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SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, State of Washington,

Respondent.

AMICUS BRIEF ON BEHALF
OF GOVERNOR CHRISTINE O. GREGOIRE

ADAM J. BERGER, WSBA #20714
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Christine O. Gregoire is Governor of the State of Washington. Washington Constitution Article III, § 2 provides that “[t]he supreme executive power of this state shall be vested in a governor...” As the Washington Supreme Court has explained, this provision means that “the Governor, under our Constitution, is the *highest executive authority*.” *State ex rel Hartley, Governor v. Clausen*, 146 Wash. 588, 264 P. 403, 405 (1928) (emphasis in original). The Washington Constitution also provides for other executive officers elected by the people, including an Attorney General. Article III, §§ 1, 21. Governor Gregoire served as Attorney General of Washington for twelve years. Governor Gregoire recognizes both the value of an independently elected Attorney General and the Governor’s important role as the chief executive officer. Governor Gregoire has an interest in the sharing and division of executive power among these offices.

II. ISSUE ADDRESSED BY AMICUS CURIAE

Governor Gregoire urges recognition of an independent Attorney General, but not with undue derogation of the designation of the Governor as the highest executive authority. In most circumstances over the years, these executive officers have been able to discuss the factors relating to the public interest of the State and determine a course that allows each

officer the ability to perform his or her duties without the need for judicial intervention. The Governor believes this pattern will continue in the future. Therefore, the Governor respectfully requests direction from the Court that addresses the limited circumstances of this case: a situation in which the Attorney General commences an action in the name of the State of Washington as a sovereign state to challenge the constitutionality of a federal statute that impacts state government when the Governor of the state has expressed the view that the interests of the state are adversely impacted by the Attorney General's action.

For the reasons explained below, the Governor believes the constitution and laws of our state require: (1) that the Attorney General consult with the Governor before commencing an action in federal court in the name of the State of Washington that is not explicitly authorized by statute; and (2) 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.

III. ARGUMENT

A. **The Attorney General Had A Statutory And Constitutional Duty To Consult With The Governor Prior To Commencing This Federal Court Action On Behalf Of The State.**

Since the adoption of the Washington Constitution it has been the duty of the Attorney General to “[c]onsult with and advise the governor” and other state officers. *See* 1 Hill's Statutes and Codes of Washington, Commencement of Actions, and Pleadings, Title 3, ch. 5, § 117, at p. 47 (1891) (“The duties of the attorney-general shall be, 1. To consult with and advise the governor and other state officers, and give, when requested, written opinions upon all legal or constitutional questions relating to the duties of such officers respectively. . . .”). The word “consult” signifies seeking the opinion of another person and suggests a dialogue to compare views. The 1899 WEBSTER’S INTERNATIONAL DICTIONARY provides the definition of the word “consult” when this provision was first enacted: “to seek the opinion or advice of another; to take counsel; to deliberate together; to confer.” Confer in turn is defined as “[t]o have discourse, to consult; to compare views; to deliberate.”

The statute and the dictionary meaning of “consult with” are similar today. RCW 43.10.030(5) directs “[t]he Attorney General shall:

Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers.

And WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2nd ed. 1983) defines "consult" as "to seek the opinion or advice of another; to confer or converse in order to decide or plan something."

In addition, under the rules that govern relationships between attorneys and clients the attorney's "duty to consult with the client regarding 'important decisions,'" is an obligation on the attorney to affirmatively bring decisions regarding matters "of such moment that they cannot be made for the [client] by a surrogate." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 560, 160 L.Ed.2d 565 (2004). Concerning these types of decisions, "an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Id.*

Here, the Attorney General did not seek the input of the Governor prior to announcing that he would file a lawsuit naming the State of Washington as a plaintiff seeking to overturn the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (the "Act"). See Agreed Statement of Facts ¶ 7; *State of Florida, et al. v. United States Department of Health and Human Services*, U. S. District Court for the Northern District of Florida, No.: 3:10-cv-91-RV/EMT.

