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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

State of Arizona, *ex. rel.* Mark Brnovich, Attorney General,

Plaintiff,

v.

Arizona Board of Regents,

Defendant.

No. CV2017-012115

MOTION TO DISMISS NUMBER 1 (ATTORNEY GENERAL'S LACK OF AUTHORITY)

(Assigned to the Hon., Connie Contes)

Arizona courts have made clear for decades that Arizona's Attorney General (the "AG") does not have a roving mandate to file suits whenever he or she feels it necessary. Rather, the AG only has the power to file suit when the Legislature provides a *specific grant of statutory power* to do so. Here, no statute authorizes this lawsuit by the AG against the Arizona Board of Regents ("ABOR"). As a result, dismissal of the suit is required.

Argument

A. The AG Only Has the Power to File Suit When a "Specific Statutory Grant[] of Power" Allows It.

The AG does not possess the broad power to file suits to seek enforcement of the law as he or she sees fit. While "there are occasions on which the Attorney General may initiate proceedings on behalf of the State, and may even appear in opposition to a particular State agency . . . these instances are dependent upon *specific statutory grants of power*." *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 144, 348 P.2d 912, 915 (1960) (emphasis added); *see also State ex rel. Woods v. Block*, 189 Ariz. 269, 272, 942 P.2d 428, 431 (1997) ("[T]he Attorney General has no common law powers; whatever powers he possesses must be found in the Arizona Constitution or the Arizona statutes.") (citation omitted).

B. No Statute Authorizes the AG to File this Suit Against ABOR.

It naturally follows that the AG must rely on a "specific statutory grant[] of power" when bringing suit. *See McFate*, 87 Ariz. at 144, 348 P.2d at 915. Failure to do so requires dismissal. *See id.* at 148, 348 P.2d at 918 (entering writ of prohibition to bar further proceedings in the superior court). The one statute the AG relies on does not apply and there are no other statutes that authorize or allow this lawsuit.

1. The Statute Relied on By the AG in the Complaint, A.R.S. § 35-212, Does not Allow for this Suit.

Here, the AG claims to bring this suit pursuant to A.R.S. § 35-212. [Compl. ¶ 1] That statute provides that "[t]he attorney general in his [or her] discretion may bring an action in the name of the state to enjoin the illegal payment of public monies." A.R.S.

§ 35-212(a). But Section 35-212 cannot be read to authorize any of the AG's claims because *none* seek to "enjoin the illegal payment of public monies."[1]

Counts I through V of the Complaint do not concern any such "payment"; rather, those Counts only relate to the *collection* of money—namely, tuition. Moreover, the Complaint's request for relief does not seek a payment injunction with respect to those Counts. Rather, it seeks seemingly-omnibus "follow-the-law" injunctions: (a) prohibiting the Board from violating the Arizona Constitution, [*id*. at 19 (Prayer for Relief 1)], and (b) requiring the Board to fulfill its duties under Arizona law [*id*. at 20 (Prayer for Relief 2)]. As discussed, Section 35-212 does not provide the AG a broad commission to file suits seeking these sorts of generalized injunctions, none of which seek to enjoin any "payment of public monies."

Section 35-212 is equally inapplicable to Count VI. In that Count, the AG appears to claim that collecting allegedly-subsidized tuition from resident students who reside in Arizona and who qualify for Deferred Action for Childhood Arrival ("DACA") is an illegal "payment of public monies" because the universities should have collected *more* money from these students by charging them out-of-state tuition. But that argument fails because the *collection* of tuition is not a "payment" for purposes of Section 35-212. *See Biggs v. Cooper*, 234 Ariz. 515, 522, ¶ 19, 323 P.3d 1166, 1173 (App. 2014), *aff'd in part, vacated in part sub nom. Biggs v. Cooper ex rel. Cty. of Maricopa*, 236 Ariz. 415, 341 P.3d 457 (2014) ("[T]he collection of funds authorized by . . . statute does not establish any identifiable payment that may be prevented or recovered."). Notably, the AG's request for injunctive relief as to DACA students seeks an order requiring the Board "to sequester an amount of public monies equal to the amounts that are being paid to

[1] "Public monies" is defined to include "all monies coming into the lawful possession, custody or control of state agencies, boards, commissions or departments . . . irrespective of the source from which, or the manner in which, the monies are received." A.R.S. § 35-212(b).

subsidize DACA students" but, like Counts I-V, never identifies any "payment" to be enjoined. [Complaint 20 (Prayer for Relief 3)]

The AG's failure to identify any illegal "payment" to be enjoined requires dismissal of this suit.

2. The Statute Relied on by the AG in a Similar Suit Against the Maricopa County Community College District Does Not Apply Here.

Apart from Section 35-212, the AG does not cite any statutory authority for his Complaint. One statute (not cited in the Complaint) that potentially could furnish this authority under certain conditions is A.R.S. § 41-193(A)(2). The AG relied on that statute when he filed a more limited suit (about tuition for DACA students) against the Maricopa County Community College District. *See State ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.* ("*MCCCD*"), 242 Ariz. 325, 395 P.3d 714 (App. 2017). But, like Section 35-212, this statute is also inapplicable here.

Section 41-193(A)(2) provides that the Department of Law may "[a]t the direction of the governor or when deemed necessary by the attorney general, prosecute and defend any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest." But that statute does "not permit the Attorney General, in the absence of specific statutory power, to initiate an original proceeding." *See McFate*, 87 Ariz. at 145, 348 P.2d at 916. Otherwise, Section 41-193(A)(2) would swallow whole the longstanding rule that the AG must rely on a "specific statutory grant[] of power." *Id*. at 144, 348 P.2d at 915.

Where, as here, no specific statute authorizes the AG's action, Section 41-193(A)(2) may authorize such an action only when the Governor has directed enforcement by the AG. That was the case the last time the AG relied on this power to sue over tuition. *See MCCCD*, 242 Ariz. ¶ 10, 395 P.3d at 719 (noting such direction existed where then-

Governor Brewer directed the AG to take "all legal actions" to enforce the laws about aliens' eligibility for in-state tuition benefits). But that approval does not exist here.

In fact, instead of *directing* a lawsuit to be filed against ABOR, Governor Ducey has publicly stated that the Complaint is meritless. Specifically, Governor Ducey said that the tuition rates set by ABOR are Constitutional, undercutting the fundamental premise of Counts I-V. *See* Howard Fischer, *Ducey stands by ABOR, says tuition rates are constitutional*, ARIZONA CAPITOL TIMES (Sept. 14, 2017), attached hereto as Exhibit A ("[T]he governor said he believes the regents, in setting tuition . . . are keeping the cost of instruction within what the constitution requires."). Governor Ducey likewise stated that "those in the [DACA] program should be able to attend state universities by paying the same tuition charged to other Arizona residents" *id*., undercutting Count VI of the Complaint. Far from authorizing this suit, Governor Ducey instead criticized its filing. *Id*. ("[Ducey] also took a slap at the attorney general for seeking to resolve the issue by filing suit—and doing so without first talking to the regents."). As a result, although the AG may have relied on Section 41-193(A)(2) when suing the Maricopa County Community College District, he cannot similarly rely on that Statute for the present case. Unlike *MCCCD*, here the Governor has not authorized suit.

Conclusion

Neither the Legislature nor Governor has authorized this suit. To allow the AG to move forward here would upend decades of precedent holding that "whatever powers [the AG] possesses must be found in the Arizona Constitution or the Arizona statutes." *Woods*, 189 Ariz. at 272, 942 P.2d at 431 (citation omitted). Because the AG lacks authority, this suit must be dismissed.

Dated: December 7, 2017

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Exhibit A

ARIZONA CAPITOL TIMES

Ducey stands by ABOR, says tuition rates are constitutional

By: Howard Fischer, Capitol Media Services September 14, 2017 , 2:26 pm

Gov. Doug Ducey chats Thursday with Sandra Watson, president of the Arizona Commerce Authority, ahead of the meeting of the board. (Photo by Howard Fischer/Capitol Media Services)

Arizona's three universities are in compliance with constitutional requirements to keep instruction "as nearly free as possible," Gov. Doug Ducey said Thursday, despite what Attorney General Mark Brnovich contends.

