No. 24-30272
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Anne White Hat; Ramon Mejía; Karen Savage; Sharon Lavigne; Harry Joseph; John Lambertson; Peter Aaslestad; Theda Larson Wright; Alberta Larson Stevens; Judith Larson Hernandez; RISE St. James; 350 New Orleans; Louisiana Bucket Brigade,
Plaintiffs – Appellants,

v.

Elizabeth B. Murrill, in her official capacity as Attorney General of Louisiana; M. Bofill Duhé, in his official capacity as District Attorney of the 16th Judicial District Attorney's Office; Becket Breaux, in his official capacity as Sheriff of St. Martin Parish,
Defendants – Appellees,

On Appeal from the United States District Court for the Western District of Louisiana, No. 6:20-cv-983
Honorable Robert R. Summerhays, U.S. District Judge, Presiding

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ORIGINAL BRIEF ON BEHALF OF DEFENDANT-APPELLEE M. BOFILL DUHÉ

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1. have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

(1) Hon. Robert R. Summerhays
United States District Judge
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(2) Anne White Hat, Ramon Mejia, Karen Savage, Sharon Lavigne, Harry Joseph, John Lambertson, Peter Aaslestad, Theda Larson Wright, Alberta Larson Stevens, Judith Larson Hernandez, Rise St. James, 350 New Orleans, and Louisiana Bucket Brigade, Plaintiffs

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NEW ORLEANS, LOUISIANA this 23rd day of September, 2024.

s/ Ralph R. Alexis III
RALPH R. ALEXIS III (BAR NO. 02379)

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully suggests that oral argument is not necessary with respect to this appeal.

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STATEMENT OF JURISDICTION

Plaintiffs have invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1291 as an appeal from a final judgment rendered in the United States District Court for the Eastern District of Louisiana.

STATEMENT OF ISSUES PRESENTED

1) Whether the District Court erred in dismissing the claims of the "non-arrestee" Plaintiffs because of their failure to allege sufficient facts to establish standing. [It did not err.]

2) Whether the District Court erred in dismissing the claims of the Arrestee Plaintiffs on the grounds of mootness. [It did not err.]

3) Whether the Arrestee Plaintiffs have standing to sue District Attorney Duhé for injunctive and declaratory relief.

STATEMENT OF THE CASE

A. Background

The original Plaintiffs in this case were: Anne White Hat ("White Hat"), Ramon Mejia ("Mejia"), Karen Savage ("Savage")[1] Sharon Lavigne ("Lavigne"), Katherine Aaslestad[2] and Peter Aaslestad ("The Aaslestads"), Theda Larson Wright ("Wright"), Alberta Larson Stevens ("Stevens"), Judith Larson Hernandez ("Hernandez")[3], Harry Joseph ("Joseph"), RISE St. James, 350 New Orleans, and the Louisiana Bucket Brigade[4].

This litigation arose out of the construction of the "Bayou Bridge Pipeline" ('Pipeline'), which is situated partly in the state of Louisiana.[5] White Hat, Mejia, and Savage allege that in August-September 2018, in connection with protests against the construction of the Pipeline on private property in St. Martin Parish, they were arrested by the St. Martin Parish Sheriff's Office for unauthorized entry of a "critical

[1] White Hat, Mejia and Savage are sometimes referred to herein as "Arrestee Plaintiffs."
[2] Katherine Aaslestad died on April 24, 2021. Without waiving any arguments as to Aaslestad's standing, her spouse and executor, John P. Lambertson has been substituted herein as her personal representative. ROA.24-1
[3] The Aalestads, Wright, Stevens and Hernandez are sometimes referred to herein as "Landowner Plaintiffs."
[4] Joseph, RISE St. James, 350 New Orleans, and the Louisiana Bucket Brigade are hereinafter sometimes referred to as the "Advocacy Plaintiffs."
[5] Upon information and belief, the construction of the pipeline within St. Martin Parish was completed in November 2018 and construction within Louisiana was completed in December 2018.

infrastructure" in violation of La. R. S. 14:61.) ROA.56-58.[6]

Plaintiffs The Aaslestads, Wright, Stevens, and Hernandez ("Landowner Plaintiffs") allege that they are landowners of undivided interest in certain property located in St. Martin Parish where the arrests allegedly occurred. They allege that the Pipeline runs through their property. They allege that they were opposed to its construction. ROA.40. In pertinent part they allege that they are:

> concerned that they and other landowners, and guests they allow onto their property, face the possibility of five years in prison if they run afoul of the law merely by being present on or in the vicinity of the pipeline on their property with no clear direction as to why, when, who decides, and how the law is to be applied. ROA.41.

