19TH JUDICIAL DISTRICT COURT
EAST BATON ROUGE PARISH
STATE OF LOUISIANA

NO. C-755217 DIVISION 33

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 himself and his patients.

VERSUS

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

FILED: _____ _____

DEPUTY CLERK

**PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' EXCEPTIONS**

Plaintiffs Birthmark Doula Collective, LLC ("Birthmark"), Nancy Davis, Dr. Emily Holt, Pharmacist Kaylee Self, Dr. Tonya Hunter, Dr. Sarah Lamothe, Dr. Rebecca Perret, Dr. Vibha Rao, Dr. Stephanie Schwartzmann, and Dr. Eric Siegel (collectively, "Plaintiffs") respectfully submit this Consolidated Opposition to Defendants' Exceptions. *See* Defendant Liz Murrill, in her official capacity as Attorney General of the State of Louisiana, and Defendant State of Louisiana's Peremptory Exception of No Right of Action against Plaintiffs; Defendant Louisiana Board of Pharmacy's Peremptory Exceptions of No Cause of Action; Dilitory [SIC] Exceptions of Behalf of the Louisiana State Board of Medical Examiners. This Court should deny the Exceptions because Plaintiffs have sufficiently alleged a valid cause of action and right of action as to all claims asserted in the Petition, and as to their Equal Protection claim, Plaintiffs have further set forth a prima facie case of unconstitutionality. Defendants fail to identify any valid basis for dismissal.

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## INTRODUCTION

Louisiana Act 246 of the 2024 Legislative Session schedules misoprostol and mifepristone—two safe, effective, and non-addictive medications—as controlled dangerous substances. The Plaintiffs in this case, nearly all of whom are doctors and other healthcare professionals with decades of experience delivering care in Louisiana, allege in extensive detail the specific and ongoing harms wrought by the law on them, their patients, and their clients. Despite these allegations, Defendants protest vociferously and repeatedly that there is nothing to see here—not even a dispute or controversy.

In order to get there, Defendants disregard, misstate, or grossly understate the allegations of the Petition.[1] Not only do Defendants mischaracterize and ignore critical facts set forth in the Petition, but in erroneously asserting that neither Plaintiffs nor their patients and clients have suffered any harm, they focus on narrow and irrelevant issues identified solely by Defendants which Plaintiffs have not alleged. Namely, whether Plaintiffs have been *entirely* denied access to the medications or prevented from prescribing or dispensing them altogether. While those things would also, undoubtedly, be bad, they are not the problems Plaintiffs raise. Indeed, the theoretical harms selected by Defendants are divorced from the claims actually asserted and the concrete harms alleged in the Petition—which painstakingly describes the delays, burdens, and administrative barriers Act 246 imposes on anyone who prescribes, dispenses, administers, or takes misoprostol and/or mifepristone.

In other words, Defendants predicate their analysis of harm on a narrow set of arbitrarily selected facts which they believe would constitute harm, but which is not the harm alleged by Plaintiffs or the basis of the claims asserted. Defendants then declare that everything *actually* alleged in the Petition constitutes hypothetical future harm, which they claim Plaintiffs are powerless to assert on behalf of themselves or their patients and clients, and which this Court is powerless to remedy. As explained herein, neither is true. Plaintiffs have sufficiently alleged current, existing, and ongoing concrete harms to themselves and those whose interests they

[1] Plaintiffs filed their Petition on October 31, 2024, after which they discovered that several pages were clerically missing from the filed copy. Pet. After discussions with the clerk's office, Plaintiffs filed the complete petition, which was substantively identical to the original filed, as a substitution on November 13, 2024, and served it through original process. *See* Subst. Pet. Each defendant moved for an extension to answer the Petition, which this Court granted, giving them until February 3, 2025, to answer. *See* Subst. Pet. On January 23, 2025, Plaintiffs amended their Petition as a matter of right to add five obstetrician-gynecologists and a certified midwife as Plaintiffs. *See* Am. Pet. ("Petition"); La. Code Civ. P. art. 1151 ("A plaintiff may amend his petition without leave of court at any time before the answer thereto is served.").

represent, and this case presents a justiciable controversy in which declaratory and injunctive relief are undoubtedly appropriate remedies, and to which Plaintiffs have sufficiently pled their entitlement. Nothing more is required at this stage of the proceedings, and all Exceptions filed by Defendants must be dismissed.

In that regard, on January 31, 2025, Defendant Louisiana and Defendant Murrill filed seven No Right of Action Exceptions, each virtually identical in law and argument. Mems. in Supp. of Defs.' Preemptory Exception of No Right of Action (AG's Brs. ISO Exc.").[2] On February 3, 2025, Defendant Louisiana Board of Pharmacy filed a No Cause of Action Exception. Mem. in Supp. of Def. Louisiana Bd. of Pharmacy, Preemptory Exceptions of No Cause of Action ("LBP Br. ISO Exc."). On February 3, 2025, Defendant Louisiana Board of Medical Examiners filed a Dilatory Exception of Prematurity. Mem. in Supp. of Exceptions on Behalf of the Louisiana State Bd. of Medical Examiners ("LSBME Br. ISO Exc."). While Defendants' Exceptions are each styled differently and technically assert different objections to Plaintiffs' claims, all the Exceptions rely on similar flawed legal theories and mischaracterizations of the facts and claims at issue. Therefore, for ease of reference and the sake of avoiding needless repetition, Plaintiffs file this Consolidated Opposition to the Exceptions filed by Defendants—all noticed for hearing on May 15, 2025. Each Exception asserted by each respective Defendant is addressed separately below.

Because Defendants brazenly cherry-pick facts and incorrectly characterize or gloss over the concrete allegations of harm and the nature of the claims asserted, Plaintiffs begin by placing the matters in dispute in the proper context as to the causes of action stated and their right of action to pursue their claims. Then, Plaintiffs address each of the arguments raised by Defendants in their respective Exceptions. Plaintiffs incorporate the full text of their Petition as if restated herein.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. This Case Presents Important Issues of Public Health and Safety and Unconstitutional Government Action.

When Louisiana enacted Act 246 (the "Challenged Law"), it became the only state in the nation to classify misoprostol and mifepristone—two FDA-approved medications that are safe,

[2] Defendants Murrill and State filed seven motions with the same title. One relating to the claims of Birthmark, one for the claims of Ms. Self, one for the claims of Ms. Davis, one for the claims of Ms. Josuha, one for the claims of Dr. Holt, one for the claims of Ms. LaMothe (identified there and herein as the Plaintiff Midwife), and one for the combined claims of Dr. Hunter, Dr. Perret, Dr. Rao, Dr. Schwartzmann, and Dr. Seigel (identified there and herein as the Plaintiff OBGYNs)

effective, and carry no risk of abuse or dependence—as controlled dangerous substances. Act 246, 2024 Leg., Reg. Sess. (La. 2024).[3] This classification subjects both medications to Louisiana's Uniform Controlled Dangerous Substances Law ("CDSL"), La. R.S. 40:961 *et seq.*, a complex and burdensome regulatory scheme intended for the purpose of controlling drugs with a high potential for abuse and dependence. *See* Act 246, 2024 Leg., Reg. Sess. (La. 2024).

To be clear, classifying misoprostol and mifepristone under the CDSL is a wholly terrible policy decision. But this lawsuit does not ask this Court to substitute its wisdom for that of policymakers. Rather, Plaintiffs seek a ruling that the law is unconstitutional under well-settled, binding legal principles. The Challenged Law arbitrarily, capriciously, and unreasonably discriminates against individuals based on physical condition, violating the Louisiana Constitution's guarantee of equal protection through its right to individual dignity. The Challenged Law also suffers from fatal procedural flaws, with multiple provisions that lack a common object or purpose and an amendment that was not germane to the original bill. Both of these defects violate core legislative requirements under the Louisiana Constitution.

As explained in detail herein, Plaintiffs have sufficiently alleged three constitutional claims at the pleading stage. They allege facts showing that the Challenged Law burdens those who take, prescribe, dispense, or manufacture misoprostol and mifepristone without justification, subjecting them to heightened regulations and access restrictions reserved for addictive or dangerous substances—despite the fact that neither drug is addictive or dangerous. The result is an unjustifiably discriminatory law that also violates the procedural safeguards that ensure transparency and fairness in the legislative process.

Plaintiffs—birth workers, medical professionals, reproductive health advocates, and a pregnant individual—each have a direct and personal stake in this litigation. Their work, safety, and constitutional rights are all affected by this discriminatory and unconstitutional law. In addition to asserting their individual rights, all but two named Plaintiffs are medical and support professionals who bring this action on behalf of their patients and clients who rely on these medications for safe, timely treatment of their physical conditions, including miscarriage and

[3] *See also* Daniella Silva & Natalie Obregon, *Louisiana governor signs bill classifying abortion pills as controlled dangerous substances*, NBC News (May 24, 2024), Louisiana governor signs bill classifying abortion pills as controlled dangerous substances.

postpartum hemorrhage. All Plaintiffs also sue in their capacity as taxpayers harmed by the State's imposition of needless regulatory burdens that reduce public safety and waste public resources.

This case presents a clear and urgent controversy. In *all cases*, the Challenged Law imposes unjustifiable restrictions that, in *some cases*, pose life-threatening risks. For example, misoprostol is a widely used, effective, and low-cost treatment for postpartum hemorrhage—one of the leading causes of maternal mortality in Louisiana. Unreasonably restricting treatment for a condition that can be as severe and dangerous as a gunshot wound unnecessarily increases that risk and can be fatal. Obviously, Plaintiffs have no obligation to prove—much less allege—that, in all cases, *fatality* will ensue. Instead, Plaintiffs credibly allege that classifying the drug as a controlled substance forces hospitals to restrict access to this necessary medication, including by requiring that they store it in locked facilities, which necessarily delays access during medical emergencies where every second counts. There can be no question that such restrictions, which follow directly from the Challenged Law, increase the risk to patient health and safety.

As professionals providing care to Louisiana patients daily and reproductive healthcare advocates promoting patient safety, Plaintiffs already feel the law's impact. It is current and ongoing. They bring this action to challenge the State's unconstitutional conduct, protect their ability to care for those who depend on these essential medications, and ensure their patients' access to necessary and safe medical treatments without delay or unnecessary burden.

## II. Plaintiffs' Detailed Petition Asserts Three Distinct Constitutional Claims.

The operative Petition in this case is a 57-page document detailing the facts that Plaintiffs intend to prove at trial to support their claims. Collectively, Plaintiffs assert three claims:

1. Violation of Equal Protection and Individual Dignity under Article I, Section 3 of the Louisiana Constitution of 1974 (*see* Am. Pet. ¶¶ 296–305);
2. Violation of the Single Object Rule in Article III, Section 15 (*see* Am. Pet. ¶¶ 306–12);
3. Violation of the Germane Amendment Rule of Article III, Section 15 (*see* Am. Pet. ¶¶ 313–19).

Plaintiffs are a pregnancy services organization that provides close and comprehensive support to its clients during childbirth and miscarriage (Birthmark Doula Collective); a family practice physician who provides reproductive healthcare (Dr. Holt); two reproductive healthcare advocates (Nancy Davis and Kaitlyn Joshua); a pharmacist who dispenses misoprostol for a variety of purposes (Kaylee Self); five obstetrician-gynecologists ("OB-GYN Plaintiffs") (Dr. Tonya

Hunter, Dr. Rebecca Perret, Dr. Vibha Rao, Dr. Stephanie Schwartzmann, and Dr. Eric Siegel) who treat patients throughout pregnancy, including during miscarriages and childbirth; and one Advanced Practice Registered Nurse licensed as a Certified Nurse Midwife ("Midwife Plaintiff") (Sarah LaMothe). *See* Am. Pet. ¶¶ 15–22.

Defendants are government entities and officials with responsibility for enforcing the Challenged Law: the State of Louisiana, the State Attorney General, the Louisiana Board of Pharmacy, and the Louisiana Board of Medical Examiners. *See* Am. Pet. ¶¶ 23–25. Specifically, Defendant State is the state government of Louisiana, which "originates with the people and is founded on their will alone." Am. Pet. ¶ 23. Defendant Murrill is the Attorney General, also known as the "chief legal officer of the state," who oversees all district attorneys in the state and has authority to "initiate, prosecute, or intervene in any legal proceedings" that she deems necessary for asserting or protecting the rights and interests of the State, including potential prosecution under the Challenged Law. Am. Pet. ¶ 24. Defendant Louisiana Board of Pharmacy oversees and regulates the practice of pharmacy, including issuing licenses to dispense controlled dangerous substances. Am. Pet. ¶ 25. Defendant Louisiana Board of Pharmacy ensures compliance with the CDSL, including the Challenged Law, and can make referrals to other licensing and regulatory authorities for disciplinary actions related to such laws. *Id.* Finally, Defendant Louisiana State Board of Medical Examiners licenses and disciplines those who practice medicine in the state, including investigating and taking disciplinary action against those alleged to have violated laws related to controlled dangerous substances, including the Challenged Law. *Id.*

The Petition seeks declaratory and injunctive relief. Am. Pet. ¶¶ 11, 305, 312, 319. Because La. R.S. 40:964(F) and 40:969(C) (collectively, the "Drug Scheduling Amendments"), as enacted and amended by and through the Challenged Law, violate the right to equal protection and individual dignity, the laws are invalid and unenforceable, and Plaintiffs "are entitled to declaratory and injunctive relief prohibiting Defendants from enforcing or implementing" the identified statutes. Am. Pet. ¶ 305.[4] In addition, all Plaintiffs, including Nancy Davis and Kaitlyn Joshua, assert a claim that the Challenged Law is invalid in its entirety because it fails to meet the Louisiana Constitution's single object rule, and Plaintiffs are therefore entitled to a declaration that the law is null and void and injunctive relief prohibiting Defendants from enforcing or

[4] Plaintiffs Nancy Davis and Kaitlyn Joshua do not join in this claim.

implementing all statutory provisions enacted by Act 246. Am. Pet. ¶ 312; Am. Pet. ¶ 8 ("Act 246 amended La. R.S. 14:87.1, 15:1352, 40:964, and 40:969, and created the new statute of La. R.S. 14:87.6.1."). Lastly, all Plaintiffs assert a claim that the Drug Scheduling Amendments are invalid because they were not germane to the original bill, and Plaintiffs are entitled to a declaration that those provisions are null and void and injunctive relief prohibiting Defendants from enforcing or implementing them. Am. Pet. ¶ 319.

## LAW AND ARGUMENT

### I. Plaintiffs Assert Valid Constitutional Claims That Are Properly Pled.

Defendants' Exceptions misapply binding caselaw, distort—and ignore—the facts alleged in Plaintiffs' Petition, and contain meritless arguments that have no bearing on Plaintiffs' ability to proceed at this stage of the litigation. This Court should deny each Exception. Plaintiffs' Petition satisfies all pleading requirements under Louisiana law. The Petition adequately pleads a cause of action under three distinct constitutional theories and alleges ample facts to support each Plaintiff's right of action to maintain this lawsuit. Plaintiffs have a direct interest in this litigation as people who are directly regulated by the Challenged Law; businesses experiencing the concrete harms of that law; and taxpayers who seek to restrain enforcement of the Challenged Law because it will burden the public fisc. As explained herein, nearly all of the Plaintiffs also have third-party standing to assert claims on behalf of their patients and clients. Moreover, each Defendant that Plaintiffs have named is proper because they have the statutory authority to enforce the Challenged Law either against Plaintiffs directly or to the detriment of Plaintiffs. Finally, Plaintiffs have properly alleged and meet the requirements for injunctive and declaratory relief because their claims are ripe for review; there is a concrete adverse relationship between the parties; and they seek to enjoin enforcement of an unconstitutional law. As set forth in detail below, because Plaintiffs have met their affirmative pleading obligations, Defendants' Exceptions can be easily denied. Defendants point to no legitimate reason to dismiss Plaintiffs' case, nor can they.

In that regard, under Article 891 of the Louisiana Code of Civil Procedure, a petition need only "contain a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation." La. Code

Civ. P. art. 891.[5] Additionally, to state a cause of action for any claim, a Petition must contain "well-pleaded allegations" that, if proven true, would "legally entitle[] [Plaintiffs] to the relief sought." *Wright v. La. Power & Light*, 2006-1181, p. 15 (La. 3/9/07), 951 So.2d 1058, 1068–69. Plaintiffs' comprehensive Petition clearly meets this standard.

Defendants Murrill and the State of Louisiana spend significant time arguing that laws are presumed constitutional and that the court should avoid making constitutional rulings. *See* AG Br. ISO Birthmark Exc., 10–12; AG Br. ISO Davis Exc., 10–12; AG Br. ISO Holt Exc., 9–11; AG Br. ISO Joshua Exc., 9–11; AG Br. ISO LaMothe Exc., 8–10; AG Br. ISO OB-GYN Exc., 9–11; AG Br. ISO Self Exc., 11–13. Although generally true, that is an incorrect statement of the law in this case. Here, Plaintiffs have set forth a valid equal protection claim that the Challenged Law constitutes a statutory classification based on physical condition, and the Louisiana Supreme Court has repeatedly held that when such a classification is under review, there is *no* presumption of constitutionality.

As explained by the Louisiana Supreme Court in *Moore v. RLCC Technologies, Inc.* regarding the Court's seminal case on classifications based on physical condition under Article I, Section 3 of the Louisiana Constitution, *Sibley v. Board of Supervisors of Louisiana State University.,* 477 So.2d 1094 (La.1985): "[T]his court held that when [a physical condition classification] is under review, the classification itself presents a prima facie case of unconstitutionality, and the burden is on the proponents of the statute to prove that the legislative classification substantially furthers an important governmental objective." 95–2621, p. 9 (La.2/28/96), 668 So.2d 1135, 1140–41. The *Moore* court proceeded to make clear, as to the six enumerated grounds prohibited by the Louisiana Constitution, including physical condition:

> When a statutory classification is based on any of these enumerated grounds, the classification is a prima facie denial of equal protection. **Because the ordinary presumption that statutes are constitutional no longer applies, there is a reversal of the ordinary placement of the burden of proof on the party asserting unconstitutionality.** The burden is shifted to the proponent of the classification and the standard of review is heightened, requiring the proponent to establish that the classification substantially furthers an important governmental objective.

*Id*. (emphasis added); *see also Revere v. Canulette*, 97-0552, p. 6–7 (La. App. 1 Cir. 5/15/98), 715 So.2d 47, 51–53.

[5] *See also* La. Code Civ. P. art. 854, cmt. a ("Although it has always been necessary to state a cause of action and to allege the material facts constituting the cause of action, it is not necessary to allege evidence.").