"Our universities are accessible and affordable," the governor said.

The governor said he and lawmakers had to make some difficult decisions in prior years, making sharp cuts in funding for higher education and other priorities. It is only recently that the state has started to restore some of those cuts.

What that means, he said, is that the Board of Regents is doing the best it can to keep tuition not only affordable but maintain a high level of education, with U.S. News and World Report saying Arizona State University is the No. 1 most innovative school in the country, "beating out MIT and Stanford."

"So by those metrics I think the universities are oasises of excellence," Ducey said. "And they are also quite a value."

More to the point, the governor said he believes the regents, in setting tuition — and even in imposing sharp increases during the past 15 years — are keeping the cost of instruction within what the constitution requires.

Ducey, in his comments Sept. 14, did more than disagree with Brnovich's conclusion that the tuition is unconstitutionally too high. He also took a slap at the attorney general for seeking to resolve the issue by filing suit — and doing so without first talking to the regents.

"I'm not a big fan of lawsuits," the governor said. "When I can I like to reduce the number of lawsuits rather than expand them."

And Ducey worried that, no matter what the results, the taxpayers could be the losers.

There was no immediate response from Brnovich.

Arizona Attorney General Mark Brnovich announces a lawsuit against the Arizona Board of Regents on Sept. 8. The suit alleges ABOR is not adhering to a constitutional requirement that tuition for residents attending state universities be "nearly as free as possible." (Photo by Katie Campbell/Arizona Capitol Times)

On a related note, Ducey said that, as far as he's concerned, those in the Deferred Action for Childhood Arrivals program should be able to attend state universities by paying the same tuition charged to other Arizona residents.

"I've always thought that a child that graduates from an Arizona high school is certainly an Arizona student and certainly should have access under in-state tuition inside our universities," he said.

But the governor acknowledged that view is complicated by the 2006 voter-approved law which prohibits the use of state dollars to subsidize the tuition of those who are not legally in this country. And the state Court of Appeals earlier this year said that includes DACA recipients, making in-state tuition off limits to them.

That case is on appeal to the Arizona Supreme Court.

Ducey said he agrees with President Trump, who just announced he would phase out the program and that the Obama administration acted illegally in creating the program in 2012. But the governor said he also agrees with Trump that the real solution not only to the question of tuition but the entire fate of the 800,000 "dreamers" in Arizona and 28,000 in Arizona should be "resolved by the action of Congress."

The governor said his belief that the universities are complying with the constitutional requirements for instruction to be "as nearly free as possible" is based on a 2007 Supreme Court ruling. In that case, the justices threw out a claim by some students that a 39 percent increase in tuition put the schools out of compliance.

"It's already been litigated and answered," Ducey said.

In actuality, the high court never decided whether the tuition hike passed constitutional muster. Instead, the justices said this was "a nonjusticable political question," with the size of each university's budget — and the amount of tuition that needs to be raised to support them — "left to the discretion of the board."

And the justices said that question of tuition is also determined by the amount of aid provided by the Legislature, something they said is totally within the purview of the elected lawmakers.

Ducey said that, from his perspective, the regents are doing the best they can — and acting legally — within the context of the state dollars available.

"We inherited a $1 billion deficit when we came into office," the governor said.

"The state's financial house was not in order," he continued. "We made some very difficult decisions in those first several years."

That included a $99 million reduction in state funding for universities in Ducey's first term in office, the largest single one-year cut in the schools' history.

Now, Ducey said, the state is no longer running a deficit "and we're able to invest again."

That investment, though, has been nowhere near what was taken.

For example, last year's budget provided an additional $32 million.

But there was less there than meets the eye, with just $8 million to restore general funding that was cut. And of the balance $19 million was one time funding that went away this current school year, replaced with $15 million in one-time dollars.

But Ducey said he remains committed to the idea that every student who wants a university education in Arizona has access to it.

“And I’m confident that they can,” he said.

While acknowledging the limited dollars for higher education, Ducey also defended the tax cuts he has pushed through the Legislature.

“It’s a balance of what we want to have in terms of an economic climate and what we want to have in terms of investment in universities,” he said.

He said they are paying off in new firms moving to Arizona from places like California.

“They’re coming here because of our business climate,” the governor said. “And they’re getting out of the high taxes and regulation of California.

Nor is Ducey going to ease up.

“We’re going to improve our tax situation and be lighter on regulation and grow jobs for our state and our citizens,” he said.

Issue: ABOR | BOARD OF REGENTS | DOUG DUCEY | DREAMERS | LAWSUIT | LEGISLATURE | MARK BRNOVICH | TUITION

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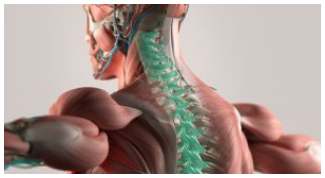

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November 4, 2017

Zachary Brooks

September 14, 2017 , 3:59 pm at 3:59 pm

It is a waste of taxpayer money to have the Attorney General spend tax payer money to sue ABOR who will use tax defend the lawsuit when all of that money should be going toward the universities.

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

State of Arizona, *ex. rel.* Mark Brnovich, Attorney General,

Plaintiff,

v.

Arizona Board of Regents,

Defendant.

No. CV2017-012115

MOTION TO DISMISS NUMBER 2 (COUNTS I-V PRESENT NONJUSTICIABLE POLITICAL QUESTION)

(Assigned to the Hon. Connie Contes)

Over a decade ago, the Arizona Board of Regents ("ABOR") was sued over tuition in this Court. Then, as now, plaintiffs claimed that tuition at Arizona's three universities violated the "as nearly free as possible" clause in article XI, section 6 of the Arizona Constitution. The Arizona Supreme Court affirmed this Court's dismissal of that suit because claims brought under the "as nearly free as possible" clause presented nonjusticiable political questions. *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 165

P.3d 168 (2007). *Kromko* reasoned that policy decisions about setting tuition rates were constitutionally entrusted to other branches of government—the Legislature and ABOR—and that there was no justiciable standard by which to second guess those policy decisions.

The same is true of the present case. Counts I-V of the Complaint allege that ABOR violated the "as nearly free as possible" clause because of its tuition-setting policy decisions. Under *Kromko*, those claims present nonjusticiable political questions. The only meaningful difference between Kromko and this case is that ten years ago the Attorney General (the "AG") defended ABOR and today the AG is suing ABOR—on substantially similar claims. While the AG's decision to sue its former (and current) client on substantially similar claims is itself problematic,[1] its about face does not change the law. As the AG successfully argued in Kromko, claims like those presented in Counts I-V here present nonjusticiable political questions.

Argument

A. *Kromko* Holds that Challenges Under the "As Nearly Free As Possible" Clause Present Nonjusticiable Political Questions.

In *Kromko,* state university students sued ABOR claiming that "the total amount of tuition charged . . . was excessive and thus violated the 'as nearly free as possible' provision in article XI, section 6, of the Arizona Constitution." *Id*. at 192 ¶ 10, 165 P.3d at 170. The Supreme Court affirmed dismissal of the claim because it involved a nonjusticiable political question. The Court reasoned that policy decisions about setting tuition rates are constitutionally entrusted to ABOR and the Legislature. *Id*. at 193 ¶ 13,

[1] At the very least, the substantial similarity of these matters raises significant questions under ER 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in . . . a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ."). Moreover, the AG presently represents ABOR in other matters, which raises concerns under ER 1.7(a) (prohibiting the representation of one client directly adverse to another client).

165 P.3d at 171. Further, there neither existed, nor could the Court conceive of, any "judicially discoverable and manageable standards . . . by which [courts] could decide such issues."[2] *Id*. at 194 ¶ 21, 165 P.3d at 172.

