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STATE OF WASHINGTON

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

HONORABLE RICHARD B. SANDERS,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

**SUPPLEMENTAL BRIEF OF RESPONDENT
STATE OF WASHINGTON**

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I. INTRODUCTION

This memorandum addresses the Court's request for supplemental briefing on the phrases "state officer acting in his official capacity" in RCW 43.10.030(3), and "official of the state" in RCW 43.10.040, "as relevant to the facts of this case."¹ Neither phrase requires that the State provide a taxpayer-funded defense to Justice Sanders, since he was found by clear, cogent, and convincing evidence to have engaged in ethical misconduct.

II. ARGUMENT

A. Under RCW 43.10.030, the "Official Capacity" Determination is Within the Discretion of the Attorney General.

1. Acts violating the ethical rules governing a state officer's position are not "official capacity" acts.

The phrase "state officer . . . acting in his official capacity" generally refers to "another way of pleading an action against an entity of

¹ RCW 43.10.030 provides:

The attorney general shall . . . (3) Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States.

RCW 43.10.040 provides:

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

which an officer is an agent.” See *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (emphasis added). RCW 43.10.030 reflects the principle that if a claim is brought against an officer acting in his or her official capacity, the proceeding is, in effect, against the government entity – not the individual officer – and thus it is appropriate for the State to provide a defense. See *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 98, 829 P.2d 746 (1992) (“This is an ‘official capacity’ lawsuit. In other words, appellant is suing only the County; the hearing examiner and individual county council members have been named defendants only in their official capacities as representatives of the County.”).

The “official capacity” requirement, however, precludes a publicly-paid defense to judges who have violated the Canons of Judicial Conduct. Such acts – here, Justice Sanders’ *ex parte* contacts at the McNeil Island Special Commitment Center (“SCC”) with residents who had cases pending before the Supreme Court, regarding an issue presented in those cases – constitute the derelection of official duties. Ethics claims are quintessentially personal claims against the individual, not the office.

RCW 43.10.030(3) on its face requires consideration of two separate factors: (a) whether an individual is a state officer, and (b) whether he or she was acting in his or her official capacity at the time of

the alleged offense. While Justice Sanders is unquestionably a state officer by virtue of his position, it does not follow that all of his acts while he is a Justice are within his official capacity. When he violates the ethical rules governing his judicial role, they are not.

“Acting in his official capacity” means that the “public servant is acting within the scope of what he or she is employed to do as distinguished from being engaged in personal frolic.” *State v. O’Neill*, 103 Wn.2d 853, 859, 700 P.2d 711, 715 (1985) (emphasis added); *see also Nelson v. Bartell*, 4 Wn.2d 174, 180, 103 P.2d 30, 33 (1940) (“The purpose of his expedition may have been to perform an official act, but the character of that which he was doing at the time plaintiff suffered injuries was not official.”) (citation omitted).

Justice Sanders was not “employed” to engage in unethical *ex parte* contacts at the SCC. He has attempted to turn the Court’s focus from those contacts by arguing that his visit to the SCC was within his official capacity. The visit, however, was not the subject of the Commission on Judicial Conduct (“CJC”) proceedings, nor the object of the CJC’s sanctions. The issue here is whether the specific conduct that

resulted in those sanctions (affirmed by this Court on *de novo* review) was “official capacity” conduct. It clearly was not.²

Justice Sanders’ attorney conceded at oral argument that a state official can step outside his or her “official” capacity and engage in individual acts for which he or she must shoulder the consequences. This admission was made in response to the State’s illustration of the implications of Justice Sanders’ position. The State’s counsel explained:

If Justice Sanders’ construction of these statutes were correct, it would allow one of you to could come off the bench, wearing your black robe, punch me in the nose, and then you would not be entitled to a defense in the criminal case for assaulting, for having punched me, because of RCW 10.01.150. You would need to be acting under the agency’s rules and procedures within the scope of your employment and there would be no dispute that punching me in the nose was not within the scope of these requirements. No defense for the criminal charge, no defense for the civil suit, for making me bleed on my suit, because you wouldn’t have a defense under [RCW] 4.92.060 which is the relevant statute for claims for money damages for state officials. There you have to be acting in good faith and within his/her official duties. No argument there.

