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

BRIEF OF AMICUS CURIAE
JOHN A. ("JACK") LASOTA, ROBERT CORBIN, TERRY GODDARD, AND THOMAS HORNE
IN SUPPORT OF PETITION FOR REVIEW

FILED WITH WRITTEN CONSENT OF THE PARTIES

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INTERESTS OF AMICI CURIAE

Amici curiae John A. ("Jack") LaSota, Robert Corbin, Terry Goddard, and Thomas Horne file this brief in support of Petitioner Brnovich. Amici curiae, as former Arizona Attorneys General and otherwise elected office holders, have compelling interests in protecting the role of the Attorney General as the chief legal officer of Arizona. During the lengthy, collective tenure of these former Attorneys General, they balanced the office's statutory authority with sufficient latitude and discretion to protect the rights and interests of Arizona's residents. Amici curiae therefore can provide information and a unique perspective to the issue this case presents: should the Attorney General have standing to bring a constitutional claim against the Arizona Board of Regents, a constitutionally-created state agency? These former Attorneys General do not advocate for or against the substantive merits of Petitioner Brnovich's challenge.

Mr. LaSota was Arizona's 21st Attorney General, serving in office from 1978 to 1979. Prior to his appointment to Attorney General, Mr. LaSota was a law professor at the Arizona State University College of Law. Following his term as Attorney General, Mr. LaSota served as Chief of Staff for Governor Bruce Babbitt.

Mr. Corbin was Arizona's 22nd Attorney General, holding office from 1979 to 1991, the longest in Arizona's history. Prior to his election as Attorney General,

Mr. Corbin served as the Maricopa County Attorney from 1965 to 1968, and served on the Maricopa County Board of Supervisors from 1972 to 1978.

Mr. Goddard was Arizona's 25th Attorney General, holding the office from 2003 to 2011. Before becoming Attorney General, Mr. Goddard served as the Mayor of Phoenix from 1984 to 1990 and as the Arizona State Director for the U.S. Department on Housing and Urban Development from 1995 to 2002. Mr. Goddard served on the Central Arizona Water Conservation District from 2001 to 2003, where he currently serves today.

Mr. Horne was Arizona's 26th Attorney General, holding the office from 2011 to 2015. Before his time as Attorney General, Mr. Horne served on the Paradise Valley Unified School District Board, including as its Chair; was elected to the Arizona House of Representatives from 1997 to 2001; and served as the Arizona Superintendent of Public Instruction from 2003 to 2011.

Between the four, amici curiae served as Arizona Attorneys General for a combined twenty-six years, which experience informs their views upon the issues presented in this matter and places them in a uniquely situated position to assist this Court by offering their perspective on the issues.

ARGUMENT

I. The Attorney General is Arizona's Chief Law Enforcement Officer.

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; among the Attorney General's express obligations is 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 State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956). And this was consistent with an interpretation of "prosecute" in the civil context that came only a few years before the Legislature expanded the Attorney General's statutory powers. *See State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 189 (1942) ("We think the words 'direct prosecution' mean it is the duty of the auditor to cause to be instituted prosecutions in the name of the state, on her relation, whenever she

thinks public money has come into the hands of anyone who fails to pay it over as required by law, and to direct and guide such prosecutions until they are terminated.").

After the legislative expansion, this Court determined that "the Attorney General'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 [or recovering] the allegedly illegal payment of public monies[.]" *See State ex rel. Woods v. Block*, 189 Ariz. 269, 274 (1997) (quoting *Fund Manager, Pub. Safety Pers. Ret. Sys. v. Corbin*, 161 Ariz. 348, 353 (App. 1988) (internal citations omitted).

The Arizona Board of Regents ("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). Except for *ex officio* members (the Governor and Superintendent of Public Instruction, who serve as long as they remain in their offices) and student regents, the term of a Regent is eight years. *See* A.R.S. § 15-1621(B). Unlike most state agencies, ABOR may employ legal counsel other than the Attorney General. *See* A.R.S. § 41-192(D)(4). The Governor is similarly permitted to hire its own counsel. *See* A.R.S. § 41-192(D)(7). The Attorney General is not beholden, by design, to advocate for ABOR or the Governor. One might infer the Legislature predicted that there could

be conflicts between the Attorney General's role as the people's chief legal officer and ABOR's policies. This is one such case.

