IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE CHEROKEE NATION, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Case No. 122,108

OKLAHOMA ATTORNEY GENERAL'S REPLY BRIEF

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In his brief, the Governor tells this Court that he has "the right to counsel who will seek to advance **his** interests rather than undermine them." Gov. Br. at 17 (emphasis added). This illustrates the Governor's nescience in this matter. This dispute is not about who represents the Governor's individual interests. This case is about who represents the State of Oklahoma's interest in the DC Gaming Litigation. The Governor's individual interests are not relevant.

What matters are the State's interests. And Oklahoma law clearly and unambiguously vests its chief law officer, the Attorney General, with the power and responsibility to represent Oklahoma's interests in litigation. 74 O.S. §§ 18, 18b. The parties have previously thoroughly addressed these issues in the DC Gaming Litigation and other forums. As a result, the Attorney General in his brief-in-chief preemptively addressed most of the Governor's arguments, and he will limit this reply to the more nuanced arguments advanced by the Governor.

In summary, this Court has had to remind the Governor on an almost yearly basis that he "is without authority to exercise a discretion not validly and specifically granted by the statutory law and not within the power conferred upon the Chief Executive by the Constitution." *Stitt v. Treat*, 2024 OK 21, ¶ 21, 546 P.3d 882, 891 ("*Treat III*") (quoting *Ritter v. State*, 2022 OK 73, ¶ 15, 520 P.3d 370, 379). Here, the Governor has not identified any constitutional provision addressing who controls litigation involving the State. Therefore, Oklahoma statutory law controls. *See* OKLA. CONST. art. 5, § 36. Subsection A(3) of 74 O.S. § 18b specifically gives the Attorney General power to "take and assume control of the prosecution or defense of the state's interest" in litigation if the Attorney General "deems it advisable and to the best interest of the state." The Governor does not claim that 74 O.S. § 18b is unconstitutional, and he has not identified any statute giving the Governor similar express power to take and assume control of litigation. Thus, Subsection A(3) of 74 O.S. § 18b is dispositive here and resolves the certified question in the Attorney General's favor.

A. The Governor's Discretion to Request the Attorney General Enter an Appearance in Litigation Does Not Mean the Attorney General Must Follow the Governor's Directives in Litigation.

The Governor accuses the Attorney General of myopically focusing on "a single word or phrase" in 74 O.S. § 18b(A)(3) when it is the Governor who does just that. Gov. Br. at 9–10 (quoting *Stricklen v. Multiple Injury Tr. Fund*, 2024 OK 1, ¶ 19, 542 P.3d 858, 868). Specifically, the Governor argues that the phrase "or to appear at the request of the Governor" somehow means the Governor's authority to control litigation is superior to the Attorney General's. That is nonsensical, as shown by an examination of "the statutory context wherein the particular . . . phrase appears," in accord with the principle that "[w]ords used in a part of a statute must be interpreted in light of their context and understood in a sense that harmonizes with all other parts of the statute." *Stricklen*, 2024 OK 1, ¶ 19, 542 P.3d at 867–68 (quotation omitted).

Subsection A(3) of 74 O.S. § 18b contains two parts separated by a semicolon. The first part—the phrase relied on by the Governor—discusses only when the Attorney General may initiate or enter an appearance in litigation. It gives the Attorney General the power to enter an appearance on his own initiative, "or" at the request of the Governor, the Legislature, "or either branch thereof." § 18b(A)(3). "[O]r is a 'disjunctive particle used to express an alternative or give a choice of one among two or more things.'" *Toch, LLC v. City of Tulsa*, 2020 OK 81, ¶ 25, 474 P.3d 859, 867 (quoting *Or, Black's Law Dictionary* 987 (5th ed. 1979) ; *State ex rel. Wise v. Whistler*, 1977 OK 61, ¶ 8, 562 P.2d 860, 862) (emphasis deleted)). So, the first part of Subsection 18b(A)(3) simply addresses four different circumstances in which the Attorney General may initiate or appear in litigation for the State. It does not address who controls litigation involving the State of Oklahoma after the Attorney General appears.

