SUPREME COURT OF LOUISIANA

_____

No. 2020-OC-421

SETH H. SCHAUMBURG

versus

THE PARISH OF JEFFERSON, ET AL.

_____

CIVIL ACTION

_____

BRIEF OF AMICI CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND LOUISIANA ASSOCIATION OF BUSINESS & INDUSTRY
IN SUPPORT OF APPLICATION FOR WRIT OF SUPERVISORY REVIEW

From the Fifth Circuit Court of Appeal for the State of Louisiana,
No. 19-CA-140
(Judges Fredericka Homberg Wicker, Jude G. Gravois, and Stephen J. Windhorst)
and
From the 24th Judicial District Court for the Parish of Jefferson,
State of Louisiana, No. 786-052, Division "N"
The Honorable Stephen D. Enright, Jr.

Leigh Ann Schell, #19811
ADAMS & REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139
Tel: (504) 581-3234
Fax: (504) 566-0210

Elbert Lin, *pro hac vice**
J. Pierce Lamberson, *pro hac vice**
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Tel: (804) 788-8200
Fax: (804) 788 8218

Counsel for Amici Curiae

*Orders of admission *pro hac vice* were submitted to the Court with amici curiae's Motion for Leave to File Amici Curiae Brief in Support of Application for Writ of Supervisory Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over three-million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Louisiana Association of Business & Industry ("LABI") is a non-profit trade association representing over 2,500 business and industry members that, for over thirty years, has represented the interests of Louisiana business and industry. LABI's membership includes both large and small businesses engaged in all sectors of the economy. LABI's mission is to foster a climate of economic growth by championing the principles of the free enterprise system and to represent the general interest of the business community through active involvement in the legislative, regulatory, and judicial process.

Amici support this Court's review because the lower court's decision departs from several widely followed principles of American jurisprudence and, in so doing, creates an uncertain climate for businesses in Louisiana. Two rulings in the decision below—an expansive reading of the savings clause in the citizen suit provision of the Louisiana Environmental Quality Act ("LEQA") and a categorical narrowing of the doctrine of primary jurisdiction—concern *amici*. Businesses, including *amici*'s members, depend on regulatory certainty. But these rulings, which are out of step with decisions of this Court and many others across the country, threaten the opposite. Left uncorrected, they are likely to lead to a dramatic increase in litigation and conflicting efforts by courts and administrative agencies not present elsewhere. *Amici* believe this case cries out for this Court to step in.

INTRODUCTION AND SUMMARY OF ARGUMENT

For at least a century, federal and state courts across the United States, including the U.S. Supreme Court, have traversed the terrain between the proper role of the judiciary and that of administrative agencies. This long history has produced several common jurisprudential principles in Louisiana and beyond that facilitate the interaction between statutory regimes and traditional tort-based remedies. Two aspects of the Fifth Circuit Court of Appeal's published

decision run counter to these principles, and threaten to set Louisiana well apart from rules consistently applied by courts across the country. This unnecessarily injects uncertainty and increased litigation costs into the Louisiana business environment and may make the State a less attractive place to do business.

First, the Fifth Circuit read the savings clause in the citizen suit provision of the LEQA to allow any suit to proceed so long as the plaintiff formally pleads it as a private nuisance—even if the allegations, arguments, and relief sought in the case render it indistinguishable from a citizen suit under the Act. That interpretation effectively eviscerates the Act's prohibition on citizen suits duplicative of agency enforcement. And it is thus contrary to the prevailing approach of federal and state cases, including in this Court, addressing similar questions about artful pleading and the reach of savings clauses. Unlike the Fifth Circuit, these cases teach that courts must look beneath labels in a plaintiff's complaint and cannot nullify whole provisions of a statute through an expansive application of a savings clause.

Second, the Fifth Circuit categorically narrowed the scope of the primary jurisdiction doctrine by concluding that it never applies in actions styled as nuisance suits seeking injunctive relief. That blanket prohibition finds absolutely no support in this Court's cases or those of any other jurisdiction. Rather, marked by its flexibility, primary jurisdiction is a tool available to courts on a case-by-case basis to yield to an agency's expertise—even when the plaintiff pursues tort claims. No court has imposed the categorical limitation adopted by the Fifth Circuit below. To the contrary, courts across the country have exercised the primary jurisdiction doctrine in circumstances similar to those here, and the Fifth Circuit should have done so, as well.

