ARIZONA SUPREME COURT

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General Appellant/Petitioner, 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; JOHN M. ALLEN, in his official capacity as MARICOPA COUNTY TREASURER, Appellees/Respondents.	CV– Court of Appeals No. 1 CA-TX 20-0003 Maricopa County Superior Court No. TX2019-000011

STATE OF ARIZONA'S
PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

INTRODUCTION 5

ISSUES PRESENTED 8

FACTUAL BACKGROUND 9

REASONS FOR GRANTING THE PETITION 11

I. The COA's Holdings Regarding The Timeliness Of The State's Public-Monies Claim Warrant Review. 11

A. The COA Misinterpreted §35-212(E). 11

B. In Conflict With Its Own Decisions, The COA Used An Incorrect Accrual Standard for §12-821.01. 14

C. The Relation-Back Analysis Conflicts With Other Arizona Cases and Incorrectly Decides An Important Issue of Law. 16

II. The COA's Holdings Regarding Tax Exemption And ABOR's Statutory Authority Warrant Review. 20

A. The COA's Interpretation Of The Term "State" In Article IX And Failure to Analyze Improvements Separately From Land Conflict With Multiple Arizona Decisions. 20

B. The State's Claim Under Article IX, §2(12) Of The Arizona Constitution Raises an Important Issue of Law. 23

C. The COA Erred In Interpreting Arizona Law To Allow ABOR To Serve As Strawman For Private Parties. 25

D. The COA's Narrow Interpretation Of The *Quo Warranto* Statute Conflicts With The Text And Case Law. 26

III. Issues Raised But Not Addressed. 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Anderson v. City of Prescott,
2014 WL 4104010 (Ariz. Ct. App. Aug. 14, 2014) 15

ASARCO, LLC v. Union Pac. R.R. Co.,
765 F.3d 999 (9th Cir. 2014) 19

Board of Regents v. Sullivan,
45 Ariz. 245 (1935) 21, 28

Buckeye Pollution Control Corp. v. Maricopa Cty.,
2007 WL 5517458 (Ariz. Ct. App. July 31, 2007) 22

Canyon Del Rio Investors, L.L.C. v. City of Flagstaff,
227 Ariz. 336 (App. 2011) 15

City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Assoc.,
99 Ariz. 270 (1965) 24, 25

City of Tempe v. Del E. Webb Corp.,
13 Ariz. App. 597 (1971) 22

Coleman v. City of Mesa,
230 Ariz. 352 (2012) 26

Cruz v. City of Tucson,
243 Ariz. 69 (App. 2017) 15

Dube v. Likens,
216 Ariz. 406 (App. 2007) 14

Englehorn v. Stanton,
No. CV2017-001742, Minute Entry (5/10/2018) 24

Flynn v. Campbell,
243 Ariz. 76 (2017) 16

In re Estate of Winn,
214 Ariz. 149 (2007) 12

Indus. Dev. Auth. of Cty. of Pima v. Maricopa County,
189 Ariz. 558 (App. 1997) 22

Leatherwood v. Hill,
10 Ariz. 243 (1906) 28

Long v. City of Glendale,
208 Ariz. 319 (App. 2004) 14, 15

Marshall v. Super. Ct.,
131 Ariz. 379 (1982) 17, 18, 19, 20

Offutt Hous. Co. v. Sarpy County,
351 U.S. 253 (1956) 25

Parnell v. State ex rel. Wilson,
68 Ariz. 401 (1949) 27

Rogers v. ABOR,
233 Ariz. 262 (App. 2013) 14

S. Pac. Co. v. Cohise Cnty.,
92 Ariz. 395 (1962) 26

Schires v. Carlat,
50 Ariz. 371 (2021) 6

Sky Ranch Operations LLC v. Yavapai County,
2020 WL 2393785 (Ariz. Ct. App. May 12, 2020) 23

