ARIZONA SUPREME COURT

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Appellant/Petitioner, v. ARIZONA BOARD OF REGENTS, Appellee/Respondent.	Supreme Court No. CV-19-0247 Arizona Court of Appeals No. 1 CA-CV 18-0420 Maricopa County Superior Court No. CV 2017-012115

SUPPLEMENTAL BRIEF OF AMICUS CURIAE TERRY GODDARD, THOMAS HORNE, ROBERT CORBIN AND JOHN A. ("JACK") LASOTA WITH THE SUPPORT OF 12 CURRENT AND 50 FORMER ATTORNEYS GENERAL OF STATES AND TERRITORIES

FILED WITH WRITTEN CONSENT OF THE PARTIES

William G. Klain, AZ Bar No. 015851
Michelle H. Swann, AZ Bar No. 019819
Brian J. Pouderoyen, AZ Bar No. 034915
LANG & KLAIN, P.C.
6730 N. Scottsdale Road, Suite 101
Scottsdale, Arizona 85253
Phone: (480) 534-4900
Fax: (480) 970-5034
Firm email: Filing@lang-klain.com
Attorneys for Amicus Curiae
Terry Goddard, Thomas Horne, Robert Corbin, and John A. ("Jack") LaSota

ALSO SUPPORTED BY:

