STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 12
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D12-2104-PL-014068
	)	
ERIC J. HOLCOMB, GOVERNOR OF THE STATE OF INDIANA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RODRIC BRAY, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND FOR ALTERNATIVE RELIEF

Unauthorized counsel filed a lawsuit on behalf of Governor Eric Holcomb in his official capacity against members of the legislative branch seeking injunctive relief and a declaration from this Court that HEA 1123 is unconstitutional. Under Indiana law, however, the Indiana Attorney General alone holds the authority to represent the State, State agencies, or State officials acting in their official capacities. For this reason, State officials may hire outside counsel only with the express consent of the Attorney General, and here the Governor and the attorneys who purported to file a complaint on his behalf did not have the Attorney General's consent to do so. Accordingly, the Court should strike those attorneys' unauthorized appearances and all their filings in this case.

The Unauthorized Attorneys' Appearances and All Subsequent Filings Should Be Struck Because the Governor Does Not Have Authority to Hire Outside Counsel to Bring Suit without the Attorney General's Consent

The Governor lacks authority to bring this suit because the Attorney General has not consented to the Governor's representation by outside counsel.

1. The Attorney General Has Exclusive Authority to Represent State Officials

The General Assembly created the Office of the Attorney General as an elected position "in order to give the State independent legal representation and to establish a general legal policy for State agencies." *State ex rel. Sendak v. Marion Cty. Superior Ct., Room No. 2*, 268 Ind. 3, 6, 373 N.E.2d 145, 148 (1978). Therefore, the Attorney General alone is charged with "represent[ing] the state of Indiana in any matter involving the rights or interests of the state, including actions in the name of the state of Indiana, for which provision is not otherwise made by law." *State ex rel. Young v. Niblack*, 229 Ind. 596, 603–04, 99 N.E.2d 839, 842 (1951) (internal quotation marks and citation omitted).

To this end, the Attorney General has the authority to "prosecute and defend *all suits instituted by or against the state of Indiana*" and to "defend all suits brought against the state officers in their official relations." Indiana Code § 4-6-2-1 (emphasis added); *see also* Ind. Code § 4-6-1-6 (providing that the Attorney General "shall represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law"). Indiana law gives the Attorney General the "exclusive power and right in most instances to represent the State, its agencies and officers," *i.e.*, "sole responsibility for the legal representation of the State." *Sendak*, 373 N.E.2d at 149. Such exclusive power ensures that the State will adopt a single, unified, and consistent position on legal issues. *See Indiana State Toll-Bridge Comm'n v. Minor*, 236 Ind. 193, 199, 139

N.E.2d 445, 448 (1957) ("Before 1943, many of the various boards, bureaus and commissions had been employing their own attorneys, with no effective authority vested in the Attorney General to establish a general legal policy for such agencies, and no responsibility of counsel to the Attorney General.")

2. State Officials May Not Be Represented by Outside Counsel Without the Attorney General's Consent

To ensure the Attorney General's legal determinations are not undermined by contrary positions taken by other state officials, Indiana law provides that "[n]o agency . . . shall have any right to name . . . or hire any attorney . . . to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general." Ind. Code § 4-6-5-3; *see also Sendak*, 373 N.E.2d at 148 ("No State agency is permitted to hire another attorney to perform legal services unless the Attorney General renders his written consent."). Thus, the Governor can hire outside counsel to litigate on his behalf in his official capacity *only* with the Attorney General's consent.

As the Indiana Supreme Court explained in *Sendak*, this statutory scheme creates an independent focal point for "a general legal policy for State agencies" and thereby *excludes* other state officials from taking contrary positions on behalf of the State. *Id.* To permit other state officials to speak for the State in court would engender chaos and confusion before federal and state courts, and indeed would cause "substantial prejudice to the Attorney General's efficacy in defending his statutory client[s]." *Id.* Because the Attorney General is authorized by law with "defending State

agencies, officers and employees," he "must, of necessity, direct the defense of the lawsuit in order to fulfill his duty to protect State interests." *Id.*

3. Courts Consistently Strike Unauthorized Appearances and Pleadings Purportedly Filed on Behalf of State Officials

Accordingly, on multiple occasions spanning decades, state and federal courts have consistently struck other appearances for state officials who were not properly represented by the Attorney General. In *Sendak*, for example, the Indiana Supreme Court granted, on writ of mandamus, the Attorney General's motion to strike the appearance of private counsel who had appeared on behalf of a state agency at the request of the Governor, explaining that "the legislature has chosen to vest the responsibility for the legal representation of the State in the Attorney General." *Id.* at 149. Similarly, in *Young*, the Indiana Supreme Court rejected a change-of-venue motion because it had been filed by outside counsel, on behalf of the State Superintendent of Public Instruction—who was at that time a constitutional officer—without the Attorney General's consent. 99 N.E.2d at 841–43. The Court observed that the Attorney General's "right to defend suits brought against state officers in their official relations includes the right to exercise his discretion as to whether a change of venue . . . shall be sought." *Id.* "It is not for any state officer to substitute his discretion for that of the Attorney General," for such an officer "has none of the rights of a party to litigation." *Id.*

More recently, in 2013 the Marion Circuit Court applied *Young* to a suit by the State Superintendent of Public Instruction against the members of the State Board of Education and granted the Attorney General's motion to strike the appearance of

counsel and all pleadings. *Ritz et al. v. Elsener et al., Marion Circuit Court*, 49C01-1310-PL-038953. (Exhibit 1).

Indiana's federal courts concur. In 2007, the Southern District of Indiana in *Eberle v. Indiana Department of Workforce Development* granted the Attorney General's motion to strike the appearances of two state officials who had appeared on behalf of state agencies without the written consent of the Attorney General. 3:06-cv-00188-RLY-WGH. (Exhibits 2 and 3). Several years later, the Southern District of Indiana again recognized the Attorney General's exclusive litigation authority, denying the motion to intervene of three Indiana state senators who sought to "substitute themselves for the Office of the Attorney General in order to pursue their own strategic litigation preferences." *Buquer v. City of Indianapolis*, No. 1:11-cv-708, 2013 WL 1332137, at *1 (S.D. Ind. Mar. 28, 2013). (Exhibit 4). In reaching that conclusion, the Court recognized that "[t]he Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities." *Id.* at *5 (quoting *Sendak*, 373 N.E.2d at 148). Finally, in *Bernard v. Individual Members of the Ind. Med. Licensing Bd.*, No. 1:19-cv-1660, at ECF No. 23 (S.D. Ind. motion to strike filed May 14, 2019), the Office of the Attorney General moved to strike the appearance of separate counsel on behalf of the Marion County Prosecutor on similar grounds. (Exhibit 5). The attorneys quickly withdrew, admitting that the prosecutor does not have "authority to advance [his] own independent arguments for or against the legality of a state law." *Id.* at ECF No. 28. (Exhibit 6).

In sum, a fundamental legal principle consistently understood and applied over several decades by both State and Federal judges is that Indiana law vests the Attorney General alone with authority to determine the State's position on legal questions—including the constitutionality of HEA 1123—and to direct the State's representation in Court.

