STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D12-2104-PL-014068

ERIC J. HOLCOMB, GOVERNOR OF THE STATE OF INDIANA,

Plaintiff,

vs.

RODRIC BRAY, in his official capacity as the President Pro Tempore of the Indiana State Senate, and chairman of the Indiana Legislative Council, TODD HUSTON, in his official capacity as the Speaker of the Indiana State House of Representatives, and vice-chairman of the Indiana Legislative Council, THE LEGISLATIVE COUNCIL, as established by Indiana Code § 2-5-1.1-1, and THE INDIANA GENERAL ASSEMBLY,

Defendants.

GOVERNOR HOLCOMB'S RESPONSE IN OPPOSITION TO MOTION TO STRIKE AND FOR ALTERNATIVE RELIEF

Plaintiff, Eric J. Holcomb, Governor of the State of Indiana (the "Governor" or "Governor Holcomb"), by counsel, in opposition to Defendants' Motion to Strike and for Alternative Relief ("Motion"), states as follows:

INTRODUCTION

Contrary to the assertions of Attorney General Rokita, this is not a case of a governor suing the legislature "over laws he does not like." House Enrolled Act 1123 ("HEA 1123") is challenged because its content infringes upon an inviolate constitutional power vested solely with Indiana governors. By overriding the Governor's veto of HEA 1123, the General Assembly has enacted a

law that usurps the exclusive constitutional power of a sitting governor of the State of Indiana to call a special session of the General Assembly.

This action has forced the Governor to file this lawsuit as part of his constitutional duties as the head of the executive branch of state government. The Governor, a constitutionally-established officer, seeks a judicial determination that another co-equal branch of government (the General Assembly) has impermissibly infringed upon his constitutional powers. Through his Motion, and based solely on a discretionary legal opinion by Attorney General Rokita that HEA 1123 is constitutional, Mr. Rokita seeks to deny Governor Holcomb the right to avail himself of a remedy from the judicial branch.

The governor of Indiana is vested with the sole and exclusive jurisdiction and authority to exercise executive powers. *Tucker v. State,* 35 N.E.2d 270, 280 (Ind. 1941). As the *Tucker* case makes clear, Indiana's governor – as a constitutional officer – has the inherent authority to protect constitutional duties and obligations assigned exclusively to his office from being usurped by another branch of government. *Id.* Whether pursuant to the Indiana Constitution or the Indiana Code, Indiana governors have both the inherent right and statutory authority to retain counsel to take actions to protect their constitutional powers. It is for the judicial branch, not a statutorily-created attorney general (whose position could theoretically be legislatively eliminated), to determine whether a law – in this case HEA 1123 – usurps the constitutional powers of Indiana's governors, now and in the future.

Notably, Attorney General Rokita does not seek to intervene in this lawsuit to represent the Governor and pursue his claims. Rather, he takes the remarkable position that he, as Attorney General, has the sole right and power to determine whether HEA 1123 is constitutional. If, in his

judgment, he determines that it is constitutional, then, in his view, he has the authority to block the Governor from obtaining legal representation and redress.

Although the Attorney General has an important role to play in Indiana government, his statutorily-created position is not on the same constitutional foundation as the governor, the legislature, or the judiciary. Our system of three governmental branches — with their respective checks and balances — was not intended, nor established, to allow a statutorily-created position to dictate how Indiana's Constitution is to be interpreted, based on his "legal judgment." It is absurd to conclude that access to the courts by Indiana governors rests solely on such tenuous and subjective judgments made by a current holder of a statutorily-created political position.[1]

Apart from those issues, the Attorney General misreads, and asks this Court to misapply, the statutory provisions outlining the circumstances which require his approval to hire outside counsel. No authority exists requiring a constitutional officer to obtain the Attorney General's consent to retain outside counsel when seeking to defend his or her constitutional rights and responsibilities.

Attorney General Rokita's position that he must represent both Governor Holcomb and the members of the General Assembly (and General Assembly itself) in this action also directly conflicts with the Indiana Rules of Professional Conduct. Relevant here, the Rules apply with equal force to him as they do to all licensed Indiana attorneys. Mr. Rokita cannot represent parties that have a concurrent conflict of interest, as Governor Holcomb and the General Assembly and its officers do here. Finally, an argument that the Defendants cannot be served with process does not

[1] If that were the case, the risk of self-promotional political mischief would abound, especially if a sitting attorney general is in the adverse political party of a sitting governor. Who is to say – and how could one challenge – that an attorney general's "legal judgment" is based on an actual legal analysis, versus political or other reasons.

apply in this case for several reasons, not least of which is because this action puts the separation-of-powers between branches of Indiana state government at issue.

For these reasons, Attorney General Rokita's Motion should be DENIED.

ARGUMENT

I. THE GOVERNOR HAS BOTH THE INHERENT CONSTITUTIONAL AUTHORITY, AS WELL AS EXPRESS STATUTORY AUTHORITY, TO HIRE COUNSEL WITHOUT THE ATTORNEY GENERAL'S CONSENT

A. INHERENT AUTHORITY

The starting point for analyzing the Governor's right to retain independent counsel without the Attorney General's consent is the Indiana Constitution itself. As Indiana appellate courts have repeatedly held throughout our State's history, a governor has broad powers to carry out his executive functions, even in the absence of express statutory authority. *Tucker*, 35 N.E.2d at 283-84; *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1260 (Ind. 2020). This is especially true where the governor seeks to defend his position and office from unconstitutional encroachment by other branches of government. Because HEA 1123 is such an encroachment, the Governor may retain counsel in this case.

The separation-of-powers among the three branches of government is memorialized in the Indiana Constitution under Article 3 § 1:

> The powers of the Government are divided into three separate departments: the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

"The purpose of the separation of powers provision is to rid each separate department of government from any influence or control by the other department." *A.B. v. State*, 949 N.E.2d 1204, 1212 (Ind. 2011). The Indiana Supreme Court noted, for example, that "[i]f the legislature

should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void." *Tucker*, 35 N.E.2d at 283.

