STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 12
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D12-2104-PL-014068
	)	
ERIC J. HOLCOMB, GOVERNOR OF THE STATE OF INDIANA, Plaintiff,	)	
v.	)	
RODRIC BRAY, ET AL., Defendants.	)	

REPLY IN SUPPORT OF MOTION TO STRIKE AND FOR ALTERNATIVE RELIEF

As both the Office of the Attorney General and the Indiana Supreme Court have long recognized, Indiana law vests the Attorney General with the authority and responsibility for setting a single legal policy on behalf of the State; Indiana courts, meanwhile, have authority to resolve concrete and justiciable legal disputes. The Attorney General therefore neither "seeks to usurp the role of the judiciary" nor claims "that he, and he alone, is to determine the constitutionality of HEA 1123" (Response at 5). If HEA 1123 imposes a concrete injury on a private party that challenges the statute's validity in a justiciable case, Indiana courts will resolve that dispute.

The question here is instead whether the Governor—who in his official capacity *is* the State (or a part of it)—may, without the consent of the Attorney General, call *another* branch of the State to account before yet a *third* branch of the State. The Indiana Supreme Court's decisions in *Sendak* and *Niblack* squarely say no: *Sendak* upholds the statutes vesting the Attorney General with exclusive authority to set a single legal policy for the State, and *Niblack* applies those statutes to a suit by a constitutional officer. And far from altering this conclusion, the Rules of Professional

Conduct recognize the Attorney General's authority to resolve conflicting legal positions and expressly provide that the Rules do not in any way limit that authority.

Unauthorized counsel acknowledge that Indiana statutes vest the Attorney General with *some* exclusive litigation authority for the State and its officials yet offer no consistent or coherent theory limiting that authority. Article 3 section 1 does not confer on constitutional officers a freestanding power to challenge statutes in court. Indeed, the separation of powers exists to protect the liberty of the governed—not the prerogatives of public officials. The Governor already exercised his constitutional role in vetoing HEA 1123; having been overridden by the General Assembly, he is not entitled to another veto via litigation. To confer such authority, this Court would have to invalidate, overturn, or ignore the original understanding of the Indiana Constitution, not to mention statutes and cases going back more than half a century.

Accordingly, unauthorized counsel may not litigate on behalf of the State in the person of the Governor, and the proper remedy, as the State's motion explains and illustrates (Motion to Strike, Exhibits 1–6), is to strike their appearances. Doing so will ensure that the State maintains a single, unified legal position in court (and preserve legislative independence).

I. Binding Precedent Bars the Governor from Hiring Outside Counsel Without the Attorney General's Consent

A. Indiana Supreme Court precedent and longstanding practice confirm that the laws creating and empowering the Office of the Attorney General are constitutional

Unauthorized counsel assert that the Governor has "inherent constitutional authority to hire counsel" that somehow limits the statutes creating and empowering

the Office of the Attorney General (Response 7). That assertion contradicts binding Supreme Court precedent and decades of practice.

1. The Indiana Supreme Court has long recognized that the General Assembly has lawfully placed authority to direct the State's litigation in the Attorney General

The Indiana Supreme Court in *Sendak* expressly repudiated the claim that, when it comes to hiring counsel and directing litigation, the Governor's "inherent" constitutional authority overrides the Attorney General's statutory authority. There, the Court squarely rejected the notion "that the consent requirement is unconstitutional because it conflicts with the Governor's constitutional responsibility to exercise executive power." *State ex rel. Sendak v. Marion Cty. Superior Ct., Room No.2*, 268 Ind. 3, 8–9, 373 N.E.2d 145, 149 (1978). While the Court "recognize[d] that the executive power of the government is vested not in the various departments and agencies, but in the Governor alone," (citing *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941)), it held that this principle did not conflict with the legislature's decision to vest responsibility for setting a unified legal position for the State in an elected Attorney General. *Id.* The Court explained that "[i]n defending a lawsuit the Attorney General is not dictating policy or directing the State, but is merely defending the State." *Id.* And it concluded that "the legislature has chosen to vest the responsibility for the legal representation of the State in the Attorney General. This Court cannot disregard so clear an expression of that body." *Id.*

Unauthorized counsel argue that *Sendak* only rejected the claims of a statutorily created state agency, while the Governor is a constitutional officer with the constitutional authority to direct his own litigation (Response 4–6, 8–9 (citing *Tucker*, 35

N.E.2d at 280)). But *Sendak* squarely addressed the limits of the Governor's executive authority and did not recognize, much less turn on, any distinction between constitutional officers and statutory agencies; after all, in *Sendak* it was the Governor who requested outside counsel for the agency in the first place. 373 N.E.2d at 147. Indeed, *Sendak* expressly acknowledges that "[t]he Attorney General is charged with the responsibility of defending the State *and its officers* and employees when sued in their official capacities." *Id.* at 148 (emphasis added).

