

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

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

x

Civil Action No. 6:20-cv-00983

Plaintiffs,

JUDGE ROBERT R. SUMMERHAYS

v.

MAGISTRATE JUDGE
CAROL B. WHITEHURST

JEFF LANDRY, in his official capacity as Attorney General of Louisiana; BO DUHÉ, in his official capacity as District Attorney of the 16th Judicial District Attorney’s Office; RONALD J. THERIOT, in his official capacity as Sheriff of St. Martin Parish,,

Defendant.

X

**PLAINTIFFS’ REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE
TO FILE SUPPLEMENTAL COMPLAINT WITH REQUEST TO ADD OR
INCORPORATE FACTS OFFERED BY DEFENDANTS**

Preliminary Statement

Defendants have wrongly accused undersigned counsel and Plaintiffs Sharon Lavigne and RISE St. James of impropriety in seeking to supplement the complaint in this matter. Dkt. 46, pp. 9-10. In doing so, they have offered up additional facts that further strengthen Plaintiffs’ claims and Plaintiffs now request that the other proceedings, pleadings, and rulings Defendants introduced in their opposition be incorporated into the complaint.

The new facts pled in the supplemental complaint, along with those offered by Defendants, further illustrate the law’s unconstitutional vagueness in violation of the Due Process Clause and its interference with First Amendment rights, including the rights to

expression and free exercise of religion. The motion to supplement was timely filed, would not cause undue delay, and is not futile.¹

LAW AND ARGUMENT

I. Defendants Offer Additional Facts Which Further Support Plaintiffs' Claims and Their Motion to Supplement the Complaint.

Defendants have accused undersigned counsel and Plaintiffs Sharon Lavigne and RISE St. James of “jurisdictional manipulation” and “claim splitting” in seeking to supplement the complaint:

Plaintiffs' jurisdictional manipulation is yet another reason to deny supplementation. After filing one suit based on the Buena Vista burial site in federal court, Plaintiffs filed another suit in state court, intimated they are entitled to access the site under Louisiana jurisprudence, and obtained a TRO on that basis. Plaintiffs then dismissed their state court suit, and now seek to recast that claim as a constitutional claim and append it to this case. Plaintiffs seek to do so without joining the affected property owner as a defendant. Avoiding such claim-splitting and multiplicity of litigation is yet another reason to deny supplementation.

Def. Br., dkt. 46 at pp. 9-10. It is difficult to fathom how such a scheme would work, but the proceedings Defendants reference further support Plaintiffs' claims and their motion to supplement the complaint.

A. *Case 1. The Temporary Restraining Order to Allow a One-Hour Prayer Service on former Plantation Cemetery on Juneteenth.*

One of the cases Defendants reference arose when Plaintiffs Lavigne and RISE St. James were forced to seek a temporary restraining order to hold a prayer service and ceremony on

¹ Subsequent to Plaintiffs' Motion for Leave to Supplement the Complaint filed on July 6, 2020, and the filing of Defendants' Opposition on July 27, 2020, which were pending before the Magistrate Judge, the District Judge issued a ruling on the Defendants' Motions to Dismiss on July 30, 2020, in which he dismissed the claims against the Attorney General and transferred the case from the Middle District to the Western District. Dkt. 48. He denied Defendants' motions in all other respects, which included motions as to standing, abstention, and failure to state a claim. *Id.*

Juneteenth on the Buena Vista Plantation Cemetery, which, as noted in the proposed Supplemental Complaint, is believed to contain graves of people once enslaved there. Supp'l Compl., dkt. 45-2 at ¶¶ 22, 99-106. *See also*, Verified Petition for Temporary Restraining Order, annexed as Exhibit 2 to Defendants Opposition to Motion to Supplement, dkt. 47-2. Lavigne and RISE St. James did so not because they wanted to protest and “trespass” without consequence, as Defendants repeatedly suggest, *see, e.g.*, dkt. 46 at 1, 2, but because they wanted to freely exercise their religion and commemorate an important spiritual and cultural holiday at this newly discovered site without fear of prosecution under La. R.S. 14:61 because a pipeline runs through the graveyard, rendering it critical infrastructure. *See* Verified Petition, dkt. 47-2 at ¶¶ 2-6, 22-32 (describing significance of burial site, pipeline running through it, denial of access, attempts to get agreement for access for the event, threats of arrest, fear of prosecution under La. R.S. 14:61).

