ARIZONA SUPREME COURT

KRISTIN K. MAYES,
ARIZONA ATTORNEY GENERAL,

Petitioner,

vs.

RACHEL H. MITCHELL,
MARICOPA COUNTY ATTORNEY,

Respondent,

vs.

AARON BRIAN GUNCHES,

Real Party in Interest.

No. CV-24-0127-SA

MCAO'S RESPONSE TO AMICI CURIAE BRIEF OF FORMER ATTORNEY GENERAL TERRY GODDARD, FORMER MARICOPA COUNTY ATTORNEY RICK ROMLEY, AND FORMER PIMA COUNTY ATTORNEY BARBARA LAWALL

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INTRODUCTION[1]

Marred as much by what it fails to address as by what it purports to address, the Amici brief hurts rather than helps the AAG's position. The brief ignores critical issues that dispose of the AAG's claims, but even setting aside that fatal deficiency, the brief adds no value to the inquiry here, given that it merely repeats the AAG's unsupported and unsupportable legal conclusions and, in so doing, spotlights the flaws in the AAG's arguments.

ARGUMENT

I. What The Amici Brief Fails To Address.

First, the Amici brief disregards the Victims entirely, effectively assuming them and their constitutional and statutory rights out of existence. That alone is enough to question why anything said in the Amici brief warrants consideration.

Second, the Amici brief also ignores—and thus makes no attempt to defend—the principal reason provided by AAG Mayes to excuse her refusal to seek a subsequent warrant in this case: the purported need to complete an "independent

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[1] This brief uses the following conventions: "CA" for county attorney; "AAG" for Arizona Attorney General; "MCAO" for the Maricopa County Attorney's Office; and "Rule" or "Rules" for the Arizona Rules of Criminal Procedure.

death penalty review."[2] As such, the Amici brief implicitly concedes that the reason for the delay is ill-conceived, especially where, as here, it is undisputed that the legal requirements for the subsequent warrant's issuance are satisfied—just as they were when AAG Brnovich obtained the prior warrant.

Third, like the AAG before it, the Amici brief identifies nothing in Rule 31.23(a) and (b) or § 13-759(A) that contradicts what CA Mitchell is urging. Indeed, the Amici brief does not so much as make even a passing reference to these governing laws.

Fourth, the Amici brief does not cite, much less address, *State ex rel. Brnovich v. Arizona Bd. of Regents*, 250 Ariz. 127 (2020), which unequivocally rejects the AAG's exclusive-authority claim.

Fifth, the Amici brief declines to endorse the AAG's supervisory-authority claim (AAG Special-Action Petition at 2-4; AAG Supp. Brief at 8-9), which, in any event, is a legally unsupported attempt to exercise absolute control—not "supervision"—over the county attorneys.

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[2] *Attorney General Mayes Issues Statement on Maricopa County Attorney's Motion to Seek Death Warrant*, Arizona Attorney General Kris Mayes, https://www.azag.gov/press-release/attorney-general-mayes-issues-statement-maricopa-county-attorneys-motion-seek-death (last visited August 19, 2024).

Unlike the federal system where the United States Attorney General can "direct" or override the prosecutorial decisions of a local United States Attorney, 28 U.S.C. § 519, the AAG has no similar powers of direction, control, or intervention. Instead, the AAG's "supervisory powers" under § 41-193(A)(4) are specifically limited to the ability to require reports from the county attorneys. (MCAO Supp. Brief at 17-19.) *See Goldstein v. City of Long Beach*, 715 F.3d 750, 756 (9th Cir. 2013) (concluding that although the California Attorney General "shall have direct supervision over every district attorney and sheriff," this control—under a similarly worded statute—"is limited to requiring a district attorney to 'make reports'"). Nor does the term "supervisory" otherwise imply absolute direction or control. *See Newman v. Lance*, 129 Idaho 98, 102 (1996) (finding that although Idaho law vests "supervisory powers" over prosecuting attorneys in the state's attorney general, "[n]o definition of 'supervisory' contemplates the exclusion of the individual or office being supervised"; instead, "supervision is defined as 'a critical watching and directing' and 'supervise' means 'to have general oversight over a matter'").

