



ARRESTING DISSENT:

LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST

In the past several years, the United States has experienced a resurgence of the long-standing tradition of public protest.

From the growth of the Black Lives Matter movement and its large-scale demonstrations, to the Women's March protests that began in 2017 in response to the election of President Trump, to youth-led movements calling for action on gun violence and climate change, to mobilization against infrastructure projects and in defense of lands and resources sacred to Native Americans, protest is on the rise in the U.S. In the spring of 2020, even amid a global pandemic, many state capitols saw protests by citizens demanding that COVID-19 lockdowns be lifted. By one estimation, one out of five Americans participated in a protest or political rally between 2016 and 2018.¹

But in response, protest rights are also coming under attack. As individuals have mobilized, state legislatures across the country have begun introducing bills meant to suppress, restrict, or criminalize the right to protest at an ever-increasing rate.

The broader political context for these legislative proposals matters. Until recently, President Trump had demonstrated an openly hostile attitude toward the right to protest,² including when he said, "I

think it's embarrassing for the country to allow protesters," in response to demonstrations against then-Supreme Court nominee Brett Kavanaugh.³ As a candidate, he urged supporters to "knock the crap out" of protesters at his events.⁴ Against this backdrop, government actors across state capitols have taken action to restrict the protest rights of their fellow Americans. However, more recently, President Trump has cheered on protesters who have demanded relief from pandemic-related stay-at-home orders.⁵

PEN America—drawing from research conducted by the Leitner Center for International Law and Justice at Fordham Law School—has undertaken a comprehensive review of state legislative proposals spanning the last five legislative sessions to examine where and how these efforts aim to restrict the right to protest. We find that:

- From 2015 to 2019, 116 bills have been proposed to limit protest rights in state legislatures across the country.
- Of those bills, some 23 have become law in 15 states.
- Before 2017, the number of restrictive protest bills was almost negligible.
- Nearly a third of all states have implemented

new regulations on protest-related activity in the past five years.

While there are many factors that have driven such restrictions, industry lobbying efforts are identifiably tied to some of the most significant proposed new limitations.

While President Trump has been selective in his support for the First Amendment right to protest — as evidenced by his recent support for the anti-COVID-19 lockdown demonstrations—leaders across the political spectrum must support the right to assemble and demand an address of grievances. Unfortunately, the recent legislative trend has been to introduce proposals to curb demonstrations. As we contemplate a post-COVID-19 society, politicians and legislators across the political spectrum should be consistent and resolute in protecting the right to protest and defeating proposals that undercut that basic right.

Research Methodology

Working in collaboration with Fordham Law School's Leitner Center for International Law and Justice, PEN America conducted an analysis of all relevant proposals introduced in state legislatures beginning with the 2015 session. We confined the subject of these bills to those primarily aimed at placing constraints on the right to assembly. With the Leitner Center, we developed a database of bills meeting this description, alongside a typology of anti-protest bills.

This research report draws heavily from interviews with experts on free expression and constitutional law, community organizing leaders, free speech policy advocates, and civil society advocates. The paper also reflects a comprehensive review of secondary sources, including scholarly and news articles, civil society reports, domestic legislative databases, and legislative tracking information, including the U.S. Protest Law Tracker developed by the International Center for Not-for-Profit Law (ICNL), which monitors and regularly updates state and federal proposals related to protest restrictions. The report includes, as its Appendix, a comprehensive list of 116 bills proposed during the five legislative sessions from 2015 through 2019.⁶



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Section I

Major Findings

Since the November 2016 presidential election, there has been an explosive increase in the number of state-level bills both proposed and enacted that criminalize or heighten penalties for protest-related activities—that is, activities that either arise naturally from a protest or are likely to occur as a foreseeable part of the protest. These bills take aim at various categories of such activity, from acts of civil disobedience intended as a statement of protest, to protesters stepping into the street during a march.

Prior to 2017, the number of proposals introduced across the country was extremely limited: between 2015 and 2016 together, state legislators introduced only six proposals that restricted protest rights.⁷ In 2017, this number shot up to 56.⁸ In 2018, the number of such bills dropped to 17,⁹ and in 2019, an additional 37 bills were proposed.¹⁰ To date in 2020 an additional sixteen bills were introduced, with four enacted into law.¹¹

Out of a total of 116 bills proposed from the beginning of 2015 to the end of 2019, 23 have become law across 15 states.¹² Nearly a third of all states have implemented new regulations on protest related activity in the past five years. Starting in 2017, PEN America has found, passage rates for such bills are approximately 20.9 percent.¹³

Broadly, PEN America has found that these proposals may be divided broadly into four categories of bills that: (1) expand the definition of and/or heighten penalties for conduct deemed to be

riot, criminal trespass, obstruction of traffic, or a similar offense; (2) impose costs on protesters such as clean-up costs or the costs of law enforcement; (3) criminalize constitutionally-protected activity that may occur in relation to a protest, such as wearing masks; or (4) immunize public or private actors from liability for harm caused to protesters.

The ubiquity of these bills has been fostered, at least in part, by industry interests who view environmental protests as a potential threat to their bottom line, and who are knowledgeable in how to promote their agenda in both governmental and quasi-governmental spaces—something this report discusses in further depth.

But even beyond this, the sheer number of these bills, across so many states, points to something greater: an increasingly hostile attitude among legislators toward protesters, often motivated by viewpoint-specific animus toward specific protest movements. As activist Nick Tilsen, of the NDN Collective in South Dakota, put it: “We have lost the narrative game. Protesters have lost the narrative that dissent and assembly are okay. This has been a very long process, supported by corporate interests to redraw political lines, to have elected officials in place that do not represent the interests of the people. Public officials don't see us in the same light as a young MLK. We're young anarchists in their eyes.”¹⁴ (Of course, during the Civil Rights Movement itself, many public officials similarly saw “young MLK” as a threat to the public order, illustrating

that these anti-protest attitudes are nothing new in American civic life). Particularly in the current, highly-polarized political environment in the U.S., both public and official views of the right to protest seem more likely to be based on whether a protest movement's political objectives align with one's personal political views, rather than a universal respect for the protections afforded by the First Amendment.

Many of the recently introduced bills attempt to create or expand criminal penalties for protest-related activities. Often, these regulations infringe on core protected activity, placing them on shaky constitutional ground. Others exist in a grayer constitutional area, clearly impeding the right to protest but potentially able to survive a legal challenge. Out of the 23 bills that have become law, only two have actually been challenged in court thus far—though this number may rise depending on how the new laws are enforced by law enforcement.¹⁵

As this report demonstrates, there is a clear and identifiable link between the increase in these legislative proposals and the rise of broad-based protest movements in the relevant states and retaliatory efforts to constrict First Amendment rights. Legislators often make it explicitly clear that their bills have been proposed with specific protests in mind, verging on viewpoint specific restraints on speech.

Commonly, a state's 'anti-protest' bills have sought to regulate the very type of protest activity that occurred in the years, if not months, prior. "Lawmakers' intent is clear," lawyer Elly Page of the International Center for Not-for-Profit Law ("ICNL"), which has tracked anti-protest bills since early 2017, told PEN America. "They are introducing these extreme and often redundant new laws not because they lack the tools to deal with unlawful behavior, but because they want to specifically discourage disfavored and dissenting voices."¹⁶

In most cases, these bills have ended up dying on the state House or Senate floors. The consistent and repeated introduction of these bills by state-level legislators across the country, then, seems intended at least in part not to pass legislation, but to shape the political narrative and to send a message to

the public. In some cases, sponsors continually re-propose identical bills in subsequent legislative sessions, so that these proposals become "zombie bills"—bills that simply refuse to die a permanent death.¹⁷ Every re-introduced bill is a new iteration of the argument that the right to protest should be further limited. Additional anti-protest bills have been proposed for the 2020 legislative session in states across the country. In several instances these target protests at pipelines and critical infrastructure, attempting to preemptively suppress ecologically-minded dissent directed against drilling, pipeline expansions and other types of construction that raises environmental concerns.

At a moment when many of the norms and institutions of American democracy are being tested, the right to protest remains a fundamental form of public expression. In recent years, both targeted protests and mass demonstrations have played an important role in helping to shape public discourse around critical policy and societal questions. The number of bills attempting to restrict freedom of assembly at this particular moment smacks of a deliberate attempt to constrain that discourse, and it demands our attention as a fundamental threat to free expression. The recent turning of the tables and the rise of conservative protest movements enjoying support from some of the very same politicians who have previously derided assembly rights is potent evidence of the political motivations that have shaded these legislative efforts.

First Comes Protest, Then Comes Anti-Protest Legislation

The sudden increase in the number of anti-protest bills introduced at the state level in 2017 coincided with a burst of public protests following the election of President Donald Trump, from the Women's March the day after the 2017 inauguration to spontaneous demonstrations against the Trump administration's travel ban at airports across the country in early 2017. It also followed a year of significant protests by Native American communities against the Dakota Access Pipeline in North Dakota. The introduction of anti-protest bills often follows closely on the heels of major protest events.

Nowhere is this trend more apparent than in Minnesota, Missouri, Massachusetts and North Dakota, four states that have been the site of some of our nation’s most significant recent protests. North Dakota is the site of the Standing Rock protests against the Dakota Access Pipeline. The protests in Ferguson, Missouri—as well as in Massachusetts—brought the Black Lives Matter movement to national recognition. Minnesota, meanwhile, has hosted major Black Lives Matter, anti-Trump, and environmental protests. These states are also among those that have seen the highest number of anti-protest bills introduced between 2017 and 2019: Minnesota saw nine bills, Massachusetts with nine, Missouri with eight, and North Dakota with seven.¹⁸

In North Dakota, protests against the Dakota Access Pipeline began in April 2016 and received substantial media attention, particularly in the fall of that year.¹⁹ At the very beginning of the next legislative session, in January 2017, state legislators proposed six different anti-protest bills. Four of these proposed bills would go on to become law.²⁰ In Missouri, Black Lives Matter protests began in 2014, but have continued a sustained protest presence in years since. In 2017, legislators there began proposing a raft of anti-protest bills, targeting the exact tactics that BLM protesters had popularized.²¹ In July 2016, Black Lives Matter protesters marched along Interstate 94 in St. Paul, Minnesota, in; months later, in Minneapolis, thousands of people marched to protest Trump’s win in the November 2016 election, including by marching on the interstate highway.²² Within the next few months, Minnesota legislators had proposed six different anti-protest bills,²³ including five that would have created new criminal penalties for either obstructing a highway or obstructing traffic.²⁴

Nationwide, anti-protest bills were far more likely to have a Republican as their primary sponsor than a Democrat. Of the 116 bills PEN America examined, 95 had a Republican as their primary sponsor, while only 13 had a Democratic sponsor. Five other bills were proposed by legislative committees and two had bi-partisan primary sponsorship.²⁵

For Minnesota, therefore, the Republicans’

seizure of the state Senate may help explain the raft of 2017 anti-protest bills. Julia Decker, of the ACLU of Minnesota, commented to PEN America that “The Republicans gained control of the Senate after the 2016 election, which gave them control of both legislative chambers. This apparently emboldened them to introduce several anti—protest bills—bills focused on criminalizing protest around highways, transit, and airports. In 2017, a lot of bills started cropping up.”²⁶

While respect for the rights enshrined in the Constitution should, in theory, be nonpartisan, protest has long been and remains a fiercely political issue, particularly as a form of expression often wielded against those currently holding political power. The growth of a series of protest movements advancing policy goals and interests generally considered progressive, and the spread of protests against President Trump and his policies, has seemingly fostered among Republican lawmakers an increased willingness to constrain the right to assembly. Yet, at a moment when American democracy feels particularly fragile and a fundamental contention is underway over which values will shape our public discourse and policy in the coming years, the role of peaceful protest has rarely felt more vital, nor the right to engage in it more in need of defense.

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The Civil Rights Movement and the Power of Protest

The Civil Rights Movement showed how protest—at times disruptive, discomforting protest—can right injustice and propel our democracy forward. Over the course of some two decades, civil rights leaders used mass demonstrations, including the deliberate inconvenience of blocked traffic and civic disruptions, to shine a light on and oppose racist laws and policies. Many of these demonstrations, boycotts, and sit-ins were met with police violence and arrest, including under ostensibly neutral public order laws.²⁷ As Sue Udry, executive director of Defending Rights and Dissent, told to PEN America: “Protest movements are rarely welcomed when they are happening. After all, their job is to push the envelope beyond where the popular consensus is, to bend the arc toward justice. It isn’t usually until after gains have been made—the right

to vote for women and Blacks, the eight hour work day, gay marriage—that the rest of the world catches up and begins to appreciate the protesters.²⁸ Today, it is broadly accepted that these protesters were fully justified in their actions, including in the tactics that authorities were, at the time, all-too-eager to label as disturbances of the peace.

The violent police crackdown against protesters attempting to cross the Edmund Pettus Bridge in Selma, Alabama—the watershed moment of the Civil Rights Movement known as “Bloody Sunday”—was legitimized by authorities as necessary to prevent an “unlawful assembly.”²⁹ Today, it is widely recognized that those “unlawful” protesters played a vital role in shifting public opinion—and government policy—on issues of race and civil rights. Public protests today continue to demonstrate their power to focus the public’s attention on issues from systemic racism to climate change.



