SUPREME COURT

STATE OF LOUISIANA

NO. 2021-CC-983

JEROME MORGAN
PLAINTIFF/APPLICANT

VERSUS

BLAIR'S BAIL BOND, ET AL.
DEFENDANTS/RESPONDENTS

CIVIL PROCEEDING

ON WRIT APPLICATION FROM THE LOUISIANA FOURTH CIRCUIT COURT OF APPEALS, CASE NO. 2021-CA-0316 AND FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS, CASE NO. 2019-08430, DIVISION G, HON. ROBIN GIARRUSSO, JUDGE

AMICUS CURIAE BRIEF
BY THE LOUISIANA DEPARTMENT OF INSURANCE
IN SUPPORT OF APPLICANT, JEROME MORGAN

RESPECTFULLY SUBMITTED,

By: The Louisiana Department of Insurance

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STATEMENT OF RELEVANT FACTS

The Louisiana Legislature set the cap on the amount of premium commercial surety underwriters writing criminal bonds could charge at 12% since at least 1993. The original statute was La.R.S. 22:1404.3, but was redesignated in 2008 as La.R.S. 22:1443. While other aspects of the statute may have been amended, the statute has always, and still to this day, maintains a 12% cap on premiums. Prior to 2019, La.R.S. 22:1443 read as follows:

> **§ 22:1443. Premium on criminal bail bond**
>
> The premium rate set for commercial surety underwriters writing criminal bail bonds in the various courts throughout the state of Louisiana shall not be subject to the rates set by the insurance commissioner, but shall be set and adjusted by the legislature. The rate for all commercial surety underwriters writing criminal bail bonds in the state of Louisiana shall be twelve percent of the face amount of the bond or one hundred twenty dollars, whichever is greater. Any additional fee authorized by R.S. 13:718(I)(2) shall not be included in this premium rate and shall be exclusive of the limit set by this Section. All other provisions of the code relating to enforcement of the rate shall be effective and enforced in accordance with all parts of this Section.

In 2005, the Louisiana Legislature amended and reenacted La.R.S. 22:1065.1(A) and (B)(3), redesignated as La.R.S. 22:822 in 2008, which increased the bail bond annual license fee for Orleans Parish commercial surety underwriters from two (2%) percent of liability written to three (3%) percent of liability written. Prior to 2020, that statute, in pertinent part, read as follows:

> **§ 22: 822. Criminal bail bond annual license fee**
>
> A. There shall be a fee on premiums for all commercial surety underwriters who write criminal bail bonds in the state of Louisiana, as follows:
>
> * * *
>
> (2)
> In the parish of Orleans, the fee shall be equal to three dollars for each one hundred dollars worth of liability underwritten by the commercial surety. This shall be the exclusive fee or tax on any criminal bail bond premium, including thereto premium taxes owed. In furtherance of the payment of this premium fee, all commercial surety underwriters underwriting criminal bail bonds in the parish of Orleans shall, upon submitting the appearance bond and their power of attorney, simultaneously pay to the sheriff a fee of three dollars for each one hundred dollars worth of liability on the bail bond being presented for the release of a person on bail. Failure to pay the fee shall prevent the sheriff from accepting the appearance bond and power of attorney. The sheriff may receive the fee by check or cash and shall accept only it from the surety or the agent of the surety. In the event a surety or agent of the surety presents payment of the fee by an instrument which is returned for insufficient funds, the agent or the agent of the surety shall be prevented from presenting the appearance bonds with their power of attorney attached until the outstanding fees are paid to the sheriff.

Notably, while the Legislature increased the license fee for commercial surety underwriters from two (2%) percent to three (3%) percent of liability written, it did not increase the cap on the

amount of premium commercial surety underwriters could charge to consumers. That cap remained, and still remains, at twelve (12%) percent since 1993.