That issue is addressed in the second part of 74 O.S. § 18b(A)(3), i.e., the portion after the semicolon. It says the Attorney General may "take and assume control of the prosecution or

defense of the state's interest" in litigation "if the Attorney General deems it advisable and to the best interest of the state." *Id.* That text gives the Attorney General discretion to make litigation decisions. It nowhere makes the Attorney General's power subordinate to that of the Governor or anyone else. Although the Governor or either legislative branch may request the Attorney General's appearance, their authority to do so is set off by a semicolon from the Attorney General's discretionary power to take and assume control of litigation in which he appears. This blocks any suggestion that the power to request an appearance implicitly dominates the Attorney General's power to take and assume control. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 162 (2012) ("[p]eriods and semicolons insulate words from grammatical implications that would otherwise be created by the words that precede or follow them"). Therefore, the Governor's ability to request that the Attorney General enter an appearance in no way means the Governor may overrule the Attorney General's express statutory mandate to take and assume control of litigation. Under the clear terms of the statute, the Attorney General may assume control of litigation decisions even when his involvement occurred after the Governor's request.

And the same is true of other statutory provisions referenced by the Governor, which allow the Governor and others to ask the Attorney General to appear in different types of litigation but say nothing about the Attorney General's power to take and assume control of litigation. *See* Gov. Br. at 10 (citing 74 O.S. §§ 18b(A)(6) and (10), 18e).

Straining further afield, the Governor contends Section 18c "makes clear that the Attorney General's litigation authority does not override the Governor's." Gov. Br. at 11. This contention fails because the provision on which the Governor relies, Subsection 18c(A)(4)(a), simply restates the authority of the Governor to employ legal counsel under Section 6. Neither Subsection 18c(A)(4)(a) nor Section 6 says anything about who controls the litigation if the Governor has

employed counsel in a case in which the Attorney General subsequently appears. That separate question is controlled by Subsection 18b(A)(3). Nothing in Section 18c even mentions, much less negates, the Attorney General's authority to take and assume control of litigation under Subsection 18b(A)(3); nor is there anything in Section 6 that does so, *see infra* at 2–3. Finally, the Governor urges that "[v]arious" Attorney General opinions "recognized the limitations on [the Attorney General's] authority imposed by Section 18c." Gov. Br. at 11–12. But none of those opinions even mentions Subsection 18b(A)(3), much less negates its explicit command, and they are therefore irrelevant.[1]

Furthermore, Subsection A(3) of 74 O.S. § 18b is not the only instance where the Legislature has made the Governor subordinate to the Attorney General in legal matters. Subsections A(5) and (18) give the Attorney General the power to issue formal written opinions. These opinions are "binding upon the state official affected by it and it is their duty to follow and not disregard those opinions." *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765. The list of officials required to follow Attorney General Opinions includes the Governor. *Keating v. Edmondson*, 2001 OK 110, ¶ 4 & n.8, 37 P.3d 882, 885 & n.8. Even outside of litigation, the Attorney General's interpretation of law must be followed by the Governor. Accordingly, it should come as no surprise that the Legislature gave the Attorney General express statutory power to control litigation involving the State, even if the Governor disagrees with the Attorney General.

Therefore, 74 O.S. § 18b(A)(3) resolves the certified question in the Attorney General's favor.

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[1] *In re Bardsley*, 2003 OK AG 9, concluded that a state board could not employ its own counsel because the legislature, in Section 18c, had prohibited such employment and required the board to be represented by the Attorney General. *In re Wells*, 2002 OK AG 4, concluded that this legislative prohibition does not apply to the board of a local service district. The Governor erroneously attributes to *In re Meachum*, 1983 OK AG 97, a quotation from *In re Shannon*, 1983 OK AG 58. *Shannon* concluded only that a state commission could hire an attorney when a statute other than Section 18c specifically allowed it to do so.

