ARIZONA SUPREME COURT

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

STATE OF ARIZONA *EX REL.* MARK BRNOVICH, ATTORNEY GENERAL'S PETITION FOR REVIEW

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INTRODUCTION

This Petition presents a critical question about the rule of law and separation of powers in Arizona. This Court has held, consistent with statutory authority, that the Attorney General ("AG") may "go to the courts for protection of the rights of the people." *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956). Such authority is necessary to protect constitutional rights that would otherwise go unenforced and does not make the AG a "dictator" because "the courts alone [will] in all such cases make the final decisions and not the [AG]." *Id.*

Four years after *Morrison*, this Court did an about-face and interpreted "prosecute" in A.R.S. § 41-193(A)(2) as not granting the AG authority to initiate suit. *See Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 144-46 (1960). That decision, and the conclusion by lower courts that the First Amended Complaint ("FAC") does not allege a payment of public monies under A.R.S. § 35-212, has been dispositive in this case.

While bound by *McFate*, **all three** Court of Appeals judges agreed its interpretation "appears to be flawed." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 2019 WL 3941067 at *4 ¶22 (App. Aug. 20, 2019) (mem. decision) (special concurrence). The Court of Appeals was right about *McFate*. And, in any event, the FAC clearly alleges a payment of public monies under § 35-212. This Court should grant review and reverse the judgment of dismissal.

ISSUE PRESENTED

1. Did the courts below err by dismissing the FAC for lack of jurisdiction? This issue encompasses:
   a. whether § 41-193(A)(2) authorizes the AG's suit;
   b. whether § 35-212 authorizes the AG's suit; and
   c. whether dismissal was required on a different threshold ground—political question or legislative immunity.

FACTUAL BACKGROUND

The AG sued ABOR related to tuition and fees at the State's public universities. R.1 ¶¶54-98; R.16 ¶¶53-97. Counts I-V of the FAC allege ABOR is violating (1) Article XI, § 6 of the Arizona Constitution, which mandates "the instruction furnished [at the universities] shall be as nearly free as possible," and (2) statutory provisions in A.R.S. Title 15. R.16 ¶¶53-91. Count VI alleges ABOR is making illegal payments of public monies under § 35-212 by paying state subsidies to cover the costs of instruction for students who pay less than cost to attend the universities but are ineligible for such benefits under Proposition 300. R.16 ¶¶92-97.[1]

ABOR moved to dismiss for lack of jurisdiction. R.10-14. The Superior Court granted dismissal based on limits on the AG's authority to institute suit. R.30, 34. The AG specifically noted in his Response to the MTDs (R.17 at 3 n.2) that he would seek *McFate*'s reversal in this Court.

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[1] ABOR subsequently rescinded its subsidies for ineligible students, but the FAC seeks *recovery* of the illegally paid monies. *Id.* at 20 ¶3.

The Court of Appeals affirmed, concluding the AG lacked authority under § 41-193(A)(2) and had not challenged a "payment" under § 35-212. *Brnovich*, 2019 WL 3941067 at *3 ¶¶12-16.[2] However, **all three** panel judges specially concurred to explain that *McFate*'s "interpretation of 'prosecute' in A.R.S. § 41-193(A)(2) appears to be flawed." *Id.* at *4 ¶22 (special concurrence). *McFate* "overlooks substantial evidence of the plain meaning of the phrase in 1953 when the legislature amended the 1939 Code 4-607(a) to authorize the [AG] to 'prosecute and defend' actions, and adopts an interpretation that ascribes different meanings to 'prosecute' within the same sentence." *Id.*

REASONS THE COURT SHOULD GRANT REVIEW

I. The Court Should Overrule *McFate*'s "Flawed" Interpretation of § 41-193(A)(2)

A. Plain Language, Secondary Factors, And Case Law ***Uniformly*** Support One Conclusion—§ 41-193(A)(2) Authorizes The AG To Initiate Suit In Matters Of State Concern

Plain language. Section 41-193(A)(2)'s plain language authorizes the AG to initiate suit. Courts look to plain language as the "best indicat[or]" of legislative intent and apply clear language "unless an absurd or unconstitutional result would follow." *Premier Physicians Grp. v. Navarro*, 240 Ariz. 193, 195 ¶9 (2016). "Absent statutory definitions, courts apply common meanings, and may look to

[2] The AG unsuccessfully sought transfer to this Court and filed an original petition, jurisdiction over which was declined. *See* Case Nos. T-19-0002-CV, CV-19-0027.

dictionaries." *State v. Pena*, 235 Ariz. 277, 279 ¶6 (2014). Section 41-193(A)(2) states, "[t]he department of law shall … when deemed necessary by the [AG], prosecute … any proceeding … in which the state … has an interest."