When it granted the restraining order, the state court ruled that Lavigne and RISE St. James would suffer “immediate and irreparable injury” to their “constitutional and legal rights” if not allowed access to the cemetery “to conduct a prayer and ceremony for one hour on June 19, 2020 (Juneteenth).” Temporary Restraining Order issued June 15, 2020, annexed to Defendant’s Opposition as Exhibit. 3, dkt. 47-3. The state court subsequently upheld its issuance of the TRO when it denied a Motion to Dissolve brought by the Defendant in that case. *See* Judgment Denying Motion to Dissolve Temporary Restraining Order, annexed to Defendant’s Opposition as Ex. 4, dkt. 47-4. The Defendant in that case then sought an emergency writ from the Louisiana Fifth Circuit Court of Appeal to prevent Lavigne and RISE St. James from holding the prayer service at the cemetery the following morning. The Court of Appeal denied that writ

application on the evening of June 18, 2020, and the event was finally allowed to proceed as planned on Juneteenth. *See* Writ Denial Annexed to Declaration of Pamela Spees, as Ex. A.

Defendants claim that “Plaintiffs then dismissed their state court suit, and now seek to recast that claim as a constitutional claim and append it to this case.” Dkt. 46 at 10. This allegation is difficult to comprehend – the state court suit was successful. The prayer ceremony was held on Juneteenth and afterward the parties jointly agreed to dismissal of the matter because it was moot. Spees Declaration, ¶ 5. Soon thereafter, Plaintiffs sought to amend their complaint in this case with the recent events as they further illustrate the Due Process and First Amendment problems of the 2018 amendments to the critical infrastructure law.

In attempting to cast counsel and Plaintiffs as manipulating this and other courts to suggest something nefarious about supplementing their complaint, Defendants help make Plaintiffs’ case: The fact that Lavigne and RISE St. James had to go to state court to get an order allowing them to pray and commemorate their ancestry for one hour on Juneteenth on a cemetery with a pipeline running through it to avoid being prosecuted for violating La. R.S. 14:61 only further strengthens their claims in this matter. Plaintiffs thus also request leave to add or incorporate these proceedings, pleadings and rulings to the Proposed Supplemental Complaint.

Case 2. Judicial Review of Agency Action

Defendants also refer to a case brought by RISE St. James and others challenging permits granted by the U.S. Army Corps of Engineers under the Clean Water Act to the company that owns and intends to develop the land where the burial ground was discovered. The complaint in that matter is annexed to Defendant’s Opposition Brief as Exhibit 1, dkt. 47-1, and speaks for itself. It was filed on January 15, 2020, and seeks judicial review of agency action. Because a federal permit was involved, the National Historic Preservation Act requires that a consultation

be undertaken to determine if historic properties would be impacted. Plaintiffs in that case challenge the adequacy of the Army Corps' consultation with regard to the late discovered burial site. *See id.* It has no bearing whatsoever on Plaintiffs' Motion to Supplement their complaint in this case challenging the constitutionality of Louisiana's law prohibiting unauthorized entry on critical infrastructure.

II. Supplementing the Complaint Is Timely, Will Not Cause Undue Delay, Further Demonstrates the Unconstitutionality of La R.S. 14:61, and Is Not Futile.

