ARIZONA COURT OF APPEALS

DIVISION ONE

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

STATE'S REPLY BRIEF

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INTRODUCTION

This appeal involves dismissal of an action to prevent an ABOR transaction (the "Omni Transaction") that will unlawfully usurp property-tax revenue and gift millions to a private company.

FAC Counts I-III challenge the Transaction based on its unlawful property-tax aspects. The Transaction seeks to shelter millions of dollars from the property tax rolls for decades. ABOR lacks the powers it now claims—*i.e.*, to use its government tax status to shelter ***any and all*** property in Arizona from the tax rolls and to engage in conveyances to evade taxation (diverting monies from local schools/governments).

FAC Count IV challenges the Transaction based on illegal payment of public monies. After waiving its public auction requirement, ABOR agreed to sell prime downtown Tempe land to Omni for much less than nearby parcels. ABOR also agreed to pay the full cost of construction—up to $19.5 million—for a new *private* conference center. However, ASU's rights are limited to only seven free days per year (<2% of the year), and ASU must still pay for any food and beverage. ABOR also gave Omni an option to buy the property for only $10 and agreed to pay millions to construct parking spaces for Omni's exclusive use.

This appeal can be resolved by 1) entering summary judgment for the State—or vacating summary judgment for ABOR—on the timeliness of Count IV,

and 2) reversing the Rule 12 dismissal of Counts I-III against ABOR and Count IV against Creer because the AG has standing and these Counts state valid claims. The Court should also vacate (or if it affirms, reduce) the award of fees and costs.

ARGUMENT

I. THE AG TIMELY BROUGHT COUNT IV—THE § 35-212 CLAIM.

For multiple independent reasons, this Court should reverse and enter summary judgment for the AG on Count IV's timeliness. *See* Parts I(A)-(C); *Aaron v. Fromkin*, 196 Ariz. 224, 227 ¶10 (App. 2000) (this Court may enter summary judgment when cross-motions for summary judgment were filed below). Even if the Court disagrees, it should vacate judgment for ABOR. Part I(C)-(D).

A. The AG Has Five Years To Bring Count IV.

The AG has five years to bring a claim under § 35-212: "If the action is brought by the [AG], the action must be brought within five years after the date an illegal payment was ordered[.]" A.R.S. § 35-212(E). Because the five-year period became effective in August 2018, when the AG's claim was not time barred, the five-year period applies and the AG's public monies claim is timely. *See* A.R.S. § 12-505(B); OB at 18-19.

The trial court rejected a five-year period because it believed the AG was retroactively applying the statute. ABOR does not defend that conclusion.

Instead, ABOR says a one-year period applies because § 12-821 broadly applies to all actions against all public entities and employees. Answering Brief ("AB") at 28-29. But ABOR's emphasis on the breadth of § 12-821 necessarily defeats that statute's application. Compared to § 12-821's broad application, § 35-212(E) narrowly applies only to public monies claims by one litigant, the AG. That narrower application, and § 35-212(E)'s more recent enactment, means that § 35-212(E) applies and § 12-821 doesn't. *See In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157 (1997) (applying statute that "covers a limited class (incapacitated or vulnerable adults) and limited causes of action (abuse, neglect, or exploitation). In contrast, the survival statute applies to all causes of action and all parties injured."). Moreover, the statute of limitations defense is "not favored," and "where two constructions are possible, the longer period of limitations is preferred." OB at 18.

ABOR also responds that "[h]ad the Legislature wanted to exempt A.R.S. § 12-821, it would have said so." AB at 29. But the Legislature did say so. ABOR can only claim the absence of such a statement by misquoting § 35-212(E) as follows: "If the action is brought by the Attorney General . . . § 12-821.01 does not apply to the action." *Id.* The language ABOR omits is the five-year filing period for AG claims. ABOR also doesn't explain why the Legislature would call out § 12-821 when it wasn't just exempting the AG from that provision but also creating

a five-year filing period for all AG public monies claims, including claims against non-governmental defendants which, under A.R.S. § 12-510, would previously have had no filing period.

ABOR characterizes the five-year period as a statute of repose but doesn't explain why that matters. ABOR doesn't dispute that the five-year period conflicts with § 12-821's one-year period, and that if the five-year period applies, the AG's claim is timely. ABOR also doesn't explain why the Legislature cannot, or would not, replace a statute of limitations with a statute of repose. *See Jackson v. Am. Credit Bureau, Inc.*, 23 Ariz.App. 199, 203, (1975) ("The statute of limitations is a statute of repose[.]").

