IN THE FRANKLIN COUNTY, OHIO
COURT OF COMMON PLEAS

CHRISTINA COLLINS,	:	
	:	
Plaintiff,	:	Case No. 23 CV 006611
	:	
v.	:	Judge Karen Held Phipps
	:	
MIKE DEWINE *et al*,	:	
	:	
	:	
Defendants.	:	

BRIEF RESPONDING TO THE COURT'S OCTOBER 3, 2023, ORDER

The Attorney General is firmly devoted to his ethical duties to the people of Ohio. Here, his paramount duty is to exercise his constitutional power and duty to determine what is in the best interest of the people. That makes him—and the assistants he directs—very different from private-sector counsel. In the private sector, the client calls the shots. But the Attorney General is not a "hired gun" for state officers or agencies. By contrast, the People of Ohio give the Attorney General decision-making power over cases, from filing or defending to appealing. They are the true clients. The other state officers are also agents of the people, but they do not control litigation.

All of that is well-settled law in Ohio and across the nation. Nevertheless, because the legal profession is engrained with the importance of ethics—rightfully so—sometimes actions that are undeniably valid in the public sector might be viewed, at first blush, as a violation of ethical duties to clients. That seems to perhaps be the case here. Settled law empowers the Attorney General—indeed, requires him—to make legal calls for multiple clients and interests in a way that a private lawyer cannot. Here, the Attorney General and his assistants have properly exercised the Attorney

General's duties to direct the State's legal decisions, represent the parties under his domain, and promote the people's best interest.

Two days ago, the Court requested briefing on the following question: whether, based on the events in this case "all counsel from the Office of the Attorney General should be disqualified from continuing to represent any party in this case?" The answer to the question is no, both as a matter of statutory law under R.C. 109.02 and as a matter of the Ohio Rules of Professional Conduct.

Nonetheless, out of an abundance of caution and to eliminate distraction, the Attorney General has appointed outside special counsel to represent Defendants in this matter going forward.

BACKGROUND

Last month, seven members of Ohio's nineteen member Board of Education brought a lawsuit challenging a recently enacted Ohio law. The board members sued because, in their view, they were being unlawfully deprived of "nearly all of [their] official duties and responsibilities" as members of the Board of Education. Compl. ¶¶17–23. The board members brought their official capacity claims through private counsel, without authorization from the Ohio Attorney General.

The Office of the Ohio Attorney General responded by having his Office's Chief Counsel and Ethics Officer—Bridget C. Coontz—move to substitute as counsel for the board members in their official capacities. The Court granted the motion to substitute in part, substituting Ms. Coontz for the official-capacity claims and allowing two of the board members to proceed with private-capacity claims. That same day, Ms. Coontz filed notices of voluntary dismissals under Civil Rule 41, dismissing the board members' unauthorized official-capacity claims. Thus, as of September 29, Ms. Coontz was no longer an attorney for any party in this case.

On October 3, Ms. Coontz sent a two-sentence email to Julie Pfeiffer, who is counsel for the State and Governor in this case. The email briefly addressed a matter of litigation strategy in this case. A member of the Court's staff was accidentally copied on the email. This Court ordered briefing addressing whether this communication required the disqualification of the Attorney General's office from representing the Governor of Ohio and the State of Ohio in this case.

ARGUMENT

The Attorney General and his staff have fully complied with all ethical duties under the Ohio Constitution, statute, and the Ohio Rules of Professional Conduct. He rightfully exercised his duty to determine the State's legal position in the underlying lawsuit, and he lawfully directed his staff to speak with one voice in the litigation. He was not required to adopt the purported official capacity claims that the board members brought without following the statute, and he was therefore not required to create a screened legal team for the board members.

I. The Attorney General alone decides the State's legal positions.

The Attorney General is elected to represent the people's legal interests. He has the power to control legal strategy and decisions in the State. As such, he fills unique roles that no private attorney does. He has a duty to represent all state entities. So if two different state agencies have a dispute, he has the duty to represent both. He also has the duty to decide the State's legal positions and strategies. So if an agency asks him to press a legal claim that he thinks is wrong, he may decline because of his greater duty to the people of Ohio. Because the Attorney General has these unique obligations, the usual ethics rules about representing opposing parties or following a client's instructions do not operate the same way for the Attorney General as for a private attorney.

