

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

NO. 2018-CA-0417

ATCHAFALAYA BASINKEEPER, LOUISIANA BUCKET BRIGADE,
AND 350 NEW ORLEANS

VERSUS

BAYOU BRIDGE PIPELINE, LLC AND CHRIS MARTIN

CIVIL PROCEEDING

ON CIVIL APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
CASE NO. 665373, DIVISION "24"
THE HONORABLE R. MICHAEL CALDWELL, PRESIDING

ORIGINAL APPELLEE BRIEF OF
BAYOU BRIDGE PIPELINE, LLC AND CHRIS MARTIN

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Defendant-Appellee Bayou Bridge Pipeline, LLC (“Bayou Bridge”) submits this brief in response to the appeal filed by Plaintiffs-Appellants Atchafalaya Basinkeeper, Louisiana Bucket Brigade, and 350 New Orleans (collectively, the “Plaintiffs-Appellants”). Plaintiffs-Appellants have appealed the district court’s ruling granting Bayou Bridge’s exception of no cause of action as to Plaintiffs-Appellants’ mandamus action brought under the Louisiana Public Records Law, La. R.S. 44:1 *et seq.* The district court’s ruling is correct in all respects and should be affirmed by this Court.

STATEMENT OF THE CASE

This case presents Plaintiffs-Appellants’ straightforward claim that because Bayou Bridge has utilized the power of eminent domain to expropriate private property to build its crude oil pipeline, it is therefore an “instrumentality of state” and “public body” that is subject to the Public Records Law with respect to any and all corporate records relating to the proposed project. Bayou Bridge excepted to Plaintiffs-Appellants’ petition on the ground, among others, of failure to state a cause of action because the Public Records Law does not apply to Bayou Bridge. The district court granted Bayou Bridge’s exception of no cause of action and gave Plaintiffs-Appellants fifteen days in which to amend their petition to state a claim. Plaintiffs-Appellants did not amend. The action was thereafter dismissed with prejudice. Plaintiffs-Appellants have appealed.

STATEMENT OF FACTS

Bayou Bridge is a private, for-profit limited liability company engaged in the business of transporting hydrocarbons by pipeline as a common carrier. Though authorized to do business in Louisiana, the company was formed under the laws of the state of Delaware and has its principal place of business in the state of Texas. Record (“R.”) at 4, ¶ 5.

Sunoco Pipeline, LP presently operates a crude oil pipeline that extends from Nederland, Texas to Lake Charles, Louisiana. Bayou Bridge is currently in the process of constructing a roughly 162-mile extension of that pipeline that would extend from the Lake Charles terminus of the existing pipeline to St. James, Louisiana. R. at 4, ¶ 5. Bayou Bridge was issued the required federal and state permits for the proposed pipeline project as well as letters of support and/or no objection from many federal, state, and local governmental entities and agencies. These include, among others, the United States Corps of Engineers, the Louisiana Office of Coastal Management, the Louisiana Coastal Zone Protection and Restoration Authority, the Bayou Lafourche Fresh Water District, the Louisiana Office of Cultural Development, the Louisiana Department of Fish and Wildlife, Iberia Parish, the Calcasieu Police Jury, St. James Parish, and the Atchafalaya Levee Board District.

Plaintiffs-Appellants are three non-profit organizations that have opposed the proposed pipeline project vociferously from the moment it was announced. R. at 4, ¶¶ 1-3. Some or all Plaintiffs have submitted comments against the project to virtually every governmental entity and/or administrative agency with jurisdiction over some component of the project, and one Plaintiff-Appellant (Atchafalaya Basinkeeper) has, to date, filed judicial review actions of the two main permits that have been issued with respect to the project. *See Atchafalaya Basinkeeper et al v. United States Corps of Engineers*, No. 3:18-cv-00023-SDD-EWD (United States District Court for the Middle District of Louisiana) and No. 18-30257 (United States Court of Appeals for the Fifth Circuit); *Harry Joseph (Pastor) et al v. State of Louisiana Department of Natural Resources*, No. 38163 (23rd Judicial District Court, St. James Parish). Both of those actions remain pending.

The present action involves another opposition strategy being actively pursued by Plaintiffs-Appellants: public records requests. Some or all of the

Plaintiffs-Appellants (and/or Plaintiffs-Appellants' counsel, the Center for Constitutional Rights) have served public records requests on various public entities relating to the proposed pipeline project, including the St. Charles Parish Sheriff's Office and the Office of the Governor of Louisiana. Two mandamus actions followed these requests and remain pending in other Louisiana state courts. *See The Center for Constitutional Rights v. St. Charles Parish Sheriff's Office et al*, No. 83,927 (29th Judicial District Court, St. Charles Parish) and No. 18-CA-274 (Court of Appeal, Fifth Circuit); *Louisiana Bucket Brigade v. Office of the Governor et al*, No. 664293 (19th Judicial District Court, East Baton Rouge Parish).