The common meaning of "prosecute" includes instituting civil actions.

> "1. Law a. To initiate or conduct a criminal case against ... b. To initiate or conduct (a civil case or legal action) ... c. To initiate or conduct legal proceedings regarding (an offense, for example)[.]"

The American Heritage Dictionary of the English Language 1414 (5th ed. 2011); *see also Black's Law Dictionary* 1476 (11th ed. 2019) ("1. To commence and carry out (a legal action)<because the plaintiff failed to prosecute its contractual claims, the court dismissed the suit>."). And dictionaries show the word also meant this when § 41-193(A)(2) was amended in 1953:

> PROSECUTE. … To "prosecute" an action is not merely to commence it, but includes following it to an ultimate conclusion.
>
> PROSECUTION. … The term is also frequently used respecting civil litigation; and includes every step in an action from its commencement to its final determination.

Black's at 1450-51 (3d ed. 1933); *accord Black's* at 1385 (Revised 4th ed. 1968).

> Prosecute: … *Intransitive*: … 2. Law. To institute and carry on a legal suit or prosecution….
>
> Prosecution … 2. *Law*. a The institution and carrying on of a suit or proceeding in a court of law or equity….

Webster's New Int'l Dictionary of the English Language at 1987 (2d ed. 1947).[3]

Courts interpreting "prosecute" for attorney-general powers have thus concluded that "prosecute" plainly includes instituting civil actions. *E.g.*, *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270-71 & n.16 (5th Cir. 1976) (citing *Black's* and cases from 1911 to 1971); *State v. Valley Sav. & Loan*, 636 P.2d 279, 281 (N.M. 1981) (citing 1948 case interpreting "prosecute" using *Webster*'s and court decisions).

Secondary factors. Section 41-193(A)(2) is not ambiguous, but secondary factors nevertheless confirm that it authorizes initiating actions. Courts "determine [ambiguous statutes'] meaning by considering secondary factors, such as … context, subject matter, historical background, effects and consequences, and spirit and purpose." *Premier Physicians Grp.*, 240 Ariz. at 195 ¶9.

Following the people's vote to create a Department of Law under the AG's direction "to properly administer the legal affairs of the state," the Legislature in 1953 revised the AG's duties in two critical ways. *See* 1939 Code § 4-606 (1954 supp.) (reproducing 1952 SCR No. 10). First, the Legislature added that the AG "shall serve as chief legal officer of the state." 1939 Code § 4-609(a) (1954 supp.), codified at A.R.S. § 41-192(A). In Arizona and elsewhere, "chief legal officer" is a

[3] Courts cited these dictionaries. *See State v. Dickens*, 66 Ariz. 86, 92 (1947); *Marquez v. Rapid Harvest Co.,* 89 Ariz. 62, 66 (1960).

term of art used in conjunction with common-law powers. *See Shute v. Frohmiller*, 53 Ariz. 483, 492 (1939); *see also Shevin*, 526 F.2d at 268. Therefore, that language indicates legislative intent to confer on the AG statutory power similar to other "chief legal officers," including the power to initiate actions. *See U.S. v. San Jacinto Tin Co.*, 125 U.S. 273, 280 (1888) (words familiar in common law must be interpreted in statute with reference to common-law meaning); *Shevin*, 526 F.2d at 270-71 ("no doubt" common-law power to "prosecute" includes initiating suit).

Second, the Legislature added that the Department of Law shall "at the direction of the governor <u>or when deemed necessary by the attorney general</u>, prosecute and defend any cause…." *Id.* § 4-607(a)(2) (1954 supp.) (addition underlined), codified as amended at A.R.S. § 41-193(A)(2). This addition textually equated the AG's power with the Governor's in this area and confirmed each could order the initiation of suit.

