Brett W. Johnson (#021527)
Tracy A. Olson (#034616)
Ryan P. Hogan (#036169)
Charlene A. Warner (#037169)
SNELL & WILMER L.L.P.
One East Washington Street
Suite 2700
Phoenix, Arizona 85004-2556
Telephone: 602.382.6000
bwjohnson@swlaw.com
tolson@swlaw.com
rhogan@swlaw.com
cwarner@swlaw.com

Attorneys for Proposed Intervenors Arizona House Speaker Ben Toma and Arizona Senate President Warren Peterson

Sambo (Bo) Dul (#030313)
Office of Arizona Governor Katie Hobbs
1700 West Washington Street, 9th Floor
Phoenix, Arizona 85004
T: (602) 542-6578
bdul@az.gov

Attorneys for Proposed Intervenor Governor Katie Hobbs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, ex rel. KRISTIN K. MAYES, Attorney General of the State of Arizona,

Plaintiff,

v.

THE ARIZONA DEPARTMENT OF ADMINISTRATION, a public entity, and ELIZABETH ALVARADO-THORSON, in her official capacity as its Cabinet Executive Officer & Executive Deputy Director,

Defendants.

No. CV2024-016033

EMERGENCY MOTION TO DISSOLVE TRO PURSUANT TO ARIZ. R. CIV. P. 65(B)(5)

(Assigned to the Hon. Scott Minder)

(Expedited Consideration Requested)

Pursuant to Arizona Rule of Civil Procedure 65(B)(5), Ben Toma, Speaker of the Arizona House of Representatives, Warren Petersen, President of the Arizona Senate, and Katie Hobbs, Governor of Arizona move for an order dissolving the Court's June 20, 2024, order (the "Order") granting Plaintiff's *Ex Parte* Motion for Emergency Injunction and Other Relief (the "Motion").[1]

INTRODUCTION

Plaintiff Kris Mayes ("Plaintiff" or "Attorney General") has no constitutional or statutory authority to unilaterally deploy attorneys to disrupt Arizona's constitutionally mandated budgetary and legislative process—pursuant to which the Legislature and Governor develop public policy and institute a fiscal scheme to ensure those policies are carried out. Yet here, the Attorney General improperly seeks to use the judiciary as a tool to effectuate her unilateral dissatisfaction with the public policy decisions made by the Legislature and Governor in the most recent general appropriations act, H.B. 2897 and the carrying out of other statutorily authorized duties.

Specifically, without any basis in the Arizona Constitution, statute, or reality, the Attorney General requests an order to carve out or effectively line-item veto a $75,000,000 appropriation from the budget for fiscal year 2023-24 and a $40,000,000 appropriation from the budget for fiscal year 2024-2025. Plaintiff's sole basis for doing so is her subjective belief that those funds might somehow, one day be spent for purposes that are not "Authorized Purpose(s)" contemplated in the settlement agreements resolving the claims against opioid distributors and other defendants ("Settlement Agreements") and the consent judgments entered in connection with the Settlement Agreements (the "Consent Judgments").[2] Those documents expressly recognize, consistent with the Arizona Constitution, that the Legislature decides how to prioritize and allocate state funds.

[1] Although Rule 65(B)(5) requires two-days' notice, it allows the court to set a shorter time. Given the importance of the issues and the looming budget deadline, the Court should waive the notice requirement here.

[2] A more complete summary of the background facts leading up this action is provided in the contemporaneously filed Motion to Intervene and incorporated herein by reference.

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602.382.6000

Plaintiff's entire premise would upend this constitutional balance and give her unfettered discretion to allocate the opioid funds—irrespective of the Legislature's exercise of its appropriation power. This novel argument is wrong. The Attorney General can only exercise her discretion within constitutional and statutory parameters.

Moreover, Plaintiff's rampant speculation about what *might* happen is directly contradicted by the plain text of H.B. 2897, which explicitly restricts the funds to opioid remediation—an Authorized Purpose that the Attorney General herself acknowledged as recently as April of this year. These funds have not been paid to anyone yet. Under H.B. 2897, they are only to be transferred from one governmental account to another. There is nothing illegal about that appropriation, and discretion over appropriations and eventual expenditures are solely within the Legislature and Governor's purview. As a result, even if her claims were somehow justiciable (and they are not), Plaintiff has not stated a claim either under A.R.S. § 35-212 or under the article II, section 25 of the Arizona Constitution.

On June 20, 2024, this Court, without the required notice under Rule 65 or input from any party but the self-serving presentation of Plaintiff, entered the Attorney General's proposed Temporary Restraining Order ("TRO") and set a hearing on this matter for June 27, 2024. Respectfully, that will be too late. H.B. 2897 set a deadline of June 20, 2024 (the date Plaintiff filed her action) to transfer the funds at issue in this action. Thus, there is presently a gaping $115 million hole in the budget that the Legislature passed and the Governor signed through the traditional lawmaking process mandated by the Arizona Constitution. That cannot stand.

If this Court had the benefit of input from the Legislature and the Governor, it would have been clear that the Attorney General's factual and legal assertions are false and her claims have no chance of success on the merits, show no likelihood of imminent irreparable harm, and that the balance of equities tips sharply against issuance of an injunction here. Accordingly, Proposed Intervenors respectfully request that the Court dissolve the TRO entered on June 20, 2024, in order to prevent the Attorney General from using the judiciary to accomplish what she could not in the traditional budget process.

