BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Birthmark Doula Collective, LLC's, a Louisiana LLC d/b/a Birthmark, on behalf of itself and its clients (hereinafter "Birthmark" or "Birthmark clients"), *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General raises the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

Birthmark does not belong to the class of persons to whom the law grants the cause of action asserted in either of its constitutional challenges, as Birthmark lacks standings to bring these claims.

3.

Birthmark has failed to demonstrate any harm caused to its doulas or its clients by the passage of Act 246 that would provide Plaintiff with the standing it needs to bring this constitutional challenge under Louisiana Constitution article I, § 3.

4.

Birthmark, in its capacity as a tax payer has failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing it needs to bring this constitutional challenge under Louisiana Constitution article III, § 15.

5.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiff's claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiff's cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
LIZ MURRILL
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By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

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PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiff, Birthmark Doula Collective, LLC, a Louisiana LLC d/b/a Birthmark, on behalf of itself and its clients (hereinafter "Birthmark" or "Birthmark clients") for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964(Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.*, 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd., 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356*

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Birthmark has not provided any substantiated instances either through their petition or their deposition testimony of the "irreparable injury, loss, or damage" they will sustain if Act 246 is enforced.

In fact, Birthmark states multiple times in their deposition that neither they nor their clients have experienced harm by the passage of Act 246.

Birthmark has not been denied access to these drugs since the passage of Act 246:

"Q. Have any of your members been unable to obtain misoprostol after the passage of Act 246?

A. Not to my knowledge.

Q. Have any of your members been able to --been unable to obtain mifepristone after the passage of Act 246?

A. Not to my knowledge."

(*See* Exhibit Birthmark 1 at page 28, lines 4-10.)

"Q. Has Birthmark been denied the use of misoprostol since Act 246 went into effect?

A. No."

(*See* Exhibit Birthmark 1 at page 20, lines 21-23.)

"Q. Has Birthmark been denied the use of mifepristone since Act 246 went into effect?

A. No."

(*See* Exhibit Birthmark 1 at page 21, lines 3-5.)

Birthmark also fails to demonstrate any actual harm their clients have received as the result of the passage of Act 246:

"Q. Okay. Has any of Birthmark's clients been denied the use of misoprostol since Act 246 went into effect?

A. No."

(*See* Exhibit Birthmark 1 at page 20, lines 24-25 and page 21, lines 1-2).

"Q. Has any of Birthmark's clients been denied the use of mifepristone since Act 246 went into effect?

A. No."

(*See* Exhibit Birthmark 1 at page 21, lines 6-9).

"Q. Are you aware of any of the clients of Birthmark Doula Collective, LLC, requesting to Birthmark Collective, Birthmark Doula Collective, LLC, for access to misoprostol or mifepristone?

A. No."

(*See* Exhibit Birthmark 1 at page 56, lines 6-10).

"Q. Okay. Can you tell me the services that Birthmark used to provide clients that it no longer can provide clients because of the passage of Act 246?

A. I think that in our -- well, there aren't any. I don't think there are any."

(*See* Exhibit Birthmark 1 at page 23, lines 13-18).

The only possible claim of harm Birthmark alleges on behalf of their clients comes through their deposition testimony:

"Q. Okay. And the same question, and you just touched on it, but more in regards to your clients. Can you describe in your own words the alleged harm Birthmark's clients have received from the passage of Act 246?

A. Clients have been actively hemorrhaging, and there has been a delay in their receipt of the medication which causes more, you know, more blood or more time for them to bleed out. Which is very harmful for not only our clients, but also the doula witnessing this experience."

(*See* Exhibit Birthmark 1 at page 22, lines 19-25 & page 23, lines 1-4).

This claim that since the passage of Act 246 they have had a client actively hemorrhaging, and there was a delay in their access to these drugs is not substantiated anywhere in the three Petitions filed by Birthmark.

Because Birthmark's testimony is that neither they nor their clients have suffered any harm, Birthmark would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Birthmark has not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring these claims.

B. Declaratory Judgment

1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. Petition of *Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely **hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and

upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of facts**" *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Birthmark has not demonstrated a real and substantial controversy here as the facts it alleges are derived from hypothetical situations. ("Thus, Act 246 **will** also add to the time and intensity of each doula's advocacy...Further these additional steps **may** lead to misoprostol not being used early in labor, **potentially** extending the duration of childbirth for their clients and the duration of their needed assistance...Birthmark is also **concerned** that these requirements imposed by Act 246 **will** make its advocacy with medical professionals inefficient and significantly more time-consuming...This discrimination is **likely to lead** to worse outcomes for its clients...Birthmark's doulas **will** have to learn a variety of new systems that each hospital uses...Birthmark is **concerned** that Act 246 **will** impact its doulas' ability to abide by these beliefs...etc.)(*See* 2nd Amended Petition at paragraphs 134, 136, 137, 139 & 143).

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which Birthmark contends might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action

Birthmark lacks standing to bring the claims they have asserted against Defendants herein and therefore their claims cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City of Baton Rouge v. Norman*, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To satisfy article 681's standing requirement, a plaintiff must show that he has a legally protectable and tangible interest in the litigation. *Municipal Employees' Retirement System v. Office of Rural Development,* 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182.

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely

> hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. Birthmark's claim

Birthmark brings this claim on two constitutional grounds: **(1)** Challenging the constitutionality of Act 246, alleging that Act 246 discriminates against their clients on the basis of physical condition and against Birthmark itself, violating the rights to equal protection and individual dignity under the Louisiana Constitution (*See* 2nd Amended Petition at paragraph 15) and **(2)** Challenging the constitutionality Act 246 based on the single object and Germane Amendment rule both under Article III, Section 15 of the Louisiana Constitution (*See* 2nd Amended Petition at paragraph 15 & 306-319).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing

Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc., 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation. *Greater New Orleans Expressway Commission v. Olivier*, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court

before it may consider a constitutional challenge to a legal provision is whether the person challenging the provision has standing". *Mercadel,* supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing the challenge must have rights in controversy. More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights'." *Id,* citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

Here, Birthmark admits that it is not a patient that is prescribed Misoprostol or Mifepristone. *See* Exhibit Birthmark 1 at page 19, paragraphs 5-8. Birthmark admits that its Doulas do not "carry, prescribe, or administer misoprostol or mifepristone". *See* 2nd Amended Petition at paragraph 133. Birthmark also claims that its Doulas are non-medical providers. *See* Exhibit Birthmark 1 at page 25, lines 7-8.

Therefore, it appears that Birthmark is bringing these claims of unconstitutionality on three grounds: **(1)** through third party standing on behalf of

its clients (*See* 2nd Amended Petition at paragraph 15); **(2)** on its own behalf through the alleged harm that will be suffered by its Doulas (*Id* at paragraphs 136, 137 and 139) and **(3)** on its own behalf as an LLC that pays taxes in the State of Louisiana (*Id at* paragraphs 15 & 306-319). Birthmark fails on all fronts.

a. Third Party Standing on Behalf of its Clients

Birthmark brings this equal protection claim in part on behalf of their clients. This means that Birthmark is bringing this claim to assert the rights of others, and as such Birthmark is relying on the principle of Associational Standing.

The doctrine of associational standing is an exception to the general prohibition against third party standing. The requirements for associational standing in a declaratory judgment action were set forth by the Louisiana Supreme Court in *Louisiana Hotel-Motel Ass'n v. East Baton Rouge Parish,* 385 So.2d 1193 (1980):

> "We note that C.C.P. art. 681 is analogous to, and partly derived from, rule 17(a) of Federal Rules of Civil Procedure which establishes the requirement that one who asserts a cause must have standing to do so. Thus, Federal jurisprudence is of assistance to us in determining what constitutes an actual interest assertable before our courts.
>
> An analysis dealing with the requirement that a plaintiff show that it has an interest in the suit, because of some actually existing or probable future harm to itself, is that made by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the court indicated three criteria (which it found to be present) which would have to be present in any suit that an association would bring in behalf of its members. Those criteria are:
>
> '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt* supra, 97 S.Ct. at 2441."

An organization that fails to satisfy any prong of the "three part" test articulated in *Hunt* lacks standing. *See*, *Louisiana Hotel-Motel Ass'n, supra; Vieaux Carre Property Owners, Residents and Associates, Inc. v. Hotel Royal, LLC,* 09-0641

(La. App. 4 Cir. 2/3/10), 55 So.3d 1, on rehearing (2011), writ denied, 62 So.3d 112 (La. 2011); *Yokum v. Nicholas S. Karno, II, Inc.,* 10-1239 (La. App. 4 Cir. 6/1/11), 66 So.3d 1240, writ denied, 71 So.3d 294 (La. 2011). See also, *Clark v. State, Dept. of Revenue,* 02-0703 (La. App. 1st Cir. 5/9/03), 700, writs denied, 855 So.2d 320 and 321 (La. 2003).

Birthmark brings this claim in part seeking, "declaratory relief, pursuant to La. Code Civ. Proc. Art. 1871, et seq., declaring Act 246 invalid, unenforceable, and unconstitutional for the reasons detailed herein..." (*See* 2nd Amended Petition at paragraph 11). This makes an analysis under the three prong test above applicable here.

Birthmark fails to allege any claim in its petition that meets the first prong of the three prong test--, that its clients would have standing to sue in their own right. Birthmark alleges no actual harm to their clients as a result of the passage of Act 246 that might give rise their standing to bring this suit, therefore giving them standing to bring this suit. Despite the lengthy Petitions, Birthmark offers not one single instance in which any client of theirs has suffered some injury due to Misopristol & Mifepristone now being declared a schedule IV drug. As stated above, only one unsubstantiated remark during depositions even mentions any actual harm to Birthmark's clients. (*See* Exhibit Birthmark 1 at page 22, lines 19-25 & page 23, lines 1-4).

Birthmark cites to the potential "delay" its clients may experience in access to Misoprostol or Mifepristone brought on by the passage of act 246 (*See* 2nd Amended Petition at Paragraphs 135, 137 and 151). Unabashedly speculative, Birthmark's claims and testimony are wholly lacking in real and actual harm. Birthmark does not claim that their clients no longer have access to these drugs by the passage of Act 246, only that they now could possibly, maybe, might in some circumstance that is purely hypothetical, experience delays in their access to these drugs that could result

in harm. This is not the kind of real and actual harm contemplated by Louisiana Code of Civil Procedure article 681.

Birthmark's client's rights have not been affected and they therefore do not have standing to bring these claims.

i. Equal protection

Further, Birthmark claims that Act 246 discriminates against its clients, without an appropriate state interest (*See* 2nd Amended Petition at Paragraph 142).

"Generally, the state constitutional guarantee of equal protection mandates that state laws affect alike all persons and interests similarly situated. This guarantee does not, however, take from the legislature all power of classification." *Beauclaire v. Greenhouse*, 2005-0765 (La. 2/22/06), 922 So. 2d 501, citing *State v. Baxley,* 94–2982, p. 6 (La.5/22/95), 656 So.2d 973, 977–978.

"The equal protection clause does not require absolute equality or precisely eq ual advantages. It is possible for parties to be treated differently without violation of equal protection rights. Equal treatment of all claimants in all circumstances is not required. The law merely requires equal application in similar circumstances." *See City of Baton Rouge/Par. of E. Baton Rouge v. Myers*, 2013-2011 (La. 5/7/14), 145 So. 3d 320.

"This court has previously addressed the proper analysis for determining whether an equal protection violation has occurred. In *Sibley v. Board of Supervisors of Louisiana State University,* 477 So.2d 1094 (La.1985), this court enunciated a three-tier evaluation to determine whether there was a violation of equal protection. We stated:

Article I, Section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical

condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest. [Footnotes omitted.]"

Beauclaire v. Greenhouse, 2005-0765 (La. 2/22/06), 922 So. 2d 501, citing *Sibley v. Board of Supervisors of Louisiana State University,* 477 So.2d at 1107.

Birthmark claims that its clients are being discriminated based upon their physical condition. Birthmark defines this type of discrimination: "A law discriminates on the basis of physical condition if it makes distinctions based on health or handicap, the nature of an injury or condition, the needs of an injury or condition, or the severity of an injury or condition." (*See* 2nd Amended Petition at paragraph 299). Birthmark does not cite to any legal authority applying this definition.

In the next paragraph Birthmark explains its equal protection theory as it applies to its clients: "By treating people with physical conditions that can be treated with misoprostol and/or mifepristone differently than people with physical conditions that require other treatment with similar risk and dependence profiles as misoprostol and mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, discriminate on the basis of physical condition." (*See* 2nd Amended Petition at paragraph 300). This analysis is incorrect and makes it unclear who exactly the claim is being brought on behalf of. "By treating people with physical conditions that can be treated with misoprostol and/or mifepristone differently" does not refer specifically to Birthmarks' clients.

Birthmark's Petition states at length the many uses of Misoprostol or Mifepristone. These drugs are not only used for birth related issues. This claim is brought, in part, on behalf of Birthmark's clients, who are all at some stage in the pre

or post pregnancy process ("Plaintiff Birthmark's doulas advocate for safe and equitable client care during pregnancy, birth, miscarriage, and postpartum. Each Birthmark doula offers support and advocacy for the pregnant people they work with, seeking to assure that each of their clients receives compassionate, non-discriminatory, and appropriate care.")(*See* 2nd Amended Petition at Paragraph 62.)

Even if those references do relate to Birthmark's clients, they do not show any discrimination, much less any discrimination that would be protected by the equal protection provisions of the Louisiana Constitution. However, out of an abundance of caution, the Defendants will address the equal protection claim as if it were adequately pleaded by Plaintiff.

The passage of Act 246 has not created a class of people based on physical condition. Anyone that could require the use of Misoprostol & Mifepristone has now been effected. Birthmark fails to demonstrate how their clients are being treated differently than any other Louisiana Citizen that must abide by the drug scheduling procedure. Before the passage of Act 246, Birthmark's clients had the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. After the passage of Act 246, Birthmark's clients still have the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. These drugs have simply been moved to a different schedule for everyone. Such an allegation does not amount to discrimination against Birthmark's clients nor constitute a violation of equal protection.

Therefore, Birthmark is unable to establish associational standing on behalf of its clients as it has not shown any actual harm/discrimination/violation of equal protection to its clients by the passage of Act 246.

b. Standing of Birthmark Doula Collective, LLC

Birthmark also files this petition on behalf of itself, as a Doula owned LLC, with Doulas that, "advocate on behalf of pregnant people to ensure that they have

safe, healthy, and empowering deliveries, which frequently includes advocating for clients who require misoprostol before, during, or after delivery".(*See* 2nd Amended Petition at paragraph 134).

We have identified the following allegations of harm Birthmark has alleged on behalf of itself in its Second Amended Petition:

1. Added time and difficulty its Doulas will take to advocate with the current change in the law (*See* 2nd Amended Petition at paragraphs 134, 139 & 143);

2. The diverted resources from other birth concerns while performing their job of Doula (*Id* at paragraph 134);

3. The potential for working longer hours due the possibility that misoprostol may not be used early in the labor process (*Id* at paragraph 134);

4. Learning new systems that each hospital will use to comply with Act 246 (*Id* at paragraph 136);

5. That act 246 will impact doulas ability to abide by their own "beliefs and values to create positive birthing experiences for their clients" (*Id* at paragraph 137) and;

6. The potential that Birthmark Doulas may experience trauma as they watch their clients wait to receive misoprostol or mifepristone (*Id* at paragraph 137).

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. Here, Birthmark has failed to allege any actual harm to itself brought on by the passage of Act 246.

1. <u>Potential for harm</u>

Before addressing each claim of harm individually, it is important to realize that each of the claims deals with the potential for harm and does not address harm

suffered by Birthmark itself. ("Thus, Act 246 **will** also add to the time and intensity of each doula's advocacy...Further these additional steps **may** lead to misoprostol not being used early in labor, **potentially** extending the duration of childbirth for their clients and the duration of their needed assistance...Birthmark is also **concerned** that these requirements imposed by Act 246 **will** make its advocacy with medical professionals inefficient and significantly more time-consuming...This discrimination is **likely to lead** to worse outcomes for its clients...Birthmark's doulas **will** have to learn a variety of new systems that each hospital uses...Birthmark is **concerned** that Act 246 **will** impact its doulas' ability to abide by these beliefs...)(*See* 2nd Amended Petition at paragraphs 134, 136, 137, 139 & 143).

The Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.,* 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a case based upon the plaintiff's failure to demonstrate convincingly that a real and actual dispute had been presented. Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that the plaintiff based her claims on "**abstract harm she might suffer in the future**" and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.* (emphasis added)

Here, Birthmark alleges only the potential for harm and fails to meet its requirement of having standing to bring this claim. Nothing in the Birthmark's allegations show that Birthmark has a "real and actual" interest in this case; instead, their interest is hypothetical and theoretical based upon conjecture and speculation. However, out of an abundance of caution, Defendant will address each example of alleged potential harm Birthmark brings on its own behalf.

First, Birthmark has failed to attach anything to the Petition or demonstrate within the Petition how the passage of Act 246 has harmed them as advocates. If Birthmark's role is to advocate for "Birth Justice" then surely part of that job is staying current on proposed legislation and new laws that effect Birth Rights. When discussing her duties as Advocacy Director, the representative from Birthmark explains that her duties include "Cultivating relationships with community to create policy, advocate for our client, for our community as a whole. Pushing through -- talking to legislators. **You know, creating just a community-based understanding of policy and how does it affect their lives.**" *See* Exhibit Birthmark 1 at page 7, lines 23-25 and page 8, lines 1-4.

Laws change, and advocates need to make changes in the way they advocate that correlate to new laws. This is not harm. This is Birthmark performing its job as an advocate.

Second, Birthmark has also failed to demonstrate how they are diverting resources from their clients during birth due to the passage of Act 246.

Third, Birthmark has failed to establish how they have a right to work less, and consequently how that right has been violated by the passage of Act 246.

Fourth, if Birthmark is in the business of providing support to clients during the birthing process, one would think that staying up to date on new systems hospitals use for any reason during the birthing process would be a part of their role as doula. Again, Birthmark fails to establish how having more work or needing more education violates their rights to a point that harm has occurred.

Fifth, Birthmark has not demonstrated how a hypothetical delay their clients may receive when requesting misoprostol or mifepristone drugs during the "birthing experience" causes harm to Birthmark. They are not hindered from performing their job as a result of Act 246.

Sixth, Birthmark cites to no law or jurisprudence that gives them an avenue to bring a claim for potential trauma they have not yet received.

c. Standing as a Tax Payer

Birthmark next invokes their status as a taxpayer as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, Birthmark is attempting to restrain action by the Attorney General/State of Louisiana. Birthmark has failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for Birthmark as a taxpayer. *Id.* Further, Birthmark fails to establish how District Attorneys, not the Attorney General, enforcing Act 246 will increase the tax burden of Birthmark.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in order to have standing they are not required to demonstrate a personal or special interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will**

entertain their suit." *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, writ denied, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

Birthmark is not absolved of their requirement in establishing a real and actual interest in the action, merely because they pay taxes in the State of Louisiana. They must, nonetheless, make the requisite allegations to meet the standard established in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana are about to take any action that would threaten Birthmark as a taxpayer and there are no allegations that Birthmark is threatened with actual harm in their capacity as a taxpayer.

Birthmark cites to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster its argument for having standing to bring this claim. This 1965 case, deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. Birthmark fails to cite to a case similar to the one before this Court. Birthmark fails to demonstrate any actual harm they as a taxpayer have received or will receive as a result of the passage of Act 246 in their petition. This is bolstered by their deposition testimony cited at length above. Without any harm, Birthmark, as a tax payer, lacks standing to bring these constitutional challenges.

Second, Birthmark has mischaracterized how taxpayer standing works in Louisiana. Birthmark's claim in its Second Amended Petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by Birthmark, the State of Louisiana and the Attorney General. (*See also*, *Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out their job and therefore present a greater tax burden on tax payers. Again, Birthmark

enters the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If Birthmark's theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, Birthmark, as a Louisiana LLC that pays taxes in the State, lacks standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiff, Birthmark Doula Collective, LLC, a Louisiana LLC d/b/a Birthmark, be dismissed with prejudiced at the sole cost of Plaintiff.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Emily Holt, Do, MPH's, on behalf of herself and her patients (hereinafter "Dr. Holt"), *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General and State of Louisiana raise the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

Dr. Holt does not belong to the class of persons to whom the law grants the cause of action asserted in either of her constitutional challenges, as she lacks standings to bring these claims.

3.

Dr. Holt has failed to demonstrate any harm caused to herself as a medical provider or her patients by the passage of Act 246 that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article I, § 3.

4.

Dr. Holt, in her capacity as a tax payer, has failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article III, § 15.

5.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiff's claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiff's cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
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Counsel for Defendant, State of Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

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VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiff, Emily Holt, Do, MPH on behalf of herself and her patients (hereinafter "Dr. Holt") for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964(Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.*, 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356.

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Dr. Holt has not provided any instances either through her petitions or her deposition testimony of the "irreparable injury, loss, or damage" she will sustain if Act 246 is enforced.

Dr. Holt's deposition testimony makes clear she still has the ability to prescribe Misoprostol:

"Q. Thank you. So it's your understanding that after the passage of Act 246, you no longer will be able to prescribe misoprostol for IUD placement?

MS. JOHNSON:

Objection. Mischaracterizes prior testimony.

THE WITNESS:

I'm able to prescribe it. I can send the prescription to a pharmacy. I cannot dispense it on site as I wanted to be able to do when I got my dispensing license."

(*See* Exhibit Holt 1 at page 30, lines 15-25).

"Q. Okay. So if you wanted to dispense misoprostol for an IUD, you would need a Schedule 4 license; is that correct?

A. I have a license to prescribe controlled substances. I would need to get a license to dispense them."

(*See* Exhibit Holt 1 at page 31, lines 7-12).

Any harm or potential that is alleged by Dr. Holt could be eliminated if Dr. Holt simply took the steps necessary to be able to dispense these drugs:

"Q. Okay. And if you were to get the proper license to disperse [sic] Schedule 4 drugs, would that eliminate the burden that you believe your patients face through the passage of Act 246?

A. It's hard to say. So it's dispense. It's a dispensing license; not a dispersing license...

Q. But they would have access to it? You would be able to dispense it?

A. If I had a dispensing license where I could dispense controlled substances, I technically would be able to dispense them."

(See Exhibit Holt 1 at page 42, lines 12-17 and page 43, lines 7-11).

Because Dr. Holt's testimony is that neither she nor her patients have suffered any harm, she would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Dr. Holt has not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring these claims.

B. Declaratory Judgment

1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of

conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of facts**". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Dr. Holt has not demonstrated a real and substantial controversy here on behalf of her patients, as the facts she alleges are derived from hypothetical situations. ("Dr. Holt is also **concerned** that her patients **will forego** necessary medical treatment because of their **concerns** about the privacy implications of Act 246. In Dr. Holt's experience, her patients are sometimes **concerned** about being monitored for receiving regular healthcare. **She is concerned** that they **may** opt to decline effective and safe medications due to their fears about the PMP and the drugs' scheduling status.")(*See* Second Amended Petition at Paragraph 161)(emphasis added). The allegations are not imminent, immediate, or concrete as is required to establish a justiciable case or controversy. Dr. Holt's claims as a medical provider are further addressed below

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which Dr.

Holt contends might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action.

