ARIZONA SUPREME COURT

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General Appellant/Petitioner, v. ARIZONA BOARD OF REGENTS, Appellee/Respondent.	CV-19-0247-PR Court of Appeals No. 1 CA-CV 18-0420 Maricopa County Superior Court No. CV2017-012115

COMBINED RESPONSE TO BRIEFS OF AMICI CURIAE BY PETITIONER STATE OF ARIZONA *EX REL.* MARK BRNOVICH, ATTORNEY GENERAL

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INTRODUCTION [1]

This is an important case abut judicial review of *government* agencies' and officials' compliance with the Arizona constitution and laws. The Amici supporting ABOR share a misconception that judicial review of government actions is zero-sum, stripping power from one group of government actors and giving that exact same power to the AG.

But Judicial review of government actions does not improperly diminish the powers and discretion of the government actors reviewed. Instead, it ensures compliance with the law—which is a hallmark of the rule of law. And it can guard against officials exercising powers not conferred on them and thus threatening individual liberty,[2] or improperly conferring government benefits on a few politically favored entities or groups. This is clear from the cases that have arisen:

- conferring liquor licenses in excess of a statutory quota on certain businesses (*Morrison*, 1953);
- selling certain state land trust land without following the proper constitutional and statutory procedures (*McFate*, 1960);
- classifying certain property for property tax purposes at a lower classification rate, in violation of statute (*Santa Rita Mining*, 1975); and

[1] Rather than filing separate responses to each of the three amici briefs supporting ABOR, which span 50 pages total, this consolidated brief responds to all three. Those briefs are referred to herein as the Governors' Br., the Chamber's Br., and the SOS & Superintendent's Br. The briefs supporting the State are referred to as 11/8/19 AG Br., the AG Supp. Br., the Law Profs' Br., and the Martin Ctr. Br.

[2] *See Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well.").

- public universities and colleges violating Prop. 300, as well as Article XI, § 6 and other statutes (*MCCCD*, 2018, and instant case).

A government actor can violate the law by denying a right to a certain disfavored group (in which case a private right of action is possible), but it can also carve out unlawful exceptions for favored groups or selectively refuse to follow restrictions placed on it by the constitution and laws. There are also situations where a group is harmed but in a relatively minor amount compared to the costs and risks of litigation, or the perceived reputational risk from bringing litigation deters individuals from doing so.

In all of these situations, the ability of the AG to seek judicial review, and bring potential illegalities or sweetheart deals to the court, is a critical check and a buttress to the rule of law. "[T]he system must run on what is actually written down in a manner that is discoverable by economic actors." Tim Worstall, *Capitalism Needs the Rule of Law, Not the Whim of Bureaucracy, To Function*, Forbes.com (Sept. 9, 2015, 3:54 AM).[3] "Todd Zywicki offered the view that the Rule of Law operates as a restraint on government and we obviously agree…. But we would also argue that it is actually a restraint on … the institutions by which power is exercised to benefit interest groups." David R. Barnhizer & Daniel D. Barnhizer, *Political Economy, Capitalism and the Rule of Law*, Clev. St. U. Res.

[3] *Available at* https://www.forbes.com/sites/timworstall/2015/09/09/capitalism-needs-the-rule-of-law-not-the-whim-of-bureaucracy-to-function/#784605c73000

Paper No. 16-292 at 8 (Jan. 2016).[4] Similarly, the framers of our state's constitution believed "process and structure are key controls on the tendency to abuse power." State's Supp. Br. at 18 (quoting John D. Leshy, *The Making of the Ariz. Constitution*, 20 Ariz. St. L.J. 1, 70 (1988)). And they "unmistakably demonstrated they understood and assumed the courts would exercise judicial review." Leshy, 20 Ariz. St. L.J. at 74. Four former AZ AGs—supported by 62 current and former AGs from across the country—filed a supplemental Amici Brief contending (at 12-14) that the ability to bring litigation on behalf of the State is "[i]ntegral to the [p]reservation of [o]rdered [l]iberty."

This Court should therefore not shrink from its traditional duty to engage in judicial review (by improperly expanding the political-question doctrine or legislative-immunity) or interpret "prosecute" contrary to its plain meaning, since the only power conferred on the AG is the power to go to court and "the courts alone [will] in all such cases make the final decisions and not the [AG]." *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956).

Finally, it is important to note what the Amici supporting ABOR do not challenge. They do not challenge § 35-212 as an alternative basis for AG authority to sue here, or that once the AG brings an action under § 35-212, he can assert other claims based on that statute or § 41-193(A)(2), even under *McFate*'s

[4] *Available at* https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1832&context=fac_articles

construction of "prosecute." These Amici also do not meaningfully argue that *Kromko* should be expanded—contrary to its own express disclaimers and logic—to make *all* tuition-related decisions non-justiciable political questions. Instead, under existing political-question doctrine, Counts I-V are justiciable. And the availability of this doctrine in appropriate cases (*e.g.*, those seeking to order the Legislature to increase taxation or appropriations) should give the Court comfort that it can interpret "prosecute" consistent with its plain meaning to promote the rule of law, without getting improperly embroiled in political disputes. Finally, the Amici supporting ABOR do not argue in favor of ABOR's meritless legislative immunity argument. Therefore, regardless of these Amici's arguments, this Court can and should remand this case for further proceedings on the merits.

ARGUMENT

I. Amici Confirm That "Prosecute" In § 41-193(A)(2) Must Be Interpreted Consistent With Its Plain Meaning And *McFate*'s Contrary Interpretation Should Be Overruled

This Court should interpret "prosecute" in § 41-193(A)(2) based on the consistent framework it has applied to interpreting the AG's statutory powers and the North Star of plain language. These principles lead to only one conclusion: "prosecute" in § 41-193(A)(2) includes initiating suit and, as the Court of Appeals unanimously concurred, *McFate*'s contrary construction "appears to be flawed." *State ex rel. Brnovich v. ABOR*, No. 1 CA-CV 18-0420, 2019 WL 3941067, at *4

¶22 (Ariz. Ct. App. Aug. 20, 2019) (concurrence).[5] Moreover *McFate*'s "flawed" construction should be overruled.

