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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0086

STATE OF WEST VIRGINIA ex rel.

DISCOVER FINANCIAL SERVICES, INC., DISCOVER BANK, DFS SERVICES, L.L.C., and AMERICAN BANKERS MANAGEMENT COMPANY, INC.,

BANK OF AMERICA CORPORATION and FIA CARD SERVICES, N.A.,

CITIGROUP INC. and CITIBANK, N.A.,

GE MONEY BANK,

WORLD FINANCIAL NETWORK NATIONAL BANK., CSI PROCESSING, LLC, and CPP NORTH AMERICA LLC,

HSBC BANK NEVADA, N.A. and HSBC CARD SERVICES, INC.,

JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.,

Petitioners,

v.

HONORABLE DAVID W. NIBERT, JUDGE OF THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA,

Respondent.

Case Nos. **11-C-086-N**
11-C-087-N
11-C-089-N
11-C-091-N
11-C-092-N
11-C-093-N
11-C-094-N

AMICUS CURIAE BRIEF OF THE WEST VIRGINIA CHAMBER OF COMMERCE IN SUPPORT OF BANK DEFENDANTS' VERIFIED PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

At issue in this case is whether the Attorney General of West Virginia has authority to hire private lawyers to enforce state law, and, if so, whether such lawyers must be disqualified when (a) they represent the State on a contingent-fee basis, providing an incentive to seek the highest monetary award rather than pursue injunctive or other relief that may be in the public interest; (b) they have brought a quasi-criminal action seeking fines that are not available to private litigants; and (c) the private attorneys control, or appear to control, the litigation.

IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The Chamber, with a 5,000 member reach, is the recognized voice of business in West Virginia. In that role, the Chamber strives to (1) analyze matters of general interest to its members, (2) promote its members' interests, as well as the interests of the general public, in the proper administration of the laws relating to its members, and (3) otherwise promote the general business and economic welfare of West Virginia. An important part of the Chamber's activities is representing the interests of its members in matters of importance before the courts, the West Virginia Legislature, and state agencies.[1]

This case is of importance to the Chamber because arrangements that delegate authority to enforce state laws to private attorneys with a profit interest violate constitutional and ethical requirements, public policy, and express provisions of the West Virginia Code. If the Attorney General is permitted to continue to engage in this practice, those who do business in West

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[1] Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, the Chamber states that counsel for a party did not author this *amicus* brief in whole or in part, nor did such counsel or a party make a monetary contribution specifically intended to fund the preparation or submission of the brief. No person, other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution toward the brief.

Virginia may find themselves targeted by attorneys wielding State authority but unrestrained by the safeguards that accompany the exercise of that authority.

The Chamber has filed a motion concurrently with this *amicus* brief requesting leave to file.

STATEMENT OF THE FACTS

Attorney General Darrell McGraw, Jr., deputized the private lawyers in this case as "Special Assistant Attorneys General" for the purpose of bringing claims under the West Virginia Credit and Protection Act, W. Va. Code §§ 46A-7-101 *et seq.* against the Petitioners stemming from their sale of "payment protection plans" for credit cards. These actions seek injunctive relief and civil penalties, remedies available only to the Attorney General and not to private litigants. *See* W. Va. Code § 46A-7-111(2).

Six private lawyers, from firms in West Virginia, Pennsylvania, and Texas, appear on the State's pleadings. These lawyers were not chosen through any open procurement process and appear to be operating under a one-page letter agreement, composed of four sentences, that provides that the private lawyer is to "advance all expenses associated with the maintenance of the action" and entitles the lawyer to "a proper, reasonable, and customary fee," subject to approval of the court. (*See* Petitioners' App'x)

As Special Assistant Attorneys General, these private lawyers are obligated only to report and periodically consult with government attorneys. The letter agreement requires that the deputized attorneys keep the Office of the Attorney General (OAG) "apprised" of actions taken in the case and "anticipates ongoing discussions regarding tactics and strategy." (*Id.*).

