

The Rise of Critical Infrastructure Protest Legislation and Its Implications for Radical Climate Activism

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INTRODUCTION

The global crisis of climate change looms large over every aspect of our society today. It presents an increasingly potent existential danger to humanity, as the widespread consequences of rising global temperatures include increasing ocean temperatures, rising sea levels, more frequent heatwaves and droughts, and extreme and unseasonal natural disasters and weather events.¹ The results of a warming planet are already wreaking havoc on the ecosystems, biodiversity, and civilizations of Earth. And the devastating effects on people's food security, water supply, health, and livelihoods, along with the myriad of accompanying secondary effects, will continue to worsen should our society fail to properly respond and adapt in sufficient time.²

In light of the potentially monumental, society-altering effects of climate change, intergovernmental reports, international agreements, and countless environmental organizations and experts have emphasized the urgent need for a rapid transition away from a fossil fuel-based society.³ This society-wide change must occur for humanity to adequately reduce its greenhouse gas emissions in order to curtail further global temperature increases and to minimize the pernicious and potentially deadly effects of climate change. However, in response to these vehement admonishments and mass public support, governments of industrialized countries—those most blameworthy for emitting globally harmful pollution—have largely

¹ MYLES ALLEN ET AL., IPCC, GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS 7–9 (2018).

² *Id.*

³ *See, e.g., id.* at 12–16.

failed to take the action necessary to radically alter our society's dependence on fossil fuels and thus change the trajectory of the Earth's warming temperatures and its increasingly unstable and dangerous climate.

In the United States specifically, while coal energy use has steadily declined, domestic oil and gas production has instead steadily increased over the last decade, with extraction of these fossil fuels reaching all-time highs thanks to new extraction methods and technology.⁴ This fact reflects the general failure of the United States to make serious progress in its efforts to reduce emissions and transition away from reliance on fossil fuel energy. In a recent report on the progress made toward building a low carbon future and adapting to climate change, the United States, out of seventy-six countries analyzed, ranked 53rd in efforts to reduce carbon emissions and 56th in efforts to transition to renewable energy.⁵ Among high-income countries, the United States was near the bottom, even behind heavy oil-producing countries like Saudi Arabia and the United Arab Emirates.⁶ Fossil fuel infrastructure, including pipelines, continues to be built in the United States, despite the fact that the global carbon budget associated with keeping global average temperature increases below 1.5 degrees or two degrees Celsius will already be exhausted within the next two decades if all current fossil fuel projects remain in operation.⁷

As people have come to terms with the existential threat posed by the climate crisis, they have seen at the same time the failure of governments and polluting industries to urgently take the crucial actions required to reduce emissions and mitigate climate change. As a result, there has been a surge of climate activism around the world, manifesting itself in a variety of forms.⁸ This activism has led to global protests for a cleaner planet and calls for climate justice from the marginalized communities most negatively affected by climate change due to the consequences of widespread environmental racism.⁹ Fossil fuel development and pipeline

⁴ 2020 U.S. ENERGY INFO. ADMIN. ANN. COAL REP. 2–3 (Oct. 2021); *Monthly Crude Oil and Natural Gas Production*, U.S. ENERGY INFO. ADMIN. (Mar. 31, 2021), <https://www.eia.gov/petroleum/production/#oil-tab>.

⁵ *The Green Future Index*, MIT TECH. REV. (2021), <https://www.technologyreview.com/2021/01/25/1016648/green-future-index/#:~:text=The%20Green%20Future%20Index%20is,building%20a%20low%20carbon%20future>.

⁶ *Id.*

⁷ GREG MUTTITT ET AL., OIL CHANGE INT'L, THE SKY'S LIMIT 13 (2016).

⁸ See, e.g., *About Us*, EXTINCTION REBELLION, <https://rebellion.global/about-us/> (last visited Apr. 15, 2021); see, e.g., *Sunrise's Principles*, SUNRISE MOVEMENT, <https://www.sunrisemovement.org/principles/?ms=Sunrise%27sPrinciples> (last visited Apr. 15, 2021).

⁹ SUNRISE MOVEMENT, *supra* note 8.

infrastructure, as some of the heaviest polluters, have increasingly been the target of public ire and fervent opposition.¹⁰

Many of those passionately opposing continued unconscionable fossil fuel development have taken the necessary climate mitigation tactics into their own hands, utilizing nonviolent direct action against environmentally harmful activities in order to stop or impede the further desecration of the planet by extractivism. In recent years, this type of activism was seen most notably in the Standing Rock camp of water protectors' opposition to the Dakota Access Pipeline running through ancestral Oceti Sakowin tribal lands in North Dakota and in the concurrent efforts of Valve Turners to shut off tar sands oil flows through various pipelines across the United States.

Many states have ignored these increasingly numerous protests and the intense public opposition to perpetual fossil fuel use, refusing to vigorously work to transition to renewable energy as fast as possible. Instead, states are spending their legislative time and energy working to protect the survival of carbon-intensive extraction industries in the face of increasingly ardent public disapproval and direct actions to stop extraction activities. This legislative protection of the extraction industry has manifested in a recent wave of critical infrastructure protest laws being rapidly enacted in states around the country. These laws, which have proliferated across the nation since the first introduction in 2017, seek to harshly criminalize protests around and interference with pipelines and oil and gas facilities.¹¹ These laws have been introduced in at least half of the states so far, backed wholeheartedly by the oil and gas industry and supported by model legislation from the American Legislative Exchange Council, a corporate-funded organization for conservative state legislators.¹²

This Note will discuss these two diametrically opposed reactions to the climate crisis in the United States. On one side, public protests in opposition to further fossil fuel development and pipeline construction and direct action designed to hinder, delay, or prevent continued extractivism. On the other side, the rise of critical infrastructure protest laws in state legislatures, designed to criminalize protests around pipelines and other

¹⁰ See, e.g., *About 350*, 350.ORG, <https://350.org/about/> (last visited Apr. 15, 2021).

¹¹ See *US Protest Law Tracker: Infrastructure*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=6&date=&type=> (last updated Feb. 18, 2022).

¹² *Id.*; Alleen Brown, *A Powerful Petrochemical Lobbying Group Advanced Anti-Protest Legislation in the Midst of the Pandemic*, INTERCEPT (June 7, 2020, 7:11 AM), <https://theintercept.com/2020/06/07/pipeline-petrochemical-lobbying-group-anti-protest-law/>.

facilities dubbed critical infrastructure and heavily supported by the fossil fuel industry.

This Note will first provide a background on the history of state repression through legislative means of environmental activists and organizations participating in and supporting direct action; it will then examine the Standing Rock camp opposing the Dakota Access Pipeline, as well as the associated Valve Turners. Next, the Note will survey and analyze the proliferation of critical infrastructure protest laws introduced and enacted in several states in recent years, sparked by the events of Standing Rock. This Part will also focus on the fossil fuel industry support and corporate origins of these anti-protest laws. Then, the Note analyzes the oppressive potential of these laws and their relevancy to the environmental movement's efforts moving forward. Finally, the Note will focus on the current legal challenges to these laws and will examine the climate necessity defense, a type of affirmative defense that could possibly be raised by those criminally charged under these critical infrastructure protest laws. By arguing that illegal direct action had to be undertaken in order to stave off the disastrous impacts of climate change, this relatively novel defense has the potential to act as an important tool in the strategy to defend the environmental movement against this recent rise of critical infrastructure protest laws.

I. BACKGROUND ON STATE REPRESSION AND VILIFICATION OF RADICAL ENVIRONMENTAL ACTIVISTS

Radical environmental activism has been a target of government and law enforcement vilification since at least the 1980s, when the term “ecoterrorism” was first coined by antienvironmentalists opposed to public lands regulation. Defined as a “crime committed to save nature,” the ecoterrorism label first entered the congressional record in 1988, used to describe Earth First! groups, and became a common misnomer among legislators opposing environmentalists in the following decades.¹³ This rhetoric surrounding the government's view of radical environmental activism eventually culminated in the FBI labeling two radical animal rights and environmental groups, the Animal Liberation Front and Earth Liberation Front, as the “[number one] priority in the domestic terrorism program” in

¹³ Rebecca K. Smith, *Ecoterrorism: A critical Analysis of the Vilification of Radical Environmental Activists as Terrorists*, 38 ENV'T L. 537, 545–48, 553, 555 (2008).

2001, despite the fact that zero people had been killed by their actions.¹⁴ Law enforcement and legislation have particularly focused on targeting activists who are willing to engage in direct action to stop the exploitation of the environment.¹⁵

A. Direct Action

Direct action is a form of protest and civil disobedience but is also a tactic that goes a step further than simply assembling to challenge unjust laws and voice grievances to the government. Direct action involves people taking matters into their own hands as part of their overall strategy to change repressive aspects of society, and physically doing something to obstruct, delay, or stop the harmful activities, structures, and institutions they are opposing.¹⁶ It is more than a simple gathering of people to protest—it is a powerful deed of actively taking various measures to prevent something from happening.¹⁷ Examples of direct action in the environmental movement include activists turning valves to shut off pipelines, sitting in trees to stop logging, locking themselves to construction equipment, physically blocking access to fossil fuel facilities and slaughterhouses, and other more controversial acts such as liberating fur farms and monkeywrenching or eco-defense, which may involve various degrees of vandalism and property destruction.¹⁸

Many activists see direct action as the only means left to meaningfully resist and slow down fossil fuel production today.¹⁹ In the face of years of corporate climate denial and political incompetence, many dedicated environmentalists feel they have exhausted their avenues of preventing environmental destruction through civic means and legal remedies.²⁰ In spite of these traditional efforts, society has witnessed the failure of its governments to engage with and protect their citizens by largely neglecting to effectively address the climate crisis through serious and urgent action. This state of affairs has left climate-conscious individuals with few

¹⁴ Alleen Brown, *The Green Scare: How a Movement That Never Killed Anyone Became the FBI's No. 1 Domestic Terrorism Threat*, INTERCEPT (Mar. 23, 2019, 6:32 AM), <https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/>.

¹⁵ *Id.*

¹⁶ See *What is Direct Action*, CONVIVIAL RES. & INSURGENT LEARNING, http://crl.mit.edu/sites/default/files/content/what_is_direct_action.pdf (last visited Apr. 14, 2021).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Climate Necessity Defense*, CIV. LIBERTIES DEF. CTR., <https://cldc.org/climate-necessity-defense/> (last visited Apr. 14, 2021).

²⁰ *Id.*

significant options other than to attempt to prevent planetary destruction themselves. In the environmental movement, direct action can complement other forms of political activities in a variety of ways and, at the very least, publicly bring attention to existential issues and aspects of our relationship with our planet that desperately require bold institutional action and radical reform. Furthermore, direct action can serve as a powerful, life-changing inspiration for those wanting to create positive change in the world. Such acts can have the “immeasurable psychological effect of empowering the powerless to action, by encouraging everyday people to take control of their lives and to shrug off the self-doubt and genuine fear” which has come from years of government oppression and inaction resulting in harm to their communities.²¹ This type of awareness of the power of grassroots movements to create change in society can have far-reaching implications for those distraught with the current outlook of society.

