UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

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ANNE WHITE HAT, RAMON MEJÍA, and KAREN SAVAGE,

Plaintiffs,

v.

Civil Action No. 6:20-cv-00983

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; JEFF LANDRY, in his official capacity as Louisiana Attorney General,

JUDGE ROBERT R. SUMMERHAYS

MAGISTRATE JUDGE CAROL B. WHITEHURST

Defendants.

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PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO RECONSIDER

In light of questions raised by Defendants' opposition to Plaintiffs' Motion to Reconsider, Dkt. 131, it is necessary to recap the distinctions between the overbreadth and vagueness doctrines. The concepts are "logically related and similar," but the Supreme Court has instructed that in cases involving a facial challenge to the overbreadth and vagueness of a statute, "a court should first consider whether the statute is overbroad, and, if it is not, then whether it is unconstitutionally vague." *CISPES (Comm. in Solidarity with People of El Salvador) v. F.B.I.*, 770 F.2d 468, 472 (5th Cir. 1985) citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). With regard to overbreadth, the Supreme Court has held that the "vice of an overbroad statute in the First Amendment context is that persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Id.* at 468 citing *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). With regard to vagueness, a penal statute must

"define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Where First Amendment rights are involved, the Supreme Court has held that the "standards for permissible vagueness are strict." *NAACP v. Button,* 371 U.S. 415, 432, 438 (1963); *See also Smith v. Goguen,* 415 U.S. 566, 573 (1974) (where a statute's scope is "capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine *demands a greater degree of specificity than in other contexts.*") (emphasis added). Moreover, the Supreme Court has emphasized that while "the doctrine is concerned with both notice and enforcement, […] fear of arbitrary enforcement is the more important consideration." *Kolender,* 461 U.S. at 358.

I. THE FIRST AMENDMENT: THE STATUTE IS OVERBROAD *AND* UNDER-INCLUSIVE IN VIOLATION OF THE FIRST AMENDMENT.

A statute may be both overbroad, in that a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep, and under-inclusive in that it leaves "appreciable damage to [the state's] interest unprohibited." *See, e.g., Natl. Press Photographers Assn. v. McCraw,* 594 F. Supp. 3d 789, 808 (W.D. Tex. 2022).

A. Defendants' Interpretation that the Statute Applies to Tracts of Land Where Pipelines Exist Does Not Cure the Statute's Substantial Overbreadth.

Defendants repeat the Attorney General's earlier pronouncement that "premises of a pipeline" means a tract of land where "a pipeline exists or does not" for purposes of enforcement of La. R.S. 14:61(A)(3), which prohibits remaining after being forbidden from the premises of a critical infrastructure. Dkt. 30-1 at 14 (Motion to Dismiss Brief) and *see* Dkt. 131 at 13 (Opposition to Plaintiffs' Motion to Reconsider). In their most recent opposition brief, Defendants offer the dictionary.com definition of "premises," i.e. "a piece of land together with

its buildings, [especially] considered as a place of business." Dkt. 131 at 13. This "piece-of-land" definition clarifies nothing for an average person or a law enforcement officer; yet, Defendants simply restate that a "pipeline is either present on a tract or it is not." *Id.* An obvious flaw in Defendants appeal to simple dictionary definitions is that a tract of land could be – and in the reality of this case does – run in size from half an acre, or less, to dozens or hundreds of acres or more. [1] Despite this reality, Defendants do not even attempt to identify or delimit where within a given tract a person may run afoul of La. R.S. 14:61(A)(3) for remaining after being forbidden on the premises of critical infrastructure when it comes to pipelines. A person may standing be on the edge of a premises – i.e. a large tract of land – hundreds of yards away from any actual pipeline that might exist on the farthest bounds of the tract and without any nexus or disruption to the pipeline itself and be subject to La R.S. 14:61(A)(3) under the Defendants' interpretation. This is true even if the landowner wishing to eject them from the property is not the owner or operator of the pipeline. There is nothing in the Statute to prevent this situation.

