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NO. 84483-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, Washington State,

Respondent.

**ATTORNEY GENERAL'S RESPONSE TO AMICUS BRIEF ON
BEHALF OF GOVERNOR CHRISTINE O. GREGOIRE**

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I. INTRODUCTION

The Governor's amicus brief asks this Court to create a rule that where the Governor does not consent to certain litigation in federal court on behalf of the State of Washington, the Attorney General has authority to bring suit in the name of the Attorney General as plaintiff. The Governor's claim conflicts with the City's claim. The Petition of the City of Seattle asserts that the Attorney General lacks authority to challenge the federal act, and seeks a writ from this Court "compel[ling] [the Attorney General] to withdraw the State of Washington from the [health care] case, and to cease participating in that case." Petition, p. 1, ¶ 1.

The Governor's brief, however, steps beyond the well-established bounds of an amicus brief. Under longstanding jurisprudence of this Court, an amicus may not raise new claims or issues, as the Governor's brief does, and the Governor's arguments should not be considered.

If the Court nevertheless considers the Governor's brief, the rule that the Governor asks the Court to create is internally inconsistent. The Governor asks the Court to create a rule that "before commencing an action in federal court in the name of the State of Washington that is not explicitly authorized by statute", the Attorney General must consult with the Governor, and "if the Governor objects to the action, the Attorney General may commence an action in his capacity as and on behalf of the

Attorney General of the State of Washington but not on behalf of the State of Washington as a sovereign state.” Gov. Br. 2. The Governor’s rule assumes the need for additional statutory authority, and yet assumes that permission of the Governor may substitute for such authority. The Governor’s requested rule also assumes litigation by the Attorney General in his official capacity, but without authority to assert the rights of the State and its citizens.

In addition, Washington law does not support the rule that the Governor asks the Court to create. The Governor’s legal argument would make the divided executive branch created by the Washington Constitution a nullity. The Washington Constitution and statutes enacted pursuant to its direction entrust discrete areas of authority to independently elected constitutional officers. The Governor’s status as the State’s chief executive does not override the authority assigned to the State’s other executive officers pursuant to Washington’s Constitution, including the Attorney General’s authority and discretion to determine whether to bring litigation on behalf of the State to protect the rights of the State and its citizens. Nor does the law support the Governor’s claim that the Attorney General may not assert the legal rights of the State of Washington and its citizens in litigation when they do not align with the preference of the Governor. To safeguard the legal interests of Washington and its citizens

against this very danger, the Governor, when she was Attorney General, submitted an amicus brief in the Georgia Supreme Court contrary to the position that she now asserts.

II. ARGUMENT

A. The Court Should Not Consider The New Claim Raised By The Governor

This Court “will not address arguments raised only by amicus.” *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003), citing *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413, 997 P.2d 915 (2000). “[T]he case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court.” *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (internal quotation marks and citations omitted).

The Governor asserts that the Court should depart from the longstanding rule that amicus may not raise new issues. None of the cases cited by the Governor supports this assertion.¹ The Governor’s brief quotes the following sentence from *City of Tacoma v. Luvene*, 118 Wn.2d 826, 832, 827 P.2d 1377 (1992): “While we ordinarily only consider issues that have been raised by the parties, there are exceptions.” Gov. Br.

¹ The Governor’s citation to *Seeley v. State*, 132 Wn.2d 776, 815 n.4, 940 P.2d 604 (1997), apparently is an error. Gov. Br. 15. The Governor’s citation is to the dissent. The *Seeley* majority declined to consider an argument raised only by amicus.

15. The next sentence in *Luvene* explains: "It is proper to do so when there is no dispute about the law to be applied." *Id.* The argument that the Governor asserts is very much in dispute. The Governor also cites *Harris v. Department of Labor & Industries*, 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993), for the proposition that the Court has inherent authority to address an issue raised by amicus if necessary to reach a proper decision.² Gov. Br. 15. Again, in *Harris*, however, the Court determined to reach an argument raised only by amicus because there was no dispute about the law raised by amicus, and there were numerous pending cases raising the same threshold issue. The law is in dispute in this case, and there are pending no cases that raise the claims the Governor now seeks to assert.³

The Governor also asserts that the Court should ignore the limited role of an amicus because this case "presents circumstances where it is

² The Governor's brief does not explain how it can be necessary to consider new claims and a new request for relief raised by amicus in order to properly decide a pending case that advances a different claim and seeks different relief.