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602.382.6000

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Whether a TRO or a preliminary injunction, the purpose of such preliminary relief is to preserve the status quo. *Univ. of Tex v. Camensich*, 451 U.S. 390, 395 (1981). To obtain a TRO, Plaintiff must show: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable harm if the relief is not granted; (3) the balance of hardships favors the party seeking injunctive relief; and (4) public policy favors granting the injunctive relief. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Courts apply a sliding scale to assess these factors. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-11 ¶¶ 9-10 (2006). To meet its burden, the moving party must show "either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and the balance of hardships tips sharply in his favor." *TP Racing, L.L.L.P v. Simms*, 232 Ariz. 489, 495 ¶ 21 (App. 2013) (internal quotation marks omitted). Under this sliding scale, the less the irreparable harm, the greater the showing of a strong likelihood of success on the merits must be (and vice versa). *Smith*, 212 Ariz. at 411 ¶ 10. Because Plaintiff has not come close to meeting the high bar for her requested TRO, this Court should immediately vacate the Order.

I. Plaintiff Failed to Comply with Rule 65(b)

To obtain a TRO *ex parte*, Plaintiff's attorney must "certify in writing any efforts made to give notice or the reasons why it should not be required." Ariz. R. Civ. P. 65(b). Issuance of a TRO without notice is the exception and the need for justification is "scrupulously observed." *Bussart v. Superior Court*, 11 Ariz. App. 348, 350 (1970).

Plaintiff failed to comply with this basic duty. Instead, *after* the Complaint and TRO motion were already filed, Plaintiff's counsel provided notice only to ADOA—not the Governor, with whom Plaintiff had been in discussions about this matter, nor the Legislature, whose budget and policy decisions are at stake. Within 24 minutes of that notice, the TRO had already issued. Yet, Plaintiff did not provide the required certification and instead cited in a footnote that she was "going to" give notice and without identifying

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what "efforts" were taken to provide notice.[3]

While preparing the Complaint and TRO, Plaintiff or her counsel could have (and should have) given notice to allow ADOA and the real parties in interest, *e.g.*, the Proposed Intervenors, a chance to be heard. This is a fatal procedural due process violation that alone requires the dissolution of the TRO.

II. Plaintiff Cannot Succeed on the Merits.

Plaintiff's Complaint sets forth three counts—two under A.R.S. § 35-212 (Counts I and II) and one under the article II, section 25 of the Arizona Constitution (Count III). Plaintiff's claims here fail. This action does not fit within the parameters of A.R.S. § 35-212: Plaintiff identifies no actual or potential payment and is not suing the recipient or payor of illegally paid monies. Her entire argument asserting illegality rests on a surmise that potentially one day the money might be spent in contravention of the express restrictions in H.B. 2897. As a result, Plaintiff lacks authority to bring this action under A.R.S. § 35-212. But, even if she could, these claims would be barred by the political question doctrine.

A. Plaintiff Cannot Succeed on Her A.R.S. § 35-212 "Claims."

In bringing this lawsuit, Plaintiff relies exclusively on a statute that focuses with laser-like precision on the illegal payment of public monies and allows her to sue the recipient or payor of those monies. A.R.S. § 35-212(A)(1)–(2), (B). This is an unprecedented utilization of a statute targeting individuals engaged in corruption and malfeasance with public monies in an attempt to disrupt the constitutionally mandated budget process.[4] Here, Plaintiff has not identified any actual or potential payment by ADOA. And ADOA is simply the entity charged with transferring funds under H.B. 2897 §§ 139, 140—it has no authority to make any payments of those funds. But even setting all

[3] Ironically, Plaintiff's failure to give notice is inconsistent with the Settlement Agreements and the Consent Judgments she relies on here. *See* Mot., Ex. 1 (requiring a 14-day period to provide documented evidence of unapproved spending prior to initiating legal action to halt un-approved uses), Ex. 2 (requiring the complaining party to provide notice to the Enforcement Committee who may seek to informally resolve the complaint).That the Attorney General's lawsuit is inconsistent with her duties and the procedures spelled out in the relevant agreements is yet another reason the Commissioner erred in granting the TRO.

[4] A.R.S. § 35-212 must be read in context of A.R.S. § 38-511, barring conflicts of interest.

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that aside, the transfer of funds is not "illegal" but rather specifically authorized by statute *and* tailored for Authorized Purposes consistent with the Settlement Agreements and Consent Judgments. Not only is there no "violation" of A.R.S. § 35-212, but Plaintiff also cannot even seriously fit this action within the statutory framework. She lacks standing to insert herself in the budget process, mandating dissolution of the Order (if not summary dismissal of this action).

1. Plaintiff Identifies No Actual or Potential Payment as Required Under A.R.S. § 35-212.

Section 35-212(A) is exclusively concerned with enjoining "illegal payment of public monies" and recovering "illegally paid public monies." But H.B. 2897 does not mandate or authorize the payment of any public monies. The bill states that "the sum of $75,000,000 is **appropriated** from the consumer remediation subaccount of the consumer restitution and remediation revolving fund established by section 44-1531.02 . . . . This amount consists of monies deposited in the subaccount pursuant to opioid claims-related litigation or settlements." H.B. 2897 § 139(A) (emphasis added); § 140(A) (same for $40,000,000 appropriation for fiscal year 2024-2025).

