UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

ANNE WHITE HAT, RAMON MEJIA, and KAREN SAVAGE *Plaintiffs,* *v.* 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; BECKET BREAUX, in his official capacity as Sheriff of St. Martin Parish, *Defendants.*	CIVIL ACTION NO. 6:20-cv-983 JUDGE ROBERT R. SUMMERHAYS MAGISTRATE JUDGE CAROL B. WHITEHURST

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' FED. R. CIV. P. 56(f) RESPONSE AND MOTION TO RECONSIDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

This is a constitutional challenge to parts of a Louisiana statute, La. R.S. 14:61, as amended by 2018 H.B. 727, 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. Three individuals were arrested for violating La. R.S. 14:61 after they refused to leave the pipeline construction site. Those three individuals, among others, filed a complaint seeking to have part of La. R.S. 14:61 declared unconstitutional as violating the First Amendment and for vagueness. Dkt. 1 ("Compl.").

On June 5, 2023, the Court denied Plaintiffs' Motion for Summary Judgment and ordered Plaintiffs to show why summary judgment should not be granted in favor of Defendants. Dkt. 127 ("SJ Order"). Plaintiffs filed their combined response and motion to reconsider on June 26, 2023, but Plaintiffs did not identify any evidence beyond that already in the record. Dkt. 129. Defendants now submit their response in support of summary judgment.

BACKGROUND

THE STATUTE

In 2004, Louisiana created the statutory crime of unauthorized entry of a critical infrastructure. 2004 Reg. Sess. Act 157. As relevant here, the statute was amended in 2018 to (1) cover pipelines, which it defined as "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;" (2) cover "any site where the construction or improvement of any facility or structure referenced in this Section is occurring;" (3) decrease the maximum penalty from six years to five years imprisonment; and (4) expand a First Amendment carveout for "lawful assembly and peaceful and orderly petition for the redress of grievances, including but not limited to any labor dispute between any employer and its employee" to

> Lawful assembly and peaceful and orderly petition, picketing, or demonstration for the redress of grievances or to express ideas or views regarding legitimate matters of public interest, including but not limited to any labor dispute between any employer and its employee or position protected by the United States Constitution or the Constitution of Louisiana

Compl. App'x A, 2018 Reg. Sess. Act. 692 ("H.B. 727"), codified at La. R.S. 14:61.

THE EXPROPRIATION ACTION

Along with numerous other individuals, certain former plaintiffs own interests in a 38 acre tract of land located in St. Martin Parish (the "Property"). Compl. ¶¶ 23, 66, 67. Seeking to construct a pipeline, Bayou Bridge Pipeline ("BBP") obtained rights of way from hundreds of co-owners of the 38 acre tract, but other co-owners were either not located or refused to grant rights of way. Compl. ¶ 71; *see also* Dkt. 30-6 (Reasons for Judgment) at 1-2. Peter Aaslestad, Katherine Aaslestad, and Theda Wright — with respective interests of 0.0005803, 0.0005803, and 0.0000994 in the tract — were among the co-owners who refused to grant a right of way to BBP. Compl. ¶¶ 23-24, 67, 69-70; *see also* Dkt. 30-6 (Reasons for Judgment). BBP recorded the rights of way it obtained, *see, e.g.*, Dkt. 30-8, and filed a state court action for expropriation against the remaining co-owners on July 27, 2018, Compl. ¶¶ 70-81; *see also* Dkt. 93-6 (Quigley Decl.) at ECF p.14. The state court entered its reasons for judgment on December 6, 2018, and a final judgment of expropriation that incorporated those reasons on December 18, 2018. Compl. ¶ 83; *see also* Dkt. 30-6 (Reasons for Judgment); Dkt. 30-7 (Final Judgment).

THE TRESPASSING ARRESTS AND DISAVOWAL OF PROSECUTION

At some point prior to filing the expropriation action, BBP entered the Property and began constructing its pipeline. Compl. ¶ 72. Thereafter, on August 18, 2018, Plaintiffs Mejia and Savage were arrested on the Property and accused of violating La. R.S. 14:61. Compl. ¶¶ 20-21. Plaintiffs White Hat and Savage were later arrested pursuant to warrants for violation of R.S. 14:61 based on their presence on the Property. Compl. ¶¶ 19, 21, 75, 87-89; *see also* Dkt. 93-4 at ECF pp.350-55

(arrest warrants). All four arrests were tied to the arrestee's presence on part of the Property that was the subject recorded right of way agreements in favor of BBP, and which was subsequently expropriated for the BBP pipeline right of way. Compl. ¶¶ 88-91.

