SUPREME COURT

STATE OF LOUISIANA

NO. _____

JUNE MEDICAL SERVICES, LLC, et al.

versus

JEFF LANDRY, in his official capacity as Attorney General of Louisiana, et al.

ON APPLICATION FOR SUPERVISORY OR REMEDIAL WRITS TO THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 2022-5633, DIVISION "N," SECTION 8 THE HONORABLE ETHEL SIMMS JULIEN, PRESIDING

APPLICATION ON BEHALF OF DEFENDANTS, HONORABLE JEFF LANDRY, in his official capacity as Attorney General of Louisiana, and HONORABLE COURTNEY N. PHILLIPS, in her official capacity as Secretary of the Louisiana Department of Health

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CIVIL PROCEEDING

REQUEST FOR PRIORITY CONSIDERATION AND STAY

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SECRETARY COURTNEY PHILLIPS OF THE LOUISIANA DEPARTMENT OF HEALTH

LOUISIANA SUPREME COURT
CIVIL PRIORITY FILING SHEET

Honorable Jeff Landry, Atty. Gen. of La., and Honorable Courtney Phillips, Sec. of La. Dep't of Health
Applicants' Names

June Medical Health Services, LLC, et al. v. Jeff Landry, in his official capacity as Attorney General of Louisiana, et al.
Case Title

1. What is the nature of the priority?

☐ Child in Need of Care (Ch.C. Title VI)
☐ Judicial Certification for Adoption (Ch.C. Title X)
☐ Surrender of Parental Rights (Ch.C. Title XI)
☐ Adoption of Children (Ch.C. Title XXI)
☐ Child Custody
✓ Other (specify): The district court issued TROs restraining Defendants statewide from enforcing three of Louisiana's anti-abortion statutes. The district court has scheduled a preliminary injunction hearing for July 8, 2022, at which Plaintiffs will litigate their claims regarding the unconstitutionality of the statutes.

Application made by:
☐ PLAINTIFF
✓ DEFENDANTS
☐ OTHER

2. Is a hearing or trial date set? NO **YES** ✓ DATE: July 8, 2022 TIME: 10:00 a.m.

IN PROGRESS Jury Trial? NO YES Any out of state witnesses?

3. Was relief applied for in the trial court? NO **YES** ✓ By: **PLAINTIFFS** ✓ DEFENDANT OTHER

Stay: DENIED/GRANTED UNTIL: N/A

Ruling of Dist. Court: Granted TROs at request of Plaintiffs

4. Was an application made to the court of appeal? **NO** ✓ YES

Which Circuit? 1ST 2ND 3RD 4TH 5TH

Application was made by? PLAINTIFF DEFENDANT OTHER

Date of Court of Appeal action: N/A

Court of Appeal action: N/A

If you did not apply to the Circuit Court of Appeal state why: Pursuant to Plaintiffs' attacks on the constitutionality of three of Louisiana anti-abortion statutes, the district court granted TROs halting their enforcement. Defendants ask this Court to exercise its plenary authority for supervisory review to dissolve those TROs.

5. How and when will applicant be adversely affected if relief is not granted?

The district court's TROs have halted the enforcement statewide of three of Louisiana's anti-abortion statutes.

6. List of **Lead Counsel** & **Judge** involved in case:

PHONE NUMBERS

Name: James M. Garner
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Day Bus. (504) 299-2100
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Name: Ellie T. Schilling
Home:
Day Bus. (504) 680-6050
Night Bus. (504) 680-6050

Dist. Ct. Judge: Hon. Ethel S. Julien
Home:
Day Crt. (504) 407-0330
Night Crt. (504) 407-0330

CERTIFICATION

I am requesting ✓ priority consideration of this application or ✓ a stay pending consideration of this application. Pursuant to Supreme Court Rule 10, Section 2(e), I have notified all counsel and unrepresented parties by telephone or other equally prompt means of communication that said writ application has been or is about to be filed in this court and that I have served on all parties at interest or their counsel, by a means equal to the means used to effect filing in this court. ✓ I SHALL IMMEDIATELY NOTIFY THE COURT IF THE NEED FOR EXPEDITED CONSIDERATION CHANGES DUE TO SETTLEMENT, CONTINUANCE OR ANY OTHER CIRCUMSTANCE. FAILURE TO NOTIFY THE COURT SHALL SUBJECT ME TO PUNISHMENT FOR CONTEMPT OF THE AUTHORITY OF THE COURT.

July 1, 2022
DATE

/s/ James M. Garner
SIGNATURE

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO.