An appropriation is not the same thing as a payment or expenditure. A "payment" is the "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation." *Payment*, Black's Law Dictionary (11th ed. 2019). An appropriation, on the other hand, "is 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'" *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 483–84 ¶ 14 (2022) (citation omitted). In other words, an appropriation does not involve the payment of *anything*, the money is not spent, does not leave the State's control, and is only set aside for a particular statutorily authorized purpose.

Thus, Plaintiff fails to identify any actual or potential "payment" that could authorize her to sue under A.R.S. § 35-212, which alone is fatal to her chances of success under

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Counts I and II of her Complaint. Rather, she seeks to enjoin the transfer of funds from one government fund (the subaccount of the consumer restitution and remediation revolving fund) to another (the department of corrections opioid remediation fund). *See* H.B. 2897 § 139(B), (D). Because there is no textual basis in § 35-212 authorizing suit for unilaterally interfering with an inter-governmental transfer of funds—before any payment has been actually made—Plaintiff cannot succeed on her claims under A.R.S. § 35-212.

2. Defendants Do Not Receive Illegal Payments and Do Not Cause Illegal Payments to Be Made as Required Under A.R.S. § 35-212.

Relatedly, but independently, Plaintiff has not sued any party recognized in A.R.S. § 35-212(B). That section carefully lays out who the Attorney General "may bring an action to recover illegally paid public monies against." As relevant here, the Attorney General may only sue:

> 1. Any person who received the illegal payment.
>
> 2. The public body or the public officer acting in the officer's official capacity who ordered or caused the illegal payment or has supervisory authority over the person that ordered or caused the illegal payment.
>
> 3. The public official, employee or agent who ordered or caused the illegal payment, including a payment ordered or caused to be made without authorization of law.

A.R.S. § 35-212(B). The statute does not list any other classes of persons or entities that may be sued, nor does it list any sort of residual category. Those five categories are the only persons or entities against whom the Attorney General may bring an action.

Plaintiff has not satisfied this component of A.R.S. § 35-212 either. Plaintiff has sued ADOA and its Cabinet Executive Officer & Executive Deputy Director. Nothing in H.B. 2897 § 139, however, authorizes ADOA to make any payments whatsoever. To reiterate, the Legislature has only appropriated funds and ADOA is simply the entity tasked with transferring those funds from one account to another to effectuate the appropriation. H.B. 2897 § 139(A), (D). It is not the recipient of any illegal payment, nor has it "ordered or caused the illegal payment." Nor does it have any authority to do so. This is yet another

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fatal flaw in Plaintiff's A.R.S. § 35-212 "claims."[5]

3. There Is Nothing "Illegal" About the Appropriation in H.B. 2897.

Last, but perhaps most important, Plaintiff fails to show anything remotely illegal about H.B. 2897 § 139, 140. The bill expressly limits the appropriated funds to Approved Purposes. Resisting this conclusion, Plaintiff places great weight on an isolated statement in the Consent Judgments that, "[w]ith the advice and consent of the Legislature" she "shall direct how and when the [Opioid Funds] are used." But this statement can only mean that the Attorney General may exercise discretion subject to legislative prerogatives. Any other conclusion would allow Plaintiff to usurp the Legislature's plenary appropriations authority by *contract* without any basis in *statute*—the sole basis of her authority.

To start, H.B. 2897 itself negates any contention that funds will not be used for Approved Purposes:

> C. The state department of corrections **shall use the monies in the state department of corrections opioid remediation fund only for past and current department costs for care, treatment, programs and other expenditures for individuals with opioid use disorder and any co-occurring substance use disorder or mental health conditions or for any other approved purpose as prescribed in a court order, a settlement agreement or the one Arizona distribution of opioid settlement funds agreement that is entered into by this state and other parties to the opioid litigation.**

H.B. 2897 § 139(C) (emphasis added); § 140(C) (same for fiscal year 2024-2025).[6] In addition, the appropriation of these funds is also expressly authorized by A.R.S. § 44-1531.02(C), which states that "[a]ll monies deposited in the subaccount pursuant to opioid claims-related litigation or settlements are subject to legislative appropriation."

[5] If the appropriation could somehow constitute a payment, it only underscores why the Legislature and the Governor should be permitted to intervene in this action.

[6] To the extent that Plaintiff argues the appropriation is somehow illegal because it allows for reimbursement of funds, that argument is entirely misplaced. Reimbursement for Approved Purposes is expressly permitted under the Distributor Settlement Agreement. *See* Mot., Ex. 2. "Opioid Remediation" includes "care, treatment, and other programs and expenditures (including reimbursement for past such programs or expenditures except where this Agreement restricts the use of funds solely to future Opioid Remediation)." *Id.* at 9 § I.SS. The Distributor Settlement Agreement goes on to specify that "Future Opioid Remediation includes amounts paid to satisfy any future demand by another governmental entity to make a required reimbursement in connection with the past care and treatment of a person related to the Alleged Harms." *Id.* at 33 n.8.

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What is more, H.B. 2897's restriction on the appropriated funds is narrowly tailored to be used for opioid remediation and, in fact, mirrors the Approved Purposes in the very documents that Plaintiff cites to support her claim of illegality. *See, e.g.*, Mot., Ex. 1 at 15 (addressing the needs of criminal-justice involved persons is an Approved Purpose), Ex. 2 at 9 (defining Opioid Remediation). The Attorney General herself has already recommended $21.5 million of the Opioid Funds be used for criminal-justice-related purposes. *See* Mot., Ex. 6 at 2–3, 6-7. Nothing in H.B. 2897 violates any law or authorizes payments violating the Settlement Agreements or Consent Judgments.