The protests that led to the arrest involved approximately 30-35 protesters who were allegedly climbing and jumping on construction equipment, throwing mud into the exhaust and fuel tank of an excavator, throwing mud on the inside walls of a guard shack, and then locking the guard shack and removing the key. Compl. ¶¶ 88-91; Dkt. 93-4 at ECF pp.346-355 (probable cause affidavits and arrest warrants). Plaintiffs allege that Mejia, Whitehat, and Savage were present on the Property with the permission of certain co-owners. Compl. ¶¶ 19-21. However, another co-owner of the Property had authorized BBP to contact law enforcement on his behalf for the removal of trespassers. Dkt. 93-4 at ECF p.345 (Authorization for Removal of Trespassers). So the protesters were instructed to leave the area around the pipeline, the right of way for which – although later determined to be unperfected – was "marked by wooden stakes with blue and white ribbon attached." Compl. ¶¶ 88-91; Dkt. 93-4 at ECF pp.346-355 (probable cause affidavits and arrest warrants). Certain protesters were arrested after they refused to do so. The relevant district attorney—Defendant Duhe—subsequently disavowed prosecution. Dkt. 93-5 (Quigley Decl.) ¶ 4; Dkt. 94-3 (Duhe Decl.) ¶¶ 4-10 & Exh. A.

LEGAL STANDARDS

SUMMARY JUDGMENT

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [one] party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). "After giving notice and a reasonable time to respond, the court may … grant summary judgment for a non-movant" or "grant the motion on

grounds not raised by a party." Fed. R. Civ. P. 56(f); *see also Celotex* , 477 U.S. at 326 ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence."); *Wolcott v. Sebelius*, 497 F. App'x 400 (5th Cir. 2016) (affirming grant of summary judgment pursuant to Rule 56(f)).

STATUTORY CONSTRUCTION

"[A] federal court is, to the extent possible, to construe the provisions [of a state statute] to avoid a constitutional conflict." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). Accordingly, "[t]he determination of whether a democratically enacted statute is constitutional on its face requires that 'every reasonable construction must be resorted to in order to save a statute from unconstitutionality.'" *Id.* (quoting *Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2594 (2012)). That rule applies in First Amendment challenges, *see Hersh v. United States ex rel Mukasey*, 553 F.3d 743, 753-55, 757-58 (5th Cir. 2008) (citing, *e.g.*, *Boos v. Barry*, 485 U.S. 312 (1988)), and vagueness challenges, *see Skilling v. United States*, 561 U.S. 358, 403-404 (2010); *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 184-85 (2004). Further, a federal court must defer to the interpretation of the official charged with enforcing the statute, so long so long as it does not conflict with the statutory text. *Voting for Am.*, 732 F.3d at 387 (*citing Hamer v. Musselwhite*, 376 F.2d 479, 481 (5th Cir. 1967). Louisiana law is in accord. *See, e.g., State v. Cinel*, 646 So. 2d 309, 312, 315-16 (La. 1994). Moreover, under Louisiana law, "[t]he unconstitutionality of one portion of a statute does not necessarily render the entire statute unenforceable." *State v. Azar*, 539 So. 2d 1222, 1226 (La. 1989). "If the remaining portion of the statute is severable from the offending portion [a] court may strike only the offending portion and leave the remainder in tact." *Id.*

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE ENTERED AGAINST PLAINTIFFS' FIRST AMENDMENT CLAIMS.

A. The Court correctly determined there is no First Amendment right to trespass, such that Plaintiffs' as-applied First Amendment challenge fails.

The Court correctly held that "the summary judgment record indicates that … the pipeline protest … occurred on private property." SJ Order at 18. The Court also correctly held that Plaintiffs' "First Amendment claims fail to the extent that La. R.S. 14:61 impacts speech on private property because there is no First Amendment right to trespass on private property to conduct protests or other forms of symbolic speech." *Id.* (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972)). Plaintiffs do not appear to challenge these holdings, and they fully dispose of Plaintiffs' as-applied First Amendment challenge.

