id.* ¶¶69-70. On January 11, 2018, the Tempe City

Council adopted an ordinance authorizing the Mayor to execute a development agreement with Omni. Separate from the monies paid by ABOR (discussed below), Tempe agreed to provide $21 million in privilege and transient-lodging tax incentives. *Id.* ¶¶72-80.

On February 28, 2018, ABOR and Omni executed the Option Agreement, in which ABOR gave Omni an option to lease the property and improvements for sixty years. *Id.* ¶85. The prospective "long-term lease" is indistinguishable from a sale, and was even discussed as a sale during the approval process. *Id.* ¶82. If Omni chooses to exercise the Option Agreement, Omni agrees to pay pre-paid rent of $85 per square foot (approximately $5.9 million total); this amount is supposed to represent what it would cost for Omni to buy the land from ABOR. *Id.* ¶81.

Omni is also required to pay "additional rent" of $1.09 million per year, which increases over the term of the lease. *Id.* This amount is an "in lieu" payment to ASU approximating (although it likely undercharges) the amount of *ad valorem* taxes that would otherwise be due. *Id.* ¶¶83, 99, 109(b). In fact, in the event Omni ever has to pay *ad valorem* taxes, it will receive a contractual, dollar-for-dollar credit against the "additional rent" payment. If Omni pays taxes exceeding "additional rent" for three consecutive years, it can exercise an option to purchase the property, thereby obviating any "additional rent." *Id.* ¶83. ABOR and Omni refer to the "additional rent" payment as a "payment in lieu of taxes," *id.*

¶¶99, 109(b), 111, and the Option Agreement unabashedly states that it is ABOR and Omni's "intention … that the Demised Premises (including the Land and the Improvements thereon) will be exempt from *ad valorem* property taxes and assessments." *Id.* ¶97(a). These contractual payments divert property taxes from local schools and other local governments. *Id.* ¶¶22, 83.

The Option Agreement further makes clear that Omni is "entitled to realize all economic benefits from the ownership and operation of the Improvements and all Alterations during the Term of this Lease, including all rental and other revenues generated from the ownership and operation of the Demised Premises." *Id.* ¶95(a). Omni is even entitled during the lease to depreciate the property, including those portions constructed with public funds, on Omni's taxes. *Id.*

Confirming the deal structure was purely a means to evade property taxation, and that Omni has effectively already purchased the property through the pre-paid rent, Omni has the option at the end of the lease (or earlier if it continues to make the "additional rent" payments), to purchase the hotel, including the publicly-funded conference center, and land below it for a mere $10. *Id.* ¶¶81-82.

D. The Omni Transaction Is Also An Unlawful Gift or Subsidy.

Not only is the Omni Transaction structured to evade property taxation, but it is entirely one-sided in Omni's favor. As explained, ABOR plans to sell the property to Omni for an up-front payment of approximately $5.9 million ($85 per

square foot). Contemporaneous arms-length sales of nearby parcels to build hotels ranged in value from $132 per square foot to $257 per square foot. *Id.* ¶88. At $212 per square foot, the amount of the sale closest in time, ABOR would have received $14.8 million for the property—$8.9 million more than what Omni agreed to pay. *Id.* ¶93.

ABOR also agreed to pay the full cost (up to $19.5 million) for construction of the new private conference center (adding to 5 others within 0.6-5.3 miles). *Id.* ¶112. In return for $19.5 million, ASU receives very little. The lease requires Omni to make the conference center available to ASU for only seven days a year, subject to availability and ASU's payment for any food and drink. *Id.* ¶100.[3]

ASU also plans to construct a $30 million parking structure adjacent to the property. Approximately 23% of the spaces (275 out of 1,200) will be for Omni's exclusive use. *Id.* ¶¶103-05. ASU values these spaces at $8.5 million. *Id.* ¶106. ABOR also intends to take full title to the parking structure (including Omni's spaces and other fixtures), thereby avoiding property taxation. *Id.* ¶107.

E. The AG Did Not Know The Terms Of The Omni Transaction Until March 9, 2019.

The following facts regarding accrual are stipulated. *See* R.74 ¶¶1-4 (AG's SOF); R.81 ¶¶1-4 (ABOR's CSOF). ABOR and Omni did not execute the Option

[3] ASU also gets to include "ASU" in the name of the conference center, name one of the conference rooms, and maintain a display wall. *Id.* ¶101.

Agreement until February 28, 2018. R.74 ¶1. No prior agreement between ABOR and Omni exists relating to a hotel and conference center. *Id.* ¶2. As of April 3, 2019, when the AG filed the FAC, Omni had not exercised its option under the Option Agreement, construction had not begun on the Hotel and Conference Center, and ABOR had not paid or ordered any monies to be paid to Omni. *Id.* ¶¶3-4.

For purposes of ABOR's summary judgment motion, the AGO first became aware of a potential deal between ABOR and Omni on January 11, 2018, when the *Arizona Republic* published an opinion article that was distributed via email to some AG staff. *Id.* ¶5. Staff did not learn until November 2018 that the Omni Transaction contemplated the payment of public monies (rather than payment by Omni). *Id.* ¶6. Moreover, staff did not become aware that ABOR had executed the Option Agreement until February 25, 2019, and did not become aware of the actual terms of the Option Agreement until first receiving a copy on March 9, 2019 (within a few weeks of the FAC's filing). *Id.* ¶¶7-8. The AG only learned about these aspects of the deal after AGO staff had an Omni-requested phone call on February 25, 2019 with Omni-related personnel where the Omni-related personnel affirmatively told the AGO that they had been concerned that their deal violated the Gift Clause. R.82 ¶187 (AG's CSOF).

ABOR and its representatives concealed material terms in the Omni Transaction. ASU's Executive VP testified to the Legislature that "the university will own" the conference center, which "will be a university asset," and the university will have "a right to use the conference center." R.75 ¶41 (ABOR SOF). ASU President Crow stated at an ABOR subcommittee meeting that, upon completion, the Omni conference center would be available for the ASU Founder's Day dinner without ASU "writing someone else a check." *Id.* ¶146. However, it was not publicly disclosed until the FAC that while ABOR is paying full cost of construction, ASU's rights to the conference center are limited to only seven free days per year (if available), and ASU must pay for food and beverage. R.74 ¶8.

STATEMENT OF ISSUES

I. Did the trial court err in granting summary judgment on ABOR's affirmative defense that the AG's claim under § 35-212 (Count IV) is time-barred?

II. Did the trial court err in dismissing Counts I-III against ABOR and Count IV against ASU VP Creer, where the AG has authority to bring the counts in the FAC and these counts state claims upon which relief can be granted?

III. Even if this Court affirms judgment for ABOR and Creer, was the nearly $1 million award of attorneys' fees excessive?

STANDARD OF REVIEW

Rule 12 dismissals are subject to *de novo* review. *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶7 (2012). Arizona's notice pleading standard requires that courts "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts" when deciding a Rule 12 motion. *Id.* at 356 ¶9. In addition to pleadings, courts may consider exhibits and public records regarding matters referenced in pleadings. *Id.* "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.

The Court reviews *de novo* whether an amendment relates back to the original complaint's filing date under Rule 15(c). *Pargman v. Vickers*, 208 Ariz. 573, 578 ¶22 (App. 2004); *see also Flynn v. Campbell*, 243 Ariz. 76, 80 ¶7 (2017).

Summary judgment is also subject to *de novo* review. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130 ¶4 (App. 2000). This Court determines *de novo* whether any genuine dispute of material fact exists and whether the trial court properly applied the law. *Id.*; *see also* Ariz. R. Civ. P. 56(a). Courts must review the facts in the light most favorable to the party against whom judgment was entered. *AROK Constr. Co. v. Indian Constr. Svcs.*, 174 Ariz. 291, 293 (App. 1993). This Court may enter summary judgment when cross-motions for summary judgment are filed. *See Aaron v. Fromkin*, 196 Ariz. 224, 227 ¶10 (App. 2000).

ARGUMENT

The majority of issues on appeal can be resolved by reversing the erroneous grant of summary judgment to ABOR on Count IV. Even if the Court disagrees that the AG is entitled to summary judgment, it should still vacate summary judgment for ABOR due to factual disputes. The Court should also reverse dismissal of the other Counts because the AG has authority to bring those Counts, the AG properly pled statutory and constitutional violations, and dismissal should not be affirmed on alternate grounds. Finally, the attorneys' fees were excessive.

