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SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 2021-CC-00983

JEROME MORGAN

Plaintiff/Applicant

VERSUS

BLAIR'S BAIL BONDS and
BANKERS INSURANCE COMPANY, INC.

Defendants/Respondents

A Civil Proceeding

FROM THE RULING OF THE LOUISIANA COURT OF APPEAL
FOURTH CIRCUIT, CASE NO. 2021-C-0249

BANKERS INSURANCE COMPANY'S OPPOSITION TO APPLICATION FOR SUPERVISORY WRIT

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MAY IT PLEASE THE COURT:

Defendant-Respondent, Bankers Insurance Company ("Bankers") submits this opposition to the Application for Supervisory Writ of Jerome Morgan, Plaintiff-Applicant (the "Supervisory Writ Application"). Bankers respectfully submits that the Supervisory Writ Application of Jerome Morgan ("Mr. Morgan") should be denied.

I. Summary of Argument

Unsuccessful with the Court of Appeal, Mr. Morgan now asks the Supreme Court to exercise its supervisory writ jurisdiction and reverse the District Court's decision to stay three counts of Mr. Morgan's Petition. These counts make constitutional challenges to Act 54, and have been stayed (not dismissed) until the outcome of a previously filed administrative proceeding (the "Administrative Proceeding") pending before the Division of Administrative Law (the "DAL"). The Defendants are parties, and Mr. Morgan is an Intervenor, in this Administrative Proceeding.[1]

No court below has concluded that Act 54 is constitutional or unconstitutional. Nor has Bankers, the District Court, or the Court of Appeal, asked that the DAL consider the constitutionality of Act 54. Nor would they, because no one disputes that the issue of the constitutionality of Act 54, now that it has been raised by Mr. Morgan, is an issue for the District Court, and not for an administrative law judge. Any suggestion or implication by Mr. Morgan to the contrary in his Application is simply misleading. What is at issue, rather, is merely *the timing* on when the constitutionality of Act 54 is addressed, if necessary, by the District Court.

Mr. Morgan vigorously contends that the constitutional question should be decided first. However, following the established doctrine that constitutional issues are not reached unless necessary, the validity of "Directive 214" should be decided before reaching the constitutional question. As discussed further below, Directive 214 was the vehicle used by the Commissioner of Insurance to order a refund of premium overpayments.

While Mr. Morgan contends in his Application that the validity of Directive 214 is no longer "justiciable" because of the passage of Act 54, such a contention is without legal or factual

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[1] *In the matter of American Contractors Indemnity Company et al.*, Docket Nos. 2019-3704-INS; 2019-3707-INS; 2019-3716-INS; 2019-3742-INS; 2019-3847-INS; 2019-4000-INS; 2019-4005-INS; 2019-4011-INS; 2019-4014-INS; 2019-4017-INS; 2019-4030-INS; 2019-4035-INS, State of Louisiana Division of Administrative Law, Louisiana Department of Insurance.

basis. This is because Mr. Morgan and his putative class are very definitely seeking a refund under pre-Act 54 law. That is the whole point of Mr. Morgan's intervention in the Administrative Proceeding. And in his Petition with the District Court, Mr. Morgan expressly pleads that he is entitled to a refund of excess premiums under "Directive 214." (Petition, Ex. A, p. 9).[2] Further, Mr. Morgan even states how much of a refund he and the putative class want in the opening paragraph of their Application: $5 million. This refund issue, based on Directive 214, is the subject of the now pending Administrative Proceeding. It makes no sense for Mr. Morgan to seek money damages while simultaneously maintaining that his claim for money damages under Directive 214 is not "justiciable."

The Commissioner of Insurance issued Directive 214 based on the pre-Act 54 version of La. R.S. 22:1443. For Mr. Morgan and others similarly situated to obtain a refund of the premiums they seek, the DAL must ultimately assess the validity of Directive 214. In his Supervisory Writ Application to the Court of Appeal, Mr. Morgan admits this, as he must. (Supervisory Writ Application to Court of Appeal, p. 17). Mr. Morgan has no remedy under Louisiana law for the alleged overcharged bail bond premiums unless and until Directive 214 is found to be valid and Mr. Morgan entitled to a refund after an administrative proceeding, and after any appeals of that proceeding to the Nineteenth Judicial District Court." La. R.S. 22:855(E)(2). Louisiana law and procedure in this regard is very specific. Mr. Morgan's counsel, the Southern Poverty Law Center ("SPLC"), is familiar with this legal framework, because it urged the Commissioner to issue Directive 214 in the first instance, contending:

> State law delegates responsibility for the enforcement and the administration of the insurance laws to the Commissioner of Insurance.

(Decl. of Micah West in Opposition to Exceptions, App'x, p. 118).

The Court of Appeal got it right. The District Court did not clearly abuse its discretion in ruling that the Administrative Proceeding should proceed as to the validity of Directive 214, and

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[2] Bankers refers to Mr. Morgan's Appendix as: (App'x __), and refers to Mr. Morgan's Exhibits as (Ex. __, p. __). Bankers has included references to other portions of the record below by document name and page number found in the sequentially-numbered appendices filed before the Fourth Circuit Court of Appeal. *See* Louisiana Supreme Court Rule X, Section 3. These references are designated as ([Document], App'x, p. ___) for those appearing in Mr. Morgan's Appendix, and ([Document], Bankers App'x, Ex. __) for Bankers' Appendix.

that Mr. Morgan's constitutional claims in this action should be stayed pending the DAL's determination of the validity of Directive 214 in the Administrative Proceeding.

II. The Lack of Any Basis for Writ Consideration

Bankers respectfully submits that there is no ground, pursuant to Rule X of the Supreme Court of Louisiana, for the Court to intervene on a supervisory writ basis. Bankers first discusses briefly each basis for a writ asserted by Mr. Morgan.