Sometime in 2018, the Commissioner of the Louisiana Department of Insurance ("Commissioner") was presented with a complaint filed by the Southern Poverty Law Center ("SPLC") evidencing the fact that bail bond producers and commercial sureties, including Respondents herein, Blair's Bail Bonds, Inc. and Bankers Insurance Company, Inc. ("Respondents"), were charging and collecting bail bond premiums in excess of the twelve (12%) percent cap mandated by La.R.S. 22:1443. The Commissioner initially pursued an action for Declaratory Judgment in the 19th Judicial District Court for the Parish of East Baton Rouge, but that Court found there to be no justiciable controversy upon which it had authority to rule. Thereafter, the Commissioner issued Directive 214, which stated, in pertinent part:

> Any 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. Any excess premium collected must be returned to the payer.
>
> 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 overcharge no later than June 1, 2019.

In March of 2019, multiple Louisiana Surety Companies, including Respondents, filed requests for a hearing before the Division of Administrative Law ("DAL") seeking an order staying Directive 214, and alleging that Directive 214 violated the legislatively established purpose for Directives. They also alleged that Directive 214 was an improper rulemaking Regulation. The DAL judge granted the stay as to the enforcement of Directive 214 pending a hearing on the merits of Louisiana Surety Companies' allegations of invalidity.

In June of 2019, lobbyists for the Louisiana Surety Companies convinced the Legislature to pass 2019 La. Act 54 ("Act 54"). Act 54 *retroactively* amended La.R.S. 22:1443 to essentially override Directive 214. The statute, as currently constructed and with the changes made by Act 54 highlighted, reads as follows:

> **§ 1443. Premium on criminal bail bond**
>
> A. The premium rate set for commercial surety underwriters writing criminal bail bonds in the various courts throughout the state of Louisiana shall not be subject to the rates set by the insurance commissioner, but shall be set and adjusted by the legislature. Except as provided in Subsection B of this Section, the rate for all commercial surety underwriters writing criminal bail bonds in the state of Louisiana shall be twelve percent of the face amount of the bond, or one hundred twenty

dollars, whichever is greater. Any additional fee authorized by R.S. 13:718(I)(2) shall not be included in this premium rate and shall be exclusive of the limit set by this Section. All other provisions of the code relating to enforcement of the rate shall be effective and enforced in accordance with all parts of this Section.

B.

(1) In any parish having a population of more than three hundred thousand and fewer than four hundred thousand persons according to the latest federal decennial census, to the extent an additional one percent has been collected under color of the provisions of Act 350 of the 2005 Regular Session, no repayment of overcollections as determined by the commissioner shall be required nor shall such actions be considered a violation of R.S. 22:855 or R.S. 22:1443.

(2) Notwithstanding any provision of law to the contrary, in no parish covered by the provisions of this Subsection shall the fee provided for in R.S. 22:822 be more than two dollars for each one hundred dollars worth of liability underwritten by the commercial surety.

As a result of the passage of Act 54, the Louisiana Surety Companies filed a Motion for Summary Judgment in the DAL matter seeking a declaration that Directive 214 was ineffective and overruled by legislation. On that same date, SPLC filed Case No. 2019-8430 in Civil District Court for the Parish of Orleans ("CDC matter"), which is the subject of this writ application, seeking class certification and challenging the constitutionality of Act 54. Thereafter, the Commissioner filed a Motion to Continue and Stay the DAL proceedings pending the outcome of the CDC matter. The DAL judge granted the Commissioner's stay request pending resolution of SPLC's constitutional challenge in the CDC matter.

Thereafter, Banker's Insurance Company ("Banker") filed an Exception of No Cause of Action and Exception of Prematurity in the CDC matter. Banker's argument for its exceptions was anchored in the Primary Jurisdiction Doctrine. The trial judge in the CDC matter granted Banker's exception and stayed the CDC matter pending a determination of the validity of Directive 214.

WRIT GRANT CONSIDERATIONS

(1) This case presents an issue where the lower courts have erroneously interpreted or applied La.R.S. 22:1443 as amended by Act 54 and that decision will cause material injustice and significantly affect the public interest. The lower courts' decisions create a slippery slope of allowing the retroactive application of a substantive change to a statute in contravention to Louisiana law.

(2) This case presents a significant unresolved issue of law that can only be resolved by this Court, as the scope of the primary jurisdiction doctrine is unresolved and unclear to the lower courts, the litigants, and the Commissioner. It raises complex and difficult

procedural questions about the proper allocation of power between courts and administrative agencies.

