THE LOUISIANA DEPARTMENT OF JUSTICE and JEFF LANDRY, in his official capacity as ATTORNEY GENERAL FOR THE STATE OF LOUISIA	**NO. 652,283; DIVISION A; SECTION 27**
VERSUS	**19TH JUDICIAL DISTRICT COURT**
JOHN BEL EDWARDS, in his official capacity as GOVERNOR OF THE STATE OF LOUISIANA	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

GOVERNOR EDWARDS' POST-TRIAL MEMORANDUM

NOW INTO COURT, through undersigned counsel, comes Governor John Bel Edwards, Defendant/Plaintiff-in-Reconvention, who submits this Post-Trial Memorandum in opposition to the Petition for Injunctive Relief and Declaratory Relief filed by Attorney General Jeff Landry and in support of the Reconventional Demand.

I. INTRODUCTION

While there are several subsidiary questions, this case presents two basic issues: 1) on the principal demand, whether the Governor has authority to issue Executive Order JBE 2016-11 ("JBE 16-11"); and 2) on the reconventional demand, the extent of the authority of the Attorney General with respect to the appointment and management of private legal counsel by other executive branch entities. These questions, by their nature, are primarily constitutional and statutory legal issues, but the facts giving rise to the controversy, and to which the law will be applied, must be established. To that end, the Court heard the testimony of eight witnesses and received eighteen exhibits at trial. As is shown by the attached Appendix summarizing the testimonial and documentary evidence presented at the hearing, the bulk of the Attorney General's evidence did not address the issues in the case – the relative constitutional and statutory powers of the Governor and the Attorney General – but instead focused on whether JBE 16-11 is a good idea as a matter of policy. Any opinion about whether that executive branch policy is a good idea, whether it's from the Attorney General or from an attorney who has testified before the legislature, in his personal capacity, many times against expansion of the state's non-discrimination laws, is simply that – an opinion that is non-binding 1) on the agencies for whom the Attorney General acts as legal advisor; and 2) on this Court.

The question before this Court on the principal demand is limited to the authority of the Governor to issue an executive order related to state employment and contracting policies. Whether that executive branch policy is popular is a matter best left for elections. This Memorandum connects the evidence presented to each of the party's claims for relief. Section II addresses the claims by the Attorney General, on various bases, that the Governor overstepped the bounds of his authority in issuing JBE 16-11, referencing the evidence concerning those issues. Section III addresses the constitutional and statutory limitations on the Attorney General's role in the retention and supervision of private counsel by other executive branch entities, likewise relating the evidence presented to each of those issues and to the relief requested. This Section includes discussion of the relief, and the authority for such relief, sought in the reconventional demand. Because the legal basis for the Governor's position was fully briefed in the pre-trial memoranda, his position on the legal underpinnings of each claim will be presented summarily.[1] Section IV summarizes how the evidence supports the Governor's position on each of the claims at issue, and the conclusion, Section V, sets forth the precise relief sought by the Governor.

II. PRINCIPAL DEMAND: THE GOVERNOR ACTED WITHIN HIS AUTHORITY IN ISSUING JBE 16-11.

The Attorney General contends the Governor exceeded his authority in issuing JBE 16-11 on six grounds. Despite the arguments and statements of counsel on November 29, 2016, that the "gender identity" language is the only part of JBE 16-11 with which the Attorney General objects, the Attorney General prays in his Petition that the Court invalidate the entirety of JBE 16-11, including the part that prohibits discrimination based upon sexual orientation.[2] Neither

[1] Detailed explanations of the Governor's legal position on the Attorney General's demands can be found in the Governor's Memorandum In Opposition To Petition For Injunctive Relief and Declaratory Judgment and Governor Edwards' Surreply In Opposition to Petition For Injunctive Relief and Declaratory Judgment. Detailed explanations of the Governor's legal position on the reconventional demand can be found in the Governor's Memorandum In Support of Reconventional Demand and Governor Edwards' Reply Memorandum In Support of Reconventional Demand.

[2] The gravamen of the Attorney General's objection to the gender identity language of JBE 16-11 is that he alleges it is beyond the Governor's authority because "gender identity" is not included in state and federal anti-discrimination statutes. *However, the same is true for sexual orientation.* As is apparent from the evidence, *see* AG Exhibit A1a (ProAct Contract Log), specifically, the multiple repeated comments included from the Attorney General's representative, "The contracts you submitted to retain outside counsel are being returned to you without approval from our office. **The Attorney General Requires antidiscrimination clauses in legal contracts to be written in conformity with State and Federal law; therefore, these provisions should not contain language exceeding what the law requires.** Additionally, on May 14, 2016, the Attorney General issued an opinion regarding the Governor's Executive Order JBE 16-11, which can be found on our website." (Emphasis added). One such example is entered by Lauren Barbalich on September 23, 2016 (p. 3). There are 50 references within the Attorney General's own exhibit which clearly contradict the position presented to the Court that the Attorney General only objects to the inclusion of "gender identity," the most recent being on November 22, 2016, one week prior to the trial.

the law nor the evidence supports invalidating any portion of the Executive Order and, moreover, the Attorney General has asked the Court to invalidate the entire Order, not a particular part of it.

