UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

ANNE WHITE HAT, RAMON MEJÍA, 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 Plaintiffs, v. JEFF LANDRY, in his official capacity as Attorney General of Louisiana; BO DUHÉ, 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.	Civil Action No. 6:20-cv-00983 JUDGE ROBERT R. SUMMERHAYS MAGISTRATE JUDGE CAROL B. WHITEHURST

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' RE-URGED MOTION TO DISMISS
AND MOTION TO RECONSIDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

I. Standard of Review 4

II. Plaintiffs Have Standing Under First Amendment Standing Doctrine Which Is More Permissive in Recognition of the Importance of These Rights to the Proper Functioning of Our Democratic Society. 5

III. Plaintiffs Arrested and Charged Under the Challenged Law Are Not Barred by the *Younger* Abstention Doctrine. 14

IV. Plaintiffs Have Sufficiently Stated a Claim Against Defendant Duhé 16

V. A Change in Official Capacity Defendant Is Remedied by the Automatic Substitution Provided for in Fed. R. Civ. Pro. 25(e) – Not Dismissal 16

CONCLUSION 17

TABLE OF AUTHORITIES

Rules and Statutes	Page(s)
Fed. R. Civ. Proc. 12(b) (1) and (6)	4
Fed. R. Civ. Proc. 25(d)	1,16
La. C.Cr.P. art. 208,	15
La. C.Cr.P. Art. 211	15
La. C.Cr.P. Art. 572(A)(2)	6
La. Rev. Stat. § 14:61	*passim*
La. Rev. Stat. § 14:82(A)(2)	1, 6
Cases	
281 Care Comm. v. Arneson, 638 F.3d 621 (8th Cir. 2011)	10
Ashcroft v. Iqbal, 556 U.S. 662 (2009)	4
Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)	9-10, 13, 16
Bayou Bridge Pipeline, LLC v. 38.00 Acres, 2019-565, 2020 WL 4001135 (La.App. 3 Cir. 7/15/20)	3
Bell Atlantic v. Twombly, 550 U.S. 544 (2007)	4
Benton v. United States, 960 F.2d 19 (5th Cir. 1992)	4
CISPES v. F.B.I., 770 F.2d 468 (5th Cir. 1985)	12
City of Clinton v. Pilgrim's Pride Corp., 632 F.3d 148 (5th Cir. 2010)	4
City of Los Angeles v. Lyons, 461 U.S. 95 (1983).	11
Cook v. Harris County, 2019 WL2225051 (S.D. Texas May 23, 2019)	15
Dombrowski v. Pfister, 380 U.S. 479 (1965).	7, 10
Doran, 22 U.S. 922 (1975)	15
Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278 (5th Cir. 1993)	4
Hobbs v. Thompson, 448 F.2d 456 (5th Cir.1971).	14

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) 10, 13

Meredith v. Nowak, No. CIV A 06-2384, 2006 WL 3020097 (E.D. La. Oct. 19, 2006)

Morrison v. Board of Education of Boyd Count, 521 F.3d 602 (6th Cir. 2008). 10

Nobby Lobby, Inc. v. City of Dallas,
767 F.Supp. 801 (N.D. Tex.1991), *aff'd*, 970 F.2d 82 (5th Cir.1992) 15

O'Shea v. Littleton, 414 U.S. 488 (1974) 11

Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) 5

Seals v. McBee, 898 F.3d 587 (5th Cir.2018), *as revised* (Aug. 9, 2018) 5-7, 14

Steffel v. Thompson, 415 U.S. 452 (1974) 7-8, 12

Susan B. Anthony v. Driehaus, 573 U.S. 149 (2014) 7-8

Lopez v. Candaele, 630 F.3d 775 (9th Cir. 2010) 10

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 5

Majors v. Abell, 317 F.3d 719 (7th Cir. 2003). 10

United Food & Commercial Workers Local 99 v. Bennett,
934 F. Supp. 2d 1167 (D. Ariz. 2013) 12

Ward v. Utah, 321 F.3d 1263 (10th Cir. 2003). 10

Younger v. Harris, 401 U.S. 37 (1971). 14

Other Authorities

U.S. Const. Amend. I ..... *passim*

U.S. Const., Due Process Clause ..... *passim*

PRELIMINARY STATEMENT

This case concerns the serious First Amendment and Due Process harms resulting from the 2018 amendments to Louisiana's law prohibiting unauthorized entry on critical infrastructure, La. R.S. 14:61. Defendants Duhé and Theriot re-urge their previous motions to dismiss on the basis of standing.[1] Because free speech and other First Amendment rights are so important to our democratic society, First Amendment standing doctrine is more permissive and the threshold standing requirements are more broadly interpreted in cases alleging harms to these rights. Plaintiffs have standing to challenge La. R.S. 14:61 on First Amendment and Due Process grounds.