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

June Medical Services, LLC, et al.
VS.
Jeff Landry, et al.

Applicants: Defendants, Honorable Jeff Landry, Attorney General of Louisiana, and Honorable Courtney N. Phillips, Secretary of the Louisiana Department of Health
Have there been any other filings in this Court in this Matter? ☐ Yes ✓ No
Are you seeking a Stay Order? Yes
Priority Treatment? Yes
If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANTS:
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Pleading being filed: ☐ In proper person. ☐ In Forma Pauperis
Attached is a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

✓ Civil, ☐ Criminal, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: N/A Docket No.
Judge/Commissioner/Hearing Officer: _____ Ruling Date:

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Civ. Dist. Ct, Orleans Parish Docket No. 2022-5633
Judge and Section: Hon. Ethel Simms Julien, Div. "N," Sec. 8 Dates of Ruling/Judgment: June 27, 2022

APPELLATE COURT INFORMATION

Circuit: N/A Docket No. _____ Action: N/A
Applicant in Appellate Court: N/A Filing Date: N/A
Ruling Date: N/A Panel of Judges: N/A En Banc: ☐

REHEARING INFORMATION

Applicant: N/A Date Filed: N/A Action on Rehearing: N/A Ruling Date: N/A Panel of Judges: N/A En Banc: ☐

PRESENT STATUS

✓ Pre-Trial, Hearing/Trial Scheduled date: July 8, 2022 prelim injunc hrg., ☐ Trial in Progress, ☐ Post Trial
Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No
If so, explain briefly

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.

July 1, 2022
DATE

/s/ James M. Garner
SIGNATURE

COUNSEL AND SERVICE LIST

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May It Please the Court:

CONSIDERATIONS FOR GRANTING WRIT APPLICATION

This Court should grant this Writ Application to correct the district court's erroneous application and interpretation of Louisiana law. Defendants-applicants, Louisiana Attorney General Jeff Landry and Secretary Courtney N. Phillips of the Louisiana Department of Health, seek to have this Court dissolve temporary restraining orders that have wrongfully been issued to prevent the enforcement of Louisiana's pre-existing and therefore currently effective statute, and its newly enacted statutes, parts of which are now in effect and parts of which are effective August 1, but all of which prohibit abortion in this state with only narrow exceptions. The Louisiana Legislature has long awaited the reversal of *Roe v. Wade.*[1] That day has come, and it was met with improperly filed, procedurally defectively attempts to thwart legislative will. Indeed, in preparing for this day to come, Louisiana voters adopted the "Love Life" amendment, which ensures that nothing in the Louisiana Constitution should be construed as creating a right to an abortion.[2] And the Louisiana Legislature also placed triggers within each of three statutes — Louisiana Revised Statutes § 40:1061, § 14:87.7, and § 14:87.8 — stating that they would become effective "immediately" upon the overruling of *Roe* and the restoration to Louisiana of the authority to prohibit or limit abortion. The statutes require no other mechanism to take effect — no certification process, no delegation to determine what to do — just the simple overruling of *Roe*.

On June 24, 2022, the United States Supreme Court did just that. It issued *Dobbs v. Jackson Women's Health Organization*,[3] stating clearly: "We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[4] Thus the three statutes automatically became effective.

The people of Louisiana, through their elected representatives, overwhelmingly passed those statutes to prevent most abortions in Louisiana — 72 yeas and 25 nays in the House, 29 yeas

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[1] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[2] La. Const. art. I, § 20.1.

[3] 597 U.S. ----, 2022 WL 2276808 (2022).

[4] *Id.* at *38.

and 4 nays in the Senate, and signed by the Governor. But three plaintiffs — a *Shreveport* abortion clinic, its Shreveport-based administrator, and an association that includes Tulane University medical students (who may work periodically at Plaintiff Hope Medical Clinic in Shreveport, but claim no other connection to New Orleans than school affiliation) — immediately filed this suit, broadly alleging the Legislature's laws are "unconstitutionally vague" and improperly delegate authority from the legislative branch. With less than a half-hour notice to two state employees in Baton Rouge and based on these representations, the Civil District Court in Orleans Parish signed temporary restraining orders purporting to prevent two state officials — Defendants Louisiana Attorney General Jeff Landry and Secretary Courtney N. Phillips of the Louisiana Department of Health — from "enforcing" the new laws.

