ARIZONA SUPREME COURT

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

AMICUS CURIAE BRIEF OF THE SECRETARY OF STATE AND SUPERINTENDENT OF PUBLIC INSTRUCTION URGING THAT *McFATE* BE REAFFIRMED

Filed pursuant to A.R.C.A.P. 16(b)(1)(B)
and Stipulation of the Parties
Regarding the Filing of Amicus Briefs

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INTEREST OF AMICI CURIAE

This brief is filed *pro bono* on behalf of Katie Hobbs in her official capacity as the Arizona Secretary of State (the "Secretary") and Kathy Hoffman in her official capacity as the Arizona Superintendent of Public Instruction (the "Superintendent"). Neither the Secretary nor the Superintendent has made expenditures or incurred indebtedness to secure its preparation. Nor have others done so. The brief addresses only a single issue: whether this Court should overrule or reaffirm its longstanding interpretation of A.R.S. §41-193(A)(2) in *Arizona State Land Department v. McFate*, 87 Ariz. 139 (1960).

The Secretary and Superintendent oppose the Attorney General's position on that question and have turned to *pro bono* counsel rather than permit the Attorney General to veto their ability to advance their opposition. *See* A.R.S. §§ 41-192 (D) and (E) and 41-2513(B) [1]; *see also McFate*, 87 Ariz. at 144 ("[A]n agency may au-

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[1] Subsections 41-192(D) and (E*)* set forth the following restrictions and exceptions regarding state agencies' appointment of legal counsel:

D. Notwithstanding any law to the contrary, except as provided in subsections E and F of this section, no state agency other than the attorney general shall employ legal counsel or make an expenditure or incur an indebtedness for legal services, but the following are exempt from this section.

1. The director of water resources.
2. The residential utility consumer office.
3. The industrial commission.
4. The Arizona board of regents.
5. The auditor general.
6. The corporation commissioners and the corporation commission other than the

thorize a member of the State bar to appear on its behalf … so long as State funds are not expended for his services.")

The Secretary of State is the elected constitutional executive officer who oversees the Arizona Department of State. Ariz. Const. art. V, § 1(A); A.R.S. § 41-121.02. Among other statutory duties, the Secretary: (i) acts as the chief election officer for the State and prescribes rules and procedures for efficient and uniform election administration throughout the State; (ii) is second in line in succession should the Governor leave office due to death, resignation, or impeachment;

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securities division.
7. The office of the governor.
8. The constitutional defense council.
9. The office of the state treasurer.
10. The Arizona commerce authority

E. If 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 attorney general shall give written notification to the state agency affected. If the agency has received written notification from the attorney general that the attorney general is disqualified from providing judicial or quasi-judicial legal representation or legal services in relation to any particular matter, the state agency is authorized to make expenditures and incur indebtedness to employ attorneys to provide the representation or services.

Subsection 41-2513(B) additionally provides;

B. In accordance with section 41-192, subsection D and notwithstanding any contrary statute, no contract for the services of legal counsel may be awarded without the approval of the attorney general.

(iii) acts in the Governor's place in case of emergency or when the Governor is out of state; (iv) oversees the state library, archives, and public records; and (v) registers trade names and trademarks, and issues certificates of registration for businesses. In meeting her many statutory responsibilities, the Secretary is required by Section 41-192 to rely upon the Attorney General for legal counsel, and would benefit greatly from a productive attorney-client relationship built on trust and confidence.

The Superintendent of Public Instruction is the elected constitutional executive officer who oversees the Arizona Department of Education and executes the policy determinations of the State Board of Education. Ariz. Const. art. V, § 1(A); A.R.S. § 15-231. The Superintendent's many responsibilities are detailed in Title 15 of the Arizona Revised Statutes, and likewise require regular legal consultation. Examples include executing state- and federally-mandated assessments of academic achievement in Arizona's public schools (A.R.S. § 15-241), and monitoring the fiscal management of the State's school districts (A.R.S. §§ 15-103 to 107). Like the Secretary, the Superintendent is required by Section 41-192 to rely on the Attorney General for legal counsel, and would benefit greatly from a productive attorney-client relationship built on trust and confidence.

McFate delineates constitutional and statutory constraints on the Attorney General's power to initiate litigation against the Arizona agencies it represents *i.e.*,

to sue his own clients. In so doing, *McFate* defines an important safeguard of the Secretary and Superintendent's relationship with the office they must turn to for day-to-day legal advice and representation. Preserving that safeguard is the interest that motivates this brief.

