WALTER J. DIRKIN, IN HIS OFFICIAL CAPACITY AS AN ASSISTANT ESSEX COUNTY PROSECUTOR	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Appellant	:	DOCKET NO. A-3379-24T1
v.	:	
OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY	:	
Defendant-Respondent	:	CIVIL ACTION
	:	On Appeal from a Final Agency Decision of the Department of Law & Public Safety, Office of the Attorney General.

BRIEF ON BEHALF OF APPELLANT WALTER J. DIRKIN, IN HIS OFFICIAL CAPACITY AS AN ESSEX COUNTY ASSISTANT PROSECUTOR

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Preliminary Statement

Assistant Prosecutor ("AP") Walter J. Dirkin is currently accused in a one-count complaint filed by the Office of Attorney Ethics ("OAE") alleging that he, while employed and in his role as an Assistant Prosecutor, failed to comply with Rule of Professional Conduct ("RPC") 3.8 in how he handled a criminal case. Simply stated, AP Dirkin investigated a theft case, obtained a one-count indictment alleging third-degree theft in violation of the State's Criminal Code, and, after the defendant moved to dismiss that indictment, investigated the matter further, agreed that the indictment should be dismissed, and then took steps to do so. It is beyond dispute that AP Dirkin's actions—his investigation of the case, his presentment of evidence and charges to the Grand Jury, and his subsequent investigation and request to dismiss the indictment—were all actions undertaken by him in his role as an Assistant Prosecutor.

Assistant Prosecutors conduct the criminal business of this State under the authority of its chief law enforcement officer, the Attorney General. This—and nothing else—is what AP Dirkin was doing when he investigated, indicted, and then ultimately moved to dismiss a criminal case. But when the former criminal defendant turned to the OAE, and that office in turn filed a complaint alleging a violation of an RPC only applicable to prosecutors, the

Office of the Attorney General ("OAG") abandoned him, leaving him to personally defend his prosecutorial decision-making before the OAE.

The OAG's decision to do so in this case was contrary to the letter and purpose of the law and constituted an arbitrary, capricious, and unreasonable decision that cannot stand. The County Prosecutors and their Assistant Prosecutors exist for the purpose of prosecuting the criminal business of this State, and they do so under the absolute supervisory authority of its chief law enforcement officer, the Attorney General. Today it is well established that when prosecutors execute their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime, such as classic criminal law enforcement activities like the investigation and prosecution of criminal defendants, they act as agents of the State. As such, State representation is required when the prosecutor's act or omission that gave rise to the alleged ethical violation derived from, and was an exercise of, the prosecutor's power to enforce the criminal law. Here, there can be no real dispute that it did. For the reasons that follow, the OAG's contrary decision must be reversed.

Statement of Procedural History & Facts[1]

Following a criminal investigation that began in August 2019, AP Dirkin, in his official capacity as an Assistant Prosecutor with the Essex County Prosecutor's Office ("ECPO"), went to the Grand Jury on March 23, 2023, and presented the case of State v. Andrea Anderson. (Pca10).[2] Following his presentation, the Grand Jury, on March 30, 2023, returned a one-count indictment against Anderson alleging third-degree theft, in violation of N.J.S.A. 2C:20-3a. (Pca11-12).

Anderson obtained counsel and, on June 28, 2023, moved to dismiss the indictment, alleging that "exculpatory evidence was withheld from the Grand Jury, resulting in a misleading presentation…." (Pca12, 104-119). The brief that accompanied that motion included a document new to AP Dirkin's investigation that caused him to believe that a conviction on the indictment would be unlikely. (Pca12).

On October 13, 2023, AP Dirkin recommended to the County Prosecutor that the indictment against Anderson be dismissed. (Pca12, 132-133). He explained his reasons as follows:

> After a thorough and complete investigation of the facts of this case, I respectfully recommend that the charge(s) made against

[1] Because they are intertwined, these sections have been combined for the Court's convenience.

[2] "Pca" refers to the appellant's confidential appendix. See R. 1:20-9(a).

> this defendant be dismissed without prejudice for the following reasons:
>
> > The allegations in this matter involved the allegations that the defendant committed a theft of funds over several years from the New Jersey Arts Incubator [("NJAI")], where she was the Executive Director. Throughout the investigative and grand jury stages of this case, the information available to the State indicated that Ms. Anderson was in a volunteer position. This was based upon witness interviews [and] tax returns and filings with [the] State of New Jersey. Many of these documents were received through subpoenas to the [NJAI]. On June 28, 2023, [Anderson's] counsel filed a motion to dismiss. Attached to the motion to dismiss was a contract, the existence of this contract was not previously known to the State. After a review, the contract, which contradicts every public filing made by the NJAI, is nonetheless likely to raise sufficient reasonable doubt to a jury as to the defendant's guilt as to make conviction unlikely in this case. Given the above reasons, the indictment is being moved for dismissal at this time. [(Pca132).]

The trial court dismissed the indictment against Anderson shortly thereafter. (Pca13, 133).

On January 17, 2024, Anderson filed a grievance with the OAE seeking "a full investigation of these matters" and alleging that AP Dirkin "mishandled an investigation" and "improperly presented allegations against [her] to the Grand Jury, and thus, unlawfully secured an indictment against" her. (Pca4); see (Pca19-22). Anderson aptly noted that "[t]he conduct in question goes to the heart of one of the prosecutor's greatest powers: the power to pursue charges." (Pca19). The only RPC or standards Anderson alleged AP Dirkin violated were those related to prosecutors. (Pca20-22) (referring to RPC 3.8

and the American Bar Association's Criminal Justice Standards for the Prosecution Function, Standard 3-4.3(b)), post.

On February 29, 2024, AP Dirkin answered the grievance and denied the allegations. (Pca13); see (Pca121-130). In early June 2024, AP Dirkin turned over his ECPO file in the State v. Anderson case to the District VII Ethics Committee. That committee also interviewed AP Dirkin as part of its investigation. (Pca13-15).

On February 18, 2025, the District VII Ethics Committee filed a one-count complaint against AP Dirkin, alleging: "Failure to comply with the special responsibilities of a Prosecutor in violation of RPC 3.8 to present clearly exculpatory evidence to the Grand Jury." Specifically, the complaint alleges that AP Dirkin violated RPC 3.8(d), which "provides in relevant part a prosecutor must 'make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense....'" (Pca15). The complaint also contends that "[b]ecause he is an Assistant Prosecutor working for the ECPO, [AP Dirkin] had an obligation to present evidence to the Grand Jury that is 'credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a prima facie case against the accused.'" (Pca15-16) (quoting State v. Hogan, 144 N.J. 216, 236 (1996) (emphasis added)).

The key piece of evidence in support of this allegation appears to be the contract found in AP Dirkin's ECPO criminal investigatory case file, and the allegation of misconduct relates exclusively to AP Dirkin's decision to not present the contract as part of his presentation to the Grand Jury. The ethics complaint alleges RPC 3.8(d) was violated because, according to the District Ethics Committee, the contract was "known to the prosecutor" and AP Dirkin had an obligation under that RPC "to make 'timely disclosure'" of it. "It follows that because prosecutors have a duty to present 'clearly exculpatory material' to a Grand Jury, a prosecutor's timely review of the investigative file must occur prior to presentation of the case to the Grand Jury[,]" the complaint contends. (Pca16).

In addition to RPC 3.8(d), the complaint adds in its concluding paragraph that AP Dirkin also violated RPC 1.3 because he "failed to act with reasonable diligence when he did not review his investigative file before presenting to the Grand Jury." The complaint seeks unspecified discipline. (Pca17).

On April 14, 2025, AP Dirkin sought representation and indemnification from the OAG. (Pa1) (citing N.J.S.A. 59:10-1, et seq.; N.J.S.A. 59:10A-1; Wright v. State, 169 N.J. 422 (2001)).

On May 14, 2025, the OAG denied representation. (Pa2-3). In its letter saying so, OAG stated that:

> The underlying matter, again, is a disciplinary action complaint brought by the District VII Ethics Committee, which asserts violations of RPC 3.8(d) and RPC 1.3. Based on the factual allegations contained therein, it recommends "discipline[]." It does not assert claims sounding in tort or brought pursuant to the Civil Rights Act, let alone claims seeking damages in relief. [(Pa3) (internal citation and footnote omitted).]

A footnote indicates that the factual allegations against AP Dirkin are, in OAG's view, "not dispositive to this final agency decision denying your request for representation and indemnification…." (Pca3 n. 1).

AP Dirkin sought reconsideration on May 22, 2025. Specifically, AP Dirkin noted that he was "requesting reconsideration of [the OAG's May 14, 2025] decision" and that "the Attorney General consider representation under its discretionary authority pursuant to N.J.S.A. 59:10A-3." (Pa4).

Just nine business days later, on June 5, 2025, OAG informed AP Dirkin that its "May 14, 2025 final decision remains unchanged. You have presented no basis to warrant reconsideration. Please also be advised that the Attorney General declines to exercise his discretionary authority under N.J.S.A. 59:10A-3 to provide for your defense in the above-referenced matter." (Pa5).

AP Dirkin filed a timely Notice of Appeal of these orders. (Pa6-9); see R. 2:2-3(a)(2); R. 2:4-1(b).

Legal Argument

Point I

OAG's decision to not defend AP Dirkin in an OAE action that stems exclusively from his prosecution of the criminal business of this State was contrary to law and arbitrary, capricious, and unreasonable. (Pa2-3, 5).

AP Dirkin is accused in an ethics complaint of violating the RPC that applies only to prosecutors for how he handled the investigation and prosecution of a criminal case. There can be no legitimate dispute that at all times during that conduct AP Dirkin was engaged in classic criminal law enforcement activities aimed at fulfilling the criminal business of the State of New Jersey under the express authority of the Attorney General. The OAG therefore had an obligation to defend AP Dirkin against the OAE complaint and, even if it was not so obligated, its decision to not exercise its discretionary authority to do so was arbitrary, capricious, and unreasonable. Having the OAG defend Assistant Prosecutors against ethics complaints that challenge how they exercised their prosecutorial decision-making in furtherance of the State's criminal business best serves the State interest. This Court must reverse.

A. New Jersey's Prosecutors

Our Supreme Court has long recognized that the role of prosecutors in New Jersey is unique—one unlike any other attorney or government employee. State v. McNeil-Thomas, 238 N.J. 256, 274-75 (2019); Wright, 169 N.J. at 450, 452, 456. Being a prosecutor in New Jersey is "uniquely challenging because it is a double calling -- to represent vigorously the state's interest in law enforcement and at the same time help assure that the accused is treated fairly and that justice is done." McNeil-Thomas, 238 N.J. at 274-75 (cleaned up); see also State v. Mahoney, 188 N.J. 359, 376 (2006); State v. Ramseur, 106 N.J. 123, 323-24 (1987)).

County Prosecutors and Assistant Prosecutors are not only governed ethically by all of the RPCs just like all other attorneys, but also by one only applicable to them, RPC 3.8. That rule provides that "[t]he prosecutor in a criminal case shall:

> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

> (d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
>
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
>
> > (1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and
> >
> > (2) there is no other feasible alternative to obtain the information;
>
> (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

See also American Bar Association's Criminal Justice Standards for the Prosecution Function, Standards 3-4.1 to 4.6 (4th ed. 2017) (suggesting similar standards for all prosecutors nationwide).[3]

[3] Available at: https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function (last accessed Sept. 26, 2025).

County Prosecutors and Assistant Prosecutors in New Jersey are also bound by a Code of Ethics for County Prosecutors issued by the Attorney General along with the County Prosecutors pursuant to the former's authority under the Criminal Justice Act, N.J.S.A. 52:17B-97, et seq. (Pa17-24). The Code specifically provides that that Act "recognizes the importance of public confidence in the administration of criminal justice and provides for the general supervision of the county prosecutors by the Attorney General as chief law enforcement officer of the State." (Pa17) (emphasis added). Importantly, attorneys serving as Assistant Prosecutors are restricted from practicing law "or engag[ing] in any other business, trade, profession or occupation," even on a volunteer or pro bono basis, with very limited exceptions such as teaching. (Pa19-20).

The position of the County Prosecutor, and thus of his or her Assistant Prosecutors as well, "was created for the purpose of prosecuting '[t]he criminal business of the State,' and 'the Attorney General [is the] chief law enforcement officer,' who 'maintains a general supervision' and control over all of the county prosecutors." Wright, 169 N.J. at 454 (quoting N.J.S.A. 2A:158-4, 52:17B-98, and 52:17B-103). And "[e]ach prosecutor [is] vested with the same powers and [is] subject to the same penalties…as the attorney general shall by law be vested with or subject to…." N.J.S.A. 2A:158-5.

But the power is by no means equal. The Attorney General always retains the right to participate and even supersede a County Prosecutor "in any investigation, criminal action or proceeding…." N.J.S.A. 52:17B-107a. And "'the Attorney General's supersedure power appears to have been bestowed with the understanding that it was intended to ensure the proper and efficient handling of the county prosecutors' 'criminal business.'" Wright, 169 N.J. at 438 (quoting Coleman v. Kaye, 87 F.3d 1491, 1501 (3d Cir. 1996) (citing N.J.S.A. 52:17B-106), cert. denied, 519 U.S. 1084 (1997)). Simply stated, "the Attorney General has been given statutory authority to guide law enforcement entities," Gramiccioni v. Dep't of Law & Pub. Safety, 243 N.J. 293, 314-15 (2020) (citing N.J.S.A. 52:17B-98), and "[t]he advice of the Attorney General must be considered binding on state employees[,]" Chasin v. Montclair State Univ., 159 N.J. 418, 436 (1999).[4]

[4] Indeed, the OAG and the Division of Criminal Justice, which is under its authority, has dozens of binding Guidelines and Directives on how County Prosecutors and their APs must practice criminal law in this State. See N.J. Attorney General Directives, available at: https://www.njoag.gov/resources/ag-directives (last accessed Sept. 26, 2025); N.J. Division of Criminal Justice Guidelines, available at: https://www.nj.gov/oag/dcj/agguide.htm (last accessed Sept. 26, 2025). Its teaching arm, the N.J. Attorney General's Advocacy Institute ("NJAGAI"), routinely puts on continuing legal education courses that aim to "meet[] the practice needs of deputy and assistant attorneys general, county prosecutors and other government lawyers[,]" NJAGAI Home, available at: https://www .njoag.gov/about/ divisions-and-offices/attorney-generals-advocacy-institute-home (last accessed Sept. 26, 2025), including courses on ethical behavior for prosecutors, see id. at Highlights, available at:

Thus, it is "well established that when county prosecutors execute their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime, they act as agents of the State." Wright 169 N.J. at 454 (quoting Coleman, 87 F.3d at 1499) (emphasis added). These tools include "classic criminal law enforcement activities" including the "detection, investigation, arrest, and prosecution of criminal defendants." Gramiccioni, 243 N.J. at 301; see State v. Ward, 303 N.J. Super. 47, 56-57 (App. Div. 1997) ("[T]he determination of whether a matter should or should not be criminally prosecuted is fundamentally an executive determination delegated to the Attorney General and the county prosecutors" and "[t]he duty of a prosecuting officer necessarily requires that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other, and that he intelligently weigh the chances of successful termination of the prosecution….").