But regardless of Defendants' incorrect pronouncement of the law, at this stage of the litigation the Challenged Law's constitutionality is not at issue. What is at issue is simply whether Plaintiffs have satisfied their pleading requirements, which mandate only that they allege sufficient facts that, if proven true, would entitle them to relief. Plaintiffs have more than met this standard. *See infra* at 8–21. *Cf. Hill v. Jindal*, 2014-1757, p.15 (La. App. 1 Cir. 6/17/15), 175 So.3d 988, 1000 ("The exception [of no right of action] does not raise the question of the plaintiffs['] ability to prevail on the merits.").

## A. Plaintiffs Have Stated Three Causes of Action under the Louisiana Constitution.

### *1. The Petition states a valid claim under Article I, Section 3 of the Louisiana Constitution.*

Nine of the Plaintiffs assert a cause of action under Article I, Section 3 of the Louisiana Constitution.[6] This clause protects the right to individual dignity, and states, in relevant part:

> No person shall be denied the equal protection of the laws. . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

La. Const. art. I, § 3. Article I, Section 3 is more protective of individual rights than the Fourteenth Amendment. *See Sibley*, 477 So.2d at 1108. In *Sibley*, the Louisiana Supreme Court identified three tiers of judicial scrutiny for an equal protection claim; laws that classify on the basis of "physical condition," like the Challenged Law, are subject to intermediate scrutiny and cannot survive unless the state shows that "the classification [is] not arbitrary, capricious or unreasonable." *Id.*

To plead a cause of action under Article I, Section 3's equal protection clause, a plaintiff must (1) identify the "distinction made between one group and another"; (2) identify the person that suffers the discrimination; and (3) allege that the classification fails to survive the appropriate scrutiny. *Moore*, 668 So.2d at 1141–42.

The nine Plaintiffs who assert this claim are healthcare and patient support professionals who rely on these medications, and Plaintiffs allege ample facts to support a claim that the Challenged Law unconstitutionally discriminates against them and their patients and clients who rely on misoprostol or mifepristone to treat their physical conditions. *See* Am. Pet. ¶¶ 33–259. As explained in the Petition, misoprostol and mifepristone are widely prescribed for a variety of

[6] Plaintiffs Nancy Davis and Kaitlyn Joshua bring only two of the claims in this lawsuit: the single object claim and the germane amendment claim. *See* Am. Pet. ¶¶ 306–19.

physical conditions, and they are safe, effective, and carry no risk of abuse or dependence. Am. Pet. ¶¶ 33–67, 199–259.[7] Classifying both drugs as controlled dangerous substances subjects patients and healthcare providers to a complex regulatory system that imposes significant restrictions on the use, prescription, dispensing, distribution, and manufacturing of the drugs. Am. Pet. ¶¶ 68–85. Further, the Petition alleges that similarly situated healthcare providers and patients who require treatment with medications that are equally as safe and non-addictive as misoprostol and mifepristone are not subject to those same requirements. Am. Pet. ¶ 30. For example, patients suffering from a gunshot wound, which is as severe and dangerous as postpartum hemorrhage, can access epinephrine and lidocaine quickly and easily in the emergency room because—unlike misoprostol, which is used to treat postpartum hemorrhage—neither of the drugs those patients and providers rely on are required to be locked away as a controlled dangerous substance. Am. Pet. ¶¶ 108–109.

Thus, the law "treat[s] 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." Am. Pet. ¶ 300; *see Sibley*, 477 So.2d at 1108–09 (holding that a law prohibiting medical malpractice claims exceeding $500,000 was a classification on the basis of physical condition because it "impose[d] different burdens on different classes of persons according to the magnitude of damage to their physical condition"). Likewise, the Petition alleges that healthcare providers who prescribe, dispense, or want to dispense misoprostol and/or mifepristone are treated differently than those who prescribe or dispense drugs with a similar risk and dependence profile as misoprostol and mifepristone. *See,* Am. Pet. ¶ 301. Thus, the Petition alleges the law scheduling misoprostol and mifepristone as controlled substances classifies on the basis of physical condition because it singles out medications used to treat certain conditions, but not similarly safe and non-addictive drugs needed to treat *other* physical conditions, and thereby imposes different burdens on different classes of persons by virtue of the nature of their physical condition.

[7] Misoprostol is used to treat postpartum hemorrhage after birth, manage miscarriages, reduce the risk of gastric ulcers caused by nonsteroidal anti-inflammatory drugs, treat patients with osteoarthritis or rheumatoid arthritis, and prepare the cervix for a wide range of procedures (e.g. intrauterine device placements, cancer biopsies, and induction of labor). Am. Pet. ¶¶ 37–49. Mifepristone is used for miscarriage management, blocking cortisol receptors in Cushing's Syndrome patients with diabetes, labor induction, treatment of uterine fibroids, and treatment of ovarian cancer. *Id.* at ¶¶ 50–55.

Accordingly, the thrust of Plaintiffs' equal protection claim is that the Challenged Law is discriminatory on its face. By classifying misoprostol and mifepristone as controlled substances, the Challenged Law necessarily imposes burdens on Plaintiffs, their patients, and clients that are not imposed on those who take, prescribe, or dispense equally safe and equally non-addictive medications that are not scheduled as controlled substances. Am. Pet. ¶¶ 28–32. The very act of scheduling misoprostol and mifepristone as controlled substances subjects those drugs—as well as the healthcare providers who prescribe and dispense them and the patients who take them—to a complex regulatory scheme. Am. Pet. ¶¶ 68–85. Among other things, that regulatory scheme, which the scheduling of a drug immediately triggers: (1) intrudes on patient privacy; (2) requires prescribers to comply with lengthy and onerous prescription requirements when prescribing the medications; (3) prevents providers from delegating administration of the medications to anyone other than a doctor, registered nurse, or advanced practice nurse;[8] (4) jeopardizes patient health by necessarily delaying access to medications during critical emergencies and at pharmacies; (5) deprives patients relying on either drug to treat chronic conditions of the right to obtain a prescription for longer than six months; and (6) burdens dispensers by requiring that they handle, store, and delegate the dispensing of the drugs differently than they do with non-controlled substances.[9] Am. Pet. ¶¶ 86–198.

This is the epitome of a physical condition classification because it distinguishes "on the basis of one's health or handicap," *Revere*, 715 So.2d at 53, "the nature of an injury or condition, the needs of an injury or condition, or the severity of an injury or condition." Am. Pet. ¶ 299; *see Cook v. New Orleans Police Dep't*, 94-2490, p. 2–3 (La. App. 4 Cir. 7/26/95), 659 So.2d 530, 532–33; *Fiorella v. Sewerage & Water Bd.*, 411 So.2d 619, 619 (La. App. 4 Cir. 1982); *Leckelt v.*

[8] Defendants Murrill and the State of Louisiana erroneously argue that "Act 246 did not change [Plaintiffs'] authority to delegate the administration of controlled dangerous substances to staff members," *see, e.g.*, AG Br. ISO Holt Exception at 18. To the contrary, as described clearly in the Petition, Louisiana law specifically prevents any medical providers other than doctors, registered nurses, and advanced practice nurses from administering controlled dangerous substances. *See* La. Admin Code, tit. 46, pt. XLVII, § 3709(D)(1)(i); Am. Pet. ¶¶ 180, 193–94. That is not the case for non-controlled substances, and Act 246's scheduling of the drugs is the sole basis why Plaintiffs are no longer able to delegate the administration of these drugs to other trained personnel outside the restricted class of persons allowed for controlled substances.

[9] LBP seems to argue in its Exception that these statutory and regulatory requirements, which patients must now navigate and are incumbent on healthcare prescribers and pharmacists to follow, are irrelevant because they are not expressly contained in the body of Act 246 (the Challenged Law). *See, e.g.*, LBP Br. ISO Exception, 11 (arguing, for example, that adding all patient information to the Prescription Monitoring Program database, is "[n]ot requirement of Act 246"). To the extent LBP is making such an argument, it is nonsensical to suggest the only relevant facts and associated harm are requirements stated specifically on the face of legislation, when that legislation expressly adds and incorporates two medications into an existing comprehensive set of statutory and regulatory requirements.

*Bd. of Comm'rs of Hosp. Dist. No. 1*, 714 F. Supp. 1377, 1391 (E.D. La. 1989) *Cook v. New Orleans Police Department*, 94-2490 (La. App. 4 Cir. 7/26/95), p.2-3, 659 So.2d 530, 533.[10]

Like the laws that were held to classify on the basis of physical condition in well-established Louisiana caselaw, the Challenged Law imposes different burdens on classes of similarly situated people depending on whether their physical condition is treated with misoprostol and/or mifepristone or with another drug that is similarly safe and has a similarly low risk-profile. In other words, the law distinguishes based on physical condition by imposing burdens on medications *some* people need to treat their conditions, while not burdening *other* people whose conditions are treated with similarly safe medications. For example, pregnant patients who experience extreme nausea and vomiting may access doxylamine and pyridoxine, two safe, effective, and non-addictive treatments, easily at pharmacies without having to go through the process for obtaining a controlled dangerous substance. Am. Pet. ¶ 122. By contrast, patients who experience a miscarriage in pregnancy and require misoprostol and/or mifepristone are subjected to the burdens and administrative hurdles of the CDSL. *Id.* ¶¶ 110–121. The Challenged Law also imposes different burdens on classes of similarly situated healthcare providers depending on whether they treat and work with people whose physical conditions are treated with these drugs.

Plaintiffs further allege that there is no adequate purpose for the Challenged Law's classification and that the law is arbitrary, capricious, or unreasonable. Although many laws discriminate, a discriminatory law is unconstitutional only if it fails to satisfy the appropriate level of scrutiny. Here, because the law discriminates on the basis of Plaintiffs' patients' and clients' physical conditions, it is subject to intermediate scrutiny and must be invalidated if it is "arbitrary, capricious, or unreasonable." Am. Pet. ¶¶ 297–98; *see also Sibley*, 477 So.2d at 1108. Likewise, the law is subject to intermediate scrutiny because healthcare providers who treat and work with patients who rely on these drugs to treat their physical conditions are treated differently than similarly situated healthcare providers. Am. Pet. ¶ 31–32.

[10] Defendants Murrill, the State of Louisiana, and LBP take issue with Plaintiffs' definition of "physical condition" AG Br. ISO Birthmark Exc., 16; AG Br. ISO Holt Exc., 15; AG Br. ISO LaMothe Exc., 14; AG Br. ISO OB/GYN Exc., 15; AG Brief ISO Self Exc., 17; LBP Br. ISO Exc., 14–16. However, the Louisiana cases cited above all make clear that health conditions, medical diagnoses, and treatments qualify as "physical conditions." Moreover, at the pleading stage, Plaintiffs were not required to extensively cite caselaw or do more than make well-pleaded allegations—a standard that they clearly meet. *See* La. Code Civ. P. art. 891. *See also infra* at 8–21.

The Petition provides detailed allegations to sufficiently state a claim that the classification fails the appropriate level of scrutiny. This includes ample facts to negate any alleged state purpose for the Challenged Law. Neither misoprostol nor mifepristone carry any risk of abuse or dependence and, to the extent that the government argues that the Challenged Law is necessary for preventing abortion, abortion is already unlawful in nearly all circumstances in Louisiana, and the Challenged Law does little, if anything, to further that interest because the restrictions it imposes impact only *legal* prescribing for *non-abortion purposes*. Am. Pet. ¶¶ 199–259.

Further, the Petition describes the devastating consequences that the Challenged Law has on patient health and safety, including delayed access to vital treatment, Am. Pet. ¶¶ 86–172; and burdensome requirements for patients retrieving their prescriptions at pharmacies, *Id.* ¶¶ 110–120.[11] In addition to alleging concrete facts about each Plaintiff's injury, the Petition describes the relationship between Plaintiffs and their patients and clients and why Plaintiffs are in the best position to assert the interests of their patients and clients. *Id.* ¶¶ 132–172.[12] Finally, due to the foregoing allegations summarized here, the Petition alleges that the law cannot withstand intermediate scrutiny. *Id.* ¶¶ 199, 303. In the alternative, even if rational basis review applies, the Challenged Law cannot survive that standard because it bears no relationship to any asserted state interest. *Id.* ¶¶ 199, 303–04. Accordingly, the Petition states a valid equal protection claim under Article I, Section 3 of the Louisiana Constitution.[13]

*2. The Petition states two separate valid claims under Article III, Section 15 of the Louisiana Constitution.*

Next, all Plaintiffs adequately plead two prima facie claims under Article III, Section 15 of the Louisiana Constitution: (1) a single object claim and (2) a germane amendment claim. The Petition explains the legislative history of the Challenged Law, *see* Am. Pet. ¶¶ 260–295, that

[11] Specifically, although the Petition explains some of the heightened *risks* that the Challenged Law poses for patients whose physical conditions require treatment with misoprostol and/or mifepristone—including the potential for life-endangering situations—Plaintiffs' injury is not based on whether these consequences occur, as Defendants suggest. Instead, Plaintiffs' Article I, Section 3 cause of action is based on the *very fact* of the classification in the Challenged Law, which necessarily treats misoprostol and mifepristone differently than similarly situated drugs without any valid justification. Treating both drugs differently creates automatic impacts for Plaintiffs as regulated parties, businesses impacted by the burdens, and taxpayers; it also automatically results in discriminatory treatment for patients who rely on such drugs for their treatment. And discrimination in violation of the equal protection clause is a per se injury. *See infra* at 22–23. As a result, the Challenged Law's harmful impacts are current and ongoing, and in no way based on hypothetical possibilities. *See also infra* at 8–12.

[12] Moreover, while Defendants cherry-pick quotes from the Petition, it is overwhelmingly clear that every Plaintiff has tangible injuries for the claims asserted by that Plaintiff, and each Defendant has a statutory role in enforcement of the Challenged Law. *See infra* at 8–21. The Court should review the Petition in its entirety, and not be swayed by the limited, and often deceptive, way the Petition is cited and described in the Exceptions.

[13] Indeed, as explained herein, Plaintiffs have set forth sufficient facts to establish a prima facie case of unconstitutionality. *See infra* at 8–12.

misoprostol and mifepristone were added to Schedule IV of the CDSL in an amendment to an unrelated bill, Am. Pet. ¶¶ 260–274, and that the legislature did not have the opportunity to hear valuable community input on the bill because that amendment, which dramatically changed the nature of the bill, was proposed without prior notice to the public, then quickly adopted with no further public hearing on the bill. Am. Pet. ¶¶ 275–292.

The single object requirement provides that "[e]very bill . . . shall be confined to one object." La. Const. art. III, § 15(A). This rule reflects the principle that "[a] legislator should not have to consider the validity of two unrelated objects in deciding how to vote on a bill." *State v. Cooper,* 382 So.2d 963, 965 (La. 1980). To plead a cause of action under the single object rule, a plaintiff must allege that one law has two objects that are "incongruous and unrelated." *See id.*; *Matter of Rubicon, Inc.,* 95-0108, p. 6 (La. App. 1 Cir. 2/14/96), 670 So.2d 475, 480 (invalidating a law with two objects that did not have a natural connection to one another).

Here, Plaintiffs allege that the Challenged Law has at least two objects: (1) criminalizing those who provide abortion-inducing drugs to pregnant people without their knowledge or consent, and (2) heavily regulating healthcare providers, pharmacists, and others seeking to provide, dispense, administer, or obtain misoprostol or mifepristone for a wide range of legal medical purposes to people who consent to such treatment. Am. Pet. ¶ 309. Plaintiffs also allege that the law's title contains multiple objects. *See* Am. Pet. ¶¶ 268–69. Together, these allegations are more than sufficient to state a claim under the single object rule. *See, e.g.*, *Matter of Rubicon*, 670 So.2d at 480; *State v. Ferguson*, 28 So. 917, 918 (La. 1900) (invalidating law where both the legislation and the title contained multiple objects).

Additionally, Plaintiffs have properly pled a claim under the germane amendment rule in Article III, Section 15 of the Louisiana Constitution. The germane amendment rule provides that "[n]o bill shall be amended in either house to make a change not germane to the bill as introduced." La. Const. art. III, § 15(C). A legislative amendment is germane if it is "in close relationship, appropriate, relative, [and] pertinent" to the original bill. *Jones v. Bd. of Ethics for Elected Officials*, 605 So.2d 1064, 1067 (La. 1992). An amendment that is not sufficiently related to a bill violates the germane amendment requirement. *See, e.g.*, *Casey v. S. Baptist Hosp.*, 526 So.2d 1332, 1336 (La. App. 4 Cir. 1988) (finding amendments not germane and striking statutes as unconstitutional).

Plaintiffs allege that the amendment adding misoprostol and mifepristone to the CDSL was not germane to the bill as introduced, which is focused on preventing coercive abortion. Am. Pet. ¶¶ 263–281. The amendment, which was added late in the legislative process without prior notice and with no further public hearing on the bill, did not have a close relationship to the original bill, and it was not appropriate, related, or pertinent to it. Am. Pet. ¶ 318. Plaintiffs provide ample detail on the legislative history of the Challenged Law, its amendments, and the restricted public input that the legislature received on the final law as enacted. Am. Pet. ¶¶ 263–281. This is sufficient to plead a claim under the germane amendment requirement. *See Casey*, 526 So.2d at 1336. *Cf. A. & M. Pest Control Serv., Inc. v. LaBurre*, 170 So.2d 855, 859 (La. 1965) (holding that an amendment prohibiting certain types of employment contracts was not germane to a law requiring pest control operators to make certain monthly reports);[14] *see also* La. Code Civ. P. art. 854, cmt. a.

**B. The Petition Alleges Sufficient Facts to Support Each Plaintiff's Standing.**

Each Plaintiff has a right to assert their constitutional claims against the Defendants, as set forth below.[15] "Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." La. Code Civ. P. art. 681. Louisiana courts often refer to a "right of action" as standing, borrowing the common law term. *See, e.g.*, *Citizen Comm. for Better Law Enf't v. City of Lafayette*, 95-1630, p. 2–3 (La. App. 3 Cir. 11/20/96), 685 So.2d 289, 290–91 (describing Article 681 as "[t]he foundation of our standing requirement"). "The requirement of standing is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation." *Id.* at 290. "A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights." *La. Paddlewheels v. La. Riverboat Gaming Comm'n*, 94-2015, p. 5 (La. 11/30/94), 646 So.2d 885, 888. The requirement of standing ensures that a justiciable controversy is present in a case. *See Richardson v. Reeves*, 600 So.2d 138, 140 (La. App. 2 Cir. 1992). "A 'justiciable controversy' connotes an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or

[14] *A. & M.* was decided before the 1974 Constitutional Convention that drafted the current version of the Louisiana Constitution. Its decision was based on the 1921 Constitution's "Title-Body" clause, which is equivalent to the existing single object requirement. *See* La. Const. of 1921, art. III, § 16. However, courts at the time interpreted the single object rule to require germane amendments, just as the current germane amendment requirement now explicitly mandates. *See A. & M. Pest Control Serv., Inc.*, 170 So.2d at 855.