Riot police block off the Albuquerque Convention Center to anti-Trump protests following a rally and speech by Republican presidential candidate Donald Trump at the convention center where the event was held, in Albuquerque, N.M. Photo by Brennan Linsley/AP

Legislation to Shape the Conversation Around Protest

In its analysis of the anti-protest bills considered in this report, PEN America identified an overarching theme: they all seek to either redraw the boundaries between permissible and impermissible protest-related activity, or to heighten penalties for existing criminal offenses that may arise from protest activity.

Many of these bills create new crimes for protest-related behavior, or otherwise work to expand police officers' discretionary ability to arrest protesters and charge them with serious crimes. They accomplish this by, for example, re-drawing the boundary lines between a protest and a "riot" or "unlawful assembly," or by expanding existing criminal penalties for public order violations that may arise during a large protest (such as obstruction of traffic). Other bills would shield people from liability if they harm a protester. Still other bills raise the cost for protesting as an activity. Many of the bills would achieve the goal of augmenting the state's ability to punish unlawful, protest-related activity.

There is an obvious implied message to these anti-protest bills—one that sets a dangerous precedent; even if such bills rarely become law, they promote the view that today's protests should be viewed through the narrative of criminal disruption, not civic participation.

The number of anti-protest bills emerging in recent years is so significant that even international human rights experts have taken notice. In 2017, two UN Special Rapporteurs—David Kaye, the Special Rapporteur on Freedom of Expression and Opinion; and Maina Kiai, then-Special Rapporteur on Freedom of Peaceful Assembly and of Association—wrote to the State Department to warn that "a number of undemocratic bills have been proposed in state legislatures with the purpose or effect of criminalizing peaceful protests."³⁰ The problem has only continued since then.

Even if such bills rarely become law, they promote the view that today's protests should be viewed through the narrative of criminal disruption, not civic participation.



Section II

The Legal Right to Protest in The U. S.

The right to protest is a fundamental constitutional right in the U.S., arising from the First Amendment’s guarantees of freedom of speech, freedom of assembly, and freedom to petition the government. While these rights are subject to some government regulation for preservation of public safety, order, and peace, they are generally carefully guarded from government interference and regarded as essential components of democracy.

The First Amendment explicitly lays out that Congress—and, by extension under the Fourteenth Amendment, state governments— shall make no law abridging or limiting our right to assemble or speak freely. While these protections have been tested time and again throughout our country’s history, the result has been a long history of jurisprudence repeatedly re-affirming both the civic importance of, and the legal right to, public protest. “The tradition of public protest dates back to the revolutionary period,” First Amendment lawyer Bob Corn-Revere of Davis Wright Tremaine told PEN America. “And it gained judicial recognition in the 20th century as the Supreme Court held that the First Amendment requires the government to preserve the right to speak in public spaces.”³¹ In 1939, the Supreme Court recognized that “[u]se of the streets in public places has, from ancient times, been part of the privileges, immunities, rights and liberties of citizens.”³² Streets, parks, and sidewalks have “immemorially been held in trust for the use of

the public and, time out of mind, have been used for purposes of assembly.”³³ By 1949, the Supreme Court acknowledged that protected speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”³⁴

While it is true that the government may impose some regulations on the right to assemble, these regulations must be narrowly circumscribed. Government actors have latitude to regulate the time, place, and manner (“TPM”) of protest and other expressive activity, so long as such restrictions are: content-neutral; narrowly tailored to serve a significant governmental interest; and leave open ample alternatives for communication.³⁵ Similarly, the Supreme Court has long made it clear that the government can only impose restrictions on the exercise of speech when such restrictions are “reasonable and [...] not an effort to suppress expression merely because public officials oppose the speaker’s view.”³⁶

The government does have some limited power to act to disallow or shut down assemblies that pose a risk to public order, including there being the clear and present danger of imminent collective violence.³⁷ Virginia Governor Terry McAuliffe’s declaration of an “unlawful assembly” during the Unite the Right white supremacist rally in Charlottesville in 2017, stands as an example of such permissible power. Even in such instances, these powers are

circumscribed by the First Amendment, and rely on the finding of an imminent threat to public safety.

At times throughout history, some protests have employed civil disobedience—a form of protest that includes the willful decision to disobey the law but which is in practice predominantly nonviolent—as a form of activism and for the attention these acts often garner. While such actions, by virtue of their illegality, are not protected by the First Amendment, nonviolent civil disobedience has often been effective in achieving social change, including the realization or enlargement of our human and civil rights. Furthermore, civil disobedience is predominantly a non-violent act; most definitions of civil disobedience specifically exclude acts of violence. This distinction, between non-violent civil disobedience and acts of violence, is often conveniently elided by authorities who wish to paint participants in civil disobedience with the same broad brush as violent actors.



A crowd gathers in front of the Georgia State Capitol at the 2017 Women's March in Atlanta, GA. Photo by Nora Benavidez



Section III

Redrawing the Lines Around Lawful Protest

PEN America found that the slate of anti-protest legislation proposed from 2015 to 2019 can be divided broadly into four categories of bills that:

- (1) **expand the definition of and/or heighten penalties** for conduct deemed to be riot, criminal trespass, obstruction of traffic, or a similar offense;
- (2) **impose costs on protesters** such as clean-up costs or the costs of law enforcement;
- (3) **criminalize constitutionally-protected activity** that may occur in relation to a protest, such as wearing masks; or
- (4) **immunize public or private actors from liability for harm caused to protesters** or create carve-outs for law enforcement action against protesters.

Several of the identified anti-protest bills attempt to simultaneously advance more than one of these objectives, so that they are not mutually exclusive from each other.

Of the 116 bills analyzed in this report, the great majority of proposals fall into the first category: expanding the scope of illegality in relation to protest-related conduct, and thus narrowing the definition or more rigorously policing the bounds of “acceptable” protest.

Bills that expand the definition of and/or heighten penalties for conduct deemed to be riot, criminal trespass, obstruction of traffic, or similar offense

Since 2015, 86 bills have been introduced across 32 state legislatures that would either broaden criminal statutes to incorporate current tactics employed by protesters, or would significantly increase the penalties related to “unlawful protests” so that such prohibitions can be applied more punitively to protesters.³⁸ Eighty-two of those bills were introduced since 2017 alone. These bills tend to focus on:

- A.** criminalizing activity which obstructs highways;
- B.** imposing new or heightened penalties for individuals protesting at or near “critical infrastructure” sites; and/or
- C.** expanding the legal definitions of unlawful protest and riot.

What unites these three sub-categories of bills is that they each focus on re-drawing the line between legal protest-related activity and illegal activity, so that some of today’s more common protest tactics—such as highway marches and pipeline protests—more explicitly fall on the far side of criminality. These bills also all tend to increase the legal punishment for such protest-related activity, enabling the state to act far more punitively towards protesters who refuse to toe the line.

A. HIGHWAY OBSTRUCTION

Thirty-six of the 116 bills PEN America analyzed have attempted to create a new, heightened criminal action for obstructing or impeding traffic on a public highway.³⁹ Twenty-one of these bills would create a misdemeanor action⁴⁰ for such obstruction, while nine would create a felony action.⁴¹

The state of Missouri provides a powerful example of how these bills would work to chill protest. On August 9, 2014, teenager Michael Brown was shot and killed by a police officer in Ferguson, Missouri. The resulting protests in Ferguson and nearby communities helped raise the Black Lives Matter movement—and the issues the movement focuses on, including police brutality, racial inequality in the justice system, and racial profiling—to greater national prominence. As early as the next day, protesters in St. Louis assembled on I-70, shutting down traffic there.⁴²

As PEN America itself previously noted in its October 2014 report on press freedom violations in Ferguson, the protests were largely peaceful, a fact that contrasts heavily with the police's aggressive and militarized response to the demonstrations.⁴³ Reviewing the allegations of infringement on press freedoms in Ferguson at the time, PEN America concluded that the heavily militarized response “apparently created a mentality among some police officers that they were patrolling a war zone, rather than a predominantly peaceful protest attended by citizens exercising their First Amendment rights, and members of the press who also possess those rights.”⁴⁴

In fact, as a result of its own review of police response to the protests from August to October 2014, PEN America recommended that Ferguson and other police departments “Establish a clear policy for the policing of public protests that emphasizes respect for the rights to assembly and freedom of the press.”⁴⁵

Subsequent Black Lives Matter protests nationwide have also employed the blocking of highways and other public roads. When a Missouri grand jury decided not to indict the officer who had shot and killed Michael Brown, solidarity protests

occurred again in over 170 cities around the country on November 25, 2014, and brought protesters out onto streets and highways from Los Angeles to Boston to Dallas.⁴⁶

In February 2017, Rep. Nick Marshall introduced HB 826 to Missouri's House of Representatives.⁴⁷ HB 826 would impose a misdemeanor offense on anyone who interferes with traffic on a public street or highway.⁴⁸ If an individual interferes with traffic on a public street or highway a second time, they may be charged with a Class E felony.⁴⁹ “Over the last few years we've seen peaceful protests and assemblies turn into mobs,” said Marshall, explaining his rationale for proposing the bill.⁵⁰ One of Rep. Marshall's colleagues, Rep. Bruce Franks, was arrested in 2014 for participating in the Ferguson protests; in his own remarks, Franks noted that had HB 826 been law when he was arrested, he would have been convicted of a felony.⁵¹

Historically, protesters have used public areas like roadways and streets as protest space precisely because such actions are hard to ignore, and help draw attention to the protesters' cause. Jamecia Gray, Florida based political strategist and founder of Peak Power Strategies, highlighted to PEN America: “By gaining attention, we can change the narrative. We can do that by shutting down a highway, by doing things that people cannot ignore — which is a chance for us to reclaim our story. And protesting is not criminal, protest is about gathering for an issue.”⁵²

As it stands, there are already existing local ordinances all over the country that allow local law enforcement to prosecute people who obstruct cars or pedestrians. However, as the American Civil Liberties Union has noted, “driving isn't a right—it's a privilege. Protesting on the other hand, and specifically protesting in the streets, is a fundamental constitutional right.”⁵³ These new laws attempt to re-balance the scales, prioritizing the privilege of driving over our constitutional rights, even to the point of attempting to transform highway-marching protesters into felons.

While some recent legislative proposals that enhance penalties for highway obstruction specify a specific mens rea standard—a state of mind by which the protester actually intended to block traffic—

others, such as SB 1096 of Florida,⁵⁴ do not specify any such standard.⁵⁵ Under the second category of bills, a person could be arrested and convicted even if they unintentionally/accidentally impeded traffic during their participation in a protest, for example by crossing a street. Yet, even under the higher mens rea standard, police will still have substantial discretion to arrest, based on their subjective determination of a protester's intent.

More than a third of the bills analyzed provide for criminal sanctions if one obstructs traffic that specifically prevents emergency vehicles, the flow of commerce, or access to airports.⁵⁶ Yet, while these provisions may appear to narrow the scope of the bills, in reality phrases like “flow of commerce” provide great latitude for law enforcement to enforce these provisions extremely broadly.

Demonstrating the link between such bills and protest rights, a small number of bills explicitly condition the crime of highway/traffic interference on the occurrence of a public protest or unlawful assembly. For example, HB 1259,⁵⁷ introduced in Missouri in 2017,⁵⁸ aimed to create a new Class D felony for “unlawful traffic interference on any public street, highway, or interstate highway while part of an unlawful assembly.”⁵⁹ Other types of unlawful traffic interference—those not specifically connected to “unlawful assembly”—would have been treated as lesser offenses.⁶⁰ In the case of such bills, individuals blocking traffic as part of exercising their right to protest would actually find themselves in greater legal jeopardy than if they were impeding traffic for any other reason.

A few bills would have prevented demonstrations on streets well beyond the ambit of highways and freeways. HB 1898,⁶¹ introduced in Arkansas in 2019,⁶² for example, would have created a Class A misdemeanor to block the entry to a place of work, public road, school entrance, or private residence.⁶³ Such a bill, had it passed, would have dramatically expanded police officers' discretion to arrest protesters for ‘blocking’ roads or entrances as they marched. In a 2017 interview, Lee Rowland of the New York Civil Liberties Union said: “A law that would allow the state to charge a protester \$10,000 for stepping in the wrong place... is about one thing: chilling protest.”⁶⁴

CASE STUDY: MINNESOTA

One major highway obstruction proposal appeared in Minnesota, where state representatives voted to both widen the definition of “public nuisance” and to increase criminal penalties for those who blocked highways, public transit, or access to airports. Although it was first proposed in January 2017,⁶⁵ the bill—HF 390⁶⁶—passed both houses of Minnesota's legislature in 2018, failing to become law only because the governor vetoed it.⁶⁷

Among other changes, HF 390 would have converted obstruction of traffic on a freeway or airport road into a “gross misdemeanor,” the same category of crime as repeated domestic assault.⁶⁸ The bill would also have increased and expanded penalties for “unlawful interference with transit,” from the previous maximum penalty of 90 days imprisonment, to a new maximum penalty of one year imprisonment.⁶⁹

Notably, Minnesota has been the home to several large-scale Black Lives Matter protests that involved blocking roads, including a 2015 BLM protest at an airport the day before Christmas Eve that led to 13 arrests⁷⁰ and a July 2016 protest that shut down I-94 and led to 102 arrests.⁷¹ The ACLU of Minnesota closely monitored the state bill once it was introduced. Julia Decker, ACLU-MN policy director, explained to PEN America that the “timing was no coincidence. The highway bill was proposed in direct response to Black Lives Matter protests, to send a message to potential protesters.”⁷² The bill's sponsor, Representative Nick Zerwas, even spelled out the bill's purpose in no uncertain terms, saying that his “intent” for the proposal was “to discourage this highly dangerous and illegal behavior and to punish those that are not deterred.”⁷³ (Apparently, police action to arrest protesters prior to that point—including its arrests of over 100 people at the 2016 I-94 protest—was not seen by proponents of the bill as sufficient discouragement.)

