IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ex rel. MARK BRNOVICH, Attorney General, Petitioner, v. ARIZONA BOARD OF REGENTS Respondent.	Case No. CV-19-0027-SA

STATE'S REPLY IN SUPPORT OF ORIGINAL PETITION FOR SPECIAL ACTION

MARK BRNOVICH
ATTORNEY GENERAL

Brunn ("Beau") W. Roysden III (Bar No. 28698)
Oramel H. ("O.H.") Skinner (Bar No. 32891)
Evan G. Daniels (Bar No. 30624)
Drew C. Ensign (Bar No. 25463)
Robert J. Makar (Bar No. 33579)
Dustin D. Romney (Bar No. 34728)
Katherine H. Jessen (Bar No. 34647)
Assistant Attorneys General
2005 North Central Avenue
Phoenix, AZ 85004
Phone: (602) 542-8958
Fax: (602) 542-4377
beau.roysden@azag.gov

Attorneys for State of Arizona ex rel. Mark Brnovich, Attorney General

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INTRODUCTION

This case is about requiring, through judicial review, that a powerful state agency follow its constitutional and statutory mandates on a critical issue of public concern—the affordability of public higher education for the people of Arizona. In addition, the current state of Arizona law renders the State's Original Petition for Special Action ("Petition") under A.R.S. § 41-193(A)(1) possibly the *only* mechanism available for the State to obtain judicial review.

"ABOR has neither statutory nor constitutional authority to raise tuition solely in an attempt to be competitive with other public universities." Ariz. Op. Att'y Gen. No. I99-011, 1999 WL 311255, at *3 (May 11, 1999). This follows from our constitution's mandate (at art. XI, § 6) that "the instruction furnished" at the universities "shall be as nearly free as possible."

Yet over the past sixteen years, ABOR has engaged in the type of activity Attorney General Napolitano opined it could not, and our state's universities went from among the U.S.'s least expensive to among the most expensive (from bottom third to nearly top quarter). During this time, ABOR's tuition-setting policy did not even consider the cost of furnishing instruction; looking instead at factors such as students' ability to assume debt and what other states' universities charge. ABOR also increased prices at all three universities in lock-step—preventing the availability of less expensive options for Arizona students.

The State's Original Petition for Special Action ("Petition") seeks judicial review under A.R.S. § 41-193(A)(1), as interpreted by *State ex rel. Morrison v. Thomas*, 80 Ariz. 332 (1956), which authorizes the Attorney General to bring actions in this Court when the State or an officer is a party. Moreover, the matters in the Petition warrant acceptance of jurisdiction.

The Petition presents five constitutional and statutory claims. The first challenges the constitutionality of the policy and practice underlying ABOR's improper tuition hikes—setting resident tuition based on factors other than the cost of instruction. The other four claims challenge specific tuition-and-fee-related policies that discriminate against part-time and online students and that require paying *mandatory* fees for non-instruction to access instruction. ABOR's Response betrays the weakness of its explanations for its tuition-and-fee-related actions by almost completely failing to respond to the claims' merits. In an effort to misdirect and avoid review of its unlawful tuition-and-fee-related actions, ABOR relies on empty procedural arguments that purport to shield ABOR from any judicial review of these actions, ever.

Given the importance of the State's claims, and the weakness of ABOR's request for carte blanche, this Court should accept original jurisdiction and grant relief or refer this case to Superior Court or a master under Rule of Procedure for Special Actions 4(f) to develop facts, so this Court may fashion appropriate relief.

ARGUMENT

I. This Court Should Accept Jurisdiction

A. The Attorney General Has Authority To Bring This Action Under A.R.S. § 41-193(A)(1), Which Is Possibly The *Only* Judicial-Review Mechanism Presently Available To The State

Section 41-193(A)(1) authorizes the Attorney General to bring this original action, and because of the current state of Arizona law, a petition instituted in this Court under that statute is possibly the *only* mechanism available to the State to obtain judicial review. *See* Petition ("OP") at 7-8 & n.3.

