ARIZONA SUPREME COURT

STATE OF ARIZONA ex rel. RACHEL MITCHELL, Maricopa County Attorney, Petitioner, v. THE HONORABLE DAVID J. PALMER, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, TAMIRA MARIE DURAND, Defendant/Real Party in Interest.	No. CR 21-0397-PR Court of Appeals No. 1 CA-SA 21-0241 Maricopa County Superior Court No. CR2019-005593-001 CR2020-001680-002

AMICUS CURIAE BRIEF OF THE ARIZONA ATTORNEY GENERAL

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INTEREST OF AMICUS CURIAE

The Arizona Attorney General, as the State's chief legal officer, *see* A.R.S. § 41–192(A), leads the largest law office in Arizona, with approximately 400 attorneys and 1,000 employees. The Attorney General's Office ("AGO") spans across offices located in Phoenix, Tucson, and Prescott, and is structured in six divisions (Criminal Division, State Government Division, Child and Family Protection Division, Civil Litigation Division, Solicitor General's Office, and Operations). Among other responsibilities, the AGO enforces consumer protection and civil rights laws; represents and provides legal advice to many state agencies; prosecutes criminals charged with complex financial crimes and certain drug-related conspiracies; and represents the State of Arizona in all appeals statewide from felony convictions arising out of Arizona's 15 counties. In addition to prosecuting crimes over which the AGO has jurisdiction, the AGO prosecutes conflict cases, which are referred to the AGO by county attorneys' offices.

Consequently, the Attorney General has a manifest interest in the legal standard that governs whether an appearance of impropriety—based on one government attorney's conflict—justifies vicarious disqualification of the entire government office from prosecuting or litigating a case. Because vicarious disqualification is an extraordinary remedy that should be reserved for rare cases, the Attorney General submits this Amicus Brief in support of the State of Arizona.

INTRODUCTION

A trial court must consider four factors "whenever a defendant seeks to disqualify an entire prosecutor's office, regardless of whether the basis for the motion is a conflict of interest, misconduct, or appearance of impropriety." *State v. Marner (RPI Goldin)*, 251 Ariz. 198, 200, ¶ 11 (2021) ("*Goldin*"). Those factors, which stem from *Gomez v. Superior Court*, 149 Ariz. 223 (1986), and *Alexander v. Superior Court*, 141 Ariz. 157 (1984), are:

(1) whether the motion is being made to harass the other party;

(2) whether the moving party "will be damaged in some way if the motion is not granted";

(3) "whether there are any alternative solutions, or [whether] the proposed solution [is] the least damaging possible under the circumstances"; and

(4) "whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation."

Id. at 200, ¶ 9 ("*Gomez* factors").

In *Goldin*, this Court affirmed an order disqualifying the AGO's Tucson office where an appearance of impropriety arose from misconduct of one attorney who had been removed from the criminal case and left the AGO years before the defendant sought disqualification. *Id*. at 199-200, ¶¶ 3, 13. "[T]he appearance of impropriety was grounded not in a mere perception of wrongdoing but an actual finding of misconduct with no ability to determine the scope of its impact." *Id*. at 201, ¶ 13.

This case—in contrast to *Goldin*—does not involve misconduct of any lawyer in the Maricopa County Attorney's Office ("MCAO"). Instead, the trial court vicariously disqualified MCAO merely because one attorney employed by MCAO (the "conflicted attorney") is a victim of the defendant's crime who suffered "a *de minimus* loss of $56." 11/18/21 Order at 2. The trial court found that, even though MCAO screened the conflicted attorney from this case, the attorney's victim status was reason enough to overcome the ethical screen. *Id*. at 3 (finding that "in the circumstances presented here with [the conflicted attorney]'s status as a victim, no screening mechanism will effectively quarantine [the conflicted attorney] and keep the conflict from being imputed to the entire office"). The trial court disregarded the *Gomez* test and announced an unprecedented, bright line rule: regardless of any ethical screen, a prosecutorial agency in Arizona will be removed from a criminal case whenever one of its employees falls victim to a crime prosecuted by the agency.

It is imperative for the Court to delineate the specific criteria relevant to each *Gomez* factor and explain how courts should evaluate ethical screens when a disqualification motion is grounded in a mere suspicion of an imputed conflict. Vicarious disqualification of an entire government office is a "drastic remedy" that should be reserved for rare cases. *See Goldin*, 251 Ariz. at 201, ¶ 17 (citation omitted). When a government agency creates and maintains an effective ethical screen (as MCAO did here), the screen is sufficient to protect the integrity of the

judicial process and the criminal justice system. Disqualification of a government office from a case merely because someone might perceive a possible conflict implicates separation of powers, deprives government agencies of their counsel of choice, leads to wasteful spending of public money to hire outside counsel, assigns a litigation advantage to the moving party, and does not serve the public interest.