State ex rel. Brnovich v. ABOR,
250 Ariz. 127 (2020) 26

Taylor v. State Farm Mut. Auto. Ins. Co.,
185 Ariz. 174 (1996) 14

Tucson Transit Auth. v. Nelson,
107 Ariz. 246 (1971) 22

Woods v. Block,
189 Ariz. 269 (1997) 27

Woodward v. Chirco Constr. Co.,
141 Ariz. 520 (App. 1984) 12

STATUTES

A.R.S. §15-1625 ..... 22, 28

A.R.S. §15-1626 28

A.R.S. §15-1636(B) 26

A.R.S. §15-1637(A) 26

A.R.S. §15-1637(D) 26

A.R.S. §15-1683(A) 22

A.R.S. §35-212 11

A.R.S. §35-213 11

A.R.S. §42-19003 ..... 23, 24

A.R.S. §42-6202 23

A.R.S. §48-4202(C) 26

A.R.S. §12–2041(A) 26

A.R.S. §35-511(2) 22

A.R.S. §35-701(9) 22

A.R.S. §42-11104(A) 21

Ariz. Const. art. IX, §2(2) 21

OTHER AUTHORITIES

Ariz. AG Op. I20-009, 2020 WL 3498071 (June 15, 2020) 21

Exercise, Black's Law Dictionary (11th ed. 2019) 27

Franchise, Black's Law Dictionary (11th ed. 2019) 28

Wright & Miller, 6A Federal Practice & Procedure Civ. §1497 (3d ed. 2021) 18

INTRODUCTION

This case, which resulted in a published Court of Appeals ("COA") opinion, presents multiple legal issues of statewide importance about 1) limitation of actions, 2) taxation, and 3) *quo warranto*.

ABOR recently began entering into unprecedented real-estate transactions taking bare title to large, private commercial developments and converting property taxes that fund local government into contractual payments to ABOR. OB at 6-7. Without statutory authorization, ABOR claims the authority to take bare title to any property in Arizona, rendering the property tax-exempt "state" property under article IX, §2(1), so long as ABOR receives contractual payments in return. These deals—which result in *no* property tax being paid—usurp the Legislature's power to set fiscal policy through statute, render multiple statutes conferring more limited power on ABOR superfluous, and require other taxpayers to make up lost revenue.

Here, the State *ex rel.* its Attorney General (the "State") seeks declaratory, injunctive, and *quo warranto* relief against ABOR arising from one such transaction—a deal with an Omni Hotels Corporation affiliate ("Omni") to build a private hotel and conference center and have ABOR take legal title to the new improvements to shield them from taxation in return for "additional rent" payments (the "Omni Deal"). The original complaint challenged whether the private hotel

and conference center would be tax-exempt and sought "to void the transaction" because ABOR lacks authority to enter into such transactions. Opinion ¶6.

The State then amended its complaint to seek declaratory and injunctive relief regarding the illegal payment of public monies under A.R.S. §35-212. Opinion ¶7. The new count arose from the same transaction (the Omni Deal) and asserted that ABOR was agreeing to pay $19.5 million to Omni to fund the full cost of the conference center, but will receive only minimal return consideration (7 free days/year) in violation of the Gift Clause. The new count was also factually interrelated with whether the property would be tax exempt because ABOR claims its primary return consideration is Omni's "additional rent" payments, and the contract specifies those payments are reduced dollar-for-dollar by any property taxes Omni pays. *Schires v. Carlat*, 250 Ariz. 371, 376 ¶14 (2021) (consideration "'focuses … on the objective fair market value of what the private party has promised to provide in return'").[1]

The COA's opinion, which affirmed dismissal of the original counts and summary judgment that §12-821 barred the new count, makes new law and conflicts with previously clear law in important and recurring areas that will affect

[1] Even if "additional rent" payments remain, they are not cognizable consideration because they are simply redirection of otherwise-due taxes. *Id.* at 377 ¶18 (payment of taxes is "an indirect benefit that is irrelevant to [Gift-Clause] analysis."). The Gift Clause turns on "the value to be received by the public," *id.* at 375 ¶7, and the public receives no value from redirected taxes.

countless civil cases, the Attorney General's Office (AGO)'s duty to police public-monies expenditures, and taxation. This Court should grant review.

ISSUES PRESENTED

1. Was AGO's public-monies claim under §35-212 (Count IV) timely because:

   a) the specific five-year limitations period in §35-212(E) governs over the general one-year period in §12-821,

   b) a public-monies claim does not accrue under §12-821.01 until the challenged public monies are ordered paid and AGO "realizes [the State] has been damaged" by the illegal payment, or

   c) relation-back under Rule 15(c)(1) is met when the new claim "arose out of" the same transaction set forth in the original complaint?

