ARIZONA SUPREME COURT

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General Appellant/Petitioner, v. ARIZONA BOARD OF REGENTS, Appellee/Respondent.	CV–19-0247-PR Court of Appeals No. 1 CA-CV 18-0420 Maricopa County Superior Court No. CV2017-012115

SUPPLEMENTAL BRIEF OF PETITIONER STATE OF ARIZONA *EX REL.* MARK BRNOVICH, ATTORNEY GENERAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES–Continued

TABLE OF AUTHORITIES–Continued

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

TABLE OF AUTHORITIES–Continued

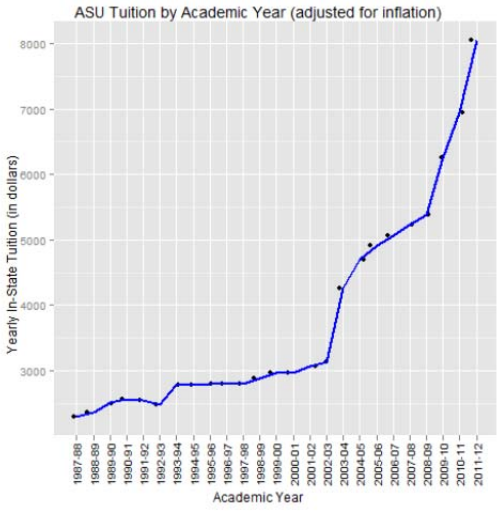
OTHER AUTHORITIES

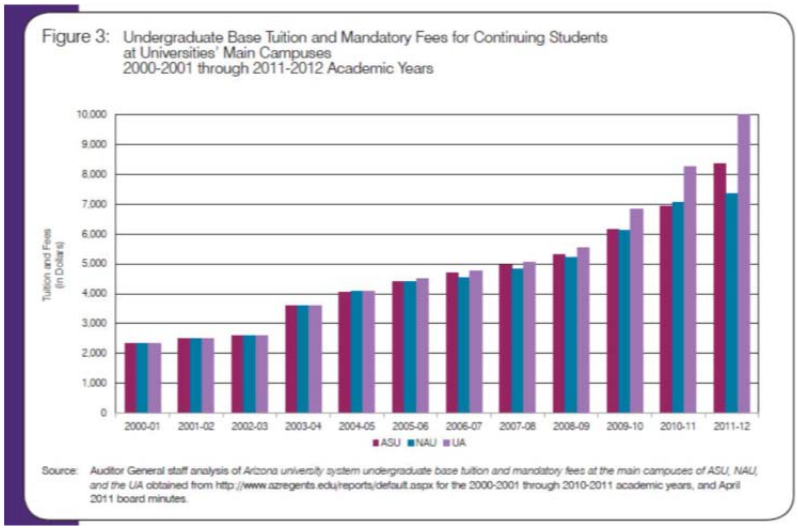
INTRODUCTION

The framers of the Arizona Constitution expressly required that "[t]he university and all other state educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible." Ariz. Const. art. XI, § 6. Like all other constitutional provisions, these restrictions are "mandatory, unless by express words they are declared to be otherwise." *Id.* art. II, § 32. Through this important case, this Court should affirm its duty to interpret the constitution and in turn keep ABOR within the bounds of its legal mandates.

After allowing public university tuition to skyrocket over 300% since 2003, ABOR seeks to block judicial review of the claims here. But just as ABOR violating the co-ed mandate of Article XI, § 6 would be subject to judicial review, so too is this case. Count I of the Attorney General ("AG")'s complaint alleges (FAC ¶¶ 53-66) that ABOR's tuition-setting policy is based not on *cost of instruction* but other factors, such as students' ability to assume debt and what other states' universities charge. Counts II-IV (FAC ¶¶67-86) allege that ABOR charges higher amounts per credit to part-time and online students and fails to give online students in-state tuition, making it even more expensive to attend while working. Count V (FAC ¶¶87-91) alleges that ABOR requires fees unrelated to instruction in order to access instruction. And Count VI (FAC ¶¶92-97) details ABOR's flouting of Prop. 300 in charging in-state tuition to ineligible students.

