

1 Paul F. Eckstein (#001822)
2 Joel W. Nomkin (#011939)
3 Shane R. Swindle (#011738)
4 Thomas D. Ryerson (#028073)
5 Austin C. Yost (#034602)
6 **PERKINS COIE LLP**
7 2901 North Central Avenue, Suite 2000
8 Phoenix, Arizona 85012-2788
9 Telephone: 602.351.8000
10 Facsimile: 602.648.7000
11 PEckstein@perkinscoie.com
12 JNomkin@perkinscoie.com
13 SSwindle@perkinscoie.com
14 TRyerson@perkinscoie.com
15 AYost@perkinscoie.com
16 DocketPHX@perkinscoie.com

*Attorneys for Defendant
Arizona Board of Regents*

Brett W. Johnson (#021527)
Lindsay Short (#034125)
SNELL & WILMER LLP
400 E. Van Buren Street, Suite 1900
Phoenix, Arizona 85004
Telephone: 602.382.6000
Facsimile: 602.382.6070
bwjohnson@swlaw.com
lshort@swlaw.com
docket@swlaw.com

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

<p>State of Arizona, ex rel. Mark Brnovich, Attorney General, Plaintiff, v. Arizona Board of Regents, Defendant,</p>	<p>No. TX2019-000011 MOTION TO DISMISS NUMBER 1 (ATTORNEY GENERAL'S LACK OF AUTHORITY) (Assigned to the Hon. Christopher Whitten)</p>
<p>Paul D. Petersen, in his official capacity as Maricopa County Assessor, and Royce T. Flora, in his official capacity as Maricopa County Treasurer, Relief-Defendants.</p>	

1 **MOTION**

2 The Attorney General’s (“AG”) complaint contains three separate counts: count I
3 seeks a declaration that the tax-exempt state property that the Arizona Board of Regents
4 (“the Board”) owns and seeks to lease to Omni Tempe, LLC (“Omni”) is nevertheless
5 subject to taxation; count II seeks to enjoin the Board from leasing its property to Omni
6 under the terms of the planned agreement; and count III seeks a declaration that the Board
7 does not have the statutory authority to lease its property to Omni.

8 Pursuant to Arizona Rules of Civil Procedure 12(b)(1) and (6) and Rule 12(c), the
9 Board moves to dismiss all three counts of the AG’s complaint on the grounds that he
10 lacks the statutory authority to bring this suit for the reasons set forth in the memorandum
11 below.¹

12 **MEMORANDUM**

13 For the second time in 18 months, the AG has sued his own client, the Board,
14 alleging that the Board’s actions violate the Arizona Constitution and Arizona statutes.²
15 This time, the AG alleges that a proposed transaction in which the Board would lease land

16 _____
17 ¹ The Board’s Motions to Dismiss Numbers 2 through 4, filed contemporaneously,
separately address the various counts of the AG’s complaint.

18 ² The AG sued the Board in September 2017, alleging in counts I-V of his
19 complaint that the Board violated the “nearly free as possible” clause of article XI, section
20 6 of the Arizona Constitution by charging resident students too much in tuition, and in
21 count VI that the Board violated two Arizona statutes by charging resident Deferred
22 Action for Childhood Arrival students too little in tuition. *See* Complaint, *State ex rel.*
23 *Brnovich v. Ariz. Bd. of Regents*, No. CV-2017-012115 (Ariz. Super. Ct. Sept. 8, 2017).
24 The Maricopa County Superior Court dismissed the AG’s complaint with prejudice ten
25 months ago, holding that the AG lacked the statutory authority to bring any of the six
26 counts. Minute Entry, *State ex rel. Brnovich*, No. CV-2017-012115 (Apr. 20, 2018). The
AG appealed, and all arguments have been fully briefed to the Court of Appeals. *See*
State ex rel. Brnovich v. Ariz. Bd. of Regents, No. 1 CA-CV 18-0420. The AG
subsequently petitioned to transfer the appeal to the Arizona Supreme Court, but the Court
denied the AG’s petition. *See* Minute Entry, *State ex rel. Brnovich v. Ariz. Bd. of Regents*,
No. T-19-0002-CV (Mar. 5, 2019).

