

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ex rel. MARK
BRNOVICH, Attorney General,

Petitioner-Appellant,

v.

ARIZONA BOARD OF REGENTS

Respondent-Appellee.

Case No.

Court of Appeals Case No. 1 CA-
CV 18-0420

Maricopa County Superior
Court No. CV2017-012115

PETITION FOR TRANSFER AND MOTION TO CONSOLIDATE

MARK BRNOVICH

Attorney General

Firm State Bar No. 14000

Brunn (“Beau”) W. Roysden III (Bar No. 28698)

Oramel H. (“O.H.”) Skinner (Bar No. 32891)

Evan G. Daniels (Bar No. 30624)

Drew C. Ensign (Bar No. 25463)

Robert J. Makar (Bar No. 33579)

Dustin D. Romney (Bar No. 34728)

Katherine H. Jessen (Bar No. 34647)

Assistant Attorneys General

Address: 2005 North Central Avenue

Phoenix, AZ 85004

Phone: (602) 542-8958

Fax: (602) 542-4377

Email: beau.roysden@azag.gov

*Attorneys for State of Arizona, ex rel. Mark
Brnovich, Attorney General*

INTRODUCTION

This appeal raises the question of whether Arizona law enables the Attorney General to go to court and obtain judicial review to protect the rights of the people. Over the past sixteen years, the Arizona Board of Regents (“ABOR”) has raised tuition and mandatory fees for in-state undergraduates as though it were unconstrained by law. Notwithstanding the requirement that “the instruction furnished [at Arizona’s public universities] shall be as nearly free as possible,” Ariz. Const. art. XI, § 6, ABOR’s official policy did not even include the cost of instruction as a factor in setting tuition. Instead, ABOR used other factors such as students’ ability to pay by taking on debt. Using these factors, ABOR increased tuition in lock-step across all three universities by over 300%, greatly exceeding funding cuts from the Legislature. ABOR also has imposed mandatory fees unrelated to instruction and charged higher rates to part-time and online students.

After unlawfully hiking the price of attendance, ABOR then claimed “unaffordability” as grounds to ignore yet another law, voter-enacted Proposition 300, which bars in-state classification for students lacking lawful immigration status. *See* A.R.S. § 15-1803. ABOR violated Proposition 300 by classifying certain ineligible students as in-state, and it continued this policy even after the unanimous conclusion in *State ex rel. Brnovich v. MCCC*, 242 Ariz. 325 (App. 2017), which this Court unanimously affirmed, 243 Ariz. 539 (2018).

When the Attorney General sued on behalf of the State in Superior Court under A.R.S. § 35-212, seeking to enjoin and recover ABOR’s unlawful payments subsidizing the in-state tuition of ineligible students, ABOR moved to dismiss. It contended that the Attorney General may come to court only when authorized by specific statute, and § 35-212 did not authorize the instant lawsuit because ABOR did not make any “payments” under that statute, among other grounds for dismissal. The Superior Court agreed and dismissed the Attorney General’s claims. The State timely appealed. *See State v. Arizona Board of Regents*, No. 1 CA-CV 18-0420 (the “Underlying Appeal”).

Pursuant to ARCAP 6 and 19, the State of Arizona *ex rel.* Mark Brnovich, Attorney General (the “State”) respectfully moves to 1) transfer the Underlying Appeal to this Court; and 2) consolidate consideration of that appeal with the State’s forthcoming Original Petition for Special Action against ABOR, No. 18-____ (the “Original Petition”). Transfer is proper because the Underlying Appeal raises jurisdictional questions that only this Court can resolve given its prior decisions and because this matter presents other extraordinary circumstances.¹ Consolidation is also appropriate because the issues in the two cases overlap significantly.

¹ This Petition to Transfer is timely under ARCAP 19(b), because it is being filed on the same date as the final reply brief in the Underlying Appeal.

ARGUMENT

I. The Grounds for Transferring the Underlying Appeal to This Court Are Met.

ARCAP 19(a) sets forth three alternative grounds for transferring an appeal to this Court, two of which are met: the appeal requests that a decision of this Court be overruled or qualified and there are other extraordinary circumstances justifying transfer.

Most significantly, the Opening Brief requests that a decision of this Court be overruled or qualified. To resolve the jurisdictional questions in the Underlying Appeal, the courts will have to address the following potential issues: 1) does § 35-212 authorize Counts I-VI in the First Amended Complaint (“FAC”); 2) does § 41-193(A)(2) separately authorize Counts I-VI; and 3) does the political question doctrine or legislative immunity require affirming the dismissal in part on alternative grounds. Proper resolution of Question 2 involves overruling a prior decision of this Court. ABOR contends that Question 3 is also governed by a prior decision of this Court.

