

LOUISIANA SUPREME COURT

NO. _____

JEROME MORGAN, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff/Applicant

VERSUS

BLAIR'S BAIL BONDS, INC., 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

FROM THE CIVIL DISTRICT COURT,
PARISH OF ORLEANS, CIVIL CASE NO. 2019-08430, DIVISION "G-11",
HONORABLE ROBIN M. GIARRUSSO, PRESIDING

APPLICATION OF
JEROME MORGAN, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED,
FOR SUPERVISORY WRIT

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Jerome Morgan, on behalf of himself and
all others similarly situated

VS.

Blair's Bail Bonds, Inc. and Bankers
Insurance Company, Inc.

Applicant: Jerome Morgan

Have there been any other filings in this
Court in this matter? Yes No

Are you seeking a Stay Order? No

Priority Treatment? No

If so you MUST complete & attach a Priority
Form

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Pleading being filed: In proper person, In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

- Civil, Criminal, R.S. 46:1844 protection, Bar, Civil Juvenile, Criminal Juvenile, Other
 CINC, Termination, Surrender, Adoption, Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____

Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Civil District Court, Parish of Orleans Docket Number: 2019-08430

Judge and Section: Hon. Robin M. Giarrusso, Division "G-11" Date of Ruling/Judgment: 02/25/2021

APPELLATE COURT INFORMATION

Circuit: Fourth Docket No. 2021-C-0249 Action: Writ Denied

Applicant in Appellate Court: Jerome Morgan Filing Date: 05/04/2021

Ruling Date: 06/08/2021 Panel of Judges: Hon. McKay, Lobrano, and Chase En Banc:

REHEARING INFORMATION

Applicant: _____ Date Filed: _____ Action on Rehearing: _____

Ruling Date: _____ Panel of Judges: _____ En Banc:

PRESENT STATUS

Pre-Trial, Hearing/Trial Scheduled date: N/A, Trial in Progress, Post Trial


Is there a stay now in effect? Yes Has this pleading been filed simultaneously in any other court? No

If so, explain briefly The district court stayed Morgan's constitutional claims until the Division of Administrative Law evaluates
the validity of the Commissioner of Insurance's Directive 214.

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to
the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are
attached to this filing. I further certify that a copy of this application has been mailed or delivered to the
appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other
counsel and unrepresented parties.

07/08/21
DATE


SIGNATURE

**LOUISIANA SUPREME COURT
ATTACHMENT TO
WRIT APPLICATION FILING SHEET**

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INDEX

TABLE OF AUTHORITIES ii

TABLE OF EXHIBITS v

I. STATEMENT OF CONSIDERATIONS FOR GRANTING THE WRIT 1

 A. This Court should exercise its jurisdiction to clarify the scope of the primary jurisdiction doctrine. 3

 B. The court of appeal erroneously applied La. Const. art. III, § 12. 5

 C. The district court’s decision conflicts with this Court’s decision in *Bourgeois v. A.P. Green Indus., Inc.* 6

 D. The district court’s decision conflicts with this Court’s decision in *Cat’s Meow and Louisiana Paddlewheels*. 7

II. SUMMARY OF CASE AND PRIOR PROCEEDINGS..... 8

 A. State law required Defendants to charge a twelve percent premium for a bail bond..... 8

 B. The Commissioner issued Directive 214 after learning that Defendants systematically overcharged Morgan and other consumers..... 9

 C. The DAL stayed the administrative proceedings to allow this Court to determine whether Act 54 is constitutional. 10

 D. Defendants took contradictory positions in the DAL and district court. 11

III. ASSIGNMENTS OF ERROR 13

IV. SUMMARY OF THE ARGUMENT 14

V. ARGUMENT 16

 A. The district court abused its discretion in referring this case to the DAL under the primary jurisdiction doctrine when this dispute involves purely legal questions within the district court’s expertise..... 16

 B. The district court abused its discretion because the Directive’s validity is not a prerequisite to determining Act 54’s constitutionality. 19

 1. Act 54 is an unconstitutional local and special law..... 19

 2. Act 54 violates due process. 21

 C. The DAL does not have jurisdiction to determine whether the Commissioner correctly interpreted the pre-Act 54 statutes because doing so would be a prohibited hypothetical exercise. 24

VI. CONCLUSION..... 25

VERIFICATION..... 27

APPENDIX..... 28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Able v. La. Workers’ Comp. Corp.</i> , 97-0581 (La. 10/21/97), 700 So. 2d 824.....	2, 8, 16
<i>Apalachicola Riverkeeper v. Taylor Energy Co., LLC</i> , 954 F. Supp. 2d 448 (E.D. La. 2013).....	4, 17
<i>Borlem S.A.-Empreedimentos Industriais v. United States</i> , 710 F. Supp. 797 (Ct. Int’l Trade 1989)	17
<i>Bourgeois v. A.P. Green Indus., Inc.</i> , 00-1528 (La. 4/3/01), 783 So. 2d 1251	6, 16, 19, 22
<i>Burmester v. Plaquemines Par. Gov’t</i> , 07-2432 (La. 5/21/08), 982 So. 2d 795	22
<i>In re Cartesian Co., Inc.</i> , 16-1556 (La. App. 1st Cir. 10/12/17), 233 So. 3d 9	16
<i>Cat’s Meow, Inc. v. City of New Orleans Through Dep’t of Fin.</i> , 98-0601 (La. 10/20/98), 720 So. 2d 1186.....	7, 24
<i>Cent. La. Elec. Co. v. Louisiana Pub. Serv. Comm’n</i> , 92-0988, 92-1001 (La. 01/19/93), 601 So. 2d 1383	4, 18, 22
<i>Commercial Union Ins. Co. v. Bernard</i> , 303 So. 2d 728 (La. 1974)	22
<i>Daily Advertiser v. Trans-La, a Div. of Atmos Energy Corp.</i> , 92-0988, 92-1001 (01/19/93), 612 So. 2d 7	4
<i>Deer Enters. LLC, v. Par. Council of Wash. Par.</i> , 10-0671 (La. 1/19/11), 56 So. 3d 936.....	20, 21
<i>Deshotels v. SHRM Catering Servs., Inc.</i> , 88-1323 (La. 01/30/1989), 538 So. 2d 988.....	17
<i>Envtl.Def. Fund, Inc. v. Wheelabrator Techs. Inc.</i> , 725 F. Supp. 758 (S.D.N.Y. 1989)	17
<i>Faucheaux v. Alton Ochsner Med. Found. Hosp. & Clinic</i> , 85-0968 (La. 6/17/85), 470 So. 2d 878.....	22
<i>Grubbs v. Gulf Int’l Marine, Inc.</i> , 93-0583 (La. 10/18/1993), 625 So. 2d 495	17
<i>Herlitz Const. Co. v. Hotel Inv’rs. of New Iberia, Inc.</i> , 81-231 (La. 03/30/81), 396 So. 2d 878.....	5
<i>Hopkins v. Howard</i> , 05-0732 (La. App. 4th Cir. 4/5/06), 930 So. 2d 999.....	17
<i>Johno v. Doe</i> , 16-0087 (La. 12/6/16), 218 So. 3d 1004.....	22
<i>Kimball v. Allstate Ins. Co.</i> , 97-2885, 97-2956 (La. 4/14/98), 712 So. 2d 46.	<i>passim</i>

<i>La. High Sch. Athletics Ass’n, Inc. v. State</i> , 12-1471 (La. 1/29/13), 107 So. 3d 583	20, 21
<i>La. Paddlewheels v. La. Riverboat Gaming Comm’n</i> , 94-2015 (La. 11/30/94), 646 So. 2d 885, 888 n.4.....	8, 15, 17, 25
<i>La. Workers’ Comp. Corp. v. La. Ins. Guar. Ass’n</i> , 08-0885 (La. App. 1st Cir. 5/13/09), 20 So. 3d 1047	17
<i>Landry v. La. Citizens Prop. Ins. Co.</i> , 07-1907, 2007-1908 (La. 5/21/08), 983 So. 2d 66.....	17
<i>Michel v. State, Div. of Admin. Law</i> , 13-1419, (La. App. 1st Cir. 11/03/14), 167 So. 3d 654, 663	18
<i>Morrell v. Harris</i> , 505 F. Supp. 1063 (E.D. Pa. 1981)	18
<i>Occidental Chem. Corp. v. Louisiana Pub. Serv. Comm’n</i> , 810 F.3d 299 (5th Cir. 2016)	4, 17, 18, 19
<i>Sierra v. City of Hallandale Beach, Fla.</i> , 904 F.3d 1343 (11th Cir. 2018)	18
<i>St. Charles Par. Sch. Bd. v. GAF Corp.</i> , 85-2334 (La. 08/07/87), 512 So. 2d 1165.....	24
<i>State Through Dep’t of Highways v. Terral</i> , 206 So. 2d 307 (La. App. 3d. Cir. 1968)	21
<i>State v. McCue</i> , 75 So. 100 (La. 1917)	21
<i>State v. Sprint Commc’ns Co., L.P.</i> , 96-1931 (La. 9/13/96), 679 So. 2d 382.....	5
<i>Ulrich v. Robinson</i> , 2018-0534 (La. 3/26/19), 282 So. 3d 180.....	24
<i>State ex rel. Ward v. Bd. of Sup’rs of Elections, Par. of Rapides</i> , 34314 (La. 3/22/37), 173 So. 726	16
Constitution, Statutes, and Rules	
La. Const. Art. III, § 12.....	5, 19, 21
2019 La. Act 54.....	1, 2, 7, 23, 24
La. Civ. Code Ann. art. 7	22
La. Civ. Code Ann. art. 1968	22
La. Civ. Code Ann. art. 2033	23
La. Rev. Stat. § 13:718(I)(2).....	8
La. Rev. Stat. § 22:6(13)(e)	17
La. Rev. Stat. § 22:695.....	17
La. Rev. Stat. § 22:822.....	8, 9
La. Rev. Stat. § 22:855(E)	<i>passim</i>

