STATE OF WISCONSIN SUPREME COURT

Appeal No. 2011AP987

In the Matter of the Rehabilitation of:
Segregated Account of Ambac Assurance Corporation:

Ted Nickel and Office of the Insurance Commissioner,
Petitioners-Respondents,

Ambac,
Interested Party-Respondent,

United States of America,
Interested Party-Appellant-Petitioner,

Access To Loans for Student Loan Corporation, Assured Guaranty Corporation, Aurelis Capital Management LP, Bank of America, N.A., Bank of New York Mellon, Countrywide Home Loans Servicing L.P., Customer Asset Protection Company ("CAPCO"), Depfa Bank, plc, Deutsche Bank National Trust Company, Deutsche Bank Trust Company Americas, Eaton Vance, Federal Home Loan Mortgage Corporation ("Freddie Mac"), Federal National Mortgage Association ("Fannie Mae"), Fir Tree Inc., Goldman Sachs & Co., Inc., HSBC Bank USA, National Association, King Street Capital Master Fund, Ltd., King Street Capital, L.P., Knowledgeworks Foundation, Lloyds TSB Bank plc, Monarch Alternative Capital LP, Nuveen Asset Management, One State Street LLC, PNC Bank, Restoration Capital Management LLC, Stone Lion Capital Partners LP, Stonehill Capital Management LLC, Treasurer of the State of Ohio, U. S. Bank National Association, Wells Fargo Bank, N.A., Wells Fargo Bank, National Association as Trustee for the LVM

Bondholders, Wilmington Trust Company and Wilmington Trust FSB,
Interested Parties.

Review of the dismissal of appeal by
the Wisconsin Court of Appeals, District IV
(Judges Paul B. Higginbotham,
Gary E. Sherman, and Paul F. Reilly)

Appeal from the Circuit Court
for Dane County, Wisconsin
(No. 2010CV1576; Judge William D. Johnston)

OPENING BRIEF FOR UNITED STATES OF AMERICA INTERESTED PARTY-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUES

The Wisconsin Court of Appeals, District IV, dismissed the appeal of the United States for lack of jurisdiction because the United States' notice of appeal was signed by a United States Department of Justice attorney who was not a member of the Wisconsin bar and had not sought admission *pro hac vice*. That holding raises two issues:

1. Does Wisconsin Supreme Court Rule (SCR) 23.02(2) require a Department of Justice attorney (if not licensed to practice law in Wisconsin) to follow the procedures for appearing *pro hac vice* in the Wisconsin courts, or do the exceptions in SCR 23.02(h) or (n) for "[a]ctivities which are preempted by federal law" or employees of "[g]overnmental agencies . . . carrying out responsibilities provided by law" render inapplicable the exception for *pro hac vice* admission?

2. Does 28 U.S.C. § 517, by virtue of the Supremacy Clause of the United States Constitution, preempt any Wisconsin law that would require a Department of Justice attorney (not licensed

to practice in Wisconsin) to comply with the *pro hac vice* provisions in the Wisconsin courts?

Disposition below and standard of review

The Court of Appeals held that neither the preemption exception nor the government-employee exception in SCR 23.02(2) exempted the Justice Department attorney from the procedures for appearing *pro hac vice*, and that 28 U.S.C. § 517 did not preempt the Wisconsin procedures for appearing *pro hac vice*. (A. 19–22.)[1] Both issues are reviewable *de novo* because they present legal questions on undisputed facts. *Covenant Healthcare Sys., Inc. v. City of Wauwatosa*, 2011 WI 80, 800 N.W.2d 906, ¶21 (Wis. 2011).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The United States respectfully requests oral argument because this case presents novel legal issues regarding the

[1] "A." references are to the pages of the separate appendix. The website http://ambacpolicyholders.com/court-filings organizes all significant Ambac filings by date and description and also has a separate section with only the documents comprising the record on appeal.

application of SCR 23.02(2) to attorneys of the United States Department of Justice. Oral argument will allow counsel to respond to questions and concerns that may not have been evident to the parties during the briefing process.

The United States respectfully requests publication because publication will clarify the law in this area for counsel and the courts, thereby reducing the chance of future appeals raising the issues presented herein.

STATEMENT OF THE CASE

A. Nature of the case

Ambac Assurance Corporation (Ambac) is a Wisconsin insurance company. (A. 45–46, 60.) After Ambac experienced financial difficulties, it obtained the approval of the Wisconsin Insurance Commissioner to create a "segregated account" that is being rehabilitated by the Circuit Court for Dane County, Wisconsin (No. 10CV1576). (A. 36–38, 45–53; *see generally* A. 106–111.) On January 24, 2011, the Circuit Court entered a final, appealable order approving a plan of rehabilitation for the

segregated account. (A. 42–43, 94–104.) The plan made permanent a previously issued injunction against the Internal Revenue Service (IRS). (A. 40, 88–91, 103.)

On March 9, 2011, the United States timely filed a notice of appeal in the Circuit Court. (A. 11, 27–29, 44.) Other than a copy of a notice of removal (required by 28 U.S.C. § 1446(d)), the notice of appeal was the first document filed by the United States in the Circuit Court.[2] (*See* A. 41–42, 111.) The United States' notice of appeal was signed by Robert J. Kovacev, an attorney in the Tax Division of the United States Department of Justice in

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[2] The United States previously had removed the case to the United States District Court for Western District of Wisconsin (No. 3:10-cv-778-bbc). The United States maintained that the Circuit Court lacked jurisdiction: (1) to bind the United States to the purported allocation to the segregated account of a tentative tax-refund liability and (2) to enjoin collection. (*See* A. 113–115.) The District Court remanded for lack of removal jurisdiction. __ F. Supp. 2d __, 2011 WL 956855 (W.D. Wis. 2011) (slip op. at A. 105–125). The United States then filed a separate suit under the District Court's original jurisdiction seeking injunctive and declaratory relief (No. 3:11-cv-99-bbc), which was dismissed for lack of jurisdiction. 767 F. Supp. 2d 980 (W.D. Wis. 2011). Appeals from both of those suits are currently pending in the United States Court of Appeals for the Seventh Circuit (Nos. 11-1158; 11-1419).

Washington, D.C. (A. 18, 29, 33.) Mr. Kovacev is an active member of the District of Columbia bar, but he was not admitted to the Wisconsin bar and had not sought admission *pro hac vice*. (A. 18–19, 34.) Mr. Kovacev was specifically directed by the Tax Division's Acting Deputy Assistant Attorney General for Civil Matters, D. Patrick Mullarkey, to represent the interests of the United States in these proceedings, and he signed the notice of appeal as part of his representation. (A. 34–35.)

