ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE CHEROKEE NATION,
a federally recognized Indian Tribe,
17675 S. Muskogee Ave.
Tahlequah, OK 74464,

THE CHICKASAW NATION,
a federally recognized Indian Tribe,
520 E. Arlington St.
Ada, OK 74820

THE CHOCTAW NATION,
a federally recognized Indian Tribe,
1802 Chukka Hina Dr.
Durant, OK 74701, and

THE CITIZEN POTAWATOMI NATION,
a federally recognized Indian Tribe,
1610 S. Gordon Cooper Dr.
Shawnee, OK 74801,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, in his official capacity as the Secretary of the Interior, TARA KATUK MAC LEAN SWEENEY, in her official capacity as the Assistant Secretary of the Interior – Indian Affairs,
United States Department of the Interior,
1849 C Street N.W.
Washington, DC 20240,

J. KEVIN STITT, in his official capacity as the Governor of the State of Oklahoma,
2300 N. Lincoln Blvd., #212
Oklahoma City, OK 73105,

WILLIAM NELSON, SR., in his official capacity as the Chairman of the Business Committee of the Comanche Nation,
584 NW Bingo Rd.
Lawton, OK 73507,

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SUPREME COURT
STATE OF OKLAHOMA
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No. 122,108

JOHN R. SHOTTON, in his official capacity as the Chairman of the Tribal Council of the Otoe-Missouria Tribe of Indians,
8151 Hwy 177
Red Rock, OK 74651,

JOE BUNCH, in his official capacity as the Chief of the United Keetoowah Band of Cherokee Indians in Oklahoma,
18263 Keetoowah Cir.
Tahlequah, OK 74464, and

BRIAN GIVENS, in his official capacity as the Mekko of the Kialegee Tribal Town,
100 Kialegee Dr.
Wetumka, OK 73883,

Defendants,

and

GENTNER DRUMMOND, in his official capacity as the Attorney General of the State of Oklahoma,

Real Party in Interest.

GOVERNOR J. KEVIN STITT'S BRIEF-IN-CHIEF

SUBJECT INDEX

INTRODUCTION

The Oklahoma Constitution vests the "Supreme Executive power" in the Governor and charges him alone with the authority to "cause the laws of the State to be faithfully executed." Okla. Const. art. VI, §§ 2, 8. And the Oklahoma Legislature has long authorized the Governor to "employ counsel to protect the rights or interests of the state." 74 O.S. § 6. The question before this Court is whether the Attorney General may nonetheless override the Governor's decisions about how to defend the State in litigation—specifically in litigation concerning the executive's actions, in which the Governor was named as a defendant.

The issue arises in the context of a federal lawsuit concerning the validity of certain tribal-gaming compacts. In 2020, four Native American tribes challenged the U.S. Secretary of the Interior's approval of four competitor tribes' gaming compacts, claiming that the compacts were invalid under the federal Indian Gaming Regulatory Act (IGRA). They named as defendants Governor Stitt, the U.S. Department of Interior, and the leaders of the four competitor tribes. Since 2021, Governor Stitt has been defending against those claims through his chosen counsel. In July 2023, however—seven months after taking office—Attorney General Drummond attempted to assert control over the federal litigation, with the apparent goal of abandoning the defense of the Governor and the State and siding with the Plaintiff Tribes.

The Attorney General's gambit is contrary to fundamental principles of Oklahoma law. The Attorney General evidently has strong political disagreements with the Governor's policy decisions and defense of this litigation, but he is free to express those disagreements in Oklahoma electoral circuits or even an amicus brief supporting the Plaintiff tribes. What the Attorney General has no power to do, however, is to insert himself as counsel for the Governor of Oklahoma and somehow supersede the Governor's constitutional *and* statutory authority to

defend the State's interests through his own chosen counsel. This Court should answer the certified question in the negative and reject the Attorney General's attempt to commandeer the Governor's defense of the State of Oklahoma in the federal litigation.

