



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**State of Arizona ex rel. Brnovich v.  
Arizona Board of Regents, CV-19-0247-PR**

**PARTIES:**

*Petitioner:* State of Arizona ex rel. Mark Brnovich (“**Attorney General**”)

*Respondent:* Arizona Board of Regents (the “**Board**” or “**ABOR**”)

**FACTS:**

The Board is the governing body that oversees Arizona’s public universities. In early 2018, the Attorney General filed suit against the Board. Counts I–V of the Amended Complaint (the “Complaint”) argued that the Board’s policies for setting tuition at the universities violated article 11, section 6 of the Arizona Constitution, which requires that “university . . . instruction furnished shall be as nearly free as possible.” Those counts alleged that the Board had violated the “nearly free” provision by, among other things, ignoring the cost of furnishing “instruction” and by charging more for online than in-person classes.

Count VI, in contrast, alleged that the Board was violating A.R.S. § 15-1825(A), which prohibits an individual who is “without lawful immigration status” from receiving “any . . . type of financial assistance that is subsidized or paid in whole or in part with state monies.” Count VI contended that the Board’s tuition-setting policies violated § 15-1825(A) by permitting Arizona’s universities to offer in-state tuition to students who are not “lawfully present,” i.e. to students in Arizona under the federal Deferred Action for Childhood Arrival program.

According to the Complaint, the Attorney General had authority to bring Count VI under A.R.S. § 35-212; that provision permits the Attorney General to “bring an action . . . to . . . [e]njoin the illegal payment of public monies.” The Complaint also asserted that the constitutional arguments in Counts I–V were properly brought in superior court under A.R.S. § 35-212 as claims “factually related” to Count VI because they all involved “tuition and fees.”

In response, the Board filed three separate motions to dismiss; only the first motion is at issue here. In that first motion, the Board argued the Attorney General did not have authority to bring Count VI (and, consequently, the superior court could not permissibly decide Counts I–V) because the Board’s act of setting in-state tuition for students present under the Deferred Action for Childhood Arrival program did not involve the “payment of public monies” as required to bring an action under A.R.S. § 35-212. In a brief ruling, the superior court granted the Board’s first motion to dismiss; the court then dismissed the Complaint with prejudice.

The Attorney General appealed the superior court’s ruling. On appeal, the Attorney General argued that he had authority to bring an action against the Board under A.R.S. § 35-212,

and also under A.R.S. § 41-193(A)(2). Section 41-193(A)(2) permits the Attorney General 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.”

In the court of appeals, the Attorney General raised three arguments:

(1) the superior court erred by concluding that the Attorney General lacked authority to bring Counts I–VI under A.R.S. § 35-212;

(2) the Attorney General had an independent basis for bringing Counts I–VI under A.R.S. § 41-193(A) and *Arizona State Land Department v. McFate*, 87 Ariz. 139 (1960), should be overruled; and

(3) the superior court’s dismissal cannot be affirmed as to Counts I–V on alternative grounds.

*See State ex rel. Brnovich v. Arizona Bd. of Regents*, 1 CA-CV 18-0420, 2019 WL 3941067, at \*3 ¶ 12 (Ariz. App. Aug. 20, 2019) (mem. decision) (footnote omitted).

The court of appeals stated that A.R.S. § 35-212 authorized the “Attorney General to ‘bring an action to enjoin the illegal payment of public monies’ and ‘recover illegally paid public monies.’” *Id.* ¶ 13 (alterations omitted). The court noted that the dispute centered on “the meaning of ‘payment’ in A.R.S. § 35-212.” *Id.* ¶ 14. The court indicated that in the Complaint the Attorney General alleged that the Board had “failed to collect monies accruing to it or to the State as required by A.R.S. § 35-143.” And, the court of appeals stated that Arizona cases had previously “held that ‘the collection of funds does not establish any identifiable payment that may be prevented or recovered.’” *Id.* ¶ 15 (quoting *Biggs v. Cooper*, 234 Ariz. 515, 522 ¶ 19 (App. 2014), *aff’d in part, vacated in part on other grounds*, 236 Ariz. 415 (2014)). The court of appeals rejected the Attorney General’s attempt to distinguish *Biggs*, *id.* ¶ 16, and “agree[d] with ABOR that collecting tuition does not constitute a ‘payment’ under A.R.S. § 35-212,” *id.* ¶ 15.

As for the Attorney General’s second argument, the court of appeals held that “the use of A.R.S. § 41-193(A)(1)-(2) as an independent basis for bringing the complaint is precluded by *McFate*.” *Id.* at \*4 ¶ 19. In *McFate*, the Arizona Supreme Court held that in certain circumstances, the word “prosecute” could “include the power to commence a proceeding” but that “is not the meaning of ‘prosecute’ in the context of A.R.S. § 41-193(A)(2).” 87 Ariz. at 145–46. Here, the court of appeals determined that under *McFate*, A.R.S. § 41-193(A)(2) did not give the Attorney General authority to sue ABOR. The court of appeals thus affirmed the superior court’s judgment dismissing the Complaint with prejudice.

The Attorney General then filed a petition for review in this Court, contending that the lower courts erred in dismissing the Complaint for lack of jurisdiction because both A.R.S. §§ 35-212 and 41-193 authorized the Attorney General’s suit. This Court granted review and re-phrased the issue on review as stated below.

**ISSUE:**

Did the trial court err by dismissing the first amended complaint?

**STATUTES:**

In relevant part, A.R.S. § 35-212(A) provides:

A. The attorney general in the attorney general's discretion may bring an action in the name of the state to:

1. Enjoin the illegal payment of public monies . . . .
2. Recover illegally paid public monies plus twenty percent of that amount together with interest and costs, including reasonable attorney fees . . . .

In relevant part, A.R.S. § 41-193(A) provides:

A. The department of law shall be composed of the attorney general and the subdivisions of the department created as provided in this article. Unless otherwise provided by law the department shall:

1. Prosecute and defend in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party.
2. At the direction of the governor or when deemed necessary by the attorney general, 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.

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