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6 *Attorneys for Maricopa County Community College District Board*

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE OF ARIZONA ex rel. Attorney ) No. CV2013-009093  
General Thomas C. Horne, )  
10 )  
Plaintiff, ) **DEFENDANT’S REPLY IN SUPPORT**  
11 ) **OF MOTION FOR JUDGMENT ON**  
vs. ) **THE PLEADINGS**  
12 )  
MARICOPA COUNTY COMMUNITY ) **(Oral Argument Requested)**  
13 COLLEGE DISTRICT BOARD, )  
14 ) (Assigned to the Hon. Arthur Anderson)  
Defendant. )  
15 )

16 The Attorney General essentially concedes that he exceeded his powers and duties when  
17 he filed this lawsuit against MCCCC. *See* Arizona’s Resp. to MCCCCD’s Mot. for Judgment on  
18 the Pleadings (the “Response”). In his Response, he abandons any argument that the Attorney  
19 General had statutory authority to initiate this action on behalf of the State of Arizona. In an  
20 apparent attempt to cure this deficiency, Governor Brewer sent the Attorney General a letter on  
21 February 19, 2014 that purports to ratify his actions taken to date and directs him to continue  
22 this litigation. *See* Corrected – Arizona’s Request to Take Judicial Notice, Ex. A (the  
23 “Governor’s Letter”). The Attorney General now relies solely on this letter as the source of his  
24 authority to continue this action. (Response at 2). However, this attempt to remedy the  
25 Attorney General’s lack of statutory power to initiate this lawsuit fails because the Governor  
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1 similarly lacks any Constitutional or statutory authority to control the actions of an independent  
2 government entity such as MCCCCD. She cannot initiate litigation—or direct the Attorney  
3 General to initiate litigation—simply because she disagrees with the legal interpretation  
4 adopted by a separate and independent government entity.

### 5 **Argument**

#### 6 **I. Neither the Governor nor the Attorney General has carte blanche to bring actions 7 on behalf of the State without constitutional or statutory authority.**

8 The Attorney General’s Response presumes without citation that the common law  
9 powers he does not possess are nonetheless possessed by the Governor. He asserts that the  
10 Governor’s authority to direct this litigation against MCCCCD arises from her constitutional  
11 duty to “take care that the laws be faithfully executed.” (Response at 1). Although the  
12 Governor certainly has the authority to supervise the executive department of state government,  
13 her executive authority does not empower her to direct this particular lawsuit.

14 The framers of Arizona’s Constitution purposefully divided the executive power among  
15 several elected officials, each with limited powers. *See* Toni McClory, *Understanding*  
16 *Arizona’s Constitution* 104-05 (2d. ed. 2010). This fragmented structure protects against the  
17 abuses that can occur with consolidated executive power. *Id.* (explaining the Progressive  
18 framers’ deep mistrust of government). Accordingly, Arizona’s Constitution provides for a  
19 separately elected governor, secretary of state, attorney general, state treasurer, superintendent  
20 of public instruction, state mine inspector, and five corporation commissioners. Ariz. Const.  
21 art. 5, § 1, arts. 15 & 19. There is simply no support in the Arizona Constitution, statutes, or  
22 case law for the notion that the common law powers one elected official lacks are residually  
23 retained by the Governor, and the Attorney General has cited none.

24 The powers of the executive department, including those of the Governor, must be  
25 found in the Arizona Constitution or the Arizona statutes. *See* Ariz. Const. art. 5, § 1  
26 (confirming that officers of the executive department “shall perform such duties as are

1 prescribed by the constitution and as may be provided by law”); *Citizens Clean Elections*  
2 *Comm'n v. Myers*, 196 Ariz. 516, 523, 1 P.3d 706, 713 (2000) (acknowledging that the  
3 Governor’s powers are not unlimited); *cf. State v. Block*, 189 Ariz. 269, 272, 942 P.2d 428, 431  
4 (1997) (“In Arizona, the Attorney General has no common law powers; whatever powers he  
5 possesses must be found in the Arizona Constitution or the Arizona statutes.”). Neither the  
6 Arizona Constitution nor statute provides the Governor with authority to initiate or direct a  
7 declaratory judgment action against an independent governmental entity because the Governor  
8 disagrees with its interpretation of state law.

9 **A. Article V, § 4 of the Arizona Constitution does not provide the Governor**  
10 **authority to direct this litigation.**

11 The Arizona Constitution provides that the Governor “shall transact all executive  
12 business” and “shall take care that the laws be faithfully executed.” Ariz. Const. art. 5, § 4.  
13 Arizona courts have never extended this duty as far as the Attorney General asks this Court to  
14 do here.

