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ANOTHER CALL TO AMEND LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 966 TO PROMOTE EFFICIENCY, PRACTICALITY, AND ALIGNMENT WITH THE EXPLICIT PURPOSE OF SUMMARY JUDGMENT PROCEDURE

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INTRODUCTION

The Louisiana State Legislature has given significant attention to motions for summary judgment in recent years.[1] In 1996, the Legislature adopted the modern burden-shifting framework and legal standard for summary judgment motions in an effort to bring Louisiana's summary judgment procedures in Article 966 of the Louisiana Code of Civil Procedure more closely in line with the federal summary judgment procedures in Rule 56 of the Federal Rules of Civil Procedure.[2] In furtherance of this effort, the 1996 amendments to Article 966 also included an explicit policy statement that summary judgment is a preferred means for resolving cases, which stated:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.[3]

Although the Legislature has subsequently amended or revised Article 966 multiple times since 1996,[4] the legal standard for summary judgments and the statement of policy set forth in the Article have not changed. Most recently, the Legislature passed Act No. 422 of the 2015 Regular Session, which enacted

1. As one commentator noted, the Legislature amended or revised La. Code Civ. Proc. art. 966 twenty times between 1996 and 2015. Garrett Filetti, Comment, *22nd Time's the Charm: The 2015 Revisions to Summary Judgment in Louisiana*, 77 LA. L. REV. 479, 489 n.85 (2016).

2. *See id.* at 486-488.

3. *Id.* at 487; LA. CODE CIV. PROC. ANN. art. 966(A)(2) (rev. 1997).

4. Filetti, *supra* note 1, at 489 n.85.

major changes to the procedural requirements in Article 966, while retaining the same legal standard and statement of policy codified by the 1996 amendments.[5]

The amended Article 966, which went into effect on January 1, 2016,[6] differs from its predecessors in three main ways. The first change pertains to the documents that can be filed in support of or in opposition to the motion, as well as the manner in which objections to these documents must be raised. The next change sets forth precise deadlines for filing and serving motions, oppositions, and reply memoranda, and provides definitive deadlines by which the trial court must set the motion for hearing and render judgment. The last change relates to appellate review of the district court's denial of a motion for summary judgment. This Article focuses on the first two of the foregoing changes, highlights the practical issues and confusion that these provisions have created since they went into effect, and proposes (yet another) legislative amendment to remedy these issues.

Part I outlines the relevant provisions in Article 966 that were added by the 2015 legislative amendments and explains how these provisions differed from the prior version of Article 966. Part II highlights several practical issues that the provisions in the amended Article 966 have caused and identifies other potential problems that could arise. Part III proposes a legislative solution to amend Article 966 again to eliminate the issues discussed in Part II, to promote efficiency and practicality in the court system, and to fall back in line with the Article's stated purpose—just, speedy, and inexpensive determination of all cases.

I. THE 2015 LEGISLATIVE AMENDMENTS TO ARTICLE 966

A. NEW EVIDENTIARY REQUIREMENTS.

The 2015 Legislature overhauled the evidentiary requirements for motions for summary judgment in Article 966 in four major ways. First, Subsection (A)(4) creates an exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment. Second, Subsection (B)(1)-(3) outlines the process by which parties must file evidence in

5. *See* Act No. 422, 2015 Leg., Reg. Sess. (La. 2015).

6. *Id.*

support of or in opposition to a motion. Third, Subsection (D)(2) outlines the process by which parties object to evidence submitted in support of or in opposition to a motion. Fourth, Subsection (D)(2) also limits the evidence that the court may consider in ruling on a motion for summary judgment.

Subsection (A)(4) creates an "exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment."[7] This provision states:

> The *only* documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. The court may permit documents to be filed in any electronically stored format authorized by court rules or approved by the clerk of court.[8]

As explained in the revision comments, "This Subparagraph intentionally does not allow the filing of documents that are not included in the exclusive list, such as photographs, pictures, video images, or contracts, unless they are properly authenticated by an affidavit or deposition to which they are attached."[9] In other words, evidence attached to the motion or the opposition must fall within the exclusive list in Subsection A(4) or else it must be independently authenticated by affidavit or deposition.

Subsection (B)(1)-(3) outlines the process by which parties must file evidence in support of or in opposition to a motion. These provisions are as follows:

> B. Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following

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7. LA. CODE CIV. PROC. ANN. art. 966 cmt. c (rev. 2015).

8. *Id.* art. 966(A)(4) (emphasis added).

9. *Id.* art. 966 cmt. c. Although "answers to interrogatories" are expressly included in Subsection (A)(4), the revision comments explain that "Article 1458 requires that interrogatories be answered under oath, *and only answers that are made under oath may be filed in support of or in opposition to a motion for summary judgment*." *Id.* (emphasis added). Article 1458 also requires the party answering interrogatories to "verify he has read and confirmed the answers and objections." *Id.* art. 1458. Thus, answers to interrogatories that were not answered under oath or verified are not proper summary judgment evidence unless independently authenticated by affidavit or deposition. *See* Dowdle v. State, 2018-878, pp. 4-7 (La. App. 3 Cir. 5/15/19); 272 So. 3d 77, 80-83.

provisions:

> (1) A motion for summary judgment and all documents in support of the motion shall be filed and served on all parties in accordance with Article 1313 not less than sixty-five days prior to the trial.
>
> (2) Any opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion.
>
> (3) Any reply memorandum shall be filed and served in accordance with Article 1313 not less than five days prior to the hearing on the motion. No additional documents may be filed with the reply memorandum.[10]

"The Article makes clear that all motions, memoranda, and supporting documents shall be served on all the parties and filed with the clerk of court," and further prohibits new documents from being filed with a reply memorandum.[11] This effectively requires the mover to "show all of his cards" in the motion, as Subsection (B)(3) prohibits rebuttal evidence from being filed with a reply memorandum. The prior versions of Article 966 did not specifically preclude the mover from filing additional documents with his reply memorandum.[12]

Subsection (D)(2) outlines the process by which parties object to evidence submitted in support of or in opposition to a motion and also limits the evidence that the court may consider in ruling on a motion for summary judgment. This provision states:

> (2) The court *may* consider *only those documents filed in support of or in opposition to a motion for summary judgment* and *shall* consider *any documents to which no objection is made*. Any objection to a document shall be raised in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing which

10. LA. CODE CIV. PROC. ANN. art. 966(B)(1)-(3) (emphasis added).

11. *Id.* art. 966 cmt. d.

12. *See* Reed v. Cowboy's W. Store & Trailer Sales, Inc., 2016-462, p. 4 (La. App. 3 Cir. 3/1/17); 214 So. 3d 987, 991 (applying pre-2016 law that was in effect at the time the motion was filed and rejecting non-mover's argument that mover was prohibited from filing new evidence with his reply brief on the grounds that this provision in Article 966(B)(3) was not applicable under the law in effect at the time the motion was filed).

> documents, if any, it held to be inadmissible or declined to consider.[13]

Before the 2015 amendments, "part[ies] could object to [summary judgment] evidence via a written motion to strike or in writing via their opposition or reply memorandum."[14] But, "[p]roblems arose from the use of the motion to strike because an additional hearing would have to be held on that motion, and that motion would also be subject to the deadlines set out in [Uniform District Court] Rule 9.9."[15] This "led to unnecessary delays," as hearings on motions for summary judgment would be postponed until all of the evidentiary issues were resolved.[16]

The 2015 amendments changed the prior law "by specifically removing the motion to strike as a means of raising an objection to a document offered by an adverse party in support of or in opposition to a motion for summary judgment."[17] The revised provision "does not allow a party to file that motion."[18] This provision "also makes explicit that an oral objection to any document *cannot* be raised at the hearing on the motion for summary judgment and that a court *must* consider all documents to which there is no objection."[19]

Additionally, "Subsection (D)(2) makes clear that the court can consider only those documents filed in support of or in opposition to [a] motion."[20] The revision comments note that "Subsection (D)(2) maintains most of the recent legislative changes" to Article 966.[21] Between 1996 and 2012, Article 966(B) provided that the district court "could render a summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions *on file*, together with the affidavits, if any, show that there is no genuine issue as to material fact, and the mover is entitled to judgment as a matter

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13. LA. CODE CIV. PROC. ANN. art. 966(D)(2) (emphasis added).

14. Filetti, *supra* note 1, at 500 (citing LA. CODE CIV. PROC. ANN. art. 966(F)(3) (rev. 2015)).

15. *Id.*

16. *Id.*

17. LA. CODE CIV. PROC. ANN. art. 966 cmt. k (rev. 2015).

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.* (emphasis added).

21. *Id.*

of law.'"[22] Under that version of Article 966, parties could simply support or oppose a motion for summary judgment by referencing documents already filed into the record.[23] Indeed, under the old law, evidence could be considered in support of a motion for summary judgment even if it was only attached to a previously filed pleading in the record.[24] That version of Article 966 aligned with Rule 56(c)(3) of the Federal Rules of Civil Procedure, which allows a federal district court to consider other materials in the record when deciding a motion for summary judgment.[25]

This practice began to change when the Legislature amended Article 966 in 2012 and then again in 2013. "The 2012 amendments renumbered Subsection B as (B)(2), removed the words 'on file' from that part of the Article," and added a provision in Subsection (E)(2) stating that "[o]nly evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion."[26] "[T]he 2013 amendments moved the evidentiary requirements to [Subsection (F)(2)]," which provided:

> (2) Evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion.[27]

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22. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 2014-1109, p. 27 (La. App. 3 Cir. 1/27/16); 185 So. 3d 222, 240-41 (emphasis added) (discussing historical changes to Article 966's evidentiary requirements).

23. *See* La. AG Credit, PCA v. Livestock Producers, Inc., 42,072, p. 7 (La. App. 2 Cir. 4/4/07); 954 So. 2d 883, 888.

24. *See id.* This is because "pleadings" are one type of proper summary judgment evidence. A written motion for summary judgment is one type of "pleading." *See* LA. CODE CIV. PROC. ANN. art. 852. As such, documents attached to pleadings are a part thereof for all purposes. *See id.* art. 853.

25. FED. R. CIV. P. 56(c)(3). The Federal Rule provides that "[t]he court need consider only the cited materials, *but it may consider other materials in the record*" in deciding a motion for summary judgment. *Id.* (emphasis added).

26. *Meyer & Assocs., Inc.*, 185 So. 3d at 241 (discussing 2012 and 2013 amendments to Article 966's evidentiary requirements).

27. *Id.* (citing LA. CODE CIV. PROC. ANN. art. 966(F)(2) (rev. 2014)). The 2014 amendments to Article 966 retained this provision and added another sentence providing that "[t]he court may permit documentary evidence to be filed in the record with the motion or opposition in any electronically stored format authorized by the

As one court explained, "The intended effect of the 2012 and 2013 amendments was to establish that no longer could a trial court (or reviewing court for that matter) consider any and all pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record when considering a motion for summary judgment."[28] Instead, the court's review "was limited to consideration of only the pleadings, depositions, answers to interrogatories, admissions, and affidavits properly admitted for the purpose of the motion."[29]

The 2015 amendments continued this trend with Subsection (D)(2), by narrowly defining the field of evidence that a court can consider for purposes of a motion for summary judgment to "those documents filed in support of or in opposition to the motion."[30] This provision is much more restrictive than its federal counterpart, as recognized in the revision comments.[31]

In summary, the mover and the non-mover must attach all documentary evidence to their motion and opposition, respectively, and file the evidence with the clerk of court in advance of the hearing. The mover is barred from submitting any additional evidence with his reply memorandum, however. Additionally, evidence attached to the motion or the opposition must fall within the exclusive list in Subsection (A)(4) or else it must be independently authenticated by affidavit or deposition. However, if the non-mover or the mover fails to object to otherwise incompetent summary judgment evidence vis-à-vis a timely filed opposition or reply memorandum, respectively, the court must consider it. Finally, when ruling on the motion, the court cannot consider any evidence that was not attached to and filed with the motion or the opposition.

B. NEW DEADLINES FOR FILINGS, SERVICE, SETTING HEARINGS, AND RENDERING JUDGMENTS.

The 2015 amendments to Article 966 made several substantial changes to the various time periods required for filing, service, setting hearings, and rendering judgments. These

local court rules of the district court or approved by the clerk of the district court for receipt of evidence." LA. CODE CIV. PROC. ANN. art. 966(F)(2) (rev. 2015).

28. *Meyer & Assocs., Inc.*, 185 So. 3d at 241.

29. *Id.*

30. LA. CODE CIV. PROC. ANN. art. 966(D)(2).

31. *See id.* art. 966 cmt. k.

changes are reflected in Subsections B and C of the Article.

The first set of summary judgment-specific deadlines established by the 2015 amendments to Article 966 are those in Subsection B, which sets forth deadlines for filing and serving the motion, opposition, and reply. Before the 2015 amendments, Article 966(B) provided, in relevant part:

> B. (1) The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided in District Court Rule 9.9. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9.[32]

Incidentally, the prior version of "Article 966 relied on Uniform District Court Rule 9.9 . . . to set the timeline for filing motions for summary judgment, oppositions, replies, and other supporting documents," although the Article itself had no specific provision governing reply memoranda.[33] Rule 9.9 requires a party who files a motion to serve a supporting memorandum on all other parties "so that it is received . . . at least fifteen calendar days before the hearing."[34] The party opposing the motion is required under Rule 9.9 to serve an opposition memorandum on all other parties so that it is received at least eight calendar days before the hearing.[35] Lastly, Rule 9.9 requires the mover to serve a reply memorandum on all other parties "so that it is received before 4:00 p.m. on a day that allows one full working day before the hearing."[36]

Now, Article 966 has no references to Rule 9.9, and instead establishes its own set of deadlines for filing and serving motions, oppositions, and replies in Subsection (B)(1)-(4).[37] The motion and all supporting documents must be filed and served on all

32. *Id.* art. 966(B).
33. Filetti, *supra* note 1, at 493.
34. *See* LA. DIST. CT. R. 9.9(b).
35. *See* LA. DIST. CT. R. 9.9(c).
36. *See* LA. DIST. CT. R. 9.9(d).
37. *See supra* note 10 and accompanying text.

parties pursuant to Article 1313 not less than sixty-five days before trial.[38] The opposition and all supporting documents "shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion."[39] The reply "shall be filed and served pursuant to Article 1313 not less than five days prior to the hearing on the motion."[40] "These provisions supersede Rule 9.9 . . . but at the same time recognize the ability of the trial court and all of the parties to enter into a case management or scheduling order or other order to establish deadlines different from those provided" in the Article.[41] Nevertheless, in the absence of consent by the parties, "these orders may not shorten the period of time allowed for a party to file or oppose a motion for summary judgment under [Article 966]."[42]

In this regard, the 2015 amendments removed language in the former Subsection (B)(1) that expressly gave the district "court the discretion, upon a showing of 'good cause,' to afford additional time to oppose a motion for summary judgment."[43] The introductory phrase in the amended Article 966(B) is clear that the deadlines set forth in Subsection (B)(1)-(4) are mandatory and may not be extended or modified by the court unless all parties agree.[44] The Louisiana Supreme Court examined the effect of this legislative change as follows: "By removing the discretionary language and replacing it with mandatory language, we must assume the legislature intended to change the law to eliminate [the trial court's] previously afforded discretion" to extend the summary judgment briefing deadlines.[45]

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38. LA. CODE CIV. PROC. ANN. art. 966(B)(1).

39. *Id.* art. 966(B)(2).

40. *Id.* art. 966(B)(3).

41. *Id.* art. 966 cmt. d (rev. 2015).

42. *Id.* art. 966 cmt. d (rev. 2015) (emphasis added). In fact, the Louisiana Supreme Court has recognized that a district court has *no discretion* to consider a late-filed opposition under Article 966(B)(2). *See* Auricchio v. Harriston, 2020-01167, p. 1 (La. 12/10/21); 2021 WL 5865496, at *1.

43. *Auricchio*, 2021 WL 5865496, at *3.

44. LA. CODE CIV. PROC. ANN. art. 966(B) ("Unless extended by the court *and agreed to by all of the parties*, a motion for summary judgment *shall* be filed, opposed, or replied to in accordance with the following provisions . . .").

45. *Auricchio*, 2021 WL 5865496, at *4. Under the 2015 amendments, the district court only has discretion to order a continuance of the hearing on the motion for summary judgment so as to enable the parties to comply with the deadlines in Subsection (B). *See* LA. CODE CIV. PROC. ANN. art. 966(C)(2). Otherwise, the court has no discretion to consider late-filed documents under Subsection (B). *Auricchio*,

The 2015 amendments also added a new provision, Subsection (B)(4), which was intended to provide guidance for situations when the deadline for filing a motion, opposition, or reply falls on a legal holiday. This provision states:

> If the deadline for filing and serving a motion, an opposition, or a reply memorandum falls on a legal holiday, the motion, opposition, or reply is timely if it is filed and served no later than the next day that is not a legal holiday.[46]

For example, if a hearing on a motion for summary judgment is set for Tuesday, July 19, under Subsection (B)(2), the opposition would need to be filed and served on all parties no less than fifteen days before the July 19 hearing. Thus, in this example, the deadline for filing and serving the opposition falls on Monday, July 4, which is a legal holiday (Independence Day). According to Subsection (B)(4), however, the opposition is timely if it is filed and served no later than the next day that is not a legal holiday––in this case, Tuesday, July 5.

The next set of summary judgment-specific deadlines established by the 2015 amendments to Article 966 are contained in Subsection C. This Subsection sets forth deadlines imposed on the court (and presumably, the clerk of court) in the administrative context of summary judgment motions. The provisions in Subsection C most pertinent to this Article are as follows:

> C. (1) Unless otherwise agreed to by all of the parties and the court:
>
> (a) A contradictory hearing on the motion for summary judgment *shall* be set not less than thirty days after the filing and not less than thirty days prior to the trial date.
>
> (b) Notice of the hearing date *shall* be served on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing.
>
> (2) For good cause shown, the court may order a continuance of the hearing.
>
> (3) The court *shall* render a judgment on the motion not less

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2021 WL 5865496, at *1.

46. LA. CODE CIV. PROC. ANN. art. 966(B)(4). Legal holidays are listed in Louisiana Revised Statute § 1:55. LA. REV. STAT. ANN. § 1:55.

than twenty days prior to the trial.[47]

Thus, when a timely motion for summary judgment is filed, Subsection (C)(1)(a) requires the court to set it for hearing at least thirty days after the date of filing and at least thirty days before trial.[48] If a party has good cause for failing to meet the briefing deadlines in Subsection (B), Subsection (C)(2) authorizes the court to "order a continuance of the hearing on the motion so that the parties and the court can comply with the applicable deadlines."[49]

Once the court sets a hearing date for the motion, Subsection (C)(1)(b) requires that "[n]otice of the hearing date" be served on all parties at least thirty days before the hearing, but this provision is silent on who is responsible for serving the "notice of the hearing date."[50] Further, there have not been any cases that have shed light on who bears this responsibility. The legislature likely intended for the clerk of court to perform this task, especially considering another provision in the Code requiring the clerk to provide written notice of a trial date to a party who has made a written request for one.[51] Without any authoritative guidance, however, the answer remains unclear.

The court is required to render judgment on the motion at least twenty days before trial, pursuant to Subsection (C)(3). Before the 2015 amendments, courts were permitted to rule on motions for summary judgment at "a reasonable time," but no less than ten days before trial.[52] The new deadline in Subsection (C)(3) "requires the court to decide a motion for summary judgment sufficiently in advance of the trial to allow a party to apply for supervisory writs without interrupting the trial setting."[53]

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47. LA. CODE CIV. PROC. ANN. art. 966(C)(1)-(3) (emphasis added).

48. *Id.* art. 966(C)(1)(a).

49. *Id.* art. 966 cmt. g (rev. 2015).

50. *Id.* art. 966(C)(1)(b).

51. *Id.* art. 1572 ("The clerk shall give written notice of the date of the trial whenever a written request therefor is filed in the record or is made by registered mail by a party or counsel of record. This notice shall be mailed by the clerk, by certified mail, properly stamped and addressed, at least ten days before the date fixed for the trial. The provisions of this article may be waived by all counsel of record at a pre-trial conference.").

52. *See* LA. CODE CIV. PROC. ANN. art. 966(D) (rev. 2015).

53. *Id.* art. 966 cmt. h (rev. 2015).

To summarize, the 2015 amendments to Article 966 removed summary judgment motions from the purview of Uniform Rule 9.9's general briefing deadlines for motions and established summary judgment-specific deadlines for filing and serving motions, oppositions, and replies. These new deadlines are mandatory, and courts no longer have discretion to extend or modify them without all of the parties' agreement. The 2015 amendments also imposed mandatory deadlines in which the motion must be set for hearing, notice of the hearing must be served on the parties, and judgment on the motion must be rendered.

II. PRACTICAL ISSUES RESULTING FROM APPLYING THE 2015 AMENDMENTS TO ARTICLE 966

A. THE EVIDENTIARY REQUIREMENTS IN SUBSECTIONS (A)(4), (B)(1)-(2), AND (D)(2) NECESSITATE REDUNDANT FILINGS AND UNNECESSARY EXTRA EXPENSES.

One of the most important but often overlooked changes brought about by the 2015 amendments to Article 966 is Subsection (D)(2), which addresses the evidence that can be introduced and considered by a court when deciding a motion for summary judgment. That provision restricts the documents that the trial court may consider to those *filed* in support of or in opposition to the motion.[54] Recall that, pursuant to Subsection (B)(1)-(2), the mover and non-mover must *file all of their supporting documents* with the motion and opposition, respectively.[55] When read *in para materia*, the foregoing provisions have created harsh practical consequences. The parties are precluded from supporting or opposing a motion by referencing previously filed documents, irrespective of whether the documents are competent summary judgment evidence under Subsection (A)(4). The trial court is prohibited from considering documents that are not filed with the motion or opposition, regardless of whether those documents are admissible under Subsection (A)(4).

Prior versions of Article 966 allowed parties to support or oppose a motion for summary judgment by simply referencing

54. *See* LA. CODE CIV. PROC. ANN. art. 966(D) (emphasis added).

55. *See id.* art. 966(B)(1)-(2) (emphasis added).

documents already filed into the record.[56] This practice, colloquially referred to as "incorporation by reference," was considered sufficient to direct the court's attention to the supporting documents.[57] Under that procedure, documents could be considered in support of a motion for summary judgment even if they were only attached to a previously filed pleading in the record.[58] The previous versions of Article 966 were consistent with the requirements of Federal Rule of Civil Procedure 56(c)(3), which allows a federal district court to "consider other materials in the record" when deciding a motion for summary judgment.[59]

The 2015 revisions to Article 966 continued the recent legislative trend of restricting summary judgment evidence "by no longer allowing a court to consider the record as a whole when deciding a motion for summary judgment."[60] Subsection (D)(2) of the revised Article 966 provides, in pertinent part, that "[t]he court may consider *only* those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made."[61] Although this language may seem perfunctory, the Legislature's use of the word "only" in Subsection (D)(2) effectively put in place stricter and substantially narrower evidentiary requirements for motions for summary judgment.

Indeed, the evidentiary standard in Subsection (D)(2) "makes

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56. *See* La. AG Credit, PCA v. Livestock Producers, Inc., 42,072, p. 7 (La. App. 2 Cir. 4/4/07); 954 So. 2d 883, 888.

57. *See* Palmer v. Ameriquest Mortg. Co., 41,576, p. 10 (La. App. 2 Cir. 12/13/06); 945 So. 2d 294, 300-01 (emphasis in original).

58. *Id.* This is because "pleadings" are one type of proper summary judgment evidence. A written motion for summary judgment is one type of "pleading." *See* LA. CODE CIV. PROC. ANN. art. 852. As such, documents attached to pleadings are "a part thereof for all purposes." *Id.* art. 853.

59. FED. R. CIV. P. 56(c)(3). The Federal Rule provides that "[t]he court need consider only the cited materials, *but it may consider other materials in the record*" in deciding a motion for summary judgment. *Id.* (emphasis added).

60. Davis v. Hixson Autoplex of Monroe, L.L.C., 51,991 (La. App. 2 Cir. 5/23/18); 249 So. 3d 177, 182 (2018).

61. LA. CODE CIV. PROC. ANN. art. 966(D)(2) (emphasis added). As previously explained, the revised article also limits the types of documentary evidence that may be filed in support of or in opposition to a motion for summary judgment to "pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions." *Id.* art. 966(A)(4). Documents that are not included in this exclusive list are not proper summary judgment evidence "unless they are properly authenticated by an affidavit or deposition to which they are attached." *Id.* art. 966 cmt. c (rev. 2015).

clear that the court can consider *only* those documents filed in support of or in opposition to the motion."[62] As a result, "the parties must now attach all documents in support of or in opposition to their motion . . . ."[63] Unlike the prior versions of Article 966, the 2015 version differs from its federal counterpart, Federal Rule of Civil Procedure 56(c)(3),[64] and makes clear that parties can no longer support or oppose a motion for summary judgment via incorporation by reference. Thus, because previous versions of Article 966 mirrored Federal Rule 56 in that respect, it was foreseeable that the 2015 revisions to Article 966—specifically Subsection (D)(2)—would cause some confusion.

A 2018 opinion issued by the Fourth Circuit Court of Appeal illustrates the significant consequences of failing to follow the requirements of Article 966(D)(2). In *Forstall v. City of New Orleans*, the Fourth Circuit reversed the trial court's ruling granting summary judgment in favor of the mover because the mover had supported its motion solely by referencing documents that were already in the court record.[65] In reaching its decision, the court explained that "[the mover] failed to meet its burden . . . to establish a *prima facie* case showing that there are no genuine issues of material fact" because it merely "referenced

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62. *Id.* art. 966 cmt. k (rev. 2015) (emphasis added). This standard also applies to courts of appeal, which review motions for summary judgment "*de novo* 'under the same criteria governing the trial court's consideration of whether summary judgment is appropriate.'" Makhoul v. City of New Orleans, 2019-1099, pp. 6-7 (La. App. 4 Cir. 12/16/20); 312 So. 3d 678, 682. In doing so, an appellate court "*looks to the record before it* and makes an independent determination regarding whether there are genuine issues of material fact that would preclude granting summary judgment." *Id.* (emphasis added). Thus, a court of appeal reviewing a district court's ruling on a motion for summary judgment likewise cannot consider any materials that were not attached to the motion or opposition filed in the district court. LA. CODE CIV. PROC. ANN. art. 966(F) ("A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at the time.").

63. Viering v. Liberty Mut. Ins. Co., 2017-0204, p. 8 (La. App. 1 Cir. 9/27/17); 232 So. 3d 598, 603.

64. LA. CODE CIV. PROC. ANN. art. 966 cmt. k (rev. 2015). Indeed, the Federal Rule provides that "[t]he court need consider only the cited materials, *but it may consider other materials in the record*" in deciding a motion for summary judgment. FED. R. CIV. P. 56(c)(3) (emphasis added).

65. Forstall v. City of New Orleans, 2017-0414, p. 12 (La. App. 4 Cir. 1/17/18); 238 So. 3d 465, 471-72. The Second Circuit and the First Circuit have followed *Forstall*'s interpretation of Article 966(D)(2) as prohibiting trial courts from considering the record as a whole when deciding a motion for summary judgment. *See* Davis v. Hixson Autoplex of Monroe, L.L.C., 51,991, p. 8 (La. App. 2 Cir. 5/23/18); 249 So. 3d 177, 182; James as Co-Trustees of Addison Family Tr. v. Strobel, 2019-0787, p. 4 (La. App. 1 Cir. 6/24/20); 2020 WL 3446635, at *8.

evidence located elsewhere in the record," without "attach[ing] any documents in support of its motion for summary judgment."[66] Therefore, "[g]iven that La. [Code Civ. Proc.] art. 966(D)(2) precluded the trial court from considering other materials in the record for purposes of ruling on the motion for summary judgment," the trial court should not have granted summary judgment in favor of the mover.[67]

While *Forstall* may have been a proper interpretation of Subsection (D)(2), the Fourth Circuit's decision had practical consequences. Under *Forstall*, the district courts (and courts of appeal conducting de novo review) essentially consider motions for summary judgment in a vacuum without regard for any previous activity in the case. Thus, a party moving for summary judgment must file all supporting evidence with the motion—even if that evidence has already been filed into the suit record. The court will not take judicial notice of such evidence in deciding motions for summary judgment, "even though [the evidence] may technically be 'in the record.'"[68]

Forstall is clear that the mover must attach *every* piece of supporting evidence to his motion or he will fail to meet his burden of proof. This effectively requires parties to make redundant filings, thereby necessitating increased expenses to the parties, increased administrative manpower, and a superfluous lengthening of the suit record. This was a detrimental consequence (perhaps unintended, but nonetheless negative) of a court endorsing a rigid, "form-over-substance" interpretation of Article 966—a result that contravenes Article 966's expressly stated purpose:

> The summary judgment procedure is designed to secure the *just, speedy, and inexpensive* determination of every action,

66. *Forstall*, 238 So. 3d at 471.

67. *Id.* at 472. The Court acknowledged that the revised Article 966(D)(2) differs from its federal counterpart, Fed. R. Civ. P. 56(c)(3). *Id.* at 471.

68. *See* Washington v. Gallo Mech. Contractors, LLC, 2016-1251, pp. 4-6 (La. App. 4 Cir. 5/17/17); 221 So. 3d 116, 119-21 (rejecting non-mover's argument that trial court erred in failing to take judicial notice of sworn testimony he gave at prior hearing in the case, because non-mover did not attach it to his opposition, and, therefore the court could not consider it in deciding the motion, pursuant to Article 966(D)(2)). *See also* Horrell v. Alltmont, 2019-0945, pp. 9-11 (La. App. 1 Cir. 7/31/20); 309 So. 3d 754, 760-61 (holding that district court erred in taking judicial notice of various court decisions and not requiring the movers to attach those decisions to their motion for summary judgment).

> except those disallowed by Article 969. *The procedure is favored and shall be construed to accomplish these ends.*[69]

The practice of referencing otherwise competent summary judgment evidence already in the suit record and allowing courts to consider the record as a whole eliminates all of these issues. That was the previous practice in Louisiana state courts for many years, and it remains the practice in federal courts under Rule 56. Therefore, Subsection (D)(2) should be amended to revive the former practice while maintaining the current evidentiary safeguards in Subsection (A)(4). Doing so would align Article 966's evidentiary rules with the Article's stated purpose—i.e., that the summary judgment procedure is favored and should be construed to secure the just, speedy, and inexpensive determination of every action.

B. THE MOVER'S INABILITY TO FILE REBUTTAL EVIDENCE WITH REPLY MEMORANDA PURSUANT TO SUBSECTION (B)(3) PREVENTS THE PARTIES FROM MAKING A COMPLETE RECORD.

Another evidentiary issue stemming from the 2015 amendments to Article 966 is Subsection (B)(3)'s prohibition against filing rebuttal evidence with reply memoranda. Indeed, Subsection (B)(3) explicitly states that "[n]o additional documents may be filed with [a] reply memorandum."[70] Of course, the introductory phrase in Article 966(B) suggests that additional documents may be filed with a reply memorandum if all of the parties and the court agree to it.[71] In reality, however, the adversarial nature of litigation will be unlikely to lend itself to those circumstances. Consequently, there is effectively no scenario in which parties may file rebuttal evidence in support of or in opposition to a motion for summary judgment with a reply (or sur-reply) memorandum.

The First Circuit has suggested two possible options for parties that wish to file rebuttal evidence in compliance with Article 966's evidentiary rules:

> If a party filing a reply memorandum needs additional documents to be filed . . . that party may either request that

69. LA. CODE CIV. PROC. ANN. art. 966(A)(2) (emphasis added).

70. *Id.* art. 966(B)(3).

71. *See id.* 966(B) ("Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following provisions . . . .").

> its motion for summary judgment be dismissed so as to allow a new motion for summary judgment to be filed that would include all necessary documents, or they may request additional time to supplement their initial motion with the necessary documents, which may necessitate the continuance of the hearing on the motion for summary judgment and allow for all of the mandatory delays under La. Code Civ. Proc. art. 966(B) to be adhered to.[72]

Neither of those options, however, favors a "just, speedy, and inexpensive determination" of a case.[73] Article 966(B)(3) makes no exceptions to the rule precluding any additional evidence filed with reply memoranda.

Presumably, the Legislature intended to craft Subsection (B)(3) to streamline the process for resolving the issues raised in the motion.[74] After all, that was the reason why the Legislature removed the motion to strike as one method for objecting to summary judgment evidence in favor of including all objections in opposition and reply memoranda.[75] In fact, the objections procedure set forth in Subsection (D)(2) is in many ways consistent with Subsection (B)(3)'s prohibition of filing evidence with reply memoranda.

In this respect, the present version of Article 966 only contemplates three filings: a motion, an opposition, and a reply.[76] The mover can only file evidence with his motion and the non-mover can only file evidence with his opposition. In turn, the non-mover can only raise objections to the mover's evidence in his opposition, while the mover can only raise objections to the non-mover's evidence in his reply memorandum. If this process were

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72. Adolph v. Lighthouse Prop. Ins. Corp., 2016-1275, p. 6 (La. App. 1 Cir. 9/8/17); 227 So. 3d 316, 320 n.6.

73. *See* LA. CODE CIV. PROC. ANN. art. 966(A)(2).

74. Filetti, *supra* note 1, at 500.

75. *Id.*

76. Crump v. Lake Bruin Recreation & Water Conservation Dist., 52,559, p. 4 (La. App. 2 Cir. 4/10/19); 267 So. 3d 1229, 1234. "There is no provision for a surreply or supplementary opposition." *Id.* (citing Baez v. Hosp. Serv. Dist. No. 3, 2016-951, p. 10 (La. App. 3 Cir. 4/5/17); 216 So. 3d 98, 105). "A court may, in its discretion, permit a surreply to allow the opponent to contest matters presented for the first time in the mover's reply, if the surreply is filed within the delays of Art. 966(B)." *Id.* (citing Dufour v. Schumacher Grp. of La. Inc., 18-20, p. 8 (La. App. 3 Cir. 8/1/18); 252 So. 3d 1023, 1029). "A surreply may not be used to correct an alleged mischaracterization or to reiterate arguments already made." *Id.*

allowed to continue *ad infinitum*, it would delay resolution of the motion for summary judgment. Thus, the 2015 amendments drew a hard line by giving the mover and the non-mover each one chance to file all of their evidence and one chance to make all of their objections to the other party's evidence.

The inability of the parties—especially the mover—to file any additional evidence after their initial filings can overcomplicate the issues raised in the motion, however. The mover is put in a bind when preparing his motion. The mover is left to anticipate the non-mover's opposition arguments and evidence and is effectively required to attach every piece of documentary evidence to his motion—irrespective of its direct relevance to the arguments in the motion. This essentially requires the mover to "show all of his cards" when filing the motion, which could distract from arguments relating to nuanced factual issues.

In this regard, the non-mover might raise arguments in his opposition that appear relevant, but which may not be entirely accurate or ultimately have little-to-no bearing on the material factual issues in the motion. While the mover can always object to the non-mover's evidence when he files his reply memorandum, this may not always prove sufficient to redirect the court's attention to the relevant issues. Often times, the best way to rebut these arguments is with hard evidence; but the mover is unable to do that unless he already filed the rebuttal evidence with his motion.[77]

This differs from Federal Rule 56, which has no express prohibition on summary judgment evidence filed after the motion or the opposition. With this void, each federal district court in Louisiana has its own set of rules governing motion practice in general, as well as summary judgment motions.[78] Each of the

77. Unless, of course, all of the other parties and the court agree to allow the mover to file rebuttal evidence. *See* LA. CODE CIV. PROC. ANN. art. 966(B). Without all of the other parties' consent, however, the court has *no discretion* to allow the rebuttal evidence. *See Auricchio*, 2021 WL 5865496, at *4-5 (holding that 2015 amendments to Article 966 removed language that gave court the discretion, upon a showing of "good cause" to afford additional time to oppose a motion for summary judgment, replacing it with mandatory deadlines that cannot be extended by court without all parties' agreement).

78. *See* U.S. DIST. CT. E.D. LA. LR. 7.1, 7.2, 7.4, 7.5, 7.7, 56.1, 56.2; U.S. DIST. CT. M.D. LA. LR 7(b), 7(d), 7(f), 7(g), 56; U.S. DIST. CT. W.D. LA. LR 7.4.1, 7.4, 7.5, 7.8, 56.1, 56.2.

three federal district's local rules requires supporting evidence to be filed with the motion or with the opposition.[79] Only the Middle District explicitly permits the filing of supporting evidence with the reply memoranda without leave of court for Rule 12 and Rule 56 motions.[80] The Middle District also allows parties to file sur-reply memoranda for Rule 12 and Rule 56 motions, but only after obtaining leave of court.[81] In contrast, the Eastern District and the Western District do not have any specific rules that address reply and sur-reply memoranda filed in support of or in opposition to motions—apart from limiting the length of reply briefs.[82] Even without specific rules governing reply and sur-reply memoranda or evidence filed with such memoranda, Louisiana's federal courts frequently consider and allow such filings with leave of court.

In this respect, Louisiana's federal courts have determined that *new arguments* raised for the first time in a summary judgment reply brief need not be considered.[83] But, district courts may consider *new evidence* introduced in a reply brief if the non-mover is given an adequate opportunity to respond.[84] When deciding whether to consider new evidence, the court may consider the circumstances of the case, including the posture of the case or timing of the filings.[85] Notably, federal courts in Louisiana have allowed a mover to file evidence with his reply memorandum where the evidence did *not* pertain to *new arguments* and simply responded to matters raised in the non-mover's opposition.[86]

The Legislature should amend Article 966 to align with the approach applied by Louisiana's federal district courts.

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79. *See* U.S. DIST. CT. E.D. LA. LR 7.4, 7.5; U.S. DIST. CT. M.D. LA. LR. 7(d), 7(f); U.S. DIST. CT. W.D. LA. LR 7.4, 7.5.

80. *See* U.S. DIST. CT. M.D. LA. LR 7(f).

81. *See* U.S. DIST. CT. M.D. LA. LR 7(f).

82. *See* U.S. DIST. CT. E.D. LA. LR 7.7; U.S. DIST. CT. W.D. LA. LR 7.8.

83. *See* Elwakin v. Target Media Partners Operating Co. LLC, 901 F. Supp. 2d 730, 745 (E.D. La. 2012); Mitchell v. Univ. of La. Sys., 154 F. Supp. 3d 364, 388 (M.D. La. 2015); Cummings v. Elec. Ins. Co., No. 1:18-cv-00786, 2020 WL 5505652, at *2 (W.D. La. Sept. 11, 2020).

84. *Elwakin*, 901 F. Supp. 2d at 745-46; *Mitchell*, 154 F. Supp. 3d at 388 (quoting *Elwakin*, 901 F. Supp. 2d at 745-46); *Cummings*, 2020 WL 5505652, at *2.

85. *Elwakin*, 901 F. Supp. 2d at 746; *Mitchell*, 154 F. Supp. 3d at 388 (quoting *Elwakin*, 901 F. Supp. 2d at 745-46); *Cummings*, 2020 WL 5505652, at *2.

86. *See, e.g.*, Keybank Nat'l Ass'n v. Perkins Rowe Assoc., LLC, No. 09-497, 2010 WL 1945715, at *1-2 (M.D. La. May 12, 2010).

Specifically, the evidentiary requirements associated with motions, oppositions, and replies set forth in Subsection (B)(1)-(3) should be revised to give courts the discretion to allow parties to file rebuttal evidence with leave of court. Further, Subsection (D)(2) should be revised to provide the non-mover with a mechanism by which to file objections to any rebuttal evidence that is allowed by the court. When determining whether to grant the mover leave to file the rebuttal evidence, the court should consider the circumstances of the case, including the posture of the case and timing of the filings. These changes would afford the mover the chance to make a complete record when addressing matters presented in the non-mover's opposition, while giving the non-mover an adequate opportunity to respond by way of objecting to the rebuttal. This approach would bring the evidentiary rules in Article 966 more in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

C. THE REQUIREMENTS FOR SERVING THE NOTICE OF THE HEARING DATE UNDER SUBSECTION (C)(1)(B) ARE UNCLEAR.

As explained in Part II(B), *supra*, Article 966 contains instructions on the manner and timing of service of the motion, opposition, and reply, as well as the "notice of the hearing date" for the motion. This Subpart addresses the uncertainties surrounding the manner of serving these papers under Section (C)(1)(b). Subsection B(1)-(3) of Article 966 provides that the motion, opposition, and reply memorandum "shall be filed and served in accordance with Article 1313" by a specific number of days preceding the hearing on the motion.[87] Subsection (C)(1)(b) is ostensibly more specific in its instructions for serving the notice of hearing. It provides that "[n]otice of the hearing date shall be served on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing."[88]

Article 1313 outlines the requirements for serving pleadings subsequent to the original petition. Under Article 1313(A),[89]

87. *See* LA. CODE CIV. PROC. ANN. art. 966(B)(1)-(3).

88. *Id.* art. 966(C)(1)(b).

89. This provision states:

> (A) Except as otherwise provided by law, every pleading subsequent to the original petition, and ever pleading which under an express provision of law may be served as provided in this Article, may be served either by the sheriff or by:
>
> (1) Mailing a copy thereof to the counsel of record, or if there is no counsel

parties can serve post-petition pleadings by U.S. mail, hand delivery, or email unless the pleading sets a court date, in which case Subsection(C) of Article 1313 governs the manner for serving it. Thus, because a motion for summary judgment is a contradictory motion that is required to be set for hearing,[90] it must be served pursuant to Article 1313(C).[91]

Until recently, service of a pleading or an order that sets a court date was proper under Article 1313(C) if made by registered mail, certified mail, the sheriff under Article 1314,[92] or actual

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> of record, to the adverse party at his last known address, this service being complete upon mailing.
>
> (2) Delivering a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party.
>
> (3) Delivering a copy thereof to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.
>
> (4) Transmitting a copy by electronic means to counsel of record, or if there is no counsel of record, to the adverse party, at the number or addresses expressly designated in a pleading or other writing for receipt of electronic service. Service by electronic means is complete upon transmission but is not effective and shall not be certified if the serving party learns the transmission did not reach the party to be served.

LA. CODE CIV. PROC. ANN. art. 1313(A)(1)-(4).

90. *See* LA. DIST. CT. R. 9.8(a) ("All exceptions and motions, including those incorporated into an answer, *shall be accompanied by a proposed order requesting that the exception or motion be set for hearing*.") (emphasis added); LA. CODE CIV. PROC. ANN. art. 963 ("If the order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion *shall be served on and tried contradictorily with the adverse party*.") (emphasis added).

91. In contrast, a memorandum in opposition to a motion for summary judgment and a reply memorandum in support of a motion for summary judgment do *not* request a hearing date (the hearing has usually already been set). Therefore, those memoranda need not be served pursuant to Article 1313(C). This is presumably why Subsection B(1)-(3) of Article 966 broadly references "Article 1313" rather than any specific subsections of Article 1313.

92. Article 1314 states:

> A pleading which is required to be served, but which may not be served under Article 1313, shall be served by the sheriff by either of the following:
>
> (1) Service on the adverse party in any manner permitted under Articles 1231 through 1266.
>
> (2) (a) Personal service on the counsel of record of the adverse party or delivery of a copy of the pleading to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.
>
> (b) Except as otherwise provided in Article 2293, service may not be made

delivery by a commercial courier.[93] Recognizing the need for modernizing certain provisions in the Code of Civil Procedure, the Legislature passed Act No. 68 during the 2021 Regular Session.[94] Among other things, Act No. 68 amended Article 1313(C) "to allow service of a pleading or order setting a court date by emailing the party or his counsel at a designated email address, provided that the sender receives an electronic confirmation of delivery."[95] Thus, effective January 1, 2022, parties may serve pleadings and orders that set a court date via email.[96]

The recent amendment to Article 1313(C) allowing email service allows parties to avoid the added expenses associated with serving physical copies of pleadings and orders that set a court date via certified mail, registered mail, the sheriff, or commercial courier. This is particularly advantageous when serving motions for summary judgment, which often include voluminous exhibits attached to the motion. Moreover, email service is instantaneous, whereas delivering pleadings via the other methods in Article 1313(C) often takes at least one business day (and often times, more than that). Consequently, if a party uses any of the other methods for service under Article 1313(C), that party effectively shortens the already tight deadlines for making timely service. Email service avoids this dilemma.

Consistent with the new amendment to Article 1313(C), Act No. 68 also amended Articles 863 and 891 to further require every pleading to include an email address of the party or the party's attorney for service.[97] In today's world, these changes were important to streamline litigation and avoid unnecessary delays caused by antiquated procedural rules.

Of course, these changes, while certainly steps in the right

> on the counsel of record after a final judgment terminating or disposing of all issues litigated has been rendered, the delays for appeal have lapsed, and no timely appeal has been taken.

LA. CODE CIV. PROC. ANN. art. 1314(A).

93. *Id.* art. 1313(C).

94. *See* Act No. 68, 2021 Reg. Leg. Sess. (La. 2021).

95. LA. CODE CIV. PROC. ANN. art. 1313 cmt. (2021). As an aside, practical issues may arise from the inability of the sender to obtain an "electronic confirmation of delivery" due to incompatibility between the sender's and the recipient's email servers. Those issues, however, are outside the scope of this article.

96. *Id.* art. 1313(C).

97. *See* Act No. 68, 2021 Reg. Leg. Sess. (La. 2021).

direction, did not (and could not) address every problem. One issue that remains unclear following the passage of Act No. 68 relates to the requirements for serving the "notice of the hearing date" for a motion for summary judgment under Article 966(C)(1)(b). This provision requires the notice of the hearing date to be served "on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing."[98] However, unlike the motion, opposition, and reply, none of the parties creates or files the "notice of the hearing date." Further, Subsection (C)(1)(b) does not specify exactly what the "notice of the hearing date" is—i.e. the form of the notice. As a result, while Subsection (C)(1)(b) is clear that the "notice of the hearing date" must be served on all parties by certified mail, registered mail, the sheriff, commercial courier, or email, it is unclear what the "notice" must look like or who is responsible for serving it. Compounding this problem is that the "notice" must be served on all parties no later than thirty days before the hearing date, and courts cannot modify these requirements under any circumstances unless all of the parties agree.[99]

Much of this confusion can be attributed to the lack of homogeneity among Louisiana's forty-two district courts, particularly with respect to technological standards for the clerks of court. For example, while some district courts allow parties to file documents electronically, others do not.[100] Additionally, some

98. LA. CODE CIV. PROC. ANN. art. 966(C)(1)(b).

99. *Id.* art. 966(C)(1) ("*Unless otherwise agreed to by all of the parties* and the court . . .") (emphasis added).

100. Specifically, Article 253 authorizes the clerks of court to establish their own electronic filing and recordkeeping systems. The article provides, in relevant part:

> A. All pleadings or documents to be filed in an action or proceeding instituted or pending in a court, and all exhibits introduced in evidence, shall be delivered to the clerk of the court for such purpose. The clerk shall endorse thereon the fact and date of filing and shall retain possession thereof for inclusion in the record, or in the files of his office, as required by law. The endorsement of the fact and date of filing shall be made upon receipt of the pleadings or documents by the clerk and shall be made without regard to whether there are orders in connection therewith to be signed by the court.
>
> B. The filings as provided in Paragraph A of this Article and all other provisions of this Chapter may be transmitted electronically in accordance with a system established by a clerk of court or by Louisiana Clerks' Remote Access Authority. When such a system is established, the clerk of court shall adopt and implement procedures for the electronic filing and storage of any pleading, document, or exhibit. The official record shall be the electronic record. A pleading or document filed electronically is deemed filed on the date and time stated on the confirmation of electronic filing sent from the system, if the clerk of court accepts

district courts maintain electronic docket records that enable parties to monitor activity in their cases online; but many other district courts are not equipped with these features.[101]

This is in stark contrast to the comprehensive electronic filing and recordkeeping system used in all federal courts across the country (including federal courts in Louisiana), known as CM/ECF.[102] When a party or the party's attorney files a document in a federal lawsuit using CM/ECF, the document is immediately uploaded onto the docket for that lawsuit, and the other parties' attorneys promptly receive an email notifying them of the filing and providing them access to the online docket to view it.[103] Additionally, when the court sets a matter for hearing or another type of conference, CM/ECF sends an email to all of the parties notifying them of the court's action and giving them access to the online docket to view the court's order, if any.

Needless to say, this process is exponentially more efficient than the analogous patchwork of different processes among Louisiana's state district courts. Unfortunately, however, this problem is unlikely entirely fixable by legislation, as it is more of an administrative budgetary issue.[104]

Without uniformity among Louisiana's district courts, there is less certainty as to the proper form of the "notice of hearing" under Article 966(C)(1)(b) and who is responsible for serving it.

> the electronic filing. Public access to electronically filed pleadings and documents shall be in accordance with the rules governing access to written filings.

LA. CODE CIV. PROC. ANN. art. 253(A)-(B). The Louisiana Clerks' Remote Access Authority ("LCRAA") is established by LA. STAT. ANN. § 13:754. LA. STAT. ANN. § 13:754.

101. *Id.*

102. CM/ECF is an abbreviation for "case management/electronic case files." In 2001, the federal judiciary began the process of installing CM/ECF in bankruptcy, district, and appellate courts. 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1147 (4th ed.). "The system now operates throughout the federal judiciary." *Id.*

103. *Id.*

104. The Judicial Budgetary Control Board is responsible for establishing rules and regulations to govern the expenditure of all funds appropriated by the legislature to the Louisiana judiciary and judicial agencies. *See* LA. SUP. CT. GEN. ADMIN. R., Part G, § 4. Additionally, the Louisiana Clerks' Remote Access Authority would likely have a say in how any funds appropriated to the Louisiana judiciary and judicial agencies should be allocated for the creation and implementation of a comprehensive uniform electronic filing and recordkeeping system used on a statewide basis. *See* LA. STAT. ANN. § 13:754.

In some district courts, the clerk of court will typically issue a "notice of hearing" to all counsel of record after the judge sets a motion for hearing. This is usually a one-page document addressed to each attorney in the case, which states that a particular motion is set for hearing at a specified date, time, and location. Sometimes, the notice will attach a copy of the court's signed order setting the motion for hearing.

Notably, a party is only entitled to receive "notice" of a hearing from the clerk of court via certified mail at least ten days before the hearing if that party has filed a "request for written notice" into the record, pursuant to Article 1572.[105] Otherwise, each district court has its own procedures for providing adequate notice to all parties.[106] But, even if a party has filed a "request for written notice" in accordance with Article 1572, nothing in that Article mandates the clerk of court to serve a notice of hearing on the requesting party *more* than ten days before the hearing or in any manner other than certified mail. Consequently, the notice required by the clerk of court in Article 1572 is not broad enough to comply with the notice required in Article 966(C)(1)(b).

Absent any assurance that the clerk of court will serve a "notice of the hearing date" for a motion for summary judgment on all of the parties via Article 1313(C) at least thirty days before the hearing, the mover may have to take matters into his own hands to ensure compliance with Article 966(C)(1)(b). How does the mover accomplish this? The best practice would be to secure a hearing date from the court as soon as the motion is filed, obtain a copy of the court's signed order setting the motion for hearing, and serve the signed order on all of the other parties pursuant to Article 1313(C), which now authorizes email service.

However, this may not be feasible in every instance for a

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105. Article 1572 states:

> The clerk shall give written notice of the date of the trial whenever a written request therefor is filed in the record or is made by registered mail by a party or counsel of record. This notice shall be mailed by the clerk, by certified mail, properly stamped and addressed, at least ten days before the date fixed for the trial. The provisions of this article may be waived by all counsel of record at a pre-trial conference.

LA. CODE CIV. PROC. ANN. art. 1572.

106. *See id.* art. 1571(A)(1) ("The district courts shall prescribe the procedure for assigning cases for trial, by rules which shall . . . [r]equire adequate notice of trial to all parties . . . .").

variety of circumstances—especially if the district court is located across the state and is not one of the more technologically advanced jurisdictions. In those scenarios, the mover should account for potential logistical delays when preparing to file a motion for summary judgment and try to file the motion with enough lead-time to comply with all of the statutory and case-specific deadlines.

Obviously, the latter scenario is not ideal; but, that is the most prudent approach under the current rules. It follows that litigants would undoubtedly benefit from a clearer rule addressing service of the "notice of the hearing date" for a motion for summary judgment than the current rule in Article 966(C)(1)(b). This should be the clerk of court's responsibility rather than the mover's. Indeed, the clerk's office is in a much better position to learn when a judge signs an order setting a hearing date. Moreover, the clerk is already responsible for giving written notice of a trial date to a party who submits a request for such notice under Article 1572. Accordingly, the Legislature should amend this provision to specify that the clerk of court shall serve notice of the hearing date for a motion for summary judgment on all of the parties via Article 1313(C) not less than thirty days before the hearing. The Legislature should also permit the mover to serve notice to the other parties via Article 1313(C) in the event that the clerk's office does not promptly do so, to ensure compliance with the rule.