The Attorney General is "'chief legal officer' of the State" and "'shall have charge of and direct the department of law.'" *Morrison*, 80 Ariz. at 332 (quoting A.R.S. § 41-192(A)). The department of law shall "[p]rosecute and defend in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party." A.R.S. § 41-193(A)(1). *Morrison*, which was "an original proceeding in certiorari, initiated by an application of the State of Arizona, on relation of its Attorney General," concluded "it follows from [§ 41-193(A)](1) that the Attorney General is the proper state official to institute the action. In doing so he acts as the 'chief legal officer' of the State." 80 Ariz. at 329, 332. It added, the Attorney General "may, like the Governor, go to the courts for protection of the rights of the people." *Id.* *Morrison* thus resolves the Attorney General's authority to bring the Petition's claims in this Court via § 41-193(A)(1).

ABOR's Response (at 18-20) fundamentally misconstrues *Morrison*. ABOR argues (at 19) that "*Morrison* emphasized that '[t]he state was [already] a party to that action'" (alterations in original); *id.* at 17-18 (arguing that (A)(1) "by its terms" requires that "the State or an officer already 'is a party'"). But ABOR must insert the word "[already]," which is not in *Morrison* or the statute. Instead, *Morrison* stands for the opposite of what ABOR argues: its touchstone was not whether the State was already a party but rather whether it would be a proper party based on its "very direct interest in this matter." *Id.* at 330. Indeed, *Morrison* describes at length the Louisiana attorney general ***instituting*** an action relating to the duties of the state's mineral board. *Id.*at 330-31. It then returns to Arizona and says, when "matters of state concern" are present, "the Attorney General is the proper state official ***to institute*** the action. In so doing he acts as the 'chief legal officer' of the State." *Id.* at 331-32 (Attorney General "may, like the Governor, ***go to the courts*** for protection of the rights of the people.") (emphases added).[1]

[1] Cases since *Morrison* have not overruled it and are instead applicable to other contexts. *See* OP at 8 n.3. *Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 145-46 (1960), involved the Attorney General going to Superior Court under § 41-193(A)(2). *Santa Rita Mining Co. v. Dep't of Property Valuation*, 111 Ariz. 368, 371 (1975), also decided under (A)(2), involved an appeal over the client agency's express objection. Finally, *State ex rel. Woods v. Block* was an original action in this Court, but the State did not assert (A)(1) and *Morrison* as authority for going to court, and this Court ruled for the Attorney General on other statutory grounds. 189 Ariz. 269, 273, 275 (1997). Therefore, this Court need not overrule any prior case to hold the Attorney General has authority to bring this Petition.

Even if *Morrison* had not already resolved the question, § 41-193(A)(1)'s plain language authorizes the Attorney General to institute actions in which the State or an officer thereof is a party. "Prosecute" includes instituting an action and is not limited to pursuing a remedy after proceedings are otherwise instituted. *See The American Heritage Dictionary of the English Language* 1414 (5th ed. 2011); *Black's Law Dictionary* 1341 (9th ed. 2009).[2] Additionally, courts around the country have concluded in attorney-general-powers cases that "prosecute" includes instituting actions. *See, e.g.*, *State v. Exxon Corp.*, 526 F.2d 266, 270-71 & n.16 (5th Cir. 1976) (citing *Black's* and cases spanning 1911 to 1971); *State v. Valley Sav. & Loan*, 636 P.2d 279, 281 (N.M. 1981) (citing 1948 case on "prosecute").

