UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

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ANNE WHITE HAT, RAMON MEJÍA,
and KAREN SAVAGE,

Plaintiffs,

v.

Civil Action No. 6:20-cv-00983

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,

JUDGE ROBERT R. SUMMERHAYS

MAGISTRATE JUDGE
CAROL B. WHITEHURST

Defendants.

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PLAINTIFFS' REPLY TO THE OPPOSITION OF SHERIFF BREAUX AND FORMER SHERIFF THERIOT IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come the Plaintiffs, who submit this Reply in support of their Motion for Summary Judgment to the opposition filed by St. Martin Parish Sheriff Becket Breaux and former Sheriff Ronald Theriot ("the Sheriffs").[1] Dkt. 103. 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.

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[1] The Sheriffs' attempt to incorporate by reference a proposed brief appended to the Attorney General's motion to intervene is wholly improper: the Attorney General is not presently a party to the case so arguments it wishes to make are not properly before the court. Plaintiffs will confront and eagerly dispense with the arguments contained therein if the Attorney General and his brief are allowed into this litigation and therefore when it is procedurally proper to do so. Even worse, the Sheriffs seek to get a brief in through the back door which should not be permitted through the front door given the Attorney General's unjustifiable delay in seeking to intervene. Moreover, the Attorney General's reply in support of his motion to intervene contained a number of revelations as to the extensive communications with Defendants about his intervention beginning as early as May 10, 2022, which appear to be a waiver of privilege. In light of that – and the Attorney General's unsupportable justification that he planned to merely appear as "additional counsel" without moving to intervene – Plaintiffs would urge the Court to consider an *in camera* inspection of the Attorney General's written communications with Defendants to assure itself and Plaintiffs that these eleventh-hour maneuvers have not been undertaken to harass, cause delay, or increase the cost of this litigation.

REBUTTAL ARGUMENT

The Sheriffs have failed to meet their burden to show the existence of genuine issues of material fact. It is well-settled that a party opposing a summary judgment motion must inform the trial judge of the legal or factual reasons why summary judgment should not be entered. *See Ledet v. Fleetwood Enterprises, Inc.*, 245 F.3d 791 (5th Cir. 2000) (per curiam) (citation omitted). The Sheriffs make a series of meritless objections to Plaintiffs Statement of Undisputed Material Facts and do not indicate at all how the purported inadmissibility of the exhibits should defeat summary judgment. In so doing, the Sheriffs fail to meet their burden to point to any evidence that creates a genuine issue of fact to defeat summary judgment.[2] Even though this elementary default by the Sheriffs is enough to entitle Plaintiffs to summary judgment, Plaintiffs nevertheless address these evidentiary objections below at Sec. IV.

Ultimately, the undisputed facts demonstrate that the statute as amended in 2018 is vague and overbroad, entitling Plaintiffs to summary judgment as a matter of law.

I. The Sheriffs' Brief Illustrates the Statute's Facial Vagueness and Overbreadth.

Defendants cannot get around the fact 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" 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). Thus, the Sheriffs' attempt to cast Plaintiffs' arrests as "within the surveyed limits of the pipeline construction project,"[3] Dkt. 103 at 3, is irrelevant to

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[2] *See also Alto-shaam, Inc. v. Manitowoc Co.*, No. 7:09-CV-18-O, 2011 WL 13196212, at *1 (N.D. Tex. May 6, 2011) ("The Fifth Circuit has reaffirmed on several occasions that Rule 56 does not impose on the trial court the task of digging through the record in search of evidence to support a party's arguments in opposition to summary judgment. Thus, a party opposing summary judgment must clearly identify the record evidence and articulate how it raises a genuine factual dispute." (collecting Fifth Circuit cases)).

[3] St. Martin Parish Sheriff's Deputy Chris Martin, testified that there were no stakes or survey markers in the area where Plaintiffs Savage and Mejía had been arrested, so he "eyeballed" it after the fact from about 50 yards away and advised the arresting officer they were on critical infrastructure. *See* Dkt. 93-2 ¶¶ 87-88. Moreover, the pipeline company's presence on the property where the arrests took place was illegal so there was no legally

the principal legal question before this Court because the 2018 amended law does not define "premises" in any way, including with reference to "surveyed limits." 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 Statute as it relates to pipelines is thus impermissibly vague and overbroad and Defendants' mere assertion that Plaintiffs were on proscribed grounds cannot save the Statute from this constitutional infirmity.