Steve Marshall,
Attorney General of Alabama

Karl Racine,
Attorney General of the District of Columbia

Lawrence G. Wasden,
Attorney General of Idaho

Curtis T. Hill, Jr.,
Attorney General of Indiana

Tom Miller,
Attorney General of Iowa

Jeff Landry,
Attorney General of Louisiana

Keith Ellison,
Attorney General of Minnesota

Eric Schmitt,
Attorney General of Missouri

Wayne Stenehjem,
Attorney General of North Dakota

Mike Hunter,
Attorney General of Oklahoma

Jason Ravnsborg,
Attorney General of South Dakota

Patrick Morrisey,
Attorney General of West Virginia

Bruce Botelho,
Former Attorney General of Alaska

Michael C. Geraghty,
Former Attorney General of Alaska

Bill Lockyer,
Former Attorney General of California

Ken Salazar,
Former Attorney General of Colorado

Gale Norton,
Former Attorney General of Colorado

Duane Woodard,
Former Attorney General of Colorado

George Jepsen,
Former Attorney General of Connecticut

Jane Brady,
Former Attorney General of Delaware

Richard E. Doran,
Former Attorney General of Florida

Michael A. Lilly,
Former Attorney General of Hawaii

David M. Louie,
Former Attorney General of Hawaii

Ron Amemiya,
Former Attorney General of Hawaii

Jim Jones,
Former Attorney General of Idaho

Roland W. Burris,
Former Attorney General of Illinois

Neil Hartigan,
Former Attorney General of Illinois

Greg Zoeller,
Former Attorney General of Indiana

Steve Carter,
Former Attorney General of Indiana

Pamela L. Carter,
Former Attorney General of Indiana

Bonnie Campbell,
Former Attorney General of Iowa

Robert Stephan,
Former Attorney General of Kansas

Jack Conway,
Former Attorney General of Kentucky

Chris Gorman,
Former Attorney General of Kentucky

Drew Ketterer,
Former Attorney General of Maine

Hubert H. Humphrey, III,
Former Attorney General of Minnesota

Jim Hood,
Former Attorney General of Mississippi

Edwin Lloyd Pittman,
Former Attorney General of Mississippi

Jon Bruning,
Former Attorney General of Nebraska

Frankie Sue Del Papa,
Former Attorney General of Nevada

George Chanos,
Former Attorney General of Nevada

Michael A. Delaney,
Former Attorney General of New Hampshire

Peter Harvey,
Former Attorney General of New Jersey

John Farmer,
Former Attorney General of New Jersey

Hal Stratton,
Former Attorney General of New Mexico

Rufus L. Edmisten,
Former Attorney General of North Carolina

Jim Petro,
Former Attorney General of Ohio

Drew Edmondson,
Former Attorney General of Oklahoma

Mike Turpen,
Former Attorney General of Oklahoma

Walter W. Cohen,
Former Attorney General of Pennsylvania

Ernie Preate, Jr.,
Former Attorney General of Pennsylvania

Peter F. Kilmartin,
Former Attorney General of Rhode Island

Patrick C. Lynch,
Former Attorney General of Rhode Island

Jeffrey B. Pine,
Former Attorney General of Rhode Island

Dennis J. Roberts, II,
Former Attorney General of Rhode Island

Marty J. Jackley,
Former Attorney General of South Dakota

W. J. Michael Cody,
Former Attorney General of Tennessee

Jan Graham,
Former Attorney General of Utah

Jerry Kilgore,
Former Attorney General of Virginia

Stephen D. Rosenthal,
Former Attorney General of Virginia

Anthony F. Troy,
Former Attorney General of Virginia

Andrew P. Miller,
Former Attorney General of Virginia

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INTERESTS OF AMICI CURIAE

Amici curiae Terry Goddard, Thomas Horne, Robert Corbin, and John A. ("Jack") LaSota (collectively, "Amici") are former Arizona Attorneys General and have compelling interests in protecting the role of the Attorney General as the chief legal officer of Arizona. Amici filed a brief at the petition stage in this matter on November 8, 2019,[1] which sets forth their interests in detail (at 4–5). Amici file this brief solely to express support for the powers and independence of the office of the Attorney General to initiate suit, and do not take any position on the merits of the underlying claims.[2]

The arguments in this brief are supported by 62 current or former attorneys general of other states and territories in the United States. *See supra* p. i–v. These states and territories share constitutional and common law roots with Arizona, and

[1] This Supplemental Brief does not restate the arguments made in the November 8, 2019 Brief of Amicus Curiae filed by John A. ("Jack") LaSota, Robert Corbin, Terry Goddard, and Thomas Horne in Support of Petition for Review.

[2] Pursuant to ARCAP 16(b)(3), no group or organization has sponsored this brief, provided financial resources for the preparation of this brief, or has any financial interest in the outcome of this appeal. Undersigned counsel has prepared this Supplemental Brief without cost to Amici, and Amici have rendered professional services to review and edit this Supplemental Brief and prior drafts.

all interpreted the attorney general's statutory authority with sufficient latitude and discretion to protect the rights and interests of their jurisdictions.[3]

Through constitutional mandate, legislative provision, and common law tradition, attorneys general across the country have long advanced the public interest and protected the legal interests of their states and territories by bringing suit on behalf of the people they represent. Amici, as well as the current and former attorneys general who support this brief, thus have a strong common interest with Petitioner in defending his prerogative and duty to initiate litigation on behalf of Arizona residents, particularly when such litigation is necessary to uphold and defend Arizona's Constitution.

STATEMENT OF THE CASE

The facts in this case, insofar as they relate to the arguments addressed in this amicus brief, are not in dispute. The Attorney General seeks review of the superior court's dismissal of the First Amended Complaint for lack of jurisdiction. The Attorney General sued the Arizona Board of Regents ("ABOR") on the basis that ABOR violated provisions of the Arizona Constitution and state law. The superior court dismissed the Attorney General's complaint based on the alleged

[3] This Supplemental Brief is adapted from the Brief filed by amicus curiae Attorneys General in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003).

limits of the Attorney General's authority to institute suit under this Court's ruling in *Arizona State Land Department v. McFate*, 87 Ariz. 139, 144–46 (1960).

On review, the Court of Appeals correctly acknowledged the interpretation of the limits to the Attorney General's authority to file suit in *McFate* "appears to be flawed." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 2019 WL 3941067, *4, ¶ 22 (Ariz. Ct. App. Aug. 20, 2019) (mem. decision) (special concurrence).

SUMMARY OF ARGUMENT

The Attorney General, in the vast majority of states and territories, litigates on behalf of the people and the state itself.[4] As expressed in Attorney General Brnovich's Petition for Review, this Court has held the Attorney General may "go to the courts for protection of the rights of the people," because that authority is necessary to protect constitutional rights that would otherwise go unenforced. *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956). Amici urge this Court to find the Attorney General does not litigate simply on behalf of the Governor or some other executive or subdivision of state government. If so limited, the Attorney General would be unable to institute and maintain a uniform and coherent legal policy that takes into full account, and protects, the interests of the public.

[4] While Amici recognize that the Arizona Attorney General's authority most directly stems from statute, it also recognizes the importance of the historical context of common law in determining the scope of such authority. *See Salazar*, 79 P.3d at 1230 (recognizing relevance of the Attorney General's historical common law authority in a statutory authority state); *Wade v. Miss. Co-op. Extension Serv.*, 392 F. Supp. 229, 232 (N.D. Miss. 1975).

Nor would the Attorney General be able to uphold the law and the Arizona Constitution or, as here, question whether ABOR's action offends the Constitution.