B. The Court correctly concluded the statute is content neutral.

Plaintiffs begin with a sleight of hand. They urge "the Court erred when it found [R.S. 14:61] is content-neutral," and claim the Court's basis for that finding was that "'damage caused to critical infrastructure does not fall within the protection of the First Amendment ….'" Dkt. 129-1 at 3-4 (quoting SJ Order at 24). That causing damage to someone else's property is not protected by the First Amendment is true enough, but that does not appear to be the basis for the Court's ruling. Plaintiffs then suggest the Court further erred by "adopt[ing] testimony by the bill's sponsor as if it were the meaning of the text." Dkt. 129-1 at 4. That doesn't appear to be correct either.

What the Court addressed was Plaintiffs' "argu[ment] that La. R.S. 14:61 is content-based because [according to Plaintiffs] the legislative history of the statute shows that it was promoted by [industry] to squelch protests against pipeline projects." SJ Order at 23 (citing Dkt. 96-1 at 9). The Court correctly rejected that argument as a matter of law. "The Supreme Court has held that a statute is not rendered a content-based restriction on free speech merely because [the] statute's

'enactment was motivated by the conduct of the partisans on one side of a debate.'" SJ Order at 24 (citing *Hill v. Colorado*, 530 U.S. 703, 724 (2000)); *see also* 530 U.S. at 724 (rejecting "theory that a statute restricting speech becomes unconstitutionally content based because of its application to the specific locations where that discourse occurs"); *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.").[1]

C. The First Amendment carveout is not content-based.

Plaintiffs thus fall back on yet another attack on the content-neutrality of R.S. 14:61, urging the carveout for "lawful assembly and peaceful and orderly petition, picketing, or demonstration for the redress of grievances or to express ideas or views regarding legitimate matters of public interest, ***including but not limited to any labor dispute*** between any employer and its employee or position protected by the United States Constitution" in R.S. 14:61(D)(1) renders the statute content-based. Specifically, Plaintiffs urge the reference to a "labor dispute" as content-based. Dkt. 129-1 at 8. But Plaintiffs ignore the "including but not limited to" preceding that phrase, which renders "labor dispute" merely an illustrative example of "lawful assembly … picketing," etc. *See, e.g.*, *Heniff Transport. Sys., L.L.C. v. Trimarc Transp. Servs., Inc.*, 847 F.3d 187, 191 (5th Cir. 2017) ("the phrase 'including' in the statute indicates that the examples … listed in the statute are an illustrative

[1] To be sure, the Court then referenced the evidence Plaintiffs now selectively point to as "refut[ing] [Plaintiffs'] argument that the 2018 pipeline amendment … was intended to squelch pipeline protests and environmental activists' opposition to pipeline projects." SJ Order. at 24. It's notable that H.B. 727 actually did two things. First, it amended R.S. 14:61 to include "pipelines" in the definition of critical infrastructure, defined the term "pipeline," and expanded First Amendment carveouts. Second, it enacted new R.S. 14:61.1 that punishes "criminal damage to a critical infrastructure." The hearing transcript on which Plaintiffs' rely is not clear, but it is possible the statements Plaintiffs point to were addressing the latter. Regardless, the testimony of Plaintiffs' counsel at that hearing made clear H.B. 727 "is not just about damage to property, it is about unauthorized entry," Dkt. 93-4 at ECF p.278, such that the legislature was apprised of the statute's scope. And Plaintiffs themselves provide a viewpoint and content-neutral rationale for H.B. 727: to give the law enough teeth to protect property owners from trespassers.

and non-exhaustive list"); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009) (noting "use of the phrase 'including, but not limited to' to indicate a non-exhaustive list"). The statute's reference to picketing as an illustrative *example* of protected First Amendment activity thus stands in sharp contrast to *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), cited by Plaintiffs, where only picketing on certain subjects was permitted.

The Court chided Plaintiffs for "focus[ing] on isolated language in section 14:61(D)(1) without reading that language in the context of the entire provision." SJ Order at 23. Plaintiffs simply rehash the same error and apply it to a different phrase in the statute. When the phrase Plaintiffs point to is read in its entirety, there can be little doubt H.B. 727 is content neutral.

D. H.B. 727 survives intermediate scrutiny.

After determining the 2018 Amendments were content neutral, the Court concluded the four- prong test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), is the proper "analytical framework to evaluate content-neutral restrictions on expressive activities." SJ Order at 25 (quoting *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282-83 (5th Cir. 2001)). "The *O'Brien* test sustains a statute's validity: '[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Doe I v. Landry*, 909 F.3d 99, 108 (5th Cir. 2018) (quoting *O'Brien*, 391 U.S. at 377). Plaintiffs do not dispute that conclusion, and they attack only the application of the fourth prong.

