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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE ARIZONA TAX COURT

State of Arizona, ex rel. Mark Brnovich, Attorney General, Plaintiff, v. Arizona Board of Regents, Defendant,	No. TX2019-000011 **MOTION TO DISMISS NUMBER 4 (COUNTS II AND III PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS)** **(Assigned to the Hon. Christopher Whitten)**
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.	

MOTION

Pursuant to Arizona Rules of Civil Procedure 12(b)(6) and 12(c), the Arizona Board of Regents ("the Board") moves to dismiss counts II and III of the Attorney General's ("AG") complaint on the grounds that those counts present non-justiciable political questions for the reasons set forth in the memorandum below.

MEMORANDUM

The Board has broad statutory authority to "[p]urchase, receive, hold, make and take leases and long-term leases of and sell real and personal property *for the benefit of this state* and *for the use of the institutions under its jurisdiction*." A.R.S. § 15-1625(B)(4) (emphasis added). Acting to benefit the state and to support the growth and development of higher education, the Board has made subjective and deliberative policy decisions to partner with businesses and lease the Board's property. Such leasing of the Board's real property to private businesses that serve university communities is a well-established Board prerogative authorized under Arizona law. ASU's Memorial Union, for example, has at least 14 restaurants, two banks, a hair salon, and a commercial print/copy shop as private, third-party lessees. *See* Arizona State University, *What's in the Memorial Union*, https://eoss.asu.edu/mu/whats_in (last visited Mar. 7, 2019). And the Beus Center for Law and Society is home to not just the Sandra Day O'Connor College of Law at Arizona State University, but also independent legal organizations and a private coffee vendor. *See* Arizona State University, *Beus Center for Law and Society*, http://beuscenterforlawandsociety.com/ (last visited Mar. 7, 2019).[1] All these transactions, in the Board's view, benefit the state and are for the use of ASU and the students it serves.[2]

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[1] ASU's website is a "matter of public record" that a court may consider in deciding a Rule 12(b)(6) motion. *See Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64 ¶ 13, 226 P.3d 1046, 1050 (App. 2010).

[2] The Board exercises oversight and judgment regarding all these transactions. In fact, as the AG acknowledges, the Board recently adopted policies that (1) require universities to document the economic benefits of long-term leases to the universities and the State of Arizona and (2) prohibit universities from engaging in commercial long-term leases if the "primary purpose is to remove private land or real property improvements from property tax rolls." [Compl. ¶¶ 71–72].

The Board's most recent policy decision is that ASU would likewise benefit from an on-campus hotel and conference center ("the Omni Project"), to be operated by Omni Hotels Management Corporation ("Omni Hotels"). [Compl. ¶¶ 60–61]. The AG does not question whether the Omni Project benefits the state, but instead claims it is "for the use of private third parties" and therefore violates the institutional use component of A.R.S. § 15-1625(B)(4). [*Id.* ¶ 108]. Regardless if the AG's unfounded innuendo is correct or sufficient to state a claim, any dispute as to the Board's exercise of its authority under that statute is a political question with which the AG is not empowered to interfere. Simply, neither the courts nor the AG is authorized to resolve the political question of whether a project is sufficiently "useful" to Arizona's universities to satisfy A.R.S. § 15-1625(B)(4)'s standard. For this reason, the Court should dismiss counts II and III of the AG's complaint and leave decisions related to the Board's use of its real property to the political branches.