The present action involves another such public records request—in this case, one transmitted by Plaintiffs-Appellants and others to **private, for-profit** company Bayou Bridge as opposed to a state or local governmental entity. Specifically, by letter dated December 6, 2017, Plaintiffs-Appellants transmitted a purported “Public Records Request” (hereinafter “Request”) to Bayou Bridge, claiming that Bayou Bridge’s authority to expropriate private property in Louisiana “places [Bayou Bridge] under the control of, and subject to, regulation by the Louisiana Public Service Commission . . . and, functioning as an instrumentality of the government, subject to the Louisiana Public Records Act.” R. at 5, ¶12; 28.

Though the Request is predicated solely upon Bayou Bridge’s power of eminent domain, the records requested by Plaintiffs extend far beyond any records relating to Bayou Bridge’s exercise of its eminent domain rights in conjunction with the building of the proposed pipeline. In particular, Plaintiffs-Appellants seek the production of several broad categories of records, including:

- all records relating to acquiring of easements or rights of way through, or expropriation of, private property in connection with the proposed Bayou Bridge Pipeline;

- all records relating to communications with local, parish, state, and federal agencies and/or officials, including law enforcement agencies and regulatory or permitting agencies, concerning the proposed pipeline, including opposition thereto;
- all records relating to public opposition to the proposed pipeline, including individuals and organizations opposing the pipeline, including any records or surveillance or other operations concerning opponents by private security companies such as TigerSwan or others;
- all records relating to communications with officials, staff or entities affiliated with Louisiana State University, including David Dismukes, and the Center for Energy Studies; and
- all records relating to public relations messaging about the pipeline, including safety concerns, and communications with public relations and public affairs consultants or agents, journalists, media, spokespeople, and lobbyists.

R. at 28. As is evident from even a cursory reading of this list, Plaintiffs-Appellants seek records wholly unrelated to Bayou Bridge’s exercise of eminent domain power, including various categories of records relating to “public opposition” to the proposed project and Bayou Bridge’s public relations efforts to deal with same.

On December 15, 2017, because Bayou Bridge is in no way a “public body” that is subject to the Public Records Law, it responded as such to Plaintiffs-Appellants’ purported public records request. R. at 6, ¶ 15; 32.

On January 16, 2018, Plaintiffs-Appellants filed their Petition for Mandamus, seeking not only a writ of mandamus compelling Bayou Bridge and/or its alleged “custodian” Chris Martin to produce the requested records, but also attorney’s fees, costs, unspecified damages, and civil penalties under the Public

Records Law. R. at 3,7. In response, Bayou Bridge filed four exceptions, including the exception of no cause of action. R. at 33.

The district court heard the exceptions on January 25, 2018, at which time the court orally granted Bayou Bridge's exception of no cause of action and allowed Plaintiffs-Appellants fifteen days to amend their Petition. R. at 91-94 (hearing transcript); 1 (hearing minutes). The district court issued extensive verbal reasons for its ruling, stating, in pertinent:

As with most things, and as dictated by the Supreme Court in the *Bulldog*^[1] decision everybody's been referring to, we must start with the statute and the words of the statute. And the public records statute found in R.S. 44:1, general definitions, states that a public body means any instrumentality of the state, parish, or municipal government, including a public or quasi public nonprofit corporation designated as an entity to perform a governmental or proprietary function.

...

So the question is: is it an instrumentality of the state, and is it attempting to perform a governmental or proprietary function? Now, it's the argument of the plaintiffs that by expropriating property for a so-called "public purpose," that that makes it an entity that is performing a governmental function, but there's more that goes into the decision. As mentioned in the *New Orleans Bulldog Society versus Louisiana Society for the Prevention of Cruelty to Animals*^[2], the court found that the S.P.C.A. was a – a public entity performing a public function: but there it was, number one, a nonprofit corporation; it was, number two, doing things for the City of New Orleans that the City of New Orleans would have had to do for itself otherwise.

There's no showing here that the State of Louisiana would go in and build pipelines. I think they would be prohibited from building a for-profit pipeline in any way. What the -- I found **more telling, however, was the court's reference in the *Bulldog* case to the *State of Louisiana versus Nicholls College Foundation*^[3] which**

¹ *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, 2016-1809 (La. 5/3/17), 222 So. 3d 679.