Plaintiff Joseph alleges he is a resident of the Fifth District of St. James Parish, "a predominately African American community heavily inundated by petrochemical facilities…" He alleges that he "has been an active and vocal community leader who speaks out frequently against the siting of new petrochemical companies…" in St. James. ROA.41. Joseph alleges that he was "very active and outspoken against the Bayou Bridge Pipeline project…" and that he "has helped organize public events on these issues and has organized and participated in marches and press conferences about the Bayou Bridge Pipeline…, and at times attempted to monitor, observe and

[6] Plaintiffs Mejia and Savage allege that they were also cited for "Remaining After Being Forbidden" in violation of La. R.S. 14:63.3, a misdemeanor. That statute is not at issue in these proceedings.

report on construction of the Bayou Bridge Pipeline." ROA.41-42. Joseph alleges that he "…is concerned that the new law[7]will make it more difficult to organize and participate in marches in opposition to such projects, given the proliferation of pipelines in the community." ROA.42.

Plaintiff Sharon Lavigne also alleges that she lives and resides in the Fifth District of St. James Parish. She alleges that she is the founder and president of RISE St. James, alleged to be a "grassroots faith based organization dedicated to opposing the siting of new petrochemical facilities in the area…" ROA.39-40.

RISE alleges that it is "concerned that the law could be used against them to prevent or discourage their protests and public events…" ROA.42.

Plaintiff 350 New Orleans alleges that it "... is a volunteer climate activist group…based in New Orleans that supports local initiatives connecting the issues in the region to international climate advocacy…" ROA.42-43. Plaintiff 350 New Orleans alleges that its members "have engaged in acts of civil disobedience and have incurred misdemeanor charges when protesting near or on pipeline construction sites…" ROA.43. They allege that "their work and political …are directly impacted by the amendment to La. R.S. 14:61 as it severely increases the punishment for presence on or near pipelines and chills their First Amendment expression…" ROA.60.

[7] La. R.S. 14:61 as amended.

Plaintiff Louisiana Bucket Brigade alleges that it is a "non-profit environmental health and justice organization based in New Orleans that works with communities in Louisiana located near oil refineries and chemical plants, which are often predominantly African-American communities." ROA.43. The Louisiana Bucket Brigade further alleges that "It has members who frequently exercise their First Amendment rights to advocate, educate about, and protest against environmental injustices, including pipeline projects." ROA.43. The Complaint further alleges that:

> Bucket Brigade staff also reported live and frequently filmed activities in the area, interviews with experts, community members, and activists, at or near pipeline construction sites and have been at times threatened by pipeline construction workers and/or security personnel. Their work and political advocacy are directly impacted and chilled by the amendment to La. R.S. 14:61 as it severely increases the punishment for presence on or near pipelines and its members are concerned about the possibility of arrests and felony charges.

ROA.43.

B. Defendant-Appellee M. Bofill Duhé[8]

Defendant District Attorney M. Bofill Duhé is the District Attorney for the Sixteenth Judicial District ("Duhé") which is composed of the parishes of Iberia, St.

[8] Co-Defendant with Duhé was St. Martin Parish Sheriff Ronald J. Theriot, who has been replaced as defendant by his successor Becket Breaux.

Mary and St. Martin.[9] Plaintiffs White Hat, Mejia and Savage asserted in the Complaint that they were "…currently facing the possibility of Prosecution…" ROA.44. He is sued in his official capacity. The Arrestee Plaintiffs do not allege that the district attorney has initiated a prosecution against them. ROA.55. In fact, as set forth hereinafter Duhé declined to prosecute them and also disavowed any intent to prosecute them. See discussion *infra* regarding Duhé's decision to not prosecute and to disavow prosecution, and the running of the Statute of Limitations as to any potential prosecution.

C. The Expropriation and Trespass Proceeding

The Complaint contains extensive allegations concerning state court actions for expropriation brought in St. Martin Parish on behalf of Bayou Bridge Pipeline, LLC and a trespass action filed by various property owners against Bayou Bridge Pipeline, LLC. ROA.52-53. A trial was held before Judge Keith R. J. Comeaux of the Louisiana 16th Judicial District on November 27-29, 2018.[10] Judge Comeaux ruled that the expropriation of land for a servitude to lay the pipeline served a public and necessary purpose and granted expropriation to Bayou Bridge Pipeline. He further found that, although Bayou Bridge Pipeline was entitled to a servitude to lay

[9] La. R. S. 13:477 (16).

[10] This Court can and respectfully should take notice of the Reasons For Judgment rendered by Judge Comeaux in the matter entitled *Bayou Bridge Pipeline, LLC vs. 38 Acres, More or Less, Located in St. Martin Parish; Barry Scott Carline, et al*, bearing no. 87011 on the docket of the 16th Judicial District Court for the Parish of St. Martin, State of Louisiana. ROA.177-187.

the pipeline, it had entered onto and disturbed certain landowners' property prior to the time it had acquired the right to do so.