B. Animal Enterprise Terrorism Act

As a result of utilizing these direct action strategies that are often meant to be highly visible and publicized, radical environmental groups and activists have been consistently denounced by governments and corporations as environmental extremists and eco-terrorists.²² In the wake of several high-profile events of eco-sabotage carried out by various environmental and animal rights groups, such as the burning of a ski lodge at Vail and the liberation of mink from fur farms, in 2002 the FBI declared radical environmental groups the number one domestic terrorism threat in the country.²³ In the context of a post-September 11 hyper focus on terrorism, this law enforcement priority manifested in the Green Scare of the early 2000s, an unprecedented crackdown on radical environmental activists that resulted in harsh sentences for several political prisoners.²⁴

At the same time, congressional hearings and legislative efforts focused on this perceived threat of eco-terrorism, culminating in the passage of the Animal Enterprise Terrorism Act (“AETA”) in 2006, a legislative precursor to modern critical infrastructure protest legislation.²⁵ The AETA, along with the Animal Enterprise Protection Act of 1992 that it amended, “create[d] the federal crime of ‘animal enterprise terrorism’ as a means of prosecuting individuals for politically-motivated advocacy on

²¹ NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 19 (2019).

²² Brown, *supra* note 14.

²³ *Id.*

²⁴ *Id.*

²⁵ Smith, *supra* note 13, at 546–59.

behalf of animals.”²⁶ The AETA allows draconian terrorism enhancements to be added to charges related to protests and direct actions taken against enumerated facilities.²⁷ It grants greater authority to law enforcement agencies to target environmental and animal rights activists by broadening the definition of targeted enterprises and it enhances the penalties for crimes prosecuted under the statute.²⁸ The threshold factor for adding the enhancement at sentencing is the intention to coerce the government into taking action, an incredibly low and open-ended bar that makes it easier to prosecute political dissidents for their views.²⁹ Direct actions prosecuted under the AETA have been victimless crimes in terms of injuries to humans or animals with property damage the only outcome of such acts; nevertheless, the government sought to apply terrorism enhancements because such actions appeared to be intended to influence the government on environmental policy and interfere with corporate operations through perceived intimidation.³⁰

The AETA can be seen as the historical legislative precedent for today’s draconian and oppressive anti-protest laws directed against environmental causes. By turning what were often low-level misdemeanors into federal felonies, with the potential terrorism label accompanying them, the AETA employs a strategy of repressing radical activity that serves as a preview for the critical infrastructure protest legislation proliferating today. Ratcheting up the seriousness of crimes associated with the radical environmental movement, accompanied by the legislation’s excessively broad and vague language, expanded the scope of who can be charged for arguably innocuous direct actions. This was intended to create a chilling effect on the activities of targeted environmentalists and sent a clear precautionary warning to the public regarding the government’s views of those engaging in acts of direct action.³¹

Over a decade later, we are seeing this pattern of repression repeated, this time directed against those taking direct action to prevent continued pipeline construction in the face of a worsening climate crisis. As Congress did with the AETA, state legislatures today are sending a punitive warning through their critical infrastructure bills to dissuade people from

²⁶ *Operation Backfire: A Survival Guide for Environmental and Animal Rights Activists*, NAT’L LAWS. GUILD 2, <https://www.nlg.org/wp-content/uploads/2016/09/Operation-Backfire.pdf> (last visited Apr. 14, 2021).

²⁷ *Id.* at 4.

²⁸ *Id.* at 2.

²⁹ ANDY PARKER, BEYOND AETA: HOW CORPORATE-CRAFTED LEGISLATION BRANDS ACTIVISTS AS TERRORISTS, NAT’L LAWS. GUILD 7, <https://www.nlg.org/wp-content/uploads/2016/09/Beyond-AETA-White-Paper.pdf> (last visited Apr. 14, 2021).

³⁰ *See id.* at 5–7.

³¹ *See id.*

expressing their views and taking action that may threaten the property and profits of fossil fuel corporations. This background knowledge regarding the AETA and the vilification of radical environmental activists serves as a crucial foundation for examining the resurging criminalization of environmental dissent now seen through the proliferation of critical infrastructure protest laws. Knowing this history is vital to perceiving the repressive tactics and strategies that continue to be recycled by state governments and law enforcement agencies to utilize against environmental activists. Recognizing the legal crackdowns faced by radical environmental movements in the past thus enables activists to more effectively identify and navigate the risks set up to dissuade those taking direct action from opposing further construction of oil and gas infrastructure.

C. Standing Rock and Valve Turners: The Impetus for the Rise of Critical Infrastructure Protest Laws

In the last few years, the focus of radical environmental activism and direct action has largely shifted from fur farms, animal testing laboratories, and logging operations to fossil fuel extraction and pipeline construction. The current wave of anti-protest legislation and government crackdowns on environmental activists can be traced to the efforts of indigenous water protectors and their allies at the Standing Rock camp in North Dakota to stop the construction of the Dakota Access Pipeline (“DAPL”) along the Standing Rock Reservation and under the Missouri River.

After the pipeline was rerouted in early 2016 from crossing the river upstream of Bismarck to instead cut through ancestral tribal burial grounds and cross the river directly upstream of the reservation and the tribe’s water supply—a route approved without proper consultation and consent from the tribe—indigenous activists rose up to enforce their treaty rights, protect their sacred land and water, and exercise their tribal sovereignty.³² In response to the grave threat posed by fossil fuel development on the tribe and Mni Sose (the tribal name for the sacred Missouri River), thousands flocked to the Standing Rock Reservation in North Dakota in order to protect the life-giving water from another instance of planetary desecration by extractivism.³³ Acting in the context of a tradition of indigenous resistance to federal destruction of tribal land, sovereignty, and life in the Dakotas, indigenous activists and their allies proceeded to engage in a

³² Bill McKibben, *A Pipeline Fight and America’s Dark Past*, NEW YORKER (Sept. 6, 2016), <https://www.newyorker.com/news/daily-comment/a-pipeline-fight-and-americas-dark-past>.

³³ Nick Estes, *Fighting for Our Lives: #NoDAPL in Historical Context*, RED NATION (Sept. 18, 2016), <http://therednation.org/fighting-for-our-lives-nodapl-in-context/>.

mass act of direct action, peacefully blocking the continued irreverent construction of the pipeline by blockading roads and setting up camps within the path of construction.³⁴ The indigenous-led camps of water protectors constituted one of the largest gatherings of Native Americans and their allies in history, united in resisting state repression and the further exploitation of the planet in service of corporate profits.³⁵ This prolonged act of nonviolent direct action drew widespread support and solidarity from environmental groups and activists around the world and brought international attention to the movement of resisting pipelines.³⁶

The state response to the camps at Standing Rock and the grassroots indigenous-led efforts opposing DAPL was a resurgence of intense government surveillance and violent crackdowns on environmental activists and organizations, particularly of indigenous peoples involved in the pipeline resistance, reflecting similarities to the Green Scare of the early 2000s.³⁷ Invoking the full force of federal, state, and local law enforcement agencies, the government responded to this mass opposition against construction of DAPL with a brutal militarized suppression of the water protectors and their camps. Utilizing intimidation and riot control measures, such as blasting water protectors with high-powered hoses in freezing temperatures and indiscriminately shooting rubber bullets and flashbang grenades at protesters, the government inflicted hundreds of injuries on those peacefully trying to protect the water and land.³⁸ Counterterrorism tactics were also utilized against the Standing Rock water protectors, whom law enforcement labeled as pipeline insurgents.³⁹ Coordinating with private security firms, law enforcement agencies conducted intense aerial and online surveillance of the camps, blocked cell phone signals in the area, erected blockades on roads reaching the

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Press Release, United Nations: Dep't of Econ. And Soc. Aff. – Indigenous Peoples, Statement from Mr. Alvaro Pop Ac, Chair of the Permanent Forum on Indigenous Issues, and Ms. Dalee Dorrough and Chief Edward John, Members of the Permanent Forum on Indigenous Issues on the Protests on the Dakota Access Pipeline (North Dakota, USA), (Aug. 31, 2016).

³⁷ Alleen Brown, Will Parrish & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to “Defeat Pipeline Insurgencies”*, INTERCEPT (May 27, 2017, 6:04 AM), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

³⁸ Alleen Brown, Will Parrish & Alice Speri, *Standing Rock Documents Expose Inner Workings of “Surveillance-Industrial Complex”*, INTERCEPT (June 3, 2017, 9:57 AM), <https://theintercept.com/2017/06/03/standing-rock-documents-expose-inner-workings-of-surveillance-industrial-complex/>.

³⁹ *Id.*

reservation, and planted informants within the camps.⁴⁰ Hundreds of indigenous water protectors and their allies were arrested over the course of the resistance against DAPL and subjected to harsh prosecutions for their nonviolent actions.⁴¹ Those convicted have been considered political prisoners and subjected to the state's repression of indigenous and environmental movements for the peaceful and powerful resistance they engaged in.⁴² The last water protectors were eventually violently evicted from the remaining camps in February 2017.⁴³

At the same time as the Standing Rock camps were gaining international recognition for their defense of tribal sovereignty rights and unprecedented, indigenous-led opposition to fossil fuel extraction, a group of climate activists—part of an organization known as Climate Direct Action—acted to stop tar sands crude oil moving from Canada into the United States through five different pipelines.⁴⁴ Acting in solidarity with those at Standing Rock and responding to a call for International Days of Prayer and Action, five climate activists—dubbed “Valve Turners”—carried out acts of climate disobedience by breaking into remote flow stations and turning off valves in order to shut down the flow of oil through the pipelines.⁴⁵ The group informed the pipeline companies of the action beforehand so there would be ample time to shut down each pipeline to safely carry out the valve turning.⁴⁶ The highly publicized act resulted in stopping as much as fifteen percent of crude oil imports into the United States for nearly a day.⁴⁷ The activists and their support teams all remained on-site until police arrived, allowing themselves to be arrested in order to have a chance to present their defenses of climate necessity in court.⁴⁸ The Valve Turners

⁴⁰ *Id.*

⁴¹ Alleen Brown, Will Parrish & Alice Speri, *The Battle of Treaty Camp*, INTERCEPT (Oct. 27, 2017, 6:23 PM), <https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/>.

⁴² Sam Levin, *‘He’s a political prisoner’: Standing Rock activists face years in jail*, GUARDIAN (June 22, 2018, 9:36 AM), <https://www.theguardian.com/us-news/2018/jun/22/standing-rock-jailed-activists-water-protectors>.

⁴³ Julia Carrie Wong, *Police remove last Standing Rock protesters in military-style takeover*, GUARDIAN (Feb. 23, 2017, 4:52 PM), <https://www.theguardian.com/us-news/2017/feb/23/dakota-access-pipeline-camp-cleared-standing-rock>.

⁴⁴ Nia Williams, *Activists disrupt key Canada-U.S. oil pipelines*, REUTERS (Oct. 11, 2016, 11:09 AM), <https://www.reuters.com/article/us-usa-canada-pipelines/activists-disrupt-key-canada-u-s-oil-pipelines-idUSKCN12B26O>.