The first asserted ground for invalidation of JBE 16-11 is that it conflicts with existing law. While Douglas Sunseri pointed out that the Executive Order's requirements are *different* than existing law, neither he nor any other witness offered any evidence that those requirements *conflict* with existing law. That is because, simply, the Executive Order prohibits discrimination based upon, *inter alia*, sexual orientation or gender identity, and there is no existing law *requiring* such discrimination.[3] As is the case with federal Executive Order 11246, compliance with JBE 16-11 does not require anyone to break existing state or federal statutory law; therefore, the Attorney General's claim that JBE 16-11 conflicts with existing law is baseless.[4] Instead, the Attorney General, utilizing his imagination rather than the language of the actual Order, posits potential problems that could arise, should someone assert they have rights beyond that which is provided for by state and federal law. This request is somewhat puzzling, especially given the fact that the Attorney General had the opportunity to present an actual and real person, *i.e.*, a representative from his office or another state agency, a vendor wishing to contract with the state who objects to the non-discrimination clause, or a state employee who feels their constitutional rights are being violated in some way, willing to testify to any real problems resulting from implementation of JBE 16-11, and he chose instead to rely purely on hypothetical concerns.[5] He was unable to show any justiciable controversy, other than his own objections with regard to his own contracts. And even then, there is a question as to whether any conflict exists given the Attorney General's voluntary consent to contract terms which agree to comply with federal Executive Order 11246.

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[3] The Attorney General presented no evidence to the Court showing an actual conflict between JBE 16-11 and any law. When asked to identify the portions of the Executive Order that make it unlawful, he only points to the words "gender identity." As the Attorney General is well aware, there is simply no law which prohibits the appearance of the words "gender identity." For him to successfully show any conflict, he must provide a connection between a directive of JBE 16-11 and a specific law. He did not and cannot do so.

[4] An apparently significant portion of this claim is based upon the failure of the legislature to enact statutes with broader applicability than JBE 16-11 (*i.e.* related to private employment) which aimed to prohibit discrimination based upon gender identity. But the Attorney General has yet to explain how proposed bills which did not become law have any legal significance in light of La. R.S. 24:177(D), which provides that a bill that "does not become law is not competent evidence of legislative intent," and that any action other than enactment of a law or adoption of a resolution "shall not constitute a confession as to the meaning of the law extant." The Attorney General did not dispute application of this statute, but instead continues to suggest the significance of the bills referenced throughout his petition and pleadings. Further, while irrelevant, given La. R.S. 24:177, the Attorney General's argument clumsily fails to articulate why the Court should be persuaded that a bill's inability to survive a committee hearing in any given legislative session indicates anything at all about the intent of the entire legislature.

[5] The Court will recall that Ms. Murrill stated in chambers that the Attorney General had received several letters complaining about the effects of JBE 16-11. However, when it came time for the presentation of *evidence*, these complainants, nor the letters they wrote, if they ever existed, did not appear in court.

The second count of the petition claims that JBE 16-11 violates separation of powers, both between the executive and legislative branches of state government and between constitutionally segregated executive branch officers. The only witness to address the former was Cameron Henry, who expressed his personal belief that the Governor should not be able to direct the inclusion of standard language in contracts entered into by the executive branch, because that somehow diminishes the role of legislators. Representative Henry also indicated that whatever the Court's judgment may be with respect to the legality of JBE 16-11, he has no intention of accepting the ruling of the Court if it permits contracts containing language conforming to the Executive Order. Entering into contracts to further the execution of state law or executive policy is, of course, a core function of the executive branch, in general, and the Governor in particular. It is further the obligation of the contracting agency, and the Office of State Procurement, to ensure that any executive branch contract is consistent with state law and policy. Notwithstanding Representative Henry's personal thoughts and apparent disregard for Court judgments, the Governor's policy determinations concerning employment and services provided by the executive branch and its contractors does not infringe upon any prerogatives of the legislature.

As to other executive branch entities, the evidence made it clear that the only entity expressing any trepidation about JBE 16-11 is the Attorney General. Paula Tregre, Rick McGimsey, Scott Johnson, and even the Attorney General's human resources expert, Ms. Sandra Schober, all testified that no one other than the Attorney General has expressed any opposition to or confusion about the requirements of the Executive Order.[6] But even if there were concerns on the part of other executive branch agencies or contractors, the fact remains that, as set forth in the Governor's previous briefing, La. Const. article IV, § 5 designates the Governor as the "chief executive officer of the state."[7] As such, he is empowered to make policy decisions for the executive branch as part of his duty to "see that the laws are faithfully executed." Because he is the superior constitutional officer, that duty and that prerogative are

[6] Notably, the Attorney General has objected, through his amended petition, to the inclusion of the non-discrimination language specified in JBE 16-11 in his own contracts, and listed Bill Stiles, Chief Deputy Attorney General, as a witness who could have certainly testified to the Attorney General's position. However, the Attorney General presented no witness who affirmatively asserted the Attorney General's position on the stand. The closest live testimony provided to the Court was from a paralegal holding an administrative role in processing contracts for the Attorney General's Office who stated the Attorney General refused to sign a contract containing the non-discrimination language.