B. *State ex rel. Derryberry v. Kerr-McGee Corp.* Controls in Resolving the Certified Question.

The Governor argues that the binding precedent of *State ex rel. Derryberry v. Kerr-McGee Corp.*, 1973 OK 132, 516 P.2d 813, is inapplicable here because the Attorney General has not properly appeared in the DC Gaming Litigation. This is plainly incorrect. Oklahoma law expressly permits the Attorney General to enter an appearance in litigation involving the interests of the State on his or her own initiative. 74 O.S. § 18b(A)(3). There is no dispute that the interests of the State are at issue in the DC Gaming Litigation. *See* Doc. 110 at 1 (admission by the Governor in the DC Gaming Litigation that the State of Oklahoma is the real party in interest). Regardless, consistent with 74 O.S. § 18b(A)(3), the Oklahoma House of Representatives and Senate both requested the Attorney General take and assume control of the State's interest in the DC Gaming Litigation. Docs. 176-1 and 176-2. Therefore, the Attorney General clearly had authority to enter an appearance in the DC Gaming Litigation to protect the interests of the State. Thus, *Derryberry* controls here.

The Governor also claims without authority that *Derryberry* is inapplicable because he does not meet the definition of a relator or some other nominal party. Gov. Br. at 12. But *Derryberry* makes clear that the Attorney General's authority to control litigation in which he properly appears exists "*whether or not* there is a relator or some other nominal party," 1973 OK 132 at ¶ 20 (emphasis added). Even if *Derryberry* were limited to cases where there is such a party, there is one here: the Governor. A relator is simply "[t]he real party in interest in whose name a state or an attorney general brings a lawsuit." *Relator, Black's Law Dictionary* (12th ed. 2024). Here, the Governor is named as a party in his official capacity. Doc. 26 at ¶ 15. And "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v. Clarke*, 581 U.S. 155, 162 (2017) (citing *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989); *Dugan v. Rank*, 372 U.S. 609, 611, 620–22 (1963)). "The real party in

interest is the government entity, not the named official." *Id.* (citing *Edelman v. Jordan,* 415 U.S. 651, 663–65 (1974)). Therefore, the Governor clearly falls under the broad definition of a relator or a nominal party, i.e., the party through which the State has been sued.

Accordingly, the mandate in *Derryberry* that the 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" controls and resolves the certified question in the Attorney General's favor. *Derryberry*, 1973 OK 132, ¶ 20, 516 P.2d at 818.[2]

C. The Statutory Power to Retain Legal Counsel Does Not Give the Governor Power to Overrule the Attorney General in the DC Gaming Litigation.

The Governor contends that his power to employ legal counsel in 74 O.S. § 6 to "protect the interests of the state" means he can overrule the Attorney General in the DC Gaming Litigation. But 74 O.S. § 6 does not say that. It simply provides that the Governor may employ legal counsel to "protect the interests of the state" and that such counsel "may, under the direction of the Governor, plead" in cases "in which the state is interested or a party." *Id.* There is no mention of the Attorney General at all in this statute, much less consideration of the result when the Attorney General properly appears in a case and takes and assumes control of the litigation for the State. That subject is expressly controlled by a more recently adopted statute, 74 O.S. § 18b(A)(3), which gives the Attorney General the express power to take and assume control of litigation. There is no conflict between 74 O.S. §§ 6 and 18b. The Governor is free to retain legal

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[2] The Governor suggests the "fact pattern" of *Derryberry* "makes [its] language unsurprising," Gov. Br. at 13, but the principles the Court explained in *Derryberry* are clearly not limited to the facts of that case. *See State ex rel. Nesbitt v. Dist. Ct.*, 1967 OK 228, ¶ 17, 440 P.2d 700, 707; *State ex rel. Cartwright v. Ga.-Pac. Corp.*, 1982 OK 148, ¶ 9, 663 P.2d 718, 721; *State ex rel. Pruitt v. Steidley*, 2015 OK CR 6, ¶ 16, 349 P.3d 554, 558. The Governor, relying on a statement by the district court in the DC Gaming Litigation, says that *Steidley* only deals with the Attorney General's relationship to a "subservient" official. Gov. Br. at 12. Respectfully, the district court and the Governor misread *Steidley*, which clearly said that a district attorney's role would be subservient "when the Attorney General enters the case pursuant to Section 18b(A)(3) of Title 74," 2015 OK CR 6, ¶ 16, 349 P.3d at 558—in other words, what has occurred in the DC Gaming Litigation.