A. As Chief Law Officer, the Attorney General manages legal policy for the State.

Ohio has the sovereign authority to "structure its executive branch," *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1011 (2022), so that its legal staff will "speak with a single voice, often through an attorney general." *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022) (quotation omitted). Like many States, Ohio has an elected Attorney General. Ohio Const. art. III, 1; R.C. 109.01. He has power as the "chief law officer for the state and all its departments." R.C. §109.02. Indeed, Ohio law expressly prohibits "state officer[s] and board[s]" from being represented by, "other counsel or attorneys at law." R.C. §109.02

Like many other States, the Ohio Supreme Court holds that the Attorney General retains all common-law powers of attorneys general unless they are expressly taken away. *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986 ¶19; *see* 2 Edward M. Thornton, *A Treatise on Attorneys at Law* 1143–44 (1914). "The office of attorney general is of ancient origin." *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 454 (Ch. 1943). His traditional powers include "the authority to control litigation involving state and public interests." William C. Haflett, *Tice v. Department of Transportation: A Declining Role for the Attorney General?*, 63 N.C. L. Rev. 1051, 1053–54 (1985) (quotation omitted).

Defending the State's interests includes deciding what those interests are. Unlike private attorneys, the Attorney General does not need consent from the agencies or officials he represents before making his litigation decisions. His "duties as chief law officer of the state do not require the Attorney General to follow the direction of the head of a department with reference to instituting litigation or instituting or defending other proceedings." *State ex rel. Walton v. Crabbe*, 109 Ohio St. 623, 626 (1924); *see also, e.g.*, *Feeney v. Com.*, 373 Mass. 359, 366 (1977). "[H]is own opinion as to the merits of the controversy may determine what action, if any, his department should take." *Walton*, 109 Ohio St. at 626. He may choose to "abandon, discontinue, dismiss or

compromise" any legal claims, even against the wishes of the agencies or officials he represents. Thornton, *A Treatise on Attorneys at Law* at 1161. Because the people of Ohio elect the Attorney General directly, this is arguably his "core function." Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J.L. & Soc. Probs. 365, 374 (2005). This arrangement also prevents "chaos into the area of legal representation of the State." *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n*, 174 Conn. 308, 320 (1978) (quotation omitted). The Ohio Attorney General's legal power is no stranger to our legal system. Several State's attorneys general declined to defend their States' marriage laws even before *Obergefell v. Hodges*, 576 U.S. 644 (2015). Niraj Chokshi, "Seven attorneys general won't defend their own state's gay-marriage bans," *Washington Post* (Feb. 20, 2014), https://archive.ph/TxuoK#selection-445.0-445.72.

Any other understanding of the Attorney General's power would divest Ohioans of their right to elect a "chief law officer." The Attorney General alone is the official elected to make legal decisions on Ohioans' behalf. Other agencies, even when they are his clients, are "merely agencies of the state." *Connecticut Comm'n on Special Revenue*, 174 Conn. at 320. Although they may hold opinions on the best legal strategy for their agency, they are neither the ultimate client (the people are) nor the ultimate decisionmaker (the Attorney General is). Allowing other executive officers to "dictate a course of conduct to the Attorney General" would "prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy," *Feeney*, 373 Mass. at 365–66, and render the "status as chief law officer meaningless." Davids, *State Attorneys General* at 378.

B. The Attorney General's legal duties and powers prevent applying contradictory professional standards.

As part of pursuing the public interest, the Attorney General often fulfills a "dual role" as both the attorney for state officers and Chief Law Officer for the people. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240 (2002). But the Attorney General remains bound to the public interest foremost. Davids, *State Attorneys General* at 378. For that reason, he alone must "control the litigation." *Id.* When a public official "recommends a course of action, the Attorney General must consider the ramifications" to the State and the public. *Sec'y of Admin. & Fin. v. Att'y Gen.*, 367 Mass. 154, 163 (1975). "To fail to do so would be an abdication of official responsibility," *id.*, because the "public interest is the *actual* client," Davids, *State Attorneys General* at 378.