This Case Cannot Proceed for Multiple Additional Reasons

It should be an unsurprising proposition that the Governor cannot merely sue the legislature over laws he does not like. Even aside from the fact that unauthorized counsel cannot bring this case, multiple additional barriers to adjudication of the asserted constitutional claims exist—barriers that the Attorney General, as attorney for all of state government, has taken into account in refusing to authorize this lawsuit. To say nothing of the Attorney General's exclusive authority to represent state officials, doctrines relating to lack of standing, lack of a statutorily authorized cause of action, and legislative immunity are just some of the critical barriers that prevent inter-branch political disputes from spilling into court.

The purported lawsuit is a nullity if the Court follows controlling legal precedents and strikes the unauthorized appearances and pleadings. But if it does not, this lawsuit cannot continue any further (even for consideration of additional defenses) for yet another reason: All of the defendants are legislators, *and the legislature is still in session*. Indiana Code § 2-2.1-1-2(e)(1) (HEA 1372 effective April 26, 2021, upon signature by Governor) (available at http://iga.in.gov/static-documents/2/3/d/8/23d8eca0/ HB1372.04.ENRS.pdf).

The Indiana Constitution provides unequivocal and broad protection to legislators while they are in session. Article 4, Section 8 provides, in relevant part, that "Senators and Representatives, in all cases except treason, felony, and breach of the peace, . . . shall not be subject to any civil process, during the session of the General Assembly . . . ." Accordingly, any service of process against the defendants is invalid while the legislature is in session, including right now.

This aspect of legislative immunity serves to "'protect the integrity of the legislative process by insuring the independence of individual legislators.'" *Hansen v. Bennett*, 948 F.2d 397, 404 (7th Cir. 1991) (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)).

In addition, the General Assembly codified this constitutional principle to provide concrete, unequivocable, non-discretionary direction to courts under Indiana Code section 2-3-5-1: "Whenever a party to a civil action . . . is a member of the general assembly of the state of Indiana, the court . . . shall grant such motion for a continuance to a date not sooner than thirty (30) days following the date of adjournment of the session of the general assembly."

Because the General Assembly is in session, the legislators enjoy the privileges and immunity from service of process and suit granted under Indiana law. Accordingly, while unambiguous controlling precedents require the Court to strike the unauthorized appearances and filings in this case, additional unambiguous constitutional and statutory provisions require that, even failing that remedy, the Court

should continue all proceedings to a date not sooner than 30 days following the adjournment of the 2021 Session.

CONCLUSION

Indiana law vests the Attorney General alone with the authority to reconcile conflicting legal views and harmonize the State's legal position before the courts. Thus, the authority to determine the State's position on the constitutionality of HEA 1123 rests with the Office of the Attorney General. The Governor may hire outside counsel to litigate on his behalf in his official capacity *only* with the Attorney General's consent, *see* Ind. Code § 4-6-5-3; the Attorney General has *not* consented to such outside representation in this case. Accordingly, the appearances of unauthorized counsel and all of their filings in this case should be struck or the Court should continue all proceedings.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Attorney Number 18857-49

By: */s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General
Attorney No. 17949-49

/s/ Patricia Orloff Erdmann
Patricia Orloff Erdmann
Chief Counsel for Litigation
Attorney No. 17664-49

/s/ Jefferson S. Garn
Jefferson S. Garn
Deputy Attorney General
Attorney No. 29921-49

/s/ Kian Hudson
Kian Hudson
Deputy Solicitor General
Attorney No. 32829-02

CERTIFICATE OF SERVICE

I certify that on April 30, 2021, the foregoing document was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing document in the U.S. Mail, first class, postage prepaid, if exempt or non-registered user:

John C. Trimble
A. Richard M. Blaiklock
Aaron D. Grant
Michael D. Heavilon
LEWIS WAGNER, LLP
501 Indiana Ave., Suite 200
Indianapolis, IN 46202

By: */s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

OFFICE OF ATTORNEY GENERAL TODD ROKITA
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
E-mail: Tom.Fisher@atg.in.gov

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION CIRCUIT COURT

CAUSE NO. 49C01-1310-PL-038953

GLENDA RITZ, CHAIR INDIANA STATE BOARD OF EDUCATION & INDIANA SUPERINTENDENT OF PUBLIC INSTRUCTION

Plaintiff,

V.

DANIEL ELSENER, TONY WALKER, DAVID FREITAS, CARI WHICKER, SARAH O'BRIEN, ANDREA NEAL, BRAD OLICER, B.J. WATTS, TROY ALBERT, GORDON HENDRY, in their Individual capacities as members of the Indiana State Board of Education, GEORGE ALGELONE, in his official capacity as Director of Legislative Services Agency,

Defendants.

ENTRY ON MOTION TO STRIKE APPEARANCE AND COMPLAINT

I. FACTS AND PROCEDURAL HISTORY

The following recital of facts is based on the allegations of the Complaint. Plaintiff, Glenda Ritz, is the Superintendent of Public Instruction for the State of Indiana. As such, Ms. Ritz serves as both the Chair of the State Board of Education (SBOE) and the Director of the Department of Education (Department). The Defendants include the nine (9) other individual members of the SBOE: Troy Albert, Daniel Elsener, David Freitas, Gordon Hendry, Andrea Neal, Sarah O'Brien, Brad Oliver, Troy Walker, and B.J. Watts. George Angelone is also a Defendant. Mr. Angelone is the Director of the Legislative Services Agency (LSA), a bipartisan administrative agency serving the General Assembly. Overseeing the LSA are the Speaker of the House of Representatives, Brian Bosma, and the Senate's President Pro Tempore, David Long.

The underlying dispute between Plaintiff and Defendants concerns the publication of the A-F school grades for the 2012-2013 school year. Both state and federal law require a "grading" of each school's performance. Ind. Code 20-31-8-4. This information may affect the funding of a school district, and can be the basis for intervention by the SBOE in the administration of a school district.

During a regular monthly public meeting of the SBOE held on October 2, 2013, the publication of the A-F grades for 2012-13 was discussed. Although board members agreed that grades could be published before Thanksgiving, no formal action was taken.

On October 16, 2013, the nine (9) defendant board members sent a letter to President Pro Tempore of the Indiana Senate David Long and House Speaker Brian Bosma. The Defendants requested the assistance of the LSA to calculate and publish the A-F grades for the 2012-2013 school year. The Superintendent was not informed that the Defendants planned to send the letter, and she was the only member of the SBOE who was not a signatory. The Superintendent and SBOE staff members received a copy of the letter on October 17, 2013.

On October 18, 2013, Brian Bosma and David Long sent a letter to George Angelone directing the LSA to enter into a data-sharing Memorandum of Understanding with the SBOE for the purpose of undertaking a calculation of the grades for the 2012-2013 school year.

On October 22, 2013, the instant complaint was filed. Appearing for the Superintendent in her official capacity were Michael Moore and Bernice Corley, in-house counsel for the Department of Education. The complaint sought a declaratory judgment that the actions of the individual Board members violated Indiana's Open door law; a preliminary and permanent injunction against defendant Board members, George Angelone, the LSA, and all persons and entities acting under their direction or in concert with them from taking further action unless or until the members comply with the requirements of Indiana's Open Door Law; awards for plaintiff's costs, if any, incurred in prosecuting the lawsuit.

On October 24, 2013, the Attorney General filed a motion to strike the appearance of Plaintiff's counsel and complaint.

