

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

CASE NO. 19-00565-CA

BAYOU BRIDGE PIPELINE, L.L.C.

Plaintiff/Appellee

VERSUS

**38.00 ACRES, MORE OR LESS, LOCATED
IN ST. MARTIN PARISH, ET AL.**

Defendants/Appellants

**BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO THE
APPELLANTS' CONSTITUTIONAL CHALLENGE OF LA. CONST. ART.
I, § 4, LA. R.S. 19:2, AND LA. R.S. 45:251**

**CIVIL APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT,
PARISH OF ST. MARTIN, CIVIL DOCKET NO. 87011,
HONORABLE KEITH COMEAUX, DIV. E, PRESIDING**

**JEFF LANDRY
ATTORNEY GENERAL**

HARRY J. VORHOFF (#35365)
RYAN M. SEIDEMANN (#28991)
Assistant Attorneys General
Civil Division
1885 North Third Street
P.O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: 225-326-6000
Facsimile: 225-326-6099
vorhoffh@ag.louisiana.gov
seidemannr@ag.louisiana.gov

TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES | iii |
| CONCISE STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 4 |
| I. State law is presumed to be constitutional. | 4 |
| II. La. R.S. 19:2 and La. R.S. 45:251 comply with the requirements of the Fifth and Fourteenth Amendments of the U.S. Constitution and of La. Const. art. I, § 4. | 6 |
| III. La. R.S. 19:8 embodies the necessary due process protections of La. Const. Art. I, § 2 and the Fifth and Fourteenth Amendments to the United States Constitution. | 9 |
| CONCLUSION..... | 12 |
| VERIFICATION OF SERVICE..... | 13 |

TABLE OF AUTHORITIES

United States Constitution

| | |
|--|------|
| Fifth Amendment, United States Constitution..... | 3, 9 |
| Fourteenth Amendment, United States Constitution | 9 |

Louisiana Constitution

| | |
|-----------------------------|-----------|
| La. Const. art. I, § 2..... | 2, 9 |
| La. Const. art. I, § 4..... | 2-7, 9-12 |

State Jurisprudence

| | |
|---|-----|
| <i>Bd. of Directors of La. Recovery Dist. v. All Taxpayers, Property Owners,</i> 529 So.2d 384 (La. 1988) | 4-6 |
| <i>Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot,</i> 628 So.2d 75 (La.App. 3 Cir. 1993), <i>writ denied</i> , 94-0168 (La. 3/18/94), 634 So.2d 854 | 7 |
| <i>Crooks v. Placid Ref. Co.,</i> 05-119 (La.App. 3 Cir. 6/1/05), 903 So.2d 1154 | 6 |
| <i>East Baton Rouge School Board v. Foster,</i> 02-2799 (La. 6/6/03), 851 So.2d 985 | 6 |
| <i>ExxonMobil Pipeline Company v. Union Pacific Railroad Company,</i> 2009-1629 (La. 3/16/10), 35 So.3d 192 | 5-8 |
| <i>Fullilove v. U.S. Casualty Co.,</i> 129 So.2d 816 (La.App. 2 Cir. 1961)..... | 2 |
| <i>Interstate Oil Pipe Line Co. v. Guilbeau,</i> 46 So.2d 113 (La. 1950)..... | 4 |
| <i>La. Municipal Assoc. v. State of La. and the Firefighters' Retirement Sys.,</i> 2004-0227 (La. 1/19/05), 893 So.2d 809 | 4 |
| <i>Polk v. Edwards,</i> 626 So.2d 1128 (La. 1993)..... | 4 |
| <i>State ex rel. LaBauve v. Michel,</i> 46 So. 430 (La. 1908) | 6 |
| <i>State on behalf of J.A.V.,</i> 558 So.2d 214 (La. 1990)..... | 4 |