counsel to "protect the rights or interests of the state in any action or proceeding" under Section 6. However, if the Attorney General appears in a case in which the State is a party or is interested, and "deems it advisable and to the best interests of the State," the Attorney General can take and assume control of the State's interests in the matter under Section 18b(A)(3). Furthermore, even if there were a conflict, the more recently enacted 74 O.S. § 18b controls. *See* 75 O.S. § 22; *Sesow v. Swearingen*, 1976 OK 97, ¶ 4, 552 P.2d 705, 706; *Duncan v. Okla. Dep't of Corr.*, 2004 OK 58, ¶ 6, 95 P.3d 1076, 1079 (citing *Milton v. Hayes*, 1989 OK 12, 770 P.2d 14, 15).

Regardless, the Governor fails to articulate how his attempts to force Oklahoma to honor gaming compacts that undisputedly violate Oklahoma law constitutes "protect[ing] the rights or interests of the state." 74 O.S. § 6. What rights or interests of the State are protected if the State were forced to honor gaming compacts that violate Oklahoma law—as held by the Attorney General and this Court? How are Oklahoma's interests protected by expending State funds to retain expensive attorneys in New York and Washington D.C. to argue that Oklahoma law should be disregarded and ignored because federal bureaucrats failed to timely stop the Governor's malfeasance? It is no mystery why the Governor does not attempt to articulate what State interest he is serving in the positions he has taken in the DC Gaming Litigation. There are obviously no State interests supporting such actions.

The Governor tries to pass off his own personal agenda as a State interest by asserting that this Court's decisions in *Treat v. Stitt*, 2020 OK 64, 473 P.3d 43 ("*Treat I*"), and *Treat v. Stitt*, 2021 OK 3, 481 P.3d 240 ("*Treat II*"), "cannot render invalid a compact that has already taken effect under federal law," and by calling the DC Gaming Litigation an effort to "unwind" the compacts. Gov. Br. at 3–4. These assertions misconstrue the very decisions on which they rely. As this Court explained in *Treat I*: "Any gaming compact to authorize Class III gaming must be validly entered into under state law, and it is Oklahoma law that determines whether the compact is consistent

with the IGRA." 2020 OK 64, ¶ 6, 473 P.3d at 445 (citing *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553, 1557 (10th Cir. 1997) and 25 U.S.C. § 2710(d)(8)(C)). This Court decided that issue by holding the Governor did not have "authority to bind the State to the new compacts with the Comanche Nation and Otoe-Missouria Tribes." *Id.* at ¶ 3. This Court again so concluded, as to two other compacts, in *Treat II*. 2021 OK 3, at ¶¶ 11–12, 481 P.3d at 243–44.[3] Accordingly, this Court's rulings in *Treat I* and *Treat II* conclusively resolve whether the compacts at issue in the DC Gaming Litigation were ever entered into or are valid today. As the district court explained in the DC Gaming Litigation, "[i]f a compact has not been legally entered into under state law, it is 'invalid' under IGRA." Doc. No. 157 at 4 (citing *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 46 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995) and *Pueblo of Santa Ana*, 104 F.3d at 1555, 1559). Because the compacts were not made consistent with IGRA, they have always been nullities. There is nothing to "unwind."