[15] Because Defendants' characterization of the relevant facts is not only incomplete but also misleading, key facts are summarized below regarding the rights and interests of each Plaintiff, as well as the patients and clients whose interests they represent. The recitations are not exhaustive; additional facts alleged in the Petition further support Plaintiffs' standing to pursue this case.

abstract," and it must also be "definite and concrete, touching the legal relations of parties having adverse legal interests." *St Charles Par. Sch. Bd. v. GAF Corp.*, 512 So.2d 1165, 1171 (La. 1987).

Importantly, Louisiana courts are clear that a case may proceed as long as just *one* of the plaintiffs has a right of action. In *Latour v. State*, for example, the Louisiana Supreme Court held that it was unnecessary to analyze whether the remaining plaintiff had standing after the Court held that "one of the plaintiffs has standing to raise the constitutionality" of the challenged law. 2000-1176, p.6 n.6 (La. 1/29/01), 778 So.2d 557, 560 n.6. Likewise, in *Bruneau v. Edwards*, the Louisiana Court of Appeal for the First Circuit explained that, "[a]lthough there are numerous plaintiffs with varying interests, the determination that the legislators have a right of action[] pretermits the necessity of discussing the other plaintiffs[']capacity to litigate this suit." 517 So.2d 818, 822 (La. App. 1 Cir. 1987); *see also In re Tufts Oil & Gas-III*, 03-1296, p.7 (La. App. 5 Cir. 3/30/04), 871 So.2d 476, 479 (declining to consider one party's standing to appeal once the court found that another party was "clearly a proper party appellant and we are thus able to address the merits of this appeal"). In *Bruneau*, the court relied on the U.S. Supreme Court's decision in *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). *See Bruneau*, 517 So.2d at 822.

Although just one plaintiff with standing would be enough to sustain this case, the Petition clearly establishes that each Plaintiff has standing to support this lawsuit. Plaintiff healthcare providers are either directly regulated by the law or experiencing negative business impacts as a result of the law that give rise to a concrete and ongoing injury. *See Walker v. State ex rel. La. Legislature*, 40,402, p.8 (La. App. 2 Cir. 12/21/05), 917 So.2d 1229, 1234 ("It is difficult to imagine what class of plaintiff would be appropriate to challenge the constitutionality of the statute[] . . . if defendants' argument is accepted. Some class of plaintiff must exist, since no legislation or governmental act can be beyond question in a free society."). In addition, all of the Plaintiffs seeking third-party standing adequately allege that they have the right to assert the interests of their patients and clients. And all Plaintiffs are Louisiana taxpayers who have alleged sufficient facts to support taxpayer standing.

1. *The Challenged Law directly regulates nearly all Plaintiffs, seriously affecting their rights.*

Most of the Plaintiffs bringing Article I, Section 3 claims are healthcare providers who are directly regulated by the Challenged Law. *See, e.g.*, Am. Pet. ¶¶ 193–95. These Plaintiffs—Dr. Holt, pharmacist Kaylee Self, the OB-GYN plaintiffs, and the Midwife plaintiff—prescribe,

dispense, and/or administer misoprostol as part of their regular medical practice. Plaintiff OB-GYNs and Plaintiff Midwife prescribe and administer misoprostol to treat postpartum hemorrhage, IUD insertions, labor induction, and miscarriage management. *See Id*. ¶¶ 56–57. Dr. Holt provides reproductive healthcare as a regular part of her practice, including IUD placements and miscarriage management. *Id.* ¶¶ 58–60. Both are procedures for which she currently prescribes misoprostol, and, if not for the Challenged Law, she had planned to dispense misoprostol and mifepristone directly to patients at her clinic for both procedures. *Id.* ¶¶ 58–61. And Kaylee Self fills prescriptions for misoprostol regularly in her job as a community pharmacist. *See id.* ¶ 66.

The Challenged Law, which amends the CDSL, imposes special obligations and limitations on Plaintiffs when they prescribe, dispense, and/or administer misoprostol and mifepristone. *See, e.g.*, *id.* ¶¶ 173–98. For example, as a direct result of the Challenged Law, the prescribing Plaintiffs must now go through at least five additional steps when they prescribe misoprostol or mifepristone that are not required when they prescribe non-controlled substances. *See id.* ¶ 154. Prescribers must also include certain mandatory information on prescriptions for misoprostol and mifepristone that are not required for non-controlled substances, such as the dosage amount and the number of refills. *See id.* ¶ 169. The law also restricts the administration of misoprostol and mifepristone by placing limits on who may administer controlled substances. *See id.* ¶ 180. And the law places obligations on pharmacists, like Plaintiff Kaylee Self, who must now verify that necessary information is included on a prescription before dispensing the medication. *See, e.g.*, *id.* ¶ 196.

Under the Challenged Law, directly regulated parties, including Plaintiffs, risk severe consequences, including imprisonment of up to 20 years, a fine of up to $30,000, and professional discipline, if they fail to comply with these requirements. *See id.* ¶¶ 78–81. As the state entities and officials who prosecute violations of the CDSL and impose professional disciplinary consequences on pharmacists and healthcare providers, each Defendant would have the authority to enforce the law against Plaintiffs, those in their medical practice, or their patients and clients in the event of a violation. *Supra* at 5. And, but for the Challenged Law, Plaintiffs would continue to treat misoprostol and mifepristone as they had before, just as they treat other equally safe and non-addictive medications that are not scheduled under the CDSL. *See* Am. Pet. ¶¶ 85, 129, 109**.**

Because of the many requirements classifying a drug as a controlled dangerous substance imposes on regulated parties, there is no question that the Challenged Law seriously affects

Plaintiffs' rights and interests. Indeed, it is axiomatic that a person who is directly regulated by a law has a right of action to challenge that law's constitutionality. In *Bruneau v. Edwards*, the Louisiana Court of Appeal for the First Circuit held that plaintiff legislators had standing to challenge a law that they alleged diminished their voting power by unconstitutionally conferring legislative powers on the governor. 517 So.2d at 822. The court agreed, holding that "the individual with the right to assert a challenge to acts that reduce the authority of the legislature is a legislator himself." *Id.* Likewise, here, the regulated Plaintiffs have a right of action to challenge a law that directly regulates their medical practice and obligations because it "seriously affects [their] rights." *La. Paddlewheels*, 646 So.2d at 888*; see also La. Indep. Auto Dealers Ass'n v. State*, 295 So.2d 796, 800 (1974) (holding that non-franchised auto dealers had standing to challenge the constitutionality of a law regulating them); *State in Interest of K.A.S.*, 54,446, p.11 (La. App. 2 Cir. 9/21/22), 348 So.3d 853, 861 (holding that foster parents interested in adoption had right of action to challenge a permanency plan because "they are persons directly affected" by the plan); *All. For Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 168–69 (5th Cir. 2024) (holding that nonprofit organization had standing to challenge Nasdaq stock market regulations because one of its members was listed by Nasdaq "and so is directly regulated by Nasdaq's rules").

*2. Two Plaintiffs have standing because they have experienced concrete business harms.*

Two Plaintiffs assert that the Challenged Law negatively impacts their business by requiring them to divert resources to comply with the law and forbidding them from engaging in certain desired business activities. Business impacts like these are sufficient to give rise to a right of action. *See, e.g.*, *Concerned Citizens of Rapides Par. v. Hardy*, 397 So.2d 1063, 1070 (La. App. 3 Cir. 1981) (holding that plaintiff had standing to challenge plan to construct a bridge over river because she alleged the bridge would delay deliveries that were necessary for her business to operate); *Holland v. Police Jury of Vernon Par.*, 56 So.2d 583, 588 (La. App. 1 Cir. 1952) (holding that liquor salesmen had right of action to challenge law restricting sale of liquor because they alleged their businesses would be "closed down if the ordinance is enforced"). *Concerned Citizens of Rapides Par. v. Hardy*, 397 So.2d 1063, 1070 (La. App. 3 Cir. 1981) (holding that plaintiff had standing to challenge plan to construct a bridge over river where she alleged that the bridge would delay deliveries that were necessary for her business to operate).

Birthmark Doula Collective alleges that its doulas routinely work with and advocate for pregnant people who are prescribed misoprostol for a variety of physical conditions, including postpartum hemorrhage, miscarriage management, and induction of labor. *See* Am. Pet. ¶¶ 63–65, 133. Birthmark further alleges that the Challenged Law concretely impacts the success and efficacy of its business model and its doulas' time and responsibilities. Specifically, Birthmark argues that the Challenged Law (1) diverts the organization's resources by requiring its doulas to learn new systems for the administration of misoprostol and/or mifepristone at the hospitals where they practice; (2) increases the time and intensity of its doulas' advocacy during the birthing process; and (3) interferes with Birthmark's ability to adhere to its ethics and values by imposing restrictions on access to two safe and effective medications that are regularly used in the delivery and post-partum recovery rooms where its doulas provide care. *See, e.g.*, *id.* ¶¶ 134–43.

In addition to her injury as a directly regulated medical provider, Dr. Holt alleges that Challenged Law has impacted her medical clinic, which provides a range of healthcare services, including reproductive health services. Before the Challenged Law was passed, Dr. Holt planned to dispense misoprostol and mifepristone directly at her clinic, as she does with other medications that are not controlled dangerous substances. She obtained a dispensing license to dispense medications, but did not—and does not want to—obtain a dispensing license to dispense controlled substances. *See, e.g.*, Am. Pet. ¶¶ 158–59. She alleges that complying with the necessary protocols for dispensing controlled substances would be "costly and administratively burdensome for her small clinic" and change the nature of her practice. *Id.* As a result, Dr. Holt's patients must visit pharmacies to retrieve their prescriptions for misoprostol, instead of obtaining them on-site at the clinic as they can with other similarly effective, safe, and non-addictive medications. *See* Am. Pet. ¶¶ 160–61. Dr. Holt further alleges that the Challenged Law threatens her medical practice by interfering with the trusting relationship she seeks to build with patients and making it more difficult for her to provide evidence-based treatment. *See, e.g.*, *id.*

*3. The Challenged Law discriminates against the patients and clients of Plaintiffs, who properly assert third-party standing on their behalf.*

Birthmark, Kaylee Self, Dr. Holt, the OB-GYN plaintiffs, and the Midwife plaintiff assert third-party standing on behalf of their patients and clients. Louisiana courts allow plaintiffs to assert the interests of third parties if: (1) there is a substantial relationship between the plaintiff and the third party; (2) the third party is hindered in asserting her own rights; and (3) the third party

would suffer irreparable damage unless the claimant were allowed to assert her rights. *See State v. Hollins*, 375 So.2d 922, 923 (La. 1979).[16] Louisiana courts have also embraced the third-party standing test used by federal courts, including the U.S. Supreme Court in *Craig v. Boren*, 429 U.S. 190 (1976), and *Carey v. Population Services International*, 431 U.S. 678 (1977), which permits a party to raise the interests of another person when the third party's rights would be "diluted or adversely affected" if the lawsuit fails. *See Craig*, 429 U.S. at 195. In *State v. Brenan*, for example, the Louisiana Supreme Court permitted the owner of a store to challenge a law prohibiting the sale of "obscene devices" on behalf of her customers, the "ultimate users." 1999-2291, 5 n.2 (La. 5/16/00), 772 So.2d 64, 68–69 & 68 n.2. Citing *Carey* and *Craig*, the Court explained that it was "clear" that the defendant could "assert the rights" of her customers because she is a vendor of such devices whose customers would have their rights "diluted or adversely affected by her failure in this suit." *Id.* at 68 n.2 (cleaned up) (citation omitted). Similarly, in *State v. Velez*, the Louisiana Court of Appeal for the Third Circuit overturned the trial court's finding that a criminal defendant did not have standing to assert the interests of jurors to be free from racial discrimination. 588 So.2d 116, 126 (La. App. 3 Cir. 1991).

Plaintiffs easily meet each of the requirements for third-party standing, as they allege: (1) they have close relationships with their patients and clients; (2) their patients and clients are hindered in their ability to assert their own interests because they do not know ahead of time whether they will need or be prescribed misoprostol or mifepristone; (3) their patients and clients will not be able to go into court during an urgent medical situation or while waiting for necessary medication at the pharmacy; and (4) the Challenged Law discriminates against their patients and clients because it treats them differently than people with physical conditions that require similarly effective and similarly non-addictive medications. *See generally* Am. Pet. ¶¶ 88–192. Additionally, Plaintiffs' patients' and clients' rights would be diluted and adversely affected if Plaintiffs fail in this lawsuit because they will continue to be treated differently than similarly situated patients by an unconstitutional discriminatory law. Specifically, Plaintiffs have demonstrated that the very act of scheduling misoprostol and mifepristone as controlled dangerous substances subjects their patients and clients to invasions of privacy, delayed access to medication,

[16] Although Defendants Murrill and the State of Louisiana cite the test for associational standing, that is not the correct standard for individuals asserting the rights of third parties with whom they have a close interest. *See La. Hotel-Motel Ass'n, Inc. v. E. Baton Rouge Par.*, 385 So.2d 1193, 1197 (1980). Even if the associational standing test applies, however, Plaintiffs meets it to the extent it is applicable. Defendants only contest the harm to Plaintiffs' patients and clients, but as set forth above and herein, the harm to Plaintiffs' patients and clients is real and ongoing.

burdensome requirements at the pharmacy, discriminatory treatment on the basis of their physical condition, and an increased risk of harm. *Id.*; *see also supra* at 8–12.

*4. All Plaintiffs have taxpayer standing to restrain enforcement of the Challenged Law.*

Finally, the Petition supports Plaintiffs' taxpayer standing and includes allegations about the fiscal burden imposed by the Challenged Law. Am. Pet. ¶¶ 15–22; 293–95. All Plaintiffs, including Kaitlyn Joshua and Nancy Davis, have a right of action as Louisiana taxpayers to sustain their claims under Article III, Section 15 of the Louisiana Constitution. Louisiana courts permit a taxpayer to sue 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." *La. Assoc. Gen. Contractors, Inc. v. Calcasieu Par. Sch. Bd.*, 586 So.2d 1354, 1357 (La. 1991). Unlike a plaintiff attempting to *compel* a government official to do something, plaintiffs seeking to restrain official activity can maintain a taxpayer-standing suit even if they do not have a special interest in the litigation beyond their status as taxpayers. *See id. Cf. League of Women Voters of New Orleans v. City of New Orleans*, 381 So.2d 441, 447 (La. 1980) (declining to find standing where plaintiffs "do not seek to restrain an increase in the burden of taxation," but rather "seek to compel an increase"). Crucially, "[t]he fact that the taxpayer's interest may be small and insusceptible of accurate determination is not sufficient to deprive [a taxpayer] of" his right of action. *La. Associated Gen. Contractors, Inc.*, 586 So.2d at 1357–58; *Ralph v. City of New Orleans*, 2006-0153, p. 3 (La. 5/5/06), 928 So.2d 537, 538–39 (finding taxpayer standing where plaintiffs challenged city ordinances acknowledging domestic partnerships, and holding that a taxpayer has standing based on "[t]he spending of tax money, no matter how miniscule").

Here, Plaintiffs are attempting to restrain the Defendants—state officials and administrative bodies with enforcement authority over the Challenged Law—from enforcing the Challenged Law. *See supra* at 5; *See, e.g.*, *Stonecipher v. Caddo Parish*, 51,148, p. 13 (La. App. 2 Cir 4/7/17), 219 So.3d 1187, 1196 ("The plaintiffs herein seek declaratory and injunctive relief. They clearly are attempting to *restrain* action . . . ." (emphasis in original)). They allege that the Challenged Law will "increase[] the tax burden of Louisiana citizens because 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 Challenged

Law].” Am. Pet. ¶¶ 294. At this stage of the litigation, this is more than sufficient to establish a right of action based on taxpayer standing.

### C. The Petition States a Justiciable Controversy Sufficient to Support Declaratory and Injunctive Relief.

#### *1. Plaintiffs properly alleged a justiciable controversy sufficient to give rise to declaratory relief.*

Under Louisiana law, the purpose of a declaratory judgment is “to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” La. Code Civ. P. art. 1881; *see also* La. Code Civ. P. art. 1871. The declaratory judgment law is “to be liberally construed and administered.” La. Code Civ. P. art. 1881. A person is entitled to declaratory judgment when a declaration “will remove the uncertainty or terminate the dispute.” *Terrebonne Par. Consol. Gov’t v. La. Dep't of Nat. Res.*, 2021-0486, p. 7 (La. App. 1 Cir. 12/30/21), 340 So.3d 940, 944 (citation omitted). To satisfy the requirements for a declaratory judgment, the facts pled in the petition must present a justiciable controversy. *Id.* A justiciable controversy is a substantial issue or dispute involving the legal relations of parties with real adverse interests. *Id.* While not identical to standing, the justiciable controversy requirement also ensures that the plaintiffs have a concrete stake in the litigation.

When the defendants have the authority to enforce a law that injures the plaintiffs, a justiciable controversy exists. For example, in *Louisiana Associated General Contractors, Inc. v. State*, the Louisiana Supreme Court issued a declaratory judgment declaring unconstitutional a law that required a certain percentage of funds expected to be expended on public works and procurement contracts be designated solely to “certified” minority and women's businesses. 95-2105, p. 2 (La. 3/8/96), 669 So.2d 1185, 1188 [hereinafter *LAGC*]. The plaintiffs were general contractors who argued that a barrier prohibiting members of a certain race from bidding equally on public contracts violated the equal protection rights afforded by the Louisiana Constitution. *Id.* at 1189. In holding that there was a justiciable controversy, the Court explained that the LAGC’s position was adverse to the State’s and that determining the constitutionality of the law would terminate the controversy. *Id.* at 1193. Specifically, the Court held that “[b]oth sides of the dispute have a significant interest in achieving a successful resolution of the case,” *id.*, and that the defendant state agencies had authority to enforce the challenged law in the future, *id.* at 1995; *see also La. Indep. Auto Dealers Ass’n*, 295 So.2d at 800–01 (holding that the State was a proper

defendant in declaratory judgment action because the State would represent consumers in proceedings against car dealers under the relevant statute).

Here, Plaintiffs allege sufficient facts to support a conclusion just like the one in *LAGC*. A judgment in their favor would eliminate the Challenged Law's regulatory burdens, allow Plaintiffs and their patients and clients to provide and receive care without the discriminatory treatment caused by the Challenged Law, remove the threat of enforcement by Defendants, and stop the State from using taxpayer resources to enforce an unconstitutional law that jeopardizes public health and welfare. Accordingly, Plaintiffs and Defendants have adverse interests with respect to the Challenged Law, which Defendants not only enforce but are actively defending, and there is a real dispute to be settled. As in *LAGC*, a judgment issued by this court would terminate this dispute. Therefore, Plaintiffs have an interest in this Court determining the constitutionality of the Challenged Law, and they are appropriately seeking a declaratory judgment.