D. THE DELAY FOR FILING AND SERVING REPLY MEMORANDA IN SUBSECTION (B)(3) NEEDS TO SPECIFY WHETHER OR NOT LEGAL HOLIDAYS ARE INCLUDED.

As explained in Part II(B), *supra*, prior to the 2015 amendments to Article 966, the delays for filing and serving memoranda in support of, memoranda in opposition to, and reply memoranda in support of motions for summary judgment were governed by the Louisiana Uniform District Court Rules.[107] The

107. *See* LA. CODE CIV. PROC. ANN. art. 966(B)(1) (2015) ("The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided in District Court Rule 9.9. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9."). The previous version of Article 966 did not specify the delay for filing a reply memorandum in support of a motion for summary judgment. *See id; see also* LA.

2015 amendments carved out an exception, and provided specific, lengthier delays for filing and serving memoranda in support of, memoranda in opposition to, and reply memoranda in support of motions for summary judgment. This Subpart concerns the delay for filing reply memoranda set forth in Article 966(B)(3). The language of this provision has led to uncertainty about whether or not legal holidays are included in calculating the delay for filing reply memoranda in support of motions for summary judgment.

Uniform District Court Rule 9.9(d) previously governed the delay for filing and serving reply memoranda in support of motions for summary judgment. That provision states that "[t]he mover or exceptor may furnish the trial judge a reply memorandum, but only if the reply memorandum is furnished to the trial judge and served on all other parties so that it is received before 4:00 p.m. on a day that allows one full working day before the hearing."[108]

Now, Article 966(B)(3) governs the delay for filing reply memoranda in support of motions for summary judgment. Under that provision, "[a]ny reply memoranda shall be filed and served in accordance with Article 1313 not less than five days prior to the hearing on the motion."[109] Although this new time delay seems straightforward, it has nevertheless caused confusion about whether legal holidays (including weekends) are included in the five-day period. Put differently, it is not entirely clear whether the five-day period in Article 966(B)(3) means five *calendar days*. This confusion stems from the Code of Civil Procedure's computation of time rules set forth in Article 5059, which states, in relevant part:

> B. A half-holiday is considered as a legal holiday. A legal holiday is to be included in the computation of a period of time allowed or prescribed, *except when*:
>
> (1) It is expressly excluded;
>
> (2) It would otherwise be the last day of the period; or

DIST. CT. R. 9.9(b)-(d).

108. LA. DIST. CT. R. 9.9(d). Rule 9.9(d) was also amended by the 2015 amendments to explicitly carve out reply memoranda in support of motions for summary judgment from the purview of the rule, noting that the delays for filing and serving reply memoranda in support of motions for summary judgment are established by Article 966. *Id.*

109. LA. CODE CIV. PROC. ANN. art. 966(B)(3).

(3) *The period is less than seven days.*[110]

Hence, because the delay for filing and serving reply memoranda in Article 966(B)(3) is less than seven days, there is an argument that legal holidays are not included in calculating this time period. Two different appellate courts examined this conundrum in 2017, although neither of those cases resulted in a binding opinion on the issue.

In *Baez v. Hospital Service District No. 3*, the Third Circuit Court of Appeal considered whether the district court erred in vacating its previous order granting the non-mover's motion for leave to file a sur-reply in opposition to a motion for summary judgment, which was filed five calendar days before the hearing on the mover's motion.[111] The Third Circuit affirmed the district court's ruling vacating the order allowing the sur-reply for two reasons: (1) Article 966(B) does not provide for the filing of a sur-reply memorandum, and (2) even if a sur-reply were permitted as a reply memorandum under 966(B), it would have been untimely under Subsection (B)(3).[112] Regarding the timeliness issue, the Third Circuit explained that:

> At the time Ms. Baez filed her motion to file a surreply, the hearing was set for Wednesday, July 6, 2016. *Louisiana Code of Civil Procedure Article 5059 provides that in the computation of time, the last day of a period of time is to be included in the period of time allowed by law. However, if the period is less than seven days, legal holidays are not included. La. Code Civ. Proc. art. 5059(3). In that case, Ms. Baez should have filed her motion to file surreply on June 28, 2016, five days before July 6, not including Saturday, Sunday, or July 4.*[113]

Although this was dicta, the Third Circuit in *Baez* interpreted the five-day delay for filing and serving reply memoranda in Article 966(B)(3) to *exclude* legal holidays, pursuant to Article 5059(B)(3).

A few months later in *Adolph v. Lighthouse Property Insurance Corp.*, the First Circuit Court of Appeal sua sponte

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110. *Id.* art. 5059(B)(3) (emphasis added).

111. Baez v. Hosp. Serv. Dist. No. 3, 16-951 (La. App. 3 Cir. 04/05/17); 216 So. 3d 98.

112. *Id.* at 105-06.

113. *Id.* (emphasis added).

considered the issue of whether legal holidays are included in the five-day time delay under Article 966(B)(3), but the majority opinion did not ultimately rule on the issue.[114] Instead, the majority opinion, though ostensibly endorsing an interpretation that legal holidays *are included* in the five-day time period in Article 966(B)(3), simply recognized in a footnote that there is a conflict between Article 966(B)(3) and Article 5059(B)(3):

> The hearing on Lighthouses' motion for summary judgment was scheduled for June 23, 2016. [La. Code Civ. Proc. art.] 966(B)(3) requires that a reply memorandum be served "not less than five days prior to the hearing on the motion." Five days prior to the hearing was June 18, 2016, which was a Saturday (a legal holiday). Therefore, under [La. Code Civ. Proc.] art. 966(B)(4), the reply memorandum would be timely because it was fax-filed the next day that was not a legal holiday-June 20, 2016. However, [La. Code Civ. Proc.] art. 5059 states that in computing time delays, if the period of time allowed by law is less than seven days, then legal holidays are not included. *It appears that [La. Code Civ. Proc.] art. 5059 and [La. Code Civ. Proc.] art. 966(B) are in conflict in computing the time delays for filing a reply memorandum in the instant matter. Because [La. Code Civ. Proc.] art. 966(B) is the most current expression of legislative intent and the time requirements provided therein are specific rather than general, it appears that [La. Code Civ. Proc.] art. 5059 does not apply to the instant matter.* However, because the parties did not raise this issue on appeal, we decline to address the issue.[115]

Nevertheless, two of the judges on the panel—Judge Welch and Judge Crain—penned separate concurring opinions, each having a different conclusion on the proper interpretation of the five-day time period in Article 966(B)(3). Both Judges based their conclusions in part on differing analyses of another provision in Article 966—Subsection (B)(4).

First, Judge Welch opined in his concurrence that Article 5059 governed the time periods for filing and serving reply memoranda under Article 966 (thus, legal holidays are not included in calculating the delay).[116] Judge Welch reasoned:

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114. *Adolph*, 227 So. 3d at 318 n.3.

115. *Id.* (emphasis added).

116. *Id.* at 322 (Welch, J., concurring).

> The majority has determined (implicitly) that the reply memorandum was timely, presumably on the basis that five days prior to the hearing was June 18, 2016, which was a Saturday (and a legal holiday), and therefore under [La. Code Civ. Proc.] art. 966(B)(4), the reply memorandum was timely because it was filed the next day that was not a legal holiday—June 20, 2016. *However, as previously set forth, legal holidays are not included in the computation of the time period within which to file the reply memorandum and the majority's inclusion of legal holidays in the calculation of the time period to file the reply memorandum ignores the express provisions of [La. Code Civ. Proc.] art. 5059.*[117]

Judge Welch pointed out that the 2015 revision comments to Article 966 explicitly state that Subsection (B)(4) follows Article 5059.[118] Therefore, because Subsection (B)(4) applies to the deadlines for filing motions, oppositions, and replies set forth in Subsection (B)(1)-(3), Judge Welch concluded that the general rules for computation of time in Article 5059 should apply to each of those deadlines. Specifically, Judge Welch explained:

> In addition, the majority's determination suggests that [La. Code Civ. Proc.] art. 5059 is applicable to the computation of the applicable time period for filing the motion for summary judgment and the opposition, but not to the reply memorandum. However, such an interpretation would require us to read language into [La. Code Civ. Proc.] art. 966(B)(3) to the effect of "including legal holidays" when such language was not included or intended by our legislature. Furthermore, *there is no language in [La. Code Civ. Proc.] art. 966(B)(4) to suggest that the provisions of [La. Code Civ. Proc.] art. 5059 is not applicable to the reply memorandum or that the calculation of the time period within which to file a reply memorandum should include legal holidays*. Rather, *[La. Code Civ. Proc.] art. 966(B)(4) simply provides a rule that if the deadline for filing and serving the motion, opposition, or reply falls on a legal holiday, then it is timely if it is filed and served no later than the next day that is not a legal holiday; such language neither abrogates [La. Code Civ. Proc.] art. 5059 nor expressly provides that the calculation of time for filing the reply memorandum should include legal*

117. *Id.* (emphasis added).

118. *See id.*

> *holidays*. As such, the majority has erred in its determination that the defendant's reply memorandum was timely and that a review of the merits of the defendant's objection to the plaintiff's expert's affidavit was warranted.[119]

Conversely, Judge Crain opined in his concurrence that the time periods in Article 966 are sui generis, and, therefore, not governed by Article 5059—thus finding that legal holidays *are* included in calculating the delay. Judge Crain explained:

> In addition to the objection being properly made, I find the reply memorandum was timely filed. [La. Code Civ. Proc. art.] 966(B)(3) requires a reply memorandum be filed "not less than five days prior to the hearing on the motion." [La. Code Civ. Proc. art.] 966(B)(4) then provides, in relevant part, that when "the deadline for filing and serving a . . . reply memorandum falls on a legal holiday, [it] is timely if it is filed and received no later than the next day that is not a legal holiday." The hearing on the motion for summary judgment was set for June 23, 2016. "[F]ive days prior to the hearing" was Saturday, June 18, 2016, a legal holiday; therefore, the express language of Article 966(B)(4) required the reply memorandum be filed "no later than the next day that is not a legal holiday," which was Monday, June 20, 2016. The defendant's reply memorandum filed that day was timely.[120]

Judge Crain added that:

> By expressly addressing in Article 966(B)(4) the circumstance where the filing deadline "falls on a legal holiday," the legislature necessarily excluded the application of the more general rule of [La. Code Civ. Proc. art.] 5059, which requires that legal holidays not be counted if the delay provided for is less than seven days. *Because legal holidays are not counted under Article 5059, its application to Article 966B would prohibit the filing deadline from ever falling on a legal holiday—the very scenario that Article 966B(4) expressly addresses*.[121]

As the foregoing excerpts from *Baez* and *Adolph* illustrate,

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119. *Id.* at 322-23 (emphasis added).

120. *Id.* at 325 (Crain, J., concurring) (emphasis added).

121. *Id.* at 325 n.2.

there are arguments that the five-day time period in Article 966(B)(3) includes legal holidays and there are arguments that it does not include legal holidays. Unfortunately, this issue has not been addressed in any other cases since *Baez* and *Adolph*. Therefore, without further legislative action or the Louisiana Supreme Court weighing in, the issue remains unclear and unresolved.

III. PROPOSAL

As explained throughout this Article, several problems have arisen from courts applying the highly technical and sometimes confusing rules established by the 2015 amendments to Article 966. The Louisiana Legislature should rectify these problems by revising Article 966 in four main respects:

(1) Allow parties to cite and courts to consider competent summary judgment evidence that is already in the record.

(2) Permit rebuttal evidence filed with reply memoranda and objections to rebuttal evidence under appropriate circumstances.

(3) Clarify the requirements for serving the notice of the hearing date.

(4) Clarify the delay for filing and serving reply memoranda.

These proposed changes would require amending Subsections (A)(4), (B)(1)-(4), (C)(1)(b), and (D)(2) in the present version of Article 966. Most importantly, these changes would bring Article 966 back in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

A. Allow Parties to Cite and Courts to Consider Competent Summary Judgment Evidence that is Already in the Record.

First, Subsections (A)(4), (B)(1), and (B)(2) should be revised to allow the parties to cite to competent summary judgment evidence already contained in the suit record. Correspondingly, Subsection (D)(2) should be revised to broaden the scope of materials that the court may consider when deciding a motion and specifically allow the court to consider competent summary judgment evidence that is already in the record.

The current version of Subsection (D)(2) mandates that

"[t]he court may consider only those documents *filed in support of or in opposition to the motion for summary judgment*" and further requires that the court "*shall* consider any documents [filed in support of or in opposition to the motion] to which no objection is made."[122] Thus, because Subsection (B)(1) and (2) require that the mover and non-mover must file "*all documents in support*" of the motion and the opposition, respectively,[123] courts can only consider those documents, pursuant to Subsection (D)(2). Further, Louisiana courts have interpreted the foregoing provisions as prohibiting parties from citing documents already in the record in lieu of physically filing those same documents with a motion or an opposition—even if the documents are admissible summary judgment evidence under Subsection (A)(4).[124] In the same vein, district courts are barred from considering materials that are not filed with a motion or an opposition, irrespective of whether those materials are competent summary judgment evidence and already filed in the record.[125]

As such, under the current version of Article 966, the mover must attach every piece of supporting evidence to his motion or he will fail to meet his burden of proof. This effectively requires parties to make redundant filings, thereby necessitating increased expenses to the parties and superfluously lengthening the suit record.

The practice of referencing otherwise competent summary judgment evidence already in the suit record and allowing courts to consider the record as a whole eliminates all of these issues. That was the previous practice in Louisiana state courts for many years, and it remains the practice in federal courts under Rule 56. Therefore, Subsections (A)(4), (B)(1), and (B)(2) should be revised to allow parties to cite to the types of documents listed in Subsection (A)(4) in lieu of physically filing them, so long as the documents are already in the suit record. This would be sufficient to direct the court's attention to the supporting

122. LA. CODE CIV. PROC. ANN. art. 966(D)(2) (emphasis added).

123. *Id.* art. 966(B)(1)-(2) (emphasis added).

124. *See, e.g.*, Forstall v. City of New Orleans, 2017-0414 (La. App. 4 Cir. 1/17/18); 238 So. 3d 465, 471-72; Davis v. Hixson Autoplex of Monroe, L.L.C., 51,991 (La. App. 2 Cir. 5/23/18); 249 So. 3d 177, 182; James as Co-Trustees of Addison Fam. Tr. v. Strobel, 2019-0787 (La. App. 1 Cir. 6/24/20); 2020 WL 3446635, at *4.

125. *See, e.g.*, *Forstall*, 238 So. 3d at 471-72; Washington v. Gallo Mech. Contractors, LLC, 2016-1251 (La. App. 4 Cir. 5/17/17); 221 So. 3d 116, 120-21; Horrell v. Alltmont, 2019-0945 (La. App. 1 Cir. 7/31/20); 309 So. 3d 754, 758.

documents, and it would not unnecessarily increase the size of the suit record with redundant materials.[126] In turn, Subsection (D)(2) should be amended to expand the court's review of the evidence supporting and opposing a motion to documents already filed in the record. These revisions would align Article 966's evidentiary rules with the Article's stated purpose—i.e., that the summary judgment procedure is favored and should be construed to secure the just, speedy, and inexpensive determination of every action.

B. PERMIT REBUTTAL EVIDENCE FILED WITH REPLY MEMORANDA AND OBJECTIONS TO REBUTTAL EVIDENCE UNDER APPROPRIATE CIRCUMSTANCES.

Second, the introductory paragraph in Subsection (B) should be amended to delete the phrase requiring all of the parties to agree on extending or modifying any of the provisions in Subsection (B)(1)-(4). The introductory phrase should also be revised so that the provisions in Subsection (B)(1)-(4) may be extended or modified by the court, upon showing of good cause. This would give the court discretion to address issues regarding timeliness of briefs and supporting evidence. It would also eliminate the onerous and unrealistic requirement that all parties must agree to extend or modify any of the provisions in Subsection B.

As a corollary, the evidentiary requirements associated with filing reply memoranda set forth in Subsection (B)(3) should be revised to give courts the discretion to allow parties to file rebuttal evidence with leave of court. Further, Subsection (D)(2) should also be revised to provide the non-mover with a mechanism by which to file objections to any rebuttal evidence that is allowed by the court. When determining whether to grant the mover leave to file the rebuttal evidence, the court should consider the circumstances of the case, including the posture of the case and timing of the filings.

These changes would afford the mover the chance to make a complete record when addressing matters presented in the non-mover's opposition, while giving the non-mover an adequate opportunity to respond by way of objecting to the rebuttal. Most importantly, this approach would bring the evidentiary rules in

126. *See* Palmer v. Ameriquest Mortg. Co., 41,576, p. 10 (La. App. 2 Cir. 12/13/06); 945 So. 2d 294, 300-01 (emphasis in original).

Article 966 more in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

C. CLARIFY THE REQUIREMENTS FOR SERVING THE NOTICE OF THE HEARING DATE.

Third, much like Subsection (B), the introductory paragraph in Subsection (C)(1) should be revised to delete the phrase requiring all of the parties to agree to any modification of the provisions in Subsections (C)(1)(a)-(b). The introductory phrase should also be revised so that the provisions in Subsections (C)(1)(a)-(b) may be modified by the court, upon showing of good cause.

Correspondingly, Subsection (C)(1)(b) should be revised to clarify the "notice of hearing date" requirement. This provision requires the notice of the hearing date to "be served on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing."[127] But, it does not specify exactly what the "notice of the hearing date" is or who is responsible for serving it.

In other contexts, the clerk of court is responsible for providing "notice" to all parties that have submitted a written request.[128] It follows that it should likewise generally be the clerk's responsibility for serving all of the parties with the "notice of hearing date" for a motion for summary judgment.

That said, practical considerations also warrant an exception allowing a party to serve the other parties with any form of "notice" of the hearing date. In particular, parties cannot be sure that every litigant in a case receives timely notice of the hearing date from the clerk's office, given that the forty-two clerks of court in Louisiana do not have a uniform notification system. Unless and until this happens, Article 966(C)(1)(b) should be amended to prevent unnecessary technical defects in the form of a judgment granting a motion for summary judgment. In addition to giving the court discretion to modify the "notice of hearing date" requirements when appropriate, as proposed above, the revised Subsection (C)(1)(b) should require the clerk of court to serve the notice on all of the parties at least thirty days before the hearing; but, it should also allow any of the parties to serve the other

127. LA. CODE CIV. PROC. ANN. art. 966(C)(1)(b).

128. *See id.* art. 1572.

parties with any form of "notice" to ensure compliance.

D. CLARIFY THE DELAY FOR FILING AND SERVING REPLY MEMORANDA.

Finally, Subsection (B)(3) should be amended to clarify whether the five-day delay for filing and serving reply memoranda includes legal holidays. The most practical interpretation of the current provision is that legal holidays *are included* in the five-day period. As Judge Crain explained in his concurring opinion in *Adolph*, "[b]y expressly addressing in Article 966(B)(4) the circumstance where the filing deadline 'falls on a legal holiday,' the legislature necessarily excluded the application of the more general rule of [La. Code Civ. Proc. art.] 5059, which requires that legal holidays not be counted if the delay provided for is less than seven days."[129] Thus, "[b]ecause legal holidays are not counted under Article 5059, its application to Article 966B would prohibit the filing deadline from ever falling on a legal holiday—*the very scenario that Article 966B(4) expressly addresses*."[130] As mentioned above, this interpretation makes the most practical sense—if the general rule of Article 5059 applied, the "five-day" delay in Article 966(B)(3) is, in reality, a period of at least seven calendar days (because weekends will never be included).

Still, there are other logical interpretations of Article 966(B)(3) that arrive at the opposite conclusion.[131] Without a clear answer, the prudent approach for the mover would be to file his reply memorandum on a date that satisfies the general rule excluding legal holidays, which necessitates an earlier filing deadline. The Legislature should eliminate all doubt by revising the five-day time delay for filing reply memoranda in Subsection (B)(3) to explicitly include legal holidays. Doing so would ensure consistency with the rule in Subsection (B)(4) extending the delays for filing and serving motions, oppositions, and replies in Subsections (B)(1)-(3) when the deadline falls on a legal holiday. Put differently, by explicitly providing that the five-day delay for filing and serving reply memoranda in Subsection (B)(3) includes legal holidays, the deadline could definitively fall on a legal holiday, thus triggering Subsection (B)(4). If legal holidays are

129. *Adolph*, 227 So. 3d at 325 n.2 (Crain, J., concurring).

130. *Id.* (emphasis added).

131. *See id.* at 322 (Welch, J., concurring).

not included in the five-day delay, Subsection (B)(4) would be superfluous when applied to Subsection (B)(3).

CONCLUSION

In conclusion, the 2015 amendments to Article 966 substantially overhauled the rules governing summary judgment procedure in Louisiana's state courts. Importantly, however, these revisions did not change the legal standard for summary judgments. And the 2015 amendments retained the explicit statement of policy from prior versions of Article 966—i.e., that the summary judgment procedure is favored and should be construed to secure the just, speedy, and inexpensive determination of every action.

The biggest changes brought about by the 2015 amendments were to the briefing, evidentiary, and service requirements codified in Subsections (A)(4), (B)(1)-(4), (C)(1)(a)-(b), (C)(3), and (D)(2) of Article 966. While the Legislature's goal in enacting these requirements was streamlining the summary judgment procedure, a number of issues have arisen from courts applying the new rules.

Four issues are particularly problematic. First, the evidentiary requirements in Subsections (A)(4), (B)(1)-(2), and (D)(2) necessitate redundant filings and unnecessary extra expenses by prohibiting parties from citing to and courts from considering materials already in the suit record. Second, the mover's inability to file rebuttal evidence with reply memoranda pursuant to Subsection (B)(3) prevents the parties from making a complete record. Third, the requirements for serving the notice of the hearing date under Subsection (C)(1)(b) are unclear. Fourth, the delay for filing and serving reply memoranda in Subsection (B)(3) needs to specify whether or not legal holidays are included. As a result, these new rules have resulted or could result in added expenses and delays—contrary to the expressly stated purpose of the summary judgment procedure in Article 966.

This Article calls for the Legislature to go back to the drawing board to fix these problems by revising Subsections (A)(4), (B)(1)-(4), (C)(1)(b), and (D)(2) in the present version of Article 966. This amendment would change the current procedures in four respects by:

(1) Allowing parties to cite and courts to consider competent

summary judgment evidence that is already in the record;

(2) Permitting rebuttal evidence filed with reply memoranda and objections to rebuttal evidence under appropriate circumstances;

(3) Clarifying the requirements for serving the notice of the hearing date; and

(4) Clarifying the delay for filing and serving reply memoranda.

Above all, these proposed changes would bring Article 966 back in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

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A PRIMER ON CLAIMS OF SPOUSES IN LOUISIANA

*Sandi S. Varnado**

This Article is the sixth in a series of primers on Louisiana Family Law. The Louisiana Civil Code of 1870, as amended to date, operates as the primary source of law, with other ancillary statutes and codes on particular subject matters. The law of claims of spouses appears in three different parts of the Code. First, claims of spouses for support during the marriage are found in Chapter 3 in Title IV on Husband and Wife. Second, claims of spouses for support pending divorce or thereafter are found in Section 1 of Chapter 2 in Title V on Divorce. Finally, claims of spouses for contributions to education or training are found in Section 2 of Chapter 2 in Title V on Divorce.

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INTRODUCTION

Louisiana law provides spouses with three potential claims against one another. First, a spouse may make a claim for support during the marriage pursuant to the reciprocal duties of support that spouses owe to one another.[1] Second, a spouse may make a claim for spousal support, which may be interim spousal support (during the pendency of a divorce action)[2] or final spousal support (after the termination of the marriage).[3] Finally, a spouse may make a claim for the financial contributions made during the marriage to the education or training of the other spouse (in a proceeding for divorce or thereafter).[4]

Although spouses may not sue one another as a general rule,[5] among other exceptions, they are allowed to do so to seek spousal support while the parties are living separate and apart[6]

1. LA. CIV. CODE ANN. art. 98.
2. *Id.* arts. 105, 111, 113-117.
3. *Id.* arts. 105, 111-112, 114-117.
4. *Id.* art. 121.
5. LA. STAT. ANN. § 9:291.
6. *Id.*

or in a proceeding for divorce or thereafter.[7]

I. CLAIM FOR SUPPORT OWED DURING THE MARRIAGE

By operation of law, the contract of marriage creates the reciprocal duty of support for the spouses as detailed in Louisiana Civil Code Article 98.[8] Note that Louisiana law imposes this duty on spouses *during* their marriage, regardless of any impending separation or divorce.[9] As such, it is distinguishable from interim spousal support (the claim to which arises during the pendency of a divorce action) and final spousal support (the claim to which arises upon the termination of the marriage).

This duty of support covers the necessities of life—food, clothing, and shelter.[10] With regard to shelter, one court has interpreted this duty to foreclose one spouse from evicting the other spouse from the matrimonial domicile that was the separate property of the spouse seeking the eviction.[11] The duty of support also extends to the cost of modern conveniences like telephones, appliances, and automobiles.[12]

Like most reciprocal duties imposed on spouses,[13] the duty of support is a rule of public order. This means that generally the parties may not contractually avoid it.[14] However, courts have allowed spouses who opted out of the community property regime to agree on an allocation of expenses during the marriage and

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7. LA. CIV. CODE ANN. art. 105.

8. *Id.* art. 98.

9. *See, e.g.*, Chi v. Pang, 94-284, p. 3 (La. App. 3 Cir. 10/5/94); 643 So. 2d 411, 413.

10. Bernhardt v. Bernhardt, 283 So. 2d 226, 229 (La. 1973).

11. Purdy v. Purdy, 331 So. 2d 868, 869 (La. App. 2 Cir. 1976).

12. LA. CIV. CODE ANN. art. 98 cmt. c (1987).

13. Louisiana law provides two other reciprocal duties as well. *Id.* First is the duty of fidelity, which provides that spouses may not commit adultery (i.e., the negative duty of fidelity) and that they submit to the "reasonable and normal sexual desires" of the other spouse (i.e., the positive duty of fidelity). LA. CIV. CODE ANN. art. 98 cmt. b (1987). *See, e.g.*, Von Bechman v. Von Bechman, 386 So. 2d 910 (La. 1980). Second is the duty of assistance. While this duty arguably falls within the scope of the duty of support, it also includes the personal care to be given to an ill or infirm spouse. LA. CIV. CODE ANN. art. 98 cmt. c (1987).

14. LA. CIV. CODE ANN. art. 7; *see* Favrot v. Barnes, 332 So. 2d 873, 875 (La. App. 4 Cir. 1976) (rejecting the idea that parties, by a premarital understanding, can repeal or amend the nature of marital obligations set forth in the Louisiana Civil Code).

even to allocate the everyday and usual expenses of the marriage to one spouse alone, finding that such an arrangement did not violate Article 98.[15]

II. CLAIM FOR SPOUSAL SUPPORT

A. THE HISTORICAL DEVELOPMENT OF SPOUSAL SUPPORT IN LOUISIANA

Louisiana first codified the concept of spousal support (formerly called "alimony") in Article 160 of the Louisiana Civil Code of 1870.[16] At that time, the law allowed a spouse to obtain a separation from bed and board and/or divorce only on grounds of the other spouse's fault,[17] so alimony, likewise, was tied to fault. In its original form, only a wife could obtain alimony from her at-fault husband.[18] Preeminent French scholar Marcel Planiol insinuated that alimony was a duty of the at-fault husband to make pecuniary amends to the wife for his fault, such that the wife would be restored to the means and resources of which she had been deprived because of his fault.[19] Any alimony award was paid from the husband's property (not his earnings), and it could not exceed one-third of his income.[20]

In 1916, Louisiana enacted Act 269, which recognized no-fault divorce, allowing either spouse to obtain a divorce on proof of living separate and apart for a certain period of time.[21] To

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15. *See* Gereighty v. Domingue, 17-339, p. 17 (La. App. 5 Cir. 5/30/18); 249 So. 3d 1016, 1030.

16. Player v. Player, 110 So. 332, 332-33 (La. 1926).

17. LA. CIV. CODE ANN. arts. 138-139 (1870); McAlpine v. McAlpine, 94-1594, p. 4 (La. 9/5/96); 679 So. 2d 85, 88.

18. *Player*, 110 So. at 332; *McAlpine*, 94-1594, p. 4; 679 So. 2d at 88.

19. *McAlpine*, 94-1594, p. 4; 679 So. 2d at 87 (quoting Planiol, CIVIL LAW TREATISE, Vol. I, No. 1259, pp. 696-97 (La. State Law Institute Translation 1959) ("Divorce having destroyed the marriage, no effects of it should continue. Upon what idea is founded persistence of the obligation of support between two persons who have nothing in common? Its basis is found in a principle already mentioned more than once. Whatever act of man causes damage to another obliges him by whose fault it happened to repair it, says Art. 1382. As long as the marriage lasted it gave each of the spouses an acquired position upon which each could count. The community of life permitted the spouse without means to share the welfare of the other. Suddenly through no fault of the spouse in question, he or she find himself or herself devoid of resources and plunged into poverty. It is manifestly in such a case as this that the guilty party should be made to bear the consequences of his wrongful acts.")).

20. *Player*, 110 So. at 332; *McAlpine*, 94-1594, p. 4; 679 So. 2d at 88.

21. *McAlpine*, 94-1594, p. 4; 679 So. 2d at 88. The time period changed several

address the no-fault divorce scenario, Article 160 was amended to remove the husband's fault as a pre-requisite for alimony; instead, it required the wife to prove that she was not at fault.[22] This amendment also made alimony payable from the husband's earnings, as well as from his property.[23] In 1979, the legislature again amended Article 160 to allow either spouse who had not been at fault to assert a claim for alimony.[24] This amendment served to remove the unconstitutional gender-bias from the article.[25]

Under current law, the request for spousal support commonly arises in connection with a divorce proceeding (fault or no-fault based) or thereafter. Spousal support is one of the many incidents that a party may request.[26] The request may also arise in a proceeding for the declaration of nullity of a marriage.[27] In a pending proceeding, the court may award a party the same incidental relief afforded in a divorce proceeding,[28] and after a declaration of nullity, "a party entitled to civil effects of marriage may seek the same relief as a divorced spouse."[29]

Either spouse in the proceeding may seek spousal support, and such support may be one of two types—interim periodic support or final period support (discussed, in turn, in Parts B and C below).[30] One may assert a claim for both, either, or neither of these types of spousal support, but the decision to award spousal support lies within the sole discretion of the court.[31] Summary proceedings may be employed for the original spousal support awards, as well as for subsequent modifications and/or

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times, from as many as seven years separate and apart to as few as 180 days separate and apart. *Id.*

22. *Id.*

23. *Player*, 110 So. at 332.

24. Lovell v. Lovell, 378 So. 2d 418, 421 (La. 1979).

25. Smith v. Smith, 382 So. 2d 972, 974 (La. Ct. App. 1 Cir. 1980); *Lovell*, 378 So. 2d at 421.

26. LA. CIV. CODE ANN. art. 105. Others include custody, visitation, or support of a minor child; injunctive relief, use and occupancy of the family home, or use of community movables or immovables; or use of personal property. *Id.*

27. LA. CIV. CODE ANN. arts. 151-152.

28. *Id.* art. 151.

29. *Id.* art. 152. Even a spouse not entitled to civil effects of marriage may be awarded custody, child support, or visitation, and the declaration of nullity has no effect on such awards. *Id.*

30. LA. CIV. CODE ANN. art. 111.

31. *Id.*

termination of spousal support.[32]

In proceedings involving a claim for spousal support, both parties must provide to the court a copy of their most recent federal tax returns, a verified income statement that shows gross income and adjusted gross income, as well as documentation of current and past earnings.[33] Pay stubs or employer statements generally qualify as suitable documentation.[34] If a spouse has an ownership interest in a business, state and federal income tax returns with all attachments and schedules, the most recent profit/loss statement, balance sheets, financial statements, quarterly sales tax reports, personal and business bank account statements, receipts, and expenses should qualify as suitable documentation.[35]

In the event that a party alleges that the other party is hiding or underreporting income, the court will admit evidence of redirected income[36] and deferred income,[37] and in the event that the income claimed is inconsistent with the spouse's lifestyle, the court will admit evidence of that spouse's standard of living and assets both before and after the establishment of a spousal support order.[38] When a spouse's income cannot be sufficiently established from the foregoing, courts may admit evidence of wage and earnings surveys distributed by government agencies for the purpose of attributing income.[39]

B. INTERIM SPOUSAL SUPPORT

The first type of spousal support that a party may seek is interim spousal support (previously known as *alimony pendente lite*). Recognition of this type of support predated its codification,[40] which happened in Article 146 of the Louisiana

32. LA. CODE CIV. PROC. ANN. art. 2592.

33. LA. STAT. ANN. § 9:326(A).

34. *Id.*

35. *Id.*

36. Redirected income might include loans to that spouse by a business they own or payments (in the form of wages or salary) by that spouse or a business they own to someone related to that spouse. LA. STAT. ANN. § 9:326(B).

37. Deferred income might include recent reductions in the distribution of income from the spouse's business to the spouse. *Id.*

38. *Id.*

39. LA. STAT. ANN. § 9:326(C).

40. Malony v. Malony, 9 Rob. 116, 116 (La. 1844) (an interlocutory decree ordering defendant to pay $10 per month alimony pendente lite); *Player*, 110 So. at

Civil Code of 1870.[41] That article provided: "If the wife has not a sufficient income for her maintenance during the suit for separation, the judge shall allow her a sum for her support proportioned to the means of the husband."[42]

Under current law, the claim is gender-neutral, and the spouse in need will seek support from the other spouse who has the ability to pay[43] when the parties are physically separated with a pending divorce action.[44] The foundation of this type of spousal support is the mutual duty of support imposed on spouses.[45] As one court explained: "A spouse's right to claim interim periodic support is grounded in the statutorily imposed duty on spouses to support each other during marriage and thus provides for the spouse who does not have sufficient income for his or her maintenance during the period of separation."[46] Thus, this type of spousal support serves to preserve the status quo, i.e., to allow spouses to adjust to the new normal of living apart without suffering unnecessary economic detriment.[47] Stated another way, interim spousal support preserves parity in the levels of maintenance and support and avoids unnecessary financial dislocation until a final determination of support can be made.[48]

1. ROLE OF FAULT

It is important to note that a spouse's fault is irrelevant to a court's determination of interim spousal support.[49] This is because interim spousal support is awarded while the marriage is still intact, and as mentioned above, spouses are statutorily bound to support each other during their marriage pursuant to

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332-33.

41. As one court noted, this type of alimony has been in the Louisiana Civil Code since its inception. Cassidy v. Cassidy, 477 So. 2d 84, 85 (La. 1985).

42. LA. CIV. CODE art. 148 (1870).

43. The terminology change was made in the 1997 revisions to the articles via Act 1078. 1997 La. Sess. Law Serv. Act 1078 (H.B. 2053) (West).

44. LA. STAT. ANN. § 9:291; LA. CIV. CODE ANN. art. 113.

45. *See* LA. CIV. CODE ANN. art. 98.

46. Hogan v. Hogan, 49,979, p. 16 (La. App. 2 Cir. 9/30/15); 178 So. 3d 1013, 1022.

47. LA. CIV. CODE ANN. art. 113 cmt. b.

48. Rodriguez v. Rodriguez, 2020-0171, p. 3 (La. App. 1 Cir. 11/6/20); 315 So. 3d 913, 916-17 (citing Lambert v. Lambert, 2006-2399, p. 10 (La. App. 1 Cir. 3/23/07); 960 So. 2d 921, 928).

49. LA. CIV. CODE ANN. art. 111.

Louisiana Civil Code Article 98.[50] Thus, the relevant inquiry is the continued existence of the marriage,[51] and fault plays no role in the determination of interim spousal support.[52]

2. CONSIDERATIONS FOR INTERIM SPOUSAL SUPPORT

Either party may move for interim spousal support.[53] In deciding whether to award it, the court considers the moving party's needs, the other party's ability pay, any interim or final child support obligation (presumably of the payor),[54] and the parties' standard of living during the marriage.[55] The length of the marriage is irrelevant.[56] The party claiming interim support bears the burden of proving entitlement to it,[57] and the court may consider the entire financial condition of the spouses in making its decision.[58]

A judgment awarding an interim spousal support allowance is retroactive to the date of judicial demand except for good cause shown.[59] A court determines whether there is good cause shown on a case-by-case basis.[60] In *Cabral v. Cabral*, the court found good cause to delay commencement where the payor was unable

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50. Larson v. Larson, 16-695, p. 2 (La. App 5 Cir. 10/25/17); 229 So. 3d 1043, 1048; Holly v. Holly, 2018-207, pp. 2-3 (La. App. 3 Cir. 9/26/18); 255 So. 3d 1158, 1160.

51. Hall v. Hall, 08-706, p. 4 (La. App. 5 Cir. 2/10/09); 4 So. 3d 254, 257; Short v. Short, 09-639, p. 9 (La. App. 5 Cir. 3/23/10); 33 So. 3d 988, 994.

52. Lightell v. Lightell, 17-327, p. 8 (La. App. 5 Cir. 12/13/17); 234 So. 3d 244, 250.

53. Prior to the 2018 revision to Article 113, the court could award interim spousal support upon the motion of a party or when a demand for final spousal support was pending. Under current law, a party must simply move for interim spousal support. LA. CIV. CODE ANN. art. 113 cmt. c.

54. This consideration was inserted by legislature in 2014. 2014 La. Acts No. 616, § 1.

55. LA. CIV. CODE ANN. art. 113(A).

56. Galbraith v. Galbraith, 382 So. 2d 1042, 1043 (La. Ct. App. 2 Cir. 1980) ("Neither the brevity of the marriage nor the wife's capacity to earn a gainful wage are factors to be considered in setting alimony pendente lite").

57. Molony v. Harris, 2009-1529, pp. 3-4 (La. App. 4 Cir. 10/14/10); 51 So. 3d 752, 757.

58. Curry v. Curry, 19-49, p. 4 (La. App. 5 Cir. 2/12/20); 292 So. 3d 128, 132.

59. LA. STAT. ANN. § 9:321(A).

60. Roan v. Roan, 38,383, pp. 21-22 (La. App. 2 Cir. 4/14/04); 870 So. 2d 626, 639 (citing Piccione v. Piccione, 2001-1086 (La. App. 3 Cir. 5/22/02); 824 So. 2d 427, 433 ("good cause" must be determined on a case-by-case basis and must constitute, if not a compelling reason, certainly a reason of such significance and gravity that "it would be inequitable to deny an extension of such support.")).

to work while recovering from surgery for a malignant tumor.[61] In cases like this, the court will set the date on which the award commences.[62]

a. Needs of Claimant

The first step in an interim spousal support claim is for the claimant to demonstrate need, i.e., the amount sufficient to maintain the claimant in a standard of living comparable to that enjoyed while living with the other spouse during the marriage.[63]

To assess the claimant's needs, courts look at the claimant's means and their expenses. In considering the claimant's means, one court considered the child support received by the claimant for a child of a previous marriage to be part of her income and also imputed full-time earning capacity to the claimant despite the fact that she did not work full-time due to court-ordered attendance at Alcoholics Anonymous meetings.[64] In considering the claimant's expenses, those incurred during the marriage are appropriate for consideration on a claim for interim spousal support, but they must be reasonable.[65] Thus, a claimant must show that they lack sufficient income to maintain that standard of living.[66]

As to the standard of living, this "relates to facts as they have existed during the time that the parties were living together and as they actually exist at the time the litigation commences, not to the future possibilities and capabilities."[67] With regard to the claimant's ability to maintain themselves in that standard of living, a heavily litigated issue is whether the earning capacity of the claimant should be considered. Courts have consistently held that the claimant may not establish their needs by arbitrarily refusing to work.[68] They have also routinely considered the

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61. Cabral v. Cabral, 503 So. 2d 144 (La. Ct. App. 5 Cir. 1987).

62. LA. STAT. ANN. § 9:321(E).

63. King v. King, 51,942, pp. 4-5 (La. App. 2 Cir. 4/11/18); 247 So. 3d 973, 977.

64. *Molony*, 2009-1529, pp. 3-4; 51 So. 3d at 757.

65. Rockett v. Rockett, 51,453, p. 9 (La. App. 2 Cir. 6/21/17); 223 So. 3d 1227, 1233.

66. Note, though, that courts have specified that the claimant need not be practically destitute to qualify for spousal support. Loyacano v. Loyacano, 358 So. 2d 304 (La. 1978).

67. LA. CIV. CODE ANN. art. 113 cmt. b.

68. *See, e.g.*, Fairchild v. Fairchild, 537 So. 2d 1260, 1260-62 (La. App. 4 Cir. 1989); Richard v. Richard, 577 So. 2d 110, 112 (La. App. 1 Cir. 1991); LeBlanc v.

earning capacity of the claimant spouse where the claimant was the primary wage earner during the marriage, where the claimant spouse was regularly employed during the marriage and has the capability of securing employment, or where neither spouse was employed.[69] However, interim spousal support is not foreclosed for a claimant who does not accept the first available job regardless of the circumstances or the income to be earned.[70]

Courts employ one of three different rationales in deciding whether to consider the claimant's earning capacity. First, some courts refuse to consider the claimant's earning capacity where the claimant spouse was not the primary wage earner and was not regularly employed during the marriage.[71] Courts reason that the status quo of the parties during the marriage precludes a consideration of future possibilities or capabilities, and parties should continue in the roles that they held during the marriage until they are divorced.[72] Second, some courts simply state that, given the permissive "may" in Louisiana Civil Code Article 113, the court is vested with the discretion to consider all relevant factors, which may or may not include earning capacity.[73] Finally, some courts reason that if the claimant is able to work for their own support, interim spousal support is inappropriate.[74]

In *Rodriguez v. Rodriguez*, the court awarded interim spousal support to a fifty-six-year-old wife who had little formal education and limited English language skills and who suffered from medical issues.[75] She had been unemployed for most of the

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LeBlanc, 405 So. 2d 1187, 1188-89 (La. App. 1 Cir. 1981).

69. *See, e.g.*, Evans v. Evans, 49,160, p. 6 (La. App. 2 Cir. 6/25/14); 145 So. 3d 1093, 1096; Brar v. Brar, 2001-0370, p. 7 (La. App. 3 Cir. 10/3/01); 796 So. 2d 810, 815.

70. Whipple v. Whipple, 424 So. 2d 263, 268 (La. App. 1 Cir. 1982).

71. *See, e.g.*, *Evans*, 49,160, pp. 5-6; 145 So. 3d at 1096; Arrendell v. Arrendell, 390 So. 2d 927 (La. Ct. App. 2 Cir. 1980); Braswell v. Braswell, 494 So. 2d 1333, 1338 (La. App. 2 Cir. 1986); Clayton v. Clayton, 431 So. 2d 1082, 1084 (La. App. 2 Cir. 1983); Harrington v. Campell, 413 So. 2d 297, 302 (La. App. 3 Cir. 1982); Cortinez v. Cortinez, 414 So. 2d 830, 831-32 (La. App. 4 Cir. 1982).

72. *Evans*, 49,160, pp. 5-6; 145 So. 3d at 1096.

73. *See, e.g.*, Hardee v. Hardee, 551 So. 2d 846, 848 (La. Ct. App. 3 Cir. 1989); Wester v. Wester, 564 So. 2d 799, 804 (La. App. 3 Cir. 1990); Kirkpatrick v. Kirkpatrick, 41851, p. 5 (La. App. 2 Cir. 1/24/07); 948 So. 2d 390, 394.

74. *See. e.g.*, *Smith*, 382 So. 2d at 974 ; Morris v. Morris, 413 So. 2d 285 (La. Ct. App. 3 Cir. 1982); Jones v. Jones, 612 So. 2d 240, 241-42 (La. Ct. App. 4 Cir. 1992); Daigle v. Daigle, 96-541, p. 3-4 (La. App. 3 Cir. 11/6/96); 689 So. 2d 478, 480.

75. *Rodriguez*, 2020-0171, pp. 7-8; 315 So. 3d at 919-20.

marriage, and even when employed, only earned minimum wage.[76] The court found that even assuming that she could return to work, her income earning potential at minimum wage would be insufficient to meet her expenses.[77]

In some interim spousal support claims, litigants have raised the issue of whether a claimant should be forced to deplete assets to meet their needs. In making that determination, courts apply a rule of reasonableness and have considered the relative financial positions of the parties, the type of asset under consideration, and the consequences of its liquidation.[78] As explained by the Louisiana Supreme Court:

> [I]n determining the rate at which a spouse may be required to deplete his or her assets, it may be pertinent to consider the mental and physical health of the parties, their age and life expectancy, the parties' other financial responsibilities, the relative ability, education and work experience of the parties, and the potential effect of any contemplated depletion of assets upon the children of the marriage. The problem is of such a nature as to be insusceptible of solution by any exact formula or monetary index, and the court should proceed with great caution and due regard for the probable long range effects of any depletion contemplated.[79]

Typically, though, a court will not require the claimant to deplete assets to meet their needs except to the extent that those assets can be invested such that they will generate income without the risk of loss of capital.[80] In *Sonfield v. Deluca*, therefore, the Louisiana Supreme Court refused to allow the claimant's $92,000 worth of equity in her home (a non-liquid asset) to serve as a basis to terminate her existing spousal support award.[81] To do otherwise, it found, would force the claimant to sell her home and exhaust the equity for her support until such time as she again needed to be totally dependent upon her former spouse.

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76. *Id.* at 919.

77. *Id.*

78. *Loyacano*, 358 So. 2d at 311.

79. *Id.*

80. *See, e.g.*, Arceneaux v. Arceneaux, 426 So. 2d 745, 747 (La. App. 3 Cir. 1983); Thomas v. Thomas, 281 So. 2d 471, 473 (La. App. 4 Cir. 1973); Patton v. Patton, 37,401, pp. 6-8 (La. App. 2 Cir. 9/24/03); 856 So. 2d 56, 60-61.

81. Sonfield v. Deluca, 385 So. 2d 232, 235 (La. 1980).

b. Other Spouse's Ability to Pay

Once the claimant demonstrates the need for interim spousal support, the court will then assess the other spouse's ability to pay.[82] In other words, the claimant's needs are limited only by the other spouse's ability to pay.[83] Thus, the court must assess the payor's "means." Obviously, a court will consider the payor's income from labor or services performed.[84] However, the term "means" extends beyond income to any resource from which the wants of life may be supplied.[85] As a result, courts have considered the payor's physical property, income from such property, and earning capacity.[86] They have also considered social security benefits,[87] veterans' benefits,[88] retirement income,[89] profitability of a corporation (where payor owned fifty percent of a Subchapter S corporation that reported profit from income and interest),[90] and draws against future commissions.[91] In a recent case, the court considered the expenses of a husband paid by his parents as an income source to be considered as part of his means.[92] In *Goldberg v. Goldberg*, the court ordered a wife who inherited more than $1 million from her parents to pay interim spousal support to her husband who earned $160,000 per year during the marriage, despite the fact that the wife had never worked during the marriage.[93] In *Sykes v. Sykes*, a husband failed to carry his burden of proof that he lacked the means to pay interim spousal support.[94] He testified that he was not employed regularly, working only a day occasionally.[95] He claimed that he

82. Hight v. Hight, 2017-0566, pp. 5-6 (La. App. 4 Cir. 12/13/17); 234 So. 3d 1143, 1147.

83. McFall v. Armstrong, 10-181, p. 4 (La. App. 5 Cir. 10/12/10); 50 So. 3d 904, 907.

84. *Rockett*, 51,453, pp. 9-12; 223 So. 3d at 1233-1234.

85. *Curry*, 19-49, pp. 5-6; 292 So. 3d at 133-134.

86. *Rockett*, 51,453, pp. 9-10; 223 So. 3d at 1233-1234.

87. Prestenback v. Prestenback, 2008-0457, pp. 12-13 (La. App. 1 Cir. 11/18/08); 9 So. 3d 172, 181.

88. Vassallo v. Vassallo, 540 So. 2d 1300, 1302-03 (La. Ct. App. 5 Cir. 1989).

89. *Id.* at 1302.

90. Dagley v. Dagley, 96-1796, pp. 4-5 (La. App. 4 Cir. 5/21/97); 695 So. 2d 521, 523.

91. Gravois v. Gravois, 495 So. 2d 315 (La. Ct. App. 4 Cir. 1986).

92. *Curry*, 19-49, pp. 5-6; 292 So. 3d at 133-34.

93. Goldberg v. Goldberg, 96-2145, p. 8 (La. App. 4 Cir. 7/23/97); 698 So. 2d 63, 67-68.

94. Sykes v. Sykes, 308 So. 2d 816, 817 (La. Ct. App. 4 Cir. 1975).

95. *Id.*

had tried to secure employment with no success, which he attributed to his lack of education and skill.[96] The court stated that to be excused from his spousal support obligation, he would have to show absolute unemployability, i.e., that he had exhausted every possibility to find employment.[97]

Once the court determines the means of the payor, it will also consider the payor's reasonable expenses. For example, in *Alexander v. Alexander*, the court declined to award interim spousal support to a wife whose husband was paying considerable community debts.[98] It reasoned that because he alone was paying these debts, this expense would preclude him from having the sufficient means to pay the requested support.[99]

In a case where the amount the claimant needs to maintain the prior standard of living exceeds the other party's ability to pay, the court will fix interim spousal support at a sum that will be just and fair to all parties involved.[100] Where there is not enough money for both, the court will not allow one spouse to live better than the other.[101]

Unlike final spousal support discussed in Part C below, there is no statutory maximum on the amount of interim spousal support.[102] However, in *Martello v. Martello*, the appellate court found an abuse of discretion by the trial court that set interim spousal support at sixty-four percent of the payor's income, particularly in light of the fact that after paying child support, the payor would only have $886.83 left for his own expenses.[103]

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96. *Id.*

97. *Id.*

98. Alexander v. Alexander, 2002-683, p. 10 (La. App. 3 Cir. 11/13/02); 831 So. 2d 1060, 1067.

99. *Id.*; *see also Cabral*, 503 So. 2d at 147; Stansbury v. Stansbury, 258 So. 2d 170, 172-73 (La. Ct. App. 1 Cir. 1972).

100. Lambert v. Lambert, 2006-2399, p. 11 (La. App. 1 Cir. 3/23/07); 960 So. 2d 921, 929.

101. *See Arrendell*, 390 So. 2d at 930; *Rodriguez*, 2020-0171, p. 3; 315 So. 3d at 917; *Rockett*, 51,453, p. 10; 223 So. 3d at 1234.

102. *Compare* LA. CIV. CODE ANN. art. 112(D) (providing for a maximum final spousal support award of 1/3 of the obligor's net income, absent abuse), *with* LA. CIV. CODE ANN. art. 113 (no maximum interim spousal support award provided).

103. Martello v. Martello, 2006-0594, p. 9 (La. App. 1 Cir. 3/23/07); 960 So. 2d 186, 194-95.

3. DURATION OF INTERIM SPOUSAL SUPPORT

In its original form, *alimony pendente lite* terminated at the judgment of divorce.[104] However, beginning in 1997, the termination of interim spousal support was not necessarily aligned with the divorce judgment. Article 113 of the Louisiana Civil Code, at that time, provided a general rule that an award of interim spousal support terminated upon the rendition of a divorce judgment, but several exceptions existed to complicate the general rule.[105] First, if a claim for final spousal support was pending when the divorce judgment was rendered, the interim spousal award would terminate at the rendition of the judgment awarding or denying final spousal support or 180 days from the rendition of the divorce judgment, whichever came first, but it could be extended for good cause.[106] Second, if a claim for final spousal support was pending when the divorce judgment was rendered on grounds of abuse or protective order and the final spousal support award was equal to or less than the interim spousal support award, the interim spousal support award would terminate no less than 180 days from the rendition of the divorce judgment.[107]

In 2018, Article 113 was amended to provide the current version of the law, which is straightforward and simplifies the pre-amendment rules. Under current law, interim spousal support terminates 180 days from the rendition of a judgment of divorce as a general rule,[108] and thus, in most instances, the duration of an interim spousal support award is not discretionary.[109] The current law provides a uniform set of rules for all interim support awards, and it ties the duration of the award solely to the judgment of divorce as opposed to the demand for final spousal support.[110] Note that the amendment is prospective only because the change to the article is substantive.[111]

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104. Wascom v. Wascom, 96-0125, p. 4 (La. 4/8/97); 691 So. 2d 678, 680.

105. LA. CIV. CODE ANN. art. 113 (1997).

106. *Id.*

107. *Id.*

108. LA. CIV. CODE ANN. art. 113.

109. *Id.* art. 113 cmt. c (2018).