² *Id.*

³ *State of Louisiana v. Nicholls College Found.*, 564 So. 2d 682 (La. 1990)

addressed the nonprofit corporation of the foundation attempting to raise money for the use and benefit of the public entity, Nicholls State University, a state-run or a state-owned and run university; and that was a question of whether that foundation was subject to the public records law, which is the question before me and footnote five of the Supreme Court decision states: it is important to note the distinction of this case from the court's opinion in *Property Insurance Association of Louisiana versus Theriot*^[4] where the Court concluded that the Property Insurance Association of Louisiana was a private entity finding it fit under four factors previously iterated in *State versus Smith*.

State versus Smith^[5] was a criminal proceeding against individuals employed with a nonprofit corporation providing services to the City/Parish of East Baton Rouge, and its employees were charged with malfeasance as being public employees. The Court in *Smith* held that they were not, and the court set forth four criteria of whether an entity would be considered a public body or fit under the instrumentality of the state. Those criteria are, number one, that it was created by the legislature. Bayou Bridge Pipeline was in no way created by the legislature. Number two, its powers were specifically defined by the legislature. That obviously does not apply in this case; the legislature gave them certain power but did not specifically define all of their powers. Third, whether the property of the entity belongs to the public. As argued by Mr. Percy several times, any rights in the property that Bayou Pipeline might acquire belong to Bayou Pipeline. They do not belong to the public in any way. And force (phonetic) four -- fourth, whether the entity's functions are exclusively of the public character and performed solely for the public benefit.

Certainly, the State has indicated that it may benefit from Bayou Pipeline's activities, but they are not going to be the sole beneficiary. I'm sure that Bayou Pipeline's hope is that it will be the sole beneficiary of any monetary reward from resil (phonetic) -- resulting from this pipeline. And the footnote from the Supreme Court goes on to point out that it has held, as in *Louisiana High School Athletes Association versus the State*^[6], that all four of these criteria must be met in order for a private

⁴ *Property Insurance Association of Louisiana v. Theriot*, 09-1152 (La. 3/16/10), 31 So.3d 1012.

⁵ *State v. Smith*, 357 So.2d 505 (La. 1978).

⁶ *Louisiana High School Athletics Ass'n Inc. v. State*, 12-1471 (La. 1/29/13), 107 So.3d 583.

entity such as this to be considered a public body or subject to be -- being classified as an instrumentality of the state.

None of those criteria have been met. There is nothing to show that any records that the plaintiffs seek in this case are public records. The public records that are out there are the expropriation suits which have been accessed and by -- accessed by the plaintiffs, and one is attached to the petition. The other public records are things that Bayou Pipeline may have filed with the Department of Natural Resources or with the Department of Environmental Quality to get permits or licenses from those state agencies. I'm sure under federal law that anything they filed with the Corps of Engineer to get a permit or license from them would also be public record. **but the records that the plaintiffs seek here from them, if they are not things that were made available to Natural Resources or D.E.Q. or anybody in the public sphere, then they are not public records, and there is no basis for making this private, for-profit corporation subject to the public records act.**

As I stated, I don't think they fit under the statute. I don't think there's any way they could fit under the statute under the decision in the *Bulldog* decision and other cases I've cited: *State of Louisiana versus Smith*, *Property Insurance Association of Louisiana versus Theriot*; all of those cases require more than just the fact that the state authorized this corporation to exercise eminent domain.

R. at 91-94 (emphasis added).

On February 5, 2018, the district court signed a written order consistent with its oral ruling. R. at 64. Plaintiffs-Appellants did not amend their petition. On May 29, 2018, the district court issued a Judgment dismissing Plaintiffs-Appellants' action with prejudice. R. at supplement.

SUMMARY OF ARGUMENT

The district court correctly granted Bayou Bridge's exception of no cause of action, as the mere fact that Bayou Bridge enjoys the right of eminent domain under Louisiana law falls far short of what is required to render it an "instrumentality of the state" and, therefore, a "public body" that is subject to the Public Records Law. Bayou Bridge is a private, for-profit entity that bears little to

no connexity to the state or local government and operates without public funding to perform a pipeline transportation business that is not a “governmental or proprietary function.” Therefore, it is not an “instrumentality of the state” or a “public body” under La. R.S. 44:1.

Plaintiffs-Appellants’ brief largely focuses on Bayou Bridge’s eminent domain power and footnote 5 of the Louisiana Supreme Court’s recent decision, *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, 2016-1809 (La. 5/3/17), 222 So. 3d 679. Plaintiffs-Appellants contend that the district court misread and misapplied the four-factor test from *State v. Smith*, 357 So.2d 505 (La. 1978) – discussed in footnote 5 of *New Orleans Bulldog Society* – for determining an entity’s public or private character. However, the Supreme Court did not hold in footnote 5 of *New Orleans Bulldog Society* that the four *Smith* factors are inapplicable or that the factors cannot be considered in analyzing whether an entity is subject to the Public Records Law. Moreover, the district court’s rulings was not based on its analysis of the *Smith* factors alone.