On October 28, 2013, Plaintiff filed her response, which was followed by the Attorney General's Reply. The motion was set for hearing on November 5, 2013. Before the hearing the Court granted Plaintiff's Motion to Dismiss Defendant Angelone without prejudice. At the

hearing Plaintiff in response to the Court's question orally moved to dismiss Count II of the Complaint, and the same was granted.

This Court then heard oral argument on the Motion to Strike. Appearing for Plaintiff was Mr. Michael Moore and Ms. Bernice Corley. Appearing for the Attorney General was Deputy Attorney General David Arthur, Deputy Attorney General Dennis Mullen, and Deputy Attorney General Kenneth Joel.

At the conclusion of argument Plaintiff was given leave to file no later than November 8, 2013 a supplemental memo on the dissenting opinion in *State ex rel. Young v. Niblack*. On November 7, 2013, Ritz filed her supplemental brief. The matter was then taken under advisement until November 9, 2013.

II. LEGAL DISCUSSION

Chapter 2 of Article 5 of Title 4 sets forth the powers and duties of the Attorney General. Sec. 1 provides in pertinent part as follows:

> **IC 4-6-2-1**
>
> **Prosecuting and defending suits by or against state and state officers.**
>
> Sec. 1 The attorney general shall prosecute and defend all suits instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided for by law...

Section 3 of Chapter 5 of the above article prohibits state agencies, as defined in the chapter, from retaining counsel other than the Attorney General, absent the Attorney General's written consent:

> **IC 4-6-5-3**
>
> **Written consent; employment of attorneys or special General counsel**
>
> Sec 3. No agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any

> attorney or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney general.

As a general proposition, the above statutes clearly vest in the Attorney General's hands the sole responsibility for the legal representation of the State. Plaintiff makes four (4) arguments in her brief and oral argument why the instant case is an exception to that general rule. The Court finds those arguments unpersuasive for the following reasons.

Argument 1: This Case Does Not Satisfy the Conditions of Ind. Code 4-6-2-1.5.

This argument was not raised in oral argument but was addressed in Plaintiff's response to the instant Motion. Ind. Code 4-6-2-1.5(a) states as follows:

> **Suits against state governmental offices or employees and teacher; defense by attorney general**
>
> Sec. 1.5 (a) Whenever any state governmental official or employee, whether elected or appointed, is made a party to a suit, and the attorney general determines that said suit has arisen out of an act which such official or employee in good faith believed to be within the scope of the official's or employee's duties as prescribed by statute or duly adopted regulation, the attorney general shall defend such person throughout such action.

It is true that this provision does not authorize the Attorney's General's representation in behalf of Superintendant Ritz, in that this section only applies to instances in which a State official is a defendant rather than a plaintiff. One could conceivably regard this provision as implicitly amending section 1. In other words, the General Assembly might have intended to scale back the scope of the Attorney General's mandatory responsibilities to the circumstances described in section 1.5.

The above interpretation is unlikely for two (2) reasons. First, had the General Assembly intended such a substantial change in law, it would have adopted a more direct method i.e. amending and/or repealing Section 1. If we accept Plaintiff's position, we are left as Defendant

points out with a Section 1 that serves no purpose. It is black-letter law that Courts should avoid constructions of statutes which render them superfluous.

Second, Plaintiff's interpretation is not consistent with the underlying purpose of Chapter 2. "The office of the Attorney General was re-created by the Indiana Legislature in 1943, in order to give the State independent legal representation and to establish a general legal policy for State agencies." *State ex rel. Sendak v. Marion County Superior Court,* 373 N.E.2d 145, 148 (Ind. 1978). If it makes sense for the State of Indiana to speak with one voice, the Attorney General's, in cases in which a state official is a defendant, why shouldn't the State speak with one voice, when it is necessary for the State to initiate suit.

A more plausible interpretation is that this section was intended to clarify and even expand the Attorney General's duties. This Section was probably intended to cover those cases in which an individual is sued in his individual capacity for acts which the defendant in good faith performed in pursuit of his official duties. This interpretation harmonizes the two sections and is more consistent with the legislative purposes of Chapter 2.

Argument 2: Requiring Superintendant Ritz to be Represented by the Attorney General Will Strip Her of Her Right to Enforce Ind. Code Open Door Law (ODL).

Assuming that Supt. Ritz has standing to invoke the ODL Ind. Code 5-14-1.5 et seq., it is by no means clear that she will not be afforded counsel by the Attorney General, should she decide to pursue her claims under that Act. If her request is denied, that raises different issues than are now before the Court. In the same vein, the contention raised by Plaintiff's counsel that her request for representation by the Attorney General was denied in an arbitrary and capricious manner was neither proven nor pled. The only fact that is clear on this topic is that the Attorney General did not give his written consent to Plaintiff to retain counsel other than from his office.

Argument 3: As a Constitutional Officer, Plaintiff is Exempt From Obtaining the Attorney General's Written Consent Pursuant to Ind. Cod 4-6-5-6(b)(4).

The above statute reads as follows:

IC 4-6-5-6
Definitions; exemptions from act

(b) The term "agency", whenever used in this chapter, means and includes any board, bureau, commission, department, agency, or instrumentality of the state of Indiana; provided, however, this chapter shall not be construed to apply where...

(4) A constitutional officer of the state is by law made a board, bureau, commission, department, agency, or instrumentality of the state of Indiana.

Neither party has been able to explain the phrase "constitutional officer being made a board, bureau..." While the above statutory language is unclear, two (2) cases decided by the Indiana Supreme Court subsequent to the enactment of this provision militate against its application to the instant case.

In *State ex rel. Young v. Niblack* 99 N.E. 2d 839 (Ind. 1951), Superintendant of Public Instruction Wilbur Young retained private counsel when he was named as a defendant in a suit brought by the State of Indiana seeking declaratory relief as to the distribution of state funds to various Indiana school corporations. Young moved for a change of venue. The Attorney General moved to strike the appearance of Young's counsel, invoking Burns' Ann. St. 49-1903, the forerunner of today's Ind. Code 4-6-2-1. The Attorney General's Motion to Strike was granted, whereupon Young sought a Writ of Mandamus to order the trial court judge to allow private counsel to continue to represent Superintendant Young.

Our Supreme Court denied the Writ by a 3-2 vote. While the court did not construe the exemption language now found at Ind. Code 4-6-5-6, that language was in effect at the time of the decision. Thus, in a case involving the very constitutional office and agency now before this Court, the Supreme Court held that the Superintendant of Public Instruction was not empowered to retain his own counsel, but was required to be represented by the Attorney General.

State ex rel. Sendak v. Marion County Superior Court, Room No. 2, 373 N.E.2d 145 (Ind. 1977), more explicitly deals with the application of the exemption language of Ind. Code 4-6-5-6 (b) (4). This case concerned Governor Bowen's hiring of counsel to represent the Alcoholic Beverage Commission. The trial court denied the Attorney General's Motion to Strike private

counsel's appearance, from which decision the Attorney General successfully sought a Writ of Mandamus.

