

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

ANNE WHITE HAT, RAMON MEJÍA, KAREN SAVAGE, SHARON LAVIGNE, HARRY JOSEPH, KATHERINE AASLESTAD, PETER AASLESTAD, THEDA LARSON WRIGHT, ALBERTA LARSON STEVENS, JUDITH LARSON HERNANDEZ, RISE ST. JAMES, 350 NEW ORLEANS, and LOUISIANA BUCKET BRIGADE

Plaintiffs,

v.

JEFF LANDRY, in his official capacity as Attorney General of Louisiana; BO DUHÉ, in his official capacity as District Attorney of the 16th Judicial District Attorney's Office; RONALD J. THERIOT, in his official capacity as Sheriff of St. Martin Parish,,

Defendant.

Civil Action No. 19-cv-322-JWD-EWD

JUDGE John W. deGravelles

MAGISTRATE JUDGE Erin Wilder-Doomes

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT**

Introduction

Now into court, through undersigned counsel, come Plaintiffs, who respectfully submit this memorandum of law in support of their Motion for Leave to file a Supplemental Complaint, pursuant to Federal Rule of Civil Procedure 15(d).

The proposed supplemental complaint, annexed hereto as Exhibit A, includes new allegations concerning the standing of Plaintiffs Sharon Lavigne and RISE St. James and impact of the 2018 amendments to La. R.S. 14:61 on them. The new factual allegations and supplemental claim, which are highlighted in yellow for the Court's convenience, relate to recent events that have occurred since the filing of the complaint and briefing of Defendants' motions to dismiss and

further demonstrate the law's unconstitutional vagueness and overbreadth, and its interference with the practice of religion in violation of the First Amendment.

BACKGROUND

A. Procedural History

This litigation was commenced by Plaintiffs on May 22, 2019, challenging the constitutionality of amendments to La. R.S. 14:61, which prohibits unauthorized entry and remaining after being forbidden on critical infrastructure. Dkt. 1. Plaintiffs asserted that the addition of over 125,000 miles of pipelines to the definition renders the law unconstitutionally vague in violation of the Fourteenth Amendment and overbroad in violation of the First Amendment. Plaintiffs also assert that the law as amended violated their rights to expression and discriminates against them on the basis of viewpoint in violation of the First Amendment.

On September 16, 2019, Defendants moved to dismiss on the basis of sovereign immunity, standing, *Younger*, and failure to state claims under 12(b)(6) with regard to the vagueness and viewpoint discrimination claims. Dkts. 30, 31, 32. Plaintiffs filed their opposition briefs on October 7, 2019. Dkts. 34, 35, 36. With briefing complete, the matter is currently pending before the court.

B. Proposed Supplemental Allegations and Claim

In late November 2019, Plaintiff RISE St. James learned through records obtained in response to a public records request to the Louisiana Division of Archaeology that a cemetery had been discovered in St. James on the site of a proposed plastics facility on property that has until recently been farmed for sugar cane. *See* Proposed Supplemental Complaint (Supp'l Compl.) at ¶ 99. The records indicated that the property owners' consultants believe it could have been a "slave cemetery" associated with the Buena Vista Plantation which once operated

there. *Id.* at ¶ 100. The records also revealed that a pipeline had been constructed through the cemetery several years ago, undoubtedly damaging some of the graves at the time. *Id.* at 101. The pipeline is not visible – the only way RISE would know it existed is because of the public records request and reports documenting its existence. *Id.* at ¶ 102. The discovery of the cemetery is enormously significant for Plaintiffs Lavigne and RISE St. James, and they have gone to the cemetery to pray, sing, and report on its discovery and its significance for the descendant community in St. James. *Id.* at ¶ 103. There cemetery is in a wide open field of 2,375 acres. *Id.* at ¶ 104. Recently, on May 1, 2020, a representative of the company who owns the property advised Lavigne that she could not visit the cemetery, despite the fact that Louisiana law requires landowners to allow descendant communities reasonable access. *Id.* at ¶ 105. Lavigne and other members of RISE fear that if they attempt to visit the cemetery to pray and commemorate the lives of those who lived and died on that property, who they believe could be ancestors, they face up to five years in prison. *Id.* at ¶ 106. Lavigne and members of RISE St. James have felt intimidated and cancelled plans to go to the cemetery on Memorial Day weekend, May 22, 2020. *Id.* at ¶ 107. The proposed supplemental complaint includes these recent developments and an additional claim that the law also operates to interfere with Plaintiffs’ practice of religion.

LAW AND ARGUMENT

A. Legal Standard

Under Fed. R. Civ. P. 15(d), the court may, “[o]n motion and reasonable notice” and “on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” “In general, an application for leave to file a supplemental pleading is addressed to the discretion of the court

and should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.” *Henderson v. Stewart*, 82 F.3d 415 (5th Cir. 1996) (citing 6A Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1505 (1990)).

In this way, the purpose of Rule 15(d) is “to promote as complete an adjudication of the dispute between the parties as is possible.” *D.T. Apartment Grp., LP v. CWCapital, LLC*, No. 3:12-cv-0437-D, 2012 WL 4740488, at *2 (N.D. Tex. Oct. 3, 2012) (Citing 6A Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1504 (2004)). In determining whether to allow a supplemental pleading, courts use the same factors for determining motions to amend pleadings such as whether it will cause undue delay or whether the pleading is futile. *See Lewis v. Knutson*, 699 F.2d 230, 239 (5th Cir.1983); *see also Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) (“...the trial court should consider whether permitting the amendment would cause undue delay in the proceedings or undue prejudice to the nonmoving party, whether the movant is acting in bad faith or with a dilatory motive, or whether the movant has previously failed to cure deficiencies in his pleadings by prior amendments.”).