This interpretation also effectuates the 1953 Arizona statutory amendments, which expressly added to what is now § 41-192(A) that the Attorney General is "chief legal officer of the state" with "charge of and direct[ion of] the department of law." 1939 Code § 4-609(a) (1954 supp.). Finally, interpreting "prosecute" as conferring statutory authority to institute actions is also consistent with the rule in the ***vast majority*** of other states. *State ex rel. Discover Fin. Servs. v. Nibert*, 744

[2] Older dictionaries are in accord. *Black's* at 1450-51 (3d ed. 1933); *Webster's New Int'l Dictionary of the Eng. Lang.* 1987 (2d ed. 1947). *See also, e.g.*, *Lesnow Bros. v. United States*, 78 F. Supp. 829, 831-32 (Ct. Cl. 1948) ("'[P]rosecute' not only in its ordinary definitive sense but by the interpretation of many courts, includes the commencement or institution of suits."); *State v. Dawson*, 119 P. 360, 364 (Kan. 1911); *W. Elec. Co. v. Pickett*, 118 P. 988, 990 (Colo. 1911); *Inhabitants of Clinton v. Heagney,* 55 N.E. 894, 894-95 (Mass. 1900).

S.E.2d 625, 645 n.47 (W.Va. 2013) (identifying 35 states recognizing common-law powers, 8 that do not, and 6 without a definitive ruling); Committee on the Office of Attorney General, Nat'l Ass'n of Attorneys General, *Common Law Powers of State Attorneys General* 26-27 (1980) (identifying 35 states with common-law powers, 8 without, and 8 not decided); Emily Myers, *State Attorneys General Powers and Responsibilities* 29 & n.12 (3rd ed. 2013) (While jurisdictions "var[y] in the extent to which the attorney general's common law authority is recognized, cases affirming the…uses of those traditional powers are legion.").

ABOR unsuccessfully offers 1) subsequent legislative action, 2) other statutes, and 3) "absurdity" to attempt to overcome *Morrison* and the statute's plain language. First, ABOR argues (at 16) that § 41-193 was twice amended after *McFate*. But those amendments also came after *Morrison* so, if relevant, they equally support that the Legislature agreed with *Morrison*'s interpretation of (A)(1). ABOR notes one legislator offered a bill to add "institute" to (A)(1)-(2), but that bill (which never advanced) was an attempt to abrogate *McFate*'s (A)(2) construction without creating confusion about the existing construction of (A)(1).

Second, ABOR (at 17) cites other Arizona statutes that include the words "institute" and "prosecute" and says that if the words "mean the same thing," then those other statutes contain a surplus word. But that is not what ABOR must establish; ABOR must demonstrate that using "prosecute" alone *excludes*

instituting an action. And despite multiple chances, ABOR has cited nothing but *McFate*, which interpreted "prosecute" contrary to its ordinary meaning.[3]

ABOR finally argues (at 19-20) that reading "prosecute" in § 41-193(A)(1) consistent with its common meaning, and as conclusively interpreted by *Morrison*, produces an "absurd result." But there is nothing "absurd" about it. The vast majority of other states give their attorneys general (through statute or case law) authority to go to court to protect the rights of the people. *See supra* p. 5-6.

This Court should therefore reach the straightforward conclusion that under *Morrison*, consistent § 41-193(A)(1)' plain meaning, this action is authorized. Reaching this conclusion does not require overruling any prior case: the Court should, but need not, overrule *McFate*'s construction of (A)(2) as contrary to the plain language. Finding this action authorized by (A)(1) permits judicial review to go forward in this important case through perhaps the only procedural mechanism presently available to the State to obtain judicial review.

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[3] ABOR's cited statutes (at 17) actually further undercut *McFate*. *McFate* placed great weight on the idea that if "prosecute" in § 41-193(A)(2) included instituting an action, other statutes stating "commenc[ing]," "bring[ing]," or "institut[ing]" actions would be "render[ed] meaningless." 87 Ariz. at 144-45. But "prosecute" as used in the statutes ABOR cites is equally "render[ed] meaningless" under *McFate* since § 41-193(A) authorizes the Attorney General to "prosecute."

This shows that *McFate*'s use of the surplusage canon was faulty. Instead, the better understanding is that it was reasonable for the Legislature to grant a general authority to go to court in § 41-193(A)(1)-(3), while also authorizing going to court in specific statutes, particularly when the statutes address penalties and division of duties between the Attorney General and others.