Dr. Holt lacks standing to bring the claims she has asserted against Defendant herein and therefore her claims cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City of Baton Rouge v. Norman*, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To satisfy article 681's standing requirement, a plaintiff must show that he has a legally

protectable and tangible interest in the litigation. *Municipal Employees' Retirement System v. Office of Rural Development,* 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. Dr. Holt's claim

Dr. Holt brings this claim on two constitutional grounds: **(1)** Challenging the constitutionality of Act 246, alleging that Act 246 discriminates against her patients and against herself as a healthcare provider, violating the rights to equal protection and individual dignity under the Louisiana Constitution (*See* 2nd Amended Petition at paragraphs 19 & 296) & **(2)** Challenging the constitutionality Act 246 based on the single object and Germane Amendment rule both under Article III, Section 15 of the Louisiana Constitution (*See* 2nd Amended Petition at paragraphs 21 & 306-319).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation. *Greater New Orleans*

Expressway Commission v. Olivier, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court before it may consider a constitutional challenge to a legal provision is whether the person challenging the provision has standing". *Mercadel*, supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing the challenge must have rights in controversy. More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or

her rights'." *Id*, citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

Dr. Holt appears to rest standing on three grounds: **(1)** through third party standing on behalf of her Patients (*See* 2nd Amended Petition at paragraphs 19 and 158); **(2)** on her own behalf as a medical provider (*Id*) and **(3)** on her own behalf as an person that pays taxes in the State of Louisiana (*See* 2nd Amended Petition at paragraphs 19 and 158). Dr. Holt fails on all fronts.

a. Third Party Standing on Behalf of her patients

Dr. Holt brings this equal protection claim in part on behalf of her patients. This means that Dr. Holt is bringing this claim to assert the rights of others, and as such she is relying on the principle of Associational Standing.

The doctrine of associational standing is an exception to the general prohibition against third party standing. The requirements for associational standing in a declaratory judgment action were set forth by the Louisiana Supreme Court in *Louisiana Hotel-Motel Ass'n v. East Baton Rouge Parish,* 385 So.2d 1193 (1980):

> "We note that C.C.P. art. 681 is analogous to, and partly derived from, rule 17(a) of Federal Rules of Civil Procedure which establishes the requirement that one who asserts a cause must have standing to do so. Thus, Federal jurisprudence is of assistance to us in determining what constitutes an actual interest assertable before our courts.
>
> An analysis dealing with the requirement that a plaintiff show that it has an interest in the suit, because of some actually existing or probable future harm to itself, is that made by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the court indicated three criteria (which it found to be present) which would have to be present in any suit that an association would bring in behalf of its members. Those criteria are:
>
> '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt* supra, 97 S.Ct. at 2441."

An organization that fails to satisfy any prong of the "three part" test articulated in *Hunt* lacks standing. *See, Louisiana Hotel-Motel Ass'n, supra; Vieaux Carre Property Owners, Residents and Associates, Inc. v. Hotel Royal, LLC,* 09-0641 (La. App. 4 Cir. 2/3/10), 55 So.3d 1, on rehearing (2011), writ denied, 62 So.3d 112 (La. 2011); *Yokum v. Nicholas S. Karno, II, Inc.,* 10-1239 (La. App. 4 Cir. 6/1/11), 66 So.3d 1240, writ denied, 71 So.3d 294 (La. 2011). *See also, Clark v. State, Dept. of Revenue,* 02-0703 (La. App. 1st Cir. 5/9/03), 700, writs denied, 855 So.2d 320 and 321 (La. 2003).

Dr. Holt brings this claim in part seeking, "declaratory relief, pursuant to La. Code Civ. Proc. Art. 1871, et seq., declaring Act 246 invalid, unenforceable, and unconstitutional for the reasons detailed herein..." (*See* 2nd Amended Petition at paragraph 11). This makes an analysis under the three prong test above applicable here.

Dr. Holt alleges no actual harm to her patients as a result of the passage of Act 246 that might give rise their standing to bring this suit therefore giving them standing to bring this suit. Despite the lengthy Petitions, Dr. Holt offers not one

single instance in which any patient of Dr. Holt that has suffered some injury due to Misopristol & Mifepristone now being declared a schedule IV drug.

Dr. Holt claims that the passage of Act 246 has harmed her patients because Dr. Holt does not currently have the proper license or permit to dispense controlled substances. As a result she now has to send them to pharmacies to get these drugs and this results in a delay that would not be present if Dr. Holt obtained a license or permit to dispense controlled substances ("She obtained a license to dispense non-controlled substances and intended to disburse both misoprostol and mifepristone in her clinic before the passage of Act 246. However, she will not be able to disburse controlled substances on-site because she does not have a license to do so, and it will likely be costly and administratively burdensome for her small clinic to comply with the necessary protocols."; "Act 246 creates even more restrictions on access to necessary medications, burdening patients and imposing delays for patients to complete their medical procedures".)(*See* 2nd Amended Petition at paragraphs 158 & 160).

This is not harm, and therefore Dr. Holt's patients do not have standing. If Dr. Holt does not want her patients to experience this alleged "delay", she simply needs to obtain a permit or license to dispense these drugs. Or don't. It is her choice whether or not she obtains the necessary license to dispense mifepristone and misoprostol to her patients at her office. This is made clear by Dr. Holt's deposition testimony:

"Q. Okay. So if you wanted to dispense misoprostol for an IUD, you would need a Schedule 4 license; is that correct?

A. I have a license to prescribe controlled substances. I would need to get a license to dispense them."

(*See* Exhibit Holt 1 at page 31, lines 7-12).

i. Potential to forgo medical treatment

Dr. Holt further claims that she is concerned with the potential that a hypothetical situation may occur in which her patients may forgo medical treatment because of the passage of Act 246 ("In Dr. Holt's experience, her patients are **sometimes concerned** about being monitored for receiving regular healthcare. She is **concerned that they may** opt to decline effective and safe medications due to their fears about the PMP and the drugs' scheduling status.")(*See* 2nd Amended Petition at Paragraph 161)(emphasis added).

The Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.,* 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a case based upon the plaintiff's failure to demonstrate convincingly that a real and actual dispute had been presented. Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that the plaintiff based her claims on "**abstract harm she might suffer in the future**" and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.* (emphasis added)

Unabashedly speculative, Dr. Holt's claims and testimony are wholly lacking in real and actual harm. Dr. Holt does not claim that her patients no longer have access to these drugs by the passage of Act 246, only that they now could possibly, maybe, might in some circumstance that is purely hypothetical, decide to forgo medical treatments that could result in harm. This is not the kind of real and actual harm contemplated by Louisiana Code of Civil Procedure article 681.

Dr. Holt's patients' rights have not been affected and they therefore do not have standing to bring these claims.

ii. Equal protection

Dr. Holt claims that Act 246 discriminates against her patients, without a legitimate State purpose (*See* 2nd Amended Petition at paragraphs 297-298 & 303-304). She claims that her patients are being discriminated based upon their physical condition. Dr. Holt defines this type of discrimination: "A law discriminates on the basis of physical condition if it makes distinctions based on health or handicap, the nature of an injury or condition, the needs of an injury or condition, or the severity of an injury or condition." (*Id* at paragraph 299). Dr. Holt does not cite to any legal authority applying this definition.

In the next paragraph Dr. Holt explains her equal protection theory as it applies to her patients: "By treating people with physical conditions that can be treated with misoprostol and/or mifepristone differently than people with physical conditions that require other treatment with similar risk and dependence profiles as misoprostol and mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, discriminate on the basis of physical condition." (*See* 2nd Amended Petition at paragraph 300). This is too much of a stretch. Dr. Holt does not allege that her patients have been denied the drugs when others have not. In fact, she does not allege that any of her patients have been deprived of the drugs at all. Nothing in the petition suggests that discrimination has occurred in any way, shape, or form. This analysis is not a viable equal protection theory.

The only other analysis specific to Dr. Holt's patients and their equal protection of the laws comes under Section C, iv titled "*Plaintiffs' Patients and Clients*" starting at page 25. The analysis for Dr. Holt's patients begins at paragraph 158 and ends at paragraph 161. Nowhere in these paragraphs is there an equal protection analysis demonstrating how Dr. Holt's patients specifically have been treated differently based on their physical condition. There is an equal protection analysis under the section titled "Factual allegations" that discusses "patients" but nothing in the

paragraphs of this section make it clear that this is a reference to Dr. Holt's patients. Further there are references scattered throughout the amended petition that reference "patients" but it is unclear which Plaintiff's patients is being referenced.

Even if those references do relate to Dr. Holt's patients, they do not show any discrimination, much less any discrimination that would be protected by the equal protection provisions of the Louisiana Constitution. However, out of an abundance of caution, the Attorney General will address the equal protection claim as if it were adequately pleaded by Plaintiff.

The passage of Act 246 has not created a class of people based on physical condition. Anyone that could require the use of Misoprostol & Mifepristone has now been effected. Dr. Holt fails to demonstrate how her patients are being treated differently than any other Louisiana Citizen that must abide by the drug scheduling procedure. Before the passage of Act 246, Dr. Holt's patients had the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. After the passage of Act 246, Dr. Holt's patients still have the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. These drugs have simply been moved to a different schedule for everyone. Such an allegation does not amount to discrimination against Dr. Holt's patients nor constitute a violation of equal protection.

Therefore, Dr. Holt is unable to establish associational standing on behalf of her patients as she has not shown any actual harm/discrimination/violation of equal protection to her patients by the passage of Act 246.

b. Standing of Dr. Holt as a Medical Provider

Dr. Holt also files this Second Amended Petition on behalf of herself as a medical provider. (*See* 2nd Amended Petition at paragraph 158).

Consider the following allegations of harm Dr. Holt has alleged in her Second Amended Petition as a medical provider:

1. Burdens in obtaining a CDS permit/license (*See* 2nd Amended Petition at paragraphs 158-160);

2. Impacted as a result of the impact of Act 246 on manufacturers and distributors (*Id* at paragraph 194);

3. "Additionally, Dr. Holt is impacted as a provider who will not be able to delegate the administration of CDS to staff members who are not registered nurses or advanced practice nurses." (*Id* at paragraph 194);

4. She is now treated differently than other medical providers that prescribe or dispense medications other than mifepristone and misoprostol "that are similarly effective and safe, have no potential of abuse or dependence, and are required for both emergency and routine treatment for other physical conditions." (*Id* at paragraph 194);

5. Requires her to act differently with patients that require misoprostol and mifepristone that with patients who require other prescriptions (*Id* at paragraph 197) and;

6. "Act 246 singles out the healthcare providers who prescribe or dispense misoprostol and mifepristone for disparate treatment that violates their right to individual dignity by subjecting them to a regulatory regime that, at a minimum, will cause unnecessary burdens, distress, delay, and stigmatization in providing the care their patients need. Additionally, Act 246 unnecessarily burdens and interferes with healthcare providers' medical judgment, ethical obligations, and the physician-patient relationship—all without a valid justification or medical purpose." (*Id* at paragraph 198).

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v.*

Municipal Fire and Police Civil Service Bd. of City of Kenner, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. Here, Dr. Holt has failed to allege any actual harm to herself brought on by the passage of Act 246.

First, as described above, the decision to obtain the proper credentials in order to dispense controlled dangerous substances is completely left up to Dr. Holt. There is no harm that Dr. Holt has suffered, and if there was, it is not different from that of the "public generally".

Second, Dr. Holt claims she is unable to dispense the mifepristone and misoprostol drugs. She will therefore not be affected by the hypothetical delay manufacturers and distributors may experience in labeling and packaging mifepristone and misoprostol as schedule IV drugs. Also, this claim for equal protection is not brought by Dr. Holt on behalf of manufacturers and distributors.

Third, Act 246 did not change Dr. Holt's authority to delegate the administration of controlled dangerous substances to staff members.

Fourth, the passage of Act 246 does not treat Dr. Holt differently than any other doctor in the state of Louisiana. As explained above, if Dr. Holt wants access to the drugs mifepristone and misoprostol in her clinic she need only to obtain the proper permit/license to do so. This is exactly the same with every doctor in the State.

Fifth, Dr. Holt has always been required to "act differently" with patients seeking schedule IV controlled and dangerous substances. Act 246 has only added two drugs to the list of schedule IV controlled and dangerous substances. Further, Dr. Holt has not prescribed Misoprostol since before the passage of Act 246, nor have her patients requested it:

"Q. Okay. Do you prescribe misoprostol to your patients?

A. I have prescribed it in the past, yes.

Q. Okay. When was the last time you prescribed it?

A. The last time I prescribed it for which purpose?

Q. Any purpose. Any purpose --

A. Any purpose?

Q. Yes.

A ...So I would say the last time that I prescribed it was at Tulane. Which was before I started this practice in September."

(*See* Exhibit Holt 1 at page 14, lines 12-21 and page 15 lines 15-18).

"Q. Do you prescribe mifepristone to your patients?

A. No, not currently because it is -- I intended to, to manage first-trimester miscarriages but at this point because of this law, I can't."

(*See* Exhibit Holt 1 at Page 15, lines 19-23)

"Q. That's okay. Thank you.

Your patients, have any of them requested misoprostol or mifepristone since the passage of Act 246?

A. I don't know that they would know that drug by name -- no, the answer is no."

(*See* Exhibit Holt 1 at page 16, lines 24-25 and page 17, lines 1-4.)

Sixth, as discussed above, Dr. Holt as a medical provider, is not being treated differently than any other doctor in the state of Louisiana. There is no harm that Dr. Holt has suffered, and if there was, it is not different from that of the "public generally".

c. Standing as a Tax Payer

Dr. Holt next invokes her status as a taxpayer as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, Dr. Holt is attempting to restrain action by the Attorney General/State of Louisiana. Dr. Holt has failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for Dr. Holt as a taxpayer. *Id.* Further, Dr. Holt fails to establish how District Attorneys, not the Attorney General, enforcing Act 246 will increase the tax burden of Dr. Holt.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in order to have standing they are not required to demonstrate a personal or special interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will entertain their suit."** *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, writ denied, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

Dr. Holt is not absolved of her requirement in establishing a real and actual interest in the action, merely because she pays taxes in the State of Louisiana. She must, nonetheless, make the requisite allegations to meet the standard established

in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana are about to take any action that would threaten Dr. Holt as a taxpayer and there are no allegations that Dr. Holt is threatened with actual harm in her capacity as a taxpayer.

Dr. Holt cites to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster her argument for having standing to bring this claim. This 1965 case, deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. Dr. Holt fails to cite to a case similar to the one before this Court. Dr. Holt fails to demonstrate any actual harm she as a taxpayer has received or will receive as a result of the passage of Act 246 in her petition. This is bolstered by Dr. Holt's deposition testimony cited at length above. Without any harm, Dr. Holt, as a tax payer, lacks standing to bring these constitutional challenges.

Second, Dr. Holt has mischaracterized how taxpayer standing works in Louisiana. Dr. Holt's claim in her 2nd amended petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by Dr. Holt, the State of Louisiana and the Attorney General. (*See also, Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out their job and therefore present a greater tax burden on tax payers. Again, Dr. Holt enters the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If Dr. Holt's theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, Dr. Holt, as a resident that pays taxes in the state, lacks standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiff, Emily Holt, Do, MPH be dismissed with prejudiced at the sole cost of Plaintiff.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Kaylee Self, PharmD's, on behalf of herself and her patients (hereinafter "Ms. Self"), *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General and State of Louisiana raise the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

Ms. Self does not belong to the class of persons to whom the law grants the cause of action asserted in either of her constitutional challenges, as she lacks standings to bring these claims.

3.

Ms. Self has failed to demonstrate any harm caused to herself as a pharmacist, a pregnant person or her patients by the passage of Act 246 that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article I, § 3.

4.

Ms. Self, in her capacity as a tax payer, has failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article III, § 15.

5.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiff's claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiff's cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
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Counsel for Defendant, State of Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

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VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiff, Kaylee Self, PharmD, on behalf of herself and her patients (hereinafter "Ms. Self") for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964(Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.*, 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356.

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Ms. Self has not provided any instances either through her petition or her deposition testimony of the "irreparable injury, loss, or damage" she will sustain if Act 246 is enforced.

In fact, Ms. Self states multiple times in her deposition that neither she nor her patients have experienced harm by the passage of Act 246.

As a pregnant person, Ms. Self makes clear she has not experienced any harm by the passage of Act 246:

"Q. Okay. And these are your concerns, hypothetically saying, in the event that you would need them. But so far during your pregnancy, have you been harmed by the -- by Act 246 making these drugs a Schedule 4?

A. So my main windows in which I would have need of misoprostol would be in the event of a spontaneous miscarriage -- **and that window when I could have used it has passed.** And I'm past 13 weeks so past that.

And now, at this point, the potential for me to have a need of that drug would be in the coming weeks. You know, as I hopefully I make it to 40 weeks and give birth at that time.

But should I give birth at a sooner time or need to give birth and require that it be induced, that's when these medications would become necessary potentially. But, again, as of today, **I have not had a specific need of those drugs.**"
(*See* Exhibit Self 1 attached to the Exceptions herein at page 12, lines 5-10; page 12, lines 15-25 & page 13, lines 1-3. Emphasis added).

"Q. Since Act 246 has gone into effect, have you been denied access to misoprostol?

A. No.

Q. Same question for mifepristone? A. No."

(*See* Exhibit Self 1 at page 10, lines 18-22).

"Q. In your petition, you discuss that you would likely encounter medical conditions during the course of your pregnancy that could be treated with misoprostol. Has a doctor told you that you're likely to encounter medical conditions that would require misoprostol?

A. **I have not been informed of any particular circumstances that put me at risk of needing misoprostol for induction or post-partum hemorrhaging or what other events could arise.**"

(*See* Exhibit Self 1 at page 10, lines 23-25 & page 11, lines 1-8)(emphasis added).

Ms. Self also fails to demonstrate that she has suffered any harm as a pharmacist since the passage of Act 246:

"Q. Thank you. In your own words, can you describe the harm, as a pharmacist, that you have received since the passage of Act 246.

A. So the main concerns **is just the increased burden** that having to adhere to these more onerous controlled-drug requirements being put on misoprostol. So mainly there are a lot of requirements that have to be on a prescription, for example. And there's steps we have to follow to be in compliance with controlled medications that are now being applied to a drug that it previously was not required on. **I have only dispensed it one time since October 1st. And at that time, we did not have any issues with the particular prescription;**"

(*See* Exhibit Self 1 at Page 14, lines 9-24)(emphasis added).

"Q. Since the passage of Act 246, have you been unable to dispense misoprostol?

A. Since October 1st when it went into effect, I have mainly noticed a large decrease in these prescriptions that are coming in but I -- so that my impact my answer is what I'm saying. **But I have not at this time had a specific issue where I was unable to dispense it because of, you know, the new regulations.**"

(*See* Exhibit Self 1 at page 13, lines 22-25 & page 14, lines 1-5)(emphasis added).

Lastly, Ms. Self also specifically states in her deposition that beyond concerns with potential delays her patients might face if they attempt to get her to fill a

prescription for Misopristol, her patients have incurred no harm as the result of the passage of Act 246:

"Q. And how would you say your patients have been harmed by the passage of Act 246?

A. So they have been harmed in a lot of ways they may not necessarily know at this point. I certainly have **concerns** that are unanswered about why I have seen such a marked decrease in the prescriptions. If it's other things at play besides my own pharmacy practice. I worry that there might be issues. You know, prescribers might be even sending prescriptions that we are not receiving because of the changes in controlled substances and how that affects electronic transmissions sometimes.

So that I don't know at this time of a specific case of someone who was harmed at my pharmacy. The one time we were able to dispense it, you know, at this point, it seems to have gone smoothly. I have not been made aware of any problems after the point the patient received the medication. So no specific harms as of today that I'm aware of."

(*See* Exhibit Self 1 at page 22, lines 4-11)(emphasis added).

Because Ms. Self's testimony is that neither she nor her patients have suffered any harm by the passage of Act 246, she would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Ms. Self has not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring these claims.

B. Declaratory Judgment

1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be

claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical**

state of facts". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Ms. Self has not demonstrated a real and substantial controversy here on behalf of her patients, or herself as a pregnant person, as the facts she alleges are derived from hypothetical situations. ("Plaintiff Kaylee Self is **concerned** that Act 246 **will delay** access to medications for her patients...This **could delay** a patient's access to necessary medication... Self **is concerned** that other pharmacies **may** be unwilling to fill the prescription because of their fears of criminalization... Because doctors are not always able to call back quickly, **this can result in delays** for patients to access their medication...However, **this can delay** access to medications for patients... these protocols will add time and burdens to her pharmacy practice **that could result in delays** to a patient's access to the drugs... Pharmacists, including herself, **may be reluctant** to fill these prescriptions out of fear that they could be prosecuted... Self **fears** that this reluctance **could lead to** access difficulties for her patients, including delays and outright denials...She **is concerned** that Act 246 will thus make her practice less efficient and lead to access delays for her patients...it is **likely** that Self could require misoprostol at some point during her pregnancy for induction of labor or to treat a post-partum hemorrhage...is **concerned** that, **if she requires** the medication during her pregnancy, **she may** face delays and other difficulties with access.)(*See* 2nd Amended Petition at paragraphs 162-168, 170 and 172). The allegations are not imminent, immediate, or concrete as is required to establish a justiciable case or controversy. Ms. Self's claims as a medical provider are further addressed below.

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which Ms.

Self contends might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action

Ms. Self lacks standing to bring the claims she has asserted against Defendants herein and therefore her claims cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City of Baton Rouge v. Norman*, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To

satisfy article 681's standing requirement, a plaintiff must show that he has a legally protectable and tangible interest in the litigation. *Municipal Employees' Retirement System v. Office of Rural Development,* 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182.

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. Ms. Self's claim

Ms. Self brings this claim on two constitutional grounds: **(1)** Challenging the constitutionality of Act 246, alleging that Act 246 discriminates against her patients, against herself as a healthcare provider, and against herself as a pregnant person, violating the rights to equal protection and individual dignity under the Louisiana Constitution (*See* 2nd Amended Petition at paragraphs 21 & 296), and **(2)** Challenging the constitutionality Act 246 based on the single object and germaneness rule both under Article III, Section 15 of the Louisiana Constitution (*See* 2nd Amended Petition at paragraphs 21 & 306-319).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant

constitutional considerations in enacting legislation. *Greater New Orleans Expressway Commission v. Olivier*, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court before it may consider a constitutional challenge to a legal provision is whether the person challenging the provision has standing". *Mercadel*, supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing the challenge must have rights in controversy. More specifically, '[a] person can

challenge the constitutionality of a statute only if the statute seriously affects his or her rights'." *Id*, citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

Ms. Self appears to rest standing on four grounds: **(1)** through third party standing on behalf of her Patients (*See* 2nd Amended Petition at Paragraphs 21 and 162); **(2)** on her own behalf as a medical provider (*Id*); **(3)** on her own behalf as a pregnant person (*Id*); and **(4)** on her own behalf as an person that pays taxes in the State of Louisiana (*See* 2nd Amended Petition at Paragraphs 21 and 293). Ms. Self fails on all fronts.

a. Third Party Standing on Behalf of her patients

Ms. Self brings this equal protection claim in part on behalf of her patients. This means that Ms. Self is bringing this claim to assert the rights of others, and as such she is relying on the principle of Associational Standing.

The doctrine of associational standing is an exception to the general prohibition against third party standing. The requirements for associational standing

in a declaratory judgment action were set forth by the Louisiana Supreme Court in *Louisiana Hotel-Motel Ass'n v. East Baton Rouge Parish,* 385 So.2d 1193 (1980):

> "We note that C.C.P. art. 681 is analogous to, and partly derived from, rule 17(a) of Federal Rules of Civil Procedure which establishes the requirement that one who asserts a cause must have standing to do so. Thus, Federal jurisprudence is of assistance to us in determining what constitutes an actual interest assertable before our courts.
>
> An analysis dealing with the requirement that a plaintiff show that it has an interest in the suit, because of some actually existing or probable future harm to itself, is that made by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the court indicated three criteria (which it found to be present) which would have to be present in any suit that an association would bring in behalf of its members. Those criteria are:
>
> '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt* supra, 97 S.Ct. at 2441."