Judge Comeaux further determined in pertinent part that the ownership interest in the 38 acres at issue and the valuation thereof was established as follows:

> **Theda Larson Wright**
> 0.0000994 (interest) x $871 (appraised value) = **$0.09**
> (rounded up)
> **Peter K. Aaslestad**
> 0.0005803 (interest) x $871 (appraised value) = **$0.51**
> (rounded up)
> **Katherine Aaslestad**
> 0.0005803 (interest) x $871 (appraised value) = **$0.51**
> (rounded up)

ROA.182-183.

Judge Comeaux found that the Pipeline did trespass but in awarding Wright and the Aaslestads $150 each as compensation therefor, the Court noted the following:

> The Court finds that their total ownership interest is very minor compared to the ownership interests of the other numerous landowners. **Additionally, all the defendants testified that they had very little contact with the property. The Aaslesteds testified that they had never been on the property prior to November 25, 2018, and Ms. Wright testified that she had never been on the property. Parties indicated that they had never leased the property and had not paid any taxes on the property.** The parties further testified they made no effort to possess the property as owner other than filing legal documentations in the chain of title. The Court notes that although all the defendants claim some mental anguish for

> this property, no party has sought medical attention and all the defendants are self-admitted advocates against pipelines. The Court is vested with the task of determining what are the damages for the trespass prior to the expropriation judgment. The Court finds that an award of $75 each for the trespass of the approximately 5 months of activity on the property prior to the final expropriation is just damages to the defendants based on their ownership interests. Therefore, the Court will award a total to Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad the sum of $150 each as compensation and damages pursuant to the claims fostered by them.

(ROA.186-187. (**Emphasis** added).

Judge Comeaux's ruling was appealed to the Louisiana Third Circuit, which affirmed the judgment in part, reversed the judgment in part, and remanded the case. *Bayou Bridge Pipeline, LLC v. 38.00 Acres, More or Less, Located in St. Martin Parish, et al*., 2019-565 (La. App. 3 Cir. 7/15/20); 304 So.3d 52, affirmed and remanded, 2020-01017 (La. 6/29/21); 320 So.3d 1054.

D. The Disavowal of Prosecution by Duhé; Passage of Statute of Limitations

A Louisiana District Attorney "… has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." La. C. Cr. Proc. art. 61; Louisiana Const. of 1974, Art. V, § 26(B); La. R.S. 16:1. During the course of these proceedings, Duhé exercised his prosecutorial discretion and determined not to prosecute the Arrestee Plaintiffs for any crime. ROA.1489-1492**. Further, Duhé completely disavowed**

any intent whatsoever to prosecute Arrestee Plaintiffs and certain other individuals for any acts "arising out of the alleged events occurring from August 2018 through September 2018" ROA.1490-1492.

Moreover, as the District Court noted in its April 5, 2024 ruling, the statute of limitations for the institution of any criminal charges arising out of the events of August-September 2018 was four years; accordingly, there is no possibility of any future prosecution of the Arrestee Plaintiffs arising out of those events. ROA.2046-2047.

In his Memorandum in Response to Plaintiff's Motion for Summary Judgment, Duhé stated the following, which is also applicable to this appeal:

> Duhé submits that he should not be and is not required to defend the statute in question. Accordingly, Duhé herein takes the position that, while by no means agreeing with Plaintiffs that the statute is unconstitutional, he is not undertaking the defense of the statute at issue—because he has no stake in that issue. Duhé asserts that he is merely a "straw man" in this proceeding. Duhé avers that he has never taken any steps to prosecute the Arrestee Plaintiffs. In fact, as the Court is now well aware, Duhé has declined and disavowed any prosecution. This disavowal of prosecution was included in Duhé's "Answer, Defenses and Affirmative Defenses" filed herein on June 18, 2021. … The declination and disavowal was reiterated by letter to counsel for Plaintiffs dated July 7, 2021.
>
> Duhé submits that this case thereafter became moot as to him and he should have been voluntarily dismissed at that time. **The continuation of this suit against Duhé is inequitable.** Plaintiffs are under no threat of

> prosecution. Plaintiffs' attempt here to coerce Duhé into defending a statute he has no stake in defending—and, if Plaintiffs are successful in having the statute declared unconstitutional—Plaintiffs will no doubt assert that Duhé is liable to them for attorney fees. ROA.1687-88.