1 that it owns to Omni for building and operating a hotel and conference center near ASU's
2 main campus would violate article IX, section 2(12) of the Arizona Constitution and
3 A.R.S. § 15-1625(B)(4). [Compl. ¶¶ 60–66, 81–82, 98–101, 110–12]. In doing so, the
4 AG challenges a transaction that has not yet closed and a lease that has not yet been
5 executed and seeks to enjoin the Board from leasing a hotel and conference center that
6 have not yet been built. [*Id.* ¶¶ 67, 68, 81, 82, 98, 108, 112].

7 It is also the second time in 18 months that the AG has sued the Board without the
8 statutory authority to do so. Arizona courts have made clear for decades that the AG does
9 not have a roving mandate to file suits whenever he or she feels it necessary. Instead, the
10 AG only has the power to sue when the Legislature provides a *specific grant of statutory*
11 *power* to do so. Here, no statute authorizes the AG's lawsuit against the Board. The
12 Court therefore must dismiss this suit.

13 **ARGUMENT**

14 **A. The AG's authority to file suit is "dependent upon specific statutory** 15 **grants of power."**

16 The Arizona AG does not possess broad, common law power or discretion to file
17 suits whenever he or she deems litigation to be warranted. While "there are occasions on
18 which the [AG] may initiate proceedings on behalf of the State, and may even appear in
19 opposition to a particular State agency, . . . these instances are dependent upon *specific*
20 *statutory grants of power.*" *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 144, 348 P.2d
21 912, 915 (1960) (emphasis added); *see also State ex rel. Woods v. Block*, 189 Ariz. 269,
22 272, 942 P.2d 428, 431 (1997) (following *McFate*); *Amphitheater Unified Sch. Dist. No.*
23 *10 v. Harte*, 128 Ariz. 233, 234, 624 P.2d 1281, 1282 (1981) (same); *Smith v. Super. Ct.*
24 *In & For Cty. of Cochise*, 101 Ariz. 559, 560, 422 P.2d 123, 124 (1967) (same).

25 **B. No statute authorizes the AG to file this suit against the Board.**

26 Here, the AG relies upon two statutes to bring this suit against the Board. [Compl.

1 ¶ 11]. The AG relies upon the quo warranto statute, A.R.S. § 12-2041, for counts II and
2 III of the complaint. [*Id.* ¶¶ 95–97, 103–04]. And he relies upon the tax enforcement
3 statute, A.R.S. § 42-1004, to bring counts I and III. [*Id.* ¶¶ 77, 107]. Neither statute
4 authorizes this suit.

5 **1. The quo warranto statute, A.R.S. § 12-2041, does not authorize**
6 **counts II and III.**

7 The quo warranto statute, A.R.S. § 12-2041, authorizes the AG to bring an action
8 only “against any person who usurps, intrudes into or unlawfully holds or exercises any
9 public office or any franchise within this state,” A.R.S. § 12-2041(A), and requires the
10 AG to bring an action only when “he has reason to believe” that a public office or
11 franchise “is being usurped, intruded into or unlawfully held or exercised,” A.R.S. § 12-
12 2041(B). The quo warranto statute does not authorize the AG to bring counts II and III of
13 his complaint because those counts do not allege that the Board has been usurped,
14 intruded into, or is otherwise unlawfully constituted and therefore improperly exercising
15 its authority.

16 Quo warranto is “the prerogative writ by which the government can call upon any
17 person to show by what warrant he holds a public office or exercises a public franchise.”
18 *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 545–46 (1915); *see also* 74 C.J.S.
19 Quo Warranto § 11 (2019) (“Quo warranto is a proper and appropriate remedy to test the
20 right or title to an office and to remove or oust an incumbent.”). “The purpose of a writ of
21 quo warranto is to prevent *usurpation* of office, and its function is narrow.” 74 C.J.S. Quo
22 Warranto § 11 (2019) (emphasis added). Specifically, “[t]he proper scope of a quo
23 warranto proceeding is to challenge the *authority* to act, not the *manner* of exercising
24 authority; a challenge to the *manner* in which a lawful incumbent is exercising the
25 powers, privileges, and duties pertaining to an office *exceeds the scope of such an action.*”
26 *Id.* (emphasis added) (footnotes omitted); *see also* Tim Delaney, *Keeping the Taint of*

1 *Guilt out of Office: Proposals to Clarify Arizona’s Public Office Vacancy Statute*, 31 Ariz.
2 St. L.J. 95, 101 n.22 (1999) (“‘Quo warranto’ is an action that asks ‘by what authority’
3 someone exercises the powers of a public office.”).