ARGUMENT

Article V, Section 1 of the Arizona Constitution establishes the office of the Attorney General and provides in Section 9 that its powers and duties "shall be as prescribed by law." "[T]he 'law' referred to in Article V, Section 9," *McFate* tells us, "is the statutory law of the State and not the common law." 87 Ariz. at 142. The Attorney General does not purport to challenge that conclusion. *See* State Supplemental Brief at 8. The Attorney General instead challenges *McFate* on the ground that it too narrowly construes the powers the Legislature has assigned him.

I. Overturning McFate Would Impair Attorney-Client Relations and Disrupt Inter-Governmental Relations

Relationship concerns of two sorts underlie the constraints that *McFate* attributes to the Attorney General's statutory legal-advisor role. One is the attorney-client relationship; the other is the allocation of powers among the Legislature, the Governor, and the Attorney General.

The Court recognized in *McFate* that the Legislature, through "specific statutory grants of power," can define instances where the Attorney General may initiate lawsuits against client agencies. *Id.* at 144. The Governor is constitutionally

and statutorily empowered to do the same. *Id.* at 148, citing Ariz. Const. art. V, § 4, and A.R.S. § 41-101(A). But in the absence of such external delegations:

> Two propositions flow generally from [the] conception, embodied in our statutes, of the basic role of the Attorney General as 'legal advisor of the departments of the state' who shall 'render such legal services as the departments require' . . . : the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor; and 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 this role.

Id. at 144.

The Attorney General responds that concerns for legal ethics "can be better accommodated through ethical screens and outside counsel practices rather than a bright-line rule on AG authority." State Petition at 9-10. In this very case, however, the Attorney General displayed the tensions and impasses within current outside counsel practices. Unilaterally determining that the Secretary—and the Citizens Clean Elections Commission as well—lacked sufficient interest in these issues to warrant the expenditure, his office rejected their requests to hire independent counsel to prepare *amicus* briefs. [2]

[2] The Citizens Clean Elections Commission has documented the rejection of its request to consult *amicus* counsel in its Executive Director's Report of 2/2/20, pp. 2-4, found on line toward the end of the lengthy meeting packet provided at https://storageccec.blob.core.usgovcloudapi.net/public/docs/609-2-27-20-Meeting-Packet.pdf (last visited Mar. 30, 2020).

These tensions are also highlighted, though indirectly, by the former attorneys general appearing as *amici,* who point out that because the Arizona Board of Regents and the Governor are permitted by A.R.S. § 41-192 (D) to employ independent counsel, the Attorney General "is not beholden, by design, to advocate for [them]." *Amici* AGs' Br. at 7. This brief, however, is filed on behalf of two constitutional executive officers whose departments the Attorney General *is* beholden to advocate for, and whose ability to hire independent counsel the Attorney General can—sometimes quite aggressively—control.[3]

Multiple tensions inhere, of course, when the Attorney General, an elected official, serves as legal advisor for the Secretary and Superintendent, both elected officials, or for an office headed by an appointee of the Governor, another elected official. These tensions are magnified when the officials in question bring differing policy preferences to their positions or are members of differing political parties. Legal positions are not exempt from politics.

McFate does not purport to erase such tensions. Instead, it places them within the context of the checks and balances of Arizona's constitutional structure. Ari-

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[3] *See* Notes 1 and 2, *supra.* Moreover, even agencies statutorily permitted to employ outside counsel are sometimes represented by the Attorney General's office and can face conflict concerns and attorney-client strains. For example, that office currently represents ABOR in other litigation, and did so even in *Kromko v. Arizona Bd. of Regents*, 216 Ariz. 190 (2007), which presented the same substantive issue that underlies this case. *See* ABOR Response at 29, n. 17.

zona's Attorney General, as noted, lacks common law powers and has only those the Legislature provides, the foremost of which is to be "legal advisor of the departments of the state and render such services as the departments require." A.R.S. § 192(A)(1). While the Legislature and Governor may authorize the Attorney General to initiate litigation against departments he represents, the Attorney General otherwise lacks power to act in a manner so disharmonious with his legal-advisor role. This, *McFate* recognizes, is not a structural vacuum but a structural choice:

> [T]he Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interest of the people and the State by taking care that the laws are faithfully executed.

