UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

ANNE WHITE HAT, RAMON MEJÍA, and KAREN SAVAGE,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 6:20-cv-00983

JUDGE ROBERT R. SUMMERHAYS

MAGISTRATE JUDGE CAROL B. WHITEHURST

PLAINTIFFS' RESPONSE TO COURT'S NOTICE PURSUANT TO FED. R. CIV. PROC. 56(f) AND MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO RECONSIDER PURSUANT TO FED. R. CIV. PROC. 54(b)

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NOW INTO COURT, through undersigned counsel, come the Plaintiffs, who submit this response to the Court's notice of its intent to grant summary judgment to Defendants issued in its Ruling on Plaintiffs' Motion for Summary Judgment. Dkt. 127. For the sake of judicial efficiency, Plaintiffs also respectfully submit this filing as a Motion to Reconsider the Court's denial of their Motion for Summary Judgment, pursuant to Fed. R. Civ. Proc. 54(b), in light of a series of material omissions and errors in the Court's ruling. Plaintiffs identify those below and ask this Court to reconsider and instead grant summary judgment to the Plaintiffs.[1]

PROCEDURAL HISTORY AND SUMMARY

Plaintiffs moved for summary judgment because the 2018 amendments incorporating pipelines into the definition of critical infrastructure in La. R.S. 14:61 dramatically changed the statute and violate the First Amendment right to freedom of expression, assembly, and association, and the prohibition on vague and overbroad enactments under the Due Process clause of the Fourteenth Amendment. Dkts. 93 (Plaintiffs' Motion for Summary Judgment), 98 (Memorandum of Law in Support of Motion for Summary Judgment). In its June 5, 2023, ruling denying Plaintiffs' motion, the Court noticed its intent to grant summary judgment for Defendants, who had not so moved, and provided Plaintiffs with 30 days to respond. Dkt. 127. Plaintiffs do so now, and simultaneously move the Court to reconsider its ruling because it omitted key undisputed material facts and Supreme Court jurisprudence that require a finding that the 2018 amendments to the critical infrastructure are unconstitutional.

[1] Plaintiffs incorporate herein the facts and arguments set forth in their Memoranda in Support of their Motion for Summary Judgment, Dkt. 98, and in Opposition to Defendant Bofill Duhe's Motion for Judgment on the Pleadings and Motion for Summary Judgment, Dkt. 101, and in their replies to the Opposition to their Motion for Summary Judgment filed Sheriff Beckett Breaux, Dkt. 114, and the Louisiana Attorney General, Dkt. 126, and the claims set forth in the Complaint, Dkt. 1.

At the outset, Plaintiffs note that the Court undertook analysis of other forms of critical infrastructure protected by the Statute that are not at issue in this litigation. Plaintiffs challenged the 2018 amendments to the law because the addition of the state's vast networks of pipelines to the definition of critical infrastructure rendered La. R.S. 14:61(A)(3), prohibiting remaining upon the premises of a critical infrastructure after being forbidden, impermissibly vague when applied to pipelines. In addition, the Court's ruling omitted several key facts and legal requirements that pertain, *inter alia*, to the proper interpretation of the actual text of the amendment and whether it is content-based or neutral, to the law's applicability to public forums, the level of scrutiny to be applied, the availability of other applicable, less restrictive laws, and the arbitrary and discriminatory enforcement of the law.

First, in saving the Statute by reading into it an element of the commission of "damage" based on the unenacted testimony of a legislator, the court ran afoul of the requirement that interpretation of unambiguous statute is limited to the text – which in this case omits any such element. Second, even assuming intermediate scrutiny applies, as the Court has, the existence of alternative, neutral measures to regulate conduct absent impermissible suppression of speech means, under long-standing Supreme Court precedent, the Statute is not content-neutral. Third, the inclusion of "pipelines" into the statute – given their sprawling and underground presence and undefined areas around them – necessarily means that the Statute's prohibitions do, in fact, include public forums. Fourth, the statutory carve-out the court cited that explicitly protects labor-related speech only underscores that the Statute preferences certain content and is therefore subject to strict scrutiny. Finally, in its short treatment of Plaintiffs' extensive arguments about the vagueness and due process defects arising from the 2018 amendments, the court placed all its weight on the requirement of an instruction to leave, which it concluded provided "sufficient

notice" of proscribed conduct. In doing so, the Court failed to consider Supreme Court precedent instructing that such commands cannot save vague statutes, particularly when they lack minimal guidelines to govern law enforcement and prevent arbitrary or discriminatory enforcement in issuing such orders.

