SUPREME COURT OF LOUISIANA

NO. 2022-OC-1198

JUNE MEDICAL SERVICES, LLC, et al.

versus

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

ON APPLICATION FOR SUPERVISORY WRITS TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL, NO. 2022-CW-0806, AND TO THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, NO. 720988, DIVISION "B," SECTION 24 THE HONORABLE DONALD R. JOHNSON, PRESIDING

OMNIBUS OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEF OF 22 INTERESTED LAW PROFESSORS AND JAMES D. "BUDDY" CALDWELL AS *AMICI CURIAE* AND OPPOSITION TO BRIEFS OF 22 INTERESTED LAW PROFESSORS AND JAMES D. "BUDDY" CALDWELL AS *AMICI CURIAE*

CIVIL PROCEEDING

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May It Please the Court:

Proposed *amici curiae*, 22 individual current or retired law professors from Louisiana schools, and also former Louisiana Attorney General James D. "Buddy" Caldwell, repeat the same positions taken by Plaintiffs in their Application for Supervisory Writs to this Court. The law professors and Mr. Caldwell also do not meet any of the other criteria required of them by this Court under Rule VII, § 12. None of the law professors studies, teaches, or specializes in Louisiana Civil Procedure, and thus whatever "insights" they purport to offer are irrelevant and do not qualify them as "friends of the court." As for Mr. Caldwell, the former attorney general who lost reelection to the current Attorney General Jeff Landry in 2015, he does not have any substantial, legitimate interest in this case, and if he did, it is adequately protected by the *current* Attorney General, Jeff Landry, who is a party to this case. The only thing Mr. Caldwell has is a conflict of interest. Under Rule VII, § 12, *amici curiae*'s requests for leave should be denied.

In the event this Court grants *amici curiae* leave to file their briefs, this Court should disregard their arguments because their arguments have no foundation in Louisiana law. *Amici curiae*'s "insights" and personal viewpoints ignore well-settled principles of statutory construction and this Court's well-settled jurisprudence. *Amici curiae*'s efforts to re-write La. R.S. 13:4431 and overturn well-settled Louisiana jurisprudence must fail.

I. *Amici Curiae*'s Motions for Leave Should Be Denied.

A. *Amici curiae* merely repeat the same positions taken by Plaintiffs.

Louisiana Supreme Court Rule VII, § 12 governs the requirements for briefs of *amici curiae*. According to that Rule, a brief of an *amicus curiae* may not "merely repeat[] the position(s) taken by a party." A brief of an *amicus curiae* that repeats positions taken by a party "burdens the staff and facilities of the court and its filing is not favored," and thus leave to file it should be denied. La. Sup. Ct. R. VII, § 12.

As demonstrated by the following excerpts from Plaintiffs' Writ Application and the proposed briefs of *amici curiae*, *amici curiae* repeat *the exact same* arguments raised by Plaintiffs:

Plaintiffs' Writ Application	Law Professors' Brief
"Reading La. R.S. 13:4431 to eliminate district court's discretion to deny suspensive appeals would improperly render the permissive 'may' of the statute mandatory." P. 12.	"La. R.S. 13:4431 allows that defendants 'may' seek a suspensive appeal… . But the right to a suspensive appeal under La. R.S. 13:4431 should not be—and is not—absolute." P. 2.
"Defendants' application to the First Circuit argues that *Guillot* represents the 'sole exception to appeal-of right under La. R.S. 13:4431' recognized only because that case involved preventing 'irreversible destruction of physical property.' But all irreparable harms (and certainly the violation of the Due Process Clause and rights of the Accused in the Louisiana Constitution) are, by definition, irreversible." P. 16.	"In *Guillot*, the consequence at stake was the destruction of property under a potentially unconstitutional statute. Contrary to Defendants' protestations in their writ application, nothing in this Court's holding there demonstrates that the *Guillot* principle's application is cabined to cases involving the potential destruction of physical property." P. 2.
"Defendants' arguments that La. R.S. 13:4431 *requires* district courts to grant suspensive appeals…would eliminate the discretion district courts enjoy under Article 3612 of the Code of Civil Procedure to deny suspensive appeals when a law is preliminary enjoined." P. 6.	"All of [the court's discretion to grant a suspensive appeal under Article 3612] is jettisoned if Defendants' interpretation of La. R.S. 13:4431 is given effect." P. 4.
"In fact, *Guillot's* reasoning applies directly to this case—*but with even more force*—because the threat of constitutional violations is *per se* irreparable." P. 16.	"As this Court recognized in *Guillot*, a suspensive appeal is not appropriate under La. R.S. 13:4431 when allowing the enforcement of the challenged statute risks violating an individual's constitutionally protected property rights. Here, allowing the State to enforce the criminal penalties would similarly 'produce unconstitutional results.'" P. 5. "Such a deprivation of constitutionally mandated liberty would be as irreversible as the property damage described in *Guillot*." P. 6.
"[A]pplication of these prior rulings in the manner…adopted by the First Circuit would create an absurd state of affairs in which no individual could ever obtain preliminary relief." P. 3.	"The First Circuit's decision thus perverts the very purpose of preliminary injunction." P. 1.

Plaintiffs' Writ Application	Mr. Caldwell's Brief
"La. R.S. 13:4431 does not apply because there has been no final ruling on unconstitutionality." P. 18.	"La. R.S. 13:4431 applies only where a trial court has made a final declaration of unconstitutionality." P. 1.

All of *amici curiae*'s arguments are restatements of Plaintiffs' arguments. They add nothing new. "The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).[1] An *amicus curiae* who restates a party's arguments is a "friend of a party," not a "friend of the court." Having merely restated Plaintiffs' arguments, *amici curiae*'s briefs are not helpful to this Court, and their motions to leave should be denied.

B. *Amici curiae* do not satisfy the other criteria required of them by this Court.

Rule VII, § 12 also requires *amicus curiae* to satisfy one of three criteria before being granted leave to file a brief: "(1) Amicus has an interest in some other case involving a similar question; (2) There are matters of fact or law that might otherwise escape the court's attention; or (3) The amicus has substantial, legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already party to the case." Like an *amicus curiae* brief that merely repeats positions taken by a party, an *amicus curiae* brief that does not meet one of these three criteria also "burdens the staff and facilities of the court and its filing is not favored," and thus leave to file it should be denied. La. Sup. Ct. R. VII, § 12.

1. The law professors have no expertise in this area, and their opinions are inadequate.

The law professors rely solely on the second criteria, claiming that their *amicus curiae* brief raises issues "that may not be raised by the other parties, and that otherwise escape this Court's attention."[2] As discussed above, the issues raised by the law professors **were** raised by other parties, and thus those issues will not escape this Court's attention. The law professors further claim that they are "experts in a broad array of legal fields" and that "their teaching and legal

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[1] "An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied." *Ryan*, 125 F.3d at 1063. Here, Plaintiffs are adequately represented, neither the law professors nor Mr. Caldwell claim a substantial, legitimate interest in this case, and the law professors and Mr. Caldwell have no unique information or perspective to add on this narrow issue of Louisiana procedural law. Thus, their motions for leave should be denied.

[2] Motion for Leave to File Brief of 22 Interested Law Professors as *Amici Curiae* in Support of Plaintiff-Applicants ¶ 2.

expertise afford them a unique appreciation of the historical and doctrinal significance of the issues."[3]

The law professors could only be referring to one issue, which is the single, narrow issue of whether La. R.S. 13:4431—a civil procedural law—entitles Defendants to obtain a suspensive appeal of the district court's preliminary injunction when that injunction enjoined the enforcement and execution of state laws. To the extent any law professor is qualified to submit an *amicus curiae* brief on this narrow procedural issue, the law professor should study, teach, or specialize in the field of Louisiana civil procedure. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (*amicus curiae* brief submitted by law professors specializing in federal Native American law); *Martinez-Cedillo v. Barr*, 923 F.3d 1162 (9th Cir. 2019) (*amicus curiae* brief submitted by law professors specializing in immigration law); *Sahu v. Union Carbide Corp.*, 475 F.3d 465 (2d Cir. 2007) (*amicus curiae* brief submitted by law professors specializing in international law).