On March 25, 2011, the insurance commissioner moved in the Court of Appeals to dismiss the United States' appeal, arguing that Wis. Stat. § 802.05(1) requires all filings in the Wisconsin courts to be signed by an attorney admitted in Wisconsin. (A. 11; *see also* A. 18–19.) In its April 4, 2011 opposition, the United States responded that: (1) SCR 23.02(2) contains exception (h) for activities preempted by federal law and exception (n) for government employees carrying out responsibilities provided by law; (2) 28 U.S.C. § 517 would preempt Wis. Stat. § 802.05(1) if there were a conflict between the

two statutes; but (3) those statutes could be harmonized by treating 28 U.S.C. § 517 as authorizing Justice Department attorneys to serve as attorneys of record for the United States under Wis. Stat. § 802.05(1), as allowed by SCR 23.02(2)(n).[3] (A. 11; *see also* A. 19–21.)

In a May 3, 2011 order, the Court of Appeals granted the insurance commissioner's motion to dismiss. (A. 14, 18–23.) The

[3] The insurance commissioner also argued for the dismissal of the United States' appeal (and later against the granting of the United States' petition for review) on the independent ground that the United States purportedly waived the issues listed in its appellate docketing statement (A. 30–32) by not participating in the proceedings before the Circuit Court. In both instances, the United States responded: (1) that its issues challenged the Circuit Court's subject-matter jurisdiction (a matter that can be raised at any time) to enjoin the United States in the absence of *any* statute waiving sovereign immunity (and in light of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a)); and (2) that Wis. Stat. § 752.35 gave the Court of Appeals discretion to determine that a miscarriage of justice had occurred and to consider the United States' arguments on their merits. In dismissing the United States' appeal, the Court of Appeals did not address those arguments, and this Court did not find the arguments presented by the insurance commissioner to be a reason to decline review. In any event, this Court restricted the issues that the United States may argue to the two set forth in the United States' petition for review. Accordingly, we are not preemptively addressing these arguments of the insurance commissioner.

court noted that Mr. Kovacev is not a Wisconsin attorney, that he had not sought to appear *pro hac vice*, and that the notice of appeal was not co-signed by a Wisconsin attorney. (A. 18–19.) Although the court recognized "that the Wisconsin rules do not require a Department of Justice attorney to have a Wisconsin law license or bar membership in order to practice law in our state courts" (A. 20–21), it nevertheless rejected the United States' argument premised on 28 U.S.C. § 517, finding no conflict between that statute and the Wisconsin *pro hac vice* rules (A. 19–22).

The Court of Appeals' analysis focused on SCR 23.02(2), which allows individuals to engage in a list of lettered activities "regardless of whether these activities constitute the practice of law." (A. 19–20.) One of those activities, SCR 23.02(2)(a), allows the practice of law by non-resident counsel or registered in-house counsel pursuant to the *pro hac vice* rules of SCR 10.03(4). The Court of Appeals engrafted the *pro hac vice* exception onto the other exceptions relied upon by the United States, even though

those other exceptions do not mention *pro hac vice* admission. (A. 20–22.) Thus, the court held that the preemption exception of SCR 23.02(2)(h) was inapplicable to this case because the *pro hac vice* provisions of SCR 10.03(4) did not conflict with, and were not preempted by, 28 U.S.C. § 517 (despite the court's recognition that § 517 empowered the Attorney General to send non-Wisconsin attorneys to represent the United States). (A. 20–21.) The court also acknowledged the government-employee exception of SCR 23.02(2)(n), but it again looked to "the sponsorship and co-signature requirements for *pro hac vice* appearances" and to the fact that they had not been followed with respect to the notice of appeal. (A. 21–22.) Finding the United States' notice of appeal to be fundamentally flawed, the court dismissed the appeal for lack of jurisdiction. (A. 22–23.)

The Court of Appeals severed the United States' appeal from the other challenges and assigned a separate docket number "to make clear that this is a final and appealable order with

respect to the United States."[4] (A. 23.) On August 31, 2011, this Court granted the United States' petition for review.

B. Statement of the facts

1. The creation of the segregated account

Ambac is a subsidiary of Ambac Financial Group, Inc. (AFGI), a holding company headquartered in New York City. (A. 45–46, 60.) Ambac and AFGI are members of a group that files consolidated federal income tax returns. (A. 65, 72.) The group has a tax-sharing agreement (A. 65, 72), but intramural agreements cannot alter each member's several liability to the United States for a consolidated group's taxes. *See* 26 C.F.R. §§ 1.1502-6(a), (c), 1.1502-78(b)(2). The IRS issued "tentative" refunds totaling approximately $700 million to AFGI under 26 U.S.C. § 6411, which provides a special procedure for expedited refunds without the usual pre-refund audit. (A. 65, 72,

[4] The original appeal (No. 2011AP561), which involved private-party challenges to the rehabilitation plan for the segregated account, continued. It has been fully briefed and is awaiting oral argument in the Court of Appeals, District IV.

81–82.) AFGI transferred almost all of the tentative refunds to Ambac under their tax-sharing agreement. (A. 65, 72, 82.)

Ambac traditionally insured municipal bonds, but it encountered financial difficulties from its later-written policies insuring instruments like mortgage-backed securities. (A. 46–52, 99, 107.) In late March 2010, Ambac, with the approval of the insurance commissioner, created a segregated account to hold its approximately 1,000 most troubled policies out of 15,000 total policies. (A. 49, 52, 107–108.) *See* Wis. Stat. § 611.24 (segregated accounts). The other policies, and virtually all of the assets, remained with Ambac in what is commonly referred to as the "general account." (A. 108–109.)

On March 24, 2010, the insurance commissioner petitioned the Dane County Circuit Court to rehabilitate the segregated account. (A. 37, 45–58.) The insurance commissioner obtained a "first day" injunction (A. 37–38, 53, 109), but the IRS was not affected. Section 301.6331-1(a)(3) of 26 C.F.R. already restrained the IRS from levying on the segregated account, but it allowed

the IRS to levy on Ambac, which held the refunds and was not under the Circuit Court's jurisdiction. (A. 45, 60, 65, 72, 82.)

2. The allocation of the tentative-refund liabilities to the segregated account

Soon after the IRS sent AFGI an information document request regarding the tentative refunds, the insurance commissioner, on November 7, 2010, approved Ambac's amendment to the segregated-account rehabilitation plan purporting to allocate any liability to repay the tentative refunds to the segregated account. (A. 66–67, 72–73, 81–87.) The $700 million, however, remained in Ambac. (*See* A. 65, 72.)

On November 8, 2010, AFGI filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York (No. 1:10-bk-15973-scc). (A. 72–73, 77–78, 110.) The same day, the insurance commissioner obtained from the Circuit Court an *ex parte* supplemental injunction prohibiting the IRS from taking any steps to collect (or possibly even assess) any liability for the

tentative refunds not only from the segregated account, but also from Ambac. (A. 39–40, 64–70, 88–91.) The insurance commissioner did not serve the United States with notice of the plan amendment in time for the United States to meet the deadline for written objections to the rehabilitation plan (a prerequisite for participating in the hearing on the plan). (*See* A. 61–62, 92–93; Pet. Resp. 3.)