The Court of Appeal and the District Court did not even purport to construe or apply any provision of the Louisiana Constitution, and so could not have done so erroneously. Mr. Morgan contends as a basis for a writ that the Court of Appeal and the District Court erroneously applied La. Const. art. III, § 12. (Application, p. 5). But, neither of these courts purported to apply any provision of the Louisiana Constitution. If they had, they would have so ordered. Rather, these courts merely decided to allow the Administrative Proceeding to come to a conclusion first about whether Mr. Morgan even had a right to a refund under pre-Act 54 law before assessing the constitutionality of Act 54. This was a straightforward application of the principle that constitutional issues are not to be decided unnecessarily.

The Court of Appeal did not rule on, or sanction a decision predicated upon, any significant unresolved issue of law. Mr. Morgan contends that the state of the law in Louisiana on the primary jurisdiction doctrine is unsettled, and asks this Court to clear things up. But there is no point in trying to use this case for such a purpose. The DAL is not tasked with deciding any constitutional issues about Act 54 (nor could it). And when it comes to an interpretation of the pre-Act 54 version of La. R.S. 22:1443 (a subject of Count I of Mr. Morgan's Petition, which count is not even before this Court), the Commissioner of Insurance, as previously requested by the Southern Poverty Law Center (Mr. Morgan's counsel), has ***already*** interpreted and applied pre-Act 54 law through Directive 214. This interpretation, together with other issues pertaining to the validity of Directive 214, are squarely before the DAL.

Further, if this Court added another judicial pronouncement on the primary jurisdiction doctrine on these facts, it would not likely have broader application to other disputes. This is because the statutory scheme for handling premium overpayment matters under La. R.S. 22:855 is unique and highly specific.

The Court of Appeal's decision does not conflict with any decisions of another court of appeal, of this Court, or of the Supreme Court of the United States.

While Mr. Morgan tries vigorously to find a case law conflict, there is not one. Mr. Morgan argues that the Court of Appeal's decision conflicts with *Bourgeois v. A.P. Green Indus., Inc.*, 00-1528 (La. 4/3/01), 783 So. 2d 1251. However, this is not possible, because *Bourgeois* involved a direct appeal of a judgment to this Court after the district court had declared a statute unconstitutional. 783 So. 2d at 4. Here, the District Court has made no such rulings whatsoever—it merely stayed a proceeding as to certain claims.

Mr. Morgan also argues that the Court of Appeal's decision conflicts with *Cat's Meow, Inc. v. City of New Orleans Through Dep't of Fin.*, 98-0601 (La. 10/20/98), 720 So. 2d 1186, contending that if an amended statute such as Act 54 purports to apply retroactively, then any dispute about monetary compensation under the prior version of the statute is always moot and non-justiciable. But that is surely incorrect where a party now contends, as Mr. Morgan does here, that it would be unconstitutional for Act 54 to be applied retroactively.

Nor is there a conflict with *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Comm'n*, 94-2015 (La. 11/30/94), 646 So. 2d 885. Bankers does not contend that the DAL can decide the constitutionality of Act 54. Respectfully Mr. Morgan's argument misses the point, which is that it was within the District Court's discretion to temporarily stay resolution of the constitutional counts to see whether it is ever necessary to address them, by first allowing the DAL to assess the validity of Directive 214 (Mr. Morgan's stated basis for refund recovery). It cannot be said that the District Court's decision in this regard is so obviously incorrect that a supervisory writ is required. *Good Hope Refineries, Inc. v. Oil, Chemical and Atomic Workers Intern. Local 4-447*, 405 So. 2d 343 (La. App. 4 Cir. 1981). Given the undeniable existence of Louisiana's special statutory scheme for resolving premium overpayment claims, and the judicial reluctance to unnecessarily decide constitutional issues, it was certainly a reasonable discretionary call for the District Court to temporarily stay disposition of the constitutional claims. The Court of Appeal was right not to disturb this ruling.

One additional reason why a writ is inappropriate is that an appellate reversal here will not necessarily terminate the litigation. *Miller v. Tassin*, 02-2383 (La. App. 4 Cir. 6/4/03); 849 So. 2d

782, 783-84 (citing *Herlitz Constr. Co. v. Hotel Inv'rs of New Iberia, Inc.,* 396 So. 2d 878 (La. 1981)). Rather, a reversal on the stay issue would only cause the termination of the overall litigation if Mr. Morgan loses his constitutional challenge in every respect. However, if Mr. Morgan is successful in his constitutional challenge in any meaningful way (including on whether Act 54 can apply retroactively), reversal will just be his first step inexorably leading back to the administrative process that his counsel (SPLC) helped get started in the first place.

This matter has no issues requiring immediate resolution by the Supreme Court. The Application should be denied.

III. Statement of the Case and Relevant Facts

Events Omitted by Mr. Morgan's Supervisory Writ Application Leading Up to Directive 214

The SPLC is no stranger to Louisiana's required administrative procedure on insurance issues. Specifically, in September 2017, the SPLC wrote the Commissioner of Insurance, complaining about the bail bond industry's passing on to criminal defendants of a portion of the fees that bail bond producers are required to pay to help subsidize the criminal justice infrastructure in Orleans Parish. (Decl. of Micah West in Opp. to Exceptions, App'x, pp. 111-128). In these communications, the SPLC expressly noted that it was the responsibility of the Louisiana Commissioner of Insurance to administer and enforce the Louisiana Insurance Code. (*Id.*, p. 108, 118-120; 128).

