ARIZONA SUPREME COURT

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

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

FILED WITH WRITTEN CONSENT OF THE PARTIES

Whitney DuPree
AZ Bar No. 035061
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, GA 30309
(404) 572-4600
wdupree@kslaw.com

Paul Alessio Mezzina*
Amy R. Upshaw*
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
pmezzina@kslaw.com

Matthew Warren*
KING & SPALDING LLP
353 N Clark Street, 12th Floor
Chicago, IL 60654
(312) 995-6333
mwarren@kslaw.com

**Application for Admission* Pro Hac Vice *Pending*

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae Neal E. Devins, Steven Berenson, Michael S. Gilmore, and William P. Marshall are current or former law professors at universities in the United States whose academic work has addressed the powers and duties of state attorneys general. *See* Appendix. *Amici* have no personal interest in the outcome of this case. They have only a professional interest in the development of the law. They submit this brief to provide information about the role of state attorneys general, both historically and at present, that may inform the Court's analysis of the questions presented.

ARGUMENT

Arizona law allows the Attorney General to "prosecute" civil actions in which the state "is a party or has an interest." A.R.S. § 41-193(A)(2). The Attorney General argues that the plain meaning of that statute authorizes him to sue the Arizona Board of Regents to enforce the Arizona Constitution. Sixty years ago, however, this Court read the statute more narrowly. *See Ariz. State Land Dep't v. McFate*, 87 Ariz. 139 (1960).

McFate rests, at least in part, on two erroneous premises. First, the Court believed that "the initiation of litigation . . . in furtherance of

interests of the public generally" was not part of an attorney general's "basic role," which it thought was limited to serving as "'legal advisor of the departments of the state.'" *Id.* at 144 (quoting A.R.S. § 41-192(A)(1)). Second, the Court believed that "the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department" would be "inconsistent with his duty as its legal advisor." *Id.*

History and current practice show that both of these premises were mistaken. At common law, the role of attorney general encompassed the duty not only to provide legal advice but also to represent the attorney general's conception of the public good by bringing lawsuits. And since *McFate* was decided, this Court and many others have adopted ethical rules that contemplate the attorney general's exercise of this traditional power to sue fellow state officers.

The Arizona legislature may define and limit the Attorney General's powers in a way that departs from tradition and common practice. But *McFate* erred to the extent it construed the Attorney General's statutory powers narrowly based on an incorrect understanding of the powers and duties traditionally and commonly attached to the office.

I. As a matter of tradition and current practice, the role of an attorney general encompasses filing lawsuits in the public interest.

To justify its interpretation of the Attorney General's statutory powers, *McFate* declared that "the initiation of litigation by the Attorney General in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of" the Attorney General's "basic role . . . as 'legal advisor of the departments of the state.'" 87 Ariz. at 144. That statement was at odds with the understanding of an attorney general's role that has prevailed throughout history and remains widely accepted today.

The office of attorney general dates back at least as far as sixteenth-century England. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2449–50 (2006). Under the common law, English attorneys general both served the wishes of the Crown and occupied positions of "power and discretion." *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 & n.4 (5th Cir. 1976). In addition to acting as legal advisor to the Crown, the attorney general "engaged in both criminal and civil litigation." Clinton J. Miller III & Terry M. Miller, *The*

Constitutional Charter of Ohio's Attorney General, 37 Ohio State L.J. 801, 802 (1976). He could commence prosecutions in certain criminal matters, and he could also champion the interests of both the government and the general public by instituting civil litigation. *Id.* at 802 & nn.5–6.

When the office of attorney general was transplanted to the American colonies, the diffusion of power throughout many executive officers and agencies necessitated an even broader grant of discretion. As one scholar explained, the "incidents of the office were so numerous and varied as to discourage the framers of the state constitutions and legislatures from setting them out in complete detail, thus permitting [attorneys general] to look to common law to fill in the gaps." John Ben Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 Baylor L. Rev. 1, 1 (1955); *see also* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2125 (2015). And whatever uncertainty exists about the scope of the attorney general's common-law powers, "[i]t is unquestioned that at common law, the Attorney General had the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and

the protection of public rights." *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016) (quoting *Commonwealth ex rel Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009), *corrected* (Jan. 4, 2010)).

