LOUISIANA FIRST CIRCUIT COURT OF APPEAL

NO. 2024-CA-0543

STATE OF LOUISIANA
Plaintiff/Appellee

VERSUS

OPTUMRX, INC., AND UNITED HEALTHCARE OF LOUISIANA, INC. d/b/a UNITED HEALTHCARE COMMUNITY PLAN
Defendants/Appellant

A CIVIL PROCEEDING

ON APPEAL FROM
THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA, CIVIL DOCKET NO. 24-717848
HONORABLE JUDGE DONALD R. JOHNSON

ORIGINAL BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS BY CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Respectfully Submitted:

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MAY IT PLEASE THE COURT:

The U.S. Chamber of Commerce (the "Chamber") submits this Amicus Brief in support of Defendants, Optumrx, Inc. and United Healthcare of Louisiana, Inc. d/b/a United Healthcare Community Plan.

The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber submits this brief to highlight the business community's concerns with the Attorney General's retention of private counsel on a contingency fee basis and without legislative approval in this and similar matters. As the Louisiana Supreme Court held in *Meredith v. Ieyoub*, 96-1110 (La. 9/9/97), 700 So. 2d 478, the "separation of powers doctrine, enunciated in Article II, § 2 of the Louisiana Constitution," prohibits the Attorney General from paying private counsel absent express legislative approval.

Allowing the Attorney General to use contractual arrangements like the one at issue here will erode the statutory protections contained in Louisiana Revised Statute § 42:262 and the separation of powers protections contained in Louisiana's Constitution. When it enacted Louisiana Revised Statutes § 42:262 and codified the Louisiana Supreme Court's decision in *Meredith v. Ieyoub*, the Legislature recognized such arrangements should be largely prohibited because they raise ethical

issues and violate public policy.[1] Indeed, the Attorney General's use of these arrangements has led to prosecution of government lawsuits on the basis of profitability — not the public interest — at the expense of the taxpayers' dollars.

Recognizing that the structure of separation of powers is critical to both ensuring effective government and preserving individual freedom, *see*, *e.g.*, *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting), the Louisiana Legislature enacted Louisiana Revised Statute § 42:262 in 2014. In § 42:262, the Louisiana Legislature (1) made the affirmative policy decision to prohibit the Attorney General from entering into contingency fee agreements with private counsel unless expressly authorized by statute and (2) closed the loopholes the Attorney General and private counsel had been using to evade *Meredith* by confirming that (a) "[a]ny recovery or award of attorney fees . . . belongs to the state and shall be deposited into the state treasury" and (b) private counsel cannot be paid for their services by "any third party." La. Rev. Stat. § 42:262(B)–(C).

And for good reason: the Legislature's judgment protects businesses and individuals from entrepreneurial attorneys motivated by personal enrichment rather than the public interest. Now, the Attorney General and her private counsel seek to circumvent these legislatively enacted limitations through use of yet another poorly disguised loophole, which plainly violates the statutory text and Louisiana jurisprudence. The Court should reject the Attorney General's attempt.

These for-profit suits brought in the State's name create doubt and engender distrust from the public as to the Attorney General's true motivations in bringing suit. And they incentivize private counsel to select an industry with "deep pockets" (without regard to the merits of the claims) and prosecute that industry through litigation as opposed to regulating it through legislation. At the same time, the State's

[1] *See* Louisiana Record Reports, *Jindal signs bill limiting Attorney General's use of contingency fee attorneys,* Louisiana Record (June 25, 2014), https://louisianarecord.com/stories/510584811-jindal-signs-bill-limiting-attorney-general-rsquo-s-use-of-contingency-fee-attorneys.

reliance on private counsel may lead to under-enforcement in cases where private counsel cannot find potential for profit. This end-run around representative government creates a hostile climate for business in Louisiana, and this Court should enforce the Legislature's purpose and reject it.

