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SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
COLO. CONST. ART. VI, § 3

DONETTA DAVIDSON, IN HER OFFICIAL
CAPACITY AS SECRETARY OF STATE FOR THE
STATE OF COLORADO,

Petitioner,

v.

THE HONORABLE KEN SALAZAR, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL FOR THE
STATE OF COLORADO,

Respondent.

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Case No.: 03SA147

**BRIEF OF THURBERT E. BAKER,
ATTORNEY GENERAL OF GEORGIA,
AND LAWRENCE E. LONG,
ATTORNEY GENERAL OF SOUTH DAKOTA,
AND THE ATTORNEYS GENERAL OF 42 OTHER STATES AND TERRITORIES AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Attorneys General of 44 states and territories, many of which share constitutional and common law roots with Colorado. They are the chief legal officers of each of their jurisdictions. Through constitutional mandate, legislative provision, and common law tradition, amici have long advanced the public interest and protected the legal interests of their states and territories by bringing suit on behalf of the people. Amici thus have a strong common interest with the Attorney General of Colorado in defending his prerogative and duty to initiate litigation on behalf of the people of the State of Colorado without interference from any other state agency or official, particularly when such litigation is necessary to uphold and defend the Colorado Constitution.

STATEMENT OF THE CASE

The facts in this case, insofar as they relate to the arguments addressed in this amicus brief, are not in dispute. The Attorney General of Colorado, in an original petition filed with this Court (Case No. 03SA133), seeks to enjoin the enforcement of newly-enacted legislation that he believes violates the Colorado Constitution. The Attorney General also seeks, by mandamus, an order directing the Secretary of State to abide by the court-drawn redistricting plan that was approved by this Court prior to the enactment of the subject legislation. The Secretary of State, in response to the Attorney General's original petition in Case No. 03SA133, filed her own original petition (Case No. 03SA147) for writs of injunction and mandamus, essentially asking this Court to enjoin the Attorney General from proceeding with his petition in Case No. 03SA133. The gravamen of the Secretary of State's petition is that the Attorney General does not have authority to bring suit to enjoin her from enforcing a statute that the Attorney General

challenges as unconstitutional. The Secretary of State further claims that the Attorney General's petition "raises fundamental issues never before addressed by the courts of Colorado which will impact the definition of his duties and responsibilities beyond the parameters of the petition" Pet. at 3. Inasmuch as this Court is called upon to define the duties and responsibilities of the Attorney General, amici file this brief solely to express support for the common law powers and independence of the office of the Attorney General.¹

SUMMARY OF ARGUMENT

The Attorney General, in the vast majority of states and territories, litigates on behalf of the people and of the state itself. The Attorney General does not litigate simply on behalf of the Governor or some other executive or subdivision of state government that can override the litigation decisions of the Attorney General. Indeed, without such prerogative, the Attorney General would be unable to institute and maintain a uniform and coherent legal policy that takes into full account, and protects, the interests of the public. Nor would he, consistent with his obligations as the public's attorney, be able to uphold the law and the constitution of his state or, as here, challenge a legislative enactment he believes violates the state constitution. This essential role of the Attorney General, relative to other constitutional offices, would be radically transformed if the Secretary of State or other state officials were able to exercise veto power over the Attorney General's public interest litigation.

The independence of the Attorney General is also critical to the preservation of ordered liberty. The state must speak with one voice in the courtroom, and that voice is of the Attorney General. It is for the Attorney General to reconcile the interests of individual state officials with

¹ Amici take no position on the redistricting dispute underlying this litigation, or on the constitutionality of the legislation giving rise to this petition.

the interests of the state and of the people. Sometimes this responsibility requires the Attorney General to take positions to which individual state officials or agencies object. The exercise of these powers permits the Attorney General to independently assess the public's interest in any particular matter of law, act on behalf of that interest without parochial or partisan interference, and in so doing, establish and sustain a uniform and consistent legal policy for the state. Without these powers, the one voice of the state's legal affairs would be replaced by a cacophony of divergent interests vying for control of Colorado's legal policy. The constitutional, statutory, and common law traditions of Colorado and its sister states and territories do not countenance such a result.

ARGUMENT

I. Six Centuries Of Common Law Tradition, Amplified By Modern Statute And Constitutional Mandate, Give The Attorney General The Exclusive Power To Determine Whether And When A Lawsuit Is In The Public Interest.

