COLORADO SUPREME COURT 2 East 14th Avenue | Denver, CO 80203	
Original Proceeding Pursuant to C.A.R. 21 **In Re: John W. Hickenlooper**, in his official capacity as Governor of Colorado, Petitioner, v. **Cynthia H. Coffman**, in her official capacity as Attorney General of Colorado, Respondent.	
CYNTHIA H. COFFMAN, Attorney General FREDERICK R. YARGER, Solicitor General* DAVID C. BLAKE, Chief Deputy Attorney General* GLENN E. ROPER, Deputy Solicitor General* MATTHEW D. GROVE, Assistant Solicitor General* W. ERIC KUHN, Assistant Attorney General* 1300 Broadway, 10th Floor Denver, CO 80203 Telephone: (720) 508-6000 E-Mail: fred.yarger@state.co.us Registration Nos: 39479, 43170, 38723, 34269, 38083 *Counsel of Record *Attorneys for Respondent*	▲**COURT USE ONLY**▲ Case No. 2015 SA 296
Attorney General's Brief Addressing Jurisdictional Questions	

Certificate of Compliance

I certify that this brief complies with the requirements of C.A.R. 21, C.A.R. 32, and the Court's order of November 10, 2015. Specifically, I certify that:

The brief complies with the word limit set forth in the Court's November 10, 2015 Order because it contains 3,664 words.

/s/ Frederick R. Yarger

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INTRODUCTION

Twelve years ago, this Court decided *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), a landmark case in which the Attorney General sued his own client to invalidate an act of the Colorado General Assembly. *Salazar* was divisive and politicized, pitting a Democratic Attorney General against a Republican Secretary of State, a Republican Governor, and a Republican legislative majority. Yet this Court unanimously agreed that even when the Governor and the Attorney General split along party lines, the Attorney General has not only the authority but also the public duty to seek judicial review to protect the legal interests of Colorado and its people.

Today, Governor Hickenlooper requests this Court's permission to rehash the same legal dispute it settled in *Salazar*. He overlooks that, in *Salazar*, Governor Owens submitted—and this Court rejected—arguments substantively identical to those the Governor asserts here. *Salazar* rejected the notion that as "supreme executive," the Governor may prevent the Attorney General from seeking judicial review of legal

questions that implicate state interests. The Court likewise rejected attempts to use the rules of professional conduct to block Attorney General Salazar's independent legal judgment. And while Governor Hickenlooper claims that *Salazar* pertains only to the scope of this Court's original jurisdiction and says nothing about the Attorney General's authority to protect the State's legal interests in court, no reasonable reading of *Salazar* justifies that conclusion. Indeed, that unsupported reading of *Salazar* contravenes the balance of power that has governed identical intra-branch disagreements since *Salazar* was decided, a balance that the General Assembly has refused to disrupt.

Because the relevant legal questions presented by the Petition were resolved in *Salazar*, this Court should not invoke its "extraordinary" original jurisdiction to re-litigate the same dispute. C.A.R. 21(a)(1). The Governor's Petition presents neither a "solemn occasion" nor, given the holding of *Salazar*, an "important question." Colo. Const. art. VI, § 3. Instead, this case is merely an attempt to have the Court choose sides in a disagreement between the Governor and an independently elected Attorney General, a disagreement no different

from those that have played out, and continue to play out, in this State and across the country year after year. Refereeing this kind of recurring political dispute would be an inappropriate use of the Court's extraordinary original jurisdiction.

BACKGROUND

State Attorneys General often exercise their independent authority to seek judicial review of important legal questions. And precisely because doing so is an independent act, state officers of opposing political parties often object. Governor Ritter, for example, objected to Attorney General Suthers's decision to join the multistate challenge to the federal Affordable Care Act, as did three other Governors who disagreed with their own Attorneys General regarding that litigation. Section III, *infra*. Governor Hickenlooper opposed Suthers's legal arguments regarding the validity of Colorado's marriage laws. *Id*. In Maryland—in a mirror-image of the facts here—the Republican Governor has criticized the Democratic Attorney General for intervening in litigation to support the federal government's Clean

Power Plan. Timothy B. Wheeler, *Frosh Joins Maryland in Legal Fray over Obama Climate Plan, Against Hogan's Wishes*, BALTIMORE SUN, Nov. 4, 2015, http://bsun.md/1WyVTLb.