[7] The Attorney General is apparently less impressed with the Governor's designation as chief executive officer than with his own designation as chief legal officer.

placed solely upon the Governor; no other member of the executive branch, including inferior constitutional officers such as the Attorney General, are authorized to make such decisions.

The Attorney General's newfound willingness to accept an executive order from the Governor so long as it only restricts discrimination based on sexual orientation further demonstrates a fatal flaw in the Attorney General's separation of powers argument.[8] As discussed in footnote 2 above, there is no statutory restriction from discrimination based on sexual orientation *or* gender identity. Thus, if the Attorney General is now admitting that the Governor would be well within his authority to issue an order relating to sexual orientation, that is a *per se* admission that the Governor would be within his authority as it relates to gender identity. There is simply no legal distinction between the two groups. Accordingly, by the Attorney General's own admission, he has conceded that JBE 16-11 does not violate any constitutional allocation of authority to the legislative branch.

The third alleged infirmity of JBE 16-11 is its purported creation of a "protected class" without following the process mandated for constitutional amendment.[9] As discussed at length in the Governor's prior briefing, particularly the Surreply in Opposition to the Petition, the Executive Order does not make law or usurp the authority of any other constitutional entity. Although counsel for the Attorney General suggested there was some deficiency in the issuance of the Executive Order because it was not preceded by a rulemaking process under the Administrative Procedure Act, La. R.S. 49:950 *et seq.*, that Act specifically exempts from its application "executive orders duly issued by the governor and attested to by the secretary of state." La. R.S. 49:968. And every witness who was questioned about this admitted that agencies (including the Department of Justice) make internal policies without going through the rulemaking process of the APA. JBE 16-11 was properly and legally issued. It is neither a rule or law. It is an internal policy of the executive branch: 1) not to discriminate against a person for reasons not related to job performance; 2) not to discriminate regarding the provision of state services; and 3) not to contract with vendors who refuse to comply with contract provisions required by the Executive Order and the Office of State Procurement. Not a single witness testified that JBE 16-11, or the implementation of it by the Division of Administration or the Office of State Procurement, was deficient because of an alleged lack of rulemaking process.

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[8] As discussed above, this limitation of the Attorney General's claims to the issue of gender identity is a recent revelation, as the Attorney General's position, as stated in his petition, calls for the entire Executive Order to be declared *ultra vires* and thrown out.

[9] Petition, ¶¶ 16-18.

Further, and perhaps most importantly, the Order simply does not create a protected class that should be treated differently than anyone else. Instead, it requires the opposite, and sets a policy that executive branch entities will require that people be treated equally and not discriminated against for any non-merit based reason.

The remaining three grounds for the alleged illegality of JBE 16-11 are violations of the Commerce Clause, U.S. Const. article 1, § 8; the privacy interests protected by U.S. Const. amend. 1 and La. Const. article 1, §§ 5, 7, 8 and 9; and due process under U.S. Const. amends. 5 and 14 and La. Const. article 1, §2. None of these constitutional protections are implicated by the Executive Order, because as previously explained, no one has a constitutional "right" to a government contract, and the rights of state employees can be limited when they are exercising their public duties. The Executive Order's impact, such as it is, applies equally to interstate and intrastate commerce, so the Commerce Clause is not even implicated, much less violated.

The only evidence presented on any of these issues was the "expert" testimony of Douglas Sunseri and Sandra Schober, and their testimony was limited to the alleged vagueness of the Executive Order's use of the term "gender identity." But for all of the problems and alternative interpretations proposed and anticipated by Mr. Sunseri – he admitted that none of the imagined difficulties have actually occurred.[10] Ms. Schober testified that she was also unaware of any perceived difficulties, and she would be able to professionally respond to any issues that might arise. She offered specific, concrete examples of potential issues and how they could be resolved on a case-by-case basis, with reasonable thought and reasonable actions. Most importantly, she agreed that an employee's gender identity should be irrelevant to employment status unless it (somehow) impacted "an essential job function." JBE 16-11 requires nothing more than that recognition and reasonable accommodation, none of which Ms. Schober indicated would present problems. Scott Johnson confirmed that no agency other than the Attorney General, and no contractor, has expressed any problem or difficulty with the Executive Order.[11] In fact, all of the contracts sent to the Attorney General's office for approval of private counsel appointment have already been signed by the state agency and private counsel. The evidence presented shows the Attorney General has rejected approval of at least 50 such appointments

[10] In addition to a lack of knowledge of the existence of Federal Executive order 11246, Mr. Sunseri was unable to point to any of the wild and imagined scenarios he discussed even though federal contractors have been under an obligation to not discriminate based on gender identity and sexual orientation for two and a half years.

[11] One witness offered hearsay testimony that a contractor named Kyle Duncan was opposed to the language of the Executive Order being in his contract. However, Mr. Duncan was not called to testify and, other than this hearsay, there is no evidence that Mr. Duncan has any issue with the contract language.

based solely on the contracting parties' voluntary consent not to discriminate. *See* AG A1a and FN 2 *supra*.