This Court should grant the writ application and review the Fifth Circuit's exceptional conclusions on these issues. The case readily meets the Court's criteria for review because both errors present significant issues of law that should be decided by this Court, affect the public interest, and are in tension with decisions of this Court and the U.S. Supreme Court. Supreme Court Rule X, § (1)(a)(1), (2), (4). Moreover, beyond making Louisiana an outlier on both of these common jurisprudential principles, the Fifth Circuit's decision creates significant uncertainty by casting a cloud of doubt over the reliance regulated entities may place on permits and compliance orders issued by the Louisiana Department of Environmental Quality ("LDEQ"), as well as other actions taken by the agency. The Fifth Circuit's departures from the weight of nationwide authority not only invite, but effectively mandate, overlapping and potentially

contradictory efforts by courts and administrative agencies. For these reasons and the reasons discussed in Defendants' writ application, this Court's intervention is sorely needed.

ARGUMENT

I. The Fifth Circuit's decision ignores prevailing norms of pleading and statutory interpretation in applying the savings clause of the LEQA's citizen suit provision.

The Fifth Circuit reads the savings clause of the LEQA's citizen suit provision to allow plaintiffs to bring any suit formally pleaded as a private nuisance, even if the actual allegations, arguments, and relief sought make clear that the suit seeks citizen enforcement of the LEQA. Opinion of Court of Appeal, pp. 8–10. The court held that Mr. Schaumburg's suit could go forward under the savings clause because he "very clearly alleged a cause of action in nuisance pursuant to La. C.C. art. 667 and did not seek to avail himself of the cause of action created by La. R.S. 30:2026." *Id.*, p. 9. And it agreed that "includ[ing] violations of environmental laws as grounds for an injunction in the petition does not matter, 'as long as the cause of action itself is created by a law other than the citizen suit provisions of the Louisiana Environmental Quality Act.'" *Id.* at 11 (quoting *Elmwood Village Center v. K-Mart Corp.*, 863 F. Supp. 309, 311 (E.D. La. 1994)). In short, the Fifth Circuit held that the LEQA citizen enforcement provision does not preempt any action styled as a private nuisance suit—no matter the alleged basis or remedy sought.

That holding contradicts two settled judicial principles recognized and followed by state and federal courts across the country. *First*, courts should not blindly accept how plaintiffs formally label their causes of action, particularly where it may encourage efforts to game jurisdiction or evade statutory constraints. *Second*, courts should not interpret savings clauses in a manner that destroys the broader statutory scheme. The Court should grant the application to prevent Louisiana from contravening these prevailing judicial norms.

A. Jurisdictions around the country, including this Court, routinely look beneath artful pleading to ascertain the true nature of plaintiffs' claims.

Prioritizing substance over form, courts throughout the country repeatedly refuse to accept plaintiffs' claims simply as they are formally identified in pleadings, focusing instead on the gravamen of those claims as informed by the allegations and relief sought. This elementary principle follows from a court's ultimate power to decide controversies and prevents subversion of the judicial process by crafty litigants. *See Daily Advertiser v. Trans-La, a Div. of Atmos Energy Corp.*, 612 So. 2d 7, 16–18 (La. 1993). And it is applied consistently to enforce constitutional and statutory boundaries on allowable causes of action, available remedies, jurisdiction, venue, and the appropriate sources of substantive law.

With the exception of the Fifth Circuit's decision below, Louisiana courts have consistently looked beyond artful pleading to evaluate a plaintiff's claims. This Court has twice done so in the very circumstances implicated by this case—where administrative and judicial remedies collide. In *Daily Advertiser*, this Court faced the question whether the plaintiffs' claims fell within the domain of the judiciary or the public service commission. In deciding that question, this Court observed that "the jurisprudence requires that we look beneath these labels, ascertain the gravamen of plaintiffs' claims, and determine whether plaintiffs' claims are within the adjudicative sphere of the district court or the LPSC." 612 So. 2d at 16–18. This Court stressed that "the manner in which plaintiffs couch their claims does not automatically vest jurisdiction in the district court; rather, the nature of the relief demanded is dispositive." *Id.* at 16. In *Opelousas Transit Auth. v. Cleco Corp.*, this Court confronted the same question and again held that the plaintiffs' mere "phrasing their allegations in terms of contract and tort law" did not end the jurisdictional inquiry. 2012-0622, p. 16 (La. 12/4/12), 105 So. 3d 26, 36. *See also Richards v. Baton Rouge Water Co.*, 2013-0873, p. 5 (La. App. 1 Cir. 3/21/14), 142 So. 3d 1027, 1031 ("In resolving this jurisdictional issue, we are not bound by the legal labels a plaintiff affixes to her claims, but must look beneath the labels to ascertain the gravamen of plaintiff's claims.").