Here, the majority of the law professors study and teach courses in the area of criminal law. Others teach courses and study comparative law, international law, civil rights, administrative law, successions, donations, and environmental law. **None** of the professors studies, teaches, or specializes in Louisiana Civil Procedure. Notably, the professors at the Louisiana law schools who **do** teach Louisiana Civil Procedure did not sign on as *amicus curiae*. Further, 9 out of the 22 professors do not even have a license to practice law in Louisiana. None of the law professors is qualified to opine on Louisiana Civil Procedure or what the law is under La. R.S. 13:4431.

Contrast the law professors' brief with the brief filed by Certain Louisiana Legislators as *Amicus Curiae* in support of Defendants' Writ Application to the First Circuit. Over eighty members of the Louisiana legislature submitted an *amicus curiae* brief to the First Circuit offering their perspective on La. R.S. 13:4431. The perspective of the Louisiana Legislature is helpful and important **because they create and are stewards of the law.** *See* La. Const. art. 3, § 1(A) (The legislative power of the state is vested in a legislature, consisting of a Senate and a House of Representatives."). They know the laws of record, how they interplay with each other, and whether it is necessary to amend laws in light of changes in public policy or in reaction to judicial decisions, none of which has happened with La. R.S. 13:4431. Unlike the over eighty Louisiana legislators,

[3] *Id.* ¶ 3.

the law professors (who work in a "broad array of legal fields") have no important experience or perspective to offer on La. R.S. 13:4431.

Courts have denied motions for leave from law professors, like those here, who do not "purport to represent any individual or organization with a legally cognizable interest in the subject matter at issue, and who give only their concern about the manner in which this court will interpret the law as the basis for their brief." *See, e.g., Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983). In such a case, denial of leave is warranted because the professors do "not adequately present all relevant legal arguments." *Id.* Here, the law professors have no interest in this case; they give only their "concern" about the interpretation of a law they do not study, teach, or specialize in. The law professors do not adequately present all relevant legal arguments, and they should be denied leave.

2. <u>Mr. Caldwell has no substantial, legitimate interest in this case. If he does, he has a conflict of interest.</u>

Mr. Caldwell relies solely on the third criteria of Rule VII, § 12, claiming that he has a "substantial, legitimate interest in the solution of the matter" and that his "interests are not adequately protected by those already party to the case."[4]

Mr. Caldwell is the former Attorney General of this State. While he may have contributed to over one thousand attorney general opinions during his eight-year term from 2008 to 2016 as he indicates in his Motion for Leave,[5] he does not cite a single one concerning La. R.S. 13:4431. Further, he does not have any *existing* substantial, legitimate interest in the outcome of this case. He is not the Attorney General of this State, so he does not have the powers and duties that belong to the existing Attorney General under Article 4, § 8 of the Louisiana Constitution. Rule VII, § 12(3) also requires that Mr. Caldwell's supposed interests "not be adequately protected by those already party to the case." Since the current Attorney General, Jeff Landry, is a party to this case, any interest Mr. Caldwell as the former Attorney General might have is adequately protected.

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[4] James D. "Buddy" Caldwell's Motion for Leave to Appear as *Amicus Curiae* in Support of Plaintiffs-Applicants ¶¶ 3, 5.

[5] *Id.* ¶ 1.