Governor Hickenlooper has taken his present disagreement with the Attorney General a drastic step further, however, asking this Court to declare that Attorney General Coffman must withdraw from three pending federal administrative review proceedings. In those proceedings, the Attorney General, on behalf of the people of Colorado, seeks judicial review of the legality of federal rules that will have a profound effect on the States' legal rights.[1] The courts have so far agreed that these cases implicate vital state interests and raise important legal questions:

- "The [federal] Fracking Rule creates an overlapping federal regime, in the absence of Congressional authority to do so, which interferes with the States' sovereign interests in, and public policies related to, regulation of hydraulic fracturing." *Wyoming v.*

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[1] The plaintiffs in these proceedings are multi-state coalitions ranging in number from four to 32 States.

U.S. Dep't of the Interior, No. 15-cv-41, 2015 U.S. Dist. LEXIS 135044 at *61–62 (D. Wyo. Sept. 30, 2015).

- "Once the [Waters of the United States] Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act." *North Dakota v. EPA*, No. 15-cv-59, 2015 U.S. Dist. LEXIS 113831 at *22 (D.N.D. Aug. 27, 2015); *see also In re "Clean Water Rule: Definition of Waters of the United States*," 803 F.3d 804 (6th Cir. 2015) (enjoining the Waters Rule nationwide).

None of these cases involve client confidences. They involve only straightforward legal inquiries: whether final, publicly available federal rules are lawful under federal statutes and judicial precedent. In Attorney General Coffman's independent judgment, Colorado's legal interests are served by ensuring that the federal executive branch acts within the bounds of the law when it seeks to displace state regulatory authority.

JURISDICTIONAL STANDARDS

This Court's original jurisdiction extends to requests for common-law writs, including "habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be provided by rule of court." Colo. Const. art. VI, § 3. The

Governor's Petition, however, does not seek a writ; it requests a "legal declaration." Pet. 1, 22.

Perhaps recognizing that Article VI, Section 3, does not contemplate declaratory judgments, the Governor cites Appellate Rule 21 as a jurisdictional hook. *Id.* at 2. But Rule 21 does not expand this Court's original jurisdiction. It "applies only to … writs … and to the exercise of the Supreme Court's general superintending authority over all courts." C.A.R. 21(a)(1). The Rule cautions that the Court's original jurisdiction should rarely be invoked and "is extraordinary in nature." *Id.*

Thus, the Governor's Petition is best understood not as a request for a writ, but as a request for an advisory opinion,[2] which the Governor may seek only when faced with "important questions upon solemn

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[2] Even if the Petition were seeking a common-law writ, it should still be dismissed. Given *Salazar* and the fact that this dispute is a political disagreement couched as a legal question, this is not an "extraordinary" case that justifies this Court's original jurisdiction. C.A.R. 21(a)(1).

occasions." Pet. 3 (quoting Colo. Const. art. VI, § 3).[3] Because of their advisory nature, requests of this type should "rarely be … presented or considered." *In re Senate Resolution,* 21 P. 478, 479 (Colo. 1889). The Court must ultimately "decide for itself, as to any given question, whether or not it should exercise the jurisdiction of answering the same." *In re Interrogatories of the Senate*, 129 P. 811, 814 (Colo. 1913) (quotation marks and citation omitted).

The Petition fails the requirements for an advisory opinion. *Salazar* resolved the legal issues that underlie the present dispute. This case is therefore not a "solemn occasion," nor does the question presented "possess a peculiar or inherent importance not belonging to all questions of the kind." *In re Senate Resolution*, 21 P. at 479. Without

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[3] Advisory opinions must also be limited to questions "relating to purely public rights." *In re Senate Resolution*, 21 P. 478, 479 (Colo. 1889). The Attorney General agrees that "a conflict between two officers of the state" relates to public rights. *Salazar*, 79 P.3d at 1230. But the public rights at issue here were adjudicated in *Salazar*.

a legal question in need of resolution, this case presents only a political disagreement between state officials of different parties.

ARGUMENT

I. In *Salazar*, the Secretary of State and Governor raised the same arguments that Governor Hickenlooper attempts to re-raise here, and this Court resolved them.