| | |
|---|------|
| <i>State v. All Property and Casualty Ins. Carriers Authorized and Licensed to Do Business in the State of La.,</i> 2006-2030 (La. 8/25/06), 937 So.2d 313 | 4-5 |
| <i>State v. Brown,</i> 94-1290 (La. 1/17/95), 648 So.2d 872 | 6 |
| <i>State v. Caruso,</i> 98-1415 (La. 9/2/99), 733 So.2d 1169 | 4 |
| <i>State v. Griffin,</i> 495 So.2d 1306 (La. 1986) | 4 |
| Federal Jurisprudence | |
| <i>Ass'n of Am. Railroads v. United States DOT,</i> 821 F.3d 19 (D.C. Cir. 2016)..... | 9-10 |
| <i>Boerschig v. Trans-Pecos Pipeline, L.L.C.,</i> 872 F.3d 701 (5 th Cir. 2017) | 9-11 |
| <i>Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,</i> 508 U.S. 602 (1993) | 4-5 |
| <i>Davies Warehouse Co. v. Bowles,</i> 321 U.S. 144 (1944) | 4-5 |
| <i>Doe v. City of Albuquerque,</i> 667 F.3d 1111 (10 th Cir. 2012) | 6 |
| <i>Eubank v. City of Richmond,</i> 226 U.S. 137 (1912) | 11 |
| <i>Ferguson v. Skrupa,</i> 372 U.S. 726 (1963) | 5 |
| <i>Illinois Central R. Co. v. Mayeux,</i> 301 F.3d 359 (5 th Cir. 2002) | 7 |
| <i>John Doe No. 1 v. Reed,</i> 561 U.S. 186 (2010) | 6 |
| <i>Joiner v. City of Dallas,</i> 380 F. Supp. 754 (N.D. Tex. 1974), <i>aff'd</i> , 419 U.S. 1042 (1974) | 10 |
| <i>Ohio Citizen Action v. City of Englewood,</i> 671 F.3d 564 (6 th Cir. 2012) | 6 |
| <i>Smart v. Tex. Power & Light Co.,</i> 525 F.2d 1209 (5 th Cir. 1976) | 10 |

| | |
|--|------|
| <i>United States v. Salerno</i> , 481 U.S. 739 (1987) | 6 |
| <i>Usery v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1 (1976) | 5 |
| <i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008) | 6, 8 |
| <i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955) | 5 |

Louisiana Revised Statutes

| | |
|------------------------|---------------|
| La. R.S. 13:4448 | 2 |
| La. R.S. 19:2 | 2-6, 9-10, 12 |
| La. R.S. 19:8 | 9, 11 |
| La. R.S. 45:251 | 2-6, 8-10, 12 |
| La. R.S. 45:252 | 8-9 |
| La. R.S. 45:254 | 3 |
| La. R.S. 49:257 | 2 |

Louisiana Code of Civil Procedure

| | |
|--------------------------|---|
| La. C.C.P. art 1880..... | 2 |
|--------------------------|---|

CONCISE STATEMENT OF THE CASE

The Appellee, Bayou Bridge Pipeline, L.L.C. (“Bayou Bridge”), filed this expropriation action to acquire the necessary property rights to construct and operate a crude oil pipeline. The Appellants, Peter K. Aaslestad and Katherine Aaslestad (“the Aaslestads” or “the Appellants”), are co-owners of one of the tracts subject to the expropriation action. The Aaslestads raised affirmative defenses, which included an assertion that Louisiana’s Constitution and statutes unconstitutionally permit privately-owned pipeline companies to exercise eminent domain. The Aaslestads also filed a reconventional demand, asserting that Bayou Bridge trespassed on their property and violated their rights to property and due process under the United States and Louisiana constitutions by allegedly unlawful entry and construction upon their land.

The State submitted to the district court a brief opposing the challenge to Louisiana’s Constitution and statutes. After a trial to determine whether the expropriation was for a necessary and public purpose and to determine appropriate compensation, the district court granted the expropriation sought by Bayou Bridge, but the court ruled that Bayou Bridge committed trespass on the property. The district court denied the Aaslestad’s affirmative defenses and affirmed the constitutionality of the Louisiana constitutional provisions and statutes challenged by the Aaslestads. The Aaslestads appealed the district court’s judgment, and the State files this brief to oppose the constitutional challenge filed by the Aaslestads.

SUMMARY OF ARGUMENT

Jeff Landry, Attorney General, acting on behalf of the State of Louisiana, opposes the constitutional challenges to La. Const. art. I, § 4, La. R.S. 19:2, and La. R.S. 45:251.¹ As required by law, the State limits its argument to the constitutionality challenges.² The Aaslestads allege that the delegation of expropriation authority to crude oil common carriers, pursuant to these constitutional and statutory provisions, violates the Louisiana and the United States Constitutions. Their arguments fail at both the state and federal level.

