19TH JUDICIAL DISTRICT COURT

FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

DOCKET NO: 652,283 **SECTION: 27**

THE LOUISIANA DEPARTMENT OF JUSTICE and JEFF LANDRY, in his official capacity as ATTORNEY GENERAL FOR THE STATE OF LOUISIANA

VERSUS

JOHN BEL EDWARDS, in his official capacity as GOVERNOR OF THE STATE OF LOUISIANA

ATTORNEY GENERAL JEFF LANDRY AND THE LOUISIANA DEPARTMENT OF JUSTICE POST-TRIAL MEMORANDUM

INTRODUCTION AND SUMMARY

This matter came before this Court for hearing on November 29, 2016, after the parties consented to an expedited hearing on declaratory judgment and injunctive relief. The claims arise from the Attorney General Jeff Landry and the Department of Justice's petition for declaratory and injunctive relief related to constitutionality of JBE Executive Order 2016-11 and Governor John Bel Edwards' reconventional demand for declaratory and injunctive relief relative to the Attorney General's constitutional authority and authority over appointment of counsel. Fifteen legislators also intervened, aligned with the Attorney General, challenging constitutionality of the JBE 2016-11 as a violation of the separation of powers, specifically the power reserved exclusively to the Legislature to make the laws. This Court heard arguments on exceptions filed by the Attorney General, and then deferred ruling on the exceptions until after the parties completed the full trial on the merits. Following a consolidated trial on both matters, this Court requested Post-Trial Memoranda summarizing the testimony and making closing arguments.

The Attorney General respectfully submits that he has met his burden of proving by a preponderance of evidence that JBE 2016-11 has the effect of law and is an unconstitutional

exercise of legislative authority. The Attorney General also met his burden of proving that the Order impinges on the authority of independent statewide elected officers and offices, in particular that of the Attorney General, and is therefore a violation of the diffusion of authority among executive branch officials and offices in the Louisiana Constitution. The Attorney General proved that the enforcement of the Order threatens the operations of the Department due to the Governor's withholding of $18 million in funds budgeted for departmental operations. This Court has previously enjoined gubernatorial overreach. The First Circuit Court of Appeal, affirming this Court, recognized both the separation of powers among the three branches and within the executive branch in *Hill v. Jindal*, 2014-1757 (La. App. 1 Cir. 6/17/15), 175 So.2d 988. This Court has also expressly recognized the Governor cannot make law with an executive order. The evidence proved that he has done so here, without any legislative delegation of authority and contrary to the procurement laws passed by the Legislature.

The Governor not only attempts to circumvent the Legislature, which rejected the language imposed across the executive branch in JBE 2016-11, but also asks this Court to re-write the State Constitution in order to avoid enforcement of the Constitution by the Attorney General, who was elected and pledged an oath to uphold it. The relief requested by the Attorney General is clearly justified and necessary to resume the constitutional balance of powers contemplated by the State Constitution. The relief requested by the Governor is not justiciable because it requests an advisory opinion and presents questions clearly committed to the voters and the Legislature. The Governor's interpretation of the law is also plainly wrong. The Governor appears to read *himself* into the constitutional provision naming the Attorney General Chief *Legal* Officer of the State. (See Governor's Memo in Opposition to the Attorney General's Exception, stating on page 2 "that the Attorney General is challenging the authority of the *Governor* direct legal proceedings of the State"). He appears to miss the language in the Constitution that states the Attorney General is the Chief Legal Officer. There is no language in the Constitution or the Revised Statutes that commands, permits, or authorizes the Governor to direct legal proceedings of the State. The Governor also offers a self-serving and legally incorrect interpretation of statutes involving the appointment of counsel and approval of legal services contracts. The Governor submitted *no evidence whatsoever* to support his contentions relative to his or the Attorney General's constitutional authority or his interpretation of laws

related to appointment of counsel. This Court should dismiss the Governor's claims as both non-justiciable and legally wrong.

I. THE ATTORNEY GENERAL MET HIS BURDEN OF PROOF THAT JBE 2016-11 IS UNCONSTITUTIONAL.

A. Declaratory Relief is Proper and Will Resolve the Conflict with Finality.

1. Standards for declaratory relief

A declaratory judgment action is designed to provide a means for adjudication of rights and obligations in cases involving an actual controversy that has not reached the state where either party can seek a coercive remedy. The Code articles on declaratory judgment are to be liberally construed and administered. Due to its nature, declaratory relief makes it possible to adjudicate a grievance at an earlier time than would otherwise be allowed. The purpose of the relief is to settle and afford relief from uncertainty and insecurity, at times, before damages arise and the need for traditional remedies occurs. *See* La. Civ. Code art. 1881; *American Waste & Pollution Control Co. v. St. Martin Parish Police Jury,* 627 So.2d 158, 162 (La. 1993). It is available when the action meets the rules governing ordinary proceedings and the grounds for discretionary refusal to grant the declaration do not exist. La. Civ. Code art. 1876; *Declaratory Judgments in Louisiana,* 33 La. Law Rev. 127 (1972). *See also*, *Code v. Dept. of Public Safety and Corrections,* 2011-1282, 2011-0601 (La. App. 1 Cir. 2012), 103 So.3d 1118.

The jurisprudence is well-settled that a declaratory judgment should not be rendered if a contingency could change the existing facts in a case. *Code*, 2011-1282 at 12; 103 So.3d at 1127; (*citing American Waste,* 627 So.2d at 162). In *Code*, however, the First Circuit confirmed the possibility that a rule may be amended (in this case the Order) but the amendment may not moot a controversy. The appeal court in *Code* rejected the contention that because administrative rules could be amended, the controversy was not appropriate for declaratory relief, holding that the issue was broader than the specific wording of the current drug protocols at issue in the case. *Id.* at p. 12-13, 103 So.3d at 1127-28. Moreover, the DPSC sought a declaration that the protocols did not constitute rules, which was a request for a ruling that would terminate a major portion of the controversy in the case and obviate future challenges to DPSC's protocols in the future. *Id.* at p. 13, 103 So.3d at 1128.

In this case, the Governor could amend his executive order; however, he has decisively refused to do so and, even if he did, it would not moot the controversy raised by the Attorney General because the constitutional violation is capable of repetition. *See Cat's Meow, Inc. v.*

City of New Orleans, et.al., 98-0601 at p. 21-22 (La. 1998), 720 So.2d 1186, 1194 (amending may not moot controversy). In addition, the Governor has been enforcing the Order in contracts since it took effect on July 1, which has created collateral consequences in contracts even if he amended the Order. *Id.* (discussing collateral consequences exception to mootness doctrine.)

A judicial decision regarding whether the Governor has authority to issue and enforce an executive order in which he creates extra-statutory classes for protection under anti-discrimination law would resolve this matter and obviate future challenges arising from or related to the Order, including collateral consequences for contractors. The declaration would render unenforceable any contract provisions previously required as a result of the Order and would resolve the legal impasse between the Governor and the Attorney General.

The pleading and the testimony at trial demonstrate this is a discrete controversy over the effect and enforceability of the Executive Order, which is being enforced across the entire executive branch. The Attorney General not only challenges the Order because he is the constitutional Chief Legal Officer of the State, who has a duty to uphold and see that the Constitution is enforced, but also because he and the Department of Justice operations are directly impacted by the Governor's actions. This Court can see that enforcement of the Order has had consequences both immediate in the employment and contracting arenas, and will have further consequences well into the future as a result of the mandate regarding contract terms. A declaratory judgment would resolve questions of enforceability and liability arising from the Order now and forever.

2. The Attorney General demonstrated that a justiciable controversy exists.

Although the standards for a declaratory judgment are more permissive, a court still may refuse to render a declaratory judgment or decree where it would not terminate the uncertainty or controversy giving rise to the proceeding. Virtually every witness who testified at the hearing confirmed that a justiciable controversy exists related to the enforcement of the Order.