⁴⁵ *Solidarity with Standing Rock*, SHUT IT DOWN, <https://www.shutitdown.today/solidarity> (last visited Mar. 31, 2021); Williams, *supra* note 44.

⁴⁶ *About the Action*, SHUT IT DOWN, <https://www.shutitdown.today/> (last visited Mar. 31, 2021).

⁴⁷ Williams, *supra* note 44.

⁴⁸ See SHUT IT DOWN, *supra* note 46.

defiantly stood by their actions, arguing that they were morally and legally justified to mitigate the devastating harm to humanity and the planet caused by fossil fuel extraction and climate change.⁴⁹ While the activists were denied the opportunity to present their full defenses of climate necessity to juries, most were ultimately acquitted of the felony charges they faced for their acts of climate disobedience because the prosecution was unable to prove that they had damaged the pipelines.⁵⁰

The actions of the Valve Turners provoked fierce backlash from the fossil fuel industry and conservative politicians, who called the shutdowns dangerous stunts with serious potential risks to the public and the environment.⁵¹ The activists were labeled violent environmental rights extremists by the Department of Homeland Security and their actions have been cited by fossil fuel corporations as examples of the type of direct actions new critical infrastructure protest laws are designed to prevent.⁵²

II. SURVEY AND STATUTORY ANALYSIS OF CRITICAL INFRASTRUCTURE PROTEST LAWS

As Standing Rock water protectors were being forcibly cleared out of the remaining camps by militarized police in January 2017, the first bill directed at criminalizing future protests against pipelines made its appearance in Georgia, which attempted to expand the definition of domestic terrorism to include disabling critical infrastructure.⁵³ The next day, a bill was introduced in the Colorado legislature that would substantially increase penalties for protesting near oil and gas equipment and attempting to interfere with extraction operations.⁵⁴ Although these two bills eventually failed to become law, the political climate was now set for the age of critical infrastructure protest legislation to begin.

⁴⁹ *Valve Turners*, CIV. LIBERTIES DEF. CTR., <https://cldc.org/valve-turners/> (last visited Apr. 14, 2021).

⁵⁰ *Id.*

⁵¹ Letter from Ken Buck et al., Members, Congress, to Jeff Sessions, Att'y Gen., U.S. Dep't of Justice (Oct. 23, 2017), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Protecting%20Energy%20Infrastructure.pdf; Williams, *supra* note 44.

⁵² U.S. DEP'T OF HOMELAND SECURITY, TTPs USED IN RECENT US PIPELINE ATTACKS BY SUSPECTED ENVIRONMENTAL RIGHTS EXTREMISTS 1-3 (2017), <https://www.documentcloud.org/documents/4325264-May-2017-Field-Analysis-Report.html>; *Critical Infrastructure ALEC Letter*, ALEC (Dec. 7, 2017), <https://www.documentcloud.org/documents/6266212-Critical-Infrastructure-ALEC-Letter-Dec72017.html>.

⁵³ INT'L CTR. FOR NOT-FOR-PROFIT L., *supra* note 11.

⁵⁴ *Id.*

A. Typical Provisions

Since the first bills were introduced in January 2017, similar legislation relating to pipeline protests and interference with fossil fuel structures—dubbed “critical infrastructure”—has rapidly proliferated in state legislatures around the country. In the five years since their first appearance, such laws have been introduced over forty times in at least twenty-five different states and successfully enacted in eighteen so far.⁵⁵ While the specifics of the individual bills vary somewhat from state to state, they all contain similar key provisions. Many closely resemble model legislation published by the American Legislative Exchange Council, the fossil fuel-supported, conservative organization behind numerous pro-corporate template bills sent out to state lawmakers. Four common elements form the central thrust of these bills and reflect their purpose of discouraging pipeline protests:

First, the bills typically codify an expansive definition of “critical infrastructure” that includes not just power plants, water treatment plants, and dams, but also far more ubiquitous infrastructure like oil and gas pipelines, rail lines, and even telephone poles. Second, many of the bills create a new offense of felony trespass on critical infrastructure facilities and construction sites, frequently punishable by multiple years in jail [and heavy fines]. . . . Third, most of the bills create new felony crimes of impeding the construction or operation of critical infrastructure. . . . Finally, many of the bills have broadly worded collective liability provisions that 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. . . .⁵⁶

Oklahoma’s critical infrastructure protection law, HB 1123, was the first to be enacted in May 2017, and its language served as inspiration for the model legislation.⁵⁷ Its text has provided a basis for many of the subsequent bills that have been introduced relating to critical infrastructure protests; its provisions are examined here to provide an example of what these critical infrastructure laws typically entail.

Oklahoma’s law creates a new criminal offense for these facilities; for example, trespassing on property with such facilities is a misdemeanor

⁵⁵ *Id.*

⁵⁶ NICHOLAS ROBINSON & ELLY PAGE, INT’L CTR. FOR NOT-FOR-PROFIT L., CRITICAL INFRASTRUCTURE BILLS: TARGETING PROTESTERS THROUGH EXTREME PENALTIES 1–2 (2019).

⁵⁷ OKLA. STAT. tit. 21, § 1792 (2017); *Critical Infrastructure Protection Act*, ALEC (Jan. 20, 2018), <https://www.alec.org/model-policy/critical-infrastructure-protection-act/>.

punishable by a fine of at least \$1000, six months imprisonment in county jail, or both.⁵⁸ However, if it is determined that there was intent to damage, vandalize, tamper with equipment or to impede or inhibit the operations of the facility, the punishment is increased to a felony punishable by a fine of at least \$10,000, one year in state prison, or both a fine and prison time.⁵⁹ Those who are found to have willfully damaged, vandalized, or tampered with equipment in a critical infrastructure facility shall be found guilty of a felony punishable by a fine of \$100,000, up to ten years in state prison, or both a fine and prison time.⁶⁰ The law also contains a provision focused on organizations that may be found to have conspired with individuals convicted under this law, allowing for such organizations to be punished with fines ten times the amount authorized for the illegal actions of individuals.⁶¹ The act then provides an extensive definition of protected “critical infrastructure facilities,” including: petroleum refineries, electrical power lines, natural gas terminals, storage facilities, processing plants, cell towers, telephone poles, railroad tracks, crude oil storage and distribution facilities, and various kinds of aboveground pipelines used for oil and gas distribution, among others.⁶² Finally, “being immediately necessary for the preservation of the public peace, health or safety,” an emergency was declared so that the law would immediately be implemented in full force upon its approval.⁶³

B. Jurisdictional Survey

Legislation that relates to protesting near, trespassing on, or interfering with critical infrastructure sites has been enacted in eighteen states at the time of writing. Oklahoma was the first in 2017; Iowa and Louisiana followed in 2018; then Indiana, Missouri, North Dakota, Tennessee, Texas, and Wisconsin in 2019; Kentucky, Mississippi, South Dakota, and West Virginia in 2020; Ohio, Kansas, Arkansas, and Montana in 2021; and, most recently, Alabama in February 2022.⁶⁴

⁵⁸ OKLA. STAT. tit. 21, § 1792 (2017).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 2017 Okla. Sess. Laws 190.

⁶⁴ INT’L CTR. FOR NOT-FOR-PROFIT L., *supra* note 11. The bills that passed in Missouri, Texas, Kentucky, Mississippi, Ohio, and Alabama were all successful second or third attempts after first attempts failed.

Similar bills are currently pending in two states at the time of writing: Illinois HB 1759 and SB 3814 and Minnesota HF 254, HF 129, HF 1558, SF 355, SF 386, and SF 1378.⁶⁵

While a majority of the states that have proposed legislation protecting critical infrastructure have eventually enacted the laws, such bills have been successfully defeated or have expired in seven states so far.⁶⁶ In 2017, these bills failed to pass in Colorado and Georgia.⁶⁷ Though critical infrastructure protection legislation was passed in Minnesota and Wyoming in 2018, their respective governors ultimately vetoed the bills.⁶⁸ Two versions of this legislation failed in Pennsylvania in 2018 and 2019.⁶⁹ Such legislation was also unsuccessful in Idaho and Illinois in 2019, as were second attempts in Minnesota and Wyoming.⁷⁰ Two more attempts failed in Minnesota in 2020.⁷¹

C. Partisanship of Enacted Legislation

Critical infrastructure protest legislation has followed a pattern of being introduced and passed in states containing overwhelmingly Republican-controlled legislatures and Republican governors. Of the eighteen states that have passed and enacted such laws so far, fourteen had Republican Party trifectas with significant majorities in both legislative houses and a Republican governor in power.⁷²

There was seemingly bipartisan support in the other four states where critical infrastructure bills passed through Republican-controlled legislatures and were signed by Democratic Governors. In Louisiana, where there is an abundance of oil and gas pipelines and refineries, the bill was passed by an overwhelmingly Republican state legislature and then signed by Democratic Governor John Bel Edwards in 2018.⁷³ Similar legislation was passed the next year by a Republican state legislature in Wisconsin, where several oil pipelines pass through, and then signed by Democratic

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas (last visited Apr. 14, 2021).

⁷³ *H.B. 727*, LA. STATE LEG., <http://www.legis.la.gov/legis/BillInfo.aspx?s=18RS&b=HB727&sbi=y> (last updated May 30, 2018).

Governor Tony Evers.⁷⁴ In Kentucky, with its prominent fracking industry, critical infrastructure legislation was passed by an overwhelmingly Republican legislature and signed by Democratic Governor Andy Beshear in 2020.⁷⁵ Finally, similar legislation was passed by a Republican legislature in Kansas, a state many pipelines travel through, and signed by Democratic Governor Laura Kelly in April 2021.⁷⁶

However, a clear partisan pattern is less apparent in the states where critical infrastructure legislation has failed to become law. In Colorado, the bill passed the Republican-controlled Senate but died in the Democratic-controlled House; while in Georgia, the bill passed the Republican Senate but then failed in the Republican House.⁷⁷ Such legislation has also failed to make its way through the overwhelmingly Republican legislature in Idaho.⁷⁸ In Wyoming, critical infrastructure legislation was passed by the Republican legislature in 2018 but was ultimately vetoed by Republican Governor Matt Mead, who was concerned with the law's overly broad language adversely impacting ranchers and farmers whose property contained facilities listed as critical infrastructure.⁷⁹ In that same year, a similar bill was passed through a split legislature in Minnesota but was ultimately vetoed by Democratic Governor Mark Dayton, who was concerned about the bill's effect on the public's First Amendment rights.⁸⁰

III. ALEC AND THE CORPORATE INFLUENCE BEHIND CRITICAL INFRASTRUCTURE PROTEST LAWS

Critical infrastructure protest legislation has found the most receptive legislatures in the states containing numerous prominent pipelines and extraction projects, where the fossil fuel industry holds significant political

⁷⁴ ASSEMB. B. 426, WIS. STATE LEG., <https://docs.legis.wisconsin.gov/2019/proposals/reg/asm/bill/ab426> (last updated Nov. 20, 2019).

⁷⁵ H.B. 44, KY. GEN. ASSEMB., <https://apps.legislature.ky.gov/record/20rs/hb44.html> (last updated Mar. 16, 2020).