Many state courts thus recognized that their attorneys general had a power, rooted in the common law, to "institute" legal proceedings even without express statutory authorization. *Commonwealth ex rel. Minerd v. Margiotti*, 188 A. 524, 530 (Pa. 1936), *overruled on other grounds*, *Commonwealth v. Schab*, 383 A.2d 819 (Pa. 1978). As early as 1850, the Massachusetts Supreme Court explained that "[t]he power to institute and prosecute" certain suits, "in order to establish and carry into effect . . . the public interest, is understood to be a common-law power, incident to the office of attorney-general or public prosecutor for the government." *Parker v. May*, 59 Mass. 336, 338 (1850). Other courts likewise looked to the common law to hold that the attorney general had "discretion to determine whether he would institute" certain civil actions, "and his discretion could not be controlled and was not subject to review." *People ex rel. Miller v. Fullenwider*, 160 N.E. 175, 176 (Ill. 1928); *see*

generally Nat'l Ass'n of Att'ys Gen., *Common Law Powers of State Attorneys General* 14–15 (Jan. 1975) (collecting cases).

The United States Supreme Court, too, cited the common law when concluding that the U.S. Attorney General had the power to initiate lawsuits without express statutory authorization. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278–80 (1888). The Court reasoned that the Judiciary Act of 1789, which "created the office of attorney general," "must have had reference to the similar office" as defined by the common law of England. *Id.* at 280. And that common-law backdrop made clear that the Attorney General, in addition to serving as legal advisor "to the president and the heads of the other departments of the government," possessed a "general authority under the constitution and laws of the United States to commence" civil actions. *Id.* at 278. The Court further noted that in prior cases no party had questioned "the right of the attorney general to institute" a civil suit. *Id.* at 282.

The vast majority of state attorneys general still enjoy these traditional powers. Courts in at least 35 states have expressly decided that their attorneys general retain common-law powers, including the power to initiate litigation in the public interest. *See State ex rel. Discover*

Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 645 n.47 (W. Va. 2013) (collecting cases). As a result, state attorneys general "are frequently in the affirmative posture of initiating lawsuits against private parties, the federal government, or other state officials." Katherine Shaw, *Constitutional Nondefense in the States*, 114 Columbia L. Rev. 213, 233 (2014).

The power to initiate legal action against other state officials is especially important to an attorney general who is directly elected by and accountable to the people. Early state attorneys general were mostly appointed. *See* Devins & Prakash, 124 Yale L.J. at 2124–25 & n.78; Marshall, 115 Yale L.J. at 2450–51. But over time the people demanded a more direct role in their government, and today 43 states directly elect their attorneys general. Devins & Prakash, 124 Yale L.J. at 2124–25. When an attorney general serves at the people's pleasure, his "primary obligation is to the people," not to the governor or other state officials. *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973). Popular election thus helps to promote "an intrabranch system of checks and balances" within the executive branch of the state government,

where the attorney general serves as an independent check on governors and other state agencies. Marshall, 115 Yale L.J. at 2451.[1]

An elected attorney general plays a critical role in protecting and securing the rights of the people guaranteed by the state constitution and laws. All state constitutions, including Arizona's, "provide protections of individual rights and constraints on government power that are completely unknown to the U.S. Constitution," as well as "freedom provisions that are similar to provisions in the U.S. Constitution" but that are "written more broadly" than their federal counterparts. Clint Bolick, J., *State Constitutions: Freedom's Frontier*, Cato Sup. Ct. Rev. 15, 16 (2017); *see Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). But private parties will sometimes lack the resources or legal standing to sue to enforce those protections. In such cases, the attorney general "may"—indeed, must—"go to the courts for protection of the rights of the people."

[1] In Arizona, the Attorney General is and (since statehood) always has been chosen by and accountable to the people. Ariz. Const. art. V, §1(A)–(B); *see* 93 Com. & Fin. Chron. 901, 1736 (Oct. 7, 1911), https://tinyurl.com/wggqeuo (reporting George Purdy Bullard's election as Arizona's first state Attorney General). And Arizona law authorizes state agencies to retain independent counsel in the event of a conflict with the attorney general, suggesting the legislature anticipated the attorney general would fulfill his common-law role of representing the people. *See* pp. 16–17, *infra*.

State ex rel. Morrison v. Thomas, 80 Ariz. 327, 332 (1956). State constitutional guarantees could become empty promises if the state official charged with their enforcement were powerless to act against state agencies and officials that violate them.

That is why in 2003, more than 40 state attorneys general, including Arizona's, filed an amicus brief in the Supreme Court of Colorado asserting their "prerogative and duty to initiate litigation on behalf of the people" to enjoin action by other state officials that, in the attorney general's judgment, violates the constitution and laws of the state. *Amicus* Br. of Thurburt E. Baker, Att'y Gen. of Ga., and Lawrence E. Long, Att'y Gen. of S.D., and the Att'ys Gen. of 42 Other States and Territories in Support of Resp. at 1, *People ex rel. Salazar v. Davidson,* 79 P.3d 1221 (Colo. 2003) (en banc) (No. 03-SA147), 2003 WL 23221412. The court agreed, holding that Colorado's attorney general could sue to enjoin the secretary of state from conducting elections under an unconstitutional scheme. *Salazar*, 79 P.3d at 1229–30. Other courts likewise routinely allow attorneys general to bring similar actions, recognizing "that it is within the right of the Attorney General, if not his duty, to bring suits to clarify the constitutionality of laws enacted by the

Legislature if he deems it appropriate." *Hansen v. Barlow*, 456 P.2d 177, 181 (Utah 1969); *see also, e.g.*, *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974) (the attorney general's "constitutional, statutory and common law powers include the power to initiate a suit questioning the constitutionality of a statute").