A. This Court Has Established A Framework For Interpreting The AG's Powers, Under Which "Prosecute" Should Be Interpreted Based On Its Plain Meaning To Include Instituting Civil Actions

1. The Court's Framework Is "Expressly Or By Reasonable Intendment In The Statutory Law"

Neither ABOR nor its Amici attempt to dispute that the governing standard is well-established here: the AG is a constitutional officer and "the powers of the [AG are] what is found 'either expressly or by reasonable intendment in the statutory law.'" State's Supp. Br. at 4 (quoting *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 597 (1983)). The State asks the Court to adhere to this longstanding standard; ABOR and its Amici seek to break from it and "squeeze the statute authorizing the [AG] to 'prosecute' civil actions to fit the mistaken premise that, as *McFate* appeared to believe, initiating litigation against other state agencies and officials is inconsistent with an [AG's] traditional role." Law Profs' Br. at 10-11 (cautioning against this interpretation).

The applicable standard dates back at least to *Westover v. State*, which stated that "in Arizona the Attorney General has no common[-]law powers, and that

[5] The Court need not reach, and the State takes no position in this appeal on, whether the Arizona Constitution confers common-law powers on the AG or other officers whose duties are "as prescribed by law." *See* Petition at 11 n.5. The cases saying the AG has no common-law powers stand for two narrow propositions, neither of which is disturbed by finding *statutory* authority to initiate suit based on § 41-193(A)(2). State's Supp. Br. at 8.

consequently his authority to sign the information must be found either expressly or by reasonable intendment in the statutory law." 66 Ariz. 145, 150 (1947). That standard was repeated by this Court in *State ex rel. Corbin v. Pickrell*, 136 Ariz. at 589 (quoting *Westover*). It was again challenged when the PSPRS Fund Manager claimed "because no Arizona statute expressly authorizes the [AG] to challenge the constitutionality of a state statute, he cannot do so." *Fund Manager v. Corbin*, 161 Ariz. 348, 353 (App. 1988). The Court of Appeals rejected that argument: "we are aware of nothing that would disable the [AG] from attacking the constitutionality of an Arizona statute in the process of exercising his specific statutory powers" and "the [AG's] discretionary power under A.R.S. § 35-212(A) necessarily includes the authority to press any ethically permissible argument he deems appropriate to aid him in preventing the allegedly illegal payment of public monies or in recovering public monies alleged to have been illegally paid." *Id.* at 354. This Court granted review and "approved" the Court of Appeals' discussion. *Fund Manager v. Corbin*, 161 Ariz. 364, 364 (1989). And this Court reiterated its rejection of the idea that where "no statute specifically authorized the [AG] to challenge the constitutionality of a state statute, he could not do so," instead articulating the requirement as "[s]tanding must be linked to some statutory basis." *State ex rel. Woods v. Block*, 189 Ariz. 269, 273 (1997) (finding statutory authority to sue).

Amici's arguments to the contrary never recognize or dispute this Court's longstanding standard for interpreting the AG's statutory powers and thus provide no reason to depart from it. Instead, Amici's briefs are littered with the very arguments that have been repeatedly rejected. *See, e.g.*, Governors' Br. at 10 ("those areas of authority not expressly included are excluded"); 14 ("Viewed in light of that overall scheme, Section 41-193(A)(2) serves a limited and specific purpose apart from express authorization for filing suit."); *see also* Chamber's Br. at 1-2 ("[I]f the AG is now recognized to have power to bring actions in the name of the public interest on behalf of the State, despite the absence of specific legislative authority for such actions, it will create uncertainty…."); SOS & Superintendent's Br. at 7 (When "the Legislature intends 'to authorize the [AG] to initiate proceedings, it has so provided in clear terms.'" (quoting *McFate* at 146)).

Amici also never explain how it is less disruptive to their theory of state government to recognize the AG's authority to challenge statutes' constitutionality (*Woods*, *Fund Manager*) but not to institute suit against another executive agency or official whom the AG believes is violating the constitution. Indeed, the Legislature comprises the representatives of the People whose duly enacted laws are conferred a "presumption of constitutionality." *Gallardo v. State*, 236 Ariz. 84, 87-88 ¶9 (2014). There is thus no basis to draw a distinction, and the same, well-

established standard for statutory interpretation should apply: the AG's powers are what is "expressly or by reasonable intendment in the statutory law."

2. Section 41-193(A)(2) Expressly Or By Reasonable Intendment Authorizes Instituting Civil Actions

The way to start determining what is "expressly or by reasonable intendment in the statutory law" is the plain language, "apply[ing] common meanings" and "look[ing] to dictionaries" for undefined terms. Pet. Rev. at 3-4. Here, like ABOR itself, none of its Amici has refuted that the long-established, common and ordinary meaning of "prosecute" includes instituting civil actions. *Id.* at 4-5. The Governors' Brief tries (at 14) to offer snippets of definitions, but the State's Petition (at 4-5) provided the full definitions, and the Court of Appeals' unanimous concurrence (¶¶22, 26) agreed with the State.

Given that the common meaning of "prosecute" includes instituting actions, the courts must follow that meaning "unless an absurd or unconstitutional result would follow." Pet. Rev. 3. It cannot be absurd or unconstitutional to interpret the statutory law to give the AG a power that was traditionally held by that office and is presently held by the majority of state AGs. State's Supp. Br. at 14; *see also* AGs' Supp. Br. at 3; Law Profs' Br. at 6-7.[6] Amici supporting ABOR offer up a

[6] As the State explained in its Ct. App. Opening Brief (at 34), the word "prosecute" has long been used in connection with attorney general powers and understood to include the authority to commence an action. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270-71 & n.16 (5th Cir. 1976).

parade of horribles but never dispute that interpreting "prosecute" according to its common meaning is consistent with both the traditional role of the AG and the present role in the majority of other states. If this grant of authority was unworkable, it would have been abandoned long ago, and not be the majority rule today. And the traditional and widespread AG power to go to court does not violate the Arizona constitution or legal ethics rules. *See parts* II, III *infra*.