The Attorney General was only able to prove a single problem created by JBE 16-11: the Office of State Procurement's refusal to approve his contracts, Exhibits AG-I, AG-J and AG-K. That "problem," however, is self-inflicted by the Attorney General's refusal to abide by the Executive Order, and that obstinate refusal on his part does not invalidate an otherwise lawful Order or give rise to a cause of action. Because none of the grounds of purported illegality have been shown to exist, either legally or factually, the Attorney General's demand for nullification of JBE 16-11 should be rejected.

III. RECONVENTIONAL DEMAND: THE CONSTITUTIONAL AND STATUTORY LIMITS OF THE ATTORNEY GENERAL'S AUTHORITY IN THE SELECTION AND MANAGEMENT OF PRIVATE COUNSEL SHOULD BE RECOGNIZED.

In contrast to the lack of evidence of problems caused by JBE 16-11, there was plenty of evidence of the disruption of the functioning of state government caused by the Attorney General's arrogation of authority to himself in the selection and management of private counsel by other executive branch entities and in the provision of contractual forms and specifications to be used state contracts. Both Rick McGimsey and Scott Johnson testified to the problems being created by the Attorney General's continued refusal to appoint private counsel. Important legal work is either not being done, or it's not being paid for. As counsel for the Attorney General elicited from Mr. McGimsey, failing to pay legal counsel when services have been performed is a significant problem. Mr. Johnson testified that he is contacted daily by private counsel inquiring as to when they will be officially appointed and/or paid. And Lauren Barbalich confirmed, via Exhibit GOV-2, that the Attorney General is attempting to assert managerial control over private counsel of other agencies.

The Governor's Memorandum in Support of the Reconventional Demand sets forth in great detail the constitutional and statutory provisions limiting the Attorney General's role with respect to the appointment and management of *private* counsel retained by executive branch entities.[12] In a nutshell, the Attorney General can supersede any lawyer for the state *for cause* as determined by a court under La. Const. art. IV, § 8; the converse is that he cannot do so without cause. With respect to appointment, La. R.S. 42:262(F) gives him authority with respect to

[12] The Attorney General places much weight on the various statutes making him the legal advisor to various entities, but those statutes do not address his authority with respect to private lawyers retained by those entities.

boards and commissions only, but other executive branch entities are not covered by that statute. Finally, La. R.S. 49:258 gives him authority to review the qualifications only of private counsel retained to defend state agencies from tort or contract suits. According to the Supreme Court in *Green v. Louisiana Underwriters Ins. Co.*, 571 So.2d 610, 613-14 (La. 1990), that statute covers only counsel retained for the defense of state interests; it does not apply to counsel retained for assertion of state interests or for consultation only. Thus, the authority of the Attorney General with respect to private counsel of other executive branch entities is highly circumscribed, both constitutionally and statutorily.

The testimony of both Rick McGimsey and Scott Johnson confirmed that the Attorney General's creative interpretation of his dictatorial authority over state contracts is inconsistent with the position of prior administrations. Mr. McGimsey worked for three different attorneys general, and he spent years in charge of the Department of Justice's role in the appointment of private counsel. He testified that his primary concern was making sure that the private lawyers were qualified to do the work they were hired to do, and that the contractual fee comported with the Attorney General's recommended fee schedule.[13] His only review of the substance of the contracts was to offer advice – not dictate terms – when it was apparent that the contracts did not comply with some specific requirements of the Office of State Procurement. He did not even examine conflicts of interest unless he was specifically requested to do so, as was the case in the single "extraordinary" incident brought to his attention involving a local government (not a state agency) contract. He confirmed that the Office of State Procurement was the final decision maker with respect to approval of a legal services contract.

The preponderance of the evidence shows that the Attorney General has overstepped the bounds of his authority and abused the limited discretion he may have. The Governor is seeking two forms of relief to rectify the problems currently being caused by the Attorney General's usurpation of authority and to prevent similar problems in the future. First, the Governor seeks both mandatory and prohibitory injunctions against the Attorney General, the first ordering that he appoint the private lawyers that he is statutorily required to appoint,[14] and the second enjoining him from abusing his limited discretion and interfering with any aspect of the appointment of private counsel beyond the role afforded him by La. R.S. 42:262(F) and La. R.S.

[13] Regulating the fees of private counsel is beyond the Attorney General's statutory authority, but the lack of difficulty with these matters in the past simply shows that the system worked when the participants acted in good faith.

[14] *I.e.*, private counsel for boards and commissions under La. R.S. 42:262(F) and private counsel for the defense of state interests pursuant to La. R.S. 49:258.

49:258. Second, the Governor seeks a declaratory judgment limiting the Attorney General's roles in the appointment and management of private counsel to that set forth in La. Const. art. IV, § 8, La. R.S. 42:262 and La. R.S. 49:258.

