

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

DAKOTA RURAL ACTION, DALLAS
GOLDTOOTH, INDIGENOUS
ENVIRONMENTAL NETWORK, NDN
COLLECTIVE, SIERRA CLUB, AND
NICHOLAS TILSEN,

Plaintiffs,

vs.

KRISTI NOEM, in her official capacity as
Governor of the State of South Dakota,
JASON RAVNSBORG, in his official
capacity as Attorney General, and KEVIN
THOM, in his official capacity as Sheriff
of Pennington County,

Defendants

Case No.: 5:19-cv-5046

COMPLAINT

1. This is an as-applied and facial constitutional challenge under 42 U.S.C. § 1983 to South Dakota S.B. 189, 2019 Leg. Session (S.D. 2019), to be codified in South Dakota Codified Laws Chapter 20-9-1, et. seq. (“Riot Boosting Act” or “Act”) and South Dakota Codified Laws sections 22-10-6 and 22-10-6.1 (“criminal statutes”) (together, “Challenged Laws”). Under the pretext of preventing riots, the Challenged Laws chill peaceful protests of the Keystone XL Pipeline (“pipeline”) by (1) equating peaceful organizing and the support of protest with “riot boosting” or “encouraging a riot,” (2) exposing protesters and social justice organizations to civil and/or criminal liability for the violent conduct that others engage in, regardless of the protesters’ or organizations’ intent, the

likelihood that their speech will result in violence or forceful action, or the imminence of such an action, (3) failing to adequately describe what conduct or speech will subject an individual or an organization to liability for “riot boosting,” and (4) effectively discouraging any support of peaceful protest to the pipeline, in violation of the First and Fourteenth Amendments of the Constitution. A copy of the Act is attached as Exhibit A to this Complaint.

2. The right of individuals to express themselves on important public issues—including protesting the construction of the Keystone XL pipeline in South Dakota—is a form of expression that “has always rested on the highest rung of First Amendment values.” *Carey v. Brown*, 447 U.S. 455, 467 (1980). The First Amendment exists to “protect the free discussion of governmental affairs,” *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966), and enable “uninhibited, robust, and wideopen” debate on public issues, *Watts v. United States*, 394 U.S. 705, 708 (1969). This “is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). And “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

3. Plaintiffs plan to exercise their First Amendment rights of free speech and association to protest the Keystone XL Pipeline and to advise and encourage others to do the same.

4. The Riot Boosting Act was passed in response to protests of pipeline construction near Standing Rock, North Dakota and legislators’ concerns about possible protests within South Dakota of the Keystone XL Pipeline that could slow or turn public sentiment against construction.

5. These statutes are unconstitutional on their face and as applied to Plaintiffs' planned speech and expressive conduct because (1) they target protected speech, (2) they are written too broadly and so reach a substantial amount of protected speech, and (3) they fail to make it clear to Plaintiffs, others subject to these laws, and government actors tasked with enforcing the laws what conduct and speech is prohibited by them. As such, the Act and the criminal statutes violate the First and Fourteenth Amendments.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(3) and (4).

7. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of this Court.

8. Venue is appropriate under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurs in this judicial district and Plaintiffs reside or are located in this judicial district.

9. Defendants' constitutional violations are actionable pursuant to 42 U.S.C. § 1983.

PARTIES

10. Plaintiff Dakota Rural Action ("DRA") is a 501(c)(3) non-profit organization registered in Brookings, South Dakota. DRA supports grassroots organizing and protest among landowners in South Dakota on issues related to land use. DRA has planned and is planning to organize and educate individual ranchers and landowners along the path of the pipeline to protest.

11. Plaintiff Dallas Goldtooth is a resident of Chicago, Illinois and an organizer for Plaintiff Indigenous Environmental Network ("IEN"). Plaintiff IEN

is a 501(c)(3) non-profit organization registered in Minnesota. Goldtooth and IEN (together “IEN Plaintiffs”) work with indigenous individuals and grassroots community groups to protect their sacred sites, land, water, air, natural resources, and the health of their people and all living things, and to build economically sustainable communities. The IEN Plaintiffs’ work encompasses a range of environmental and economic justice issues that impact the lands and cultures of indigenous peoples and individuals, including mining and oil development on and near indigenous lands; soil and water contamination from energy exploration and development; climate change; and water conservation. The IEN Plaintiffs plan to organize opposition to the Keystone XL pipeline in South Dakota.