The below charts show the skyrocketing tuition and discriminatory per-hour charges to part-time students alleged in the FAC (¶¶11, 15, 25, 34-39).





Name of Institution	**Resident Tuition and Mandatory Fees for 2017-18**	**Increase Since 2002-03**
University of Arizona Main Campus	$12,228	370%
Northern Arizona Univ. Flagstaff Campus	$11,059	325%
Arizona State University All Campuses	$10,792	315%

Arizona State University	**University of Arizona**	**Northern Arizona U.**
$917/hr for 1 credit to $360/hr for 15 credits	$733/hr for 1 credit to $408/hr for 15 credits	$1054/hr for 1 credit to $369/hr for 15 credits

This Court should hold: 1) the AG has authority to initiate this suit against ABOR; 2) Counts I-V do not present non-justiciable political questions, and instead present questions that can be adjudicated under judicially manageable standards, and 3) ABOR's legislative immunity argument fails. It should further vacate the judgment of dismissal and remand for further proceedings ***on the merits***.

ARGUMENT

The AG has statutory authority to initiate this suit based on the plain language of § 41-193(A)(2) and § 35-212. Interpreting these statutes as written does not give the AG improper powers because "the courts alone [will] in all such cases make the final decisions and not the [AG]." *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956). Indeed, requiring governmental actors to demonstrate compliance with constitutional commands is the hallmark of the rule of law. On the other hand, ABOR's non-justiciability and legislative immunity arguments directly contravene recent caselaw and would foreclose all judicial review.

I. The AG Has Statutory Authority To Initiate This Suit Against ABOR

The question of authority is narrow: does the AG have statutory authority to file a lawsuit on the State's behalf to prevent ABOR from violating the law? As shown below, § 41-193(A)(2) and § 35-212 independently provide such authority.

A. Section 41-193(A)(2) Authorizes Initiating Suit, And *McFate*'s "Flawed" Interpretation Of "Prosecute" Should Be Overruled

1. Plain Language, Secondary Factors, And Case Law ***Uniformly*** Show § 41-193(A)(2) Authorizes Initiating Suit

The Petition (at 4) examined authoritative dictionaries, which define "prosecute" as including instituting a civil action. It also cited (at 5) cases from other jurisdictions holding that "prosecute" in the AG-powers context plainly includes instituting civil actions. And this analysis is entirely in accord with the AG-powers framework in *State ex rel. Corbin v. Pickrell*, which stated: "the

powers of the [AG are] what is found 'either expressly or by reasonable intendment in the statutory law,'" 136 Ariz. 589, 597 (1983).[1]

Secondary interpretive factors confirm "prosecute" here includes initiating civil actions. The Petition (at 6) outlined the importance of the 1953 amendments. First, they expressly added that the AG "shall serve as chief legal officer of the state." A.R.S. § 41-192(A). "Chief legal officer" is a term of art; its addition indicates intent to confer statutory powers consistent with that role, which include initiating actions. Pet.6. Second, the amendments established a "Department of Law" as part of restructuring state government and stated that the AG "shall have charge of and direct" the Department, which in turn has authority to "prosecute" certain actions in state court under § 41-193(A)(1)-(2), *e.g.*, those in which the state "has an interest." In addition, the Legislature added "when deemed necessary by the [AG]" to § 41-193(A)(2), which textually equated the AG's powers with the Governor's in this area. Pet.7; *see also Brewer v. Burns*, 222 Ariz. 234, 239 ¶27 (2009) (finding "when" "signal[s] a point in time related to…a specific event").

Granting the AG the power to "direct" a newly created Department of Law that has authority to "prosecute" actions—and expressly adding the clause "when

[1] *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270 n.16 (5th Cir. 1976) (rejecting "any argument…that the right to 'prosecute' an action does not include the right to institute the action. That term typically is used to refer, as a unit, to the institution and maintenance…of a legal proceeding."); *State v. Valley Sav. & Loan*, 636 P.2d 279, 281 (N.M. 1981) ("Inherent in the [AG]'s duty to 'prosecute' is the power to initiate civil lawsuits when, in his judgment" it is in the state's interest).

deemed necessary by the Attorney General" to this power-to-prosecute provision (which previously referenced only the Governor)—should not be rendered null. Instead, given the legislative purpose shown by all of these changes, "prosecute" should be interpreted consistent with its plain and ordinary meaning.[2] And it was constitutional and appropriate for the Legislature to confer this power, because AGs traditionally and presently have it. Pet.6-7 (collecting authorities); *see Giss v. Jordan*, 82 Ariz. 152, 162 (1957) (citing *Hudson v. Kelly*, 76 Ariz. 255, 260 (1953)) (analyzing constitutional offices in light of their common-law origins).

