ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL

JANE E. YOUNG
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January 16, 2020

The Honorable Stephen Shurtleff
Speaker of the House
Office of the Speaker
State House, Room 311
107 North Main Street
Concord, NH 03301

The Honorable Donna Soucy
President of the Senate
Senate President's Office
State House, Room 302
107 North Main Street
Concord, NH 03301

Dear Speaker Shurtleff and President Soucy:

On January 10, 2020, the Legislative Fiscal Committee considered Item FIS 20-006 submitted by the Department of Justice. The Item requested, *inter alia*, approval of an additional appropriation of $777,321 for the purpose of covering expected shortfalls in the Department's general litigation expense account. The litigation fund is used to pay for certain expenses across all of the Department's five bureaus. The availability of adequate funds is absolutely critical to support our work in prosecuting crimes, protecting the public, and defending the State in civil litigation. The requested amount was based on my estimate of funds required to support these essential functions through the remainder of State Fiscal Year 2020.

By a vote of 7-3, the Committee amended the Item to reduce the appropriation to $300,000. The amended Item was then approved by the Committee, again by a vote of 7-3. During consideration of the Item, questioning focused on this Department's conduct in defending two cases brought against the State: *League of Women Voters of New Hampshire and New Hampshire Democratic Party v. Gardner* and *Casey and New Hampshire Democratic Party v. Gardner, et al.* At issue in the former case is the constitutionality of a law known as Senate Bill 3, and at issue in the latter case is the constitutionality of a law known as House Bill 1264. Both cases continue to be actively litigated. Following the hearing, the media quoted a statement from Committee Chair Mary Jane Wallner that the Committee "voted to cease funding for two cases which put the voting rights of Granite Staters in jeopardy."

To this Department's knowledge, the Committee's action marks the first time that a request from the Department seeking appropriations for its litigation fund had been rejected. It is also, to our knowledge, the first time that the Legislature has suggested eliminating support for cases being actively defended on behalf of the State by the Department.

Senate Bill 3 and House Bill 1264 are duly enacted laws of the State of New Hampshire. In the last legislative session, bills to repeal these laws failed over the Governor's veto. Under our Constitution, the repeal effort and the fact that a majority of the General Court may have supported repeal does not diminish the force and effect of these laws. Simply put, they are the laws of the State.

The New Hampshire Constitution grants to "the executive branch the *exclusive* power to *enforce* the law." *Opinion of the Justices (Requiring Attorney General to Join Lawsuit),* 162 N.H. 160, 169 (2011) (emphases in original). The Attorney General is a member of the executive branch and is a constitutional officer, appointed by the Governor and Council pursuant to part II, article 46 of the Constitution. This Department predates the Constitution and its powers and duties are "broad and numerous," some arising from the common law and some set forth in statute. *State v. Swift*, 101 N.H. 340, 342-43 (1958). One of those duties is to represent the state in civil actions. *Id.* at 343; *see also* RSA 7:6 ("The attorney general *shall* act as attorney for the state in all criminal and civil cases in the supreme court in which the state is interested") RSA 21-M:2, II(a) (the department of justice, through its officials, "*shall* be responsible for . . . advising and representing the state and its executive branch agencies in all civil legal matters.") (emphases added). The Attorney General "[has] broad authority to manage the state's litigation and to make any disposition of a case which he deems is in the state's best interest." *Opinion of the Justices*, 117 N.H. 393, 396 (1977); *see also Opinion of the Justices*, 162 N.H. at 170 ("The executive branch alone has the power to decide the State's interest in litigation.").

The defense of a duly enacted statute against a constitutional challenge is among the most solemn duties imposed on an Attorney General. The enactment of a statute is an expression of the policy of our state made by the people through their elected representatives. The legislative process is the foundation of our democracy and the product of that process is presumptively constitutional. *See, e.g., Baines v. Senate President*, 152 N.H. 124, 133 (2005) ("In reviewing a legislative act, we presume it to be constitutional and we will not declare it invalid except upon inescapable grounds."). It has long been the policy of the Department that a statute will be defended unless it is patently illegal or unconstitutional. The Attorney General has no discretion to pick-and-choose which statutes to defend. To do so would be to displace constitutional processes with an Attorney General's personal views, thereby undermining the rule of law. Whether or not a statute represents good policy is a determination to be made solely through the legislative process, not by an Attorney General.

Any suggestion that a majority of a legislative body could direct, control or otherwise interfere with the conduct of litigation would raise serious concerns. One can easily imagine legislators who might disagree with a decision to prosecute a crime, investigate a public official, or to take an action that might be adverse to a particular constituency. It is essential to the administration of justice and the protection of the public that this Department is able to discharge its constitutional and legal duties without such an incursion.

The New Hampshire Department of Justice has a proud record of defending New Hampshire law. The above-described events and Representative Wallner's statement appear

intended to encroach on the authority of the executive branch and undermine the Attorney General's duty to defend legislative acts. This Department will meet its constitutional obligations and will continue to defend legislative acts, including Senate Bill 3 and House Bill 1264. In doing so, we will endeavor, as always, to be prudent stewards of public funds.