BACKGROUND

Nearly four years ago, the Governor negotiated and entered into gaming compacts with the Comanche Nation, Otoe-Missouria Tribe, United Keetoowah Band of Cherokee Indians, and Kialegee Tribal Town, pursuant to his authority under Oklahoma law to "negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest." 74 O.S. § 1221(C)(1). The four compacts support those Tribes' congressionally recognized interests in "raising revenues to provide governmental services for the benefit of the tribal communit[ies] and reservation residents [and] promoting public safety as well as law and order on tribal lands." S. Rep. No. 100-446, at 13 (1988).

As required under the federal Indian Gaming Regulation Act (IGRA) and its implementing regulations, the Governor submitted the compacts to the Secretary of the Interior with the required certification that the Governor had authority under Oklahoma law to enter into them. Because the Secretary of the Interior did not disapprove the compacts within 45 days, the compacts were "considered to have been approved" under IGRA. 25 U.S.C. § 2710(d)(8)(C). The Secretary published the Comanche and Otoe-Missouri compacts in the Federal Register on June 29, 2020, and the UKB and KTT compacts on September 8, 2020. On those days, the respective compacts "[took] effect" as a matter of federal law. *Id.* § 2710(d)(3)(B).

After the compacts took effect, this Court concluded that they suffered from defects under Oklahoma law. On July 21, 2020, this Court issued a decision that the compacts with

the Comanche Nation and Otoe-Missouria Tribe were invalid under Oklahoma law, concluding that the compacts allow "types of Class III gaming expressly prohibited by the State-Tribal Gaming Act." *Treat* v. *Stitt*, 2020 OK 64, 473 P.3d 43 (*Treat I*). On January 26, 2021, this Court ruled that the UKB and KTT compacts were also invalid under Oklahoma law, on the ground that the Governor had exceeded his authority by negotiating terms "that differ from the Model Compact found in the State-Tribal Gaming Act." *Treat* v. *Stitt*, 2021 OK 3, ¶10, 481 P.3d 240, 243-244 (*Treat II*).

The Tribes who are plaintiffs in the federal litigation—Cherokee Nation, Chickasaw Nation, Choctaw Nation, and Citizen Potawatomi Nation—brought that action seeking to set aside the Secretary of the Interior's approval of the gaming compacts. [*See Cherokee Nation* v. *United States Dep't of Interior*, No. CV 20-2167 (TJK), 2024 WL 1212987 (D.D.C. Mar. 21, 2024), ECF No. 1]. Among other things, the Plaintiff Tribes allege that the Secretary acted arbitrarily and capriciously by not disapproving the challenged compacts. The Plaintiff Tribes contend that although the *Treat* decisions were issued after the compacts were deemed approved under IGRA, those subsequent decisions require retroactively unwinding the already approved compacts under IGRA. They seek a declaratory order that the compacts are invalid under federal law.

The Plaintiff Tribes named Governor Stitt as a defendant, in his official capacity as the Governor of Oklahoma. Governor Stitt retained his own counsel to defend him, pursuant to Title 74, Section 6 of the Oklahoma Statutes, which authorizes the Governor to "employ counsel to protect the rights or interests of the state." 74 O.S. § 6. Since January 2021, the Governor has defended the compacts as validly approved under IGRA, and has argued in the alternative that any invalid provisions of the compacts can be severed. [*See, e.g.*, ECF No.

154]. The Governor has never contested this Court's determinations in *Treat I* and *Treat II* that the compacts are inconsistent with Oklahoma law. Instead, Governor Stitt has maintained that under the federal Indian gaming regulatory framework, certain state-law disputes and decisions cannot render invalid a compact that already has taken effect under federal law. [*Id.*].