*2. Plaintiffs have adequately alleged that they are entitled to injunctive relief.*

Plaintiffs also plead sufficient facts to support their request for injunctive relief. Injunctive relief is proper 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; *See Ouachita Par. Police Jury v. Am. Waste & Pollution Control Co.*, 606 So.2d 1341, 1350 (La. App. 2 Cir. 1992). Irreparable injury is a loss that "cannot be adequately compensated in money damages or measured by pecuniary standard." *Ouachita Par. Police Jury*, 606 So.2d at 1350 (citation omitted).

Here, the Petition alleges more than sufficient facts to satisfy the pleading standard for irreparable harm. As alleged throughout the Petition, the burdens and barriers imposed by the Challenged Law increase the risks to patient health and safety, including in emergency situations, interfere with patients' ability to timely access necessary medical care, and unconstitutionally discriminate on the basis of physical condition. *See supra* at 8–12. Such harms are not compensable in money damages. Indeed, violation of a constitutional right is per se irreparable. *State ex rel. Cotting v. Somerville*, 28 So. 977, 982 (La. 1900).

Furthermore, although Plaintiffs adequately allege an irreparable injury, they are not required to do so in this case. It is well settled that "[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 violation of a constitutional right." *Jurisich v. Jenkins*, 99-0076, p. 4 (La. 10/19/99), 749 So.2d 597, 599

(citation omitted).[17] Here, Plaintiffs have sufficiently alleged violations of their constitutional rights, including their right to equal protection. *See supra* at 8–14. Indeed, the Petition sets forth a prima facie case of a constitutional violation because the Challenged Law is a discriminatory classification based on physical condition. As such, Plaintiffs are relieved of the need to prove irreparable harm.

## II. Because Plaintiffs Met Their Pleading Burden, Each Defendant's Exception Should Be Denied.

Plaintiffs far exceed their pleading requirements. Nevertheless, each Defendant asks the Court to dismiss this important litigation. The State of Louisiana and Defendant Murrill's Peremptory Exceptions of No Right of Action must fail because Plaintiffs' Petition alleges sufficient facts to show that the Challenged Law concretely injures Plaintiffs and their patients and clients, and that those injuries are currently existing and ongoing. Even if the Court looks beyond the Petition for evidence of standing, the evidence in the record only confirms that Plaintiffs have a right of action. Further, both the State and Defendant Murrill overlook the well-established principle, supported by binding Louisiana law, enabling Plaintiffs to challenge the Challenged Law's constitutionality even though it has not yet been enforced against them.

Likewise, LBP's Peremptory Exception of No Cause of Action should be denied. The Petition alleges sufficient facts to support all three constitutional claims, and LBP is a proper Defendant in this action because it has enforcement authority with respect to controlled dangerous substances and dispensing licenses. LBP ignores binding authority requiring Plaintiffs challenging a statute's constitutionality to sue each entity that, like LBP, has a role in its enforcement. Moreover, LBP's arguments concerning Plaintiffs' equal protection claim fail to address a single relevant Louisiana case and are entirely off-base.

Finally, Defendant LSBME's Dilatory Exception of Prematurity must fail. Plaintiffs are asserting a proper pre-enforcement challenge to the constitutionality of a law that is currently injuring them, and the viability of their lawsuit does not require any ongoing or specific enforcement action. Nor would an administrative hearing be an appropriate forum for this constitutionality challenge. And, as with each of the defendants, a justiciable controversy exists

[17] Under *Jurisich*, "[o]nce a plaintiff has made a *prima facie* showing that the conduct to be enjoined is reprobated by law, the petitioner is entitled to injunctive relief without the necessity of showing that no adequate legal remedy exists." 749 So.2d at 599. Plaintiffs meet this alternative basis for injunctive relief because they have made a *prima facie* showing that the Challenged Law is unconstitutional. *See supra* at 8–14.

between the parties because LSBME has statutory authority to enforce the Challenged Law. For these reasons, this Court should deny all of the exceptions.

### A. The Court Must Deny the Exceptions Brought by Defendant Murrill and Defendant State.

This Court should reject Defendants' attempts to mischaracterize Plaintiffs' causes of action, injuries, and the relief they seek, and deny their exception of No Right of Action. A No Right of Action exception questions whether "the plaintiff . . . is a member of the class of persons that has a legal interest in the subject matter of the litigation." *Turner v. Busby*, 2003-3444, p.4 (La. 9/9/04), 883 So.2d 412, 415–16. An exception of No Right of Action assumes the truth of the allegations in the Plaintiff's petition. *See, e.g.*, *Bd. of Directors of La. Recovery Dist. v. All Taxpayers, Property Owners, and Citizens of the State of La.*, 529 So.2d 384, 386 (La. 1988). For example, the Court must accept as true that "Dr. Hunter . . . practices in a rural setting, where the impacts of [the Challenged Law] on patient care are particularly severe due to limited resources and the distance between hospitals, pharmacies, and a patient's home." Am. Pet. ¶ 147. It must also accept as true that her patients "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-equipped to handle excessive bleeding through the timely administration of misoprostol, which under most circumstances, is the first-line standard of care." *Id.* Additionally, it must accept as true that "[p]atients experiencing postpartum hemorrhage lose as much blood, and as quickly, as patients suffering from a gunshot wound." *Id.* at ¶ 5. And it must assume that, because of the Challenged Law, "[e]ven at the hospitals where Dr. Hunter practices, misoprostol is now significantly more difficult to obtain for patients experiencing life-threatening emergencies" than before the law was enacted. *Id.* at ¶ 147.[18]

Importantly, unlike an exception of No Cause of Action, an exception of No Right of Action assumes that *someone out in the public* belongs to the class of people who can challenge a law. Here, there can be no doubt that Plaintiffs, as the people most harmed by the Challenged Law, have standing to challenge it. *See La. Assoc. Gen. Contractors, Inc.*, 586 So.2d at 1358 (denying exception of no right of action because, "[i]f these individual contractors do not have the requisite

[18] "The hospital pharmacy is far from the labor and delivery unit, and, in one hospital where Dr. Hunter delivers, it is in a separate building. As a result, the hospital must send a runner to rush to the pharmacy and bring the drug back to a patient." Am. Pet. ¶ 147.

standing . . . , clearly no one does"); *Stewart v. Stanley*, 5 So.2d 531, 536 (La. 1941) ("If a taxpayer cannot complain [about the unconstitutionality of a law]—who else would have the right?").[19]

*1. The Attorney General and the State improperly rely on evidence outside the Petition, contrary to Louisiana law.*

Under Article 931 of the Louisiana Code of Civil Procedure, "evidence may be introduced to support or controvert" a peremptory exception, including an exception of No Right of Action, only "when the grounds thereof *do not appear from the petition*." La. Code Civ. P. art. 931 (emphasis added); *see Haynes v. Haynes*, 2002-0535, p. 5–6 (La. App. 1 Cir. 5/9/03), 848 So.2d 35, 38. Louisiana courts are clear that Article 931 authorizes a court to look beyond the pleadings only in the limited circumstances when a plaintiff's right of action is not clear from the petition.

In *State ex rel. Caldwell v. Molina Healthcare, Inc.*, the Supreme Court of Louisiana relied in part on Article 931 to reverse a lower court's conclusion that the Attorney General had no right of action to maintain its lawsuit. 2018-1768, p. 1, 22–23 (La. 5/8/19), 283 So.3d 472, 474, 487. The Louisiana Supreme Court reversed the lower court's finding of no right of action, holding that the allegations in the Attorney General's petition were sufficient to maintain the action and that external evidence could be introduced to evaluate an exception of no right of action "only when the grounds [for standing] do not appear from the petition." *Id.* at 487 (cleaned up).

Plaintiffs' detailed Petition clearly identifies the basis of each party's interest in this case. *See supra* at 14–21. Thus, there is no need for the Court to look outside the four corners of the pleadings. Plaintiffs allege three distinct theories of injury to sustain their action: (1) individual injuries suffered by the Plaintiffs as medical providers, directly-regulated parties, and business owners; (2) injuries suffered by the Plaintiffs' patients and clients; and (3) injuries that the Plaintiffs suffer as taxpayers. *See id.* Each of these injuries is more than adequately alleged and is independently sufficient to deny Defendant Murrill and the State's exceptions. However, as explained below, even if the Court looks outside the pleadings, the limited deposition testimony in this case so far only serves to further confirm each Plaintiffs' standing.

[19] Notably, much of Defendant Murrill's and the State of Louisiana's briefing seems to question whether a remedy could be provided to *anyone* based on the facts alleged in the petition. But that is not the proper posture for a no right of action exception. *See Lift La. v. State*, 2021-1453, p. 5 (La. App. 1 Cir. 6/3/22), 343 So.3d 203, 207 ("When facts alleged in the petition provide a remedy to someone, but the plaintiff who seeks the relief for himself is not the person in whose favor the law extends the remedy, the plaintiff lacks standing."). Here, the facts in the Petition provide a remedy to Plaintiffs and Plaintiffs have been injured by the Challenged Law, so they have both a clear right of action *and* a cause of action to maintain this suit. *See supra* at 8–21.

*2. The Attorney General and the State's arguments fail because Plaintiffs allege present, concrete injuries that support standing and justiciability.*

Defendant Murrill's and the State's insistence that Plaintiffs' standing hinges solely on hypothetical future injuries, *see, e.g.*, AG Br. ISO OB/GYN Exc., p. 5–6, is unsupported by the face of the Petition. Rather than meaningfully address the extensive and detailed harms alleged in the Petition, Defendants focus exclusively on narrow issues of theoretical harm invented by Defendants themselves out of whole cloth, which Plaintiffs have *not* alleged, nor are facts that would be necessary for Plaintiffs' claims. For example, Defendants announce that neither Birthmark nor its clients has "been denied access to these drugs," and on the basis solely of that fact, declare that, therefore, neither Birthmark nor its clients has suffered any harm as a result of the Challenged Law. *See* AG Br. ISO Birthmark Exc. 4–6. That proclamation is fairly remarkable since denial of access to the medication is *not* among the many harms Birthmark has specifically identified and alleged.[20] Likewise, as to Dr. Holt, Defendants declare that neither she nor her patients has suffered any harm because "she still has the ability to prescribe Misoprostol," notwithstanding that Dr. Holt never alleged that the Challenged Law would prevent her from *prescribing* misoprostol. *See* AG Br. ISO Holt Exc. 4.[21]

Although they spend significant time arguing that Plaintiffs' potential harm is hypothetical because they have failed to allege a narrow set of manufactured circumstances invented by Defendants, Defendants disregard the *actual* allegations set forth in the Petition and entirely ignore the nature of the claim at issue. Plaintiffs' standing is based on current and ongoing harm and does not depend on the future or hypothetical occurrence of any particular consequence. As explained in detail above, *see supra* at 8–12, 14–21, Plaintiffs are asserting an injury based on the *very fact* of the Challenged Law's discriminatory classification.[22] Among many other impacts, as a direct

[20] Notably, however, among the most grievous injuries Birthmark alleges, as to itself and its clients, is a client's access to misoprostol being delayed in the midst of an emergency post-partum hemorrhage, where timely access to that drug is often the best chance of saving the person's life. When Defendants deposed Birthmark's representative, she described this incident and further testified that clients have, in fact, hemorrhaged and been delayed in receiving misoprostol since the Challenged Law took effect. AG Br. ISO Birthmark Exc., 5–6. Undeterred, Defendants nevertheless declare that Birthmark "fails to demonstrate any actual harm their clients have received as the result of the passage of Act 246." *Id*. at 4.

[21] As explained herein, where Defendants encounter deposition testimony outside the narrow scope of harm they seek to arbitrarily impose on the case, Defendants simply wave it away. For example, as to the delay in care the Challenged Law has caused Birthmark and its clients, Defendants label Birthmark's representative's *sworn testimony* "not substantiated," and as to the law preventing Dr. Holt from dispensing misoprostol or mifepristone at her clinic, Defendants disregard her stated reasons, under oath, for not wanting to dispense controlled substances at her clinic, and say she simply needs to get a license "Or don't. It is her choice . . . ." AG Br. ISO Birthmark Exc., 6; AG Br. ISO Holt Exc., 13.

[22] Defendants' arguments that the medical providers have always been required to act differently with patients seeking Scheduled IV controlled and dangerous substances is of no relevance to the issue of standing to assert their

result of the Challenged Law and its discriminatory classification: (1) the regulated Plaintiffs must now spend more time, and engage in more steps, to prescribe and dispense both misoprostol and mifepristone to patients in need; (2) patients are subjected to intrusions on their privacy as a result of the Prescription Monitoring Program; and (3) misoprostol and mifepristone must be stored separately from non-controlled substances, causing delays and access barriers. Am. Pet. ¶¶ 88–192. For example, Dr. Perret alleged, which the Court must accept as true, that "each time she electronically prescribes [misoprostol] she now must click through five additional steps and related questions on her online prescription system . . . . When these burdens are multiplied by the frequency with which misoprostol is prescribed, often on a daily basis, they add significant administrative burdens and requirements for physicians, without any medical justification." *Id.* ¶ 154. And Kaylee Self alleges that she now is required to verify that patient information is entered into the Prescription Monitoring Program when she fills prescriptions, and that she must make more calls to prescribers to inform them of errors with prescriptions, which happen more frequently with controlled dangerous substances. *Id.* ¶¶ 166–67. Dr. Holt also alleges that the intrusions on privacy under the Challenged Law injure her patients, who take their privacy very seriously and seek to avoid "being monitored for receiving regular healthcare." *Id.* ¶ 161. These are current, ongoing, existing injuries caused by the Challenged Law.

To be sure, the Petition also describes the heightened health and safety risks associated with adding two safe, frequently used, and non-addictive medications to the CDSL, including a heightened risk of life-endangering delay during critical emergencies and a risk of access delays at the pharmacy.[23] These allegations demonstrate that there is a serious risk of severe consequences

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claims. *See* e.g., AG Br. ISO OB/GYN Exc., p. 18. Plaintiffs' claims do not challenge the existence of the CDSL as a general matter. Rather, they challenge the Challenged Law's arbitrary, capricious, unreasonable, and/or irrational inclusion of misoprostol and mifepristone in the CDSL. *See, e.g.*, Am. Pet. ¶¶ 7, 302. As explained herein, a law is not unconstitutional just because it discriminates between two types of people—it is only unconstitutional when it does so in a manner that does not meet the appropriate scrutiny level. *See supra* at 8–12, 48–49. Here, including misoprostol and mifepristone on the CDSL does not withstand any level of scrutiny. Misoprostol and mifepristone have been FDA-approved for 36 years and 24 years, respectively. Am. Pet. ¶ 200. Both drugs have a low incidence of adverse side effects. Am. Pet. ¶ 201. However, by definition, drugs that are classified in Schedule IV of the CDSL have a potential for abuse, a currently accepted medical use for treatment, *and* the potential to lead to physical dependence or psychological dependence if abused. Am. Pet. ¶ 202. Yet, neither drug carries any risk of abuse or causes patients to develop physical or psychological dependence. *See* Am. Pet. ¶¶ 203–248. Additionally, as set forth in the Petition, the Challenged Law is also downright dangerous and inconsistent with decades of scientific evidence regarding the safety of both drugs. *See, e.g.*, Am. Pet. ¶¶ 36–41; 88–109; 290–92. Moreover, as to the harm the unconstitutional classification causes to doctors, being required to comply with the regulatory regime as to other patients and drugs that are properly scheduled is in no way equivalent to being forced to act differently as to these patients and drugs for no legitimate medical purpose, and at the risk of harm to the patient.

[23] "One physician who was recently informed about Act 246 expressed significant concern about the prospect that misoprostol would no longer be on the obstetric hemorrhage cart that is easily accessible in postpartum patients' rooms after childbirth. 'What? That's terrifying,' he said. 'Take it off the carts? That's death. That's a matter of life and death.'" Am. Pet. ¶ 101.

that could result from the law's discriminatory classification, which negates any alleged government interest in support of the law. *See, e.g.*, *City of Lake Charles v. Chaney*, 468 So.2d 1191, 1193 (La. 1985) (holding that law creating selective rules for itinerant vendors was unconstitutional in part because its consequences "do[] not reasonably achieve the city's purpose"). Moreover, such allegations are in no way hypothetical future injuries. To the contrary, they are based on extensive and detailed allegations from multiple doctors and other healthcare providers with decades of experience providing care in Louisiana. Heightened risk of harm is a currently existing and ongoing cognizable harm that presents an existing justiciable controversy that courts are empowered to enjoin and prevent. To the extent that Defendants are suggesting that under such circumstances a court is required to wait until such harm actually occurs, this is an absurd allegation. Indeed, the very purpose of injunctive relief is to prevent future harm. *See* La. Code. Civ. P. art. 3601.

Additionally, the Challenged Law negatively impacts Birthmark's business practices and requires Dr. Holt, Ms. Self, and the OB-GYN Plaintiffs to act in ways that are burdensome to them while carrying out the discrimination of the Challenged Law. *See supra* at 14–18. For example, Birthmark alleges, which the Court must accept as true, that its doulas are the first people to identify when their clients are experiencing post-partum hemorrhages, and they will "be the first to notify members of the clients' care team that they require urgent administration" of misoprostol. Am. Pet. ¶ 137. Birthmark also alleges that the Challenged Law will hamper its ability to advocate for its clients in critical emergencies, making its advocacy "with medical professionals inefficient and significantly more time-consuming due to the frequency with which misoprostol is needed in routine obstetrics and gynecology care." Am. Pet. ¶ 139. [24]

[24] There are too many such allegations in the Petition to restate them all but, among other things, the Petition explicitly alleges that the Challenged Law "harms patients who require misoprostol or mifepristone to treat their physical conditions, as well as the medical professionals seeking to provide timely, appropriate, and compassionate care, by (1) impeding and delaying access to potentially lifesaving medications for patients experiencing critical emergent situations, (2) creating unnecessary, burdensome and possibly prohibitive barriers to access for patients who rely upon misoprostol or mifepristone to manage and treat their chronic physical conditions, and (3) subjecting all patients who need a prescription for misoprostol or mifepristone to an intrusive monitoring system that interferes with their privacy." Am. Pet. ¶ 29. It alleges that, "[b]y contrast, patients with similarly situated physical conditions who are treated with other medication that have a similar risk profile as misoprostol and mifepristone—meaning drugs with a very low risk profile, both in terms of adverse events and the potential to cause abuse or dependence—do not face these same burdens and barriers to accessing necessary medical treatment, nor do they face the associated infringement on patient dignity and medical autonomy that will result" from the Challenged Law. *Id.* ¶ 30. And it alleges there are "dozens of additional statutory and regulatory requirements for physicians, nurses, manufacturers, distributors, pharmacists, and patients that apply when a drug is on the Schedule IV list and do not apply if a drug is not scheduled." *Id.* ¶ 85.

