SUPREME COURT OF COLORADO Court Address: 2 East Fourteenth Avenue Denver, CO 80203	
IN RE: **Petitioner**: John W. Hickenlooper, in his official capacity as Governor of the State of Colorado, v. **Respondent**: Cynthia H. Coffman, in her official capacity as Attorney General of the State of Colorado	**▲ COURT USE ONLY ▲**
Attorneys for Petitioner **Governor John W. Hickenlooper** Sean Connelly, # 33600, sconnelly@rplaw.com Daniel M. Reilly, # 11468, dreilly@rplaw.com Larry S. Pozner, # 2792, lpozner@rplaw.com John McHugh, # 45456, jmchugh@rplaw.com REILLY POZNER LLP 1900 Sixteenth Street, Suite 1700 Denver, Colorado 80202 Phone: 303-893-6100 Fax: 303-893-6110	Case Number:
PETITION FOR RULE TO SHOW CAUSE UNDER C.A.R. 21	

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Order to Show Cause complies with all requirements of C.A.R. 21 and C.A.R. 32. The undersigned certifies that this Petition for Order to Show Cause (including headings and quotations) contains 4,867 words.

Dated this 4th day of November, 2015.

s/ Sean Connelly
Sean Connelly

Governor Hickenlooper petitions this Court under Colorado Constitution art. VI, § 3, and C.A.R. 21 for a rule requiring Attorney General Coffman to show cause regarding her legal authority to sue the United States without the Governor's authorization. In this Petition, he requests a ruling on the Governor's and Attorney General's respective authority under the Constitution and laws of Colorado to determine whether the State of Colorado should sue the United States. The Governor asks this Court to issue a legal declaration that (1) the Governor, not the Attorney General, has ultimate authority to decide on behalf of the State of Colorado whether to sue the federal government, and (2) the Attorney General's lawsuits against the federal government without the Governor's authorization must be withdrawn.

DISCUSSION

A. Identity of the Petitioner

Petitioner is the Governor—the "'supreme executive'"—of the State of Colorado. *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004) (quoting Colo. Const. art. IV, § 2).

B. Identity of the Court Below

This is an original action filed in the Supreme Court of Colorado.

C. Identity of the Respondent

Respondent is Colorado's Attorney General.

D. The Actions Complained of and Relief Being Sought

This year, the Attorney General, without seeking the Governor's consent or direction, has filed three federal lawsuits against the federal government. In April and June 2015, she had Colorado join federal lawsuits that the Governor did not request her to join and does not support: first, in Wyoming, challenging an Interior Department hydraulic fracking rule; and second, in North Dakota, challenging an EPA Clean Water Act rule. *See States of Wyoming & Colorado v. U.S. Dep't of Interior*, No. 15-CV-43-SWS (D. Wyo.) (Ex. 1); *North Dakota, et al. (including Colorado) v. EPA*, No. 3:15-cv-59-RRE-ARS (D.N.D.) (Ex. 2). Then, in October 2015, over the Governor's express objection, she made the "State of Colorado" a party to a D.C. Circuit Court lawsuit challenging federal environmental rules meant to reduce carbon emissions. *See State of West Virginia, et al. (including Colorado) v. EPA*, No. 15-1363 (D.C. Cir.) (Ex. 3).

E. Reasons Why No Other Adequate Remedy Is Available

Rule 21 relief is appropriate in original actions that "involve an extraordinary matter of public importance" where there are "no adequate conventional appellate remedies." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1228 (Colo. 2003) (internal quotations omitted). Here, as in *Salazar v. Davidson*—which also involved an intra-executive branch dispute (there, between the Attorney General and Secretary of State)—these Rule 21 requirements are met.

There is an additional constitutional basis for this Court's review here not present in *Salazar*: "The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor…." Colo. Const. art. VI, § 3; *see In re Hickenlooper*, 312 P.3d 153, 155-57 (Colo. 2013).