B. Like the Claims in *Kromko*, Counts I-V of the Complaint are Nonjusticiable.

Counts I-V of the Complaint raise *Kromko*-like claims under the "as nearly free as possible" clause article XI, section 6, of the Arizona Constitution:

- Count I alleges a violation because of the factors taken into account in setting tuition. [Compl. ¶¶ 54-67]
- Count II alleges a violation because tuition is charged at a greater rate per credit hour for part-time students. [Compl. ¶¶ 68-73]
- Count III alleges a violation because tuition is charged in greater amounts for online than in-person instruction. [Compl. ¶¶ 74-82]
- Count IV alleges a violation because tuition is charged at the same rate for online instruction for residents and non-residents. [Compl. ¶¶ 83-87]
- Count V alleges a violation because tuition is not charged separately from things like athletics, recreation, technology, and health care. [Compl. ¶¶ 88-92]

Under *Kromko*, these claims are nonjusticiable because they challenge *policy* determinations that have been entrusted to ABOR, and there exists no manageable standards by which this Court can resolve whether these decisions somehow violate the "as nearly free as possible" clause. 216 Ariz. at 193-94 ¶ 21, 165 P.3d at 171-72.

The AG suggests that this suit differs from *Kromko* because the Complaint only challenges the *methodology* by which ABOR sets tuition. As authority, the Complaint selectively quotes from an Opinion authored by the AG's own office eight years before *Kromko* was decided. [Compl. ¶ 20 (citing Ariz. Att'y Gen. Op. I99-011 (May 11, 1999)

[2] Following *Kromko*, the Arizona Supreme Court continues to look to these two factors in considering whether a case presents a political question. *See Brewer v. Burns*, 222 Ariz. 234 ¶ 17, 238, 213 P.3d 671, 675 (2009).

for the proposition that ABOR "has neither statutory nor constitutional authority to raise tuition solely in an attempt to be competitive with other public universities") [3]]

But the AG's attempt to differentiate this case from *Kromko* fails. *Kromko* found that challenges under the "as nearly free as possible" clause were nonjusticiable *precisely because* those challenges involved consideration of the sort of policy decisions that the AG challenges here. The Court observed that, in setting tuition, ABOR "mak[es] a series of *policy decisions* about the *quality of the state universities* and *the level of instruction* to be offered." *Kromko*, 216 Ariz. at 194 ¶ 18, 165 P.3d at 172 (emphasis added). Likewise, the Court held that "it is impossible to determine whether tuition is as nearly free as possible without also confronting two inextricably related issues" that the courts are ill suited to handle: "whether the Legislature appropriated sufficient money [and] . . . whether, in light of the amount actually appropriated by the Legislature, the Board of Regents adopted too expensive a budget or, in other words, whether the universities should offer educational services of a lesser number or quality than those chosen by the Board." *Id*. at 194 ¶ 20, 165 P.3d at 172. As to both questions, the Court held that "there is no North Star to guide a court in making such a determination; at best, we would be substituting our subjective judgment of what is reasonable under all the circumstances for that of the Board and Legislature, the very branches of government to which our Constitution entrusts this decision." *Id*. at 194 ¶ 21, 165 P.3d at 172.

Likewise, here, the AG does nothing more than challenge ABOR's "policy decisions about the quality of the state universities and the level of instruction to be offered." *Id*. at 194 ¶ 18, 165 P.3d at 172. Specifically, the AG attacks those policy

[3] The AG selectively quotes its own Opinion, which also stated that "[c]omparison with other public universities . . . may offer insight into the reasonableness of Arizona's resident tuition." Ariz. Att'y Gen. Op. I99-011 (May 11, 1999). That Opinion also made clear that "[o]ne of the circumstances that ABOR may consider when determining whether tuition is unreasonable are the tuition and fees at other public universities, although this factor may not be the sole basis for raising tuition." *Id*.

decisions by challenging the factors that ABOR takes into account in setting tuition generally [Compl. ¶¶ 54-67], for part time students [*id.* ¶¶ 68-73], and for online students [*id.* ¶¶ 74-82], and ABOR's pedagogical decision that things like athletics, recreation, technology and healthcare are attendant to a fulsome higher education [*id.* ¶¶ 88-92]. Under *Kromko*, these are nonjusticiable political questions because, in resolving them, the Court (at the AG's behest) would be doing nothing more than "substituting [its] subjective judgment of what is reasonable under all the circumstances for that of the Board and Legislature."[4] *Kromko*, 216 Ariz. at 194 ¶ 21, 165 P.3d at 172; *see also Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (declining to adjudicate what constitutes a "high quality" education because "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion"); *Danson v. Casey*, 399 A.2d 360, 366 (Pa. 1979) (declining to review statewide system of funding education against language in constitution requiring "thorough and efficient education" and thereby "bind future Legislatures and school boards to a present judicial view of [what is] constitutionally required").

Conclusion

The only thing that has changed since *Kromko* is that the AG has changed sides. As the AG convincingly argued ten years ago, Counts I-V of this Complaint should be dismissed because they present nonjusticiable political questions.

[4] While an assessment of the merits is outside the scope of this Motion, it is worth noting that Arizona residents pay less than actual cost and, in fact, today the average resident student at an Arizona public university pays a net tuition that is thousands of dollars less than base tuition and that, in real dollars, is actually less than the net tuition paid in 1985.

Dated: December 7, 2017

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

State of Arizona, *ex. rel.* Mark Brnovich, Attorney General,

Plaintiff,

v.

Arizona Board of Regents,

Defendant.

No. CV2017-012115

MOTION TO DISMISS NUMBER 3 (LEGISLATIVE IMMUNITY)

(Assigned to the Hon. Connie Contes)

The Attorney General's Complaint consists of sweeping, unprecedented challenges to tuition and fee setting policy decisions of the Arizona Board of Regents ("ABOR"). Specifically, the Attorney General claims that each of the following violate Arizona law: (1) the factors that ABOR takes into account in setting tuition [Compl. ¶¶ 54-67], (2) the

tuition ABOR set for part time students [*Id*. ¶¶ 68-73], (3) the tuition ABOR set for online students [*Id*. ¶¶ 74-82, 88-92], (4) ABOR's imposition of fees for athletics, recreation, technology, and health care, [*Id*. ¶¶ 88-92], and (5) the tuition ABOR set for certain students based on immigration status [*Id*. ¶¶ 93-98]. Each of these tuition-setting policies stems from an exercise of ABOR's *legislative* authority. The legislative quality of these actions immunizes ABOR from this suit. Indeed, the Attorney General recognized just that in *Kromko v. Arizona Board of Regents*, 216 Ariz. 190, 191, 165 P.3d. 168, 169 (2007), where it argued that ABOR was immune from suit over its tuition-setting function. Accordingly, this case should be dismissed.

Argument

A. Under Arizona Law, Legislative Immunity Broadly Protects Entities Acting in a Legislative Capacity.

Legislative immunity is a common law doctrine that "bars criminal and civil liability for legislative acts." *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 122, 290 P.3d 1226, 1245 (App. 2012). Common law legislative immunity is "similar in origin and rationale to" the constitutional immunity "accorded Congressmen" and state legislators "under the Speech or Debate Clause[s]" of the U.S. and Arizona Constitutions. *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) (citing U.S. Cont., art. 1, § 6, cl. 1); *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, 75 P.3d 1088, 1095 (App. 2003) (citing Arizona Constitution, art. IV, Pt. 2, § 7). Courts have employed common law legislative immunity to ensure that "legislative function[s] . . . may be performed independently without fear of outside interference." *Sup. Ct. of Va.*, 446 U.S. at 732; *Fields*, 206 Ariz. at 137, 75 P.3d at 1095 (noting that the privilege "support[s] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal").

Legislative immunity extends beyond the legislative branch. Arizona courts use "a 'functional' approach to determine who may assert the legislative privilege, which is not dependent on the manner of selection for office." *Fields*, 206 Ariz. at 138, 75 P.3d at 1096. And, "[a] public official" or entity "who acts in a legislative capacity may assert the legislative privilege regardless of his or her particular location within government." *Id.*; *see also id.* (applying privilege to a three-member commission). Put simply, "if an entity performs a legislative function, courts should regard that entity as a legislative body," entitled to legislative immunity. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 594, 208 P.3d 676, 683 (2009).

"Whether an act is 'legislative' depends on the nature of the act." *Fields*, 206 Ariz. at 138, 75 P.3d at 1096 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). Arizona courts have held that "[a]n act is legislative in nature when it bears the 'hallmarks of traditional legislation' by reflecting a discretionary, policymaking decision that may have prospective implications, as distinguished from an application of existing policies." *Id.* (quoting *Bogan*, 523 U.S. at 54-56). Additionally, "a legislative act occurs in 'a field where legislators traditionally have power to act.'" *Id.* (quoting *Bogan*, 523 U.S. at 56). In other words, if the legislature delegates its legislative authority to another government entity, that entity is entitled to legislative immunity in exercising its "delegated legislative powers." *Schmidt v. Contra Costa Cty.*, 693 F.3d 1122, 1132 (9th Cir. 2012).

