

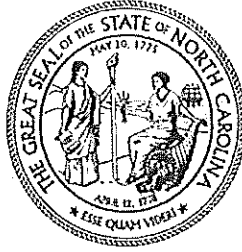
ATTACHMENTS TO NOVEMBER 13, 2017 OPINION

Roy Cooper – Executive Order No. 24, October 18, 2017

Proposed Consent Decree by Governor, Attorney General and ACLU

Louisiana Department of Justice v. Governor Edwards, November 1, 2017

Pat McCrory – Executive Order No. 93, April 12, 2016



State of North Carolina

ROY COOPER
GOVERNOR

October 18, 2017

[EXECUTIVE ORDER NO. 24]

POLICIES PROHIBITING DISCRIMINATION, HARASSMENT, AND RETALIATION IN STATE EMPLOYMENT, SERVICES, AND CONTRACTS UNDER THE JURISDICTION OF THE OFFICE OF THE GOVERNOR

WHEREAS, North Carolina welcomes all people and recognizes the importance of diversity; and

WHEREAS, North Carolina has a strong commitment to maintaining an excellent statewide workforce and a robust economy, and must eliminate discrimination, harassment, and retaliation to attract, grow, and retain its workforce and build its economy; and

WHEREAS, robust workplace protections produce greater employee job commitment, improved workplace relationships, increased job satisfaction, improved productivity, and improved health outcomes; and

WHEREAS, protecting against discrimination, harassment, and retaliation in the provision of government services promotes solidarity, government accountability, and economic efficiency; and

WHEREAS, the United States Supreme Court in *Grutter v. Bollinger* recognized a compelling state interest in diversity; and

WHEREAS, the United States Supreme Court in *Obergefell v. Hodges* recognized that "[t]he fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs," and laws burdening this liberty interest "abridge central concepts of equality"; and

WHEREAS, the majority of federal courts that have addressed the issue to date have held that discrimination on the basis of transgender status is unlawful; and

WHEREAS, a 2013 Pew Research study found that twenty-one percent of LGBT respondents "had been treated unfairly by an employer in hiring, pay, or promotions" due to their sexual orientation and/or gender identity; and

WHEREAS, a 2015 study conducted by the National Center for Transgender Equality found that thirty-two percent of transgender workers in North Carolina experienced workplace harassment or discrimination in the past year; and

WHEREAS, discrimination, harassment, and retaliation based on activities and identities protected under existing federal and state law, including but not limited to race, color, ethnicity, national origin, age, disability, sex, pregnancy, religion, National Guard or veteran status, sexual

orientation, gender identity or expression, is prohibited and unlawfully infringes upon individual dignity and autonomy; and

WHEREAS, it is in the State's interest to invite private businesses, private non-profit organizations, and other private entities to adopt policies protecting transgender individuals from discrimination, harassment, and retaliation; and

WHEREAS, it is necessary to provide state and local government actors with clarity and guidance regarding existing laws and policies prohibiting discrimination, harassment, and retaliation; and

WHEREAS, the measures set forth in this Executive Order are not inconsistent with existing federal and state law.

NOW, THEREFORE, I, Roy Cooper, Governor of the State of North Carolina, by virtue of the authority vested in me under the Constitution and the laws of the State of North Carolina, do hereby order the following:

I. Definitions and Standards

A. Prohibited Grounds

Activities and identities protected under existing federal and state law, including but not limited to race, color, ethnicity, national origin, age, disability, sex, pregnancy, religion, National Guard or veteran status, sexual orientation, gender identity or expression, shall be referred to in this Executive Order as "Prohibited Grounds" for discrimination, harassment, or retaliation.

B. Guidance

As used in this Executive Order, "Guidance" is defined to be a statement within the scope of one or more of the sub-subdivisions of N.C. Gen. Stat. § 150B-2(8a)a - l.

C. State Employment, State Government Services and Programs, State Contracts, and State Grants

1. State agencies, boards, commissions, and departments under the jurisdiction of the Office of the Governor shall not discriminate, harass or retaliate on the basis of Prohibited Grounds in employment against an individual;
2. State agencies, boards, commissions, and departments under the jurisdiction of the Office of the Governor shall not discriminate, harass or retaliate on the basis of Prohibited Grounds in the provision of government services or in the administration of government programs, including, but not limited to, programs and services concerning public safety, health, and welfare;
3. State agencies, boards, commissions, and departments under the jurisdiction of the Office of the Governor shall not discriminate, harass or retaliate on the basis of Prohibited Grounds in awarding state contracts and state grants; and
4. State agencies, boards, commissions, and departments under the jurisdiction of the Office of the Governor will not adopt policies or regulations barring, prohibiting, blocking, deterring, or impeding any individual who lawfully uses public facilities under their control or supervision, in accordance with that individual's gender identity.

II. Access to State Services

State agencies and departments under the jurisdiction of the Office of the Governor (referred to hereafter as "State Agencies" or "State Agency") are directed to adopt additional rules and policies permissible under existing federal and state law that are necessary to provide the public with equal access and opportunity, without discrimination, harassment, or retaliation based upon Prohibited Grounds, to:

- a. Services provided by the State;
- b. Services both:
 - i. Funded directly by State treasury funds that are disbursed by a State Agency; and
 - ii. Provided by a private entity receiving those funds (a "Grantee"); a private entity receiving those funds from a Grantee (a "Sub-Grantee"); a private contractor pursuant to an agreement with a State Agency (referred to in this section, and this section alone, as a "Service Contractor"); or a private subcontractor pursuant to an agreement with a Service Contractor.