Perhaps recognizing this, Plaintiff makes much of a footnote in the Consent Judgments, *e.g.*, Compl. ¶ 4; Mot. at 10, but this does not support her claim that the appropriated funds will be used for illegal purposes. That footnote states:

> Payments made to the State of Arizona shall be deposited by the Arizona Attorney General [to the account established by A.R.S. § 44-1531.02(C)]. **With the advice and consent** of the Arizona Legislature, **pursuant to A.R.S. § 44-1531.02(C)**, the Attorney General shall direct how and when the funds paid by the Settling Distributors are used, provided that any such uses shall conform to the to the requirements of Sections V.B.1 and V.B.2 of the Agreement.

See Mot., Ex. 3, at 4 n.1 (emphasis added). This footnote does not, and cannot, give the Attorney General an effective veto over the Legislature's appropriation power as Plaintiff appears to argue. *See* Mot. at 10 (citing footnote to support argument that the appropriation "would exceed [the Legislature's] authority under the consent orders").

To the contrary, and as recognized with the inclusion of "advice and consent" of the Legislature in the Consent Judgments, "the power to appropriate funds is exclusively a legislative function, subject to executive veto which, in turn, is subject to legislative override." *Rios v. Symington*, 172 Ariz 3, 11 (1992); *see also Le Febvre v. Callaghan*, 33 Ariz. 197, 204 (1928) ("[A]ll power to appropriate money for public purposes or to incur any indebtedness therefor, unless given by the Constitution to some other body politic, or individual, rests in the Legislature."). To read the footnote as Plaintiff suggests would rob the Legislature of its exclusive power to appropriate funds and set public policy for the State (in this case, how to address the opioid crisis and utilize State monies to do so), which is

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fundamentally at odds with Arizona's constitutional structure. *See Ariz. Farm Bureau Federation v. Brewer*, 226 Ariz. 16, 23 ¶ 30 (App. 2010) (holding that the legislature has "plenary" power over state monies); *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 6 (2013) ("[U]nless constitutionally restrained, the legislature's plenary authority includes the discretion to consider any subject within the scope of government, including decisions on how state funds are prioritized and spent" (internal citations omitted)).[7]

The Attorney General, on the other hand, has no power to set policy for appropriations. Her powers "must be found in statute." *State ex rel. Brnovich v. ABOR*, 250 Ariz. 127, 130 ¶ 8 (2020). Thus, H.B. 2897 necessarily limits whatever discretion the footnote gives Plaintiff. In other words, she has no discretion to do anything other than what the budget requires—transfer the funds to ADOA. Any other reading of the footnote would allow the Attorney General to accomplish by contract what she cannot do under the law.

Courts, of course, do not indulge such extravagant and unconstitutional readings. *Cf. Patches v. Industrial Comm'n*, 220 Ariz. 179, 182 ¶ 10 (App. 2009) (courts avoid readings that are unconstitutional or would produce absurd results); *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 477 ¶ 48 (App. 2010) (courts avoid reading contracts in a way that would produce absurd results). Rather the footnote in the Consent Judgments is perfectly consistent with A.R.S. § 44-1531.02(C), which expressly authorizes this appropriation. Put in proper and plain context, the footnote means only that the Attorney General must administer the funds *consistent with* the Legislature's appropriation and direction of how to use those funds towards Approved Purposes. It does not control the Legislature's discretion under the traditional appropriation process of where to direct those funds among the many competing Approved Purposes. Simply, the Attorney General cannot unilaterally usurp what is clearly a legislative and gubernatorial prerogative.

Perhaps recognizing this, Plaintiff turns to a statement by a single staff member of the Joint Legislative Budget Committee ("JLBC") to argue that the appropriated funds

[7] Nor could the judiciary for that matter. *Ariz. Sch. Bds. Ass'n v. State*, 252 Ariz. 219, 229 ¶ 229 (2022) (recognizing that the judicial role in the budget process is limited to enforcing the limits that the Arizona Constitution imposes on that process).

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might somehow not be used for Approved Purposes. *See* Mot. at 7. That is wrong for at least three reasons. First, our courts never presume that an official will violate the law, *cf. Malnar v. Joice*, 236 Ariz. 170, 172 ¶ 8 (2014) (collecting cases), as Plaintiff asks this Court to do. Second, the statements of a single legislator or government official does not show that a law was enacted for illegal purposes. *See Brnovich v. DNC*, 594 U.S. 647, 689 (2021) (rejecting reliance of the "cat's paw" theory to legislative bodies). If the statement of a legislator is not enough to show a violation, then the statement of a JLBC staff member is necessarily even less relevant. Third, Plaintiff's concern about what *might* happen with the funds is entirely speculative and unripe. The doctrine of ripeness ensures that courts do not "adjudicate hypothetical or abstract questions," *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 24 (2022), nor render "a premature judgment or opinion on a situation," like the one Plaintiff alleges "that may never occur." *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 244 ¶ 8 (App. 2006) (citation and quotation marks omitted).