Looking at context and seeking to avoid rendering other statutes superfluous when interpreting § 41-193(A)(2) still does not support construing "prosecute" contrary to its common meaning. First, the context of the 1953 amendments is not just the word "prosecute" in a vacuum, but rather at least three changes that ***all*** support the conclusion that the AG has power to institute suit. State's Supp. Br. at 4-5. Second, context within 41-193(A) supports the idea that "prosecute" includes instituting actions. *McFate* interprets (A)(2) contrary to *Morrison*'s earlier interpretation of that word in (A)(1). And the AG's powers in (A)(2) are identical to the Governor's. *See State ex rel. Brnovich*, 2019 WL 3941067 ¶22 (concurrence) (*McFate* "adopts an interpretation that ascribes different meanings to 'prosecute' within the same sentence."); *id.* ¶33 ("There is no countervailing textual reason to apply a narrow construction of 'prosecute' in [] § 41-193(A)(2) solely as it applies to the [AG's] authority…while adopting a broader construction

as applied to the Governor's.").[7]

The duties of the AG overlap, rather than being surgically set forth in distinct statutes. State's Supp. Br. at 9; *see also* Law Profs' Br. at 4 (noting that "the 'incidents of the office [of AG] were so numerous and varied as to discourage the framers of the state constitutions and legislatures from setting them out in complete detail'"). And contrary to the Governors' argument (at 11, 13), other statutes are not "render[ed] meaningless" or "nullifie[d]." State's Supp. Br. at n.3; *see also State ex rel. Brnovich*, 2019 WL 3941067 ¶¶28-32 (concurrence).

The Governor (at 14) cites *McFate*'s discussion about other statutes using both "commence" and "prosecute" in the statute of limitations context. As the Court of Appeals recognized, this is of little moment for interpreting § 41-193(A)(2), which is not setting up "prosecute" in contrast to "commence" or "institute," but rather in contrast to "defend." In this pairing, Arizona law *does* recognize that prosecute includes instituting an action. *State ex rel. Brnovich*, 2019 WL 3941067 ¶24 (concurrence) (citing three different historical examples); *see also id.* ¶27 (explaining why the SOL cases do not support *McFate*'s interpretation). Indeed, Governor Ducey's own Executive Order 2020-07 at p. 2 ¶6 (Mar. 11, 2020) instructs the AG to "investigate and vigorously prosecute complaints of consumer fraud in relation to COVID-19 diagnosis and treatment-

[7] The discussion of *Morrison* in the Governors' Brief (at 6-8) is contrary to the plain language of that decision. *See* State's Ct. App. Reply Br. at 12-13 & n.8.

related services under the consumer protection laws."[8] It does not use "institute," "commence," or "bring." Amici Governors (like ABOR) never show this court an Arizona case, other than *McFate*, that interprets the use of "prosecute" alone to exclude commencing actions.

* * *

Viewed from any angle, *McFate* is not part of a "century of unbroken precedent." Governors' Br. at 18. It did not follow the consistent framework for analyzing AG statutory powers that both predates it (*Westover v. State*) and post-dates it (*State ex rel. Corbin v. Pickrell*; *Fund Manager v. Corbin*; and *Woods v. Block*). It did not interpret "prosecute" as other cases before it interpreted that word in Arizona (*State ex rel. Frohmiller v. Hendrix* and *Morrison*), or cases since it have interpreted the word in other jurisdictions. (State's Supp. Br. at 4 n.1). If *McFate* was truly consistent with precedent and not an outlier, all three Court of Appeals Judges would not have concurred (¶22) that it "appears to be flawed."

B. *McFate*'s Contrary Interpretation of "Prosecute" Should Be Overruled.

1. A Lower *Stare Decisis* Standard Applies To *McFate* Because It Is Based On Constitutional And Legal Ethics Concerns

This Court recognizes that court-made rules and constitutional interpretation are subject to lower standards for reversal under *stare decisis* than decisions of

[8] Available at https://azgovernor.gov/sites/default/files/eo_2020-07.pdf.

statutory interpretation. State's Supp. Br. at 6-7. Here, the *McFate* court referred to its rule as the AG's "standing" to sue, which is a textbook example of a court-made rule in Arizona. 87 Ariz. at 141; *see also* 11/8/2019 AZ AG Amicus Br. at 13-14 (advocating that Court could even "waive" this requirement of "standing" (citing *Sears v. Hull*, 192 Ariz. 65, 71 (1998)). By *McFate*'s own terms, this requirement is thus a "court-made" rule to which "stare decisis applies with the least force." Governors' Br. at 17 (citing *State v. Hickman*, 205 Ariz. 192, 201 ¶38 (2003)). To the extent that *McFate* is driven by legal ethical concerns, these too are the product of court-made rules, triggering the same low level of *stare decisis*.

Moreover, the Amici supporting ABOR repeatedly make clear through their arguments for retaining *McFate* that they *agree* it was based on court-made rules regarding legal ethics and constitutional interpretation. *See, e.g.*, SOS & Superintendent's Br. at 4 ("Relationship concerns of two sorts underlie the constraints that *McFate* attributes to the [AG's] legal-advisor role. One is the attorney-client relationship; the other is the allocation of powers among the Legislature, the Governor, and the [AG]."); Governors' Br. at 1 (filing brief to "protect the constitutional authority of the office [Governor] they have held").

And the Court of Appeals judges were clear: "The *McFate* court acknowledged that 'the term "prosecute" may in some situations … include the power to commence a proceeding,' but found that *policy-based concerns related to*

the role of the Attorney General compelled a different interpretation." *State ex rel. Brnovich*, 2019 WL 3941067 at ¶23 (concurrence) (emphasis added) (quoting *McFate*, 87 Ariz. at 145-46). Therefore, it is clear that a weaker form of *stare decisis* applies.