The Louisiana Constitution authorizes the delegation of expropriation authority to crude oil common carriers.³ The people have provided that, “[p]roperty shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.”⁴ That law further provides that the term, “public purpose,” includes “public transportation, access, and navigational systems available to the general public” as well as “public utilities for the benefit of the public generally.”⁵

Oddly, the Aaselestads contend that a provision of the Louisiana Constitution violates the Louisiana Constitution. Specifically, they argue that La. Const. art. I, § 4(B)(4) violates La. Const. art. I, § 2 and La. Const. art. I, § 4 as a whole. As the Louisiana Second Circuit Court of Appeal has explained, with respect to “a constitutional provision, no question can arise as to its constitutionality [under the same constitution].”⁶ It is axiomatic that a provision of the Louisiana Constitution cannot violate the Louisiana Constitution.

¹ See La. C.C.P. art 1880; La. R.S. 13:4448; La. R.S. 49:257.

² See *id.*

³ La. Const. art. I, § 4(B)(4).

⁴ *Id.*

⁵ *Id.* § 4(B)(4).

⁶ *Fullilove v. U.S. Casualty Co.*, 129 So.2d 816, 821 (La.App. 2 Cir. 1961).

As authorized by La. Const. art. I, § 4(B)(4), the Louisiana Legislature enacted statutes and granted crude oil common carriers the right of expropriation of private property for use in their common carrier pipeline businesses.⁷ In accordance with the public purpose requirement of La. Const. art. I, § 4(B)(1), the Legislature recognized that a “common carrier” is any “persons engaged in the transportation of petroleum as public utilities and common carriers for hire.”⁸ These laws squarely conform with the constitutional requirements of La. Const. art. I, § 4. The district court, therefore, correctly denied the Aaslestads’ challenge under the Louisiana Constitution.

The Aaslestads’ challenge under the United States Constitution is likewise unsupported by law. La. Const. art. I, § 4(B)(4) requires that any expropriation of private property by a private entity authorized by law to expropriate must be for “a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial decision.” Moreover, crude oil common carriers are subject to the expropriation requirements provided under La. R.S. 19:2 *et seq.*, which afford notice, procedural, and substantive rights to property owners. Taken together, these due process safeguards satisfy the due process requirements of the Fifth Amendment of the United State Constitution. The district court’s judgment should be affirmed because: (1) La. Const. art. I, § 4 is, by definition, constitutional under the Louisiana Constitution; (2) La. R.S. 19:2 and La. R.S. 45:251 comport with the requirements of La. Const. art. I, §4; and (3) La. Const. art. I, § 4, La. R.S. 19:2, and La. R.S. 45:251 provide due process as required by the Fifth Amendment of the United States Constitution.

⁷ La. R.S. 45:254; *see also* La. R.S. 19:2.

⁸ La. R.S. 45:251.

ARGUMENT

La. Const. art. I, § 4(B)(4), La. R.S. 19:2, and La. R.S. 45:251 were enacted to allow private entities to expropriate private property for public and necessary purposes. Because these constitutional provisions and statutes articulate clear standards and provide substantive and procedural due process, they are valid under the Louisiana Constitution of 1974 and the United States Constitution. This Court should therefore affirm the district court's judgment and uphold their constitutionality.

I. State law is presumed to be constitutional.

While this Court reviews questions of law *de novo*, state law is presumed to be constitutional.⁹ Thus, any analysis of La. R.S. 19:2, La. R.S. 45:251, and La. Const. art. I, § 4(B)(4) must begin with the presumption that the laws are constitutionally sound. Generally, courts presume that laws are valid and uphold their constitutionality whenever possible.¹⁰

These general principles of statutory construction were best laid out by the Louisiana Supreme Court in *Polk v. Edwards*.¹¹ The *Polk* decision provided:

An elementary principle of statutory construction in constitutional law holds that all statutory enactments are presumed to be constitutional. *Interstate Oil Pipe Line Co. v. Guilbeau*, 217 La. 160, 46 So.2d 113 (1950); *State on behalf of J.A.V.*, 558 So.2d 214 (La. 1990). Unless the fundamental rights or privileges and immunities of a person are involved, a strong presumption exists that the legislature in adopting legislation has acted within its constitutional authority.¹²

⁹ See *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637 (1993).