I. SUMMARY JUDGMENT FOR ABOR WAS IMPROPER BECAUSE THE AG TIMELY BROUGHT THE ILLEGAL PAYMENTS CLAIM (COUNT IV).

The trial court granted summary judgment for ABOR on Count IV, erroneously concluding that the AG's claim against ABOR under § 35-212 was barred by a one-year statute of limitations. R.92. This was error in several respects, and instead the trial court (and this Court) must grant the AG's cross-motion for summary judgment. First, Count IV is governed by the five-year time period in § 35-212(E), not the one-year period in § 12-821. Second, even if § 12-821 applies, Count IV relates back to the filing date of the original complaint under Rule 15(c)(1), thereby resolving any statute-of-limitations issue. Third, the AG's illegal payments claim accrued, as a matter of law, less than one year before the FAC. Fourth, if there is any question whether the claim accrued more than one

year before the FAC, then the accrual date and tolling raise disputed issues of material fact, precluding summary judgment for ABOR.

A. Under § 35-212(E), The AG Has Five Years To Bring His Illegal Payments Claim.

The AG timely filed his illegal payments claim within the pertinent five year window. That claim is governed by A.R.S. § 35-212(E), which states that any claim the AG brings "must be brought within five years after the date an illegal payment was ordered." The AG thus has *at least* until February 28, 2023 to file his illegal payments claim (assuming the Option Agreement—the first binding agreement between ABOR and Omni—triggers accrual).

The trial court instead subjected the AG's illegal payments claim to the one-year period in A.R.S. § 12-821. That is inconsistent with the plain language, history, and structure of § 35-212 and accepted canons of construction.

The statutory language, without ambiguity, gives the AG five years to file: "If the action [brought pursuant to this article] is brought by the attorney general, the action must be brought within five years after the date an illegal payment was ordered and § 12-821.01 does not apply to the action." A.R.S. § 35-212(E). This mandate is clear and unequivocal, so the Court should do what the statute says and apply a five-year period. *See Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003).

The statutory history of A.R.S. § 35-212 also supports a five-year period. The Legislature added that extended period in 2018, in connection with a number

of revisions expanding the AG's ability to recoup public funds. For example, the revisions made clear that the AG may bring an action to recover illegally paid public monies against any person who received an illegal payment, the public body or officer who ordered or caused the illegal payment, or the public official, agent, or employee who ordered or caused the illegal payment. *See* 2018 Ariz. Legis. Serv. Ch. 253 (S.B. 1274) (West). The revisions also expanded § 35-212 to allow the AG to hold public officials, agents, or employees personally liable for illegal payments. *See id.* Finally, the revisions expanded the definition of "public monies" to allow the AG to better police the expenditure of government funds. *See id.* It would make little sense to greatly expand the AG's ability to bring an action under § 35-212, including by expressly adding a five-year period for AG actions, only to leave the one-year filing requirement as a limit on the AG. In truth, the Legislature extended the AG's filing period to five years, while simultaneously keeping the one-year period for private taxpayer actions.

The structure of A.R.S. § 35-212 further supports the AG's interpretation. There are two types of potential plaintiffs in a claim for the illegal payment of public monies: the AG and private taxpayers. Section § 35-212(E), containing the five-year filing period, deals with pre-litigation procedures. The first sentence of that subsection provides that "[a]n action brought pursuant to this article is subject to title 12, chapter 7, article 2." A.R.S. § 35-212(E). That article covers myriad

subjects relating to claims against public officials, including immunity defenses, punitive damages, proper venue, interest and costs, and required reports to the Legislature. *See* A.R.S. § 12-820 *et seq*. Article 2 also contains: the one-year statute of limitation ABOR relies upon, A.R.S. § 12-821, and requirements and procedures for pre-litigation notices of claim, *id.* § 12-821.01. The second sentence of § 35-212(E) creates two exceptions to the application of article 2 for claims by the AG: "The action must be brought within five years after the date an illegal payment was ordered and § 12-821.01 does not apply to the action." The AG is subject to all other requirements of article 2, and private taxpayers are subject to all requirements of that article.

Importantly, § 12-821.01, which § 35-212(E) says no longer applies to claims by the AG, contains the provision defining accrual for a claim against a public official. *See* A.R.S. § 12-821.01(B). Under ABOR's proffered reading, § 12-821 and its one-year period applies to public monies claims by the AG, but the Legislature confusingly removed any guidance about when such claims accrue. The better reading of the statute's structure is that the Legislature was not concerned about removing the accrual definition in § 12-821.01 for AG claims because it was replacing the one-year period in § 12-821 with the five-year period in § 35-212(E), which accrues when the "payment was ordered."

Finally, statutory canons of construction support a five-year period. "[W]hen there is conflict between two statutes, the more recent, specific statute governs over the older, more general statute." *In re Estate of Winn*, 214 Ariz. 149, 152 ¶16 (2007). Moreover, "[t]he defense of the statute of limitations is not favored … and where two constructions are possible, the longer period of limitations is preferred." *Woodward v. Chirco Constr. Co.*, 141 Ariz. 520, 524 (App. 1984); *see also* R.73 at 11 (collecting other Arizona cases). Thus, the more recent and specific statute, A.R.S. § 35-212(E), changed the limitations period for AG actions to five years, and any ambiguity between § 35-212 and § 12-821 should be resolved in favor of a five-year filing period. *See Monroe v. Ariz. Acreage LLC*, 246 Ariz. 557, 562-63 ¶¶17-21 (App. 2019).

The trial court rejected application of A.R.S. § 35-212(E) because it believed the AG was attempting to have the provisions retroactively applied. Contrary to that belief, § 35-212(E) became effective in August 2018, *see General Effective Dates*, Ariz. State Leg., https://www.azleg.gov/general-effective-dates/ (last visited July 7, 2020), months before the AG filed his original complaint in January 2019. This is not a retroactive application situation. Instead, at the time the five-year period in § 35-212(E) went into effect in August of 2018, only five months had elapsed since ABOR entered into the Option Agreement, and thus any public monies claim related to the Omni Transaction was not barred by the one-year

statute of limitations in § 12-821. Therefore, under § 12-505(B) the longer statute (for any AG claim) began to apply. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 553 ¶36 (2005) ("Subsection B provides that the new statute will govern claims not so barred…."); *see also id.* at 554 ¶¶42-43.

Because the AG filed within five years, the Court should reverse and enter summary judgment for the AG on this issue. *See Aaron*, 196 Ariz. at 229 ¶30.

B. Count IV of the FAC Against ABOR Relates Back To The Date Of The Original Complaint Under Rule 15(c)(1).

Even without a five year window, Count IV of the FAC against ABOR is timely because it relates back to the original complaint. The pertinent date is, therefore, the date of the original complaint, January 10, 2019. Because no reasonable factfinder could conclude the AG's claim accrued on or before January 9, 2018—indeed ABOR did not enter into the Option Agreement until February 28, 2018—this Court should reverse and enter summary judgment for the AG.

An amended complaint adding a claim against an existing defendant, such as the FAC against ABOR, "relates back to the date of the original pleading if the amendment asserts ***a claim*** or defense ***that arose out of the*** conduct, ***transaction***, or occurrence ***set forth, or attempted to be set forth, in the original pleading***." Ariz. R. Civ. P. 15(c)(1) (emphasis added). "Rule 15(c)'s purpose is to 'ameliorate the effect of the statute of limitations,'" and the Rule should be interpreted to maximize the likelihood of a decision on the merits. *Flynn*, 243 Ariz. at 80 ¶10.

Rule 15(c)(1) compels relation back when the original complaint provides notice about the transaction being challenged; the defendant is presumed to have knowledge about any other claim that might arise out of the same transaction. *Watts v. State*, 115 Ariz. 545, 549 (App. 1977). Thus, "[a] party may allege new facts in an amended complaint so long as they relate to the same transaction." *Servs. Holding Co. v. Transamerica Occidental Life Ins. Co.*, 180 Ariz. 198, 208 (App. 1994). Relation back also applies to amended legal theories and claims: "[A]n amendment may set forth a different statute as the basis of the claim, or change a common law claim to a statutory claim or vice versa, or shift from a contract theory to a tort theory…." *Marshall v. Super. Ct., Maricopa Cty.*, 131 Ariz. 379, 383 (1982). "Indeed, an amendment that states an entirely new claim for relief will relate back as long as it satisfies the test embodied in the first sentence of Rule 15(c)." *Id.*; *see also ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1006-07 (9th Cir. 2014) (mining company's amended complaint related back to its original complaint, even though amended complaint included allegations expressly disclaimed in original pleading).