B. Because ABOR's Tuition and Fee Setting Decisions Were Legislative Acts, ABOR Is Entitled to Legislative Immunity from those Acts.

The tuition and fee setting policy decisions the Attorney General now challenges are inherently "legislative" in nature and thus entitled to the protections of legislative immunity. This conclusion finds support in Arizona statutes, long-standing Arizona precedent, persuasive out-of-state authority and—quite notably—the Attorney General's own forceful advocacy in a 2004 brief in which it *defended* ABOR from similar claims by

raising ABOR's immunity. *See Kromko v. Ariz. Bd. of Regents*, No. 1-CA-CV 2004-0250, at 13-18, attached as Exhibit A (Attorney General's brief arguing that ABOR's tuition setting practices were cloaked in legislative immunity).

"The Legislature has delegated to the [ABOR] the power to '[f]ix tuitions and fees to be charged' at the state universities." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 191, 165 P.3d 168, 169 (2007) (quoting A.R.S. § 15-1626(A)(5)). And, ABOR is "required by law to adopt rules governing the 'tuition and fee setting process.'" *Id.* (quoting A.R.S. § 15-1626(A)(6)). Following this mandate, in setting tuition ABOR "make[s] a series of policy decisions about the quality of the state universities and the level of instruction to be offered." *Kromko*, 216 Ariz. at 194, 165 P.3d at 172. Accordingly, in setting tuition, ABOR makes a "discretionary, policymaking decision." *Fields*, 206 Ariz. at 138, 75 P.3d at 1096 (quoting *Bogan*, 523 U.S. at 54-56). It does not "merely implement an established . . . policy," but instead formulates policies that prospectively dictate tuition. *Fields*, 206 Ariz. at 138, 75 P.3d at 1096; *see also id.* (holding enactment of redistricting plan was legislative where, among other things, the plan had "prospective application").

That tuition-setting is an element of ABOR's budget process also supports the conclusion that ABOR's tuition and fee setting policy decisions in this case are legislative. ABOR is required to adopt annual operating budgets for state universities "equal to the sum of appropriated general fund monies and the amount of tuition, registration fees and other revenues approved by the board and allocated to each university operating budget." A.R.S. § 15–1626(A)(13). In other words, setting the cost of tuition is integral to ABOR's determination of the budgets for the state universities. *See Kromko*, 216 Ariz. at 194, 165 P.3d at 172 (discussing role of tuition in budget). Budget-making is indisputably a "quintessential legislative function," reflecting the "ordering of policy priorities in the face of limited financial resources." *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988)

(quoting *Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill. 1986)); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 471 (4th Cir. 2012) ("[W]e have no trouble concluding that enacting a budget is a legislative act."). This is true even when the budget is set by an executive. *See Bogan*, 523 U.S. at 55 (noting that mayor's introduction of a budget was "legislative" in nature).

Kromko v. Arizona Board of Regents, 213 Ariz. 607, 614, 146 P.3d 1016, 1023 (App. 2006), *opinion aff'd in part, vacated in part*, 216 Ariz. 190, 165 P.3d 168 (2007), is not to the contrary. Although the Court of Appeals rejected ABOR's immunity defense there, it did so based on reasoning that is inapplicable to the legislative immunity principle raised here. First, the court held that ABOR could not rely on the absolute immunity statute, A.R.S. § 12-820.01, because that statute was "intended to apply only to actions against public entities and public employees for money damages." *Zeigler v. Kirschner*, 162 Ariz. 77, 84, 781 P.2d 54, 61 (App. 1989). Unlike in *Kromko*, ABOR does not base its entitlement to immunity on A.R.S. § 12-820.01. Second, in *Kromko*, the Court of Appeals rejected an argument that ABOR was immune from suit based on the "concept of separation of powers," *Kromko*, 213 Ariz. at 615, 146 P.3d at 1024. That too is an argument ABOR has not raised here. Critically, the Court of Appeals in *Kromko* did not address the argument, raised now, that *common law legislative immunity* extends to ABOR's funding decisions. Regardless, the Arizona Supreme Court ultimately "vacate[d] the opinion of the Court of Appeals insofar as it held that the complaint against [ABOR] should not have been dismissed." *Kromko*, 216 Ariz. at 195, 165 P.3d at 173.

There's no question but that had the Legislature (as opposed to ABOR) made the tuition setting decisions that the Attorney General now challenges, the Legislature would be immune from suit. The same result should now extend to ABOR, given that the Legislature expressly delegated tuition-setting authority to ABOR. Because ABOR acted in a legislative capacity in instituting the tuition-setting policies challenged by the

Attorney General in this lawsuit, it is immune from suit. *See Fields*, 206 Ariz. at 139, 75 P.3d at 1097.

Conclusion

The Attorney General's Complaint is barred by legislative immunity and the Complaint must be dismissed.

Dated: December 7, 2017

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Exhibit A

ARIZONA COURT OF APPEALS

DIVISION ONE

JOHN KROMKO, RACHEL WILSON, ADRIAN DURAN, and SAM BROWN, on their own behalf and on behalf of all others similarly situated, Appellants, v. THE ARIZONA BOARD OF REGENTS, a constitutionally and legally established entity of the State of Arizona, and THE STATE OF ARIZONA, Appellees.	No. 1 CA-CV 2004-0250 Maricopa County Superior Court No. CV03-021650

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STATEMENT OF THE CASE

The Plaintiffs, John Kromko, Rachel Wilson, Adrian Duran, and Sam Brown, appeal from the superior court's judgment in favor of Defendants-Appellees, the State of Arizona ("State") and the Arizona Board of Regents ("Board"), in an action they filed to: (1) enjoin the Board from effectuating a previously-approved increase in tuition at the State's universities, or alternatively to compel a refund of tuition already paid; and (2) compel the Legislature to make additional appropriations for higher education. (R. 1 ¶ 66, AA.1.)[1] The Defendants moved to dismiss because the challenged decisions — the Legislature's appropriations for higher education and the Board's setting of tuition — were legislative acts entitled to absolute immunity. (R. 16, AA. 2.) The Board also argued that it is absolutely immune from suit challenging its tuition-setting decisions because such decisions require the determination of fundamental governmental policy. (*Id.*)

On February 25, 2004, the superior court issued an unsigned minute entry dismissing the Complaint. (R. 34, AA. 3.) On March 23, 2004, it entered formal judgment in favor of Defendants. (R. 36, AA. 4.) The Plaintiffs had previously

[1] "R." refers to the Clerk's record on appeal. "AA." refers to the attached appendix.

filed a Notice of Appeal on March 17, 2004. (R. 35, AA.5.) This Court has jurisdiction under A.R.S. § 12-2101(B). *See Schwab v. Ames Const.*, 207 Ariz. 56, 58, 83 P.2d 56, 58 (App. 2004) (court of appeals has appellate jurisdiction where a premature notice of appeal is followed by entry of an appealable judgment).

STATEMENT OF FACTS

The Plaintiffs, John Kromko, Rachel Wilson, Adrian Duran, and Sam Brown, are University of Arizona students who filed suit seeking to void a tuition increase instituted by the Board for the 2003-2004 academic year. (AA. 1 ¶ 10.) They sought monetary, declaratory, and injunctive relief against the State and the Board, including reimbursement of the increased tuition amounts that the universities had collected. (*Id.* ¶ 66.) They asked the court to require "that amounts collected in tuition from members of the [putative] Plaintiff class above [the] pre-increase level be deposited into an escrow account pending the outcome of this litigation." (*Id.*)

The Plaintiffs alleged that the $1,000 per annum increase in resident undergraduate tuition violated provisions of the Arizona Constitution mandating that: 1) university education be "as nearly free as possible," Ariz. Const., Art. XI, §

6,[2] [3] and 2) the Legislature appropriate money through taxation to "insure the proper maintenance of all State educational institutions" and to "provide for their development and improvement," *id.* § 10.[4] (AA. 1 ¶ 1.) In particular, the Plaintiffs contended that the claimed unlawful $1,000 increase was necessitated by an unconstitutional legislative decision to freeze higher-education spending for the 2003-2004 fiscal year at the prior year's level. (*Id.* ¶¶ 57-66.)[5]

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[2] "Section 6. The 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."