The Attorney General may argue that RCW 43.10.030(5) assigns him only a passive role that is invoked only when the legislature or the

Governor seek his legal opinion. But that reading of the statute ignores the fact that this is a duty placed on the Attorney General, and that he is directed to consult with the other constitutional officers. The statute imposes this duty generally, and does not condition it on a prior request from the Governor or other state officers. Such a narrow reading of the statute also would ignore the concepts of checks and balances and shared power inherent in Washington's constitutional scheme. *See State v. Gattavara*, 182 Wash. 325, 332-33, 47 P.2d 18 (1935). The Attorney General relies on this constitutional structure to support his independent authority to initiate actions in federal court beyond the specific authorities delegated by statute. *See Resp. Br.* at 38. The necessary corollary is that the Attorney General also is bound to honor this system of checks by consulting with the Governor before taking such action and tailoring his actions appropriately when the Governor disagrees upon the course that best serves the interests of the sovereign State.

Requiring an Attorney General to consult with the Governor prior to commencing an action in the name of the State of Washington best reconciles the Governor's constitutional designation as the supreme executive authority with a constitutional structure that includes an independent Attorney General. The Attorney General is part of a state government composed of separate and coordinate branches and

independently elected constitutional officers. Consultation with other independently elected officials who have coincident duties and areas of responsibility was contemplated by the framers of the Washington Constitution. Certainly the framers would not have contemplated that the Governor would be presented with a *fait accompli* in an area of concurrent authority where the Attorney General's action could significantly affect the Governor's duties to administer the state government and execute the laws. Requiring the Attorney General to consult with the Governor gives effect to the statute which makes this a duty of the Attorney General and also enforces the framers' concept of shared executive power.

B. The Concurrent Authority Of The Governor And The Attorney General Precludes The Attorney General From Maintaining This Action On Behalf Of And In The Name Of The State When The Governor Has Objected.

The Georgia Supreme Court discussed the shared responsibilities of a Governor and an independently elected Attorney General in *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003), a case involving the defense of a State Senate redistricting plan. There, the Georgia Attorney General had filed an appeal of a federal district court order rejecting the state redistricting plan. The Governor wanted the appeal dismissed, which would leave in place an order invalidating the Senate's action. The Court determined the appeal should go forward because the legislature specifically empowered

the Attorney General to bring the action¹ and because the executive power could not be asserted to prevent the execution of a law. “Because there is constitutional authority for the General Assembly to vest the Attorney General with specific duties and a state statute vested the Attorney General with the authority to litigate in the voting rights action, we hold that the Attorney General had the power to seek a final determination on the validity of the State Senate redistricting statute under the federal Voting Rights Act.” *Id.* at 607.

The Georgia Supreme Court, however, specifically “reject[ed] the broader claim by each officer that he has the ultimate authority to decide what is in the best interest of the people of the State in every lawsuit involving the State of Georgia.” *Id.* at 610. The Court reviewed Georgia’s constitutional and statutory scheme and concluded that “neither the Governor nor the Attorney General has the exclusive power to decide the State’s interest in litigation.” *Id.* The Court observed:

Both the Governor and Attorney General are elected constitutional officers in the executive branch of state government, which is responsible for enforcing state

¹The Washington legislature has not authorized the Attorney General to bring an action in the name of the State that challenges the federal law. To the contrary, the legislature expressed a positive view of federal health care reform in Laws of 2009, ch. 545 § 1: “The legislature finds that the principles for health care reform articulated by the president of the United States in his proposed federal fiscal year 2010 budget to the congress of the United States provide an opportunity for the state of Washington to be both a partner with, and a model for, the federal government in its health care reform efforts. The legislature further finds that the recommendations of the 2007 blue ribbon commission on health care costs and access are consistent with these principles.”

statutes. The Georgia Constitution provides that the Governor is vested with the chief executive powers. Among those powers is the responsibility to see that the laws are faithfully executed. Other executive officers, including the Attorney General, are vested with the powers prescribed by the constitution and by law. The constitution states that the Attorney General “shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.”

Id. at 609 (citations omitted).

The constitutional and statutory provisions cited by the Georgia Supreme Court are similar in many respects to those in Washington. The Washington Constitution provides for the election of both a Governor and an Attorney General. Article III, section 2 vests the “supreme executive power of this state” in the Governor. The Attorney General is among the other executive officers who are elected under Article III, section 3. The Governor “may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices” and has the duty to “see that the laws are faithfully executed.” Article III, section 5. The Attorney General “shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.” Article III, section 21.

