

December 2020

## The Fossil Fuel Industry's Push to Target Climate Protesters in the U.S.

Grace Nosek

*Peter A. Allard School of Law, University of British Columbia*

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>



Part of the [Constitutional Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [First Amendment Commons](#), and the [Natural Resources Law Commons](#)

---

### Recommended Citation

Grace Nosek, *The Fossil Fuel Industry's Push to Target Climate Protesters in the U.S.*, 38 Pace Envtl. L. Rev. 53 (2020)

DOI: <https://doi.org/10.58948/0738-6206.1844>

Available at: <https://digitalcommons.pace.edu/pelr/vol38/iss1/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

---

---

## The Fossil Fuel Industry's Push to Target Climate Protesters in the U.S.

GRACE NOSEK\*

*At the very moment when the United Nations has called for profound shifts in social and economic systems to avert climate catastrophe, state and non-state actors in the United States (U.S.) are using a series of tactics to target and stifle climate protesters. Although the move to stifle climate protesters is often framed as a government effort, this Article argues it is critical to draw out the role of the fossil fuel industry in initiating, amplifying, and supporting such tactics.*

*This Article highlights the role the fossil fuel industry has played in supporting the targeting and restricting of climate protesters in the U.S. The strategies for targeting protesters are grouped into three broad categories, with each category relying on distinctive legal tools. The first category is federal and state legislation that heightens penalties for climate protester in myriad ways. The second is the use of violence and surveillance against climate protesters by both state and non-state actors, which is connected to a rhetorical and legal push to label protesters as extremists and terrorists. The third is retaliatory lawsuits filed against climate protesters and organizations that support climate protests. Although such actions often ostensibly target civil disobedience, by imposing immense criminal and financial consequences, they threaten to unconstitutionally chill lawful, protected protest as well.*

*By examining the tactics in concert, it is much easier to see how both individual protesters and organizations that support protesters might be chilled from participating in lawful climate protest. It is also clear that there are important synergistic effects when these tactics are*

---

\* PhD Candidate, Peter A. Allard School of Law, University of British Columbia. Pierre Elliott Trudeau Foundation Scholar 2018. I am grateful to Professors Joel Bakan, Camden Hutchison, and Jocelyn Stacey, as well as the editors of the Pace Environmental Law Review, for their helpful feedback. Any opinions expressed are my own and do not represent those of the Pierre Elliott Trudeau Foundation.

*used together, heightening their respective abilities to undermine and chill climate protest. A third insight is how difficult it is for climate protesters to legally challenge these tactics. Finally, the analysis shows the pivotal role fossil fuel industry trade and lobbying groups play in targeting climate protesters, highlighting the breadth and depth of industry support for such tactics.*

I. Introduction.....	55
II. The Right to Protest Under the First Amendment .....	59
A. The Right to Protest and Civil Disobedience .....	64
III. Tactics to Restrict and Target Climate Protest .....	71
A. Critical Infrastructure Bills.....	71
1. The Dakota Access Pipeline and its Resistance Movement .....	73
2. State Critical Infrastructure Bills .....	74
a. ALEC’s Model Critical Infrastructure Bill .....	75
b. Similarities Between State Bills.....	76
3. The Federal Government’s Critical Infrastructure Proposals .....	82
4. Industry Connection to Critical Infrastructure Legislation .....	83
a. The Industry Influence Behind the ALEC Model Bill.....	83
b. Louisiana .....	85
c. South Dakota.....	85
d. The Influence of Fossil Fuel Trade and Lobbying Organizations .....	87
B. Use of Violence and Surveillance Against Protesters, and the Push to Label Them as Terrorists and Extremists .....	89
1. Paramilitary and Private Security Forces Being Used Against Climate Protesters .....	90
2. Use of Violence Against Water Protectors and Protesters .....	93
3. Federal Lawmakers’ Push to Prosecute Protesters as Terrorists.....	94
4. Social Media Surveillance of Climate Protesters .....	96
C. Retaliatory Lawsuits Against Climate Protesters.....	97
1. Energy Transfer’s Lawsuits Against Greenpeace and Others .....	98
a. Strategic Lawsuits Against Public Participation.....	101
IV. Conclusion .....	105

## I. INTRODUCTION

The United Nations (UN) has warned that governments around the world must rapidly decrease greenhouse gas emissions to avoid catastrophic climate change, that the window to decrease such emissions is closing, and that profound economic and social transformation will be needed to achieve such emission reductions.<sup>1</sup> Despite these warnings, between 2015 and 2019, global greenhouse gas emissions actually rose.<sup>2</sup> Around the world people, particularly young people, have mobilized to protest inaction on climate change.<sup>3</sup> Some governments are responding to this mobilization by attempting to target climate protesters.<sup>4</sup> For example, the London Metropolitan Police issued a citywide ban on protests by Extinction Rebellion—a movement that uses non-violent civil disobedience to advocate for bold climate action<sup>5</sup>—only to have that ban overturned as unlawful;<sup>6</sup> Australian Prime Minister Scott Morrison has threatened several times to crack down on protesters who target polluting companies;<sup>7</sup> French authorities have asked counter-terrorism units to investigate peaceful acts of civil disobedience by

---

1. Report of the Secretary-General on the 2019 Climate Action Summit and the Way Forward in 2020 at 3 (Dec. 11, 2019), [https://www.un.org/sites/un2.un.org/files/cas\\_report\\_11\\_dec\\_0.pdf](https://www.un.org/sites/un2.un.org/files/cas_report_11_dec_0.pdf) [<https://perma.cc/FS8W-46VQ>].

2. *Id.*

3. *Id.*

4. Patrick Strickland, *Threats, Prison, Death: What Environmental Activists Face, at an Alarming Rate*, OPENCANADA (Aug. 1, 2019), <https://www.opencanada.org/features/threats-prison-death-what-environmental-activists-face-alarming-rate/> [<https://perma.cc/6HFY-5TDT>].

5. *See About Us*, EXTINCTION REBELLION (2020), <https://rebellion.earth/the-truth/about-us/> [<https://perma.cc/ZWP3-K9V3>].

6. Damien Gayle & Vikram Dodd, *Extinction Rebellion Protesters May Sue Met as Ban Ruled Unlawful*, THE GUARDIAN (Nov. 6, 2019), <https://www.theguardian.com/environment/2019/nov/06/police-ban-on-extinction-rebellion-protests-ruled-illegal-by-high-court> [<https://perma.cc/AV8E-UEQ4>].

7. Paul Karp, *Scott Morrison Threatens Crackdown on Protesters Who Would 'Deny Liberty'*, THE GUARDIAN (Nov. 1, 2019), <https://www.theguardian.com/australia-news/2019/nov/01/scott-morrison-threatens-crackdown-on-secondary-boycotts-of-mining-companies> [<https://perma.cc/UZ49-62AZ>].

climate activists.<sup>8</sup> The Canadian province of Alberta just passed a critical infrastructure bill that creates steeper penalties for protesters, which was introduced at the height of Indigenous-led protests against the Coastal GasLink Pipeline project.<sup>9</sup> This is all happening within the larger context of governments and businesses around the world harassing, silencing, arresting, and even murdering environmental defenders.<sup>10</sup>

The United States (U.S.) provides an important example of recent government efforts to undermine, surveil, and punish climate protesters. Non-profit and civil society organizations have raised the alarm about a recent nationwide trend to stifle protest more generally.<sup>11</sup> As of January 2021, the International Center for Not-For-Profit-Law reported that 146 legal initiatives restricting the right to peaceful protest had been considered by 40 states, and 25 of those had been enacted since November 2016.<sup>12</sup> In 2017, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association wrote a letter to the U.S. government highlighting the alarming attempt to criminalize peaceful protest.<sup>13</sup> The letter noted that many

---

8. Natalie Sauer, *French Police Tap Counter-Terrorism Unit to Quell Climate Activists*, CLIMATE HOME NEWS (Mar. 4, 2019), <https://www.climatechangenews.com/2019/04/03/french-police-tap-counter-terrorism-unit-quell-climate-activists> [<https://perma.cc/BRS4-78KJ>].

9. Matthew Black, *Alberta Bill Targeting Blockade Protesters Passed into Law*, CTV NEWS (June 17, 2020), <https://edmonton.ctvnews.ca/alberta-bill-targeting-blockade-protesters-passed-into-law-1.4988429> [<https://perma.cc/MGU9-9F79>].

10. GLOBAL WITNESS, ENEMIES OF THE STATE? HOW GOVERNMENTS AND BUSINESS SILENCE LAND AND ENVIRONMENTAL DEFENDERS 6 (July 2019) [<https://perma.cc/4G39-96ZA>].

11. See, e.g., INT'L CTR. FOR NOT-FOR-PROFIT L., ANNUAL REPORT 2018-2019: EXPANDING CIVIC SPACE 16 (2019), <https://www.icnl.org/wp-content/uploads/ICNL-Annual-Report-2018-19-web-final.pdf> [<https://perma.cc/2B9Y-6U9J>]; Traci Yoder, *Conservative-Led Anti-Protest Legislation Already Doubled Since Last Year*, NAT'L LAWYERS GUILD (Feb. 15, 2018), <https://www.nlg.org/conservative-led-anti-protest-legislation-already-doubled-since-last-year/> [<https://perma.cc/ARS9-2V2Y>].

12. U.S. *Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/> [<https://perma.cc/NC38-RQPB>].

13. Letter from Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association to the Chargé d'affaires a.i. of the U.S. Mission to the U.N. and Other International Organizations (Mar.

of the legislative proposals seemed to target environmental protesters in particular.<sup>14</sup> Politicians, practitioners, and academics have echoed this position, arguing that there is a large scale and multi-pronged attempt to silence climate protesters in the U.S.<sup>15</sup>

In this article, I will highlight the role the fossil fuel industry has played in supporting the targeting and restricting of climate protesters in the U.S. My analysis will begin with a brief introduction of how and why the right to protest is protected under the First Amendment. I will also touch on the historical importance of civil disobedience and how harsh penalties for civil disobedience may stifle lawful protest. Then I will analyze the tactics used to target and restrict climate protesters. I have grouped the strategies for targeting protesters into three broad categories, with each category relying on distinctive legal tools. The first category is federal and state legislation that heightens penalties for climate protesters in a myriad of ways. The second is the use of violence and surveillance against climate protesters by both state and non-state actors, which is connected to a rhetorical and legal push to label protesters as extremists and terrorists. The third is retaliatory lawsuits filed against climate protesters and organizations that support climate protests. I will highlight the fossil fuel industry's role in initiating, supporting, or amplifying each of the three strategies.

By examining these three strategies, we will see four important insights. First, when looking at the strategies together, it is evident that such tactics may thwart individual protesters and organizations that support protesters from participating in lawful climate protest.

---

27, 2017),  
[http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL\\_USA\\_3\\_2017.pdf](http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_USA_3_2017.pdf) [https://perma.cc/54X9-P236] [hereinafter Letter from the Special Rapporteurs].

14. *Id.* at 18.

15. See, e.g., Ben Lefebvre & Anthony Adragna, *Trump Administration Seeks Criminal Crackdown on Pipeline Protests*, POLITICO (June 3, 2019), <https://www.politico.com/story/2019/06/03/trump-administration-seeks-criminal-crackdown-on-pipeline-protests-1499008> [https://perma.cc/NM56-JMEM]; Traci Yoder, *The Attack on Climate Justice Movements*, NAT'L LAWYERS GUILD (Mar. 14, 2019), <https://www.nlg.org/the-attack-on-climate-justice-movements/> [https://perma.cc/P8XN-8YZT]; Jenna Bitar, *6 Ways Government Is Going After Environmental Activists*, ACLU (Feb. 6, 2018), <https://www.aclu.org/blog/free-speech/rights-protesters/6-ways-government-going-after-environmental-activists> [https://perma.cc/EP2L-PD8S]; Jenna Ruddock, *Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws*, 69 AM. U. L. REV. 665, 674-77 (2019).

---

---

Second, there are important synergistic effects when these tactics are used together, heightening their respective abilities to undermine and deter climate protest. For example, one tactic I analyze is how state and non-state actors are undertaking expansive surveillance of climate protesters. Another key tactic is proposing and passing state and federal critical infrastructure provisions that increase penalties for climate protesters. Some states are drafting critical infrastructure provisions framed in terms of conspiracy, which only requires that conspirators take steps towards an unlawful act rather than committing an unlawful act. These provisions can thus give law enforcement even broader latitude to surveil and arrest climate protesters. A third insight is how difficult it is for climate protesters to legally challenge these tactics. Governments and industry are using their superior resources to adapt as soon as protesters successfully challenge their tactics. Finally, we will see the pivotal role fossil fuel industry trade and lobbying groups play in creating, supporting, and amplifying various tactics to target climate protesters.

Before I begin my analysis, it is important to explain my choice of terminology. I am borrowing the International Center for Not-For-Profit-Law's definition of restriction, where something restricts peaceful protest when it "constrain[s] or narrow[s] the means, methods, or venues used by individuals seeking to participate in or facilitate a peaceful protest."<sup>16</sup> I also use the word "target" to capture tactics that could potentially discourage or stifle climate protesters in addition to merely restricting their ability to protest.

The targeting and restricting measures in this article are all connected to the protest or resistance of oil and gas industry infrastructure in some way, as forthcoming analysis makes clear. People protest oil and gas infrastructure projects for different reasons, including their potential to infringe on Indigenous sovereignty and rights, their localized environmental impacts, and their contributions to climate change. Because climate change is almost always an underlying concern for those resisting oil and gas infrastructure projects, for ease of reference, I generally refer to those who resist oil and gas infrastructure projects as "climate protesters." However, Indigenous peoples, including those who led the resistance

---

16. *U.S. Protest Law Tracker Methodology and Key Terms*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/methodology.php> [<https://perma.cc/A7A8-HJKC>].

to the Dakota Access Pipeline (DAPL), have strenuously critiqued being labelled as protesters, arguing that they are not protesters but peaceful defenders of their land.<sup>17</sup> Indeed, in a legal challenge, the Standing Rock Sioux Tribe made clear that, although the DAPL did not cross its reservation, it was built on what the Tribe considers treaty land.<sup>18</sup> In this article, I will refer to Indigenous peoples resisting oil and gas infrastructure as “water protectors,” since some of those leading the resistance have publicly articulated such a preference.<sup>19</sup>

## II. THE RIGHT TO PROTEST UNDER THE FIRST AMENDMENT

Before detailing all the tactics U.S. federal and state governments have used to restrict and target climate protesters, supported by the fossil fuel industry, it is important to understand why such targeting of climate protesters might undermine important freedom of speech values or even violate the U.S. constitution. Drawing from Supreme Court case law, I will briefly detail why and to what extent protest is protected in the U.S. As many of the restrictions ostensibly target civil disobedience rather than lawful protest, I will also demonstrate how harsh punishments for civil disobedience might deter lawful protest and undermine important freedom of speech values. In the next three sections, I will apply the First Amendment analysis to the measures restricting and targeting protesters discussed to highlight how certain tactics might raise constitutional concerns. Indeed, one such tactic, a series of legislative provisions passed by South Dakota, was already enjoined by a federal court for infringing on the First Amendment. Ultimately the

---

17. See, e.g., Allison Herrera, *Standing Rock Activists: Don't Call Us Protesters. We're Water Protectors*, PUB. RADIO INT'L (Oct. 31, 2016), <https://www.pri.org/stories/2016-10-31/standing-rock-activists-dont-call-us-protesters-were-water-protectors> [<https://perma.cc/SJ6G-CNFC>]; Iyuskin American Horse, *'We are Protectors, Not Protesters': Why I'm Fighting the North Dakota Pipeline*, THE GUARDIAN (Aug. 18, 2016), <https://www.theguardian.com/us-news/2016/aug/18/north-dakota-pipeline-activists-bakken-oil-fields> [<https://perma.cc/DFZ8-JCM4>].