In July 2023, without consulting the Governor or obtaining his consent, Attorney General Drummond filed a "notice" purporting to "enter [his] appearance as counsel in this case for J. Kevin Stitt, in his official capacity as the Governor of the State of Oklahoma." [ECF No. 176 at 4]. In his Notice of Appearance, the Attorney General argued that 74 O.S. § 18b(A)(3) gave him the "power to assume and control the State's defense in this case," and superseded the Governor's authority to proceed with the counsel of his own choosing. [*Id.* at 2]. The Governor moved to strike the Attorney General's appearance, ECF No. 178, explaining why under Oklahoma law and principles of legal ethics he is entitled to counsel "who will advocate for his defense and for his legal views, rather than one who openly states his objective to side with the Plaintiffs." [*Id.* at 4].

While the motion to strike remained pending, the Attorney General moved to certify to this Court the question whether he had authority under Oklahoma law to override the Governor's decision and assume control over the State's defense. [*See* ECF No. 183]. Governor Stitt opposed certification, explaining that it is clear under Oklahoma law that he has the authority to retain counsel to represent him in litigation and that he wields the "Supreme Executive power" that cannot be overruled by other executive officers. Okla. Const. art. VI, § 2; 74 O.S. § 18c(A)(4)(a). After finding no controlling precedent of the Oklahoma Supreme Court on this specific issue, the district court certified the following question to this Court:

> May the Attorney General of Oklahoma, under Title 74, Section 18 of the Oklahoma Statutes, "take and assume control" of the "defense of the state's

interests," Okla. Stat. tit 74 § 18b(A)(3), in the instant case before this Court—in which the Governor of Oklahoma is named as a defendant in his official capacity for his role in entering into certain tribal-gaming contracts on behalf of the State of Oklahoma—over the objection of the Governor, who is vested with "Supreme executive power" under Article VI, Section 2 of the Oklahoma Constitution, and when the Governor has already exercised his authority under Title 74, Section 6 of the Oklahoma Statutes to "employ counsel to protect the rights or interests of the state," Okla. Stat. tit 74 § 6?

ARGUMENT

This Court should hold that the Attorney General lacks authority to take over the representation of the Governor in the federal district court proceedings. First, the Governor unambiguously has the authority under Oklahoma law to appoint counsel of his own choice to represent him. Second, the Attorney General has no authority to seize control of any litigation from the Governor, the State's highest executive officer. The Oklahoma Constitution vests the Governor with the Supreme Executive power, and Oklahoma statutory law also makes clear that the Attorney General's litigation authority does not override the Governor's.

I. The Governor Appropriately Exercised His Authority To Employ Counsel To Defend The State's Interests.

A. Oklahoma law unambiguously gives the Governor the authority to retain counsel to defend the interests of the State in the federal litigation. Most directly, 74 O.S. § 6 provides:

> The Governor shall have power to employ counsel to protect the rights or interests of the state in any action or proceeding, civil or criminal, which has been, or is about to be commenced, and the counsel so employed by him may, under the direction of the Governor, plead in any cause, matter, or proceeding in which the state is interested or a party.

This language plainly supports the Governor's retention of his own chosen counsel. *See St. John Med. Ctr. v. Bilby*, 2007 OK 37 ¶6, 160 P.3d 978, 979 ("When statutory language is unambiguous, no further construction is needed, and the unambiguous language will be applied

as written."). The statute confers on the Governor two related powers. First, the Governor is authorized under Section 6 "to employ [counsel] to protect the interests of the state in the litigation." *Board of Com'rs of Tulsa County v. Johnston*, 1942 OK 258, ¶22, 134 P.2d 335, 339. Second, the statute gives the Governor the authority to "direct[]" his chosen counsel how to plead in "any cause, matter, or proceeding" involving the State. By empowering the Governor to choose counsel to represent the State and to direct that counsel how to proceed in litigation, Section 6 gives the Governor control over the State's position and strategy in litigation matters involving the State.

The authority explicitly granted under Section 6 is rooted in the Governor's constitutional executive authority. The Oklahoma Constitution gives the Governor the "Supreme Executive power," and confers on him alone the power to "cause the laws of the State to be faithfully executed." Okla. Const. art. VI, §§ 2, 8; *see Ex parte Kelly*, 1915 OK 92, 146 P. 444, 446 (the Governor "is vested by law with the supreme executive authority, and clothed with the power of executing the laws"). As the Oklahoma Court of Criminal Appeals has explained, the powers delegated to the Governor in Section 6 are a "means of carrying out his executive functions conferred by . . . the Constitution." *State v. Hudson*, 44 Okla. Crim. 1, 279 P. 921, 922 (1929). In particular, the Governor could not oversee the faithful execution of the laws as "Supreme Executive" without ultimate control over the State's representation and positions in litigation.