Inherent in the concept of separation-of-powers is the ability of each branch to carry out the necessary steps to provide checks and balances on the other two branches. This includes the governor as the chief of the executive branch. *See Id.* (providing that "Constitutions are concisely drawn and superfluity is avoided" and therefore "generally understood" powers of the governor may exist without a specific grant of that power). Seventy years ago, the Indiana Supreme Court expressly rejected the argument that the governor's executive powers were limited to "only such as were specifically granted," and instead held that a "[r]easonable construction" of the Indiana Constitution required a reading that "the grant of full executive power to the Governor included all of its incidents as they were then generally understood to exist." *Id.* at 292.

Attorney General Rokita – a statutorily-created, non-constitutional officer – is attempting to expand statutory power given to him by the legislative branch, to prevent the constitutionally-created chief executive – the Governor – from retaining counsel to defend his constitutional authority from impermissible encroachment by the General Assembly. That cannot occur.

Attorney General Rokita additionally seeks to usurp the role of the judiciary in this dispute. He posits that he, and he alone, is to determine the constitutionality of HEA 1123. And because he believes it is constitutional, he argues that he can prevent Governor Holcomb from seeking legal access to the courts. The Attorney General seeks to expand his authority into an area that is clearly the province of the judicial branch. "'Where a law or the application of a law is challenged on constitutional grounds, the judiciary has the authority as well as the duty, to explore the constitutional ramifications of the law.'" *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind.

1996) (*quoting City of Anderson v. Assoc. Furniture and Appliances, Inc.*, 423 N.E.2d 293, 295 (Ind. 1981)). As the Indiana Supreme Court further stated in *Boehm*:

> While courts must not interfere with the General Assembly's proper exercise of its constitutional prerogative to determine public policy and to enact legislation in furtherance thereof, ***the judiciary is obligated to enforce our state constitution's provisions regarding legislative action***. In the discharge of our constitutional obligations, we may be required to determine whether such legislative action is constitutionally valid.

Id., at 322 (emphasis added).

Denying a governor the right to retain independent counsel to defend his executive powers before the judiciary would effectively prohibit a governor from exercising his constitutional duties to prevent legislative encroachment on executive powers in violation of Art. 3 § 1 of the Indiana Constitution. *A.B. v. State*, 949 N.E.2d at 1212 (providing purposes of separation of powers "to rid each separate department of government from any influence or control by the other department."). It would also represent a full break from the precedent set forth in *Tucker* and *City of Bloomington*.

The Governor's unique position as the chief executive officer of our State also distinguishes this case from *Ritz v. Elsener, et. al.*, Cause No. 49C01-1310-PL0038953 (Marion Cir. Ct. 2013). In that case, then-Indiana Superintendent of Public Instruction Glenda Ritz attempted to file suit against individual members of the State Board of Education, as well as the Director of the Legislative Services Agency. Former Indiana Attorney General Greg Zoeller filed a motion to strike, arguing that the Superintendent did not have the authority to retain independent counsel without his consent. The trial court agreed. Attorney General Rokita would like this Court to believe that *Ritz* is analogous to this situation and controls here. It does not.

Ritz did not involve two branches of government engaged in a constitutional dispute with one another over the scope of executive authority under the Indiana Constitution. Nor did it involve an Attorney General who has publicly-sided with one of those two branches of government over

the other.[2] Instead, the Superintendent was involved in an intra-agency dispute with her own State Board of Education. This type of intra-agency internal conflict is the type of situation in which Ind. Code § 4-6-5-6 would apply, requiring the Attorney General's involvement.[3] That is a far cry from a constitutional dispute between the executive and legislative branches over whether a legislative enactment impermissibly infringes upon executive power. The order entered in *Ritz* has no application here.

The inherent authority vested in Governor Holcomb as the head of the State's executive branch grants him the authority to carry out his constitutionally-granted powers. This necessarily includes the power to retain outside counsel to represent his interests vis-à-vis those of another co-equal branch of government. Permitting Attorney General Rokita to prevent Governor Holcomb from hiring counsel would further represent a violation of the well-settled separation-of-powers doctrine. For this reason alone, the Attorney General's Motion to Strike should be denied.

B. STATUTORY AUTHORITY

In addition to the Governor's inherent constitutional authority to hire counsel, the Indiana Code specifically provides for a governor's ability to do so. Ind. Code § 4-3-1-2. That statutory law provides further evidence that the governor may proceed with outside counsel in this case.

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[2] Defendant Todd Huston on April 27, 2021: "We are in consultation with the Indiana Attorney General's Office on what the next steps will be in this matter." https://www.ibj.com/articles/holcomb-files-lawsuit-against-legislature-challenges-law-that-weakens-his-emergency-powers

[3] Then Attorney General Greg Zoeller: "The reason you don't see one arm of state government's executive branch sue another is because the statute and case law make it the Attorney General's responsibility to represent **state agencies** in court and harmonize their conflicting legal positions, and the judicial branch was not meant to oversee **internal conflicts within the executive branch**." (emphasis added). https://www.insideindianabusiness.com/story/ 29816212/judge-dismisses-ritz-lawsuit

Under Ind. Code § 4-3-1-2, a governor may employ counsel "to protect the interest of the state in any matter of litigation where the same is involved[.]" The State clearly has an interest in the validity of the Indiana Constitution as drafted, and the proper functioning of the executive branch. This express grant of statutory authority to the Governor to hire counsel in this situation provides yet another basis why he is not required to obtain the Attorney General's consent before taking that action.

The Defendants argue that Ind. Code § 4-6-5-6, as interpreted by the Indiana Supreme Court's decision in *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145, 148 (Ind. 1978), nullifies Ind. Code § 4-3-1-2, and requires Governor Holcomb to obtain the Attorney General's consent to hire counsel.[4] Reliance on *Sendak* is misplaced.

In *Sendak*, a private party sued the Indiana Alcoholic Beverage Commission seeking both declaratory and injunctive relief. *Sendak*, 373 N.E.2d at 147. The Attorney General entered his appearance in the matter, while outside counsel retained by the Governor entered an appearance the following day on behalf of, among others, the Indiana Alcoholic Beverage Commission. *Id.* The Attorney General filed a motion to strike the outside counsel's appearance and pleading, arguing that only the Attorney General could represent a state agency, *i.e.*, the Alcoholic Beverage Commission. *Id.* The trial court denied the Attorney General's motion, and the Attorney General filed a writ of mandamus with the Indiana Supreme Court. *Id.*

The Indiana Supreme Court contemplated and answered the narrow question of "whether the Governor can hire private counsel *to represent a State agency* without obtaining the consent of the Attorney General." *Id.* at 147 (emphasis added). The Court first identified that the governor was not attempting to hire counsel on his behalf in that case, and noted that the Alcoholic Beverage

[4] As discussed in Section I(C), *infra*, Ind. Code § 4-6-5-6 does not apply to the Governor.