2. Did the complaint validly plead that certain ABOR property is taxable and ABOR lacks authority to enter the Omni Deal (Counts I-III) by alleging:

   a) ABOR property is exempted not under article IX, §2(1) but rather §2(2) and A.R.S. §42-11104(A), and regardless, improvements should be analyzed separately for exemption purposes, A.R.S. §42-19003,

   b) ABOR taking bare title to new improvements and "leasing" those improvements and land back to a private entity, such that it pays no property tax, would be a conveyance to evade taxation under §2(12),

   c) ABOR does not hold or lease property "for the benefit of this state and for the use of the" universities when it enters into straw-man transactions for private parties, A.R.S. §15-1625(B)(4), and

   d) Analogous to annexation/condemnation, ABOR unlawfully "exercise[s]" a public office/franchise under *quo warranto* when it enters into straw-man transactions for private parties, A.R.S. §12-2041?

FACTUAL BACKGROUND

On February 28, 2018, ABOR and Omni executed an Option Agreement, giving Omni an option to construct a hotel and conference center on ABOR-titled land, convey title of the new facility to ABOR, and lease it back for 60 years with a further option to purchase it for $10. State's Opening Brief ("OB") 8-9. The "long term lease" is indistinguishable from a sale and was discussed as such during the approval process. *Id.* at 8. ABOR serves as straw-holder of title after construction for property-tax purposes, so that no property tax is paid. *Id.* And notwithstanding ABOR's paper "ownership," the Option Agreement declares that Omni is "entitled to realize all economic benefit from the ownership and operation of the Improvements and all Alterations during the Term of this Lease." *Id.* at 9.

If Omni chooses to exercise its option, which has not occurred, it will pay pre-paid "rent" of about $5.9 million, which is supposed to represent the sales price for the land. *Id.* at 8. Omni must also pay "additional rent" of $1.09 million per year (with annual increases). *Id.* ABOR and Omni refer to the "additional rent" as "payment in lieu of taxes." *Id.* If Omni pays property taxes, it receives a dollar-for-dollar credit against "additional rent" owed. *Id.*

On January 10, 2019—less than a year after execution of the Option Agreement—AGO filed a three-count complaint seeking "to void the transaction." Opinion ¶6. On February 25, it learned *from Omni* that the deal also contemplates

an illegal gift of public monies: Omni disclosed to AGO that although ABOR agreed to pay the full cost—up to $19.5 million—for construction of the conference center, ABOR can only use the conference center seven days per year (<2%), subject to availability and ABOR's payment for food and beverage. OB 10. ABOR also agreed to spend $30 million constructing a parking garage, 23% of which Omni could exclusively use for free. *Id.* After learning these aspects of the transaction, AGO promptly filed an amended complaint as a matter of right under Rule 15(a)(1)(B), seeking declaratory and injunctive relief under §35-212 and adding ASU's Real Estate VP as an additional defendant.

In moving to dismiss the original complaint, ABOR repeatedly argued it was filed *too early*. OB 25 n.5. But after AGO amended, ABOR changed its tune and argued the new claim was *too late*, as it was filed 1 year and 34 days after ABOR and Omni entered into the Option Agreement, and did not relate back to the filing of the original complaint under Rule 15(c). The Tax Court dismissed the three original claims under Rule 12. The Tax Court denied dismissal of Count IV, but ultimately granted summary judgment on statute-of-limitations grounds. The COA affirmed in a published opinion.

REASONS FOR GRANTING THE PETITION

I. The COA's Holdings Regarding The Timeliness Of The State's Public-Monies Claim Warrant Review.

A. The COA Misnterpreted §35-212(E).

In a matter of first impression, the COA construed §35-212(E)—a provision the Legislature recently added as part of a bill expanding AGO's public-monies powers—as imposing an additional statute of repose on AGO, rather than displacing the general one-year statute of limitations in §12-821 for AGO claims against public entities. Because AGO is often asked to investigate and prosecute public monies claims, the amount of time AGO has to bring public monies claims is an important and recurring issue of law. The Opinion incorrectly interprets this new statutory provision and hampers AGO's ability to enforce Arizona law.

In 2018, the Legislature amended §35-212(E) to provide that a public monies claim by AGO "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 COA, however, held that the State's claim was untimely because §35-212(E) first states that "[a]n action brought pursuant to this article is subject to title 12, chapter 7, article 2." The COA concluded that the one-year statute of limitations in A.R.S. §12-821 still applies when AGO brings a public-monies claim against a government defendant. Opinion ¶14.

The COA misinterpreted §35-212(E). There are two types of claimants for public monies claims: AGO and taxpayers. *See* A.R.S. §§35-212, 35-213. The first sentence in §35-212(E) clarifies that the provisions in title 12, chapter 7, article 2 apply to claims by either. But the second sentence clearly makes two exceptions for AGO claims, including that in all circumstances AGO has five years from the date the payment is ordered to bring a claim.