¹⁰ See, e.g., *State v. Caruso*, 98-1415 (La. 9/2/99), 733 So.2d 1169, 1170 (citing *State v. Griffin*, 495 So.2d 1306 (La. 1986)); see also *State v. All Property and Casualty Ins. Carriers Authorized and Licensed to Do Business in the State of La.*, 2006-2030 (La. 8/25/06), 937 So.2d 313, 319; *La. Municipal Assoc. v. State of La. and the Firefighters' Retirement Sys.*, 2004-0227 (La. 1/19/05), 893 So.2d 809, 842-843; *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944).

¹¹ 626 So.2d 1128 (La. 1993).

¹² *Id.* at 1132 (citing *Bd. of Directors of La. Recovery Dist. v. All Taxpayers, Property Owners*, 529 So.2d 384 (La. 1988)).

Likewise, the United States Supreme Court has recognized that “[s]tate statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared.”¹³

Furthermore, it is well settled in Louisiana jurisprudence that the presumption of constitutionality is particularly forceful in the case of laws enacted to promote a public purpose, such as La. R.S. 19:2 and La. R.S. 45:251.¹⁴ La. R.S. 19:2(8) allows common carriers to expropriate property, and La. R.S. 45:251 defines a “common carrier” as “all persons engaged in the transportation of petroleum as public utilities and common carriers for hire....” Because these statutes support a public purpose—they provide for the transportation of petroleum to and for the public—they enjoy a strong presumption of constitutionality.

In addition, “the party challenging the validity of the statute has the burden of proving it is unconstitutional.”¹⁵ As the United States Supreme Court explained in *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, “the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”¹⁶ Thus, the Aaslestads bear the burden of proving the unconstitutionality of La. R.S. 19:2, La. R.S. 45:251 and La. Const. art. I, § 4(B)(4).

The Aaslestads bring facial challenges to La. R.S. 19:2, La. R.S. 45:251, and La. Const. art. I, § 4(B)(4).¹⁷ An “as applied” constitutional challenge is limited to the facts of the particular situation, but a facial challenge invokes the rights of others

¹³ *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944).

¹⁴ *Bd. of Directors*, 529 So.2d at 387.

¹⁵ *All Property and Casualty Insurers*, 937 So.2d at 319.

¹⁶ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)); see also *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

¹⁷ Even under an “as applied” challenge, “[w]hether the expropriator’s purpose is public and necessary is a judicial determination that will not be reversed on appeal absent *manifest error*.” *ExxonMobil Pipeline Company v. Union Pacific Railroad Company*, 35 So.3d 192, 200 (La. 3/16/10) (emphasis added).

reaching beyond the specific circumstances of the challenger.¹⁸ The Aaslestads facially challenge the constitutionality of La. R.S. 19:2, La. R.S. 45:251, and La. Const. art. I, § 4(B)(4), which together allow any crude oil common carrier pipeline company to expropriate property. Facial challenges are disfavored, and such challenges present a much higher bar for review.¹⁹ If there is any uncertainty as to the constitutionality of the legislation in question, that doubt must be resolved with a determination that the legislation is constitutional.²⁰

II. La. R.S. 19:2 and La. R.S. 45:251 comply with the requirements of the Fifth and Fourteenth Amendments of the U.S. Constitution and of La. Const. art. I, § 4.

La. Const. Art. I, § 4(B)(4) provides that, “[p]roperty shall not be taken or damaged by any *private entity* authorized by law to expropriate, except for a *public and necessary purpose...*” (emphasis added). In other words, if authorized by law, a private entity can expropriate if the purpose is public and necessary.²¹ Crude oil common carrier pipelines serve public and necessary purposes.²²

The Louisiana Constitution provides an exhaustive list of the uses that qualify for a “public purpose,” including “transportation” and “public utilities for the benefit of the public generally.”²³ In *ExxonMobil Pipeline Company v. Union Pacific*

¹⁸ See *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 570 (6th Cir. 2012) (citing *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010)). A facial challenge is a challenge to the terms of the statute, not hypothetical applications. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012).

¹⁹ See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); see also *State v. Brown*, 94-1290 (La. 01/17/95), 648 So.2d 872, 875 (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

²⁰ *Bd. of Directors*, 529 So.2d at 387; see also *State ex rel LaBauve v. Michel*, 46 So. 430, 432 (La. 1908) (stating that every doubt must be resolved in favor of the statute), quoted in *East Baton Rouge School Board v. Foster*, 02-2799 (La. 6/6/03), 851 So.2d 985, 1004 (Weimer, J., dissenting).