The Court cited the *Niblack* case and *Indiana State Toll Bridge Commission v. Minor* (1957), 236 Ind. 193, 139 N.E. 2d 445, for the general proposition that the Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities. The Court then considered the Governor's reliance on Ind. 4-6-5-6 (b)(4):

> Respondents argue this case is within the statutory exception to the consent requirements in IC 4-6-5-6(b)(4). That section states that the statute does not apply where a constitutional officer is, by law, made a board, bureau, commission, department agency or instrumentality of the State. However, The Governor of Indiana is not by law made the Alcoholic Beverage Commission. The ABC is a separate entity of the government....

State ex rel. Sendak v. Marion County Superior Court, Room No. 2, supra, at 148.

This Court can find no legally significant difference between the relationship of the ABC to Governor Bowen and the relationship of the State Board of Education to Superintendant Ritz. It is true that the Superintendant of Public Instruction serves on the SBOE as its Chair. On the other hand, as the instant litigation illustrates, the Board may act independently of its Chair, just as she may act independently of the Board. The SBOE interacts with and is undoubtedly influenced by its Chair, but is not controlled by her. In this regard, it cannot be said that the Superintendant was "made" into the Board. For that reason, Plaintiff's third argument must fail.

Argument 4: Even if the Attorney General Were Willing to Represent Superintendant Ritz, Such Representation Together With His Representation of the Defendants Would Constitute a Conflict of Interest Under Rule 1.7 of the Rules of Professional Conduct.

Plaintiff gingerly treated the issue of whether representation of all of the parties by the Attorney General would violate the Rules of Professional Conduct ("RPC"), conceding on the one hand that such multiple representation did not fall within the scope of the RPC, but asserting on the other hand that such a conflict should nonetheless be considered by the Court in deciding

whether to allow Ms. Corley and Mr. Moore to continue as counsel. The Attorney General is of course subject to the RPC. Moreover, this Court is empowered to insure fidelity to the RPC. What the Court is not empowered to do is to create and enforce ethical rules not recognized by the RPC.

For the Court to consider the alleged conflict of interest, the Plaintiff must therefore demonstrate that the Attorney General's conduct or reasonably anticipated conduct violates Rule 1.7. It does not.

To begin with, the Attorney General has not entered his appearance for Superintendant Ritz, nor for that matter, the Defendants. After reviewing the case, the Attorney General may advise his state clients to enter into an out-of-court settlement. Or he may decide that with appropriate safeguards, his office can represent both sides in a new action he would file. Or he may ultimately decide to give his written consent to allow Ms. Corley and Mr. Moore to resume their representation. In sum, even if Rule 1.7 were applicable, the question of the Attorney General's compliance with it is not ripe for adjudication.

Most importantly, however, even if the Attorney General were to decide that he would replace present counsel in behalf of Superintendant Ritz, Rule 1.7 would be inapplicable. As acknowledged by Plaintiff in argument, his conduct would not be covered by the RPC. Paragraph 18 of the Preamble to the RPC addresses the topic as follows:

> [18] Under various legal provision, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. ***Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.***

(emphasis added).

As noted by Ritz in her Supplemental Brief, the dissent in the *Niblack* case discusses at length the ethical perils of the Attorney General representing both sides in an intragovernmental suit. The dissent demonstrates, however, that the majority was well aware of the ethical concern raised in this case and whether rightly or wrongly rejected them. In our common law system, case law precedent must be followed by the trial court. Neither the *Niblack* nor the *Sendak* opinions have been questioned by our Supreme Court. Until they are, this Court is obliged to follow them.

III. CONCLUSION

For all of the above reasons, the Court GRANTS the Attorney General's Motion to Strike the appearances of Bernice Corley and Michael Moore and the Complaint herein. This is a Final Order concluding this matter, but is without prejudice to the claims herein being filed by the Attorney General or by other counsel consented to in writing by the Attorney General.

SO ORDERED this 8th day of November, 2013:

Hon. Louis F. Rosenberg
Judge, Marion Circuit Court

Distribution:

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JUDITH A. EBERLE	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 3:06-cv-00188-RLY-WGH**
	)	
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT	)	
	)	
Defendant.	)	

ORDER ON MOTION TO STRIKE APPEARANCE OF TERESA L. MELTON

The Attorney General filed its Motion to Strike Appearance of Teresa L. Melton in the above-captioned cause of action.

And the Court, being first duly advised in the premises, now **FINDS** that said Motion should be, and hereby is, **GRANTED**.

IT IS, THEREFORE, ORDERED that the Appearance of Teresa L. Melton be, and the same is, hereby stricken in the above-captioned matter.

SO ORDERED.

Date: 12/12/2007

WILLIAM G. HUSSMANN, JR.
Magistrate Judge

Distribution:

Judith A. Eberle
5277 Bethany Church Road
Boonville, Indiana 47601

Kathryn Morgan
kmorgan@atg.in.gov

Teresa L. Melton
tvoors@dwd.in.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JUDITH A. EBERLE	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 3:06-cv-00188-RLY-WGH**
	)	
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT	)	
	)	
Defendant.	)	

ORDER ON MOTION TO STRIKE APPEARANCE OF ANNA KRISTINE MUSALL

The Attorney General filed its Motion to Strike Appearance of Anna Kristine Musall in the above-captioned cause of action.

And the Court, being first duly advised in the premises, now **FINDS** that said Motion should be, and hereby is, **GRANTED**.

IT IS, THEREFORE, ORDERED that the Appearance of Anna Kristine Musall be, and the same is, hereby stricken in the above-captioned matter.

SO ORDERED.

Date: 12/12/2007

WILLIAM G. HUSSMANN, JR.
Magistrate Judge

Distribution:

Judith A. Eberle
5277 Bethany Church Road
Boonville, Indiana 47601

Kathryn Morgan
kmorgan@atg.in.gov

Anna Kristine Musall
kmusall@dwd.in.gov

2013 WL 1332137
Only the Westlaw citation is currently available.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Ingrid BUQUER, Berlin Urtiz, Louisa Adair on their own behalf and on behalf of those similarly situated, Plaintiffs,
v.
CITY OF INDIANAPOLIS, Marion County Prosecutor in his official capacity, City of Franklin, Johnson County Sheriff in his official capacity, Johnson County Prosecutor in his official capacity, Defendants.

No. 1:11–cv–00708–SEB–MJD.
|
March 28, 2013.

Attorneys and Law Firms

Andre I. Segura, Lee Gelernt, Omar C. Jadwat, New York, NY, Angela Denise Adams, Lewis & Kappes, Indianapolis, IN, Cecillia D. Wang, Katherine Desormeau, San Francisco, CA, Gavin Minor Rose, Kenneth J. Falk, ACLU of Indiana, Indianapolis, IN, Karen Tumlin, Linton Joaquin, Shiu-Ming Cheer, Los Angles, CA, for Plaintiffs.

Alexander Phillip Will, Office of Corporation Counsel, Jillian Leigh Spotts, City of Indianapolis, Corporation Counsel, Betsy M. Isenberg, Indiana Office of the Attorney General, Jefferson S. Garn, Kenneth Lawson Joel, Indiana Attorney General, Patricia Orloff Erdmann, Office of the Attorney General, Indianapolis, IN, Lynnette Gray, Johnson Gray & MacAbee, Franklin, IN, William W. Barrett, Williams Hewitt Barrett & Wilkowski LLP, Greenwood, IN, for Defendants.