On this last point, Plaintiff repeatedly gives away the reality that her claims rest entirely on hypotheticals and speculation about what may or may not happen with these funds. *See* Mot. at 7 ("Although the Legislature recited that the funds would be used for opioid abatement, that is highly **questionable**." (emphasis added)), *id.* (faulting the Department of Corrections for having no current "plans in place to use these enormous sums for opioid education, prevention, or treatment"), *id.* at 10 (citing "the **risk** that the settling defendants **may** claw back these Opioid Funds and reduce payment of Opioid Funds **in the future**" (emphasis added)), *id.* at 11 (hypothesizing that the appropriation "**could** also reduce—or eliminate—Arizona's share of Opioid Funds **going forward**" (emphasis added)). Plaintiff's own statements confirm that her claim is based on nothing more than speculation, which is not the proper subject of judicial review.

In short, H.B. 2897 is consistent with Approved Purposes in the Settlement Agreements and Consent Judgments, and expressly envisioned and authorized by A.R.S. § 41-1531.02(C). It cannot be said to be "illegal" as required to state a claim under A.R.S. § 35-212. Plaintiff's contrary argument relies on faulty assumptions and sheer speculation

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about circumstances that may never come to pass. Given all this, Plaintiff has fallen far short of showing a likelihood of success on the merits under A.R.S. § 35-212.

4. Because Plaintiff Has Not Even Attempted to Identify an Actual or Potential Payment, She Lacks Authority to Bring this Action Under A.R.S. § 35-212.

Just recently, the Arizona Supreme Court confirmed that the Attorney General lacks authority to initiate legal actions under A.R.S. § 35-212 that are not actually "aimed at aiding the Attorney General in preventing or recovering illegal payments." *State ex rel. Brnovich*, 250 Ariz. at 133 ¶ 22. There, the Attorney General brought suit alleging ABOR's policies violated "the constitutional guarantee that instruction provided by Arizona postsecondary institutions 'shall be as nearly free as possible.'" *Id.* at 129 ¶ 2 (citation omitted). Affirming dismissal, the Court noted "unlike some other states, [Arizona's] Attorney General has no inherent or common law authority." *Id.* at 130 ¶ 8. The Office's authority "must be found in statute." *Id.* Those statutes are "the means by which '[t]he powers and duties of . . . [the] attorney-general . . . [have been] prescribed by law.'" *Id.* at 133 ¶ 21 (quoting Ariz. Const. art. V, § 9). Thus, the Attorney General had no authority to bring claims based on the constitutional provision providing that postsecondary instruction "shall be as nearly free as possible" because those claims did not fit within the contours of A.R.S. § 35-212. *Id.* ¶ 22. Without authority, the claims were properly dismissed. *Id.*

Despite requiring dismissal of this entire action, *State ex rel. Brnovich v. ABOR* appears nowhere in Plaintiff's *ex parte* filings even as she stretches A.R.S. § 35-212 far beyond what its text can bear.[8] She challenges an appropriation, not a payment or potential payment of funds. She is not even suing the proper party under A.R.S. § 35-212, but an entity designated to transfer the funds from one account to another. And her claim of

[8] Confirming that this action does not truly fit within A.R.S. § 35-212's parameters, the present action stands in stark contrast to previous cases where the Attorney General has invoked that statute. *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997) (seeking to enjoin the payment of funds by a state agency on the basis that the underlying statute violated the separation of powers); *Fund Manager, Public Safety Personnel Ret. Sys. v. Corbin*, 161 Ariz. 348, 352 (App. 1988) (alleging that the defendant failed to adhere to statutory provisions in the state procurement code before entering into a contract).

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illegality rests entirely upon speculation about hypothetical scenarios that may never occur. Because she has no authority to bring this action under A.R.S. § 35-212, she has no likelihood of success on the merits.

B. Plaintiff Cannot Succeed on her Claim Under Article II, Section 25 of the Arizona Constitution for the Same Reasons.

Plaintiff has also brought a claim under article II, section 25 of the Arizona Constitution, which provides that no "law impairing the obligation of a contract, shall ever be enacted." Compl., at 13–14. But this claim fails for much the same reasons as Plaintiff's misguided claims under A.R.S. § 35-212.

First, Plaintiff must show that H.B. 2897 constitutes a "substantial impairment" of a contractual relationship. *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). She has not shown any impairment of any contractual relationship because H.B. 2897 §§ 139, 140 are consistent with the Approved Purposes in the Settlement Agreements and Consent Judgments. Plaintiff's claims to the contrary rest on nothing more than her speculative assumption that official's might not comply with the dictates of the law, which our courts do not indulge and which is not the proper subject of judicial review. *Mills*, 253 Ariz. at 423 ¶ 24; *Town of Gilbert*, 213 Ariz. at 244 ¶ 8.

Second, assuming (without conceding), that H.B. 2897 somehow fell outside the Approved Purposes, it is nonetheless reasonably related to a "significant and legitimate purpose," 459 U.S. at 411–12, because the funds are to be used expressly for opioid remediation purposes for criminal-justice involved persons, the importance of which was expressly recognized in the Settlement Agreements and the Attorney General's own recommendation regarding the use of the Opioid Funds. *See* Mot., Ex. 1 at 15, Ex. 6 at 2–3, 6–7. The reality that the Attorney General wants to spend the monies on her own preferences to advance the Approved Purposes is not a sustainable rationale. These are State monies, not the Attorney General's personal piggybank.