[3] All relevant constitutional provisions and statutes are reproduced under Tab 6 to the attached appendix.

[4] "Section 10. The revenue for the maintenance of the respective State educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the Enabling Act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective State education institutions. In addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement."

[5] Although not clearly set forth in the Complaint, in the Spring of 2003, the Board increased undergraduate resident tuition from $2,508 to $3,508 per annum. (AA. 2, p. 3 n.1.) Before the increase, tuition in the State's universities was the lowest (*i.e.*, 50th) in the nation relative to other public universities. (*Id.*) It rose to 42nd in the nation as a result of the increase. (*Id.*)

ISSUES PRESENTED FOR REVIEW

1. Did the superior court correctly dismiss Plaintiffs' injunctive and declaratory relief claims because they are barred by the separation of powers and legislative immunity doctrines?

2. Did the superior court correctly dismiss Plaintiffs claims requesting damages and a refund of tuition payments because they are barred by absolute immunity?

ARGUMENT

I. Plaintiffs' Injunctive and Declaratory Relief Claims are Barred by the Separation of Powers and Legislative Immunity Doctrines.

A. Standard of Review.

The appellate court conducts *de novo* review of orders dismissing complaints. *See Fairway Constructors, Inc. v. Ahern*, 193 Ariz. 122, 124, ¶ 6, 970 P.2d 954, 956 (App. 1998).

B. Plaintiffs' Declaratory and Injunctive Relief Claims, if Granted, Would Interfere with Legislative Functions.

In their Complaint, Plaintiffs requested the superior court to declare that the Legislature's decision to freeze appropriations for higher education and the Board's decision to increase undergraduate tuition violated the Arizona Constitution. (R.1 ¶ 66, AA. 1.) They also asked the Court to order the Legislature

to "set in a place [sic] for providing sufficient funding for the maintenance, operation and improvement of Arizona's University System" and the Board to repay or not impose tuition increases for the 2003-2004 academic year. Id. The court correctly determined that Plaintiffs' lawsuit challenged decisions that were within the Legislature's and the Board's exclusive authority and thus that the requested relief was barred by absolute legislative immunity. (R. 34, AA. 3.)

One of the oldest and most deeply entrenched principles in our jurisprudence is that legislative bodies, legislators, and individuals and entities that act in a legislative capacity are entitled to absolute immunity from suit for their legislative activities. The principle of absolute legislative immunity pre-dates the founding of our nation, "'has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries,'" and was "'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49, 118 S. Ct. 966, 970 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 786 (1951)); *see also Ariz. Indep. Redistricting Comm'n v. Fields,* 206 Ariz. 130, 75 P.3d 1088 (App. 2003) (reciting a similar history of legislative immunity).

"[A]bsolute [legislative] immunity . . . finds support not only in history, but also in reason." *Bogan*, 523 U.S. at 52, 118 S. Ct. at 971. It prevents the threat of

lawsuits from inducing officials to act "with an excess of caution or otherwise to skew their decisions." *Forrester v. White,* 484 U.S. 219, 223, 108 S. Ct. 538, 542 (1988). Thus, the doctrine promotes the public good by eliminating obstacles to "the rights of the people to representation in the democratic process." *Bogan*, 523 U.S. at 52, 118 S. Ct. 971 (quoting *Spallone v. United States,* 493 U.S. 265, 279, 110 S. Ct. 625, 634 (1990)).

The principle is incorporated into the Speech or Debate Clause of our Federal Constitution, Article I, § 6, which provides: "The Senators and Representatives . . . shall in all Cases, . . . be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, *they shall not be questioned in any other Place.*" (Emphasis added.) In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 1821-22 (1975), the Court held that the protection afforded by the Speech or Debate Clause extends beyond literal speech or debate to include matters that are within the jurisdiction of legislators. The purpose of the Clause is to allow legislators to act with independence without having "to divert their time, energy and attention from their legislative tasks." *Eastland*, 421 U.S. at 503, 95 S. Ct. at 1821. The Clause therefore shields legislators from having to answer to any "private civil action,

whether for an injunction or damages . . . [that] may be used to delay or disrupt the legislative function." *Id.*

Similarly, "the Constitutions of many of the newly independent States, and the common law . . . protected legislators from liability for their legislative activities." *Bogan*, 523 U.S. at 49, 118 S. Ct. at 970. Thus, the United States Supreme Court held that the Supreme Court of Virginia and its members were immune from a 42 U.S.C. § 1983 lawsuit requesting declaratory and injunctive relief when they acted in their legislative capacity in promulgating the law that the plaintiff challenged. *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734, 100 S.Ct. 1967, 1976 (1980).

The Court reasoned that because state legislative immunity "is similar in origin and rationale to [the protection] accorded Congressmen under the Speech or Debate Clause," it too shields governmental entities and officials acting in a legislative capacity from both damages *and* injunctive relief. *Id.* at 732, 100 S. Ct. at 1974; *see also Romero-Barcelo v. Hernandez-Agosto,* 75 F.3d 23, 29 (1st Cir. 1996)("The scope of state legislative immunity from suit . . . is 'essentially conterminous' with the absolute immunity accorded members of Congress under the Speech or Debate Clause of the United States Constitution")(quoting *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 629 (1st Cir. 1995)).

The Arizona Constitution has a corollary to the federal Speech or Debate Clause: "[n]o member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. The Arizona Legislature has also codified the doctrine of absolute immunity in A.R.S. § 12-820.01(A)(1): "[a] public entity shall not be liable for acts and omissions of its employees constituting . . . [t]he exercise of a judicial or legislative function."

In addition, the principle of separation of powers embodied in Article III of the Arizona Constitution supports the doctrine of absolute immunity:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

This separation of powers doctrine holds special stature in Arizona. "'Nowhere in the United States is this system of structured liberty [of separation of powers] more explicitly and firmly expressed than in Arizona.'" *State ex rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997) (quoting *Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988)). "The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of

control, interference, or intimidation by other branches." *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61, 102 S. Ct. 2690, 2707 (1982).

In keeping with the separation of powers, courts should refrain from deciding political matters. *Baker v. Carr*, 369 U.S. 186, 216, 82 S. Ct. 691, 710 (1962) (refraining from deciding political questions is "essentially a function of the separation of powers"); *Renck v. Superior Court*, 66 Ariz. 320, 325, 187 P.2d 656, 660 (1947) ("The doctrine that the judiciary shall not take jurisdiction of and consider matters political in their nature is based upon art. 3 of the Constitution of the State of Arizona relating to the distribution of powers . . . ."); *see also Adams v. Bolin*, 74 Ariz. 269, 285, 247 P.2d 617, 628 (1952) ("[T]he well established rule [is] that the courts will not consider political matters . . . . And the refusal of the courts to interfere in the exercise of the legislative function is by no means a minority rule but appears to be well-nigh universal").

Courts identify political questions by looking for one or more of several elements:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

> resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, 82 S. Ct. at 710. All of those elements are present here.

1. The Legislature's appropriation decision on higher-education spending is a political question protected by the separation of powers doctrine and is entitled to absolute legislative immunity.

Plaintiffs' declaratory and injunctive relief claims against the State are barred because their Complaint directly attacks a legislative budgetary decision:

> 54. In allocating a $0 increase in funding for the State's universities in the 2004 budget, the Arizona Legislature has violated the provisions of Article 11, Section 10 of the Arizona State Constitution.

(AA. ¶ 54.) The Complaint also asked for injunctive relief to remedy the alleged error in budgeting. (AA. 1 ¶ 66.)