In *Salazar*, the Attorney General sued to enjoin the Secretary of State from implementing a public policy—redistricting by the General Assembly rather than the courts—which the Secretary officially supported and was working to implement. The Secretary countersued, arguing that the Attorney General had no power to independently seek judicial review on behalf of the people. The Court agreed to consider both the suit and the countersuit. Among the parties who participated in the case was Governor Bill Owens.

The three central arguments Governor Hickenlooper raises now are remarkably similar to the arguments that Governor Owens and Secretary Davidson made in 2003. Governor Hickenlooper cites the

same statutes and many of the same cases. And he relies on the same incorrect theories about Colorado's constitutional structure.

First, Governor Hickenlooper emphasizes that he is Colorado's "supreme executive" and his office is listed "first … in the Constitution." Pet. 9. This, he says, means that his policy decisions trump the Attorney General's independent legal judgment. Pet. 8–9, 17–21.

Governor Owens made similar claims in *Salazar*. He argued that allowing the Attorney General, "an inferior officer," to file suit against the Governor's wishes would deprive him of "the supreme executive power" and would give "the Attorney General an authority that the Constitution reserves for the office of the Governor." Ex. A at 11.

This Court disagreed. In Colorado, "executive power is intentionally diffused." *Salazar*, 79 P.3d at 1230 n.5. "The Attorney General acts as the chief legal representative, not of a king, but of the state." *Id*.

Second, Governor Hickenlooper claims that the Attorney General lacks statutory and common-law authority to challenge the federal government in court. Pet. 10–15. In his view, section 24-31-101(1)(a),

C.R.S., limits the Attorney General to taking action only when the Governor directs her to or when a separate statute explicitly authorizes her to do so. Pet. 12–15.

Governor Owens and Secretary Davidson tried the same arguments. Owens claimed, "[t]he Attorney General lacks authority, whether derivative of the Constitution, statutes, or common law, to file this petition against the Secretary of State." Ex. A at 5. Davidson asserted that "Colorado law expressly limits [the Attorney General's] authority to bring an action to cases where he is commanded to do so by the governor or where specific named officials request that he do so." Ex. B at *7.

The Court again disagreed. Colorado, this Court held, adheres to "the well-settled principle" that, in addition to her express statutory powers, "the Attorney General has common law powers unless they are *specifically repealed* by statute." *Salazar*, 79 P.3d at 1230 (emphasis added). No Colorado statute, including those cited by the Governor, has "specifically repealed" the Attorney General's authority to seek judicial review in the public interest. *See* § 2-4-211, C.R.S. (adopting the

common law and giving it "full force until repealed by legislative authority").

Finally, Governor Hickenlooper claims that seeking judicial review of federal rules against his wishes violates the Attorney General's professional obligations. Pet. 16–17. General Coffman's rule-review challenges, the Governor says, "unilaterally … created a conflict" that prevents the Attorney General from "counsel[ing] the Governor and state agencies on regulatory policies." *Id.*

Governor Owens and Secretary Davidson likewise tried to use the ethical rules to block the Attorney General's independent powers. Owens argued that General Salazar "continue[d] to actively represent and advise both the Governor and Secretary of State on a multitude of legal issues" and had "created a conflict of interest for himself and arguably for his office." Ex. A at 8–10. Secretary Davidson cited "the potential for even inadvertent disclosure of confidential information" and said that allowing "the Attorney General [to] sue the clients which on a daily basis he must counsel and represent" would be "untenable." Ex. C at *17.

This Court refused to transform the professional rules into political weapons. The Court explained that when an Attorney General seeks only to obtain judicial review of important legal questions, "no client confidences are involved." *Salazar*, 79 P.3d at 1231.[4] Acknowledging the vital role of the Attorney General in Colorado's plural executive system, the Court held that "the Attorney General must consider *the broader institutional concerns of the state* even though these concerns are not shared by an individual agency or officer." *Id*. (emphasis added).

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[4] Here, he Governor cites no instances of breaches of client confidentiality, and there are none. The Attorney General's rule challenges are based on public information and her own legal research. Moreover, the deliberate structure of the Department of Law guards against the improper sharing of confidential client information. Attorneys representing the relevant state agencies work in sections of the Department that are physically and electronically separated from counsel handling the rule challenges. And most importantly, the Attorney General has not created any direct conflicts of interest. She challenges only the actions of *federal* entities under *federal* law. She has never sought to challenge the separate policy functions of Governor Hickenlooper or the state agencies under his supervision. Attorney General Coffman's actions here are far more modest than those the Court approved in *Salazar*.