³ On the contrary, the Governor explains that "in most circumstances over the years" the Governor and the Attorney General have been able to "determine a course that allows each officer the ability to perform his or her duties without the need for judicial intervention," and that "the Governor believes this pattern will continue in the future." Gov. Br. 1-2. And, of course, the Governor did *not* seek "judicial intervention" in this case; only the City of Seattle did. Had there been a need for the Governor to seek judicial intervention, presumably, the Governor would have done so.

Moreover, months ago, at the inception of the federal health care litigation, the Attorney General agreed to the Governor's participation in the health care litigation on behalf of the State and its citizens, and at the Governor's request, appointed special assistant attorneys general to represent the Governor in that litigation. ASF, Att. 3, 0025-0026; Att. 4, 0027-0030. Accordingly, the Attorney General provided "a course that allows each officer the ability to perform his or her duties [at least as asserted by the Governor] without the need for judicial intervention." Gov. Br. 2.

appropriate for the Court to look to the public nature of the question presented and provide guidance to public officers.” Gov. Br. 15. For this proposition, the Governor cites a single case, *Seattle v. State*, 100 Wn.2d 232, 237, 668 P.2d 1266 (1983). *Seattle v. State* is inapposite. It concerns only mootness, and recognizes that “on extraordinary occasion” the Court will hear a case that has become moot “where the question presented is one of great public interest and has been brought to the court’s attention in an action wherein it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to other branches of the government.” *Id.*, quoting *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 895, 529 P.2d (1975). That the Court will “on extraordinary occasion” consider issues that *were* raised in a case, but that have become moot, does not support the proposition that an amicus should be allowed to raise issues that *were not* raised in the case.

The Governor’s brief does not suggest that the Governor was unaware of this litigation, or otherwise precluded from intervening in it. If the Governor wished to assert a new claim and arguments, intervention was the appropriate readily available course. *See, e.g., Comty. Care Coal. of WA v. Reed*, 165 Wn.2d 606, 609, 200 P.3d 701 (2009). No circumstances in this case warrant abandoning the longstanding rule that amicus may not raise new arguments.

B. No Constitutional Or Statutory Provision Conditions The Attorney General's Authority To Bring Litigation On Behalf Of The State To Protect The Legal Rights Of The State And Its Citizens Upon The Permission Of The Governor

1. The Rule That The Governor Would Have This Court Create Is Internally Inconsistent

As is discussed in sections B.2 through B.4, *infra*, the law does not support the rule that the Governor asks this Court to create. Before turning to that law, however, it first is important to recognize that the rule the Governor asks the Court to create also is itself internally inconsistent.

The Governor asks the Court to create a rule that “before commencing an action in federal court in the name of the State of Washington that is not explicitly authorized by statute,” the Attorney General must consult with the Governor, and “if the Governor objects to the proposed action, the Attorney General may commence an action in his capacity as and on behalf of the Attorney General of the State of Washington but not on behalf of the State of Washington as a sovereign state.” Gov. Br. 2.

Implicit in the premise of the Governor's requested rule is an asserted need for, but lack of, a statute “explicitly authoriz[ing]” the Attorney General to “commence an action in federal court in the name of the State of Washington.” *Id.* The Governor's brief does not explain where the requirement for a statute “explicitly authoriz[ing]” the Attorney

General to “commence an action in federal court in the name of the State of Washington” comes from in the first place, or why RCW 43.10.030 and .040 do not provide such authority.⁴ The requirement appears to be a creation of the Governor. But even assuming the Governor’s category of cases for the moment, the Governor also does not explain how her permission would substitute for what the Governor’s requested rule posits as necessary, but absent, statutory authority. Certainly, the Governor lacks the power to grant statutory authority to state officers, and the Governor’s permission is not tantamount to legislative authorization.

The Governor’s proposed rule is internally inconsistent in a second fundamental respect. The Governor suggests that if she objects to the commencement of an action to protect the legal rights of the State and its citizens in federal court, the Attorney General may bring the action “as and on behalf of the Attorney General of the State of Washington but not on behalf of the State of Washington as a sovereign state.” Gov. Br. 2. Elsewhere in the amicus brief, the Governor refers to this as the Attorney General appearing in “his separate, official capacity.” Gov. Br. 14. A