B. This Court Should Exercise Its Discretion To Accept Original Jurisdiction

The Court should exercise its discretion to accept original jurisdiction here. The Petition (at 3-5) set forth the affirmative bases to accept jurisdiction. This case "involves a dispute over an important public policy at the highest levels of state government." *Id.* at 4. ABOR notably does not appear to disagree. ABOR also failed to dispute the merits of the State's claims in this case, and none of claim preclusion, political question, or legislative immunity bars judicial review. *See infra* Part II. Finally a prompt decision is required because each semester for which ABOR charges improperly high tuition harms students and the people of Arizona. The importance, merits, and need for prompt resolution compel accepting jurisdiction here. *See, e.g.*, *Rios v. Symington*, 172 Ariz. 3, 5 (1992).

ABOR argues 1) filing in this Court is "forum shopping" and the pending Court of Appeals appeal is an "equally plain, speedy and adequate" remedy; 2) this case does not require "immediate" resolution; and 3) this Court should decline jurisdiction because the State's claims are too fact dependent. Response at 2-14.

First, filing the Petition was necessary because this Court may be the only court where the Attorney General currently has authority to institute the Petition's claims. As previously discussed, the Petition invokes § 41-193(A)(1), which can be asserted only in this Court, and the existing case law differs on (A)(1) and (A)(2). Even though the Petition itself was clear on this, and even though the State

made the point doubly clear in its Reply In Support of Motion to Consolidate in No. T-19-0002, ABOR appears to intentionally misapprehend the Petition as seeking judicial review of the Superior Court's dismissal in the other action. *See* Response at 4. But it is not "forum shopping" to bring one's claims in possibly the only court that has authority to hear them under existing law. Nor was it "forum shopping" to first seek relief a lower court, as this court has indicated should be done in other contexts. *See, e.g.*, Ariz. R. P. Spec. Act. 7(b); *Fleischman v. Protect Our City*, 214 Ariz. 406, 407-08 ¶7 (2007). In fact, this actually supports accepting jurisdiction here. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (For original jurisdiction, the Court "explore[s] the availability of an alternative forum in which the issue tendered can be resolved").

Second, ABOR's arguments regarding delay are both irrelevant and incomplete. They are irrelevant because this case attacks changes ABOR made as recently as November 2018, and is a separate case from the Superior Court action. But even as to that action, the State did not unreasonably delay. Much of the delay was at ABOR's request, which should not be grounds to decline jurisdiction.

Third, factual issues are not a reason to decline jurisdiction of this important case. As shown below, the claims are predominantly legal. If development of the true cost of instruction and ABOR's practices and policies is helpful, the Court can transmit the matter to Superior Court or a master. *See* Ariz. R.P. Spec. Act. 4(f).

II. This Court Should Either Grant Relief Outright Or Transmit The Matter To Superior Court Or A Master

A. The Petition Sets Forth Five Specific Claims, Which Are Meritorious, And ABOR Did Not Even Attempt To Refute Them

The Petition (at 20-27) set forth five specific claims that collectively present three predominately legal questions. *See* OP at 8 (statement of the issues). ABOR failed to respond on the merits to these claims and issues. The Court may treat this as a concession of the claims' merits. *See, e.g.*, *Chalpin v. Snyder*, 220 Ariz. 413, 423 n.7 (App. 2008) ("Failure to respond in an answering brief to a debatable issue constitutes confession of error."); *cf. Pride v. Superior Court*, 87 Ariz. 157, 159 (1960). But even if this Court excuses ABOR's concession, the claims have merit.

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

Despite the Arizona Constitution's mandate to furnish instruction "as nearly free as possible," ABOR's policies and practice considers things other than the cost of furnishing instruction. ABOR Policy 4-103(D) lists various factors it considers regarding tuition proposals the universities make to ABOR, including median tuition and fees at peer universities, Arizona's median family income levels, and student-loan availability. OP at 22. Failing to even consider, let alone give the actual cost of furnishing instruction primary weight, violates ABOR's constitutional mandate.