An organization that fails to satisfy any prong of the "three part" test articulated in *Hunt* lacks standing. *See, Louisiana Hotel-Motel Ass'n, supra; Vieaux Carre Property Owners, Residents and Associates, Inc. v. Hotel Royal, LLC,* 09-0641 (La. App. 4 Cir. 2/3/10), 55 So.3d 1, on rehearing (2011), writ denied, 62 So.3d 112 (La. 2011); *Yokum v. Nicholas S. Karno, II, Inc.,* 10-1239 (La. App. 4 Cir. 6/1/11), 66 So.3d 1240, writ denied, 71 So.3d 294 (La. 2011). *See also, Clark v. State, Dept. of Revenue,* 02-0703 (La. App. 1st Cir. 5/9/03), 700, writs denied, 855 So.2d 320 and 321 (La. 2003).

Ms. Self brings this claim in part seeking, "declaratory relief, pursuant to La. Code Civ. Proc. Art. 1871, et seq., declaring Act 246 invalid, unenforceable, and unconstitutional for the reasons detailed herein..." (*See* 2nd Amended Petition at paragraph 11). This makes an analysis under the three prong test above applicable here.

Ms. Self fails to allege any claim in her petition that meets the first prong of the three prong test--, that her patients would have standing to sue in their own right. Ms. Self alleges no actual harm to her patients as a result of the passage of Act 246 that might give rise their standing to bring this suit, therefore giving them standing to bring this suit. Despite the lengthy Petitions, Ms. Self offers not one single instance in which any patient of Ms. Self that has suffered some injury due to Misopristol & Mifepristone now being declared a schedule IV drug. As stated above, Ms. Self says this herself in her deposition testimony:

"So that I don't know at this time of a specific case of someone who was harmed at my pharmacy. The one time we were able to dispense it, you know, at this point, it seems to have gone smoothly. I have not been made aware of any problems after the point the patient received the medication. So no specific harms as of today that I'm aware of."

(*See* Exhibit Self 1 at page 22, lines 4-11)(emphasis added).

Ms. Self has not demonstrated any imminent or probable harm in the future as a result of these drugs being moved to schedule IV.

Further, Ms. Self has not demonstrated a controversy on behalf of her patients here as the facts she alleges are derived from hypothetical situations. ("Plaintiff Kaylee Self is **concerned** that Act 246 **will delay** access to medications for her patients...This **could delay** a patient's access to necessary medication... Self **is concerned** that other pharmacies **may** be unwilling to fill the prescription because of their fears of criminalization... Because doctors are not always able to call back quickly, **this can result in delays** for patients to access their medication...However, **this can delay** access to medications for patients... these protocols will add time and burdens to her pharmacy practice **that could result in delays** to a patient's access to the drugs... Pharmacists, including herself, **may be reluctant** to fill these prescriptions out of fear that they could be prosecuted... Self **fears** that this

reluctance **could lead to** access difficulties for her patients, including delays and outright denials...She **is concerned** that Act 246 will thus make her practice less efficient and lead to access delays for her patients...etc.) (*See* 2nd Amended Petition at paragraphs 162-168, 170 and 172).

The Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.*, 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a case based upon the plaintiff's failure to demonstrate convincingly that a real and actual dispute had been presented. Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that the plaintiff based her claims on "**abstract harm she might suffer in the future**" and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.* (emphasis added)

Here, Ms. Self alleges only the potential for harm to her patients and fails to meet her requirement of demonstrating that her patients would standing to bring this claim in their own right. This is bolstered by Ms. Self's own deposition testimony: "I certainly have **concerns** that are unanswered about why I have seen such a marked decrease in the prescriptions. I **worry that there might be issues**. You know, prescribers might be even sending prescriptions that we are not receiving because of the changes in controlled substances and how that affects electronic transmissions sometimes."

(See Exhibit Self 1 at page 21, lines 19-25 & page 22, lines 1-3)(emphasis added).

Nothing in Ms. Self's allegations show that her patients have a "real and actual" interest in this case; instead, their interest is hypothetical and theoretical based upon conjecture and speculation.

Specifically, Ms. Self discusses the potential "delay" her patients may experience in access to Misopristol & Mifepristone brought on by the passage of act 246 (*See* 2nd Amended Petition at paragraphs 162, 163, 165 – 172 and Self Exhibit 1 at pages 16-19 & pages 27-28). Unabashedly speculative, Ms. Self's claims and testimony are wholly lacking in real and actual harm. Ms. Self does not claim that her patients no longer have access to these drugs by the passage of Act 246, only that they now could possibly, maybe, might in some circumstance that is purely hypothetical, experience delays in their access to these drugs that could result in harm. This is not the kind of real and actual harm contemplated by Louisiana Code of Civil Procedure article 681.

Ms. Self's patients' rights have not been affected and they therefore do not have standing to bring these claims.

i. Equal protection

Ms. Self claims that Act 246 discriminates against her patients, without a legitimate State purpose (*See* 2nd Amended Petition at paragraphs 297-298 & 303-304). She claims that her patients are being discriminated based upon their physical condition. Ms. Self defines this type of discrimination: "A law discriminates on the basis of physical condition if it makes distinctions based on health or handicap, the nature of an injury or condition, the needs of an injury or condition, or the severity of an injury or condition." (*Id* at paragraph 299). Ms. Self does not cite to any legal authority applying this definition.

In the next paragraph Ms. Self explains her equal protection theory as it applies to her patients: "By treating people with physical conditions that can be treated with misoprostol and/or mifepristone differently than people with physical conditions that require other treatment with similar risk and dependence profiles as misoprostol and mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, discriminate on the basis of physical condition."

(*See* 2nd Amended Petition at paragraph 300). This is too much of a stretch. Ms. Self does not allege that her patients have been denied the drugs when others have not. In fact, she does not allege that any of her patients have been deprived of the drugs at all. Nothing in the petition suggests that discrimination has occurred in any way, shape, or form. This analysis is not a viable equal protection theory.

The only analysis specific to Ms. Self's patients comes under Section C, iv titled "*Plaintiffs' Patients and Clients*" starting at page 25. The analysis for Ms. Self's patients begins at paragraph 162 and ends at paragraph 172. Nowhere in these paragraphs is there an equal protection analysis demonstrating how Ms. Self's patients specifically have been treated differently based on their physical condition. There is an equal protection analysis under the section titled "Factual allegations" that discusses "patients" but nothing in the paragraphs of this section make it clear that this is a reference to Ms. Self's patients. Further there are references scattered throughout the 2nd Amended Petition that reference "patients" but it is unclear which Plaintiff's patients is being referenced.

Even if those references do relate to Ms. Self's patients, they do not show any discrimination, much less any discrimination that would be protected by the equal protection provisions of the Louisiana Constitution. However, out of an abundance of caution, the Defendants will address the equal protection claim as if it were adequately pleaded by Plaintiff.

The passage of Act 246 has not created a class of people based on physical condition. Anyone that could require the use of Misoprostol & Mifepristone has now been effected. Ms. Self fails to demonstrate how her patients are being treated differently than any other Louisiana Citizen that must abide by the drug scheduling procedure. Before the passage of Act 246, Ms. Self's patients had the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. After the passage of Act 246, Ms. Self's patients still have the ability to use the drugs

Misoprostol & Mifepristone, just like any other Louisiana Citizen. These drugs have simply been moved to a different schedule for everyone. Such an allegation does not amount to discrimination against Ms. Self's patients nor constitute a violation of equal protection.

Therefore, Ms. Self is unable to establish associational standing on behalf of her patients as she has not shown any actual harm/discrimination/violation of equal protection to her patients by the passage of Act 246.

b. Standing of Ms. Self as a Medical Provider

Ms. Self also files this petition on behalf of herself as a pharmacist. (*See* 2nd Amended Petition at paragraphs 21 & 162).

Consider the following allegations of harm Ms. Self has alleged in her Second Amended Petition as a Pharmacist:

1. "Self has personally witnessed the trauma and damage that delays may cause a patient who urgently requires necessary medication like misoprostol. In 2022, Louisiana passed a law requiring that certain diagnosis information be added to misoprostol prescriptions. Following that change in the law, Self had to notify patients suffering from miscarriages that she could not fill their prescriptions before calling their doctors to ensure that the appropriate diagnosis codes were used and to verify information related to the prescription" (*See* 2nd Amended Petition at paragraph 170);

2. Impacted as a result of the impact of Act 246 on manufacturers and distributors (*See* 2nd Amended Petition at paragraph 195);

3. Forces Ms. Self to spend more time ensuring compliance when distributing misoprostol and mifepristone (*See* 2nd Amended Petition at paragraph 196);

4. Requires her to act differently with patients that require misoprostol and mifepristone that with patients who require other prescriptions (*See* 2nd Amended Petition at paragraph 197) and;

5. "Act 246 singles out the healthcare providers who prescribe or dispense misoprostol and mifepristone for disparate treatment that violates their right to individual dignity by subjecting them to a regulatory regime that, at a minimum, will cause unnecessary burdens, distress, delay, and stigmatization in providing the care their patients need. Additionally, Act 246 unnecessarily burdens and interferes with healthcare providers' medical judgment, ethical obligations, and the physician-patient relationship—all without a valid justification or medical purpose." (*See* 2nd Amended Petition at paragraph 198).

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. Here, Ms. Self has failed to allege any actual harm to herself brought on by the passage of Act 246.

First, Act 246 did not become effective until October 1, 2024. Therefore, any "trauma" Ms. Self experienced in 2022 could not possibly be a result of the passage of Act 246. There is no harm that Ms. Self has suffered, and if there was, it is not different from that of the "public generally".

Second, it appears Ms. Self is claiming she will be affected by the hypothetical delay manufacturers and distributors may experience in labeling and packaging Misoprostol & Mifepristone as schedule IV drugs. This claim for equal protection is not brought by Ms. Self on behalf of manufacturers and distributors.

Third, Ms. Self has failed to establish how she has a right to work less, and consequently how that right has been violated by the passage of Act 246.

Fourth, Ms. Self has always been required to "act differently" with patients seeking schedule IV controlled and dangerous substances. Act 246 has only added

two drugs to the list of schedule IV controlled and dangerous substances. Further, Ms. Self has testified that since the passage of Act 246 she has only dispensed one of these drugs once and it went great: "I have only dispensed it one time since October 1st. And at that time, we did not have any issues with the particular prescription;" (*See* Self Exhibit 1 at page 14, lines 22-24).

Fifth, Ms. Self as a medical provider, is not being treated differently than any other pharmacist in the state of Louisiana. "In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. There is no harm that Ms. Self has suffered, and if there was, it is not different from that of the "public generally".

c. Standing as a pregnant person

Ms. Self further brings this claim on behalf of herself as a pregnant person. (*See* 2nd Amended Petition at paragraphs 21 & 162).

As stated above, Ms. Self's petition only references potential harm that she may experience in the future ("...it is **likely** that Self could require misoprostol at some point during her pregnancy for induction of labor or to treat a post-partum hemorrhage...is **concerned** that, **if she requires** the medication during her pregnancy, **she may** face delays and other difficulties with access.)(*See* 2nd Amended Petition at paragraph 172). As referenced above, the Louisiana Supreme Court has addressed claims of hypothetical harm by plaintiffs.

The Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.,* 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a case based upon the plaintiff's failure to demonstrate convincingly that a real and actual dispute had been presented. Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that

the plaintiff based her claims on "**abstract harm she might suffer in the future**" and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.* (emphasis added).

Ms. Self has not been denied access to these drugs as a pregnant person ("Q. Since Act 246 has gone into effect, have you been denied access to misoprostol? A. No. Q. Same question for mifepristone? A. No.")(*See* Exhibit Self 1 at page 10, lines 18-22). She has not been told by doctors that she will need access to these drugs during her pregnancy ("**I have not been informed of any particular circumstances that put me at risk of needing misoprostol for induction or post-partum hemorrhaging or what other events could arise.")**(*See* Exhibit Self 1 at page 11, lines 5-8)(emphasis added).

Therefore, Ms. Self does not have standing to bring this claim on behalf of herself as a pregnant person.

d. Standing as a Tax Payer

Ms. Self next invokes her status as a taxpayer as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination

is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, Ms. Self is attempting to restrain action by the Attorney General/State of Louisiana. Ms. Self has failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for Ms. Self as a taxpayer. *Id.* Further, Ms. Self fails to establish how District Attorneys, not the Attorney General, enforcing Act 246 will increase the tax burden of Ms. Self.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in order to have standing they are not required to demonstrate a personal or special interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will entertain their suit."** *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, *writ denied*, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

Ms. Self is not absolved of her requirement in establishing a real and actual interest in the action, merely because she pays taxes in the State of Louisiana. She must, nonetheless, make the requisite allegations to meet the standard established in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana are about to take any action that would threaten Ms. Self as a taxpayer and there are no allegations that Ms. Self is threatened with actual harm in her capacity as a taxpayer.

Ms. Self cites to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster her argument for having standing to bring this claim. This case deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from

diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. Ms. Self fails to cite to a case similar to the one before this Court. Ms. Self fails to demonstrate any actual harm she as a taxpayer has received or will receive as a result of the passage of Act 246 in her petition. This is bolstered by Ms. Self's deposition testimony cited at length above. Without any harm, Ms. Self, as a tax payer, lacks standing to bring these constitutional challenges.

Second, Ms. Self has mischaracterized how taxpayer standing works in Louisiana. Ms. Self's claim in her 2nd amended petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by Ms. Self, the State of Louisiana and the Attorney General. (*See also, Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out their job and therefore present a greater tax burden on tax payers. Again, Ms. Self enters the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If Ms. Self's theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, Ms. Self, as a resident that pays taxes in the state, lacks standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiff, Kaylee Self, PharmD, be dismissed with prejudiced at the sole cost of Plaintiff.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Plaintiffs' Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD (collectively "Plaintiff OB/GYNs"), *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General and State of Louisiana raise the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

OB/GYNs do not belong to the class of persons to whom the law grants the cause of action asserted in either of their constitutional challenges, as they lack standings to bring these claims.

3.

OB/GYNs have failed to demonstrate any harm caused to them as medical providers or to their patients by the passage of Act 246 that would provide Plaintiff with the standing they need to bring this constitutional challenge under Louisiana Constitution article I, § 3.

4.

OB/GYNs, in their capacity as tax payers, have failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing they need to bring this constitutional challenge under Louisiana Constitution article III, § 15.

5.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiffs' claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiffs' cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiffs Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD (collectively "Plaintiff

OB/GYNs"), on behalf of themselves and their patients for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964 (Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.,* 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356.

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Plaintiff OB/GYNs have not provided any instances in their petition of the "irreparable injury, loss, or damage" they will sustain if Act 246 is enforced. Their petition is littered with hypothetical situations and speculation of potential harm that does not meet the requirements for a Permanent Injunction. All of OB/GYNs' claims of harm are addressed at length throughout this memorandum.

Because Plaintiff OB/GYNs petition fails to claim that either they or their patients have suffered any harm by the passage of Act 246, they would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Plaintiff OB/GYNs have not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring these claims.

B. Declaratory Judgment

1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient

immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of facts**". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Plaintiff OB/GYNs have not demonstrated a real and substantial controversy here on behalf of their patients, as the facts they allege are derived from hypothetical situations. ("(Dr. Hunter's) patients, for example, **may go into labor** far from the hospitals where she delivers and need to rely on emergency room care at other hospitals across the state that are now ill-equiped to handle excessive bleeding through the timely administrations of misoprostol...While Dr. Hunter's patients wait for misoprostol to be delivered from the pharmacy, a patient **may lose** significant blood, which can be life-threatening.... Although there is an on-call pharmacist at all times, the pharmacist **may be at their home**, several minutes away from the hospital, and they will have to drive to the hospital pharmacy before misoprostol can be dispensed and administered... **Dr. Hunter is concerned** about the impact that Act 246 will have on patient outcomes...Dr. Rao **shares similar concerns** about the impact that Act 246 will have on her patients... Her patients **then may be in situations where** an ER department does not have ready access to misoprostol ... Pharmacists, including herself, **may be reluctant** to fill these prescriptions out of fear that they could be prosecuted... Like Birthmark, the Plaintiff OB/GYNs and

Plaintiff Midwife **are deeply concerned**...**They are concerned** that the access barriers imposed by Act 246 will make it harder for them to prescribe necessary induction medications...**They are concerned** that Act 246 will make it harder for their patients who need to access misoprostol...**The OB/GYN plaintiffs are concerned**, for example, that their patients who require misoprostol for miscarriage management **may be faced** with skepticism or hostility at a pharmacy...**Dr. Perret is also concerned** about the risks her patients face after she prescribes them misoprostol... The Plaintiff OB/GYNs and Plaintiff Midwife who perform IUD placements **are also concerned** about the ability to access the drug in a timely fashion)(*See* 2nd Amended Petition at paragraphs 144-157). The allegations are not imminent, immediate, or concrete as is required to establish a justiciable case or controversy. OB/GYNs claims as medical providers are further addressed below.

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which OB/GYNs contend might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action.

OB/GYNs lack standing to bring the claims they have asserted against Defendants Attorney General & State of Louisiana herein and therefore their claims cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City of Baton Rouge v. Norman*, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To satisfy article 681's standing requirement, a plaintiff must show that he has a legally protectable and tangible interest in the litigation. *Municipal Employees' Retirement System v. Office of Rural Development,* 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182.

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35;

Richardson v. Reeves, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. OB/GYNs' claims

OB/GYNs brings this claim on two constitutional grounds: **(1)** Challenging the constitutionality of Act 246, alleging that Act 246 discriminates against their patients & against them as medical providers, violating the rights to equal protection and individual dignity under the Louisiana Constitution (*See* 2nd Amended Petition at page 52), and **(2)** Challenging the constitutionality of Act 246 based on the single object and germaneness rule both under Article III, Section 15 of the Louisiana Constitution (*See* 2nd Amended Petition at Pages 53-55).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation. *Greater New Orleans Expressway Commission v. Olivier*, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed

constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court before it may consider a constitutional challenge to a legal provision is whether the person challenging the provision has standing". *Mercadel*, supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing the challenge must have rights in controversy. More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights'." *Id*, citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where

the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

OB/GYNs appears to rest standing on three grounds: **(1)** through third party standing on behalf of their Patients (*See* 2nd Amended Petition at paragraph 144); **(2)** on their own behalf as medical providers (*Id* at paragraph 144); and **(3)** on their own behalf as people that pays taxes in the State of Louisiana (*Id* at paragraphs 293-295). OB/GYNs fail on all fronts.

a. Third Party Standing on Behalf of their patients

OB/GYNs bring this equal protection claim in part on behalf of their patients. This means that OB/GYNs are bringing this claim to assert the rights of others, and as such they are relying on the principle of Associational Standing.

The doctrine of associational standing is an exception to the general prohibition against third party standing. The requirements for associational standing in a declaratory judgment action were set forth by the Louisiana Supreme Court in *Louisiana Hotel-Motel Ass'n v. East Baton Rouge Parish,* 385 So.2d 1193 (1980):

> "We note that C.C.P. art. 681 is analogous to, and partly derived from, rule 17(a) of Federal Rules of Civil Procedure which establishes the requirement that one who asserts a cause must have standing to do so. Thus, Federal jurisprudence is of assistance to us in determining what constitutes an actual interest assertable before our courts.
>
> An analysis dealing with the requirement that a plaintiff show that it has an interest in the suit, because of some actually existing or probable future harm to itself, is that made by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the court indicated three criteria (which it found to be present) which would have to be present in any suit that an association would bring in behalf of its members. Those criteria are:

> '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt* supra, 97 S.Ct. at 2441."

An organization that fails to satisfy any prong of the "three part" test articulated in *Hunt* lacks standing. *See, Louisiana Hotel-Motel Ass'n, supra; Vieaux Carre Property Owners, Residents and Associates, Inc. v. Hotel Royal, LLC,* 09-0641 (La. App. 4 Cir. 2/3/10), 55 So.3d 1, on rehearing (2011), writ denied, 62 So.3d 112 (La. 2011); *Yokum v. Nicholas S. Karno, II, Inc.,* 10-1239 (La. App. 4 Cir. 6/1/11), 66 So.3d 1240, writ denied, 71 So.3d 294 (La. 2011). *See also, Clark v. State, Dept. of Revenue,* 02-0703 (La. App. 1st Cir. 5/9/03), 700, writs denied, 855 So.2d 320 and 321 (La. 2003).

OB/GYNs bring this claim in part seeking, "declaratory relief, pursuant to La. Code Civ. Proc. Art. 1871, et seq., declaring Act 246 invalid, unenforceable, and unconstitutional for the reasons detailed herein..." (*See* 2nd Amended Petition at paragraph 11). This makes an analysis under the three prong test above applicable here.

OB/GYNs fail to allege any claim in their petition that meets the first prong of the three prong test--, that their patients would have standing to sue in their own right. OB/GYNs alleges no actual harm to their patients as a result of the passage of Act 246 that might give rise to their standing to bring this suit, therefore giving them standing to bring this suit. Despite the lengthy Petitions, OB/GYNs offer not one single instance in which any patient of theirs has suffered some injury due to Misopristol & Mifepristone now being declared a schedule IV drug.

As stated above, OB/GYNs have not demonstrated a real and substantial controversy on behalf of their patients here as the facts they allege are derived from hypothetical situations. ("(Dr. Hunter') patients, for example, **may go into labor** far from the hospitals where she delivers and need to rely on emergency room care at

other hospitals across the state that are now ill-equiped to handle excessive bleeding through the timely administrations of misoprostol...While Dr. Hunter's patients wait for misoprostol to be delivered from the pharmacy, a patient **may lose** significant blood, which can be life-threatening.... Although there is an on-call pharmacist at all times, the pharmacist **may be at their home**, several minutes away from the hospital, and they will have to drive to the hospital pharmacy before misoprostol can be dispensed and administered... **Dr. Hunter is concerned** about the impact that Act 246 will have on patient outcomes...Dr. Rao **shares similar concerns** about the impact that Act 246 will have on her patients... Her patients **then may be in situations where** an ER department does not have ready access to misoprostol ... Pharmacists, including herself, **may be reluctant** to fill these prescriptions out of fear that they could be prosecuted... Like Birthmark, the Plaintiff OB/GYNs and Plaintiff Midwife **are deeply concerned...They are concerned** that the access barriers imposed by Act 246 will make it harder for them to prescribe necessary induction medications...**They are concerned** that Act 246 will make it harder for their patients who need to access misoprostol...**The OB/GYN plaintiffs are concerned**, for example, that their patients who require misoprostol for miscarriage management **may be faced** with skepticism or hostility at a pharmacy...**Dr. Perret is also concerned** about the risks her patients face after she prescribes them misoprostol... The Plaintiff OB/GYNs and Plaintiff Midwife who perform IUD placements **are also concerned** about the ability to access the drug in a timely fashion)(*See* 2nd Amended Petition at paragraphs 144-157).

The Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.,* 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a case based upon the plaintiff's failure to demonstrate convincingly that a real and actual dispute had been presented. Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that the plaintiff based her claims on "**abstract harm she might suffer in the future**"

and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.* (emphasis added).

Here, OB/GYNs allege only the potential for harm to their patients and fail to meet their requirement of demonstrating that their patients would have standing to bring this claim in their own right.

Nothing in OB/GYNs' allegations show that their patients have a "real and actual" interest in this case; instead, their interest is hypothetical and theoretical based upon conjecture and speculation.

Specifically, OB/GYNs discusses the potential "delay" their patients may experience in access to Misopristol & Mifepristone brought on by the passage of act 246 (*See* 2nd Amended Petition at paragraphs 148, 151, 153 and 154). Unabashedly speculative, OB/GYNs' claims and testimony are wholly lacking in real and actual harm. OB/GYNs do not claim that their patients no longer have access to these drugs by the passage of Act 246, only that they now could possibly, maybe, might in some circumstance that is purely hypothetical, experience delays in their access to these drugs that could result in harm. This is not the kind of real and actual harm contemplated by Louisiana Code of Civil Procedure article 681.

