

LOUISIANA SUPREME COURT

NO. 2021-CC-00983

**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**

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

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This case is about whether it is constitutional for the legislature to have engaged in retroactive lawmaking to insulate a politically powerful industry from liability and to strip tens of thousands of New Orleans families of any remedy for overpaying for a bail bond. In its opposition, Bankers Insurance Company, Inc. (“Bankers”) repeatedly mischaracterizes Morgan’s constitutional challenge to 2019 La. Act 54 (“Act 54”) to divert the Court from the issues at stake in Morgan’s case. Accordingly, Morgan’s reply first sets out the actual issues at stake in this writ application and then explains in more detail why the Division of Administrative Law (“DAL”) cannot simply cast aside the passage of Act 54 and evaluate whether the Commissioner’s actions were lawful based on a version of La. Rev. Stat. § 22:1443 that no longer exists.

- *First*, the claims in this case involve a challenge to Act 54’s constitutionality, which all parties and the DAL agree that the DAL lacks jurisdiction to decide. Morgan is not attempting to litigate in the district court whether he is entitled to a refund under Directive 214 (“the Directive”), but rather whether it was constitutional for the legislature to retroactively foreclose the possibility of any compensation for Bankers’ wrongdoing. The dispute about the Directive’s validity and whether Morgan is entitled to a refund under that Directive is a separate dispute that can only be litigated after the district court addresses the threshold constitutional questions.¹

- *Second*, no one disputes that the Orleans Parish Civil District Court has jurisdiction to decide Morgan’s constitutional claims or that it is the proper venue to hear that dispute because Blair’s Bail Bonds (“Blair’s”) operates and has its principal place of business in New Orleans and because Morgan signed his bail bond contract with Blair’s and Bankers there.

- *Third*, the DAL itself and the Commissioner of Insurance, as evidenced by his amicus brief, have asked this Court to decide whether Act 54 violates due process or is a prohibited local or special law before resuming the DAL proceedings. The DAL stayed the administrative proceedings to allow the district court to answer these threshold questions after remarking:

¹ Bankers’ central analytical mistake is that it repeatedly conflates Morgan’s constitutional challenge to Act 54 with the procedures available to Bankers to challenge the Directive’s validity. They are not the same. Bankers is correct that its exclusive remedy to challenge the Directive’s validity is requesting a hearing pursuant to La. Rev. Stat. § 22:2191(A). Under La. Rev. Stat. § 22:2191(A), “[t]he division of administrative law shall hold a hearing . . . (2) [u]pon written demand for a hearing made by any person aggrieved by any act, [or] order of the commissioner” However, Morgan is not alleging that the Commissioner aggrieved him, and he is not challenging the Directive’s validity. Instead, Morgan has challenged the constitutionality of Act 54, a challenge that “must be raised first in the district court.” *Bd. of Ethics In re Cartesian Co., Inc.*, 2016-1556 (La. App. 1st Cir. 10/12/17), 233 So. 3d 9, 20.

“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?” and that he would be “uncomfortable” invalidating the Directive because of Act 54 without this Court first determining Act 54’s constitutionality. *See Bankers Mot. Sum. Jud. Tr.* 21:14–16; 29:15-19.² The district court should have resolved those constitutional questions, which are “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. Instead, the district court stayed Morgan’s constitutional claims, disregarding the DAL’s assessment that it could not move forward until the constitutional challenge to Act 54 is resolved. Both the DAL and district court proceedings are now at a standstill until this Court resolves which forum should proceed first and whether the district court properly applied the primary jurisdiction doctrine.

- *Fourth*, as discussed in more detail in Morgan’s supervisory writ application and below, *see* Supervisory Writ Application at 24–25, the DAL cannot simply pretend that the legislature did not pass Act 54. The DAL is limited to answering justiciable questions and cannot answer—without violating fundamental justiciability principles—a hypothetical question about whether the Directive would be valid under the version of La. Rev. Stat. § 22:1443 that would be in effect if Act 54 was never enacted.

- *Fifth*, the only justiciable action that the DAL can take at this time is to invalidate the Directive based on Act 54. However, a plaintiff does “not have to exhaust any administrative remedy in order to challenge the constitutionality of a statute under which [he] was adversely affected,” *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Comm’n*, 94-2015 (La. 11/30/94), 646 So. 2d 885, 888 n.4, and Morgan was plainly adversely affected by Act 54 here. Because the DAL cannot decide non-justiciable questions and because Morgan does not have to exhaust his administrative remedies to challenge Act 54’s constitutionality, it begs the question what, if anything, the DAL can decide that would be consistent with this Court’s precedent if the district court’s judgment is affirmed.