The legal question—whether the Governor or Attorney General ultimately speaks for Colorado in dealing with the federal government on clean air, clean water, and energy issues—is extraordinarily important. The Attorney General, in asserting her authority to sue the federal government over federal rules that she deems are not "good environmental policy," has relied on an overly expansive reading of the *Salazar* case. *See* Ex. 4; *see also* Ex. 5 (Attorney General's claiming broad powers as "the people's lawyer"). The Governor contends instead that this case is controlled by his express constitutional authority as supreme executive, Colo. Const. art. IV, § 2, and by statutes and cases limiting the Attorney General's right to file lawsuits not authorized by the Governor. *See, e.g.*, C.R.S. § 24-31-101(1); *People on Info. of Witcher v. Dist. Ct.*, 549 P.2d 778 (Colo. 1976); *People ex rel. Tooley v. Dist. Ct.*, 549 P.2d 774 (Colo. 1976).

F. Issue Presented

Whether Colorado's Constitution and laws allow the Attorney General to sue the United States on behalf of Colorado where the Governor did not authorize a lawsuit.

G. Facts Necessary to Understand the Issue Presented

The Attorney General's lawsuits interfere with the Governor's execution of Colorado laws involving clean air, clean water, and energy. In April, June, and October of this year, the Attorney General unilaterally enmeshed our State in ideologically charged lawsuits against the federal government: (1) in Wyoming, over fracking rules; (2) in North Dakota, over clean water rules; and, most recently, (3) in Washington, D.C., over clean power rules. The Governor had determined as a matter of policy to work cooperatively with, not sue, the federal government and that policy was working until an Attorney General lawsuit halted what had been productive state and federal negotiations.

1. April 2015: The Attorney General enmeshes Colorado in a Wyoming lawsuit challenging federal fracking rules.

In April 2015, while the Governor and responsible state agencies were working cooperatively with the federal government to coordinate state and federal rules, the Attorney General joined Colorado as a party to a federal lawsuit previously filed by Wyoming. *See* Ex. 1. That lawsuit challenges U.S. Bureau of Land Management (BLM) rules on hydraulic fracturing ("fracking"). *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16128 (Mar. 26, 2015) (promulgating 43 C.F.R. § 3160).

Colorado agencies under the Governor had been working for years with energy companies to develop fracking rules that made sense for Colorado and would meet or exceed any federal requirements. In January 2012, the Colorado Oil and Gas Conservation Commission worked to develop disclosure rules for chemicals used in fracking. Colorado's fracking rules, with the strictest disclosure requirements nationwide, are a model of public and private cooperation.

On May 4, 2012, the BLM released a draft fracking rule for comment. The responsible state agency, Colorado's Department of Natural Resources, began working with federal officials to encourage BLM to (1) use Colorado's rules as a model and (2) create a variance provision for states whose existing regulations were equal to or more protective than the federal rules.

On March 26, 2015, BLM promulgated final fracking rules. They contained disclosures and well integrity and waste requirements that in many ways were "consistent with what … Colorado … [was] already doing" and had "language … very similar to the requirements in Colorado rule 341." *See* 80 Fed. Reg. at 16129, 16161. As Colorado had requested, the federal rules also allowed for a state "variance" if its own "regulations are demonstrated to be equal to or more protective than the BLM's rules." *Id.* at 16130. The Colorado Department of Natural Resources began working with BLM to obtain a variance under which Colorado's fracking rules would be accepted as compliant with federal rules.

On April 21, 2015, while Colorado and federal executive branch officials were working on the variance, the Attorney General called the Governor's office to say she intended to sue the federal government in Wyoming. Hours later, without discussing the suit with the Governor, the Attorney General added Colorado to the case filed the month before by Wyoming.

The Attorney General's lawsuit ended the previously cooperative federal-state relationship: BLM ended negotiations on a variance for Colorado. In late September, the court issued a preliminary injunction binding the parties while the case continues, ensuring future litigation and uncertainty rather than the predictability the Governor believed best served Colorado's people and businesses.