The Governor acted pursuant to his statutory authority under Section 6 and his constitutional authority under Article VI when retaining counsel in the federal litigation. The Governor's chosen counsel then proceeded to defend against the federal-law claims in that case "under the direction of the Governor." 74 O.S. § 6; *see Teleco, Inc. v. Corp. Comm'n of State*

of Okla., 1982 OK 93, ¶11, 649 P.2d 772, 775 ("By statute, the Governor of Oklahoma is granted authority to 'employ counsel to protect the rights or interest of the State in any action or proceeding, civil or criminal, which has been, or is about to be commenced . . . .' ").

B. The Attorney General has not disputed that the Governor has the specific authority to retain counsel to represent the State's interests in litigation. Instead, the Attorney General has argued that the Governor lacks authority under Section 6 in this case because he is not acting to protect the "interests of the State." [ECF No. 179 at 3]. That argument is both irrelevant and wrong. It is irrelevant because nothing in the statute contemplates any role for the Attorney General (or anyone else other than the Governor) in determining "the rights or interests of the state" before the Governor may exercise his "power to employ counsel" and provide "direction" to that counsel as to how to proceed. And it is wrong because the Governor *is* acting in the interests of the State, and the Attorney General's contrary argument rests on mischaracterizations of the Governor's position in the underlying federal litigation.

First, the Attorney General's argument is irrelevant, because when the statute looks to the "interests of the State," that means the interests of the State *as the Governor assesses them.* Section 6 does not empower the Attorney General to determine the "interests of the State" before the Governor can direct the State's litigation strategy. On the contrary, Section 6 contemplates a role for only the Governor, and provides that he alone may "employ counsel to protect the rights or interests of the state" at his "direction." 74 O.S. § 6. The Oklahoma Legislature's decision to vest the Governor alone with that authority would have been meaningless if other executive officers could override his judgments about the "interests of the state" and thwart him from retaining and directing his own counsel at their whim.

Second, even assuming that the Attorney General may second-guess whether the Governor is acting in the "interests of the State" under Section 6, he is. The Attorney General contends that the Governor is acting against the State's interests because he is "refusing to defend State law" in the federal litigation. [ECF No. 179 at 3]. That is simply untrue. The Governor has never contested or refused to recognize the *Treat* decisions, nor has he ever suggested that they are not the final word on whether the underlying compacts comply with Oklahoma law. The Governor has deep and abiding respect for this Court's final pronouncement on matters of State law, even in cases in which this Court has ruled against his position. After all—just as the Governor is the final decision-maker in the executive branch as its "Chief Magistrate," so too is this Court the final decision-maker in the judicial branch as its "Supreme Court." Instead, the Governor's argument in the federal litigation is that as a matter of *federal law*, "after-the-fact state-law decisions like the *Treat* cases cannot unwind an approved compact that has gone into effect under" IGRA. [ECF No. 154-1 at 18]. The Governor's federal-law argument rests on a close reading of IGRA, its implementing regulations, and federal case law. It is not a "refus[al] to defend State law," as the Attorney General misleadingly asserts as a ploy to inflame courts and outside interest groups.

II. The Attorney General Lacks Authority To Seize Litigation From The Governor.

The Attorney General further contends that even if the Governor can employ counsel in the underlying case, the Attorney General has superior authority under 74 O.S. § 18b(A)(3) to "take and assume control" of the litigation even after the Governor has exercised his authority under Section 6. The Attorney General's argument is wrong several times over. It misreads 74 O.S. § 18b(A)(3) and conflicts with this Court's precedent. It is inconsistent with the constitutional roles assigned to both the Governor and the Attorney General. And it produces illogical and implausible results.