Others have also made the connection. The ACLU of Minnesota fought against HF 390, declaring it “a partisan dog whistle intended to strike fear into the hearts of patriotic citizens whose goal is

to shine a spotlight on challenges we face as a state and as a nation.”⁷⁴ Minnesota Rep. John Consideine, who opposed the bill, said that the arguments and language of its proponents looked “remarkably similar to what the governor of Alabama said when [Dr. Martin Luther King] started marching in Selma.”⁷⁵

B. CRITICAL INFRASTRUCTURE

Of the bills PEN America analyzed, 28 seek to create or expand criminal punishments for crimes relating to trespassing on “critical infrastructure.”⁷⁶ Though the bills may vary widely in the specific terminology, they all seek to criminalize the same underlying conduct.⁷⁷

Introduction of these bills has closely followed the protests against pipeline construction at Standing Rock and other locations.⁷⁸ “In response to these protests,” ICNL has written, “a number of states have proposed (and in some cases passed) bills that proponents claim will protect critical infrastructure from trespass and vandalism. However, many of these bills include provisions that would chill or limit the rights of protesters at or around infrastructure sites.”⁷⁹ Thirteen of the twenty-seven critical infrastructure bills have been proposed in states which have featured protests against energy pipeline projects.⁸⁰

“Critical infrastructure” is a remarkably malleable term, allowing legislators to justify their imposition of stiff new criminal penalties for trespass based on their determination that the trespassed-upon location should enjoy a special status. Some of the legislative proposals “broadly define ‘critical infrastructure’ to include ubiquitous structures such as telephone poles or railroad tracks” while other proposals “create harsh new penalties for interference with critical infrastructure sites with no exemption for peaceful protest.”⁸¹

The newly created criminal acts in these proposals provide for substantial penalties. Depending on the jurisdiction, the crime of “trespass upon critical infrastructure” would be treated as a misdemeanor or a felony, punishable with a fine ranging from \$1,000 to \$3,000 and a prison sentence ranging from up to one year to five years. Kentucky’s HB 238,⁸² for

example, carries a maximum five-year sentence for trespass on critical infrastructure⁸³—equivalent to punishment for crimes such as possession of a firearm by a convicted felon, and wanton endangerment in the first degree.⁸⁴ Under such statutes, a protester who merely crosses onto land hosting a pipeline could be held criminally liable.

Bills that instead delineate the crime of “impeding the function of critical infrastructure” uniformly treat the act as a felony, punishable with a fine ranging from \$10,000 to \$100,000 and a prison sentence of up to 10 years. For example, HB 3557,⁸⁵ proposed and signed into Texas law last year, ⁸⁶made “interference” with “energy infrastructure construction” (a term primarily encompassing pipelines), a third-degree felony punishable by two to ten years imprisonment—equivalent to the punishment for the crime of attempted murder.⁸⁷

Broad terms like “impeding” leave protesters in a state of uncertainty as to what type of protest-related activities near pipelines are permissible, and which are criminal. “These vague offenses mean that the state has sweeping discretion to apply the law or not, while the extreme penalties involved dramatically raise the stakes for protesters,” Elly Page of ICNL said to PEN America. “Individuals who want to exercise their First Amendment right may be unwilling to take the risk.”

Some bills attempt to limit the severity of these criminal provisions by requiring that at least \$1,000 in property damage or economic loss occur before the crime of impeding critical infrastructure can be prosecuted as a felony, as opposed to a misdemeanor.⁸⁸ However, many of these bills are silent as to whether this damage must be caused by the indicted protester specifically, leaving open the possibility that protesters could be charged with a crime connected to property damage that they themselves did not cause.⁸⁹ There are, of course, already statutes that criminalize property damage, suggesting that these bills are actually intended for another purpose—namely to discourage protest. While the criminal penalties for protesters are troubling, these bills have other concerning side effects that would allow deep pocketed parties (including the state) to bring civil suits asking for damages against protesters. These

bills, therefore, pose compounding risks of chilling protest and even bankrupting those who do engage in protest.

Perhaps the most problematic provision present in critical infrastructure bills is the establishment of criminal penalties for “aiding or abetting in the impeding of critical infrastructure.” Such penalties aim to punish the groups that organize protesters who are arrested under these bills’ provisions. An organization—or even a single individual—found guilty of aiding or abetting the impeding of critical infrastructure could be fined and sued for damages including lost profits. Depending on the jurisdiction, the fine could range from \$10,000 to \$1,000,000.⁹⁰

The danger of such “aiding and abetting” charges is obvious. Advocacy groups that organize protests, or that simply encourage protesters to organize or participate in protest actions, could find themselves facing financial ruin. Even legal groups performing “Know Your Rights”-style trainings could potentially face criminal charges, simply for training people who later participate in a protest where someone breaks the law. In fact, these bills do not even require that such “abettors” have knowledge that unlawful conduct will occur at the protest, leaving groups liable for even the unanticipated illegal conduct of others. And of course, faced with such a choice, many groups might choose not to organize protests or even trainings. “These bills keep coming up again and again, if nothing else as a statement to would-be protesters,” said Terri Nelson, legal director of the ACLU of Minnesota.⁹¹

Nelson is not the only one to have concluded that these bills seem geared to send a statement. Alice Cherry, co-founder of the Climate Defense Project, told one outlet in 2018 that “The main motivation for these bills seems to be to deter would-be protesters and to make potential jail sentences and fines more draconian.”⁹² In Minnesota, Senator Paul Utke explained the rationale for his own critical infrastructure bill by noting that “We saw what happened in North Dakota [with the pipeline protests] and we have a big pipeline project coming up.”⁹³

The commonalities among these bills, as well as the frequency with which they have been introduced, is

no accident. Two different influential think-tanks—the American Legislative Exchange Council and the Council of State Governments—have promoted model legislation that has provided a template, with many state-level legislators borrowing heavily from them.⁹⁴ In January 2018, ALEC published a model Critical Infrastructure Protection Act, which drew heavily from two Oklahoma anti-trespass bills, HB 1123 and HB 2128.⁹⁵ According to ALEC, their model policies are developed by state legislators who participate in ALEC-convened task forces (such as the Task Force on Energy, Environment, and Agriculture, which developed this specific model act), and are ultimately approved by ALEC’s Board of Directors, who are themselves all state legislators.⁹⁶

The month before ALEC published its model bill, the nonprofit Council of State Governments had highlighted HB 1123 and 2128 in its annual list of Shared State Legislation, a compilation of selected recently-passed laws across the country that it distributes widely to state legislators. CSG says that it does not “promote or advocate for the enactment of state legislation,”⁹⁷ but selects which bills to highlight in its list in part through a determination that the bill-at-issue “provide[s] a benefit to bill drafters,” and “provide[s] a clear, innovative and practical structure and approach.”⁹⁸

Twenty-three of the twenty-seven ‘critical infrastructure’ bills that PEN America has identified were proposed either during or after January 2018, after both ALEC and CSG had engaged on the issue, demonstrating how quickly anti-protest bills in one state can become a model that is promoted and replicated across the country.⁹⁹

Both ALEC and CSG are well-known for promoting model or sample legislation on various issues throughout the country.¹⁰⁰ Both organizations, responding to PEN America’s request for comment, emphasized that they see their processes as information-sharing efforts for a legislative audience, driven by state legislators themselves.¹⁰¹ Yet while drafting model legislation is not an uncommon advocacy tool for civil society organizations, some have raised questions about whose interests are being advanced in this case. In December 2017, for example, a group of oil and gas

umbrella groups sent a letter lobbying ALEC state legislators to approve the Critical Infrastructure Protection Act as an official ALEC model policy, pointing approvingly to the Oklahoma laws as a precedential model. Signatories to the letter included a who's-who of energy lobbying groups, such as the American Gas Association, American Fuel & Petrochemical Manufacturers, and the American Chemistry Council.¹⁰² The advocacy organization GreenPeace has noted that all but one of the letter's signatories are also associate members of CSG, with environmental groups raising questions as to the level of influence these corporate members have over CSG processes.¹⁰³

Even the energy sector's lobbyists have acknowledged playing a significant role in pushing for the bills—albeit only behind closed doors. In August of last year, investigative media outlet *The Intercept* obtained an audio recording of a high-level officer in the American Fuel & Petrochemical Manufacturers speaking frankly about the energy sector's efforts to lobby for the bill at an industry conference in Washington, D.C.¹⁰⁴ The next month, *The Intercept* also broke the news that another industry lobbyist, the Association of Oil Pipelines, was lobbying federal legislators to insert the model bill into federal safety legislation.¹⁰⁵ “These [critical infrastructure] bills are backed by corporate interests,” Nick Robinson from ICNL told PEN America. “We see the same language being used again and again across states. These bills generally aren't being drafted by local legislators.”¹⁰⁶

CASE STUDY: LOUISIANA

Over the summer of 2017, residents of St. James Parish, Louisiana, began a protest against the proposed Bayou Bridge Pipeline, a 163-mile crude oil pipeline that would run through 700 different bodies of water. The pipeline—approved by the Army Corps of Engineers in December 2017—united various groups of “Indigenous water protectors, Black residents of ‘Cancer Alley,’ Atchafalaya Basin landowners and others,” who engaged in lawsuits, protests, and acts of civil disobedience.¹⁰⁷ As construction began, activists brought suit to stop the pipeline, and a judge ruled that the state had illegally

issued a coastal use permit for the pipeline—but Louisiana's Department of Natural Resources refused to enforce the judge's order.¹⁰⁸

In 2018, Louisiana's legislature passed HB 727.¹⁰⁹ The proposal, sponsored by Representative Major Thibaut (D) and drafted with input from the Louisiana Mid-Continent Oil and Gas Association,¹¹⁰ targets protests near gas and oil pipelines by expanding the definition of critical infrastructure and providing for the offense of unauthorized entry of a critical infrastructure. Under the bill, protesters arrested for trespass under this provision face felony charges resulting in up to five years imprisonment.¹¹¹ Louisiana contains 125,000 miles of pipelines that criss-cross the state.¹¹²

Since the law took effect, fourteen protesters and one journalist have been arrested under its provisions.¹¹³ In May 2019, community and civil rights groups sued to find the law unconstitutional.¹¹⁴ Bill Quigley, a Loyola University law professor and lawyer representing a protester arrested under the new law's provisions, explained in a 2019 interview that “the law infringes on the First Amendment right to protest by being so vague that it can be used in an arbitrary and discriminatory manner.”¹¹⁵

Protesters and reporters alike have pointed out the discrepancy between this law's criminalization of trespass, and the state's apparent attitude towards pipeline builders who trespass: in 2018, the builders of the Bayou Bridge Pipeline were found to have trespassed on three owners' private land in order to build their pipeline.¹¹⁶ Their punishment? A \$450 dollar fine, enacted by the same judge who would go on to set bail at \$21,000 for one of the pipeline's protesters.¹¹⁷ Litigation is ongoing to challenge the constitutionality of this law.¹¹⁸

The critical infrastructure bills are not going away. Several new iterations have already been introduced and are moving through state legislatures in the 2020 legislative session. “We're inundated,” said Nick Tilsen of the NDN Collective in South Dakota.¹¹⁹ These legislative tactics also serve to take up public oxygen, forcing civil rights groups and protest-related organizations to focus on fighting these bills instead of further organizing or advocating for their agenda. As is, organizers like Tilsen and others leading the

Native American communities in protest to protect sacred lands and the environment cannot stand in a proactive posture if they are constantly trying to defend the right to protest in the first place.

C. UNLAWFUL PROTEST AND RIOT

Twenty-two bills in eleven states have attempted to alter the definitions of and punishments associated with riot and unlawful protest.¹²⁰ The bills seek primarily to increase the criminal sentences associated with acts of protest or make it easier for law enforcement to declare a gathering “a riot.” Some of the bills, however, provide that individuals involved in a gathering where a violent or destructive incident takes place could be charged with participation in a riot, even if their own actions during the protest were peaceful.¹²¹ The punishments associated with participation in a riot could include expulsion from public universities, fines of up to \$10,000, and prison time.

Such efforts would essentially re-brand entire areas as places where lawful protest is all but impossible, for example, or increase a police officer’s discretion to determine that a peaceful protest is instead an unlawful riot. As the UN Special Rapporteurs for freedom of assembly and of expression highlighted, there is an inherent danger to proposals that carve out protest as being “unlawful” or “violent”: “There can be no such thing in law as a violent protest [...] There are violent protesters, who should be dealt with individually and appropriately by law enforcement. One person’s decision to resort to violence does not strip other protesters of their right to freedom of peaceful assembly. This right is not a collective right; it is held by each of us individually.”¹²² In redrawing the boundaries around how we define protest, this category of state legislation poses a uniquely dangerous threat to our freedom of assembly and association.