2. June 2015: The Attorney General enmeshes Colorado in a North Dakota lawsuit challenging federal clean water rules.

In June 2015, the Attorney General had Colorado join as a party to another lawsuit, which the Governor likewise did not authorize, against federal clean water rules promulgated by the Environmental Protection Agency (EPA). *See* Ex. 2. This lawsuit challenges a federal rule under the Clean Water Act known as the "WOTUS" rule because it revises the definition of "waters of the United States." The federal district court entered a preliminary injunction, which it later clarified was not nationwide but applied only to the states that were parties to the action, staying implementation of the federal rule.

3. October 2015: The Attorney General enmeshes Colorado in a Washington, D.C. case challenging federal clean power rules.

Most recently, over the Governor's objection, the Attorney General had Colorado join a challenge filed in the D.C. Circuit to the EPA's clean power rules. *See* Ex. 3. Colorado has a long history of leading rather than resisting reforms in this area. In 2004, through Initiative 37, Colorado became the first state to adopt a renewable energy standard by ballot initiative. In 2007, Colorado implemented demand-side requirements requiring utilities to reduce their retail and peak demand. In 2010, the Colorado General Assembly passed the Clean Air—Clean Jobs Act, which, consistent with the EPA's clean power plan, will secure significant emission reductions and drive conversion of coal-fired energy generators to natural gas.

The Colorado Energy Office of the Governor's Office ("CEO") and other responsible state agencies took active roles in commenting on EPA's June 2014 draft rules establishing guidelines for states to follow as they develop plans to reduce greenhouse gas emissions from existing fossil fuel-fired electric generating units. In October 2014, Colorado joined twelve other western states in providing comments to EPA on these rules. Similarly, in December 2014, the Colorado Department of Health and Environment ("CDPHE"), the Colorado Public Utilities Commission ("PUC"), and the CEO, submitted comments to EPA.

Governor Hickenlooper spoke for Colorado on this issue in a May 14, 2015, letter to U.S. Senate Majority Leader Mitch McConnell. He cited Colorado's "long-standing history of investing in our natural environment" and said Colorado "is already a leader in reducing carbon emissions from power plants." He added that while "complying with the Clean Power Plan will be a challenge, states tackle problems of this magnitude on a regular basis," and "*we intend to develop a compliant Clean Power Plan*." Ex. 6 (emphasis added).

On October 21, 2015, the Governor's Office sent the Attorney General's Office an email instructing the Attorney General not to sue the EPA, underscoring: "[T]he State of Colorado should not be made a party to any lawsuit challenging the new rules." Ex. 7 (emphasis in original). It explained, "The Governor believes the public interest is better served by an open, inclusive process to implement the Clean Power Plan than it is by policy dictated through costly, time-consuming, and unpredictable litigation." Citing Colorado's past "success" in this area, the email told the Attorney General that state officials had worked with EPA "to ensure that Colorado has the time and flexibility necessary to meet our performance standards." It added that the EPA clean power rules did "not dictate how states must meet their individual standards" and "Colorado has begun crafting a compliance plan through an open and transparent process that promotes participation by utilities, the public, and other interested stakeholders."

On October 23, 2015, the same day the final EPA rules were published, the Attorney General disregarded the Governor's instructions and joined a D.C. Circuit petition challenging the rules. She issued a press release opining:

> We've proven again and again that good environmental policy can be developed and implemented successfully by Coloradans, and within the bounds of the law. This [EPA clean power] rule fits neither description.

Ex. 4.

H. Argument: Colorado law does not allow the Attorney General to sue the federal government on behalf of the State where the Governor did not authorize the lawsuit..

1. The Constitution makes the Governor "supreme executive" ultimately responsible for enforcing Colorado law.

Colorado's Governor is the state's "'supreme executive,' and it is his responsibility to ensure that the laws are faithfully executed." *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004) (quoting Colo. Const. art. IV, § 2). He is "ultimately responsible for enforcing [Colorado] law," as "[f]or litigation purposes, the Governor is the embodiment of the state." *Id.*

The Governor is the first of five positions named in the Constitution as part of the executive department; the other four are the Lieutenant Governor, Secretary of State, State Treasurer, and Attorney General. Colo. Const. art. IV, § 1(1). Each is directed to "perform such duties as are prescribed by [the] constitution or by law." *Id.*

As this Court recognized in *Ainscough*, the Governor is vested with "supreme executive power of the state." Colo. Const. art. IV, § 2. In that capacity, he must ensure that the "officers of the executive department ... execute the duties imposed upon them by law." *People v. Kenehan*, 55 Colo. 589, 604 (1913). The Governor may "take whatever actions he deems necessary ... to execute the laws of the state and run his office." Formal Opinion of Colorado Attorney General, AG File No. 1979 WL 34468 (Colo. A.G. Aug. 13, 1979).