ORDER DENYING MOTION TO INTERVENE AND DENYING AS MOOT DEFENDANTS' MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

SARAH EVANS BARKER, District Judge.

***1** By their motion, three Indiana state senators seek to have this court resolve the internecine disagreement between themselves and the Indiana Attorney General over the strategy to be pursued in this litigation by Defendants. Having carefully reviewed the senators' request, we cannot endorse the result they seek, and their motion to intervene must be denied. As would-be suitors these three legislators lack the power to substitute themselves for the Office of the Attorney General in order to pursue their own strategic litigation preferences.

The Complaint in this class action challenges the constitutionality of Section 18 (currently codified at Indiana Code § 34–28–8.2) and Section 20 (currently codified at Indiana Code § 35–33–1(1)(a)(11)-(13)) of the 2011 Senate Enrolled Act ("SEA") 590.[1] On June 24, 2011, our court entered a preliminary injunction in favor of Plaintiffs enjoining Defendants from enforcing Sections 18 and 20 until further order of the Court. On November 20, 2011, Plaintiffs filed their motion for summary judgment and supporting memorandum. On December 21, 2011, Defendant City of Indianapolis filed a cross-motion for summary judgment. After discovery, on April 9, 2012, the Office of the (Indiana) Attorney General, representing the Marion and Johnson County Prosecutors ("the State Defendants"), filed its response opposing Plaintiffs' motion for summary judgment. In its response, the Office of the Attorney General requested not only that Plaintiffs' motion be denied but also that summary judgment be issued for the state officials. On April 20, 2012, Plaintiffs filed their reply in support of their motion for summary judgment, at which point the motion was fully briefed.

On June 25, 2012, before Plaintiffs' pending summary judgment motion was decided, the United States Supreme Court handed down its ruling in *Arizona v. United States*, —— U.S. ——, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). On July 17, 2012, with this court's permission, Plaintiffs filed a notice of supplemental authority asserting that "[t]he Supreme Court's holding in *Arizona* is entirely conclusive of the issues presented by Class A in this case, which has challenged the 'arrest provisions' in Section 20 of SEA 590." Docket No. 186 at 4. Plaintiffs further maintained that, with regard to Section 18, although not directly addressing the issue, *Arizona* "underscores the arguments made on behalf of Class B regarding Section 18 of SEA 590, which prohibits the use or acceptance of consular identification cards under most circumstances." *Id.* at 5.

On July 31, 2012, the Office of the Attorney General filed a response to the supplemental authority stressing that *Arizona* did not directly address the issue of consular identification cards addressed in Section 18 of SEA 590, and stating: "[t]he Attorney General submits the issue to the Court for its determination of [the consular identification card] issue, with the recommendation that the State should enjoy the right to define what identification it deems reliable and acceptable for government purposes, including licensed occupations." Docket No. 188 at 3. With regard to Section 20, the Attorney General indicated that, based on the Supreme Court's holding in *Arizona*, he recognized that warrantless arrests of persons with a removal order, notice of action, or a commission of an aggravated felony are unconstitutional and therefore "[w]arrantless arrests under those circumstances and justifications will not be defended and a ruling by this Court to that effect will be accepted. However, a federal, state, or immigration detainer justified an arrest before Ind.Code 35–33–1–1, and still justifies an arrest after the *Arizona* decision." *Id.* at 2.

***2** Despite the fact that the Attorney General's April 9, 2012 summary judgment response remains pending before this Court and that he has not consented to judgment, on September 4, 2012, pursuant to Rule 24 of the Federal Rules of Civil Procedure, Indiana State Senators Mike Delph, Phil Boots, and Brent Steele, three of the state senators who originally co-authored and voted for SEA 590, filed a Motion to Intervene [Docket No. 190], seeking to intervene in their official capacities as Indiana State Senators on the side of Defendants to defend the constitutionality of SEA 590. Both Plaintiffs and the State Defendants have filed responses in opposition to the motion to intervene. Additionally, on September 12, 2012, the State Defendants filed a Motion for Reconsideration [Docket No. 197] of the Court's September 10, 2012 Order Granting Motion to Appear Pro Hoc Vice and a Motion to Strike the Motion to Intervene [Docket No. 198]. On October 3, 2012, the State Senators filed a combined reply to the motion to intervene and response to the State Defendants' motions. On October 12, 2012, the State Defendants filed a reply in support of their motion to reconsider and motion to strike. Having now all been fully briefed, we address these three currently pending motions.

Discussion

I. Intervention by Right

The State Senators' motion to intervene seeks leave to intervene as of right, pursuant to section 24(a)(2) of the Federal Rules of Civil Procedure. Under Rule 24(a)(2), a party seeking intervention of right must show: "(1) timeliness; (2) an interest relating to the subject matter of the main action, (3) at least potential impairment of that interest if the action is resolved without the intervenor, and (4) lack of adequate representation by existing parties." *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir.2002) (citation omitted). If any of these criteria are not met, "the district court must deny intervention of right." *Id.* (citing *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir.1985)).

While noting a circuit split on the issue, the Seventh Circuit has ruled that Rule 24(a)(2)'s requirement that the proposed intervenor possess an "interest" relating to the subject of the underlying action incorporates the requirement that the party seeking intervention possess Article III standing. *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 984–85 (7th Cir.2011); *see also* *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir.2009). "To establish standing under Article III, a prospective intervenor must show: (1) he or she has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Peters v. District of Columbia*, 873 F.Supp.2d 158, 211 (D.D.C.2012) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C.Cir.2002)).

A. Standing/Rule 24(a)(2) Interest Requirement

***3** We turn initially to address the issue of standing and the Rule 24(a)(2) interest requirement.[2] The proposed intervenors contend that, as the co-authors of SEA 590, they have an interest in protecting the exercise of their legislative power to introduce and pass laws in the areas of police arrest power and the regulation of identification documents sufficient to confer standing. They argue that a preemption holding by the Court in this case not only invalidates the legislation that they co-authored, but also precludes them from sponsoring and enacting future legislation on similar subjects. The three legislators also

contend that they have a related interest in preventing the nullification of their votes in favor of SEA 590 sufficient to confer standing under *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

Although the United States Supreme Court has seldom had occasion to address the issue of legislative standing, it has taken up the issue in two seminal cases—*Coleman* and *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). In *Coleman*, the Supreme Court held that a group of twenty state legislators who had voted against a proposed child labor amendment to the federal constitution had standing to challenge the State Lieutenant Governor's authority to cast a deciding vote in favor of the amendment because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. at 438. The three legislators in the case before us argue that a preemption finding here would similarly nullify their votes in favor of SEA 590, depriving them of any legislative recourse following a negative decision. Thus, they contend that the Attorney General's failure to defend SEA 590 in the manner that they desire is akin to the Lieutenant Governor's actions challenged in *Coleman.*

We disagree. The Supreme Court clarified the scope of its *Coleman* holding in *Raines.* In *Raines*, six members of the United States Congress who had voted against the Line Item Veto Act filed suit challenging the constitutionality of the law after it was passed, arguing that the Act limited their institutional power as legislators because it gave the President the power to veto certain measures after he signed them into law. The Court rejected the members' contention, stating:

> [O]ur holding in *Coleman* stands (at most ...) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.
>
> It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated.