Finally, the Governors' Brief (at 17) cites the need for a "special justification" under stare decisis. *See also* ABOR's 3/23/2020 Supp. Citation of Legal Authority. Here, the "special justification" is established by meeting *all five* of the factors in *Lowing v. Allstate Ins.*, 176 Ariz. 101 (1993). *Lowing* was a case involving *stare decisis* for a prior interpretation of a statute, and cited case law stating this Court would not overrule the prior interpretation absent "compelling reasons." *Id.* at 107. It then articulated a five-factor test for *stare decisis*. *Id.* at 107-08. Here, the AG has shown that *all five* factors favor overruling *McFate*. State's Supp. Br. at 8; Pet. Rev. at 9-11; *see also Hickman*, 205 Ariz. at 200-01 ¶¶37-40 (noting requirement of "special justification" and still overruling prior case). The "special justification" requirement is therefore met here through compliance with *Lowing*.

2. Interpreting "Prosecute" Consistent With Its Plain Meaning Does Not Violate The Constitution By Infringing On The Governor's Powers, But Rather Protects The Rule Of Law

The plain language interpretation of "prosecute" in § 41-193(A)(2) is not unconstitutional as infringing on the Governors' constitutional powers. The only

power conferred on the AG under this interpretation is to "go to the courts for protection of the rights of the people." *Morrison*, 80 Ariz. at 332. And "the courts alone [will] in all such cases make the final decisions and not the [AG]." *Id.*

For this interpretation to result in unconstitutionality means the Legislature *cannot* confer such authority on any officer other than the Governor, without violating the take care powers in Article V, § 4. That is clearly not the case given the actual nature of judicial review. The Governor indisputably has power to appoint and remove officers and to instruct officers within the scope of their duties. See Ariz. Const. art. V, § 4; *see also Ahearn v. Bailey*, 104 Ariz. 250, 253 (1969). But if officers are acting outside the bounds of the law, then they are not exercising discretion, and it is proper for the Courts to so hold. *See Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 601 (1989) ("We hold that the trial court merely set forth in its order duties already mandated by the legislature. The trial court did not create duties for the defendants—it held that the legislature had created the duties. It is an appropriate judicial function to determine whether the legislature has created a duty and whether the duty has been breached.").

And the courts have acted to restrain the executive when it attempts to act outside its legal bounds. *See, e.g.*, *Williams v. Superior Court*, 108 Ariz. 154, 158 (1972) (noting public officials may be enjoined from acts that are beyond their powers); *Litchfield Elementary Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 220-21

(App. 1980) (noting that Governor lacks authority to unilaterally make legislative decisions, and reviewing Governor's actions for whether they are consistent with the constitution and statutes). The *Morrison* court addressed exactly this point when it said its holding would not make the Attorney General a "dictator" because "it will be the courts alone who in all such cases make the final decisions and not the Attorney General." 80 Ariz. at 332; *see also* The Federalist No. 78 (Alexander Hamilton) (The judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment.").

The alternative is that the Governor or other executive-branch officials can simply decline to follow the law, which would promote executive supremacy at the expense of the other branches, the people, and the rule of law. *See Perdue v. Baker*, 586 S.E.2d 606, 610 (Ga. 2003) ("giving both the Governor and the Attorney General the responsibility for enforcing state law ... provides a system of checks and balances within the executive branch so that no single official has unrestrained power to decide what laws to enforce and when to enforce them").[9] The four former Arizona AGs, supported by 62 current and former attorneys

[9] *See also Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 365 (Ky. 2016) ("Because the Attorney General is the chief law officer of the Commonwealth, he is uniquely suited to challenge the legality and constitutionality of an executive or legislative action as a check on an allegedly unauthorized exercise of power."); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628 (S.C. 2002) ("[T]he Attorney General can bring an action … when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.").

general from across the country, stated it best: "[t]o 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." AGs' Supp. Amicus Br. at 11.

And the application of such AG authority is perfectly illustrated by Count VI here, which challenges Prop. 300. If the Governor does not authorize this claim, then it appears no one can pursue it. On the other hand, permitting the AG to bring such a claim promotes the rule of law, and in no meaningful way impinges on the Governor's take care powers. Counts 1-5 similarly fit comfortably in this Court's traditional framework of judicial review. State's Supp. Br. at 16-19.

There are also many other situations where permitting the AG to initiate suit protects the rule of law. As noted *supra* p. 1-2, the cases where the AG's authority has been challenged have often involved government actors carving out unlawful exceptions for favored groups or selectively refusing to follow restrictions placed on them by the constitution and laws. There also are situations where a group is harmed but in a relatively minor amount compared to the costs and risks of litigation, or the perceived reputational risk from bringing litigation deters individuals from doing so.[10] In all of these areas it is important to uphold the law

[10] Our State constitution is more protective of private rights in many circumstances. *See* Law Profs' Br. at 8 (citing Clint Bolick, *State Constitutions: Freedom's Frontier*, Cato Sup. Ct. Rev. 15 (2017)). The AG has an important role

as written. *See State Bar of Ariz. v. Ariz. Land Title & Tr. Co.*, 90 Ariz. 76, 82 (1961) ("From the inception of our national form of government, we have recognized and attempted to proceed under a system which is commonly referred to as 'the rule of law.'").

Moreover, the importance of judicial review is not specific to any one group or viewpoint, as illustrated by recent challenges brought by varied groups. *Compare Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 536 ¶1 (2017) (chambers of commerce challenging minimum wage initiative), *with Meyer v. State*, 246 Ariz. 188, 191 ¶4-5 (App. 2019) (legislators defending minimum wage initiative).[11] The fact that judicial review has been demonstrated to be so important shows why it is constitutional for the Legislature to confer a power to initiate litigation—nothing more, nothing less—on the AG, consistent with the majority of other states.

In contrast, the Chamber's and Governors' Briefs portray judicial review as a zero-sum game (that it's simply reallocating power from one person to another). *See* Chamber's Br. at 17 n.11; Governors' Br. at 15-16. As shown above, that is

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to play in protecting those (both by enforcing limits on executive power and bringing suit when private litigants lack the resources, or are otherwise deterred from doing so).