Defendants Duhé and Theriot also re-urge their motions to dismiss on the basis of *Younger* abstention. However, there simply are no state judicial proceedings to bar adjudication of these claims in federal court under *Younger* – a point with which the Louisiana Attorney General concurs. Defendant Duhé also re-urges his motion to dismiss for failure to state a claim against him, and Defendant Theriot also moves to dismiss on the grounds of mootness since he is no longer serving as sheriff. Plaintiffs have more than adequately stated a claim against Defendant Duhé, and the fact that there is a new sheriff in St. Martin Parish is easily remedied with the official capacity substitution *mandated* by Fed. R. Civ. Proc. 25(d).

The Court rightly denied defendants' motions the first time and should do so again.

---

[1] Defendant Duhé adopts by reference arguments made by the Attorney General in earlier briefing on this motion to dismiss concerning "chilling effect." *See* dkt. Dkt. 30-1, pp. 8-10. Plaintiffs thus address those argument as well. Plaintiffs also note that their Motion to Supplement the Complaint is also pending, in which they seek to add events that have transpired since the first round of briefing on defendants' motions to dismiss. *See* dkt. 45. These events also provide additional reasons to find Plaintiffs have standing and further demonstrate the law's unconstitutional vagueness and overbreadth. Plaintiffs have also moved to reconsider the Court's dismissal of their claims against the Attorney General on the basis of his multiple connections to and enforcement authority over the subject-matter of this case as described in both the Complaint and Proposed Supplemental Complaint. *See* dkt. 66.

FACTUAL BACKGROUND

At the urging of the Louisiana Mid-Continent Oil and Gas Association in response to high-profile protests opposing controversial pipeline projects, Louisiana's 2018 amendments to the law prohibiting Unauthorized Entry of a Critical Infrastructure, La. R.S. 14:61 ("the Statute"), have turned vast, unmarked stretches of this State into critical infrastructure, exposing individuals to up to five years' imprisonment for nothing other than their mere presence on such "infrastructure" after being forbidden by "authorized persons." Dkt. 1, ¶¶ 1, 46-64. There is no requirement that they cause or intend to cause property damage or harm of any kind. *Id.* ¶¶ 53-63. There are over 125,000 miles of pipelines in Louisiana, most of which are underground and invisible, running through private and public property, waterways, wetlands, public streets, parks, and sidewalks. *Id*. ¶¶ 1, 3, 5. These vague and in many cases invisible areas are now considered critical infrastructure. *Id*. at ¶¶ 53-64.

As a result, the Statute violates the Due Process clause and First Amendment because it is vague and overbroad, violates the rights to speech, of the press, association, and assembly, and targets a particular viewpoint for harsher punishment. Plaintiffs include people who: 1) have been arrested under this vague law in an arbitrary and discriminatory manner, including a journalist; 2) landowners with pipelines running through their property whose rights have been affected; and 4) environmental and racial justice advocates whose First Amendment rights to assembly, expression, and of the press, are chilled by the existence of this Statute and the threat of its enforcement. Dkt. 1, ¶¶ 19-30, 85-108.