At best for ABOR, there is ambiguity about which period applies. But even then proper statutory construction requires a five-year period.

The COA ignored multiple rules to select among competing limitations periods. Because the five-year period in §35-212(E) is more narrowly applicable, more recent, and longer, it governs over the broadly applicable, older, and shorter period in §12-821. *See Woodward v. Chirco Constr. Co.*, 141 Ariz. 520, 524 (App. 1984) ("[W]here two constructions are possible, the longer period of limitations is preferred."); *In re Estate of Winn*, 214 Ariz. 149, 152 ¶16 (2007) ("[T]he more recent, specific statute governs over the older, more general statute."). Nor does this construction render §12-821 superfluous because it still applies to private actions.

The statute's legislative history and purpose also support the State's interpretation. The 2018 statutory amendments universally *expanded* AGO's power to prosecute public monies claims. OB 15-16. Construing §35-212(E) to

allow AGO five years *in all cases* to bring a public monies claim furthers that legislative purpose; the COA's interpretation frustrates it.

The structure of §35-212(E) further supports the State's interpretation. The second sentence of §35-212(E) states that §12-821.01 does not apply to AGO claims. Section 12-821.01(B) sets forth the accrual standard for §12-821. Why would the Legislature retain the limitations period in §12-821 for AGO actions while simultaneously eliminating the accrual standard in §12-821.01? Reply Br. 4-6. The COA gave no explanation.

Finally, the COA's interpretation creates a confusing patchwork of limitations periods. If a taxpayer brings a public monies claim against a government official, the claim must be brought within one year of accrual under §12-821.01, regardless of how long it takes for accrual to occur. If the State brings a public monies claim against a government official, the claim must be brought within one year of accrual, but if more than five years pass, the claim is barred even if it is within one-year of accrual (and even if any taxpayer can still bring the same claim).

Two hypotheticals demonstrate the absurdity of the COA's interpretation. Any private taxpayer who has not yet learned about the Omni Deal remains free to bring the exact same lawsuit under §35-213 that is supposedly time-barred when brought by the State. And, per §12-510, the State remains free to bring a §35-212

suit against Omni when Omni receives public monies, but is time-barred from suing ABOR to prevent that same payment of public monies. This cannot be the intended result.

ABOR does not dispute that with a five-year deadline, the State's claim is timely. The Court should grant review to resolve this important issue.

B. In Conflict With Its Own Decisions, The COA Used An Incorrect Accrual Standard for §12-821.01.

Even if §12-821 applies, the COA applied the wrong accrual standard for claims against government defendants, risking confusion and erroneous application in lower courts. Given §12-821's stringent limitations period, the accrual standard for claims against government defendants often arises in cases involving government defendants. Proper articulation of the accrual standard is an important issue of statewide concern. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 174 (1996).

The COA articulated the proper accrual standard for claims against government defendants in *Long v. City of Glendale*: "[S]uch claims do not accrue until the claimant realizes he or she has been injured." 208 Ariz. 319, 325 ¶11 (App. 2004). Further, accrual only occurs after the claimant knows or reasonably should know the injury's source. *Id.* The COA twice applied this correct standard to claims against ABOR. *See Rogers v. ABOR*, 233 Ariz. 262, 265 ¶7 (App. 2013); *Dube v. Likens*, 216 Ariz. 406, 411 ¶7 (App. 2007).

Not so here. Instead, the court committed two legal errors, by (1) applying only a "notice to investigate" standard and (2) granting summary judgment that accrual occurred before Omni exercised the Option Agreement or ABOR ordered or made payment.

First, the COA ignored realization of injury and asked only when a "reasonable person" was on "notice to investigate." Opinion ¶15. As support, the court cited *Cruz v. City of Tucson*, 243 Ariz. 69, 72 ¶8 (App. 2017). But *Cruz*—a case where review was not sought—cited this Court's opinions in *Doe v. Roe* and *Walk v. Ring*. Neither of those cases were §12-821 cases. *Walk* dealt with accrual for malpractice claims against private professionals, not claims against government defendants. *Doe* dealt with repressed memories of sexual abuse. "Notice to investigate" should never be the sole accrual inquiry for the stringent one-year limitations period protecting government defendants. *Long*, 208 Ariz. at 325.