Any question over whether the private lawyers in this case are operating under contingent-fee agreement, *see* Slip Op. ¶ 6, is purely semantics. A contingent-fee agreement is

"a contract under which an attorney may be compensated for work in progress, dependent on the occurrence of some future event which is not certain and absolute." W. Va. Code § 48-1-215(a). While the letter agreement does not set fees as a specific percentage of recovery, it is clear under this arrangement, based on statements of OAG staff and past practice, that the private attorneys (1) are not receiving compensation for their services on an hourly, flat-fee, or salaried basis; (2) will receive no compensation unless they prevail in the lawsuit, in which case they are entitled to fees; and (3) the amount of their compensation will, at least in part, be based on the amount recovered. (*Id.* at 4-5). Indeed, as Petitioners show, in a prior case operating under the same terms before the same Circuit Court Judge, the private lawyers received $4.5 million in attorneys' fees based in part of the "sizable settlement" reached, including a $10.5 million cash payment and up to $3 million in debt relief. In other words, private lawyers acting as government attorneys received a twenty-five percent contingent fee.

INTRODUCTION

The practice of state officials to delegate their authority to enforce state law to private attorneys whose compensation is tied to the fines they impose raises serious statutory, ethical, constitutional, and public policy concerns.[2] Although Attorney General McGraw routinely deputized contingent-fee lawyers with state enforcement power, this Court has not considered the propriety of these highly questionable arrangements.

Courts in several states have considered these important issues, *see infra* Section II, and others are now doing so.[3] This Court should provide guidance as to whether such arrangements

[2] This *amicus* brief does not duplicate the argument, thoroughly presented by the Defendants, that the Attorney General lacks the necessary statutory authority to enter into such arrangements.

[3] *See, e.g., Lender Processing Servs., Inc. v. Masto*, No. 61387 (Nev. 2012); *Merck Sharp & Dohme Corp. v. Conway*, 3:11-cv-00051-DCR-EBA (E.D. Ky. Mar. 23, 2012) (Order denying Defendant
(Footnote continued on next page)

are permissible at all, and, if so, under what circumstances. The Attorney General's enforcement of State law through profit-driven private attorneys, without safeguards or limitations, is a reason why some have alleged that West Virginia has a challenging litigation environment. Attorney General McGraw's contracting out of state law enforcement power to private plaintiffs' lawyers has been singled out and criticized by business and tort reform groups, think tanks, scrutinized in the media, and even raised in testimony before Congress.[4] If this practice is allowed to continue, those who do business in West Virginia will remain at risk of finding themselves targeted by private attorneys wielding State authority but who are unrestrained by the safeguards that accompany the exercise of that authority.

The Chamber urges the Court to grant the Petition for a Writ of Prohibition.

Kentucky Attorney General's initial motion to dismiss) and (Dec. 19, 2012) (Order denying renewed motion to dismiss); *GlaxoSmithKline LLC v. Caldwell ex rel. State of Louisiana*, No. 612562 (La., 19th Judicial Dist. Ct.) (Petition for Declaratory and Injunctive filed May 31, 2012). Another recent challenge, *AstraZeneca Pharms. v. Wilson*, No. 2011-CP-42-1213 (S.C. Cir. Dec. 20, 2011) (Order denying Defendant South Carolina Attorney General's Motion to Dismiss), was rendered moot when the parties settled the underlying litigation, *see* Nate Raymond, *AstraZeneca Pays $26 Million to Settle South Carolina Lawsuit*, Chic. Trib., Aug. 24, 2012, *at* http://www.chicagotribune.com/health/sns-rt-us-astrazeneca-settlementbre87n11o-20120824,0,4302336.story.

[4] *See, e.g.*, Manhattan Inst., Trial Lawyers Inc.: Attorneys General: A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011, at 7, 19 (2011), *available at* http:// www.triallawyersinc.com/TLI-ag.pdf; Hans Bader, The Nation's Worst Attorneys General 16-19 (Competitive Enterprise Inst. 2010), *available at* http://cei.org/sites/default/files/Hans%20Bader%20-%20 The%20Nation's%20Worst%20State%20Attorneys%20General_0.pdf; Editorial, *McGraw Exposed the State to Losses*, Charleston Daily Mail, Aug. 10, 2012, at 4A, at 2012 WLNR 16984590; Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, Serial No. 112–82, 112th Cong., 2d Sess., at 55-56 (Feb. 2, 2012) (testimony of Testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research).