Commission "is a separate entity of the government" from the governor. *Id.* at 148. The Court then found that because the Attorney General's statute (Ind. Code § 4-6-5-3) conflicted with the terms of the governor's statute (Ind. Code § 4-3-1-2), regarding the representation of state agencies, the statute requiring the attorney general's consent controlled because it was enacted later. *Id.* at 148. Therefore, under that set of facts, the governor was prevented from appointing outside counsel on behalf of a state agency without the attorney general's consent. *Id.* at 148-49.

In *Sendak,* however, the Indiana Supreme Court did not consider the factual situation presented in this case: whether the governor can hire private counsel *to represent him in his official capacity* under the facts of this case, without obtaining the attorney general's consent. When the governor requires counsel to represent him, like in the present case, Ind. Code § 4-3-1-2 applies, allowing the governor to obtain independent counsel without the attorney general's consent. *Sendak* only applies when the governor attempts to hire outside counsel to represent an agency without the attorney general's consent. Because the Governor has retained counsel to represent him in his official capacity regarding his constitutional rights, rather than on behalf of a state agency, Ind. Code § 4-3-1-2 applies. Therefore, the Governor's outside counsel in this case is not "unauthorized" as the Attorney General alleges.

Accordingly, Attorney General Rokita's Motion should be denied on this additional basis.

C. THE STATUTES CITED BY ATTORNEY GENERAL ROKITA DO NOT APPLY TO THE GOVERNOR WHEN HE SEEKS INDEPENDENT REPRESENTATION

Attorney General Rokita argues that Indiana's governor cannot bring an action in his official capacity with his own independent counsel, unless the attorney general has consented. He is wrong. The Attorney General's arguments repeatedly fail to recognize the crucial difference between a "constitutional officer" – like Governor Holcomb – who does not require approval from the attorney general to retain outside counsel, and state "agencies," who do. Unlike many

provisions of the Indiana Code, Ind. Code § 4-6-5-6(b), which defines the agencies that are barred from hiring counsel without the attorney general's consent, does not include an "office" or "officer" within its definition of "agency." As the United States Supreme Court, various federal district courts, and Indiana appellate courts have repeatedly held, the distinction between a constitutional officer and an agency is crucial and often dispositive.

Furthermore, the Attorney General's contention that only his office may set forth the legal position of the State is undercut by numerous statutes expressly authorizing various state entities to retain outside counsel without his consent. As will be shown, the Governor's right to hire outside counsel to represent him in this case does not require the Attorney General's consent.

1. Governor Holcomb is a Constitutional Officer, Not an Agency or Agency Head Who Must Retain the Attorney General to Represent its Interests

Unlike many states, the Indiana Constitution does not provide for an attorney general. Rather, the position was created in its current form by the Indiana legislature in 1943. *Sendak*, 373 N.E.2d at 148. The statutes creating the position grant the attorney general the general power to "represent the state in any matter involving the rights or interests of the state." Ind. Code § 4-6-1-6. The attorney general also has the statutory authority to "prosecute and defend all suits instituted by or against the state of Indiana, the prosecution or defense of which is not otherwise provided for by law[.]" Ind. Code § 4-6-2-1. Finally, state ***agencies*** cannot hire outside counsel to represent them without the written consent of the attorney general. Ind. Code § 4-6-5-3(a).

Attorney General Rokita contends that the statute requiring written consent to hire outside counsel, Ind. Code § 4-6-5-3(a), applies to the Governor, thus describing the Governor's retention of outside counsel in this case as "unauthorized." In making that argument, however, Attorney General Rokita conflates the terms "agency" and "officer." They are two meaningfully different terms.

The Attorney General bases his argument that the Attorney General's consent is required before the Governor can retain outside counsel on Indiana Code § 4-6-5-3. Indiana's well-settled principles of statutory construction govern the evaluation of this argument. Indiana law is clear that statutes are interpreted on their enacted text. *R.R. v. State*, 106 N.E.3d 1037, 1043 (Ind. 2018). "We begin by interpreting the statute 'consistent with its plain meaning, by giving effect to what the legislature both said and did not say.'" *Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 834 (Ind. 2020) (quoting *KS&E Sports v. Runnels*, 72 N.E.3d 892, 907 (Ind. 2017)). As the Indiana Supreme Court has further explained: "to ascertain [legislative] intent, we must first look to the statutes' language. If the language is clear and unambiguous, we give effect to its plain and ordinary meaning and cannot resort to judicial construction." *D.P. v. State*, 151 N.E.3d 1210, 1216 (Ind. 2020) (quoting *Jackson v. State*, 50 N.E.3d 767, 772 (Ind. 2016)). *See generally, Esserman v. Ind. Dep't of Envtl. Mgmt.*, 84 N.E.3d 1185, 1192 (Ind. 2017) ("Had the legislature intended to subject the State to whistleblower liability, it could have expressed that intention any number of ways.")

a. The Relevant Statute Does Not Include "Officers" Within Its Definition of an "Agency"

Looking to the relevant statutory provisions with these principles of statutory construction in mind, it is clear that there is a fundamental difference between an "agency" and an "officer" with respect to the right to retain counsel.

Indiana Code § 4-6-5-3 provides that "no agency" can employ or hire an attorney to represent it without the attorney general's consent. "Agency" is defined in Ind. Code § 4-6-5-6(b) as a "board, bureau, commission, department, agency, or instrumentality of the state of Indiana." Ind. Code § 4-6-5-6(b). The governor does not fall under any of those categories; instead, the governor is a "constitutional officer." *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1260

(Ind. 2020). Giving the statute its plain meaning, as this Court should do (*D.P.*, 151 N.E.3d at 1216), a "constitutional officer" is not an "agency."