Prompted by this complaint, the Louisiana Commissioner of Insurance, approximately thirteen years after the supposedly offending conduct complained of by Mr. Morgan commenced, filed a Petition for Declaratory Judgment in the Nineteenth Judicial District Court seeking a "judicial interpretation of La. R.S. 22:822 and R.S. 22:1443" as they pertain to the amount that may be charged for bail bonds in Orleans Parish (the "19th JDC Petition"). (19th JDC Petition, Bankers App'x, pp. 49-63). The 19th JDC Petition named every single bail bond producer and surety that operated in Orleans Parish. In his Petition, the Commissioner asserted that "La. R.S. 22:822 and La. R.S. 22:1443 create a regulatory scheme that may lead to conflicting interpretations of the statutes." (*Id.*, p. 61).

Initially, the Commissioner did not offer any interpretation of the relevant statutes or find that SPLC's complaints were valid. Instead, the Commissioner filed a declaratory judgment

action, contending essentially that the Commissioner was not sure what to do or think. Because the Commissioner had not taken a definitive position on the very statutes he was charged with administering, the defendants in the 19th JDC Action filed preemptory exceptions, noting that a declaratory relief action was inappropriate. Judge R. Michael Caldwell, at the hearing on the exceptions, noted that it was the duty of the Commissioner of Insurance to administer and enforce the Insurance Code. (January 7, 2019 Hearing Transcript, App'x, p. 70). Accordingly, Judge Caldwell sustained the peremptory exceptions of no cause of action and lack of subject matter jurisdiction and dismissed the 19th JDC Action entirely. *Id.* at p. 71.

Directive 214, the Administrative Proceeding, Mr. Morgan's Intervention, and His Announcement of a Constitutional Challenge

Only after the 19th JDC Action was dismissed did the Commissioner, on February 20, 2019, issue his interpretation of the Louisiana Insurance Code sections regarding charges for bail bonds in the form of Directive 214. (App'x B, p. 18-19). In his Directive 214, the Commissioner concluded that La. R.S. 22:1443 sets the premium rate for criminal bail bonds at 12% and that "[a]ny criminal bail bond premium collected from consumers in Orleans Parish in excess of twelve (12%) percent of the liability written is in violation of the Louisiana Insurance Code" and that "any excess premium collected must be returned to the payer." (*Id.*, p. 18). By Directive 214, the Commissioner also announced:

> ***Bail bond producers and commercial sureties may have been erroneously informed that they could charge thirteen (13%) percent premium.*** That notwithstanding, I am directing these entities to refund all persons to whom they charged an excessive premium since 2005. Any bail bond producer or commercial surety who has collected premium in excess of twelve (12%) percent is directed to refund said overage no later than June 1, 2019.

Id. (Emphasis added).

Through Directive 214, the Commissioner sought to enforce his interpretation against "All Licensed Bail Bond Producers and Commercial Sureties." Defendants Bankers and Blair's Bail Bonds, Inc. ("Blair's") and ten (10) other bail bond producers and commercial sureties timely challenged Directive 214 pursuant to La. R.S. 22:2191(A)(2) by requesting a hearing on the validity of Directive 214 before the DAL. (Bankers Exceptions, App'x, pp. 41-48).

In this Administrative Proceeding, Bankers, and other sureties and bail bond producers, seek a declaration from the DAL that Directive 214 constitutes an invalid exercise of the

Commissioner's power and improperly analyzes Louisiana law. Bankers and the other interested entities also asserted, among other things, that:

1. Directive 214 was not issued to a particular "person" as required, but rather generically to all bail bond producers and commercial sureties in the state, and imposed new obligations onto the entire bail industry not found in any statute or regulation;
2. Directive 214 requires return of funds that were not actually paid in most cases by the criminal defendants;
3. Directive 214 improperly conflates various "fees" as established by La. RS. 22:822 (which may be collected from criminal defendants) with premiums on bail bonds as established by La. R.S. 22:1443, which are two different legislatively created devices; and
4. The bail bond industry relied upon representations by the Commissioner's office for well over a decade that charging thirteen (13%) of the face amount of the bond was appropriate to compensate for the additional monies that the Legislature required be collected to pay for various criminal justice activities in Orleans Parish.

(*Id.*)

In the Administrative Proceeding, Bankers and the other petitioners also requested a stay of Directive 214's requirement that they provide refunds of amounts charged over 12% for bonds in Orleans Parish since 2005. (Bankers Exceptions, App'x, p. 48). The DAL Judge stayed the refund requirement of Directive 214 pending a final hearing on the merits. (Decl. of Micah West in Opposition to Exceptions, App'x, pp. 133-134).

Mr. Morgan successfully sought leave to intervene in the Administrative Proceeding "to protect his and other Orleans Parish consumers' interests in obtaining their refunds." (Ex. A, p. 9, ¶ 38; Order Granting Leave to Intervene, App'x, pp. 73-74).

While the Administrative Proceeding was pending, the Louisiana Legislature passed, and Governor John Bell Edwards signed into law on June 1, 2019, Act 54. Act 54 clarifies prior law, and specifically provides that the charging and collecting of a 13% premium for bail bonds written in Orleans Parish since the passage of Act 350 is not "a violation of R.S. 22:855 or R.S. 22:1443"

and that "to the extent an additional one percent has been collected under the color of the provisions of Act 350 of the 2005 Regular Session, no repayment of overcollections as determined by the commissioner shall be required." La. R.S. 22:1443 (as amended by Act 54).

Immediately after Act 54 became effective, on August 12, 2019, Bankers, along with other bond producers and sureties, timely moved for summary judgment in the Administrative Proceeding. The summary judgment motion was extremely narrow and based solely on the fact that the enactment of Act 54 subsequent to the Commissioner's issuance of Directive 214 rendered Directive 214 (assuming it was even valid in the first place) contrary to existing law. (Bankers Mot. For Summary Judgment, App'x, pp. 136-149).

