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12 *ex rel. Mark Brnovich, Attorney General*

13 **THE SUPERIOR COURT OF THE STATE OF ARIZONA**

14 **IN THE ARIZONA TAX COURT**

15 STATE OF ARIZONA *ex rel.*

16 MARK BRNOVICH, Attorney General

17 Plaintiff,

18 v.

19 ARIZONA BOARD OF REGENTS; JOHN
20 P. CREER, Assistant Vice President for
University Real Estate Development at ASU,

21 Defendants,

22 PAUL D. PETERSEN, in his official capacity
23 as MARICOPA COUNTY ASSESSOR, and
24 ROYCE T. FLORA, in his official capacity as
25 MARICOPA COUNTY TREASURER.

26 Relief-Defendants.

Case No: TX2019-000011

**FIRST AMENDED CIVIL COMPLAINT
FOR DECLARATORY, INJUNCTIVE,
SPECIAL ACTION, AND QUO
WARRANTO RELIEF**

**(Assigned to the Hon. Christopher
Whitten)**

1 Plaintiff State of Arizona *ex rel.* Mark Brnovich, Attorney General for its complaint
2 specifically alleges as follows:

3 **INTRODUCTION**

4 1. This case is about ending the Arizona Board of Regents (“ABOR”) and Arizona
5 State University (“ASU”)’s practice of picking winners and losers in the highly competitive
6 properly development business by unlawfully using ABOR’s tax-exempt status and substantial
7 payments of public money to facilitate special property deals for favored businesses. This is
8 improper because the State has not (and could not) give ABOR a generalized authority to grant
9 tax exemptions to private businesses, and the Gift Clause of the Arizona Constitution bars just
10 the sort of gratuitous payments of public monies to private businesses that ABOR is doing here.

11 2. These deals are designed to shield selected companies from property taxes, while
12 converting the property taxes that would otherwise be paid for local schools and other services
13 into payments to ASU. And because of ABOR and ASU’s unauthorized actions over the past
14 years, some of the largest existing and planned construction projects in Tempe will be built by
15 private developers, leased back to private tenants for the tenants’ uses, and yet produce no
16 property tax revenue. This is because ABOR has offered to step in and hold bare legal title,
17 without any other trappings of ownership. These construction projects are therefore not
18 included in the property tax base available to local schools and governments, even as ASU
19 receives substantial income for its straw-man role.

20 3. ASU has publicly maintained it needs to engage in these types of tax avoidance
21 transactions to make up for recent funding cuts from the Legislature, and that it engages in these
22 transactions at “fair market value” and to “maximize revenue.”

23 4. But, contrary to ABOR’s public posture about immediate revenue generation and
24 revenue maximization, the transaction at issue here (the “Omni Hotel/CC Project”) is an
25 immediate, substantial drain on ASU funds that would otherwise be available for reducing
26 tuition and providing instruction. The project documentation details a huge, immediate

1 university outlay through a giveaway in which ABOR will commit **\$28 million** up front in order
2 to get a four-diamond hotel and ASU-branded conference center that ASU gets to use **only**
3 **seven days out of the year.** This is on top of the \$21 million in economic incentives (in the
4 form of tax rebates over 30 years) that Tempe is providing to Omni for the deal. In particular:

- 5 a. at ASU’s request, ABOR waived its formal policy requiring a public auction
6 for a property sale and instead authorized ASU to sell the land to the private
7 business for what appears to a fraction of market value (constituting a
8 substantial gift, which on information and belief may be up to \$8.9 million);
- 9 b. ASU agreed to pay the full cost of construction—up to \$19.5 million—for the
10 conference center, which ASU has the right to use **only seven days a year;**
- 11 c. ASU agreed to pay approximately \$8 million to construct parking spaces that
12 the private business gets to exclusively use and keep revenue;
- 13 d. ASU is letting Omni depreciate on its taxes the value of the assets that ABOR
14 purportedly “owns,” even prior to Omni exercising its option to purchase; and
- 15 e. ASU is giving the Omni an option to buy the land and improvements
16 (including the conference center ASU paid for) for \$10.

17 5. Nothing about the Omni Hotel/CC Project is about generating additional revenue
18 for ASU to cover today’s shortfalls, nor is it at “fair market value.” Put simply, the improper tax
19 scheme here is simply a mechanism for recouping the millions that ABOR is improperly gifting
20 to the private business in the first place for a project that ABOR does not own or control, and
21 which ABOR can only use (by contract) for seven days a year for free.

22 6. The terms in ASU’s agreement with Omni thus separately violate our
23 Constitution’s Gift Clause, Ariz. Const. art. IX, § 7, and are actionable as illegal payments of
24 public monies pursuant to A.R.S. § 35-212.

25 7. ASU is a public university, not a commercial enterprise or development authority.
26 It is inappropriate for this educational institution to pick winners and losers in the highly

1 competitive property development industry by negotiating for the use of ABOR's tax status and
2 paying tens of millions of public dollars for a private conference center that ASU gets to use
3 only seven days out of the year. Indeed there are at least 5 other private conference centers
4 within 5.3 miles, including one that is an almost exact match to the present project only 3 blocks
5 north of the project site. The Arizona Constitution, relevant statutes, and longstanding historical
6 practice establish that ABOR is not authorized to act in this manner. This Court must now hold
7 ABOR and ASU accountable and require both to adhere to their enumerated powers as provided
8 by the Constitution and Legislature.

9 **PARTIES**

10 8. Plaintiff is the State of Arizona *ex rel.* Mark Brnovich, Attorney General ("the
11 State").

12 9. Defendant ABOR is a body corporate with jurisdiction and control over the state's
13 three public universities, including ASU.

14 10. ABOR may be sued pursuant to A.R.S. § 15-1625.

15 11. Defendant John P. Creer is Assistant Vice President for University Real Estate
16 Development at ASU, who directly signed the transaction documents related to the Omni
17 Hotel/CC Project and who would sign the ground lease if entered into between ABOR and
18 Omni.

19 12. Defendant Paul D. Petersen is named as a relief defendant solely in his official
20 capacity as the Maricopa County Assessor, the public official charged with assessing and
21 placing on the tax roll all non-centrally-assessed property within Maricopa County, including
22 the improvements at issue in this lawsuit.

23 13. Defendant Royce T. Flora is named as a relief defendant solely in his official
24 capacity as Maricopa County Treasurer, the public official charged with collecting property
25 taxes in Maricopa County.

26

1 **JURISDICTION AND VENUE**

2 14. This Court has jurisdiction over actions seeking declaratory and injunctive relief
3 under Article VI, § 14 of the Arizona Constitution and A.R.S. §§ 12-123, 12-1801, and 12-1831.

4 15. This Court has jurisdiction over special actions against bodies, officers, and
5 persons pursuant to Article VI, § 18 of the Arizona Constitution and Arizona Rule of Procedure
6 for Special Actions 4(a).

7 16. Pursuant to Article VI, § 14 of the Arizona Constitution and A.R.S. § 12-123, this
8 Court has jurisdiction over claims brought pursuant to A.R.S. §§ 12-2041 and 42-1004(E).

9 17. This Court has jurisdiction over claims brought pursuant to A.R.S. § 35-212 under
10 Article VI, Section 14 of the Arizona Constitution.

11 18. The State and its law-abiding taxpayers and residents will suffer irreparable injury
12 unless the relief sought by this action is granted.

13 19. Venue is proper in Maricopa County under A.R.S. § 12-401 and Arizona Rule of
14 Procedure for Special Actions 4(b).

15 20. Assignment to the tax court is proper under A.R.S. § 12-163 because this action
16 involves the imposition, assessment, or collection of a tax, including questions of law and fact
17 relating to the appropriate tax treatment for certain property and improvements.

18 **FACTUAL BACKGROUND**

19 **Background On Taxation Of Improvements On Government Land**

20 21. Because property taxes are levied to fund a specified level of government
21 operations and financial obligations, taking property off the tax rolls necessarily requires
22 shifting property taxes that would otherwise be due on the exempted property to other property
23 owners—who will have to pay more to make up for the untaxed property.