B. The Attorney General's Duty to Defend its Prosecutors

In the seminal Wright case, the Supreme Court "held that when county prosecutors and their employees are involved in law enforcement functions

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https://www.njoag.gov/about/ divisions-and-offices/attorney-generals-advocacy-institute-home/highlights (last accessed Sept. 26, 2024) (touting that "[t]he AGAI provided 33 ethics programs, covering a wide range of topics and conferring 54 ethics credits" in 2024).

under general State supervisory authority, the State should bear the responsibility for defense and indemnification for litigation generated by such activities." Gramiccioni, 243 N.J. at 296 (citing Wright, 169 N.J. at 456). Its decision had a "twofold purpose…: ensuring defense and indemnification coverage for law enforcement activities conducted by county prosecutors; and avoiding anomalous results due to the State's potential for vicarious liability." Id. at 296-97 (citing Wright, 169 N.J. at 455-56).

The Wright Court, considering whether the OAG had to defend a County Prosecutor and his subordinates in a wrongful prosecution tort case seeking monetary damages against former criminal defendant Isaac Wright, looked at the issue through the lens of the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 12:3. 169 N.J. at 450. It did so, quite simply, because that was the sort of case it had before it, and so the Court's focus was on the TCA. Id. at 450.

The Wright Court discussed various provisions of the TCA in its decision. For example, N.J.S.A. 59:10A-1 provides:

> Except as provided in section 2 hereof, the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment. [(Emphases added).]

The exceptions in section 2 are narrow and not applicable here:

> The Attorney General may [only] refuse to provide for the defense of an action referred to in section 1 if he determines that:

> a. the act or omission was not within the scope of employment; or
>
> b. the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or
>
> c. the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee. [N.J.S.A. 59:10A-2.]

The Court stated in clear, certain terms that "the Attorney General must defend a State employee for actions committed in the scope of employment as long as one of the above exceptions does not apply." Wright, 169 N.J. at 444 (emphases added).

In addition, N.J.S.A. 59:10A-3 provides that, "[i]n any other action or proceeding, including criminal proceedings, the Attorney General may provide for the defense of a State employee or former State employee, if he concludes that such representation is in the best interest of the State." The Supreme Court has since observed, in viewing a similar statute, that such "optional indemnification is encouraged." Gramiccioni, 243 N.J. at 310 (citing Wright, 169 N.J. at 455).

Years before Wright, in Chasin, the Court read these three provisions (10A-1, -2, and -3) to say that the first two apply to actions "brought in tort[,]" while the third "vests the Attorney General with the discretion to defend in cases not covered by N.J.S.A. 59:10A-1." 159 N.J. at 428. Although the

statute does not say so, the Court noted in that case that "[b]ecause N.J.S.A. 59:10A-3 grants discretion 'in any other action, including criminal proceedings' that discretion cannot be limited to criminal proceedings, but must include some civil actions. N.J.S.A. 59:10A-1 requires the Attorney General to defend state employees against tort liability, so the civil claims left to N.J.S.A. 59:10A-3 must seek a remedy other than tort damages." Ibid. (second and third emphases added). This Court has recently "characterized N.J.S.A. 59:10A-3 as 'a catch-all,' designed to 'cover actions not arising under the [TCA], including civil actions not seeking damages, as well as criminal actions[,]' reasoning the OAG 'should have discretionary authority to furnish a defense for a state employee when the state interest would be served.'" Monmouth Cty. Pros. Office v. OAG, 480 N.J. Super. 33, 41 (App. Div. 2024) (quoting Helduser v. Kimmelman, 191 N.J. Super. 493, 508 (App. Div. 1983)), certif. denied, 260 N.J. 449 (2025).

Wright also discussed N.J.S.A. 59:2-2(a),[5] and, after stressing the unique role County Prosecutors and their Assistants play in this State, explained:

> [T]he [official legislative] comment to N.J.S.A. 59:2-2(a) explains that "[t]his provision specifically adopts the general concept of vicarious liability expressed by [this] Court in McAndrew v.

[5] That statute provides: "A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances."

> Mularchuk, 33 N.J. 172 (1960)." Comment to N.J.S.A. 59:2-2(a). In McAndrew, we held that "liability follows tortious wrongdoing and that employers or principals…are responsible for that wrongdoing when [it is] committed by agents and employees acting within the scope of the employment." 33 N.J. at 190 (emphasis added). Thus, the Legislature's adoption of the principle of vicarious liability as established in McAndrew expresses an intent not to exclude "agents" from the definition of "employee" for purposes of determining vicarious liability under the TCA.
>
> In addition, we note that when prosecutors perform their law enforcement function, they are discharging a State responsibility that the Legislature has delegated to the county prosecutors, N.J.S.A. 2A:158-4 ("The criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors."), subject to the Attorney General's right to supersede. See N.J.S.A. 52:17B-106. The legislative delegation, in combination with the Attorney General's supervisory authority and power to supersede, demonstrates that at its essence the county prosecutors' law enforcement function is clearly a State function. …[T]he county prosecutor's law enforcement function is unsupervised by county government or any other agency of local government, but remains at all times subject to the supervision and supersession power of the Attorney General. [169 N.J. at 451-52 (emphasis added).]

In N.J.S.A. 59:10A-6, the Legislature provided that "[t]he authority granted to the Attorney General by [the TCA] shall be in addition to and not in derogation of his existing authority to represent and defend State employees and former State employees." (Emphasis added). In other words, the common law in this area was not abolished; the TCA simply added to the Attorney General's ability and obligation to represent and defend State employees under its control or right to control.

"With regard to the common-law principles of the doctrine of respondeat superior, '[i]t has long been recognized that control by the master over the servant is the essence of the master-servant relationship on which the doctrine of *respondeat superior* is based.'" Wright, 169 N.J. at 436 (quoting N.J. Prop. Liab. Ins. Guar. Assn. v. State, 195 N.J. Super. 4, 8 (App. Div.), certif. denied, 99 N.J. 188 (1984)). In this context, a "servant" is one "employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Restatement (Second) of Agency §220(1) (1958).

The "control test" is derived from this restatement. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 307 (2015). Under that test, "'the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.'" Wright, 169 N.J. at 436-37 (quoting N.J. Prop. Liab. Ins., 195 N.J. Super. at 9). "The test is ultimately a totality-of-the-circumstances evaluation[,]" and requires consideration of several factors such as "the skill required; the source of the instrumentalities and tools;…whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work;… whether the

work is part of the regular business of the hiring party; whether the hiring party is in business; [and] the provision of employee benefits….'" Hargrove, 220 N.J. at 307-08 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).

For example, in Cashen v. Spann, 125 N.J. Super. 386, 391 (App. Div. 1973), aff'd as mod., 66 N.J. 541 (1975), plaintiffs, victims of a mistaken raid, sued various entities including the Morris County Prosecutor and detectives from his office. Reviewing the claims against the county, which had been dismissed by way of summary judgment, this Court observed:

> The theory upon which plain[t]iffs assert liability on the part of the County of Morris is that the prosecutor and his aides were acting in this instance as agents of the county which was therefore vicariously liable on principles of respondeat superior. The short answer -- though the question was not discussed in any of the briefs -- is that the prosecutor and his aides were not agents of the county, but rather of the State in their actions with respect to plaintiffs. The county prosecutor is a constitutional officer appointed by the Governor, with the advice and consent of the Senate. N.J. Const. (1947), Art. VII, § 2, ¶ 1. The relevant statute provides that: "The criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors." N.J.S.A. 2A:158-4 (emphasis added). The county prosecutor represents the State. State v. Longo, 136 N.J.L. 589 (E. & A. 1947). And ultimately when an indictment is found, the prosecution thereof is undertaken by the State of New Jersey in its own name. Therefore, in performing the actions with which they are charged, the prosecutor and his aides were the agents of the State and not of the County of Morris, and there is no liability as to the county for those actions under the doctrine of respondeat superior. [Id. at 403-404 (some citations omitted).]

The Supreme Court agreed with this Court, finding "that in the context of this case, the prosecutor and the detectives are to be considered as agents of the State and not the county…. We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity…." 66 N.J. at 552 (citing Cashen, 125 N.J. Super. at 404-05) (emphasis added).

Another provision, N.J.S.A. 59:10-3, is entitled "Public employee's duty to notify and cooperate with Attorney General." This provides that State employees—which prosecutors are when acting in a "law enforcement/ investigatory capacity[,]" Wright, 169 N.J. at 452—"shall not be entitled to indemnification under this act unless within 10 calendar days of the time he is served with any summons, complaint, process, notice, demand or pleading, he delivers the original or a copy thereof to the Attorney General or his designee." (emphases added). AP Dirkin thus had a legal obligation to notify OAG that he had been served with the ethics complaint, and he did so here timely. See (Pca1) (noting service of the OAE complaint on Thursday, April 3, 2025); (Pa1) (notifying OAG of the same on Monday, April 14, 2025).

While Wright is the first word when addressing the OAG's duty to defend County Prosecutors and their subordinates in actions against them, it is certainly not the last. Indeed, in the years after Wright, the Supreme Court has

expanded OAG's obligation in this area, i.e. when prosecutors are acting in a law enforcement capacity, carrying out the "criminal business of the State" on behalf of the Attorney General. N.J.S.A. 2A:158-4; N.J.S.A. 52:17B-106.

For example, in Lavezzi v. State, 219 N.J. 163, 166-67 (2014), the Supreme Court applied the Wright standard, "under which the employees of a county prosecutor's office are entitled to defense and indemnification when they are 'sued on the basis of actions taken in the discharge of their law enforcement duties. The articles disputed in this case were seized in the course of a criminal investigation, part of the State's 'criminal business' for which the State and county prosecutors are responsible pursuant to N.J.S.A. 2A:158-4." (quoting Wright, 169 N.J. at 456). The Court explained that:

> In this case, the damage and loss alleged by plaintiffs may have occurred following the conclusion of the criminal investigation, when the non-contraband items at issue were no longer potential evidence, but had not been returned to plaintiffs. If so, the continued retention of plaintiffs' property, either intentionally or by oversight, derives from and directly relates to the law enforcement function that the Prosecutor's Office fulfilled when it seized and retained the evidence. Notwithstanding the State's argument that plaintiffs could have pursued a remedy based upon the equitable doctrine of replevin, the claim in this case originated from an activity that was part of the Prosecutor's Office's performance of "the criminal business of the State."
>
> Accordingly, we hold that the County has met its burden demonstrating that the Attorney General's administrative determination was "arbitrary, capricious or unreasonable." [Id. at 179 (internal citations omitted; emphasis added).]

The Court added that, "if a more complete record at a later stage of this case reveals that plaintiffs' property was stored in a facility at the direction of the County, and that the loss or damage to plaintiffs' property resulted from the condition or maintenance of that facility [as opposed to an unlawful seizure as part of a criminal investigation], the State may pursue a claim against the County for reimbursement of all or part of its costs incurred in the defense and indemnification of the Prosecutor's Office employees." Id. at 180.

More recently, in Gramiccioni, a case where the Court found OAG had abused its discretion in refusing to defend all parts of a suit against a County Prosecutor's Office for how it complied with an Attorney General Directive, the Court held that "all claims related to [the County Prosecutor's] acts or alleged omissions associated with duties imposed by the Directive constitute state prosecutorial functions[,]" and so defense and indemnification were required. 243 N.J. at 318. In that case, "in keeping with the thrust of Wright[, t]he prosecutorial function should be covered," and so, "[b]ecause the alleged acts and omissions that gave rise to the suit against the members of the Prosecutor's Office were tied to their law enforcement responsibilities," defense and indemnification were required as to those claims. Id. at 318, 297.

Discussing Lavezzi, the Gramiccioni Court noted that while that decision "is remarkable for its recognition that some factual settings call for more nuance than others[,]"

> the decision in Lavezzi hews to the obligation of the State, consistent with Wright, to provide defense and indemnification to county prosecutors' offices and their personnel for acts and omissions in connection with their law enforcement duties, reiterating that the test should be understood as 'whether the act or omission of the county prosecutor's office and its employees that gave rise to the potential liability derived from the prosecutor's power to enforce the criminal law, and constituted an exercise of that power.'" Gramiccioni, 243 N.J. at 313-14 (quoting Wright, 219 N.J. at 178) (emphasis added).]

C. Standard of Review

Administrative determinations made by the OAG are entitled to deference, but "that discretion is not unbounded…." In re: Vey, 124 N.J. 534, 543-44 (1991); see Gramiccioni, 243 N.J. at 305; Lavezzi, 219 N.J. at 171. For example, appellate courts are in no way "bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Lavezzi, 219 N.J. at 172 (citation omitted).

Moreover, reviewing courts have not hesitated to set aside agency decisions that are "'arbitrary, capricious, or unreasonable….'" Id. at 171 (quoting Prado v. State, 186 N.J. 413, 427 (2006)). For example, the OAG taking "too narrow an approach to the prosecutorial law enforcement

function[s]" of a County Prosecutor or a "crabbed approach toward the provision of defense and indemnification …not in keeping with the thrust of Wright" are timely examples of such arbitrary and unreasonable agency action. Gramiccioni, 243 N.J. at 317-18; accord Lavezzi, 219 N.J. at 179-80 (finding an arbitrary, capricious, and unreasonable a decision where the OAG would not defend a County Prosecutor when "the claim in th[e] case originated from an activity that was part of the Prosecutor's Office's performance of 'the criminal business of the State.'" (quoting N.J.S.A. 52:17B-106)).

Reasonless or categorical decisions are also not to be upheld. See Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (explaining that an abuse of discretion "arises when a decision is 'made without a rational explanation….'") (citation omitted); Vey, 124 N.J. at 543-44 ("Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded…. Administrative agencies must 'articulate the standards and principles that govern their discretionary decisions in as much detail as possible.'") (citation omitted).

D. The OAG must defend AP Dirkin against OAE's ethics complaint. The complaint is based exclusively on AP's Dirkin's performance of "the criminal business of the State" and OAG representation serves the best interest of the State under these circumstances.

Against this legal backdrop, it is clear that the OAG had an obligation to defend AP Dirkin against the OAE complaint and, even if it was not so obligated, its decision to not exercise its discretionary authority to do so was arbitrary, capricious, and unreasonable. Having the OAG defend Assistant Prosecutors against ethics complaints that challenge how they exercised their prosecutorial decision-making in furtherance of the criminal business of this State best serves the State interest.

i. The TCA, as interpreted by Wright and its progeny, compels representation here.

First, the TCA—by its plain language and the Supreme Court's recent applications of it in Lavezzi and Gramiccioni—obligates OAG to defend prosecutors in "any action" where no statutory exception applies and the conduct that generated the ethics complaint stems from its classic prosecutorial function. As noted above, N.J.S.A. 59:10A-1 provides that, but for the exceptions in N.J.S.A. 59:10A-2, "the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment." (Emphases

added). None of those exceptions (outside the scope of employment, fraud/willful misconduct/actual malice, or representation will create a conflict of interest) apply here, and the OAG has never denied representation on that basis. Thus, in accord with Wright, the Attorney General must defend a State employee for actions committed in the scope of employment as long as one of the above exceptions does not apply." 169 N.J. at 444 (emphasis added).