A declaration of the rights and duties of the Attorney General in this respect is critical because it is clear from the pleadings submitted, testimony presented, and evidence introduced that if this Court finds the Executive Order to be lawful, the Attorney General will find some other reason to deny the appointment of counsel. However, as the Attorney General has so aptly pointed out in his previous filings, it is the legislature's duty to provide for the authority of state entities. With respect to the regulation of contract terms, the legislature has given that authority to the state procurement officer. *See* La. R.S. 39:1564. The legislature has limited the Attorney General's role to legal advisor to the state procurement officer. La. R.S. 39:1565. The legislature has explicitly outlined the Attorney General's discretion with regard to the appointment of private attorneys for ORM cases to that found within the four corners of La. R.S. 49:258. The Attorney General has not pointed to any other provision, constitutional, statutory, or otherwise, that provides him with the "plenary authority" to deny an appointment for other reasons, such as budgetary constraints, as he has claimed to have. Under Louisiana law, the Attorney General is the chief legal officer, with the authority to exercise that role within the boundaries of La. Const. art. IV, § 8, but he is not the legislature, commissioner of administration, state treasurer, or head of every state agency he is statutorily assigned to represent. He is the state's lawyer.

Further, while the Attorney General is a constitutional officer, his status is inferior to that of the Governor. The legislature has limited the Attorney General's role in the review of state contracts, and he is supposed to advise, not control, the Office of State Procurement. The trial itself demonstrated the need for the relief requested by the Governor, relief designed to resolve and clarify the Attorney General's role, as related to the Governor, and limit his ability to interfere with matters outside the scope of his statutory duties and authority. The Governor's role as the superior constitutional officer means that in the event of a dispute between the Governor and Attorney General relating to a legal matter involving the state, the position of the Governor must prevail. The Attorney General's authority, at that stage, is outlined in La. Const. art. IV, § 8: he can intervene in a case, or he can show legal cause to a court of appropriate and original jurisdiction to supersede private counsel.

IV. SUMMARY

The bulk of the evidence presented by the Attorney General at trial concerned whether attempting to prevent discrimination against persons based upon gender identity is a good idea or a bad idea. All of that evidence is irrelevant because that question is not before the Court. Regardless of the resolution of that question, this Court only has to decide if the Governor, with respect to the executive branch of state government, is empowered to set policy for the executive branch through an Executive Order related to the delivery of state services, state employment, and state contracts. The constitution and state law clearly provide the Governor with this authority. Furthermore, there are no laws which demand discrimination for any reason that are being violated by the Order or in the implementation of the Order. And other than the Attorney General, there are no parties to whom the Order applies complaining about the Executive Order or who have argued any violations of their constitutional rights. This "chaos" and "controversy" has been created by the Attorney General. He presented no other witnesses to support his claims.

The Attorney General has not proven that JBE 16-11 was improperly issued or that it violates any constitutional or statutory provision. Accordingly, the Attorney General's demands should be rejected. The Governor has shown, by a preponderance of the evidence, that the Attorney General has overstepped not only his constitutional and statutory prerogatives in the appointment and management of private counsel, but even the expanded authority informally conceded to his predecessors by virtue of their cooperation in the process. Therefore, the Governor respectfully requests that the Court declare the limited authority vested in the Attorney General in the appointment and management of private counsel and thus curtail his attempted expansion of his authority to include his arbitrary refusal to approve contracts which conform with a valid Executive Order.

The Court should order that the Attorney General perform his duties in conformance with the same strict adherence to the constitutional and statutory authority to which he holds others, curtail his attempted expansion of his authority and enjoin him from abusing his limited discretion, and declare the limited authority vested in him in the appointment and management of private counsel.

V. CONCLUSION

The Governor respectfully prays that the Court deny the Attorney General's Petition for Injunctive Relief and Declaratory Judgment and declare Executive Order JBE 16-11 to be valid,

and grant the Governor's Reconventional Demand for mandatory and prohibitory injunctions and declaratory judgment, with the Attorney General to bear all costs.

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GOVERNOR JOHN BEL EDWARDS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email on Elizabeth Baker Murrill, Chester R. Cedars, and Christopher Victory on this 2nd day of December, 2016.

EMALIE A. BOYCE

APPENDIX

THE LOUISIANA DEPARTMENT OF JUSTICE and JEFF LANDRY, in his official capacity as ATTORNEY GENERAL FOR THE STATE OF LOUISIANA	**NO. 652,283; DIVISION A; SECTION 27**
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GOVERNOR EDWARDS' POST-HEARING MEMORANDUM: SUMMARY OF WITNESS TESTIMONY AND EXHIBITS

WITNESS TESTIMONY AND EXHIBITS[1]

1. **Paula Tregre, State Procurement Interim Director, Division of Administration ("DOA"), Office of State Procurement ("OSP")**

   Ms. Tregre generally testified regarding the enforceability of Executive Order JBE 16-11. She testified that, for purposes of state contracting, OSP is requiring agencies to adhere to the Order, and OSP has issued an email directive to that effect to the undersecretaries. She further testified that no specific personnel policies have been drafted in response to the Executive Order, but that they do consider it binding on them. She testified that OSP has refused to approve any contracts that are not in conformance with the Order. To her knowledge, the only agency that has submitted a non-compliant contract that is subject to the Executive Order is the Attorney General's office. Ms. Tregre was asked whether she had seen the Attorney General opinion regarding the Executive Order and whether anyone had instructed her not to follow that opinion.[2] Ms. Tregre testified that she had read the opinion, but that no one had specifically told her not to follow it. She was asked whether the directives for implementation had been promulgated as a rule or whether she knew if it should have been. She testified that she was not aware of any new rules or that any were required. The Attorney General originally called this witness for purposes of addressing their justiciable controversy issue. Otherwise, the witness did not testify as to the lawfulness of the EO. She did not testify regarding any separation of powers issues, First Amendment issues, Due Process clause problems, or Commerce Clause problems. Ms. Tregre could not identify any person, agency, or contractor, other than the Attorney General, who had complained about the Executive Order.