Beyond that narrow supervisory role, only § 41-193(A)(5) contemplates any form of AAG involvement in a CA's business. And that involvement is likewise narrow: all the AAG can do is "*assist* the [CA] . . . in the discharge of the [CA's] duties" upon order by the governor or necessity. A.R.S. § 41-193(A)(5) (emphasis added). And "assist" means assist—not control, dominion, or direction. *See*

Newman, 129 Idaho at 102-04 (explaining the Idaho Attorney General's authority to "assist" county prosecutors is a "collaborative effort" and does not include the right to "assert[ ] dominion and control"); *see also City of Tempe v. Pilot Properties, Inc.*, 22 Ariz.App. 356, 362 (App. 1974) (stating "assist" means "to give support or aid to, especially in some undertaking or effort").

All that aside, there is nothing for AAG Mayes to supervise here in any event, where it is undisputed that CA Mitchell is seeking—as part of her office's own prosecution—what is effectively the same warrant that AAG Brnovich previously obtained, without any intervening change in circumstances.

II. What The Amici Brief Purports To Address.

A. *The Amici brief's agreement with the AAG's exclusive-authority claim*.

Offering no citation to supporting authority, the Amici brief (at 4, 7, 10) summarily reiterates the AAG's contention that the AAG has exclusive authority to seek execution warrants. Despite the absence of any ambiguity in the governing laws, the Amici brief relies entirely on historical practices, alleged policy concerns, funding sources, and the previous officeholders' personal experiences to support its adoption of the AAG's exclusive-authority claim. Like the AAG, the Amici brief thus improperly ignores that such "secondary interpretation methods" are applied only when, unlike here, legal text "yields different reasonable meanings." *BSI Holdings, LLC v. Arizona Dep't of Transp.*, 244 Ariz. 17, 19, ¶ 9 (2018) (internal

quotation marks omitted); *see also Glazer v. State*, 244 Ariz. 612, 614, ¶ 12 (2018) (explaining "a statute is not ambiguous merely because the parties disagree about its meaning," it is ambiguous if the "meaning is not evident after examining the statute's text as a whole or considering statutes relating to the same subject or general purpose"). Not only is there no ambiguity in the text of the governing laws here, but neither the Amici brief nor the AAG suggests otherwise.

1. The Amici brief's erroneous assumption that "shall" confers exclusive authority.

Again like the AAG, the Amici brief's exclusive-authority claim (at 7) is predicated upon the flawed premise that the term "shall" in § 41-193(A) confers exclusive authority to the AAG. *Brnovich*, of course, refutes any such reading of this statute, along with the exclusive-authority claim itself. 250 Ariz. at 132, ¶ 19 (stating "shall" in § 41-193 imposes duties; it does not grant powers or unrestricted authority).

Contrary to the Amici brief's and the AAG's unsupported suggestions otherwise, "shall" in a legal text does not, standing alone, grant or imply exclusive authority. *See id.*; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 112 (2012) (explaining "shall" is mandatory and imposes a duty; permissible words like "may" grant discretion); Black's Law Dictionary (11th ed. 2019) (defining "shall" as "[h]as a duty to; more broadly, is required to"). Nor does it do so in § 41-193 given the absence of any express term

of exclusivity—*viz.*, "exclusive," "sole," or "only." *See Brnovich*, 250 Ariz. at 132, ¶ 19; *Holbrook v. Guynes*, 827 S.W.2d 487, 491–92 (Tex. App. 1992) (concluding a statute stating that the district attorney "shall represent" the county in civil matters did not confer exclusive authority when it could have, but did not, instead state "shall exclusively represent").

Had the legislature intended to vest exclusive authority in the AAG, it could have and would have said so explicitly. *See S. Arizona Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286, ¶ 31 (2023) (presuming the legislature says what it means). Yet it did not.