18. Elizabeth Bower, *Standing Together: How the Federal Government Can Protect the Tribal Cultural Resources of the Standing Rock Sioux Tribe*, 42 VT. L. REV. 605, 607 (2018).

19. See, e.g., WATER PROTECTOR LEGAL COLLECTIVE, <https://waterprotectorlegal.org/> [<https://perma.cc/E43D-BLK5>]; Iyuskin American Horse, *supra* note 17.

South Dakota government agreed not to enforce the provisions the court found problematic.<sup>20</sup> My goal is not to argue that each tactic in isolation violates the First Amendment, but to outline a pattern of activity that, taken together, threatens to profoundly chill free speech and democratic engagement in a critical moment for climate action. Indeed, some have argued that the intent behind many of these tactics is the unconstitutional deterrence of climate protest.<sup>21</sup> This pattern of targeting climate protesters is happening within the larger decades-long pattern of the fossil fuel industry actively undermining the ability of the public to participate in the climate policy debate by manufacturing doubt around climate science.<sup>22</sup>

The Supreme Court has repeatedly emphasized that political speech receives the maximum protection under the First Amendment.<sup>23</sup> In discussing why political speech receives such protection, the Court in *Carey v. Brown* cited Alexander Meiklejohn, stating that “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”<sup>24</sup> Political speech includes “discussions of candidates, structures and forms of

---

20. Vera Eidelman, *South Dakota Governor Caves on Attempted Efforts to Silence Pipeline Protesters*, ACLU (Oct. 24, 2019), [https://www.aclu.org/news/free-speech/south-dakota-governor-caves-on-attempted-efforts-to-silence-pipeline-protesters/?fbclid=IwAR2127foWCXwQuN\\_JyeiwbvKTnnjEotmtqqrNfNAFP3wEOBt9ZKkKJidkrI](https://www.aclu.org/news/free-speech/south-dakota-governor-caves-on-attempted-efforts-to-silence-pipeline-protesters/?fbclid=IwAR2127foWCXwQuN_JyeiwbvKTnnjEotmtqqrNfNAFP3wEOBt9ZKkKJidkrI) [<https://perma.cc/2B2Q-24XA>].

21. Spencer Woodman, *Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protest*, THE INTERCEPT (Jan. 19, 2017), <https://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest/> [<https://perma.cc/8NZF-N8Z3>].

22. Grace Nosek, *The Climate Necessity Defense: Protecting Public Participation in the U.S. Climate Policy Debate in a World of Shrinking Options*, 49 ENV'T L. 249, 250, 258 (2019); Robert J. Brulle, *Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-movement Organizations*, 122 CLIMATIC CHANGE 681, 692 (2014) [hereinafter Brulle, *Institutionalizing Delay*]; Robert Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 CLIMATIC CHANGE 289, 302 (2018) [hereinafter Brulle, *The Climate Lobby*].

23. See, e.g., *Carey v. Brown*, 447 U.S. 455, 466–67 (1980); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

24. *Carey*, 447 U.S. at 467.

government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”<sup>25</sup> The Court has also underscored that protest, including public-issue picketing, is a key embodiment of protected political speech.<sup>26</sup> Thomas Emerson, a preeminent First Amendment theorist often cited by the Supreme Court, argues that robust protections for political speech and protest by “radical, unpopular, or underprivileged individuals and groups” are absolutely critical because “these persons do not normally have access to the mass media of communication.”<sup>27</sup> The U.S. can only attempt to achieve a true marketplace of ideas by ensuring that such groups have robust protections for speech, assembly, and protest.<sup>28</sup>

In case law arising from the civil rights struggle, the Court built on its political speech jurisprudence to articulate what amounts to a robust right to protest.<sup>29</sup> In *NAACP v. Claiborne Hardware Co.*, the Court ruled that even if some protesters engaged in acts of violence, or other actions not protected by the constitution, “the right to associate does not lose all constitutional protection.”<sup>30</sup> In other words, the violence of some protesters does not remove First Amendment protection from the protest as a whole, or those who helped organize it. Protest can include “vituperative, abusive, and inexact” language, “political hyperbole,” and “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>31</sup> Additionally, the right to associate is fundamental to the right to engage in political expression. In *NAACP v. Alabama ex rel. Patterson*, the Court noted that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”<sup>32</sup>

However, there are important constraints to the right to protest under the First Amendment. In most cases, First Amendment

---

25. *Mills*, 384 U.S. at 218–19.

26. *Carey*, 447 U.S. at 466–67.

27. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 286 (1970).

28. *Id.*

29. Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. REV. L. & SOC. CHANGE 595, 606–07 (2019).

30. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

31. *Watts v. United States*, 394 U.S. 705, 708 (1969).

32. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

protections do not extend to political speech or protest on private property.<sup>33</sup> Protesters can thus be charged with trespass or other crimes for protesting on private property.

Additionally, the conduct and speech elements of protest are protected differently under the First Amendment, with conduct receiving less protection.<sup>34</sup> Conduct is defined as behavior or action outside of pure speech.<sup>35</sup> Generally, conduct only receives First Amendment protection if the Court determines that it is “expressive conduct.”<sup>36</sup> To determine if conduct is expressive, the Court asks whether said conduct was intended to convey a message, and whether there would be a great likelihood an audience would understand that message.<sup>37</sup> In a series of decisions, the Court held that all of the following behavior qualified as expressive conduct: wearing black armbands to protest the Vietnam War,<sup>38</sup> staging a sit-in in a “whites only” area to protest segregation,<sup>39</sup> wearing American military uniforms to critique war policy,<sup>40</sup> burning the American flag to protest the policies of an executive administration,<sup>41</sup> and picketing to protest a diverse array of causes.<sup>42</sup> In *United States v. O'Brien*, the Court stated, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom.”<sup>43</sup> However, the government interest behind its regulation cannot be related to “the suppression of free expression.”<sup>44</sup> The Court thus created a two-tier analysis where expressive conduct receives less stringent protection than pure speech.

---

33. Joseph H. Hart, *Free Speech on Private Property—When Fundamental Rights Collide*, 68 TEX. L. REV. 1469, 1471 (1990) (“[I]n most cases the first amendment protects free speech against abridgement by the government but does not shield the exercise of speech on private property.”).

34. EMERSON, *supra* note 27, at 295.

35. Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2209 (2018).

36. See *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

37. *Spence v. Washington*, 418 U.S. 405, 410–411 (1974).

38. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

39. *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

40. *Schacht v. United States*, 398 U.S. 58 (1970).

41. *Johnson*, 491 U.S. at 406.

42. See, e.g., *Food Emps. v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313–14 (1968); *United States v. Grace*, 461 U.S. 171, 176 (1983).

43. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

44. *Id.* at 377.

Even the most constitutionally protected protest—pure political speech in traditional fora like public streets and sidewalks—can be regulated by the government. Generally the government cannot base regulations on the content of protected speech, but it has wider discretion to regulate the time, place, and manner of such speech.<sup>45</sup> The Supreme Court recently reaffirmed that, “even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”<sup>46</sup> If the Court finds that government regulation is not content neutral, it will be subject to strict scrutiny,<sup>47</sup> an exacting standard that regulation often fails.<sup>48</sup>

Some scholars contend that viewpoint-based government restrictions are even more suspect than content-based discriminations, pointing to past court decisions.<sup>49</sup> As scholar Joseph Blocher articulated, “[t]he prevention of viewpoint discrimination has long been considered *the* central concern of the First Amendment.”<sup>50</sup> The prohibition on viewpoint discrimination is so strong that the Supreme Court has held that even speech normally unprotected by the First Amendment cannot be regulated differently based on the viewpoint it articulates.<sup>51</sup> For example, fighting words are one of the few exceptions to the constitutional prohibition on content-based restrictions; the First Amendment does not protect them, and the government can restrict them.<sup>52</sup> Nevertheless, even though the government could ban all fighting words, it cannot selectively ban “only those fighting words directed at Democrats.”<sup>53</sup> Such a move would be an impermissible restriction based on

---

45. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

46. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

47. Goldberg, *supra* note 35, at 2184, 2208.

48. Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 10 (2016).

49. Goldberg, *supra* note 35, at 2208.

50. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696 (2011).

51. *Id.* at 703.

52. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

53. Blocher, *supra* note 50, at 703 (“Put simply: The government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed.”).

viewpoint. There is Supreme Court case law to suggest that “speech regulation may be held unconstitutional if viewpoint discrimination is so much as a part of the motivation for passing it.”<sup>54</sup> Thus, even though the behavior targeted by the recent suite of bills and proposals—often the blocking of traffic—may not qualify as expressive conduct protected by the First Amendment,<sup>55</sup> there may still be a case that the government regulation was the result of impermissible viewpoint-based discrimination, and the bills can be challenged on that ground.<sup>56</sup> Some state governments have specifically articulated that their regulation was proposed in response to pipeline protesters,<sup>57</sup> bolstering the argument for viewpoint-based discrimination. However, state governments can argue that their regulation or proposed regulation is merely a response to disorderly protests that undermine public order and safety rather than a targeting of specific viewpoints, making it more difficult to challenge regulation on those grounds.<sup>58</sup>

### A. The Right to Protest and Civil Disobedience

Now that I have given a brief introduction to the basic principles and theory animating the constitutional right to protest and the case law defining the contours of that right, I will explore the relationship between civil disobedience and the right to protest. Many of the current legal tactics being used to restrict climate protesters are ostensibly targeted at conduct that falls under the umbrella of civil disobedience. Civil disobedience has many definitions, but there is a

---

54. *Id.* at 703–04. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (holding that even speech which falls outside the reach of the First Amendment, and therefore can be flatly prohibited, may not be treated differently on the basis of the viewpoint it expresses); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (“[R]egulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator.”).

55. It is difficult to characterize obstruction of traffic as expressive conduct under the current Supreme Court jurisprudence. *See, e.g.*, EMERSON, *supra* note 27, at 293; Goldberg, *supra* note 35, at 2207–09.

56. Goldberg, *supra* note 35, at 2208.

57. *See, e.g.*, Joe Wertz, *Oklahoma Bill To Protect ‘Critical Infrastructure’ Could Curb Public Protest, Critics Say*, STATEIMPACT OKLA. (Mar. 2, 2017), <https://stateimpact.npr.org/oklahoma/2017/03/02/oklahoma-bill-to-protect-critical-infrastructure-could-curb-public-protest-critics-say> [https://perma.cc/4DWX-2H5E].

58. Goldberg, *supra* note 35, at 2209.

general consensus that “it entails a conscientious violation of the law as a protest over an unjust law or governmental policy and therefore, is morally justified.”<sup>59</sup> Another scholar describes civil disobedience as “unlawful, public action, undertaken to protest a specific law or policy.”<sup>60</sup> Under current jurisprudence, civil disobedience is largely categorized as unlawful conduct that does not receive First Amendment protection.<sup>61</sup> However, as already described above, even laws targeting unprotected conduct or speech, like civil disobedience, can be held unconstitutional if the court finds they were motivated by viewpoint-discrimination. Some scholars argue that, given its profound social value, civil disobedience can and should receive some measure of First Amendment protection.<sup>62</sup> I argue that harsh restrictions on civil disobedience chill constitutionally protected speech, undermine important democratic and First Amendment values, and fail to reflect the historical importance of civil disobedience in advancing positive change in the U.S. I argue further that this is especially true for those protesting in the face of the fossil fuel industry’s profound influence over public discourse around climate change.

Scholars, UN officials, and civil rights organizations have warned that the recent spate of bills from across the U.S. that dramatically increase criminal and monetary penalties for protesters threatens to undermine lawful, constitutionally protected speech.<sup>63</sup> Although the bills, which are discussed in more detail in the next section, ostensibly target already unlawful behavior, such as trespassing or disorderly conduct, their draconian penalties—including a potential five-year jail sentence for anyone who

---

59. Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2085 (2007).

60. Barbara J. Katz, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 904 (1985).

61. *Id.* at 909. (“[M]ost kinds of civil disobedience would have difficulty passing constitutional muster.”); Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance*, 59 OHIO STATE L.J. 185, 186 (1998) (“Still, the free speech clause of the First Amendment holds no sanctuary for violators. So long as a law is directed at eliminating harmful conduct rather than suppressing disfavored ideas, the government may punish or hold civilly responsible, those who break it.”).

62. *See, e.g.*, Jacobs, *supra* note 61, at 185–86.

63. *See, e.g.*, Goldberg, *supra* note 35, at 2212; Letter from the Special Rapporteurs, *supra* note 13, at 1; Woodman, *supra* note 21; Eidelman, *supra* note 20.

trespasses near a pipeline<sup>64</sup>—and broad language risk infringing on protected speech. The International Center for Not-For-Profit Law warns that, “[g]iven the broad definition of critical infrastructure in many of the bills, peaceful protesters could potentially be prosecuted for felony trespass for simply accidentally protesting too close to a pipeline.”<sup>65</sup> UN officials sounded a similar warning. They cited the example of a proposed bill from Colorado, arguing that the vague definition of “tampering” in the bill “could be interpreted very broadly, therefore encompassing a wide range of situations, such as a peaceful protest near the concerned area, which could be construed as going in and tampering with equipment. The bill could consequently deter protestors from assembling freely, *especially in contexts of environmental protests.*”<sup>66</sup>

Scholars and civil rights groups also point to bill provisions protecting motorists from the negligent killing of protesters as clear attempts to chill protected speech.<sup>67</sup> Such provisions “will not only deter protesters who are blocking traffic but may deter protesters who are standing in permissible locations.”<sup>68</sup> As Thomas Emerson writes, protests can “involve large masses of people, hostile forces opposing each other face to face, [and] high emotions.”<sup>69</sup> They are chaotic, messy, and can be frenzied; it is not always clear where the line between lawful protest ends and civil disobedience begins. When lawful protesters risk massive fines, criminal penalties, or a heightened fear of negligent driving, they may just stay home. As the American Civil Liberties Union warns, the bills that cause such an effect are unconstitutional.<sup>70</sup> Moreover, those mentioned above are

---

64. INT’L CTR. FOR NOT-FOR-PROFIT L., CRITICAL INFRASTRUCTURE BILLS: TARGETING PROTESTERS THROUGH EXTREME PENALTIES 3 (2019), <https://mk0rofifiqa2w3u89nud.kinstacdn.com/wp-content/uploads/CI-Bill-Briefer-final-formatted.pdf> [<https://perma.cc/QLK8-2S3A>] (“[U]nder Louisiana’s critical infrastructure law, a person who trespasses on land near pipelines or other critical infrastructure can be convicted of a felony and sentenced to five years in jail. Before the law was passed, a similar act of trespass was a misdemeanor offense.”).

65. *Id.* at 2.

66. Letter from the Special Rapporteurs, *supra* note 13, at 2–3 (emphasis added).

67. Goldberg, *supra* note 35, at 2211.

68. *Id.*

69. EMERSON, *supra* note 27, at 288.

70. See Lee Rowland & Vera Eidelman, *Where Protests Flourish, Anti-Protest Bills Follow*, ACLU (Feb. 17, 2017), <https://www.aclu.org/blog/free-speech/rights->

not the only risks lawful protesters may face. As will be detailed in later sections, protestors may also face the prospect of being harassed and surveilled by private security forces, sometimes working in conjunction with state and federal authorities, who have often described protesters as extremists.<sup>71</sup> They may also fear massive retaliatory lawsuits from corporate entities.<sup>72</sup> It is critical to see the pattern of action directed at and felt by climate protesters to understand the full scope of the potential chilling of protected speech.