²¹ See *ExxonMobil Pipeline Company v. Union Pacific Railroad Company*, 35 So.3d 192 (La. 3/16/10).

²² *Crooks v. Placid Ref. Co.*, 05-119 (La.App. 3 Cir. 06/01/05), 903 So. 2d 1154, 1161 (citing La. R.S. 45:254).

²³ As set forth in La. Const. Art. I, § 4(B)(2) (emphasis added), public purposes that are valid bases for takings are:

- (a) A general public right to a definite use of the property.
- (b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:
 - (i) Public buildings in which publicly funded services are administered, rendered, or provided.

Railroad Company, the Louisiana Supreme Court found that an access road for a crude oil pipeline served a public purpose because “they permit the pipeline company to maintain and inspect its pipeline, which delivers petroleum products to end users, and which redounds in benefits to the public at large.”²⁴ The Bayou Bridge pipeline delivers petroleum products to users and “redounds in benefits to the public at large.”²⁵ This Court should therefore uphold that crude oil common carrier pipelines serve a public purpose.

An expropriation must also serve a necessary purpose. The necessary purpose requirement has two components.²⁶ First, the purpose of the expropriation must satisfy a public necessity.²⁷ Second, the extent and location of the expropriation must be reasonably necessary.²⁸ Echoing this Court’s analysis in *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, the Louisiana Supreme Court explained in *ExxonMobil* that, “the word ‘necessary’ refers to the necessity of the purpose for the expropriation not the necessity for a specific location.”²⁹ The Court further explained that, “[o]nce public necessity is established, the extent and the location of property to be expropriated are within the sound discretion of the expropriation authority and determination of same will not be disturbed by the courts if made in good faith.”³⁰

-
- (ii) Roads, bridges, waterways, access to public waters and lands, and *other public transportation*, access, and navigational systems available to the general public.
 - (iii) Drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally.
 - (iv) Parks, convention centers, museums, historical buildings and recreational facilities generally open to the public.
 - (v) *Public utilities for the benefit of the public generally.*
 - (vi) Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.

- (c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.

Clearly, the complained-of activity falls under the allowable public purpose of La. Const. Art. I, § 4(B)(2)(b)(ii) and (iv).

²⁴ 35 So.3d at 199.

²⁵ *Id.*

²⁶ *Illinois Central R. Co. v. Mayeux*, 301 F.3d 359, 368 (5th Cir. 2002).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *ExxonMobil*, 35 So.3d at 199 (citing *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, 628 So.2d 75, 78 (La.App. 3 Cir. 1993), *writ denied*, 94-0168 (La. 3/18/94), 634 So.2d 854)).

³⁰ *ExxonMobil*, 35 So.3d at 200.

The trial court considered expert testimony that the Bayou Bridge Pipeline will have positive public benefits to consumers and market competition.³¹ The trial court also evaluated testimony regarding the extent and location of the expropriated property and found both of those elements to be reasonable and in good faith.³² Considering these findings of fact, the trial court found “that the public purpose and necessity of the pipeline [had] been proven by Bayou Bridge Pipeline, LLC.”³³ This Court should uphold the trial court’s finding “absent manifest error.”³⁴

In order to prevail on their facial constitutional challenge, the Aaslestads must show that: (1) there is no possibility for a crude oil common carrier pipeline to satisfy a public necessity; and (2) all crude oil pipeline common carriers necessarily exercise their expropriation authority arbitrarily, capriciously, or irrationally. The United States Supreme Court has explained that a litigant “can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications.”³⁵ The Aaslestads have failed on both counts. Indeed, the Aaslestads have not argued that all crude oil common carriers cannot serve a public necessity, and they failed to show how *all* crude oil pipeline common carriers necessarily exercise their expropriation authority arbitrarily, capriciously, or irrationally.

To the extent the Aaslestads argue that oil pipeline companies “expropriate [] property under a self-designated status as a common carrier pipeline,” the law demonstrates the contrary. La. R.S. 45:252 states that, “[a]ll pipe lines through which petroleum is conveyed from one point in this state to another point in the state are declared to be common carriers as defined in R.S. 45:251 and are placed under the

³¹ R. at 40.

³² R. at 41-42.

³³ R. at 42.