Paula Tregre, the Interim Director of State Purchasing, testified that the Order is being enforced by the Office of State Purchasing (OSP) in new contracts, amendments, and cooperative endeavor agreements among others. Ms. Tregre testified, as did other witnesses, that contracts will not be approved if they do not have the *ultra vires* language required by the Order. Lauren Barbalich, a paralegal for the Attorney General who manages professional legal services contracts, testified that the Attorney General and Kyle Duncan, an attorney whose contract with

the Attorney General's Office is to assist in a large, complex challenge to seven abortion laws, both objected to the inclusion of the language but cannot obtain approval of the contract from the Commissioner or OSP without the mandated "sexual orientation and gender identity" language. Both the Governor's witnesses, Mr. McGimsey and Mr. Scott Johnson, confirmed a large number of contracts have been stalled by the disagreement between the Governor and the Attorney General over the legal effect and enforceability of EO 2016-11.[1]

Mr. McGimsey, the Executive Counsel to the Commissioner, further testified that OSP approval of the Interagency Agreement between the Office of Risk Management and the Attorney General's office is being withheld at the direction of the Governor's Office because of the Attorney General's refusal to include the *ultra vires* EO language. Mr. McGimsey confirmed that "it was his understanding" that in addition to directing OSP not to approve this agreement, the $18 million in funds budgeted for the Attorney General to operate the Risk Litigation Division has also been withheld at the direction of the Governor's Office, which clearly creates a significant deficit in the Attorney General's operating budget and places people's jobs in jeopardy.[2]

And finally, Cameron Henry, Chairman of the House Committee on Appropriations, testified that at a Nov. 18, 2016, joint oversight hearing of the Senate Finance and the House Appropriations Committee, the House committee refused to approve a contract amendment (submitted as required by La. R.S. 42:802), because one of the amendments included the *ultra vires* language mandated by the Executive Order.[3] Mr. Henry confirmed that the Committee was looking to this Court to rule on the effect and enforceability of the language, which was being imposed at the direction of the OSP. Mr. Henry also confirmed that 6,700 people have health care coverage resulting from these State contracts, which originated in January 2016, before the Order was issued. Their coverage is threatened by the Governor's Order. As confirmed by Paula Tregre, the OSP believes it lacks discretion to approve the contract

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[1] Mr. Johnson testified somewhere between 50-100 contracts were being held. Although this number was not verified by any documentation, the Attorney General certainly does not dispute that contracts are not being approved due to their rejection by OSP for failure to have the language or due to rejection by the Attorney General for its inclusion.

[2] *See* 2016 La. Acts 47 (the Supplemental Budget bill), showing IAT funds for the Attorney General's Office included in the Office of Risk Management appropriations at page 4. http://www.legis.la.gov/legis/ViewDocument.aspx?d=1013191. The budget of the Attorney General includes $17,937,726 million from ORM to provide legal representation, which funds 172 authorized position. *See* p. 31 of House Bill 1 of the 2016 Regular Session. http://www.legis.la.gov/legis/ViewDocument.aspx?d=1013096

[3] All three contracts were submitted into evidence by the Intervenor as Intervenor 1, *in globo*. Only one of the contracts was voted on at the hearing. Two other contracts were submitted for review, but due to the vote on the first one neither received a hearing. This Court rejected a DVD of the legislative hearing during trial; however, the hearing itself is a matter of public record and this Court may take judicial notice of judicial hearings. The Governor, while objecting to the DVD, cited and linked to the hearing in his Memorandum in Opposition to the Attorney General's Reconventional Demand.

amendments without inclusion of the disputed language due to the mandate of the Order, even in this contract which resulted from a public bid award and which predates the effective date of the Order.[4]

The law regarding justiciability was thoroughly briefed previously by both parties. The Attorney General submits that he has met his burden of proving a justiciable controversy exists that will be decisively resolved by a final judgment on the legal effect and enforceability of the Order. It is undisputed the Order went into effect with regard to employment provisions when it was issued in April and on July 1, 2016, with regard to the contract provisions. It is undisputed that the Governor believes he has the authority to require the entire executive branch of State government to comply with his Order. Its enforcement, therefore, has immediate effects on employment policies, supervisor training, working conditions and conduct in the workplace, as confirmed by the Attorney General's Human Resource Director Sandra Schober, and has precipitated an impasse between the Governor and the Attorney General with significant and immediate financial and personal consequences regarding contracting.

3. *The Court has discretion to craft appropriate relief and may enjoin all or part of the Order.*

The relief requested by the Attorney General requests a declaration that the Order is an exercise of unconstitutional authority that violates the separation of powers among the three branches, as well as those distributed in the State Constitution to independent Statewide elected officials, agencies, boards, and commissions (including the Civil Service Commission). The Attorney General submits that enjoining the Order in its entirety is proper because the Order reflects the actual constitutional violation. This is not a law, and therefore no statutory presumption of severability exists. Nor does the Order itself contain a severability clause. The Attorney General submits that the entire purpose of the Order was to create *legal* protections for classes of individuals not currently included in statutorily protected classes, and therefore the entire Order reflects an *ultra vires*, unconstitutional action of the Governor.[5] The Petition further requests *specifically* that the Court enjoin the Governor and any officer or employee under his

[4] The Governor's refusal to allow amendment of the contracts exposes the State to liability as well. It is highly probable that the State will be sued if 6,700 state employees lose or in any manner are detrimentally impacted in their health coverage due to his insistence upon inserting the EO language in these pre-existing contracts. It is somewhat baffling that the Governor attempts to foist this threat upon the Legislature in an effort to *force* legislators to approve legal terms they rejected when they were proposed as laws. The Governor clearly controls the Order and the Division of Administration staff's interpretation of it, and therefore has the power to avoid this result. The fault for any adverse consequences falls squarely on his own shoulders. More than anything, this event demonstrates the Governor's motives in imposing his "policy" agenda as having the force of law.

[5] Mr. Block's questioning of Mr. Sunseri demonstrates the Governor believes the Order protects a class of individuals who previously were not protected. It is impossible to square that position with the Governor's denials that the Order has the effect of law or that it doesn't impact private rights.

direction or control from enforcing the Order as it relates to "gender identity." Obviously, if the entire Order is enjoined, the injunction would necessarily include this precise language.

The focus of the Attorney General's case and the proof at the trial focused specifically on the "gender identity" language in the Order. The petition and the pleadings focus on the meaning and effect of this new ideology being imposed in state employment relationships and contracts. The term "sexual orientation" suffers from a similar legal defect – it is clearly not included within the statutory term "sex" under the state or federal anti-discrimination laws – nevertheless, this phrase was not the focus of the petition. Indeed, *any* new extra-statutory class, classification, or category created by the Order would suffer from the same legal defect as the gender identity language. But the focus of the case was on gender identity because its inclusion has much more far-reaching effects on state law, employment policies and state contracting.

Indeed, the Governor has made it very clear the punishment for refusing to include this language is the contractor is barred from contracting with State Government. The Attorney General suggests to this Court that *any* element of the Order which creates an extra-statutory condition for contracting with the State, the refusal of which punishes a private party by disqualifying him/her/it from contracting with the State, is patently unconstitutional and should be enjoined. State law provides a process for debarring or disqualifying a party from consideration for award of a state contract, which requires *cause* and also requires notice and an opportunity to be heard. The Governor's argument that "no one has a right to a State contract" does not mean he has the authority to issue an Executive Order, the effect of which is to arbitrarily and unilaterally debar any party who disagrees with his "policy." *See* La. R.S. 39:1556(18 (defining debarment) and 39:1672 ("this section applies to debarment for cause from consideration for award of contracts"). The Attorney General has previously briefed the First Amendment implications of the Governor's mandate. Because it is not a law, it clearly amounts to enforcing a political ideology by Executive Order and punishing those who may disagree by disqualifying them from doing business with the State or threatening them with adverse employment action.

This Court has both the authority and discretion to fashion appropriate relief, and therefore the Court may fashion that relief as broadly or narrowly as it deems appropriate. The Attorney General suggests that enjoining the Order in its entirety *is* appropriate. Some elements of the Order simply re-state protected classes that are covered already under state and federal

anti-discrimination laws; therefore enjoining the order in its entirety would serve the purpose of prohibiting enforcement of *any* extra-statutory elements of the Order, all of which suffer from the same constitutional defect as the "gender identity language," *i.e.,* they violate the separation of powers. Alternatively, the Court may craft narrower relief that would enjoin enforcement of the Order only as to the "gender identity" language, which was the focus of the Attorney General's case.

B. The Law contemplates "Sex" as a fixed, objectively determinable characteristic of a person.

1. State and federal law do not cover "gender identity."

The meaning of the term "sex" is a matter of law and has previously been thoroughly briefed by the Attorney General in his Memorandum in Support of Preliminary Injunction. In addition, at trial the Attorney General offered the uncontradicted testimony of J. Douglas Sunseri, an employment lawyer who was admitted by the Court as an expert in employment law and policy. Mr. Sunseri confirmed under State and federal law "gender is determined by biology" and "it's immutable." Gender is not determined under Title IX or Title VII by a subjective, emotional feeling. "Guidance" issued by the federal Departments of Justice and Education relative to Title IX[6] as well as EEOC guidance relative to Title VII purporting to interpret the term "sex" to include "gender identity" have been enjoined by a federal court in Texas.[7] Other efforts of the federal Department of Education to include gender identity within the purview of Title IX have also been stayed pending review by the United States Supreme Court of *Grimm v. Gloucester County Schools,* No 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016).