The orders issued against Defendants are improper and should be dissolved. And, even more importantly, this Court should immediately halt these efforts to thwart the enforcement of validly-enacted State laws by flagrant judge-shopping and abuse of process. The Plaintiffs have not even come close to meeting the high standard for the issuance of a restraining order blocking state laws, temporary or otherwise. Their allegations have not demonstrated in any way that the statutes are unconstitutionally vague or improperly delegate a legislative function to anyone. The orders purport to halt the State's new abortion regime *statewide*, despite no basis for such a claim to power using temporary injunctive relief *and* the United States Supreme Court's return of full legislative power in this area to Louisiana. Should this improper attack on state law by the Plaintiffs and improper exercise of power exercised by a district court judge in an improper forum be permitted to stand, these efforts to thwart the law will continue. As Defendants show in this Writ Application, Plaintiffs' are willfully misreading clear terms in the law in an attempt to manufacture arguments that the statutes are unconstitutionally vague and therefore violate Plaintiffs' due process rights. But the terms of the laws are clear and the triggers are not vague. The application of basic interpretive principles makes this plain. As this is purely a matter of law, this Court should take the case and end this improper assault on the law.

This matter presents issues of significant public interest, such that jurisdiction in this Court is appropriate.[5] The supervisory jurisdiction of this Court is invoked pursuant to Article V, § 5 of the Louisiana Constitution of 1974, Louisiana Code of Civil Procedure article 2201, and Rule X of the Louisiana Supreme Court. Defendants urge the Court to review the district court's restraining orders before that court goes further with additional injunctive relief. The supervisory review of this Court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the Court.[6] This Court can intervene under its own plenary powers, whether or not the lower courts have properly acted on the matter.[7] Due to the importance of these issues and the current improper bar to the enforcement of Louisiana's anti-abortion laws, Defendants respectfully request that this Court grant their Writ Application, accept immediate supervisory jurisdiction over this case, and decide this matter on an expedited basis, while staying all proceedings in the district court.

REQUEST FOR EXPEDITED CONSIDERATION AND FOR STAY

Defendants seek expedited consideration of their Application for Supervisory Writs, as well as a stay of all proceedings in the district court. The district court has set a hearing on Plaintiffs' application for a preliminary injunction on **July 8, 2022**. Defendants submit that in the interest of justice and judicial efficiency, the preliminary injunction hearing should be stayed while this Court considers whether Plaintiffs have even brought a sufficient constitutional challenge to the three Louisiana statutes in the first place, and whether instead the restraining orders should be dissolved. Defendants therefore respectfully move this Court to render a decision on this writ application as soon as possible and to stay all district court proceedings at this time.

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[5] *See State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed to Do Bus. in State*, 2006-2030 (La. 8/25/2006), 937 So. 2d 313, 318; *see also Herlitz Const. Co. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1978).

[6] *See Marionneaux v. Hines*, 2005-1191, p. 4 (La. 5/12/2005), 902 So. 2d 373, 376; *Progressive Sec. Ins. Co.*, 1997-2985, p. 2 n.3 (La. 4/23/1998), 711 So. 2d 675, 678 n.3.

[7] *See Marionneaux*, 2005-1191 at p. 4, 902 So. 2d at 376.

STATEMENT OF THE CASE

The People of Louisiana recently amended the Louisiana Constitution to affirm that it contains no right to abortion.[8] The Louisiana Legislature, in keeping with this mandate, has long-anticipated a day that just arrived: the overruling of *Roe v. Wade*,[9] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[10] returning power to the States to legislate on this important topic. Two weeks ago, the Supreme Court of the United States did just that in *Dobbs v. Jackson Women's Health*,[11] overruling both *Roe* and *Casey*. But in an effort to block or stall this transfer of power, the Plaintiffs filed this suit.

I. LOUISIANA STATUTES

In 2006, the Louisiana Legislature enacted La. R.S. 40:1061. This law essentially stated that no person could knowingly use any instrument or procedure upon a pregnant woman, nor could one administer or prescribe any medicine or drug to a pregnant woman, with the intent to terminate the life of an unborn human being. But because of *Roe*, the Legislature stated it would become effective only if *Roe* were overruled, in whole or in part or upon the adoption of an amendment to the United States Constitution restoring to Louisiana the authority to prohibit abortion.[12] Plaintiffs challenge this statute, calling it the "First Trigger Ban."