24 22. When writing the Arizona constitution, the framers were particularly cognizant of
25 protecting taxpayers from the government providing property-tax breaks to favored special
26 interests; the framers had lived through the territorial days when railroads, mines, and other

1 interests received tax breaks at the expense of the general public. See John D. Leshy, *The*
2 *Arizona State Constitution* 256 (2d ed. 2013); Toni McClory, *Understanding the Arizona*
3 *Constitution* 61 (2001).

4 23. In Article 9, § 2 of the constitution, the framers set forth exactly what exemptions
5 to property tax are permitted (through operation of the constitution itself or through subsequent
6 legislation, if enacted by the Legislature).

7 24. Most relevant to this case are the exemptions in Article 9, § 2(1) and 2(2), which
8 provide that “[t]here shall be exempt from taxation all federal, state, county and municipal
9 property” and “[p]roperty of educational, charitable and religious associations or institutions not
10 used or held for profit may be exempt from taxation by law.”

11 25. The framers also set forth that all property not exempted is subject to taxation. See
12 *Ariz. Const. art. IX, § 2(13)*.

13 26. Later, consistent with these provisions, the voters added that property conveyed to
14 evade taxation cannot be exempt. See *id.* § 2(12).

15 27. For decades the Legislature has imposed property taxes on privately owned
16 improvements located on government land, known as improvements on possessory rights
17 (“IPRs”). See, e.g., A.R.S. § 42-19003.

18 28. During the 1980s, in the name of economic development, counties and
19 municipalities began shielding private companies from property taxes by taking ownership of
20 private improvements built on government land and leasing the now “government-owned”
21 improvements back to private entities for the private entities’ use.

22 29. In 1985, the Legislature responded to this tactic by extending property taxation to
23 private lease-hold interests in government-owned improvements; this tax was called the
24 possessory interest tax (“PIT”), and was distinct from the IPR tax.

25 30. However, due to exceptions contained in the PIT, it was declared unconstitutional
26 as violating Article 9, § 1’s uniformity clause.

1 31. In response to these constitutional concerns, the Legislature repealed the PIT and
2 subsequently enacted the government property lease excise tax (“GPLET”), currently set forth in
3 A.R.S. §§ 42-6201 to -6210, which provides for an excise tax in lieu of property taxes for
4 lessees operating on certain government-owned property improvements.

5 32. GPLET’s structure applies to improvements owned by cities, towns, counties, and
6 county stadium taxing districts. A.R.S. § 42-6201.

7 33. However, unlike counties and municipalities, ABOR had not traditionally
8 functioned as a general commercial real estate developer and therefore the Legislature did not
9 include ABOR in the GPLET structure, which remains inapplicable to ABOR property.

10 **ABOR’s Status And Powers Relating To Holding Real And Personal Property**

11 34. The text of the Arizona Constitution and relevant statutes as well as longstanding
12 historical practice demonstrate that ABOR is not, and has never been, authorized to rent out its
13 tax-exempt status so that private real estate developers can build large buildings for private
14 tenants while evading property taxes.

15 35. ABOR pre-dates statehood and has been a corporation established by Arizona law
16 (both territorial and state) since the late 1800s.

17 36. In *Board of Regents v. Sullivan*, the Arizona Supreme Court collected authorities
18 detailing the history of ABOR and explained that “the [1934] act did not create it a corporation;
19 [ABOR] was already, and for a long time had been, a corporation.” 45 Ariz. 245, 251 (1935).

20 37. When the framers drafted the Arizona constitution in 1910, they established a
21 “uniform public school system,” including the university (University of Arizona) as well as the
22 normal schools (now ASU and Northern Arizona University). Ariz. Const. art. XI, § 1.

23 38. ABOR’s sole duty is set forth in the constitution, which is the “general conduct
24 and supervision” of the educational institutions assigned to it by law. *See id.* § 2.

25
26

1 39. Originally, ABOR managed only the University of Arizona, but over time its
2 jurisdiction was expanded to cover the other two universities as well. *See generally* Ariz. Atty.
3 Gen. Op. No. I17-007 (R17-013) (Dec. 7, 2017).

4 40. In *Sullivan*, the Arizona Supreme Court noted that the statutes establishing ABOR
5 did not violate the prohibition on special laws because they were enacted to carry out the
6 constitutional provisions stating that ABOR was to govern educational institutions as part of the
7 state’s overall public school system; in other words, consistent with the prohibition on special
8 legislation, ABOR was not and could not be established as a special corporation with general
9 corporate powers. *See Sullivan*, 45 Ariz. at 255-56.

10 41. Current Arizona statutes are in accord with ABOR’s longstanding status as a state-
11 established corporation, whose sole duty is to manage the universities.

12 42. Titled “General powers of board as a body corporate,” A.R.S. § 15-1625 states
13 “[t]he Arizona board of regents is a body corporate with perpetual succession. The board has
14 jurisdiction and control over the universities.”

15 43. And § 15-1625(B)(4) states that ABOR may “[p]urchase, receive, hold, make and
16 take leases and long-term leases of and sell real and personal property *for the benefit of this*
17 *state and for the use of the institutions under its jurisdiction*” (emphasis added).

18 44. The first restriction in § 15-1625(B)(4), “for the benefit of this state,” recognizes
19 that ABOR is a body corporate and while it may hold legal title to property, it does so for the
20 state, which is the beneficially interested owner.

21 45. The second restriction in § 15-1625(B)(4) covers the sole purpose for which
22 ABOR may exercise its property-related powers—“for the use of the institutions under its
23 jurisdiction.”

24 46. To lawfully hold property, ABOR must satisfy both of the foregoing requirements.

25 47. And when discussing the ability of the State to find other sources of revenue for
26 the universities beyond charges to students and income from state trust land, the *Sullivan* court

1 was clear as to the need for legislative involvement: “the Legislature, or the institutions *with the*
2 *Legislature's consent*, [may] resort to other sources of revenue than that of state taxation for that
3 purpose.” *Sullivan*, 45 Ariz. at 262 (emphasis added).

4 48. The Legislature has acted at least three times to expand ABOR’s powers as it
5 relates to holding property or conferring tax benefits, but in no case has it conferred on ABOR a
6 general power to rent out its tax exempt status to private businesses to evade property taxes. In
7 fact, these specific legislative actions show that the Legislature has never conferred—and does
8 not understand ABOR to have—such a power.

9 49. First, the universities have been authorized by statute to operate university
10 research parks, wherein private companies engaged in educational or research activities on
11 university campuses would pay a reduced amount in property taxes. *See* A.R.S. § 15-1636.

12 50. Second, with respect to University Medical Center in Tucson, the Legislature
13 passed a law allowing ABOR to lease its hospital and other property to a nonprofit, subject to
14 strict controls by ABOR and/or the University of Arizona. *See* A.R.S. 15-1637.

15 51. Third, the Legislature authorized the universities to establish special taxing
16 districts to pay for improvements to university athletic facilities. *See* A.R.S. § 48-4202(C).

17 **ASU’s Trading On ABOR’s Tax Status Through Commercial Real Estate Development**

18 52. Without ever receiving specific statutory authority comparable to that given for
19 university research parks, health care teaching institutions, and special taxing districts, ABOR
20 nonetheless has been entering into agreements wherein ABOR receives interests in real property
21 and improvements from private commercial companies subject to leases of the property back to
22 the private entities.

23 53. Upon information and belief, in recent years, ABOR has entered into multiple
24 commercial lease agreements with private enterprises allowing commercial property
25 improvements to be built and operated on ABOR-owned real property by third parties, with
26 ABOR holding no more than bare legal title.

1 54. These deals purport to shield the private companies from paying property taxes
2 that otherwise would be assessed.