Finally, ABOR asks the Court to ignore that the Legislature exempted the AG's public monies claims from § 12-821.01, thereby confusingly leaving no statutory accrual standard under ABOR's interpretation. *See* A.R.S. § 12-821.01(B) (defining accrual). ABOR argues that § 12-821.01 sets forth the standard for a notice of claim, not the statute of limitations. But this Court has repeatedly identified § 12-821.01(B) as the accrual standard for limitations.[1] *See, e.g., Dube v. Likens*, 216 Ariz. 406, 411 n.1 (App. 2007); *Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214, 230 ¶59 (App.2008).

[1] Below, ABOR cited § 12-821.01(B) as "defining accrual" for the limitations period. R.71 at 7.

ABOR also asserts that removing the § 12-821.01(B) accrual standard creates no confusion because accrual for the AG's claims under § 35-212 will be governed by some universal common-law accrual standard. This might be true if a public monies claim was a common-law claim, as in ABOR's cited cases. *See Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, 90 ¶10 (App. 1999) (negligence); *Dube*, 216 Ariz. at 422 ¶4 (Suppl. Op.) (defamation). But § 35-212 creates a statutory cause of action, so a common-law standard is inapplicable. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (Ninth Circuit "erred in holding that a generally applied discovery rule controls this [statutory cuase of action]").

ABOR also wrongly implies there is one common-law accrual standard. In reality, accrual standards vary widely. A malpractice claim accrues "when the plaintiff knew or by the exercise of reasonable diligence should have known of the defendants' conduct." *Mayer v. Good Samaritan Hosp.*, 14 Ariz.App. 248, 252 (1971). But a conversion claim runs "at the time of the wrongful taking and not at the time of the discovery by plaintiff of the taking or of the identity of the taker." *Jackson*, 23 Ariz. App. at 201. Even a single cause of action can have different accrual standards. *Wheel Estate Corp. v. Webb*, 139 Ariz. 506, 508 (App. 1983) (accrual for breach of contract varies based on whether installment payments were made or the creditor accelerated the debt).

ABOR's response that the Legislature purposefully created confusion and left litigants guessing about accrual is unpersuasive. Instead, the Legislature provided a clear answer: a five-year limitations period applies, accruing on "the date an illegal payment was ordered." A.R.S. § 35-212(E); *see TRW*, 534 U.S. at 28 ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one.").

B. Count IV Relates Back To The Original Complaint.

The AG's public monies claim easily satisfies relation back under Rule 15(c)(1).[2] The AG's original complaint challenged the legality and tax structure of the Omni Transaction. The FAC, while adding a § 35-212 claim, still challenged the legality and tax structure of the Omni Transaction. Moreover, the AG's original claims are intertwined with the AG's added claim. If Omni has to pay property taxes, then Omni is no longer required to make "additional rent" payments, which directly impacts adequacy of consideration for the AG's Gift Clause claim. Similarly, if ABOR is acting *ultra vires* by leasing its tax exempt status to private developers, any payment ABOR makes for the Omni Transaction will be an illegal payment of public monies. *See* Part II(A)(1), *infra* (discussing *State ex rel. Woods v. Block*, 189 Ariz. 269, 274 (1997), which permits the AG to assert any ethically permissible argument to prevent illegal payment of monies and

[2] ABOR doesn't dispute that if the AG's claim relates back, it was timely.

recognizes AG may challenge lawfulness of Government action itself when that action will necessarily result in the payment of public monies).

ABOR attempts to avoid Rule 15(C)(1) relation back through a "same evidence" test mentioned by the Ninth Circuit. That attempt fails.

No Arizona case adopts a "same evidence" requirement. Instead, Arizona takes a broad view of relation back: "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." *Marshall v. Super. Ct.*, 131 Ariz. 379, 383 (1982). ABOR acknowledges that a "same evidence" requirement would change the law, suggesting the Arizona Supreme Court has "depart[ed] from state precedent under Arizona Rule of Civil Procedure 15(c) to follow new federal precedent" and that this Court should too. AB at 41. This Court, however, can't revise the Supreme Court's interpretation. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420 ¶13 (2008).

Similarly, a "same evidence" requirement would be a-textual. *Ariz. Dept. of Revenue v. Super. Ct.*, 189 Ariz. 49, 52 (App. 1997) ("Rules of procedure are also interpreted by their plain meaning."). Arizona courts don't use federal decisions to interpret rules when the resulting standard would differ from the current standard,

as would happen with a "same evidence" requirement. *See Cullen*, 218 Ariz. at 419 ¶8 (rejecting federal interpretation of Rule 8).

Regardless, the Ninth Circuit's relation-back standard is more relaxed than ABOR would lead this Court to believe. The Ninth Circuit has explained that "once litigation has been commenced, an opposing party is on notice that the pleading party may subsequently raise any claims or defenses that form part of the same conduct, transaction, or occurrence as the original pleading." *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1005 (9th Cir. 2014). The facts and relief alleged "can and should be sorted out through later discovery and amendments to the pleadings." *Id.* at 1006. Parties shouldn't fear that limiting claims and defenses to those with evidentiary support "will foreclose them from amending their pleadings if new facts come to light after further investigation and discovery." *Id.* Thus, the Ninth Circuit allowed relation back of allegations expressly excluded from an original pleading. *Id.* at 1005-07.