La. Rev. Stat. § 22:1065.1.....	8
La. Rev. Stat. § 22:1379(3)(f).....	17
La. Rev. Stat. § 22:1443.....	<i>passim</i>
La. Rev. Stat. § 22:2191(A)(2)	9
La. Rev. Stat. § 23:1395(D).....	17
La. Rev. Stat. § 49:959.....	11
La. Rev. Stat. § 49:964(A)(1)	11
La. Rev. Stat. § 49:964(A)(2)(a).....	5
La. Stat. Ann. § 49:964(B).....	4, 11
Louisiana Supreme Court Rule X.....	2, 3, 5, 6, 7
Other Authorities	
InJustice Watch, <i>Around the country bail bondsmen’s political muscle works overtime against reform efforts</i> (Dec. 14, 2016).....	1
Jessica Williams, <i>Facing little competition for seat in Congress, Cedric Richmond has begun to broaden his power base</i> (Dec. 4, 2016).....	1
La. Att’y Gen. Op., No. 05-0171, 2006 WL 1670246 (May 25, 2006).....	23

>

TABLE OF EXHIBITS*

- Exhibit A: Plaintiff's Petition for Class Certification and Declaratory Judgment, filed August 12, 2019.
- Exhibit B: Directive 214 issued by the Commissioner of the Louisiana Department of Insurance to all bail bond companies and their insurers, dated February 20, 2019.
- Exhibit C: Louisiana 2019 Act 54.

*The exhibits are bound separately from the writ application in accordance with Louisiana Supreme Court Rule X, Section 3(6).

I. STATEMENT OF CONSIDERATIONS FOR GRANTING THE WRIT

The outcome of this appeal impacts as many as 50,000 New Orleans families who collectively overpaid, among others, Defendants Blair’s Bail Bonds, L.L.C. (“Blair’s”) and Bankers Insurance Company, Inc. (“Bankers”) (“Defendants”) about \$5 million. Under La. Rev. Stat. § 22:1443, the Louisiana legislature established that “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” Nevertheless, Defendants charged Plaintiff-Applicant Jerome Morgan—and the putative class he represents—a thirteen percent premium for a bail bond during a fourteen-year period between 2005 and 2019.

After being informed about Defendants’ actions, the Commissioner of Insurance (“Commissioner”) issued Directive 214 (“Directive”) in 2019, which ordered Defendants to refund Morgan and tens of thousands of other New Orleans families that Defendants collectively wronged for more than a decade. The purpose of the Directive was to force Defendants to comply with the law and to provide compensation to New Orleans families who, among other harms, deferred mortgage, rent, utility, or other bills to pay illegal premium or languished in jail until they could borrow or save enough money to do so.

Blair Boutte, the owner of Blair’s, is also an influential political consultant for Democratic legislators in Louisiana. He operates B-3 Consulting, a political consulting business, whose clients include many Democratic members of the state legislature, the governor, and judges.¹ The New Orleans bail bond industry, which includes Defendants, successfully lobbied the legislature to pass 2019 La. Act 54 (“Act 54”) to overturn the Directive and to prohibit any compensation to New Orleans families. Act 54 states that “to the extent an additional one percent [premium] has been

¹ Two district court judges in this case recused themselves because they had either hired—or been opposed by—Mr. Boutte in past re-election campaigns. Judge Giarrusso, the district court judge who ultimately sustained Bankers’ exceptions, also offered to recuse herself because she, too, had hired Mr. Boutte as part of her most recent re-election campaign. *See also* InJustice Watch, *Around the country bail bondsmen’s political muscle works overtime against reform efforts*, TheLensNola.org (Dec. 14, 2016), <https://thelensnola.org/2016/12/14/around-the-country-bail-bondsmen-political-muscle-works-overtime-against-reform-efforts/> (describing Mr. Boutte as a “power in New Orleans”); Jessica Williams, *Facing little competition for seat in Congress, Cedric Richmond has begun to broaden his power base*, Nola.com (Dec. 4, 2016), https://www.nola.com/article_e2824c59-5a57-558e-84ad-0c2882614fc7.html (describing Mr. Boutte’s “no-holds-barred tactics,” intimidation, and attempts to “sometimes strong-arm rivals”).

collected . . . , no repayment of overcollections . . . shall be required nor shall such [overcollections] be considered a violation of R.S. 22:855 or R.S. 22:1443.”

Following Act 54’s enactment, Defendants argued in the DAL—where they had initiated proceedings to challenge the Directive’s validity—that the new law rendered the Directive unlawful and “of no effect.” Bankers’ Mot. Sum. Jud. at 7.² Morgan—a community activist who spent twenty years in prison for a crime that he did not commit—did not dispute that Act 54 invalidated the Directive but asked the DAL to stay the administrative proceedings to allow Morgan to challenge Act 54’s constitutionality. Morgan simultaneously filed this action in the Orleans Parish Civil District Court alleging that Act 54 violates due process and is a prohibited local and special law. These constitutional protections—which prohibit the legislature from retroactively immunizing Defendants from liability and from stripping New Orleans families of any remedy—are important bulwarks against the powerful capturing the legislative process at the expense of those with fewer political connections.

The DAL stayed the administrative proceedings because “administrative agencies lack the power to hold statutory provisions unconstitutional,” *Able v. La. Workers’ Comp. Corp.*, 97-0581 (La. 10/21/97), 700 So. 2d 824, 827, and until the state courts determine Act 54’s constitutionality. *See* Bankers Mot. Sum. Jud. Tr. 21:14–16 (“Wouldn’t it be a little premature for me to say what the law is until the Supreme Court tells me what the law is and what’s valid or not?”).

Defendants then changed their position in the district court to avoid a ruling on Act 54’s constitutionality. Contradicting their position in the DAL, Defendants argued that the DAL should ignore Act 54 and evaluate the Directive’s legality as if the legislature did not give Act 54 retroactive effect. But the DAL cannot ignore the passage of Act 54 without violating fundamental principles of justiciability. Doing so would be a prohibited hypothetical exercise because Act 54 retroactively amended the laws upon which the Commissioner based the Directive, exempts Defendants from complying with the law, and eliminates any compensation for wrongdoing.

Nevertheless, the district court—invoking the primary jurisdiction doctrine—agreed to stay Morgan’s constitutional claims and referred the dispute to the DAL to determine the validity of

² Mr. Morgan has included citations to the record but—except for his Petition for Class Certification and Declaratory Judgment, Directive 214, and the text of Act 54—has not attached those records. *See* Louisiana Supreme Court Rule X, Section 3(6).

the Directive. The district court's reasons for its judgment included only a single sentence: "Determining the validity of Directive 214 is a necessary predicate to any constitutional challenge to Act 54." Trial Court Written Reasons for Judgment. The district court did not offer any explanation why it believed this to be true or how the DAL should examine the Directive's validity given that the DAL is limited to deciding justiciable questions.

The district court's judgment creates a catch-22: the district court held that it cannot evaluate Morgan's constitutional claims without the DAL first affirming the Directive's validity. But the DAL can only affirm the Directive's validity if the district court first finds Act 54 to be unconstitutional. In other words, unless the district court declares Act 54 to be unconstitutional, the only justiciable question that the DAL can answer is that Act 54 invalidates the Directive (an answer that no party disputes). For the reasons discussed below, Act 54's constitutionality is the actual threshold question and there are no predicate issues that the DAL must first decide before the district court can adjudicate that question.

More than two years have passed since the Commissioner issued the Directive intended to compensate about 50,000 New Orleans families for being overcharged. Those families deserve to know without any further delay whether the legislature violated Louisiana's Constitution by passing legislation intended to strip them of this compensation and to insulate the bail bond industry from any liability. As discussed herein, this Court should order the district court to adjudicate Morgan's constitutional claims before the DAL resolves the Directive's validity because the constitutionality of Act 54 is the threshold question, the DAL does not have jurisdiction to resolve that question, and there is nothing within the DAL's special expertise that it must decide before the district court can adjudicate Morgan's constitutional claims.

A. This Court should exercise its jurisdiction to clarify the scope of the primary jurisdiction doctrine.

Supreme Court Rule X, Section 1(a)(2) authorizes this Court to exercise jurisdiction if a case involves "significant unresolved issues of law." This case presents an appropriate vehicle to resolve significant questions about the scope of the primary jurisdiction doctrine—the basis for the district court's decision to stay Morgan's constitutional claims—which "has not been, but should be, resolved by this court." Supreme Court Rule X, § 1(a)(2).

The primary jurisdiction doctrine applies only when "(1) the court has original jurisdiction over the claim before it; (2) the adjudication of that claim requires the resolution of predicate issues

or the making of preliminary findings; and (3) the legislature has established a regulatory scheme whereby it has committed the resolution of those issues or the making of those findings to an administrative body.” *Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 460 n.25 (E.D. La. 2013) (quotation marks and citation omitted). This Court has had only a few opportunities to address the scope of the primary jurisdiction doctrine and this Court’s most extensive discussion about the doctrine is in a concurring opinion. *Cent. La. Elec. Co. v. Louisiana Pub. Serv. Comm’n*, 92-0988, 92-1001 (La. 01/19/93), 601 So. 2d 1383, 1388 (Lemmon, Justice, concurring). In one of this Court’s most recent decisions about the primary jurisdiction doctrine, it acknowledged that litigants view the doctrine as “confusing” and a “tool[] of less than surgical precision.” *Daily Advertiser v. Trans-La, a Div. of Atmos Energy Corp.*, 92-0988, 92-1001 (01/19/93), 612 So. 2d 7, 27 n.31 (citation and quotation marks omitted).