Here, the AG's original complaint and the FAC assert claims that "arose out of the [same] transaction": the Omni Transaction. The original complaint described the aspects of the Omni Transaction of which the AG was aware. *See* Ariz. R. Civ. P. 15(c) (discussing "transaction … set forth, or attempted to be set

forth, in the original pleading"). For instance, ABOR had authorized ASU to enter into agreements with Omni for development of a hotel and conference center. R.1 ¶61. The City of Tempe later authorized its mayor to enter into a development agreement with an Omni affiliate. *Id.* ¶62. Tempe then entered into such a development agreement on January 11, 2018. *Id.* ¶64. The development agreement provided that ASU and Omni would enter into an "Option to Lease and Escrow Instructions," granting Omni an option to lease land from ASU for use as a hotel and conference center. *Id.* ¶¶65-66. Through the option, Omni could obtain the right to be the sole occupant of the land for a period of at least sixty years. *Id.* ¶¶67-68.

Each of Counts I-III in the original complaint challenged the Omni Transaction and ABOR's ability to enter that transaction. Count one sought declaratory and injunctive relief that the property conveyed in the Omni Transaction will be subject to *ad valorem* taxation. *Id.* ¶¶81-83. Count two sought *quo warranto* relief that ABOR is not authorized to purposely structure the Omni Transaction to avoid taxation. *Id.* ¶¶98-101. Count three sought declaratory and *quo warranto* relief that ABOR is not authorized to enter into the Omni Transaction at all. *Id.* ¶¶108-115. The AG's prayer for relief was focused entirely on the Omni Transaction. *Id.* p.18.

The FAC, like the original complaint, arises out of the Omni Transaction and the question of whether ABOR has the ability to enter into that transaction. The FAC begins by stating that "the transaction at issue here (the 'Omni Hotel/CC Project') is an immediate, substantial drain on ASU funds …." R.17 ¶4. While the FAC contains more details than the original complaint, the subject of the FAC's allegations is the Omni Transaction. *See id.* ¶¶69-118. Counts one through three of the FAC are nearly identical to counts one through three of the original complaint. *See id.* ¶¶119-161. And the prayer for relief in the FAC still focuses solely on the Omni Transaction. *See id.* pp.34-35.

The FAC adds Count IV for illegal payment of public funds. But that claim also arises out of the Omni Transaction. Indeed, every substantive paragraph of that claim discusses the Omni Transaction. *Id.* ¶¶163-69. The FAC, like the original complaint, requests that the trial court enjoin ABOR from making the payments contemplated by that transaction. *Id.* p.35. Because the original complaint's allegations, legal claims, and prayer for relief all focused on the Omni Transaction, the FAC relates back to the filing date of the original complaint, January 10, 2019, under Rule 15(c)(1).

The trial court agreed that the original complaint and the FAC "both deal with the agreements between the Defendant and Omni," but rejected relation back because it believed the AG's § 35-212 claim is "completely separate" from the

claims in the original complaint. R.92 at 3. That was error—each claim challenges the legality of the Omni Transaction, and under Rule 15's plain language, and the case law applying it, a new or even different claim relates back so long as it arises from the same transaction. *Marshall*, 131 Ariz. at 383.

The trial court (R.92 at 4) relied on a single Arizona case post-dating *Marshall*. *See Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212-13 (App. 1990). That case cites only Illinois law, does not mention "transaction," and is factually inapposite. *See id.* (defamation claim did not relate back; defamatory statements were not part of the conduct giving rise to plaintiffs' original claim for intentional interference with contract).

The only other authority the trial court cited was a pre-*Marshall* Arizona case and two Ninth Circuit cases. Those cases are similarly unhelpful to ABOR. All involve new claims based on <u>different conduct</u> than that alleged in the original complaint.[4] And *Barnes* and *Williams* <u>support</u> relation back here. In *Barnes*, the Court concluded that a new statutory claim based on statements made to promote

[4] *See Barnes v. Vozack*, 113 Ariz. 269, 272 (1976) (statutory claim based on statements made in connection with obtaining an exemption for registering securities was conduct different than later statements made in connection with promoting securities); *Williams v. Boeing Co.*, 517 F.3d 1120, 1134 (9th Cir. 2008) (new claim based on compensation discrimination did not relate back to older claims based on different types of discrimination); *Echlin v. Peacehealth*, 887 F.3d 967, 978 (9th Cir. 2018) (rejecting relation back; taking general role in collections process is distinct from making specific representations in a collections letter).

stock did relate back to the plaintiffs' original claim for common law fraud based on the same statements. 113 Ariz. at 272. In *Williams*, the Ninth Circuit confirmed that the new claim would have related back had it merely been "a new legal theory depending on the same facts." 517 F.3d at 1133. Here, the illegal payments claim is merely "a new legal theory depending on the same facts." *See Williams*, 517 F.3d at 1133. And it is only when a claim "seeks relief with respect to a transaction or event which was not the 'basis of the original complaint' that the doctrine of relation back is considered inapplicable." *Marshall*, 131 Ariz. at 383 (quoting *Barnes*, 113 Ariz. at 272).

Relation back applies under Rule 15(c)(1), and the Court should reverse and enter summary judgment for the AG. *See Aaron*, 196 Ariz. at 229 ¶30.

C. The AG's Illegal Payments Claim Accrued Within One Year of the FAC.

As a third independent basis for summary judgment for the AG, the illegal payments claim had not accrued one year before the FAC's filing date, April 3, 2018. Section 12-821 states, "[a]ll actions against any public entity or public employee shall be brought within one year after the cause of action accrues." A.R.S. § 12-821. A claim "accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01.

As a matter of law, the AG's claim under § 35-212 (which requires a payment of public monies) has not yet accrued under § 12-821.01 (which requires a party to have been "damaged"). ABOR stipulated below that Omni has not exercised the Option Agreement and ABOR has not made or ordered any payments to Omni. R.74 ¶¶3-4; R.81 ¶¶1-4. Thus, the statute of limitations had not yet begun to run. *See, e.g.*, R.71 at 4-5; R.86 at 4-5 (citing five cases, including *Canyon del Rio Investors, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 341 ¶19 (App. 2011)). The AG cited five cases supporting the legal proposition that a § 35-212 claim does not accrue under § 12-821.01 until monies are actually paid or ordered to be paid, and ABOR did not offer a single contrary case. *See* R.86 at 5.[5]

If the AG's claim had accrued under § 12-821.01 (contrary to the above case law), then the earliest it could have done so was March 9, 2019, when the AG "realize[d]" the amounts ABOR was expending on the Omni Transaction and what ABOR was receiving in return. To trigger the one-year period, a plaintiff must have "a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Thompson v. Pima Cty.*, 226 Ariz. 42, 46 ¶12 (App.

[5] In its motions to dismiss, ABOR repeatedly criticized the AG for prematurely filing his claims. *See, e.g.*, R.11 at 2 ("[T]he AG challenges a transaction that has not yet closed and a lease that has not yet been executed…."), *id.* at 12 ("The AG's alleged interest is not 'present' because the transaction is not complete…."); R.10 at 5 (describing this lawsuit as "the AG's attempt to intervene at this premature stage"). Then, when the AG asserted his § 35-212 claim, ABOR did an about face and argued the claim was stale.

2010). A plaintiff's knowledge must provide sufficient facts to constitute a cause of action. *Id.* In fact, § 12-821's one-year period is "not unreasonable precisely because such claims do not accrue until the claimant realizes he or she has been injured." *Long v. City of Glendale*, 208 Ariz. 319, 325 ¶11 (App. 2004). "The determination of when a cause of action accrues requires an analysis of the elements of the claim presented." *Glaze v. Larsen*, 207 Ariz. 26, 29 ¶10 (2004); *see also Dube v. Likins*, 216 Ariz. 406, 411 ¶8 (App. 2007).

Count IV asserts that the Omni Transaction will result in an illegal payment of monies in violation of the Gift Clause. To succeed, the AG will need to prove that the Omni Transaction is lacking a public purpose or that ABOR's expenditures are disproportionate to the direct consideration it receives. *See Turken v. Gordon*, 223 Ariz. 342, 348 (2010). The Arizona Supreme Court has instructed courts to carefully analyze the parties' contract when adjudicating a Gift Clause claim. *See id.* at 349-51.