ARGUMENT

Government law offices are distinct from private law firms. The disqualification of a single law firm may impact only the litigants involved in a private lawsuit. But the disqualification of an entire government office imposes additional societal impacts, including: the expenditure of public money to retain outside counsel; the risk that similarly situated cases will be treated inconsistently; and the risk of discouraging qualified private practitioners to seek government employment. In light of these costs, courts should refrain from imposing the vicarious disqualification rule to government offices in all but the rarest of cases where disqualification is the only means to prevent harm to the moving party. *See Alexander*, 141 Ariz. at 161 ("Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent … [w]henever possible the courts should endeavor to reach a solution that is least burdensome upon the client or clients."). "Particularly is this so in the case of a[n] [attorney] who is a constitutional officer chosen by the electorate and whose removal

by a court implicates separation of powers considerations." *Schumer v. Holtzman*, 454 N.E.2d 522, 526 (N.Y. 1983).

When a party alleges that the appearance of impropriety justifies removal of an office based on one conflicted attorney who has been screened from the case, the *Gomez* test requires the moving party to allege articulable harm. Speculation that the government office's attorneys, or the public's perception generally, would somehow violate the movant's rights does not satisfy the *Gomez* test. This Court should also clarify that—given the distinctions between private practice and government work noted in the ethical rules and Arizona case law—a government office's ethical screen is sufficient to cure any conceivable harm stemming from an appearance of impropriety. Finally, this Court should disavow *dicta* in prior court of appeals decisions erroneously suggesting that cases perceived as "high profile" or "politically charged" are subject to greater scrutiny under the *Gomez* test.

I. Arizona's Ethical Rules Reflect Important Distinctions Between Government Attorneys and Attorneys in the Private Sector

"A trial court's authority to apply an ethical rule to govern a disqualification motion in a litigation setting derives from the [court's] inherent power … to control judicial officers in any proceeding before it." *Smart Indus. Corp., Mfg. v. Superior Court*, 179 Ariz. 141, 145 (App. 1994). Of course, "inherent powers should be exercised with particular caution when their use infringes on the authority of other branches of government." *Arpaio v. Baca*, 217 Ariz. 570, 577, ¶ 23 (App. 2008).

This judicial power must be exercised consistent with ethical rules and the duty "to maintain public confidence in the legal profession and to protect the integrity of the judicial process." *Smart Indus. Corp., Mfg.*, 179 Ariz. at 145 (citation omitted).

As relevant here, the Arizona Rules of Professional Conduct include express distinctions between private attorneys representing private clients and government attorneys representing government agencies.[1] For example, paragraph 18 of the Preamble states "the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships," that government lawyers "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients," and that government attorneys "have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." Ariz. R. Sup. Ct. 42, Preamble, ¶ 18. The Preamble makes clear that the Ethical Rules ("ER") "do not abrogate any such authority" of government lawyers. *Id*.

[1] This Court recently observed that "[t]he current Arizona rules of ethics for attorneys might not adequately contemplate or address th[e] unique roles and the potential conflicts" of the Arizona Attorney General, county attorneys, and other public lawyers charged with "statutory responsibilities in the justice system." Ariz. S. Ct. Admin. Order 2022-22, *available at* https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-22.pdf?ver=tFCDIEnnqvvDSSRL_j_bIQ%3d%3d (last visited May 26, 2022). The Task Force established by this Court's Order may very well decide that changes to Arizona's ethical rules are necessary to better harmonize the ethical rules with public attorneys' statutory responsibilities under Arizona law.

Similarly, comment 9 to ER 1.13 (Organization as Client) illustrates differences between government and private attorneys. This comment notes that "in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances" and "a different balance may be appropriate between maintaining confidentiality and assuring that [any] wrongful act is prevented or rectified, for public business is involved." ER 1.13, cmt. 9. The Ethical Rules also impose special responsibilities of prosecutors. ER 3.8; *see also Matter of Martinez*, 248 Ariz. 458, 463, ¶¶ 7-8 (2020) (recognizing that under ER 3.8, prosecutors "must act as ministers of justice" and "[t]he role of a prosecutor is not to seek convictions and sentences but rather to seek justice").