In Prado, the Supreme Court concluded "that the Attorney General must provide a defense to a state employee who requests representation pursuant to N.J.S.A. 59:10A-1 unless the Attorney General determines that it is more probable than not that one of the three exceptions set forth in N.J.S.A. 59:10A-2 applies…." 186 N.J. at 427. In reaching that conclusion, the Court did not qualify its language in terms of the remedy being sought in the underlying action, but explained that it is "[a] general principle of statutory interpretation [] that 'exceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law.'" 186 N.J. at 426 (quoting Serv. Armament Co. v. Hyland, 70 N.J. 550, 558-59 (1976)). For that reason, "'[a]ll doubt should be resolved in favor of the general provision' contained in N.J.S.A. 59:10A-1, which is to afford representation, 'rather than the proviso or exception' contained in N.J.S.A. 59:10A-2, which permits the Attorney General to refuse to defend." Ibid.

(emphasis added). Thus, "'where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions'"). Id. at 426-27 (quoting 2A Norman J. Singer, Sutherland Statutory Construction § 47.11 (5th ed. 1992)).

Here, this means the general provision affording representation must be respected, and all doubts should be resolved in favor of that provision, a key purpose of which is to ensure "defense and indemnification coverage for law enforcement activities conducted by county prosecutors…." Gramiccioni, 243 N.J. at 296-97 (citing Wright, 169 N.J. at 455-56).

In its letter denying representation, the OAG interpreted "any action" as only actions "that seek damages[, i.e. monetary damages] in relief." (Pa2-3). Of course, the statute does not say that. Nor does Wright itself draw any such distinction. Indeed, no Supreme Court case post-Wright has held that the OAG can deny representation in "any action" for the sole reason that the result of that action could be anything but monetary damages. Moreover, the OAG's single-minded focus on remedy is contrary to "the letter and purpose of Wright[,]" Gramiccioni, 243 N.J. at 297, and constitutes an abuse of discretion warranting reversal.

It should be noted here before going any further first that the OAG's myopic view appears to be of recent vintage. Before it took that position in

Monmouth Cty. Pros. Office (2024) which will be discussed post, in Gramiccioni (2020), "[r]elying on Wright, the Attorney General [agreed to] 'defend and indemnify the [MCPO] Defendants against any claims related to their engagement in classic criminal law enforcement activities: detection, investigation, arrest, and prosecution of criminal defendants[,]'" including failing to conduct a criminal investigation and failure to prosecute. 243 N.J. at 301-02. Indeed, in that case, "the Attorney General [did] not challenge Wright and relie[d] on its differentiation between administrative and law enforcement functions[,]" its concern being "that under petitioners' assertions, any actions taken by a county prosecutor's office could be said to be a law enforcement function, expanding the State's obligation to defend and indemnify county prosecutors for matters the Attorney General asserts are properly categorized as administrative." Id. at 309.

In Kaminskas v. OAG, 236 N.J. 415, 419, 422 (2019), the Supreme Court noted that the OAG "agreed to defend and indemnify the county prosecutors but not [the municipal police officers]" in a wrongful prosecution case, recognizing that county prosecutors are treated specially under the TCA. In fact, the OAG argued "first, [that] the Attorney General maintains supervisory control over the county prosecutors; and second, county

'prosecutor's office employees [are] not guaranteed defense and indemnification from the county.'" Id. at 421.

Indeed, as far back as 1955, the Attorney General, after surveying the State Constitution and statutory framework, recognized that the County Prosecutor is, "by statute" and "within his county, the person who is to do such acts and things in behalf of the state as were formerly done by the Attorney General…." A.G. Mem. Op. P-27 p. 257 (Sept. 23, 1955)[6] (quoting Longo, 136 N.J.L. at 593). As such, it was "[the Attorney General's] opinion, that the office of a county prosecutor must be considered a state office and its employees, must, therefore, be regarded as state employees who are paid by the various counties." Ibid.

The OAG was right then and is wrong now—it must defend its prosecutors in cases such as this, where the underlying action is based exclusively on acts or omissions done "in the scope of his [or her] employment[,]" N.J.S.A. 59:10A-1, which is conducting the criminal business of this State, Lavezzi, 219 N.J. at 179; Wright, 169 N.J. at 463; N.J.S.A. 2A:158-4.

[6] This opinion was cited in Cashen, 125 N.J. Super. at 403, and is available at: https://dspace.njstatelib.org/items/4846c24a-49c4-4dce-aa13-38b747b13a35 (last accessed Sept. 26, 2025).

In support of its relatively new position, the OAG relied on two pre-Wright cases, Chasin, 159 N.J. at 428, and In re Petition for Review of Op. 552 of the Advisory Comm. on Prof'l Ethics, 102 N.J. 194, 200 (1986). (Pa2-3). Both are easily distinguishable and do not dictate the outcome here.

In Chasin, the remedy sought in the underlying case was injunctive relief. 159 N.J. at 423-24. But there, the state employee was a college professor, id. at 421, not a County Prosecutor or Assistant Prosecutor, and, as detailed above, prosecutors play a unique role in this State given their "inter-relationship with both the State and the county…." Wright, 169 N.J. at 450; see also id. at 455-56 (noting parts of the TCA "did not take into account the unique role of county prosecutorial employees, paid by the county, but performing a State law enforcement function under State supervisory authority."). So, not only did Chasin predate Wright and its analysis of the unique role of prosecutors in New Jersey, the issue there is not at all applicable here, where defense and indemnification is being sought not by a professor who wouldn't give a grade, but a prosecutor who was at all times acting in his official capacity and in his performance of the "criminal business" of this State. Lavezzi, 219 N.J. at 179; Wright, 169 N.J. at 438; N.J.S.A. 2A:158-4.

In re Petition for Review of Op. 552 provides even less support for the OAG's bright-line rule. There, the issue before the Court, which was

reviewing an opinion by its Advisory Committee on Professional Ethics, was "whether a municipal attorney may represent both the municipality and individual officials or employees of that municipality when all have been sued as co-defendants in a civil rights action under 42 U.S.C. § 1983." 102 N.J. at 196. The Court commented in dicta that "New Jersey construes its statutory defense and indemnification obligations under the Tort Claims Act…as extending to the defense of actions brought pursuant to 42 U.S.C. § 1983[,]" but engaged in no analysis regarding the TCA or the unique role of prosecutors in this State as discussed by later cases like Wright, Lavezzi, or Gramiccioni. Id. at 200 (citations omitted). This is no surprise since the case doesn't mention prosecutors at all; nor does it interpret or apply the TCA in any way. This case therefore provides no support for the OAG's denial here.

Other cases upon which the OAG relied, all pre-Wright, are also inapposite here. (Pa2-3). For example, in In re Napoleon, 303 N.J. Super. 630, 632 (App. Div. 1997), the Court was considering whether a former State employee was entitled to defense and indemnification in proceedings brought by the State Board of Medical Examiners ("the Board") to revoke or suspend his license to practice medicine. The complaint alleged that "Napoleon engaged in various acts of professional misconduct, gross malpractice, gross negligence, and gross incompetence, including acts which evidenced the

intentional and deliberate infliction of unnecessary pain on inmates under his care…." Id. at 633. The OAG denied representation based on "the nature of the allegations and the proceedings" and because "it would be inappropriate for the Attorney General to provide representation in a case which she had initiated before the professional board." Ibid. The opinion does not explicitly state that the OAG denied representation based on the remedy sought.

This Court upheld the OAG's decision. It noted that the Board's complaint, which was filed by the AG, "is not a civil action for damages. It is a disciplinary hearing commenced by the licensing authority which oversees the professional conduct of persons who practice medicine in New Jersey." Id. at 634. And there, "[w]hile most of the treatment which is the subject of the administrative charges stems from Napoleon's treatment of inmates at a State correctional facility, the Board[] is not examining his proficiency as a medical director but his competency to practice medicine and conformity to basic principles governing a person licensed to practice medicine in this State." Ibid. (footnote omitted). But here, the OAE is examining AP Dirkin's competency not just as a lawyer in the general sense, but his proficiency as a prosecutor in particular, as is clear from the OAE's allegation that he primarily violated RPC 3.8, (Pca17), which is only applicable to those who are prosecutors and who are conducting the criminal business on behalf of the

State and under the control and authority of the Attorney General.

The Court also concluded representation in an action brought by the Attorney General on behalf of the Board would create a conflict of interest. Ibid. "The Attorney General has many responsibilities, one of which is to provide legal representation to the Governor and all State agencies" like the Board and thus the conflict of interest is "inevitable." Id. at 634-35. But here, the Attorney General does not claim a conflict of interest, nor could it; overseeing the discipline of attorneys is the exclusive providence of the Judiciary. See N.J. Const. (1947), Art. VI, § 2, ¶ 3; R.M. v. Supreme Court of New Jersey, 185 N.J. 208, 213 (2005); State v. Rush, 46 N.J. 399, 411 (1966).[7]

Moreover, even if Napoleon did apply here, once again, that decision predates Wright and other cases (specifically Lavezzi and Gramiccioni) which clearly treat prosecutors differently in this area of the law based on their unique relationship with the State and the Attorney General, as will be discussed shortly. Thus, if Napoleon is read as broadly as the OAG has here, that decision is no longer good law as it applies to prosecutors who are alleged to have violated the Rules of Professional Conduct when exercising their

[7] Nor has the OAG denied representation based on "willful misconduct…." Napoleon, 303 N.J. Super. at 635 (citing N.J.S.A. 59:10A-2b). This exception is not applicable here either; the allegations focus on violating duties imposed on prosecutors by RPC 3.8(d), and, secondarily, for the failure to act with reasonable diligence" under RPC 1.3. (Pca16-17).

prosecutorial responsibilities during the course of their employment and this Court should not follow it.

Even less on point are two other pre-Wright cases cited by the OAG. (Pa3). In Abbamont v. Piscataway Bd. of Educ., 138 N.J. 405, 418 (1994), the Court was considering a different statutory scheme altogether, only mentioned the TCA by analogy, and did not address the principles of defense and indemnification relevant here, particularly as to prosecutors. Similarly, in First Am. Title v. Rockaway, 322 N.J. Super. 583, 595-96 (Ch. Div. 1999), a trial court opinion, the court merely stated generally that "actions for equitable relief are not subject to the" TCA, but didn't say anything about OAG's ability to defend state employees in other sorts of actions, particularly when those employees are prosecutors.

The OAG also cited Monmouth Cty. Pros. Office, 480 N.J. Super. at 41-42, in its initial letter denying defense and indemnification. (Pa2-3). It is true that there this Court upheld the OAG's denial of representation where one Reck, a deputy police chief, sued the Monmouth County Prosecutor's Office ("MCPO") seeking by way of an action in lieu of prerogative writs various forms of legal and equitable relief but not money damages. 480 N.J. Super. at 37-39. In doing so, the Court relied almost exclusively on Chasin, which again was a pre-Wright decision that does not apply to prosecutors. See id. at 40-42.

The Court even observed that, "[b]ut for the absence of a claim for tort damages in Reck's complaint, the OAG might be found responsible for providing representation to the MCPO." Id. at 43. It explained:

> The Court stated in Wright that county prosecutors and their subordinates, such as county detectives, hold a hybrid status "with respect to their functions and responsibilities related to both the county and the State." Wright, 169 N.J. at 449-50 (citing Dunne v. Fireman's Fund Am. Ins. Co., 69 N.J. 244, 248 (1976)). When prosecutors act in their law enforcement capacity, "they act as agents of the State. [However], when county prosecutors are called upon to perform administrative tasks…such as a decision whether to promote an investigator, the county prosecutor in effect acts on behalf of the county that is the situs of his or her office." Id. at 450 (citing Coleman[], 87 F.3d [at] 1499 [] (emphasis added)). The Court focused on:
>
> > [W]hether the function that the county prosecutors and their subordinates were performing during the alleged wrongdoing is a function that traditionally has been understood to be a State function and subject to State supervision in its execution.
> >
> > [Id. at 454.]
>
> County prosecutors act within the interest of the State when following the directives of the OAG, which vests them with vital discretionary decision-making authority and otherwise supersedes normal governing rules. Gramiccioni, 243 N.J. at 317. When the county prosecutors act pursuant to state-delegated responsibility to enforce the law that the OAG has entrusted to them, it "is not akin to the administrative duties that have been exempted from State defense and indemnification in the past…." Ibid. [Monmouth Cty Pros. Office, 480 N.J. Super. at 43 (emphasis added).]

Thus, the one hinge upon which the decision swings was Reck's lack of pursuit of money damages; "but for" that missing piece, this Court all but

concluded that the law points squarely at a statutory duty to defend under the circumstances.

The Monmouth Cty. Pros. Office panel only tangentially cited the Supreme Court's more recent decisions in Lavezzi (2014) and Gramiccioni (2020), neither analyzing nor applying those decisions. Had it done so, it would have recognized that those cases have expanded OAG's statutory duty to defend and indemnify County Prosecutors and their APs when acting in their law enforcement function, over which the OAG has ultimate authority, regardless of the remedy sought in the underlying action.

For example, in Lavezzi, the Court applied the Wright standard, "under which the employees of a county prosecutor's office are entitled to defense and indemnification when they are 'sued on the basis of actions taken in the discharge of their law enforcement duties. The articles disputed in this case were seized in the course of a criminal investigation, part of the State's 'criminal business' for which the State and county prosecutors are responsible pursuant to N.J.S.A. 2A:158-4." 219 N.J. at 166-67 (quoting Wright, 169 N.J. at 456). Although there was a claim for money damages in the underlying case, that was not the driving factor—or a factor at all—in the Court's analysis. Indeed, it specifically noted that notwithstanding the OAG's argument that plaintiffs could have pursued some other remedy, such as one

"based upon the equitable doctrine of replevin, the claim in this case originated from an activity that was part of the Prosecutor's Office's performance of 'the criminal business of the State.'" Id. at 179 (quoting N.J.S.A. 52:17B-106). The Court even added that, "if a more complete record at a later stage of this case reveals that plaintiffs' property was stored in a facility at the direction of the County, and that the loss or damage to plaintiffs' property resulted from the condition or maintenance of that facility [as opposed to an unlawful seizure as part of a criminal investigation], the State may pursue a claim against the County for reimbursement of all or part of its costs incurred in the defense and indemnification of the Prosecutor's Office employees." Id. at 180. This comports with caselaw that consistently holds the State is not liable when acting in one of its administrative roles, such as hiring, firing, promoting, or record-keeping.[8] In other words, it is not the remedy but the context of the alleged wrongdoing that binds the OAG to defend and indemnify its prosecutors.

More recently, in Gramiccioni, the Supreme Court found the OAG had abused its discretion in refusing to defend all parts of a suit against a County

[8] See, e.g., Coleman, 87 F.3d at 1499 (discrimination claim regarding a promotion); Courier News v. Hunterdon Cty. Pros. Office, 378 N.J. Super. 539, 541 (App. Div. 2005) (attorney fees under OPRA); DeLisa v. County of Bergen, 326 N.J. Super. 32, 40-41 (App. Div. 1999) (retaliatory discharge claim), rev'd o.g., 165 N.J. 140 (2000).

Prosecutor's Office for how it complied with an Attorney General Directive, holding that "all claims related to [the County Prosecutor's] acts or alleged omissions associated with duties imposed by the Directive constitute state prosecutorial functions[,]" and so defense and indemnification were required. 243 N.J. at 318. Again, the focus was not on remedy, but on what role the alleged bad actor was playing at the time of the conduct that gave rise to the underlying matter. Thus, "in keeping with the thrust of Wright[, t]he prosecutorial function should be covered," and so, "[b]ecause the alleged acts and omissions that gave rise to the suit against the members of the Prosecutor's Office were tied to their law enforcement responsibilities," defense and indemnification were required as to those claims. Id. at 318, 297.