Those decisions align with many similar ones around the country, in which courts have likewise sought to police artful attempts at circumventing statutory limitations or requirements. Just three years ago, the U.S. Supreme Court followed this approach in determining whether a plaintiff was required to exhaust procedures under the Individuals with Disabilities Education Act (IDEA). *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017). Among other things, exhaustion was required if a plaintiff brought a suit seeking "relief for the denial of a FAPE" ("free appropriate public education") under the IDEA. *Id.* at 752. The Court concluded that "in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint." *Id.* The examination "should consider substance, not surface," as "[t]he use (or non-use) of particular labels and terms is not what matters." *Id.* at 755. The Court reasoned that "a 'magic words' approach would make [the statutory] exhaustion rule too easy to bypass." *Id.*

State courts have applied a similar approach to thwarting attempts by plaintiffs to evade statutory displacement of tort remedies. For example, in an effort to escape Right to Farm Acts

that eliminate nuisance suits against long-standing farm operations, plaintiffs have attempted to repackage nuisance actions as trespass actions. State appellate courts in both Indiana and Texas have rejected this tactic by looking behind the formally pleaded claims. *See Himsel v. Himsel*, 122 N.E.3d 935, 945 (Ind. Ct. App. 2019) ("Despite artful pleading, we observe that application of the RTFA does not turn on labels . . . the Plaintiffs' trespass claim is barred by the RTFA."); *Ehler v. LVDVD, L.C.*, 319 S.W.3d 817, 824 (Tex. App. 2010). As one Texas appellate court explained, allowing the plaintiff to avoid the prohibition "by pleading a nuisance action as a trespass would eviscerate the statute and deny Appellees the protection intended by the Legislature when it passed the Right to Farm Act." *Ehler*, 319 S.W.3d at 824.

Texas courts have also probed beneath the surface of litigant labels seeking to circumvent the state's Medical Liability and Insurance Improvement Act. The Act imposes several requirements on claims when the "essence" of a suit addresses health care liability. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004). In enforcing those requirements, the Texas Supreme Court has emphasized many times that "courts are not bound by the form of the pleading." *Harris Methodist Fort Worth v. Ollie*, 342 S.W.3d 525, 527 (Tex. 2011) (citing *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005); *Garland*, 156 S.W.3d at 543–44). "Rather, the underlying nature of the claim determines whether it is [a health care liability claim], and the statutory requirements cannot be circumvented by artful pleading." *Id.*

These cases are just a fraction of the state court cases that, dating back several decades, have blocked plaintiffs from artfully pleading around statutory restrictions. *See, e.g.*, *Whitehall Tenants Corp. v. Estate of Olnick*, 213 A.D.2d 200, 200, 623 N.Y.S.2d 585, 585 (1995) ("[P]rivate plaintiffs will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney General under the Martin Act."); *Burkin v. Burlington N. R. Co.*, 690 S.W.2d 508, 508 (Mo. Ct. App. 1985) ("Artful pleading does not change the fact this petition concerns a 'minor dispute' cognizable under the RLA."); *Ongstad v. Piper Jaffray & Co.*, 755 N.W.2d 877, 881 (N.D. 2008) ("[P]laintiffs may not avoid SLUSA's preemptive effect by creative or artful pleading."); *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 285 (Tex. 2017) ("[W]here the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts." (citation omitted)); *Baral v. Schnitt*, 376 P.3d 604, 615 (Cal. 2016) ("[C]ourts may rule on

plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity."); *Estate of Grochowske v. Romey*, 813 N.W.2d 687, 700 (Wis. App. 2012) ("Allowing the plaintiffs to use artful pleadings to bypass GARA's protections . . . would undermine the legislative intent behind the statute of repose.").

Beyond enforcing statutory requirements, courts seek for numerous other reasons to ascertain the true nature of a plaintiff's claim. For example, federal courts routinely look beneath labels to differentiate between federal claims and claims arising under state law for the purpose of assessing jurisdiction. The well-known "artful pleading doctrine" dictates that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 22 (1983). "Where it appears that the plaintiff may have carefully crafted her complaint to circumvent federal jurisdiction, [federal courts] consider whether the facts alleged in the complaint actually implicate a federal cause of action." *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 358 (6th Cir. 2015) (internal quotations omitted). The plaintiff is presumptively master of the complaint, but if a court finds "that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998).

Likewise, because it retains separate systems for law and equity, the Delaware court system regularly looks behind the asserted cause of action to the underlying nature of a plaintiff's claim in assessing jurisdiction. The Chancery Court has stated that neither "the artful use nor the wholesale invocation of familiar chancery terms in a complaint will itself excuse the court . . . from a realistic assessment of the nature of the wrong alleged and the remedy available." *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987). In the *McMahon* case, the plaintiff "attempted to assert many of the traditional grounds for equity jurisdiction," but the court saw through each of them and, finding a legal remedy fully adequate, dismissed the case for lack of jurisdiction. *Id.* at 604. *See also Gelof v. Prickett, Jones & Elliott, P.A.*, No. CIVA4930-VCS, 2010 WL 759663, at *3 (Del. Ch. Feb. 19, 2010) ("As this court has stated many times before, this court does not have jurisdiction merely because a party styled one of its counts as a breach of fiduciary duty." (internal quotation and citation omitted)).