In further anticipation of a possible reversal of *Roe* in *Dobbs*, the Louisiana Legislature recently enacted La. Acts 545 of 2022 Regular Session, which added a *Dobbs* reversal of *Roe* as another trigger to La. R. S. 40:1061. Act 545 also comprehensively revised and re-enacted a set of several other statutes dealing with abortion in Louisiana. Included in the Act are two new statutes in the Criminal Code — La. R.S. 14:87.7 and La. R.S. 14:87.8. Like R.S. 40:1061, these two new statutes would become effective upon a reversal of *Roe*, whether through *Dobbs* or otherwise, or a constitutional amendment effectively overruling *Roe*, and returning to Louisiana the power to prohibit abortion. Plaintiffs refer to these two statutes as the "Second Trigger Ban"

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[8] *See* La. Const. art. I, § 20.1.

[9] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[10] 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

[11] 597 U.S. ----, 2022 WL 2276808 (2022).

[12] *See* La. Rev. Stat. § 40:1061, eff. as of 2006 La. Acts No. 467 and until its amendment through 2022 La. Acts No. 545.

and the "Third Trigger Ban," respectively. Section 14:87.7 makes it unlawful to perform any "abortion" (a defined term), with a mandatory term of imprisonment between one and ten years, as well as a mandatory fine between $10,000 to $100,000.[13] Section 14:87.8 makes it unlawful to perform "late term abortions" (also a defined term), meaning an abortion of an unborn child of gestational age fifteen weeks or more, with more severe penalties of a mandatory term of imprisonment between one and fifteen years, and a mandatory fine between $20,000 to $200,000.[14]

On June 24, 2022, the United States Supreme Court announced *Dobbs*, with its central tenet: "We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[15] The condition precedent for all three "Trigger Bans" occurred, and by their plain terms, they each became effective "immediately."[16]

II. THIS LAWSUIT

Just three days after *Dobbs* was issued, Plaintiffs filed this suit at 9:33 a.m.[17] on Monday, June 27, 2022, in Civil District Court for Orleans Parish, along with a Motion for Entry of Temporary Restraining Order and to Set Hearing on Application for Preliminary Injunction.[18] Plaintiffs are June Medical Services, LLC, d/b/a Hope Medical Group for Women (in Shreveport); its Shreveport administrator Kathaleen Pittman; and an association (of alleged Tulane medical students) identified as Medical Students for Choice. Plaintiffs argue the Trigger Ban statutes are "unconstitutionally vague." Plaintiffs also argue that the Trigger Ban statutes impermissibly "delegate" decision-making authority as to the effectiveness of the statutes, even though the triggers are self-operative in that they are immediately effective upon the overruling of *Roe*.

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[13] *See* La. Rev. Stat. § 14:87.7(C).

[14] *See id.* § 14:87.8(C); *see also id* § 14:87.1(16).

[15] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ----, 2022 WL 2276808, *38, *see also id.* at *7.

[16] La. Rev. Stat. § 40:1061(A), § 14:87.7(F), § 14:87.8(F).

[17] Plaintiffs' counsel sent an email at **9:23 a.m.** with the proposed pleadings to Elizabeth Murrill, who works in the Baton Rouge office of the Department of Justice and is the head of the Federalism Division, and Stephen Russo, who works in the Baton Rouge office of the Louisiana Department of Health.

[18] *See* App'x B, Plaintiffs' Verified Petition for Temporary Restraining Order and Preliminary and Permanent Injunction Enjoining the Implementation or Enforcement of La. R.S. §§ 40:1061, 14:87.7, 14:87.8; App'x C, Plaintiffs' Motion for Entry of Temporary Restraining Order and to Set Hearing on Application for Preliminary Injunction and Memo. in Support.

This suit was assigned to Division "N" of Civil District Court. An order was signed setting a preliminary injunction hearing for July 8, 2022 at 10:00 a.m.[19] But there is no temporary restraining order signed by any *judge*. Instead, there are two "Restraining Orders" signed *by Deputy Clerk of Court Amber Darby* — one directed to Louisiana Attorney General Jeff Landry and another directed to the Secretary of the Louisiana Department of Health, Courtney N. Phillips — ordering them to "refrain and desist" from enforcing all three of the Trigger Ban statutes.[20]

Defendants, Attorney General Jeff Landry and Secretary Courtney N. Phillips of the Louisiana Department of Health, now submit this Writ Application to this Court, seeking the immediate dissolution of the "Restraining Orders" (to the extent they are binding at all). Defendants further ask this Court to declare as a matter of law that Plaintiffs have not suffered any harm for which they would be entitled to any injunctive relief because the Trigger Bans are effective and are not unconstitutionally vague in a manner that harms any of their due process rights, nor do they improperly delegate authority to anyone.

ASSIGNMENTS OF ERROR

1. The district court committed legal error when it permitted a deputy clerk of court to sign orders purporting to restrain state officers from carrying out their lawful duties.