The authority of the Attorney General to bring litigation in the public interest has its roots in English common law. The King's Attorney was first appointed as Attorney General of England in 1461. By the sixteenth century, legal powers were consolidated in a single attorney who could be called 'the chief representative of the crown in the courts.'² As the United States Court of Appeals for the Fifth Circuit has observed,

The office of attorney general is older than the United States.... As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.³

At common law, the Attorney General was not just the chief legal representative of the crown. He was also the guardian, *parens patriae*, of the public interest. He was responsible not

² *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 n. 4 (5th Cir. 1976) (quoting 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 457-61 (2d ed. 1971)).

³ *Id.* at 268-69 (footnotes omitted). In some states, the legislature is constitutionally prohibited from reducing the Attorney General's common law powers. *See, e.g., Lyons v. Ryan*, 780 N.E.2d 1098, 1105-06 (Ill. 2002).

only for the management of all legal affairs on behalf of the crown but also for the prosecution of all suits, civil and criminal, that were necessary to vindicate the public interest. He had the right to initiate, conduct, and maintain all litigation that he deemed necessary to enforce the law, to preserve the civic order, and to protect the rights of the public. His duty was not solely or even primarily to represent and protect the rights of the king. Rather, it was to represent and protect the rights of the people.⁴

This role continued in the American colonies and the United States. With the king deposed and executive authority reposed in governors who were also elected by the people, the conviction only became stronger that the Attorney General's primary allegiance was to the people, not to other branches or officials of government:

Although presently the Attorney General is vested with those powers he had under the common law, the source of his authority and his consequent obligations have been materially changed. When this country promulgated its Declaration of Independence, the writers of that instrument in discussing the inalienable rights of man stated: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed" Thus, the source of the authority of the Attorney General is the people who establish the government, and *his primary obligation is to the people.*⁵

In modern political theory, the Attorney General must put the interests of the public ahead of all other legal interests. "Paramount to all of his duties, of course, is his duty to protect the interest of the general public." *Superintendent of Insurance v. Attorney Gen.*, 558 A.2d 1197, 1202 (Me. 1989). He must not yield to the directives of other government agencies or officials, if he does not believe those directives to be in the public interest.

⁴ 7 AM. JUR. 2D *Attorney General* §§ 1-11; *Darling Apt. Co. v. Springer*, 22 A.2d 397, 403 (Del. Ch. 1941).

⁵ *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973) (emphasis added).

The Attorney General thus has both the right and the responsibility to promote the interests of all the citizens of the state, not just of certain segments of government.⁶ He has "a common law duty to represent the public interest."⁷ This common law concept of the role of the Attorney General has been reinforced and strengthened by modern statutes and constitutional provisions,⁸ to the point that

there can be no dispute as to the right of an Attorney General to represent the state in *all* litigation of a public character. The Attorney General represents the public, may bring *all* proper suits to protect its rights, and *he alone* has the right to represent the state as to *all litigation* in which the subject matter is of statewide interest.⁹

Furthermore, because the "real client" of the Attorney General is the people of the state, the Attorney General is generally "not constrained by the parameters of the traditional attorney-client relationship."¹⁰ Unlike private attorneys, whose conduct in litigation may be subject to the whims of their clients, the Attorney General answers *first* to one client: the people.

⁶ *State ex rel. Olsen v. Public Serv. Comm'n*, 283 P.2d 594, 599 (Mont. 1955) (Attorney General represents the public and may bring all proper suits to protect its rights); *State ex rel. Allain v. Mississippi-Pub. Serv. Comm'n*, 418 So. 2d 779, 782 (Miss. 1982) (the Attorney General's "responsibility is not limited to serving or representing the particular interests of State agencies, including opposing agencies, but embraces serving or representing the broader interests of the State") (citing *EPA v. Pollution Control Bd.*, 372 N.E.2d 50, 52 (Ill. 1977)).

⁷ *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977)

⁸ *Wade v. Mississippi Co-op. Extension Serv.*, 392 F. Supp. 229, 232 (N.D. Miss. 1975) (statutory designation of the Attorney General as legal counsel for the state in all civil cases stretches forward in unbroken succession since territorial time); *Evans-Aristocrat Indus. v. City of Newark*, 380 A.2d 268, 273 (N.J. 1977) (interpreting statute as giving Attorney General exclusive power to sue to abate public nuisance in light of common law); *Ex parte Weaver*, 570 So. 2d 675, 677 (Ala. 1990).

