UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ANNE WHITE HAT, RAMON MEJIA, KAREN SAVAGE, SHARON LAVIGNE, HARRY JOSEPH, KATHERINE AASLESTAD, PETER AASLESTAD, THEDA LARSON WRIGHT, ALBERTA LARSON STEVENS, JUDITH LARSON HERNANDEZ, RISE ST. JAMES, 350 NEW ORLEANS, and LOUISIANA BUCKET BRIGADE,	CIVIL ACTION NO. 19-CV-00322
Plaintiffs,	JUDGE JOHN W. deGRAVELLES
v.	MAGISTRATE JUDGE ERIN WILDER-DOOMES
JEFF LANDRY, in his official capacity as Attorney General of Louisiana, BO DUHE, in his official capacity as District Attorney of the 16th Judicial District Attorney's Office; RONALD J. THERIOT, in his official capacity as Sheriff of St. Martin Parish,	
Defendants.	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SUPPLEMENT

Over a year after filing this suit and nearly two years after the facts underlying it, Plaintiffs seek to supplement their complaint with a Free Exercise claim regarding access to an unmarked burial site in St. James Parish. That claim does not involve any Defendant, and it is based on events outside Defendants' jurisdiction. Moreover, Plaintiffs seek to bring that claim after obtaining relief against the burial site's owner in the appropriate state court, then voluntarily dismissing that suit.

Regardless, Plaintiffs lack standing against the officials with jurisdiction over the unmarked burial site, none of whom Plaintiffs seek to add as Defendants. Plaintiffs' Free Exercise claim cannot provide them a right to trespass, is foreclosed by Supreme Court precedent, would greatly expand discovery, and would require this Court to resolve a substantial question of state law. Permission to supplement should therefore be denied.

BACKGROUND

This suit is a constitutional challenge to parts of a Louisiana criminal trespass statute, La. R.S. 14:61, that forbids unauthorized entry of a critical infrastructure. The suit arises from protests targeting the construction of an oil pipeline in St. Martin Parish, in the Western District of Louisiana. *See* Proposed Supp. Compl. (ECF 45-2) ("PSC") ¶¶ 23, 66-68. Three individuals were arrested for violating La. R.S. 14:61 after they refused to leave the pipeline construction site. *See id.* ¶ 75. Those individuals, joined by fractional co-owners of the servient estate and various activists seek to have portions of La. R.S. 14:61 declared unconstitutional. Plaintiffs do not, however, challenge Louisiana's ordinary criminal trespass statute. *See* R.S. 14:63. Plaintiffs instead make clear they want to continue their civil disobedience — trespassing and disrupting construction — but aren't willing to risk a serious punishment for doing so. *See* PSC ¶ 7.

In November 2019, over a year after filing this suit, Plaintiffs learned through a public records request that an unmarked burial site was located on the site of a proposed plastics facility in St. James Parish. *Id.* ¶ 99. "The records indicated that the property owners' consultants believe it could have been a 'slave cemetery' associated with the Buena Vista Plantation which once operated there," and that "a pipeline was constructed through the cemetery several years ago." *Id.* ¶¶ 100-101. Although no Plaintiff alleges a friend or family member is interred at the site, certain Plaintiffs allege they visited the site several times "to pray, sing, and report on the development and its significance." *Id.* ¶ 103.

In January 2020, Plaintiff RISE filed suit against the U.S. Army Corps of Engineers asserting, *inter alia*, a claim for violation of the National Historic Preservation Act in connection with the Buena Vista burial site. RJN Exh. 1 at ¶¶ 9, 13, 48-50, 65, 67, 69, 123-126. On February 5, the judge in that case granted a motion by the property owner — FG LA, LLC ("FG") — to intervene as a defendant. RJN Exh. 9.

"On May 1, 2020, a representative of [FG] advised [RISE's President, Plaintiff] Lavigne that she could not visit" the burial site. PSC ¶ 105. Plaintiffs RISE and Lavigne responded on June 15 by filing an ex parte verified petition for a TRO against FG in state court. St. John Decl. Exh. 2. In their petition, Plaintiffs identified Louisiana jurisprudence recognizing a right of access for "descendants and friends" of those buried in a cemetery, and demanded access on June 19. *Id.* The state court granted the TRO and set a PI hearing for June 24. RJN Exhs. 3-4. RISE and Lavigne then dismissed their state suit and sought to file a supplemental complaint in this case.