⁷⁶ S.B. 172, KAN. LEG., http://www.kslegislature.org/li/b2021_22/measures/sb172/ (last updated Apr. 9, 2021).

⁷⁷ INT'L CTR. FOR NOT-FOR-PROFIT L., *supra* note 11.

⁷⁸ *Id.*

⁷⁹ Cooper McKim, *Governor Vetoes Critical Infrastructure Bill, No Legislative Override*, WYO. PUB. MEDIA (Mar. 15, 2018, 5:01 PM), <https://www.wyomingpublicmedia.org/post/governor-vetoes-critical-infrastructure-bill-no-legislative-override#stream/0>.

⁸⁰ Veto Letter from Mark Dayton, Governor, Minn., to Warren Limmer, President Pro Tempore, Minn. Senate (May 30, 2018), https://mn.gov/gov-stat/pdf/2018_05_30_LETTER_VETO_Letter_Infrastructure_Protest_Bill.pdf.

and economic power and wields a heavy-handed lobbying presence.⁸¹ Such bills have been consistently supported by the oil and gas industry as it seeks to protect profits from future pipeline projects in the face of increasing opposition to the continued existence and growth of fossil fuel operations across the United States.⁸² In addition to lobbying, the industry has also been among the biggest campaign donors for many of the state legislators introducing and sponsoring critical infrastructure protest legislation.⁸³

A. ALEC's Model Legislation

The full-fledged support of these bills by the oil and gas industry is most notably reflected in the existence of ALEC's model legislation related to criminalizing critical infrastructure protests. ALEC is a conservative organization for state legislators, backed heavily by industry groups and corporations, which provides funds and perks to members in exchange for the introduction and promotion of model bills that advance the interests of ALEC's corporate members.⁸⁴ The organization's structure and purpose are designed to help corporate lobbyists craft sample bills that conservative lawmakers then introduce in multiple state legislatures simultaneously, allowing for the rapid dissemination of pro-corporate, conservative legislation across the country.⁸⁵ Fossil fuel corporations make up some of the organization's most prominent members and generous backers, including Koch Industries, ExxonMobil, Chevron, and Energy Transfer, the company responsible for the construction of the Dakota Access Pipeline.⁸⁶

⁸¹ Susie Cagle, "Protesters as terrorists": growing number of states turn anti-pipeline activism into a crime, *GUARDIAN* (July 8, 2019, 6:00 AM), <https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say>.

⁸² *Id.*

⁸³ See Connor Gibson, *State Bills to Criminalize Peaceful Protest of Oil & Gas "Critical Infrastructure"*, *POLLUTERWATCH*, <https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines/> (last updated Feb. 23, 2021).

⁸⁴ Yvonne Wingett Sanchez & Rob O'Dell, *What is ALEC? 'The most effective organization' for conservatives, says Newt Gingrich*, *USA TODAY*, <https://www.usatoday.com/story/news/investigations/2019/04/03/alec-american-legislative-exchange-council-model-bills-republican-conservative-devos-gingrich/3162357002/> (last updated Apr. 5, 2019).

⁸⁵ Lisa Graves, *ALEC's 2016 Agenda Moving in the States: A Snapshot*, *CTR. FOR MEDIA & DEMOCRACY'S PRWATCH* (May 5, 2016, 7:29 AM), <https://www.prwatch.org/news/2016/05/13099/alec's-2016-agenda-snapshot>.

⁸⁶ *ALEC Corporations*, *SOURCEWATCH*, https://www.sourcewatch.org/index.php?title=ALEC_Corporations (last updated Sept. 23, 2020).

ALEC's model bill that focuses on critical infrastructure protests—titled the “Critical Infrastructure Protection Act”—was expressly inspired by and based upon Oklahoma's critical infrastructure protest law enacted in 2017, which was the first to be passed in the aftermath of Standing Rock.⁸⁷ The model Act closely follows the structure of the Oklahoma law, providing a long list of facilities to be considered critical infrastructure and focusing on criminalizing those who trespass on and damage or tamper with property containing critical infrastructure facilities.⁸⁸ It also includes provisions imposing heightened criminal and civil penalties for organizations associated with or supporting individuals found to have committed any of the crimes covered in the Act.⁸⁹ The model bill provides a template for state legislatures to codify these increased criminal and civil penalties, leaving spaces for legislators to simply plug in the appropriate state names, carceral entities, and whatever values they choose as the fine amounts and prison sentences:

Any person who shall willfully damage, destroy, vandalize, deface or tamper with equipment in a critical infrastructure facility shall, upon conviction, be guilty of a felony punishable by a fine of {dollar figure}, or by imprisonment in the custody of the {Department of Corrections [or substitute the appropriate State equivalent thereof]} for a term [of] not more than {length of time}, or by both such fine and imprisonment.⁹⁰

Less than a week after ALEC finalized its Critical Infrastructure Protection Act in early 2018, Republicans in Ohio and Iowa introduced legislation relating to critical infrastructure interference that closely matched the model bill.⁹¹ Many of the critical infrastructure protest laws that have appeared in the last few years have likewise closely resembled ALEC's model legislation, either in whole or with certain provisions plucked from the model.⁹² The existence of this model act is a major reason why these types of laws have been able to appear so rapidly around the country in such a short time. Conservative and fossil fuel-backed legislators are able

⁸⁷ *Critical Infrastructure Protection Act*, ALEC (Jan. 20, 2018), <https://www.alec.org/model-policy/critical-infrastructure-protection-act/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Zoë Carpenter & Tracie Williams, *PHOTOS: Since Standing Rock, 56 Bills Have Been Introduced in 30 States to Restrict Protests*, THE NATION (Feb. 16, 2018), <https://www.thenation.com/article/archive/photos-since-standing-rock-56-bills-have-been-introduced-in-30-states-to-restrict-protests/>.

⁹² GABRIELLE COLCHETE & BASAV SEN, INST. FOR POL'Y STUD., MUZZLING DISSENT: HOW CORPORATE INFLUENCE OVER POLITICS HAS FUELED ANTI-PROTEST LAWS 14–18 (2020).

to swiftly introduce critical infrastructure bills without much difficulty by merely inserting their state's information and desired penalties into ALEC's template.

B. Corporate Involvement in Enacting Legislation

The pervasive and pernicious influence of ALEC and its model legislation, as well as the support for these bills from the fossil fuel industry, is evident from statements of legislators, the prominence of ALEC members among the bills' sponsors, and lobbying records. Additionally, the purpose behind many of these bills—preventing more instances of massive grassroots, Standing Rock-style direct actions—can be understood in this context. The oil and gas industry is explicitly seeking to prevent further negative press and delays to their pipeline projects and profits like those brought about by the global awareness and calls to action created by the Water Protectors at Standing Rock.⁹³

The history behind Louisiana's critical infrastructure protest law stands out as an illustrative example of the corporate involvement in this type of legislation, as well as the expressed desire of conservative, fossil fuel-backed legislators to avoid a Standing Rock-type situation in their own state. The bill, enacted in 2018, was swiftly passed in anticipation of protests against the Bayou Bridge pipeline being constructed across the state by Energy Transfer Partners.⁹⁴ It closely followed the language of ALEC's model statute, and its sponsor, Major Thibault, was an ALEC affiliate, along with at least seventeen cosponsors who had received large campaign contributions from the oil and gas industry during the prior election cycle.⁹⁵ Thibault admitted that the Standing Rock resistance in North Dakota inspired this legislation, and several other representatives who supported the bill likewise stated that they did not want Louisiana to ever have a Standing Rock-type situation involving mass protests around the vast network of pipelines in the state.⁹⁶ The state's fossil fuel industry was also

⁹³ *Id.* at 10–11.

⁹⁴ Jarvis DeBerry, *Louisiana would rather criminalize protest than offend Big Oil*, NOLA.COM (July 12, 2019, 12:47 PM), https://www.nola.com/opinions/article_27638100-5eae-5812-b076-1be83d09d7fd.html.

⁹⁵ Connor Gibson, *Louisiana – Oil and Gas “Critical Infrastructure” Anti-Protest Bills*, POLLUTERWATCH (June 22, 2020), <https://polluterwatch.org/LOUISIANA-Oil-Gas-Critical-Infrastructure-Anti-Protest-Bills-alec-csg/>; COLCHETE & SEN, *supra* note 92, at 14–16, 19–20.

⁹⁶ DeBerry, *supra* note 94; Julie Dermansky, *Bayou Bridge Protesters Arrested as Louisiana Advances Bill Toughening Penalties for Pipeline Protests*, DESMOG (Apr. 6, 2018, 4:29 PM), <https://www.desmogblog.com/2018/04/06/bayou-bridge-protesters-arrested-louisiana-advances-bill-toughening-penalties-pipeline-protests>.

very public about its fervent support of the bill. At a press conference about the bill's introduction, Thibault sat next to the Louisiana Mid-Continent Oil and Gas Association's chief counsel, who made it clear to the House Criminal Justice Committee that he was the one who actually provided the bill to the legislator, evincing the industry's fierce backing of the legislation to protect their own financial and property interests.⁹⁷

In similar illustrative fashion, the fossil fuel industry was also a staunch supporter of SB-33 in Ohio, one of the most recent critical infrastructure protest bills to pass in 2021. Several oil and gas companies, including Marathon, TransCanada, and ExxonMobil, as well as trade groups including the American Fuel and Petrochemical Manufacturers, registered to lobby on the bill.⁹⁸ Lobbyists representing Koch Industries also met with the primary sponsor of the bill, state senator Frank Hoagland.⁹⁹ Hoagland owns two private security consulting firms that provide services to fossil fuel companies and is an ALEC affiliate.¹⁰⁰ Fifteen of the bill's eighteen cosponsors were also confirmed to be affiliated with the organization.¹⁰¹

In addition to the efforts at the state level, there have been similar corporate-backed efforts by legislators in Congress to crack down on protests and direct actions potentially interfering with critical infrastructure. In 2017, a group of eighty-four overwhelmingly Republican members of the House of Representatives sent a letter to U.S. Attorney General Jeff Sessions, asking for responses to various questions about the adequacy of existing federal statutes to prosecute those involved in anti-pipeline activity.¹⁰² Under the guise of concerns over public safety and environmental protection, the legislators requested information on whether the Department of Justice could adequately prosecute climate activists using existing federal statutes such as the Patriot Act and Pipeline Safety Act, whether the Department was taking any prosecutorial action against the Valve Turners who successfully shut off several crude oil pipelines in 2016, and whether these actions could fall within the Department's understanding of federal domestic terrorism definitions.¹⁰³ The letter was championed by

⁹⁷ DeBerry, *supra* note 94.

⁹⁸ Alexander C. Kaufman, *Ohio Quietly Passes A Bill That Could Bankrupt Churches Linked To Fossil Fuel Protests*, HUFFPOST (Dec. 19, 2020, 5:45 AM), https://www.huffpost.com/entry/ohio-fossil-fuel_n_5fdb862cc5b6f24ae35e61ba.