On January 24, 2011, the Circuit Court entered a final order confirming the rehabilitation plan for the segregated account. (A. 42–43, 94–104.) The order repeated an assurance by the insurance commissioner that he would provide appropriate treatment under Wis. Stat. § 645.68 for any future claim that the IRS might file.[5] (A. 100.) The order made permanent prior

[5] The adjudication of the tentative refunds fell to the bankruptcy court in AFGI's case. In early May 2011, the IRS filed a bankruptcy proof of claim for more than $800 million. Because most of the tentative refund money has been transferred to Ambac (A. 65, 72, 82), any suggestion (*see* Pet. Resp. 15) that the IRS can recover full relief from AFGI is unfounded.

orders, including the March 24, 2010 first-day injunction and the November 8, 2010 *ex parte* injunction. (A. 103.)

ARGUMENT

I

Supreme Court Rule 23.02(2) does not require a United States Department of Justice attorney (not licensed to practice law in Wisconsin) to follow the procedures for appearing *pro hac vice* in the Wisconsin courts, because the separate exceptions in SCR 23.02(h) or (n) for "[a]ctivities which are preempted by federal law" or employees of "[g]overnmental agencies . . . carrying out responsibilities provided by law" obviate any need to satisfy the exception for *pro hac vice* admission.

A. Introduction

Wisconsin Statute § 802.05(1) provides, in part, that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." Section 802.05(1) further states that "[a]n unsigned paper shall be stricken unless omission of the signature

is corrected promptly after being called to the attention of the attorney or party."

Although the signing of court filings falls within the definition of the practice of law (*see* SCR 23.01(3)), SCR 23.02(2) states that "[a] license to practice law and active membership in the State Bar of Wisconsin are not required for a person engaged in any of the following activities in Wisconsin, regardless of whether these activities constitute the practice of law." The listed activities include:

> (a) Practicing law pursuant to SCR 10.03(4) by a non-resident counsel or registered in-house counsel.[6]
>
> * * * *
>
> (h) Activities which are preempted by federal law.
>
> * * * *

[6] SCR 10.03(4)(b) provides a *pro hac vice* procedure for nonresident counsel. SCR 10.03(4)(f) allows for practice by registered in-house counsel.

(n) Governmental agencies, Indian tribes and their employees carrying out responsibilities provided by law.[7]

Both the signature requirement of Wis. Stat. § 802.05 and the *pro hac vice* provisions noted by SCR 23.02(2)(a) are tied to concerns about the unauthorized practice of law. The purposes of requiring an authorized attorney to sign court filings include protecting the public, ensuring that any attorney practicing law in Wisconsin is accountable for following the Wisconsin rules of professional responsibility, and ensuring that the signing

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[7] Wisconsin Rule of Professional Conduct 5.5 (SCR 20:5.5(d)(2)), governing the unauthorized and multi-jurisdictional practice of law, likewise states:

> (d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, who is not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or medical incapacity, may provide legal services in this jurisdiction that:
>
> * * * *
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

attorney has reflected upon the filing in question and judged it to be meritorious. *See*, *e.g.*, *Schaefer v. Riegelman*, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d 715, ¶¶22–23, 29–30, 33 (Wis. 2002); *Jadair, Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 562 N.W.2d 401, 407 (Wis. 1997); *Brown v. MR Group, LLC*, 2004 WI App 122, 274 Wis. 2d 804, 683 N.W.2d 481, ¶¶11–13 (Wis. App. 2004). The purposes of *pro hac vice* admissions likewise are to control the unauthorized practice of law and to ensure that the public is not put upon or damaged by inadequate or unethical counsel. *Filppula-McArthur ex rel. Angus v. Halloin*, 2001 WI 8, 241 Wis. 2d 110, 622 N.W.2d 436, ¶¶36, 56, 59 (Wis. 2001). Accordingly, a court can revoke *pro hac vice* privileges for conduct manifesting "incompetency to represent a client in a Wisconsin court or unwillingness to abide by the rules of professional conduct for attorneys or the rules of decorum of the court." SCR 10.03(4)(e); *Filppula-McArthur*, 622 N.W.2d 436, ¶37.

As we will explain (pages 28–30, *infra*), 28 U.S.C. §§ 515–519 empower the Attorney General to send a Justice

Department attorney into any court in the United States — state or federal — to attend to the interests of the United States.[8] Accordingly, a Justice Department attorney who signs a filing in the course of representing the United States is not engaged in the unauthorized practice of law under Wisconsin rules. Instead, he is a Federal Government employee carrying out his responsibility to provide legal services as authorized by federal law, which would preempt Wisconsin law where the latter interferes with the

[8] Because the case law regarding the signing of court filings was developed entirely in the context of private parties and practitioners, it has little relevance to the interpretation of Wis. Stat. § 802.05(1) and SCR 23.02(2) in the context of the above-cited federal statutes. *Compare* (correction of signature error allowed) *Rabideau v. Stiller*, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108, ¶¶2, 5, 14–15, 18 (Wis. App. 2006) (Wisconsin attorney allowed to correct unsigned complaint); *State v. Seay*, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437, ¶¶1–6, 10 (Wis. App. 2002) (*pro se* parties, entitled by law to represent selves, allowed to correct unsigned notices of appeal) *with* (correction of signature error not allowed) *Schaefer*, 639 N.W.2d 715, ¶¶1–5, 22–23, 38 (complaint signed by Minnesota attorney on instructions and in name of supervising Wisconsin attorney); *Jadair, Inc.*, 562 N.W.2d at 407–08 (nonlawyer officer could not sign notice of appeal for corporation); *Brown*, 683 N.W.2d 481, ¶¶1–2, 3 n.2, 5–7, 10–13 (Wisconsin attorney not allowed to submit untimely amended notice of appeal after original notice signed in attorney's name by non-attorney legal assistant).

implementation of federal laws. Thus, the United States should prevail under either the government-employee exception of SCR 23.02(2)(n) or the federal-preemption exception of SCR 23.02(2)(h). Moreover, as explained in Argument II, *infra*, the United States should prevail in any event because the Supremacy Clause prohibits Wisconsin from imposing bar-membership or *pro hac vice* obligations on Justice Department attorneys.

B. SCR 23.02(2), by its express terms, allows Department of Justice attorneys to represent the United States in the Wisconsin courts without being members of the Wisconsin bar, and nothing therein mandates that those attorneys also be admitted *pro hac vice*

1. The Court of Appeals' opinion

The Court of Appeals correctly recognized "that the Wisconsin rules do not require a Department of Justice attorney to have a Wisconsin law license or bar membership in order to practice law in our state courts." (A. 20–21.) But it held that the preemption exception of SCR 23.02(2)(h) was inapplicable

because the *pro hac vice* provisions of SCR 10.03(4) did not conflict with, and thus were not preempted by, 28 U.S.C. § 517. (*Ibid.*) The Court of Appeals also acknowledged the government-employee exception in SCR 23.02(2)(n), but it again looked to "the sponsorship and co-signature requirements for *pro hac vice* appearances" and the fact that they had not been followed with respect to the notice of appeal in concluding that the government-employee exception was not applicable. (A. 21–22.)