It is true that Arizona is among the small minority of states where the Attorney General "has no common law powers." *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997) (en banc). As a consequence, "whatever powers [the Attorney General] possesses must be found in the Arizona Constitution or the Arizona statutes." *Id.* (internal quotation marks omitted). Nonetheless, the common law should inform this Court's interpretation of those statutes and constitutional provisions. *See Giss v. Jordan*, 82 Ariz. 152, 162 (1957) ("[T]he offices of governor, secretary of state, state auditor, state treasurer and attorney general, have had a well-understood meaning and stature" and "refer to offices occupied by these officers at common law."); *Farnsworth v. Hubbard*, 78 Ariz. 160, 168 (1954) ("[S]tatutory enactments . . . if possible should be construed as consistent with the common law."). At a minimum, the Court should not squeeze the statute authorizing the Attorney General 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 attorney general's traditional role.

II. Professional ethics do not prevent an attorney general from suing other state actors to enforce the constitution and laws of the state.

McFate was equally wrong to suggest that the Attorney General's initiation of litigation against other departments of the state might conflict with his ethical duties as legal advisor to those departments. Since *McFate* was decided in 1960, courts have increasingly recognized that the duties a state attorney general owes to other state actors do not prevent him from advancing his view of the public interest through litigation, including against those state actors. If they did, the attorney general could not serve as the people's check on other parts of the state government. *See* pp. 6–7, *supra*.

Notably, this Court has adopted rules clarifying that unique ethical considerations apply to government lawyers like the Attorney General. In 1983, following six years of study and drafting, the American Bar Association approved the Model Rules of Professional Conduct. *See* Ann. Model Rules of Prof'l Conduct, Preface (Am. Bar Ass'n 2019). In the

1980s, this Court largely adopted the Model Rules as the Arizona Rules of Professional Conduct. *See* Ariz. S. Ct. R. 42; *Foulke v. Knuck*, 162 Ariz. 517, 520 n.1 (Ct. App. 1989). The preamble clarifies that the Rules do not subject the Attorney General to the same conflict-of-interest rules that apply to private lawyers.

The Rules' preamble explains that government attorneys, and the Attorney General in particular, "may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." Ariz. S. Ct. R. 42, Preamble ¶ 18. The preamble also recognizes that the Attorney General 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 intragovernmental legal controversies" in circumstances where such dual representation would create a disqualifying conflict for a private lawyer. *Id.*; *see also* Restatement (Third) of Law Governing Lawyers § 97 cmts. b, g (2000) (noting that "[s]ome government lawyers, such as an elected state attorney general . . . , have discretionary powers under law that

have no parallel in representation of nongovernmental clients," and citing the preamble to the Model Rules).[2]

This part of the Model Rules did not chart new ground. Many state courts had previously recognized that an attorney general's "relationship with the State officers he represents" is "not constrained by the parameters of the traditional attorney-client relationship." *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977). These courts explained that the attorney general's "responsibility is not limited to serving or representing the particular interests of State agencies," but "embraces serving or representing the broader interests of the State" and "the public interest." *Envtl. Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50, 53 (Ill. 1977); *see also Conn. Comm'n on Spec. Revenue v. Conn. Freedom of Info. Comm'n*, 387 A.2d 533, 537–38 (Conn. 1978). In a real sense, "the people of the state are his clients." 387 A.2d at 537.

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[2] When the Model Rules were amended in 2002, the sentence regarding government lawyers' authority to "represent the public interest" was omitted for reasons that are unclear. *See* Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J. L. & Soc. Probs. 365, 399–400 (2005). Regardless, the sentence still appears in the Arizona Rules of Professional Conduct (and in many other states' rules).

Courts therefore understood that "in case of a conflict of duties," the attorney general's "primary obligation is to the [state and] the body politic, rather than to its officers, departments, commissions, or agencies." *Hancock*, 516 S.W.2d at 868. Accordingly, they held that an attorney general could represent opposing state agencies in a dispute, *see Conn. Comm'n*, 387 A.2d at 537–38; *Envtl. Prot. Agency*, 372 N.E.2d at 53; pursue an appeal over the objection of the state officer he represents, *see Feeney*, 366 N.E.2d at 1267; intervene in a case to oppose a state agency his office had previously represented, *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 780–84 (Miss. 1982); and bring suit against an executive officer or agency to question the constitutionality of a statute, *Hancock*, 516 S.W.2d at 867–68.