In New Jersey, for example, Representative Ronald Dancer (R) proposed successive bills—first in 2017 and an identical version in 2018—that sought to expand the definition of a riot to include any ‘disorderly’ group conduct that results in property damage. Under A 4777 and A 2853,¹²³ if anyone in a group of four or more people causes damage to

property, everyone in the group can be charged with rioting as long as they participated in “disorderly conduct.” Under New Jersey law specifically, the definition for “disorderly conduct”¹²⁴ is expansive—even loud swearing qualifies.¹²⁵ Under such a low standard, it makes it very likely that a group of protesters at a major protest could be found—at least in the eyes of the arresting officer—to have engaged in such disorderly conduct.

Had Dancer’s bill become law, everyone participating in a protest where any one protester caused damage costing more than \$2,000 could have faced up to five years’ imprisonment.¹²⁶ In other words, protesters could face jail time solely because of the conduct of others participating in the same protest.

SB 540,¹²⁷ proposed in Oregon in January 2017,¹²⁸ would have mandated that any public university or community college expel a student convicted of rioting.¹²⁹ This would have proved a dramatic overreach into the decision-making power of state university officials, especially as students could have been punished for participating in protests not even held on campus grounds.

Of the proposed bills, most carry steep legal consequences for protesters. One example is HB 249¹³⁰ of North Carolina. HB 249 specifically creates a crime of economic terrorism and states that a person may be prosecuted as a terrorist if the person has committed obstruction with the intent to “intimidate the civilian population at large, or an identifiable group of the civilian population” or “influence, through intimidation, the conduct or activities of the government of the United States, a state, or any unit of local government.”¹³¹

The problem with such a formulation is an obvious one. Many protest actions are meant to shame government actors, or heighten the cost for a proposed course of government action. From there, it is a short leap to the conclusion that anti-pipeline protesters engaged in civil disobedience are instead trying to “intimidate” the government—enabling them to be prosecuted as terrorists, potentially punishable with up to over three years in prison.¹³²

The concepts of “unlawful protest” or “unlawful assembly”—mentioned in over half of the twenty-

two bills proposed—exist in tension with the right to protest.¹³³ The state has dueling obligations to ensure its residents' civil rights while maintaining public order. With bills that attempt to expand or broaden the definition of “unlawful protest,” however, state legislators are attempting to redraw the boundaries of unlawful behavior to fold in more and more protest-related conduct, and to create harsher and harsher punishments for protesters whom law enforcement or the state deems to have crossed those boundaries. It is a legislative two-step: legislators can claim with a straight face that they are not infringing on the right to lawfully protest nor target any specific viewpoint, while simultaneously expanding the sphere by which the state will treat protests as ‘unlawful’. But the result is a diminution of the right to protest, all the same.

CASE STUDY: SOUTH DAKOTA

South Dakota has been the site of one of the nation's most significant protests in modern memory: the protests led by Native American communities against the massive Keystone Pipeline. Protests over the pipeline's environmental cost and infringement on native land gained significant steam in 2016 but became increasingly urgent in 2017 after President Trump granted permission for the final part of the pipeline to be built.¹³⁴ Protests continued to build after November 2017, when the purportedly-safe pipeline leaked 200,000 gallons of oil into the surrounding area.¹³⁵ That same year, South Dakota legislators made it a Class 1 misdemeanor—punishable by up to one year in prison¹³⁶—to stop traffic on the highway or to trespass in a posted emergency area.¹³⁷

On March 4, 2019, the anti-protest bill SB 189¹³⁸ was proposed in the South Dakota State Senate.¹³⁹ SB 189 establishes a civil action to sue “riot boosters,” which it defines as anyone who “directs, advises, encourages or solicits” others towards “acts of force or violence.”¹⁴⁰ The bill makes no effort to narrowly define such terms—leaving the door open for police to arrest protesters for “encouraging” violence through First Amendment-protected expression, such as common protest slogans like “no justice, no peace.” The bill also establishes that a person can engage in riot boosting through “any employee,

agent, or subsidiary,”¹⁴¹ raising the possibility that professional environmental or indigenous advocacy groups could be sued for the actions of any one of their employees or supporters who are determined to be “encouraging violence.”

The bill itself was drafted not by a legislator but by the state's governor, Kristi Noem, who reportedly consulted not only with police but with TC Energy—the developer of the Keystone XL pipeline—while drafting the bill; local Native American leaders, in contrast, said that their communities were not consulted.¹⁴² The bill was rushed through late in the legislative session, going from introduction to passage within three days.¹⁴³ Governor Noem signed the bill on March 27, only three weeks later.¹⁴⁴ One Native American leader, Faith Spotted Eagle, of the Yankton Sioux tribe, called the bill's lightning-fast passage an attempt to “legislate by ambush.”¹⁴⁵ The ACLU of South Dakota noted that one hearing was uniquely planned for a day when many of the tribal chairpeople were at a meeting in Washington, D.C. for other federal legislative purposes.¹⁴⁶ Their absence was surely felt: Libby Skarin, policy director of the ACLU of South Dakota, noted that “public outcry could have helped at the legislative level to push back.”¹⁴⁷

Governor Noem, in her comments on SB 189, made clear that the connection between the Keystone protests and the legislation's intent. The day of its introduction, Noem released a press statement declaring: “The legislative package introduced today will help ensure the Keystone XL pipeline and other future pipeline projects are built in a safe and efficient manner while protecting our state and counties from extraordinary law enforcement costs in the event of riots.”¹⁴⁸

Subsequently, however, after the ACLU sued over the bill, a judge found that vast portions of the law “impinge upon protected speech and other expressive activity as well as the right of association.”¹⁴⁹ The South Dakota government was eventually compelled to pledge not to enforce the law.¹⁵⁰



Police officers arrest activist DeRay Mckesson during a protest along Airline Highway, a major road that passes in front of the Baton Rouge Police Department headquarters in Baton Rouge, La., after the fatal shooting of Alton Sterling by two white Baton Rouge police officers. Photo by Max Becherer/AP

Assaults on Protest in the Courts: *Doe v. Mckesson*

A recent federal court decision, *Doe v. Mckesson*, raises its own concerns about protest rights and mirrors recent riot-boosting legislation in that it limits free speech by creating an overly broad definition of endorsing violence. DeRay Mckesson, one of the leaders of the Black Lives Matter movement, took part in a demonstration on July 9, 2016 outside a Baton Rouge police office protesting the shooting of Alton Sterling, an unarmed street vendor, by two police officers. During the protest, another participant threw an object at a police officer, referred to in the case as John Doe. After sustaining injuries from the altercation, Doe pressed charges against Mckesson, alleging that, as a leader of the movement, Mckesson tacitly endorsed the action of all fellow protesters.

In what observers have called a shocking decision, Louisiana’s Fifth Circuit Court held that Mckesson was liable to pay damages to John Doe.¹⁵¹ The Circuit Court’s decision runs contrary to Supreme Court precedent, namely, *NAACP v. Claiborne*, a 1982 case that established that people harmed at a protest may sue the individuals who harmed them, but cannot sue organizers unless they have proof that organizers explicitly ordered violence. The Fifth Circuit Court, notwithstanding, held that Mckesson was liable because he did not properly address “the foreseeable risk of violence” his advocacy efforts allegedly created.

As Garrett Epps told PEN America: “The Fifth Circuit Court of Appeals upheld a civil lawsuit against Black Lives Matter activist DeRay Mckesson for merely participating in a demonstration against police violence at which a police officer was injured by another protester—a decision that flies directly in the face of Supreme Court precedent from the Civil Rights era.” In a rare move, one of the Fifth Circuit panel judges changed his vote in late 2019, publishing a sudden reversal of his original stance and acknowledging he had had a change of heart.¹⁵² Judge Willett wrote that the original decision botched its analysis of the First Amendment: “Our Constitution explicitly protects nonviolent political protest [...] The Constitution does not insulate violence, but it does insulate citizens from responsibility for others’ violence.”¹⁵³ While Judge Willett’s vote change does not affect the ruling, it was a remarkable move that shone a light on the decision’s potential ramifications.

The appeal has now come before the U.S. Supreme Court on a petition for the Court to hear the case, though a decision had not been made at time of writing. Should the decision be upheld, it would place an undue burden on protest organizers and set a dangerous precedent, leaving many activists to calculate the risks of organizing a protest where they could be held accountable for the actions of others.



Section IV

Other Legislative Restrictions on the Right to Protest

Proposals that heighten penalties or create broader definitions of criminality for protesters have represented the biggest contingent of new anti-protest bills. However, other forms of anti-protest bills have also been introduced across the country. PEN America identified three additional categories of bills that aim to: i) impose potentially unconstitutional costs on would-be protesters; ii) criminalize protected activity such as mask-wearing; and iii) shield public and private actors from liability if they harm a protester. Each will be discussed below.

1. Bills that impose costs on protesters such as clean-up costs or the costs of law enforcement

From January 2017 through March 2019, lawmakers in 12 states introduced 18 bills to allow either public or private actors to charge protesters for costs associated with their demonstrations—costs such as cleanup or security.¹⁵⁴

These bills are intended to—quite literally—raise the costs of protesting. While the government may indeed accrue some costs as a result of large-scale demonstrations, it is by definition part of the government’s job to bear the costs of ensuring the public’s rights. These bills, instead, aim to levy what amounts to a protest tax on Americans who assemble to express their civic concerns. If such bills are implemented, they would essentially force people to pay for access to their own First Amendment rights.

But if faced with potential financial costs for merely participating in a protest, many people may simply decide not to join a protest at all.

Pennsylvania has been the site of two different proposed “protest tax” bills. The city of Philadelphia saw several major protests following the election of President Trump, including the Women’s March, a “Queer Rager” dance party, and a demonstration against the Muslim ban.¹⁵⁵ Additionally, the state has seen its share of pipeline protests, including a series of 2017 protests against the construction of the Atlantic Sunrise natural gas pipeline.¹⁵⁶ Among the protesters in Lancaster were a group of Catholic nuns—the Adorers of the Blood of Christ—who had announced their intent to hold vigils and prayer services as acts of protest against the pipeline.¹⁵⁷

In August of 2017, Lancaster County’s Senator Scott Martin (R), proposed SB 754,¹⁵⁸ a bill that aimed to make individuals convicted of a crime in connection to a protest or demonstration—a category that included specific reference to “vigils or religious services”—liable for the costs of public safety response.¹⁵⁹ Under the bill, convicted demonstrators could be held liable not only for costs related to their own conduct, but the costs associated with the protest writ large.¹⁶⁰

Marcellus Drilling News, a trade publication for the oil and gas industry in the region, covered the bill warmly, writing “PA residents in Lancaster County have a keeper in freshman Senator Scott Martin . . . Law and order folks (those of us who

are sane, rational people) are tired of the lawless actions by a few who oppose pipelines, drilling, Trump...whatever.”¹⁶¹ And while the text of SB 754 did not reference the Lancaster County protests, it did make explicit reference to the “protests and related illegal activities” against the Dakota Access Pipeline (DAPL) in South Dakota.¹⁶²

Two months after SB 754 was proposed, in October 2017, 25 anti-pipeline protesters were arrested for trespassing on land where the pipeline construction was set to begin.¹⁶³ If SB 754 had been law at the time, these protesters would have faced not only criminal charges but also would have faced the prospect of being forced to pay the state for the costs associated with arresting them. SB 754 failed to pass,¹⁶⁴ but in 2019, Republican legislators proposed an essentially-identical bill, SB 323, which is still pending in the Pennsylvania legislature.¹⁶⁵

2. Bills that criminalize protected activity, such as concealing one’s identity at a protest

Between January 2017 and January 2019, lawmakers in eleven states proposed fifteen bills that would create criminal penalties for individuals who conceal their identity at protests.¹⁶⁶ Of the 15 bills, two have become law.¹⁶⁷

The state of legislative play for concealing one’s identity, namely through mask-wearing, varies widely across the country: while several states such as Georgia and New York have pre-existing criminal anti-mask laws on the books, many courts have instead found that laws criminalizing the hiding of one’s identity at a protest are unconstitutional.¹⁶⁸ In litigation, many of these laws inevitably stumble against the right to anonymity, a right that has been found by courts to be protected under the First Amendment.¹⁶⁹ In 1995, the Supreme Court ruled that “Anonymity is a shield from the tyranny of the majority [and] exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.”¹⁷⁰

Many of the already-existing anti-mask laws originated as a way to counter the demonstrations

of the Ku Klux Klan, whose hood-wearing was intended—at least in part—as an act of intimidation.¹⁷¹ Enforcement of these laws today has thus led to some ironic and uncomfortable results, such as when Georgia police invoked one such criminal statute to justify arresting anti-racism protesters who had shown up to counter-protest at a neo-Nazi rally in April 2018. As *The Washington Post* described, covering the event:

But things quickly went awry for the counterprotesters who were wearing masks or bandannas that concealed their faces — a problem in the eyes of some police officers. About 2:30 p.m., police began to point their guns at a crowd of the anti-racism protesters gathered on a sidewalk. “State law requires you to remove your masks right now,” one SWAT officer told the crowd, according to video footage from the scene. “You will do it right now or you will be arrested.” Within minutes, several counterprotesters were in handcuffs. Video footage from the scene showed SWAT officers pulling some counterprotesters off the curb and throwing them to the ground. One man wearing a bandanna over his face was arrested as counterprotesters chanted, “Hands up, don’t shoot!” The officers continued to yell, “Remove your masks!”¹⁷²

At public protests, many protesters may wear masks, scarves, hats, or face paint as a way of indicating political affiliation; others cover their faces to make a political statement or to remain anonymous —again, both protected under the First Amendment. Others may use masks for protection from tear gas or other risks associated with protest participation. Georgia-based civil rights litigator and senior counsel at the Southern Center for Human Rights, Gerald Weber, who has represented protesters charged under the Georgia mask-wearing statute, told PEN America: “Those who wear masks during protests most often either have a particular expressive purpose for their mask, or a need to be anonymous because of fear of retaliation at work or in their community. Legislation that limits

the wearing of masks impacts what citizens are able to say and sometimes whether they express themselves at all.¹⁷³

Yet many states have recently attempted to introduce proposals targeting protesters who conceal their identity. In some cases, these bills are sponsored by officials who purport that those who hide their identity are more likely to commit criminal acts.¹⁷⁴ Such a viewpoint presumes from the outset that protesters are concealing their identity not to politically express themselves nor to freely protest without fear of targeting by police, but to engage in criminal behavior. As Washington Senator Jim Honeyford, sponsor of a 2017 bill which would have made it a gross misdemeanor to conceal one's identity under "the guise of political speech," explained: "I really believe that people, when they hide their identity, are more likely to commit a crime."¹⁷⁵

Arizona quickly introduced legislation to criminalize concealment of one's identity after a protest incident on August 22, 2017, in which

masked protesters clashed with police and three people were arrested at a Trump rally in Phoenix.¹⁷⁶ In comments at the time, Phoenix's mayor and chief-of-police both downplayed reports that the protests were chaotic, with the mayor noting that the protests were mostly peaceful.¹⁷⁷ The day after the rally, state Rep. Jay Lawrence announced on his Facebook page that he would work to draft an anti-mask bill.¹⁷⁸ Lawrence stated: "The thugs wearing masks and throwing things at police officers and breaking windows and robbing and pillaging while wearing masks and hoods are the equivalent of the Ku Klux Klan. Now, there are no hangings of white people, yet."¹⁷⁹

Lawrence's bill, HB 2007,¹⁸⁰ aimed to make it a felony to wear a disguise, "whether partial or complete" at any public event with the aim "to evade or escape discovery, recognition or identification."¹⁸¹ Under HB 2007, violation of the 'no disguises' law would be a Class 6 felony, punishable by up to one year in prison.¹⁸²



A protester wears a Donald Trump paper mache mask at a 2017 protest in New York City. Under Arizona's HB 2007 as originally written, wearing this mask in Arizona would have provided police officers probable cause to detain this protester, and--upon a determination that the mask was a "disguise" worn to "evade recognition"--charge them with a felony. Picture by Shaun Dawson.

The bill offered no definition for “disguise,” raising the possibility that a person could be stopped by police and/or arrested and charged with a crime for even wearing a scarf or a pair of sunglasses at a public or political event. And by also granting the police powers to detain a person for wearing a “disguise,” the bill attempted to legalize the idea that merely wearing a mask would constitute probable cause for arrest. Ironically, this means that protesters who would try to evade police recognizing them might in fact become more susceptible to law enforcement targeting. Additionally, the bill offered no provisions limiting how or whether police could determine that a mask-wearer’s specific aim was evading or escaping recognition.¹⁸³

After significant pushback, the bill was revised substantially to instead allow the wearing of masks but also permit courts to consider the fact that an individual wore a mask or other disguise to hide their face while committing a criminal offense as an aggravating factor, for sentencing purposes. Thus neutralizing the most concerning First Amendment aspects, the bill was signed into law in March 2018.¹⁸⁴

Even Rep. Lawrence, the sponsor, would come to admit that the bill in its original form would have “shattered the First Amendment,” saying later that “It really was not the best bill in history.”¹⁸⁵ Yet, Arizona’s eventual passage and implementation of this modified law is no success story for Arizonans’ protest rights, as it still threatens to heighten the criminal penalties for arrested protesters who wear a mask as an expressive act or out of a desire to be anonymous due to fear of retaliation or targeting. HB 2007 is a prime example of how even clearly unconstitutional bills pose a threat to free expression rights, as they may be watered down just enough to potentially pass constitutional muster but still chill protest.

Anti-mask legislation has even been repeatedly proposed at the federal level. In 2018, Rep. Daniel Donovan of New York proposed the “Unmasking Antifa Act.” The bill, which died in committee that year, would have created federal criminal penalties—of up to 15 years in prison—for anyone wearing a disguise who “injures, oppresses, threatens, or

intimidates” someone.¹⁸⁶ The bill’s very title leaves no doubt that this Act was proposed to target one specific political movement—the antifascist, or “antifa” movement.¹⁸⁷ The next year, Tennessee’s Rep. Tim Burchett proposed the bill again, saying, “It’s time we get tough on this issue. These cowards wouldn’t act the way they do if the whole world could see their faces.”¹⁸⁸ The creation of a fifteen year federal sentence for a protester who “oppresses” someone while wearing a mask, however, would pose an obvious and significant threat to every American’s right to protest.

In criticizing these proposed bills, PEN America is not ignoring the fact that a person could indeed wear a mask for the purpose of intimidation or for concealing their identity in the anticipated commission of a crime. Indeed, the anti-KKK origins of many of the anti-mask laws currently in place help illustrate this reality. Yet these bills are inherently in deep tension with our First Amendment rights, including our right to anonymity and our rights to political expression. Such laws—especially the recent proposals—carry the potential of enabling viewpoint-based discrimination against political protest under the guise of neutral enforcement. The end result, worryingly, could be a chilling of Americans’ political speech and a diminution of protest rights.

Of course, in the context of the COVID-19 pandemic, with mask-wearing now being mandated or at least recommended in many localities across the U.S., these laws have an entirely new set of implications that legislatures and courts have yet to reckon with. It is safe to assume, however, that public opinion is likely to be significantly more tolerant of mask wearing in many contexts for some time to come.

3. Bills that immunize public or private actors from liability for harm caused to protesters

From January 2017 through February 2019, lawmakers in nine states proposed bills to limit the liability of public or private actors for harm caused to protesters or to create carve-outs for law enforcement action against protesters.¹⁸⁹ Of the 10 bills that were proposed, two passed (West Virginia SB 4618 and North Dakota SB2302) and eight failed. West Virginia's SB 4618, one of the bills that passed, added the state capitol police to the list of law enforcement branches that are shielded from liability for any deaths caused when breaking up a riot.¹⁹⁰ Of the eight that failed, the most common provision of these bills is one that would exempt drivers from liability for unintentionally hitting a protester standing on public roads or blocking traffic.

Of the ten bills, two were proposed after August 2017, when a Neo-Nazi drove his car into a group of counter-protesters at the Unite the Right Rally in Charlottesville, Virginia, killing 32-year-old Heather Heyer and wounding at least 19 people.¹⁹¹ In the wake of Heyer's murder especially, these bills risk sending a distinctly chilling message—that protesters are open targets for both public and private actors. Such bills tangibly reduce the standard of care that people must apply when interacting with protesters, including in life-threatening situations. Were these bills to become laws, they might embolden people who disagree with protests to act out and injure protesters, knowing that in this instance the law has afforded them a special penumbra of privilege.

Florida's SB 1096/HB 1419,¹⁹² proposed in February 2017, is one such bill.¹⁹³ SB 1096/HB 1419 would have immunized drivers from liability for unintentionally injuring or even killing a protester obstructing a public road, in addition to creating a misdemeanor action for persons obstructing a public road during a protest.¹⁹⁴ Under the bill, if an injured protester—or the representative of a dead protester—wanted to sue or press charges, they would have the evidentiary burden of proving

that the protester was not blocking the road when struck, and that the driver hit them intentionally.

Remarking on the bill, sponsoring Senator George Gainer said its purpose was “to keep people safe, not to allow people to go and do whatever they wanted to do just because it was a protest.”¹⁹⁵ While the bill ultimately failed to pass, Gainer has indicated he will consider re-introducing it.¹⁹⁶

As with the anti-protest bills that seek to criminalize obstructing the flow of commerce, these bills prioritize a driver's privileges over a protester's rights. The right to peacefully assemble is written into our Constitution. The right to an uninterrupted commute is not. But these bills also go further, increasing the risks to life and limb that an individual must take into account when deciding to participate in a protest. While most of these bills have been defeated, the mere fact that so many have been introduced—some of them even in the wake of Heather Heyer's murder—reflects a remarkable degree of political hostility towards the act of peaceful protest.



Section V

Legal Challenges to Anti-Protest Laws

Many of these anti-protest proposals, including those that seek to criminalize mask wearing or impose costs on protesters before they even assemble, appear on their face to be unconstitutional, particularly in relation to the First Amendment. In fact, only two proposals which have become law have been challenged through litigation.¹⁹⁷ This is likely due, at least in part, to the concern around mounting a successful legal challenge to laws that are crafted artfully enough to pass constitutional muster.

But a reliance on the judiciary to invalidate these laws—at least in the cases where the law is not clearly facially unconstitutional—means that some group of protesters must put themselves on the line, waiting to be arrested and even criminally charged under the new provisions in order to challenge the law’s constitutionality. And they would have to do so knowing that, if the courts decide against them, they will be left to face the full brunt of the punishment. And regardless, protesters will face the prospect of a years-long court battle alongside potentially ruinous legal fees. As First Amendment expert and litigator Bob Corn-Revere told PEN America, “Where laws regulating public protests may be tested only through as-applied challenges, speakers are forced to place their freedom at risk and roll the dice to find out whether courts eventually will find their actions to be protected by the First Amendment’s. This is particularly chilling in this climate, where many legislatures seem determined

to clamp down on demonstrations.”¹⁹⁸

As such, it is preferable to head these bills off before they become law. As Nick Robinson, a Legal Advisor at ICNL, states, “It is important that these bills are stopped from being enacted. It is expensive and risky for peaceful protesters to challenge them in court. It also wastes taxpayer money for the state to defend these draconian and unnecessary laws from legal challenge.”¹⁹⁹

Constitutional law professor and writer Garrett Epps offered similar views, telling PEN America:

“We are witnessing a concerted attempt to narrow the First Amendment’s prohibition against unpopular speech. Ironically, it is coming at the precise time when the same federal courts are broadening the protection for speech by the rich and powerful, as in the campaign-finance cases. Citizens who value the right to oppose the government in word or deed would be well advised not to leave these questions to courts, but to become politically involved to oppose these legislative attempts to stifle this foundational means of protest.”²⁰⁰

Even the most egregious anti-protest proposals—bills that will clearly not survive a constitutional challenge—can have a deep chilling effect on protesters who feel that their liberties have been targeted. Native American activist Nick Tilsen

shared with PEN America his belief that “the intent is to chill people, to incite fear.”²⁰¹

The example of SB 189 was, until recently, an encouraging example of the courts in action. In South Dakota, the state passed an unconstitutional bill, but civil society and the courts were eventually able to force a course correction.²⁰² Yet a judicial block on one legislative attempt will also not stop legislators from trying to pass new anti-protest legislation. In South Dakota, the legislature and governor suffered a blow when the ACLU successfully challenged its 2019 proposals to broaden law enforcement’s ability to arrest people for riot-boasting. During the 2020 legislative session and amid the COVID-19 pandemic, however, the South Dakota legislature moved quickly to introduce and pass a refined, better-crafted version of the previous bill. This new Senate Bill 151 will incorporate a series of “critical infrastructure”-related crimes into the state’s criminal code, including extending the crime of trespass to critical infrastructure facilities.²⁰³ The bill has now been signed into law by the governor.²⁰⁴ That South Dakota’s legislators would act to consider a new anti-protest bill, so soon on the heels of the defeat of their last disastrous law, demonstrates the resilience of this anti-protest agenda.



Conclusion

An Ongoing Threat to Free Expression

Moments of heightened political contention in the U.S. have long been marked by mass protests as a fundamental form of public expression. As the country faces a heated presidential election, the likelihood that protests would increase again this year seemed certain. The COVID-19 pandemic, however, has dramatically altered that calculation. This public health crisis has significant and still emerging implications for the right to assembly, and even at a moment when there is good reason to restrict mass gatherings, it is critical that such constraints occur within the boundaries of the Constitution and with a long-term view to protecting Americans' protest rights.

As this report has laid out, there is reason to be concerned about the state of those rights. The slate of anti-protest bills analyzed in this report are unnecessary, overbroad, and in many cases, aimed at deterring specific protest movements. "These bills appear to be a direct reaction from politicians and corporations to some of the most effective tactics of those speaking out today, including water protectors challenging pipeline construction, [and] Black Lives Matter," explained First Amendment attorney Vera Eidelman at the ACLU. "These legislative moves are aimed at suppressing dissent and undercutting marginalized and over-policed groups voicing concerns that disrupt current power dynamics."²⁰⁵ Even in their application, many laws—such as anti-mask bills, which in their recent iterations would

criminalize the wearing of a 'disguise' during a protest—may be arbitrarily enforced by police. Of course, such bills also take on new meaning in the context of the COVID-19 pandemic. And bills that remove liability for individuals who injure a protester could even risk providing legal cover for the exact type of violence that led to the death of Heather Heyer.