[11] *See also Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 274 ¶2 (2019) (artisans' challenge based on "sincerely held religious beliefs"); *Biggs v. Cooper*, 236 Ariz. 415, 417 ¶1 (2014) (legislators challenging tax/fee increase without three-fourths vote).

not the view of legal scholars or the framers of the AZ constitution. Allowing for judicial review still allows executive and legislative officials to properly exercise their discretion (i.e. ensure that the laws are faithfully executed) while ensuring they stay within legal mandates, which they have no authority to cross as part of executing the law.

The Chamber's Brief (at 9-13, 17) also says the AG will set policy and somehow become "the predominant political office in the state." That is a straw man argument. It never acknowledges that the standard of review by the judiciary is only going to keep officers within the bounds of the constitution and laws, not control their discretion. And it also never addresses the fact that 35 states have this structure: apparently, all along, the AGs have been the "predominant political office" in the majority of the states. Or that AGs instituting suit even dates back to the King of England, who likely would have been surprised to learn that his attorney general was the "predominant political officer" in his kingdom.

3. Interpreting "Prosecute" Consistent With Its Plain Meaning Is In Accord With The Rules Of Professional Conduct And Well-Accepted Principles Of Legal Ethics

a. Unlike A Private Lawyer, The AG *May* Sue Another State Agency Or Officer That Is A Current Client, And Screens, Delegations, And Outside Counsel Are The Appropriate Ethical Safeguards

From shortly after the AG filed this suit under § 35-212 (one of the statutory bases identified in *McFate* as allowing the AG to bring suit), ABOR has repeatedly

accused him of improperly suing his own client. *See, e.g.*, Rachel Leingang, *Attorney General Sues Universities Over Massive ASU Real Estate Deals*, azcentral (Jan. 10, 2019, 5:25 PM) ("'Arizona's confused and confusing attorney general has once again sued his own client,' ASU said in a statement.'").[12] This accusation is echoed by the Secretary and Superintendent's Amici Brief (at 3-4). The Chamber's Brief (at 20) piles on, saying that permitting the AG to file suit in the public interest will "set a broad and dangerous precedent for all attorney-client relationships."

The Rules of Professional Conduct, however, make clear that the AG's duties are not the same as private-lawyer duties in this area, and it is ethically proper for the AG to file an action in the "public interest" against another state agency, officer, or political subdivision, even if that agency, officer, or subdivision is a current client or the AG is in some capacity a legal advisor to it. Since *McFate*, this Court adopted the Model Rules, which expressly state they do not abrogate AG powers in this regard. State's Supp. Br. at 9 n.6 (citing Ariz. S. Ct. R. 42 pmbl ¶18 (Government Attorneys "also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate such authority.")); *see also* Law Profs' Br. at

[12] *Available at* https://www.azcentral.com/story/news/local/arizona-education/2019/01/10/arizona-attorney-general-mark-brnovich-sues-over-asu-real-estate-deals/2537804002/.

11-12 (noting that "[t]he preamble [to Rule 42] clarifies that the Rules do not subject the [AG] to the same conflict-of-interest rules that apply to private lawyers"). In *Salazar*, the Colorado Supreme Court relied on the preamble in holding that the AG could sue the Secretary of State to enforce his understanding of the state constitution despite also serving as "legal advisor" to the Secretary. Law Profs' Br. at 15 (citing *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003)). And the "public interest" distinction for purposes of legal ethics is echoed in ER 1.13 cmt. 9, as the Chamber's Brief acknowledges (at 20).

"The preamble also recognizes that the [AG] may decide matters of legal policy that would normally be reserved for the client in an ordinary attorney-client relationship and that lawyers under his supervision 'may be authorized to represent several government agencies in intergovernmental legal controversies' in circumstances where such dual representation would create a disqualifying conflict for a private lawyer." Law Profs' Br. at 12 (citing pmbl. ¶18); *see also* Restatement (Third) Law Governing Lawyers § 97. This part of the Model Rules did not chart new ground. Law Profs' Br. at 13.

The distinction between the AG and a private law firm is particularly clear in terms of the duty of loyalty. The authorities make clear that in case of conflict of duties, the AG's primary obligation is to the State and body politic, rather than officers, departments, commissions, agencies. Law Profs' Br. at 14; *see also* AGs'

Supp. Br. at 9 ("While the [AG] is obligated to represent state officials and agencies to the best of its ability, it must also represent the people as a whole. Failure to do so 'would be an abdication of official responsibility.'" (citations omitted)); *id.* at 11 ("The [AG] 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.").

Given all of the foregoing, screens, delegations, and outside counsel are the appropriate ethical safeguards, not a bright-line rule contrary to the plain language of "prosecute" in § 41-193(A)(2). State's Supp. Br. at 9-10; *see also* Law Profs' Br. at 16-17. This is particularly true after the Legislature added § 41-192(E)—which like the Model Rules, came after *McFate*. Subsection (E) expressly allows the AG to declare a conflict and appoint outside counsel.

The Chamber's Brief at 17-20 does not refute the above points about the actual legal-ethics issues presented here. It cites authorities that either do not relate specifically to government attorneys or are not speaking to the issue of AG authority to institute litigation against a state agency or officer he believes is violating the constitution and laws.[13] And the Chamber's argument (at 20) that whatever rule the Court adopts for the AG in this context specifically will "set a

[13] *See State v. Holsinger*, 124 Ariz. 18, 23 (1979) (prosecutor's duties during cross examination); *In re Peasley*, 208 Ariz. 27, 32 ¶18 (2004) (prosecutorial misconduct).

broad and dangerous precedent for all attorney-client relationships" proves too much—*McFate* expressly blessed the AG suing a current client when based on statutory authority, which is not the rule for private lawyers. *See* SOS & Superintendent's Br. at 4-5 (citing *McFate*, 87 Ariz. at 144).

While recognizing preamble ¶18 and ER 1.13 comment 9, the Chamber's Brief (at 18) cites ER 1.11 comment 2 (lawyer representing a government agency is subject to ethical rules, including prohibition against concurrent conflicts of interest stated in ER 1.7 and the protections afforded former clients in ER 1.9). The Preamble ¶18 and ER 1.13 comment 9 relate to the scope of the rules themselves, and are more specific; and the specific governs over the general here, where the only power is the power to go to court and seek relief.