There are reasons to question the imposition of draconian penalties for acts of civil disobedience beyond the chilling effect on constitutionally protected protest. Civil disobedience has a long history of positive social change in the U.S., and many scholars argue that it can advance important First Amendment and democratic values.<sup>73</sup> Scholar Leslie Geilow Jacobs explains the critical difference between typical law breaking and civil disobedience:

The usual lawbreaking is where one individual asserts his will against the will of the majority (embodied in the law) for selfish purposes, accompanied by an effort to avoid detection and punishment. The act is functional, rather than expressive, and the act evidences contempt for the democratic principle of majority rule. The civil disobedient also asserts his will against the will of the majority, but in a different way and for a different purpose. Civil disobedience is a public act. The purpose is to convey a political message from the minority to the majority. The civil disobedient's willingness to accept the punishment demonstrates a respect for the general principle of the rule of law at the same time that the act communicates dissent from the law's particular provisions.<sup>74</sup>

---

protesters/where-protests-flourish-anti-protest-bills-follow  
[<https://perma.cc/333U-G8C3>].

71. See generally, Alleen Brown, Will Parrish & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies"*, THE INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/> [https://perma.cc/WUL2-9ZYH].

72. See *infra* Part III.C.1 and accompanying text.

73. See, e.g., Jacobs, *supra* note 61, at 232; Lawrence R. Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 GEO. WASH. L. REV. 464, 486 (1969); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 345 (1990).

74. Jacobs, *supra* note 61, at 231–32.

Geilow thus demonstrates how civil disobedience can retain social value while being unlawful.

Indeed, scholars have long argued that civil disobedience plays a critical role in democratic societies and has had a key role in advancing U.S. political dialogue since before the American Revolution.<sup>75</sup> Civil disobedience was a foundational tactic of the women's suffrage movement, the civil rights movement, and various anti-war protests, among others.<sup>76</sup> Matthew R. Hall describes civil disobedience as "a firebreak between legal protest and rebellion" allowing disaffected and disenfranchised voices to communicate their grievances without employing more extreme measures.<sup>77</sup> Others have echoed the idea that civil disobedience acts as an important safety valve for the disaffected.<sup>78</sup> Thomas Emerson argued that one of the four key principles animating freedom of speech theory and doctrine was maintaining a balance between stability and change in a democratic society.<sup>79</sup>

Scholars also point to the unique ability of civil disobedience to lift up marginalized voices, ensuring the robust marketplace of ideas so central to First Amendment jurisprudence.<sup>80</sup> As Lawrence R. Velvel explains,

our modern-communications media are the key to whether or not the marketplace of ideas can function effectively . . . . When citizens lack access to these media, often because of the lack of the astronomical financial resources necessary or because of a lack of high political position, they have little opportunity to contribute effectively to the process by which public opinion is formed.<sup>81</sup>

---

75. *Id.* at 238–40 ("From before the American Revolution through anti-slavery activities, the women's suffrage movement, civil rights and anti-war activism, up to the current environmental, animal rights, gay rights, and abortion-related protests, to name a few, civil disobedience has contributed to the American political dialogue.").

76. *Id.*; see also Velvel, *supra* note 73, at 486; Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 75 (1990).

77. Hall, *supra* note 59, at 2083.

78. See, e.g., Velvel, *supra* note 73, at 468.

79. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1963).

80. Hall, *supra* note 59, at 2083; Velvel, *supra* note 73, at 467–68; Jacobs, *supra* note 61, at 240–41.

81. Velvel, *supra* note 73, at 467.

Yet, media covers peaceful protest, making it one of the most effective ways for voices usually locked out of traditional mass media to be heard.<sup>82</sup> James Pope raises a parallel point, arguing that civil disobedience and a range of other nonviolent, popular, extra-institutional tactics are uniquely able to challenge the corruption and power imbalance of interest group bargaining.<sup>83</sup> As Pope explains, interest group bargaining creates a distortion in the political marketplace, where “interest groups active on an issue represent substantially less than the entire population, [and] they can agree on a solution that will benefit themselves by transferring wealth from underrepresented constituencies.”<sup>84</sup> Corporations are often the beneficiaries of such interest group bargaining.<sup>85</sup> By more forcefully disrupting the status quo, civil disobedience has the potential to coerce an audience to pay attention and to “divert . . . politicians and administrators from the cozy routine of interest group bargaining.”<sup>86</sup> Thus, civil disobedience can advance key democratic and First Amendment values even if it is unlawful.

Of course, some scholars have argued that seeing civil disobedience as a vehicle to advance democratic and First Amendment values is an overly idealistic view of civil disobedience. The state has a critical interest in protecting the rule of law, a foundational presumption of which is “that the proper form of protest against particular government actions is through lawful speech and action designed to change it.”<sup>87</sup> In a functioning democracy, civil disobedience can be seen as undermining democratically created laws and policies.<sup>88</sup> Steven Schlesinger argues that civil disobedience would be utterly destructive to democratic institutions if everyone disobeyed the laws they disagreed with, with little consequence.<sup>89</sup> He also points to theoretical examples of civil disobedience that would

---

82. *Id.* at 467–68.

83. Pope, *supra* note 73, at 345–46.

84. *Id.* at 320.

85. *Id.*

86. *Id.* at 345.

87. Jacobs, *supra* note 61, at 232–33.

88. See Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1898 (2005).

89. Steven R. Schlesinger, *Civil Disobedience: The Problem of Selective Obedience to Law*, 3 HASTINGS CONST. L.Q. 947, 948 (1976).

undermine justice rather advance it.<sup>90</sup> Yet, many scholars who believe that civil disobedience advances important democratic and First Amendment values also acknowledge that breaking the law can undermine democratic systems and, thus, argue that “civil disobedients” can and should face legal consequences for their actions.<sup>91</sup>

Leslie Geilow Jacobs threads the gap between the democratic values advanced by civil disobedience and those undermined by such action by focusing on the type and amount of penalties individuals who engage in civil disobedience should face. She argues that the social value of the law-breaking act of the civil disobedience must be considered when deciding on a punishment.<sup>92</sup> Even given the state’s interest in maintaining the rule of law, the new bills targeting civil disobedience are disproportionately punitive. As discussed below, Louisiana’s new law bumped potential punishment for civil disobedience near a pipeline from misdemeanor trespass to felony charges carrying a potential five-year prison term and up to \$1000 in fines.<sup>93</sup> The Trump administration proposed amending pipeline safety standards to include language threatening *twenty*-year prison terms for civil disobedience near pipelines.<sup>94</sup> In temporarily enjoining South Dakota’s new provisions aimed at climate protesters who engage in or “support” civil disobedience, the district court warned that such provisions could have imposed immense damages on Dr. Martin Luther King and his fellow civil rights leaders.<sup>95</sup> Climate civil disobedience can advance important values; although the state has an interest in ensuring respect for the rule of law, the disproportionately harsh penalties detailed above go far and above that interest and are detrimental to democracy.

---

90. *Id.* at 55 (“But the argument for civil disobedience would justify the members of school boards who disagree with court orders of various kinds designed to integrate school facilities in refusing compliance and would justify the owners of hotels, motels, restaurants, and other facilities, determined by the courts and by Congress to serve the public, in refusing service to members of certain groups.”).

91. Jacobs, *supra* note 61, at 186 & n. 6, 187 & n. 12, 232–33.

92. *Id.* at 240.

93. See LA. STAT. ANN. § 14:61 (2018); *White Hat v. Landry*, CTR. FOR CONST. RTS. (July 7, 2020), <https://ccrjustice.org/home/what-we-do/our-cases/white-hat-v-landry> [<https://perma.cc/99L2-NGRN>].

94. Lefebvre & Adragna, *supra* note 15.

95. *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 890 (D.S.D. 2019).

The fossil fuel industry has played an important role in pushing governments to make climate civil disobedience exponentially more risky, even though its efforts at undermining public participation in the climate debate have been a key driver behind such disobedience. The fossil fuel industry has leveraged interest group bargaining and financial resources to exert a profoundly outsized influence on the political marketplace and the marketplace of ideas in the U.S. The fossil fuel industry and its allies have spent massive amounts of money sowing misinformation around climate change science for decades.<sup>96</sup> This manufactured uncertainty campaign not only distorts the marketplace of ideas by giving powerful interests disproportionate influence, but it also fundamentally undermines the marketplace by keeping key facts from the public. As emphasized in a previous article:

This is the landscape climate protesters face—decades of deliberate strategies to confuse the public and influence government decision makers, hundreds of millions of dollars in corporate funding to delay or prevent government action on climate change, crackdowns on peaceful protest, and scientific research saying the world is on the brink of disaster. It is not hard to see how such climate protesters would feel like their options for effectively challenging [the fossil fuel industry and its allies'] framing of climate change and spurring public and government interest have been dramatically narrowed.<sup>97</sup>

At the very moment when civil disobedience seems like it could uniquely challenge the political status quo and urgently advance marginalized voices in a moment of impending climate crisis, the penalties for climate civil disobedience are being ratcheted up to draconian levels. Such penalties are bad for democracy.

### III. TACTICS TO RESTRICT AND TARGET CLIMATE PROTEST

#### A. Critical Infrastructure Bills

As mentioned above, there has been a recent wave of bills, both proposed and enacted, restricting protest more broadly, and climate protest more specifically, in the U.S. The International Center for

---

<sup>96</sup> Brulle, *Institutionalizing Delay*, *supra* note 22, at 685; Brulle, *The Climate Lobby*, *supra* note 22, at 14.

<sup>97</sup> Nosek, *supra* note 22, at 258.

Not-For-Profit Law (ICNL) is tracking both trends in its U.S. Protest Law Tracker, which “tracks legal initiatives since November 2016 that restrict the right to peaceful assembly.”<sup>98</sup> The ICNL “works in more than 100 countries to strengthen civil society, foster freedom of association and assembly, and promote public participation in the political sphere.”<sup>99</sup> As of January 2021, federal and state governments have considered 146 bills “that restrict the right to peaceful assembly,” and 25 of such bills had been enacted.<sup>100</sup> The ICNL is also tracking what they and others call “critical infrastructure bills,”<sup>101</sup> which “are used to target demonstrations against oil and gas pipelines across the country.”<sup>102</sup> I will also use the term critical infrastructure bills to describe such legislative provisions in this article. These bills have been enacted in nine states but there are a spate of other proposals pending or defeated at the federal and state level,<sup>103</sup> and a legal adviser for the ICNL believes the trend will continue.<sup>104</sup> The fossil fuel industry can be connected to many of the bills, even deeply connected to some, either through its support in drafting specific state bills, in drafting model bills being used at the state and federal level, or in advocating and testifying for bills’ passage.<sup>105</sup> Scholars and journalists have pointed to the movement against DAPL as a key impetus for the recent wave of legislative restrictions on climate protesters, although there were some initial attempts before the DAPL protest.<sup>106</sup> I will briefly

---

98. *U.S. Protest Law Tracker Methodology and Key Terms*, *supra* note 16.

99. *Former Schell Fellow Nick Robinson Directs Program on U.S. Civil Freedoms*, YALE L. SCH. (Nov. 28, 2017), <https://law.yale.edu/yls-today/news/former-schell-fellow-nick-robinson-directs-program-us-civil-freedoms> [<https://perma.cc/4UTS-J799>].

100. *See U.S. Protest Law Tracker*, *supra* note 12.

101. *U.S. Current Trend: Environmental Nonprofits Facing Lawfare Tactics*, INT’L CTR. FOR NOT-FOR-PROFIT L. (Oct. 2019), <https://www.icnl.org/post/analysis/environmental-nonprofits-facing-lawfare-tactics> [<https://perma.cc/5BDL-LEM8>].

102. *Id.*

103. *See U.S. Protest Law Tracker*, *supra* note 12.

104. Susie Cagle, ‘Protesters as Terrorists’: Growing Number of States Turn Anti-pipeline Activism into a Crime, THE GUARDIAN (July 8, 2019), <https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say> [<https://perma.cc/7D6C-FEUF>].

105. *See infra* notes 121, 130 (Kaufman), 169, 179, 189, 194 and accompanying text.

106. Connor Gibson, *Oklahoma – Oil & Gas “Critical Infrastructure” Anti-Protest Bills*, POLLUTERWATCH (July 14, 2019),

describe the anti-DAPL movement below and how it spurred the legislative restrictions. I will also provide a high-level description of the bills themselves, highlighting the similarities across legislation. Then I will draw out the fossil fuel industry's connections to various bills, demonstrating the substantial role the fossil fuel industry has played in the government move to restrict climate protesters.

### 1. The Dakota Access Pipeline and its Resistance Movement

In 2014, Energy Transfer Partners began applying for the construction of a crude oil pipeline from the Bakken oil fields in North Dakota to southern Illinois.<sup>107</sup> The route of the pipeline passes within a half mile of the Standing Rock Sioux Tribe's reservation, on territory the Tribe considers treaty land.<sup>108</sup> In a legal complaint filed against the federal government, the Standing Rock Sioux argued that DAPL "threatens the Tribe's environmental and economic well-being, and would damage and destroy sites of great historic, religious, and cultural significance to the Tribe . . . . [DAPL] also crosses waters of utmost cultural, spiritual, ecological, and economic significance to the Tribe and its members."<sup>109</sup> Resistance to the pipeline grew as it received all of the requisite approvals from state and federal entities.<sup>110</sup> On April 1, 2016, 200 Native Americans rode on horseback to protest the pipeline's route through the sacred, ancestral lands of the Standing Rock Sioux Tribe.<sup>111</sup> The riders, Lakota, Nakota, and Dakota peoples, established a small campsite where the Missouri and Cannonball rivers meet, called the Sacred Stone Camp, and announced their intention to oppose DAPL and

---

<https://polluterwatch.org/OKLAHOMA-Oil-Gas-Critical-Infrastructure-Anti-Protest-Bills-alec-csg> [<https://perma.cc/2R26-TRRY>] (Oklahoma's "HB 1123 greatly resembles 2004 LA Act 157, which became CSG shared state legislation in 2006.").

107. Ruddock, *supra* note 15, at 670.

108. Bower, *supra* note 18, at 607.

109. *Id.* at 606–07.

110. See Ryan W. Miller, *How the Dakota Access Pipeline Battle Unfolded*, USA TODAY (Dec. 4, 2016), <https://www.usatoday.com/story/news/nation/2016/12/02/timelinedakota-access-pipeline-and-protests/94800796> [<https://perma.cc/7ZWJ-P3TW>].

111. *Id.*; see also Jack Healy, *North Dakota Oil Pipeline Battle: Who's Fighting and Why*, N.Y. TIMES (Aug. 26, 2016), <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html> [<https://perma.cc/27GA-5QFL>].

protect the water.<sup>112</sup> As the year progressed and a flood of supporters arrived, more camps were established.<sup>113</sup>

As hundreds of camp residents readied for an indefinite stay, and Energy Transfer broke ground on the pipeline without waiting for the final resolution of legal challenges by the Standing Rock Sioux, conflict between water protectors, government law enforcement, and private security forces escalated.<sup>114</sup> In fall 2016, DAPL security guards attacked water protectors with dogs and pepper spray.<sup>115</sup> Energy Transfer Partners hired TigerSwan, a paramilitary organization, to oversee its security response to the anti-DAPL movement.<sup>116</sup> As will be described in later sections, TigerSwan proceeded to surveil and harass water protectors, whom it viewed as akin to jihadists. Militarized local police confronted water protectors with sound cannons, fired rubber bullets and water cannons at them in sub-freezing temperatures, and arrested hundreds of them in a manner that drew international condemnation and allegations of unlawful detainment.<sup>117</sup> Although the outgoing Obama administration denied a final permit for the pipeline in late October 2016, the Trump administration reversed course and granted the pipeline the go-ahead in early January 2017.<sup>118</sup>

## 2. State Critical Infrastructure Bills

In early 2017, Oklahoma began the legislative process to pass some of the first in a wave of critical infrastructure bills restricting climate protesters.<sup>119</sup> The state ultimately passed two bills, House Bill 1123 and House Bill 2128, that dramatically raised penalties for those protesting critical infrastructure in the state.<sup>120</sup> UN officials

---

112. *Oil and Water*, THE INTERCEPT, <https://theintercept.com/series/oil-and-water/timeline/> [https://perma.cc/9UXS-Y4WV].

