UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

ANNE WHITE HAT, RAMON MEJÍA, and KAREN SAVAGE,

Plaintiffs,

v.

BECKET BREAUX, in his official capacity as Sheriff of St. Martin Parish; BOFILL DUHÉ, in his official capacity as District Attorney of the 16th Judicial District Attorney's Office,

Defendants.

Civil Action No. 6:20-cv-00983

JUDGE ROBERT R. SUMMERHAYS

MAGISTRATE JUDGE CAROL B. WHITEHURST

PLAINTIFFS' REPLY TO ATTORNEY GENERAL'S OPPOSITION IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

REBUTTAL ARGUMENT

Plaintiffs are entitled to summary judgment. The Attorney General has failed to meet his burden to articulate reasons to deny summary judgment. *Ledet v. Fleetwood Enterprises, Inc.*, 245 F.3d 791 (5th Cir. 2000). He makes numerous meritless objections to Plaintiffs' Statement of Undisputed Facts but does not indicate how the purported inadmissibility of the exhibits should defeat summary judgment.[1] The Attorney General's brief also proceeds as if he is defending an entirely run-of-the-mill criminal trespass statute. In fact, what Plaintiffs challenge is an extraordinarily sweeping amendment to a law that now covers many thousands of miles of territory without defining the premises under which pipelines exist. He also urges an incorrect standard for vagueness, and inconsistent views as to the statute's application. The statute sweeps more broadly than permissible on constitutionally protected speech and discriminates among content. But these attempts at misdirection cannot obscure the statute's unconstitutionality as there is no *genuine* dispute as to these four material *facts* evident on the Statute's face:

1) The Louisiana Legislature amended La. R.S. 14:61 in 2018 to include pipelines in the definition of critical infrastructure, making it a felony punishable by up to five years in prison for "remaining upon or in the premises of a [pipeline] after being forbidden to do so." La. 14:61(A)(3), (B)(1) and (3), and (C);

2) The prohibition as it pertains to pipelines is not limited in any way to visible, above-ground, or marked structures; instead it includes the entirety of any kind of pipeline in the state including "flow, transmission, distribution, or gathering lines, regardless of size or length, which transmit or transport oil, gas, petrochemicals, minerals, or water in a solid, liquid, or gaseous state." La. R.S. 14:61(B)(3).

3) The prohibition as it relates to pipelines is in contrast to other forms of critical infrastructure included in the statute which are above ground and visible and/or clearly marked. See La. R.S. 14:61(A)(1) and (B)(1).

[1] Plaintiffs address the evidentiary objections in the chart annexed hereto as Exhibit A. Plaintiffs also incorporate herein the facts and arguments set forth in their briefing in Support of their Motion for Summary Judgment, Dkts. 98, 114, and 115, and in Opposition to Defendant Bofill Duhe's Motion for Judgment on the Pleadings and Motion for Summary Judgment, Dkt. 101, and their opposition to defendants' motion to dismiss, Dkt. 36.

4) The statute requires a law enforcement officer to determine whether a person's presence on the undefined pipeline premises is in connection with "lawful assembly and peaceful and orderly petition, picketing or demonstration for the redress of grievances" or "express[ion] [of] ideas or views" concerning "legitimate matters of public interest" such as a "labor dispute between any employer and its employee or position protected by the United States Constitution or the Constitution of Louisiana," pursuant to La. 14:61(D)(1); or whether their presence "in the open or unconfined areas around a pipeline" is in connection with "commercial or recreational activities" such as "fishing, hunting, boating, and birdwatching." La. R.S. 14:61(D)(2).