Finally, if it were not already clear from the plain language and secondary factors that "prosecute" in § 41-193(A) includes initiating actions, this Court so held in *Morrison* shortly after the 1953 amendments: "it follows from [§ 41-193 (A)(1)] that the [AG] is the proper state official to institute the action. In so doing he acts as the 'chief legal officer' of the State." 80 Ariz. at 332. The AG "may, like the Governor, go to the courts for protection of the rights of the people." *Id.*

ABOR has no response to this mountain of interpretive evidence and related authority. First, it is unavailing to contend that *Morrison* hinged on there being an

[2] It follows that these changes were informed by this Court's then-recent cases interpreting such language as including the power to institute suit. *See State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 189 (1942) ("[T]he words 'direct prosecution' mean it is the duty of the auditor to cause to be instituted [civil] prosecutions…."); *see also Westover v. State,* 66 Ariz. 145, 151 (1947) ("When directed by the Governor or either branch of the Legislature to appear and prosecute criminal proceedings in any county, he becomes the prosecuting attorney of that county in those proceedings, and has all" rights of a prosecutor).

ongoing proceeding, as *Morrison* involved initiating an original action, and it *expressly states* the AG can institute suit. *See id.* Second, ABOR's reliance on this Court reading a statute's plain language "in context with other statutes relating to the same subject or having the same general purpose," Resp. at 8, is unavailing. As discussed above, context and purpose overwhelmingly show "prosecute" includes instituting an action, and ABOR's interpretation makes the 1953 changes surplus.[3] Third, ABOR cannot prevail by citing (at 9) limitations statutes requiring suit be "commenced and prosecuted" within a time; both terms are necessary in those statutes to show mere institution is insufficient. C.A. Reply Br.11-12. Instead, to support its statutory construction, ABOR must show that a statute's use of "prosecute" alone *excludes* commencing an action; but ABOR has not cited a case from Arizona or elsewhere—other than *McFate*—supporting this. In sum, *McFate*'s interpretation § 41-193(A)(2) is wrong, and it is no wonder the panel judges ***unanimously*** concurred (¶22) that it "appears to be flawed."

2. None Of Stare Decisis, Legislative Acquiescence, Or Later Legislation Can Save *McFate*'s "Flawed" Interpretation

Stare decisis. A lower stare-decisis standard applies here, but under any possible standard, this Court should overrule *McFate* in favor of *Morrison*'s plain-

[3] Indeed, nothing in these other statutes (Resp.8-9) suggests "prosecute" in § 41-193(A) does not include instituting actions: such an interpretation does not render these other statutes superfluous for multiple reasons, *e.g.*, authorizing penalties/ damages, dividing authority between AG and others, imposing time limits, and allowing AG to participate in otherwise private matters. C.A. Reply Br.18, O.B.36.

language interpretation of "prosecute." The Petition showed that a lower standard applies because *McFate* is not statutory but based on policy concerns about ethics rules and infringing on the Governor's constitutional powers. Pet.8 (citing *State v. Hickman*, 205 Ariz. 192, 201 ¶38 (2003); *McFate*, 87 Ariz. at 143-44, 148). And *McFate* misconstrued legal-ethics and constitutional concerns. The AG's dual role of legal advisor and people's lawyer is not unconstitutional or absurd: instituting suit is a traditional AG function (as recognized by a majority of states). *See supra* p.5. Despite noting ethical concerns, *McFate* failed to address the prevalence of this dual role. *See* 87 Ariz. at 141-48. *McFate* also incorrectly feared impingement on the Governor's powers. The AG may only seek judicial relief; courts will decide the merits of the AG's claims, *i.e.* whether the defendant violated Arizona law. *Morrison*, 80 Ariz. at 332; C.A. Reply Br.19, O.B.37-38.