Instead of identifying any State interests that are protected through disregarding State law in the DC Gaming Litigation, the Governor appears to take the astounding position that essentially whatever the Governor believes and wants to do is automatically in the "interests of the State." *See* Gov. Br. at 7 (arguing that "the Attorney General (or anyone else other than the Governor)" has no role "in determining 'the rights or interests of the state'" when the Governor employs counsel under 74 O.S. § 6). The interests of the State, argues the Governor, are "as [he] assesses

[3] In so doing, the Oklahoma Supreme Court confirmed the Attorney General's opinion that the Governor lacked authority to enter into the compacts. After the Governor submitted the IGRA compacts to the Secretary of the Interior, but before they went into effect by inaction, a former Attorney General issued a formal opinion that "the Governor currently lacks the authority to bind the State to the compacts he recently negotiated with the Comanche Nation and the Otoe-Missouria Tribe." *In re Treat*, 2020 OK AG 8 ¶¶ 12–15. As the District Court held in the DC Gaming Litigation, that opinion was "legally binding on all state officials whom it affects until it is overruled judicially . . . includ[ing] the Governor of Oklahoma." Doc. No. 157 at 36 (citing 74 O.S. § 18b(A)(18), *York*, 1984 OK 26, ¶ 5, 681 P.2d at 765, and *Keating*, 2001 OK 110, ¶ 4, 37 P.3d at 885 & n.8).

them." *Id.* This would, with no textual warrant, invest the Governor with power well beyond making litigation decisions. And the Governor's self-aggrandizing position has no basis in the law. As Justice Riley explained in a concurrence in *Wentz v. Thomas*, 1932 OK 636, ¶ 125, 15 P.2d 65, 84:

> it is obvious that the Hamiltonian idea of a centralized form of government by a concentration of all executive authority in one office, was not the public policy adopted by the people and expressed in Constitution of Oklahoma. To the contrary, the Constitution of this state embraced the political idea of a plural executive department–one consisting of many executive officers *who would obey the law rather than policy of a man who might happen to occupy the position of Governor.*

(emphasis added).

More recently, this Court has consistently corrected the Governor's misplaced sense of ultimate superiority—some of which he wishes to subvert to prevail in the DC Gaming Litigation. *See e.g., Treat I*; *Treat II*; *Treat III*. The Governor thrice challenged the Legislature's defining of the scope of his authority and lost. This clearly shows that the Governor's decisions are not unreviewable or entirely within his powers "as he assesses them." Further, if the Court were to accept the Governor's misguided belief that he is sole decider of what is in the State's interests, then the State of Oklahoma will have no representation in the DC Gaming Litigation, as the attorneys supposedly representing the State as a real party in interest will only protect the Governor. That would essentially condone the Governor's violating: (a) Oklahoma law through executing illegal gaming compacts, (b) an Attorney General Opinion by failing to withdraw the compacts during IGRA's 45-day review period, *see supra* at n.4, and (c) two orders of this Court by continuing to argue that the compacts are enforceable in the DC Gaming Litigation. Such a result cannot be reconciled with the Oklahoma Constitution's separation of powers, including a division of the executive authority of the State among the Governor, Attorney General and others. OKLA. CONST. art. 6, § 1(A).

Accordingly, the Governor has no statutory power pursuant to 74 O.S. § 6 to overrule the Attorney General in litigation. And even if the Court made such a finding, it would not be applicable here because the Governor has failed to identify how his actions in the DC Gaming Litigation are protecting the State's interest as opposed to the Governor's personal political interests.

D. The Alabama Supreme Court's Interpretation of Alabama Law Regarding the Alabama Governor's and Attorney General's Powers in Litigation Is Not Relevant to the Certified Question.

The Attorney General preemptively addressed in his brief-in-chief the Governor's arguments premised on *Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 728–29 (Ala. 2010). *Riley* has no relevance to the present dispute. But if it did, it supports the Attorney General's position. Consider first the different facts of both cases. In *Riley*, Alabama's attorney general purportedly failed to enforce Alabama's gambling laws. *Id.* at 718. In this case, the Attorney General is seeking to enforce two decisions of this Court, *Treat I* and *Treat II*, that the Governor refuses to obey.