³⁴ *ExxonMobil*, 35 So.3d at 200.

³⁵ *Wash. State Grange*, 552 U.S. at 449.

control of and subject to regulation by the Louisiana Public Service Commission.”³⁶ Moreover, La. Const. art. I, § 4(B)(4) provides that “whether the purpose is public and necessary shall be a judicial question.” The judiciary, therefore, plays an important role in ensuring due process and constitutional compliance.

Because the common carrier status of oil pipeline companies is not “self-designated” and because the Aaslestads have failed to make a showing that all oil pipeline companies make arbitrary decisions, their affirmative defenses that La. R.S. 19:2 and La. R.S. 45:251 unconstitutionally violate rights to property and due process should be denied.

III. La. R.S. 19:8 embodies the necessary due process protections of La. Const. Art. I, § 2 and the Fifth and Fourteenth Amendments to the United States Constitution.

La. Const. Art. I, § 2 states that “[n]o person shall be deprived of life, liberty, or property, except by due process of law.” This sentiment is echoed by the Fifth and Fourteenth Amendments to the United States Constitution: “[n]o person shall...be deprived of life, liberty, or property, without due process of law...” and “[n]o State shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law....” These instruments sought to ensure the protection of citizens’ due process rights. However, despite the Aaslestads’ allegations, no infringement of these rights has occurred here. La. Const. art. I, § 4(B)(4) and La. R.S. 19:8 specifically protect a landowner’s right to challenge (*i.e.*, due process rights) the constitutionally-protected components of the law—the public and necessary purpose and the compensation.

In their constitutional challenge, the Aaslestads primarily rely on two cases: *Ass’n of Am. Railroads v. United States DOT*, 821 F.3d 19 (D.C. Cir. 2016), and *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 708 (5th Cir. 2017). Neither

³⁶ La. R.S. 45:252.

case supports a finding that La. Const. art. I, § 4(B)(4), La. R.S. 19:2, and La. R.S. 45:251 are unconstitutional. Indeed, as set forth below, *Boerschig* supports a finding of constitutionality.

In *Ass'n of Am. Railroads*, the D.C. Circuit Court of Appeals evaluated whether the Passenger Rail Investment and Improvement Act of 2008 “violates the Fifth Amendment’s Due Process Clause by authorizing an economically self-interested actor[] to regulate its competitors.”³⁷ The D.C. Circuit concluded that the law was unconstitutional because it gave an economically self-interested entity regulatory authority over its competitors. Unlike in *Ass'n of Am. Railroads*, the laws at issue in this case do not allow an economically self-interested entity regulatory authority over its competitors. The D.C. Circuit’s opinion in *Ass'n of Am. Railroads* is inapposite.

The Fifth Circuit Court of Appeals’ decision in *Boerschig* is relevant to this matter, but contrary to the Appellants’ arguments, it leads to a conclusion of constitutionality. Like in this case, *Boerschig* dealt with a contention “that by ceding condemnation power to a private company, Texas eminent domain law offends due process.”³⁸ The Texas laws at issue allow a “quick taking” of property by a private company without a prior hearing.³⁹ Dispatching with the argument concerning the lack of a hearing prior to the taking, the Fifth Circuit recognized that it and the United States Supreme Court had “repeatedly held that such ‘quick taking’ without a prior hearing is consistent with due process.”⁴⁰

The Fifth Circuit then considered whether the statutory scheme allowing gas pipeline companies to condemn property was so unrestrained as to result in a

³⁷ 821 F.3d 19, 23 (D.C. Cir. 2016).

³⁸ 872 F.3d 701, 702 (5th Cir. 2017).

³⁹ *Id.* at 707. The question before the court was whether a preliminary injunction should issue, so the issue was whether the plaintiff was likely to succeed on the merits.