⁹⁹ *Id.*

¹⁰⁰ *Id.*; *Ohio – Oil & Gas “Critical Infrastructure” Anti-Protest Bills*, POLLUTERWATCH, <https://polluterwatch.org/OHIO-Oil-Gas-Critical-Infrastructure-Anti-Protest-Bills-alec-csg/> (last updated Feb. 16, 2021).

¹⁰¹ *Ohio – Oil & Gas “Critical Infrastructure” Anti-Protest Bills*, *supra* note 100.

¹⁰² Buck et al., *supra* note 51.

¹⁰³ *Id.*

oil and gas lobbyists and industry groups; the four Democrats who had signed on had taken over \$3 million in campaign funds from the oil and gas industry.¹⁰⁴ It was later revealed that several fossil fuel industry groups were among those that assisted in garnering support for the letter, and there have also been questions over whether those groups helped to ghostwrite the letter.¹⁰⁵

The Trump administration, full of former fossil fuel industry lobbyists and executives, also issued its own plans and support for federal legislation that would criminalize protests against pipeline construction sites. In June 2019, the Pipeline and Hazardous Materials Safety Administration, housed within the Department of Transportation, unveiled proposed federal legislation related to pipeline safety that contained provisions focusing on critical infrastructure protests that closely followed the ALEC model bill and was supported by oil and gas industry groups.¹⁰⁶ The proposal suggested broadening the reach of federal criminal penalties for damaging or disrupting the operation of existing pipelines, with prison sentences of up to twenty years, to also prohibit damaging pipeline facilities under construction.¹⁰⁷ Additionally, it would have broadened the scope of activities subject to such draconian penalties to include merely vandalizing, tampering with, or impeding pipeline construction.¹⁰⁸ However, the proposed changes faced strong opposition in Congress, and the federal pipeline safety program that was ultimately reauthorized did not include any of the proposed changes to the criminal provisions.¹⁰⁹

¹⁰⁴ Steve Horn, *Congress Works with Big Oil on Letter Suggesting Anti-Pipeline Activists Face Terrorism Charges*, DESMOG (Nov. 3, 2017, 11:17 AM), <https://www.desmog-blog.com/2017/11/03/congress-big-oil-letter-anti-pipeline-activists-terrorism-charges>.

¹⁰⁵ *Id.*

¹⁰⁶ Ben Lefebvre & Anthony Adragna, *Trump administration seeks criminal crackdown on pipeline protests*, POLITICO (June 3, 2019, 6:42 PM), <https://www.politico.com/story/2019/06/03/trump-administration-seeks-criminal-crackdown-on-pipeline-protests-1499008>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Keith J. Coyle & Brianne K. Kurdock, *President Trump Signs Law Reauthorizing Federal Pipeline Safety Program*, 6 PIPELINE SAFETY ALERT 1, 1–3 (Jan. 4, 2021), <https://www.babstcalland.com/news-article/president-trump-signs-law-reauthorizing-federal-pipeline-safety-program/>.

IV. OPPRESSIVENESS OF CRITICAL INFRASTRUCTURE PROTEST LAWS

The fossil fuel industry and conservative lawmakers have been portraying the need for critical infrastructure protest legislation as a public safety issue, claiming the bills are designed to protect the crucial energy facilities, public and private, that keep our society functional, and are introduced in order to deter supposed terroristic activity by environmental extremists that would harm the public.¹¹⁰ In reality, however, these laws are plainly being used to criminalize various forms of dissent and to chill the speech and activities of those rallying against environmentally destructive oil and gas operations, particularly a time when the resistance to fossil fuel extraction has never been more imperative and only continues to grow. The corporations strongly backing these laws are meanwhile dismissing the extremely valid environmental concerns being raised by protesters and failing to meaningfully address their outsized contributions to the climate crisis, the effects of which present actual and widespread safety threats to the public.¹¹¹

Rather than confront ubiquitous concerns about their substantial involvement in exacerbating the climate crisis and delaying meaningful action to address climate change, the fossil fuel industry is instead attempting to silence the vehement opposition through these laws and provide itself with enhanced statutory protection as the public increasingly stands united against its destructive extractivism.¹¹² By codifying pipelines as “critical infrastructure” worthy of government protection through these laws, the fossil fuel industry is seeking to portray these structures as critical aspects of our society and public necessities that must be kept free from any interference.¹¹³ Below the surface of these critical infrastructure laws, however, are efforts by the industry to discourage any opposition to or direct action against environmentally destructive pipeline projects, continuing the trend of vilifying environmental activists in the climate crisis era. These laws are ultimately designed to promote a narrative that demonizes those engaging in direct action, shifting the negative attention of concerned citizens, with the attendant potential consequences to fossil fuel

¹¹⁰ ALEC, *supra* note 52.

¹¹¹ Traci Yoder, *The Attack on Climate Justice Movements*, NAT'L LAWS. GUILD (Mar. 14, 2019), <https://www.nlg.org/the-attack-on-climate-justice-movements/>.

¹¹² *Id.*

¹¹³ COLCHETE & SEN, *supra* note 92, at 5.

profits, away from the structures and corporations that are actually poisoning their communities and endangering their futures.¹¹⁴

In reality, critical infrastructure protest laws are unnecessary and superfluous in regard to their purported goals of protecting the safety of the public and corporate property. There are already statutes on the books in every state covering much of what these laws seek to penalize, such as trespassing, vandalism, property destruction, criminal mischief, and economic sabotage.¹¹⁵ Critical infrastructure legislation instead serves to hypercriminalize activities and protests around pipelines and other oil and gas facilities by imposing unnecessary, draconian, and disproportionate penalties for actions that ultimately only interfere with private property and profit interests.¹¹⁶ By bumping up many of these offenses from misdemeanors to felonies, based merely on the location of the alleged crime, these statutes impose extreme punitive consequences, including all the collateral effects of felony convictions, on activists engaging in peaceful activities.¹¹⁷ The redundancy of these laws and the severity of their prescribed punishments gives further credence to the view that this type of legislation only functions as a statutory scare tactic and is a classic illustration of the state attempting to surreptitiously criminalize dissent. Rather than truly being about a desire to protect public safety, the hypercriminalization of protests against pipelines seems to be part of the larger and long-lasting effort of the fossil fuel industry to stifle the political speech of activists and environmental groups opposed to its exploitative ways.¹¹⁸

A. First Amendment Issues

Furthermore, these laws also implicate First Amendment issues of vagueness, overbreadth, and discrimination against particular viewpoints.¹¹⁹ “The bills include language that is both so broad that it renders constitutionally protected speech illegal, and so vague that those who wish to follow or to enforce the law are unclear as to the legislation’s scope.”¹²⁰ “Under the First Amendment, laws that restrict speech must be ‘narrowly

¹¹⁴ *Protest Under Fire, Critical Infrastructure Bills and the Targeting of Anti-Pipeline Protests – A Toolkit for Activists*, DEFENDING RIGHTS AND DISSENT 5, <https://www.rightsanddissent.org/resource/critical-infrastructure-bills-toolkit-for-activists/> (last visited Apr. 15, 2021).

¹¹⁵ ROBINSON & PAGE, *supra* note 56, at 2–3.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 3–4.

¹¹⁸ Yoder, *supra* note 111.

¹¹⁹ ROBINSON & PAGE, *supra* note 56, at 4–6.

¹²⁰ *Id.* at 4.

tailored to serve a significant government interest.’¹²¹ Critical infrastructure protest laws clearly fail this test. They are specific in defining the types of critical infrastructure, both public and private, where certain activities are proscribed and hypercriminalized, but contain overbroad provisions concerning what constitutes the prohibited activities. The laws do not provide definitions for the activities they make illegal, such as impeding or interfering with operation or construction of critical infrastructure facilities, instead leaving it up to the interpretation of the courts.¹²² This broad type of language “lacks a geographical link between an individual’s conduct and the ‘impeding’ of construction[,]” potentially allowing, for example, lawful protests outside a pipeline company’s headquarters or public attention from activists pressuring the company to delay or halt a project to be considered by law enforcement as falling within the scope of critical infrastructure laws.¹²³ Criminalizing this sort of lawful activity is not necessary to ensure public safety—the purported purpose of these laws—and thus this type of language in the statutes fails the test of being narrowly tailored to serve that interest.¹²⁴

The language of the bills is also so sweeping in scope and vague regarding the details of proscribed protest sites that people cannot know where around the numerous facilities covered they can lawfully be present when demonstrating.¹²⁵ Laws must “be sufficiently clear that a person of ordinary intelligence can understand what conduct is prohibited.”¹²⁶ However, many of these critical infrastructure laws do not define what areas around specified facilities might be considered critical infrastructure sites.¹²⁷ Nor do they take into account the fact that pipelines often run through private land, such that landowners cannot be sure what types of activities they or anyone else can engage in on their land without potentially serious legal repercussions.¹²⁸ There are millions of miles of oil and gas pipelines running across the United States, concentrated particularly

¹²¹ *Id.* (quoting *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984)).

¹²² Susie Cagle, ‘Protesters as terrorists’: growing number of states turn anti-pipeline activism into a crime, *GUARDIAN* (July 8, 2019, 6:00 AM), <https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say>.

¹²³ ROBINSON & PAGE, *supra* note 56, at 4.

¹²⁴ *Id.*

¹²⁵ *Id.* at 4–5.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.*

in many of the states enacting critical infrastructure laws.¹²⁹ With such an expansive area potentially covered by these laws, environmental activists cannot be certain whether or not they are violating the law if they do not know where specifically protest activity is prohibited. The intended result of these overly broad and vague provisions of critical infrastructure laws thus appears to be to intimidate activists into staying home and censoring themselves out of fear rather than risking the severe punishments of this type of sweeping legislation. Even the introduction of these bills into legislatures can create chilling effects for activists and environmental organizations, demonstrating the state's plans to target speech and expressive conduct with a particular viewpoint for harsher punishment.¹³⁰

“[L]aws that discriminate against particular viewpoints [and speech] must face strict scrutiny,” meaning they are presumed unconstitutional unless necessary to serve a compelling state interest and are narrowly drawn to achieve that end.¹³¹ Given the express motivations of legislators behind critical infrastructure laws to prevent anti-pipeline protests, the overly broad and vague provisions of the laws, and the draconian penalties accompanying them, it seems clear that these statutes are intended to target particular speech and protest movements.¹³² As discussed above, critical infrastructure legislation is not narrowly tailored to serve a compelling state interest in public safety. Therefore, these rapidly appearing laws are subject to potential legal challenges under the First Amendment. The critical infrastructure legislation enacted in Louisiana, a state containing 125,000 miles of pipelines, is currently being challenged in federal court on First Amendment grounds.¹³³

Additionally, imposing liability on anyone who encourages, advises, or provides compensation to someone engaging in prohibited direct action is another common feature of critical infrastructure protest legislation.¹³⁴ These provisions impose extremely steep fines on organizations for such support, many times the maximum fine for the individual, and are specifically designed to cut off material support and publicity for activists.¹³⁵ This aspect of critical infrastructure statutes likewise implicates First

¹²⁹ *Where are the Pipelines?*, AM. PETROL. INST., <https://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/pipeline/where-are-the-pipelines> (last visited Apr. 15, 2021).