113. Ruddock, *supra* note 15, at 672; Cheree Franco, *The Final, Messy, Defiant Days of the Standing Rock Camps*, VICE (Feb. 21, 2017), [https://www.vice.com/en\\_ca/article/gvmypx/the-final-messy-defiant-days-of-the-standing-rock-camps](https://www.vice.com/en_ca/article/gvmypx/the-final-messy-defiant-days-of-the-standing-rock-camps) [https://perma.cc/3ZFJ-U9QS].

114. Ruddock, *supra* note 15, at 672.

115. *Oil and Water*, *supra* note 112.

116. *Id.*

117. Ruddock, *supra* note 15, at 672–73.

118. *Id.* at 673.

119. *Id.* at 674; Letter from the Special Rapporteurs, *supra* note 13, at 8.

120. H.B. 1123, 2017 56th Leg., Reg. Sess. (Okla. 2017).

warned that House Bill 1123 was reportedly introduced in response to the anti-DAPL movement.<sup>121</sup> The principal author of House Bill 1123, State Representative Scott Briggs, pointed at disruptive protests in advocating for the bill's passage, saying: "Across the country, we've seen time and time again these protests that have turned violent, these protests that have disrupted the infrastructure in those other states."<sup>122</sup> House Bill 1123 changes the law so that protesters risk a ten-year-prison term or \$100,000 fine if they "willfully damage, destroy, vandalize, deface or tamper with equipment in a critical infrastructure facility."<sup>123</sup>

Further, House Bill 2128 holds those who trespass, or potentially even those merely arrested for trespass, liable for damages incurred during the trespass.<sup>124</sup> Additionally, the law states that any person or group "that compensates, provides consideration to or remunerates a person for trespassing" may be held vicariously liable for damages incurred during the trespass.<sup>125</sup> Scholars and practitioners argue that such collective liability provisions deter constitutional advocacy by non-profits and other civil society groups and movements.<sup>126</sup> Oklahoma's two critical infrastructure bills were introduced in early 2017 and signed into law in May 2017.<sup>127</sup> A spate of similar bills in other states followed.<sup>128</sup>

### a. ALEC's Model Critical Infrastructure Bill

One of the next critical milestones in the growing wave of anti-protest legislation was the creation of a model critical infrastructure bill by the American Legislative Exchange Council (ALEC) in

121. Letter from the Special Rapporteurs, *supra* note 13, at 9.

122. Wertz, *supra* note 57.

123. Nosek, *supra* note 22, at 254.

124. H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017); Nosek, *supra* note 22, at 254.

125. Okla. H.B. 2128.

126. See, e.g., INT'L CTR. FOR NOT-FOR-PROFIT L., "GUILT BY ASSOCIATION" CRITICAL INFRASTRUCTURE BILLS AND THE RIGHT TO PROTEST (2018), <https://www.icnl.org/wp-content/uploads/Critical-Infrastructure-Legislative-Briefer.pdf> [<https://perma.cc/QZB6-HF9H>].

127. OKLA. STAT. tit. 76, § 80.1 (2017); Ruddock, *supra* note 15, at 674–75.

128. Ruddock, *supra* note 15, at 675–76; Alleen Brown, *Ohio and Iowa are the Latest of Eight States to Consider Anti-Protest Bills Aimed at Pipeline Opponents*, THE INTERCEPT (Feb. 2, 2018), <https://theintercept.com/2018/02/02/ohio-iowa-pipeline-protest-critical-infrastructure-bills/> [<https://perma.cc/RB8G-U7NX>].

January 2018.<sup>129</sup> ALEC, a membership organization funded largely by corporations, supports corporate entities and state lawmakers in working together to create template legislation that can be proposed in state legislatures across the U.S.<sup>130</sup> As stated on its website, ALEC drew from Oklahoma's 2017 bills to create its own model critical infrastructure bill, which it called the Critical Infrastructure Protection Act.<sup>131</sup> The model legislation:

[C]odifies criminal penalties for a person convicted of willfully trespassing or entering property containing a critical infrastructure facility without permission by the owner of the property, and holds a person liable for any damages to personal or real property while trespassing. The Act also prescribes criminal penalties for organizations conspiring with persons who willfully trespass and/or damage critical infrastructure sites, and holds conspiring organizations responsible for any damages to personal or real property while trespassing.<sup>132</sup>

The model legislation echoes the same troubling collective liability provision enshrined in the Oklahoma legislation. Below, I will describe why such provisions raise constitutional red flags. Less than a week after the creation of the ALEC model legislation, legislators in Ohio and Iowa proposed similar critical infrastructure bills.<sup>133</sup> By January 2020, eleven states had passed critical infrastructure bills and a myriad of others had pending or defeated bills;<sup>134</sup> many of the bills resemble ALEC's model bill.<sup>135</sup> Below I will highlight some of the key similarities between the bills to underscore that they do indeed represent a legislative trend.

### b. Similarities Between State Bills

There are discernable patterns between who has proposed critical infrastructure bills, when they are most likely to succeed, and what content they contain. Most, but not all, of the bills have been

---

129. Ruddock, *supra* note 15, at 675–76; Brown, *supra* note 128.

130. Nosek, *supra* note 22, at 254.

131. *Critical Infrastructure Protection Act*, AM. LEGIS. EXCH. COUNCIL, (Jan. 20, 2018), <https://www.alec.org/model-policy/critical-infrastructure-protection-act/> [<https://perma.cc/Z5TD-D56G>].

132. *Id.*

133. Brown, *supra* note 128.

134. *U.S. Protest Law Tracker*, *supra* note 12.

135. INT'L CTR. FOR NOT-FOR-PROFIT L., *supra* note 64, at 1.

proposed and championed by conservative lawmakers.<sup>136</sup> They tend to find the most receptive audience in states where oil and gas companies wield political influence or where climate protests have been especially robust.<sup>137</sup> While the bills' exact provisions may vary, they have many similarities in their content. One thing civil rights organizations have noted is that the bills target behavior that is usually already punishable under the law.<sup>138</sup> Indeed, when Minnesota Governor Mark Dayton vetoed a critical infrastructure bill proposed in the state, he underscored this point, writing, "Minnesota's laws already address criminal activity and liability. [Those] statutes are clear; this proposed law is not."<sup>139</sup>

The ICNL identified four other key patterns in the content of critical infrastructure bills. The first is that the bills create extremely broad legal definitions of "critical infrastructure," expanding beyond critical infrastructure with obvious, discrete boundaries like power plants and dams to infrastructure that is ubiquitous and has far less obvious boundaries, like oil and gas pipelines, and even telephone poles.<sup>140</sup> Louisiana's new definition of critical infrastructure, which, as of August 2018, included the state's 125,000-mile network of pipelines, shows the potential consequences for climate protesters of such broad legislative definitions.<sup>141</sup> The majority of Louisiana's

---

136. See, e.g., Complaint for Declaratory and Injunctive Relief at 17, *White Hat v. Landry*, No. 19-322-JWD-EWD (M.D. La. July 30, 2020) ("House Bill (HB) 727 contained amendments to Louisiana's Critical Infrastructure laws and was introduced in the state House of Representatives on March 26, 2018 by Representative Major Thibaut."); Letter from the Special Rapporteurs, *supra* note 13, at 17 (writing in 2017 about the broader legislative crackdown on protest in the U.S., UN officials noted the bills were proposed "exclusively by Republican legislators."); Alexander C. Kaufman, *Environmentalists Say They're Averting Climate Disaster. Conservatives Say It's Terrorism*, HUFFPOST (Feb. 21, 2018), [https://www.huffpost.com/entry/pipeline-environmentalist-terrorism\\_n\\_5a85c2ede4b0058d55672250](https://www.huffpost.com/entry/pipeline-environmentalist-terrorism_n_5a85c2ede4b0058d55672250) [<https://perma.cc/P8T2-B7U2>].

137. Cagle, *supra* note 104.

138. INT'L CTR. FOR NOT-FOR-PROFIT L., *supra* note 64, at 3 ("State lawmakers and supporters of critical infrastructure bills justify the new statutes as necessary to protect infrastructure from damage by bad actors, yet conduct that could result in damage—such as trespass, disorderly conduct, or vandalism—is in most, if not all cases, already criminalized under state law.")

139. Letter from Mark Dayton, Governor of Minn., to the Hon. Warren Limmer, President Pro Tempore of the Minnesota Senate (May 30, 2018) (on file with state of Minn.).

140. INT'L CTR. FOR NOT-FOR-PROFIT L., *supra* note 64, at 1, 2.

141. Press Release, Ctr. for Const. Rts., *New Lawsuit Challenges Anti-Protest Trespass Law* (May 22, 2019), <https://ccrjustice.org/home/press-center/press->

pipelines are not clearly marked and the Center for Constitutional Rights argues that landowners, pedestrians, and commercial boaters, among others, “now cannot be sure of where they can lawfully remain present.”<sup>142</sup> In expanding critical infrastructure definitions to include more ubiquitous infrastructure that was not treated as critical infrastructure in the past, legislators have made it difficult for the public to know when they are violating the law.

The second discernible pattern is the codification of a new offense—felony trespass on critical infrastructure sites, often paired with the potential for long jail terms.<sup>143</sup> Again, Louisiana provides a helpful example of how such legislative changes can impact climate protesters. Before the 2018 law took effect, protesters or those participating in civil disobedience near pipelines risked being charged with misdemeanor trespass.<sup>144</sup> After, such protester now faces felony charges carrying the potential of a five-year prison term and up to \$1,000 in fines.<sup>145</sup> Commentators fear that these provisions could put peaceful protesters at risk of felony prosecution “for simply accidentally protesting too close to a pipeline.”<sup>146</sup>

Indeed, the Center for Constitutional Rights has challenged Louisiana’s amended Critical Infrastructure law, Louisiana Revised Statute § 14:61, on behalf of pipeline protesters, landowners, community leaders, environmental justice organizations, and a journalist.<sup>147</sup> The plaintiffs allege the statute is unconstitutional because it is vague and overbroad, it targets protected speech and conduct, and it was motivated by viewpoint-discrimination.<sup>148</sup> Three of the plaintiffs, Anne White Hat, Ramon Mejía, and Karen Savage—a journalist—were arrested and charged under Louisiana’s amended statute and are facing a potential sentence of five years in prison as well as substantial fines.<sup>149</sup> The plaintiffs’ complaint quotes from the arrest warrants for the plaintiffs, highlighting that plaintiffs were

---

releases/new-lawsuit-challenges-anti-protest-trespass-law  
[<https://perma.cc/Q8ZH-L8TT>].

142. *White Hat v. Landry*, *supra* note 93.

143. INT’L CTR. FOR NOT-FOR-PROFIT L., *supra* note 64, at 2.

144. *White Hat v. Landry*, *supra* note 93.

145. LA. STAT. ANN. § 14:61 (2018); *White Hat v. Landry*, *supra* note 93.

146. INT’L CTR. FOR NOT-FOR-PROFIT L., *supra* note 64, at 2.

147. Complaint for Declaratory and Injunctive Relief at 7–11, *White Hat v. Landry*, No. 19-322-JWD-EWD (M.D. La. July 30, 2020).

148. *Id.* at 6.

149. *Id.* at 7–8.

confused about where they could and could not legally be. The complaint summarizes the arrest affidavit for Anne White Hat in the following way:

[White Hat] was “on the pipeline right of way” with approximately 30-35 other protesters. For the second charge under La. R.S. 14:61, the affidavit states that White Hat “started to walk back up the incline,” which according to the affidavit was in the right of way, but then noted that she moved off the incline along with others after discussion with officers.<sup>150</sup>

Obviously, the complaint is an advocacy document, intended to show plaintiffs’ actions in the best light, but it does give a sense of how the amended Critical Infrastructure law might be used to levy draconian penalties on protesters, even protesters claiming they were not trying to engage in unlawful behavior. It also shows how broad definitions of critical infrastructure paired with heavy felony penalties might have a serious chilling effect on climate protester activism. Indeed, the plaintiff environmental justice organizations argued that Louisiana’s amendments were undermining their lawful political speech, advocacy, and protest.<sup>151</sup>

The third key pattern discernable in the proliferation of critical infrastructure bills is the creation of “new felony crimes of impeding the construction or operation of critical infrastructure.”<sup>152</sup> Again, commentators warn that such provisions put peaceful, lawful protesters at risk of felony charges if their “protest merely inconveniences the movement of construction equipment or personnel.”<sup>153</sup>

Finally, there is a pattern of new collective liability provisions in the bills which “can create liability for other protesters or organizations that are found to have been ‘conspirators’ or to have encouraged or advised a protester’s unlawful activity, such as trespass.”<sup>154</sup> The ICNL has pointed out all of the ways that these collective liability provisions can encroach on or discourage constitutionally protected protest. One problem is that the provisions are framed in terms of conspiracy, which only requires that

---

150. *Id.* at 26.

151. *Id.* at 28–30.

152. INT’L CTR. FOR NOT-FOR-PROFIT L., *supra* note 64, at 2.

153. *Id.*

154. *Id.*

conspirators take steps towards an unlawful act rather than committing an unlawful act.<sup>155</sup> Thus, if groups or individuals merely take steps towards planning an act of civil disobedience, or even chant encouragement for those committing civil disobedience, they could in theory be charged with conspiracy.<sup>156</sup> It may sound unlikely, but conspiracy charges have recently been used in exactly that way against protesters in the U.S.<sup>157</sup> In addition to making it easier to prosecute protesters and organizations, framing these collective liability provisions in terms of conspiracy also gives law enforcement broader latitude to surveil and arrest protesters.<sup>158</sup> As the ICNL explains:

A warrant for law enforcement to engage in surveillance may be given on “probable cause”, which is defined as a “fair probability” that evidence of a crime will be found. It is generally easier for law enforcement to show that there is a “fair probability” that they will find evidence of a conspiracy than other crimes, because a conspiracy does not require an individual to have engaged in any unlawful activity.<sup>159</sup>

Difficulty in controlling what will happen at a protest makes matters even more complicated for organizations or movements that support protests and protestors. Groups that only support lawful, constitutional protests cannot be sure that someone at the protest will not engage in civil disobedience, and the threat of facing vicarious liability for others’ civil disobedience may hinder them from supporting lawful speech and assembly.<sup>160</sup>

South Dakota’s 2019 Riot Boosting Act is a prime example of how these collective liability provisions might infringe on constitutionally protected speech.<sup>161</sup> The Act, which South Dakota Governor Kristi Noem stated herself when it was proposed, was

---

155. INT’L CTR. FOR NOT-FOR-PROFIT L., *supra* note 126, at 3 (“The use of conspiracy and other collective liability provisions in critical infrastructure bills can infringe the right to association. The definition of conspiracy varies by state, but the offense generally includes an agreement by two or more people to undertake an unlawful act, and some step towards completion of that act.”).

156. *Id.* at 4.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 5.