110. *Id.*

111. Hanna v. Hanna, 53,210, pp. 6-7 (La. App. 2 Cir. 11/20/19); 285 So. 3d 116, 120.

However, an interim spousal support award may be extended for good cause.[112] Good cause is determined on a case-by-case basis.[113] As explained by one court, good cause must constitute a significant or grave reason such that it would be inequitable to deny an extension of support.[114] Another court provided that an extension must be genuinely needed, for a legitimate purpose, and "not calculated to cause hardship or to obtain as much spousal support as possible for as long as possible."[115]

In *Larocca v. Larocca*, the court extended interim spousal support in favor of a sixty-four-year-old wife who had been out of the work force for ten years during the marriage and who had only two years of junior college study in interior design, rejecting the payor's argument that an extension should only be granted to a disabled claimant or one who cannot find work due to forces preventing such.[116] In *Hogan v. Hogan*, the court extended interim spousal support because the payor engaged in financial gamesmanship and withheld support to an extent that the court labeled outrageous and extreme, leaving the claimant destitute in the process.[117] Similarly, in *Bernstein v. Bernstein*, the court found good cause to extend interim spousal support where the trial on the issue took place two years after the date of demand, mainly due to the payor's actions.[118] During that time, the payor failed to meet many obligations. He failed to pay child support, did not produce information necessary to determine spousal support (causing continuances), and did not pay attorney's fees, court costs, and expert fees incurred because of those continuances.[119] All of this resulted in the claimant having to file motions for contempt, take advances on community property funds, and secure loans to support herself and the children.[120] Had the court not granted the extension, the interim spousal

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112. LA. CIV. CODE ANN. art. 113.

113. *Piccione*, 2001-1086, pp. 9-10; 824 So. 2d at 433.

114. *Id.*

115. *Roan*, 38,383, p. 22; 870 So. 2d at 639.

116. LaRocca v. LaRocca, 14-255, pp. 10-11 (La. App. 5 Cir. 10/29/14); 164 So. 3d 207, 213-14.

117. *Hogan*, 49,979, pp. 25-26; 178 So. 3d at 1027.

118. Bernstein v. Bernstein, 2019-1106, pp. 16-17 (La. App. 4 Cir. 2/10/21); 313 So. 3d 413, 425.

119. *Id.*

120. *Id.* at p. 17; 313 So. 3d at 425.

support award would have terminated more than a year before trial.[121]

C. FINAL SPOUSAL SUPPORT

Final spousal support (formerly known as permanent periodic alimony)[122] is the other type of spousal support recognized by Louisiana law. Unlike spouses in an intact marriage, former spouses have no duty to support one another.[123] As such, some earlier opinions characterized final spousal support awards as a "pension"[124] or a "pure gratuity" awarded in the court's discretion.[125] Thus, a claim for final spousal support differs from one for interim spousal support.

The obligation to pay final spousal support does not begin until the termination of an interim spousal support award.[126]

1. ROLE OF FAULT

As has been the case from the inception of final spousal support claims, fault plays a very important role. Per the Louisiana Civil Code, one must be free from fault prior to the filing of the divorce action[127] to be awarded final spousal support.[128] Whether a claimant was at fault is a question of fact.[129] In assessing fault in the context of final spousal support,

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121. *Id.* at pp. 16-17; 313 So. 3d at 425.

122. The terminology change was made in the 1997 revisions to the articles via Act 1078. 1997 La Acts No. 1078, § 1, eff. Jan. 1, 1998.

123. Barber v. Barber, 2009-0780, p. 5 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1046, 1050.

124. *Player*, 110 So. at 333 ("As the marriage is forever dissolved, there is no obligation arising from it. The law accords, not alimony in such a case, but a pension, to the unfortunate spouse who has obtained the divorce. This pension becomes revocable in case it should become unnecessary, and in case the wife should contract a second marriage").

125. Fortier v. Gelpi, 197 So. 138, 140 (La. 1940).

126. LA. CIV. CODE ANN. art. 113(B).

127. This timing provision was inserted in the 1997 revision to the articles. *See* Jones v. Jones, 34,822, p. 2 (La. App. 2 Cir. 6/20/01); 793 So. 2d 243, 245. It is a recognition that for fault to bar final spousal support, it should be directly related to and a substantial cause of the dissolution of the marriage. *See* Brown v. Brown, 50,833, p. 7 (La. App. 2 Cir. 8/10/16); 200 So. 3d 887, 893 ("A spouse may be awarded final periodic support when he or she is in need of support and is free from fault prior to the filing of a petition for divorce, based on the needs of that party and the ability of the other party to pay.").

128. LA. CIV. CODE ANN. arts. 111-112(A).

129. Matthews v. Matthews, 15-499, p. 5 (La. App. 5 Cir. 12/23/15); 184 So. 3d 173,

as a general rule, the claimant bears the burden of proving no fault.[130] Of course, proving a negative is not the easiest burden to satisfy. One court found that the claimant satisfied her burden by offering her own testimony that she was not at fault and the testimony of others who stated that that she performed her fair share of the household duties, the couple rarely argued, and they never saw her nag her husband.[131] In the event that a spouse agrees to pay final support, this constitutes a judicial admission that the payee spouse is free from fault,[132] and, in such a situation, the issue cannot be raised later.[133]

This general rule—that the claimant bears the burden of proving lack of fault—carries two noteworthy exceptions under which the law provides that a spouse is presumed to be entitled to final spousal support.[134] First, when a judgment of divorce is granted due to the fault of one spouse,[135] the other spouse is presumed to be entitled to final spousal support.[136] Second, when one spouse is guilty of domestic abuse of the other spouse or a child of either of them, the victim spouse is presumed to be entitled to final spousal support.[137] Like any presumption, these are rebuttable.[138] In both instances, the burden of proof shifts to the non-claimant to rebut the presumption, and that burden is met by proving that the claimant was at fault.[139]

The first issue that arises in assessing fault is its definition.

176; Barnett v. Barnett, 15-766, p. 6 (La. App. 5 Cir. 5/26/16); 193 So. 3d 460, 466.

130. Hutson v. Hutson, 39,901, p. 6 (La. App. 2 Cir. 8/9/05); 908 So. 2d 1231, 1235.

131. *Id.* at pp. 7-8; 908 So. 2d at 1236.

132. *See, e.g.*, Vesper v. Vesper, 469 So. 2d 458, 460 (La. App. 3 Cir. 1985).

133. *See* Shows v. Shows, 345 So. 2d 975, 977 (La. App. 2 Cir. 1977); Mitchell v. Mitchell, 539 So. 2d 839, 842 (La. Ct. App. 1989), *reversed on other grounds*, 541 So. 2d 831 (La. 1989).

134. LA. CIV. CODE ANN. art. 112(C).

135. The Louisiana Supreme Court developed this burden-shifting mechanism in the context of divorces granted on the basis of the non-claimant's adultery; *see* Lagars v. Lagars, 491 So. 2d 5 (La. 1986); but until 2018, it was only in the jurisprudence. The 2018 amendment to Article 112 (Paragraph C) via Act 265 codified this mechanism and explicitly extended it to situations when a divorce is granted on any fault-based ground, not just adultery. 2018 La. Sess. Law Serv. Act 265 (H.B. 125) (West). It also specifically allows the court to make a finding of abuse, regardless of the grounds on which the divorce was granted, and it extends the presumption to the victim, as well. *Id.*

136. LA. CIV. CODE ANN. art. 112(C).

137. *Id.*

138. *See id.* at cmt. c.

139. LA. CIV. CODE ANN. art. 112(C).

Fault has a different interpretation in the context of final spousal support than it does in the context of divorce. To be at fault for divorce purposes, one must commit adultery,[140] be convicted of a felony carrying a sentence of death or life imprisonment,[141] or perpetrate or threaten abuse.[142] These grounds qualify as fault for purposes of final spousal support as well,[143] but they are not the exclusive grounds of fault in this context.

When it comes to fault for final spousal support, the list of conduct that qualifies is actually much broader. Fault in this context has been defined as "serious misconduct which is a cause of the marriage's dissolution."[144] It has also been expressed as "conduct or substantial acts of commission or omission by a spouse violative of his or her marital duties or responsibilities."[145] It has been equated with the fault grounds that previously existed for separation from bed and board under former law[146] and includes cruel treatment or outrages, abandonment, habitual intemperance or excess, public defamation, an attempt on the other's life, fugitive status, and intentional non-support.[147] Additionally, courts have decided that violations of the marital duties of fidelity, support, and assistance also constitute fault.[148] That said, one seeking final spousal support need not be perfect

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140. Of course, adultery includes sexual intercourse during the marriage with someone other than a spouse, but the concept is not that limited. Louisiana cases have extended it to other sexual contact, as well. *See, e.g.*, Menge v. Menge, 491 So. 2d 700, 701-02 (La. App. 5 Cir. 1985); Bonura v. Bonura, 505 So. 2d 143, 144 (La. App. 4 Cir. 1987). To prove adultery, one may offer (1) direct evidence or (2) circumstantial evidence that leads fairly and necessarily to the conclusion that adultery has been committed. Lyons v. Lyons, 33,237, p. 7 (La. App. 2 Cir. 10/10/00); 768 So. 2d 853, 858.

141. A guilty plea to the crime will suffice as a "conviction." Scheppf v. Scheppf, 430 So. 2d 370, 372 (La. App. 3 Cir. 1983). Additionally, one is still convicted even if the appeals process has not been exhausted. Nickels v. Nickels, 347 So. 2d 510, 511 (La. App. 2 Cir. 1977).

142. LA. CIV. CODE ANN. art. 103(2)-(5).

143. Gitschlag v. Gitschlag, 593 So. 2d 1331, 1335 (La. App. 1 Cir. 1991).

144. Anderson v. Anderson, 2002-1226, p. 3 (La. App. 3 Cir. 3/5/03); 839 So. 2d 1091, 1094.

145. Simon v. Simon, 96-876, p. 6-7 (La. App. 5 Cir. 5/14/97); 696 So. 2d 68, 72; Guillory v. Guillory, 2008-1375 (La. App. 3 Cir. 4/1/09); 7 So. 3d 144, 144.

146. Allen v. Allen, 94-1090, p. 8 (La. 12/12/94); 648 So. 2d 359, 362.

147. Rusk v. Rusk, 2012-176, p. 7 (La. App. 3 Cir. 6/6/12); 102 So. 3d 193, 199.

148. *See Guillory*, 2008-1375, p. 4; 7 So. 3d at 147 (explaining that "fault" contemplates conduct or substantial acts of commission or omission by a spouse violative of his or her marital duties or responsibilities and that those spousal obligations include fidelity, support, and assistance).

to be free from legal fault.[149]

Cruel treatment is commonly asserted as fault in litigation involving final spousal support. To succeed in proving this ground, one must show (1) cruelty occurred; and (2) it rendered marital life insupportable.[150] A continued pattern of mental harassment, nagging, and griping can qualify as fault.[151] However, friction or dissatisfaction in the marital relationship or incompatibility of the spouses,[152] complaints and criticism,[153] and mere bickering and fussing will not suffice,[154] even where one spouse says extremely harsh things. For example, in *Rusk v. Rusk*, while fighting about money, the wife told her husband that she "should blow his head off."[155] Although the couple owned guns, the husband failed to show that he believed his wife's words were any more than baseless comments made in the heat of an argument or that the wife had the capacity or ability to harm him.[156] By contrast, in *Cauthron v. Cauthron*, the court denied a wife's claim for final spousal support due to her cruel treatment.[157] She exhibited a cavalier attitude toward her husband's health and refused to accompany him to Mexico for surgery.[158] The court found this was the final straw leading to the dissolution of the marriage.[159] Other examples of conduct that amounts to cruel treatment include persistently refusing to engage in sexual intercourse without justification,[160] engaging in intimate relations with someone other than a spouse (even if not adulterous under the legal definition of that term),[161] and continuously or habitually failing to perform household chores

149. *See Matthews*, 15-499, p. 6; 184 So. 3d at 177.

150. ROBERT C. LOWE, DIVORCE § 8:175, *in* 1 LA. PRAC. DIVORCE § 8:175 (2021).

151. Adkins v. Adkins, 42,076, p. 4 (La. App. 2 Cir. 4/11/07); 954 So. 2d 920, 923.

152. *Id.*

153. *See Allen*, 94-1090, p. 9; 648 So. 2d at 362; *see generally Lyons*, 33,237; 768 So. 2d at 859.

154. *King*, 48,881, p. 9; 136 So. 3d at 947*; Anderson*, 2002-1226, p. 3; 839 So. 2d at 1093.

155. *Rusk*, 2012-176, p. 2; 102 So. 3d at 196.

156. *Id.* at p. 8; 102 So. 3d at 199.

157. Cauthron v. Cauthron, 2012-0913, p. 2 (La. App. 1 Cir. 2/15/13); 113 So. 3d 232, 233.

158. *Id.* at p. 5; 113 So. 3d at 234-35.

159. *Id.*

160. Jergins v. Jergins, 451 So. 2d 1336, 1338 (La. Ct. App. 1 Cir. 1984).

161. Slaughter v. Slaughter, 436 So. 2d 1352 (La. Ct. App. 3 Cir. 1983).

over a long period of time.[162]

In *King v. King*, the husband alleged that the claimant's abandonment[163] precluded her from an award of final spousal support.[164] The court disagreed, determining that while she did withdraw from the common dwelling,[165] she had lawful cause to do so, given the payor's lack of support and communication with her following her cancer diagnosis, as well as his steps to end the marriage and eliminate her access to a bank account and television and internet service while she was undergoing difficult medical treatments.[166] Further, the payor never requested that she return, and therefore, he could not prove that she constantly refused to return, which is another necessary element of an abandonment claim.[167]

In *Rodrigue v. Rodrigue*, the court considered whether a wife's drinking qualified as habitual intemperance rendering the marriage insupportable.[168] It explained that the inquiry is one of the extent and habitualness of consumption rather than amount consumed and that the other spouse's reaction must be considered.[169] Under the facts of the case, the husband also drank, and the two of them consented to, participated in, and encouraged the other's drinking.[170]

The second issue that arises in assessing fault is its timing. To bar final spousal support, the claimant's fault must have

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162. Carter v. Carter, 316 So. 2d 829 (La. App. 3 Cir. 1984); *but see* Lamb v. Lamb, 460 So. 2d 634 (La. App. 3 Cir. 1984) (where a wife's failure to perform chores was not fault given the spouses' financial standing allowing them to dine out and hire a maid).

163. In addition to the traditional notions of abandonment, constructive abandonment also constitutes fault. This is where a spouse, without lawful cause, prevents the other spouse from entering the matrimonial domicile. *See, e.g.*, Kriger v. Kriger, 397 So. 2d 21, 23 (La. App. 2 Cir. 1981); *Guillory v. Guillory*, 626 So. 2d 826, 830 (La. Ct. App. 2 Cir. 1993) (citing Quinn v. Quinn, 412 So. 2d 649 (La. Ct. App. 2 Cir. 1982)).

164. King v. King, 48,881, p. 11 (La. App. 2 Cir. 2/26/14); 136 So. 3d 941, 948.

165. If both parties agree to the withdrawal, there is no grounds for abandonment. *Gitschlag*, 593 So. 2d at 1336.

166. *King*, 48,881, p. 11; 136 So. 3d at 948.

167. The one asserting abandonment has the burden to show the other's withdrawal; once successful, the one who withdrew has the burden to show lawful cause justifying the abandonment. LOWE, *supra* note 150, at § 8:177.

168. Rodrigue v. Rodrigue, 424 So. 2d 1185, 1187-88 (La. Ct. App. 1 Cir. 1982).

169. *Id.*

170. *Id.*

occurred before the filing of a proceeding to terminate the marriage.[171] In other words, the conduct in question must be an independent, contributory, or proximate cause of the breakup of the marriage.[172] In *Matthews v. Matthews*, the court determined that while the claimant's daily marijuana use to increase her appetite (because of anorexia) could constitute habitual intemperance or excess (i.e., fault), the consumption must be to such an extent that it substantially interferes with the person's marital duties or inflicts great mental anguish upon the other.[173] In this instance, her husband knew of her habit prior to and during the marriage, and she fulfilled her marital duties.[174] Thus, the claimant's marijuana use was not a proximate cause of the dissolution of the marriage.[175] Courts have also held that when a spouse does not find out about the other spouse's fault until after the filing of the divorce petition, the conduct will not bar spousal support.[176]

Note, too, that if the parties reconcile after the act of fault, the fault is essentially extinguished under the rationale that the spouse not at fault condoned it.[177] Of course, if the conduct continues post-reconciliation, the pre-reconciliation fault is revived to show a pattern of conduct constituting fault.[178]

The spouse alleged to be at fault can defend against a finding of fault in several ways. Health concerns have excused a spouse's behavior, and a spouse who is provoked may be justified in reasonably responding to the other spouse's fault. For example, in *Barnett v. Barnett*, the court noted that the reason for the claimant's failure to keep or clean the house was her health issues, and therefore, her conduct did not amount to legal fault.[179] In *Anderson v. Anderson*, the court explained that if alcoholism or

171. LA. CIV. CODE ANN. arts. 111-112(A).

172. Bowes v. Bowes, 2000-1062, p. 4 (La. App. 4 Cir. 8/15/01); 798 So. 2d 996, 999.

173. *Matthews*, 15-499; 184 So. 3d at 174.

174. *Id.* at 178.

175. *Id.* at 179.

176. Henry v. Henry, 2008-692, p. 3 (La. App. 3 Cir. 12/10/08); 999 So. 2d 255, 257.

177. Hamsa v. Hamsa, 95-736, 95-737, p. 4 (La. App. 5 Cir. 1/17/96); 668 So. 2d 1209, 1211; *see also* Noto v. Noto, 09-1100, p. 7 (La. App. 5 Cir. 5/11/10); 41 So. 3d 1175, 1180 ("The effect of reconciliation is to "wipe the slate clean" and make the issue of fault of the parties prior to the reconciliation moot as to any cause of action subsequent to the reconciliation.").

178. Bloodworth v. Bloodworth, 306 So. 2d 812, 814 (La. App. 3 Cir. 1975).

179. *Barnett*, 15-766, pp. 12-13; 193 So. 3d at 469.

dependency is an illness over which the alcoholic has no control, this may excuse what would otherwise be considered fault, assuming, of course, that the illness caused the behavior constituting fault.[180]

A frequently litigated issue is whether the conduct of an alleged at-fault spouse was simply a justifiable response to the other's initial acts. For example, a spouse who suspects infidelity may become quarrelsome or hostile (even to the point of cruel treatment) or may become a habitual substance abuser, and courts have determined that this is a reasonable reaction, not fault.[181] In *Miller v. Miller*, despite telling her husband that she did not love or like him, the wife was not at fault, given her reasonable suspicion that he was having an affair.[182] In such situations, the suspicion of adultery causes the break up, not the claimant's reaction.[183] In *Jergins v. Jergins*, the court found the wife justified in occasionally refusing sexual relations when it was because of her husband's drunkenness.[184] Similarly, "[i]n the domestic violence context in particular, the court should consider the potentially responsive nature of a victim's response."[185] In other words, abuse is a provocative act, and a spouse's response, which might otherwise constitute fault, may be deemed a justifiable response. In *Smith v. Smith*, a court awarded final spousal support to a wife who threw boiling water on her husband because her conduct was a reasonable or justifiable response to her husband's provocative act.[186]

2. CONSIDERATIONS FOR FINAL SPOUSAL SUPPORT

In addition to freedom from fault, a claimant must be in need of support to obtain final spousal support.[187] In determining need for support, the court will evaluate the needs of the claimant and the payor's ability to pay.[188]

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180. Anderson v. Anderson, 379 So. 2d 795, 796 (La. Ct. App. 4 Cir. 1979).

181. *See, e.g.*, Diggs v. Diggs, 2008-1271, p. 4 (La. App. 3 Cir. 4/1/09); 6 So. 3d 1030, 1033.

182. Miller v. Miller, 2013-1043, pp. 8-9 (La. App. 3 Cir. 4/2/14); 161 So. 3d 690, 696.

183. *Lyons*, 33237, p. 7; 768 So. 2d at 859.

184. *Jergins*, 451 So. 2d at 1338.

185. LA CIV. CODE ANN. art. 112 cmt. c (2018).

186. Smith v. Smith, 08-575 (La. App. 5 Cir. 1/12/10); 31 So. 3d 453, 454.

187. LA CIV. CODE ANN. art. 111.

188. *Id.* art. 112(A).

The claimant must prove their needs, which include the basic necessities of life, like food, shelter, clothing, transportation, medical and drug expenses, utilities, household maintenance, and income tax liability generated by alimony payments.[189] In some instances, television and internet services and lawn maintenance may constitute necessities.[190] In *Anderson v. Anderson*, the hair coloring and dining out of the claimant (who had a history of depression and anxiety) were considered as needs.[191] However, in *Ennis v. Ennis*, the court decided that costs for birthday and Christmas gifts, church donations, vacations, entertainment, and such other expenses were unnecessary for support.[192]

Assuming that the claimant is entitled to final spousal support, the court must determine the amount and duration of the award, considering all relevant factors, including those specifically listed in Louisiana Civil Code Article 112(B). Those factors are:

> (1) The income and means of the parties, including the liquidity of such means.
>
> (2) The financial obligations of the parties, including any interim allowance or final child support obligation.
>
> (3) The earning capacity of the parties.
>
> (4) The effect of custody of children upon a party's earning capacity.
>
> (5) The time necessary for the claimant to acquire appropriate education, training, or employment.
>
> (6) The health and age of the parties.

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189. Stowe v. Stowe, 49,596, pp. 1-3 (La. App. 2 Cir. 3/4/15); 162 So. 3d 638, 640-41. Prior to January 1, 2019, the payor spouse was allowed a deduction for alimony paid, and the alimony constituted taxable income for the payee spouse. I.R.C. §§ 61(a)(8), 71(a), 215(a) (repealed 2017). That rule was changed pursuant to the Tax Cuts and Jobs Act such that alimony is no longer deductible by the payor nor is it taxable to the payee. 26 U.S.C.A. § 11051. This new rule applies to orders issued or modified after January 1, 2019. 26 U.S.C.A. § 11051(c) 131 Stat. 2090.

190. *See King*, 48,881, p. 20; 136 So. 3d at 951 (wherein because the claimant was seriously ill and unable to leave the house often, the court considered television and internet services as a necessary expense).

191. Anderson v. Anderson, 48,027, pp. 10-11 (La. App. 2 Cir. 5/15/13); 117 So. 3d 208, 215.

192. Ennis v. Ennis, 2016-0423, p. 9 (La. App. 1 Cir. 5/8/17); 2017 WL 1900328, at *4.

(7) The duration of the marriage.

(8) The tax consequences to either or both parties.

(9) The existence, effect, and duration of any act of domestic abuse committed by the other spouse upon the claimant or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of domestic violence.[193]

This list is merely illustrative, and courts are free to consider factors not listed therein.[194]

Many of the factors considered for final spousal support awards mirror those employed in the analysis of interim spousal support awards. For example, both require a court to assess the other party's ability to pay and any child support awards.[195] Therefore, analysis of these factors applies in the context of both interim and final spousal support determinations.[196]

With that said, the rules on interim spousal support and final spousal support differ in some ways. For example, the parties' standard of living during the marriage is clearly a consideration for interim spousal support (as discussed above); while Louisiana Civil Code Article 112 does not address the issue, some courts have decided it is not an appropriate factor to consider for final spousal support.[197] Additionally, while the

193. In determining whether to award final spousal support pursuant to Louisiana Civil Code Article 112, "the court shall consider any criminal conviction of the obligor spouse for an offense committed against the claimant spouse during the course of the marriage." LA. STAT. ANN. § 9:327(A). Absent a criminal conviction, the court may, in order to assist it determining the existence and nature of the alleged abuse, order an evaluation of both parties. LA. STAT. ANN. § 9:327(B). This evaluation is conducted by an independent, court-appointed mental health professional who is an expert in the field of domestic abuse and who has no familial, financial, or prior medical relationship with either party or their attorneys of record; the mental health professional shall provide a written report of his/her findings to both the court and the parties. *Id.*

194. Rhymes v. Rhymes, 2013-0823, pp. 7-8 (La. 10/15/13); 125 So. 3d 377, 381-82 (given the history of the children's education, the court could consider one parent's role as the homeschooler of the children).

195. LA. CIV. CODE ANN. art. 112(A), (B)(2); *id.* art. 113(A).

196. *Id.* art. 112(A), (B)(2); *id.* art. 113(A).

197. *E.g.*, West v. West, 51,692 (La. App. 2 Cir. 11/15/17); 245 So. 3d 269, 275 (citing Richards v. Richards, 47,492 (La. App. 2d Cir. 9/20/12); 105 So. 3d 77). Prior to the 2006 revision to Louisiana Civil Code Article 112, jurisprudence was in conflict on this question. *See, e.g.*, Gremillion v. Gremillion, 39,588 (La. App. 2 Cir. 4/6/05); 900 So. 2d 262 (court considered the standard of living); Jones v. Jones, 35,502, 35,503 (La. App. 2 Cir 12/5/01); 804 So. 2d 161 (court did not consider the standard of

earning capacity of the claimant is an open question for interim spousal support (as discussed above), Louisiana Civil Code Article 112(B)(3) is clear that the claimant's earning capacity is considered for final spousal support purposes.[198] Note, though, that the parties' earning capacity is assessed in light of the effect that custody of children has upon it.[199] Additionally, many courts take into consideration one spouse's subordination of their own career to attend to the other spouse's, especially if the marriage is one of significant duration.[200]

In addition to the differences in the two sets of rules, the assessment of final spousal support includes factors not considered in the context of interim spousal support. For example, per Louisiana Civil Code Article 112(B)(5), courts must consider the time necessary for the claimant to acquire appropriate education, training, or employment.[201] Thus, while many final spousal support awards are rehabilitative (as opposed to permanent), the time necessary to obtain education or training must be reasonable.[202] One party who has the physical and mental ability to secure employment should not be allowed to avoid employment and remain economically dependent on the other.[203] Also, Louisiana Civil Code Article 112(B)(6)-(8) requires a court to consider the health and age of the parties, the duration the marriage, and the tax consequences to either or both parties, none of which are considered in connection with interim spousal support.[204]

In recent years, domestic abuse has come to the forefront of family law. Among other contexts, it has been considered in connection with final spousal support. Until 2014, domestic abuse was not on the list of fault-based grounds for divorce; it was also not considered in connection with final spousal support determinations.[205] In 2014, the Louisiana Legislature amended

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living).

198. LA. CIV. CODE ANN. art. 112(B)(3).

199. *Id.* art. 112(B)(4).

200. *See, e.g.*, Brett v. Brett, 2000-0436, p. 6 (La. App. 1 Cir. 5/30/01); 794 So. 2d 912, 917; Politz v. Politz, 2005-2568 (La App. 1 Cir. 8/1/07); 2007 WL 2193547, at *5.

201. LA. CIV. CODE ANN. art. 112(B)(5).

202. Johnson v. Johnson, 442 So. 2d 901, 903 (La. App. 3 Cir. 1983).

203. *See* Ballanco v. Ballanco, 538 So. 2d 1100, 1102-03 (La. Ct. App. 5 Cir. 1989); Fountain v. Fountain, 93-2176, pp. 7-8 (La. App. 1 Cir. 10/7/94); 644 So. 2d 733, 739.

204. LA. CIV. CODE ANN. art. 112(B)(6)-(8).

205. *Id.* art. 103 (2014); *id.* art. 112 (2006).

Louisiana Civil Code Article 112 to mandate final spousal support to a spouse who had not been at fault prior to the filing of a petition for divorce and who was the victim of domestic abuse committed during the marriage in accordance with the factors set forth in the article.[206] Among the other factors, courts were to consider "[t]he existence, effect, and duration of any act of domestic abuse committed by the other spouse upon the claimant, regardless of whether the other spouse was prosecuted for the act of domestic violence."[207] However, the Louisiana Legislature amended Article 112 again in 2018. Under the current version, abuse is retained in the list of factors for consideration, but the provision mandating a final spousal support award for the victim has been deleted.[208] Ultimately, under the current version of the article, Louisiana law does not give a spouse who was the victim of domestic abuse an automatic final spousal support award.

As a general rule, the final spousal support award cannot exceed one-third of the payor's net income.[209] No such cap exists when (1) the divorce was rendered on ground of abuse or protective order[210] or (2) the court determines that a party or child of one of the spouses was the victim of domestic violence committed by the other party during the marriage.[211] In such instances, the final spousal support may be awarded as a lump sum.[212]

While the term "final spousal support" seems to connote an award that lasts forever, this is not the case. Spousal support

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206. *Id.* art. 112(B) (2014).

207. *Id.* art. 112(C)(9) (2014).

208. Remember, though, that Article 112(C) now gives the victim of domestic abuse during the marriage a presumption of entitlement to final spousal support as discussed in the section on fault above. Also, remember that this presumption extends to all claimants whose divorces were granted on fault-based grounds or when the court has made a finding of domestic abuse.

209. LA CIV. CODE. ANN. art. 112(C). Louisiana law offers no guidance on what expenses are appropriate to deduct from gross income to calculate net income. *See Molony*, 2009-1529, p. 12; 51 So. 3d at 761 (holding that it is within the trial court's discretion, based on the evidence and testimony before it, to make a determination regarding the spouses' income). Note that prior to 1997, the limitation on final spousal support was calculated using the payor's gross income. *See* LA. CIV. CODE ANN. art. 112 cmt. f (1997) (citing Slayter v. Slayter, 576 So. 2d 1121 (La. Ct. App. 3 Cir. 1991); Robinson v. Robinson, 412 So. 2d 633 (La. Ct. App. 2 Cir. 1982)).

210. *See* LA. CIV. CODE ANN. art. 103(4)-(5).

211. *Id.* art. 112(D).

212. *Id.*

awards are never final (even if the award is silent as to its duration) because parties may always move for modification, termination, or extinguishment (as discussed in Parts E and F below).[213]

D. TIME LIMITATIONS ON SPOUSAL SUPPORT CLAIMS

The rules regarding the time limitations to assert a spousal support claim apply to both interim and final spousal support. Ultimately, per Louisiana Civil Code Article 117, a claimant who seeks spousal support after divorce has a peremptive period of three years to do so.[214] A peremptive period must be distinguished from a liberative prescriptive period. Prescription is a mode of barring actions as a result of inaction for a period of time;[215] peremption is a period of time fixed by law for the existence of a right that if not timely exercised, extinguishes the right altogether.[216] While prescriptive periods may be suspended,[217] interrupted,[218] or renounced,[219] the same is not true of peremptive periods.[220] As Louisiana jurisprudence consistently provides, nothing interferes with the running of peremption.[221]

The three-year peremptive period on spousal support claims begins to run from the latest of the following three events: (i) the day the judgment of divorce is signed; (ii) the day a judgment terminating a previous judgment of spousal support is signed (as long as the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter); or (iii) the day the last spousal support payment is made (if the spousal support obligation is initially performed by voluntary payment within the periods described in (i) or (ii) and no more than three years has elapsed between payments).[222]

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213. *See, e.g.*, Faucheux v. Faucheux, 11-939, p. 10 (La. App. 5 Cir. 3/27/12); 91 So. 3d 1119, 1126; Harmon v. Harmon, 2012-580, p. 6 (La. App. 3 Cir. 11/7/12); 101 So. 3d 1122, 1126.

214. LA. CIV. CODE ANN. art. 117.

215. *Id.* art. 3447

216. *Id.* art. 3458.

217. *Id.* arts. 3467-3473.

218. *Id.* arts. 3462-3466.

219. *Id.* arts. 3449-3451.

220. *Id.* art. 3461.

221. Naghi v. Brener, 2008-2527, p. 1 (La. 6/26/09); 17 So. 3d 919, 920.

222. LA. CIV. CODE ANN. art. 117.

As explained in the comments to Article 117, the general rule is that the three-year peremptive period commences at the signing of the judgment of divorce.[223] However, in the event that an award of spousal support was made before the judgment of divorce or during the peremptive period, the period begins to run anew from the day a judgment terminating that prior judgment of support is signed.[224] That same rule applies if the obligor recognized the obligation by making voluntary payments to the other party, in which case, the period begins to run from the date of the last payment.[225] In *Lacombe v. Lacombe*, the wife's spousal support claim made ten months after the husband's last voluntary support payment was timely, despite the fact that it was made eight years after the initial divorce petition.[226]

While the three-year peremptive period is an important time limitation, one should note others that may affect spousal support claims. For example, Louisiana Code of Civil Procedure Article 561 provides that an action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years.[227] Additionally, note that the time period to assert a claim for spousal support differs from the time period to collect *past due* spousal support (also known as "arrearages"). One seeking to collect past due spousal support has a *prescriptive* period of five years.[228]

E. MODIFICATION OF SPOUSAL SUPPORT

Both interim and final spousal support may be modified as a general rule,[229] and Louisiana Civil Code Article 114 governs

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223. *Id.* at cmt. a.

224. *Id.*

225. *See, e.g.*, Reggio v. Reggio, 14-493 (La. App. 5 Cir. 12/16/14); 166 So. 3d 290; Lacombe v. Lacombe, 11-1178 (La. App. 3 Cir. 2/1/12); 85 So. 3d 721. A "voluntary payment" is one that is not court-ordered. *Lacombe*, 11-1178, p. 12; 85 So. 3d at 726. Thus, payments made under an interim order requiring the payor to make the payments pending the trial on the payee's rule for final spousal support did not qualify. *See id*; Stephens v. Stephens, 49,957, p. 6 (La. App. 2 Cir. 4/9/14); 137 So. 3d 1242, 1246.

226. *Lacombe*, 11-1178, p. 12; 85 So. 3d at 726.

227. LA. CODE CIV. PROC. ANN. art. 561(A).

228. LA. CIV. CODE ANN. art. 3497.1 (emphasis added).

229. A spousal support award may not be modified if the consent judgment contains a non-modification provision. Bland v. Bland, 97-0329 (La. App. 1 Cir. 12/29/97); 705 So. 2d 1158, 1161.

both.[230] A judgment modifying a final spousal support judgment is retroactive to the date of judicial demand except for good cause shown,[231] in which case the court may fix the date on which the award commences.[232]

The burden of proof rests with the one seeking the modification to show a material change of circumstances of either party—either that the obligor's needs have materially changed or that the obligee's ability to pay has materially changed.[233] Louisiana Civil Code Article 114 specifically states that the subsequent remarriage of the *obligor* spouse (the spouse making payments) shall not constitute a change of circumstance.[234] This is not the case when the *obligee* spouse (the one receiving payments) subsequently remarries, in which case the spousal support obligation is extinguished (as discussed in Part F below).[235]

Note, though, that a change in circumstances does not automatically result in a modification of spousal support.[236] Instead, such a finding simply shifts the burden to the party opposing the modification.[237] When assessing a request for modification of interim spousal support, the court considers the factors in Article 112 (in the case of final spousal support) or Article 113 (in the case of interim spousal support).[238]

In *Richards v. Richards*, the trial court awarded spousal support to the wife (along with a child support award) and directed that the spousal support award would terminate if the wife received Social Security disability (SSI) benefits.[239] It also noted that either party could seek modification.[240] Ten years later, the wife began receiving SSI benefits, ending the husband's

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230. LA. CIV. CODE ANN. art. 114; *see also id.* art. 112 cmt. g; *id.* art. 113 cmt. a.

231. LA. STAT. ANN. § 9:321(C).

232. *Id.* § 9:321(E).

233. LA. CIV. CODE ANN. art. 114; *see* Williams v. Poore, 2010-1087, p. 2 (La. App. 4 Cir. 1/12/11); 55 So. 3d 953, 955.

234. LA. CIV. CODE ANN. art. 114 (emphasis added).

235. *Id.* art. 115.

236. Mizell v. Mizell, 40,601, p. 3 (La. App. 2 Cir. 1/25/06); 920 So. 2d 927, 929.

237. *Id*.

238. LA. CIV. CODE ANN. art. 114 cmt. b.

239. Richards v. Richards, 49,260, p. 1 (La. App. 2 Cir. 8/13/14); 147 So. 3d 800, 802.

240. *Id.* at p. 6; 147 So. 3d at 805.

spousal support obligation.[241] However, about a year later, the youngest child reached majority and graduated high school, terminating the husband's child support obligation.[242] Thereafter, the wife moved to modify the previous spousal support judgment by having the award reinstated due to the loss of child support as well as her inability to work due to her disability.[243] The court granted the modification based on the wife's acute and devastating financial need and her seriously declining health, finding the loss of child support to be financially catastrophic for her.[244] The court was careful to explain that while the loss of child support alone is not justification for reinstituting final periodic spousal support, it can be considered as a factor in determining the need for final spousal support under appropriate facts, such as those in the case before it.[245]

F. TERMINATION AND EXTINGUISHMENT OF SPOUSAL SUPPORT

Spousal support awards—interim or final—may be terminated or extinguished.[246] In either scenario, the spousal support award ends. However, a terminated award may be sought again within the three-year peremptive period, but an extinguished spousal support award is lost forever.[247]

1. TERMINATION OF SPOUSAL SUPPORT

Termination of a spousal support award is appropriate only if it has become unnecessary.[248] This must be determined by a court, considering the factors in Article 112 (in the case of final spousal support) or Article 113 (in the case of interim spousal support).[249] The person seeking termination bears the burden of proof.[250] A judgment terminating a final spousal support judgment is retroactive to the date of judicial demand except for good cause shown.[251]

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241. *Id.* at p. 1; 147 So. 3d at 802.
242. *Richards*, 49,260, p. 2; 147 So. 3d at 803.
243. *Id.*
244. *Id.* at pp. 9-10; 147 So. 3d at 806-07.
245. *Id.* at p. 11; 147 So. 3d at 807.
246. LA. CIV. CODE ANN. arts. 114-115.
247. Lowe, *supra* note 150, at § 8:188.
248. LA. CIV. CODE ANN. art. 114.
249. *Id.* at cmt. b.
250. *Mizell*, 40,601, p. 3; 920 So. 2d at 929.
251. LA. STAT. ANN. § 9:321(C).

In *Williams v. Williams*, the court terminated the husband's spousal support obligation as unnecessary.[252] The wife had settled a personal injury claim, which netted her the sum of $323,724.27, but in the next two years, she had expended all but $40,000.00 of the proceeds in paying the debts of others, buying gifts, and donating money to charity.[253] The court found that her spirit of charity was admirable, but it also indicated she had sufficient income and means for her support and no longer needed her ex-husband to support her.[254] In *Mitchell v. Mitchell*, the court denied the husband's motion to terminate his spousal support obligation because although he had voluntarily retired, his ex-wife's needs actually increased due to her involuntary reduction in income.[255] Additionally, the husband had disposed of tens of thousands of dollars to buy a truck for himself and gifts for his adult daughter and his second wife (whose income contributed to payment of their expenses).[256] While the husband averred that termination was appropriate, given the marriage to his ex-wife was short and they had no children, the court rejected that argument.[257] In *Gray v. Gray*, a husband moved to terminate his spousal support obligation because, among other issues, the wife was receiving financial support from another.[258] The court noted that well-settled jurisprudence provides that "one party's legal obligation to pay alimony is not obviated by the gratuity of another."[259]

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252. Williams v. Williams, 2012-0281, p. 1 (La. App. 1 Cir. 11/14/12); 2012 WL 5506669.

253. *Id.* at p. 5; 2012 WL 5506669.

254. *Id.* at p. 6; 2012 WL 5506669.

255. Mitchell v. Mitchell, 626 So. 2d 571, 572-73 (La. Ct. App. 3 Cir. 1993).

256. *Id.* at 572.

257. *Id.* at 573.

258. Gray v. Gray, 451 So. 2d 579, 586-87 (La. Ct. App. 2 Cir. 1984).

259. *See id.* at 587; *see also* Shelton v. Shelton, 395 So. 2d 899, 900 (La. Ct. App. 2 Cir. 1981); Zatzkis v. Zatzkis, 632 So. 2d 307, 315 (La. Ct. App. 4 Cir. 1993), *writ denied*, 640 So. 2d 1340 (La. 1994); *but see* Higginbotham v. White-Higginbotham, 97-1191, p. 6 (La. App. 5 Cir. 5/27/98); 713 So. 2d 832, 835 (finding that the trial judge did not have authority to order husband to pay the mortgage, utilities, insurance, and reasonable expenses related to the family home in which the wife and children continued to live after divorce, absent hearing on fault and alimony after divorce was granted; purpose of payments was to provide financial assistance to the wife, rather than to preserve community asset).

2. EXTINGUISHMENT OF SPOUSAL SUPPORT

A spousal support award may also be extinguished upon the recipient's remarriage, the death of either party, or a judicial determination that the recipient has cohabited with another person in the manner of married persons.[260] Where the recipient remarries or where either party dies, the obligation to pay spousal support is extinguished automatically (without the need for judicial declaration).[261] Note, too, that even a remarriage of the recipient that is null will terminate the spousal support obligation of the previous spouse.[262]

However, in *Hamsa v. Hamsa*, the parties had a consent judgment specifying a term for payment of spousal support, and during the term, the wife remarried.[263] The husband filed pleadings to extinguish his support obligation, but the court granted the wife's exception of res judicata, effectively determining that the term in the contract of compromise governed, rather than Article 115.[264] With that said, this case has been limited to its particular facts.[265] In *Rosenfeld v. Rosenfeld*, the court noted that consent judgments are generally subject to modification and termination.[266] It also noted that the only reason the *Hamsa* court created an exception was that the consent judgment was a lump-sum support judgment that included a significant (thirteen-year) past obligation, and the court could not ascertain what amount of the lump-sum payment was owed for past due obligations and what amount was designated for future support obligations.[267] Thus, in most scenarios, even where a term for the duration of spousal support payments is included in a consent judgment, the recipient's remarriage will extinguish the spousal support obligation automatically unless the judgment provides otherwise.

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260. LA. CIV. CODE ANN. art. 115.

261. *Id.*

262. *See, e.g.*, Keeney v. Keeney, 30 So. 2d 549 (La. 1947); LA. CIV. CODE ANN. art. 115 cmts. c-d. That said, a spouse to a subsequent null marriage may seek spousal support as an incident of that marriage in certain circumstances. *See* LA. CIV. CODE ANN. art. 96, LA. CIV. CODE ANN. art. 115 cmt. d; LA. CIV. CODE ANN. art. 97.

263. Hamsa v. Hamsa, 05-219, p. 2 (La. App. 5 Cir. 12/27/05); 919 So. 2d 776, 777.

264. *Id.* at p. 6; 919 So. 2d at 779.

265. Rosenfeld v. Rosenfeld, 11-686, pp. 5-6 (La. App. 5 Cir. 3/13/12); 90 So. 3d 1077, 1080.

266. *Id.*

267. *Id.*

While extinguishment is automatic in the situations above, a judicial declaration must be obtained when the recipient has cohabited with another person of either sex in the manner of married persons.[268] In *King v. King*, although the wife had been cohabitating with her boyfriend since she and her husband physically separated, she was allowed interim spousal support until the trial court made that determination months later.[269] Thus, the simple fact of the wife's cohabitation with her boyfriend was not sufficient to deny spousal support.

To "cohabitate in the manner of married persons" is defined as living together in a sexual relationship of some permanence; sexual intercourse alone will not suffice.[270] The party seeking extinguishment on this ground bears the burden of proof, and a judgment extinguishing spousal support on these grounds is retroactive to the date of judicial demand.[271] Conception of a child alone will not suffice for a finding of cohabitation.[272] In *Almon v. Almon*, the recipient lived with a man for a year, during which time he contributed to the payment of household expenses, helped with her daughter, and performed repairs.[273] The two engaged in sexual intercourse, but they did not share a bedroom, date, attend events together as a couple, or discuss marriage.[274] The court refused to extinguish the support obligation because the recipient and the live-in man engaged in only random acts of sexual intercourse.[275] In *Ronquille v. Ronquille*, the court denied the husband's motion to terminate permanent spousal support because, although the wife had a sexual relationship with another man who spent at least eight consecutive nights at her home and exercised visitation with his child there, the evidence did not necessarily establish the parties' intent to cohabitate together as married persons.[276] Testimony showed that he did not move his

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268. LA. CIV. CODE ANN. art. 115 cmt. e; Almon v. Almon, 05-1848, p. 5 (La. App. 1 Cir. 9/15/06); 943 So. 2d 1113, 1116-17. Under older versions of the law, spousal support terminated when the payor lived in open concubinage with another. Petty v. Petty, 560 So. 2d 629 (La. Ct. App. 4 Cir. 1990).

269. *King*, 51,942, pp. 5-7; 247 So. 3d at 978.

270. LA. CIV. CODE ANN. art. 115 cmt. e.

271. LA. STAT. ANN. § 9:321(F).

272. Polk v. Polk, 626 So. 2d 1233, 1237 (La. Ct. App. 4 Cir. 1993).

273. *Almon*, 05-1848, pp. 5-8; 943 So. 2d at 1116-18.

274. *Id.* at pp. 7-8; 943 So. 2d at 1117-18.

275. *Id.* at p. 8; 943 So. 2d at 1118.

276. Ronquille v. Ronquille, 17-207, pp. 4-5 (La. App. 5 Cir. 11/15/17); 233 So. 3d 189, 192-93.

belongings into her home and maintained a separate residence; he also did not contribute financially to her household.[277] By contrast, in *Olsen v. Olsen*, the court granted the husband's motion to extinguish spousal support because, although the recipient and the man living with her had separate bedrooms, they had or attempted sexual intercourse on occasion, ate meals together, and discussed marriage.[278] She had also helped him pay his debts and visited him while he was in the hospital.[279] The court determined that this arrangement went beyond friends living together with benefits.[280]

G. PARTIES' FREEDOM OF CONTRACT

Louisiana law grants spouses the freedom to enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy.[281] These contracts—like all contracts in Louisiana—have the effect of law for the parties.[282] With that said, if the agreement violates public policy, it is absolutely null,[283] and therefore, as a general rule, it is deemed never to have existed.[284] Persons are not allowed by juridical acts to derogate from laws enacted for the public interest.[285]

1. WAIVER OF SPOUSAL SUPPORT BY CONTRACT

One common topic included within a matrimonial agreement is spousal support. Many times, parties will, by contract, waive their rights to spousal support. It is important to note that, for this topic, the law differentiates between final and interim spousal support. Spouses may not waive interim spousal support, which is a matter of public policy,[286] but they may waive final spousal support, which is not.[287]

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277. *Ronquille*, 17-207, p. 4; 233 So. 3d at 192.
278. Olsen v. Olsen, 12-737, pp. 7-8 (La. App. 5 Cir. 3/13/13); 113 So. 3d 274, 279.
279. *Id.*
280. *Id.* at p. 10; 113 So. 3d at 280.
281. LA. CIV. CODE ANN. art. 2329.
282. *Id.* art. 1983.
283. *Id.* art. 2030.
284. *Id.* art. 2033.
285. *Id.* art. 7.
286. LA. CIV. CODE ANN. art. 116 cmt.
287. *Id.* art. 116.

The public order nature of interim spousal support was explained in *Holliday v. Holliday*, wherein the court noted that although marriage is a contract, it is more than that.[288] Marriage creates a legal relationship which carries with it a duty of support; this, in turn, is the basis for the obligation to pay interim spousal support.[289] These duties are of public order, and as such, may not be waived by the parties.[290]

By contrast, final spousal support is not a matter of public order. Spouses are not bound to support one another permanently after the marriage terminates.[291] As explained in *McAlpine v. McAlpine*, final spousal support is not a duty by a spouse to a spouse; after all, the marriage has terminated such that they are no longer spouses.[292] As such, final spousal support protects the private recipient.[293] Accordingly, parties are allowed to modify the rules of the Louisiana Civil Code.[294] They may do so before or during the marriage and also after divorce as long as the waiver is clear and unequivocal, and they follow the requisite form requirements.[295] Matrimonial agreements may be nullified upon the same grounds as any contract.[296]

In most instances, the waiver of interim spousal support and the waiver of final spousal support are included in the same contract and, in many instances, in the same provision of that document.[297] When litigated, courts will sever them, thereby invalidating the waiver of interim spousal support and enforcing the waiver of final spousal support.[298]

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288. Holliday v. Holliday, 358 So. 2d 618, 619 (La. 1978).

289. *Id.* at 620.

290. *Favrot*, 332 So. 2d at 875.

291. *Barber*, 2009-0780, p. 5; 38 So. 3d at 1050 (citing *McAlpine*, 94-1594, p. 9; 679 So. 2d at 90).

292. *McAlpine*, 94-1594, p. 9; 679 So. 2d at 87 (quoting 1 Planiol, CIVIL LAW TREATISE, Vol. I, No. 1259 (La. State Law Institute Translation 1959)).

293. *Id.*

294. LA. CIV. CODE ANN. art. 116; *id.* cmt.

295. *Id.* art. 116. These agreements must be in authentic act or act under private signature duly acknowledged. LA. CIV. CODE ANN. arts. 116, 2331. *See* Vincent v. Vincent, 2005-1175, p. 2 (La. App. 4 Cir. 1/10/07); 949 So. 2d 535, 542-43 (Cannizzaro, J., concurring in part and dissenting in part).

296. *McAlpine*, 94-1594, p. 15; 679 So. 2d at 93.

297. *See, e.g.*, *Barber*, 2009-0780, pp. 5-6; 38 So. 3d at 1050.

298. *Id.* (citing LA. CIV. CODE ANN. art. 2034).

2. OTHER TOPICS OF CONTRACTUAL AGREEMENT

Parties may make other agreements regarding spousal support. For example, in *Ellefson v. Ellefson*, the parties agreed to a specific amount in spousal support.[299] Although that amount could have exceeded the statutory limit, the court upheld the agreement as not in violation of public policy.[300] In *Aldredge v. Aldredge*, the parties agreed that spousal support could be modified without a change of circumstances, and the court upheld the contract.[301] In *Boudreaux v. Boudreaux*, the parties agreed that the recipient would receive final spousal support unconditionally, even if at fault, but the court struck this agreement as in violation of public policy.[302] Note that some courts have upheld such agreements when the parties enter them in anticipation of or after the dissolution of the marriage, as opposed to at the inception of the marriage in contemplation of divorce.[303]

Parties can also contractually agree when spousal support will terminate. While the Civil Code provides, as a default rule, that the obligation to pay spousal support extinguishes upon the remarriage of the recipient, the death of either party, or a judicial determination that the recipient has cohabitated with another person in the manner of married persons,[304] parties may provide otherwise. In *Romero v. Romero*, the parties agreed that final spousal support would terminate upon the earlier of the recipient's death or remarriage.[305] Later, the husband moved the court to terminate his spousal support obligation on the grounds that his ex-wife was living with another man, but the court denied his request, reasoning that termination was only appropriate in the instances to which the parties had

299. Ellefson v. Ellefson, 616 So. 2d 221, 222 (La. Ct. App. 5 Cir. 1993).

300. *Id.*

301. Aldredge v. Aldredge, 477 So. 2d 73, 75 (La. 1985).

302. Boudreaux v. Boudreaux, 98-791, p. 4 (La. App. 3 Cir. 6/2/99); 745 So. 2d 61, 63; *see also Williams*, 99-1101, p. 6; 760 So. 2d at 469; *Daigle*, 2006-346, pp. 4-5; 940 So. 2d at 891.

303. *See, e.g.*, Aufrichtig v. Aufrichtig, 34,909, pp. 3-4 (La. App. 2 Cir. 8/22/01); 796 So. 2d 57, 60-61; Cason v. Cason, 38,974, pp. 5-6 (La. App. 2 Cir. 10/27/04); 886 So. 2d 628, 632; *but see* Taylor v. Taylor, 33,959, pp. 7-8 (La. App. 2 Cir. 11/1/00); 772 So. 2d 891, 896.

304. LA. CIV. CODE ANN. art. 115.

305. Romero v. Romero, 509 So. 2d 681, 683-84 (La. Ct. App. 3 Cir. 1987).

contractually agreed.[306] In *Gibson v. Gibson*, the parties agreed that spousal support would terminate when the recipient obtained her master's degree, and the court upheld that agreement.[307] In *Waites v. Waites*, the parties agreed that the husband would pay the wife's spousal support until her remarriage, his disability, or her agreement to the terminate the agreement at any time, and the court upheld the agreement.[308]

III. AWARDS FOR CONTRIBUTION TO EDUCATION OR TRAINING

In addition to claims for support, spouses may also assert claims for reimbursement for their financial contributions to the education or training expenses of the other spouse when such contributions increased the recipient spouse's earning power, to the extent that the claimant spouse did not benefit from that earning power during the marriage.[309] Such claims are typically asserted in a divorce proceeding or thereafter[310] but may also be asserted in the wake of an action for the declaration of nullity of the marriage.[311]

To succeed on a claim for contributions to a spouse's education or training, one must prove several things. First, the claimant must prove the financial contributions to the spouse's education or training during their marriage.[312] These include direct expenses for educational or training costs paid by the claimant for the other spouse (such as tuition, books, and school fees), as well as contributions to the living expenses of the supported spouse.[313] Transportation costs for commuting are not included.[314] Second, the claimant must prove that the contributions led to the spouse's increased earning power.[315] In *Shaheen v. Khan*, the court denied the husband's claim for

306. *See also* Burns v. Burns, 2012-128, pp. 4-5 (La. App. 3 Cir. 9/20/12); 94 So. 3d 941, 943-44.