3 **Marina Heights—The Largest Commercial Real Estate Sale In Arizona**

4 55. Through a series of leases and subsequent amendments, ABOR (through ASU or
5 its affiliate) has leased approximately 20 acres of ABOR land along Tempe Town Lake for the
6 purpose of having a private commercial development enterprise construct the commercial office
7 space known as Marina Heights (the “Marina Heights Property”).

8 56. The Marina Heights Property was leased to a private, commercial third-party for
9 99 years.

10 57. Upon information and belief, the Marina Heights Property and improvements are
11 currently leased as commercial office space to State Farm Insurance Inc. and other tenants.

12 58. Upon information and belief ABOR holds legal title to the now-completed
13 commercial office buildings on the Marina Heights Property.

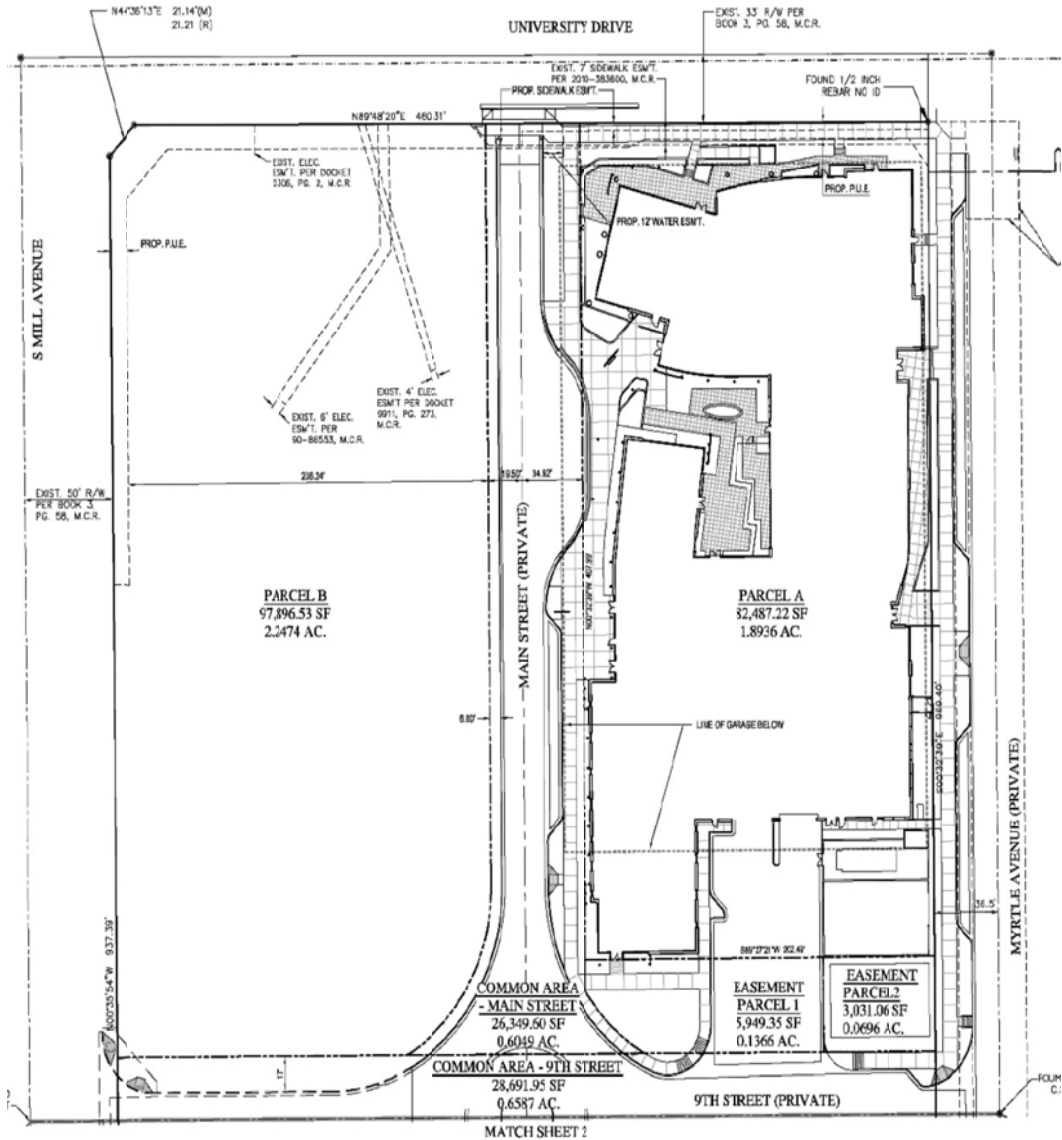
14 59. But for ABOR holding legal title, the Marina Heights Property and improvements
15 would be subject to ad valorem taxes under Arizona law, including as IPRs under A.R.S. § 42-
16 19003.

17 60. The “novelty” of this tax scheme can be seen in a key provision of the lease that
18 shows even the parties to the agreement doubted ABOR’s ability to take part in a conveyance to
19 evade taxation—if the arrangement with ABOR in the Marina Heights deal is declared unlawful
20 for any reason, then the lessee can force the City of Tempe to take title of the improvements and
21 impose a GPLET on the property to attempt to ensure a backup, preferential tax treatment
22 without use of ABOR’s status.

23 **Mirabella Luxury Senior Living Condo Tower**

24 61. ABOR owns approximately 10 acres of real property at the southeast corner of
25 Mill Avenue and University Drive, known as Blocks 22 and 27. The property is bounded by
26 Mill Avenue on the East, Myrtle Avenue on the West, University Drive on the North, and Tenth

Street on the South. Blocks 22 and 27 are split into an approximate north half (Block 22) and south half (Block 27) by Ninth Street. A diagram of Block 22 is provided below for illustrative purposes:



62. At a duly noticed special meeting on June 22, 2016, ABOR authorized ASU to lease out a portion of Block 22 consisting of approximately 1.9 acres of real property on the eastern half of Block 22 (Parcel A) for the purpose of constructing completely new improvements—a luxury high-rise tower—that will become the senior living facility known as Mirabella (the “Mirabella Property”). The project is a joint venture of the ASU Foundation

1 (through University Realty, a subsidiary of Enterprise Partners) and Pacific Retirement Services
2 (“PRS”), an Oregon non-profit corporation.

3 63. Residents of the Mirabella Property will not be required to be current students at
4 ASU during their time as residents of Mirabella.

5 64. The Mirabella senior living facility is currently under construction.

6 65. On information and belief, upon completion, ABOR will take title to the newly
7 constructed improvements, including the luxury high-rise tower.

8 66. The Mirabella Property, including the newly constructed improvements, has been
9 leased for 99 years to Mirabella at ASU, Inc., the joint venture established by the ASU
10 Foundation and PRS.

11 67. The expected cost of this luxury development is \$270 million.

12 68. But for ABOR agreeing to take legal title to the improvement, the newly
13 constructed, luxury high-rise tower on the Mirabella Property would be subject to ad valorem
14 taxes, including as an IPR under A.R.S. § 42-19003, or at a minimum would be required to
15 comply with other provisions related to nonprofits obtaining property tax exemptions in whole
16 or in part.

17 **Planned Omni Luxury Hotel And Convention Center**

18 69. ABOR is seeking to have an additional portion of Block 22 consisting of up to 1.6
19 acres of real property on the western half of Block 22 (Parcel B) developed into a new four-
20 diamond hotel and conference center (the “Omni Property”).

21 70. Based on the March 14, 2017 term sheet, the development budget for the Omni
22 Property is \$123 million.

23 71. At the duly noticed regular meeting ABOR held on November 17-18, 2016,
24 ABOR authorized ASU to enter into agreements with the Omni Hotels Management
25
26

1 Corporation or an affiliate for development of a privately-operated hotel on the Omni Property.
2 APP 250.¹

3 72. On January 11, 2018, the Tempe City Council held a duly noticed special meeting
4 and voted to adopt an ordinance that authorized the Mayor to execute a development agreement
5 with Omni Tempe, LLC.

