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

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

Plaintiffs – Appellants,

v.

ELIZABETH B. MURRILL, in her official capacity as Attorney General of Louisiana; BECKET BREAUX, in his official capacity as Sheriff of St. Martin Parish; M. BOFILL DUHÉ, in his official capacity as District Attorney of the 16th Judicial District Attorney's Office;

Defendants – Appellees.

On appeal from United States District Court for the Western District of Louisiana, Case No. 6:20-CV-983

APPELLANTS' REPLY BRIEF

William P. Quigley
Loyola University College of Law
7214 St. Charles Ave.
New Orleans, LA 70118

Baher Azmy
Pamela Spees
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Counsel for Plaintiffs-Appellants

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INTRODUCTION

Among others, this case raises the question: How many sophisticated lawyers does it take to interpret a statute? The Attorney General's office, switching its position years into this litigation, and only after the district court's ruling, has mined the intricacies of Louisiana property law so as to imagine that the general term "premises" in La. R.S. §14:61 (the "Statute") is limited to privately owned and non-public premises—and thus not subject to First Amendment protections. Plaintiffs demonstrate that this overly lawyered interpretation is implausible as a matter of plain understanding. Meanwhile, this Court need not resolve this arcane interpretive dispute; instead, this Court must ask whether an average citizen (deprived of the prolix of property law the Attorney General relies upon) could reasonably read the Statute in the contrived way the Attorney General now proposes. The answer must be no; the text of the Statute plainly tracks the Legislature's intentions to suppress expressive activity across all of the 125,000 miles of pipelines throughout the state, including those running under public property.

If the Statute is going to be rewritten to limit the 2018 amendment to private property alone, the burden should be placed on the legislature—not this Court—to do so, in order to avoid the substantial chill produced by such vague, overbroad, and otherwise unconstitutional terms in the actual Statute.

ARGUMENT

I. UNDER PERMISSIVE FIRST AMENDMENT PRINCIPLES, ALL PLAINTIFFS HAVE ADEQUATELY DEMONSTRATED STANDING.

Defendants disregard the Supreme Court's repeated instructions to apply standing rules more permissively for First Amendment claims.[1] *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965) (explaining exception to conventional standing rules arises in response to "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application").

Thus, in a pre-enforcement First Amendment challenge, a plaintiff "need not show that the authorities have threatened to prosecute him" because "the threat is latent in the existence of the statute." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 336 (5th Cir. 2020) (internal quotations and citation omitted); *see also Barilla v. City of Houston, Texas*, 13 F.4th 427, 433 (5th Cir. 2021) (court "may assume a substantial threat of future enforcement absent compelling contrary evidence, provided that

[1] The Sheriff and District Attorney join in the Attorney General's arguments as to standing and raise specific arguments of their own.

[relevant laws] are not moribund"). In the context of overbroad statutes, the Court recognizes third party standing "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Joseph H. Munson Co.*, 467 U.S. at 956-57 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

A. Arrestee Plaintiffs

1. Injury-in-Fact

The district court held that Arrestee Plaintiffs satisfied the requirements of standing because "they intend to participate in future protests targeting the Bayou Bridge Pipeline and other pipeline projects and the record reflects a credible threat of prosecution given their arrest under the statute." ROA.1885-86 (applying *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014)) (plaintiffs establish standing if they have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but prescribed by a statute, and there exists a credible threat of prosecution thereunder"). Defendants' challenge to this injury-in-fact determination disregards inferences from well-pled allegations and evidence as well as governing First Amendment doctrine.

The Sheriff's suggestion that the Arrestee Plaintiffs should have been dismissed at the 12(b) stage because they did not allege "any intention of mounting a future protest in St. Martin Parish" is contradicted by the very allegations to which

he cites.[2] ECF 63 at 7. Plaintiff White Hat explicitly pleaded that the pending charges affected "her ability to engage in *further demonstrations* against the Bayou Bridge pipeline and other petrochemical projects." ROA.38 ¶19 (emphasis added). This allegation not only demonstrates White Hat's intention to protest the Bayou Bridge pipeline, a highly reasonable inference, [3] it also demonstrates the core injury in this case—that the Statute chilled her exercise of her First Amendment rights.

The same holds true for Plaintiff Savage, a journalist, as she pleaded that she now "hesitates to *continue to* cover not only pipeline protests but other hotly contested issues as well." ROA.39 [¶21] (emphasis added). Savage clearly intended to *continue to cover* the pipeline protests in the *future* and was chilled in the exercise of her right to do so. Similarly, it is a reasonable inference of the complaint that Plaintiff Mejía intended to engage in future protests of the pipeline and was chilled

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[2] The Sheriff's brief asserts in footnote 1 that the Bayou Bridge pipeline construction was completed before this matter was commenced and, without any support from the record, none of the protesters launched any pipeline protests once the pipeline construction was completed, perhaps suggesting mootness. If this Court has a question as to whether the relevant facts—not in the record on appeal—show a controversy still exists, the proper step would be to remand to the district court to determine whether subsequent events have "so altered [Plaintiffs'] desire to engage in [protests against pipeline projects] that it can no longer be said that this case presents a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Steffel v. Thompson*, 415 U.S. 452, 460 (1974) (noting recent developments around the war in Vietnam and United States foreign policy that may have affected plaintiff's desire to continue hand-billing).

[3] On a motion to dismiss, the court "must construe the factual allegations in a complaint, and all reasonable inferences therefrom, in the light most favorable to the plaintiffs." *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 210 (5th Cir. 2004).

in the exercise of his First Amendment rights, as a result of his arrest and the existence of the law. ROA.39-63 [¶¶20, 122].

The Sheriff's attempted invocation of *O'Shea v. Littleton* is thus unavailing because, unlike here, the *O'She*a plaintiffs only referenced *past* injury and because there were no allegations that "any relevant . . . criminal statute is unconstitutional on its face or as applied or that [Respondents] have been or will be improperly charged with violating criminal law." 414 U.S. 488, 496 (1974).