Furthermore, Ind. Code § 4-6-5-6(b) ends by providing "this chapter shall not be construed to apply where: . . . (4) a constitutional officer of the state is by law made a board, bureau, commission, department, agency, or instrumentality of the state of Indiana." This final provision makes two things clear: (1) the legislature considered constitutional officers when writing this statute and did not expressly include them except to name them in an exception; and (2) even where constitutional officers may be considered a board, bureau, commission, etc., they were not to be subject to this statute. Therefore, Ind. Code § 4-6-5-6 applies only to agencies as defined in that chapter, and does ***not*** apply to constitutional officers.

In sum, the Attorney General completely fails to recognize the distinction between agency and officer, repeatedly citing to statutes providing for the attorney general's representation of "agencies" and attempting to apply that definition to "officers." (*See* Motion, p. 3) (citing Ind. Code § 4-6-5-3 ("[n]o ***agency*** . . . shall have any right to name . . . or hire any attorney . . . to represent it or to perform any legal service in [sic] behalf of the ***agency*** and the state without the written consent of the attorney general.") (emphasis added); *Sendak*, 373 N.E.2d at 148 ("No State ***agency*** is permitted to hire another attorney to perform legal services unless the Attorney General renders his written consent.") (emphasis added).[5] The statutes relied upon by the Attorney General and the Defendants to claim that the Governor retained "unauthorized" outside counsel therefore do not apply.

[5] The only statute that includes the term "officer" cited by the Attorney General relates to the ***defense*** of an action. Ind. Code § 4-6-2-1 (providing the attorney general's authority to "defend all suits brought against the state officers in their official relations, except suits brought against them by the state"). Because the Governor initiated this action, this statute does not apply.

b. Other Statutes Related to State Government Expressly Include an "Office" or "Officer" Within Their Definition of "Agency"

The absence of an "office" or "officer" from the definition of "agency" in Ind. Code § 4-6-5-6(b) is telling in light of the fact that "offices" and "officers" are expressly included within the definition of "agency" in other sections of Title 4 of the Indiana Code, which contains the portions of the Indiana Code addressing matters relating to state offices and administration. Clearly, the General Assembly knows how to include an officer like the governor within the definition of "agency." But it elected not to include an "officer" within the ambit of those required to obtain the attorney general's consent before retaining outside counsel under Ind. Code § 4-5-6 et seq. upon which the Attorney General relies in his Motion to Strike.

For example, Ind. Code § 4-2-6 *et seq.*, sets forth ethical rules that state employees must follow. Indiana Code § 4-2-6-1(2) defines "[a]gency" for the purposes of that chapter as "an authority, a board, a branch, a bureau, a commission, a committee, a council, a department, a division, ***an office***, a service, or other instrumentality of the executive, including the administrative, department of state government." (Emphasis added).

In addition, the term "agency" is defined numerous times throughout Title 4 alone, and in many instances expressly includes "office" or "officer." In other instances, the definition of "agency" excludes "office" or "officer" from the definition of the same term.[6] As noted above,

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[6] Definitions of "Agency" or "State Agency" that do not include "office" or "officer". See Ind. Code §§ 4-1-6-1, 4-1-8-1, 4-1-13-1, 4-2-7-1, 4-3-24-2, 4-4-38.5-8, 4-6-3-2.5, 4-12-13-1, 4-13-1-1, 4-13-1.1-5, 4-13-1.3-2, 4-13-1.4-2, 4-13-4.1-1, 4-13-16.5-1, 4-13.1-1-4, 4-15-2.2-9, 4-15-13-1, 4-15-16-6, 4-20.5-5-1, 4-20.5-6-1, 4-23-7.3-8, & 4-23-25-1.

Definitions of "Agency" or "State Agency" that include "office", "officer," or both. See Ind. Code §§ 4-1-7.1-1, 4-1-10-2, 4-1-11-4, 4-2-6-1, 4-3-6-2, 4-3-25-2, 4-6-3-1, 4-6-5-6, 4-12-1-2, 4-13-2-1, 4-15-10-1, 4-15-10.5-4, 4-15-12-1, 4-15-14-6, 4-20.5-1-3, 4-20.5-22-3, 4-21.5-1-3, 4-22-2-3, 4-22-6-1, 4-22-10-1, 4-23-7.1-1, & 4-23-7.2-1.

statutory interpretation must consider "what the legislature both said and did not say." *Estabrook,* 140 N.E.3d at 834. The inescapable conclusion is that where the definition of "agency" in Title 4 of the Indiana Code does not expressly include an "office" or "officer," the General Assembly intended that exclusion.

Read in its entirety, it is clear that the statutory provisions requiring the attorney general's consent before hiring outside counsel (Ind. Code § 4-5-6 *et seq.*) limit those entities who must obtain the attorney general's consent to retain outside counsel to those expressly set forth in Ind. Code § 4-6-5-6. Therefore, contrary to his assertion, the Attorney General has no wide, sweeping, or broad mandate to exclusively litigate each and every case involving every person or component of the State of Indiana. The office of attorney general was created by statute and therefore can only exercise powers, consistent with our Constitution, expressly given to him by statute. As the Indiana Supreme Court has held, a state officer "exercises only such powers as may be delegated by legislative act. When a public officer derives his power and authority solely from the statute, 'unless a grant of power and authority can be found in the statute it must be concluded that there is none.'" *State ex rel. Young v. Niblack*, 229 Ind. 596, 602, 99 N.E.2d 839 (Ind.1951) (internal citations omitted). *See also generally State v. Huebner*, 230 Ind. 461, 475 104 N.E.2d 385 (Ind. 1952) (Emmert dissenting) ("A city attorney is an officer of limited authority the same as the Attorney General.")

2. Analogous Federal Law Supports the Governor's Ability to Directly Retain Outside Counsel

This interpretation that Ind. Code § 4-6-5-6 only applies to "agencies" and excludes the Governor is also supported by analogous federal law. Like a governor under Indiana law, the President of the United States is a "constitutional officer" and chief executive of the federal government's executive branch. *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992); *See also*

Carroll v. Trump, 2020 WL 6277814 (S.D.N.Y. Oct. 27, 2020) ("The president is a *constitutional* officer.") (emphasis in original). The United States Supreme Court in *Franklin* considered whether the Administrative Procedures Act ("APA"), which allows the judicial branch to review "agency actions," applied to decisions made by the President, a constitutional officer. *Franklin*, 505 U.S. at 791. The APA defines "agency," but that definition does not specifically include the President or specifically exclude him either. *Id*. The Supreme Court then had to assess whether the term "agency" included the chief executive as a constitutional officer.