   - AG Exhibit A – JBE 16-11
   - AG Exhibit A1a – Log from Proact
   - AG Exhibit A1b – July 15 email Notice re: JBE 16-11 changes to contract language
   - AG Exhibit A1c – May 12 email

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[1] Multiple documents were submitted to witnesses or provided to the court at or prior to the hearing, some of which were and some of which were not actually entered into evidence. We have listed of each documents referenced in the hearing under the witness for which each was discussed, to the best of our recollection and in accordance with our notes, even those not entered into the record.

[2] It goes without saying that Attorney General opinions are certainly not law and, further, are not even binding on courts of law.

- AG Exhibit L (in globo) – Vantage and People's Health Contracts with Office of Group Benefits ("OGB")
- AG Exhibit I – Attorney General/Kyle Duncan contract
- AG Exhibit J – Attorney General/Office of Risk Management Interagency Transfer ("IAT") Agreement
- AG Exhibit K – Attorney General/Advocacy Center Contract

2. **Miranda Babin, State Procurement Officer, DOA/OSP**

Ms. Babin was also called by the Attorney General to attempt to prove a justiciable controversy. She was largely asked the same questions as Ms. Tregre. Ms. Babin was also asked about contracts Ms. Murrill alleged during her questioning were altered after the Attorney General approved the contracts. Ms. Babin testified that she had no knowledge of this happening, she did not know that it had happened or who may have done it, that it must have been done at the contracting agency level. Ms. Babin further testified that it was not the policy of OSP to alter contracts after they had been approved. The witness did not testify as to the lawfulness of the Executive Order; she did not identify any separation of powers, First Amendment, Due Process clause, or Commerce Clause issues. Ms. Babin did not identify any person, agency, contractor or vendor, other than the Attorney General, who had complained about the Executive Order.

- AG Exhibit M (in globo) – two contracts with the Speech and Pathology Board

3. **The parties stipulated that Pamela Rice's, Assistant Director-Professional Services & RFP, DOA/OSP, testimony would be substantially the same as Ms. Tregre's; therefore, Ms. Rice was not called as a witness. The parties stipulated that Brad Van Oss', State Procurement Officer, DOA/OSP, testimony would be substantially similar as Ms. Babin's, so Mr. Van Oss was released.**

4. **Rick McGimsey, Executive Counsel, DOA**

Mr. McGimsey testified that prior to his current position as Executive Counsel for DOA, he was the Civil Division Director at the Attorney General's office, a position he held for 8 years, from 2007-2016. Prior to that and beginning in 2001, Mr. McGimsey had advised and reviewed contracts when he worked in the Public Finance Section of the Civil Division. In both capacities, he was responsible for reviewing and approving the appointment of private counsel for state agencies, board and commissions, as well as political subdivisions. His formal approval of contracts began in 2007 when he became the Director of the Civil Division.

Mr. McGimsey testified that, on average, he reviewed 400 contracts per year for state agencies, boards and commissions, and 400 resolutions per year for political subdivisions. Mr. McGimsey testified at length about the appointment process when he was at the Attorney General's office, a process he stated did not change much from the Ieyoub, Foti, or Caldwell administrations. He testified that to his knowledge, no other Attorney General he had worked for denied the appointment of private counsel based on a contractual provision. Mr. McGimsey testified that his review was limited to: 1) is the attorney licensed to practice and in good standing, 2) is the fee reasonable and within the Attorney General's fee schedule, and 3) if not, is there a justification letter. Mr. McGimsey was asked by Ms. Murrill whether he reviewed for conflicts of interest. He testified he did not typically review the contracts for conflicts. He considered conflicts and/or waivers to be the obligation of the attorney to raise and not the Civil Division of the Attorney General's office. He reviewed conflicts when someone raised it as an issue, but typically did not independently investigate conflicts. As to the conflicts letter shown to him, he stated this was a local entity, not a state entity, and this was an extraordinary

circumstance. Mr. McGimsey also testified that the minimum qualifications published in the Bar Journal include language regarding conflicts and insurance because these are requirements for the Office of Risk Management contracts, but not necessarily the contracts reviewed by the Civil Division. Contracts submitted to the Civil Division undergo a similar review, using some but not all of the requirements of the Bar Journal.