The AG did not know that Omni's return consideration was out of all ordinary bounds until March 9, 2019, when he first received a copy of the executed Option Agreement. [6] R.74 ¶8. [7] The AG did not know, for example, that ABOR

[6] The AG's Office repeatedly testified that the AG did not know the material terms of the Option Agreement until March 9, 2019. R.74 ¶8. The trial court disregarded this testimony.

was providing $19.5 million for the construction of a conference center, which ASU has the right to use gratis only seven days a year. Nor did the AG know that ABOR is granting Omni an option to buy all of the land and improvements (including the conference center paid for by public money) for only $10.

The trial court ignored the AG's testimony and other evidence based on two events: a January 11, 2018 op-ed in the *Arizona Republic* and a January 8, 2018 request by one employee of the AG's Office that another employee "look into a gift clause violation related to ASU's commercial development in Tempe." R.92 at 4. (The January 8 request related to Marina Heights, not the Omni Transaction, which the AG and staff was not aware of until January 11. R.80 at 7.) Neither was sufficient to trigger accrual, particularly as a matter of law. Most notably, both occurred two months before ABOR and Omni even executed the Option Agreement. Until the AG received the executed Option Agreement, he could not "realize[]" the Omni Transaction involved an illegal payment of monies under the Gift Clause, giving rise to a § 35-212 action. *See Long*, 208 Ariz. at 325 ¶¶10-11.

The trial court acknowledged that "[t]here are certainly details about the Omni Deal which the Attorney General did not actually know until after April 3, 2018…." R.92 at 4. This is a significant understatement. As of the January 2018

[7] Notably, ABOR refused to provide the draft Option Agreement when requested by a member of the public during the July-October 2017 timeframe. *See* R.82 ¶179.

dates the trial court relied upon, the Option Agreement had not been executed or exercised, the AG had not received a copy of the Option Agreement, and ABOR had made no payments. R.74 ¶¶3-4, 8.

Because a § 35-212 claim does not accrue under § 12-821.01 as a matter of law until monies are actually paid or ordered to be paid, *see*, *e.g.*, R.86 at 4-5, or because there is no genuine issue of material fact that the AG and staff did not "realize" the state was damaged before April 3, 2018, this Court should enter summary judgment for the AG even if § 12-821 is the applicable statute of limitations and relation-back under Rule 15(c)(1) does not apply. *See Aaron*, 196 Ariz. at 229 ¶30.

D. Alternatively, Any Accrual Date Earlier Than One Year Before the FAC Is a Question of Fact, And the Trial Court Improperly Denied the AG's Discovery Into Tolling.

If the Court disagrees with the foregoing arguments (Part I(A)-(C)), the AG is entitled to have a jury determine the accrual date, particularly where the Court abused its discretion in prohibiting the AG from taking any meaningful discovery into concealment for tolling the statute of limitations or the actual status of negotiations in the months leading up to the final Option Agreement in late-February 2018. *See* R.67 at 2-4; *State v. Connor*, 215 Ariz. 553, 557, ¶ 6 (App.2007) ("This court will not disturb a ruling on a discovery request absent an abuse of that discretion.").

Separate from the legal issues in Part I(A)-(C) that require summary judgment for the AG, if the Court believes the AG could have exercised more diligence in obtaining a copy of the Option Agreement before April 3, 2018, that question and tolling are quintessential questions of fact for the jury. *See, e.g.*, *Doe v. Roe*, 191 Ariz. 313, 324 ¶36 (1998) ("The jury must determine at what point Plaintiff's knowledge, understanding, and acceptance in the aggregate provided sufficient facts to constitute a cause of action."); *Walk v. Ring*, 202 Ariz. 310, 316 ¶24 (2002) (same); *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 162 (App. 1993) ("Whether this concealment occurred and was sufficient to toll the statute of limitations is a factual dispute to be resolved by the fact finder.").

II. DISMISSAL OF COUNTS I-III AGAINST ABOR AND COUNT IV AGAINST CREER WAS IMPROPER BECAUSE THE AG HAS AUTHORITY AND THESE CLAIMS ARE VALIDLY PLED.

The trial court dismissed Counts I-III against ABOR and also dismissed Count IV against ASU VP Creer. R.41, R.47. This was error because the AG has authority to bring the counts in the complaint, the counts state claims upon which relief can be granted, and there are no alternative grounds for affirmance in part.

Moreover, in order to provide the AG full relief on Count IV, this Court must address the trial court's erroneous legal conclusion that ABOR has authority to enter the Omni Transaction under § 15-1625(B)(4) and all ABOR property is exempt from taxation under Article 9, § 2(1). *See infra* Parts II(B)(1)-(3) If the

improvements or land are taxable (as the AG alleges), then the "additional rent" payments to ABOR under the Option Agreement plummet toward ~$0, meaning ABOR is not receiving "additional rent" payments under the deal. Because the legal conclusion underlying dismissal of Counts I-III could materially impact the consideration prong of the Gift Clause claim under Count IV, this Court must reach this issue for this additional reason.

A. The AG Has Authority To Bring The Counts in the FAC.

The AG has express statutory authority to assert a claim under § 35-212, which comes with the authority to assert the other theories of liability and relief in the FAC. The AG also has independent statutory authority to assert a claim for *quo warranto* relief and to enforce the Arizona tax statutes.

1. The AG Has Broad Authority Under § 35-212, As Recognized in *Woods v. Block*, and He Also Has Authority To "Prosecute" Actions Under § 41-193(A)(2).

The AG challenges the Omni Transaction because it will result in the payment of public monies in violation of Arizona law. The AG seeks "declaratory and injunctive relief enjoining the illegal payment of public monies." R.17 at p.35. ABOR has never disputed that the AG has authority under § 35-212. This dooms ABOR's argument that the AG lacks the authority to assert the other legal theories contained in the FAC.

The AG 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." *State ex rel. Woods v. Block*, 189 Ariz. 269, 274 (1997) (*quoting Fund Manager v. Corbin*, 161 Ariz. 348, 353 (App. 1988)). In *Woods*, the AG also was permitted under § 35-212 to challenge the governmental entity's ability to enter into a transaction where the challenge would necessarily include a request to prohibit payment stemming from the transaction. *See id.* at 274 ("We conclude that the Attorney General's request to prohibit CDC from exercising its power to litigate necessarily includes a request to prohibit payment for such litigation.").

In addition to *Woods*'s interpretation of § 35-212, once the AG initiates suit, he has authority to "prosecute" the action under § 41-193(A)(2). This includes pursuing related claims such as Counts I-III here. *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 145-46 (1960), is not to the contrary.[8] It only holds that "prosecute" does not permit instituting action in the first place. *See id.* Section 41-

[8] The AG reserves the right to argue that § 41-193(A)(2) provides an independent basis to institute suit. *See State ex rel. Brnovich*, 2019 WL 3941067, at *4 ¶¶22-23 (Ariz. Ct. App. Aug. 20, 2019) (Morse, Campbell, and Cruz, JJ., specially concurring), *review granted* (February 11, 2020).

193(A)(2), by its plain language, thus provides an independent basis (in addition to *Woods*'s interpretation of § 35-212) to pursue Counts I-III after initiating suit based on Count IV.

The AG therefore has authority to challenge the transaction as a whole and to seek an order stopping the transaction; doing so necessarily includes a request to prohibit illegal payments to Omni, because the transaction is *ultra vires* and in violation of Arizona law on tax exemptions. The AG is empowered to seek an injunction to prohibit illegal payments, *see* A.R.S. § 35-212(A)(1), and seek declaratory relief, *see id.* § 12-1831 *et seq.* Moreover, because the payments in lieu of taxes are reduced dollar-for-dollar by any property taxes Omni pays, R.17 ¶83, whether and how much property taxes Omni will pay is factually intertwined with, and directly relevant to, whether the transaction violates the Gift Clause (because it impacts the "consideration" ABOR receives, even assuming the "in lieu" payments are legally cognizable). *See Turken*, 223 Ariz. at 350 ¶¶38-39. All of the AG's claims are thus authorized under § 35-212.

The trial court never addressed authority under § 35-212 because ABOR did not dispute authority under § 35-212 in response to the FAC. Thus, once the Court determines that the AG's claim under § 35-212 was timely, the Court should reverse the trial court's determination that the AG lacks authority to pursue Counts I-III alongside the timely filed claim under § 35-212 discussed in Section I.