Count IV satisfies any "same evidence" requirement. The supporting evidence for Count IV will overlap with the evidence supporting Counts I-III—documents and communications leading to the Omni Transaction and the resulting transactional documents. ABOR admits as much—it lists facts it anticipates the AG will use to prove his public monies claim, each of which ABOR admits stems from "the terms of the Omni Deal." AB at 45. Count IV itself overlaps with the

AG's original claims—as explained, those claims impact the AG's public monies claim and vice versa—and thus the evidence will also overlap. Tellingly, ABOR doesn't address this reality.

ABOR was also on notice. The original complaint was centrally a challenge to the legality and structure of the Omni Transaction, putting ABOR on notice that the AG might further challenge the legality of payments stemming from that transaction. ABOR has never argued that it was unfairly prejudiced by Count IV's inclusion *as of right* under Rule 15(a)(1)(B).

Instead, ABOR takes inconsistent positions. To support its accrual defense, ABOR claims the AG knew he had a Gift Clause claim merely because the AG knew "what the Board was 'expending' and what Omni was 'receiving' before April 3, 2018." AB at 36. If the Court accepts that argument, then ABOR, as the party entering the Omni Transaction and possessing the deal documents, also was unquestionably on notice of a Gift Clause claim. Omni even admitted to the AG that it was concerned about a Gift Clause claim prior to the filing of that claim. R.82 ¶187.

ABOR's cases don't help its cause. ABOR principally relies on *Echlin v. Peacehealth*, 887 F.3d 967, 978 (9th Cir. 2018). There, the court refused relation back after the plaintiff didn't move for leave to amend or argue relation back. Moreover, the new allegations were contrary to those in the original complaint.

Echlin was also a different conduct case—the court unsurprisingly concluded that taking a general role in a collections process is conduct distinct from later making specific representations in a collections letter. Neither the procedural posture here nor the AG's claim is anything like that in *Echlin*.

ABOR's other cases are similarly unhelpful. *See Supreme Auto Trans., LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 741 (7th Cir. 2018) (rejecting relation back for claim added nine years into litigation; original complaint involved "the indirect purchase of steel pipes, tubing, and sheets," and new claim involved "the purchase of washing machines, cars, [and] swimming pools"); *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001) (rejecting relation back for claim added two years into litigation because "the proposed amendment alleged retaliation based on an entirely distinct set of protected employee activity"); *Caron v. NCL (Bah.), Ltd.*, 910 F.3d 1359, 1368 (11th Cir. 2018) (rejecting relation back because over-serving alcohol and failing to maintain the physical condition of a ship are "separate and distinct conduct"); *Barnes v. Vozack*, 113 Ariz. 269, 272 (1976) (allowing relation back, without analyzing "same evidence," where a new statutory claim and an existing common law claim arose from the same transaction—the sale of stock).

C. Count IV Hadn't Accrued By April 3, 2018.

If this Court rejects the arguments in Parts I(A)-(B), it should conclude 1) as a matter of law Count IV didn't accrue prior to April 3, 2018 (warranting summary

judgment for the AG), or 2) there's a factual dispute, precluding summary judgment.

First, no breach or injury has occurred, so no statute of limitations started. OB at 25 (citing *Canyon Del Rio Investors, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 341 ¶19 (App. 2011), and five other cases). ABOR doesn't dispute that Omni hasn't yet exercised the Option Agreement nor has ABOR made any payment to Omni. Without authority, ABOR nonetheless bases accrual on the AG's request for injunctive relief with Count IV. The plaintiff in *Canyon* similarly brought a coercive claim for damages. This Court held that the coercive claim was **premature** because no breach or injury had occurred, but that the plaintiff's declaratory judgment claim could still proceed. If anything, therefore, ABOR's argument merely means the AG's injunction claim is premature, but that doesn't mean (contra *Canyon* and five other cases) that the AG can't obtain declaratory relief in the interim.