E. Course of Proceedings

This case was originally filed in the U.S. District Court for the Middle District of Louisiana. Duhé moved to dismiss these proceedings as against him on the grounds that the District Court should abstain from exercising its jurisdiction and for failure to state a claim. ROA.268-288. Alternatively, Duhé moved that the case should be transferred to the Western District of Louisiana. ROA.268-288. The Honorable John deGravelles denied the motion to dismiss but granted the motion to transfer. ROA.551-584. Thereafter Duhé filed a Motion for Reconsideration of his Motion to Dismiss. ROA.716-741. The Honorable Robert R. Summerhays granted Duhé's motion in part, dismissing the claims of all Plaintiffs except for the three Arrestee Plaintiffs, i.e. White Hat, Majia, and Savage. ROA.861-886, 887-913. In so doing, the District Court held that only the Arrestee Plaintiffs had standing to sue. As to the standing of the Arrestee Plaintiffs to bring this action against Duhé, the District Court opined thusly:

> Here, the Arrestee Plaintiffs allege that they were arrested and are still under the threat of prosecution for violating La. R.S. 14:61 even though they have not been formally charged for those violations. In *Seals v. McBee*, the plaintiff was arrested for allegedly threatening a public official …The plaintiff, however, was not formally charged and the district attorney disavowed prosecution. The Fifth Circuit nevertheless

> concluded that the plaintiff had adequately demonstrated an injury in fact because the plaintiff "has a concrete stake in this litigation because the District Attorney can change his mind and prosecute him." According to the court "the specter of prosecution for violating a potentially unconstitutional law" with prosecution hanging over the plaintiff's head demonstrated an injury that was concrete, particularized, and actual or imminent.
>
> The Arrestee Plaintiffs' injury allegations here are stronger than the allegations in Seals—not only have they have been arrested by St. Martin Parish Sheriff's Deputies for violating La. R.S. 14:61, *there is no showing that Defendants have disavowed prosecutio*n. Moreover, even if defendant Duhé disavows prosecution, the Arrestee Plaintiffs would be subject to the threat of prosecution until September 2022 under the four-year statute of limitations applicable to the type of felony offense created by La. R.S. 14:61.
>
> The Arrestee Plaintiffs also have stated an injury based on their allegation that Defendants' enforcement of La. R.S. 14:61 has a chilling effect on future protests directed toward the Bayou Bridge Pipeline. The Arrestee Plaintiffs allege that they would participate in future protests of the Bayou Bridge Pipeline but fear a felony prosecution under La. R.S. 14:61 given their prior arrests.

ROA.871-873 footnotes omitted. *Emphasis added.*

Thereafter, Duhé filed a Motion for Summary Judgment asserting that the Arrestee Plaintiffs lacked standing to pursue their claims because the District Attorney had disavowed any prosecution of them arising out of their alleged actions. ROA.1469-1492. Despite disagreeing with the Plaintiffs concerning the constitutionality of the Critical Infrastructure statute, Duhé declined to defend the statute's constitutionality "because he has no stake in that issue." ROA.1685-88. Judge Summerhays denied the motion. ROA.1874-1902. Plaintiffs also filed a

Motion for Summary Judgment.[11] ROA.968-1468. Judge Summerhays also denied Plaintiff's Motion for Summary Judgment; however, pursuant to Fed. R. Civ. Proc. 56(f) the Court provided the "White Hat Plaintiffs" with notice that the Court intended to grant summary judgment in favor of the defendants on the First Amendment and Due Process claims asserted in the complaint. The court allowed the plaintiffs thirty days from the date of its ruling to file a response as to why summary judgment should not be granted in favor of the defendants. ROA.1901-1903. The Arrestee Plaintiffs thereafter filed *Plaintiffs' Response to Court's Notice Pursuant to Fed. R. Civ. Proc. 56(f) and Motion to Reconsider Pursuant to Fed. R. Civ. Proc. 54(b)*. ROA.1904-1925. The District Court granted summary judgment in favor of the defendants and dismissed plaintiffs' First Amendment and Due Process claims with prejudice. ROA.1987-2049. The District Court rendered a judgment dismissing all defendants on March 28, 2024. ROA.2018.

In its April 5, 2024 ruling, the District Court opined in pertinent part as follows:

> Duhé's disavowal of prosecution falls within this exception to the mootness doctrine. It is unclear from the record and the relevant authorities that the District Attorney's disavowal is legally binding and that it would prevent him from reversing course in the future. Indeed, Duhé's disavowal is limited to the protest and events that

[11] Attorney General Jeff Landry intervened to defend the constitutionality of the Critical Infrastructure Statute. We adopt the Attorney General's statement of the facts and procedural history to supplement those sections contained in this brief.

> resulted in the 2018 arrest of the pipeline protestors, including the Plaintiffs. He does not disavow enforcement of La. R.S. 14:61 in connection with future protests of the Bayou Bridge Pipeline. On the other hand, **the lapse of limitations is not a "voluntary cessation" of the enforcement of a challenged statute and moots any claims** by the Plaintiffs based on their 2018 protest and arrest.
>
> To the extent that Plaintiffs seek a declaration that the statute is unconstitutional as applied to a future anticipated protests of the Bayou Bridge Pipeline on private property, the Plaintiffs **lack a constitutionally protected right to protest on private property**. …

ROA.2046-2047. (**emphasis** added)

On April 22, 2024, all Plaintiffs filed a notice of appeal (ROA.2050-51) to this Honorable Court from the District Court's Judgment of March 28, 2024 (ROA.2018), and Corrected Memorandum Ruling, dated April 5, 2024 (ROA.2019-49), denying Plaintiffs' Motion to Reconsider and granting summary judgment in favor of Defendants under Rules 56(a) and 56(f) and dismissing Plaintiffs' First Amendment and Due Process claims with prejudice.