12. Plaintiff Sierra Club is the nation’s oldest grassroots organization dedicated to the protection and preservation of the environment. Sierra Club has approximately 800,000 members nationwide dedicated to exploring, enjoying, and protecting the wild places of the Earth; practicing and promoting the responsible use of the Earth’s ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. The Sierra Club has chapters and members in each of the states through which the proposed Keystone XL pipeline would pass. That includes the South Dakota Chapter, which has over 1,200 members. The Sierra Club’s concerns encompass the protection of wildlands, wildlife and habitat, water resources, air, climate, public health, and the health of its members, all of which stand to be adversely affected by Keystone XL. Since 2008, Sierra Club has been working to stop the Keystone XL pipeline from being constructed using all lawful means available.

13. Plaintiff Nicholas Tilsen is a resident of Rapid City, South Dakota and the President of Plaintiff NDN Collective, a 501(c)(3) non-profit organization

registered in Rapid City, South Dakota. Tilsen and NDN Collective (“NDN Plaintiffs”) are educating, funding, and organizing those engaged in Native American resistance to the Keystone XL Pipeline.

14. Defendant Kristi Noem is the Governor of the State of South Dakota. She is responsible, under South Dakota law, for “supervis[ing] the official conduct of all executive and ministerial officers” and “see[ing] that the laws of the state are faithfully and impartially executed.” S.D.C.L. § 1-7-1(1)–(2); *see also* S.D. Const. art. IV, § 3. Defendant Noem is sued in her official capacity as Governor of the State of South Dakota.

15. Defendant Jason Ravensborg is the Attorney General of the State of South Dakota. He is the State’s chief law enforcement officer and is charged by law with prosecuting and defending the interests of the State in any court, any cause or matter, civil or criminal, “[w]hen requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands.” S.D.C.L. § 1-11-1(2). He also exercises supervision over the state’s attorneys. *Id.* § 1-11-1(5). Defendant Ravensborg is sued in his official capacity.

16. Defendant Kevin Thom is the sheriff of Pennington County and, as a “[l]aw enforcement officer” of a political subdivision of the State, he “is responsible for the prevention, detection, or prosecution of crimes, for the enforcement of the criminal or highway traffic laws of the state, [and] for the supervision of confined persons or those persons on supervised release or probation.” *Id.* § 22-1-2. As such, he has the authority and the duty to enforce the Challenged Laws within Pennington County. He is sued in his official capacity.

STATEMENT OF FACTS

I. THE “RIOT BOOSTING” ACT

17. The Riot Boosting Act passed the State Legislature on March 11, 2019. The Act was signed by Governor Kristi Noem on March 27, 2019 and took effect immediately.

18. The Riot Boosting Act provides, in relevant part:

- a. “In addition to any other liability or criminal penalty under law, a person is liable for riot boosting, jointly and severally with any other person, to the state or a political subdivision in an action for damages if the person: (1) Participates in any riot and directs, advises, encourages, or solicits any other person participating in the riot to acts of force or violence; [or] (2) Does not personally participate in a riot but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;” and
- b. “A defendant who solicits or compensates any other person to commit an unlawful act or *to be arrested* is subject to three times a sum that would compensate for the detriment caused.” Exhibit A, §§ 2, 4 (emphasis added).

19. Under the Act, “person” is defined as “any individual, joint venture, association, partnership, cooperative, limited liability company, corporation, nonprofit, other entity, or any group acting as a unit.” *Id.* § 1.