No principled distinction exists between the Governor's asserted authority to *direct* an agency's litigation in *Sendak* and unauthorized counsel's asserted authority to *initiate* litigation for the Governor here. As the Court recognized in *Sendak*, the statutes delineating the authority of the Attorney General "must be construed as giving the Attorney General the *sole responsibility* for the *legal representation* of the State." *Id.* at 149 (second emphasis added). The term "legal representation" plainly makes no distinctions among the roles of plaintiff, defendant, counterclaimant, cross-claimant, intervenor, or any other participant in a legal case. And the Attorney General is no more "dictating policy or directing the State" here, where the Governor presumes to act as plaintiff, than in *Sendak*. No matter on which side of the "v." an official appears, all state-official litigation involves the *defense* of the State's legal interests and thereby implicates the Attorney General's exclusive authority.

Notably, a constitutional claim by the Governor in his official capacity is a claim by the State that will bind the State. "[T]he State is the State," explained the Supreme Court in *Becker v. State*, 992 N.E.2d 697, 698 (Ind. 2013), when it ruled that

a prosecuting attorney's failure to appeal a sex-offender-registry case bound the Department of Correction. And where, as here, the Governor as the State seeks to pursue a legal claim without the Attorney General's consent, it impedes the Attorney General's core mission to adopt a unified litigation position on behalf of the State. The result is different state officials taking contradictory legal positions in court and thereby jeopardizing the State's legal interests—precisely the situation the Office of the Attorney General was created to prevent. If anything, such a suit is a *greater* impediment to the Attorney General's statutory responsibilities than the Governor's unauthorized retention of outside counsel at issue in *Sendak*.

Further, *Sendak* expressly rejects the theory that *Tucker* limits the General Assembly's ability "to vest the responsibility for the legal representation of the State in the Attorney General." 373 N.E.2d at 149 (citing *Tucker*, 35 N.E.2d at 270). After all, *Tucker* itself involved a challenge to, among other things, the statute recreating the independently elected post of Attorney General and invalidated only a minor provision of the statute governing who would appoint the interim Attorney General to serve before the elected Attorney General took office. The Court never suggested that the Constitution in any way limited the statute's substantive provisions conferring litigation authority upon the Attorney General. *See Tucker*, 35 N.E.2d at 304.

2. State officials have long recognized that the General Assembly has lawfully placed authority to direct the State's litigation in the Attorney General

Sendak's conclusion that the Constitution permits the General Assembly to vest the Attorney General with the authority to establish a unified legal position for

the State accords with the long history of the Office. The General Assembly first created the Office of Attorney General as an independently elected position in 1855, just four years after the State adopted its current 1851 constitution. *Hord v. State*, 167 Ind. 622, 633, 79 N.E. 916, 920 (1907). The Office continued in this manner until it was abolished in 1933, and less than a decade later the Legislature "recreated the office of Attorney General" and again charged him with "represent[ing] the state of Indiana in any matter involving the rights or interests of the state, including actions in the name of the state of Indiana, for which provision is not otherwise made by law." *State ex rel. Young v. Niblack*, 229 Ind. 596, 603–04, 99 N.E.2d 839, 842 (1951) (internal quotation marks and citation omitted); *see also Ind. Legislation-1941*, 17 Ind. L. J. 129, 134 (1941).

The Office of the Attorney General thus plainly comports with the Indiana Constitution as originally understood. The Office has existed for over 156 years of the State's history, and over that time Indiana courts have consistently affirmed the Attorney General's "exclusive power and right in most instances to represent the State, its agencies and officers," including by recognizing that "agencies and officers may not hire outside counsel unless the Attorney General has consented in writing." *Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979); *see also Niblack*, 99 N.E.2d at 841.