This case is no exception. The district court conceded that it struggled with its decision, describing the issue as “a little bit more challenging than some of the things I normally [] have on my docket,” Bankers’ Exceptions Tr. 30:32-31:2. This case presents an opportunity to provide much needed clarity to courts about the factors that courts should consider before issuing a stay in deference to an agency—including whether abstention is appropriate when (1) the agency itself stayed the administrative proceedings because it believed that the state courts must decide a preliminary legal question about an Act’s constitutionality; (2) the dispute “is strictly a legal one, involving neither the agency’s particular expertise, no its fact finding prowess”; and (3) the legal dispute is “within the conventional competence of the courts.” See *Occidental Chem. Corp. v. Louisiana Pub. Serv. Comm’n*, 810 F.3d 299, 309 (5th Cir. 2016).

A supervisory writ application is the appropriate vehicle to seek review. The district court’s conclusion that Morgan’s constitutional claims cannot be evaluated unless the DAL affirms the Directive’s validity cannot be corrected after the completion of the DAL proceedings: the Nineteenth Judicial District Court (where a party appealing an adverse administrative decision must file)³ does not have appellate jurisdiction over the Orleans Parish Civil District Court and,

³ La. Stat. Ann. § 22:855(E)(2); see also La. Stat. Ann. § 49:964(B) (“Proceedings for review may be instituted by filing a petition in the district court of the parish in which the agency is located . . .”). However, as discussed herein, Morgan properly filed his constitutional challenge to Act 54 in the Orleans Parish Civil District Court, the venue where he signed his bail bond contract, where he resides, and where Defendant Blair’s Bail Bonds’ principal place of business is located.

even if it did, the completion of the administrative proceedings will have mooted this dispute over which questions are threshold and which forum must proceed first. *Herlitz Const. Co. v. Hotel Inv'rs. of New Iberia, Inc.*, 81-231 (La. 03/30/81), 396 So. 2d 878 n.1 (exercise of supervisory jurisdiction appropriate if trial court overrules an exception to venue because “an appellate court has no practical means of correcting the error on appeal” if “the case is tried on the merits in the wrong venue”); *State v. Sprint Commc'ns Co., L.P.*, 96-1931 (La. 9/13/96), 679 So. 2d 382, 383 (granting supervisory writ application concerning “denial of a stay” because the ruling could not as a practical matter be corrected on appeal).

The dispute over which forum must proceed first has profound implications. The DAL would be required to invalidate the Directive if the DAL lifted the stay because the only justiciable action that the DAL could take is to invalidate the Directive because of Act 54. The DAL’s decision invalidating the Directive would also be final as to the Commissioner because state statute prohibits the Commissioner from appealing any adverse decision from the DAL. *See* La. Rev. Stat. § 49:964(A)(2)(a) (“No agency or official thereof . . . shall be entitled to judicial review.”). Those outcomes would cause material injustice to the families who were overcharged and who would be left without any opportunity for the courts to determine whether the legislature violated the Constitution by retroactively stripping those families of any possible compensation.

B. The court of appeal erroneously applied La. Const. art. III, § 12.

The district court invoked the primary jurisdiction doctrine after concluding that the DAL must first determine the Directive’s validity before it can evaluate Morgan’s constitutional claims. Morgan alleges in his second and third claims that Act 54 is an unconstitutional local and special law. In denying a supervisory writ, the court of appeal let stand a decision that improperly applied La. Const. art. III, § 12. Review by this Court is therefore appropriate under Rule X § 1 (a)(4).

Determining whether a law is an unconstitutional local or special law requires courts to engage in a two-step analysis: first, a court must determine “whether the law is, in fact, local or special. If it is, we must then ascertain whether the law concerns a subject listed in Art. III, § 12(A).” *Kimball v. Allstate Ins. Co.*, 97-2885, 97-2956 (La. 4/14/98), 712 So. 2d 46, 50. Act 54 is a local law on its face because it impacts Orleans Parish only and cannot be extended to other localities. Act 54 is a special law on its face because it retroactively grants Defendants an exception from complying with La. Rev. Stat. § 22:1443. Act 54 addresses a subject matter contained in La.

Const. art. III, § 12 because it impacts any “civil action”: Act 54 immunizes Defendants from any liability and forecloses any civil remedy. *See* Section B.(1), Act 54 (“no repayment of overcollections as determined by the commissioner shall be required nor shall such [overcollections] be considered a violation of R.S. 22:855 or R.S. 22:1443”). No one—not Bankers, the court of appeal, or the district court—have articulated any reason why the district court cannot determine whether Act 54 is an unconstitutional special or local law through a simple facial analysis and must wait for the Commissioner to predetermine the Directive’s validity. For this reason, review is appropriate.

C. The district court’s decision conflicts with this Court’s decision in *Bourgeois v. A.P. Green Indus., Inc.*

The district court also concluded that it could not evaluate Morgan’s fourth claim before the DAL evaluates the Directive’s validity. Morgan alleges in his fourth claim that Act 54 violates due process because Act 54 divested Morgan of his “vested” rights by eliminating his contract and administrative remedies under state law after his ability to pursue those remedies had already accrued. Bankers argued that this claim was premature because Morgan’s rights under La. Rev. Stat. § 22:855(E)⁴ vest, if at all, only if the Directive is valid. However, rights do not vest only if there is a final enforceable judgment: Morgan’s right to pursue his contract and administrative remedies accrued when he signed his bail bond contract that required him to pay a premium in violation of state law. In denying a supervisory writ, the court of appeal let stand a district court decision that conflicts with *Bourgeois v. A.P. Green Indus., Inc.*, 00-1528 (La. 4/3/01), 783 So. 2d 1251 (“*Bourgeois II*”). This Court’s review is therefore appropriate under Rule X § 1 (a)(1).

In *Bourgeois II*, this Court held that a statute violated due process where, as here, the legislature—intending to overturn a prior Supreme Court decision—enacted a law retroactively eliminating medical monitoring damages. The Court explained that the legislature may not retroactively eliminate a remedy under a cause of action after a plaintiff already had a “vested right” to seek that remedy “prior to the effective date of the Act.” 783 So. 2d at 1259.

Morgan’s right to bring a contract action vested when he signed a bail bond contract that required Morgan to pay a premium exceeding what state law required. Pet. ¶¶ 1–3. Morgan’s right

⁴ Bankers did not explain why Morgan’s rights under state contract law turn on the outcome of the administrative proceedings, as administrative agencies typically do not resolve contract disputes.

to pursue his administrative remedies also vested when he fulfilled his contractual obligations with Defendants and paid a thirteen percent premium for his bail bond. *Id.* ¶ 16. There are no predicate issues within the DAL’s special expertise that it must first decide before the district court can evaluate Morgan’s due process claim. For this reason, this Court’s review is appropriate.

D. The district court’s decision conflicts with this Court’s decision in *Cat’s Meow* and *Louisiana Paddlewheels*.

The district court referred the Directive back to the DAL to consider the Directive’s validity but did not explain what it expected the DAL to do. There are two options: (1) the DAL could interpret the validity of the Directive by ignoring Act 54, which would involve deciding moot questions; or (2) invalidate the Directive based on Act 54. Both actions would conflict with this Court’s precedent. For this reason, this Court’s review is appropriate under Rule X § 1 (a)(1).

Defendants argued to the district court that it should avoid ruling on Morgan’s constitutional claims and instead request the DAL to evaluate the Directive’s validity based on statutes that Act 54 retroactively amended. But, to the extent that the district court agreed with Defendants that the DAL could simply evaluate the Directive’s validity as if Act 54 did not exist, it erred. Because Act 54 retroactively amended the laws upon which the Commissioner issued the Directive, the DAL cannot disregard Act 54’s passage without violating fundamental principles of justiciability, as outlined in *Cat’s Meow, Inc. v. City of New Orleans Through Dep’t of Fin.*, 98-0601 (La. 10/20/98), 720 So. 2d 1186.

If the legislature amends a statute, it may moot a dispute over the interpretation of the statutes as they existed before the amendments. *Cat’s Meow*, 720 So. 2d at 1194. “In such a case, there is no longer an actual controversy for the court to address, and any judicial adjudication on the matter would be an impermissible advisory opinion.” *Id.* Although an amended statute may not be moot under the collateral consequences exception “when damages or other monetary relief has been claimed on account of former provisions of a challenged . . . statute,” that exception applies only when the amendment or “repeal does not have retroactive effect.” *Id.* at 1196.

Act 54 explicitly states that it “shall have retroactive effect,” *see* Section 2, Act 54, and neither Morgan nor the Commissioner disputes that Act 54—if constitutional—invalidates the Directive. It would be a prohibited advisory opinion for the DAL to disregard the passage of Act 54 and evaluate the Directive’s validity as if Act 54 did not retroactively exempt Defendants from complying with the law and eliminate any compensation for being overcharged.

Alternatively, the DAL could invalidate the Directive based on Act 54. However, requesting the DAL to invalidate the Directive based on Act 54—without first adjudicating Act 54’s constitutionality—would violate this Court’s holding in *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Comm’n*, which held that a plaintiff “did not have to exhaust any administrative remedy in order to challenge the constitutionality of a statute under which it was adversely affected, and only the district court can declare a statute unconstitutional.” 94-2015 (La. 11/30/94), 646 So. 2d 885, 888 n.4. Bankers, too, now argues that invalidating the Directive based on Act 54 would not be “appropriate” at this stage given Morgan’s challenge to Act 54’s constitutionality and the DAL’s stay. Bankers’ Reply in Support of Exceptions at 3.