Another reason courts seek the true nature of a plaintiff's claim is to determine the applicable source of law. In *United Steelworkers of Am., AFL-CIO v. Craig*, the Alabama Supreme Court dismissed the case as time-barred because "the duty, if any, on which the plaintiffs' claims rest, ar[ose] solely out of federal labor law." 571 So. 2d 1101, 1102 (Ala. 1990). The Alabama high court did not simply accept the plaintiff's use of state-law labels. "The fact that the plaintiffs couched their suit in language indicative of state-law claims does not create a state-law cause of action where, as here, a state-law claim does not otherwise exist." *Id.*

Ignoring the clear mandate of this Court's statements in *Daily Advertiser* and *Opelousas*, as well as the prevailing practice in courts around the country, the Fifth Circuit refused to look beyond the labels in Mr. Schaumburg's complaint. The Fifth Circuit found it dispositive that Mr. Schaumburg did not formally cite to "La. R.S. 30:2026 or any other section of the LEQA in his petition," deeming it irrelevant that he nevertheless had "alleged specific violations of the LEQA and LDEQ rules." Opinion, pp. 9, 11; *see also id.* at 12 (acknowledging that "Plaintiff is asking the court to order Defendants to comply with current laws"). In doing so, the court transgressed a basic rule that courts across the country have recognized for many years and in many different contexts—that courts *must* look beneath the labels pleaded by the parties to ascertain the true nature of the claims. And if the Fifth Circuit had simply peered behind the legal labels in Mr. Schaumburg's complaint, it would have realized that the nuisance claim is a thinly-disguised citizen suit barred by LDEQ's pending compliance orders. This Court's review is needed to correct this fundamental error, which is at odds with this Court's holdings and black letter American jurisprudence.

B. Jurisdictions around the country recognize that courts should not interpret savings clauses to destroy a comprehensive statutory scheme.

The Fifth Circuit's reading of the savings clause in the LEQA's citizen suit provision also departs from a widely recognized principle of statutory interpretation—that a statute cannot destroy itself. Subsection B of the LEQA's citizen suit provision prevents a plaintiff from bringing a duplicative private law suit against an entity already under an LDEQ compliance order. *See* Louisiana Revised Statute 30:2026(B). But by reading the Act's savings clause to allow any claim formally labeled a private nuisance to proceed, even when the plaintiff's pleadings and arguments are essentially a citizen suit enforcing the LEQA, the decision effectively eliminates subsection B from the statutory scheme. Any conscientious plaintiff's

attorney now has a roadmap to avoiding dismissal under subsection B. The weight of precedent in this country cuts against this outcome.

The U.S. Supreme Court first articulated the principle that a statute cannot destroy itself in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). At issue was the Interstate Commerce Act's savings clause, which broadly provided that "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute." *Id.* Despite that facially sweeping language, the Court reasoned that the savings clause could not "be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *Id.* Stated succinctly, the opinion famously continues, "the act cannot be held to destroy itself." *Id.*

That principle has endured in U.S. Supreme Court jurisprudence ever since. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 872 (2000); *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998); *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995). Less than two months ago, the Court reaffirmed that it has "long rejected interpretations of sweeping saving clauses that prove 'absolutely inconsistent with the provisions of the act' in which they are found." *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020) (citation omitted).

State courts, too, have applied this principle to savings clauses in comprehensive statutes. In a variety of regulatory contexts, California courts have applied *Abilene*'s prohibition against the sweeping application of savings clauses. *See, e.g.*, *Restore Hetch Hetchy v. City & Cty. of San Francisco*, 25 Cal. App. 5th 865, 882 (2018) (interpreting the Raker Act and observing that "[legislative] intent cannot be overcome by the Act's general saving clause"); *Kanter v. Warner-Lambert Co.*, 99 Cal. App. 4th 780, 791 (2002) (interpreting the Food and Drug Administration Modernization Act of 1997 and finding the plaintiffs' "argument is inconsistent with the fundamental principle that a savings clause should not be interpreted in such a way as to undercut or dilute an express preemption clause."); *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 372 (Cal. 2000) (interpreting the Federal Insecticide, Fungicide, and Rodenticide Act and recognizing "the fundamental principle that savings clauses generally should not be interpreted in such a way as to undercut or dilute an express preemption clause").