The complete lack of limitation or definition of "premises" with regard to pipelines means that someone could be standing anywhere, protesting or not, in the broad amorphous vicinity of a pipeline, which may not even be visible or marked, *see* Dkt. 93-2 ¶¶ 1-9, and if they remain after being forbidden, they could be charged with a five-year felony under La. R.S. 14:61(A)(3). There can hardly be a better example of a criminal statute's vagueness and overbreadth violating the most fundamental due process requirements *and* ensnaring a substantial number of unconstitutional applications within its sweep. *See Lanzetta v. N.J.,* 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."); *Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018), *as revised* (Aug. 9, 2018) (citing *United States v. Stevens,* 559 U.S. 460, 473 (2010)) (explaining that a law is overbroad when it "encompasses a substantial number of unconstitutional applications 'judged in relation to the statute's plainly legitimate sweep'").

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

cognizable critical infrastructure to begin with, which is what protesters were attempting to draw attention to. *See* Dkt. 93-2 ¶¶56-76, Dkt. 93-9, ¶4, Dkt. 103 at 3.

regulated by a statute drawn with the requisite narrow specificity." *See Dombrowski*, 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." *Dombrowski,* 380 U.S. at 487.

II. The Sheriffs' Brief Helps Illustrate the Availability of Content-Neutral Alternative Statutes and Why the Statute Fails Under Both Strict *and* Intermediate Scrutiny.

Plaintiffs have shown, Dkt. 98. at 5-13, and the Sheriffs have failed to refute, that the Statute is a content-based regulation and viewpoint discriminatory and therefore subject to strict scrutiny, which means it is only justifiable if "the government proves [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Texas Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 509 (5th Cir. 2021) (citing *Reed*, 576 U.S. at 163). The First Amendment requires that the Government's chosen restriction on speech be "actually necessary" to achieve the state's compelling interest and the means chosen must be the least restrictive. *U.S. v. Alvarez,* 567 U.S. 709, 725 (2012) ("There must be a direct causal link between the restriction imposed and the injury to be prevented."). For reasons previously explained, Dkt. 98 at 11-15, the felonizing of "trespass" over a vast and undefined territory is not the least restrictive means of achieving the state's interest in protecting critical infrastructure.

The Sheriffs emphasize what Plaintiffs have also pointed out – that La. R.S. 14:61 "deals with trespass." *Id*. at 5. As such, there were pre-existing statutes that could have been applied to Plaintiffs for allegedly entering or remaining upon property without authorization as Plaintiffs point out in their opening brief. *See* Dkt. 98 at 12-13. As the Supreme Court has noted, this "existence of adequate content-neutral alternatives thus 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." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

The Sheriffs appear to attempt to defend the statute by pointing to allegations of property damage on the site. Dkt. 103 at 1. This attempt suffers from a fatal flaw at the summary judgment phase: the Sheriffs did not produce any evidence to show Plaintiffs in this action had engaged in any acts of property damage, nor explain why this is relevant to the challenge to a law that only "deals with trespass." If anything, this attempt only demonstrates again there were content-neutral alternatives the Sheriffs could have invoked but chose not to.[4] *See also* Dkt. 98 at 13.

Even if the statute were deemed "content-neutral," it still would fail intermediate scrutiny applied to such laws for the same reasons set out above and in Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment. That level of scrutiny requires that the law be "narrowly tailored to serve a significant governmental interest." *See McCullen v. Coakley*, 573 U.S. 464, 486. In *McCullen*, for example, the Supreme Court noted that a police captain testified before the legislature that the regulation setting fixed buffer zones outside abortion clinics would "make our job so much easier." *Id*. 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, 495. ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply

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[4] *See, e.g.,* La. R.S. 14:56, which prohibits simple criminal damage to property, which carries sentences ranging from six months to up ten years depending on the amount of damage caused, or La. R.S. 14:61.1, which 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 a critical infrastructure would be disrupted.

that the chosen route is easier.”).