The unmarked burial site lies on FG's property in St. James Parish. *See, e.g.*, PSC ¶ 29. FG is not a defendant in this case, and St. James Parish is outside the jurisdiction of Defendants Duhe and Theriot. *See* Duhe Decl. (ECF 30-3) ¶ 3; Theriot Decl. (ECF 30-4) ¶ 2. The right of way for the pipeline through the burial site is reflected in FG's recorded title. RJN Exh. 5-D ¶ 26; *see also* RJN Exhs. 6-8; St. John Decl. & Exh. 10.[1]

LEGAL STANDARD

"On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." FED. R. CIV. P. 15(d). Unlike leave to amend pursuant to Rule 15(a), permission to supplement pursuant to Rule 15(d) is not "freely given." *Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998) (distinguishing rules and affirming denial of supplementation).

The decision to permit a supplemental pleading is committed to the district court's discretion. *Id.* "In exercising its discretion, the district court should consider whether permitting the [supplemental] pleading would cause undue delay in the proceedings or undue prejudice to the

[1] In the accompanying Request for Judicial Notice, Defendants request the Court take judicial notice of the existence and allegations of the related proceedings, as well as the publicly-filed real property records for the site of the Buena Vista burial ground. Fed. R. Evid. 201. Defendants note that St. John Declaration Exhibit 10 is likely incorporated by reference in Plaintiffs' Proposed Supplemental Complaint. *See* PSC ¶¶ 22, 99, 100; *see also id.* at ¶¶ 99-107, 117, 146-150.

nonmovant, the movant is acting in bad faith or with a dilatory motive, the movant has previously failed to cure deficiencies by prior pleadings, or the proposed pleading is futile[.]" *Lewis v. Knutson*, 699 F.2d 230, 239 (5th Cir. 1983). A proposed pleading is futile if "it adds nothing of substance to the original allegations," *id.*, "is not germane to the original cause of action," *id.*, would fail to survive a Rule 12(b)(1) motion, *Ayers v. Johnson*, 247 F. App'x 534, 535-36 (5th Cir. 2007), or "would fail to survive a Rule 12(b)(6) motion," *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014).

ARGUMENT

I. The proposed supplement is futile because the Court lacks subject matter jurisdiction over the proposed Free Exercise claim.

A. Plaintiffs fail to establish standing against Defendants Duhe and Theriot.

"[S]tanding is not dispensed in gross." *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Rather, each "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Thus, for each claim, each Plaintiff must plausibly allege that (1) he has suffered an "injury in fact" which is "an invasion of a legally protected interest" that is "concrete and particularized" rather than "conjectural or hypothetical"; (2) there is a "causal connection between the injury and the conduct complained of" such that the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) the injury will "be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61; *see also McMahon v. Fenves*, 946 F.3d 266, 270 (5th Cir. 2020) ("At the motion-to-dismiss stage, this means alleging a plausible set of facts establishing jurisdiction."). Both injunctive and declaratory relief claims are subject to those rules. *See id.* at 559. Plaintiffs proposed Free Exercise claim fails under these standards.

Plaintiffs originally sued Sheriff Theriot and District Attorney Duhe based on arrests in St. Martin Parish, seeking declaratory and injunctive relief against enforcement of the pipeline provision in Louisiana's trespass to critical infrastructure statute. But Plaintiffs' proposed Free Exercise claim is tied to an unmarked burial site in St. James Parish, PSC ¶¶ 146-150, that is outside defendant Theriot's and defendant Duhe's jurisdiction, *see* Theriot Decl. (ECF 30-4) ¶ 2; Duhe Decl. (ECF 30-3) ¶ 3. Moreover, the only Plaintiffs that raise the proposed Free Exercise claim — Lavigne and RISE St. James — do not allege any threat of enforcement against them. That the trespass to critical infrastructure statute was allegedly enforced by Theriot and Duhe against other people nearly two years ago does not establish standing for Lavinge and RISE vis-à-vis a burial site in St. James Parish. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976); *Ellis v. Dyson*, 421 U.S. 426, 434-45 (1975). Not surprisingly, the best allegation Lavigne and RISE can muster is that they "feel inhibited," PSC ¶ 149, an allegation the Supreme Court has held insufficient to establish standing, *Younger v. Harris*, 401 U.S. 37, 42 (1971).

Further undermining Plaintiffs' claim for standing, no judgment against the current defendants will provide redress vis-à-vis enforcement by officials with jurisdiction over the burial site. Plaintiffs fail to appreciate that the Court's power to grant relief runs only against Defendants, not the res of the statute they attack. *Ex parte Young*, 209 U.S. 123, 163 (1908) ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . ."); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020) ("*Abbott I*") ("The district court lacked authority to enjoin enforcement of GA-09 as to anyone other than the named plaintiffs."). Thus no order against Defendants would prevent enforcement of the statute by the St.