In sum, there is nothing unethical about the well-established, traditional role of the AG to file a lawsuit in the public interest, even if the defendant is a state officer or agency that is also represented by the AG.[14]

[14] The SOS & Superintendent's Brief (at 5) says the AG "[u]nilaterally determin[ed] that the Secretary—and the Citizens Clean Elections Commission as well—lacked sufficient interest in these issues to warrant the expenditure, [and] his office rejected their requests to hire independent counsel to prepare *amicus* briefs." The SOS and CCEC's powers are in Title 16. In the context of dividing authority between the AG and other prosecutors, A.R.S. § 16-1021 states that the AG "may enforce the provisions of this title through civil and criminal actions" for certain types of elections. Since the CCEC and SOS have duties related to the elections for which § 16-1021 authorizes the AG to enforce the provisions of Title 16, their interest in *McFate*'s interpretation is remote at best, and it was not unreasonable for the AG to decline to approve expenditure of public funds under § 41-2513(B). The Superintendent did not make such a request for paid counsel.

b. If The Court Does Not Overrule *McFate*'s Interpretation Entirely, It Should Limit It To Where The AG Was Actually Legal Advisor On The Issue

The State's Supplemental Brief argued (at 10) that if the Court disagrees with overruling *McFate*'s interpretation of "prosecute" entirely, in the alternative, it should limit it to situations like *McFate* where the AG is suing a client for whom he served as a legal advisor on the issue in question. State's Supp. Br. at 10 (citing *Amphitheater Unified Sch. Dist. No. 10 v. Harte*, 128 Ariz. 233, 235 (1981)); *see also* 11/8/19 AG Amici Br. at 7-8.

The Legislature expanded those for whom the AG is not legal advisor (including ABOR and the Governor) in § 41-192(D). State's Supp. Br. at 9. And now, like ABOR, the Amici Governor, Treasurer, and ACA are all statutorily exempt from the AG serving as their legal advisor. A.R.S. § 41-192(D)(4), (7), (9), (10). These Amici do not explain how they would be harmed from a legal ethics perspective if the court overrules or limits *McFate*, since the AG is not their legal advisor in the first place.[15]

[15] *McFate* was clear to use the term "legal advisor," and specifically reference the duty in § 41-192(A)(1) to be the "legal advisor." 87 Ariz. at 142-46. Section 41-192(D) allows the specified agencies to employ legal counsel other than the AG. *See Indust. Comm'n v. Sch. Dist. No. 48*, 56 Ariz. 476 (1941) (Industrial Commission had power to employ attorney both to advise it and to bring its litigation). Since *McFate*, the Legislature has increased the number of agencies exempted under § 41-192(D) from two to ten, showing that the AG's role has changed substantially in this regard. *See* 87 Ariz. at 144 (identifying interstate stream commission and industrial commission as only two exempted agencies). Here, ABOR interacts with the AG's Office based not on the AG's duty to be a

c. The Secretary's Arguments In *D.N.C. v. Hobbs* Show How State Officers Can Attempt To Use *McFate* As A Sword To Defeat The State's Ability To Defend Its Own Laws

"[A] litigant cannot with one hand wield the sword … and with the other hand raise the shield," *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 66 ¶¶38-39 (2000), and in the pending Ninth Circuit case of *D.N.C. v. Hobbs*, the Secretary's own actions show that state officers can attempt to use *McFate* as a sword to defeat the State's defense of its own laws.

After Secretary of State Reagan won at both the District Court (following a ten-day bench trial) and the Ninth Circuit panel stages, the Ninth Circuit *en banc* reversed, by a vote of 7-4, holding in part that Arizona's requirement of in-person voting at the elector's precinct violates § 2 of the Voting Rights Act. Secretary Hobbs then determined she would not appeal to the U.S. Supreme Court. She

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legal advisor under § 41-192(A), but rather § 41-621(M), which uses entirely different language and has a distinct purpose—to protect the State's self-insurance fund. A prospective action to ensure compliance with the law is consistent with the purposes of that statute.

To the extent that *McFate* was driven by concerned about a duty of confidentiality for information obtained in the course of providing legal advice, limiting it to the cases where the AG actually served as legal advisor would tailor it to those situations where his office would be likely to possess confidential information. *See also* Chamber's Br. at 15 (citing E.R. 1.6 cmt. 6, which states there is a duty to maintain confidentiality of government lawyers applies to government lawyers who may disagree with the policy goals that their representation is designed to advance). Nonetheless, screens, delegations, and outside counsel accomplish the same protections, and are preferable from any sort of rule that interprets § 41-193(A)(2) contrary to its plain language. *See* Part I(B)(3)(a), *supra*.

argued that her determination was final for the State:

> Federal courts look to state law to determine who can represent the State and its officials in federal court. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-52 (2019). Here, the Arizona Supreme Court has held that the Attorney General is prohibited from attempting to appeal on behalf of another officer who does not wish to appeal. *Santa Rita Mining* [*Co. v. Dept. of Property Valuation*, 111 Ariz. 368, 371 (1975)].

See Hobbs's Opposition to the State of Arizona's Mtn. to Intervene, Dkt. 133 at ECF p.10, *D.N.C. v. Hobbs*, No. 18-15845 (9th Cir. Mar. 13, 2020).

The AG does not dispute that he cannot appeal in the Secretary's name, and did not seek to do so. *See* State's Reply In Support Of Its Mtn. to Intervene, Dkt. 134 at ECF p. 8-10, *D.N.C. v. Hobbs*. But the Secretary went even farther, arguing the AG could not even seek to intervene on behalf of the State to defend its laws:

> The Attorney General, by intervening on the State's behalf, therefore seeks to appeal a decision for the Secretary against her wishes. But under *Santa Rita Mining*, the Attorney General cannot maintain a lawsuit in the guise of an appeal by the State that he could not maintain directly on behalf of the Secretary.

Hobbs' Opposition at ECF p. 7-8 (citing 111 Ariz. at 370-71).