Defendants' interpretation of "premises" only confirms the statute's substantial overbreadth. Defendants assert that the purposes of the amendments were to protect critical infrastructure against damage (albeit prospectively because the Statute says nothing about damage, or even an intent to do damage) and to protect citizens' property rights. Dkt. 131 at 7-8. While the Court, and subsequently the Defendants, adopted a view that the Statute's proscriptions are limited to private property and non-public forums, there is nothing in the Statute to that effect. Even if the Statute were restricted to private property and non-public

[1] "Tract" is defined by Black's Law Dictionary as "a lot, piece or parcel of land, of greater or less size, the term not importing, in itself, any precise dimension." The only time Defendants refer to a pipeline right-of-way or a marked, visible area is with regard to the illegal pipeline construction site on the property where Plaintiffs were accused of violating the Statute, suggesting they had notice of the premises in that instance. *See, e.g.*, Dkt. 131 at 11.

forums, the Statute would still be overbroad given the State's definition of premises, which renders vast swaths of pipeline territory subject to the reach of the Statute.[2]

The overbreadth is even more pronounced when the Statute's potential application to pipelines in public spaces and forums is considered, e.g. if an officer issues a dispersal order in a public space, pursuant to La. R.S. 329.3,[3] where there are pipelines of some kind or size, or a person is accused of obstructing a public passageway under La. R.S. 100.1[4] through which a pipeline of some kind runs, and refuses to leave. The Statute's overbreadth and vagueness raise serious concerns about whether such charges could be combined with or escalated under La. R.S. 14:61(A)(3).[5]

The Statute as amended in 2018 and as understood by the state's chief law enforcement officer is not narrowly tailored to achieve the interests he has identified because it reaches a

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[2] Defendants also misrepresent and attempt to muddy Plaintiffs' arguments in support of their Motion to Reconsider the Court's ruling that the Statute is not content-based. Plaintiffs stand by their arguments, which speak for themselves as to the Court's ruling and the fact that the authors of the bill assured the legislature that the Statute challenged here would only come into play when damage was involved, while the resulting law requires no such thing. *See* Dkt. 129-1 at 3-6. Defendants effectively confirm this when they point to La. R.S. 14:61.1, which emerged as a separate law prohibiting damage to critical infrastructure, including pipelines. Dkt. 131 at n. 1 ("The hearing transcript on which Plaintiffs' rely is not clear, but it is possible the statements Plaintiffs point to were addressing the latter [La. R.S. 14:61.1]").

[3] La. R.S. 14:329.3(A) provides:

> Any law enforcement or peace officer or public official responsible for keeping the peace may issue a command to disperse under the authority of R.S. 14:329.1 through 329.8 if he reasonably believes that riot is occurring or about to occur. The command to disperse shall be given in a manner reasonably calculated to be communicated to the assemblage.

[4] La. R.S. 100.1(A) provides:.

> No person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor, or passage of any public building, structure, water craft, or ferry, by impeding, hindering, stifling, retarding, or restraining traffic or passage thereon or therein.

[5] For these same reasons, Defendants attempts at Dkt. 131 at 11-13 to put distance between the concerns about this Statute and the operation of the laws at issue in *Wright v. State of Georgia*, 373 U.S. 284 (1963), *Kolender v. Lawson*, 461 U.S. 352 (1983), and *City of Chicago v. Morales*, 527 U.S. 41 (1999), are unavailing. Specifically, Defendants appear to concede, the Supreme Court in *Morales* made clear that a dispersal provision in a statute of the kind the Defendants' point to here, will not save an otherwise unconstitutionally vague statute since one cannot sanitize the underlying unconstitutional statutory prohibition. *Id* at 59 ("Because an officer may issue an order only after the prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer.")

substantial number of unconstitutional applications when judged in relation to the Statute's plainly legitimate sweep.[6] *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973).

B. A Purported Limitation to Private Property and Non-Public Forums Does Not Cure the Statute's Vagueness and Otherwise Renders it Underinclusive.