2. To the extent the orders are operative at all, the district court committed legal error in restraining the Attorney General and the Secretary of the Department of Health based on the purported allegations in the petition that the Triggers are vague or an unlawful "delegation" of authority by the Legislature.

[19] *See* App'x D, Order.

[20] *See* App'x E, Restraining Order issued to Louisiana Attorney General Jeff Landry; App'x F, Restraining Order issued to Secretary Courtney N. Phillips of the Louisiana Department of Health.

SUMMARY OF ARGUMENT

Plaintiffs' attacks on R.S. 40:1061, 14:87.7, and 14:87.8 are baseless and cannot support the issuance of the district court's orders restraining enforcement of the statutes. Plaintiffs raise perceived differences in language between the statutes, trying to create vagueness issues. But Plaintiffs repeatedly read words into the statutes that are not there, and also ignore words and definitions that *are* used in common among the statutes. But when one actually reads the prohibited conduct described in all three statutes, it is clear to people of ordinary intelligence what is being proscribed, which is enough to survive challenges regarding unconstitutional vagueness. Plaintiffs also raise differences in penalties among the statutes. But courts focus on the conduct regulated in statutes, not the penalties, when determining vagueness. Finally, Plaintiffs claim that certain supposed legislative decision-making has been delegated to unnamed persons to decide whether the statutes are effective, when the statutes are effective, and which statutes are effective. But all the statutes are effective upon a single discrete event — the overruling of *Roe* — without any decision-making required of any person at all. This Court should exercise its plenary authority to put down Plaintiffs' unlawful challenge to Louisiana's clear anti-abortion statutes that have been enacted through the will of the people.

LAW AND ARGUMENT

This Court should immediately dissolve the purported Restraining Orders issued by the Civil District Court for Orleans Parish, which purport to enjoin the Louisiana Attorney General and the Secretary of the Louisiana Department of Health from enforcing Louisiana's laws prohibiting abortion, as set forth in Louisiana Revised Statutes § 40:1061, § 14:87.7, and § 14:87.8. These statutes are not unconstitutionally vague and are indeed enforceable. Their effective dates are self-operative provisions. Thus the district court committed plain legal error in granting temporary restraining orders (via a deputy clerk) on the basis that Plaintiffs had alleged "due process injuries."

This Court has explained that a statute is unconstitutionally vague only "if its meaning is not clear to the average citizen or if any ordinary person of reasonable intelligence is incapable of discerning its meaning and conforming his conduct to it."[21] This Court has further held that when statutory terms "may straddle the fence and be susceptible of contrary interpretations, the proper test to be applied is derived from the overall purpose of the statute."[22] These provisions are not vague.

I. THE PROHIBITIONS AGAINST ABORTION ARE NOT VAGUE.

Plaintiffs claim the Trigger Bans inconsistently define what constitutes an abortion and thus what conduct is prohibited, making it impossible to determine what is illegal. But employing simple canons of statutory construction easily refutes this argument.

Act 545 of 2022 enacts a new definition section contained in La. R.S. 14:87.1, which expressly defines "abortion," a term used in both the Second Trigger Ban (La. R.S. 14:87.7) and the Third Trigger Ban (La. R.S. 14:87.8).[23] Act 545 also incorporates the same definition of "abortion" in R.S. 14:87.1 into the First Trigger Ban at La. R.S. 40:1061(I): "The terms as used in this Section have the same meaning as the definitions provided in R.S. 14:87.1"[24] Thus **all**

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[21] *State v. Interiano*, 2003-1760, p. 6 (La. 2/13/2004), 868 So. 2d 9, 14.

[22] *State ex rel. Guste v. K-Mart Corp.*, 462 So. 2d 616, 621 (La. 1985).

[23] *See* App'x A, Act No. 545 at 3, 10-11. (Act 545 also is attached to an affidavit of Plaintiffs' counsel Ellie Schilling, which affidavit and exhibits are attached to (1) Plaintiff's Verified Petition for Temporary Restraining Order and Preliminary and Permanent Injunction Enjoining the Implementation or Enforcement of La. R.S. §§ 40:1061, 14:87.7, and 14:87.8, and (2) Plaintiff's Memorandum in Support of Motion for Entry of Temporary Restraining Order and Application for Preliminary Injunction.

[24] App'x A, Act 545 at 12-13.

three statutes reference the same definition of the prohibited activity — "abortion." There is no inconsistency in how abortion is defined among the statutes, and thus they are not vague.