4 Arizona’s statute is consistent with these well-established limits on the writ. As the
5 Arizona Supreme Court has recognized, the purpose of a quo warranto action is “to
6 protect the public interest by preventing one who is not entitled to an office from
7 exercising it.” *Woods*, 189 Ariz. at 274, 942 P.2d at 433 (quoting *State ex rel. Sullivan v.*
8 *Moore*, 49 Ariz. 51, 57, 64 P.2d 809, 812 (1937)). Thus, prior Arizona cases applying the
9 writ involve challenges to the exercise of the powers of an office that the defendant
10 allegedly does not lawfully hold. See, for example:

- 11 • *Jennings v. Woods*, 194 Ariz. 314, 982 P.2d 274 (1999) (the incumbent
12 commissioner of the Arizona Corporation Commission challenged the
eligibility of the person who won the general election to replace him);
- 13 • *State ex rel. Woods v. Block*, 189 Ariz. 269, 942 P.2d 428 (1997) (the AG
14 sought to prohibit members of the Constitutional Defense Council from
15 exercising their purported powers because the office was created by an
unconstitutional statute); and
- 16 • *Laos v. Arnold*, 141 Ariz. 46, 685 P.2d 111 (1984) (the AG sought to
17 remove a member of the Tucson City Council because he unlawfully held
18 that office when he did not resign his position before initiating a
congressional campaign).³

19 ³ See also *Tracy v. Dixon*, 119 Ariz. 165, 579 P.2d 1388 (1978) (a former Phoenix
20 City Court judge alleged that two people usurped his former office because they were
21 unlawfully appointed); *Ahearn v. Bailey*, 104 Ariz. 250, 451 P.2d 30 (1969) (an
22 incumbent member of the Industrial Commission sought to oust three newly appointed
23 commissioners because the legislation that expanded the Industrial Commission from
24 three to five members and shortened the terms of the existing commissioners was
25 unconstitutional); *State ex rel. Smith v. Bohannan*, 101 Ariz. 520, 421 P.2d 877 (1966)
26 (the AG sought to oust a member of the Arizona State Board of Public Welfare because he
unlawfully held that office after he admitted that he simultaneously served on the Arizona
State Retirement Board and as the president and director of a mortgage and investment
company that transacted with the Arizona State Retirement Board); *State ex rel. Jones v.*
Lockhart, 76 Ariz. 390, 265 P.2d 447 (1953) (the AG sought to oust a newly appointed

1 Notably, counsel for the Board has not discovered *a single* Arizona case where the writ
2 has been applied to challenge the *manner* in which a valid office holder exercises his or
3 her authority, as opposed to *usurpation* of the office.

4 The quo warranto statute does not authorize the AG to do what he has done here—
5 challenge the acts of a lawful office holder merely because the AG alleges that the Board
6 is exercising its authority in an unlawful manner. If that were the standard, *McFate's*
7 holding that the AG is limited to his statutorily-delegated authority would be meaningless;
8 the AG could invoke the quo warranto statute to challenge literally any policy decision or
9 other action by any and every state agency and officer—precisely the sort of common law
10 power that Arizona law has long denied the AG. Because the AG concedes that the Board
11 is lawfully constituted, [Compl. ¶¶ 5, 28, 34, 35], and alleges only that the Board is
12 exercising the powers of its office in an unlawful manner, [*id.* ¶¶ 97, 108], the quo
13 warranto statute does not authorize him to bring counts II and III of his complaint.

14 **2. The tax enforcement statute, A.R.S. § 42-1004, does not authorize**
15 **counts I and III.**