⁹ 7 AM. JUR. 2D *Attorney General* § 14 (citations omitted) (emphasis added).

¹⁰ *Terry v. Wilder*, 29 Va. Cir. 418, 431 (1992) (quoting *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977), *rev'd on other grounds*, 247 Va. 119, 439 S.E.2d 398 (Va. 1994)).

This is particularly true where the Attorney General is elected, as is the case in Colorado.

Because litigation is always brought on behalf of the people, and only sometimes on behalf of a specific agency or official, the Attorney General is not subject to the direction of the individual state officials named as defendants in the litigation. If that were the case, any state official who happened to be sued would thereby attain the constitutional authority to set legal policy for the entire state.

Instead, the views of the Attorney General in litigation prevail when a conflict arises between his views and those of the state agencies and officers whom the Attorney General represents.¹¹ The reason for this rule is clear: While the Attorney General is obligated to represent state officials and agencies to the best of his abilities, he need not - indeed, must not - do so at the expense of the people as a whole.¹² To do so "would be an abdication of official responsibility."¹³

¹¹ *Battle v. Anderson*, 708 F.2d 1523, 1529 (10th Cir. 1983) (holding that the views of the Oklahoma Attorney General in litigation "must prevail" over the views of the legal counsel for any particular state defendant); *Prisco v. State of New York*, 804 F. Supp. 518, 520 (S.D.N.Y. 1992) (holding that Attorney General is authorized to represent individual state officers who are sued in their official capacities, despite claimed conflicts of interest).

¹² *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n*, 387 A.2d 533, 538 (Conn. 1978) (Attorney General's real client is the people); *Reiter v. Wallgren*, 184 P.2d 571, 575 (Wash. 1947) (while Attorney General may represent state officers, "it still remains his paramount duty to protect the interests of the people of the state"); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (Attorney General represents people, not "machinery" of state government).

¹³ *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977) (quoting *Secretary of Admin. and Fin. v. Attorney Gen.*, 326 N.E.2d 334, 338 (Mass. 1975). See also *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (1961), overruled for other reasons, *Christensen v. Minneapolis Municipal Employees Retirement Bd.*, 331 N.W.2d 740 (Minn. 1983) (Attorney General must do more than espouse individual views of state officials represented); *Ex parte Weaver*, 570 So. 2d 675, 684 (Ala. 1990) (upholding Attorney General's authority to dismiss state insurance department proceedings over objection of state insurance commissioner); *State ex rel.*

Absent a constitutional or statutory limitation, the Attorney General has broad discretion to determine what legal matters fall within the public interest and require his attention.¹⁴ It readily follows that the Attorney General is the proper party to determine whether and when a given lawsuit is in the public interest. The Attorney General has the exclusive and absolute discretion to determine whether and when to initiate a lawsuit in a matter of public interest.¹⁵ He also has the exclusive and absolute discretion to set state legal policy and to control all aspects of litigation for and against the State, including whether to maintain a given lawsuit through to its conclusion.¹⁶

Derryberry v. Kerr-McGee Corp., 516 P.2d 813, 821 (Okla. 1973) (upholding authority of Attorney General to settle pending litigation).

¹⁴ *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990) (Attorney General "may exercise such authority as the public interest may require" and "has very broad discretion to decide what matters are of public interest and require its attention"); *Mundy v. McDonald*, 185 N.W. 877, 880 (Mich. 1921) (Attorney General has broad discretion "in determining what matters may, or may not, be of interest to the people generally").

¹⁵ *State v. Monarch Chemicals Inc.*, 443 N.Y.S.2d 967, 969 (1981) (affirming Attorney General's common law power to bring action to abate environmental nuisance despite disapproval of state oversight agency); *State ex rel. Porterie v. Walmsley*, 160 So. 91, 93 (La. 1935) (affirming Attorney General's authority to prosecute litigation in which state had an interest); *Superintendent of Insurance v. Attorney Gen.*, 558 A.2d 1197, 1201 (Me. 1989) (holding that Attorney General had standing to seek judicial review under administrative procedures act); *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976) (Attorney General can bring lawsuits "without specific authorization of the individual governmental entities who allegedly have sustained the legal injuries asserted").