The essential role of an Attorney General, relative to other constitutional offices, would be radically transformed if ABOR or other state officials were able to exercise veto power over the Attorney General's public interest litigation. The Attorney General's independence is also critical to the preservation of ordered liberty because the state must speak with one voice in the courtroom.

Sometimes this responsibility requires the Attorney General to bring public interest litigation to which individual state officials or agencies object. The exercise of these powers permits the Attorney General to independently assess the public's interest in any particular matter of law, act on behalf of that interest without parochial or partisan interference, and in so doing, establish and sustain a uniform and consistent legal policy for the state. Without these powers, the one voice of the state's legal affairs would be replaced by a cacophony of divergent interests vying for control of Arizona's legal policy.

The constitutional, statutory, and common law traditions of Arizona and its sister states and territories do not countenance such a result.

ARGUMENT

I. In Arizona and Across the United States, the Attorney General is a Constitutionally-Mandated Executive Officer with the Power to Determine Whether and When a Lawsuit is in the Public Interest.

The Attorney General is the "chief legal officer of the state" and an elected, constitutionally-mandated executive officer. *See* Ariz. Rev. Stat. ("A.R.S.") § 41-192(A); Ariz. Const. art. V, § 1. The Attorney General "direct[s]" the Department of Law with one of the Attorney General's express obligations being to act as the "legal advisor" of Arizona's departments. *See* A.R.S. § 41-192(A)(1).

In 1953, the Legislature expanded the Attorney General's powers to include the discretion to "prosecute and defend any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest." *See* Code 1939, Supp. 1954, § 4-607(a) (current version at A.R.S. § 41-193(A)(2)). This Court has determined that the Attorney General has the power to appeal rulings on behalf of a state agency, even where the agency directly impacted fails to take action, and to "go to the courts for protection of the rights of the people." *See Thomas*, 80 Ariz. at 332.

This is entirely consistent with the Attorney General's powers and purpose in English common law.[5] The King's attorney was first appointed as Attorney

[5] In some states, the legislature is constitutionally prohibited from reducing the Attorney General's common law powers. *See, e.g.*, *Lyons v. Ryan*, 780 N.E.2d 1098, 1105–06 (Ill. 2002).

General of England in 1461. By the sixteenth century, legal "powers were consolidated in a single attorney who could be called 'the chief representative of the crown in the courts.'" *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 n.4 (5th Cir. 1976) (quoting 6 W. Holdsworth, *A History of English Law*, 457–61 (2d ed. 1971)). As the United States Court of Appeals for the Fifth Circuit has observed,

> The office of attorney general is older than the United States . . . . As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

Id. at 268 (citations omitted). As a result, the Attorneys General of our states have enjoyed a significant degree of autonomy.

The powers and duties of Attorneys General typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. Certainly, the legislature may deprive the Attorney General of specific powers; but in the absence of such legislative action, the Attorney General typically may exercise all such authority as the public interest requires. *Id.* Further, the Attorney General has wide discretion in making the determination as

to what is in the public's interest. *Id.* at 268–69.

At common law, the Attorney General was not just the chief legal representative of the Crown but also the guardian, *parens patriae*, of the public interest, responsible not only for the management of the Crown's legal affairs but also for the prosecution of all criminal and civil suits that – in the Attorney General's discretion – were necessary to vindicate the public interest. The Attorney General had the right to initiate, conduct and maintain all litigation deemed necessary to enforce the law, to preserve the civic order, and to protect the rights of the public. The Attorney General's duty was not solely or even primarily to represent and protect the rights of the king but to represent and protect the rights of the people. *See* 7 Am. Jur. 2d *Attorney General* § 1 (2020); *see also Darling Apt. Co. v. Springer*, 22 A.2d 397, 403 (Del. Ch. 1941).

This role continued in the American colonies and the United States, where executive authority was shifted from the Crown to elected governors. At that time, the conviction became stronger that the Attorney General's primary allegiance was to the people, not to other branches or officials of government:

> Although presently the Attorney General is vested with those powers he had under the common law, the source of his authority and his consequent obligations have been materially changed. When this country promulgated its Declaration of Independence, the writers of that instrument in discussing the inalienable rights of man stated: "That to secure these rights, Governments are instituted among Men, deriving their just powers from

> the consent of the governed." Thus, the source of authority of the Attorney General is the people who establish the government, and *his primary obligation is to the people.*

Hancock v. Terry Elkhorn Mining Co., 503 S.W.2d 710, 715 (Ky. 1973) (emphasis added).