16 The AG relies upon the tax enforcement statute, A.R.S. § 42-1004(E), to bring

17 state senator because he unlawfully held that office); *Garcia v. Sedillo*, 70 Ariz. 192, 218
18 P.2d 721 (1950) (a person who ran for election as the supreme president of a fraternal
19 benefit society sought to oust the incumbent supreme president because the incumbent
20 unlawfully held that office after he received less votes than the challenger in the election);
21 *State ex rel. De Concini v. Garvey*, 67 Ariz. 304, 195 P.2d 153 (1948) (the AG challenged
22 the Secretary of State's unlawful assumption of the Office of Governor after the Governor
23 died); *State ex rel. De Concini v. Sullivan*, 66 Ariz. 348, 188 P.2d 592 (1948) (an
24 appointed AG sought to oust an elected AG because the elected AG was unlawfully
25 holding his office after he was convicted of conspiring to violate the gambling laws and a
26 statute provided that an office was vacant when an incumbent was convicted of a felony);
State ex rel. Sullivan v. Moore, 49 Ariz. 51, 64 P.2d 809 (1937) (the AG sought to oust
two newly elected tax commissioners of the Arizona State Tax Commission because they
unlawfully held those offices); *Abbey v. Green*, 28 Ariz. 53, 235 P. 150 (1925) (a Superior
Court judge who was recalled challenged his replacement judge for allegedly unlawfully
usurping that office on the grounds that the recall was unlawful).

1 counts I and III of his complaint. [Compl. ¶¶ 77, 107]. That statute authorizes the AG to
2 “prosecute in the name of this state all actions necessary to enforce” Arizona’s tax laws.
3 (emphasis added). The plain language of the tax enforcement statute does not authorize
4 the AG to bring counts I and III of his complaint for three reasons. First, the statute does
5 not authorize the AG to initiate or commence litigation, and the Arizona Department of
6 Revenue (“ADOR”) did not request that the AG enforce the property tax laws against the
7 Board. Second, the AG is not enforcing Arizona’s tax laws against the Board because no
8 tax related to the Omni Hotel and Conference Center is due and owing to anyone. Third,
9 the AG is not a “person interested” in ASU’s Omni Hotel and Conference Center
10 transaction for purposes of declaratory relief. *See* A.R.S. § 12-1832.

11 **a. ADOR did not request that the AG enforce the property
tax laws at issue in this suit.**

12 The tax enforcement statute does not authorize the AG to bring counts I and III of
13 his complaint because ADOR was required to request that the AG initiate this property tax
14 enforcement action, and the AG did not allege (and cannot allege) that ADOR made any
15 such request. This requirement is clear from the language of the operative statutes.

16 For starters, because A.R.S. § 42-1004(E) only authorizes the AG to “prosecute,”
17 rather than to “initiate” or “commence,” actions necessary to generally enforce the tax
18 laws, the AG must always proceed with ADOR—*i.e.*, he cannot proceed alone—when he
19 is acting pursuant to his authority to enforce the tax laws under this statute. *Compare*
20 A.R.S. § 42-1004(E) (authorizing the AG to “prosecute” actions) *with* A.R.S. § 42-
21 11052(A)(2) (authorizing the AG to “commence and prosecute” actions); A.R.S. § 3-633
22 (authorizing the AG to “institute and prosecute” actions); A.R.S. § 3-734 (same); A.R.S.
23 § 23-929 (same); A.R.S. § 42-14257(2) (same); *see also* *McFate*, 87 Ariz. at 145–46, 348
24 P.2d at 916 (concluding that the power to “prosecute” actions granted to the AG by A.R.S.
25 § 41-193(A)(2) does not include the authority to “commence” or “initiate” actions).

26

1 Otherwise the “commence” and “institute” parts of these other statutes would be rendered
2 completely meaningless—an absurd result that the Legislature could not have intended.⁴
3 *See Champlin v. Sargeant*, 192 Ariz. 371, 374 ¶ 16, 965 P.2d 763, 766 (1998)
4 (“Interpreting statutory language requires that we give meaning to each word, phrase,
5 clause, and sentence within a statute so that no part will be superfluous, void,
6 contradictory, or insignificant.”). Consistent with this interpretation, counsel for the
7 Board has not discovered *a single* Arizona case where the AG has brought an action
8 unilaterally to enforce the tax laws acting pursuant to his authority under A.R.S. § 42-
9 1004(E), without representing a taxing authority. For that reason alone, the AG lacks the
10 authority under A.R.S. § 42-1004(E) to bring counts I and III of his complaint.