And California is not alone. State courts across the country regularly recognize and apply this principle to federal and state laws. *See, e.g.*, *Cook v. Turner*, 593 A.2d 504, 505 (Conn. 1991) (interpreting state law "bar[ring] any action for injury to person or property caused by a defective road" and noting that legislature could not have intended savings clause "to swallow up and nullify the section's other provisions"); *Reynolds State Bank v. Office of the State Guardian*, 51 Ill. Ct. Cl. 332, 359 (1998) (refusing to interpret savings clause "to encroach into" the other clauses of state statute); *Master Royalties Corp. v. City of Baltimore*, 200 A.2d 652, 657–58 (Md. 1964) (holding that section of amendment to state constitution was "simply a saving clause to provide for continuity and transition, not a clause to nullify changes otherwise made by the Amendment"); *Blackburn v. Doubleday Broad. Co.*, 353 N.W.2d 550, 555 (Minn. 1984) (interpreting Federal Communications Act and citing principle that savings clauses are "not to nullify other parts of the Act"); *Hardy v. Claircom Commc'ns Grp., Inc.*, 937 P.2d 1128, 1133 (Wash. App. 1997) (same); *Zimmer Radio of Mid-Missouri, Inc. v. Lake Broad., Inc.*, 937 S.W.2d 402, 406 (Mo. Ct. App. 1997) ("[I]f there is a conflict between the FCA and the common law remedy at issue, the latter is preempted."); *Smith v. La Forge*, 244 P.2d 211, 214 (Kan. 1952) (interpreting Packers and Stockyards Act and citing principle that savings clause cannot destroy Act); *Martin v. Crook*, No. 08-1711, 776 N.W.2d 110, 2009 WL 2392077, at *10 (Iowa Ct. App. Aug. 6, 2009) (refusing to interpret savings clause in way that "would essentially nullify the preemptive force" of other part of statute); *Cooper v. Gen. Motors Corp.*, 702 So. 2d 428, 440 (Miss. 1997) (noting that savings clauses are "not to nullify other parts of the Act").

The Fifth Circuit's decision is inconsistent with this settled authority. Under the court's expansive interpretation, the savings clause of the LEQA's citizen suit provision (subsection C) completely swallows the prohibition on duplicative citizen suits (subsection B). Any plaintiff seeking to avoid dismissal under subsection B need only "very clearly allege[] a cause of action in nuisance pursuant to La. C.C. art. 667" and "not seek to avail himself of the cause of action created by La. R.S. 30:2026." Opinion, p. 9. Because the Fifth Circuit refused to look beneath Mr. Schaumburg's legal labels, the savings clause in subsection C effectively destroys the preclusive force of subsection B. For this reason, as well, this Court should grant review.

II. The Fifth Circuit's categorical refusal to apply the primary jurisdiction doctrine is at odds with the way this Court and others universally understand the doctrine.

The Fifth Circuit separately determined that the primary jurisdiction doctrine had no application solely because Mr. Schaumburg claimed to have brought a nuisance suit and not a

citizen suit under the LEQA. The court said: "[A]s we have determined that Plaintiff has not filed a citizen suit pursuant to La. R.S. 30:2026, but rather a suit to enjoin a nuisance pursuant to La. C.C. art. 3601 and La. C.C. art. 667, we find that the doctrine of primary jurisdiction is not implicated by the facts of this case." Opinion, p. 13. The Fifth Circuit did not exercise its discretion in not applying the doctrine, but rather concluded the doctrine had no application at all.

That categorical refusal to apply the primary jurisdiction doctrine is out of line with how this Court and others around the country understand and apply the doctrine. The Fifth Circuit's blanket rule contravenes the Supreme Court's long-standing and uniformly heeded instruction that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction." *United States v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956). Moreover, other courts around the country have exercised primary jurisdiction in precisely the scenario here—where a nuisance suit falls facially within the scope of a statutory savings clause—and the Fifth Circuit should have, as well.

A. Primary jurisdiction is a prudential doctrine assessed on a case-by-case basis.

The doctrine of primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). The doctrine developed to promote "proper relationships between the courts and administrative agencies charged with particular regulatory duties." *W. Pac. R. Co.*, 352 U.S. at 63. It "serves as a judge-made tool for allocating power" between courts and agencies. Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 Nw. U. L. Rev. 997, 1026 (2007). "The doctrine's central aim is to allocate initial decisionmaking responsibility between courts and agencies and to ensure that they 'do not work at cross-purposes.'" *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006) (quoting *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996)). Two principal rationales underlie the doctrine: (1) promoting uniformity in a regulated field and (2) employing the specialized knowledge of agencies. *W. Pac. R. Co.*, 352 U.S. at 63.