James Parish officials with jurisdiction over the burial site. Because Plaintiffs' PSC fails to allege traceability and redressability, Plaintiffs lack standing to pursue their Free Exercise claim tied to the burial site. Their proposed supplement accordingly would not survive a Rule 12(b)(1) motion and is futile.

B. Plaintiffs fail to establish standing against the Attorney General, and their proposed claim against him is barred by sovereign immunity.

As set forth in support of the Attorney General's Motion to Dismiss, Plaintiffs plead no facts suggesting the Attorney General has any connection to enforcing the trespass to critical infrastructure statute. Mem. (ECF 30-1) at 5-7. That silence is not surprising: the Louisiana Constitution makes "any involvement the Attorney General might have in prosecuting cases under the statute . . . indirect and remote." *Id.* at 7 (quoting *Doe v. Jindal*, No. 11-554-BAJ-SCR, 2011 U.S. Dist. LEXIS 93094, at *8 (M.D. La. Aug. 19, 2011) (itself quoting *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 828 (M.D. La. 2006)).

Plaintiffs' proposed supplement adds no allegations to the silence of their original complaint vis-à-vis the Attorney General. Indeed, the only thing that has changed since the Attorney General moved to dismiss is the Fifth Circuit held that an attorney general's contingent authority to enforce criminal statutes is — absent an actual threat of enforcement — insufficient to overcome sovereign immunity. *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) ("*Abbott II*"). Plaintiffs' proposed supplement thus does nothing to remedy the Court's lack of subject matter jurisdiction, and the Attorney General would remain entitled to dismissal as a matter of law.

II. Plaintiffs' proposed Free Exercise claim is foreclosed by *Employment Division v. Smith*, 494 U.S. 872 (1990).

Turning to the merits, criminal trespass statutes generally do not raise Free Speech concerns. *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 123 (2003) ("[I]t is Hicks' nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is punished as a trespasser.");

Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) (rejecting contention "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please"). Plaintiffs thus try to re-spin their attack on Louisiana's trespass to critical infrastructure statute as a Free Exercise of Religion claim. There is no basis for distinguishing the logic of *Hicks* and *Lloyd Corp.*, however, and Plaintiffs Free Exercise claim fails as a matter of law.

Indeed, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held "that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 897. The Court expressly rejected the contention that criminal laws which "substantially burden a religious practice must be justified by a compelling government interest." *Id.* at 883-889 (discussing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

Applying those standards here, Louisiana's trespass to critical infrastructure statute makes no reference to the Buena Vista burial site or Plaintiffs' purported religious practices. Indeed, the pipeline provision was enacted before Plaintiffs were even aware the burial site existed. PSC ¶¶ 1, 4, 99. Plaintiffs thus cannot argue the pipeline provision targeted their practices at the burial site. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-35 (1993). Rather, the pipeline provision is a neutral law of general applicability to which the right of Free Exercise provides no exception. And Plaintiffs' contention that "[t]he Free Exercise Clause . . . [nevertheless] prohibits the Government from interfering with and substantially burdening [their] exercise of their religion," PSC ¶ 147, is the very contention the Supreme Court rejected in *Employment Division*.

Plaintiffs implicitly acknowledge these problems, Mem. (ECF 45-1) at 6, and try to circumvent them by pointing to dicta regarding "hybrid" claims in *Cornerstone Christian School v. University Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009), which in turn points to the recounting in *Employment Division* of prior cases involving Free Exercise claims asserted in

conjunction with other constitutional protections. But the Fifth Circuit noted in *Cornerstone* that it "need not consider" the hybrid claims issue, 563 F.3d at 136 n.8, and it has avoided doing so since. Other circuits are split as to whether the standards in prior cases survive *Employment Division* given the latter's expressly addressing the standard for Free Exercise claims. *Combs v. Hunter-Center Sch. Dist.*, 540 F.3d 231, 244-47 (3d Cir. 2008) (reviewing circuit split and concluding the "hybrid-rights theory" is dicta); *see also Church of the Lukumi Babalu*, 508 U.S. at 567 (Souter, J., concurring-in-part) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*[.]").

Regardless, any doubt that Plaintiffs' claim is foreclosed is resolved by *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). In *Heffron*, a religious group and one of its adherents filed suit to enjoin a rule requiring "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds." *Id.* at 643-45. The plaintiffs raised both Free Speech and Free Exercise claims asserting "that the Rule would suppress the practice of Sankirtan, one of [their] religious rituals, which enjoins [Krishna] members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. *Id.* at 645, 659 n.3. After performing a generic First Amendment analysis, the Court rejected those claims, and held the rule was a valid time, place, and manner restriction. *Id.* at 647-50. The Court notably did *not* apply any type of compelling interest test, despite the assertion of both Free Speech and Free Exercise claims.