The Court of Appeals thus read the preemption and government-employee exceptions of SCR 23.02(2)(h) and (n) as incorporating the separate *pro hac vice* exception of SCR 23.03(2)(a) in a case involving a Justice Department attorney carrying out his duties under 28 U.S.C. § 517. The Court of Appeals erred in interpreting Wisconsin law to preclude Justice Department attorneys from carrying out their duties without obtaining *pro hac vice* status, which would impose significant (and unlawful) burdens on the United States.

2. Under the text of SCR 23.02(2), each exception listed therein is independent of the others

As explained above, SCR 23.02(2) states that a Wisconsin law license is not required for a person engaged in any one of a list of separate activities, "regardless of whether these activities constitute the practice of law." The excepted activities include: (1) practicing law after being admitted *pro hac vice* under SCR 10.03(4); (2) activities preempted by federal law; and (3) employees of government agencies and Indian tribes "carrying out responsibilities provided by law."

The text of SCR 23.02(2) therefore provides no basis for engrafting one of those exceptions — the *pro hac vice* exception of SCR 23.02(2)(a) — onto the entirely separate preemption and government-employee exceptions. The general language of SCR 23.02(2) states that if a person is engaging in an excepted activity, "[a] license to practice law and active membership in the State Bar of Wisconsin are not required . . . regardless of whether [the activity] constitute[s] the practice of law." SCR 23.02(2) then

provides *separate*, individual exceptions, *inter alia*, for: (1) nonresident counsel "[p]racticing law pursuant to SCR 10.03(4)" (*i.e.,* the *pro hac vice* provisions); (2) activities which are preempted by federal law; and (3) employees of government agencies and Indian tribes "carrying out responsibilities provided by law." The Court of Appeals thus had no textual basis for concluding that one of those exceptions — the *pro hac vice* exception — somehow operated to disable the application of the other, separately enumerated exceptions for activities preempted by federal law and for employees of government agencies and Indian tribes carrying out their responsibilities.[9]

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[9] The insurance commissioner has argued (Pet. Resp. 11) that SCR 10.03(4)(c)'s narrow exception from the *pro hac vice* rules for nonresident military counsel representing military personnel "demonstrat[es] that other government attorneys must comply with the usual *pro hac vice* regime." But this Court created SCR Chapter 23 specifically to govern the unauthorized practice of law. *See* Rule Petition 07-09 (adopted by final order dated July 27, 2010). In so doing, this Court not only approved of the broader exceptions, applicable here, for activities preempted by federal law and for government employees carrying out

(continued...)

Once the Court of Appeals recognized the authority granted by Congress through 28 U.S.C. § 517 to the Attorney General to send Justice Department attorneys not licensed in Wisconsin into the Wisconsin state courts to represent the interests of the United States (*see* A. 20–21), it had no authority, under the Rules of this Court, to deny the Attorney General the benefit of either the federal-preemption exception or the government-employee exception. Moreover, the drastic consequence of the holding of the Court of Appeals — the dismissal of an appeal in a case where approximately $700 million is at issue — raises a question of fundamental fairness, inasmuch as a plain reading of the exceptions would not alert the Attorney General, nor any component of the Department of Justice, of the court's newly created interpretation of the rule requiring a Justice Department

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[9](...continued)
responsibilities provided by law, but it also made them independent of the *pro hac vice* exception. *See also* SCR 20:5.5(d)(2) (non-Wisconsin lawyer may provide legal services in Wisconsin that he is authorized to provide by federal law). At most, the insurance commissioner has detected a minor and unintended redundancy in this Court's rules.

attorney acting pursuant to a federal statute to seek *pro hac vice* admission before he can appear as attorney of record.[10]

Indeed, it is not at all clear why SCR 23.02(2) would have been drafted with separate, broadly worded exceptions for preempted activities and for government employees if the Court of Appeals were correct that the intent of the rule is to subject government attorneys to the *pro hac vice* rules in any event. *Cf. Mueller v. McMillan Warner Ins. Co.*, 2006 WI 54, 290 Wis. 2d 571, 714 N.W.2d 183, ¶27 (Wis. 2006) (statute should be construed so that no word or clause rendered surplusage, and every word given effect if possible). By engrafting the *pro hac vice* exception onto the preemption and government-employee exceptions, the Court of Appeals has ignored the structure of the

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[10] The Court of Appeals erred in stating that § 6-1.120 of United States Attorneys' Manual directs that local counsel be listed as counsel of record in civil tax cases. (A. 21) Instead, that section states that the United States Attorney generally "will be listed as an attorney on the case" (not as counsel of record), and that "[d]epending on local practice, and after consultation, an Assistant United States Attorney *may* be listed as counsel of record in a particular case" (emphasis added).

rule and has created a trap even for wary government attorneys, like Mr. Kovacev, who examined SCR 23.02(2) and acted consistently with the rule as written. For example, SCR 23.02(2)(n) requires only that a government employee be "carrying out responsibilities provided by law" for that exception to be applicable. Correctly treating that exception as a separate exception would allow employees of the government (and of Indian tribes) to carry out their legal responsibilities without having to appear *pro hac vice*.

3. Other considerations confirm that the *pro hac vice* exception is not engrafted onto the other exceptions

Engrafting the *pro hac vice* exception onto the other exceptions is inconsistent with the nature of the federal-preemption exception. That exception provides that active membership in the Wisconsin bar is not required for a person engaged in an activity preempted by federal law. But if the activity at issue truly has been removed from state control in favor of federal control, then the state could not nevertheless

reassert control by imposing *pro hac vice* requirements on the activity. And if the *pro hac vice* exception is not to be engrafted upon the federal-preemption exception, it would be anomalous to engraft it upon all the other, separately listed exceptions, including the government-employee exception.

Imposing the *pro hac vice* on the other exceptions would also conflict with the "cardinal rule of statutory construction . . . to preserve a statute and find it constitutional if it is at all possible to do so." *State ex rel. Fort Howard Paper Co. v. Lake Dist. Bd. of Review*, 82 Wis. 2d 491, 263 N.W.2d 178, 185 (Wis. 1978); *see also In re Termination of Parental Rights to Max G.W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, ¶20 (Wis. 2006) (courts try to avoid interpretations creating constitutional infirmities); *In re Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660, 664 (Wis. 1998). We maintain in Argument II, *infra*, that the Wisconsin bar admissions and *pro hac vice* provisions run afoul of the Supremacy Clause of the United States Constitution to the extent that they purport to allow state regulation of the Federal

Government absent express authorization by the United States Congress. But any Supremacy Clause question regarding SCR 23.02(2) can be avoided altogether if this Court simply reads the rule as it is plainly written with a set of independent exceptions — each of which stands on its own and for which "[a] license to practice law and active membership in the State Bar of Wisconsin are not required . . . regardless of whether [the activity] constitute[s] the practice of law." SCR 23.02(2).