The Attorney General incorrectly argues that Arrestee Plaintiffs failed to show "future harm or future chilling effect based on the Statute" at the summary judgment stage.[4] ECF 64 at 29. In fact, Plaintiff White Hat asserted exactly that in her declaration, *i.e*., that she believes there is a "sacred responsibility to protect the earth and a moral duty to speak out against projects which we know will do more damage," that "the critical infrastructure law was intended to dissuade [her] and others from this duty," and that she has "not engaged in protests or actions to the same extent after her arrests." ROA.1458 [¶¶24-26]. Plaintiffs Mejía and Savage similarly asserted they have been chilled in the exercise of their rights to expression (Mejía) and of the press (Savage). *See* ROA.1460 [¶¶12-13] (declaration showing Mejía's

[4] At the summary judgment stage, any evidentiary inferences drawn in favor of the nonmoving party must be *reasonable. See DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 798 (7th Cir. 1995) ("A party is entitled only to *reasonable* or *justifiable* inferences when confronted with a motion for summary judgment." (internal citations and quotations omitted)). The inferences suggested by the Attorney General are not reasonable.

ability to engage in other protests and advocacy limited because of the law and his arrest); ROA.1465 [¶¶36-38] (Savage declaration describing that the arrests affected her life and work as a journalist and her decisions about covering similar protests).

In *Barilla*, this Court determined that the plaintiff sufficiently pleaded his "intention to engage in a course of conduct arguably affected with a constitutional interest" because he asserted that a) he wanted to busk on Houston's public streets; b) he had previously applied for and received a busking permit; and c) he had previously busked. *Barilla*, 13 F.4th at 432-33. Because busking involves music and solicitation, the conduct was affected with a constitutional interest in expression and arguably proscribed by the ordinances. *Id.* As in *Barilla*, Arrestee Plaintiffs alleged, and later demonstrated, a) they wanted to protest the pipeline project; b) they previously protested the project (and were even arrested while engaging in that conduct); and c) the protest was affected with a constitutional interest related to protest. La. R.S. §14:61(A)(3) arguably proscribes the conduct at issue, and the threat of future enforcement of the law is substantial, given that the law is not "moribund," particularly in light of the recent history of enforcement. *Barilla*, 13 F.4th at 433-34 (citing *Susan B. Anthony List*, 573 U.S. at 161-64).

2. Traceability and Redressability

District Attorney Duhé reasserts his argument that the Arrestee Plaintiffs do not have standing for the threat of future enforcement because he disavowed any

intent to prosecute them. ECF 65 at 23-26. As the district court noted, this argument implicates "the mootness doctrine, not standing." ROA.1883. Duhé's disavowal was "limited to the protest and events that resulted in the 2018 arrest of the pipeline protesters," and he did not "disavow enforcement of La. R.S. §14:61 in connection with future protests of the Bayou Bridge Pipeline." ROA.1885-86. As such, Duhé's disavowal did not render Plaintiffs' facial challenge moot.

Duhé's argument, which the district court rejected, relies on *Kokesh v. Curlee*, 422 F.Supp.3d 1124 (E.D. La. 2019). But, as Plaintiffs showed below, ROA.1563-65, unlike here, *Kokesh* was not challenging a content-based law for its chilling effect on First Amendment freedoms, and the threat of any future prosecution was too remote and speculative.

Sheriff Breaux summarily asserts that Plaintiffs did not have standing to maintain a claim against him because he should not have been "lump[ed]" together with the District Attorney when the district court determined there was a credible threat of prosecution. ECF 63 at 6. According to the Sheriff, while his deputies made the arrests of Arrestee Plaintiffs, he "has no authority to initiate prosecutions." *Id*. As demonstrated in the case upon which the district court relied, this argument does not save him. In *Seals v. McBee*, the case brought against the arresting officer was

justiciable even though the district attorney had not charged the plaintiff and "expressly disavowed bringing charges." 898 F.3d 587, 592 (5th Cir. 2018).[5]

B. Landowner Standing

Landowners clearly satisfy the first element of injury-in-fact under *Susan B. Anthony List* because, construing their allegations in a light most favorable to the plaintiffs, *Kapps v. Torch Offshore, Inc.*, 379 F.3d at 210, they show an intention to engage in a course of conduct "affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 159. The Landowners allege that they have previously used their property to host speakers protesting pipelines, and they "intend to continue to" do so. ROA.40-41,58 [¶¶23-25, 95]. Thus, the Statute implicates their rights to associate with others and to host political speech on their property, which has been designated a critical infrastructure under the new law. And, as detailed in Plaintiffs' Opening Brief, at 50-51, Landowners also satisfy the second and third elements for injury-in-fact because the Statute "arguably proscribe[s]" their intended conduct, and the threat of enforcement is credible, concrete, and substantial. *Fenves*, 979 F.3d at 330-32. Moreover, the district court correctly found that Landowners satisfied redressability and traceability for standing as against Defendants Breaux and Duhé,

[5] *Dickerson v. Kemp*, 540 So.2d 467 (La. Ct. App. 1989), *see* Sheriff Br. 6, is inapposite because the case did not involve a facial or as-applied challenge to an unconstitutional statute, and the petition did not allege any independent acts on the part of the sheriff or his deputies that deprived the plaintiff of his constitutional rights. *Id.* at 471.

and the Attorney General's arguments to the contrary are without merit in light of the recent history of past enforcement of this non-moribund law.

C. Advocacy Plaintiffs

The Defendants challenge the Advocacy Plaintiffs' standing while ignoring the lower threshold required of them in the First Amendment context. *See supra* Section I. The Attorney General acknowledges that the Advocacy Plaintiffs allege a "general intent to protest in the future near unidentified pipelines," but she nevertheless argues that they "fail to allege any concrete plans that would show that any threatened enforcement is likely or imminent." ECF 64 at 26. However, as explained in their Opening Brief, at 52-55, Plaintiffs do not need to show that they themselves were arrested or threatened with arrest. *Barilla*, 13 F.4th at 431 ("A plaintiff bringing such a [pre-enforcement] challenge need not have experienced 'an actual arrest, prosecution, or other enforcement action' to establish standing."); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff showed a credible threat of prosecution based on companion's arrest under the challenged statute for constitutionally protected conduct he desired to continue). Plaintiffs have been chilled in the exercise of their First Amendment rights by the law, and their fear of punishment is objectively reasonable and not "imaginary or wholly speculative." *Fenves*, 979 F.3d 319, 336 (5th Cir. 2020).

The Attorney General also argues that Plaintiffs cannot show redressability because they had not shown a "substantial risk of prosecution by the Attorney General."[6] ECF 64 at 27. However, as this Court recognized in *Fenves*, "a plaintiff who mounts a pre-enforcement statutory challenge on First Amendment grounds need not show that the authorities have threatened to prosecute him. . . . [T]he threat is latent in the existence of the statute." 979 F.3d at 336 (internal quotations and citations omitted); *see also N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) (standard for assessing whether a threat of enforcement is credible in First Amendment cases is "quite forgiving" (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 (1979) (plaintiffs were "not without some reason in fearing prosecution," even though no criminal penalties had ever been levied and might never be))).