307. Gibson v. Gibson, 464 So. 2d 914, 916 (La. Ct. App. 4 Cir. 1985).

308. Waites v. Waites, 2017-499, pp. 5-8 (La. App. 4 Cir. 10/10/18); 256 So. 3d 539, 543-45.

309. LA. CIV. CODE ANN. art. 121.

310. *Id.*

311. *Id.* arts. 124, 151.

312. *Id.* art. 121.

313. *Id.* at cmt. d.

314. *Id.*

315. *Id.* art. 121.

contributions to the wife's education, in part, because she received no benefit from the degree.[316]

Finally, the claimant must prove that he did not enjoy the benefit of the spouse's increased earning power during the marriage.[317] If the claimant reaped the benefits during the marriage, which could happen by way of an improved standard of living or an accumulation of community property,[318] an award is not appropriate.[319] For example, in *Bourgeois v. Bourgeois*, the parties divorced three years after the husband graduated from law school.[320] After his graduation, the couple had moved into a nicer apartment, purchased a replacement vehicle for the wife and one for the husband, and paid for the wife to obtain cosmetic surgery and upgrade her engagement ring.[321] The court found that the wife had already benefitted from her husband's education.[322]

In deciding a claim for contributions to a spouse's education or training, courts will assess three factors: (1) the claimant's expectation of a shared benefit when the contributions were made, (2) the degree of detriment suffered by the claimant in making the contributions, and (3) the magnitude of the benefit the other spouse received.[323] Courts tend to focus, in part, on the length of the marriage post-education or training. Typically, the longer the spouses are married after the education or training is completed, the more likely that the claimant will have already benefitted.[324] Framed another way, courts typically grant awards in cases where the parties divorce shortly after the graduation of the recipient spouse.[325] For example, in *McConathy v. McConathy*,[326] the award was appropriate where the parties

316. Shaheen v. Khan, 2013-998, p. 13 (La. App. 5 Cir. 5/21/14); 142 So. 3d 257, 265.

317. LA. CIV. CODE ANN. art. 121.

318. *See, e.g.*, Clemons v. Clemons, 42-129, 42-130, pp. 9-10 (La. App. 2 Cir. 5/09/07); 960 So. 2d 1068, 1074.

319. LA. CIV. CODE ANN. art. 121.

320. Bourgeois v. Bourgeois, 2000-2149, p. 2 (La. App. 1 Cir. 5/10/02); 818 So. 2d 1005, 1007.

321. *Id.* at pp. 6-7; 818 So. 2d at 1010.

322. *Id.* at p. 7; 818 So. 2d at 1010-11.

323. Barrow v. Barrow, 27-714, p. 13 (La. App. 2 Cir. 2/28/96); 669 So. 2d 622, 629.

324. LA. CIV. CODE ANN. art. 121 cmt. e.

325. *Id.* at cmt. c.

326. McConathy v. McConathy, 25-542 (La. App. 2 Cir. 2/23/94); 632 So. 2d 1200,

separated during the final year of the husband's schooling, and in *Shewbridge v. Shrewbridge*, the same was true where the parties separated a year after the husband obtained his commercial pilot's license.[327] By contrast, in *Earle v. Earle*, the parties divorced six years after the husband graduated from law school, and the court determined that by that time, the wife had received sufficient benefit from her husband's education and denied her claim.[328]

The considerations set forth in Article 121 ensure that the award is granted only when equity dictates,[329] typically in cases where the contributing spouse failed to realize benefits from the contribution due to the timing of the divorce.[330] In other words, one who supports the other spouse through school or training only to be divorced by that spouse shortly thereafter is the most likely recipient of this type of award.[331]

Ultimately, then, the court has discretion to make such an award,[332] and if it does so, it will use the *De La Rosa* formula to determine the amount.[333] Louisiana courts have set forth this formula as: "working spouse's financial contributions to joint living expenses and educational costs of student spouse less ½ (working spouse's financial contributions plus student spouse's financial contributions less cost of education) equals equitable award to working spouse."[334]

If the court decides to make an award for contributions to education or training, it may be in addition to a sum for support and community property received in a partition,[335] making it an independent claim in Louisiana.[336] As a result, rules governing

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1202-06.

327. Shewbridge v. Shewbridge, 31-170, pp. 1, 7 (La. App. 2 Cir. 10/28/98); 720 So. 2d 780, 781-84.

328. Earle v. Earle, 43-925, pp. 12-13 (La. App. 2 Cir. 12/03/08); 998 So. 2d 828, 836-37.

329. LA. CIV. CODE ANN. art. 121 cmts. c, e.

330. *Id.* at cmt. c.

331. *Id.*

332. *Id.* at cmt. b.

333. *See McConathy*, 25-542; 632 So. 2d at 1204-05 (citing DeLaRosa v. DeLaRosa, 309 N.W.2d 755 (Minn. 1981), and adopting the formula used by the Minnesota court to calculate the amount of award to be granted under Article 121).

334. *Id.* at 1205.

335. LA. CIV. CODE ANN. art. 121.

336. *Id.* at cmts. c, f.

support do not apply, making fault irrelevant to this claim.[337] Additionally, any award for contributions to education or training does not terminate on the remarriage or death of either party.[338] Furthermore, these awards cannot be modified.[339] While an award for reimbursement for contributions to education or training differs from a support award in many ways, both may be awarded in a sum certain payable in installments as opposed to a lump sum.[340] The law allows installment payments because the court may make the award early in the defendant's career, when the spouse has not yet realized the benefits of his education or training.[341] Note, however, that in cases of installment payments, the judgment is still a money judgment for a specified sum, not an open-ended award.[342]

Louisiana law provides that a claim for reimbursement for contributions to education or training has a prescriptive period of three years, which begins to run on the date of the signing of the divorce judgment or declaration of nullity of the marriage.[343] By contrast, an action to make arrearages of installment payments of this award executory prescribes in five years.[344] In such a case, the court shall, except for good cause shown, award attorney's fees and costs to the prevailing party.[345]

Claims for contributions to education or training are strictly personal to each party[346] prior to the rendition of a judgment.[347] However, once a court makes the award, it does not terminate on either party's death.[348] If either spouse dies while an action for such a claim is pending, the action dies with that spouse.[349]

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337. *Id.* at cmt. c.
338. *Id.* art. 123.
339. *Id.* at cmt. c.
340. *Id.* art. 123; *id.* at cmt. b.
341. *Id.* art. 123; *id.* at cmt. b.
342. *Id.* at cmt. c.
343. *Id.* art. 124.
344. *Id.* art. 3497.1.
345. LA. STAT. ANN. § 9:375.
346. The rules for heritable and strictly personal obligations can be found in Louisiana Civil Code Articles 1765-66. LA. CIV. CODE ANN. arts. 1765-66.
347. LA. CIV. CODE ANN. art. 122.
348. *Id.* art. 123.
349. *Id.* at cmt. c.

CONCLUSION

Louisiana law offers spouses several claims for support against the other spouse. First, during the marriage, one spouse may sue the other for breach of one of the reciprocal obligations detailed in the Louisiana Civil Code, including the duty of support. Second, during the pendency of a divorce action, one spouse may claim entitlement to interim spousal support to be paid by the other spouse; upon termination of the marriage, the payor spouse may also owe final spousal support to the claimant. Finally, in a proceeding for divorce or thereafter, one spouse may claim entitlement to an award for their financial contributions to the other spouse's education or training.

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INCORPORATING TOOLS AND TECHNICAL GUIDELINES INTO THE WEB ACCESSIBILITY LEGAL FRAMEWORK FOR ADA TITLE III PUBLIC ACCOMMODATIONS

Jonathan Lazar, J. Bern Jordan & Brian Wentz

INTRODUCTION

Websites act as a crucial link in the systems that enable us to find information, connect to service providers, and meet our work, education, health, and entertainment needs. As websites have become more central to our lives—more acutely since the onset of the COVID-19 pandemic—the web is garnering increased attention. An accessible website is one that is equally usable by people with disabilities who rely on alternate forms of input or output, such as screen readers, alternate keyboards, captioning,

voice recognition, and alternate pointing devices or no pointing devices.[1] Estimates from the Centers for Disease Control (CDC) indicate that approximately 26% of adults in the U.S., or sixty-one million people, have a disability.[2] Designing websites so that they can be utilized by the greatest number of possible users is a combination of good design and following existing standards. In fact, making a website more accessible is also likely to make it more usable for people without disabilities.[3] However, despite the availability of design/evaluation tools, many websites and online digital content are inaccessible for people with disabilities—a February 2021 automated analysis detected accessibility errors in 97.4% of the top one million website homepages.[4]

Web accessibility has been an issue for the twenty-five years since the original Department of Justice (DOJ) announcement in 1996 that websites of public accommodations were required to be accessible.[5] Since the Americans with Disabilities Act (ADA) became a statute before the advent of the web, websites are not mentioned in the original statute. The twelve categories of public accommodations listed in Title III of the ADA include places of lodging, food and drink establishments, places of exhibition or entertainment, and places of public gathering—all physical locations.[6] However, this fact has not prevented disabled plaintiffs from asserting their right to accessible websites. Lawsuits related to the topic of web accessibility have been an issue for at least fifteen years since *National Federation of the Blind v. Target Corp.*,[7] and they have become a focal point over

1. For definition and discussion of accessible technology in general, *see* JONATHAN LAZAR ET AL., ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY 2 (1st ed. 2015).

2. *Disability Impacts All of Us,* CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

3. *See generally* Sven Schmutz et al., *Implementing Recommendations from Web Accessibility Guidelines: Would They Also Provide Benefits to Nondisabled Users,* 58 HUM. FACTORS 611 (2016) (concluding that "that implementing accessibility guidelines can provide several benefits for nondisabled users.").

4. *The WebAIM Million, WEBAIM* (Apr. 30, 2021), https://webaim.org/projects/million/.

5. *See* Letter from Deval L. Patrick, Assistant Att'y Gen. Civ. Rights Div., to Tom Harkin, Sen., U.S. DEP'T OF JUST. (Sept. 9, 1996), https://www.justice.gov/crt/foia/file/666366/download.

6. See 42 U.S.C. § 12181(7).

7. *See, e.g.*, Nat'l Fed'n of Blind v. Target Corp., 452 F. Supp. 2d 496 (N.D. Cal.

the past five years as the number of lawsuits has increased dramatically.[8]

This Article argues that the weakness of the existing legal framework for web accessibility for public accommodations is that it does not acknowledge the existence of automated tools and guidelines. These automated tools and guidelines are necessary for defining and validating accessibility, and without them, there is an environment of confusion that encourages web accessibility lawsuits. Furthermore, other areas of federal law, such as those requiring accessibility for federal government websites or airline websites, already incorporate tools and guidelines into their regulatory framework, which demonstrates the feasibility of incorporation.[9] In addition, this Article also proposes several enhancements to the legal framework for public accommodations that acknowledge and incorporate existing tools and guidelines.

Technical experts may be knowledgeable about the Web Content Accessibility Guidelines (WCAG).[10] However, for most other stakeholders involved in litigation, both the tools and guidelines for accessibility such as WCAG are confusing and hard to apply—and they are rarely even mentioned in the legal framework. Apart from lawyers, very few stakeholders have a clear understanding of what the law requires, and outside of technical experts, very few stakeholders know whether their websites are accessible.

This Article postulates that the confusion occurring in web accessibility lawsuits is due to the legal side not recognizing the technical side, as evidenced by statutes and regulations that do not even mention tools and guidelines. Similarly, the tools and guidelines often do not acknowledge the legal side, but that is outside of the scope of this Article. The current legal framework for web accessibility does not offer enough clarity to protect the rights of people with disabilities. This Article offers potential enhancements to the legal framework with the goal of protecting

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2006).

8. *See* Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2021 Despite Mid-Year Pandemic Lull*, SEYFARTH: ADA TITLE III (Mar. 21, 2021), https://www.adatitleiii.com/2022/03/federal-website-accessibility-lawsuits-increased-in-2021-despite-mid-year-pandemic-lull/#more-3988.

9. *See* discussion *infra* Part II.A.

10. *WCAG 2 Overview,* W3C: WEB ACCESSIBILITY INITIATIVE (Apr. 29, 2021), https://www.w3.org/WAI/standards-guidelines/wcag/ (discussing the general WCAG 2 guidelines).

the rights of people with disabilities to equal access to information and digital content. Additionally, a clearer, improved framework will benefit companies that want to better understand their legal requirements and avoid lawsuits.

I. AUTOMATED TOOLS AND GUIDELINES FOR WEB ACCESSIBILITY

Disabilities can present many barriers to accessing internet content: people who have no vision cannot see text and other visual content, people with limited reach and dexterity may not be able to reliably touch a screen or click with a mouse, people who cannot hear will miss dialog and sounds in videos, and so on. People in specific disability groups often share common accessibility barriers, but there may be some idiosyncrasies. Web accessibility guidelines are compilations of web access barriers (and potential solutions) across disability groups. These accessibility guidelines can be used in the evaluation of websites for accessibility. The best-known and most widely accepted guidelines for web accessibility are the Web Content Accessibility Guidelines.[11] While incorporating the WCAG into a development process should ensure an accessible website, that is sometimes not the case. There are three standard evaluation methods used to determine if a website is accessible: usability testing involving users with disabilities, manual expert reviews (also known as inspections), and automated accessibility testing.[12] Web accessibility guidelines such as WCAG are frequently used in the latter two evaluation methods.[13]

Usability testing involves people with disabilities working through tasks on the website to identify the barriers that they encounter.[14] Such testing does not rely on web accessibility guidelines and often does not find accessibility barriers that do

11. *See generally WCAG 2 Overview,* W3C: WEB ACCESSIBILITY INITIATIVE (Mar. 18, 2022), https://www.w3.org/WAI/standards-guidelines/wcag/ (discussing the general WCAG 2 guidelines).

12. *See generally* Julio Abascal et al., *Tools for Web Accessibility Evaluation*, in WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH 479, 480-82 (Yeliz Yesilada & Simon Harper eds., 2019).

13. *Id.* at 479, 481.

14. *See* Sheryl Burgstahler et al., *Software Accessibility, Usability Testing and Individuals with Disabilities*, 10 INFO. TECH. & DISABILITIES E-J., no. 2, 2004 (discussing usability in terms of the user's experience and in terms of the "testing and feedback process employed by designers and engineers wherein actual users are observed as they interact with specific feature(s) of a product.").

not relate to the user's own disability.[15] Expert inspections (programs such as the U.S. federal government's Trusted Tester program[16] provide certification) can find accessibility barriers and are good at determining compliance with accessibility guidelines, but they require access to experts and are too labor intensive to scale for an organization that may have hundreds or even thousands of pages that would need to be inspected.[17] In their inspections, experts might use manual or semi-automated tools to check for accessibility problems and conformance to guidelines.[18] Combining usability testing involving people with disabilities and expert inspections is the ideal method. However, both involve humans, so scalability is limited.[19] Furthermore, the levels of expertise of the "experts" in an expert review can lead to inconsistent results.[20] With larger websites, non-automated lay users or experts use some form of sampling technique: either evaluating the most frequently visited pages, a random sampling of pages, or sampling pages that use different page templates.[21] Automated tools for accessibility testing measure compliance against accessibility guidelines but cannot find accessibility barriers outside of the guidelines that have been implemented.[22] Such tools are often presented as a scalable method for accountability since they can potentially check all the web pages on a website.[23] However, the reports that current tools generate are often confusing, misleading, and do not provide guidance in

15. LAZAR ET AL., *supra* note 1, at 147.

16. The Trusted Tester program "provides a code-inspection based test approach for determining web content conformance to the Section 508 standards." *Section 508 Trusted Tester Conformance Test Process Version 5*, U.S. DEP'T OF HOMELAND SEC. (Jan. 31, 2022), https://www.dhs.gov/trusted-tester.

17. LAZAR ET AL., *supra* note 1, at 143.

18. Abdullah Alsaeedi, *Comparing Web Accessibility Evaluation Tools and Evaluating the Accessibility of Webpages: Proposed Frameworks*, 11 INFO. 40 § 3.1 (2020).

19. LAZAR ET AL., *supra* note 1, at 143.

20. *See generally* Giorgio Brajnik et al., *The Expertise Effect on Web Accessibility Evaluation Methods*, 26 HUM.-COMPUT. INTERACTION 246, 256-74 (2011).

21. *See* Matthew King et al., *Managing usability for people with disabilities in a large web presence*, 44 IBM Sys. J. 519, 520 (2005); *see generally* Giorgio Brajnik et al., *Effects of sampling methods on web accessibility evaluations*, in 9TH INTERNATIONAL ACM SIGACCESS CONFERENCE ON COMPUTERS AND ACCESSIBILITY 59, 60-61 (2007).

22. Abascal et al., *supra* note 12, at 481.

23. *See* King et al., *supra* note 21, at 520; *see generally* Brajnik et al., *supra* note 21, at 60-61.

assessing legal compliance.[24]

A. GUIDELINES

The Web Content Accessibility Guidelines are the most well-accepted and well-known technical standards for accessibility in the world.[25] WCAG originated in the mid-1990s as the Trace Center Unified Web Site Accessibility Guidelines, which formed the foundation for WCAG 1.0, which was approved by the Web Accessibility Initiative of the World Wide Web Consortium (W3C) in 1999.[26] WCAG 2.0 is significantly different in structure and content from WCAG 1.0 and was finalized in 2008.[27] WCAG 2.1 was released in June 2018 and extends WCAG 2.0 with seventeen additional success criteria.[28] In total, WCAG has been in use, with W3C approval, for over twenty years.

Large technology companies such as Microsoft, IBM, Google, and Apple were involved in the development of the WCAG standards, and an open, public process was used to allow all stakeholders to participate.[29] There was wide support from consumers, industry, and researchers when the guidelines were

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24. *See* Hayfa Y. Aabuaddous et al., *Web Accessibility Challenges*, 7 INT'L. J. COMPUT. SCI. & APPLICATIONS, no. 10, 2016, at 176.

25. *See* Loïc Martínez & Michael Pluke, *Mandate M 376: New Software Accessibility Requirements*, 27 PROCEDIA COMPUT. SCI. 271, 272 (2014); Carli Spina, *WCAG 2.1 and the Current State of Web Accessibility in Libraries*, 2 WEAVE J. OF LIBR. USER EXPERIENCE, no. 2, 2019.

26. *See* Shadi Abou-Zahra & Judy Brewer, *Standards, Guidelines, and Trends*, in WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH 225, 231 (Yeliz Yesilada & Simon Harper eds., 2019); Elizabeth Ellcessor, *Bridging Disability Divides*, 12 INFO., COMMC'N & SOC'Y 289, 298 (2010); Jonathan Lazar, *Web Accessibility Policy and Law*, in WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH 247, 253 (Yeliz Yesilada & Simon Harper eds., 2019).

27. *See generally* Loretta Guarino Reid & Andi Sno-Weaver, *WCAG 2.0: a web accessibility standard for the evolving web*, in INTERNATIONAL CROSS DISCIPLINARY CONFERENCE ON WEB ACCESSIBILITY: BEIJING 2008, 109 (Yeliz Yesilada gen. chair, 2008) (comparing WCAG 1.0 and WCAG 2.0).

28. Shawn Lawton Henry, *What's New in WCAG 2.1*, W3C: WEB ACCESSIBILITY INITIATIVE (Aug. 13, 2020), https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/.

29. *See* W3C (2008, press release) W3C Web Standard Defines Accessibility for Next Generation Web (Dec. 2008), https://www.w3.org/2008/12/wcag20-pressrelease; Accessibility Guidelines Working Group - Participants, W3C: Web Accessibility Initiative, https://www.w3.org/groups/wg/ag/participants (last visited Jan. 11, 2022); W3C Process Document, W3C: Web Accessibility Initiative (Nov. 2, 2021), https://www.w3.org/2021/Process-20211102/.

finalized.[30] In many ways, the W3C process of allowing all stakeholders to comment is similar to the U.S. federal regulatory development process, albeit without any specific legal requirements to it.

The WCAG 2.x series documents are organized by the four principles of "POUR," which require that web content must be "Perceivable, Operable, Understandable, and Robust" for all.[31] Under each of these principles are a series of informative guidelines, each of which encompass one or more normative success criteria.[32] Conformance to WCAG is evaluated according to the success criteria levels (Level A, AA, and AAA), where each subsequent level has more accessibility features.[33] WCAG 2.x success criteria are technology-agnostic, in that they lay out what must be true of the web content and access to it, but not how it must be done in a specific format or technology (such as HTML or PDF).[34] The W3C publishes a large set of informative documents on how to understand and apply WCAG success criteria to different technologies.[35]

Success criteria in WCAG are meant to be testable, with technical details included so that conformance can be ascertained through a combination of human and automated means.[36] However, these guidelines can be difficult to understand for people who do not have the technical expertise. A W3C working group has recognized this difficulty and is working on what is currently called the W3C Accessibility Guidelines 3—three drafts were published 2021.[37] In these drafts, the editors were interested in public feedback on an approach in which guidelines

30. *See* W3C (2008, press release) *W3C Web Standard Defines Accessibility for Next Generation Web* (Dec. 2008), https://www.w3.org/2008/12/wcag20-pressrelease; *W3C Process Document*, W3C: WEB ACCESSIBILITY INITIATIVE (Nov. 2, 2021), https://www.w3.org/2021/Process-20211102/#Consensus.

31. *See* Spina, *supra* note 25.

32. *See WCAG 2 Overview, supra* note 11.

33. *See 5.2.1 Conformance Level*, W3C (June 5, 2018), https://www.w3.org/TR/WCAG21/#cc1.

34. *See W3C Accessibility Guidelines – Abstract*, W3C (June 5, 2018), https://www.w3.org/TR/WCAG21/#abstract-0.

35. *See* Accessibility Guidelines Working Grp., *Techniques for WCAG 2.1*, W3C: WEB ACCESSIBILITY INITIATIVE (Mar. 9, 2022), https://www.w3.org/WAI/WCAG21/Techniques/.

36. *See id.*

37. W3C, *W3C Accessibility Guidelines (WCAG) 3.0 Publication History*, https://www.w3.org/standards/history/wcag-3.0 (last visited Apr. 24, 2022).

were simplified, and conformance tests were listed separately.[38] It is not yet known whether this new simplified-and-separated approach to the guidelines will be successful in making them easier to understand while still being useful for different stakeholders, such as website developers, decision makers, and those who check for conformance. WCAG allows for significant flexibility in how organizations meet its accessibility success criteria, and governments around the world accept WCAG as the gold standard for making web content (and related technologies) accessible.[39]

B. AUTOMATED TOOLS

There are two general types of automated tools for web accessibility: tools for evaluation and tools for remediation. Evaluation tools have been available since the mid-1990s[40] and check web content for non-conformance against guidelines and common patterns of inaccessibility.[41] Web accessibility tools may give guidance or suggestions, or may be integrated in development workflows to fix some accessibility issues.[42] Web accessibility remediation tools began to add machine learning and other artificial intelligence methods in the mid-2010s.[43] However, the currently available automated web accessibility evaluation tools are still limited in ability and scope. They are designed primarily for programmers or web developers interested in the coding level, not for website managers interested in the overall organizational level of accessibility or for those who are trying to

38. *See* Jeanne Spellman et al., *W3C Accessibility Guidelines (WCAG) 3.0: W3C First Public Working Draft*, W3C (Dec. 7, 2021), https://www.w3.org/TR/2021/DNOTE-wcag-3.0-explainer-20211207/.

39. *See* Spina, *supra* note 25.

40. *See Early Favorite Accessibility Tools & Checkers: A Trip Down Memory Lane*, DEQUE SYSTEMS (Nov. 16, 2016), https://www.deque.com/blog/deques-favorite-early-accessibility-tools/.

41. Abascal et al., *supra* note 12, at 481.

42. *See id.* at 486-87.

43. *See generally* Shadi Abou-Zahr et al., *Artificial Intelligence (AI) for Web Accessibility: Is Conformance Evaluation a Way Forward?*, in WEB4ALL 2018: 15TH INTERNATIONAL WEB FOR ALL CONFERENCE 2, 4 (2018), https://www.w4a.info/2018/ (choose "Download Communication Papers"; then select "38") (discussing AI for web accessibility today including current limitations and potential applications); Aisha Counts, *COVID-19 kickstarted a war over web accessibility* (Dec. 8, 2021), https://www.protocol.com/digital-accessibility-web-covid (discussing the impact of the COVID-19 pandemic on increasing web accessibility).

assess legal compliance.[44] Most evaluation tools are based on the WCAG 2.0 (or WCAG 2.1) and cover only a subset of its guidelines.[45] Human understanding and context are needed to successfully analyze some aspects of WCAG conformance, but most evaluation tools cover the technological low-hanging fruit with the success criteria that are easy to implement.[46] In addition, tools often flag items that could be potential problems that need to be manually checked by evaluators who are familiar with accessibility.[47] Effectively interpreting detailed reports from automated evaluation tools requires technical knowledge of both web development and accessibility,[48] so the technical nature of such reports do not help website managers really understand what the barriers are and whether their site is accessible. There are frequently many false positives that need to be manually checked[49]—and that inflated number may be intimidating to people unfamiliar with using the tools. Different tools have different strengths and weaknesses, but novices may assume that the results they get are completely accurate. This may lead users of the tools to incorrectly believe that their website is beyond repair, leading to "negative effects and . . . undesirable consequences."[50] This might also empower litigants who want to scare potential defendants with data showing that their website is in violation of accessibility requirements.

Many popular accessibility remediation tools today are in a category of tools known as accessibility overlays.[51] Accessibility overlays are software layers that act on top of the underlying page code.[52] The person visiting the website interacts with the

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44. *See generally* Jonathan Lazar et al., *Investigating the Potential of a Dashboard for Monitoring U.S. Federal Website Accessibility*, in PROCEEDINGS OF THE 50TH ANNUAL HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 2428 (2017); LAZAR ET AL., *supra* note 1, at 139, 161.

45. *See* Abascal et al., *supra* note 12, at 484.

46. *See id.* at 483-84.

47. *See id.*

48. *See* Hayfa Y. Abuaddou et al., *Web Accessibility Challenges*, 7 INT'L J.R OF ADVANCED COMPUT. SCI. & APPLICATIONS, no. 10, 2016, at 171, 176.

49. *See* Markel Vigo et al., *Benchmarking Web Accessibility Evaluation Tools: Measuring the Harm of Sole Reliance on Automated Tests*, in W4A 2013: 10TH INTERNATIONAL DISCIPLINARY CONFERENCE ON WEB ACCESSIBILITY § 4.3 (2013).

50. *See id.*

51. *See* Hugh Grant, *A Simple Guide to Web Accessibility Overlays*, TECHBULLION (Feb. 11, 2022), https://techbullion.com/a-simple-guide-to-web-accessibility-overlays/.

52. *See* Brad Henry, *Accessibility Overlays in Digital Content*, TPGI (May 13, 2020), https://www.tpgi.com/accessibility-overlays-in-digital-content/.

overlay software, which can change the presentation, structure, content, and behavior of the underlying page to potentially better fit a user with disabilities.[53] The currently available web accessibility overlays may only remediate a subset of accessibility problems.[54] There is also some controversy in the web accessibility community about the claims made by companies that sell accessibility overlays.[55] However, the controversy and limitations of current-generation overlays are beyond the scope of this paper.

II. EXISTING LEGAL FRAMEWORK FOR WEB ACCESSIBILITY

Typically, there are four primary sources of legal rules: constitutions,[56] statutes, regulations (federal or state, where applicable), and case law. This Article will examine these sources to understand the legal framework for web accessibility for public accommodations.

A. STATUTES

The Americans with Disabilities Act is split up into three main parts: Title I (employment), Title II (state and local government), and Title III (public accommodations).[57] There are currently twelve categories of public accommodations as defined in the ADA:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

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53. Symposium, *Overlays Panel at the 2020 ICT Accessibility Testing Symposium* 2-3 (2020), https://www.ictaccessibilitytesting.org/wp-content/uploads/2021/04/Overlays-Transcript.pdf (transcript).

54. *See id.* at 16.

55. *See Overlay Fact Sheet,* OVERLAY FACT SHEET, https://overlayfactsheet.com/ (last visited Jan. 11, 2022).

56. The U.S. Constitution does not mention web accessibility (or more broadly, disability), and there currently are no U.S. state constitutions that mention web accessibility. While federal disability rights laws may have their roots in the U.S. Constitution, that is a topic beyond the scope of this paper, and currently, constitutions are not sources for legal rules related to web accessibility.

57. The lesser-known Title IV relates to telecommunications and Title V is miscellaneous. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101).

> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[58]

It is important to note that all twelve categories of public accommodation are physical places. Websites are not, as of yet, mentioned in the statute. Not surprisingly, then, case law has therefore become the primary source of legal rules in the area of web accessibility for public accommodations.[59] However, although the ADA does not mention web accessibility requirements for public accommodations, there are several other

58. 42 U.S.C. § 12181(7).

59. *See* Jonathan Lazar, *Due Process and Primary Jurisdiction Doctrine: A Threat to Accessibility Research and Practice?*, 20TH INTERNATIONAL ACM SIGACCESS CONFERENCE ON COMPUTERS AND ACCESSIBILITY 404, 404-05 (2018).

federal statutes that relate to the accessibility of websites.[60]

There are very disparate statutory requirements for government websites and for the broader set of organizations known as "public accommodations."[61] For example, websites for the federal government are required to be accessible under Section 508 of the Rehabilitation Act, and the required technical standard under the updated Section 508 regulation is provided by the Web Content Accessibility Guidelines 2 (WCAG 2).[62] The revised Section 508 standards apply the WCAG 2 level AA criteria[63] to all electronic content, whether on the web or not.[64] However, while WCAG is mentioned in the Section 508 regulations, there is no mention of automated inspection tools.

Another federal statute, the Air Carrier Access Act, prohibits discrimination against people with disabilities in air transportation,[65] and its implementing regulations mention the WCAG 2 level AA guidelines.[66] However, it also does not discuss automated testing tools, and it covers only airline websites, not the broader category of public accommodations.[67] For the Air Carrier Access Act, the enforcement remedies are orders to compel issued by the Secretary of Transportation and occasionally civil fines for the air carrier.[68]

At a high level, Section 255 of the Telecommunications Act requires that "[a] provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[69] Section 255 of the

60. *See* Christopher Mullen, Note, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 754 (2019).

61. LAZAR ET AL., *supra* note 1, at 88-95.

62. 82 Fed. Reg. 5790-91.

63. WCAG has three levels: level A is the minimum level, AA is a necessity for a workable website (it also includes level A), and AAA is the most difficult to implement. *See* LAZAR ET AL., *supra* note 1, at 64.

64. *Applicability and Conformance Requirements*, GSA: SECTION508.GOV (2018), https://www.section508.gov/develop/applicability-conformance/.

65. Air Carrier Access Act of 1986, Pub. L. No. 99-435, § 2, 100 Stat. 1080 (1986).

66. *Part 382 – Nondiscrimination on the Basis of Disability in Air Travel*, NAT'L ARCHIVES (Sept. 23, 2021), https://www.ecfr.gov/current/title-14/chapter-II/subchapter-D/part-382.

67. *See id.*

68. *See* 14 C.F.R. § 383.2(a).

69. 47 U.S.C. § 255.

Telecommunications Act of 1996[70] applies to all technology (not only the web), and it does not refer to the WCAG guidelines.[71] However, Section 255 does defer to the U.S. Access Board for defining the terms "accessible to" and "usable by."[72] The U.S. Access Board, in turn, uses WCAG in its implementing regulations for Section 255.[73] The only Section 255 remedy is that of the Federal Communications Commission (FCC) deciding to issue an order based on its formal complaint process.[74]

Many states also have statutes requiring the state government to have accessible websites.[75] For example, Arizona has a statute adopting the accessibility standards of Section 508 of the Rehabilitation Act for any electronic or information technology to which state funds are directed.[76] In California, the law states that anything conducted, operated, administered, or funded by the state must provide equal access.[77] Other states, such as Maryland, tie accessibility directly to the procurement process.[78] Yet for the much larger number of websites for ADA-defined public accommodations, there are no statutes or regulations that specifically mention website accessibility.[79]

B. REGULATIONS

Although the DOJ started a regulatory process in 2010 to define specific regulations for web accessibility for public accommodations under Title III of the ADA, that rulemaking did not progress and was withdrawn in 2017.[80] So, like the statute

70. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 255, 110 Stat. 56.

71. *See id.*

72. *See id.*

73. 82 Fed. Reg. 5790-91.

74. *Id.*

75. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 18-131 to -132; ARK. CODE ANN. §§ 25-26-203; COLO. REV. STAT. ANN. § 24-85-103; FLA. STAT. ANN. § 282.60; IDAHO CODE ANN. § 67-6702(6)(e), 6708(9)(k); IND. CODE ANN. § 4-13.1-3-1; KY. REV. STAT. ANN. § 61.982; LA. STAT. ANN. § 39:302; MD. CODE ANN., State Fin. & Proc. § 3A-311; MINN. STAT. ANN. § 16E.03(9); MO. ANN. STAT. § 191.863; MONT. CODE ANN. § 18-5-603; NEB. REV. STAT. § 73-205; OKLA. STAT. ANN. tit. 62, § 34.28; VA. CODE ANN. § 2.2-3500; W. VA. CODE ANN. § 18-10N-3.

76. *See* ARIZ. REV. STAT. ANN. §§ 18-131 to -132.

77. CAL. GOV'T CODE § 11135(d)(2).

78. *See, e.g.*, MD. CODE ANN., STATE FIN. & PROC. § 3A-311.

79. *See* Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits under Title III Unduly Burden Private Businesses*, 69 CASE W. RSRV. L. REV. 1079, 1081 (2019).

80. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four

itself, existing formal administrative rules interpreting the ADA, while containing general language applicable to websites, do not specifically mention websites. However, administrative regulations have nonetheless been a source of legal rules related to the ADA's application to web accessibility.

ADA regulations state that public accommodations are bound by a duty to provide "effective communications" to people with disabilities. This duty is defined in 28 C.F.R. § 36.303(a), which states:

> A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.[81]

Another section of that regulation, 28 C.F.R. § 36.303(c)(1), further discusses effective communication: "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities."[82]

The DOJ has stated since 1996 that websites of public accommodations are covered under this "effective communications" requirement (in both the statute and the regulations) of Title III of the ADA.[83] For instance, it did so in

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Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017), https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced (notice of "withdrawal of four previously announced Advance Notices of Proposed Rulemaking (ANPRMs), pertaining to title II and title III of the Americans with Disabilities Act (ADA), for further review.").

81. 28 C.F.R. § 36.303(a).

82. *Id.* at § 36.303(c)(1).

83. Letter from Deval Patrick, Assistant Att'y Gen., C.R. Div., to the Hon. Tom Harkin, U.S. Sen. (Sept. 9, 1996), https://www.justice.gov/crt/foia/file/666366/download.

the 1996 initial letter from Assistant Attorney General for Civil Rights Deval Patrick to Senator Tom Harkin[84] and the 2014 DOJ Statement of Interest in *New v. Lucky Brand Dungarees Store, Inc.*, explaining the application of the "effective communications" requirement to websites.[85] The DOJ's reasoning was that even when an accessibility standard has not yet been defined for a particular technology, the general ADA requirements of equal access, specifically "effective communications" under Title III (Public Accommodations), still apply because the ADA cannot predict in advance every potential technology that could be used in a public accommodation.[86] Along similar lines, the Statement of Interest noted that "[t]he fact that POS [point of sale] devices are not specifically addressed in the current title III regulation and the ADA Standards does not change Lucky Brand's obligations under the ADA to ensure effective communication with individuals with disabilities."[87] Later, the DOJ noted in its Statement that Title III of the ADA requires that public accommodations provide "appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."[88] So, in general, the DOJ points people to the ADA Title III regulations that relate to effective communication.[89] However, this administrative rule was not created through a formal rulemaking procedure, which is more open to stakeholder involvement.[90]

As relates to administrative law, there are three levels of deference that courts give: *Chevron*, *Auer*, and *Skidmore* deference.[91] *Auer* deference would apply when agencies are interpreting their own interpretations of the ADA as promulgated through regulations[92]—as was the case with the 1996 letter and

84. *Id.*

85. Statement of Interest of the United States at 6-7, New v. Lucky Brand Dungarees Stores, Inc., 51 F. Supp. 3d 1284 (2014) (No. 14-20574), https://www.ada.gov/briefs/lucky_brand%20_soi.docx; *see also* New v. Lucky Brand Dungarees Stores, Inc., 51 F. Supp. 3d 1284 (S.D. Fla. 2014).

86. Statement of Interest of the United States at 7-8, *New*, 51 F. Supp. 3d 1284.

87. *Id.* at 9 (citing 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303).

88. 28 C.F.R. § 36.303(c); 42 U.S.C. § 12182(b)(2)(A)(iii).

89. *See* Statement of Interest of the United States at 9, *New*, 51 F. Supp. 3d 1284; *see also* 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

90. *See generally* 5 U.S.C. §§ 551-59.

91. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Auer v. Robbins, 519 U.S. 452 (1997); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

92. *See* Daniel J. Sheffner, CONG. RSCH. SERV., LSB10279, HAS JUDICIAL

2014 Statement discussed above. Indeed, courts have often given significant deference to the DOJ in interpreting the regulations that they have promulgated under Title II and Title III of the ADA.[93] However, while the formal regulations for broad, effective communications under Title III are clear, the application of those regulations to websites appears in agency interpretation, which can be hard to understand—both in terms of their content and legal authority—for those who primarily work on developing and maintaining websites.[94]

C. CASE LAW

As is common when the other sources of legal rules are not clear, case law has filled the gap of providing guidance in the area of web accessibility. However, in many ways, this has resulted in additional confusion and more lawsuits. Since websites are not mentioned in the ADA statute or regulations, the DOJ (as mentioned in the last section) has interpreted websites as falling under the "effective communication" clauses of the ADA. However, instead of focusing on the meaning of "effective communication," courts have mainly analyzed the relationship between the website and the definition of "public accommodation." This focus has resulted in the development (or appropriation from previous ADA case law) of the "nexus" theory[95] for analyzing whether a website is a public accommodation under the ADA. If and when ADA coverage is established, this naturally leads to the question of remedy, which involves tools and guidelines for web accessibility. The next two sections will discuss the nexus analysis and questions related to remedies.

1. NEXUS

A core requirement of Title III of the ADA is that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or

DEFERENCE TO AGENCY REGULATORY INTERPRETATIONS REACHED ITS FINAL AUER? 1 (2019), https://sgp.fas.org/crs/misc/LSB10279.pdf.

93. *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 906-07 (9th Cir. 2019).

94. *See generally* Stuy, *supra* note 79.

95. *See infra* Part II.C.1.

operates a place of public accommodation."[96] However, there may be limits to the coverage that Title III provides. Specifically, there is currently a circuit split regarding the requirement for a sufficient nexus between a physical public accommodation and its website in order to subject the latter to coverage by ADA.

The nexus theory of interpreting the ADA pre-dates web accessibility, which may explain some of the challenges in clearly applying the nexus theory to websites.[97] The nexus theory, as applied to websites, requires that there must be a nexus between the website and the physical location of a public accommodation (which is clearly covered by the ADA), so, for example, "the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores . . ."[98] Before the web, the nexus rule was discussed in cases such as *Weyer v. Twentieth Century Fox Film Corp.*,[99] *Parker v. Metropolitan Life Ins. Co.*,[100] and *Ford v. Schering–Plough Corp.*[101] As applied to websites, and as first articulated in *National Federation of the Blind v. Target*, the nexus theory requires that an inaccessible website be a barrier to accessing the physical accommodation itself for the ADA to apply.[102]

Currently, the Third, Sixth, and Ninth Circuits maintain a nexus requirement.[103] Thus, a website is only required to be accessible if the website is an extension of a physical accommodation such that barriers on the website are barriers to the physical accommodation.[104] In the Ninth Circuit district court case *National Federation of the Blind v. Target*, the inaccessible website was a barrier to accessing the physical Target store, or, as the court found, the "inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target

96. 42 U.S.C. § 12182.

97. Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT L.J. 215, 227 (2016).

98. *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 956.

99. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

100. *See* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (en banc).

101. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3d Cir. 1998).

102. *See Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 952.

103. *See* Lazar, *supra* note 59, at 404.

104. *See id.*

stores."[105] Therefore, ADA coverage applied to the website that was the subject of the plaintiff's claim.[106]

In contrast, courts in the First, Second, and Seventh Circuits have held that a consumer website, by itself, counts as a public accommodation.[107] As an example, according to a district court in the First Circuit, the Netflix website is covered under the ADA, even though Netflix has no physical store.[108] It is important to note that this circuit split on the nexus issue already existed before the legal question on web accessibility. In *National Federation of the Blind v. Scribd*,[109] another case about web accessibility, the district court cited *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England*, noting that in *Carparts*, "the First Circuit explained that public accommodations are not limited to physical structures,"[110] and further noting that "[i]t would be 'absurd' to conclude people who enter an office to purchase a service are protected by the ADA but people who purchase the same service over the telephone or by mail are not."[111] The Seventh Circuit similarly noted, in *Morgan v. Joint Administration Building*, that "[a]n insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store."[112] Similarly, "The Second Circuit Court of Appeals [has] emphasized that it is the sale of goods and services to the public, rather than how and where that sale is executed, that is crucial when determining if the protections of the ADA are applicable."[113]

The Eleventh Circuit Court of Appeals had been considered

105. *See Nat'l Fed'n of the Blind*, 452 F. Supp. at 956.

106. *See id.*

107. *See, e.g.*, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 202 (D. Mass. 2012); Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 575-76 (D. Vt. 2015); Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001). For further discussion of the circuit split, *see* Stuy, *supra* note 79, at 1086-89; Lazar, *supra* note 59, at 404.

108. *See Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d 196.

109. *Nat'l Fed'n of the Blind*, 97 F. Supp. 3d 565.

110. *See id.* at 570 (citing Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994)).

111. *Id.*

112. *Morgan*, 268 F.3d at 459 (citations omitted).

113. Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 392 (E.D.N.Y. 2017) (citing Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000)).

to be a nexus circuit, with rules similar to those of the Ninth Circuit.[114] However, the 2021 Eleventh Circuit ruling in *Gil v. Winn-Dixie* created confusion, as the court indicated that people misunderstood its previous ruling in *Rendon v. Valleycrest Productions*.[115] *Rendon* is a 20-year-old non-web precedent about ADA Title III, which addressed phone access for contestants trying out for the television show "Who Wants to be a Millionaire?"[116] In *Gil v. Winn-Dixie*, the Eleventh Circuit indicated that the *Rendon* case did not actually endorse or adopt a nexus standard.[117] This recent ruling seemed to add a new legal standard for web accessibility which applies only in the Eleventh Circuit:

> Accordingly, we hold that Winn-Dixie's website does not constitute an "intangible barrier" to Gil's ability to access and enjoy fully "the goods, services, facilities, privileges, advantages or accommodations of" a place of public accommodation (here, a physical Winn-Dixie store). Consequently, Gil's ability to access the website does not violate Title III of the ADA in this way.[118]

At the moment, the "intangible barrier" standard in the Eleventh Circuit is unique: "Winn-Dixie's limited use website, although inaccessible by individuals who are visually disabled, does not function as an intangible barrier to an individual with a visual disability accessing the goods, services, privileges, or advantages of Winn-Dixie's physical stores . . . ."[119] The "intangible barrier" standard does not exist in any other circuit, and, as of January 2022, this case is no longer good law and the

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114. *See* Haynes v. Dunkin' Donuts LLC, 741 F. App'x 752, 753 (11th Cir. 2018); *see also* Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340, 1348-49 (S.D. Fla. 2017) (stating that "where a website is wholly unconnected to a physical location, courts within the Eleventh Circuit have held that the website is not covered by the ADA," however the question of whether a website is a public accommodation was not at issue in this case).

115. *See* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1281 (11th Cir. 2021) (citing Rendon v. Valleycrest Prods., 294 F.3d 1279 (11th Cir. 2002)) ("Gil erroneously assumes in his arguments that *Rendon* established a 'nexus' standard . . . . But we did not adopt or otherwise endorse a 'nexus' standard in *Rendon*. Indeed, the only mention of a 'nexus' in *Rendon* is a footnote acknowledging that certain precedent from other circuits . . . .").

116. *See Rendon*, 294 F.3d 1279.

117. *See Gil*, 993 F.3d at 1281.

118. *Id.* at 1280.

119. *See id.* at 1279.

standard does not exist in the Eleventh Circuit, either.[120] Gil, the plaintiff in the case, requested an en banc rehearing in the Eleventh Circuit on April 15, 2021.[121] Then on December 28, 2021, the Eleventh Circuit granted the en banc rehearing but noted that the appeal was rendered moot, stating, "we vacate our opinion and the underlying judgment, dismiss the appeal, and remand for the district court to dismiss the case as moot."[122]

The nexus requirement for web accessibility present in some circuits is an example of the connection and accompanying confusion between the technical and the legal communities. There is confusion not only because of the existing circuit split on whether a nexus is required, but also because there is not a clear legal test for whether a nexus between a website and a physical location exists. "By alleging that (1) Defendant's website gives individuals 'the opportunity to place an order through the website for free pickup' at Defendant's physical stores, and that (2) Plaintiff was prevented from using that portion of the website because it was not compatible with SRS and inaccessible to him as an individual with blindness, Plaintiff pled facts sufficient to plausibly state a claim under the nexus theory."[123] But how much of a nexus must be present? How would you document the nexus? The confusion due to the unclear standards and circuit split on the nexus issue would merit scholarly attention even without the dramatic increase in "drive-by" lawsuits (discussed in Part III), but these lawsuits take advantage of the existing situation and highlight the need for work in this area. A clear definition of what constitutes a nexus for a website would be helpful.

As mentioned earlier, there are multiple interpretations of statutes and regulations coming out of the DOJ, providing that websites of public accommodations are covered under Title III of the ADA.[124] Yet, courts have not uniformly ruled the same way.[125]

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120. *See* Gil v. Winn-Dixie Stores, Inc., 21 F.4d 775, 776 (11th Cir. 2021) (per curiam).

121. *See id.*

122. *See id.*

123. Haynes v. Kohl's Dep't Stores, Inc., 391 F. Supp. 3d 1128, 1135 (S.D. Fla. 2018).

124. *See supra* Part II.C.

125. Ryan C. Brunner, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 174-75 (2017); *see also* Youlan Xiu, Note, *What Does Web Accessibility Look like under the ADA?: The Need for Regulatory Guidance in an E-*

2. REMEDIES

While the nexus issue is often in the limelight, there is another legal issue that less frequently gets attention: the appropriate remedy for violations. Under Title III of the ADA, private lawsuits can request injunctive relief but not damages.[126] Attorney fees can also be provided in private lawsuits.[127] Only lawsuits filed in court by the DOJ—not by private citizens—can request damages in the form of civil penalties.[128]

Thus, injunctive relief is the most widely available remedy. However, under the current legal framework, it is unclear what the injunctive relief should be when websites are inaccessible. From a strictly technological point of view (or, put another way, if you asked a computer scientist this question instead of a lawyer), if one wants a website to be accessible, the best guide is the Web Content Accessibility Guidelines, first issued as an international standard in 1999[129] and included in other federal laws,[130] as well as most legal settlements.[131]

There is currently no legal specification for the web accessibility technical standards that should be used. This lack of specification was a key legal question in *Robles v. Dominos Pizza*.[132] Robles, a blind individual, sued Domino's Pizza because its website and mobile app were not accessible.[133] Domino's claimed that Robles could not request compliance with a specific technical standard, such as WCAG, because no standard is cited

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Commerce World, 89 GEO. WASH. L. REV. 412, 400-428 (2021) (discussing the circuit split relevant to the nexus issue); Carly Schiff, Note, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2344-46 (2015) (proposing elimination of the nexus requirement in favor of content classifications).

126. *See* 28 C.F.R. § 36.501.

127. *Id.* at § 36.505.

128. *See id.* at § 36.503-504.

129. *See Web Content Accessibility Guidelines 1.0*, W3C (May 5, 1999), https://www.w3.org/TR/WAI-WEBCONTENT/.

130. *See* 36 C.F.R. § 1194.1; *Part 382 – Nondiscrimination on the Basis of Disability in Air Travel*, NAT'L ARCHIVES (Sept. 23, 2021), https://www.ecfr.gov/current/title-14/chapter-II/subchapter-D/part-382.

131. *See generally* LAZAR ET AL., *supra* note 1, at 62-65.

132. *See* Robles v. Dominos Pizza LLC, No. CV 16–06599 SJO (SPx), 2017 WL 1330216, at *3 (C.D. Cal. Mar. 20, 2017), *rev'd and remanded sub nom.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019).

133. *Id.* at *1.

in the regulations or the statute.[134] Siding with Domino's, the court reasoned that requiring compliance with a specific standard would violate Domino's due process rights.[135] Thus, the district court granted a motion to dismiss.[136] As Jonathan Lazar mentioned in *Due Process and Primary Jurisdiction Doctrine: A Threat to Accessibility Research and Practice?*, *Robles* was dismissed at the district court "*because* the plaintiff asked for the WCAG. Not only will the relief of the WCAG not be offered, but having a plaintiff simply asking for WCAG, will lead to the plaintiff losing the case."[137] There is even some evidence that in cases filed right after *Robles*, there was a hesitation to ask for WCAG.[138]

Fortunately, the district court's ruling did not stand. The Ninth Circuit reversed and remanded, noting that use of the WCAG is a question of remedy, not of liability.[139] As the court explained:

> Robles merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA. At this stage, Robles only seeks to impose liability on Domino's for failing to comply with § 12182 of the ADA, not for the failure to comply with a regulation or guideline of which Domino's has not received fair notice.[140]

In response, Domino's filed a writ of certiorari to the U.S. Supreme Court, which declined to hear the case.[141] Finally, in June 2021, following remand, the district court granted summary judgement to plaintiff Robles on the cause of action related to the accessibility of the Domino's website, ordering Domino's Pizza "to bring its website into compliance with the WCAG 2.0 guidelines."[142]

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134. *Id.* at *2.

135. *Id.*

136. *Id.* at *1.

137. *See* Lazar, *supra* note 59, at 405 (emphasis in original).

138. *Id.*

139. *See Robles*, 913 F.3d at 907.

140. *Id.*

141. *See* Domino's Pizza, LLC v. Robles, 140 S. Ct. 122 (2019) (Mem.).

142. Robles v. Domino's Pizza LLC, No. CV 16-6599 JGB (Ex), 2021 WL 2945562, at *10 (C.D. Cal. June 23, 2021). After the June 23, 2021 summary judgment for Robles on the website, a trial was going to occur on the issue of the mobile app accessibility, but the parties came to a settlement. Seyfarth Shaw LLP, Robles v.

Currently, no circuit has claimed that the WCAG are required for public accommodations, even though WCAG are the only internationally accepted guidelines for web content accessibility.[143] Indeed, there are still many open questions in the legal framework and some confusion as to whether and how WCAG should be brought up in an initial filing. This is because none of the statutes, regulations, or administrative guidance for public accommodations under Title III of the ADA specifically mention WCAG. The question still remains open: can/should a plaintiff ask for WCAG as a potential remedy and does the current legal framework lead to a clear understanding of the topic, or confusion and a potential increase in the number of lawsuits?

III. THE PREVALANCE OF "DRIVE-BY" LAWSUITS

In the years since the holding that websites can be public accommodations in *National Federation of the Blind v. Target*,[144] there have been thousands of lawsuits related to web accessibility. One law firm, Seyfarth Shaw, documented over 2,200 web accessibility lawsuits in federal court under ADA Title III per year in 2018 and 2019[145] and over 2,500 filings in 2020.[146] According to research from UsableNet, the number of ADA related lawsuits has continued to increase significantly over the past several years, and their estimate, at approximately 3,500 cases, was higher than the Seyfarth Shaw figure.[147]

Domino's Settles After Six Years of Litigation (June 10, 2022), https://www.adatitleiii.com/2022/06/robles-v-dominos-settles-after-six-years-of-litigation/.

143. *See generally WCAG 2 Overview, supra* note 11.

144. *See Nat'l Fed'n of Blind*, 452 F. Supp. 2d 946.

145. Kristina M. Launey & Minh N. Vu, *The Curve Has Flattened for Federal Website Accessibility Lawsuits*, SEYFARTH: ADA TITLE III (Apr. 29, 2020), https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits/.

146. *See* Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2020 Despite Mid-Year Pandemic Lull*, SEYFARTH: ADA TITLE III (Apr. 28, 2020), https://www.adatitleiii.com/2021/04/federal-website-accessibility-lawsuits-increased-in-2020-despite-mid-year-pandemic-lull/#more-3988.