Even on the rare occasion when ABOR policy mentions cost, it does not tie tuition and mandatory fees to the cost *of furnishing instruction*. Policy 4-105(A)(1), which is incorporated by reference into 4-103(D), calls for "consider[ing] the purpose and cost of the proposed use of the [mandatory] fee," but that only addresses how mandatory fees are dedicated to their stated purpose. OP at 23. And no similar reference to cost even exists for tuition.[4]

The cost of furnishing instruction less state appropriations for instruction should provide a *ceiling* for in-state tuition. If that ceiling is not in fact "free," then to make tuition "as nearly free as possible," ABOR must procedurally engage in steps to consider other factors to *reduce* tuition. These could include availability of lower-cost programs offered by the universities, moving some of the cost for

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[4] ABOR fails to refute the State's arguments regarding cost. Response at 4-5. For its part, ABOR asserts that the price of tuition and mandatory fees charged has not "*ever* exceeded the cost to educate students." Response at 9 (emphasis original). The apparent basis for this claim is several comparisons of ABOR's asserted "sticker price" or "Net Tuition Paid" with education and general expenditures ("E&G"), which purportedly show that students generally do not pay above E&G. Response Appendix at 3-8. But, as a threshold matter, *no* measure of cost is in ABOR's policy on tuition.

Moreover, by ABOR's own admission, E&G is not a reliable indicator of cost. In its statutorily-mandated costs report, ABOR stated "E&G does not align perfectly with the purposes of this cost study, which is to determine the cost of education for a resident undergraduate student." Report at 5; *See* OP at 19-20. It attempted to "align the [E&G] cost model with" the cost of furnishing instruction, and ABOR itself conceded E&G exceeds the cost of furnishing instruction by more than $3,000 for a full-time student. Report at 5. ABOR's assertion that students always pay below cost based on E&G thus cannot validate ABOR's tuition policies and practices (which, as noted above, fail to even consider cost).

programs with substantially higher cost to differential tuition, or using other sources of revenue (e.g., out-of-state tuition and donations).

ABOR's practice mirrors the lack of cost-consideration in its policies. Since 2003, when ABOR abandoned its prior policy of requiring in-state tuition to be within the lower one-third of in-state tuition levels in other states, OP at 10, tuition increases at Arizona's public universities have been among the nation's highest. OP at 14, 21-23.

2. Violation of Arizona Constitution and statutes by charging part-time students greater amounts per credit hour

ABOR's policy that charges part-time students tuition more than double or even triple per credit hour, based solely on number of credit hours taken in a particular semester, violates both constitutional and statutory requirements. OP at 18-19. ABOR's response says nothing about this. ABOR's authority to differentiate tuition is statutory, codified at A.R.S. § 15-1626(A)(5), which requires ABOR to "differentiate the tuitions and fees between institutions and between residents, nonresidents, undergraduate students, graduate students, students from foreign countries and students who have earned credit hours in excess of the credit hour threshold."[5] In interpreting a statutory list, this Court "assume[s] the exclusion of items not listed." *State v. Maestas*, 244 Ariz. 9, 13 ¶15 (2018).

[5] The "credit hour threshold" refers to the credits taken over a student's career ("one hundred forty-five hours"), not in a particular semester. *See id.*

Because the list does not include part-time or full-time student status, ABOR's current policy is not authorized by statute. OP at 23-24. To the extent higher tuition borne by a part-time, in-state student substantially exceeds the cost of instruction for that student, this policy is additionally unconstitutional. OP at 25.

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

ABOR's response also ignored the State's claim that greater fees and tuition costs for online instruction are unlawful. Tuition differentiations permitted by statute (*see* Part II(A)(2), *supra*) do not include tuition discrimination based on taking classes online as opposed to in-person. Furnishing instruction online is less expensive today than furnishing in-person instruction, which ABOR does not dispute. OP at 25. ABOR has approved higher fees for online coursework at the universities relative to in-person instruction. OP at 26. Such higher fees are not authorized by statute. While some of this conduct has been eliminated since the Attorney General filed the Superior Court suit, the practice still persists. *E.g.*, https://nau.edu/admissions/tuition-and-cost/tuition-expenses/ (visited Mar. 8, 2019). To the extent tuition paid by an online, in-state student substantially exceeds the cost of instruction for that student, the policy is also unconstitutional. OP at 26.