2. The AG Has Independent Authority To Bring Counts II-III Under The *Quo Warranto* Statute, A.R.S. § 12-2041.

The AG also derives authority to bring Counts II-III under Arizona's *quo warranto* statute, A.R.S. § 12-2041.[9] That statute provides that the AG may bring an action in the superior court "against any person who usurps, intrudes into or unlawfully holds or exercises any public office or any franchise within this state." A.R.S. § 12-2041(A). ABOR is acting unlawfully by engaging in a transaction that is *ultra vires* and violates Arizona law in several ways. Thus, the AG has authority to challenge ABOR's unlawful exercise of the franchise granted to it by the State.

The trial court held that the AG lacks standing for this claim because ABOR is not exercising a "franchise" and ABOR is permitted to lease land to private companies for non-university use. The former conclusion is wrong and the latter conclusion (while also incorrect) is irrelevant to the issue of authority.

The State's grant of power to ABOR to oversee public universities is a "franchise" as that term is used in § 12-2041. The *quo warranto* statute has been on the books since at least 1913. At that time, the term "franchise" was defined as "a 'special privilege emanating from the government by a legislative grant, and vested in an individual person or in a body politic or corporate.'" *Leatherwood v. Hill*, 10 Ariz. 243, 249 (1906); *see also City of Tombstone v. Macia*, 30 Ariz. 218,

[9] Once the AG initiates suit under the quo warranto statute, he also has authority to "prosecute" the remaining claim in Count I under §§ 41-193(A)(2) and § 42-1004(E).

220-21 (1926) (approving of the "learned trial court" defining "franchise as 'a right which cannot be exercised without the express permission of the sovereign power'"); Franchise, THE CENTURY DICTIONARY, Vol. III, p. 2361 (1895) ("[A] privilege of a public nature conferred on individuals by grant from government…."). The term is similarly defined today as "[t]he government-conferred right or privilege to engage in a specific business or to exercise corporate powers." Franchise, BLACK'S LAW DICTIONARY (11th ed. 2019).

Here, the Legislature has conferred on ABOR, a body corporate with perpetual succession, management over Arizona's public universities. By statute, ABOR has been granted numerous general and administrative powers. *See* A.R.S. §§ 15-1625, -1626. Those powers fit comfortably within the definition of a "franchise" as "a 'special privilege emanating from the government by a legislative grant, and vested in an individual person or in a body politic or corporate.'" *Leatherwood*, 10 Ariz. at 249.

The trial court, without citation to authority, reasoned that "[t]o say that the state legislature granted a franchise to the Board is like saying the state granted a franchise to itself." R.41 at 2. That is inaccurate. ABOR is an independent corporate entity, exercising powers conferred on it by the Legislature. *See Sullivan*, 45 Ariz. at 251 (concluding ABOR was not the "state" within the meaning of Article 9, § 5, and stating ABOR "was already, and for a long time had

been, a corporation."); *see also Bd. of Regents of Univs. and State Coll. v. City of Tempe*, 88 Ariz. 299, 305 (1960) (citing *Sullivan*).

To be sure, ABOR performs governmental functions, but it only does so by way of its statutory authority. For purposes of whether it is exercising a franchise, ABOR is akin to a county, which is also a public corporate body. *See* Ariz. Const. art. XII, § 1 ("Each county of the state … shall be a body politic and corporate."); *accord* A.R.S. § 11-202(A). Arizona courts have repeatedly analyzed the actions and decisions of counties under the *quo warranto* statute because they exercise a "franchise" granted by the State. *See City of Scottsdale v. McDowell Mountain Irr. & Drainage Dist.*, 107 Ariz. 117, 120 (1971) ("[N]o one other than the Attorney General or the County Attorney can maintain an action to test the validity of a Board of Supervisor's action in authorizing the creation of a political subdivision."); *McDonald v. Cochise Cty.*, 37 Ariz. 90, 96 (1930) (holding that *quo warranto* could be used to challenge a decision by the Cochise County Board of Supervisors to move the county seat). ABOR is no different—it exercises a statutory franchise to operate public universities.

The trial court also believed that the AG lacks standing because ABOR is authorized to enter into leases like the one at issue. R.41 at 3. While the trial court was incorrect about ABOR's ability to enter into the Omni Transaction (*see infra* Part II(B)(1)), that merits issue is irrelevant to the AG's standing to assert a

quo warranto claim in the first place (confusing the merits with standing). *See Brewer v. Burns*, 222 Ariz. 234, 238 ¶14 (2009) ("[D]efendants cannot defeat standing merely by assuming they will ultimately win."). As explained, ABOR exercises a franchise, and the AG alleges that ABOR is exercising that franchise in a manner that is unlawful. That establishes authority for the AG under A.R.S. § 12-2041.

Finally, a *quo warranto* claim may challenge the manner in which a person is exercising a franchise, not just whether a person is lawfully holding office. Any contrary argument, such as that ABOR made below (but the trial court did not address), fails for a number of reasons. It is inconsistent with the statutory language, which provides for relief against "any person who … unlawfully … exercises … any franchise within this state." A.R.S. § 12-2041(A) (emphasis added). It is inconsistent with Arizona case law holding that a challenge to a public official's exercise of authority (as opposed to possessing office) must be brought under the *quo warranto* statute. *See, e.g., McDonald*, 37 Ariz. at 96-98 (County Board's decision to move the county seat needed to be challenged through the *quo warranto* statute); *Faulkner v. Bd. of Sup'rs of Gila Cty.*, 17 Ariz. 139, 145 (1915) (County Board's decision to incorporate the town of Winkelman needed to

be challenged through the *quo warranto* statute). And it is inconsistent with the historical understanding of the *quo warranto* remedy.[10]

3. The AG Has Independent Authority To Bring Count One Under The Tax Enforcement Statute, A.R.S. § 42-1004(E).

The AG has the authority, pursuant to A.R.S. § 42-1004(E), to seek the relief in Count I for declaratory and injunctive relief that the property subject to the Omni Transaction is subject to *ad valorem* taxes.[11] Specifically, A.R.S. § 42-1004(E) states that "[t]he Attorney General shall prosecute in the name of [the] state all actions necessary to enforce this title and title 43." Among the provisions contained in title 42 is A.R.S. § 42-11002, which provides that "[a]ll property in this state is subject to taxation except as provided in Article IX, Constitution of Arizona, and article 3 of this chapter." Under Article IX, § 2(12) of the Arizona Constitution, "[n]o property shall be exempt which has been conveyed to evade taxation." Moreover, the tax exemption statutes make clear that property owned by

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[10] *State ex rel. Watkins v. Fernandez*, 106 Fla. 779, 784 (1932) ("The assumption of a mere power by an individual such as the right to manufacture an article or deal in evidences of indebtedness without authority to do so may be tested by quo warranto." (emphasis added)); QUO WARRANTO AND PRIVATE CORPORATIONS, 37 Yale L.J. 237, 239 (1927) ("[I]n the absence of a statute, quo warranto is the exclusive means of … restraining a corporation from engaging in some unauthorized activity."); 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND p. 262 (St. George Tucker ed. 1803) ("A writ of quo warranto … lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it…." (emphasis added)).

[11] This Court only need reach this issue if it concludes the AG was not authorized to institute suit by any of § 35-212, § 12-2041, or § 41-193(A)(2), or that none of those statutes authorize instituting Count I.

colleges "for education" are only "exempt from taxation if they are used for education and not used or held for profit." A.R.S. § 42-11104(A). The AG has the authority through § 42-1004(E) to enforce these limitations on tax exemptions.

The AG recognizes that the Arizona Supreme Court held in *McFate* that the authority to "prosecute" actions under A.R.S. § 41-193(A)(2) does not authorize the AG to commence actions. 87 Ariz. at 145-46. Like criminal actions, the enforcement of the State's tax laws is another instance where the term "prosecute" should include the commencement of an action. *See id.* Moreover, as three judges of this Court have determined, "*McFate*'s interpretation of 'prosecute' in A.R.S. § 41-193(A)(2) appears to be flawed" because "common usage before and around the time of the 1953 amendment suggests that the term 'prosecute' included civil actions and contemplated both the initiation and the continuation of legal proceedings." *State ex rel. Brnovich*, 2019 WL 3941067, at *4 ¶¶22-23 (special concurrence). The Court should not import *McFate*'s interpretation of "prosecute" into § 42-1004(E).