11 The requirement that the AG and ADOR act in concert is doubly applicable in the
12 field of property tax enforcement. A.R.S. § 42-11052(A)(2) provides that ADOR may
13 “[r]equest the [AG] . . . to commence and prosecute actions and proceedings . . . to
14 enforce the laws relating to property taxation.” In the context of the general tax
15 enforcement statute *requiring* ADOR and the AG to enforce the tax laws, this property
16 tax-specific statute only makes sense if it modifies the AG’s general duty to enforce the
17 tax laws and vests the AG with the authority to enforce the property tax laws only when
18 ADOR “[r]equests” that the AG “commence and prosecute” those actions. A.R.S. § 42-
19 11052(A)(2) (emphasis added); *see also Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11,

20
21 ⁴ In fact, as recently as 2018, the Legislature considered *but did not approve* an
22 amendment to A.R.S. § 41-193(A)(1) and (2), which similarly only authorize the AG to
23 “prosecute” and “defend” litigation in certain circumstances. The amendment that the
24 Legislature considered would have authorized the AG to “initiate” actions as well as to
25 “prosecute” and “defend” them. *See* Ariz. House Bill 2204,
26 <https://www.azleg.gov/legtext/53leg/2r/bills/hb2204p.htm> (last visited Mar. 7, 2019).
Because A.R.S. § 42-1004(E) only authorizes the AG to “prosecute” actions and because
the Legislature has specified when it authorizes the AG to “initiate” actions, the Court
should not interpret A.R.S. § 42-1004(E) to give the AG authority the Legislature has
declined to provide.

1 432 P.3d 925, 927 (2019) (“A cardinal principle of statutory interpretation is to give
2 meaning, if possible, to every word and provision so that no word or provision is rendered
3 superfluous.”); *United Behavioral Health v. Maricopa Integrated Health Sys.*, 240 Ariz.
4 118, 124 ¶ 22, 377 P.3d 315, 321 (2016) (describing the rule that “a specific statute
5 governs a general one” as a “time-honored interpretive principle”); *Scottsdale/101*
6 *Assocs., LLC v. Maricopa Cty.*, 238 Ariz. 291, 294 ¶ 13 n.5, 359 P.3d 1035, 1038 (App.
7 2015) (noting that the “Legislature has given [ADOR] general oversight responsibilities
8 for Arizona’s property tax system”). Here, the AG has not alleged that ADOR
9 “[r]equest[ed]” that the AG “commence and prosecute” this property tax enforcement
10 action. The AG thus does not have the authority, acting on his own, to bring counts I and
11 III of his complaint.

12 Read in context, A.R.S. § 42-11052(A)(2) plainly does not provide the AG with the
13 authority to unilaterally file a suit to try and collect property taxes that the AG thinks
14 should be assessed. In the subsections immediately following this grant of authority to the
15 AG in situations where ADOR requests his assistance, the Legislature provided specific
16 remedies to address situations where county taxing officials are not properly taxing
17 property. For instance, when the ADOR director or the AG believes that a county taxing
18 official is “guilty of official misconduct” or has neglected his or her duty, the ADOR
19 director must “take whatever steps are necessary . . . to remove the official from office,”
20 which may include requesting that the AG file suit with a complaint charging “official
21 misconduct or neglect of duty of a public officer.” A.R.S. § 42-11052(B). And the
22 ADOR director may request that the AG “initiate a mandamus action” when “a county
23 assessor fails to follow any rule, order or direction” of the ADOR director or when the
24 ADOR director “determines that an assessor or county board of equalization has practiced
25 discrimination in valuing property.” A.R.S. § 42-11052(C). Thus, in the property tax
26 arena, the Legislature has provided specific remedies in those circumstances where county

1 taxing officials are acting improperly. In addition to not having ADOR’s requisite request
2 to initiate this suit, the AG also has not alleged (because he cannot) that any county
3 assessor failed “to follow any rule, order or direction” of the ADOR director. In short, the
4 AG is seeking a remedy here that the Legislature did not provide, and that runs counter to
5 the property tax legislative scheme.

6 Further, A.R.S. § 42-1004(E) and A.R.S. § 42-11052(A)(2) should be read together
7 because A.R.S. § 42-1004(E) applies to centrally valued property, whereas A.R.S. § 42-
8 11052(A)(2) applies to locally valued property. *See State ex rel. Ariz. Dep’t of Revenue v.*
9 *Chastain Builders, Inc.*, 137 Ariz. 240, 242, 669 P.2d 1017, 1019 (App. 1983) (providing
10 that “the various provisions of our tax statutes are to be read together and ordinarily
11 construed as a whole”). The AG argued as much in a recent case:

12 By statute, the [AG] must prosecute in the State’s name all actions
13 necessary to enforce Arizona Revised Statutes Title 42. A.R.S. § 42-
14 1004(E). The [AG] may defend all actions brought against any agency of
15 the State arising under Title 42. *Id. Clearly, the foregoing pertains to*
16 *defending [ADOR] in a matter involving a centrally valued property.*
17 Additionally, [ADOR] may *request* that the [AG] or the County Attorney in
the respective county initiate and prosecute actions and proceedings or
represent [ADOR] in litigation to enforce the laws relating to property
taxation and [ADOR]’s orders or rules. A.R.S. § 42-11052(A)(2).