2. The Attorney General cannot override the Governor's policy judgment that Colorado should not sue the federal government in a matter within the Governor's executive authority.

The Attorney General's authority is much more limited—she is a constitutional officer assigned no specific constitutional duties—and often depends on "an express command from the Governor." *People ex rel. Brown v. Dist. Ct.*, 585 P.2d 593, 595-96 (Colo. 1978). The "specific duties and limitations of [her] office are found in our statutes as construed by our courts." *Id.* at 595. Thus, the Attorney General lacks unilateral authority to:

- File criminal lawsuits in lower state courts, *People on Info. of Witcher v. Dist. Ct.*, 549 P.2d 778 (Colo. 1976); *People ex rel. Tooley v. Dist. Ct.*, 549 P.2d 774 (Colo. 1976);
- Appear in a lower state court on behalf of a county welfare department, *Dunbar v. County Ct.*, 283 P.2d 182 (Colo. 1955); or
- Sue a railroad in a lower state court, *Atchison, T & S.F. R. Co. v. People ex rel. Attorney General*, 5 Colo. 60 (1879).

As discussed below, the same result holds here. The Attorney General lacks statutory authority to bring these federal lawsuits unless "required to do so by the governor." C.R.S. § 24-31-101(1)(a). Nor does the "common law" allow her to circumvent the statutory limitations and undermine the Governor's constitutional authority to set Colorado executive branch policy.

a. Colorado law is clear: the Attorney General has no statutory authority to sue the federal government in federal court.

The Attorney General's main statutory authority to litigate on behalf of Colorado comes from C.R.S. § 24-31-101. (Other statutes covering specific areas, such as antitrust enforcement, *e.g.*, C.R.S. § 6-4-111, have no bearing here.)

That statute authorizes the Attorney General to represent the State of Colorado in three instances, and the first—the only one applicable here—requires the Governor's approval. *First*, and most pertinently, the Attorney General "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested *when required to do so by the governor*." C.R.S. § 24-31-101(1)(a) (emphasis added). Second, without regard to gubernatorial approval, the Attorney General "shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested." *Id.* Third, "[i]t is the duty of the attorney general, at the request of the governor" or other enumerated officials "to prosecute and defend all suits relating to matters connected with their departments." *Id.* § 24-31-101(1)(b).

The Attorney General's statutory authority to sue the federal government on behalf of Colorado thus depends on the Governor requiring her to do so. As in cases like *Witcher*, *Tooley*, *Dunbar*, and *Atchison*, because the Governor did not require her to file the instant lawsuits, the Attorney General lacked statutory authority to sue.

b. The Attorney General has no common law or other authority to sue the federal government contrary to the Governor's wishes.

The Attorney General has tried to find authority in an expansive misreading of a case allowing then-Attorney General Salazar to petition this Court regarding a Colorado apportionment law he (correctly) thought unconstitutional. The *Salazar* case is far afield from the present situation.

Salazar, in holding the Attorney General could file a Rule 21 petition, relied on (1) the "long-established practice" allowing the Attorney General and other public officials to petition the Court in important cases, and (2) the Court's own constitutional grant of jurisdiction to hear original cases which the General Assembly could not "restrict." *Id.* at 1229-30 (citing Colo. Const. art. VI, § 3). Indeed, the opinion noted that, given "Colorado's broad conception of taxpayer standing," the "Attorney General, as an ordinary taxpayer," would have had "standing to challenge the constitutionality of the 2003 redistricting statute in an original proceeding." *Id.* at 1229 n.4.