Further, having a duty to perform an act is different from having unfettered discretion regarding how that duty will be fulfilled. *See Brnovich*, 250 Ariz. at 132, ¶ 19; *City of Houston v. Houston Firefighters' Relief & Ret. Fund*, 667 S.W.3d 383, 398 (Tex. App. 2022) ("'[S]hall' does not imply that the party with a duty to perform—who 'shall' perform—does so exclusively or that the duty cannot be regulated."). Nor does having a duty automatically exclude others from also performing that act. *See Brnovich*, 250 Ariz. at 132, ¶ 19; *City of Houston*, 667 S.W.3d at 398.

And although § 11-532(A) contains no reference to the county attorneys' representation of the State in this Court, this absence means only that county attorneys have no *duty* to provide such representation. However, it does not mean or

imply that county attorneys have no *authority* to do so under Title 13 or the Rules. In other words, there is no support, and certainly none cited by the Amici brief or the AAG, for the proposition that absence of duty equates to absence of authority.

Fairly read, what the Amici brief and the AAG have presented is nothing other than a request to disregard well-settled interpretive principles. *See*, *e.g.*, *Planned Parenthood Arizona, Inc. v. Mayes*, 257 Ariz. 110, 115-16, ¶¶ 15-17 (2024) (setting forth interpretive rules).[3] They neither assert nor show ambiguity in the text of the governing laws yet nonetheless rely on secondary-interpretation techniques to support their proposed construction; instead of starting with and effectuating the text, they treat it as inconsequential; they give different meanings to the same words used in the same way in the governing laws; they attempt to find conflict between similar laws instead of harmonizing them; and they presume the drafters of the applicable legal texts did not mean what they actually said.

2. The Amici brief's parade of horribles.

Unable to refute the conclusion compelled by plain-meaning analysis—*viz.*, that Rule 31.23(a) and (b) and § 13-759(A) do not vest exclusive authority in the AAG to request execution warrants—the Amici brief (at 8, 12-13) retreats to alarmist rhetoric and colorful language. Thus, the Amici brief (at 8, 12-13) would

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[3] These principles are also outlined in MCAO's supplemental brief (at 4-6).

have this Court assume, without any supporting evidence, that if MCAO is allowed to request a subsequent execution warrant here—the same warrant previously obtained by AAG Brnovich—"chaos would ensue" and "the practical results would be disastrous."

Such speculative and highly improbable parade-of-horribles arguments are generally rejected as beside the point. *See Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 144 S. Ct. 1414, 1427 (2024) (stating a parade-of-horribles argument is insufficient to overcome a statute's plain language) (quotation omitted); *Yslava v. Hughes Aircraft Co.*, 188 Ariz. 380, 385 (1997) ("A simple reading of the relevant statutory language, coupled with common reason, indicates we need not fear such parade of horribles."); *see also Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."). The inquiry can and should end there.

Even so, the Amici brief's and the AAG's slippery slope argument is ill-conceived. The intercounty line-drawing problems and potential intercounty "squabbles" that the Amici brief (at 6, 8, 12) and the AAG (AAG Supp. Brief 14-15) imagine—ones where county attorneys suddenly begin rushing to different counties to file motions to dismiss and notices of intent to seek the death penalty, even though they have never done so before—are just that: imaginary.

Under § 11-532(A)(1), county attorneys are obligated and empowered to prosecute offenses that occur within their respective counties. *See id.* (providing that a CA is the "public prosecutor *of the county*" and responsible for prosecuting the county's criminal offenses) (emphasis added). As a corollary, county attorneys are implicitly prohibited from independently prosecuting offenses that do not occur within their respective counties. *See id.*; *Abbott Labs. v. Superior Court of Orange Cnty.*, 9 Cal. 5th 642, 659 (2020) (explaining California district attorneys' prosecutorial authority is "territorially limited" to crimes occurring within the confines of their respective counties); Scalia & Garner at 107 (discussing the negative-implication canon, where "[t]he expression of one thing implies the exclusion of others").

Equally true is that when county attorneys prosecute criminal offenses that have occurred in their counties, they act on behalf of the State, *State v. Payne*, 223 Ariz. 555, 562, ¶ 19 (App. 2009), and this, in turn, triggers their authority as "the State" under Title 13 and the Rules. But in acting for the State in a criminal prosecution, county attorneys do not somehow become—as the Amici brief and the AAG suggest—released from the geographical limitations on what offenses § 11-532(A)(1) permits them to prosecute. Of course county attorneys must satisfy § 11-532(A)(1)'s territorial requirement to have *any* independent involvement in a

criminal prosecution.[4] This constraint, however, does not limit the actions that they are authorized to take in criminal proceedings resulting from their prosecution of a qualifying offense.