Second, the State's claim has not accrued because *Omni has not exercised its option under the Option Agreement*, and ABOR has not ordered or made payment. OB 25 & n.5; Reply Br. 11. The State cited five appellate cases, including *Canyon Del Rio Investors, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 341 ¶19 (App. 2011) and *Anderson v. City of Prescott*, 2014 WL 4104010 *3 ¶¶14-15 (Ariz. Ct. App. Aug. 14, 2014) (a Gift Clause claim under §35-213 accrues when the claimant "knows or reasonably should know a city has expended public funds for a

nonpublic purpose"); R.71 3-4, R.86 5-6 (citing cases). The COA's decision ignored these requirements for accrual, thereby conflicting with prior Arizona decisions.

Even if realization of injury can occur without payment ordered or made, ABOR did not execute the Option Agreement until February 28, 2018. The State filed its amended complaint on April 3, 2019. Thus, unless the State's claim accrued between February 28, 2018 and April 3, 2018 (one year prior to the amended complaint), a 34-day period, the State's claim was timely.

The COA did not identify any triggering event during that 34-day period. Rather, the COA held the State's claim untimely because AGO "was on notice to investigate" as of January 11, 2018 (before the Option Agreement was even executed) based on a state legislator's op-ed. The COA did not explain how an op-ed before execution or exercise of an option could possibly have caused AGO to *realize* that ABOR (the lessor) would also make a payment to Omni, let alone further *realize* that payment would violate the Gift Clause.

The Court should clarify the proper accrual standard for claims against government defendants and hold that the State's public monies claim was timely.

C. The Relation-Back Analysis Conflicts With Other Arizona Cases and Incorrectly Decides An Important Issue of Law.

"[T]he standard for allowing 'relation back' of pleadings under Rule 15(c) presents a recurring issue of statewide importance." *Flynn v. Campbell*, 243 Ariz.

76, 79 ¶6 (2017). The COA introduced an incorrect analysis contrary to Rule 15(c)(1)'s text and this Court's case law, creating substantial uncertainty in a frequently arising area of civil procedure.

Long ago, this Court established the proper relation back test. Consistent with Rule 15(c)(1)'s text, "[i]t is only when the amendment 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 v. Super. Ct.*, 131 Ariz. 379, 383 (1982). And "an 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." *Id.* Thus, the Court held that claims seeking damages for wrongful and negligent conduct regarding a real estate transaction related back to the original complaint, which was based on the same real estate transaction but had only sought equitable relief. *Id.* at 380, 383-84.

Here, rather than apply *Marshall*'s test, the COA rejected relation back, claiming that the elements of the new claim in the State's amended complaint involve "different inquiries" and that there is insufficient "factual overlap" between the State's old and new claims. Opinion ¶¶27-28.

The COA's analysis is inconsistent with Rule 15(c)(1)'s text, which already sets forth the required "factual overlap": new claims must have "arose from" the

same "conduct, transaction, or occurrence" set forth or attempted to be set forth in the original complaint. Wright & Miller, 6A Federal Practice & Procedure Civ. §1497 (3d ed. 2021) (explaining that "[t]he best [formulation for relation back] is the Rule 15(c)(1)(B) standard itself[.]"). Rule 15 also does not require that the elements of a new claim involve the "same inquiries" as the elements of the original claims.

The COA's analysis is inconsistent with *Marshall*. As to "factual overlap," *Marshall* recognized that the only "factual overlap" required is that in Rule 15's text. 131 Ariz. at 383. The COA erroneously required more—the court acknowledged that "the amended complaint introduced new facts *relating to the ABOR/Omni deal raised in the original complaint*" and yet rejected relation back. Opinion ¶28 (emphasis added). As to "different inquiries," *Marshall* allowed relation back of new negligence and fiduciary duty claims and requests for compensatory and punitive damages, when the original complaint requested only equitable relief (quiet title and constructive trust). The new claims and relief in *Marshall* unquestionably required "different inquiries," and yet the Court found relation back.

The COA's analysis will cause confusion. How much factual overlap is required for relation back? Is complete overlap required? Is partial overlap enough? If partial is enough, how much is required? Similar questions abound as

to the "different inquiries" analysis. For example, what if one element of a new claim requires a "different inquiry" but others do not? The COA left trial courts and litigants guessing. Parties, therefore, will now bring all potential claims at the outset of litigation, even without factual or evidentiary support, for fear of being later barred. *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1006 (9th Cir. 2014) ("Parties should not be discouraged from limiting their initial pleadings to claims and defenses that have evidentiary support.").