A. The Attorney General's Position Conflicts With Statutory Text And Precedent.

The Attorney General rests his attempt to assert control over the litigation on 74 O.S. § 18b(A)(3), which grants the Attorney General the authority

> [t]o initiate or appear in any action in which the interests of the state or the people of the state are at issue, or to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested; and when so appearing in any such cause or proceeding, the Attorney General may, if the Attorney General deems it advisable and to the best interest of the state, take and assume control of the prosecution or defense of the state's interest therein.

The Attorney General contends that the final clause empowers him to "take and assume control" over any litigation he chooses, including the federal litigation in this case, over the wishes of the Governor—and presumably also other statewide officials and legislative leadership. That argument misreads the statutory text by improperly reading a snippet of statutory language in isolation and out of context. And the Attorney General's reading of Section 18b finds no support in this Court's precedent.

1. Beginning with the text, the Attorney General's argument flouts the command that the proper interpretation of statutory language cannot myopically focus on "a single word or phrase," but instead must take into account its full "context." *Stricklen v. Multiple Injury Trust Fund*, 2024 OK 1, ¶14, 542 P.3d 858, 868. In particular, the Attorney General's theory ignores other language in Section 18b that makes clear that his authority to "take and assume control" of litigation is *subordinate* to the Governor's power, rather than *superseding* it. Specifically, the Attorney General may be *required* to appear by the Governor. *See* 74 O.S. § 18b(A)(3) (requiring the Attorney General to "appear at the request of the Governor"). Numerous other provisions outlining the Attorney General's authority use similar language, again confirming that the Governor has the ultimate authority to direct the Attorney General

in litigation, not the other way around. For example, Section 18b(A)(6) authorizes the Attorney General to prosecute or defend actions involving the Departments of the State Auditor and Treasurer "[a]t the request of the Governor" or certain other actors. 74 O.S. § 18b(A)(6). Section 18b(A)(10) authorizes the Attorney General to "institute actions to recover state monies illegally expended," but only "upon the request of the Governor or the Legislature." *Id.* § 18b(A)(10). And Section 18e authorizes the Attorney General to initiate *quo warranto* criminal actions "when requested by the Governor." *Id.* § 18e.

The Attorney General has emphasized in response that the first clause of Section 18b(A)(3) gives him the authority to appear even without the "request of the Governor." In 1995, the Oklahoma Legislature added what are now the first words of Section 18b(A)(3), granting the Attorney General the power "[t]o initiate or appear in any action in which the interests of the state or the people of the state are at issue." [*See* ECF No. 179 at 8]. The Attorney General thus has the authority "to initiate or appear" in actions on behalf of the State, "*or* to appear at the request of the Governor . . . and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested." 74 O.S. § 18b(A)(3). Based on the statute's use of the disjunctive "or," the Attorney General contends that the Attorney General has the power to appear in any action even without "the request of the Governor." [ECF No. 179 at 8]. This argument, however, misses the point entirely. The fact that the Attorney General is permitted to appear without the Governor's request in some circumstances does not mean that he may *override* the Governor's litigation choices when they conflict. On the contrary, the fact that the Attorney General may appear on his own *or* at the request of the Governor confirms that the Attorney General's authority is subordinate to the Governor's. In short, read as a whole,

Section 18b(A)(3) does not authorize Attorney General to supersede the Governor's litigation decisions.

The Attorney General's argument also ignores the neighboring provision of Section 18c, which likewise makes clear that the Attorney General's litigation authority does not override the Governor's. Section 18c(A)(4)(a) expressly carves out from the "legal duties . . . vested in the Attorney General" the Governor's "authority to employ special counsel to protect the rights or interest of the state as provided in Section 6 of this title." 74 O.S. § 18c(A)(4)(a). The whole point of the carveout is to protect the Governor's right to hire counsel to represent the State when he—not the Attorney General—believes it to be in Oklahoma's interests. The Attorney General tries to downplay Section 18c, contending that the "general instruction" at the beginning of the provision shows that it "simply discusses which state officers, boards and commissions have authority to retain legal counsel without obtaining the permission of the Attorney General." [ECF No. 179 at 4 (citing 74 O.S. § 18c(A)(1))]. But the Attorney General has never explained why the statute would expressly protect the Governor's authority to retain legal counsel if the Attorney General could override that decision under Section 18b and displace the Governor's chosen counsel.