Then consider the differences in the law. The Governor seeks to analogize this case to *Riley* by asserting that "[a]s 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." Gov. Br. at 15 (quoting ALA. CONST. art. 5, §§ 113, 120). But whatever that phrase may mean in Alabama's Constitution, it is not used in Oklahoma's Constitution to establish an independent source of power. In Oklahoma:

> 'the Supreme Executive power' vested in the Governor by section 2, art. 6, Constitution, is in fact just that executive authority not otherwise vested by the preceding section of the Constitution, and . . . is only such specific executive power as is by the Constitution granted to the chief executive or required for the performance of such duties 'as may be designated in this Constitution or prescribed by law.'

Wentz, 159 OK 124, ¶ 129, 15 P.2d at 84 (quoting OKLA. CONST. art. 6, §§ 1(A), 2)(Riley, J. concurring specially). The first section of Article 6, i.e., the section preceding art. 6, § 2, authorizes the Legislature to "prescribe[] by law" the duties of *all* executive officers, including the Governor and the Attorney General. OKLA. CONST. art. 6, § 1(A). The Legislature has done that here by assigning the Attorney General, not the Governor, the role of "chief law officer of the state," 74 O.S. § 18, and giving the Attorney General, not the Governor, the power to take and assume control of litigation, *id.* § 18b(A)(3). By contrast, in Alabama, its legislature can "prescribe" duties for all executive branch officials *except* the governor. *Riley*, 57 So.3d at 726–27 (quoting ALA. CONST., § 137). Thus, while the Oklahoma Legislature is expressly empowered to enact laws prescribing the duties of the Governor and the Attorney General, the Alabama legislature has no such power with respect to the Governor.

Accordingly, the Alabama Supreme Court's interpretation of Alabama law in *Riley* has no relevance to this case.

E. The Attorney General's Client Is the State of Oklahoma, Not the Governor. Accordingly, the Governor's Ethical Arguments Are Unfounded.

The Governor's continued ethical arguments show that he misunderstands the role of the Oklahoma Attorney General. As the chief law officer of the State of Oklahoma, the Attorney General possesses the responsibility of representing the State's interest in this or any other litigation. 74 O.S. §§ 18, 18b. For example, any time a plaintiff claims that an Oklahoma statute is unconstitutional, the Attorney General must be notified in order to defend the State's interests. 12 O.S. § 1653(C). In litigation, the Attorney General has the power to determine what is "advisable and [in] the best interest of the state," 74 O.S. § 18b(A)(3), including whether to settle, compromise, or dispose of an action, *id.* § 18b(A)(12). This is quite different from the authority of a private attorney, who must leave major litigation decisions in the hands of the client. The reason for this is that the Attorney General represents the State's interests, not merely the narrow

interests of a singular state agency or official. Because of this, attorneys general are "not constrained by the parameters of the traditional attorney-client relationship." *Feeney v. Commonwealth*, 373 Mass. 359, 366, 366 N.E.2d 1262, 1266 (1977).

Additionally, the comments to the Oklahoma Rules of Professional Conduct acknowledge that "the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships[,]" which means that "a lawyer for a government agency may have authority on behalf of the government to decide upon settlement." 5 O.S. App. 3-A ("RPC") Scope, n. 18. This authority "is generally vested in the *attorney general* . . . . " *Id.* (emphasis added). The Legislature—recognizing this distinction between the Attorney General and private attorneys—authorized the Attorney General to determine whether to settle cases. *See* 74 O.S. § 18b(A)(12).

Moreover, "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to the[] Rules determine whether a client-lawyer relationship exists." RPC Scope, n. 17. Similarly, the RPC acknowledge that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." RPC 1.13, n.9. Thus, the "duties of lawyers employed by the government . . . may be defined by statutes and regulation." *Id.* The rules do not limit such authority created by statute. *Id.*

Even though the Governor and Attorney General disagree about the DC Gaming Litigation, the Legislature explicitly determined that the Attorney General, as chief law officer, may control the case. 74 O.S. § 18b(A)(3). Again, the Legislature provided that "when so appearing in [an action in which the interests of the state are at issue], 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." *Id.* This statute contemplates that the

Attorney General prevails in any dispute with another executive officer over controlling a lawsuit involving State interests. After all, the Attorney General would only ever take and assume control of the prosecution of the State's interest from another attorney employed by a State entity or officer when he or she disagreed with the actions of that entity or officer, or of their counsel. Accordingly, a plain reading of 74 O.S. § 18b(A)(3) resolves any ethical claim by the Governor. The Attorney General is vested with the express power to make litigation decisions for the State, even if another State officer, including the Governor, disagrees.