By definition and design, primary jurisdiction defies categorical rules. The U.S. Supreme Court has stated unequivocally that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction." *Id*. at 64. Rather, "in every case the question is whether the reasons for

the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.*

Accordingly, state and federal courts across the country "have resisted creating any fixed rules or formulas for [primary jurisdiction's] application." *Tassy v. Brunswick Hosp. Center, Inc.*, 296 F.3d 65, 68 (2d Cir. 2002). This Court has said that the doctrine may be invoked in any case that "presents issues falling within the jurisdiction of both [an agency] and the district court." *Daily Advertiser*, 612 So. 2d at 31. Other courts have echoed the U.S. Supreme Court's mandate that the doctrine follows no set rules. *See, e.g., W. Bend Mut. Ins. Co. v. TRRS Corp.*, No. 124690, 2020 WL 124690 (Ill. Jan. 24, 2020) ("Because the doctrine depends on the circumstances presented in each case, '[n]o fixed formula exists for applying the doctrine of primary jurisdiction.'" (citation omitted)); *Seybert v. Alsworth*, 367 P.3d 32, 39 (Alaska 2016) ("No fixed formula exists for applying the doctrine of primary jurisdiction."); *United Pub. Workers v. Abercrombie*, 325 P.3d 600, 608–10 (Haw. 2014) (same); *The Country Vintner, Inc. v. Louis Latour, Inc.*, 634 S.E.2d 745, 753 (Va. 2006) (same); *Travelers Ins. Co. v. Detroit Edison Co.*, 631 N.W.2d 733, 741 (Mich. 2001) ("[W]hether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency 'necessarily depends upon the agency rule at issue and the nature of the declaration being sought in the particular case.'" (citation omitted)); *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411, 417 (Or. 1997) ("There is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute." (quoting Kenneth Culp Davis, *Administrative Law Text* § 19.01, 374 (3d ed. 1972))).

In sum, primary jurisdiction is applied "on a case-by-case basis." *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990). Though courts have developed a variety of similar multi-factor tests to guide them in each case, none imposes any categorical rule or directive. One such test considers: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 82–83 (2d Cir. 2006); *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (same). *See also Syntek Semiconductor Co.*, 307 F.3d at 781 (articulating

different four-factor test); *Rymes Heating Oils, Inc. v. Springfield Terminal R. Co.*, 358 F.3d 82, 91 (1st Cir. 2004) ("[T]hree factors are relevant to whether the primary jurisdiction doctrine applies … .").

The Fifth Circuit's novel and categorical limitation on the primary jurisdiction doctrine is at odds with the very core of the doctrine and threatens to put Louisiana well out of step with other states and federal courts. Primary jurisdiction is a case-by-case determination about the appropriateness of judicial forbearance in the face of agency expertise. By its very nature, it does not permit categorical rules. But the Fifth Circuit created a blanket and inflexible rule that primary jurisdiction simply has no application in nuisance cases. This Court's review is needed to ensure Louisiana courts retain the same flexible approach to primary jurisdiction that this Court has previously recognized and that exists in the rest of the country.

B. Primary jurisdiction should be exercised in this case, where the plaintiff's allegations and relief sought overlap with LDEQ's robust compliance orders.

Had the Fifth Circuit evaluated the primary jurisdiction doctrine properly, it would have found exercise of the doctrine appropriate. Several recent state and federal court decisions have applied primary jurisdiction in circumstances like those here—where a nuisance suit falls facially within the scope of a statutory savings clause but seeks relief that could undermine or interfere with an agency's ongoing remedial efforts. Like those courts, the Fifth Circuit should have exercised the doctrine of primary jurisdiction in light of LDEQ's existing compliance orders that address the same issues underlying Mr. Schaumburg's petition.

For example, a recent Michigan appeals court decision invoked primary jurisdiction in affirming dismissal of tort claims for damages and injunctive relief in a case involving a gas leak from an underground storage tank. *Carson City Hosp. v. Quick-Sav Food Stores, Ltd*, No. 325187, 2016 WL 1719047 (Mich. Ct. App. Apr. 28, 2016). The court noted that "[t]here is no fixed formula for applying the doctrine," and expressly rejected the argument that "the doctrine of primary jurisdiction cannot be employed in the context of a tort claim or allegations of tortious conduct." *Id.* at *7, 10. Instead, the question is simply "whether the reasons for the doctrine's existence are present and whether the purposes served by the doctrine would be aided by its application in the particular litigation." *Id.* at *7. And recognizing that Michigan's environmental agency had already initiated a clean-up action at the site, the court reasoned that "litigation entailing . . . equitable or declaratory relief with respect to remediation and corrective

actions[] was simply premature and could have undermined and conflicted with determinations yet to be made by the [agency]." *Id.* at *9.