Plaintiffs, however, claim that the word "abortion" is not used in R.S. 40:1061, so it must have a different definition of that word, and thus the whole scheme among the three Trigger Bans is "vague." Common sense dictates otherwise. First, the word "abortion" indeed **is** used in R.S. 40:1061(A) *and* in R.S. 40:1061(H). Second, the statutory context is clear: the title of R.S. 40:1061 is "*Abortion.*" Moreover, that statute is contained in Title 40, Chapter 5 of the Louisiana Revised Statutes, which is titled "Health Provisions: *Abortion.*" Finally, all these revisions are part of the same Act 545 — the definition of "abortion" in R.S. 14:87.1, and the express incorporation of that definition in all three Trigger Bans in R.S. 14:87.7, 14:87.8, **and** 40:1061 — such that they are interpreted together as a whole. Indeed, this Court has recognized that "[w]here a part of an act is to be interpreted, it should be read in connection with the rest of the act."[25]

Finally, the prohibited conduct described in these statutes contains all the same elements, even if the exact same words are not used throughout. See how similar the defined term "abortion" is to the description of prohibited abortion activity in R.S. 40:1061. First, the term "abortion" defined in R.S. 14:87.1(1) is:

> the performance of any act with the intent to terminate a clinically diagnosable pregnancy with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child by one or more of the following means:
> (i) Administering, prescribing, or providing any abortion-inducing drug, potion, medicine, or any other substance, device, or means to a pregnant female.
> (ii) Using an instrument or external force on a pregnant female.

The same conduct is made illegal in R.S. 40:1061(C):

> no person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.

All that is required for any statute to survive a vagueness challenge is that a person of reasonable intelligence is notified of the proscribed **conduct**. Further, this Court has noted that

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[25] *Theriot v. Midland Risk Ins. Co.*, 1995-2895, p. 3 (La. 5/20/1997), 694 So. 2d 184, 186 (citing *Thibaut v. Bd. of Comm'rs of Lafourche Basin Levee Dist.*, 153 La. 501, 96 So. 47 (1923)).

"[w]ords used in statutes need not have the same precision as mathematical symbols."[26] The language in these two statutes is clear to someone of reasonable intelligence that they apply to the same conduct. And again, this Court must take note of the fact that these statutes all are part of the same Act 545 and overall statutory scheme. None of the Trigger Bans is unconstitutionally vague.

Plaintiffs next claim that the proscribed conduct is vague among the three Trigger Bans because they say the First Trigger Ban recognizes an unborn child at the time of fertilization, while the Second and Third Trigger Bans recognize an unborn child at the time of implantation of the fertilized egg. Once again, Plaintiffs read in ambiguity that is not there. Plaintiffs note again that the First Trigger Ban (R.S. 40:1061) does not use the term "abortion," but instead describes the prohibited conduct by referring to other defined terms including a "pregnant" woman and "unborn human being," and when you drill down further into those defined terms, one finds the concept of an unborn child as one coming into existence after "fertilization and implantation":

- "Pregnant" means that female reproductive condition of having a developing embryo or fetus in the uterus which commences at fertilization and implantation.[27]
- "Unborn child", "unborn human being", or "fetus" shall have the same meaning as "unborn child" as defined in R.S. 14:2.[28] Louisiana Revised Statutes § 14:2(A)(11) defines "unborn child" as "any individual of the human species from fertilization and implantation until birth."

Plaintiffs claim they cannot tell whether under the First Trigger Ban, an unborn child is recognized at fertilization **or** implantation, so it is vague. But Plaintiffs ignore (and in fact change) the plain language in the statutes. The statutes expressly say an unborn child is recognized once there is "fertilization **and** implantation." Thus the definition of an unborn child who must be protected from abortion is the same under the First Trigger Ban and under the Second and Third Trigger Bans. Again, there is no inconsistency, and thus no vagueness, among the three Trigger Bans in this regard either.

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[26] *State v. Boyd*, 1997-0579, p. 3 (La. 4/14/1998), 710 So. 2d 1074, 1076.

[27] La. R.S. 14:87.1(23).

[28] La. R.S. 14:87.1(27).