In addition, there is no genuine dispute that Louisiana has *a lot* of pipelines – approximately 125,000 miles of oil and gas pipelines alone – and that many are underground and not visible, not clearly marked and/or not marked as to their exact location.[2] Plaintiffs' Statement of Undisputed Facts, Dkt. 93-2, ¶¶ 1-2, 4, 7-8, and 41. There is no genuine dispute that the amendments were initiated by counsel for the Louisiana Mid-Continent Oil and Gas Association (LMOGA) for the 2018 legislative session in the midst of very public protests against the Bayou Bridge Pipeline Project – both the LMOGA counsel and pipeline protesters testified before the legislature. *Id*. at ¶¶ 11, 24-25, 36. Or that the legislation emerged along with a wave of similar laws around the country pursued by the oil and gas industry aimed at countering pipeline protests, and that despite representations by the lead legislative sponsor that the statute as amended would only apply to actual damage, the statute makes no mention of that neutral trigger. *Id.* at ¶¶ 15-19, 21-23, 34-35. About two weeks after the amendments went into effect, as intended, pipeline protesters were arrested and charged under the new law. *Id*. at ¶¶ 82, 89.

I. Plaintiffs Have Established Their Entitlement to Summary Judgment.

A. Vagueness: The Attorney General Offers Further Proof of Vagueness.

The Attorney General suggests that the statute is not vague because "[o]n a given tract of

[2] There must be more than a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

land, a pipeline exists or does not…." Dkt. 119 at 19. Yet, the State's chief law enforcement officer doesn't bother to define "tract," nor indicate what part of a given tract constitutes the premises of a pipeline – an exercise he describes as being "hypertechnical" even though ordinary people struggling with these technical questions face up to five years in prison if they or the arresting officer get it wrong. *Id.* Elsewhere, he suggests average citizens can apprehend an otherwise facially confusing statute "by recourse to work-a-day property law, the servitudes recorded at parish court houses, or obvious surface markings." *Id.* In this alternate version, a "person of ordinary intelligence" is required to know and understand Louisiana property law or have reviewed servitudes in parish courthouses to have a sense of where they can legally stand "on a given tract of land" where a pipeline exists. The very point of vagueness prohibitions is *not* to condition an ordinary person's liberty, and their freedom of expression, on an ability to access and understand Louisiana real property law, or to have reviewed servitudes across parish courthouses to ascertain whether and how much of a given "tract" of land sits atop a pipeline. *See Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939) (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (laws may not violate "ordinary notions of fair play" such that persons of "common intelligence must necessarily guess at its meaning and differ as to its application.").

The Attorney General also urges application of an incorrect and less rigorous test for vagueness – suggesting that vagueness challenges may not be based on "imprecise" standards, "but rather in the sense that no standard of conduct is specified at all." Dkt. 119 at 18. However, the Fifth Circuit has held that this looser test for vagueness only applies to civil statutes regulating economic activity. *Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 508 (5th Cir. 2001). For criminal statutes – and civil statutes carrying quasi-criminal penalties – the stricter, two-part, disjunctive vagueness test is applied to determine whether the statute: (1)

"fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits;" or (2) "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Id*. at 507 (citing *City of Chicago v. Morales*, 571 U.S. 41 (1999)). Similarly, the non-smoking regulation challenged in *Roark v. Hardee LP v. City of Austin* that defendant relies upon did not "have the capacity to chill constitutionally protected conduct, especially conducted protected by the First Amendment" and thus was also subject to the less stringent standard. 522 F.3d 533, 546 (5th Cir. 2008). *See also, Garden Dist. Book Shop, Inc. v. Stewart,* 184 F. Supp. 3d 331, 340 (M.D. La. 2016) (regulations with criminal penalties have the "constant potential to be a repressive force in the lives and thoughts of a free people"). But the 2018 amendments would fail even the less stringent test because the statute goes beyond "mere imprecision" to being utterly standardless, lacking any definition whatsoever with respect to pipelines in Louisiana.

The Attorney General's attempt to rely on *Hill v. Colorado* fails because *Hill* perfectly illustrates why La. R.S. 14:61 as amended is impermissibly vague. 530 U.S. 703 (2000). There, the plaintiffs made a vagueness challenge to a criminal statute that prohibited any person from knowingly approaching within eight feet of another person within 100 feet of a healthcare facility with the purpose of leafletting or displaying signs without that person's consent. The Supreme Court upheld the constitutionality of the law, in part, because "***one of the [statute's] virtues is the specificity of the definitions of the zones described in the statute***." *Id*. at 733 (emphasis added). The statute thus provided for a defined and ascertainable zone - precisely lacking in La. R.S. 14:61 as it relates to premises of pipelines.