With respect to Question 2, *McFate v. Arizona State Land Department*, 87 Ariz. 139 (1960), incorrectly held that § 41-193(A)(2) does not provide a basis for the Attorney General to initiate litigation. However, as set forth in the Opening Brief at 24-45 and Reply Brief at 8-21, *McFate* was wrongly decided and should be overruled in favor of the interpretation in *State ex rel. Morrison v. Thomas*, 80

Ariz. 327, 332 (1956). Such a holding would be consistent with the plain language of A.R.S. § 41-193(A)(1)-(2) and promote the rule of law through judicial review. That reading will permit the Attorney General to bring matters of state concern before the courts, and “it will be the courts alone who in all such cases make the final decisions and not the Attorney General.” *Morrison*, 80 Ariz. at 332.

Moreover, ABOR argues with respect to Question 3 that all issues regarding its tuition and fee setting are non-justiciable political questions under *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190 (2007). This is a misreading of *Kromko*, see Opening Brief at 45-50; Reply Brief at 23-26, but given ABOR’s interpretation, resolving this issue may likewise involve overruling or qualifying a prior decision of this Court.

The Underlying Appeal also presents other extraordinary circumstances justifying transfer. It involves solely questions of law and presents a dispute over an important public policy at the highest levels of state government—a dispute between the elected “chief legal officer of the state” and the constitutional board with authority for governing the state’s public universities. Therefore, review by this Court is both proper and likely. *Cf. State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997) (accepting original jurisdiction where dispute involves separation of powers and a matter of statewide importance); *Rios v. Symington*, 172 Ariz. 3, 5 (1992) (accepting original jurisdiction where case involves a dispute at the highest

levels of state government). And the Court’s decision on this issue will have implications for future actions by Attorneys General against public officers and bodies.²

In sum, this Court is the only one that can finally and fully resolve these important jurisdictional issues involving the authority of the elected Attorney General, the State’s “chief legal officer,” to protect the rights of the public by obtaining judicial review to compel another public officer or body to follow the law.

II. This Court Should Also Consolidate the Underlying Appeal With the Original Petition.

This Court also should consolidate the Underlying Appeal with the forthcoming Original Petition. *See* Case No. 18-____. The jurisdictional issue raised in the Original Petition, specifically the Attorney General’s authority to bring claims directly in the Supreme Court pursuant to § 41-193(A)(1), overlaps with a jurisdictional question in the Underlying Appeal, specifically the Attorney General’s authority to bring claims in Superior Court under § 41-193(A)(2).

² Even if the Attorney General’s authority to bring the FAC were resolved by the Court of Appeals solely on the basis § 35-212 (*i.e.*, by ruling in the Attorney General’s favor on Question 1), review by this Court is still likely. Of the twelve available appellate decisions on § 35-212, seven ended with this Court taking action (either by issuing its own opinion, accepting review on other grounds, or de-publishing the Court of Appeals’ decision).

Through the FAC (which has given rise to the Underlying Appeal) and the Original Petition, the State has presented the jurisdictional bases for the Attorney General to go to court and obtain judicial review to protect the rights of the people related to ABOR's past and ongoing tuition and fee-setting practices. Therefore, by consolidating the Underlying Appeal with the Original Petition, this Court can evaluate jurisdiction holistically rather than through piecemeal petitions.³

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court

- 1) grant this Petition to Transfer the Underlying Appeal to this Court, and
- 2) consolidate consideration of that appeal with the State's Original Petition.

³ If the Court accepts jurisdiction of the Original Petition, it can transfer the Original Petition to the Superior Court in conjunction with vacating and remanding the Underlying Appeal. *See* Ariz. R. P. Spec. Act. 4(f) (appellate court may transfer matter to Superior Court for trial, subject to reference back if desired).

RESPECTFULLY SUBMITTED this 28th day of January, 2019.

MARK BRNOVICH
ATTORNEY GENERAL

/s/ Brunn (“Beau”) W. Roysden, III
By: Brunn (“Beau”) W. Roysden III
Oramel H. (“O.H.”) Skinner
Evan G. Daniels
Drew C. Ensign
Robert J. Makar
Dustin D. Romney
Katherine H. Jessen
Assistant Attorney General
Attorneys for State of Arizona, ex rel. Mark
Brnovich, Attorney General