Indeed, even the Attorney General's own office has previously recognized the limitations on his authority imposed by Section 18c. Various Opinions of the Attorney General acknowledge that Section 18c circumscribes the Attorney General's role in representing other state officials and agencies. *See* 2002 OK AG 4 (Feb. 5, 2002); *see also* 2003 OK AG 9 (Feb. 27, 2003) (acknowledging limitation on prohibition of retention of counsel based on statutory authorization); 1983 OK AG 97 (Jan. 25, 1984) ("[Section] 18c sets forth the general authority of the Attorney General of Oklahoma to represent and advise state officers. . . . The statute also

lists a number of public agencies who are authorized to retain their own legal counsel independent of the Attorney General."). As those Opinions show, the statutory text here does not confer on the Attorney General the sweeping power that he asserts.

2. The Attorney General's theory also finds no support in precedent. As the federal district court concluded in its certification order, neither of the cases on which the Attorney General relies is relevant. The Attorney General cited *State, ex rel. Pruitt v. Steidley*, 2015 OK CR 6, ¶16, 349 P.3d 554, 558, in which the Oklahoma Court of Criminal Appeals concluded that the Attorney General had authority under Section 18b to take control over a local criminal prosecution. But as the federal district court explained, *Pruitt* is inapposite because there the Attorney General "sought to displace a state official whose role that court called 'subservient' to the Attorney General's—a district attorney—rather than the Governor." [ECF No. 190 at 7].

The Attorney General also attempted to rely on *State ex rel. Derryberry v. Kerr-McGee Corp.*, 1973 OK 132, ¶20, 516 P.2d 813, 818, in which this Court stated that "[i]n the absence of explicit legislative or constitutional expression to the contrary," the Oklahoma Attorney General "possesses complete dominion over every litigation in which he properly appears in the interest of the State, whether or not there is a relator or some other nominal party." But *Derryberry* does not support the Attorney General's position for several reasons. For one thing, the entire question here is whether the Attorney General can "*properly* appear[] in the interest of the State" where the Governor already has appeared through his chosen counsel and is prosecuting the case. *Derryberry*, 1973 OK 132, ¶20, 516 P.2d at 818 (emphasis added). And of course the Attorney General is not trying to take over litigation from a "relator or some other nominal party," but rather from Oklahoma's "Supreme Executive" officer. Finally, there

is an "explicit legislative or constitutional expression" of support for the Governor's superior authority to retain counsel to represent the State. *See* 74 O.S. § 18c(A)(4)(a); *see also* Okla. Const. art. VI, § 2.

Perhaps most importantly, *Derryberry* did not involve an Attorney General trying to usurp litigation authority from a Governor. Instead, a newly elected Attorney General challenged a settlement reached by his predecessor, and the Oklahoma Supreme Court rejected that challenge and held that the predecessor Attorney General "had the authority to settle and compromise the case," *id.* at 819—a fact pattern that makes *Derryberry*'s language unsurprising. The federal district court agreed that *Derryberry* is irrelevant for that reason, noting that the Attorney General's reliance on *Derryberry* "bypasses the key issue here: whether he may properly appear here in the first place." [ECF No. 190 at 7]. The Attorney General's reading thus finds no basis in precedent.

B. The Attorney General's Position Is Incompatible With The State Constitution.

The Attorney General's reading of the statute would also conflict with the constitutional roles assigned to both the Governor and the Attorney General. As this Court has explained, "[t]he meaning of language in a statute is construed by courts as internally consistent and externally consistent with the constitution." *Young v. Station 27, Inc.*, 2017 OK 69, ¶18, 404 P.3d 829, 838. Because the Attorney General's statutory theory is inconsistent with the Oklahoma Constitution, it should be rejected.