18 Opening Brief, *SunDevil Power Holdings, LLC v. Ariz. Dep’t of Revenue*, No. 1 CA-TX
19 15-0001, 2015 WL 6558078, at *44 (Ariz. App. Aug. 6, 2015) (emphasis added).
20 Because the Omni Hotel and Conference Center would be valued by the Maricopa County
21 Assessor after it is built, *see* A.R.S. § 42-13051(A)–(B),⁵ only the enforcement statute
22 pertaining to locally valued property would apply. Pursuant to that statute, the AG could
23 file suit only if ADOR had requested him to do so, which it has not done. *See* A.R.S.
24 § 42-11052(A)(2). The AG therefore does not have the authority to bring counts I and III.

25 ⁵ Indeed, the AG concedes this point by naming the Maricopa County Assessor and
26 the Maricopa County Treasurer as nominal defendants.

1 Careful attention to the statutory prerequisites is particularly important here
2 because no County Assessor has ever valued the Omni Hotel and Conference Center for
3 tax purposes or tried to assess a tax against it—because it has not yet been built and
4 because the Board’s property is and has been exempt from taxation under the Arizona
5 Constitution.⁶ [Compl. ¶¶ 60, 76, 81–84, 90, 98, 108]. The AG also does not allege that
6 Omni, as the taxpayer, has failed to pay any tax. In this situation, it is all the more
7 important to give ADOR the opportunity to request the AG’s assistance if or when it
8 becomes necessary.⁷ The AG should not be allowed to end-run the taxing authorities to
9 prosecute his policy preferences for the taxation of property that is owned now by the
10 Board, and is therefore not subject to taxation under article IX, section 2(1) of the Arizona
11 Constitution and A.R.S. § 42-11102(A), and will still be owned by the Board after the
12 contemplated transaction is complete.

13 **b. The AG is not “enforcing” any tax law.**

14 A.R.S. § 42-1004(E) only authorizes the AG to “enforce” Arizona’s tax laws, but
15 the AG does not allege that there is any tax due and owing against anyone. As the
16 dictionary says, the power to “enforce” is the power to “give force or effect to” a law or to
17 “compel obedience to” a law. *See Enforce*, Black’s Law Dictionary (10th ed. 2014). But
18 the AG has not identified any tax statute that he is “giv[ing] force or effect to” or any tax
19 statute that he is seeking to “compel obedience to” because no taxing authority has ever
20 even valued the Omni Hotel and Conference Center for tax purposes because those
21 buildings have not yet been built and relate to a leasing transaction that has not yet been

22
23 ⁶ For discussion of why the Court should dismiss count I of the AG’s complaint
24 because the Board’s property is tax-exempt state property, see Motion to Dismiss Number
25 3 (Count I Unlawfully Requests That Tax-Exempt State Property Be Taxed).

26 ⁷ For discussion of the process by which the County Assessor or taxpayer may
appeal an alleged error, incorrect valuation, or misclassification of property for tax
purposes, see Motion to Dismiss Number 2 (Failure to Exhaust Administrative Remedies).

1 executed. Further, no taxing authority has ever assessed a tax against Omni, as the
2 taxpayer, that Omni refused to pay. There is simply no outstanding tax that is currently
3 due and owing for the AG to “enforce.” A ruling here would therefore amount to nothing
4 more than a prohibited advisory opinion. *See Velasco v. Mallory*, 5 Ariz. App. 406, 410–
5 11, 427 P.2d 540, 544–45 (1967) (providing that courts should not “render advisory
6 opinions anticipative of troubles which do not exist; may never exist; and the precise form
7 of which, should they ever arise, [courts] cannot predict”). A.R.S. § 42-1004(E) thus does
8 not authorize the AG to bring counts I and III of his complaint.