¹⁶ *Ex parte Weaver*, 570 So. 2d 675, 677 (Ala. 1990) ("As the state's chief legal officer, the attorney general has power, both under common law and by statute to make any disposition of the state's litigation that he deems for its best interest. ... He may abandon, discontinue, dismiss, or compromise it"); *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1267 (Mass. 1977) (upholding authority of Attorney General to prosecute appeal in the U.S. Supreme Court over express objections of state officials); *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961), *overruled for other reasons*, *Christensen v. Minneapolis Municipal Employees Retirement Bd.*, 331 N.W.2d 740 (Minn. 1983) (stating that "the courts will not control the discretionary power of the attorney general in conducting litigation for the state"); *State ex rel. Igoc v. Bradford*, 611 S.W.2d 343, 347 (Mo. Ct. App. 1980) ("It is for the attorney general to decide where and how to litigate these issues involving public rights and duties and to prevent injury to the public

A. **This Power Includes The Authority Of The Attorney General To Bring A Lawsuit Challenging The Constitutionality Of A State Statute.**¹⁷

The Attorney General, in a separate action filed with this Court on behalf of the people of Colorado, seeks a determination on a matter of seminal importance to the people of Colorado. By filing an original action with this Court challenging the constitutionality of a state statute, he is exercising his professional legal judgment as to what is in the best legal interests of the state and its citizens. **To be certain, challenging the constitutionality of a duly-enacted statute is an act rarely undertaken by an Attorney General, but it is certainly not without precedent.**¹⁸ **Nor should it be. The Attorney General has both a legal and a professional duty to uphold the law. When, as here, he believes a statute violates the constitution, he has a paramount obligation to defend**

welfare"); *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (Alaska 1975) (Attorney General possesses "power to make any disposition of the state's litigation which he thinks best"); *State ex rel. Bd. of Transp. v. Fremont, E. & M.V.R. Co.*, 35 N.W. 118, 120 (Neb. 1887) (recognizing that Attorney General controls litigation and other state officials "cannot control his actions"); *Perillo v. Dreher*, 314 A.2d 74, 79 (N.J. Super. Ct. App. Div. 1974) (recognizing that Attorney General has "the exclusive power to control all litigation to which the State is a party"); *Opinion of the Justices*, 373 A.2d 647, 649 (N.H. 1977) (Attorney General has "broad authority to manage the state's litigation and to make any disposition of a case which he deems is in the state's best interest"); *Michigan State Chiropractic Assn v. Kelley*, 262 N.W.2d 676, 677 (Mich. App. 1977) (Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed").

¹⁷ Amici take no general position on the specific circumstances under which it would be appropriate for an Attorney General to challenge the constitutionality of a state statute. The propriety of such an action might vary from state to state.

¹⁸ See, e.g., *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633 (S.C. 1982) (Attorney General, in bringing action in name of the state, speaks for all citizens and may, on their behalf, challenge the constitutionality of a state statute); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974) ("the Attorney General's primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies. . . . [h]is constitutional, statutory and common law powers include the power to initiate a suit questioning the constitutionality of a statute"); *State ex rel. Meyer v. Peters*, 188 Neb. 817, 199 N.W.2d 738 (Neb. 1972) (Attorney General authorized to challenge the constitutionality of state tax statute); *State v. Chaſtain*, 871 S.W.2d 661 (Tenn. 1994) (within limits, Attorney General has authority to challenge the constitutionality of state statutes).

the constitution he is sworn to uphold.¹⁹ This fundamental obligation of the Attorney General has been upheld even where no common law powers were found.²⁰

II. The Prerogative Of The Attorney General To Control Litigation On Behalf Of The State Is Integral To The Preservation Of Ordered Liberty.