But even if Mr. Caldwell had a "substantial, legitimate interest" as he claims, he would have a clear and direct "conflict of interest" under Rule 1.9(a) of the Louisiana Rules of Professional Conduct:

> If you formerly represented a client in a matter, you shall not represent another person in the same or substantially related matter if that person's interests are materially adverse to the interests of the former client, unless your former client gives informed consent, confirmed in writing.

There is no doubt that Mr. Caldwell, as the former Attorney General, represented the same client as the current Attorney General, i.e., the State of Louisiana. Mr. Caldwell served as the Attorney General of Louisiana from January 2008 to January 2016.[6] Indeed, Mr. Caldwell claims he "was the chief legal officer of the state and represented Louisiana's interest in litigation."[7] Consequently, there is no question that Mr. Caldwell and the current Attorney General, Jeff Landry, each represented the State of Louisiana.

Whether he now represents himself as he claims to, or to the extent that he is engaged by Plaintiffs, their attorneys, or a special interest group, there is no question that his supposed "substantial, legitimate interest" is materially adverse to his former client—the State of Louisiana. Mr. Caldwell confesses that, as the former Attorney General, he represented the "State's long held position with regards to La. R.S. 13:4431," which is the same statute or matter that is currently before this Court.[8] He further references specific cases in which he advocated or represented the State's interest as to La. R.S. 13:4431 during his tenure, so there is no doubt the current matter before this Court is the same as the matters in which he previously represented the State.[9] Mr. Caldwell even declares that "I am also the author of an amicus brief in a case that clearly outlines the State's position."[10] Mr. Caldwell's position as to when La. R.S. 13:4431 applies plainly contradicts the current Attorney General's position and the position of the State (and even that of this Court), which is that La. R.S. 13:4431 is clear and unambiguous inasmuch as it provides an unqualified right to a suspensive appeal when a district court enjoins the enforcement or execution

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[6] *Id.* ¶ 1.

[7] *Id.*

[8] *Id.*

[9] *See* Brief of James D. "Buddy" Caldwell as *Amicus Curiae* in Support of Plaintiffs-Applicants, pp. 2-4.

[10] *Id.* at p. 2.

of a state law. Further, neither the Attorney General nor the State of Louisiana provided any consent to Mr. Caldwell to file his brief *amicus curiae*. All the elements of Rule 1.9(a) are met, and thus Mr. Caldwell has a clear and direct conflict of interest.

II. In the Event This Court Grants *Amici Curiae* Leave, This Court Should Disregard Their Arguments.

As discussed previously, all of *amici curiae*'s arguments are repeats of the arguments raised in Plaintiffs' Writ Application. Defendants' response to those arguments are set forth fully in their Opposition to Plaintiffs' Writ Application. If this Court were to consider or allow the briefs *amicus curiae*, Defendants adopt and incorporate into this Omnibus Opposition the arguments contained in Defendants' Opposition to Plaintiffs' Writ Application. Defendants address some highlights here.

A. The law professors are wrong.

The law professors raise a series of points that Plaintiffs already raised, and that Defendants have addressed in their Opposition:

- The law professors contend that Louisiana Code of Civil Procedure article 3612 grants a district court discretion whether to grant or deny a suspensive appeal of any preliminary injunction ruling, and that discretion would be "jettisoned" if Defendants' interpretation of La. R.S. 13:4431 is given effect. But this Court has acknowledged that it is "well-settled" that "[w]hen two statutes apply to the same situation, the specific statute prevails over the general one." *Silver Dollar Liquor, Inc. v. Red River Parish Police Jury*, 2010-2776, p. 10 (La. 9/7/2011), 74 So. 3d 641, 648; *State in Interest of A.C.*, 1993-1125 (La. 1/27/1994), 643 So. 2d 719, 730. Article 3612 deals generally with all appeals of injunctive orders, which La. R.S. 13:4431 deals specifically with appeals of injunctive orders that restrain the enforcement of state laws, as is the case here. Thus Article 3612 does not even apply. Further, the preliminary injunction hearing in the district court is not meaningless because it still sets the record and the arguments to the courts, to be considered on appeal.