II. THE STATUTE IS VOID FOR VAGUENESS.

The Attorney General's shifting efforts to narrow or clarify this otherwise plainly defective Statute only underscore the Statute's "fail[ure] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and how it "authorize[s] and even encourage[s] arbitrary and discriminatory

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[6] The Attorney General was dismissed in earlier proceedings on the basis of sovereign immunity, which Plaintiffs address in Section V, *infra*.

enforcement." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)); *see also Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982) (emphasizing that courts "express[] greater tolerance of enactments with civil rather than criminal penalties").

First, as detailed in Section III, *infra*, the proposed limiting construction, depending as it does on an application of lattice-work state property law doctrines, is not reasonable; no ordinary citizen would think to add the proposed but presently non-existing terms "on private property" to modify the concededly vague term "premises." Indeed, contrary to the deeply distorted historical account the Attorney General conjures in footnote 11, it is demonstrably the case that the Attorney General *did* defend the Statute below by *agreeing it applied to public fora* and then relying on the carve-out provision (which would not apply absent application to public fora) to save the Statute on the merits. *See* ROA.1784 (Mtn Opp. Summary Judgment) ("With respect to public property, as detailed below, the carve-outs in La. R.S. §14:61(D) are at least co-extensive with the First Amendment protections.").[7] Indeed, consistent with the Attorney General's early interpretation of the Statute, and contrary to its current view, Plaintiffs allege that the law *has already been*

[7] In earlier briefing, responding to Plaintiffs' concern about "areas of public access . . . like sidewalks," the Attorney General also pointed to the Statute's "carveout." ROA.164.

applied in a public space. ROA.55 [¶76] (three people arrested and charged while "paddling in kayaks on navigable waters" near pipeline construction site).[8]

Critically, whatever (ultimately ineffectual) force the statutory carve-out in La. R.S. §14:61(D) has in response to Plaintiffs' First Amendment claims, it does not cure the due process concerns with its vagueness. In any event, if the State's chief law enforcement officer did not believe the Statute was limited to private property at least until the district court suggested such an interpretation, how can we expect an ordinary citizen to believe it so limited?

Second, the Attorney General has again, apparently on further research and reflection of the kind no ordinary citizen could undertake, changed the plain meaning of the Statute, committing explicitly for the first time in five years to the position that, in addition to now being limited to "private property or public property not generally open to the public," "premises" are limited to a "pipeline and *its associated right of way*." ECF 64 at 54. In the Attorney General's motion to dismiss, she stated that the provision was not vague because "[o]n a given tract of land, a pipeline exists or does not, a person is present on that tract or is not. . . . *Nothing more is required*." ROA.164. The Attorney General's own shifting interpretation proves that the Statute

[8] The definition of "public things" expressly includes "the waters and bottoms of natural navigable water bodies" pursuant to the Louisiana Civil Code. *See* La. Civ. Code Ann. Art. 450.

fails to give notice to an ordinary citizen and risks arbitrary or discriminatory enforcement.

Third, the cases the Attorney General relies upon only prove Plaintiffs' point. In *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008), plaintiffs challenged an anti-smoking ordinance on the ground that the designation of a "public place," and the requirement that proprietors take "necessary steps" to prevent customers from smoking there, were unconstitutionally vague. Yet, unlike generalized "premises" here, the Austin ordinance defined "public place" in the text as "an enclosed area to which the public is invited or in which the public is permitted," *id.* at 538, and then *specifically listed* fifteen kinds of facilities that would fall into that definition. *Id.* at 538 n.2. As for what constitutes "necessary steps," the City adopted and distributed a "'how to' guide for avoiding a violation," *id.* at 553, listing mandated "necessary steps" and then incorporated those five guidelines into pre-printed forms inspectors were instructed to consult before issuing a violation. *Id.* at 554. By contrast, there are *no* comparable mechanisms to cabin law enforcement discretion in this case. Thus, the fatal flaw in the Attorney General's reliance on an officer's instruction to leave is that a Louisiana officer has no more guidance than a citizen to identify what constitutes proscribed "premises," leaving the judgment about who can be told to leave and when entirely to law enforcement's arbitrary

discretion.[9] *See Wright v. Georgia*, 373 U.S. 284, 291-92 (1963); *Morales*, 527 U.S. at 58-59.

Moreover, the proximity cases the Attorney General relies upon, which prohibit a person's presence near a government building, prove Plaintiffs' point because in each of those cases, the reference point for the potential violation is obvious and ascertainable—*i.e.*, committing a violation near a courthouse, s*ee Cox v. Louisiana*, 379 U.S. 536 (1965), or "adjacent to a schoolhouse," *Grayned v. City of Rockford*, 408 U.S. 104, 111 & n.17, or within "hearing distance" of a school or church, *Johnson v. Quattlebaum*, 664 F. App'x 290, 294-95 (4th Cir. 2016). The defect in the Statute does not stem from an adjective ("near"), which an ordinary person could comprehend even if there are slight interpretive variations; the defect stems from the invisible subject, a pipeline, leaving citizens and, even "more important," law enforcement officers only to guess.[10] *Kolender v. Lawson*, 461 U.S.

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[9] The Attorney General takes issue with Plaintiffs' account of the conflicting testimony of the deputies involved in the arrests, but acknowledges the testimony of Sgt. Martin that he did not see where Plaintiffs were standing when they were arrested because he was not present at the time. ECF 64, FN 14. As Plaintiffs point out, Martin testified that he eyeballed from about 50 yards away where he thought the survey lines were. ECF. 51 at 34. If he was off by even a foot, his error would result in a wrongful charge subjecting someone to the possibility of up to five years in prison. The Attorney General also minimizes the fact that while Plaintiffs were being arrested for remaining after being forbidden from a pipeline construction site, the construction site itself was illegal, as was the presence of the pipeline company's employees and agents. *Id*. at 10-12.

[10] Likewise, the general trespass cases the Attorney General relies upon found statutes not impermissibly vague because it is generally not hard to know whether one is on "property belonging to another," *State in the Interest of J.A.V.*, 558 So. 2d 214, 216 (La. 1990), or a lawful resident of a housing complex. *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994). By contrast,

352, 358 (1983) (requirement that legislature establish minimal guidelines to govern law enforcement is "more important aspect of vagueness doctrine").

III. THE STATUTE IS NOT REASONABLY SUSCEPTIBLE TO THE ATTORNEY GENERAL'S LIMITING CONSTRUCTION, AS ITS PLAIN TERMS COVER PUBLIC SPACES.