161. *See Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 886-88 (D.S.D. 2019).

created to “help ensure the Keystone XL pipeline and other future pipeline projects are built in a safe and efficient manner.”<sup>162</sup> The Act created a “fund and legal remedies to pursue out-of-state money funding the riots aiming to shut down the pipeline build.”<sup>163</sup> It also created a new legal term, “riot-boosting,” stating that a person is liable for any damages incurred from “riot-boosting,” even if that person does not participate in a riot, but “directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence.”<sup>164</sup>

The ACLU immediately challenged the Act, as well as two felony riot statutes, arguing that they were unconstitutional.<sup>165</sup> The District Court recognized the potential for the Act’s riot-boosting definition to capture a significant portion of constitutionally protected speech, writing:

Sending a supporting email or a letter to the editor in support of a protest is encouraging. Giving a cup of coffee or thumbs up or \$10 to protesters is encouraging. . . . Asking someone to protest is soliciting. . . . Suggesting that the protest sign be bigger is advising. The possible violations of those felony or damage creating statutes against advising, encouraging or soliciting goes on and on. Encouragement, advice, or solicitation for the protest on social media would be a fertile ground for damages or charges or both. And each of these examples involve protected speech or expressive activity.<sup>166</sup>

The Court pointed to civil rights era cases defining the robust right to protest, underscoring that “mere advocacy, even if distasteful, is protected speech as distinguished from incitement to immediate lawless action” and found that the statute unconstitutionally infringed on protected speech.<sup>167</sup> This is a clear example of how a law ostensibly targeted at unlawful behavior or civil disobedience can actually threaten lawful protest. After the Court temporarily enjoined the portions of the statutes it found to violate First Amendment protections, South Dakota reached a settlement agreement saying it would never enforce the parts of the

---

162. *Noem Introduces Pipeline Legislative Package*, S.D. STATE NEWS, <https://news.sd.gov/newsitem.aspx?id=24203> [<https://perma.cc/TZM4-WNRU>].

163. *Id.*

164. S.B. 189, 2019 Leg., 94th Sess. (S.D. 2019).

165. *Dakota Rural Action*, 416 F. Supp. 3d at 879–80.

166. *Id.* at 886.

167. *Id.* at 887.

statute the Court had found to be unconstitutional.<sup>168</sup> However, just two months later, in December 2019, Governor Noem wrote to the South Dakota legislature, stating that “riot boosting is still in effect and enforceable” and proposing new changes to the laws to avoid judicial censure.<sup>169</sup> The ACLU responded to Governor Noem’s memo, warning of serious constitutional shortcomings in the laws and arguing that Governor Noem had misrepresented the extent of the state’s ability to enforce such laws after the settlement agreement.<sup>170</sup>

### 3. The Federal Government’s Critical Infrastructure Proposals

Similarly to state governments, the federal government has advanced its own proposals around critical infrastructure, with provisions echoing the ALEC model bill.<sup>171</sup> Under the Trump administration, the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration asked Congress to amend pipeline safety standards to include language threatening twenty-year prison terms and fines for “damaging or destroying” existing pipelines and those under construction.<sup>172</sup> An attorney for the ICNL said the Trump administration’s “proposed penalty is far and away more extreme than what we’ve seen at the state level.”<sup>173</sup> Key Democratic lawmakers were dismissive of the proposed criminalization provisions; a spokesperson for Energy and Commerce Chairman Frank Pallone said he would not “allow[] a pipeline safety bill to be used as a vehicle for stifling legitimate dissent and protest.”<sup>174</sup> Fossil fuel industry lobbyists have pushed for other versions of pipeline safety bills moving through Congress to

---

168. Eidelman, *supra* note 20.

169. Stephen Groves, *South Dakota Governor Plans Revision of Riot-boosting Laws*, ABCNEWS (Dec. 16, 2019), <https://abcnews.go.com/US/wireStory/south-dakota-governor-plans-revision-riot-boosting-laws-67764424> [<https://perma.cc/K9DV-4BTT>].

170. *Id.*

171. See Lefebvre & Adragna, *supra* note 15.

172. *Id.* (calling for Congress to “expand a law that threatens fines and up to 20 years’ prison time for ‘damaging or destroying’ pipelines currently in operation,” with the expanded version adding “vandalism, tampering with, or impeding, disrupting or inhibiting the operation of” either existing pipelines or those “under construction”).

173. *Id.* (combining provisions that vague to penalties that extreme creates uncertainty about what is and is not legal).

174. *Id.*

have criminalization provisions, but such provisions are also facing opposition from key Democratic lawmakers.<sup>175</sup> As of February 2020 the legislation was still pending, but it is clear that the trend of restricting climate protesters has been embraced by some actors and legislators in the federal government.

#### **4. Industry Connection to Critical Infrastructure Legislation**

Although the move to stifle climate protesters is often framed as a *government* effort, it is critical to draw out the role of industry in creating, championing, and advancing the legislative trend. The fossil fuel industry's influence has been immense, and it has also been leveraged through diverse avenues, making it impossible to cover every instance of influence here. I will focus on how the fossil fuel industry was involved from the early stages of the legislative push, drawing out the industry influence behind the ALEC model bill. I will also highlight several examples of particularly heavy industry influence on specific state and federal proposals. Finally, I will underscore the key role of industry trade and lobbying groups like the American Fuel & Petrochemical Manufacturers and the American Petroleum Institute (API), in championing the government restrictions.

##### **a. The Industry Influence Behind the ALEC Model Bill**

As discussed above, many of the state and federal proposals to restrict climate protesters echo provisions in the ALEC model critical infrastructure bill, which was officially approved by ALEC's board in January 2018.<sup>176</sup> ALEC itself has proven to be a center for fossil fuel industry influence. In a 2011 report, the Center for Media and Democracy found that nearly 98% of ALEC's funding came from sources other than legislative dues, including corporations, corporate

---

<sup>175</sup> Lee Fang & Nick Surgey, *Oil Lobbyists Attempt to Influence Pipeline Safety Legislation to Further Criminalize Pipeline Protests*, THE INTERCEPT (Sept. 27, 2019), <https://theintercept.com/2019/09/27/pipeline-safety-legislation/> [<https://perma.cc/N35Z-YTDM>].

<sup>176</sup> *Critical Infrastructure Protection Act*, *supra* note 131.

foundations, and trade associations.<sup>177</sup> Corporations can pay up to \$25,000 a year or more for membership.<sup>178</sup> The American Petroleum Institute (API) has funded ALEC, while ExxonMobil and its foundation gave more than \$1.4 million to the organization over a decade.<sup>179</sup>

As ALEC publicly stated, it drew from Oklahoma's two critical infrastructure bills enacted in 2017 to create its own model bill.<sup>180</sup> In fact, one of those bills, House Bill 2128, was originally authored by a confirmed ALEC legislative member, Charles McCall.<sup>181</sup> Greenpeace reports that Charles McCall has taken more than \$48,000 in donations from the oil and gas industry and its employees.<sup>182</sup> Thus an ALEC legislative member with deep ties to the fossil fuel industry proposed one of the two bills ultimately used by ALEC to create its own model bill. However, those are not the only avenues of fossil fuel industry influence behind the creation of the ALEC model bill. In December 2017, fossil fuel trade groups, a think tank, and one individual corporation wrote a letter addressed to state lawmakers, asking for their support in getting ALEC to officially adopt the Critical Infrastructure Protection Act as one of its model bills.<sup>183</sup> In the letter, these industry stakeholders warned that "[e]nergy infrastructure is often targeted by environmental activists to raise awareness of climate change," and those actions can "cause millions of dollars in damage."<sup>184</sup> The letter provides clear evidence that members of the fossil fuel industry saw the ALEC model bill, and consequently the state proposals drawing from the bill, as a way to target what they considered disruptive and risky climate protests. Having highlighted evidence of industry influence on the ALEC

---

177. Lisa Graves, *A CMD Special Report on ALEC's Funding and Spending*, CTR. FOR MEDIA & DEMOCRACY'S PRWATCH (July 13, 2011), <https://www.prwatch.org/news/2011/07/10887/cmd-special-report-alecs-funding-and-spending> [<https://perma.cc/AZH7-J2CF>].

178. *Id.*

179. *Id.*

180. *See supra* note 131 and accompanying text.

181. H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017); *Oklahoma ALEC Politicians*, SOURCEWATCH, (Aug. 11, 2020), [https://www.sourcewatch.org/index.php/Oklahoma\\_ALEC\\_Politicians](https://www.sourcewatch.org/index.php/Oklahoma_ALEC_Politicians) [<https://perma.cc/A7Y9-MCNN>].

182. Gibson, *supra* note 106.

183. Kaufman, *supra* note 136.

184. *Id.* Letter from American Legislative Executive Council to State Legislators (Dec. 7, 2017), [https://www.huffpost.com/entry/pipeline-environmentalist-terrorism\\_n\\_5a85c2ede4b0058d55672250](https://www.huffpost.com/entry/pipeline-environmentalist-terrorism_n_5a85c2ede4b0058d55672250).

model bill, I will now provide several more examples of how state critical infrastructure bills were heavily influenced by the fossil fuel industry.

### b. Louisiana

One of the most explicit examples of industry influence comes from Louisiana. In 2018, the President and General Counsel of Louisiana Mid-Continent Oil and Gas Association, a trade association representing oil and gas industry sectors in Louisiana, drafted the updates that the state legislature made to Louisiana’s Critical Infrastructure law, as discussed above.<sup>185</sup> These updates imposed drastically heavier criminal and financial penalties on trespassers, while simultaneously making it much less clear to potential protesters when they were trespassing by creating an immensely broad definition of critical infrastructure. According to the complaint filed by the Center for Constitutional Rights challenging the law, the President and General Counsel of the trade association stated publicly at Tulane Law School that he had followed in the footsteps of Oklahoma, working with the Oklahoma Oil and Gas Association, to draft the amendments to Louisiana’s Critical Infrastructure law.<sup>186</sup>

### c. South Dakota

There is also evidence of deep industry collaboration and influence on South Dakota’s critical infrastructure bill, which pioneered the legal term “riot-boosting” in an attempt to broadly define and punish collective liability for protesters and organizations supporting protests.<sup>187</sup> As reported by various news outlets,

---

185. Alleen Brown, *Pipeline Opponents Strike Back Against Anti-Protest Laws*, *THE INTERCEPT* (May 23, 2019), <https://theintercept.com/2019/05/23/pipeline-protest-laws-louisiana-south-dakota/> [https://perma.cc/8LNC-KQE5]. See News Release, *LMOGA Statement on Critical Infrastructure Protection*, LA. MID-CONTINENT OIL & GAS ASS’N (May 22, 2019), <https://www.lmoga.com/news/lmoga-statement-on-critical-infrastructure-protection> [https://perma.cc/Y36G-P57Y], for information regarding Louisiana Mid-Continent Oil and Gas Association.

186. Complaint for Declaratory and Injunctive Relief at 17, *White Hat v. Landry*, No. 19-322-JWD-EWD (M.D. La. July 30, 2020).

187. See S.B. 189, 94th Leg., Reg. Sess. (S.D. 2019); Andrew Malone & Vera Eidelman, *The South Dakota Legislature Has Invented a New Legal Term to*

TransCanada, the parent company of the Keystone XL tar sands pipeline, which expected massive protests against the pipeline, worked with South Dakota's government to shape the critical infrastructure bill.<sup>188</sup> South Dakota Governor Kristi Noem publicly recognized the collaboration with TransCanada on the critical infrastructure bill in anticipation of Keystone XL protests. She said the legislation would "help ensure the Keystone XL pipeline and other future pipeline projects are built in a safe and efficient manner."<sup>189</sup> The Governor and her team had met with TransCanada and others "to discuss the Keystone XL pipeline project and to listen and develop legislative solutions that allow for an orderly construction process for this pipeline."<sup>190</sup>

South Dakota and Louisiana are particularly obvious examples of industry influence, but they are just the tip of the iceberg. A Texas newspaper reported that the authors of the state's critical infrastructure bill had attended ALEC conferences in recent years and that one had received substantial campaign contributions from energy companies in 2018, while many fossil fuel industry corporations and associations had officially registered support of the bill with the legislature.<sup>191</sup> Iowa's lobbying disclosure records show that a myriad of fossil fuel corporations and trade groups lobbied for the passage of a similar critical infrastructure bill within the

---

*Target Pipeline Protestors*, ACLU (Apr. 1, 2019) <https://www.aclu.org/blog/free-speech/rights-protesters/south-dakota-legislature-has-invented-new-legal-term-target> [<https://perma.cc/BUS8-ZE87>].

188. Elena Saavedra Buckley, *South Dakota Pushes Bills to Prosecute 'Riot-boosting' Ahead of Pipeline Construction*, HIGH COUNTRY NEWS (Mar. 6, 2019), <https://www.hcn.org/articles/tribal-affairs-south-dakota-pushes-bills-to-prosecute-riot-boosting-ahead-of-keystone-xl-pipeline-construction> [<https://perma.cc/B55D-D3AM>] ("TransCanada had a seat at the table as the bills took form, Noem said."); Brown, *supra* note 185 ("Noem's office drafted it in consultation with KXL parent company TransCanada (recently re-named TC Energy), in an effort to manage the burden of expected protest costs.").

189. *Noem Introduces Pipeline Legislative Package*, *supra* note 162.

190. *Id.*

191. Candice Bernd, *Pipeline Protesters Could Face 10 Years in Prison Under Bill OK'd by Texas House*, TEX. OBSERVER (May 1, 2019), <https://www.texasobserver.org/pipeline-protesters-could-face-20-years-in-prison-under-bill-in-texas-house/> [<https://perma.cc/A8SS-WM72>] (one representative's committee received at least \$40,000 from energy companies during the 2018 election); Jennifer A. Dlouhy, *Oil Companies Persuade States to Make Pipeline Protests a Felony*, BLOOMBERG (Aug. 19, 2019), <https://www.bloomberg.com/news/articles/2019-08-19/oil-companies-persuade-states-to-make-pipeline-protests-a-felony> [<https://perma.cc/Z7RY-2D7G>].

state.<sup>192</sup> Although I cannot highlight the industry influence on every state bill here, examples of such influence abound. Greenpeace’s project PolluterWatch is tracking the industry influence behind each critical infrastructure bill.<sup>193</sup>

#### d. The Influence of Fossil Fuel Trade and Lobbying Organizations

Finally, I will highlight the influence of fossil fuel industry trade and lobbying organizations on the wave of critical infrastructure bills. It is important to highlight the role of trade and lobbying organizations because they demonstrate the breadth of fossil fuel industry support for the legislative restrictions of climate protesters. Some of them also serve as a key link between the fossil fuel industry’s push to undermine climate science for decades and its more recent push to stifle climate protesters.

As described above, trade and lobbying groups pushed for ALEC to adopt its critical infrastructure model bill.<sup>194</sup> One of those groups was American Fuel & Petrochemical Manufacturers (AFPM), an energy trade association with more than 450 corporate members,<sup>195</sup> a Board of Directors that has included ExxonMobil, Chevron, and BP,<sup>196</sup> and a history of working to defeat government climate action.<sup>197</sup> A 2019 Bloomberg News report found that “[t]he AFPM, and one of its top members, Marathon Petroleum Corp., spearheaded efforts to get ALEC to support the model legislation in 2017, according to two people familiar with the matter who asked not to be

192. Dlouhy, *supra* note 191.

193. Connor Gibson, *State Bills to Criminalize Peaceful Protest of Oil & Gas “Critical Infrastructure”*, POLLUTERWATCH (Feb. 18, 2019), <https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines> [<https://perma.cc/9YDK-GHFS>].