6 73. Upon information and belief, Omni Tempe, LLC is an affiliate of Omni Hotels
7 Management Corporation.

8 74. On January 11, 2018, Tempe and Omni Tempe, LLC executed a development
9 agreement (the “Development Agreement”) regarding the Omni Property. APP 256.

10 75. The Development Agreement states that ABOR owned approximately 2.25 acres
11 (subsequently reduced by agreement of the parties to 1.6 acres) at the southeast corner of Mill
12 Avenue and University Drive in Tempe that ASU and Tempe wished to redevelop into “among
13 other things a hotel, convention and conference center and other commercial enterprises and
14 other improvements.” APP 257.

15 76. The Development Agreement states that upon its execution, ASU and Omni would
16 enter into an “Option to Lease and Escrow Instructions” that would grant Omni an option to
17 lease the land from ASU and, if Omni exercised its option, ASU and Omni would enter into a
18 lease agreement where ASU would act as landlord and Omni would agree to construct
19 improvements to the property. APP 257.

20 77. Under the lease arrangement, Omni will be the sole occupant of the land and will
21 enjoy its use exclusively. APP 68.

22 78. The “ground lease term” will be sixty years. APP 107.

23 79. In a document entitled “City of Tempe Request for Council Action” prepared for
24 the January 11, 2018 meeting, the Tempe City Council was informed that ASU “will record a
25

26 ¹ Filed with this amended complaint are FAC Exhibits 1-9, cited as APP 1 through APP 303.

1 restrictive covenant that limits the use of the property to a hotel and conference center for sixty
2 years.” APP 281.

3 80. In addition to the monies and other incentives paid by ABOR, Tempe agreed to
4 provide \$21 million in incentives in the form of rebates on certain transaction privilege tax and
5 transient lodging tax. Such rebates are 100% for the first 10 years and 90% for the following 20
6 years. APP 253.

7 **ASU Is Leasing The Land To Omni (With A Nominal-Cost Option To Buy) For A Fraction**
8 **Of What Appears To Be Market Value**

9 81. ASU agreed to lease the 1.6 acres of land on which Omni will construct the hotel
10 and conference center to Omni for: 1) prepaid rent of \$85/sf (approximately \$5.9 million), which
11 is supposed to represent the land’s market value, and 2) “additional rent” of \$1.09 million/year
12 (which increases over the sixty-year term under a lease-provided schedule). As part of the lease,
13 Omni has the option to purchase the land and improvements for the additional sum of \$10. APP
14 57; APP 108; APP 110.

15 82. Given the nominal price of \$10 for Omni to purchase the land and improvements,
16 this long-term lease is economically indistinguishable from a sale from the perspective of
17 ABOR and ASU, and indeed was discussed as a sale in the context of seeking ABOR approval
18 to “sell” the land under ABOR Policy 7-202, 7-204.

19 83. The “additional rent” described above is intended to be an “in lieu” payment to
20 ASU that approximates (or, on information and belief, may undercharge) the *ad valorem* taxes
21 that would otherwise be due to the County on a taxable property like the one at issue. APP 251-
22 52; APP 21. Indeed, in the event that Omni is required to pay any *ad valorem* taxes on the
23 property, it gets a dollar-for-dollar credit against the “additional rent” it would otherwise have to
24 pay to ASU. APP 111. And if Omni has to pay taxes that exceed “additional rent” for three
25 consecutive years, it can exercise the option to purchase through a special provision that
26 thereafter obviates any requirement of paying “additional rent.” *Id.*

1 84. Other similar hotel properties pay property taxes approximately equal to the
2 “additional rent” paid here:

3 a. The Camby Hotel at 2401 East Camelback Rd., Phoenix, AZ 85016 has
4 277 rooms and 20,000 square feet of meeting space.² It was renovated in
5 2015. Its property taxes for 2018 (parcel 163-17-089D) were \$899,440.10.

6 a. The Renaissance Glendale Hotel & Spa, at 9495 West Coyotes Blvd.,
7 Glendale, AZ 85305 has 320 rooms and 100,000 square feet of meeting
8 space.³ It was built in 2007. Its property taxes for 2018 (parcel 120-01-
9 033D) were \$968,238.98.

10 85. ASU and Omni entered into this deal on or about February 28, 2018 by signing the
11 Option to Lease and Escrow Instructions for a Portion of Block 22. APP 47; APP 80-81.

12 86. Three weeks earlier, an industry publication called The Arizona Builders
13 Exchange (“BEX”) published an article about a 22-Story Mixed-Use Tower (“The Collective on
14 7th & Myrtle”) two blocks away from where the Omni Property would be located. It stated:

15 In January, 2017 Cushman & Wakefield announced the sale of the site, as well as
16 another site at 7th Street and Mill Avenue, to Core Campus Investment Partners,
17 LLC. In announcing the sale, Brian Rosella of Cushman & Wakefield was quoted
18 as saying, ***“This sale was the highest (per square foot) sales price for any piece
of land in Arizona over the last 10 years. As a vibrant urban area, demand for
land in Tempe has been unprecedented, but this closing has set a new
benchmark for pricing in the state.”***

19 High profile projects in immediate proximity to The Collective on 7th & Myrtle
20 site include: Mirabella at ASU Senior Living (20 stories), Union Tempe
21 Residential & Retail Portion (20 stories and 12 stories), Canopy by Hilton at
Union Tempe (14 stories), and Westin Tempe (18 stories).

22 <http://azbex.com/22-story-mixed-use-tower-planned-in-tempe/> (emphasis added)

23 _____
24 ² Source: [http://www.successfulmeetings.com/Meeting-Facilities/Phoenix/Convention-
Hotel/The-Camby-Hotel-Autograph-Collection-p51047751](http://www.successfulmeetings.com/Meeting-Facilities/Phoenix/Convention-Hotel/The-Camby-Hotel-Autograph-Collection-p51047751)

25 ³ Source [https://www.cvent.com/venues/glendale/hotel/renaissance-phoenix-glendale-hotel-
spa/venue-a5994d1a-5e12-44b8-903b-eed3213a5ba4](https://www.cvent.com/venues/glendale/hotel/renaissance-phoenix-glendale-hotel-spa/venue-a5994d1a-5e12-44b8-903b-eed3213a5ba4)

87. The “immediate proximity” of these various “high profile” developments (and sales prices of the land) is shown by the below diagram:



88. Supporting information for sales prices is shown in the below table:

<u>Date</u>	<u>Price</u>	<u>Project</u>
1/5/2017	\$132/sf (\$15.24M) ⁴	Union Tempe
1/18/2017	\$257/sf (\$8.4M) ⁵	The Collective and the parcel at 7 th and Mill
12/7/2017	\$216/sf (\$8M) ⁶	Westin Hotel Project
2/27/2018 (or earlier) ⁷	\$212/sf (\$5.3M) ⁸	Canopy by Hilton Project

89. While ABOR has stated that there were two independent appraisals showing that \$85/sf was fair market value for the Omni Property, parcels for hotels less than 2 blocks away were sold for \$216 and \$212/sf within three months of when ASU and Omni executed the option. And the “fair market value” of \$85/sf appears in documents from March 14, 2017 until the execution of the option on February 28, 2018—almost a year later. There is no indication that ASU was sufficiently updating its opinion of fair market value after it first arrived at \$85/sf. APP 251.

90. To sell the land to Omni, ABOR departed, at ASU’s request, from its formal written Policy 7-204(A) not to hold a public auction, and instead relied on appraisals. APP 30.