147. *See* Jason Taylor, A record-breaking year for ADA Digital Accessibility Lawsuits., USABLENET (Dec. 21, 2020, 4:04 PM), https://blog.usablenet.com/a-record-breaking-year-for-ada-digital-accessibility-lawsuits ("ADA related cases in 2020 increased 23% over 2019. This includes cases filed in federal court and those filed in California state court under the Unruh Act with a direct reference to violation of the ADA.").

While many lawsuits for web accessibility are genuine efforts to improve accessibility, some lawsuits are caused by misunderstandings, and unfortunately, some lawsuits are filed to seize opportunities for quick cash without genuine concern for advancing or protecting the rights of disabled persons.[148] Web accessibility has gained increased attention, primarily because of the massive increase in the number of lawsuits filed claiming inaccessible websites for people with disabilities.[149] In some ways, this increase is not surprising and is not necessarily a bad thing: the ADA was written to provide an avenue for enforcement through lawsuits by private individuals.[150] Furthermore, because the statutes and regulations have not been clear about web accessibility, all involved have looked to case law to help interpret the legal requirements.[151] However, there has been a crushing growth in drive-by lawsuits, in which 100 or more businesses are sued on the same day by the same plaintiff and the same law firm (also known as "cut-and-paste" lawsuits).[152] As one district court judge noted:

> Computers have made a lot of things in life easier. Copy-and-paste litigation is one of them. The pitfalls of such an approach is [sic] evident here where, among other things, Plaintiff's opposition responds to arguments never made by its opponent . . . and failed to even correctly identify what Defendant sells . . . (referring to Banana Republic as a "food establishment"). Although it features the fruit in its name, Banana Republic does not sell bananas.[153]

Indeed, it is becoming more common for a law firm and a serial plaintiff to sue all entities within a category (e.g., all of the art galleries in New York City) without actually knowing whether their websites are accessible.[154] Since Title III of the ADA does not provide for financial damages as a form of relief, the lawyers

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148. *See Ethics in the Digital Accessibility Legal Space: ADA Enforcement Cases or Something Else?*, LAINEY FEINGOLD (Sept. 29, 2020), https://www.lflegal.com/2019/07/ethics-2/.

149. *See id.*

150. *See* 28 C.F.R. § 36.501.

151. *See generally* LAZAR ET AL., *supra* note 1, at 89-90.

152. *See generally Ethics in the Digital Accessibility Legal Space*, *supra* note 148.

153. Dominguez v. Banana Republic, LLC, No. 1:19-CV-10171-GHW, 2020 WL 1950496, at *30 (S.D.N.Y. Apr. 23, 2020).

154. *See* Elizabeth A. Harris, *Galleries from A to Z sued over websites that the Blind can't use*, N.Y. TIMES (Feb. 18, 2019), https://www.nytimes.com/2019/02/18/arts/design/blind-lawsuits-art-galleries.html.

for serial plaintiffs use this approach, similar to "phishing" online, hoping that they can score a few settlements.[155] Disability rights lawyers, such as the law firm of Lainey Feingold, try to separate their goals from those of these "serial/nuisance/drive-by" lawsuits, noting that the serial lawsuits performed for quick cash settlements do not further the goals of the Americans with Disabilities Act.[156] A built-in assumption in this type of serial lawsuit is that the defendant will not understand web accessibility and will not know whether their website is accessible. Given the lack of knowledge on the part of the defendant, the plaintiff may assume that it is not even necessary to check whether the defendant's website is accessible because the defendant will have no way to determine if the claim is correct. These serial plaintiffs may be driven by a desire to take advantage of a situation where there is confusion in the law and a lack of usable tools to easily determine whether a website is accessible—not by a desire for improving website accessibility. Furthermore, it is not only that the defendant does not know whether their website is inaccessible; there is also no easy way to determine whether it is accessible within a reasonable time frame.

In a drive-by lawsuit, a plaintiff files a lawsuit providing just enough detail about why a website of a public accommodation (usually a business) is inaccessible to meet the plaintiff's complaint filing requirement, but not enough to actually assist the defendant in determining what barriers may be present. There are no special pleading standards related to filing a complaint related to web accessibility—just the minimum required under the Federal Rules of Civil Procedure.[157] When the defendant does not know whether or not their website is accessible and the legal framework provides no guidance on tools or evaluation methods for determining whether the website is accessible, the defendants may offer a settlement rather than fixing the website to make it accessible. When there is a settlement, but the website is not made accessible, there are no net societal gains in terms of improved accessibility. These nuisance lawsuits are result of confusion about the law and a lack of information about the actual accessibility of websites. Current statutes, regulations, and automated testing tools leave big gaps

155. *See Ethics in the Digital Accessibility Legal Space*, *supra* note 148.

156. *See id.*

157. FED. R. CIV. P. 3, 5.

in our knowledge and understanding. For instance, if one is sued for web inaccessibility under Title III of the ADA, two main questions arise: (1) what would be the suggested way to determine if the website is accessible, and (2) if the website is not accessible, what would be the suggested tools or methods to make the website compliant? The current legal framework is silent on both of those questions. The authors of this Article believe that the lack of clarity, in part, is what drives companies that have been sued for web accessibility to settle. While the serial lawsuit problem exists more broadly in Title III of the ADA,[158] the rules for how to make an accessible physical location are clear, unlike those for websites.

The high number of nuisance lawsuits threatens the existing legal framework with repeated, bipartisan attempts to pass legislation to make it procedurally more difficult to file a civil rights claim. Rather than creating appropriate statutes or regulations, a group of 100 U.S. senators and representatives have recently asked the DOJ to eliminate the ability for people with disabilities to sue for web accessibility.[159] When the DOJ refused, noting their longstanding interpretation that the ADA applies to websites,[160] the group put forth a bill to remove the right to sue for web accessibility without first overcoming multiple procedural hurdles.[161] This proposed brute force legislative measure, likely a result of the increase in drive-by lawsuits, would severely limit the legal rights of people with disabilities by hindering access to the courts.

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158. Hannah Albarazi, *COVID-19's Impact On Businesses Fuels ADA Reform Debate*, LAW360 (Nov. 14, 2021, 8:02 PM) https://www.law360.com/articles/1439804/covid-19-s-impact-on-businesses-fuels-ada-reform-debate.

159. *See* Letter from Ted Budd et al., N.C. Rep., House of Representatives, to Jeff Sessions, U.S. Att'y Gen. (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf (relying on Robles v. Dominos Pizza LLC, No. CV 16-06599 SJO (SPx), 2017 WL 1330216, at *5 (C.D. Cal. Mar. 20, 2017)).

160. *See* Letter from Stephen E. Boyd, Assistant Atty. Gen., to Ted Budd, N.C. Rep., House of Representatives (Sept. 25, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf.

161. *See* Online Accessibility Act, H.R. 1100, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1100/text. The current status of this proposed bill as of February 19, 2022, is that it was referred to the Subcommittee on Consumer Protection and Commerce in the House of Representatives. For updated actions on this Act, see Online Accessibility Act, H.R. 1100, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1100/all-actions?overview=closed#tabs.

At the same time, on the defendant side, there clearly is a need to limit the number of lawsuits or have better ways to evaluate and respond to the claims related to web accessibility. As we have previously explained, there is currently no guidance in the law on the use of tools and guidelines to assist defendants in proactively or reactively evaluating or remediating their websites for accessibility.[162] Legislators are now sometimes making the argument that the right to sue should be removed,[163] rather than working to enhance the legal framework with more technical detail on tools and guidelines to avoid lawsuits by proactively increasing accessibility in the first place.

IV. AN IMPROVED LEGAL FRAMEWORK

During the COVID-19 pandemic, the essential nature of websites has become more apparent, as they are critical to systems for service delivery, community participation, and social contact. Often, in the rush to place services online, accessibility has not been considered.[164] Websites that play a key role in filling society's educational, employment, commercial, and entertainment needs need to be accessible. Furthermore, the legal framework needs to provide guidance on the use of tools and guidelines, not only to lawyers, but also to the people involved with actual website creation and maintenance: the designers, developers, and webmasters.[165]

The increased media attention to web accessibility is due in large part to a massive increase in the number of lawsuits being filed against organizations under Title III of the Americans with Disabilities Act.[166] The authors postulate that this increase in lawsuits reflects weaknesses in the legal framework, and

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162. *See infra* Part II.

163. *See* Online Accessibility Act, H.R. 1100, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1100/text.

164. *See generally* Jonathan Lazar, *Managing digital accessibility at universities during the COVID-19 pandemic*, UNIVERSAL ACCESS IN THE INFO. SOC. (2021).

165. *See* Jonathan Lazar et al., *Improving web accessibility: A study of webmaster perceptions*, 20 COMPUTS. IN HUM. BEHAV. 269, 272, 276 (2004).

166. *See, e.g.*, Ann-Marie Alcantara, *Lawsuits Over Digital Accessibility for People With Disabilities Are Rising*, WALL ST. J. (July 15, 2021, 1:10 PM), https://www.wsj.com/articles/lawsuits-over-digital-accessibility-for-people-with-disabilities-are-rising-11626369056 ("Consumers' increased use of e-commerce and other digital experiences during the Covid-19 pandemic heightened awareness of accessibility issues, but advocates say many companies still don't give priority to accessibility when they design new products and features.").

specifically, the lack of tools and guidelines in the legal framework. This weakness manifests itself in multiple ways. For instance, if sued, defendants are unsure as to what the legal requirements are, and none of the automated web accessibility tools currently available can confidently determine if an organization's websites are legally compliant. An improved legal framework, where organizations can evaluate the merits of any lawsuit and decide how to respond appropriately, using tools and guidelines, may potentially lead to a reduction in drive-by lawsuits, freeing up judicial resources.

A. PROPOSED ENHANCEMENT TO THE EXISTING LEGAL FRAMEWORK

The authors propose the following solutions as potential ways (either separately or in combination) to resolve the challenges with the existing legal framework for web accessibility. These solutions all involve tools and/or guidelines.

1. Legislators can enact new statutes that specifically mention web accessibility and incorporate tools and guidelines.

This is the most obvious solution, and many have already suggested this.[167] An example of this was the Online Accessibility Act (H.R. 8478), which was proposed but failed to pass during the 116th Congress.[168] The Act would have added web accessibility and mobile app accessibility to the ADA by requiring compliance with WCAG.[169] However, it would have first provided the operator of the inaccessible website with a ninety-day notice period in which to remediate the problem. If the problem was not remediated within ninety days, then the plaintiff would have another ninety days in which to file a complaint with the DOJ. A plaintiff would not have the right to file a claim until all administrative remedies through the DOJ had been exhausted.[170]

Both pro-business forces and disability advocates want clearer guidance in the form of new statutes.[171] However, the

167. *See generally* Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 602-04 (2020).

168. *See* Online Accessibility Act, H.R. 8478, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/8478.

169. *See id.* at 2.

170. *See id.* at 5.

171. *See generally The Proposed Online Accessibility Act in US Congress is [STILL]*

biggest stumbling block seems to be that pro-business forces want reduced access to the courts for cases related to web accessibility, whereas disability advocates do not want any reduction in access to the courts.[172] For instance, pro-business forces want to remove the right to use the courts for web accessibility actions, to require a DOJ investigation first,[173] or to require a waiting period before any lawsuits can be filed.[174]

One author suggests that the easiest way to make the fix would be to simply add a thirteenth category of public accommodation: websites.[175] The current ADA has twelve categories of public accommodation, and while those twelve categories were meant to be inclusive, it has become clear that they are not.[176]

For any proposed legislation to be useful, it should include specifics related to tools and guidelines. For instance, as previously discussed, legislation would need to state which technical guidelines (or categories of technical guidelines) would meet the legal requirement. Similarly, the legislation would need to address how automated accessibility testing tools can potentially be used to determine legal compliance. For instance, if a defendant can prove that they had previously used either a testing tool or a remediation tool, and that tool showed the defendant's website to be accessible, would that be sufficient to provide a safe harbor of some type? Given that tools and guidelines are necessary for creating and remediating websites for accessibility, the proposed legislation certainly would need to address both of those.

Bad for Digital Inclusion, LAINEY FEINGOLD (Apr. 3, 2021), https://www.lflegal.com/2020/10/ada-backlash/.

172. *See generally id.*

173. *See* Letter from Ted Budd et al., N.C. Rep., House of Representatives, to Jeff Sessions, U.S. Att'y Gen. (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf (relying on Robles v. Dominos Pizza LLC, No. CV 16-06599 SJO (SPx), 2017 WL 1330216, at *5 (C.D. Cal. Mar. 20, 2017)).

174. Similar demands for waiting periods have been made under ADA Title III more broadly, such as in Bailey Howard, *Enforcement, Compliance, and Waiting Periods in Litigation under the Americans with Disabilities Act*, 17 FLA. ST. U. BUS. REV. 25, 28 (2018).

175. *See* Mullen, *supra* note 60, at 768.

176. *See id.* at 768-70.

> **2. Regulations can be issued or revised for clarity** to incorporate accepted standards such as the WCAG guidelines and appropriate evaluation/remediation tools.

There seems to be a wide level of agreement that there is a need for updated regulations, although certainly, there may be disagreements about the content of the regulations. Businesses have taken the viewpoint that without clear regulations and guidance on web accessibility, it is unfair to require vague compliance.[177] The DOJ—which has authority to promulgate regulations for public accommodations under the ADA Title III, with the exception of transportation-related provisions which are granted to the Department of Transportation[178]—started a regulatory process in 2010 to define specific regulations for web accessibility for Title III Public Accommodations under the ADA.[179] There was initial progress, including a supplemental notice for proposed rulemaking in 2016.[180] However, the rulemaking process did not progress to a Notice of Proposed Rulemaking,[181] and the rulemaking process was withdrawn in 2017.[182] There has long been demand for regulations that specifically mention and clarify requirements for web accessibility under the ADA.[183] On November 5, 2015, fifteen disability rights groups sent a joint letter to President Obama, stating, in part:

> As you said on July 26, 2010, these rules are "the most important updates to the ADA since its original enactment in 1991." We agree, and we believe it is essential that the associated final rule be issued under your administration. Therefore, we urge you to release the NPRM [Notice of

177. *See generally* Stuy, *supra* note 79, at 1097-1103.

178. *See* 42 U.S.C. § 12186.

179. *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010).

180. *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28658, 28659 (May 9, 2016).

181. Shah, *supra* note 97, at 226.

182. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017), https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced

183. *See, e.g.*, Letter from Clark Rachfal et al., Am. Council of the Blind, to Hon. Kristen Clarke, Assistant Atty. Gen. (Feb. 28, 2022), https://www.acb.org/accessibility-standards-joint-letter-2-28-22.

> Proposed Rulemaking] for Title III of the ADA without further delay and take immediate action to ensure equal internet access for all Americans with disabilities.[184]

These demands do not only come from disability advocates. Even technology companies such as Microsoft have sent letters to the White House requesting regulations on web accessibility to help clarify their requirements.[185] On January 14, 2016, a joint letter was sent to President Barack Obama by Microsoft President and Chief Legal Officer Brad Smith, and National Federation of the Blind President Mark Riccobono, including the following text:

> Regulations from the Department of Justice (DOJ) are needed to provide companies with clear and meaningful guidelines so they can serve their clients and customers with disabilities. Thus, as you said on July 26, 2010, these rules are "the most important updates to the ADA since its original enactment." We agree, and urge you to release the NPRM for Title III of the ADA without further delay.[186]

As with the previous suggestion of a new statute, this Article's authors are certainly not the first authors to suggest the need for updated and clarified regulations.[187] Two noteworthy efforts take different approaches: Moroney modifies the standard argument, suggesting that the DOJ use a negotiated rulemaking approach[188] and Weissburg suggests that the Equal Employment Opportunity Commission (EEOC) issue web accessibility regulations under Title I (employment) for employers and employment application websites, which could potentially spur similar action by DOJ under Title III (public accommodations).[189] Given that other federal regulations require conformance with

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184. E-mail from American Association of People with Disabilities et al., to Barack Obama, Pres. of the U.S. (Nov. 5, 2015) (on file with authors).

185. *See* E-mail from Mark A. Riccobono, Pres., Nat'l Fed. of the Blind, and Brad Smith, Pres. & Chief Legal Off., Microsoft, to Barack Obama, Pres. of U.S. (Jan. 14, 2016) (on file with authors).

186. *See id.*

187. *See generally* Mullen, *supra* note 60, at 768-72.

188. *See generally* Julie Moroney, Note, *Reviving Negotiated Rulemaking for an Accessible Internet*, 119 MICH. L. REV. 1581 (2021).

189. *See generally* Harper Weissburg, Note, *Are You There, EEOC? It's Me. Title I: Using Title I to Improve Web Accessibility under the ADA.* 101 B.U.L. REV. 1917 (2021).

WCAG for airline websites[190] and for federal websites,[191] requiring the use of WCAG would be a reasonable approach consistent with existing regulations and would do nothing to diminish the rights of people with disabilities to access the courts.

> **3. Heightened pleading standards** could be adopted that require a standard of evidence prior to filing a case related to web accessibility, therefore reducing the number of frivolous lawsuits.

The current lack of a strict pleading standard for ADA web accessibility cases has created a situation rife with confusion and frivolous suits.[192] The authors would suggest that there be a requirement that the accessibility violations and nexus be pled with reference to specific details, thus eliminating the ability to "copy-and-paste" lawsuits as is currently occurring. Suits filed with several U.S. district courts in California, where the number of ADA cases has significantly increased,[193] illustrate the need for this reform. Because the state of California has heightened pleading standards for ADA cases, frivolous litigants are now filing their cases in federal court instead of state court.[194] For example, in *Schutza v. Cuddeback*, the Southern District of California criticized this activity as "forum shopping" because the plaintiff was clearly seeking to avoid the heightened pleading standards in California state court.[195] The need for reform was also well-illustrated by the prior example of *Banana Republic*, where the litigants did not even realize that the store chain does not sell bananas.[196] The Online Accessibility Act hinted at this need for heightened pleading standards in Section 603, proposing

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190. *See* 14 C.F.R. § 382.43.

191. *See* 36 C.F.R. § 1194 App. D.

192. *See* Joseph A. Seiner, *Pleading Disability*, 51 B.C.L. Rev. 95, 97-98 (2010) (discussing "confusion over the proper pleading standards to apply . . . ," in disability cases).

193. *See* Minh Vu et al., *ADA Title III Federal Lawsuit Filings Hit An All Time High*, SEYFARTH: ADA TITLE III (Feb. 17, 2022), https://www.adatitleiii.com/2022/02/ada-title-iii-federal-lawsuit-filings-hit-an-all-time-high/.

194. *See* Martin H. Orlick & Stuart K. Tubis, *California's Central District tries to curb high frequency ADA litigant filings by declining supplemental jurisdiction over state law claims*, ADA COMPLIANCE & DEF. BLOG (Mar. 17, 2021), https://ada.jmbm.com/californias-central-district-tries-to-curb-high-frequency-ada-litigant-filings-by-declining-supplemental-jurisdiction-over-state-law-claims/.

195. *Schutza v. Cuddeback*, 262 F. Supp. 3d 1025, 1031 (S.D. Cal. 2017).

196. *Dominguez*, No. 1:19-CV-10171-GHW, 2020 WL 1950496, at *30; *see supra* note 158 and accompanying text.

that "[i]n any action filed under this title, the complaint shall plead with particularity each element of the plaintiff's claim, including the specific barriers to access a consumer facing website or mobile application."[197]

Heightened pleading standards could require that a complaint filed by a plaintiff include specific references to success criteria in the Web Content Accessibility Guidelines. So, if a web accessibility barrier is claimed, the plaintiff would also need to note specifically where in the WCAG potential solutions are provided. Using this approach would get around the reality that a statute or regulation may not yet require the use of WCAG, so it would not be possible to require a complaint to document how existing barriers would violate WCAG. However, there would not be any reason why potential *solutions* described in WCAG could not be required in a complaint. Similarly, a complaint could be required to document the types of evaluation methods used to determine that there were accessibility barriers: users with disabilities, expert (manual) evaluations, or automated testing tools. While requiring more information related to tools and guidelines would likely not be problematic for plaintiffs with disabilities who want to file individual lawsuits for access, the heightened pleading standards could potentially stop some of the drive-by lawsuits, where the barrier of providing the additional information may stop those who are filing 100 lawsuits a day.

4. Legal certification of tools, individuals, and firms that conduct evaluations or remediations.

The authors suggest legal certification for both tools and firms that assist with both evaluation and remediation of web accessibility. Defendants who are sued often do not know where to turn to determine whether their website is indeed accessible, and therefore, they often settle instead. What if there were pre-vetted tools, or pre-vetted individuals, or pre-vetted firms, who had a certification for evaluating for accessibility—or for remediating? That would provide some guidance on who could be trusted. While such certifications do not exist in a legal sense, there are existing efforts to certify individuals and organizations at a professional level.[198] The proposed certification could be

197. Online Accessibility Act, H.R. 1100, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1100/text.

198. *See, e.g.*, *Web Accessibility Specialist*, INTERNATIONAL ASSOCIATION OF ACCESSIBILITY PROFESSIONALS, https://www.accessibilityassociation.org/s/

similar to what Underwriters Laboratory (UL)[199] does when they certify the safety of physical products.[200] The certifying agency could even be a federal body, such as the U.S. Access Board.[201] A clear process of certification and validation through audits that have an oversight board would be a much better approach than the current one, in which various companies and individuals claim that they can test and validate websites for compliance. A state example of a guided process is Massachusetts, with its IT Acquisition Access Compliance Program, which outlines the accessibility requirements that must be included in any IT system contract for the state of Massachusetts.[202] The earlier mentioned "Trusted Tester" program for the Department of Homeland Security[203] is an example of the type of certification program for individuals that could be expanded to certify individuals as being qualified to evaluate or remediate for web accessibility, since Trusted Tester focuses, not surprisingly, on testing methods. Figure 1 illustrates the authors' recommendations with a flowchart of how the process of using certified firms, people, or tools might work.

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wascertification.

199. Underwriters Laboratories Inc. provides safety standards, testing, and certification for a variety of services and physical products. *See About UL*, UL, https://www.ul.com/about (last visited June 10, 2022).

200. *See Certification*, UL, https://www.ul.com/services/certification (last visited Mar. 1, 2022).

201. The U.S. Access Board is a federal agency that creates design guidelines and technical standards related to accessibility for people with disabilities. The Access Board has staff, as well as an actual "board" which is comprised of a combination of representatives of federal agencies involved with disability, and members of the public with disabilities. For more information, see *About the U.S. Access Board*, U.S. ACCESS BD., https://www.access-board.gov/about/ (last visited Apr. 10, 2022).

202. *See IT Acquisition Access Compliance Program*, MASS.GOV, https://www.mass.gov/guides/it-acquisition-access-compliance-program (last visited Nov. 19, 2021).

203. LAZAR ET AL., *supra* note 1, at 192-93.

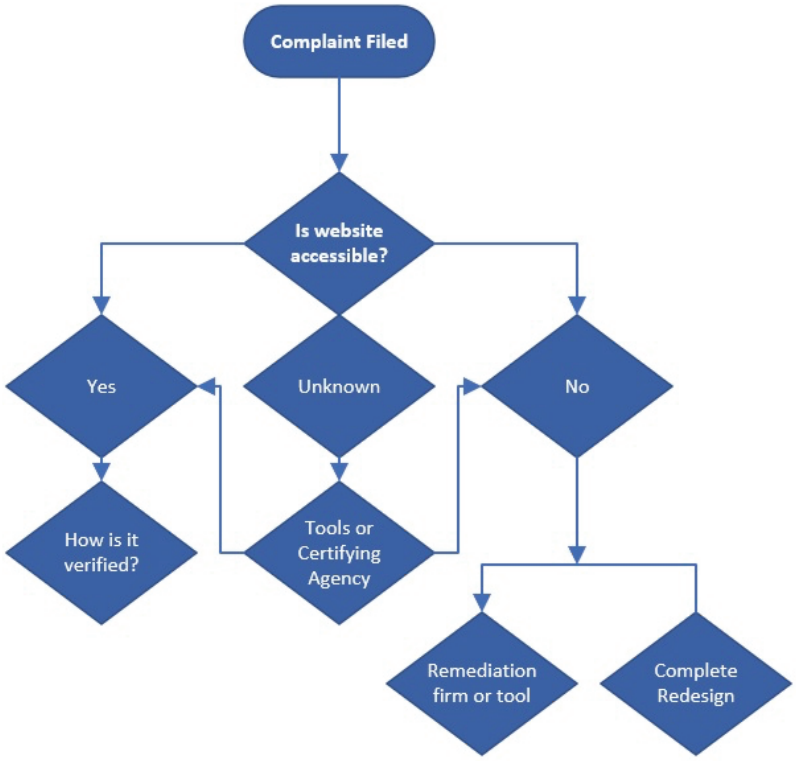

Figure 1. The proposed flow from a complaint being filed to remediation

5. Indemnification remediation / transfer of liability is yet another possibility.

As of now, no providers of tools or consulting services for accessibility are required to guarantee their work through indemnification. Using the indemnification approach, if a theoretical company, Widgets, Inc., hired a theoretical consulting firm, Accessibility and Family, to remediate their website for accessibility, the procurement contract would be required to contain a clause whereby Accessibility and Family would indemnify Widgets, Inc. against any lawsuits for an inaccessible website for a period of six months after the work is completed. At this point, companies which provide consulting services and tools for evaluating or remediating for accessibility generally do not

indemnify their clients against lawsuits, and as far as we know, there are no such requirements at the state or federal levels. While the use of indemnification clauses is gaining attention in the procurement of technologies by universities and K-12 education (many of which are afraid of being sued for inaccessible technology),[204] the indemnification model used for websites would need to be different. Purchasing a piece of hardware, which generally will not change over time, is different from developing or remediating a website for accessibility, since the website will certainly change within months. Therefore, the indemnification clause in the latter case will need to have a shorter timeline, perhaps three to six months. In line with the previous suggestion about certification of people, firms, or technologies that evaluate or remediate for accessibility, there could potentially be a link between the certification of expertise and the requirement to indemnify for a short period of time—a requirement almost akin to "malpractice insurance" used by healthcare workers.

There is currently no barrier to entry for accessibility remediation services, so their output may be of varied quality, with some instances of fraud. Given the existing problem with drive-by lawsuits, requiring or encouraging indemnification could be an option. Web accessibility overlay transactions provide an example of why indemnification could be useful. Currently, overlay companies claim to fix all aspects of a website related to accessibility by providing an overlay tool, which does not actually fix any of the underlying code and does not address a majority of the accessibility problems.[205] Over 700 individuals, including accessibility experts and advocates, have signed a statement against the use of overlays and their deceptive marketing,[206] and companies that have installed overlays are still being sued for having inaccessible websites.[207] Perhaps these companies should be required to provide indemnification in case their clients are

204. S.B. 617, 2022 Leg., 444th Sess. (Md. 2022).

205. *See* Timothy Springer, Lies, Damned Lies, Overlays and Widgets, LINKEDIN (June 25, 2020), https://www.linkedin.com/pulse/lies-damned-overlays-widgets-timothy-springer/; *see generally Legal Update: Accessibility Overlay Edition*, LAINEY FEINGOLD (Dec. 28, 2021), https://www.lflegal.com/2021/11/overlay-legal-update/.

206. *See Overlay Fact Sheet*, *supra* note 55.

207. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 12-16, Murphy v. Eyebobs, LLC, No. 1:21-cv-17, 2021 WL 5331389 (W.D. Pa. Jan. 7, 2021) (documenting how overlays did not actually make the website accessible). For an ongoing update of cases where the use of overlays did not protect companies from lawsuits for inaccessible websites, *see Legal Update*, *supra* note 205.

sued. And perhaps companies that are certified to audit or remediate accessibility should be required to bear a responsibility to provide insurance/indemnity for a period of time.

CONCLUSION

In the existing legal framework for web accessibility for public accommodations under Title III of the ADA, organizations that are sued struggle to understand the tools and guidelines that can help them remediate their websites for accessibility and often fall back on simply settling a suit to "make it go away" rather than actually addressing the issues of accessibility. As a result, frivolous lawsuits continue to be filed, all while people living with disabilities are denied their statutorily protected right to accessible public accommodations. For the rights of people with disabilities to be protected and to move the ADA's goals of inclusion forward, the legal framework needs to be clarified. This Article argues that the major weakness of the existing legal framework for web accessibility for public accommodations is that it does not even acknowledge the existence of automated tools and guidelines, making compliance much harder. Automated tools and guidelines are necessary for defining and validating accessibility, and without them, there is an environment of confusion that encourages an increased number of web accessibility lawsuits. Potential legal solutions which incorporate tools and guidelines that this Articles has discussed include: (1) new statutes, (2) new/updated regulations, (3) heightened pleading standards, (4) legal certification of individuals, organizations, and tools that evaluate or remediate web accessibility, and (5) the encouragement or requirement of indemnification for accessibility remediation vendors.

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LET'S DIVE IN: THE PROBLEM WITH LOUISIANA'S CURRENT POOL OF WATER LAW

DIPPING OUR TOES: INTRODUCTION

Louisiana has long been recognized as a water-rich state. As a function of this apparent overabundance of water, most of the state's historical approach to water management has treated the resource as more of a nuisance than a gift.[1] Such a wary approach certainly serves a purpose: it protects (or at least

1. LA. GROUND WATER RES. COMM'N, MANAGING LOUISIANA'S GROUNDWATER RESOURCES WITH SUPPLEMENTAL INFORMATION ON SURFACE WATER RESOURCES: AN INTERIM REPORT TO THE LOUISIANA LEGISLATURE 1 (2012), http://dnr.louisiana.gov/assets/docs/conservation/groundwater/12.Final.GW.Report.pdf.

attempts to protect) Louisiana's citizens, property, and industries from the often-devastating aftermath of water that has slipped its banks. Hurricanes, floods, and waterways literally shape Louisiana's communities, and their promise of inevitable disaster has demanded a response. Louisiana is home to untold miles of drainage canals, levees, spillways, ditches, and dikes that all attest to the need to manage the destructive potential of water. In moments of crisis, the state's response is a matter of life and death, and the continued well-being of Louisiana's residents and communities has required a coordinated, effective response. However, as Louisiana's scientists, legal scholars, and lawmakers have realized in the last few decades, it is a mistake to focus on water management only in circumstances when there is too much of it.[2]

Louisiana also needs to address the growing possibility that it will someday (sooner than may be commonly expected) have too little water to meet its needs. It may seem counterintuitive that Louisiana, the "Sportsman's Paradise" of interwoven wetlands, streams, lakes, and aquifers and the delta of one of the largest river systems in the world, would run short of water. However, recent data suggests that it could.[3] There are a myriad of reasons for this, but some major contributing factors can be traced directly to Louisiana's lack of effective water management and inventory practices.[4] In particular, Louisiana's groundwater resources have seen decades of overuse, directly resulting in saltwater intrusion that could have long-term effects greater than any storm or flood.[5]

Worse, dwindling groundwaters face growing demand, partially due to policy decisions allowing the use of surface waters

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2. *See, e.g.*, *id.* at 1-2; LA. STATE L. INST. WATER CODE COMM., 2021 ANNUAL REPORT TO THE LEGISLATURE IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION 1-2 (2021).

3. *See* LA. GROUND WATER RES. COMM'N, *supra* note 1, at 2 (discussing how inadequate monitoring and increased use caused aquifers in southern Caddo Parish to fall below sustainable levels).

4. *Id.* at 1 (explaining the disparity between Louisiana's treatment of surface waters, which require compensation for use, and groundwater, which is in limited supply yet exploited free of charge).

5. *See* DARYL G. PURPERA, LOUISIANA'S MANAGEMENT OF WATER RESOURCES 7-8 (2020), *reprinted in* LA. STATE L. INST. WATER CODE COMM., 2021 ANNUAL REPORT TO THE LEGISLATURE IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION (2021).

through Cooperative Endeavor Agreements.[6] This issue flows from Louisiana's bifurcated approach to water law: the state handles groundwater and surface waters as completely separate concerns.[7] This approach ignores everything that science tells us about water. Water moves and transforms in response to natural forces.[8] Water on the surface can absorb into the ground, seeping through pores and cracks in the earth until it becomes trapped in underground deposits.[9] Over time, pressure can build on those deposits and push water back toward the surface, where it emerges from natural springs.[10] These springs feed into rivers, lakes, streams, and other bodies of surface water.[11] Thus, any classification of water based on its location on or below the surface is based on a superficial and temporary characteristic. Unfortunately, this distinction is the cornerstone of Louisiana's water law.[12] Because such an approach ignores the fundamental nature of water, it is no longer tenable in the face of modern challenges.

Louisiana faces an impending water crisis, albeit of a nature altogether different from those it has faced in the past.[13] In moments of crisis, the state's response may very well be a matter of life and death, and the continued well-being of Louisiana's residents and communities demands a coordinated, effective response. This Comment will address the inherent flaw in Louisiana's dual approach to water underground and on the surface. Part I will explore the growing demands on Louisiana's water resources in the context of the impending global water

6. *Id.* at 13-14. For a discussion of Cooperative Endeavor Agreements, *see infra* Part III.A.

7. *Compare* LA. CIV. CODE ANN. arts. 657-58 (establishing a system of riparian rights for surface waters), *with* LA. STAT. ANN. § 31:4, 6 (setting forth the rule of capture applicable to groundwaters).

8. *See A Comprehensive Study of the Natural Water Cycle,* U.S. GEOLOGICAL SURV., https://www.usgs.gov/special-topics/water-science-school/science/comprehensive-study-natural-water-cycle?qtscience_center_objects=0#overview (last visited Apr. 2, 2022).

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Mark S. Davis & Michael Pappas, *Escaping the Sporhase Maze: Protecting State Waters within the Commerce Clause*, 73 LA. L. REV. 175, 185-86 (2012) (explaining that in Louisiana and several other states, "for the most part the laws governing groundwater continue to treat it as a resource legally distinct from surface water").

13. *See* LA. GROUND WATER RES. COMM'N, *supra* note 1, at 2-3.

crisis. Part II will provide a brief survey of Louisiana's existing water laws and the local problems that they create. Part III will propose a solution seemingly as difficult to implement as it is easy to suggest: Louisiana should adopt a unified approach to water law, ideally expressed in a newly created Water Code. Through these Parts, this Comment will attempt to demonstrate that, in the face of growing demands on Louisiana's water, the current approach is simply inadequate and must be replaced with a robust, unified approach to water management.

I. THE RISING TIDE OF DEMAND: A GLOBAL WATER CRISIS

The issue of growing demand for freshwater resources is not unique to Louisiana. Rather, it exists (as it must) within the wider context of a growing global demand for water, even as freshwater resources become scarcer. Experts predict a global freshwater shortage within the next decade, and some predict that the crisis will occur even sooner.[14] 3.2 billion people already live in places with "high to very high water shortages or scarcity" due to either a physical lack of water or infrastructure that is inadequate to take advantage of available water sources.[15] By 2030, as many as 700 million people world-wide could be displaced by factors related to water scarcity.[16] Alarmingly, some scholars even posit that water will be the motivating force behind future armed conflicts, much like how oil played a pivotal role in conflicts in the last century.[17] These troubling predictions are based on a number of factors contributing to increased demand for fresh water, such as growing populations, shifting consumption patterns, novel market forces, and the undeniable effects of global climate change.[18]

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14. U.N. WATER, *Water Scarcity*, https://www.unwater.org/water-facts/scarcity/ (last visited Mar. 11, 2022).

15. *Id.*

16. UNESCO WORLD WATER ASSESSMENT PROGRAMME, THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 3: WATER IN A CHANGING WORLD 32 (Bruce Ross-Larson & Meta de Coquereaumont eds., 2009).

17. *See* STEVEN SOLOMON, WATER: THE EPIC STRUGGLE FOR WEALTH, POWER, AND CIVILIZATION (2010) (positing that due to increased demand for water, it will replace oil as the most politically important scarce natural resource and assume a similar role in shaping future conflicts to the role oil had in twentieth century conflicts), *reprinted in Will The Next War Be Fought Over Water?*, NAT'L PUB. RADIO (Jan. 3, 2010, 2:36 P.M.), https://www.npr.org/templates/story/story.php?storyId=122195532.

18. UNESCO WORLD WATER ASSESSMENT PROGRAMME, *supra* note 16, at 14.

Many of these same global forces affect Louisiana, so an examination of some major factors leading to growing global freshwater demand may prove instructive. Accordingly, this Part will first explore some of these factors to illustrate the scope of the impending global freshwater crisis. It will then highlight a few key examples of the desperate responses taken by governments around the world. Finally, it will address recent developments in the commodities market and their potential impact on water availability.

A. UPSTREAM DRIVERS: FACTORS CONTRIBUTING TO INCREASED WATER DEMAND

There are innumerable factors leading to the impending global water crisis, but two readily apparent contributors are population growth and climate change. In some areas of the world, populations are declining, and others are predicted to follow that trend.[19] However, the shrinking populations in some advanced nations is projected to be more than offset by booming populations in developing countries.[20] The net effect will not just be more people; it will be a shift in global population distribution toward areas of the world in which the population is comparatively economically poor.[21] In particular, the populations of sub-Saharan Africa and Southern Asia are expected to grow spectacularly in this century, and by 2100, more than half the Earth's population will live in these two regions.[22] As mentioned above, several of the countries in these regions are historically poor, and as a matter of necessity, poor populations tend to consume fewer resources than wealthy populations.[23] For example, many African communities are plagued by inadequate sanitation infrastructure and unsafe drinking water.[24] However, recent trends suggest that as these populations grow, they are also developing infrastructure that more adequately meets their

19. *Id.* at 30-31.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* at 39 (explaining that "[a]s standards of living rise in developing countries and countries undergoing economic transition, the demand for larger homes and for 'luxury' items such as kitchen appliances, cars, and other vehicles and the energy to run, heat and or cool them is increasing the demand for the resources required to produce, generate and operate them").

24. *Id.* at xii ("About 340 million Africans lack access to safe drinking water, and almost 500 million lack access to adequate sanitation.").

basic needs.[25] Naturally, as basic needs become more readily met, populations tend to shift their attention toward improved quality of life.[26] Sustaining higher standards of living, though, almost always requires a greater investment of resources, including water.

For example, societal advances in developing areas tend to correlate with a shift in dietary habits of the population.[27] As families are lifted out of poverty, they tend to eat more expensive, more nutritious food.[28] This leads to increased demand on the agricultural sector to produce more foods such as beef, chicken, eggs, bread, and milk.[29] However, this type of diet requires more water to produce than the grain-rich diets that it replaces.[30] When people can only afford to eat rice and other grains, the agricultural sector only has to grow these commodities. When the same people can afford meat with their grains, the net investment of resources is much higher. Livestock is often fed the same grains that farmers were already growing,[31] but then farmers have to produce enough grain to feed the livestock as well as the population.

In China, for instance, the average consumption of meat per capita has increased by roughly 150% in the last forty years.[32] The cumulative effect is staggering. The UN calculated the impact of this shift as follows: "Assuming that 1 kg of grain requires 1,000 liters of water to produce, the annual water footprint of this change in diet for some 1.3 billion Chinese will translate into a need for 390 cubic kilometers (km^3) of water."[33] It

25. *Id.* at 14-15.

26. *See id.* at 39.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* For instance, it takes about 460 gallons of water to produce a single quarter-pound hamburger, but it takes only about 100 gallons of water to produce a pound of potatoes. *See How Much Water Does it Take to Grow a Hamburger?*, U.S. GEOLOGICAL SURV., https://water.usgs.gov/edu/activity-watercontent.html (last visited Mar. 11, 2022).

31. UNESCO WORLD WATER ASSESSMENT PROGRAMME, *supra* note 16, at 39.

32. *Id.*

33. *Id.* By way of comparison, Toledo Bend Reservoir is the largest body of fresh water in Louisiana, and it has a capacity of 4,477,000 acre-feet of water. That translates to about 5.5 cubic kilometers, so the additional amount of water needed would drain Toledo Bend Reservoir just short of 71 times. *See Toledo Bend Dam*, TOLEDO BEND LAKE COUNTRY, https://toledobendlakecountry.com/listing/toledo-

is a sad truth that many people in the poorest parts of the world may eat only a single meal each day (or even less).[34] It is of course a worthy goal to provide adequate nutrition for the world's population, but it is no less true that producing the increased amount of food necessary for even one more meal each day for billions of people will require an extraordinary amount of water.

Through sustained effort and societal advances, some of the poorest countries now have a growing middle class.[35] Such an achievement is certainly to be celebrated, but again, it does not come without increased burdens on natural resources. For example, a growing middle class often correlates to a demand for larger houses, but larger houses require more resources to construct than smaller houses. Members of the middle class often require personal cars, but more cars means more investment of resources to construct and maintain them. Even adding things like kitchen appliances can, in the aggregate, lead to a massive increase in energy consumption for a given community.[36] These shifting consumption trends are one of "the most important drivers affecting water resources" today, and their effects will only be compounded by the predicted population growth in the areas most likely to experience them in the coming decades.[37] Unfortunately, this expected progress will almost certainly have another steep cost: the exacerbation of climate change.

Climate change is a threat on an existential level,[38] and it should come as no surprise that it colors nearly every major challenge facing the world today. That is no less true regarding water supply. Both drought and flooding occur with greater frequency and severity today than they have historically, even in places not typically associated with such events, and there is a scientific consensus that the effects of climate change will only get worse with time.[39] In fact, several self-reinforcing cycles are

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bend-dam (last visited Mar. 6, 2022).

34. *See* UNESCO WORLD WATER ASSESSMENT PROGRAMME, *supra* note 16, at 39.

35. *Id.*

36. *Id.*

37. *See id.*

38. David Vergun, *Defense Secretary Calls Climate Change an Existential Threat*, U.S. DEP'T OF DEF. (Apr. 22, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2582051/defense-secretary-calls-climate-change-an-existential-threat/.

39. *See, e.g.*, Katharine Hayhoe, *2018: Our Changing Climate*, *in* 2 IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE

already at play that virtually assure climate change will only get worse. For example, increased ambient temperatures in the Earth's polar regions have led to decades of melting ice and snow.[40] As ice and snow melt, the ground beneath is exposed to direct sunlight. Problematically, the ground is usually darker in color than ice or snow, so the area absorbs more heat than it previously did when the area was covered in the comparatively reflective ice and snow, which deflected heat and sunlight.[41] The increased heat retention will contribute to warmer ambient temperatures, which in turn will melt more snow and ice.[42] More melting will lead to more exposed ground, and the cycle will perpetuate itself.

Even worse, much of the ground in polar regions is permafrost, a layer of "previously permanently frozen ground."[43] As organic material in the permafrost decays, it produces carbon dioxide and methane, both of which are greenhouse gases which contribute to global warming.[44] Until recently, however, the layer of permafrost near the surface had kept the gases trapped underground.[45] As a result of increased temperature and greater exposure to direct sunlight, the permafrost is beginning to thaw, and as it does, it will release the vast amount of carbon dioxide and methane that it has accumulated over the millennia.[46] Those gases will contribute to increased ambient temperatures, which will lead to more permafrost thawing.[47] This cycle, too, will perpetuate itself.

Although it may be too late to curb the worst effects of climate change,[48] many governments are coming to realize that they can no longer afford to ignore those effects.[49] In fact, there is

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ASSESSMENT 73, 91 (Linda O Mearns, ed., 2018).

40. *Id.* at 91-92.

41. *Id.* at 91.

42. *Id.*

43. *Id.*

44. *Id.* at 92.

45. *See id.*

46. *Id.*

47. *Id.*

48. *See id.* at 100 (explaining that "[s]elf-reinforcing cycles or feedbacks within the climate system have the potential to amplify and accelerate human-induced climate change [and] . . . may even shift Earth's climate system, in part or in whole, into new states that are very different from those experienced in the recent past.").

49. *See, e.g.*, OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION AND SUSTAINMENT, REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT

a growing trend to view the effects of climate change as a matter of national security.[50] For instance, in January 2019, the United States Department of Defense ("DoD") issued a "Report on Effects of a Changing Climate."[51] As part of its report, the DoD conducted a survey of seventy-nine U.S. military installations to assess the most pressing threats related to climate change.[52] It identified five major threats that could pose "high risks to mission effectiveness on installations and to operations": flooding, drought, desertification, wildfires, and thawing permafrost.[53] Significantly, four of the five greatest climate-related threats to the U.S. military are tied directly to water. The report also notes that these climate-related threats could further undermine the efficacy of military installations by damaging "critical energy and water infrastructure," and in response, "the Army . . . released guidance to establish requirements for Army energy and water security to enhance resilience on Army installations."[54]

B. A THIRSTY WORLD: GOVERNMENTAL RESPONSES TO THE WATER SHORTAGES

The growing demand for water is perhaps best illustrated by the efforts that governments around the world are taking to meet that demand. Take China, for example. China, like the United States, has water-rich areas and water-scarce areas.[55] In 2002, China began construction of the South-to-North Water Diversion Project ("SNWDP"), the world's largest ever water diversion project.[56] It will take decades to build, has an estimated cost of $62 billion, and will link China's four largest rivers through a series of canals, dams, pipelines, and tunnels, which combined

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OF DEFENSE 2 (2019); MINISTRY OF DEF., CLIMATE CHANGE AND SUSTAINABILITY-STRATEGIC APPROACH 4 (2021).

50. MINISTRY OF DEF., CLIMATE CHANGE AND SUSTAINABILITY- STRATEGIC APPROACH 4-5 (2021).

51. OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION AND SUSTAINMENT, REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT OF DEFENSE (2019).

52. *Id.* at 4.

53. *Id.* at 2, 4-5.

54. *Id.* at 10.

55. Lily Kuo and Quartz, *China Has Launched the Largest Water Pipeline Project in History*, THE ATLANTIC (Mar. 7, 2014), https://www.theatlantic.com/international/archive/2014/03/china-has-launched-the-largest-water-pipeline-project-in-history/284300/.

56. *Id.*

will run approximately 2,700 miles.[57] For context, the longest distance between the Atlantic and Pacific Oceans in the continental United States is about 2,800 miles. The goal of SNWDP is to transport vast quantities of water from China's water-rich southern provinces to major population centers, including Beijing and other cities in China's northern provinces that have a dwindling water supply.[58] Even if the project runs at maximum capacity, however, it will not be able to completely make up the deficit in water supply that the cities in the northern region currently experience.[59] China has also proposed the construction of a separate 1000 kilometer (621.3 mile) pipeline to transport water from Russia's Lake Baikal to China's same water-starved northern provinces.[60] The proposed path would cross the entirety of Mongolia, including mountain ranges, and end up at an elevation one kilometer higher than that where the water started.[61] Whether or not this plan proves feasible, the fact that China is willing to push water uphill for 1000 kilometers to address its water deficit certainly "underscores the severity of the water crisis" in the nation.[62]

Although China's penchant for massive engineering projects may be atypical, their water shortage is not: Saudi Arabia may be in even more dire straits. Throughout the 1980s, the desert kingdom pursued a policy of food self-sufficiency, and the Saudi government offered substantial subsidies to the country's growing agricultural sector.[63] Saudi Arabia has almost no fresh surface water, so farmers relied heavily on water drawn from deep wells to irrigate their crops.[64] Those wells account for up to 98% of

57. *South-to-North Water Diversion Project*, WATER TECH., https://www.water-technology.net/projects/south_north/, (last visited Mar. 11, 2022).

58. Kuo and Quartz, *supra* note 55.

59. *Id.*

60. Tom Phillips, *'Parched' Chinese city plans to pump water from Russian lake via 1000km pipeline*, THE GUARDIAN (Mar. 7, 2017), https://www.theguardian.com/world/2017/mar/07/parched-chinese-city-plans-to-pump-water-from-russian-lake-via-1000km-pipeline.

61. Eugene Simonov, *Lake Baikal Pipeline Threatens Critical Ecosystem*, CHINA DIALOGUE (Apr. 7, 2017), https://chinadialogue.net/en/nature/9723-lake-baikal-pipeline-threatens-critical-ecosystem/.

62. *See* Phillips, *supra* note 60.

63. *See* Souhail Karam, *Saudi Arabia Scraps Wheat Growing to Save Water*, REUTERS (Jan. 8, 2008), https://www.reuters.com/article/idUSL08699206.

64. Hazel Sheffield, *Saudi Arabia is Running Out of Water*, THE INDEPENDENT (Feb. 19, 2016), https://www.independent.co.uk/news/business/news/saudi-arabia-running-out-water-a6883706.html.

naturally occurring fresh water in the country, and farmers were able to use that water to grow government subsidized wheat for decades.[65] Now, scientists estimate that the wells will run dry in a little over a decade.[66]

As a result, Saudi Arabia has had to look elsewhere for water, and they first turned to the surrounding seas. The country now operates more than thirty desalination centers along its coasts, and those centers account for around 50% of the country's total freshwater supply.[67] However, desalination centers are not without their costs. Critics often note that desalination centers pollute the area around them and lead to higher levels of salinity in the seas, to which the centers normally return the waste salt.[68] The centers also require an incredible amount of energy to stay productive.[69]

Ultimately, water constraints proved too much for Saudi Arabia's food self-sufficiency goal, and the Saudi government abandoned the policy.[70] More recently, the Saudi government began to place restrictions on crops requiring large amounts of water, and in 2016, it banned growing alfalfa in the country.[71] As a result, some Saudi businesses have begun to move their agricultural operations overseas to places where water is more readily available.[72] For example, Almarai is a Saudi-based food production company and one of the largest dairy companies in the world.[73] Since 2012, Almarai has purchased 30,000 acres in Argentina and 15,000 acres in California, on which it primarily

65. Karam, *supra* note 63.

66. Ruth Michaelson, *Oil Built Saudi Arabia – Will a Lack of Water Destroy It?*, THE GUARDIAN (Aug. 6, 2019), https://www.theguardian.com/cities/2019/aug/06/oil-built-saudi-arabia-will-a-lack-of-water-destroy-it.

67. *Id.*

68. Erica Gies, *Slaking the World's Thirst with Seawater Dumps Toxic Brine in Oceans*, SCIENTIFIC AMERICAN (Feb. 7, 2019), https://www.scientificamerican.com/article/slaking-the-worlds-thirst-with-seawater-dumps-toxic-brine-in-oceans/.

69. Sheffield, *supra* note 64.

70. Karam, *supra* note 63.

71. Lauren Markham, *Who Keeps Buying California's Scarce Water? Saudi Arabia*, THE GUARDIAN (Mar. 25, 2019), https://www.theguardian.com/us-news/2019/mar/25/california-water-drought-scarce-saudi-arabia.

72. This practice is sometimes referred to as "virtual water trading" because it moves water, in the form of crops with high water content, from one place to another. *See Projecting the Future Trade of Virtual Water*, PAC. NW. NAT'L LAB'Y (Aug. 3, 2020), https://www.pnnl.gov/news-media/projecting-future-trade-virtual-water.

73. Lauren Markham, *supra* note 71.

grows alfalfa to feed its massive herd of cows.[74] However, its dairy operations remain in Saudi Arabia, so Almarai sends monthly shipments of alfalfa overseas to Saudi Arabia to feed its cows.[75] This arrangement is somewhat controversial, particularly in California, where many locals have questioned the wisdom of exporting large quantities of water-intensive crops out of a drought-stricken region.[76] After all, the western United States has generally had significant difficulty meeting its own water needs without bearing the burdens of others.

Similarly, consider Texas. It is currently home to one of the United States' fastest growing population centers,[77] and large parts of the state are famously short on water. Texas has made a number of attempts over the years to secure water from neighboring states to supply the needs of its citizens. Since at least 1968, Texas has considered diverting water from the Mississippi River to address water shortages.[78] In 1978, Texas, Oklahoma, Arkansas, and Louisiana entered into the Red River Compact in order to secure each state its fair share of water from the Red River and prevent future disputes amongst the states.[79] The effort has been mostly successful, but there has been some controversy.[80] Later, for example, Texas sought to secure more water from Oklahoma through the Red River Compact, but the effort ultimately failed in the United States Supreme Court.[81]

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74. *Id.*

75. *Id.*

76. *See id.*; *see also Saudi Land Purchases in California and Arizona Fuel Debate Over Water Rights*, L.A. TIMES (Mar. 29, 2016), https://www.latimes.com/business/la-fi-saudi-arabia-alfalfa-20160329-story.html.

77. Timothy Fanning, *Texas is the fastest-growing state in the country again, according to U.S. Census*, SAN ANTONIO EXPRESS-NEWS (Dec. 27, 2021), https://www.expressnews.com/news/local/article/texas-census-population-growth-16731933.php.

78. Davis & Pappas, *supra* note 12, at 177-78.

79. RED RIVER COMPACT COMMISSION, https://www.owrb.ok.gov/rrccommission/rrccommission.html (last visited Mar. 11, 2022).

80. *See* Tarrant Reg'l Water Dist. v. Herrman, 569 U.S. 614 (2013) (resolving a dispute between Texas and Oklahoma regarding the allocation of waters governed by the Compact).