II. The aftermath of *Salazar*—in which the Attorney General opposed the Governor's attempt to avoid state law by raising federal theories in federal court—illustrates that Colorado's system of intra-branch checks and balances applies to matters involving federal law.

According to the Governor, *Salazar*'s analysis of the Attorney General's independent powers was in large part meaningless, because *Salazar* merely clarified the scope of this Court's original jurisdiction. The Governor claims the Attorney General serves no greater role in Colorado's government than any other taxpayer. Pet. 13, 18 ("The Attorney General, of course, is entitled to her own policy opinions. In that respect, *she is like any 'ordinary taxpayer*.'" (emphasis added; quoting *Salazar*)).

Based on this cramped and unsupportable reading of *Salazar*, Governor Hickenlooper asserts that he has exclusive authority to address federal matters. In his view, even when the Attorney General has grave doubts about a question of federal law that will significantly affect the State's legal interests, she is powerless to seek judicial review absent the Governor's approval. Pet. 10–12, 17–21. But the State's legal

interests, which the Attorney General is independently elected to protect, *Salazar*, 79 P.3d at 1231, do not disappear simply because a question arises under federal law or a matter is litigated in the federal courts, as the aftermath of *Salazar* demonstrates.

The *Salazar* decision did not end the litigation over Colorado's congressional districts. In *Keller v. Davidson*, 299 F. Supp. 2d 1171 (D. Colo. 2004), private plaintiffs separately sued Secretary Davidson, Governor Owens, and the General Assembly on the same issue. After *Salazar* was decided, Owens and the General Assembly raised federal counterclaims challenging the constitutionality of that ruling. *See Keller*, 299 F. Supp. 2d at 1175. This forced Attorney General Salazar to move to intervene in the federal litigation to protect this Court's judgment settling critical questions of state and federal law.

Here, Governor Hickenlooper suggests that Colorado's plural executive system evaporates when a legal question involves federal policy or federal agencies. As the *Keller* litigation demonstrates, however, our system of checks and balances does not end at the doorstep to the federal courts.

III. The Governor seeks to destabilize Colorado's system of checks and balances, which the General Assembly has declined to alter.

Salazar reaffirmed what had long been understood—that the Attorney General may seek judicial review in matters affecting the public interest.[5] Since then, disagreements between the Governor and the Attorney General have respected the Attorney General's important institutional role.

A month before *Salazar* was decided, Attorney General Salazar issued a policy explaining his role in state government.[6] The policy emphasized Colorado's "plural executive" system, in which the Attorney General "create[s] an additional check and balance." Ex. D at 1. Because the State is composed of many agencies and officials, which have

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[5] This has been the view of Colorado Attorneys General for at least a century. *See* Colo. Att'y Gen. Op. No. 25-3 (Jan. 22, 1925); Colo. Att'y Gen. Op. No. 17-43 (Mar. 19, 1917) ("[The people] rely, and have the absolute assurance of their constitution that they may rely, upon the appearance of this officer in the preservation and protection of their rights, both civil and criminal.").

[6] Salazar's policy was not novel; it was based on a policy adopted by his Republican predecessor, Attorney General Norton.

"deliberate tensions among them," the Attorney General represents not just individual agencies but "the interests of the state as a whole." *Id.* at 3. "The prevailing view," Salazar observed, "is that an Attorney General with common law powers has the right to intervene in *all suits* affecting the public interest … *apart from the representation of state agencies by members of the Attorney General's office*." *Id.* at 7 (emphasis added). When he took office, Attorney General Suthers adopted and re-issued this policy in full, and it remains in effect today.

Since *Salazar*—and under the longstanding policies of the Attorneys General—the State's intra-branch relationships have remained stable. Most importantly, the current system ensures that the proper institution, the Courts, will ultimately resolve the legal questions that the Attorneys General independently raise. This means that while the Attorney General's independent authority is vitally important, it is also properly constrained. The Attorney General cannot unilaterally effectuate her legal judgments; she relies on the agreement of the separate judicial branch.

When Attorney General Suthers challenged the federal Affordable Care Act, for example, Governor Ritter said the suit was "not the right thing to do for Colorado" because the State was "making tremendous strides" in healthcare. Ex. E; *compare* Pet. Ex. 7. But despite this party-line disagreement, Governor Ritter did not attempt to undermine General Suthers's independent role or compel him to withdraw from the case. Instead, he filed an amicus brief along with three other Governors who also disagreed with the participation of their own States' Attorneys General in the litigation. Ex. F at 7–8 (citing *Salazar*).