But according to Justice Sanders, you would be entitled to a defense on the ethics charges resulting from the same act. That is a nonsensical result, I submit to the court, and it should be rejected. The Court should construe these

² The CJC found “official capacity” as an aggravating factor for purpose of its sanctions analysis. The CJC did not address the issue presented here, and it would be both illogical and bad public policy for an aggravating factor, which requires a more serious sanction, to be used to qualify Justice Sanders for the benefits of a taxpayer-funded defense.

statutes in a way that is sensible and consistent with the overall statutory regime dealing with the defense.³

In response, Justice Sanders' counsel conceded that, under the example presented by the hypothetical, the judge would not be acting in his official capacity:

I don't think that a judge stepping down from the bench, punching an advocate in front of them, is something that is in the official capacity of the Judge unless, as I said, they were trying to issue a contempt sanction.⁴

This admission is fatal to Justice Sanders' position that a defense is always required for a state official. The admission both (a) acknowledges that some acts by a judge (a "state officer") while wearing the mantle of office are not "official capacity" acts, and thus not entitled to a defense; and (b) demonstrates that an initial determination must be made by the Attorney General, *i.e.*, whether the acts at issue were in a state officer's official capacity.

2. The Court's prior decisions establish that the Attorney General has discretion under RCW 43.10.030 to decide the "official capacity" issue.

The Attorney General is vested with discretion under RCW 43.10.030(3) to make the initial determination of whether particular acts were in a state officer's official capacity. This conclusion is mandated by

³ This argument can be viewed on the Washington State Public Affairs TV Network, www.TVW.org. The quoted language is found at Title 2, Ch. 27, approximately 32 minutes into the argument.

⁴ *Id.*, Title 2, Ch. 32, approximately 38 minutes into the argument.

the Court's prior decisions concerning the Attorney General's authority under RCW 43.10.030. See *Boe v. Gorton*, 88 Wn.2d 773, 567 P.2d 197 (1977); *Berge v. Gorton*, 88 Wn.2d 765, 567 P.2d 187 (1977). This also is the only result consistent with every other Washington statute regarding publicly-funded defenses of state officials, including judges.⁵

In both *Berge* and *Boe*, this Court rejected the argument now made by Justice Sanders that RCW 43.10.030's use of the word "shall" (in the clause preceding the list of the various powers of the Attorney General) requires that the Attorney General take action. In *Berge*, the Court reasoned:

The "duty" imposed upon the Attorney General here was to "exercise discretion." If in his judgment the proposed litigation was warranted, he could, as the Attorney General, have attempted to bring such an action. He was not, however, required by law to do so.

88 Wn.2d at 761-62, 576 P.2d at 191.

Justice Sanders previously has tried to distinguish *Berge* by claiming that the subsection of 43.10.030 at issue in that case, subsection (2), includes the clause "which may be necessary," which gives the

⁵ See RCW 4.92.060; .070 (Attorney General must find that the subject acts "were, or were purported to be in good faith, within the scope of that person's official duties"); RCW 10.01.150 (Attorney General must determine that the alleged criminal acts "fully conformed" to the state's written rules and policies and were within the scope of employment); RCW 42.52.430(7) (in ethics proceeding, Attorney General required to defend a state officer in a subsequent proceeding only if an ethics board has found the absence of reasonable cause to believe that an ethics violation has been or is being committed).