Finally, treating the exceptions listed in SCR 23.02(2) as independent of each other is reinforced by the history of the government-employee exception. SCR 23.02(2)(n) was initially drafted to encompass only government agencies and their employees carrying out responsibilities provided by law. (A. 127–128.)[11] The Wisconsin Tribal Judges Association requested, and obtained, an amendment to add "Indian tribes"

[11] The cited written testimony is from this Court's publicly available archives. Related oral testimony is available at: mms://sc-media.wicourts.gov/sc-media/mp3/rh0709am2.mp3 starting at 57:20 and ending at 1:02:37.

alongside "Government agencies." (*Ibid.*) The amendment was done to allow tribes to be represented in the Wisconsin courts by non-lawyers without the participation of a Wisconsin attorney, consistent with the tribes' long-standing practice of sending non-lawyers to represent their interests in state-court, child-custody proceedings involving Indian children. (*Ibid.*) This history shows that the government-employee exception encompasses non-lawyers, who cannot seek to appear *pro hac vice*, thereby confirming that the exception is not subject to the *pro hac vice* rules. Moreover, adopting the reasoning of the Court of Appeals would require Indian tribes to change the very practice that this Court accommodated when it added "Indian tribes" to the rule.

C. Justice Department attorney Kovacev fit within the government-employee exception of SCR 23.02(2)(n) when he signed the United States' notice of appeal

1. The federal statutes governing the assignment of Justice Department attorneys

As we have described, under SCR 23.02(2)(n), neither a license to practice law nor active membership in the State Bar of Wisconsin is required for employees of governmental agencies (and Indian tribes) carrying out responsibilities provided by law. *See also* SCR 20:5.5(d)(2) (non-Wisconsin lawyer may provide legal services in Wisconsin that he is authorized to provide by federal law). The United States Supreme Court has "long recognized" that the Federal Government is unlike any private litigant "both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates." *United States v. Mendoza*, 464 U.S. 154, 159 (1984). Moreover, "Government litigation frequently involves legal questions of substantial public

importance." *Id.* at 160. In light of that reality, Congress has enacted a set of interrelated statutes that empower the Attorney General to attend to the United States' legal interests throughout the nation, including in state courts.

Taken together, 28 U.S.C. §§ 515–519 reserve to the Department of Justice the conduct of most litigation in which the United States, an agency, or an officer thereof is a party, under the direction and supervision of the Attorney General. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. *See also Marshall v. Gibson's Products, Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (Attorney General is United States' chief legal officer and is vested with plenary power over all litigation to which United States or agency thereof is party).

Section 515(a) of 28 U.S.C. states that "[t]he Attorney General or any other officer of the Department of Justice . . . may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal . . . which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought." *See also* 28 C.F.R. § 0.13 (delegating Attorney General's authority under 28 U.S.C. § 515(a) to each Assistant Attorney General and Deputy Assistant Attorney General in cases supervised by such official). The Attorney General's authority is more specifically confirmed by 28 U.S.C. § 517, which states that the Attorney General may send any officer of the Justice Department "to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, *or in a court of a State*, or to attend to any other interest of the United States" (emphasis added).

2. Mr. Kovacev fit within the government-employee exception

The United States' notice of appeal in the instant case was signed by Mr. Kovacev, an attorney of the United States Department of Justice, an active member of the District of Columbia bar, but not a member of the Wisconsin bar. (A. 18–19, 29, 34.) Mr. Kovacev was specifically directed to represent the interests of the United States in this proceeding by Acting Deputy Assistant Attorney General Mullarkey, who could assign Mr. Kovacev to this case pursuant to 28 C.F.R. § 0.13. (A. 34.)

Thus, under the authority provided by 28 U.S.C. §§ 515(a) and 517, Mr. Kovacev was authorized and directed by a delegate of the Attorney General to attend to the interests of the United States in the *Ambac* litigation, which included filing a notice of appeal in the Circuit Court. When Mr. Kovacev filed the notice of appeal, he was acting as an employee of a government agency carrying out responsibilities provided and authorized by federal law, placing him squarely within the exception provided by

SCR 23.02(2)(n). *See also* SCR 20:5.5(d)(2). Because he fit within that exception, Mr. Kovacev was entitled to engage in activities constituting the practice of law in Wisconsin on behalf of the United States, and was able to serve, according to the terms of Wis. Stat. § 802.05(1) and SCR 23.02(2), as an "attorney of record" for the United States when signing the notice of appeal. Because the United States' notice of appeal was signed by its attorney of record, it was not defective, and the Court of Appeals erred in holding otherwise.

Construing the government-employee exception as allowing Mr. Kovacev to sign the United States' notice of appeal is the simplest way to resolve this appeal. This Court could avoid the preemption question posed by SCR 23.02(2)(h). Nor would it need to reach the Supremacy Clause issues addressed in Argument II. *See County of Milwaukee v. Williams*, 2007 WI 69, 301 Wis. 2d 134, 732 N.W.2d 770, ¶63 (Wis. 2007) (fundamental that courts should not reach constitutional questions unless essential to

resolution of case); *Labor & Farm Party v. Elections Bd. of Wis.*, 117 Wis. 2d 351, 344 N.W.2d 177, 179 (Wis. 1984).

D. Justice Department attorney Kovacev also fit within the preemption exception in SCR 23.02(2)(h) when he signed the United States' notice of appeal

1. Under the Supremacy Clause, federal laws preempt conflicting state laws

Under SCR 23.02(2)(h), neither a license to practice law nor active membership in the State Bar of Wisconsin are required for a person engaged activities which are preempted by federal law. The Supremacy Clause of the United States Constitution (art. VI, cl. 2) states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985). Even

where Congress has not completely displaced state regulation by express preemption or by fully occupying a particular field, a state law still must yield "to the extent that it actually conflicts with federal law." *Hillsborough County*, 471 U.S. at 713. Such a conflict arises when compliance with both state and federal law is impossible, or when state law obstructs "'the accomplishment and execution of the full purposes and objectives of Congress.'" *Ibid.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As we will explain, the Wisconsin *pro hac vice* rules (as interpreted by the Court of Appeals) conflict with, and thus are preempted by, the federal statutes that authorize the Attorney General to dispatch Justice Department attorneys to attend to the interests of the United States.

2. The allocation of responsibility for representing the United States

As explained above, the Department of Justice is responsible for the conduct of most litigation — across the country and involving a multitude of issues — in which the

United States is interested. Although such litigation usually occurs in the federal courts, it is not uncommon for Justice Department attorneys to appear in state courts to represent the interests of the United States.

Responsibility for representing the United States is shared among attorneys serving in the Department's specialized litigating divisions, headquartered in Washington, D.C., and attorneys based in United States Attorney's offices located throughout the nation. The specialized litigating divisions include the Antitrust Division (28 C.F.R. § 0.40), the Civil Division (28 C.F.R. § 0.45), the Civil Rights Division (28 C.F.R. § 0.50), the Criminal Division (28 C.F.R. § 0.55), the Environment and Natural Resources Division (28 C.F.R. § 0.65), the Tax Division (28 C.F.R. § 0.70), and the National Security Division (28 C.F.R. § 0.72). The statutes governing United States Attorney's offices (28 U.S.C. §§ 541–550) require the President to appoint a United States Attorney for each federal judicial district (§ 541); allow the hiring of Assistant United States Attorneys

(§ 542); and give each United States Attorney's office broad authority to represent the United States within its district (§ 547). Nevertheless, 28 U.S.C. § 517 authorizes the Attorney General to send "*any officer* of the Department of Justice . . . to attend to the interests of the United States" (emphasis added).