As about a fifth of these anti-protest proposals have become law, they are more than a hypothetical threat to Americans' ability to raise their voice in protest. A person's legal right to protest is substantially downgraded if they must first decide whether, for example, it is worth the risk of facing criminal charges as a "booster" for rioting if they participate. This is why PEN America does not hesitate to label these types of bills as anti-protest efforts—the seemingly intended and practically predictable effect of these bills is to chill Americans' First Amendment rights to assemble and express dissent, and to target specific social movements.

While this report only assesses bills proposed through the 2019 legislative session, activity in 2020 also demonstrates that the anti-protest legislative trend is not waning.²⁰⁶ As of the time of writing, Minnesota had introduced two bills that would hold protesters criminally liable for engaging in protest at or near critical infrastructure sites.²⁰⁷ Louisiana has introduced a new bill²⁰⁸ that would increase potential penalties for protesters at critical infrastructure sites by making entry to such a site

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during a state of emergency a felony, punishable by up to 15 years in prison.²⁰⁹ And as noted above, despite a court’s determination last year that South Dakota’s riot-boosting bill was unconstitutional, the legislature has vowed to keep trying and has introduced and passed a new proposal that once again attempts to expand the definition of a riot.²¹⁰ Native American tribal members in South Dakota see the proposal—which has already been signed into law by the governor—as a tactic meant to “silence” anti-pipeline protests.²¹¹ While some of these proposals have moved onto governors’ desks or died, many are in limbo amid the COVID-19 pandemic, as states have suspended their legislative sessions.

Some proposals to constrain protests are also emerging at the federal level. In June 2019, the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration proposed an amendment to existing law that would add criminal penalties of up to 20 years in prison for those who protest at pipelines.²¹² The proposal includes a new provision that would add “vandalism, tampering with, or impeding, disrupting or inhibiting the operation of” pipelines or projects under construction.²¹³ Of the federal provision proposed by the Department of Transportation, for

example, a spokesperson reiterated that “this [...] is not meant in any way to inhibit lawful protesters from exercising the First Amendment rights.”²¹⁴

At a moment when there are a series of new and unanticipated constraints on people’s ability to gather and make their voices publicly heard, there is the very real risk that attempts to instill new legal restrictions on freedom of assembly could increase, under the guise of public health measures. While some temporary restrictions are obviously warranted, the potential for abuse is also high. In the long term, it is critical for American democracy that the country emerge from this moment of crisis with constitutional rights preserved. Indeed, with widespread public discourse already turning to what the post-pandemic future will look like, it is clear that protecting the space for all forms of free expression is both crucial and urgent. Ensuring a broad-based, inclusive debate requires it. As such, legislators across the country must cease their attempts to constrain the right to protest and instead direct their focus to protecting the rights of all Americans to participate in a robust public dialogue, including the fundamental right to assembly as a form of essential—and consequential—democratic participation.

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ENDNOTES

1. Mary Jordan and Scott Clement, “Rallying Nation: In Reaction to Trump, Millions of Americans Are Joining Protests and Getting Political,” *The Washington Post*, April 6, 2018.

2. See e.g. *PEN America, Trump the Truth: Free Expression in the President’s First 100 Days, April 2017, at 15.*

3. Felicia Sonmez, “Trump Suggests That Protesting Should Be Illegal,” *The Washington Post*, September 5, 2018; Philip Bump, “With A Wink, Trump Asks That Supporters Not Hurt Protesters Criticizing His Rhetoric,” *The Washington Post*, October 24, 2019.

4. E.g. Meghan Keneally, “A Look Back At Trump Comments Perceived By Some As Encouraging Violence,” *ABC News*, October 19, 2018 “If you see somebody getting ready to throw a tomato, knock the crap out of them, would you? Seriously, OK? Just knock the hell ... I promise you I will pay for the legal fees. I promise, I promise.”

5. Michael D. Shear and Sarah Mervosh, Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions. *The New York Times*, April 17, 2020.

6. “US Protest Law Tracker,” International Center for Not-for-Profit Law, last modified April 14, 2020.

7. H 1336 (2015), H 1672 (2015), H 3453 (2015), and S 1869 (2015) of Massachusetts; HF 2892 (2016) of Minnesota; and HB 4643 (2015) of Michigan. See Appendix for details.

8. HF 390, HF 34, HF 55/SF 148, SF 803, HF 1066/SF 918, and HF 322 of Minnesota; HB 179 and HB 826 of Missouri; HB 1426, HB 1193, HB 1293, HB 1304, HB 1203, and SB 2302 of North Dakota; H 807, H 808, H 916, S 982 and S 1976 of Massachusetts; SB 1055 and HB 1791 of Virginia; SF 111 of Iowa; HB 488 and BR 175 of Kentucky; HB 249, HB 330, and SB 229 of North Carolina; SB 652 and SB 754 of Pennsylvania; HB 250 of Texas; SB 1142 of Arizona; HB 1578 and SB 550 of Arkansas; SB 1096/HB 1419 of Florida; SB 1, SB 160, and HB 452 of Georgia; SB 285 of Indiana; SB 2730 of Mississippi; HB 423 of Ohio; HB 1123 and HB 2128 of Oklahoma; SB 902 and HB 0668/SB 0944 of Tennessee; AB 395, AB 396, and AB 397 of Wisconsin; HB 220 of Alabama; SB 17-035 of Colorado; A 4777 of New Jersey; SB 176 of South Dakota; SB 5941 and SB 5009 of Washington; HB 571 of Montana; SB 540 of Oregon; and H 5690 of Rhode Island. See Appendix for details.

9. SF 3463 of Minnesota; HB 2145, SB 813, and HB 1259 of Missouri; HB 1601 of Virginia; SF 2235 of Iowa; HB 53 of Kentucky; HB 2007 and SB 1033 of Arizona; SB 250 of Ohio; HB 94 of Alabama; SB 18-264 of Colorado; A 2853 of New Jersey; SF 0074 of Wyoming; HB 2612 of Kansas; HB 727 of Louisiana; and HB 4618 of West Virginia. See Appendix for details.

10. SF 2011 and SF 1463 of Minnesota; HB 288, SB 293, and HB 355 of Missouri; SB 2044 of North Dakota; S 1036, H 1428, H 3286 and H 1588 of Massachusetts; HB 3190, SB 1486, and HB 1633 of Illinois; SF 286 of Iowa; HB 238 of Kentucky; HB 966 of North Carolina; SB 323 and SB 887 of Pennsylvania; SB 2229, SB 1993, and HB 3557 of Texas; HB 1898 of Arkansas; SB 471 and SB 78 of Indiana; SB 2474 and SB 2754/HB 1336 of Mississippi; SB 33 and HB 362 of Ohio; SB 592 of Oklahoma; SB 0264 of Tennessee; AB 426 of Wisconsin; SB 189 of South Dakota; HB 0010 of Wyoming; HB 9 of Alaska; SB 1090 of Idaho; SB 316 of Nevada; HB 2776 of Oregon. See Appendix for details.

11. US Protest Law Tracker, International Center for Not-for-Profit Law.

12. HB 355 (2019) of Missouri; SB 2044 (2019), HB 1426 (2017), HB 1293 (2017), HB 1304 (2017), and SB 2302 (2017) of North Dakota; SF 2235 (2018) of Iowa; HB 3557 (2019) of Texas; HB 2007 (2017) of Arizona; HB 1578 (2017) of Arkansas; SB 160 (2017) and HB 452 (2017) of Georgia; SB 471 (2019) of Indiana; HB 1123 (2017) and HB 2128 (2017) of Oklahoma; SB 902 (2017) and SB 0264 (2019) of Tennessee; AB 426 (2019) of Wisconsin; SB 176 (2017) and SB 189 (2019) of South Dakota; HB 727 (2018) of Louisiana; SB 316 (2019) of Nevada; and HB 4618 (2018) of West Virginia. See Appendix for details.

13. The 23 bills that restrict protest rights passed since 2017 divided by 110, the total number of such bills proposed since 2017, equals approximately 20.9 percent.

14. PEN America interview with Nick Tilsen, February 19, 2020.

15. HB 355 of Missouri; SB 2044, HB 1426, HB 1293, HB 1304, and SB 2302 of North Dakota; SF 2235 of Iowa; HB 3557 of Texas; HB 2007 of Arizona; HB 1578 of Arkansas; SB 160 and HB 452 of Georgia; SB 471 of Indiana; HB 1123 and HB 2128 of Oklahoma; SB 902 and SB 264 of Tennessee; SB 176 and SB 189 of South Dakota; HB 727 of Louisiana; SB 316 of Nevada; AB 426 of Wisconsin; HB 618 of West Virginia. See Appendix for details.

16. PEN America Interview with Elly Page, March 16, 2020.

17. E.g., Representative Colleen Garry (D) from Massachusetts has introduced H 1336, a bill to create the crime of manslaughter caused by reckless disregard of life while protesting or blocking highways or roadway access, three

times since 2015. The bill text is identical to H 808 and H 3284 of Massachusetts, both of which Representative Garry sponsored in 2017 and 2019, respectively.

18. HF 34 (2017), HF 390 (2019), HF 55/SF 148 (2017), SF 803 (2017), HF 1066/SF 918 (2017), SF 3463 (2018), HF 322 (2017), SF 2011 (2019), and SF 1463 (2019) of Minnesota; HB 288 (2017), HB 2145 (2018), SB 293 (2019), HB 179 (2017), HB 355 (2019), SB 813 (2018), HB 1259 (2017), and HB 826 (2017) of Missouri; SB 2044 (2019), HB 1426 (2017), HB 1193 (2017), HB 1293 (2017), HB 1304 (2017), HB 1203 (2017), and SB 2302 (2019) of North Dakota. See Appendix for details.

19. See e.g., “Standing Rock Special: Unlicensed #DAPL Guards Attacked Water Protectors with Dogs & Pepper Spray,” *Democracynow.org*, November 24, 2016.

20. SB 2044, HB 1426, HB 1193, HB 1293, HB 1304, and HB 1203 of North Dakota were proposed in January 2017. HB 1426, HB 1293, HB 1304, and SB 2302 went on to become law in North Dakota. See Appendix for details.

21. HB 288, HB 2145, SB 293, HB 179, HB 355, SB 813, HB 1259, and HB 826 of Missouri. See Appendix for details.

22. MNPR News Staff, “Thousands in Minneapolis take to I-94, protesting Trump's win,” Minnesota Public Radio, November 10, 2016; Randy Furst, “Protesters shut down I-94 in St. Paul for hours,” *Star Tribune*, July 11, 2016.

23. HF 34, HF 390, HF 55/SF 148, SF 803, HF 1066/SF 918, and HF 322 of Minnesota were all proposed in either January or February of 2017. See Appendix for details.

24. HF 34, HF 390, HF 55/SF 148, SF 803, and HF 1066/SF 918 of Minnesota amended existing law to increase penalties or created new penalties for obstructing traffic. See Appendix for details.

25. SF 2235 of Iowa; SD 176 and SB 189 of South Dakota; SB 1090 of Idaho; and HB 2612 of Kansas were sponsored by state legislative committees. AB 426 of Wisconsin and SB 5009 of Washington had bi-partisan sponsorship. BR 175 of Kentucky has no stated sponsor.

26. PEN America interview with Julia Decker, September 27, 2019

27. See e.g. *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963)

28. PEN America interview with Sue Udry, May 1, 2020.

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30. United Nations Office of the High Commissioner for Human Rights, “UN rights experts urge lawmakers to stop ‘alarming’ trend to curb freedom of assembly in the US,” media release, March 30, 2017.

31. PEN America Interview with Bob-Corn Revere, March 29, 2020.

32. *Hague v. CIO*, 307 U.S. 496 (1939).

33. *Hague v. CIO*, 307 U.S. 496 (1939).

34. *Terminiello v. City of Chicago*, 337 U.S., 1, 4, 69 (1949).

35. *Ward v. Rock Against Racism*, 491 U.S. 781, 795–96, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

36. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Education Assn*, 460 U.S. 37, 46 (1983)).

37. *Jones v. Parmley*, 465 F.3d 46, 56–57 (2d Cir. 2006).

