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Clerk
Marion County, Indiana

STATE OF INDIANA	)	MARION SUPERIOR COURT 12
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D12-2104-PL-14068

ERIC J. HOLCOMB, Governor of the State of Indiana,

Plaintiff,

v.

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.

MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Pursuant to Appellate Rule 14(B), the State of Indiana respectfully moves the Court to certify for immediate appeal its July 3, 2021, Order Denying Motion to Strike and for Alternative Relief. The people of Indiana through their elected Attorney General have for decades relied on the precedents and arguments set forth in the Motion to Strike to protect the citizens' collective interests. The court's order upends this constitutional and well-worn practice.

An interlocutory appeal is warranted as to the following issues:

1. Whether the Governor, acting in his official capacity, can retain outside counsel and sue the Indiana General Assembly or its members or the Legislative Council without the consent of the Attorney General.
2. Whether the Governor may sue the Indiana General Assembly or its members or the Legislative Council while the General Assembly remains in session despite the absolute immunity from "any civil process" conferred by Article 4, § 8, of the Indiana Constitution and Indiana Code section 2-3-5-1.

These predicate legal issues require final, definitive resolution by Indiana's appellate courts before this case can proceed.

BACKGROUND

On April 15, 2021, the Indiana General Assembly overrode the Governor's veto and enacted HEA 1123. The law vests a "legislative council" with authority to convene an emergency legislative session when the Governor declares a statewide emergency. In response to the enactment, the Governor retained outside counsel—without the express written consent of the Attorney General—and filed this suit in his official capacity against members of the legislative branch seeking injunctive relief and a declaration from this Court that HEA 1123 is unconstitutional.

The State, through the Attorney General, promptly appeared on behalf of Governor Eric J. Holcomb, President Pro Tempore Rodric Bray, Speaker Todd Huston, the Legislative Council, and the Indiana General Assembly, and moved to strike the appearances and filings of the Governor's unauthorized attorneys on the basis that

Indiana law vests the Indiana Attorney General alone with the authority to represent state officials absent the Attorney General's consent. Alternatively, the State requested the Court continue all proceedings until 30 days following the date of adjournment of the General Assembly session as required by Indiana Code section 2-3-5-1 and Article 4, Section 8 of the Indiana Constitution. This Court denied the State's motion on July 3, 2021.

REASONS AN INTERLOCUTORY APPEAL SHOULD BE PERMITTED

The Court should certify for interlocutory appeal its July 3, 2021, order because the questions whether the Governor can ignore the limits of Indiana Code section 4-6-5-3 and hire outside counsel without the Attorney General's written consent to sue another branch of government and whether the defendants are protected by constitutional and statutory legislative immunity are profoundly important threshold legal questions. *See* Ind. Appellate Rule 14(B)(1)(c)(ii).

Interlocutory appeal is also warranted for an additional reason: Because the immunity conferred by Article 4, § 8, of the Indiana Constitution and Indiana Code section 2-3-5-1 is an absolute immunity from suit, delaying final resolution of that legal issue while the case proceeds would irrevocably strip the defendants of their immunity, an injury for which appeal after a final judgment could provide no relief. *See* App. R. 14(B)(1)(c)(iii).

The reasons for certifying the under Appellate Rule 14(B) are explained in more detail below.

1. Indiana law has long vested the Attorney General with the authority to determine, definitively, the State's position on disputed legal questions. *See State ex rel. Sendak v. Marion Cty. Superior Ct., Room No. 2.*, 268 Ind. 3, 6, 373 N.E.2d 145, 148 (1978); *Ind. State Toll-Bridge Comm'n v. Minor*, 236 Ind. 193, 199, 139 N.E.2d 445, 448 (1957); *State ex rel. Young v. Niblack*, 229 Ind. 596, 603–04, 99 N.E.2d 839, 842 (1951). And Indiana courts have recognized for decades that the legislature made that power exclusive by providing 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 Young*, 99 N.E.2d at 841.

Any new interpretation of the Attorney General's authority as nonexclusive presents a critical shift in the law that should be immediately reviewed on appeal. The legislature established the Attorney General to ensure the State would adopt a single, unified, and consistent position on legal issues. *Sendak*, 268 Ind. at 6, 373 N.E.2d at 148; *see also* Ind. Code §§ 4-6-2-1, 4-6-1-6. Now, this Court has suggested that the Governor's power to execute the laws overrides the legislature's decision to vest exclusive litigation authority in the Attorney General. Order, at 7 (¶30), 9–15 (¶¶39–57). Whether that assessment represents a constitutional rebuke to the legislature or merely a rationale for interpreting the relevant statutes in a particular way, the result threatens a sea change for state government litigation authority.

