



# Statement

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## Statement from ABOR Chairman Larry E. Penley in Response to Amicus Briefs Filed in Opposition to AZ Attorney General

“The Arizona Board of Regents is gratified the Arizona Supreme Court has received friend of the court (amicus) briefs prior to scheduled oral arguments in the tuition litigation [scheduled this Thursday, April 16](#). With these briefs, the Arizona Supreme Court will have the critical perspectives of governors, elected leaders, and community and business leaders. All oppose the Attorney General’s attempt to usurp the power vested in other branches of government. These individuals and organizations have honorably served our state for decades. Their briefs – rooted in Arizona law and our state Constitution – stand as testimony to the division of powers that our founders viewed as necessary to protect the public.

“Having lost this case in the lower courts, the Arizona Attorney General is now using this last petition to seek power not permitted by the Arizona Constitution. The lawsuit violates limits on the Attorney General’s authority imposed by the Arizona Constitution and statutes, and it seeks an unprecedented and unbridled expansion of the office’s power. The Attorney General’s attempt to gain such powers violates the intent of the state’s founders. These additional, unwarranted powers would change Arizona in a way not recognized since statehood. What the Attorney General wants is nothing less than the authority to sue whoever he wants whenever he alone deems it in his interest. That includes suing his own clients.

“Arizona policymakers, community officials and leaders of business are supporting the Arizona Board of Regents and have made clear they oppose the Attorney General’s position in this lawsuit against the board. The expansion of the Attorney General’s power would adversely impact the Arizona business community and other Arizona state offices, which he represents. This action by the Attorney General is simply an attempt to arrogate powers to the Attorney General now held by the governor and Legislature and to obtain powers not authorized by the Arizona constitution.”

The following three amicus briefs were filed in opposition to the Attorney General’s lawsuit. The excerpts that follow each are highlights from the respective briefs.

### [Amicus Brief of Governor Doug Ducey and former Governors Janet Napolitano and Fife Symington](#)

*“Neither the state Constitution nor any statute empowers the attorney general to sue the Arizona Board of Regents over the manner in which the body has exercised its power. Notably, the attorney general does not represent an aggrieved state agency or allege that the Board has exceeded its constitutional role. Instead, the dispute is whether the Board has faithfully discharged its duty to set tuition ‘as nearly free as possible.’ That type of oversight belongs to the governor ... The current dispute is a political and economic one left to the State’s chief executive – the governor.”*

### [Amicus Brief of Secretary of State Katie Hobbs and Superintendent of Public Instruction Kathy Hoffman](#)

*“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.*

*“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.”*

**Amicus Brief of State Treasurer Kimberly Yee, Arizona Commerce Authority, Greater Phoenix Economic Council, Greater Phoenix Leadership, Southern Arizona Leadership Council, Arizona Chamber of Commerce & Industry, Greater Phoenix Chamber of Commerce, Commercial Real Estate Development Association, League of Arizona Cities and Towns, and Valley Partnership:**

*“Business certainty and confidence is the bedrock upon which investment and ingenuity is built. But, if McFate is abandoned, the AG would become the predominant political office in the State. Vested with a new power to bring suit in the name of the “public interest,” the AG would have nearly unfettered authority to bring actions seeking to undo a business’s agreements with, or authorizations from, a State agency.*

*“If McFate is overruled, the business community will be fraught with uncertainty in dealing with the State, and the attorney-client relationship between the AG and the State will be unnecessarily weakened. In this time of crisis, it is more important than ever that the State government is able to speak with ‘one voice’ and provide certainty to those businesses and individuals for whom they must interact to ensure safety, prosperity, progress. McFate should be affirmed.”*

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