However, the same day that Bankers filed its Motion for Summary Judgment in the Administrative Proceeding, Mr. Morgan separately filed his action below challenging the constitutionality of Act 54. Mr. Morgan then moved the DAL to stay the Administrative Proceeding pending resolution of Mr. Morgan's constitutional challenge to Act 54 (the "Stay Motion"). (Morgan's Mot. to Stay Admin. Proceeding, App'x, p. 151-174). The Commissioner ultimately joined in Mr. Morgan's Stay Motion. (*Id.*, p. 179). Mr. Morgan's Stay Motion was predicated on the argument that the DAL did not have the authority to determine the constitutionality of Act 54, which had at that point been raised by Mr. Morgan in this lawsuit.

The DAL held a hearing on the pending motions, including the Motion for Summary Judgment, and motion for stay, on October 1, 2019. The DAL Judge stated he was uncomfortable deciding the Motion for Summary Judgment pending a determination of whether Act 54 is unconstitutional. (October 1, 2019 Hearing Tr., App'x, p. 436; 28:15-19). Bankers' counsel then argued that if the DAL was inclined to stay consideration of the Motion for Summary Judgment based on Act 54, the DAL should still proceed to consider Bankers and the other petitioners' remaining challenges to the validity of Directive 214. (*Id.*, pp. 431, 438; 23:14-25:7; 30:11-21, 22-27)

The DAL subsequently entered its Order staying the Administrative Proceeding while the issue of the constitutionality of Act 54 was pending, ruling that all outstanding dates in the DAL's scheduling order were "stayed pending a judicial determination of the constitutionality of La. R.S.

22:1443, as amended by Act 54 of the 2019 Regular Legislative Session." (DAL Order Granting Stay, App'x, p. 578). The DAL never ruled on the Motion for Summary Judgment.

Had Mr. Morgan not successfully sought a stay of the Administrative Proceeding in its entirety, the DAL was scheduled (and in fact required under La. R.S. 22:2191) to finally resolve the merits of the remaining challenges to Directive 214 on December 9, 2019, just two months later. (*See* DAL Scheduling Order issued by the DAL, Bankers App'x, Ex. 2).

Mr. Morgan blames Bankers and the other defendants for Mr. Morgan not yet getting a refund. But Mr. Morgan is the one who sought the global stay before the DAL, not Bankers, or any other defendant. Instead, Mr. Morgan chose to proceed with his global stay request, fully understanding that the original challenges to Directive 214 lodged by Bankers and others had never been resolved.

Mr. Morgan's Claims, Bankers' Exceptions, and the Resulting Judgment

In his Petition, Mr. Morgan asserts four Claims for Relief. In the First Claim for Relief, Mr. Morgan seeks a declaratory judgment, applying pre-Act 54 law, that Blair's and Bankers overcharged Mr. Morgan, and other members of a proposed class of individuals, by charging an additional 1% of the face value of the bond. In his Second, Third, and Fourth Claims for relief, Mr. Morgan challenges the constitutionality of Act 54 as a local law (Second Claim for Relief), a special law (Third Claim for Relief), and as violating Mr. Morgan's due process rights under both state and federal constitutions (Fourth Claim for Relief).

In his Petition, Mr. Morgan expressly ties his right to a refund to Directive 214. Indeed, Mr. Morgan identifies a common question of fact for the putative class as "Whether Plaintiff [Mr. Morgan] and members of the Class are eligible for a refund under Directive 214." (Ex. A, p. 9).

Because of Mr. Morgan's express claims in his Petition that Bankers violated his due process rights under the United States Constitution, Bankers initially removed the Petition to federal court, which ultimately went before the same judge (the Honorable Wendy Vitter) who had adjudicated an earlier action filed by the SPLC against Bankers, Blair's, and others.[3] Judge Vitter nevertheless remanded the case back to the District Court for Orleans Parish.

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[3] The SPLC, through another individual, Mr. Ronald Egana, sued Bankers and others contending that the bail bond producers and sureties in Louisiana qualified as one big RICO criminal enterprise. This made for a good news story (picked up by the *New York Times*), but had one basic

On August 25, 2020, Bankers asserted various defenses and arguments that underlie its Exception of No Cause of Action as to Certain Claims and Exception of Prematurity as to Certain Claims (the "Exceptions"). In the Exceptions, Bankers argued, among other things, that Mr. Morgan could not proceed with his Petition because: (1) as to Mr. Morgan's First Claim for Relief, there was no private right of action available under the Louisiana Insurance Code and that any refund claim based on the Commissioner's already rendered interpretation of the subject statutory language had to be handled in the Administrative Proceeding and any subsequent appeals to the Nineteenth Judicial District Court; and, (2) Mr. Morgan's constitutional challenges to Act 54 were completely pointless unless he has a right to a refund under Directive 214 and pre-Act 54 law in the first place. (Bankers Exceptions, App'x, pp. 23-74). The District Court heard the Exceptions on January 15, 2021, and took the matter under advisement.

During the hearing, the District Court noted that if it deferred resolution on the constitutional claims, the DAL would have to lift its prior stay. Bankers' counsel responded by inviting Mr. Morgan's counsel to join forces with Bankers and seek a lifting of the DAL's stay to allow the Administrative Proceeding to come to a conclusion. (January 15, 2021 Hearing Tr., App'x, p. 233-34, 13:19-14:9). Mr. Morgan's counsel did not say a word in response.

On February 25, 2021, the District Court issued its Judgment, ruling in favor of Bankers and against Mr. Morgan, sustaining Bankers' exception of no cause of action as to the First Claim for Relief, granting Bankers' exception of prematurity as to the Second, Third and Fourth Claims for Relief, and staying the "action until there is a final and enforceable administrative determination on the validity of Directive 214." (App'x 1). In its Reasons, the District Court noted that "[d]etermining the validity of Directive 214 is a necessary predicate to any constitutional challenge to Act 54." (App'x 1).