Arizona's Ethical Rules also "distinguish between private law firms and government law offices for purposes of vicarious disqualification." *Turbin v. Superior Court*, 165 Ariz. 195, 197 (App. 1990). "Private law firms are guided by ER 1.10," but government attorneys "are guided by ER 1.11(c)[.]" *Id*. Critically, "[u]nlike ER 1.10, ER 1.11(c) does not disqualify the remaining attorneys in a government office when one of its members is prevented from participating in the matter." *Id.* at 198; *see also* ER 1.11, cmt. 3 (stating that ER 1.11(c)(1) "does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees").

The Ethical Rules thus recognize the unique position of government lawyers. Unlike private attorneys, a "salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice." *Turbin*, 165 Ariz. at 198 (quoting the ABA Committee on Ethics and Professional Responsibility's Formal Opinion 342 (1975)). Regarding prosecutors specifically, a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate," which carries "specific obligations" not required of other attorneys. ER 3.8, cmt. 1. Given these distinctions, courts should be reluctant to disqualify an entire government law office under the *Gomez* test—particularly when the only basis for disqualification is a mere appearance of impropriety.[2]

II. This Court Should Refine the *Gomez* Test to Ensure that Disqualification of an Entire Government Office Is the Rare Exception, Not the Rule

In *Goldin*, this Court declined to require trial courts to make express findings when applying the *Gomez* test, although a trial court's analysis of "each of the *Gomez* factors [would] give the appellate courts a better indication of its reasoning[.]" *Goldin*, 251 Ariz. at 202, ¶ 18. Here, the trial court did not explicitly or implicitly analyze the *Gomez* factors; instead, the court summarized the parties' arguments and

[2] It does not appear that the trial court, or Durand's own expert, considered these distinctions. The trial court did not address ER 1.11(c) or apply the *Gomez* test; the court simply disqualified MCAO upon its conclusory finding that this extreme remedy was "in the interest of justice." 11/18/21 Order at 3.

decided it was "in the interest of justice" to disqualify MCAO. 11/18/21 Order. As MCAO argues, the trial court erred as a matter of law.

This Court should reverse the trial court's order and refine important aspects of the *Gomez* test that are implicated when a motion seeks to disqualify a government law office. First, the Court should reiterate that the movant must allege articulable prejudice. Second, the Court should emphasize that whether the government office has created and maintained an effective ethical screen is the most important consideration under the *Gomez* test. Finally, it is imperative to disavow *dicta* in two court of appeals' decisions that erroneously suggest that a "high profile" case should receive greater scrutiny.

A. *Gomez*'s Second Factor Requires the Moving Party to Allege Articulable Prejudice, Not Speculative Harm

It is well-settled that the party seeking disqualification of an attorney or an entire office must establish that disqualification is required under *Gomez*'s four-factor test. *See Alexander*, 141 Ariz. at 161 ("The burden should be upon the moving party to show sufficient reason why an attorney should be disqualified from representing his client."). After all, the underlying purpose of the *Gomez* test is to determine if an alleged conflict is "sufficiently weighty to justify disqualification." *Goldin*, 251 Ariz. at 200, ¶ 12; *see also Gomez*, 149 Ariz. at 225 ("It does not necessarily follow that [an appearance of impropriety] must disqualify [counsel] in every case. Where the conflict is so remote that there is insufficient appearance of

wrongdoing, disqualification is not required."); *Sellers v. Superior Court*, 154 Ariz. 281, 289 (App. 1987) (mere appearance of impropriety is "too slender a reed" to require disqualification).

Ordering disqualification in the face of a generalized or speculative claim of prejudice does not satisfy the *Gomez* test. *Gomez*'s second factor specifically requires the movant to show how he/she "will be damaged" absent disqualification, thus requiring the moving party to allege articulable harm. *See Goldin*, 251 Ariz. at 200, ¶ 9; *see also People v. Adams*, 987 N.E.2d 272, 274 (N.Y. 2013) ("The courts, as a general rule, should remove a public prosecutor *only* to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence.") (cleaned up).

Here, Durand failed to articulate what specific harm she would suffer if MCAO was not disqualified. She merely asserted that the appearance of impropriety required the MCAO's disqualification because otherwise, her constitutional right to due process would be violated. This allegation is insufficient because "[s]peculation is not the stuff out of which constitutional error is made." *State v. Youngblood*, 173 Ariz. 502, 506 (1993).