The Statute's serious vagueness and overbreadth problems – and true purpose – were on display almost immediately when it was invoked a matter of days after it went into effect by a pipeline company that was itself knowingly trespassing and illegally constructing on property

where protesters and a journalist were arrested and charged under the Statute. *Id.* ¶¶ 8-12, 65-84. The trespassing company served as the authorized person directing law enforcement to remove alleged trespassers. *Id*. The fact that law enforcement was taking direction from a trespassing pipeline company and arresting protesters and a journalist and not company employees demonstrates arbitrary and discriminatory enforcement. On July 15, 2020, the Louisiana Third Circuit Court of Appeal, in an appeal from the expropriation proceeding Defendants reference at length, ruled that the pipeline company had "trampled" the due process rights of the landowners, three of whom are Plaintiffs in this case, and "eviscerated the constitutional protections laid out to specifically protect those property rights." *Bayou Bridge Pipeline, LLC v. 38.00 Acres,* 2019-565, 2020 WL 4001135, p. 32 (La.App. 3 Cir. 7/15/20). The Third Circuit awarded them $10,000.00 each for the due process violation. Yet it was people protesting that violation while it was happening on Plaintiffs' land who were arrested and charged with unauthorized entry of a critical infrastructure, and who now face a sentence of up to five years' imprisonment.

Defendants' own briefs show that even officials tasked with the enforcement of this Statute are uncertain and inconsistent among themselves as to the law's parameters. La. R.S. 14:61(A)(3) punishes "[r]emaining upon or in the premises of a critical infrastructure after having been forbidden…" but does not define what "premises" means when it comes to pipelines, nor does it identify who is a person authorized to do the forbidding. Dkt. 1, ¶¶ 54, 58. In the first round of briefing on defendants' motions to dismiss, Attorney General Jeff Landry, the chief legal officer for the state of Louisiana, described "premises" as entire tracts of land where pipelines either "exist or do[] not." Dkt. 30-1 at 14. According to the Attorney General, a person is either "present on that tract or is not." *Id*. Elsewhere in his brief, he referred to pipeline "rights-of-way." *Id*. at 11. Defendant Duhé, the official tasked with deciding whether or not to

prosecute the three Plaintiffs in this case who were arrested and charged under La. R.S. 14:61, suggests the question of what constitutes "premises" is clear for the landowner Plaintiffs in St. Martin Parish as a result of the expropriation judgment setting a 50-foot right of way for the pipeline. Dkt. 64-1 at 17-18. But these landowners' invitees were arrested and charged with violating La. R.S. 14:61 over a year before that judgment was rendered when there was no pipeline, no valid servitude or right of way, and the company and its agents and officers were themselves trespassing on Plaintiffs' land. Dkt. 1 ¶¶19-21, 23-24, 65-84.

LAW AND ARGUMENT

I. Standard of Review

On motions to dismiss under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, courts must "accept well-pled factual allegations as true," *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 153 (5th Cir. 2010), and "resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of [the] plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 n. 9 (5th Cir. 1993); *see also, Meredith v. Nowak*, No. CIV A 06-2384, 2006 WL 3020097, at *2 (E.D. La. Oct. 19, 2006) citing *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992) (same standard applies to motions to dismiss brought under either Rule 12(b)(1) for lack of jurisdiction or 12(b)(6) for failure to state a claim). While "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not suffice, *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), "heightened fact pleading of specifics" is not required, "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly,* 550 U.S. 544, 570 (2007).

Plaintiffs' provide a thorough, detailed, and plausible accounting of the facts surrounding the amendment of the law prohibiting unauthorized entry of critical infrastructure, its facial

invalidity, its unconstitutional application to three of the plaintiffs, the chilling effect on all of the plaintiffs, as well as their claims and entitlement to relief.

II. Plaintiffs Have Standing Under First Amendment Standing Doctrine Which Is More Permissive in Recognition of the Importance of These Rights to the Proper Functioning of Our Democratic Society.

Plaintiffs present a facial and as-applied challenge to La. R.S. 14:61, as amended, that it violates the First Amendment and Due Process Clause because it is vague and overbroad, violates the rights to speech, of the press, and assembly, and targets a particular viewpoint for harsher punishment. Standing requirements are more permissive in the First Amendment context because the exercise of these rights is so crucial to the functioning of a democracy, and because there are unique obstacles to, and necessity for, challenges to this kind of governmental overreach. *See Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) ("Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."). In the First Amendment context, the more permissive standing requirements exist to address the concern that "society as a whole would suffer" when an individual engaged in protected activity refrains from engaging in such activity further rather than risk punishment in challenging the statute. *See id.* While the requirements are more relaxed in the First Amendment context, Plaintiffs must still satisfy the core requirements of injury, causation, and redressability. *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir.2018), *as revised* (Aug. 9, 2018) citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (injury-in-fact, causal connection between the injury and conduct complained of fairly traceable to the challenged action of the defendant, that is likely redressed by a favorable decision).