State Agencies will notify their employees of measures undertaken pursuant to this Section and will ensure that those employees provide the public with equal access and opportunity without discrimination, harassment, or retaliation based upon Prohibited Grounds, to services provided by the State.

III. Policy Development

A. State Agency Specific Policies Addressing Discrimination, Harassment, and Retaliation

By the authority vested in me as the Governor of the State of North Carolina under the Constitution, *see* N.C. CONST. art. III, §§ 1, 5(4), (8), (10), and as chief supervisor of State Agencies, *see* N.C. Gen. Stat. §§ 126-1 – 99, 143B-1 – 30.4, 147-12 – 33, I further direct the Office of State Human Resources ("OSHR") to take the following actions in furtherance of the goals set forth in this Executive Order:

1. Issue Guidance applicable to all state agencies, boards, commissions, and departments under the jurisdiction of the Office of the Governor, and all directors, supervisors, officers, officials, managers, staff, and employees covered under N.C. Gen. Stat. § 126-1 – 99 (2017) (the "Human Resources Act") that addresses state government non-discrimination policy and facilitates compliance with Section II of this Executive Order. At a minimum, this Guidance will:
 - a. Set forth internal State Agency standards addressing discrimination, harassment, and retaliation based upon Prohibited Grounds;
 - b. Set forth standards which may be used by State Agencies as guidelines for complying with Section II of this Executive Order; and
 - c. Charge OSHR with adopting measures that would identify under what circumstances State Agencies may impose consequences on Grantees and Sub-Grantees who discriminate, harass, or retaliate based upon Prohibited Grounds, up to and including grant revocation and exclusion from consideration for future state grants.
2. Take any additional steps necessary to prevent and stop discrimination, retaliation, and harassment based upon Prohibited Grounds; and
3. Periodically report on efforts to comply with and implement this Executive Order.

I further direct State Agencies to take the following actions in furtherance of the goals set forth in this Executive Order.

1. Consult with OSHR and thereafter develop State Agency specific internal dispute procedures that will remain continuously in effect for State Agency employees alleging discrimination, harassment or retaliation based upon Prohibited Grounds in connection with state employment;
2. Take any additional steps necessary to prevent and stop discrimination, retaliation, and harassment based upon Prohibited Grounds; and
3. Periodically report on efforts to comply with and implement this Executive Order.

B. State Procurement Measures

I further direct the Department of Administration ("DOA") to take the following actions in furtherance of the goals set forth in this Executive Order:

1. Issue Guidance addressing discrimination, retaliation, and harassment based upon Prohibited Grounds in state procurements. At a minimum, this Guidance will;
 - a. Require, where necessary, that state contracts or subcontracts managed by and through DOA for (i) construction of public buildings, (ii) other public works, and (iii) goods or services include provisions, in accordance with existing federal and state law, which establish that bids are awarded on the basis of merit and qualifications and prospective contractors will not be discriminated, harassed or retaliated against on the basis of Prohibited Grounds;
 - b. Charge DOA with adopting measures that would identify under what circumstances:
 - i. State contractors would have to attest that they will not discriminate, harass, or retaliate based upon Prohibited Grounds prior to providing goods and services to the State;
 - ii. State contractors would be required to have in place internal policies prohibiting discrimination, harassment, and retaliation based upon Prohibited Grounds, and ensure subcontractors working on any state project under this Section have similar policies in place; and
 - iii. DOA may set forth consequences for state contractors and subcontractors who discriminate, harass or retaliate based upon Prohibited Grounds, up to and including contract termination and exclusion from consideration for future state contracts and subcontracts.
 - c. Affirm DOA's commitment to retain contractors from diverse backgrounds.
2. Notify State Agencies of DOA's measures to address discrimination, harassment, and retaliation in state procurements;
3. Take any additional steps necessary to prevent and stop discrimination, retaliation, and harassment based upon Prohibited Grounds in state procurements; and
4. Periodically report on efforts to comply with and implement this Executive Order.

IV. Commission on Inclusion

In furtherance of the goals set forth in this Executive Order, the Secretary of the Department of Administration is hereby directed to establish a commission (the "Commission") comprised of members from state government, private businesses, and non-profit organizations to (i) assist DOA and OSHR in carrying out their duties under Section III of this Executive Order and (ii) identify additional policies and measures that would promote inclusion and address discrimination, harassment, and retaliation based upon Prohibited Grounds. The Commission will meet at the request of the Secretary of the Department of Administration and work in consultation with State Agencies. DOA shall adopt any rules and policies necessary to further the Commission's objectives and the goals set forth in this Executive Order.

V. Counties, Municipalities, Political Subdivisions, Local Government Agencies, and Private Entities


1. Consistent with existing federal and state law, I affirm that all counties, municipalities, political subdivisions, local government agencies, and private entities in North Carolina may establish their own policies prohibiting discrimination, harassment, and retaliation based upon Prohibited Grounds in employment, the provision of services, and contracting.