The Attorney General also seems to believe that the Statute's trigger – "being forbidden" from an undefined premises – provides sufficient notice. But this only reveals that he misapprehends how profoundly defective La. R.S. 14:61(A)(3) is after the 2018 amendments.

Because "premises" or "tracts" of many thousands of underground pipelines are not readily ascertainable, what is properly forbidden cannot be readily ascertained, permitting standardless discretion for law enforcement to forbid or not forbid. *See Wright v. State of Ga.*, 373 U.S. 284, 293 (1963) (warning not sufficient when a generally worded statute, construed to punish conduct which cannot be constitutionally punished, is unconstitutionally vague); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (striking down law requiring "credible and reliable" forms of identification because "entrusts lawmaking to the moment-to-moment judgment of the policeman"). *Roark* only underscores the comparative deficiency of La. R.S. 14:61(A)(3) because the City enacted two sets of guidelines to clarify the regulation which worked as a "how-to" roadmap for bar owners and law enforcement to understand its application and because the municipality only filed charges after *three* warning notices to relevant management officials. Courts "must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982). With respect to the "premises" provision, there has been no clarification or limiting construction of any sort with respect to pipelines. Officers may arrest and subject citizens to five years imprisonment based on a confusing and discretionary ascertainment of what premises are forbidden. This statute is at the heartland of unconstitutional vagueness.

B. Overbreadth: The Statute's Vagueness Leads to Overbreadth.

The statute represents a perfect storm of vagueness and overbreadth. In *Seals v. McBee*, the Fifth Circuit distinguished between statutes with potential overbreadth concerns but a "low risk that the statute would transgress constitutional limitations." 898 F.3d 587, 599 (5th Cir. 2018), as revised (Aug. 9, 2018) (noting that the statute at issue *United States v. Hicks*, 980 F.2d 963 (5th Cir. 1992) only applied on airplanes). The statute here, by contrast, has such a vast and

unknowable reach - undefined premises of at least 125,000 miles of oil and gas pipelines

In addition, like the plaintiff in *Seals,* Plaintiffs have pointed to potential overbroad applications of the statute that are distinct from their own situation. *Id*. at 599; *see e.g.,* Peter Aaslestad Decl., dkt. 93-7, ¶ 18 (private landowner with pipelines under his property concerned that he or guests could be subject to the new law even if he could not be trespassing on his own estate); Anne Rolfes Decl.,[3] dkt. 93-12, ¶¶ 5-10 (volunteers, staff, and community partners concerned the statute would apply to their efforts to monitor pollution, and report on pipeline construction for adherence to regulatory and permit requirements, as well as meeting, filming, and conducting interviews in communities where pipelines are part of the petrochemical infrastructure). The so-called carve-outs for commercial or recreational activities or certain types of petitioning or speech do not allay these concerns. *See Natl. Press Photographers Assn. v. McCraw*, 2022 WL 939517, at *13 (W.D. Tex. Mar. 28, 2022) (finding "commercial purposes" unconstitutionally vague in statute prohibiting unmanned aircraft from flying over critical infrastructure, leaving journalists unable to determine if actions were unlawful).

C. Content-Based: The Supreme Court's Recent Decision in *City of Austin* Confirms the Content-Based Nature of the Statute.[4]

A statute is facially content-based if it "target[s] speech based on its communicative

[3] The Attorney General objects to the declaration of Ms. Rolfes, director of the Louisiana Bucket Brigade, as an undisclosed witness. However, the Louisiana Bucket Brigade was included in the initial disclosure of Defendant District Attorney Bofill Duhe, annexed hereto as Exhibit B, in addition to the fact that the organization was initially a party with detailed factual allegations in the complaint as to the statute's chilling effect on their advocacy.