Second, the AG didn't possess sufficient knowledge to start the clock. The Omni Transaction didn't exist until the Option Agreement was executed on February 28, 2018. Thus, the AG's claim is timely unless he "realized [the State] . . . ha[d] been injured" during the 34 days between February 28 and April 3, 2018 (one year before the FAC). *See Long v. City of Glendale*, 208 Ariz. 319, 325 ¶11 (App. 2004). ABOR argues the AG knew the Omni Transaction existed, knew the

Omni Transaction involved "payments in lieu of taxes," and believed those payments might violate the Gift Clause. But ABOR misstates the record. As sole support for the AG's supposed belief that "in lieu" payments might violate the Gift Clause, ABOR cites deposition testimony regarding the Attorney General's Office's ("AGO") view **at the time of the deposition in August 2019** whether the Omni Transaction will violate the Gift Clause even if "in lieu" payments are valid consideration. R. 75 ¶97. By that time, AGO had received the Option Agreement and uncovered other unlawful aspects of the Transaction (discussed below). ABOR has no evidence that AGO, prior to April 3, 2018, believed the Omni Transaction would violate the Gift Clause even if "in lieu" payments are consideration.[3]

March 2019, when AGO received the Option Agreement, was the first time AGO could analyze the consideration, or lack thereof, ABOR will receive for doling out millions to construct a conference center and parking spaces for Omni's benefit. It was the first time AGO could know that Omni is permitted at nearly any

[3] ABOR claims the AG knew about the Omni Transaction in 2017 because one member of AGO attended a capital review meeting at the Legislature. That employee, who represents the State in liability management matters, was waiting for the next meeting to begin. R.82 ¶180. He was also screened from communicating with the AG about ABOR matters, and thus monitoring ABOR's spending was *not* "important in the act which [he was] authorized to perform." *See Sears Roebuck & Co. v. Jackson*, 21 Ariz. App. 176, 180 (1973) (imputation of knowledge requires subject matter be important to act agent is authorized to perform).

time to purchase the property and improvements for only $10. And it was the first time AGO could fully understand just how blatantly ABOR and Omni had structured the Transaction to help Omni evade property taxes (significantly reducing any chance "in lieu" payments will be realized). *See Turken v. Gordon*, 223 Ariz. 342, 348 (2010).

ABOR also responds that the limitations period started because AGO should have obtained the Option Agreement sooner. But ABOR can't establish as a matter of law that AGO should have (1) learned that the Option Agreement had been executed, (2) obtained the Option Agreement through a public records request, and (3) reviewed and analyzed the Agreement to "realize" the State had been injured, all within the 34-day period between February 28 and April 3, 2018. At best for ABOR, whether AGO should have done so is a jury question. *See Doe v. Roe*, 191 Ariz. 313, 324 ¶36 (1998).

In sum, this Court should either reverse and enter summary judgment *for the AG* on the timeliness of Count IV or vacate and remand due to a factual issue.

D. The State's Claim Against Creer Was Timely.

The AG brought a single claim under § 35-212 against ASU VP John Creer ("Creer"). That claim was timely for the same reasons explained above (five-year period in § 35-212(E); no breach or injury has yet occurred; and the AG didn't "realize" injury before April 3, 2018).

If the Court rejects these arguments, it should remand for further factual development as to Creer, not affirm dismissal on the alternative ground that the claim was untimely (as Creer now urges). Because Creer was dismissed under Rule 12, the State had no opportunity to develop a factual record about Creer's knowledge of this lawsuit prior to joinder or whether he knew or should have known that he could become a defendant once AGO obtained a copy of the Option Agreement. *See* Ariz. R. Civ. P. 15(c)(2)(B); *Rhoads v. Harvey Publ'ns, Inc.*, 131 Ariz. 267, 269 (App. 1981) (court shouldn't affirm summary judgment on alternative grounds not developed unless "no conceivable facts" allow non-moving party to prevail).

II. THE TRIAL COURT ERRED IN DISMISSING COUNTS I-III AGAINST ABOR AND COUNT IV AGAINST CREER.

This Court should also reverse dismissal of Counts I-III against ABOR and Count IV against Creer because the AG has authority to bring these counts and they state valid claims.

A. The AG Has Standing To Bring Counts I-III.

1. The AG Has Authority Under § 35-212.

Section 35-212 authorizes the AG to assert claims against ABOR and Creer for the illegal payment of public monies, ***including*** Counts I-III. *See* A.R.S. § 35-212(A). Once the AG brings a claim under § 35-212, he has "the authority to press any ethically permissible argument he deems appropriate to aid him in preventing

the allegedly illegal payment of public monies[.]" *State ex rel. Woods v. Block*, 189 Ariz. 269, 274 (1997). He can also challenge a governmental entity's ability to enter a transaction because that "necessarily includes" a challenge to prohibit payment for the transaction. *See id.* ABOR doesn't dispute this authority.

The trial court didn't address the AG's authority under § 35-212, because ABOR didn't challenge that authority. ABOR now contends that § 35-212 doesn't grant the AG authority "to bring an entirely separate claim that does not seek to recover or prevent an illegal payment." AB at 28. Even if true, that isn't what the AG is doing. Instead, each of the claims and legal theories included in the FAC "seek to prevent an illegal payment." The AG's claim that ABOR is acting without authority under A.R.S. § 15-1625(B)(4) challenges payments for an *ultra vires* (i.e., illegal) transaction. *See Woods*, 189 Ariz. at 274. The AG's claim that ABOR is unconstitutionally conveying property to evade property taxes challenges payment for an unconstitutional transaction (just as the AG's Gift Clause claim does). And the AG's other tax-exemption claim directly relates to his Gift Clause claim: if the property is taxable, Omni's "in lieu" rent payments vanish, which impacts adequate consideration for the Gift Clause claim.