OB/GYNs' patients' rights have not been affected and they therefore do not have standing to bring these claims.

i. <u>Equal protection</u>

OB/GYNs claim that Act 246 discriminates against their patients, without a legitimate State purpose (*See* 2nd Amended Petition at paragraphs 297-298 & 303-304). They claim that their patients are being discriminated based upon their

physical condition. OB/GYNs defines this type of discrimination: "A law discriminates on the basis of physical condition if it makes distinctions based on health or handicap, the nature of an injury or condition, the needs of an injury or condition, or the severity of an injury or condition." (*Id* at paragraph 299). OB/GYNs do not cite to any legal authority applying this definition.

In the next paragraph OB/GYNs explains their equal protection theory as it applies to their patients: "By treating people with physical conditions that can be treated with misoprostol and/or mifepristone differently than people with physical conditions that require other treatment with similar risk and dependence profiles as misoprostol and mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, discriminate on the basis of physical condition." (*See* 2nd Amended Petition at paragraph 300). This is too much of a stretch. OB/GYNs do not allege that their patients have been denied the drugs when others have not. In fact, they do not allege that any of their patients have been deprived of the drugs at all. Nothing in the petition suggests that discrimination has occurred in any way, shape, or form. This analysis is not a viable equal protection theory.

The only analysis specific to OB/GYNs' patients comes under Section C, iv titled "*Plaintiffs' Patients and Clients*" starting at page 25. The analysis for OB/GYNs' patients begins at paragraph 144 and ends at paragraph 157. Nowhere in these paragraphs is there an equal protection analysis demonstrating how their patients specifically have been treated differently based on their physical condition. There is an equal protection analysis under the section titled "Factual allegations" that discusses "patients" but nothing in the paragraphs of this section make it clear that this is a reference to OB/GYNs patients. Further there are references scattered throughout the 2nd Amended Petition that reference "patients" but it is unclear which Plaintiff's patients is being referenced.

Even if those references do relate to OB/GYNs' patients, they do not show any discrimination, much less any discrimination that would be protected by the equal protection provisions of the Louisiana Constitution. However, out of an abundance of caution, the Defendants will address the equal protection claim as if it were adequately pleaded by Plaintiff.

The passage of Act 246 has not created a class of people based on physical condition. Anyone that could require the use of Misoprostol & Mifepristone has now been effected. OB/GYNs fail to demonstrate how their patients are being treated differently than any other Louisiana Citizen that must abide by the drug scheduling procedure. Before the passage of Act 246, OB/GYNs' patients had the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. After the passage of Act 246, OB/GYNs patients still have the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. These drugs have simply been moved to a different schedule for everyone. Such an allegation does not amount to discrimination against OB/GYNs patients nor constitute a violation of equal protection.

Therefore, OB/GYNs are unable to establish associational standing on behalf of their patients as they have not shown any actual harm/discrimination/violation of equal protection to their patients by the passage of Act 246.

b. Standing of OB/GYNs as Medical Providers

OB/GYNs also file this petition on behalf of themselves as medical providers. (*See* 2nd Amended Petition at paragraph 144).

Consider the following allegations of harm OB/GYNs have alleged in their 2nd Amended Petition as a medical provider:

1. "Since the passage of Act 246, the Plaintiff OB/GYNs and Plaintiff Midwife have had to change how they deliver care to their patients, in both hospital and office-based settings." (*See* 2nd Amended Petition at paragraph 145);

2. "Additionally, Act 246 injures Plaintiff OB/GYNs and Plaintiff Midwife as medical providers because it discriminates against them for prescribing misoprostol and/or mifepristone, without imposing the same administrative burdens and regulatory requirements on medical providers that do not prescribe misoprostol and/or mifepristone but do prescribe or dispense drugs that are as safe and low-risk as misoprostol and mifepristone." (*See* 2nd Amended Petition at paragraph 146);

3. "They are concerned that the access barriers imposed by Act 246 will make it harder for them to prescribe necessary induction medications to their 30 patients by complicating the process and increasing the workload of other health care providers in the hospitals." (*See* 2nd Amended Petition at paragraph 153);

4. "The Plaintiff OB/GYNs and Plaintiff Midwife are impacted as medical providers who prescribe drugs that are regulated by Act 246, and as medical providers who rely on manufacturers and distributors for access to these medications." (*See* 2nd Amended Petition at paragraph 193);

5. "They are also impacted as providers who will not be able to delegate the administration of controlled substances to staff members who are not registered nurses or advanced practice nurses, whereas they were previously able to do so." (*See* 2nd Amended Petition at paragraph 193);

6. "The Plaintiff OB/GYNs and Plaintiff Midwife also bring their La. Const. art. 1, § 3 claims on their own behalf because the law treats them differently than medical providers that prescribe, administer, or dispense medications other than misoprostol or mifepristone that are similarly effective and safe, have no potential for abuse or dependence, and are required for both emergency and routine treatment of other physical conditions." (*See* 2nd Amended Petition at paragraph 193); and

7. "By treating healthcare providers who prescribe or dispense misoprostol and mifepristone differently than healthcare providers that do not prescribe or dispense misoprostol and mifepristone but prescribe or dispense other medications with

similar risk and dependence profiles as misoprostol and/or mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, also discriminates against healthcare providers in violation of Article I, Section 3." (*See* 2nd Amended Petition at paragraph 301).

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. Here, OB/GYNs have failed to allege any actual harm to themselves brought on by the passage of Act 246.

First, Plaintiff OB/GYNs, just like any other medical provider, must abide by new drug scheduling orders as they are enacted. This is not a demonstration of harm. This is simply them performing their job in accordance with the law.

Second, OB/GYNs as medical provider, are not being treated differently than any other providers in the state of Louisiana. "In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. There is no harm that OB/GYNs have suffered, and if there was, it is not different from that of the "public generally".

Third, OB/GYNs have failed to establish how they have a right to work less, and consequently how that right has been violated by the passage of Act 246.

Fourth, this claim for equal protection is not brought by OB/GYNs on behalf of manufacturers and distributors.

Fifth, Act 246 did not change OB/GYNs authority to delegate the administration of controlled dangerous substances to staff members.

Sixth and seventh, as stated above, the passage of Act 246 does not treat OB/GYNs differently than any other doctor in the state of Louisiana.

c. Standing as Tax Payers

OB/GYNs next invoke their status as taxpayers as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, OB/GYNs are attempting to restrain action by the Attorney General/State of Louisiana. OB/GYNs have failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for OB/GYNs as a taxpayer. *Id.* Further, OB/GYNs fail to establish how District Attorneys, not the Attorney General or State of Louisiana, enforcing Act 246 will increase the tax burden of OB/GYNs.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in order to have standing they are not required to demonstrate a personal or special

interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will entertain their suit."** *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, *writ denied*, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

OB/GYNs are not absolved of their requirement in establishing a real and actual interest in the action, merely because they pay taxes in the State of Louisiana. They must, nonetheless, make the requisite allegations to meet the standard established in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana is about to take any action that would threaten OB/GYNs as taxpayers and there are no allegations that OB/GYNs are threatened with actual harm in their capacity as taxpayers.

OB/GYNs cite to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster their argument for having standing to bring this claim. This case deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. OB/GYNs fail to cite to a case similar to the one before this Court. OB/GYNs fail to demonstrate any actual harm they as taxpayers have received or will receive as a result of the passage of Act

246 in their petition. Without any harm, OB/GYNs, as tax payers, lacks standing to bring these constitutional challenges.

Second, OB/GYNs have mischaracterized how taxpayer standing works in Louisiana. OB/GYNs' claim in their second amended petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by OB/GYNs, the Attorney General and the State of Louisiana. (*See also*, *Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out

their job and therefore present a greater tax burden on tax payers. Again, OB/GYNs enter the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If OB/GYNs' theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, OB/GYNs, as residents that pays taxes in the state, lack standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiffs, collectively referred to as OB/GYNs, be dismissed with prejudiced at the sole cost of these Plaintiffs.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS	**DOCKET NO. 755,217 DIV. 33** **19th JUDICIAL DISTRICT COURT**
VERSUS	
STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS	**PARISH OF EAST BATON ROUGE** **STATE OF LOUISIANA**

****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Plaintiff Sarah LaMonthe, CNM ("Plaintiff Midwife"), *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General and State of Louisiana raise the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

Plaintiff Midwife does not belong to the class of persons to whom the law grants the cause of action asserted in either of her constitutional challenges, as she lacks standings to bring these claims.

3.

Plaintiff Midwife has failed to demonstrate any harm caused to her as a medical provider or to her patients by the passage of Act 246 that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article I, § 3.

4.

Plaintiff Midwife, in her capacity as a tax payer, have failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article III, § 15.

5.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiff's claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiff's cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
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Counsel for Defendant, State of Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

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VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiff Sarah LaMonthe, CNM ("Plaintiff Midwife") on behalf of herself and her patients for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964 (Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.,* 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356.

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Plaintiff Midwife has not provided any instances in her petition of the "irreparable injury, loss, or damage" she will sustain if Act 246 is enforced. Her petition is littered with hypothetical situations and speculation of potential harm that does not meet the requirements for a Permanent Injunction. All of Plaintiff Midwife's claims of harm are addressed at length throughout this memorandum.

Because Plaintiff Midwife petition fails to claim that either they or their patients have suffered any harm by the passage of Act 246, she would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Plaintiff Midwife has not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring these claims.

B. Declaratory Judgment

1. 1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient

immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of facts**". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Plaintiff Midwife has not demonstrated a real and substantial controversy here on behalf of her patients, as the facts she alleges are derived from hypothetical situations. ("Like Birthmark, the Plaintiff OB/GYNs and Plaintiff Midwife **are deeply concerned** that pregnant people who are experiencing postpartum hemorrhages **will face** life-threatening delays in accessing necessary medications...Additionally, the Plaintiff OB/GYNs and Plaintiff Midwife frequently use misoprostol to induce labor for their patients. **They are concerned** that the access barriers imposed by Act 246 will make it harder for them to prescribe necessary induction medications to their patients...**They are concerned** that Act 246 will make it harder for their patients who need to access misoprostol... The Plaintiff OB/GYNs and Plaintiff Midwife who perform IUD placements **are also concerned** about the ability to access the drug in a timely fashion")(*See* 2nd Amended Petition at paragraphs 151,153,153 & 157). The allegations are not imminent, immediate, or concrete as is required to establish a justiciable case or controversy. Midwife's claims as medical providers are further addressed below.

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which Plaintiff Midwife contends might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action.

Plaintiff Midwife lacks standing to bring the claims she has asserted against Defendants Attorney General & State of Louisiana herein and therefore her claims cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City of Baton Rouge v. Norman*, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To satisfy article 681's standing requirement, a plaintiff must show that he has a legally protectable and tangible interest in the litigation. *Municipal Employees' Retirement System v. Office of Rural Development,* 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182.

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely

> hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. Plaintiff Midwife's claims

Plaintiff Midwife brings this claim on two constitutional grounds: **(1)** Challenging the constitutionality of Act 246, alleging that Act 246 discriminates against her patients & against her as medical provider, violating the rights to equal protection and individual dignity under the Louisiana Constitution (*See* 2nd Amended Petition at page 52), and **(2)** Challenging the constitutionality of Act 246 based on the single object and germaneness rule both under Article III, Section 15 of the Louisiana Constitution (*See* 2nd Amended Petition at Pages 53-55).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*,

529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation. *Greater New Orleans Expressway Commission v. Olivier*, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court before it may consider a constitutional challenge to a legal provision is whether the

person challenging the provision has standing". *Mercadel*, supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing the challenge must have rights in controversy. More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights'." *Id*, citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

Plaintiff Midwife appears to rest standing on three grounds: **(1)** through third party standing on behalf of her Patients (*See* 2nd Amended Petition at paragraph 144); **(2)** on her own behalf as a medical provider (*Id* at paragraph 144); and **(3)** on her own behalf as someone that pays taxes in the State of Louisiana (*Id* at paragraphs 293-295). Plaintiff Midwife fails on all fronts.

a. Third Party Standing on Behalf of their patients

Plaintiff Midwife brings this equal protection claim in part on behalf of her patients. This means that Plaintiff Midwife is bringing this claim to assert the rights of others, and as such she is relying on the principle of Associational Standing.

The doctrine of associational standing is an exception to the general prohibition against third party standing. The requirements for associational standing in a declaratory judgment action were set forth by the Louisiana Supreme Court in *Louisiana Hotel-Motel Ass'n v. East Baton Rouge Parish,* 385 So.2d 1193 (1980):

> "We note that C.C.P. art. 681 is analogous to, and partly derived from, rule 17(a) of Federal Rules of Civil Procedure which establishes the requirement that one who asserts a cause must have standing to do so. Thus, Federal jurisprudence is of assistance to us in determining what constitutes an actual interest assertable before our courts.
>
> An analysis dealing with the requirement that a plaintiff show that it has an interest in the suit, because of some actually existing or probable future harm to itself, is that made by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the court indicated three criteria (which it found to be present) which would have to be present in any suit that an association would bring in behalf of its members. Those criteria are:
>
> '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt* supra, 97 S.Ct. at 2441."

An organization that fails to satisfy any prong of the "three part" test articulated in *Hunt* lacks standing. *See, Louisiana Hotel-Motel Ass'n, supra; Vieaux Carre Property Owners, Residents and Associates, Inc. v. Hotel Royal, LLC,* 09-0641 (La. App. 4 Cir. 2/3/10), 55 So.3d 1, on rehearing (2011), writ denied, 62 So.3d 112 (La. 2011); *Yokum v. Nicholas S. Karno, II, Inc.,* 10-1239 (La. App. 4 Cir. 6/1/11), 66 So.3d 1240, writ denied, 71 So.3d 294 (La. 2011). *See also, Clark v. State, Dept. of Revenue,* 02-0703 (La. App. 1st Cir. 5/9/03), 700, writs denied, 855 So.2d 320 and 321 (La. 2003).

Plaintiff Midwife brings this claim in part seeking, "declaratory relief, pursuant to La. Code Civ. Proc. Art. 1871, et seq., declaring Act 246 invalid, unenforceable, and unconstitutional for the reasons detailed herein..." (*See* 2nd

Amended Petition at paragraph 11). This makes an analysis under the three prong test above applicable here.

Plaintiff Midwife fail to allege any claim in her petition that meets the first prong of the three prong test--, that her patients would have standing to sue in their own right. Plaintiff Midwife alleges no actual harm to her patients as a result of the passage of Act 246 that might give rise to their standing to bring this suit, therefore giving them standing to bring this suit. Despite the lengthy Petitions, Plaintiff Midwife offers not one single instance in which any patient of hers has suffered some injury due to Misopristol & Mifepristone now being declared a schedule IV drug.

As stated above, Plaintiff Midwife has not demonstrated a real and substantial controversy here on behalf of her patients, as the facts she alleges are derived from hypothetical situations. ("Like Birthmark, the Plaintiff OB/GYNs and Plaintiff Midwife **are deeply concerned** that pregnant people who are experiencing postpartum hemorrhages **will face** life-threatening delays in accessing necessary medications...Additionally, the Plaintiff OB/GYNs and Plaintiff Midwife frequently use misoprostol to induce labor for their patients. **They are concerned** that the access barriers imposed by Act 246 will make it harder for them to prescribe necessary induction medications to their patients...**They are concerned** that Act 246 will make it harder for their patients who need to access misoprostol... The Plaintiff OB/GYNs and Plaintiff Midwife who perform IUD placements **are also concerned** about the ability to access the drug in a timely fashion")(*See* 2nd Amended Petition at paragraphs 151,153,153 & 157). The allegations are not imminent, immediate, or concrete as is required to establish a justiciable case or controversy.

The Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.,* 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a case based upon the plaintiff's failure to demonstrate convincingly that a real and actual dispute had been presented. Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that

the plaintiff based her claims on "**abstract harm she might suffer in the future**" and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.* (emphasis added).

Here, Plaintiff Midwife alleges only the potential for harm to her patients and fails to meet her requirement of demonstrating that her patients would have standing to bring this claim in their own right.

Nothing in Plaintiff Midwife's allegations show that her patients have a "real and actual" interest in this case; instead, their interest is hypothetical and theoretical based upon conjecture and speculation.

Specifically, Plaintiff Midwife discusses the potential "delay" her patients may experience in access to Misopristol & Mifepristone brought on by the passage of act 246 (*See* 2nd Amended Petition at paragraphs 151, 153, 154 and 157). Unabashedly speculative, Plaintiff Midwife's claims and testimony are wholly lacking in real and actual harm. Plaintiff Midwife's do not claim that her patients no longer have access to these drugs by the passage of Act 246, only that they now could possibly, maybe, might in some circumstance that is purely hypothetical, experience delays in their access to these drugs that could result in harm. This is not the kind of real and actual harm contemplated by Louisiana Code of Civil Procedure article 681.

Plaintiff Midwife's patients' rights have not been affected and they therefore do not have standing to bring these claims.

i. <u>Equal protection</u>

Plaintiff Midwife claims that Act 246 discriminates against her patients, without a legitimate State purpose (*See* 2nd Amended Petition at paragraphs 297-298

& 303-304). She claims that her patients are being discriminated based upon their physical condition. Plaintiff Midwife defines this type of discrimination: "A law discriminates on the basis of physical condition if it makes distinctions based on health or handicap, the nature of an injury or condition, the needs of an injury or condition, or the severity of an injury or condition." (*Id* at paragraph 299). Plaintiff Midwife does not cite to any legal authority applying this definition.

In the next paragraph Plaintiff Midwife explains her equal protection theory as it applies to her patients: "By treating people with physical conditions that can be treated with misoprostol and/or mifepristone differently than people with physical conditions that require other treatment with similar risk and dependence profiles as misoprostol and mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, discriminate on the basis of physical condition." (*See* 2nd Amended Petition at paragraph 300). This is too much of a stretch. Plaintiff Midwife does not allege that her patients have been denied the drugs when others have not. In fact, she does not allege that any of her patients have been deprived of the drugs at all. Nothing in the petition suggests that discrimination has occurred in any way, shape, or form. This analysis is not a viable equal protection theory.

The only analysis specific to Plaintiff Midwife's patients comes under Section C, iv titled "*Plaintiffs' Patients and Clients*" starting at paragraph 144. The analysis for OB/GYNs' patients begins at paragraph 144 and ends at paragraph 157. Nowhere in these paragraphs is there an equal protection analysis demonstrating how her patients specifically have been treated differently based on their physical condition. There is an equal protection analysis under the section titled "Factual allegations" that discusses "patients" but nothing in the paragraphs of this section make it clear that this is a reference to Plaintiff Midwife's patients. Further there are references scattered throughout the 2nd amended petition that reference "patients" but it is unclear which Plaintiff's patients is being referenced.

Even if those references do relate to Plaintiff Midwife's patients, they do not show any discrimination, much less any discrimination that would be protected by the equal protection provisions of the Louisiana Constitution. However, out of an abundance of caution, the Defendants will address the equal protection claim as if it were adequately pleaded by Plaintiff Midwife.

The passage of Act 246 has not created a class of people based on physical condition. Anyone that could require the use of Misoprostol & Mifepristone has now been effected. Plaintiff Midwife fails to demonstrate how her patients are being treated differently than any other Louisiana Citizen that must abide by the drug scheduling procedure. Before the passage of Act 246, Plaintiff Midwife's patients had the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. After the passage of Act 246, Plaintiff Midwife's patients still have the ability to use the drugs Misoprostol & Mifepristone, just like any other Louisiana Citizen. These drugs have simply been moved to a different schedule for everyone. Such an allegation does not amount to discrimination against Plaintiff Midwife's patients nor constitute a violation of equal protection.

Therefore, Plaintiff Midwife is unable to establish associational standing on behalf of her patients as she has not shown any actual harm/discrimination/violation of equal protection to her patients by the passage of Act 246.

b. Standing of Plaintiff Midwife as a Medical Provider

Plaintiff Midwife also files this petition on behalf of herself as a medical providers. (*See* 2nd Amended Petition at paragraph 144).

Consider the following allegations of harm Plaintiff Midwife has alleged in her 2nd Amended Petition as a medical provider:

1. "Since the passage of Act 246, the Plaintiff OB/GYNs and Plaintiff Midwife have had to change how they deliver care to their patients, in both hospital and office-based settings." (*See* 2nd Amended Petition at paragraph 145);

2. "Additionally, Act 246 injures Plaintiff OB/GYNs and Plaintiff Midwife as medical providers because it discriminates against them for prescribing misoprostol and/or mifepristone, without imposing the same administrative burdens and regulatory requirements on medical providers that do not prescribe misoprostol and/or mifepristone but do prescribe or dispense drugs that are as safe and low-risk as misoprostol and mifepristone." (*See* 2nd Amended Petition at paragraph 146);

3. "They are concerned that the access barriers imposed by Act 246 will make it harder for them to prescribe necessary induction medications to their 30 patients by complicating the process and increasing the workload of other health care providers in the hospitals." (*See* 2nd Amended Petition at paragraph 153);

4. "The Plaintiff OB/GYNs and Plaintiff Midwife are impacted as medical providers who prescribe drugs that are regulated by Act 246, and as medical providers who rely on manufacturers and distributors for access to these medications." (*See* 2nd Amended Petition at paragraph 193);

5. "They are also impacted as providers who will not be able to delegate the administration of controlled substances to staff members who are not registered nurses or advanced practice nurses, whereas they were previously able to do so." (*See* 2nd Amended Petition at paragraph 193);

6. "The Plaintiff OB/GYNs and Plaintiff Midwife also bring their La. Const. art. 1, § 3 claims on their own behalf because the law treats them differently than medical providers that prescribe, administer, or dispense medications other than misoprostol or mifepristone that are similarly effective and safe, have no potential for abuse or dependence, and are required for both emergency and routine treatment of other physical conditions." (*See* 2nd Amended Petition at paragraph 193); and

7. "By treating healthcare providers who prescribe or dispense misoprostol and mifepristone differently than healthcare providers that do not prescribe or dispense misoprostol and mifepristone but prescribe or dispense other medications with

similar risk and dependence profiles as misoprostol and/or mifepristone, La. R.S. 40:964(F) and 40:969(C), as enacted and amended by and through Act 246, also discriminates against healthcare providers in violation of Article I, Section 3." (*See* 2nd Amended Petition at paragraph 301).

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. Here, Plaintiff Midwife has failed to allege any actual harm to themselves brought on by the passage of Act 246.

First, Plaintiff Midwife, just like any other medical provider, must abide by new drug scheduling orders as they are enacted. This is not a demonstration of harm. This is simply her performing her job in accordance with the law.

Second, Plaintiff Midwife as a medical provider, are not being treated differently than any other providers in the state of Louisiana. "In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325. There is no harm that Plaintiff Midwife has suffered, and if there was, it is not different from that of the "public generally".

Third, Plaintiff Midwife has failed to establish how she has a right to work less, and consequently how that right has been violated by the passage of Act 246.

Fourth, this claim for equal protection is not brought by Plaintiff Midwife on behalf of manufacturers and distributors.

Fifth, Act 246 did not change Plaintiff Midwife's authority to delegate the administration of controlled dangerous substances to staff members.