194. Kaufman, *supra* note 136.

195. *Committees*, AM. FUEL & PETROCHEM. MFRS., <https://www.afpm.org/about-us/leadership/committees> [<https://perma.cc/YP63-DBBX>].

196. *Board of Directors*, AM. FUEL & PETROCHEM. MFRS., <https://www2.afpm.org/forms/committee/CommitteeFormPublic/view?id=FBF00000030> [<https://perma.cc/CDG2-WYVN>].

197. Lee Fang, *Oil Lobbyist Touts Success in Effort to Criminalize Pipeline Protests, Leaked Recording Shows*, THE INTERCEPT (Aug. 19, 2019), <https://theintercept.com/2019/08/19/oil-lobby-pipeline-protests/> [<https://perma.cc/2MDF-AYK7>] (stating that AFPM and its members mobilized over \$30 million to defeat the carbon tax proposed in Washington State).

named discussing internal strategy.”<sup>198</sup> *The Intercept* obtained an audio recording featuring Derrick Morgan, a senior vice president for federal and regulatory affairs at AFPM, speaking about the group’s involvement in the wave of critical infrastructure bills at the Energy & Mineral Law Foundation conference.<sup>199</sup> In the recording, Morgan says that AFPM has had “a lot of success at the state level,” adding that “we’re up to nine states that have passed laws that are substantially close to the [ALEC] model policy.”<sup>200</sup> Morgan’s remarks underscore two things. The first is that, as many commentators have assumed, legislators are drawing inspiration from ALEC’s model bill to propose their own critical infrastructure bills. Second, the remarks also underscore that AFPM thinks of the model bill as its own project and is closely monitoring its success at the state level. There is more evidence to show that AFPM is advocating for, and even drafting, critical infrastructure bills in different states.<sup>201</sup>

The American Petroleum Institute (API), the largest oil and gas trade association in the U.S., has also influenced the wave of critical infrastructure bills restricting climate protesters.<sup>202</sup> The Center for Media and Democracy reports that API seems to be the driving force behind the critical infrastructure bill proposed in Wisconsin.<sup>203</sup> Iowa’s lobbying disclosure records also show that API advocated for the state’s critical infrastructure bill.<sup>204</sup> Other fossil fuel industry

---

198. Dlouhy, *supra* note 191.

199. Fang, *supra* note 197.

200. *Id.*

201. *Id.*

202. See e.g., David Armiak, *Wisconsin Legislators Seek to Criminalize Climate, Environmental Protests with Latest Bill*, CENTER FOR MEDIA & DEMOCRACY’S PRWATCH (Sept. 16, 2019), <https://www.prwatch.org/news/2019/09/13493/wisconsin-legislators-seek-criminalize-climate-environmental-protests-latest-bill> [https://perma.cc/47TM-FTG2] (discussing API’s involvement in Wisconsin’s proposed Senate Bill 386 designed to chill protests around oil and gas pipelines and other energy infrastructure in the state).

203. *Id.* (indicating that the impetus for Senate Bill 386 appeared to come from the API where an authorized representative had been heavily involved in the drafting of and lobbying for the bill).

204. See *Lobbyist Declarations*, IOWA LEGIS., <https://www.legis.iowa.gov/lobbyist/reports/declarations?ga=87&ba=SSB3062> [https://perma.cc/DW44-F9HQ] (showing that API was represented by lobbyists in favor of Iowa’s Senate Study Bill 3062); Steve Horn, *As Trump Unfurls Infrastructure Plan, Iowa Bill Seeks to Criminalize Pipeline Protests*, DESMOG (Jan. 31, 2018), <https://www.desmogblog.com/directory/vocabulary/4023> [https://perma.cc/E9FE-F29G].

trade groups have aggressively pushed for federal legislation mirroring the recent spate of state critical infrastructure bills.<sup>205</sup>

**B. Use of Violence and Surveillance Against Protesters, and the Push to Label Them as Terrorists and Extremists**

In addition to the wave of industry-backed critical infrastructure bills, climate protesters also face the threat of surveillance and violence from industry, paramilitary, and government stakeholders. This threat against lawful protest is most greatly felt where those who disagree with climate protesters have led a rhetorical push to label such protesters as terrorists and extremists. As with the legislative restrictions on climate protesters, there is clear fossil fuel industry influence behind the threatening tactics of surveillance and violence. Unlike the first and third categories of tactics targeting climate protesters discussed in this article—critical infrastructure legislation and retaliatory litigation—this section’s legal tactics are not as uniform. Nevertheless, government and industry stakeholders are relying on various legal tactics to surveil protesters and to label them extremists, and it is important to draw out the various ways in which law is facilitating these actions. These tactics include federal lawmakers asking the Justice Department whether critical infrastructure protesters can be targeted under the Patriot Act, paramilitary security forces planning to pressure law enforcement to prosecute protesters more harshly, and prosecutors issuing broad warrants for social media activity connected to climate protests. In this section, I will explore how the fossil fuel industry has used private security forces to respond to protesters, as well as how government stakeholders are cooperating with industry and private security forces to coordinate their responses to protesters. I will also explore the push by private security, industry, and government stakeholders to label broad swathes of protesters as terrorists and extremists, as well as how social media is being used to surveil and potentially punish climate protesters.

---

205. Fang & Surgey, *supra* note 175 (“The draft language was provided to legislators by the Association of Oil Pipelines, a lobbying group in Washington, D.C., that represents Koch Industries, Kinder Morgan, TransCanada, Phillips 66, Energy Transfer Partners, Enbridge, Plains All American, and other major oil and gas pipeline interests.”).

### 1. Paramilitary and Private Security Forces Being Used Against Climate Protesters

One of the most troubling examples of private security forces being used against climate protesters and water protectors comes from the resistance against DAPL. As discussed above, Energy Transfer Partners, the company behind DAPL, hired TigerSwan to coordinate its response to the Indigenous-led movement against the pipeline.<sup>206</sup> TigerSwan is a private security firm created by retired military officers in 2007.<sup>207</sup> The company publicly touts its years of “global combat leadership” as well as its ability to “monitor, protect, and secure your assets with mobile and fixed-site security and rapid response and deployment.”<sup>208</sup> When Energy Transfer Partners hired TigerSwan to monitor its response to the anti-DAPL movement, the firm leveraged its “global combat leadership” against Indigenous water protectors and their allies, largely U.S. citizens. Internal documents leaked to *The Intercept* by a TigerSwan contractor show a troubling picture of how the company monitored protesters.<sup>209</sup> After reviewing those records, as well as more than a thousand others obtained through public record requests, *The Intercept* found that “TigerSwan spearheaded a multifaceted private security operation characterized by sweeping and invasive surveillance of protesters.”<sup>210</sup>

The TigerSwan documents made public by *The Intercept* provide clear evidence of the company monitoring water protectors, collaborating with lawmakers from across states, attempting to sow discord between water protectors and their allies along racial lines, and viewing water protectors and protesters as being akin to “jihadists.”<sup>211</sup> In a TigerSwan situation report from October 3, 2016,

---

206. Brown et al., *supra* note 71.

207. *Who We Are*, TIGERSWAN, <https://www.tigerswan.com/who-we-are/> [<https://perma.cc/XX6D-V44T>]; see Brown et al, *supra* note 71.

208. *Protective Services for Global Risk Management*, TIGERSWAN, <https://www.tigerswan.com/our-services/protective-services/> [<https://perma.cc/9WGT-8J6Z>].

209. See Brown et al., *supra* note 71.

210. *Id.*

211. See *id.*; JOHN PORTER, TIGERSWAN DAPL SITREP 168 at 4 (2017), <https://assets.documentcloud.org/documents/3868812/Internal-TigerSwan-Situation-Report-2017-02-27.pdf> [<https://perma.cc/GA6P-UA7C>] (stating that the anti-DAPL protesters movement was an ideologically driven insurgency that resembled the jihadist insurgency model).

company employees wrote that they “met with campus police from University of Illinois and Lincoln Land College in Springfield, IL. Both agencies reported nothing seen or heard of public postings about developing protest support among the students against DAPL project.”<sup>212</sup> This internal report reveals a disturbing state of affairs—that a private security firm hired by a fossil fuel company was monitoring university students hundreds of miles away from a pipeline construction site to determine if they were engaging in constitutionally protected political speech.

The private security force was not only monitoring and surveilling those opposed to (or even potentially opposed to) the DAPL, but it was actively trying to turn them against each other. The company wrote that “[e]xploitation of ongoing native versus non-native rifts . . . is critical in our efforts to delegitimize the anti-DAPL movement.”<sup>213</sup> The company clearly viewed water protectors as extremists and treated them accordingly. In a situation report from February 27, 2017, TigerSwan employees wrote that the anti-DAPL movement “generally followed the jihadist insurgency model”<sup>214</sup> and that “aggressive intelligence preparation of the battlefield and active coordination between intelligence and security elements are now a proven method of defeating pipeline insurgencies.”<sup>215</sup> TigerSwan expanded its target far beyond potential perpetrators of civil disobedience at the pipeline construction site, going so far as to speak to campus security in a different state about what would have been completely lawful and highly protected political speech in its attempt to “defeat pipeline insurgencies.”<sup>216</sup> Since the First Amendment only protects against government action infringing on protected speech, private companies have wider leeway to scrutinize and monitor political speech. However, civil rights attorneys have pointed out the danger in allowing private security firms to monitor, surveil, and

---

212. JOHN PORTER, TIGERSWAN DAPL SITREP 022 at 2 (2016), <https://assets.documentcloud.org/documents/3766413/Internal-TigerSwan-Situation-Report-2016-10-03.pdf> [<https://perma.cc/E4CF-GSLR>].

213. *Id.* at 4.

214. PORTER, *supra* note 211, at 4, <https://assets.documentcloud.org/documents/3868812/Internal-TigerSwan-Situation-Report-2017-02-27.pdf> [<https://perma.cc/GA6P-UA7C>].

215. *Id.* at 5.

216. *See id.* at 3, 5.

undermine speech that would be protected from identical government interference.<sup>217</sup>

The danger is heightened because the company worked so closely with government law enforcement while it was surveilling protesters. Media reports show that the company worked closely with law enforcement in at least five states in the course of responding to the anti-DAPL movement.<sup>218</sup> In a leaked situation report, TigerSwan analysts highlight the reluctance of certain county law enforcement officials “to arrest or cite trespassing individuals” and underscored a “need to work closer with Calhoun, Boone, and Webster county [law enforcement] to ensure future protestors will at least be fined, if not arrested.”<sup>219</sup> In essence, a private security company had the financial incentive to portray protesters as threatening and unpredictable in order to continue its contract,<sup>220</sup> as well as the incentive to pressure the government to treat protesters more harshly in order to keep protesters from bothering their employer. It is a deeply troubling precedent to have a private entity—an entity trained in global intelligence and battleground tactics, whose analysts equate pipeline protesters to jihadists and work to divide them along racial lines, with financial incentive to portray protesters as threatening—working with government law enforcement to monitor and surveil protesters and water protectors as well as pressuring government actors to punish protesters more harshly. It is clear why the ACLU alleges that such coordinated collaboration between government and private security forces creates “undue scrutiny of political speech.”<sup>221</sup> As conflict over pipelines continues in the U.S., it is likely that companies will continue to hire private security firms to respond to protesters. Protesters will likely have to face surveillance from private security firms and government officials working in tandem, in addition to

---

217. Antonia Juhasz, *Paramilitary Security Tracked and Targeted DAPL Opponents as ‘Jihadists,’ Docs Show*, GRIST (June 1, 2017), <https://grist.org/justice/paramilitary-security-tracked-and-targeted-nodapl-activists-as-jihadists-docs-show/> [<https://perma.cc/5J5P-3JMB>]; Complaint For Injunctive Relief at 5, *ACLU v. Dep’t of Def.*, No. 18-cv-154-DWM (D. Mont. Sept. 4, 2018).

218. Brown et al., *supra* note 71.

219. *Id.*

220. *Id.* (“[T]he company’s profit-driven imperative to portray the nonviolent water protector movement as unpredictable and menacing enough to justify the continued need for extraordinary security measures.”).

221. Complaint for Injunctive Relief, *supra* note 217, at 5.

critical infrastructure bills that potentially give government prosecutors and lawmakers' broader latitude to search, arrest, and charge them with dramatically heightened criminal and financial penalties.

## 2. Use of Violence Against Water Protectors and Protesters

As described above, water protectors and their allies faced a wave of violence during their resistance to the DAPL. The Indigenous Peoples Law and Policy Program at the University of Arizona Rogers College of Law prepared a Report for the Inter-American Commission on Human Rights, which highlighted such violence. The Report found that, during the seven months between September 2016 and February 2017, there were at least seventy-six law enforcement agencies, federal agencies, and private security agencies present at the site of resistance against the DAPL pipeline.<sup>222</sup> In September 2016, water protectors peacefully approached workers bulldozing sacred burial sites and attempted to pray and protect the sites.<sup>223</sup> Industry security guards used attack dogs and pepper spray on the water protectors, injuring a number of Indigenous people, including a pregnant woman.<sup>224</sup> Further, in October 2016, law enforcement descended on the camps, using “a Long Range Acoustic Device sound weapon, explosive teargas grenades, chemical agents, Tasers, rubber bullets, batons and a Directed Energy weapon” against non-violent water protectors.<sup>225</sup> A Councilwoman for the Ponca Tribe of Oklahoma who was at the camps when law enforcement descended described the scene:

Our people stood or sat in prayer. Some chanted, some sang, some observed and filmed the assault that happened. We were violently overcome. None of us were armed with anything more than our prayers and Sacred Pipes and Eagle Feather Staffs. Several of us were Elders of our Nations, 70 and above. Many were our Sacred

---

222. UNIV. OF ARIZ. ROGERS COLL. OF L., CRIMINALIZATION OF HUMAN RIGHTS DEFENDERS OF INDIGENOUS PEOPLES RESISTING EXTRACTIVE INDUSTRIES IN THE UNITED STATES 4 (2019), <https://waterprotectorlegal.org/app/uploads/2019/06/FINAL-IPLP-WPLC-Report-to-IACHR-6-24-19.pdf> [<https://perma.cc/UK8N-E5ZQ>].

223. *Id.*

224. *Id.*

225. *Id.* at 5.

Youth. We were pepper sprayed in our faces, struck down, tazed, then hands zip-tied behind us, thrown to the ground and eventually 142 of us were taken by bus to jail . . . .

I'll always hold one image in my mind. When I had last seen my oldest son, he was being assaulted and dragged away by 5 police in riot gear because he was asking for the Elders to have the zip-ties removed or at least placed in front of our bodies. The next place I saw him was in the basement of that jail, he was injured and in a dog cage, but alive.<sup>226</sup>

The Report documents several other examples of extreme violence used against peaceful water protectors at Standing Rock, including a November 2016 incident where over two-hundred people were injured.<sup>227</sup> It also argues that, in many parts of the world, peaceful, Indigenous-led resistance is disproportionately met by violence.<sup>228</sup> To support this proposition, the report highlights the stark difference in how law enforcement responded to the peaceful Indigenous-led resistance at Standing Rock and how it responded to the armed, unlawful resistance led by the Bundy family in Oregon and Nevada, pointing out the comparative lack of police presence and militarized response to the Bundy family and its anti-government militias.<sup>229</sup>

### 3. Federal Lawmakers' Push to Prosecute Protesters as Terrorists

It is not just private security firms that view pipeline protesters as extremists. In an October 2017 letter to the U.S. Department of Justice, eighty-four federal lawmakers queried whether pipeline protesters could be prosecuted as domestic terrorists under the Patriot Act.<sup>230</sup> Several months earlier, in May 2017, the American

---

226. *Id.* at 6.