Both the Governor and the Attorney General have other powers and duties prescribed by law which reflect a concept of discussion and coordination among the executive officers. These statutes also reflect the concept of the Governor as the supreme executive authority, exercising some measure of supervision and direction over all legal and policy matters on behalf of the State. RCW 43.06.010 provides in pertinent part:

In addition to those prescribed by the Constitution, the governor may exercise the powers and perform the duties prescribed in this and the following sections:

(1) The governor shall supervise the conduct of all executive and ministerial offices;

* * *

(4) The governor is the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States;

(5) Whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to any property, or which may result in any claim against the state, the governor may direct the attorney general to appear on behalf of the state, and report the same to the governor, or to any grand jury designated by the governor, or to the legislature when next in session;

(6) The governor may require the attorney general or any prosecuting attorney to inquire into the affairs or management of any corporation existing under the laws of this state, or doing business in this state, and report the same to the governor, or to any grand jury designated by the governor, or to the legislature when next in session;

(7) The governor may require the attorney general to aid any prosecuting attorney in the discharge of the prosecutor's duties;

* * *

These constitutional provisions and statutes reflect a role for the Governor in assessing the interests of the state, a role that does not stop at the courthouse door.²

This Court, as well, has recognized that the Governor has the power to exercise authority over legal matters on behalf of the State, up to and including initiation of litigation, even when the Attorney General has declined to pursue a claim. In *State ex rel. Hartley v. Clausen*, 146 Wash. at 592-93, the Court explained, “[I]t would be an anomalous situation if the governor, having the supreme executive power of the state, was unable to secure such a determination [from the courts] because of the failure or refusal to act on the part of one having less power.”

² This proposition is not contrary to the amicus brief filed by the Attorneys General in *Perdue, supra*, and quoted by the Attorney General in this case. See Resp. Br. at 47. In *Perdue*, the issue was whether the governor could exercise a veto power over the attorney general's pursuit of a particular legal claim. Here, the Governor does not deny the Attorney General's authority to participate in the federal health care litigation in his official capacity. However, to the extent that the *Perdue* amicus brief can be read to deny a governor *any* authority over litigation on behalf of the State, that position was both rejected by the Georgia Supreme Court in *Perdue* and is inconsistent with this Court's holding in *State ex rel. Hartley v. Clausen, supra*.

**C. Where The Governor Objects To Commencement Of
Litigation On Behalf Of The State, The Attorney General May
Maintain The Action In His Separate, Official Capacity.**

Thus, if neither the Governor nor the Attorney General has exclusive power to control legal proceedings and each has a concurrent power over litigation in which the state has an interest, the question becomes what happens if – even if there were full consultation—these officers disagree on whether an action should be commenced. The answer to this question in one state is that the Governor, as the chief executive, has the power to decide. *See People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981) (if a conflict between the Governor and the Attorney General develops the Governor retains the "supreme executive power" to determine the public interest). However, the conclusion most consonant with Washington's constitution, statutes, and case law is that the Attorney General may proceed with litigation, but if he does so without the agreement of the chief executive or legislative authority³, he must bring the action in his capacity as a separately elected public official and not on behalf of the State of Washington as a sovereign entity.

³ The legislature has specified types of cases in which the Attorney General may bring an action in the name of the State. *See, e.g.*, RCW 19.86.080(1) ("The attorney general may bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful . . .").

This result is the correct one on both a conceptual and a practical level. Divided executive power is a structural part of Washington's Constitution. Bringing an action in the name of the State of Washington as a whole is not true to that constitutional structure where the Attorney General has not been authorized by law to act on behalf of the State as an overarching entity. An action brought with the specific public official, the Attorney General, as plaintiff more accurately informs a court of the source of the arguments being advanced and the constitutional foundation on which those arguments are made. Further, concurrent authority should not mean a race to the courthouse, where the winner occupies the entire sphere of the State's authority and interest. This court has said the Governor has the right to bring an action where the Attorney General declines to do so. *State ex rel. Hartley, supra*. Yet a Governor will find it difficult if not impossible to be fully heard in a matter in a federal district court when one of the plaintiffs is the "State of Washington" which by its name purports to be on behalf of the government as a whole.