⁴ Moreover, in *Young Americans For Freedom v. Gorton*, 91 Wn.2d 204, 208-209, 588 P.2d 195 (1978), the Court found the Attorney General’s authority to be “broad and inclusive enough to confer upon that office authority to appear as amicus curiae before the United States Supreme Court in cases which may directly or indirectly impact upon state functions or administrative procedures and operations.” *Id.* at 207. The Court held that it had rejected the requirement that the Attorney General may act only with express statutory authority in *State v. Taylor*, 58 Wn.2d 252, 256, 362 P.2d 247 (1961), and it again declined to declare such a requirement.

state officer acting in an official capacity, however, in effect acts for and is the State. *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”). *See also Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (Official capacity proceedings “generally represent only another way of pleading an action against an entity of which an officer is an agent.”). But that plainly is not the rule that the Governor proposes. The Governor’s requested rule would preclude the Attorney General from litigating on behalf of the sovereign State. The Governor thus asks the Court to create a rule that is self-contradictory.

In a related vein, the Governor’s brief does not explain how the Attorney General could assert the rights of the State and its citizens, if the Attorney General were before a court in the capacity that the Governor seeks—i.e., where the Attorney General does *not* represent the State, but only himself as a party.⁵ In this important respect, the Governor’s position

⁵ The Governor understands that the Attorney General brings actions in federal court to protect the legal rights of the State and its citizens, and brings them on behalf of the State in circumstances that would be implicated by the Governor’s requested rule. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 505, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). In *Massachusetts v. EPA*, for example, the rule the Governor seeks would mean

is not what it may appear to be at first blush. It is not an inconsequential explication of the Governor's preference concerning how the Attorney General appears in the caption of certain federal pleadings. Rather, it is a proposal that would endanger, if not extinguish, the ability of the Attorney General to raise the legal rights of the State and its citizens in those cases.⁶

that if the Governor opposed suing the EPA to require it to follow federal law concerning regulation of motor vehicle greenhouse gas emissions, the Attorney General could not bring an action to protect the legal rights of the State of Washington and its citizens, as the Attorney General did. Under the Governor's requested rule, the Attorney General, as plaintiff, could assert his own rights. What rights would those be? The rights at issue in that case were—and the rights invariably at issue in similar cases will be—the rights of the State and its citizens, not rights of the Attorney General. The Governor's brief does not venture to explain what rights the Attorney General could assert if he does not represent the sovereign State in such matters, and the Governor's answer, whatever it may be, would not bind a federal court.

A lack of concern for how the requested rule would work also is evident in the Governor's request for "guidance" that the Attorney General "may substitute as plaintiff" in the federal health care litigation. Gov. Br. 15. Guidance to whom? To the United States District Court for the Northern District of Florida? Under the District Court's Final Scheduling Order, the pleadings and discovery closed months ago, the United States' motion to dismiss has been heard and determined, and summary judgment motions presently are being prepared. ASF, Att. 7, 0035-0037. The Governor cites no authority for the proposition that a state court may direct the proceedings of a federal court with respect to substitution of parties or otherwise, and the Attorney General knows of none.

⁶ In order to ensure the Attorney General's ability to protect the rights of the State of Washington and its citizens in the federal health care litigation, the Attorney General declined the Governor's request that the Attorney General amend his appearance in the health care litigation to identify the plaintiff as "Robert M. McKenna, Attorney General of Washington", and instead, approved appearance by the Governor in the litigation on behalf of the State of Washington, as well. ASF, Att. 6, 0033-34. The Governor states that the Attorney General authorized the Governor to appear as *amicus* in the health care litigation. Gov. Br. 13-14. This is incorrect. The Attorney General agreed to the Governor's participation in the health care litigation on behalf of the State of Washington, and appointed special assistant attorneys general at the Governor's request, without any restriction as to the capacity in which the Governor could appear. ASF, ¶¶ 9, 10; Att. 3, 0025-0026; Att. 4, 0027-0030; Att. 6, 0033-0034. The Governor did not choose to intervene.

2. The Governor's Position Is At Odds With Washington's Divided Executive Branch And Its Assignment to the Attorney General of Authority and Discretion to Bring Litigation on Behalf of the State

“Virtually every state government . . . has a divided executive in which executive power is apportioned among different executive officers independent of gubernatorial control.” William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446 (2006). The states “tended to reject the federal [unitary executive] model because they were concerned with the concentration of too much power in one executive officer.” *Id.* at 2451; *See also, State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) (“Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among . . . elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers.”)

Washington's constitutional framers adopted this approach, creating a divided executive branch, comprised of independently elected constitutional officers, including the Attorney General.⁷ Under

⁷ Article III, section 1 provides: “The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state.”