C. Plaintiff's Claims Are Barred by the Political Question Doctrine.

"The political question doctrine provides that a dispute is a nonjusticiable political

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question if there is '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.'" *Puente v. Ariz. State Legislature*, 254 Ariz. 265, 268 ¶ 7 (2022) (citation omitted). This doctrine reflects the judiciary's "constitutional commitment to separation of powers" and "acknowledges that some decisions are entrusted to other branches of government." *Id.*

Both prongs are present here. Since statehood, it has always been understood that the appropriation power belongs to the Legislature and no other branch. *Le Febvre*, 33 Ariz. at 204. That power is "supreme." *Navajo Tribe v. Ariz. Dep't of Admin*, 111 Ariz. 279, 280 (1974). It is embodied in article IX, section 25 of the Arizona Constitution, which provides that "[n]o money shall be paid out of the state treasury except in the manner provided by law." *See also Crane v. Frohmiller*, 45 Ariz. 490, 495-96 (1935) (explaining that such provisions have "universally been interpreted to mean that the people's money may not be expended without their consent either as expressed in the organic law of the state or by constitutional acts of the legislature appropriating such money for a specified purpose"). And of course, the Governor has a constitutional role in the appropriation process as appropriations bills require her signature, and she has the constitutional power to exercise a line-item veto if she sees fit. *See* Ariz. Const. art. V, § 7.

Article IX, section 25 of the Arizona Constitution thus represents a textually demonstrable commitment of the power to appropriate funds to the Legislature. "Thus, whether and how much money can be paid out of the state treasury is clearly committed by our Constitution to those acting in a legislative capacity." *Fogliano v. Brain ex rel. County of Maricopa*, 229 Ariz. 12, 20 ¶ 24 (App. 2011). Nor are there judicially discoverable and manageable standards for courts to exercise policy prerogatives over appropriations. Courts "are ill-equipped to inquire into and second-guess the complexities of decision-making and priority-setting that go into managing the State's budget and the appropriations made pursuant to budgetary decisions." *Id.* ¶ 25. Courts in other jurisdictions agree. *Cf. SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774, 778 ¶ 12 (Wash. 2010).

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L.L.P.
LAW OFFICES
One East Washington Street, Suite 2700
Phoenix, Arizona 85004-2556
602.382.6000

Accordingly, absent a contrary constitutional command, it is not for this Court to decide what sources of funds the Legislature may appropriate and how it directs those funds be spent. That policy prerogative is subject only to the Governor's veto. *Rios*, 172 Ariz at 11. Simply, the Attorney General has no role in this process and cannot use the judiciary to usurp both the Legislature's budget authority and the Governor's veto power. Because Plaintiff's claims are nonjusticiable, they have no likelihood of success on the merits.

III. Plaintiff Has Not Shown Imminent Irreparable Injury.

"[G]iven that the purpose of a TRO is to maintain the status quo until a potential hearing on a preliminary injunction, any likely threat of harm must threaten to disrupt that status quo; that is, the threat must be imminent." *Ariz. Recovery Hous. Ass'n v. Ariz. Dep't of Health Servs.*, 462 F. Supp. 3d 990, 998 (D. Ariz. 2020) (collecting cases). Indeed, Plaintiff cannot rely on the "mere 'possibility of some remote future injury,' or a 'conjectural or hypothetical' injury." *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) (citation omitted).

Nothing in Plaintiff's Complaint or Motion shows a likely threat of imminent harm; instead, Plaintiff relies on the same speculative arguments that the funds appropriated by H.B. 2897 §§ 139, 140 might not be used for Approved Purposes. For example, Plaintiff claims that "the Attorney General's Office will be unable to honor its commitment to existing grantees or implement the needs-based plan to address the opioids epidemic" and that, if the funds are not used for Approved Purposes, it "could" result in reduction or elimination of Arizona's share of the Opioid Funds. *See* Mot. at 11.

This is a red herring argument because every contract or grant with a state agency is required to include an appropriation availability of funds clause required by A.R.S. § 35-154. Under this provision, every payment obligation of the Attorney General is conditioned upon the availability of funds appropriated or allocated for payment of such obligation. If funds are not allocated and available, as directed by the Legislature, for the continuance of a contract or grant, the agreement is subject to a termination for convenience (which is also supposed to be included in every agency agreement or is otherwise "read into" such an

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agreement). *See G. L. Christian & Associates v. United States,* 312 F.2d 418 (Ct. Cl. 1963).

Regardless, as referenced, H.B. 2897 §§ 139, 140 is only an appropriation. All the bill does is transfer funds from one state-run account to another. No payments of those funds have been made, and the bill explicitly requires those funds be used for Approved Purposes. Plaintiff's irreparable harm arguments simply regurgitate their speculative claims on the merits, which cannot suffice to show irreparable harm—particularly in the TRO context. *Ariz. Recovery Hous. Ass'n*, 462 F. Supp. 3d at 998.