ARGUMENT

The proliferation of state attorneys general hiring outside, private counsel under contingency fee contracts nationwide is an area of growing concern to the business and legal communities alike. Bernard Nash et al., *Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector*, page 1 (U.S. Chamber Com. Inst. for Legal Reform Sept. 2013). While many state attorneys general have argued that these contingency fee arrangements are a "win-win" for their constituents because the lawyers do not get paid unless the states do too, they are easily susceptible to abuse because they often incentivize outside, private counsel to "inflate the amounts sought in lawsuits in order to maximize their own potential take in litigation – rather than the public good." *Id*. The United States' judicial system "relies . . . on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive." *Id*. When private, outside counsel "has a personal interest in the litigation, the neutrality so essential to the system is violated." *Id.* Accordingly, the federal government does not hire private counsel to litigate on contingency under Executive Order No. 14433, signed by former President George W. Bush on May 16, 2007.

Although the contract at issue here may not entitle private counsel to a percentage of the State's recovery, it is still very much a contingency fee contract. The private counsel will be paid only *if* they are successful in the litigation. Therefore, the same structural, constitutional concerns and policy considerations the Louisiana Supreme Court analyzed in *Meredith* and that the Legislature recognized

when it enacted Louisiana Revised Statutes § 42:262 guard against the Attorney General arranging to retain and pay private counsel without legislative approval.

I. The Attorney General's Prosecution of Suits Through Private Counsel without Legislative Approval is Contrary to Well-Settled Public Interests Recognized by Both the Louisiana Supreme Court and the Louisiana Legislature.

In *Meredith v. Ieyoub*, the Louisiana Supreme Court held that the Louisiana Attorney General could not hire outside, private counsel to represent the State unless authorized by the Legislature. Such arrangements are "illegal." *Meredith v. Ieyoub*, 96-1110 (La. 9/9/97), 700 So. 2d 478. Therefore, "*unless and until*" the Attorney General has been expressly and legislatively granted the power to pay private lawyers from state funds then she has no such power to do so. *Id*. at 481 (emphasis added). Since *Meredith*, courts have consistently closed the door on attorneys' attempts to escape its holding through loopholes. *See, e.g., Ieyoub ex rel. State v. W.R. Grace & Co.-Conn.*, 97-728 (La. App. 3d Cir. 03/6/98), 708 So. 2d 1227 (holding that absent constitutional or legislative authorization, the Attorney General did not have the authority to enter into a contingency fee contract with a private law firm in this asbestos case and that such was a violation of the separation of powers doctrine); *Foti v. Bayer Corp.*, No. 04-439, 2004 WL 5283410 (La. Civil D. Ct. Sept. 27, 2004) (holding that in a case in which a private firm would be compensated either by court order or private agreement between the litigants, it was still an impermissible contingency fee arrangement by the attorney general and private law firm).

In 2014, Louisiana's Legislature codified *Meredith* and further closed the door to attempted end-runs around its holding when it amended and reenacted Louisiana Revised Statutes § 42:262. This legislation made clear that, unless otherwise provided by law, when the Attorney General hires any private counsel: (1) "[n]o payment of attorney fees shall be made out of state funds in the absence of express

statutory authority" including payments made "on a contingency fee *or* percentage basis;" (2) "[a]ny recovery or award of attorney fees, including settlement, in litigation involving the attorney general . . . belongs to the state and shall be deposited into the state treasury;" and (3) private counsel "shall not accept nor demand as payment for the services rendered . . . anything of economic value from any third party." La. Rev. Stat. § 42:262(A) – (C) (emphasis added).

The Legislature also made clear that private counsel must "keep[] . . . accurate records of the hours worked" and cannot "incur fees in excess of five hundred dollars per hour for legal services," including as part of a fee award. La. Rev. Stat. § 42:262(D). These provisions support the legislative purpose to limit compensation of private counsel to fixed fees. Further, the purpose of this Legislation was not only to codify *Meredith*, but to also close loopholes like those used by former Attorney General Buddy Caldwell's office to circumvent its holding. In fact, the bill's sponsor, Representative Stuart Bishop, specifically identified Attorney General Caldwell's practice of paying contingency fee awards directly from the proceeds of lawsuits rather than from his office's general funds as one of the reasons the Legislature saw need to codify *Meredith*. Louisiana Record Reports, *Jindal signs bill limiting Attorney General's use of contingency fee attorneys*, Louisiana Record (June 25, 2014), https://louisianarecord.com/stories/510584811-jindal-signs-bill-limiting-attorney-general-rsquo-s-use-of-contingency-fee-attorneys. The fee contract at issue here violates both § 42:262 and *Meredith* for this exact reason.