Establishing the State's budget is, of course, *the* quintessential legislative function. *See, e.g., Rios v. Symington,* 172 Ariz. 3, 6, 833 P.2d 20, 23 (1992). Adopting a budget and its concomitant decisions about revenue and spending are integral to the legislative process. *See* Ariz. Const., Art. IV, Pt. 2, § 20 (the Legislature is responsible for "appropriations for the different departments of the

State, for State institutions, for public schools, and for interest on the public debt"); *Rios,* 172 Ariz. at 5–6, 833 P.2d at 22–23 ("the Legislature commands the power of the purse," a power derived from its constitutional power to enact laws, including the adoption of appropriation bills); *Reinhold v. Bd. of Supervisors,* 139 Ariz. 227, 232, 677 P.2d 1335, 1340 (App. 1984)(judiciary may not "encroach upon the legislative function [in] budgeting matters.").

"The Legislature, in the exercise of its lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect." *Rios*, 172 Ariz. at 6, 833 P.2d at 23. Few courts have expressed this principle as clearly as U.S. District Court Judge Shadur of Illinois:

> Budgetmaking is a quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources.
>
> * * *
>
> Ordering budget priorities is a complex process subject to many pressures and resulting in many compromises. Budgets are written to the clangor of many axes grinding. Money may be withdrawn from project A simply because it must be added to project B, though some or many people may think project A the more important. . . . Each line item in a budget may affect the interests of a few people intensely, but a budget expresses general policy by balancing the competing claims of hundreds or thousands of line items.

Rateree v. Rockett, 630 F. Supp. 763, 771 (N.D. Ill. 1986), *aff'd,* 852 F.2d 946 (7th Cir. 1988); *accord Bogan,* 523 U.S. at 55, 118 S. Ct. at 973 (official's act of introducing a budget and signing an ordinance were formally legislative).

The affirmative decision to freeze appropriations for higher education was only one of many difficult political decisions the Arizona Legislature was forced to make in deciding how to allocate the State's finite resources during the recent, well-publicized economic downturn. These tough budgetary decisions were an exercise of a quintessential legislative function involving the allocation and prioritization of limited financial resources. While the Plaintiffs may disagree with the Legislature's budgetary decisions, their remedy is political, not judicial. *See Bogan,* 523 U.S. at 53, 118 S. Ct. at 972 (the electoral process is the ultimate check on dissatisfaction with legislative decisions); *Rateree,* 630 F. Supp. at 771 (those dissatisfied with legislative budgetmaking should resort to "the ballot-box check," as "the rationale for disfavoring judicial second-guessing of the budgetmaking process applies"). There can be no doubt that the State, through the Legislature, is entitled to absolute immunity from suit under the Arizona Constitution and A.R.S. § 12-820.01(A)(1).

2. The Board's tuition decision is also protected by the separation of powers doctrine and is entitled to absolute legislative immunity.

Legislative immunity is not limited to the Legislature; it extends to any governmental entity engaged in "the exercise of a . . . legislative function." A.R.S. § 12-820.01(A)(1). "It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan*, 523 U.S. at 46, 118 S. Ct. at 969. *See also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 402-03, 99 S. Ct. 1171, 1178 (1979) (regional planning agency created by compact between neighboring states entitled to absolute legislative immunity); *Fields*, 206 Ariz. at 136, 75 P.3d at 1094 (constitutionally created commission composed of volunteers was entitled to legislative privilege). The same separation of powers considerations that guide the judiciary to refrain from second-guessing legislative budgetary decisions also guide it to not usurp administrative agency policy decisions. *See U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S.Ct. 2755, 2765 (1984)(separation of powers doctrine "prevent[s] judicial 'second-guessing' of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort").

The fact that the Board is part of the executive branch does not preclude legislative immunity from applying to it. "[O]fficials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan*, 523 U.S. at 55, 118 S. Ct. at 973 (citing *Sup. Ct. of Va.*, 446 U.S. at 731-34, 100 S. Ct. at 1974-76). A functional approach determines who is entitled to assert legislative immunity: it "is not dependent on the manner of selection for office." *Field*, 206 Ariz. at 138, 75 P.3d at 1096. Under this approach, "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54, 118 S. Ct. 973. "[A]n act is legislative in nature when it bears the 'hallmarks of traditional legislation' by reflecting a discretionary, policymaking decision that may have prospective implications." *Fields*, 206 Ariz. at 138, 75 P.3d at 1096 (quoting *Bogan*, 523 U.S. at 55-56, 118 S. Ct. at 966).

Legislative acts are prospective and are "distinguished from an application of existing policies, such as the creation of administrative rules to implement legislative policies." *Id.* (citing *Crymes v. De Kalb County*, 923 F.2d 1482, 1485 (11th Cir. 1991)). Stated another way, whether an act is legislative depends on: "(1) whether the act involves 'ad hoc decision-making or the formulation of policy;' and (2) whether the act applies 'to a few individuals, or to the public at

large.'" *San Pedro Motel Co. v. City of Los Angeles,* 159 F.3d 470, 476 (9th Cir. 1998) (quoting *Chappell v. Robbins,* 73 F.3d 918, 920 (9th Cir. 1996)).

The laws that govern the Board's existence and define its powers establish that it acts in a legislative capacity when setting tuition. Article XI, § 2 of the Constitution provides that "[t]he general conduct and supervision of the public school system shall be vested in . . . such governing boards for the State institutions as may be provided by law." Article XI, § 5, in turn, establishes the Board. The Board is a free-standing body corporate. A.R.S. § 15-1625(A).

The Board's powers include those that are "necessary for the effective governance and administration of the institutions under its control." A.R.S. § 15-1626(A)(1). Such powers are plenary. *See Fairfield v. W.J. Corbett Hardware Co.*, 25 Ariz. 199, 203, 215 P. 510, 511 (1923) ("Within the scope of its duties, [the Board] is supreme"); *Ariz. Bd. of Regents v. Dep't of Admin.,* 151 Ariz. 450, 451, 728 P.2d 669, 670 (App. 1986) (Legislature could not mandate that the Board's employees be covered under the state civil-service system because the Board has plenary powers over its employees). The Board's powers, therefore, are analogous to those of, the Corporation Commission, which "'has full and exclusive power in the field of prescribing rates which cannot be interfered with by the courts'"). *Qwest Corp v. Kelly*, 204 Ariz. 25, 30, 59 P.2d 789, 794 (App.

2002)(quoting *Morris v. Ariz. Corp. Comm'n,* 24 Ariz. App. 454, 457, 539 P.2d 928, 931 (1975)).

One court has noted that a board of regents' possession of such plenary powers demonstrates legislative power: "[o]f critical importance to the implementation of the Board of Regents' powers is the broad legislative function with which it has been endowed, i.e., to 'establish rules for carrying into effect the laws and policies of the [S]tate relating to education.'" *Adelphi Univ. v. Bd. of Regents*, 229 A.D.2d 36, 38, 652 N.Y.S.2d 837, 839 (3d Dept. 1997) (quoting *McKinney's Education Law* § 207) (alteration in original). Similarly, where — as here — a board of regents is a constitutionally created body corporate, it exists on a plane equivalent to that of a legislature: "'[t]he Board of Regents is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature.'" *Schmidt v. Regents of the Univ. of Mich.,* 63 Mich. App. 54, 55-56, 233 N.W.2d 855, 855-56 (1975) (quoting *Bd. of Regents v. Auditor Gen'l,* 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911)); *see also Fairfield*, 25 Ariz. at 203, 215 P. at 511 ("within the scope of its duties, [the Board of Regents] is supreme").

The Board's statutory budgetmaking and tuition-setting powers entail the exercise of legislative functions comparable to those of a traditional legislature. One of its statutory duties is to "[a]dopt annually an operating budget for each university equal to the sum of appropriated general fund monies and the amount of tuition, registration fees and other revenues approved by the board and allocated to each university operating budget." A.R.S. § 15-1626(A)(12). The Board's determination of an operating budget for each university is a function of revenue, one portion of which it does not control, i.e., "appropriated general fund monies," while the other portion, *including tuition and registration fees,* is specifically under its control. These wedded concepts of revenue and spending are at the heart of any legislative budgetmaking process. *Rateree*, 630 F. Supp. at 771. As noted earlier, "[b]udgetmaking is a quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources." *Id.*

The Board is also obligated to "fix tuitions and fees to be charged A.R.S. § 15-1626(A)(5)." Such powers "reflect[ ] a discretionary, policymaking decision. . . hav[ing] prospective implications," *Fields*, 206 Ariz. at 138, 75 P.3d at 1096, that affect not just "a few individuals, [but] the public at large." *San Pedro Motel Co.*, 159 F.3d at 476.