Because the DAL lacks jurisdiction to decide the threshold constitutional questions, the DAL correctly stayed the administrative proceedings to allow the district court to evaluate Act 54’s constitutionality. This Court’s review is therefore appropriate to preserve long-standing principles of justiciability and to re-enforce that a plaintiff is not required to exhaust his administrative remedies before a district court can resolve a constitutional claim.

II. SUMMARY OF CASE AND PRIOR PROCEEDINGS

A. State law required Defendants to charge a twelve percent premium for a bail bond.

La. Rev. Stat. § 22:1443 states that the premium “rate . . . for all commercial surety underwriters in the state of Louisiana shall be twelve percent of the face amount of the bond or one hundred twenty dollars, whichever is greater.” La. Rev. Stat. § 22:1443 (emphasis added). While the statute exempts Jefferson Parish from this limitation by authorizing an additional 0.5% fee, *see id.*; La. Rev. Stat. § 13:718(I)(2), it does not do the same for Orleans Parish.

Nevertheless, Defendants overcharged Morgan and thousands of other New Orleans families for a bail bond during a fourteen-year period between 2005 and July 31, 2019. *See* Pet., attached as Ex. A. Defendants began overcharging families after the legislature amended a different statute—La. Rev. Stat. § 22:822 (then La. Rev. Stat. § 22:1065.1)—to increase the fees that the New Orleans bail bond industry must pay on every bail bond from two percent for each one hundred dollars that they underwrote to three percent. *Id.* ¶¶ 21–24. Defendants unlawfully passed this increased fee onto families by charging a thirteen percent premium to purchase a bail bond. *Id.* ¶ 24. They did so even though the plain language of La. Rev. Stat. § 22:1443 continued to require the industry to charge a twelve percent premium. *Id.* ¶ 22. Morgan, a community activist

who spent twenty years in prison for a crime that he did not commit, is one of the individuals who Defendants overcharged. *Id.* ¶ 12. In 2014—after an Orleans Parish Criminal District Court judge overturned his conviction and the district attorney decided to re-prosecute him (before ultimately dropping all charges)—Morgan purchased a bail bond from Defendants. *Id.* ¶ 13–14. He did so after first spending an additional eighteen days in jail after his conviction was overturned and while he raised enough money to purchase his bail bond. *Id.* The bail bond contract required Morgan to pay a thirteen percent premium on his \$25,000 bond—one percent more than state law allowed—which has since been paid in its entirety. *Id.* ¶¶ 15–16.

B. The Commissioner issued Directive 214 after learning that Defendants systematically overcharged Morgan and other consumers.

On February 20, 2019, following an insurance complaint, the Commissioner issued Directive 214 to all bail bond companies and their insurers. *See* Directive, attached as Ex. B. The Directive ordered bail bond companies to charge a twelve percent premium for a bail bond, as is required under La. Rev. Stat. § 22:1443. *Id.* The Commissioner recognized that the legislature amended La. Rev. Stat. § 22:822 through Act 350 of the Regular Legislative Session to increase “the criminal 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.” *Id.* The Commissioner explained, however, that “the increased fee was to be absorbed by the industry, not passed on to consumers.” *Id.* “Had the legislature desired to pass the fee on in the form of increased premium, they would have amended La. R.S. 22:1443. This was not done.” *Id.*

The Commissioner further ordered Defendants and every other bail bond company and insurer to review their records and “to make every effort to identify” customers who were overcharged and return any excess premium, because “[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.” *Id.*

Defendants subsequently requested a hearing in the DAL pursuant to La. Rev. Stat. § 22:2191(A)(2) to challenge the Directive’s validity. *See* Pet., Ex. A. ¶ 36. Defendants alleged in their hearing request that the Directive is invalid because the Commissioner improperly interpreted the Insurance Code. They also made additional arguments about why the Directive is invalid that relate to the scope—rather than the merits—of the remedy, namely that the Directive (1) should have been directed to individual people rather than entities; (2) created unreasonable obligations

on the bail bond industry; and (3) required a refund to people who may not have paid the entire premium. Morgan intervened in the DAL shortly thereafter. *Id.* ¶ 38.

C. The DAL stayed the administrative proceedings to allow this Court to determine whether Act 54 is constitutional.

On June 1, 2019, while the administrative proceedings were pending, Governor John Bel Edwards signed Act 54 into law after the bail bond industry lobbied for its passage. *Id.* ¶ 41. Act 54 amended La. Rev. Stat. § 22:1443 to immunize Defendants from administrative or civil liability:

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.

See Section B.(1), Act 54, attached as Ex. C (emphasis omitted).⁵

Bankers moved for summary judgment in the DAL after Act 54 went into effect. Bankers argued in its motion that Act 54 overrules the Directive’s interpretation of the disputed statutes and therefore “renders Directive 214 . . . moot and of no effect.” Bankers’ Mot. Sum. Jud. at 7–8.

Morgan did not dispute that the Directive is invalid if Act 54 is constitutional. However, Morgan did move the DAL to stay the administrative proceedings to allow the state courts to determine whether Act 54 is unconstitutional and simultaneously filed this action in the Orleans Parish Civil District Court. *See* Pet., Ex. A. Morgan alleges in his Petition that Act 54 is an unconstitutional local and special law and violates due process because the legislature may not retroactively grant Defendants’ impunity for violating the law. *See id.* ¶¶ 68–75.

The Commissioner subsequently filed his own motion to stay for the same reasons that Morgan outlined in his stay request. The Commissioner argued in his motion that the DAL should stay the administrative proceedings because “administrative agencies lack the power to hold statutory provisions unconstitutional”; because he shared Morgan’s assessment that Act 54 is unconstitutional; and because “[a] ruling that Act 54 is unconstitutional . . . would render moot the merits for which summary judgment is being sought.” Commissioner’s Mot. to Stay at 3–5.

⁵ The amendment also prospectively reduced the criminal bail bond annual license fee in Orleans Parish from three dollars to “two dollars for each one hundred dollars worth of liability underwritten by the commercial surety.” *Id.*

The DAL stated on the record at the hearing on Defendants’ summary judgment motion that it would be “uncomfortable” invalidating the Directive because of Act 54 without this Court first determining whether Act 54 is unconstitutional, Bankers’ Mot. Sum. Jud. Tr. 29:15-19, and ultimately stayed the entire administrative proceedings “pending a judicial determination of the constitutionality of . . . Act 54.” *See* DAL Stay Order; Bankers’ Mot. Sum. Jud. Tr. 29:15-27.

After the DAL announced its ruling from the bench, Bankers and another insurer asked the DAL to consider additional arguments unrelated to Act 54 about why the Directive is invalid. Bankers’ Mot. Sum. Jud. Tr. 30:11–21; 31:22–27. The DAL stated that “[i]t is not my intention to piecemeal this” and that it “would rather do it all at once” but that it would consider Bankers’ request for reconsideration and invited briefing about why it should enter a more limited stay. *Id.* 30:23–27, 31:29–32:5. Bankers had ten days to file a motion for reconsideration under state law, La. Rev. Stat. § 49:959, or thirty days to file an interlocutory appeal, La. Rev. Stat. § 49:964(A)(1), (B). Bankers let those deadlines pass.

D. Defendants took contradictory positions in the DAL and district court.

Defendants have spent the last two years shuffling this case between various forums. Defendants first removed the case to federal court, where they argued that the federal court had jurisdiction to hear Morgan’s claims. After the federal court remanded the case back to the district court, Defendants moved to recuse the judge to which this case was first assigned because that judge had a pre-existing relationship with Blair Boutte, the principal of Defendant Blair’s Bail Bonds. *See* Order to Remand; Judge Bruno Recusal Order. After that judge granted the recusal motion, a second judge recused herself before this case was finally transferred to Judge Giarrusso.

More than a year after Bankers let its deadlines to file a motion for reconsideration or interlocutory appeal in the DAL pass, Bankers filed peremptory exceptions of no cause of action and prematurity in this action. Invoking the primary jurisdiction doctrine in the district court, Bankers made the very arguments that it could have made to the DAL if it did not allow its briefing deadline to expire—namely, Bankers asserted that the DAL must “determine the validity of Directive 214 as issued, irrespective of and without reference to Act 54,” as a predicate to the district court’s resolution of Morgan’s constitutional challenge to Act 54. Bankers Reply Br. in Support of Exceptions at 3 (emphasis omitted).

Throughout this lawsuit, Bankers has taken contradictory positions in the DAL and the district court. It argued before the DAL that the DAL must enter summary judgment in its favor because Act 54 is existing Louisiana law. But in its exceptions in the district court, Bankers argued that it would be inappropriate for the DAL to consider Act 54 at all. A line-by-line comparison of Bankers’ opposing arguments in the DAL and the district court is outlined below:

The DAL’s consideration of Act 54⁶	
<p style="text-align: center;">Argument before the DAL</p> <p>“The Court should proceed and <u>must apply existing Louisiana law</u>. It is presumed that the Legislature acts within its constitutional authority in enacting legislation, and courts must construe a statute so as to preserve its constitutionality when it is reasonable to do so. Therefore, unless and until a Court of competent jurisdiction declares Act 54 unconstitutional, this Court must apply La. R.S. 22:1443 as amended by Act 54 [and enter summary judgment in Bankers favor].”</p>	<p style="text-align: center;">Argument in the district court</p> <p>“By its Exceptions, Bankers does not request, and does not believe at this stage of the proceedings it would be appropriate or necessary for the DAL to consider Act 54 at all in determining the validity of Directive 214. Rather, the DAL should proceed to determine the validity of Directive 214 as issued, <u>irrespective of and without reference to Act 54.</u>”</p>

Before the DAL, Bankers also argued that the Commissioner did not have authority to interpret the Insurance Code—only to enforce it. But, in the district court, Bankers argued that the Commissioner has the exclusive authority to do so:

Commissioner’s ability to interpret the Insurance Code⁷	
<p style="text-align: center;">Argument before the DAL</p> <p>“The Insurance Code, however, vests exclusively with the legislature the authority to determine what may be charged as ‘premium.’ Thus, while the Commissioner must ‘enforce’ provisions of the Insurance Code, including what is being charged to consumers as premiums, the Commissioner has no authority to set the rate for or say what is ‘premium.’ In Directive 214 the Commissioner performed a quasi-judicial role in interpreting § 22:1443 and § 22:855 of the Insurance Code, for the purposes of enforcing it.”</p>	<p style="text-align: center;">Argument in the district court</p> <p>“Louisiana’s declaratory judgment articles do not provide Mr. Morgan a private right of action to seek an ‘interpretation of’ a statute the administration and enforcement of which is vested solely with an administrative agency of the state. The interpretation . . . of the Insurance Code lies in the first instance within the exclusive purview of the Commissioner”</p>

Morgan argued in its opposition to the exceptions that Act 54’s constitutionality does not require the DAL to first determine the Directive’s validity and that the constitutionality of Act 54 is the threshold question, as no party disputes that the Directive is invalid if Act 54 is constitutional.