¹³⁰ ROBINSON & PAGE, *supra* note 56, at 5–6.

¹³¹ *Id.* at 5.

¹³² *Id.* at 5–6.

¹³³ *White Hat v. Landry*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/white-hat-v-landry> (last updated Mar. 3, 2021).

¹³⁴ NICHOLAS ROBINSON & ELLY PAGE, INT'L CTR. FOR NOT-FOR-PROFIT L., “GUILT BY ASSOCIATION”: CRITICAL INFRASTRUCTURE BILLS AND THE RIGHT TO PROTEST 2 (2018).

¹³⁵ *Id.* at 5–6.

Amendment issues, as the bills typically contain deliberately vague and overly broad wording in order to hold supportive groups vicariously liable for the political speech and direct actions of individuals.¹³⁶ These “guilt by association” provisions do not define what type of actions constitute encouraging or advising individuals engaging in direct action. In turn, this potentially expands the scope of these statutes to cover any environmental organizations or individuals sympathetic to the cause behind the action, but who may be only tangentially related in any way to the person charged with a crime.¹³⁷

The First Amendment restricts states from “impos[ing] liability on an individual solely because of his association with another.”¹³⁸ Through these collective liability provisions, it may be possible that simply donating money, hosting websites, boosting activists’ messages and actions on social media, or even joining chants at a protest could fall under the proscribed actions and make one liable for the actions of another. These provisions especially put antifossil fuel organizers at significant legal risk for simply providing training, promotion, or even medical support to peaceful activists engaged in direct action against pipelines and oil and gas facilities.¹³⁹ These “guilt by association” aspects of critical infrastructure laws can thus be challenged for infringing on the right to association.

In one of the newest critical infrastructure laws from Ohio, groups that “knowingly direct, authorize, facilitate . . . encourage . . . or provide compensation to a person” to commit any of the offenses listed in the act can be punished with a fine ten times the maximum amount that could be imposed on the individual protesters.¹⁴⁰ These groups could also be sued for damages under the statute by the companies operating the targeted infrastructure facilities.¹⁴¹ Some churches in the state have spoken out against this provision in a particularly poignant way, arguing that it could prevent religious faithful from exercising their moral and spiritual duties at a time when new oil and gas projects threaten the stability of humanity’s future.¹⁴² The churches have also argued that the penalties potentially resulting from the law could bankrupt their congregations, a fate many other smaller organizations would likely face if found criminally or civilly liable under this type of provision.¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 3 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982)).

¹³⁹ *Id.* at 5–6.

¹⁴⁰ OHIO REV. CODE ANN. §§ 2923.04 (B)–(C) (2021).

¹⁴¹ OHIO REV. CODE ANN. § 2307.67 (C).

¹⁴² Kaufman, *supra* note 98.

¹⁴³ *Id.*

B. Disproportionate Effects on Indigenous and Marginalized Communities

The proliferation of critical infrastructure protest legislation, within the wider context of government and law enforcement repression of environmental activists, has even raised human rights concerns in the United Nations regarding the suppression of indigenous protests and violations of international human rights law. The rapid appearance of these anti-protest laws has been condemned by both the UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression, and the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association.¹⁴⁴ Additionally, international human rights bodies have held hearings on the issue, receiving testimony from indigenous water protectors. These bodies have vehemently deplored the criminalization of dissent occurring in the United States, particularly for its disproportionate effects, in response to Standing Rock, on indigenous peoples and minorities resisting oppression.¹⁴⁵

Historically underrepresented and impoverished communities are disproportionately impacted by pipeline construction as a result of environmental racism.¹⁴⁶ Fossil fuel corporations often choose to locate their pipelines in close proximity to indigenous territories and communities of color, populations with the least socioeconomic resources and political power to challenge construction of facilities with extreme pollution and public health consequences for their marginalized communities.¹⁴⁷ For example, the recently completed Bayou Bridge pipeline in Louisiana travels through Cancer Alley, a predominantly Black community with a disproportionately high poverty rate and hazardous exposure to toxic pollutants and below-average life expectancy.¹⁴⁸ In Minnesota, the new route for the recently constructed Line 3 pipeline cuts through traditional indigenous territory and travels adjacent to several Indian reservations.¹⁴⁹ An astounding thirty-seven percent of the Native Americans residing along the

¹⁴⁴ *UN rights experts urge lawmakers to stop “alarming” trend to curb freedom of assembly in the US*, U.N. HUM. RTS.: OFF. OF THE HIGH COMM’R (Mar. 30, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21464&LangID=E>.

¹⁴⁵ See SEÁNNA HOWARD ET AL., INDIGENOUS PEOPLES LAW AND POLICY PROGRAM & WATER PROTECTOR LEGAL COLLECTIVE, CRIMINALIZATION OF HUMAN RIGHTS DEFENDERS OF INDIGENOUS PEOPLES RESISTING EXTRACTIVE INDUSTRIES IN THE UNITED STATES: REPORT TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2019).

¹⁴⁶ COLCHETE & SEN, *supra* note 92, at 6.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 23–25.

¹⁴⁹ *Id.* at 26.

pipeline path live in poverty.¹⁵⁰ Anti-protest laws designed to hypercriminalize pipeline protesters are thus likely to have a disproportionate effect on indigenous and Black communities, which, due to environmental racism, are most likely to be placed in harm's way of the extraction industry. Depending on the state, it will therefore likely be indigenous peoples and people of color leading the resistance against continued pipeline construction that has devastating consequences for their communities. As a result and combined with the racism inherent in the legal system, these minority peoples will be the ones most likely to bear the full force of state oppression of environmental activists through the draconian penalties of critical infrastructure protest laws.

In sum, while the fossil fuel industry and its supportive legislators are purporting to only be targeting dangerous violent extremists and costly property damage in service of pipeline safety, the overly broad and vague characteristics of specific provisions within critical infrastructure protest statutes show that their true purpose is to criminalize environmental activists and organizations who may engage in or support direct action against pipelines, often with a disproportionate effect on indigenous communities and communities of color in their path. This attempt at hypercriminalizing certain speech and actions is aided by the rhetoric surrounding such legislation, framing the acts of dissent as potentially violent, criminal, and detrimental to society, rather than the environmentally destructive actions of the targeted corporations themselves. This type of demonizing discourse is part of a broader current trend of purposeful miscasting of protestors as destructive terrorists and violent scapegoats, accompanied by waves of new repressive anti-protest laws and typically perpetuated by targeted industries and conservative lawmakers and media.¹⁵¹ Critical infrastructure protest legislation is ultimately being passed with the intent to chill the free speech rights of those opposing pipelines and continued fossil fuel extraction; yet it remains to be seen how courts will rule on the constitutionality of these dubious laws, a question presently before a federal court in Louisiana.¹⁵²

¹⁵⁰ *Id.*

¹⁵¹ Adam Gabbatt, *Republicans push 'tsunami' of harsh anti-protest laws after BLM rallies*, GUARDIAN (Apr. 12, 2021, 3:00 PM), <https://www.theguardian.com/world/2021/apr/12/republicans-push-anti-protest-laws-blm-demonstrations>.

¹⁵² CTR. FOR CONST. RTS., *supra* note 133.

V. LEGAL CHALLENGES TO CRITICAL INFRASTRUCTURE PROTEST LAWS

A. White Hat v. Landry

Protesters demonstrating against the Bayou Bridge pipeline, a 163-mile-long pipeline that carries crude oil through the wetlands of Southern Louisiana, were the first charged under the state's critical infrastructure protest law in August 2018.¹⁵³ Detained while in canoes on navigable, public waters, several activists were charged with felony trespassing just a week after the state's new anti-protest law went into effect. Sixteen activists eventually faced felony charges under the new statute for peacefully protesting in public waterways or even on private land with the owner's permission.¹⁵⁴

In response to the charges brought under the new statute, the Center for Constitutional Rights ("CCR"), an organization focused on defending movements for social justice, filed a lawsuit in United States District Court in the Middle District of Louisiana in May 2019.¹⁵⁵ On behalf of several of the charged protestors and organizations opposing the pipeline, it brought allegations against Louisiana's Attorney General and the sheriff and district attorney who had jurisdiction over the arrests, challenging the constitutionality of the state's new critical infrastructure statute.¹⁵⁶ CCR argues that the law is unconstitutional because (1) it is vague in not providing adequate notice to protesters or law enforcement regarding what conduct is prohibited and where, and allows for arbitrary and discriminatory enforcement; (2) is overbroad and chills constitutionally protected speech; and (3) targets particular speech and conduct with certain viewpoints for harsher punishment.¹⁵⁷ The organization's complaint ultimately alleged that the "actual aim [of the statute] is to chill, and harshly punish, speech and expression in opposition to pipeline projects. . . ."¹⁵⁸

The District Court dismissed the claims against the state's Attorney General in July 2020, however, for plaintiffs' failure to allege "sufficient facts to show that the Attorney General has more than a scintilla of a connection with the enforcement of or prosecution [under the critical

¹⁵³ Cagle, *supra* note 122.

¹⁵⁴ *Id.*

¹⁵⁵ CTR. FOR CONST. RTS., *supra* note 133.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Complaint at 2, *White Hat v. Landry*, 475 F. Supp. 3d 532 (M.D. La. May 22, 2019) (No. 19-322).

infrastructure statute],” which was necessary to allow for him to be properly sued as a defendant in his official capacity for prospective injunctive relief under *Ex Parte Young*.¹⁵⁹ In May 2021, the claims made by the landowners and supporting organizations, including the environmental justice organizations 350 New Orleans and the Louisiana Bucket Brigade, were also dismissed for lack of standing.¹⁶⁰ However, the claims of the activists arrested under the law are still ongoing in the Western District of Louisiana.¹⁶¹ Activists and lawyers opposing similar statutes in other states have stated that they are closely monitoring the progress of this case as an indicator of how they might fare themselves in challenging critical infrastructure protest legislation as unconstitutional in their own states.¹⁶²

VI. CLIMATE NECESSITY DEFENSE

This growing trend of critical infrastructure protest legislation—matching the current trajectory of anti-protest laws in general, which are proliferating as part of the reactionary and repressive backlash to the Black Lives Matter movement of summer 2020—shows no sign of slowing down as state lawmakers have continued to introduce, vote on, and pass bills criminalizing dissent directed against pipelines and other fossil fuel sites, even throughout the COVID-19 pandemic.¹⁶³ Despite widespread backlash from activists, the environmental movement, and civil liberty defenders, there is no indication state legislatures will relent in their mission to suppress protests, evidenced by the continual introduction of anti-protest laws in general and the most recent enactment of critical infrastructure legislation in Alabama in February 2022.¹⁶⁴ While some of these enacted statutes may eventually fail in their repressive efforts due to courts declaring them unconstitutional in the future, there is no assurance the disturbing criminalization of dissent across the country will not continue.

Notwithstanding these attempts at suppressing resistance, the vital imperative for speaking out, protesting, and taking direct action against

¹⁵⁹ *White Hat v. Landry*, 475 F. Supp. 3d 532, 549 (M.D. La. July 30, 2020).