2. Consistent with existing federal and state law, all private entities in North Carolina, along with all North Carolina counties, municipalities, political subdivisions, and local government agencies, are encouraged to adopt policies similar to those outlined in this Executive Order.

VI. Miscellaneous

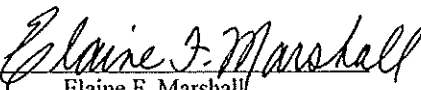
1. This Executive Order does not create a private cause of action.
2. Except as provided in Section VI.4, this Executive Order is subject to and does not otherwise conflict with or abrogate existing state law.
3. The "whereas" recitals in this Executive Order are for convenience of reference only, are not operative, and shall not be deemed to alter or affect the meaning or interpretation of any provisions thereof.
4. Unless otherwise provided, this Executive Order supersedes and rescinds Executive Order No. 93, issued on April 12, 2016.
5. This Executive Order is effective immediately and shall remain in effect until amended or rescinded by future Executive Order of the Governor.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this the 18th day of October, in the year of our Lord two thousand seventeen.



Roy Cooper
Governor

ATTEST:



Elaine F. Marshall
Secretary of State



Governor Cooper signed Executive Order No. 24, which prohibits discrimination in for employees of his administration and employees of state contractors and ensures executive agencies do not discriminate. Here are the facts about the Governor's non-discrimination executive order.

What does the executive order do?

The executive order prohibits discrimination in the Governor's administration on the basis of race, color, ethnicity, sex, National Guard or veteran status, sexual orientation, and gender identity or expression. It also will require certain state contractors to put in place non-discrimination protections for their workers. Lastly, it will ensure that the State provides all members of the public with equal access to state services without discrimination.

How many people will this affect?

Executive agencies have more than 55,000 employees and contract with more than 3,000 vendors who employ thousands of North Carolinians.

How much are these contracts worth?

Preliminary estimates indicate this executive order could impact up to \$1.5 billion worth of executive agency contracts.

Is this contractor policy unique to North Carolina?

The federal government has had a similar rule in place for years. More than twenty states – including Virginia and Montana – and more than forty localities – including Atlanta and Dallas – also have policies like this for their contractors.

Will this increase government contract costs?

Not according to the available data. More than forty localities have adopted similar rules, and resistance to these non-discrimination rules has been virtually non-existent. Almost no contractors declined to bid on a contract after having these rules explained. None of the localities that have adopted similar non-discrimination policies have reported increased expenses.

How is this different than previous non-discrimination executive orders?

This order requires executive agency contractors to have protections for their workers. And there will be real enforcement of anti-discrimination policies in hiring and promotions.

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

ROY A. COOPER, III, *et al.*,

Defendants,

PHIL BERGER, *et al.*,

*Intervenor-
Defendants.*

No. 1:16-cv-00236-TDS-JEP

**PROPOSED
CONSENT JUDGMENT AND DECREE**

1. Whereas on March 28, 2016, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Angela Gilmore, the American Civil Liberties Union of North Carolina (“ACLU-NC”), and Equality North Carolina filed a complaint challenging House Bill 2 (Session Law 2016-3, hereafter referred to as “H.B. 2”) and seeking relief from Defendants Patrick McCrory, in his official capacity as Governor of North Carolina; Roy A. Cooper III, in his official capacity as Attorney General of North Carolina; the University of North Carolina; the Board of Governors of the University of North Carolina; and W. Louis Bissette, Jr., in his official capacity as Chairman of the Board of Governors of the University of North Carolina.

2. Whereas Phil Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Tim Moore, in his official capacity as Speaker of the North

Carolina House of Representatives, sought and were granted permissive intervention in this action on June 6, 2016.

3. Whereas Roy A. Cooper, III took office as Governor of North Carolina on January 1, 2017, and was automatically substituted as a defendant for Governor McCrory in his official capacity as Governor of North Carolina pursuant to Federal Rule of Civil Procedure 25(d).

4. Whereas on March 30, 2017, the North Carolina General Assembly enacted, and Governor Cooper signed, House Bill 142, codified as Session Law 2017-4 (“H.B. 142”). H.B. 142, incorporated herein as “Exhibit A,” rescinded H.B. 2’s provisions limiting transgender individuals’ use of public facilities. The term “public facilities” as used throughout this Consent Decree refers to the types of facilities identified in N.C.G.S. § 143-760 and sect. 2 of H.B. 142.

5. Whereas on July 21, 2017, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Madeline Goss, Angela Gilmore, Quinton Harper, and ACLU-NC (“Plaintiffs”) filed a Fourth Amended Complaint challenging Sections 2, 3, and 4 of H.B. 142 and seeking relief from Defendants Roy A. Cooper, III, in his official capacity as Governor of North Carolina; the University of North Carolina; Margaret Spellings, in her official capacity as President of the University of North Carolina; Josh Stein, in his official capacity as Attorney General of North Carolina; Machel Sanders, in her official capacity as Secretary of the North Carolina Department of Administration; Mandy K. Cohen, in her official capacity as Secretary of the North Carolina Department of Health and Human

Services; and, James H. Trogdon III, in his official capacity as Secretary of the North Carolina Department of Transportation.