[4] The Attorney General accuses Plaintiffs of a "last-minute change" in arguing that the statute is content-based on its face because those magic words do not appear in the complaint. Plaintiffs have pled this in the complaint, *see, e.g.,* Dkt. 1, ¶ 15, and argued it in briefing since 2019. Dkt. 36 at 7-9. This unsupported suggestion confuses contents of a legal claim with a legal theory and corresponding tiers of scrutiny applicable to prove such a claim. To state a cause of action, all a complaint need do is provide a "statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8. Plaintiffs' detailed complaint sufficiently put defendants on notice of the claim with supporting factual allegations. See *Johnson v. City of Shelby, Miss*., 574 U.S. 10, 11 (2014) (stating "it is unnecessary to set out a legal theory for the plaintiff's claim for relief" and holding that claim asserting violation of constitutional rights need not expressly invoke 42 U.S.C. Sec. 1983); *see also, Michel v. Ford Motor Co.,* CV 18-4738, 2019 WL 718731, at *3 (E.D. La. Feb. 20, 2019).

content — that is, if it applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin, Texas v. Reagan Natl. Advert. of Austin, LLC,* 142 S. Ct. 1464, 1471 (2022). (quoting *Reed v. Town of Gilbert, 576 U.S. 155 (2020)*) (internal quotations omitted). That is exactly what Plaintiffs claim here. The sign code in *Reed* "single[d] out specific subject matter for differential treatment," and was thus content-based in contrast to the restrictions in *City of Austin* which the Court found were based solely on location. *Id.* at 1472-73.

Here, the statute expressly protects speech concerning a "labor dispute," or "legitimate matters of public interest" or "commercial or recreational" activity. La. R.S. 14:61(D)(1) and (2).[5] When the government preferences some content over other subject matter, like criticism of pipeline activity, strict scrutiny applies. *Reed*, 576 U.S. at 171. *See Natl. Press Photographers Assn.*, 2022 WL 939517, at *9-11 (applying strict scrutiny to law prohibiting use of unmanned aircraft over critical infrastructure because it permitted images taken for "commercial purpose" but not for media reporting, and discriminated by explicitly permitting use by professors, but not journalists).

D. Viewpoint: This Court May Consider the Justification or Purpose.

The statute is independently subject to strict scrutiny because it targets a particular viewpoint for harsher punishment, and the court may examine the law's "justification or purpose" to aid in that determination. *Reed*, *supra* at 166. *United States v. O'Brien,* 391 U.S. 367, 383 (1968) does not prohibit this inquiry as the Supreme Court relied in part on *O'Brien* when it reiterated the propriety of looking to a law's "justification of or purpose" for evidence of

[5] The Attorney General also argues that the word "lawful" in La. R.S. 14:61(D)(1) modifies "assembly," which he says is conduct, not speech, and which he apparently believes would not impinge on First Amendment freedoms. But the Supreme Court has held that a law requiring persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer" – a law aimed at conduct – had the "potential for arbitrarily suppressing First Amendment liberties" and implicated the constitutional right to freedom movement. *Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

viewpoint discrimination. *Reed, supra.* (citing *O'Brien* for examination of whether governmental interest was unrelated to the suppression of free expression) (internal quotations omitted).

The Attorney General attempts to conflate Plaintiffs' challenge with a challenge to ordinary trespass laws, which are content and viewpoint neutral by nature of their general applicability. Dkt. 119 at 15. While the government may proscribe trespass, it may not "discriminate between persons who engaged in identical conduct based upon why they did so." *See Animal Legal Def. Fund v. Kelly,* 9 F.4th 1219, 1238 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 2647 (2022) (holding that a statute was viewpoint discriminatory because rather than penalizing all forms of trespass, it only penalized trespass committed with a certain viewpoint). La. R.S. 14:16 fails to "treat[] all like conduct alike" by permitting trespasses if the trespasser is engaged in speech related to labor, "legitimate matters of public interest," or commerce, or recreation. *See id*. at 1238. *See also, W. Watersheds Project v. Michael,* 869 F.3d 1189 (10th Cir. 2017) (holding a statute was subject to First Amendment analysis because it "increase[d] a pre-existing penalty for trespassing if an individual" engaged in a specific type of speech).

