March 6, 2019

ACLU South Dakota

To the Members of the South Dakota Senate and House of Representatives:

I am writing today on behalf of the American Civil Liberties Union of South Dakota (ACLU SD) to express our grave concerns about and opposition to the recently-filed SB 189.

The ACLU of South Dakota is an organization that defends the civil liberties enshrined in the state and federal constitutions and which are guaranteed to everyone in our state. Though our work spans many issue areas we hold a special reverence for the First Amendment and the right to peacefully assemble and protest. It is that right which SB 189 threatens to eviscerate.

SB 189 is, simply put, precisely about speech and protest. Though proponents of the bill allege that they are concerned only about "riots," the context is clear: this legislation is a direct reaction to some of the most effective protests in modern American history, including the work done by water protectors challenging the construction of the Dakota Access Pipeline at Standing Rock. It attempts to blur the line between constitutionally-protected speech and unlawful actions and would catch many innocent protestors in its wide net. To blur the line between protected protests and alleged "riots" benefits only a government which seeks to overstep its bounds and infringe upon the liberties it should be protecting. With this bill, the state is prioritizing TransCanada's commercial interests over the First Amendment and due process rights of South Dakotans.

This piece of legislation is not merely an appropriation and does not solely create a new fund. Instead, it crafts an entirely new category of civil liability under South Dakota law that is motivated by anticipation and fear of protests. This civil liability hinges on a novel legal term that has never before been used in statute – "riot boosting." Under SB 189, "riot boosting" captures an extremely wide range of actors and actions related to protest before any unlawful action occurs and without knowledge that said action will occur. This will chill the free speech and assembly rights of all South Dakotans.

Though it is a complex piece of legislation, SB 189's problems and constitutional infirmities can be boiled down to a few critical points:

- **SB 189 is vague and will penalize and chill protected speech and a variety of lawful actions.** It is this element that is the most concerning impact of SB 189. On page 2, lines 6-7, the bill states that liability may fall upon a person who "does not personally participate in any riot but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence." The use of the term "encourages" is extremely vague; it may reach a person who makes an innocuous remark, such as "stop the pipeline!" or "the pipeline must go!" Such vague, undefined terms run an extremely high risk of entangling those engaging in

protected speech in expensive litigation; that fear of litigation may persuade an individual from protesting or speaking out and thus chill their free speech.

Similarly, SB 189's use of the term "advise" is also cause for concern. This could ensnare a person who simply informs (or advises) a protestor of the consequences they may face for engaging in civil disobedience or other protest-related actions.

Additionally, the term "riot boosting" may capture a wide range of actors, including those who contribute financially to protest actions. This includes those who donate money individually or via an organization to provide housing, food, or gas money for protestors. It could reach not only individuals exercising their rights to speech and assembly but organizations that do so or even their individual donors.

The specter of crushing monetary liability will chill individuals and organizations from supporting or participating in demonstrations even if they have no intention of participating in or being present at an unlawful assembly or riot. As the federal courts have made clear, such a chilling effect on speech is "antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear."[1] Additionally, the Supreme Court has repeatedly made clear that an individual cannot be punished for the actions of others. Making an individual liable for damage s/he did not cause "would impermissibly burden the rights of political association that are protected by the First Amendment."[2] SB 189 imposes guilt by association on those who fund protest activities in even the smallest of ways.

- **SB 189 imposes joint and several liability, allowing the state to pursue enormous monetary damages.** It is critical to understand the impact of joint and several liability; it means that if one person or organization is found liable they may have to pay the entirety of costs of an alleged riot even if their role was minor as compared to others. This creates an incentive for the government to pursue litigation against those with the deepest pockets rather than those who may have truly caused damage in an alleged riot. Additionally, it creates an incentive for the state to work in concert with third parties – such as energy corporations – to sue protestors. This possibility is explicitly contemplated on page 2, lines 19-23, which states that the "state, a political subdivision, or any third party having an interest in preventing a riot or riot boosting may enter into an agreement to establish joint representation of a cause of action under section 2 of this Act."

  The incentive to pursue litigation against individuals or organizations in concert with third parties creates a substantial risk that individuals or organizations that have drawn the ire of third party corporations will be targeted for their speech or protest. The fear of millions of dollars in damages and fees for an individual or group will likely convince South Dakotans and other Americans to be silent on this issue of critical public importance and further chill speech in ways impermissible under both the spirit of the First Amendment and the text of the Constitution.

- **SB 189 is a solution in search of a problem.** To the extent that this legislation seeks to stop unlawful violence or riots, it is unnecessary. Riots are already illegal in South Dakota (SDCL

§ 22-10-1) as is encouraging or soliciting violence in a riot without direct participation (SDCL § 22-10-6.1). Soliciting or encouraging violence in a riot is also illegal and comes with the stiffest penalty classification (Class 2) of all of South Dakota's riot-related statutes (SDCL § 22-10-6).

Though Governor Noem stated in her March 5, 2019 press conference that she wished to create remedies under the law to pursue "out of state" funders of protests aimed at pipeline construction, SB 189 is not limited to use in pipeline construction or pipeline-related protests. Instead, it creates a permanent form of liability that could be applied to any "undesirable" protests in South Dakota.

Outside of SB 189's textual infirmities, the process through which this bill is being considered is extremely concerning. SB 189 and its companion, SB 190, were introduced on the afternoon of the 33rd Legislative Day during a 40 day session. Due to the late introduction – requiring a suspension of the legislative rules as critical deadlines have passed – the ACLU of South Dakota fears this bill will not receive a thorough public vetting.

As you know, most pieces of legislation face at least two public hearings – one in a Senate Committee and one in a House Committee. Contrary to this practice, it appears SB 189 will receive only one hearing. That hearing took place in front of the Joint Appropriations Committee at 8:00 AM on March 6, 2019, less than 48 hours after the text of SB 189 was available to the public online. Further, this expedited schedule prevented key stakeholders from attending the hearing – such as the Chairmen of several Native American Tribes, who were conducting their official duties during negotiations in Washington, D.C.

Simply put, SB 189 is too complex and its impact too large to be rushed through the legislative process. In the interest of transparency, we strongly urge the Members of the South Dakota Legislature to ensure that SB 189 and SB 190 get two full and fair hearings and are thoroughly vetted.

In sum, SB 189 and the unusual process through which it is proceeding present significant cause for concern. As the United States Supreme Court has said, this country has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[3] We respectfully urge the Members of the South Dakota Legislature to uphold this principle and vote no on SB 189.

Sincerely,

Libby Skarin
Policy Director
ACLU of South Dakota

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[1] *American-Arab Anti-Discrimination Committee v. Dearborn*, 418 F. 3d 600 (6th Cir. 2005).
[2] *N.A.A.C.P v. Claiborne Hardware Co*., 458 U.S. 886, 931 (1982). *See also Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 337(1993)(holding that the city could not recoup costs for cleaning up graffiti from plaintiff who had not created the graffiti).
[3] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).