The AG also has standing under A.R.S. § 41-193(A)(2), which allows the AG to "prosecute and defend any proceeding in a state court . . . in which the state or an officer thereof is a party or has an interest." In *Arizona State Land*

Department v. McFate, the Supreme Court held only that this provision doesn't grant the AG authority to initiate an action. 87 Ariz. 139, 148 (1960). But once the AG initiates an action, including under § 35-212, he can "prosecute" claims under § 41-193 and has the power to assert additional legal theories. *Fund Manager v. Corbin*, 161 Ariz. 348, 354 (App. 1988) (AG could assert claims "in the process of exercising his specific statutory powers [under § 35-212]"). Thus, *McFate* doesn't impact the AG's authority under § 35-212—in conjunction with § 41-193 or not—to initiate this action and assert additional legal theories.

2. The AG Has Authority Under The Quo Warranto Statute.

Arizona's quo warranto statute also gives the AG authority to initiate this action: a "[quo warranto] action may be brought . . . by the attorney general in the name of the state upon his relation[.]" A.R.S. § 12-2041(A) (emphasis added); *see also McFate*, 87 Ariz. at 144 (§ 12-2041 grants AG authority to initiate).

ABOR doesn't dispute the AG can initiate a claim under § 12-2041(A). ABOR claims the AG can't here because ABOR isn't exercising a "franchise" and the quo warranto statute only authorizes claims challenging whether a person is lawfully holding an office. Neither argument is valid.

ABOR exercises a "franchise" because it is a body corporate exercising special privileges from the Legislature. *See Leatherwood v. Hill*, 10 Ariz. 243, 249 (1906) (defining "franchise"). The Legislature has granted ABOR the privilege of

managing Arizona's public universities. *See* A.R.S. §§ 15-1625, 1626. ABOR exists as "a body corporate with perpetual succession" independent of the State. *Id.* § 15-1625(A). That the State exercises some control over ABOR and that ABOR exercises certain governmental functions doesn't mean it's not a franchise. All "franchises" have those characteristics.

ABOR claims it's a "state agency," so it can't be a franchise. ABOR doesn't explain why a state agency can't also be a franchise. To the contrary, "[a] state agency is created only after the legislature delegates 'the responsibility of performing a governmental function' to a particular entity." *Pima Cty. v. Clear Channel Outdoor, Inc.*, 212 Ariz. 48, 50 ¶7 (App. 2006). So the definition of a state agency aligns closely with the definition of a franchise. The two are not mutually exclusive—a franchise such as ABOR is one type of state agency. Regardless, the AG has authority to challenge the exercise of "any public office or any franchise within this state." A.R.S. § 12-2041(A). Even if a state agency can't be a "franchise," ABOR is still unquestionably exercising a "public office." So the AG can challenge ABOR's exercise of authority under § 12-2041. *See Woods*, 189 Ariz. at 275 (AG can use quo warranto to prevent the Constitutional Defense Council, an executive agency, "from exercising their purported powers"); *Ahearn*

v. Bailey, 104 Ariz. 250 (1969) (quo warranto to challenge the Industrial Commission, a state agency).[4]

ABOR also responds that quo warranto doesn't include challenges to a franchise's authority. ABOR ignores the statutory language, which grants the AG authority to challenge the "exercise[] [of] any public office or any franchise within this state."[5] A.R.S. § 12-2041(A) (emphasis added). The term "exercise" isn't limited to the act of holding office; it includes the broader issue of how one uses that office. *Exercise*, BLACK'S LAW DICTIONARY 595 (7th ed. 1999) (defining "exercise" as "[t]o make use of"). If the legislature desired to limit the statute, it would have said only "unlawfully holds," not "unlawfully holds or exercises." ABOR's interpretation renders "or exercises" superfluous. *See Grand v. Nacchio*, 225 Ariz. 171, 175–76, ¶22 (2010).

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[4] ABOR fears the AG's interpretation means quo warranto will cover much of Arizona's government, including the attorney general. AB at 16 n.4. But quo warranto already covers much of Arizona's government, including the attorney general. *See State ex rel. DeConcini v. Sullivan*, 66 Ariz. 348, 350 (1948) (quo warranto successfully challenging authority to exercise the powers of the attorney general).

