

CONGRESSIONAL TESTIMONY

Protecting Americans' Right to Peaceful Assembly From "Critical Infrastructure" and Other Anti-Protest Laws

WRITTEN TESTIMONY OF

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Introduction

The US has seen a rise in protests against the construction of gas and oil pipelines, driven by concerns about pipelines' harm to the environment, indigenous land, and landowner rights. In response, fossil fuel interests have promoted new laws that can limit and chill the First Amendment rights of individuals who protest near pipelines and other infrastructure sites. States across the country have enacted the laws, which create vague criminal offenses and extreme penalties that can cover nonviolent protest activity. While lawmakers have cited the legislation as necessary to protect critical infrastructure from trespass and vandalism, in states where the laws have passed, it was already a criminal offense to trespass or damage property.

Since 2016, at least 17 states have adopted industry-backed laws that can be used to target pipeline protesters.

Twenty-four states have considered at least 43 such bills.¹ Many of the bills resemble a model promulgated by the American Legislative Exchange Council (ALEC),² which is funded in part by fossil fuel companies. In late 2017, when ALEC began circulating its model "critical infrastructure bill" among state lawmakers, it was accompanied by a

¹ <https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=6&date=&type=>

² <https://alec.org/model-policy/critical-infrastructure-protection-act/>

letter signed by a group of fossil fuel corporations, asking for lawmakers’ support for the legislation.³ In the top 10 states by total number of pipeline miles, all but one has introduced so-called “critical infrastructure bills.”⁴

The laws create extreme penalties.

Many of the laws establish a new felony offense for trespassing onto “critical infrastructure” facilities and construction sites of such facilities. The laws often define “critical infrastructure” broadly, to include not only water treatment plants and power stations, but also far more ubiquitous infrastructure including pipelines⁵ and a wide range of other gas and oil production, storage, and distribution facilities and equipment. The felony trespass offense is usually punishable by multiple years in prison. For instance, under Arkansas’ critical infrastructure law, which was enacted in 2021, a protester who trespasses onto pipeline property can be convicted of a felony and sent to prison for 6 years.⁶ Ordinary trespass, by contrast, is a misdemeanor or minor violation.

The laws also create new felony crimes of impeding the construction or operation of critical infrastructure. For instance, under Mississippi’s critical infrastructure law, an activist protesting at the designated site of a future pipeline faces a felony sentence of up to 7 years in prison and a \$10,000 fine if they are deemed to be “impeding” critical infrastructure by “preventing legal access to” a pipeline construction site.⁷ Previously, such activity would have been charged as misdemeanor trespass—or not charged at all if it was protected First Amendment activity, such as engaging in a lawful protest near a construction site that had the effect of impeding construction efforts.

The laws are overbroad and vague.

Many critical infrastructure and other anti-protest laws targeting pipeline protesters include language that is both so broad that it renders constitutionally protected speech illegal, and so vague that those who wish to follow or to enforce the law are unclear as to the legislation’s scope. Under the First Amendment, laws that restrict speech must be “narrowly tailored to serve a significant government interest.”⁸ Yet most critical infrastructure bills are not “narrowly tailored.” For example, North Dakota’s critical infrastructure law includes an overbroad provision that prohibits “caus[ing] a substantial interruption or impairment of a critical infrastructure facility [by]... interfering, inhibiting, impeding or preventing the construction or repair of a critical

³ https://www.huffpost.com/entry/pipeline-environmentalist-terrorism_n_5a85c2ede4b0058d55672250

⁴ TX, OK, LA, KS, IL, OH, WY, PA, MS, CA. California has not introduced a critical infrastructure law.

<https://www.liebertpub.com/doi/10.1089/env.2021.0102>

⁵ There are over 2,000,000 miles of pipelines in the US, some of which run across public parks and streets as well as private land. <https://www.bts.gov/content/us-oil-and-gas-pipeline-mileage>

⁶ Ark. Code § 5-39-203

⁷ Miss. Code § 97-25-59

⁸ Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984)

infrastructure facility.”⁹ It is unclear if “interfering,” “inhibiting,” or “impeding” includes any amount of inconvenience or delay, nor is there a geographical link to an individual’s conduct. Individuals who block a public street as part of a lawful, permitted protest that delays equipment from reaching a pipeline construction site some distance away might be deemed to have “impeded” construction.

Many of the bills are also vague. The Constitution requires that a law be clear enough for a person of ordinary intelligence to understand what conduct is prohibited.¹⁰ In the context of laws restricting speech, vagueness raises First Amendment problems as well, as it can lead individuals to censor themselves out of fear that they might otherwise violate the law. Vague laws can also be applied selectively by law enforcement against parties engaged in disfavored speech.

Louisiana’s critical infrastructure law exemplifies challenges that statutory vagueness can pose: The law provides that anyone who commits “unauthorized entry” onto “critical infrastructure” commits a felony. The law defines critical infrastructure to include “pipelines,” but does not define what would be considered “unauthorized entry” on the state’s 125,000 miles of pipeline, which run across both private and public land.¹¹ It is not clear what distance around a pipeline might be considered a critical infrastructure site or whether unauthorized entry extends to individuals walking above underground pipelines. Nor does the law account for the reality that ownership rights where pipelines are constructed are often shared by the true landowner and a pipeline company that has exercised eminent domain to claim a portion of an individual’s land. In 2018, activists were arrested and charged under Louisiana’s law while protesting pipeline construction on private land, despite the landowner having given them permission to be there.¹² Landowners in Louisiana and other states with critical infrastructure laws can no longer be sure that they or anyone else can engage in a protest on their land without serious legal repercussions.