STANDARD OF REVIEW

A. De Novo Review—Motion to Dismiss

A district court's ruling on a Fed. R. Civ. Proc. 12(b)(6) or 12(b)(1) motion is subject to de novo review. *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996); *Harmon v. City of Arlington, Texas, et al*, 16 F.4th 1159, 1162-63, (5th Cir. 2021).

In considering a Motion to Dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). That said, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), 127 S.Ct 1955, 167 L.Ed.2d 929 (2007), and two years later in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed. 2d 868 (2009), the U.S. Supreme Court specifically rejected blind adherence to the longstanding maxim that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief …'" *Twombly,* 127 S.Ct., at 1969.[12] In *Twombly*, the Supreme Court held that Federal Rule of Civil Procedure 8(a) requires factual allegations sufficient "to raise a right to relief above the speculative level." Further, the plaintiff must allege "enough facts to state a claim that is plausible on its face," *Twombly*, at 1974.

A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference" that the plaintiff is entitled to relief. *Iqbal,* 129 S.Ct. at 1949. Plausibility "is not akin to a probability requirement;" rather plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Pleading a fact that is "merely consistent" with a defendant's liability does not satisfy the plausibility standard. *Id.*

[12] In fact, it can be fairly said that the Supreme Court has jettisoned that doctrine.

The "…plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1964-65. The Court does not "presume true a number of categories of statements, including legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement." *Harmon v. City of Arlington, Texas, supra* (quoting *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (*en banc*)).

B. De Novo Review—Motion for Summary Judgment

The standard of review on summary judgment is also de novo. *Miller v. Michaels Stores, Inc.*, 98 F. 4th 211, 215-16 (5th Cir. 2012). Summary Judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. See Fed. R. Civ. P. 56. Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the non-movant's case. See *Topalain v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), cert. denied, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed 2d 46 (1992). The threshold inquiry, therefore, is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be

resolved in favor of either party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251, 106 S. Ct. 2505 91 L.Ed 2d 202 (1986). Of course, "the substantive law will identify which facts are material." Id. At 248.

A movant for summary judgment need not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish each element as to which that party will have the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct 2548, 91 L.Ed 2d 265 (1986).

Once the burden shifts, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Rule 56 (e)); see also Fontenot, 780 F. 2d at 1195-98. A party must do more than simply show some metaphysical doubt as to the material facts. *Matsushita***,** 475 U.S. at 586**,** Stated another way, [i]f the record, taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Friou v. Phillips Petroleum Co*., 948 F.2d 972, 974 (5th Cir. 1991) (citing Matsushita, 475 U.S. at 587). In determining whether a genuine issue exists for trial, all of the

evidence must be viewed in the light most favorable to the motion's opponent. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).[13]

C. Mootness Can Be Raised At Any Time In The Proceedings

Mootness and ripeness are jurisdictional matters which can even be raised for the first time on appeal. The mootness doctrine, the so-called "doctrine of standing set in a time frame," mandates that litigants retain a "personal interest" in a dispute at its inception and throughout the litigation. *Texas Midstream Gas Services, LLC v. City of Grand Prairie*, 608 F. 3d 200, 204 (5th Cir. 2012). Ripeness is also an essential component of federal subject matter jurisdiction. *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005). The Supreme Court has stated that the "**ripeness** doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (citing *Buckley v. Valeo,* 424 U.S. 1, 114, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam))

D. The Ruling of The District Court May Be Affirmed on Any Grounds Supported By The Record

Under Fifth Circuit precedent, this Court may affirm the ruling appealed from on any grounds supported by the record, even if not relied on by the lower court.

[13] See also Judge F. A. Little's summary of applicable law in *Todd v. City of Natchitoches,* 238 F.Supp.2d 793, 798 (U.S.D.C. W.D. La. 2002). ("…Conclusory denials, improbable inferences, and legalistic argumentation are not an adequate substitute for specific facts showing that there is a genuine issue for trial….")

Lauren C. ex rel Tracey K. v. Lewisville Indep. Sch. Dist., 904 F. 3d 363, 374 (5th Cir. 2018).