Staffing appropriate cases from the Department's headquarters components promotes efficiency and ensures that the United States takes consistent positions on the substantive issues presented. The attorneys in the litigating divisions have expertise in their particular areas, and they are backed by appropriate administrative resources so that they can effectively represent the United States — anywhere in the nation — in litigation concerning their specialized areas. Local United States Attorney's offices are thereby freed to concentrate on managing their own heavy dockets.

For example, the authority to litigate most civil tax cases (outside of Tax Court cases handled by the IRS) is delegated to the Tax Division, not to the offices of the local United States

Attorneys. 28 C.F.R. § 0.70. As a result, most of those offices do not dedicate significant resources to tax matters.[12] State-court suits involving Tax Division attorneys include probate actions in which the IRS files a claim against the estate, receiverships, actions involving property against which the IRS has a lien, and interpleader actions. Such proceedings can arise on an expedited basis and require immediate action by the Tax Division trial attorney assigned to the case. Such proceedings can also be legally or factually complex. The instant case, for example, involves approximately $700 million in tentative income tax refunds and has been described by the insurance commissioner as the largest insurer rehabilitation proceeding in Wisconsin history.[13] (3/25/11 Mot. to Dismiss Appeal 3.) The Tax Division of

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[12] The only local United States Attorney's offices with dedicated officials handling tax cases are those located in New York City (S.D.N.Y.), San Francisco (N.D. Cal.), and Los Angeles (C.D. Cal.).

[13] Another example of a large, significant case requiring specialized expertise is a 1985 aviation accident in Dallas, in which the United States was represented by attorneys from the

(continued...)

the Department of Justice has the specialized attorneys best able to devote the time and resources necessary to expertly represent the interests of the United States in these proceedings.

3. The Wisconsin *pro hac vice* rules (as interpreted by the Court of Appeals) conflict with the federal statutes that authorize the assignment of Justice Department attorneys

If SCR 10.03(4)(b) is applied to headquarters attorneys (that is, Justice Department attorneys generally based in Washington, D.C.), they not only must apply for admission *pro hac vice*, but also must "appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin who appears and participates in the action

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[13](...continued)
Aviation and Admiralty Section of the Torts Branch of the Civil Division. *In re Air Crash at Dallas/Fort Worth Airport*, 720 F. Supp. 1258, 1260 & n.1 (N.D. Tex. 1989) (trial lasted 14 months (with interruptions) and produced 18,000 pages of transcript and a large number of exhibits), *aff'd*, 919 F.2d 1079 (5th Cir. 1991). Airplane disasters are so significant, but also so rare, that the Justice Department's resources are most efficiently employed by having a centralized group of specialized attorneys who can litigate such matters in any venue.

or proceeding." Although SCR 10.03(4)(b) itself does not define the extent to which the Wisconsin attorney must appear and participate, the Tenth Judicial Administrative District, for example, has adopted rules for lawyers admitted *pro hac vice*. Under those rules, an attorney admitted *pro hac vice* must be accompanied by a Wisconsin lawyer at all proceedings held on the record (including depositions), and must review and sign all papers to be filed with a circuit court. *See also State v. Mosley*, 201 Wis. 2d 36, 547 N.W.2d 806, 811 (Wis. App. 1996) (participation by local attorney includes "making, at a minimum, one in-court appearance," but court can impose additional requirements); Milwaukee County Circuit Court Rule 1.18(C) ("The court may require local counsel to personally appear and actively participate in certain proceedings, including a trial. If at any time the court revokes the permission granted under this rule, local counsel shall be prepared to appear immediately in all further proceedings.")

United States Attorney's offices are often distant from the local state court in which a matter is proceeding. For example, the United States Attorney for the Western District of Wisconsin represents the United States in the western two-thirds of Wisconsin from offices in Madison, Wisconsin. If a headquarters attorney is assigned to a matter in the Circuit Court for Eau Claire County (the closest county to Madison in the Tenth Judicial Administrative District, *supra*), the rules of that district would require an Assistant United States Attorney to set aside his own docket and make a round trip of approximately 350 miles every time the headquarters attorney needed to appear at a hearing.

But, even if there were no live-appearance requirements, signing a court paper, even a notice of appeal, is not a ministerial act. *Brown*, 683 N.W.2d 481, ¶¶1, 11–13. To comply with Wis. Stat. § 802.05(2)'s reasonable-inquiry requirement, an Assistant United States Attorney would have to set aside his own assigned cases to familiarize himself, on an ongoing basis, with the facts

and the law of matters already being competently handled by headquarters attorneys. To require Assistant United States Attorneys to acquire and maintain that level of familiarity would place considerable obligations on the local attorneys, and would invariably waste already stretched government resources. Indeed, sometimes a local United States Attorney's office cannot litigate a given case because the office is particularly small (and the case large), because the case poses unique issues requiring specialized expertise, or because the entire office has been recused from the matter. For the same reasons that the local office could not handle the case in the first place, it would not be feasible for the attorneys therein to serve as responsible local counsel for the Justice Department lawyers brought in from elsewhere to handle the matter.

4. There is no inherent conflict between the federal statutes and the legitimate concerns of the Wisconsin courts

Relieving Justice Department attorneys of the *pro hac vice* provisions does not detrimentally affect the Wisconsin courts.

There is no concern about protecting the public from unscrupulous or incompetent counsel. The United States is a sovereign entity capable of attending to its own interests, and Congress has seen fit to assign to the Department of Justice primary responsibility for representing the United States. 28 U.S.C. § 516. Section 530C(c)(1) of 28 U.S.C. ensures that the officer dispatched by the Attorney General will be an attorney licensed in at least one State, territory, or the District of Columbia. As already explained, Justice Department attorneys in the Washington-based litigating divisions are generally specialists in their practice areas; they work under the close supervision of more senior attorneys; and they routinely seek advice not only from attorneys in the legal departments of client agencies but also from Assistant United States Attorneys about local practices. *See* 28 U.S.C. § 519 (Attorney General to supervise all litigation to which United States, agency, or officer thereof is a party). Moreover, prosecution of all Federal Government appeals must be approved by the Office of the

Solicitor General, located in Washington, D.C. 28 C.F.R. § 0.20(b). Thus, the Wisconsin courts need not be concerned about the Department of Justice prosecuting an appeal on behalf of the United States without first giving full and careful consideration to the merits of that appeal. *See Schaefer*, 639 N.W.2d 715, ¶30 (requiring "moment of reflection" by attorneys before signing notice of appeal).