Under *Marshall*, the State's amended complaint relates back. This is not a case where "the amendment seeks relief with respect to a transaction or event which was not the 'basis of the original complaint'" *Marshall*, 131 Ariz. at 383. Instead, the State's original complaint broadly sought relief prohibiting ABOR from carrying out the Omni Deal. Opinion ¶6. The amended complaint did too, including for "the illegal payment of public monies." Adding a new statutory basis for illegality does not change that the transaction underlying the two complaints is identical. The claims in the original complaint also directly impact the AG's public monies claim—if Omni pays taxes (as the original claims seek to require), Omni will be entitled to a credit against its "additional rent" payments, making the public monies claim irrefutable. *See supra* pg. 2 (citing *Schires*). And notice or prejudice is not at issue—the State filed the amended complaint *as of right* under Rule 15(a)(1) within twenty-one days of the first motions to dismiss.

The COA also incorrectly relied on *Barnes v. Vozack*. As *Marshall* explains, *Barnes* held "there was no relation back where the original complaint alleged fraud in the sale of stock to plaintiff and the amended complaint alleged fraud in defendant's application for a registration exemption." 131 Ariz. at 383. *Barnes* is a "different transaction" case: the counterparty to the sale of stock was the *buyer of stock*, while the counterparty to the earlier securities registration was the *government*. With different counterparties at different times, came different transactions. Here, there was only one transaction, the Omni Deal (which was the exclusive topic of both complaints), and only one counterparty, Omni. This clearly is not a "different transaction" case.

The Court has not interpreted Rule 15(c)(1) for 40 years because the standard in Rule 15 and *Marshall* was clear, predictable, and easy to apply. The COA's analysis injects significant ambiguity into a settled area of law. The Court should grant review and hold that the State's amended complaint relates back.

II. The COA's Holdings Regarding Tax Exemption And ABOR's Statutory Authority Warrant Review.

A. The COA's Interpretation Of The Term "State" In Article IX And Failure to Analyze Improvements Separately From Land Conflict With Multiple Arizona Decisions.

Whether ABOR property is always tax exempt under the Arizona Constitution and, even if so, whether such exemption extends to improvements owned by private parties, are additional important legal issues justifying review.

Because the COA affirmed legal conclusions on these questions, it is critical that the Court address these issuea to afford AGO complete appellate relief on its public-monies claim. *See supra* pg. 2 (explaining interrelatedness of taxation questions and public-monies claim).

Property ABOR holds *for educational use* is tax exempt. Ariz. Const. art. IX, §2(2); A.R.S. §42-11104(A); Ariz. AG Op. I20-009, 2020 WL 3498071 (June 15, 2020). To perpetuate its strawman transactions, however, ABOR claims, and the COA agreed, that *any property* ABOR holds *for any use* is tax exempt because ABOR is the "state" under article IX, §2(1) of the Arizona Constitution. Opinion ¶3 ("state-owned property"), ¶30 (citing §2(1)).

ABOR is not the "state" under article IX, §2(1). That provision, included in the original Constitution, provides that "[t]here shall be exempt from taxation all federal, state, county and municipal property." Just three sections away, article IX, §5, also included in the original Constitution, provides that "[t]he state may contract debts" not to exceed $350,000. In *Board of Regents v. Sullivan*, the Court held that ABOR is not the "state" for purposes of article IX, §5. 45 Ariz. 245, 260-61 (1935). The COA, ignoring *Sullivan*, did not explain how the term "state" in §2 includes ABOR when three sections away, in §5, this Court already held it does not.

The COA's interpretation is inconsistent with its own prior interpretation of "state." Using the plain language of §2(1), the COA has held that a governmental entity is not the "state" if it is a "political subdivision" under state law. *Indus. Dev. Auth. of Cty. of Pima v. Maricopa County*, 189 Ariz. 558, 560-61 (App. 1997) (citing A.R.S. §35-511(2)); *Buckeye Pollution Control Corp. v. Maricopa Cty.*, 2007 WL 5517458 *3 ¶13 (Ariz. Ct. App. July 31, 2007). For purposes of article IX, ABOR is a "political subdivision." *See id.*[2] ABOR titles property in its name, can sue and be sued in its name, is run by an independent board, has the power to issue bonds, and is solely responsible for its debt. *See* A.R.S. §§15-1625, 15-1683(A); *id.* §35-701(9) (distinguishing between property "owned by this state or by the Arizona board of regents"). Under the correct interpretation, therefore, ABOR is not the "state" under article IX, §2(1). *See Tucson Transit Auth. v. Nelson*, 107 Ariz. 246, 252 (1971) (entity not exempt under article IX, §2(1) where it held title in its name, paid its own debt, and had an independent board).