Furthermore, longstanding practice by both the current Governor and his predecessors confirms the Attorney General's litigation authority. This Governor, of course, solicited the Attorney General's consent to hire outside counsel for this very case; only after the Attorney General denied the request did the Governor contend

that no such consent was necessary. *See* Kayla Sullivan, *A legal battle splits Republican party on emergency powers* (Apr. 27, 2021), https://cbs4indy.com/news/a-legal-battle-splits-republican-party-on-emergency-powers/ (last visited May 23, 2021).

More broadly, the Governor is frequently named as a defendant in suits challenging the constitutionality of state laws and executive orders. *See, e.g., Holcomb v. City of Bloomington,* 158 N.E.3d 1250 (Ind. 2020); *Bonney v. Indiana Fin. Auth.*, 849 N.E.2d 473 (Ind. 2006). And the Governor consistently accedes to the Attorney General's authority to conduct such litigation, even including recent cases challenging the Governor's authority to issue executive orders during the pandemic requiring face coverings and limiting the capacity of public venues. *See, e.g., Yergy's State Rd. BBQ, LLC v. Holcomb*, 90C01-2012-PL-000015 (Wells Circuit Ct.); *Ceruti Catering, Inc. v. Allen Cty. Health Dep't & Holcomb*, 02D03-2103-PL-000101 (Allen Superior Ct.).

3. The Attorney General's authority to set a single litigation position for the State *furthers* the separation-of-powers cause

Unauthorized counsel also argue (Response 6) that limiting the Governor's ability to hire counsel to assert a particular claim in Court against another branch of government somehow "prohibit[s] a governor from exercising his constitutional duties to prevent legislative encroachment on executive powers in violation of" the separation of powers principle of Article 3, Section 1 of the Indiana Constitution. Not so.

First, unauthorized counsel cite no authority for the proposition that the Constitution's separation of powers exists for the benefit of officeholders. Rather, as Justice Slaughter recently observed, "the principal reason for separating governmental power was to protect liberty and avoid tyranny." *Horner v. Curry*, 125 N.E.3d 584,

612 (Ind. 2019). Lawsuits by government officials seeking to overturn statutes that allegedly encroach on their authority, therefore, do not necessarily advance the separation-of-powers cause. Crucially, if a statute *does* violate the separation of powers and thereby injures a private person, that person can seek redress in court against an appropriate defendant.[1]

The laws creating and empowering the Office of the Attorney General thus do not prevent private individuals from securing the liberty protected by the Constitution's separation-of-powers provision; they merely prevent state officials from unilaterally invoking judicial power as leverage to resolve inter-branch disputes over constitutional meaning. Indeed, far from undermining separation-of-powers principles, the Supreme Court has long recognized that the General Assembly created an independently elected Attorney General to implement "checks and balances in government." *Indiana State Toll-Bridge Comm'n v. Minor*, 236 Ind. 193, 199, 139 N.E.2d 445, 448 (1957).

Second, no Constitutional text confers upon the Governor a freestanding duty or power "to prevent legislative encroachment on executive powers in violation of" Article 3, Section 1 (Response 6). Instead, at its most general, the Constitution confers upon the Governor the power to execute the laws, which the Supreme Court has already said does *not* include litigating civil cases. *See Sendak*, 373 N.E.2d at 149 (rejecting the notion that the Governor's "executive power" prevents the legislature from

[1] As it happens, a private citizen has filed a lawsuit in Marion Superior Court challenging the same provision of HEA 1123. *Whitaker v. Bray*, 49D02-2104-PL-14586. Whether and when that case may be properly justiciable remain open questions.

"vest[ing] the responsibility for the legal representation of the State in the Attorney General").

And even aside from the Attorney General's statutory consent power, a host of barriers prevent the Governor from using the courts "to prevent legislative encroachment on executive powers," including the inapplicability of the Declaratory Judgment Act and the threshold doctrines of standing, redressability, and legislative immunity. *See Indiana Fireworks Distrib. Ass'n v. Boatwright*, 764 N.E.2d 208, 210 (Ind. 2002) ("A state official, acting in his or her official capacity, may not bring a declaratory judgment action . . . ." (internal quotation marks and citation omitted)); *Horner*, 125 N.E.2d at 589 (observing that standing requires a plaintiff to "'show adequate injury or the immediate danger of sustaining some injury'" (internal quotation marks and citation omitted)); *Stoffel v. Daniels*, 908 N.E.2d 1260, 1271 (Ind. Ct. App. 2009) (explaining that a plaintiff must show that the defendants are "the proper parties from whom to seek redress"); *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) ("[S]tate legislators enjoy common-law immunity from liability for their legislative acts . . . .").