The Attorney General's power in this respect may be counterintuitive for those familiar with private attorneys' duties to private parties, but the distinctions are engrained in the Attorney General's role and duties. "State attorneys general" are simply "not private attorneys," and they "have different obligations." Davids, *State Attorneys General* at 391. The relationship between agencies and the Attorney General is "quite different from that between private counsel and a client who retains him." *Connecticut Comm'n on Special Revenue*, 174 Conn. at 320. In particular, his dual role—with primary duty to Ohioans—creates two areas where the Attorney General does not function like a private attorney under the Rules of Professional Conduct: dual representation and litigation strategy. For each of these, the Rules "do not abrogate any … authority." *Ohio Rules of Professional Conduct* at 3.

Dual Representation. The Attorney General may represent multiple sides in one case. The Ohio Rules of Professional Conduct recognizes that lawyers "under the supervision of [government legal] officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent

multiple private clients." *Ohio Rules of Professional Conduct* at 3. What would create a conflict of interest for private lawyers does not apply in the same way for the Attorney General.

Courts around the country tend to agree. "[A]lmost every state allows its attorney general to … represent two officers at the same time on the same case." Davids, *State Attorneys General* at 395; *see State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 418 So. 2d 779, 782–83 (Miss. 1982). (collecting cases). For that purpose, when the Attorney General sees fit, he may "designate … counsel from his staff" to represent different sides in litigation. *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 421 (1976). Any concerns about the "superficial seemliness of the dual appearances" gives way to Attorney General's "unique position" and "relationship" to state entities and the public. *Connecticut Comm'n on Special Revenue*, 174 Conn. at 318.

While the Attorney General has this power for addressing conflicting positions within the executive, he is not required to exercise it. Because he is the Chief Law Officer, he has a second possible path for resolving disputes: he can decide which position is best for the public interest. This brings us to the second main distinction between private attorneys and the Attorney General: determinations of litigation strategy.

Litigation Strategy. The Attorney General may choose not to press another state officer's desired legal claims. The Ohio Rules of Professional Conduct recognize the Attorney General's unique role in making litigation decisions. Many "legal provisions, including constitutional, statutory, and common law," give "government lawyers,"—often "the attorney general"—the "authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships." *Ohio Rules of Professional Conduct* at 3. This may include authority to "decide upon settlement or whether to appeal from an adverse judgment." *Id.*

The Rules' recognition is consistent with the Attorney General's common-law and statutory powers. Even though private clients are generally the masters of their own cases, "something other than that traditional attorney-client relationship exists" with the Attorney General. *Sec'y of Admin. & Fin.*, 367 Mass. at 159. His role "as chief law officer" and his "control over the conduct of litigation," necessarily "includes the power to make a policy determination" about whether a litigation strategy "further the interests of the Commonwealth and the public he represents." *Id.* at 159, 163. He is "not constrained by the parameters of the traditional attorney-client relationship," and he may, for example, "prosecute an appeal … over the expressed objections of the State officers he represents." *Feeney*, 373 Mass. at 366. Or he may choose to "abandon, discontinue, dismiss, or compromise" the official's claims, even against the official's wishes. *State v. Finch*, 128 Kan. 665, 280 P. 910, 912 (1929) (quoting Thornton, *A Treatise on Attorneys at Law* at 1161). Even when he represents a state official, the "people of the state are his clients." *Connecticut Comm'n on Special* Revenue, 174 Conn. at 319.

II. The Attorney General's and his agents properly exercised his authority.

The Attorney General properly exercised his authority in this case by dismissing the board members' public-capacity claims, albeit in a procedurally awkward position created by the board members' violation of the law. The Attorney General's agents likewise properly exercised their duty to "perform such duties, not otherwise provided by law, as are assigned [them] by the attorney general." R.C. 109.03. The principles above apply to them as the Attorney General's agents.