ARGUMENT

I. THE COURT SHOULD CONSIDER THE STRONG PUBLIC POLICY CONCERNS INVOLVED WHEN ATTORNEYS EMPOWERED WITH LAW ENFORCEMENT AUTHORITY ARE PAID BASED ON WINNING A CASE AND INHERENTLY MOTIVATED TO MAXIMIZE DAMAGES OR FINES

Delegation of enforcement of state law to private lawyers with a profit interest in the litigation raises significant legal and government ethics, constitutional law, and public policy concerns that should be closely considered by this Court.

A. The Purpose of Contingent Fees Is to Provide Access to Justice to Those Who Cannot Afford to Sue; Government Use Is Suspect

As a foundational matter, it is important to recall that contingent-fee agreements were intended to help people of limited means secure legal representation, not state governments that have the ability to raise revenue and allocate funds. When contingent-fee agreements do not further access to the courts for individuals with limited means or when these fee arrangements create incentives that violate public policy, they should be viewed with skepticism and scrutiny.

Contingent fees, once viewed as illegal in the United States,[5] gained grudging acceptance in the late nineteenth century. *See, e.g.*, 33 A.B.A. Rep. 80, at 579 (1908) (Canon 13 of the Canons of Ethics) (approving of contingent fees, but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges"). Contingent fees, when properly used, can serve a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989). As one commentator observed of the American system, "contingent fees are generally allowed in the

[5] *See, e.g., Lewis v. Broun*, 36 W. Va. 1, 14 S.E. 444, 446 (1892) (recognizing that, until 1849, contingent-fee agreements were considered champertous and void in Virginia).

United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel." *See* Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965). In recognizing the validity of contingent-fee agreements in Virginia, Justice Lucas Thompson found that such contracts "are in fact based on his ability to pay. Abrogate the right to so contract, and . . . you virtually close the doors of justice upon the party aggrieved in the cases." *Major's Ex'r v. Gibson*, 1 Patton & H. 48, 1855 Va. LEXIS 70, at *62 (Va. 1855).

Despite the widespread use of contingent-fee agreements today, they remain subject to prohibitions and limitations based on public policy. For example, contingent fees are not permitted in criminal defense because they threaten to corrupt justice by incentivizing lawyers to win at any cost, such as by suborning perjury. *See* W. Va. R. of Prof. Cond. 1.5(d)(2); *see also id.* 1.8(k) (prohibiting lawyers, for similar reasons, from paying a witness or to anyone referring a lawyer to a witness, contingent upon the content of the witness's testimony or the outcome of the case). In addition, contingent-fee agreements in divorce cases are facially invalid because public policy prohibits any contract that tends toward the separation of spouses or circumvents attempts at reconciliation. *See id.* 1.5(d)(1).

Rule 1.5(d)'s express prohibition on use of contingent fees when representing criminal defendants and in domestic relations cases is not exclusive. The rule recognizes that "a fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) *or other law*." *Id.* 1.5(c) (emphasis added). "Other law" includes situations where such agreements are void for public policy, violate due process, or are prohibited by statute. *See, e.g., Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 334 (1853) (invalidating a contingent-fee contract based on securing the

passage of state legislation as "tend[ing] to corrupt or contaminate, by improper influences, the integrity of our social or political institutions"); *see also* National Conference of State Legislatures, Ethics: Contingency Fees For Lobbyists, Ethics: Contingency Fees For Lobbyists (2011), *at* http://www.ncsl.org/legislatures-elections/ethicshome/50-state-chart-contingency-fees.aspx (citing the laws of 43 states that have adopted statutes explicitly prohibiting contingent-fee contracts with respect to lobbying because "[a] majority of legislators seem to agree that legislation should be prompted solely from considerations of the public good, and agreements for compensation contingent upon success suggest the use of corrupt means for accomplishing the desired end and undermine the public confidence in government").

As this Court recognized in *Bias v. Atkinson*, 64 W. Va. 486, 63 S.E. 395, 397 (1908) (quoting 9 Cyc. 481):

> It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it sometimes has been, the policy of the law or the public policy in relation to the administration of the law. Where a contract belongs in this class, it will be declared void; although in the particular instance no injury to the public good may have resulted. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public, it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not the actual injury in a particular instance.