If it would be helpful to discuss this matter further, I will, of course, make myself available to meet with you.

Sincerely,

Gordon J. MacDonald
Attorney General

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February 28, 2020

The Honorable Donna M. Soucy
President of the Senate
Senate President's Office
State House, Room 302
107 North Main Street
Concord, NH 03301

The Honorable Stephen J. Shurtleff
Speaker of the House
Office of the Speaker
State House, Room 311
107 North Main Street
Concord, NH 03301

The Honorable Mary Jane Wallner
Chair, Legislative Fiscal Committee
State House
107 North Main Street
Concord, NH 03301

The Honorable Lou D'Allesandro
Vice Chair, Legislative Fiscal Committee
State House, Room 117
107 North Main Street
Concord, NH 03301

Dear President Soucy, Speaker Shurtleff, Senator D'Allesandro, and Representative Wallner:

This is in further response to your letter dated February 4, 2020.

The legislature enacted RSA 7:12 in 1911. Its first sentence has remained essentially unchanged since then. It provides that: "[w]ith the approval of the joint legislative fiscal committee and the governor and council, the attorney general may employ counsel, attorneys, detectives, experts, accountants and other assistants in case of reasonable necessity, and may pay them reasonable compensation, on the warrant of the governor, out of any money in the treasury not otherwise appropriated."

The statute provides a means to fund expenses incurred by the Office of Attorney General in the course of prosecution of crimes and the defense of the state. Those expenses span a range of litigation-related costs. In State Fiscal Year 2019, there were 1,981 separate transactions in more than 500 cases. Those expenses included fees incurred by outside counsel. The Office routinely retains outside counsel to assist with its functions. In the cases of *League of Women Voters of New Hampshire and New Hampshire Democratic Party v. Gardner, et al.* and *Casey and New Hampshire Democratic Party v. Gardner, et al.,* the Office retained Cleveland, Waters & Bass, P.A., (CWB) to assist with its defense of the State. As I explained during my appearance before the legislative fiscal committee, the scope of these cases and the volume of discovery exceeds the capacity of the Office's civil litigation unit. That unit, which is

responsible for representing all three branches of government in hundreds of separate litigated cases per year, has 7.5 attorneys. In the *League of Women Voters* case alone, 9 attorneys have entered appearances for the plaintiffs.

You are correct that I did not seek legislative fiscal committee approval for the retention of CWB. In fact, I have not sought fiscal committee approval for the retention of any "counsel, attorneys, detectives, experts, accountants and other assistants" to be compensated from appropriated funds. My actions are consistent with longstanding practice with respect to the operation of the fund.

There are three principal reasons for this longstanding practice. The first is practical. Many of these expenses reflect decisions that must be made quickly, sometimes within hours. To require each one of these transactions to be subject to an approval process that can take six weeks or more would cripple our ability to perform our essential duties. To give just one example, very early on in homicide cases, it can become apparent that the accused's competency or sanity may be at issue. In those situations, we must act swiftly to retain the professional services of an outside forensic psychiatric expert to assist with an evaluation in order to ensure that justice is achieved.

The second reason relates to our professional responsibilities as attorneys. As prosecutors, our duty to seek justice includes protecting the rights of the criminally accused, refraining from extrajudicial statements about a case, and using our independent judgment free from outside interference with respect to prosecutorial decisions. *See* N.H. R. Prof. Cond. 3.8 (Special Responsibilities of Prosecutors). A public discussion about a decision to enter into a retention agreement with an external resource would almost certainly implicate one of these principles. As civil lawyers, we owe our clients the duty to provide competent representation, N.H. R. Prof. Cond. 1.1, and the duty to "not reveal information relating to the representation of a client unless the client gives informed consent," N.H. R. Prof. Cond. 1.6(a). The Rules specifically address retention of other lawyers to assist with a matter, *id.* at 1.1(c)(4), and the commentary makes clear that this is a decision to be made after consultation and informed consent by the client, *id.*. at ABA Comment, ¶ 6. As lawyers, we are duty-bound to keep all such discussions confidential. *Id.* at 1.6(a). Any public discussion about an individual decision made in the course of defending the state would necessarily implicate these principles and could seriously undermine the interests of the state.

The third reason is constitutional. As you suggest, it is absolutely clear that "our constitution did not intend to make a total separation of the three powers of the government." *Merrill v. Sherburne*, 1 N.H. 199, 203 (1818). There are overlapping powers between the branches. However, "[w]hile some overlapping is permitted, the legislature may not encroach upon the exercise by the executive branch of clearly executive powers." *Opinion of the Justices*, 129 N.H. 714, 717 (1987). "In this State the nature of the act performed rather than the title of

the performer determines whether an act is legislative or executive." *Opinion of the Justices*, 110 N.H. 359, 364 (1970). The act of prosecuting crimes and defending the laws of the state fall exclusively to the executive. And, to the specific act in question with respect to FIS 20-006, the Supreme Court has stated: "Once the legislature has made an appropriation for the executive branch, the requirement of fiscal committee approval of contracts made pursuant thereto is an unconstitutional intrusion into the executive branch of the government." *Opinion of the Justices*, 129 N.H. 714, 718 (1987). It is imperative that the functions of the Office of the Attorney General are discharged without any external interference.