227. *Id.* at 6–7.

228. *See id.* at 7, 13.

229. *Id.* at 13.

230. Timothy Gardner, *U.S. Lawmakers Ask DOJ if Terrorism Law Covers Pipeline Activists*, REUTERS (Oct. 23, 2017), <https://www.reuters.com/article/us-usa-pipelines-activism/u-s-lawmakers-ask-doj-if-terrorism-law-covers-pipeline-activists-idUSKBN1CS2XY> [<https://perma.cc/58YF-RG4P>]; Letter from Members of Cong. to Jeff Sessions, U.S. Att'y Gen. (Oct. 23, 2017), [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Protecting%20Energy%20Infrastructure.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Protecting%20Energy%20Infrastructure.pdf) [<https://perma.cc/3A84-UEQ8>].

Petroleum Institute had sent a letter to the Department of Justice citing the threat of environmental extremists and encouraging the Department to “renew the government’s commitment to . . . the importance of identifying, deterring, detecting, disrupting, and preparing for threats and hazards to our nation’s critical infrastructure.”<sup>231</sup> Further, when the office of Representative Ken Buck sent around a letter addressed to the Department of Justice to his congressional colleagues to gather support for the October 2017 query, the American Petroleum Institute was listed as a supporter of the official query along with the Association of Oil Pipe Lines and the Interstate Natural Gas Association of America.<sup>232</sup> Additionally, after publication of Ken Buck’s October 2017 letter, the American Petroleum Institute released a statement of support for the letter, saying it was an important step in protecting against environmental extremists.<sup>233</sup>

In his media comments regarding the letter, terrorism expert David Schanzer expressed skepticism that it would have legal consequences, but did think it “could be used for rhetorical value.”<sup>234</sup> That rhetorical power is underscored by research showing that, for more than fifteen years, Americans have consistently ranked terrorism as one of the top policy priorities for the federal government.<sup>235</sup> Americans are extremely worried about terrorism

---

231. Letter from Stacy Linden, Vice President & Gen. Couns., Am. Petrol. Inst., to Kenneth A. Blanco, Acting Assistant Att’y Gen., Crim. Div., U.S. Dep’t of Just. (May 19, 2017), <https://www.api.org/~media/Files/News/Letters-Comments/2017/API-Letter-to-DOJ-Security-and-Enforcement-5-19-17.pdf> [<https://perma.cc/DB9D-HJRE>].

232. Letter from Ken Buck, U.S. Cong. Representative, to Colleagues (Oct. 10, 2017), <http://dearcolleague.us/2017/10/help-prevent-dangerous-attacks-on-energy-infrastructure-2/> [<https://perma.cc/TBL6-48DC>].

233. Press Release, Am. Petrol. Inst., API Welcomes Bipartisan Effort To Examine Attacks On U.S. Energy Infrastructure (Oct. 23, 2017), <https://www.api.org/news-policy-and-issues/news/2017/10/23/api-welcomes-bipartisan-effort-to-examine-attacks-on-us-energy-infrastructure> [<https://perma.cc/7VZ9-QHMJ>].

234. Gardner, *supra* note 230.

235. John Gramlich, *Defending Against Terrorism Has Remained a Top Policy Priority for Americans Since 9/11*, PEW RSCH. CENTER (Sept. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/09/11/defending-against-terrorism-has-remained-a-top-policy-priority-for-americans-since-9-11/> [<https://perma.cc/Z7Y8-YZZZ>] (“Over the course of more than 15 years and three presidential administrations, Americans have consistently said that defending the nation against terrorism should be a top policy priority for the White House and Congress, according to Pew Research Center surveys....”).

and want the government to protect them against the threat. The rhetorical force of framing protesters as extremists and terrorists has undoubtedly helped advance the wave of legislative proposals restricting climate protesters. When industry stakeholders pushed lawmakers to support the creation of an ALEC model critical infrastructure bill in December 2017, they pointed to several instances of explosive use and gunfire—which were not connected to protesters—to say the bill was necessary.<sup>236</sup> The model bill has spurred state legislation that gives law enforcement broader latitude to search and arrest protesters, as well as to charge them with hefty penalties. As discussed previously, there is clear evidence that TigerSwan, a private security firm working closely with law enforcement, viewed water protectors and protesters as an extremist insurgency similar to jihadists. It is not hard to see how this rhetorical framing might contribute to government and private security's militarized response to protesters.

#### 4. Social Media Surveillance of Climate Protesters

Climate protesters also face the threat of their social media being surveilled, potentially undermining their First Amendment rights. An example from Washington state demonstrates how social media can be used to target and gather information on climate protesters. In February 2017, the Red Line Salish Sea, an Indigenous-led climate justice group, organized a protest against Trump's executive orders and fossil fuel projects that blocked a highway for an hour in Whatcom County.<sup>237</sup> Nobody was arrested, but there was a minor car accident tied to the slowing of traffic from the protest.<sup>238</sup> The Whatcom County Prosecuting Attorney launched an investigation into the protest and served Facebook with a warrant, seeking "all messages, photos, videos, wall posts, and location information" connected to Red Line Salish Sea's Facebook page.<sup>239</sup> The first warrant application was withdrawn after the ACLU took legal action, and a second was withdrawn after objections

---

236. Kaufman, *supra* note 136.

237. Simon Davis-Cohen, *The Justice Department Helped a County Prosecutor Target the Facebook Records of Anti-Pipeline Activists*, THE INTERCEPT (Jan. 14, 2018), <https://theintercept.com/2018/01/14/facebook-warrant-pipeline-protest-whatcom-county-justice-department/> [https://perma.cc/929T-9YYF].

238. *Id.*

239. *Id.*

from Facebook, but a third warrant application was approved.<sup>240</sup> The warrant forced Facebook to hand over all of the Facebook page content stored between February 5th, 2017 and February 15th, 2017.<sup>241</sup> This included administrative and moderator profiles, images and videos posted to the page, and event information—including the account names and ID numbers for all users who were interested in, going to, or invited to the event.<sup>242</sup> In its legal challenge to the first warrant application, the ACLU argued that granting sweeping warrants for the identifying information of those who engage in protected speech on social media would inevitably chill political speech and association.<sup>243</sup> There is a clear risk of deterring protected speech and association if even those merely “interested” or “invited” to climate protests now risk having their Facebook account information shared with law enforcement over minor incidents connected to such protests.

This section highlights the various avenues that government and industry stakeholders can take to monitor climate protesters. Private security forces are checking in on the political speech of university students far from protest sites, and prosecutors are requesting the social media information of even those most tangentially related to climate protests. It also shows how industry and government stakeholders are pushing to label protesters as terrorists and extremists, ultimately justifying legislation to make it easier to surveil protesters and potentially changing the way law enforcement confronts protesters. It is clear that law enforcement officials are prepared to use militarized and violent tactics to disperse water protectors and climate protesters.

### C. Retaliatory Lawsuits Against Climate Protesters

The final tactic being used to target climate protesters is punitive lawsuits aimed at undermining lawful protest. Civil rights attorneys allege that fossil fuel industry members are attempting to

---

<sup>240.</sup> *Id.*

<sup>241.</sup> Search Warrant at 1, No. 17A03639 (May 11, 2017), <https://assets.documentcloud.org/documents/4345880/Red-Line-Facebook-Warrant.pdf> [<https://perma.cc/M45U-NBEX>].

<sup>242.</sup> *Id.*

<sup>243.</sup> Motion to Quash Search Warrant at 1, 7–8, No. 171002910 (Mar. 8, 2017), [https://www.aclu.org/sites/default/files/field\\_document/motion\\_to\\_quash\\_-\\_filed.pdf](https://www.aclu.org/sites/default/files/field_document/motion_to_quash_-_filed.pdf) [<https://perma.cc/PC45-ZHEQ>].

stifle the environmental activism of both individuals and organizations through Strategic Lawsuits Against Public Participation (SLAPPs).<sup>244</sup> Some of the clearest examples of this tactic are the lawsuits filed by Energy Transfer, the parent companies of DAPL, against Greenpeace and other anti-DAPL movement members for hundreds of millions of dollars.<sup>245</sup> One of Energy Transfer's lawsuits alleged that Greenpeace and other activists violated the Racketeering Influence and Corrupt Organization (RICO) act.<sup>246</sup> Non-profits argue that such allegations are particularly chilling to environmental speech and activism.<sup>247</sup> In this section I will delve into the details of Energy Transfer's lawsuits against Greenpeace and others, giving a brief introduction to the hallmarks and consequences of SLAPPs. Then I will discuss how using SLAPPs in conjunction with RICO allegations can be especially threatening to protesters.

### 1. Energy Transfer's Lawsuits Against Greenpeace and Others

In August 2017, Energy Transfer Equity and Energy Transfer Partners, collectively called Energy Transfer, filed a \$900 million dollar lawsuit in federal district court against Greenpeace, BankTrack, Earth First! and a collection of individuals in connection to their resistance to Energy Transfer's DAPL.<sup>248</sup> The complaint alleged that the defendants were a "network of putative not-for-profits and rogue eco-terrorist groups who employ patterns of criminal activity and campaigns of misinformation to target legitimate companies and industries with fabricated environmental claims and other purported misconduct, inflicting billions of dollars

---

244. Yoder, *supra* note 15.

245. *Id.*; Nicola Morrow, *The Dakota Access Pipeline Company Is Abusing the Judicial System to Silence Dissent*, ACLU (Mar. 1, 2019), <https://www.aclu.org/blog/free-speech/rights-protesters/dakota-access-pipeline-company-abusing-judicial-system-silence> [<https://perma.cc/9UMB-MEUE>].

246. Morrow, *supra* note 245.

247. Brief for ACLU et al. as Amici Curiae Supporting Defendants' Motions to Dismiss at 10, *Energy Transfer Equity, L.P. v. Greenpeace Int'l*, No. 17-CV-173-DLH-CSM (D.N.D. Dec. 5, 2017).

248. Complaint at 1–2, *Energy Transfer Equity, L.P. v. Greenpeace Int'l*, No. 17-CV-173-BRW (D.N.D. Aug. 22, 2017); Maggie Ellinger-Locke & Vera Eidelman, *The Assault on Environmental Protest*, THE HILL (Mar. 2, 2018), <https://thehill.com/opinion/civil-rights/376458-the-assault-on-environmental-protest> [<https://perma.cc/T2EA-79PW>].

in damage.”<sup>249</sup> More specifically, it alleged that the defendants had engaged in racketeering and conspiracy in contravention of the federal RICO Act, as well as engaging in racketeering in violation of state law, defamation, tortious interference with business, and common law civil conspiracy.<sup>250</sup> Additionally, Energy Transfer’s complaint used the word “terrorist” 23 times in total, demonstrating how the fossil fuel industry has attempted to leverage another legal avenue to paint climate protesters as terrorists and extremists.<sup>251</sup>

After a few procedural steps, including several defendants being dropped from the lawsuit, a federal judge ultimately granted the defendants’ motions to dismiss Energy Transfer’s lawsuit in February 2019.<sup>252</sup> Energy Transfer’s federal RICO claims were dismissed with prejudice, but their state law claims were dismissed without prejudice.<sup>253</sup> When reviewing a defendant’s motion to dismiss, a court accepts all factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff.<sup>254</sup> Even under that lenient standard, the court found that Energy Transfer had failed to establish plausible claims under RICO, often highlighting that the companies were not even close to establishing such claims.<sup>255</sup> The court explained what Energy Transfer would have had to show to make a valid civil RICO claim:

A valid civil RICO claim requires: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” So, Plaintiff must establish that an enterprise existed; each Defendant was associated with the enterprise; each Defendant participated in the conduct of the affairs of the enterprise; and each Defendant’s participation was through a pattern of racketeering activity.<sup>256</sup>

The RICO Act was designed to target long-term criminal coordination like mob activity.<sup>257</sup> In assessing Energy Transfer’s

---

249. Complaint, *supra* note 248, at 1.

250. *Id.* at 150–185.

251. See *id.*

252. Energy Transfer Equity, LP v. Greenpeace Int’l, No. 17-CV-173-BRW, at \*1 (D.N.D. Feb. 14, 2019).

253. *Id.*

254. *Id.* at \*4.

255. See *id.* at \*6, \*10.

256. *Id.* at \*6.

257. *Id.* at \*10 (“RICO is . . . ‘a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity.’”); Morrow, *supra* note 245.

RICO allegations step by step, the Court highlighted how the allegations fell far short of the criminal enterprise targeted by the RICO act. It wrote that, “[d]onating to people whose cause you support does not create a RICO enterprise,” and “[p]osting articles written by people with similar beliefs does not create a RICO enterprise.”<sup>258</sup> In assessing Energy Transfer’s allegations of mail and wire fraud, the Court wrote, “most (if not all) of the alleged ‘false and sensational claims’ are either subject to debate, matters of opinion, or inconsequential.”<sup>259</sup> Although Energy Transfer was far from establishing the necessary RICO claims, it was able to hold the threat of a \$900 million lawsuit over the defendants for almost two years. Below I will describe how the case had the hallmarks of a SLAPP and why SLAPPs can so effectively chill protected First Amendment activity.

Just a week after Energy Transfer’s case was dismissed by a federal court in February 2019, the companies (plaintiffs) filed a new lawsuit in state court against the same organizations and individuals, with the addition of Red Warrior Society.<sup>260</sup> Since the state law claims were dismissed from the federal court without prejudice, the companies brought the same or similar state claims against Greenpeace and the other defendants, as well as several new claims, in *state* court.<sup>261</sup> The speed with which this second lawsuit was filed shows how difficult it is for non-profits and others to fight the various legal tactics being used to target climate protesters. Similar to Energy Transfer’s quick turnaround after being defeated in court, the South Dakota government was exploring new legislation to stifle climate protest just months after being forced into a settlement agreement by the ACLU’s constitutional challenge of its “riot-boosting” provisions.<sup>262</sup> Litigation takes an immense amount of time, energy, and financial resources. Many non-profits and individual protesters cannot match the resources governments and industry members have at their disposal, making it difficult for those non-profits and individual protestors to outlast legal challenges brought against them.

---

258. *Energy Transfer Equity*, No. 17-CV-173-BRW, at \*8.

259. *Id.* at \*11.

260. See Complaint, *Energy Transfer L.P. v. Greenpeace Int’l et al.*, No. 30-2019-CV-180 (D.N.D. Mar. 18, 2019).

261. See *id.*

262. Groves, *supra* note 169.

There is another illuminating connection between the South Dakota litigation and the Energy Transfer litigation. Although the cases are very different in content and procedural posturing—one was a constitutional challenge to state legislation brought by a civil rights organization, and one was an industry lawsuit alleging various state and federal law infractions by individuals and organizations—federal courts in both cases highlighted how normal and lawful behavior of climate protesters is now at risk of sparking legal action. In temporarily enjoining provisions of South Dakota’s laws, the Court warned that “sending a[n] . . . email or a letter to the editor in support of a protest,” in addition to a long list of other pedestrian actions, could run afoul of the enjoined provisions.<sup>263</sup> In dismissing Energy Transfer’s lawsuit against Greenpeace and other defendants, the Court wrote, “[p]osting articles written by people with similar beliefs does not create a RICO enterprise.”<sup>264</sup> Such warnings give a sense of the broad scope of behavior, including merely sending a letter to the editor or posting an article, that may subject individual and organizational protesters to legal action, even if such action is later dismissed, enjoined, or overturned. The threat is particularly potent because of the ability of government and industry to leverage superior resources against protesters and any legal challenges they mount, as evidenced by how quickly South Dakota and Energy Transfer responded to their respective legal defeats.