Washington's divided executive, Article III, section 21 of the Washington Constitution directs that the Attorney General "shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." Under laws enacted pursuant to Article III, section 21, the Attorney General has broad statutory authority to institute and prosecute all actions for the state, and to represent the state in all courts in all legal matters in which the state is interested. RCW 43.10.030(1)(2); RCW 43.10.040. The Attorney General also is obligated to "support the Constitution of the United States" and the State, and to faithfully discharge the duties of his office, RCW 43.01.020, and with limited exceptions, is designated as the exclusive source of representation of the state and its officers and agencies. RCW 43.10.067. In other words, under the Washington Constitution and statutes enacted pursuant to its direction, the Attorney General is the constitutional officer designated to represent the State, its officers, and agencies in the courts in legal matters.

Neither the Governor's supreme executive authority (Art. 3, § 2) nor the Governor's obligation to see that the laws are faithfully executed (Art. 3, § 5) fairly may be read as the Governor would read them – to render the State's divided executive a nullity, and to extinguish the powers that the constitution and statutes grant to other executive officers.

The error in the Governor's assertion of overriding authority is one explained in a similar context in *Perdue v. Baker*, 586 S.E.2d 606, 611 (Ga. 2003):

[T]he drafters wanted to ensure that the Governor did not possess unlimited authority over other executive officers. Immediately after granting executive powers to the Governor, the ... Constitution places a restraint on those powers: it grants [powers identified in the constitution and as otherwise provided by law] to the other executive officers.

The Governor's view would subordinate the powers of the Attorney General, and by logical extension, the powers of all of the officers of the executive branch, in the spheres of responsibility assigned to them by the Constitution and statutes, to the preferences of the Governor.

3. Decisions Of This Court Confirm That The Governor's Claim Overstates The Authority Of Her Office

That the Governor overstates the authority of her office also is confirmed by decisions of this Court. In *Young v. State*, 19 Wash. 634, 54 P. 36 (1898), the Governor contracted with an individual to audit and report to the Governor concerning the books and financial affairs of the state penitentiary. When the State declined to pay the full amount agreed to by the Governor, the individual hired to perform the audit sued the State. The State defended, arguing that the Governor lacked the authority to contract for his services, and that accordingly, he was entitled to recover

only an amount subsequently appropriated by the legislature for payment of his claim. This Court agreed. The Court considered the Governor's constitutional authority to require information in writing from the officers of the state upon subjects relating to their duties and to see that the laws are faithfully executed. *Id.* at 637. The Court also considered the Governor's statutory authority to supervise the conduct of all executive and ministerial officers, and the Governor's duty to visit the state penitentiary at least once a year. *Id.* The Court held that these powers neither expressly nor by necessary implication authorized the Governor to employ expert assistance to investigate the books and records of the prison, and that accordingly, the Governor lacked the authority to enter into the contract on behalf of the State.

The constitutional and statutory provisions relied upon by the Governor in *Young* are virtually identical to the provisions that the Governor relies upon to claim that the Governor may override the authority of the Attorney General to sue the federal government on behalf of the State in order to protect the rights of the State and its citizens from infringement by federal law. As was the case in *Young*, none of the provisions to which the Governor points, either expressly or by necessary implication grants such authority.

That the Governor's assertion of power in this case is overly broad also is confirmed by *State ex rel. Hartley v. Clausen*, 146 Wash. 588, 593, 264 P. 403 (1928). In that case, then-Governor Hartley, who was by law a member of the State Highway Committee, brought an action to restrain the other members of the Committee (the State Auditor and State Treasurer) from employing and paying a secretary and consulting engineer, after the Attorney General had declined Governor Hartley's request to bring the action. The Committee, represented by then-Attorney General Dunbar, sought dismissal of the Governor's suit, asserting that "the only person authorized to institute an action to restrain the unlawful expenditure of state funds is the Attorney General." *Id.* at 589. The trial court dismissed the Governor's suit. *Id.* This Court reversed, and in doing so, set forth the manner in which such a matter should proceed when the Governor and the Attorney General are at odds over enforcement of state law.

We hold that, under our constitutional provisions and in accordance with the cases above cited, the Attorney General may act in any matter such as this upon his own initiative or at the request of the governor, but upon his failure or refusal to act, the governor, because of the provisions of section 2, art. 3, of our Constitution, granting him the supreme executive power of the state, is entitled to maintain an action such as this.