Importantly, the magnitude of an injury is irrelevant for the purpose of determining standing; Plaintiffs can maintain a lawsuit as long as their rights are violated, as they are here. *See Uzuegbunam v. Preczewski*, 592 U.S. 279, 802 (2021) (holding that "a completed violation of [plaintiff's] constitutional rights" was a redressable injury even though he only had a claim for nominal damages); *Bruneau*, 517 So.2d at 822 (holding that legislators had standing to challenge law regulating the legislature without regard to the magnitude of the regulation).

Moreover, despite Defendants' confusion on this point, Louisiana courts are clear that litigants can challenge a law's constitutionality even if it has not yet been enforced against them. There are numerous examples of Louisiana courts allowing parties to challenge a statute's constitutionality when there is "an actual present or *immediately threatened* injury resulting from unlawful governmental action," *State v. Rochon*, 2011-0009, p. 8 (La. 10/25/11), 75 So.3d 876, 882 (emphasis added) (citation omitted)—even if the defendants have not yet taken any enforcement action against the party challenging the law. In *Hichell v. Louisiana State Board of Optometry Examiners*, for example, the court held that an optometrist could challenge the constitutionality of a law that threatened optometrists with fines or imprisonment if they worked for a corporation. 128 So.2d 825, 828–29 (La. App. 3 Cir. 1961). Although the plaintiff had not lost his license or been subjected to fines or prosecution under the law, the Court held that there was a justiciable controversy because the plaintiff was "threatened with substantial uncertainty and insecurity" as a result of the challenged law. *Id.* "We do not think that the plaintiff should be required to continue in his practice of optometry at his peril that charges will subsequently be filed . . . ." *Id.* at 829. Similarly, in *Theodos v. City of Bossier City*, the court held that there was a justiciable controversy[25] enabling the plaintiff to challenge a law regulating the sale of alcohol, even though the law had not been enforced against him. 106 So.2d 851, 853–54 (La. App. 2 Cir. 1958). The court explained that the fact that the plaintiffs were "threatened . . . with prosecution" was sufficient to establish a justiciable controversy. *Id.*; *see State v. Powdrill*, 95-2307, p. 9 (La. 11/25/96), 684 So.2d 350, 357 (La. 1996) (holding that, for the purposes of standing, "it is

[25] In fact, "the requirement of a justiciable issue and the requirement of standing to bring the action are separate and distinct requirements. The distinction between these two concordant concepts may sometimes be blurred because 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." *In re Melancon*, 2005-1702, p. 8–9 (La. 7/10/06), 935 So.2d 661, 667–68 (cleaned up). Here, Plaintiffs have standing *and* they are sufficiently adverse to the Defendants—all of whom have enforcement authority under the Challenged Law—as to give rise to a justiciable controversy. *See supra* at 14–22.

sufficient to show that there is a realistic danger of sustaining a direct injury as a result of the operation or enforcement of the law"). *See supra* at 8.

*Louisiana Federation of Teachers v. State* is not to the contrary. In that case, the Louisiana Supreme Court held that the teacher union's declaratory judgment action against the State did not present a justiciable controversy because numerous contingencies had to take place before the potential injury would occur. 2011-2226, p. 3–4 (La. 7/2/12), 94 So.3d 760, 763–64. Despite its holding, the Court explained that a justiciable controversy exists, regardless of whether the defendants have enforced the law against plaintiffs, as long as "(1) the issues are fit for judicial decision; and (2) the parties will suffer hardship if the court withholds consideration." *Id.* The court explained that "hardship" occurs if "a law affects a party's primary conduct and is felt immediately by those subject to it in conducting their day-to-day affairs.'" *Id.* (citation omitted).[26]

Here, like the optometrist in *Hichell* and the business owners in *Theodos*, Plaintiffs have a justiciable pre-enforcement challenge because the Challenged Law is currently affecting their primary conduct and day-to-day affairs, including their medical practice, their businesses, taxpayer spending, and the care provided to and received by their patients and clients. *See, e.g.*, *Walker*, 917 So.2d at 1234–35 (holding that attorney who was previously a member of the Indigent Defender Board and hoped to be appointed again had standing to challenge appointment process); *Holland*, 56 So.2d at 587 (holding that, as liquor salesmen, plaintiffs had a right of action to challenge law forbidding the sale of alcoholic beverages).

*3. Contrary to the Attorney General and the State's assertions, Louisiana courts have long recognized taxpayer standing to challenge unconstitutional laws in similar cases.*

Finally, as taxpayers, all Plaintiffs have a recognized interest in enjoining the enforcement of legislation that increases taxpayer costs, jeopardizes the health and safety of Louisianans, and was passed in violation of the Constitution. *See supra* at 20–21. Instead of explaining why Plaintiffs fail to allege sufficient facts to support taxpayer standing, Defendants Murrill and the State protest, without analysis or explanation, that Plaintiffs' "claims of potential tax burden are markedly different than the burden raised in the cases cited." *See, e.g.*, AG Br. ISO Holt Exc., 22. To the contrary, Louisiana courts have a long history and tradition of recognizing taxpayer

[26] *Rambin v. Caddo Par. Police Jury*, relied upon by LSBME, *see* LSBME Br. ISO Exception at 4 n.1, is not on point, because in that pre-enforcement challenge, the petitioners did not include any allegations making it clear that they engaged in or wished to engage in conduct affected by the law. 316 So.2d 499, 501–02 (La. App. 2 Cir. 1975).

standing to challenge an unconstitutional law—particularly, as here, when a lawsuit alleges that a law was enacted in violation of the Constitution's requirements for legislative instruments. Plaintiffs' allegations demonstrate that they are similarly situated to a variety of other taxpayers who have successfully asserted taxpayer standing to challenge a law's constitutionality.

For example, in *Retired State Employees Association v. State*, a group of taxpayers challenged the constitutionality of a law creating a cash balance retirement plan for certain new state employees. 2013-0499, p. 2 (La. 6/28/13), 119 So.3d 568, 570. Like Plaintiffs here, the plaintiffs in *Retired State Employees Association* argued that the law was passed in violation of the constitutional requirements for new legislation—specifically, that the law needed a two-thirds majority rather than a simple majority to pass. *Id.* at 571. The Court held that the plaintiffs had standing as taxpayers because they alleged that the retirement provisions would "increase state expenditures." *Id.* at 573. As the Court explained, even though there was "no ultimate factual determination by the district court that [the law] would necessarily increase the state's contributions to the retirement system, . . . [t]he spending of tax money, no matter how miniscule the effect on the State's budget, clearly affects the public fisc." *Id.* at 574.

Likewise, in *Ralph v. City of New Orleans*, the Louisiana Supreme Court held that taxpayer plaintiffs had standing to challenge a New Orleans ordinance that created a registry to provide health insurance coverage to the domestic partners of City employees. 928 So.2d at 538–39 (holding that allegation that law would impact the City budget, "no matter how small and indeterminable," was sufficient to confer standing). Many other cases cited by Defendants similarly stand for the principle that a taxpayer has a right of action to challenge a law plaintiffs allege will result in increased tax spending. *See, e.g.*, *La. Assoc. Gen. Contractors, Inc.*, 586 So.2d at 1357–58 (permitting taxpayer standing to challenge a prevailing wage rate provision in public contracts); *Meredith v. Ieyoub*, 96–1110, p. 4 (La. 9/9/97), 700 So.2d 478, 480–81 (allowing taxpayers to proceed where they challenged a contract executed by the Attorney General that granted private law firms the right to investigate and prosecute state environmental damage claims); *Hudson v. City of Bossier*, 36,213, p. 6 (La. App. 2 Cir. 8/14/02), 823 So.2d 1085, 1089 (holding that taxpayer plaintiffs had right of action to challenge city's decision to contract away its right to levy a per-person boarding tax on riverboat gaming operations).

Even when there is no definitive proof that a law will result in increased tax spending, Louisiana courts have held that taxpayers have a right of action to restrain unlawful state conduct. In *Louisiana Associated General Contractors, Inc.*, the Supreme Court of Louisiana held that a group of taxpayers had standing to challenge a rule requiring contractors and subcontractors to pay a prevailing wage rate set by the Louisiana Department of Labor. 586 So.2d at 1358–59. Although the court held that the plaintiffs had not proven "that the Board's action would, with certainty, increase their tax burden," it explained that the plaintiffs, who were contractors that had submitted bids and hoped to be awarded contracts with the School Board in the future, had standing because they had a keen interest "in maintaining the integrity of the public bid process in Louisiana." *Id.* at 1358. "No one could have a more personal stake in the legality of these public bid contracts than those bidding on the contracts." *Id.* Likewise, in *Alliance For Affordable Energy v. Council of City of New Orleans*, the Court held that plaintiff taxpayers had standing to challenge city contracts based on their allegations that the contracts would "burden . . . the tax base" *and* their interest in the "health and welfare of the residents of Orleans Parish." 96-0700 (La. 7/2/96), 677 So.2d 424, 429; *see also Meredith*, 700 So.2d at 480–81 (holding that taxpayers' interest in defending themselves against legal action from the state gave them a right of action even where there was not clear evidence of a tax increase). Moreover, the Supreme Court of Louisiana has recognized an especially "broad standing conferred on citizens and taxpayers" when, as here, plaintiffs assert that a law was passed in violation of the Constitution. *Shepherd v. Schedler*, 2015-17509, p. 12 (La. 1/27/16), 209 So.2d 752, 764; *see also Retired State Employees Ass'n*, 119 So.3d at 574.

Defendant Murrill and the State argue that Plaintiffs have failed to show how tax spending will increase as a result of the Challenged Law. Specifically, they argue that Plaintiffs have failed to show that the Challenged Law will result in increased spending of the Attorney General or the State in particular. But Louisiana courts have never suggested that taxpayer standing requires a plaintiff to prove that the challenged law will require every defendant to spend money, or to specifically explain how spending will increase. In *Retired State Employees Association*, for example, the Court held that plaintiffs had standing because they alleged generally that the law would "increase the state's contributions to the retirement system." 119 So.3d at 574. The Court did not also require the plaintiffs to show that the official budget of *each* defendant—including the Attorney General and the Treasurer—would be impacted by the challenged law; *see also Hudson*, 823 So.2d at 1089 (holding that taxpayers had standing where they argued that contract would

cause an increase in tax spending, even where there was no suggestion that the other defendants, who were private entities, were funded by tax revenues). Likewise, here, Plaintiffs' allegation that the Challenged Law will result in increased tax spending is sufficient for taxpayer standing without showing that each individual defendant will spend more as a result of the law.[27] *See supra* at 20–21. Moreover, Defendants, again, invoke the incorrect standard at the pleading stage by protesting that Plaintiffs have not alleged additional facts in support of what they characterize as generalized allegations. However, Plaintiffs have plausibly identified and alleged specific government action that is likely to increase tax spending through the operation of specific government entities. Nothing more is required at this stage of the proceedings.

Here, in addition to allegations about the Challenged Law's impact on tax spending—which are sufficient at this stage of the litigation to maintain this lawsuit—Plaintiffs also allege a variety of other concrete interests in this litigation. *See supra* at 14–20. Moreover, Plaintiffs Kaitlyn Joshua and Nancy Davis allege interests based on their work as advocates supporting the health and welfare of pregnant women and women seeking reproductive healthcare in Louisiana. *See* Am. Pet. ¶¶ 18, 20. As in *Alliance For Affordable Energy*, Plaintiffs allege that the Challenged Law will impact the health and welfare of Louisianans. *See e.g.* Am. Pet. ¶ 4. Given Nancy Davis and Kaitlyn Joshua's current and prior work and their demonstrated commitment to safe and accessible healthcare, they have a vested interest in ensuring that Louisiana's laws promote reproductive health and do not jeopardize health and safety in the state. The same is true of the other Plaintiffs in their medical and patient-support fields. These interests, paired with their allegations about an increased burden on the public fisc, provide Plaintiffs with a right of action as taxpayers.

*4. The Attorney General and the State's arguments mischaracterize Plaintiffs' allegations of patient and client harm.*

Defendants Murrill and the State erroneously argue that Plaintiffs fail to allege that their patients and clients have been harmed by the Challenged Law, and proceed to claim that no Plaintiff's patients' rights have been affected because the harms alleged are purportedly all

[27] This also defeats Defendant LSBME's and Defendant LBP's similar arguments about taxpayer standing. Specifically, Defendant LSBME asserts that the fact that it is not funded through the general tax revenue defeats Plaintiffs' taxpayer standing. LSBME Br. ISO Exc., 5–6 n.2. Similarly, Defendant LBP asserts that it does not deposit its revenues in the state treasury. LBP Br. ISO Exc., 17 n.65. But these assertions are irrelevant to the viability of Plaintiffs' taxpayer standing. *See also supra* at 20–21, 30–33.

hypothetical and speculative.[28] This could not be further from the truth. The Petition contains extensive allegations about the concrete negative impacts that the Challenged Law has on pregnant people, people experiencing miscarriages, and others whose physical conditions require them to take misoprostol and/or mifepristone. *See generally* Am. Pet. ¶¶ 88–131.[29] These impacts occur as a direct result of the scheduling of misoprostol and mifepristone under the CDSL, which necessarily requires patients and clients to be treated differently if they rely on either or both drugs to treat their physical conditions than if they relied on other drugs with a similar risk and dependency profile. *Id.* Thus, Plaintiffs' patients and clients are currently experiencing these harms by virtue of the scheduling of both drugs—a harm that has already occurred, and that will continue to cause injuries every day that it remains in effect.

As explained above, Plaintiffs allege that the Challenged Law currently harms their patients and clients because it draws an unconstitutional classification between (1) misoprostol and mifepristone, and (2) other similarly safe and effective medications. *See supra* at 8–12, 14–21. As alleged in the petition, the classification itself is discriminatory because it subjects patients whose physical conditions require treatment with misoprostol and/or mifepristone to differential treatment not faced by similarly situated people with physical conditions that require treatment by other safe, effective, and non-addictive medications. *See generally* Am. Pet. ¶¶ 88–131 (describing the special process patients' doctors must follow to prescribe controlled substances, the Prescription Monitoring Program, and the secure storage requirements for controlled dangerous substances, which impact patient treatment).[30] The Petition identifies specific similarly situated populations, including victims of gunshot wounds, pregnant patients who need nausea medications, and asthma patients requiring asthma medications, who are not required to follow

[28] *See* AG Br. ISO Birthmark Exc., 14; AG Br. ISO Holt Exc., 12; AG Br. ISO LaMothe Exc., 12; AG Br. ISO OB-GYN Exc., 12; AG Br. ISO Self Exc., 15.

[29] Defendants Murrill and the State of Louisiana argue that it is unclear whose patients the term "patients" refers to. *See, e.g.*, AG Br. ISO Holt Exc., 16. But the petition is clear that it uses the term patients to refer to those with physical conditions that require treatment with mifepristone and/or misoprostol, and that all of the Plaintiffs asserting third-party standing have a close relationship with people who meet that definition. As a result, "patient" refers to the patients of Dr. Holt, the OB-GYN plaintiffs, the Midwife plaintiff, and Kaylee Self, and "clients" refers to pregnant people who work with Birthmark. *See* La. Code Civ. P. art. 891; *Thibodeaux v. Jones & Lockhart, Inc.*, 393 So.2d 291 (La. App. 1 Cir. 1980) (explaining that a trial court must draw "reasonable inferences" from a petition and that "all doubt must be resolved in favor of the validity of the petition").

[30] Defendant LBP argues that, pursuant to Rule 2717B, controlled substances may be kept by pharmacies and institutional practitioners with non-controlled substances to avoid theft. *See* LBP Br. ISO Exc., 5. Indeed, the petition states that controlled substances must be stored separately from other drugs "[i]n most cases." Am. Pet. ¶ 95. However, even if that is the case, dispersing non-controlled drugs with controlled drugs will be administratively burdensome, and controlled substances must be treated differently than non-controlled substances in a variety of ways by pharmacies and hospitals. *See generally id.* ¶¶ 94–123. Most importantly, LBP does not dispute that these drugs must now be kept in locked storage.

any of the CDSL restrictions as a result of the Challenged Law, despite the fact that the drugs they rely on for their physical conditions are equally safe and non-addictive. *See* Am. Pet. ¶¶ 108–09, 122–23, 129. As a result, Plaintiffs do not assert that their patients and clients will suffer an injury based on hypothetical situations, but allege that the Challenged Law causes their patients and clients to be treated less favorably than similarly situated people. *See, e.g.*, *Hichell*, 128 So.2d at 829; *Walker*, 917 So.2d at 1234–35.[31] *See also supra* at 8–12, 14–21.

The cases Defendants rely upon arise in unrelated circumstances that do not support a different result here. For example, in *Soileau v. Wal-Mart Stores, Inc.*, an employee at Wal-Mart sued her employer, alleging that it was illegally preventing her from obtaining medications from any pharmacy other than Wal-Mart. 2019-0040, p. 2–3 (La. 6/26/19), 285 So.3d 420, 424. The only problem was that Wal-Mart had never *actually* failed to furnish her with "proper medical attention" or caused her to experience "delays or deficiencies in filling prescriptions." *Id.* at 422. The court held that the employee's claim did not present a justiciable controversy because it was dependent on the possibility of "abstract harm she might suffer in the future if Wal-Mart is permitted to restrict her to its own pharmacy." *Id.* at 425. And the Court's decision was based in part on a specific worker's compensation claim, which does not apply here. *Id.*

By contrast, Plaintiffs argue that the mere fact that misoprostol and mifepristone are scheduled as controlled dangerous substances has caused—and will continue to cause—harm to their patients and clients. It subjects Plaintiffs' patients and clients to a complex regulatory scheme, necessarily entailing delays, intrusions on privacy, administratively burdensome prescription requirements, and interference with the delegation of the administration of controlled dangerous substances, among other things. This is sufficient to demonstrate a non-speculative, concrete injury because Plaintiffs and their clients and patients who are prescribed misoprostol and/or mifepristone are presently impacted by the Challenged Law, not simply hypothetically impacted. *Compare Walker*, 917 So.2d at 1234–35 (holding that attorney had standing to challenge the constitutionality of appointment process that regulated his ability to serve on indigent defender board, even though he was not currently serving on the board) *with State v. Mercadel*, 2003-3015, p. 8 (La. 5/25/04), 874 So.2d 829, 834 (holding that criminal defendant, who moved to quash his indictment for first-

[31] Similarly, pharmacist Kaylee Self also alleges standing based on her status as a pregnant person at the time that the petition was filed. *See* Am. Pet. ¶¶ 21, 67, 172. Like Plaintiffs' clients and patients, Self was discriminated against as a pregnant person who was at risk of a variety of physical conditions that are treated with misoprostol and/or mifepristone.

degree murder, could not challenge the constitutionality of laws that had not harmed him); *see also Prator v. Caddo Parish*, 2004-0794, p. 6–7 (La. 12/01/04), 888 So.2d 812, 816 (holding that possibility that parish would decline to fund food, laundry, and other expenses for pretrial detention center was "based on a contingency which may or may not occur" but that parish's request for a credit from the sheriff based on an actual demand for a credit represented an adverse relationship that gave rise to a justiciable controversy).[32]

*5. Even if the Court considers deposition testimony, that testimony strengthens—not undermines—Plaintiffs' standing.*

The Petition clearly alleges the basis for each Plaintiff's right of action. *See supra* at 14–21. Therefore, it is unnecessary for the court to look to the depositions when ruling on Defendants' exceptions. Even if the Court reviews the depositions, however, that evidence only further confirms that Plaintiffs have standing to sue. Defendants' cherry-picked quotations and misleading references do not alter the fact that each Plaintiff presented clear evidence about the many ways that the Challenged Law injures them, giving rise to standing to sue.

