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)

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

RICHARD D. HUMPHREY
Assistant U.S. Attorney
Wisconsin Bar No. 1016934
Suite 303
660 West Washington Ave.
Madison, WI 53703
Telephone: (608) 264-5158
Facsimile: (608) 264-5172
Richard.Humphrey@usdoj.gov

ANTHONY T. SHEEHAN
Attorney – Tax Division
Admitted *pro hac vice*
U.S. Dep't of Justice
Illinois Bar No.: 6210019
Post Office Box 502
Washington, D.C. 20044
Telephone: (202) 514-4339
Facsimile: (202) 514-8456
Anthony.T.Sheehan@usdoj.gov

Attorneys for Interested Party-Appellant-Petitioner
United States of America

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ARGUMENT

This brief addresses those contentions in the briefs of Wisconsin Insurance Commissioner (WICBr) and Ambac (AmBr) (collectively, "respondents") that warrant a response. We otherwise rely upon our opening brief.

I

Supreme Court Rule 23.02 does not require a Justice Department attorney to be admitted *pro hac vice* because the separate exceptions for "[a]ctivities which are preempted by federal law" and employees of "[g]overnmental agencies . . . carrying out responsibilities provided by law" allow a Justice Department attorney to serve as attorney of record for the United States.

The Court of Appeals dismissed the United States' appeal because its notice of appeal was signed only by Robert Kovacev, a United States Department of Justice attorney who was not a Wisconsin attorney or admitted *pro hac vice*. In our opening brief (USBr), we maintained that the dismissal was erroneous for any one of three reasons: (1) SCR 23.02(2)(n)'s government-employee exception allowed Kovacev to serve as attorney of record for the

United States; (2) SCR 23.02(2)(h)'s federal-preemption exception permitted the same; or (3) the Supremacy Clause prohibits Wisconsin from imposing on the United States Attorney General the requirement that Justice Department attorneys meet *pro hac vice* conditions. We also explained that 28 U.S.C. § 530B requires Justice Department attorneys to follow generally applicable state ethics rules.

1. Wisconsin Statute § 802.05(1) provides that every court filing "shall be signed by at least one attorney of record in the attorney's individual name." Respondents rely on *Schaefer v. Riegelman*, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d 715, ¶¶17, 19 (Wis. 2002), for the proposition that an "attorney of record" must be a Wisconsin attorney, and they argue that the United States is seeking to be excused from the attorney-of-record requirement of § 802.05. (WICBr:4, 20–46; AmBr:6 n.4.) *Schaefer* held that a Minnesota attorney could not sign a Wisconsin attorney's name to a complaint because the Minnesota attorney's lack of a Wisconsin license meant that she was "not

authorized" to sign the pleadings as attorney of record. *Ibid.* But *Schaefer* and respondents' other cases all involve private counsel and predate the January 1, 2011 effective date of SCR 23.02. None of those cases address a situation where 28 U.S.C. § 517 and related statutes authorize a Justice Department lawyer to serve as attorney of record for the United States under SCR 23.02. The United States does not invoke SCR 23.02 as an exception to § 802.05's signature requirement; rather, SCR 23.02 provides the means by which a Justice Department attorney *fulfills* § 802.05. (*See* USBr:44 (Justice attorneys bound by § 802.05 and subject to ethical requirements when signing pleadings).)

When interpreting a statute or rule, this Court begins with the provision's language, gives the words their common meaning, reads them in context, and applies those words to the situation before it unless the language yields an ambiguity. *State v. Denis L.R.*, 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154, ¶35 (Wis. 2005). SCR 23.01(3) states that practicing law includes

"[r]epresentation of another entity or person(s) in a court." And SCR 23.02(2) states that a Wisconsin law license "[is] not required for a person engaged in any of the following [listed] activities in Wisconsin, *regardless of whether these activities constitute the practice of law*" (emphasis added). Thus, if a person fits within the terms of "any" of those listed activities, that person is authorized to engage in that activity even if the activity constitutes the practice of law, including court representation.