SUMMARY OF THE ARGUMENT

The judgment of the District Court should be affirmed. The District Court correctly dismissed the claims of the non-arrestee Plaintiffs on the grounds that they did not have standing. The District Court correctly held that the claims against Duhé arising out of the August-September 2018 arrests and events were moot. The District Court correctly dismissed all claims against Duhé for injunctive and declaratory relief.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFFS LACK STANDING TO BRING THIS PROCEEDING[14]

A. General Principles

Article III of the U.S. Constitution restricts the jurisdiction of the federal courts to actual cases and controversies. The case or controversy requirement has been effectuated by several doctrines, the most important of which is standing**.** *Parkhurst v. Tabor*, 569 F. 3d 861, 865 (8th Cir. 2009), quoting *Allen v. Wright*, 468 U. S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 566 (1984). To establish constitutional standing "the plaintiff must show that [she] has suffered an 'injury in fact' that is:

[14] Duhé also adopts the argument of the Louisiana Attorney General with respect to the Plaintiff's lack of standing as if copied herein *in extenso.*

concrete and particularized and actual or imminent, fairly traceable to the challenged action of the defendant; and likely to be redressed by a favorable decision." *Lugan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Furthermore, Article III requires more than theoretical possibilities: "… [W]e have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper v. Amnesty International USA et al*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L. Ed 2d 264 (2013); *In Re Rebekah Gee et al*, 2019 WL 5274960 (5th Cir. 2019) *8.

The Plaintiffs are suing for prospective relief only, asking for a declaratory judgment regarding the constitutionality of R.S. 14:61 and an injunction to prevent the Defendants from enforcing this statute as it pertains to pipelines. To establish standing to sue for injunctive relief,[15]

> … a party must: (1) have suffered an injury-in-fact; (2) establish a causal connection between the injury-in-fact and a complained-against defendant's conduct; (3) show that it is likely, not merely speculative, that a favorable decision will redress the injury-in-fact; and (4) demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. … Even when a plaintiff has standing to sue for damages, he or she may lack standing to seek prospective injunctive relief. …

Kokesh v. Curlee, 19-1372 (E.D. La. 10/24/2019) 422 F.Supp.3d 1124, 1132.

[15] The same restrictions are imposed on suits for declaratory relief. See *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003).

B. The Non-Arrestee Plaintiffs Do Not Have Standing

In its ruling on Duhé's motion to dismiss the District Court correctly observed the following concerning the lack of standing of the "organization plaintiffs":[16]

> Turning to causation and redressability, however, none of the Organization Plaintiffs have satisfied these requirements for Article III standing, even if they satisfy the injury in fact requirement. These requirements require not only that the Organization Plaintiffs demonstrate that they have been injured, but that their injuries resulted from the actions of the remaining defendants in the case—Duhé and Theriot. The conduct attributed to these defendants is the arrest of White Hat, Mejía, and Savage by Sheriff Theriot, and the chilling effect flowing from future prosecution by Duhé in his capacity as the 16th JDC District Attorney. **The causal link required for Article III standing breaks down at this point because the Organization Plaintiffs cannot "fairly trace" their alleged injuries to the actions of these defendants. The Organization Plaintiffs do not allege that they were involved in the St. Martin Parish protests where the Arrestee Plaintiffs were taken into custody, or that any of their members were arrested during these protests**. As far as the chilling effect from the enforcement of La. R.S. 14:61, the Organization Plaintiffs do not allege that they plan any protest activities in St. Martin Parish or, more broadly, within the boundaries of the 16th JDC (Iberia, St. Mary, and St. Martin Parishes). Instead, the injuries alleged by these plaintiffs pertain to unspecified protest activities around the state of Louisiana. Even when the Organization Plaintiffs tie their protest activities to specific locations, the activities are located *outside* St. Martin Parish and the boundaries of the 16th JDC—in St.

[16] This was the designation given to the Non-Arrestee Plaintiffs by the District Court.

> Charles Parish or New Orleans, for example. **These allegations cannot support the causation requirement of standing because the enforcement and prosecutorial authority of defendants Theriot and Duhé is limited to St. Martin Parish and the 16th JDC, respectively.77 Accordingly, their enforcement of La. R.S. 14:61 within the 16th JDC cannot have caused the injuries alleged by the Organization Plaintiffs with respect to protest activities outside St. Martin Parish and the 16th JDC**.
>
> **The standing allegations of the Organization Plaintiffs also do not satisfy the "redressability" requirement for the same reasons**. Injunctive relief against defendants Theriot and Duhé will not redress the Organizational Plaintiffs' injuries arising from prosecution—or threats of prosecution—under La. R.S. 14:61 in connection with their activities outside of St. Martin Parish and the 16th JDC. Any such injury would flow from other state officers who are not parties to the present case and would not be bound by injunctive relief entered against Theriot and Duhé. Nor will the grant of declaratory relief redress the injuries alleged by the Organization Plaintiffs…

ROA.877-878. Footnotes omitted. **Emphasis** added.