One way a plaintiff satisfies standing requirements in First Amendment cases is when they are arrested under the challenged statute and face a credible threat of prosecution. *Seals v. McBee*, 898 F.3d 587, 592-3 (2018). Three of the Plaintiffs – White Hat, Mejia, and Savage – have been arrested and charged by St. Martin Parish Sheriff's deputies under the 2018 amendments to the statute and the charges have not been dropped by the prosecutor. Even if the prosecutor were to disavow prosecution, they would still have standing as they would be legally subject to prosecution until September 2022 in light of the four-year statute of limitations for this type of felony offense. *Id. See also,* La.C.Cr.P. Art. 572(A)(2). The Fifth Circuit has held such an arrest to suffice as a credible threat of enforcement even when prosecution has been declined. *Seals v. McBee, supra*.

The Attorney General and Defendant Duhé agree these Plaintiffs have standing. *See* dkt. 30-1 at 10 (Attorney General) ("all Plaintiffs other than Arrestee Plaintiffs should be dismissed") and dkt. 64-1 (Duhé) (challenging standing of all other plaintiffs and moving to dismiss "Arrestee Plaintiffs" on *Younger* abstention grounds). Defendant Theriot argues they do not because these Plaintiffs did not identify "any encounter with any St. Martin Parish Sheriff's deputy, nor any encounter with Sheriff Theriot himself" after their arrest and until the filing of the complaint in this matter challenging that arrest. Dkt. 62-1 at 4. Sheriff Theriot does not provide any cases at all to support this bare assertation that failure to encounter a law enforcement officer after a felony arrest negates their standing to challenge the constitutionality of the arrest or the offense with which they are charged. But Defendant Theriot's deputies arbitrarily and discriminatorily enforced the Statute in St. Martin Parish leading to arrests and criminal charges that are still pending. Dkt. 1, ¶¶73-76, 80. There is no reason to believe they would not continue to do so. If charges are accepted, he and his employees may be witnesses and

conduct further investigations. These Plaintiffs were arrested under the Statute, they are still "legally subject to prosecution" until September 2022 and have standing to challenge the law, even if prosecution is disavowed. *Seals v. McBee*, 898 F.3d at 592.

Even if the Statute was constitutionally applied to these Plaintiffs – which it was not – they can still bring a facial challenge based on the First Amendment impacts it has on parties not before the court because of the Statute's vagueness and overbreadth. *Dombrowski v. Pfister*, 380 U.S. 479, 486-7 (1965). This "exception to the usual rules governing standing" reflects "the transcendent value to all society" of free expression, and the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Id*.

For the Plaintiffs who have not yet been arrested, Defendants mistakenly suggest Plaintiffs are required to plead they intend to violate the law in order to have standing. *See* e.g., dkt. 30-1 at 10 (Attorney General) ("Like the other Plaintiffs, none of the landowners plead that they intend to violate R.S. 14:61."). However, the Supreme Court has made clear that plaintiffs do not confirm that their future speech would violate the law in order to establish injury-in-fact and a credible threat of enforcement of a statute. *Susan B. Anthony v. Driehaus*, 573 U.S. 149, 164 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.") (Thomas, J.). *See also*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights").

The Plaintiff landowners and environmental and racial justice advocates who have not been arrested have plainly alleged what is required for standing in the First Amendment context:

they have engaged in and "intend to engage in a course of conduct that is affected with a constitutional interest" – associational and expressive activity as well as freedom of the press – that is "arguably proscribed by statute," under a "credible threat of prosecution." *See Susan B. Anthony*, 573 U.S. at 164. They are not required to plead they intend to violate the law. Plaintiffs have pled their realistic concern about the vagueness and overbreadth, and overarching purpose, of the amendments that place them at risk of prosecution by not clearly defining what is proscribed and where.

They also allege a credible risk of enforcement that is not "imaginary" or "speculative" – particularly in light of the fact that others have been arrested at the behest of a pipeline company that was illegally trespassing and had no right to be where it was, as well as others arrested while protesting in public, navigable waterways. *See id*. at 163-64 citing *Babbit*, *supra*, at 298. ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'"); *see also, See Steffel v. Thompson*, 415 U.S. 452, 459 (plaintiff showed a credible threat of prosecution by pointing out his companion's arrest under the challenged statute for conduct he desired to continue and believed was constitutionally protected).