The facts of this case aptly demonstrate the correctness and necessity of this approach. The Attorney General's Amended Complaint before the federal district court in Florida alleges, among other things, that provisions of the Patient Protection and Affordable Care Act ("PPACA" or "the Act") that expand Medicaid and call for establishment of insurance

exchanges are unconstitutional because they “commandeer” the executive officers and staff of the state government. Agreed Statement of Facts, Att. 8, at pp. 27-28. The Governor, as the chief executive charged with supervising the conduct of all executive offices, is clearly in the best position to make an assessment of whether these staff have been “commandeered.” Moreover, RCW 43.06.120 specifically grants the Governor authority over the State’s receipt and disbursement of federal funds, including federal matching funds under the Medicaid program. Because the Attorney General’s claim would result in the denial of additional Medicaid funding to the State pursuant to PPACA, it directly impinges on this authority specifically delegated to the Governor.⁴

Under such circumstances, it would be inappropriate for the Attorney General to occupy the field of the State’s authority in the federal litigation over health care reform. The Attorney General has recognized this, and has authorized representation of the Governor by outside counsel

⁴In addition to specific claims, the Plaintiffs in the Florida litigation argue that the challenged sections of the Act are not severable and thus that the entire Act is rendered unconstitutional. See Plaintiffs’ Memorandum In Opposition to Defendants’ Motion to Dismiss, in *State of Florida, et al. v. United States Department of Health and Human Services*, U. S. District Court for the Northern District of Florida, No.: 3:10-cv-91-RV/EMT, at p. 26 (“the Individual Mandate’s unconstitutionality renders the entire Act unconstitutional”) (available at [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-883LV3/\\$file/MotionToDismiss.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-883LV3/$file/MotionToDismiss.pdf)).

for purposes of appearing as amicus in the Florida litigation. Agreed Statement of Facts ¶ 9 & Att. 3. However, the Attorney General's proposed solution to this dilemma, that the State can appear and be represented in its sovereign capacity as both a plaintiff in the litigation and as an amicus (or potentially intervenor) on the defendant's side, violates basic precepts of orderly legal procedure. It is unlikely a case would proceed in an orderly fashion if both the Governor and Attorney General are permitted to purportedly represent the State of Washington. It would also require the Governor to take affirmative action whenever the Attorney General initiates litigation in the name of the State of Washington over the Governor's objection in order to explain to the court that the Attorney General does not represent the interest of the State as a whole, contrary to the implication of the caption and the pleading.⁵

By contrast, a rule authorizing the Attorney General to appear in his separate, official capacity and the Governor to appear in her separate, official capacity is more consistent with the reality of the situation and with Washington's constitutional structure and basic legal principles. This

⁵There are a number of examples of cases in which attorneys general have appeared as named plaintiffs in their official capacity. *E.g.*, *Attorney General Jennifer M. Granholm v. Michigan Public Service Comm'n*, 625 N.W.2d 16 (Mich. App. 2000); *Attorney General v. Department of Public Utilities*, 900 N.E.2d 862 (Mass. 2009).

presents a more accurate picture to the federal judiciary in a case where the fundamental issues at stake, the impact of federal action on a state's sovereign interests, unarguably fall within the province of the Governor as well.

IV. CONCLUSION

While the order requested by the City of Seattle is appropriate in light of the specific circumstances of this case, the Governor urges the Court to further provide guidance that the Attorney General may substitute as the plaintiff. This Court has the inherent authority to address an issue raised by amicus if necessary to reach a proper decision. *Harris v. Department of Labor & Indus.*, 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993); *Seeley v. State*, 132 Wn.2d 776, 815 n.4, 940 P.2d 604, 623 (1997). *See also City of Tacoma v. Luvene*, 118 Wn.2d 826, 832, 827 P.2d 1374, 1377 (1992) (“While we ordinarily only consider issues that have been raised by the parties, there are exceptions”). This case presents circumstances where it is appropriate for the Court to look to the public nature of the question presented and provide guidance to public officers. *See City of Seattle v. State*, 100 Wn.2d 232, 250, 668 P.2d 1266, 1275 (1983) (court will decide moot issue where public interest would be served). The Governor respectfully requests a decision that without either

a statute authorizing the Attorney General to file an action in the name of the State of Washington or the Governor's concurrence, the Attorney General may not commence a challenge to a federal statute listing the State of Washington as the plaintiff, but may commence an action naming the Attorney General of the State of Washington as the plaintiff.

RESPECTFULLY SUBMITTED this 19th day of October, 2010.

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