*a. Birthmark Doula Collective: concrete harms to clients, staff, and mission.*

Birthmark's deposition confirms that its clients are regularly prescribed misoprostol and/or mifepristone for a variety of conditions, including post-partum hemorrhage, IUD administration, birth control, and miscarriage. Birthmark Dep. 17:11–18. The deposition detailed at least two specific instances where Birthmark's clients have already suffered specific adverse consequences as a result of the law of the exact nature described in the Petition, which Defendants nevertheless claim are hypothetical and speculative: first, a client who had difficulty accessing miscarriage management medication, and second, a client who was "actively hemorrhaging" and experienced a significant delay at the hospital before receiving misoprostol. *Id.* 22:12–23:4. Incredibly, Defendants claim that Birthmark did not allege this issue in the Petition, which is patently untrue. Birthmark alleged that its doulas are sometimes the first to even notice signs of post-partum hemorrhage, and work with clients who have needed misoprostol in such instances. Birthmark specifically alleged concerns for client safety in situations of post-partum hemorrhage because of the delays caused by misoprostol being kept in secure storage areas away from labor and delivery,

[32] Likewise, Defendants' reliance on *Lift Louisiana v. State* is misplaced. 343 So.3d at 208. Plaintiffs here allege specific adverse consequences that are occurring *now* as a result of the classification of misoprostol and mifepristone as controlled dangerous substances.

despite how urgently such medication can be needed to treat post-partum hemorrhage. Am. Pet. ¶¶ 63, 134–35, 137. Notwithstanding, Defendants then declare the facts elicited under oath of a specific instance of that exact nature as "unsubstantiated" and proceed to reassert "Birthmark's testimony is that neither they nor their clients have suffered any harm." AG Br. ISO Birthmark Exc., 6. That is an absurd twisting of both the facts and law: the deposition testimony *is* substantiating evidence of the allegations, and Plaintiffs are not required to present any evidence at this stage of the proceedings, regardless. Further, the organization's representative explained that the Challenged Law harms the organization's mission because Birthmark "desires to provide care with dignity and with respect to all people," and its clients have experienced concrete delays and harms since the law went into effect that jeopardize its ability to meet that goal. Birthmark Dep. 21:13–18.

Birthmark also provided concrete evidence of the business impacts that the Challenged Law has had on the organization. Birthmark described a specific doula who took a leave of absence after experiencing a client's traumatic delay in accessing misoprostol during a hemorrhage, which concretely impacted the organization's business, including its contracts and "the number of clients that we are able to serve." *Id.* 23:21–25. Since the Challenged Law went into effect, doulas have taken sabbaticals due to "secondary trauma" they experienced after witnessing a client who was unable to obtain misoprostol in a timely manner during a hemorrhage. *Id.* 66:2–67:5. Additionally, the Challenged Law has forced Birthmark to restructure and reframe the conversations that its doulas must have with clients to prepare them for the birthing experience. *Id.* 30:16–31:24.

Defendants Murrill and the State of Louisiana fixate on Birthmark's statement, in response to a direct question from counsel, that its doulas have not *personally* been unable to obtain mifepristone or misoprostol since the enactment of the Challenged Law, but as clearly alleged in the Petition, Birthmark's doulas do not personally prescribe or obtain the drugs for patients. Instead, it is an organization that provides support to pregnant people and has a mission of ensuring safe and dignified experiences for its pregnant clients. Birthmark's doulas advocate for the rights of their clients by (1) helping to ensure their client's wishes related to their birth plan and birth experience are met, (2) helping to empower the client's partner to advocate for their birthing partner, and, (3) directly communicating with members of a patient's medical team if the patient is endangered, in pain, or otherwise needs medical assistance. *Id.* 44:24–47:6, 63:18–65:23.

Birthmark's deposition makes clear that the Challenged Law is causing current and ongoing harm to its clients, its doulas, and the organization's ability to act in accordance with its mission.

*b. Nancy Davis: taxpayer standing and public health mission-driven injury.*

Nancy Davis is asserting taxpayer standing to raise two claims in this action: a violation of the single object rule and a violation of the germane amendment rule. *See supra* at 12–14, 20–21, 30–33. Her deposition confirms that she has standing to assert both claims because she is an advocate who focuses on reproductive justice and strives to "bridg[e] gaps in healthcare access, and help[] other individuals who are facing struggles with accessing safe legal healthcare." Davis Dep. 7:11–23. Her foundation, the Nancy Davis Foundation, has been impacted by the Challenged Law because the bill "puts barriers in place" to safe reproductive healthcare, which "makes the [Foundation's] mission even more difficult and important than ever." *Id.* 13:20–14:13; 19:19–20:1. Ms. Davis further testified that she did not have an opportunity to advocate against the Challenged Law when it was introduced in the legislature (*Id.* 12:1–9), which was precipitated by the abbreviated timeframe where the bill was amended without any meaningful opportunity for members of the public to weigh in. Although Defendants argue that she has no standing because she does not prescribe or administer misoprostol or mifepristone and has never been prescribed either, her standing to sue was never alleged or predicated on that basis. Ms. Davis's standing is based on her status as a taxpayer and advocate who is concerned about the law's impact on public spending and the health and welfare of Louisianans. *See supra* at 20–21, 30–33.

*c. Dr. Holt: Burdens on care, clinic, and provider safety.*

During Dr. Holt's deposition, she testified that her new clinic, Poppy Direct Care, sees patients between the ages of 18 to 45 and provides a "complete scope of primary care including sexual and reproductive healthcare." Holt Dep. 7:19–21. To illustrate, she described a concrete, specific instance when a patient sought healthcare that could be treated with misoprostol. *Id.* 17:6–24. When asked about the harm she has experienced from the law, Dr. Holt provided concrete and specific details about her clinical model, which necessitates dispensing medications on-site, and the injury she is enduring because she does not have a license to dispense controlled dangerous substances. *E.g.*, *Id.* 18:14–22:3. Additionally, she described why it is not part of her clinical model—and would in fact be risky and harmful to her as a solo medical provider—to dispense controlled dangerous substances at her clinic. *Id.* 25:13–26:14. She explained that she is a "single female physician in a building," and that she developed a sign for her clinic that states "No cash

or controlled substances kept on site" in order to protect herself and her clinic. *Id.* She further testified that "there is such a stigma associated with controlled substances," and she believes her clinic would be at risk of break-ins if there was an impression she kept controlled substances onsite. *Id.* 25:24–26:14 Therefore, she would not choose to stock controlled dangerous substances on site, because it would deprive her of the "shroud of protection that I have when I'm able to say that I don't keep controlled substances on site." *Id.* Finally, because she does not dispense controlled substances on site, she described the additional steps that both she and her patients must take to prescribe and access misoprostol and mifepristone at a pharmacy. *Id.* 22:4–24:16.

These explanations eviscerate Defendants' suggestion that "[a]ny harm" to Dr. Holt "could be eliminated if [she] simply took the steps necessary to be able to dispense these drugs." AG Br. ISO Holt Exc., 4. Even if obtaining a controlled dangerous substance dispensing license would resolve Dr. Holt's harm, the Challenged Law is the *only* reason she now needs to obtain such a license—demonstrating clearly that the law has injured her as a medical provider and business owner.[33] However, Dr. Holt's explanation of the dangers, risks, and obligations associated with keeping controlled substances on-site demonstrates the numerous reasons why obtaining a controlled dangerous substances dispensing license would not resolve Dr. Holt's injury. Nor would it resolve all of her patients' harms, such as privacy concerns, because all patient information would still have to be reported to the Prescription Monitoring Program.

*d. Kaitlyn Joshua: taxpayer standing and public health mission-driven injury.*

Like Nancy Davis, Kaitlyn Joshua asserts an injury based on her status as a taxpayer and is only asserting two claims: a violation of the single object requirement and a violation of the germane amendment requirement. *See supra* at 12–14, 20–21, 30–33. In her deposition, she confirmed that she works with people who have been denied or delayed in their access to

[33] Indeed, this is true for all of the Plaintiffs. As the Petition lays out clearly, all of the Plaintiffs allege that the Challenged Law is currently causing them harm. For the OB-GYN Plaintiffs, the Midwife Plaintiff, and Kaylee Self, those harms include having to treat misoprostol and mifepristone differently than all other similarly-situated drugs with respect to prescribing and dispensing, including following additional steps on the electronic prescription system, verifying additional information for prescriptions, and ensuring special storage and security protocols and patient information data collection processes are followed. *See* Am. Pet. ¶¶ 94–171. For Dr. Holt, those harms also include not being able to dispense and prescribe the medications as she intended without spending additional money and complying with administrative burdens that change the nature of her medical practice. *See id.* ¶¶ 158–61. For Birthmark, those harms include having to learn new hospital systems for the dispensing and administration of both drugs and having to alter the nature of its advocacy for pregnant patients. *See id.* ¶¶ 132–42. Finally, for Nancy Davis and Kaitlyn Joshua, those harms include having to contribute tax dollars to a law they argue was passed in violation of the Louisiana Constitution and will jeopardize the health and safety of the Louisianans they advocate for. *See id.* ¶¶ 18, 20. For all Plaintiffs, the size and magnitude of the harm is irrelevant; because the Plaintiffs have experienced, and are experienced concrete and ongoing violations of their constitutional rights, they have standing to sustain this lawsuit. *See supra* at 14–21, 29.

reproductive healthcare and strives to tell their stories to the public. Joshua Dep. 8:6–9:6. She confirmed that she was unable to testify at the legislature in opposition to the Challenged Law because she did not have an opportunity to do so. *Id.* 11:11–21. And she explained that the Challenged Law impacts her advocacy goals because it will increase the difficulty that pregnant women have accessing misoprostol and mifepristone when seeking reproductive healthcare. *Id.* 23:7–15 (explaining that "the communities that I advocate for" will be impacted by the law).

The Defendants argue that the Challenged Law does not personally impact Ms. Joshua, but their argument misunderstands the nature of her injury and takes her testimony out of context. Like Ms. Davis, Ms. Joshua is asserting an injury based on her status as a taxpayer. Because she is seeking to restrain official conduct, she is not required to show any personal injury beyond the impact that the law will have on tax spending. *See supra* at 20–21, 30–33. Moreover, when read in context, Ms. Joshua's deposition reveals that the Challenged Law impacts her advocacy because it discriminates against pregnant Louisianans who are seeking misoprostol and/or mifepristone. *See* Joshua Dep. 23:4–23:15. Specifically, Ms. Joshua testified that (1) that pregnant women who need misoprostol and/or mifepristone "will have a difficult time when they are seeking" care as a result of the Challenged Law, (2) the law could "cause someone to lose their life," and (3) "the communities that I advocate for" will be "directly impacted" by the Challenged Law. *Id.* Ensuring safe and accessible reproductive healthcare is a core part of her mission as an advocate, which is sufficient on its own to provide her with a cognizable injury. *See supra* at 20–21, 30–33; *see also* Joshua Dep. 8:3–23 (describing her role with Abortion in America and her experience meeting "hundreds, if not thousands, of women across the country who have faced adversity as a result of trying to navigate their healthcare crisis or the system in their state"); 10:13-11:10 (describing her desire to promote the health and wellness of Louisianans and her concrete belief that the Challenged Law "is not a step in the right direction in terms of trying to address the maternal healthcare deficiency that the State of Louisiana already has, but instead is creating more barriers and blocking women from getting the care that they need in the times they need it the most").

*e. Kaylee Self: Direct regulatory injury as pharmacist*

Finally, Kaylee Self's deposition shows that she is injured as a person who is directly regulated under the Challenged Law. She described the many additional requirements that the Challenged Law places on her as a pharmacist, including the burdensome steps she must take to ensure that a prescription is reported correctly on the Prescription Monitoring Program, Self Dep.

14:9–15:21, and the lengthy list of requirements she must verify before dispensing the medication, *id.* 16:9–17:8. She also testified about the impact on her patients, who she must turn away from the pharmacy if their prescription does not contain the necessary elements for a controlled substance prescription. *Id.* 17:12–22. And she testified about the "increased burden on [her] workload." *Id.* 18:22–19:22. Those burdens include: (1) manually adding patient and prescription information to the Prescription Monitoring Program; (2) verifying that the necessary prescription requirements are included on prescriptions and making follow-up calls to medical providers if they are not; and (3) checking a patient's identification if they are seeking misoprostol and/or mifepristone. *See id.* 14:12–15:21, 16:16–17:8, 18:22–19:22. This testimony confirms that the Challenged Law regulates her conduct as a pharmacist, and she therefore has a cognizable injury.

*6. Defendants' legal citations actually support Plaintiffs' entitlement to the relief they seek.*

Contrary to Defendants Murrill's and the State's assertions, Plaintiffs are entitled to injunctive relief. Defendants' reliance on *Lafreniere Park Found. v. Friends of Lafreniere Park, Inc.,* is misplaced. In that case, the Court held that there was no confusion in a trademark dispute involving two organizations using similar names. 97-152 (La. App. 5 Cir. 07/29/97) 698 So.2d 449, 453. That was why the plaintiffs could not demonstrate irreparable harm. *Id*.

By contrast, Plaintiffs here have clearly articulated how the Challenged Law inflicts irreparable harm. In any case, *Jurisich*, supports the argument that the unconstitutionality of the law itself negates the need to demonstrate irreparable harm. 749 So.2d at 599; *see also supra* at 22–23. Defendants Murrill and the State of Louisiana rightfully concede that Plaintiffs can demonstrate unconstitutionality without showing irreparable harm. *See, e.g.*, A.G. Br. ISO OB-GYNs Exc., 4. However, Defendants use irrelevant authority to bolster their argument that Plaintiffs have not adequately demonstrated that the Challenged Law is unconstitutional. *See id*. As noted above, *supra* at 7–8, Plaintiffs are not required to *prove* unconstitutionality at this stage. Suggesting that Plaintiffs must prove unconstitutionality now misunderstands Plaintiffs' pleading obligations, which simply require Plaintiffs to sufficiently allege a constitutional violation, which they have met fully. Accordingly, Defendants have failed to demonstrate that Plaintiffs cannot obtain injunctive relief.

Moreover, Defendant Murrill's and the State's argument that Plaintiffs' request for declaratory relief constitutes an "advisory opinion" is meritless. Plaintiffs seek a resolution to a concrete, ongoing dispute to prevent Defendants from taking unconstitutional enforcement actions.

Unlike the plaintiffs in *Abbott v. Parker*, who raised hypothetical issues regarding taxpayer funds, Plaintiffs' arguments do not hinge upon a hypothetical or abstract set of facts. 249 So.2d 908 (La.1971). In *Abbott*, the plaintiffs were citizens, taxpayers, property owners, legislators, and bondholders who challenged the issuance of $113 million in bonds to construct a stadium in New Orleans. *Id.* at 910. They argued that the hotel rental occupancy tax pledged to assure the bonds violated the equal protection clause of the Fourteenth Amendment. *Id.* at 916. In declining to rule, the Court specifically noted the lack of "immediacy and reality" in the plaintiffs' claims because some of their requests for relief asked hypothetical, abstract questions of law regarding taxpayer funds and the legislature's "poor" financial judgment. *Id.* at 919. The facts in *Abbott* are easily distinguishable from those in the present case. Here, Plaintiffs' claims are based on immediate and tangible harm caused by the Challenged Law from the moment it took effect on October 1, 2024. *See, e.g.*, Am. Pet. at ¶¶ 76–85; *Supra* at 14–20.[34]

Defendants also rely on *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth* to argue that no justiciable controversy exists. 300 U.S. 227 (1937). In *Aetna*, the plaintiff insurance company sued the defendant because of the defendant's failure to make payments on their premiums despite claiming disability benefits under their insurance policy. *Id.* at 238. The defendant argued that he had become totally and permanently disabled, relieving him of his duty to pay the premiums, while the insurance company disputed this fact and demanded he continue payments. *Id*. at 242. In holding that a justiciable controversy existed, the court reasoned that the contentions between the parties demonstrated "a dispute between parties who face each other in an adversary proceeding" and that such a controversy called for "an adjudication of present right upon established facts." *Id.* at 242. Similarly, here, the Challenged Law exposes Plaintiffs to enforcement actions by Defendants, and the parties on both sides take entirely opposing positions on the operation and effect of the Challenged Law and its constitutional validity. Am. Pet. at ¶¶ 78–84. Although Defendants disregard their allegations, Plaintiffs thoroughly outline how the Challenged Law subjects them to a complex regulatory scheme that imposes delays, intrudes on patient privacy,

[34] In *Abbott*, the plaintiffs invoked the Fourteenth Amendment's equal protection clause. *Id.* at 301. Unlike the plaintiffs in *Abbott*, Plaintiffs here do not assert any claims under the Equal Protection clause of the Federal Constitution, which, as explained *infra* at 46–48, affords less protection than the Louisiana Constitution.

and establishes administratively burdensome prescription requirements. Since Defendants have enforcement authority under the statute, and Plaintiffs have sufficiently alleged real and actual harm caused by the Challenged Law under existing facts, Plaintiffs' claims are justiciable and eligible for both declaratory and injunctive relief.[35]

### B. The Louisiana Board of Pharmacy's Peremptory Exception of No Cause of Action Must Be Denied.

"The peremptory exception of no cause of action questions whether the law affords any remedy to a plaintiff under the allegations of the petition." La. Prac. Civ. Pretrial § 9:79 (2024 ed.). A Petition cannot be dismissed for failure to state a cause of action unless a defendant establishes "beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief." *Indus. Companies, Inc., v. Durbin*, 2002-0665, p. 7 (La. 1/28/03); 837 So.2d 1207, 1215 (quotation omitted). Every reasonable interpretation must be made in favor of the petition's sufficiency. *Id.* at 1213.[36]

The Petition includes well-pleaded factual allegations to support Plaintiffs' constitutional claims, and further, as explained herein, sets forth a prima facie case of unconstitutionality regarding their equal protection claim. LBP's exception can, therefore, easily be denied. *See supra* at 8–12, 21–23. Still, LBP makes five erroneous arguments in its Exception, each of which this Court should reject. Common amongst them are a mischaracterization of the law and a misunderstanding of how the facts, in this case, impact that law.