The Attorney General thus has both the right and the responsibility to promote the interests of all the citizens of the state, not just of certain segments of government. *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 782 (Miss. 1982) (citing *EPA v. Pollution Control Bd.*, 372 N.E.2d 50, 53 (Ill. 1977)); *see also Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197, 1202 (Me. 1989) ("Paramount to all of [the Attorney General's] duties, of course, is his duty to protect the interests of the general public.").

The Attorney General has "a common law duty to represent the public interest." *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977). This common law concept of the role of the Attorney General has been reinforced and strengthened by modern statutes and constitutional provisions. *See Wade v. Miss. Co-op. Extension Serv.*, 392 F. Supp. 229, 232 (N.D. Miss. 1975) (finding the statutory designation of the Attorney General as legal counsel for the state in all civil cases has stretched forward in unbroken succession since territorial times); *Evans-Aristocrat Indus. v. City of Newark*, 380 A.2d 268, 273 (N.J. 1977) (interpreting statute as giving the Attorney General exclusive power to sue to abate

public nuisance in light of common law). The Attorney General represents the public and may bring *all* proper suits to protect public rights, and it alone has the right to represent the state as to *all litigation* in which the subject matter is of statewide interest. 7 Am. Jur. 2d *Attorney General* § 14.

While the Attorney General is obligated to represent state officials and agencies to the best of its ability, it must also represent the people as a whole. *Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n,* 387 A.2d 533, 538 (Conn. 1978) (the Attorney General represents the people); *Reiter v. Wallgren*, 184 P.2d 571, 575 (Wash. 1947) (while the Attorney General may represent state officers, "it still remains his paramount duty to protect the interests of the people of the state"); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (the Attorney General represents people, not the "machinery" of state government). Failure to do so "would be an abdication of official responsibility." *Feeney,* 366 N.E.2d at 1266; *see Slezak v. Ousdigian,* 110 N.W.2d 1, 5 (Minn. 1961) (the Attorney General must do more than espouse individual view of state officials represented), *overruled on other grounds, Christensen v. Minneapolis Mun. Emps. Ret. Bd.,* 331 N.W.2d 740 (Minn. 1983); *State ex rel. Derryberry v. Kerr-McGee Corp.,* 516 P.2d 813, 821 (Okla. 1973).

Given the foregoing principles, courts recognize that absent a constitutional or statutory limitation, the Attorney General has broad discretion to determine

what legal matters fall within the public interest and require its attention. *State v. Heath,* 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990) (Attorney General "may exercise such authority as the public interest may require" and "has very broad discretion to decide what matters are of public interest and require its attention"); *see Mundy v. McDonald,* 185 N.W. 877, 880 (Mich. 1921) (the Attorney General has broad discretion "in determining what matters may, or may not, be of interest to the people generally"). It readily follows that the Attorney General is a proper party to initiate litigation on behalf of the people when the state has an interest.

II. The Attorney General Has Authority to Bring a Lawsuit Challenging the Actions of a State Agency.

Here, the Attorney General, on behalf of Arizona resident tuition payers, seeks a determination on a matter of constitutional importance to the people of Arizona. The Arizona Constitution requires "the instruction furnished [at Arizona's public universities] shall be as nearly free as possible." *See* Ariz. Const. art. XI, § 6. ABOR is a constitutionally created state agency largely comprised of persons confirmed by the Senate after appointment by the Governor. *See* Ariz. Const. art. XI, § 5; A.R.S. § 15-1621(B). The Legislature has tasked ABOR with setting the tuition and fees for Arizona institutions, which may be differentiated based on residency. *See* A.R.S. § 15-1626(A)(5). Accordingly, it is the duty of ABOR to fix such tuition and fees in compliance with Arizona's constitutional limitations.

If a state agency fails to adhere to its constitutional obligations, the Attorney General has the prerogative to exercise its professional judgment to take legal action to protect the best interests of the state and its citizens. As South Carolina's Supreme Court opined, "[t]he Attorney General, by bringing [an] action in the name of the State, speaks for all of its citizens and may, on their behalf, bring to the Court's attention for adjudication charges that there is [a constitutional] infringement." *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633, 635 (S.C. 1982). To be certain, challenging the constitutionality of a duly enacted statute or an agency's action is an act rarely undertaken by an Attorney General, but it should not be prohibited.

The Arizona Attorney General has both a legal and professional duty to uphold the Constitution, and the capacity to do so exists throughout the United States and common law. As the Colorado Supreme Court stated, "[w]e have always recognized the ability of the Attorney General and other public officials to request original jurisdiction in matters of great public importance." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003). "If the Constitution is threatened . . . , the Attorney General may rise to the defense of the Constitution by bringing a suit, and is not required to wait until someone else sues." *Paxton*, 516 S.W.2d at 868.