¹⁶⁰ J. Den. Mot. to Dismiss at 26, *White Hat v. Landry* (W.D. La. May 5, 2021) (6:20-CV-00983).

¹⁶¹ *Id.* at 13.

¹⁶² E.A. Crunden, *Trump pushes up to 20 Years in prison for pipeline protesters*, THINKPROGRESS (June 2, 2019, 3:14 PM), <https://thinkprogress.org/trump-pipeline-protestors-20-years-texas-7d6e4e06a33b/>.

¹⁶³ Brown, *supra* note 12.

¹⁶⁴ See *US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=&date=&type=> (last updated Feb. 18, 2022).

those most responsible for humanity's greenhouse gas emissions and destroying the planet will not subside. Every day that governments and corporations fail to meaningfully act to mitigate and adapt to the impending disasters of the climate crisis is another day the pernicious and calamitous future effects of global climate change intensify. For those environmental activists bold enough to continue to take potentially illegal direct action in opposition to the desecration of the planet by the extraction industry, even in the face of draconian criminal and civil penalties imposed by proliferating critical infrastructure protest legislation, the climate necessity defense may be available as a relatively novel affirmative defense gaining traction to justify such actions.

The climate necessity defense is a relatively novel legal tool being spotlighted in the radical environmental movement as a possible defense for those willing to engage in potentially illegal direct action to prevent fossil fuel corporations and pipelines from continuing to destroy the planet and the future of its inhabitants.¹⁶⁵ In light of the ongoing proliferation of anti-protest legislation targeting environmental activists, it is likely that there will be an increased use of this affirmative defense by those facing the extreme penalties imposed by critical infrastructure laws to attempt to justify in court their acts of direct action.

A. Elements of the Defense

There are three primary elements of the climate necessity defense, reflecting the traditional necessity defense in criminal law, though these will vary slightly from state to state: (1) the defendant must be able to show that they faced serious, imminent danger; (2) they reasonably expected their illegal action to avert this serious danger, using less harmful means; and (3) there were no legal alternatives to their alleged criminal conduct.¹⁶⁶

In the context of climate disobedience, the first element involves proving the serious, imminent danger from climate change, often by calling climate scientists and leaders of prominent environmental groups as expert witnesses to testify on the existential dangers our modern society is facing due to the increasingly destructive consequences of the climate crisis.¹⁶⁷ To improve chances of successfully invoking the defense, emphasis

¹⁶⁵ CIV. LIBERTIES DEF. CTR., *supra* note 19.

¹⁶⁶ *The Climate Necessity Defense: A Legal Tool for Climate Activists*, CLIMATE DISOBEDIENCE CTR., <http://climatedefense.wpengine.com/wp-content/uploads/2016/11/Necessity-Defense-Pamphlet-Correct-Order-2016-update.pdf> (last visited Apr. 15, 2021).

¹⁶⁷ *Id.*

in the argument for this factor must be placed on the urgency of mitigating the dangers of the changing climate that are already inflicting devastation on areas of the world—i.e., that the world has already run out of time to prevent many of the serious effects of climate change from happening.¹⁶⁸ The argument must also emphasize the fact that continued fossil fuel development is serving to exacerbate the serious and imminent danger from climate change and is unconscionable at a time when a transition to renewable energy and a reduction in emissions must be accomplished as fast as possible.¹⁶⁹ The fact that many of the pipelines being targeted by activists are transporting tar sands oil can be particularly salient to this element due to its status as one of the dirtiest and most carbon-intensive fossil fuels on the planet.¹⁷⁰ The high frequency of oil spills from pipelines, creating immediate environmental and health hazards for marginalized communities that surround much of the nation's polluting energy infrastructure, may also be particularly relevant to this element of the defense.¹⁷¹

Next, a defendant must show a direct causal connection between their breaking of the law and preventing the harm they are seeking to avoid.¹⁷² This means activists must typically show that they were engaging in direct action, not just a typical protest, which was reasonably expected to mitigate or avert the harm resulting from the pipeline or other fossil fuel structure they were targeting.¹⁷³ As part of this factor, a defendant must be able to articulate how their action actually put a stop to something, which will likely be a contentious and difficult argument to make. One would likely have a much better chance in successfully arguing this factor of the defense if they were engaged in actions that actually turned off pipeline flows or prevented fossil fuels from being extracted, as opposed to simply holding a protest or sit-in at an oil and gas company's or politician's office. A strong counterargument that will likely be raised against this element, depending on the scale of the direct action taken, will question how much of a difference the acts of a few activists could actually make in stopping or mitigating the serious and imminent harm presented by climate change.

Finally, a defendant must be able to show that they had no legal alternatives to the criminal conduct they undertook—i.e., that their illegal

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ David Biello, *How Much Will Tar Sands Oil Add to Global Warming?*, SCI. AM. (Jan. 23, 2013), <https://www.scientificamerican.com/article/tar-sands-and-keystone-xl-pipeline-impact-on-global-warming/>.

¹⁷¹ *See* GREENPEACE USA & WATERKEEPER ALLIANCE, OIL AND WATER: ETP & SUNOCO'S HISTORY OF PIPELINE SPILLS (2018), <https://www.greenpeace.org/usa/reports/oil-and-water/>.

¹⁷² *See* CLIMATE DISOBEDIENCE CTR., *supra* note 166.

¹⁷³ *Id.*

direct action was necessary because nothing else worked.¹⁷⁴ This element will also likely be difficult to argue, as the activists raising the defense must show that they have put in a great deal of work exhausting all reasonable alternatives available to them to mitigate climate change, and that all the exhausted alternatives have been ineffectual, thus forcing activists to take climate change mitigation efforts into their own hands.¹⁷⁵ This would likely include showing extensive and dedicated participation in environmental protection activities, such as serious involvement with environmental organizations, lobbying representatives for legislation, petitioning for environmental action, planting trees, educating people on the dangers presented by climate change, attending protests, and others. This element also requires defendants to bring in evidence of the futile efforts of the political campaigns, grassroots movements, and communities they have been involved in to effect meaningful action on climate change.¹⁷⁶ Such futility could be shown as a result of the unresponsiveness of the current political system, inability or unwillingness of the courts to address climate mitigation actions, and intense resistance from the fossil fuel industry to allow meaningful climate action and to move away from environmentally destructive extraction activities.¹⁷⁷

B. Case Survey

The climate necessity defense has seen mixed results across the country so far, with some courts allowing it to be presented, some denying it and convicting defendants, and some dismissing cases right before trial to not allow the defense to be presented to a jury. The defense was successfully raised in 2018 by several activists in Boston Municipal Court, who were arrested for holding a die-in in a pipeline construction trench for the West Roxbury pipeline.¹⁷⁸ As part of their argument justifying their actions, the activists were prepared to call Bill McKibben, one of the founders and leaders of the international environmental organization 350.org, and legendary climate scientist James Hansen—both of whom have vigorously supported use of the climate necessity defense—as expert witnesses to testify on the imminence and seriousness of the dangers

¹⁷⁴ *Id.*

¹⁷⁵ CIV. LIBERTIES DEF. CTR., *supra* note 19.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ CLIMATE DEFENSE PROJECT, CLIMATE NECESSITY DEFENSE CASE GUIDE 14, <https://climatedefenseproject.org/wp-content/uploads/2021/08/CDP-Climate-Necessity-Defense-Case-Guide.pdf> (last updated Aug. 12, 2021).

presented by climate change.¹⁷⁹ However, the activists did not get to present their defense to a jury because the charges were reduced to civil infractions; but the judge still found the activists not responsible in a bench trial by reason of necessity.¹⁸⁰

A version of the climate necessity defense was also successful in 2020 in a Multnomah County Circuit Court case in Portland, Oregon, where activists blockaded railroad tracks to prevent the transportation of tar sands oil to a Zenith Energy facility for export.¹⁸¹ The defendants were allowed to present the choice of evils defense, Oregon's version of the necessity defense, and called environmental scientists and law professors to testify as expert witnesses. They ultimately succeeded, as the case resulted in a hung jury and a mistrial, and the charges were dismissed by the state.¹⁸²

In cases related to the Valve Turners in Minnesota and Washington, both state supreme courts ruled that the activists were allowed to present the climate necessity defense as justifications for their actions.¹⁸³ However, in Minnesota, the judge dismissed the charges against the Valve Turners right before the trial started; it has been speculated this was done to prevent the defendants from calling well-known expert witnesses, including James Hansen again, to present their strong climate necessity defense to a jury.¹⁸⁴ The defense was denied for fellow Valve Turners facing charges in Montana and North Dakota, however, where the court ruled that the defendant's actions constituted only indirect civil disobedience and that they were simply trying to attract publicity and shift responsibility to the government.¹⁸⁵

Overall, according to a case guide from the Climate Defense Project, the climate necessity defense has only been raised in twelve states so far and in a federal appellate court in the 10th Circuit.¹⁸⁶ Therefore, it remains a novel affirmative defense waiting to be tested in most jurisdictions across the country. It has only been raised, and subsequently denied, in three states where critical infrastructure protest statutes have been enacted—Montana, North Dakota, and Oklahoma—but those cases were concluded

¹⁷⁹ *Id.* at 14–15.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 7–8.

¹⁸² *Id.*

¹⁸³ *Id.* at 4, 10.

¹⁸⁴ *Valve Turners on Trial: Judge Acquits Three Climate Activists Who Shut Down Tar Sands Pipelines*, DEMOCRACY NOW! (Oct. 10, 2018), https://www.democracynow.org/2018/10/10/valve_turners_on_trial_judge_acquits.

¹⁸⁵ CLIMATE DEFENSE PROJECT, *supra* note 178, at 7, 15.

¹⁸⁶ *See generally id.*

before the bills became law.¹⁸⁷ In states where critical infrastructure protest legislation has been enacted, or foreseeably will be, the defense remains an available tool for environmental lawyers and activists to establish as law, and to utilize as a justification for potentially violating those laws through direct actions.

The climate necessity defense has been recognized, and at least partly successful, in at least a dozen cases.¹⁸⁸ However, the defense still appears to be very difficult to invoke, as most judges have not been receptive to allowing it to be argued. Presentation of the defense has been denied by judges far more than it has been permitted. Where it has been allowed to be presented to juries, the defendants in most cases have ultimately failed in arguing the defense and have been convicted, usually due to a belief that reasonable legal alternatives had not yet been exhausted.¹⁸⁹

C. Value of the Defense

Notwithstanding the defense's lack of success so far, compared to other legal theories being utilized in the fight against the climate crisis, such as suits centered around civil rights, the public trust doctrine, and nuisance suits holding fossil fuel companies liable for the damage they cause, the climate necessity defense may have the greatest potential to act as a legal tool with an immediate impact for activists engaged in direct actions against pipelines and oil and gas facilities.¹⁹⁰ It has promise as a legal strategy to push back against government and industry efforts to silence opposition to the continued development of fossil fuels. The defense could also be powerful as a way to identify the social and environmental injustices that prompted the direct action and to argue that the law should be utilized to order meaningful climate change mitigation efforts to protect human life and the planet.¹⁹¹ It is essential that the climate necessity defense now be utilized in criminal cases dealing with climate-focused direct actions in order to bring attention to these critical issues and to resist state repression directed against radical environmental activists.