#### *1. LBP fails to acknowledge its role as a proper party to this action: a statutory role that flows from its enforcement authority.*

LBP is a proper defendant in this declaratory judgment action, which challenges the constitutionality of amendments to the CDSL. Indisputably, Defendant LBP is tasked with enforcing the CDSL, which—following the enactment of the Challenged Law—now includes

[35] Some of the cases Defendants rely upon involve situations where the dispute between the parties was moot or no longer alive. *See, e.g.*, *St. Charles Par. Sch. Bd. v. GAF Corp.*, 512 So.2d 1165, 1172 (La. 1987) (holding that there was no justiciable controversy between the parties because "all of the legal questions . . . became moot, abstract or hypothetical upon the settlement of the case"); *Richardson v. Reeves*, 600 So.2d 138, 141 (La. Ct. App. 2 Cir. May 13, 1992) (holding that plaintiff had no right of action to seek injunctive relief against his *former* prison when he was moved to a new location during the course of the litigation). Here, in contrast, the Challenged Law is in effect and currently enforceable, and the Defendants all have enforcement authority over the law. *See supra* at 8; *see Women's Health Clinic v. State*, 2002-0016, p. 7–8 (La. App. 1 Cir. 5/10/02), 825 So.2d 1208, 1212-13 (holding that there was no justiciable controversy between the parties where the defendant did not have enforcement authority under the law). Additionally, *Duplantis v. Louisiana Board of Ethics* is entirely inapposite because it involved the specific question of whether *advisory opinions* issued by the Board of Ethics were reviewable. 2000-1750, p. 13–14 (La. 3/23/01), 782 So.2d 582, 591. Here, Plaintiffs are currently being injured by a law that is enforceable by the Defendants, and they seek the court's determination that the law is unconstitutional—not review of an administrative agency's advisory opinion.

[36] "If the allegations in the petition state a cause of action as to *any part of the demand*, the court must overrule the exception." *§ 9:79. Three types of exceptions—Peremptory exceptions—No cause of action, La. Prac. Civ. Pretrial § 9:79 (2024 ed.)*

misoprostol and mifepristone. Amen. Pet. ¶ 25; *see supra* at 8 (describing LBP's role with respect to controlled dangerous substance licensing and discipline of licensees).

Under Louisiana law, any party "who [has] or [claims] any interest which would be affected by the declaration" must be joined in a declaratory judgment action, and no declaration may "prejudice the rights of persons not parties to the proceeding." La. Code Civ. P. art. 1880. Government agencies tasked with enforcing statutes plainly have such an interest when the constitutionality of those statutes are called into question.[37] LBP does not—and cannot—dispute that it possesses enforcement authority over the CDSL.[38] Because the Challenged Law amended the CDSL to classify misoprostol and mifepristone as Schedule IV substances, LBP now bears responsibility for enforcing that classification.[39] As such, it has a direct and legally cognizable interest in the validity of the law. This alone makes LBP a proper Defendant in this case.

*2. Defendant LBP's justiciability arguments fail because Plaintiffs present an actual, substantial controversy with LBP.*

Defendant LBP's contention that Plaintiffs' claims are nonjusticiable is without merit and has already been addressed in detail. *See supra* at 21–23, 41–43. LBP's exception relies heavily on out-of-context quotations from *Abbott*, but that case is inapplicable here. Unlike in *Abbott*, there is an actual, substantial, and pre-enforcement controversy between Plaintiffs and LBP that warrants judicial resolution. This case is therefore more like *Aetna Insurance Company*, another case cited by LBP. *See supra* at 42–43 (discussing authorities).

This case is not speculative or hypothetical. It is a pre-enforcement constitutional challenge to LBP's authority to enforce a newly enacted statute that directly affects the legal rights and

[37] LBP's pleading is unclear, but to the extent it implies *only* the attorney general is to be sued, this is incorrect. *See* La. Code Civ. P. art 1880 ("the attorney general of the state shall *also* be served") (emphasis added); La. Code Civ. P. art. 855.1 (giving discretion to the attorney general represent or supervise the interests of the state).

[38] The Petition does not misquote the LBPs statutory enforcement authority, as the Petition does not purport to "quote" the statutes giving LBP authority. Instead, the Petition provides a broad explanation of the many ways LBP has enforcement powers with proper citations to relevant applicable authority. *See* LBP Br. ISO Exc., 4; Am. Pet. ¶¶ 25, 83. Nor are any of the quibbles made by LBP relevant, even if they were true, so Plaintiffs will save the court the extra pages of responding. All that matters is that LBP does not dispute it has significant authority to enforce the CDSL and since the Challenged Law adds two drugs to the CDSL, Defendant LBP has enforcement authority as to the relevant part of the Challenged Law. While the Petition did not cite every single regulation under which the legislature has given the CDSL enforcement powers, it did not need to. It summarized and provided examples. This authority is overwhelmingly clear in R.S. 40:972, R.S. 40:973; R.S. 40:973.1; R.S. 40:974; R.S. 40:975; R.S. 40:976; R.S. 40:984; et seq. Plaintiffs highly encourage the court to read these parts of the CDSL.

[39] Defendant LBP's statements that the petition does not specify the portions of the Challenged Law that are unconstitutional is flatly wrong. *See e.g.* Am. Pet. ¶¶ 303–05, 312, 316–19. The Petition is riddled with allegations, and accompanying citations to specific statutory provisions, that the Art. 1, Section 3 claim challenges the constitutionality of adding misoprostol and mifepristone to the CDSL; that the violation of the Single Object Rule makes the entire legislative enactment unconstitutional; and that the violation of the Germane Amendment Rule makes the contents of the Drug Scheduling Amendment unconstitutional.

obligations of each Plaintiff. Rather than engage with that reality, LBP attempts to sidestep the controversy by insisting there are no allegations of misconduct directed at the Board. But that misses the point. The justiciability of this case does not turn on past misconduct—it turns on LBP's *ongoing authority* to enforce the Challenged Law against Plaintiffs.[40] As the entity charged with enforcing the CDSL, including the Challenged Law's recent amendment to that law that schedules misoprostol and mifepristone, LBP is plainly a proper defendant. Plaintiffs Dr. Holt, Kaylee Self, the OB-GYN Plaintiffs, and the Midwife Plaintiff all allege that but for the implementation and enforcement of the Challenged Law, they would prescribe and/or dispense these medications as legend drugs—not as scheduled substances. LBP's enforcement power creates an imminent threat to their legal interests, medical practices, and the rights of their patients. *See supra* at 8, 21–23.

Additionally, LBP's regulation of medical professionals who prescribe and dispense these medications makes it a proper defendant for all other Plaintiffs, including Birthmark and its clients and patients. Birthmark relies on medical professionals to appropriately prescribe and administer medication to its clients, and it experiences concrete and negative business impacts when such prescription and administration is done unconstitutionally. *See* Am. Pet. ¶¶ 157–59; Birthmark Dep. 22:12–23:4. Additionally, LBP's statutory authority to make arrests without a warrant under the CDSL, *see* La. R.S. § 40:984(3), supports justiciability for Plaintiffs as taxpayers, including Plaintiffs Davis and Joshua. Enforcement of the Challenged Law will lead to arrests, prosecutions, and incarcerations—each of which incurs costs that burden Louisiana's general fund and harm public safety and welfare. *See supra* at 8, 20–21, 30–33.

For all these reasons, and those incorporated and restated *supra* at 21–23, 41–43, LBP's challenge to justiciability fails. Plaintiffs have established a concrete, adversarial controversy with LBP, and the declaratory judgment they seek is both appropriate and necessary. Accordingly, LBP's peremptory exception of no cause of action with respect to justiciability should be denied.[41]

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[40] To the extent it is not obvious, every allegation in the Petition is relevant to the constitutionality of the Challenged Law, and therefore every allegation is against the Defendants. The Court should reject the framing advanced by Defendant LBP that the only time an allegation relates to it is when its name is mentioned. *See* LBP Br. ISO Exc., 3–6. In that same vein, allegations in the petition are the allegations of all Plaintiffs unless specifically alleged otherwise, so the cherry-picked allegations in LBP's briefing are similarly underinclusive. *See* LBP Br. ISO Exc., 9–14. LSBME advances a similar theory, which should equally be rejected. *See* LSBME Br. ISO Exc., 5 & n.2.

[41] Defendant LBP wrongly faults Plaintiffs for citing regulations that now apply to misoprostol and mifepristone by virtue of the Challenged Law's classification of both drugs as controlled dangerous substances. *See* LBP Br. ISO Exc. 12 & nn.42, 44. Plaintiffs are not alleging that these regulatory requirements are explicitly part of the Challenged Law, or that the regulations are unconstitutional as to *all* drugs. Again, LBP's arguments betray a lack of

*3. LBP's exception to Plaintiffs' Article I, Section 3 constitutional claim is entirely without merit.*

As the Louisiana Supreme Court has made clear, federal equal protection jurisprudence under the Fourteenth Amendment should not serve as the model for interpreting Louisiana's unique constitutional guarantee of individual dignity. *Sibley*, 477 So.2d at 1107. When the drafters adopted Article I, Section 3, "Louisiana moved from a position of having no equal protection clause to that of having three provisions going beyond the decisional law construing the Fourteenth Amendment." *Id.* at 1108. The constitutional history supporting that decision is well-documented. As Professor Lee Hargrave explained in *The Declaration of Rights of the Louisiana Constitution of 1974*, the equal protection clause was designed to broadly protect individual rights and to go further than federal doctrine. 35 La. L. Rev. 1, 6 (1974). The drafters explicitly rejected efforts to mirror the federal equal protection clause, choosing instead to provide "greater protection against arbitrary discrimination." *Sibley*, 477 So.2d at 1108.

Yet despite this well-settled authority, LBP fails to cite a *single* case interpreting Article I, Section 3 in its section titled "No Cause of Action (La. C.C.P. art. 927(5)) For Violation of La. Const. Art. I, Section 3." Instead, LBP relies on two inapposite federal cases involving pro se claims under the Fourteenth Amendment—*Crull v. City of New Brunsfels*, 267 Fed. App'x 338, 341 (5th Cir. 2008) and *Douglas v. Gusman*, 567 F.Supp.2d 877 (E.D. La. 2008))—along with a pre-1974 Louisiana case concerning Article I, Section 2, which was decided *before* the state even adopted an equal protection clause. *See Kotch v. Board of River Port Pilot Com'rs. For Port of New Orleans*, 209 La. 737, 757 (La. 1946); *see also* LBP ISO Exception, p. 14–16.[42]

Among other things, LBP's assertion that the Petition "fails to allege a person was discriminated against because of his physical condition by being treated differently from similarly

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understanding of the nature of Plaintiffs' claim, which is that the classification of two safe and effective drugs as controlled dangerous substances necessarily subjects both drugs to a highly complex regulatory system that imposes burdens on Plaintiffs, their patients, and their clients. *See supra* at 8–12, 14–21.

[42] Shockingly, both *Crull* and *Douglas* involved pro se plaintiffs with wildly distinguishable situations. *Crull*, in fact, notes the plaintiff cited no cases in his brief when he argued an officer violated his right to equal protection when he did not allow Mr. Crull to file a police report against the police for withholding the property seized from his flatbed truck in Texas. *Crull*, 267 Fed. App'x at 340. *Douglas* involved a pro se incarcerated plaintiff. Incarcerated people's rights are allowed to be curtailed more heavily than those living outside of incarceration. *Turner v. Safley*, 482 U.S. 78, 89–90 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.") Therefore, prison cases that analyze constitutional rights are always distinguishable, as they are subject to different standards. *Id.* at 90. Even if Louisiana had not so clearly distinguished its Equal Protection Clause from the Federal right, Defendant LBP has failed to cite any applicable case law and has failed to meet its burden. The Court should not grapple with any efforts by Defendant LBP to invoke *Douglas* as relevant to this case.

situated persons," *see* LBP ISO Exception at 15, is both unsupported and incorrect.[43] LBP compounds this error by misapplying the factual arguments in the Petition's allegations. Had LBP consulted the caselaw on Article I, Section 3, it would have found that "physical condition" classifications refer to laws that distinguish "on the basis of one's health or handicap." *Revere*, 715 So.2d at 53. Plaintiffs' allegations—properly taken as true at this stage—fit squarely within that framework.

*a. Plaintiffs' allegation that the Challenged Law classifies based on physical condition squarely fits under* Sibley.

Plaintiffs' detailed allegations concerning the discriminatory harms caused by the Challenged Law plainly state a viable claim of unconstitutional classification based on *physical condition*, in violation of the Louisiana Constitution's Individual Dignity Clause. *See supra* at 8–12. As established by the Louisiana Supreme Court in *Sibley*, a law need not contain explicit references to health status or physical conditions to trigger heightened scrutiny under Article I, Section 3. 477 So.2d at 1094. A law that functionally distinguishes between individuals based on the *extent* or *nature* of their physical conditions constitutes a classification by physical condition and is subject to intermediate scrutiny. *Id.* at 1108–09. In *Sibley*, the Court struck down a statutory cap on medical malpractice damages that applied only to claims exceeding $500,000. Although the statute did not expressly mention people suffering a specific condition, it nevertheless "impose[d] different burdens on different classes of persons according to the magnitude of damage to their physical condition." *Id.* at 1108. As the Court recognized, this resulted in a facial

[43] A simple review of the Petition shows this statement to be simply false. *See* Am. Pet. ¶ 30 ("[P]atients with similarly situated physical conditions who are treated with other medications that have a similar risk profile as misoprostol and mifepristone—meaning, drugs with a very low risk profile, both in terms of adverse events and the potential to cause abuse or dependence—do not face these same burdens and barriers to accessing necessary medical treatment, nor do they face the associated infringement on patient dignity and medical autonomy that will result from the Act."); ¶ 31 ("The Act also treats medical providers who prescribe misoprostol and mifepristone differently than medical providers who prescribe other medications with a similar risk profile as misoprostol and mifepristone."); ¶ 86 ("By adding misoprostol and mifepristone to Louisiana's Uniform Controlled Dangerous Substances Law, Louisiana treats people with physical conditions who rely on misoprostol or mifepristone for their treatment differently than people without those physical conditions and those with other physical conditions."); ¶ 109 ("[P]atients suffering from postpartum hemorrhage, for example, are treated differently under Act 246 than patients suffering from a gunshot wound, even though both conditions are serious physical conditions that require urgent medical treatment. There is no justification for this differential treatment of patients based on physical condition."); ¶ 123 ("[P]atients with nausea and vomiting in pregnancy are treated differently under Act 246 than patients who experience miscarriage, despite the fact that both conditions are complications of pregnancy that can be treated with medications that have no potential for abuse or dependence.") ¶ 197 (Act 246 causes Plaintiffs harm because it requires that they act differently with regard to patients who require misoprostol and mifepristone prescriptions than with patients who require other prescriptions, and they risk criminal liability and professional discipline if they fail to do so."); ¶ 300 ("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."). But more importantly, its logic contradicts the caselaw on Article I, Section 3.

classification: "the statutory classification disadvantages or discriminates against one class of individuals by reason or because of their physical condition." *Id.* at 1109.

The same logic applies here. Although the Challenged Law purports to regulate drugs, its effect is to sort individuals into two classes: individuals with physical conditions that are treated with mifepristone or misoprostol, and individuals with conditions that require other medications with comparable safety and risk profiles.

This is a textbook example of a facial classification on the basis of physical condition. Those in the first class face heightened criminalization, privacy intrusions, and reduced access to care because the drugs they rely on have been reclassified under the CDSL. The second class, by contrast, faces no such burdens. While the law directly regulates *drugs*, just as the law in *Sibley* directly regulated *claims* or *judgments*, it creates two classes depending on whether an individual's physical condition is treated by mifepristone or misoprostol or whether it is not. Just as in *Sibley*, this classification is enough to subject the law to intermediate scrutiny.

Moreover, as in *Sibley*, the classification here does not stop at patients—it extends to the healthcare professionals who serve them. The Challenged Law likewise divides providers into two tiers: Those who treat patients using misoprostol or mifepristone, and those who provide care using similar medications not subject to CDSL scheduling. This distinction imposes additional regulatory and legal burdens on the former group without a rational or medically justifiable basis.

Crucially, this is not a mere disparate impact claim because Plaintiffs allege that the law *classifies on its face* in the same manner as the law in *Sibley*. *See* LBP Br. ISO Exc., 15. The distinction is embedded in the statute's text: it singles out two specific medications—mifepristone and misoprostol—for controlled substance classification, even though they are not addictive, are safer than many unscheduled drugs, and have long histories of safe medical use.

*b. Many laws classify people in substantially similar situations, but laws that fail to meet the appropriate level of scrutiny are unconstitutional*

The Challenged Law, like the one in *Sibley*, must survive intermediate scrutiny for the classification of patients—something it cannot do. For Plaintiffs' claims as health workers, the Challenged Law must either meet intermediate scrutiny or, in the alternative, rational basis scrutiny. Again, it cannot meet either level of scrutiny.

As explained in *Sibley*, there are three tiers of judicial scrutiny used to evaluate laws based on their classification. Laws that classify on the basis of race and religious beliefs are "banned absolutely." 477 So.2d at 1108. Laws that classify on the basis of another subset of conditions—"birth, age, sex, culture, physical condition, political ideas or affiliations"—are subject to intermediate scrutiny, meaning that they will not be allowed unless the state can show "that the classification [is] not arbitrary, capricious or unreasonable." *Id.* All other laws are constitutional as long as there is a valid governmental interest that they "rationally serve[]." *Id.* at 1105–06.

For the intermediate scrutiny category of cases, the defendants have the burden of demonstrating that the law is not arbitrary, capricious, or unreasonable at trial. *Id*. at 1107; *see also Revere* 715 So.2d at 52 (holding that, for intermediate scrutiny cases, "the classification itself presents a prima facie case of unconstitutionality, and the burden is on the proponents of the statute to prove that the legislative classification substantially furthers an important governmental objective"). For all other laws, Plaintiffs have the burden of showing there is no valid government interest rationally being served. *See Sibley*, 477 So.2d at 1105–06.