Discussing Lavezzi, the Gramiccioni Court noted that while that decision "is remarkable for its recognition that some factual settings call for more nuance than others[,]" Lavezzi "hews to the obligation of the State, consistent with Wright, to provide defense and indemnification to county prosecutors' offices and their personnel for acts and omissions in connection with their law enforcement duties…." Id. at 313-14. And Lavezzi correctly "reiterat[es] that the test should be understood as 'whether the act or omission of the county prosecutor's office and its employees that gave rise to the potential liability derived from the prosecutor's power to enforce the criminal

law, and constituted an exercise of that power.'" Id. at 314 (quoting Wright, 219 N.J. at 178) (emphasis added). So again, it's not the remedy that drives the analysis, but whether the conduct being challenged in the underlying action derives from the prosecutor's power to perform the criminal business of this State under the exclusive authority of the Attorney General. Here there can be no doubt that it was.

Monmouth Cty. Pros. Office therefore has little applicability here. Not only does it rely in effect exclusively on Chasin, which failed to account for the unique role prosecutors play in this State, a situation not fully explored until Wright did so years later, but also because it fails to reconcile the tension between pre-Wright cases like Chasin and the Supreme Court's more recent decisions in Lavezzi and Gramiccioni. Compelling reasons therefore exist to not follow Monmouth Cty Pros. Office, decided less than a year ago, and this Court should decline to do so.[9]

Instead, consistent with Wright and its Supreme Court progeny, this Court should hold that the TCA obligates the OAG to defend prosecutors in "any action" where no statutory exception applies and the conduct that generated the ethics complaint stems from the exercise of classic prosecutorial

[9] See generally Pressler & Verniero, Current N.J. Court Rules, cmts 3.1 and 3.3 on R. 1:36-3 (2024) ("opinions of co-equal courts do not bind each other"; "Published Appellate Division opinions…are not [binding] on other panels of the Appellate Division.").

functions. Both elements are met here. The OAG abused its discretion when it imposed a categorical rule without any analysis of the facts, reducing them to a terse footnote and deeming them "not dispositive[,]" (Pa3 n. 1), when under the current state of the law they are the most important thing to consider. This Court must therefore reverse.

ii. Discretionary representation here serves the State's best interest.

Second, even if the TCA does not obligate the OAG to represent AP Dirkin here, the agency abused its discretion in not representing him because to do so is in the best interest of this State. The OAG has the discretionary authority to represent a State employee "if he concludes that such representation is in the best interest of the State." N.J.S.A. 59:10A-3. Such "optional indemnification is encouraged" by our Supreme Court. Gramiccioni, 243 N.J. at 310 (citing Wright, 169 N.J. at 455).

This is particularly true when the State employee is a prosecutor, and the representation concerns a prosecutor's exercise of his authority in conducting the criminal business of this State. As the Supreme Court said in Wright:

> We are persuaded that when county prosecutors and their subordinates are involved in the investigation and enforcement of the State's criminal laws, they perform a function that has traditionally been the responsibility of the State and for which the Attorney General is ultimately answerable. In our view, the State should be obligated to pay the county prosecutors and their subordinates' defense costs and to indemnify them if their alleged

> misconduct involved the State function of investigation and enforcement of the criminal laws. [169 N.J. at 455.]

It is hard to fathom how it is not "in the best interest of the State" to defend the very attorneys who conduct the day-to-day criminal business of this State under the ultimate authority of the Attorney General, when they are alleged to have done so unethically and risk being temporarily or even permanently prohibited from conducting that business. It is even harder (if not impossible) to do so when the only explanation given is a single terse sentence devoid of any reasoning or explanation. (Pa5). Such a feeble explanation, in and of itself, is an abuse of the agency's discretion. See Flagg, 171 N.J. at 571.

As detailed above, prosecutors play a unique role vis-à-vis the State when engaged in classic prosecutorial functions such as investigating, charging, and prosecuting violations of the criminal laws of this State. That is precisely what AP Dirkin did here when he investigated a potential theft in violation of N.J.S.A. 2C:20-3a, sought and obtained an indictment charging that offense, and then engaged in motion practice and ultimately dismissed that case. The OAG cannot possibly argue otherwise. And because such conduct is indisputably "a function that has traditionally been the responsibility of the State and for which the Attorney General is ultimately answerable[,]" Wright, 169 N.J. at 455, only one conclusion is possible: it is in the State's best interest

to have the OAG represent the attorneys who handle the criminal business of this State on their behalf, and under their ultimate supervision and authority, when the allegations against them stem exclusively from how they conducted that criminal business on the State's behalf.

The need for statewide uniformity here—an ever-present goal of the criminal justice system—is manifest. Prosecutors in New Jersey operate under the supervision and control of the Attorney General. See Kaminskas, 236 N.J. at 421; Wright, 169 N.J. at 454 (and statutory cites therein). They follow AG Guidelines; their moves are dictated by AG Directives; and the advice they receive from that office is "binding on" them. Chasin, 159 N.J. at 436. Even their in- and out-of-office conduct is dictated by the separate Code of Ethics promulgated by the Attorney General in recognition of "the importance of the public confidence in the administration of criminal justice and provides for the general supervision of county prosecutors by the Attorney General as chief law enforcement officer of the State." (Pa17). And their day-to-day work is the very result of a statutory scheme that was put into place for the uniform investigation and prosecution of violations of the State's criminal laws.[10]

[10] Uniform application of the enforcement of the criminal laws of this State has long been a goal of our Courts. See, e.g., State v. Benjamin, 228 N.J. 358, 369 (2017) (Graves Act cases); State v. Bishop, 429 N.J. Super. 533, 549-50 (App. Div. 2013), aff'd o.b., 223 N.J. 290 (2015) (Recovery Court cases); State in the Interest of V.A., 212 N.J. 1, 8 (2012) (juvenile waiver cases); State v.

That the remedy sought by the moving party in the underlying action is not monetary damages makes no difference. After all, if a prosecutor is publicly disciplined by the OAE for conduct he or she engaged in while representing the State and conducting its criminal business, whether it be reprimand, suspension, or even disbarment, to say that would have an adverse effect on the Attorney General's ability, statutorily delegated to the County Prosecutors, is an understatement. As the State's chief law enforcement officer, a title it routinely and rightfully touts, the State's best interest is served by ensuring that its subordinates are practicing law in conformity with the Rules of Professional Conduct and that they are not falsely accused or unduly disciplined for violations. If indeed a goal of Wright was to "avoid[] anomalous results due to the State's potential for vicarious liability[,]" Gramiccioni, 243 N.J. at 296-97, then the OAG should be representing prosecutors in this situation given the liability it faces should its subordinates find themselves unable to engage in the very business for which they were hired.

Given all of this, it is in the best interest of the State to have the OAG represent prosecutors before the OAE when the alleged ethics violation stems

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Brimage, 153 N.J. 1, 4 (1998) (plea offers in drug cases); State v. Leonardis (I), 71 N.J. 85, 119 (1976) (PTI cases); State v. Wildgoose, 479 N.J. Super. 331, 337-38 (App. Div. 2024) (Lundsford Act cases), certif. granted, 260 N.J. 473 (2025).

from the prosecutor's exercise of his or her "classic criminal law enforcement activities" including the "detection, investigation, arrest, and prosecution of criminal defendants." Gramiccioni, 243 N.J. at 301; see also Ward, 303 N.J. Super. at 56-57. The OAG therefore abused its discretion in denying representation under the discretionary authority given to it by N.J.S.A. 59:10A-3.

iii. The common law compels a defense under the circumstances of this case.

Third, notwithstanding the TCA, the OAG has a common law obligation to defend AP Dirkin against OAE's ethics complaint under the circumstances presented in this case. As set forth in N.J.S.A. 50:10A-6, "[t]he authority granted to the Attorney General by [the TCA] shall be in addition to and not in derogation of his existing authority to represent and defend State employees and former State employees." Thus, the common law in this area was not abolished, and so should this Court believe that the TCA does not resolve the issue presented in AP Dirkin's favor, then it must hold that the Attorney General's obligation to represent and defend State employees under its control under these circumstances is required.

It is plain that under the common law doctrine of *respondeat superior* and the applicable "control test" derived from the Restatement (Second) of

Agency, that the Attorney General is the "master," County Prosecutors and their APs are "servants," and that the former is responsible for representing the latter in actions arising from that master-servant relationship. Control is "the essence of the master-servant relationship on which the doctrine of *respondeat superior* is based[,]" Wright, 169 N.J. at 436 (citation omitted), and there can be no doubt that the Attorney General exercises complete control over the County Prosecutors. See Gramiccioni, 243 N.J. at 314-15; Wright, 169 N.J. at 438; Chasin, 159 N.J. at 436; Coleman, 87 F.3d at 1501; N.J.S.A. 52:17b-106, -107a; (Pa17). Prosecutors in this State are "employed to perform services in the affairs of another[, i.e. the Attorney General] and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Restatement at §220(1).

Under the "control test," the key is whether the master "'retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.'" Wright, 169 N.J. at 436-37 (quoting N.J. Prop. Liab. Ins., 195 N.J. Super. at 9). Such is clearly the case here, where, when it comes to the execution of the criminal business of this State, the Attorney General always has the right to direct how that business is conducted and even supersede and displace a prosecutor at any time to complete that business in a manner

consistent with his will. Such business requires specialized skill and training, which, along with much of the tools (such as guidelines, directives, and a code of ethics) to competently carry out that business, are provided by the Attorney General. Hargrove, 220 N.J. at 307. And again, "the work is part [indeed, here it is the ultimate responsibility] of the [Attorney General's] regular business…." Id. at 308.

As this Court said in Cashen,

> [T]he prosecutor and his aides were not agents of the county, but rather of the State in their actions with respect to plaintiffs. The county prosecutor is a constitutional officer appointed by the Governor, with the advice and consent of the Senate. The relevant statute provides that: "The criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors." The county prosecutor represents the State. And ultimately when an indictment is found, the prosecution thereof is undertaken by the State of New Jersey in its own name. Therefore, in performing the actions with which they are charged, the prosecutor and his aides were the agents of the State and not of the County of Morris, and there is no liability as to the county for those actions under the doctrine of respondeat superior. [125 N.J. Super. at 403-04 (internal citations omitted and first and third emphasis added).]

The Supreme Court agreed, concluding that the prosecutors were "State agents where the alleged tortious conduct arose out of the investigation of criminal activity…." 66 N.J. at 552 (citation omitted).

And, as noted above, since the middle of the last century, both the Court of Errors & Appeals (the forerunner to our current Supreme Court) and the Attorney General have recognized that County Prosecutors and their

subordinates "do such acts and things in behalf of the state as were formerly done by the Attorney General" and that "the office of a county prosecutor must be considered a state office and its employees, must, therefore, be regarded as state employees who are paid by the various counties." A.G. Mem. Op. P-27 at p. 257 (quoting Longo, 136 N.J.L. at 593).

As such, under the common law doctrine of *respondeat superior*, the OAG is obligated to defend AP Dirkin in the OAE action, which arose exclusively from AP Dirkin's carrying out of the Attorney General's "regular business," which is the prosecution of offenses in this State. Hargrove, 220 N.J. at 308.[11]

iv. If not compelled under existing common law, this Court should recognize a duty to defend under the circumstances of this case.

Finally, while AP Dirkin believes both the TCA and existing common law support his position that the OAG must defend him against the OAE complaint under the circumstances presented, should this Court conclude

[11] AP Dirkin is aware that, in Wright, the Court commented that, in the context of the tort case before it, the "control test" was inadequate due to the "unique inter-relationship" between the State and the County Prosecutors, and so it resolved the issue before it by applying the TCA. 169 N.J. at 450. But that language does not prohibit courts from applying the common law in this area to claims which are outside of the scope of the TCA. Again, while AP Dirkin believes, for the reasons already expressed, that the TCA does require representation here, if this Court has gone this far the issue is now whether, having concluded otherwise, the common law compels representation.

otherwise, this Court should recognize that such a duty does exist. "With changes in social expectations, values, and public policy, the common law evolves to keep pace with what we expect of one another. This is not new, but rather a benefit of the common law long recognized by" our Courts. Ross v. Lowitz, 222 N.J. 494, 515 (2015) (LaVecchia, J., dissenting) (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 435 (1993)). There is therefore "a 'power of growth…inherent in the common law….'" Ibid. (quoting State v. Culver, 23 N.J. 495, 506, cert. denied, 354 U.S. 925 (1957)).

For the reasons already expressed herein, County Prosecutors and APs conduct the criminal business of this State under the authority and control of the Attorney General. When they engage in conduct that is part of a prosecutor's classic criminal law enforcement activities such as the detection, investigation, arrest, and prosecution of criminal defendants for violations of the State's criminal laws, and that conduct is later alleged to have been done unethically, it serves the best interest of the State to have the OAG undertake that representation. To the extent the law does not already demand it, the OAG should be required to do so here under these circumstances.

Conclusion

For the reasons set forth herein, this Court should reverse the decisions of the OAG denying AP Dirkin representation and order it to defend and indemnify him in the ethics action and to reimburse him for all attorneys' fees and costs incurred to date.

Respectfully submitted,

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WALTER DIRKIN IN HIS OFFICIAL CAPACITY AS AN ASSISTANT ESSEX COUNTY PROSECUTOR, Appellant, v. OFFICE OF THE ATTORNEY GENERAL DEPARTMENT OF LAW AND PUBLIC SAFETY, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3379-24 Civil Action On Appeal from a Final Agency Decision of the Office of the Attorney General Department of Law & Public Safety

BRIEF ON BEHALF OF RESPONDENT, OFFICE OF THE ATTORNEY GENERAL DEPARTMENT OF LAW AND PUBLIC SAFETY

Date Submitted: November 24, 2025

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PRELIMINARY STATEMENT

The New Jersey Tort Claims Act (TCA) provides for a publicly funded defense and/or indemnification of a current or former State employee in only three circumstances. The first provision, N.J.S.A. 59:10A-1, requires the Attorney General—subject to narrow exceptions not relevant to this appeal—to provide representation when the employee's alleged act or omission occurred within the scope of employment and the action poses a monetary risk to the State. The second provision, N.J.S.A. 59:10A-3, grants the Attorney General discretion to provide representation in cases not covered by section 1, when doing so is deemed to be in the State's best interest. The third, catch-all provision, N.J.S.A. 59:10A-6, preserves the Attorney General's pre-TCA discretion to provide representation, so long as doing so does not contravene the TCA's overarching purpose of limiting the State's liability.

Ethics proceedings initiated by a licensing body against a licensed employee do not fall within any of these categories, as such proceedings do not assert tort claims or seek damages that the State might be required to pay.

The appellant in this matter is a criminal prosecutor who has been charged by an investigative arm of the Office of Attorney Ethics (OAE) with violating the Rules of Professional Conduct in connection with a prosecution. Appellant raises three primary arguments. One, that the TCA mandates representation for

prosecutors engaged in criminal prosecutions, even absent an underlying tort claim. Two, that the Office of the Attorney General (OAG) abused its discretion by declining to represent him. Three, that OAG violated a common-law duty to defend. Those arguments ignore one of the key objectives of the TCA—limiting the State's liability wherever possible.