When, as here, the Attorney General believes a state agency has violated the Constitution, it has an obligation to represent the interests of the public. The Attorney General's role as the people's chief legal officer may supersede defense of the state if the actions of state officers or agencies infringe on the constitutional provisions they have sworn to uphold.

III. The Prerogative of the Attorney General to Bring Litigation on Behalf of the State is Integral to the Preservation of Ordered Liberty.

The independence of the Attorney General is not just historical fact. Amici urge this Court to find that the Attorney General's independence is good government. Reposing responsibility for the legal affairs of the state in a single constitutional officer and giving this officer the discretion to appear in legal proceedings and to control the course of litigation promotes uniformity, consistency, efficiency, and liberty.

It holds one public official, elected by the people, accountable for the prosecution and defense of all legal proceedings involving the state. It holds one public official accountable for ensuring that the interest of the people is vindicated in that litigation. It adds another layer of separation to the ingenious American scheme of divided powers, further ensuring that no one branch of government – be it legislative, executive, or judicial – acquires total power to direct the legal affairs of the state.

Indeed, the courts of some states have recognized that the independence of

the Attorney General reflects a conscious decision by the framers of their constitutions to interpose an additional check upon the traditional American tripartite scheme of government. *See, e.g.*, *State v. Gattavara*, 47 P.2d 18, 21 (Wash. 1935); *State ex rel. Foster v. Kansas City*, 350 P.2d 37, 42 (Kan. 1960) (holding separation of powers precluded the Governor from directing the Attorney General to dismiss a quo warrant proceeding, since the Attorney General was both an executive officer and officer of the judiciary). The Attorney General is like an internal legal watchdog, acting on behalf of the people:

> As the State's legal counsel, the Attorney General is responsible for supporting and upholding [the State's] Constitution . . . . Indeed, like other State elected officers, the Attorney General is required by the Legislature to swear a loyalty oath to support the [] Constitution and faithfully discharge his duties. Therefore, it is incumbent upon the Attorney General to safeguard the Constitution against legislative enactments that encroach upon or conflict with its provisions. Where, as here, a legislative enactment appears to clash with the constitutional duties of a State board, it seems axiomatic that the Attorney General must step forward to uphold the Constitution.

Wasden v. State Bd. of Land Comm'rs, 280 P.3d 693, 698 (Idaho 2012) (citations omitted).

Here, the Attorney General's proposed action against ABOR presents a vivid illustration of this principle in action. ABOR seeks to avoid review of its compliance with its constitutional mandate; the Attorney General seeks to enforce

compliance on behalf of the people of Arizona. Believing that the Constitution reflects the will of the people, the Attorney General seeks a judicial determination of ABOR's constitutional compliance. The Attorney General does not and cannot declare ABOR's tuition setting unconstitutional but seeks redress through the courts to vindicate the people's rights.

Attorneys General routinely resolve issues of state legal policy from a perspective broader than that of a particular state executive, or state agency, or even of the Governor. Other state officials or agencies may have narrower political interests that drive their decisions concerning a particular lawsuit. Uniform and consistent legal policy, taking into account the entire public interest, cannot be achieved if the litigation decisions of the Attorney General are overridden whenever another state official disagrees. In such a regime, the Attorney General would no longer be the Attorney "General."

CONCLUSION

The Court should give continuing recognition to the constitutional, statutory, and common law independence of the Attorney General. The Court should preserve the concept of an executive branch that consists of several elected officers, each with a separate, distinct, and vital contribution to be made to the operation of government. The traditional independence of the Attorney General, with all the checks and balances associated therewith should be preserved,

particularly given the ever expanding and more complex government. It is critical the Attorney General speak with one voice for the state on matters of law and legal policy and has the independent ability to resort to the courts for resolution of matters of legal and constitutional import.

Accordingly, Amici respectfully request that this Court reverse the Court of Appeals' decision upholding the trial court's dismissal for lack of standing. In particular, this Court should confirm the Attorney General, as Arizona's chief legal officer, has the authority to initiate lawsuits when deemed necessary to address matters of state concern and to protect the public interest.

RESPECTFULLY SUBMITTED this 31st day of March, 2020.

LANG & KLAIN, P.C.

By: /s/ William G. Klain
William G. Klain
Michelle H. Swann
Brian J. Pouderoyen
Attorneys for Amicus Curiae Goddard, Horne, Corbin, and LaSota