The Supreme Court ruled that for a statute to apply to a "constitutional officer" such as the President, it must specifically refer to the President:

> Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. **We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion**. . . . As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.

Id. at 800-01 (citations omitted) (emphasis added).

Like the APA, the statute upon which the Attorney General relies for the broad authority that he seeks here, Ind. Code § 4-6-5-6(b), has a definition of "agency" that contains no express mention of Indiana's governor. Although the statutory provision makes reference to a "constitutional officer," that reference only appears in the exceptions to the rule rather than in the definition of "agency."[7] Consistent with the U.S. Supreme Court's opinion in *Franklin*, Ind. Code § 4-6-5-6(b) must specifically name the governor as included in the definition of agency for the

[7] "The term 'agency,' whenever used in this chapter, means and includes any board bureau, commission, department, agency, or instrumentality of the state of Indiana; provided, however, this chapter shall not be construed to apply where: . . . (4) A constitutional officer of the state is by law made a board, bureau, commission, department, agency, or instrumentality of the state." Ind. Code § 4-6-5-6(b).

statute requiring written consent from the attorney general to apply. To hold otherwise would run afoul of the "respect for the separation of powers and the unique constitutional position" of the head of the executive branch. *Franklin*, 505 U.S. at 800-01.

Attorney General Rokita is asking this Court to do precisely what *Franklin* forbids: imply that a statute applies to Indiana's governor when the operative provisions of the statute make no express mention of that constitutionally-created position. Such an interpretation would run afoul of separation-of-powers and the governor's unique position as the constitutional officer leading the executive branch. Indiana Code § 4-6-5-6(b) does not apply to Governor Holcomb; his outside counsel is authorized to appear on his behalf; and the Defendants' Motion should be denied.

3. The Indiana Code Expressly Authorizes Governmental Bodies to Retain Outside Counsel in Certain Circumstances

Again, contrary to the Attorney General's position, Indiana law does not unambiguously provide that the attorney general represents every component of the State in all situations. Particularly relevant are the numerous instances where state agencies, quasi-agencies, and even the legislature, have the statutory authority to hire outside counsel without the attorney general's consent. For example, Ind. Code § 4-15-2.2-18 permits the State Personnel Department to hire its own attorneys. Indiana Code § 2-3-9 *et seq*. provides that the General Assembly has reserved for itself the exclusive right to employ outside counsel whenever the legislature or a member is sued officially. Additionally, Ind. Code § 2-3-8 *et seq*. allows the General Assembly to bypass the attorney general when litigating redistricting lawsuits.

The Indiana Code also contains numerous provisions authorizing state entities known as "quasi-agencies" to retain outside counsel. *See* Ind. Code § 5-28-5-3(a) (the Indiana Economic Development Corporation "may, without the approval of the attorney general, employ legal counsel[.]"); Ind. Code § 5-1.2-3-8(a) (the Indiana Finance Authority "may, without the approval

of the attorney general or any other state officer, employ bond counsel [or] other legal counsel[.]");; Ind. Code § 5-1.5-3-2(8) (the Indiana Bond Bank may "appoint and employ general or special counsel[.]"); Ind. Code § 21-9-4-7(3)(F) (Board of Directors of the Indiana Education Savings Program); Ind. Code § 5-20-1-4(a) (Indiana Housing and Community Development Authority); Ind. Code § 5-10.5-4-1 (Board of Trustees of the Indiana public retirement system). If Attorney General Rokita were truly tasked with the duty and authority to create a "single, unified position" for the State of Indiana, these exceptions would not exist.

By its plain language, Ind. Code § 4-6-5-6 does not apply to the Governor in cases brought in his official capacity. The Defendants' Motion should therefore be denied.

II. THE ATTORNEY GENERAL MAY NOT REPRESENT BOTH PARTIES IN THIS ACTION

The Attorney General purports to represent the "State of Indiana" as his sole "client" in this case. The State of Indiana, however, is not a unified client who can be represented by a single attorney in this constitutional dispute. This is inter-branch litigation between separate branches of state government, and the Attorney General is attempting to represent separate clients whose interests in the litigation are in conflict. That representation directly violates the Indiana Rules of Professional Conduct, applicable to the Attorney General and his deputies, as well as the fundamentals of separation-of-powers.

A. THE INDIANA RULES OF PROFESSIONAL CONDUCT PREVENT THE ATTORNEY GENERAL FROM REPRESENTING BOTH GOVERNOR HOLCOMB AND THE DEFENDANTS AS HIS "CLIENTS"

The Attorney General filed his Motion and Appearances allegedly on behalf of a singular client, the "State of Indiana, including Governor Eric J. Holcomb, President Pro Tempore Rodric Bray, Speaker Todd Huston, the Legislative Council, and the Indiana General Assembly . . . ." That representation cannot occur under the Indiana Rules of Professional Conduct (the "Rules").

As provided in the Rules, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" which exists when "the representation of one client will be directly adverse to another client." Ind. Professional Conduct Rule 1.7(a)(1). Even the *mere possibility* of an "adverse effect upon exercise of free judgment" prevents a lawyer from representing clients with opposing interests. *Matter of Gerde*, 634 N.E.2d 494, 497 (Ind. 1994). The Rules apply equally to the Indiana Attorney General and to his deputies. Ind. Professional Conduct Rule 1.11(d)(1) ("a lawyer currently serving as a public officer or employee . . . is subject to Rules 1.7 and 1.9[.]"); *see also Matter of Hill*, 144 N.E.3d 184, 192 (Ind. 2020) (applying the Rules of Professional Conduct to the Attorney General).

Although the Attorney General argues that he has a duty to defend state agencies under Ind. Code § 4-6-2-1, that duty does not allow him to serve as arbiter of a dispute by representing clients who have divergent interests. *See* Curt A. Levely & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 391 (2014) (providing that the Attorney General "must examine the Acts of Congress and the Constitution to determine what they require of him; and if he finds in a given case that there is a conflict between" those requirements, "**he must acknowledge his dilemma and decide how to proceed**.") (emphasis added). Former Indiana Attorney General Greg Zoeller contemplated this dilemma and found that "[a]t the state level, the divided executive structure largely mitigates [conflict of interest] concerns because the governor or another enforcement officer could challenge a statute that infringes on his office's powers while the attorney general simultaneously defends the statute." Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 541 (2015).