First, the Attorney General's statutory obligation to defend and/or indemnify applies only to civil actions asserting tort claims. The Legislature's rationale for this limitation is shaped by the TCA intent to reinforce the State's sovereign immunity and protect the public fisc. Because even an adverse finding by OAE's ethics proceedings would not impose tort liability or monetary damages, the Attorney General was not required to defend or indemnify Appellant.

Second, OAG acted within its discretion and in the State's best interest by declining to meddle in the Supreme Court's exclusive authority over attorney discipline. The requirements for maintaining a license to practice law apply to all attorneys in New Jersey, especially those entrusted with the extraordinary power to prosecute criminal cases, and it was not arbitrary, unreasonable or capricious to deny representation to a prosecutor charged with failing to meet those ethical obligations.

Finally, there was no common-law duty to defend Appellant. The doctrine of respondeat superior is irrelevant in this instance because any finding by OAE that Appellant personally failed to comply with the professional standards imposed by the New Jersey Supreme Court does not give rise to liability on the State's part.

Accordingly, for these and the following reasons, OAG's decision to deny representation and indemnification should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This appeal arises from a May 14, 2025 decision of the Office of the Attorney General (OAG) denying former Essex County Deputy Chief Assistant Prosecutor Walter Dirkin's request for a defense in an ethics matter filed against him by the District VII Ethics Committee (DEC) on February 18, 2025, District VII Ethics Committee v. Walter Dirkin, Esq., Docket Number VII-2024-0005E.[2] (Pa1; Pca3-17.)[3]

These alleged ethics violations occurred in 2023 during his prosecution of a criminal case, State of New Jersey vs. Andrea Anderson. (Pca99; Pca104; Pca132.) Dirkin presented a one-count complaint against Anderson to a grand jury which then indicted Anderson for third-degree theft by unlawful taking,

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[1] Because the procedural history and fact histories are closely related, they are presented together for economy and the convenience of the court.

[2] The district committee acts as an arm of the Supreme Court when it performs the functions of receiving and investigating grievances and holding disciplinary hearings. Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433, 102 S.Ct. 2515, 2522, 73 L.Ed.2d 116, 126 (1982). Each District Ethics Committee, in accordance with the Court Rules, shall "review and act upon all grievances submitted to it by a grievant, the Supreme Court, the Administrative Office of the Courts, the Board, the Director or otherwise brought to its attention regarding alleged unethical conduct that, if proved, would constitute grounds for disciplinary action." R. 1:20–3(e).

[3] "Pa" refers to Appellant's appendix; "Pb" refers to Appellant's brief; and "Pca" refers to Appellant's Confidential Appendix.

finding probable cause that Anderson had diverted between $500 and $75,000 to herself while acting as a board member for the New Jersey Arts Incubator (NJAI). (Pca11-12; Pca99.)

In June, Anderson moved to dismiss that indictment, arguing that "critical exculpatory evidence was withheld from the grand jury," specifically, her employment contract with NJAI. (Pca12; Pca107; Pca117-119.) In October, Dirkin submitted a dismissal notice, recommending that the charges be dismissed without prejudice and representing that the employment contract attached to Anderson's motion "was not previously known to the State" and was "likely to raise sufficient reasonable doubt to a jury as to the defendant's guilt." (Pca13; Pca132.)

After the dismissal, Anderson filed an OPRA request for the complete Essex County Prosecutor's Office (ECPO) file. (Pca13.) Notably, the file included a copy of the contract between Anderson and NJAI and numerous other documents referencing their contractual relationship. (Pca14; Pca35-Pca96.) Anderson filed a grievance with the DEC, asking it to investigate and determine whether Dirkin's actions during the prosecution violated any Rules of Professional Conduct (RPC). (Pca19.)

After conducting its investigation, the DEC filed a disciplinary action complaint against Dirkin on February 18, 2025, alleging violations of RPC

3.8(d) and RPC 1.3.[4] (Pca17.) The complaint alleged, among other things, that the contract between Anderson and the NJAI had been in Dirkin's file and that he was obligated under those ethics rules to present it to the grand jury. (Pca16.) According to DEC, his failure to do so violated his ethical obligations under RPC 3.8(d) to disclose clearly exculpatory evidence to the grand jury and, more fundamentally, to exercise reasonable diligence as required by RPC 1.3 when reviewing the case "file to determine if any "clearly exculpatory material" existed. (Pca15-17.) Dirkin submitted a response to the complaint on February 29, 2024, maintaining as he had claimed in the dismissal notice, that the contract was not previously known to the State until he first reviewed the record at the time of Anderson's motion to dismiss.[5] (Pca128.)

On April 14, Dirkin asked OAG to represent and indemnify him in the disciplinary action,[6] citing N.J.S.A. 59:10-1, N.J.S.A 50:10A-1 and Wright v. State of New Jersey, 169 N.J. 422 (2001). (Pa1.)

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[4] RPC 3.8(d) provides that a prosecutor in a criminal matter shall, among other things, "make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." RPC 1.3 states "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

[5] Dirkin claims that the employment contract was unknown to him but does not dispute that it was part of the State's file. (Pca127-128.)

[6] OAG is not aware of the status of the disciplinary proceedings.

On May 14, OAG issued a final decision denying the request. It noted that the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -14-4, only obligates the OAG to defend and/or indemnify a public employee or entity when that person or entity is sued in a civil action that asserts a tort or 42 U.S.C. § 1983 claim seeking damages. (Pa2.) It thus concluded that Dirkin was not entitled to a defense or indemnification because the underlying disciplinary complaint asserted only ethics violations and did not: 1) assert claims sounding in tort or 2) seek damages for alleged violations of a civil right. (Pa3; Pca3-17.)

On May 22, 2025, Dirkin asked OAG to reconsider its decision and offered a new basis for his request: that OAG should provide representation under N.J.S.A. 59:10A-3 which gives the Attorney General discretion to provide legal representation even when representation is not mandated by the TCA. (Pa4.)

On June 5, 2025, the OAG declined to exercise its discretionary authority under N.J.S.A. 59:10A-3. (Pa5.) Finding no basis to warrant reconsideration, it reaffirmed its initial May 14 decision denying Dirkin's request for representation. Ibid.

This appeal followed.

ARGUMENTS

POINT I

OAG IS NOT OBLIGATED TO DEFEND DIRKIN'S REQUEST BECAUSE THE TCA DOES NOT COMPEL REPRESENTATION IN ACTIONS THAT DO NOT SEEK MONETARY DAMAGES UNDER THE TORT CLAIMS ACT AND/OR § 1983.

No public employee or entity enjoys an absolute right to a publicly funded defense or indemnification. That is because any public employee's right to representation springs from the TCA and is thus circumscribed by its limits. Dirkin cannot establish that he was entitled to a defense and indemnification in his ethics proceeding because the State's mandate to provide representation in N.J.S.A. 59:10A-l extends only to civil actions that assert claims for damages. Dirkin's arguments presuppose a far broader reading to the phrase "any action" than the TCA contemplates. Therefore, the court should affirm OAG's denial of his request for a defense and indemnification under N.J.S.A. 59:10A-l.

The Attorney General's determination under this provision must be affirmed unless Dirkin can show that it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting Prado v. State, 186 N.J. 413, 427 (2006)). Dirkin cannot make this showing because the decision on appeal is consistent with the TCA and related case law and is fully supported by the

undisputed facts.

N.J.S.A. 59:10A-l states that "the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment." (emphasis added).

Contrary to what Dirkin's opening brief might suggest, there is no dispute that Dirkin was acting within the scope of his employment. The sole disagreement is whether the phrase "any action" includes disciplinary actions. Dirkin's claim that OAG is required to provide him a defense under N.J.S.A. 59:10A-l in this instance raises a question of statutory interpretation.

"The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). "However, if the plain language of the statute is ambiguous in respect of how the Legislature intended the statute to apply in particular circumstances" courts may look to extrinsic evidence to determine the Legislature's intent. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The context of the TCA's enactment is critical here.

In adopting the TCA, the Legislature recognized "the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity." N.J.S.A. 59:1-2. However, it also recognized

that while private parties "may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit." Ibid. "The paramount concern was that a statute imposing general liability, limited only by specified statutory immunities, would provide public entities with little basis on which to budget for the payment of claims and judgments for damages." Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 407-08 (1988).

To strike a balance that would preserve the rights of the injured without jeopardizing the public fisc, the Legislature declared it the "public policy of this State that public entities shall only be liable for their negligence within the limitations of this act" and that "[a]ll of the provisions of this act should be construed with a view to carry out [that] legislative declaration." N.J.S.A. 59:1-2. It also included provisions that impose specific procedural requirements, including notice provisions, time limitations, and liability thresholds for bringing a claim against a public entity or public employee. See e.g., N.J.S.A. 59:8-3 (notice of claim), 59:8-8 (late notice of claim), 59:9-2 (limitation on recovery of damages), and 59:2-2 (general immunity of public entities).

To exert additional controls to circumscribe the State's liability, the TCA also provided "the unified scheme under which the Attorney General's duty to defend and indemnify employees must be evaluated," Chasin v. Montclair State

Univ., 159 N.J. 418, 425 (1999), and gave the Attorney General discretion to determine whether to provide for the defense and indemnification of any State employee or former State employee in "any other action or proceeding" outside the TCA context upon if "such representation is in the best interest of the State," N.J.S.A. 59:10A-3, and to assert full control over any such litigation. Helduser v. Kimmelman, 191 N.J. Super. 493, 504 (App. Div. 1983).

On appeal, Dirkin devotes most of his brief to discussing the function of prosecutors and arguing that he was acting within the scope of his employment in Anderson's prosecution. (Ab9-13, 20-23, 25-40, 44-47.) Dirkin's argument appears to assume that the phrase "any action" in N.J.S.A. 59:10A-1 means literally "any" proceeding and is only limited by the refusal grounds listed in N.J.S.A. 59:10A-2 so that this case turns on whether he was acting within the scope of his employment. (Ab25-40.) However, that misses a fundamental point—nothing in the TCA or in case law supports his assumption that the Legislature's use of "any action" in N.J.S.A. 59:10A-l extends to disciplinary proceedings initiated by a disciplinary board against a licensee by sole virtue of the fact that the licensee is a public employee who used that license in carrying out their employment duties. Quite the opposite.

The Appellate Division's decision In re Napoleon, 303 N.J. Super. 630 (App. Div. 1997) is highly instructive here. There the court held that a medical

director of a state prison was not entitled to a defense under N.J.S.A. 59:10A-l in disciplinary proceedings initiated by the State Board of Medical Examiners even though the proceedings stemmed from actions he took in his employment capacity. After noting that the duty to defend was "delimited by the context in which the Legislature has conferred this duty on the Attorney General;" i.e. the TCA, it observed:

> The action initiated by the Board of Medical Examiners is not a civil action for damages. It is a disciplinary hearing commenced by the licensing authority which oversees the professional conduct of persons who practice medicine in New Jersey. While most of the treatment which is the subject of the administrative charges stems from Napoleon's treatment of inmates at a State correctional facility, the Board of Medical Examiners is not examining his proficiency as a medical director but his competency to practice medicine and conformity to basic principles governing a person licensed to practice medicine in this State.
>
> [Id. at 633-34.]

That same logic applies here nearly word for word: The action initiated by the Office of Attorney Ethics is not a civil action for damages. It is an administrative disciplinary hearing commenced by the licensing authority that oversees the professional conduct of persons who practice law in New Jersey. While the disciplinary charges stem from Dirkin's actions as a prosecutor, the Office of Attorney Ethics is not examining his proficiency as a prosecutor or assessing

liability, but rather his competency to practice law and conformity with the basic standards that govern a person licensed to practice law in this State and the heightened ethical obligations that the New Jersey Supreme Court imposes upon criminal prosecutors. Ibid.; see also, State Health Planning & Coordinating Council v. Hyland, 161 N.J. Super. 468 (App. Div. 1978) (affirming OAG's denial of representation to the State Health Planning and Coordinating Council at a hearing before the Health Care Administration Board).

Dirkin insists that Wright requires OAG to defend him in his disciplinary proceedings complaint because he was engaging in a "State law enforcement function" at the time of the alleged ethics violations requires OAG representation, regardless of the type of underlying action. (Pb25.) But that view contradicts the Supreme Court's holding that OAG's obligation under the TCA to provide defense and indemnity is generally "intended to apply only to civil actions seeking damages for tortious conduct." Chasin, 59 N.J. at 428. And for good reason. Dirkin's strained reading of N.J.S.A. 59:10A-1 would render superfluous N.J.S.A. 59:1-4 which explicitly states that the TCA does not extend to any "right to obtain relief other than damages against the public entity or one of its employees." Dirkin's contrary interpretation cannot be sustained. See Smith v. Dir. Div. of Taxation, 108 N.J. 19 (1987) (reiterating that it is well-established that a statute should not be construed in a manner that renders any

portion of it a nullity). A panel of the Appellate Division recently reaffirmed that the narrow scope of "civil actions" for purposes of N.J.S.A. 59:10A-1 in Monmouth County Prosecutor's Office v. Office of Attorney General Department of Law & Public Safety, 480 N.J. Super. 33, 40-43 (App. Div. 2024), certif. denied, 260 N.J. 449 (2025), when it held that OAG's obligation to provide a defense under applies only to instances in which a public defendant has been sued for monetary damages under the TCA and/or § 1983.

There, the Monmouth County Prosecutor's Office (MCPO) unsuccessfully challenged OAG's denial of its request for representation in an action in lieu of prerogative writs filed by retired Deputy Police Chief Frederick Reck. MCPO argued that Wright required OAG to defend MCPO with respect to Reck's claims for injunctive relief because MCPO had been engaging in a State law-enforcement function when applying OAG's directives as to its investigation of Reck and his subsequent resignation. Id. at 39. But the Appellate Division rejected that argument holding, in relevant part, that: (1) OAG's duty to defend arises solely from the TCA; (2) OAG is only charged with defending a state employee to the extent required under N.J.S.A. 59:10A-1, which only applies "in the context of civil actions seeking damages for tortious conduct. Id. at 39-42. The Appellate Division, after examining the statutory language and applicable precedent, most prominently Chasin, unambiguously stated: "It is

well-settled that the TCA, and the statutory analogs of our sister states, do not apply to claims other than common law causes of action for tort damages under state law." Ibid. (citations omitted).

Unsurprisingly, Dirkin does not cite any caselaw supporting his overbroad reading of "civil action." In fact, the key cases Dirkin relies upon all featured actions with an underlying claim for damages. See Gramiccioni v. Dep't of L. & Pub. Safety, 243 N.J. 293, 299 (2020) ("[P]laintiffs brought claims for damages" in connection with their federal claim under 42 U.S.C. § 1983); Lavezzi v. State, 219 N.J. 163, 168 (2014) ("[P]laintiffs sought compensatory and punitive damages and attorneys' fees based on theories of negligence, gross negligence, conversion, and unlawful taking); Wright v. State, 169 N.J. 422, 447 (2001) (concerning "a civil action for false arrest, invasion of privacy, malicious prosecution, false imprisonment, and other causes of action").

Dirkin suggests there is a tension between Chasin and Monmouth County, on the one hand, and Lavezzi and Gramiccioni, on the other. (Pb39.) However, because the underlying actions in all those matters involved claims for damages, there is no conflict among those decisions with respect to the dispositive legal issue in this appeal: which type of legal action triggers the right to a defense under N.J.S.A. 59:10A-l. It was this threshold question that Chasin

unambiguously resolved in a manner consistent with OAG's position, and the "unique role of prosecutors" (Pb39) has no bearing on that aspect of the analysis.