Attorney General discretion.⁶ He notes that that clause is not contained in subsection (3), the subsection at issue in this case.⁷

But in *Boe*, decided the same day as *Berge*, the Court reached the same conclusion with respect to discretion under RCW 43.10.030(8), which – like .030(3) – does not include the qualifying language found in .030(2).⁸ The *Boe* Court agreed that the statute granted discretion to the Attorney General:

Petitioner argues that RCW 43.10.030(2) and (8) impose upon the Attorney General an absolute duty to recover the funds. But in *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), we held that RCW 43.10.030(2) only imposes upon the Attorney General a duty to exercise discretion. RCW 43.10.030(8) is of no additional help to petitioner. There is nothing in this subsection which suggests that the “duty” imposed upon the Attorney General is any different from that imposed on him by subsection (2), that is, to exercise his discretion.

In his Response to Respondent’s Statement of Additional Authorities, Justice Sanders attempts to distinguish both *Berge* and *Boe* by arguing that those cases stand only for the principle that the Attorney General has discretion to decide whether or not to initiate litigation, rather

⁶ RCW 43.10.030(2) provides: “The attorney general shall: . . . (2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer . . .”

⁷ The Court in *Berge*, in reaching its result, did not rely on the “as may be necessary” language of subsection (2).

⁸ RCW 43.10.030(8) provides: “The attorney general shall: . . . (8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law . . .”

than to decide whether a defense should be provided. This distinction is illusory.⁹

In both *Berge* and *Boe*, the Court interpreted the statute's use of "shall," which is the same "mandatory" language that applies to .030(3), the subsection on which Justice Sanders relies. Neither case refers to the "initiation" of a lawsuit as a basis for the Court's conclusion. In fact, in two subsequent cases, *Blue Sky Advocates v. State*, 107 Wn.2d 112, 727 P.2d 644 (1986) and *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 588 P.2d 195 (1978), this Court relied on *Berge* and *Boe* as conferring discretion on the Attorney General in decisions involving matters unrelated to the initiation of a lawsuit, including the providing of a defense.¹⁰

In *Young Americans for Freedom*, the Washington Supreme Court expressly rejected the same lack-of-discretion argument made by Justice

⁹ Justice Sanders also suggests that determining whether to initiate an action requires consideration of factors such as funding limitations and the likelihood of success, which are not involved in the question of whether to defend an action. Response to Respondent's Statement of Additional Authorities, at 2-3. There is no basis in fact or law for such an assertion.

¹⁰ In *Blue Sky*, the plaintiffs sued the State for malpractice based on the Attorney General's status as "counsel for the environment" in response to an application by the Washington Water Power Company for a proposed electrical generating facility. This Court relied upon both *Berge* and *Boe* in concluding that the statute at issue in that case "must be interpreted as according the Attorney General discretion in the exercise of his duties as counsel for the environment." *Blue Sky*, 107 Wn.2d at 119, 727 P.2d at 648.

In *Young Americans*, the plaintiffs sued the State for filing an *amicus curiae* brief in the case of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978).

Sanders. 91 Wn.2d at 206-07, 588 P.2d at 197. This Court referred to .030 as “vest[ing] the Attorney General with a reasonable degree of discretion as an official legal adviser . . .,” and described the *Boe* and *Berge* decisions as cases “in which we held that the Attorney General may exercise broad discretion in the exercise of his duties.” *Id.* at 208, 210, 588 P.2d at 198.

B. RCW 43.10.040 Does Not Provide Any Broader Rights to a Taxpayer-Funded Defense than those Afforded by .030.

RCW 43.10.040, providing that the Attorney General shall represent “officials . . . of the state” in various hearings and proceedings, does not grant any broader rights to state officials than those in .030. The legislature was not required to reiterate the phrase “acting in his official capacity,” because .040 was intended as a companion statute to RCW 43.10.030 and must be interpreted consistently with it. *Department of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002) (“plain meaning” is derived not only from statutory language but from related statutes disclosing legislative intent about the provision in question). The statutory language, the legislative history, and public policy require such a result.

1. The language and legislative history of RCW 43.10.040 establish that taxpayer-funded representation is appropriate only for “official capacity” acts, consistent with RCW 43.10.030.