Id. at 593. *Hartley*, thus, upheld the authority of the Attorney General to maintain an action upon his own initiative, and recognized that the

Attorney General could decline to follow the litigation preference of the Governor. Based on the constitutional status of the Governor as the state's chief executive, however, the Court held that where the Attorney General declined to act at the Governor's request, in order to enforce state law, the Governor could maintain an action of his own accord.⁸ The *Hartley* decision does not support the position of the Governor, that the Governor's opposition precludes the Attorney General from maintaining a contrary position on behalf of the State in litigation. In fact, the Court's decision in *Hartley* is to the opposite effect.

The Governor's reliance on RCW 43.10.030(5) for the proposition that the Attorney General requires permission from the Governor before bringing certain litigation in federal court to protect the rights of the State and its citizens from infringement also is misplaced. Gov. Br. 3-4. RCW 43.10.030(5) addresses the responsibility of the Attorney General to

⁸ Notably, *Hartley* was concerned with the authority of the Governor to enforce a *state* law within the Governor's responsibility. The Governor's amicus brief does not explain what state law the Governor seeks to enforce in this case. The federal health care litigation challenges the constitutionality of the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152, a federal law, not a state law. ASF Att. 8, 0040, ¶ 1. The reference in the Governor's brief to Laws of 2009, ch. 545, § 1 may be misunderstood in this regard. Gov. Br. 7, n.1. The referenced state law concerns state health care reform efforts, and the referenced section expresses only support for the concept of health care reform. It predates the federal law challenged in the federal health care litigation and is not directed to it.

Even assuming application of *Hartley* where the Governor's execution of a state law is not at issue, the Attorney General's agreement to the Governor's appearance in the federal health care litigation on behalf of the State, and his appointment of special assistant attorneys general to represent the Governor in those proceedings, fully complies with the course contemplated by *Hartley*.

consult with and advise state officers “upon all constitutional or legal questions relating to the duties of their offices.” The Governor’s brief reads these quoted words, and the statutory context that they establish, entirely out of the statute. *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (A court must construe statutes so that all language is given effect.) RCW 43.10.030(5) addresses the Attorney General’s authority to answer legal questions posed by state officers concerning their duties, not the Attorney General’s authority to bring litigation. The Governor’s brief also impermissibly reads “consult with and advise” language into subsections of RCW 43.10.030, and into RCW 43.10.040, where the legislature did not include such language. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (A court may not add language to statutes.) Moreover, even if RCW 43.10.030(5) applied, and it does not, the Governor’s position converts consultation into permission. No definition of “consult” intimates permission, let alone equates the terms.⁹

⁹ The Governor’s reliance on *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L .Ed. 2d 565 (2004) to read into Washington law a duty on the part of the Attorney General to secure the Governor’s permission before bringing litigation also is misplaced. Gov. Br. 4. *Florida v. Nixon* concerns effective assistance of counsel in a criminal proceeding, and arises in the context of a private, individual, attorney-client relationship. The case does not address the unique constitutional and statutory role and authority of the Attorney General in the structure of State government. Rules governing the private attorney client relationship do not readily transfer to the government context. *See, e.g.*, Comment [18] of Scope of the Rules of Professional Conduct, recognizing that

4. The Governor's Position Is Not Supported By *Perdue v. Baker*, And The Governor's Argument In The Instant Case Is Contrary To Her Position In That Case

The Governor relies on *Perdue v. Baker* to assert concurrent authority over litigation, contending that “[t]he constitutional and statutory provisions cited by the Georgia Supreme Court are similar in many respects to those in Washington.” Gov. Br. 8. Actually, the constitutional and statutory authority of the Governor of Georgia considered in *Perdue* is quite different from, and far more expansive than, the authority of Washington’s Governor.¹⁰ Although the Governor’s brief notes some of Georgia’s laws considered in *Perdue v. Baker*, it does not note them all. Specifically, the Governor’s brief does not note that by Georgia statute, “[t]he Governor ‘shall have the power to direct the Department of Law, through the Attorney General as head thereof, to institute and prosecute in the name of the State such matters, proceedings, and litigations as he shall deem to be in the best interest of the people of the State.’ ” *Perdue*, 586 S.E.2d. at 609, quoting OGCA § 45-15-35. Washington’s Governor has no statutory analog. In addition, the Georgia Constitution provided: “The Attorney General . . . shall represent the state . . . in all civil and criminal

the authority of government attorneys is established by laws other than the RPC and that the RPC do not abrogate that authority.