The Arizona Constitution requires that "the instruction furnished [at Arizona's public universities] shall be as nearly free as possible." *See* ARIZ. CONST. art. XI, § 6. The modern Court has declined to answer the question of what the phrase "as nearly free as possible" means in the context of the constitutional mandate. *Cf. Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190 (2007) (declining to consider a challenge to "as nearly free as possible" asserted by tuition payers, deciding the issue is a political question); *Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 263 (1935) (refuting argument that "as nearly free as possible" entitled residents to "entirely free" tuition, but finding that the challenged fees were constitutionally permissible where there was "no suggestion" that they were excessive or other than reasonable). The Attorney General initiated an action against ABOR, which the trial court dismissed for lack of standing, and the Court of Appeals ruled that it had no choice but to uphold the trial court's ruling in light of this Court's opinion in *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139 (1960). *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 2019 WL 3941067, at *4, ¶ 22 (Ariz. App. Aug. 20, 2019) (mem. decision).

Amici curiae agree with the Court of Appeals and Petitioner Brnovich that *McFate* should be revisited and reversed in order to preserve the Attorney

General's status and necessary authority as the public's elected chief legal officer to act in the best interests of the public.

II. The Attorney General Must be Permitted to Act as a Check on the Constitutionality of the Actions of the Unelected ABOR.

The drafters of the Constitution included checks on their elected representatives and other branches of government, including ABOR (an unelected and independent agency). One such check is the Constitution's requirement that instruction furnished at Arizona's public universities "shall be as nearly free as possible." *See* ARIZ. CONST. art. XI, § 6. Arizona's chief legal officer correctly acts as a further check to ensure that ABOR complies with its constitutional mandate. The Attorney General must be able to seek guidance of this Court (and that of the Superior Court and Court of Appeals) where constitutional rights are involved; if specific legislation were required to permit the Attorney General to challenge ABOR's tuition setting, then the Legislature (who confirms the Regents) and the Governor (who appoints the Regents) may decline to enact the legislation and avoid any check on ABOR's power. The requirement that public university education "shall be as nearly free as possible" could be rendered meaningless or, at the least, unenforced and ignored.

The *Woods* and *Fund Manager* courts allowed the Attorney General to attack the constitutionality of laws even though there was no specific statutory

authorization for the Attorney General to do so. *See Woods*, 189 Ariz. at 274; *Fund Manager*, 161 Ariz. at 354. In *Woods*, this Court allowed the Attorney General's challenge to move forward, noting that "Arizona has long considered the Attorney General to be a key player in litigation concerning a statute's constitutionality" and that the Attorney General "must support and defend the Arizona Constitution." 189 Ariz. at 272; *see also* A.R.S. § 12-1841. Given the Attorney General's fundamental role relative to constitutional questions, this Court should permit the Attorney General to lodge the challenge based on the facts of this case, and overrule *McFate* to the extent it prevents the Attorney General from so doing.

The Court of Appeals agreed, as noted in the three-judge panel's special concurrence filed with its memorandum decision. Although the Court of Appeals stated that *McFate* prohibits them from holding that the authority to "prosecute" actions in A.R.S. § 41-193(A)(2) authorizes the Attorney General to challenge ABOR's tuition rate hikes, it also noted that *McFate*'s holding appeared "flawed." *See Brnovich*, 2019 WL 3941067 at *4, ¶ 22. To the extent this Court is disinclined to overrule *McFate*, it can nonetheless distinguish *McFate* as concerns the Attorney General's current challenge. In *McFate*, this Court concluded that the Attorney General did not have standing to initiate legal proceedings against the Arizona State Land Department because that power had been specifically

delegated to the Governor. *McFate*, 87 Ariz. at 148. In reaching this conclusion, the Court noted that the Arizona Constitution obligates the Governor to "take care that the laws be faithfully executed" and that the Legislature gave the Governor the power to "supervise the official conduct of all executive ministerial officers," "see that all offices are filled and the duties thereof performed, or, in default thereof, invoke such remedy as the law allows," and "require any officer or board to make special reports to him upon demand in writing." *Id.*; ARIZ. CONST. art. V, § 4; A.R.S. § 41-101(1), (2), and (9). More specifically, the *McFate* Court referenced and relied on the Governor's statutory ability to: (a) appoint the State Land Commissioner; (b) remove the State Land Commissioner for cause; and (c) require the State Land Commissioner to provide annual reports. A.R.S. § 37-131(B) and (C); A.R.S. § 37-383(B). The *McFate* Court attached significance to the fact that these powers were not vested in the Attorney General.