- *Sixth*, while Bankers ties this case in procedural knots, tens of thousands of New Orleans families wait for a decision about whether it is constitutional for the legislature to

² Although Bankers moved the DAL to lift the stay following the district court’s ruling, it subsequently asked the DAL to hold that motion in abeyance until this Court resolves Morgan’s supervisory writ application. The DAL granted that request and the DAL’s (and the district court’s) stay remains in effect until this Court resolves which forum must proceed first.

retroactively strip them of any compensation for Bankers' wrongdoing and to immunize a politically powerful industry from any liability. This is compensation that struggling New Orleans families could use for mortgage payments, rent, utilities, food, transportation, or medical bills, especially during a global pandemic that continues to ravage Louisiana families. Guidance from this Court is necessary because both the DAL and district court proceedings have ground to a halt: neither the district court nor the DAL can compel the other forum to lift their respective stays—as neither has appellate jurisdiction over the other.

In disagreeing with the DAL's determination that Act 54's constitutionality is the threshold issue, the district court concluded that "[d]etermining 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 explain why it believed that it could not evaluate Morgan's constitutional claims without the DAL first affirming the Directive's validity, and Bankers does not attempt to defend the district court's reasoning in its opposition. Instead, Bankers offers an entirely different justification for staying Morgan's constitutional claims than the one that the district court offered in its opinion. In its opposition, Bankers now argues that the district court properly issued the stay under the doctrine of constitutional avoidance. Bankers' Opposition at 16. Bankers apparently believes that the dispute over the constitutionality of Act 54 can be avoided altogether if the DAL simply pretends like the legislature did not pass Act 54 and that Act 54 does not retroactively amend the disputed statutes. However, the district court cannot—in the name of constitutional avoidance—ask the DAL to imagine that Act 54 did not retroactively amend La. Rev. Stat. § 22:1443 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. "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it." *St. Charles Par. Sch. Bd. v. GAF Corp.*, 1985-2334 (La. 3/12/87), 512 So. 2d 1165, 1173. A court cannot "decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Id.* (emphasis added). Whether there is anything justiciable for the

DAL to decide is a “threshold issue” that the district court should have considered before issuing its stay. *See Rand v. City of New Orleans*, 2017-0596 (La. 12/6/17), 235 So. 3d 1077, 1082.

The DAL cannot pretend like the legislature did not pass Act 54 because there is no interpretation of the pre-Act 54 version of La. Rev. Stat. § 22:1443 that the DAL can offer, which would “affect the result as to the thing in issue in the case before it”—that is, the Directive’s validity. *St. Charles Par. Sch. Bd.*, 512 So. 2d at 1173 (emphasis added). For instance, a ruling from the DAL that the Commissioner incorrectly interpreted the pre-Act 54 version of La. Rev. Stat. § 22:1443 would have no practical effect because Act 54 already states that the bail bond companies’ actions shall not “be considered a violation of R.S. 22:855 or R.S. 22:1443.” *See* Section 1. B.(1), Act 54, attached as Ex. C to Supervisory Writ Application. Likewise, a ruling from the DAL that the Commissioner correctly interpreted the pre-Act 54 version of La. Rev. Stat. § 22:1443 would have no practical effect because Act 54 invalidated the Directive and eliminates any compensation for wrongdoing under La. Rev. Stat. § 22:855(E). *See* Section 1. B.(1), Act 54, Ex. C (“to the extent an additional one percent [premium] has been collected . . . , no repayment of overcollections . . . shall be required . . .”). Whether the Commissioner correctly interpreted the pre-Act 54 version of La. Rev. Stat. § 22:1443 is justiciable only if the district court first declares Act 54 to be unconstitutional. Act 54’s constitutionality is the actual threshold question and one that every party—and the DAL—agrees that the DAL does not have jurisdiction to decide.

In its opposition, Bankers argued that Act 54 does not moot the original dispute over how to interpret the pre-Act 54 version of La. Rev. Stat. § 22:1443 because that dispute falls within the collateral consequences exception to the mootness doctrine. Bankers’ Opposition at 19. This is the opposite position that Bankers took in the DAL, where it argued that Act 54 “renders Directive 214 . . . moot and of no effect.” *See* Bankers’ DAL Sum. Jud. Mot. at 7 (emphasis added).

Regardless, the collateral consequences exception does not apply here. It is true that an amendment to a statute may not moot a dispute over the interpretation of the original statute under the collateral consequences exception “when damages or other monetary relief has been claimed on account of former provisions of a challenged . . . statute.” *Cat’s Meow, Inc. v. City of New Orleans Through Dep’t of Fin.*, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1196. However, the collateral consequences exception applies only when an amendment or “repeal does not have retroactive effect.” *Id.* (emphasis added). That is not the case here.