Federal courts have also recognized that separate branches of government can be individual litigants in inter-branch disputes. *See, e.g., Committee on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (holding that House Judiciary Committee had Article III standing to pursue civil action to enforce subpoena to former White House counsel Donald McGahn); *Arizona State Legislature v. Arizona Independent Redistricting Commission,* 576 U.S. 787, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (holding that Arizona state legislature had standing to sue redistricting commission and secretary of state over usurpation of legislature's authority to redistrict). In none of these, or many other similar cases, have courts held, or even suggested, that the various branches of federal or state government are one, unified "client." Rather, those separate governmental entities have been treated as separate parties, with separate interests, as they should be.

This is consistent with the Rules of Professional Conduct as well. Rule 1.13 provides guidance for attorneys representing organizations. As set forth in Comment 9 to Rule 1.13, "this Rule applies to governmental organizations." Subsection (f) of Rule 1.13 expressly provides that a lawyer representing an organization may also represent its "officers" or "other constituents" "subject to the provisions of Rule 1.7."

Attorney General Rokita has refused to "acknowledge his dilemma" under Rule 1.7 by representing one side in this case – and, in doing so, seeks to essentially prevent the other party from pursuing legal redress. Instead, the Attorney General is attempting to represent *multiple clients* in a legal dispute whose interests are in direct conflict, a decision and action directly forbidden by the Rules. The Attorney General's purported representation of the Governor in the Motion is in direct violation of the Rules, and therefore may not continue unless both the Governor Holcomb and Defendants give their written consent to the Attorney General permitting him to

represent both parties in this action. *See* Ind. Professional Conduct Rule 1.7(b)(4). *The Governor has given no such consent here.* To the extent the Attorney General contends he may choose a side in this dispute, that option is no longer available to him; he has already publicly sided with, and provided consultation to, the Defendants.[8]

For the same reason, the Attorney General, who has entered an appearance for Governor Holcomb in this matter, should have that appearance stricken as he does not represent Governor Holcomb. Governor Holcomb is adverse to Attorney General Rokita's view of the law here, and he has not asked Mr. Rokita to represent them under these circumstances. Procedurally, at a minimum, his appearance for Governor Holcomb should be stricken.

The Attorney General's duty to defend the statute in question – HEA 1123 – puts him in direct conflict with the Governor's action seeking to declare it unconstitutional. Accordingly, that conflict of interest prevents the Attorney General from representing the Governor or denying the Governor his right to counsel.

B. THE JUDICIARY, NOT THE ATTORNEY GENERAL, DECIDES THE CONSTITUTIONALITY OF STATUTES

The Attorney General also argues that he is charged with adopting a "single, unified, and consistent position on legal issues" that would apparently require the Attorney General to represent both Governor Holcomb and the Defendants in this action. Beyond the clear conflict of interest implicated by that position, that flawed interpretation also runs afoul of Indiana's system of government.

[8]Defendant Todd Huston: "We are in consultation with the Indiana Attorney General's Office on what the next steps will be in this matter." https://www.ibj.com/articles/holcomb-files-lawsuit-against-legislature-challenges-law-that-weakens-his-emergency-powers

The Attorney General has the right to "represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law." Ind. Code § 4-6-1-6. That right allows the Attorney General to "establish a general legal policy for State ***agencies***." *Sendak*, 373 N.E.2d at 148 (emphasis added). It does not, as Attorney General Rokita contends, grant the him the *sole* right to determine the constitutionality of statutes passed by the General Assembly and to prevent the Governor from obtaining counsel to defend his constitutional powers; that authority is reserved for the judicial branch. *City of Bloomington*, 158 N.E.3d at 1263 ("'in exercising the judicial function of government,' the judiciary has the power and 'the inevasible duty' in cases such as these 'to declare legislative enactments void when the body has, in such an enactment, gone beyond or outside the power granted to it.'") (quoting *Ellingham v. Dye*, 99 N.E. 1, 19, 21 (Ind. 1912)). "In fact, the ability of an independent judiciary to check the other branches and declare statutes unconstitutional was one of the central principles underlying the thinking of the framers of the Indiana Constitution and also the Constitution of the United States." *Id.* (quotations omitted). "[I]f the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void." *Tucker*, 35 N.E.2d at 283.

The Attorney General, a statutorily-created position, would have this Court believe that he exercises greater authority on Indiana constitutional questions than the constitutionally-created judicial branch. To hold so would create an absurd result, allowing a statutory officer created by the legislative branch to forbid the governor, who is a constitutional officer and also head of the executive branch, from challenging legislative overreach. That is why the attorney general's alleged "exclusive power" to adopt a "single, unified, and consistent position on" inter-branch Indiana constitutional questions does not appear in the Indiana Constitution, the Indiana Code, nor

prior opinions by courts of this State. It is a legal fiction created by the Attorney General to expand his authority beyond his statutory duties and powers. This Court, not the Attorney General, is the proper constitutional body to determine whether HEA 1123 unconstitutionally grants the General Assembly a power exclusively given to the governor by our Constitution.

Attorney General Rokita's argument that he alone must decide the State's position on the constitutionality of a law passed by the General Assembly is not well-supported. In fact, that position is directly contradicted by the Indiana Code, which specifically allows the General Assembly to hire independent counsel without the attorney general's consent. Under Ind. Code §§ 2-3-9-2 and 3, both the Speaker of the House of Representatives and the President Pro Tempore of the Senate "may employ one (1) or more attorneys necessary to defend a lawsuit" brought against any individual senator/representatives or the senate/house of representatives as a body "**without obtaining the consent of the attorney general**." (emphasis added). If the attorney general were truly charged with determining the "single, unified" position for all of state government, this negates that theory. Indeed, in the present case, the House and the Senate could have decided to be represented by outside counsel of their own choice, and Attorney General Rokita could not prevent that from occurring. *See also* Ind. Code § 2-3-8-1 ("The House of Representatives and Senate of the Indiana General Assembly are hereby authorized and empowered **to employ attorneys other than the Attorney General** to defend any law enacted creating legislative or congressional districts for the State of Indiana.") (emphasis added). These statutes further undermine Attorney General Rokita's opinion that he alone acts as the arbiter of Indiana law.