Several federal courts have similarly invoked primary jurisdiction to stay cases alleging nuisance claims. In *B.H. v. Gold Fields Mining Corp.*, the court stayed claims for injunctive relief relating to a historic mining site under the primary jurisdiction doctrine. 506 F. Supp. 2d 792 (N.D. Okla. 2007). The court reasoned that any injunctive relief would "almost certainly conflict" with the Environmental Protection Agency's ongoing efforts at the site and that the matter fell "soundly within the EPA's expertise." *Id.* at 805. And just last month, the court in *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, dismissed under the primary jurisdiction doctrine a public nuisance claim seeking an injunction for safety measures related to COVID-19. No. 5:20-CV-06063-DGK, 2020 WL 2145350, at *8 (W.D. Mo. May 5, 2020). The court deferred to the "expertise and experience with workplace regulation" of the Occupational Health and Safety Administration. *Id.*; *see also Jones v. Halliburton Energy Servs., Inc.*, No. CIV-11-1322-M, 2016 WL 1212133 (W.D. Okla. Mar. 25, 2016) (dismissing nuisance claim for injunctive relief against an oilfield services company where state environmental agency was investigating and remediating site and had entered a consent order with defendant); *Collins v. Olin Corp.*, 418 F. Supp. 2d 34 (D. Conn. 2006) (dismissing without prejudice nuisance claim for injunctive relief against municipal defendant where state environmental agency was overseeing implementation of consent decree with defendant); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F. Supp. 838 (D.N.M. 1994) (staying nuisance claim for injunctive relief against facility where EPA and state environmental agency were undertaking efforts to investigate and remediate site and defendant had entered into consent order with EPA).

As in these cases, invoking primary jurisdiction is a sensible option in this case, as the Defendants explain. Mr. Schaumburg's Petition targets Jefferson Parish Landfill's gas collection and leachate control systems, critical components of all landfills that are the subject of regulation, permitting, and close oversight by LDEQ. Because LDEQ has squarely addressed Mr. Schaumburg's complaints through robust compliance orders, any judicial involvement at this time presents a high risk of conflicting mandates. Moreover, LDEQ possesses expert knowledge regarding technical questions of landfill engineering, operations, and impacts, making it better suited to first address the Parish's alleged problems. A trial court judge of general jurisdiction is ill-equipped to assume this regulatory role through injunctive relief and judicial oversight.

III. The Fifth Circuit's decision creates an unfavorable business climate by fostering regulatory uncertainty.

The Fifth Circuit's rulings on the savings clause LEQA's citizen suit provision and the primary jurisdiction doctrine create an uncertain climate for businesses in Louisiana by depriving them of the relative certainty of LDEQ regulation. Businesses depend on predictable regulatory regimes. Regulatory certainty allows them to rationally allocate resources in a manner that aids long-term success and survival. In the face of clear standards and punishments, businesses know what to expect and can plan accordingly. Regulatory uncertainty, however, makes planning impossible. In that environment, businesses must constantly be on the lookout for additional costs, wasted investments, unexpected demands, and protracted legal battles. At best, resources that could be devoted to growth and development must be saved to protect against the unexpected. *See* Brian Dabson, et al., *Business climate and the role of development incentives*, Federal Reserve Bank of Minneapolis (June 1, 1996)[1] ("A positive business climate is created by regulators who seek to work with business to achieve acceptable standards."). The Fifth Circuit's rulings are likely to lead to just such uncertainty. The decision below makes it exceedingly easy for plaintiffs to seek judicial second-guessing and interference with LDEQ enforcement actions and, at the same time, takes away the courts' ability rely on the expertise of Louisiana's agencies under the primary jurisdiction doctrine.

First, the lower court's overly broad reading of the savings clause of the LEQA's citizen suit provision undermines the ability of businesses to rely on the LDEQ's regulatory and permitting regime and on the orderly issuance of compliance and enforcement measures. Consider the circumstances here. Since 2018, the landfill has been negotiating a resolution of three LDEQ enforcement actions primarily seeking to address alleged violations of the landfill's permits and applicable environmental regulations, including alleged deficiencies with its leachate collection system, gas collection system, and waste cover practices. LDEQ's compliance orders provide a measure of certainty and predictability—if the landfill cooperates, it will discharge its remedial duties and avoid fines. The State Legislature no doubt sought to protect this important business interest when it barred citizen suits during pending enforcement actions. *See* La. R.S. 30:2026(B). But the Fifth Circuit's formalistic approach to the savings clause destabilizes this carefully-balanced regime. If the Fifth Circuit's decision stands, fulfilling its obligations under

[1] https://www.minneapolisfed.org/article/1996/business-climate-and-the-role-of-development-incentives

the compliance orders will not necessarily bring the landfill any certainty. The Fifth Circuit's decision—which sanctions a nuisance claim based on the same alleged deficiencies that the compliance orders address—all but invites the random filing of duplicative injunctive actions sure to upset orderly enforcement and draw out disputes.

Second, the Fifth Circuit's novel and categorical limitation on the primary jurisdiction doctrine further heightens the uncertain business climate. If courts can never invoke primary jurisdiction in a nuisance suit, judicial mandates overlapping with regulatory efforts will multiply. Under the lower court's decision, each time an administrative agency initiates an enforcement action against a regulated entity, courts would have no choice but to hear cumulative nuisance claims piled on by individual litigants.