In this case, attorney Kovacev was a government employee, and his responsibility provided by federal law was to represent the United States in court. Therefore, he was authorized by SCR 23.02(2)(n) — addressing "Governmental . . . employees carrying out responsibilities provided by law" — to engage in that activity (even though it constituted the practice of law) without having to comply with the terms of any other listed activity. *See also* SCR 20:5.5(d)(2) (non-Wisconsin lawyer may provide legal services that he "is authorized to provide by federal law"). Kovacev was also authorized to appear in the Dane County

Circuit Court (the Wisconsin Court) under SCR 23.02(2)(h), addressing "[a]ctivities which are preempted by federal law," because, consistent with § 517, he was representing the United States in that proceeding. Because Kovacev was authorized to represent the United States in the Wisconsin Court, he was eligible to serve as the attorney of record for the United States, and his signature on the notice of appeal thereby satisfied § 802.05(1).[1]

2. Respondents argue that the *pro hac vice* exception of SCR 23.02(2)(a) governs this case in conjunction with the *pro hac vice* procedures in SCR 10.03(4). (WICBr:23–31; AmBr:1–2, 6–36.) But nothing in the text of SCR 23.02(2) empowers the *pro hac vice* exception to "trump" any of the other exceptions; it is

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[1] Respondents attempt to maximize the importance of active involvement by local counsel to protect the Wisconsin courts (WICBr:26–30) but at the same time minimize the burden that such involvement necessarily entails (WICBr:42–44; AmBr:31–33). They cannot have it both ways. Moreover, § 530B gives state courts ample authority for enforcement of local ethical rules *vis-à-vis* Justice Department attorneys. (USBr:43–45, 53–54, 56–57.)

merely one — among many — exceptions to the normal requirement that only Wisconsin bar members can appear in the Wisconsin courts.

Moreover, SCR 10.03(4)(b) states only that Wisconsin judges "may allow" *pro hac vice* practice and sets forth various procedures in that regard. It does not reference SCR 23.02, let alone purport to override anything contained therein. Instead, it is SCR 23.02(2)(a) that refers to SCR 10.03(4) as one of many separate activities (on a lengthy list) permitting the practice of law in the Wisconsin courts free of state licensure requirements (whether permanent or temporary).

Finally, SCR 23.02(2)(a), (h), and (n) do not evidence any inconsistencies. SCR 23.02(2)(a) directs private counsel to the *pro hac vice* rules and their protections for the Wisconsin courts, whereas Justice Department attorneys can rely on SCR 23.02(2)(h) and (n), with § 530B giving the Wisconsin courts the same enforcement powers as the *pro hac vice* rules.

3. Respondents make the irrelevant argument that SCR 23.02 merely codified prior practices. (WICBr:6, 44–46; AmBr:10–15, 18–19.) Resolution of this appeal, however, starts with the language of the newly promulgated SCR 23.02, and it also ends there because that language establishes the correctness of our position without ambiguity or absurdity. *Denis L.R.*, 699 N.W.2d 154, ¶35. All that matters is that attorney Kovacev was in full compliance with SCR 23.02(2)(h) and (n).

In any event, the assumptions underlying respondents' past-practice argument are incorrect. Respondents, like the court below, have misread the United States Attorneys' Manual. The manual states only that "an Assistant United States Attorney *may* be listed as counsel of record," indicating that it is the "Tax Division attorney" that normally is listed as counsel of record. (RA:107 (emphasis added).) The manual does not mention anything about bar membership or *pro hac vice* motions, and it does not speak specifically to Wisconsin. Moreover, the Manual provides internal guidance only; it does not give opposing

litigants any substantive or procedural rights. *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005).

Contrary to respondents' assertion of a longstanding practice (WICBr:45–46; AmBr:11–12), Justice Department attorneys not licensed in Wisconsin have not always appeared *pro hac vice* in the Wisconsin courts. Indeed, we have been able to identify cases (not in respondents' database) where non-Wisconsin Tax Division attorneys of the Justice Department have appeared as counsel of record for the United States without seeking *pro hac vice* status, and have had their filings accepted by the Wisconsin courts.[2] In any event, regardless of practice, the

[2] *See In re Accurate Transmission*, 2004CV004041 (Milwaukee County); *Somers v. Luterbach, United States*, 2004CV000680 (Waukesha County); *Feyen's Estate*, 2002PR000040 (Price County); *Nelson's Estate*, 2001PR000103 (Polk County); *Wapp's Estate*, 1997PR001378 (Milwaukee County); *Pitts's Estate*, 1995PR003063 (Milwaukee County); *Corbett's Estate*, 1995PR000326 (Dane County); *Gardner's Estate*, 1995PR000070 (Lincoln County); *Davis's Estate*, 1993PR002112 (Milwaukee County); *Bartell's Estate*, 1990PR000680 (Dane County); *Dreske's Estate*, 1983PR000522 (Waukesha County).

critical inquiry is the proper application of SCR 23.02 to Justice Department attorneys.

In sum, because SCR 23.02 authorized Kovacev to appear as counsel of record, his signature on the notice of appeal satisfied § 802.05. Respondents' contrary arguments are unfounded.

II

The Supremacy Clause prohibits Wisconsin from imposing state-bar membership requirements on Justice Department attorneys performing their official responsibilities under the Attorney General's direction.