Sixth and seventh, as stated above, the passage of Act 246 does not treat Plaintiff Midwife differently than any other medical provider in the state of Louisiana.

c. Standing as a Tax Payer

Plaintiff Midwife next invokes her status as a taxpayer as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, Plaintiff Midwife is attempting to restrain action by the Attorney General/State of Louisiana. Plaintiff Midwife has failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for Plaintiff Midwife as a taxpayer. *Id.* Further, Plaintiff Midwife fails to establish how District Attorneys, not the Attorney General or State of Louisiana, enforcing Act 246 will increase the tax burden of Plaintiff Midwife.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in

order to have standing they are not required to demonstrate a personal or special interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will entertain their suit."** *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, *writ denied*, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

Plaintiff Midwife is not absolved of her requirement in establishing a real and actual interest in the action, merely because she pays taxes in the State of Louisiana. She must, nonetheless, make the requisite allegations to meet the standard established in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana is about to take any action that would threaten Plaintiff Midwife as a taxpayer and there are no allegations that Plaintiff Midwife is threatened with actual harm in her capacity as a taxpayer.

Plaintiff Midwife cites to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster their argument for having standing to bring this claim. This case deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. Plaintiff Midwife fails to cite to a case similar to the one before this Court. Plaintiff Midwife fails to demonstrate any actual harm she as a taxpayer has received or will receive as a result

of the passage of Act 246 in her petition. Without any harm, Plaintiff Midwife, as a tax payer, lacks standing to bring these constitutional challenges.

Second, Plaintiff Midwife has mischaracterized how taxpayer standing works in Louisiana. Plaintiff Midwife claims in her second amended petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by Plaintiff Midwife, the Attorney General and the State of Louisiana. (*See also*, *Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out

their job and therefore present a greater tax burden on tax payers. Again, Plaintiff Midwife enters the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If Plaintiff Midwife's theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, Plaintiff Midwife, as a resident that pays taxes in the state, lack standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiff Midwife, be dismissed with prejudiced at the sole cost of these Plaintiffs.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS	**DOCKET NO. 755,217 DIV. 33** **19th JUDICIAL DISTRICT COURT**
VERSUS	
STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS	**PARISH OF EAST BATON ROUGE** **STATE OF LOUISIANA**

****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Nancy Davis', (hereinafter "Ms. Davis"), *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General and State of Louisiana raise the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

Ms. Davis does not belong to the class of persons to whom the law grants the cause of action asserted in her constitutional challenge, as she lacks standings to bring this claim.

3.

Ms. Davis, in her capacity as a tax payer, has failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article III, § 15.

4.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana, should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiff's claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiff's cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
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Counsel for Defendant, State of Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

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MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiff, Nancy Davis for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964(Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

Nancy Davis brings this claim under Louisiana Constitution article III section 15.

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.,* 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356.

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Nancy Davis has not provided any instances either through her petition or her deposition testimony of the "irreparable injury, loss, or damage" she will receive if Act 246 continues to be enforced.

In fact, Ms. Davis makes clear through her deposition testimony that she has never received any harm by the passage of Act 246:

"Q. Okay. I want to change gears here and ask you some more questions concerning these drugs and less about the legislature. Are you currently prescribed misoprostol?

A. No, sir.

Q. Are you currently prescribed mifepristone?

A. No, sir.

Q. Do you sell misoprostol?

A. No, sir.

Q. Do you sell mifepristone?

A. No, sir.

Q. Does the Nancy Davis Foundation sell misoprostol?

A. No, sir.

Q. Does the Nancy Davis Foundation sell mifepristone?

A. No, sir.

Q. Okay. And do you administer or prescribe misoprostol?

A. No, sir.

Q. Do you administer or prescribe mifepristone?

A. No, sir.

Q. Does anyone for the Nancy Davis Foundation prescribe misoprostol?

A. No, sir.

Q. Does anyone for the Nancy Davis Foundation prescribe mifepristone?

A. No, sir.

Q. Since Act 246 has gone into effect, have you been denied access to misoprostol?

A. No, sir.

Q. Since Act 246 has gone into effect, have you been denied access to mifepristone?

A. No, sir."

(*See* Exhibit Davis 1 at page 12, lines 10-25 and page 13 lines 1-19).

"Q. If you're not currently prescribed it, are you seeking a prescription for misoprostol?

A. No, sir.

Q. Are you seeking a prescription for mifepristone?

A. No, sir."

(*See* Exhibit Davis 1 at page 19, lines 8-13.)

The only attempt Ms. Davis makes to show any potential harm is through her work as an advocate for the Nancy Davis foundation:

"Q. Okay. Can you describe, just in your own words, the harm that you have received since the passage of Act 246.

A. Well, since the passage of Act 246, it has impacted my advocacy with the Nancy Davis Foundation because a part of our mission is to protect pregnant individuals and also assure that they have access to essential care.

Not only that, but it has also impacted me on an emotional and mental standpoint because it's very, very exhausting to see these attacks on reproductive healthcare."

(*See* Exhibit Davis 1 at page 13 lines 20-25 and page 14, line 1-6.)

This is not a demonstration of harm. Ms. Davis has in no way shown or even attempted to demonstrate how her rights have been affected by the passage of Act 246.

Paragraph 18 of the Second Amended Petition is dedicated to Ms. Davis's story as a person dealing with pregnancy issues in 2022 and her setting up the Nancy Davis Foundation. The next time Ms. Davis's name is even mentioned in the Petition is paragraph 279 which states: "Plaintiffs Nancy Davis and Kaitlyn Joshua, both of whom have actively engaged in legislative advocacy after Louisiana laws impacted their medical care, did not have an opportunity to testify before lawmakers about the impact that making the drugs controlled substances would have in Louisiana, even though they would have done so if given the opportunity."

Ms. Davis does not present any facts that explain how she was denied the opportunity to testify or under what theory of law this denial gives her a cause of action for. Again, this is not harm. Because Ms. Davis' testimony is that she has not suffered any harm, she would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Ms. Davis has not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring this claim.

B. Declaratory Judgment

1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of facts**". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Ms. Self has not demonstrated a real and substantial controversy here. As, stated above her deposition testimony makes clear she has no connection with the drugs misoprostol or mifepristone. *See* Exhibit Davis 1 at page 12, lines 10-25; page

13 lines 1-19 & page 19, lines 8-13. She is not seeking access to these drugs, is not prescribed these drugs, does not sell, prescribe or administer these drugs.

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which Ms. Davis contends might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action.

Ms. Davis lacks standing to bring the claims she has asserted against Defendants herein and therefore her claims cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City*

of Baton Rouge v. Norman, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To satisfy article 681's standing requirement, a plaintiff must show that he has a legally protectable and tangible interest in the litigation. *Municipal Employees' Retirement System v. Office of Rural Development,* 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182.

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted

the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. Ms. Davis's claim

Ms. Davis invokes her status as a taxpayer as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a

statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation. *Greater New Orleans Expressway Commission v. Olivier*, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court before it may consider a constitutional challenge to a legal provision is whether the person challenging the provision has standing". *Mercadel*, supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing

the challenge must have rights in controversy. More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights'." *Id*, citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

2. Standing as a Tax Payer

Nancy Davis brings her constitutional challenges under La. Const. art. III, §§ 15 (A) and (C) as a Louisiana tax payer. (*See 2nd* Amended Petition at paragraph 18 & 293.)

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination

is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, Ms. Davis is attempting to restrain action by the Attorney General/State of Louisiana. Ms. Davis has failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for Ms. Davis as a taxpayer. *Id.* Further, Ms. Davis fails to establish how District Attorneys, not the Attorney General, enforcing Act 246 will increase the tax burden of Ms. Davis.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in order to have standing they are not required to demonstrate a personal or special interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will entertain their suit."** *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, *writ denied*, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

Ms. Davis is not absolved of her requirement in establishing a real and actual interest in the action, merely because she pays taxes in the State of Louisiana. She must, nonetheless, make the requisite allegations to meet the standard established in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana are about to take any action that would threaten Ms. Davis as a taxpayer and there are no allegations that Ms. Davis is threatened with actual harm in her capacity as a taxpayer.

Ms. Davis was denied an abortion in 2022, before Act 246 went into effect. Further, Ms. Davis claims that:

"Well, since the passage of Act 246, it has impacted my advocacy with the Nancy Davis Foundation because a part of our mission is to protect pregnant individuals and also assure that they have access to essential care.

Not only that, but it has also impacted me on an emotional and mental standpoint because it's very, very exhausting to see these attacks on reproductive healthcare."

See Exhibit Davis 1 at page 13 lines 20-25 and page 14, line 1-6.

Ms. Davis cannot demonstrate harm by alleging that Act 246 has made her job more exhausting as an advocate.

Ms. Davis cites to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster her argument for having standing to bring this claim. This case deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. Ms. Davis fails to cite to a case similar to the one before this Court. Ms. Davis fails to demonstrate any actual harm she as a taxpayer has received or will receive as a result of the passage of Act 246 in her petition. This is bolstered by Ms. Davis' deposition testimony cited above. Without any harm, Ms. Davis, as a tax payer, lacks standing to bring these constitutional challenges.

Second, Ms. Davis has mischaracterized how taxpayer standing works in Louisiana. Ms. Davis' claim in her 2nd amended petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by Ms. Davis, the State of Louisiana and the Attorney General. (*See also*, *Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out their job and therefore present a greater tax burden on tax payers. Again, Ms. Davis

enters the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If Ms. Davis' theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, Ms. Davis, as a resident that pays taxes in the state, lacks standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiff, Nancy Davis, , be dismissed with prejudiced at the sole cost of Plaintiff.

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Respectfully submitted,
LIZ MURRILL
ATTORNEY GENERAL

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

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****

DEFENDANTS', LIZ MURRILL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant Attorney General of the State of Louisiana, Liz Murrill, and Defendant State of Louisiana, who appearing solely for the purpose of these exceptions, and specifically reserving all other rights, jointly move to dismiss the claims against them as set forth in Kaitlyn Joshua's (hereinafter "Ms. Joshua") *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* as more fully addressed in the attached Memorandum in Support of the Peremptory Exception of No Right of Action.

1.

The Attorney General and State of Louisiana raise the peremptory exception of no right of action pursuant to La.Code Civ.P. art. 927(6).

2.

Ms. Joshua does not belong to the class of persons to whom the law grants the cause of action asserted in her constitutional challenge, as she lacks standings to bring this claim.

3.

Ms. Joshua, in her capacity as a tax payer, has failed to demonstrate a real and actual interest in this action that would provide Plaintiff with the standing she needs to bring this constitutional challenge under Louisiana Constitution article III, § 15.

4.

Accordingly, all claims against the Attorney General, Liz Murrill and the State of Louisiana, should be dismissed.

WHEREFORE, the Attorney General, Liz Murrill and the State of Louisiana pray that these exceptions be heard and **SUSTAINED** prior to the trial of any other issue and that Plaintiff's claims against the Attorney General, Liz Murrill and the State of Louisiana be dismissed with prejudice at Plaintiff's cost and the Attorney General, Liz Murrill and the State of Louisiana be dismissed as Defendants in this case.

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Respectfully submitted,
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By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS, TONYA HUNTER, MD, ON BEHALF OF HERSELF AND HER PATIENTS, SARAH LAMOTHE, CNM, ON BEHALF OF HERSELF AND HER PATIENTS, REBECCA PERRET, MD, ON BEHALF OF HERSELF AND HER PATIENTS, VIBHA RAO, MD, ON BEHALF OF HERSELF AND HER PATIENTS, STEPHANIE SCHWARTZMANN, MD, ON BEHALF OF HERSELF AND HER PATIENTS, ERIC SIEGEL, MD, ON BEHALF OF HERSELF AND HER PATIENTS

DOCKET NO. 755,217 DIV. 33

19th JUDICIAL DISTRICT COURT

VERSUS

STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BAORD OF MEDICAL EXAMINERS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

****

MEMORANDUM IN SUPPORT OF DEFENDANTS', LIZ MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA, PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Defendant, Liz Murrill, in her official capacity as Attorney General of the State of Louisiana (hereinafter "Attorney General") and Defendant State of Louisiana, jointly except to the *Second Supplemental and Amending Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 regular legislative session* filed by Plaintiff, Kaitlyn Joshua (hereinafter "Ms. Joshua") for the reasons expressed below.

I. FACTS AND BACKGROUND

On October 31st, 2024, Plaintiffs filed a Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964(Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion-inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

On, November 13th, 2024, Plaintiffs filed an Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. The Amended Petition added pages missing from their first filing.

On December 19th, 2024 & December 20th, 2024, limited depositions for each Plaintiff were completed as to the issue of standing.

On January 23rd, 2025, Plaintiffs filed another Amended Petition for Declaratory and Permanent Injunctive Relief to enjoin the enforcement of Act 246 of the 2024 Legislative Session. Opposing counsel adds six new plaintiffs to the suit: Tonya Hunter, MD, Rebecca Perret, MD, Vibha Rao, MD, Stephanie Schwartzmann, MD, and Eric Siegel, MD, grouped together collectively as ("Plaintiff OB/GYNs") and Sarah LaMonthe, CNM referred to as ("Plaintiff Midwife").

Kaitlyn Joshua brings this claim under Louisiana Constitution article III section 15.

II. LAW AND ARGUMENT

A. Permanent Injunction

1. *Legal standard for Permanent Injunction*

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726.

"An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.,* 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356.

"However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La.10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

Here, Kaitlyn Joshua has not provided any instances either through her petition or her deposition testimony of the "irreparable injury, loss, or damage" she will sustain if Act 246 is enforced.

In fact, Ms. Joshua's deposition testimony could not make any clearer that she has suffered no harm at all by the passage of Act 246:

"Q. Okay. And can you describe in your own words the harm that you have received by the passage of Act 246.

A. **I can't say that I have personally been harmed by Act 246**. But my **concern** is that communities, especially women, pregnant women that need this medication -- either medications – will have a difficult time when they are seeking that care. And as a result, it is going to cause someone to lose their life. **So I have not been directly impacted, but the communities that I advocate for certainly will be**."

(*See* Exhibit Joshua 1 at page 23, lines 4-15).

Ms. Joshua does not bring this claim on behalf of the communities she advocates for. She has in no way shown or even attempted to demonstrate how her rights have been affected by the passage of Act 246.

Paragraph 20 of the Second Amended Petition is dedicated to Ms. Joshua's story as a person dealing with pregnancy issues in 2022 and her advocacy efforts. The next time Ms. Joshua's name is even mentioned in the Petition is paragraph 279 which states: "Plaintiffs Nancy Davis and Kaitlyn Joshua, both of whom have actively engaged in legislative advocacy after Louisiana laws impacted their medical care, did not have an opportunity to testify before lawmakers about the impact that making the drugs controlled substances would have in Louisiana, even though they would have done so if given the opportunity."

Ms. Joshua does not present any facts that explain how she was denied the opportunity to testify or under what theory of law this denial gives her a cause of action for. In fact, she explains that she spoke with the bill author for Act 246 twice before it went into effect:

"Q. And did you advocate in any way for Act 246 or for or against Act 246?

A. I did not. No, I did not.

Q. And that would include testifying, putting in cards, or attending any legislative sessions on the bill?

A. Oh, I will take that back, then. I didn't get an opportunity to testify or weigh in, but I did engage once or twice with the bill's legislature -- excuse me -- the bill's author just to give my personal opinion on the bill."

(*See* Exhibit Joshua 1 at page 11, lines 11-21).

Because Ms. Joshua's testimony is that neither she has never suffered any harm by the passage of Act 246, she would have to demonstrate that the enforcement of Act 246 is unconstitutional. As explained at length below Ms. Joshua has not demonstrated that Act 246 is unconstitutional, and therefore lacks standing to bring these claims.

B. Declaratory Judgment

1. Legal Standard for Declaratory Judgment

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. Ann. art. 1871

"The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy'

connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of facts**". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

Kaitlyn Joshua has not demonstrated a real and substantial controversy here. Her deposition testimony makes this clear: "I can't say that I have personally been harmed by Act 246." (*See* Exhibit Joshua 1 at page 23, lines 7 & 8.)

The allegations of the petition and amended petitions fail to demonstrate any real adversity of interest upon which declaratory relief might be predicated. The fact that an act of the legislature changed the schedule of two specific dugs, which Ms. Joshua contends might be unconstitutional, does not, without more establish a justiciable controversy to challenge the applicability of the act.

C. Legal standard for a peremptory exception of no right of action

Ms. Joshua lacks standing to bring the claim she has asserted against Defendants herein and therefore her claim cannot survive this exception of no right of action.

1. Legal standard for no right of action

"Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *See* Louisiana Code of Civil Procedure article 681. When a real and actual interest is lacking, "this article also serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action." *Id,* comment (b).

"The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie–Baily Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights. *City of Baton Rouge v. Norman*, 290 So.2d 865 (La.1974)." *See Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So.2d 885.

2. *Standing*

"Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. *Guidry v. Dufrene,* 96–0194, p. 4 (La.App. 1 Cir. 11/8/96); 687 So.2d 1044, 1046. To satisfy article 681's standing requirement, a plaintiff must show that he has a legally protectable and tangible interest in the litigation. *Municipal Employees' Retirement*

System v. Office of Rural Development, 95–2505, p. 3 (La.App. 1 Cir. 6/28/96); 676 So.2d 835, 836, *writ denied,* 96–1989 (La.11/8/96); 683 So.2d 269. Even when a plaintiff seeks to restrain a public body from an alleged unlawful action, the plaintiff must still demonstrate an interest that will be affected by the challenged action, however small and indeterminable. *Meredith v. Ieyoub,* 96–1110, p. 4 (La.9/9/97); 700 So.2d 478, 480." *See Martin v. Dep't of Pub. Safety*, 97-0272 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1182.

"In order to have standing, an individual must show that he or she has suffered some harm from the challenged action that is different from the harm to the public generally." *Haynes v. Haynes*, 02-535 (La.App. 1 Cir. 5/9/03), 848 So.2d 35; *Richardson v. Reeves*, 600 So.2d 138 (La.App. 2 Cir. 1992); *Kenner Fire Dept. v. Municipal Fire and Police Civil Service Bd. of City of Kenner*, 96-525 (La.App. 5 Cir. 11/26/96), 685 So.2d 325.

"We recognize the long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable." *Duplantis v. Louisiana Board of Ethics,* 00–1750, pp. 11–12, (La.3/23/01), 782 So.2d 582, 589. In *Jordan v. Louisiana Gaming Control Board,* 98–1122, pp. 18–19 (La.5/15/98), 712 So.2d 74, 85, the supreme court quoted the following language from *Abbott v. Parker,* 259 La. 279, 308, 249 So.2d 908, 918 (1971), to define a justiciable controversy:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *See Women's Health Clinic v. State,* 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

See Women's Health Clinic v. State, 2002-0016 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

D. Ms. Joshua's claim

Ms. Joshua invokes her status as a taxpayer as grounds for a constitutional challenge under La. Const. art. III, §§ 15 (A) and (C).

1. Constitutional Challenges

Louisiana Courts have made clear that making constitutional rulings, such as the one proposed by Plaintiffs, should be avoided whenever possible. In that regard, it is well-established that all statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Carver v. Louisiana Dep't of Pub. Safety,* 2017-1340 (La. 1/30/18), 239 So.3d 226, 230; *see also, Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), 332 So.3d 606, 613-14; *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719; *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135; *Faul v. Trahan*, 98-488 (La. App. 3 Cir. 10/7/98), 718 So.2d1081, 1087. The presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1193) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939). The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation. *Greater New Orleans Expressway Commission v. Olivier*, 04-2147 (La. 1/19/05), 892 So.2d 570, 573 ("Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.").

Because of the presumption of constitutionality, in determining the validity of a constitutional challenge, a court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *Carver*, 2017-

1340, 239 So.3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08) 998 So.2d 16, 31. Additionally, because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional. *State v. Brenan*, 99-2291 (La. 5/16/00), 772 So.2d 64, 67.

"Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in defendant's motions to quash his indictment, it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so'." *See State v. Mercadel*, 03-3015 (La. 5/25/04), 874 So. 2d 829, 834; *Ring v. State, DOTD*, 02-1367 (La. 1/14/03), 835 So. 2d 423, 428. Further, a court should avoid constitutional questions whenever the case can be disposed of on non-constitutional grounds. *Id.* "Further, our jurisprudence counsels that the practice of courts is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'." *Ring* at 426; *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 434. "One of the threshold non-constitutional issues that must be decided by a court before it may consider a constitutional challenge to a legal provision is whether the person challenging the provision has standing". *Mercadel*, supra. "In order to have standing to challenge the constitutionality of a legal provision, the person bringing the challenge must have rights in controversy. More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights'." *Id*, citing *Latour v. State,* 2000-1176, p. 560 (La.App.1/29/01), 778 so.2d 557, 560, citing *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La.11/30/94), 646 So.2d 885.

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise the challenge. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667. A litigant not asserting a substantial existing legal

right is without standing in court. *Id.* The Louisiana Supreme Court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations. *Id.*" *Lift Louisiana v. State*, 2021-1453 (La. App. 1 Cir. 6/3/22), 343 So. 3d 203, reh'g denied (June 17, 2022), reh'g denied (June 30, 2022).

2. Standing as a Tax Payer

Ms. Joshua brings her constitutional challenges under La. Const. art. III, §§ 15 (A) and (C) as a Louisiana tax payer. (*See 2nd* Amended Petition at paragraph 18 & 293.)

Under Louisiana jurisprudence, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board,* 586 So.2d 1354, 1357 (La.1991); *Stewart v. Stanley,* 199 La. 146, 5 So.2d 531, 535 (1941). The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right. 586 So.2d at 1357–58; 5 So.2d at 535. *See Meredith v. Ieyoub*, 95-0719 (La. App. 1 Cir. 4/4/96), 672 So. 2d 375, writ granted, 96-1110 (La. 6/21/96), 675 So. 2d 1094, and aff'd, 96-1110 (La. 9/9/97), 700 So. 2d 478.

Here, Ms. Joshua is attempting to restrain action by the Attorney General/State of Louisiana. Ms. Joshua has failed to show how the Attorney General or State of Louisiana has/is "transcending their lawful powers or violating their legal duties in any unauthorized mode" as is required to establish standing in this case for Ms. Joshua as a taxpayer. *Id.* Further, Ms. Joshua fails to establish how District

Attorneys, not the Attorney General, enforcing Act 246 will increase the tax burden of Ms. Joshua.

"The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action by the Calcasieu Parish School Board. Consequently, in order to have standing they are not required to demonstrate a personal or special interest which is separate and distinct from the interest of the general public. **They must merely assert a real and actual interest in the action before we will entertain their suit."** *See Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So. 3d 1187, *writ denied*, 2017-0972 (La. 10/9/17), 227 So. 3d 830 (emphasis added).

Ms. Joshua is not absolved of her requirement in establishing a real and actual interest in the action, merely because she pays taxes in the State of Louisiana. She must, nonetheless, make the requisite allegations to meet the standard established in the jurisprudence. There are no allegations that the Attorney General or State of Louisiana are about to take any action that would threaten Ms. Joshua as a taxpayer and there are no allegations that Ms. Joshua is threatened with actual harm in her capacity as a taxpayer.

Ms. Joshua had pregnancy issues in 2022, before Act 246 went into effect. Ms. Joshua is not prescribed misoprostol or mifepristone:

"Q. Thank you. Are you currently prescribed misoprostol?

A. No, I'm not.

Q. Are you currently prescribed mifepristone?

A. No, I'm not."

(*See* Exhibit Joshua 1 at page 13, lines 20-24).

Most importantly, Ms. Joshua says herself that she has not been harmed by the passage of Act 246:

"Q. Okay. And can you describe in your own words the harm that you have received by the passage of Act 246.

A. I can't say that I have personally been harmed by Act 246. But my concern is that communities, especially women, pregnant women that need this medication -- either medications – will have a difficult time when they are seeking that care. And as a result, it is going to cause someone to lose their life. So I have not been directly impacted, but the communities that I advocate for certainly will be."
(*See* Exhibit Joshua 1 at page 23, lines 4-15).