Here, public policy concerns are implicated when the government delegates law enforcement power to a private firm through a contingent-fee agreement. Such arrangements have the general tendency to drive those who represent the State to seek the greatest amount of damages and inflict the maximum monetary penalties since the lawyers involved will receive a share of that recovery. In addition, use of contingent-fees in cases seeking civil penalties, a quasi-criminal punitive remedy that is available only to the State, raises the same public policy

concerns that preclude their use in criminal cases under Rule 1.5. The Court should consider that once a case is brought, and a private attorney spends time and money on the State enforcement action, he or she has a strong incentive to pursue the litigation regardless of whether evidence emerges that suggests the target of the suit is not liable or a nonmonetary settlement best serves the public interest.

B. Contingent-Fee Agreements Permitting Private Attorneys to Pursue State Enforcement Actions Raise Significant Conflict-of-Interest Issues

There are key distinctions between government attorneys and private lawyers. As the United States Supreme Court has recognized, government attorneys are "the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). The government attorney's duty is not necessarily to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963). For example, requiring a defendant to change allegedly harmful behavior or remediate pollution for which it is responsible may be more important to the public interest than obtaining a monetary award. By contrast, attorneys who work on a contingent-fee basis are motivated by financial incentives to maximize recovery. In state litigation, the two functions—impartial governance and profit motive—are irreconcilably conflicted.

West Virginia law includes a number of rules designed to ensure that government officers and employees are independent and impartial, to avoid action that creates the appearance of impropriety, to protect public confidence in the integrity of its government, and to protect against conflicts of interest. The Ethics Act prohibits public officials from using their office for private, personal gain. W. Va. Code §§ 6B-1-2, 6B-2-5(b)(1). The Act specifically provides that "[i]f a public official . . . has an interest in the profits or benefits of a contract," as is the case when a

lawyer will only receive compensation if he prevails in litigation and recovers a monetary award, "then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest." W. Va. Code § 6B-2-5(d)(3).

These basic good government principles are directly contrary to arrangements in which private lawyers, acting as Special Assistant Attorneys General, negotiate an agreement that includes a significant sum—potentially millions of dollars—that they will personally receive as a condition of settlement. Without question, the private lawyers involved have a financial interest in the agreement to provide legal services in return for compensation based on the amounts recovered in the action, and they are intricately involved in making decisions regarding litigation strategy and settlement. Such arrangements are antithetical to West Virginia Ethics Act and sound public policy.

C. Contingent-Fee Awards Siphon Public Dollars

Contingent-fee awards are often misrepresented as coming at no cost to the public, with no need for government resources – "litigation for free." These contracts are, of course, not free. Whether a private law firm hired by the state is compensated directly by a defendant as a condition of a settlement or by the government through a percentage of the settlement funds its receives, there is a similar result for the state's taxpayers. The cost, *i.e.*, the lucrative fees paid to private lawyers as a result of the litigation, is money that the state will not be able to use to fund government services or reduce the public's tax burden. When governments enter into arrangements that can yield multi-million dollar payouts to private law firms when they could use their own attorneys, the public loses. For example, when a pharmaceutical company found it was worth $22.5 million to settle a state's allegations related to its marketing practices, West

Virginia received $15.75 million of the settlement because $6.75 million went straight to three "special assistants" who handled the case. *See* Michelle Saxton, *Group Questions Attorney Fees for Eli Lilly Settlement*, Charleston Daily Mail, Aug. 28, 2009, at 1A, available at 2009 WLNR 16909173.

Experience in West Virginia and beyond also shows that when public entities hire private law firms, they often do so without the open and competitive process used with other contracts to assure the government receives the best value. As a result, governments routinely have awarded potentially lucrative contracts to friends and political supporters. *See, e.g.*, Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, at A15, *abstract available at* 2009 WLNR 14671092. The ultimate result is a system whereby the government may not receive the most qualified counsel, taxpayers may not have received a fair deal, and private attorneys benefit at the expense of the public. *See generally* Testimony of James R. Copland, *supra*, at 48. Indeed, such agreements have transferred millions of dollars to private lawyers. *See* Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003* 6 (2003), *available at* http://www.manhattan-institute.org/pdf/triallawyersinc.pdf (estimating that approximately 300 lawyers from 86 firms are projected to earn up to $30 billion over the next 25 years from the 1998 tobacco settlement); Editorial, *The State Should Curb McGraw*, Charleston Daily Mail, Jan. 26, 2007, at 4A, *available at* 2007 WLNR 1602450 (noting that private lawyers who represented West Virginia in the tobacco litigation received $33.5 million).