38. HF 34, HF 390, HF 55/SF 148, SF 803, HF 1066/SF 918, SF 3463, SF 2011, and SF 1463 of Minnesota; HB 288, HB 2145, SB 293, SB 813, HB 355, HB 1259, and HB 826 of Missouri; SB 2044, HB 1426, HB 1193 and HB 1293 of North Dakota; H 1672, H 3453, S 1869, S 982, S 1976, H 3284, S 1036, H 916, H 807, H 808, H 1336, and H 1428 of Massachusetts; SB 1055, HB 1791, and HB 1601 of Virginia; HB 3190, SB 1486, and HB 1633 of Illinois; SF 286, SF 2235, and SF 111/SF 2222 of Iowa; HB 238 and HB 53 of Kentucky; HB 249 and SB 229 of North Carolina; SB 652 and SB 887 of Pennsylvania; SB 2229, SB 1993, and HB 3557 of Texas; SB 1142 and SB 1033 of Arizona; HB 1578, HB 1898 and SB 550 of Arkansas; SB 1096/HB 1419 of Florida; SB 1, SB 160, and HB 452 of Georgia; SB 471 of Indiana; SB 2474, SB 2754/HB 1336, and SB 2730 of Mississippi; SB 33 and SB 250 of Ohio; HB 1123 of Oklahoma; SB 0902 and SB 0264 of Tennessee; AB 426, AB 395, AB 396, and AB 397 of Wisconsin; HB 94 of Alabama; SB 17-035 and SB 18-264 of Colorado; A 2853 and A 4777 of New Jersey; SB 176 of South Dakota; SB 5009 of Washington; HB 0010 and SF 0074 of Wyoming; HB 9 of Alaska; SB 1090 of Idaho; HB 727 of Louisiana; SB 316 of Nevada; and SB 540 and HB 2776 of Oregon. See Appendix for details.

39. HF 34, HF 390, HF 55/SF 148, SF 803, HF 1066/SF 918, and SF 1463 of Minnesota; HB 288, HB 2145, SB 813, HB 1259, and HB 826 of Missouri; S 1869, H 3453, S 982, S 1976, H 1672, H 3284, S 1036, H 916, H 807, H 808, H 1336, and H 1428 of Massachusetts; SF 286, and SF 111/SF 2222 of Iowa; HB 53 of Kentucky; HB 1898 of Arkansas; SB 160 of Georgia; ; SB 2474 and SB 2730 of Mississippi; SB 0902 of Tennessee; AB 396 of Wisconsin; SB 5009 of Washington;

HB 9 of Alaska; SB 1096/HB 1419 of Florida; and SB 316 of Nevada. See Appendix for more details.

40. Misdemeanor action: HF 390, HF 55/SF 148, SF 803, HF 1066/SF 918, and SF 1463 of Minnesota; HB 288, HB 2145, SB 813, HB 1259, and HB 826 of Missouri; SF 286 and SF 111/SF 2222 of Iowa; HB 53 of Kentucky; SB 1096/HB 1419 of Florida; HB 1898 of Arkansas; SB 160 of Georgia; SB 2474 and SB 2730 of Mississippi; SB 0902 of Tennessee; AB 396 of Wisconsin; and HB 9 of Alaska. See Appendix for details.

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45. *Id.*, at 18.

46. Eric Avila, “Why the Road to Ferguson Was a Freeway,” *Time Magazine*, December 17, 2014; see also Erika Aguilar and KPCC staff, “Ferguson: Protesters block 101 freeway on second night of LA demonstrations (updated),” Southern California Public Radio, November 25, 2014; See also Steve Almasy and Holly Yan, “Protesters fill streets across country as Ferguson protests spread coast to coast,” *CNN*, November 26, 2014.

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51. *Id.*

52. PEN America Interview with Jamecia Gray, May 8, 2020.

53. Vera Eidelman and Lee Rowland, “Where Protests Flourish, Anti-Protest Bills Follow,” American Civil Liberties Union, accessed February 27, 2020.

54. SB 1096 of Florida died in the Senate Criminal Justice Committee in May 2017.

55. SB 1096, 2017, (FL), <https://www.flsenate.gov/Session/Bill/2017/1096/BillText/Filed/PDF>. See Appendix.

56. HF 34, HF 390, SF 903, HF 1066/SF 918, and SF 1463 of Minnesota; H 982, H 3453, and S1036 of Massachusetts; HB 249 of North Carolina; SB 2474 and SB 2730 of Mississippi; SB 0902 of Tennessee; and SB 5009 of Washington. See Appendix for details.

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59. HB 1259, 2017, (MO), <https://house.mo.gov/billtracking/bills181/hlrbillspdf/4979H.011.pdf>.

60. *Id.*

61. HB 1898 of Arkansas died on the House Calendar at the end of the 2019 legislative session in April.

62. “Bill Information,” Arkansas State Legislature, accessed March 4, 2020.

63. HB 1898, 2019, (AR), <http://www.arkleg.state.ar.us/assembly/2019/2019R/Bills/HB1898.pdf>.

64. Spencer Woodman, “Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protest,” *The Intercept*, January 19, 2017.

65. “HF 390 Status in the House for the 90th Legislature (2017 - 2018),” Minnesota Legislature, accessed February 27, 2020.

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71. Elisha Fieldstadt et al., “Hundreds Arrested in Protests Over Police Shootings in St. Paul, Baton Rouge,” *NBC News*, July 9, 2016.

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74. “Dear Governor Dayton: Veto the HF 390 Anti-Protest Bill,” American Civil Liberties Union of Minnesota, accessed February 28, 2020.

75. Tad Vezner, “Bill targeting freeway-blocking protests passes Minnesota House after impassioned speeches,” *The Pioneer Press*, May 8, 2018.

76. SF 3463 and SF 2011 of Minnesota; SB 293 and HB 355 of Missouri; SB 2044 of North Dakota; HB 3190 and HB 1633 of Illinois; SF 2235 of Iowa; HB 238 of Kentucky; SB 652 and SB 887 of Pennsylvania; SB 2229, SB 1993, and HB 3557 of Texas; SB 1 and HB 452 of Georgia; SB 471 of Indiana; SB 2754/HB 1336 of Mississippi; SB 33 and SB 250 of Ohio; HB 1123 of Oklahoma; SB 264 of Tennessee; AB 426 of Wisconsin (“energy provider property” in lieu of “critical infrastructure”); SF 0074 and HB 0010 of Wyoming; SB 17-035 of Colorado; SB 1090 of Idaho; and HB 727 of Louisiana. See Appendix for details.

77. Depending on the specific bill, up to three new criminal acts related to trespass upon or interfering with the operation of critical infrastructure are created. Although the specific name of each violation varies among states, they can be generally characterized as: trespass upon critical infrastructure, impeding the function of critical infrastructure, and aiding or abetting in the impeding of critical infrastructure.

78. International Center for Not-for-Profit Law (ICNL), “Guilt by Association” Critical Infrastructure Bills and the Right to Protest, September 2018.

79. ICNL, “Guilt by Association” Critical Infrastructure Bills and the Right to Protest.

80. SF 3463 and SF 2011 of Minnesota; SB 293 and HB 355 of Missouri; SB 2044 of North Dakota; SF 2235 of Iowa; SB 652 and SB 887 of Pennsylvania; SB 2229, SB 1993, and HB 3557 of Texas; SB 1090 of Idaho; and HB 727 of Louisiana. See Appendix for specific bills that have been proposed in states where there is protest in response to pipeline construction.

81. ICNL, “Guilt by Association” Critical Infrastructure Bills and the Right to Protest.

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83. HB 238, 2019, (KY), <https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb238/bill.pdf>.

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a fine of \$100,000 for organizations that aid or abet the impeding of critical infrastructure; HB 1123 of Oklahoma legislates a fine of up to \$1,000,000 for organizations that conspire with persons who “willfully” deface critical infrastructure. See Appendix for details.

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CLOSING RANKS: STATE LEGISLATORS DEEPEN ASSAULTS ON THE RIGHT TO PROTEST

State policymakers have introduced at least 100¹ proposals since June 2020 to reduce the scope of Americans' right to protest, PEN America research finds.



Authorities fire gas munitions at demonstrators gathered late Tuesday, April 13, 2021, outside the Brooklyn Center Police Department to protest the shooting death of Daunte Wright in Brooklyn Center, Minn. (AP Photo/John Minchillo)

By Nora Benavidez, James Tager, and Andy Gottlieb

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In the wake of the mass protests for racial justice sparked by the murder of George Floyd on May 25, 2020, a flood of legislation has been introduced in statehouses across the United States that would restrict protest rights. From June 1, 2020, through March 15, 2021, state policymakers have introduced at least 100 proposals in 33 states. Anti-protest bills were being introduced at an alarming rate even prior to last year's protests, but as a point of comparison, from January to May of 2020, PEN America identified only 15 such proposals. The rate at which such legislation is being introduced has significantly increased since the protests sparked by Floyd's murder began.

The 100 proposals introduced since June 2020 primarily take aim at protest-related activity—that is, activities that arise naturally from participating in a protest or are likely to occur as a foreseeable part of protests—seeking to create new penalties or expand existing penalties for such activity. A smaller number of proposals incentivize greater police presence during protests. Only six of the 100 proposals have a Democrat as a primary sponsor.

The majority—73—of these proposals came in the wake of the January 6 Capitol Hill riot. But it would be misleading to conclude that these bills have been developed overall as a direct response to the Capitol siege. The continuity between anti-protest bills proposed before January 6 and those that came after strongly indicates that state legislators have been sticking to the same anti-protest playbook developed in response to the [largely peaceful](#) Black Lives Matter protests.² Many state legislatures also started a new legislative session in January, which accounts for the [significant number of bills](#) introduced since then. And based on [existing research](#), there is reason to anticipate that even bills introduced on the pretext of responding to a right-wing insurrection are likely to be disproportionately enforced against movements led by people of color or focused on issues of racial and social justice.

These bills are part of a larger trend of anti-protest legislation proposed in recent years, which PEN America first documented in [Arresting Dissent: Legislative Restrictions on the Right to Protest](#). That report was released on May 27, 2020, just two days after Floyd's murder. In [Arresting Dissent](#), PEN America found that many bills were seemingly or explicitly designed to target movements led by people of color, including Black Lives Matter protests and anti-pipeline protests often led by Native American communities; and the anti-fascist or “antifa” movement.

This pattern of bills motivated by legislators' animus toward particular protest movements persists, but with more fervor and drastic consequences for would-be protesters. While the majority of demonstrations over the last 10 months have been peaceful, lawmakers have repeatedly played on fears of violence and disorder to introduce bills that severely undermine the right to protest.

The First Amendment explicitly lays out that Congress—and, by extension under the 14th Amendment, state governments—shall make no law abridging or limiting our right to assemble or speak freely. While the government may impose some regulations on the right to assemble, these regulations must be narrowly circumscribed.

The current slate of anti-protest proposals fails to narrowly regulate the right to assemble freely, and instead takes aim at many protected forms of speech as well as other constitutional rights. For example, the enlargement of the concept of “unlawful



In this July 28, 2020, file photo, the “Wall of Moms” protest group marches with other demonstrators during a Black Lives Matter protest at a courthouse in Portland, Ore. (AP Photo/Marcio Jose Sanchez)

assembly” tilts the balance toward viewing protest as inherently criminal—something that fundamentally impacts First Amendment rights. Some proposals additionally implicate different constitutional rights. For example, at least 11 proposals would make people convicted of (or in one case, merely charged with) protest activity ineligible to receive public state benefits, raising obvious concerns about due process.

In seeking to create new crimes and steeper penalties for activity protected by the First Amendment, all of these proposals burden our right to freedom of assembly. The bills that do become law may lead to fewer people engaging in peaceful protests, as individuals weigh the risk of various sanctions—from large monetary fines, to 15-year prison sentences, to ineligibility for state benefits, or even the ability to run for office.

While this newest slate of bills is in many ways simply a continuation of previous trends, there are some signs that things are getting worse.

THREE KEY FINDINGS OF PEN AMERICA'S RESEARCH

1. At least 100 anti-protest bills have been introduced across 33 states since George Floyd's murder.

In *Arresting Dissent*, PEN America documented how state lawmakers introduced 110 anti-protest proposals between 2017 and 2019. Now, in the past 10 months alone, we have observed the introduction of 100 such bills—a staggering escalation.

Of these 100 proposals, only Tennessee's [HB 8005](#), Kansas' [SB 172](#), Arkansas' [HB 1321](#), Florida's [HB 1](#), Oklahoma's [HB 1674](#), and Alabama's [SB 152](#) have become law, but 64 bills are still active in their state legislatures. Another 30 have not moved forward. The states that have put forward the largest numbers of anti-protest bills since June 2020 are Oklahoma (12), Virginia (11), Minnesota (7), Ohio (5), Indiana (5), Missouri (5), Alabama (5), Iowa (4), Mississippi (4), Tennessee (4), and Texas (4).

Our [Anti-Protest Proposals index](#) features a summary of each bill. Key provisions that appear within multiple bills include: 1) creation of new crimes like “unlawful assembly”, 2) steeper felony penalties for existing misdemeanor offenses such as obstructing traffic, 3) penalties to strip eligibility to receive public state benefits from people convicted of certain protest activity, and 4) immunity for drivers who hit and even kill protesters.

Across the board, these proposals squarely threaten Americans’ rights by raising the potential costs of engaging in peaceful protest, an activity protected by the First Amendment. The bills often use vague terminology for concepts like “unlawful assembly,” which would afford police wide discretion to determine what constitutes criminal activity—discretion that evidence shows is likely to be [wielded](#) in biased or arbitrary ways.

A growing set of proposals also seeks to incentivize heavier police presence at protests. In Georgia, for instance, [SB 171](#) sought to make local governments civilly liable for any damages resulting from their failure to “provide reasonable law enforcement protection during a riot or unlawful assembly.” In the wake of the past year’s Black Lives Matter protests against excessive use of force by police, and against a backdrop of widespread calls for policing reform, such measures come across as both a culture war broadside and an intentional effort to force a more aggressive police response to protests.