The independence of the Attorney General is not just historical fact. It is good government. Reposing responsibility for the legal affairs of the state in a single constitutional officer, and giving this officer the discretion to appear in legal proceedings and to control the course of litigation promotes uniformity, consistency, efficiency, and liberty. It holds one public official, in this case one elected by the people, accountable for the prosecution and defense of all legal proceedings involving the state. It holds one public official accountable for ensuring that the interest of the people is vindicated in that litigation. It adds another layer of separation to the ingenious American scheme of divided powers, further ensuring that no one branch of government -- be it legislative, executive, or judicial -- acquires total power to direct the legal affairs of the state. Indeed, the courts of some states have recognized that the independence of the Attorney General reflects a conscious decision by the framers of their constitutions to interpose an additional check and balance in the traditional American tripartite scheme of

¹⁹ See, e.g., *Hansen v. Barlow*, 456 P.2d 177, 181 (Utah 1969) ("After consideration of our Constitution, statutes and decisions of our sister states, we are of the opinion that it is within the right of the Attorney General, if not his duty, to bring suits to clarify the constitutionality of laws enacted by the Legislature if he deems it appropriate. He is in a much more informed, duty-entrusted, and advantageous position to do so than the individual citizen and taxpayer."); *Hetherington v. McHale*, 311 A.2d 162 (Pa. Commw. Ct. 1973), *rev'd on other grounds*, 329 A.2d 250 (Pa. 1974) (if Attorney General believes statute is unconstitutional, he has the right and the duty to either file suit and seek judicial determination or submit corrective legislation to the legislature).

²⁰ *Fund Manager v. Corbin*, 778 P.2d 1255 (Ariz. 1988) (Attorney General, even without common law powers, has authority to challenge the constitutionality of a legislative enactment).

government.²¹ The Attorney General is like an internal legal watchdog, acting on behalf of the people.

This case is a vivid illustration of this principle in action. The Secretary of State seeks to quash the Attorney General's efforts on behalf of the people of Colorado to ensure compliance with the state's constitution in an area of critical importance to the people – their right to a representative democracy and the fundamentally important redistricting and voting principles underlying that right. Believing that the constitution reflects the will of the people, the Attorney General of Colorado has sought, in the name of the people, a judicial determination of the constitutionality of a legislative enactment. As he cannot declare the legislation unconstitutional himself, he seeks redress through this Court to vindicate the people's rights in as expeditious a manner as possible. The Attorney General's independence to undertake such action is crucial here, where another state official seeks to curtail the Attorney General's actions and interpose her views on a critical legal issue affecting a fundamental right of the state's citizens.

Attorneys General routinely resolve issues of state legal policy from a perspective broader than that of a particular state executive, or state agency, or even of the Governor. Other state officials or agencies may have narrower political interests that drive their decisions concerning a particular lawsuit. Uniform and consistent legal policy, taking into account the entire public interest, cannot be achieved if the litigation decisions of the Attorney General are overridden whenever the Secretary of State or another state official disagrees. In such a regime, the Attorney General would no longer be the Attorney "General."

²¹ E.g., *State v. Gattavara*, 47 P.2d 18, 21 (Wash. 1935). See also *State ex rel. Foster v. Kansas City*, 350 P.2d 37, 42 (Kan. 1960) (holding separation of powers concerns precluded Governor's directing Attorney General to dismiss quo warranto proceeding, since Attorney General was both an executive officer and an officer of the judiciary).

CONCLUSION

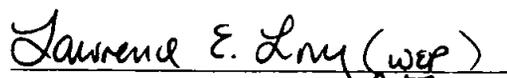
It is respectfully submitted that the Court, in crafting its decision, should give continuing recognition to the constitutional, statutory and common law independence of the Attorney General. The Court should preserve the concept of an executive branch that consists of several elected officers, each with a separate, distinct and vital contribution to be made to the operation of government; should preserve the traditional independence of the Attorney General, with all the checks and balances associated therewith; should preserve, in an ever expanding and more complex government, the important notion of consistency manifested when the Attorney General speaks with one voice for the state on matters of law and legal policy; and should preserve the independent ability of the Attorney General to resort to the courts for resolution of matters of legal and constitutional import to the state and its citizens.

For the foregoing reasons, this Court should deny Petitioner's Petition for Injunction and Mandamus and consider instead the original petition filed on behalf of the people of Colorado by their duly-elected Attorney General.

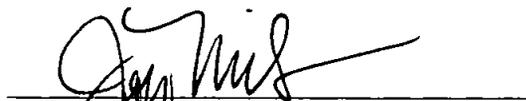
Respectfully submitted, this 20th day of June, 2003.



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **Amicus Brief in Support of Respondent Attorney General Ken Salazar** upon all parties herein by sending copies of same by FedEx overnight delivery, postage prepaid, from Atlanta, Georgia, this 20th day of June, 2003, addressed as follows:

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