In refusing to give consent for unauthorized counsel to litigate this case, the Attorney General has taken all these barriers to litigation into account (in addition to his view of the constitutionality of HEA 1123) and determined that keeping them intact serves the best legal interests of the State and *all* its officials. *Cf.* Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L.J. 513 (2015) (explaining the Attorney General's obligation to defend lawfulness of statutes and executive actions

where any good faith basis for defense is available). Unauthorized counsel, by contrast, would wipe them out in one fell swoop by invoking a supposed non-textual "inherent" power of just one official to demand judicial intervention.

Third, the Constitution structures the powers of the Governor and General Assembly vis-à-vis one another in a very specific way: through the enactment, presentment, veto, and override mechanisms. *See* Ind. Const. art. 4, § 25; Ind. Const. art. 5, § 14. Through such mechanisms, the Governor and General Assembly act based on their respective institutional views of the Constitution, including Article 3, Section 1. A lawsuit by the Governor against legislators to invalidate a law enacted over the Governor's veto amounts to a demand for a "super" veto via the judiciary. It is no small thing for one branch of government to drag another branch of government to account before the third branch of government. No constitutional provision secures to officials of any branch such extraordinary power.

B. The Indiana Supreme Court's decisions and the statutory text foreclose unauthorized counsel's statutory argument

Accordingly, it is now beyond question that the statutes creating the Office of the Attorney General and vesting it with exclusive litigation authority comport with the Indiana Constitution. And the Indiana Supreme Court has further held that those statutes do not authorize the Governor to retain outside counsel to advance claims and defenses in court without the consent of the Attorney General.

1. *Sendak* and *Niblack* hold that the Attorney General's exclusive litigation authority extends to suits by all state officials, including the Governor

Indiana law confers upon the Attorney General the authority to "have charge of and direct the prosecution of *all civil actions* that are brought in the name of the state," Indiana Code § 4-6-3-2 (emphasis added), and for this reason prohibits state agencies and officials from "employ[ing], or hir[ing] any attorney . . . to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general," *id.* § 4-6-5-3. Unauthorized counsel argue (Response 7–8) that this authority is limited by a separate statutory provision purporting to authorize the Governor to employ counsel "to protect the interest of the state in any matter of litigation where the same is involved." Ind. Code § 4-3-1-2. Yet the Supreme Court rejected this exact argument in *Sendak*.

There, unauthorized counsel "contend[ed] that the enforcement of the consent requirement here violates IC § 4-3-1-2 (Burns' 1974), which gives the Governor the power to employ counsel in litigation where the State has an interest." *Sendak*, 373 N.E.2d at 148. The Indiana Supreme Court rejected that argument, explaining that "[w]hen two statutes are in conflict the earlier statute will be impliedly repealed and the latter enactment will control." *Id.* The Court observed that "the legislature passed what is now IC § 4-3-1-2" in 1852, "at a time when there was no Attorney General in this State," and "[t]he office of the Attorney General was created by a series of later statutes, beginning in 1889." *Id.* The Court concluded that these later statutes creating the Office of the Attorney General "must be construed as giving the Attorney General the sole responsibility for the legal representation of the State." *Id.* "There

clearly is an irreconcilable conflict between the statute giving the Governor the power to employ counsel in litigation and the statute setting forth the duties of the Attorney General and hence *the latter enactments must prevail*." *Id.* (emphasis added).