521 U.S. at 823–24.

Guided by this analysis in *Coleman* and *Raines*, we find that the three legislators here have not alleged a vote nullification injury sufficient to bestow standing in this case. Unlike the situation presented in *Coleman*, these proposed intervenors do not claim that a bill they voted for "would have become law if their vote had not been stripped of its validity ...." *Raines*, 521 U.S. at 824 n. 7. It is undisputed that SEA 590 was properly enacted by the Indiana General Assembly and signed by the Governor. Thus, this is not a case analogous to *Coleman* in which the three legislators' votes in favor of SEA 590 were completely nullified by an allegedly improper procedure by the executive branch that interfered in the legislative process. Rather, the proposed intervenors merely disagree with the litigation strategy decisions made by the Indiana Attorney General.

***4** In *Planned Parenthood of Mid–Missouri and East Kansas, Inc. v. Ehlmann*, 137 F.3d 573 (8th Cir.1998), the Eighth Circuit addressed a situation closely analogous to the one before us. In *Ehlmann*, the appellate court affirmed the district court's denial of a motion to intervene filed by ten Missouri state legislators seeking to intervene in litigation challenging a Missouri legislative enactment defended by the Missouri Attorney General, after the Attorney General indicated that he did not intend to appeal the district court's ruling that the enactment was unconstitutional. There, the Eighth Circuit noted that the parties' dispute limited to a disagreement between the legislative and executive branch over litigation strategy, which differentiated that case from *Coleman.* The Eighth Circuit observed: *"Coleman* related to whether legislators had standing in a lawsuit where they contended an allegedly illegal action of the Lieutenant Governor nullified their votes. It does not hold that when a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment can intervene." *Ehlmann*, 137 F.3d at 578.[3] Because we also note that the case before us does not involve nullification resulting from improper intervention into the legislative process, the three legislators seeking to intervene have not demonstrated that they have standing under a vote nullification theory based on *Coleman.*

Nor is any separate claimed interest by them "in protecting the exercise of their legislative power to introduce and pass laws in the fields of police arrest power and the regulation of identification documents" sufficiently particularized to confer standing. The individual legislators contend that, as the co-authors of SEA 590, they have a distinct and personal interest in its constitutionality, but this interest is not distinguishable from the injury suffered by all members of the state legislature if the statute is subsequently preempted. This type of claimed interest has been held by other courts to be "nothing more than an 'abstract dilution of institutional legislative power,' " which "does not entitle individual

legislators to seek a judicial remedy." *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (C.A.D.C.1999) (denying standing to state legislators alleging the threat of federal preemption caused sufficient institutional injury to challenge a federal statute which removed the power of the Alaska Legislature to control hunting and fishing on federal lands within Alaska) (quoting *Raines*, 521 U.S. at 826).[4] Similarly, in *Raines*, the Court emphasized the importance of the fact that the plaintiffs had alleged an institutional injury in their official capacities which necessarily damaged all members of the legislature equally, distinguishing those circumstances from situations in which individual legislators had been found to have standing based on their having "been singled out for specially unfavorable treatment as opposed to other Members in their respective bodies." 521 U.S. at 821; *see also Newdow v. U.S. Congress*, 313 F.3d 495, 500 (9th Cir.2002) ("Of course, every time a statute is not followed or is declared unconstitutional, the votes of legislators are mooted and the power of the legislature is circumscribed in a sense, but that is no more than a facet of the generalized harm that occurs to the government as a whole. By the same token, the President's signing of the legislation is also nullified, judges, who might have felt otherwise, are bound by the decision, and citizens who relied upon or desired to have the law enforced are disappointed.").[5]

***5** It is well established, however, that "state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (citing *Karcher v. May*, 484 U.S. 72, 82, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987)). The proposed intervenors here argue that, although Indiana state law does not authorize them to stand in for the State of Indiana to represent *its* interests, Indiana state law expressly authorizes them to protect their *own* official interests as legislators, and thus, they have standing on that basis. The statute they cite, Indiana Code § 4–6–2–1.5, does not support their argument in that it clearly addresses the right state governmental officials and employees have to select the counsel of their own choosing to represent their personal interests whenever that governmental official or employee "is made a party to a suit" arising out of an official act. *Id.* § 1.5(a), (f). That is not the case here. Indiana law provides that, although state officials may hire outside counsel of their choosing to protect their personal interests, "when the suit involves State officers or employees in their official capacities, the outside attorney may only act as an amicus curiae unless the Attorney General consents. The Attorney General is charged by law with defending State agencies, officers and employees, and must, of necessity, direct the defense of the lawsuit in order to fulfill his duty to protect the State's interests." *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 268 Ind. 3, 373 N.E.2d 145, 148 (Ind.1978) (internal citation omitted). Accordingly, we reject the three legislators' contention that state law gives them standing on this basis, and hold that the proposed intervenors have failed to assert an interest sufficient to confer Article III standing. Without standing, they cannot and do not satisfy the Rule 24(a)(2) interest requirement.

B. Adequacy of Representation

Even if the proposed intervenors could establish that they have standing to sue and a sufficient interest in this litigation under Rule 24(a)(2), they have failed to show that the Attorney General is providing inadequate representation in the litigation before us. In most cases, the burden of showing inadequacy is a minimal one. *See Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir.2007) (citations omitted). However, in cases like this one, where the governmental entity responsible for protecting the interests of the intervenors is the party accused of inadequacy, the Seventh Circuit has held that "the representative party is presumed to adequately represent [the proposed intervenors'] interests unless there is a showing of gross negligence or bad faith." *Id.* (citing *United States v. South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir.1982); *United States v. Bd. of Sch. Comm 'rs of Indianapolis*, 466 F.2d 573, 575–76 (7th Cir.1972)). Here, "[t]he Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities." *Sendak*, 373 N.E.2d at 148 (citing IND.CODE §§ 4–6–2–1, 1.5). Thus, we find that the deferential standard applied in *Ligas* applies here as well.

***6** As detailed above, the Attorney General has not engaged in or otherwise declared a wholesale refusal to defend SEA 590 nor has he consented to judgment in the case at bar. His position with regard to Section 18 of SEA 590 as set forth in his response to Plaintiffs' motion for summary judgment has remained consistent throughout the litigation, and the proposed intervenors do not criticize that response which is still pending before the court. Their disagreement is with the Attorney General's most recent legal argument regarding the applicability of the *Arizona* decision to certain provisions of Section 20 of SEA 590. However, their dispute with regard to the

application of relevant caselaw evidences neither gross negligence nor bad faith on the part of the Attorney General,[6] and is thus insufficient to overcome the presumption that the representation is adequate. *See* *Wisconsin Educ. Ass'n Council v. Walker,* 705 F.3d 640, 659 (7th Cir.2013) ("[Proposed intervenors] rely largely on post-hoc quibbles with the state's litigation strategy. This does not provide the conflict of interest necessary to render the state's representation inadequate."); *Verizon New England v. Maine Public Utilities Comm'n,* 229 F.R.D. 335, 338 (D.Me.2005) ("[F]ailure of a party to raise a particular legal argument favored by the prospective intervenor does not establish inadequate representation per se.") (citing *Daggett v. Comm'n on Governmental Ethics & Election Practices,* 172 F.3d 104, 112 (1st Cir.1999)).