Note that this Court has stated that questions of unconstitutional vagueness are generally available only to those whom they concern.[29] Therefore, a party cannot claim a statute is unconstitutionally vague by speculating about hypothetical conduct that *might* be prosecuted under the statute.[30] Here, Plaintiffs have not alleged with specificity, as required in a constitutional challenge, exactly what they want to do that falls within the allegedly vague language.[31]

II. THE EXCEPTIONS TO ABORTION ARE NOT VAGUE.

The definition of "abortion" in La. R.S. 14:87.1 defines not only what **is** abortion, but it also lists six procedures involving unborn children that are **not**.[32] Once again, Plaintiffs fall back on their flawed argument that the First Trigger Ban (R.S. 40:1061) does not use the term "abortion" (unlike the Second and Third Trigger Bans), and thus does not include the six procedures that are **not** deemed abortion, and therefore potentially criminalizes those procedures. But as explained above, R.S. 40:1061 *does* contain the word "abortion," is *titled* "Abortion," and most importantly *expressly references* the La. R.S. 14:87.1 definition of "abortion," and thus the exceptions to abortion too.

Plaintiffs quibble with more subtle differences in some language, but none render the statutes unconstitutionally vague and, in any event, they allege no specific actions in which they wish to engage that might fall within any allegedly vague term. They complain that one of the exceptions to the defined term of "abortion" in R.S. 14:87.1 is "the performance of a medical procedure necessary *in good faith medical judgment or reasonable medical judgment* to prevent the death or risk of substantial death to the pregnant woman due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman."[33] Plaintiffs contrast this exception with one contained in the First Trigger Ban based on "serious

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[29] *See State v. Sandifer*, 1995-2226, p. 10 (La. 9/5/1996), 679 So. 2d 1324, 1331.

[30] *See State v. Hair*, 2000-2694, p. 5 (La. 5/15/2001), 784 So. 2d 1269, 1273.

[31] Defendants reserve the right to file exceptions of no cause of action and no right of action based on deficiencies in Plaintiffs' pleading and Plaintiffs' lack of standing. Further, this Court may consider such issues sua sponte. *See, e.g.*, *Keeping Our Legacy Alive, Inc. v. Cent. St. Matthew United Church of Christ*, 2017-1060, p. 14 (La. App. 4 Cir. 10/31/2018), 318 So. 3d 130, 139.

[32] *See* La. R.S. § 14:87.1(1)(b)(i)-(vi).

[33] La. R.S. § 14:87.1(1)(b)(v).

health risk to the unborn child's mother,"[34] which term is defined in La. R.S. 14:87.1(26) as "*in reasonable medical judgment* the mother has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function." Therefore, Plaintiffs contend the First Trigger Ban's use of the phrase "reasonable medical judgment" is so different from the Second and Third Trigger Bans' use of "good faith medical judgment and reasonable medical judgment" that the two schemes are impermissibly and unconstitutionally vague. They also argue that the exception in the First Trigger Ban allows an abortion if the mother is at risk of "major bodily function," in contrast to the Second and Third Trigger Bans' focus on whether the mother has a risk of "impairment of a life-sustaining organ." But Plaintiffs' meaningless nitpicking over similar terms merely creates distinctions without a difference. Both statutes require "reasonable medical judgment." And "good faith medical judgment" in the Second and Third Trigger Bans is implicit in that "reasonable medical judgment," and certainly does not contradict the "reasonable medical judgment" required. Again, this Court recognizes that "[w]ords used in statutes need not have the same precision as mathematical symbols.[35] These minor differences in language for the same exceptions do not render these prohibitions unconstitutionally vague.

Plaintiffs' pleadings fail to even properly allege a viable vagueness challenge because they never actually allege what they want to do and why they don't understand whether they can do it. To the contrary, they read words into the statute that are not even there, they feign ignorance as to what they can or cannot do, but fail to allege what they *want* to do that might expose them to criminal sanctions. Their factual allegations fail to adequately assert a constitutional claim, and their flawed interpretations of the law do too.

III. DIFFERENT PENALTIES DO NOT CREATE VAGUENESS.

Plaintiffs assert that the differing penalties among the three Trigger Bans creates additional vagueness. First, this Court in *State v. Booth*[36] held that the concept of constitutional vagueness

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[34] La. Rev. Stat. § 40:1061.23.

[35] *Boyd*, 1997-0579 at p. 3, 710 So. 2d at 1076.