Plaintiffs-Appellant also argue in their brief that Bayou Bridge’s status as a private corporation is “more, not less, reason” that the Public Records Law should apply. However, to the contrary, no Louisiana court has ever held a private corporation to be subject to the Public Records Law.

The district court properly granted Bayou Bridge’s exception of no cause of action and dismissed Plaintiffs-Appellants’ mandamus petition with prejudice. Bayou Bridge respectfully requests that this Court affirm that ruling.

ARGUMENT

The burden of demonstrating that a petition fails to state a cause of action is upon the mover. *Guillory v. Goulette*, 2016-CA-1116 (La. App. 1st Cir. 4/20/17), 2017 La. App. Unpub. LEXIS 123, at *3-4. Because the exception of no cause of action raises a question of law and the trial court's decision is based solely on the

sufficiency of the petition, review of the trial court's ruling on an exception of no cause of action is de novo. *Id.* The pertinent inquiry is whether, in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. *Id.*

The district court correctly ruled that Bayou Bridge is not subject to the Public Records Law and, in accordance with its ruling, properly granted Bayou Bridge's exception of no cause of action and dismissed Plaintiffs-Appellants' petition with prejudice. No Louisiana court has ever held a private corporation to be an "instrumentality of state" and "public body" subject to the Public Records Law. Further, the district court's conclusion that Bayou Bridge cannot be regarded as an "instrumentality of the state" for all purposes merely because it enjoys the power of eminent domain is consistent with the Supreme Court's reasoning in *New Orleans Bulldog Society* and the jurisprudence discussed therein.

A. The district court properly held that a private corporation's expropriation authority alone does not make the Public Records Law applicable.

It is well-established that the purpose of the Public Records Law is to foster "the inherent right of the public to be reasonably informed as to the manner, basis, and reasons upon which **government affairs** are conducted." *Trahan v. Larivee*, 365 So. 2d 294, 298 (La. App. 3d Cir. 1978) (emphasis added). *See also Kyle v. Perrilloux*, 2002-1816 (La. App. 1st Cir. 11/7/13), 868 So. 3d 27, 30. While Plaintiffs-Appellants correctly state that the Public Records Law is to be construed liberally as a general matter, that principle does not provide a license to deviate from the express language of the statute by expanding the Law's reach beyond the group of **governmental** actors described therein. *See, e.g., Frey v. Amoco Prod. Co.*, 741 F. Supp. 601 (E.D. La. 1991), *aff'd in relevant part*, 943 F.2d 578, 588 (5th Cir. 1991), *withdrawn in other part*, 951 F.2d 67 (5th Cir. 1992) and *reinstated in other part*, 976 F.2d 242 (5th Cir. 1992).

To be subject to the Public Records Law, an entity must be a “public body” with a “custodian” of public records. Under La. R.S. 44:1, “the phrase ‘public body’ means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function, or an affiliate of a housing authority.” La. R.S. § 44:1(A)(1). Further, “the word ‘custodian’ means the public official or head of any **public body** having custody or control of a public record, or a representative specifically authorized by him to respond to requests to inspect any such public records.” La. R.S. 44:1(A)(3) (emphasis added).

In *New Orleans Bulldog Society*, the Supreme Court construed the “public body” definition of La. R.S. 44:1 in the context of a private nonprofit corporation that had been contracted by the City of New Orleans (the “City”) pursuant to a Cooperative Endeavor Agreement (“CEA”) to perform the City’s required animal control services. Because the defendant was a nonprofit corporation that had contracted with a city, the court was interpreting the language of La. R.S. 44:1’s “public body” definition that referenced an “instrumentality of . . . municipal government . . . including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function.” 222 So. 3d at 685.

First, the court looked to the **function** that the defendant performed as an “instrumentality” of the City. With respect to this function, the court noted that:

- the defendant performed its animal control services “at the behest of the municipality and arising out of their . . . agreement to do so”;

- the defendant “acts under color of City authority” through its enforcement of City ordinances, including its issuance of citations and court appearances related to same;
- the defendant provided shelter services for the City, which included maintaining a shelter to accept and care for (or euthanize) unwanted animals, responding to emergency calls involving such animals, and investigating reports of ordinance violations ; and
- the defendant’s vehicles were provided and maintained by the City.