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

ABOR's response also did not address the claim that Arizona residents taking online classes are charged the same amount as nonresidents. Arizona statute *mandates* differentiation in tuition between residents and nonresidents. A.R.S. § 15-1626(A)(5). ABOR has failed to differentiate among online students based on residency, as required by statute. OP at 19, 26. While some of these practices have been eliminated since the Attorney General filed the Superior Court suit, the practice still persists. *E.g.*, https://uaonline.arizona.edu/cost-and-aid/tuition (visited Mar. 8, 2019) ("At Arizona Online, there's no such thing as out-of-state tuition. Pay the same, anywhere in the world."). And as noted above, to the extent tuition borne by an online, in-state student substantially exceeds the cost of instruction for that student, the policy is additionally unconstitutional. OP at 26.

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

ABOR's response also does not address the claim that ABOR is charging unlawful mandatory fees. Each of the universities, with ABOR's approval, charges mandatory fees, including athletic, health, recreation, and technology fees. OP at 16-17. These fees pay for various goods and services that are not prerequisite to furnishing instruction. *Id.* at 27. Consequently, the mandatory fees are unconstitutional.

B. ABOR's Non-Merits Defenses Fail

1. The Claims Are Not Barred By Claim Preclusion

Under any applicable standard, the claims here are not barred by claim preclusion based on the dismissal with prejudice of the Superior Court action.[6] The applicable standard under Arizona law is the "same evidence" test. OP at 6-7. Under that test, the Petition is not barred because it alleges new evidence with respect to tuition and fees for a new school year and also because ABOR has actually changed its tuition-and-fee-setting policies since the policy challenged in the Superior Court. *Id.*

In response, ABOR incorrectly argues (at 23) that the "transactional" test rather than the "same evidence" test applies. ABOR cites this Court's recent decision in *Crosby-Garbotz v. Fell*, 434 P.3d 143, 147-48 ¶19 (Ariz. 2019), but that case involved issue preclusion, not claim preclusion, and did not change existing claim-preclusion law. *See Lawrence T. v. DCS*, 2019 WL 964336, at *5 ¶18 (App. Feb. 28, 2019) (applying same evidence test after *Crosby-Garbotz*).[7]

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[6] Because of the denial of the petition to transfer, T-19-0002, the State takes the dismissal "with prejudice" as given for purposes of this Petition. The State reserves the right to contest it at the Court of Appeals and in a petition for review.

[7] ABOR also "*cf.*" cites *Phillips v. O'Neil*, 243 Ariz. 299 (2017), but that case involved claim preclusion of a *federal* judgment, so it does not inform claim preclusion of an Arizona judgment. *See In re Gila River*, 212 Ariz. 64, 69 ¶13 (2006) ("Federal law dictates the preclusive effect of a federal judgment.").

If this Court changes the test in this or a future case, that change should apply only to judgments entered after *Crosby-Garbotz* was decided to avoid the manifest unfairness of retroactively expanding a judgment's preclusive effect. *See, e.g.*, *Turken v. Gordon*, 223 Ariz. 342, 351 ¶44 (2010) (discussing factors for declining to have court holdings apply retroactively).[8] Here, retroactive application not only would establish a new principle under Arizona law, *see Lawrence T, supra*, but also adversely affect the rule's purpose and produce substantially inequitable results. Parties have a right to rely on a possible final judgment's preclusive effect when making decisions about appealing, filing a new trial motion, or taking other action (such as settling with a stipulated dismissal without prejudice). Expanding judgments' preclusive effect retroactively would vitiate that reliance interest, which is central to claim preclusion's purpose.