Defendants agree with the Court's ruling that the Statute's reach was limited to private property and non-public forums, based on its observation that "the statute's entry restrictions appear framed to largely impact structures on private property" or government-owned nonpublic forums and that "many of the types of structures protected – pipelines, chemical manufacturing facilities, refineries, etc. – are traditionally private property." Dkt. 127 at 17-21.[7] Neither the Court nor the Defendants, however, clarify whether this means that privately-owned pipelines running in or through public spaces like sidewalks or parks turn those public spaces into private property or non-public forums for purposes of the Statute, or whether pipelines in those public spaces are simply not protected as forms of critical infrastructure under the Statute. The question raised by the Court's ruling exacerbates the already serious concerns about the vagueness of the Statute, discussed further below. This conclusion may only increase citizen or law enforcement confusion about the statute's scope.

If the Court intended to exclude all pipelines in public spaces and forums from the Statute's reach, it potentially renders the statute under-inclusive, in light of the purposes of the

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[6] Defendants suggest that Plaintiffs "do not appear to challenge" the Court's holdings that "there is no First Amendment right to trespass on private property to conduct protests… ." Dkt. 131 at 5. Plaintiffs do maintain, however, that the First Amendment protects expressive activity on private property. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Any law proscribing such expressive activity must be narrowly tailored to achieve the State's compelling interest, if the restriction is content-based, or a significant state interest, if the law is deemed content-neutral. *Id*

[7] The Court also holds that the purported carve-out for expressive activity eliminates any vagueness and overbreadth concerns as it relates to public forums. But the "carve-out" "cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments." *CISPES v. F.B.I.*, 770 F.2d at 474. Further, the Statute is not limited to expressive activity, but any presence for any reason on the premises of a critical infrastructure after being forbidden and regardless of a person's intent

Statute as identified by the Court and Defendants, i.e. to protect critical infrastructure facilities and citizens' property rights. *See* Dkt. 127 at 21 and Dkt. 131 at 7-8. "Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee v. Fla. B.*, 575 U.S. 433, 451 (2015) (emphasis in original). *See also, Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015) (a "law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") citing *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). "While it is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too little speech, underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint, or underinclusiveness can reveal that a law does not actually advance a compelling interest." *Williams-Yulee.*, 575 U.S. at 448.

II. VOID FOR VAGUENESS IN VIOLATION OF DUE PROCESS

A. The Defendants Highlight the Wrong Standard for Vagueness in Criminal Statutes.

As a threshold matter, Defendants restate their erroneous argument first raised in their summary judgment opposition 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 (summary judgment opposition brief) and Dkt. 131 at 11 (opposition to Motion to Reconsider). 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)). The concern about precision is even further heightened when First Amendment activity is concerned. *See Smith v. Goguen*, 415 U.S. at 573 (where a statute's scope is "capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine *demands a greater degree of specificity than in other contexts.*"). Likewise, contrary to Defendants' suggestion that Plaintiffs are "side-stepping" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010), Plaintiffs claims in fact are that the Statute is vague because it "(1) fails to provide a person of ordinary intelligence fair notice of what is prohibited," and "(2) is so standardless that it authorizes or encourages seriously discriminatory enforcement."

Even if the looser standard applied, the 2018 amendments would fail because, as discussed more below and in previous briefing, the addition of Louisiana's vast networks of pipelines to the definition of critical infrastructure without limitation or qualification provided no guidance or standards at all for determining what constitutes a pipeline premises. Tellingly, and as discussed below, the state's law enforcement officials do not agree on where the Statute's prohibitions begin and end even in the context of this litigation.

B. Law Enforcement Officials' Inconsistent Interpretations of the Statute's Scope Clearly Demonstrate the Statute's Vagueness.

As set out above with regard to the Statute's overbreadth, Defendants repeat the Attorney General's earlier pronouncement that "premises of a pipeline" means a tract of land where "a pipeline exists or does not." Dkt. 30-1 at 14 (Motion to Dismiss Brief) and *see* Dkt. 131 at 13 (Opposition to Plaintiffs' Motion to Reconsider), and do not even attempt to limit where on a given tract a person may run afoul of La. R.S. 14:61(A)(3) for remaining after being forbidden.

As described above, this definition would render the Statute substantially overbroad.