Recognizing that the Statute's plain language proscribes and chills speech activity on public lands, and thus renders the statute vulnerable to a First Amendment challenge, the Attorney General now clings to the district court's attempt to redraft the statutory language so it almost exclusively covers premises on private lands. ECF 64 at 37-38.[11] As much as Plaintiffs would prefer a statutory codification of this constructed private-land-limitation, such an interpretation—depending, as it does, on contrived definitions and a sophisticated parsing of the intricacies of Louisiana property law—is not reasonably discernible. The Statute will thus continue to suppress protected expressive activity on public property by individuals who reasonably read the Statute to cover such premises, and it therefore implicates the First Amendment rights of Louisiana citizens.

Louisiana citizens cannot readily discern if any such property contains an unmarked pipeline under it or, if it does, where exactly the pipeline and its "premises" are.

[11] As described *supra*, before the district court came up with its proposed limiting construction, the Attorney General read the Statute as Plaintiffs did—to apply to public property, relying on the statutory carve-out to defend the application of public-property speech restrictions on the merits. ROA.1784. And, as the complaint alleges, three individuals were arrested for protesting in kayaks on navigable waterways, considered public property, pursuant to La. Civ. Code Ann. art. 450. ROA.55 [¶76].

Given the Statute's constitutional infirmities and the implausibility of the Attorney General's proposed limiting construction, principles of federalism and separation of powers counsel invalidating the amendment and permitting the legislature to redraft the Statute within clearly defined constitutional parameters.

"In statutory interpretation, we have three obligations: (1) Read the statute; (2) read the statute; (3) read the statute!" *United States v. Koutsostamatis*, 956 F.3d 301, 306 (5th Cir. 2020) (internal quotations and citations omitted). The Supreme Court has consistently admonished that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms . . . ." *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 674 (2020); *see also United States v. Stevens*, 559 U.S. 460, 481 (2010) (emphasizing that a court will not "rewrite a . . . law to conform it to constitutional requirements . . . for doing so would constitute a serious invasion of the legislative domain (internal citations and quotations omitted)). The Court recently emphasized: "It . . . makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. . . . *[I]f it is not the best, it is not permissible*." *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2266 (2024) (emphasis added). Thus, the Attorney General's interpretation is neither binding on nor authoritative to this Court. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988). Ultimately, judges cannot change what democratically elected

legislators have written. "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation." *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 441 (2017) (Gorsuch, J., dissenting).

The Attorney General relies on *City of El Cenizo v. Texas*, 890 F.3d 164, 182 (5th Cir. 2018), for the proposition that "this Court 'must accept a reasonable narrowing construction of a state law,'" but the Attorney General neglects to include the Court's caveat that "a statute must be 'readily susceptible' to a construction for a court to adopt it." *Id.* at 182. Moreover, "the canon of constitutional avoidance comes into play only when" a statute has two equally reasonable interpretations a court must choose between, "after the application of ordinary textual analysis." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). Failing to require that the legislature fulfill its obligation to redraft imprecise statutes runs the acute risk that "where statutes would otherwise be facially overbroad . . . the broad language . . . remains on the books . . . . Ordinary people . . . will see only its broad, speech-chilling language." *United States v. Hansen*, 599 U.S. 762, 808 (2023) (Jackson, J., dissenting).

Despite this admonition, the Attorney General goes to great lengths over multiple pages of dense property-law analysis in an attempt to retroactively rewrite the Statute so it does not cover public property subject to First Amendment protections. *See* ECF 64 at 37-39, 52-61. However, the Statute's plain text clearly

applies to all pipelines and in no way delineates for the ordinary reader between public and private property. *See* La. R.S. §14:61(B)(1). If the Legislature meant to limit the Statute to private property, it should have done so by adding clarifying language such as "*on private property*," which the Court could interpret and enforce.[12] But it did not.

The text of the relevant (A)(3) provision reads as follows:

> Unauthorized entry of a critical infrastructure is any of the following. . .
>
> (3) Remaining upon or in the premises of a critical infrastructure after having been forbidden to do so, either orally or in writing, by any owner, lessee, or custodian of the property or by any other authorized person.

La. R.S. §14:61(A)(3).

Comparing what this text actually says to what the Attorney General now wishes had been written (*i.e.*, "the *private* premises" or "*private* property") is revealing. Even in the absence of such restrictive text, the Attorney General imagines the terms "owner, lessee, or custodian" to cover only private entities, ECF 64 at 37; it seeks, *ipse dixit*, to limit the general term "premises" to include only private owners with power to exclude others, ECF 64 at 39; and it suggests that the

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[12] It did not make this change even though, in August 2024—while this litigation over the Statute's overbroad application to public property was in its fifth year—the Louisiana Legislature chose to amend §14:61, to further expand the definition of critical infrastructure and to add mandatory minimum sentences for second or subsequent violations of La. R.S. §14:61.1(A). If the legislature well knows how to amend statutes to increase their scope and penalties, it can amend a statute to prevent deprivations of citizens' constitutional rights.

"premises" covers "critical infrastructure" that, despite contrary evidence, the Attorney General believes are almost exclusively "private property." ECF 64 at 37 (citing D.Ct. Op at ROA.2035). Beyond the Attorney General's own bald assertion, the Statute's reference to "premises" does not limit coverage to only private ones.

In fact, the statutory amendment specifically expands the critical infrastructure law to broadly cover pipelines, which stretch across over 125,000 miles[13] and which are far from limited to private property. Indeed, the system of pipelines across Louisiana stretches through or under virtually every major highway, railroad, and sidewalk, as well as navigable waterways. Furthermore, obviously a public entity can act as an "owner" or "custodian" of the other types of facilities named in §14:61(B)(1), cementing that the Statute's plain terms are not limited to private actors on private land.[14]

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[13] While the Attorney General objects to the admissibility of "much of" Plaintiffs' evidence, ECF 64, FN 1, the evidence Plaintiffs reference is admissible under the public records exception pursuant to Fed. R. Evid. 803(8), as explained in briefing below. ROA.1859.