Landowner Plaintiffs Larson Wright, Larson Stevens, Larson Hernandez, and the Aaslestads are also injured because there is a credible threat that the Statute will be enforced against them or their guests on the 38 acres of property they co-own with others in St. Martin Parish – because it already has been. Dkt. 1 at ¶¶ 23-24, 65-84, 94-96. The power given by the Statute to "authorized persons" who can proscribe assembly "upon or in the premises of" a pipeline has been used several times on those 38 acres against individuals who had these co-owners' permission to be on that property – again when the "pipeline" was not there legally and

the trespassing company was deemed an "authorized person." *Id*. and ¶86.[2] The company now has a completed pipeline running through their property, which makes the entire 38-acre tract (according to the Attorney General, dkt. 30-1 at 14), or at least some unknown portion of it, a critical infrastructure under the Statute. But the landowners intend to continue to advocate against the fossil fuel industry, and to allow guests to do the same. Dkt. 1, ¶¶ 94-96. They face a credible threat that they could be liable or their guests will again be arrested and charged under that Statute and prosecuted. *Babbit*, 442 U.S. at 301-3.

The Plaintiffs arrested under the Statute and the landowners of the property where their arrests took place have suffered injuries that are fairly traceable to the Defendants and would be redressed by a favorable decision declaring the Statute unconstitutional, i.e. the felony charges against those arrested would be invalidated and the credible threat of enforcement of an unconstitutional statute on landowners' property carrying a sentence of up to five years would disappear.

Plaintiffs Lavigne, Joseph, RISE St. James, 350 New Orleans, and Louisiana Bucket Brigade have standing because they assert that they are interested "in engaging in a course of conduct arguably affected with a constitutional interest" but for which they may be penalized. *See Babbit*, 442 U.S. at 298, 303. Those Plaintiffs have "previously engaged in" marches, protests, press conferences, filming on location, and other advocacy in areas where there are pipelines, and have alleged that in "the future will engage in" such assembly. *Babbit*, 442 U.S. at 303; Dkt. 1, ¶¶ 22, 26-29, 97-100, 102, 106. The Statute empowers "authorized persons" to arbitrarily decide to proscribe otherwise lawful presence "upon or in the premises of" a pipeline

[2] While other co-owners of that property could have refused permission for Landowners' guests to be present, "express, legal, or implied authority to be in the movable or on the immovable property" is an affirmative defense under the criminal trespass statute. La. R.S. 14:63(D). The guests were arrested and removed under the critical infrastructure statute, which does not include such an affirmative defense.

– this could be a public park, sidewalk, or waterway. La. R.S. 14:61(A)(3). Because the law is vague and overbroad, Plaintiffs have no way of knowing for sure, but have a "palpable basis for believing" that they will also be proscribed from lawfully assembling to express opposition to, or report on, pipeline projects on public sidewalks, parks, waterways, or private property that are "upon or in the premises of" pipelines.[3] *Babbitt*, 442 U.S. at 304. *See also, Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (considering enforcement of challenged statute against others as a factor to determine whether there is a credible threat of prosecution).

The challenged statute need only "arguably" proscribe plaintiff's intended conduct. *281 Care Comm. v. Arneson*, 638 F.3d 621, 630 (8th Cir. 2011); *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). And "the improbability of successful prosecution" is irrelevant, as "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. at 487. This is particularly so in a vagueness challenge where plaintiffs cannot know if their conduct is proscribed, and if "the provision were truly vague, [plaintiffs] should not be expected to pursue their collective activities at their peril." *Babbitt*, 442 U.S. at 303. Such a plaintiff "suffers from an 'ongoing injury resulting from the statute's chilling effect on [their] desire to exercise [their] First Amendment rights.'" *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003).