After the District Court entered its Order, Bankers moved the DAL to lift the stay to consider the original grounds for the challenge to Directive 214 and again invited Mr. Morgan to join in that request. Mr. Morgan declined. (Bankers Motion to Lift Stay, Bankers App'x, Ex. 3).

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problem: the SPLC did not have the facts to back up its position. *See Ronald Egana v. Blair's Bail Bonds, Inc.*, et al., Case No. 2:17-cv-5899, United States District Court for the Eastern District of Louisiana (the "Egana Litigation"). The Egana Litigation, presided over by Judge Wendy Vitter, ended as to Bankers with the SPLC issuing a highly unusual written apology to Bankers for instituting the litigation without an adequate factual basis.

The motion to lift the stay has not yet been heard, pending this Court's decision on Mr. Morgan's Petition.

Given the requirements for an expedited Administrative Proceeding built right into Louisiana law under La. R.S. 22:2191, there is no meaningful delay in a continuation of the Administrative Proceeding as to the non-Act 54 issues; in fact, Bankers welcomes the opportunity to resolve these issues in an accelerated fashion before the DAL.

Mr. Morgan has filed a separate appeal to the Court of Appeal of the District Court's dismissal of the First Claim for Relief. That appeal is at the briefing stage.

Mr. Morgan's Prior Supervisory Writ Application

On May 4, 2021, Mr. Morgan filed a supervisory writ application with the Court of Appeal, making essentially the same arguments as in his Application to this Court. The Court of Appeals denied Mr. Morgan's prior application. And contrary to the statement of Mr. Morgan at p. 5 of his Application to this Court, the Court of Appeal did not make any findings or conclusions about the constitutionality of Act 54. This is readily apparent from the face of the Court of Appeal's order.

IV. Legal Argument

A. The vehicle Mr. Morgan alleges in his Petition to recover premiums is Directive 214, which directive is currently being adjudicated in the Administrative Proceeding.

Before refuting Mr. Morgan's particular "error" points, Bankers briefly addresses Louisiana's legislatively adopted scheme for obtaining refunds of allegedly excessive premium, to address this omission in Mr. Morgan's Application. Bankers highlights this Legislative scheme because it was argued extensively to the District Court and Court of Appeal below, and helps inform the underlying legal issues.

Mr. Morgan is not merely pursuing his lawsuit below to overturn Act 54 on constitutional grounds. His objective, rather, is ultimately to obtain a refund of the allegedly excessive premiums. Indeed, Mr. Morgan's claims are premised on a finding that Directive 214 entitled him to a refund of amounts paid above 12%. (*See, e.g.* Petition, Ex. A, ¶ 54(b) (alleging that among the common questions of fact are "Whether Plaintiff and members of the Class are eligible for a refund under Directive 214").

But the Civil District Court of Orleans Parish cannot order the refund sought by Mr. Morgan and the putative class. Indeed, the plain language of 22:855(E) outlines the administrative process and appeal to the Nineteenth Judicial District Court that is the vehicle for Mr. Morgan to obtain a refund under Directive 214:

> E. (1) Upon making a written finding that an amount in excess of the quoted premium has been received, ***the commissioner shall issue a written order to the person who received the excess amount to refund it to the person who paid it.*** Such amount shall be paid within thirty days after the date of the commissioner's order in the matter.
>
> (2) ***Upon such determination, the person ordered to pay the refund may appeal to the Nineteenth Judicial District Court after paying to the commissioner a sum equal to one-half of the assessed refund.*** The Commissioner shall keep any such sum paid in escrow and shall return it promptly to the payor if he prevails in the court proceeding. ***Thirty days after the commissioner's written findings or thirty days after final denial of the appeal, any order of the commissioner made pursuant to this Section shall be enforceable as a judgment under the Code of Civil Procedure.***

La. R.S. 22:855(E) (emphasis added).

The Louisiana Insurance Code "does not provide for a private right of action." *Taxicab Ins. Store, LLC v. Amer. Svc. Co., Inc.*, 17-0004 (La. App. 4 Cir. 7/12/2017) 224 So. 3d 451, 457. As explained further below, this is because the Louisiana Insurance Code makes the Commissioner responsible for administering and enforcing the code. La. R.S. 22:2 provides that "It shall be the duty of the commissioner of insurance to administer the provisions of this Code."[4] Other courts have reached the same conclusion. *See, e.g., Ctr. for Reconstructive Breast Surgery, LLC v. Blue Cross Blue Shield of Louisiana*, 2014 WL 4930443, at *8 (E.D. La. Sept. 30, 2014) (dismissing plaintiffs' claims under section 22:1077 of the Louisiana Insurance Code for lack of private right of action).

Mr. Morgan's counsel, the Southern Poverty Law Center, knows this. It has repeatedly argued that it is the duty of the Commissioner to enforce and administer the Insurance Code. As plainly stated in its complaint to the Commissioner that ultimately led to issuance of Directive 214: "State law delegates responsibility for the enforcement and administration of the insurance laws

[4] Morgan argues in a footnote (Application, p. 19 n. 12) that Louisiana Courts have long interpreted provisions of the Insurance Code without first requesting that the Commissioner provide an interpretation. Mr. Morgan misses the point. The cases on which Morgan relies do not involve a situation, such as here, where the Commissioner, in the capacity of administering and enforcing the Insurance Code, has already issued a Directive interpreting, applying, and enforcing the Insurance Code, and there is a pending Administrative Proceeding regarding the same.

to the Commissioner of Insurance." (Decl. of Micah West in Opposition to Exceptions, App'x, p. 118). In follow up correspondence in support of its complaint, the SPLC further urged:

> It is the responsibility of the Commissioner to "protect the public interest in the realm of insurance." *Doerr v. Mobil Oil Corp.*, 773 So. 2d 119, 134 (La. 2000); *see also* La. Att'y Gen. Op. No., 05-0171 (May 25, 2006) ("The criminal bail bonds, as issued by commercial surety underwriters, fall within the scope of insurance and surety laws of this state. . . ."). The Commissioner has the responsibility to investigate, hold hearings, and prohibit charging excessive rates" in violation of state law. *Commercial Union Ins. Co. v. Bernard*, 303 So. 2d 728, 732 (La. 1974). As the Louisiana Supreme Court held, "[i]f excessive rates are prohibited, and they are, the commissioner is *obligated* to investigate."