And even if the "transactional" test applied retroactively, the Petition's claims still would not be barred. When a defendant "change[s] its … policy … we hold that plaintiffs' claims in this case do not arise from the 'same transactional nucleus of facts.'" *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000). Even disregarding thousands of new students and another year of tuition

[8] *Nunez v. Professional Transit Management, Inc.*, suggests the factors are elements, *see* 229 Ariz. 117, 123 ¶27 (2012) (citing *Law v. Superior Court*, 157 Ariz. 147, 160 (1988)), but *Law* itself states (at 162) that the test involves "[w]eighing the foregoing factors," which is how *Turken* properly applied it.

for existing students, ABOR *changed* its tuition and fee setting policies in November 2018.[9] New policies are not immunized on account of repeated infirmity. *Id.* ABOR responds that it "took the same factors into account in setting tuition" in 2016 "that it takes into account now." Response at 24. This does not support finding claim preclusion—ABOR is effectively asserting, to avoid review, that its substantial changes to pertinent policies somehow do not affect how it sets tuition and fees. Its argument actually supports the need for judicial review here.

2. The Claims Are Justiciable Under Political Question

a. *Kromko* is not controlling here

The holding of *Kromko v. Arizona Board of Regents*, 216 Ariz. 190 (2007), is limited to whether a tuition increase for a particular academic year violated the Arizona Constitution. In response, ABOR offers (at 25-26) selective quotations of dicta from *Kromko* to suggest that this Court's political-question holding was far broader: *i.e.*, barring challenges to *all* conceivable claims under the tuition clause (article XI, § 6). But this Court did no such thing.

In *Kromko*, this Court expressly characterized its own holding by explaining "we *hold only* that other branches of state government are responsible for deciding whether a *particular level of tuition* complies with Article XI, Section 6." *Id.* at

[9] *See* https://public.azregents.edu/News%20Clips%20Docs/2018-09%20Board%20Book%20(1).pdf at Item #20, especially characterization of factors in Policy 4-103 and newly rewritten Policy 4-105 re: mandatory fees.

195 ¶23 (emphasis added). ABOR's attempt to smuggle in additional holdings violates the Court's unequivocal disavowal that any such other holdings exist. Put simply, "only" means *only*.

The Court's explicit limitation on its holding's scope is underscored by its statement that the claim presented was "*only that* the total amount of tuition charged for the 2003–04 academic year was excessive." *Id.* at 192, ¶10 (emphasis added). ABOR's retelling of *Kromko* is thus doubly dubious: it is premised on this Court 1) deciding an issue that was expressly *not* presented 2) to reach a holding it explicitly *denied* making. This Court should follow its own unqualified "we hold only" statement and recognize that *Kromko* does not control here.

b. Even if *Kromko* controlled, it should be overruled

If, however, ABOR's expansionist reading of *Kromko* is accurate, then *Kromko* should be overruled. *Kromko* is inconsistent with *every* political question decision of this Court since it was decided in 2007. *See State v. Maestas*, 244 Ariz. 9 (2018); *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347 (2012); *Brewer v. Burns,* 222 Ariz. 234 (2009). Moreover, *Kromko*'s holding is impossible to reconcile with each of those subsequent decisions, as well as *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482 (2006), where the textual commitments to the political branches were at least as strong as in *Kromko*—but the outcomes exactly opposite regarding judicial review.

Contrary to ABOR's contention, *Kromko* has caused jurisprudential harm. As Justice Bolick's *Maestas* concurrence identifies, *Kromko*'s expansive view of political-question doctrine threatens to have the judiciary "shrink[] from its central duty and drain[] the Constitution of its intended meaning." *Maestas*, 244 Ariz at 16 ¶30 (2018) (Bolick, J., concurring). Additional jurisprudential harm was caused by the *Kromko* Court's incorrect belief that its holding would not lead to substantial tuition increases because ABOR's policies would limit tuition to the "bottom third of tuitions charged by peer institutions." *Kromko*, 216 Ariz. at 195 ¶23. History has proven this premise demonstrably false: tuition has skyrocketed and is now nearly in the top quartile. And ABOR has no apparent response to this specific harm identified by the State (other than to ignore it).[10]