To the contrary, Plaintiffs' TRO seeks to *disrupt* the status quo. The status quo is H.B. 2897, which was passed by the Legislature and signed by Governor Hobbs. As Plaintiff concedes, H.B. 2897 was the product of a hard-fought compromise, with negotiations going late into the evening of Saturday, June 15, 2024. *See* Compl. ¶ 8; Mot. at 6. But Plaintiff's proposed TRO delays the deadline to transfer the appropriated funds set forth in H.B. 2897 § 139(B) and (D), threatening to disrupt that political compromise and force the Legislature and Governor back to the drawing board all on the eve of the budget deadline. Plaintiff has not made the kind of showing necessary to justify disruption of the status quo in this manner. *N.A. Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (where injunction disrupts status quo "a party seeking one must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits'"); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1014–15 (10th Cir. 2004) (McConnell, J., concurring) (injunctions that disturb the status quo are disfavored).

IV. The Equities Tip Sharply Against Injunctive Relief.

When a government entity is a party, it is appropriate to "consider the balance of equities and the public interest together." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Plaintiff claims (at 11) these factors tip in her favor because "the Attorney General's Office will be unable to honor its commitment to existing grantees or implement the needs-based plan to address the opioids epidemic." As addressed above, this harm to grantees or contractors is a red herring, as government contracts are regularly terminated for

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convenience due to, as here, government's shifting priorities and public policies. But for at least six other reasons, this argument also fails.

First, all Plaintiff's arguments about the balance of hardships presume her success on the merits. As explained above, however, Plaintiff is not even authorized to bring this action. And without any likelihood of success on the merits, "the balance of hardships and public interest weigh against preliminary injunctive relief." *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1079 (D. Ariz. 2016).

Second, even if Plaintiff raised "serious questions"—and she does not—she argues that the ultimate public interest served by the injunction is fighting the opioid epidemic. *See* Mot. at 11. Again, H.B. 2897 requiring that the appropriation be used *only* for Approved Purposes. H.B. 2897, §§ 139(C), 140(C); *see also* Declaration of Sarah Brown, attached hereto as **Exhibit A**, ¶ 5. H.B. 2897 is already furthering Plaintiff's cited objective, just under the prerogatives of the branches actually tasked with setting the budget.

Third, this money was appropriated to cover "approved costs"—much of which has already been identified and encumbered—including "$4,148,000 for medications employed in medication assisted treatment for individuals with opioid use disorder and approximately $40,500,000 for the treatment of Hepatitis C, a condition that is co-occurring with opioid use disorder." Ex. A ¶ 8. As with her other arguments, Plaintiff offers nothing but speculation about potential misuse of the appropriated funds, misuse that would be contrary to the express terms of H.B. 2897. That speculation adds no weight to Plaintiff's side of the ledger when considering the balance of hardships. *D.T. v. Sumner Cnty. Schls.*, 942 F.3d 324, 327 (6th Cir. 2019).

Fourth, Plaintiff's real complaint is that H.B. 2897 supersedes her personal policy goals for the opioid settlement monies. But this actually detracts from her arguments. The Attorney General has no claim or right to appropriate money as she wishes. Rather, the Legislature holds "supreme" appropriation power, *Navajo Tribe*, 111 Ariz. at 280, checked only by the gubernatorial veto, *see* Ariz. Const. art. V, § 7. The Attorney General has no share in that power. A.R.S. § 41-192, -193. Because the TRO essentially empowers the

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Phoenix, Arizona 85004-2556
602.382.6000

Attorney General to exercise line-item veto power and re-write enacted appropriations policy, it upsets the Constitution's structural balance and in turn harms public interest. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

Fifth, failing to effectuate the will of the Legislature and Governor will result in real, adverse consequences to Arizonans. The challenged appropriation "is needed nearly immediately to cover approved costs incurred in the past months." Ex. A ¶ 7. "If the Appropriation is not delivered and continues to be blocked, then ADCRR may not be able to cover portions of invoices from April through June . . . for opioid-related services" resulting in a "breach of ADCRR's vendor contracts, could subject them to future litigation, fees and interest liability, and could jeopardize ADCRR's ability to pay for and continue to provide treatment for substance use disorder and co-occurring health conditions as required by the April 7, 2023 Order and Permanent Injunction issued in *Jensen v. Thornell*, No. CV-12-00601-PHX-ROS." Ex. A ¶¶ 9-10. Unlike the Attorney General, who desires preferred expenditures for grants or contracts in the future, the ADCRR's contracts at issue have already been performed in support of the Approved Purposes and the contractors are entitled to payment. Consequences like these illustrate the wisdom of courts' reluctance to intrude on the legislative process in the manner that Plaintiff proposes.

Sixth, H.B. 2897 became immediately effective upon being passed by the Legislature and signed by the Governor. Enjoining the law does not maintain status quo—it disrupts it. And again, Plaintiff has not even attempted to make the kind of showing necessary for such an invasive injunction.

Thus, the balance of equities tips sharply against Plaintiff's requested injunction.

CONCLUSION

This motion should be granted, and this Court should dissolve the Order. This Court should also award attorneys' fees and costs pursuant to A.R.S. §§ 12-348.01, 12-349, or any other applicable authority.

Snell & Wilmer
L.L.P.
LAW OFFICES
One East Washington Street, Suite 2700
Phoenix, Arizona 85004-2556
602.382.6000

DATED this 21st day of June 2024.

SNELL & WILMER L.L.P.