II. The Attorney General's Attempted Use of Contingency Fee Contracts Incentivizes Personal Profit Over the Public Interest

The Louisiana Legislature is well-founded in its conclusion that it violates State public policy to allow the Attorney General to retain private counsel, who are essentially deputized governmental employees, on a contingency basis. *See* David Hammer, *New questions emerge about outgoing AG Caldwell's contracts*, WWLTV

(Nov. 24, 2015), https://www.wwltv.com/article/news/investigations/david-hammer/new-questions-emerge-about-outgoing-ag-caldwells-contracts/289-47981732 (noted ethics lawyer and expert, Dane Ciolino, opining that such arrangements are a "blatant violation of state ethics laws."). And the business community shares the Legislature's concern. Contingency agreements serve an important but limited purpose: to increase access to courts for individuals with potentially meritorious claims who do not have the resources to pay an hourly attorney rate. States and other governments have uninhibited access to justice and have no such need for these protections.

Where, as here, a contingency fee contract is *not* undertaken to provide a party with access to the courts, it creates perverse incentives which violate public policy and should be viewed with skepticism and scrutiny.[2] Because a state (like Louisiana) does not need help accessing the courts, a state attorney general's use of contingency fee contracts uniformly results in financially motivated litigation without regard to the merit of claims. Bernard Nash et al., *Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector*, page 13 (U.S. Chamber Com. Inst. for Legal Reform Sept. 2013).

When litigating under a contingency fee arrangement, the interests of government and private counsel are widely divergent. Government attorneys represent a sovereign and have an obligation to govern impartially. *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 334 (1854) (describing the role of the U.S. Attorney General as "not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and legal

[2] Despite the widespread acceptance of contingency fee agreements today, there remain lingering prohibitions based on sound public policy. For example, contingency fees are still prohibited in criminal defense cases. *See* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 40–41 (1989). Contingency fees are barred in criminal cases due to the mis-incentives that threaten to corrupt justice. As such, contingency fee agreements make improper incentives by encouraging use of the state's enforcement power to obtain the highest monetary award at any broader cost to society.

obligation"). Businesses may vigorously contest the merits of enforcement actions brought by government attorneys, but these actions generally do not raise questions of improper motivation: they are brought to assert the public interest as it is defined by the elected government.

Conversely, private lawyers retained on contingency may be motivated to subordinate the public interest in favor of personal, pecuniary gain. *See* Nash at p. 11. Indeed, if an attorney's compensation rests on the amount of money awarded in a particular case, the attorney will ultimately (and even understandably) be driven by his financial interest rather than the obligation to pursue justice and protect the public's interest on behalf of the State. *See id.* at 16; *see also* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 79–80, n.4 (2010) (explaining that attorneys bet everything on attainment of victory in contingency-fee arrangements); Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1251 n.128 (2008) ("relators' counsel, who play an integral role in the exercise of the prosecutorial discretion delegated to relators, usually work on a contingency fee basis, and thus unquestionably are motivated by the prospect of a financial reward"). This risk is eliminated when government attorneys pursue these claims on behalf of the State and is reduced when any participating private attorneys are paid on an hourly basis. Nash at p. 13.

Because private counsel working on contingency are paid only if they win, defendants generally cannot persuade private counsel to abandon a meritless case, to enter a reasonable settlement, or to agree to nonmonetary remedies. Andrew J. Pincus, *Unprincipled Prosecution: Abuse of Power and Profiteering in the New Litigation Swarm*, page 12 (U.S. Chamber Com. Inst. for Legal Reform Oct. 2014). Lacking this unique pecuniary motivation, government attorneys have no such

perverse incentive to prolong litigation where dismissal, settlement, or a nonmonetary relief is in the public interest. Actions brought by the State involve a delicate balancing and weighing of interests and values that "demands the representative of the government to be absolutely neutral," which cannot be the case when the private attorney's compensation for representation depends on the amount recovered in a case. Nash at p. 13.

III. The Attorney General's Attempted Use of Contingency Fee Contracts Incentivizes Pursuit of "Deep Pocket" Defendants Without Regard to Legal Merit.