Unauthorized counsel's attempt to distinguish *Sendak*'s statutory analysis—on the ground that it applies only when the Governor attempts to hire outside counsel to represent an agency (Response 9)—finds no grounding in either *Sendak* or the statute. On the contrary, *Sendak* explicitly provides that "to the extent that IC § 4-3-1-2 is inconsistent with the Attorney General's duties as prescribed by law, *it must be disregarded*." *Id.* (emphasis added) Accordingly, Indiana Code Section 4-3-1-2 is irrelevant to the statutory interpretation question: Where Indiana law gives the Attorney General the authority to direct the legal representation of the State, *Sendak* holds that Section 4-3-1-2 "must be disregarded." *Id.*

Furthermore, the Supreme Court has also rejected the suggestion (Response 10) that the statutes "giving the Attorney General the sole responsibility for the legal representation of the State," *id.*, should be interpreted to *exempt* "constitutional officers." As the State explained in its Motion, in *Niblack* the Court held that the laws creating the Office of the Attorney General barred the State Superintendent of Public Instruction—an office, the Court recognized, created by "Section 8 of Article 8 of the Constitution of Indiana," 99 N.E.2d at 841—from hiring private counsel without the Attorney General's consent. The Court concluded that the Attorney General has the "right to defend suits brought against state officers in their official relations," which

means "[i]t is not for any state officer to substitute his discretion for that of the Attorney General" as to legal questions concerning State interests, such as "where the cause shall be tried." *Id.* at 843. As the Court later summarized in *Sendak*, "when the suit *involves State officers or employees in their official capacities*, the outside attorney may only act as an amicus curiae unless the Attorney General consents." 373 N.E.2d at 148 (emphasis added) (citing *Niblack*, 99 N.E.2d 839).

Unauthorized counsel protest (Response 23) that in *Niblack* "the Superintendent of Public Instruction brought his claim on behalf of the State of Indiana," whereas here "the Governor is bringing this case in his official capacity only." Incorrect: there the Superintendent filed *in his capacity as a state official*: "Wilbur Young, in the following capacities namely, individually, State Superintendent of Public Instruction of the State of Indiana and as a member of the Commission on General Education of the Indiana State Board of Education, . . . filed an affidavit for change of venue . . . ." *Niblack*, 99 N.E.2d at 840. Moreover, as juridical entities, state officials *are* the State—there is no distinction. And in any event, the statutes creating the Office of Attorney General do not distinguish between actions by or against "the State" and actions by or against state officials in "their official capacities."

Unauthorized counsel next argue that *Niblack* rested on the Superintendent's lack of authority to obtain counsel, which (in their view) is somehow not lacking in the Governor (Response 23). The thrust of this supposed distinction is unclear. Since *Sendak* said section 4-3-1-2 is irrelevant when set against the Attorney General's consent authority, the entire point of the State's motion is that the Governor lacks

authority to hire outside counsel to bring litigation. In any event, the key point of *Niblack* was that "[t]he General Assembly has made other specific provisions for [the Superintendent's] representation by the Attorney General," including by authorizing the Attorney General to "represent the state of Indiana in any matter involving the rights or interests of the state." 99 N.E.2d at 842 (internal quotation marks and citation omitted).

The Attorney General's statutory authority to "represent the state in any matter involving the rights or interests of the state," Ind. Code § 4-6-1-6, applies equally here. *Niblack*, like this case, was initiated by a constitutional officer, but the Supreme Court deemed that irrelevant. There is simply no way to distinguish that holding.

2. The current statutory framework confirms that the Attorney General's exclusive litigation authority extends to all suits brought by or against state officials in their official capacities

Today's statutory framework confirms the Court's conclusion in *Niblack*. Indiana law then and now provides that the Attorney General shall "represent the state of Indiana in any matter involving the rights or interests of the state, including actions in the name of the state of Indiana, for which provision is not otherwise made by law," *Niblack*, 99 N.E. 2d at 842 (quoting then-current language). In addition, Indiana law now *also* provides that the Attorney General "shall have charge of and direct the prosecution of *all civil actions that are brought in the name of the state of Indiana or any state agency*." Indiana Code § 4-6-3-2 (emphasis added). Notably, this provision defines actions brought by a "state agency" to *include* actions brought in the name of an "office" or "officer," Ind. Code § 4-6-3-1, which confirms that no distinction exists between the State and its officers, including the Governor.

That statutory text also contradicts unauthorized counsel's assertion (Response 12) that the Attorney General's authority is limited to suits brought *against* state officers: Section 4-6-3-2 authorizes the Attorney General to "have charge of and direct the prosecution of all civil actions that are *brought in the name of*" any office or officer. Indiana Code § 4-6-3-2 (emphasis added). And *Niblack* confirms that the Attorney General's authority to "have charge of and direct the prosecution of" a civil action means that State officials may not hire outside counsel to bring such actions without the Attorney General's consent. *See Niblack*, 99 N.E. 2d at 841 (concluding that the Attorney General's authority to represent the State foreclosed Superintendent's argument that he "had the right to employ his own counsel to represent him in the trial court").