In response, ABOR curiously relies (at 1, 4-5) on a 2018 bill that never advanced in the Legislature. "That a bill failed to reach the house floor for a vote indicates little, if anything, about legislative intent." *Safeway Stores, Inc. v. Indus. Comm'n of Ariz.*, 152 Ariz. 42, 48 (1986). ABOR also presents a parenthetical from a "*cf.*" citation to federal law in *Twin Cities Fire Ins. v. Leija*, 244 Ariz. 493, 497 n.1 (2018), as if it were Arizona law from this Court; it is not. Moreover, Alito, Roberts, and Thomas's dissent well explains why this Court should not proliferate this into Arizona law. *See Kimble v. Marvel Entm't, LLC*, 135 S.Ct.

2401, 2415 (2015) (dissent) (Prior case "was not simply a case of incorrect statutory interpretation. It was not really statutory interpretation at all.").

Even applying the stare decisis standard for statutory interpretation cases, *McFate* still should be overruled. The Petition (at 9-11) demonstrated that *all five* statutory-interpretation stare decisis factors are met here (citing *Lowing v. Allstate Ins.*, 176 Ariz. 101, 107 (1993)), and that courts recognize that stare decisis carries less weight when reliance interests are not at stake or in cases involving how courts function. ABOR cannot identify any reliance interest on *McFate*, and to the extent ABOR has relied on impunity from judicial review in choosing to disregard state law, that tips *toward* overruling *McFate* rather than retaining it.

ABOR appears to make a final stand on the idea that this Court has reiterated the need for specific statutory authority for AG powers. Resp. 5-6. That precedent stands for two points: 1) statute can authorize state agencies to use counsel other than the AG,[4] and 2) the AG has no common-law powers in criminal matters. Pet.11 (citing C.A. O.B. at 44 nn.14-15). Interpreting § 41-193(A)(2) as statutorily authorizing the AG to file suit on behalf of the State to prevent an agency from violating the constitution and laws will not disrupt those holdings. And pointing to *Woods* is no answer (Resp. 10), as that case ***found*** statutory authority, and the majority did not even touch § 41-193. 189 Ariz. at 275.

[4] This is the point of the Kanefield essay, which also notes the Legislature acts *affirmatively* to remove AG powers. 53 Ariz. L. Rev. 689, 699 (2011).

Legislative acquiescence. Legislative acquiescence is inapplicable here (contra Response at 6), given both that *McFate* was not statutory *and* "the absence of some affirmative indication that the legislature considered and approved [the court's construction]." *Lowing*, 176 Ariz. at 106; *accord Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 314 ¶24 (2017).[5] There is no such indication here in any later statutes or amendments to § 41-193. CA Reply Br.18, 20.

Subsequent legislation. Finally, subsequent legislation counsels *in favor of* overruling *McFate*'s § 41-193(A) interpretation. The Legislature expanded those for whom the AG is not legal advisor (including ABOR and the Governor), § 41-192(D), and added § 41-192(E), which expressly allows the AG to declare a conflict and appoint outside counsel. And this Court adopted the Model Rules, which make clear they do not abrogate AG powers.[6]

ABOR points (at 7) to subsequent statutes it contends would be superfluous for the same reasons as those cited in *McFate*. Not so. *See supra* n.3. Moreover, statutes conferring AG powers have consistently been analyzed as overlapping, not separately setting out discrete powers. C.A. Reply Br. 19; O.B.36.

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[5] An example of "affirmative indication" is 2017 Ariz. Sess. Laws ch. 175 at p. 4-5 § 4, where the Legislature stated its intent was to clarify the law consistent with a prior case, *available at* https://www.azleg.gov/legtext/53leg/1R/laws/0175.pdf

[6] Ariz. S. Ct. R. 42 pmbl ¶18 (Government Attorneys "also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.").