Specifically, Plaintiffs urge "the Court failed to address the availability of alternative measures that serve the purpose identified by the bill's sponsor, i.e., to prevent damage." Dkt. 129-1 at 5. But the State's briefing identified other interests furthered by H.B. 727: the State's "vital interest in protecting citizens' property rights, which are a right of constitutional magnitude" and which is an

interest that is "reinforced where the private property is being used for activities that are dangerous or capable of causing widespread harm if done improperly, but are critical for society to function." Dkt. 119 at ECF p.22. *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002) (plurality: "We find that reducing crime is a substantial government interest….").

Those interests were before the legislature, too: Plaintiffs' own counsel – Bill Quigley – testified that H.B. 727 "is not just about damage to property, it is about unauthorized entry." Dkt. 93-4 at ECF p.278. Other witnesses made the same point. Dkt. 93-4 at ECF pp.285, 291-92, Yet more witnesses testified about the trespassing activities that could be impacted: "people put[ting] themselves in trees to keep pipelines from going through" or "climb[ing] … on top of a bulldozer at a pipeline," Dkt. 93-4 at ECF p.294, *i.e.*, the very activities that allegedly occurred at the BBP protests. As Senator Carter put it, she broadly sought a balance to "protect … pipelines and to make sure that there's no one whether it's a terrorist or an individual or just somebody seeking to cause harm to something as significant as our ability to transport through our pipelines." Dkt. 93-4 at ECF p.279.

Continuing to ignore the interests the State asserts, Plaintiffs complain that the Court did not address the availability of alternative measures to prevent damage, pointing to statutes that punish damage to property. Dkt. 129-1 at 5-6. But Plaintiffs make no attempt to address the State's interests in protecting property — particularly critical infrastructure like pipelines — against trespass, as well as prospectively protecting that property from damage. Further undermining their position, Plaintiffs concede that under prior law — which Plaintiffs point to and do not challenge — "those who engaged in . . . civil disobedience in the vicinity of pipelines or pipeline construction sites faced [only] the possibility of a misdemeanor charge of trespass if they remained on the property after being forbidden." Compl. ¶ 7. And Plaintiffs further concede that the deterrence provided by prior law proved ineffective despite active enforcement. Compl. ¶¶ 7, 28, 39, 103; *see also* Dkt. 93-4 at ECF

pp.231-232 (media report of protesters "lock[ing] themselves to construction equipment"); Dkt. 30-14 (letter referenced in complaint describing protesters who "chained themselves to equipment" and "formed 'aerial blockades' blocking the pipeline route" thereby "put[ting] workers, law enforcement and nearby community members at risk"). That history of ineffectiveness is strong evidence that the alternative measures Plaintiffs point to were not sufficient, and that H.B. 727 is narrowly tailored. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 770 (1994) ("The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order."); *Reilly v. City of Harrisburg*, 790 F. App'x 468, 477 (3d Cir. 2019) (noting failure of "existing criminal laws prohibiting trespassing" and holding statute was narrowly tailored).

In any event, "intermediate scrutiny does not require perfect tailoring." *Reagan Nat'l Advertising of Austin, Inc. v. City of Austin*, 64 F.4th 287, 294 (5th Cir. 2023) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989)). "The government's interests need not be accomplished through the 'least restrictive or least intrusive means.'" *Id.*at 293 (quoting *Ward*, 491 U.S. at 798). "Rather, the requirement of narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward*, 491 U.S. at 799). "[C]ommon sense" on that point is enough. *Id.* at 296-87. As urged above, the record makes clear that the tailoring requirement is satisfied in spades: the State has strong interests in protecting property – particularly property used for dangerous purposes – from trespassers and damage; existing law failed to adequately protect those interests; and the State's interests would be achieved less effectively absent H.B. 727, particularly in the "remote" locations where trespassing and damage were occurring. *See* Compl. ¶ 66. The statute therefore survives intermediate scrutiny.