His attempt to rely on *Hill v. Colorado,* 530 U.S. 703 (2000), *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *McCullen v. Coakley*, 573 U.S. 464 (2014) fails because none of the laws or court orders in those cases contained distinctions preferencing certain subject matter. The distinctions in La. R.S. 14:61 combine with the discriminatory origins of the amendments to illustrate their content-basis and necessity for strict scrutiny under *Reed*. *See also, Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) (legislative history and content distinction combine to demonstrate content-based statute).

But even if the 2018 amendments were deemed content-neutral, they would fail even intermediate scrutiny. Accepting the Attorney General's post-hoc rationalization for the law that

the government has a "vital" interest in protecting citizens' property rights, Dkt. 119 at 17, the law does not come close to being narrowly tailored to serve the proffered significant governmental interest. *See McCullen v. Coakley*, 573 U.S. 477, 466 (2014) (finding statute providing for 35-foot buffer zone outside of abortion clinic was not narrowly tailored because the "buffer zones burden substantially more speech than necessary to achieve the [state's] interests"). *See also Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

II. PLAINTIFFS HAVE ESTABLISHED STANDING, AND DEFENDANTS FAIL TO MEET THEIR BURDEN OF DEMONSTRATING MOOTNESS.

Remarkably, the Attorney General studiously avoids any mention of the *Susan B. Anthony* doctrine, upon which this Court relied in denying defendants' motions to dismiss. Dkt. 83 at 12. *See also Barilla v. City of Houston*, 13 F. 4th 427, 432 (5th Cir. 2021) (standing exists for pre-enforcement First Amendment challenge where court "assume[s] a substantial threat of future enforcement absence compelling contrary evidence" given that the relevant ordinances "are not moribund"). *Accord Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020).

First, this Court earlier found, and Plaintiffs have further demonstrated, an injury under *Susan B. Anthony v. Driehaus*, 573 U.S. 149, 161-64 (2014) because Plaintiffs' speech has produced a "substantial threat that the challenged statute would be enforced in the future" – a threat exacerbated by a "history of past enforcement." Dkt. 83 at 12. Second, Plaintiffs have demonstrated standing under a "chill" theory. The Attorney General's attempt to diminish the adequacy of Plaintiffs' evidence that their speech activity is being chilled, Dkt. 119 at 9 (quoting White Hat and Mejia declarations), again studiously avoids this Court's conclusion that identical allegations – which now stand as undisputed evidence – are sufficient to confer standing. *Compare* Dkt. 101 at 8-9 (detailing Plaintiffs' histories of pipeline protests and reporting thereof, and deterred protest activity) *with* Dkt 83 at 12 (allegations that Plaintiffs "desire to continue

their protests. . . their prior protest activities resulted in multiple arrests, and that they have curtailed their activities because of fear of prosecution" demonstrate a "sufficient injury in fact").[6] Indeed, a plaintiff in a pre-enforcement First Amendment challenge "need not show that the authorities have threatened to prosecute him" because "the threat is latent in the existence of the statute." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 336 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (citation, internal quotations omitted). Third, as explained in Plaintiffs' Reply to Defendant Duhe's Opposition to Summary Judgment, Dkt. 115 at 4, an argument Plaintiffs' incorporate herein, even if the statute was constitutionally applied to Plaintiffs, overbroad statutes permit plaintiffs to stand in for third parties not before the court in order to prevent further chilling of expression. Finally, as also discussed in the same brief, Defendant Duhe's disavowal of prosecution does not defeat Plaintiffs' standing. *See id*. at 2-4. Rather, under the "voluntary cessation" doctrine, a defendant bears the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 189 (2000). Defendants have failed to meet this heavy burden.

Respectfully submitted,

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[6] The Attorney General's passing reference to the "independent causation" principle, Dkt. 119 at 10, is confused. Plaintiffs' injury is not caused by a run-of-the mill trespass statute. Plaintiffs are independently injured by an overbroad and unconstitutionally vague statute that proscribes protected speech and carries much harsher penalties. *See also* Dkt. 83 at 12-13 (concluding that Plaintiffs have shown causation and redressability).

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, a copy of the foregoing was served on all counsel of record via this court's electronic case filing system.

s/Pamela C. Spees
Pamela C. Spees