F. The Governor's Fears of an Abuse of the Attorney General's Litigation Powers Are Unfounded.

In his brief, the Governor cites a lone hypothetical of the pending *Stitt v. Drummond*, No. CV-2024-606 (Okla. Dist. Ct. filed Mar. 7, 2024) to suggest that the Attorney General could abuse his power to take and assume control of litigation to prevent state officials from challenging attorney general opinions. Gov. Br. at 16. But the Attorney General has not taken any such action in the *Stitt v. Drummond* case. Further, *State ex rel. Howard v. Okla. Corp. Comm'n*, 1980 OK 96, 614 P.2d 45, cited by the Governor, would likely prevent such abuse by an attorney general. There, this Court permitted the Attorney General and in-house counsel for the Corporation Commission to both appear in an original action when the Attorney General issued an opinion finding the statute at issue in the case was unconstitutional. *Id.* at 33–35, 37–39. As a result, a party affected by an attorney general opinion is clearly entitled to separate legal counsel to challenge the opinion.

Moreover, the Attorney General's power to take and assume control of litigation is statutory. Consistent with OKLA. CONST. art. 6, § 1(A), the Legislature, which prescribes the law, *see* OKLA. CONST. art. 5, §§ 1, 36 "has the power to not only add to [the Attorney General's powers and duties], but may lessen or limit the common law duties which attached to the office under

common law."[4] *Cartwright*, 1982 OK 148, ¶ 6, 663 P.2d at 720. Consequently, an out-of-control attorney general that abused his or her discretion to take and assume control of litigation could be brought into check through a legislative reallocation of the attorney general's powers. *See Keating*, 2001 OK 110, ¶ 17, 37 P.3d at 890 (where this Court acknowledged "the Legislature is free to amend" a statute addressing executive powers).

Regardless, there is always a risk that the final decisionmaker in litigation for the State will abuse such position. This is similarly true if the Governor (especially one that believes whatever he says is automatically in the best interests of the State) were able to overrule the Attorney General in litigation. That's why Oklahoma's Constitution establishes an independent judiciary to keep executive officers in check and permits the Legislature to change the allocation of powers among the State's executive officers at any time. Accordingly, the Governor's fears of an abuse of the Attorney General's litigation powers are unfounded and demonstrate a misunderstanding of the balance of powers in our government.

CONCLUSION

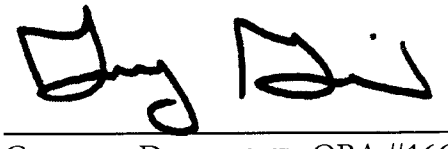
For these reasons, the Attorney General respectfully requests the Court answer the certified question from the DC Gaming Litigation as follows:

> The Attorney General may "take and assume control" of the "defense of the state's interest," 74 O.S. § 18b(A)(3), in the DC Gaming Litigation—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—and the Attorney General may do so over the objection of the Governor, who is vested with "Supreme

[4] Again, while this quote comes from this Court's description of the differing views between states over the powers vested in attorneys general, the remainder of the opinion makes clear that this is the view adopted in Oklahoma. *Id.* ¶¶ 8–12, 663 P.2d at 721 (discussing the modifications made by the Legislature to the Oklahoma Attorney General's common law powers).

Executive power" under Article VI, Section 2 of the Oklahoma Constitution, and after 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," 74 O.S. § 6.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2024 a true and correct copy of the foregoing instrument was mailed by depositing it in the U.S. Mail, postage prepaid to the following:

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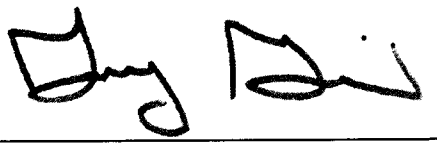

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