Furthermore, 28 U.S.C. § 530B (the McDade Amendment) satisfies any concern about Justice Department attorneys being subject to Wisconsin ethics and procedural rules. Section 530B(a) states that "[a]n attorney for the Government[14] shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Section 530B thus requires Justice Department attorneys to abide by the rules of professional

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[14] An "attorney for the Government" includes any attorney employed by the Tax Division. 28 U.S.C. § 530B(c); 28 C.F.R. § 77.2(a).

responsibility and generally applicable procedural rules "governing attorneys in each State" where they perform their duties. *See also* 28 C.F.R. § 77.1(b) (§ 530B "requires Department attorneys to comply with state and local federal court rules of professional responsibility"), § 77.2(h) (phrase "state laws and rules . . . governing attorneys" means ethics rules that would subject any attorney to professional discipline); § 77.4(a) (similar). For example, 28 U.S.C. § 530B would subject a headquarters attorney: (1) to the requirement of Wis. Stat. § 802.05(1) that he sign his filings as the attorney of record for the United States; (2) to the provision of § 802.05(2) that his signature makes the certifications of proper purpose and good-faith legal and factual accuracy listed therein; and (3) to the possibility of sanctions under § 802.05(3) for violations of § 802.05(2).

Section 530B thus harmonizes with SCR 23.02(2)'s structure, which makes the federal-preemption exception (and the government-employee exception) independent of the *pro hac vice* exception. Section 530B subjects Justice Department

attorneys acting under those exceptions to generally applicable local ethics and procedural rules, whereas the *pro hac vice* exception and the coordinate *pro hac vice* rules confirm the enforcement power of the Wisconsin courts over private attorneys.

The Court of Appeals erred in its resolution of the legal question presented by this case. The United States has interests throughout Wisconsin, and it will continue on a recurring basis to call upon the attorneys of the Department of Justice to represent those interests. This Court should accordingly hold that the exceptions found in SCR 23.02(2)(h) and (n) allow Justice Department attorneys to represent the United States in the Wisconsin courts without having to comply with the *pro hac vice* exception of SCR 23.02(2)(a) and the corresponding requirements imposed by SCR 10.03(4).

II

By virtue of the Supremacy Clause of the United States Constitution, Wisconsin cannot impose state bar membership obligations on Department of Justice attorneys carrying out their official responsibilities under the direction of the Attorney General.

A. The Supremacy Clause prohibits state regulation of the Federal Government, except where expressly allowed by Congress

The Supreme Court of the United States has on numerous occasions held that, under the Supremacy Clause, *supra*, the activities of federal officers and agents carrying out their duties on behalf of the United States are shielded from direct state regulation, except where Congress has expressly provided otherwise.[15] *See*, *e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180–81 (1988); *EPA v. State Water Res. Bd.*, 426 U.S. 200, 211 (1976); *Hancock v. Train*, 426 U.S. 167, 178–79 (1976); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103–04 (1940). The

[15] We note that this Court need not reach this issue if it accepts either of our arguments regarding the proper interpretation of this Court's own rules.

Supreme Court has long held that, even when Congress has mandated compliance with state-law standards, federal instrumentalities are not subject to associated state-law permitting or licensing requirements absent an affirmative declaration that they are so bound. *EPA*, 426 U.S. at 211–13, 227–28; *Hancock*, 426 U.S. at 178–80, 198–99; *see also Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1339 (Fed. Cir. 2005) ("It is long established that any state or local law which attempts to impede or control the federal government or its instrumentalities is deemed presumptively invalid under the Supremacy Clause").

For example, the Supreme Court held in *Hancock* that the Clean Air Act required federal installations to comply with local air pollution standards, but that the imposition of substantive emissions standards did not include subjecting the installations to state permitting requirements (and the state control that came with them). 426 U.S. at 180, 184, 198–99. To require a federal facility to get a state permit would give the states far-reaching

control over the federal function. *Id.* at 180. A state could, by denying a permit, prevent the facility from operating even if it otherwise met the state's pollution standards. *Ibid.* *See also* *Sperry v. Florida*, 373 U.S. 379, 384–403 (1963) (Florida could not enjoin individual from preparing and prosecuting patent applications before U.S. Patent Office on ground that individual engaged in unauthorized legal practice where federal statute and Patent Office regulations authorized the activity); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956) (reversing conviction of federal contractor for violating state licensing laws; subjecting federal contractor to state license requirements would give state licensing board power to review federal determination of "responsibility," frustrating federal policy to select lowest responsible bidder); *Mayo v. United States*, 319 U.S. 441, 447–48 (1943) (Florida could not require U.S. Department of Agriculture to obtain state inspection-fee stamps on bags of fertilizer distributed as part of federal program); *Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920) (immunity of federal instruments from

state control extends to state examination and fee requirements; such requirements impermissibly go beyond general conduct rules to mandate qualifications beyond what federal agency has deemed sufficient); *Cunningham v. Neagle*, 135 U.S. 1, 60–62 (1890) (California sheriff cannot interfere with U.S. Marshal carrying out duty to protect federal officials); *United States v. Virginia*, 139 F.3d 984 (4th Cir. 1998) (granting declaratory judgment against threatened enforcement action; state may not require contractors performing FBI background investigations to comply with state licensing and registration requirements for private investigators). In sum, "[n]o state government can exclude [the Federal Government] from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it." *Cunningham*, 135 U.S. at 62.

B. Congress has not authorized Wisconsin to impose *pro hac vice* rules on Justice Department attorneys, as such rules constitute impermissible state regulation of the Federal Government

Whereas 28 U.S.C. § 517 allows the Attorney General to deploy his chosen attorneys to *any* court, Wisconsin's *pro hac vice* provisions give a state court discretion not only to deny *pro hac vice* admissions, but also to revoke them during a case. SCR 10.03(4); *Filppula-McArthur*, 622 N.W.2d 436, ¶31. The Court of Appeals seemed to assume that *pro hac vice* admission would be readily granted to, and not lightly withdrawn from, Justice Department attorneys (A. 20–21), but the Court of Appeals' interpretation does not change the fact that, under Wisconsin law, such admission remains a privilege to be granted and withdrawn by a particular court. *Filppula-McArthur*, 622 N.W.2d 436, ¶¶31, 33, 47, 56.

This discretion to withhold or to withdraw *pro hac vice* status effectively gives the state courts (and not the Attorney General) the ability to dictate whom the United States can use as

counsel.[16] The *pro hac vice* provisions themselves thus stand as an obstacle to the execution of the full purposes and objectives of Congress in enacting 28 U.S.C. § 517, regardless of how leniently some Wisconsin courts might apply them to Justice Department attorneys. *See Hillsborough County*, 471 U.S. at 713.

Moreover, as discussed in Argument I, *supra*, SCR 10.03(4)(b) requires nonresident counsel admitted *pro hac vice* "to appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin who appears and participates in the action or proceeding." Some Wisconsin courts, on an *ad hoc* basis, might allow Justice Department attorneys to represent the United States without the participation of Wisconsin counsel. But just like the requirement of *pro hac vice* admission, the participation requirement, as a matter of law, imposes a state regulation on the

[16] This, of course, assumes that the federal attorney is complying with all applicable state ethics rules. Section 530B of 28 U.S.C. already supplies an avenue for relief for the violation of any such rules.