Ms. Joshua does not bring this claim on behalf of the communities she advocates for. She does not have a real and actual interest in this matter.

Ms. Joshua cites to *Cully v. City of New Orleans*, 173 So.2d 46, 49 (La. App. 4 Cir. 1965) to bolster her argument for having standing to bring this claim. This case deals with the dedication of land. Plaintiffs sought to enjoin the city of New Orleans from diverting a 57 acre tract of land forming the Delgado Trade Schools for any purpose not directly related to the purpose for which it was dedicated to the city of New Orleans. Plaintiffs further sought to enjoin the city from constructing any building on the tract which did not relate to activities of the Delgado Trade Schools. The city of New Orleans intended to build the New Orleans Recreation Department on the 57 Acre Tract of land, to be used for purposes entirely unrelated to the purposes, functions and activities of the Delgado Trade Schools.

First, in no way does this case establish that all tax payers have standing to bring constitutional challenges simply because they pay taxes. Ms. Joshua fails to cite to a case similar to the one before this Court. Ms. Joshua fails to demonstrate any actual harm she as a taxpayer has received or will receive as a result of the passage of Act 246 in her petition. This is bolstered by Ms. Joshua' deposition testimony cited above. Without any harm, Ms. Joshua, as a tax payer, lacks standing to bring these constitutional challenges.

Second, Ms. Joshua has mischaracterized how taxpayer standing works in Louisiana. Ms. Joshua's claim in her 2nd amended petition that Act 246 will increase the tax burden of Louisiana citizens relies on three scenarios:

(1) It will require various officials—from district attorneys to police officers to court staff—to spend time and money investigating, prosecuting, and judging criminal cases that are brought under the Act.

(2) The Act will also require the Louisiana Board of Pharmacy and the Louisiana State Board of Medical Examiners to divert resources to enforce the law and perform additional disciplinary procedures in the event of noncompliance.

(3) And the Act will require state hospitals to expend time and resources changing their policies and procedures to comply with its requirements.

See 2nd Amended Petition at paragraph 294. Of course, plaintiff alleges no facts in support of those generalized, conclusory allegations.

These claims of potential tax burden are markedly different than the burden raised in the cases cited by Ms. Joshua, the State of Louisiana and the Attorney General. (*See also*, *Retired State Employees Ass'n v. State*, 2013-0499 (La. 6/28/13), 119 So.3d 568 dealing legislature changes to retirement benefits of tax payers; *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, *writ denied*, 2002-2383 (La. 11/27/02), 831 So.2d 279, dealing with per admission boarding taxes on riverboat casinos and contracts entered into by elected officials; *Ralph v. City of New Orleans*, 2006-0153 (La. 5/5/06), 928 So.2d 537 dealing with among other things extending health insurance and other benefits to registered domestic partners of city employees.) None of these cases cited by any party concern a tax payer arguing simply that by adapting to a new law, a State official, State Board, or State Hospital or any public body, will spend more tax dollars carrying out their job and therefore present a greater tax burden on tax payers. Again, Ms. Joshua

enters the realm of speculation in claiming that taxes might somehow increase as a result of the contested legislation.

If Ms. Joshua's theory that the enforcement of a law, without any specific language resulting in a change of property rights, increased taxes, spending of tax payer money, gave tax payers standing to challenge the constitutionally of that law, then every citizen that pays taxes would have standing to challenge every single law that gets passed by the legislature. That simply is not the law.

For these reasons, Ms. Joshua, as a resident that pays taxes in the state, lacks standing to bring these constitutional challenges.

CONCLUSION

Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and The State of Louisiana jointly submit that their exceptions should be sustained and that all claims against them made by Plaintiff, Kaitlyn Joshua, be dismissed with prejudiced at the sole cost of Plaintiff.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has on this date been served upon all known counsel of record, all by electronic mail.

Baton Rouge, Louisiana, this 31st day of January 2025.

_____
Hunter N. Farrar

PREPAYMENT OF COURT COSTS
NOT REQUIRED (LA. R.S. 13:4521)

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS	DOCKET NO. C-755,217 DIV. 33 19TH JUDICIAL DISTRICT COURT
VS.	PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA, ELIZABETH MURRILL, in her official capacity as Attorney General of the State of Louisiana, LOUISIANA BOARD OF PHARMACY and LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	STATE OF LOUISIANA

DEFENDANT, LOUISIANA BOARD OF PHARMACY, PEREMPTORY EXCEPTIONS OF NO CAUSE OF ACTION

NOW INTO COURT, through undersigned counsel, comes Defendant/Exceptor, Louisiana Board of Pharmacy, which, appearing solely for the purpose of these exceptions, and specifically reserving all other rights, moves to dismiss all claims against it set forth in the *Second Amended Petition For Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 Regular Legislative Session* ("Second Amended Petition") as more fully addressed in the attached *Memorandum in Support of the Peremptory Exceptions of No Cause of Action.*

1.

The Louisiana Board of Pharmacy raises the peremptory exceptions of no cause of action pursuant to La. Code Civ.P. art. 927(5) as to all claims asserted by all plaintiffs and those on whose behalf the plaintiffs sue.

2.

The Second Amended Petition fails to state a cause of action against the Louisiana Board of Pharmacy for declaratory judgment with respect to the constitutionality of Act 246, either for an alleged violation of La. Const. Art. I, Sec. 3 or an alleged violation of La. Const. Art. III, Sec. 15.

3.

The Second Amended Petition fails to state a cause of action against the Louisiana Board of Pharmacy to enjoin the enforcement of Act 246.

Accordingly, all claims brought by all plaintiffs against the Louisiana Board of Pharmacy should be dismissed with prejudice at plaintiffs' costs.

WHEREFORE, Defendant, Louisiana Board of Pharmacy, prays that these exceptions be heard and sustained prior to trial or any other issue; and that all of Plaintiffs' claims against the Louisiana Board of Pharmacy be dismissed with prejudice at Plaintiffs' cost, dismissing the Louisiana Board of Pharmacy as Defendant in this case. Defendant/exceptor further prays for all full, general and equitable relief.

By Attorney:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Defendant, Louisiana Board of Pharmacy, Peremptory Exceptions of No Cause of Action* has been served upon all parties, through their counsel of record, via electronic mail, addressed to the following:

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Baton Rouge, Louisiana, this 3rd day of February, 2025.

Celia R. Cangelosi

CELIA R. CANGELOSI

PREPAYMENT OF COURT COSTS
NOT REQUIRED (LA. R.S. 13:4521)

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS	DOCKET NO. C-755,217 DIV. 33
	19TH JUDICIAL DISTRICT COURT
VS.	
	PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA, ELIZABETH MURRILL, in her official capacity as Attorney General of the State of Louisiana, LOUISIANA BOARD OF PHARMACY and LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF DEFENDANT, LOUISIANA BOARD OF PHARMACY, PEREMPTORY EXCEPTIONS OF NO CAUSE OF ACTION

MAY IT PLEASE THE COURT:

Defendant, Louisiana Board of Pharmacy (hereinafter "LBP" or "Pharmacy Board"), excepts to the (Second) *Amended Petition For Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 Regular Legislative Session* filed by eleven plaintiffs, Birthmark Doula Collective, LLC, a Louisiana LLC d/b/a Birthmark, on behalf of itself and its clients, Nancy Davis, on behalf of herself, Emily Holt, DO, MPH, on behalf of herself and her patients, Kaitlyn Joshua, on behalf of herself, Kaylee Self, PharmD, on behalf of herself and her patients, Tonya Hunter, MD, on behalf of herself and her patients, Sarah LaMothe, CNM, on behalf of herself and her patients, Rebecca Perret, MD, on behalf of herself and her patients, Vibha Rao, MD, on behalf of herself and her patients, Stephanie Schwartzmann, MD, on behalf of herself and her patients, and Eric Siegel, MD, on behalf of himself and his patients, for the reasons expressed below.

I. FACTS AND BACKGROUND

A. Procedural Background

On October 31, 2024, the five original plaintiffs, (1) Birthmark Doula Collective, LLC, on behalf of itself and its clients, (2) Nancy Davis, on behalf of herself, (3) Emily Holt, DO, MPH, on behalf of herself and her patients, (4) Kaitlyn Joshua, on behalf of herself, and (5) Kaylee Self, PharmD, on behalf of herself and her patients, filed *Petition For Declaratory and Permanent*

Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 Regular Legislative Session. On November 15, 2024, the original plaintiffs filed an Amended Petition seeking the same relief. On November 25, 2024, the LBP requested an extension of time for pleading in response to the petition, as amended. The Pharmacy Board and the other three defendants: (1) State of Louisiana, (2) Elizabeth Murrill, in her in her official capacity as Louisiana Attorney General, and (3) Louisiana State Board of Medical Examiners were granted until February 3, 2025, to file responsive pleadings. On December 19 and 20, 2024, defendants deposed the five original plaintiffs on the issue of standing.

On or about January 27, 2025, a mere one week before responsive pleadings were due, the original five plaintiffs filed a second amended petition (SAP) adding six additional plaintiffs requesting the same relief: (6) Tonya Hunter, MD, on behalf of herself and her patients, (7) Sarah Lamothe, CNM, on behalf of herself and her patients, (8) Rebecca Perret, MD, on behalf of herself and her patients, (9) Vibha Rao, MD, on behalf of herself and her patients, (10) Stephanie Schwartzmann, MD, on behalf of herself and her patients, and (11) Eric Siegel, MD, on behalf of himself and his patients.

B. Requested Relief

Without designating which part, if any, of Act 246 is being challenged, by general references to Act 246 throughout the SAP, plaintiffs seek declaratory and injunctive relief regarding Act 246:

1. A declaration that Louisiana Act 246:

    a. Unconstitutionally discriminates on the basis of physical condition in violation of Article I, Section 3 of the Louisiana Constitution;

    b. Unconstitutionally discriminates against prescribing physicians and pharmacists who fill prescriptions in violation of Article I, Section 3 of the Louisiana Constitution;

    c. Unconstitutionally violates the single object requirement of Article III, Section 15 of the Louisiana Constitution; and

    d. Unconstitutionally violates the germane amendment rule of Article III, Section 15 of the Louisiana Constitution; and

2. A permanent injunction enjoining the enforcement or implementation of Louisiana Act 246, which amends La. R.S. 14:87.1, 15:1352, 40:964, and 40:969, and creates the new statute of La. R.S. 14:87.6.1.

C. Act 246 of 2024 Regular Session of Louisiana Legislature

The SAP contains continuing references to and allegations regarding Act 246 without mentioning which part, if any, of Act 246 is specifically being challenged at all or challenged specifically, particularly against the LBP. As the title to Act 246 notes, the Act:

1. Creates the crime of coerced criminal abortion by means of fraud (enacted La. R.S. 14:87.6.1).

No allegations are made with respect to the LBP and this criminal statute; the LBP does not prosecute criminal offenses, nor are any of the plaintiffs or those on whose behalf they sue charged with this criminal offense.

2. Provides relative to the crime of criminal abortion by means of abortion-inducing drugs (enacted La. R.S. 15:1352(71).

No allegations are made with respect to the LBP and this criminal statute; the LBP does not prosecute criminal offenses, nor are any of the plaintiffs or those on whose behalf they sue charged with this criminal offense.

3. Provides relative to the definition of the criminal offense of "racketeering activity" (amended La. R.S. 15:1352(A)(7)).

No allegations are made with respect to the LBP and this criminal statute; the LBP does not prosecute criminal offenses nor are any of the plaintiffs or those on whose behalf they sue charged with this criminal offense.

4. Adds certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law (enacted La. R.S. 40:964 Scheule IV (F) to make Mifepristone and Misoprostol Schedule IV drugs).

No plaintiff and none on whose behalf they sue are alleged to have a justiciable controversy adverse to the LBP regarding this designation or an immediate and genuine dispute of an adverse nature with the LBP with respect to this Schedule IV designation.

5. Provides for related matters (enacted La. R.S. 40:969(C)(2) providing "It shall not be a violation...for a pregnant woman to possess mifepristone or misoprostol for her own consumption")

This amendment excludes certain persons from criminal responsibility. The LBP does not prosecute criminal offenses. The petition does not contain one allegation with respect to this exclusion. No allegations are made with respect to La. 40:969(C)(2) in the SAP at all.

D. Allegations Against Defendant/Exceptor, Louisiana Board of Pharmacy

Mentions of defendant/exceptor, the Pharmacy Board in the 319 paragraph, 57 page SAP are few. Paragraph 25 of the SAP contains the most mention of LBP as:

1. "tasked with overseeing and regulating the practice of pharmacy".[1]

2. "engages in the administration and licensure of pharmacists".[2]

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[1] La. R.S. 37:1163 does not so provide, instead refers to "effective control and regulation of the practice of pharmacy". The SAP fails to allege that the LBP has violated or failed to perform any duty with respect to the control and regulation of the practice of pharmacy, certainly not with respect to the drugs at issue and any plaintiff.

[2] The LBP does not engage in "administration" of pharmacists. The Pharmacy Practice Act (PPA), La. R.S. 37:1162 et seq., defines "administration" at La. R.S. 37:1164(1) as "the direct application of a drug...". The SAP fails to allege that the LBP has failed to license or incorrectly

3. "engages in ... the licensure, permitting, certification, registration, control and regulation of all persons and sites, in or out of this state, that sell and disburse drugs or devices to consumers and/or patients or assist in the practice of pharmacy within the state", citing La. R.S. 37:1171, 37:1201 and 37:1221.[3]

4. "serves as the controlled substance authority for the state and is responsible for issuing controlled dangerous substance (CDS) licenses to applicants desiring to conduct research with, manufacture, distribute, procure, possess, prescribe or dispense CDS within the state", citing La. R.S. 40:973.[4]

5. "monitors compliance with the laws and rules regulating CDS", citing La. R.S. 40:973.[5]

6. "La. R.S. 40:973(E) authorizes the LBP to inspect pharmacies, CS licenses, and applicants to ensure compliance with such laws and regulations".[6]

7. "La. R.S. 40:984 empowers the LBP's employees to carry firearms, make arrests, execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses, and seize property pursuant to the Uniform Controlled Dangerous Substances (UCDS) Law".[7]

8. "Makes referrals to other licensing and regulatory authorities, such as the Louisiana State Board of Medical Examiners (LSBME) and Louisiana State Board of Nursing (LSBN) for possible disciplinary action against doctors or nurses related to the UCDS law and its" regulations.[8]

Paragraph 25 of the SAP misquotes statutes and many times mischaracterizes the duties of the LBP. More importantly, no where does the SAP allege that the LBP has failed to perform or has incorrectly performed any of these duties at all, and certainly not with respect to any particular plaintiff or the two Schedule IV drugs at issue.

Paragraph 80 of the SAP next mentions the LBP, alleging "The Louisiana Board of Pharmacy may suspend or revoke a license to manufacture, distribute, or dispense a controlled

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licensed any plaintiff with respect to the drugs at issue.

[3] This quote from La. R.S. 37:1163 is incorrect; La. R.S. 37:1163 does not contain the words "and disburse". La. R.S. 37:1201 is a criminal statute not enforced by the LBP. The SAP contains no allegations that the LBP has failed to perform any of the duties specified in the cited statutes or has performed or failed to perform any such duty with respect to the drugs at issue and any plaintiff in the case.

[4] The words "desiring to" are not found in La. R.S. 40:973A(1). The SAP contains no allegations that the LBP failed to issue a CDS license with respect to the drugs at issue and any plaintiff.

[5] La. R.S. 40:973 does not so provide.

[6] La. R.S. 40:973E is misquoted, and does not so provide. La. R.S. 40:973E provides "The LBP is authorized to inspect the establishment of a license or applicant for licensing in accordance with the rules and regulations promulgated by the board." The SAP contains no factual allegations with respect to the LBP and inspections regarding any plaintiffs and the drugs at issue. Nor are there any rules or regulations challenged as unconstitutional in any regard.

[7] La. R.S. 40:984 is misquoted. The statute says that "The Louisiana Board of Pharmacy's authorized employees may..." The SAP contains no allegations that any LBP authorized employee exercised or failed to exercise any such permissive authority with respect to the drugs at issue and a plaintiff.

[8] The SAP contains no allegation that a "referral" was made to either board for any matter relating to the drugs at issue and/or a plaintiff.

dangerous substance for several reasons, including failure to timely renew the license," citing La. R.S. 40:975. While not an incorrect statement of law, the SAP contains no allegation that any CDS license held by any plaintiff is being suspended or revoked or has been suspended or revoked improperly or otherwise. Moreover, it is only the doctor plaintiffs who may hold a CDS license.

Paragraph 95 cites a LBP rule, LAC 46:LIII §2717B; and states that Rule 2717B provides that "Controlled substances listed as Schedule II, III and IV shall be stored in a securely locked, substantially constructed cabinet." The SAP fails to note that the remainder of Rule 2717 provides, "However, pharmacies and institutional practitioners may disperse such substances throughout the stock of non-controlled substances in such a manner as to obstruct the theft or diversion of the controlled substance."[9] The only limitations Rule 2717 imposes for an agent or employee to access controlled substances, are for those convicted of a felony relating to controlled substances, those who had an application for a DEA registration denied or revoked, or who surrendered a DEA registration for cause, LAC 46:LIII §2717E. Whatever the case, the SAP does not allege that the LBP has taken any or failed to take any action regarding the storage of or access to the Schedule IV drugs mentioned in the SAP. Nor does the SAP challenge the constitutionality of LAC 46:LIII §2717 or any particular rule.

Paragraph 109 cites other LBP rules found in LAC 46:LIII §2525 providing that a prescription for a scheduled CDS expires within 6 months while alleging a prescription for a drug other than a Schedule II through IV CDS expires one year after date written; and that expired prescriptions are not refillable or renewal. Otherwise, the SAP makes no allegation with respect to the LBP and Rule 2525 and any plaintiff in this case, nor is the constitutionality of any rule being challenged.

Paragraph 112 states that La. R.S. 40:971E provides that a patient or patient agent (unless known to the pharmacist) picking up a CDS prescription at a pharmacy may be asked to produce a photo I.D. The SAP fails to make any allegation with respect to a patient or patient agent required to produce a photo I.D. regarding either drug at issue or how the LBP was involved in any such specific situation. Nor is the constitutionality of La. R.S. 40:971E challenged in the SAP.

Paragraph 183 lists rules of the LBP that pertain to manufacturing and compounding, LAC 46:LIII §183. None of the plaintiffs in this case are alleged to be a manufacturer or compounder of

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[9] Controlled substances listed in Schedule I are not subject to the exception, LAC 46:LIII §2717A.

the drugs at issue. While SAP ¶ 184 states that Act 246 requires compliance with certain LBP rules, the rules cited in that paragraph are not found in Act 246 or any statute amended or enacted by Act 246. Paragraph 188 also relates to packaging and labeling by manufacturers and distributers, none of which are plaintiffs in this case. Paragraph 189 refers to commercial containers and commercial packaging, none of which are alleged to have been performed by the only pharmacist in the case.[10] Throughout these paragraphs, continued references are to requirements for manufacturers and distributers, none of which are plaintiffs in the case, as well general allegations to what "Act 246 requires" where Act 246 contains no such requirements. None of the rules cited or any rules at all are challenged as unconstitutional in the SAP.

The only remaining allegations against or mentioning the LBP are found in ¶ 271 (an amendment to Act 246 required the LBP to notify pharmacists about Act 246), in ¶282 (the LBP notified in a newsletter) and in ¶ 294 (alleging the LBP will be required to divert resources). None allege any violation of any duty by the LBP or related in any way to a particular plaintiff or related to any ground for alleging unconstitutionality of Act 246 on the part of the Pharmacy Board. No where in the entire SAP is an immediate and genuine dispute or a justiciable controversy alleged to exist with respect to any plaintiff or those on whose behalf they sue and the LBP.

II. EXCEPTIONS

A. Peremptory Exception of No Cause of Action

1. Law

As used in the context of a peremptory exception, a cause of action refers to the operative fails which give rise to a plaintiff's right to state a cause of action against a defendant,[11] for the purposes of these exceptions, the Louisiana Board of Pharmacy. The purpose of the peremptory exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition.[12] No evidence may be introduced to support or controvert the exception of no cause of action.[13] The exception is triable on the face of the petition; the well-pled facts in the petition must be accepted as true.[14] However, the mere

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[10] See Rules 2727 and 2723 regarding "commercial containers".
[11] *Scheffler v. Adams and Reese, L.L.P.*, 06-1774 (La. 2/22/07); 950 So.2d 641, 646.
[12] *Scheffler*, 646.
[13] La. C.C.P. art. 931.
[14] *Mista v. St. Tammany Parish Government,* 18-1595 9La. App. 1st Cir. 9/11/19), 286 So.3d 440, 443-44, *writ denied* 19-01877 (La. 1/28/20), 291 So.3d 1060.

conclusions of a plaintiff unsupported by facts do not set forth a cause of action.[15] Moreover, in viewing the plaintiff's petition, a court can consider only the facts; a general statement of law or of a conclusion of law (such as those present in SAP ¶ 25) will not state or support a cause of action.[16] The burden of demonstrating that no cause of action has been stated rests with the exceptor.[17] In ruling on the exception of no cause of action, the court must determine whether the law affords any relief to the claimant if the factual allegations in the pleading were proven at trial.[18]

2. No Cause of Action (La. C.C.P. art. 927A(5)) Against the Louisiana Board of Pharmacy For Declaratory Judgment

The exception of no cause of action is an appropriate procedure device in an action for declaratory judgment.[19] The exception of no cause of action simply states that the facts alleged are accepted as true, but that no reasons for judgment have been set forth as a matter of law.[20]

In the action for declaratory judgment, the plaintiffs seek a determination that Act 246 is unconstitutional,[21] without specifying the statutes found in or the portions of Act 246 that plaintiffs allege are unconstitutional. Essentially, what Act 246 does is establish or pertain to criminal statutes and makes mifepristone and misoprostol Schedule IV drugs.[22]

Louisiana Code of Civil Procedure articles 1871-1883 provide with respect to declaratory judgments. La. C.C.P. art. 1871 sets forth the scope of a declaratory judgment to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." A 2024 amendment[23] to La. C.C.P. art. 1880, La. C.C.P. art. 855.1 and La. C.C.P. art. 1845 provides that when a law is alleged to be unconstitutional in an action for declaratory judgment, the pleading shall be served on the attorney general, who shall represent or supervise the interests of the state.[24] A

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[15] *Bias v. Foster*, 2022-0408 (La. App. 1 Cir. 11/4/22), 356 So.3d 49, 58, *citing Palowsky v. Cork*, 2019-0148 (La. App. 1 Cir. 5/20/20), 304 So.3d 867, 872, *citing Ramey v. Caire*, 2003-1299 (La. 3/19/04), 869 So.2d 114, 188.
[16] *Prudential Ins. Co. of America v. CC&F Baton Rouge*, 93-2074 (La. App. 1 Cir. 12/27/94) 647 So.2d 1131, 1137.
[17] *Dodson v. Hooks, APLC v. Louisiana Community Development Fund, Inc.*, 2019-1516 (La. App. 12/30/20), 318 So.3d 939, 944.
[18] *Frigon v. Universal Pictures, Inc.*, 2017-0993 (La. App. 1 Cir. 6/21/18), 255 So.3d 591, 596, *writ denied*, 2018-1868 (La. 1/18/19), 262 So.2d 896.
[19] *Town of Brusly v. West Baton Rouge Parish Police Jury*, 9462 (La. App. 1 Cir. 8/22/73), 382 So.2d 288, 289, *rehearing denied*, (cite), *writ denied*, (cite).
[20] *Town of Brusly*, 489.
[21] For violation of La. Const. Art. I, Sec. 3 and La. Const. Art. III, Sec. 15.
[22] Act 246 does not contain the Board of Pharmacy rules cited throughout the statute, for which no declaration of unconstitutionality is sought.
[23] Act 12 of 2024 Second Extraordinary Session of Louisiana Legislature.
[24] La. C.C.P. art. 855.1.

judgment rendering a law unconstitutional is absolutely null and void and unenforceable if the attorney general is not served.[25]

A person is entitled to relief by declaratory judgment if his rights are uncertain or disputed in an immediate and genuine situation, and the declaratory judgment will remove the uncertainty or terminate the dispute.[26] Moreover, there must exist a concrete, justiciable controversy between a plaintiff and the LBP framing the facts in order to avoid the rendering of an advisory opinion.[27]

In the context of a petition for declaratory judgment, a "justiciable controversy" connotes an existing actual and substantial dispute that involves the legal relations of parties with real adverse interests, upon which the court may operate through a decree of conclusive character.[28] "The consistent interpretation of the Uniform Act and of our own code articles is that declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law. *Petition of Sewerage & Water Board*, 248 La. 169, 177 So.2d 276 (1965); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). A 'justiciable controversy' connotes, in the present sense, **an existing actual and substantial dispute**, as distinguished from one that **is merely hypothetical or abstract**, and a dispute which involves the **legal relations of the parties who have real adverse interests**, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the **plaintiff should have a legally protectable and tangible interest at stake**, and the **dispute presented should be of sufficient immediacy and reality** to warrant the issuance of a declaratory judgment." *See Abbott v. Parker*, 259 La. 279, 249 So. 2d 908 (1971)(emphasis added).