9 **c. Because the AG has no “interest” in the Omni transaction,
10 he does not have standing to obtain relief under Arizona’s
11 Declaratory Judgments Act.**

12 The AG is not a “person interested” in ASU’s Omni Hotel and Conference Center
13 transaction for purposes of declaratory relief. The AG’s attempt to shoehorn broad,
14 common law type power that decades of precedent have denied him into a claim for a
15 declaratory judgment regarding the Omni transaction falls flat. Although “[d]eclaratory
16 judgment relief is an appropriate vehicle for resolving controversies as to the legality of
17 acts of public officials,” in order to be entitled to relief, a plaintiff “must have a legal,
18 protectible interest,” *i.e.*, “his pleading must present a state of facts showing he has a
19 present legal right against the defendant.” *Riley v. Cochise Cty.*, 10 Ariz. App. 55, 59, 455
20 P.2d 1005, 1009 (1969); *see also* A.R.S. § 12-1832 (authorizing any “person interested”
21 under a contract to seek declaratory relief regarding the “rights, status or other legal
22 relations” under the contract).

23 The AG does not have a present legal interest in ASU’s Omni Hotel and
24 Conference Center transaction because there is no *specific statutory grant of power* that
25 authorized the AG to initiate this suit. *See McFate*, 87 Ariz. at 144, 348 P.2d at 915.
26 Further, and in any event, the AG is not a “person interested” in ASU’s Omni Hotel and

1 Conference Center transaction for purposes of the declaratory judgment statute because he
2 does not have a present legal interest in the transaction or a present legal right against the
3 Board. The AG’s alleged interest is not “present” because the transaction is not complete;
4 no county taxing authority has valued the Omni Hotel and Conference Center for tax
5 purposes or assessed a tax against Omni that Omni refused to pay; and ADOR has not
6 requested the AG to enforce the property tax laws pursuant to A.R.S. § 42-11052(A)(2).
7 And the AG’s alleged right against the Board is also not “present,” but is rather
8 nonexistent, because the Board currently owns the property, which means that the
9 property is not subject to taxation under article IX, section 2(1) of the Arizona
10 Constitution and A.R.S. § 42-11102(A). The Board will also continue owning the
11 property after the Omni transaction is completed, which means that the property will
12 continue to not be subject to taxation under those same provisions. *See, e.g., City of*
13 *Tempe v. Del E. Webb Corp.*, 13 Ariz. App. 597, 598, 480 P.2d 18, 19 (1971) (providing
14 that the Board “is a state agency and therefore exempt from taxation”). The Court should
15 not condone the AG’s back-door attempt to paper over the complete absence of statutory
16 authority to bring this suit. The declaratory judgment statute does not independently
17 empower the AG to bring this action, and the tax enforcement statute does not authorize
18 the AG to bring counts I and III of his complaint.

19 **ATTORNEY FEES NOTICE**

20 The Board requests reasonable attorney fees as the successful party in this action
21 under A.R.S. § 12-348.01.

22 **CONCLUSION**

23 The Legislature did not authorize the AG to bring this suit against his client, the
24 Board. Allowing the AG to move forward here would upend decades of precedent
25 holding that “whatever powers [the AG] possesses must be found in the Arizona
26 Constitution or the Arizona statutes.” *See Woods*, 189 Ariz. at 272, 942 P.2d at 431

1 (citation omitted). Because the AG lacks the statutory authority to bring any of his
2 claims, the Court must dismiss his suit.

3
4 Dated: March 8, 2019

PERKINS COIE LLP

5 By: /s/ Paul F. Eckstein

6 Paul F. Eckstein
7 Joel W. Nomkin
8 Shane R. Swindle
9 Thomas D. Ryerson
10 Austin C. Yost
11 2901 North Central Avenue
12 Suite 2000
13 Phoenix, Arizona 85012-2788

SNELL & WILMER LLP

14 By: /s/ Brett W. Johnson

15 Brett W. Johnson
16 Lindsay Short
17 400 E. Van Buren Street, Suite 1900
18 Phoenix, Arizona 85004

*Attorneys for Defendant
Arizona Board of Regents*

19 E-filed with the Court this March 8, 2019
20 and copies emailed this same date to:

21 Mark Brnovich, Attorney General
22 Brunn W. Roysden III, Assistant Attorney General
23 2005 N. Central Avenue
24 Phoenix, AZ 85004
25 Beau.roysden@azag.gov

26 /s/ Susan Carnall

143266167.8