

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

x

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

Civil Action No. 6:20-cv-00983

Plaintiffs,

JUDGE ROBERT R. SUMMERHAYS

v.

MAGISTRATE JUDGE
CAROL B. WHITEHURST

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.

x

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER
DISTRICT COURT'S RULING DISMISSING CLAIMS
AGAINST ATTORNEY GENERAL**

Procedural Background

Plaintiffs commenced this litigation on May 22, 2019, to challenge the constitutionality of the 2018 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. Defendants filed Reply briefs on October 21, 2019. Dkts. 39-41. On July 30, 2020, Judge deGravelles issued a ruling on Defendants' Motions to Dismiss in which he dismissed the claims against the Attorney General and transferred venue to this district. Dkt. 48. He denied Defendants' motions in all other respects.

Prior to the issuance of Judge deGravelle's ruling, Plaintiffs filed a Motion for Leave to File Supplemental Complaint, to incorporate new facts that arose subsequent to the briefing on Defendants' motions to dismiss. Dkt. 45. The new factual allegations related to the discovery of a cemetery on a former plantation believed to contain the graves of people enslaved there with a pipeline running through it, rendering it a form of critical infrastructure under the challenged law. In particular, Plaintiffs RISE St. James, Sharon Lavigne, and Harry Joseph, have been impacted by the law prohibiting unauthorized entry onto critical infrastructure in their efforts to convene at the cemetery and conduct prayer and commemoration. Dkt. 45-2 at 22, 27, 99-109. They had to seek, and in fact obtained, a temporary restraining order allowing them to do so without fear of prosecution. *See* Plaintiffs' Reply Memorandum in Support of Supplemental Complaint, Dkt. 61 at 2-4; Verified Petition for Temporary Restraining Order, Dkt. 47-2, and Dkt. 47-3, Temporary Restraining Order. The new facts further demonstrate the law's unconstitutional vagueness and overbreadth. Defendants filed an opposition to that motion on July 27, 2020. Dkt. 47. Plaintiffs have since filed a Reply to Defendants' Opposition. Dkts. 59, 61.

The new facts concerning the cemetery as critical infrastructure are relevant to the claims against the Attorney General because, as set forth below, the Attorney General has been specifically entrusted with the protection of unmarked human burial sites. *See* La. R.S. 8:306(A)(1). The

Louisiana Attorney General also represents the Louisiana Cemetery Board in all matters relating to the administration and enforcement of the law relating to cemeteries. La. R.S. 8:69. In addition, the Attorney General is also designated pursuant to La. R.S. 29:725.1 to be legal advisor to the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), which has the authority and mandate to protect critical infrastructure against threats, a fact about which the Attorney General failed to advise the court in previous briefing on this question. Finally, subsequent to the briefing on the motions to dismiss, the United States Fifth Circuit Court of Appeals issued a ruling that is relevant to this question and that further illustrates why the Attorney General is a proper party to this matter.

For all of these reasons not previously considered by the District Court, the Attorney General is a proper party in this matter and the claims against him should be reinstated.

LAW AND ARGUMENT

I. This Court Has the Power to Reinstate the Claims Against the Attorney General.

Judge deGravelle's July 30th order on Defendants' motions to dismiss did not adjudicate all of the Plaintiffs' claims and is therefore governed by Rule 54(b). *See Fed. R. Civ. P. 54* ("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). Under Rule 54(b), "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) (discussing the less stringent standard that applies to motions to reconsider non-final orders as compared to reconsideration of final judgments under Fed. R. Civ. Proc. 54(e)).

II. The Attorney General Has Multiple Constitutional and Statutory Obligations, and Sufficient Connections, to the Subject Matter in This Case.

A recent case decided by the United States Fifth Circuit Court of Appeals concerning the Attorney General in Texas helps illustrate why the Louisiana Attorney General is a proper defendant. The Texas Attorney General’s authority and ability to commence prosecutions, which was at issue in *In re Abbott*, 956 F.3d 696 (5th Cir. Apr. 20, 2020), is greatly circumscribed and limited in comparison to that of the Louisiana Attorney General. The Texas Attorney General’s enforcement authority is limited to requests from local prosecutors. *See Tex. Gov’t Code ¶ 402.028; see also, Texas Const. Art. 4, Sec. 22.* As a result, the Fifth Circuit held that such limited authority, absent an explicit threat of prosecution, lacked the “required enforcement connection” to the law challenged in that case. *In re Abbot*, 956 F.3d at 709.

In contrast, the Louisiana Attorney General has multiple clear and sufficient enforcement connections to the criminal statute challenged here. As “chief legal officer of the state,” the Louisiana Constitution of 1974 vests the Attorney General with authority to institute, prosecute, or intervene in any criminal action or proceeding, or supersede any attorney representing the state in any civil or criminal action, for cause and with judicial authorization, in addition to advising and assisting in the prosecution of any criminal case at the request of district attorneys in the state. La. Const. Art. IV, Sec. 8. Unlike the Attorney General in Texas, the Louisiana Code of Criminal Procedure also provides that the Louisiana Attorney General exercises supervision over all district attorneys in the state. La.C.Cr.P. Art. 62(A). In turn, and “[s]ubject to the supervision of the attorney general,” district attorneys have “entire charge and control of every criminal prosecution instituted or pending in [their] district, and determine[] whom, when, and how they shall prosecute.” La.C.Cr. P. Art. 61.

Beyond his inherent prosecutorial and supervisory authority in criminal cases, the Attorney General also has a special connection to the subject-matter of the law challenged here.

First, the Attorney General is designated pursuant to La. R.S. 29:725.1 to be legal advisor to the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), which has the authority and mandate to protect critical infrastructure against threats.¹ This was a fact that the Attorney General failed to note in his previous briefing on this matter.²

Second, with regard to the new facts alleged in the Supplemental Complaint concerning the burial ground that was transformed into critical infrastructure because of a pipeline running through it, the Attorney General has been specifically "entrusted" by the Louisiana Legislature with the protection of unmarked human burial sites. *See* La. R.S. 8:306(A)(1). The Louisiana Attorney General also represents the Cemetery Board in all matters relating to the administration and enforcement of the law relating to cemeteries. La. R.S. 8:69.

The Attorney General is thus triply connected to and responsible for the subject matter at issue in this litigation and should be deemed a proper party.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the earlier ruling of the District Court and reinstate the claims against the Attorney General.

Date: August 27, 2020

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

¹ See Website of Governor's Office of Homeland Security and Emergency Preparedness, Critical Infrastructure: Threat and Hazard Identification and Risk Assessment, available at <https://gohsep.la.gov/PREVENT/CIKR> and Critical Infrastructure Protection Division of Homeland Security and Interoperability Division available at <https://gohsep.la.gov/ABOUT/CONTACT-US/GOHSEP-CONTACTS>.

² The Attorney General did, however, note his role as Legal Advisor to GOHSEP in an opinion he recently issued on the constitutionality of the Governor's mask mandate.

WILLIAM QUIGLEY
La. Bar Roll No. 7769
Professor of Law
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Tel. (504) 710-3074
Fax (504) 861-5440
quigley77@gmail.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 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/Pamela C. Spees
Pamela C. Spees