20. The Act unconstitutionally targets protected speech, including anti-pipeline protests and related expressive conduct by Plaintiffs and others, which cannot be properly characterized as “directed to inciting or producing imminent lawless action and [] likely to incite or produce such action.” *Brandenburg v. Ohio*,

395 U.S. 444, 447 (1966). The Act unconstitutionally threatens to impose liability on speakers regardless of their intent to incite violence, the likelihood that their speech will result in violence, or the imminence of the intended violence.

21. The Act's terms are unconstitutionally overbroad, reaching speech that "encourages" or "advises" but does not incite unlawful activity.

22. The Act is unconstitutionally vague such that it does not provide individuals proper notice of what behaviors will expose them to liability and invites arbitrary enforcement.

23. Even if a person is not present at an event that began as a peaceful protest but becomes a riot where acts of violence or force occur, that person risks civil liability under the Act by "advising" or "encouraging" those present to "Stop the pipeline" or "Give it all you've got."

24. The Act unconstitutionally threatens organizations with civil liability if they compensate individuals who travel to a protest and are arrested. Such liability can attach even if those individuals are not ultimately convicted of any crime or found to have engaged in unlawful activity.

25. The Act describes its purpose as establishing "a fund to receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefor, and to declare an emergency." Ex. A, p. 1.

26. The Act creates a "riot boosting fund," to be filled with damages paid by those who violate the Act. This incentivizes the State to sue protesters and those who encourage and advise them in order to compensate for security and other costs incurred by the State and third parties during a protest.

27. Money from the riot boosting fund may be used to pay either for damages from a riot or it "may be transferred to the pipeline engagement activity coordination expenses fund."

28. The Act targets anti-pipeline protests and protestors. Governor Noem cited George Soros as an example of an out-of-state entity that the State wanted to shut down, and block from disrupting the construction of the pipeline, through the Act. *See* March 4, 2019 “Press Conference” of Governor Noem found at <https://www.youtube.com/watch?v=IDHe5cjxgRU> at minute 6:24-6:50 (“I would say the most typical national offender that we see funding these types of activities would be George Soros. So those type of entities that want to come in and *create disruption on a build with this infrastructure is what we are hoping to shut down*”) (Emphasis added).

29. The Act is aimed at “disruptive activity or violent activity.” Press Conference at 11:15-11:34 (Act aimed at “those who are in the State actively using *disruptive activity or violent activity to do harm or disruption to the project, the people, and to slow this operation down.*”) (Emphasis added).

30. During testimony before the South Dakota legislature in support of the law, Governor Noem’s lobbyist testified that a catalyst for the Act was the fact that some of the people who participated in the protest at Standing Rock in North Dakota were “professional protestors” from other parts of the country. *See* “Hearing on SB 189 and 190” found at https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=SB189&Session=2019 at minute 16:50.

31. During 2016 and 2017, a large, grassroots protest occurred near Mandan, North Dakota after the federal government approved construction of Energy Transfer Partners' Dakota Access Pipeline (“DAPL”) to cross underneath the Missouri River south of Bismarck, North Dakota and north of the water intake for Fort Yates, North Dakota where the Standing Rock Sioux Reservation is centered. In its explanation of the Act to the legislature, South Dakota used a slide

presentation that stated “661 professional protesters” were arrested in North Dakota during the Standing Rock protest to DAPL.

32. Similarly, Deputy General Counsel for Governor Noem testified that the bill package is the Governor’s plan “to be proactive and make sure everyone is financially accountable for their actions,” including project developers, beneficiaries of economic development, or “violent *objectors*.” Hearing on SB 189 and 190 at 4:55 (emphasis added).

33. According to Governor Noem, the Act is unique and no similar law has been reviewed by a court. During her press conference, Governor Noem stated “this type of [law] has not happened anywhere in the Nation before.” Press Conference at 4:18-4:35.

34. According to the State’s website, “Governor Noem and her team have met with TransCanada, public safety, law enforcement officials, lawmakers, and other stakeholders since before taking office to discuss the Keystone XL pipeline project and to listen and develop legislative solutions that *allow for an orderly construction process for this pipeline and others*. The legislation is the result of those discussions.” <http://news.sd.gov/newsitem.aspx?id=24203> (emphasis added).