E. The "pipeline" provision doesn't apply to traditional public forums.

As a last gasp, Plaintiffs urge that, in the case of pipelines, H.B. 727 applies to traditional public forums. Dkt. 129-1 at 6-7. Whether viewed through the express carveout for activities protected by the First Amendment, *J&B Entm't v. City of Jackson*, 152 F.3d 362, 367 (5th Cir. 1998) (citing *Osborne v. Ohio*, 495 U.S. 103, 112 & n.9 (1990)); *United States v. Bird*, 124 F.3d 667, 683 (5th Cir. 1997), through the lens of constitutional avoidance, *Voting for Am.,* 732 F.3d at 387, in the context of surrounding provisions, *see Luminant Gen. Co. v. E.P.A.*, 713 F.3d 841 (5th Cir. 2013), or the law of severability, *Azar*, 539 So. 2d at 1226, that simply isn't the case.

Indeed, at least the First Circuit holds that a First Amendment carveout is sufficient to defeat standing absence evidence of prosecutions under similar facts. *See Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) (applying *Clapper v. Amnesty Int'l*, 558 U.S. 398 (2013), and affirming dismissal for lack of standing). That's because there's simply no credible threat of prosecution. *Id.* The Supreme Court recently indicated much the same, explaining that "[t]o justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *United States v. Hansen*, 2023 WL 4138994 (U.S. June 23, 2023). The Court's obligation is to strain to read a statute as constitutional, not strain to find unconstitutionality.

II. SUMMARY JUDGMENT SHOULD BE ENTERED AGAINST PLAINTIFFS' FOURTEENTH AMENDMENT VAGUENESS CLAIM.

A. The term "premises" is not unconstitutionally vague.

Plaintiffs focus their Due Process challenge on the word "premises" in R.S. 14:61(A)(3), urging that the term is not defined, and that it does not provide guidelines to govern law enforcement in the context of unenclosed pipelines. Dkt. 129-1 at 11-13. But the Court correctly determined the statute "appear[s] to be limited to … conduct occurring on private property or in non-public forums." Dkt. 127 at 17. The presence or absence of a pipeline on a tract of land is

definitively ascertainable. The associated right of way is generally recorded in parish land records, and is in many cases obvious or marked by signs. *See* Dkt. 934-4 at ECF pp.229, 234. Indeed, that was the case here, where Plaintiffs allege they were arrested for, e.g., walking "onto the top of the berm" in a right of way that had been recorded, but not perfected, Compl. ¶¶ 88-92; *see also* Dkt. 30-6, 30-7, 30-8. The record also reflects that the pipeline right of way was apparent and marked by survey pins, even if there is some question as to how frequently. Plaintiffs simply misapprehend the vagueness inquiry.

"A statute is unconstitutionally vague only if it [1] fails to provide a person of ordinary intelligence fair notice of what is prohibited, or [2] is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010). Mere imprecision does not render a statute vague. *Ferguson v. Estelle*, 718 F.2d 730, 735 (5th Cir. 1983). Indeed, "[a] facial challenge for vagueness is appropriate only on an allegation that the law is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)); *see also Doe I,* 909 F.3d at 118 ("[W]e have rejected that a law must delineate the exact actions a person would have to take to avoid liability."). Plaintiffs point to *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), in attempting to sidestep *Holder* and *Estelle*, but none carry the day.

Wright and *Morales* involved convictions for refusing to obey police orders to cease lawful conduct. In *Wright*, the Supreme Court reversed convictions for "breach of the peace for peacefully playing basketball in a public park." 373 U.S. at 285. A police officer ordered the defendants to leave the park, then arrested them "for playing basketball in [the park]" "because they were negroes." *Id.* at 286. The Court explained that if the defendants "were held guilty of violating the Georgia [breach

of the peace] statue because they disobeyed the officers," the case fell "within the rule that a generally worded statute which is construed to punish conduct which cannot be constitutionally be punished is unconstitutionally vague to the extent it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." *Id.* at 292.

Similarly, in *Morales*, the Supreme Court addressed an anti-loitering ordinance that provided for warning, *i.e.*, loiterers were not subject to sanction until after they have failed to comply with a police officer's order to disperse. 527 U.S. at 58. The city argued that "whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do." *Id.* The Court rejected that argument. It explained that "loitering is the conduct that the ordinance is designed to prohibit," and "[i]f the loitering is in fact harmless and innocent," "the dispersal order itself is an unjustified impairment of liberty." *Id.* at 58. "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." *Id.* at 59.