Here, although the Governor still maintains the general powers granted by the Constitution and A.R.S. § 41-101, the Legislature has not granted the Governor with the same ability to regulate ABOR as it did the *McFate* State Land Department. For instance, unlike the State Land Commissioner that serves "at the pleasure of the Governor", the Regents are part of a constitutionally-established agency. *Compare* A.R.S. § 37-131(C), *with* ARIZ. CONST. art. XI, § 5, *and* A.R.S. § 15-1621(A). The Regents are appointed by the Governor to serve eight year

terms (twice the term-length of a Governor, Senate President, or Attorney General), except for the designated student members (who are appointed for two years). *See* A.R.S. § 15-1621(B) and (C). Article XI, Section 2 of the Arizona Constitution grants to the state educational boards, including ABOR, the power of the "general conduct and supervision" of the institutions under their control. *See also Hernandez v. Frohmiller*, 68 Ariz. 242, 251 (1949) (concluding this provision prohibits the legislature from transferring "the general conduct and supervision" of the state universities to bodies outside the scope of Article XI, § 2). As such, they are distinguishable from an agency director which acts "under [the Governor's] direction in the execution of the laws." *Ahearn v. Bailey*, 104 Ariz. 250, 253 (1969) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926) (internal quotation marks omitted)).

The powers prescribed to the Governor to supervise and regulate ABOR are thus not the same as those considered by the *McFate* Court. Indeed, the Governor serves on ABOR as an *ex officio* member with the appointed Regents. A.R.S. § 15-1261(A). Given these particular distinctions, the Attorney General should be permitted to initiate a constitutional challenge to ABOR's tuition setting in this instance to protect the interest of the State and the public.

III. If this Court is Disinclined to Overrule *McFate*, this Court Can and Should Waive the Standing Requirement.

This Court has waived, and should now waive, the standing requirement if it is disinclined to overrule *McFate.* Waiver would permit this Court to immediately examine ABOR's criteria for tuition setting (including any need to consider the actual cost of instruction), a matter of clear statewide importance that is likely to recur because ABOR annually sets tuition rates.

In *Sears v. Hull*, this Court reiterated that it may waive the standing requirement in "exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." 192 Ariz. 65, 71 (1998) (en banc). The *Hull* court cited *Rios v. Symington*, 172 Ariz. 3 (1992), as an example of allowing the President of the Senate to bring a special action to challenge the constitutionality of the Governor's line item veto because the dispute involved "the highest levels of state government," substantial issues, and presented a matter of first impression. 192 Ariz. at 71. Similarly, the *Goodyear Farms v. City of Avondale* Court disregarded standing in a constitutional challenge of a municipal annexation ordinance, which raised federal and state constitutional questions of "great public importance that were likely to recur." 148 Ariz. 216, 217 n. 1 (1986); *see also Fraternal Order of Police Lodge 2 v. Phoenix Emp. Rel. Bd.*, 133 Ariz. 126, 127 (1982) (recognizing that the Supreme Court may waive standing to

consider a question of great public importance or one which is likely to recur even where question presented is moot). Likewise, in *State v. B Bar Enterprises*, this Court waived the standing requirement where the owners of massage parlors brought a constitutional challenge to a public nuisance statute where the statute had not previously been interpreted. 133 Ariz. 99, 101 n.2 (1982).

Arizona law allows the Governor to direct the Attorney General to appear if anyone is acting unconstitutionally against the State. *See* A.R.S. § 41-101(A)(5). But what if the Governor, who sits with ABOR, chooses to ignore the constitutional limits on ABOR's actions? The Legislature acknowledged that there may be times that the Attorney General is at odds with ABOR and/or the Governor. *See* A.R.S. § 41-192(D)(4) and (7). In a case, such as this, where there are significant constitutional questions presented relating to ABOR's actions, the Attorney General should be permitted to initiate an action.

This Court has not previously examined the constitutional challenge lodged by the Attorney General in the instant matter. This Court has, however, rejected a challenge by tuition payers because this Court determined that ABOR's *level* of spending is a political question. *See Kromko*, 216 Ariz. at 195. Here, the Attorney General does not challenge the level of spending. If the Attorney General is not permitted to pursue this challenge then the practical consequence is to force Arizona tuition-payers and would-be payers to bring individual challenges to

ABOR's policies. And they may not have standing if they only allege "generalized harm that is shared alike by all or a large class of citizens[.]" *Sears*, 192 Ariz. at 69. To avoid multiple, annual lawsuits and conflicting trial and appellate rulings, and given the importance of ensuring that nonelected officials comply with their constitutional mandates, this Court may, and should, waive the standing requirement if it is not inclined to revisit and overrule *McFate* in the instant matter.

CONCLUSION

For the forgoing reasons, amici curiae respectfully request that this Court grant the Petition for Review and reverse the Court of Appeals' decision upholding the trial court's dismissal for lack of standing. In doing so, the Court should overrule *McFate* and hold that A.R.S. § 41-193(A)(2) grants the Attorney General, as Arizona's chief legal officer, the authority to initiate lawsuits when deemed necessary to address matters of State concern and to protect the public interest.

RESPECTFULLY SUBMITTED this 8th day of November, 2019.

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