ARGUMENT

There are two principles of Louisiana law at the forefront of this litigation. The first is the mainstay doctrine of retroactive versus prospective application, which the lower courts' decisions are in danger of eradicating. The second involves the doctrine of Primary Jurisdiction. The confusion surrounding this doctrine begs for clarity from this Court. This Court should grant the writ application to provide guidance and clarity so desperately needed by the public on these issues.

I. THE LOWER COURTS' ERRONEOUS INTERPRETATION OF LA.R.S. 22:1443 AS AMENDED BY ACT 54 IS IN VIOLATION OF LOUISIANA LAW AND WILL CREATE A DANGEROUS SLIPPERY SLOPE REGARDING RETROACTIVE VERSUS PROSPECTIVE STATUTORY CONSTRUCTION.

Applicant and Respondents have clashed at both the trial and appellate courts over the Primary Jurisdiction Doctrine. It is undeniable that the confusion surrounding that doctrine warrants intervention by this Court. However, this Court should grant the writ application for a simpler reason involving a much more indisputable doctrine of law. This case presents this Court with the opportunity to protect the mainstay Louisiana statutory construction doctrine of retroactive versus prospective application.

The Trial Court reasoned that "[d]etermining the validity of Directive 214 is a necessary predicate to any constitutional challenge to Act 54." However, the only possible way that interpretation could be correct is if Directive 214 and Act 54 are in conflict with each other, and the only way they can be in conflict with each other is if the Courts improperly accept the Legislature's designation of Act 54 as retroactive.

(A) Directive 214 relates to 2005 – February 20, 2019.

In Directive 214, the Commissioner details the twelve (12%) percent cap on the amount of premium commercial surety underwriters writing criminal bonds can charge, and the three (3%) percent bail bond annual license fee for Orleans Parish commercial surety underwriters that went into effect in 2005. After establishing that he had received credible evidence that commercial surety underwriters in Orleans Parish were charging thirteen (13%) percent premium rather than twelve (12%) percent, the Commissioner went on to state that he was "directing [any bail bond producers and commercial sureties who charged more than the 12% cap] to refund all persons to

whom they charged an excessive premium since 2005." He further stated that "[a]ny bail bond producer or commercial surety who has collected premium in excess of twelve (12%) is directed to refund said overcharge no later than June 1, 2019."

It is clear that the date range for Directive 214 is from 2005 to February 20, 2019. Act 54 was signed into law on June 1, 2019. While the Legislature attempted to establish retroactive application with the specific wording of the amendments to the statute, Louisiana law does not allow any such statutory application.

(B) Act 54 is a substantive change in the law, and therefore cannot be applied retroactively.

The legislature is free, within constitutional confines, to give its enactments retroactive effect. La. Rev. Stat. Ann. § 1:2 provides that "[n]o section of the Louisiana Revised Statutes is retroactive unless it is expressly so stated." However, La. Rev. Stat. Ann. § 1:2 has been construed as co-extensive with La. Civ. Code Ann. art. 6.[1] Article 6 codifies the general rule against retroactive application of legislative enactments and the exceptions jurisprudentially grafted on, providing as follows:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.[2]

A two-fold inquiry is performed in determining whether a newly enacted provision is to applied prospectively only, or may also be retroactive. The Court must first determine whether the amendment to the statute expresses legislative intent regarding retroactive or prospective application.[3] Second, if no intent is expressed, the enactment must be classified as substantive, procedural, or interpretive.[4] However, "even [where] the legislature has expressed its intent to give a law retroactive effect, the law may not be applied retroactively if doing so would impair contractual obligations or disturb vested rights.[5] If it does so, then in spite of legislative pronouncements to the contrary, the law is substantive rather than procedural or interpretive. *State*

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[1] See *St. Paul Fire & Marine Insurance Company v. Smith*, 609 So.2d 809, 816 (La. 1992).
[2] La.C.C. art. 6.
[3] See *Keith v. U.S. Fidelity & Guaranty Company*, 96-2075 (La. 5/9/97), 694 So. 2d 180, 183.
[4] *Id.* @ 183.
[5] *Home Bank v. Marcello*, 2017-0281 (La.App. 4 Cir. 10/18/17) 2017 La.App. LEXIS 1978 @ *10; see also *Landry v. Baton Rouge Police Dep't*, 2008-2289 (La.App. 1 Cir. 05/08/09), 17 So.3d 991, 997; *State Farm Mutual Automobile Insurance Company v. Noyes*, 2002-1876 (La. App. 1st Cir. 2/23/04), 872 So. 2d 1133, 1138.