A. The Attorney General fully met his ethical duties to Ohioans.

The right to represent the board members in their official capacities belongs to the Attorney General alone because an official-capacity claim is the "equivalent" of the government agency itself suing. *See Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483 ¶21. Thus, the board members violated Ohio law when they hired private counsel to represent their purported public-

capacity interests in this case. R.C. 109.02. And private counsel also violated Ohio law when they brought those unauthorized and unlawful claims to this Court. For that reason, the Attorney General was entitled to substitute himself (or his agent) immediately as their counsel.

But doing so did not oblige him to adopt their legal claims or theories. Such an obligation would violate his traditional powers of determining which legal claims are in the people's best interest. *See Walton*, 109 Ohio St. at 626. Instead, he could determine that the claims were frivolous and dismiss the board members, in their official capacities, from the case. That is what he did. In doing so, the Attorney General was not required to create a separate legal team with interests aligned to the board member's public-capacity positions. While he *could* have assigned two walled-off teams to represent conflicting interests, he did not have to. He had the authority to adopt one uniform view of the legal challenge. Exercising his right to substitute counsel and dismiss the board members' public-capacity claims aligned with that prerogative and the office's uniform view of the public's best interest. Put another way, assigning an attorney to the board members did not make her a plaintiffs' attorney; it clarified that the board members were never entitled to be plaintiffs in their official capacities in the first place.

B. Ms. Coontz fully met her ethical duties to Ohioans.

Ms. Coontz substituted as counsel for the board members' purported official capacity claims and moved to dismiss them from the case. In doing so, she did not develop a traditional attorney-client relationship with the board members. Nor did she adopt the board members' self-characterization as plaintiffs in opposition to the State. Rather, as her actions demonstrate, she aligned the board members with their lawful position under the Attorney General's authority.

This is even clearer when considering what board members should have done: ask the Attorney General to represent them in their official capacity. He would have declined for at least two reasons: plaintiff board members are a minority of the Board and do not speak for the Board,

and regardless, their position is contrary to the public interest. The board members could not have hired private counsel without the Attorney General's permission. The board members' disregard of the law—even if unintentional—led to the need to intervene to dismiss their unlawful claims. Private counsel, on the other hand, cannot feign ignorance of the law. As officers of the Court, they were obligated to ensure the lawfulness of the claims before they brought them to this Court. Here, private counsel must shoulder the blame for any confusion this situation presented.

If the law required the Attorney General to designate walled-off attorneys to rectify purported public-capacity claims raised *ultra vires* through private counsel, it would effectively require him to sever a piece of his authority to direct the legal position of his office and every attorney in it. In other words, the Attorney General's authority to direct litigation cannot be eroded by a private counsel who improvidently tries to bring official capacity claims by state actors. For these reasons, Attorney Coontz never adopted a legal position contrary to office and was never required to screen herself from other attorneys in the Attorney General's office.

To the extent that other provisions of the Ohio Rule of Professional Conduct may apply to the Attorney General's agents, none are implicated here. Attorney Coontz did not violate any duty of confidentiality because she did not obtain any confidential information from the board members. Nor did she violate a duty of loyalty because, as mentioned above, the minority group of board members who purported to sue in the State's name had no right to assert an interest adverse to the State. The fact that they did so without authority does not obligate the Attorney General to assign them counsel who must be loyal to their unlawful position.

C. Ms. Pfeiffer fully met her ethical duties to Ohioans.

For the same reasons, Attorney Pfeiffer did nothing wrong. As part of the Attorney General's office, she was entitled to work with other members of his team. Since the Attorney

General was not required to wall off Ms. Coontz, Ms. Pfeiffer was not required to avoid communication either.

III. No grounds exist for disqualification of any attorney in the Attorney General's office.

Because no attorney in the Attorney General's office violated any professional duties or ethical rules, there is no reason to disqualify any attorney of the Office.

Respectfully submitted,

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Ohio Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023, the foregoing was filed with the Clerk of the Court via the e-Filing system. Notice of this filing will be sent by electronic mail to the following counsel for Plaintiffs:

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