Unlike the plaintiffs in *Heffron*, the Plaintiffs here do not bring a Free Exercise claim based on religious activity in a public forum. They instead attack a facially neutral criminal trespass statute that enforces a private property owner's right to exclude them, itself an interest of constitutional magnitude. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). But if *Heffron*'s far-more direct

restriction on religiously-commanded prosletyzing in a public forum was not subject to heightened scrutiny, there can be no basis for applying heightened scrutiny to the criminal trespass provisions challenged here. *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943) ("[W]e do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment."). Because Plaintiffs' proposed new claim is foreclosed by Supreme Court precedent, their motion to supplement the complaint should be denied.

III. Plaintiffs inexplicably delayed supplementing while pursuing related claims in both federal and state court, and their proposed claim would radically complicate resolution of this case.

Plaintiffs motion to supplement comes over a year after they filed this case and nearly two years after the facts underlying it. The proposed supplemental claim also does not involve any Defendant, and it is based on events outside Defendants' jurisdiction. Those facts alone are reason to deny permission to supplement. *Lewis v. Knutson*, 699 F.2d 230, 239-40 (5th Cir. 1983) (affirming denial of supplementation: "Lewis filed a motion for leave to amend over five months after the occurrences of which he complains. Further, the motion was filed . . . after Inside Defendants moved to dismiss for lack of standing[.]"); *see also Jarvis v. Allison*, 776 F. App'x 267, 268 (5th Cir. 2019) (noting that second attack involved different inmates and occurred months after attack forming the basis of original lawsuit: "Leave to supplement should not be granted where the 'transaction, occurrence, or event' is unrelated to the original cause of action."); *Lowrey v. Beach*, 708 F. App'x 194, 195 (5th Cir. 2018) (affirming denial of supplementation: "Lowrey gave no indication that the new claims, made against new parties, were connected with the retaliation alleged in his original complaint."); *Haralson v. Campuzano*, 356 F. App'x 692, 699 (5th Cir. 2009) (affirming denial of supplementation where supplement required additional defendants).

Plaintiffs' jurisdictional manipulation is yet another reason to deny supplementation. After filing one suit based on the Buena Vista burial site in federal court, Plaintiffs filed another suit in

state court, intimated they are entitled to access the site under Louisiana jurisprudence, and obtained a TRO on that basis. Plaintiffs then dismissed their state court suit, and now seek to recast that claim as a constitutional claim and append it to this case. Plaintiffs seek to do so without joining the affected property owner as a defendant. Avoiding such claim-splitting and multiplicity of litigation is yet another reason to deny supplementation.

To be sure, Plaintiffs do not state a state law cemetery access claim under the federal rules.[2] But given their suggestion in the state suit that they are entitled to access on that basis, allowing Plaintiffs to proceed with their Free Exercise claim would likely expand the scope of discovery into an obscure genealogical inquiry while also requiring this Court to address the scope of Louisiana's jurisprudential right of access to cemeteries. *See Lyng v. Nw. Indian Cemtery Protective Ass'n*, 485 U.S. 439, 445 (1989) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *see also Faulk v. Union Pac. R. Co.*, 449 F. App'x 357, 364 (5th Cir. 2011) (holding that district court erred in reaching constitutionality of statute without addressing potentially dispositive state law property question). The dominance of the state law issue and the serious federalism concerns attendant in delineating real property rights weigh heavily against Plaintiffs' proposed supplement. *See La. Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25 (1959) ("We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of

[2] Plaintiffs urge that "when cemeteries or burial grounds are discovered on private property, the landowner may not prevent access to those sites by descendants or friends." Mem. (ECF 45-1) at 7 n.1. Assuming *arguendo* Plaintiffs' statement of law is correct, their Proposed Supplemental Complaint does not state a claim for access. Plaintiffs do not allege they are descendants or friends of anyone interred at the Buena Vista burial site. Indeed, Plaintiffs make clear the property owner's archaeologists have only *speculated* the unmarked burial site "*could have been* a slave cemetery." PSC ¶¶ 22, 100 (emphasis added). That is precisely the type of allegation that "stops short of the line between possibility and plausibility of entitlement to relief" and thus fails to state a claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

state law."); *see also Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

CONCLUSION

For the foregoing reasons, Plaintiffs' proposed supplemental Free Exercise claim is futile, dilatory, and disruptive; and Plaintiffs' supplemental allegations are otherwise not germane to their existing claims. Plaintiffs' motion to supplement should therefore be denied.

Dated: July 27, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I am causing the foregoing document to be filed using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 27th day of July 2020.

/s/ Joseph S. St. John

Counsel for Attorney General Jeff Landry