B. Allowing the Supplemental Complaint Will Promote the Economic and Speedy Disposition of the Matter and Will Not Prejudice Defendants, or Cause Undue Delay.

The supplemental allegations Plaintiffs propose relate to events that occurred after the filing of the original complaint (May 22, 2019) and after briefing was completed on Defendants’ motions to dismiss (October 7, 2019), and will promote a more complete adjudication of the dispute set out in the original pleading. Plaintiffs Lavigne and RISE St. James only learned in late November

2019 of the existence of the cemetery, that it was believed to contain graves of people enslaved on the plantation that once existed on the property, and that a pipeline had been constructed through it years earlier, Supp'l Compl. at ¶¶ 99-102, and it was only in May 2020 that Ms. Lavigne was advised that she could not visit the cemetery by a representative of the company that owns the property that the cemetery is on, *Id.* at ¶ 105.

The existence of the pipeline running through the cemetery renders at least some portion of it a form of critical infrastructure under the amendments to La. 14:61 which are challenged in this matter. The proposed supplemental allegations further illustrate and clarify the allegations in the original pleading concerning the impact of the law on Plaintiffs Lavigne and RISE St. James. The supplemental allegations also further illustrate and clarify the constitutional problems with the amendments to the law that render it vague and overbroad through the addition of pipelines, which as originally pled, can be virtually anywhere in this state – in this case in a cemetery in an empty field, and invisible to the naked eye.

The supplementation of the complaint will not prejudice the defendants or cause undue delay. Plaintiffs have timely sought to amend this pleading in that the motion is brought only a little over a month after Plaintiffs Lavigne and RISE St. James cancelled plans to visit the cemetery for prayer and commemoration of those buried there, which was to take place on May 22, 2020, the start of Memorial Day weekend, because they were concerned about possible prosecution under the critical infrastructure law after they had been denied access by a representative of the landowner. Supp'l Compl. at ¶¶ 105-107.

Moreover, the litigation is in the early stage as motions to dismiss are pending and there is no discovery schedule, other scheduling order, or trial date in place. The supplemental allegations will neither surprise Defendants, inasmuch as they are further illustrating allegations already pled

in the original complaint, and they will not significantly increase the resources they would have to devote to any additional related briefing.

Finally, allowing the supplemental complaint would not be futile. A supplemental complaint is futile if “it adds nothing of substance to the original allegations or is not germane to the original cause of action.” *Lewis v. Knutson*, 699 F.2d at 239. The supplemental pleading may also be futile if it “would fail to state a claim upon which relief could be granted.” *Enniss Family Realty I, LLC v. Schneider Nat. Carriers, Inc.*, 916 F. Supp. 2d 702, 717 (S.D. Miss. 2013) quoting *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000). As noted above, the supplemental allegations relate to and are germane to claims in the original complaint upon which relief can and should be granted. They also support the supplemental claim for interference with the practice of Plaintiffs’ religion in that Plaintiffs have been chilled and inhibited from visiting a cemetery and singing and praying over the graves. *See Satiacum v. Laird*, 475 F.2d 320, 321 (D.C. Cir. 1972) (Regulation prohibiting “ceremonies at [Arlington Memorial] Cemetery if they coincide in point of time with ‘partisan’ activities outside of the Cemetery,” may “unduly trammel freedom of religion, by prohibiting memorial, religious services inside the Cemetery.”). *See also Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) (Undue burden on free exercise of religion may occur when “the plaintiff alleges a viable free exercise claim in conjunction with another colorable constitutional claim, giving rise to heightened scrutiny.”).

The threat of prosecution with a felony offense carrying up to five years in prison has inhibited Plaintiffs’ expression and practice of their faith at a gravesite despite the fact that

Louisiana cemetery dedication law does not permit landowners to categorically and unreasonably deny to descendant communities access to such sites.¹

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for leave to file a Supplemental Complaint.

Date: July 6, 2020

Respectfully submitted,

s/Astha Sharma Pokharel

ASTHA SHARMA POKHAREL

(Admitted *Pro Hac Vice*)

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¹ Louisiana law is clear that when cemeteries or burial grounds are discovered on private property, the landowner may not prevent access to those sites by descendants or friends. *In re St. James Methodist Church of Hahnville*, 95-410 (La. App. 5 Cir. 12/27/95) 666 So. 2d 1206 citing *Vidrine v. Vidrine*, 225 So.2d 691, 697-698 (La. App. 3rd Cir. 1969). The Louisiana Attorney General has referred to such sites as “isolated cemeteries,” which that office defined as “cemeteries that have become separated from easy access due to property transfers and the like, typically causing them to lie wholly within the property of someone unrelated to the descendants of those interred in the cemetery.” La. Attorney Gen. Op. 08-0186. A landowner may not place unreasonable limitations or categorically deny access to the descendant communities. *See id.*

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, a copy of the foregoing was filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record unless indicated otherwise.

s/Astha Sharma Pokharel
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