For the foregoing reasons, we hold that the three legislators have failed to assert a specific, legally-protectable interest in this litigation sufficient to meet either the standing requirement or the second prong of the test under Rule 24(a)(2), and that they have also failed to show inadequate representation by the Attorney General as required by the fourth prong under Rule 24(a)(2). Accordingly, we deny their request to intervene as of right.

II. Permissive Intervention

The proposed intervenors alternatively seek to intervene permissively under Rule 24(b). Permissive intervention is allowed upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. Pro. 24(b). Relevant factors in determining whether permissive intervention under Rule 24(b) is appropriate include undue delay and prejudice to other parties. *See* *Heartwood, Inc. v. U.S. Forest Serv., Inc.,* 316 F.3d 694, 701 (7th Cir.2003). The determination of whether to grant permissive intervention falls within the discretion of the court. *Sokaogon Chippewa Community v. Babbitt,* 214 F.3d 941, 949 (7th Cir.2000) (citation omitted).

Initially, we address the issue of the timeliness of the motion to intervene, at least as to Section 18 of the statute under review by the Court regarding consular-issued identification cards. To determine whether a motion to intervene is timely, courts look at factors such as: "(1) the length of time the intervenor knew or should have known of [his] interest in the case, (2) the prejudice caused to the original parties by the delay, (3) the prejudice to the intervenor if the motion is denied, and (4) any other unusual circumstances." *Reid L.,* 289 F.3d at 1017. "As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of this litigation he must move promptly to intervene." *United States v. South Bend Community Sch. Corp.,* 710 F.2d 394, 396 (7th Cir.1983).

***7** Here, the legislators seeking to intervene argue that their application is timely because it was not until Attorney General filed his response concerning the decision by the Supreme Court in *Arizona* on July 31, 2012, declining to actively defend the constitutionality of certain provisions of Section 20 of SEA 590, that they became aware of their need to intervene. However, with regard to Section 18, the Attorney General's July 31, 2012 response does not alter, much less withdraw, his arguments set forth previously in his April 9, 2012 summary judgment response and his June 15, 2011 memorandum opposing a preliminary injunction. Because the Attorney General has maintained a consistent position on Section 18 throughout this litigation, the three legislators had more than a year to move to intervene to defend the constitutionality of that section. These circumstances fall far short of establishing that they have moved "promptly." Given the advanced stage of this litigation at which the motion to intervene was filed, we hold that the legislators' request was not timely with regard to their arguments in support of the constitutionality of Section 18.

The legislators' untimeliness is underscored by the fact that, as discussed above, the Attorney General has not withdrawn, consented to judgment, or otherwise left SEA 590 undefended. Allowing them to intervene at this point would force Plaintiffs to defend against the disparate views of both the executive and legislative branches, and to do so well after the pending summary judgment motion has been briefed. Our determination is also rooted in the well-established principles of Indiana law that provide: "The office of the Attorney General was re-created by the Indiana Legislature in 1943, in order to give the State independent legal representation and to establish a general legal policy for State agencies." *Sendak,* 373 N.E.2d at 148 (citing *Indiana State Toll Bridge Commission v. Minor,* 236 Ind. 193, 139 N.E.2d 445 (Ind.1957)). Thus, "the Attorney General has exclusive power and right in most instances to represent the State, its agencies and officers, and the agencies and officers may not hire outside counsel unless the Attorney General has consented in writing." *Banta v. Clark,* 398 N.E.2d 692, 693 (Ind. Ct.App. S 1979) (citations omitted). Allowing the three individual legislators to intervene here in their official capacities as State Senators not only would

conflict with this well-settled state law, but would provide the legislators a trump card with respect to the Attorney General's statutorily derived discretion in this context. Informed as well by the cautious restraints imposed by courts on the exercise of their discretionary powers to take pains to avoid entering the fray of interbranch political controversies, we deny the proposed intervenors' request to intervene permissibly.

For the foregoing reasons, we *DENY* the legislators' Motion to Intervene. In light of this ruling, the State Defendants' Motion for Reconsideration and Motion to Strike are *DENIED AS MOOT*. The case will proceed accordingly.

***8** IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1332137

III. Conclusion

Footnotes

1 Section 20 amends Indiana Code 35–33–1–1(1), by adding new sections (a)(11)-(a)(13), authorizing state and local law enforcement officers to make a warrantless arrest of a person when the officer has a removal order issued for the person by an immigration court, a detainer or notice of action issued for the person by the United States Department of Homeland Security, or has probable cause to believe the person has been indicted for or convicted of one or more aggravated felonies. Section 18 creates a new infraction under Indiana law for any person (other than a police officer) who knowingly or intentionally offers or accepts a consular identification card as a valid form of identification for any purpose.

2 Because we deny intervention as of right on the other grounds discussed in detail below, the element of timeliness is deferred until our discussion of permissive intervention, *infra,* where it is addressed in detail.

3 We remain mindful of the Eighth Circuit's caution in *Ehlmann* that: "Justice Souter [in his concurring opinion in *Raines*] cautioned against courts embroiling themselves in a political interbranch controversy between the United States Congress and the President. [citation omitted] Federal courts should exercise this same caution when, as in this case, there exists a political interbranch controversy between state legislators and a state executive branch concerning implementation of a bill." 137 F.3d at 578 n. 5.

4 It is true, as the proposed intervenors argue, that the ability to make laws is a core legislative power. However, at issue here is a relatively narrow aspect of that institutional power, similar to the injury at issue in *Babbitt,* where the the state legislature's power to control hunting and fishing on federal lands within Alaska was at stake. Although the three legislators here characterize their interest as "protecting the exercise of their legislative power to introduce and pass laws in the fields of police arrest power and the regulation of identification documents," that characterization of their interest is drawn much too broadly. A preemption finding in this case would not eliminate the proposed intervenors' ability to introduce and pass *any* laws in those fields, but rather would restrict only the breadth of their power to propose legislation in those fields inasmuch as they intersect with federal immigration regulation. Thus, the dilution of the legislators' institutional power resulting from a preemption finding in the case at bar would be slight.

5 We note that a number of the cases cited by the proposed intervenors in support of their motion address or reference circumstances in which either the legislature as a whole or individual legislators authorized to act on behalf of the legislative bodies they served sought to intervene to defend legislation. *Karcher v. May,* 484 U.S. 72, 76–77, 94–85, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987) (state legislators authorized to represent the New Jersey Legislature had the authority to defend the constitutionality of a statute challenged in federal court only as long as the legislators continued to hold office, but declining to address "the issue whether individual legislators have standing to intervene and defend legislation for which they voted") (White, J., concurring); *Yniquez v. State of Ariz.,* 939 F.2d 727 (9th Cir.1991) (citing *Karcher* and

holding that ballot initiative sponsors had standing to intervene to defend initiative's constitutionality in part based on the court's belief that "a state legislature" would have standing if the ballot initiative were instead a statute); *Interactive Media Entertainment & Gaming Ass'n, Inc. v. Holder,* 2011 WL 802106, at *10 (D.N.J. Mar.7, 2011) (recognizing that "the state legislature would have a vested institutional interest in defending a state law against a constitutional attack when the executive branch declines to defend it"). However, the question of whether the Indiana General Assembly as a legislative body might have a right to intervene under the circumstances presented here is not at issue. Although the state legislature as a whole might have an institutional interest in defending the constitutionality of a state law when the executive branch declines to defend it, there is no argument here that the Indiana General Assembly has authorized the three proposed intervenors to act on its behalf. Moreover, the Attorney General's position on the application of *Arizona* to the facts in this case does not mean that SEA 590 is left undefended as the Attorney General has neither consented to judgment in this case nor expressed a wholesale refusal to defend SEA 590. Accordingly, we do not find these cases either applicable or particularly helpful in resolving the issues at bar.