ARGUMENT

Counts II and III of the AG's complaint raise non-justiciable political questions and should therefore be dismissed. Courts refrain from addressing issues that are deemed "non-justiciable." *See, e.g.*, *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192 ¶ 11, 165 P.3d 168, 170 (2007). Lawsuits seeking resolution of political issues are non-justiciable and are therefore properly dismissed for lack of subject matter jurisdiction and pursuant to principles of judicial restraint. *See, e.g.*, *Fogliano v. Brain ex rel. Cty. of Maricopa*, 229 Ariz. 12, 19–21 ¶¶ 22–29, 270 P.3d 839, 846–48 (App. 2011) (holding that the determination of whether Proposition 204, an initiative expanding the number of Arizonans eligible to receive Medicaid benefits, required the Arizona Legislature to appropriate supplemental funding was a non-justiciable political question).[3]

Under Arizona law, "[a] controversy is nonjusticiable . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department;

[3] At the federal level, for example:

> The Supreme Court has articulated several legal doctrines emanating from Article III that restrict when federal courts will adjudicate disputes, such as standing, ripeness, mootness, and

or a lack of judicially discoverable and manageable standards for resolving it." *Kromko*, 216 Ariz. at 192 ¶ 11, 165 P.3d at 170 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). The political question doctrine, a species of non-justiciability, recognizes that some decisions are entrusted to branches of government other than the judiciary. *See id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962) and *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485, 143 P.3d 1023, 1026 (2006)). Accordingly, Arizona courts refrain from second-guessing policy makers' discretionary decisions. *See id.* at 193–95 ¶¶ 13–25, 165 P.3d at 171–73 (holding that the Board's university tuition decisions are immune from judicial review).

This principle is deeply embedded in the Arizona Constitution, which provides that the branches of state government "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III; *see also Kromko*, 216 Ariz. at 192 ¶ 12, 165 P.3d at 170 ("The federal political question doctrine flows from the basic principle of separation of powers and recognizes that some decisions are entrusted under the federal constitution to branches other than the judiciary. Arizona courts refrain from addressing political questions for the same reasons.") (internal citation omitted); *Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988) ("Nowhere in the United States is [separation of powers] more explicitly and firmly expressed than in Arizona.").

> the prohibition against issuing advisory opinions. These "justiciability" doctrines are rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including the "proper—and properly limited—role of the courts in a democratic society." One justiciability concept is the "political question" doctrine—according to which federal courts will not adjudicate certain controversies because their resolution is more proper within the political branches.

Jared P. Cole, *The Political Question Doctrine: Justiciability and the Separation of Powers*, Congressional Research Service Report 1 (Dec. 23, 2014).

A. University policy is textually committed to the Board.

The Arizona Constitution vests "[t]he general conduct and supervision of the public school system" in "such governing boards for the state institutions as may be provided by law." Ariz. Const. art. XI, § 2; *see also* Ariz. Const. art. XI, § 5 (identifying the "regents of the university" as an educational governing board). Arizona courts have recognized these provisions as a constitutional commitment of university management to the Board. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 251, 204 P.2d 854, 860 (1949) (noting that article XI, section 2 of the Arizona Constitution is the source of the Board's "constitutional supervisory power"); *Devol v. Bd. of Regents of Univ. of Ariz.*, 6 Ariz. 259, 261, 56 P. 737, 737 (1899) (providing that, under the Arizona Constitution, "[t]he university is a public institution, placed under the control of the board of regents, with full power to manage the same"); *see also* Ariz. Op. Atty. Gen. No. I17-007, 2017 WL 6512557, at *3 (2017) (recognizing the Board's constitutional duties). Furthermore, the Legislature has explicitly charged the Board with establishing university policy, including the purchase, sale, and lease of real estate. *See* A.R.S. § 15-1625(B)(4).

Any disagreement with the Board's decision-making on policy matters is appropriately addressed with the Arizona Legislature. As the AG pointedly observed, "the Arizona Supreme Court has recognized the ultimate authority of the Legislature to settle policy disputes about the scope of [the Board's] authority." Ariz. Op. Atty. Gen. No. I17-007, 2017 WL 6512557, at *5 (2017); *see also Bd. of Regents of the Univs. & State Colls. of Ariz. v. City of Tempe*, 88 Ariz. 299, 311, 356 P.2d 399, 406–07 (1960) ("The ultimate responsibility for higher education is reposed by our Constitution in the State. The legislature has empowered [the Board] to fulfill that responsibility subject only to the supervision of the legislature and the governor."). These political branches are both constitutionally and institutionally positioned to oversee the Board's authority in the purchase, lease, and use of university property.