6. Whereas Governor Cooper, Attorney General Stein, Secretary Sanders, Secretary Cohen, and Secretary Trogdon (“Executive Branch Defendants”) believe that continued litigation over enforcement of Section 2 of H.B. 142 will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina.

7. Whereas Executive Branch Defendants do not waive any protections offered to them through federal or state law, and do not make any representation regarding the merits of Plaintiffs’ claims or potential defenses which could be raised in court.

8. Whereas Plaintiffs and the Executive Branch Defendants (collectively referred to as “the Consent Parties”) believe that a resolution of the matter at this time and in the manner encompassed by the terms of this Consent Decree serves the best interests of the State and its citizens.

9. Whereas the Consent Parties agree that this Consent Decree promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs’ claims against the Executive Branch Defendants.

10. Whereas the Consent Parties agree that Section 2 of H.B. 142 must be interpreted to mean that no executive agency, officer, employee, or agent thereof, may promulgate any regulation which prevents transgender people from using public facilities in accordance with their gender identity, nor subject transgender people to prosecution pursuant to N.C.G.S. § 114-11.6.

11. Whereas the Consent Parties further agree that any interpretation or application of Section 2 of H.B. 142 that bars, prohibits, blocks, deters, or impedes transgender people from using public facilities in accordance with their gender identity or subjects transgender people to arrest, prosecution, or criminal sanctions for doing so, raises serious federal-law concerns, including concerns over constitutional guarantees of equal protection and due process, as well as other applicable federal statutes.

12. Whereas the Consent Parties wish to record the interpretation of H.B. 142 set forth in this Consent Decree, and thereby effect a binding and enforceable resolution of the claims by Plaintiffs against the Executive Branch Defendants with respect to H.B. 142.

13. Whereas the Consent Parties therefore consent to entry of the following final and binding judgment as dispositive of all claims raised by Plaintiffs against the Executive Branch Defendants with respect to H.B. 142.

14. Whereas Plaintiffs agree to a waiver of any entitlement to damages, fees, including attorneys' fees, expenses, and costs against the Executive Branch Defendants, with respect to any and all claims raised by Plaintiffs in this action.

15. Whereas Plaintiffs further agree that dismissal of any and all remaining claims stemming from H.B. 2, and Sections 1, 3 and 4 of H.B. 142, against the Executive Branch Defendants is appropriate, and therefore request a dismissal of all remaining claims against the Executive Branch Defendants following the formal approval of the Consent Decree by the presiding District Court Judge.

16. Whereas the parties intend the following Consent Decree to benefit all transgender people who visit public facilities under Executive Branch control or

supervision, and to be binding for purposes of issue preclusion and claim preclusion in all future actions, including through non-mutual offensive collateral estoppel.

**ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
THAT:**

1. Under H.B. 142, and with respect to public facilities that are subject to Executive Branch Defendants' control or supervision, transgender people are not prevented from the use of public facilities in accordance with their gender identity. The Executive Branch Defendants as used in this paragraph shall include their successors, officers, and employees. This Order does not preclude any of the Parties from challenging or acting in accordance with future legislation.

2. The Executive Branch Defendants, in their official capacities, and all successors, officers, and employees are hereby permanently enjoined from enforcing Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant's control or supervision, in accordance with the transgender individual's gender identity. Under the authority granted by the General Statutes existing as of October 18, 2017, and notwithstanding N.C.G.S. § 114-11.6, the Executive Branch Defendants are enjoined from prosecuting an individual who uses public facilities under the control or supervision of the Executive Branch, when such use conforms with the individual's gender identity, and is otherwise lawful.

3. The Consent Parties shall each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Branch Defendants.

4. All remaining claims filed by Plaintiffs against the Executive Branch Defendants in this action are hereby dismissed.

IT IS SO ORDERED:

Dated: _____

The Honorable Thomas D. Schroeder
United States District Judge

/s/ Christopher A. Brook

Christopher A. Brook (NC Bar No. 33838)

Irena Como*

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*Appearing by special appearance
pursuant to L.R. 83.1(d).

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Counsel for Defendants GOV. ROY A. COOPER, III, in his Official Capacity as Governor of North Carolina, JOSHUA H. STEIN, in his official capacity as Attorney General of North Carolina; MACHELLE SANDERS, in her official capacity as Secretary of the North Carolina Department of Administration; MANDY K. COHEN, in her official capacity as Secretary of the North Carolina Department of Health and Human Services; and JAMES H. TROGDON III, in his official capacity as Secretary of the North Carolina Department of Transportation.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-4
HOUSE BILL 142

AN ACT TO RESET S.L. 2016-3.

The General Assembly of North Carolina enacts:

SECTION 1. S.L. 2016-3 and S.L. 2016-99 are repealed.

SECTION 2. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 81A,

"Preemption of Regulation of Access to Multiple Occupancy Restrooms.

"§ 143-760. Preemption of regulation of access to multiple occupancy restrooms, showers, or changing facilities.

State agencies, boards, offices, departments, institutions, branches of government, including The University of North Carolina and the North Carolina Community College System, and political subdivisions of the State, including local boards of education, are preempted from regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly."