In holding otherwise, the COA relied only on an intra-governmental tax immunity decision, which did not involve article IX, §2(1) and held only that the City of Tempe cannot impose sales tax on ABOR's contractors. *City of Tempe v. Del E. Webb Corp.*, 13 Ariz. App. 597, 598 (1971). That ABOR enjoys intra-

[2] Article IX addresses state finances; nothing herein implies ABOR is not the "state" for other purposes, including Eleventh Amendment immunity.

governmental tax immunity like most political subdivisions does not make ABOR the "state" under the Constitution's property tax exemption.

The COA also extended tax exemption to Omni for all purposes, incorrectly relying on valuation case and stating that "[t]axes are levied upon land itself and not its separate legal interests[.]" Opinion ¶30. In reality, multiple Arizona statutes tax separate legal interests on land, including possessory interests in improvements on tax-exempt land. *See, e.g.,* A.R.S. §§42-19003 (establishing a personal property tax on private improvements on government land (known as "IPRs")); 42-6202 (establishing a government property lease excise tax (known as "GPLET")). Indeed, the COA recently held that taxes can be levied on improvements located on exempt land where the lessee (like Omni) owns the improvements. *See Sky Ranch Operations LLC v. Yavapai County*, 2020 WL 2393785, *1 ¶3 (Ariz. Ct. App. May 12, 2020). The Opinion's misstatements of law limit the government's ability to collect lawful. The Court should grant review to clarify these important legal issues.

B. The State's Claim Under Article IX, §2(12) Of The Arizona Constitution Raises an Important Issue of Law.

The State's complaint validly stated a claim that ABOR and Omni structured the Omni Deal to evade property taxes, in violation of Article IX, §2(12) of the Arizona Constitution, which states that "[n]o property shall be exempt which has been conveyed to evade taxation." Whether ABOR's straw-man transactions

violate this provision is a matter of first impression: neither this Court nor any other appellate court has interpreted the constitutional provision.[3]

By dressing a sale of property up as a lease expressly to avoid taxes, ABOR will violate Article IX, §2(12). After the property improvements are constructed, ABOR agreed to take bare legal title to avoid taxes on those improvements. R.17 ¶27 (citing A.R.S. §42-19003, which discusses IPRs). ABOR also agreed to retain title to the land notwithstanding that Omni will make a lump sum payment of about $5.9 million (representing the purported land value) and is then able to purchase the entire property—improvements and all—for only $10. *Id.* ¶¶81-82. The Option Agreement states that Omni is "entitled to realize all economic benefit from the *ownership* and operation of the Improvements and all Alterations during the Term of this Lease." *Id.* ¶95(a). And it declares that it is the parties' "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). Omni even gets to depreciate the property and improvements on its own taxes. *Id.* ¶95(a).

It is obvious Omni owns this property, but the transaction has been disguised as a lease to evade taxation. *City of Phoenix v. Phoenix Civic Auditorium &*

[3] In *Englehorn v. Stanton*, the Superior Court denied a motion to dismiss a claim under §2(12), so this is also a recurring issue. No. CV2017-001742, Minute Entry (5/10/2018).

Convention Ctr. Assoc., 99 Ariz. 270, 287 (1965) (holding that a lease conveyance structured like the Omni Deal was a sale); *Offutt Hous. Co. v. Sarpy County*, 351 U.S. 253, 261 (1956). The Court should grant review to make clear that the State validly stated a claim against ABOR under article IX, §2(12).[4]

C. The COA Erred In Interpreting Arizona Law To Allow ABOR To Serve As Strawman For Private Parties.

As a political subdivision, ABOR has only the power the Legislature grants it. There is no statute allowing ABOR to act as a straw-holder of title or to rent out its purported tax exempt status.

The COA (with no analysis) stated that A.R.S. §15-1625(B)(4) grants such power, but that provision requires that ABOR lease property "for the benefit of this state *and for the use of the institutions under its jurisdiction*" (emphasis added). As a matter of statutory interpretation, and as the AG pled, the Omni Deal, which requires ABOR to hold title only for Omni's benefit, does not satisfy that requirement, particularly when the proceeds will be used to build Omni a

[4] Logically, to address Count I, the COA had to reach either the AGO's authority under A.R.S. §42-1004(E) or whether the AGO stated a claim for conveyance to evade taxation. *See* OB 37-38, 43-45 (explaining Count I alleges a claim under art. IX, §2(12)). When addressing whether the Omni Deal involves a conveyance to evade taxation, the Opinion did not mention §42-1004(E) at all, instead appearing to rely solely on §15-2625(B)(4) and *quo warranto*. Opinion ¶31. Therefore, this Petition treats the Opinion's decision on §2(12) as based on failure to state a claim and the §42-1004(E) authority issue as presented but not decided. *See* page 28, *infra*.

conference center. R.17 ¶158. The Court must take these well-pled factual allegations as true. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012).