Salazar simply holds that the Attorney General, other public officials, or even taxpayers may invoke this Court's original jurisdiction in important cases. In the course of that holding, when explaining that *Tooley* did not compel a different result, *Salazar* disagreed with Secretary Davidson's "sweeping interpretation" that *Tooley* eliminated all of the Attorney General's common law powers; instead, *Tooley* is "consistent with the well-settled principle that the Attorney General has common law powers unless they are specifically repealed by statute." *Id.* at 1230.

While reaffirming the "long-established" right of public officials to petition this Court in an original proceeding, *Salazar* did not recognize any "common law" right of the Attorney General to file other lawsuits not authorized by C.R.S. § 24-31-101(a). Nor did it overrule the equally long-established cases, like *Witcher*, *Tooley*, *Dunbar*, and *Atchison*, holding the Attorney General lacked authority to file other types of lawsuits not authorized by the Governor or General Assembly.

In any event, there is no "common law" authority for state attorneys general to sue the federal government unilaterally. In contrast, the example noted in *Salazar* (discussing *Tooley*)—attorneys general prosecuting crimes—was a traditional common law power. *See* Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 Harv. L. Rev. 973, 980 (2014) (discussing "traditional powers that attorneys general hold").

But there is no "common law" right of state attorneys general to sue the federal government over the objection of their state's Governor. Indeed, even a case construing much more expansive Florida statutes to uphold a state attorney general's power to sue a third party—a private defendant rather than the federal government—added this caution: the case did not "deal with a situation in which there was a conflict between the wishes of the Attorney General and the government body as to the body's legal representation." *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 273 (5th Cir. 1976).

Moreover, even if the Attorney General could strain to find some common law authority for state attorneys general to sue the federal government, *Salazar* recognizes that any such authority is subject to legislative control. *See* 79 P.3d at 1230 (citing *Colo. State Bd. of Pharmacy v. Hallett*, 296 P. 540, 542 (Colo. 1931)). *Hallett* teaches that the General Assembly may abrogate common law not just expressly, but also impliedly by passing a statute inconsistent with the common law. *Hallett*, 296 P. at 542. Here, as in *Tooley*, the General Assembly has expressly abrogated the Attorney General's common law power (if any ever existed) to sue the federal government by prohibiting her from making the state a party to a civil action without being required to do so by the Governor. *See* C.R.S. § 24-31-101(1)(a).

The legislative intent to supplant any contrary common law power is revealed by the contrast with other statutory grants of authority—including § 24-31-101 itself—expressly reserving common law powers to the Attorney General. In contrast to subsection (1), subsection (5) reaffirms the Attorney General's common law powers regarding "trusts established for charitable, educational, religious, or benevolent purposes." C.R.S. § 24-31-101(5). Likewise, unlike § 24-31-101(1), other statutes empowering the Attorney General include language such as "[n]othing in this article shall be construed as limiting the Attorney General's common law powers." C.R.S. § 6-19-104(1); *see also* C.R.S. §§ 7-131-104(3), 24-31-402(2), 25.5-5-412(14)(c). Section 24-31-101(1) lacks such language because it would render meaningless the gubernatorial authorization requirement.

Finally, the fact that the General Assembly has expressly granted specific enforcement powers to the Attorney General—to sue over false Medicaid claims, discriminatory housing practices, and deceptive trade practices, *see* C.R.S. §§ 25.5-4-306(1), 24-34-505.5, 6-1-110, respectively—necessarily implies that she has no power to act absent such specific statutory authority. These legislative enactments would be entirely unnecessary were the Attorney General "the people's lawyer" already empowered "to take independent legal action in the public interest." Ex. 5. *Cf. Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 188 (Colo. 2009) (generally presuming statutory enactments are meant to change law).

c. The Attorney General's actions are at odds with her statutory responsibility to be legal counsel and advisor to the state.

The Attorney General's inflated conception of her powers is at odds with the role assigned her by Colorado's Constitution and laws. She penned a recent "editorial" calling herself "the people's lawyer" with the "ability to take independent legal action in the public interest." Ex. 5. The same piece also suggested that the Governor, just like the Attorney General, was a "plural executive." *Id.*

There is only one "'supreme executive'" in Colorado. *Ainscough*, 90 P.3d at 858 (quoting Colo. Const. art. IV, § 2). And that is the Governor.