⁴ Source: <https://www.bizjournals.com/phoenix/news/2017/01/05/tempe-land-near-asu-sells-for-planned-160m.html>

⁵ Source: <http://cem-az.com/core-campus-investment-partners-purchases-land-for-8-4-million/>

⁶ Source: https://images2.loopnet.com/d2/rPNgNRYhmxeg_mKIQ16fBJHLKj3tKYeOYIFi226_W6Q/document.pdf

See also <https://azbigmedia.com/construction-begins-westin-tempe/>

⁷ The deal was reported on as early as 1/24/2018. See <https://azbigmedia.com/canopy-hilton-will-build-new-hotel-tempe/> A special warranty deed was signed on 2/27/2018. See <https://recorder.maricopa.gov/UnOfficialDocs/pdf/20180158161.pdf>

⁸ Source: <https://azbigmedia.com/canopy-by-hilton-will-be-built-at-union-tempe/>

1 91. On information and belief, ASU may have been notified only months before it
2 entered the Omni deal that ASU had inadequate protections in place with respect to its planned
3 land deals, including failing to obtain adequate appraisals.

4 92. ASU may have not only failed to conduct an auction as is generally required by
5 the policy (absent a waiver, such as what ASU obtained from ABOR), but on information and
6 belief, also failed to fully invite bids/proposals from other comparable hotels to similarly
7 construct a 30,000 square foot conference center on more favorable financial terms, even as two
8 other comparable hotel brands—Hilton and Westin—are involved in projects within one block
9 of the Omni Hotel/CC Project and the land for those deals was sold in the three months prior to
10 the execution of the Omni lease option for \$212 and \$216 per square feet respectively. Instead,
11 ASU’s Executive Vice President, Morgan Olsen, testified to the Legislature that ASU “had
12 discussions with another development group who ultimately wasn’t able to move their plan
13 forward. And so we have been focused now on the Omni project, which you have information in
14 front of you.” 12/19/17 JCCR Testimony at 2:14:38.

15 93. ASU agreeing to \$85 / sq. ft. versus \$212 / sq. ft. for the 1.6 acres to be used in the
16 Omni Project represents a difference to ASU (and subsidy to Omni) of up to \$8.9 million.

17 **The Term Sheet, Ground Lease, And Other Leases Contain Provisions Expressly Stating**
18 **That The Parties Intend To Shield The Omni Project From All Ad Valorem Taxes**

19 94. While ASU has owned the land at Blocks 22 and 27 for many years, the Omni
20 improvements are being newly constructed for the use of a private entity (Omni) and Omni has a
21 nominally-priced option to purchase them at the lease’s end (or earlier if it continues to pay
22 “additional rent” less the ad valorem taxes it must pay), *see infra* ¶102.

23 95. The transaction is therefore simply a masked sale, as provisions of the contract
24 plainly denote:

- 25 a. The Ground Lease at paragraph 6(e) provides in part: “Upon installation or
26 construction thereof, title to all Improvements, including all Alterations

1 thereto, shall automatically vest in Landlord and become part of the
2 Demised Premises; provided, however, that **Tenant shall be entitled to**
3 **realize all economic benefits from the ownership and operation of the**
4 **Improvements and all Alterations during the Term of this Lease,**
5 including all rental and other revenues generated from the ownership and
6 operation of the Demised Premises and; provided, further, however, that
7 **Tenant shall have the exclusive right to depreciate all such**
8 **Improvements and Alterations for tax purposes** and Landlord hereby
9 waives any right, if any, with respect to any claim of depreciation prior to
10 the expiration of the Term of this Lease.” APP 116.

11 96. If ABOR only leased the land it owned to Omni and did not take title to the private
12 improvements constructed by Omni for Omni’s use, those improvements would be subject to *ad*
13 *valorem* taxes as IPRs under A.R.S. § 42-19003.

14 97. Instead, ASU and Omni’s agreement expressly provides in multiple places that
15 ABOR will take title to the improvements and retain title to the land (notwithstanding the lease
16 and option to purchase) in order to shield the private improvements from property tax that would
17 otherwise be assessed:

- 18 a. The proposed ground lease (“Ground Lease”) which is Exhibit D to the
19 Option to Lease and Escrow Instructions for a Portion of Block 22, at
20 paragraph 5(i) provides in part: “It is the intention of Landlord and Tenant
21 that the Demised Premises (including the Land and the Improvements
22 thereon) will be exempt from *ad valorem* property taxes and assessments.
23 Landlord and Tenant will cooperate in good faith to ensure that any
24 applicable exemptions are at all times in effect with respect to the Demised
25 Premises.” APP 111.

- 1 b. The Ground Lease at paragraph 19 provides in part: “Landlord shall not
2 have the right to transfer its interest in the Demised Premises to any entity
3 that is not the State of Arizona or a political subdivision thereof that is
4 exempt from *ad valorem* property taxation.” APP 136.
- 5 c. And the Ground Lease at Exhibit F includes a Quit Claim Deed for ABOR
6 to take title to the improvements that Omni is constructing for Omni’s use
7 to facilitate keeping them off of the property tax rolls. APP 164-65
- 8 d. This is consistent with the March 14, 2017 term sheet, which states at 3(f):
9 “ASU and Omni intend that while owned by ABOR the Hotel, Conference
10 Center and Hotel/CC Parcel will be exempt from ad valorem property
11 taxes.” APP 252.

12 98. ABOR is even agreeing to take legal title to the improvements that Omni installs
13 in Omni’s portion of the parking garage to enable Omni to collect parking fees (the “Hotel
14 Parking Facility Improvements”), which are defined as “ticket booths, security gates, and
15 various and similar Improvements to operate the Hotel Parking Entry.” *See* APP 201; *see also*
16 APP 195 (defining Hotel Parking Facility Improvements). As discussed below, Omni keeps all
17 revenue it generates from the 275 parking spaces that ABOR is building for Omni at ABOR’s
18 expense.

19 **ASU Is Paying Up-Front The Full Cost Of Construction For A Conference Center It Only**
20 **Has The Right To Use For Free Seven Days Out Of The Year**

21 99. As part of the Omni deal, ABOR has promised on ASU’s behalf to pay up to
22 \$19.5 million for the full cost of construction of the conference center. *See* Ground Lease at p. 3
23 (defining “CC Cost Reimbursement”). ASU President Michael Crow asserted that this
24 expenditure is to be “funded by the in-lieu [of taxation] contractual payments over the first
25 fifteen to twenty years of operation.” APP 21. As such, these funds are directly attributed, and
26 attributable, to foregone tax revenue.

1 100. In exchange, the Ground Lease requires Omni to make the conference center
2 available to ASU, “free of charge, for up to seven (7) days in each Lease Year” subject to
3 scheduling through established procedures; ASU does not even get to jump the line if a
4 customer already booked the conference center from Omni in a given period. APP 113-14.

5 101. The only other “direct benefits” provided to ABOR/ASU include “allow[ing] ASU
6 to maintain a display wall in the Conference Center highlighting ASU achievements and
7 research” and “an ASU named conference room,” as well as including “ASU” in the name of the
8 overall conference center. APP 253-54.

9 **Omni Has The Option To Purchase for \$10 The Land, The Hotel, And The Conference**
10 **Center (Which ASU Paid up to \$19.5M To Construct)**

11 102. According to the parties’ Ground Lease, notwithstanding anything to the contrary,
12 Omni retains the right to purchase the hotel and convention center, including the underlying
13 land, for a nominal fee of \$10, although the “additional rent” (amounts in lieu of property taxes)
14 would still be due through the end of the 60-year lease term (unless the ad valorem override is
15 triggered). APP 107-08.

16 **Planned Parking Structure With 275 Spaces For Exclusive Use Of Omni**

17 103. ASU also intends to construct at its own expense a parking structure located on the
18 eastern part of Block 27 (directly south of the Mirabella) for \$30 million. APP 33.

19 104. 275 out of the 1200 parking spots (or approximately 23%) are for the exclusive
20 use of Omni. APP 200.

21 105. Omni gets to keep the revenue from these 275 parking spaces even though it did
22 not pay to have the parking structure constructed. APP 198.

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1 106. ASU has implicitly valued these 275 spaces in its March 14, 2017 term sheet with
2 Omni as an “incentive” worth \$8.5 million.⁹ APP 252.