SECTION 3. No local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations.

SECTION 4. This act is effective when it becomes law. Section 3 of this act expires on December 1, 2020.

In the General Assembly read three times and ratified this the 30th day of March, 2017.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 3:52 p.m. this 30th day of March, 2017



STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0173

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

Judgment Rendered: NOV. 01 2017

* * * * *

On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 652,283

Honorable Todd W. Hernandez, Judge Presiding

* * * * *

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Hon. Beryl A. Amedee, et al.

* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

Holdridge J., concurs in the result. I agree that the executive order is overly broad and in certain limited circumstances, it may extend additional protection to certain individuals not currently permitted by the constitution, legislature, or judiciary.

HIGGINBOTHAM, J.

This appeal centers on an Executive Order issued by the Governor of the State of Louisiana and challenges the legal authority and discretion of two elected state officials, the Governor and the Attorney General, relating to anti-discrimination language included in all state services, state contracts, and employment by the state.

FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. On April 13, 2016, Governor John Bel Edwards issued Executive Order No. JBE 2016-11 ("Executive Order"), concerning "EQUAL OPPORTUNITY AND NON-DISCRIMINATION" in all state services, all employment by the state, and all state contracts for the purchase of services. The Executive Order specifically required that, effective July 1, 2016, all state contracts for the purchase of services must include a provision that the contractor shall not discriminate on the basis of "race, color, religion, sex, sexual orientation, gender identity, national origin, political affiliation, disability, or age" of the persons seeking such contracts or in any matter relating to employment.¹ The Executive Order further directed all "state agencies, departments, offices, commissions, boards, entities, or officers of the State of Louisiana, or any political subdivision . . . to cooperate with the implementation of the provisions" of the Executive Order. In accordance with the Executive Order, the Division of Administration, through the Office of State Procurement, began notifying contractors of the need to revise all professional services contract documents, including legal service contracts, to comply with the new anti-discrimination provision by adding the terms "sexual orientation" and "gender identity" so that the contracts could be reviewed and/or approved.

¹ The anti-discrimination provision was not required for contracts involving a religious corporation, religious association, religious educational institution, or religious society.

Shortly after the Executive Order was issued, a group of state legislators requested that the Attorney General for the State of Louisiana, Jeff Landry, issue a formal opinion addressing the validity and enforceability of the Executive Order. The legislators were concerned because proposed anti-discrimination legislation that had been intended to expand the protected groups of individuals to include “gender identity” had repeatedly failed to pass during legislative sessions for several years prior to the issuance of the Executive Order. The Attorney General issued an opinion on May 24, 2016, concluding that the Executive Order had no binding or legal effect since there was no constitutional or statutory provision in Louisiana that banned discrimination on the basis of “gender identity.” The Attorney General stated that the Executive Order exceeded the Governor’s authority to see that state laws are faithfully executed and enforced by attempting to create new legislation in violation of the separation of powers. Consequently, the Attorney General refused to approve various state agency requests for the appointment of private legal counsel if the proposed state contracts included the term “gender identity” in the anti-discrimination provision.

The Governor filed a separate mandamus action seeking an order for the Attorney General to approve a number of pending state contracts, but that action was denied on the grounds that the Attorney General had discretion in the state contract approval process. No appeal was taken in that action; therefore, the issues in the mandamus action are not currently before us. However, because the conflict remained concerning the impasse over approval of private legal counsel contracts, the Attorney General instituted the current litigation pertinent to this appeal.

In a petition for injunctive relief and for a declaratory judgment filed against the Governor on October 20, 2016, the Attorney General, as the executive head and chief administrative officer of the Louisiana Department of Justice, requested the district court to declare that the Executive Order was invalid and to enjoin any

implementation or enforcement of the Executive Order. A group of state legislators filed a petition for intervention, joining and asserting the same claims as the Attorney General regarding the question of which branch of state government has the constitutional authority to add “gender identity” as a protected class under Louisiana’s anti-discrimination laws.² In response, the Governor filed a reconventional demand for injunctive relief and declaratory judgment, seeking to have the Executive Order declared valid and insisting that the Executive Order does not create new law, does not conflict with current law, and was a lawfully issued policy directive relating to the issuance of state contracts and state employment in the executive branch of government. The Governor also requested that the district court define the role and authority of the Attorney General with regard to legal proceedings and the approval of private legal counsel for the state and its agencies, departments, boards, and commissions. The Attorney General filed several exceptions to the Governor’s reconventional demand, asserting objections on the grounds of res judicata, no cause of action, and prematurity.

The parties agreed to proceed to an expedited trial on the exceptions and the merits on November 29, 2016. The district court considered the law, evidence, and arguments of all counsel before denying all of the Attorney General’s exceptions and granting the Attorney General’s request for permanent injunctive and declaratory relief, enjoining the mandatory adoption and implementation of the Executive Order. The district court declared that the Executive Order constituted an unlawful ultra-vires act because it created new and/or expanded upon existing Louisiana law as opposed to directing a faithful execution of the existing laws of Louisiana, which was the sole purpose for the issuance of the Executive Order. The

² Intervenorors are fifteen duly-elected Louisiana State Representatives: Beryl A. Amedee, Lawrence A. Bagley, Phillip R. DeVillier, Rick Edmonds, Raymond E. Garofalo, Jr., Lance Harris, Cameron Henry, Dodie Horton, Frank A. Howard, Mike Johnson, Blake Miguez, Jay Morris, Clay Schexnayder, Alan Seabaugh, and Julie Stokes.

district court further declared that the Executive Order was a violation of the Louisiana Constitution's separation of powers doctrine and an unlawful usurp of the constitutional authority vested only in the legislative branch of government.