[5] Instead of the statutory language, ABOR relies on a treatise, which cites only one decision from the Illinois Court of Appeals. *See* 74 C.J.S. *Quo Warranto* § 11. But Illinois law is inconsistent with Arizona law on the scope of quo warranto. *Compare People ex rel. Farrington v. Whitcomb*, 55 Ill. 172, 176-77 (1870) (rejecting that quo warranto could be used to challenge annexation), *with State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 365 (1967) (quo warranto action used to challenge annexation).

ABOR also claims that no party in Arizona has ever used quo warranto to challenge the use of a public officer or franchise. In reality, such examples abound. *See, e.g.*, *Parnell v. State ex rel. Wilson*, 68 Ariz. 401, 405 (1949) ("The writ of quo warranto likewise constitutes a direct attack upon the jurisdiction of the board[.]"); *City of Scottsdale v. McDowell Mountain Irr. & Drainage Dist.*, 107 Ariz. 117, 120-21 (1971) (quo warranto challenging Scottsdale's power to incorporate a water district); *Downey*, 102 Ariz. at 365 (quo warranto challenging Board of Supervisor's power to annex Paradise Valley); *State ex rel. Pickrell v. Town of Scottsdale*, 99 Ariz. 103, 104-06 (1965) (issuance of quo warranto when Scottsdale annexed land without authority); *McDonald v. Cochise Cty.*, 37 Ariz. 90, 96-99 (1930) (quo warranto challenging Board of Supervisor's authority to move county seat); *Faulkner v. Bd. of Supv'rs of Gila Cty.*, 17 Ariz. 139, 145 (1915) (quo warranto required to challenge Board of Supervisor's decision to incorporate Winkelman). ABOR is exercising its office or franchise in a manner in which it is not permitted. The AG has the power to challenge that use.

3. The AG Has Authority Under the Tax Enforcement Statute.

Arizona law also empowers the AG to "prosecute" all actions necessary to enforce tax laws. *See* A.R.S. § 42-1004(E). The Court shouldn't apply *McFate*'s flawed interpretation of the term "prosecute" to a statute naturally understood to include the initiation of proceedings, such as with enforcement of the tax laws. *See*

McFate, 87 Ariz. at 145 ("We recognize that the term 'prosecute' may in some situations, especially with reference to criminal actions, include the power to commence a proceeding . . . ."); *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 2019 WL 3941067, *4 ¶¶22-23 (Ariz. Ct. App. Aug. 20, 2019) (three judges agreeing that *McFate*'s interpretation of "prosecute" is flawed).

ABOR argues that the AG lacks authority under A.R.S. § 42-1004(E) because its property is exempt from taxation. (AB 18-24.) So ABOR contends the AG lacks standing because ABOR will win on the merits. Standing doesn't work this way—one can't defeat standing by arguing victory on the merits. Instead, to establish standing, a party need only allege particularized injury. *See Brewer v. Burns*, 222 Ariz. 234, 237-38 (2009) ("[D]efendants cannot defeat standing merely by assuming they will ultimately win."); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing "often turns on the nature and source of the claim asserted," but it "in no way depends on the merits"). The AG alleges (all that was required for a pleading) that ABOR claims a tax exemption where none exists and that ABOR and Omni plan to make conveyances to evade taxation. Those allegations give rise to authority under A.R.S. § 42-1004(E).

B. The AG Stated Claims For Relief Against ABOR.

1. The AG Stated A Claim That ABOR Is Not Authorized To Enter Into The Omni Transaction.

In the FAC, the AG alleged that (1) ABOR only has the power to enter into leases "for the benefit of this state and for the use of" public universities, and (2) neither the Omni Transaction nor its proceeds satisfy that requirement. For example, the AG alleged that ASU will use the conference center for only seven days per year, subject to availability and payment for food and drink. R.17 ¶100. ASU will also gift a large portion of a parking garage constructed with public funds. *Id.* ¶103-06. ABOR will not use or benefit from the proceeds of the Omni Transaction because those proceeds will construct a conference center later conveyed to Omni. *Id.* ¶99. The statutory language "for the use of" must be given meaning under superfluousness and constitutional-avoidance canons. OB at 40-42.

ABOR denied these allegations and, in the context of Rule 12, convinced the trial court to prejudge their merits and rule as a matter of law that the Transaction's proceeds will be "for the use of" the universities. ABOR now attempts to convince this Court to do the same: ABOR's primary defense of the trial court's ruling is that "[t]he lease will provide ASU with access to a conference center and the lease proceeds will fund Arizona's universities." AB at 22. That may be ABOR's position on the merits, but the AG alleges otherwise, which is all that is required at the pleading stage. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012).