"A 'controversy' in this sense must be one that is appropriate for judicial determination .... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests .... **It must be a real and substantial controversy** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a **hypothetical state of**

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[25] La. C.C.P. art. 1845.
[26] *Blanchard v. Blanchard*, 2012-0106 (La. App. 1 Cir. 12/31/12), 112 So.3d 243, 255, *citing Williams v. City of Baton Rouge*, 02-0339 (La. App. 1 Cir. 2/14/03), 848 So.2d 9, 13, and *Spicer v. Spicer*, 10-1577 (La. App. 1 Cir. 3/25/11), 62 So.2d 798, 800.
[27] *Terrebonne Parish Consolidated Government v. Louisiana*, 2021-0486 (La. App. 1 Cir. 12/30/21), 340 So.3d 940, 944, *citing Goodwin v. City of Mandeville,* 18-01118 (La. App. 1 Cir. 5/31/19), 277 So.3d 822, 828.
[28] *Id.*

facts". *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)(emphasis added).

No where in the 319 paragraphs or the 57 pages of the SAP does any plaintiff allege an existing actual and substantial dispute that involves the legal relations of that plaintiff (or anyone on whose behalf a plaintiff sues) and the Board of Pharmacy with real adverse interests, upon which the court may operate through a decree of conclusive character. In other words, there is no justiciable controversy alleged between the Louisiana Board of Pharmacy and any plaintiff sufficient to state a cause of action for declaratory relief.

a. Allegations of Plaintiffs Fail to Establish Justiciable Controversy Against LBP for Declaratory Judgment For A Violation of La. Const. Art. I, Sec. 3

Let's look at the allegation of each plaintiff who or which allege a violation of La. Const. Art. I, Sec. 3, an equal protection violation.[29]

(1) Birthmark Doula Collective, LLC d/b/a Birthmark on behalf of itself and its clients

Allegations regarding Birthmark and its clients are found in ¶¶ 15, 62-65, 133-134, 136-143 and 293 of the SAP. Not one of these paragraphs even mentions the Louisiana Board of Pharmacy and certainly no justiciable controversy between the Louisiana Board of Pharmacy and Birthmark or a client of Birthmark. The absence of a factual allegation of an immediate and genuine dispute between the LBP and Birthmark or its clients where the rights of Birthmark or its clients are disputed by the Louisiana Board of Pharmacy in an immediate and concrete adverse situation, or of a concrete and justiciable controversy between LBP and Birthmark or clients, merits granting the exception of no cause of action. Birthmark and its clients have failed to state a cause of action against the LBP for declaratory relief under La. Const. Art I, Sec. 3.

(2) Emily Holt, DO, MPH, on behalf of herself and her patients

Allegations regarding Dr. Emily Holt and her patients are found in ¶ 19 (Dr. Holt is a physician who operates a clinic in New Orleans), ¶ 141 (Dr. Holt does not have a license to dispense CDS on site), ¶ 142 (Dr. Holt's patients who require misoprostol or mifepristone for IUD placement must obtain those drugs from another location), ¶ 143 (patients may be burdened or delayed in obtaining these drugs from pharmacies), ¶ 144 (Dr. Holt is concerned that patients will forego necessary medical treatment for fear of privacy). In ¶ 194 Dr. Holt alleges she relies on manufacturers and distribution to access these medications and that she will not be able to rely on certain staff members

[29] Two of the eleven plaintiffs, Nancy Davis and Kaitlyn Joshua, do not allege an equal protection claim.

to administer these medications.[30] Dr. Holt claims that the law treats her differently than medical providers that prescribe or dispense medications other than misoprostol or mifepristone that are similarly effective and safe, have no potential abuse or dependence, and are required for both emergency and routine treatment for other physical conditions.[31]

Absent from these allegations regarding Dr. Holt and her patients is any mention of the Louisiana Board of Pharmacy, no mention of an immediate and actual dispute or adverse interests, between those parties that is immediate, substantial or or genuine. No justiciable controversy. The petition fails to state a cause of action for declaratory relief by Dr. Holt or her patients against the Louisiana Board of Pharmacy for violation of La. Const. Art. I, Sec. 3.

(3) Kaylee Self, PharmD, on behalf of herself and her patients

Kaylee Self is alleged to be a "community based" pharmacist at a Walgreens; and is alleged to be currently pregnant and will "likely encounter" medical conditions during her pregnancy that "could be" treated with misoprostol.[32] Ms. Self allegedly fills prescriptions for misoprostol for gynecological purposes and less likely for nongynecological purposes.[33] Ms. Self is pregnant and "anticipates" she could require misoprostol to induce labor or for postpartum hemorrhage.[34] Ms. Self is "concerned" that Act 246 will delay access to patients filling a misoprostol medication at her pharmacy.[35] Prescription for controlled substances cannot be transferred to another pharmacy except for refill.[36] Ms. Self alleges this "could delay" a patient's access to the medication.[37] Ms. Self has experienced times where her pharmacy does not have misoprostol in stock. Self is concerned that other pharmacies may be unwilling to fill the prescription because of fear of criminalization.[38]

In ¶ 164, Ms. Self alleges there are "significant penalties for improperly filling a prescription under Act 246."[39] If Self has questions about a prescription, she will call the patient's doctor for information which "can result" in delays for patient access to medication.[40] "If" prescription

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[30] These allegations are irrelevant as Dr. Holt does not have a license to dispense these medications, see ¶ 141.
[31] A conclusion, not a statement of fact. Hypothetical. No immediate dispute. No adverse interest to LBP.
[32] SAP, ¶ 21. These are hypothetical and conjectural allegations insufficient to state a cause of action.
[33] SAP, ¶ 66.
[34] SAP, ¶ 67. More conjectural and hypothetical allegations.
[35] SAP, ¶ 162. Conjectural and hypothetical, as well.
[36] Not a provision of law found in Act 246.
[37] SAP, ¶ 163. More conjecture and hypothet.
[38] SAP, ¶ 164. Again, conjecture and hypothet.
[39] This conclusion of law is not required to be taken as true for purposes of the exception of no cause of action. *Friton v. Universal Pictures, Inc., Inc.,* at p. 596. No where does Act 246 enact a penalty for improperly filling a prescription.
[40] Continuing conjecture and hypothet.

software is not set up to recognize that misoprostol and mifepristone are CDS, electronic prescriptions "may" be rejected by the system, which "can" delay access to medication.[41] Protocols for handling scheduled drugs under state law may not be required under federal law, which "could result" in a delay to a patient's access to the drugs. Patient information must be entered into the PMP when prescriptions for misoprostol are filed; and there is a need to check the PMP before filling prescriptions.[42] In Self's experience, people who are prescribed misoprostol for reproductive health conditions "often" receive the most scrutiny at the pharmacy. Pharmacists "may be" reluctant to fill these prescriptions for fear of prosecution; this could lead to access delay and denial.[43] "If" any of the mandatory required elements are left off a prescription for CDS like mifepristone or misoprostol, the provider will have to be contacted for a new prescription, this can take time and lead to extended delays.[44]

Self allegedly witnessed in 2022, "trauma" that delay caused a patient who required an unidentified medication. Self is "concerned" about being forced to focus on legal compliance. As a result of Act 246, she alleges the laws requires doctors to include additional information on prescriptions for misoprostol. No law is cited for this claim, certainly not a statute found in Act 246. Her "concern" is that Act 246 will make her practice less efficient, lead to patient access delays, and potentially cause additional trauma to patients.[45] Self's patients will not be able to "enforce their own rights"[46] because they will not know whether they will require misoprostol in advance.[47]

As a pregnant person, Self "could require" misoprostol to induce labor or treat postpartum hemorrhage. "She is presently enduring an unconstitutionally high 'risk' that she will be discriminated against due to her physical condition." "Self and Plaintiff's patients and clients will be subjected to a regulatory regime that ... will cause unnecessary burdens, distress, delay, and stigmatization in seeking the medical care they need, without a valid justification or medical purpose – and could even be life threatening."[48]

The paragraphs regarding Self are more detailed than those against the other plaintiffs. Even so, there is no mention of the Louisiana Board of Pharmacy or a justiciable controversy between Self

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[41] SAP, ¶ 166. Continuing conjectural and hypothetical allegations.
[42] SAP, ¶ 167. Not requirement of Act 246.
[43] SAP, ¶ 168. Conjecture and hypothet.
[44] SAP, ¶ 169. Allegation not based on any provision of Act 246.
[45] SAP, ¶ 170. Continuing conjecture and hypothet.
[46] "Rights" not specified.
[47] SAP, ¶ 171. A conclusory statement, not a well pled fact.
[48] Both quoted statements found in SAP, ¶ 172. Inasmuch a conclusory and hypothetical, and not mere statement of fact, not to be considered true for purposes of exception of no cause of action.

or her patients, and the LBP, no immediate adverse interests are alleged, no immediate and concrete dispute is alleged between the two to establish a justiciable controversy sufficient to state a cause of action for declaratory relief.

> *(4) Tonya Hunter, MD, on behalf of herself and her patients, Sarah Lamothe, NCM, on behalf of herself and her patients, Rebecca Perrett, MD, on behalf of herself and her patients, Vibha Rao, MD, on behalf of herself and her patients, Stephanie Schwartzmann, MD, on behalf of herself and her patients, Eric Siegel, MD, on behalf of himself and his patients*

The suit was filed on October 31, 2024, and first amended on November 15, 2024. After depositions were taken of the five original plaintiffs, and only days before the responsive pleadings were due, plaintiffs amended and added these six additional plaintiff, five medical doctors and a midwife. The paragraphs of the SAP relating to these latecomers are ¶¶ 144-157 and ¶ 193.

Noticeably missing from these paragraphs is any mention of the Louisiana Board of Pharmacy and any concrete and immediate dispute between any latecomer plaintiff or a patient of any and the LBP sufficient to establish a justiciable controversy and establish a cause of action against the Louisiana Board of Pharmacy for declaratory judgment.

The SAP refers to the six as Plaintiff OB/GYN's and Plaintiff Midwife. They sue on their own behalf as medical providers allegedly harmed by Act 246 and on behalf of their patients.[49] They allege that since the passage of Act 246 they have had to change how they deliver care to patients in hospitals and offices.[50] They allege Act 246 discriminates against the patients on the basis of physical conditions that necessitate use of misoprostol or mifepristone. They allege Act 246 discriminates against them as medical providers for prescribing misoprostol and/or mifepristone, without imposing the same administrative burdens and regulatory requirements on medical providers that do not prescribe either drug but prescribe or do dispense drugs that are safe and as low risk as misoprostol and mifepristone.[51] No regulatory requirements are found, however, in Act 246. The alleged regulatory requirements cited are found in rules that do not exist in Act 246 or any statute enacted or amended there but rather are administrative rules which the SAP does not challenge as unconstitutional.

Dr. Hunter allegedly practices in a rural setting with limited resources and distance between hospitals. Her patients "may" go into labor away from a hospital and rely on emergency room care at sites allegedly ill equipped to handle excessive bleeding through timely administration of

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[49] SAP, ¶ 144.
[50] SAP, ¶ 145.
[51] SAP, ¶ 146.

misoprostol. At hospitals where Hunter practices, misoprostol is allegedly more difficult to obtain. Hunter must order misoprostol to be sent to patient's room and the hospital pharmacy may be at a distance.[52] Some hospitals do not have pharmacies open at all hours.[53] Dr. Hunter is "concerned about the impact Act 246 will have on patient outcomes."[54] Nothing but conclusions, conjecture and hypothet presented.

Dr. Rao "shares similar concerns". Some of her patients have "transportation instability". Some of her patients go to emergency departments for labor and delivery and "may be in situations where an ER department does not have ready access to misoprostol...".[55] More conclusion, conjecture and hypothet.

The six latecomer additional plaintiffs "are deeply *concerned* that pregnant people who are experiencing postpartum hemorrhages will face life-threatening delays in accessing necessary medications."[56] These plaintiffs allegedly frequently use misoprostol to induce labor for patients. They are "concerned" that "access barriers imposed by Act 246" (unspecified) will complicate the process and increase the work load of other health care providers. It is alleged that these patients "will be unable" to go to court to challenge Act 246" in the moment."[57] Again, nothing but conclusory statements, conjecture and hypothets.

These plaintiffs allegedly also prescribe misoprostol for miscarriage management. These plaintiffs "are *concerned* that Act 246 will make it harder for their patients who need to access misoprostol in an outpatient setting to access the necessary medication at a pharmacy."[58] Conclusion, conjecture, hypothets.

Drs. Siegel and Schwartzmann are allegedly now more likely to give patients misoprostol at hospital to manage miscarriages instead of sending the patient to pick up prescription at a pharmacy. These patients may miscarry at night and have to return to the hospital.[59] All conjecture and hypothet.

These plaintiffs who perform IUD placements are "*concerned* about the ability to access the drug in a timely fashion for patients."[60] "Concern" does not establish a cause of action.

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[52] SAP, ¶ 147.
[53] SAP, ¶ 148.
[54] SAP, ¶ 149.
[55] SAP, ¶ 150.
[56] SAP, ¶ 152.
[57] SAP, ¶ 153.
[58] SAP, ¶ 154.
[59] SAP, ¶ 157.
[60] SAP, ¶ 157.

The latecomer plaintiff medical providers "are impacted as medical providers who prescribe drugs that are regulated by Act 246, and as medical providers who rely on manufacturers and distributors for access to these medications." These plaintiff medical providers allege that "the law treats them differently than medical providers that prescribe, administer or dispense medications other misoprostol or mifepristone that are similarly effective and safe, have no potential for abuse or dependence, and are required for both emergency and routine treatment of other physical conditions."[61]

When considering all allegations, the SAP fails to state a cause of action against the Louisiana Board of Pharmacy for declaratory judgment. The petition sets forth no facts that establish a justiciable controversy between the Pharmacy Board and any plaintiff whether the plaintiff sues on its own behalf or for its patients.

3. No Cause of Action (La. C.C.P. art. 927(5)) For Violation of La. Const. Art. I, Sec. 3

Assuming for the sake of argument only that a plaintiff had alleged a sufficient justiciable controversy between it and the LBP, the SAP fails to state a cause of action against anyone for violation of equal protection due to a physical disability.

Plaintiffs allege that Act 246 violates their right to individual dignity or equal protection under La. Const. Art. I, Sec. 3 which provides:

> § 3. Right to Individual Dignity
> Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

"The essence of an equal protection claim is that the plaintiff was treated differently than similarly situated persons." *Crull v. City of New Brunsfels*, 267 Fed.Appx. 338, 341 (5th Cir. 2008)(citing *Stoneburner v. Secretary of the Army*, 152 F.3d 485, 491 (5th Cir. 1988)).

In *Douglas v. Gussman,* 567 F.Supp.2d 877 (E.D. La. 2008), a deaf prisoner alleged an equal protection violation as a result of his limited access to a telephone typewriter device for phone calls. The deaf prisoner alleged that other inmates had access whenever they were not locked in their cells to the telephone on the tier where housed. The telephone typewriter device was not however similarly available on the tier. The court found that the deaf prisoner was not similarly situated to

[61] SAP, ¶ 193. See later discussion on equal protection cause of action regarding "impact" not sufficient to establish equal protection violation and regarding the lack of an allegation of disparate treatment due to physical condition.

prisoners who could use the phone in their housing tier because the deaf prisoner could not use the regular inmate telephone system and instead must use a specifically equipped telephone.

The SAP fails to allege a person was discriminated against because of his physical condition by being treated differently from similarly situated persons. First, none of the individual plaintiffs asserting claims on their own behalf suffered from a physical condition as a basis for the alleged discrimination, except for perhaps Ms. Self who brings a claim as a pregnant person. Her equal protection claim however fails to state a cause of action based upon the denial of equal protection due to a physical condition. The petition alleges at best that "She is presently enduring an unconstitutionally high risk that she will be discriminated against due to physical condition."[62] A hypothet at best and insufficient to state a cause of action for declaratory judgment.

As far as Birthmark or the patients or clients of the individuals or Birthmark are concerned, there is no allegation that any personal physical disability of any of them is balanced against any similarly situated person. Nor are these comparisons expressed in other than conjectural or hypothetical allegations as to unspecified individuals.

Paragraph 7 alleges only that "the challenged law...discriminates based on physical condition" but provides no specifics. In SAP ¶¶ 29 and 30, patients who require misoprostol or mifepristone to treat their physical conditions are alleged to be "similarly situated" with "patients with similarly situated physical conditions" who are treated with other medications that have a similar risk profile as misoprostol and mifepristone. In this allegation, the physical condition of the alleged two classes for discrimination based on physical condition are alleged to be "similarly situated physical conditions" thus no discrimination based on physical condition is alleged. The alleged discrimination is based on the treatment provided by unknown forces, certainly not the Louisiana Board of Pharmacy or any other defendant. There is no allegation, as is required for an equal protection claim based on physical condition, that any defendant discriminated against any plaintiff based on that plaintiff's physical condition.

Note also SAP ¶ 32's reference to "discriminatory impact." "[D]isparate impact alone cannot suffice to state an Equal Protection violation; otherwise, *any law could be challenged on Equal Protection grounds by whomever it has negatively impacted...", Doulas v. Gusman*, 567 F.Supp.2d 877, 886 (E.D. La. 2008), *quoting Johnson v. Rodriguez*, 110 F.3d 299, 306-07 (5th Cir. 1977).

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[62] SAP, ¶172.

Also absent in stating a cause of action for the alleged constitutional violation is reference to anything other than Act 246 which allegedly causes discrimination. No portion of Act 246 is specified. References are made throughout the petition to rule and regulations, cited as LAC 46:LIII §..., but these rules are found no where in Act 246.

As in *Douglas v. Gusman*, where deaf inmates who required use of special phones were not similarly situated to other inmates who did not, individual patients with similarly situated physical conditions and treated with the drugs at issue are not similarly situated to others with similarly situated physical conditions treated with other drugs. This does not allege disparate treatment based on differing physical condition. "Furthermore," 'a State does not violate the Equal Protection Claim merely because the classifications made by its laws are imperfect.'"[63]

The petition fails to state a cause of action against the Pharmacy Board or any other defendant for a constitutional violation, certainly not a violation of La. Const. Art. I, Sec. 3.

What Act 246 does, in part, other than establishing criminal violations, is amend La. R.S. 40:964(F) to classify misoprostol and mifepristone as Schedule IV controlled dangerous substances. In SAP ¶ 9, plaintiffs suggest that neither misoprostol or mifepristone meets the "criteria" for scheduling. This allegation fails to state a cause of action for any relief. The Louisiana Supreme Court has long held that "...it is not for the court to question the wisdom of the Legislature in enacting the legislation...". *Kotch v. Board of River Port Pilot Com'rs. For Port of New Orleans*, 209 La. 737, 757 (La. 1946). *Kotch* challenged a statute creating Crescent River Port Pilots Association with membership limited to persons selected by the association. The Supreme Court found that there "is nothing in the law which requires the Crescent River Pilots Association to admit to membership persons not of their selection". In the case here, there is nothing in Louisiana law which requires the Legislature to classify only a specific type of drugs as a Schedule IV controlled dangerous substance. This seems to be the gist of the plaintiffs' petition, the plaintiffs feel that mifepristone and misoprostol do not fit within the class of drugs that plaintiffs believe should be classified as Schedule IV. "...courts cannot annual or pronounce void any act of the Legislature on any other ground than that of repugnancy to the Constitution." *Kotch*, at 756.

4. Plaintiffs Fails To State a Cause of Action (La. C.C.P. art. 927(5)) For Declaratory Relief Against the LBP for Violation of La. Const. Art. III, Sec. 15

[63] *Douglas v. Gusman*, 886, *quoting Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997).

Plaintiffs base their cause of action for violation of La. Const. Art. III, Sec. 15, upon the allegation that they are "taxpayers."[64] Supposedly, this is what vests these plaintiffs with and immediate and substantial dispute against the Pharmacy Board for violation of La. Const. Art. III, Sec. 15.

In *Animal Legal Defense Fund v. State, Dept. of Wildlife and Fisheries,* 2012-0971 (La. App. 1 Cir. 4/25/13) 140 So.3d 8, 17-18, the First Circuit found that as taxpayers, plaintiffs there had sufficient interests to sustain a right of action to seek an injunction to refrain any alleged unlawful conduct by the Department of Wildlife and Fisheries (DWF). The plaintiffs sought to restrain specific action by DWF, the issuance of any future permits to Mr. Sandlin for the possession of Tony, a tiger. Here the plaintiffs allege no specific action by the Pharmacy Board that Act 246 authorizes and that Pharmacy Board has performed or will perform with respect to the adoption of Act 246 in the context of a "single object" or "germane amendment." The LBP had no duty with respect to the adoption of the law regarding the challenged constitutional La. Const. Art. III, Sec. 15 provisions.

Also distinguishing *Animal Legal Defense Fund*'s reliance on taxpayer status of a plaintiff to state a cause of action for an Art. III, Sec. 15 violation, the *Kotch* plaintiffs paid taxes which were utilized to fund the DWF and its operations. This was based on the finding that "the DWF receives monies for its actual budget from the state general fund." The Pharmacy Board, however, is not funded by the state general fund but rather by its own self-generated funds.[65]

The absence of a taxpayer relationship between the LBP and any plaintiff serves to destroy the alleged taxpayer adverse interest requirement to state a cause of action for declaratory judgment. The fact that "taxpayers" do not fund the LBP deprives the La. Const. Art. III, Sec. 15 of a justiciable controversy necessary to state a cause of action.

5. No Cause of Act (La. C.C.P. art. 927(5)) is Stated Against the Louisiana Board of Pharmacy By Any Plaintiff For Declaratory or Injunctive Relief

Not one of the three causes of action (violation of La. Const. Art. 1, Sec. 3, violation of the single object requirement of La. Const. Art. III, Sec. 15, violation of the germane amendment rule of La. Const. Art. III, Sec. 15) states a cause of action for declaratory relief against the Louisiana

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[64] SAP, ¶¶ 293-295.

[65] See La. R.S. 37:1171 subjecting the LBP to the provisions of La. R.S. 36:803. See La. R.S. 36:803A(2) allowing the LBP "to impose, collect and retain license or certification fees." See La. Op. Atty. Gen. 78-67A providing that a licensing and regulatory body is considered a trade or professional association under La. Const. Art. VII, § 9 and is not required to deposit funds in the state treasury.