Permitting the Governor to advance his own legal position in court would put the Attorney General in an impossible position: Either sue one client at the be-

hest of another, defend one client from suit by another, or be disqualified altogether. And it would create precisely the sort of intra-State contradictions the legislature created the Attorney General to prevent. The legislature has appropriately determined that—to avoid the problems that arise when the State's "various boards, bureaus and commissions" take contradictory legal positions in court, *Minor*, 139 N.E.2d at 448—such internal legal disputes should be resolved by the Attorney General.

Given the harm to the State's ability to maintain consistent litigation positions and the dispositive nature of the question presented, the Court should certify its order denying the motion to strike for immediate appeal. The Attorney General has not consented to the Governor's suit by outside counsel against the legislative branch of government. And if the appellate courts agree with the State that Indiana law vests the Attorney General alone with the authority to initiate suits on behalf of the State, and thus the Governor does not have the right to adopt his own position and advance that position via litigation in his official capacity, this suit will be terminated. *See Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 730–31 (Ind. 2010) (approving a discretionary interlocutory appeal where the issue was potentially dispositive).

2. Further supporting this motion, Indiana's appellate courts often resolve the issue of unauthorized counsel mostly in original actions or interlocutory appeals.

In *Sendak*, for example, the Court held that, despite being generally disfavored, an original action was the "proper remedy" because the question whether an

arm of the State can bring its own litigation without the consent of the Attorney General "is not a question of judicial discretion, but a question of the lawful authority of the trial court to overrule the Attorney General's motion to strike the appearance" of unauthorized outside counsel. 268 Ind. at 6, 373 N.E.2d at 148. Indeed, the Court determined that "an emergency clearly exist[ed]" justifying the writ "in that substantial prejudice to the Attorney General's efficacy in defending his statutory client … would have resulted had this Court not acted." *Id.*; *see also Young*, 229 Ind. 596, 99 N.E.2d 839 (holding, in an original action for a writ of mandamus, that the trial court properly denied a change of venue filed by counsel hired by a constitutional officer without the Attorney General's consent). And in *Banta*, the Court of Appeals examined an agency's authority to hire outside counsel *with the Attorney General's consent* on interlocutory appeal from the trial court's order denying the plaintiff's motion to strike. 398 N.E.2d at 693.

These cases lend further support to certification of this Court's July 3, 2021, order for interlocutory appeal.

3. Moreover, the Court's determination that legislative immunity does not apply presents yet another substantial question of law ripe for interlocutory appeal. Despite the clear command of Article 4, § 8—which 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" (emphasis added)—this Court determined that "any civil process" does not include the civil process in this case because otherwise the Governor would be deprived of his

authority to faithfully execute the laws. Order, at 15–19 (¶¶58–72). Here, again, the Court has invoked constitutional gubernatorial power to override contrary legal directives—this time, both constitutional (Article 4, § 8) and statutory (Ind. Code § 2-3-5-1). The reconciliation of constitutional provisions—one specific, the other general—and the constitutionality of a statute enforcing one of them are quintessential legal questions that should be resolved on interlocutory appeal.

Critically, moreover, the Constitution by its plain terms confers on legislators immunity from suit—not just immunity from liability—and that immunity from suit will be irreparably lost absent an interlocutory appeal. *Cf. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143–47 (1993) (holding that States may take an immediate appeal in federal court from a district court's denial of a motion to dismiss on Eleventh Amendment sovereign immunity grounds because that immunity entitles States to immunity from suit, not just immunity from liability). Accordingly, certification of the Court's July 3, 2021, order for interlocutory appeal is appropriate for this additional reason.

CONCLUSION

The State requests the Court to certify its order denying the State's motion to strike the appearances and filings of unauthorized attorneys for Governor Holcomb for immediate appeal under Appellate Rule 14(B).

Respectfully submitted,

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Dated: July 6, 2021

CERTIFICATE OF SERVICE

I certify that on July 6, 2021, I electronically filed the foregoing document using the Indiana E-Filing System. I also certify that on July 6, 2021, the following persons were served electronically with the foregoing document through the IEFS:

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