Santa Rita Mining held no such thing, expressly suggesting the opposite. *See* 111 Ariz. at 371 (noting affected county had not sought to intervene for appeal).[16] Instead, this is an attempt by the SOS to use the very interpretation of

[16] *Santa Rita Mining* involved an appeal over the client agency's express objection. 111 Ariz. at 371. It relied on *McFate* (and distinguished *Morrison*), but ultimately did not depend on interpretation of the word "prosecute," and the AG is not challenging its holding. The AG would likely address the rare situation where a

McFate asserted by ABOR and the Amici supporting it here—that the AG's "main role" is as legal advisor, Chamber's Brief at 20 (citing *Santa Rita*)—as a sword to defeat the State's defense of its laws.

While the Ninth Circuit granted intervention, this illustrates how *McFate* is potentially a sword that can be used to defeat the State's ability to defend its own laws in federal court. This Court should not countenance such gamesmanship and instead, in the course of overruling *McFate*'s interpretation of "prosecute," also make clear that the AG is always authorized as a matter of state law to seek to intervene and defend Arizona's laws in federal court.

4. Importantly, There Is No Reliance Interest Weighing Against Overruling *McFate* Here, And Neither Subsequent Legislation Nor Legislative Acquiescence Can Bear The Weight ABOR's Amici Place On Them

a. There Is No Reliance Interest In *McFate* By Other Executive Officials, Agencies, Or Private Parties

There is no reliance interest by other executive officials, agencies, or private parties on *McFate*. As a preliminary matter, the Governors' Brief never asserts a reliance interest on *McFate*, but rather argues its correctness as a matter of statutory interpretation. The Chamber's brief does assert that private parties have relied on *McFate* in not seeking second opinions from the Attorney General's

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state law is invalidated in federal court, but the relevant official does not wish to appeal as he did in *DNC v. Hobbs*: by moving to intervene as the State for purposes of appeal. *Compare* A.R.S. § 12-1841 (providing intervention right in state court).

office when transaction business with state agencies. But in making this argument, the Brief sets up a false dichotomy—the Attorney General's Office does not give legal opinions to private parties. To the extent the Chambers' Brief is asserting reliance on reducing legal risk in general, it undercuts its own argument by asserting (at 15-16) that the private attorney general doctrine accomplishes all of the same work as interpreting "prosecute" in § 41-193(A)(2) according to its plain meaning. Why a "private" attorney general should be able to bring a rotten deal to light when the actual, elected AG cannot makes no sense. And regardless, the Chamber cannot have it both ways—either it has no meaningful reliance interest because it is already subject to suit by private attorneys general, or private attorneys general are not actually a substitute for the elected AG carrying out his duty to protect the "public interest." Finally, it is very curious that the Chamber's Brief (at 7-8) focuses on the procurement code and "enhancing economic development"—since there is a statute § 35-212 that allows the AG to go after and recover a 20% penalty on any money that is illegally paid. Any purported "reliance interest" in the procurement context would thus be unaffected.

b. There Is Also No Reliance Interest In *McFate* By The Legislature Through Legislative Acquiesce; In Fact, Subsequent Legislation Supports Overruling It

There is no reliance interest on the part of the Legislature here, either through subsequent legislation conferring power to bring suits in specific contexts,

or legislative acquiescence generally. Instead, this Court is free to fix its own prior error without disrupting any settled legislative expectations.

The State's Supplemental Brief demonstrated (at 9) that subsequent legislation supports overruling *McFate*. The Legislature passed § 41-192(E), which allows the AG to declare a conflict and appoint outside counsel, and it substantially expanded the number of agencies listed in § 41-192(D) that can employ their own legal counsel. This Court also adopted the Model Rules, which as shown above, expressly provide as an ethical matter for the AG to take actions in the "public interest." These changes lessen any force (if it ever existed) to *McFate*'s erroneous construction of "prosecute" based on its conclusion that the AG's role as legal advisor is incompatible with a plain-language interpretation of § 41-193(A)(2). 87 Ariz. at 142-44 (citing 1960 versions of these statutes).

Second, the State's Supplemental Brief (at 9) cited *Lowing*, 176 Ariz. at 106, and *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 314 ¶24 (2017), to demonstrate that legislative acquiescence is not met here. The SOS & Superintendent's Brief (at 8-10) recognizes that those cases provide the governing standard for legislative acquiescence, but do not plausibly meet it with respect to § 41-193(A)(2).[17] The 1976 amendment to § 41-193(A)(7) related to making AG

[17] It is noteworthy that *Lowing* found no legislative acquiescence even though there clearly were substantial reliance interests resulting from the Court's interpretation of a statute governing insurance provisions. 176 Ariz. at 102 (citing § 20-259.01).

opinions public records. 1976 Ariz. Sess. Laws ch. 93 (2d Reg. Sess.). And the 1995 amendment similarly related to AG opinions (permitting any member of the Legislature to request one) and removed the phrase "his" from the subsection relating to county attorneys. 1995 Ariz. Sess. Laws. ch. 94 (1st Reg. Sess.) Neither amendment comes close to touching on the subject matter addressed in *McFate*, and notably there has been no amendment to § 41-193(A)(1)-(3) since the 1956 codification of the Arizona Revised Statutes prior to *McFate*. This Court should not water-down its legislative acquiescence standard: when the Court speaks on legal ethics or constitutional interpretation, even in the context of interpreting a statute, it should not presume the Legislature locks-in erroneous statements of law simply by re-enacting statutes that are at most tangentially related to the Court's decision.

There are also major logical problems with drawing the conclusion that the Legislature has acquiesced in *McFate*'s construction of § 41-193(A)(2). Any legislative acquiescence of *McFate*'s interpretation of "prosecute" in (A)(2) would also be legislative acquiescence of *Morrison*'s contrary interpretation in (A)(1). As the Court of Appeals' unanimous concurrence concluded, *McFate* is "flawed" as a matter of statutory interpretation in part because it "ascribes different meanings to 'prosecute' within the same sentence." *See State ex rel. Brnovich*,

2019 WL 3941067 ¶22 (concurrence). Legislative acquiescence thus does not point in favor of any one interpretation of "prosecute" in § 41-193(A).