[36] 347 So. 2d 241 (La. 1977).

does not even apply when a plaintiff complains of ambiguities in the **penalties** of a criminal statute.[37] This Court explained, "By its very terms, the void-for-vagueness doctrine focuses on the certainty of the **conduct proscribed**, not the penalties for such conduct."[38]

But even if one could consider the different penalties, they do not render all the statutes vague. Criminal statutes that have nearly identical elements can have different penalties based on the slight differences in criminal conduct. For example, "simple robbery"[39] has the exact same elements as "purse snatching"[40] except the latter involves the taking of a purse. A purse snatcher meets the elements of, and could be charged with, simple robbery and receive a lesser jail term for the exact same conduct. The same goes for "theft"[41] and "theft of livestock."[42] Or "prostitution"[43] and "prostitution of persons under eighteen."[44]

In this case, the fact that someone who performs an abortion at fifteen weeks of pregnancy or later — which is prohibited under R.S. 14:87.8 — can also be charged under R.S. 14:87.7 — which criminalizes performing an abortion at any stage — does not make these statutes vague. And the fact that performing abortions at fifteen weeks and later (R.S. 14:87.8) exposes one to a more severe fine and maximum jail sentence than that under the other Trigger Bans (R.S. 14:87.7 and 40:1061) merely reflects the public policy determination that elevates the penalty for later-term abortions.

Finally, Act 545 creates another statute —La. R.S. 1:18, titled "Construction of laws relative to abortion" — which expressly permits these statutes to co-exist and expressly states the canons of construction. Specifically, it states, "laws regulating or prohibiting an abortion at a certain gestational age of the unborn child shall not be in [*sic*] considered to be in conflict with

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[37] *See id.* at 243.

[38] *Id.* (emphasis added).

[39] *See* La. R.S. § 14:65.

[40] *See* La. R.S. § 14:65.1.

[41] *See* La. R.S. § 14:67.

[42] *See* La. R.S. § 14:67.1.

[43] *See* La. R.S. § 14:82.

[44] *See* La. R.S. §14:82.1.

other laws that regulate or prohibit abortions at a different gestational age of the unborn child."[45] The Trigger Bans are not unconstitutionally vague simply because they have different penalties and can apply to the same conduct.

IV. TIMING OF THE TRIGGERS ARE NEITHER VAGUE NOR A DELEGATION PROBLEM.

Plaintiffs claim that ordinary citizens cannot look at the Trigger Ban statutes and determine **when** they will take effect and **which** Trigger Ban will take effect. This argument is specious.

First, the plain text of all three statutes contains identical triggers for when they became effective:

> The provisions of this Section shall become effective immediately upon, and to the extent permitted, by the occurrence of any of the following circumstances:
>
> 1) any decision of the Supreme Court of the United States which overrules, in whole or in part, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.
>
> 2) adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit or limit abortion.
>
> 3) a decision of the Supreme Court of the United States in the case of *Dobbs v. Jackson Women's Health Organization*, Docket No. 19-1392, which overrules, in whole or in part, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.[46]

This trigger is crystal clear. Plaintiffs cannot seriously wonder **when** the trigger is effective in this case. On June 24, 2022, when the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, the Court clearly declared, "We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[47]

Plaintiffs also cannot reasonably claim there is a question **which** of the three Trigger Bans is triggered because **all three** have the identical trigger. All three have been triggered.

Finally, Plaintiffs also assert a series of arguments, including the claim that the statutes improperly delegate authority to unknown persons:

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[45] La. R.S. § 1:18(B)(2).

[46] La. Rev. Stat. § 14:87.7(F), § 14:87.8(F), § 40:1061(A).

[47] *Dobbs*, 597 U.S. ----, 2022 WL 2276808 (2022).

- There is no mechanism or process for evaluating the trigger.
- There are no guidelines for the statutes' enforcement, as they are silent as to which official or agency should determine that the trigger has occurred.
- The Trigger Bans are unconstitutional because they delegate to unidentified enforcement officers the function of determining when abortion is prohibited in Louisiana.

Although these are different arguments, they can all be disposed for the same reason — these assertions do not stand up to the plain trigger language. That is, there is no need for any mechanism to determine the effective date, as the trigger is clear. There is no need for any official to determine whether *Roe* has been overruled, as that fact dominated the news after the decision was released and is an undisputed fact. And no one has been delegated that decision to determine whether *Roe* has been overruled because it was stated emphatically by the Supreme Court itself, and its decision is automatically the law of the land. None of these attacks on any of the Trigger Bans has any merit.

For all these reasons, this Court should grant Defendants' Writ Application, dissolve the Restraining Orders of the district court, and find that Plaintiffs have not suffered any harm for which they would be entitled to any injunctive relief because the Trigger Bans are effective and are not unconstitutionally vague in a manner that harms any of their due process rights, nor do they improperly delegate authority to anyone.

CONCLUSION

For the reasons set forth above, this Court should grant Defendants' Writ Application, dissolve the Restraining Orders entered by the district court, and find the Trigger Ban statutes are not unconstitutionally vague.

/s/ James M. Garner

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