Farm Mutual Automobile Insurance Company v. Noyes, 2002-1876 (La. App. 1st Cir. 2/23/04), 872 So. 2d 1133, 1138.

Procedural laws prescribe a method for enforcing a previously existing substantive right and relate to the form of the proceeding or the operation of the laws.[6] Substantive laws either establish new rules, rights, and duties or change existing ones.[7] Interpretive laws, on the other hand, do not create new rules, but merely establish the meaning that the interpretive statute had from the time of its initial enactment.[8] It is the original statute, not the interpretive one, that establishes the rights and duties.[9]

There is no question that Act 54 changes and/or creates new rules and rights. It eliminates the right of the public to recover any overcharge of premiums. It grants new rights to the commercial surety underwriters writing criminal bail bonds by insulating them from any right of recovery from the public or any rule or order set forth by the Commissioner relative to the overcharges. Finally, it eliminates the Commissioner's right to set forth rules and orders to vindicate the public for the overcharging of the premiums. Given same, no matter how the Legislature tried to frame the amendment to the statute, Act 54 is an unconstitutional retroactive application to a substantive statute.

The statutory interpretation and the construction to be given to legislative acts is a matter of law and rests with the judicial branch, not an administrative agency.[10] Allowing an administrative agency to issue a ruling interpreting statutory construction creates a dangerous precedent, especially where the issue involves whether a statute is to be given retroactive versus prospective application. In the end, because Act 54 is substantive and only receives prospective application - June 1, 2019 going forward - it does not conflict with Directive 214 which relates to 2005 – February 20, 2019. The trial and appellate courts therefore erred in staying the CDC matter matter pending the outcome of the DAL matter. Not only do Directive 214 and Act 54 not conflict with each other, but the DAL judge does not have the authority to interpret Act 54 and determine its applicability. Given same, guidance from this Court regarding the applicability and constitutionality of Act 54 is paramount to efficient and swift justice.

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[6] See *Keith*, 694 So. 2d at 183.
[7] *Id.*
[8] *Id.*
[9] See *St. Paul Fire & Marine Insurance Company*, 609 So. 2d at 817.
[10] See *Bourgeois v. A.P. Green Indus., Inc.*, 2000-1528 (La. 4/3/01), 783 So. 2d 1251, 1260.

II. THE LOWER COURT'S RULINGS REVEAL A LACK OF CLARITY REGARDING THE PROPER APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE, REQUIRING INTERVENTION BY THIS COURT.

In the abstract, the Primary Jurisdiction Doctrine seems to be a very simple concept. It is a doctrine of judicial abstention whereby a court which has jurisdiction over a matter, nonetheless defers to an administrative agency for an initial decision on questions of fact or law within the peculiar competence of the agency.[11] However, there is confusion amongst courts as to when it applies because "[n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."[12]

Without proper guidance from this Court, the application of the Primary Jurisdiction Doctrine will have no continuity amongst the courts, litigants, or citizens of Louisiana, leading to protracted, inefficient, and possibly ineffective litigation. This is no more evident than in the case at bar, as we have a situation where the CDC trial judge says the doctrine applies and the DAL judge essentially says the doctrine doesn't apply leading to a standoff. Both judges have issued stays saying they need the other to rule first, and neither judge has the authority to force the other judge to lift its stay and go forward. Meanwhile, a class action seeking to redress a wrong to thousands of Louisiana citizens sits stagnant. Guidance from this Court is required to secure justice.

(A) The Primary Jurisdiction Doctrine does not apply because the statutory interpretation and the construction to be given to legislative acts is a matter of law and rests with the judicial branch, not an administrative agency.