Moreover, before the Board can adopt a tuition increase, it must hold public hearings at each of the three state universities, invite students and members of the public to attend and comment, and then conduct a roll-call vote. A.R.S. § 15-1626(A)(5). These procedures are the "hallmarks of traditional legislation," to which absolute immunity has always attached. *Bogan*, 523 U.S. at 55, 118 S. Ct. at 973; *see also Gravel v. U.S.*, 408 U.S. 606, 625, 92 S. Ct. 2614, 2627(1972) (legislative immunity extends to "matters [which are] . . . an integral part of the deliberative and communicative processes by which [legislators] participate in . . . proceedings"). In sum, the Board is entitled to absolute legislative immunity for its tuition-setting decision.

3. Plaintiffs' requested relief is not susceptible to judicial resolution.

There is another compelling reason for dismissing Plaintiffs' Complaint. In particular, the Constitutional mandates challenged here — that the Legislature provide for the proper maintenance of the universities and that the Board set tuition as nearly free as possible — are not susceptible to judicially discoverable and manageable standards for resolution. *See Baker,* 369 U.S. at 210, 92 S.Ct. at 706 ("In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also to the lack of satisfactory criteria for a

judicial determination are dominant considerations")(internal quotations omitted). The injunctive and declaratory relief that the Plaintiffs seek would, therefore, require the judiciary to invade the provinces of co-equal branches of government in matters of policy and politics. *See id.*

In contrast, courts have declined to intervene in the legislative prerogative when, for instance, state constitutional provisions mandate that States furnish a "high quality," "thorough," or an "efficient" education — all terms that are not objectively quantifiable.[6] *Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 28, 672 N.E. 2d 1178, 1191 (1996) ("high quality" education not subject to judicially discoverable or manageable standards); *see also Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 631, 458 A.2d 758, 776 (1983) ("thorough and efficient" clause "is a matter for legislative determination"); *Danson v. Casey*, 484 Pa. 415, 427, 399 A.2d 360, 366 (1979) ("thorough and efficient education" is not "a judicially manageable standard"). Because the budgetary and tuition-setting decisions at issue implicate political issues exclusively entrusted to coordinate

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[6] On the other hand, Article XI, § 1, of the Arizona Constitution mandates that the Legislature provide "a general and uniform public school system." In *Roosevelt Elementary School District No. 66 v. Bishop,* 179 Ariz. 233, 877 P.2d 806 (1994), the Supreme Court held that it could intervene because the term "uniform" was judicially manageable: it meant "equal." *See id.* at 241, 877 P.2d at 814.

branches of government, the Defendants are absolutely immune from suit under A.R.S. § 12-820.01(A)(1).

C. None of the Plaintiffs' Cases Address Requests for Equitable Relief That Would Intrude on Core Legislative Functions.

Plaintiffs argue that legislative immunity does not bar their claims for equitable relief. Opening Brief at 5-9. Plaintiffs' cases do not support their argument, however, because they do not address requests for equitable relief that would intrude on core legislative functions.

All of the non-Arizona cases that the Plaintiffs cite hold that *sovereign* immunity does not bar injunctive relief, and none of their cases involve requests for relief that would have required Courts to interfere with core legislative functions.[7] Sovereign immunity is based on the notion that "the King could do no wrong." *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 205, 16 P.3d 757, 766

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[7] *Pamela B. v. Ment*, 244 Conn. 296, 327-28, 709 A.2d 1089, 1106 (1998); *In re A.V.B.*, 267 Ga. 728, 728, 482 S.E.2d 275, 276 (1997); *Village of Maywood Bd. of Fire & Police Comm'rs v. Ill. Dep't of Human Rights,* 296 Ill. App.3d 570, 579, 695 N.E.2d 873, 879 (1998); *Greyhound Welfare Fund v. Miss. State Univ.*, 736 So. 2d 1048, 1049 (Miss. 1999); *Claremont Sch. District v. Governor*, 144 N.H. 590, 593-94, 761 A.2d 389, 391 (1999); *Legal Capital, LLC v. Prof'l Liab. Catastrophe Loss Fund*, 561 Pa. 336, 342-43, 750 A.2d 299, 302 (2000); *Shaw v. Phillips Crane & Rigging of San Antonio, Inc.*, 636 S.W.2d 186, 188 (Tex. 1982); *Tex. State Employees Union/CWA Local 6184 AFL-CIO v. Tex. Workforce Comm'n,* 16 S.W.3d 61, 69 (Tex. App. 2000); *Dallas v. Bolton*, 89 S.W.3d 707 (Tex. App. 2002), *pet. for review granted,* 2003 Tex. Lexis 441 (2003).

(2001). Our supreme court abolished this principle more than forty years ago, calling it unjust and outmoded. *Stone v. Ariz. Highway Comm'n*, 93 Ariz. 384, 393, 381 P.2d 107, 113 (1963). But abolishing the sovereign immunity doctrine did not affect the immunities that were necessary to protect Article III's separation of powers doctrine. Thus, in *Ryan v. State*, 134 Ariz. 308, 310, 656 P.2d 597, 599 (1982), the Court "hasten[ed] to point out that certain areas of immunity must remain. The most obvious of such immunities [is] legislative immunity." In *Ryan*, the Court invited the Legislature to enact laws "necessary to avoid a severe hampering of a governmental function or thwarting of established public policy." *Id.* at 311, 656 P.2d at 600. Seizing on the invitation, the Legislature codified absolute legislative immunity in what is now A.R.S. § 12-820.01(A)(1). *Clouse*, 199 Ariz. at 199, 16 P.3d at 760.

Unlike sovereign immunity, absolute legislative immunity is neither unjust nor outmoded; it is necessary for an efficient government. And unlike sovereign immunity, which is not protected by the Arizona Constitution, legislative immunity bars injunctive relief to maintain the separation of powers, thereby promoting legislative independence and eliminating delays and distractions to the legislative process. *See Supreme Court of Va.*, 466 U.S. at 731-32, 100 S. Ct. at 1974-75 (noting that the separation of powers doctrine justifies legislative immunity for

Congressmen and state legislators and holding that the Virginia Supreme Court was entitled to legislative immunity when promulgating rules). Thus, the Plaintiffs' sovereign immunity cases are inapposite because they do not deal with relief that would undermine the separation of powers doctrine by interfering with legislative functions.

Similarly, the Plaintiffs' reliance on *Zeigler v. Kirschner*, 162 Ariz. 77, 781 P.2d 54 (App. 1989), is misplaced. Like their sovereign immunity cases, *Zeigler* is inapplicable because it does not involve legislative immunity or separation of powers; it addressed administrative function immunity. In *Zeigler*, persons affected by adverse eligibility decisions under the Arizona Health Care Cost Containment System (AHCCCS) sought to enjoin implementation of those decisions. The AHCCCS Director defended by claiming that "A.R.S. § 12-820.01(A)(2) absolutely immunizes a public entity from liability for any act or omission of an employee constituting '[t]he exercise of an administrative function involving the determination of fundamental governmental policy.'" *Id.* at 84, 781 P.2d at 61. The Court rejected the Director's claim of administrative function immunity from injunctive relief because he "failed to call to our attention any provision in those statutes remotely suggesting an intention to regulate or limit actions seeking injunctive, declaratory, or other equitable relief." *Id.* That the

specific language of A.R.S. § 12-820.01(A)(1) does not indicate that it applies to claims for equitable relief does not limit the protection provided by legislative immunity. First, legislative immunity that is necessary to preserve the separation of powers and protect the legislative process in the Arizona Constitution may be broader than the language in A.R.S. § 12-820.01(A)(1). Second, in enacting A.R.S. § 12-820.01, the Legislature intended to incorporate the common law. *See* 1984 Ariz. Sess Laws, Ch. 285, § 1 ("[I]t is herby declared to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state"). As noted by the Supreme Court in *Supreme Court of Virginia*, legislative immunity precluded actions for equitable relief at common law. 446 U.S. at 733, 100 S.Ct. at 1975.