As a matter of statutory history, the Legislature has thrice granted ABOR power to hold property. *See* A.R.S. §§15-1636(B), 15-1637(A), (D), 48-4202(C). If ABOR has always had the power it now claims under §15-1625(B)(4), those grants were unnecessary and superfluous.

To interpret §15-1625(B)(4) to give an administrative body like ABOR unlimited and standard-less discretion to exempt property from local taxation would also render that statute unconstitutional under the non-delegation doctrine. *S. Pac. Co. v. Cohise Cnty.*, 92 Ariz. 395, 404 (1962).

Whether ABOR has statutory authority to engage in these real estate transactions, or whether authorization from the Legislature is required, is a legal issue of statewide importance. *See State ex rel. Brnovich v. ABOR*, 250 Ariz. 127, 130 ¶6 (2020).

D. The COA's Narrow Interpretation Of The *Quo Warranto* Statute Conflicts With The Text And Case Law.

Whether AGO can challenge how a public office or franchise is exercised, and whether ABOR is a public office or franchise, are also important legal issues warranting review. *Id.* Arizona law says AGO may bring an action "against any person who . . . unlawfully holds or exercises any public office or any franchise within this state." A.R.S. §12–2041(A). Here, the State challenges ABOR's

unlawful "exercise" of official authority over property to take title to it and make it "state" property. That challenge falls squarely within the text of §12-2041(A) and is supported by closely analogous case law. The COA's narrow interpretation hampers, if not precludes, future enforcement actions using this longstanding statute.

The COA held that §12-2041 allows AGO "to challenge a person's right to hold office but not how that person exercises that office's power." Opinion ¶32. But that is not what the statute says; it provides that AGO can bring an action if any person "unlawfully holds *or exercises*" an office. The term "exercise" is defined as "[t]o make use of" something. *Exercise*, Black's Law Dictionary (11th ed. 2019). So §12-2041 applies if a person unlawfully holds *or "makes use of"* an office. The COA's interpretation ignores "exercises."

Consistent with the statute's text, the Court has explained that "[t]he writ of quo warranto likewise constitutes a direct attack upon the jurisdiction of the board." *Parnell v. State ex rel. Wilson*, 68 Ariz. 401, 405 (1949). Arizona courts have repeatedly employed *quo warranto* in challenges to authority to annex property, which is akin to what ABOR seeks to do here. Reply Br. 19 (citing *City of Scottsdale*, *State ex rel. Pickrell*, *McDonald*, and *Faulkner*); *see also* OB 35; R.19 at 8. Nothing in *Woods v. Block*, 189 Ariz. 269, 274 (1997), cited at Opinion ¶32, overrules these cases.

The Legislature's grant of authority to ABOR to oversee the state's universities is also a "franchise" as that term is used in §12-2041. In 1913, when the quo warranto statute was enacted, the term "franchise" meant "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); *Franchise*, Black's Law Dictionary (11th ed. 2019). Here, the Legislature conferred on ABOR, a corporate body, management over Arizona's universities, including numerous general and administrative powers. A.R.S. §§15-1625, -1626; *Sullivan*, 45 Ariz. at 251 (ABOR "was already, and for a long time had been, a corporation"). Thus, ABOR falls within the meaning of the term "franchise" in §12-2041. Even if ABOR is not a "franchise," it is a "public office," and therefore AGO can challenge ABOR's unlawful exercise of authority. The Court should grant review and correct the COA's erroneous interpretations.

III. Issues Raised But Not Addressed.

The State raised the following issues that the COA did not address and this Court may need to address if it grants review:

- Were Counts I, III properly dismissed on the ground that §42-1004(E) does not authorize AGO to institute an action? OB 30-32, 33 n.9, 37-38; Reply Brief 19-20.
- Did Count IV state a §35-212 claim for declaratory and injunctive relief against ASU VP Creer? *See* OB 50-52; Reply Brief 28-29.

CONCLUSION

The State respectfully requests that the Court grant this petition for review and vacate the judgment in favor of ABOR and Creer, including attorneys' fees.

RESPECTFULLY SUBMITTED this 20th day of May, 2021.

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