#### **a. Strategic Lawsuits Against Public Participation**

Strategic Lawsuits Against Public Participation, or SLAPPs, are, at their core, lawsuits brought in retaliation for citizens’ attempts to influence the government or the wider electorate, which have the effect of reducing future public engagement in policy debates.<sup>265</sup> George Pring, one of the leading scholars on SLAPPs, described four criteria to decide whether a lawsuit qualifies as a SLAPP, including whether the case is:

---

263. *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 886 (D.S.D. 2019).

264. *Energy Transfer Equity, LP v. Greenpeace Int’l*, No. 17-CV-173-BRW, at \*8 (D.N.D. Feb. 14, 2019).

265. GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* 8 (1996).

1. a civil complaint or counterclaim (for monetary damages and/or injunction),
2. filed against non-governmental individuals and/or groups,
3. because of their communications to a government body, official, or the electorate,
4. on an issue of some public interest or concern.<sup>266</sup>

Other scholars have suggested a fifth criterion, whether “the suits are without merit and contain an ulterior political or economic motive.”<sup>267</sup> The criteria capture how SLAPPs transform disputes, allowing a politically and financially powerful stakeholder to unilaterally shift the forum of a debate and the issue being debated.<sup>268</sup> George Pring draws from the work of Penelope Canan to describe this fundamental shifting of the debate: “[o]ne moment a citizen is testifying against a city zoning permit for a proposed housing subdivision; suddenly, ‘city hall’ becomes ‘courthouse,’ and ‘zoning’ becomes ‘slander.’”<sup>269</sup> The consequences of this kind of unilateral reframing of issues by powerful stakeholders can be devastating for social movements; Pring and Canan “saw committed, hardcharging activists become frightened into silence, supporters drop out, resources diverted, fund-raising wither, public-issue campaigns flounder, and community groups die.”<sup>270</sup> Strikingly, the targets of SLAPPs rarely lose in court, but they are still “depoliticized—‘chilled’ in first amendment vernacular.”<sup>271</sup> Environmental activists have long been the target of SLAPP suits,<sup>272</sup> and activists warn that SLAPPs have become a key tactic in a global trend to stifle and intimidate environmental activists.<sup>273</sup>

---

266. George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 PACE ENV'T. L. REV. 3, 7–8 (1989).

267. Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENV'T L. & POL'Y F. 17, 18 (1993).

268. Pring, *supra* note 266, at 12.

269. *Id.*

270. *Id.* at 7.

271. *Id.* at 8.

272. Merriam & Benson, *supra* note 267, at 17.

273. Marcos Orellana, *Human Rights Watch: Green Activists Are Fighting the Great Fight – but Are Being Dragged Down by Petty Lawsuits*, PROTECT THE PROTEST (May 10, 2019), <https://www.protecttheprotest.org/2019/05/10/human->

Energy Transfer’s first lawsuit against Greenpeace and other defendants meets the criteria of a SLAPP suit. I will focus on the first lawsuit because it reached a final judicial determination, but the second lawsuit has similar features to the first.<sup>274</sup> In its first lawsuit, Energy Transfer filed a civil complaint for massive money damages, potentially up to and beyond \$900 million, against non-governmental groups and individuals. Energy Transfer’s complaint is rife with examples of the defendants’ communications to the electorate on an issue of public concern, and it uses those communications as the basis of its various allegations. For instance, in an attempt to demonstrate Greenpeace and others’ criminal enterprise activity, Energy Transfer alleged that the defendants:

wrote a letter to the Equator Principles Association (“EPA”), a consortium of global banks committed to responsible environmental and social practices, alleging “astonish[ment]” that thirteen EPA banks were funding DAPL, which the letter described as a “climate destroying project[.]” The letter falsely asserted, among other things, that:

DAPL “threatens air and water resources in the region and further downstream.”<sup>275</sup>

The complaint also highlights what it sees as other key examples of the defendants’ schemes, alleging that they launched the #NODAPL Campaign, disseminated false claims about DAPL, misrepresented that DAPL will poison tribal water, and

---

rights-watch-green-activists-are-fighting-the-great-fight-but-are-being-dragged-down-by-petty-lawsuits/ [https://perma.cc/67UF-BFWL].

274. See Complaint at 2–3, Energy Transfer LP v. Greenpeace Int’l et al., No. 30-2019-CV-180 (D.N.D. Mar. 18, 2019). See also *Energy Transfer LP v. Greenpeace International*, SABIN CTR. FOR CLIMATE CHANGE L. <http://climatecasechart.com/case/energy-transfer-lp-v-greenpeace-international/> [https://perma.cc/5HD9-FC7A] (“The lawsuit was filed a week after a federal court in North Dakota dismissed claims under the Racketeer Influenced and Corrupt Organizations Act against the same defendants (except for Red Warrior Society, which was not a party to the earlier action). The new lawsuit asserted some claims that were the same as or similar to claims the federal court dismissed without prejudice (trespass, defamation, tortious interference, and civil conspiracy), as well as new claims ... The plaintiffs alleged that the defendants ... ‘also engaged in large-scale, intentional dissemination of misinformation and outright falsehoods,’ including about DAPL’s impacts on climate change.”).

275. Complaint at 95, Energy Transfer Equity, L.P. v. Greenpeace Int’l, No. 17-CV-173 (D.N.D. Aug. 22, 2017).

misrepresented that DAPL will catastrophically alter climate.<sup>276</sup> Such examples almost certainly suggest that the complaint was filed because of the defendants' communications to the electorate on an issue of public concern—how the Dakota Access Pipeline would affect climate change, water, and Indigenous sovereignty. As discussed above, the Court found that these communications fell far short of establishing the claimed infractions,<sup>277</sup> emphasizing that posting articles and donating money do not establish racketeering activity. The communications also fit squarely within the constitutional category of political speech and are thus supposed to be subject to the highest level of protection from government action. It is clear to see how a \$900 million dollar lawsuit that explicitly targeted the political speech of non-profits and individual protesters and lasted a year and a half before it was dismissed, only to immediately be followed by a similar suit, could have the exact First Amendment chilling effects that Pring and Canan warned about.

In addition to bearing the hallmarks of a SLAPP suit, Energy Transfer's lawsuit also alleged that the defendants violated RICO, an allegation that can deter protesters and organizations in unique ways. By making RICO allegations, industry stakeholders can frame activists as criminal enterprises, thereby supporting the terrorist or extremist framing that has been used against climate protesters.<sup>278</sup> Civil rights and environmental organizations expanded on the unique threat of RICO allegations in an amicus brief they submitted in support of defendants' motions to dismiss Energy Transfer's first lawsuit. They pointed to case law describing a RICO allegation as "the litigation equivalent of a thermonuclear device," explaining that non-profits are particularly vulnerable to such allegations because of their limited financial capacity and dependence on a positive public

---

276. *Id.* at 44–65.

277. Energy Transfer Equity, LP v. Greenpeace Int'l, No. 17-CV-173-BRW, at \*10 (D.N.D. Feb. 14, 2019) ("This is far short of what is needed to establish a RICO enterprise.").

278. GREENPEACE, TOO FAR TOO OFTEN: ENERGY TRANSFER PARTNERS' CORPORATE BEHAVIOR ON HUMAN RIGHTS, FREE SPEECH, AND THE ENVIRONMENT 12 (June 2018), <https://www.greenpeace.org/usa/wp-content/uploads/2018/06/9122696a-toofar-toooften-web-mech-6.18.pdf> [<https://perma.cc/75QS-UD56>]; Brief for ACLU et al. as Amici Curiae Supporting Defendants' Motions to Dismiss at 11, Energy Transfer Equity, L.P. v. Greenpeace Int'l, No. 17-CV-173-DLH-CSM (D.N.D. Dec. 5, 2017) ("Finally, RICO suits allow civil plaintiffs to allege federal crimes. The mere assertion of a RICO claim consequently has an almost inevitable stigmatizing effect on those named as defendants.").

reputation.<sup>279</sup> RICO claims carry the risk of treble damages, can be resource-intensive to defend in court, and create strong financial incentives for organizations not to appeal potential losses at the district court level. Such claims have the potential to transform the most constitutionally protected speech into federal crimes like mail fraud, wire fraud, and extortion.<sup>280</sup> Thus, SLAPP suits and RICO allegations are a dangerous combination. SLAPPs retaliate against those who engage in public discourse, discouraging future public participation in devastating ways; but SLAPPs that utilize RICO allegations retaliate against public participation and political speech by framing such actions as criminal activity, thereby heightening the potential to undermine constitutionally protected activity. Energy Transfer's lawsuits also underscore that it is not just individuals who face an industry-driven pattern of tactics to stifle or chill their participation in climate protest. Organizations and non-profits also face the triple threat of collective liability provisions in critical infrastructure bills, SLAPP suits, and RICO allegations, all of which attempt to hold them vicariously liable for the actions of other protesters.

#### IV. CONCLUSION

At the very moment when the UN has called for profound shifts in social and economic systems to avert climate catastrophe,<sup>281</sup> governments around the world are targeting protesters advocating for climate action. The U.S. is a key part of this trend; federal and state government stakeholders have moved to stifle protest more generally, and climate protest in particular. Although such actions often ostensibly target civil disobedience, by imposing immense criminal and financial consequences, they threaten to unconstitutionally chill lawful, protected protest as well. Building off of the First Amendment's heightened protection for political expression, the U.S. Supreme Court has articulated a robust, but not unlimited, right to protest. Although not protected under the First Amendment, civil disobedience has played a long and storied role in advancing justice in the U.S., and there are strong arguments

---

279. Brief for ACLU et al. as Amici Curiae Supporting Defendants' Motions to Dismiss, *supra* note 278, at 10.

280. *Id.* at 4–5.

281. Report of the Secretary-General on the 2019 Climate Action Summit and the Way Forward in 2020, *supra* note 1, at 3.

---

---

against imposing draconian penalties on climate civil disobedients, particularly considering how much the fossil fuel industry has undermined effective legal avenues for citizens to engage in the climate policy debate. Although the move to stifle climate protesters is often framed as a *government* effort, it is critical to draw out the role of industry in initiating, amplifying, or supporting such tactics. In this article, I grouped tactics into three broad categories: federal and state critical infrastructure legislation; violence against and surveillance of protesters, including a rhetorical and legal push to label protesters as terrorists and extremists; and retaliatory lawsuits. I also provided a brief description of the anti-DAPL movement, which has been identified as one of the key catalysts in the government and industry push to target climate protesters.

Interesting patterns and insights emerge from analyzing these three trends in conjunction with one another and drawing out the role of industry in each. The first, and most obvious, is that when looking at the trends together, it is much easier to see how both individual protesters and organizations that support protesters might be deterred from participating in lawful climate protest. Individual protesters potentially face the combined threat of newly broadened critical infrastructure definitions—which can make it difficult to recognize the line between lawful and unlawful protest—massive criminal and financial penalties for accidentally or purposefully engaging in unlawful protest, retaliatory industry lawsuits for hundreds of millions of dollars, and comprehensive and invasive surveillance of constitutionally protected expressive activity. Additionally, they may have to contend with militarized law enforcement, working in conjunction with private security forces who view protesters as extremist insurgencies, in an atmosphere in which they know industry and government officials are pushing to label them as terrorists. Non-profits and civil society groups, even those with official policies against civil disobedience, are facing their own risks when they engage in constitutionally protected speech. The triple threat of collective liability provisions in critical infrastructure bills, SLAPP suits, and RICO allegations, all of which attempt to hold organizations vicariously liable for the actions of other protesters, can make organizations think twice about participating in or supporting climate protests. Of course, protesters will not always face all of the tactics in conjunction. However, water protectors and protesters in the anti-DAPL movement had to face

surveillance, violence, being labelled terrorists and extremists, and retaliatory lawsuits. Many of the states affected by the anti-DAPL movement successfully passed critical infrastructure bills, and states gearing up for large protests against Keystone XL, like South Dakota, have passed or proposed their own critical infrastructure bills. Thus, given the government and industry response to the anti-DAPL movement, it seems likely that these same stakeholders will attempt to utilize every tactic possible to target climate protesters when larger, sustained climate protests occur.

A second, related insight that emerges from this analysis is that there are important synergistic effects when these tactics are used together, heightening their power to undermine and chill climate protest. For example, critical infrastructure provisions framed in terms of conspiracy, which only requires that conspirators take steps towards an unlawful act rather than committing an unlawful act, give law enforcement broader latitude to surveil and arrest protesters. As demonstrated by the DAPL resistance, water protectors and protesters are already facing invasive monitoring and surveillance from private security forces working in conjunction with government law enforcement. The rhetorical push by government lawmakers and fossil fuel industry stakeholders to cast protesters as terrorists and extremists has eased the passage of critical infrastructure provisions imposing draconian penalties on violators, which in turn have made it easier for lawmakers to surveil and arrest protesters. Such framing also affects how law enforcement engages with protesters, potentially making them more likely to surveil, arrest, and use violence against protesters. Industry SLAPP suits echo that terrorist language, framing non-profits that support climate protests as criminal enterprises. Such public framing can help justify collective liability provisions in critical infrastructure bills that hold organizations vicariously liable for the actions of other protesters.

A third insight is the difficulty that climate protesters face in challenging these tactics. Climate protesters have won two legal victories against tactics targeting their protest after diverting time and resources to the challenges, only to see government or industry stakeholders immediately try again with similar tactics. Just months after the South Dakota government reached a settlement agreement stating it would never enforce the provisions of its critical infrastructure bills that the federal court found violated the

constitution, the government proposed new changes to the laws. Similarly, just a week after Greenpeace and other defendants had Energy Transfer's \$900 million federal lawsuit dismissed, the companies refiled a similar suit in state court.

A fourth and final insight that emerges from this article is the pivotal role of fossil fuel industry trade and lobbying groups in creating, supporting, and amplifying various tactics to target climate protesters. The involvement of these groups demonstrates the breadth of fossil fuel industry support for such tactics. Fossil fuel trade and lobbying groups, like the American Petroleum Institute, also serve as a key link between the push to stifle climate protesters and the drive to undermine climate science for decades.<sup>282</sup> Evidence of their support shows that the same actors, representing broad swathes of the fossil fuel industry, have been deeply involved in both strategies.

---

282. See, e.g., Andrew C. Revkin, *Industry Ignored Its Scientists on Climate*, N.Y. TIMES (Apr. 23, 2009), <https://www.nytimes.com/2009/04/24/science/earth/24deny.html> [<https://perma.cc/GG2W-C3TW>]; David Hasemyer & John H. Cushman Jr., *Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty*, INSIDECLIMATE NEWS (Oct. 22, 2015), <https://insideclimatenews.org/news/22102015/Exxon-Sowed-Doubt-about-Climate-Science-for-Decades-by-Stressing-Uncertainty> [<https://perma.cc/38B2-QXGM>]; CAROLINE JONES ET. AL., COUNTERMOVEMENT COALITIONS: CLIMATE DENIALIST ORGANIZATIONAL PROFILES 3 (2018), <http://www.climatedevlab.brown.edu/uploads/2/8/4/0/28401609/covercountermovementcoalitions.2.2019.pdf> [<https://perma.cc/N7N9-CTZ9>] (“The Global Climate Coalition (GCC) was a non-profit industrial organization formed in 1989. The group was notorious for promoting the views of climate skeptics, opposing greenhouse gas regulations, and was instrumental in the U.S. opposition to the Kyoto Protocol in 1997. Among its members were groups like the American Petroleum Institute, Chevron, Exxon, Ford, Shell, Texaco, General Motors, and the United States Chamber of Commerce.”).