In any event, *Zeigler*'s rejection of immunity from injunctive actions is questionable. One of the rationales behind governmental immunities is to shield governmental entities and officials from actions that "divert their time, energy and attention from their [assigned] tasks." *Eastland*, 421 U.S. at 503, 95 S.Ct. at 1821. Lawsuits force governmental actors to reallocate their limited resources from core functions to the defense of the suit. Equitable actions are as disruptive in this respect as are legal ones. *Id.* Immunity is, therefore, just as important for injunctive actions as for legal ones. *Johnson v. City of Edgerton*, 207 Wis. 2d 343,

352, 558 N.W.2d 653, 656-57 (1996) (public-policy considerations shielding public agencies and officials from actions seeking damages "apply just as earnestly to an equitable action seeking injunctive relief against the agency or the official").

Because *Zeigler* did not involve a claim of legislative immunity, it does not govern this case. Instead, the Supreme Court's holding that such immunity bars claims for injunctive and declaratory relief controls. *Supreme Court of Va.*, 466 U.S. at 733, 100 S. Ct. at 1975. The Plaintiffs' injunctive relief claim is clearly barred under the rationale of that holding.

II. The Board is Entitled to Absolute Immunity from Plaintiffs' Damages Claims Under A.R.S. § 12-820.01.

A. Standard of Review.

The standard of appellate review set forth in section I(A) of this brief applies here as well.

B. The Board's Tuition Decision was not Only a Legislative Determination, it was Also a Determination of Fundamental Governmental Policy and was, Therefore, Entitled to Absolute Immunity.

In addition to equitable relief, Plaintiffs also requested damages and an order that the Board refund tuition already paid. (AA. 1 ¶ 66.) These damages claims are barred by legislative and executive immunity.

For the reasons stated in Section I of this Brief *infra*, Plaintiffs damages claims are barred by legislative immunity because such claims attack the Board's tuition-setting decision, which it made in its legislative capacity. The Board is also entitled to absolute immunity from damages on the basis of administrative-function immunity.[8] As noted earlier, the Constitution empowers the Legislature to direct the manner in which suit may be brought against the State. Ariz. Const., Art. 4, Pt. 2, § 18; *Clouse*, 199 Ariz. at 199, 16 P.3d at 760. Pursuant to that power, the Legislature has absolutely immunized the exercise of certain administrative functions: "[a] public entity shall not be liable for acts and omissions of its employees constituting. . . [t]he exercise of an administrative function involving the determination of fundamental governmental policy." A.R.S. § 12-820.01(A)(2). The Legislature provided a non-exclusive list of guidelines to help decide whether something constitutes the determination of a fundamental governmental policy:

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[8] As discussed in the prior section, *Zeigler* held that administrative-function immunity only applies to actions for money damages, not injunctive relief. *But see Johnson*, 207 Wis.2d at 352, 558 N.W.2d at 656-57. In this case, the Plaintiffs are seeking a refund of tuition already paid. (AA. 1 ¶ 66.) *Zeigler* therefore does not negate the Board's entitlement to administrative-function immunity from injunctive relief because Plaintiffs' action is tantamount to one for damages. *See Jagnandan v. Giles,* 379 F. Supp. 1178, 1188 (N.D. Miss. 1974) ("the [tuition] refunds, if ordered, . . . would necessarily be a charge upon the state treasury, or at least that portion of the fisc dedicated to higher education").

> The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:
>
> 1. A determination of whether to seek or whether to provide the resources necessary for any of the following:
>
> (a) The purchase of equipment.
>
> (b) The construction or maintenance of facilities.
>
> (c) The hiring of personnel.
>
> (d) The provision of governmental services.
>
> 2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

A.R.S. § 12-820.01(B). Non-enumerated functions are entitled to absolute immunity if similar in nature and quality to an enumerated function. *Evenstad v. State*, 178 Ariz. 578, 583, 875 P.2d 811, 816 (App. 1983).

The Board's university budgetmaking and related tuition decisions fall under more than one of the listed administrative functions, including the provision of governmental services. Subsection (B)(2), in fact, essentially defines budgetmaking. Likewise, whether to seek or provide resources for the operation of the state universities, which affects the purchase of university equipment, the construction and maintenance of university facilities, and the hiring of university personnel, are all integrally related to the budgetmaking process. And setting

tuition falls under subsection (1) as a decision whether to seek resources necessary for the operation of the universities. Both subsections of § 12-820.01(B), therefore, clearly describe aspects of the budgetmaking process. Thus, § 12-820.01(A)(2) immunizes the Board from the Plaintiffs' claims for relief.

"For the actions of an administrative body to receive absolute immunity, 'fundamental governmental policy is the element which, first and foremost, must be present in the decision making process.'" *Doe ex rel. Doe v. State*, 200 Ariz. 174, 176, 24 P.3d 1269, 1271 (2001) (quoting *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 225, 954 P.2d 580, 583 (1998)). Absolute administrative-function immunity applies to big-picture decision-making, as opposed to agency micro-management. *See id.* ("The statute . . . provides immunity for 'such matters as . . . a decision as to the direction and focus of an entire regulatory scheme,' but not for operational actions and decisions within that regulatory scheme"); *see also Warrington v. Tempe Elementary Sch. Dist. No. 3*, 187 Ariz. 249, 252-53, 928 P.2d 673, 676-77 (App. 1996) (administrative-function immunity applies to policy decisions).

The Board's budgetary and tuition-setting decisions are the type of fundamental governmental policy decisions to which administrative-function immunity has been held to apply. One example is *Sanchez v. City of Tucson*, 189 Ariz. 429,

943 P.2d 789 (App. 1997), *vacated in part on other grounds,* 191 Ariz. 128, 953 P.2d 168 (1998). There, pedestrians who were hit by a truck while crossing a state highway sued the city, alleging that the accident occurred because of poor lighting. *Id.* at 430, 943 P.2d at 790. The city had assumed the duty to illuminate the highway under a Comprehensive Illumination Program ("CIP") that it had previously adopted. *Id.* at 432, 943 P.2d at 792. In holding that the city was entitled to absolute immunity, the Court noted:

> The CIP was adopted by the mayor and city counsel in order to prioritize lighting improvement projects within the city. It involved a comprehensive analysis of lighting policies, public safety, energy use, maintenance, astronomy impact, and funding, and it established a schedule for lighting installations and upgrades. Ajo Way was scheduled for Phase III of the project, which only received funding by special bond election the year after the accident. Adoption of the CIP required discretionary decisions regarding when, where, and how to spend the city's limited financial resources for initial installation of major roadway improvements. This clearly represents the kind of fundamental governmental policy making shielded by § 12-820.01.

Id.

Here, the Board was charged with establishing budgets and setting tuition for the state universities. In doing so, it engaged in discretionary decisionmaking "regarding when, where, and how to spend the [State's] limited financial resources." *See id.* As in *Sanchez*, therefore, the Board's decision "clearly

represents the kind of fundamental governmental policymaking shielded by § 12-820.01." *Id.* The Board is entitled to absolute immunity on this basis as well.

Citing *Galati v. Lake Havasu City*, 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996), Plaintiffs claim that the Legislature's decision to freeze higher-education spending for 2003-2004 at the prior fiscal year's level is not entitled to absolute administrative-function immunity under A.R.S. § 12-820.01(A)(2) because such immunity "require[s] an actual decision or affirmative act, not a failure to make a decision." *Id.* This argument should be rejected for two reasons. First, Defendants did not argue below, nor do they now, that the Legislature is entitled to absolute administrative-function immunity. Defendants have made this argument solely as to the *Board's* tuition-setting decision. Second, it is disingenuous to argue that the Legislature's affirmative decision to freeze higher-education spending is a non-decision. The Legislature *acted* by enacting a budget; it simply appropriated the same amount as it had in the previous year's budget.

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment.

Respectfully submitted this 7th day of September, 2004.

Terry Goddard
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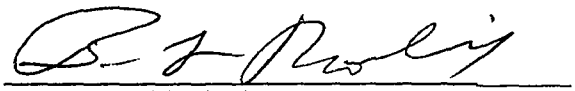

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(b) Arizona Rules of Civil Appellate Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point Times New Roman proportionately-spaced typeface, and contains 6,003 words.

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