B. There is no standard under which the Court can resolve the issues raised in counts II and III of the AG's complaint.

Besides the restraint inherently necessary based on separation of powers principles, courts must also refrain from entertaining political questions when there are no judicially discoverable or manageable standards on which to base a decision. *See, e.g.*, *Kromko*, 216 Ariz. at 192 ¶ 11, 165 P.3d at 170. Without objective criteria to apply, the Court would be forced to make discretionary decisions reserved for policy makers. *See id.* at 193 ¶ 14, 165 P.3d at 171 (stating that "'the lack of satisfactory criteria for a judicial determination'" is the "'dominant consideration[]' in determining whether an issue is nonjusticiable") (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939)); *see also Fogliano*, 229 Ariz. at 20 ¶ 25, 270 P.3d at 847 (observing that courts "are ill-equipped to inquire into and second-guess the complexities of [agency] decision-making and priority-setting").

In 2003, the Board determined it was necessary to raise tuition and fees for in-state students by 39.1% for the 2003–04 academic year. *See Kromko*, 216 Ariz. at 191 ¶ 4, 165 P.3d at 169. Some students filed suit, claiming that the increase violated article XI, section 6's mandate that the instruction furnished at universities be as "nearly free as possible" and article XI, section 10's directive that the Legislature "make such appropriations . . . as to ensure the proper maintenance of all state educational institutions." *Id.* ¶ 5, 165 P.3d at 169. The Arizona Supreme Court's handling of this political question and the lack of guidance in evaluating the Board's discretionary authority is instructive:

> We can conceive of no judicially discoverable and manageable standards—and the students have suggested none—by which we could decide such issues, either individually or in the aggregate. Even assuming, as the students contend, that Article XI, Section 6, requires that tuition be "reasonable" and not "excessive," 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. The issue of whether tuition is as nearly free as possible is thus a nonjusticiable political question.

Id. at 193–94 ¶¶ 15–21, 165 P.3d at 171–72.

Likewise, here, there is no judicially discoverable or manageable standard under which to resolve whether a particular Board real estate transaction, or the Board's real estate

transactions in the aggregate, provides sufficient "use" for Arizona's public universities. The Legislature entrusted the Board with the broad authority to make subjective policy choices about how best to support the state's universities. Whether a hotel and conference center is desirable or necessary, where it is located, whether the property should be leased or sold, how much it should be leased or sold for, what the term of the lease should be, and who should operate the hotel and conference center are all policy decisions reached through careful deliberation authorized by Arizona law. *See* A.R.S. § 15-1625(B)(4). Neither the AG nor the courts are in a position to second guess the Board's policy decisions or to impose their own standards on Arizona's universities. *See Kromko*, 216 Ariz. at 193–94 ¶¶ 15–21, 165 P.3d at 171–72.

Significantly, the AG has failed to identify or suggest any standard for this Court to apply, except to simply second-guess how the Board is exercising its statutory authority. For example, the AG takes issue with the Board's alleged "practice of using ABOR's tax-exempt status to facilitate special property deals for favored businesses . . . [that] are designed to shield selected companies from property taxes[.]" [Compl. ¶ 1; *see also id.* ¶ 111 ("Taking title to improvements that are in fact used by private parties *in order to shield the private parties from applicable property taxes* is not 'for the benefit of the institutions under [the Board's] jurisdiction.'") (emphasis added)].[4] But the AG does not allege that the Omni Project was anything less than an arms-length transaction. Indeed, the public record amply demonstrates that the transaction has been publicly discussed and negotiated for years.[5] The AG does not create a rule by which this Court can resolve counts

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[4] The AG's allegations badly distort what is actually happening. As explained in more detail in Motion to Dismiss Number 3 (Count I Unlawfully Requests That Tax-Exempt State Property Be Taxed), the Board purchased the property that is the subject of the Omni transaction in November 1983 and still currently owns that property. Because the Board's property is state property that is exempt from taxation under article XI, section 2(1) of the Arizona Constitution and A.R.S. § 42-11102(A), this property has been off the property tax rolls for over three decades.