In fact, one of the purposes of the primary jurisdiction doctrine is to foster regulatory certainty. The U.S. Supreme Court counseled over seventy years ago that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort . . . to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far E. Conference v. United States*, 342 U.S. 570, 574–75 (1952). But by placing the primary jurisdiction doctrine categorically beyond the reach of Louisiana courts in a large class of cases, the Fifth Circuit's decision achieves the opposite. It guarantees unnecessary and otherwise avoidable conflict between the judicial and administrative spheres.

The Fifth Circuit's decision threatens to degrade what regulatory certainty the LEQA currently provides. Not only does it throw open the courthouse door to thinly-veiled citizen suits dressed up as nuisance actions, it eliminates a critical tool for avoiding judicial intrusion on pending administrative enforcement actions. The result will be an increase in unnecessarily overlapping and potentially contradictory efforts by courts and LDEQ. *Cf.* F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 Nat. Resources & Env't 34, 36 (Spring 2010) ("[A]n overlapping public nuisance regime in the administrative state creates potential for conflict and confusion"). That is not an environment in which businesses thrive. For this reason as well, this Court should grant the application.

CONCLUSION

The writ application should be granted.

Respectfully submitted,

s/ Leigh Ann Schell

Leigh Ann Schell, #19811
leighann.schell@arlaw.com
ADAMS & REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139
Tel: (504) 581-3234
Fax: (504) 566-0210

Elbert Lin, *pro hac vice*
elin@hunton.com
J. Pierce Lamberson, *pro hac vice*
plamberson@hunton.com
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Tel: (804) 788-8200
Fax: (804) 788 8218

Counsel for Amici Curiae

VERIFICATION

I hereby verify the allegations of this Brief. I further verify this Brief was filed with the Louisiana Supreme Court using the Court's E-Filing System, and was served on all counsel listed below and J. Stephen D. Enright via email and the Louisiana Fifth Circuit Court of Appeal was served by U.S. Mail, postage prepaid and properly addressed, as per its request, on this 16th day of June, 2020.

s/ Leigh Ann Schell

Seth H. Schaumburg
seth@favretlaw.com
Favret, DeMarest, Russo, Lutkewitte
& Schaumburg
1515 Poydras Street, Suite 1400
New Orleans, LA 70112

Val P. Exnicios
vpexnicios@exnicioslaw.com
Max N. Tobias, Jr.
maxtobias504@aol.com
Lacy Radcliff
lradcliff@exnicioslaw.com
Liska, Exnicios & Nungesser
1515 Poydras Street, Suite 1400
New Orleans, LA 70112

Douglas M. Hammel
douglashammel@gmail.com
Hammel Law Firm, L.L.C.
3129 Bore Street
Metairie, LA 70001

David R. Taggart
dtaggart@bradleyfirm.com
Michael C. Mims
mmims@bradleyfirm.com
Bradley Murchison
401 Edwards Street, Suite 1000
Shreveport, LA 71101

James B. Slaughter
jslaughter@bdlaw.com
Beveridge & Diamond PC
1350 I Street, N.W., Suite 700
Washington, DC 20005

Fifth Circuit Court of Appeal
State of Louisiana
101 Derbigny Street
Gretna, LA 70053

Megan R. Brillault
mbrillault@bdlaw.com
John H. Paul
jpaul@bdlaw.com
Beveridge & Diamond PC
477 Madison Avenue, 15th Floor
New York, NY 10022

J. Michael Digiglia
mdigiglia@glllaw.com
John W. Baay II
jbaay@glllaw.com
Gieger, Laborde & Laperouse, L.L.C.
701 Poydras Street, Suite 4800
New Orleans, LA 70139

William A. Barousse
wbarousse@couhigpartners.com
Couhig Partners, LLC
3250 Energy Centre
New Orleans, LA 70163

William Peter Connick
pconnick@connicklaw.com
Michael S. Futrell
mfutrell@connicklaw.com
Matthew D. Moghis
moghis@connicklaw.com
Connick and Connick, L.L.C.
3421 North Causeway Boulevard
Suite 408
Metairie, LA 70002

Honorable J. Stephen Enright
anne@24jdc.us
Judge, Division "N"
24th Judicial District Court
State of Louisiana
Thomas F. Donelon Courthouse
Suite 3200
Gretna, LA 70053

Bruce C. Betzer
bruce@brucebetzer.com
The Law Office of Bruce C. Betzer
3129 Bore Street
Metairie, LA 70001

Kelsey L. Haddow
khaddow@leakeandersson.com
Leake & Andersson
1100 Poydras Street, Suite 1700
New Orleans, LA 70163