Later, another debate over the meaning of federal law—the debate over the right to same-sex marriage—again split Colorado's Governor and Attorney General along party lines. But Governor Hickenlooper did not challenge General Suthers's authority to represent the people in the state and federal trial courts, where litigation was pending. He instead appeared in court separately, through his in-house attorneys, to oppose General Suthers's arguments. *Brinkman v. Long*, No. 2013 CV 32572,

Gov'r Resp. to Summ. J. Mots. (Colo. D. Ct., Adams Cnty., May 30, 2014).[7] At the same time, in public statements, Governor Hickenlooper reaffirmed the Attorney General's independence. "I am not his boss, and I shouldn't be," he said. "*That's why the system is set up the way it is*." Ex. G at 1 (emphasis added).

Until now, Governor Hickenlooper's administration continued to respect the Attorney General's independent authority to raise federal questions in federal courts, even in the context of federal rulemaking. In public statements concerning the multi-state challenge to the federal hydraulic fracturing rules—a case the Governor now says Attorney General Coffman had no right to join—the Executive Director of the

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[7] In addition to defending Colorado's marriage law in federal and state court, Attorney General Suthers, in the name of the State, sued to prevent a county clerk from issuing same-sex marriage licenses until the legal debate was properly settled. No one questioned his authority to bring that trial court action, despite the lack of specific statutory authority. To the contrary, on General Suthers's motion, this Court enjoined the clerk "from issuing marriage licenses to same-sex couples" until the legal proceedings concluded. *Colorado v. Hall*, No. 2014 SC 582, En Banc Order of Court (Colo. July 29, 2014).

Department of Natural Resources stated that Attorney General Coffman "is exercising her own independent authority. She has every right to do that. We recognize that." Ex. H at 1.

Yet in recent months—after Attorney General Coffman's legal arguments in the underlying federal proceedings proved to have merit—the Governor's position has abruptly changed. Based on advice from "lawyers in [his] office," the Governor now says that he "speak[s] for the people" on questions of law. Ex. I at 3. Contrary to his previous understanding of "why the system is set up the way it is," Ex. G at 1, Governor Hickenlooper asserts that "this was intended *ultimately to be the governor's decision*." Ex. I at 3 (emphasis added).

It is unsurprising that the Governor would seek the right to veto the Attorney General's independent legal judgments after courts have held that federal policies he has supported are likely based on unlawful assertions of federal power. But changes to our plural executive system must be made by the people or the legislature, not through an original proceeding brought by a Governor who disagrees with the legal decisions of an Attorney General from an opposing political party. And,

for its part, the legislature already declined to change our system. In 2004, after *Salazar* was decided, a bill was introduced to "repeal[ ]" "any duty, power, or authority the attorney general may have had under the common law" and "limit" the Attorney General's powers "to those specifically granted in statute." Ex. J at 2. During a House Judiciary Committee hearing, the sponsor explained, "this is an attempt to discuss the common-law powers that we've granted the attorney general and whether those are really what the general assembly thinks is in the best interest of the state." Ex. K at 5:7–11. The sponsor was particularly concerned with the Attorney General's independent actions in federal trial court. *Id.* at 5:12–15. But other representatives disagreed with the bill. One stated, "the attorney general's first responsibility as a constitutionally elected official is to the people of the state." *Id.* at 9:5–7. Ultimately, the sponsor moved to postpone the bill indefinitely, because it had "become a political issue and … a campaign issue for a good number of people." *Id.* at 6:14–16

This history underscores that *Salazar* settled the relevant *legal* questions. The remaining disagreements are for the political process to

address. Because this case presents neither a "solemn occasion" nor an "important" legal question, the Court should decline to revisit the intra-branch balance of power it reaffirmed in *Salazar* and which has served the State well ever since.

CONCLUSION

The Court should deny the Governor's Petition for Rule to Show Cause and dismiss this case.

Respectfully submitted on November 20, 2015.

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Certificate of Service

I certify that I served a true and complete copy of this **Attorney General's Brief Addressing Jurisdictional Questions** on all parties through ICCES on November 20, 2015. Service was made on the following:

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