- The law professors assert that the purpose of a preliminary injunction is to prevent potential irreparable harm from occurring, but allowing La. R.S. 13:4431 to mandate a suspensive appeal prevents that from occurring. But while that may be the case with the appeal of ordinary preliminary injunctions, the very purpose of La. R.S. 13:4431, as set forth in *Wall v. Close*, 201

La. 986, 10 So. 2d 779 (1942) and its progeny from this Court, is to prevent district courts from having the authoritative word on a statute's enforceability. Instead, the statute ensures that the challenged statute will **not** be enjoined until declared unenforceable by a **final** decision of the courts. *Id.*, 201 La. at 996, 10 So. 2d at 783.

- The law professors state that suspension of a preliminary injunction against the enforcement of laws found likely to be unconstitutional affects the liberty of medical providers who may be subject to criminal prosecution. But this Court already ruled in *Manuel v. State*, 1995-2189 (La. 3/8/1996), 692 So. 2d 320, that La. R.S. 13:4431 requires a suspensive appeal even when a district court finds criminal laws to be unconstitutional. Further, this Court has held that it is not even necessary to restrain an allegedly unconstitutional criminal statute in advance of criminal prosecution, as it is not an undue burden, and indeed is the more proper course of action, to require a party to challenge the constitutionality of a criminal statute as a defense to a criminal suit actually prosecuted against the party, which is an adequate remedy at law. *See Knights of Columbus, Ch. No. 2409 v. La. Dep't of Pub. Safety & Corrections, Div. of State Police*, 548 So. 2d 936, 938, 940 (La. 1989).

- The law professors contend that the sole exception to the mandatory entitlement to a suspensive appeal in *Guillot v. Nunez*, 225 La. 1035, 74 So. 2d 205 (1953) can be extended to other intangible property rights, including medical licenses. But this Court already ruled in *Hirt v. City of New Orleans*, 225 La. 1077, 10 So. 2d 380 (1953) and in *Womack v. Louisiana Commission on Governmental Ethics*, 250 La. 37, 193 So. 2d 777 (1967), that the *Guillot* exception is limited to cases when physical property may be destroyed. Further, neither Plaintiffs in this case, which include an abortion clinic, nor any other Louisiana medical provider for that matter, have a property right to abort a child. *See* La. Const. art. 1, § 20.1 ("To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.").

Defendants note that the law professors have no special standing to weigh in on medical providers' alleged concerns with the abortion statutes. Even so, the law professors carelessly throw about these concerns, freely claiming these medical providers' very livelihoods are at stake. It is as if these law professors have not even read the very abortion statutes they seek to restrain. In order to be prosecuted under any of the statutes, there must be an **intent** to terminate the life of

an unborn child through the unlawful means described in the statutes. *See* La. R.S. 14:87.1, 14:87.7, 14:87.8, 40:1061. Medical providers who use their good faith and reasonable medical judgment in treating their patients and who are not intending to kill unborn children through the means proscribed are not targeted by these statutes.

For these reasons, and those contained in Defendants' Opposition to Plaintiffs' Writ Application, the law professors' arguments should be disregarded.

B. Mr. Caldwell is wrong.

Mr. Caldwell's proposed brief dismisses one of the cardinal rules of Louisiana rules of statutory construction. Article 9 of the Louisiana Civil Code provides:

> When a law is clear an unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

Mr. Caldwell does not argue in his Motion for Leave or proposed brief *amicus curiae* that La. R.S. 13:4431 is vague or ambiguous. Instead, Mr. Caldwell immediately jumps to the "State's long held position with regards to La. R.S. § 13:4431."[11] Under article 9 of the Louisiana Civil Code, if the language of the statute is clear and unambiguous, then no "further interpretation may be made in search of the intent of the legislature." As the former Attorney General, Mr. Caldwell was not a legislator who helped pass La. R.S. 13:4431, or who may have periodically reviewed the statute to determine if it should be amended in light of this Court's consistent jurisprudence stating that under La. R.S. § 13:4431, a party seeking an appeal of an injunction order restraining the enforcement of a state law is "**entitled** to a suspensive appeal as a **matter of right**." *Wall*, 201 La. at 994, 10 So. 2d at 782 (emphasis added). Consequently, if no further interpretation may be made in search of the intent of the legislature, then any position or personal view that Mr. Caldwell held as the Attorney General with respect to this statute is plainly not helpful.