Neither Gramiccioni nor Lavezzi suggested that the Court was stepping away from its unambiguous holding in Chasin that the duty to defend under the TCA extended only to civil claims for damages. Chasin 159 N.J. at 429. Indeed, Gramiccioni contains no mention of Chasin, and Lavezzi makes only passing reference it. See Lavezzi, 219 N.J. at 172 ("The TCA was enacted 'to supersede the patchwork of statutory provisions providing for the defense and indemnification of state employees.' (quoting Chasin, 159 N.J. at 425)."). The Supreme Court's denial of certification in MCPO's appeal of the recent published opinion in Monmouth County Prosecutor's Office further underscores the conclusion that the panel correctly decided Monmouth County Prosecutor's Office. See R. 2:12-4 (permitting certification when "the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires.").

In short, the OAG's obligation to defend State employees in lawsuits is triggered only when the underlying matter seeks damages. N.J.S.A. 59:10A-1. Monmouth County, 480 N.J. Super. at 43. Only if a prosecutorial employee is subject to a claim seeking monetary damages would a court then potentially need

to undertake additional analysis under Wright, Gramiccioni, and Lavezzi to determine whether the actions of prosecutor's office employee qualify as a "law-enforcement function," under N.J.S.A. 59:10A-1. Dirkin's disciplinary proceedings do not fall with the scope of "any action" as the Legislature intended in enacting the TCA because the proceedings will not result in an award of damages or otherwise allocate civil liability.

POINT II

IT WAS NOT ARBITRARY, UNREASONBLE OR CAPRICIOUS FOR THE ATTORNEY GENERAL TO DECLINE TO EXERICISE HIS DISCRETIONARY AUTHORITY TO DEFEND AND INDEMNIFY DIRKIN.

Dirkin is also not entitled to a defense under N.J.S.A. 59:10A-3. It was not arbitrary, unreasonable, or capricious for the Attorney General to deny him a defense and indemnification because it is not in the State's best interests to interfere with the Judiciary's supervision of attorneys and its efforts to ensure that all members of the bar, especially those entrusted with the extraordinary authority to bring criminal charges, adhere to the standards it establishes.

The judicial review of administrative decisions is limited. In re Stallworth, 208 N.J. 182, 194 (2011). Thus, "[a] reviewing court 'may not substitute its own judgment for the agency's, even though the court might have reached a different result.'" Ibid. (internal citations omitted). That is especially

true here, as the Attorney General is uniquely positioned to determine which matters align with the State's best interests where criminal prosecutions are concerned. Helduser, 191 N.J. Super. at 509.

In assessing whether the decision here is arbitrary, capricious, or unreasonable, the court must examine whether the denial: (1) violates express or implied legislative policies, "that is, did the agency follow the law"; (2) the record contains substantial evidence to support the determination; and (3) whether in applying the legislative policies of the TCA to the facts here, the Attorney General "clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Ibid. (quoting In re Carter, 191 N.J. 474, 482 (2007). Only factors one and two are relevant here because the facts surrounding Dirkin's conduct regarding Anderson's employment contract are not in dispute. Dirkin falls short of meeting factors one and two.

First, the plain text of N.J.S.A. 59:10A-3 makes clear that the Attorney General's decision to provide a defense in "any other action or proceeding" outside the tort context is entirely discretionary: "In any other action or proceeding, including criminal proceedings, the Attorney General may provide for the defense of a State employee or former State employee, if he concludes that such representation is in the best interest of the State." And as discussed in

Point I, the disciplinary proceedings here, like in In re Napoleon, implicate Dirkin's individual ethical obligations as an attorney, not the interests of the State.

Second, Dirkin cannot show that that Attorney General exercised his discretion in a clearly erroneous matter. Dirkin asserts that a prosecutor who is publicly disciplined by the OAE for conduct undertaken in the context of his criminal business could adversely impact the Attorney General's interest in ensuring that criminal prosecutors are not falsely accused by vengeful litigants of violating the RPCs. (Pb43.) However, that risk is exaggerated because the Court's process for addressing public grievances would minimize the disruption that might arise.

Our New Jersey constitution grants the Supreme Court exclusive "jurisdiction over the admission to the practice of law and the discipline of persons admitted." N.J. Const. art. VI, § 2, ¶ 3, Sullivan as Tr. of Sylvester L. Sullivan Grantor Retained Income Tr. v. Max Spann Real Estate & Auction Co., 251 N.J. 45, 61 (2022). The Court's authority to regulate the practice of law is "exercised in the public interest" to "protect the public." In re Op. No. 26, 139 N.J. 323, 327 (1995). The Court created various entities to assist in its disciplinary role, most pertinently to this case, the Disciplinary Review Board

(DRB), which acts as an arm of the Court. Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433 (1982).

Grievances are first presented to the DEC which evaluates the grievance to determine if it alleges facts which, if true, would constitute unethical conduct, and then either decline, or dismiss the matter. R. 1:20-3(c). After an investigation, an investigator presents a written report and, if the grievance is meritorious, a recommendation to file a complaint. R. 1:20–3(h). The DEC, therefore, acts as a gatekeeper to ensure that litigants do not use disciplinary proceedings to harass attorneys with frivolous grievances.

Dirkin also contends that it is in the best interests of the State to defend his ethics complaint to ensure statewide uniformity of criminal justice system and because—aside from being subject to the RPCs—prosecutors are also bound by a separate code of ethics promulgated by the Attorney General. (Pb41-42; Pa17.) However, while Dirkin may disagree with the Attorney General's denial of representation, it cannot be said that he exercised his discretion to deny in an arbitrary, unreasonable or capricious matter. As the State's chief law enforcement officer, the Attorney General is in the best position to determine if the State's participation in a prosecutor's attorney ethics matter is necessary to vindicate the State's interests and that determination is entitled to deference.

Moreover, there is little question that the potential for a substantiated finding that a prosecutor violated or is likely to have violated the applicable codes and rules of conduct, introduces a potential conflict between the Attorney General's duty of loyalty to the represented client (the accused prosecutor) and the State's interest in ensuring that criminal prosecutors abide by the highest standards. Cf. N.J.S.A. 59:10A-2(c) (providing that the Attorney General can refuse to provide a defense if "the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee."); N.J.S.A. 59:2-10 ("[A]public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct.")

By their very nature, ethics proceedings against a prosecutor start from the essential premise that the prosecutor has engaged in wrongful, unethical conduct, creating in every such circumstance the looming possibility of a conflict or the potential that the Attorney General would be defending or potentially indemnifying a prosecutor for misconduct when the TCA explicitly provides an entity should not be liable for such conduct.

Thus, it was not arbitrary, capricious or unreasonable to deny Dirkin's request for a defense here.

POINT III

DIRKIN IS NOT ENTITLED TO A DEFENSE UNDER N.J.S.A. 59:10A-6

Dirkin next contends that the Attorney General has a common law obligation, incorporated into N.J.S.A. 59:10A-6, to defend Dirkin against DEC's ethics complaint. (Pb44.) There is no legal support for that argument.

The TCA was the Legislature's response to our Supreme Court's abrogation of the doctrine of sovereign immunity to tort claims in Willis v. Department of Conservation & Economic Development, 55 N.J. 534 (1970). Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 404-11 (1988). All twelve substantive chapters of that Act were discussed in the Report of the Attorney General's Task Force on Sovereign Immunity (Task Force Report), which convened to make recommendations on the legislative response that became the TCA. Malloy v. State, 76 N.J. 515, 519 n.1 (1978). That Task Force Report provides key context to understand the meaning of N.J.S.A. 59:10A-6, and confirms that this provision neither reserves a pre-existing entitlement to the Attorney General's defense in professional disciplinary proceedings nor supplies a new source for one.

At the outset, N.J.S.A. 59:10A-6 could not have reserved and incorporated obligations to represent prosecutors that did not exist when the TCA was enacted. As the Task Force Report explains, prior to the TCA, the Legislature

had only imposed a duty of representation on the Attorney General with respect to narrow categories of state employees. Task Force Report at 47-48; N.J.S.A. 38A:4-10 (state militia); N.J.S.A. 53:1-22 (State police, under certain circumstances); N.J.S.A. 52:17A-4 (state officers); N.J.S.A. 18A:60-4 to -5 (state institution teachers). The Task Force viewed these limited duties as fundamentally distinct from the Attorney General's "inherent power to represent state officers and employees," which in their view allowed—but crucially did not require—that the Attorney General assume representation of state employees "when he considers it to be in the best interest of the State of New Jersey." Task Force Report at 49. That is the permissive "existing authority" that N.J.S.A. 59:10A-6 references and which the TCA does not subsume. See Task Force Report at 249, comment to P.L. 1944, c.20 (discussing the "authority . . . undoubtedly possessed by the Attorney General under his existing powers"). The provision simply does not speak to any obligation to represent that Dirkin seeks to impose.

To be sure, the TCA did prospectively create a statutorily circumscribed obligation to represent state employees under certain circumstances, but Dirkin falls outside it for reasons explained in Point I and, in any event, the new obligation could not have been reserved as already "existing" when N.J.S.A. 59:10A-6 first became law in 1972. Indeed, the history of the relevant

provisions underscores why Dirkin's purported duty to represent is inconsistent with the goals of the TCA.

The Task Force recommended the explicit creation of a framework for the defense of state employees to coexist with the Attorney General's intrinsic authority to defend and thereby bring more predictability for State employees—and the Legislature obliged. See ibid. (Task Force comment that the Chapter 10A authority "is provided primarily for the purpose of satisfying the needs for representation of State employees resulting from the passage of the [TCA]"); Task Force Report at 16. Chapter 10A was a response to prevailing "confusion" and "understandable concern" that state employees had faced when they had no guarantee that the chief legal officer of the State would represent them as they faced liability for acts for which the State itself was immune. See Task Force Report at 16, 48; Czyzewski v. Schwartz, 110 N.J. Super. 255, 259 (App. Div. 1970) (explaining pre-TCA state employee liability regime). To achieve predictability, Chapter 10A was "intended to explicitly establish" the Attorney General's statutory representation "authority and the circumstances under which it will be exercised." See Task Force Report at 249, comment to P.L. 1944, c.20; Task Force Report at 16 (essential for Attorney General to "be provided with a more specific authority under which to act" in representing state employees as under current office practice). In other words, the TCA withheld some of the

discretion that is at the core of the intrinsic representation power by spelling out when the "Attorney General's duty to defend State employees" attaches under the statute, language that is still in force today. Id. (quoting P.L. 1944, c.20, § 1); N.J.S.A. 59:10A-1. Dirkin's attempt to find a freestanding duty to represent outside that framework should be rejected.

Tellingly, Dirkin—whose brief again centers on the separate question of whether a prosecutor is a relevant State employee—offers no support for his assertion that the Attorney General's "existing authority" at the time the TCA was enacted encompassed an obligation to defend and indemnify State employees in disciplinary matters, much less that the Attorney General then had a general common law duty to provide a defense. And to the extent that he purports to locate the source of a common law duty in the doctrine of respondeat superior, that argument is unavailing, too. The doctrine of respondeat superior is a mechanism for imposing liability upon the State for the tortious actions of a State employee. Wright, 169 N.J. at 449. An ethics matter does not assert a tort, and a finding by the Office of Attorney Ethics that Dirkin failed to act in conformity with the standards set by the New Jersey Supreme Court would not flow through him to the State. An adverse disciplinary finding would be personal to Dirkin and impose no liability upon the State.

In sum, nothing in N.J.S.A. 59:10A-6 requires the Attorney General to provide Dirkin a defense in his disciplinary matter and there is no basis to graft the principles of respondeat superior to this statutory provision.

CONCLUSION

For these reasons, the court should affirm.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3379-24T1

WALTER J. DIRKIN, IN HIS OFFICIAL CAPACITY AS AN ASSISTANT ESSEX COUNTY PROSECUTOR Plaintiff-Appellant, v. OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY Defendant-Respondent.	:	CIVIL ACTION ON APPEAL FROM A FINAL AGENCY DECISION OF THE DEPARTMENT OF LAW & PUBLIF SAFETY, OFFICE OF THE ATTORNEY GENERAL

BRIEF ON BEHALF OF THE COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY

YOLANDA CICCONE
MIDDLESEX COUNTY PROSECUTOR
PRESIDENT, COUNTY PROSECUTORS
ASSOCIATION OF NEW JERSEY

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STATEMENT OF PROCEDURAL HISTORY AND FACTS

Consistent with the limited role of amicus curiae, and to avoid unnecessary repetition, the County Prosecutors Association of New Jersey (CPANJ) will not only combine its statements of procedural history and facts, but also adopt the Statement of Procedural History & Facts contained in the Appellant's brief. Pa3-7.

LEGAL ARGUMENT

POINT I

THE CPANJ JOINS THE APPELLANT TO URGE FOR THE REVERSAL OF THE ATTORNEY GENERAL'S ARBITRARY, CAPRICIOUS, AND UNREASONABLE DENIAL OF ASSISTANT PROSECUTOR DIRKIN'S REQUEST FOR REPRESENTATION

The CPANJ is "a nonprofit organization whose members are the twenty-one county prosecutors of New Jersey." Am. Civ. Liberties Union v. Cnty. Prosecutors Ass'n of New Jersey, 257 N.J. 87, 93-94 (2024). The CPANJ members' offices are not immune from the "new problem" that is the "prosecutor vacancy crisis in the United States." Adam M. Gershowitz, The Prosecutor Vacancy Crisis, BYU L. Rev., 355, 358 (2024).

As defined by Gershowitz, supra at 357-58, and as experienced by the CPANJ members, this crisis looks like a "downward spiral," where unfilled

assistant prosecutor vacancies – caused by a myriad of factors such as comparably low pay, high caseloads, and the increasing burdens imposed by Brady/Giglio[1] in an ever more audio/visually-recorded world – require "[t]he remaining prosecutors ... pick up the cases of those who quit, resulting in astronomical caseloads."

> With massive caseloads, prosecutors are forced to work nights and weekends to try to keep up. But because prosecutors are salaried employees, this "overtime" typically does not translate into additional pay. Increased workloads for the same low pay hurts morale. In turn, more prosecutors quit their jobs and matters become even worse for those who stay. Entry-level lawyers look at this situation and decide to begin their careers elsewhere. The downward spiral feeds on itself, and vacancies grow.

Ibid.; see also Debra Cassens Weiss, Prosecution Careers Are a Tougher Sell Since the Pandemic; Positions Go Unfilled As Few Apply, ABA J., April 14, 2022; Jonah E. Bromwich, Why Hundreds of New York City Prosecutors Are Leaving Their Jobs, N.Y. TIMES, April 3, 2022; National Prosecutor Retention Survey, NAT'L DIST. ATT'Y ASS'N, June 2024 at 95-97 (52% of responding New Jersey assistant prosecutors have "given serious consideration to leaving" the office at which they work, with 44% having considered leaving in the last month).

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[1] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

While the negative repercussions of this crisis for the CPANJ members' offices are readily apparent, county prosecutors – and the assistants that work for them – are not the crisis' only victims. "It is a serious problem for public safety. Faced with huge workloads, prosecutors can make mistakes on their cases, that result in guilty defendants going free." Gershowitz, supra at 362, 408-14; see also id. at 407-08 ("the public expects the [county prosecutor's] office to prosecute not just violent crime, but also property crime. To prosecute the minimum threshold of criminal activity, the office needs enough prosecutors to do the basic work of the office. If the office becomes too understaffed, the legitimacy of the office and the [county prosecutor] will suffer").