Plaintiffs have also moved to supplement the complaint with events that transpired after the first round of briefing on Defendants' motions to dismiss. *See* dkts. 45, 61. The new factual allegations further demonstrate the law's unconstitutional vagueness and overbreadth, as well as

[3] The Attorney General also argues that "no Plaintiff alleges an intent to protest on private property," Dkt. 30-1 at 9, but does not explain why this is relevant: the Statute is not by any of its terms limited to private property, and in fact has been used to arrest people on public, navigable waters. *See* Dkt. 1 at ¶76.

the standing of Plaintiffs' Lavigne, RISE St. James, and Louisiana Bucket Brigade as they detail the discovery of a cemetery where it is believed that people enslaved on the plantation that once operated there are buried. *See* Dkt. 45-2, ¶¶ 22, 27, 29, 99-107, 117. Because the cemetery has a pipeline running through it, it is now also a form of critical infrastructure. *Id.* Plaintiffs Lavigne and RISE St. James had to seek, and in fact obtained, a temporary restraining order allowing them to conduct a prayer ceremony to commemorate their ancestry on Juneteenth because they feared prosecution under the critical infrastructure law. Dkt. 61 at 2-4.

The cases cited by Defendants to suggest Plaintiffs have not sufficiently pled standing are inapposite. The Attorney General, whose arguments in this regard have been adopted by Defendant Duhé, cites *Morrison v. Board of Education of Boyd County* for the general proposition that "in the absence of threats or actual punishment for protected speech, the presence of the carveout [leaves] plaintiffs without a justiciable injury." Dkt. 30-1 at 9. However, in *Morrison*, the Board of Education had not taken any concrete action that gave rise to a credible threat of prosecution. 521 F.3d 602, 610 (6th Cir. 2008). Here, just days after the amendments went into effect, Defendant Theriot's deputies took concrete action: they used the Statute in an arbitrary and discriminatory manner to proscribe assembly of individuals reporting on or advocating against pipelines on public and private property. Dkt. 1, at ¶¶65-76.

Defendant Theriot points to *O'Shea v. Littleton,* 414 U.S. 488, 491-6 (1974) and *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983). Dkt. 31-1 at 5-8. However, neither of those cases is relevant because the plaintiffs there did not challenge any statute as unconstitutional, nor allege that unconstitutional criminal statutes were being employed to deter constitutionally protected conduct. In contrast, Plaintiffs here challenge the constitutionality of a statute and its deterrent chilling effect on constitutionally protected conduct, and they have specifically alleged

an intention to engage in conduct arguably proscribed by the Statute: expressing opposition to pipelines and other environmental harms while assembled upon or near the undefined premises of a pipeline. Dkt. 1, ¶¶ 22, 26- 29, 100, 102, 106. In that sense, this case is far more like *Steffel v. Thompson*, in which the Court found that the plaintiff had standing to challenge a statute as applied to him where he alleged an intent to engage in conduct that was arguably proscribed by the statute, was threatened with arrest for engaging in that conduct, and his companion was prosecuted under the statute for the same conduct. 415 U.S. 452, 459 (1974).

On page 10 of his brief, the Attorney General argues that "Arrestee Plaintiffs" were not arrested for activities protected by the "carveouts" in the Statute for lawful assembly, citing to paragraph 11 of the Complaint, but omitting a crucial part of that paragraph:

> There have been more than a dozen arrests of people peacefully protesting and a journalist covering the events who were charged with felonies for acts which would have been charged as misdemeanor trespass before August 1, 2018 – *and only if in fact those arrested did not have permission or a legal right to remain on the property in the first place*. Dkt. 30-1 at 10 (emphasis added).

The "carveouts" regarding lawful assembly, lawful commercial and recreational activities, and the rights of ownership in La. R.S. 14:61(D) merely restate "already-existing constitutional limits on any government activity." *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1207 (D. Ariz. 2013) (savings clause did not cure statute's serious overbreadth and vagueness defects). *See also, CISPES v. F.B.I.*, 770 F.2d 468, 474 (5th Cir. 1985) (such clauses "cannot substantively operate to save an otherwise invalid statute, since [they are] a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments").