[14] Many of these forms of critical infrastructure are publicly owned in Louisiana. For example, water treatment facilities are often publicly owned. *See, e.g.*, NING LIU ET AL., CONTRIBUTIONS OF STATE AND PRIVATE FOREST LANDS TO SURFACE DRINKING WATER SUPPLY: LOUISIANA 103-04 (2020), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs248/gtr_srs248_LA.pdf; *id.* at 266-68.UNC ENVIRONMENTAL FINANCE CENTER, NAVIGATING LEGAL PATHWAYS TO RATE-FUNDED CUSTOMER ASSISTANCE PROGRAMS: A GUIDE FOR WATER AND WASTEWATER UTILITIES 56 (2017), https://efc.sog.unc.edu/wp-content/uploads/sites/1172/2021/06/Nagivating-Pathways-to-Rate-Funded-CAPs.pdf. Similarly, many ports are also publicly owned in Louisiana. *See* LOUISIANA LEGISLATIVE AUDITOR, PROFILES OF LOUISIANA'S PUBLIC PORTS (2024), https://app.lla.la.gov/publicreports.nsf/0/8821f5584897978386258ab50064a7f9/$file/00003bbab.pdf. Finally, Louisiana also has publicly owned water control structures. *See* State of Louisiana, *State Agencies with Regulatory Authority for Water Management*, DEP'T OF ENERGY & NAT. RES., https://www.dnr.louisiana.gov/index.cfm/page/912 (last accessed Oct. 16, 2024).

Similarly, the Attorney General has no basis to assert that the key term "authorized person" is limited to a "delegee" of a private landowner or "owner" of a non-public forum. ECF 64 at 37-38. Applying the "tried and true" canons of *noscitur a sociis* and *ejusdem generis*, *see Koutsostamatis*, 956 F.3d at 306, "authorized person" should be read in the context of the words immediately preceding: "owner, lessee, or custodian," which encompass public ownership. *See, e.g.*, La. R.S. §14:329.4 (2023) (covering custodians of public property, including property open to the public). A government agency acting as an "owner, lessee, or custodian" of public lands also has the power to exclude others. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (citations omitted)). As such, "authorized person" includes law enforcement authorized by the State, acting as custodian, to exclude the public from pipeline premises, including those that run through sidewalks, highways, parks, or waterways. *See* La. Civ. Code Ann. Art. 450 (noting that "public things" include "streets and public squares" as well as "navigable water bodies" and "are *owned* by the state or its political subdivisions in their capacity as public persons" (emphasis added)).

Second, the Statute specifically includes a carve-out for "legitimate matter[s] of public interest" covered by the Constitution, La. R.S. §14:63(D)(1). The carve-

out cannot save the Statute on the merits, and if anything it introduces the kind of discretion that makes the Statute impermissibly content based. *See infra* Section IV.B(1). But, for purposes of understanding the Statute's scope, the carve-out by *necessity* demonstrates the Statute cannot be limited to private property and non-public fora, because there would be no need to statutorily protect speech in areas where uninvited protesters are not generally allowed to begin with.[15] The Attorney General's attempt to disregard the carve-out in understanding its coverage (while stressing its importance of in defending the merits) violates the rule against surplusage and "makes nonsense of the statute." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., writing for plurality).

Given the glaring difference between the Statute's plain meaning and the proposed, complex limiting construction, this Court should resist the Attorney General's invitation to redraft the Statute. No ordinary citizen would set aside the plain meaning of the Statute and unearth, through a complex understanding of state property law, the imagined hidden meaning the Attorney General proposes. The Constitution places the burden on the legislature to draft criminal statutes clearly, rather than on citizens who will naturally chill their protected expression in the manner the oil and gas industry intended.

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[15] The Attorney General took the position that the Statute applied to public fora but was saved substantively by the carve-out, in defending the Statute below, *see* ROA.1784, until the district court came up with the limited construction the Attorney General has since latched onto.

Even as Plaintiffs firmly believe the Statute should be re-written, as between a limiting construction of the Statute and a ruling on the merits that, as written, the Statute does not violate the Constitution, Plaintiffs recognize that a limiting construction would do less constitutional harm.[16] But, for the reasons set forth above, this Court should resist the invitation to redraft the Statute and should instead ask the legislature to repair the Statute's infirmities in the "constitutionally prescribed way." *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. at 441 (Gorsuch, J., dissenting).

IV. THE STATUTE VIOLATES THE FIRST AMENDMENT.

Because the Attorney General's limiting construction is unreasonable, the Statute will continue to chill protected First Amendment activity on public property. And even if it were limited to private property and non-public fora, its vagueness as to what constitutes pipeline "premises" would still chill First Amendment rights of private landowners on their own property.

The Attorney General suggests, relying on cases outside the First Amendment context, that facial challenges are generally disfavored, *see* ECF 64 at 34-36, failing to acknowledge that the standards for First Amendment facial challenges are less

[16] However, as discussed in Plaintiffs' Opening Brief, at 25, 28-31, and Section II, *supra*, limiting the Statute's reach to private property alone would not cure the vagueness problems resulting from the 2018 amendments, and any limiting construction must address that concern as well.

demanding because of its paramount goal: to "provide[] breathing room for free expression." *United States v. Hansen*, 599 U.S. 762, 769 (2023). In a First Amendment facial challenge, the court must "explore the laws' full range of applications—the constitutionally impermissible and permissible—and compare the two sets." *Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2398 (2024). A court will deem a statute overbroad where "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010).

Here, first, the harsh penalties imposed impermissibly chill and restrict a vast expanse of protected activity, as compared to the State's legitimate—and independently achievable—interest in preventing "damage" to pipeline premises, rendering the Statute substantially overbroad on its face. Second, the Statute on its face permits discrimination in enforcement based on content and was motivated by a desire to restrict pipeline protests, rendering it content based and invalid under the corresponding strict scrutiny analysis. Third, even if the Statute is deemed a content-neutral time, place or manner restriction, it nevertheless is insufficiently narrowly tailored and fails intermediate scrutiny. Finally, in the event that the Court accepts the proposed limiting construction, the Statute would still violate the First Amendment rights of private property owners, who retain the right to host speech

on their private land, especially given the Statute's vagueness, and resulting overbreadth, as to what constitutes a pipeline "premises."

A. The Statute Is Unconstitutionally Overbroad Because It Harshly Criminalizes More Expression than Necessary to Protect Any Legitimate State Interest in Property Damage and Because it Impermissibly Shrinks Physical Space for Public Expression.

The threat of enforcement of an overbroad law "may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions," improperly depriving society of "an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). By acknowledging a law's overbreadth, courts "reduce[] these social costs caused by the withholding of protected speech." *Id.*

1. The Statute's Harsh Penalties Chill Far More Speech than Necessary to Achieve an Asserted Interest in Preventing "Damage" to Pipelines

The Attorney General defends the critical infrastructure amendments—and the vast restrictions on expression—as necessary to prevent "damage" to pipelines, ECF 64 at 43-44, even though separate, independent statutes already prohibit trespass upon or damage to pipelines. *See, e.g.*, La. R.S. §14:61.1 (criminal damage to a critical infrastructure); La. R.S. §14:63.3 (criminal entry on or remaining in places or on land after being forbidden). Yet the novel and harsh penalties imposed by the Statute improperly restrict a vast expanse of protected activity, as compared to the State's legitimate—and independently achievable—interest in preventing

"damage" to pipeline premises, rendering the Statute substantially overbroad on its face. *See Stevens*, 559 U.S. at 473 (holding that a law is overbroad when "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep"). The Statute does not, in fact, specifically regulate "damage" at all and fails to mention this word anywhere in its text.