3. If The Court Does Not Overrule *McFate*'s Interpretation Entirely, It Should Limit It To When The AG Actually Served As Legal Advisor

It is not inconsistent with the AG's role as "legal advisor" to initiate suit, as evidenced by the many other States that permit this, *supra* p.5, as well as ¶18 of the Preamble to the Model Rules, Ariz. S. Ct. R. 42. But if it were inconsistent in some circumstances, then ethical screens, delegations, and outside counsel are the proper tools, *see* A.R.S. § 41-192(E), not rewriting § 41-193(A)'s plain language.

In any event, unlike in *McFate*, the AG is not ABOR's legal advisor regarding tuition, *see* A.R.S. § 41-192(D)(4), and this Court rejected an argument that the AG was precluded from initiating suit against a school district when the district "d[id] not allege any facts which show an actual or real conflict of interest." *Amphitheater Unified Sch. Dist. No. 10 v. Harte*, 128 Ariz. 233, 235 (1981). If the Court does not overrule *McFate*'s interpretation of "prosecute" entirely (in favor of screens, delegations, and outside counsel), it should at least limit it consistent with *Amphi* and Preamble ¶18 to cases like *McFate* where the AG is suing a client for whom he served as legal advisor on the issue in question. 11/8/19 AG Amic.Br.7-8.

B. Section 35-212 Also Authorizes This Lawsuit

1. Count VI Challenges An Illegal Payment Of Public Monies Under § 35-212 As Interpreted By *Woods*

Count VI alleged a payment of public monies, specifically the monies paid to cover the cost of instruction for students who pay less than cost to attend the

universities. R.16 ¶¶93, 97. By providing below-cost tuition to ineligible students under Prop. 300, ABOR necessarily pays the difference between the below-cost, subsidized rate and the actual cost of instruction. This is exactly the type of payment that can be challenged under § 35-212 per *State ex rel. Woods v. Block*: "[w]e conclude that the [AG's] request to prohibit CDC from exercising its power to litigate ***necessarily includes*** a request to prohibit payment for such litigation." 189 Ariz. 269, 274 (1997) (emphasis added). And if the AG cannot bring this claim, then it appears no one can bring this claim and Prop. 300 goes unenforced.

The Court of Appeals erroneously departed from *Woods* and instead required an "identifiable payment." *State ex rel. Brnovich v. Ariz. Bd. Of Regents*, No. 18-0420, 2019 WL 3941067, at *3 ¶15 (Ariz. Ct. App. Aug. 20, 2019) (citing *Biggs v. Cooper*, 234 Ariz. 515, 522 ¶19 (App. 2014), *vacated in part*, 236 Ariz. 415 (2014)). That statement in *Biggs* was 1) dicta;[7] 2) not petitioned to this Court, *see* 236 Ariz. at 417 ¶1; and 3) contrary to *Woods*. This Court's jurisprudence has never required an "identifiable payment"; instead, *Woods*'s standard—"necessarily includes a request to prohibit payment"—governs and should not be overruled. 189 Ariz. at 274. Regardless, the FAC had sufficient allegations (¶¶93, 97) of an "identifiable payment," particularly in light of Prop. 300's express prohibitions.

[7] The *Biggs* appeals court holding (at 522 ¶19) with respect to the § 35-212 claim was that the statutes did "not grant an express expenditure power." Here, §§ 15-1626 (A)(13) and 15-1664, among others, provide ABOR such a power. R.17 at 3.

2. The AG Can Join Other Claims To A Properly Brought § 35-212 Claim Under That Statute Or § 41-193(A)(2)

Once the AG properly pleads a § 35-212 claim, that statute also authorizes other factually related claims. *See Woods*, 189 Ariz. at 273 (requiring only that AG's "[s]tanding … be linked to some statutory basis" and recognizing that AG "may use 'any ethically permissible argument' to prevent the illegal payment of public monies," quoting *Fund Manager v. Corbin*, 161 Ariz. 348, 354 (App.1988)).

Here, Counts I-V are intertwined with Count VI because resolving them also partially resolves Count VI. Every count includes a common factual question: what is the actual cost of furnishing instruction? Answering that question not only will determine whether and how much of an illegal subsidy ABOR pays in providing in-state tuition to ineligible students, but also will inform if the other tuition procedures and policies challenged in Counts I-V are illegal because they violate "as nearly free as possible" and statutes in A.R.S. Title 15. C.A. Reply Br.7.