3 107. ASU and Omni specifically provided that title to the parking facility
4 improvements (including the hotel parking facility improvements) will automatically vest in
5 ABOR. APP 201. This includes even additional fixtures that Omni installs (such as gates and
6 payment systems). This will have the effect of removing this property from the property tax
7 rolls even though it is exclusively used by a private entity.

8 **ASU’s Testimony Before The Joint Committee On Capital Review Failed To Disclose**
9 **Multiple Material Facts To Legislators, Most Significantly That ASU Only Gets Seven**
 Days Per Year Of Free Use Of The Conference Center It Paid For In Full

10 108. On December 19, 2017, ABOR and ASU reported to the Legislature’s Joint
11 Committee on Capital Review (JCCR) regarding the Mirabella and Omni projects. ASU
12 responded to the Legislators’ oral questions through ASU Executive Vice President Olsen, a
13 high-ranking university official. ASU Assistant Vice President Creer, another high-ranking
14 official who reports to Mr. Olsen and is responsible for ASU’s real estate development, was
15 present and communicated with Mr. Olsen during the hearing.

16 109. During his testimony, Mr. Olsen repeatedly affirmed that the purpose of the Omni
17 Hotel/CC Project was to “maximize the revenue” for ASU based on its immediate financial
18 needs. This has been ASU’s stated public purpose for this deal and justification for renting its
19 tax status out to private entities generally.

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24 ⁹ This is computed as the \$28 million overall incentive amount minus the \$19.5 million for the
25 conference center. And this 8.5 million valuation is generally consistent with 23% of the total
26 \$30 million cost of construction, which would be \$6.9 million (plus the pro rata value of the
land).

1 a. In an exchange with Senator Allen at 2:14:29, Mr. Olsen stated:

2 Q: Who is getting the money from that?

3 A: The owner of the property which is ABOR on behalf of
4 Arizona State University, so the university.

5 Q: The university fighting for its life?

6 A: Correct.

7 Q: And is in dire need? And is struggling and having a horrible
8 time? They're the ones getting the money?

9 A: Correct.

10 b. In a further exchange at 2:16:33-2:17:35, Mr. Olsen stated: "And what we
11 are doing is charging an in-lieu payment that approximates property tax as a
12 revenues stream to help us with some of the problems that the members
13 have already referenced. ... And in our case, we are incented to maximize
14 the revenue that we can generate there to fund the operation of the
15 university. And so that's our approach."

16 c. In a further exchange with Chair Livingston at 2:17:35: "Q: Is ASU trying
17 to maximize the revenue received from the hotel and the residential
18 building? A: Yes. Given what we're getting and what that market is."

19 d. In a further exchange with Sen. Kavanagh at 2:18:18, he stated: "But to the
20 previous question about maximizing revenue. It is our intent to maximize
21 revenue that we can use for the purposes of supporting the universities. So
22 that's our approach to it."

23 110. ASU represented to the JCCR multiple times that the land was being sold to Omni
24 at fair market value:

25 a. President Crowe's November 28, 2017 letter to JCCR stated that the up-
26 front payment by Omni for the land would be "a market rate."

27 b. The attachment to President Crowe's letter was an Executive Summary for
28 the November 17-18, 2016 ABOR meeting that stated, "[t]he fair market

1 value of the Parcel is approximately \$85.00 per square foot, based on
2 appraisals received by ASU in accordance with Board policy.”

3 c. Mr. Olsen testified to Senator Allen: “The leases that we do are at market
4 rate. So it would be comparable to what someone would pay to lease a
5 similar property in another comparable location.” 2:16:33.

6 111. ASU did not disclose to JCCR that ASU would only be able to use the conference
7 center for free for a mere seven days out of each year, despite having paid the complete costs of
8 construction (up to \$19.5 million):

9 a. Mr. Olsen testified at 2:25:05 “[t]he property is exempt, but we are using
10 the charge in lieu to build the conference center *which the university will*
11 *own and will be a university asset ... The conference center will be*
12 *university property*” (emphasis added).

13 b. He similarly testified at 2:24:48 “the in lieu payment that we are charging
14 we are investing in the construction of the conference center *which the*
15 *university then will own*” (emphasis added).

16 c. Consistent with this, the ABOR Executive Summary stated (at 3) “Under
17 the terms of the management agreement, ASU will have a presence in *and*
18 *a right to use the conference center*, while Omni will pay all operating and
19 capital maintenance costs and be entitled to revenues therefrom”

20 **The Omni Hotel/CC Project Constitutes Picking Winners And Losers In The Highly**
21 **Competitive Property Development Industry**

22 112. There are at least 5 other private conference centers within 5.3 miles of the Omni
23 Property, including one with identical specifications only 3 blocks north of the project site.
24 These are:

25 a. **Tempe Mission Palms—0.6 miles**
26 60 East 5th Street, Tempe, AZ 85281
30,000 sq. ft. of meeting space

- b. **Double Tree by Hilton Hotel Phoenix Tempe—2.2 miles**
2100 South Priest Drive, Tempe, AZ 85282
30,000 sq. ft. of meeting space
- c. **Phoenix Marriott Resort Tempe at The Buttes—3.9 miles**
2000 West Westcourt Way, Tempe, AZ 85282
43,523 sq. ft. of meeting space
- d. **Phoenix Airport Marriott—5 miles**
101 North 44th Street, Phoenix, AZ
24,716 sq. ft. of meeting space
- e. **Arizona Grand Resort and Spa—5.3 miles**
8000 S. Arizona Grand Parkway Phoenix, AZ 85044
120,000 sq. ft. meeting space

ABOR’s New Policies Are Insufficient

113. At a special meeting on December 18, 2018, ABOR adopted new policies regarding leases of real property.

114. One of these policies prohibits universities from engaging in long-term leases that are commercial in nature if the “primary purpose is to remove private land or real property improvements from property tax rolls.”

115. Another of these policies requires universities to document the economic benefits of long-term leases to the university and to the State.

116. The belated adoption of these policies signals a tacit acknowledgement by ABOR of the tenuous nature of its actions and the growing public concern with universities and ABOR acting outside of their educational mission.

117. Moreover, these policies, which merely constitute vague, non-preclusive mandates on universities, do not foreclose deals that would run afoul of Article 9 of the Constitution, nor stop future unlawful or unauthorized developments such as those detailed above, which ABOR itself previously acquiesced in or even affirmatively blessed.

118. For example, ABOR has re-affirmed the Omni Hotel/CC Project through a Fourth Amendment to Option to Lease executed on February 18, 2019—after the foregoing new

1 policies were adopted. This includes still having ASU pay for the full cost of a hotel conference
2 center (up to \$19.5 million) that it only has the right to use seven days out of the year, and for
3 the cost of 275 parking spaces (costing approximately \$8 million) of which the private entity has
4 exclusive use. And it still has ABOR taking legal title to the improvements to shield them from
5 paying ad valorem tax, including as an IPR under A.R.S. § 42-19003. APP 245-48.

6 **COUNT 1: DECLARATORY AND INJUNCTIVE RELIEF THAT THE HOTEL/CC**
7 **LAND AND IMPROVEMENTS ARE SUBJECT TO TAXATION**

8 119. Plaintiff re-alleges and incorporates the preceding paragraphs.

9 120. Irrespective of whether ABOR or Omni holds legal title to the Hotel/CC Land and
10 Improvements, if a hotel and convention center is built on the site, the Hotel/CC Land and
11 Improvements must be subject to standard property tax treatment, or, at a minimum, treated as
12 an improvement on possessory rights (“IPR”).

13 121. Under the relevant portion of A.R.S. § 42-1004(E), the Attorney General “shall
14 prosecute in the name of this state all actions necessary to enforce this title and title 43.”

15 122. Under A.R.S. § 42-11002, “[a]ll property in this state is subject to taxation except
16 as provided in article IX, Constitution of Arizona, and article 3 of this chapter.”

17 123. Under Article 9, § 2(13) of the Arizona Constitution, “[a]ll property in the state
18 not exempt under the laws of the United States or under this constitution or exempt by law under
19 the provisions of this section shall be subject to taxation to be ascertained as provided by law.”