It is well established that courts need not refer an issue to an agency when the issue is strictly a legal one, involving neither the agency's particular expertise nor its fact-finding prowess.[13] Where the standards to be applied in resolving the issue are within the conventional competence of the courts and the judgment of an expert body is not likely to be helpful in the application of the standard to the facts of the case, the Primary Jurisdiction Doctrine is not applicable. Courts have stated that they "should be reluctant to invoke the doctrine of primary

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[11] See *Occidental Chem. Corp. v. La. PSC*, 15-30100 (5th Cir. 01/04/16) 810 F.3d 299; see also *REO Indus., Inc. v. Natural Gas Pipeline Co. of Am.*, 932 F.2d 447, 456 (5th Cir. 1991).

[12] *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 520 n.15 (5th Cir. 1981) (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956)).

[13] *Occidental* @ 309; see also *Mississippi Power & Light*, 532 F.2d at 419 [(5th Cir. 1976)]; *Shew v. Southland Corp.*, 370 F.2d 376, 379-80 (5th Cir. 1966)

jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate."[14] Additionally, "when the agency's position is sufficiently clear or nontechnical or when the issue is peripheral to the main litigation, courts should be very reluctant to refer. . . . Finally, the court must always balance the benefits of seeking the agency's aid with the need to resolve disputes fairly yet as expeditiously as possible."[15]

In this matter, the viability of Directive 214 is peripheral, at best, to the issue at hand, which is the applicability and constitutionality of Act 54. Interpretation of same is inherently and solely within the purview of the judiciary, and the DAL has neither the particular expertise nor the authority to weigh in on same. This is a rudimentary principle of our judicial and legal system. Yet, courts in general, and the lower courts in particular in this case, struggle with the applicability of the Primary Jurisdiction Doctrine. The doctrine is meant to "simply allocate power between courts and administrative agencies to make initial determinations when two potential jurisdictions exist."[16] It is different from the exhaustion rule, which applies when exclusive jurisdiction exists in the administrative agency, and the courts have only appellate, as opposed to original, jurisdiction to review the agency's decisions.[17] Guidance from this Court is important not only for this case, given the tens of thousands of people who may be impacted by the Court's ruling, but also for future disputes that involve questions about whether the relief demanded by the parties presents issues for court or agency resolution.

CONCLUSION

While this case is certainly unique in its fact pattern, it is crucial to Louisiana courts in establishing a proper analysis as to when the Primary Jurisdiction Doctrine should be utilized, as well as the limits on legislative authority as it relates to the retroactive nature of statutes. It presents an issue where the lower courts have erroneously interpreted or applied La.R.S. 22:1443, as amended by Act 54, and that decision will cause material injustice and significantly affect the public interest. The lower courts' decisions create a slippery slope of allowing the retroactive application of a substantive change to a statute in contravention to Louisiana law. It further presents a significant unresolved issue of law that can only be resolved by this Court, as the scope

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[14] *Id.*

[15] *Mississippi Power & Light*, 532 F.2d 412, 419 (5th Cir. 1976).

[16] Central Louisiana Electric Co. v. Louisiana Public Service Com., 601 So. 2d 1383 (La. 1992)(Justice Lemmon concurring).

[17] Daily Advertiser v. Trans-La, Div. of Atmos Energy Corp., 612 So.2d 7, 27 (La. 1993).

of the primary jurisdiction doctrine is unresolved and unclear to the lower courts, the litigants, and the Commissioner. It raises complex and difficult procedural questions about the proper allocation of power between courts and administrative agencies, while the litigation is at a stand-still because of confusion between the application of the doctrine between the court and the administrative agency.

Consequently, the Louisiana Department of Insurance prays that this Court grant the writ application, and upon due proceedings had, reverse the trial and appellate courts, order the Trial Court to lift the stay, and remand the matter back to the Trial Court for further proceedings.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Memorandum has been served this day, via electronic transmission, personal service and/or by United States Mail, properly addressed and postage prepaid, upon all parties in this matter.

New Orleans, Louisiana, this 7th day of July, 2021.

_____
William D. Aaron, Jr.