Likewise, the trial court did not identify any articulable harm Durand would suffer if her motion was not granted. The trial court noted Durand's argument (possibly agreeing with Durand) that, based on a statement in *Turbin*, 165 Ariz. at

198, Durand was not required "to prove actual prejudice." 11/18/21 Order at 2. But *Turbin* itself explicitly states that trial courts "should consider not only the requirements set forth in *Alexander* [i.e., the *Gomez* factors], but also any showing of prejudice or the lack of it." *Turbin*, 165 Ariz. at 199. This Court should correct the trial court's legal error and reiterate that (1) the moving party bears the burden of showing that vicarious disqualification is necessary; and (2) courts cannot disregard *Gomez*'s second factor.

B. Whether a Government Office Has an Effective Ethical Screen Is the Most Important Consideration Under the *Gomez* Test

Gomez's second factor requires the movant to allege articulable prejudice, and the third factor considers whether other alternatives exist in lieu of disqualification. *Goldin*, 251 Ariz. at 200, ¶ 9. Whether the government agency has screened a conflicted lawyer from a matter is materially relevant to both of these factors. The creation and maintenance of an ethical screen is a classic example of an alternative solution that ameliorates any potential harm and ensures that an ethical conflict has no impact on a client's representation by the remaining lawyers in an organization. Ethical screens are certainly superior alternatives to the drastic remedy of vicarious disqualification, even in cases where (unlike in this case) the imputed conflict involves attorney-client or confidential information.

As discussed above, the Ethical Rules acknowledge that a government attorney's personal conflict is *not* imputed to the remaining attorneys within a

government agency. ER 1.11, cmt. 3; *Turbin*, 165 Ariz. at 198. Therefore, an ethical screen will generally be sufficient to defeat vicarious disqualification of an entire office, particularly when the motion is premised on a mere possibility of harm stemming from an imputed conflict.[3] *See* ER 1.0, 2003 cmt. 8 (definition of screened "applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under" ER 1.11).

At least one Arizona case, *State ex rel. Romley v. Superior Court (RPI Pearson) ("Pearson")*, has already recognized that an effective screen is usually sufficient to defeat a motion to disqualify an entire prosecutor's office. 184 Ariz. 223, 228 (App. 1995) ("In most cases an effective screening mechanism will satisfy the defendant's interests and permit implementation of the policy change underlying ER 1.11(c)."). In *Pearson*, the court of appeals reversed a trial court's order disqualifying MCAO based on the conflict of one prosecutor who had previously represented the defendants. The court of appeals found that MCAO had created "an

[3] In *Turbin*, the court of appeals recited the *Gomez* factors, but disqualified the entire Navajo County Attorney's Office from prosecuting a criminal case with little analysis. *Turbin*, 165 Ariz. at 199. Importantly, *Turbin* did not address whether the office had an ethical screen in place for the newly-hired prosecutor, who had previously represented the defendant, interviewed witnesses, and negotiated with the county attorney in the same case. *Turbin* also placed significant weight on "the principle that criminal prosecutions must appear fair," reasoning the defendant and his family might not believe he would receive a fair trial when his attorney left his case to work in the same office prosecuting him. *Id*. *Turbin* is easily distinguishable from this case; nonetheless, the court's terse reasoning exemplifies why this Court should elaborate on and refine the *Gomez* test.

effective security wall," and, applying an objective standard, MCAO "sufficiently protected against inadvertent disclosure of confidential information." *Id*. at 230. And although *Pearson* involved MCAO—a large prosecutorial agency that employs hundreds of attorneys—the court of appeals emphasized, "there is no reason to believe a small office cannot create a satisfactory [screening] mechanism." *Id*. at 228, n.6.

There are well-established hallmarks of effective screens. First, screens should be "implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening." ER 1.0, 2003 cmt. 10; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. (d)(i) (AM. LAW INST. 2000) ("Restatement") (screening measures should be established "at the time the conflict is discovered or reasonably should have been discovered"). Second, personnel within the office must be informed of the screen "and that they may not communicate with the personally disqualified lawyer with respect to the matter." ER 1.0, 2003 cmt. 9; *see also* ER 1.10, cmt. 1 (factor to consider in determining adequacy of screen is "whether adequate notice is provided to lawyers in the firm regarding the screening procedures"); Restatement at § 124 cmt. (d)(ii) ("The screened lawyer should be prohibited from talking to other persons in the firm about the matter as to which the lawyer is prohibited, and from sharing documents about the matter and the like."). Screens also "must be of sufficient scope,

continuity, and duration to assure that there will be no substantial risk to confidential client information." Restatement, at § 124 cmt. (d)(i). Finally, courts may look to whether "technology is available and has been implemented to restrict lawyer access to electronically stored information maintained by the firm[.]" ER 1.10, cmt. 1.[4]