A. *Plaintiffs' Motion to Supplement is timely.*

Defendants suggest "Plaintiffs inexplicably delayed supplementing while pursuing related claims both federal and state court." Dkt. 46 at 9. Inexplicably, Defendants believe Plaintiffs should have supplemented the complaint with these events before they occurred. Plaintiffs' motion was filed a little more than two months after Sharon Lavigne and RISE St. James were first officially denied access to the cemetery with a pipeline running through it, making their presence on it subject to prosecution under the critical infrastructure law, and just over two weeks after a state court acknowledged and enforced their right to access the property without interference when it granted their request for a temporary restraining order. *See* Supp'l Complaint, dk. 45-2 ¶¶ 105-106; Temporary Restraining Order, June 15, 2020, dkt. 47-3; Judgment Denying Motion to Dissolve Temporary Restraining Order, June 18, 2020, annexed to Defendant's Opposition as Ex. 4, dkt. 47-4.

The operative facts giving rise to the Motion to Supplement in this litigation had not occurred before then, so Plaintiffs could not have brought this motion on January 15, 2020, when RISE St. James, along with others, filed for judicial review of federal agency action.²

² Defendants also fail to point out certain key facts in the lead cases they cite for the proposition that Plaintiffs waited too long to supplement their complaint. In *Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998), the case had been going on for a *decade* and the court had already granted motions for partial summary judgment when

B. Supplementing the Complaint Would Not Be Futile.

Defendants also suggest that supplementing the complaint would be futile because the Free Exercise claim is foreclosed.³ Dkt. 46 at 6-8. Even if that were true, which it is not, the new factual allegations are relevant to the other existing claims in this case – i.e. that the statute is void for vagueness in violation of the Due Process Clause (claim I) and other First Amendment rights (claims II and III) as well as violations of the Louisiana Constitution (Claims IV and V).

Beyond that, Defendants mischaracterize the allegations in this matter and conflate the jurisprudence regarding the question of the level of scrutiny to be applied with whether a claim is plausibly stated under any level of scrutiny. First, in asserting that trespass laws “generally do not raise Free Speech concerns,” dkt. 46 at 6, Defendants ignore the fact that the statute at issue in this matter is in fact content-based, as discussed more fully in Plaintiffs’ Opposition to Defendant Bofill Duhé’s Motion to Dismiss. *See* Dkt. 36 at 7-9. As a result, the law may be justified only if the state proves that it is narrowly tailored to serve a compelling state interest. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015). Defendants also overlook the fact that there is a strict review for vagueness challenges, particularly when First Amendment rights are implicated. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-

plaintiffs sought to supplement or amend their complaint. Even then, those plaintiffs failed to show that any transaction, occurrence, or event that had transpired in the *ten years* since they filed their original complaint. *Id.* In *Lewis v. Knutson*, 699 F.2d 230, 239-40 (5th Cir. 1983), the matter had already been set for trial, then dismissed when plaintiff failed to show, then reinstated at which point the plaintiff was allowed to amend the complaint. Defendants moved to dismiss the amended complaint, the motion was converted to one for summary judgment and granted by the Court. It was only then that Plaintiff sought to supplement his amended complaint and the court denied the motion. In stark contrast to the cases Defendants cite, this litigation is still in the early stages, no scheduling order is in place, and Plaintiffs’ promptly sought to supplement their complaint with the recent events soon after they occurred.

³ Defendants also fault Plaintiffs for not suing the private landowner in this challenge to the constitutionality of the 2018 amendments to Louisiana’s critical infrastructure law even though purely private entities or individuals acting in purely private capacities have no authority to make or enforce the laws. *See, e.g., Mongrue v. Monsanto*, 249 F.3d 422 (5th Cir. 2001) (private entity not liable for unconstitutional taking absent express delegation of state’s eminent domain authority).

499 (1982); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432 (1963) (“standards of permissible statutory vagueness are strict in the area of free expression”).