At best for ABOR, whether the Omni Transaction falls within § 15-1625(B)(4) is a fact issue. *See Homebuilders Assoc. of Cent. Ariz. v. City of Scottsdale*, 183 Ariz. 243, 248 n.6 (App. 1995) ("[T]he benefit question is an issue of fact involving broad policy or public welfare considerations."); *Pimalco, Inc. v. Maricopa Cty.*, 188 Ariz. 550, 560 (App. 1997) ("The pertinent question is whether the refund would disproportionately outweigh the public benefit from the statute. This is a question of fact[.]"). The AG is, therefore, entitled to discovery on the "use/benefit" issue and to develop and present evidence to the factfinder.[6]

2. The AG Stated A Claim That ABOR Entered A Conveyance To Evade Taxation.

The economic substance of the Omni Transaction is that Omni will <u>own</u> the Hotel and Conference Center during the "lease." Omni will make an up-front lease payment meant to approximate the purchase price of the land. Omni will have full use and benefit of the property as if it is the owner, including any net profits. Omni will be permitted to depreciate the property on its tax returns. Omni can then convert the lease to a sale at lease end, or earlier, for $10.

But two problems prevented ABOR from accurately labeling the conveyance a sale: (1) if Omni buys land from ABOR, Omni pays property taxes, and (2) if Omni constructs and holds title to new improvements on ABOR land, Omni pays

[6] ABOR relies on the political question doctrine, but doesn't address any of the arguments why that doctrine is inapplicable. OB at 53-56.

property taxes. So ABOR and Omni hatched a plan to allow Omni to disguise that it will own the land and improvements, while funneling tax funds to ABOR. The scheme goes like this: First, call the land conveyance a "lease," not a sale, so ABOR keeps title. After Omni constructs new improvements, convey title to ABOR. The land and improvements will then be shielded from taxes using ABOR's purported tax exempt status. Meanwhile, pay ABOR the amount that Omni would otherwise pay for property taxes. Characterize those payments as "in lieu" rent to make the conveyances appear more "lease" like. Next, use the "in lieu" payments to build a private conference center, which ASU can "use" (still paying for food) only seven days per year during the "lease." Then, deed the property, including the conference center built with public funds, to Omni for a nominal sum at "lease" end (or sooner if the County or courts call ABOR on the scheme).

All this, in the FAC, states a claim for violation of Article 9, section 2(12) of the Arizona Constitution, which provides that "[n]o property shall be exempt which has been conveyed to evade taxation." In fact, the Arizona Supreme Court has held that a lease conveyance structured similar to the Omni Transaction is a purchase. *See City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Assoc.*, 99 Ariz. 270, 287 (1965) ("[T]he City not only receives the use of the property during the term thereof, but it receives all of the net profits therefrom,

should there be any, and the property itself at the end of the lease. So the property is part of the consideration included in the lease payments as well as the use thereof during the term. The agreement therefore amounts to nothing more than a purchase agreement.").

The trial court ignored the AG's evasion claim in dismissing Counts I-III. ABOR's only defense of that ruling is that its land has not been on the tax rolls for some time, so the Omni Transaction will not remove it from the tax rolls. AB at 21-22. This mischaracterizes the AG's claim and would render the evasion limitation meaningless. ABOR is selling the land to Omni and Omni is building new improvements, so both the land and improvements should be on the tax rolls. ABOR is artificially retaining title to the land and taking title to the improvements (which don't currently exist and aren't on the tax rolls) to keep both off of the tax rolls (*i.e.*, to evade taxation). ABOR can't do so without violating the Arizona Constitution. *See City of Phoenix*, 99 Ariz. at 293 ("We cannot make constitutional limitations meaningless by judicial circumvention in order to assist the City in acquiring a civic auditorium and convention center, no matter how desirable it might be.").

3. The AG Stated A Claim That The Hotel And Conference Center Aren't Tax Exempt.

To be exempt, ABOR's property must be "used for education and not used or held for profit." A.R.S. § 42-11104(A); Ariz. Const. art. IX, § 2(2). The AG

pled that the Hotel and Conference Center won't qualify, and ABOR doesn't respond otherwise.

Instead, ABOR relies on the tax exemption in Article IX, section 2(1), which provides that "[t]here shall be exempt from taxation all federal, state, county, and municipal property." ABOR claims that it is the "state."

No Arizona court has addressed whether ABOR is the "state" in article IX, section 2(1). But the Arizona Supreme Court has come close; it held that ABOR isn't the "state" under Article IX, section 5, just three sections away from section 2. *See Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 257 (1935). Article IX, section 5 says that the "state" may contract debts but for no more than $350,000. According to ABOR, "state" in section 2 has a different meaning than "state" in section 5, such that Arizona's framers used two different meanings for "state" within three sections of one another. But ABOR provides no explanation how a constitutional term can rapidly transform meaning like this (because it can't). *See Obregon v. Indus. Comm'n*, 217 Ariz. 612, 616 ¶21 (App. 2008) ("[I]dentical words used in different parts of the same Act are intended to have the same meaning.'").