B. Counts I-III State Valid Claims Against ABOR, and Count IV States a Valid Claim Against ASU VP Creer.

In Counts I-III, the AG pled valid claims for declaratory, injunctive, special action, and quo warranto relief on the grounds that: (1) the Omni Transaction exceeds the statutory powers authorizing ABOR to sell or lease land "for the use of the institutions under its jurisdiction," and the statute would violate Arizona

constitutional provisions (as applied to the Omni Transaction) if it were as broad as ABOR contends; (2) even if ABOR has authority and its property qualifies for exemption under Article 9, § 2(1), the Hotel and Conference Center is taxable under the Arizona Constitution's prohibition on conveying property "to evade taxation"; (3) alternatively, ABOR-owned property is governed by Article 9, § 2(2) and such property is exempt only if "used for education and not used or held for profit." Finally, with respect to Count IV against ASU VP Creer (who actually signed the Option Agreement), the AG pled a valid claim for declaratory and injunctive relief under § 35-212.

1. The AG Properly Pled That ABOR Does Not Have The Authority To Enter Into The Omni Transaction.

In the FAC, the AG alleged that ABOR does not have the statutory authority under § 15-1625(B)(4) to engage in a transaction such as the Omni Transaction, giving rise to valid quo warranto, declaratory, and injunctive claims. R.17 ¶¶145-47 (Count II); *id.* ¶¶154-58 (Count III). Section 15-1625(B)(4) permits ABOR to "[p]urchase, receive, hold, make and take leases and long-term leases of and sell real and personal property for the benefit of this state and for the use of the institutions under its jurisdiction." The FAC sets forth several allegations stating a claim that ABOR exceeded this power in entering into the Omni Transaction. *See, e.g.*, R.17 ¶¶34-54, 139-61.

First, as a matter of interpreting the plain language of § 15-1625(B)(4), the AG alleged that "[w]hen ABOR receives and thereafter holds real and personal property subject to a lease back to a private third party for that party or another third party's use, such as it appears to be poised to do with Omni, ABOR is not receiving and holding property 'for the use of the institutions under its jurisdiction.'" *Id.* ¶158.

Second, as a matter of statutory history, the plain-language allegation follows because the contrary interpretation would render subsequent statutes superfluous. The Legislature has acted three times to specifically expand ABOR's powers to hold property. *See* A.R.S. §§ 15-1636, 15-1637, 48-4202(C). If ABOR has always had unfettered power to hold and lease property unrelated to "the use of the institutions under its jurisdiction" (which it did not exercise for the first 100 years of statehood), those statutory changes would have been superfluous.

Third, even if § 15-1625(B)(4)'s plain language unambiguously supported ABOR (which it does not), ABOR's expansive views of its own powers (as applied to the Omni Transaction and other similar deals) must be rejected under the constitutional avoidance doctrine. *See Premier Physicians Group, PLLC v. Navarro*, 240 Ariz. 193, 195 ¶9 (2016) ("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."); *State v. Gomez*, 212 Ariz. 55, 60, ¶ 28, 127

P.3d 873, 878 (2006) ("We also construe statutes, when possible, to avoid constitutional difficulties."). ABOR is claiming a general, unfettered power to remove any property from the property tax rolls anywhere in Arizona, so long as the property generates revenue (in the form of contractual payments) to ABOR. The AG alleged that this limitless interpretation would violate the non-delegation doctrine, particularly in the taxation context. *See* R.17 ¶160 (collecting cases).[12] The Court should avoid construing § 15-1625(B)(4), or any other statute, to confer such unfettered and unconstitutional power in violation of the separation of powers. *See, e.g.*, *Bade v. Drachman*, 4 Ariz. App. 55, 60 (App. 1966) (Legislature "cannot … delegate to an administrative body or official not only the power to fix a rate of taxation according to a standard but also the power to prescribe the standard"). There is no intelligible statutory standard, in § 15-1625(B)(4) or elsewhere, that cabins ABOR's claimed power to take any and all property in Arizona off of the tax rolls to raise revenue *for ABOR* through contractual "in lieu" payments.

ABOR's interpretation of § 15-1625(B)(4) must be rejected under constitutional avoidance for a second independent reason: the Legislature cannot

[12] In property taxes, removing any property from the rolls necessarily increases the tax burden on other property in the jurisdiction. R.17 ¶21.

confer a power to engage in unconstitutional conveyances to evade taxation. *See infra* Part II(B)(2) (discussing Ariz. Const. art. IX, § 2(12)).

It was no answer for the trial court to push aside these points by reasoning that "[a]s long as the proceeds [from a lease] are put to the use of the universities, [§ 15-1625(B)(4)] is satisfied." R.41 at 3. The statute nowhere says that ABOR may unconditionally use its property power to exempt private property from taxation, so long as some proceeds are later used by its universities. Rather, the statute clearly provides that the making of the lease itself must be "for the use of the institutions," and that language should not be read as authorizing ABOR to lease out its tax exempt status to private parties.

Additionally, the AG alleges that the lease proceeds will be used to construct the private conference center being used by, and sold to, Omni. R.17 ¶99. So even if there is a "proceeds" exception in § 15-1625(B)(4), the FAC pleads that the Omni Transaction does not qualify as a factual matter because ABOR is not using the proceeds for the universities; rather, it is using them for a private entity. Under no circumstances should the issue have been resolved on a motion to dismiss without discovery. *See Coleman*, 230 Ariz. at 356 ¶9 (courts "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts" when deciding a Rule 12 motion).

2. The AG Properly Pled That The Omni Transaction Violates Article 9, § 2(12) of the Arizona Constitution.

The FAC also validly states a claim that ABOR and Omni structured their lease transaction to evade property taxes, in violation Article 9, section 2(12) of the Arizona Constitution. R.17 ¶¶124-27 (Count I) and ¶144 (Count II).[13] This provisions states, "[n]o property shall be exempt which has been conveyed to evade taxation." The lease between ABOR and Omni is a conveyance, so the only remaining issue is whether the AG pled that the lease was structured in a manner to evade taxation. *Foundation Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 442 (1990) ("[A]lthough logically and analytically it is correct to say that a lease is both a conveyance and a contract, the modern law traditionally viewed it as a conveyance.").

The FAC contains numerous allegations stating a claim that the Omni Transaction involves a conveyance to evade taxation. *See Coleman*, 230 Ariz. at 356 ¶9 (courts "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts" when deciding a Rule 12 motion). Most significantly, after the Hotel and Conference Center are constructed, ABOR takes title to those completed improvements to attempt to shield them from taxation. R.17 ¶95. This conveyance seeks to exempt these privately constructed

[13] In its ruling dismissing counts one through three of the FAC, the trial court did not specifically address the AG's allegations related to Article IX, § 2(12). *See* R.41.

and privately used improvements from property taxation by having ABOR take bare legal title. *See* R.17 ¶27 (citing A.R.S. § 42-19003, which discusses the tax treatment of privately owned improvements on government property, known as improvements on possessory rights ("IPRs")); *see also Sky Ranch Operations LLC v. Yavapai Cty.*, No. 1 CA-TX 19-0005, 2020 WL 2393785, at *1 ¶3 (Ariz. Ct. App. May 12, 2020) (discussing IPRs). ABOR also agrees to retain title to the land, notwithstanding that (1) Omni agreed to pre-paid rent of approximately $5.9 million total (an amount representing what it would supposedly cost for Omni to buy the land) and (2) that Omni can purchase the hotel, including the conference center, and land for a mere $10. R.17 ¶¶81-82.

The Option Agreement unabashedly states that it is ABOR and Omni's "intention … that the Demised Premises (including the Land and the Improvements thereon) will be exempt from *ad valorem* property taxes and assessments." *Id.* ¶97(a). Under the conveyance, Omni would not have to pay any property taxation (or even excise tax in lieu of property tax) and instead is only *contractually* required to pay "additional rent" of $1.09 million per year, which increases over the term of the lease. *Id.* ¶81.[14] Unlike property taxes, these

[14] ABOR and Omni refer to the "additional rent" payment as a "payment in lieu of taxes," and in the event Omni ever has to pay *ad valorem* taxes, Omni receives a dollar-for-dollar credit against the "additional rent" it would otherwise pay ABOR. *See supra* pp.8-9 (citing R.17 ¶¶83 99, 109(b), 111).

contractual payments go entirely to ABOR (rather than to local school and other local government as provided by law), and likely undercharge the amount of *ad valorem* taxes that would otherwise be due.