LAW AND ARGUMENT

Pursuant to Fed. R. Civ. Proc. 54(b), any order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Unlike motions to reconsider final judgments, under this rule, "the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Austin v. Kroger Texas*, L.P., 864 F.3d 326, 336 (5th Cir.2017) (explaining that Rule 54(b) motions to reconsider non-final orders under Rule 54(b) are subject to a less stringent standard than Rule 54(e) motions to reconsider of final judgments).

As the Court's ruling on Plaintiffs' summary judgment motion was not a final judgment, it may reconsider that decision now. When key undisputed material facts and relevant Supreme Court jurisprudence are taken fully into account, Plaintiffs are entitled to summary judgment, pursuant to Fed. R. Civ. Proc. 56(a). At a minimum, the omitted undisputed material facts and jurisprudence demonstrate that Defendants are not entitled to summary judgment.

I. KEY FACTUAL AND LEGAL OMMISSIONS AND ERRORS CONCERNING PLAINTIFFS' FIRST AMENDMENT CLAIMS.

A. Damage Is Not an Element of La. R.S. 14:61.

The Court erred when it found that the Statute is content-neutral because "[d]amage caused to critical infrastructure does not fall within the protections of the First Amendment given

that courts have repeatedly held that the First Amendment protects only 'peaceful' picketing and protest activities." Dkt. 127 at 24. In fact, damage to critical infrastructure is not mentioned anywhere in La. R.S. 14.61.

The Court disregarded this critical fact and instead relied upon testimony by the bill's sponsor that the Statute would be triggered only upon damage to critical infrastructure – which led the Court to conclude that the Statute was content-neutral, did not discriminate against a particular viewpoint, and was not subject to strict scrutiny. *Id*. Specifically, the Court adopted testimony by the bill's sponsor as if it were the meaning of the text. The legislator stated that the law, "does nothing to impact the ability to peacefully protest … [but] only comes into play when there is damage to that critical infrastructure, so if you don't damage anything, this law does not apply." *Id.*

In doing so, the Court improperly substituted a single legislator's pronouncement of a subjective interpretation of the Statute for the *text* of the statute itself. Yet, as the Supreme Court has repeatedly admonished, we must "begin, as always, with the text," *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391 (2017), and, if the text is unambiguous, our inquiry "ends there as well." *Nat'l Ass'n of Mfg. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018). Plaintiffs themselves highlighted this legislative history – not because it can inform the meaning of the statute – but precisely to show the contrast between public rhetoric regarding the requirement of damage and the actual law that omits such a requirement. Dkt. 98 at 9-11.

The ordinary – indeed obvious – meaning of a statute that omits any reference to "damage" is that causing damage, or even intending to cause damage, is simply not an element of the statute and thus no constraint on its otherwise plainly overbroad and discriminatory application. *See*, 93-2, ¶ 39.

B. The Court Failed to Consider the Existence of Other Available Measures that Burden Substantially Less Speech.

Plaintiffs maintain that the Statute is content-based and subject to strict scrutiny. However, even accepting, *arguendo*, the Court's finding that the Statute is content-neutral, Dkt. 127 at 24-25, it still fails the corresponding application of intermediate scrutiny because the availability of alternative expressly content-neutral measures to regulate impermissible conduct shows that the statute is not narrowly tailored to achieve the purpose to prevent damage to critical infrastructure.

Intermediate scrutiny of content-neutral regulations requires that the law be "narrowly tailored to serve a significant governmental interest." *See McCullen v. Coakley*, 573 U.S. 464, 477 (2014). Narrow tailoring requires that "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495. The Supreme Court has recognized that the "existence of adequate content-neutral alternatives […] undercuts significantly any defense of such a statute" and "cast[s] considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law." *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (citations omitted).