In West Virginia, this practice became so prevalent that a local newspaper had characterized Attorney General McGraw's office as "a state-sanctioned tort law firm" that targets companies through hiring private lawyers who are often campaign contributors and sometimes receive millions in fees. *See* Editorial, *McGraw Should be Stopped Now*, Charleston Daily Mail,

June 17, 2009, at 4A, *available at* 2008 WLNR 11612644. One of many examples is the OAG's 2005 settlement of a lawsuit against Purdue Pharma, the manufacturer of the painkiller Oxycontin, for allegedly "aggressive marketing" tactics that understated the drug's risks. The four law firms hired to pursue that case had given $47,500 to the Attorney General McGraw's campaign—nearly one-third of his campaign contributions for the 2004 election cycle, according to a study of campaign finance reports conducted by West Virginia Citizens Against Lawsuit Abuse (WVCALA). *See* West Virginia Citizens Against Lawsuit Abuse, *Campaign Cash*, *at* http://www.wvcala.org/issues-facts/attorney-general/campaign-cash/. Soon after the 2004 election, those lawyers reached a settlement agreement on behalf of the State which ultimately netted them $3.3 million in legal fees. *See* Matthew Thompson, *Private Lawyers Pocket $3.3 Million; Outside Counsel to Get One-third of State's Oxycontin Settlement*, Charleston Daily Mail, Mar. 28, 2005, at 1A, *available at* 2005 WLNR 4922661. More recently, WVCALA found that "special assistant attorneys general" accounted for 40% of Attorney General McGraw's 2012 campaign contributions. *See* Chris Dickerson, *WV CALA Seeks More AG Transparency*, W. Va. Record, May 18, 2012, *at* http://wvrecord.com/news/244087-wv-cala-seeks-more-ag-transparency.

Even where the private attorneys deputized to enforce state law are not large campaign contributors, West Virginians are left to wonder whether they are getting a fair deal. For example, with respect to the Zyprexa settlement, Deputy Chief Attorney General Fran Hughes suggested that the taxpayers received a good deal when paying $6.75 million for the work of three lawyers because giving outside counsel one-third of the total settlement was "lower than what most attorneys make and lower than many other lawsuits the office has settled." Saxton,

supra. Neither the Office of the Attorney General, nor the private firms, however, would disclose how much time or effort was spent litigating the case. *Id.*

D. Such Agreements Are Not Needed to Pursue Corporate Misconduct

Disqualifying private counsel who have entered into contingent-fee arrangements with the State will not tie the hands of the Office of Attorney General in protecting the citizens of West Virginia from illegal conduct. Experience has proven that state governments – large and small – do, indeed, have a choice as to whether to contract with lawyers on a contingent-fee basis, even when taking on the largest of adversaries.

Many individuals who served as state attorneys general opted not to hire outside counsel on a contingent-fee basis. For example, former Delaware Attorney General Jane Brady has reflected that she had "real aversion" to such arrangements because "[t]he motivation of public attorneys is, or should be, to serve the best interests of the people they represent and to pursue equity, justice, and fairness. Contingency fee arrangements are not consistent with these motivations." Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 37 (Wash., D.C., June 22, 1999), *available at* http://www.manhattan-institute.org/pdf/mics1.pdf (transcript of remarks). Similarly, United States Court of Appeals Judge William H. Pryor, Jr., when he was Attorney General of Alabama, observed:

> The use of contingency fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the Contracts.

William H. Pryor, Jr., Curbing the Abuses of Government Lawsuits Against Industries, Speech Before the American Legislative Exchange Council, Aug. 11, 1999, at 8. Likewise, former New

York Attorney General Eliot Spitzer, widely considered one of the most aggressive and active state attorneys general, did not enter into contingent fee agreements with private lawyers as a matter of principle and practice. *See* Manhattan Inst., *Regulation Through Litigation, supra,* at 7 ("I would never enter into an agreement with the plaintiffs' bar on a contingency fee basis to give away billions of dollars.").