Attorney General Rokita cites to numerous inapplicable or distinguishable cases to support their position. First, the Court in *Ritz et al. v. Elsener et al.*, cited *supra*, relied upon both *Sendak*

and *Niblack*, to determine that then-Superintendent of Public Instruction Glenda Ritz required the attorney general's consent to obtain outside counsel. As discussed, *supra*, *Sendak* does not apply in this case where the governor is hiring counsel to represent him rather than attempting to obtain counsel on behalf of a state agency. The litigation in *Ritz* also involved the propriety of hiring outside counsel for an intra-agency dispute between the Superintendent and the State Board of Education. That has no application to the present litigation brought by a constitutional officer to defend his constitutional rights against impermissible encroachment by another branch of state government. Thus, like *Sendak*, it is distinguishable and inapplicable here.

The trial court's order in *Ritz* also relied upon *Niblack*, but that similarly does not apply here. In *Niblack*, the Superintendent of Public Instruction brought his claim on behalf of the State of Indiana. 99 N.E.2d at 840. Here, the Governor is bringing this case in his official capacity only. Additionally, the Indiana Supreme Court in *Niblack* found no independent statutory authority for the Superintendent to obtain counsel. *Id.* at 841. As discussed *supra*, the Governor, on the other hand, has both independent statutory authority to obtain counsel under Ind. Code § 4-3-2-1, as well as his inherent authority to check the other constitutional branches pursuant to Ind. Const. Art. 3 § 1 and otherwise. Because *Ritz* relied upon the inapplicable opinions of *Niblack* and *Sendak*, the trial court's order in *Ritz* is unpersuasive.

The remaining cases cited by the Attorney General similarly offer no guidance. In *Eberle v. Indiana Dep't of Workforce Development*, the District Court entered an order striking the appearance of outside counsel attempting to appear on behalf of the Indiana Department of Workforce Development ("DWD"). Unlike the governor, who is a "constitutional officer," the DWD is an agency subject to Ind. Code § 4-6-5-6. In *Bernard v. Individual members of the Ind. Med. Licensing Bd.,* an attorney for the City of Indianapolis entered an appearance on behalf of

the Marion County Prosecutor. The Court found that only the attorney general had the authority to represent the prosecutor in that case because the attorney general had the duty to ***defend*** the officer under Ind. Code § 4-6-2-1. As discussed *supra*, the Governor initiated this action, making the Attorney General's duty to defend officers inapplicable.

Finally, the court in *Buquer v. City of Indianapolis* denied a motion to intervene by Indiana State Senators who wished to join the City of Indianapolis, Marion County Prosecutor, City of Franklin, Johnson County Sheriff, and Johnson County Prosecutors as defendants. That denial of a motion to intervene does not apply to the present motion to strike, as the District Court determined that "the proposed intervenors [] failed to assert an interest sufficient to confer Article II standing." That can hardly be used to justify a motion to strike here. Those cases, therefore, offer no precedential or persuasive value.

None of the cases relied upon by the Attorney General make any reference to a source of Indiana law which "vests the Attorney General alone with authority to determine the State's position on legal questions . . . ." (Motion, pp. 5-6). Under Indiana law, the attorney general does not decide the constitutionality of laws passed by the General Assembly; that power belongs to the judiciary. Allowing the attorney general alone to determine a "single, unified, and consistent position on legal issues" affecting the constitutionality of statutes, when there is a constitutional dispute between the executive and legislative branches involving same, would undermine the separation-of-powers established by our Constitution. This Court should not allow such a result. Instead, as the Defendants previously stated, the parties should "let the courts decide" this case.

III. THE CONSTITUTION DOES NOT PROTECT THE DEFENDANTS FROM PROCESS IN THIS INSTANCE

Despite the Attorney General's assertions, and as noted at the outset of this Response, this case does not concern the Governor suing legislators "over laws he does not like." (Motion, p. 6).

Instead, the Governor has brought this suit to resolve a constitutional controversy between the executive and legislative branches in order to prevent "disruption to Indiana and the proper functioning of state government – something that concerns every Hoosier." (Complaint, ¶ 11). When the General Assembly oversteps its constitutional boundaries by unconstitutionally usurping the Governor's exclusive authority to call special sessions of the General Assembly, the Governor must take action to protect his constitutional powers. In those instances, legislative immunity cannot apply.[9]

A. LEGISLATIVE IMMUNITY CANNOT APPLY TO SEPARATION OF POWERS ISSUES

Attorney General Rokita misapplies Article 4 § 8 of the Indiana Constitution in an attempt to dismiss, or simply delay, this extraordinarily important and urgent case. The legislative immunity conferred by the Indiana Constitution does not apply to cases where the judiciary must resolve constitutional questions when the separation-of-powers is implicated. Because HEA 1123 constitutes legislative overreach into the executive branch's exclusive powers -- thus warranting a declaratory judgment and permanent injunction -- legislative immunity cannot apply.

Article 4, Section 8, of the Indiana Constitution, known as the "Speech and Debate Clause," provides that "Senators and Representatives . . . shall not be subject to any civil process, during the session of the General Assembly, nor during the fifteen days next before the commencement thereof." This section confers "legislative immunity" upon legislators in their **individual capacities** to "preserve legislative independence." *U.S. v. Brewster*, 408 U.S. 501, 508 (1972). However, this clause was designed to only "preserve legislative independence, not [its]

[9] Section III of this Response only pertains to Defendants Rodric Bray and Todd Huston in their official capacities. The General Assembly itself and the Legislative Council are not "Senators and Representatives" as provided in Article 4 § 8 of the Indiana Constitution, and therefore cannot assert legislative immunity. *See, e.g., ICLU v. Indiana General Assembly*, 512 N.E.2d 432 (Ind. Ct. App. 1987) (allowing Access to Public Records Act suit to proceed against General Assembly).

supremacy." *Id.* Accordingly, when separation-of-powers between branches of government is implicated, legislative immunity under the Speech and Debate Clause cannot stand. *Id.* ("Our task, therefore, is to apply the Clause in such a way as to ensure the independence of the legislature **without altering the historic balance of the three co-equal branches of Government**.") (emphasis added); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) ("This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role.").