Id. Based upon these extensive contractually-assumed municipal animal control functions (and the vehicle and fuel benefits enjoyed by the defendant), the court held that the defendant acted as an instrumentality of the City when it performed the agreement and “is therefore subject to the Public Records Law as it relates to its specific functions and duties under the CEA.” *Id.*

Second, after considering the function performed by the defendant, the court considered whether, and to what extent, the entity was **publicly funded**. *Id.* at 686. The court found that though the monthly salary paid to the defendant by the City under the CEA constituted only a small percentage of the entity’s budget, “the use of public money in this context triggers the Public Records Law” because “the public has a fundamental right to know how that money is spent by the LSPCA through its animal control services outlined in the CEA.” *Id.* at 687. Thus, the defendant’s public funding also supported the conclusion that the nonprofit entity was serving as an “instrumentality of the municipality” in conjunction with its performance of animal control services for the City. *Id.*

The holding of *New Orleans Bulldog Society* is consistent with other Louisiana decisions in which nonprofit or other entities have been held to be “public bodies” under the Public Records Law in light of their: (1) designated performance of an essential governmental function; and/or (2) public funding. *See,*

e.g., *State of Louisiana v. Nicholls College Found.*, 564 So. 2d 682 (La. 1990) (holding that nonprofit corporation was public body where it enjoyed a “close affiliation” and/or “connexity” with the state university as demonstrated by its location in a public building for which it paid only nominal rent, its use of state civil service employees to run its office, the payment of its own employees from the university’s budget, and the performance of functions that emulated those performed by the university itself);⁷ *State v. Reason*, 15-695 (La. App. 5th Cir. 12/7/16), 206 So. 3d 419, 424 (holding that private nonprofit fire company was a public body where it was primarily funded with government money, rendered public services pursuant to a contract with a governmental entity, and constituted a “quasi-public nonprofit corporation designated to perform a governmental or proprietary function”); *Denoux v. Bertel*, 96-CA-0833 (La. App. 4th Cir. 1996), 682 So. 2d 300 (holding that public defender agency was a public body where the agency was mandated by the state constitution, created by state statute, and performed a governmental or proprietary function).

It is also consistent with other Louisiana Supreme Court decisions in other areas in which the phrase “instrumentality of the state” has been interpreted. For example, in *Polk v. Edwards*, 626 So. 2d 1128 (La. 1993), the Louisiana Supreme Court held that the Louisiana Economic Development and Gaming Corporation (the “Casino Corporation”) was an “instrumentality of the state” for the purpose of the Louisiana Constitution article on civil service (Art. X § 1(A)). In so holding, the court relied on the facts that:

⁷ The Supreme Court analyzed *Nicholls* in *New Orleans Bulldog Society*. 222 So.3d at 685-686 (explaining that, in *Nicholls*, “[t]he Court ultimately determined **through various factors of function (and some economic)** that the Alumni Federation is a public body under the Public Records Law.”) (emphasis added).

- the Casino Corporation was owned by the state and established under state law to advance the interests of the state and to carry out a public purpose;
- the Casino Corporation's board is appointed by the governor with senate approval and may be removed by the governor for cause;
- the Casino Corporation is accountable to state government through a system of audits, reports, legislative oversight, and financial disclosure;
- state law gives the Casino Corporation extensive power to conduct gaming operations in general, including adopting rules and procedures in conformity with the Administrative Procedures Act; and
- certain acquisitions contracts by the Casino Corporation are subjected to the Louisiana Procurement Code.

Id. at 1146-47. In light of all of these facts, the court held that:

[a]fter considering its powers and functions, as well as its interrelationship with the state in many areas, we find that the Casino Corporation is an instrumentality of the state and is subject to the provisions of the civil service system. The Casino Corporation does not enjoy an existence separate from the state. It does not independently transact its business and hire its personnel. Furthermore, its actions determine the progress of the gaming industry, which the legislature has designed to assist the growth of tourism and generate revenue as a benefit to the general welfare.

Id. at 1147. See also *Department of State Civil Service v. Housing Authority of East Baton Rouge*, 95-1959 (La. App. 1st Cir. 5/10/96), 673 So. 2d 726, 729 (holding that public housing authorities are instrumentalities of the state for civil service purposes because they are created by the state legislature to further state goals and objectives and they perform state functions in exercising their authority). Indeed, in *Slowinski v. England Economic and Industrial Development District*, 2002-C-0189 (La. 10/15/02), 828 So. 2d 520, 526, the court held that the development district was not an instrumentality of the state for civil service

purposes despite the fact that it both collected taxes **and enjoyed the power of expropriation.**