2. There has been a significant rise in “kitchen sink” bills: proposals that contain at least three or more distinct anti-protest provisions, including criminalizing protest activity, shielding counter-protesters, stripping protesters of public benefits, and others.

We define “kitchen sink” bills as those that aggregate at least three different anti-protest provisions into one overarching bill. Of the 100 proposals introduced since June 2020, we identify 29 of them as “kitchen sink” bills. Florida’s originally introduced Combatting Violence, Disorder and Looting and Law Enforcement Protection Act and Tennessee’s HB 8005 have been the most consequential such proposals, serving as a template for copycat bills in other states.

In Florida, Gov. Ron DeSantis introduced an influential anti-protest proposal in September, [invoking](#) “professional agitators, bent on sowing disorder and causing mayhem in our cities,” “crazed lunatics,” and “scraggly-looking antifa types,” and [implying](#) that protesters were being funded and organized by external forces—a [common rhetorical tactic](#) for discrediting protest movements. That bill has inspired over a dozen copycat

Florida Gov. Ron DeSantis speaks at the end of a legislative session on April 30, 2021, at the Capitol in Tallahassee, Fla. (AP Photo/Wilfredo Lee)

proposals. Under the proposed [Combatting Violence, Disorder and Looting and Law Enforcement Protection Act](#) (Combatting Violence Act), which received vocal [support](#) from Republican state legislative leaders, the governor included 11 different measures that could be used to punish protest-related activity, including:

- Making blocking traffic during an unpermitted protest punishable by up to five years in prison;
- Making destroying or toppling monuments during a protest deemed to be a violent or disorderly assembly punishable by up to 15 years in prison;
- Stripping anyone convicted of “disorderly assembly”—a vague term that could easily be applied to a range of constitutionally protected protest activities—of the ability to receive public assistance benefits, such as unemployment, or to hold a government job;
- Providing a measure of legal immunity for drivers who hit demonstrators who are obstructing traffic during an unpermitted protest;
- Opening municipal governments to lawsuits if they are “grossly negligent in protecting persons and property” during anything that is deemed a violent or disorderly assembly, increasing the incentives for city leaders to direct a heavy-handed police response to demonstrations.

Some members of the legislature pushed back on the claimed need for this legislation. Noting that Florida’s existing laws already punish violence or property damage, Republican state Senator Jeff Brandes said it was unclear why the state needed new legislation, **commenting**: “While I agree we have to support law enforcement 100 percent, we also have to recognize the right afforded to citizens to peacefully protest.” Democratic state Representative Anna Eskamani **stated**, “You already have laws on the books to address vandalism, to address looting. We know this has nothing to do with public safety. It will lead to the arrests of more Black and brown people.”

A pared-back version of the Combatting Violence Act was introduced in both the Florida House and Senate (as HB 1 and **SB 484**) in January. The legislation makes blocking

A description of the Combatting the Violence, Disorder and Looting and Law Enforcement Protection Act, distributed by Governor DeSantis’ office in September 2020.

traffic punishable by up to 15 years in prison, creates vaguely defined offenses relating to riot and so-called “mob intimidation,” makes destroying or demolishing a memorial a second-degree felony, offers a measure of legal immunity to anyone who injures protesters convicted of riot, and opens municipal governments to lawsuits if they interfere in providing “reasonable law enforcement protection during a riot or unlawful assembly.” On April 15, 2021, the bill passed both chambers. On April 19, DeSantis **signed the bill into law**.

Aspects of the original, further-reaching September proposal appear to have inspired copycat proposals across the country. Legislators in 15 states—Alabama, Arizona, Georgia, Indiana, Iowa, Kentucky, Mississippi, Missouri, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Utah, and Washington—

have proposed 21 separate bills that borrow from the language of the original Florida Combatting Violence Act.

Some of the bills seemingly inspired by the Florida proposal attempt to go even further than the original. For example, Michigan [House Bill 6269](#) sought to revoke public assistance benefits for one year from protesters charged with (not convicted of) looting or vandalism in connection with civil unrest, and also would have mandated a referral to Child Protective Services for indicted protesters who brought their children with them to a demonstration. House Bill 6269 has died in committee—yet, this is only one of at least 11 recent bills that have sought to strip indicted or convicted protesters of their eligibility for government benefits.

In Indiana, [HB 1205](#)—which remains pending in the state’s House of Representatives—seeks to strip existing immunity from government entities and employees who fail to enforce laws relating to unlawful assembly. The bill would make camping on state capitol grounds a Class A misdemeanor and broaden the definition of unlawful assembly to include at least three people engaging in “tumultuous conduct,” while making tumultuous conduct a felony when participants are masked or it results in property damage. And, HB 1205 bars local governments from defunding law enforcement agencies, an increasingly common provision in these “kitchen sink” proposals.

Another example is Ohio’s [HB 109](#), which would create the felony crime of “riot vandalism,” defined to include damaging monuments or memorials and would increase penalties for causing property damage during a riot. It would also create the misdemeanor crime of harassment in a “place of public accommodation”—a category usually applied to a [wide variety](#) of locations such as restaurants, parks, and stores—and make it a third-degree felony to obstruct traffic during a riot or a “protest or demonstration for which no permit was issued or for which the scope of any issued permit was exceeded.” Such provisions could easily be used, for example, to punish protesters who step into the street during a protest where turnout exceeded expectations. In a tactic repeated in at least seven other bills, HB 109 would also extend racketeering offenses to apply to the act of providing “material support”—a notoriously vague term—to demonstrations deemed to be riots. Given the vagueness of the language, such a provision could potentially be used to hold nonprofits that offer “Know Your Rights” trainings for protesters, for example, criminally liable if training participants then joined a protest that was deemed a riot.

Meanwhile, in Tennessee, legislators responded to Black Lives Matter protesters camping out at the state capitol by [fast-tracking](#) a bill, [HB 8005](#), to make camping on state grounds, such as the state capitol, a Class E felony, punishable by up to six years in prison. It is worth noting that any Tennessean convicted of a felony also automatically [loses their right to vote](#). The law also [increases penalties](#) for interfering with a meeting of the legislature (even by “verbal utterance”), minor vandalism (such as chalking) of government property, and blocking streets. It requires that people arrested under these charges be held for at least 12 hours without bond. And the new law appears to have influenced similar bills in [Kentucky](#), [South Carolina](#), [Arkansas](#), and [Oklahoma](#), as well as [two separate](#) bills in Indiana, all of which contain similar provisions.

The sequence of events leading up to the Tennessee law itself helps illustrate PEN America’s concerns that these bills are being motivated by bias against specific protest movements. Black Lives Matter protesters began [camping out](#) at the Tennessee State Capitol in June 2020, demanding to meet with legislative leaders and the governor. Instead, Gov. Bill Lee decided to convene a special legislative

session in August 2020 to pass HB 8005, alongside emergency pandemic-related bills. The Tennessee General Assembly met and deliberated for **just three days**, the bare **minimum** allowed. Supporters of the legislation seemed unable to offer any rationale for this urgency. For example, when asked if any officers had been injured during protests at the state capitol, the bill's sponsor, House Majority Leader William Lamberth, **could not** furnish any examples.

Instead, some comments from HB 8005's supporters appeared to offer a different rationale for the urgent legislation: their personal anger and discomfort over the protests. Sen. Kerry Roberts, who voted for the bill, recalled being shouted at by protesters as he walked down a sidewalk, saying, "The thing is, what I wish I could convey to people is that it's really hard to be sympathetic to what someone is saying when they are yelling at you, when they're trying to shame you, when they're calling you names and so forth." Roberts went on to clarify that he was not referring to any fears over his safety, but rather that the protests had made him feel "extremely uncomfortable." Lt. Gov. Randy McNally, who supported the legislation, similarly **complained** of people "knowingly thumb[ing] their nose at authority." One legislator who opposed the bill, Rep. Jason Hodges, **stated**, "We seem not to worry about protesting when white people show up with AR-15s, but when Black people show up with signs we try to pass legislation... maybe that's why they're out there in the first place."

"We seem not to worry about protesting when white people show up with AR-15s, but when Black people show up with signs we try to pass legislation... maybe that's why they're out there in the first place."

—Tennessee State Rep. Jason Hodges

In Kentucky, which witnessed some of the **most sustained** demonstrations in the country in the wake of Breonna Taylor's murder, legislators proposed **SB 211**, a particularly loaded "kitchen sink" bill incorporating provisions from both the Florida proposal and the Tennessee law. It includes similar clauses on public assistance benefits, camping on state property, traffic obstruction, and civil liability for local governments. At the same time, it would classify pointing a light at a police officer as assault in the fourth degree. Taunting a police officer with "offensive or derisive words" would be classified as a Class B misdemeanor; if committed during a riot, this would mandate a prison term of at least three months, along with loss of public benefits for three months. SB 211 managed to **pass** the Kentucky Senate, but failed to pass the House before the most recent legislative session ended.

3. The penalties for protest are becoming harsher and farther-reaching, affecting one's eligibility for public assistance and even the ability to run for office.

In *Arresting Dissent*, PEN America identified one overarching theme of anti-protest proposals: efforts to redefine acceptable protest by expanding the scope of illegality for protest-related activity. We found four common bill provisions: (1) expanded definitions and penalties for conduct deemed to be riot, criminal trespass, obstruction of traffic, or a similar offense; (2) imposition of costs on protesters for unlawful conduct; (3) criminalization of constitutionally protected activity that may occur in relation to a protest, such as wearing masks; and (4) shielding public or private actors from liability for **harm caused to protesters**. Many of these elements are present in the newest spate of proposals, which continue to impose financial sanctions and/or prison time for targeted protest-related activity.

Yet, not only are new bills proliferating at a faster rate and featuring a wider array of provisions, the penalties for protests are also becoming harsher and farther-reaching.

A demonstrator talks to Oakland police officers during a protest against police brutality in Oakland, Calif., on Friday, April 16, 2021. (AP Photo/Ethan Swope)

At least 11 proposals contain provisions to make indicted or convicted protesters ineligible to receive state benefits such as health care, unemployment, or even school scholarships. Arizona's [HB 2309](#) seeks to make people ineligible for public assistance benefits if they were convicted of "unlawful assembly." Minnesota's [HF 466](#), still pending, would make anyone convicted of a criminal offense related to a protest ineligible for government aid, including student loans, unemployment benefits, food stamps, and medical assistance. Missouri's [SB 66](#), also pending, would make local government employees convicted of unlawful assembly or riot ineligible for benefits such as health insurance, sick leave, and disability, retirement, and death benefits.

Other proposals like Ohio's [HB 109](#) and Oklahoma's [SB 806](#) would extend racketeering offenses—most commonly used against organized crime—to apply to riots. This would open the door for peaceful protesters to be punished for crimes committed at a protest that they themselves did not actually commit; Ohio's bill even extends racketeering charges to apply to those providing "material support or resources" for riots. Under Ohio's [Revised Code](#), this "material support" includes training—opening the door to potential criminal liability for nonprofits offering "Know Your Rights" trainings, if a subsequent protest were to turn violent. Kansas has passed [SB 172](#), extending racketeering charges to cover "critical infrastructure" offenses. As PEN America previously noted in [Arresting Dissent](#), these types of "critical infrastructure" bills appear to be largely aimed against anti-pipeline activists and other environmental protesters.

Finally, several proposals would limit the ability of a convicted protester to hold state employment or run for public office. In Utah, [SB 138](#) died in committee, but it sought to make anyone convicted of

“felony riot” ineligible to hold public employment or receive government benefits for five years. Likewise, in Alabama, [HB 133](#) remains pending and would increase criminal and civil penalties for riot and inciting riot, establish the crime of aggravated riot, and bar anyone convicted of riot from holding public office.

CONCLUSION

In the wake of the racial justice protests of the past year, legislators around the country have responded by seeking to criminalize protest-related conduct, raise the potential costs for protesters, and degrade Americans’ rights to peacefully assemble, make their voices heard, and call for change. Just as we noted in [Arresting Dissent](#), in some cases legislators even acknowledge that they are aiming these bills at specific protest movements. These bills, collectively and individually, are misguided, unwise, and pose a direct threat to Americans’ constitutional rights.

At a moment when many of the norms and institutions of American democracy are being tested, the right to protest remains a fundamental form of public expression. In recent years, public protests have played an important role in helping to shape public discourse around critical policy and societal questions. Since June of 2020, those protests have largely focused on advancing racial justice and reckoning with legacies of racism in the United States. The number of bills attempting to restrict freedom of assembly at this particular moment smacks of a deliberate attempt to constrain that discourse, and it demands our attention as a fundamental threat to free expression.

Research Methodology

Consistent with the methods previously used in our May 2020 report [Arresting Dissent](#), PEN America conducted an analysis of all relevant proposals introduced in state legislatures between June 1, 2020, and March 15, 2021. We confined the subject of these bills to those primarily aimed at placing constraints on the freedom of assembly, and we developed a database of bills meeting this description, alongside a typology of anti-protest bills.

The paper reflects a comprehensive review of the bills themselves, along with news articles and legislative tracking information. It draws heavily from the [US Protest Law Tracker](#) developed by the International Center for Not-for-Profit Law (ICNL), which monitors and regularly updates state and federal proposals related to protest restrictions. The report includes, as its Appendix, [a comprehensive list of 100 bills proposed during the period studied.](#)

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