(*Id.*, p. 109) (emphasis in original).

Here, La. R.S. 22:855 provides its own administrative enforcement mechanism to allow the award of a refund for overcharges, and contains no language providing a private right of action to an insured.

The statutes go on to provide for administrative remedies for "any person aggrieved by any act, order of the commissioner, or failure of the commissioner of insurance to act" in the form of a hearing before the DAL in accordance with the Administrative Procedures Act. La. R.S. 22:2191(A)(2). Had the Commissioner sided with the bail bond and surety industry when reviewing the SPLC's complaint, the SPLC, and Mr. Morgan, would presumably have brought their own challenge to the Commissioner's decision pursuant to La. R.S. 22:2191(A)(2).

Whenever a statute, like La. R.S. 22:855(E), grants "broad regulatory and enforcement powers to a state agency," and does not include language expressly providing for a private right of action, a private right of action is "forcelose[d]." *See Crescent City M Dealership, L.L.C. v. Mazda Motor of Amer., Inc.*, No. Civ. A. 00-1620, 2000 WL 1372965, at *2 (E.D. La. Sept. 22, 2000) (relying on *Clausen v. Fidelity and Deposit of Maryland,* 95-0504 (La. App. 1 Cir. 8/4/95), 660 So. 2d 83, 86).

This is true under Louisiana law of essentially ***any*** statutory scheme that charges an administrative agency with administration and enforcement. *See, e.g. Navarre Chevrolet, Inc. v. Hyundai Motor Amer. Corp.*, 2019 WL 2166679 (W.D. La. Feb. 4, 2019) (finding no private right of action existed where Louisiana Motor Vehicle Franchise Act created comprehensive regulatory scheme and administrative complaint process); *River Birch, Inc. v. Robin & Assoc., Inc.,* 04-1561 (La. App. 1 Cir. 6/15/05), 906 So. 2d 729 (holding plaintiff could not invalidate contract based

upon statutory violations of the Lobbying Act, where no private right of action existed, statutory scheme provided own penalty and enforcement provisions); *Bourgeois v. Boomtown, LLC of Del.*, 10-553 (La. App. 5 Cir. 2/15/11), 62 So. 3d 166, 171 (finding no private right of action under Alcohol Beverage Control Law); *Bates v. E.D. Bullard Co.*, 11-187 (La. App. 3 Cir. 10/5/11), 76 So. 3d 111 (affirming summary judgment on negligence, including alleged duty based upon OSHA, finding "OHSA is a regulatory provision enforced by fines or criminal prosecution. It does not create a private right of action."). The Insurance Code is no different.

B. Point 1: The Court of Appeal correctly refused to issue a supervisory writ, in part, because the issue is not whether courts, rather than administrative tribunals, are charged with interpreting statutes.

Mr. Morgan contends that the District Court abused its discretion in staying resolution of the constitutional claims because the underlying dispute is a matter of statutory construction, which any court can perform. (Supervisory Writ Application, pp. 16-19).

Mr. Morgan's argument, however, is not germane to whether the District Court should be compelled to decide the constitutionality of Act 54 before the DAL adjudicates the validity of Directive 214 under pre-Act 54 law. The particular act of statutory interpretation that Mr. Morgan is referring to is of the pre-Act 54 version of La. R.S. 22:1443. But that is the subject of the First Claim for Relief in Mr. Morgan's petition, and not Mr. Morgan's separate claims challenging the constitutionality of Act 54. As stated above, Mr. Morgan's appeal of the dismissal of Count I is currently pending before the Court of Appeal. It's not before this Court.

Regardless, the Commissioner of Insurance has ***already*** purported to interpret and apply the pertinent statutory language that pre-dated Act 54. This interpretation, and the other challenges to the validity of Directive 214, are before the DAL ***right now***. After the Administrative Proceeding is completed, any appeals of the DAL's ruling will be to the Nineteenth Judicial District Court, not the District Court below, and will include any challenges to the Commissioner's statutory interpretation in Directive 214. Thus, there is simply no role to be played by the Civil District Court for Orleans Parish offering yet one more "cut" at statutory interpretation, which interpretation could then presumably be appealed to the Court of Appeal and then maybe to this Court, while there is parallel litigation on the same issues (using a procedure required by the Legislature) going on at the DAL and Nineteenth Judicial District. That would make no sense.

See, e.g., *Rogers v. Louisiana State Bd. Of Optometry Examiners*, 126 So. 2d 628 (La. App. 3 Cir. 1961) (noting that if a licensing board were to revoke or suspend the plaintiff's certificate, "a serious question would be presented as to his right to appeal to the courts from that decision" since another court would have already issued a declaration as to the interpretation of the applicable statute as to the plaintiff). *Id.* at 635.

The case law cited by Mr. Morgan actually hurts his position. In *Occidental Chemical Corp v. Louisiana Public Service Comm'n*, 810 F.3d 299 (5th Cir. 2016), the court explicitly recognizes that a stay of certain claims may be appropriate, in lieu of dismissal, to allow the predicate determination by the appropriate agency. *See, e.g. Occidental Chem. Corp.*, 810 F.3d at 302, 313 (finding invocation of the primary jurisdiction doctrine appropriate, but directing that an order of dismissal be substituted by an order staying the action for 180 days to allow administrative agency to rule on complaint).