Kolender was an attack on the facial validity of a statute that – as construed by state courts – required an individual provide "credible and reliable" identification when requested by a police officer. 461 U.S. at 355-56. The Supreme Court held the statute, as drafted and construed, "contain[ed] no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Id.* at 358. The state conceded that what was "credible and reliable" would "depend[] on the particular officer" such that the statute "confers virtually unrestrained power to arrest and charge persons with a violation." *Id.* at 360 (quotation omitted). The Court thus found the statute "unconstitutionally vague … because it

encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 361.

Here, the Court has construed the challenged statute as limited to private property and non-public forums. Defendants agree with that construction, which is proper and eliminates any theoretical concern with vagueness. *See, e.g.*, *Skilling*, 561 U.S. at 403-404; *Hiibel*, 542 U.S. at 184-85. And applying that construction, the warning called for in R.S. 14:61(A)(3) follows conduct that is itself unlawful: trespassing. The warning merely eliminates any doubt about the underlying illegality and gives the trespasser an opportunity to avoid an elevated penalty.

R.S. 14:61(A)(3) thus stands in sharp contrast to the lawful pre-warning conduct in *Morales* and *Wright*. And in contrast to *Kolender*, the "premises" subject to such a warning are not standardless. The dictionary defines "premises" as "a piece of land together with its buildings, [especially] considered as a place of business."[2] A pipeline is present on a tract of land or it is not, and that fact can be definitively ascertained. Plaintiffs may "conjure up hypothetical cases in which the meaning of ['premises'] will be nice in question" or may "speculat[e] about possible vagueness in hypothetical situations not before the Court," but their doing so "will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill*, 530 U.S. at 733. That is true here.

B. The term "authorized person" is not unconstitutionally vague.

The statute bars "[r]emaining upon or in the premises of a critical infrastructure after having been forbidden to do so, either orally or in writing, by any owner, lessee, or custodian of the property or by any other authorized person." La. R.S. 14:61(A)(3). Plaintiffs make passing references to "authorized person" being vague. Dkt. 129-1 at 7, 9, and 13. But the words "authorized person" appear nowhere in Plaintiffs' complaint; that part of the statute was not amended by 2018 H.B. 727;

[2] https://www.dictionary.com/browse/premises

and Plaintiffs' complaint only challenges the "2018 amendment to La. R.S. 14:61." Compl. at Preamble; *see also id* at ¶¶ 109-115 & Request for Relief. Plaintiffs cannot amend their complaint in a brief.

In any event, "authorized person" isn't vague. In the context of the preceding terms, it plainly refers to someone with legal authority to request removal of trespassers, including via a delegation of authority. And, lest there be doubt, that a person with authority to do so requests removal of a trespasser from private property doesn't remotely create a First Amendment problem.

III. PLAINTIFFS FAIL TO IDENTIFY ANY MATERIAL FACTS THAT ARE DISPUTED.

Plaintiffs fault the Court for not "acknowledging … the pipeline company was illegally trespassing" and "the arresting officers [purportedly] contradicted each other as to how to identify critical infrastructure." Dkt. 129-1 at 13-15. Neither are material facts. Whether the pipeline company was trespassing or not does not implicate a facial First Amendment challenge, which is purely legal. As-applied, Plaintiffs have no First Amendment right to be protest on private property. *See Lloyd Corp.*, 407 U.S. at 567. Whether Plaintiffs were on a pipeline right of way thus goes to the question of whether there was probable cause to arrest them and charge them under a particular statute; a judge determined there was based on the facts then-available to police. Dkt. 30-9 (White Hat warrant); Dkt. 30-10 (Savage warrant); Dkt. 93-4 at ECF pp.350-55 (same). That some of those facts may ultimately not have been true doesn't implicate the constitutionality of the statute.

That police officers may have had different views of what constitutes the "premises" of the pipeline is likewise not material. Statutory interpretation is a question of law, and the statute need only give fair notice of a "comprehensible normative standard." *See Ferguson*, 718 F.2d at 735 (quoting *Coates*, 402 U.S. at 614). Perfect precision is neither obtainable nor required. *See id.* Plaintiffs contend that "eyeballing" and "rough estimation" of a right of way led to their being charged. Dkt.

129-1 at 15. But that's a complaint about the standard for probable cause, not a question of vagueness.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in Defendants' favor on all counts.

Respectfully Submitted,

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