Article VI, Section 2 of the Oklahoma Constitution provides that the "Supreme Executive power shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of Oklahoma.'" Okla. Const. art. VI, § 2. Article VI, Section 8 further provides that "The Governor shall cause the laws of the State to be faithfully executed." Together, these

constitutional provisions make the Governor alone the "head of the executive branch." *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, ¶29, 343 P.3d 1273, 1279. The Attorney General, by contrast, is assigned a significantly different role under the Oklahoma Constitution. The Constitution vests some Executive power in him, as it does with other officers. Okla Const. art. VI, § 1. But it does not enshrine *any* express powers of the Attorney General, in stark contrast to the designation of the Governor as the "Chief Magistrate" with the "Supreme Executive power." *See State v. Hutson,* 1908 OK 157, 97 P. 982, 984 (noting that the state "Constitution nowhere designated the duties of the Attorney General."). The Constitution's differential treatment of those two offices confirms that the Attorney General's authority is constitutionally inferior to the Governor's. *See Application of Caudill*, 1960 OK CR 17, 352 P.2d 926 ("[T]he Governor's order is the highest executive voice within the state and may not be ignored . . . by a lesser member of the executive family.")

The relationship established by the Oklahoma Constitution between the Governor and the Attorney General echoes the relationship that existed at common law. This Court has looked to the common law for guidance on the appropriate role of the Governor and the Attorney General. *See Derryberry*, 1973 OK 132, ¶¶24-25, 516 P.2d at 818-19 (examining common-law role of Attorney General); *Vandelay*, 2014 OK 109, ¶12, 343 P.3d at 1276 (explaining that the Governor enjoys the "full-range of executive powers that were recognized at the time the Oklahoma Constitution was adopted" under the common law). And at common law, the attorney general enjoyed "considerable power," but even that power was "subject to limitation . . . by the King." Tice v. Department of Transportation*: A Declining Role for the Attorney General?* 63 N.C.L.R. 1051, 1053 (1985); *see* VI William Holdsworth, *A History of English Law* 466–67 (2d ed. 1937) (explaining the attorney general was subject to the

magistrate's authority at common law). Several commentators have thus explained that under the common law, a state "attorney general is not authorized to interfere with or to direct and control litigation by lawfully appointed statutory officers acting pursuant to the governor's authority and directions." 7A C.J.S. Attorney General § 51; *see* 7 Am. Jur. 2d Attorney General § 5 ("[A state] attorney general does not have the right to countermand the governor where the governor is acting within the bounds of the power given to him.").

Although not binding on this Court, the Alabama Supreme Court's treatment of an almost identical issue under its very similar state constitution provides helpful guidance. *See Johnson v. Bd. of Governors of Registered Dentists*, 1996 OK 41, ¶23, 913 P.2d 1339, 1346 ("[W]e may look to other states for guidance."). In *Riley v. Cornerstone Community Outreach Inc.*, 57 So. 3d 704 (Ala. 2010), the court addressed whether an attorney general could interrupt ongoing proceedings—after initially refusing to appear at the governor's request—and file a dismissal of the governor's position. As in Oklahoma, Alabama's constitution provides that the "supreme executive power" of the state "shall be vested in a chief magistrate," who holds the power to take care that the laws are faithfully executed. Ala. Const. art. V, §§ 113, 120. Likewise, in Alabama as in Oklahoma, the attorney general, as "chief law officer," is vested with statutory and common-law powers that were historically delegated to his office. *Riley*, 57 So.3d at 728. The Alabama Supreme Court held that the Attorney General lacked authority to wrest control of litigation from the Governor. As the court explained:

> To conclude otherwise necessarily would mean that the delegates created a second executive officer who has supreme executive power within some sphere assigned to him and that the governor is only the supreme executive with respect to matters in some different sphere. Obviously nothing in the text of the constitution supports such a notion, and such a notion is plainly contrary to the position of the governor expressed in . . . the constitution.