The record here confirms that MCAO implemented an effective screen. Durand argued, and the trial court apparently found, that the conflicted attorney exercising his rights as a crime victim in the case rendered MCAO's screen ineffective. This conclusion is erroneous as a matter of law. Crime victims may invoke their rights guaranteed under the Victim's Bill of Rights in the Arizona Constitution. *See* Ariz. Const. art. II, § 2.1. That those rights may be invoked by one attorney within a multi-lawyer prosecutorial agency does not mean that MCAO cannot effectively screen for conflicts under Arizona's ethical rules. The Ethical Rules' reference to an attorney's "participation" in a case is best understood as prohibiting a conflicted attorney from performing legal work in connection with the

[4] Consistent with these hallmarks, the AGO routinely uses ethical screens "to shield confidential information of a State Agency or State Employee from [AGO] personnel who are handling a matter that is adverse to the State Agency or State Employee." AGO Conflicts Manual at § 2.3, *available at* https://www.azag.gov/sites/default/files/publications/2022-03/Conflicts_Manual_3_2022.pdf (last visited May 26, 2022). The AGO's procedures "are designed to preserve [the AGO's] independence to carry out its duties and act in the public interest consistent with Arizona law." *Id.*, § 2.2.

prosecutor's office, not disallowing the attorney from exercising his constitutionally guaranteed rights as a victim.

Accepting Durand's argument would transform a mere appearance of impropriety due to a prosecutor's victim status into a conflict that *per se* requires disqualifying an entire prosecutorial agency. Other jurisdictions have wisely rejected such a rule. *See United States v. Hubbard*, 493 F. Supp. 206, 207–08 (D.D.C. 1979) (United States Attorney's Office not required to be disqualified where one member of the office was victim of burglary charged in indictment); *Melcher v. Superior Court*, 10 Cal. App. 5th 160, 163 (2017) (disqualification of district attorney's office not required when crime victim was district attorney's husband where, *inter alia*, there was "no evidence she has influenced the prosecution" and "an ethical wall prevent[ed] the district attorney from influencing the case"); *Battle v. State*, 804 S.E.2d 46, 51 (Ga. 2017) (disqualification of district attorney's office not required where mother of murder victim worked in the office); *Commonwealth v. Reynolds*, 454 N.E. 2d 512, 513–14 (Mass. App. 1983) (prosecutor's office not disqualified where member of the office was victim of crime charged against defendant); *see also People v. Arellano*, 476 P.3d 364, 366–68, ¶¶ 5–18 (Col. 2020) (affirming trial court's "lengthy and detailed bench ruling" that contained "extensive" factual findings disqualifying district attorney's office where, *inter alia*, the trial court specifically found an ethical wall would not be effective).

C. Whether a Case May Be Characterized As "High Profile" or Having "Strong Political Overtones" Has No Place in the Analysis

Finally, this Court should disavow *dicta* in court of appeals' opinions that suggest a case with "high profile or strong political overtones" should be evaluated with more scrutiny. This Court has never indicated that the perceived high profile or political nature of a case warrants disqualification of an entire government office. And this subjective determination is irrelevant to the *Gomez* test.

The language suggesting that the "high profile" or "political" nature of a case is an appropriate consideration for trial courts has been mentioned in only two court of appeals decisions: *Pearson* and *Villalpando v. Reagan*. *See Pearson*, 184 Ariz. at 229 ("Since we are here dealing with 'appearance,' both to the public as well as to individual defendants, trial courts must carefully scrutinize any case with, for example, a high public profile or strong political overtones."); *Villalpando v. Reagan*, 211 Ariz. 305, 310, ¶ 15 (App. 2005) (quoting same language). However, neither of the court of appeals' holdings turned on whether the case was "high profile." *See Villalpando*, 211 Ariz. at 310–11, ¶¶ 16–22; *Pearson*, 184 Ariz. at 229–230. This language is therefore *dicta* at best.