The laws undermine protest rights by making individual protesters and protest organizers liable for others’ unlawful conduct.

Many of the anti-protest laws have broadly worded collective liability provisions that can create chilling consequences for other protesters as well as organizations involved in protests. South Dakota’s “Riot Booster Act,” expressly aimed at stopping pipeline protesters and funders, makes a person civilly liable for damages incurred from “riot-boosting,” defined as “advis[ing], encourage[ing], or solicit[ing]” someone participating

⁹ N.D. Cent. Code § 12.1-21-06

¹⁰ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)

¹¹ Louisiana Rev. Stat. 14:61

¹² *White Hat v. Landry Complaint*, 22 May 2019, available at <https://ccrjustice.org/sites/default/files/attach/2019/05/White%20Hat%20v%20Landry%20Complaint.pdf>

in a “riot” to commit a forceful act. In a ruling enjoining these provisions of the law, a federal judge pointed out that many kinds of conduct could be considered “encouraging,” including giving protesters a thumbs up or publishing a supportive post on social media.¹³ The Act was temporarily enjoined in part because the definition of “riot-boosting” covered so much protected speech.

Other anti-protest laws use “conspiracy” provisions to target organizations that support pipeline protests. Under Oklahoma’s law, groups found to be “conspirators” in critical infrastructure trespass or interference offenses can face a fine of up to \$1 million¹⁴—a potentially catastrophic penalty for a small organization. The definition of conspiracy varies by state, but the offense generally only requires that conspirators agree on and take steps towards an unlawful act; they need not actually commit it.¹⁵ Thus, an organization that helps plan a march that would cross infrastructure property, for instance by printing posters or downloading a map of the march route, could be charged with conspiracy to trespass, even if the march never takes place. The inherent uncertainty of what may occur at protests, coupled with broad collective liability provisions, may lead groups to refrain from protest-planning altogether to avoid the risk of being held liable for the actions of others.

The laws are unnecessary.

While lawmakers and supporters of critical infrastructure and other anti-pipeline protest bills have justified the new laws as necessary to protect infrastructure from damage by bad actors, conduct that could result in damage—such as trespass, property damage, vandalism—is in most if not all cases already criminalized under state law. Minnesota Governor Mark Dayton acknowledged this when he vetoed a critical infrastructure bill in 2018, noting that existing state law on trespass and property damage not only already criminalized the activity targeted by the bill, but that current law did so more clearly.¹⁶

Many of the laws are unconstitutional and susceptible to legal challenge.

Advocates have successfully challenged laws that target pipeline protesters, with courts finding the laws to be unconstitutionally vague and overbroad. In South Dakota, for instance, the American Civil Liberties Union represented a group of organizations and individuals in a lawsuit over the state’s “Riot Booster Act.” A federal judge enjoined key provisions of the Act, holding that they were unconstitutionally “aimed at pipeline

¹³ <https://www.courthousenews.com/wp-content/uploads/2019/09/SD5026-1.pdf>

¹⁴ 21 OK Stat § 21-1792

¹⁵ Conspiracy, Legal Information Institute, available at <https://www.law.cornell.edu/wex/conspiracy>

¹⁶ Veto letter from Governor Mark Dayton, 30 May 2018, available at https://mn.gov/gov-stat/pdf/2018_05_30_LETTER_VETO_Letter_Infrastructure_Protest_Bill.pdf

protests” and “impinge[d] upon protected speech and other expressive activity as well as the right of association.”¹⁷ In Louisiana, attorneys with the Center for Constitutional Rights and the Loyola University College of Law challenged the constitutionality of the state’s critical infrastructure law, representing three protesters and a journalist who had been arrested under the law and charged with felonies. Their lawsuit argued that the law was so vague that it violated constitutional due process guarantees as well as the First Amendment. After a federal judge denied authorities’ motion to dismiss the case, a Louisiana district attorney dropped charges against not only the plaintiffs in the case, but a dozen other protesters who had faced felony penalties under the law.¹⁸

Recommendations:

Congress can take action to protect Americans’ First Amendment rights to free speech and peaceful assembly. In particular, Congress should:

- Enact legislation like the federal anti-SLAPP law that can help protect environmental protesters, protest organizers, and others from punitive lawsuits by fossil fuel companies, including those brought under critical infrastructure laws.
- Encourage the Department of Justice to file amicus briefs and statements of interest in support of litigation against critical infrastructure and other anti-protest laws that are overbroad and vague and that target particular protest movements.
- Require states to provide annual data about protest-related arrests carried out under critical infrastructure and other anti-protest laws.
- Ensure that federal energy legislation does not inadvertently reinforce industry-backed efforts to chill Americans’ peaceful assembly and speech rights, for instance by encouraging states to adopt and enforce critical infrastructure laws, but instead include safeguards for constitutionally protected protests.
- Enact legislation that will expand protections for Americans’ right to peaceful assembly, including by establishing clear standards for use of force in the policing of protests; reforming federal public order laws; and ensuring transparency around the policing and prosecution of protest-related offenses.¹⁹

¹⁷ <https://www.argusleader.com/story/news/politics/2019/09/18/judge-grants-injunction-riot-booster-lawsuit/1442805001/>.

¹⁸ <https://ccrjustice.org/home/press-center/press-releases/bayou-bridge-pipeline-protesters-journalist-celebrate-victory-free>.

¹⁹ <https://www.justsecurity.org/73689/revitalizing-us-democracy-starts-with-repairing-the-right-to-peaceful-assembly/>.