Irrespective of what standard is applied to the Free Exercise claim, the 2018 amendments to the Critical Infrastructure law operate to interfere with Plaintiffs’ free exercise of their religion, in conjunction with other fundamental constitutional rights, without even a rational basis. *See e.g.*, Supp’l Complaint, dkt. 45-2 at ¶¶ 22, 27, 99-107, 146-150; Verified Petition for Temporary Restraining Order, dkt. 47-2. In asserting that the Free Exercise claim is foreclosed, Defendants rely on a case which is inapposite. Dkt. 46 at 8. In the instant matter, Plaintiffs Lavigne and RISE St. James desired to visit a recently discovered cemetery and commemorate their ancestry with a prayer service on Juneteenth. Dk. 45-2 ¶¶ 99-107. They had to seek a court order to do so without fear of prosecution under La. R.S. 14:61, a felony punishable by up to five years in prison. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the plaintiffs sought to hand out religious literature at a state fair, a public forum, and challenged a rule requiring them to do so only in a fixed location, which was a misdemeanor offense. That kind of time, place, and manner restriction is very different from a prayer service at a cemetery, which is a site deemed so “unique,” “sacred,” and “historically significant,” that the Louisiana Attorney General advises that “the facilitation of access” to them is so important that private property owners are bound by special laws.⁴

III. The Attorney General Has Multiple Constitutional and Statutory Obligations with Respect to the Subject Matter in This Case.

Defendants again argue that the Attorney General is an improper party here, but the recent case they site for support helps illustrate exactly why he is a proper defendant.⁵ The Texas

⁴ *See* La. Atty. Gen. Op. No. 08-0186, Aug. 19, 2008 available at <http://www.lcb.state.la.us/ago/ago08-0186.pdf>.

⁵ The claims against the Attorney General were dismissed in Judge deGravelles’ ruling on the Motion to Dismiss on July 30, 2020. Dkt. 48. Plaintiffs anticipate filing a motion to reconsider that ruling. In order to preserve the issue,

Attorney General's authority and ability to commence prosecutions, which was at issue in *In re Abbott*, 956 F.3d 696 (5th Cir.2020), is greatly circumscribed and limited in comparison to that of the Louisiana Attorney General. The Texas Attorney General's enforcement authority is limited to requests from local prosecutors. *See* Tex. Gov't Code ¶ 402.028; *see also*, Texas Const. Art. 4, Sec. 22. As a result, the Fifth Circuit held that such limited authority, absent an explicit threat of prosecution, lacked the "required enforcement connection" to the law challenged in that case. *In re Abbot*, 956 F.3d at 709.

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

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

Plaintiffs address the Attorney General's argument here as well. However, whether or not the claims against the Attorney General remain at issue in this matter, the facts Plaintiffs seek to supplement are relevant to the existing claims and would not be futile.

in that he is designated pursuant to La. R.S. 29:725.1 to be legal advisor to the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), which has the authority and mandate to protect critical infrastructure against threats.⁶ Further, with regard to the new facts alleged in the Supplemental Complaint concerning the burial ground that was transformed into critical infrastructure because of a pipeline running through it, the Attorney General has been specifically "entrusted" by the Louisiana Legislature with the protection of unmarked human burial sites. *See* La. R.S. 8:306(A)(1). The Louisiana Attorney General also represents the Cemetery Board in all matters relating to the administration and enforcement of the law relating to cemeteries. La. R.S. 8:69. The Attorney General is thus triply connected to and responsible for the subject matter at issue in this litigation.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for leave to file the Supplemental Complaint.

Date: August 17, 2020

Respectfully submitted,

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⁶ See Website of Governor's Office of Homeland Security and Emergency Preparedness, Critical Infrastructure: Threat and Hazard Identification and Risk Assessment, *available at* <https://gohsep.la.gov/PREVENT/CIKR> and Critical Infrastructure Protection Division of Homeland Security and Interoperability Division *available at* <https://gohsep.la.gov/ABOUT/CONTACT-US/GOHSEP-CONTACTS>.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, a copy of the foregoing was filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record unless indicated otherwise.

s/Pamela C. Spees
Pamela C. Spees