Moreover, the statutes expressly authorizing other state entities to retain outside counsel (Response 16–17) make the State's point: The General Assembly knows how to exclude state entities from the general rule requiring the Attorney General's consent. Indeed, the General Assembly has exempted legislators—who, like the Governor, are constitutional officers—from the requirement to seek the Attorney General's consent to employ outside counsel when the General Assembly or an individual legislator is sued. S*ee* Ind. Code §§ 2-3-9-2, -3. If unauthorized counsel were correct that the Attorney General's exclusive litigation authority did not apply to constitutional officers, that exemption would be unnecessary. Thus, the Attorney General's authority extends to *all* constitutional officers unless Indiana law expressly provides otherwise. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("'Where Congress

explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

C. The Rules of Professional Conduct validate the Attorney General's statutory authority to resolve legal disputes among state entities

Finally, the Rules of Professional Conduct support the scope of the authority the General Assembly has vested with the Attorney General. Unauthorized counsel concede that Indiana law gives the Attorney General authority to resolve conflicts between state agencies (Response 6–7, noting *Ritz* involved a dispute between State Superintendent and the State Board of Education), which contradicts their later contention that the Rules of Professional Conduct bar the Attorney General from "serv[ing] as arbiter of a dispute by representing clients who have divergent interests" (Response 18). As the Supreme Court recognized in *Sendak*, the very purpose of the Office of Attorney General is to reconcile state officials' competing legal positions and set a *single* legal policy for the State as a whole. *See* 373 N.E.2d at 148.

The Rules of Professional Conduct expressly contemplate the Attorney General's authority on this count. They acknowledge that lawyers under the supervision of the Attorney General "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. *These Rules do not abrogate any such authority*." Ind. Rules of Professional Conduct, Scope ¶ 18. The Rules thus in no way limit the statutory authority vested with the Attorney General.

II. This Suit Cannot Proceed While the Legislature Is in Session

Even apart from unauthorized counsel's lack of authority to file this suit, this case cannot proceed for an entirely separate reason: The General Assembly remains in session. As a preliminary matter, unauthorized counsel do not address the State's *statutory* argument that the proceedings must be continued "to a date not sooner than thirty (30) days following the date of adjournment of the session of the general assembly." Ind. Code § 2-3-5-1. For that reason alone, unauthorized counsel have waived any argument to the contrary and have effectively conceded that statute requires the Court to continue this proceeding if it does not strike the appearances. *See, e.g.*, *Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006). And in any event, unauthorized counsel's attempts to limit the scope of legislative immunity are both arbitrary and without precedential or textual support.

A. The constitutional and statutory provisions barring service on legislators while the legislature is in session applies to *all* suits

First, the argument that either the constitutional or statutory grants of absolute legislative immunity apply only to suits against legislators in their individual capacities (Response 25) is unsupported by any legal text or case law. Neither Article 4, Section 8 nor Indiana Code Section 2-3-5-1 draws a distinction between individual-capacity suits and official-capacity suits. *See* Ind. Const. art. 4, § 8 (barring "*any* civil process" in "*all* cases except treason, felony, and breach of the peace" during the legislative session (emphasis added)); Ind. Code § 2-3-5-1 (requiring the grant of a continuance "*[w]henever* a party to *a civil action*" is a legislator and the legislature is in session (emphasis added)).

Further, neither *United States v. Brewster*, 408 U.S. 501 (1972) nor *Tenney v. Brandhove*, 341 U.S. 367 (1951), which address the scope of federal legislative immunity, suggest any individual-capacity versus official-capacity distinction: While unauthorized counsel emphasize the term "individual capacities" (Response 25), this phrase does not even appear in either of these opinions. And far from excluding suits brought against legislators in their official capacities, these decisions explain that legislative immunity extends to acts a legislator takes *as a function of his office*—"those things generally done in a session of the House by one of its members in relation to the business before it, or things said or done by him, as a representative, in the exercise of the functions of that office." *Brewster*, 408 U.S. at 512–13 (internal quotation marks and citations omitted); *Tenney*, 341 U.S. at 379 (explaining that the defendant legislators were immune because they "were acting in a field where legislators traditionally have power to act").