In the multi-state tobacco suits, the attorneys general of some states, such as Virginia, opted *not* to hire contingent-fee attorneys and instead pursued the litigation with available resources, while other states paid millions to private law firms. *See* Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8, *available at* 2001 WLNR 1140793 (comparing the additional benefits gained by Virginia citizens whose Attorney General did not hire outside counsel with the money lost by its neighbor, Maryland, to legal fees).

There may be some tasks not involving the state's enforcement power that are either routine or require special expertise for which the use of outside counsel on an *hourly* basis by state or local government may be appropriate. For example, under former Kansas Attorney General Phill Kline most legal work was undertaken by attorneys on his staff, but his office hired outside counsel to assist state attorneys when expertise in certain areas was needed, such as to defend the state in a school finance suit. *See* Jim Sullinger, *Kansas Paid $2 Million for Legal Aid; Unusual Report Fulfills a Promise by Attorney General*, Kansas City Star, Dec. 29, 2004, at B1, *available at* 2004 WLNR 19045569.

In fact, the federal government pursues litigation without hiring lawyers on a contingent-fee basis. *See* Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007). The Executive Order, which remains in place today, states "the policy of the United States that organizations or individuals

that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law." *Id.* Hiring attorneys on a hourly or fixed fee basis, and not through a contingent fees arrangement, "help[s] ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States." *Id.*

In the case before this Court, the Attorney General could have used the office's own publicly-paid government lawyers to pursue the litigation. The OAG has nearly two hundred full-time employees, including about eighty lawyers. *See* State of West Virginia, Executive Budget, Fiscal Year 2013, Volume II, Operating Detail, at 112 (2012), *available at* http://www.budget.wv.gov/SiteCollectionDocuments/VIIOD2013.pdf; Paul J. Nyden, *McGraw Touts Work to Rotary Members, Charleston Gazette*, Apr. 27, 2010, at 2A, *available at* 2010 WLNR 8705258. The OAG does not need to hire outside legal experts to enforce the WVCCPA, a state statute that the Attorney General is specifically authorized to enforce. It has a division of its office devoted to consumer protection litigation. *See* West Virginia Attorney General's Office, Office Staff Directory, *at* http://www.wvago.gov/staff.cfm?fx=division. If needed, the State could have contracted with lawyers on an hourly-fee basis, within its legislatively-approved appropriation, to assist its regular legal staff with the case.

II. PAYING INDIVIDUALS TO ENFORCE STATE LAW BASED ON THE RESULTS OBTAINED RAISES SIGNIFICANT CONSTITUTIONAL ISSUES

While ethics, public policy, and West Virginia statutory law suggest that the Attorney General's contingent-fee agreement with private counsel is improper, the Court should also consider whether such arrangements are invalid because they violate the due process rights of defendants and impermissibly intrude on the Legislature's authority to appropriate funds.

A. How Can the Court Safeguard Due Process?

The exercise of state law enforcement power through private individuals who will receive a share of any damages or fines recovered raises serious due process concerns for those targeted by such litigation. In order to address these concerns, two state supreme courts, Rhode Island and California, have found that contingent-fee agreements between government officials and private lawyers may be permissible in some circumstances if the government's lawyers maintain full and complete control over the litigation. The Court should consider whether such safeguards are in place here and whether a higher standard is necessary, especially in cases involving quasi-criminal penalties.

The Rhode Island case involved a public nuisance action against former manufacturers of lead paint brought by two private law firms hired on a contingent-fee basis by the state's Attorney General. *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 469 (R.I. 2008). In light of the special obligations of the Attorney General to the public, the Rhode Island Supreme Court found that contingent-fee agreements between the state and private lawyers must include "exacting limitations" that ensure that the Office of the Attorney General "retains **absolute and total control over all critical decision-making**" and that the case-management authority of the Attorney General is "final, sole and unreviewable." *See id.* at 475-76 (emphasis in original). Under these conditions, the Rhode Island Supreme Court permitted the contingent-fee representation with trepidation. *See id.* at 476 n.50 ("Given the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time.").

In 2010, the California Supreme Court followed Rhode Island's lead by adopting a similar approach. *See County of Santa Clara v. Atlantic Richfield Co.*, 235 P.3d 21, 36-37 (Cal.