If the Statute does deter damage, it does so by including within its sweep protected First Amendment activity and lawful presence on traditional public fora. The Statute thus displays the "vice of an overbroad statute" this Court has warned against: that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *CISPES (Comm. in Solidarity with People of El Salvador) v. F.B.I.*, 770 F.2d 468, 472 (1985). Indeed, the "government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); *see also id.* at 245 ("The prospect of crime . . . does not justify laws suppressing protected speech."). Moreover, "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Prior to the amendment, legitimate speakers held legal, peaceful demonstrations on both public and private property near pipelines that resulted in no damage. ROA.32 [¶¶ 7, 9, 39, 103, 107]. Now, the overbroad amendment to the critical infrastructure Statute chills speech because of its vagueness and its new, heightened penalties for trespass—up to five years' imprisonment including hard labor—which impermissibly deters peaceful protesters who fear that one foot over an invisible line could result in a felony charge and prison time. ROA.41-43 [¶¶ 26-29, 104, 108]. *See Ashcroft*, 535 U.S. at 244 (emphasizing that harsh penalties mean few legitimate speakers would risk expression in or near the uncertain reach of the law). The amended Statute imposes novel and particularly harsh penalties that by design, and certainly in effect, chill protected speech.

2. The Amended Statute Impermissibly Criminalizes a Substantial Amount of Protected Expressive Activity by Vastly Shrinking the Physical Space Available for Public Expression.

In *United States v. Grace*, 461 U.S. 171, 180 (1983), the Supreme Court held that the legislature cannot transform the character of traditional public fora by simply redesignating them as non-public fora and effectively closing them to expressive activity. The legislature "may not, by its own *ipse dixit*, destroy the 'public forum' status of streets and parks which have historically been public forums. . . ." *Id.* at 180 (public sidewalks surrounding the Supreme Court could not be closed to the public for expressive activities).

In violation of *Grace*, the legislature attempts to redesignate the vague "premises" of pipelines—including public highways, waterways and parks—as "critical infrastructure" and therefore seeks to transform those properties into non-public fora, where mere peaceful presence or expression subjects a person to severe penalties. Such an attempted reclassification constitutes an overbroad restriction on communications in quintessential traditional public fora, where the government may not prohibit all communicative activity. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. at 45. Indeed, the Statute's creative workaround, by silently redesignating public fora as non-public fora, effectively quashes anti-pipeline protests where they are most impactful and most likely to occur.

B. The Amended Statute Is Impermissibly Content Based and Fails Strict Scrutiny.

1. The Amended Statute Is Content Based On Its Face And Is Therefore Subject To Strict Scrutiny.

A law is content based if "it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (citing *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984) (determining that the regulation "is defined solely on the basis of the content of the suppressed speech" because "enforcement authorities must necessarily . . . determine whether the views expressed concern 'controversial issues of public importance'")). The amended

Statute creates the "specter of content and viewpoint censorship" by permitting the "unbridled discretion" of a government official, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988), to determine whether a speaker "express[es] ideas or views" that are "*legitimate* matters of public interest." *See* La. R.S. §14:61(d)(1) (emphasis added).

The Attorney General largely ignores the danger of this provision, focusing instead on §14:61(d)(1)'s authorization to engage in "lawful assembly" or "a position protected by the United States Constitution"—what she refers to as the "carve-out." Those phrases fail to save the Statute, since they offer law enforcement the same unbridled discretion to decide subjectively what constitutes "lawful" assembly or speech "protected by the [] Constitution," in addition to what constitutes "legitimate matters of public interest," as Plaintiffs pointed out in their Opening Brief. ECF 51 at 18. And the overall vagueness of the Statute, *see supra* Section II, leaves unclear what constitutes a pipeline "premise," and thus whether protests above underground critical infrastructure remain "lawful" or become a violation of the Statute. Further exacerbating the deficiency in the "carve-out" is the legislature's choice to elevate for protection one category of speech: that related to "any labor dispute between any employer and its employee." That impermissibly puts the legislature's thumb on the content-of-speech scale. *See Chicago v. Mosley*, 408 U.S. 92, 96 (1972). It also adds confusion by expressly linking "lawful" and "legitimate"

speech to labor disputes, suggesting to law enforcement reviewing this long, vague statutory subsection, that other forms of speech are less worthy of protection.

Ultimately, the Attorney General's heavy reliance on the "carve-out" cannot save the Statute. After all, even "exact expression[s]" of a legislative body's "intent to preserve First Amendment freedoms . . . cannot substantively operate to save an otherwise invalid statute." *CISPES*, 770 F.2d at 474.

2. Even if the Statute Appears Facially Content-Neutral, It Is Nonetheless Content Based And Subject To Strict Scrutiny.

If the Statute is deemed facially content neutral, it may still be content based "[i]f there is evidence that an impermissible purpose or justification underpins [it]." *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022). Indeed, in *Turner Broadcasting System, Inc. v. F.C.C.*, the Supreme Court decided whether the regulations at issue were content based by looking to "Congress' purpose," including statutory findings, Congress' description of the Act's purpose, and the "design and operation of the challenged provisions." 512 U.S. 622, 645, 646-48; *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015) ("In that context [of a facially content-*neutral* ban], we looked to governmental motive."); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011) (finding the statute content based "on its face" and also finding evidence of an impermissible legislative motive). Here, the amended Statute is content based, as the Louisiana legislature adopted the amendments because, as explained, *see* ROA.1001-1005 [¶¶10-35], it

sought to limit increased protest activity against pipeline expansion, *i.e.*, "disagreement with the message [the speech] conveys." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. at 167.

In addition, the amended Statute intentionally and effectively strips expressive conduct of its First Amendment-protected status by way of forum redesignation, by labeling vast swaths of the state's territory as critical infrastructure. That intentional restriction of speech activity should subject the Statute to strict scrutiny as well. After all, where a legislature intentionally shrinks the space where pipeline-speech could occur, that decision reflects the legislature's impermissible attempt to control the content of speech and shut down pipeline-related protests. And "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Texas v. Johnson*, 491 U.S. 397, 415 (1989).