The Attorney General is tasked not with suing the federal government over thr objection of the Governor and state agencies but with "be[ing] the[ir] legal counsel and advisor." C.R.S. § 24-31-101(1)(a). Indeed, that counseling and advice function is her first statutory assignment. In *Salazar*, where the intra-branch dispute was over a state law's constitutionality rather than over federal policies, this Court was able to "find no ethical violation" in the Attorney General's naming the Secretary of State as a respondent because "no client confidences are involved." 79 P.3d at 1230-31. The same cannot be said here. The Attorney General cannot properly counsel the Governor and state agencies on regulatory policies—and protect confidential communications—while simultaneously suing the federal government over those same policies.

The Attorney General unilaterally has created a conflict with her own client by challenging the very rules about which she is advising state agencies. In communications with the Governor's Office regarding the latest lawsuit, the Attorney General's Office revealed that no "confidentiality wall" exists between its senior attorneys (including the Solicitor General) and attorneys advising state agencies on implementation. By putting her policy views above her assigned legal duties, the Attorney General has undercut the attorney-client relationship with her statutorily assigned client.

3. The Attorney General's actions not only exceed her lawful authority but also violate the Colorado Constitution.

This case can and should be decided by holding that the Attorney General lacks authority to bring these federal lawsuits absent gubernatorial approval. But if the Attorney General otherwise did have some unilateral common law power, it would be trumped by the Governor's constitutional power as supreme executive.

a. The Governor, not the Attorney General, has ultimate constitutional power to set executive department policy.

There can be no dispute that the Governor, as Colorado's "supreme executive," is the official "ultimately responsible for enforcing [state] law." *Ainscough*, 90 P.3d at 858 (quoting Colo. Const. art. IV, § 2). The Governor has the "constitutional responsibility to uphold the laws of the state and to oversee Colorado's executive agencies." *Id.*

The Governor, not the Attorney General, has authority to direct Colorado's executive agencies—including those working with federal agencies on the energy, clean water, and clean air policies at issue here. Unlike the Governor, the Attorney General has no authority to oversee Colorado agencies outside her own Office.

The Attorney General, of course, is entitled to her own policy opinions. In that respect, she is like any "ordinary taxpayer." *Cf. Salazar*, 79 P.3d at 1229 n.4. But she is not entitled to force her own policy views about environmental issues on the State of Colorado.

Make no mistake: the Attorney General's lawsuits are about her own views regarding what constitutes "good environmental policy." *See* Ex. 4. The press release announcing her latest legal challenge specifically quoted the Attorney General criticizing federal clean power rules as neither "good environmental policy" (her first criticism) nor lawful (her second criticism). *See id.*

The Governor's disagreement with the Attorney General's filings is not based on the legal merits of the federal lawsuits; it is about the direction of executive branch policy, which he is empowered to direct under our constitution and laws. The Governor has determined on behalf of Colorado that the State should be working with rather than suing the federal government on these important environmental and energy issues of mutual concern. The Attorney General cannot constitutionally override that determination.

b. The Attorney General's actions impair the Governor's constitutional power to set executive department policy.

The California Supreme Court *rejected* a notion that "the Attorney General may determine, contrary to the views of the Governor, wherein lies the public interest." *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981). It wrote that the "constitutional pattern is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest…." *Id.* The court cited an Arizona Supreme Court case that had "reached the same conclusion," *id.* at 1210 (citing *Arizona State Land Dep't v. McFate*, 348 P.2d 912, 918 (Ariz. 1960), and cited Colorado as one of "several jurisdictions [that] have prevented the attorney general from acting without constitutional or statutory authority." *Id*. (citing *Witcher*).