20 124. Under Article 9, § 2(12) of the Arizona Constitution, “[n]o property shall be
21 exempt which has been conveyed to evade taxation.”

22 125. The Omni Deal constitutes a sale of the Hotel/CC Land to Omni, with ABOR
23 retaining bare legal title solely for purposes of evading otherwise applicable taxes.

24 126. If Omni conveys to ABOR title to the Hotel/CC Improvements made by Omni on
25 the Hotel/CC Land, it will do so to evade taxation on the improvements and therefore the
26 property improvements will not be exempt under Article 9, § 2(12).

1 127. If ABOR conveys an interest in the Hotel/CC Land and Improvements to Omni
2 through a lease (or leases), it will do so as part of allowing Omni to evade taxation, and
3 therefore Hotel/CC Land and Improvements will not be exempt under Article 9, § 2(12).

4 128. Independently, even if none of the conveyances made by Omni or ABOR would
5 trigger the bar on exemption under Article 9, § 2(12), a hotel and convention center on the Omni
6 Property nevertheless would be subject to taxation under Arizona law because such a project
7 would not be able to qualify for any of the available exemptions set forth in Arizona law.

8 129. A lease with Omni to build and run a hotel and convention center on land ABOR
9 owns would not be exempt from property taxation under Article 9, § 2(1) of the Arizona
10 Constitution.

11 130. Arizona courts have strictly construed Article 9, § 2(1), which states that “[t]here
12 shall be exempt from taxation all federal, state, county and municipal property” as applying only
13 to those enumerated government entities and no others. *See Tucson Transit Auth., Inc. v.*
14 *Nelson*, 107 Ariz. 246, 252 (1971) (recognizing that laws exempting property from taxation are
15 strictly construed); *Indus. Dev. Auth. of County of Pima v. Maricopa County*, 189 Ariz. 558, 560
16 (App. 1997) (holding that § 2(1) excludes from that exemption the property of other political
17 subdivisions of the state than those enumerated in its text); *accord Buckeye Pollution Control*
18 *Corp. v. Maricopa County*, No. 1 CA-TX 05-0011, 2007 WL 5517458, at *2-*3 ¶¶11-13 (App.
19 2007).

20 131. The court’s analysis in those cases is consistent with the plain language of § 2(1),
21 which does not mention political subdivisions, even though another adjacent provision does, *see*
22 Ariz. Const. art. IX, § 2(3), showing that the framers knew how to exempt property of all
23 political subdivisions of the state when they wanted to, and chose not to do so in § 2(1).

24 132. ABOR is and has been a distinct entity in the form of a corporation created by the
25 State. *See Bd. of Regents of Universities and State College v. City of Tempe*, 88 Ariz. 299, 305
26 (1960); *see also Sullivan*, 45 Ariz. at 255-56.

1 133. ABOR’s status as “the state” for purposes of property tax exemptions set forth in
2 Article 9, § 2 is limited to its constitutionally enumerated duty of exercising supervision of
3 educational institutions.

4 134. If ABOR has lawful authority to generally take title to property for revenue
5 generation or economic development—something Plaintiff disputes (see Count 3, *infra*)—then
6 ABOR does so as a political subdivision. In this capacity, ABOR falls outside of being “the
7 state” for purposes of Article IX, § 2(1), making any such property subject to taxation in the
8 normal course. In engaging in these types of revenue generation/economic development, ABOR
9 would be no different than industrial development authorities or pollution control districts that
10 the Arizona courts have previously dealt with in analogous circumstances. *See Tucson Transit*
11 *Auth.*, 107 Ariz. at 252; *Indus. Dev. Auth.*, 189 Ariz. at 560; *Buckeye Pollution Control Corp.*,
12 2007 WL 5517458 at *2-*3.

13 135. A lease with Omni to build and run a hotel and convention center on land ABOR
14 owns likewise would not be exempt from property taxation under Article 9, § 2(2) of the
15 Arizona Constitution and A.R.S. § 42-11104(A).

16 136. Under Article 9, § 2(2) of the Arizona Constitution, “[p]roperty of educational,
17 charitable and religious associations or institutions not used or held for profit may be exempt
18 from taxation by law.”

19 137. Under A.R.S. § 42-11104(A), “[l]ibraries, colleges, school buildings and other
20 buildings that are used for education, with their furniture, libraries and equipment and the land
21 that is appurtenant to and used with them, are exempt from taxation if they are used for
22 education and not used or held for profit.”

23 138. The exemptions provided under Article 9, § 2(2) of the Arizona Constitution and
24 A.R.S. § 42-11104(A) cannot apply to property leased by ABOR for the purpose of establishing
25 a commercial, for-profit enterprise such as a hotel and convention center.

26

1 147. ABOR is not authorized by A.R.S. § 15-1625(B)(4) to make a conveyance to
2 evade taxation and making such a conveyance would exceed its statutory authority under A.R.S.
3 § 15-1625(B)(4).

4 **COUNT 3: QUO WARRANTO, DECLARATORY, AND INJUNCTIVE RELIEF**
5 **RELATED TO THE REQUIREMENTS OF A.R.S. § 15-1625(B)(4) CONCERNING “USE**
6 **OF THE INSTITUTIONS” UNDER ABOR’S JURISDICTION**

7 148. Plaintiff re-alleges and incorporates the preceding paragraphs.

8 149. Under A.R.S. § 12-2041(A), the Attorney General may bring an action “in the
9 name of the state upon his relation, upon his own information . . . against any person who
10 usurps, intrudes into or unlawfully holds or exercises any public office or any franchise within
11 this state.”

12 150. Under A.R.S. § 12-2041(B), the Attorney General “shall bring the action when he
13 has reason to believe that any such office or franchise is being usurped, intruded into or
14 unlawfully held or exercised.”

15 151. Under A.R.S. § 12-1832, “[a]ny person interested under a deed, will, written
16 contract or other writings constituting a contract, or whose rights, status or other legal relations
17 are affected by a statute, municipal ordinance, contract or franchise, may have determined any
18 question of construction or validity arising under the instrument, statute, ordinance, contract, or
19 franchise and obtain a declaration of rights, status or other legal relations thereunder.”

20 152. When ABOR enters into or evidences an intent to enter into leasehold contracts as
21 lessor purportedly based on A.R.S. § 15-1625(B)(4), such as here with Omni, such action affects
22 what property is subject to taxation.

23 153. Because the Attorney General is charged under A.R.S. § 42-1004(E) with
24 enforcing Arizona’s property tax laws and under A.R.S. § 12-2041 with bringing quo warranto
25 for usurpation of the State’s franchises, the Attorney General is a “person interested” in any such
26 property conveyance under A.R.S. § 12-1832 and therefore entitled to declaratory judgment.

1 154. A lease with Omni to build and run a hotel and convention center on land ABOR
2 owns will usurp, intrude into, or unlawfully exercise one or more of the State’s franchises
3 because such a lease will not be for the use of the institutions under ABOR’s jurisdiction as
4 required by A.R.S. § 15-1625(B)(4), but rather for the use of private third parties.

5 155. In Arizona, agencies and other government entities, such as ABOR, are
6 empowered to act only in accordance with the constitutional provisions and statutes that create
7 them.

8 156. Under A.R.S. § 15-1625(B)(4), ABOR may “[p]urchase, receive, hold, make and
9 take leases and long-term leases of and sell real and personal property for the benefit of this state
10 and for the use of the institutions under its jurisdiction.”

11 157. The requirement in § 15-1625(B)(4) limiting ABOR’s activities regarding
12 property to those “for the benefit of this state and for the use of the institutions under its
13 jurisdiction” means what it says—that ABOR cannot take such actions for private, third-parties.
14 Taking title to improvements that are used by private third parties in order to shield the private
15 parties from applicable property taxes is not “for the benefit of this state and for the use of the
16 institutions under [ABOR’s] jurisdiction.”