On the other hand, there is an abundance of risks for activists in attempting to argue this defense. Most importantly, it can still be hard for

¹⁸⁷ *Id.* at 7, 15, 19.

¹⁸⁸ *Id.* at 1–2.

¹⁸⁹ *See id.*

¹⁹⁰ Dean Kuipers, *Three Ways to Combat Climate Change Through the Courts*, ATLANTIC (Oct. 30, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/three-ways-combat-climate-change-through-courts/574315/>.

¹⁹¹ *Necessity Strategy*, CLIMATE DISOBEDIENCE CTR., https://www.climatedisobedience.org/necessity_strategy (last visited Apr. 15, 2021).

many people sitting on juries to justify breaking the law. This is especially true in communities that rely on the fossil fuel industry for their livelihoods and are generally hostile towards climate activists. Such communities are where many of these direct actions against pipelines are likely to take place, along with any potential criminal trials.¹⁹² Hence, those thinking about arguing the defense in places with a significant fossil fuel industry presence should expect to see more skeptical juries regarding the defense.

Nevertheless, the climate necessity defense offers great potential as an important tool in the crucial legal defense of environmental activists going forward. Due to the painstakingly slow and often unresponsive legislative process, the current inability of courts to play a significant legal role in forcing climate mitigation action, and the inadequacy of executive actions, direct action is more frequently seen by radical activists as one of the only remaining tools available for taking meaningful action to prevent the further extraction of fossil fuels and the accompanying planetary destruction.¹⁹³ The foreseeable increased usage of direct actions to impede operations and prevent further construction of fossil fuel infrastructure, combined with the risk of arrest rising as draconian critical infrastructure laws targeting such conduct are enacted, will likely lead to more activists facing extremely harsh and disproportionate criminal penalties for their nonviolent actions to protect people and the planet. Thus, arguing the climate necessity defense will be crucial for legally supporting environmental activists and the climate justice movement in the near future.

The potential increased use of the defense also reflects the critical importance of movement lawyers who are familiar with political cases and the political and moral motivations of the defendants they are representing. As the climate crisis intensifies and direct action against extractivism may become even more imperative, the grassroots environmental movement will need attorneys who understand the urgency and scale of the crisis and fully comprehend the motivations and goals of its activists engaging in direct action, along with the ideals of the movement as a whole. Such direct action and other forms of civil disobedience will likely continue to be a major strategy in working to achieve the radical change necessary to prevent the most devastating predicted effects of climate change from coming to fruition. Cases invoking the climate necessity defense can thus play an important role in building the movement power required to effectively oppose fossil fuel corporations and the destruction they wreak on the planet.¹⁹⁴

¹⁹² See CLIMATE DEFENSE PROJECT, *supra* note 178.

¹⁹³ CIV. LIBERTIES DEF. CTR., *supra* note 19.

¹⁹⁴ CLIMATE DISOBEDIENCE CTR., *supra* note 191.

Not only does arguing the climate necessity defense allow activists to bring the politics of why they got arrested into the courtroom, it also allows a jury of their peers—the supposed moral compass of their community—to weigh whether or not the harm of the environmental damage activists sought to prevent is worse than the harm of technically breaking the law.¹⁹⁵ This necessity defense essentially asks juries to answer whether the serious, imminent, catastrophic, and existential harms from climate change are worse than mere criminal trespass on corporate property or interference with pipeline operations while taking safety precautions. It forces judges and jurors to address these types of radical acts of resistance deemed criminal by the government, and to decide whether, in the face of devastating planetary harm, such actions are ultimately morally justified. In a way, it flips the script and puts the government on trial, turning the criminal proceedings into something akin to a small policy referendum by asking jurors to pass judgment on the efficacy and morality of current government climate policy in the face of imminent, overwhelming harms to humanity.¹⁹⁶

Presenting the climate necessity defense during a trial can also provide an invaluable opportunity to tell a compelling story about the climate crisis and educate the public, especially those individuals in frontline communities most affected by environmentally harmful fossil fuel operations.¹⁹⁷ Even failed attempts at arguing the defense can still have positive impacts on the community by bringing serious attention to the urgency of responding to the climate crisis and to activists' justifications for engaging in direct action.¹⁹⁸ The defense can allow activists and lawyers to use the courtroom as an extension of the movement's campaign and outreach, drawing attention to activists' causes and presenting opportunities for the movement to build its organizing power.¹⁹⁹ It allows the environmental movement to create important publicity by signaling to the public that areas of the law no longer align with our moral and existential priorities—something that can have profound effects on individuals and communities grappling with severe climate anxiety in the face of perceived helplessness.²⁰⁰

Finally, the climate necessity defense can be used not just as a political tactic to generate media attention and as a device to force the legal system to discuss and rule on the harms of climate change, but, above all

¹⁹⁵ CLIMATE DISOBEDIENCE CTR., *supra* note 166.

¹⁹⁶ *Id.*

¹⁹⁷ CLIMATE DISOBEDIENCE CTR., *supra* note 191.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

else, it can be utilized as a practical tool to defend climate activists against the consequences of increasingly imperative and widespread direct action tactics. Particularly in states that have pursued critical infrastructure protest legislation, introducing this affirmative defense in jurisdictions can help protect environmental activists and force the legal system to acknowledge the threats of the climate crisis and our government's grossly inadequate response. Widespread courtroom use of arguments in favor of the climate necessity defense can establish precedent for its use today so that it can be effectively utilized by environmental activists tomorrow.

CONCLUSION

In conclusion, critical infrastructure protest laws targeting activists engaging in direct action put profits and property over people and the planet. Privately operated pipelines receive enormous protection from the state through this type of legislation, while the people and communities near these pipelines, and the Earth as a whole, will suffer the catastrophic consequences that will only continue to worsen as a result of persistent fossil fuel extraction. These critical infrastructure protest statutes all have the same true purpose of criminalizing dissent and intimidating environmental activists into silence, as growing and widespread intersectional movements for necessary radical climate change action increasingly threaten the lucrative fossil fuel profits of powerful corporations and affiliated lawmakers.

It remains to be seen how state and federal policies and the rhetoric surrounding pipeline construction and fossil fuel development will shift as the more climate conscious Biden administration begins to take steps in the right direction for addressing climate change. Almost all of the critical infrastructure laws were enacted during the Trump administration. However, these laws are also currently thriving in the context of the larger, ongoing anti-protest movement swiftly materializing in state legislatures around the country. This anti-protest movement shows no signs of slowing down, as state legislators have introduced a shocking number of laws criminalizing protests and dissent in various forms in response to the massive Black Lives Matter protests of summer 2020.

Despite the Biden administration's likely reversal of Trump's actively destructive environmental policies, the imperative for direct action to stop further fossil fuel development and pipeline construction will remain, as more activists begin to recognize that it is already too late for moderate, piecemeal reforms to have much effect in meaningfully mitigating climate change and preventing future climate disasters from occurring. As activists continue to peacefully engage in bold, potentially criminal acts

in defense of the planet, the climate necessity defense will likely grow in relevance and importance as a strategy to defend environmentalists from state and corporate repression. In the age of proliferating critical infrastructure protest laws with draconian penalties and in the context of a world increasingly desperate for radical, far-reaching, and equitable climate action, such a defense for justifying actions that place people and the planet over profits and property may be needed now more than ever.

Over the past year, another indigenous-led resistance movement rose up against pipeline construction, this time in northern Minnesota, where Enbridge replaced and rerouted sections of the Line 3 pipeline to double its capacity and make it one of the largest tar sands crude oil pipelines in the world.²⁰¹ Traveling alongside indigenous communities and through traditional tribal lands, this project implicated many of the same issues the Dakota Access Pipeline did, including tribal sovereignty, the human rights of indigenous peoples, treaty rights, sacred lands, environmental justice, and public and ecological health.²⁰² Just as DAPL prompted the Standing Rock camps to form, Line 3 likewise evoked intense feelings in the indigenous peoples in the area and their allies, with camps of water protectors springing up around the pipeline's path.²⁰³ Direct actions and demonstrations along the pipeline route frequently took place in order to impede the continued construction of a project that would have the equivalent emissions impact of building fifty new coal power plants.²⁰⁴ However, the valiant efforts of the water protectors were ultimately unsuccessful, as Enbridge was able to complete the pipeline and begin its expanded operations on October 1, 2021.²⁰⁵ Over 900 water protectors were arrested throughout the resistance, facing many of the same intense police tactics and draconian criminal charges as those at Standing Rock.²⁰⁶ Despite Line

²⁰¹ *Issues*, STOP LINE 3, <https://www.stopline3.org/issues> (last visited Apr. 16, 2021).

²⁰² *Id.*

²⁰³ Kristoffer Tigue, *Urging Biden to Stop Line 3, Indigenous-Led Resistance Camps Ramp Up Efforts to Slow Construction*, INSIDE CLIMATE NEWS (Feb. 16, 2021), <https://insideclimatenews.org/news/16022021/biden-line-3-minnesota-enbridge-pipeline-indigenous-resistance/>.

²⁰⁴ Ella Fassler, *Over 800 Water Protectors Have Been Arrested Since Line 3 Pipeline Was Approved*, TRUTHOUT (Aug. 28, 2021), <https://truthout.org/articles/over-800-water-protectors-have-been-arrested-since-line-3-pipeline-was-approved/>; *Line 3 Report: A Giant Step Backward*, MN350.ORG, <https://mn350.org/giant-step-backward/> (last visited Nov. 12, 2021).

²⁰⁵ Nia Williams, *Enbridge's long-delayed Line 3 oil pipeline project to start up Oct. 1*, REUTERS (Sept. 29, 2021, 3:49 PM), <https://www.reuters.com/business/energy/enbridge-completes-line-3-oil-pipeline-replacement-project-starts-linefill-2021-09-29/>.

²⁰⁶ Hilary Beaumont, *Revealed: pipeline company paid Minnesota police for arresting and surveilling protestors*, GUARDIAN (Oct. 5, 2021, 7:00 AM), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

3's completion, water protectors have vowed to continue the fight to protect their lands and shut down tar sands pipelines.²⁰⁷

At the time of writing, six critical infrastructure protest laws meant to counter the resistance to Line 3 are currently pending in the Minnesota legislature, showing how desperate the fossil fuel industry and its politicians are to prevent another Standing Rock situation.²⁰⁸ If any of these bills are enacted, the climate necessity defense may get its first chance to be utilized against an oppressive critical infrastructure law in order to protect and defend water protectors that continue to resist this pipeline.

²⁰⁷ *Indigenous Environmental Network Statement on Enbridge's Line 3 Completion of Work*, INDIGENOUS ENV'T NETWORK (Sept. 29, 2021), <https://www.ienearth.org/indigenous-environmental-network-statement-on-enbridges-line-3-completion-of-work-september-29-2021/>.

²⁰⁸ See *US Protest Law Tracker: Minnesota*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/?location=27&status=&issue=&date=&type=> (last updated Feb. 18, 2022).