In contrast to the public records cases discussed above, an entity has been determined not to be a “public body” for the purpose of the Public Records Law where the characteristics of the performance of extensive governmental or proprietary functions and/or the receipt of public funding have been absent. For example, in *Frey*, 741 F. Supp. 601, a federal court determined that a private, for-profit oil and gas operator was not a “public body” for public records purposes. The court held that merely being licensed and appointed as operator by the Louisiana Commissioner of Conservation did not render the operator a “public body” because the operator owned its working interest in a private capacity. *Id.* at 602. Likewise, the fact that the operator was charged with collecting severance taxes for the state on the minerals it produced did not render it a “public body” just as all retailers collecting sales taxes were not transformed into public bodies. *Id.* The court further noted that the records sought by the plaintiffs went well beyond the severance tax records of the operator, which records they could obtain from the state. *Id.* at 603. Rather, the plaintiffs sought “unimpeded access to all of [the operator’s] financial records, exploration and production activities, and trade secrets”—information that “has no relationship to Amoco’s status as unit operator or to its collection of severance taxes, nor to the ‘manner, basis and reasons upon which governmental affairs are conducted.’” *Id.* (citation omitted). The court emphasized that “the legislature never intended for [the Public Records Law] to be used as a discovery tool by private litigants against a private corporation.” *Id.*

B. The district court correctly concluded that Bayou Bridge is not subject to the Public Records Law.

In the present case, Bayou Bridge exhibits none of the characteristics that the Louisiana courts have relied upon to find the existence of a “public body,” or,

more specifically, an “instrumentality of the state,” for the purpose of the Public Records law (and beyond). Bayou Bridge:

- is a private, for-profit entity not created by state law;
- engages in the business and function of hydrocarbon pipeline transportation, which is not a “governmental or proprietary function” of state or local government;
- is not operating its pipeline business pursuant to any delegation or contract with the state, but rather as a private, for-profit business;
- is run by its own board, officers, and employees, none of whom are selected by state officials, paid by public funds, or subject to state civil service laws;
- has no connexity with the state aside from its power to utilize eminent domain when necessary (which is a default power only in light of Bayou Bridge’s ability to reach private easement/servitude agreements with landowners) and its regulation by the state, which is far from the only governmental agency regulating its proposed interstate pipeline; and
- receives no public funds to operate its business (nor does it even receive the same tax breaks as a state governmental entity).

Further, though the legislature has expressly designated many entities to be “instrumentalities of the state” (*see, e.g., Slowinski*, 828 So. 2d at 526 (listing many such statutes)), it has not designated common carrier pipelines to be such instrumentalities, including in the statutes referenced by Plaintiffs-Appellants’ in their Appellants’ Brief that define “common carriers” and give them the power of expropriation. *See* La. R.S. 45:251; La. R.S. 19:2(8). Indeed, La. R.S. 19:2 expressly lists “common carrier pipelines” **separately** from “the state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers.” *See* La. R.S. 19:2(1) and (8).

Indeed, as the district court correctly found in its verbal reasons, **none** of the four *Smith* factors discussed in *New Orleans Bulldog Society* are met.⁸ Plaintiffs-Appellants argue that the district court misread and misapplied footnote 5 of *New Orleans Bulldog Society*, wherein the *Smith* factors are discussed. Plaintiffs-Appellants incorrectly state that the Supreme Court “clearly stated that their cases applying the *Smith* factors were ... not applicable when it is undisputed that an entity is private for purposes other than applicability of the public records law.” (Appellant Br. at 16).

In fact, the Supreme Court did not hold that the four *Smith* factors are inapplicable or that the factors cannot be considered in analyzing whether an entity is subject to the Public Records Law. *See New Orleans Bulldog Society*, 222 So.3d at 686 n. 5. Further, the Supreme Court’s analysis in *New Orleans Bulldog Society* – emphasizing “the *function* the LSPCA serves as an ‘instrumentality’ of the City of New Orleans...” and “the public money paid by the City to the LSPCA” in holding the Public Records Law applied to the LSPCA (*id.* at 685-686) – is consistent with the four *Smith* factors.

The full text of footnote 5 of *New Orleans Bulldog Society* states:

It is important to note the distinction of this case from this Court's opinion in *Property Insurance Association of Louisiana v. Theriot*, 09-1152 (La. 3/16/10), 31 So.3d 1012, wherein the Court concluded that the Property Insurance Association of Louisiana was a private entity, finding it fit under four factors previously iterated in *State v. Smith*, 357 So.2d 505 (La. 1978), which were created to determine an entity's public or private character:

- (1) Whether the entity was created by the legislature;
- (2) Whether its powers were specifically defined by the legislature;
- (3) Whether the property of the entity belongs to the public; and
- (4) Whether the entity's functions are exclusively of the public character and performed solely for the public benefit.