Attorney General and his agents in the Justice Department, and, thus, runs afoul of the Supremacy Clause. Section 517 of 28 U.S.C. gives the Attorney General the authority to decide which Justice Department attorney — or attorneys — will be sent to represent the interests of the United States. The participation requirement, however, purports to give circuit courts authority over the Attorney General so as to compel him to use scare federal funds and federal personnel to dispatch unwanted and unnecessary (but locally licensed) attorneys in addition to the attorneys already selected for their expertise and experience in the substantive matters presented. Because the participation requirement purports to regulate (without express authorization by Congress) the activities of federal officers carrying out their duties on behalf of the United States, it is preempted under the Supremacy Clause.

C. Section 530B of 28 U.S.C. coordinates with 28 U.S.C. § 517 by requiring adherence to state ethics rules, but not state licensure rules

We have previously discussed the requirement of 28 U.S.C. § 530B that Justice Department attorneys must abide by local ethics rules. That provision, which is entitled "Ethical standards for attorneys for the Government," does not subject Justice Department attorneys to state licensure or *pro hac vice* rules. Congress separately addressed bar membership in 28 U.S.C. § 530C(c)(1), where it required only that Justice Department attorneys be "duly licensed and authorized to practice as an attorney under the law of a State, a territory of the United States, or the District of Columbia."

This reading of 28 U.S.C. § 530B is borne out by its legislative history, which indicates that the statute "sets forth ethical standards" for Government attorneys. H.R. Conf. Rep. No. 105-825, at 1102 (1998); *see also* H.R. Rep. No. 105-636, at 154 (1998) (provision "addresses the concerns of the Committee about the Department of Justice's issuance of a regulation that

exempts its attorneys from the same State laws and rules of ethics which all other attorneys must follow"); 144 Cong. Rec. E301 (March 5, 1998) (statement of Rep. McDade) ("the bill insures that the Department of Justice, through attempts at self-regulation, cannot exempt its lawyers from the same rules of ethics that govern the professional conduct of all other attorneys"); 144 Cong. Rec. E1584 (Aug. 7, 1998) (statement of Rep. McDade) (bill would "[t]ell the lawyers at DOJ to abide by the same ethics rules which govern all other lawyers").

Consistent with the legislative history, the Justice Department has promulgated regulations requiring its attorneys to obey state ethics rules, but also stating that § 530B "should not be construed in any way . . . to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 C.F.R. § 77.1(b). Moreover, the phrase "state laws and rules" does not include "[a] statute, rule, or regulation requiring licensure or membership in a particular state bar." 28 C.F.R. § 77.2(h)(3). *See also Augustine*, 429 F.3d at

1341 ("while government attorneys must abide by the ethical codes of conduct of each state in which they perform their services, they do not have to be licensed by those states to practice law"). Because 28 U.S.C. § 530B(b) instructed the Attorney General to "make and amend rules of the Department of Justice to assure compliance with this section," the above-quoted regulations represent controlling law. They are consistent with the text of 28 U.S.C. § 530B, with its purpose as stated in the legislative history, and with its placement among other statutes authorizing the Attorney General to dispatch Justice Department attorneys to protect the interests of the United States. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984) (regulations promulgated to fill gap explicitly left to agency by Congress have controlling weight unless arbitrary, capricious, or manifestly contrary to statute); *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, 284 Wis. 2d 264, 700 N.W.2d 158, ¶¶28–31 (Wis. 2005) (applying *Chevron*).

Taken together, 28 U.S.C. §§ 515, 517, 530B(a), and 530C(c)(1) authorize the Attorney General to send a Justice Department attorney to protect the interests of the United States by serving as an attorney of record for the Federal Government in a state court. *See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010) (if text permits, statutes should be construed consistently with each other); *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 143–44 (2001) (similar); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (similar). The state court can expect the Justice Department attorney to behave ethically, to meet deadlines, to file generally applicable forms, and to submit properly formatted filings. On the other hand, the attorney would not be subject: (1) to state licensure provisions (*e.g.*, bar examinations, bar dues, and continuing legal education); (2) to *pro hac vice* provisions; or (3) to local rules that interfere with the Attorney General's prerogatives under 28 U.S.C. § 517 (*e.g.*, rules regarding residency or participation by local counsel). *See*

Hillsborough County, 471 U.S. at 713. *See also* ABA Model Rule 8.5(b) (for conduct before tribunal, attorney subject to ethics rules of tribunal's jurisdiction unless tribunal's rules provide otherwise; for conduct not before tribunal, attorney subject to ethics rules of jurisdiction in which conduct occurred or, if elsewhere, in which conduct has predominant effect).[17]

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[17] For example, Mr. Sheehan, who is representing the United States in this appeal, is admitted in Illinois and has an office in Washington, D.C. Therefore, he would be subject to the Illinois Rules of Professional Conduct. Illinois Rule of Professional Conduct 8.5(b) (the Illinois choice of law rule consistent with the ABA's choice of law rule (Model Rule 8.5(b)) would require him: (1) for conduct in connection with a matter pending before a tribunal, to apply the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and (2) for conduct not in connection with a matter pending before a tribunal, to apply the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction. Although Mr. Sheehan therefore first considers the Illinois Rules of Professional Conduct, he is subject instead to the professional conduct rules of another jurisdiction, consistent with 28 U.S.C. § 530B, when practicing before a tribunal in that jurisdiction or taking an action with its predominant effect in the other jurisdiction. Furthermore, Mr. Sheehan is not subject to local rules that would obstruct the authority of the Attorney General, granted by federal statutes, to dispatch him to attend to the interests of the United States, as indicated above.

The *pro hac vice* provisions of SCR 10.03(4) purport to regulate as a matter of law the Attorney General of the United States, as he carries out his duties under 28 U.S.C. § 517 and the coordinate provisions of 28 U.S.C. The Court of Appeals erred by holding that a state can so control the activities of federal officers carrying out their federal responsibilities. Should this Court reach this issue, it should hold that Wisconsin law cannot require the Attorney General to use only attorneys admitted fully, or *pro hac vice*, to the Wisconsin state bar in order to represent the interests of the United States in the Wisconsin courts.

CONCLUSION

The Court should reverse the Court of Appeals' dismissal of the United States' appeal and remand for that court to consider the merits of the instant appeal.

Respectfully submitted,

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Dated: September 29, 2011

CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC FILING

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font (Century Schoolbook, 13 points). The length of this brief is 10,171 words (as counted by WordPerfect version X3).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Dated: September 29, 2011

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CERTIFICATION OF MAILING AND SERVICE

I hereby certify that this brief for the United States was on this 29th day of September, 2011, sent via First Class United States mail, with postage prepaid, in a package correctly addressed to Office of the Clerk of the Wisconsin Supreme Court. I further certify that service was made on all interested parties in accordance with the Court's order dated September 28, 2011.

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