⁶ Bankers Br. in Opp. to Mot. to Stay at 11 (emphasis added) (internal citations omitted); Reply in Support of Exceptions at 3.

⁷ Bankers Mot. Sum. Jud. at 6–7; Reply in Sup. of Exceptions at 7.

At the hearing, the district court took Bankers' exceptions under advisement, stating that "[t]his is a little bit more challenging than some things I normally [] have on my docket." Bankers' Exceptions Tr. 30:32–31:2. Six weeks later, the district court granted Bankers' exceptions, dismissed Morgan's claim seeking a declaratory judgment interpreting the pre-Act 54 statutory regime (claim one)⁸ and stayed his claims challenging the constitutionality of Act 54 (claims two through four). Judgment at 2. The district court's reasons for granting a stay included only a single sentence: "Determining the validity of Directive 214 is a necessary predicate to any constitutional challenge to Act 54." The court offered no explanation why it believed that to be true. Trial Ct.'s Written Reasons for Judgment.

Morgan filed a supervisory writ application to the court of appeal, which the court denied without reasons on June 8, 2021. Both the DAL and district court proceedings remain stayed.⁹

III. ASSIGNMENTS OF ERROR

1. A court need not refer an issue to an administrative agency under the primary jurisdiction doctrine where the dispute is purely a legal one and does not involve an agency's fact-finding prowess. Did the court of appeal err in affirming the district court's decision to stay Morgan's constitutional claims where (1) the Commissioner and the DAL previously stayed the administrative proceedings until the state courts decide whether Act 54 is unconstitutional; (2) the dispute is strictly a legal one over Act 54's constitutionality and the construction of two statutes in the Insurance Code; and (3) those legal disputes are within the district court's core competencies?

2. Morgan alleges that Act 54 is an unconstitutional local and special law. Did the court of appeal err in affirming the district court's decision to stay Morgan's second and third claims, where the district court can evaluate Act 54 on its face to determine whether Act 54 is an unconstitutional local and special law under this Court's two-step process in *Kimball v. Allstate Ins. Co.*, 97-2885, 97-2956 (La. 4/14/98), 712 So. 2d 46?

⁸ Morgan separately filed a devolutive appeal to challenge the district court's decision sustaining Bankers' exception of no cause of action on Morgan's first claim. In that appeal, Morgan recognized that his first claim is only justiciable if the district court first finds that Act 54 is unconstitutional. Morgan's appeal remains pending.

⁹ The day Bankers filed its response to Morgan's writ application in the court of appeal it also moved for the DAL to lift the stay, which Morgan and the Commissioner opposed. A hearing is scheduled for August 2, 2021 in the DAL.

3. Due process prohibits the legislature from eliminating a remedy after a person's right to pursue a remedy has already "vested." Rights vest when a plaintiff had a right to pursue a remedy before the law was enacted, which happened here when Morgan signed a bail bond contract and paid excess premium. Did the court of appeal err in affirming the district court's decision to stay Morgan's constitutional claims to allow the DAL to first determine the Directive's validity because it believed that rights only vest if a court or administrative agency enters a final judgment?

4. A Directive's validity must be evaluated based on all applicable law including subsequently enacted law that retroactively amends the statutes upon which the Directive is based. Did the court of appeal err in affirming the district court's decision to stay Morgan's constitutional claims and to either (1) invalidate the Directive based on Act 54 because it believed that Morgan must exhaust his administrative remedies before challenging Act 54's constitutionality; or (2) because it believed that the DAL could disregard the passage of Act 54 as if it was never enacted and answer questions that became moot following Act 54's enactment?

IV. SUMMARY OF THE ARGUMENT

The Commissioner issued Directive 214 in 2019 after discovering that Defendants overcharged thousands of New Orleanians for a bail bond. The Directive orders Defendants to comply with the law and to refund the families that Defendants overcharged. Defendants subsequently challenged the Directive in the DAL and lobbied the legislature to pass Act 54 to overturn the Directive and to eliminate any compensation to New Orleans families. Defendants then argued that the DAL must invalidate the Directive following Act 54's passage because the new law rendered the Directive unlawful and "of no effect."

Morgan did not dispute that Act 54 invalidated the Directive but asked the DAL to stay the administrative proceedings to allow him to challenge the constitutionality of Act 54 in state court. The DAL agreed to issue a stay until the state courts decided the threshold constitutional questions that everyone agreed the DAL lacked jurisdiction to decide.

Defendants then changed their position in the district court to avoid a ruling on Act 54's constitutionality. They argued for the first time that the DAL should ignore the passage of Act 54 and to decide (based on a version of the statutes that no longer exists) whether the Commissioner's actions were lawful—all of which has no discernable purpose other than to delay the adjudication of Act 54's constitutionality, a question that the DAL agreed the state courts must first decide.

Nevertheless, the district court agreed with Defendants, stayed Morgan’s constitutional claims, and referred the Directive to the DAL to determine its validity. The district court did not explain what it expected the DAL to do. There are two options: (1) the DAL could interpret the validity of the Directive by ignoring Act 54, which would involve deciding moot questions; or (2) invalidate the Directive based on Act 54. Both actions would conflict with this Court’s precedent.

Defendants argued in the district court that the DAL should ignore Act 54 and evaluate the Directive’s legality as if Act 54 did not exist. But it would be a prohibited hypothetical exercise for the DAL to ignore Act 54 because Act 54 retroactively amended the laws upon which the Commissioner based the Directive, exempted Defendants from complying with the law, and eliminated any remedies available to Morgan for being overcharged. The interpretation of the pre-Act 54 statutory regime is justiciable only if the district court first finds that Act 54 violates the Louisiana Constitution.

Alternatively, the DAL could invalidate the Directive based on Act 54. However, requesting the DAL to invalidate the Directive based on Act 54—without first adjudicating Act 54’s constitutionality—would violate this Court’s holding in *La. Paddlewheels v. La. Riverboat Gaming Comm’n*, that a plaintiff “did not have to exhaust any administrative remedy in order to challenge the constitutionality of a statute under which it was adversely affected” 94-2015 (La. 11/30/94), 646 So. 2d 885, 888 n.4. Bankers, too, now argues that invalidating the Directive based on Act 54 would not be “appropriate” at this stage given Morgan’s challenge to Act 54’s constitutionality. Bankers’ Reply in Support of Exceptions at 3.

The district court’s reasons for its judgment included only a single sentence: “Determining the validity of Directive 214 is a necessary predicate to any constitutional challenge to Act 54.” Trial Court Written Reasons for Judgment. That sentence was the sum of the district court’s analysis; it offered no explanation why it believed this to be true.

None of Morgan’s constitutional claims require the DAL to predetermine the Directive’s validity. Morgan alleges in his second claim that Act 54 is an unconstitutional local law because it is limited to New Orleans and cannot be extended to other localities. *See* Pet., Ex. A. ¶¶ 68–72. Morgan alleges in his third claim that Act 54 is an unconstitutional special law because it immunizes Defendants from civil and administrative liability. *See id.* ¶¶ 73–75. There is no reason

why the district court cannot engage in a simple facial analysis of Act 54’s text to evaluate those claims. No one—including Defendants, the district court, or the court of appeal—offered one.

Morgan alleges in his fourth claim that Act 54 violates due process because Act 54 divested Morgan of his “vested” rights by eliminating his contract and administrative remedies under state law after his ability to pursue those remedies had already vested. *See id.* ¶¶ 76–80. Bankers argued that this claim was premature because Morgan’s rights vest, if at all, only if the DAL enters a final judgment affirming the Directive’s validity. Bankers’ argument conflicts with this Court’s decision in *Bourgeois II*, 783 So. 2d at 1251: rights do not vest only if there is a final judgment. A person’s rights vest when a person can pursue civil or administrative remedies. Morgan’s ability to pursue those remedies vested when he signed a bail bond contract that required him to pay a premium in excess of what state law required.

More than two years have passed since the Commissioner issued the Directive intended to compensate New Orleans families. They deserve an answer about whether the legislature violated the Louisiana Constitution when it passed a law to prevent them from receiving that compensation and to immunize the bail bond industry from liability. This Court should reverse the district court and order it to lift its stay and to adjudicate Morgan’s constitutional claims before the DAL resolves the Directive’s validity. The constitutionality of Act 54 is the threshold question, the DAL does not have jurisdiction to resolve that question, and there is nothing within the DAL’s special expertise that it must decide before the district court can adjudicate Morgan’s constitutional claims.