⁸ R. at 93 (“None of these criteria have been met.”)

The *Theriot* court noted that while the *Smith* case did not specify that all four factors must be met in order to find that an entity was public, they did so by “implication.” *Id.*, 09-1152, p. 3, 31 So.3d at 1015. In *Theriot*, however, the Court concluded that “all four factors must be present in order for a court to determine that an entity is public.” *Id.*

The *Theriot* case has not been cited often since its publication, but this Court has as recently as 2013 applied the factors set forth in *Theriot* and *Smith*, to find that the Louisiana High School Athletic Association (“LHSAA”) is a private entity, created by a group of high school principals who wanted to better regulate and develop the high school interscholastic athletic program in Louisiana. In *Louisiana High School Athletics Ass'n Inc. v. State*, 12-1471 (La. 1/29/13), 107 So.3d 583, this Court ruled that not only was the LHSAA not created by the Legislature, its powers are specified in its articles of incorporation, as filed with the Secretary of State. Finding that the LHSAA already had not met two of the four *Smith* factors, the Court concluded it was a private entity, not subject to the Open Meetings Law.

We find, however, both *Theriot* and the *LHSAA* opinions are distinguishable, as they did not involve the Public Records Law, nor did they involve a contract with a municipality specifying that the entity perform a public purpose on behalf of a municipality, such as the LSPCA did in this instance. Moreover, it is undisputed from the record that the LSPCA is a private entity for purposes other than this Court's holding herein.

222 So.3d at 686 n. 5. Again, **contrary to Plaintiffs-Appellants' argument, in footnote 5 of *New Orleans Bulldog Society*, the Supreme Court did not hold that the *Smith* factors are inapplicable and cannot be considered when analyzing whether the Public Records Law applies to an entity.** It was not error for the district court to consider and apply those factors in analyzing whether Bayou Bridge is subject to the Public Records Law.

Moreover, the district court's verbal reasons make clear that its analysis was not limited to the *Smith* factors. “More telling,” the district court stated, “was the Court's reference in the *Bulldog* case to the *State of Louisiana versus Nicholls College Foundation*, which addressed the nonprofit corporation of the foundation attempting to raise money for the use and benefit of the public entity, Nicholls State University.” [R. at 91-94]. In *Nicholls*, the Supreme Court held that a nonprofit corporation, the Nicholls State University Alumni Federation, was a

public body where it enjoyed a “close affiliation” with Nicholls State University, as demonstrated by its location in a public building for which it paid only nominal rent, its use of state civil service employees to run its office, the payment of its own employees from the university’s budget, and the performance of functions that emulated those performed by the University itself. 564 So.2d at 687.

As the district court suggested, Bayou Bridge and its eminent domain power exhibit **none** of the characteristics of the “close affiliation” that Nicholls State University Alumni Federation “enjoy[ed] with” Nicholls State University. Among other things, Bayou Bridge is a private, for-profit entity, it does not engage in a “governmental or proprietary function” of state or local government, it is not operating its pipeline business pursuant to any delegation or contract with the state, is run by its own board, officers, and employees, has no connexity with the state aside from its power to utilize eminent domain when necessary and its regulation by the state, and receives no public funds to operate its business.

Under *Nicholls, New Orleans Bulldog Society*, the additional authorities cited by the district court in its verbal reasons, and the authorities cited herein, Bayou Bridge is not an “instrumentality of the state” or “public body.” It is not subject to the Public Records Law.

C. The Public Records Law is not a vehicle for accessing business records of private, for-profit corporations.

Finally, it is clear from the type of records that Plaintiffs-Appellants requested that Plaintiffs-Appellants’ true interest in their public records request has little, if anything, to do with the extraordinarily limited alleged “governmental power” of expropriation that Bayou Bridge enjoys under Louisiana law. Of Plaintiffs- Appellants’ five described areas in which production was sought, only a part of one (the first) even addresses records relating to Bayou Bridge’s exercise of its power of expropriation, though it goes beyond that to include records of private

servitude agreements as well. The remaining four areas have nothing whatsoever to do with Bayou Bridge's exercise of its eminent domain right but instead relate to records relating to Bayou Bridge's general business activities as a private pipeline company. Further, some of the requested records relate to communications with governmental agencies and personnel, with the result that Plaintiffs-Appellants could obtain any records of actual communications with these agencies and personnel from the state, local, and federal governmental authorities themselves under the Public Records Law and/or Freedom of Information Act because those entities are "public bodies."⁹ Given these facts, it is obvious that Plaintiffs-Appellants' Request is nothing more than a fishing expedition designed to provide Plaintiffs with a discovery tool to assist them in their multi-tracked litigation and other efforts to oppose the proposed pipeline project as a general matter.