81. *See generally id.* In *Tarrant,* a Texas water district brought an action against Oklahoma alleging that Oklahoma had impounded unallocated water. *Id.* at 618. The district claimed that Oklahoma's refusal to grant Texas access to impounded waters in Oklahoma was a violation of the Dormant Commerce Clause. *Id.* at 626. The Supreme Court rejected the claim, finding that the terms of the Red River Compact governed the dispute. *Id.* at 638-39. The Court noted that under the terms of the Red River Compact, each signatory state is entitled to 25% of the waters from the main

Texas has also tried to appropriate water from New Mexico, but that effort, too, fizzled in the federal court system.[82]

Additionally, in an ongoing effort to secure more water for its citizens, Texas has repeatedly turned to its neighbors, including Louisiana. In 2011, Texas approached the Sabine River Authority, a Louisiana regulatory body, with an offer to buy 600,000 acre-feet of fresh water each year until 2050.[83] Amid public outcry in Louisiana, the negotiations ultimately failed.[84] Texas has since approached Louisiana with another offer to buy water, this time by piping water from the Mississippi River.[85] While these moves may lack some of the awe-value of China's continent spanning water diversion project or the cutting-edge innovation of Saudi Arabia's desalination efforts, they nevertheless serve to demonstrate that Texas is willing to get creative to find new sources of water, and Texas does not seem to mind burdening its neighbors to do it. Louisiana just happens to be one such neighbor. Louisiana also has a perceived glut of water and a problematic legal approach to water that may allow Texas to succeed here despite its failures elsewhere.

C. COST OF WATER, CURRENT AND FUTURES: MARKET DEVELOPMENTS AND IMPACTS

In December of 2020, water was added to the Nasdaq futures exchange.[86] Thus far, all water futures contracts are cash settled, meaning that the seller does not have to actually deliver the

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channel of the Red River as long as it is flowing above a minimum threshold rate. *Id.* at 626. Also, states are allowed to impound water from tributaries that normally flow into the Red River, but if the main channel falls below the minimum flow rate, then any signatory state may demand an accounting from each of the other signatories to ensure that no state is taking more than their allotted share. *Id.* at 622-23. The court held that Oklahoma had not violated the terms of the Red River Compact because unless and until a signatory state demanded an accounting, there were no unallocated waters under the Red River Compact. *Id.* at 638.

82. Davis & Pappas, *supra* note 12, at 194-95.

83. *See id.* at 178. Under the Sabine River Compact between Louisiana and Texas, Louisiana is entitled to 1,000,000 acre-feet of water from the Toledo Bend Reservoir each year. Texas tried to buy more than half of that allocation.

84. *Id.*

85. Tristan Baurick, *Louisiana May Sell Water to Drought-Stricken Texas*, THE TIMES-PICAYUNE (Dec. 8, 2017), https://www.nola.com/news/environment/article_f1538766-fd95-5314-b48d-2785d541dad1.html.

86. Kim Chipman, *California Water Futures to Start Trading Amid Fear of Scarcity*, BLOOMBERG GREEN (Dec. 6, 2020), https://www.bloomberg.com/news/articles/2020-12-06/water-futures-to-start-trading-amid-growing-fears-of-scarcity.

water sold.[87] In effect, this allows buyers and sellers to bet against each other on the future price of water, which can be useful to industries that depend on large quantities of water to operate.[88] Farmers in particular may find water futures useful as a way to lock in a water price ahead of time. Considering the lengths to which some governments are willing to go to secure water, though, it seems at least possible that water contracts could eventually make the jump to actual delivery of water. If that happens, it may lead to increased demands on water-rich areas, which tend to undervalue their water. Notably, Louisiana's current "fair market value" for water is about seventeen times lower than the index price for water futures.[89]

It is uncertain whether trading water futures will have much direct effect on water availability, but proponents suggest that the practice will have a net stabilizing effect on water prices because it allows industrial and agricultural water users to effectively lock in a price.[90] However, the commodification of basic human needs has not always been "stabilizing" and benign. For example, in 2007 and 2008, an unexpected sharp increase in food prices led to a global food crisis.[91] As with any shift in a global system, there were several contributing factors. The financial community pointed to trends directly affecting commodity costs, such as increased fuel prices and a global wheat shortage.[92] They also pointed out that in the period leading up to the crisis, "consumers in China and India developed a taste for meat which drove up grain prices."[93] According to a U.N. study, however, those drivers could not account for the full price

87. *Id.*

88. *Id.*

89. This calculation is based on the "fair market value" for water as set in La. Stat. Ann. § 30:961(J) and the Nasdaq Veles California Water Index price for water futures as of March 31, 2022. Louisiana's fair market value is 15 cents per 1000 gallons of water. La. Stat. Ann. § 30:961(J). The index price is currently $835.00 per acre-foot. *Nasdaq Veles California Water Index Future*, NASDAQ, https://www.nasdaq.com/market-activity/futures/h2o (last visited Mar. 31, 2022). One acre-foot is the amount of water it would take to cover one acre of land in one foot of water, which is 325,851 gallons. Thus, an acre-foot of water at Louisiana's market value would cost $48.88. (325,851/1000 x .15 = $48.88) ($835.00/$48.88 = 17.08).

90. Chipman, *supra* note 86.

91. Olivier de Schutter, *Food Commodities Speculation and Food Price Crises*, 2 U.N. HUM. RTS. (2010), https://www2.ohchr.org/english/issues/food/docs/Briefing_Note_02_September_2010_EN.pdf.

92. *Id.*

93. *Id.*

increase of food.[94] The same study identified the most likely missing piece of the food crisis: speculation in the commodities futures market.[95]

Beginning in the early 2000s, changes in commodity futures trading regulations allowed some of the world's largest financial institutions greater freedom to participate in commodity trading.[96] However, banking and investment entities have little need for commodities such as wheat and rice. Rather, these rich investors entered the market as a way to diversify their investments and protect profits during a historically turbulent period in more traditional stock markets.[97] The shift proved fruitful for these large investors, at least for a time, but the food crisis that followed suggests their trading practices were at odds with the traditional stabilizing role of commodities markets.[98] As noted above, trading futures contracts allows the parties to essentially bet against each other on a particular commodity's future price, and the ability to purchase raw materials at a pre-determined price is a useful tool for buyers like farmers or manufacturers who can actually use the commodity.[99] For investors interested only in profit, though, the physical existence of the commodity becomes a problem because some agricultural contracts are settled by delivery, which means that when the contract comes due, the investor will need to accept delivery of the commodity—an act that can entail significant costs for shipping and storing the commodity.[100] Rather than incurring those additional expenses, many of the largest investors instead

94. *Id.*

95. *Id.*

96. *See id.* at 5.

97. *See id.* at 3.

98. *See* U.N. Conference on Trade and Development, *The 2008 Food Price Crisis: Rethinking Food Security Policies, G-24 Discussion Paper No. 56*, at 5-6, U.N. Doc. UNCTAD/GDS/MDP/G24/2009/3 (June 2009) (prepared by Anuradha Mittal) (noting that "the futures market is supposed to be a 'stabilizing' tool for farmers to sell their harvests ahead of time. . . . As speculators are supposed to buy when prices are low and sell when prices are high, they serve to make prices *less* volatile rather than more so").

99. de Schutter, *supra* note 91, at 3-4.

100. *See id.* at 4; *see also* Eustance Huang & Pippa Stevens, *An Oil Futures Contract Expiring Tuesday Went Negative in Bizarre Move Showing a Demand Collapse*, CNBC (Apr. 20, 2020), https://www.cnbc.com/2020/04/20/oil-markets-us-crude-futures-in-focus-as-coronavirus-dents-demand.html (describing a historic price collapse of oil futures prices which resulted in investors either paying to store oil they did not need or paying other traders to take the oil from them).

choose to sell off their contracts before delivery is due and take any increase in the commodity price as their profit.[101] This type of trading, however, is much more likely to incentivize a large number of transactions as the commodity prices fluctuate over the life of a contract.[102]

During the 2008 crisis, the practical effects of the speculative trading described above were twofold. First, the commodities market became incredibly volatile. This volatility led to the index price of wheat and rice fluctuating wildly within a relatively short period of time, with the cost sharply spiking at times and at others plummeting.[103] Such wild fluctuation is typical of "bubble" effects in the market, but the 2008 event was unique as "possibly the first price crisis that occurred in an economic environment characterized by massive amounts of novel forms of speculation" in a commodity futures market.[104] In light of the past effects of "novel forms of speculation" on basic human necessities, it seems that opponents of trading water futures should be forgiven for casting a dubious eye on claims that water trading will ultimately have a "stabilizing" effect on water prices.

Second, the average household was forced to spend a greater percentage of its income on food.[105] Between 2005 and 2008, average consumer food prices rose by 83% globally.[106] For families already struggling to meet their basic needs, the increased food prices carried a heavy cost indeed. Worldwide, as many as 150 million people sank into extreme poverty during the 2008 food price crisis, and "at least 40 million people . . . were driven into hunger and deprivation as a result of the 2008 food

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101. *See* de Schutter, *supra* note 91, at 4; *see also see also* Jennifer Clapp & Eric Helleiner, *Troubled Futures? The Global Food Crisis and the Politics of Agricultural Derivatives Regulation,* 19 REV. OF INT'L POL. ECON. 181, 186 (2012) (describing the practice of avoiding delivery costs in which "no actual commodity is delivered at the end of a futures contract either because the contracts are written this way (they are 'cash-settled' contracts as opposed to 'delivery-settled' contracts) or because contracts are cancelled out by purchases of opposite contracts by the same trader close to or on its expiry date").

102. de Schutter, *supra* note 91, at 3 (noting that in the years leading up to the global food crisis, "index fund speculation increased by 1900%").

103. *Id.* ("[W]heat prices, for instance, rose by 46% between January 10 and February 26, 2008, fell back almost completely by May 19, increased again by 21% until early June, and began falling again from August.").

104. *Id.*

105. *Id.*

106. *Id.*

price crisis."[107] People living in low-income areas were especially hard hit, where the price increases only worsened the struggle to meet basic survival needs.[108]

With the benefit of hindsight, it seems obvious that allowing unchecked speculation in food futures markets would have a negative effect on struggling populations. Unfortunately, we simply do not know what the ultimate effects of trading water futures will be, but the parallels between food and water may prove telling. Food and water are both basic necessities for human survival, meaning that they will always be in demand. Food shortages contributed to the speculative bubble in 2008, and the world currently faces increased demand for clean water even as it becomes scarcer. In 2008, relaxed restrictions granted large investors new access to established food futures markets, which in turn led to a huge influx of speculative trading and price bubbles. In 2020, the water futures market was officially created, and the index price of water nearly doubled in just a few short months.[109] It may be too soon to say with certainty that speculation will play a substantial role in the global water crisis, but based on the events of the 2008 global food crisis, the theory certainly seems to hold water.

As a final note on water in the market, recent trends in household water bills indicate that many people in the United States are already struggling to afford water.[110] Between 2000 and 2016, the average household bill for water and sewer services more than doubled.[111] That trend remains steady, and since 2012, the average water bill has increased by 31%.[112] As many as one in ten families currently struggle to pay their regular water bills, and that rate is expected to triple in the next five years due

107. *Id.*

108. *Id.*

109. *See NQH2O Historical Data,* NASDAQ, *https://www.nasdaq.com/market-activity/index/nqh2o/historical* (last visited Mar. 12, 2022). Water futures began trading on December 7, 2020, and the price closed that day at $486.53. *Id.* On May 12, 2021, water futures closed at $877.36—a price increase of just over 80 percent. *Id.*

110. Aimee Picchi, *Gulp! Water Increasingly Unaffordable for Many Americans*, CBS NEWS (Mar. 24, 2017), https://www.cbsnews.com/news/are-you-prepared-for-unaffordable-water-bills/.

111. *Id.*

112. Rachel Layne, *Water Costs Are Rising Across the U.S. – Here's Why*, CBS NEWS (Aug. 27, 2019), https://www.cbsnews.com/news/water-bills-rising-cost-of-water-creating-big-utility-bills-for-americans/.

to the combined effects of aging infrastructure and climate change.[113] The states with the largest populations in poverty are expected to be hit the hardest by these trends.[114] Sadly, 19% of Louisiana's residents live below the poverty line, the second highest percentage in the nation.[115]

II. HOW DEEP IS THE POOL?: A BRIEF LOOK AT LOUISIANA'S WATER LAW

This Part will provide a brief overview of Louisiana's current law for both surface water and groundwater. Notably, the two legal regimes are completely divorced from one another. The waters they govern, however, are inextricably linked within the hydrological cycle. Groundwater feeds into lakes and streams through natural springs, and surface waters absorb into the ground to recharge aquifers. By exploring some of the issues associated with Louisiana's separate water schemes, this Part will attempt to identify the major problem areas that Louisiana will need to address in the near future.

A. SURFACE WATERS: LOUISIANA'S RIPARIAN APPROACH AND COOPERATIVE ENDEAVOR AGREEMENTS

Approximately 17% of Louisiana's surface is covered by water,[116] the vast majority of which flows into one of the state's ten principal surface water basins.[117] Louisiana residents and industries use these waters in almost every conceivable way. Louisiana ranks first among all states for industrial water use.[118] Power generation, industry, and irrigation account for the largest share of the state's surface water use, and fracking in the northwestern region of the state is also a growing contributor.[119]

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113. Picchi, *supra* note 110.

114. *Id.*

115. Craig Benson, *Poverty: 2018 and 2019*, U.S. CENSUS BUREAU (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr20-04.pdf.

116. JoAnne T. Hymel, *Water They Trying to Say: Louisiana's Paradoxical Approach to Surface Water Management and Regulation*, 3 LSU J. ENERGY L. & RES. 483, 484 (2015).

117. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 63. A basin refers to a geographical area in which surface waters flow toward a common point, such as how most of the precipitation that falls on north-central Louisiana flows into the Ouachita River. *See id.*

118. Hymel, *supra* note 116, at 486.

119. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 20, 50, 86. Since 2008, oil

In addition, surface water provides drinking water to roughly half of Louisiana residents, with the other half being drawn from aquifers located deep beneath the ground.[120] These waters are governed by a constellation of state and local entities, each with specific and sometimes overlapping responsibilities. Unfortunately, however, there is no central authority tasked with oversight and regulation of the state's surface water use in its totality.[121]

Generally, there are two schools of thought regarding surface water governance. In the drier western states, the "prior appropriation" approach is more common.[122] Prior appropriation "views water as a scarce resource and grants prioritized rights of use to whoever puts it to a beneficial use first, without regard to proximity to the source of the water."[123] Landowners with an older title have superior rights to water that flows through their land, and the rights of newer landowners with more recent titles are superseded by a landowner with an older claims.[124] This means that the oldest estate on a given water way has first rights to the water, regardless of where on the waterway it lies. In the event of a water shortage, this means that some estates upstream may have to watch much-needed water flow untouched past their property so that prior claims downstream can be met.

The other major approach, riparianism, is more common in the wetter eastern states, including Louisiana.[125] Riparianism generally allows free access to flowing waters for anyone who owns land adjacent to the water, provided that the water is returned to the stream after its use.[126] This necessarily limits the use of water to adjacent landowners or, if interpreted more broadly, to uses within the drainage area of the particular stream

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and gas companies have used hydraulic fracturing, or "fracking," techniques to withdraw natural gas from the Haynesville Shale formation. Each well requires approximately five million gallons of water to operate. *Id.* at 86

120. *Id.* at 18.

121. The Department of Natural Resources is the closest approximation of such a central authority, but even it is limited in its ability to regulate use of state surface waters.

122. Mark Davis & James Wilkins, *A Defining Resource: Louisiana's Place in the Emerging Water Economy*, 57 LOY. L. REV. 273, 285 (2011).

123. *Id.* at 282.

124. *Id.*

125. *Id.* at 281-82.

126. *See id.* at 285.

from which it was drawn.[127]

In Louisiana, the principles of riparianism are most clearly expressed in Civil Code Articles 657 and 658, although the general obligation imposed in Article 667 may also apply. Those Articles provide that "[t]he owner of an estate bordering on running water may use it as it runs for the purpose of watering his estate or for other purposes."[128] If water runs through an estate rather than along its borders, then instead the landowner "may make use of [the water] while it runs over his lands . . . [but] he cannot stop it or give it another direction."[129] The landowner is further required to return the water to its normal course before the waterway "leaves his estate."[130] Other than these provisions, the Civil Code offers additional guidance only through the obligations of neighborhood laid out in Article 667, which provides that a landowner "may do with his estate whatever he pleases" as long as the landowner does not cause his neighbor damage or "deprive his neighbor of the liberty of enjoying his own" estate.[131]

Louisiana thus allows relatively unrestricted use of surface waters, at least with regard to riparian owners. However, these principles stop far short of granting actual ownership of the waters. In Louisiana, running water is a public thing owned by the state, so it is not susceptible to private ownership.[132] In addition to these principles expressed in the Civil Code, Louisiana's constitution imposes two important restrictions on the use of state waters. First, Louisiana's government is required to behave as a sort of public trust for the benefit of its residents.[133] Second, Louisiana may not donate any state

127. *See* Jackson v. Walton, 2 La. App. 53 (La. App. 2 Cir. 1925). This case concerned a dispute between landowners on opposite sides of a bayou. *Id.* at 54. The defendant granted a non-riparian owner the right to withdraw water from the bayou to irrigate his land, which was in the bayou's drainage basin. *Id.* The plaintiff sued to enjoin the non-riparian owner's access, but the court held that he had not demonstrated any damages caused by the existence of the non-riparian owner's access. *Id.* at 55-56.

128. LA. CIV. CODE ANN. art. 657.

129. *Id.* art. 658.

130. *Id.*

131. *Id.* art. 667.

132. *Id.* art. 450; *see also* LA. STAT. ANN. § 9:1101.

133. *See* LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with

property to or for the benefit of specific persons.[134] Additionally, La. Stat. Ann. § 9:1101 provides, in part, that "[t]here shall never be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes."[135] Taken together, these separate sources provide that (1) Louisiana owns surface waters, (2) Louisiana cannot donate those waters, and (3) no person will be charged for the most common uses of surface waters.

This situation inevitably led to uncertainties about how non-riparian owners could use state waters. Beginning in 2009, Louisiana's Attorney General issued a series of opinions[136] meant to provide guidance regarding those uncertainties as they came into focus.[137] In its first opinion on the subject, the Attorney General addressed a situation in Lincoln Parish in which oil companies were pumping water from creeks into their tankers for use in nearby fracking operations.[138] The opinion stated that "[r]unning water is a thing of value that belongs to the people of the State of Louisiana . . . that has value and that must be purchased pursuant to the laws governing the sale of State property if it is to be used for anything other than a public purpose."[139] The Attorney General then referred the oil company to the Lincoln Parish Reservoir Authority as the appropriate seller for water taken from the particular creek in question.[140]

As part of its decentralized water management program, Louisiana has statutorily authorized hundreds of local entities to oversee water in limited regions.[141] The Lincoln Parish Reservoir

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the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.").

134. LA. CONST. art. VII, § 14.

135. LA. STAT. ANN. § 9:1101.

136. *See, e.g.*, La. Atty. Gen. Op. No. 08-0176 (Mar. 17, 2010); La. Atty. Gen. Op. No. 09-0028 (Mar. 19, 2010); La. Atty. Gen. Op. No. 09-0066 (Mar. 19, 2010); La. Atty. Gen. Op. No. 09-0148 (Apr. 5, 2010).

137. *See* Davis & Wilkins, *supra* note 122, at 294 ("The flurry of Attorney General Opinions in the spring of 2010 was not a spontaneous event but was triggered by demands for water from nontraditional water users, most notably companies seeking to develop natural gas from shale formations in northwest Louisiana.").

138. *See* La. Atty. Gen. Op. No. 08-0176 (Mar. 17, 2010).

139. *Id.*

140. *Id.*

141. *See State Agencies with Regulatory Authority for Water Management*, DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/index.cfm/page/912 (last visited Feb. 19, 2022).

Authority mentioned above was one such entity,[142] but there are many more throughout the state.[143] Any one of those statutorily authorized entities may be able to enter into a water sale, depending on the specific language of the legislation that created the entity.[144] Generally, though, such entities may sell water "for irrigation, municipal and industrial uses both within and outside the district" only if such a sale would benefit the district.[145] If the local entity has the power to alienate waters within its jurisdiction, then it may enter into such transactions. Those transactions, however, must be in writing and approved by Louisiana's Attorney General and the State Mineral and Energy Board of the Department of Natural Resources.[146]

In response to the Attorney General's call for legislation, Louisiana's legislature authorized the Secretary of Louisiana's Department of Natural Resources ("DNR") to enter into a Cooperative Endeavor Agreement ("CEA") for any navigable or flowing surface waters in the state.[147] CEAs grant a person who is not a riparian landowner the right to remove water from a Louisiana waterway in exchange for its fair market value.[148] Critically, CEAs are not mandatory, so a non-riparian user can simply choose not to engage in the process and alternatively deal with a local authority as described above.[149] If a non-riparian

142. The statutory basis for Lincoln Parish Reservoir Authority was repealed subsequent to the Attorney General's opinion, but several other similar authorities still exist. *See* LA. STAT. ANN. § 38:3087.281 (2014).

143. *See State Agencies with Regulatory Authority for Water Management*, DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/index.cfm/page/912 (last visited Feb. 19, 2022).

144. *See, e.g.*, LA. STAT. ANN. § 38:2703; *id.* § 38:2603.

145. *See, e.g.*, LA. STAT. ANN. § 38:2703; *id.* § 38:2603.

146. LA. STAT. ANN. § 30:961.

147. *See id.*; Local authorities may still enter into agreements governing the use of waters within their particular jurisdictions as authorized under La. Rev. Stat. 38:3087 et. seq., but only the DNR Secretary can enter into a CEA. LA. STAT. ANN. § 30:961 ("Unless otherwise provided by law, all cooperative endeavor agreements to withdraw running surface water . . . shall be approved by the secretary"). CEAs are not mandatory, though, so a non-riparian owner could choose to deal instead with a local entity, provided that particular entity was authorized to do so at its creation and complied with the required approval process described above. *See id.* (using the permissive "may" to indicate that the CEA process is not compulsory); *see also* La. Atty. Gen. Op. No. 08-0176 (Mar. 17, 2010) (referring a potential buyer to a local entity authorized to transfer running waters within its jurisdiction).

148. LA. STAT. ANN. § 30:961.

149. *See id.*; *see also Louisiana's Surface Water Management Initiative*, DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/assets/OCM/Backup_of_FirstPrint_955_

owner chooses to enter a CEA, then the agreement must be approved by the DNR secretary before any water can be removed, and the applicant must provide a detailed Plan of Water Use along with his application.[150] If approved, no CEA can last longer than two years, but CEAs may be renewed before they expire.[151] In all CEAs, the Secretary reserves the right to limit the amount of water withdrawn should it become necessary.[152]

In addition to the regulatory agencies listed above, there are two other authorities empowered to enter agreements to transfer Louisiana's waters: the Sabine River Authority and the Red River Compact Commission.[153] These entities are responsible for overseeing and managing Louisiana's participation in the Sabine River Compact and Red River Compact respectively. These compacts are congressionally approved interstate agreements allocating water from the named rivers to the states where those rivers flow.[154] The Sabine River Compact includes Louisiana and Texas.[155] Both states are also members of the Red River Compact, along with Oklahoma and Arkansas.[156] The United States Supreme Court has held that the transfer of water from one signatory state to another is presumptively valid because Congress authorized the states to create the terms of those compacts.[157]

B. GROUND WATERS: A LOOK AT LOUISIANA'S MINERAL CODE

In addition to the abundant surface waters of the state, Louisiana is also home to an extensive series of underground water deposits called aquifers. There are eleven named aquifers

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pamp.pdf (last visited Mar. 12, 2022) (characterizing CEAs as "a voluntary process").

150. LA. STAT. ANN. § 30:961.

151. *Id.*

152. *Id.*

153. *Water Resources Commission Final Report*, 11 LA. DEP'T OF NAT. RES. (Nov. 2018), http://www.dnr.louisiana.gov/assets/OC/env_div/gw_res/WRC_Final_Report_113018.pdf (explaining that the Sabine River Compact is substantively similar to the Red River Compact, and that the United Stated Supreme Court has interpreted the Red River Compact to reserve the authority of signatory states to regulate appropriation, use, and control of water in its jurisdiction).

154. *Id.*

155. *Sabine River Compact Commission*, SABINE RIVER AUTH. OF TEX., https://www.sratx.org/about/srcc/ (last visited Mar. 12, 2022).

156. *Red River Compact Commission*, OKLA. WATER RES. BD., https://www.owrb.ok.gov/rrccommission/rrccommission.html (last visited Mar. 12, 2022).

157. *See Tarrant*, 569 U.S. at 628-39.

beneath Louisiana, and at least one of them is accessible in almost every part of the state.[158] Together they provide drinking water to roughly half of Louisiana's population.[159] In some areas, including Baton Rouge, these groundwaters are also used to meet essentially all municipal and industrial water needs.[160] They are also heavily utilized in agriculture, particularly in the southwestern part of the state, where water-intensive crops such as rice are a major part of the economy.[161] However, until the 1970s, there was no regulation of groundwater resources, and even when the state government took note of potential overuse of state aquifers, its initial response was lackluster.[162]

For most of Louisiana's history, groundwater was governed by the property rights of landowners.[163] Today, Civil Code article 490 provides that "the ownership of a tract of land carries with it the ownership of everything that is directly above or under it."[164] Article 490 descends from similar provisions in past iterations of the Civil Code, and for hundreds of years landowners enjoyed ownership of waters beneath the surface of their land based on that principle.[165] This idea evolved in the 1970s when Louisiana wrote its Mineral Code, which now governs groundwater.[166] Under Section 4 of the Mineral Code, landowners still have the right to explore for and remove from the land any minerals beneath it, including water.[167] However, Section 6 expressly states that ownership of land does not confer ownership of underground minerals that exist in "liquid or gaseous form."[168]

158. PURPERA, *supra* note 5, at B.1.

159. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 18.

160. LA. STATE L. INST. WATER CODE COMM., 2021 ANNUAL REPORT TO THE LEGISLATURE IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION 6 (2021).

161. *See* LA. GROUND WATER RES. COMM'N, *supra* note 1, at 79 (noting that "Southwest Louisiana . . . produces 65 percent of the rice grown in the state" and that "an alternative reliable source of freshwater to groundwater is not readily available" in that part of the state).

162. *Id.* at 14, 18-19 (noting "160 years of statehood without groundwater management" and explaining that the Capital Area Ground Water Conservation District, Louisiana's first government entity given regulatory power over groundwater, has focused its efforts predominantly on "groundwater quality protection rather than maintaining groundwater quantity").

163. *Id.* at 25.

164. LA. CIV. CODE ANN. art. 490.

165. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 25.

166. See LA. STAT. ANN. § 31:4.

167. *Id.*

168. *Id.* § 31:6.

Rather, land ownership confers to the landowner "the exclusive right to explore and develop his property for the production of [liquid or gaseous] minerals and to reduce them to possession and ownership."[169] Thus, landowners no longer own the water beneath their lands, but they gain ownership once they draw the water to the surface and possess it. Critically, there are still few limitations on how much water any one landowner can actually withdraw.[170]

Water is classified as a "fugitive" mineral because it moves and percolates beneath the ground.[171] Simply put, this means that changes in pressure will move water around under the ground, so when pumps are attached to wells, they draw in water not only from the area directly beneath a given plot of land but also from all surrounding water deposits.[172] Louisiana has thousands of public supply wells drawing upon its aquifers. In 2010, there were estimated to be an additional 75,000 private wells active in Louisiana.[173] Efforts to comprehensively register and monitor those wells have not been terribly successful, so it is currently impossible to tell exactly how much water is coming out of the ground.[174] Experts warn, though, that we are taking too much.[175]

For example, Baton Rouge, Louisiana's capital city, is almost entirely dependent on the Southern Hills Aquifer for its municipal water supply.[176] As Baton Rouge's population continues to grow, the demand for water grows with it. As a result of years of overuse, water levels in the Southern Hills Aquifer are falling around the Baton Rouge area.[177] Even more

169. *Id.*

170. *See* LA. GROUND WATER RES. COMM'N, *supra* note 1, at 26.

171. *See* Adams v. Grigsby, 152 So. 2d 619, 622 (La. App. 2 Cir. 1963) ("Subterranean waters . . . must be classified with oil and gas as fugitive substances" because its "fugitive and wandering existence within the limits of a particular tract is uncertain.").

172. *See Glossary of Oil and Gas Terms*, CTR. FOR AM. & INT'L L., at 10, https://www.cailaw.org/media/files/OP/ConferenceMaterial/2016/benchbar/glossary-oil-gas.pdf (last visited Mar. 5, 2022) (explaining that fugacious minerals "move from place to place in response to pressure differentials and rock permeability").

173. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 48.

174. PURPERA, *supra* note 5, at 9.

175. *Id.* at 6.

176. LA. STATE L. INST. WATER CODE COMM., *supra* note 160, at 6.

177. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 72. Overuse of groundwater dates back to at least the 1940s, and aquifer water levels in the aquifer

problematic, pumping water out of the ground draws water in the surrounding areas toward the well.[178] Baton Rouge has massive salt deposits to its south and west, and those deposits naturally mix with underground water to form areas of underground saltwater.[179] Continued pumping from the Southern Hills Aquifer around Baton Rouge has drawn saltwater into the area, and this "saltwater intrusion" could affect the capital's supply of drinking water in the next five to twenty-five years.[180] Increased groundwater salinity also impacts agricultural yields throughout the state, with one study predicting potential economic damages of over $500 million in the next thirty years.[181] Once saltwater intrusion occurs, the damage is irreversible.[182]

In response to the threat of aquifer depletion, Louisiana created the Capital Area Groundwater Conservation Commission in 1974 to regulate withdrawal of water from the Southern Hills Aquifer.[183] This commission was the first of its kind in Louisiana, and it was created as a "purpose-driven regulatory body" to "actively manage[] and regulate[] the aquifer."[184] The commission, however, did not embrace its task, and as a result, the capital area continues to face serious challenges regarding its groundwater supplies.[185] Since the commission's creation, water levels have fallen at a slower rate than before its inception, but

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dropped by as much as 150 feet between 1940 and 1975. Levels are still falling, albeit at a much slower rate.

178. *What is Saltwater Intrusion?*, LA. DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=1277&pnid=21&nid=27 (last visited Apr. 27, 2021).

179. *Id.*

180. *Id.* Geologists believe that the saltwater intrusion would actually have progressed much further than it has but for a geographical oddity. *Id.* A fault line traverses Baton Rouge, and it offsets the underground reservoirs. *Id.* This fault forms a natural barrier between Baton Rouge and the saltwater to the south and west, but the fault is permeable. *Id.* As the aquifer continues to fall, it becomes easier for the saltwater to pass through the fault line, so continued overuse could accelerate the rate of saltwater intrusion. *Id.*

181. PURPERA, *supra* note 5, at 7 (2020).

182. *See* Tegan Wendland, *Known for its Floods, Louisiana is Running Dangerously Short of Groundwater*, NPR (Mar. 19, 2021, 5:00 AM), https://www.npr.org/2021/03/19/975689866/known-for-its-floods-louisiana-is-running-dangerously-short-of-groundwater. One researcher described the effect of saltwater intrusion as follows: "You might have a well that is functioning just fine now, but once salt contaminates fresh water, it's done. That's it. You no longer have that well." *Id.*

183. PURPERA, *supra* note 5, at 9 (2020).

184. LA. STATE L. INST. WATER CODE COMM., *supra* note 160, at 6.

185. *Id.*

there are still signs of severe overuse of groundwater in the area.[186]

In the early 2000s, Louisiana adopted a broader approach by creating the Office of Conservation ("OC") within the Department of Natural Resources to regulate and manage groundwater use in the state.[187] The OC is vested with authority to designate "Areas of Ground Water Concern," "Critical Areas of Groundwater Concern," and "Groundwater Emergencies" when necessary, and the OC may impose use restrictions within any area so designated.[188] The OC is also charged with registering and monitoring the active wells in the state, but the most recent surveys suggest that there is room for improvement with those efforts.[189] As part of the registration process for new high-volume wells, the OC is authorized to impose restrictions on withdrawals.[190] Notably, however, once a well is active, the OC may not impose further restrictions on the amount of water withdrawn from it unless it is within one of the designated Areas of Concern.[191]

C. TESTING THE WATERS: ISSUES WITH THE CURRENT BIFURCATED APPROACH

In light of the approaching global water shortage and increasing domestic demand for water, it is imperative that Louisiana take a proactive approach to managing its resources and preparing for the substantial challenges that lie ahead. It is axiomatic that if problems are not solved today, then they will also be tomorrow's problems. As such, Louisiana needs to cast a critical eye towards its current approach to water governance in

186. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 72 (discussing this in terms of "cones of depression" centered on Baton Rouge). A cone of depression forms in areas of high groundwater demand. *Id.* Water is drawn from the base of a well, which draws in surrounding water, much like pulling the plug in a bathtub creates a "cone" near the drain. *Id.* Depending on the amount of water withdrawn and the rate of withdrawal, a cone of depression will have unique characteristics, such as size of the area affected and the angle of the cone. *Id.*

187. *Id.* at 2.

188. PURPERA, *supra* note 5, at 11.

189. *Id.* at 15 (suggesting that Louisiana "may wish to ensure that the statewide water resource monitoring network is continually reviewed and evaluated to determine that oversight entities have the information necessary to properly manage the state's water resources").

190. *Id.* at 12.

191. *Id.*

order to identify challenges and problem areas as they currently exist. Failure to do so will stymie any attempt to plan for the future and likely exacerbate future concerns. Accordingly, this Part will aim to identify some of the major problems with Louisiana's current approach to water.

First, Louisiana's current bifurcated water governance is not consistent with accepted tenets of science. Water is one of the most potent, important forces on Earth, and its movements and transformations are described by the hydrological cycle.[192] All water on, above, or below the surface of the Earth is interconnected, and Louisiana's failure to recognize this fact is a fundamental flaw. Surface water and groundwater do not, and indeed *cannot*, exist as separate phenomena. Over long periods of time, water on the surface seeps into the ground and becomes trapped in aquifers.[193] Natural pressures beneath the surface act on those deposits and push water back to the surface.[194] Without surface water, underground aquifers could not recharge, and wells would run dry.[195] Without the water from natural springs, bodies of water on the surface would be completely dependent on precipitation and therefore more vulnerable to large fluctuations in water levels.[196] Scientifically, there is no long-term difference between groundwater and surface water, and Louisiana's failure to account for the interdependence of the two needs to be addressed.

Second, the existence of separate legal regimes for surface water and groundwater can create unequal demand for one or the other. Specifically, Louisiana has adopted the position that surface waters are a public thing that belongs to the state for beneficial use by the public.[197] Louisiana's Civil Code, however, only provides rules for how riparian landowners may use surface water.[198] On its own, this position creates uncertainty as to whether non-riparian users can access surface water and how they can use it if they do access it.[199] Further, beginning with the Attorney General's opinions in 2009, Louisiana imposed costs on

192. *A Comprehensive Study of the Natural Water Cycle, supra* note 8.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. LA. STAT. ANN. § 9:1101.
198. LA. CIV. CODE ANN. art. 657; *id.* art. 658.
199. *See* La. Atty. Gen. Op. No. 08-0176 (Mar. 17, 2010).

non-riparian users for taking water from the surface sources.[200] Critically, there is no similar provision for the use of groundwater, so once a landowner reduces groundwater to possession, he owns it and can use it as he pleases.[201]

For the state's biggest water users, this presents a choice: use water from the surface and compensate the state, or purchase land practically anywhere in the state and draw a virtually unlimited supply of groundwater indefinitely and without subsequent charge. The state's biggest water users are industrial and agricultural operations which tend to own land anyway.[202] For any profit-driven entity, the choice seems an obvious one. However, aquifers recharge at a very slow rate, and sustained overuse can deplete groundwater to a point where it becomes more difficult to access.[203] In areas near saltwater or underground salt deposits, sustained overuse can also draw saltwater into the underground fresh water supply, and once saltwater intrusion occurs, there is no practicable way to cure it.[204] Thus, the interaction between the separate legal regimes can have the deleterious effect of shifting greater demand onto the least renewable water resources.

Third, because Louisiana treats surface water and groundwater as separate resources, the state has authorized different regulatory bodies to oversee their management. The Department of Natural Resources has limited authority to manage withdrawal of surface waters through Cooperative Endeavor Agreements.[205] The Office of Conservation is charged with monitoring and regulating withdrawal of groundwater throughout the state, but their authority is also limited.[206] Further, even though the OC is housed within the DNR, there is little evidence of cooperation or coordination between the two.[207]

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200. *See* La. Atty. Gen. Op. No. 09-0066 at 2-3 (Mar. 19, 2010).

201. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 28.

202. Wendland, *supra* note 182 (noting that "[a]griculture consumes more than 61% of Louisiana's groundwater" and that "Louisiana's oil and gas refineries, paper mills and other industries are major groundwater users").

203. LA. GROUND WATER RES. COMM'N, *supra* note 1, at 17.

204. Wendland, *supra* note 182.

205. LA. STATE L. INST. WATER CODE COMM., *supra* note 160, at 13.

206. PURPERA, *supra* note 5, at 11.

207. *Id.* at 16 (recommending adoption of a statewide water management plan that "would help establish clear authority over water resources and coordination between responsible entities").

To complicate matters even more, several other state-wide agencies have power to regulate water in some form or another, and there are around 735 other local government entities with power to regulate water usage within their jurisdictions.[208]

As a final consideration, Louisiana treats water as an article of commerce by charging for its use through CEAs.[209] This fact implicates the Dormant Commerce Clause, which will impose restrictions on Louisiana's ability to manage its water resources.[210] The Commerce Clause of the United States Constitution grants Congress the power to regulate interstate commerce, and courts have held that states lack the power to interfere with interstate commerce.[211] This principle, known as the Dormant Commerce Clause, must coexist with the states' recognized police power, which allows them to regulate health and safety.[212] Thus, when a state attempts to restrict interstate transfers of water, it must do so in furtherance of a legitimate local interest which affects interstate commerce only incidentally, or else the state runs the risk that a court will strike down the restriction as an impermissible and "explicit barrier to commerce" subject to strict scrutiny.[213] Under this framework, any attempt to outright restrict the sale of water to out-of-state users would likely be viewed as impermissibly creating winners and losers along state lines, and the restriction would almost certainly be struck down in court for violating the Dormant Commerce Clause.

III. CONFLUENCE OF THE STREAMS: PROPOSAL FOR UNIFYING THE SEPARATE LEGAL REGIMES

It is clear that Louisiana needs to take action to protect and manage its water resources. The legislature recognized this in 2014 when it commissioned the Louisiana Law Institute to form a Water Code Committee ("the Committee") "with a view towards the development of a comprehensive Water Code that integrates

208. *State Agencies with Regulatory Authority for Water Management*, DEP'T OF NAT'L RES., http://www.dnr.louisiana.gov/index.cfm/page/912 (last visited April 28, 2021).

209. Davis & Pappas, *supra* note 12, at 204-05.

210. *See id.* at 187.

211. *See id.*

212. *Id.*

213. *Id.*

all of Louisiana's water resources."[214] In 2020, the Louisiana Legislative Auditor noted that "[s]ince 1956, Louisiana has spent at least $5.3 million to conduct 12 studies on water resources and management strategies, and many of these recommended the state develop a comprehensive management plan. However Louisiana still does not have a comprehensive water management plan."[215] Seemingly in response, the Committee indicated in January of 2021 that its research phase was "largely complete" and that its remaining work would be dominated by developing and discussing specific recommendations.[216] This Part will offer four recommendations to the Committee for discussion.

First, the new Water Code should recognize the inherent link between waters on and beneath the surface. The science is clear that the two are inextricably interconnected and interdependent, and Louisiana's law should reflect that relationship. Ideally, this recognition would be expressed in a single, unified approach to the governance of both groundwater and surface water.

Second, the Water Code should completely replace the Mineral Code as the appropriate authority for water governance. Specifically, the principles of the Mineral Code which currently allow ownership of groundwater once it is reduced to possession should be abandoned, and the same standards should apply to the use of surface water and groundwater. In effect, this would mean that groundwater would not be owned by an individual once reduced to possession, but instead, the water would still belong to the people of the state and be held in trust by the state under Article IX of Louisiana's Constitution.

Third, the Committee should consider placing restrictions on the distance that water could be transported if sold. One possibility would be to allow the transportation of water only within the same drainage basin from which it was withdrawn. In effect, this would keep water near its natural location, allowing the water to drain back into the same streams and recharge the same aquifers that it would have had it not been withdrawn and transported. This restriction would also functionally place limitations on the ability to sell water out of state without creating winners and losers along state lines. Granted, it would

214. S. Res. No. 171, 2014 Reg. Sess. (La. 2014).

215. PURPERA, *supra* note 5, at 5.

216. LA. STATE L. INST. WATER CODE COMM., *supra* note 160, at 3-4.

not completely stop Louisiana's water from being shipped out of state, but because of the location and situation of the drainage basins, any water transported out of the state would eventually flow back to it. The entire border between Texas and Louisiana falls into either the Sabine River basin or the Red River basin, and both of those rivers flow into Louisiana.[217] The entire border between Louisiana's eastern border with Mississippi falls into the Mississippi River basin, the Pontchartrain basin, or the Pearl River basin.[218] If water could not be shipped outside of its own drainage basin, there would be no way to permanently lose state waters by shipping them into part of the drainage basin that lies outside of Louisiana. Because the restriction would not be based on state borders, though, it would be more likely to survive scrutiny if challenged under the Dormant Commerce Clause.

Fourth, the Committee should consider recommending an empowered central authority to monitor and regulate both groundwater and surface water use. This could be a new agency, but expanding the authority of the Department of Natural Resources may also serve this purpose. Either way, a central authority should oversee all transactions involving water in order to streamline the process and ensure that no single resource is being over-exploited to the detriment of the people of the state.

Taken together, these recommendations would provide for state ownership of all waters, both on and beneath the surface, which would allow Louisiana to better regulate all the state's water resources and ensure that water is not transported out of areas where it is critically needed. The recommendations would also provide a framework for ensuring that Louisiana lives up to its role as the public trustee of state waters while providing a mechanism for keeping Louisiana's water available to the people of Louisiana. If Louisiana wants to remain the "Sportsman's Paradise," decisive action on this matter is needed.

GLASS HALF-FULL: CONCLUSION

It is difficult to imagine any factor more significant to Louisiana's history and identity than its water. It touches everything here, from our distinct cuisine to our choice of leisure

217. Michael Liffmann, *Watershed specialists work to improve Louisiana water quality*, 47 LA. AGRIC. 36, 37 (2004), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1073&context=louisianaagriculture.

218. *Id.*

activities. It serves as the backbone of our most important industries, and it connects us to the world. It is beautiful. It is bountiful. It is unique, and in a very real sense, it is the lifeblood of the state. Any attempt to quantify its value to the people of Louisiana belies the defining role it has played in shaping our identity, and water will continue to define the state in the future. We therefore have an obligation to manage and preserve it for posterity, and we need to act on that obligation while there is still time.

At the heart of Louisiana's water governance lies a central flawed conceit that water underground is fundamentally different from water on the surface and must be governed differently. This unmanageable, convoluted approach beckons a need for change. Change is always hard, and the challenges ahead will make it even harder. They also make it imperative that Louisiana acts now to protect its most valuable and plentiful gift before the growing pressures become insurmountable. This is not to say that there will not be challenges; it is merely to suggest that with challenge comes opportunity.

After all, when a glass is half-empty, the other half is full.

Matthew Holman

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LOUISIANA'S PROHIBITION ON THE POLITICAL ACTIVITY OF STATE AND LOCAL CIVIL SERVANTS: GOOD GOVERNANCE OR A VIOLATION OF PROTECTED EXPRESSION?

INTRODUCTION

Imagine working for most of your career with a single employer and with the same coworkers. You work very well together, and your years of experience collectively allow each of you to do your jobs correctly and efficiently. There is only one catch. You work for the State of Louisiana, and every four to eight years, you get a new boss, appointed by the newly elected governor. Sometimes that boss has experience in your field and is an asset to the workplace. Other times, that boss may be appointed to this unclassified position for a reason other than merit, such as because the new governor owes them a political favor. Whatever the reason, the boss's lack of knowledge and experience impedes workplace morale and efficiency. But the real harm begins when the new administration drastically cuts the workforce,[1] freezes employees' pay,[2] and eviscerates their benefits.[3] With no possibility of pay raises on the horizon to benefit their retirement incomes, the most senior employees see no reason to continue working. When they retire, the administration chooses to not replace them.[4] As the workforce

1. *See* LA. ST. CIV. SERV., REP. ON TURNOVER RATES FOR NON-TEMP. CLASSIFIED STATE EMP. at 4 (2012-13), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2012-2013%20Act%20879%20Turnover%20Rate%20Report.pdf (the Louisiana State Civil Service voluntary and involuntary turnover rate was 31.8% in the 2012-13 fiscal year alone); *see also Civil Service reports 8,400 state employee layoffs under Governor Bobby Jindal*, THE ADVOCATE (July 5, 2016, 9:55 AM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_66c503bb-1a68-5cd8-b564-4280c6d3c303.html.

2. *Civil Service Agrees to Pay Freeze for State Workers*, WWLTV (Apr. 6, 2011, 8:21 AM), https://www.wwltv.com/article/news/civil-service-agrees-to-pay-freeze-for-state-workers/289-346894252.

3. *See* John Kennedy, Opinion, *Guest commentary: Changes mean problems for state employees*, THE ADVOCATE, (Aug. 24, 2014, 1:54 AM), https://www.theadvocate.com/baton_rouge/opinion/article_674b5c32-362c-5435-8c62-af3127bce846.html; *see also* LA. LEGIS. FISCAL OFF., OGB UPDATE (July 18, 2014), https://tomaswell.files.wordpress.com/2014/08/ogb-report_july-2014-for-jlcb.pdf (legislative report prepared to explain the need for increases in state employee health insurance premiums after depletion of $500 million health care trust fund); *What happened to $500 million?*, AMERICAN PRESS, (May 29, 2014, 8:15 AM), https://www.americanpress.com/2014/05/29/what-happened-to-500-million/ (explaining the effects of the Jindal Administration's privatization of the OGB trust fund).

4. *See* Jeff Adelson, *Gov. Bobby Jindal implements year-long state hiring freeze*, THE TIMES-PICAYUNE, (July 12, 2012, 7:15 AM), https://www.nola.com/news/

dwindles and the workload increases, the most experienced of those workers who remain begin to experience burnout and many decide to retire early.

The remaining employees are primarily those mid-career individuals who cannot retire yet but have too many years invested into their retirement to simply abandon it. However, because they have worked for the State of Louisiana and paid into the retirement system, any Social Security retirement income they may be eligible for will be statutorily reduced or eliminated.[5] Thus, most of these employees feel that they have no other viable option except to remain and hope that the next administration will be better. These employees struggle as they work sixty-hour workweeks to complete the growing stacks of past-due assignments but are only paid for the forty hours for which they are scheduled.

Eventually, the work falls so far behind and the accuracy rates of the work fall so low that the administration realizes they must begin hiring. But by this time, the once enjoyable workplace has turned into an unhappy, punitive environment. The once prevalent sense of pride and enjoyment that previously made this a satisfying place to work is gone. It does not take long for the new employees to see what is in store for them, and they quickly depart to find better employment, creating a revolving door of inexperienced employees. So, those left behind continue on, splitting their effort between wasting time training new employees, most of whom will simply leave once their training ends, and completing a workload that they only have the ability to finish timely or correctly—but not both. If, like me, you worked for the State of Louisiana during the Bobby Jindal administration, then you do not have to imagine this scenario. It is likely that you personally experienced it.

But there is a glimmer of hope. Because you work under the appointees of an elected official, you recognize that elections are near, and it simply does not have to continue this way. You could explain to others how the administration's positive spin on their spending cuts is not the whole story, and there are real consequences that are impacting real people. You could help them understand that the next time they go to the ballot box,

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politics/article_ab136806-d3bc-5c0c-a6bb-bf885cce2d92.html.

5. LA. ST. EMP. RET. SYS., *Social Security Offsets: WEP & GPO*, https://lasersonline.org/social-security-offsets/ (last visited Feb. 7, 2022).

they have the power to change this poorly performing government. Unfortunately, however, if you did that, you may lose your job. In Louisiana, if a state employee provides their insight and information to others in a way that can be construed as supporting or opposing any politician or political party, they are subject to disciplinary action.[6] "But wait," you think: "surely the First Amendment protects this kind of speech."

The First Amendment,[7] of course, is the foundation of our free democracy. The free speech protections afforded by the First Amendment do not exist merely to satisfy our individual desires for self-expression. Instead, since the founding of this nation, we have understood that a democracy can only function properly when an educated populace can discuss and debate public policy.[8] The free communication of ideas among the voting public, exploring the pros and cons of each policy choice, allows the propagation and improvement of good ideas and exposes the flaws of inferior ones.

Additionally, the Framers believed that government was a necessary evil, and they designed our Constitution with many safeguards, including the First Amendment, to ensure that tyranny did not overcome democracy.[9] We continue to see this concern expressed today in the proliferation of private government watchdog organizations[10] and congressional measures, such as the Freedom of Information Act, which allows the public to obtain information on our government's activities.[11] Without sources of inside information on the workings of

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6. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

7. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'").

8. *See* Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), https://www.loc.gov/resource/mtj1.048_0731_0734/?sp=4&st=text ("If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.").

9. *See* THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

10. *See generally* FULTON LIB., *Gov't Oversight and Watchdog Orgs.*, https://uvu.libguides.com/government-information/oversight (last visited Feb. 7, 2022).

11. U.S. DEP'T OF JUST., https://www.foia.gov/ (last visited Feb. 7, 2022) ("The basic function of the Freedom of Information Act is to ensure informed citizens, vital to the functioning of a democratic society.").

government, we may never learn of government mismanagement and corruption by public officials. There are countless examples of such conduct: Watergate,[12] the IRS Targeting Controversy,[13] Ukrainegate,[14] and numerous allegations of sexual misconduct by government officials,[15] to name but a few. But such high-profile public scandals are not the only concerns that inside information can expose. The opinions and personal knowledge of government employees can also reveal instances of inefficiency, ineptitude, and bias that would otherwise go unnoticed. Once these issues are exposed to the public and their governmental representatives, they can devise and implement resolutions to improve government efficiency and accountability.

However, despite the benefits enjoyed by the public when those with personal knowledge of government activities can freely express their opinions and concerns, the State of Louisiana has promulgated rules that effectively silence its public employees.[16] These restrictions on the free speech of government employees take the form of prohibitions on political activities, preventing public employees from making comments in support of, or in opposition to, those elected officials who operate our government.[17] However, by preventing those who best understand the inner workings of government from expressing support of or opposition to political parties and officials, the state effectively deprives the voting public of valuable information about how the government operates and whether those who run it do so competently.

The Louisiana State Civil Service agency (SCS) issues circulars on prohibitions of political activities for government

12. *See Select Committee on Presidential Campaign Activities*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/investigations/watergate.htm (last visited Feb. 7, 2022).

13. *See* Peter Overby, *IRS Apologizes For Aggressive Scrutiny Of Conservative Groups*, NPR (Oct. 27, 2017, 3:08 PM), https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.

14. *See* Viola Gienger & Ryan Goodman, *Timeline: Trump, Giuliani, Biden, and Ukrainegate,* JUST SECURITY (Jan. 31, 2020), https://www.justsecurity.org/66271/timeline-trump-giuliani-bidens-and-ukrainegate/.

15. *See, e.g.*, *Legislator Misconduct Database*, GOVTRACK, https://www.govtrack.us/misconduct (last visited Feb. 7, 2022).

16. *See generally Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

17. *See, e.g.*, *id.* at 2.

employees each year.[18] In these circulars, the agency advises employees that they will be subject to disciplinary action if they participate in any of a long list of enumerated activities.[19] One may easily understand the rationale behind some of these prohibited activities, such as actively campaigning for a politician while on duty, while wearing a public uniform, or while driving in a public vehicle.[20] Government employees should project an appearance of impartiality on the job, and members of the public should never feel as though official government decisions that personally affect them are made based on political affiliation or bias. However, there are other prohibited activities that have less apparent policy rationales.

Examples of such prohibitions include the wearing of any political clothing, buttons, or pins while off duty, on the employee's own personal time; the allowing of a political sign to be placed in the employee's yard; or the placing of a bumper sticker on the family car.[21] Many of these prohibitions make perfect sense while one is at work, representing the government as a public employee. However, Louisiana's prohibitions implicitly prohibit public employees from participating in these activities even when they are acting in their capacities as private citizens.[22] For example, employees are not allowed to wear something as simple as a T-shirt supporting their preferred presidential candidate while attending their child's baseball game.[23] They are not allowed to drive to the grocery store in the family car fitted with a bumper sticker supporting their local council member.[24] They cannot even place a sign in their yard to support their parent, sibling, or child who is running for a position on the local school board.[25] Louisiana's prohibitions are

18. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

19. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

20. *See, e.g.*, *id.*

21. *See id.* at 2.