The District Court also correctly held, as a matter of law, that the Landowner Plaintiffs lacked standing to bring this action. In its ruling, the District Court correctly reasoned as follows:

> Like the Organization Plaintiffs, the Landowner Plaintiffs must allege that they intend to engage in activities "arguably affected with a constitutional interest," that these activities are "arguably proscribed by the statue," and that there is "a credible threat of prosecution" to plead an Article III injury in fact. Allegations that these plaintiffs oppose the Bayou Bridge

> Pipeline because of its impact on the environment, without more, **does not satisfy this standard**. The Landowner Plaintiffs do not allege that they participated in the protests that led to the arrest of White Hat, Savage, and Mejía, nor do they specifically allege that, but for the Amended Statute, they would participate in protests at the pipeline in the future. The Landowner Plaintiffs also cannot base their standing on alleged violations of the *Arrestee Plaintiffs*' First Amendment rights or the rights of other protestors.

ROA.881. Footnotes omitted. **Emphasis** added.

The District Court also noted how the allegations of the landowner plaintiffs did not demonstrate any concrete and imminent injury; to wit:

> The Landowner Plaintiffs do not allege facts showing that their activities on the property have been limited in the past because of the challenged statute, nor do they show that future planned activities on the property will be curtailed as a result of the statute or that these activities could expose these plaintiffs to prosecution under La. R.S. 14:61. Indeed, the Landowner Plaintiffs' own allegations show that they did not reside on their St. Martin Parish property at the time this case was commenced—plaintiff Katherine Aaslestad resides in West Virginia, plaintiff Peter Aaslestad resides in Virginia, and plaintiffs Wright, Stevens, and Hernandez reside in New Mexico.90 Accordingly, any injury to the Landowner Plaintiffs' property interests or threat of prosecution under La. R.S. 14:61 is wholly speculative.

ROA.882.

The miniscule undivided ownership interest of each of the Landowner Plaintiffs and their undisputed lack of connection to the property supports the District Court's analysis.

C. The Arrestee Plaintiffs Do Not Have Standing

The Arrestee Plaintiffs do not have standing. As the District Court correctly recognized in its April 5, 2024 ruling, Plaintiffs' claims as against Duhé have been mooted by the fact that any prosecution for any offense arising out the Arrestee Plaintiffs' actions in August-September 2018 would be barred by the statute of limitations. ROA.2046-2047. Duhé has declined to prosecute the Arrestee Plaintiffs and has further disavowed any intent to prosecute them for their actions in August-September 2018. The running of the statute of limitations assures that Duhé cannot "change his mind and prosecute." *Seals* at 593.[17]

Moreover, the Arrestee Plaintiffs do not have standing to assert a claim for declaratory and injunctive relief as against Duhé for the alleged threat of future enforcement of the statute. Such a claim is conjectural and hypothetical. In their brief (Doc. 51, p. 53), Plaintiff Arrestees refer to the "history of past enforcement." That argument does not hold water as to Duhé. Duhé's only "history" of "past enforcement" of the statute is limited to his decision to decline to prosecute and

[17] In *Seals v. McBee,* 898 F.3d 587 (5th.Cir. 2018) the Fifth Circuit afforded standing to plaintiff-appellee Seals to allege the unconstitutionality of the Louisiana statute pursuant to which he was arrested. Movant agrees with the Attorney General's argument that the case was wrongly decided and that the reasoning of Judge Edith Jones's dissenting opinion to a Per Curium decision denying rehearing *en banc* was correct. *McBee,* (*rehearing en banc denied by an evenly divided circuit*), 907 F.3d 885 (2018). It is submitted that Duhé's disavowal of intent to prosecute is sufficient to moot the Arrestee Plaintiffs' claims. See *Kokesh v. Curlee, supra,* distinguishing *Seals* in a case where a district attorney disavowed prosecution.

disavow any intent to prosecute. Also, Duhé is not actively defending the constitutionality of the statute at issue herein.

The case of *Kokesh v. Curlee*, *supra*, supports that Plaintiffs lack standing. In *Kokesh*, the plaintiff was a passenger in a motor vehicle which had stopped on the shoulder of Interstate 10 in New Orleans. A Louisiana state trooper stopped his vehicle behind the vehicle in which Kokesh had been riding. The officer handcuffed another passenger and accused him of spray-painting the wall adjacent to the shoulder of the road. After determining that no spray painting had actually taken place, the officer began to uncuff the other passenger. While in that process, the officer noticed that Kokesh was videorecording the encounter. The officer then demanded identification from Kokesh. Kokesh refused. The officer arrested Kokesh and charged him with resisting an officer in violation of La. R.S. 14:108(B)(1)(c). Kokesh was injured in the course of the arrest. Subsequently the Orleans Parish declined prosecution. Kokesh then filed a lawsuit against, *inter alia*, the arresting officer, the superintendent of the Louisiana State Police, and the Orleans Parish District Attorney, alleging false arrest and imprisonment, kidnapping, battery, malicious prosecution, § 1983 First Amendment retaliation; a § 1983 clam for Fourth Amendment "malicious prosecution;" and a § 1983 claim for unreasonable seizure, and excessive and unreasonable use of force. Kokesh also requested injunctive and declaratory relief.