III. The Statute Is Susceptible of Arbitrary and Discriminatory Enforcement Rendering it Void for Vagueness.

A law is unconstitutionally vague when it “(1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement.” *City of Chicago v. Morales*, 527 U.S. 41, 90 (1999). Undisputed facts show that the statute is susceptible of arbitrary and discriminatory enforcement. Most telling, even the state’s attorneys responsible for prosecuting violations of the Statute differ in their opinions as to its reach. Louisiana Attorney General defines “premises” as a “tract” of land where a “pipeline exists or does not,” while Defendant Duhe argues “premises” can be determined by reference to a judgment of expropriation. *See* 93-2 at ¶¶ 111-116. The sheriffs’ deputies also testified inconsistently about whether survey markers were present at the location where Plaintiffs Savage and Mejía were arrested, as well as how they would determine whether someone was unlawfully present on the premises of a pipeline that is underground and invisible.[5] *See* dkt. 93-2 at ¶¶ 87-88, 118-127. Law enforcement’s inability to consistently understand and apply a statute’s terms is a telltale sign of its impermissible vagueness.

IV. The Sheriffs’ Objections to Admissibility of Plaintiffs’ Evidence Are Without Merit and Would Not Defeat Summary Judgment in Any Event.

A. The Court can grant Plaintiffs summary judgment as a matter of law without reference to any of Plaintiffs’ exhibits.

As set out above in Sec. I, and in Plaintiffs’ opening brief, dkt. 98, the Statute is facially vague and overbroad in violation of Fifth and First Amendments. That is a question of law turning on the Statute’s plain language, for which no further factual evidence is required. Many

[5] The Sheriffs object to their deputies’ testimony as speculation, but Plaintiffs maintain it is proper to inquire of law enforcement officers how they understand a criminal statute they are charged with enforcing as an essential function of their job.

of the exhibits offered by Plaintiffs provide important, relevant context to understanding the dangers of such a vague, open-ended, and overbroad criminal law. *See, e.g.,* Dkt. 93-2 ¶ 1, 41 (congressional testimony identifying 125,000 pipelines in the state and map published by the Louisiana Department of National Resources). But they are not necessary to finding that the Statute is unconstitutional on its face and, critically, Defendants make no effort to show how the asserted inadmissibility of any of the documents precludes summary judgment.

B. Exhibits A through F, H, I, L, and O are not inadmissible simply because they are obtained from the Internet.

The Sheriffs suggest that Exhibits A-F, I, L, and O inadmissible hearsay "because they are mere documents pulled from the internet." Dkt. 103-3 at 2. The Sheriffs ignore the applicability of relevant hearsay exceptions and the predicate fact that statements not offered for the truth of the matter asserted are not, in fact, hearsay. [6]

Exhibits A through F, I, L, and O are public records excepted from the hearsay rule under Fed. R. Evid. 803(8). "Public records and government documents are generally considered not to be subject to reasonable dispute" and "[t]his includes public records and government documents available from reliable sources on the Internet." *U.S. E.E.O.C. v. E.I. DuPont de Nemours & Co.,* No. CIV. A. 03-1605, 2004 WL 2347559, at *1-2 (E.D.-La. Oct. 18, 2004) (explaining just because an exhibit is "printed from the Internet does not establish that the information lacks trustworthiness"). **Exhibit A** is testimony before a U.S. congressional

[6] Alternatively, the Court may take judicial notice of Exhibits A through F, I, L, and O because the information in these documents can be easily obtained and verified from public records and/or government-run websites. *See* FRE 201 (permitting judicial notice of "adjudicative fact" that is not subject to reasonable dispute because it is generally known within territorial jurisdiction of trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned); *King v. Select Portfolio Servicing, Inc.*, No. 419CV00181ALMCAN, 2020 WL 7329237, at *8-9 (E.D. Tex. Aug. 28, 2020) (judicial notice of publicly recorded limited power of attorney, despite hearsay objection), *report and recommendation adopted*, No. 4:19-CV-181, 2020 WL 6778407 (E.D. Tex. Nov. 18, 2020). A court can also take judicial notice of information posted on a government website. *See, e.g., Jaso v. Coca Cola Co.*, 435 F. App'x 346, 354 n.5 (5th Cir. 2011) (citation omitted).

committee by a Louisiana government official accessed through the congressional website. **Exhibit B** is an excerpt from the appendix to the report cited by that government official and is the basis for his testimony. **Exhibits C** and **D** are excerpts of reports prepared by the Louisiana Geological Survey on pipeline mapping in Louisiana. **Exhibits E** and **F** are webpages of the Pipeline Hazardous Materials Safety Administration, a federal agency in the United States Department of Transportation**. Exhibit I** is an Oklahoma law. **Exhibit L** is House Bill 727, introducing the amendments in 2018 to La. R.S. 14:61. **Exhibit O** is a map published by the Louisiana Department of Natural Resources on its website.