The Governor argues that his Executive Order establishes "internal administrative policy," but the *facts* show otherwise. The plain language of the Order goes beyond internal administrative policy and directs officers and agencies outside his constitutional control. He offered no testimony to contradict Mr. Sunseri's testimony that the Order is contrary to current law and has real legal consequences. The Governor also failed to offer any explanation in brief or in the trial to explain what clear and unambiguous delegation of legislative authority exists

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[6] It is notable that the "dear colleague letter" issued by DOJ and DOE was 8 pages summarizing its expectations regarding what it means not to discriminate based upon gender identity. http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. DOE also produced guidance titled *Examples of Policies and Emerging Practices for Supporting Transgender Students,* which is 18 pages. http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf. This guidance is instructive because it provides detailed insight into what these agencies believe it means not to discriminate based upon gender identity. JBE 2016-11 would presumably embrace a similar interpretation, only it more expansively applicable across State government services, contracts, and to public and private employers through their contracts.

[7] *See*, Texas, *et.al.*, v. United States, 7:16-cv-00054-) (N.D.Tex.)

allowing the Governor to issue a "policy" that expands statutorily-created anti-discrimination laws. He relies only upon the argument in his brief, in which he contends his authority is derived from (1) his constitutional status as chief executive officer and, oddly, his limited appointment powers under section 5(H); (2) his general authority to issue executive orders; or (3) his authority to implement executive orders through his Commissioner of Administration. These arguments have been previously addressed by the Attorney General. Nothing new was offered at trial to justify his expansion of the law, nor has the Governor provided any reference to an *unequivocal delegation* relative to employment law or contract law and procedures.

The Governor has argued that he has not created law, but rather is creating "policy." Calling it "policy" instead of "law" does not save it. Laws, in fact, *are codified policies*. Anti-discrimination laws *and* policies *regulate conduct*. This so-called "policy" does exactly that, as confirmed by both Mr. Sunseri and by Sandra Schober, the Attorney General's Human Resources Director, who was qualified as an expert in human resource management.

Regardless of what he *labels* it, the Governor clearly is expanding statutory law to create new protected classes and/or categories not currently covered. Even a "policy" of this nature requires *some* legal foundation. The Governor's authority to issue executive orders is a not a delegation to make new laws. It allows him to issue executive orders to further execution of *existing* laws or to implement specific, *unambiguously delegated* administrative authority. Rick McGimsey, who had a lengthy (17-years) career in the Attorney General's Office and is a former Civil Division Director who now serves as the executive counsel to the Commissioner of Administration, was listed as a witness for the Governor but did not offer any insight into or justification for the Order. And although he had many years of experience with sSate contracting and constitutional challenges, he offered no legal justification for the contracting provision. He acknowledged he had no employment law experience and did not contradict any of Mr. Sunseri's testimony.

Scott Johnson, who is the general counsel for the Division of Administration, likewise offered no evidence to contradict the testimony of Mr. Sunseri.[8] Moreover, Mr. Johnson has only worked in State government for two years in the Office of General Counsel to the Division

[8] Mr. Block asked Mr. Johnson if anyone complained to him about the Order. On cross, Mr. Johnson acknowledged he didn't write the Order and is not in the Office of the Governor and therefore he would not be the likely person to receive complaints. In any event, whether anyone complained to Mr. Johnson or anyone else is irrelevant to the legal question of constitutionality of the Order. Moreover, it is evident from these proceedings that the Attorney General has objected to the enforcement of the Order.

of Administration. Mr. Johnson offered no legal justification for the Order. And although Ms. Cheryl Schilling, who is the Human Resources Director at the Division of Administration, was subpoenaed by the Attorney General and therefore was present all day, the Governor did not call her to contradict Ms. Schober's testimony.

Thus, Scott Johnson and Rick McGimsey, both attorneys and both witnesses for the Governor, did not explain from where the authority of the Governor is derived allowing him to issue a "policy" that expands statutory anti-discrimination protections.

2. *"Gender identity" is an ideology that conflicts with existing law and policy and exposes the State to liability.*

The Attorney General's prior briefing discusses how "gender identity" conflicts with existing law and anti-discrimination policies, which are implemented as a result of thorough vetting by both houses of the Legislature. Mr. Sunseri and Ms. Schober's *uncontradicted testimony* described how the "gender identity" language in the Order is problematic both in the delivery of services and in the actual implementation of human resource management and employment laws.

Mr. Sunseri testified gender identity as a protected class creates a situation with "no middle ground." Individuals are protected by the *statutory* law based upon their biological characteristics, but a male who "identifies" as female can claim rights conferred by the Order. In the example provided related to bathrooms, the transgender female (a biological male) may demand access to the women's bathroom and the employer is faced with conflicting "rights." No matter what choice the employer makes, it violates the "rights" granted by the Order or statutorily-created rights. The Governor's Order does not expressly discuss bathrooms, but it covers employment and the delivery of services generally, and certainly the use of sex-segregated facilities falls within both categories. This example, as Mr. Sunseri testified, is not merely hypothetical. It is the factual basis of the suit now pending before the United States Supreme Court in *Grimm.* Mr. Sunseri also cited to EEOC litigation involving gender identity where a transgender individual sued over colleagues in the workplace who refused to refer to him by his preferred pronoun. Although lawsuits have not yet been filed here, *preventing* them is one of the objectives of this declaratory action suit. One purpose of the declaratory judgment is to intervene *before* they proliferate. Mr. Sunseri's discussion of these cases demonstrates such conflicts are likely to occur. Ms. Schober's testimony confirms that she has to implement

workplace policy *now* to avoid them so that people know what conduct is expected of them in the workplace.

Mr. Sunseri also discussed the conflict of duties if a person goes to the Department of Motor Vehicles and demands a driver's license reflecting their "gender identity" rather than their biological gender. Based on the unqualified prohibition in the Order, a State employee is prohibited from refusing because that would be "discriminating" in the delivery of services and benefits, and yet the law requires a driver's license to reflect biological sex. If the employee refuses, the Order exposes the employee to an adverse employment action for discrimination in provision of services and the State is exposed to liability for refusing to issue the license. Again, this is not merely conjecture. Mr. Sunseri's uncontradicted testimony established the Order gives a party a "foothold in the courthouse."

The Governor attempts to discount the effects of the Order because there was no testimony that current employment claims or lawsuits have been filed, but he misses the critical point that was made concisely by Mr. Sunseri – *the Order gives the plaintiff a foothold in the courthouse* by expanding the protected classes to include the category of "gender identity." *The Order* is the basis for the cause of action. Notably, EO 2016-11 does *not* contain the same type of savings clause as federal executive order 13672.

Declaratory judgment relief exists precisely for this type of situation – to prevent such claims from ever arising. *All that is necessary to justify the relief is for the Attorney General to demonstrate the Order is intended to have the effect of law for it to be unconstitutional and enjoined* – the Attorney General does not and should not have to wait for claims to be filed to enjoin unconstitutional acts of the Governor.[9]

3. The federal executive order is entirely different from JBE 2016-11.

At trial, the Governor's counsel attempted to equate JBE 2016-11 with federal executive order 13672, issued by President Obama, amending federal EO 11246. Moreover, the Governor clearly implied the Attorney General's actions in refusing to approve language imposed by JBE 2016-11 is inconsistent with his having approved contracts referencing the federal executive order. Every contract submitted by the Governor, however, contained critical limiting language stating "*as applicable*." Thus, the federal order to the extent it too is an unconstitutional exercise

[9] Acting to stop the unconstitutional actions of the Governor could be one of the Attorney General's most important duties. The Governor exercises a significant amount of power and influence, as evidenced by his control over the State Procurement Office and the Division of Administration. Both private contractors and individual employees would be easily intimidated by this power and are unlikely to challenge it. This is precisely why the people have established the Attorney General as an independent statewide elected official in charge of legal matters for the State.

of executive authority, would be unenforceable and therefore *inapplicable*. Moreover, the federal order has *significant* differences:

- Section 3 requires the Department of Labor to issue regulations to implement the Order.[10]
- Section 4 contains a *lengthy* savings clause, which states:

> (a) nothing in this order shall be construed to impair or otherwise affect (i) the authority granted by law to an agency or the head thereof; or (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
>
> (b) This Order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

- Section 5 limits its application to on or after the effective date of rules promulgated by the Department of Labor under section 3 of the order.

JBE 2016-11 contains *no* similar these provisions. Although the Governor's counsel attempted to equate the two orders as exactly the same, they very clearly are *not* the same. In fact, they are not remotely the same in their legal effects. Mr. Sunseri read the clause to the Court in trial to emphasize this point and found it significant that JBE 2016-11 has no similar clause. Nothing in the Governor's Order disclaims a cause of action, nothing in it disclaims it as a basis for creating a right or benefit. The federal order very clearly disclaims any intent to create rights, benefits, or any substantive or procedural cause of action. It expressly states that it is not enforceable in court against *any party* for *any claim*. The Governor did not testify, nor did he produce any other witness who even attempted to disclaim these legal effects of the Order.