In our opening brief (USBr:46–58), we maintained that: (1) the Supremacy Clause requires express congressional authorization before a state can regulate the activities of federal officers carrying out their official duties; (2) applying the Wisconsin *pro hac vice* rules to federal officers would be such regulation; and (3) because Congress has not clearly authorized such regulation, Wisconsin cannot subject Justice Department attorneys to its *pro hac vice* rules.

1. The insurance commissioner argues that Congress has not exempted Justice Department attorneys from state *pro hac vice* rules (WICBr:24–25), but that argument stems from a faulty premise. Unless Congress has specifically acted to the contrary, the States cannot regulate the activities of federal officers performing their federal duties. Congressional inaction, therefore, is of no moment. Only where Congress has specifically ceded authority to the States can they regulate federal officers. *Hancock v. Train*, 426 U.S. 167, 178–79 (1976) (holding that a Kentucky permit requirement for operating an air contaminant source constituted an impermissible regulation of a federal installation when such permitting was not authorized by Congress). And Congress has taken no such steps here that would warrant the Wisconsin Court of Appeals' dismissal of the United States' notice of appeal simply because the Attorney General's chosen representative (Kovacev) had not sought a license to practice law (either temporarily or permanently) in Wisconsin.

2. Respondents also wrongly contend that applying the Wisconsin *pro hac vice* rules would not burden the Attorney General. (WICBr:36–39, 42–44; AmBr:28–33.) Section 517 of 28 U.S.C. authorizes the Attorney General to send "any officer" of the Justice Department to any federal or state court to attend to the United States' interests. As construed by respondents, the Wisconsin *pro hac vice* rules would empower the Wisconsin courts to reject the Attorney General's assignments, and to require him to assign additional and unnecessary attorneys to a case. This multiple-staffing requirement, particularly in times of extreme budget stress, clearly burdens the Attorney General.

At all events, state courts lack authority to require the Attorney General to obtain prior approval of his staffing decisions. As the Supreme Court stated over 90 years ago in *Johnson v. Maryland*, 254 U.S. 51, 57 (1920):

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that

> they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.

3. Respondents argue that such an application of the Supremacy Clause would give Justice Department attorneys free rein in state courts. (WICBr:21, 26–29, 39–42; AmBr:24–31, 36 n.15.) But § 530B and its regulations not only require Justice Department attorneys to obey local ethics rules, but also authorize state courts to enforce such rules against Justice Department attorneys in the same manner and to the same extent as those rules could be enforced against private attorneys. (USBr:43–45, 53–54, 56–57.) As shown above, the Wisconsin courts are obligated to allow a Justice Department attorney not admitted to the Wisconsin bar to represent the United States without requiring *pro hac vice* status or the assistance of local

counsel. But if that attorney thereafter lacks competence, ethics, or decorum (*see* SCR 10.03(4)(e)), § 530B and the ethics rules of the attorney's licensing state authorize the Wisconsin court to analyze his conduct under the Wisconsin ethics rules and to discipline him (if warranted) as if he had been admitted *pro hac vice*, including removing him from the case and reporting him to ethics officials at the Justice Department and in his jurisdiction of admission.

4. Respondents also err when they argue that § 530B authorizes state courts to subject Justice Department attorneys to state *pro hac vice* rules. (WICBr:39–42; AmBr:7, 21–28, 33–36.) "[N]othing in section 530B suggests that government attorneys must abide by state licensing requirements." *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1341 (Fed. Cir. 2005). Moreover, an authorization for state regulation of a federal activity "is found only when . . . this authorization [is]. . . 'clear and unambiguous.'" *Hancock*, 426 U.S. at 179. Finally, reading § 530B as respondents do would be a disfavored repeal by

implication of both the assignment authority granted to the Attorney General by § 517 and the single-bar rule of 28 U.S.C. § 530C(c)(1). *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

Moreover, Congress specifically directed the Attorney General to issue regulations under § 530B(b). The regulations issued pursuant to that authority state that § 530B should not be construed to interfere with the Attorney General's assignment authority or to subject Justice Department attorneys to state licensure rules. 28 C.F.R. §§ 77.1(b), 77.2(h)(3).[3] Regulations promulgated pursuant to express congressional instructions are controlling unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984). As explained in our opening brief (USBr:53–55), the regulations are consistent with the text of § 530B, its placement within an overall statutory program also containing single-bar and Attorney General assignment provisions, and with the focus in § 530B's legislative

[3] Relevant parts are quoted at USBr:54.

history on ethics, not licensure.[4] Ambac argues (AmBr:22, 24 n.10) that the Attorney General's regulations should be disregarded because the Justice Department opposed the passage of § 530B. But that is a *non sequitur*. Congress gave the Attorney General regulatory authority, and the Attorney General has properly exercised that authority. *See Augustine*, 429 F.3d at 1341.