While seemingly counterintuitive, the prosecutor vacancy crisis also harms defendants. "[P]rosecutor vacancies do not benefit defendants by leading [county prosecutors'] offices to simply drop cases." Id. at 414. Instead, "[e]xcessive caseloads prevent overburdened prosecutors from quickly dismissing weak cases" and lead to "suboptimal plea bargain offers." Id. at 415-17. Relevant here, "[e]thical prosecutors with excessive caseloads [can] commit ["accidental" or "unintentional"] Brady violations because they are simply too busy to notice exculpatory or impeachment evidence." Id. at 418-21. The potential for unintentional violations is exacerbated when the

exculpatory evidence is "nuanced" or in the possession of another law enforcement agency within the "jigsaw puzzle with a thousand tiny pieces [in which] [n]o one is really in charge'" that is the "criminal justice 'system.'" Ibid. (citations omitted).

Gershowitz, supra at 427-30, however, is not all doom and gloom. Solutions to this crisis exist, e.g., "[s]alary increases;" "[c]ost of living adjustments for expensive metropolitan cities;" "enhanced retirement benefits;"[2] "invest[ment] in technology and support staff to meaningfully reduce the burden placed on prosecutors by the crushing demands of complying with discovery obligations;" and "enhance[d] loan forgiveness programs to further incentivize public-interest careers." Ibid.

Included as another solution is county prosecutors "speak[ing] truth to power," "quickly and loudly." Id. at 430. Lending support to Assistant Prosecutor Dirkin, and by extension to any assistant prosecutor that may find

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[2] Through the advocacy of the Assistant Prosecutors' Association of New Jersey, N.J.S.A. 43:15A-156 was amended in 2021 to re-open the Prosecutors Part of the Public Employees' Retirement System and include within its benefits all assistant prosecutor hired after May 21, 2010. The statement accompanying this amendment shows that our Legislature intended it to "empower the Attorney General and County Prosecutors throughout the State to attract skilled and diverse attorneys and retain experienced prosecutors committed to promoting public safety and seeking equal justice under the law." Aa2-3.
"Aa" refers to the appendix of amicus curiae the County Prosecutors Association of New Jersey.

him or herself in the same position, is the CPANJ's way of doing so. The CPANJ joins with Assistant Prosecutor Dirkin in urging this Court to reverse the Attorney General's refusal to defend him before the Office of Attorney Ethics for decisions he made while "enforc[ing] the State's criminal laws," and thus "perform[ing] a function that has traditionally been the responsibility of the State and for which the Attorney General is ultimately answerable." Wright v. State, 169 N.J. 422, 455 (2001); Kaminskas v. Off. of the Att'y Gen., 236 N.J. 415, 426 (2019).

To that end, the CPANJ urges this Court to be persuaded by the analysis of N.J.S.A. 59:10A-1 and its explanatory case precedent presented by Assistant Prosecutor Dirkin, incorporating the same herein in lieu of unnecessary repetition, see Pa8-40. The CPANJ writes separately to further support Assistant Prosecutor Dirkin's alternative argument, that "even if the [Tort Claims Act ("TCA")] does not obligate the [Attorney General] to represent [him] here, the agency abused its discretion in not representing him because to do so is in the best interest of this State." Pb40.

N.J.S.A. 59:10A-3 grants the Attorney General the ability to "provide for the defense of a State employee" "[i]n any ... action or proceeding, including criminal proceedings," "if he concludes that such representation is in the best interest of the State." In choosing not to invoke the discretionary

authority conveyed by this "catch-all" provision, see Helduser v. Kimmelman, 191 N.J. Super. 493, 508 (App. Div. 1983); Monmouth Cnty. Prosecutor's Off. v. Off. of the Att'y Gen., 480 N.J. Super. 33, 41 (App. Div.), certif. denied, 260 N.J. 449 (2025), the Attorney General stated only, "Please also be advised that the Attorney General declines to exercise his discretionary authority under N.J.S.A. 59:10A-3 to provide for your defense in the above-referenced matter." Pa5. This one-line denial is wrong and should be reversed by this Court.

As an initial matter, this generic, one-line denial is utterly insufficient to "facilitate judicial review." In re Vey, 124 N.J. 534, 544 (1991). "Administrative agencies," like the Office of the Attorney General, "must 'articulate the standards and principles that govern their discretionary decisions in as much detail as possible,'" with the absence of such detail warranting – at minimum – "remand ... to the agency for a clearer statement of findings and later reconsideration." Ibid. (quoting Van Holten Group v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990)).

The CPANJ submits the terseness of the Attorney General's denial of discretionary representation does not represent a mere failure of communication, which could be corrected via remand for reconsideration, but a failure of consideration and appreciation, which warrants reversal of the

denial. In so arguing, the CPANJ recognizes that the Attorney General's determination can "only be reversed if 'it is arbitrary, capricious or unreasonable or ... not supported by substantial credible evidence in the record as a whole.'" Monmouth Cnty. Prosecutor's Off., 480 N.J. Super. at 40 (quoting Prado v. State, 186 N.J. 413, 427 (2006)). Factors relevant to this determination include both, "whether the agency's action violate[] express or implied legislative policies, that is, did the agency follow the law" and "whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Lavezzi v. State, 219 N.J. 163, 171-72 (2014) (quoting In re Stallworth, 208 N.J. 182, 194 (2011); In re Carter, 191 N.J. 474, 482-83 (2007)).

Both factors are relevant here, with the application of both demonstrating that the Attorney General's denial of discretionary representation warrants reversal. In enacting the TCA, particularly N.J.S.A. 59:10A-3, the Legislature made clear it intended the scope of the Attorney General's representation to go beyond civil tort lawsuits seeking monetary damages and to be expansive enough to include defense against even criminal charges. The Attorney General's denial of representation, see Pa2-3, 5, barely even acknowledges the broad scope of his authority, choosing instead to

dedicate focus almost entirely – save for one line – on what was perceived to be a lack of statutory obligation under N.J.S.A. 59:10A-1 to provide representation.

Thus ignored by the Attorney General was not only the TCA's expansive intent, but how that expansive intent is in keeping with the broader, express goals of our Legislature with regard to the staffing of offices charged with "prosecuting '[t]he criminal business of the State.'" Wright, 169 N.J. at 454 (quoting N.J.S.A. 2A:158-4). Not even five years ago our Legislature acted with the specific intent to "empower the Attorney General and County Prosecutors throughout the State to attract skilled and diverse attorneys and retain experienced prosecutors committed to promoting public safety and seeking equal justice under the law." Aa2-3; see also N.J.S.A. 43:15A-156.

By myopically focusing on justifying why he believed he was not statutorily obligated to provide Assistant Prosecutor Dirkin representation, the Attorney General wholly ignored both that he could provide representation anyway under N.J.S.A. 59:10A-3 and that doing so would be in keeping with the intent of our Legislature. The Attorney General here lost sight of why it is unquestionably in the best interests of the State for his Office to provide representation to assistant prosecutors who become the target of ethics investigations simply for doing the job expected of them to the best of their

abilities under increasingly challenging circumstances.

The role of the Attorney General "as the State's chief law enforcement officer" exists not only "to guide law enforcement entities" through the promulgation of "guidelines, directives and policies," but also to protect those whose livelihoods become jeopardized after following those guidelines, directives, and policies, and after acting in accordance with our State statutes and case precedent. Gramiccioni v. Dep't of Law & Pub. Safety, 243 N.J. 293, 314-15 (2020) (quoting N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 565 (2017)); N.J.S.A. 52:17B-98.

That the jeopardy threatened by an ethics charge is less overtly monetary than a civil lawsuit seeking monetary damages will be of no moment to the underpaid assistant prosecutor left alone to defend the choices he or she made while "perform[ing] a function that has traditionally been the responsibility of the State and for which the Attorney General is ultimately answerable." Wright, 169 N.J. at 455 (emphasis added). What lawyer would be interested in being an assistant prosecutor if it is known that, like Assistant Prosecutor Dirkin, he will be left to fend for himself against threats to not only his reputation, but also his financial stability.

It is axiomatic that it is in the best interests of this State – to the citizen of this State generally, and to crime victims specifically, see N.J. Const., Art.

I, Para. 22 – for the Attorney General to make decisions that both encourage experienced prosecutors to remain in the role and attract skilled and diverse young lawyers to take up the mantle of criminal prosecution. As our Legislature recognized, it is through retention and recruitment that public safety is promoted and equal justice under the law is obtained. Aa2-3.

Gershowitz, supra at 430, found "that entry-level lawyers will come to work in spite of low salaries and high workloads if an office has a positive culture and prioritizes mentoring and growth." It advised that "prosecutors must create an office culture where lawyers feel supported[.]" Ibid. (emphasis added). The Attorney General – the State's chief law enforcement officer – should not leave CPANJ's members alone in providing support to this State's assistant prosecutors. Justice for our victims and defendants requires the State's chief law enforcement officer to step up too – to provide support via representation for assistant prosecutors when they act justly[3] in the discharge of their duties and even when the justness of their actions is not perceived to

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[3] The CPANJ is not suggesting that there are no circumstances under which the Attorney General could appropriately deny discretionary representation. N.J.S.A. 59:10A-2 provides examples of circumstances under which the CPANJ would accept the denial of discretionary representation, e.g., where the alleged conduct was outside of the prosecutorial role, where the alleged conduct involved actual criminal conduct, fraud, willful misconduct, or malice. The Attorney General's blanket denial identifies no factors, much less any of these factors. None of these factors are presented by these facts.

be so by the public or opposing counsel.

To that end, the CPANJ wants to make clear for this Court and for the Attorney General that Assistant Prosecutor Dirkin is not an outlier. He is the canary in the coalmine. In furtherance of an express goal of creating "a system where every attorney can see where police misconduct has been found," see Aa5-6, and despite such a goal being inconsistent with New Jersey law, the Attorney General's Internal Affairs Policy and Procedures, and Attorney General Directives 2020-5 and -6, the Director of Investigations and Police Accountability for the Office of the Public Defender appears to have launched a statewide campaign that has involved leveling threats of potential ethics violations[4] against assistant prosecutors. See, e.g., Aa9-12; see also State v. Higgs, 253 N.J. 333, 355-57 (2023). While it appears as though these threats remain just that – threats – should these threats ripen the Attorney General cannot continue to refuse to enter the arena.

In discussing the role of a leader, the late Rear Admiral Grace Hopper of the United States Navy said: "Leadership is a two-way street, loyalty up and loyalty down. Respect for one's superiors; care for one's crew." In refusing to

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[4] Some of these threats are themselves also inconsistent with New Jersey law. Compare Aa9-10 (alleging a violation of RPC 3.8(d) and Brady/Giglio based on a failure to provide discovery following dismissal of an indictment) with State v. Campione, 462 N.J. Super. 466, 506 (App. Div. 2020) (finding no obligation to provide discovery after the dismissal of indictment).

provide discretionary representation on an ethics charge arising out of the work Assistant Prosecutor Dirkin did not only on behalf of the Essex County Prosecutor's Office and the State, but on behalf of the Attorney General, the Attorney General has not shown the care for his crew required of him. The CPANJ asks this Court to remind the Attorney General of his obligation of care via representation for the assistant prosecutors of this State. The CPANJ asks this Court to reverse.

CONCLUSION

For the above mentioned reasons and authorities cited in support thereof, the County Prosecutors Association of New Jersey respectfully requests this Court reverse the decision of the Attorney General and direct him to provide representation to Assistant Prosecutor Dirkin.

Respectfully submitted,

YOLANDA CICCONE
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ASSOCIATION OF NEW JERSEY

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LETTER REPLY BRIEF ON BEHALF OF APPELLANT

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: Walter J. Dirkin, in His Official Capacity as an Assistant Essex County Prosecutor v. Office of the Attorney General, Department of Law & Public Safety
Docket No. A-3379-24T1

Civil Action: On Appeal from a Final Agency Decision of the Department of Law and Public Safety, Office of the Attorney General.

Honorable Judges:

Pursuant to Rules 2:6-2(b) and 2:6-5, this letter reply brief is submitted on behalf of the appellant.

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Statement of Procedural History & Facts[1]

Assistant Prosecutor ("AP") Walter J. Dirkin relies upon his Statement of Procedural History & Facts in his appellant's brief. (Pb3-7).

The Office of the Attorney General ("OAG") concedes that at all times relevant to this case, specifically when he engaged in the conduct the Office of Attorney Ethics ("OAE") alleges violated the Rules of Professional Conduct governing attorneys, AP Dirkin "was acting within the scope of his employment" as an Assistant County Prosecutor, (Db9), a position which, when it involves conducting the "criminal business of the State" is done under the authority and control of "the State's chief law enforcement officer, the Attorney General…." (Db20); accord Wright v. State, 169 N.J. 422, 454 (2001); N.J.S.A. 2A:158-4, 52:17B-98, and 52:17B-103; (Pa17).

[1] Because they are intertwined, these sections have been combined for the Court's convenience.

Legal Argument

Point I

Nothing set forth in the OAG's brief changes the conclusion that this Court must reverse the OAG's decision to not defend AP Dirkin in the OAE action, which stems exclusively from his prosecution of "the criminal business of the State."

Before turning to some specific points, AP Dirkin stresses that he is not suggesting that there is "an absolute right to a publicly funded defense" in every sort of action simply because he was a public employee, because he was an attorney, or because he was an attorney employed by a County Prosecutor's Office. (Db8). Rather, his position is quite narrow and simply this: When an Assistant Prosecutor is alleged by the OAE to have violated the Rules of Professional Conduct governing attorneys based on actions undertaken as part of his or her exercise of the functions inherent in conducting "the criminal business of this State," the OAG is required to defend that AP in the OAE proceeding. Or, as the Supreme Court has put it, when "the act or omission of the [AP] that gave rise to the potential [ethical] liability derived from the prosecutor's power to enforce the criminal law, and constituted an exercise of that power." Gramiccioni v. Dep't of Law & Pub. Safety, 243 N.J. 293, 314 (2020) (quoting Lavezzi v. State, 219 N.J. 163, 178 (2014)). That is all AP Dirkin asks this Court to hold, accord (Pb29), and this Court need not go any further to reverse.

i. The TCA, as interpreted by Wright and its progeny, compels representation here.

The bulk of the OAG's argument against representation remains that the OAE action against AP Dirkin does not sound in tort or seek "monetary damages," and so because it does not put the "public fisc" at risk, it need not represent him. See, e.g., (Db1-2, 8, 14, 16, 17). Several arguments made in support of that mistaken position warrant a response.

First, AP Dirkin agrees with the OAG that whether representation is required under N.J.S.A. 59:10A-1 is "a question of statutory interpretation." (Db9). As such, this Court's standard of review when answering that question is de novo. See Lavezzi, 219 N.J. at 172 ("[T]o the extent that the Attorney General's determination constitutes a legal conclusion, we review it de novo."); see also Isaac v. Bd. of Trustees, 261 N.J. 381, 388 (2025) ("When an agency's decision is based on the agency's interpretation of a statute or its determination of a strictly legal issue, we are not bound by the agency's interpretation.") (citation and internal markings omitted).