15 The Attorney General has cited *McFate* as “clear” authority that “the Governor has the  
16 power to direct that appropriate steps are taken to bring a political subdivision of the state, such  
17 as MCCCCD, into compliance with Arizona law.” (Response at 2). However, the case states  
18 only that “the Governor alone, and not the Attorney General, is responsible for the supervision  
19 of the *executive department* and is obligated and empowered to protect the interests of the  
20 people and the State by taking care that the laws be faithfully executed.” *Ariz. State Land Dep’t*  
21 *v. McFate*, 87 Ariz. 139, 148, 348 P.2d 912, 918 (1960). Specifically, the *McFate* Court held  
22 that “[w]ith reference to the instant situation, the State Land Commissioner is appointed by the  
23 Governor, may be removed by the Governor for cause, and is required to report annually to the  
24 Governor concerning the activities of the State Land Department.” *Id.* (internal citations  
25 omitted). The case does not give the Governor any authority over a governmental entity not  
26 subject to gubernatorial supervision or control.

1 *McFate* is consistent with the notion that the Governor’s duty to take care that the laws  
2 are faithfully executed extends only to her obligations to supervise the executive department.  
3 That is her Constitutional realm of power and control. As the Arizona Supreme Court has  
4 noted, the “reasonable implication” of the Governor’s authority to “take care that the laws be  
5 faithfully executed,” is that “as part of his executive power he should select those who were to  
6 act for him under his direction in the execution of the laws. The further implication must be, in  
7 the absence of any express limitation respecting removals, that as his selection of  
8 administrative officers is essential to the execution of the laws by him, so must be his power of  
9 removing those for whom he cannot continue to be responsible.” *Ahearn v. Bailey*, 104 Ariz.  
10 250, 253, 451 P.2d 30, 33 (1969); *accord Citizens Clean Elections Comm’n*, 196 Ariz. at 523, 1  
11 P.3d at 713.

12 This litigation against MCCCCD does not involve supervision of the executive  
13 department.<sup>1</sup> As the Complaint recognizes, MCCCCD is a separate governmental subdivision of  
14 the State that is governed by an elected governing board. (Compl. ¶ 3). The governing board is  
15 directly responsible to the electorate and not subject to gubernatorial supervision. To accept  
16 the Governor’s broad assertion of power over MCCCCD would expand the Governor’s powers  
17 far beyond the powers granted to her by the Arizona Constitution.

18 **B. There is no statutory authority for this lawsuit.**

19 The Governor’s Letter asserts that A.R.S. § 41-193(A)(2) provides her with “authority  
20 to direct the attorney general to prosecute and defend any proceeding in a state court in which  
21 the state has an interest.” (Governor’s Letter at 1). As noted in MCCCCD’s Motion (at 4),  
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23 <sup>1</sup> Nor does this litigation involve a direct harm to the Governor’s constitutional authority.  
24 *See Brewer v. Burns*, 222 Ariz. 234, 237 ¶ 12, 213 P.3d 671, 674 (2009) (holding that Governor  
25 had standing to bring lawsuit against Legislature because the “Legislature’s refusal to present  
26 her with finally passed bills violates the constitutionally established procedure for lawmaking  
and undermines her express authority to veto or approve bills”). Here the Governor asserts  
only the general interests of the people of the State; she has sustained no injury related to her  
office.

1 Arizona courts have long recognized that this section presupposes a properly instituted  
2 proceeding in which the State has an “interest.” *McFate*, 87 Ariz. at 145, 348 P.2d at 916.  
3 This section “does not permit the Attorney General, *in the absence of specific statutory power*,  
4 to initiate an original proceeding.” *Id.* (emphasis added). Nor does this section permit the  
5 Governor to direct the Attorney General to take action in the absence of specific statutory  
6 authority. In other words, the Governor may direct the Attorney General to take action where,  
7 in his discretion, he has chosen not to act even though he has the statutory power to initiate or  
8 defend an action. *Cf. Block*, 189 Ariz. at 272, 942 P.2d at 431 (explaining that the Attorney  
9 General has no common law powers).

10 The Response cites no other statutory authority that permits the Governor to initiate this  
11 action. And although A.R.S. § 41-101(A)(5)-(7) permits the Governor to direct the attorney  
12 general in certain actions, that statute does not provide the Governor with the authority to direct  
13 him to file this lawsuit challenging an independent governmental subdivision’s interpretation of  
14 state law.

### 15 Conclusion

16 The Court should dismiss the Complaint because the Attorney General had no statutory  
17 authority to bring a lawsuit against MCCCCD and the Governor has no authority to ratify his  
18 actions and direct that the litigation continue.

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1 DATED this 17<sup>th</sup> day of March, 2014.

2 OSBORN MALEDON, P.A.

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14 COPY of the foregoing e-filed and a COPY  
15 e-delivered this 17<sup>th</sup> day of March, 2014, to:

16

17 The Honorable Arthur Anderson  
18 Maricopa County Superior Court  
19 East Court Building  
20 101 W. Jefferson  
21 Phoenix, AZ. 85003-2243

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23 Copy of the foregoing served via e-mail  
24 this 17<sup>th</sup> day of March, 2014, to:

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