Executive Order 11246 does not create a private right of action for persons alleging employment discrimination. *Stefanovic v. University of Tennessee*, 935 F. Supp. 944, (E.D. Tenn. 1996); *Utley v. Varian Associates, Inc.*, 811 F.2d 1279, 1288 (9th Cir.), *cert. denied*, 484 U.S. 824, 108 S. Ct. 89, 98 L. Ed. 2d 50 (1987); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 822 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187

[10] As discussed in the Attorney General's prior briefs and herein in Section I.E, there is no delegation of authority pursuant to which the anti-discrimination provisions can be expanded. The Department of Labor attempted to expand on the definition of the term "sex" in existing anti-discrimination laws, but these rules have been enjoined by a federal district court in Texas, *et.al.*, v. United States, 7:16-cv-00054-) (N.D.Tex.) The Court's August 21, 2016, Order granted a nationwide injunction. (Document No. 58) In a subsequent clarification, the court reaffirmed the broad scope of the injunction, stating, "Both Title IX and Title VII rely on the consistent, uniform application of national standards in education and workplace policy. A nationwide injunction is necessary because the alleged violation extends nationwide. Defendants are a group of agencies and administrators capable of enforcing their Guidelines nationwide, affecting numerous state and school district facilities across the country. *Texas*, 809 F.3d at 187–88.

(1976); *Weise v. Syracuse University*, 522 F.2d 397, 411 (2d Cir. 1975). It is well established that Courts will dismiss claims brought under Executive Order 11246. *Stephanic*, 935 F. Supp. At 947.

By mandating an anti-discrimination clause which protects against discrimination on the basis of gender identity, the Governor is unconstitutionally creating law in the State of Louisiana. This was evidenced by the line of questioning by attorneys for the Governor at trial. When questioning Mr. Sunseri, the Governor's attorney stated and the expert agreed that without JBE 2016-11, there would be no protection under state law for discrimination based on gender identity.

C. The Order Has the Effect of Law and Violates Separation of Powers and the Independent Authority of Constitutional Officers and Entities.

The Attorney General previously cited this court to *Louisiana Federation of Teachers v. Jindal*, 2013-0120 (La. 5/7/13), 118 So.3d 1033, in which the Louisiana Supreme Court examined SCR 99 approving the MFP formula in the 2012 Session. The Court was required to examine the resolution to see if it "had the force and effect of law," which would have rendered it unconstitutional.[11] In doing so, the Court acknowledged the lack of jurisprudence on this issue. The Court concluded the appropriate method to determine whether the resolution was intended to have the force and effect of law was to look at the language in the resolution. The Court reviewed the *content* and *substance*. The Court especially emphasized "the words "will" and "shall" "because these are *indicators not of aspiration, not of option, but of requirement*." *Id.* The Court further stated that a legislative instrument which *in mandatory terms constricts or compels action is intended to have the effect of law. See* 20 P. Raymond Lamonica & Jerry G. Jones, LOUISIANA CIVIL LAW TREATISE: LEGISLATIVE LAW AND PROCEDURE § 7.1, p. 129 (2004) ("The ultimate purpose of legislative text to be given the effect of law is not simply to communicate ideas or information but to *regulate behavior.*")." *Id.* [citations omitted *quoting* La. R.S. 1:3 ("The word 'shall' is mandatory and the word 'may' is permissive.")].

JBE 2016-11 should be reviewed in the same manner – it contains these mandatory terms: "*no* state agencies, departments, offices, commissions boards, entities or officers of the State …*shall*…*in any manner*" and "*all* contracts for the purchase of services …*shall* be awarded without discrimination on the basis of ….gender identity." It further mandates that "*all* such

[11] The Supreme Court noted the specific constitutional provision at issue with regard to whether it had the effect of law was Article III, § 2(A)(3)(a). Although that section is not at issue in this case, the case is analogous because the Governor has no authority to make law with an executive order. The case provides a reasonable and analogous methodology for analyzing whether the Order has the "effect of law."

contracts *shall* include a provision… *not* to discriminate on the basis of … gender identity." And Finally, *all state agencies, departments, offices, commissions, boards, entities, or officers of the State of Louisiana,* or any political subdivision thereof, are … *directed* to cooperate with the implementation of this Order." (This portion in Section 6 appears by its terms to extend to the *entirety* of State Government and officers of *all three* branches.)

Not only does the plain language of the Order show that it *both* restricts and compels action, but the testimony of Ms. Tregre and evidence in the case proved beyond any doubt that the Order is being enforced as having the effect of law. No party has been able to get a contract approved without the inclusion of the language, at least of those contracts which require approval by the OSP. And the Governor's counsel confidently and unapologetically admitted the consequence for refusing to include the language is that a contractor is effectively disqualified or barred from contracting with the State. Ms. Schober and Mr. Sunseri both testified the employment provisions are mandatory and took effect immediately upon issuance of the Order.

The Order is clearly intended to provide legal protections for classes or classifications that have been expressly rejected by the legislature *every year for the past five years*. The mandatory language combined with the Governor's *express* admitted rejection of the Attorney General's Opinion stating the Order could only be aspirational clearly proves he intends it to and it does have the effect of law.

Mr. Henry's testimony also supports this conclusion. Mr. Henry stated that the House Appropriations and Senate Finance committees were advised in the hearing that refusing the language would put the State Procurement Office "in a difficult position" because they have been instructed to follow the Order. Mr. Henry noted that he felt that he and the Committee were being put in a difficult position by the Governor, who was refusing to back down. The Governor refused to back down, the testimony shows, even though 6,700 people are insured through these contracts and these were amendments to contracts that pre-dated the effective date of the Order. The Governor's directives, both in the language of the Order and to officers under his direction and control, reveal his intent that the Order has the effect of law.[12]

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[12] Although a DVD and transcript of the legislative hearing was offered in evidence, the Court sustained the Governor's counsel's objection. Nevertheless, the hearing is a matter of public record and this Court may take judicial notice of it. A court may take judicial notice of legislative records where preserved, as they are a matter of public record. *See State Farm Mut. Auto. Ins. Co. v. U.S. Agencies, L.L.C.,* 2005–0728 (La. App. 1st Cir.3/24/06), 934 So.2d 745, 748; *See also Herman, Herman, Katz & Cotlar, L.L.C. v. State ex rel. Blanco,* 2008–1337 (La.9/19/08), 990 So.2d 737, 739 n.1. The Governor, while objecting to the admission of the transcript and the DVD, cited to the internet link to the hearing in his own supplemental reply brief filed the Monday before the hearing in support of his own reconventional demand.

This Court is becoming an expert on Executive Order litigation – it needs no further briefing on the law and has previously recognized both the separation of powers between the branches and among different constitutionally established officers and offices. The Governor is making law with this Executive Order, which he cannot do without violating the legislative separation of powers. Moreover he cannot mandate that Constitutional offices and officers not under his direction and control comply with it. His effort to enforce his ideology, *regardless of how right he believes the cause*, violates separation of powers *between* the branches and *within* the executive branch itself.

D. The Order Restricts the Exercise of Constitutionally-Protected Rights Without Due Process of Law.

Mr. Sunseri and Ms. Schober both provided uncontradicted testimony regarding the ambiguity of the term "gender identity." Mr. Sunseri testified there is no common agreement as to what the term means; that no clearly defined group of traits has been defined or can be defined, and that a sub-category of "gender identity" is gender *fluidity*. He exposed the difficulty for a human resource professional to determine who falls within the protected class. He referenced the definitions provided in the Attorney General's brief discussing the ambiguity of the term and noted that all the definitions were different and included male, female, and no gender. Thus, "from an HR perspective, it's a moving target," he stated. He also testified that with transgender rights, there "is no middle ground." Transgender rights, within the fluid and broad meaning of "gender identity," conflict with the rights of other individuals based upon their biological sex. Mr. Sunseri emphasized that employers need to understand legal expectations and need them defined with "not a lot of ambiguity." Sex, race, national origin, for example, are "pretty well-defined" but "gender identity" is not. He unequivocally stated, "it is unworkable and impractical to implement."

Mrs. Schober agreed and testified she had no idea how to implement the Order. Her testimony substantially corroborated Mr. Sunseri's from the perspective of a human resource expert and manager having to implement anti-discrimination policies in the workplace from day to day. She testified that she had no guidance and no idea what was expected or how to implement it. She confirmed the likelihood of competing claims based upon competing "rights."