And it was appropriate and constitutional for the Legislature to authorize the AG to initiate actions "when deemed necessary" by him because attorneys general elsewhere traditionally and presently have this authority. *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 645 n.47 (W. Va. 2013) (identifying 35 states with common-law powers, 8 without, and 6 indeterminate); Committee on the Office of Attorney General, Nat'l Ass'n of Attorneys General, *Common Law Powers of State Attorneys General* 26-27 (1980) (identifying 35 with, 7 without,

and 8 undecided); Emily Myers, *State Attorneys General Powers and Responsibilities* 29 & n.12 (3d ed. 2013) ("Although each jurisdiction varies in [what] common law authority is recognized, cases affirming … use of those traditional powers are legion.").

Case Law. Three years after the people's vote and 1953 statutory amendments, this Court interpreted § 41-193(A)(1), which includes the *identical* word "prosecute." *Morrison*, 80 Ariz. at 332. Under *Morrison*, "it follows from [§ 41-193(A)](1) that the [AG] is the proper state official ***to institute*** the action. In doing so he acts as the 'chief legal officer' of the State." *Id.* at 332 (emphasis added); *see also id.* (The AG "may, like the Governor, go to the courts for protection of the rights of the people."). Given its timing, *Morrison* (which remains good law) is excellent evidence of what "prosecute" means here.

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

The unanimous special concurrence correctly recognized that *McFate*'s interpretation of "prosecute" is "flawed," *Brnovich*, 2019 WL 3941067 at *4 ¶22, and this Court should overturn *McFate*. "It is not the function of the courts to rewrite statutes." *Lewis v. Debord*, 238 Ariz. 28, 31-32 ¶11 (2015). But *McFate* did exactly that. To reach its desired policy result, *McFate* contravened § 41-193(A)(2)'s plain language and secondary interpretive factors. *See supra* 3-7. The word "prosecute" in § 41-193(A)(2) "would have been understood by the

legislature in 1953 to include both the initiation and pursuit of proceedings, whether they be at 'the direction of the governor or when deemed necessary by the attorney general.'" *Brnovich*, 2019 WL 3941067, at *6 ¶33 (special concurrence). Because of this, *McFate*'s construction of "prosecute" is internally inconsistent even within (A)(2). *See* 87 Ariz. at 148. The word "prosecute" in (A)(2) modifies *both* the Governor's and AG's powers, meaning any limit on "prosecute" would land equally on both the Governor and the AG, not just the AG.

McFate's construction of "prosecute" is also inconsistent with the phrase "when deemed necessary by the [AG]." The most logical and natural reading of that language is that the AG has authority to determine when to initiate suit, not just how to conduct it after commencement, because "when" "signal[s] a point in time related to the occurrence of a specific event." *See Brewer v. Burns*, 222 Ariz. 234, 239 ¶27 (2009).

McFate's erroneous interpretation can properly be overruled under this Court's decisions discussing stare decisis. *McFate* should be subject to a lower standard for reversal because it is based not on statute but on concerns about court-made ethics rules and the constitutional structure of Arizona's executive branch. *See State v. Hickman*, 205 Ariz. 192, 201 ¶38 (2003) (recognizing "subject matter" determines threshold for reversal under stare decisis). *McFate* concluded the AG's "fundamental obligation … is to act as legal advisor" and that an "assertion … in a

judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor." 87 Ariz. at 143-44. *McFate* also concluded the Constitution delegated authority to initiate litigation for the public interest to the Governor. *Id.* at 148.

But the AG's dual role of legal advisor and people's lawyer is not absurd or unconstitutional and does not improperly infringe on the Governor's powers. This dual role flows from having a separately elected attorney general, who answers to the people. Instituting suit is a traditional function of the office, and a ***majority*** of states empower their attorneys general to serve this role. *See supra* 6-7. *McFate* lacked any analysis of the prevalence of this dual role in other states, including those with elected attorneys general. *See* 87 Ariz. at 141-48. It is this Court's duty to correct *McFate*'s error in contravening a plain statutory provision based on extra-textual, misplaced policy concerns.