In this regard, 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, which include: (i) La. R.S. 14:55, which prohibits aggravated criminal damage to property and carries a sentence of imprisonment of up to fifteen years; (ii) La. R.S. 14:56, which prohibits simple criminal damage to property and carries sentences from six months to ten years depending on the extent of damage caused; (iii) La. R.S. 14:61.1, which prohibits *damage to a critical infrastructure,* and carries sentences of up to fifteen years or twenty years depending on whether it is foreseeable

that human life would be threatened or operations of the critical infrastructure would be disrupted; and (iv) La. R.S. 14:58 which prohibits "contaminating water supplies" and carries sentences of imprisonment of up to five or 20 years, depending on if the acts foreseeably endanger life or health. *See also* Dkt. 98 at 13, Dkt. 114 at 4-5 and n. 5.

In *McCullen*, the Supreme Court noted that a police captain testified before the legislature that a regulation setting fixed (and speech restrictive) buffer zones outside abortion clinics would "make our job so much easier." *McCullen v. Coakley*, 573 at 495. But according to the Court, "that [wa]s not enough to satisfy the First Amendment," because the buffer zones "burdened substantially more speech than necessary to achieve the Commonwealth's asserted interests." *Id.* at 490.

C. Since the 2018 Amendments, Critical Infrastructure Includes Traditional Public Forums Because Pipelines Are Everywhere.

The vagueness and overbreadth of the Statute is also illustrated by this Court's opinion that the Statute "would appear" to be limited to conduct on private property and non-public forums. Dkt. 127 at 17. The Court's inability to state with certainty and precision whether the law applies only to private property and non-public forums demonstrates the constitutional problem with this Statute. When pipelines were incorporated into the definition of critical infrastructure, it rendered La. R.S. 14:61(A)(3) impermissibly vague given the proliferation of pipelines carrying, *inter alia*, oil, gas, and water that run in, under, through, and/or near public and private areas, including those that are traditional public forums.

What is so significant about the 2018 amendments, is that critical infrastructure as defined in La. R.S. 14:61 is *no longer* limited to private property and other non-public forums. The amendment's addition of pipelines to the Statute blew the definition of critical infrastructure wide open, and now extends to unknowable reaches around the more than 125,000 miles of oil

and gas pipelines in the state, as well as untold miles of pipelines carrying water, "regardless of size or length," as well as other petrochemical and mineral pipelines. Virtually every modern park, street, and building has a pipeline of some kind, particularly water, running in, under, near, or through it. That includes traditional public spaces like parks, streets, sidewalks, government buildings, the state Capitol, schools, and public restrooms. *See* Plaintiffs' Statement of Undisputed Material Facts, Dkt. 93-2 at ¶¶ 1-9.

The Court undertook a lengthy analysis of the other forms of critical infrastructure which are not at issue here. Dkt. 127 at 17-21. If anything, the existence of other forms of critical infrastructure that are visible, above-ground, and often posted with notices, helps illustrate how the vast network of different kinds of pipelines in the state and undefined areas around them, added without clarifying limitations or qualifications, rendered the Statute vague and overbroad. Plaintiffs have pointed out that La. R.S. 14:61(A)(3) punishes "[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*"; yet the amendment does not define what "premises" means when it comes to pipelines or identify who constitutes an "authorized person." *See, e.g.*, Dkt. 98 at 16. Plaintiffs themselves have distinguished this provision from other provisions in the Statute and forms of critical infrastructure which consist of "identifiable, above-ground facilit[ies] that [are] often enclosed by a "physical barrier" and posted with notices to the public." *See, e.g., id.* at 17.

D. The Court Disregarded Relevant Supreme Court Precedent Concerning So-Called Carve-Outs for Expression.

The Court leaned heavily on the Statute's so-called "carve-out" contained in La. R.S. 14:61(D)(1) for support for its finding that the Statute was content-neutral. Dkt. 127 at 15-16, 23 (the "carve-out" extends to expressive conduct "without regard to the content of the message

conveyed"). However, the Court overlooked the fact that the "carve-out" did in fact specify content and message, or subject-matter, when it explicitly identified "any labor dispute between any employer and its employee" for protection. La. R.S. 14:61(D)(1). The Statute's carve-out, thus explicitly singles out certain content for protective treatment. *See Reed v. Town of Gilbert,* 576 U.S. 155, 171 (2015) (regulations that address "the topic discussed or the idea or message expressed" are content-based); *City of Austin, Texas v. Reagan Natl. Advert. of Austin, LLC,* 142 S.Ct. 1464, 1474 (2022). *See also Carey v. Brown,* 447 U.S. 455, 460-61 (1980) *citing Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (reiterating that "[t]he central problem" with a municipality's effort to exempt labor picketing from a prohibition on picketing near public schools was "that it describes permissible picketing in terms of its subject matter that the carve-out in fact specifically singles out and preferences "labor disputes.")