V. ARGUMENT

A. **The district court abused its discretion in referring this case to the DAL under the primary jurisdiction doctrine when this dispute involves purely legal questions within the district court’s expertise.**

No party disputes that the district court has jurisdiction to hear Morgan’s constitutional claims. That is because the determination about whether a statute is unconstitutional “is purely a judicial function.” *State ex rel. Ward v. Bd. of Sup’rs of Elections, Par. of Rapides*, 34314 (La. 3/22/37), 173 So. 726, 731. Because “administrative agencies lack the power to hold statutory provisions unconstitutional,” *Albe v. La. Workers’ Comp. Corp.*, 97-0581, 97-0014 (La. 10/21/97), 700 So. 2d 824, 827, everyone agrees that “challenges to a statute’s constitutionality must be raised first in the district court,” *Bd. of Ethics In re Cartesian Co., Inc.*, 16-1556 (La. App. 1st Cir. 10/12/17), 233 So. 3d 9, 20. For that reason, Morgan properly filed his constitutional challenge to

Act 54 in the Orleans Parish Civil District Court—the venue where he resides, where Blair’s operates, and where he signed his bail bond contract.

Nevertheless, the court of appeal affirmed the district court’s decision staying Morgan’s constitutional claims under the primary jurisdiction doctrine after concluding that it could only evaluate Morgan’s constitutional claims if the DAL affirms the Directive’s validity.

The primary jurisdiction doctrine applies only when “(1) the court has original jurisdiction over the claim before it; (2) the adjudication of that claim requires the resolution of predicate issues or the making of preliminary findings; and (3) the legislature has established a regulatory scheme whereby it has committed the resolution of those issues or the making of those findings to an administrative body.” *Apalachicola Riverkeeper*, 954 F. Supp. 2d at 460 n.25 (quotation marks and citation omitted). This Court has provided limited guidance about what factors courts should consider before invoking the primary jurisdiction doctrine. However, federal courts have explained that “courts need not refer an issue to an agency when the issue is strictly a legal one . . .” *Occidental Chem. Corp. v. La. Pub. Serv. Comm’n*, 810 F.3d 299, 309 (5th Cir. 2016).

Louisiana courts have long followed this principle. This Court previously held that plaintiffs are not required “to exhaust any administrative remedy in order to challenge the constitutionality of a statute,” *Louisiana Paddlewheels*, 646 So. 2d at 889 n.4, and lower courts have interpreted various provisions of the Insurance Code without requesting the Commissioner to first interpret the Insurance Code. *See, e.g., La. Workers’ Comp. Corp. v. La. Ins. Guar. Ass’n*, 2008-0885 (La. App. 1st Cir. 5/13/09), 20 So. 3d 1047, 1055–59 (interpreting La. Rev. Stat. § 23:1395(D)); *Landry v. La. Citizens Prop. Ins. Co.*, 2007-1907, 07-1908 (La. 5/21/08), 983 So. 2d 66, 80–81 (interpreting La. Rev. Stat. § 22:695); *Hopkins v. Howard*, 05-0732 (La. App. 4th Cir. 4/5/06), 930 So. 2d 999, 1004–05 (interpreting La. Rev. Stat. § 22:1379(3)(f)); *Grubbs v. Gulf Int’l Marine, Inc.*, 93-0583 (La. 10/18/1993), 625 So. 2d 495, 498 (interpreting La. Rev. Stat. § 22:6(13)(e)); *Deshotels v. SHRM Catering Servs., Inc.*, 88-1323 (La. 01/30/1989), 538 So. 2d 988, 990 (interpreting the term “ocean marine insurance” in the Code).¹⁰

¹⁰ This practice in Louisiana courts is consistent with that of courts nationwide, which have refused to abstain under the primary jurisdiction doctrine when questions of statutory construction are involved. *See, e.g., Borlem S.A.-Empreeditentos Industriais v. United States*, 710 F. Supp. 797, 802 (Ct. Int’l Trade 1989) (“The Court notes that it would be inappropriate to invoke the doctrine of primary jurisdiction were the question before this Court entirely one of statutory interpretation.”); *Envtl.Def. Fund, Inc. v. Wheelabrator Techs. Inc.*, 725 F. Supp. 758, 775

Moreover—while the majority opinion did not invoke the primary jurisdiction doctrine by name—this Court held in *Cent. La. Elec. Co. v. La. Pub. Serv. Comm’n*, that deference to an administrative agency was unnecessary where, as here, the case involved “contractual and statutory issues” rather than an agency’s “ratemaking power.” 601 So. 2d at 1387; *see also id.* at 1388 (Lemmon, J., concurring) (dispute did not warrant abstention under primary jurisdiction doctrine because case did not require agency’s “technical expertise”).

The Court’s holding in *Cent. La. Elec. Co.* is instructive here because—unlike most other industries—the legislature did not delegate to the Commissioner the responsibility to set the premium rates that bail bond companies may charge: state law provides that the premium “shall not be subject to the rates set by the insurance commissioner, but shall be set and adjusted by the legislature.” La. Rev. Stat. § 22:1443 (emphasis added). The legislature set the premium that bail bond companies must charge in state statute at “twelve percent of the face amount of the bond.” *Id.* The parties’ dispute over the plain language of this statute is thus a quintessential question of statutory construction within the district court’s—not the DAL’s—special expertise.

Moreover, other federal courts have emphasized that there is simply “no reason why deference to an agency is appropriate when that agency itself feels that no deference is warranted,” particularly because “the primary-jurisdiction doctrine is prudential, not jurisdictional.” *Sierra v. City of Hallandale Beach, Fla.*, 904 F.3d 1343, 1351 (11th Cir. 2018). Accordingly, the United States Court of Appeals for the Fifth Circuit explained that “when the agency’s position is sufficiently clear . . . courts should be very reluctant to refer” a case to an administrative agency, “which often, but not always, results in added expense and delay to the litigants.” *Occidental Chem. Corp.*, 810 F.3d at 309 (internal citation omitted).

The Commissioner’s and the DAL’s positions could not be clearer here: the Commissioner, through the Directive, has already interpreted the disputed statutes. He also filed a motion to stay the administrative proceedings because he believes that Act 54 is unconstitutional and that the district court must first evaluate Act 54’s constitutionality before the administrative proceedings should resume. The DAL also agreed with the Commissioner (and Morgan), staying the

(S.D.N.Y. 1989) (“The instant controversy centers on the proper construction of [a statute], a purely legal issue. The policies underlying the primary jurisdiction doctrine would not be furthered by awaiting agency decision on that point.”); *Morrell v. Harris*, 505 F. Supp. 1063, 1068 (E.D. Pa. 1981) (“The issue is one of statutory construction . . . Statutory construction is one of the traditional tasks of the judiciary. Referral to the agency is thus not appropriate in this case.”).

administrative proceedings because it believed that this Court should first decide whether Act 54 is constitutional and did not want to address the dispute in “piecemeal” fashion. Bankers’ Mot. Sum. Jud. Tr. 30:23–27, 31:29–32:7.

This Court should grant Morgan’s writ application to clarify that abstention under the primary jurisdiction doctrine is unwarranted where, as here, (1) an agency previously stayed the administrative proceedings because it believed that the state courts must decide a preliminary statutory or constitutional question; (2) the dispute is strictly a legal one; and (3) that legal dispute is within the conventional competence of the courts. *See Occidental Chem. Corp.*, 810 F.3d at 309.

B. The district court abused its discretion because the Directive’s validity is not a prerequisite to determining Act 54’s constitutionality.

The district court stayed Morgan’s three constitutional claims under the primary jurisdiction doctrine after concluding that the DAL must first evaluate the Directive’s validity before it could determine whether Act 54 is constitutional. The district court offered no explanation why it believed this to be true. A court can evaluate Morgan’s second and third claims—alleging that Act 54 is a prohibited local and special law—through a facial analysis of Act 54’s text. And Bankers’ argument about why Morgan’s due process claim (claim four) requires a predetermination about the Directive’s validity conflicts with *Bourgeois II*: A statute violates due process when it retroactively eliminates the possibility of civil or administrative relief. A statute does not violate due process only when the legislature interferes with a final judgment.

1. Act 54 is an unconstitutional local and special law.

Morgan alleges in his second claim that Act 54 is an unconstitutional local law and he alleges in his third claim that Act 54 is an unconstitutional special law. These claims can be evaluated through a straightforward facial analysis of Act 54’s text. There is no conceivable reason the DAL must first evaluate the Directive’s validity before the district court can resolve these disputes. No one—not the court of appeal, district court, or Bankers—offered one.

“The legislature is prohibited from passing any local or special law which deals with any of the subjects enumerated in La. Const. Art. III, § 12(A).” *Kimball*, 712 So. 2d at 50. The district court’s “inquiry” into whether Act 54 “is an unconstitutional local or special law” should have begun “with a determination of whether the law is, in fact, local or special.” *Id.* The district court cannot avoid that inquiry by arguing that the DAL must engage in some separate analysis.

A statute is “local if it operates only in a particular locality or localities without the possibility of extending its coverage to other areas should the requisite criteria exist or come to exist there.” *Deer Enters. LLC, v. Par. Council of Wash. Par.*, 10-0671 (La. 1/19/11), 56 So. 3d 936, 942. “Thus, a law which operates over the whole territory of the state instead of just a particular locality is clearly general, and not local.” *Kimball*, 712 So. 2d at 51. “When the operation of a law is limited to certain parishes, it is immediately suspect as a local law.” *Id.*

Determining whether Act 54 is a local law can be done by facially examining Act 54; it does not require the DAL to first affirm the Directive’s validity. Act 54’s triggering criterion is a parish with a population of between 300,000 and 400,000 based on the most recent federal census. *See* Section B.(1), Act 54, Ex. C. (“In any parish having a population of more than three hundred thousand and fewer than four hundred thousand . . .”). Orleans Parish is the only parish that can meet this trigger—the population of East Baton Rouge and Jefferson Parishes both exceed 400,000, and the next most populous parish is St. Tammany Parish with around 230,000 people. Indeed, several co-sponsors of the bill explained that Act 54 “is only relevant to New Orleans.”¹¹ Act 54 cannot be extended to other localities because the population trigger is tied to the collection of an additional one percent under the provisions of Act 350 of the 2005 Regular Session—an Act which is no longer in effect because Act 54 superseded it.