2010). The Court found that although government use of contingent-fee agreements is not categorically impermissible, when an action is prosecuted on behalf of the public, the private lawyers involved "are subject to a heightened standard of ethical conduct applicable to public officials acting in the name of the public—standards that would not be invoked in an ordinary civil case." *Id.* at 35. The Court found that the "heightened standard of neutrality" required for private lawyers bringing lawsuits on behalf of the government is not compromised so long as "neutral, conflict-free government attorneys retain the power to control and supervise the litigation." *Id.* at 36. The private lawyers must "serve in a subordinate role" and "not supplant a public entity's government attorneys." *Id.* The Court concluded, "when public entities have retained the requisite authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions, the impartiality required of government attorneys prosecuting the case on behalf of the public has been maintained." *Id.* at 39. Applying these standards, the Court found that the contingent-fee agreements at issue lacked adequate "safeguard[s] against abuse of the judicial process." *Id.* at 41.

The arrangements before this Court, on their face, fall woefully short of meeting this "control test" and require disqualifying the private lawyers representing the state as Special Assistant Attorneys General. As discussed *supra* p. 2, there appears to be no contract between the private lawyers and the Office of the Attorney General beyond a letter agreement that provides only that the private attorneys are to keep OAG informed on the status of the litigation and periodically consult with government attorneys on the case.

While the "control test" would require invalidating the contract at issue, this test, while appealing on its surface, is unworkable and unenforceable. The trial court in the California case recognized this absolute fact. *See County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-

788657, 2007 WL 1093706 (Cal. Super. Ct., Santa Monica County, Apr. 4, 2007) (Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys). While a court may have authority to review the language of the contingent-fee contract to ensure that it contains judicially-mandated language placing control with the Attorney General:

> [A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for the contingent fee arrangement with outside counsel be permissible, (b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel. . . . Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys.

Id. at *3-4. Who is leading the actual litigation of the case would be shielded from the court's view, and that of the public, by the attorney-client privilege.

As such, the Court should recognize that the only practical, fair, and effective option for protecting both due process in West Virginia courts and the public of this honorable State is to find that enforcement of state law by individuals who are paid through the fines they collect is facially impermissible. *See, e.g., People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 352 (Cal. 1985) (finding, in invalidating an agreement that paid a private attorney a higher rate when he prevailed in nuisance abatement actions to close adult bookstores than when he did not prevail, that "there is a class of civil actions that demands the representative of the government to be

absolutely neutral");[6] Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77, 93 (2010) ("When the state acts as the plaintiff in civil litigation and seeks to impose purely punitive, rather than compensatory relief, technical distinctions between criminal and civil litigation become far less significant" and "the inherently coercive nature of the action triggers the social contract of liberal democracy: those imbued with public power are not permitted to act out of motivations of private gain."). This Court should consider criteria for the types of civil actions in which government use of contingent-fee lawyers is never permissible and other types of cases where contractual safeguards, transparency, and judicial monitoring may sufficiently address due process concerns. Here, the risk of abuse as a result of the arrangement is clear: the more penalties awarded, the more the West Virginia Attorney General's private counsel will be paid.

B. Do Such Arrangements Intrude on the Legislature's Power to Appropriate Funds?

Aside from due process concerns, the Attorney General's payment of contingent-fee lawyers out of state's recovery raises significant separation of powers concerns; specifically, the Court should consider whether this practice impermissibly intrudes on the Legislature's authority to appropriate funds.

The Supreme Court of Louisiana has considered and invalidated a contingent-fee agreement between the government and outside counsel on such grounds. In *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997), Louisiana's Attorney General contracted with two private law firms to enforce the state's environmental protection laws. Under the agreement, the firms would

[6] The California Supreme Court narrowed *Clancy*, which established bright-line rule barring any attorney with a financial interest in the outcome of a case from representing the interests of the public in a public-nuisance abatement action to cases implicating interests akin to those inherent in a criminal prosecution in *Atlantic Richfield Co.*, 235 P.3d at 31.

receive twenty-five percent of any damages recovered on behalf of the state, subject to a cap of $10 million per claim per firm. *See id.* at 479. Rather than consider the conflicting obligations, loyalties, and motivations of government and private lawyers, the Louisiana court found that "under the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingent fees from state funds or the Legislature has enacted such a statute, then he has no such power." *Id.* at 481. Finding no such grant of authority in Louisiana law, the court invalidated the contingent fee agreement. *See id.* at 481-83; *see also Pickering v. Hood*, 95 So.3d 611, 621-22 (Miss. 2012) (holding, in action brought under state consumer protection law, that the Mississippi Constitution does not permit a defendant to directly pay the attorneys' fees of private lawyers representing the state and that any amount due as a result of settlement with the state must be made into the proper state treasury).