These arrangements also encourage private lawyers to convince the government to pursue legally tenuous lawsuits against "deep pocket" defendants, who are often in industries viewed as unpopular by the public. When a state selects targets for enforcement on the basis of their profitability rather than their conduct, it creates a fundamentally hostile climate for business. Historically, private counsel has received billions representing states against corporate defendants under contingency fee arrangements, leading to plaintiffs' lawyers forming an alliance with state attorney generals in an effort to pursue "[s]peculative but lucrative litigation against a wide range of industries." Victor E. Schwartz et al., *The New Lawsuit Ecosystem: Trends, Targets and Players*, page 140 (U.S. Chamber Com. Inst. for Legal Reform Oct. 2013). These private attorneys may cloak their investigations in the legitimacy of the State, even if the claims lack legal or factual merit. *See* Andrew J. Pincus, *Unprincipled Prosecution: Abuse of Power and Profiteering in the New 'Litigation Swarm'*, page 12 (U.S. Chamber Com. Inst. for Legal Reform Oct. 2014). Such advantageous positioning makes it even more difficult for the targeted defendants to receive a fair trial. *Id.*

Through this targeted practice, private counsel may also use their representation of the government to expand or warp the development of the law. This can result in legislation by litigation and an end-run around representative

government. Victor E. Schwartz et al., *Tort Reform Past, Present, and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 258–59 (2000). In fact, these types of backdoor agreements give government officials a chance to achieve unpopular regulatory objectives which they lack a democratic mandate to pursue, weakening the public's ability to set the State's regulatory direction and defeating the purpose of an elected Legislature. *See* Michael Y. Park, *Lawyers See Fat Payoffs in Junk Food Lawsuits*, Fox News Channel, Jan. 23, 2002; *see also* John J. Zefutie, Jr., *From Butts to Big Macs – Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 Seton Hall L. Rev. 1383, 1411–13 (2004).

Finally, these arrangements routinely end up in fee disputes that clog up judicial resources and waste taxpayer dollars by promoting unnecessary litigation between government officials and their attorneys. *See e.g.*, Alex Beam, *Greed on Trial*, Atlantic Monthly, June 1, 2004, at 96; Scott Shane, *Judge to Rule on Dispute over Legal Fees*, Baltimore Sun, Dec. 10, 1999, at 2B; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27; Bruce Hight, *Lawyers Give Up Tobacco Fight*, Austin American-Statesman, Nov. 20, 1999, at A1.; Louisiana Board of Ethics, Advisory Opinion. 24-129 (2024).

Although these contingency fee agreements are depicted as bearing no cost to the public, they are not actually free—nothing of value is. The truth is that the cost, in the form of fees paid to private lawyers as the result of the litigation, is money that could have gone to fund government services or offset the public's tax burden. *See e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (reporting on controversy over government agreements giving contingency fees to private counsel, half of any recovery in public environmental

suit against poultry companies); William H. Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder, May 18, 2001, at 4 (stating that the use of contingency fee contracts creates an illusion that the suit is being pursued at no cost to the taxpayer and that there is potential for outrageous windfalls and outright corruption). Contrary to the State's position, these contingency fee agreements benefit *only* the private counsel who enrich themselves by wielding governmental authority: the State, the public, and businesses are all disadvantaged when attorneys investigate to seek profit rather than to enforce the law and remedy harms.

IV. The Attorney General's Attempted Use of Contingency Fee Contracts Erodes the Public's Trust in a Neutral Judicial System.

Finally, contingency fee agreements between state attorney generals and private attorneys routinely implicate conflicting obligations, loyalties, and motivations. Unlike private contingency fee lawyers, government lawyers are "the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger*, 295 U.S. 78, 88 (1935). "There is an inherent conflict of interest between the profit-maximizing goal of a private attorney whose compensation is based on the amount of damages imposed on a defendant, and the state's fundamental role of ensuring that the law is enforced in a fair and reasonable manner." Victor E. Schwartz et al., *The New Lawsuit Ecosystem: Trends, Targets and Players*, page 148 (U.S. Chamber Com. Inst. for Legal Reform Oct. 2013).