Stated simply, the Public Records Law was enacted to foster "the inherent right of the public to be reasonably informed as to the manner, basis, and reasons upon which **government affairs** are conducted." Contrary to Plaintiffs-Appellants' arguments, it was not intended to provide a vehicle to allow a freewheeling expedition into the business records of a **private entity** operating a for-profit business rather than a delegated governmental or proprietary function that has been "privatized" by the state or local government. The limited default power of expropriation that Bayou Bridge enjoys as a common carrier pipeline (and that is utilized only when voluntary servitude agreements cannot be reached) falls far short of the kind of activity sufficient to render Bayou Bridge a "public body" for public records purposes.

Indeed, Plaintiffs-Appellants' argument that Bayou Bridge is an "instrumentality of the state" for all purposes cannot be viewed solely through the

⁹ As discussed above, Plaintiffs-Appellants and their related organizations have already made some public records requests from state and local entities under the Public Records Law.

limited lens of the public records request at issue in the present action. As discussed above, the phrase “instrumentality of the state” is a term of art that appears throughout Louisiana’s Constitution and statutes in a wide variety of different contexts. For example, Article X § 1(A) of the Louisiana Constitution subjects the employees of an “instrumentality of the state” to the state’s civil service statutes and regulations. Further, La. R.S. 47:301(8)(c)(i) exempts any “instrumentality of the state” from the payment of state sales and use taxes, and La. R.S. 9:2798 provides for policymaking and discretionary immunity in tort for any “public entity,” which is defined to include any of the state’s instrumentalities. Thus, any holding by this Court that Bayou Bridge is an “instrumentality of the state” would have wide-ranging implications in many areas other than public records requests.

Though Plaintiffs-Appellants ignore these implications, the district court did not, and neither should this Court. The legislature has demonstrated its ability to expressly denominate certain entities to be “instrumentalities of the state” when appropriate,¹⁰ and the courts have wisely restricted findings that an entity is an “instrumentality of the state” and/or a “public body” to situations in which the facts demonstrate that it is truly performing a government function as its business, generally with public funding. Holding Bayou Bridge to be an “instrumentality of the state” for its **business** purposes merely because it has been given the limited

¹⁰ See, e.g., La. R.S. 48:1092(D) (“Each authority created hereunder is hereby declared to be a body corporate and politic, constituting an instrumentality of the State of Louisiana exercising public and essential governmental functions, and the exercise by the authority of the powers conferred by this Part in the acquisition, construction, operation and maintenance of bridges and ferries shall be deemed and held to be an essential governmental function of the State of Louisiana.”)

default **tool** of eminent domain power would result in absurd consequences and goes well beyond anything that has been held previously by a Louisiana court.¹¹

CONCLUSION

Bayou Bridge is not subject to the Public Records Law. The district court properly granted Bayou Bridge's exception of no cause of action and dismissed Plaintiffs-Appellants' petition with prejudice. This Court should affirm the district court's ruling.

Respectfully submitted,

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¹¹ Bayou Bridge notes that even where a "public body" exists, production under the Public Records Law has routinely been limited to records that are related to the public function performed by the entity. *See, e.g., New Orleans Bulldog Society*, 222 So. 3d at 687 (limiting the holding to "only those documents which pertain to the LSPCA's functions, duties, and responsibilities to enforce Chapter 18 of the Municipal Code, as outlined in the CEA with the City of New Orleans.") Thus, even if this Court were to reverse the district court and hold that Bayou Bridge is a "public body" with respect to its exercise of the right of eminent domain as Plaintiffs-Appellants suggest, Bayou Bridge should not be compelled to produce any records beyond those that are specifically related to its exercise of that right in this state. Bayou Bridge further notes that in no event can the custodian be held personally liable for the payment of any damages, attorney's fees, and costs where he has relied upon the advice of legal counsel representing the "public body." La. R.S. 44:35(E)(2).

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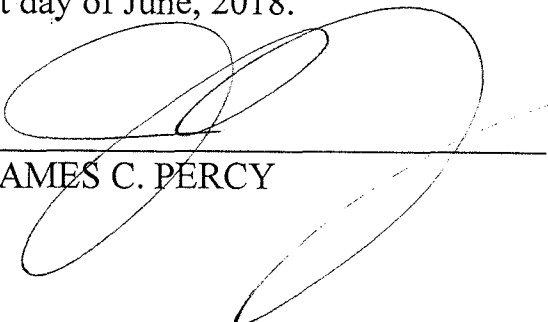
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served on the following via electronic mail and United States mail, postage prepaid:

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Baton Rouge, Louisiana, this 21st day of June, 2018.



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