22. *See id.*

23. *See id.*

24. *See id.* at 2-3.

25. *See id.* at 3. Note, however, that an employee's spouse may still place a

so strict that they do not even allow public employees to "follow" a political party or politician or "like" their posts on social media.[26] These rules arguably create a complete bar to the expression of these employees' views and concerns about politicians and candidates for political office. The result is a failure by the State of Louisiana to strike the delicate balance, better achieved by most other states and the federal government,[27] between satisfying the government's need to curb political impropriety, and its employees' rights to free speech.

There are currently over 245,000 state and local government employees in Louisiana.[28] Therefore, more than one in every twenty Louisiana residents[29] are directly subject to the chilling effects of the rules promulgated by the Louisiana State Civil Service agency. This suppresses the free speech rights of a significant portion of Louisiana's population and chills their participation in our democratic political process. More significantly, it silences the specific segment of the population who are best positioned to observe the inner workings of the very government by which they are being silenced. In turn, this creates a potential barrier to good governance in Louisiana and could be one of several reasons why the state's government has a reputation for corruption[30] and a track record for poor performance compared to other states.[31]

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political sign in the yard of their shared home as long as the sign reflects the "true expression of the spouse" and not that of the employee. *Id.*

26. *See id.* at 5.

27. *See 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffand politicalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each state); *Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx# tabGroup11|tabGroup31 (last visited Feb. 7, 2022).

28. *State and Local Government: Employment and Payroll Data*, U.S. CENSUS BUREAU (May 10, 2021, 8:01 AM), https://www2.census.gov/programs-surveys/apes/datasets/2020/2020_state_local.xls (Mar. 2020 data, released May 2021).

29. *Louisiana Population 2022,* WORLD POPULATION REV., https://world populationreview.com/states/louisiana-population (last visited Feb. 7, 2022).

30. *See* Adam B. Kushner, *Is Louisiana the Most Corrupt State?,* NEWSWEEK (Mar. 10, 2010, 7:00 PM), https://www.newsweek.com/louisiana-most-corrupt-state-69541.

31. *See* Elliott Davis Jr., *U.S. News Ranks Best States for 2021,* U.S. NEWS, (Mar. 9, 2021, 12:00 AM) https://www.usnews.com/news/best-states/articles/us-news-releases-best-states-rankings (in U.S. News' annual Best States rankings, after considering 71 metrics across 8 categories, Louisiana placed 50th out of all 50 states).

This Comment will address Louisiana's unusually strict prohibitions on political activity for public employees and propose solutions that would not only help to achieve a better balance between the needs of the government and the rights of its employees, but also improve government transparency and efficiency. Part I will explore the background of prohibitions on political expression. It will detail why the government implemented these prohibitions and how they have been relaxed over time in other jurisdictions. Part II will examine both state and federal laws on the prohibition of political activities as they exist today. Part III will provide the policy rationale for loosening Louisiana's restrictions and an examination of the constitutionally shaky ground on which Louisiana's current policies rest. Part IV will then propose solutions modeled after the practices of the federal government and other states. Ultimately, this Comment will attempt to demonstrate the need for a more balanced approach to Louisiana's prohibitions on political activities for government employees, suggesting the use of narrowly tailored prohibitions to accomplish Louisiana's objectives without needlessly infringing on its employees' constitutionally protected rights.

I. BACKGROUND

The federal and state governments of the United States have not always prohibited the political activity of civil servants.[32] In fact, for nearly a century, such activity was arguably encouraged.[33] From the earliest administrations, presidents leveraged the power of attractive government employment positions to reward those who helped them into office.[34] Worse yet, government employees began using public works and federal funds as tools for political coercion.[35] Ultimately, Congress realized the gravity of the issue and began passing legislation to curb these practices.[36]

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32. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 332 (2007); Sean M. Theriault, *Patronage, The Pendleton Act, and the Power of the People*, 65 J. POLS. 50, 54 (2003).

33. *See* Howe, *supra* note 32, at 332.

34. *See id.*

35. *See* Raymond Michael Myers IV, *"To prevent pernicious political activities:" the 1938 Kentucky Democratic primary and the Hatch Act of 1939*, 36 (2018) (B.A. honor thesis, University of Louisville) (ThinkIR).

36. *See, e.g.*, Civil Service (Pendleton) Act, 47 Cong. ch. 26, 22 Stat. 403 (1883); Steven J. Eberhard, *The Need for the Hatch Act*, 1 HARV. J.L. & PUB. POL'Y 153, 157

A. GOVERNMENT EMPLOYMENT BEFORE POLITICAL PROHIBITIONS

Beginning with the presidency of George Washington, political appointments were given to supporters of the president.[37] In these early days, however, it was customary for the incoming president to retain all political appointees made by the previous administration, except those in the very highest positions.[38] Those who were not replaced would typically remain employed with the government and be replaced only through attrition.[39] This practice retained experienced staff,[40] promoting continuity in government services. However, this custom changed sharply in 1829, upon the election of Andrew Jackson. President Jackson replaced a significant portion—ten percent by some estimates—of the total federal workforce with his supporters, resulting in more federal employees being removed from their jobs than under all six presidents before him.[41] A disproportionate number of these removals occurred in the United States Postal Service,[42] leading to a massive loss of experience, which significantly impacted the competency and performance of the agency.[43] After this practice was normalized by the Jackson administration, the resulting patronage system, or the spoils system, as it came to be known,[44] became the usual practice until the assassination of President Garfield[45] by a rejected job seeker in 1881.[46] This was the proverbial straw that broke the camel's back, prompting Congress to pass legislation to reign in the spoils system.[47]

(1978).

37. Howe, *supra* note 32, at 332.

38. *Id.* at 332-33.

39. *Id.*

40. *See id.* at 334.

41. *See id.* at 333.

42. *See id.*

43. *Id.* at 334.

44. *Id.*

45. *See* Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 248; *see generally* ALLAN PESKIN, GARFIELD: A BIOGRAPHY 596 (1978).

46. Boyle, *supra* note 45, at 248; *see also* Peskin, *supra* note 45, at 588-90.

47. Norm Ornstein, *How the Assassination of James A. Garfield Haunts VA Reform*, The Atlantic (July 10, 2014), https://www.theatlantic.com/politics/archive/2014/07/how-the-assassination-of-james-a-garfield-haunts-va-reform/374202/.

B. THE RISE OF PROHIBITIONS ON GOVERNMENT EMPLOYEES

After the assassination of President Garfield, Congress passed the Pendleton Civil Service Act of 1883.[48] This Act placed a significant number of federal employment positions into a classified service, administered by the newly created Civil Service Commission.[49] The Act also made two major changes to covered positions. First, employees in the classified service could no longer be mandated to make political campaign contributions.[50] This was significant because, at the time, these forced contributions made up nearly seventy-five percent of all political contributions.[51] Second, the spoils system was replaced by a merit-based system, in which competitive examinations were utilized for the selection of employees instead of the more traditional patronage system that depended on political loyalty.[52] This merit-based employment process prohibited the removal or demotion, for political reasons, of employees protected under the Act.[53] This prohibition, in turn, helped to retain experienced workers who could make government service a full-time career.[54] It also helped improve the reputation of employees in government service who, due to the spoils system, were generally held in disrepute in the public eye.[55]

Although the Pendleton Act brought badly needed reform to Washington, some thought it did not go far enough. In 1907, President Theodore Roosevelt signed Executive Order 642, prohibiting civil servants from using their official authority or influence to interfere with elections, beyond their own right to vote, or to "express privately their opinion on all political subjects[.]"[56] Then, during the 1938 election campaign, accusations of coercion involving Democratic primary candidates and employees of the Works Progress Administration (WPA)

48. *See* Civil Service (Pendleton) Act, 47 Cong. ch. 26, 22 Stat. 403 (1883).

49. *See* Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 303 (1959).

50. Theriault, *supra* note 32, at 52.

51. *Id.*

52. *See id.*

53. *See* Civil Service (Pendleton) Act, 47 Cong. ch. 26, 22 Stat. 403 (1883).

54. *See* Hoogenboom, *supra* note 49, at 310.

55. *See id.* at 311-12.

56. Exec. Order No. 642 (June 3, 1907).

emerged.[57] WPA employees were accused of offering public benefits in exchange for political favors in swing states and denying benefits to those who would not vote for their preferred candidate.[58] In response to these allegations, Congress passed "An Act To Prevent Pernicious Political Activities,"[59] better known as the Hatch Act, which essentially codified President Roosevelt's executive order.[60]

The Hatch Act banned the use of "official authority for the purpose of interfering with, or affecting [an] election . . . ," soliciting campaign funds from anyone having business with the agency, and coercing votes such as by promising government employment or withholding government funds to compensate or punish political activity.[61] Penalties ranged from removal from office for civil violations to fines and imprisonment for criminal violations.[62]

Shortly thereafter, in 1940, the Act was amended to apply to federally funded state and local government employees.[63] Originally, Congress had exempted state and local government employees from the Act's prohibitions due to concerns of infringing states' rights.[64] However, Congress also wished to "prevent federal money from funding coercive activities at [the state and local levels]."[65] To balance these interests, the 1940 Amendments were passed to withhold federal funds from states that failed to remove employees who were found in violation of the Act.[66]

57. *See* Myers, *supra* note 35, at 36.

58. *See id.*

59. Act to Prevent Pernicious Political Activities, Pub. L. No. 76-252, 53 Stat. 1147, 1148 § 9(a) (1939).

60. *See* Eberhard, *supra* note 36, at 157; William Hibsher, *Assault on Hatch Act Signals Political Activity for Government Workers*, 47 ST. JOHN'S L. REV. 509, 511 n.13, 513 (1973).

61. *See* Myers, *supra* note 35, at 66-67.

62. *See id.* at 67.

63. Scott J. Bloch, *The Judgement of History: Faction, Political Machines, and the Hatch Act*, 7 J. BUS. L. 225, 233 (2005); Eberhard, *supra* note 36, at 153 n.3.

64. Bloch, *supra* note 63, at 233; *see* Myers, *supra* note 35, at 50.

65. Bloch, *supra* note 63, at 233.

66. *See id.*

C. THE EASING OF FEDERAL RESTRICTIONS OVER TIME

Over the years, the Act has been amended numerous times. With each amendment, the prohibitions have become less restrictive. For example, in 1950, the Act no longer required that federally funded state and local government entities permanently remove employees found in violation of the Act.[67] Instead, the modified statute imposed only a ninety-day suspension from service, which was further reduced to a thirty-day suspension by a subsequent amendment in 1962.[68] In 1974, the Act was amended so that covered civil servants could again "(1) serve as officers of political parties; (2) solicit votes and funds for partisan candidates; (3) and participate in and manage political campaigns . . . ," as long as they did so in their personal capacities, outside the scope of their "official authority or influence."[69]

Then, in 1993, Congress passed another round of amendments to the Act.[70] These amendments drew a distinction between a "further restricted" class of employees, to whom more strict prohibitions continue to apply, and "less restricted" employees, to whom a more liberalized standard would apply.[71] Further restricted positions are those that are so sensitive to the appearance of impartiality that employees who accept those positions must take extra precautions when speaking out in a partisan manner, even in their capacities as private citizens.[72] Examples of such positions include administrative law judges, employees of the FBI, and members of the Federal Election Commission.[73] The most notable difference between prohibitions on less and further restricted positions is that less restricted employees may actively campaign for or against partisan candidates.[74] This includes making public speeches and

67. *See id.* at 234.

68. *Id.*

69. *Id.*

70. Hatch Act Reform Amendments of 1993, H.R. 20, 103rd Cong. (1993).

71. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022).

72. *See id.*

73. *See id.* (contains an exhaustive list of "Further Restricted Employees").

74. *See id*.

distributing campaign literature.[75] Further restricted employees, on the other hand, may only "participate in campaigns where none of the candidates represent a political party."[76]

II. THE LAW AS IT EXISTS TODAY

Within the last decade, Congress passed the Hatch Act Modernization Act of 2012.[77] This Act reduced penalties for Hatch Act violations, but most notably, it also reduced the scope of coverage applied to state and local governments.[78] Under the new amendments, the Hatch Act only prohibits state and local government employees from running for office as partisan candidates if 100% of their salary comes from federal funding.[79] Because there are numerous funding sources available to state and local governments, it is easy for states to partially fund virtually every employment position so that at least some of their funding comes from other sources, even if those positions are still mostly federally funded. Today, the Hatch Act is the standard by which prohibited political activities are measured, both on the federal level and in most states.[80]

A. CURRENT RESTRICTIONS ENACTED BY OTHER STATES

The Hatch Act prohibits certain political activities by federal employees while they are acting in their official capacities, on the clock, in uniform, or in public vehicles.[81] However, the political

75. *Id.*

76. *Id.*

77. Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, Stat. 2170.

78. *See id.*; Zachary G. Parks, *Hatch Act Modernization Act Loosens Ethical Restrictions*, INSIDE POL. L. (Jan. 3, 2013), https://www.insidepoliticallaw.com/2013/01/03/hatch-act-modernization-act-loosens-ethical-restrictions.

79. *See* Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, Stat. 2170 (amends 5 U.S.C. § 1502(a)(3) to prohibit public employees from being candidates for elective office only "if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency, be a candidate for elective office.").

80. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each State).

81. *Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last

activity of civil servants acting outside the scope of their employment, in their capacities as private citizens, is minimally regulated.[82] Congress also extended the same provisions to state and local governments,[83] from which loan and grant monies may be withheld upon the finding of a violation.[84] To comply with the mandates set forth in the Act and ensure federal funding is not jeopardized, many states, including Louisiana, have enacted legislation to codify prohibitions on the political activity of state civil service employees.[85] In many states, this legislation is little more than a restatement of the prohibitions defined in the federal Hatch Act itself.[86] Some states, however, take a more liberal approach to ensure that the rights of their employees are protected. For example, Alabama passed legislation explicitly providing that "[n]o person . . . whether classified or unclassified, shall be denied the right to participate in . . . political activities to

visited Feb. 7, 2022).

82. *Id.* (most "off the clock" activities are unregulated, such as contributing money to political campaigns, attending political fundraising functions and political rallies, and campaigning for or against candidates in partisan elections. However, there are a few activities that are prohibited, even on the employee's personal time, such as running for partisan political office, and soliciting donations for a partisan political party or candidate).

83. 15 U.S.C. § 1502.

84. *Id.* § 1506.

85. *50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx

86. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx; *see e.g.*, CONN. GEN. STAT. § 5-266a (2022) (A Connecticut state employee may not "use his official authority . . . for . . . interfering with . . . the result of an election . . . or directly or indirectly coerce . . . a state or local officer or employee to pay . . . anything of value . . . for political purposes." However, he is permitted to "express his opinions on political subjects and candidates and shall be free to participate actively in political management and campaigns. Such activity may include but shall not be limited to, membership and holding of office in a political party, . . . campaigning for a candidate in a partisan election by making speeches, writing on behalf of the candidate or soliciting votes in support of or in opposition to a candidate and making contributions of time and money to political parties, committees or other agencies engaged in political action, except that no such employee shall engage in such activity while on duty . . . ."); MO. REV. STAT. § 36.155 (2020) (A Missouri state employee may not use his "official authority or influence for the purpose of interfering with the results of an election," "solicit, accept or receive a political contribution from any person who is a subordinate employee," or "[r]un . . . as a candidate for election, to a partisan political office.").

the same extent as any other citizen . . . including endorsing candidates and contributing to campaigns . . . ."[87] Furthermore, civil servants in Alabama are permitted to run as partisan candidates for political office by merely taking a leave of absence from their employment duties.[88] This leave can take many forms, including unpaid leave, use of accrued overtime leave, or use of accrued vacation time.[89] Most states, such as Alabama, have found various ways of striking a harmonious balance between the requirements of the Act and the need to run the government efficiently, on the one hand, and the constitutionally protected free speech rights of their employees and the right of the populace to be well informed, on the other.[90] However, Louisiana takes a far more restrictive approach to these prohibitions.

B. THE LEGISLATIVE BASIS FOR RESTRICTIONS IN LOUISIANA

Since the passage of the Hatch Act, Louisiana has legislatively enacted several prohibitions on the political activity of state and local civil service employees. At the heart of Louisiana's administrative rules defining these prohibitions is Article X of Louisiana's constitution.[91] This Article broadly defines political activity as any "effort to support or oppose the election of a candidate for political office or to support a particular political party in an election," and prohibits such activities for employees in the classified service.[92] Curiously, State Civil Service hangs its hat on this provision of the constitution[93] even though the article specifically carves out an exception that allows an employee to "exercise his right as a citizen to express his opinion privately[.]"[94] In addition, the state

87. ALA. CODE § 17-1-4 (2006).

88. *Id.* § 17-1-4(b).

89. *Id.*

90. *See 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetable staffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each State).

91. *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 1, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; LA. CONST. art. X, §§ 9, 47.

92. LA. CONST. art. X, §§ 9, 47.

93. *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 1, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

94. LA. CONST. art. X, §§ 9, 47.

legislature has passed additional statutes that prohibit state civil servants from participating in political activity while acting in their "official capacity"[95]—clearly evincing an intent to distinguish civil servants' activities within the scope of their employment from those outside the workplace. Nonetheless, State Civil Service has chosen to look primarily to the broad, ambiguous language of Article X to define and regulate the political activities of public employees acting in their capacities as private persons—despite the exception for private political expression.[96] The only explanation can be that State Civil Service has defined "privately" to mean "in private" rather than "in one's capacity as a private individual." This is not how the federal government and other states have interpreted the very similar language that they have each adopted.[97]

C. LOUISIANA STATE CIVIL SERVICE INTERPRETATIONS

SCS has interpreted the state constitution and promulgated Rules 14.1(e), (f), and (g) governing the political activities of classified state employees. These rules strictly prohibit a very broad range of political activities.[98] A general circular is posted annually, describing the activities in which state employees are prohibited from participating and the punishments for violations of those prohibitions.[99] SCS publications warn employees of the

95. *See* LA. STAT. ANN. § 24:56(F); *see, e.g.*, *id.* § 18:1465.

96. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf; LA. CONST. art. X, §§ 9, 47.

97. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each State).

98. *Chapter 14: Prohibited Activities*, LA. ST. CIV. SERV., https://www.civilservice.louisiana.gov/CSRules/Chapter14.aspx (last visited Feb. 7, 2022).

99. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/

corrective actions to which these violations subject them, which range from the issuance of a letter of admonishment to hailing them before the Commission for a public hearing.[100] The result of these hearings can include significant penalties and disciplinary action up to and including termination of employment.[101]

Especially during election years, the agency issues additional guidance to ensure employees understand the restrictions placed upon them.[102] Some of these prohibitions are what one may expect from a state that wishes to take no chances with the possibility of losing federal funding. These include prohibitions on becoming a candidate for any elected office and prohibitions on campaigning for candidates within the civil servant's scope of employment.[103] Other prohibitions, however, are so restrictive and present such a broad reading of the state constitution that their legality is highly questionable.[104] These include prohibitions, effective outside the scope of employment, on displaying any message supporting a political candidate, such as a campaign sign in the employee's yard, a bumper sticker on the employee's car, or even wearing a T-shirt or campaign pin.[105] These prohibitions are so strict that employees may not even "like" or "follow" a party or a candidate for political office on their

GC2019-028.pdf.

100. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf.

101. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf.

102. *See, e.g.*, *Prohibited Political Activity Infographic*, GENERAL CIRCULAR NUMBER 2019-035 (St. Civ. Serv., Baton Rouge, La.), Sept. 25, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-035.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2015-037 (St. Civ. Serv., Baton Rouge, La.), July 15, 2015, at 1, https://www.civilservice.louisiana.gov/files/general_circulars/2015/GC2015-027.pdf.

103. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

104. *See infra* Part III.B.

105. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

personal Facebook or Twitter accounts, much less "share" any posts with political themes.[106] Most objective observers would likely consider much of this to be a gross overreach by the state.

III. THE NEED FOR CHANGE

There are several reasons why Louisiana should loosen its prohibitions on the political activity of public employees. The most obvious reasons are those of public policy. It should be apparent to the casual observer that these prohibitions not only infringe on public employees' freedom of expression, but also deny the public the opportunity to hear the valuable insights of those inside the political machine. Perhaps more compelling, however, is that there are several legal challenges that have been brought against other governmental entities that enacted restrictions that similarly exceeded those set forth under the Hatch Act, and courts have generally found those restrictions to be unconstitutional.[107] Because Louisiana's prohibitions are similar to those that the courts have held to be in violation of public employees' protected freedom of expression, they are on constitutionally shaky ground.

A. THE POLICY PERSPECTIVE FOR RELAXING PROHIBITIONS

As illustrated by the passage of the Hatch Act amendments discussed earlier, there has been a nationwide trend toward easing restrictions on political activity for public employees.[108] The original prohibitions were a reaction to an immediate need, triggered by corruption in a newly created federal agency during the New Deal era.[109] The new agencies of that era wielded far more power than federal agencies of the past had, and corruption within them was thus of greater concern.[110] However, as with the initial iteration of many new legislative restrictions, there were

106. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf.

107. *See, e.g.*, Bode v. Kenner City, 303 F. Supp. 3d 484, (E.D. La. 2018); Goodman v. City of Kansas City, 906 F. Supp. 537 (W.D. Mo. 1995).

108. *See* discussion *supra* Part I.C.

109. *See* Myers, *supra* note 35, at 36, 41-42.

110. *See id.*

unintended consequences that needed to be refined over time. The Hatch Act was passed over eighty years ago, and since that time, Congress has repeatedly amended the Act, each time striking a better balance between the needs of the government and the needs of its employees and the public at large.[111] However, Louisiana has failed to keep up with the changes occurring in the rest of the nation. Our state prevents a substantial portion of its populace from fully participating in the democratic process. This has significant repercussions in two areas of concern: (1) the harm experienced by employees who have been deprived of their constitutional right to participate in the political process, and (2) the harm experienced by a public who has been deprived of the unique perspectives of those with knowledge of the inner workings of the government.

The first issue of concern is the harm experienced by employees who have been deprived of their constitutional right to participate in the political process. Louisiana unnecessarily restricts the constitutionally protected speech of over five percent of the state's population.[112] This is a large number of people whose protected freedoms are infringed. Some may believe this is an acceptable tradeoff for people who accept public employment because public employment provides other benefits.[113] However, rank-and-file state and local employees, compared to their private-sector counterparts, earn notably less income.[114] Additionally, due to the substantial cutbacks to Louisiana public employees' insurance and retirement systems, as well as the nearly decade-long pay freeze that affected most state employees during and shortly after the Jindal Administration, these benefits are no longer attractive enough to outweigh the pay discrepancy between public and private sector employment.[115] In other words,

111. *See* discussion *supra* Part I.C.

112. *See Louisiana Population 2022,* WORLD POPULATION REV., https://worldpopulationreview.com/states/louisiana-population (last visited Feb. 7, 2022).

113. *See* Kellie Lunney, *Government Employees: Working Hard, or Hardly Working?*, GOV'T EXEC. (Oct. 11, 2012), https://www.govexec.com/pay-benefits/2012/10/government-employees-working-hard-or-hardly-working/58694.

114. *See* BYRON P. DECOTEAU, JR. & BRANDY MALATESTA, LA. ST. CIV. SERV., 2019 ANNUAL UNIFORM PAY PLAN REVIEW 6 (2019), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2018-2019%20Annual%20Pay%20Plan%20Report.pdf ("[A]ll six classified pay schedule midpoints lag private sector medians, on average, by 7.5% to 18.7%.").

115. *See, e.g.*, *States scaling back worker pensions to save money*, THE OAKLAND PRESS, (June 17, 2021, 9:19 AM), https://www.theoaklandpress.com/news/states-

there are no benefits that public employees enjoy by virtue of their employment with the state that justifies or adequately compensates them for this deprivation of their liberties. Furthermore, even if Louisiana state employees did enjoy such benefits, courts have held that "[i]ndividuals do not automatically relinquish their First Amendment rights by accepting government employment."[116]

The deprivation of employees' freedom of expression can also

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scaling-back-worker-pensions-to-save-money/article_9811f634-fdb1-59e8-a4e7-86f230fe2ddb.html; *see also Member's Guide to Retirement* (La. St. Emp. Ret. Sys.), Oct. 2021, at https://lasersonline.org/wp-content/uploads/2021/09/MembersGuide2Retirement_Full_web1021.pdf (illustrating increases in retirement contribution rates); *id.* at 21 (illustrating changes in retirement eligibility, removing the option to retire after 30 years of service and mandating an age requirement of 60 years for employees hired after July 1, 2006, and 62 years for those hired after July 1, 2015. This changed the prior eligibility requirement that would have allowed an eighteen-year-old hired prior to July 1, 2006 to retire by age 48); *id.* at 22 (illustrating changes in final average compensation (FAC) from a three-year average before July 1, 2006, to a five-year average after that date. After the pay freezes and the changes to the regular 4% merit increases during the Jindal and Edwards administrations, employees are less likely to reach the maximum level on the pay scale outlined in their position descriptions by retirement. This, along with the longer five-year calculation period, results in a lower FAC. Because the formula to calculate the employee's retirement payment is a factor of 2.5% per year of service multiplied by the FAC, this means most employees hired after July 1, 2006 will not only pay a higher contribution rate, but they will receive a lower retirement benefit); *Compare* 2009-2010 *Medical Benefits Comparison*, (La. Off. Grp. Benefits), https://www.groupbenefits.org/ogb-images/docs/2009_10premiums_active.pdf, *with 2022 Active Employees and Non-Medicare Retirees Benefits Comparison* (La. Off. Grp. Benefits), https://info.groupbenefits.org/docs/OGBforms/BenefitComparison/2022/ActiveNonMedicareBCOnorAfter03012015.pdf (illustrating differences in benefits between plans before the OGB cuts and today. Similar popular plans included the OGB HMO plan in 2009-10, and the Magnolia Local Plus plan in 2022. Notable differences include the lack of a deductible under the old plan, and a $400 per person (max $1200) deductible under the current plan; primary care copays of $15 and specialist copays of $25 under the old plan, increased to $25 and $50 respectively under the current plan; out-of-pocket maximums of $1,000 per individual and $3,000 per family under the old plan have increased to $3,500 and $8,500 respectively.); *Compare Official Schedule of Rates*, Effective July 1, 2009 (La. Off. Grp. Benefits), https://www.groupbenefits.org/ogb-images/docs/2009_10premiums.pdf, *with Official Schedule of Monthly Premium Rates*, Effective Jan. 1, 2022 (La. Off. Grp. Benefits), https://info.groupbenefits.org/docs/OGBforms/PremiumRates/2022/Jan2022OGBHealthInsuranceRates75percent.pdf (illustrating that despite the reduction in benefits provided across similar plans, the employee share of the premium rates nonetheless have increased during the intervening years, from $139.66 for a single employee and $486.04 for family coverage under the 2009-10 OGB HMO plan, to $196.44 and $683.62 respectively under the similar 2022 Magnolia Local Plus plan.).

116. *See, e.g.*, Goodman v. City of Kansas City, 906 F. Supp. 537, 541 (W.D. Mo. 1995) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967)).

negatively impact the workplace environment, as was shown by the author's own experience. In the private sector, an employee can bring their concerns to their manager's administrator or to their CEO's board of directors. Whoever has the ultimate decision-making authority can be notified of issues within the company so that they may choose the best path forward. But for those who work under an elected official, there is no higher authority within the organization: it is the voting public who are the ultimate decision-making authority. The public is analogous to a large board of directors who vote to choose the government's CEO and other officers to run it. When voters are deprived of inside information about the performance of the government, known only by those who work within that government, they are ill equipped to choose the best path forward. The inability to speak out on issues that are caused by poor leadership has a major impact on job satisfaction and employee retention—the consequences of which can be felt for years afterward. This, in turn, can lead to reduced performance by disgruntled employees and reduced competency by a less experienced workforce resulting from a high turnover rate, as Louisiana has seen in recent years.[117]

This impact on government performance leads to the second issue of concern. By preventing public employees from expressing their opinions and concerns about the politicians who are on the ballot to become the leaders of this state, it causes harm to the public by depriving them of the first-hand knowledge and unique perspectives of those who work within the system. If the state suffers due to incompetent leadership, the employees are prohibited from speaking out against the current administration or in favor of a new administration to replace them.[118] If the employees know of or suspect corruption, there are internal

117. *Compare* BYRON P. DECOTEAU, JR., LA. ST. CIV. SERV., STATE OF LOUISIANA REPORT ON TURNOVER RATES FOR NON-TEMPORARY CLASSIFIED EMPLOYEES: FISCAL YEAR 2020-2021 4 (2021), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2020-2021%20Act%20879%20Turnover%20Rate%20Report.pdf, *with* LA. ST. CIV. SERV., REPORT ON TURNOVER RATES FOR NON-TEMPORARY CLASSIFIED EMPLOYEES FISCAL YEAR 2012/13 4 (2013), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2012-2013%20Act%20879%20Turnover%20Rate%20Report.pdf.

118. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 3, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

avenues to report such malfeasance,[119] but unless an official investigation is opened, the public is unlikely to learn about it. The employees who know about the alleged corruption are prohibited from speaking out because such speech could be considered opposition to the re-election of the official involved.[120] Furthermore, in other scenarios, it is not the elected officials themselves who are corrupt or incompetent, but rather it is the heads of the agencies, whom they appoint. Any comments made against these individuals or their actions could also be construed as having a political motive, creating a great disincentive for public employees to speak out for fear of retribution in the form of disciplinary action that may very well cost them their jobs. For government employees, who have paid into a public retirement system for fifteen or twenty years instead of paying into Social Security, the fear of losing their job and much of their anticipated retirement as a result of speaking out is very real. Therefore, the speech of an entire class of citizens, those with perhaps some of the most politically important speech available to the public, has been chilled.

These policy-based reasons for updating Louisiana's prohibition on political activity are compelling, but are they enough to convince the state to change the status quo? They may not have to be. The State of Louisiana is not the only government entity that has enacted such harsh restrictions on the free speech of its employees. In several instances, employees of other government entities have argued that this infringement upon their constitutionally protected rights was impermissible, and courts have agreed.

B. THE LEGAL BASIS FOR RELAXING PROHIBITIONS

The courts usually uphold prohibitions on the political activity of public servants as good public policy when the challenged restrictions are those set forth under the Hatch Act or under substantially similar state statutes.[121] But when

119. *See Complaint Process*, OFF. OF ST. INSPECTOR GEN., https://oig.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&nid=3&pnid=0&pid=4&catid=0 (last visited Mar. 27, 2022).

120. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 3, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

121. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

government entities cross the line from prohibitions within the scope of employment to infringement on their employees' freedom of expression within the context of their private lives, the courts have not shied away from finding restrictions similar to those in Louisiana to be unconstitutional.[122] But how do the courts determine whether the public employee's First Amendment rights have been violated? The answer to this question will depend on the form of the challenge brought by the plaintiffs and the test that the court chooses to apply.[123] Those seeking to challenge Louisiana's restrictions on the speech of public employees could argue that these restrictions fail the *Pickering* balancing test for restrictions on the speech of public employees,[124] fail the strict scrutiny to which they may be subject as content-based restrictions,[125] or are vague or overbroad.[126]

1. THE *PICKERING* BALANCING TEST CHALLENGE

In *Pickering v. Board of Education of Township Highschool District 205, Will County, Illinois*, the U.S. Supreme Court established a balancing test for determining whether restrictions on public employees' speech violate the First Amendment.[127] As the Court later explained, "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."[128] Nonetheless, "government employees do not surrender their constitutional rights to speak on matters of public concern simply because they are employed by the government."[129] Thus, any restraints on the

122. *See, e.g.*, Goodman v. City of Kansas City, 906 F. Supp. 537 (W.D. Mo. 1995); Bode v. Kenner City, 303 F. Supp. 3d 484 (E.D. La. 2018).

123. *See generally* Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992); Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784 (2007); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018).

124. *See*, *e.g.*, *Goodman*, 906 F. Supp. at 541.

125. *See*, *e.g.*, *Bode*, 303 F. Supp. 3d at 498.

126. *See*, *e.g.*, *id.* at 505; Christopher A. Pierce, *The "Strong Medicine" of the Overbreadth Doctrine: When Statutory Exceptions Are No More than a Placebo*, 64 FED. COMM. L.J., 177, 196 (2011) (explaining how the overbreadth doctrine can provide the court with a "convenient remedy to invalidate [a] statute" without addressing the compelling government interest element under strict scrutiny review).

127. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

128. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995).

129. Davis v. Allen Par. Serv. Dist., 210 F. App'x 404, 409 (5th Cir. 2006) (citing Connick v. Myers, 461 U.S. 138, 146 (1983)).

speech of public employees must satisfy the *Pickering* test to avoid violating the First Amendment."[130]

The *Pickering* test is a two-part analysis, consisting of a threshold determination and a balancing prong.[131] The threshold determination explores whether the employee spoke "as a citizen upon matters of public concern" or "as an employee upon matters only of personal interest."[132] Courts will consider speech to "address a matter of public concern when it can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'"[133] The government employer will prevail if the employee's speech is characterized as a matter of personal interest, such as a change in the employee's own duties.[134] However, if the employee's speech meets the threshold question and is related to matters of public concern, the court moves on to the second prong of the analysis where "the government bears the burden of justifying its adverse employment action."[135] Here, the Court will balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[136]

Prior to the 1990's, most cases applying the *Pickering* test had performed post hoc analyses of situations in which individual employees had already violated a government prohibition on political activity, and then individual disciplinary action had been taken against those employees.[137] But in 1995, the Court heard *United States v. National Treasury Employees Union* ("*NTEU*"), in which the Court considered the question of whether the *Pickering* test would apply prospectively to a prohibition that constituted a "wholesale deterrent to a broad category of

130. *Pickering*, 391 U.S. at 568.

131. David L. Hudson Jr., *Pickering Connick test*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1608/pickering-connick-test (last visited Feb. 6, 2022).

132. *Nat'l Treasury Emps. Union*, 513 U.S. at 466 (quoting *Connick*, 461 U.S. at 147).

133. Watters v. City of Phila., 55 F.3d 886, 892 (1995) (quoting *Connick*, 461 U.S. at 146).

134. *Nat'l Treasury Emps. Union*, 513 U.S. at 466.

135. *Id.*

136. *Pickering*, 391 U.S. at 568.

137. *Nat'l Treasury Emps. Union*, 513 U.S at 466-67 (collecting cases).

expression by a massive number of potential speakers."[138] In such cases, the Court held that the government can prevail on the balancing prong only by showing that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[139] In her concurrence, Justice O'Connor explained that "[a]s the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification."[140] Under these standards, government entities face a much higher burden than under the original *Pickering* test when they impose sweeping restrictions with the potential to "chill[] potential speech before it happens."[141]

While the Fifth Circuit has acknowledged *NTEU*'s "modified version of the *Pickering* analysis . . . for evaluating prospective government restrictions on employee speech,"[142] the circuit court has not had occasion to conduct an in-depth *NTEU* analysis. However, shortly after the *NTEU* decision was announced, a district court in Missouri provided one example of its application.[143] In *Goodman v. City of Kansas City*, the court used the *Pickering* balancing test as modified by *NTEU* when a city employee brought a declaratory action seeking an injunction against allegedly unconstitutional restrictions[144] that were beyond the scope of the Hatch Act and very similar to those imposed by the State of Louisiana. These included prohibitions on the displaying of political bumper stickers on the employee's personal vehicle, posting political signs in the employee's yard, and attending political fundraisers, rallies, and other gatherings.[145]

First, the court held that the *Pickering* test's threshold inquiry was satisfied, as "the public expression of City employees' views regarding City elections . . . clearly involves 'matters of

138. *Id.*

139. *Id.* at 468.

140. *Id.* at 483 (O'Connor, J., concurring).

141. *Id.* at 468 (majority opinion).

142. Fairchild v. Liberty Indep. Sch. Dist., No. 1:06-CV-92-TH, 2008 WL 11446526, at *14 (E.D. Tex. Feb. 11, 2008) (citing United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465-68 (1995)).

143. *See* Goodman v. City of Kansas City, 906 F. Supp. 537, 539 (W.D. Mo. 1995).

144. *See id.* at 541.

145. *Id.* at 539.

public concern.'"[146] Thus, the court proceeded to the balancing prong.[147] The City asserted an interest in "ensur[ing] a '[c]ity government that operates, and appears to [sic] to the public to operate, on an apolitical basis" and "prevent[ing] the rise of another period of political corruption like the Pendergast era."[148] The plaintiffs, on the other hand, defended "the important right of City employees to express themselves on issues and candidates in City elections . . ."[149] The court echoed the reasoning set forth under *NTEU*, considering the massive number of potential speakers impacted by the restrictions[150] and noting that "government employees are in a position to offer the public important insights both into the workings of government generally and into their areas of specialization."[151] Furthermore, the court relied on *NTEU* for the proposition that "in order to justify restrictions on employee speech, the government must demonstrate that the threatened harms from employee speech are real and that the regulations will, in fact, alleviate these harms."[152] Finding that the City had failed to present any evidence to demonstrate that the harms it sought to mitigate were "real and not merely conjectural," the court granted summary judgment in favor of the plaintiffs and issued a permanent injunction against the City's prohibitions.[153]

If challenged under the *NTEU*-modified *Pickering* test, many of Louisiana's restrictions would likely share a similar fate. Without question, these restrictions silence speech related to matters of public concern, satisfying the threshold inquiry. The State would likely assert interests similar to those of the defendant in *Goodman*: ensuring the appearance of apolitical public services and preventing corruption. However, the State could prevail only by showing that the forms of expression that it prohibits have a "necessary impact on the actual operation of the Government" that outweighs the interests of both public employees to engage in political expression and the citizens of

146. *Id.* at 541.
147. *Id.* at 542.
148. *Id.*
149. *Id.* at 544.
150. *Id.* at 541-42 (citing *Nat'l Treasury Emps. Union*, 513 U.S. at 467).
151. *Id.* at 542 (citations omitted).
152. *Id.* at 543 (citing *Nat'l Treasury Emps. Union*, 513 U.S. at 475).
153. *Id.* at 544.

Louisiana to hear what they have to say.[154] Keeping in mind that the State could not rely on mere conjecture,[155] it is highly unlikely that it could satisfy this burden with respect to many of the currently prohibited forms of political expression, such as the wearing of partisan buttons or T-shirts while not at work.

2. THE STRICT SCRUTINY CHALLENGE

However, given the scope of Louisiana's prohibitions, it is possible that a court would circumvent the *Pickering* analysis entirely and simply subject the prohibitions to a strict scrutiny approach as content-based restrictions on speech.[156] Indeed, the *Pickering* opinion itself allows for this possibility. Citing *Pickering*, the Fifth Circuit explained that "where the political activities of a public employee are unrelated to the performance of his duties he is to be treated for purposes of adjudicating his First Amendment rights as a 'member of the general public.'"[157] It is well-settled that—outside of a few narrow exceptions[158]—a content-based restriction applied to the general public is subject to strict scrutiny, regardless of the legislative motives that drive it.[159] In determining whether restrictions abridging free speech are content-based or content-neutral, courts look to whether the restriction applies to "particular speech because of the topic discussed or the idea or message expressed."[160] Importantly, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[161]

When a restriction targets the content of a message, courts will apply strict scrutiny and the restrictions are presumptively unconstitutional.[162] When a law is reviewed under strict

154. *Nat'l Treasury Emps. Union*, 513 U.S. at 468.

155. *Id.* at 475.

156. *See, e.g.*, *Bode*, 303 F. Supp. 3d at 498.

157. Hobbs v. Thompson, 448 F.2d 456, 475 (5th Cir. 1971) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 572-73 (1968)).

158. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47, 47 n.2 (1987) (through a series of cases, the Supreme Court has defined examples of speech with low First Amendment value to include express incitement, obscenity, false statements of fact, commercial advertising, fighting words, and child pornography).

159. Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015).

160. *Id.* at 163.

161. *Id.* at 169.

162. *Id.* at 163.

scrutiny, the government carries the burden of proof to show that it is "narrowly tailored to serve compelling state interests."[163] To survive strict scrutiny, the challenged law must not be overinclusive, burdening speech that need not be burdened to advance its asserted purpose,[164] or underinclusive, failing to burden speech that would need to be burdened to achieve its asserted purpose.[165] Furthermore, a law is not narrowly tailored in the strict scrutiny context when a less restrictive alternative is readily available to achieve the same purpose.[166] It is no surprise, then, that the Supreme Court "has invalidated almost every content-based restriction that it has considered in the past thirty years," aside from those that fit within its narrow exceptions.[167] This fact, in turn, explains why legal scholars often refer to strict scrutiny as "strict in theory, fatal in fact"[168] due to the infrequency with which a challenged government action is upheld under its use.[169] Such a characterization is especially accurate in free speech cases[170] and in cases brought against state and local governments,[171] both of which apply to Louisiana's prohibitions.

In 2018, a federal court situated in Louisiana applied strict scrutiny in a challenge to the City of Kenner's prohibition on the political expression of government employees.[172] In *Bode v. Kenner City*, the City of Kenner ("the City") enacted restrictions on non-elected city employees prohibiting "participat[ion] in any political activity on behalf of any city candidate in City of Kenner elections."[173] As to the question of whether the government restrictions were subject to strict scrutiny, the City did not

163. *Id.*

164. *See* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 121 (1991).

165. *See* Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

166. Boos v. Barry, 485 U.S. 312, 329 (1988).

167. *See* Stone, *supra* note 158, at 48.

168. Kathleen Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002) (internal quotations omitted).

169. Sullivan, *supra* note 123, at 296.

170. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 845 (2006) ("[S]trict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent lower than in any other right.").

171. *See id.* at 855-56 (only 21% of state laws are upheld that undergo a strict scrutiny analysis).

172. *Bode*, 303 F. Supp. 3d at 498.

173. *Id.* at 488.

dispute that the prohibitions on its employees' political expression constituted content-based regulation.[174] Thus, for the reasons discussed in *Reed*, the court found the restrictions were subject to strict scrutiny.[175]

Under a strict scrutiny review, the City was then required to prove its restrictions were "narrowly tailored to serve a compelling interest."[176] Because the employees did not dispute that the City had a compelling governmental interest in ensuring a nonpartisan employee workforce,[177] the primary question was whether the restrictions were "narrowly tailored to serve that interest."[178] To answer this question, the court "assume[d] that certain protected speech may be regulated, and then ask[ed] what is the least restrictive alternative that can be used to achieve that goal."[179] This, in turn, required the court to analyze "whether the challenged regulation [was] the least restrictive means among available, effective alternatives."[180] On this question, the City was unable to meet its burden.[181]

While the court had many reasons for finding that the City's restrictions were not narrowly tailored,[182] the court's finding that the restrictions were not the least restrictive alternative[183] is particularly relevant. The plaintiffs "assert[ed] that there [were] a number of less restrictive alternative measures that the City could [have] adopt[ed] to accomplish its compelling interests, such as a law similar to the Federal Hatch Act or the Dallas Charter approved by the Fifth Circuit in *Wachsman v. City of Dallas*."[184] Plaintiffs also proposed the alternative of "only restricting political activities during working hours."[185] The court rejected the City's argument that these less restrictive alternatives would be inadequate.[186] It noted that in *Wachsman v. City of Dallas*,[187]

174. *Id.* at 498.
175. *Id.* at 498 n.139.
176. *Id.* at 498 (internal quotations omitted).
177. *Id.*
178. *Id.*
179. *Id.* (citing Ashcroft v. Am. C. L. Union, 542 U.S. 656, 666 (2004)).
180. *Id.*
181. *Id.* at 501.
182. *Id.* at 498-502.
183. *Id.* at 499.
184. *Id.* at 498-99.
185. *Id.* at 499.
186. *Id.* at 498-99.

the Fifth Circuit had approved the Dallas Charter, which allowed for the displaying of yard signs and bumper stickers.[188] It also took note of the Federal Hatch Act, which "allows federal employees to attend rallies, donate money, and express opinions, as long as they are not wearing a government uniform or identifying themselves as federal employees"[189]—all activities that were implicitly prohibited under the City's broad prohibition of "all political activity."[190] Finding that the City had presented no evidence that restrictions mirroring those of the Dallas Charter or the Hatch Act would be less effective, the court held that the City's prohibitions were not the least restrictive means to accomplish its purpose and thus were not narrowly tailored.[191]

A court would also be likely to find that the State of Louisiana's restrictions on the political speech of public employees fail strict scrutiny because less restrictive alternatives are available. There can be little question that Louisiana's restrictions prohibit public discussion of an entire topic by an entire group of people and would thus be classified as content-based—and would be subject to strict scrutiny. In addition, like the City of Kenner, the State of Louisiana has prohibited innocuous acts of political expression such as the wearing of pins, display of yard signs, or placement of bumpers stickers that support a candidate or a political party—even while off duty.[192] Because these restrictions exceed those of the Hatch Act and the Dallas Charter, the State would bear the burden of proving that any lesser restriction would be ineffective.[193] The State would be unlikely to meet that burden because less restrictive regimes have proven effective at the federal level and in other states and localities.[194] Therefore, a court would likely find that Louisiana's prohibitions fail strict scrutiny because less restrictive alternatives are available.

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187. *Id.*

188. *Id.* at 499.

189. *Id.* at 499, 502 n.169.

190. *Id.* at 501.

191. *Id.* at 502.

192. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 2, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

193. *See Bode*, 303 F. Supp. 3d at 502.

194. *See id.*

3. THE VAGUENESS AND OVERBREADTH CHALLENGES

Finally, Louisiana public employees could also challenge the state's restrictions based on vagueness or overbreadth. A statute is unconstitutionally vague when it "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[195] A statute is unconstitutionally overbroad when it "reaches a substantial amount of constitutionally protected conduct."[196] When a statute is found to be facially vague or overbroad, it is void regardless of whether it has actually been applied to the particular plaintiff in an unconstitutional manner.[197]

In *Broadrick v. Oklahoma*, three public employees challenged restrictions by the State of Oklahoma as vague and overbroad because they "restrict[ed] the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees."[198] The court held that that the challenged restrictions were not impermissibly vague, noting that it had upheld the Hatch Act in the face of similar challenges.[199] Similarly, the court held that the restrictions in question, which mirrored those of the Hatch Act—such as soliciting contributions for political organizations, becoming a candidate for a paid public office, or taking part in the management of a political party or campaign—were not overbroad.[200] Importantly, however, the court stated that an employee may nonetheless "exercise his right as a citizen privately to express his opinion," and noted that "[t]he State Personnel Board . . . has construed [the statute's] explicit approval of 'private' political expression to include virtually any expression not within the context of active partisan political campaigning . . ."[201] The court went on to suggest in dicta that had the prohibition of activities included those such as "the

195. Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 761 (5th Cir. 2010) (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)).

196. *Fairchild*, 597 F.3d at 755 (quoting Hoffman Ests. v. Flipside, Hoffman Ests., 455 U.S. 489, 494 (1982)).

197. *See Broadrick*, 413 U.S. at 606.

198. *Id.* at 602.

199. *Id.* at 607 (citing U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973)).

200. *Id.* at 616-19.

201. *Id.* at 617.

wearing of political buttons or the use of bumper stickers," such prohibitions may have been found impermissible.[202]

In *Bode v. Kenner City*, the plaintiffs also brought vagueness and overbreadth challenges—and here, they prevailed.[203] First, the court noted that the prohibition on "*any* political activity on behalf of any city candidate in the City of Kenner elections"[204] was indeed constitutionally vague because this "undefined term[]" was "so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application."[205] Next, to review the question of overbreadth, the court relied on the federal Fifth Circuit case *Hobbs v. Thompson*.[206] In that case, the Fifth Circuit held that a prohibition on fire department employees from "taking an active part in any election, contributing money to any candidate, or 'prominently identifying themselves in a political race with or against any candidate for office' was overbroad."[207] Most notably, the *Hobbs* court opined that "[t]he very fact that the scheme has been construed to forbid political bumper stickers—a particularly innocuous form of political activity—points out clearly the broadside nature of the . . . prohibitory regulations."[208] Based on this controlling jurisprudence from the Fifth Circuit, the *Bode* court found that the City's prohibitions restricted a "substantial amount of protected political expression that is either unrelated to or attenuated from the City's goals and the Plaintiffs' employment duties," and was therefore unconstitutionally overbroad.[209]

It is likely that some of Louisiana's regulations could also be challenged as overbroad, but not necessarily as vague. Although the argument could be made that the Louisiana State Constitution's definition of political activity as "an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election"[210] is impermissibly vague, it is unlikely this argument would succeed.

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202. *Id.* at 618.
203. *Bode*, 303 F. Supp. 3d at 508.
204. *Id.* at 499.
205. *Id.* at 505.
206. *Id.* at 506 (citing Hobbs v. Thompson, 448 F.2d 456, 474 (5th Cir. 1971)).
207. *Id.* (citing *Hobbs*, 448 F.2d at 474).
208. *Hobbs*, 448 F.2d at 471.
209. *Bode*, 303 F. Supp. 3d at 506.
210. LA. CONST. art. X, §§ 9(C), 47(C).

Unlike in *Bode*, the Louisiana State Civil Service agency has refined this definition by issuing specific "dos and don'ts" that give more specific guidance on prohibited political activity.[211] In doing so, however, the agency has made these restrictions overbroad, unjustifiably restricting employees' personal rights in their capacities as private citizens, outside the scope of their employment.[212] Indeed, several of the state's prohibitions, including the wearing of political buttons or the use of bumper stickers, were specifically mentioned by the *Broadrick* Court as likely being impermissibly overbroad.[213] Indeed, such forms of expression, when engaged in outside of the scope of one's employment, likely falls within the zone of protected speech that cannot be burdened without violating the First Amendment.

Whether a court reviews a challenge to Louisiana's prohibitions on political activity under the *Pickering* balancing test for public employee speech, the strict scrutiny standard used for content-based speech, or under a facial challenge for overbreadth, it is unlikely that the prohibitions promulgated under Louisiana's State Civil Service agency would survive a challenge in the judicial system.

To wit, we have seen that there are good policy-based reasons why Louisiana should modernize its prohibitions to ease its heavy restrictions, and we have seen that there are strong legal reasons to believe the current restrictions are on very shaky constitutional ground. It is only a matter of time before these restrictions are challenged in court by an affected public employee. So, what should the State do to prevent this costly litigation, in which it is unlikely to prevail? How should it balance the very real needs of the government, which resulted in the passage of these types of prohibitions in the first place, against the right of public employees to constitutionally protected free speech and the right of the public to be informed about the important knowledge that these employees have to share?

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211. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

212. *See id.* at 2.

213. *Broadrick*, 413 U.S. at 618.

IV. PROPOSALS

There are several possible remedies to resolve the legal and policy-based issues resulting from Louisiana's current, heavily restrictive prohibitions on the political activities of public employees. Aside from a public servant filing for injunctive relief in federal court to hold these prohibitions unconstitutional, the government could take action in any one of several ways. The first and easiest remedy would be for the Louisiana State Civil Service agency, on its own initiative, to modify its regulations interpreting the state constitution. Alternately, the Louisiana legislature could pass a statute, or even a constitutional amendment, to rectify the deprivation of public employees' rights. And finally, if Louisiana will not take action on its own, Congress could use the power of the purse or the powers granted under the Fourteenth Amendment to protect the First Amendment rights of our state's public employees.

A. PROPOSALS REQUIRING STATE ACTION

The first remedy is certainly the easiest, and in most respects, the most desirable. The Louisiana State Civil Service agency should simply reinterpret the exclusionary clause in the state constitution for a civil servant to "exercise his right as a citizen to express his opinion privately"[214] to mean in his private capacity as a citizen, in contrast to its apparent current interpretation, which does not allow any political speech in public, regardless of whether an employee is acting in an official or private capacity. This change alone would align Louisiana with both the federal government and with most other states on this issue.[215]

Accordingly, to modify the existing regulations more easily, Louisiana could then adopt the provisions used by the federal government under the Hatch Act and apply those regulations as written to the state, just as many other states have done.[216] In

214. LA. CONST. art. X, §§ 9(A), 47(A).

215. For information on federal prohibitions *see Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each state).

216. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS.,

doing so, it would draw a distinction between "restricted" employees, like election officials, who should be held to a higher standard to prevent the appearance of partisanship even when not on duty, and "regular" employees, like road construction workers or A/C repairmen, whose private political preferences are of less public concern. If, however, the state would prefer to retain heavier restrictions than are imposed by the Hatch Act, or conversely, if it would like to use this opportunity to become more progressive in this area like some of our neighbors, including Alabama, the Louisiana State Civil Service agency could review the regulations restricting political activity in other states as models.[217]

If the Louisiana State Civil Service agency declines to amend its rules on these restrictions, a bill could be introduced in the state legislature to mandate statutory changes to the way this provision of the state constitution is interpreted. Because legislation overrides administrative rules and regulations,[218] the Louisiana State Civil Service agency would be bound by any such legislatively enacted modifications on the prohibitions of political activities of public employees.