Second, the OAG argues that "any" in N.J.S.A. 59:10A-1 doesn't really mean "any." (Db11). But language in a statute is presumed to have its plain meaning and the words chosen by the Legislature are best understood when given "'their ordinary meaning and significance.'" State v. M.K.P., 470 N.J. Super. 547, 551 (App. Div. 2022) (quoting DiProspero v. Penn, 183 N.J. 477,

492 (2005)). Few words have a more basic and universally understood meaning than "any," and so this Court—whose role "is to construe, not distort[,]" ibid.—should reject the OAG's attempt to read "any action" to mean "any action that seeks monetary damages."

Moreover, no Supreme Court case post-Wright has held that the OAG can deny representation in "any action" for the sole reason that the result of that action could be anything but monetary damages. The OAG's single-minded focus on remedy remains contrary to "the letter and purpose of Wright." Gramiccioni, 243 N.J. at 297; (Pb27).

Directly on point yet unaddressed by OAG (beyond a parenthetical citation) is Prado v. State, 186 N.J. 413 (2006). There, the Supreme Court concluded "that the Attorney General must provide a defense to a state employee who requests representation pursuant to N.J.S.A. 59:10A-1 unless the Attorney General determines that it is more probable than not that one of the three exceptions set forth in N.J.S.A. 59:10A-2 applies…." Id. at 427. In reaching that conclusion, the Court did not qualify its language in terms of the remedy being sought in the underlying action, but explained that it is "[a] general principle of statutory interpretation [] that 'exceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law.'" Id. at 426 (citation omitted). For

that reason, "all doubt should be resolved in favor of the general provision contained in N.J.S.A. 59:10A-1, which is to afford representation, rather than the proviso or exception contained in N.J.S.A. 59:10A-2, which permits the Attorney General to refuse to defend." Ibid. (emphasis added; internal markings and citation omitted). Accordingly, the general provision affording representation must be respected, and all doubts should be resolved in favor of that provision, a key purpose of which is to ensure "defense and indemnification coverage for law enforcement activities conducted by county prosecutors…." Gramiccioni, 243 N.J. at 296-97 (citing Wright, 169 N.J. at 455-56).

Third, while OAG places heavy emphasis on Chasin v. Montclair State Univ., 159 N.J. 418 (1999) (cited at Db10, 13, 14, 15, 16), that case has little relevance under today's legal landscape governing the OAG's relationship with prosecutors and does not compel affirmance here. See (Pb20-23, 33-34, 36-39). There, the employee was a college professor, 159 N.J. at 421, not a County Prosecutor or Assistant Prosecutor, state actors who play a unique role in New Jersey given their "inter-relationship with both the State and the county…." Wright, 169 N.J. at 450. As Wright stressed, parts of the TCA "did not take into account the unique role of county prosecutorial employees, paid by the county, but performing a State law enforcement function under State

supervisory authority." Id. at 455-56. So, not only did Chasin predate Wright and its analysis of the unique role of New Jersey's prosecutors, the issue there is not at all applicable here, where representation is being sought not by a professor who wouldn't give a grade, but by a prosecutor who was at all times acting in his official capacity and in his performance of the "criminal business" of this State. Lavezzi, 219 N.J. at 179; Wright, 169 N.J. at 438; N.J.S.A. 2A:158-4.

Similarly, although OAG continues to rely on the pre-Wright case of In re Napoleon, 303 N.J. Super. 630, 632 (App. Div. 1997), (Db11-12), it bears reiterating that there, the panel pointed out that the Board of Medical Examiners was "not examining [Napolean's] proficiency as a medical director but his competency to practice medicine and conformity to basic principles governing a person licensed to practice medicine in this State." Id. at 634 (footnote omitted). Here, the OAE is examining AP Dirkin's "proficiency as a" prosecutor—not simply his general competence to practice law—by reviewing his exercise of a uniquely prosecutorial function: seeking an indictment. Contra (Db12). That much is clear given the OAE's allegation that AP Dirkin primarily violated RPC 3.8, (Pca17), a rule only applicable to prosecutors, who by their position are conducting the criminal business of the State under the control and authority of "the State's chief law enforcement

officer, the Attorney General…." (Db20).[2]

N.J.S.A. 59:1-4 is not rendered superfluous by AP Dirkin's reading of that TCA. (Db13). That statute provides that nothing in the TCA "shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees." This simply means that other causes of action are not eliminated by the TCA. See Andes v. Deal, 69 N.J. 86, 91 n. 1 (1976) (TCA "not applicable to preexisting causes of action or to claims for injunctive relief."); Gatto Design & Dev. Corp. v. Twp. of Colts Neck, 316 N.J. Super. 110, 120 (App. Div. 1998) (equitable claim not barred by the TCA); Dubin v. Hudson Co. Prob'n Dep't, 267 N.J. Super. 202, 212 (Law Div. 1993) (liability "based on contract concepts and the Uniform Commercial Code" not barred by the TCA). The issue here is representation, not liability, and so N.J.S.A. 59:1-4 has nothing to do with the OAG's obligation to represent AP Dirkin.

Lastly, while OAG places heavy reliance on Monmouth Cty. Pros. Office v. OAG, 480 N.J. Super. 33 (App. Div. 2024), certif. denied, 260 N.J.

[2] State Health Planning & Coordinating Council v. Hyland, 161 N.J. Super. 468 (App. Div. 1978), has no applicability here. (Db13). There, a state council sought representation under a different set of statutes, namely N.J.S.A. 52:17A-4(e) and (g) and 52:17A-13, and the Court held that, under yet another statute inapplicable here, N.J.S.A. 52:17A-12, representation was not obligatory, the decision to deny discretionary representation was not arbitrary, capricious or unreasonable, and that there was a conflict. Id. at 472, 475-76.

449 (2025),[3] (Db14-16), it fails to face the fact that the panel there "only tangentially cited the Supreme Court's more recent decisions in Lavezzi (2014) and Gramiccioni (2020)," and did not analyze those decisions. (Pb36). AP Dirkin directs this Court to its appellant's brief discussing that critical oversight, (Pb36-39), and reemphasizes that this panel need not follow that decision given its recent vintage and the panel's not accounting for the significant changes wrought by Wright, Lavezzi and Gramiccioni. This Court should do so here, and conclude that in the context of OAG representation of prosecutors under the circumstances set forth in this case, the remedy sought in the underlying action is not a basis to deny representation.

ii. Representation here serves the State's best interest.

The OAG argues that it is not in the State's best interest for it to represent the prosecutors it oversees in attorney disciplinary matters because it doesn't want to "interfere with the Judiciary's supervision of attorneys…." (Db17). The OAG overstates its role. The issue again is one of representation, not decision-making. To represent AP Dirkin before the OAE would be to

[3] The OAG is mistaken when it claims that the Supreme Court's denial of certification in Monmouth Cty Pros. Office means "the panel correctly decided" that case. (Db16). That order carries no weight or meaning whatsoever beyond denying review in that case. See State v. Njango, 247 N.J. 533, 543-44 (2021) ("Our jurisprudence makes clear that the denial of a petition for certification is not an expression of approval or disapproval of an opinion or judgment of the Appellate Division.").

represent him as any other attorney would represent a client before the OAE. Such representation before the OAE would be no more interfering with the Judiciary's supervision of attorneys than representing him in civil court would interfere with a civil jury's ability to assess liability and damages.

Ironically, the OAG says it is "uniquely positioned to determine which matters align with the State's best interests where criminal prosecutions are concerned." (Db18).[4] But it's that very "unique position" that makes it the one who should be representing prosecutors accused of ethical wrongdoing in the very exercise of those criminal prosecutions. It bears reemphasizing that such "optional indemnification is encouraged" by our Supreme Court, Gramiccioni, 243 N.J. at 310 (citing Wright, 169 N.J. at 455), particularly in a situation like this where the State employee is a prosecutor, and the representation concerns the exercise of his authority in conducting the State's

[4] For this proposition, the OAG cites Helduser v. Kimmelman, 191 N.J. Super. 493, 509 (App. Div. 1983), but that case dealt with criminal charges, and the full context of the remark the OAG cites shows its inapplicability here: "The right of the Attorney General to refuse to defend an employee when a conflict of interest between the State and the employee would be created, as provided in N.J.S.A. 59:10A-2(c), could support that refusal in most criminal actions. After all, the Attorney General is the chief law enforcement officer of the State. All crimes are prosecuted in the name of the State of New Jersey by the Attorney General and the county prosecutors. Notwithstanding differences in responsibility between county prosecutors and the Attorney General, the Attorney General must be left with broad discretion to avoid a conflict of interest that may be created by his furnishing a defense for a state employee charged with the commission of a crime." Id. at 510 (citations omitted).

criminal business. As the Court said in Wright:

> We are persuaded that when county prosecutors and their subordinates are involved in the investigation and enforcement of the State's criminal laws, they perform a function that has traditionally been the responsibility of the State and for which the Attorney General is ultimately answerable. In our view, the State should be obligated to pay the county prosecutors and their subordinates' defense costs and to indemnify them if their alleged misconduct involved the State function of investigation and enforcement of the criminal laws. [169 N.J. at 455.]

It is hard to fathom how it is not "in the best interest of the State" for the Attorney General to defend the very attorneys who conduct the day-to-day criminal business of this State, under his ultimate authority, when they are alleged to have done so unethically and risk being temporarily or even permanently prohibited from conducting that business on his behalf. Prosecutors play a unique role vis-à-vis the State when engaged in classic prosecutorial functions such as investigating, charging, and prosecuting violations of the State's criminal laws. Because such conduct is indisputably "a function that has traditionally been the responsibility of the State and for which the Attorney General is ultimately answerable[,]" ibid., it is in the State's best interest to have the OAG represent the attorneys who conduct that business on its behalf, and under its ultimate supervision and authority, when the allegations against the prosecutor stem exclusively from how they conducted that criminal business on the State's behalf.

The OAG is correct that, under N.J.S.A. 59:10A-3, its representation is "entirely discretionary." (Db18). But it neglects to acknowledge that its discretion is not unbridled. Gramiccioni, 243 N.J. at 305; In re: Vey, 124 N.J. 534, 543-44 (1991). Reviewing courts have rightly not hesitated to set aside agency decisions that are "'arbitrary, capricious, or unreasonable….'" Lavezzi, 219 N.J. at 171 (quoting Prado, 186 N.J. at 427). For example, the Supreme Court had little difficulty faulting the OAG in Gramiccioni for taking "too narrow an approach to the prosecutorial law enforcement function[s]" of a County Prosecutor, rightly calling it a "crabbed approach toward the provision of defense and indemnification …not in keeping with the thrust of Wright." 243 N.J. at 317-18; accord Lavezzi, 219 N.J. at 179-80 (finding arbitrary, capricious, and unreasonable an OAG decision to not defend a County Prosecutor when "the claim in th[e] case originated from an activity that was part of the Prosecutor's Office's performance of 'the criminal business of the State.'" (quoting N.J.S.A. 52:17B-106)).

Indeed, the OAG's unreasonableness is even more clearly on display given its advancing of a bright-line rule: it will not represent any attorney in any disciplinary action no matter how inextricably intertwined that attorney's conduct is with the primary responsibility of the Attorney General. Their rule would likely bar even their own Deputy Attorneys General from such

representation,[5] even if the Attorney General himself directed an action later challenged as violative of the RPCs.

In its brief to this Court, the OAG for the first time seeks to defend its decision to deny representation based on "a potential conflict" of interest, or because there may have been "a crime, actual fraud, actual malice, or willful misconduct." (Db21). None of these were bases for its denial in either of its final agency decisions. See (Pa2-3) (not citing N.J.S.A. 59:10A-2 or 59:2-10); (Pa5) (same). Regardless, AP Dirkin is not charged with a crime and there is no conflict; even if the OAE were to sustain a finding of one or more RPC violations, the Supreme Court would impose discipline, not the OAG. See (Db19-20) (and citations therein). Moreover, the OAG is free to obtain outside counsel to represent AP Dirkin in the event it feels that is the best course. See N.J.S.A. 59:10A-5 ("The Attorney General may provide for a defense pursuant to this act by an attorney from his own staff or by employing other counsel for this purpose.").

Simply put, representation here is in the best interest of the State, and the OAG acted arbitrarily, capriciously, and unreasonably in concluding otherwise. This Court must reverse.

[5] And if the OAG believes it could do so, that means its rule only applies to county prosecutors, which would be further evidence of arbitrariness.

iii. The common law compels a defense under the circumstances of this case. And if it doesn't, it should.

The doctrine of respondeat superior, in existence well before enactment of the TCA, is the "legal support" for the claim that the Attorney General has a common law obligation to represent AP Dirkin under the narrow circumstances presented in this case. (Db22); see (Pb44-46); Wright, 169 N.J. at 435 (citing McAndrew v. Mularchuk, 33 N.J. 172 (1960)). As noted, that doctrine remains viable in other contexts in that the TCA was enacted "in addition to and not in derogation of" the Attorney General's existing authority to represent and defend" State actors. N.J.S.A. 59:10A-6.

The OAG says that, before the TCA, the Legislature had imposed only a limited duty on it to defend "narrow categories of state employees." (Db22-23). While the OAG cites several now-repealed statutes, one that remains says otherwise. Listing "[t]he powers and duties of the Division of Law[,]" an arm of the OAG, N.J.S.A. 52:17A-4 provides in relevant part that the Division

> [a]ct as the sole legal adviser, attorney or counsel, notwithstanding the provisions of any other law, for all officers, departments, boards, bodies, commissions and instrumentalities of the State Government in all matters other than those requiring the performance of administrative functions entailing the enforcement, prosecution and hearing of issues as imposed by law upon them; and represent them in all proceedings or actions of any kind which

> may be brought for or against them in any court[6] of this State…. [N.J.S.A. 52:17A-4e (emphases added).]

Finally, the OAG ends its brief by remarking that "[a]n adverse disciplinary finding would be personal to Dirkin and impose no liability on the State." (Db25). In terms of monetary damages, it may be right. But once again, the OAG takes "too narrow an approach to the prosecutorial law enforcement function here." Gramiccioni, 243 N.J. at 317. What it neglects to consider is the non-financial consequences of a finding that an AP, in the course of conducing a criminal investigation and prosecution, violated ethical standards. Such a consequence could easily lead to financial ones when criminal defendants, now armed with a public reprimand (or worse) of an AP, file suit in civil court, where the OAG seems to concede it would then have to represent the AP. (Db8-9). And even the threat of having to individually defend against such actions risks keeping or driving away qualified lawyers from becoming prosecutors, an incalculable liability the OAG must surely wish to avoid.[7] This Court should take a less myopic view.

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[6] See generally In re Petition for Review of Op. No. 583 of Advisory Comm. on Prof'l Ethics, 107 N.J. 230, 232-34 (1987) (discussing this statute and noting representation before an Administrative Law Judge).

[7] This theme is well elaborated on by the County Prosecutors Association of New Jersey in its amicus brief, and so AP Dirkin need not say more here.

At bottom, when New Jersey's prosecutors enforce the State's criminal law by engaging in classic law enforcement functions, they act in the State's interest. Thus, when accused of committing wrongdoing in the very exercise of that engagement, the State should act in theirs. Because it refuses to do so, this Court must reverse.

Conclusion

For the reasons set forth herein and in AP Dirkin's appellant's brief, this Court should reverse the decisions of the OAG denying AP Dirkin representation and order it to defend and indemnify him in the ethics action and to reimburse him for all attorneys' fees and costs incurred to date.

Respectfully submitted,

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