3. As Amended, the Content-Based Statute Fails Strict Scrutiny.

Content based regulations are subject to strict scrutiny, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015), requiring a showing that the Statute is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). As demonstrated in Section IV(A) (overbreadth), *supra*, and Section IV(C) (narrow tailoring), *infra*, the 2018 amended

Statute fails strict scrutiny because—assuming protecting pipelines from damage is a compelling interest—it fails to provide the least restrictive means of doing so.

C. Even if It Is Deemed Content Neutral, the Statute Fails Intermediate Scrutiny Because It Is Not Narrowly Tailored.

Even if the Statute is deemed content neutral, it must still survive intermediate scrutiny, which requires that the law be "narrowly tailored to serve a significant governmental interest." *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. at 76; *see also McCullen v. Coakley*, 573 U.S. at 476-77 (statute that is directed at conduct but nevertheless "incidentally regulates the place and time of protected speech" is subject to intermediate scrutiny). The Statute punishes pipeline-related speech in places it is most important and does so in a manner wildly disproportionate to any legitimate government interest, where alternative, tailored conduct prohibitions sufficiently advance those government interests. As such, and for the same reasons it is overbroad, the Statute violates the Legislature's obligation to narrowly tailor regulations that affect speech.

1. The Amended Statute Is Not Narrowly Tailored to Address Damage.

Even though the Statute nowhere mentions "damage" (or even an "intent to damage"), the Attorney General claims the Statute's remarkable sweep is designed ultimately to prevent such narrow harm. ECF 64 at 43. But the mere possibility of damage cannot justify the suppression of protected speech. *Ashcroft*, 535 U.S. at 245

("The prospect of crime, however, by itself does not justify laws suppressing protected speech."); *see also id.* at 253 ("The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" (citing *Hess v. Indiana,* 414 U.S. 105, 108 (1973))); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (holding that the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency").

Critically, the Statute also deprives plaintiffs and others of "the most effective means" of relaying their message, *McCullen*, 573 U.S. at 487, by preventing them from protesting near sites of pipeline construction—geographical spaces intrinsic and crucial to their speech. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (emphasizing the importance location can have for a speaker's message).

Ultimately, the Statute's omission of any reference to or requirement of damage, its remarkable overbreadth, and the availability of prosecution under the existing criminal-damage-of-a-critical infrastructure law, La. R.S. §14:61.1, makes plain that the Statute seeks to and does suppress peaceful expression relating to pipelines, far beyond what is necessary to prevent damage.

2. The Amended Statute Is Not Narrowly Tailored.

The Attorney General imagines Plaintiffs only seek a right to trespass. Not so. Plaintiffs here, like those in *McCullen*, "do not claim a right to trespass on [others'] property . . . . They instead claim a right to stand on the public sidewalks . . . . Before the [statute], they could do so. Now they must stand a substantial distance away." *McCullen*, 573 U.S. at 490. Moreover, the Statute reaches far beyond trespass by criminalizing, via felony penalty, mere lawful presence on public property where protestors have a right to be. The Statute is no way tailored to prevent trespass.

The Attorney General baldly asserts, with no creditable analysis, that "pre-existing laws were not sufficient to protect property rights and critical infrastructure." ECF 64 at 45. However, "[g]iven the vital First Amendment interests at stake, it is not enough for [the state] simply to say that other approaches have not worked." *McCullen*, 573 U.S. at 496. In any event, the purported interests here "can readily be addressed through existing" statutes. *Id.* at 492. It is plain that Louisiana does have more tailored mechanisms to regulate trespass, short of the overly broad and punitive Statute. *See, e.g.*, La. R.S. §14:103 (2023) (criminalizing disturbing the peace on public property); La. R.S. §14:63.3 (criminalizing entry on or remaining on private property after being forbidden). The State can also impose civil remedies for trespass or enact civil statutes designed to target trespass. *McCullen*, 573 U.S. at 491-92 (showing the law was not narrowly tailored because there existed alternative

means to enforce violations through criminal and civil penalties or civil injunctive actions). The Statute is not nearly precise enough to save it from First Amendment infirmities.

The Attorney General relies on *Virginia v. Hicks*, 539 U.S. 113 (2003), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), to argue that the Statute is concerned with the non-expressive conduct of pure trespass and damage to critical infrastructure. This argument is unavailing for several reasons.

First, the Attorney General's misplaced reliance on the run-of-the mill housing trespass policy upheld in *Hicks* obfuscates critical distinctions and mischaracterizes the facts. *Hicks*, unlike this case, did not examine an overbroad statute; instead, it scrutinized a housing authority's *policy* regulating its streets. *Hicks*, 539 U.S. at 116. The *Hicks* court emphasized—and the Attorney General here neglects to mention—that, under the policy, "entering for a First Amendment purpose is not a trespass." *Id.* at 123. Indeed, in *Hicks*, the Court found that the appellant was not engaged in expressive activity when asked to leave. *Id.* at 123. Here, in contrast, the amended Statute does apply to—and has been used against—people engaged in constitutionally protected activity and speech in a traditional public space. See ROA.55 [¶76]. Thus, rather than merely regulate trespass, the legislature itself "trespasses upon First Amendment protections." *Members of City*

Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 824 (1984) (Brennan, J., dissenting).

Similarly, the Defendant's appeal to *Clark*—which upheld a regulation barring camping in national parks as applied to individuals seeking to protest homelessness—is inapposite. In *Clark*, the areas to which plaintiffs sought access had never permitted camping. 468 U.S. at 290. Here, in contrast, plaintiffs merely seek to continue exercising their free speech rights in areas long designated for that purpose—namely, traditional public fora under which pipelines run, including public parks and sidewalks. Moreover, plaintiffs in *Clark* were still able to camp in other parks, *see id.* at 295, whereas in this case, plaintiffs are subject to harsh criminal penalties for expressive conduct in an indeterminable area near *any* pipeline—which, in Louisiana, could be almost anywhere.

In sum, even if the amended Statute is considered to be content neutral, it fails intermediate scrutiny and thus violates the First Amendment.

D. The Amended Statute Fails the *O'Brien* Test.

The district court and Attorney General erroneously urge that the four-part framework from *United States v. O'Brien*, 391 U.S. 367 (1968), should apply when analyzing content-neutral restrictions on expressive activities. But the Supreme Court has "limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free

expression'" and "highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule." *Texas v. Johnson*, 491 U.S. 397, 407 (1989).