3. ABOR's Legislative Immunity Argument Is Baseless.

ABOR's legislative immunity argument is baseless and, if accepted, would mean that courts could never review the constitutionality of legislative enactments or legality of quasi-legislative administrative rules. Quite simply, legislative immunity does not immunize governmental policies from judicial scrutiny over how such policies and procedures are implemented, irrespective of whether the

[10] On March 8, ABOR filed a motion to dismiss in *State ex rel. Brnovich v. ABOR*, No. TX2019-00011 (Ariz. Tax Ct.), in which it argued that even its decision whether to serve as a straw man for property tax purposes is a "political question" under Article XI, § 2, showing the blanket immunity from judicial review that ABOR reads *Kromko* as conferring.

enactment of those policies was legislative in nature. ABOR notably does not dispute this bedrock legal principle or cite a single decision holding otherwise.[11]

C. After Accepting Jurisdiction, This Court May Transmit The Matter To Superior Court Or A Master Under Rule 4(f)

This Court can grant the declaratory, injunctive, and special action relief sought by the State. ABOR has not contested the asserted material facts pertaining to its tuition policies and practices. *See* Part II(A), *supra*. Moreover, unlike *Kromko*, the State is not challenging specific tuition and fee amounts. Given the lack of contested facts and the legal nature, the Court should therefore grant relief in the first instance.

While the State believes the Court should grant relief outright, the Court may transmit this matter to Superior Court or a master to resolve any factual issues regarding ABOR's policies and practices and the appropriate scope of relief that this Court may view as material. Ariz. R. P. Spec. Actions 4(f).

In constitutional challenges, courts routinely permit appropriate discovery, cross summary judgment motions, and if necessary bench trials. *E.g.*, *Cheatham v. DiCiccio*, 240 Ariz. 314, 317 ¶5 (2016) (Superior Court held bench trial); *see also Biggs v. Betlach*, 243 Ariz. 256, 258 ¶¶4-5 (2017) (cross-MSJs); *Saban Rent-A-Car LLC v. Ariz. Dep't of Revenue*, 244 Ariz. 293, 297 ¶6 (App. 2018) (discovery

[11] ABOR's legislative immunity argument was resolved *against* it in the *Kromko* Ct. App. Opinion, and not clearly vacated. *See Kromko*, 216 Ariz. at 195 ¶26.

followed by cross-MSJs), *aff'd* 2019 WL 905192 (Ariz. Feb. 25, 2019); *Gallardo v. State*, 236 Ariz. 1, 3 ¶5 (App.) (submission of expert report), *vact'd on other grnds.*, 236 Ariz. 84 (2014).

U.S. Supreme Court original jurisdiction practice is similar to what the State is proposing as an option here under Rule 4(f). *E.g.*, *Delaware v. Pennsylvania*, 137 S.Ct. 462 (2016) (parties may file stipulated facts or "a Special Master will be appointed to conduct any necessary discovery and to make proposed findings of fact, and the case will proceed in the usual manner"); *see also United States v. Texas*, 339 U.S. 707, 715 (1950) ("The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.").

CONCLUSION

This Court should accept original jurisdiction. It should either grant relief or transmit this case to Superior Court or a master under Rules of Procedure for Special Actions 4(f) to develop facts so this Court may fashion appropriate relief.

RESPECTFULLY SUBMITTED this 12th day of March 2019.

MARK BRNOVICH
Attorney General

By: /s/ *Brunn ("Beau") W. Roysden III*
Brunn ("Beau") W. Roysden III
Oramel H. ("O.H.") Skinner
Evan G. Daniels
Drew C. Ensign
Robert J. Makar
Dustin D. Romney
Katherine H. Jessen
Assistant Attorneys General

Attorneys for State of Arizona ex rel. Mark Brnovich, Attorney General