By arguing for the position they set forth in their Motion, the Defendants are attempting to use legislative immunity as a means to ensure the legislature's supremacy by preventing this Court from moving forward to resolve this serious dispute. As noted in the Governor's Complaint that was filed, HEA 1123 grants the General Assembly, through its Legislative Council, the ability to call an "emergency session" of the General Assembly, which is a special session by another name, at any time during a state of emergency. That power infringes upon the Governor's exclusive constitutional authority to declare "special sessions" of the General Assembly conferred upon him by the Indiana Constitution. *See* Ind. Const. Art. 4 § 9 ("But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session."). Therefore, this instance represents the exact type of infringement by the legislature where legislative immunity cannot apply. *See Brewster*, 408 U.S. at 508; *Tenney*, 341 U.S. at 376.

The Defendants cite to *Hansen v. Bennet*, 948 F.2d 397 (7th Cir. 1991), but that case does not favor the Defendants' simplistic view of legislative immunity. Although legislative immunity is intended to "protect the integrity of the legislative process" as Defendants argue, *Hansen* provides that such immunity should not be promulgated to create "a broad, per se rule which eliminates all immunity for the commission form of government." *Id.* at 404. Instead, when

analyzing the scope of legislative immunity, courts should "not [] extend the scope of the protection further than its purposes require." *Id.* (quoting *Forrester v. White*, 484 U.S. 219, 223 (1988)). That situation presents itself here: granting legislative immunity to the Defendants would allow them to usurp the power of the executive branch without recourse, thereby undermining the separation-of-powers enshrined in our Constitution. Ind. Const. Art. 3 § 1 ("no person, charged with official duties under one of" the three branches of government "shall exercise any of the functions of another . . . ."). For that reason, the immunity conferred upon the legislature through the Speech and Debate Clause does not apply in this particular situation.

B. THE UNIQUE CIRCUMSTANCES OF THIS CASE ARE OUTSIDE THE SCOPE OF LEGISLATIVE IMMUNITY AS CONTEMPLATED BY THE INDIANA CONSTITUTION

The unique circumstances of this case prevent the application of the Speech and Debate Clause, the purpose of which was not to insulate the legislature from constitutional challenges by other branches of government.

The "Speech and Debate Clause" was enacted to grant immunity "to protect the legislators from distraction during the stated periods of time" in which the legislature was in session. *Seamans v. Walgren*, 514 P.2d 166, 168 (Wash. 1973) (construing similar "Speech and Debate" clauses in various state constitutions); *see also Auditor General v. Wayne Circuit Judge*, 208 N.W. 696, 697 (Mich. 1926) ("The idea back of the constitutional provision was to protect the legislators from the trouble, worry and inconvenience of court proceedings during the session . . . so the State could have their undivided time and attention in public affairs.").

Here, the Defendants do not seek immunity to protect themselves "from distraction during" the legislative session. In fact, the General Assembly has adjourned and is not currently engaged in legislative activity. This action presents a question of the validity of legislation that was passed, which does not involve a factual dispute but rather presents a question of law for this Court. It

does not require depositions or testimony of legislators or other typical discovery or matters of litigation that might be a distraction to legislators or take them away from their legislative duties. No court proceedings would interfere with any committee hearings, drafting of or deliberating over new legislation, or other functions of the legislature. Therefore, there is no threat of "trouble, worry, and inconvenience of court proceedings during the session" that gave rise to the protections included in Art. 4 § 8.

Instead, the Defendants are attempting to use legislative immunity as a shield to protect them against claims of unconstitutional activity for a length of time unprecedented in our State's history. Instead of having session for only a few months this year, the regular session will continue for virtually the entire calendar year, after which the next regular session will promptly begin and then continue through March 2022. The interpretation that legislative immunity, pursuant to Art. 4 § 8, would prevent the Governor from bringing this case until March 2022, would allow the Legislative Council to institute an unconstitutional "emergency session" without challenge during that lengthy period of time. This is especially true considering the General Assembly passed HEA 1123 on an "emergency" basis, meaning the law went into effect before the current session could end, and, under Attorney General Rokita's theory, preventing that new law from any legal challenge. The unique circumstances presented by this case are beyond the contemplated scope of legislative immunity provided by the Indiana Constitution. Accordingly, the Defendants should not be immune from civil process.

Legislative immunity, like that provided for in Art. 4 § 8, has questionable application, as noted above, in the context of a "continuing legislative session" beyond the normal part-time sessions that have always existed. *Seamans*, 514 P.2d at 168. Accepting the Defendants' argument that they cannot be sued in this instance while the legislature is "in session" would create an absurd

result, providing the legislature with unchecked power for an extended period of time. When adopting the 1851 Indiana Constitution, or even the 1970 amendment thereto, legislative immunity was not considered in the context of a year-round legislature that would, in essence, shield the legislature from any legal challenge. Indeed, the General Assembly could simply continue to pass unconstitutional legislation like HEA 1123, usurping the power of the executive branch while maintaining immunity from legal challenge by refusing to end its regular session. Such a result would substantially alter, and interfere with, the "checks and balances" inherent in Indiana's three-branch form of government. *See* THE FEDERALIST No. 48 (James Madison) ("It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."). That type of unchecked power favoring the legislative branch directly contradicts the principle of separation-of-powers that protects the proper functioning of state government under our Constitution. Accordingly, the Defendants cannot rely upon legislative immunity here.

CONCLUSION

There is no authority for the Attorney General's argument that the Governor must obtain the Attorney General's consent before retaining independent counsel to pursue actions in his own official capacity. The Attorney General's Motion should be denied on that basis alone. Instead, the Governor has both the inherent constitutional and statutory authority to retain independent counsel for this action. By attempting to remove Governor Holcomb's counsel and insert himself in their place, Attorney General Rokita seeks to constrain the Governor's attempt to prevent the General

Assembly from usurping his constitutional powers. In addition, the Attorney General does not have the sole authority to decide issues of Indiana constitutional law or to represent all of state government in all matters. Instead, the parties, as they have previously stated, should "let the courts decide." Finally, the separation-of-powers implicated by this case prevents the use of legislative immunity to avoid civil process. For these reasons, the Attorney General's Motion should be denied. Additionally, Attorney General Rokita's unauthorized appearance for Governor Holcomb should be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2021, a copy of the foregoing was served on the following parties electronically by using the Court's IEFS System and U.S. Postal Service, pre-paid delivery for those parties not yet registered.

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