⁴⁰ *Id.* (citing *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042 (1974); *Smart v. Tex. Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976)).

deprivation of private property rights without “process of law.”⁴¹ As with La. Const. art. I, § 4(B)(4), the Texas scheme “imposes a standard to guide the pipeline companies—that the taking is necessary for ‘public use’—and provides judicial review of that determination that prevents the company from having the final say.”⁴² Judicial review under the Texas scheme is limited to whether “fraud, bad faith, abuse of discretion, or arbitrary or capricious action” infected the pipeline company’s determination that expropriation was “necessary for public use.”⁴³ Despite this “seemingly feeble” judicial review provided under the Texas scheme, the Fifth Circuit upheld its constitutionality, recognizing that “this judicial review captures precisely the situations in which a private delegation deprives a property owner of due process: when the private parties may make a decision based ‘solely for their own interest, or even capriciously.’”⁴⁴ In other words, Texas law, like Louisiana law, allows the state courts to review whether a taking confers only a private benefit.⁴⁵ The Fifth Circuit held that the plaintiff’s “inability to establish a likelihood of success, much less a substantial one, means he is not entitled to a preliminary injunction.”⁴⁶

The Court should follow the Fifth Circuit’s ruling in *Boerschig* because La. Const. art. I, § 4(B)(4) and statutes enacted pursuant thereto provide even more due process than does the Texas law evaluated in *Boerschig*. La. Const. art. I, § 4(B)(4) gives state courts jurisdiction over the initial determination of whether the taking is proper. Because process under La. Const. art. I, § 4(B)(4) and La. R.S. 19:8 is required before the expropriation of private property occurs and because due process

⁴¹ *Id.* at 708.

⁴² *Id.*

⁴³ *Id.* at 709.

⁴⁴ *Id.* (quoting *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912)).

⁴⁵ *Id.*

⁴⁶ *Id.*

is provided through this instant proceeding, there is no due process violation under the United States or Louisiana Constitutions.

CONCLUSION

La. Const. art. I, § 4(B)(4), La. R.S. 19:2, and La. R.S. 45:251 were enacted to allow private entities to expropriate private property for certain public and necessary purposes. Because these constitutional provisions and statutes articulate clear standards and provide substantive and procedural due process, they are valid under the Louisiana Constitution of 1974 and the United States Constitution. This Court should therefore affirm the district court's judgment and uphold their constitutionality.

Respectfully submitted:

JEFF LANDRY
ATTORNEY GENERAL

By: 

Harry J. Vorhoff (#35365)

Ryan M. Seidemann (#28991)

Assistant Attorneys General

Louisiana Department of Justice

Post Office Box 94005

Baton Rouge, Louisiana 70804-9005

Telephone No.: (225) 326-6000

Facsimile No.: (225) 326-6099

Email: vorhoffh@ag.louisiana.gov

seidemannr@ag.louisiana.gov

Attorneys for the State of Louisiana

VERIFICATION OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary public, personally appeared

HARRY J. VORHOFF

Who, after being duly sworn, did state that he is an attorney for the State of Louisiana, *ex rel.* Jeff Landry, Attorney General, that the allegations of the Brief in Opposition to the Appellants' Constitutional Challenge of La. Const. art. I, § 4, La. R.S. 19:2, and La. R.S. 45:251 are true to the best of his knowledge, information, and belief, and that a copy of the brief was served upon the following via e-mail, this 9th day of October, 2019.

Misha L. Mitchell
Atchafalaya Basinkeeper
411 Walnut Street #15255
Green Cove Springs, FL 32043
basinkeeperlegal@gmail.com

Pamela C. Spees
Astha Sharma Pokharel
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
pspees@ccrjustice.org
asharmapokharel@ccrjustice.org

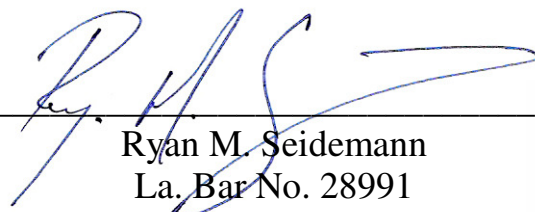
William P. Quigley
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Quigley77@gmail.com

Michael B. Donald
Tiffany Raush
Jones Walker
811 Main Street, Suite 2900
Houston, TX
mdonald@joneswalker.com
traush@joneswalker.com

Ian A. MacDonald
Jones Walker
600 Jefferson Street, Suite 1600
Lafayette, LA 70501
imacdonald@joneswalker.com

Archie Joseph
Attorney at Law
707 Berard Street
Breaux Bridge, LA 70517
ajosephlaw@cox-internet.com

SWORN AND SUBSCRIBED before me, Notary Public, on this 9th day of October, 2019.


Ryan M. Seidemmann
La. Bar No. 28991

My commission ends at death.



RYAN M. SEIDEMANN
Notary Public
Notary ID No. 77139
East Baton Rouge Parish, Louisiana