Mr. Morgan reference to *Sierra v. City of Hallendale Beach, Florida*, 904 F.3d 1343, 1351 (11th Cir. 2018), does not help him. Mr. Morgan cites *Sierra* for the proposition that there is no reason why deference to an agency is appropriate "when that agency itself feels that no deference is warranted." (Supervisory Writ Application, p. 18). In *Sierra*, the court noted, in making the dicta comment on which Mr. Morgan relies, that the FCC "has indicated that a plaintiff is not required to exhaust remedies under the CVAA to sue under other federal statutes." *Id.* But the legislative scheme here is different. Indeed, Mr. Morgan expressly states in his Petition that he is seeking a refund under Directive 214, which is the subject of the Administrative Proceeding.

The DAL never found or implied there was another forum in which to proceed to determine the underlying validity of Directive 214. There is not. Indeed, La. R.S. 22:855(E) requires such a determination, with the right of Bankers and the other petitioners to appeal any adverse ruling of the DAL to the Nineteenth Judicial District. The DAL, rather, based its decision to stay on the fact that Mr. Morgan had constitutional challenges that could not be resolved in the Administrative Proceeding.

Respectfully Mr. Morgan's argument misses the point, which is that it was within the District Court's discretion to temporarily stay resolution of the constitutional counts to first see whether it is ever necessary to address them. It cannot be said that the District Court's decision in

this regard is so obviously incorrect that a supervisory writ is required. *Good Hope Refineries, Inc. v. Oil, Chemical and Atomic Workers Intern. Local 4-447*, 405 So. 2d 343 (La. App. 4 Cir. 1981).

C. Point 2: The District Court did not abuse its discretion in insisting that the validity of Directive 214 be determined before considering the constitutionality of Act 54.

For his second error point, Mr. Morgan contends that Mr. Morgan's constitutional challenges must be adjudicated before the DAL can consider the pre-Act 54 statutory regime. (Supervisory Writ Application, pp. 19-23). According to Mr. Morgan, this is a "threshold" issue.

This is inaccurate. The "threshold" issue (which Mr. Morgan even identifies in his Petition) is to address whether Mr. Morgan is entitled to a refund under Directive 214, based upon the pre-Act 54 version of La. R.S. 22:1443. This issue is pending before the DAL.

It is a commonplace that courts should refrain from addressing constitutional determinations where matters can be resolved on other grounds. "[A] court is required to decide a constitutional issue only: 'if the procedural posture of the case and the relief sought by the appellate demand that [it] do so.'" *Burmaster v. Plaquemines Parish Gov.*, 07-2342 (La. 5/21/08), 982 So. 2d 795, 802. Accordingly, courts avoid constitutional rulings when the case can be disposed of on non-constitutional grounds. *Id.* Indeed, where exceptions may find that a party "has no ultimate interest in seeking to have [the statute] declared unconstitutional," any declaration of unconstitutionality by the district court before such rulings "is an impermissible advisory opinion." *Ring v. State, Dep't of Transp. & Dev.*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 429, n. 5.

Similar to the plaintiff in *Ring*, Mr. Morgan "will not be significantly injured by this Court's failure to decide the constitutional issue now because," depending on the resolution of Directive 214, "the constitutional challenge may simply not materialize in this case." *Id.*

While Bankers understands that Mr. Morgan would like to argue now the merits of his constitutional claims about Act 54 (Mr. Morgan dedicates several pages of his Application for this purpose, and amicus use their briefs to talk about the purported injustice of Act 54 and the flaws

in the bail bond industry generally), the District Court has made no such rulings.[5] Nor did the Court of Appeal.

And, while Mr. Morgan vigorously argues that he can carry his burden of showing that Act 54 is facially unconstitutional, and that no evidence on these claims may ultimately be necessary, Mr. Morgan nevertheless acknowledges in his Application that it is the District Court that must first decide this issue. Bankers submits that it may never be necessary for the District Court to reach the constitutional claims if the DAL determines Directive 214 was invalid as-issued.

D. Point 3: No court has yet ruled on Mr. Morgan's due process claim.

Mr. Morgan additionally argues that he has a vested right to a refund under the pre-Act 54 version of La. R.S. 22:1443, and that Act 54 has taken that away. But no court below has ruled otherwise, making it completely unnecessary for this Court to address the due process claim now. The District Court sensibly concluded that it wants to know first whether Mr. Morgan has a right to a refund under Directive 214 (which right to a refund must rely on pre-Act 54 law and the outcome of the Administrative Proceeding). The Court of Appeal agreed.

Mr. Morgan probably has no vested right to issuance of a refund without Directive 214. That is why Mr. Morgan expressly states in his Petition that one of the common questions of fact for the purported class is whether they have a right to a refund under Directive 214. "[A] 'vested' right 'must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of a future benefit . . . does not constitute a vested right.'" *Smith v. Bd. of Trustees of La. State Employees Retirement Sys.*, 02-2161 (La. 6/27/03), 851 So. 2d 1100, 1107 (quoting *Sawicki v. K/S Stavanger Prince*, 01-0528 (La. 12/7/01), 802 So. 3d 598).