B. PROPOSALS REQUIRING FEDERAL ACTION

If neither the Louisiana State Civil Service agency nor the Louisiana legislature choose to act, Congress could intervene on this issue. Congress already included a provision in the Hatch Act that withholds funding to states that are found to violate the Act.[219] Congress has also shown its preference to ease the Hatch Act's restrictions through years of amendments.[220] To continue that trend, Congress could also use its spending power in the opposite way, limiting funding to states that go too far in

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https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each state).

217. *50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx.

218. TODD GARVEY & DANIEL J. SHEFFNER, CONGRESSIONAL RESEARCH SERVICE, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 1 n.6 (2021).

219. 15 U.S.C. § 1506.

220. *See* discussion *supra* Part I.C.

restricting their employees' constitutionally protected freedom of speech.

Congress could also pass another amendment to the Hatch Act that specifies the ways in which states must implement the Act, preempting the state's current rules by way of the Supremacy Clause.[221] However, this would be a very heavy-handed approach that would likely impact many other states, including those that currently have more permissive policies. Ultimately, many of those states might choose to sue the federal government on Tenth Amendment grounds.[222] Therefore, this method would be unlikely to achieve the purpose of avoiding the costs associated with litigating this matter in court. However, in the unlikely event that a challenge to Louisiana's prohibitions were to fail in the courts, and if Louisiana concurrently chooses not to correct this issue on its own, either in a regulatory or a legislative manner, a Congressional mandate would serve as the last hope to prevent Louisiana from silencing the political speech of public employees on important matters of public interest.

CONCLUSION

There is little question, especially in today's politically charged society, that some prohibitions on the political activities of public servants are a necessary evil. The government has a genuine interest in maintaining the appearance of impartiality and combating the political corruption that could result from the free politicization of the government workforce acting in their official capacities. The creation of a Civil Service and the passage of the Hatch Act were necessary to combat the rampant political corruption of the past. But it is important to strike a balance between those needs and the free speech rights of public employees, as well as the right of the populace to benefit from public employees' knowledge of the government's inner workings. There is a point at which speech restrictions exceed the bounds of narrowly tailored public policy, and the liberties of those who are regulated are impermissibly abridged, both as individuals and as a class of citizens. The Hatch Act imposes very reasonable limitations on government employees. However, the SCS

221. *See* U.S. CONST. art. VI, cl. 2; *see also Supremacy Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/supremacy_clause (last visited Feb. 7, 2022) ("[T]he federal constitution, and federal law generally, take precedence over state laws, and even state constitutions.").

222. *See* U.S. CONST. amend. X.

interpretations of the state constitution take its restrictions too far. Government workers have a more in-depth, intimate, hands-on knowledge of how political parties and candidates truly affect the day-to-day operation of the government. Indeed, they must have such knowledge to carry out the daily tasks for which they are employed. It is for this very reason that their political opinions are among the most informed, and therefore, among the most important of any single class of individuals in this state. It is vital that we remove the gag from these citizens and allow them to responsibly enjoy the freedom of expression that the founders of this great nation intended for us all.

Daniel T. Marler

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ESTABLISHING A CAUSE OF ACTION FOR CYBERSECURITY BREACHES AGAINST GOVERNMENT AGENCIES IN LOUISIANA

INTRODUCTION

Louisiana declared a state of emergency in July 2020 when "a ransomware attack took Louisiana school district computers offline."[1] Shortly after, "[o]n October 2, 2020, the FBI issued a

1. Kartikay Mehrotra, *Louisiana Target of Attempted Ransomware Hack, Governor Says*, BLOOMBERG NEWS (Nov. 18, 2019), https://www.bloomberg.com/news/articles/2019-11-18/louisiana-targeted-by-attempted-ransomware-attack-governor-

high-impact cyber-attack warning in response to attacks" on Louisiana government targets.[2] In line with the FBI's predictions, on December 13, 2020, the City of New Orleans was attacked by ransomware that caused nearly $10 million in damages to key database structures and effectively halted all city activity.[3] Unfortunately, more attacks like this are likely in the future: the threat of cyberattacks against the state of Louisiana increases as public and private life becomes more dependent on technology. However, a consistent approach to addressing cybersecurity damages has yet to fully evolve, despite the frequency and severity of government-targeted hacking.

Indeed, as cyberattacks against municipalities become increasingly common,[4] states must determine how to protect their citizens from identity theft and other personal damages caused by the government's failure to safeguard its networks. Legislators have created statutory requirements to protect personally identifiable information ("personal information") that grant affected individuals a cause of action against an agency that has failed to adequately protect personal information[5] or provide notification to affected individuals following a breach.[6]

However, plaintiffs often face multiple barriers to litigation, undermining the ability for plaintiffs to obtain redress for these unique damages. First, plaintiffs must establish standing under Article III of the Constitution or the state equivalent by showing that they have suffered an actual injury[7]—a requirement that has

says.

2. Davey Winder, *New Orleans Declares State of Emergency Following Cyber Attack*, FORBES (Dec. 14, 2019, 6:51 AM), https://www.forbes.com/sites/daveywinder/2019/12/14/new-orleans-declares-state-of-emergency-following-cyber-attack/?sh=a3abb366a055.

3. *Id.*; The City of New Orleans (@CityofNOLA), TWITTER (Dec. 13, 2019, 5:59 PM), https://twitter.com/CityOfNOLA/status/1205623401706115072; Sarah Coble, *Bill for New Orleans Cyber-Attack $7m and Rising*, INFOSECURITY MAG. (Jan. 16, 2020), https://www.infosecurity-magazine.com/news/bill-for-new-orleans-cyberattack/.

4. Donald F. Norris, *A Look at Local Government Cybersecurity in 2020*, ICMA (Jul. 14, 2021), https://icma.org/articles/pm-magazine/look-local-government-cybersecurity-2020.

5. Privacy Act of 1974, 5 U.S.C. § 552a; LA. STAT. ANN. § 51:3072.

6. *See* Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C, *State Data Security Breach Notification Laws*, MINTZ, https://www.mintz.com/sites/default/files/media/documents/2022-04-11/OCT%202021_State%20Data%20Breach%20Matrix.pdf.

7. U.S. CONST. art. III, § 2, cl. 1; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

proven challenging, given that the exposure of personal information renders those affected vulnerable to potential future harm but typically does not result in immediate harm. Thus, the injury-in-fact requirement related to cybersecurity claims has been controversial among the federal circuit courts of appeal,[8] and remains undefined under Louisiana law. Second, potential plaintiffs must demonstrate that the government entity is not protected by sovereign immunity.[9] After surviving these preliminary obstacles, plaintiffs must then satisfy any statutory requirements that create their cause of action.

This Comment will describe how the U.S. Supreme Court's interpretation of the "injury-in-fact" prong of Article III's "actual case and controversy" requirement for granting an individual standing has not been sufficiently defined to guide the lower courts when faced with the unique challenges of cybersecurity attacks. Next, this Comment will explore Louisiana's present approach to cybersecurity litigation and the relationship between federal and state opinions. Finally, considering the increases in the frequency and severity of cyberattacks against government agencies, this Comment will propose (1) that Louisiana courts adopt a hybrid standing analysis tailored to address cybersecurity litigation, (2) that the Louisiana legislature expand the ability of data breach victims to bring suit under the Louisiana Database Security Breach Notification Law ("LDSBNL"), and (3) that the Louisiana legislature close certain loopholes in the LDSBNL that could be interpreted to allow government agencies and other entities to escape liability.

I. BACKGROUND

A. CYBERATTACKS IN GENERAL

To understand the need for the proposed changes in this Comment, it is helpful to understand what cyberattacks are, why they happen, and their effects. Cyberattacks attempt to access, freeze, or damage individual computers or large networks of computers to serve the hacker's interest.[10] These attacks are defined as "targeted instances of intrusion, fraud or damage by malicious cyber actors," rather than "discovery of insecure

8. *See infra* Part I.C.

9. *See* U.S. CONST. amend. XI, § 1.3.1.

10. *How Cyberattacks Work*, NAT'L CYBER SEC. CTR. (Oct. 14, 2015), https://www.ncsc.gov.uk/information/how-cyber-attacks-work.

databases or accidental online leaks."[11] Depending on the hacker's motive, cyberattacks can expose their targets to fraud or identity theft, block access to or delete documents and pictures, interrupt key municipal functions (telecommunications, medical and criminal systems, emergency services, and power grids), and effectively halt daily life.[12] As the world increasingly relies upon technology to conduct daily business, "[c]ybercrime has increased every year as people try to benefit from vulnerable business systems."[13]

Hackers can carry out cyberattacks in a variety of ways. The most prevalent means of cyberattack, known as ransomware, transmits a digital "virus" that tries to lock or deny access to key files until a user pays a ransom to get those files back.[14] In order to gain access to secured systems, hackers can send "a malicious email intended to trick a user into sharing computer credentials."[15] Once the individual shares his or her login information, the hackers then infiltrate the system network and can freeze all network functions, export sensitive personal information, and demand a ransom payment to release the valuable information they have frozen or exported.[16] In the first fiscal quarter of 2020, the average ransom payment was approximately $111,605, and this amount increased 60% during the second quarter.[17] Understanding how cyberattacks are perpetrated and the type of information compromised provides context for potential legal implications an organization may face when it fails to protect sensitive information.

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11. BLUEVOYANT, STATE AND LOCAL GOVERNMENT SECURITY REPORT 4, 6 (2020), https://www.bluevoyant.com/wp-content/uploads/2020/11/BlueVoyant-State-and-Local-Government-Report-26th-August-2020-FINAL.pdf. That amount that is likely only a fraction of the true number, the report adds. *Id.* at 4.

12. NAT'L INFRASTRUCTURE ADVISORY COUNCIL (NIAC), ADDRESSING URGENT CYBER THREATS TO CRITICAL INFRASTRUCTURE (2017), https://www.cisa.gov/sites/default/files/publications/niac-securing-cyber-assets-final-report-508.pdf.

13. *What is a Cyberattack?*, CISCO, https://www.cisco.com/c/en/us/products/security/common-cyberattacks.html#~how-cyber-attacks-work (last visited Mar. 2, 2022).

14. *See Ransomware 101*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY https://www.cisa.gov/stopransomware/ransomware-101 (last visited Mar. 2, 2022).

15. Jessica Williams, *New Orleans IT Leader Details Cyberattack Recovery*, GOV'T TECH. (Jun. 17, 2020), https://www.govtech.com/security/New-Orleans-IT-Leader-Details-Cyberattack-Recovery.html.

16. *Id.*

17. *Ransomware: To Pay or Not to Pay?*, KING & SPALDING (Oct. 12, 2020), https://www.kslaw.com/news-and-insights/ransomware-to-pay-or-not-to-pay#_edn4.

B. GOVERNMENT ENTITIES AS TARGETS

Cyberattacks against government entities can have much larger impacts on individuals than attacks against private companies due to the type of information contained in government networks. For example, a study conducted by the National White Collar Crime Center indicated that the "majority of governmental IT systems typically provide services to local law enforcement and other emergency service organizations," which have access to extremely sensitive information about individuals in the community.[18] As government entities frequently have access to sensitive information about individuals beyond the scope of the information possessed by the private sector, these entities should be held accountable to the individuals exposed in cyberattacks. The potential harm when government systems are infiltrated is not limited to identity theft and can include much more severe harms as well. For example, if a government database is attacked and the information of an individual working as an undercover agent or government informant is made public, that individual is not only subject to identity theft, but also at risk of physical harm.[19]

C. ARTICLE III STANDING

In order to bring a cause of action against another, a potential plaintiff must establish standing under Article III of the U.S. Constitution's "case or controversy" requirement, or the state equivalent.[20] However, data breach victims face difficulties meeting this requirement due to the unique type of harm an individual faces when sensitive information has been compromised. Article III standing requires the potential plaintiff to have a "personal stake in the outcome of the controversy" and

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18. Christian Desilets, *Cyber Intrusion and Data Breaches* 7, NAT'L WHITE COLLAR CRIME CTR. (2017), https://www.marc.org/Government/Cybersecurity/assets/cyber-intrusion-and-data-breaches.aspx.

19. *Id.* ("A breach of information on a law enforcement agency's computer system that results in the compromise of information related to confidential informants, witnesses in criminal prosecutions, victims of sex crimes, child abuse or domestic violence cases, legally protected information related to juvenile offenders, are all very serious issues, many of which can actually compromise the administration of justice and potentially re-victimize victims of crime and negatively impact the outcome of criminal trials. A compromise of confidential information at this level could even pose a threat to the safety of complaining victims, witnesses, informants or undercover officers.").

20. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).

to show that they have suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[21] Next, the plaintiff must show that the claimed injury is "fairly . . . trace[able] to the challenged action of the defendant," in that it can be attributed to the defendant's behavior, or lack thereof.[22] Finally, the injury must be redressable by judicial determination.[23]

The first prong of the "case or controversy" requirement, "injury in fact," has frequently been a barrier to data breach victims bringing actions against the entities that failed to adequately protect their data.[24] For example, the Eighth Circuit has declined to grant standing for data breach victims when only the individual's credit card number or bank account information was compromised.[25] This court reasoned that this information, while sensitive, can be changed with relative ease, and so its disclosure does not cause permanent harm to the affected individual.[26] Correspondingly, the D.C. Circuit granted standing in a case involving disclosure of an individual's Social Security number, date of birth, and other personal, permanent information, noting that such information cannot be changed and is so unique to the individual that the potential for harm persists long after the initial breach.[27] For purposes of an Article III analysis regarding data breach victims, it is vital to identify which pieces of an individual's identity have been compromised to properly determine the likelihood of later harm and the unique damage that identity theft can potentially cause in the future.

As the Supreme Court has not directly addressed the unique impact of data breaches, circuits have applied two Supreme Court decisions, *Clapper v. Amnesty International USA* and *Spokeo, Inc. v. Robins*,[28] to determine whether the possibility of future harm

21. *Id.* at 339, 353 (quoting *Lujan*, 504 U.S. at 560).

22. *Lujan*, 504 U.S. at 560-561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976)).

23. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 181 (2000).

24. *See, e.g.*, Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019).

25. *See In re* SuperValu, Inc., 870 F.3d 763, 766, 771-72 (8th Cir. 2017).

26. *See id.*

27. *See In re* U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig., 928 F.3d 42, 55-56 (D.C. Cir. 2019) (hereinafter In re *OPM*).

28. Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013); *Spokeo, Inc.*, 578 U.S. 330.

meets the "injury-in-fact" requirement for granting Article III standing.[29] It is important to note that neither of these opinions factually mirror the unique circumstances that arise when an individual's personal information is compromised, nor do they consider the various harms that can occur when a government entity fails to properly secure their networks. However, they do provide insight into the Supreme Court's approach to future harm as an injury in fact sufficient to grant Article III standing.

In *Clapper*, the plaintiffs sought to challenge the constitutionality of a portion of the Foreign Intelligence Surveillance Act (FISA) that permitted the U.S. government to conduct surveillance on individuals who were not "United States persons."[30] The plaintiffs—attorneys, journalists, and other professionals—were U.S. citizens who worked with individuals abroad, many of whom were involved in illicit activities.[31] The plaintiffs argued that there was an "objectively reasonable likelihood" that their correspondence would be subject to surveillance under this portion of the FISA, and that such surveillance could potentially violate their Fourth Amendment rights against unreasonable searches.[32] In a footnote, the Court noted that "substantial risk" faced by a plaintiff can confer standing in the absence of certainty that harm will occur.[33] However, the facts of this case did not satisfy this requirement, and the Court held that the "respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending."[34] The Court reasoned that granting standing would allow the plaintiffs to "manufacture standing . . . based on their fears of . . . future harm."[35]

While the *Clapper* Court was hesitant to recognize the threat

29. *See* Lee J. Plave & John W. Edson, *First Steps in Data Privacy Cases: Article III Standing*, 37 FRAN. L.J., 485, 493-95 (2018).

30. 50 U.S.C. § 1881a (Section 702 of the Foreign Intelligence Surveillance Act of 1978 allows the government to collect foreign intelligence by authorizing the surveillance of individuals who are not "United States persons.").

31. *Clapper*, 568 U.S. at 401, 407.

32. *Id.*

33. *Id.* at 414, n.5 ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.").

34. *Id.* at 414.

35. *Id.* at 414, 416.

of future harm as a sufficient injury in fact, three years later in *Spokeo*, the Court emphasized that such a possibility was not entirely foreclosed.[36] However, the case also illustrates why a legislature cannot simply create a cause of action for victims of a cyberattack without the jurisdiction's courts' adoption of a hybrid standing analysis.

In *Spokeo*, the plaintiffs alleged that the defendant company, which ran a search engine that aggregated personal information into a public profile, violated the Fair Credit Reporting Act, which was meant to ensure that consumer reports were as accurate as possible.[37] The plaintiffs alleged that their publicly available profiles containing incorrect information could potentially impair any future employment prospects if employers searched their names and found incorrect information.[38] Although the plaintiffs alleged a statutory violation, the Court held that "evidence of a statutory violation alone will not automatically satisfy Article III's injury requirement."[39] Faulting the lower court for failing to analyze the "distinction between concreteness and particularization," the Court emphasized that "Article III standing requires a concrete injury even in the context of a statutory violation."[40] Importantly for the cybersecurity landscape, the Court noted that its jurisprudence on concreteness "does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness."[41] Furthermore, the Court confirmed that "[c]oncrete is not . . . necessarily synonymous with 'tangible'" and that the Court "ha[s] confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete."[42]

Spokeo illustrates an opportunity for victims of a cyberattack to establish a concrete yet intangible injury in fact for Article III

36. *Spokeo, Inc.*, 578 U.S. at 341.

37. *Id.* at 333-34.

38. *See id.* at 336.

39. Megan Dowty, *Life is Short. Go to Court: Establishing Article III Standing in Data Breach Cases*, 90 S. CAL. L. REV. 683, 695-96 (2017) (citing *Spokeo, Inc.*, 578 U.S. at 341).

40. *Spokeo, Inc.*, 578 U.S. at 341-42; *see* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing").

41. *Spokeo, Inc.*, 578 U.S. at 341 (citing *Clapper*, 568 U.S. 398).

42. *Id.* at 340 (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (free speech); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (free exercise)).

standing based on a real risk of harm. However, it also cautions that potential plaintiffs do not meet the standing requirements by merely alleging that the entity that failed to protect their personal information has violated a statute. Complicating matters somewhat, as discussed below, some circuits have held that a statutory violation *is* sufficient to confer standing.[43] The splintered approach to granting standing based on a statutory violation can be addressed by the dual approach proposed in this Comment, integrating legislative and judicial action.

The facts and circumstances of a cybersecurity breach implicate a unique type of damages, and the nature of the damages should play a critical role in shaping the injury-in-fact requirement, which will not provide sufficient redress if based on a general application of Supreme Court precedent. It is important to determine whether the injury-in-fact prong requires that the harm has *actually occurred*, or whether simply allowing a malicious third party to access personal information is an injury in itself. Therefore, a brief overview of the positions of the eight federal circuit courts that have considered this issue informs this Comment's proposed hybrid Article III analysis.

1. THE CIRCUIT COURTS: STANDING GRANTED

Four of the twelve federal circuit courts have granted standing to data breach plaintiffs, finding that the injury-in-fact requirement was satisfied by the unique threat of harm that an individual faces when certain types of personal information is compromised.[44] Additionally, three circuits have generally assumed that "statutory violations . . . constitute a cognizable injury in data breach cases post-*Spokeo*."[45]

Recognizing future harm as an injury in fact, the Sixth Circuit found in *Galaria v. Nationwide Mutual Insurance Co.* that when the victims "already know that they have lost control of their data, it would be unreasonable to expect [p]laintiffs to wait for actual misuse . . . before taking steps to ensure their own

43. Dowty, *supra* note 39, at 696.

44. *See* In re *OPM*, 928 F.3d at 61; Attias v. CareFirst, Inc., 865 F.3d 620, 630 (D.C. Cir. 2017); Galaria v. Nationwide Mut. Ins. Co., 663 Fed. App'x. 384, 391 (6th Cir. 2016); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 697 (7th Cir. 2015); Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010).

45. Dowty, *supra* note 39, at 696 (". . . the Third, Sixth, and Eleventh Circuits have found statutory violations to constitute a cognizable injury in data breach cases post-*Spokeo*.").

personal and financial security."[46] This statement acknowledges that damage has already been done when personal information is compromised, even before identity theft has actually occurred.

Acknowledging the unique nature of cybersecurity breaches, *In re U.S. Office of Personnel Management Data Security Breach Litigation* ("*In re OPM*") is a prime example of a tailored Article III injury-in-fact analysis that granted data breach victims standing to sue a government entity based on the breach itself rather than requiring subsequent harm stemming from the breach.[47] Three concepts emerge from this D.C. Circuit opinion: (1) the nature of the personal information obtained can determine whether there is a "substantial risk" of future harm,[48] (2) when an attack against a government entity occurs, potential political motivations are not the only "obvious explanation" such that potential harm to the affected individuals is precluded,[49] and (3) the actual threat of future injury when a malicious party possesses personal information exists beyond "the passage of a year or two without any clearly identifiable pattern of identity theft or financial fraud" because of the "sophisticated and patient" nature of the attack.[50] The court here noted that some instances of fraud had already occurred, but emphasized that the nature of the information compromised was an injury in and of itself.[51]

First, citing their decision in *Attias v. Carefirst*,[52] the D.C. Circuit in *In re OPM* emphasized that the nature of the information compromised in the attack was such that it was reasonable to infer that the cyberattackers had "both the intent and the ability to use that data for ill."[53] The court outlined the various types of personal information that were compromised, observing that Social Security numbers, fingerprints, dates of birth, etc., "cannot be so readily swapped out for new ones" like credit card numbers.[54] The nature of the compromised information created a substantial risk sufficient to constitute an

46. *Galaria*, 663 Fed. App'x at 388.
47. In re *OPM*, 928 F.3d 42.
48. *See id.* at 56.
49. *See id.* at 57.
50. *Id.* at 59.
51. *See id.* at 56.
52. *Attias*, 865 F.3d at 629.
53. In re *OPM*, 928 F.3d at 56 (quoting *Attias*, 865 F.3d at 628).
54. *Id.* at 56.

injury in fact.[55]

Due to the governmental target of the attack, OPM argued that "scattered instances of widely varying fraud" were insufficient to constitute a substantial, ongoing threat,[56] and that the true motivation of the cyberattacks was government espionage, not identity theft.[57] This argument was based on the suggestion that the Chinese government was behind the attacks and attempting to obtain state information, not steal individual identities.[58] However, the D.C. Circuit rejected this claim and noted that it was improper for the district court to have relied on external information, such as the identity of the hackers, to determine whether there was an injury in fact.[59]

Nonetheless, the dissent found the district court's rejected argument persuasive, expressing skepticism that sophisticated hackers would spend such substantial time stealing the background information of federal employees for purposes other than espionage and finding identity theft to be an implausible claim "in light of the obvious alternative explanation."[60] Future plaintiffs should consider these competing interpretations of hackers' motivations when bringing claims against government agencies. Regardless of the hackers' true intentions, the D.C. Circuit found that the plaintiffs were at a substantial risk of harm "simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken."[61]

2. THE CIRCUIT COURTS: STANDING DENIED

The four federal circuits that have denied standing to data breach plaintiffs have held that the injury-in-fact requirement cannot be satisfied by the mere threat of harm, even when sensitive and unalterable information is implicated, because an injury in fact is defined as harm that has already occurred.[62] The

55. *See id.*

56. *Id.* (citation omitted).

57. *Id.* at 57 (quoting *In re* U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig., 266 F. Supp. 3d 1, 33 (D.D.C. 2017)).

58. *Id.*

59. *Id.* at 57.

60. *Id.* at 76 (Williams, J., concurring in part and dissenting in part).

61. *Id.* at 56.

62. *See* Beck v. McDonald, 848 F.3d 262, 266-67 (4th Cir. 2017) ("Indeed, for the Plaintiffs to suffer the harm of identity theft that they fear, we must engage with the same 'attenuated chain of possibilities' rejected by the Court in *Clapper* . . . [t]his

courts in these cases typically found that the plaintiff could not satisfy the requirement because there was no evidence that the exposed information had been exploited.[63] The Fourth and Eighth Circuits have denied standing when the breadth of the intrusion was small and isolated, or when limited, easily mitigated information was stolen (such as credit card numbers, pin numbers, expiration dates, and customer names).[64] However, some have also denied standing when specific and unchangeable information was compromised.[65]

For example, in *Beck v. McDonald*, the plaintiffs were patients at the Veterans Affairs Medical Center in South Carolina.[66] After their personal information was compromised when a laptop connected to a pulmonary function testing device was stolen, the plaintiffs brought suit under the Privacy Act and the Administrative Procedure Act against the Secretary of Veterans Affairs and the hospital administrators.[67] The laptop contained patients' "names, birth dates, the last four digits of social security numbers, and physical descriptors (age, race, gender, height, and weight)."[68] The plaintiffs argued that they were entitled to standing based on the increased risk of future identity theft and the costs to prevent potential identity theft.[69]

Rejecting the plaintiffs' arguments, the Fourth Circuit relied on the Supreme Court's analysis in *Clapper*, holding that it is a "well-established tenet that a threatened injury must be 'certainly impending' to constitute an injury-in-fact."[70] Despite acknowledging that threatened injuries can justify Article III

'attenuated chain' cannot confer standing."); In re *SuperValu, Inc.*, 870 F.3d at 771-72; Katz v. Pershing, LLC, 672 F.3d 64, 77 (1st Cir. 2012) (the defendant failed to properly maintain an electronic platform containing her account information, because plaintiff failed to "identify any incident in which her data has ever been accessed by an unauthorized person" the court found it did not constitute an "actual and impending injury"); Reilly v. Ceridian Corp., 664 F.3d 38, 43 (3d Cir. 2011) (plaintiff could not establish "actual and impending injury" when a hacker infiltrated a payroll system because there was no evidence the hacker read or copied the system's information.)

63. *See Beck*, 848 F.3d at 274.

64. *See* In re *SuperValu, Inc.*, 870 F.3d at 766, 771.

65. *See, e.g.*, *Beck*, 848 F.3d at 272.

66. *Id.* at 266.

67. *Id.*

68. *Id.* at 267.

69. *Id.* at 273.

70. *Id.* at 272.

standing, the court cited a Supreme Court opinion that held that an injury-in-fact "must be concrete in both a qualitative and temporal sense."[71] To support the "certainly impending" nature of their harm, the plaintiffs anchored their argument for standing in two sections of the Privacy Act[72] that, respectively, require the entity maintaining sensitive information to "protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm" and establish a cause of action when an agency "fails to comply with any other provision of this section . . . in such a way as to have an adverse effect on an individual."[73] The court, however, rejected the plaintiffs' claim that "'emotional upset' and 'fear [of] identity theft and financial fraud' resulting from the data breaches [were] 'adverse effects' sufficient to confer Article III standing."[74]

Addressing the "substantial risk" analysis discussed in *Clapper*, the Fourth Circuit held that "the plaintiffs' calculations that 33% of those affected by the [breach] would have their identities stolen and that all affected would be 9.5 times more likely to experience identity theft 'd[id] not suffice to show a substantial risk of identity theft.'"[75] This case illustrates the difficult barrier that plaintiffs face when bringing a cause of action against those who have failed to protect their sensitive personal information.

The splintered approach to the injury-in-fact analysis has stripped individuals of potentially legitimate causes of action simply due to their geographic location. Although state legislatures have taken some steps to protect individual citizens from the harm caused by cyberattacks against government entities,[76] the existing framework is inadequate. Indeed, the splintered approach to the standing analysis has rendered many of these legislative avenues ineffective or wholly useless.[77] Similarly, statutes often fail to functionally provide the intended

71. *Id.* at 271 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

72. *Beck*, 848 F.3d at 272.

73. 5 U.S.C.A. § 552(e)(10); *id.* § 552(g)(1)(d).

74. *Beck*, 848 F.3d at 272.

75. *Id.* at 268 (internal citations omitted).

76. *See* Mintz, *supra* note 6.

77. Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why it Matters)*, N.Y. TIMES (Sept. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/.

redress.[78]

II. APPLICATION: THE LOUISIANA CYBERSECURITY LANDSCAPE

Integrating the federal courts' complex and sometimes conflicting approaches to cybersecurity litigation, this Part outlines how the state of Louisiana can adopt a consistent, thorough approach to cybersecurity cases by implementing legislative reform and providing the judicial branch with an analysis unique to cybersecurity breaches that the federal circuit courts continue to hone. Indeed, Louisiana must be prepared to address the claims that victims of data breaches will bring with an analysis that fully recognizes the unique nature of cyberattacks. By parsing out the nuances of the conflicting approaches to cyberattacks on a national scale, this Part aims to (1) provide a tailored injury-in-fact analysis that Louisiana courts can apply and that reflects federal judicial reasoning, (2) motivate legislators to expand existing cybersecurity legislation to provide a right of action for victims of data breaches, and (3) propose modifications that would close certain loopholes in Louisiana's Database Security Breach Notification Law ("LDSBNL"). The following proposed solutions attempt to honor Louisiana's legislative intention to protect individuals affected by data breaches.

A. LOUISIANA'S "STANDING" REQUIREMENT: IT'S ALL SEMANTICS

In order to obtain a declaratory judgment in Louisiana, the courts evaluate whether the potential plaintiff has standing to bring the action *and* whether the case presents a justiciable controversy as "separate and distinct issues."[79] This distinction between Louisiana's standing analysis and whether there is a justiciable controversy that merits adjudication does not preclude the application of a federal analysis of a cybersecurity breach claim in a manner consistent with state law and practice. For example, the Louisiana standing requirement directly mirrors the portion of Article III that requires a plaintiff have a "personal stake in the outcome of the controversy"[80] and the justiciable

78. *Id.*

79. *In re* Melancon, 2005-1702 (La. 7/10/06), 935 So. 2d 661, 667–68 (internal citations omitted).

80. *Spokeo, Inc.*, 578 U.S. at 339, 353 (quoting *Lujan*, 504 U.S. at 560).

controversy requirement reflects the injury-in-fact portion of Article III standing. Louisiana courts can permit victims to bring suit for cyberattacks by evaluating the Louisiana standing and justiciable controversy requirements with the guidance of federal Article III standing analyses.

Standing under Louisiana Code of Civil Procedure Article 681 ("Louisiana standing") requires a suit to be brought "by a person having a real and actual interest in what he asserts"[81] and is evaluated by the "exception of no right of action."[82] The focus in an exception of no right of action is on whether the "*particular* plaintiff has a right to bring the suit."[83] However, "it assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation."[84]

This is not a precise state equivalent of the federal Article III standing requirement. More similar is the "justiciable controversy" requirement, which prevents Louisiana courts from "deciding abstract, hypothetical or moot" questions.[85] For example:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character. Further, the party seeking the declaratory judgment should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the

81. Bradix v. Advance Stores Co., Inc., 2017-0166 (La. App. 4 Cir. 8/16/17); 226 So. 3d 523, 528 (quoting Hershberger v. LKM Chinese, LLC, 14-1079 (La. App. 4 Cir. 5/20/15); 172 So. 3d 140, 143).

82. *Id.*

83. Jones v. Americas Ins. Co., 2016-0904 (La. App. 1 Cir. 8/16/17); 226 So. 3d 537, 540 (emphasis added).

84. *Bradix*, 226 So. 3d at 528 (quoting Hood v. Cotter, 08-0215 (La. 12/2/08); 5 So. 3d 819, 829).

85. *Id.* at 528 (quoting Cat's Meow, Inc. v. City of New Orleans Through Dep't of Fin., 98-0601 (La. 10/20/98); 720 So. 2d 1186, 1193) ("Louisiana courts do not 'decide abstract, hypothetical or moot controversies, or render advisory opinions with respect to such controversies'").

> issuance of the declaratory judgment.[86]

Thus, whereas federal courts have analyzed data breach plaintiffs' right to sue under the doctrine of standing, Louisiana courts would be likely to do so under the justiciable controversy requirement. Indeed, the concepts of "standing" and "justiciable controversy" are clear reflections of one long-established legal doctrine. The mismatch between federal and state definitions of "standing" should not preclude the state courts from incorporating the lessons learned through federal litigation. As noted previously, the federal courts have had more opportunities to address the novel issues presented in cybersecurity litigation, and Louisiana courts would benefit from adapting federal approaches to this complex, yet increasingly common issue. At present, there is a meager body of case law that addresses the complaints of data breach victims *at all*, much less that considers the government's role as a defendant.

Louisiana's current approach to victims of data breaches attempting to bring causes of action is exemplified by *Bradix v. Advance Stores Co.*, in which the Louisiana Fourth Circuit Court of Appeal declined to extend standing to a plaintiff alleging damages from a data breach to his employer's network.[87] The plaintiff's pleading "based his recovery on the theories of negligence, gross negligence, a breach of a fiduciary duty, and invasion of privacy."[88] The procedural history is of particular interest in *Bradix*, as it reflects the state court's unacknowledged influence by the federal district court's reasoning on the state claims. Initially, *Bradix* was removed to the District Court for the Eastern District of Louisiana, and the defendant filed a motion to dismiss for "lack of standing and failure to state a claim pursuant to F.R.C.P. 12(b)(1) and 12(b)(6)."[89] The federal court found that the plaintiff lacked Article III standing because he failed to allege a "certainly impending injury."[90] Nonetheless, the case was remanded for lack of subject-matter jurisdiction, and the state court had to determine whether Louisiana law provided a remedy.[91]

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86. *Cat's Meow, Inc.,* 720 So. 2d at 1193 (quoting Abbott v. Parker, 249 So. 2d 908 (La. 1971)).

87. *Bradix*, 226 So. 3d at 528.

88. *Id.* at 529.

89. *Id.* at 527.

90. *Id.*

91. *Id.*

In state court, the defendant attempted to have the case dismissed by filing the peremptory exceptions of no right of action and no cause of action.[92] In response, the plaintiff cited federal case law arguing that an individual has a justiciable controversy ripe for decision "even though his identity has yet to be stolen."[93] However, the court noted that these cases, while "persuasive," did not apply because "they [did] not interpret Louisiana laws regarding the exception of no right of action."[94] The opinion then emphasized that "[t]he focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit,"[95] and found that the lower court did not err in holding that the plaintiff had no such right.[96]

In response to the exception of no cause of action, the plaintiff argued that federal precedent, including *Clapper* and *Spokeo*, should persuade the state court to grant him a cause of action, given the unique damages that data breaches can inflict.[97] However, the court upheld the exceptions because the alleged damages were deemed insufficient and too "speculative" to constitute a valid cause of action, noting that "[t]he limited function of an exception of no cause of action is to determine whether the law provides a remedy to anyone assuming that the facts plead in the petition will be proven at trial."[98] Rather than providing a comprehensive analysis of its conclusion, the court simply referenced the federal district court's standing analysis.[99]

It appears that the state court found the Louisiana federal court's reasoning sufficient to deny standing without conducting its own analysis. Indeed, the court rejected the plaintiff's federal support for his claim due to its perceived inapplicability to Louisiana law, while substituting a cause of action analysis for

92. *Id.*

93. *Id.* at 528.

94. *Id.*

95. *Id.* (quoting *Hood*, 5 So. 3d at 829).

96. *Id.* at 529.

97. *Id.*

98. *Id.*

99. *Id.* at 528; *see also id.* at 527 ("The EDLA . . . found that Mr. Bradix lacked standing pursuant to Article III of the United States Constitution in federal court because Mr. Bradix failed to allege a 'certainly impending injury.' The EDLA noted that Mr. Bradix did 'not even [allege] that his credit score was adversely impacted by the two inquiries.' The EDLA, finding no subject matter jurisdiction, remanded the matter to state court instead of dismissing the suit. The EDLA reasoned that the Louisiana state court must determine whether Louisiana law provided a remedy.").

the "justiciable controversy" analysis analogous to federal Article III standing.[100] The court even noted that "[a]n exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief,"[101] while simultaneously declining to consider the federal opinions that explicitly supported the plaintiff's cause of action.[102]

One can infer from the opinion that a party cannot have a real and actual interest in future harm, such as potential identity theft. As the opinion emphasized, Louisiana courts do not decide "hypothetical[s]," and "must refuse to entertain an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise."[103] However, this limited analysis failed to consider the developing understanding of the distinct damages that cybersecurity breaches create for individuals.

Through its "justiciable controversy" pseudo-standing analysis, the court found that, while the plaintiff's personal information was compromised by the data breach, the plaintiff had not suffered *actual damages* because he had not alleged that someone *successfully* stole his identity.[104] The potential for identity theft was not a sufficient damage to warrant standing. This inartful application of legal semantic distinctions unnecessarily prevents Louisiana courts from learning how to best approach this complex litigation more frequently seen on the federal level. Furthermore, the fact that the federal district court that previously heard the case did not include a Louisiana standing analysis at any point in its reasoning[105] further solidifies the relevance of Article III standing interpretations to Louisiana's "justiciable controversy" requirement.

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100. *Id.* at 529.

101. *Id.* (quoting New Jax Condos. Ass'n, Inc. v. Vanderbilt New Orleans, LLC, 16-0643 (La. App. 4 Cir. 4/26/17), 219 So. 3d 471, 479).

102. *Id.* at 528.

103. *Id.* (quoting Louisiana Fed'n of Tchrs. v. State, 11-2226, p. 5 (La. 7/2/12); 94 So. 3d 760, 763).

104. *See id.* at 528-30.

105. Bradix v. Advance Stores Co., No. CV 16-4902, 2016 WL 3671122, at *3 (E.D. La. July 11, 2016) ("Without unambiguous state law authority, the Court would have to venture an *Erie* guess to conclude that Plaintiff's lack of Article III standing in this case necessarily means he would not have standing in state court. District courts only make *Erie* guesses when properly exercising subject matter jurisdiction over substantive state law matters.").

1. FIRST PROPOSAL: ADOPT FEDERAL ANALYSES

As Louisiana has yet to develop a consistent approach to cybersecurity litigation, it is imperative that the courts consider the reasoning found in federal cybersecurity opinions. While the Fifth Circuit and Louisiana district courts have not yet made their position on the injury-in-fact debate explicit, the Eastern District of Louisiana opinion in *Bradix* appears to show the court's reticence to consider the threat of harm when sensitive personal information is compromised as an injury in fact.

Both federal and state courts in Louisiana should adopt a hybrid approach to the standing/justiciable controversy requirement that (1) acknowledges that personal information in the hands of a malicious third party is an injury in and of itself, (2) expands any "imminence" requirement to account for the uniquely long-term potential for damage that a third party in possession of personal information can cause, or, alternatively, (3) grants standing when there is evidence that a government entity has violated a statutory right. These findings would be properly based on a sound application of the jurisprudence discussed in this Comment when confronting a relatively new area of law.

First, courts should acknowledge that an unauthorized third party's possession of private information is, in and of itself, an injury in fact. As noted earlier, the nature of the compromised information has been central to several of the circuit opinions on data breaches, given that Social Security numbers and biometric data cannot be changed to prevent future instances of fraud.[106] More importantly, government entities may possess more sensitive personal information (like sealed court records, expunged criminal records, etc.) than private companies possess. Therefore, the courts should acknowledge that an unauthorized third party's possession of this private information is, in and of itself, an injury in fact.

Second, courts should consider the unique harm that exposed sensitive information can cause in an imminence analysis. It is not unusual for decades to pass before the exposed personal information is used to severely damage the known victims.[107] The

106. Lee J. Plave & John W. Edson, *First Steps in Data Privacy Cases: Article III Standing*, 37 FRAN. L.J., 485, 505 (2018).

107. *See Identity Theft: How it Happens, its Impact on Victims, and Legislative Solutions: Testimony for U.S. Senate Judiciary Subcommittee on Technology,*

stolen information can be sold for explicitly criminal uses, copied and passed from hand to hand, used to open new financial accounts or apply for government benefits, and the list goes on. The Eastern District in *Bradix* noted that "Mr. Bradix did not allege that someone successfully stole his identity" to support its conclusion that he had an insufficient injury in fact.[108] Yet, an imminent or substantial likelihood requirement in a standing analysis must recognize that hackers in possession of personal information can inflict severe harm on victims far into the future.

Finally, while the United States Supreme Court appeared to decline to grant standing when there were "mere allegations" of a statutory violation in *Spokeo*, Louisiana should align itself with the circuits that have granted standing, under a presumption in favor of the plaintiff, when there is some evidence that a statutory right has been violated.[109] This approach ensures that the legislature's intention to provide redress for victims of data breaches is honored, while ensuring that the doctrines of standing and justiciability are maintained.

B. LOUISIANA'S DATABASE SECURITY BREACH NOTIFICATION LAW[110]

The Louisiana Database Security Breach Notification Law ("LDSBNL") was enacted in 2005 to further the legislative interest in protecting "[t]he privacy and financial security of individuals . . . at risk due to widespread collection of personal information."[111] The LDSBNL defines the obligations of those who possess computerized personal information and outlines an individual's cause of action should the statute be violated.[112]

The LDSBNL requires that any person or agency that owns or licenses computerized data that contains personal

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Terrorism, and Government Information, PRIVACY RIGHTS CLEARINGHOUSE (July 12, 2000), https://privacyrights.org/resources/identity-theft-how-it-happens-its-impact-victims-and-legislative-solutions-testimony-us.

108. *Bradix*, 226 So. 3d at 528.

109. Dowty, *supra* note 39, at 696.

110. *See generally Louisiana Amends Data Breach Notification Law, Eliminates Fees for Security Freezes*, HUNTON PRIVACY BLOG (June 11, 2018), https://www.huntonprivacyblog.com/2018/06/11/louisiana-amends-data-breach-notification-law-eliminates-fees-security-freezes/; *Louisiana Privacy Laws*, URISQ, https://csrcyberprivacy.com/privacy-regulations/louisiana/ (last visited Mar. 8, 2022).

111. LA. STAT. ANN. § 51:3072.

112. *Id.* § 51:3074.

information[113] and is conducting business in the state "implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information from unauthorized access, destruction, use, modification, or disclosure."[114] In the instance of a data breach that includes personal information that the agency does not own, the agency is required to "notify the owner or licensee of the information if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person . . . following discovery by the agency or person of a breach of security of the system" as quickly as possible, "but not later than sixty days from the date of discovery."[115] Of particular importance, the LDSBNL authorizes any person to institute a civil action in order "to recover actual damages resulting from a failure to disclose in a timely manner . . . that there has been a breach of the security system resulting in the disclosure of . . . personal information."[116]

1. SECOND PROPOSAL: MODIFY THE LDSBNL TO MORE PRECISELY ADDRESS DATA BREACH HARM

The LDSBNL was enacted to protect the security of individuals when their information is collected and stored electronically because the legislature recognized the potential for abuse should this information be accessed by unauthorized, ill-

113. *Id.* § 51:3073(4)(a) provides:

> (4)(a) "Personal information" means the first name or first initial and last name of an individual resident of this state in combination with any one or more of the following data elements, when the name or the data element is not encrypted or redacted:
>
> (i) Social security number.
>
> (ii) Driver's license number or state identification card number.
>
> (iii) Account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
>
> (iv) Passport number.
>
> (v) Biometric data. "Biometric data" means data generated by automatic measurements of an individual's biological characteristics, such as fingerprints, voice print, eye retina or iris, or other unique biological characteristic that is used by the owner or licensee to uniquely authenticate an individual's identity when the individual accesses a system or account.
>
> (b) "Personal information" shall not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

114. *Id.* § 51:3074(A).

115. *Id.* § 51:3074(D), (E).

116. *Id.* § 51:3075.

intentioned parties.[117] The statute is constructed well and addresses many of the issues that may arise in cybersecurity litigation. For example, it provides a thorough definition of "personal information" that considers the risk presented when an individual's immutable personal information, such as their Social Security number and biometric data, is exposed.[118]

However, the legislature should amend the statute to further advance the underlying legislative purpose to protect the interests of victims of data breaches.[119] First, Louisiana Revised Statute § 51:3075 defines the terms under which an individual can bring suit for a data breach.[120] Unfortunately, the terms of this section limit the cause of action to instances where the defendant has failed to notify the victim of the breach in a "timely manner."[121] This "notification" limitation fails to actually provide redress for the breach *itself* and only allows a victim to bring suit if the defendant has failed twice: first, failing to adequately protect the personal information, and second, failing to notify the victim that his or her information has been compromised. As discussed above, personal information often cannot be changed, and the threat of abuse persists over long periods of time. A notification requirement may help address short-term damages, for instance by providing victims with the opportunity to cancel credit cards or freeze accounts, but a more reasonable approach would create a cause of action for the actual failure to protect the digital personal information.

Secondly, just as the LDSBNL defines "personal information," the legislature should either add a definition of the damages available to data breach victims or provide a comprehensive definition of the types of damages that are unique to exposed personal information. By defining key terms, such as "injury," "damages," and "caused by," and outlining the available recovery, the statute would clarify the standing issue on a statutory level, providing standards that courts could then consistently apply.

Rather than pay lip service to the idea of protecting data breach victims, the objectives of the LDSBNL would be better

117. *Id.* § 51:3072.
118. *Id.* § 51:3073.
119. *See* Louisiana Senate Journal, 2005 Reg. Sess. No. 1.
120. LA. STAT. ANN. § 51:3075.
121. *Id.*

served by creating a cause of action similar to that created by the Privacy Act of 1975. To bring suit against a government agency for violating the Privacy Act, a plaintiff must show that (1) the government agency intentionally or willfully violated the requirements for protecting the confidentiality of personal records and information, and that (2) they sustained actual damages (3) due to that violation.[122] This approach would create a pleading barrier sufficient to prevent an avalanche of litigation while allowing legitimate plaintiffs to hold government entities liable for their failure to protect personal information.

C. LDSBNL LOOPHOLES

The LDSBNL, Louisiana's only current statute authorizing liability related to cyberattacks, is certainly better than nothing. It is noteworthy that the statute explicitly authorizes claims against government agencies,[123] implicitly waiving sovereign immunity where statutory violations have occurred.[124] However, the statute unfortunately contains several loopholes that may nonetheless allow government agencies or other entities subject to the law to avoid providing adequate notice and still escape liability. Specifically, the existing statute goes too far in allowing agencies to delay notice when law enforcement interests are involved, provide notice according to their own internal policies, and avoid the notice requirement entirely by conducting an internal investigation.[125] Given that providing adequate notice is a prerequisite for allowing plaintiffs to recover for the harms caused by data breaches themselves, it is vital to close these loopholes.

First, the "most expedient time possible" requirement for notification nonetheless permits delayed reporting for

122. In re *OPM*, 928 F.3d at 62 (citing 5 U.S.C. § 552a(g)(4)); Chichakli v. Tillerson, 882 F.3d 229, 233 (D.C. Cir. 2018) ("[A] plaintiff must allege that (i) the agency 'intentional[ly] or willful[ly]' violated the Act's requirements for protecting the confidentiality of personal records and information; and (ii) she sustained 'actual damages' (iii) 'as a result of' that violation.")).

123. LA. STAT. ANN. § 51:3074 (specifying that the statute applies to agencies); *Id.* § 51:3073(1) (defining "agency" as "the state, a political subdivision of the state, and any officer, agency, board, commission, department or similar body of the state or any political subdivision of the state.").

124. LA. CONST. art. XII, § 10(B) ("The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.").

125. LA. STAT. ANN. § 51:3074(E), (H), (I).

"legitimate" law enforcement interests:[126]

> If a law enforcement agency determines that the notification required under this Section would impede a criminal investigation, such notification may be delayed until such law enforcement agency determines that the notification will no longer compromise such investigation.[127]

This exception may render the expediency requirement irrelevant in some circumstances. Furthermore, this exception particularly reduces the likelihood that a victim can prevail in a claim against the government because even a failure to notify the victim of the breach can be ignored when done for the "legitimate needs of law enforcement,"[128] which are defined by law enforcement agencies—themselves parts of the government.

Additionally, after describing the notification methods sufficient to notify individuals of a breach, the LDSBNL effectively undercuts its own requires through the following subsection:

> H. Notwithstanding Subsection G of this Section, an agency or person *that maintains a notification procedure as part of its information security policy* for the treatment of personal information which is otherwise consistent with the timing requirements of this Section *shall be considered to be in compliance* with the notification requirements of this Section if the agency or person notifies subject persons in accordance with the policy and procedure in the event of a breach of security of the system.[129]

This subsection requires that an agency's internal security policy comply with the timing requirements of the statute, but not with its requirements regarding the means of notification.[130] A government agency may have a notification policy that is consistent with the sixty-day requirement but adopts methods for notification that fail to actually alert the victims of the data breach. Such a policy could result in a lack of actual notice to the affected individuals. However, this lack of actual notice may not constitute a violation of the LDSBNL because the agency would

126. *Id.* § 51:3074(E).
127. *Id.* § 51:3074(F).
128. *Id.* § 51:3074(C).
129. *Id.* § 51:3074(H) (emphasis added).
130. *Id.*

have complied with its internal policy and procedure. While the agency may have provided "notice" by its own definition within the required sixty-day period, the exception in Subsection H creates a gray area for compliance with notification procedures. This exception does not entirely foreclose the possibility that a plaintiff could prevail, but in practice, it creates great obstacles to adequate redress, undermining the intended goals of the LDSBN.

Most troublingly, Subsection I allows an entity to avoid the notice requirement and all liability if it concludes, "after a reasonable investigation," that there is "no reasonable likelihood of harm to the residents of this state."[131] In other words, this section gives the defendant the opportunity to entirely nullify any cause of action based on the agency's own analysis of the harm they inflicted on the victim. In effect, this subsection removes all objectivity and reasonability from the statutory standards by allowing the entity that exposed the victim to harm to determine whether the harm is likely to occur. An agency that found "no reasonable likelihood of harm" and thus failed to notify the individual of the breach would not be in violation of the LDSBNL.[132]

To illustrate how this subsection can create a barrier for potential plaintiffs, imagine the following scenario: a governmental agency is responsible for a leak of an individual's sensitive information, and the individual's information is used to commit financial crimes. The individual is never notified, but they independently trace the leaked information back to the breach. However, the agency responsible conducts an investigation and unilaterally determines that no threat of harm exists for Louisiana residents. The individual is now deprived of a cause of action under the LDSBNL because the agency followed the law as it is written. Not discouraged, the individual files suit against the agency, alleging negligence. However, because the agency acted in full compliance with the LDSBNL, the court dismisses the case.

131. *Id.* § 51:3074(I).

132. *Id.*

1. THIRD PROPOSAL: CLOSE THE LOOPHOLES IN THE LDSBNL

As there is no case law addressing the aforementioned loopholes under the LDSBNL, future plaintiffs would benefit from comprehensively pleading their claims, with particular reference to Subsections H and I. However, this Comment proposes to close the LDSBNL loopholes in order to provide an actual, workable cause of action for plaintiffs, particularly those who bring their cases against government agencies.

First, the exception to the "most expedient time possible" requirement that allows delays for legitimate law enforcement interests should be eliminated. There is simply too great a possibility that government agencies and law enforcement will exploit this provision to justify long delays, all while plaintiffs' personal information is in the hands of malicious parties. Instead, the sixty-day notice requirement should be absolute.

Second, the LDSBNL's provision in Subsection H allowing notice consistent with an agency's internal policy should be clarified or eliminated. To the existing language providing compliance "if the agency or person notifies subject persons in accordance with the [internal] policy and procedure,"[133] the legislature should add, "provided that this policy or procedure provides actual notice." This could avoid semantic game-playing by defendants seeking to use compliance with inadequate internal procedures to avoid liability. Alternatively, an even easier solution would be to eliminate this Subsection entirely.

Finally, Subsection I must either be altered or eliminated due to the clear conflict of interests that exists when a potential defendant is responsible for determining whether they have conducted a "reasonable investigation" that has found that there is no "reasonable likelihood of harm" to the potential plaintiff. At a minimum, an agency should be required to hire an independent investigative agency to conduct its investigation. However, ideally, this provision should be eliminated entirely. It is simply impossible to predict in advance whether personal information will ever be used for nefarious purposes, and plaintiffs should not be deprived of the opportunity to recover based on dubious forecasts of the future.

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133. *Id.* § 51:3074(H).

CONCLUSION

This Comment proposes judicial and legislative measures to give victims of cyberattacks the opportunity to seek justice when sensitive personal information has been exposed. By adopting existing federal approaches to grant standing and addressing the deficiencies of the Louisiana Database Security Breach Notification Law, Louisiana could give potential plaintiffs the opportunity to make a case for damages based on the individual circumstances of the breach and the type of information compromised. Cybersecurity litigation will continue to evolve as private and government entities alike collect and store increasingly detailed personal information and hackers develop new methods to invade networks. The Louisiana cybersecurity landscape is still somewhat underdeveloped, despite the increasing frequency of government-targeted hacking. Nonetheless, there are many opportunities to synthesize novel legal arguments and advocate for legislative change that can hopefully ensure that a modicum of justice is achieved for all parties affected by cyberattacks.

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