[5] A search on the Board's public website and Board agendas reflects the extensive discussion related to the proposed Omni transaction. *See* Arizona Board of Regents, *Search Results*, https://azregents.edu/SearchResults?addsearch=Omni (last visited Mar. 7, 2019).

II and III of his complaint just by (falsely) re-casting a deliberate policy decision as some sort of dishonest scheme.

Beyond casting aspersions, the AG does not even attempt to argue that there is no benefit to ASU and the students it serves when the Board leases its property in this manner. The AG simply objects that Omni Hotels *will also use* the project. But such an objection is contrary to the Board's express authority to "make . . . leases and long-term leases of . . . real and personal property." A.R.S. § 15-1625(B)(4). The Legislature surely contemplated that private parties would use property leased to them under the Board's authority.

Moreover, nothing in Arizona law requires the Board's real estate transactions to be for universities' *exclusive* use. *See generally* A.R.S. § 15-1625(B)(4). Hypothetically, such legislative specificity would lend itself to discoverable and manageable legal standards. *See, e.g.*, *Kromko*, 216 Ariz. at 193 ¶ 15, 165 P.3d at 171 ("If Article XI, Section 6, required instruction for university students to be 'free,' there would be judicially discoverable and manageable standards for determining constitutional compliance. But this Court long ago held that the phrase 'as nearly free as possible' does not entitle Arizona residents to an 'entirely free' college education."). But the Board's statute simply contemplates property transactions be "for the use" of Arizona universities, without additional limitation. *See* A.R.S. § 15-1625(B)(4).

What is more, even the concept of "use" is flexible. Assuming the transaction is executed, Omni Hotels will pay the Board rent for the duration of the lease. [Compl. ¶ 66]. A.R.S. § 15-1625(B)(4) by its terms plainly contemplates that pure revenue-generation is a permitted "use," given that the statute also authorizes the Board to "sell" and "lease[]" real and personal property. The only possible "use" from such transactions is the revenue that they generate. But that is not the only permitted "use" under the statute because A.R.S. § 15-1625(B)(4) also authorizes the Board to "purchase" and "hold" real property.

Thus, there are no standards for courts to apply to determine whether a single transaction, or all the Board's transactions in the aggregate, are of the *right type of use—i.e.*, whether the Board should have bought or held property rather than sold or leased

property, and whether the Board should have committed the property it does hold to different objectives—or *create enough use—i.e.*, whether the Board bought enough property or sold or leased its property for enough money. Tellingly, the AG suggests no standard for this Court to apply apart from his own political judgment disagreeing with that of the Board's. At bottom, these are all policy determinations that the Legislature delegated to the Board. Accordingly, without a judicially discoverable and manageable standard, the Court would be left to substitute its own policy preferences for that of the Board regarding whether the Omni Project and other transactions like it would be of the right type of use and for a reasonable enough use for Arizona's universities. Such an inquiry raises a political question that the Court should refrain from addressing.

ATTORNEY FEES NOTICE

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

CONCLUSION

The policy determination of whether a particular real estate lease will have sufficient university "use" is constitutionally and statutorily committed to the Board's discretion and is incapable of being distilled into a discoverable and manageable standard for this Court to apply. Just as the Board and the political branches must decide whether the instruction furnished at public universities constitutes a "nearly free" education, they too must decide whether real estate transactions like the Omni Project benefit the state and provide sufficient use for its universities. Because those issues are non-justiciable political questions, counts II and III of the AG's complaint should be dismissed.

Dated: March 8, 2019

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