Here, the statute expressly designates expression concerning a "labor dispute" for protection. La. R.S. 14:61(D)(1). When the government singles out subject matter, the regulation is content-based and strict scrutiny applies. *Reed*, 576 U.S. at 171. The additional catch-all language of the so-called carve-out in La. R.S. 14:61(D)(1) referencing "legitimate matters of public interest" and a "position protected by the United States Constitution or the Constitution of Louisiana" cannot save the Statute or ameliorate, or mute, the preference for labor disputes because it merely restates "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). *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").

Indeed, both the carve-out in La. R.S. 14:61(D)(1) heightens the concerns about both the

content-based nature and vagueness of the Statute for First Amendment purposes. The critical infrastructure law vests "any owner, lessee, or custodian" of the property or any other "authorized person" with the authority to determine what kind of expression is permissible and to forbid anyone from "remaining upon or in the premises of a critical infrastructure." La. R.S. 14:61(A)(3). Critical infrastructure, as it relates to pipelines, could be on public or private property, visible or invisible, a public park, sidewalk, or waterway.

In situations such as this, "the danger of content and viewpoint censorship… is at its zenith when the determination of who may speak and who may not is left to an official's unbridled discretion." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 751 (1988). *See also Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Cox v. State of La.*, 379 U.S. 536, 557–58 (1965); *see also, Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006) (vesting someone with "unbridled discretion" is a means "to hide unconstitutional viewpoint discrimination") (collecting cases).

As the Supreme Court noted in *Reed*, this holds true even when the government's motive is benign and its *justification* is content-neutral. *Reed* at 165-67 ("The vice of content-based legislation is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.") (internal citations and quotations omitted). In *Reed*, the Supreme Court emphasized the problem that arises when officials must inquire into content when enforcing a content-based law: "[O]ne could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." *Reed* at 167-78.

Under the vague and boundary-less definition of critical infrastructure created by the 2018 amendments, the statute grants authority to government officials to determine what is a

"legitimate matter of public interest," a "position protected under" the federal and state constitutions, or a permissible commercial or recreational activity on some undefined, and many times, undefinable area. The so-called carve-out not only does nothing to allay these constitutional concerns, it helps highlight the danger of the Statute. The unbridled discretion as to message and content combines with the inability to readily ascertain pipeline premises and exceeds even the concerns expressed the Supreme Court in situations with arguably less room for calamitous error. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983) (striking down law requiring "credible and reliable" forms of identification because it vested police with too much discretion and "entrusts lawmaking to the moment-to-moment judgment of the policeman" and law had the "potential for arbitrarily suppressing First Amendment liberties"). 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) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area touching our most precious freedoms."); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone… than if the boundaries of the forbidden areas were clearly marked.").

The serious First Amendment implications of this kind of vagueness and overbreadth are why the Supreme Court has "consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *See Dombrowski v Pfister*, 380 U.S. 479, 486 (1965) (citing *Thornhill v. State of Alabama*, 310 U.S. 88, 97-98 (1940)); *see also United States v. Stevens*, 559 U.S. 460 (2010). 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*. at 487

II. KEY FACTUAL AND LEGAL OMMISSIONS AND ERRORS CONCERNING PLAINTIFFS' DUE PROCESS, VOID-FOR-VAGUENESS CLAIMS.

A. The Court Failed to Acknowledge and Apply Supreme Court Precedent Requiring Adequate Guidelines for Law Enforcement to Avoid Arbitrary and Discriminatory Enforcement of Vague Statutes.