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[5] Although not properly before the Court (because the District Court has not addressed the issue), Bankers disputes that Mr. Morgan's constitutional claims can ever prevail. With respect to Mr. Morgan's argument that Act 54 is a "local law," this Court has specifically found that, just because a law "applies to localities within a certain population," a "law is not local, even though its enforcement may be restricted to a particular locality or localities, where the conditions under which it operates simply do not prevail in other localities." *Deer Enter., LLC v. Parish Council of Washington Parish*, 10-0671 (La. 1/19/11), 56 So. 3d 936, 942. Mr. Morgan's analysis on "special law" similarly fails. Here, as in *Deer Enterprises*, there is a "substantial difference between the class created and the subjects excluded, and there is a reasonable basis for the distinction." *Id.* Finally, Mr. Morgan argues that Act 54 violates due process because it took away Mr. Morgan's alleged vested right to a refund of the alleged overcharges. However, the issue of whether Mr. Morgan can even obtain a refund under pre-Act 54 law is precisely what is at issue in the Administrative Proceeding.

Mr. Morgan cites *Bourgeois v. A.P. Green Indus., Inc.*, 00-1528 (La. 4/3/01), 783 So. 2d 1251, for the proposition that "[w]hen a party acquires a right to assert a cause of action prior to a change in the law," that party has a vested right. However, Mr. Morgan ignores the continued discussion of the Louisiana Supreme Court in *Bourgeois*, which goes on to note that "[u]nder Louisiana law, a cause of action accrues when a party has the right to sue." *Bourgeois*, 783 So. 2d at 1259 (emphasis added). As stated by the Court in *Bourgeois*, a cause of action means "the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant." *Id.*, at 1260 (emphasis added).

As explained above, the Commissioner is the one tasked with administering and enforcing the Insurance Code, not Mr. Morgan. Mr. Morgan does not have a private right of action under the Insurance Code, before or after Act 54. Mr. Morgan does not cite to any case law finding that an individual has the right to sue for a refund of excess premiums allegedly overcharged, without first obtaining a final written order under La. R.S. 22:855(E) reduced to a judgment that can be enforced against the defendant.[6]

E. Point 4: Adjudication of the validity of Directive 214 is not a hypothetical exercise.

In his fourth error point, Mr. Morgan contends that it would be a fruitless hypothetical exercise for the Administrative Proceeding to continue as to the validity of Directive 214 while the issue of the constitutionality of Act 54 remains undecided. Mr. Morgan then tries an even more aggressive argument, contending that if the Administrative Proceeding goes forward now as to Directive 214 (ordering refunds based on the pre-Act 54 statute), that the Commissioner and Mr. Morgan will never be able to raise the constitutional issues.[7] (Application, p. 5). But that truly makes no sense, because the DAL will not be deciding the constitutionality of Act 54.

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[6] Under the plain language of La. R.S. 22:855(E), an order directing a refund is not final until after the expiration of thirty days or the conclusion of any appeal.

[7] Although confusing, the Commissioner's proposed amicus brief appears to be based on the false assumption that the District Court and the Court of Appeal have already decided the issue of whether Act 54 is to be applied retroactively. These courts have done no such thing. The other points raised by the Commissioner (such as the abstract legal issue of whether courts or administrative agencies best interpret statutes), is not germane to the stay of the constitutional counts. Besides, the Commissioner has already issued Directive 214, interpreting pre-Act 54 law.

Mr. Morgan's argument in his Application on how a subsequent statute supposedly moots a prior version of the statute is confusing at best, and misleading at worst. This is because Mr. Morgan and the putative class are not challenging the constitutionality of Act 54 as an academic exercise. They ultimately want money.

Indeed, if Mr. Morgan's "mootness" argument truly had merit, why has Mr. Morgan sought a declaration in his First Claim for Relief that Bankers and Blair's allegedly violated La. R.S. 22:1443 by charging Mr. Morgan and the class he seeks to represent an additional 1%? And why does Mr. Morgan state in his Application that he and his class are seeking $5 million in overpaid premiums under the pre-Act 54 version of La. R.S. 22:1443?

Mr. Morgan relies in part on *Rand v. City of New Orleans* for the basic proposition that when a challenged statute has been amended, claims based upon the amended statute are generally rendered moot. 17-0596 (La. 12/6/17), 235 So. 3d 1077, 1096. This Court went on to say in *Rand*, that amendment of a regulation alone "does not, however, require that [the court] find the case is moot." *Id.*, at 1084. Rather, the Court invoked the "collateral consequences" doctrine and recognized that there are circumstances where adjudicating issues based upon pre-amendment language is actually necessary, including "when damages or other monetary relief has been claimed on account of former provisions of a challenged ... ordinance." *Id.*, at 1085 (citing to *Cat's Meow, Inc. v. City of New Orleans Dep't of Finance*, 98-0601 (La. 10/20/98), 720 So. 2d 1186). That is precisely what is going on here.

Mr. Morgan cannot credibly deny that Act 54 might have a "collateral consequence" since he and his purported class are seeking $5 million in premium refunds under Directive 214. As the Supreme Court of the United States has noted: "For better or for worse, nothing shows a continuing stake in a dispute's outcome as a demand for dollars and cents." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). "Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, Mission's suit remains live." *Id. See also First Nat'l Bank of Picayune v. Pearl River Fabricators, Inc.*, 06-2195 (La. 11/16/07), 971 So. 2d 302, 308 (finding dispute over writ of sequestration not moot even though property at issue

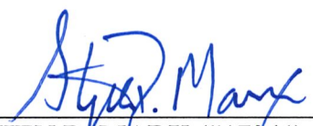
sold, because under collateral consequences doctrine it was appropriate to address issue of propriety of writ, where damages could be awarded).

Accordingly, it is hardly a "hypothetical exercise" for the DAL to address the validity of Directive 214 without regard to Act 54, but instead a necessary resolution of disputed issues of fact and law.

F. Conclusion

For the above reasons, Bankers respectfully requests that this Court deny Mr. Morgan's Application for a Supervisory Writ.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record, by notification through electronic mail, facsimile, hand delivery, and/or placing a copy of same in the United States mail, postage prepaid and properly addressed, this 2nd day of August, 2021.

STEPHEN D MARX