Mr. McGimsey testified that he did not generally review other contract provisions. However, if he did see a provision he knew was not in conformance with OSP standards, he would generally advise the contracting state entity that they may have trouble getting approval "across the street" [OSP], because OSP had the final say so over state contracts. Mr. McGimsey testified this was advice he provided to the agency, but he would never deny appointment of counsel for that reason. In response to questions asked by Judge Hernandez, Mr. McGimsey testified that final approval of the appointment and contract rests with the state procurement officer; OSP does not get the contract until after it is approved by the Attorney General's office; the approval procedure does not reflect whether any party objects to terms or conditions of the contract, but to Mr. McGimsey's knowledge, no one had ever refused to use a contract provision required by the state procurement officer, and no one had ever refused state work.

Mr. McGimsey did not testify in any way that the Executive Order was unlawful; he did not identify any separation of powers, First Amendment, Due Process clause, or Commerce Clause issues. Mr. McGimsey did not identify any person, agency, contractor or vendor, other than the Attorney General, who had complained about the Executive Order. Mr. McGimsey testified that the current review being undertaken by the Attorney General's office regarding the appointment of counsel was far beyond that ever done in his years at the office. He testified that OSP set the provisions required to be in contracts, and he reviewed for the minimum standards required in law.

- AG Exhibit N – Thornhill Memo[3]
- AG N2 (in globo) – Procurement sheet, procedures for attorney contract processing
- AG N3 – Unsigned McGimsey conflicts letter[4]

5. Cameron Henry, Louisiana State Representative

Representative Henry provided general testimony regarding the health insurance contract discussed during the Joint House Appropriations and Senate Finance Committee meeting on November 18th, stating that the committee voted to amend the contract to approve only the parts that did not encompass the anti-discrimination clause. Representative Henry testified he was personally uncomfortable with the language of the non-discrimination required by the Executive Order, and he was unlikely to approve any contract with that language, *even if the Court found the Executive Order to be valid.* Representative Henry testified that he may find another ground on which to disapprove the contract instead. He testified he, personally, considered approval of the contract with the non-discrimination language as it was currently presented in the health insurance contracts as legislative intent to limit the legislature's authority to legislate. He further testified that he was opposed to the Executive Order in any form, even if it did not mention sexual orientation or gender identity at all, and instead simply said that all employment decisions should be based on merit alone.

[3] From counsel's notes, it is unclear whether this document was admitted into evidence. It is listed for the sake of completeness. The Governor's counsel objected to the memo as hearsay and irrelevant.
[4] *See supra* FN 2.

6. **Doug Sunseri, Attorney, Qualified as an expert in the field of employment law, generally**

During voir dire, Mr. Sunseri testified about his experience in the field of employment law, largely in relation to NFL proceedings. Mr. Sunseri's testimony was primarily focused on his speculative opinion regarding the potential confusion resulting from requiring employers not to discriminate on the basis of gender identity, because gender identity, according to him, is "fluid." Mr. Sunseri did not qualify as an expert in the fields of medicine, psychology, or science. Mr. Sunseri testified at length about Equal Employment Opportunity Commission ("EEOC"), actions taken by the EEOC, and Title VII and Title IX guidance documents issued by the EEOC and the U.S. Department of Education/U.S. Department of Justice, respectively. After questioning, Mr. Sunseri admitted these guidance documents were not related to this case. Mr. Sunseri speculated that he was uncertain about whether gender specific pronouns were allowed or whether employers had to adopt four sets of uniforms to accommodate gender identity employment related matters. He did not explain why four different uniforms would be required or why the use of gender specific pronouns was problematic.

Mr. Sunseri did not testify as to any specific employment issues that have arisen in Louisiana as a result of JBE 16-11. He knew of no specific complainants (employees or employers). His testimony did not prove that the Executive Order was unlawful. His testimony did not prove that it violated the constitutional rights of any person. Mr. Sunseri did not testify that the Executive Order should have been promulgated as a rule. His testimony was conflicting in that he discussed the cases that have been filed over the EEOC guidance, stating this case was similar, and yet he stated JBE 16-11 is vague and ambiguous because it doesn't contain more guidance. Mr. Sunseri opined he was *bothered* by the lack of a definition of gender identity; however, he acknowledged that the literature offers a definition of gender identity that still confuses him. Mr. Sunseri, the Attorney General's expert, did not explain why confusion as to one's gender identity would rise to the level of prohibited discrimination if, *e.g.*, a person accidentally used an incorrect pronoun. He did not offer any testimony regarding employment discrimination law or jurisprudence in Louisiana or whether intent to discriminate is a required element of proof.

Mr. Sunseri's testimony was largely refuted by the Attorney General's second expert, Ms. Sandra Schober, an expert qualified in the field of Human Resources Management. Ms. Schober testified that policies may need to be adopted to ensure consistency across state agencies, and employee training would be helpful. However, she did not appear to be confused as to what the Executive Order was asking of state employers or employees. Ms. Schober's testimony did not evidence any confusion as to the definition of gender identity. She did not testify that gender identity was "fluid." Ms. Schober testified that employment decisions should be limited to whether an individual can perform an essential job function.