Alternatively, if Count VI states a § 35-212 claim, then the AG has validly instituted suit and has authority to "prosecute" it under § 41-193(A)(2), even under *McFate*'s construction that "prosecute" only applies to suits after commencement.

II. Counts I-V Should Not Be Dismissed As Presenting Political Questions

ABOR alternatively falls back on the political-question doctrine to avoid answering Counts I-V. But that argument directly contravenes this Court's political-question decision in *State v. Maestas*, 244 Ariz. 9, 11-12 ¶¶7-12 (2018),

amongst other cases, including ones setting forth a standard for review under Article XI, § 6. Moreover, holding Counts I-V to be justiciable does not contravene *Kromko v. Arizona Board of Regents*, 216 Ariz. 190 (2007).[8]

A. There Must Be Both A Commitment To Another Branch *And* Absence Of Judicially Discoverable And Manageable Standards

This Court's case law establishes a high burden for finding a non-justiciable political question. "'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature. v. Napolitano*, 213 Ariz. 482, 485 ¶7 (2006). "Although this test is generally framed in the disjunctive, the fact that the Constitution assigns a power to another branch only begins the inquiry." *Ariz. Indep. Redistricting Comm'n v. Brewer* ("*AIRC v. Brewer*"), 229 Ariz. 347, 351 ¶17 (2012); *id.* ¶ 18 (stating "the two aspects of the test are interdependent").

B. There Is No Commitment To Another Branch Here

The provision at issue here does not reference the Legislature or governing boards; instead it is phrased generally—"the instruction furnished ***shall be*** as nearly free as possible" (emphasis added). In *Brewer v. Burns*, the Court concluded that the phrase "[e]very measure when finally passed shall be presented

[8] For the reasons set forth in the Petition (at 15) and prior briefing (C.A. O.B.46-50, Reply Br.23-27), if *Kromko* compels the conclusion that Counts I-V present non-justiciable political questions, it should be overruled or limited.

to the Governor"—*i.e.*, identical "shall be" phrasing as here—"does not by its terms commit to the Legislature the decision." 222 Ariz. at 238 ¶18.[9]

The closest one can get to a commitment to another branch is in a *different* section of Article XI, which mentions the "legislature" providing for the "establishment and maintenance of a general and uniform public school system." Ariz. Const. art. XI, § 1. But this Court recently rejected the idea that this creates a political-question shield, holding instead that "the legislature's power to maintain universities is limited by the VPA." *Maestas*, 244 Ariz. at 12 ¶10. This was in accord with the logic of *Brewer v. Burns* and *Forty-Seventh Legislature*.[10]

The same result applies to the idea that there is a commitment because the constitution vests in governing boards such as ABOR "[t]he general conduct and supervision of the public school system." Ariz. Const. art. XI, § 2. Even accepting that governing boards can be considered "one of the political branches of government," *Forty-Seventh Legislature*, 213 Ariz. at 485 ¶7; *but see* Ariz. Const.

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[9] Finding a commitment to another branch would also be inconsistent with the rest of Article XI, § 6. The sentence at issue also states the universities "shall be open to students of both sexes." If ABOR made a university single sex, the Court would not accept that the decision was textually committed to ABOR.

[10] *Brewer v. Burns* held that a provision authorizing the legislature to "'determine its own rules of procedure'" "cannot limit or otherwise qualify the directive" to present finally passed bills. 222 Ariz. at 238 ¶18. *Forty-Seventh Legislature* concluded that even though the Governor had discretion when to exercise her line-item veto, "whether the constitution permitted the Governor to exercise [that] power" over a particular provision was not "committed to" the Governor. 213 Ariz. at 485 ¶7.

art. III (defining departments), the authority for "general conduct and supervision" is limited by § 6 under the logic of *Maestas*, *Brewer v. Burns*, and *Forty-Seventh Legislature*, just as the Legislature's power to "maintain" was limited. *See also* Ariz. Const. art. II, § 32; *State ex rel. Davis v. Osborne*, 14 Ariz. 185, 192-93 (1912) (constitutional provisions "form a standard by which is to be measured the power which can be exercised.").