¹⁰ The same is true of the constitutional language in *People ex rel. Deukmejian v. Brown*, 624 P. 2d 1206, 1209 (Cal. 1981), a case the Governor cites and correctly rejects. Gov. Br. 11.

cases in any court when required by the Governor.” *Id.*, quoting Ga. Const. Art. 5, § 3, ¶ 4. Washington’s Governor has no constitutional analog. These provisions were key to the conclusion of the Georgia Supreme Court in *Perdue v. Baker* that the Governor of Georgia had concurrent authority with the Attorney General of Georgia over litigation. In light of the substantial differences in the constitutional and statutory provisions of the two states, *Perdue v. Baker* does not support concurrent authority over litigation in this state on the part of the Governor.

Moreover, the Governor’s idea of concurrent authority is not concurrent authority at all, and would not be recognizable to the Georgia Supreme Court. To the Governor, concurrent authority means that the Governor exercises “supervision and direction over all legal . . . matters on behalf of the State”, Gov. Br. 9, and that the Attorney General may not bring litigation in federal court in certain matters on behalf of the State without the Governor’s blessing. Based on the general authorities of the Governor and the Attorney General under Georgia law, *Perdue v. Baker* concluded that, “[b]oth executive officers are empowered to make certain that state laws are faithfully enforced; both may decide to initiate legal proceedings to protect the State’s interests; both may ensure that the State’s interests are defended in legal actions; and both may institute investigations of wrongdoing by state agencies and officials. Thus, they

share the responsibility to guarantee that the State vigorously asserts and defends its interests in legal proceedings.” *Perdue*, 586 S.E.2d at 609.

The Governor’s requested rule is to the opposite effect. Under it, no one would “guarantee that the State vigorously asserts and defends its interests in legal proceedings” where the Governor would prefer the Attorney General not to do so. *Id.* The Governor’s view in this respect is precisely what the Georgia Supreme Court rejected in *Perdue*, and contrary to the assertion in the Governor’s brief, the Georgia court rejected it without regard to specific authority granted to the Attorney General of Georgia to litigate in matters of state redistricting. Gov. Br. 6-7.

Finally, the Governor asserts that her position is not inconsistent with the argument that the Governor made, when Attorney General, in *Perdue v. Baker*. Gov. Br. 10, n.2. It is difficult to understand how that is so.¹¹

¹¹ In *Perdue*, then-Attorney General Gregoire and the Attorneys General of 46 states and territories argued:

In the vast majority of States and Territories . . . the rule is that the Attorney General litigates on behalf of the people and of the State itself, not simply on behalf of the Governor or some other executive or subdivision of state government that can override the litigation decisions of the Attorney General. Without such prerogative, the Attorney General would be unable to institute and maintain a uniform and coherent legal policy that takes full account of the public interest. The essential role of the Attorney General, relative to other constitutional offices, would be radically transformed if the Governor or other state officials were able to exercise veto power over the Attorney General’s litigation decisions

This argument to the Georgia Supreme Court simply cannot be squared with the Governor's argument here that, absent the consent of Washington's Governor, the Attorney General may not bring certain litigation in federal court on behalf of the State to protect the rights of the State and its citizens. Nor is the Governor correct in asserting that *Perdue v. Baker* rejected the argument that she advanced when Attorney General. *Id.* *Perdue v. Baker* considered only a question of Georgia law, not the law of Washington as presented to the Supreme Court of Georgia by then-Attorney General Gregoire.

III. CONCLUSION

The amicus brief of the Governor raises new claims and arguments that are not properly before the Court. They should not be considered. Even if the Court considers the Governor's new claims, however, they are unsound and should be rejected.

The independence of the Attorney General is also critical to the preservation of ordered liberty. The State must speak with one voice in the courtroom, and that voice is of the Attorney General. It is for the Attorney General to reconcile the interests of individual state officials with the interests of the State and of the people. Sometimes this responsibility requires the Attorney General to take positions to which individual state officials or agencies object. To permit these officials, including the Governor, to displace the Attorney General's determination of the public interest, and to dictate what lawsuits should be brought and what legal remedies should be sought, would turn the Attorney General into a mouthpiece for other political interests. The constitutional, statutory, and common law traditions of [the States and Territories] do not countenance such a result.

Br. of Amici at 3-4, *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003) (No. S03A1154), 2003 WL 23220942.

RESPECTFULLY SUBMITTED this 3rd day of November, 2010.

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