The Court addressed in one paragraph Plaintiffs' extensive arguments about the vagueness and serious due process concerns arising from the 2018 amendments. The entire weight of the Court's ruling rests on the requirement that one cannot be criminally liable without first receiving an instruction to leave the premises, which the Court said provided "sufficient notice" of proscribed conduct. Dkt. 127 at 27. The Supreme Court has definitively held that officer commands to leave the premises do not save an otherwise vague statute lacking minimal guidelines to govern law enforcement in issuing such orders, where it "fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." *Wright v. State of Ga.*, 373 U.S. 284, 292-93 (1963). This is in part because even if an individual is instructed – and is thus themselves on notice – of a potential violation, what is even *more* important than individual notice is the other side of the equation, i.e. the "requirement that a legislature establish minimal guidelines to govern *law enforcement.*" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (emphasis added); *see also id*. at 360 (striking down law requiring "credible and reliable" forms of identification because it vested police with too much discretion and "entrusts lawmaking to the moment-to-moment judgment of the policeman.") (internal quotations omitted). Where the legislature "fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Id*. at 358 citing *Smith v. Goguen*,

415 U.S. 566 (1974). *See also, City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down as facially invalid a loitering statute in part because it lacked minimal guidelines to govern law enforcement).

While it is possible that an "instruction to leave" requirement could save a *different* statute that covers clearly demarked and ascertainable property,[2] it cannot save *this* amendment which includes pipeline "premises" covering innumerable miles of territory and undefined areas around pipelines, and is often underground and not readily unascertainable by the average person or law enforcement officer. Indeed, the instruction would likely have sufficed in all or most circumstances for this Statute *prior* to the 2018 addition of pipelines. After the 2018 amendments, the requirement does not save this Statute from its inherent vagueness for two related reasons. First, because the term "premises" as it relates to the sprawling, unknowable and undecipherable location of pipelines, and undefined areas around them, does not give minimal guidelines to law enforcement to determine whether the area is part of bona fide critical pipeline infrastructure or not, it allows impermissible law enforcement discretion and arbitrary enforcement. Second, even if an individual were to avoid criminal prosecution by obeying an instruction to leave the premises, an incorrect instruction by law enforcement – owing to the standardless determination of what is pipeline premises – would impermissibly suppress protected First Amendment speech, assembly, association, and petitioning activity.

[2] To illustrate, in the context of a person remaining on property they do not own and which may have a pipeline running through it, such an instruction would be sufficient in all or most most circumstances for enforcement of La. R.S. 14:63 prohibiting remaining after being forbidden upon the property of another, but not for enforcement of La. R.S. 14:61(A)(3) prohibiting remaining on the premises of critical infrastructure on that same property. Similarly, a person who obstructs a public passageway, like a sidewalk, with a pipeline running underneath, and refuses to leave, may have enough notice of the offense for purposes of enforcement of La. 14:1001.1 which prohibits obstruction of public passages, but not La. 14:61(A)(3) given the lack of notice of boundaries of pipelines as critical infrastructure. For the same reasons, the instruction would have provided sufficient notice in most, if not all circumstances, for enforcement of this Statute *prior to* the 2018 addition of pipelines to the definition of critical infrastructure, but not after with respect to pipelines.

The Court's ruling actually highlights the danger of tying the validity of La. R.S. 14:61(A)(3) entirely to the instruction to leave because, instead of providing necessary guidance to determine where critical pipeline infrastructure begins and ends, it leaves law enforcement or other authorized persons unbridled discretion to issue the instruction, including for arbitrary or discriminatory reasons. As Plaintiffs have repeatedly shown, La. R.S. 14:61(A)(3) punishes "[r]emaining upon or in *the premises* of a critical infrastructure after having been forbidden to do so" but does not define or limit in any way what the critical term "premises" means in relation to pipelines. *See* La. R.S. 14:61(A)(3) (emphasis added). The law as amended in 2018 does not define or limit "premises" in any way. This is in contrast to all other forms of critical infrastructure encompassed by the Statute, which consist of identifiable, above-ground facilities that are often enclosed by a "physical barrier" and posted with notices to the public. *See* La. R.S. 14:61(A)(1) and (B)(1).).

The legislature could have provided minimal guidance to law enforcement regarding the boundaries of critical pipeline infrastructure – and thus, when an instruction to leave is constitutionally permissible – but it chose not to. As a result, the state's vast networks of pipelines of all kinds and size, and undefined areas around them, are considered critical infrastructure and anyone, whether protesting or not, can be held liable under this Statute for remaining after being forbidden based on some undiscernible standard.