Finally, it is irrelevant that, as respondents argue (WICBr:42–44; AmBr:31–33), Wisconsin might readily grant *pro hac vice* admission to Justice Department attorneys.[5] It is the

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[4] The then-extant Clean Air Act in *Hancock* subjected federal facilities to state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," and its legislative history focused on emissions standards. 426 U.S. at 182 n.41, 187–90. Likewise, § 530B subjects Justice Department attorneys to state laws and rules "to the same extent and in the same manner as other attorneys in that State," and its history focused on ethics. (*See* USBr:53–54.) Because both statutes have comparable language and history, it would be anomalous to hold that one, but not the other, encompasses permitting and licensure requirements. *See Hancock*, 426 U.S. at 180, 184, 198–99.

[5] Other states might not be similarly generous. West

(continued...)

process itself — not the result of its application — that violates the United States' sovereign rights. And that process clearly — and impermissibly — restricts the authority granted by § 517 to the Attorney General to dispatch the attorney of his choice to represent the United States in any federal or state court to attend to the interests of the United States. 28 U.S.C. § 517.[6]

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[5](...continued)
Virginia, for example, reserves the right to deny *pro hac vice* admission to attorneys who have sought it too frequently in the previous 24 months. W. Va. Admit. R. 8.0(d).

[6] Respondents' reliance on *United States v. Straub*, 1999 WL 33495606 (N.D.W. Va. 1999), *vacated as moot* 2000 WL 35892562 (4th Cir. 2000), which held the Attorney General's § 530B regulations invalid, is misplaced. (WICBr:41–44; AmBr:24 n.10; RA:97–105.) That opinion was vacated as moot after Justice Department attorney Michael Stein was admitted to the West Virginia bar. Such a vacatur "clears the path for future relitigation of the issues" and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–41 (1950). *See also Augustine*, 429 F.3d at 1341 (applying the § 530B regulations post-*Straub*).

III

Respondents' remaining contentions are unavailing.

Respondents devote much of their briefs to issues not addressed below or that are pending before the Seventh Circuit. (WICBr:1–17, 46–58; AmBr:2–7, 36–43.) These matters are irrelevant to the issues for which this Court granted review — SCR 23.02 and the Supremacy Clause. Respondents' principal argument is that review was improvidently granted because the United States waived its appeal rights by not participating in the Wisconsin Court. But this argument fails because the United States contests the Wisconsin Court's jurisdiction to enjoin the United States, and because a miscarriage of justice would otherwise result. (USBr:6 n.3.) The Wisconsin Court of Appeals, moreover, did not dismiss the United States' appeal on the basis of waiver, and this Court granted review despite respondents' claim that review should be denied on that basis.

Due to the 3,000-word limit on this brief, we lack space to respond to the representations made by respondents regarding issues (such as waiver) for which review was not granted. On October 28, 2011, the United States filed a 20,104-word brief in the Seventh Circuit (appeal nos. 11-1158 and 11-1419), which presents our understanding of the facts. If this Court were to decide now to entertain respondents' arguments on matters as to which it declined review, we request leave to file a supplemental response.

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,

/s/ Richard D. Humphrey
RICHARD D. HUMPHREY
Assistant U.S. Attorney
Wisconsin Bar No.: 1016934
Suite 303
660 West Washington Ave.
Madison, WI 53703
Telephone: (608) 264-5158
Facsimile: (608) 264-5172
Richard.Humphrey@usdoj.gov

Dated: November 3, 2011

/s/ Anthony T. Sheehan
ANTHONY T. SHEEHAN
Attorney – Tax Division
Admitted *pro hac vice*
U.S. Department of Justice
Illinois Bar No.: 6210019
Post Office Box 502
Washington, D.C. 20044
Telephone: (202) 514-4339
Facsimile: (202) 514-8456
Anthony.T.Sheehan@usdoj.gov

Dated: November 3, 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 2,994 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.

/s/ Richard D. Humphrey
RICHARD D. HUMPHREY
Assistant U.S. Attorney

Dated: November 3, 2011

/s/ Anthony T. Sheehan
ANTHONY T. SHEEHAN
Attorney

Dated: November 3, 2011

CERTIFICATION OF MAILING AND SERVICE

I hereby certify that this brief for the United States was on this 3rd day of November, 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.

/s/ Richard D. Humphrey
RICHARD D. HUMPHREY
Assistant U.S. Attorney

Dated: November 3, 2011

/s/ Anthony T. Sheehan
ANTHONY T. SHEEHAN
Attorney

Dated: November 3, 2011