Plaintiffs Lavigne, Joseph, RISE St. James, 350 New Orleans, and Louisiana Bucket Brigade have standing because they assert that they are interested "in engaging in a course of conduct arguably affected with a constitutional interest" but for which they may be penalized. *See Babbit*, 442 U.S. at 298, 303. Those Plaintiffs have "previously engaged in" marches, protests, press conferences, filming on location, and other advocacy in areas where there are pipelines, and have alleged that in "the future will engage in" such assembly. *Babbit*, 442 U.S. at 303; Dkt. 1, ¶¶ 22, 26-29, 97-100, 102, 106. The Statute empowers "authorized persons" to arbitrarily decide to proscribe otherwise lawful presence "upon or in the premises of" a pipeline – this could be a public park, sidewalk, or waterway. La. R.S. 14:61(A)(3). Because the Statute is vague and overbroad, Plaintiffs have no way of knowing for sure, but have a "palpable basis for believing" that they will also be proscribed from lawfully assembling to express opposition to, or report on, pipeline projects on public sidewalks, parks, waterways, or private property that are "upon or in the premises of" pipelines.[4] *Babbitt*, 442 U.S. at 304. *See also, Holder v. Humanitarian Law Project,* 561 U.S. at 16 (considering enforcement of challenged statute against others as a factor to determine whether there is a credible threat of prosecution).

Plaintiffs have also moved for reconsideration of the Court's dismissal of the claims against the Attorney General because of his multiple connections to and enforcement responsibility for the subject-matter at the core of this case. *See* dkt. 66, 66-1 (noting his supervisory authority over district attorneys in the state, his role as legal officer to the Governor's Office of Homeland Security and Preparedness which has oversight and authority over critical infrastructure, and his enforcement responsibility with regard to cemeteries). *See*

[4] The Attorney General also argues that "no Plaintiff alleges an intent to protest on private property," Dkt. 30-1 at 9, but does not explain why this is relevant: the Statute is not by any of its terms limited to private property, and in fact has been used to arrest people on public, navigable waters. *See* Dkt. 1 at ¶76.

also, Seals v. McBee, supra (finding petitioner had standing over Attorney General's challenge when the local district attorney was not a party to the suit).

Plaintiffs have suffered an injury to a constitutionally protected interest that would be redressed by a favorable decision from this court declaring the Statute as amended in 2018 unconstitutional.

III. Plaintiffs Arrested and Charged Under the Challenged Law Are Not Barred by the *Younger* Abstention Doctrine.

For the *Younger* abstention doctrine to apply, there must be an "ongoing state judicial proceeding" for a federal court to defer to. *See Gates v. Strain,* 885 F.3d 874, 880 (5th Cir. 2018). There is no ongoing state judicial proceeding in this matter. Even the Attorney General agrees that the *Younger* abstention doctrine does not apply to bar this case at this point. *See* Dkt. 30-1 at 12. ("No charging decision has been made… [i]f the Arrestee Plaintiffs are charged, their claims would be subject to abstention under *Younger v. Harris,* 401 U.S. 37 (1971).")

Even when there are state judicial proceedings, "[c]ourts have long recognized that abstention is particularly inappropriate in an overbreadth or vagueness case grounded upon the First Amendment." *Hobbs v. Thompson,* 448 F.2d 456, 462 (5th Cir.1971). The Fifth Circuit has explained that the reason for this is because the delay caused by awaiting an attempt to vindicate the federal claim in state court, "is even more intolerable in an overbreadth case since the postponement of relief itself might effect the impermissible chilling of the very constitutional right… [a claimant] seeks to protect." *Id*. at 462 (internal quotations omitted).

Defendants Duhé and Theriot argue that this Court should abstain simply because Plaintiffs were arrested, even though the charges have not been accepted and there is no criminal prosecution in state court. Dkt. 31-1 at 7-9; dkt. 32-1 at 12-15. They point to *Doran v. Salem Inn, Inc.,* 22 U.S. 922 (1975), as support for their argument that a state judicial proceeding exists.

However, in *Doran*, the day after a federal lawsuit was filed, a plaintiff was served with a summons, which *summoned* the plaintiff to state court to answer to charges of violating the ordinance he was challenging in the federal suit, at which point the "criminal prosecution had been instituted." *Id*. at 925. The Supreme Court held that because a "prosecution" in state court had officially begun with respect to that petitioner and the federal litigation was in an "embryonic stage," *Younger* considerations warranted abstention. *Id.* at 929. However, the court allowed the other two petitioners' claims to proceed despite the fact there was a related state court prosecution under the challenged statute. *Id*. at 929-30.[5]