My predecessor, Attorney General Joseph Foster, vigorously defended this longstanding practice and these principles in litigation that eventually reached the New Hampshire Supreme Court. *See State of New Hampshire v. Actavis Pharma, Inc.*, 170 N.H. 211 (2017).[1] In a brief to that Court, he argued:

> [Office of Attorney General ("OAG")] attorneys' strategic legal decisions to, for example, retain a medical expert in a personal injury case or an attorney to advise the OAG on a nuanced issue of trademark law, do not require fiscal committee and G&C approval. These strategic legal determinations are the OAG's alone. Setting aside the potential separation of powers issues, it would be impractical for the OAG to obtain fiscal committee and G&C approval of each and every outside professional it seeks to retain in the course of managing the state's criminal and civil litigation matters. It is only when the OAG needs additional funding to compensate such professionals that it is required to seek these approvals.

Answering Brief for the State of New Hampshire, *State of New Hampshire v. Actavis Pharma, Inc.*, dated Sept. 26, 2016; *see also id.* (noting "The OAG's longstanding practice, which has been accepted by the fiscal committee and G&C, is to seek approval for funds to pay expenses related to the retention of outside professionals only when the OAG requires money in the treasury not otherwise appropriated" and "The practice, as described by the OAG, is firmly established.") (emphases added). The Supreme Court did not reach the issue of when fiscal committee approval is required, resolving the *Actavis Pharma* case on other grounds.

For the foregoing practical, ethical and constitutional reasons, I have continued this longstanding practice as Attorney General. However, as you note, I have departed from prior practice by seeking fiscal committee and governor and council approval for contingency fee agreements entered into by the state, specifically with respect to the PFAS litigation. Under a

[1] As an attorney in private practice, I participated in this case in opposition to the State.

contingent fee arrangement, counsel are typically not compensated from appropriated funds, but rather as a percentage of funds to be ultimately recovered by the state in litigation or settlement. These are funds that would otherwise be directed to the general fund. I believe that under that very different circumstance, review and approval by the fiscal committee advances the objectives of oversight and transparency without compromising the foregoing principles.

The legislature's oversight function with respect to the litigation fund is advanced by RSA 21-M:5, VI, which requires an annual report detailing expenditures.[2] I agree that this important function would be advanced if the Office was more descriptive about the specific ongoing needs for the litigation fund. In the future, I will do so. I respectfully suggest that we do our best to be responsive to committee requests for information. To that end, I note that the issue of funding for the *League of Women Voters* and *Casey* cases has been the subject of exchanges beginning with a brief colloquy during the July 25, 2019 fiscal committee meeting and continuing with a series of emails between this Office and the legislative budget assistant. I enclose those emails as Exhibit B.

I have also enclosed with this letter the materials you have requested.[3] Attached as Exhibit C are engagement letters between this Office and CWB, Target Litigation Consulting, Inc., Office Team, Jonathan N. Katz and M.V. Hood III, Ph.D. Attached as Exhibit D are invoices submitted by these entities and individuals. I have also enclosed invoices submitted by court reporter services.

Finally, you have asked for a budget projecting in detail the future estimated expenditures in each matter. Please note that the cases are in very different procedural postures. In the *League of Women Voters* case, the second trial recently concluded and the parties await a final order from the Superior Court. It is likely an appeal will result. The *Casey* case was filed in the U.S. District Court for the District of New Hampshire. That court certified questions of law to the New Hampshire Supreme Court. The future course of that case in federal court may depend on the how the Supreme Court responds to the certified questions. To that end, litigation is inherently unpredictable and these estimates are just that. The actual costs may be higher or lower depending on events in the case. In the *League* case, we estimate further expenses of $7,500 related solely to the appeal. In the *Casey* case, we estimate further expenses for outside counsel, experts and discovery management of $179,000. The projected expenses are broken down as follows: pleadings, motions and objections: $12,500; discovery, including document production, depositions, interrogatories, and expert preparation: $60,000; pretrial, trial preparation and trial, including creating exhibits, organizing witness testimony, drafting findings

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[2] A copy of the most recent report appears as Exhibit A.

[3] Due to the size of the exhibits, I am sending one set as an enclosure to President Soucy's letter. If other addressees require a copy, I will provide it. The redactions in the exhibits are consistent with *Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 NH 7 (2011).

of fact and rulings of law, drafting pretrial pleadings, preparing witness, trial attendance and post-trial pleadings: $75,000; expert expenses: $24,000; and appeal, $7,500. Again, I stress that the *Casey* budget is based on our best estimates given the case's current procedural posture. If it is helpful to the committee, I am certainly prepared to update this budget based on future events.

I am prepared to respond to any further inquiries. I appreciate your time and thoughtful consideration.

Sincerely,

Gordon J. MacDonald
Attorney General

Enclosures (President Soucy only)

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