The language is vague and *all* definitions assume a meaning that essentially *defies* definition, further demonstrating the point Mr. Sunseri made that gender *fluidity* is *part* of the concept. *Every* meaning, even the one acknowledged by the Governor in his first memo in

opposition, assumes a *subjective*, *fluid* psychological concept of gender based on feelings that may differ from one's biological gender.

The Attorney General previously briefed the constitutional standards applicable to a *law*. This Order has the effect of law, but lacks any of the due process that accompanies passage of a law. It lacks definition, but even if contained one the definitions are intentionally vague and exceptionally broad. The definition of gender identity, and indeed the purpose of the movement, is to remove what advocates consider to be the "social construct" of gender.[13] The depth of regulatory conduct implicated by prohibiting discrimination based upon "gender identity," as Mr. Sunseri testified, even reaches such basic speech as pronoun usage and privacy rights related to access to intimate facilities.

Anti-discrimination laws necessarily restrict civil liberties by *restricting* and *policing*, though the workplace and elsewhere, otherwise constitutional conduct. The effort to provide protected class status under anti-discrimination laws based upon "gender identity" attacks *fundamental*, ordinary, and for many people sincerely held religious beliefs about what defines us as man and woman. Thus, the effect of this Order is that it restricts the civil liberties embraced by the First Amendment regarding exercise of fundamental rights of freedom of speech, association, and religious expression. This Order is cannot even be properly analyzed using constitutional standards of scrutiny because *no legislative record* exists from which to determine whether it meets a "compelling state interest." Due process demands some legitimate legislative process beyond the arbitrary exercise of the Governor's pen when civil liberties are restricted.

E. Even if Some Legal Grounds Existed to Justify this "Policy," It Would Have To Be Promulgated.

The Governor has not produced any legal delegation of authority that grants him power to define anti-discrimination policy or law inside the executive branch. With regard to terms and conditions of employment, the Civil Service Commission has exclusive constitutional authority to define the terms and conditions of employment within the classified civil service. The Governor has no authority over the terms and conditions of employment of unclassified employees who serve at the pleasure of other constitutional officers, such as the Attorney General, which is constitutionally exempt from the classified civil service and whose staff is composed entirely of unclassified employees. The Louisiana Constitution is fundamentally

[13] See footnote 22 of the Attorney General's Memorandum in Support of Motion for Preliminary Injunction.

structured such that it contains *limitations*, not grants, of power. *Louisiana Fed'n of Teachers v. State*, 2013-0120 (La. 5/7/13), 118 So. 3d 1033, 1050. And unless *limited* by the Constitution, the Legislature *retains* the plenary and exclusive power to legislative.

The Governor has offered no legal justification to encroach on the authority of the Attorney General's management of his staff and authority to establish terms and conditions of employment in any manner not otherwise inconsistent with state or federal law. In his Sur-Reply Memo in Opposition to Petition for Injunctive Relief, he offers a Civil Service rule to support his argument that Civil Service authority is not exclusive.[14] The rule he cites, however, shows the Commission actually exercising its constitutional authority by delegating authority of the Commission. Notably, that power is directed to *Agencies, not to the Governor*.

In one brief, the Governor argues that no law reserves the right to define anti-discrimination "policy" exclusively to the legislature.[15] This statement demonstrates his fundamental misunderstanding of the State Constitution. If the legislative power has not been limited in the Constitution by granting it to another, *then it remains exclusively with the Legislature*. The Governor cites to no law, rule, or constitutional authority that justifies his Order and demonstrates a fundamental lack of understanding of the structure of the State Constitution.

With regard to contracts for services, a number of laws prohibit the Governor from unilaterally implementing this "policy," even if he could demonstrate some legal basis for creating it. The Louisiana Revised Statutes in Title 39 contains the Procurement Code, and expressly provides the boundaries of authority for the Commissioner, Chief Procurement Officer and the Office of State Procurement. Under La. R.S. 39:1561(A), the Commissioner of Administration has the authority *and* responsibility to promulgate regulations governing the procurement of services and professional, consulting, or social services required to be procured by the State. The Legislature has also directed in La. R.S. 39:1587(A) that regulations promulgated by the Commissioner in accordance with the Administrative Procedures Act "shall govern all procurements by all governmental bodies," with very limited exceptions not applicable in this matter. Pursuant to La. R.S. 39:1564, the Chief Procurement Officer may

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[14] See, Sur-Reply Memo in Opposition to Petition for Injunctive Relief at p. 3, stating "*your agency* has the power…" It is also notable that this rule does not say an agency can set extra-statutory anti-discrimination law. it says an agency can establish terms for "work performance and work behavior."

[15] See, Memo in Opposition to Petition for Injunctive Relief and Declaratory Judgment, on p. 9, stating "[T]he Louisiana Constitution does not grant exclusive authority to the legislature or any other constitutionally created entity to set anti-discrimination policy in state government or in contractive procedures."

adopt rules governing only *internal procedures* of the central purchasing agency. With regard to the actual procurement of services, including professional, consulting, and social services need by the State, the Chief Procurement Officer is confined to regulations issued by the Commissioner. Both Rick McGimsey, the Commissioner's Executive Counsel, and Paula Tregre, the Interim Chief Procurement Officer, stated they were unaware of any rules existing or being promulgated relative to the implementation of JBE 2016-11. A review of the Louisiana Administrative Code reveals no changes have been made corresponding to the mandates in the Order.

If the Governor could identify some legal basis for issuing what he characterizes as "administrative policy," the law clearly shows this "policy" meets the definition of rule and would therefore require promulgation. A rule is defined in the La. R.S. 49:951(6). It means:

> [E]ach agency statement, guide, or *requirement for conduct or action,* exclusive of those regulating only the internal management of an agency and those purporting to adopt, increase, or decrease any fees imposed on the affairs, actions, or persons regulated by the agency, *which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. ...it includes, but is not limited to, any provision for fines, prices, or penalties,* the attainment or loss of preferential status, and the criteria or qualifications for licensure or certification by an agency. *A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class.*

JBE 2016-11, with regard to contracting clearly contains a requirement for both conduct and action that imposes extra-statutory employment conditions on private employers in the conduct of their entire business. It applies generally to the provision of services. And it contains a significant penalty - any contractor who rejects this interference of State in its private business affairs is barred from contracting with government. The Attorney General has also previously briefed the penalty of termination of a contract if the new extra-statutory terms are breached.[16]

The Governor's Order and implementation of it also violate two additional statutes. First, the Governor has no legal authority to bar a contractor who refuses his "policy." La. R.S. 39:1672 establishes a process requiring *notice and a right to a hearing* before a contractor may be disqualified from contracting with State government. The Governor, however, *unilaterally* disqualifies a potential contractor if it refuses to include the extra-statutory content imposed by the Order, language which clearly invites government interference with private employment

[16] The Order doesn't explain what process would apply to investigate a claim of discrimination by a private employer, how a state might validate a claim, or how the state would terminate the contract.

relationships and which could threaten the financial stability of the business.[17] The employer may even have a similar policy, but reject the language because it invites the State to invade and limit his authority over his private business affairs (i.e., not because he wants to "retain the right to discriminate). Nevertheless, he will be punished by the Governor by being unilaterally barred from contracting with the State. And second, La. R.S. 39:1581(D) expressly states that "regulations shall not change existing contract rights. No regulation shall change any commitment, right or obligation of the state or of a contractor under a contract in existence on the effective date of such regulation." The testimony of Paula Tregre confirmed the OSP is applying the Order to amendments, and the OGB contracts also demonstrate it is being applied to existing, publicly bid contracts. The Order substantively changes the terms and conditions of these existing contracts and exposes the contractor to termination in the event the State believes a breach of the extra-statutory anti-discrimination clause occurs. The Governor's insistence on requiring this language in existing OGB contracts and using the Order to attempt to leverage consent to the amendments from the House Appropriations and Senate Finance Committees while jeopardizing the health care of almost 7,000 people shows the lengths to which he has gone to enforce his ideological position on others, including the Legislature.

II. NO EVIDENCE SUBSTANTIATED THE GOVERNOR'S CLAIM FOR DECLARATORY JUDGMENT AND/OR INJUNCTIVE RELIEF RELATIVE TO HIS ALLEGED "SUPERIOR" CONSTITUTIONAL STATUS.

In addressing the reconventional demand, the Attorney General re-urges his exceptions of *res judicata*, no cause of action, and prematurity. Therefore, the following argument should not be deemed retreat from those exceptions.