As in Louisiana, the West Virginia Constitution provides that the General Assembly must authorize any expenditure of State funds. *See* W. Va. Const. art. X, § 3. An executive branch official, the Attorney General, may not exercise the powers of the legislative branch. *See* W. Va. Const. art. V, § 1. Violation of this separation of powers, in which the Attorney General has spent state resources by distributing recovery to private lawyers without the necessary legislative approval, provides this Court with a sound, additional basis upon which the contingent-fee contract cannot stand. Such a ruling would not only address the propriety of contingent-fee between the state and private lawyers, but also answer broader questions regarding the authority of an Attorney General to allocate settlement funds to various groups and projects.[7]

[7] Attorney General McGraw allocated State settlement funds to groups with tenuous connections to the subject of the litigation. *See, e.g.*, Jessica M. Karmasek *McGraw's Decision to Give Funds to Legal Aid Troubles Some*, W. Va. Record, June 21, 2012, *at* http://wvrecord.com/news/244871-mcgraws-decision-to-give-funds-to-legal-aid-troubles-some (reporting $1 million of settlement money given to Legal Aid from the state's share of a nationwide mortgage settlement); Editorial, *McGraw's Client is*
(Footnote continued on next page)

In a 2002 report, the West Virginia Office of the Legislative Auditor expressed concerns along these very lines. Office of the Legislative Auditor, Special Report: Attorney General's Office: Unclear Whether the Attorney General Had Authority to Contract With Private Attorneys on a Fee Basis and Bring an Action Against Tobacco Product Manufacturers, PE01-28-227, at 14 (2002), *available at* http://www.legis.state.wv.us/Joint/PERD/perdrep/PE01_28_227.pdf. The report found that the Attorney General "had no clear authority" to hire or pay attorneys on a contingent-fee basis, that the Attorney General appointed the private attorneys to do "highly lucrative work" without any open, competitive selection process, and that future arrangements of this kind "may subvert the West Virginia's Constitution's requirement that the Legislature is the government branch responsible for appropriating State funds." *Id.* A decade later, as such agreements have become more routine, those concerns have only grown more serious. These questions warrant this Court's careful consideration.

CONCLUSION

For these reasons, *amici* respectfully request that the Court grant a writ of prohibition to the Circuit Court of Mason County.

West Virginia; The Money From his Lawsuits Belong to the People, Not Him, Charleston Daily Mail, Oct. 5, 2007, at 4A, *available at* 2007 WLNR 19579702 (listing disbursement of settlement funds totaling nearly $2 million to a pharmacy school, medical school, day-report centers, the Salvation Army, and Boys and Girls Clubs); Justin D. Anderson, *McGraw Using Lawsuit Money to Help Exhibit*, Charleston Daily Mail, Dec. 12, 2006, at 1A, *available at* 2006 WLNR 2159917 (reporting a $40,000 donation from settlement funds from a lawsuit against the maker of a hypertension drug to sponsor a Sesame Street exhibit on the human body). Attorney General McGraw's office also used settlement money to run television advertisements, purchase nearly $150,000 in self-promoting trinkets, and even to open a satellite office without allocation of funds from the Legislature during election years. *See* Richie Heath, *Attorney General McGraw Owes WV an Explanation*, State Journal, Aug. 29, 2012, *at* http://www.statejournal.com/story/19410690/attorney-general-mcgraw-owes-wv-an-explanation; John O'Brien, *McGraw Opens Office in Eastern Panhandle*, W. Va. Record, May 16, 2012, *at* http://wvrecord.com/news/244019-mcgraw-opens-office-in-eastern-panhandle; Allen H. Loughry, Don't Buy Another Vote, I Won't Pay for a Landslide: The Sordid and Continued History of Political Corruption in West Virginia 187-90 (Parsons, WV: McClain Printing Co., 2006).

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I certify that I served a copy of the foregoing *Amicus Curiae* Brief of the West Virginia Chamber of Commerce in Support of Bank Defendants' Verified Petition for Writ of Prohibition upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service addressed to:

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