Bankers knows that there is no “chance of money changing hands,” *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019), unless Act 54 is declared unconstitutional because Act 54 explicitly states that “no repayment of overcollections . . . shall be required . . .” and because Act 54 explicitly makes that provision “retroactive.” See Section 1. (B)(1), Section 2., Act 54, Ex. C (emphasis added).³ Thus, the original dispute between the parties over the interpretation of La. Rev. Stat. § 22:1443 as it existed before Act 54’s passage is ripe only if Act 54 is found unconstitutional.⁴ The DAL correctly recognized this when it issued its own stay of the administrative proceedings until this Court determines whether Act 54 is unconstitutional.⁵

Bankers treats the timing of how these disputes are resolved as if the order is of no consequence, but the order is enormously consequential. Bankers’ Opposition at 1. First, as Morgan noted in his supervisory writ application, see Supervisory Writ Application at 3, 23, the DAL would be required to invalidate the Directive based on Act 54 if the DAL lifted the stay because that is the only justiciable action that the DAL can take at this time. Act 54 is, after all, current law and is therefore the only law that the DAL could apply.⁶ Second, the DAL’s decision

³ See also <https://legis.la.gov/legis/ViewDocument.aspx?d=1141926>; La. Rev. Stat. § 22:1443, Editor’s Notes, Clarification of Acts 2005, No. 350; Retroactive Effect—Acts 2019, No. 54 (“As enacted herein, R.S. 22:1443(B)(1) clarifies the procedure and interpretation of Act 350 of the 2005 Regular Session and shall have retroactive effect.”) (emphasis added).

⁴ Bankers argues in its opposition that Morgan’s mootness argument has no merit because Morgan seeks a declaratory judgment in his first claim interpreting La. Rev. Stat. § 22:1443, as it existed before Act 54 amended the statute. Bankers’ Opposition at 19. But Morgan has consistently stated that his first claim is ripe only if Act 54 is unconstitutional and that, if the district court “finds that Act 54 is constitutional, the proper course of action would be for the district court to dismiss Morgan’s first claim as moot.” See, e.g., Court of Appeal Supervisory Writ Application at 6 n.3.

⁵ Bankers’ non-statutory arguments about why the Directive is invalid further highlight why the district court erred in staying Morgan’s constitutional claims. Bankers argued in the DAL that the Directive is invalid because 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. These arguments are directed to the scope—rather than the merits—of the Directive. If the DAL agreed with Bankers, the Commissioner could simply address those concerns by refashioning or narrowing the scope of the remedy. Such an exercise would be a waste of the DAL and Commissioner’s resources if Act 54 is constitutional, however, because Act 54 forecloses any remedy for being overcharged. See *St. Charles Par. Sch. Bd.*, 512 So. 2d at 1171 (“The doctrine that courts will not hear moot cases 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.”). For this reason, too, the DAL correctly concluded that the district court should first decide whether Act 54 is constitutional before it evaluates whether the Directive is too broad in scope. That is because there is simply no remedy that the Commissioner could fashion that would allow for compensation to New Orleans families for being overcharged if Act 54 is constitutional and remains the operating law.

⁶ Bankers pressed this very argument in its summary judgment motion in the DAL—a position that it now disavows. See Bankers’ Reply in Support of DAL Mot. Sum. Jud. at 4.

invalidating the Directive would be final because state statute prohibits the Commissioner from appealing any adverse decision. *See* La. Rev. Stat. § 49:964(A)(2)(a) (“No agency or official thereof . . . shall be entitled to judicial review.”). Third, this would result in extra and unnecessary litigation for all parties because a plaintiff does “not have to exhaust any administrative remedy in order to challenge the constitutionality of a statute under which it was adversely affected,” and Morgan was plainly adversely affected by Act 54’s enactment. *Louisiana Paddlewheels*, 646 So. 2d at 888 n.4. There is simply nothing that the DAL could decide that would be consistent with this Court’s precedent on exhaustion and justiciability if the district court’s judgment is affirmed and the DAL lifted its stay.

CONCLUSION

“At least since *Marbury v. Madison*, [the Supreme Court has] recognized that when” government action “is alleged to conflict with the Constitution, ‘it is emphatically the province and duty of the judicial department to say what the law is.’” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). “In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.” *Id.* at 194 (internal citation and quotation marks omitted). That responsibility will sometimes involve the “[r]esolution of litigation challenging the constitutional authority of one of the three branches,” but courts cannot avoid their responsibility merely “because the issues have political implications.” *INS v. Chadha*, 462 U.S. 919, 943 (1983); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (“We will not shrink from our duty ‘as the bulwar[k] of a limited constitution against legislative encroachments’”) (quoting *The Federalist No. 78*, p. 526 (J. Cooke ed. 1961) (A. Hamilton)).

For these reasons and the reasons stated in Morgan’s supervisory writ application, this Court should find that the district court erred to the extent it believed that it could avoid ruling on Morgan’s constitutional claims by asking the DAL to decide non-justiciable questions.

Respectfully submitted,

/s/ Micah West

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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 reply in support of Morgan’s 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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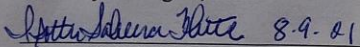
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Sworn to and subscribed before me,
this day of August, 2021.


NOTARY PUBLIC

Printed Name: Isabella Sakeens White
My commission expires on:

October 18, 2021