This Court, too, held—even before adopting the Model Rules—that the Attorney General's role as legal advisor does not necessarily create a conflict of interest when he brings a lawsuit against a public body. In *Amphitheatre Unified School District No. 10 v. Harte*, the Attorney General sued a school district for employment discrimination. 128 Ariz. 233 (1981). The district argued that the Attorney General had "a conflict of interest" because he was responsible for supervising the county

attorneys who were the district's legal advisors, reviewing the county attorneys' opinions on school matters, and issuing legal opinions on those matters himself. *Id.* at 235. The Court held that these facts did not "show an actual or real conflict of interest." *Id.*

This Court's adoption of the preamble to the Model Rules confirms that there is no ethical barrier to an attorney general's taking a position in litigation that is adverse to another state officer or agency. For example, in *Salazar*, the Colorado Supreme Court relied on the preamble (which had been incorporated into the Colorado Rules of Professional Conduct) in holding that the attorney general could sue the secretary of state to enforce his understanding of the state constitution despite also serving as "legal advisor" to the secretary. *Salazar*, 79 P.3d at 1231. The court reasoned that the preamble required the attorney general to "consider the broader institutional concerns of the state even though these concerns are not shared by an individual agency or officer." *Id.*

Other state courts have embraced these principles as well. *See, e.g.*, *Perdue v. Baker*, 586 S.E.2d 606, 610 (Ga. 2003) (no ethical violation where attorney general filed appeal over governor's objection because attorney general was not "merely . . . legal counsel to the Governor" but

also had an "important and independent role" under the state constitution); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 629 (S.C. 2002) (because of his "dual role of serving the sovereign of the State and the general public," attorney general did "not violat[e] the ethical rule against conflicts of interest by bringing an action against the Governor" to enforce state constitution); *Superintendent of Ins. v. Att'y Gen.*, 558 A.2d 1197, 1204 (Me. 1989) ("[W]hen the Attorney General disagrees with a stage agency, he is not disqualified from participating in a suit affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceedings.").

Of course, when the attorney general sues a state agency or official whom he would normally represent, the defendant may be entitled to independent representation. *See State v. Klattenhoff*, 801 P.2d 548, 551 (Haw. 1990), *abrogated on other grounds*, *State v. Walton*, 324 P.3d 876 (Haw. 2014). The Arizona legislature has addressed this possibility by adopting a statute providing that, "[i]f the attorney general determines that he is disqualified from providing judicial or quasi-judicial legal representation or legal services on behalf of any state agency in relation

to any matter," the agency may retain independent counsel. A.R.S. § 41-192(E). The legislature has also authorized certain state officials and agencies, including the governor and the Board of Regents, to retain outside counsel regardless of any conflict. A.R.S. § 41-192(D). The Board has thus hired private attorneys who are not affiliated with the Attorney General's office to represent it in this case. So *McFate*'s concerns about potential conflicts of interest, while they lack force in general, are especially misplaced here.

CONCLUSION

McFate's mistaken premises should not impede the Court's analysis of the questions of Arizona law presented in this case. History and current practice demonstrate that state attorneys general can and do serve as legal advisors to state agencies while also retaining the authority to sue those agencies to enforce the constitution and laws of the state.

Respectfully submitted,

/s/ Paul Alessio Mezzina

Paul Alessio Mezzina
Amy R. Upshaw
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
pmezzina@kslaw.com

Matthew Warren
KING & SPALDING LLP
353 N Clark Street, 12th Floor
Chicago, IL 60654
(312) 995-6333
mwarren@kslaw.com

Whitney DuPree
AZ Bar No. 035061
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, GA 30309
(404) 572-4600
wdupree@kslaw.com

Counsel for Amici Curiae

March 31, 2020

APPENDIX

- **Neal E. Devins** is the Sandra Day O'Connor Professor of Law and Professor of Government at William and Mary Law School.
- **Steven Berenson** spent nearly two decades as a Professor of Law at Thomas Jefferson School of Law. He previously worked as an Assistant Attorney General in the Office of the Massachusetts Attorney General.
- **Michael S. Gilmore** is an Adjunct Professor at the University of Idaho College of Law and a former Deputy Attorney General for the State of Idaho with 40 years' service in the Idaho Attorney General's Office.
- **William P. Marshall** is the William Rand Kenan, Jr. Distinguished Professor of Law at the University of North Carolina School of Law. He has also served in the White House Counsel's Office, as Solicitor General of Ohio, and as a Special Assistant Attorney General for the State of Minnesota.