The lease further emphasizes that Omni is "**entitled to realize all economic benefits from the ownership and operation of the Improvements and all Alterations during the Term of this Lease**, including all rental and other revenues generated from the ownership and operation of the Demised Premises." *Id.* ¶95(a). Omni is even entitled under the agreement to depreciate the property, including those portions constructed with public funds, on Omni's own taxes (thereby reducing the state and federal income taxes Omni pays). *Id.* At lease end (or sooner if it continues to make the "in lieu" payments), Omni can purchase the hotel, including the conference center built with public funds, and land below for a mere $10—a nominal sum. *Id.* ¶¶81-82. Pure and simple, Omni owns this property, and ABOR taking bare legal title—while Omni expressly reserves "all economic benefits from the ownership" during the lease and can purchase the property for $10 at any time—is a conveyance to evade taxation.

3. The AG Properly Pled That The Omni Property Will Be Subject To Taxation Under Article 9, § 2(2).

Alternatively, even if ABOR has statutory power and the lease is not a conveyance to evade taxation under § 2(12), the property will not be exempt from *ad valorem* taxes because it cannot meet the requirements of the applicable

exemption—it will not be used for educational purposes and will be used or held for profit. R.17 ¶128-38 (Count I). "All property in this state is subject to taxation except as provided in article IX, Constitution of Arizona, and article 3 of this chapter." A.R.S. § 42-11002; *accord* Ariz. Const. art. IX, § 2(13). "[T]ax deductions, subtractions, exemptions, and credits are to be strictly construed," *Ariz. Dep't of Revenue v. Raby*, 204 Ariz. 509, 511, ¶16 (App. 2003), but not in a manner that "subverts the underlying desire to exempt certain properties from taxation," *Verde Valley Sch. v. Yavapai Cty.*, 90 Ariz. 180, 182 (1961).

There are only two tax exemptions potentially applicable to the Hotel and Conference Center (even if "owned" by ABOR), but neither apply here. The first exemption is for "[l]ibraries, colleges, school buildings and other buildings … if they are used for education and not used or held for profit." A.R.S. § 42-11104(A); *see* Ariz. Const. art. IX, § 2(2). ABOR cannot satisfy this exemption because the property will be used as a commercial hotel and conference center. *See Tucson Junior League of Tucson v. Emerine*, 122 Ariz. 324, 325 (App. 1979) (exemption denied for building "used for education" when "some of the rooms were used for non-educational meetings and all of the rooms were used during many months of the year for storing items"). ABOR also cannot satisfy the "not used or held for profit" requirement because Omni, a for-profit entity, will be the exclusive user of the property. *See* A.R.S. § 42-11154(2); *Tucson Botanical Gardens, Inc. v. Pima*

County, 218 Ariz. 523, 528 ¶16 (App. 2008) (addressing this requirement in context of different exemption). This conclusion (which would treat ABOR just like public school districts, which necessarily fall under § 2(2), not § 2(1)) does not mean that ABOR is not the "state" in other contexts nor would it impact ABOR's ability to hold exempt property that is actually used as part of the "general and uniform public school system." *See* Ariz. Const. art. XI, § 1.

The trial court dismissed Count I to the extent it alleged that the property did not qualify for exemption under Article IX, § 2(1), which provides that "[t]here shall be exempt from taxation all federal, state, county and municipal property." R.41 at 4-5. The trial court assumed without analysis that ABOR qualifies as the "state" for purposes of that exemption. That assumption is mistaken.

This Court has previously held that Article IX, § 2(1), by its plain language, only exempts the property of two political subdivisions of the state, counties and municipalities. In doing so, the Court explained that "because article 9, section 2(1) expressly exempts county and municipal property from taxation, it excludes from that exemption the property of all other political subdivisions of the state." *Indus. Dev. Auth. of County of Pima v. Maricopa County*, 189 Ariz. 558, 560, (App. 1997); *see also Buckeye Pollution Control Corp. v. Maricopa Cty.*, No. 1 CA-TX 05-0011, 2007 WL 5517458, at *2-3 ¶¶11-13 (App. 2007) (same); Ariz. Const. art. IX, § 2(13) (all property not exempt is subject to taxation). In determining that the

governmental entity in that case was a political subdivision, the Court relied on the Legislature's definition of "political subdivision" contained in A.R.S. § 35-511(2). That statute defines a "political subdivision," in relevant part, as "any other agency, instrumentality, municipal corporation or other entity created by a law of this state which has the power to issue bonds." A.R.S. § 35-511(2). Because the industrial development authority claiming the exemption fell within that definition, this Court held that it was not the "state" for purposes of article 9, section 2(1) and not entitled to the exemption.

For purposes of Article 9, § 2, ABOR is also a political subdivision other than a county or municipality and therefore not the "state" and not entitled to the exemption. ABOR is an independent body corporate with exclusive authority over public universities. ABOR holds title to property and can sue and be sued in its own name. *See* A.R.S. § 15-1625; *see also id.* § 15-1637(A) ("The Arizona board of regents may lease real property, improvements or personal property owned by the board…"); *id.* § 35-701(9) (distinguishing between property "owned by this state or by the Arizona board of regents"). And ABOR has the power to issue bonds in its own name and therefore falls within the definition of "political subdivision" in A.R.S. § 35-511(2). *See* A.R.S. § 15-1683(A); *Sullivan*, 45 Ariz. at 257 (concluding ABOR is not the "state" for purposes of debt limits in Article 9, § 5, and characterizing the university governing boards as "separate and

independent legal entities and governmental instrumentalities to disseminate knowledge and learning"); *see also Bd. of Regents of Univs. and State Coll.*, 88 Ariz. at 305 (citing *Sullivan*). Indeed, ABOR executed the Option Agreement as "***a body corporate***." R.18 at App.80 (emphasis added). Thus, when ABOR engages in commercial real estate transactions, there is no material difference between it and the industrial development authority this Court held was not the "state" for purposes of article 9, section 2(1). *Indus. Dev. Auth.*, 189 Ariz. at 559-60.

The decisions ABOR cited below, each of which were decided before this Court's decision in *Industrial Development Authority*, do not establish that ABOR is the "state" in this context. ABOR primarily cited *City of Tempe v. Del E. Webb*, but that case merely stated—in the context of ABOR carrying out its governmental, educational function pursuant to statute—"[w]e agree that the Board of Regents is a state agency and therefore exempt from taxation." 13 Ariz. App. 597, 598 (1971). The case dealt with transaction privilege tax, not the constitutional provision regarding exemptions for *ad valorem* tax, and holds only that one state subdivision may not impose transaction privilege taxes on another. *See id.* In fact, for support *Del E. Webb* cited only *City of Tempe v. Ariz. Bd. of Regents*, which ABOR independently cited below, but that decision held only that the City of Tempe does not have the power to impose transaction privilege taxes on ABOR, another political subdivision. 11 Ariz. App. 24, 25 (1969); *see also Univ. Med. v.*

Dep't of Revenue, 201 Ariz. 447, 452 n.5 (App. 2001) (teaching hospital "has always been treated" as exempt under § 2(1) but not deciding question).

There is no Arizona case holding that all ABOR property is exempt under § 2(1), regardless of whether ABOR is using the property in connection with a university educational function, as opposed to a non-educational commercial function—the issue here.[15] Moreover, until *Indus. Dev. Auth. of County of Pima*, this Court had not analyzed how article 9, section 2(1) applies to entities defined as "political subdivisions" under state law. The trial court thus erred in dismissing the AG's claim that the Hotel and Conference Center is subject to *ad valorem* taxation.

4. The AG Properly Pled A § 35-212 Claim Against ASU VP Creer.

The AG sought declaratory and injunctive relief in Count IV against ASU VP Creer, in addition to ABOR, because he is the high-ranking official who executed the Option Agreement that will cause the illegal payment of public monies. R.17 ¶¶11, 108, 170; R.25 (Notice of Errata re: ¶170). The AG is permitted to do so under current A.R.S. § 35-212(B).[16] The trial court dismissed the AG's claim because it believed the AG is retroactively applying § 35-212(C).

[15] Again, even if § 2(2) applied, this would not affect the tax exempt status of ABOR property used for educational purposes. *See* A.R.S. § 42-11104(A).

[16] Creer argued below that he cannot be held liable because he only acted as ABOR's agent. R.28 at 2-6. This is irrelevant under the plain language of A.R.S. § 35-212(B), which includes government "agents" as those who the AG can name as defendants.