As for the Governor's reconventional demand, the district court declared that the law permits the Attorney General's involvement in the appointment of private legal counsel to state agencies, boards, and commissions, but the Attorney General's authority does not extend to the review of the retention of private legal counsel to assert claims on behalf of the state, and the Attorney General's actions may not supersede the actions of private legal counsel once appointed, except for cause. The district court also found that the drafters of the Louisiana Constitution intended for the office of the Governor to be superior to the office of the Attorney General within the executive branch of state government, but the district court declined to issue an advisory opinion as to which of the state officers would prevail in any given dispute that could possibly arise between them. Written reasons were issued by the district court on December 14, 2016, and a judgment was signed accordingly on January 3, 2017. The Governor filed an appeal and the Attorney General answered the appeal.³

ASSIGNMENTS OF ERROR

The Governor assigns the following specifications of error for our review: (1) the district court erred in finding that the Governor had exercised legislative powers in issuing the Executive Order; (2) the district court erred in failing to limit the Attorney General's involvement with the appointment of private legal counsel to represent state entities; and (3) the district court erred in failing to recognize that the Attorney General has limited authority to appoint private legal counsel to represent the state.

³ After this Court *ex proprio motu* issued a rule to show cause concerning our jurisdiction, we maintained this appeal in a separate action on May 1, 2017, finding that the Governor's Executive Order was not a "law or ordinance" that would warrant the Louisiana Supreme Court's direct review as provided in La. Const. art. V, § 5(D). See Benelli v. City of New Orleans, 474 So.2d 1293, 1294 (La. 1985).

Four assignments of error are raised in the Attorney General's answer to the Governor's appeal: (1) the district court erred in denying the Attorney General's exceptions; (2) the district court erred in declaring that the Attorney General may not supersede actions of private legal counsel except for cause once counsel is appointed to represent a state entity; (3) the district court erred in declaring that the Attorney General cannot review retention of outside legal counsel once appointed; and (4) the district court erred in declaring the Governor is superior to the Attorney General within the executive branch of government after determining there was no justiciable controversy.

DISCUSSION

The main issues in the appeal and answer to appeal concern the validity of the Executive Order, as well as the extent of the Governor's and the Attorney General's respective authority. Such questions of law are reviewed *de novo*, as they involve statutory interpretation. See **Thibodeaux v. Donnell**, 2008-2436 (La. 5/5/09), 9 So.3d 120, 122-23; **Crowe v. Bio-Medical Application of Louisiana, LLC**, 2014-0917 (La. App. 1st Cir. 6/3/16), 208 So.3d 473, 483, writ denied, 2017-0502 (La. 5/12/17), 219 So.3d 1106. The Governor maintains that the Executive Order is merely an important anti-discrimination policy statement related to state contracts and employment services within the executive branch of government, and that nothing prohibits the Governor from establishing policy through an Executive Order that does not conflict with existing law. The Attorney General and intervenors contend that the Governor acted outside of his lawful powers in issuing the Executive Order, which unconstitutionally usurped the constitutionally granted power of the Legislature.

The Louisiana Constitution divides the powers of government into three separate branches: legislative, executive, and judicial. La. Const. art. II, § 1. Our constitution further provides that no branch may exercise power belonging to

another. La. Const. art. II, § 2. The legislative power of the state rests exclusively in the Legislature. La. Const. art. II, § 1; La. Const. art. III, § 1; *Hill v. Jindal*, 2014-1757 (La. App. 1st Cir. 6/17/15), 175 So.3d 988, 1006, writ denied, 2015-1394 (La. 10/23/15), 179 So.3d 600. The Governor has constitutional authority, as chief executive officer of the state, to see that all laws of the state and the United States are faithfully executed, and nothing prohibits the Governor from establishing policy through Executive Orders. See La. Const. art. IV, § 5(A); La. R.S. 49:215(A). However, the limited power of the Governor to issue Executive Orders does not inherently constitute authority to exercise the legislative lawmaking function. See *Louisiana Hospital Ass'n v. State*, 2013-0579 (La. App. 1st Cir. 12/30/14), 168 So.3d 676, 687, writ denied, 2015-0215 (La. 5/1/15), 169 So.3d 372. See also P. Lamonica & J. Jones, 20 La. Civ. L. Treatise, *Legis. Law & Proc.* § 8:1, n. 2 (2016).