Other courts interpreting broader grants of legal authority to their states' attorneys general have allowed filings contrary to the views of other executive branch officials where the disagreement was over the legality of a particular action. *See, e.g.*, *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003) (Attorney General could appeal to U.S. Supreme Court, over Governor's objection, from federal decision invalidating state reapportionment plan); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623 (S.C. 2002) (Attorney General entitled to file original action challenging constitutionality of Governor's actions). State law in those cases,

however, grants those attorneys general broader authority than is vested by Colorado law upon Attorney General Coffman. In *Perdue*, for example, a general statute made it the Attorney General's duty "[t]o represent the State in all civil cases in any court" (without mentioning any requirement of gubernatorial request) and "a more narrowly drawn statute provides authority for the Attorney General to continue the voting rights litigation despite the Governor's authority to dismiss the appeal." 586 S.E.2d at 613-14. And *Condon*, like *Salazar*, was an original action in the state supreme court that the Attorney General had statutory authority to file absent gubernatorial request. *See* 562 S.E.2d at 627; *but cf. State ex rel. Haskell v. Huston*, 97 P. 982 (Okla. 1908) (making rule requested by Governor absolute by holding Attorney General could not file lawsuit without gubernatorial approval).

These cases did not allow an attorney general to bring actions in the name of a state, over the Governor's objection, based on her own policy views of what was in the state's best interests. Nor did *Salazar*: it simply allowed the Attorney General to file an original action, within this Court's constitutional jurisdiction that could not be limited statutorily, where the disagreement involved the legality of actions to be undertaken by executive branch officials. *Salazar* did not allow unilateral lawsuits against the federal government over federal rules that the Attorney General disliked as a matter of policy.

A distinguished author now on the Tenth Circuit discussed the very "problem" the Attorney General created here: one arising "when the attorney general has a different conception of the public interest than the governor or the state agency and claims that her primary responsibility is to the people (her view of the public interest) and not to an agency (the governor's or agency's view of the public interest)." Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J. of L. & Pub. Policy 1, 13 (1993). He wrote, "The client's view of the public interest, if not in violation of state law, would prevail." *Id.*; *see also id.* at 24 ("An attorney general should not interfere with an agency's policy choice as long as the policy [of that state agency] is legal.").

Another article approvingly cited an Iowa Supreme Court case for the proposition that an attorney general cannot "substitute her policy judgment for that of the [state] entity empowered to make the policy decisions." William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2464 (2006) (discussing *Motor Club of Iowa v. Dep't of Transportation*, 251 N.W.2d 510 (Iowa 1977)). It explained that "with respect to policy judgments, a structural analysis supports the authority of the Governor (or other executive officer or agency) over that of the Attorney General." *Id.*

CONCLUSION

The Court should enter a rule requiring the Attorney General to show cause that Colorado's Constitution and laws allow her to sue the United States where the Governor did not authorize a lawsuit. The rule ultimately should be made absolute with a judicial declaration that federal lawsuits filed on behalf of the State of Colorado without the Governor's authorization exceed the Attorney General's legal authority and must be withdrawn.

Respectfully submitted,

s/ Sean Connelly

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List of Supporting Documents

Exhibit 1: *State of Wyoming v. U.S. Department of the Interior*, U.S. District Court, Case No. 15-CV-43 First Amended Petition for Review of Final Agency Action (Doc. 26-1) (April 21, 2015)

Exhibit 2: *State of North Dakota v. U.S. Environmental Protection Agency*, U.S. District Court, North Dakota, Case No. 15-CV-59, Complaint (Doc. 1) (June 29, 2015)

Exhibit 3: *West Virginia v. United States Environmental Protection Agency*, U.S. Court of Appeals for the District of Columbia Circuit, Case No. 15-1363, Petition for Review (October 23, 2015)

Exhibit 4: Attorney General Press Release (October 23, 2015)

Exhibit 5: "The Colorado Attorney General Must Retain Independent Authority to Sue," Editorial by Colorado Attorney General Cynthia H. Coffman

Exhibit 6: Letter from Governor Hickenlooper to Senator Mitch McConnell (May 14, 2015)

Exhibit 7 Email from Governor's Office to Attorney General's Office (October 21, 2015)

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2015, a copy of the foregoing Petition was served via ICCES upon:

Attorney General Cynthia M. Coffman
c/o Solicitor General Fred Yarger
2 E. 14th Street
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/s Janie Cohen
Janie Cohen