To effectively evaluate the evidence presented at the trial on the merits of the Governor's reconventional demand, it is necessary to precisely define the relief he seeks. Paragraph 85 of the reconventional demand reflects that the Governor requests from the Court:

> Paragraph 85(A)-"A [declaratory] judgment declaring that the Governor is the superior constitutional officer to the Attorney General and that, in the event of a dispute with the Attorney General relating to any legal matter involving the state, its agencies, boards, or commissions, the position of the Governor should prevail."
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> Paragraph 85(B)-"A [declaratory] judgment declaring that the Attorney General has no role in supervising or approving the actions of counsel representing state agencies, boards, or commissions, and that, outside of his right to intervene, the authority of the Attorney General to direct any legal proceeding is limited to only when he is able to show legal cause to a court of appropriate and original jurisdiction as outlined in Art. 4, Section 8 of the Louisiana Constitution."

[17] Termination of the contract is a penalty for breach of the anti-discrimination "policy."

> Paragraph 85(C)-"A [declaratory] judgment declaring that 1) the Attorney General has no role in the retention of private counsel other than for a)the defense of the state and state entities in tort or contract claims, pursuant to La. R.S. 49:257 and La. R.S. 49:258, or b) the hiring of private counsel by state boards or commissions, pursuant to La. R.S. 42:262; 2) the role of the Attorney General in the retention of private counsel does not extend to reviewing the retention of private counsel to advise any state entity other than a board or commission; and 3) the Attorney General's role in the retention of private counsel for the defense of the state and state entities is limited to confirmation that the private counsel meets the qualifications promulgated pursuant to La. R.S. 49:258."

Additionally, the Governor seeks injunctive relief in the substance of the requested declaratory relief.[18] This memorandum will initially focus upon the relief sought in paragraphs 85(A), (B), and (C)(1-2). The allegations of the reconventional demand upon which the foregoing relief is sought are set forth in paragraphs 42-44, 48-55, and 78-82.

No evidence whatsoever was presented to support the allegations of paragraphs 42-44. Similarly, at trial, not a single witness testified or document was introduced to substantiate the allegations of paragraphs 48-55. Moreover, the "dispute" between the Governor and Attorney General referred to therein was resolved, as conceded in paragraph 53 of the reconventional demand. To substantiate the allegations of paragraphs 78-82 of the reconventional demand, the Governor introduced the memorandum referenced in paragraph 79; however, the memo shows and the testimony of Lauren Barbalich explained that the Attorney General's Office represents numerous state entities and that this transmittal was the product of House Concurrent Resolution No. 2 of the 2016 First Extraordinary Session of the Legislature, as well as the recent decision issued by the United States Supreme Court in *North Carolina Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).[19] HCR 2 mandates that the Attorney General review all contracts of the state to determine the need therefor and/or efficacy thereof.[20] The Governor's own witnesses, Scott Johnson and Rick McGimsey, acknowledged the Attorney General represents numerous boards and commissions and is responsible for all cases that arise in tort and contract. Furthermore, the Governor failed to submit any evidence that reflected how that legislative request created any sort of controversy, was some type of "overreach," or caused any disruption of the operations of any state entity, inclusive of the Governor's office. Simply put, nothing was presented to the Court that establishes any sort of justiciable controversy to warrant the intervention of this Court.

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[18] Paragraph 85(D) of the Reconventional Demand.

[19] This decision directly implicates the liability of board members who are market participants under anti-trust law and requires supervision by the State Attorney General.

[20] http://www.legis.la.gov/legis/ViewDocument.aspx?d=1005047. Under Article 202 of the Louisiana Code of Evidence, the Court may take judicial notice of such legislative action.

The drafters of the Louisiana Constitution, and the citizens of this State who ratified it, placed the office of Attorney General within the executive branch of government and ordained it an elected constitutional office separate and apart from the Governor.[21] Article IV, § 8, of the La. Constitution declares the Attorney General to be the "chief legal officer" of the state and grants him the ability to "institute, prosecute, or intervene in any civil action or proceeding" as he may deem "necessary for the protection of *any right or interest* of the state." La. R.S. 36:701, *et seq.*, mandate that the Department of Justice, under the exclusive control of the Attorney General, shall be responsible to the Legislature and general public in the administration of the department's affairs. Courts throughout the country have observed that the inclusion of the Attorney General and other statewide elected officials in the executive branch is viewed as a limit on gubernatorial power.[22] To disturb this constitutional and statutory balance of powers under the baseless allegations of the reconventional demand and/or in view of the lack of any evidence of any justiciable dispute or controversy would constitute a redrafting of the State Constitution.

In summary, the Governor has submitted no evidence and presented no legal argument to sustain his request for the declaratory relief prayed for in paragraph 85(A), (B), and C(1-2), and the injunctive relief associated therewith. The competing authority between the Governor and the Attorney General, as well as the role of the representation of state entities present nothing more than political questions which are beyond the purview of the declaratory relief sought by the Governor.

III. THE DUTY OF THE ATTORNEY GENERAL IN APPROVING CONTRACTS IS NOT LIMITED TO THE RESTRICTED ROLE ALLEGED BY THE GOVERNOR.[23]

The relief sought by the Governor in paragraph 85(C)(3) is a more directed attack on the discretionary authority granted by the Legislature to the Attorney General as the primary supervisor and appointing authority for outside counsel for state agencies, boards, and commissions.[24]

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[21] La. Const. Art. IV, §8.

[22] Emily Meyers and Lynee Ross, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (2d ed. 2007). In *State ex. rel. Mattson v. Kiedrowski,* 391 N. W.2d 777, 782 (Minn. 1986), the Minnesota Supreme Court stated: "Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers."

[23] Except for referenced to testimony adduced at the trial of this action, the legal arguments set forth in this section are identical to those which were urged, and sustained, by Judge Johnson in the mandamus proceedings.

[24] The arguments which follow are applicable to the entirety of the relief requested in paragraph 85(C) of the reconventional demand.

As a threshold matter, the Attorney General again asserts the issues implicated by this requested relief were fully adjudicated in the previously filed mandamus action instituted and litigated in Section 26 of this Judicial District, under docket number 651814.[25] Thus, re-litigation is barred by *res judicata*. Judge Johnson did not, as the Governor fallaciously contends, find that he [the Governor] used the wrong procedure to present his claim, but rather concluded that the role of the attorney general in approving legal services contracts is discretionary.[26] Germane are these remarks by Judge Johnson in articulating his reasons for judgment:

> As to the merits of the petition, the Court denies the request of our Governor to mandate that the Attorney General approve the contracts that are subject to the dispute today. Reason being is that, I am uncertain as the definitive nature of whether his conduct is ministerial or not; and, therefore, not convinced that it is, I decline to grant such relief. All other exceptions are mooted, in light of the decision I've reached.

An exception of no cause of action is the appropriate procedural mechanism for attacking a petition for mandamus when the duty challenged is deemed to be discretionary, the principle on which Judge Johnson's based his dismissal of the mandamus action. *Hays v. Volentine,* 29,555 (La. App. 2 Cir. 5/7/97), 694 So.2d 275. Furthermore, in his effort to escape the defense of *res judicata*, the Governor has continuously failed to demonstrate a rationale basis for not availing himself in the mandamus action of Articles 464 and/or Article 934 of the Code of Civil Procedure, if he desired to assert any other claim. He certainly had opportunity to do so before Judge Johnson. He should not be allowed to go judge-shopping and re-assert the same claim here when he had both the means and the opportunity to amend his petition, bi-furcate the trials, and proceed in the other case.

The allegations of the reconventional demand relied upon by the Governor relative to the relief set forth in Paragraph 85(C) are contained in paragraphs 56-74.

The evidence at trial, as demonstrated above in the discussion of the Attorney General's petition for declaratory judgment and injunctive relief, demonstrated that contracts have been rejected by the Attorney General for inclusion of extra-statutory language, and rejected by the State Procurement Office or held by the Governor for excluding the language mandated by JBE 2016-11. The evidence further demonstrated the question of effect and enforceability of the Order has caused a work stoppage and resulted in disapproval of amendments submitted for

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[25] The entirety of those proceedings were introduced as Exhibit AG-Exceptions 1 in connection the Attorney General's Exception of Res Judicata. That action may frequently be referred to as the "mandamus proceedings."

[26] The basis of the Court's decision in the mandamus action is evident from the oral reasons for judgment contained in Exhibit AG Exceptions-1. The Court's oral reasons discount the allegations of Paragraph 76 of the reconventional demand.

approval to the House Appropriations and Senate Finance Committee in its oversight hearing regarding the Office of Group Benefits.

The mandamus action failed to resolve this impasse because the Governor chose not to place the effect and enforceability of the Executive Order at issue. Hence, the Attorney General filed this litigation to obtain finality regarding the effect and enforceability of JBE 2016-11. The Governor, rather than allowing this Court to rule and resolve the narrow question of effect and enforceability of the Order, opted to again assail the Attorney General's statutory and constitutional rights and duties relative to contract approval via the reconventional demand before this Court.