And *Kromko* <u>supports</u> the idea that there is no commitment of all tuition-related decisions to the Legislature and ABOR. *Kromko* expressly limited itself to "only [whether] the total amount of tuition charged for the 2003-04 academic year was excessive and thus violated" Article XI, § 6. 216 Ariz. at 192 ¶10; *see also id.* ¶9 ("We therefore have no occasion today to decide whether such [other issues] would present justiciable questions."). In turn, that question was held to be committed to other branches because "a court cannot assess whether the cost of tuition is as nearly free as possible in the absence of an initial policy determination of a kind clearly reserved to the legislature and the Board." *See e.g.*, *id.* at 194 ¶20. The Court's entire analysis was limited to claims that "effectively argue either that the Board should have made less expensive policy decisions," *e.g.*, about class sizes, faculty salaries, and facilities, "or that more money should have been appropriated … or obtained from other sources." *Id.* ¶19. Finally, "[i]n some cases, there ***will be*** a judicially discoverable and manageable standard." *Id.* at 195

¶24 (emphasis added). *Kromko* therefore does not find a general commitment for political-question purposes, expressly stating the opposite.

C. There Are Discoverable And Manageable Standards, And The Court Should Give Guidance For Application On Remand

This Court's recent decisions repeatedly have found standards sufficiently manageable to render questions justiciable—even when they involved legislative actions. In *Maestas*, the Court weighed whether later legislation "'furthers the purposes'" of an initiative under the VPA. 244 Ariz. at 12 ¶12. In *AIRC v. Brewer*, it weighed whether any grounds for removal of a member of a legislative body—"substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office"—were present. 229 Ariz. at 353 ¶28. In *Brewer v. Burns*, it weighed whether a bill was "finally passed" and "whether the Legislature has acted 'reasonably' in delaying presentment." 222 Ariz. at 238-39 ¶¶18-22. And in *Forty-Seventh Legislature*, it weighed whether an item in a bill was subject to the line-item veto. 213 Ariz. 487-89 ¶¶19-26. Article XI, § 6 is no less susceptible to judicially manageable standards, and the Court should provide guidance on what standards apply for purposes of remand.

1. Claim Challenging Tuition-Setting Policy (Count I)

The judicially manageable standard for Count I is ABOR must set in-state tuition based on consideration of the cost of instruction less state appropriations, and making tuition as nearly free as possible. That standard flows from § 6's

language, which states "the instruction furnished shall be as nearly free as possible." That text uses words that define the basis on which tuition can be charged: "instruction furnished." *See Giss*, 82 Ariz. at 161 (courts "determine whether [question] falls on the one side or the other of the dividing line").[11]

Count I alleges that "ABOR violates its constitutional duty if it increases tuition for residents based on factors unrelated to costs, such as the prices charged by universities in other states." FAC ¶64. And "ABOR's tuition setting policies … have not been based on … cost for furnishing instruction, but rather have been based on factors other than cost." FAC ¶66; *see also supra* p. 2 (illustrating data in FAC re: skyrocketing tuition). Courts can determine the factors on which ABOR bases tuition and whether that is constitutional under the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* C.A. Reply Br. 25-26.[12]

A procedural claim inquiring into whether ABOR properly based tuition on cost of instruction is consistent with prior Arizona authority. Attorney General Napolitano formally opined that "ABOR has neither statutory nor constitutional authority to raise tuition solely in an attempt to be competitive with other public

[11] The cost of furnishing instruction less appropriations should provide a *ceiling* for in-state tuition. If that ceiling is not "free," ABOR must consider other factors to *reduce* tuition, such as offering lower-cost programs, moving some of the cost for programs with substantially higher cost (*e.g.*, nursing, engineering) to differential tuition, or using other sources of revenue (*e.g.*, out-of-state tuition and donations).

[12] *See* South A. Moore, Note, *Practicable and Justiciable: Why North Carolina's Constitutional Vision of Higher Education Is Judicially Enforceable*, 68 Duke L.J. 371, 413-15 (2018) (asserting procedural remedy is judicially manageable).

universities." Ariz. Op. Att'y Gen. No. I99-011, 1999 WL 311255 at *3 (May 11, 1999). In *Arizona Minority Coalition v. AIRC*, this Court permitted judicial review of whether the AIRC, a legislative body, complied with the pertinent constitutional procedure. 220 Ariz. 587, 595 ¶¶19-20 (2009); *see also* John D. Leshy, *The Making of the Ariz. Constitution*, 20 Ariz. St. L.J. 1, 70 (1988) (framers believed "that process and structure are key controls on the tendency to abuse power.").