Mr. Sunseri testified he was not familiar with federal Executive Order 11246, which prohibits discrimination in federal contracting based on on, *inter alia* reasons, sexual orientation and gender identity. He testified he was not aware the Attorney General's contracts with the Advocacy Center and the IAT agreement with ORM include language agreeing to comply with federal Executive Order 11246. Mr. Sunseri was unable to describe the contents of or even summarize the requirements of the Equal Opportunity Employment Act of 1972. He was further unable to identify any negative or burdensome effects of federal Executive Order 11246 since its adoption in July of 2014.

7. **Lauren Barbalich, Administrative Assistant, Civil Division, Attorney General's office**

Ms. Barbalich testified about the procedure used by the Attorney General's office in reviewing appointment of private counsel requests. The main point of her testimony, at least according to Ms. Freel, was to prove that the Attorney General's office exercises discretion in reviewing appointments. However, Ms. Barbalich's testimony regarding the exercise of that discretion did not venture far beyond that which is related to the minimum qualifications discussed herein. She testified about discretion as it relates to the Attorney General's fee schedule and discretion in approving attorneys with fewer than three years' experience even though the minimum published qualifications require three years. Ms. Barbalich's testimony proved only that the Attorney General's office sometimes deviates from the minimum qualifications requirements he published. This testimony conflicted with the testimony of Mr. McGimsey, who was also one of the witnesses called by the Attorney General.

Ms. Barbalich's testimony did not prove that the Executive Order is unlawful or otherwise violate any person's constitutional rights. It did not prove that the Attorney General has statutory authority to deny the appointment of counsel beyond the reasons statutorily outlined in law. Ms. Barbalich testified she has been directed to deny approval of private attorney appointments when contractors agree not to discriminate on the basis of gender identity. Ms. Barbalich further testified she was authorized to approve contracts containing non-discrimination language related to sexual orientation. However, she stated that the Attorney General specifically excluded a prohibition against sexual orientation discrimination from his own contract with Kyle Duncan. She was unable to explain the inconsistency of why the Attorney General contracts containing language adopting the requirements of federal Executive Order 11246 were acceptable, but the language adopting the identical requirements of JBE 16-11 posed a problem.

Ms. Barbalich testified regarding an agreement reached between DOA/OSP and the Attorney General whereby the Attorney General agreed not to review contracts, but rather a cover letter regarding minimum qualifications related to private counsel appointment. Her testimony confirmed this agreement was terminated by the Attorney General's office after twenty-one days. Ms. Barbalich was unaware of any contract provisions contested by any party other than the Attorney General.

Ms. Barbalich also confirmed that the Attorney General's office had asserted its purported authority to both mandate the terms of private counsel contracts and to assert oversight authority over private counsel retained by other executive branch entities.

- AG Exhibit O (in globo) – Emails re: memo on temporary approval process with AG and DOA
- GOV Exhibit 1 – Memo regarding termination clause in contracts
- GOV Exhibit 2 – Boards and Commissions letter
- GOV Exhibit 3 – CPRA and DNR contracts

8. **Sandra Schober, Human Resources Director, Attorney General's office**

Ms. Schober testified generally about the types of policies that would need to be developed in order to implement the Executive Order, *e.g.*, employee/employer training. She testified there could be impacts in other services and benefits such as LASERS (actuarial formulas are based on life expectancy which is different for males and females). She did not testify as to how this would be any different with or without the Executive Order. In other words, transgendered persons are employed by the State

regardless of whether the Executive Order exists, so her testimony sounded like Human Resources Management best practices.

Ms. Schober's testimony indicated while she has not encountered any issues or complaints with gender identity in her career, she would be more than able to professionally handle any employee human resources issues that did arise. Contrary to the assertions of Mr. Sunseri, Ms. Schober's testimony did not indicate she was in any way confused by the Executive Order. In fact, she offered very specific examples of potential issues and how they could be resolved. Ms. Schober's testimony did not prove that the Executive Order was unlawful or otherwise violated anyone's rights. Ms. Schober did not prove there was any existing justiciable controversy with regard to the Executive Order's application in state employment. In fact, she testified about hypothetical "challenges that she foresees" as opposed to actual challenges she has experienced. Ms. Schober's testimony conflicted with the testimony offered by the Attorney General's first expert, Mr. Sunseri, in that Ms. Schober did not opine that non-discriminatory practices with regard to gender identity cause "chaos" or "confusion." Ms. Schober's testimony indicated that while gender identity issues in the employment context might not be simple, they are not confusing, "fluid," or unresolvable.

9. Scott Johnson, General Counsel, DOA

Mr. Johnson testified he has not received any calls or otherwise heard of complaints from any agency – other than the Attorney General's office – or vendor regarding the inclusion of the Executive Order's required non-discrimination language in state contracts. He discussed the contracts being denied approval by the Attorney General and the problems it has created. He testified that several agencies have attorney contracts pending and work not being performed because of the failure of the Attorney General to appoint private counsel. He also testified that some private counsel are working but the agencies are unable to process and pay invoices. Mr. Johnson testified that neither the DOA nor the Governor's Office had been consulted in preparing the minimum qualifications that were published.

- GOV Exhibit 4 – Minimum qualifications published in the Bar Journal
- GOV Exhibit 5 – DOA Policy (from Exhibit B of the Attorney General's Binder)

Respectfully submitted,

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