The Attorney General is charged with ultimate responsibility for the supervision and management of the legal affairs of Louisiana.[27] The purpose in imposing this overarching duty upon him is twofold: first, it is consistent with his elected position as Chief Legal Officer directly accountable to the citizens of this State; and secondly, it protects the State from liability, threats to the State fisc, federal encroachment on the legal authority of the State, and other rights and obligations embraced in both the State and federal constitutions.[28]

Inherent in this duty is the obligation to provide legal representation for state agencies, boards, and commissions. La. R.S. 42:261(D), *et seq;* La. R.S. 49:257-258; La. Const. Art IV, §8. Indeed, the Revised Statutes are replete with instances where the Attorney General is assigned the task of representing agencies, boards, commissions, public corporations, local political subdivisions and special political subdivisions which fall within the executive branch of state government, as well as performing a wide variety of legal duties to protect the interests of the people and the State.[29] Significantly, on any occasion where officers and employees of the state are sued, which includes but is not limited to demands and lawsuits against officials, officers, or employees of the executive branch, the determination of whether or not to defend the action is made exclusively by the Attorney General.[30] It is illogical to accept that the Attorney

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[27] La. Const. Art. IV, § 8.

[28] The Attorney General, through his various powers and duties, including his power to appoint assistant attorneys general, special assistant attorneys general, special counsel, and outside counsel combined with his oversight authority, is able to defend and monitor threats to state sovereignty, sovereign immunity, to the state budget, to the legislature's authority, to the judicial authority, and to executive branch authority, among only a few threats to the operations of State government. A summary of constitutional and statutory duties of the Attorney General was provided to the Court as an attachment to the Memorandum in Opposition to the Reconventional Demand.

[29] For example, La. R.S. 49:257(A) obligates the Attorney General to represent all state departments and agencies in all litigation involving tort or contract. Additionally, the Attorney General represents numerous boards pursuant to statute in connection with other legal matters.

[30] La. R.S. 13:5108.1(B)(2) and E(1)(a).

General has this sort of authority, but does not enjoy the discretion to appoint counsel and approve contracts for private counsel.

As has been established in prior memoranda filed in this case, there are hundreds of statutes providing the Attorney General with additional powers and duties. Nothing in these laws suggests or supports the notion that the appointment of counsel, who stands in his shoes and partially carries his constitutional responsibility as Chief Legal Officer of the State, is subject to the limitations urged by the Governor in this action. The approval of contracts, a duty incidental the appointment of counsel, is equally discretionary and free of the restrictions/limitations suggested by the Governor because it requires the Attorney General to exercise his judgment regarding the scope, fees, and other liabilities imposed upon the State or to which it exposes the State. The Governor's allegation that he is "the client," is legally and factually incorrect.

The Governor attempts to circumvent the entirety of State law and the State Constitution in two ways. First, without citation to *any* jurisprudential or statutory authority, he argues La. R.S. 49:258 should be read, *to the exclusion of all other laws (particularly La. R.S. 42:262 and 49:257)*, as *obligating* the Attorney General to "approve" the appointment of any attorney proffered by a state agency, board, or commission upon request – even if the appointment violates the law, contravenes other authority granted to the Attorney General, or in the opinion of the Attorney General is not in the State's best interests. According to the Governor's unsupported view, the Attorney General merely determines whether the proposed counsel satisfies certain minimum qualifications referenced in La. R.S. 49:258.[31] The Governor's own witness Rick McGimsey refuted this claim buy admitting he did not strictly follow the published guidelines and Mr. Johnson admitted he had never even seen them until Governor Edwards chose to attack the Attorney General's approval authority. And second, the Governor further postulates, without citation to any supporting authority whatsoever, that the Attorney General has no authority to approve legal contracts for any State agency other than a board or commission. This he argues even in the face of clear statutory authority to the contrary. Finally, the Governor argues that once it is determined who should represent a State agency, the Attorney General as the chief executive's attorney *must* abide by his wishes.[32]

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[31] A determination of whether an attorney meets those qualifications *is*, in and of itself, *an exercise of discretion.* Moreover, the decision is not simply whether the individual "meets" minimum qualification, but rather whether the proposed counsel "meets or exceeds" minimum qualifications, which is a more expansive review and clearly involves the exercise of discretion.

[32] This argument was advanced at trial and in pre-trial memoranda. No allegations to this effect appear in the reconventional demand.

La. R.S. 49:257 and La. R.S. 49:258 were enacted at the same time by the same legislative act, Act 448 of the 1988 Regular Session of the Louisiana Legislature. Common sense and the rules of statutory interpretation require these two statutes to be read and applied together, not one to the exclusion of the other. Moreover, the sole relevant amendment to these statutes was in 2005, when by virtue of La. Acts 435, subparagraph E of La. R.S. 49:257 was amended to read:

> Nothing in Chapter 16-A of Title 39 of the Louisiana Revised Statutes of 1950 and in R.S. 49:257 and 258 shall prohibit any department of state government from employing a general counsel and such other attorneys as may be necessary to provide legal consultation, representation, and such other legal services as are not provided for under such provisions of law. However, all private legal counsel shall be chosen only in accordance with the provisions of R.S. 49:258, **and subject to the authority granted to the attorney general by Article IV, Section 8 of the Constitution of Louisiana**.

(Emphasis supplied.) Clearly, the *Legislature* has no issue with the recognition of the Attorney General having the role of the Chief Legal Officer for the State and has subjected any attorney appointed by him to his constitutional supervision. This is entirely consistent with the reservation of authority to the Attorney General over legal affairs of the State in the State Constitution. There should be little doubt that La. R.S. 49:257 and La. R.S. 49:258 were "born together" and should be applied co-extensively. These statutes declare that a State agency or department which seeks to hire private counsel may do so, *provided* the appointment is made by the Attorney General, as opposed to any other State official (including the Governor); and any such appointment is subject to the overriding authority of the Attorney General's constitutional power as the Chief Legal Officer of the State.

Indeed, a holistic reading of *all* the laws related to both the Attorney General's duty to represent *and* his prerogative to appoint counsel to act on his behalf reflects that the appointment of private counsel for any state agency, board, or commission is necessarily exercised at the discretion of the Attorney General. There is *no mandate* in *any* law that imposes upon the Attorney General any sort of "ministerial" or limited duty or role to accede to the wishes of another agency, *even the Governor*, and to abdicate his duty and authority to represent and protect the interests of the State as he sees fit.[33] The Attorney General is not accountable to the

[33] The Governor's counsel offered a sequence of communications related to a failed attempt to find a mutually-workable solution to the impasse regarding the Executive Order language. Lauren Barbalich explained that no agreement was ever confected or implemented. These communications do not show the Attorney General agreed with the Governor's interpretation of his authority, nor could any agreement change the law anyway. They do show the Attorney General's staff made a good faith effort to find a solution to the impasse that would have avoided the necessity of litigation but that effort failed.

Governor for the exercise of this discretion – he is accountable to the citizens and voters of this State.[34]

The minimum qualifications referenced in La. R.S. 49:258 are just that -- *minimum* requirements.[35] Nothing in La. R.S. 49:258 diminishes the constitutional obligation and authority of the Attorney General or the discretion of the Attorney General to act in the best interests of the State by virtue of the authority set forth in Article IV, §8 of the Constitution, including refusing to appoint an attorney who in his judgment *is not suitable*. Also significant is that one condition of the published minimum qualifications provides that any attorney appointed in connection therewith *shall serve at the pleasure of the Attorney General.* This statement is in complete accord with Article IV, §8 of the Constitution, which also provides that all assistants appointed by the Attorney General shall serve at his pleasure.[36]

In addition to conveniently ignoring hundreds of statutes – many of which impose the Attorney General directly into the affairs of agencies -- the Governor misrepresents the Attorney General's duty regarding approval of the associated contracts for outside counsel. The review and approval of the professional legal services contracts are both necessary and inherently part of the duty to appoint counsel because the contract is what actually binds the state and reflects the Attorney General's delegation of his legal authority to private contract counsel.

At a basic level, like any other contract, this type of contract establishes the rights and obligations of the parties. It states the names of the contracting parties (state agency board or commission and outside counsel or firm), the *scope* of the matter, particular approved counsel, the fee, and various other provisions that are required by law, including termination clauses, anti-discrimination clauses, non-appropriation clauses, dispute resolution clauses, audit clauses, and other clauses establishing the rights and obligations of the parties.[37]

A contract with the State for professional *legal* services, however, is *more* than a memorial of the appointment of counsel. It *binds the State* to pay the contractor with taxpayer funds. It also is *evidence of a delegation of the Attorney General's power* – to be exercised under the direct

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[34] The Governor's arguments, if correct, would potentially allow the Governor to direct the Attorney General to approve illegal contracts, over his own better judgment and objection. This is clearly why the Constitution does not permit the Governor to appoint the Attorney General. See footnote 3, *supra.*

[35] These published "minimum qualifications" were introduced as Exhibit Gov. C in connection with the testimony of Scott Johnson.