Board of Pharmacy. No immediate or substantial or genuine dispute between any plaintiff and the Louisiana Board of Pharmacy, no adverse interests, no justiciable controversy is alleged so as to state a cause of action for declaratory relief.

6. The SAP Fails To State A Cause of Action (La. C.C.P. art. 927(5)) Against the Pharmacy Board For Injunctive Relief; Plaintiffs Are Not Entitled To Injunctive Relief Against the Louisiana Board of Pharmacy

a. Legal Standard for Permanent Injunction

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601. *See City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC*, 2008-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, writ denied, 2008-2554 (La. 1/9/09), 998 So. 2d 726. "An injunction is a harsh, drastic and extraordinary remedy, and should only issue where the mover is threatened with irreparable loss or injury without adequate remedy at law. *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.*, 97–152 (La.App. 5 Cir. 7/29/97), 698 So.2d 449, 452, *writ denied,* 97–2196 (La.11/21/97), 703 So.2d 1312. Irreparable injury means the moving party cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards. *Id.* at 453." *See Zeringue v. St. James Par. Sch. Bd.,* 13-444 (La. App. 5 Cir. 11/19/13), 130 So. 3d 356. "However, a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.,* when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *Jurisich v. Jenkins,* 99–0076 (La. 10/19/99), 749 So.2d 597, 599; citing *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 555 So.2d 1370 (La.1990)." *Id.*

b. No Cause of Action For Injunctive Relief

No allegation of "irreparable injury" is found any where in the 319 paragraphs of the 57 page SAP. In addition, the SAP fails to state a cause of action against the Louisiana Board of Pharmacy for declaratory relief as to the alleged constitutional violations. See argument on exceptions of no cause of action for declaratory relief above. No constitutional violation against the Louisiana Board of Pharmacy having been alleged, the petition likewise fails to state a cause of action for injunctive relief against the Louisiana Board of Pharmacy to restrain enforcement of any unconstitutional or illegal act by the Pharmacy Board against any plaintiff or anyone on whose behalf they sue. The

exceptions of no cause of action should be granted and all proceedings against the Board of Pharmacy should be dismissed with prejudice at plaintiffs' cost.

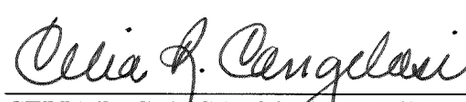
CONCLUSION

Act 12 of the Second Extraordinary Session of the Louisiana Legislature makes it clear that the Louisiana Attorney General must be served with pleadings alleging unconstitutionality of state law and allowed to respond to the allegations and/or represent or supervise the interests of the state, La. C.C.P. arts. 1880, 8551 and 1845. If not any judgment of unconstitutionality will be null and void.

To state a cause of action against the Louisiana Board of Pharmacy for a declaration of unconstitutionality of a state statute, a justiciable controversy between the plaintiff alleging unconstitutionality and the LBP must be alleged. The plaintiff and the Louisiana Board of Pharmacy must have legal relations with real adverse interests of sufficient immediacy and reality, must have a dispute in an immediate and genuine situation, an existing actual and substantial dispute, not merely hypothetical or conjectural, the plaintiff must have a legally and protectable interest at stake.

The SAP fails to allege a justiciable controversy between any plaintiff and anyone upon whose part they sue and the Louisiana Board of Pharmacy, and thus fails to state a cause of action against the LBP with respect to either declaratory or injunctive relief to declare the unconstitutionality of Act 246 of 2024 or restrain its enforcement. It is respectfully submitted that the exceptions of no cause of action have merit and should be sustained and all proceedings against the Louisiana Board of Pharmacy should be dismissed with prejudice at plaintiffs' cost.

Respectfully Submitted:



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Attorney for Louisiana Board of Pharmacy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Memorandum in Support of Defendant, Louisiana Board of Pharmacy, Peremptory Exceptions of No Cause of Action* has been served upon Plaintiffs, through their counsel of record, via electronic mail, to the following:

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Attorney for Louisiana State Board of Medical Examiners

Baton Rouge, Louisiana, this 3rd day of February, 2025.

Celia R. Cangelosi

CELIA R. CANGELOSI

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS	**DOCKET NO. 755,217 DIV. 33**
	19th JUDICIAL DISTRICT COURT
VERSUS	
STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

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DILITORY EXCEPTIONS ON BEHALF OF THE LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

NOW INTO COURT, through undersigned counsel, comes Defendant, Louisiana State Board of Medical Examiners (the "LSBME" or "Board"), who pleads dilatory exception of Prematurity in response to the (Second) "Amended Petition for Declaratory and Permanent Injunctive Relief Enjoining the Enforcement of Act 246 of the 2024 Regular Legislative Session" representing as follows:

Dilatory Exception

I.

The LSBME raises the objection of prematurity through the dilatory exception of prematurity.

II.

Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely. *Prator v. Caddo Parish*, 04-0794 (La. 12/1/04); 888 So.2d 812, 815.

III.

A justiciable controversy is a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *St. Charles Parish School Bd. v. GAF, Corp.*, 512 So.2d 1165, 1171 (La.1987).

VI.

Plaintiffs' claims are purely hypothetical, conjectural, and speculative and therefore fail to maintain a justiciable controversy between any of the plaintiffs and the LSBME.

V.

Even if plaintiffs had alleged proper justiciable controversy against the LSBME, this case is premature as La R.S. 37:1285(G) restricts judicial intervention and review prior to the exhaustion of all administrative remedies and issuance of a final decision or order by the LSBME.

IX.

Plaintiffs' claims must be dismissed as premature.

WHEREFORE, the Louisiana State Board of Medical Examiners, for the reasons more fully expressed in the attached memorandum in support of this exception, prays that this exception be maintained and that the petition be dismissed at plaintiffs' cost and for full, general and equitable relief.

Respectfully submitted,

BY: Lauryn Sudduth

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Counsel for the Louisiana State Board of Medical Examiners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing exceptions with proposed rule to show cause has on this date been served upon all known counsel of record by electronic mail at the email address provided.

New Orleans, Louisiana, this 3rd day of February, 2025.

Lauryn Sudduth

Lauryn A. Sudduth

BIRTHMARK DOULA COLLECTIVE, LLC, A LOUISIANA LLC D/B/A BIRTHMARK, ON BEHALF OF ITSELF AND ITS CLIENTS, NANCY DAVIS, ON BEHALF OF HERSELF, EMILY HOLT, DO, MPH, ON BEHALF OF HERSELF AND HER PATIENTS, KAITLYN JOSHUA, ON BEHALF OF HERSELF, AND KAYLEE SELF, PHARMD, ON BEHALF OF HERSELF AND HER PATIENTS	**DOCKET NO. 755,217 DIV. 33**
	19th JUDICIAL DISTRICT COURT
VERSUS	
STATE OF LOUISIANA, ELIZABETH MURRILL, IN HER OFFICAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA, LOUISIANA BOARD OF PHARMACY AND LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

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MEMORANDUM IN SUPPORT OF EXCEPTIONS ON BEHALF OF THE LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

MAY IT PLEASE THE COURT:

Defendant Louisiana State Board of Medical Examiners (the "LSBME") except to the (Second) *Amended Petition for Declaratory and Permanent Injective Relief Enjoining the Enforcement of Act 246 of the 2024 Regular Legislative Session* ("Second Amended Complaint") filed by Birthmark Doula Collective LLC, a Louisiana LLC d/b/a Birthmark, on behalf of itself and its clients, Nancy Davis, on her own behalf, Dr. Emily Holt, on her own behalf and on behalf of her patients, Kaitlyn Joshua, on her own behalf, Pharmacist Kaylee Self, on her own behalf and on behalf of her patients, Dr. Tonya Hunter, on her own behalf and on behalf of her patients, Sarah LaMothe, on her own behalf and on behalf of her patients, Dr. Rebecca Perret, on her own behalf and on behalf of her patients, Dr. Vibha Rao, on her own behalf and on behalf of her patients, Dr. Stephanie Schwartzmann, on her own behalf and on behalf of her patients, and Dr. Eric Siegel, on his own behalf and on behalf of his patients. ("Plaintiffs"), for the reasons expressed below.

BACKGROUND

Plaintiffs filed this suit in the 19th Judicial District Court for the Parish of East Baton Rouge challenging the constitutionality of Act 246 of the 2024 Regular Legislative Session. Act 246 states in pertinent part, "To amend and reenact R.S. 14:87.1(1)(a) and R.S. 40:969(C) and to enact R.S. 14:87.6.1, R.S. 15:1352(A)(71), and R.S. 40:964(Schedule IV)(F), relative to abortion; to create the crime of coerced criminal abortion by means of fraud; to provide relative to the crime of criminal abortion by means of abortion inducing drugs; to provide penalties; to provide relative to the definition of crime racketeering activity; to add certain substances to Schedule IV of the Uniform Controlled Dangerous Substances Law; and to provide for related matters." Plaintiffs take issue with the rescheduling of two drugs (Mifepristone & Misoprostol) as Schedule IV drugs and the ramifications therein.

The LSBME is an agency of the State of Louisiana, created by the Louisiana Legislature within the Louisiana Department of Health through the Medical Practice Act, La. R.S. 37:1261 *et seq*. Its purpose is to ensure that the public "shall be properly protected against unprofessional, improper, unauthorized, and unqualified practice of medicine and from unprofessional conduct of persons licensed to practice medicine ...." La. R.S. 37:1261. To that end, the LSBME has the sole authority to examine all applicants for the practice of medicine, issue licenses or permits to those possessing the necessary qualifications, and take appropriate administrative actions to regulate the practice of medicine in Louisiana. La. R.S. 37:1270(A)(1). The LSBME may refuse to issue, may suspend or revoke any license or permit, or may impose probation or other restrictions on any license or permit which it has issued for a number of causes articulated in the Medical Practice Act and the LSBME's rules and regulations governing the practice of medicine. La. R.S. 37:1285(A). The Board's disciplinary authority includes limited authority to impose monetary fines and obtain reimbursement of costs and attorney's fees incurred by the Board in the investigation and prosecution of licensees. The Board also possesses and employs authority to act against unauthorized practitioners by means of civil injunctive proceedings.

LAW AND ANALYSIS

I. Dilatory Exception of Prematurity

The LSBME raises the objection of prematurity through the dilatory exception of prematurity because the Plaintiffs' claims are purely hypothetical, conjectural, and speculative. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely. *Prator v. Caddo Parish*, 04-0794 (La. 12/1/04); 888 So.2d 812, 815. A justiciable controversy is a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *St. Charles Parish School Bd. v. GAF, Corp.*, 512 So.2d 1165, 1171 (La.1987).

Louisiana Code of Civil Procedure article 1871 authorizes the judicial declaration of "rights, status, and other legal relations whether or not further relief is or could be claimed." A declaratory judgment action is designed to provide a means for adjudication of rights and obligations in cases involving an actual controversy that has not reached the stage where either party can seek a coercive remedy. *Code v. Dep't of Pub. Safety & Corr*, 11-1282 (La. App. 1 Cir. 10/24/12); 103 So.3d 1118, 1126, *writ denied*, 12-2516 (La. 1/23/13); 105 So.3d 59. The function of a declaratory judgment is simply to establish the rights of the parties or express the opinion of the court on a question of law without ordering anything to be done. *Id.* at 1127. But our jurisprudence has limited the availability of declaratory judgment by holding that "courts will only act in cases of a present, justiciable controversy and will not render merely advisory opinions." *Id.*

Because of the almost infinite variety of factual scenarios with which courts may be presented, a precise definition of a justiciable controversy is neither practicable nor desirable. *Id.* However, a justiciable controversy has been broadly defined as one involving "adverse parties with opposing claims ripe for judicial determination," involving "specific adversarial questions asserted by interested parties based on existing facts." *Id.* (quoting *Prator v. Caddo Parish*, 04-0794 (La. 12/1/04); 888 So.2d 812, 816). A justiciable controversy for declaratory judgment purposes is one involving uncertain or disputed rights in "an immediate and genuine situation," and must be a "substantial and actual dispute" as to the legal relations of "parties who have real, adverse interests." *Id.* (quoting *Prator*, 888 So.2d at 817).

The Louisiana Supreme Court discussed "justiciable controversy" relative to declaratory judgment actions in *Abbott v. Parker*, explaining:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

249 So.2d 908, 918 (La. 1971); *see also Prator*, 888 So.2d at 815–17. A court must refuse to entertain an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise. *American Waste & Pollution Control Co. v. St. Martin Parish Police Jury*, 627 So.2d 158, 162 (La. 1993).

It is well settled in the jurisprudence of this state that courts will not decide abstract, hypothetical, or moot controversies or render advisory opinions with respect to such controversies. *Cat's Meow, Inc. v. City of New Orleans, Dept. of Finance*, 98-0601 (La. 10/20/98); 720 So.2d 1186, 1193; *see also Shepherd v. Schedler*, 15-1750 (La. 01/27/16); 209 So.3d 752, 764. For a court to entertain an action for declaratory relief there must be a justiciable controversy, and the question presented must be real and not theoretical. *Tugwell* v. *Members of Bd. of Hwys.*, 83 So.2d 893, 899 (La.1955). Courts are not empowered to render advisory opinions on moot or abstract issues of law. *Church Point Wholesale Beverage Co., Inc. v. Tarver*, 614 So.2d 697 (La.1993). Consequently, a declaratory action cannot generally be maintained unless it involves some specific adversary question or controversy asserted by interested parties and is based on an existing state of facts. *Tugwell,* 83 So.2d at 899. Thus, even though the relief offered by the declaratory judgment provisions must be liberally construed and administered, in the absence of a justiciable controversy, declaratory relief is not available to an applicant.[1] The same holds true for the plea for injunctive relief. Plaintiffs failed to allege a basic foundational requirement for injunctive relief: actual or imminent harm irreparable to the plaintiffs. *Louisiana Fed'n of Tchrs. v. State*, 2011-2226 (La. 7/2/12), 94 So. 3d 760, 763. Louisiana law provides that an injunction shall issue

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[1] La.Code Civ.P. art. 1881; *LA Independent Aula Dealers Ass'n* v. *Siale,* 295 So.2d 796 (La.1974); *Rambin* v. *Caddo Parish Police Jury,* 316 So.2d 499, 501 (La.App. 2 Cir. 1975).

only "in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law." La. Code Civ. P. art. 3601(A). The hypothetical harm claimed by the plaintiffs cannot amount to real and actual interest.

More recently, the Louisiana Supreme Court in *Soileau v. Wal-Mart Stores, Inc.,* 2019-0040, p. 6 (La. 6/26/19); 285 So.3d 420, 425, dismissed a plaintiff's case because the Plaintiffs' arguments, "demonstrate convincingly that no real and actual dispute has been presented in this matter." Citing *St. Charles Parish School Bd. v. GAF, Corp.*, the Court ruled that the Plaintiff based her claims on "abstract harm she might suffer in the future" and that "[t]he injury resulting from this purported conflict of interest is not based on any actual facts or occurrences; rather, she asks the court to assume that she will suffer harm if certain hypothetical facts occur." *Soileau*, 285 So.3d at 425. The Louisiana Supreme Court ruled that, "[w]e decline to render an advisory opinion based on facts which may or may not occur at some unspecified time in the future." *Id.*

The Court's reasoning in *Soileau* is easily applied here. Plaintiffs' petition for declaratory and injunctive relief fails to assert a justiciable controversy between *any* of the plaintiffs and the LSBME for *any* of the causes of actions raised in the Second Amended Petition. In the entire 57-page, 319-paragraph long petition there are only seven mentions of the LSBME. Five of which were in the caption, opening paragraph, and party introductions. The LSBME is not even listed in its own numbered paragraph as a defendant like the other defendants. There are no citations or mentions of the LSBME Rules and Regulations, no facts alleged regarding any role the LSBME had in the passage of Act 246, and no facts that an actual complaint has been filed with the LSBME for violation of the Medical Practice Act arising from a violation of a law created by Act 246. Neither do plaintiffs allege the LSBME is directly enforcing the provisions of Act 246, only that the LSBME "may initiate disciplinary actions for physicians who are convicted of a crime in Louisiana or who prescribe, dispense, or administer controlled substances "without legitimate justification . . . or in other than a legal or legitimate manner." (*See* Second Amended Petition at paragraph 84) It is this hypothetical enforcement of the medical practice act that plaintiffs seem to be resting the entirety of arguments against the LSBME on.[2] But even to the extent plaintiffs seek

[2] Save for plaintiff and defendant introductions, the only other time the LSBME is mentioned in the whole of the petition, is all the way down in paragraph 246, in the section where plaintiffs are trying to assert taxpayer standing,

merely to restrain the LSBME, plaintiffs still fail to make a showing of personal "interest" to establish a justiciable controversy.

The mentions of LSBME are related to the statutory enforcement authority granted to the Board. It's true, the LSBME fulfills its mission to protect the health and safety of the public, in part, by investigating physicians or other allied healthcare professionals under its jurisdiction in response to alleged violations of such professional's respective Practice Act, and if substantiated, taking the appropriate action to address it. Any action against a licensee originates from a complaint filed with or by the Board and must be substantiated by an investigation comprised of two phases, the first being the Preliminary Review and, if merit is found within the complainant's allegations, the Preliminary Review will usually be succeeded by Board approval to initiate a Formal Investigation.[3]

As a result of an investigation, the investigating officer may request the filing of an administrative complaint against the respondent physician alleging specific violations of the Medical Practice Act. If the Board approves the filing of the proposed complaint, any proceedings before the Board to adjudicate the complaint are conducted under the Louisiana Administrative Procedure Act ("LAPA"), La. R.S. 49:951 *et seq.*, and the Board's rules on adjudication, La. Admin. Code 46:XLV.9901 *et seq*. If the administrative proceedings end with a decision adverse to the respondent physician, the physician has the right to judicial review. *See* La. R.S. 49:964.

Plaintiffs' petition seemly seeks to invoke the Court's jurisdiction with respect to the LSBME on the off chance they might have a cause of action at some point in the future. There are no actual factual allegations made against the LSBME regarding any ongoing discipline, but the sense is that the plaintiffs are concerned that they, or their doctors, might, not that they are, but that they might be aggrieved by the Board's statutory responsibility to regulate the medical

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alleging that the LSBME may have to divert resources in order to enforce this law and perform additional disciplinary procedures. However, this is a misunderstanding of the structure of the LSBME, as the LSBME does not receive tax revenue and is wholly run on self-generating funds pursuant to La. R.S. 37:1269, which provides, in part, that "[a]ll expenses of the board and compensation of board members and employees shall be paid out of the funds of the board only and shall never be a charge on the state."

[3] *See* La. R.S. 37:1285.2(A)(1)(a) ("The board shall initiate a preliminary review to determine if cause exists to warrant formal investigation only upon one or more of the following: A complaint received from a person other than an employee of the board"); LAC 46:XLV, § 9711(A) ("If the board determines by a majority vote of the members present and voting at a board meeting that a complaint warrants investigation it shall instruct board staff to initiate a formal investigation. If the board determines that a compliant does not warrant investigation it shall be closed pursuant to §9709F.1. of this Chapter").

profession upon the speculative and groundless proposition that the a physician may violate the law, a complaint may be filed against them, there would be enough evidence to survive preliminary review and formal investigation and then, following an administrative hearing, a final order would be issued against the plaintiffs. Even if all of that were substantially likely to happen, this would still be the wrong time and place to challenge the enforcement action. As previously stated, the LSBME is subject to the LAPA, under which the Plaintiff is entitled to robust judicial review which incorporates multiple procedural safeguards in administrative proceedings such as adequate notice, the right to take depositions and conduct discovery, the opportunity to present evidence on all issues of fact and law, the right to conduct cross-examination, and the right to rehearing.[4] Only after exhausting all administrative review available under the LAPA would the plaintiffs be able to seek judicial review. Louisiana Rev. Stat. § 37:1285(G) provides:

> Notwithstanding any other law to the contrary, no judicial order staying, enjoining, or continuing an adjudication proceeding before, or a preliminary, procedural, or intermediate decision, ruling, order, or action of, the board shall be effective or issued to be effective, whether pursuant to R.S. 49:964 or otherwise, prior to the exhaustion of all administrative remedies and issuance of a final decision or order by the board.

Broken down, the statute here unambiguously prevents a court from staying, enjoining, or continuing (1) an adjudication proceeding pending before the Board, or (2) an intermediate decision, ruling, order, or action of the Board, until all administrative remedies have been exhausted, and the Board has issued a final decision or order, neither of which has occurred.

The appropriate starting point in statutory interpretation is a consideration of the language of the statute itself. *Hunter v. Morton's Seafood Restaurant and Catering*, 2008-1667 (La. 3/17/09), 2009 WL 792249, (citing *Touchard v. Williams*, 617 So. 2d 885, 887 (La. 1993)). When a statute is clear and unambiguous and its application does not lead to absurd consequences, the statute is applied as written. *Id.* (citing La. Rev. Stat. § 1:4; La. Civ. C. art. 9). The Legislature is "presumed to act deliberately and with full knowledge of existing laws on the same subject, with awareness of court cases and well-established principles of statutory construction, and with knowledge of the effect of [its] acts and a purpose in view." *Id.* at (citing *State v. Johnson*, 2003-

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4 *See* La. Rev. Stat. §§ 49:955; 49:956; 49:959.

2993 (La. 10/29/04), 884 So. 2d 568, 576; *Theriot v. Midland Risk Insurance Co.*, 1995-2895 (La. 5/20/97); *Theriot v. Midland Risk Insurance Co.*, 1995-2895 (La. 5/20/97); 694 So. 2d 184, 186).

Through Section 1285(G), the Louisiana Legislature expressly prohibited court interference with administrative proceedings before the Board until there has been a final administrative decision. Accordingly, plaintiffs' efforts to invoke the district court's jurisdiction and to state a cause of action were legally improper and procedurally premature. Plaintiffs' time to challenge any enforcement of the Medical Practice Act is through the provisions of the LAPA and following the rendering of a final judgement or order by the LSBME. The prohibition of La. Rev. Stat. § 37:1285(G) is clear on its face.

Moreover, even if there were some ambiguity in the statute's language, such that it would be appropriate to consider legislative intent, the history of the statute fully supports the LSBME's reading. Sections (G) and (H) of La. Rev. Stat. § 1285 were added to the statute by Act. No. 155, passed during the 2004 Regular Session. The title of the Act states that Sections (G) and (H) are enacted "to provide for strict limitations and conditions on staying or continuing an adjudication proceeding, decision, or order of the board *prior to the issuance of a final decision;* and to provide for related matters." The digest for Act 155 (HB No. 473) further explains that the legislation "[p]rohibits a court from continuing or staying adjudication proceedings, decision, or orders *prior to the issuance of a final decision* of the La. State Board of Medical Examiners except in certain circumstances." It is further explained that the House amendments that were adopted and incorporated into the final act, which included adding *"or order"* after *"final decision"* in both Sections (G) and (H), were intended to clarify that *all* administrative remedies must be exhausted first and that a judicial order will not be effective until *after* a final decision or final order by the Board is rendered.

If an enforcement proceeding were to commence, due process and other constitutional rights are still protected by their entitlement to seek full and complete judicial review *once final administrative action has been taken.* Clearly, Plaintiffs have filed this lawsuit prematurely, with no existing facts that give rise to a justiciable controversy in this matter.

CONCLUSION

Plaintiffs prematurely brought this matter. For the foregoing reasons, the LSBME respectfully requests that this Court sustain this exception of prematurity and dismiss plaintiffs' claims against the LSBME at plaintiffs' cost.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum has on this date been served upon all known counsel of record by electronic mail at the email address provided.

New Orleans, Louisiana, this 3rd day of February, 2025.

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