Furthermore, creating a "separation of powers" exception to legislative immunity from service of process and litigation during session (Response 26–27) would contradict the entire point of that immunity, which is to ensure that the legislative function may be performed independently without fear of outside interference. *See Brewster*, 408 U.S. at 525 (explaining that legislative immunity must be "broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers"). Unauthorized counsel respect separation of powers only insofar as doing so advances the interests of a single officer in a single case. The Attorney General, by contrast, must respect separation of powers to advance the interests of the

State of Indiana in its entirety, for both current office holders and future office holders, which is why the General Assembly created the office and conferred exclusive litigation authority upon it.

Nor is it fair to say that respecting the legislature's immunity to service of process and litigation during session insulates laws from constitutional scrutiny. Many private plaintiffs successfully challenge many state laws in both federal and state court regardless of when the legislature is in session. The key is that legislators are not appropriate defendants in such challenges in the first place (including here). Legislators are immune from suit for both injunctive relief and damages, and they generally do not enforce state laws, which means they will rarely, if ever, be appropriate defendants in constitutional cases. *See Schulz v. State*, 731 N.E.2d 1041, 1046 (Ind. Ct. App. 2000) (holding that the plaintiff "fail[ed] the redressability requirement of standing" and therefore "lacked standing to pursue [its] claim"); *Porter v. Bainbridge*, 405 F. Supp. 83, 91 (S.D. Ind. 1975) (holding that Indiana Constitution Speech and Debate Clause rendered defendants immune from liability as members of the House of Representatives). Accordingly, immunity to service of process and litigation during session will rarely bar litigation of otherwise justiciable constitutional claims—"separation of powers" or otherwise—and does not interfere with a justiciable claim here.

Finally, unauthorized counsel's argument that Article 4, Section 8 and Section 2-3-5-1 do not apply because the Legislature is temporarily recessed (Response 27–28) is foreclosed by the plain text of those provisions. Neither so much as hints at

exemption for temporary recess. Indeed, the legislature already temporarily recessed the 2021 session before reconvening to override a gubernatorial veto. *See* Actions for Senate Bill 5, http://iga.in.gov/legislative/2021/bills/senate/5. In unauthorized counsel's view, legislators would have been susceptible of service and litigation during that temporary recess such that the Governor could have challenged in court their ability to override his veto. Regardless of the merits of such a claim, the legislature's immunity to service of process and litigation during session exists precisely to hold such attempts to interfere with its work at bay.

B. Unauthorized counsel cannot evade the constitutional and statutory protections for legislators by suing collective entities such as the General Assembly or the Legislative Council

Unauthorized counsel cannot sidestep the constitutional and statutory provisions conferring legislative immunity by suing the General Assembly and Legislative Counsel in addition to individual Legislators. As even unauthorized counsel recognize (Response 26), the service-immunity and continuance provisions exist to protect the integrity of the legislative process; they could not serve that purpose if evasion were so easy. Unauthorized counsel note that "courts should 'not [] extend the scope of the protection further than its purposes require," (Response 27 quoting *Hansen v. Bennet*, 948 F.2d 397, 404 (7th Cir. 1991)), which implies the immunity and continuance protections *should* be applied as necessary to further their purposes. And a suit against the General Assembly or the Legislative Council plainly would be just as threatening as a suit against an individual legislator.

The single decision cited by unauthorized counsel on this point, *ICLU v. Indiana General Assembly*, 512 N.E.2d 432 (Ind. Ct. App. 1987), does not even mention

legislative immunity to service of process and litigation during session and concerned Indiana's Access to Public Records Act—which specifically allowed a claim against the General Assembly. Ind. Code §§ 5-14-3-2(1), 5-14-3-9 (Supp. 1985). The General Assembly has enacted no such waiver of its immunity here.

CONCLUSION

The Court should strike the appearances and all filings by unauthorized counsel. If the Court does not strike the appearances, the Court should continue all proceedings to a date not sooner than 30 days following the adjournment sine die of the 2021 Session.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 24, 2021, the foregoing document was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing document in the U.S. Mail, first class, postage prepaid, if exempt or non-registered user:

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