[36] Rick McGimsey verified during his testimony that during the time he was employed by the Attorney General, he developed additional guidelines/criteria to aid him in the attorney approval process.

[37] If a particular counsel is not approved, the agency is so notified. If the fee exceeds the approved standard fee schedule, the state agency, board, or commissioner must provide a justification in writing to the Attorney General, who has discretion to approve a higher fee up to $500 for good cause. There is no dispute that the Attorney General has an obligation to review the fee – both for its legality (i.e., whether it is a prohibited contingency fee agreement) and for its amount.

supervision of the contracting agency and always exercised pursuant to the overriding supervision of the Attorney General. It permits a non-governmental employee to act as a representative of the State of Louisiana in legal proceedings and, potentially, to *bind* the State of Louisiana. These are all important distinctions between this contract and a contract between private contracting parties. And for the Attorney General to exercise his appointment power, he must also have the corollary and incidental power to approve the contract that evidences his delegation.

It is likewise his duty to pursue claims on behalf of the State and to defend a wide variety of claims against the State, including protecting the State from liability.[38] Moreover, the terms of the contract itself can expose the State to liability, as the Attorney General has determined relative to the terms the Governor seeks to impose across the entirety of the executive branch of government with his Executive Order JBE 2016-11.[39] The execution of the contract for professional legal services, executed as an incident of his appointment power, is much broader than the Governor would have this Court believe. It was *precisely* due to these considerations that Judge Johnson dismissed the Mandamus Petition.

The Governor has submitted nothing that supports his vain arguments that he is the *sole* client of the Attorney General and therefore the Attorney General must carry out his directives. Indeed, if that was the case, then it would amount to a re-writing of the State Constitution and many of the Revised Statutes. There would also be no reason for the Governor to have been afforded statutory authority to appoint his own executive counsel. *See* La. R.S. 49:203. Moreover, if he was correct, the drafters of the 1974 Constitution, and the public who ratified it would not have established the Attorney General as an independent, statewide elected officer accountable to the people. The independence of the Attorney General under our State constitutional structure has significant meaning and was incorporated into the Constitution and laws of this State by design.

The concept that the authority and duty to appoint persons is a discretionary act reserved solely to the appointing authority is recognized by the jurisprudence. In *Murrill v. Edwards*, 613 So.2d 185 (La.App. 1 Cir. 1992), *writ denied,* 614 So.2d 65 (La.1993), several legislators filed a mandamus to require Governor Edwin Edwards to submit names of certain appointees to

[38] Even in-house counsel for agencies, boards, and commissions are subject to the overriding power of the Attorney General to intervene and to supersede in any proceeding to protect the interests of *the State*. Not insignificantly, the Constitution does *not* say "the State, *as determined by the Governor*."

the Louisiana Senate for confirmation to fill vacancies on the governing board of the Louisiana Health Care Authority Governing Board ("LHCA") and to appoint members to the local boards within the LHCA system.[40] The plaintiffs contended that the Governor should be compelled to select and appoint members to the local boards from a list submitted by a regional nominating council. The law at that time provided:

> The local boards shall be composed of seven voting members ... appointed by the governor, subject to Senate confirmation, from a list of two names for each position submitted by the regional nominating council.

Murrill v. Edwards, 613 So.2d 194. The Court noted that despite the language of the statute, the governor was not compelled to appoint a person whom he deemed unqualified. The Court specifically stated:

> We hold that the governor cannot be compelled, by mandamus, to appoint members to the local boards. *The act of appointing is a discretionary decision not a mandatory, ministerial duty. As such, no mandamus will be issued.*

(Emphasis supplied.)

The Governor has not provided any legal justification whatsoever (other than his legally incorrect view that he is "the client") that would justify any different conclusion that the one reached in *Murrill v. Edwards* relative to the appointment authority of the Attorney General. As has been well established, the Attorney General is constitutionally empowered as the Chief Legal Officer of the State and cannot be compelled by the Governor, or anyone else, to act against his own legal judgment.

In conclusion, the limitations which the Governor attempts to place upon the Attorney General by his request for declaratory judgment and injunction relief are contrary to the Constitution and laws of the State of Louisiana. Simply stated, the Governor has presented no evidence or legal support for the proposition that: 1) the Attorney General has no role in the retention of private counsel other than for a) the defense of the state and state entities in tort or contract claims, pursuant to La. R.S. 49:257 and La. R.S. 49:258, or b) the hiring of private counsel by state boards or commissions, pursuant to La. R.S. 42:262; 2) the role of the Attorney General in the retention of private counsel does not extend to reviewing the retention of private counsel to advise any state entity other than a board or commission; and 3) the Attorney General's role in the retention of private counsel for the defense of the state and state entities is limited to confirmation that the private counsel meets the qualifications promulgated pursuant to La. R.S. 49:258. See paragraph 85(C) of the reconventional demand.

[40] The LHCA was abolished by Act No. 3 of the 1997 Regular Session of the Louisiana Legislature.

The Attorney General is an independent constitutional officer with statutorily defined duties and obligations that specifically embrace the approval of legal contracts according to his discretion as the Chief Legal Officer of this State. The resolution of the impasse between the Governor and the Attorney General should not, and cannot, without offense to the Louisiana Constitution, be resolved by the re-writing of law and the constitution by judicial decree.

CONCLUSION

The Attorney General again submits he met his burden of proving by a preponderance of evidence that JBE 2016-11 has the effect of law and is an unconstitutional exercise of legislative authority. The Attorney General also met his burden of proving that the Order impinges on the authority of independent statewide elected officers and offices, in particular that of the Attorney General, and is therefore a violation of the diffusion of authority among executive branch officials and offices in the Louisiana Constitution. This Court has previously recognized both the separation of powers among the three branches and within the executive branch in *Hill v. Jindal*. This Court has recognized the Governor cannot make law with an executive order. The evidence proved that he has done so here, without any legislative delegation of authority and contrary to the procurement laws passed by the Legislature.

The Governor not only attempts to circumvent the Legislature, which rejected the language imposed across the executive branch in JBE 2016-11, but he also invites this Court to re-write the State Constitution to avoid enforcement of the Constitution by the Attorney General, who was elected and pledged an oath to uphold it. This Court should decline that invitation. The relief requested by the Governor is not justiciable because it requests an advisory opinion and presents questions clearly committed to the voters and the Legislature. It is also legally improper. The Governor has no authority over legal policy of the State. His self-serving and legally incorrect interpretation of statutes involving the appointment of counsel and approval of legal services contracts only reveal his true motive of diminishing the constitutional power of the Attorney General to enhance his own. The Governor submitted no evidence whatsoever to support his contentions. The relief requested by the Attorney General is clearly justified and necessary to resume the constitutional balance of powers contemplated by the State Constitution. This Court should dismiss the Governor's claims.

Wherefore, the Attorney General prays for the following relief:

- The exception of res judicata is sustained as it relates to the Governor's Reconventional Demand relative to the Attorney General role regarding appointment of counsel and

approval of contracts for professional legal services by the State, its agencies, boards or commissions;

- The exceptions of No Cause of Action and Prematurity be sustained on the grounds that the Governor did not present a justiciable controversy that would warrant a declaration that the Governor is the superior constitutional officer to the Attorney General and that in the event of a dispute with the Attorney General relating to any legal matter involving the state, its agencies, boards or commissions, the position of the Governor should prevail;

- That a declaratory judgment issue, declaring that Executive Order JBE 16-11 is void *ab initio* since it constitutes an *ultra vires* act of the Governor and violates the Constitutions of the State of Louisiana and United States, and, more particularly, violates the dictates of Louisiana statutory law to the extent it mandates a non-discrimination clause requiring the inclusion of gender identity;

- That the Governor, and any officers under his direction or control, be enjoined from requiring parties to enter into contracts that contain a non-discrimination clause requiring the inclusion of gender identity;

- That all legal costs be cast against the Governor; and

- And that the Attorney General be granted all other general and equitable relief.

Respectfully submitted,

JEFF LANDRY
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing opposition has on this date been served upon all known counsel of record, all by electronic mail, hand delivery, and/or depositing same in the United States mail, postage prepaid, and properly addressed.

Baton Rouge, Louisiana, this 2nd day of December 2016.

_____
Elizabeth Baker Murrill