Plaintiffs Birthmark, Dr. Holt, Kaylee Self, the OB-GYN Plaintiffs, and the Midwife Plaintiff each assert a third-party standing claim on behalf of their patients and clients that the Challenged Law discriminates on the basis of physical condition and is subject to intermediate scrutiny. Since Plaintiffs have established that the Challenged Law classifies on the basis of physical condition, it is the state's burden to show that the classification is not arbitrary, capricious, or unreasonable. Plaintiffs allege that Defendants will fail to meet this burden, *see supra* at 8–12, and Defendant LBP cannot dispute these allegations at the pleading stage. The same Plaintiffs also bring an Article I, Section 3 claim on their own behalf as healthcare providers and a pregnancy service organization. They allege that the Challenged Law discriminates against them based on the physical conditions of their patients and clients, and such discrimination is subject to intermediate scrutiny, or, in the alternative, rational basis review. Am. Pet. ¶¶ 30–32, 199, 296–305.[44]

Defendant LBP may disagree with Plaintiffs' allegations that the Challenged Law fails both rational basis review and intermediate scrutiny. But Defendant LBP cannot dispute these

[44] Many of the facts that Defendants include in their Exception are cherry-picked to demonstrate the allegedly "speculative nature," or that they allege are policy determinations, are facts that are part of the overwhelming showing that there is not any potential rational basis for the classification. Defendants' extensive focus on attempting to frame the issues in this regard furthers highlights their misunderstanding of the claims.

allegations at the pleading stage. Instead, it will have to address those claims with evidence, after discovery, and likely at a trial. By adding misoprostol and mifepristone to the CDSL, Louisiana classifies both drugs based on physical condition, and under the more general equal protection right in the Individual Dignity clause. The issue for this litigation is whether that classification is justified under the appropriate scrutiny levels. After the presentation of evidence supporting the allegations in the Petition, Plaintiffs are confident this Court will find that the law does not survive any level of scrutiny.

*4. Defendant LBP's taxpayer standing arguments for dismissal of the Article III, Section 15 claims miss the mark.*

As explained above, Plaintiffs have sufficiently alleged a claim that the Challenged Law violates Article III, Section 15 in two separate respects. *See supra* at 12–14. Defendant LBP does not address either of the Article III, Section 15 claims, but wrongly argues Plaintiffs cannot obtain a declaratory judgment as taxpayers. This legal issue has already been adequately covered. *See supra at* 20–21, 30–33. Nevertheless, one key point warrants direct attention.

At the pleading stage, this Court must accept the allegations in the Petition as true. *See Fletcher v. A.F. Dunbar & Co.*, 21 La. Ann. 150, 152 (La. 1869). Plaintiffs have specifically alleged that the enforcement of Act 246 will increase the tax burden on Louisiana's citizens. The Petition provides detailed allegations supporting this assertion. Specifically, the Petition asserts that the Challenged Law will require various state and local officials—from district attorneys to police officers to court staff—to devote time and resources to investigating, prosecuting, and adjudicating criminal cases under the Act. *See* Am. Pet. ¶ 294. Defendant LBP's citations to a statute that shows its revenue does not need to be kept in the general fund does not combat that allegation, and LBP is not permitted to add additional facts in the context of a No Cause of Action Exception, regardless. *See* LBP ISO p. 17; *see also* § 9:79. Three types of exceptions—Peremptory exceptions—No cause of action, La. Prac. Civ. Pretrial § 9:79 (2024 ed.) ("No reference can be made to extraneous supportive or controverting evidence, and the court must then determine whether the law affords any relief to the claimant if those factual allegations are proven at trial."); *see also supra* at 20–21, 30–33.

Additionally, LBP's enforcement of the Challenged Law has impacts on the criminal justice system which will cause the expenditure of taxpayer money. For instance, La. R.S. § 40:984 provides that LBP's authorized employees may: "(1) Carry firearms; (2) Execute and serve search

warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of this state; (3) Make arrests without warrant for any offense under this Part on the same basis as provided in Code of Criminal Procedure Article 213; (4) Make seizures of property pursuant to the authority granted under the provisions of this Part." All these acts would filter individuals into the criminal system, creating expenses that Plaintiffs allege will be borne by taxpayers. As taxpayers in Louisiana, Plaintiffs "have the right to resort to judicial authority to restrain their public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which will increase the burden of taxation or otherwise injuriously affect the taxpayers or their property." *Donaldson v. Police Jury of Tangipahoa Parish*, 109 So. 34, 38 (La. 1926). Plaintiffs are therefore entitled to sustain their claims under Article III, Section 15.

*5. Defendant LBP's challenge to Plaintiffs' entitlement to injunctive relief is unsupported by law.*

Finally, as described above, enforcement of an unconstitutional law is per se an irreparable injury. *See supra* at 22–23. Defendant LBP has not shown, nor could it, that Plaintiffs are not entitled to injunctive relief at this stage of the litigation. Moreover, the Petition states a cause of action for injunctive relief against LBP to restrain enforcement of the unconstitutional law.

For all of these reasons, Defendant LBP's Exception should be denied in its entirety.

**C. Defendant Louisiana State Board of Medical Examiner's Dilatory Exception of Prematurity Must Fail.**

A Dilatory Exception of Prematurity filed under La. Code Civ. P. article 926 (A)(1) "contemplates that the plaintiff has filed his action prior to some procedure or assigned time, and it is usually utilized in cases where the applicable law or contract has provided a procedure for one aggrieved by a decision to seek administrative relief before resorting to judicial action." *Transcon. Gas Pipe Line Corp. v. Bridges*, 2009-0421 (La. App. 1 Cir. 10/23/09), 28 So.3d 1082, 1086. Such an exception does not challenge the substantive merits of the underlying cause of action, but rather contends that the plaintiff has not taken the necessary preliminary steps required to make the controversy ripe for judicial review. *Id.*; *Stop the Destruction of St. Bernard, Inc. v. Board of Commissioners for Port of New Orleans*, 2023-0323 (La. App. 4 Cir. 10/26/23), 376 So.3d 982, 986. The party bringing the exception bears the burden of proof. *Transcon. Gas Pipe Line Corp.*, 28 So.3d at 1086. Here, like the other Defendants in this action, LSBME cannot meet its burden.

While an exception of prematurity typically involves situations where the law provides a procedure for relief before resorting to judicial action, this is not such a case. Regardless of whether they have initiated disciplinary action against any Plaintiff, LSBME has enforcement authority over the Challenged Law, making LSBME a proper Defendant in a pre-enforcement challenge. *See supra* at 8. Because Plaintiffs are seeking constitutional review rather than appealing any specific LSBME action against them, district courts are the only adjudicatory bodies with subject matter jurisdiction to provide appropriate relief, and there is no requirement to exhaust administrative remedies. Binding Louisiana precedent recognizes that no one should have to subject themselves to penal consequences in order to determine a law's constitutionality. *See supra* at 29–30. As a result, Plaintiffs' case is ripe for review and not premature.

*1. Contrary to Defendant LSBME's briefing, it matters that LSBME has the authority to enforce the Challenged Law.*

Like the other Defendants in this case, LSBME has a role in enforcement as a regulatory body with disciplinary authority to enforce compliance with the CDSL as amended by the Challenged Law.[45] Louisiana Rev. Stat. § RS 37:1285 provides that LSBME may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other restrictions on any license, permit, or certificate issued for "[p]rescribing, dispensing, or *administering legally controlled substances* or any dependency-inducing medication without legitimate medical justification therefor or in other than a legal or legitimate manner." La. R.S. 37:1285(A)(6) (emphasis added). Per the court in *Matter of DiLeo*, La. R.S. 37:1285 "is penal in nature and allows the Board to suspend or revoke a physician's license to practice medicine and impose a fine as it sees fit." 95-0444, p. 8 (La.App. 4 Cir. 9/28/95); 661 So.2d 162, 167. Because the Challenged Law added misoprostol and mifepristone to the list of controlled substances, LSBME is an enforcer of the improper classification and, therefore, an interested party in the constitutionality of the Challenged Law. As such, LSBME is properly named as a Defendant in this action pursuant to La. Code Civ. P. art. 1880.[46]

[45] The Petition alleges that LSBME is a state agency empowered to grant and revoke the licenses of medical practitioners in Louisiana. Am. Pet. ¶ 25. It also alleges it can impose discipline, and otherwise regulate the practice of medicine. *Id.* Within that power is the authority to initiate investigations or disciplinary action against physicians suspected of prescribing, dispensing, or administrating controlled substances in a manner that may not comply with all applicable regulations. *Id.* LSBME does not dispute this enforcement authority.

[46] Plaintiffs Holt, Hunter, Perrett, Rao, Schwartzmann, and Siegel are each regulated by LSBME as physicians and, therefore, all subject to its enforcement authority. In addition, the relief all Plaintiffs seek, regardless of whether they are physicians or not, is hindered if LSBME maintains that the Challenged Law's addition of misoprostol and mifepristone to the CDSL is constitutional. *C.f.* under La. Code Civ. P. Ann. art. 1880 ("no declaration shall

*2. Because this is a valid pre-enforcement challenge, it is irrelevant that LSBME has not brought disciplinary actions against Plaintiffs.*

The ability to challenge laws before enforcement is an important feature of our legal structure and has historically allowed litigants to challenge and defend the constitutionality of a law regardless of whether any party responsible for enforcing that law has taken enforcement actions. *See supra* at 29–30. Pursuant to its role enforcing the Challenged Law, Plaintiffs have demonstrated that a sufficient legal connection exists between themselves, the Challenged Law, and LSBME, and that they have each experienced, and are experiencing, harm as a result of the law. Regardless of whether any Plaintiff who is directly regulated by LSBME is forced to violate the Challenged Law and/or experiences professional discipline or legal repercussions as a result, a justiciable controversy exists between those who have been harmed by an unconstitutional law and those who are charged with enforcing it.

Accordingly, LSBME incorrectly asserts that absent formal disciplinary action, there is no legal relationship between itself and the Plaintiffs. LSBME relies on the standard for a justiciable controversy announced in *Prator*; however, the Court in *Prator* held that there *was* a justiciable controversy regarding the Parish's entitlement to a credit for housing out-of-parish prisoners, even though the funds at the center of the controversy had not been deducted prior to the suit. Put differently, the court held that the fact that the funds had yet not been deducted did not counteract the adverse legal relationship between the parties, and did not deprive the dispute of sufficient immediacy and reality to bar a declaratory judgment. *Prator*, 888 So.2d at 817. Likewise, here, the fact that LSBME has not sanctioned any Plaintiff to date for violating their obligations under CDSL does not change the fact that there is an existing legal relationship between itself and the Plaintiffs due to its ongoing enforcement of the law and, therefore, this Court is in no way deprived of jurisdiction over this dispute. *See also La. Indep. Auto Dealers Ass'n*, 295 So.2d at 801 (explaining in a challenge to a law's compliance with the legislative enactment requirements that it would "defeat a major purpose of the declaratory judgment act" if an individual was required to violate a law that is allegedly defective "in order to acquire standing").

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prejudice the rights of persons not parties to the proceeding.") If LSBME maintains that misoprostol and mifepristone are controlled substances subject to the regulatory requirements and criminal sanctions of the CDSL, then all Louisiana practitioners will be forced to continue to operate under the unconstitutional regime that Plaintiffs challenge here, and the law will remain in force. Therefore, LSBME has a proper interest and the Plaintiffs have a controversy with LSBME.

Additionally, LSBME misunderstands what constitutes existing harm in an Equal Protection challenge and disregards the ongoing discrimination against Plaintiffs, their clients, and their patients that is a direct—and ongoing—result of the Challenged Law. As discussed extensively above, the Petition has clearly set forth a prima facie case of discrimination on the basis of physical condition under Article I, Section 3 of Louisiana's Constitution of 1974, as well as the law's existing and imminent future harms. *Supra* at 8–12. Because discrimination itself constitutes the harm and such discrimination is ongoing so long as the Challenged Law remains in effect, the allegations set forth in the Petition are more than sufficient to give plaintiffs standing to request declaratory and injunctive relief on behalf of themselves and their clients and patients.

LSMBE's reliance on *Louisiana Federation of Teachers* to disclaim the existence of a justiciable controversy ignores the extensive factual allegations in the Petition. Applying state and federal precedent, the Court in *Louisiana Federation of Teachers* found that the plaintiff could not sustain a pre-enforcement challenge because it would not experience hardship if the court dismissed the case. 94 So.3d at 764. The Court proceeded to clarify that a hardship occurs when a law affects a party's "primary conduct" and is "'felt immediately by those subject to it in conducting their day-to-day affairs.'" *Id.* (citations omitted). The Court explained that the plaintiff had not experienced any negative impact as a result of the law at the time of filing, nor did it have to choose between complying with the law or facing penalties. *Id.*

By contrast, the Petition here alleges specific and tangible harms affecting Plaintiffs' primary conduct in many of their day-to-day affairs related to their ongoing ability to deliver safe and adequate care to their patients and clients. *Am. Pet.* at ¶¶ 134–72. Additionally, all Plaintiffs who are directly regulated by LSBME must choose between complying with the Challenged Law or the very real potential for incurring serious professional consequences due to LSBME enforcement—even though compliance is detrimental to their patients. Am. Pet. at ¶¶ 78–85.

Moreover, LSBME's role in enforcing a law that actively degrades the quality of healthcare available to pregnant patients in the state impacts all Plaintiffs and those whose interests they represent. *See All. For Affordable Energy*, 677 So.2d at 429 (finding that an interest in the health and welfare of the residents of Orleans Parish is a sufficient interest to bring an action).

*3. The Court should disregard Defendant LSBME's exhaustion arguments because administrative proceedings do not adjudicate the constitutionality of statutes.*

LSBME's exhaustion argument must fail because it cannot meet its initial burden of demonstrating the existence of an alternative administrative remedy. A dilatory exception of prematurity "is usually utilized in cases wherein the applicable law or contract has provided a procedure for one aggrieved by a decision to seek administrative relief before resorting to judicial action." *Michel v. State of La., Div. of Admin. Law,* 2013 1419 (La. App. 1 Cir. 11/03/14), 167 So.3d 654, 658; *see also Ginn v. Woman's Hosp. Foundation, Inc.*, 99 1691 (La. App. 1 Cir. 09/22/00), 770 So.2d 428, 430; *Todd v. Angelloz*, 2002 1400 (La. App. 1 Cir. 03/28/03), 844 So.2d 316, 317. In such cases, the defendant bears the initial burden of demonstrating that an administrative remedy exists, making the judicial action premature. If this burden is met, the Plaintiffs may argue either that the remedy has been exhausted or that it would be inadequate. *Dailey v. Travis*, 2002 2051 (La. App. 1 Cir. 02/23/04), 872 So.2d 1104, 1108, *Bridges v. Smith*, 2001 2166 (La.App. 1 Cir. 09/27/02) 832 So.2d 307, 310. Here, the administrative proceedings that LSBME points to are limited to discipline of a particular person concerning a specific set of conduct, and they provide no mechanism to challenge the constitutionality of an underlying law.

No adequate administrative proceeding exists to address constitutional challenges. Louisiana courts have consistently held that district courts, not administrative agencies, have original jurisdiction to determine the constitutionality of statutes. *Piazza's Seafood World, LLC v. Odom*, 2007-2191 (La. App. 1 Cir. 12/23/08), 6 So.3d 820, 824–25 (*citing ANR Pipeline Co*., 2002-1479 (La. 07/02/03), 851 So.2d 1145, 1151); *Albe v. Louisiana Workers' Compensation Corp*., 97-0014 (La. 10/21/97), 700 So.2d 824, 827-28 (holding that hearing officers cannot address constitutional issues, as such matters are judicial functions); *State v. Bd. of Supervisors of Elections, Parish of Rapides*, 186 La. 949, 173 So. 726, 731 (1937). Moreover, in cases involving constitutional challenges, courts have consistently ruled that administrative processes are not required when seeking injunctive relief, as only the district court can determine the constitutionality of statutes and regulations. *Piazza's Seafood World, LLC*, 6 So.3d at 825.

Simply put, as an administrative agency, LSBME does not have authority to declare statutory provisions unconstitutional. Importantly, in suggesting that later judicial review of a LSBME administrative proceeding would somehow be adequate, LSBME glosses over what it knows to be patently true: (1) the standard of review in such cases is far more limited than an

original proceeding before the district court; (2) regardless, any relief a district court can render regarding the constitutionality of a statute is limited, and in most cases, cannot reach beyond the parties before the court; and (3) it does not provide a forum in which a physician can represent the interests of his or her patients. Therefore, LSBME's exhaustion requirement is woefully inapplicable to the circumstances of this case, as LSBME lacks the power to enjoin an unconstitutional statute and cannot provide a remedy for Plaintiffs' harm, nor could subsequent judicial review of a LSBME proceeding provide the relief Plaintiffs seek. Such power and authority rests solely with the district court in an original action.

### III. If There Is Any Defect in the Petition, Plaintiffs Should Be Granted Leave to Amend.

Plaintiffs have met their obligation at this stage of the litigation, and nothing in Defendants' Exceptions should alter that conclusion. However, to the extent that the Court finds any defect in the Petition, Plaintiffs should be granted leave to amend the Petition to cure the defect. "Amendment of pleadings should be liberally allowed, provided that the movant is acting in good faith, amendment is not sought as delaying tactic, opponent will not be unduly prejudiced, and the trial of issues will not be unduly delayed." *Kold, Inc. v. H & A Gas Purchasing, Inc.*, 609 So.2d 328, 329–30 (La. App. 3 Cir. 1992). With respect to peremptory exceptions, if "the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court." La. Code Civ. P. art. 934.

Here, if the Court determines that Plaintiffs' Petition fails to adequately allege a cause of action or a right of action, any potential defect can be cured by amendment. *See, e.g.*, *LeBlanc v. Alfred*, 2015-0397, p. 14–15 (La. App. 1 Cir. 12/17/15), 185 So.3d 768, 777 (reversing district court's order denying leave to amend and holding that it was possible that Plaintiff could amend the petition to allege a proper cause of action against the defendant). Therefore, to the extent that the Court grants any of the Defendants' Exceptions, Plaintiffs request leave to amend for the purpose of correcting the defects in the Petition.

Finally, to the extent that the Court grants any of the Defendants' exceptions and dismisses the case with prejudice, such dismissal should not be at Plaintiffs' expense as this case presents important, non-frivolous issues of public concern.

## CONCLUSION

For the foregoing reasons, Plaintiffs have stated three causes of action and set forth sufficient facts to plead a right of action and entitlement to injunctive and declaratory relief. Each of the Defendants' Exceptions should be denied and the case should proceed accordingly.

Dated: May 7, 2025

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of May, 2025, a copy of the foregoing has been served upon all known counsel of record by electronic mail.

*/s/ Allison Zimmer*
Allison Zimmer