As such, the Amici brief's and the AAG's concerns about supposed intercounty line-drawing problems are baseless, given that § 11-532(A) has already drawn the line and drawn it precisely. Said another way, these claimed problems are a direct result of disregarding the governing laws' text and well-established interpretive principles.

Nor is there validity to the Amici brief's and the AAG's proposed horrible (Amici Brief at 12; AAG Supp. Brief at 14) that unless the AAG prevails in this matter, county attorneys might try to interfere in a criminal appellate proceeding handled by the AAG. Setting aside the vagueness of their shared fear that county attorneys might do so simply "to argue an issue differently," (Amici Brief at 12; AAG Supp. Brief at 14), the Amici brief and the AAG would have this Court believe that if CA Mitchell successfully obtains an execution warrant here, that outcome will

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[4] There are also occasions when a criminal case must be transferred to another prosecutorial office following the withdrawal or disqualification of the original prosecuting agency. *See, e.g., State v. Latigue,* 108 Ariz. 521, 523 (1972) (noting that after MCAO was disqualified, it was "necessary that the County Attorney secure the appointment of a special prosecutor if he wishes to continue the prosecution of this case").

animate county attorneys to interject in a criminal appeal where—under the proposed horrible—the AAG would have filed a notice of appearance, engaged in pre-briefing procedures, and filed the State's opening or answering brief, after all pertinent deadlines had expired. The Amici brief and the AAG do not address why or how a county attorney would take such an unsupported measure, let alone identify an interoffice dispute that they contemplate could lead to that scenario.

Even in the unlikely event that such a scenario did occur, it is reasonable to assume that neither the court of appeals nor this Court would allow that effort to proceed. It is also fair to assume that county attorneys have, in fact, disagreed with the AAG's handling of an appellate issue in past cases, yet this speculative horrible has never materialized.

This leads to the next point: the Amici brief's and the AAG's imagined doomsday scenarios have, by all accounts, never happened before. As Justice Scalia articulated, "the best indication that the sky will not fall after [a court's] decision is that it has not done so already." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009). Nor will the sky fall here if this Court comes to the innocuous conclusion that CA Mitchell is authorized to carry out the sentence imposed in an MCAO prosecution, especially when there is no empirical evidence to support the horribles forecast by the Amici brief and the AAG.

Moreover, even had the Amici brief and the AAG identified a slight risk of an ensuing horrible, that risk would still not overcome the governing laws' plain meaning. *See Truck Ins. Exch.*, 144 S. Ct. at 1427. This is so because courts generally lack the data necessary to predict future consequences; thus, "[t]he stuff of daily litigation must be resolved under existing statutes; fear of . . . what's at the bottom of a long, slippery slope is not a good reason [to make a] decision." *Marozsan v. United States*, 852 F.2d 1469, 1499 (7th Cir. 1988) (Easterbrook, J., dissenting). "The terror of extreme hypotheticals produces much bad law," and the answer to "extreme hypothetical[s]" is that courts will "cross that bridge when [they] come to it." *Id.*

Finally, when considering the Amici brief's and the AAG's suggestion that "shall" in § 41-193 confers exclusive authority, the old saying "be careful what you wish for, lest it come true" is brought to mind. Were this Court to adopt their proposed reading, it would also be true that "shall" in § 11-532(A)(1) would *vest exclusive authority in the county attorneys to prosecute offenses in the superior court*. Thus, under their own theory, the AAG would be deprived of any independent authority to prosecute crimes in the superior court.

To be sure, that outcome would be absurd and unsupported. Nor would it comport with reason or common sense. And that is exactly the point: when urging rejection of CA Mitchell's position by predicting chaos and disastrous results, the

Amici brief and the AAG become victims of their own unwillingness to distinguish sense from nonsense. *See* Frederick Schauer, *Slippery Slopes,* 99 Harv. L. Rev. 361, 381 (1985) ("[I]n virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim.").