Even more, the contested definitions *among* Louisiana law enforcement officials further proves the statute is unconstitutionally vague. The District Attorney of the 16th Judicial District, Bo Duhé previously represented to this Court that the "statute is not vague" because it prohibits unauthorized entry of a critical infrastructure that is "completely enclosed by any type of physical barrier" and did not address the situation of pipelines at all with respect to La. R.S. 14:61(A)(3). Dkt. 32-1 at 15. He later suggested the question of what constitutes "premises" would be determined through a study of property records: specifically, for the previous Plaintiff landowners in this action in St. Martin Parish by reference to the expropriation judgment setting a 50-foot right of way for the pipeline. *See* Dkt. 64-1 at 17-18. If high-level law enforcement officials in the District and the State cannot themselves agree on the Statute's scope, the Statute has put boundless – and potentially contradictory – discretion into what must be clearly defined guidance for a Statute implicating free speech.

Defendants also suggest that the fact that "police officers may have had different views of what constitutes the 'premises' of the pipeline is likewise not material." Dkt. 131 at 14. That is a remarkable claim in light of the central point of the vagueness doctrine. This concession – that different law enforcement officers have had different interpretations (and inevitably, that future officers may still yet have different definitions) – effectively proves Plaintiffs case, by meeting the very definition of vagueness. Defendants cannot waive the very point of the vagueness doctrine, after effectively conceding the Statute's terms are is so discretionary that officers can disagree on its meaning. Indeed, the Supreme Court has specifically emphasized that the "requirement that a legislature establish minimal guidelines to govern law enforcement" is even more important than individual notice of the proscribed conduct because of the danger of vesting

police with too much discretion and "entrust[ing] lawmaking to the moment-to-moment judgment of the policeman." *Kolender*, 461 U.S. at 358.

The Attorney General and Sheriff also contradict themselves in asserting that the "presence or absence of a pipeline on a tract of land is *definitively* ascertainable." Dkt. 131 at 10-11. (emphasis added). They immediately undermine this assertion with the revealing caveats that the "associated right of way is *generally* recorded in parish land records, and is in *many* cases obvious or marked by signs." *Id*. (emphasis added). Thus, even Defendants are compelled to acknowledge that pipeline routes and rights of away are not always to be found in parish land records, and the existence and location of pipelines are not always "obvious" and "marked by signs." Indeed, the factual record as to the difficulties in locating and confirming the existence of pipelines is alarming. *See* Dkt. 93-2 at ¶¶ 2-9.

Ultimately, as is apparent on the face of the statute, there are no guidelines in the Statute to govern how premises is to be determined with respect to pipelines.

C. The Addition of Pipelines to the Definition of Critical Infrastructure Creates Confusion Around Who Is Authorized to Forbid Presence on Premises.

Defendants also take issue with and misrepresent Plaintiffs' concerns about who constitutes an "authorized person" when it comes to pipelines, suggesting that this issue was not raised in the complaint. Dkt. 131 at 13-14 ("the words 'authorized person' appear nowhere in Plaintiffs' complaint"). While Plaintiffs do not concede that under federal pleading rules, a cause of action stating a due process violation need to spell out all its component parts, Defendants' assertion is nevertheless puzzling because the words do in fact appear in the complaint, *see* Dkt. 1 at 19, and because the complaint spelled out as early as the first paragraph how the concerns about the Statute's vagueness as a result of the addition of pipelines to the definition of critical infrastructure were compounded by lack of clarity as to who constitutes an authorized person

with respect to pipelines. *See id*. at ¶¶ 1, 5, 56, 59, 60.

These concerns do not exist with regard to other forms of critical infrastructure which are "completely enclosed by any type of physical barrier" (La. R.S. 14:61(A)(1), or "marked as a restricted or limited access area that is completely enclosed by any type of physical barrier" (La. R.S. 14:61(A)(4) and are overseen by entities with personnel where law enforcement officers can more easily ascertain who has authority to forbid someone from their premises.

As it did with regard to the definition of critical infrastructure, the unqualified, unlimited addition of pipelines to the Statute, also created confusion around who is authorized to forbid someone from the premises of a pipeline. Thus, an instruction to leave is not the cure-all, as the Court found, Dkt. 127 at 27, for the vagueness and confusion as to what the Statute proscribes, and where, and who can make that call.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court reconsider its ruling and grant Plaintiffs summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2023, a copy of the foregoing corrective document was served on all counsel of record via this court's electronic case filing system.

s/Pamela C. Spees
Pamela C. Spees