By: /s/ *Brett W. Johnson*

Brett W. Johnson
Tracy A. Olson
Ryan P. Hogan
Charlene A. Warner
One East Washington Street
Suite 2700
Phoenix, Arizona 85004-2556
Telephone: 602.382.6000
Facsimile: 602.382.6070
Attorneys for Proposed Intervenors House Speaker Ben Toma and Senate President Warren Peterson

By: /s/ *Sambo (Bo) Dul (w/permission)*

Sambo (Bo) Dul
Office of the Arizona Governor Katie Hobbs
1700 West Washington Street, 9th Floor
bdul@az.gov

Attorneys for Proposed Intervenor Governor Katie Hobbs

ORIGINAL of the foregoing electronically filed via AZ TurboCourt this 21st day of June, 2024, and

COPY of the foregoing served via email this 21st day of June, 2024 to:

Kristin K. Mayes
Office of the Arizona Attorney General
2005 North Central Avenue
Phoenix, AZ 85004-1592
Telephone: (602) 542-8099

Mark D. Samson (011076)
Ron Kilgard (005902)
Gary A. Gotto (007401)
KELLER ROHRBACK L.L.P.
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Telephone: (602) 248-0088
msamson@kellerrohrback.com
rkilgard@kellerrohrback.com
ggotto@kellerrohrback.com

Joseph C. Tann (029254)
LAW OFFICE OF JOSEPH C. TANN, PLLC
7735 N. Seventy-Eighth Street
Scottsdale, Arizona 85258
Telephone: (602) 432-4241
JosephTann@JosephTann.com

Attorneys for Plaintiff

D. Andrew Gaona (#028414)
Austin C. Yost (#034602)
Coppersmith Brockelman PLC
2800 North Central Ave, Suite 1900
Phoenix, AZ 85004
T: (602) 381-5486
agaona@cblawyers.com
ayost@cblawyers.com

Attorneys for Defendant
Arizona Department of Administration

/s/ Abigail Bahorich

Snell & Wilmer
L.L.P.
LAW OFFICES
One East Washington Street, Suite 2700
Phoenix, Arizona 85004-2556
602.382.6000

EXHIBIT A

D. Andrew Gaona (028414)
Austin C. Yost (034602)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5478
agaona@cblawyers.com
ayost@cblawyers.com

Attorneys for Defendants Arizona Department of Administration and Elizabeth Alvarado-Thorson

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA; KRISTIN K. MAYES, Plaintiff, v. THE ARIZONA DEPARTMENT OF ADMINISTRATION; ELIZABETH ALVARADO-THORSON, Defendants.	No. CV2024-016033 **DECLARATION OF SARAH BROWN** (Assigned to The Hon. Scott Minder)

I, Sarah Brown, hereby state that:

1. I am the Director of Governor Katie Hobbs's Office of Strategic Planning and Budgeting.

2. As Director, I oversee approximately 25 staff members charged with managing the budgeting and strategic operations of the State's agencies, including the Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR").

3. As Director, I am aware of the current status of ADCRR's budget and the potential impact of disruptions to the funding appropriated to ADCRR by the Arizona State Legislature (the "Legislature").

4. On June 15, 2024, the Legislature passed General Appropriations Act; 2024-2025, House Bill 2897, which included a supplemental appropriation (the "Appropriation") to ADCRR

for fiscal year 2023-2024 of $75,000,000 from the Consumer Remediation Subaccount of the Consumer Restitution and Remediation Revolving Fund established by Arizona Revised Statutes ("A.R.S.") §44-1531.02. The Governor signed the bill on June 18, 2024.

5. The Appropriation may be used only for "past and current [ADCRR] costs for care, treatment, programs and other expenditures for individuals with opioid use disorder and any co-occurring substance use disorder or mental health conditions or for any other approved purposes as prescribed in a court order, a settlement agreement or the One Arizona Distribution of Opioid Settlement Funds Agreement that is entered into by [the State of Arizona] and other parties to the opioid litigation." H.B. 2897, 56th Leg., 2nd Reg. Sess. (Ariz. 2024)

6. The Appropriation is explicitly exempt from the provisions of A.R.S. §35-190 relating to the lapsing of appropriations and, therefore, any portion of the Appropriation not used in fiscal year 2023-2024 may be used for the same purposes in fiscal year 2024-2025 or, to the extent unused, reappropriated in a future budget. Id.

7. As a supplemental appropriation for the current fiscal year that ends in nine days, on June 30, 2024, the Appropriation is needed immediately to cover approved costs incurred in the past months.

8. I understand that approved costs incurred by ADCRR in fiscal year 2023-2024 include $4,148,000 for medications employed in medication assisted treatment for individuals with opioid use disorder and approximately $40,500,000 for the treatment of Hepatitis C, a condition that is co-occurring with opioid use disorder. Additional approved costs in fiscal year 2023-2024 and 2024-2025 are also being identified and documented by ADCRR.

9. If the Appropriation is not delivered and continues to be blocked, an immediate harm to ADCRR includes not being able to cover portions of invoices from April through June for opioid-related services provided by both ADCRR's inmate medication vendor and its inmate healthcare vendor.

10. Failure to timely pay such invoices would constitute a breach of ADCRR's vendor contracts, could subject them to future litigation, fees and interest liability, and could jeopardize ADCRR's ability to pay for and continue to provide treatment for substance use disorder and co-occurring health conditions as required by the April 7, 2023 Order and Permanent Injunction issued in Jensen v. Thornell, No. CV-12-00601-PHX-ROS.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 21st day of June, 2024.

By: DocuSigned by: Sarah Brown 51A710C67C75469...

Sarah Brown