The Governor's Executive Order in this case goes beyond a mere policy statement or a directive to fulfill law, because there is no current state or federal law specifically outlining anti-discrimination laws concerning and/or defining sexual orientation or gender identity.⁴ The current laws simply prohibit discrimination based on a person's biological sex.⁵ Louisiana Constitution Article I, Section 3, provides that no person shall be denied the equal protection of the laws and that no law shall "arbitrarily, capriciously, or unreasonably discriminate against a person

⁴ Louisiana courts have looked to federal jurisprudence to interpret Louisiana discrimination laws. *King v. Phelps Dunbar, L.L.P.*, 98-1805 (La. 6/4/99), 743 So.2d 181, 187. See also *Martin v. Winn-Dixie Louisiana, Inc.*, 132 F.Supp.3d 794, 811 (M.D. La. 2015).

⁵ While recognizing that federal law prohibits discrimination on the basis of sex, at least one federal court has held that a person who alleges employment discrimination on the basis of sexual orientation has put forth a case of sex discrimination for Title VII (the Civil Rights Act of 1964) purposes. See *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017). Other federal courts have held that persons with gender identity disorders, including those discharged from employment because they were transsexuals, did not have claims cognizable under Title VII, because "sex" means discrimination on the basis of the person's biological sex. See *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541, *6 (E.D. La. 2002). The United States Supreme Court has yet to make such a ruling and the meaning of the word "sex" in Title VII has never been clarified legislatively. See *Id.* at *4. Nevertheless, we note that federal law provides the familiar list of protected categories found in Louisiana's counterpart to Title VII: "race, color, religion, sex, or national origin[.]" See 42 U.S.C. § 2000e-2(a) and La. R.S. 23:332.

because of birth, age, sex, culture, physical condition, or political ideas or affiliations.” Similarly, Louisiana law concerning intentional discrimination in employment declares it unlawful for an employer to engage in discrimination because of a person’s “race, color, religion, sex, or national origin.” See La. R.S. 23:332. Clearly, the Louisiana Legislature and the people of the State of Louisiana have not yet revised the laws and/or the state Constitution to specifically add “sexual orientation” or “gender identity” to the list of protected persons relating to discrimination. Further, there is no binding federal law or jurisprudence banning discrimination on the basis of sexual orientation or gender identity. Thus, we agree with the district court that the Governor’s Executive Order constituted an unconstitutional interference with the authority vested solely in the legislative branch of our state government by expanding the protections that currently exist in anti-discrimination laws rather than directing the faithful execution of the existing anti-discrimination laws of this state.

Having found the Governor’s Executive Order invalid, we conclude that the district court did not err in permanently enjoining the mandatory adoption and implementation of the Executive Order. The remainder of the Governor’s and the Attorney General’s assignments of error are mooted by our affirmation of the district court’s ruling concerning the Executive Order, because the evidence reveals that the Attorney General’s actions in approving or disapproving state contracts concerning the employment of private legal counsel revolved exclusively around the inclusion of the disputed anti-discrimination language. Once the controversial language is removed and not an issue, we find no evidence that a justiciable controversy remains. It is well settled that courts will not decide abstract, hypothetical, or moot controversies and will not render advisory opinions with respect to such controversies. **Louisiana Associated General Contractors, Inc. v. State,**

Through Div. of Admin., Office of State Purchasing, 95-2105 (La. 3/8/96), 669 So.2d 1185, 1193.

We decline to issue an advisory opinion as to the Attorney General's authority and involvement in approving the employment of private legal counsel to represent the interests of the state when there is no evidence that such an opinion is ripe for review. It was legal error for the district court to go beyond the declaration and injunction stating that the Governor's Executive Order could not be implemented. See Jordan v. Louisiana Gaming Control Board, 98-1122 (La. 5/15/98), 712 So.2d 74, 85.⁶ Therefore, we affirm that portion of the district court's judgment granting the Attorney General's declaratory judgment declaring the Governor's Executive Order unconstitutional, as it exceeds the authority of the Governor and is a violation of the separation of powers doctrine. We further affirm that portion of the judgment granting the Attorney General's request for injunctive relief and permanently enjoining the Governor, or anyone acting on his behalf, from the mandatory adoption and implementation of the Executive Order. We vacate all other portions of the district court's judgment for the reasons cited above.

CONCLUSION

The district court's judgment is affirmed in part and vacated in part. All appellate costs in the amount of \$4,732.50 are assessed equally between the Governor and the Attorney General in their official capacities for the State of Louisiana.

AFFIRMED IN PART AND VACATED IN PART.

⁶ "[A] declaration of rights must be refused if the issue presented to the court is academic, theoretical, or based upon a contingency which may or may not arise." Jordan, 712 So.2d at 85, quoting Tugwell v. Members of the Board of Highways, 228 La. 662, 83 So.2d 893, 899 (1955) (on rehearing).