An unconstitutional special law is “directed to secure some private advantage or advancement for the benefit of private persons,” *La. High Sch. Athletics Ass’n, Inc. v. State*, 12-1471 (La. 1/29/13), 107 So. 3d 583, 601 (citation and internal quotation marks omitted), “granting privileges to some persons while denying them to others,” *Deer Enters.*, 56 So. 3d at 944 (citation and internal quotation marks omitted). “A privilege is a special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not do a given act. It immunizes conduct that, under ordinary circumstances,

¹¹ *Debate on Bonds – Provides Relative to Criminal Bail Bonds*, SB 108, 2019 Reg. Sess. La. (May 26, 2019) (statement of Rep. Katrina Jackson), https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2019/may/0523_19_Day26_2019RS_P2; https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2019/may/0523_19_Day26_2019RS_P2; *see also Bonds– Provides Relative to Criminal Bail Bonds: Hearing on SB 108 Before the S. Comm. on Insurance*, 2019 Leg., Reg. Sess. La. (Apr. 16, 2019) (“it is a New Orleans issue”) (statement of Sen. Gary Smith, Jr., Member, S. Comm. on Insurance), https://senate.la.gov/s_video/videoarchive.asp?v=senate/2019/04/041619INS_0.

would subject the actor to liability.” *Id.* (citation and internal quotation marks omitted). Louisiana’s “prohibition on special laws represents an important safeguard against the abuse of legislative power on behalf of special interests.” *La. High Sch. Athletics Ass’n*, 107 So. 3d at 601 (citation and internal quotation marks omitted).

This Court can also evaluate whether Act 54 is a special law without a pre-determination about the Directive’s validity. Act 54 is a special law because it immunizes Defendants from civil or administrative liability. Bankers said so itself: Act 54 “renders Directive 214 . . . moot and of no effect,” because it “relieves” the offending “commercial sureties from the Directive’s requirement that any . . . excess premium collected . . . be returned to the payer.” Bankers’ Mot. Sum. Jud. at 7–8. There is no reason the DAL must first engage in an entirely separate analysis about the Directive’s validity before the district court can evaluate whether Act 54 is a special law.

There is also no reason the district court cannot determine whether Act 54 “concerns a subject listed in Art. III, § 12(A),” the second step in the analysis. *Kimball*, 712 So. 2d at 50. A simple facial analysis of Act 54’s text demonstrates that it concerns “any civil . . . actions,” La. Const. Art. III, § 12(A), which this Court has explained “means merely that the Legislature shall not pass a local or special law affecting any particular lawsuit,” *State v. McCue*, 75 So. 100, 101 (La. 1917). The legislature, for example, violated La. Const. Art. III, § 12(A) when it exempted a litigant from a statute of limitations that had already prescribed. *State Through Dep’t of Highways v. Terral*, 206 So. 2d 307, 309 (La. App. 3d. Cir. 1968). Here, too, the legislature violated La. Const. Art. III, § 12(A) when it passed a law that attempted to overrule the Commissioner, retroactively exempted Defendants from complying with the plain language of La. Rev. Stat. § 22:1443, and immunized Defendants from any liability for their failure to do so. The court of appeal thus erred when it let stand a district court opinion that found that it could not evaluate Morgan’s second and third claims without the DAL first predetermining the Directive’s validity.

2. Act 54 violates due process.

Morgan alleges in his fourth claim that Act 54 violates due process by divesting him of his “vested rights” by eliminating his contract remedies under state law as well as his administrative remedies. Neither the court of appeal nor the district court explained why Morgan’s due process claim first required the DAL to affirm the Directive’s validity. And Bankers’ argument that Morgan’s rights under La. Rev. Stat. § 22:855(E) will vest only if Directive 214 is valid directly

contradict *Bourgeois II*. As explained below, rights do not vest only if there is a final, enforceable judgment in a plaintiff’s favor.

In *Bourgeois II*, this Court held that a statute violated due process where, as here, the legislature—trying to overturn a prior Supreme Court decision—enacted a law retroactively eliminating medical monitoring damages. The Court explained that the legislature may not retroactively eliminate a remedy under a cause of action after a plaintiff already had a “vested right” to seek that remedy “prior to the effective date of the Act.” *Bourgeois II*, 783 So. 2d at 1259. A person has a vested right “[w]hen a party acquires a right to assert a cause of action”—that is, to file a lawsuit or pursue administrative remedies—“prior to a change in the law.” *Id.* (emphasis added). A person’s right to bring a cause of action is determined by examining “the operative facts” that give rise to a cause of action. *Id.* at 1260.¹²

Bankers did not address why Morgan’s remedies under state contract law will vest only if the DAL affirms the Directive’s validity (and administrative agencies do not ordinarily resolve contract disputes, disputes over which “are generally civil matters over which the district courts have original jurisdiction,” *Cent. La. Elec. Co.* 601 So. 2d at 1387). However, the “operative facts” giving rise to Morgan’s right to bring a contract action arose when he signed a bail bond contract that required him to pay a premium in excess of what state law required. Pet. ¶¶ 1–3, Ex. A. That is because parties cannot enter contracts that violate state law or public policy. *See* La. Civ. Code Ann. art. 1968;¹³ La. Civ. Code Ann. art. 7.¹⁴ Morgan’s bail bond contract is prohibited by law because state statute required Defendants to charge a twelve percent premium and does not permit Defendants to charge more. *See* La. Rev. Stat. § 22:1443. Morgan’s bail bond contract is also

¹² *See also* *Johno v. Doe*, 16-0087 (La. 12/6/16), 218 So. 3d 1004, 1009 (statute violated due process that retroactively took away homeowner’s ability to pursue relief under strict liability theory after parish government allegedly unlawfully demolished his house following Hurricane Katrina); *see also* *Burmester v. Plaquemines Par. Gov’t*, 07-2432 (La. 5/21/08), 982 So. 2d 795, 806 (statute violated due process that retroactively eliminated strict liability for damages against parish government for actions taken after hurricanes Katrina or Rita); *Faucheaux v. Alton Ochsner Med. Found. Hosp. & Clinic*, 85-0968 (La. 6/17/85), 470 So. 2d 878, 879 (statutes that retroactively granted immunity to physicians, hospitals, and blood banks from strict liability for blood transfusions that transmitted viruses violated due process because plaintiff’s injuries occurred prior to the effective date of the statutes’ enactment).

¹³ “The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.” *See also* *Commercial Union Ins. Co. v. Bernard*, 303 So. 2d 728, 732 (La. 1974) (“[e]xcessive rates are forbidden”).

¹⁴ “Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.”

against public policy because the purpose of requiring a twelve percent premium is to regulate “insurance rates to the end that they shall not be excessive, inadequate, or unfairly discriminatory.” La. Att’y Gen. Op., No. 05-0171, 2006 WL 1670246 (May 25, 2006).

Morgan’s remedy under Louisiana contract law for being overcharged is either the rescission of his bail bond contract or a refund. *See* La. Civ. Code Ann. art. 2033.¹⁵ His right to pursue these remedies accrued the day he signed his bail bond contract and paid Defendants that entire premium. Petition ¶ 16 (“The entire premium was paid off in March 2014.”). Act 54 violates due process because it eliminates the possibility that Morgan could obtain contract remedies under state law. *See* Section B.(1), Act 54, Ex. C (“[T]o the extent an additional one percent [premium] has been collected [in violation of R.S. 22:1443] . . . , no repayment of overcollections . . . shall be required nor shall such [overcollections] be considered a violation of R.S. 22:855 or R.S. 22:1443.”). Morgan’s right to pursue his administrative remedies accrued when he fulfilled his contractual obligations with Defendants and paid a thirteen percent premium for his bail bond.¹⁶

Thus, contrary to Bankers’ assertions, there is simply nothing within the DAL’s special expertise that it must decide before the district court can determine whether Act 54 violates due process. Indeed, Bankers’ (erroneous) argument that Morgan’s rights will vest only if the Commissioner affirms the Directive’s validity is a legal argument on the merits that Act 54 does not violate due process because Act 54 became effective before his rights vested. It does not justify staying Morgan’s claim because there are predicate issues that the DAL must decide. Indeed, were this case to be remanded to the district court, it could resolve without further discovery that Act 54 violates due process because it eliminates Morgan’s contract remedies and his ability to obtain administrative relief under La. Rev. Stat. § 22:855 after he paid an excessive premium.

¹⁵ “An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages.”

¹⁶ Louisiana courts have applied these due process principles to statutes that indirectly eliminate a person’s administrative remedies—by, for example, taking away a plaintiff’s ability to prove his claim. In *Michel v. State, Div. of Admin. Law*, for instance, the First Circuit invalidated a statute that retroactively eliminated a plaintiff’s right to subpoena an officer to an administrative hearing. 13-1419, (La. App. 1st Cir. 11/03/14), 167 So. 3d 654, 663. The statute violated due process because the practical impact of the amendment was to foreclose the plaintiff’s ability to fight the suspension and obtain reinstatement: the plaintiff’s ability to prevail turned on his ability to subpoena the arresting officer to the administrative hearing. Here, Act 54 goes beyond making it harder for Morgan to prevail: Act 54 eliminates any remedy under La. Rev. Stat. § 22:855(E).