Nevertheless, this Court should clarify that whether a case is perceived as high profile or political is not relevant to any disqualification motion. As to the third *Gomez* factor, there is no basis to conclude that alternatives to disqualification, including properly-implemented ethical screens, are any less effective when a case

is "high profile" or "political." The fourth *Gomez* factor looks to whether "public suspicion might be raised" if disqualification is not ordered, *Gomez*, 149 Ariz. at 226, but this Court has never suggested that a case's relative profile has any bearing on this factor. Allowing courts to make such subjective assessments while applying any of the *Gomez* factors would create a myriad of problems.

First, there is no clear standard by which a court would determine whether a case is "high profile" or "political" enough to warrant closer scrutiny as suggested by *Pearson* and *Villalpondo*. What evidence would be required to prove or disprove the "high profile" nature of a case? Would that assessment be evaluated by some objective standard or standards imposed by the local community or news outlets reporting on cases? How much public/media attention would be required for a case to be considered high profile? Similarly, there are no standards by which a court could determine whether a case has "strong political overtones." Courts should not consider such amorphous inquiries in applying the *Gomez* test.

Second, allowing courts to consider whether a case is "high profile" or "political" would essentially create two legal standards where some cases are subjected to greater scrutiny while others are not. For example, if a case's profile could properly be considered, two cases might involve an identical conflict that courts resolve differently, merely because one case is deemed "high profile" and thus subject to closer scrutiny. This would, in turn, create an incentive for parties to

litigate their case in the public to generate a sufficiently high-profile case to gain a more favorable legal standard in seeking to disqualify their opponent.

Third, allowing judges to subject cases *they* may perceive to be high profile or political to greater scrutiny is inconsistent with Arizona's Ethical Rules. This "high profile" inquiry encourages gratuitous speculation—contrary to Ethical Rule 3.8, for example, which applies only to prosecutors—that a high-profile case would cause a prosecutor to violate the ethical rules. Courts have no legal basis to presume prosecutors will act improperly merely because a case is perceived as high profile. *See State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 382 (App. 1995) ("We will not presume that the prosecutor will seek defendants' convictions at all costs, when his duty is to see that justice is done on behalf of both the victim and the defendants.") (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

For these reasons, this Court should disavow the *dicta* in *Pearson* and *Villalpando* suggesting that a trial court may consider whether a case is "high profile" or has "strong political overtones" when ruling on a motion to disqualify.

III. Courts Should Exercise Caution When Disqualifying Entire Government Law Offices to Avoid Separation of Powers Concerns

Finally, this Court should caution lower courts against disqualifying government agencies based on mere suspicions of impropriety. Judicial orders disqualifying government law offices from cases carries a significant risk of interfering with the executive's exercise of its authority. *See* Ariz. Const. art. III

("[t]he powers of government … shall be divided into three separate departments" and "such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others"). Because vicarious disqualification generally does not serve the public interest, courts should grant this remedy only when no other remedy will suffice.

Disqualifying an entire government office infringes on executive authority and prosecutorial discretion. The executive decides what charges to bring and how to prosecute cases. *See State v. Prentiss*, 163 Ariz. 81, 85 (1989). By disqualifying an entire office, a court divests that office of its discretion entirely.

Disqualification also deprives the party of its counsel of choice. The office representing the State, for example, must either retain special counsel or transfer the case to another government agency. In either event, the State is no longer represented by its counsel who would ordinarily handle the matter. This result leads to the expenditure of additional public monies and valuable resources.

The public interest is also harmed by vicarious disqualification because such orders necessitate delay, to locate new counsel who must familiarize themselves with the nuances of a case while litigation is pending. There is also a risk that the original office's policies for prosecuting the case will not be followed, which can lead to inconsistent outcomes for similarly-situated cases. And government law offices may be hampered from hiring qualified private attorneys simply to avoid the risks and

costs associated with vicarious disqualification. Prosecutorial agencies might also forego meritorious prosecutions for the same reasons.

As this Court observed nearly 40 years ago, disqualification where it is unwarranted "might actually raise public suspicion." *Alexander*, 141 Ariz. at 165. A disqualification order like the one here carries a risk of suggesting to the public that a trial court is choosing a prosecutor, distrusts the government office to follow its ethical screens, or is punishing the office because the judge does not agree with the office's policies. And this risk is exacerbated if courts consider whether a case is "high profile" or "political." For all of these reasons, courts should order disqualification of government law office only where no other remedy will suffice.

CONCLUSION

Consistent with Arizona's Ethical Rules, this Court should reverse the trial court's order and refine the *Gomez* test to provide trial courts with needed guidance on this important legal standard.

Respectfully submitted,

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