The superintendent of the state police moved to dismiss the claims against him in pertinent part on the grounds that Kokesh did not allege facts presenting a justiciable case or controversy. In arguing that his claim for injunctive relief was justiciable, Kokesh, like the Arrestee Plaintiffs in the instant proceeding, cited to this Court's decision in *Seals v. McBee*, *supra*. U.S. District Judge Mary Ann Vial Lemmon granted the superintendent's motion, distinguishing *Seals*. District Judge Lemmon's reasoning is instructive here:

> The present case is distinguishable …. In *Seals*, the Fifth Circuit stated that "[w]hether the government disavows prosecution is a factor in finding a credible threat of prosecution.... is only one factor among many—for example, [the Supreme Court has] found standing because there was a history of enforcement, and the government would not disavow prosecution." *Id. at 592* (citations omitted). The *Seals* court also noted that the Supreme Court had previously "found standing because, even though the plaintiffs had not yet violated the statute and the statute had never been applied, the government would not disavow prosecution if plaintiffs engaged in their intended course of action." *Id.* (citations omitted).
>
> In the instant case, as conceded by counsel for Kokesh at oral argument, the attorney representing the New Orleans D.A.'s office in this case came before the court and stated on the record that the D.A. would not be prosecuting Kokesh for the charge, which it had refused. **This is not a non-committal promise, but a firm disavowal to prosecute on the charge, made on the record.** Moreover, neither side has presented the court with evidence concerning the history of enforcement of the challenged statute. Accordingly, Kokesh has not established the requisite threat of a "real and immediate threat of repeated injury." *Lyons*, 461 U.S. at 102, 103 S.Ct. 1660.

> For an actual controversy to exist, Kokesh would have to find himself in a situation where he violated a law, was arrested by a state trooper, and the trooper invoked La. R. S. 14:108 to ascertain his identity. **While this sequence of events is not impossible, it is too speculative to constitute the immediate threat of injury required for standing to pursue prospective injunctive relief.**

Kokesh, supra, at 1133-1134; **emphasis** added.

The Orleans Parish District Attorney separately moved to dismiss on several grounds, including lack of a justiciable controversy. Judge Lemmon, in an unreported decision, also granted that motion for the same reasons.

Of particular pertinence to the instant case are her reasons for rejecting Kokesh's request for declaratory relief:

> It appears that Kokesh's claims against the OPDA are purely speculative. While the alleged ambiguity of the challenged statute may be a legal question, vis-a-vis the OPDA, the only occasion referenced in plaintiff's complaint where it could have been enforced was rendered moot when the OPDA rejected the charge. Thus, there are no facts to suggest if, or how, the OPDA intends to enforce the statute in the future. Accordingly, any purported injury by the OPDA to plaintiff or anyone else is "contingent on future events that may not occur as anticipated, or indeed may not occur at all." Lopez, supra. The claim is therefore not ripe for adjudication. Further, it appears that plaintiff will suffer no hardship from the court withholding consideration of the claim. Kokesh has no charges pending against him stemming from the challenged statute, and in the event that he does at some future date, he may raise the claim then when an actual and concrete controversy exists. Accordingly, the court lacks jurisdiction over the claims against defendant Cannizzaro.

Kokesh v. Curlee, et al, Docket No. 19-cv-1372, Rec. Doc. 18 (E.D. La. 4/30/2019) (Not reported in F.Supp.).

The facts and circumstances of this case are identical to those in *Kokesh.* Not only has Duhé declined and disavowed prosecution, but the statute of limitations has long ago run, barring any prosecution of the Arrestee Plaintiffs for any offense arising out of their actions underlying this case.

It is further submitted that similar to the allegations in *Kokesh*, the allegations of the Arrestee Plaintiffs as to potential future enforcement of the Critical Infrastructure statute against them by Duhé are completely speculative.

CONCLUSION

The undisputed facts show that there is no Article III case or controversy presented here as against Duhé. The undisputed facts support that the Plaintiffs do not have standing to pursue the injunctive and declaratory relief sought. In addition, any action by Arrestee Plaintiffs against Duhé arising out of their actions in August-September 2018 is moot. It is further respectfully submitted that it would serve no purpose to allow the continuation of these proceedings against Duhé.

The decision of the District Court dismissing the complaint as against all defendants should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief has been served this **23rd day of September, 2024**, on all counsel of record for all parties to this proceeding, and to the District Judge assigned to this matter, by electronic means or by mailing same by U.S. Mail, properly addressed and first class postage prepaid, to:

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CERTIFICATE OF COMPLIANCE

1. The Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,832 words, excluding the parts of the Motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft® Office Word 365 in size 14 Times New Roman.
3. This Brief was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

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