Id. at 726.

C. The Attorney General's Position Produces Illogical And Implausible Consequences.

The Attorney General's reading of the statute also produces implausible consequences. The Attorney General has tried to focus this dispute on the specific facts of this case, contending that he must have the authority to override the Governor's litigation decisions because in this particular case, the Governor has "failed to honor the binding precedent" of this Court in *Treat I* and *Treat II*. [ECF No. 179 at 3]. As the Governor has explained, the Attorney General is grossly mischaracterizing his litigation position and his response to the *Treat* decisions. *See supra*, pp. 3-4, 8. But regardless of the merits of that dispute, this Court should not readjust the longstanding constitutional and statutory distribution of executive power within the State based on the facts of this particular case. Instead, the Court should consider the consequences for future Governors and Attorneys General if it adopts the theory that the Attorney General advances here. Several of those consequences are implausible, intolerable, or downright absurd.

For one thing, if the Attorney General were right about his authority in this case, nothing would stop him from seizing control over the Governor's objection in every case. To take just one example, the Governor recently initiated a lawsuit seeking a declaratory judgment that an Opinion of the Attorney General regarding the Governor's cabinet appointments is not correct. *See Stitt* v. *Drummond*, No. CV-2024-606 (Okla. Dist. Ct. filed Mar. 7, 2024). If the Attorney General's reading of Oklahoma law here were correct, the Attorney General could in theory take control over the Governor's representation in that case and dismiss the suit the Governor filed against him. Indeed, in each case where the Governor and the Attorney General disagree, the Attorney General could presumably flip positions and sandbag his opposition. That consequence is absurd. The Oklahoma Legislature did not hand the Attorney General a

trump card to override the decisions of the State's "Supreme Executive" and "Chief Magistrate" every time the two officers disagree. Indeed, the Attorney General's theory could even mean that he could usurp the *Legislature*'s control over the litigation concerning the "state's interest"—implicating additional separation-of-powers concerns.

Relatedly, the Attorney General's attempt to take over the litigation in this case raises serious concerns under basic rules of legal ethics. Governor Stitt, as an involuntarily named defendant in this proceeding, has the right to be represented by a lawyer who will advocate for his defense and for his legal views, rather than one who openly states his objective to side with the Plaintiffs who sued the Governor. Under Oklahoma ethical rules, a lawyer must "abide by the client's decisions concerning the objectives of representation" and must "consult with the client as to the means by which they are to be pursued." *See* 5 O.S. § Rule 1.2; *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, 171 P.3d 899 ("The right to select counsel without state interference is implied from the nature of the attorney-client relationship in our adversarial system of justice."). Yet the Attorney General apparently would have the Governor, a named defendant, represented by an attorney who believes he should lose the case.

The Attorney General brushes aside those ethical considerations on the basis that the Governor was named as a defendant in his official capacity, not his personal capacity. But that does not deprive him of the right to counsel who will seek to advance his interests rather than undermine them. On the contrary, Oklahoma law recognizes that even state officers should not be represented by the Attorney General when a conflict exists. For example, 74 O.S. § 20i specifically contemplates that "an agency or official of the executive branch" may retain separate counsel when the Attorney General's representation is precluded by a conflict of interest. *See, e.g., State ex rel. Howard v. Oklahoma Corp. Comm'n,* 1980 OK 96, ¶¶22-24,

614 P.2d 45, 50; *see* 2003 OK AG 9 (Feb. 27, 2003) ("Agencies may also obtain legal representation if the Attorney General is unable to represent the agency or official due to a conflict of interest"). That the Attorney General's reading of the statute would invite conflicts of interest forbidden by Oklahoma law is yet another reason to reject it.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question in the negative and hold that the Attorney General lacks authority to take over the representation of the Governor in the federal district court proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that on this 8th day of July, 2024, a true and correct copy of the foregoing instrument was mailed via first class U.S. mail, postage prepaid, to the following:

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