Applying RCW 43.10.040 without the “official capacity”

limitation would result in significantly broader defense rights than under RCW 43.10.030. But legislative history indicates that this was not the Legislature’s intent. The Legislature enacted RCW 43.10.040 “to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General.”¹¹ *State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713, 715 (1977). The purpose of RCW 43.10.040 was to clarify the Attorney General’s exclusive authority to represent the state and its officers and agencies, when necessary, with regard to the performance of their official responsibilities.¹² The Attorney General’s Office sponsored the statute,¹³ presumably to eliminate any ambiguity about the need for state agencies

¹¹ The statute was one section of a broader law that expressly barred the employment of any attorney for any administrative body, department, commission, agency or tribunal . . .” Laws of 1941, ch. 50 § 2 (codified at RCW 43.10.067).

¹² Until the enactment of RCW 43.10.040, disputes periodically arose over the question of whether state agencies, boards and commissions could retain private counsel. *See, e.g., State ex rel. State Bd. of Med. Exam’rs v. Clausen*, 84 Wash. 279, 146 P. 630 (1915); *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935). The Attorney General issued an opinion, contemporaneous with the statute’s enactment, concluding that the statute resolved the issue of whether private counsel could be employed. *See* 1941 Wash. Att’y Gen. 13 (1941) (under RCW 43.10.040, Attorney General became legal adviser to the Washington State Apple Advertising Commission).

¹³ *See, e.g.,* 1941 Senate Journal at 99 (bill introduced by Rules Committee by “Departmental Request”).

and boards to use the Attorney General's Office rather than retaining private counsel.

The primary focus of the statute is representation of government agencies, not individual officials—much less officials acting outside their official capacities. The title to the session law states that it is an Act “providing for the legal representation of the State of Washington and departments, commissions, boards, agencies, and administrative tribunals thereof” Laws of 1941, ch. 50. The Legislature deemed the act to be “necessary for the immediate support of the state government and its existing public institutions” Laws of 1941, ch. 50 § 6 (emphasis added).

The statutory reference to “represent[ation of] all officials, departments, boards, commissions and agencies of the state,” indicates legislative intent to provide legal representation only where the conduct giving rise to the need for such representation can be properly characterized as the official actions of an office or entity of the State. Unethical acts by individual state officers do not fall within this class of conduct.

The Legislature intended RCW 43.10.040 to complement RCW 43.10.030. As originally enacted, RCW 43.10.040 contained the following introductory language: “In addition to the powers and duties

now given the Attorney General of the State of Washington by law . . .” Laws of 1941, ch. 50, § 1 (emphasis added). The Legislature thus signaled in RCW 43.10.040 its awareness of the existing contours of the Attorney General’s authority under RCW 43.10.030. The current version of RCW 43.10.040 maintains the reference to RCW 43.10.030 in its introductory clause by stating the “attorney general shall also represent the state and all officials . . .” (emphasis added). Nothing suggests that RCW 43.10.040 fundamentally altered the scope of the Attorney General’s responsibilities under RCW 43.10.030(3) by authorizing taxpayer-funded representation of persons acting in their individual or personal capacities simply because they also happen to be state officers.

Instead, sections .030 and .040 are to be read together and harmonized as part of an overall statutory scheme governing representation of state agencies and officials. Previous cases have declined to expand the applicability of RCW 43.10.040 or to apply it to the exclusion of other applicable provisions. For example, in *State v. Herrmann*, this Court rejected appellant’s argument that .040 provided the Insurance Commissioner with a statutory right to a defense of a civil suit at public expense. 89 Wn.2d 349, 354, 572 P.2d 713, 715 (1977). In *Young Americans*, this Court, referencing .040 among other statutes, rebuffed plaintiffs’ contention that the statute specifically and exclusively

defined Attorney General's powers, concluding instead: "[T]he constitutional and statutory provisions hereinabove alluded to vest the Attorney General with a reasonable degree of discretion as an official legal adviser . . ." *Young Americans*, 91 Wn.2d at 206, 208, 588 P.2d at 197-98.