Even as a statutory interpretation case, however, *McFate* still should be overruled. This Court set forth five factors for when stare decisis permits overturning a prior statutory interpretation—*all* are met here. *See Lowing v. Allstate Ins.*, 176 Ariz. 101, 107 (1993). First, as explained above, § 41-193(A)(2)'s language does not compel *McFate*'s conclusion; in fact, *McFate*'s analysis contravenes the plain language. Second, *McFate*'s analysis violates the policies underlying the 1953 amendments to the AG's duties. Third, *McFate*'s

concerns were the Governor's powers and legal ethics, which can be better accommodated through ethical screens and outside counsel practices rather than a bright-line rule on AG authority that is at odds with the statutory language. Fourth, overruling *McFate* would return Arizona law to the earlier *Morrison* interpretation, which aligns with § 41-193(A)(2)'s plain language, is more contemporaneous to the 1953 statutory amendments, and is better reasoned, particularly as to promoting the rule of law.[4] Fifth, this case shows that *McFate* has produced deleterious results because, unbound by meaningful judicial review, ABOR has increased tuition in lock-step across the universities contrary to the "as nearly free as possible" provision and ignored statutes, including Proposition 300.

Courts have recognized that stare decisis carries less weight when reliance interests are not at stake or in cases involving how courts function. *See*, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)); *see also White v. Bateman*, 89 Ariz. 110, 113 (1961) (stare decisis "grounded on public policy" is tied to knowledge of rights and reliance on such rights). Here, overruling *McFate* relates to how the courts function. It would

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[4] *McFate*'s construction of "prosecute," compared to *Morrison*'s earlier construction of that word in § 41-193(A)(1), flouted the venerable canon that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

not change underlying substantive law or create new causes of action; it only permits a mechanism for challenging violations of existing law.

Overruling *McFate* also would not disrupt other precedent generally stating that the AG has no common-law powers. That precedent stands for: 1) statute can authorize state agencies to use counsel other than the AG, and 2) the AG has no common-law powers in criminal matters. Ct. App. Opening Brief at 44 nn.14-15. Interpreting § 41-193(A)(2) as authorizing the AG to go to court to protect the people's rights will not disrupt those holdings.[5]

Finally, legislative acquiescence is inapplicable here, given "the absence of some affirmative indication that the legislature considered and approved of [the court's construction]." *Lowing*, 176 Ariz. at 106; *accord Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 314 ¶24 (2017). There is no such indication here in any subsequently enacted statutes or amendments to § 41-193. Ct. App. Reply Brief at 18, 20.

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[5] Because § 41-193(A)(2) confers authority to initiate suit, this Petition takes no position on whether the Arizona Constitution confers common-law powers on the AG and what implied limitations exist on the Legislature abrogating such powers. *Compare Shute v. Frohmiller*, 53 Ariz. 483, 488 (1939) (no AG common-law powers), *with Merrill v. Phelps*, 52 Ariz. 526, 530 (1938) (sheriffs have common-law powers), and *Hudson v. Kelly*, 76 Ariz. 255, 266 (1953) (Legislature cannot eliminate all duties of a constitutional office).

II. In Holding That § 35-212 Did Not Authorize The AG's Suit, The Courts Below Incorrectly Decided An Important Issue of Law

In addition to § 41-193(A)(2), section 35-212 also authorizes the FAC. This is because Count VI expressly alleged an illegal payment of public monies under § 35-212. *See*, *e.g.*, R.16 ¶¶93, 97. And those allegations withstand a Rule 12 motion. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012). Accordingly, the courts below erred in dismissing Count VI based on concluding that the FAC had not challenged a payment, as required under § 35-212.

A. Count VI Challenges An Illegal Payment Of Public Monies Under § 35-212 As Interpreted by *Woods*

The AG's claim in Count VI concerns the payment of public monies, specifically the monies paid to cover the cost of instruction for students who pay less than cost to attend the universities. R.16 ¶¶93, 97. By providing below-cost tuition to ineligible students, ABOR necessarily pays the difference between the below-cost subsidized rate and the actual cost of instruction. This is exactly the type of payment this Court said could be challenged under § 35-212 in *State ex rel. Woods v. Block*. *See* 189 Ariz. 269, 274 (1997) ("We conclude that the [AG's] request to prohibit CDC from exercising its power to litigate ***necessarily includes*** a request to prohibit payment for such litigation." (emphasis added)). The AG's

allegations do not concern merely "collecting tuition." *See Brnovich*, 2019 WL 3941067 at *3 ¶15.[6]