The Supreme Court's holding in *Sullivan*, which ABOR used to issue substantial amounts of debt, is consistent with *Industrial Development Authority of County of Pima v. Maricopa County*, 189 Ariz. 558 (App. 1997). There, this Court

held that property was not "'state' property within the meaning of article 9, section 2(1)" because the governmental entity could not be the "state" if it had the power to issue debt (i.e., bonds). *See id.* at 559-60.

That decision makes sense. As in *Sullivan*, issuing debt implicates the state's constitutional debt limitation. *See* Ariz. Const. art. IX, § 5. If an entity isn't the "state" for debt issuance purposes (§ 5), it can't be the "state" for property tax exemption purposes (§ 2) when the two provisions reside so closely.[7] Add in that ABOR holds title in its own name, can sue and be sued, is run by an independent board, and is solely responsible for its own debt, and ABOR clearly is not the "state" under article IX. *See Tucson Transit Auth. v. Nelson*, 107 Ariz. 246, 252 (1971) (entity not exempt under article IX, section 2(1) where it, like ABOR, held title in its own name, was responsible for its own debt, and had an independent board). ABOR's property, therefore, is not automatically exempt.

To respond otherwise, ABOR quotes a footnote comment this Court once made about university hospital property being treated as tax exempt. The opinion making that comment didn't address whether the term "state" in section 2(1) includes ABOR. *See Univ. Med. Ctr. v. Dep't of Revenue*, 201 Ariz. 447, 448 ¶1 (App. 2001). The Court didn't even explain who had treated that hospital property

[7] As explained, most of ABOR's property will still be tax exempt under article 9, section 2(2)—just as with public school districts.

as exempt (perhaps ABOR?). The Court certainly didn't say it had treated ABOR's property as exempt. Regardless, in the footnote, the Court also said the case didn't concern section 2(1). *Id.* at 452 ¶22 n.5. Instead, the Court analyzed the educational-use exemption in section 2(2); it wouldn't have done so if section 2(1) instead applied. *See id.* at 452 ¶21 (interpreting the statute to "conform[] the statutory exemption to the limitation imposed by Article 9, Section 2(2) of the Arizona Constitution").

ABOR also relies on *City of Tempe v. Del E. Webb Corp.*, 13 Ariz. App. 597 (1971) and *City of Tempe v. Arizona Board of Regents*, 11 Ariz. App. 24 (1969). Those are intergovernmental regulation cases, establishing only that ABOR is immune from local authority when performing a governmental function. *See Del. E. Webb*, 13 Ariz. App. at 598-99; *City of Tempe*, 11 Ariz. App at 25-26. That line of cases is of no interpretive help. The Supreme Court has held that cities are immune from regulation by other cities (same as ABOR). *See City of Scottsdale v. Mun. Ct. of the City of Tempe*, 90 Ariz. 393, 398-99 (1963). But no one would argue that converts cities into the "state." On the other hand, being a state agency doesn't guarantee immunity. *See Book-Cellar, Inc. v. City of Phoenix*, 150 Ariz. 42, 44 (1986) (city could regulate property used as fairgrounds despite that the entity regulated "is a subdivision of the State of Arizona"). So whether ABOR is immune from local regulation reveals nothing about whether it is the "state" under

article IX, section 2(1). *See Indus. Dev. Auth. of Cty. of Pima*, 189 Ariz. at 560 (rejecting an argument "that article 9, section 2(1) confers intergovernmental tax immunity rather than exemption from taxation").

C. The AG Stated A Claim Against Creer.

The AG named Creer in Count IV seeking declaratory and injunctive relief because he's the ASU employee responsible for the Omni Transaction, ensuring that Creer and those in concert with him at ASU are bound by any judgment. OB at 50-52.

Creer argues that the AG can't state a viable claim against him because he was merely an agent acting in his official capacity. Creer is wrong. *See* Restatement (Third) of Agency § 7.01 (2006) ("[A]n actor remains subject to liability although the actor acts as an agent or an employee . . . or within the scope of employment."). Moreover, Creer cites no rule restricting the AG from naming all, or just some, of those involved in an illegal transaction to ensure that any provisional relief obtained is binding (rather than trusting compliance with Rule 65(d)). The Legislature gave the AG the express power to name Creer. *See* A.R.S. § 35-212. And it was prudent for the AG to do so because Creer executed amendments to the Option Agreement even after suit was filed. R.17 exhs. 4-7.

The AG also is not retroactively applying any statute. Since the mid-80's, the AG has had the power to enjoin the illegal payment of public monies. *See*

A.R.S. § 35-212. This necessarily includes the power to enjoin individuals responsible for such payments. Moreover, recent amendments to § 35-212 merely expanded the remedies available to the AG, and retroactive application of remedial provisions is permitted (Creer has no response). OB at 51 n.17.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 8th day of September, 2020.

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