C. The DAL does not have jurisdiction to determine whether the Commissioner correctly interpreted the pre-Act 54 statutes because doing so would be a prohibited hypothetical exercise.

The district court referred the Directive to the DAL to consider the Directive's validity but did not explain what it expected the DAL to do. There are two options: (1) the DAL could interpret the validity of the Directive by ignoring Act 54, which would involve deciding moot questions; or (2) invalidate the Directive based on Act 54. Both actions conflict with this Court's precedent.

Defendants argued to the district court that it should avoid ruling on Morgan's constitutional claims and request the DAL to evaluate the Directive's validity based on versions of statutes that are no longer in operation because Act 54 retroactively amended them. The DAL cannot disregard Act 54's passage without violating fundamental principles of justiciability.

"In Louisiana, courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to such controversies." *Ulrich v. Robinson*, 2018-0534 (La. 3/26/19), 282 So. 3d 180, 186. "[A] moot question connotes an issue that has been deprived of practical significance" or "made abstract or purely academic." *St. Charles Par. Sch. Bd. v. GAF Corp.*, 85-2334 (La. 08/07/87), 512 So. 2d 1165, 1171 (citation and internal quotation marks omitted). The doctrine "serves two complementary purposes: it prevents the useless expenditure of judicial resources and assures that the courts will not intrude prematurely into policymaking in a manner that unnecessarily constrains the other branches of government." *Id.*

The DAL cannot disregard the passage of Act 54 and decide questions that Act 54 mooted. If the legislature amends a statute, a dispute over the meaning of those statutes may become moot. *Cat's Meow*, 720 So. 2d at 1194. "In such a case, there is no longer an actual controversy for the court to address, and any judicial adjudication on the matter would be an impermissible advisory opinion." *Id.* Although an amended statute may not moot a case under the collateral consequences exception "when damages or other monetary relief has been claimed on account of former provisions of a challenged article, statute, or ordinance," that exception applies only when the amendment or "repeal does not have retroactive effect." *Id.* at 1196 (emphasis added).

However, Act 54 explicitly states that it "shall have retroactive effect" and that "no repayment of overcollections as determined by the commissioner shall be required." Act 54, Ex. C. The DAL cannot interpret the pre-Act 54 statutory regime as if Act 54 was never enacted because the DAL's interpretation would have no practical effect: Act 54 already states that

Defendants' actions shall not "be considered a violation of R.S. 22:855 or R.S. 22:1443," *see* Section 2, Act 54, and eliminates any remedy that Morgan could have otherwise pursued for being overcharged. Whether the Commissioner correctly interpreted the pre-Act 54 statutes is only justiciable if the district court first finds that Act 54 is unconstitutional.

Alternatively, the DAL could invalidate the Directive based on Act 54. However, requesting the DAL to invalidate the Directive based on Act 54—without first adjudicating Act 54's constitutionality—would violate this Court's holding in *Louisiana Paddlewheels*, which held that a plaintiff "did not have to exhaust any administrative remedy in order to challenge the constitutionality of a statute under which it was adversely affected, and only the district court can declare a statute unconstitutional." 646 So. 2d at 888 n.4. And even Bankers itself now no longer believes that it would be "appropriate" for the DAL to evaluate the Directive in light of Act 54 at this stage of the case, *see* Bankers Reply in Support of Exceptions at 3, given the DAL's stay and Morgan's challenge to Act 54's constitutionality.

VI. CONCLUSION

More than two years have passed since the Commissioner issued the Directive intended to compensate about 50,000 New Orleans families for being overcharged. The Directive was intended to compensate those families for profits that the bail bond industry illegally reaped and that New Orleans families could have spent on mortgages, rent, utilities, education, transportation, healthcare, and other necessities. Those families deserve to know without any further delay whether the legislature violated Louisiana's Constitution by passing legislation intended to strip them of this compensation and to insulate the bail bond industry from any liability.

For the aforementioned reasons, this Court should reverse the district court and order it to lift its stay and to adjudicate Morgan's constitutional claims before the DAL resolves the Directive's validity. The constitutionality of Act 54 is the threshold question, the DAL does not have jurisdiction to resolve that question, and there is nothing within the DAL's special expertise that it must decide before the district court can adjudicate Morgan's constitutional claims.

Respectfully submitted,

/s/ Micah West

Micah West (ASB-1842-J82F*)

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Attorneys for Jerome Morgan, Plaintiff-Applicant

**admitted pro hac vice*

VERIFICATION

STATE OF Alabama
COUNTY OF Montgomery

Before me, the undersigned authority, personally came and appeared Micah West ("Affiant"), who, being duly sworn and deposed, stated that he is counsel of record for Jerome Morgan, on behalf of himself and all others similarly situated, the applicant herein; he has reviewed the foregoing application for supervisory writ; and all of the allegations therein are true and correct to the best of his knowledge. Affiant further stated that on this day, copies of this application were duly served by United States mail (and email for all counsel) upon the following addressees, who are, respectively, the Clerk of Court for the Fourth Circuit Court of Appeal, the district court, and all counsel of record:

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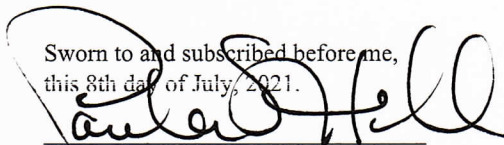
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Hon. Robin M. Giarrusso
Civil District Court, Parish of Orleans Judge
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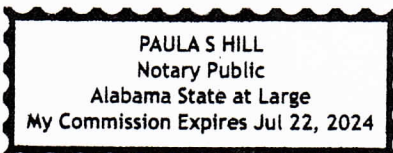


Micah West (ASB-1842-J82F*)

*Admitted Pro Hac Vice

Sworn to and subscribed before me,
this 8th day of July, 2021.

NOTARY PUBLIC

Printed Name: Paula SH:11
My commission expires on: 7/22/2024



APPENDIX

1	Judgment and Reasons issued by District Judge Robin M. Giarrusso, in Case No. 2019-08430, Civil District Court, Parish of Orleans, dated February 25, 2021	App. 1
2	Decision issued by Chief Judge James F. McKay III, Judge Joy Cossich Lobrano, and Judge Tiffany G. Chase, in Case No. 2021-C-0249, Court of Appeal, Fourth Circuit, dated June 8, 2021.	App. 2

App. 1

Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No: 2019 - 08430

Division/Section: G-11

MORGAN, JEROME
versus
BLAIR'S BAIL BONDS, INC. ET AL

Date Case Filed: 8/12/2019

NOTICE OF SIGNING OF JUDGMENT

TO:

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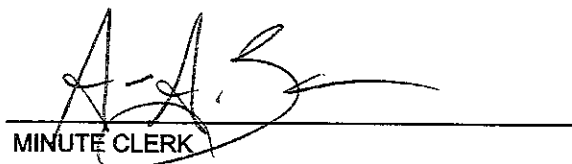
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In accordance with Article 1913 C.C.P., you are hereby notified that Judgment
in the above entitled and numbered cause was signed on February 25, 2021

New Orleans, Louisiana
February 25, 2021


MINUTE CLERK

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA**

NO. 2019-08430

DIVISION "G-11"

**JEROME MORGAN, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED**

VERSUS

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

FILED: _____

DEPUTY CLERK

JUDGMENT

This matter came for hearing on 15 January 2021 on defendant's, Bankers Insurance Company, Peremptory Exception of No Cause of Action as to Plaintiff's, Jerome Morgan, First Claim for Relief and Exception of Prematurity as to Morgan's, Plaintiff, herein Second, Third, and Fourth Plaintiff Claims for Relief.


Present:

Stephen Marx and E. Colin Thompson- Attorneys for defendant, Bankers Insurance Company (Bankers);

Michael West and William Quigley- Attorneys for plaintiff, Jerome Morgan (Morgan)

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that there be judgment herein in favor of the defendant, Bankers Insurance Company, Inc., and against the plaintiff, Jerome Morgan, sustaining Bankers', defendant, Exception of No Cause of Action as to Morgan's, plaintiff, First Claim for Relief referring the determination as to the validity of Directive 214 to the Division of Administrative Law and granting Bankers', defendant, Exception of Prematurity staying this action until there is a final and enforceable administrative determination on the validity of Directive 214.

JUDGMENT READ, RENDERED and SIGNED this 25th day of February, 2021, at New Orleans, Louisiana.



**ROBIN M. GIARRUSSO
DISTRICT JUDGE, DIV. "G"**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2019-08430

DIVISION G

SECTION 11

**JEROME MORGAN, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED**

VERSUS

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

REASONS

Determining the validity of Directive 214 is a necessary predicate to any constitutional challenge to Act 54.

NEW ORLEANS, LOUISIANA this 25th day of February, 2021.



JUDGE ROBIN M. GIARRUSSO

App. 2

NO. 2021-C-0249

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

JEROME MORGAN

VERSUS

BLAIR'S BAIL BONDS, ET AL.

IN RE: JEROME MORGAN

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE ROBIN M. GIARRUSSO
CIVIL DISTRICT COURT, ORLEANS PARISH
DIVISION "G-11", 2019-08430

WRIT DENIED

The plaintiff/respondent's writ application, seeking review of the trial court's February 25, 2021 judgment, which granted the defendant/respondent's exceptions of no cause of action and prematurity and stayed the proceedings, is denied.

New Orleans, Louisiana this 8th day of June, 2021.

JFM

CHIEF JUDGE JAMES F. MCKAY III

JCL

JUDGE JOY COSSICH LOBRANO

TGC

JUDGE TIFFANY G. CHASE