Yet, even if the Statute is considered to be content neutral, and therefore subject to the *O'Brien* framework for restrictions on expressive activities, the Statute fails to satisfy two out of the four required *O'Brien* factors:

> [W]e think it clear that a government regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

The Statute fails the last two factors and thus fails the *O'Brien* test. First, even if a statute "contains no explicit content-based limitation," it may nevertheless be "related to the suppression of free expression." *See United States v. Eichman*, 496 U.S. 310, 315 (1990) (noting that the government's interest in protecting privately owned flags' "physical integrity" rested upon a "desire to preserve the flag as a symbol for certain national ideals"). For the same reasons the Statute is content based, it must be deemed related to the "suppression of free expression" both on its face and in its broad impact on expressive activity. *See supra* Section IV(B). Indeed, Plaintiffs' ability to protest on pipeline premises has been impacted.

Second, as the thorough discussion of overbreadth, *see supra* Section IV.A, and narrow tailoring, *see supra* Section IV.C, demonstrate, the amended Statute certainly prohibits far more speech than essential to further the Defendants' asserted governmental interests of regulating trespass or damage.

E. The Statute Infringes on the First Amendment Rights of Private Landowners and Protestors with Permission to Protest on Private Property.

Even under the Attorney General's proposed limiting construction, the Statute also violates the free speech rights of private landowners protesting or associating on their own land if they or their guests demonstrate on or near the undefined premises of a pipeline running through their property. *See Spence v. Washington*, 418 U.S. 405, 411 (1974) (holding flag misuse statute unconstitutional as applied to an individual engaging in First Amendment activity with and on his own property).

Additionally, the Statute applies to protestors who are protesting on private property with the permission of property owners and all co-owners. Though the district court correctly notes that "there is no First Amendment right to trespass on private property to conduct protests," ROA.2035, Plaintiffs challenge facially the Statute's overbroad application to First Amendment protest activity *sanctioned* by property owners and all relevant co-owners. The Statute infringes on protestors' rights to expression, as well as on the rights of property owners to association and to host and hear political speech, thus violating the basic tenet that property owners

have a right to use and enjoy their own property as they wish. *See, e.g.*, *Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) ("[W]hen a private entity . . . decides to host political speech, its First Amendment protections are at their apex.").

V. SOVEREIGN IMMUNITY DOES NOT BAR AN EQUITABLE SUIT AGAINST THE ATTORNEY GENERAL, WHO WIELDS SUPERVISORY AUTHORITY OVER LOCAL OFFICIALS TASKED WITH ENFORCEMENT OF THE UNCONSTITUTIONAL STATUTE.

In determining whether the *Ex parte Young* exception to sovereign immunity applies to suits against state officials, "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *K.P. v. LeBlanc,* 627 F.3d 115, 124 (5th Cir. 2010) (citing *Ex parte Young*, 209 U.S. 123, 157 (1908)). A "scintilla of enforcement by the relevant state official with respect to the challenged law will do." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (internal quotations and citations omitted).

The Attorney General glosses over the fact that, pursuant to statute, she "*shall* exercise supervision over all district attorneys in the state," La.C.Cr.P. art. 62(A) (emphasis added), and that "*[s]ubject to the supervision of the attorney general*," district attorneys have "entire charge and control of every criminal prosecution

instituted or pending in [their] district, and determine[] whom, when, and how they shall prosecute." La.C.Cr.P. art. 61 (emphasis added). The district court also failed to reckon with this key fact. ROA.604-06.

In fact, in the lead case the Attorney General relies upon, this Court held that the Texas Secretary of State was a proper defendant under the *Ex parte Young* exception because, pursuant to the Texas election code, her duties included "being willing to 'assist and advise' local officials," "issuance of directives and instructions," and the "authority to compel or constrain local officials" with regard to actions she would take over a voter form, as compared to the Texas Attorney General who had only a "general duty to enforce the law." *Tex. Democratic Party,* 978 F.3d at 180-81.

Here, the Louisiana Attorney General acknowledges that her office "gives advice to district attorneys and law enforcement and can conduct or assist in prosecutions," ECF 64 at 33 (as provided for in the Louisiana Constitution, Art. IV, § 8), but she fails to address the fact of her mandatory supervisory authority over all district attorneys in the state. The Attorney General also attempts to minimize the fact that she is specially designated by statute, *see* La. R.S. §29:725.1, to serve as legal advisor to the Governor's Office of Homeland Security and Emergency

Preparedness, which has the authority and mandate to protect critical infrastructure against threats. ECF 51 at 45-46.[17]

Here, the Attorney General has multiple, sufficient connections to the enforcement of the Statute, including the authority to advise, assist, and "compel or constrain" district attorneys to enforce, or not enforce, the law, *see Tex. Democratic Party,* 978 F.3d at 181*,* in addition to her own authority to undertake prosecutions of violations of the law in certain circumstances. La. Const. art. IV, §8 ("for cause" when authorized by a court with original jurisdiction).

As has been apparent throughout the litigation, Plaintiffs seek both declaratory and injunctive relief. In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Supreme Court recognized an important distinction between these forms of relief that emerged in the wake of *Ex parte Young*. The Court noted that the purpose of the Declaratory Judgment Act, 28 U.S.C. 2201, was to provide "a milder alternative" to the "strong medicine of the injunction" in order to "test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable," *id.* at 466-67, in ways that would have "a less intrusive effect on the administration of state criminal laws." *Id.* at 469.

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[17] The Attorney General suggests that Plaintiffs forfeited this argument even though Plaintiffs raised this in briefing before the district court. ROA.751-52. Even if they had not, the issue is a matter of statutory law that the Court may review at any point. As to factual matters, an "appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001).

CONCLUSION

The Court should declare the 2018 amendment unconstitutional. However, should the Court find no constitutional infirmity in the Statute as written, it should affirm the district court's limiting construction and further limit the amendment to visible and above-ground structures and marked right-of-ways, so as to mitigate the risk the Statute's plain terms pose to First Amendment and Due Process rights.

Respectfully submitted,

/s/Pamela C. Spees
Baher Azmy
Pamela C. Spees
La. Bar Roll No. 29679
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel. & Fax (212) 614-6431
pspees@ccrjustice.org
bazmy@ccrjustice.org

William P. Quigley
La. Bar Roll No. 7769
Professor Emeritus
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Tel. (504) 710-3074
quigley77@gmail.com

Attorneys for Plaintiffs[*]

[*] Counsel wishes to acknowledge the important contributions to the research and preparation of this brief by New York University law students, Byul Yoon and Chloe Bartholomew.

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's October 17, 2024 order (Doc. 84-1) because it contains 9,975 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman for text and 12-point Times New Roman for footnotes) using Microsoft Word (the same program used for the word count).

/s/Pamela C. Spees
PAMELA C. SPEES

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on October 25, 2024, this filing was served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users in this appeal.

/s/Pamela C. Spees
PAMELA C. SPEES