McFate, 87 Ariz. at 148; *see also* Ariz. Const., art. V, § 4.

No doubt our current Attorney General, like his predecessors, chafes at times at this constraint. Checks and balances are fine in the abstract but entail discomfort when the checks take hold. It is a constraint, nonetheless, that Attorneys General have lived with, comfortably or uncomfortably, since *McFate* was decided in 1960, and should go on living with as long as the current structure of government holds.

II. Sixty Years of Legislative Acquiescence Should Not Be Ignored

This Court observed in *McFate* that when the Legislature intends "to authorize the Attorney General to initiate proceedings, it has so provided in clear terms." *Id.* at 146. As the Arizona Board of Regents demonstrated in Appendix B to its Response to the Petition for Review, the Legislature has continued to do so in clear

terms on more than 100 occasions since *McFate* was decided. During that same period, as the Board also pointed out, the Legislature has twice amended Section 41-193 without altering the statute in any way that would undermine *McFate's* construction. ABOR Response at 5

Although the Attorney General undertakes historical and contextual analysis to attack *McFate's* interpretation of Section 41-193, it asks the Court to ignore the most telling history and context—sixty years of legislative acquiescence. The Attorney General invokes the *Lowing* and *Delgado* decisions to this end.

In *Lowing v. Allstate Inc.*, the Court stated,

> It makes sense to infer that the legislature approves judicial interpretation of a statute when we have some reason to believe that the legislature has considered and declined to reject that interpretation. Silence in and of itself, in the absence of any indication that the legislature has considered the interpretation, is not instructive. A rule of statutory construction that requires us to presume that such silence is an expression of legislative intent is somewhat artificial and arbitrary.

176 Ariz. 101, 106 (1993),

In *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 314 ¶ 24 (2017), the Court echoed *Lowing's* tempering application of an interpretive tool that Scalia and Garner call the "Prior Construction Canon." *See* Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 322 (2012).

The Court correctly cautioned in *Lowing* and *Delgado* against indiscriminate application of the canon. As Scalia and Garner themselves caution, "context is as

important as sentence-level text" in determining whether the canon should apply. *Id.* Context is equally important, however, in comparing *Lowing* and *Delgado* with this case.

In *Lowing*, the Court rejected a prior conclusion that unidentified drivers, because they were not demonstrably uninsured, were not uninsured motorists within the mandatory coverage of the Uninsured Motorist Act. Concluding that its prior decision had inappropriately limited coverage, the Court pointed out that no subsequent amendments "had anything to do with unidentified drivers, or with the definition of uninsured motor vehicles." 176 Ariz. at 106.

In *Delgado* the Court abandoned a four-part test it had formulated in a prior interpretation of the remedial Adult Protective Services Act (APSA), concluding that the test had inappropriately limited actionable APSA claims by including restrictive elements not found within the Act itself. 242 Ariz. at 313 ¶ 20. Though the statute had been subsequently amended, none of the amendments concerned the definition of actionable abuse. *Id.* at 314 ¶ 24.

The contrast with this case is striking. When amending Section 41-193 after *McFate,* the Legislature was not addressing the remote subjects of actionable uninsured motorist or APSA claims. It was exercising its own constitutional power to define the Attorney General's authority. The same is true of the more than 100 post-*McFate* statutes that granted the Attorney General specific authority to initiate

actions. These enactments both demonstrate and constitute the very inter-governmental power relationship *McFate* concerns. Had the Legislature wished to readjust that relationship at any time since 1960, it had abundant opportunity.

CONCLUSION

The relationship between the Attorney General's office and the agencies it represents may sometimes be strained, but *McFate* validly and valuably bolsters the agencies' trust and confidence in that office's legal advice and representation. Though occasions may arise when the Attorney General must sue a constituent agency, our governmental structure, as interpreted in *McFate,* protects the ongoing legal advisor relationship by assigning the definition of those occasions to the Legislature and Governor and not to the Attorney General himself. The Legislature, which is free to decide otherwise, has acted in accordance with *McFate* for the sixty years since it was decided, and there is no good reason to change it now.

For the foregoing reasons the Secretary of State and Superintendent of Public Instruction respectfully urge that *McFate* be reaffirmed.

Dated: March 31, 2020.

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