Finally, the enactment of subsequent statutes by the Legislature is not probative of legislative reliance on *McFate*. These statutes serve specific purposes, and do not render § 41-193(A)(2) superfluous, even if "prosecute" is interpreted consistent with its plain meaning. *See* State's Supp. Br. at 9, 6 n.3.

* * *

In 2013 the West Virginia Supreme Court, overruled its prior interpretation of its state constitution and held the phrase "as prescribed by law" did confer common law powers on its AG, recognizing its prior contrary decision as "serious judicial error." *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 646 (W. Va. 2013) (citation omitted). Here, Petitioner's ask is much more modest—to simply interpret § 41-193(A)(2) consistent with its plain meaning. This Court should follow the lead of West Virginia and recognize the importance of fixing its error regarding the important area of AG powers and the rule of law.

II. The General Availability Of The Political Question Doctrine *Supports* Overruling *McFate*, And Counts I-V Are Justiciable Under *Kromko*

ABOR's Amici do not provide any argument that compels dismissal of Counts I-V of the FAC on the alternative basis of the political-question doctrine. As explained at length in the State's briefing, any argument that these counts present non-justiciable political questions contravenes this Court's recent decision

in *State v. Maestas*, 244 Ariz. 9, 11-12, ¶7-12 (2018). Conversely, holding that these counts are justiciable does not violate *Kromko v. Arizona Board of Regents*, 216 Ariz. 190 (2007). *See* State's Supp. Br. at 12-19.[18]

Indeed, the existence of the political question doctrine is a reason to be less concerned that overruling *McFate* will improperly embroil the courts in political disputes. The political-question doctrine serves a valuable purpose for certain types of claims, primarily those seeking to order the Legislature to appropriate more funding or increase taxes or fees, *see e.g.*, *Fogliano v. Brain*, 229 Ariz. 12, 20 ¶24 (App. 2011),[19] or order an executive officer how to prioritize and use its scarce enforcement resources, *Sensing v. Harris*, 217 Ariz. 261, 265 ¶13 (App. 2007).

The Governors' Brief (at 19) briefly contends that political question based on *Kromko* "dispose[s]" of Counts I-V. It also attempts in passing (at 19 n.2) to distinguish *Maestas*. These brief statements fail to rebut the extended discussion of both decisions in the State's Supplemental Brief. Moreover, the State demonstrated that *Maestas* is not an isolated decision but rather in accord with a substantial line of cases form this Court—including *Forty-Seventh Leg. v. Napolitano*, *Brewer v. Burns*, and *AIRC v. Brewer*—that lay out a consistent

[18] Only if *Kromko* compels the conclusion that Counts I-V present non-justiciable political questions, need this Court overrule or limit that decision *Id.* at 13 n.8.

[19] *Id.* (Article IX, 5 of the constitution shows that "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.")

framework for both aspects of the political-question test. *See* State's Supp. Br. at 13-16. In addition, the State's Supplemental Brief spent a full page (at 15) explicating how *Kromko* expressly states (and its reasoning supports) that it does not hold all tuition-related decisions to be non-justiciable political questions, and the Court therefore does not need to overrule or limit *Kromko* to dispose of ABOR's political-question defense to Counts I-V here. Given that the Chamber's Brief simply says (at 4 n.2) that *Kromko* should not be overruled, it similarly provides no basis to disregard this fulsome argument from the State.[20]

Finally, it is particularly noteworthy that none of ABOR's Amici dispute that there are judicially discoverable and manageable standards for Counts I-V of the FAC (as distinguished from the claim in *Kromko*, which alleged that a particular tuition level was not "as nearly free as possible"). Indeed, one of the Amici Governors, when she was AG, formally opined that ABOR "has neither statutory nor constitutional authority to raise tuition solely in an attempt to be competitive with other public universities." Op. Att'y Gen. No. I99-011, 1999 WL

[20] The Governors' Brief also argues (at 19) that "[e]ven the legislature has declined to impose standards" on ABOR, but apparently is unaware that Counts II-IV of the FAC are based not just on constitutional but also statutory violations. *See, e.g.*, State's Supp. Br. at 18 (explaining that Count II "first argues that charging more per credit-hour to part-time students is not authorized by law," A.R.S. § 15-1626(A)(5)). Contrary to the Governors' misunderstanding, the FAC does therefore allege that the Legislature imposed a standard on which ABOR can differentiate tuition, and part-time status is not one of them. *See also* State's Supp. Br. at 19 ("Counts III-IV … have similar claims for online students").

311255, at *3 (May 11, 1999).[21] Given the prior opinion from this Amicus, the State's procedural claim (Count I), which merely seeks to inquire into the bases on which ABOR sets tuition, is clearly justiciable. State's Supp. Br. at 16-18.

The Brief of Amicus James G. Martin Center for Academic Renewal further shows how there are judicially manageable standards for Counts I-V, including specifically demonstrating (at 2-7) that tuition price in higher education has been driven by things that are not part of the cost of furnishing instruction, and (at 11-12) that public universities keeping tuition low is one of the few ways to counteract the inflationary pressure of federal student loans noted in the Bennett Hypothesis.

In sum, the political question doctrine serves a valuable purpose for certain types of claims (*e.g.*, those seeking to order the Legislature to appropriate more funding or increase taxes or fees) but Counts I-V are nothing of the sort.

CONCLUSION

None of the Amici Briefs supporting ABOR change the conclusion that this Court should hold the trial court erred by dismissing the FAC, vacate the judgment of dismissal, and remand for further proceedings ***on the merits***.

[21] The Governors' Brief (at 19 misleadingly quotes the first half of a sentence in this opinion: "Whether tuition is unreasonable or excessive cannot be determined as a matter of law." It then *completely omits*—without any ellipsis to indicate the omission—the rest of the sentence which states: "but is an issue of fact to be evaluated in light of all relevant circumstances."

RESPECTFULLY SUBMITTED this 9th day of April, 2020.

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