Finally, even though he claims to possess the "State's long held position with regards to La. R.S. 13:4431," the authority that he cites in his proposed brief does not even contradict Defendants' and the State's actual position with regards to the statute. Mr. Caldwell cites to an *amicus curiae* brief that he filed with the Louisiana Fifth Circuit Court of Appeal in *Connick v. Sheppard*, 15-582 (La. App. 5th Cir. 9/24/2015), 176 So. 3d 1129. Neither that brief nor the

[11] James D. "Buddy" Caldwell's Motion for Leave to Appear as *Amicus Curiae* in Support of Plaintiffs-Applicants, ¶ 3.

authority cited therein contradicts Defendants' position that La. R.S. 13:4431 provides an unqualified right to a suspensive appeal when a district court enjoins enforcement of a state law at any stage in litigation. Indeed, nowhere in the brief filed by Mr. Caldwell in *Connick v. Sheppard*, nor the authority relied on by Mr. Caldwell either in that brief or in his proposed *amicus curiae* brief in this case, does the State of Louisiana take the position that "La. R.S. 13:4431 applies only where a trial court has made a final declaration of unconstitutionality."[12] In *Connick*, Mr. Caldwell merely asserted that a preliminary injunction may not determine the final issue of constitutionality of a statute, which is correct.

What is not correct is Mr. Caldwell's assertion that La. R.S. 13:4431 is limited to situations when a district court oversteps its authority and actually rules on the constitutionality of a statute in a temporary restraining order or in a preliminary injunction. As explained in Defendants' Opposition, the language of La. R.S. 13:4431 is not limited to just these particular situations, but instead a suspensive appeal is available for "**any** restraining order, preliminary injunction, permanent injunction, or other process which may restrain the execution or enforcement of any provision of the constitution or of any act, law or resolution of the legislature of Louisiana"—for any reason. There is no limitation in the statute that the injunction against the enforcement of the law must be based on an ultimate finding of unconstitutionality. For these reasons, the statements and arguments contained in Mr. Caldwell's proposed brief *amicus curiae*, even if considered by this Court, are not persuasive or helpful.

III. Conclusion

Amici curiae repeat the exact same positions taken by Plaintiffs. They also fail to meet any of the other criteria required of them by this Court under Rule VII, § 12 because the law professors have no relevant experience and their opinions are inadequate, and Mr. Caldwell does not have a substantial, legitimate interest in this case that is not already adequately represented by the current Attorney General, Jeff Landry. Thus *amici curiae*'s requests for leave should be denied. In the event this Court grants *amici curiae* leave to file their briefs, this Court should disregard their arguments because their arguments plainly ignore well-settled principles of statutory construction and this Court's well-settled jurisprudence. For the reasons addressed in Defendants' Opposition

[12] *See* Brief of James D. "Buddy" Caldwell as *Amicus Curiae* in Support of Plaintiffs-Applicants at 2.

to Plaintiffs' Writ Application, La. R.S. 13:4431 grants Defendants a suspensive appeal of the district court's preliminary injunction as a matter of right. *Amici curiae*'s efforts to re-write La. R.S. 13:4431 and overturn well-settled Louisiana jurisprudence must fail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on the lower courts and on all counsel of record, listed below, by e-mail and by depositing same in the United States Mail, properly addressed and postage prepaid, this 9th day of August, 2022.

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