There is no legislative history, nor any case law, suggesting that the Legislature intended RCW 43.10.040 to provide broader rights of representation to state officials than those granted in RCW 43.10.030. The statutory language and the legislative history, considered in *Herrmann*, indicate to the contrary. The Legislature intended in RCW 43.10.030(3) to provide representation only to state officials acting in their official capacities; the same requirements apply to RCW 43.10.040. As shown above, the acts of a judge violating the Canons of Judicial Conduct are not "official capacity" acts.¹⁴

2. Interpreting RCW 43.10.040's use of the phrase "state . . . officials" as requiring a defense without regard to whether an official was acting in his official capacity would result in absurd and unwarranted results.

To interpret RCW 43.10.040 as providing a taxpayer-funded defense even where a state official was not acting in an "official capacity"

¹⁴ Such a conclusion is consistent with CJC's Rule of Procedure 9, which provides that a "Respondent may retain counsel and have assistance of counsel at his or her own expense." (Emphasis added).

would lead to absurd results with wide-ranging implications. The Attorney General would be compelled to represent a state official, for example, in Personnel Appeals Board hearings, Labor & Industries Board hearings, and Ethics Board hearings – all involving personal and individual matters. This has never been the case, and is unwarranted by the statute, legislative history, public policy, and common sense.

If the Attorney General were required to represent “state . . . officials” in any administrative matters or legal proceedings regardless of whether an official was acting in his or her official capacity, then there would be virtually no limit to a State official’s right to taxpayer-funded representation. The Attorney General would be compelled to represent a state official in any “legal or quasi legal matters, hearings, or proceedings,” whether they arose in the course of a State officer’s official duties, or private life and individual capacity. Such a result is nonsensical, and clearly was not intended by the Legislature.

The use of public funds for representation of individuals on personal or individual matters also would raise potential constitutional questions about whether providing a taxpayer-funded defense constitutes a gift of public monies. *See* Wash. Const. art. VIII, § 5 (“The credit of the state shall not, in any manner be given or loaned to, or in aid of, any

individual, association, company or corporation.”).¹⁵ The ramifications of Justice Sanders’ interpretation of RCW 43.10.040 are sweeping and untenable.

III. CONCLUSION

This Court must interpret and apply the “official capacity” and “official of the state” language of RCW 43.10.030 and .040, respectively, in a manner that is consistent with the statutory scheme, legislative history, sound public policy, and common sense. Both statutes vest discretion in the Attorney General, and limit a taxpayer-funded defense to acts by a state official only in his or her official capacity. Neither provides for a defense of State officials who have violated the ethical rules governing their official position, because such conduct can never be an “official capacity” act.

The two statutes also must be harmonized with Washington statutes governing representation of state officials sued for damages, charged with criminal acts, or subject to claims under the Ethics in Public

¹⁵ See *Washington Pub. Util. Dists. Utils. Sys. v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 9, 771 P.2d 701, 706 (1989) (utility district’s indemnification agreement with officer not a gift of public funds, in part because “there is no possibility that providing coverage will eliminate the threat of personal liability as a deterrent to aberrant behavior”); *Hammack v. Monroe St. Lumber Co.*, 54 Wn.2d 224, 232, 339 P.2d 684 (1959) (“[W]here a statute is open to two constructions, one of which will render it constitutional and the other unconstitutional or open to grave doubt in this respect, the former construction and not the latter is to be adopted.”).

Service Act.¹⁶ RCW 43.10.030 and .040 cannot form the basis for a publicly-funded defense of ethics charges, where no such defense would be available for damage claims or criminal charges arising from the same conduct.

The State respectfully requests that this Court affirm the decision of the Court of Appeals.

DATED this 22nd day of January, 2009.

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¹⁶ See *supra* note 5.