6 The proposed intervenors correctly state that "Indiana courts define 'bad faith' as 'not simply bad judgment or negligence, rather it implies the conscious doing of a wrong,' and 'contemplates a state of mind affirmatively operating with furtive design or ill will.' " Docket No. 205 at 24 (quoting *Kruse v. Nat'l Bank of Indianapolis,* 815 N.E.2d 137, 148 (Ind.Ct.App.2004) (citations omitted)). However, the evidence cited by the three legislators in support of their bad faith argument is insufficient even to raise the possibility that the Attorney General's July 31, 2012 response regarding the applicability of *Arizona* was anything other than his good faith interpretation of the relevant caselaw. None of the evidence and argument adduced by the intervenors evidences bad faith on the part of the Attorney General nor does it show "a furtive intent to deny the State Senators a meaningful defense," as the proposed intervenors allege.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAITLIN BERNARD, M.D., et al. Plaintiffs, v. THE INDIVIDUAL MEMBERS OF THE INDIANA MEDICAL LICENSING BOARD, in their official capacities; THE MARION COUNTY PROSECUTOR, Defendants.	)	Case No.: 1:19-cv-01660-SEB-MJD

Motion to Strike Notice of Appearance of Daniel Bowman

Defendants the Marion County Prosecutor and the individual members of the Indiana Medical Licensing Board respectfully submit this Motion to Strike the Appearance of Daniel Bowman. Only the Indiana Attorney General has authority to represent the defendants in this case. Notwithstanding clear statutory authority, an attorney with the City of Indianapolis entered his appearance for the Marion County Prosecutor. The defendants ask the Court to strike Mr. Bowman's appearance, stating the following in support:

1. This lawsuit is a challenge to the constitutionality of an Indiana State statute, brought against the individual members of the Indiana Medical Licensing Board and the Marion County Prosecutor. Dkt. 1. The Marion County Prosecutor was sued in his official capacity and designated by his official title under Federal Rule of Civil Procedure 17(d). Dkt. 1 at 3.
2. On May 8, 2019, the Indiana Attorney General, through Thomas M. Fisher (dkt. 17), Julia C. Payne (dkt. 18), Diana Moers (dkt. 15), and Christopher M. Anderson (dkt. 16),

all of the Indiana Attorney General's Office, filed notices of appearance for the defendants.

3. On May 10, 2019, Daniel Bowman, Assistant Corporation Counsel from the Office of Corporation Counsel of the City of Indianapolis, filed a notice of appearance for the Marion County Prosecutor. Dkt. 19.
4. Daniel Bowman's notice of appearance should be stricken because only the Attorney General has authority to represent the prosecutor in this case. Only the Attorney General represents the State of Indiana through his representation of the Marion County Prosecutor and the members of the Indiana Medical Licensing Board.
5. Indiana Code Section 4-6-2-1 provides in part: "[the] attorney-general shall prosecute and defend all suits that may be instituted by or against the state of Indiana."
6. This means that the Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities. Ind. Code § 4-6-2-1; *see also State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145, 149 (Ind. 1978) (holding that the legislature has chosen to vest the responsibility for the legal representation of the State in the Attorney General).
7. Because attorney Daniel Bowman has no authority to represent the Marion County Prosecutor in his official capacity, the Notice of Appearance of Daniel Bowman should be stricken.

WHEREFORE, Defendants, Marion County Prosecutor and the members of the Indiana Medical Licensing Board respectfully request that the Court strike the Notice of Appearance of Daniel Bowman on behalf of the Marion County Prosecutor, Dkt. 19, and all other appropriate relief.

CURTIS T. HILL, Jr.
Indiana Attorney General

By: Jefferson S. Garn
Deputy Attorney General

Thomas M. Fisher
Solicitor General

Diana Moers
Julia Payne
Christopher Anderson
Deputy Attorneys General

Office of the Indiana Attorney General
IGC-South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 234-7119
Fax: (317) 232-7979
Email: Jefferson.Garn@atg.in.gov

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAITLIN BERNARD, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:19-cv-01660-SEB-DML
	)	
THE INDIVIDUAL MEMBERS OF THE INDIANA MEDICAL LICENSING BOARD, in their official capacities; THE MARION COUNTY PROSEUCTOR,	)	
	)	
Defendants.	)	

MOTION TO WITHDRAW APPEARANCE

The undersigned attorneys, Anne C. Harrigan Daniel P. Bowman, pursuant to Local Rule 83-7(c) moves the Court to permit them to withdraw their appearances on behalf of the Marion County Prosecutor ("Defendant"). In support, hereof they state:

1. On May 10, 2019, the Office of Corporation Counsel, by its Assistant Corporation Counsel Daniel Bowman, entered his appearance in this case at the request of the Marion County Prosecutor. (Dkt. 19).

2. The Office of Corporation Counsel frequently provides legal counsel and representation to the Marion County Prosecutor.

3. While Indiana Code 33-23-13-3 mandates that the Attorney General either represent judges and prosecutors sued for damages or equitable relief or authorize the hiring of defense counsel, Section 5 provides that the chapter does not "deprive a judge or prosecuting attorney of the judge's or prosecuting attorney's right to select defense counsel of the judge's or prosecuting attorney's own choice at the judge's or prosecuting attorney's own expense." IC 33-23-13-5.

4. The authority relied upon by the Attorney General in his Motion to Strike (Dkt. 24) does not discuss the specific right to hire private counsel for judges and prosecutors stated in Indiana Code 33-23-13-5 or its contours, but this is a moot point because the Marion County Prosecutor does not contend that the statute gives it authority to advance its own independent arguments for or against the legality of a state law.

5. Rather, the Marion County Prosecutor requested representation of the Office of Corporation Counsel to inform the Court that it would not be taking a legal position, and to represent elected prosecutor Terry Curry and his employees in the discovery process, including any discovery into how the challenged law would be enforced in Marion County.

6. The undersigned respectfully move the Court to withdraw their appearances because an amicus brief declining to take a legal position would be of little utility to the Court, and any disputes concerning representation in discovery can be resolved without involvement of the Court.

WHEREFORE, Anne C. Harrigan and Daniel P. Bowman respectfully move the Court to permit them to withdraw their appearances on behalf of the Marion County Prosecutor effective May 17, 2019 and for all other relief just and proper in the premises.

Respectfully Submitted,

/s/ Anne C. Harrigan
Anne C. Harrigan (23601-64)
Chief of Litigation

/s/ Daniel P. Bowman
Daniel P. Bowman (31691-49)
Assistant Corporation Counsel
OFFICE OF CORPORATION COUNSEL
200 East Washington Street, Suite 1601
Indianapolis, Indiana 46204
Telephone: (317) 327-4055
Email: daniel.bowman@indy.gov