C. Exhibits H, J, K, and N are not hearsay.

Exhibits H, J, K, and **N** are not hearsay under Fed. R. Evid. 801 as they are not being offered for the truth of the matter asserted therein. **Exhibit H** consists of a series of news articles that are offered to show that the issue of the pipeline was controversial and the subject of public reporting and debate. **Exhibit J** is a webpage from the American Legislative Exchange Council, also offered to show the matter was subject to political debate and legislative advocacy. **Exhibit K** is a letter to the editor of a Louisiana newspaper by an oil and gas industry spokesperson offered to show the industry's interest in pipelines and protests – and certainly not for the truth of the matters asserted therein. **Exhibit N** is webpage from the Louisiana Midcontinental Oil and Gas Association to show the interests of a trade association in the issues addressed in the brief.

D. Exhibit G and Exhibit L are Self-Authenticating Public Records.

Exhibit G is a report generated by the National Pipeline Mapping System operated by the Pipeline Hazardous Materials and Safety Administration**.** And as noted above, **Exhibit L** is a Louisiana house bill. As publications by a public authority, both of these exhibits are self-

authenticating. *See* Fed. R. Evid. 803(8) and 902(5).[7] *See also Birk v. Hub Int'l Sw. Agency Ltd.,* No. EP-08-CA-259-FM, 2009 WL 10701860, at *17 (W.D. Tex. Apr. 1, 2009) (records on government websites are self-authenticating); *U.S. Equal Emp. Opportunity Comm'n v. United Bible Fellowship Ministries, Inc.,* No. 4:13-CV-2871, 2015 WL 12777363, at *4 (S.D. Tex. Mar. 25, 2015) (Rule 902(5) "provides that a 'book, pamphlet, or other publication purporting to be issued by a public authority' is self-authenticating and requires no extrinsic evidence of authenticity in order to be admitted.").

D. Exhibit M is admissible as a self-authenticating record by a public authority.

The Sheriffs also object to **Exhibit M,** which is a record of a hearing held in 2018 in the Louisiana Legislature on the proposed amendments to La. R.S. 14:61 contained in House Bill 727. The Louisiana Legislature only provides video recordings of its sessions, not written transcripts. Plaintiffs provided a video link to the official recording in the Spees Declaration, but for the convenience of the Court and the parties, also provided a transcript of the video. The video itself is self-authenticating under Fed. R. Evid. 902(5); and the transcript of this admissible record is provided for ease of reference but is also verifiable by comparison with the video itself.

E. Exhibit P Is a self-authenticating, admissible public record.

Exhibit P is a photograph of a cell phone with an email from Theda Larson Wright, one of the original Plaintiffs in this matter, showing that she gave the protesters permission to be on the

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[7] Alternatively, if the Court does not find Exhibit G to be self-authenticating under Rule 702(5), with the Court's leave, Plaintiffs can submit a supplemental declaration that confirms that Ms. Spees generated this chart from publicly available data through the portal on the PHMSA website. *See* Fed. R. Civ. P. 56(e) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: give an opportunity to properly support or address the fact . . . ."; *see also* Fed. R. Civ. P. 56, advisory cmte.'s note to 2010 amdt., subdiv. (e) (recognizing courts' frequent preference to afford a party an opportunity to properly support or address an unsupported fact, as opposed to other possible action); *e.g.*, *Lackey v. Salazar*, No. 3:17-CV-2345-B-BT, 2020 WL 3507553, at *2 (N.D. Tex. Feb. 18, 2020) (relying on Fed. R. Civ. P. 56(e) to grant plaintiff permission to supplement summary-judgment record with evidence to authenticate medical records previously submitted in its summary judgment response).

property and indicating her opposition to the Bayou Bridge Pipeline. The photograph was provided to Plaintiffs by the Sheriffs in discovery. Deputy Chris Martin testified in his deposition that he saw the photograph in a report that he reviewed in preparation for his testimony. Dkt. 93-4 at 318, p. 41:15-23. As part of a report prepared by the Sheriff's office, the photograph is a public record, admissible under Fed. R. Evid. 803(8). *See Sanders v. Sky Transp., LLC,* No. 1:20-CV-203, 2021 WL 5088887, at *2 (E.D. Tex. Nov. 1, 2021) ("Public records, including police reports, are presumed to be trustworthy and admissible) (internal quotations omitted)). Finally, because it was part of a record by a public authority, it is self-authenticating under Rule 902.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and declare La. R.S. 14:61 as amended in 2018 to be unconstitutional in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, 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