In many cases, the public interest may best be served with a remedy that is not financial in nature, such as an injunction or consent order. *Id*. But contingency fee agreements disincentivize nonmonetary remedies because private attorneys are financially motivated in their representation of the State. Nash at p. 10. Therefore, contingency fee arrangements can create a unique conflict between the private

attorney's own financial interest and the public interests, potentially in violation Louisiana ethics rules. *Cf.* Louisiana State Bar Association Rules of Professional Conduct Rule 1.7 (stating that a lawyer shall not represent a client if there is a concurrent conflict of interest, which exists when there is a significant risk that the representation of the client will be materially limited by a personal interest of a lawyer) and R. 1.5 (stating that a fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law).

And, at the very least, such arrangements cast doubt on the motives underpinning the litigation, which further erodes the public's trust in a fair and impartial system. Contingency fee agreements between the government and private counsel promote *quid pro quo* relationships between government officials and private lawyers, undermining the public confidence in our judicial system while underscoring the need for strict judicial oversite. Andrew J. Pincus, *Unprincipled Prosecution: Abuse of Power and Profiteering in the New "Litigation Swarm"*, page 11 (U.S. Chamber Com. Inst. for Legal Reform Oct. 2014). When hiring private counsel under these fee arrangements, the government may do so without the open and competitive process it must use in bidding out other contracts to ensure the State receives the best value. Instead, government officials will often hire their friends and political supporters. *See, e.g.*, Jeff Landry, *The Buddy System*, Houma Today (Sept. 19, 2013), https://www.houmatoday.com/story/news/2013/09/19/the-buddy-system/27064958007/. "While people lose jobs and businesses lose revenue, Buddy's [former Louisiana Attorney General, Buddy Caldwell] buddies could make off with millions of dollars in fees." *Id*. These "friendly" relationships can damage the rule of law because the public may very well believe that the government is using its power to the benefit of a well-connected few. Schwartz at p. 141.

V. Alternatives Exist to Ensure the State Can Pursue Meritorious Claims While Also Safeguarding Its State's Power and Political Accountability.

Instead of risking the inherent conflict of interest between private profit maximization and government's obligation to see that justice is done and the public distrust that this conflict sows, the Attorney General should follow the law, the Supreme Court, and the Constitution. If she believes the underlying litigation is truly meritorious, she should use the resources the Legislature has made available to her to pursue it, which include not only her staff but also the ability to hire contract counsel on an hourly basis. And if only a contingency arrangement will suffice, she can seek legislative approval—as the separation of powers requires. As discussed, these protections not only ensure that the public interest is protected but also largely eliminate the policy implications discussed above.

In general, government attorneys, under the direction of the Attorney General, are best suited to carry out the State's representation in litigation. This is because the Attorney General and Assistant Attorneys General, unlike private counsel, take an oath to "[]support the constitution and laws of the United States and the constitution and laws of this state. . ." and to "[]faithfully and impartially discharge and perform all the duties. . ." to the best of their ability and understanding. La. Const. art. X § 30. Therefore, unlike private counsel, government attorneys are not motivated by personal pecuniary gain but instead are charged to represent the interests of the citizens of Louisiana and enforce the law as intended – not in the manner which will result in the largest financial judgment.

Of course, there are limited circumstances where retention of private counsel is justified. But none justify ignoring the separation of powers and running roughshod over the laws and constitution.

The Louisiana Supreme Court was clear in *Meredith*: "Paying outside attorneys to prosecute legal claims on behalf of the state is a financial matter," which

"remains with the Legislature." 700 So. 2d at 482. And the Legislature has been equally clear: private counsel "shall not be compensated . . . in the absence of express statutory authority." La. Rev. Stat. § 42:262(A); *see also id.;* § 42:262(B) ("No payment of attorney counsel…"); *see also id*. § 42:262(D) (capping contract rate at $500/hour). Therefore, any protestation by the Attorney General that a meritorious case would not be pursued absent the unlawful retention agreement here falls flat.

CONCLUSION

For the reasons set forth above and in defendants' brief, the Chamber respectfully submits that the Court reverse the trial court's judgment and enjoin private counsel from representing Louisiana in this litigation.

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CERTIFICATE OF SERVICE

In accordance with Rule 2-14.2, I hereby certify that, on August 12, 2024, a legible copy of the above and foregoing Brief of *Amicus Curiae* in support of Defendants by Chamber of Commerce of the United States of America has been served by electronic transmission in accordance with Code of Civil Procedure article 1313(A)(4) on all counsel of record, as indicated below:

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