3. The Amici brief's disapproval of MCAO's citation to *Crosby-Garbotz v. Fell in & for Cnty. of Pima*, 246 Ariz. 54 (2019).

The Amici brief (at 8-10) points to MCAO's isolated reference to *Crosby-Garbotz* to make the erroneous claim that MCAO "urges it . . . could have intervened in the dependency action on behalf of the State." MCAO, of course, never said or implied anything of the sort. County attorneys could not intervene as the State in such proceedings because, *inter alia*, county attorneys act on behalf of the State in one context alone: the prosecution of criminal offenses occurring within their respective counties. *See* A.R.S. § 11-532(A)(1).

But the Amici brief's mistaken assertion misses the mark for another reason. Although the brief implies that MCAO is intervening improperly in this case, MCAO did not and could not have intervened in any execution-warrant-request proceeding here because *no such proceeding existed*. MCAO's independent pursuit of an execution warrant is based on the AAG's *failure* to act, not to protest how the AAG was acting.

B. *The Amici brief's misplaced reliance on historical practices, alleged policy concerns, budgetary funding, and personal experiences*.

The Amici brief (at 10) states its agreement with the AAG that there has never been "a single instance where an execution warrant was sought by a [CA]." That invites only this question: so what? Nonetheless, MCAO agrees that AAG Mayes' unilateral and legally unsupported refusal to request a subsequent execution warrant here—which led to the instant dispute—is unprecedented.

The Amici brief (at 11-12) also reiterates the AAG's contention that MCAO should be barred from requesting an execution warrant because MCAO would then be able to "walk away" (AAG Supp. Brief at 10) from the litigation likely to follow. The Amici brief (at 12) suggests that because the AAG will be "burdened with litigating the thorny appellate issues," it should "also be the office with the authority to start the process."

But the Amici brief's and the AAG's complaints about the difficulties of briefing-schedule litigation are untethered from reality. The AAG's refusal to seek a subsequent execution warrant here has never had, and does not have, anything to do with "thorny appellate issues," just as it has nothing to do with ADCRR representation or the need to ensure that agency's readiness for conducting an

execution.[5] By AAG Mayes' own account, the only reason for the delay is to complete a review of execution protocols. The AAG has even offered a general target date, predicting executions will resume in the "first quarter of 2025."

But even were complex litigation all or part of the reason for the delay, that explanation would still be unsatisfactory. Nothing in the governing laws so much as suggests that an execution warrant cannot be sought until the AAG is prepared to deal with difficult litigation in the time leading to the warrant's issuance—just as those laws do not provide for delay to conduct a review of execution protocols.

In any event, the Amici brief's and the AAG's supposed concerns about briefing-schedule litigation raise more questions than they answer. Given AAG Mayes' stated intention to resume executions in 2025, does that not also mean her office is willing and prepared to tackle briefing-schedule issues then? Was not AAG Brnovich willing and prepared to engage in that litigation when he obtained the prior warrant? And why would MCAO suddenly "walk away" from this case when—as evidenced by the instant proceeding—it certainly has not done so yet?

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[5] ADCRR stated its readiness to conduct executions in May 2023. Ryan Randazzo, *Arizona Senate Panel Recommends Gov. Katie Hobbs' Nominee for Corrections Director*, AZ Central (June 7, 2023), https://www.azcentral.com/story/news/politics/arizona/2023/06/06/arizona-senate-committee-recommends-hobbs-corrections-nominee/70291384007/ (last visited August 19, 2024).

These rhetorical questions and the answers to them (or lack thereof) are, of course, not relevant. What they highlight, however, is that no amount of obfuscation or goalpost moving can alter the unassailable conclusion that AAG Mayes' refusal to obtain the execution warrant and her attempt to prevent CA Mitchell from doing so are unjustified and unjustifiable.

CONCLUSION

This Court should deny the AAG's request for special-action relief seeking to strike MCAO's motion to set briefing schedule.

Submitted August 19, 2024.

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BY _____
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