B. Counts I-V Are Factually Intertwined With Count VI And Thus Also Authorized by §§ 35-212 or 41-193(A)(2)

The AG is also authorized to assert FAC Counts I-V based on properly pleading Count VI under § 35-212. Once the AG properly pleads a § 35-212 claim, other factually related claims are also authorized. *See Woods*, 189 Ariz. at 273 (requiring only that AG's "[s]tanding … be linked to some statutory basis" and recognizing that AG "may use 'any ethically permissible argument' to prevent the illegal payment of public monies" (quoting *Fund Manager v. Corbin*, 161 Ariz. 348, 354 (App. 1988))). In addition, if Count VI states a § 35-212 claim, then the AG has validly instituted a proceeding and has authority to "prosecute" that proceeding pursuant to § 41-193(A)(2), even under *McFate*. Such "prosecut[ion]" includes asserting additional legal theories and factually related claims.

Here, Counts I-V are intertwined with Count VI because resolving them also partially resolves Count VI. Every count includes a common factual question: what is the cost of furnishing instruction? Answering that question not only will determine whether and how much of an illegal subsidy ABOR pays in providing

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[6] *Biggs v. Cooper* has no bearing here because the statutes at issue did "not grant an express expenditure power." 234 Ariz. 515, 522 ¶13 (App. 2014). Here, A.R.S. §§ 15-1626(A)(13) and 15-1664, among others, provide ABOR an express expenditure power. R.17 at 3.

in-state tuition to ineligible students, but also will show if the other tuition procedures and policies challenged in Counts I-V are illegal because they violate "as nearly free as possible" and provisions in A.R.S. Title 15.

III. ABOR's Alternative Grounds For Dismissal—Political Question And Legislative Immunity—Are Meritless

The alternative dismissal grounds ABOR argued—political question doctrine and legislative immunity—are neither reasons to decline review nor alternative bases for affirming dismissal of Counts I-V (ABOR did not challenge Count VI on these grounds).

These counts do not raise non-justiciable political questions. *Kromko v. Arizona Board of Regents* expressly limited itself to whether a particular tuition level violated the Arizona Constitution. *See* 216 Ariz. 190, 192 ¶9, 194-95 ¶22 (2007); *id.* at 195 ¶23 ("[W]e hold only that other branches of state government are responsible for deciding whether a particular level of tuition complies with Article XI, Section 6."). In contrast, the FAC alleges that ABOR's tuition-setting *criteria* (rather than any specific tuition *levels*) do not account for instruction's actual cost and therefore violate the Constitution's "as nearly free as possible" mandate. *See* Ariz. Const. art. XI, § 6; R.16 ¶¶8, 60. The FAC also challenges ABOR's policies that require paying fees unrelated to instruction to access instruction and charging more to online and part-time students. These allegations are distinguishable from challenging a particular tuition level.

If *Kromko* applies, its political question analysis should be reconsidered. *See State v. Maestas*, 244 Ariz. 9, 17 ¶35 (2018) (Bolick, J., concurring). "[T]he judiciary construes the law" and when questions of constitutional power arise, the courts typically will "consider the matter and determine whether [the question] falls on the one side or the other of the dividing line between constitutional and unconstitutional delegation of power." *Giss v. Jordan*, 82 Ariz. 152, 161 (1957); *see also State v. Wagstaff*, 164 Ariz. 485, 487 (1990). Courts should exercise their duty to say what the law is and not dismiss on prudential "discoverable and manageable standards" grounds unless absolutely necessary.

ABOR's legislative-immunity defense likewise fails because the FAC names ABOR based on policy implementation, not legislative function. A government body can be sued in an official capacity to challenge a legislative act's constitutionality that it implements. *See*, *e.g.*, *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 121 ¶5, 124 ¶20 (2013). Because the FAC challenges the lawfulness of ABOR policies and procedures that ABOR also implements, ABOR cannot claim legislative immunity.

CONCLUSION

This Court should grant review and reverse the judgment of dismissal.

RESPECTFULLY SUBMITTED this 18th day of September, 2019.

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