2. Claims Challenging Disparities In Tuition (Counts II-IV)

The judicially manageable standard for Counts II-IV is that any disparities or differences in tuition charged to in-state students must be 1) authorized and not contrary to statute, 2) based on cost of instruction furnished, and 3) not "excessive or other than reasonable, or … not as nearly free as possible." *See Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 263 (1935); *accord Ariz. Bd. of Regents v. Harper*, 108 Ariz. 223, 225 (1972).

Counts II-IV contain allegations that can be adjudicated with the above judicially discoverable and manageable standards. Count II first argues that charging more per credit-hour to part-time students is not authorized by law. FAC ¶67 (citing A.R.S. § 15-1626(A)(5)); *see also Maestas*, 244 Ariz. at 13 ¶15 (In interpreting a statutory list, court "'assume[s] the exclusion of items not listed.'").[13] It also argues that the disparity charged to part-time students violates Article XI,

[13] Section 15-1626(A)(5) references the "credit hour threshold," which refers to the credits taken over a career ("one hundred forty-five hours"), not a semester.

§ 6. FAC ¶72. Indeed, ABOR charges up to ***almost 3 times*** per credit hour to part-time students. *See supra* p.2. A court can determine what disparities exist in tuition charged to part-time vs. full time students, the bases for them (including cost of instruction), whether such disparities are contrary to statutory law, and whether they are unconstitutional as "excessive or otherwise unreasonable." Courts can likewise manage Counts III-IV, which have similar claims for online students.

3. Claim Challenging Charging Fees For Non-Instruction To Access Instruction (Count V)

The judicially manageable standard for Count V is that ABOR and the Legislature cannot require students to pay for things other than instruction in order to access instruction or, alternatively, any such fees must be 1) authorized and not contrary to statute and 2) not "excessive or other than reasonable." For the same reasons articulated in Part II(C)(1)-(2), *supra*, the text of the constitution, which speaks in terms of "instruction furnished" provides the standard. Items like "athletics, recreation, technology, and health" are not "instruction." *See* FAC ¶¶ 88-91. But under either standard (the per se rule or reasonableness rule), there are judicially discoverable and manageable standards.

III. ABOR's Legislative Immunity Argument Is Meritless

Legislative immunity does not shield ABOR from suit seeking relief in the nature of a declaratory judgment and possible injunction related to implementation of policies, even if their enactment was legislative. It is well-established that a

government agency or officer can be sued in an official capacity to challenge the constitutionality of a legislative act that the agency or officer merely implements. *See, e.g.*, *Stanwitz v. Reagan*, 245 Ariz. 344, 348-50 ¶¶12, 17, 22 (2018) (asking court to declare A.R.S. § 19-118(C) unconstitutional facially and as applied); *see* Pet.6 and C.A. O.B.50 (collecting cases). And Arizona courts have repeatedly reviewed challenges to legislation related to budgetary matters without running afoul of legislative immunity. C.A. O.B.51 (collecting cases).

ABOR has never disputed that it has both a legislative function and an administrative function over the state's three public universities. *See* Ariz. Const. art. XI, § 2 (vesting "general conduct and supervision" in governing boards, including ABOR). Moreover, the FAC is replete with allegations that ABOR's non-legislative actions violated the Arizona Constitution. *See, e.g.*, R.16 at 2:23-25 ("ABOR unlawfully charges students…"); *id.* at 15 ¶¶67-72, 16-17 ¶¶73-81, 17 ¶¶82-86 (same). The FAC is therefore properly brought to challenge the lawfulness of the underlying policy by challenging its implementation (whether facially or as applied). This is in accord with the many cases cited above.

CONCLUSION

This Court should hold the trial court erred by dismissing the FAC, vacate the judgment of dismissal, and remand for further proceedings on the merits.

RESPECTFULLY SUBMITTED this 17th day of March, 2020.

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