17 158. When ABOR receives and thereafter holds real and personal property subject to a
18 lease back to a private third party for that party or another third party’s use, such as it appears to
19 be poised to do with Omni, ABOR is not receiving and holding property for the benefit of the
20 state and for the use of the institutions under its jurisdiction, as required by A.R.S. § 15-
21 1625(B)(4).

22 159. In addition, a general power to exempt privately-used property from property tax
23 (so long as it generates revenue for the universities), which ABOR appears to have claimed for
24 itself, would violate the non-delegation doctrine because there is no intelligible, limiting
25 principle for the exercise of ABOR’s claimed power to exempt property. The power to exempt
26

1 property from ad valorem taxation must be held to the same non-delegation standard as the
2 power to impose a tax in the first place.

3 160. The Legislature can “delegate to an administrative body or official . . . the power
4 to fix a rate of taxation according to a standard,” but must itself prescribe the standard to be
5 used. *S. Pac. Co. v. Cochise Cnty.*, 92 Ariz. 395, 404, 377 P.2d 770, 777 (1963); *State v.*
6 *Marana Plantations, Inc.*, 75 Ariz. 111, 114, 252 P.2d 87, 89 (1953) (“It may safely be said that
7 a statute which gives unlimited regulatory power to a commission, board or agency with no
8 prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation
9 of legislative power.”); *Duhamel v. State Tax Comm’n*, 65 Ariz. 268, 272, 179 P.2d 252, 254
10 (1947) (“An act which imposes a tax must be certain, clear and unambiguous, especially as to
11 the subject of taxation and the amount of the tax The legislature must fix the mode of
12 determining the amount of tax ‘with such a degree of precision as to leave no uncertainty that
13 cannot be removed by mere computation.’” (citations omitted), *overruled on other grounds by*
14 *Valencia Energy Co. v. Arizona Dep’t of Revenue*, 191 Ariz. 565, 959 P.2d, 1256 (1998)); *Van*
15 *Winkle v. Fred Meyer, Inc.*, 151 Or. 455, 466, 49 P.2d 1140, 1144 (1935) (“It is a fundamental
16 principle of constitutional law that in delegating powers to an administrative body, the
17 Legislature must prescribe some rule of law or fix some standard or guide by which the actions
18 of that body, in administering the law, are to be governed ”); *Bade v. Drachman*, 4 Ariz.
19 App. 55, 60, 417 P.2d 689, 694 (App. 1966) (Legislature “cannot . . . delegate to an
20 administrative body or official not only the power to fix a rate of taxation according to a
21 standard but also the power to prescribe the standard”).

22 161. If ABOR’s approach to its powers were allowed to stand, it could take title to all
23 land and improvements in the entire State of Arizona (so long as it generates additional revenue
24 for the universities through lease payments) and remove all property and improvements from the
25 tax rolls—an absurd result showing that this claimed power violates the non-delegation doctrine.
26

1 Because of this, under the constitutional avoidance canon, A.R.S. § 15-1625(B)(4) should be
2 construed to prevent ABOR from proceeding in this fashion.

3 **COUNT 4: VIOLATION OF A.R.S. § 35-212 BY AGREEING TO EXPEND PUBLIC**
4 **MONIES IN CONTRAVENTION OF THE GIFT CLAUSE**

5 162. Plaintiff re-alleges and incorporates the preceding paragraphs.

6 163. ABOR on behalf of ASU has agreed to provide “economic incentives” to Omni
7 comprising several items, with an estimated net present value of \$28,000,000.00. Term Sheet at
8 *3, Item 4.

9 164. ABOR on behalf of ASU agreed to “develop, at its expense, a shared-use parking
10 area” on or near the Omni Property, and to “grant to Omni an easement for the exclusive use” of
11 275 parking spaces therein. Term Sheet at *3, 4(a)(i); Option To Lease And Escrow Instructions
12 For A Portion Of Block 22, Recitals, (F) (ASU Omni at *68).

13 165. ABOR on behalf of ASU agreed, upon completion of the Omni Property
14 improvements, to pay the actual cost to construct the conference center, “not to exceed”
15 \$19,500,000.00. Term Sheet at *4, 4(a)(ii); ASU Omni option to Lease w all Amendments at
16 *112; Ground Lease at 3, definition of “CC Cost Reimbursement”; Ground Lease at 4(b)
17 (“Following Completion of Construction of the Initial Improvements” Omni will submit an
18 invoice for the cost of constructing the convention center and within 30 days “Landlord shall
19 pay to Tenant the CC Cost Reimbursement, by wire transfer of immediately available funds” or
20 other agreed upon method).

21 166. In addition, as shown above (¶¶81, 89, 93), ASU is selling the land for the Omni
22 Property at only \$85 / sq. ft., when the true market value may be much closer to \$212 / sq. ft.,
23 representing a sale up to \$8.9 million below market.

24 167. The \$28 million in payments by ASU are asserted to be in exchange for “direct
25 benefits” (Term Sheet at *4) including the construction of the hotel and convention center on the
26 Omni Property (which Omni retains the right to purchase for a nominal fee of \$10, Ground

1 Lease 3(c)), naming rights of the hotel and conference center (Term Sheet at *5), to receive
2 Additional Rent payments (made by agreement in lieu of and in expectation of exemption from,
3 on information and belief, greater amounts of *ad valorem* property taxes that would otherwise be
4 due (Ground Lease 5(i)), the right to use the convention center for seven days out of each year
5 of the lease (Term Sheet at *5; Recorded Development Agreement Tempe at *8 para 5.7; ASU
6 Omni Option to Lease w all Amendments at *126, 6(d)), “allow ASU to maintain a display wall
7 in the Conference Center highlighting ASU achievements and research” (Term Sheet at *5), and
8 “an ASU named conference room” (Term Sheet at *5).

9 168. The “additional rent” payments cannot be considered public benefits because as
10 alleged above, they simply represent converting payments that would otherwise be made as ad
11 valorem taxes into in lieu payments. *See Turken v. Gordon*, 223 Ariz. 342, 350 ¶33 (2010).
12 Simply redirecting which government entity receives tax payments is not a public benefit as a
13 matter of law or fact.

14 169. By the foregoing, ABOR will cause the illegal payment of public monies in
15 violation of A.R.S. § 35-212.

16 170. Defendant Olsen is a person who ordered or caused the illegal payment of public
17 monies, or will do the same if the payments (\$19.5 million and Omni parking facility cost) are in
18 fact made.

19 **PRAYER FOR RELIEF**

20 Wherefore, the State respectfully requests that the Court:

21 1. Grant declaratory, injunctive, and special action relief that orders the Maricopa
22 County Assessor to place the Hotel/CC Land and Improvements on the ad valorem tax roll for
23 Maricopa County, and the Maricopa County Treasurer to collect the corresponding property tax
24 due, if a hotel and convention center is built on the Hotel/CC Land.

25 2. Grant *quo warranto* relief ousting ABOR and ASU from taking action with
26 respect to the Hotel/CC Land and Improvements that exceeds the scope of their authority or

1 authorization under A.R.S. § 15-1625; namely, relief that prevents and enjoins them from
2 making or receiving conveyances to evade taxation.

3 3. Grant *quo warranto*, declaratory, and injunctive relief that conveying, leasing, or
4 receiving property interests for purposes of building and operating a hotel and convention center
5 on the Hotel/CC Land by a commercial third party is not for the use of the institutions under
6 ABOR's jurisdiction as required by A.R.S. § 15-1625(B)(4), and oust ABOR from doing the
7 same.

8 4. Grant declaratory and injunctive relief enjoining the illegal payment of public
9 monies.

10 5. Award Plaintiff's reasonable costs and attorneys' fees.

11 6. Provide such other relief as the Court deems just and proper.

12 RESPECTFULLY SUBMITTED: April 3, 2019.

13
14 MARK BRNOVICH,
15 ATTORNEY GENERAL

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