This violates the most basic requirements of due process.

B. The Court Failed to Acknowledge the Undisputed Material Fact that the Pipeline Company Was Illegally Trespassing on the Property Where the Plaintiffs Were Cited by the Company's Paid Officers for Violating La. R.S. 14:61 for Protesting the Pipeline Company's Trespass.

It is uncontested and judicially proven that the pipeline company and its employees were illegally trespassing on the property in question. Dkt. 93-2 at ¶¶ 56-78. Thus, the pipeline

company had absolutely no legal right to be constructing the pipeline there at all so there was no legal critical infrastructure at the time of the arrests. Yet this Court failed to note that fact anywhere in its opinion.

Instead, the Court recited a series of factual allegations taken from the accounts of St. Martin Parish Sheriff's deputies, who were working as private security hired by the company, describing the situation that gave rise to the Plaintiffs' arrests for violation of La. R.S. 14:61 as amended in 2018. Dkt. 127 at 2-3. The Court included these accounts even though it later held that the Plaintiffs' as-applied challenge was moot because the time to prosecute them had expired. *Id*. at 26-27.

There was no legally cognizable critical infrastructure at the time of the events that gave rise to Plaintiffs' arrests for violation of La. R.S. 14:61. Rather, the pipeline construction site was an ongoing crime scene that the protesters were trying to call the officers' attention to – which was in vain, of course, because they were working for the pipeline company.

C. The Court Failed to Acknowledge that the Arresting Officers Contradicted Each Other as to How to Identify Critical Infrastructure with Regard to Pipelines.

Setting aside the fact that the pipeline company did not have a legal right to be on the property constructing its pipeline and therefore no legal right to eject anyone and request their arrest for violation of La. R.S. 14:61, the experiences of the company's officers in trying to discern the boundaries of the pipeline "premises" is instructive. The Court also failed to note that the officers involved in the encounters that gave rise to Plaintiffs' arrests gave contradictory testimony as to where they perceived the pipeline premises for purposes of enforcing La. R.S. 14:61. *See* Dkt. 93-2 at ¶¶ 87, 88, 118-128. They also gave contradictory testimony as to how they would go about determining the boundaries and limits of the premises of pipeline when

attempting to enforce La. R.S. 14:61 in the future. *Id.*

One example of the officers' testimony is particularly instructive: Lt. Chris Martin testified in a deposition that there were no survey markers in the area where Plaintiffs Karen Savage and Ramon Mejía had been standing near a tree where they were arrested by a different officer and initially charged with misdemeanor trespass. Dkt. 93-2 at ¶¶ 82-88. Martin testified that in order to determine that the Plaintiffs had been standing in the "right of way," he "eyeballed" it – *after* the Plaintiffs had been arrested and taken to the jail –from two survey markers about 50 yards away and "then was able to line that up with a tree further down that was also five, about five yards off the berm." *Id*. at ¶ 87. Martin also testified that he himself had not been present and had not seen exactly where Savage and Mejía had been standing at the time they were arrested by a different deputy. *Id*. at ¶ 88.

Martin's after-the-fact "eye-balling," resulted in the charge escalating from a misdemeanor to a felony carrying up to five years imprisonment. *Id*. at 84-85. With stakes so high, the interpretation and application of a felony criminal statute cannot be left to this sort of rough estimation. The potential for this kind of confusion was evident on the face of the statute when it was hurriedly amended in 2018 and pipelines were thrown so haphazardly into the definition of critical infrastructure. Indeed, it was inevitable, which is why this lawsuit was brought. The testimony of the officers who were the first to contend with how to enforce this statute – albeit on an illegal construction site – is real-life proof of what the Statute on its face guarantees, i.e. that the addition of pipelines to the definition of critical infrastructure, without limitation and qualification, results in a dangerously vague and amorphous criminal statute punishable by up to five years in prison. This testimony likewise precludes granting summary judgment to Defendants and supports Plaintiffs' motion for summary judgment.

CONCLUSION

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

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
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 June 26, 2023, a copy of the foregoing was served on all counsel of record via this court's electronic case filing system.

s/Pamela C. Spees
Pamela C. Spees