State of North Carolina

PAT McCrORY

GOVERNOR

April 12, 2016

EXECUTIVE ORDER NO. 93

TO PROTECT PRIVACY AND EQUALITY

WHEREAS, North Carolina's rich legacy of inclusiveness, diversity and hospitality makes North Carolina a global destination for jobs, business, tourists and talent;

WHEREAS, it is the policy of the Executive Branch that government services be provided equally to all people;

WHEREAS, N.C. Gen. Stat. § 160A-499.2 permits municipalities to adopt ordinances prohibiting discrimination in housing and real estate transactions, and any municipality may expand such ordinance consistent with the federal Fair Housing Act;

WHEREAS, N.C. Gen. Stat. § 143-422.2(c) permits local governments or other political subdivisions of the State to set their own employment policies applicable to their own personnel;

WHEREAS, North Carolina law allows private businesses and nonprofit employers to establish their own non-discrimination employment policies;

WHEREAS, N.C. Gen. Stat. § 143-128.2 requires each city, county or other local public entity to adopt goals for participation by minority businesses and to make good faith efforts to recruit minority participation in line with those goals;

WHEREAS, North Carolina law allows a private business or nonprofit to set their own restroom, locker room or shower policies;

WHEREAS, our citizens have basic common-sense expectations of privacy in our restrooms, locker rooms and shower facilities for children, women and men;

WHEREAS, to protect expectations of privacy in restrooms, locker rooms and shower facilities in public buildings, including our schools, the State of North Carolina maintains these facilities on the basis of biological sex;

WHEREAS, State agencies and local governments are allowed to make reasonable accommodations in restrooms, locker rooms and shower facilities due to special individual circumstances;

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Public Services

In the provision of government services and in the administration of programs, including, but not limited to public safety, health and welfare, public agencies shall serve all people equally, consistent with the mission and requirements of the service or program.

Section 2. Equal Employment Opportunity Policy for State Employees

I hereby affirm that the State of North Carolina is committed to administering and implementing all State human resources policies, practices and programs fairly and equitably, without unlawful discrimination, harassment or retaliation on the basis of race, religion, color, national origin, sex, sexual orientation, gender identity, age, political affiliation, genetic information, or disability.

I also affirm that private businesses, nonprofit employers and local governments may establish their own non-discrimination employment policies.

Section 3. Restroom Accommodations

In North Carolina, private businesses can set their own rules for their own restroom, locker room and shower facilities, free from government interference.

Under current law, every multiple occupancy restroom, locker room or shower facility located in a cabinet agency must be designated for and only used by persons based on their biological sex. Agencies may make reasonable accommodations upon a person's request due to special circumstances.

Therefore, when readily available and when practicable in the best judgment of the agency, all cabinet agencies shall provide a reasonable accommodation of a single occupancy restroom, locker room or shower facility upon request due to special circumstances.

All council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System are invited and encouraged to make a similar accommodation when practicable.

Section 4. State Buildings and Facilities Leased to Private Entities

The Department of Administration shall interpret the application of N.C. Gen. Stat. § 143-760 as follows:

When a private entity leases State real property and the property in the lessee's exclusive possession includes multiple occupancy restrooms, locker rooms or other like facilities, the private entity will control the signage and use of these facilities.

All council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System are invited and encouraged to adopt a similar interpretation of N.C. Gen. Stat. § 143-760.

Section 5. Human Relations Commission

Pursuant to N.C. Gen. Stat. § 143B-391, the Human Relations Commission in the Department of Administration shall promote equality and opportunity for all citizens.

The Human Relations Commission shall work with local government officials to study problems and promote understanding, respect and goodwill among all citizens in all communities in North Carolina.

The Human Relations Commission shall receive, investigate and conciliate fair housing, employment discrimination and public accommodations complaints.

The Human Relations Commission shall submit an annual report by April 1st to the Governor detailing the number of complaints received, the number of investigations completed, and the number of conciliations in the preceding calendar year. This report shall also describe any education and outreach efforts made by the Commission in that same calendar year.

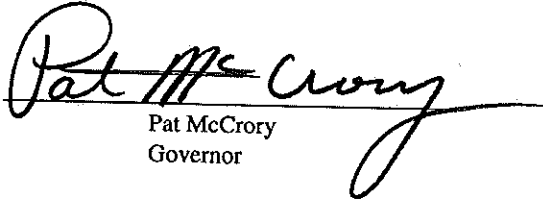
Section 6. State Cause of Action for Wrongful Discharge

I support and encourage the General Assembly to take all necessary steps to restore a State cause of action for wrongful discharge based on unlawful employment discrimination.

Section 7. State or Federal Law

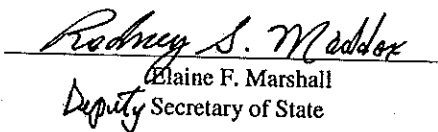
Nothing in this section shall be interpreted as an abrogation of any requirements otherwise imposed by applicable federal or state laws or regulations.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of April in the year of our Lord two thousand and sixteen.


Pat McCrory
Governor



ATTEST:


Elaine F. Marshall
Deputy Secretary of State



State of North Carolina

PAT McCrORY

GOVERNOR

April 12, 2016

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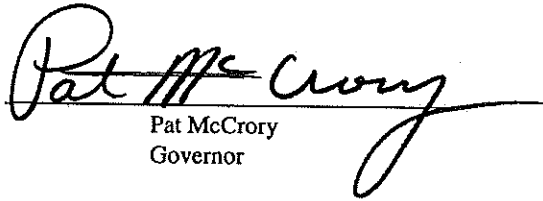
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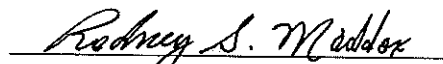
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Pat McCrory
Governor



ATTEST:


Elaine F. Marshall
Deputy Secretary of State