The AG is doing no such thing; he is seeking solely declaratory and injunctive relief with respect to the § 35-212 claim. R.17 at p. 35 ¶4. And the version of § 35-212, in effect on February 28, 2018, when VP Creer executed the Option Agreement on behalf of ABOR, permitted an action to "[e]njoin the illegal payment of public monies." *See* A.R.S. § 35-212(A)(1) (2018 version). It was therefore proper for the AG to name VP Creer (the signatory to the Option Agreement and four subsequent amendments) as a defendant in an effort to obtain injunctive relief to stop further consummation of the illegal transaction.[17] R.18 Exhs. 4-7 at 182-248.

In any event, ABOR has thwarted any discovery into who negotiated this deal and why the terms are so one-sided in Omni's favor, while simultaneously aggressively asserting a statute of limitations defense. Given that Defendant Creer is the high-ranking official who signed the Option Agreement and amendments, it

[17] Moreover, the trial court was incorrect in holding that § 35-212(C) cannot be applied to government action pre-dating August 3, 2018. The bill adding the remedy under § 35-212(C) became effective that day. *See* Ariz. Const. art. IV, pt. 1, § 1(3). An exception to the rule against retroactivity "is that statutory changes in procedures or remedies may be applied to proceedings already pending except where the statute effects or impairs vested rights." *Wilco Aviation v. Garfield*, 123 Ariz. 360, 362 (App. 1979) (emphasis added). The Arizona Legislature did not change the substance of the prohibition contained in § 35-212—the AG had the authority to recover illegally paid public monies long before 2018. The amendment to add § 35-212(C) merely altered the remedy for illegal payments to include the personal assets of certain government officials. Thus, the exception allowing retroactive application is met.

was not only appropriate but prudent for the AG to seek declaratory and injunctive relief against him.[18]

C. There Are No Alternative Grounds for Affirmance in Part.

The AG was not required to exhaust any administrative remedies, and the AG's claim that ABOR is acting beyond its statutory powers is not a political question. ABOR argued to the contrary below, but the trial court did not address either argument. Neither argument provides an alternative ground for affirmance.

1. The AG Was Not Required To Exhaust Administrative Remedies Before Bringing Counts I-III.

There is no statutory mandate that the AG first present the claims in this lawsuit to an administrative agency. *See Medina v. Ariz. Dep't of Transp.*, 185 Ariz. 414, 417 (App. 1995) ("Arizona has recognized the exhaustion doctrine as a long-settled rule of judicial administration that is usually applied by virtue of express statutory mandate."(emphasis added)). ABOR did not cite a single statutory provision mandating the AG to exhaust administrative remedies, because none exists. In fact, courts routinely resolve claims similar to the AG's without requiring exhaustion. *See, e.g, Ariz. Dep't of Revenue v. Maricopa Cty.*, 120 Ariz. 533 (1978); *Baldwin v. Rohrer*, 105 Ariz. 49 (1969); *Maricopa Cty. v. State*, 187 Ariz. 275, 278 (App. 1996).

[18] If the Court agrees that the AG stated a claim against Creer, then the claim was also timely based on Part I(A), (C)-(D) *supra*.

Below, ABOR relied only on the process in A.R.S. § 42-19051 *et seq.* for challenging personal property tax assessments[19] and the process in § 42-16251 *et seq.* for correcting property tax errors. There are multiple flaws with that reliance. Neither process applies to the situation here—there has been no tax assessment or error. Neither process mentions claims by the AG. Neither process can provide the types of relief the AG seeks. *See Hamilton v. State*, 186 Ariz. 590, 594 (App. 1996) ("[A] party is not required to employ administrative procedures that can in no way provide the party the relief sought."). And, the administrative process for appealing property tax assessments is permissive, not mandatory. *See* A.R.S. § 42-16201(A) (allowing appeal directly to tax court "regardless of whether the person has exhausted the administrative remedies under this chapter"); *Coconino Cty. v. Antco, Inc.*, 214 Ariz. 82, 86 ¶8 (App. 2006). Finally, ABOR did not cite a single case requiring the AG to wait for others—like ABOR itself—before initiating the claims. ABOR's exhaustion argument misses badly.

2. Counts II-III Are Justiciable.

In counts two and three, the AG seeks a determination that ABOR has exceeded its authority by using property in a manner that is not for "the benefit of this state and for the use of the institutions under its jurisdiction." A.R.S. § 15-1625(B)(4). The question of ABOR's authority has not been textually and

[19] The result would be no different had ABOR relied on the statutory provisions for appealing a property tax assessment, A.R.S. § 42-16201 *et seq.*

exclusively committed to another political department and courts routinely decide whether a piece of property is being used in a particular manner or for a particular purpose.

ABOR argued below, however, that the courts cannot review whether ABOR is acting beyond its powers and, therefore, the AG's claims raise non-justiciable political questions. "'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Forty–Seventh Leg. v. Napolitano*, 213 Ariz. 482, 485 ¶7 (2006).

To be sure, the Legislature has ultimate authority to set the bounds within which ABOR must operate. But the AG's claims do not seek to have the Court create or amend the authority the Legislature has statutorily conferred on ABOR. Rather, the AG merely seeks to have the Court require ABOR to respect the statutory limits the Legislature has imposed. Analyzing whether a governmental agency is acting within the bounds of its statutory or constitutional authority lies at the heart of the judicial function. The AG's claims, accurately framed, do not implicate a decision committed to another branch. *See Kromko v. Ariz. Bd. of Regents*, 216 Ariz, 190, 193 ¶13 (2007) (explaining that the plaintiffs' claims did not implicate the first prong of the political question doctrine because they "do not

contend that the judiciary should set tuition"); *see also State v. Maestas*, 244 Ariz. 9, 12 ¶¶10-11 (2018). Rather, it is ABOR's justiciability defense that poses a threat to judicial review and the separation of powers.

The statute restricting ABOR's authority to make leases also sets forth a manageable judicial standard. The statute requires only that courts determine whether ABOR is leasing its property for the benefit of the state and use of the educational institution. Courts often and routinely determine whether a piece of property has been used for a particular purpose.[20] In fact, a number of the tax exemption statutes require a "use" determination, and the Arizona courts have never refused to engage in such an analysis. *See generally* A.R.S. § 42-11102 *et seq.*; *see also, e.g.*, *Tucson Junior League of Tucson*, 122 Ariz. at 325 (analyzing whether the building at issue was "used for education"); *Tucson Botanical Gardens*, 218 Ariz. at 526 ¶11 (analyzing whether the property was used for a charitable purpose and commenting that "Section 42–11116 is one of many statutes that grant a tax exemption but condition the exemption on a particular charitable use of the property by the taxpayer."); *see also Maestas*, 244 Ariz. at 12 ¶12

[20] *See, e.g.*, A.R.S. § 13-3413(A) ("The following items used or intended for use in violation of this chapter are subject to seizure and forfeiture…."); Ariz. Const. art. II, § 17 ("Private property shall not be taken for private use…."); *Chandler Improvement Co. v. Desert Viking DV Town Homes, L.L.C.*, 2010 WL 681661, *7 ¶30 (Ariz. Ct. App. Feb. 25, 2010) ("A trustee holds title to the property subject to an obligation to use the property for the benefit of another.").

(rejecting a non-justiciability argument because "[w]e have ruled on VPA challenges in the past"). The Court should reject ABOR's argument that courts are incapable of, or ill equipped to, determine how a piece of property is used.

III. THE TRIAL COURT'S ATTORNEY FEES AWARD MUST BE VACATED OR, IF THIS COURT AFFIRMS, REDUCED.

The trial court awarded ABOR and Creer almost $1 million in fees and costs under A.R.S. § 12-348.01 based on their status as "prevailing parties." R.105, 106. If this Court vacates the judgment of dismissal and remands, then it must also vacate the trial court's award of fees and costs. Even if this Court affirms the judgment of dismissal (in full or in part), it must reduce the amount of attorneys' fees awarded because the nearly $1 million award was excessive for the reasons explained in the AG's opposition. R.100.

CONCLUSION

The State respectfully requests that the Court vacate the trial court's judgment (including fees and costs), enter summary judgment for the AG on ABOR's statute of limitations defense, and otherwise remand for further proceedings.

RESPECTFULLY SUBMITTED this 8th day of July, 2020.

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