The other cases cited by Defendant Duhé do not support his argument that a state court proceeding exists in this matter to which this Court should defer. In *Nobby Lobby, Inc. v. City of Dallas*, the court actually refused to abstain from exercising its jurisdiction even though state criminal proceedings were in play because the city's prosecution was in bad faith. 767 F.Supp. 801, 808 (N.D. Tex.1991), *aff'd*, 970 F.2d 82 (5th Cir.1992). In *Cook v. Harris County*, the Plaintiff asked the federal court to order the return of her client file that had been seized as part of an investigation into a third party. 2019 WL2225051 (S.D. Texas May 23, 2019). The federal court abstained, holding the plaintiff was afforded an adequate opportunity to raise her claim for the return of her file in the context of the state proceeding.

There is simply no state judicial proceeding that would bar this court's exercise of jurisdiction.

[5] Theriot and Duhé argue that the arrests in this matter equate with the summons issued in *Doran*. But Theriot only points to La.C.Cr.P. art. 211 as support, which allows for a summons to be issued instead of an arrest in certain circumstances. Defendants ignore the essential nature of what a summons is. As defined in La. C.Cr.P. art. 208, a summons is "an order in writing, issued and signed by a magistrate or a peace officer in the name of the state, stating the offense charged and the name of the alleged offender, and *commanding him to appear before the court designated in the summons at the time and place stated in the summons*." (emphasis added). A summons, by its very nature, means there is a judicial proceeding.

IV. Plaintiffs Have Sufficiently Stated a Claim Against Defendant Duhé.

Defendant Duhé acknowledges that the Arrestee Plaintiffs have standing to sue him but urges this Court to abstain from adjudicating their claims. *See* dkt. 64-1 (challenging standing of all other plaintiffs but moving to dismiss "Arrestee Plaintiffs" on *Younger* abstention grounds) Duhé also argues that the landowner Plaintiffs in St. Martin Parish have failed to state a claim against him. The only support he offers for this argument is two sentences, i.e.: "The actual St. Martin Parish landowners were informed of their rights by Judge Comeaux's Judgment. The Judgment spell out the rights of Bayou Bridge Pipeline, LLC and plaintiff landowners with respect to the property…" Dkt. 64-1 at 22. He then goes on to reproduce portions of the Judgment.

However, there is now a completed pipeline running through the property they co-own with others. People they allowed on their property over a year before the expropriation judgment was issued were arrested and charged under La. R.S. 14:61, and Duhé has the power to decide whether or not to institute criminal prosecutions. The landowners intend to continue to advocate against the fossil fuel industry, and to allow guests to do the same. Dkt. 1, ¶¶ 94-96. They face a credible threat that they could be liable or their guests will again be arrested, charged under that Statute, and prosecuted. *Babbit,* 442 U.S. at 301-3. For these and reasons set out at length above, Plaintiffs have sufficiently stated a claim against Defendant Duhé.

V. A Change in Official Capacity Defendant Is Remedied by the Automatic Substitution Provided for in Fed. R. Civ. Pro. 25(e) – Not Dismissal.

Defendant Theriot moves to dismiss the claims against him on the grounds of mootness as he is no longer sheriff in St. Martin Parish. However, dismissal is not appropriate as this is a routine and frequent occurrence addressed by Fed. R. Civ. Pro. 25(d), which provides:

> (d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

Defendant Theriot was sued in his official capacity. His successor can and must be substituted into the case title in subsequent proceedings.

CONCLUSION

Plaintiffs have standing under First Amendment standing doctrine. There are no state judicial proceedings that would bar litigation in this court under *Younger*. Plaintiffs have stated a claim against Defendant Duhé, and Sheriff Theriot's transition out of office is easily remedied by Fed. R. Civ. Pro. 25(d). For all of these reasons, the Defendants' motions to reconsider should be denied.

Date: September 26, 2020
Lafayette, Louisiana

Respectfully submitted,

__s/Pamela C. Spees_____
PAMELA C. SPEES
La. Bar Roll No. 29679
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel and Fax: (212) 614-6431
pspees@ccrjustice.org

WILLIAM QUIGLEY
La. Bar Roll No. 7769
Professor of Law
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Tel. (504) 710-3074
Fax (504) 861-5440
quigley77@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2020, a copy of the foregoing was filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record unless indicated otherwise.

s/Pamela C. Spees
Pamela C. Spees