35. The Governor did not meet with Native American tribes or environmental groups to listen and develop solutions.

36. The Act allows “any third party having an interest in preventing a riot or riot boosting” to enter an agreement with the State “to establish joint representation of a cause of action under section 2 of this Act.” Ex. A. § 3. Thus, hundreds if not thousands of residents of South Dakota or elsewhere could agree with the State to acquire a cause of action against any speaker who encourages others to protest against completion of the pipeline.

37. TransCanada may also assert an interest in “preventing a riot or riot boosting” and may enter into an agreement with the State to recover money seized from individuals and organizations under Section 2 of the Act. TransCanada has a financial incentive to agree with the State to prosecute as many claims as possible under the law to deter opponents of the pipeline.

II. THE CRIMINAL STATUTES

38. S.D.C.L. §§ 22-10-6 and 22-10-6.1 criminalize encouraging riot.

39. S.D.C.L. § 22-10-6 provides, “Any person who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 2 felony.”

40. S.D.C.L. § 22-10-6.1 provides, “Any person who does not personally participate in any riot but who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 5 felony.”

41. The criminal statutes target protected speech, including anti-pipeline protests and related expressive conduct by Plaintiffs and others, which cannot be properly characterized as “directed to inciting or producing imminent lawless action and [] likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1966).

42. The criminal statutes unconstitutionally impose liability on speakers regardless of their intent to incite violence, the likelihood that their speech will result in violence, or the imminence of the intended violence.

43. The statutes’ terms are unconstitutionally overbroad, reaching speech that “encourages” or “advises” but does not incite unlawful activity.

44. Finally, the criminal statutes are unconstitutionally vague such that they do not provide individuals of proper notice of what behavior will expose them to liability and invite arbitrary enforcement.

III. THE KEYSTONE XL PIPELINE

45. TransCanada Keystone Pipeline, LP (“TransCanada”), a Canadian company, plans to build and operate an oil pipeline, known as the “Keystone XL pipeline,” to transport heavy crude oil across the border between Saskatchewan, Canada and Montana, and then south through South Dakota and Nebraska.

46. In South Dakota, the pipeline will be built in the following counties: Tripp, Jones, Haakon, Meade, Butte, Perkins, Harding and Pennington.

47. TransCanada's application to build the pipeline was initially denied by the United States on November 6, 2015. *See Indigenous Env'tl. Network v. United States Dep't of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *2 (D. Mont. Nov. 22, 2017).

48. On January 24, 2017, President Donald Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline inviting TransCanada to reapply. *Id.* The State Department received a renewed application from TransCanada on January 26, 2017. The State Department approved the application and issued a Presidential Permit on April 4, 2017. *Id.*

49. In November 2017, the Indigenous Environmental Network sued the Department of State and other federal defendants in federal district court in Montana alleging that the issuance of the permit violated the Administrative Procedure Act (“APA”), National Environmental Policy Act (“NEPA”), and Endangered Species Act (“ESA”). Both parties moved for summary judgment. In November 2018, the court granted partial judgment to both parties and enjoined TransCanada “from engaging in any activity in furtherance of the construction or

operation of Keystone and associated facilities.” *Indigenous Envtl. Network v. United States Dep't of State*, 347 F. Supp. 3d 561, 591 (D. Mont. 2018); *see also Indigenous Envtl. Network v. United States Dept. of State*, 2019 WL 652416 (D. Mont. Feb. 15, 2019). On March 15, 2019, the Ninth Circuit Court of Appeals denied TransCanada’s motion for a stay of the injunction pending appeal. Accordingly, construction is currently enjoined.

IV. PLANNED ACTIONS OF PLAINTIFFS

50. Plaintiffs oppose the Keystone XL pipeline for several reasons. These include but are not limited to the government’s and companies’ failure to consult with tribes regarding the pipeline, and the environmental threat posed by the fossil fuel industry and by this pipeline in particular.

51. Plaintiffs have provided, and plan to provide, additional funding, training, and other advice and encouragement to individuals who plan to protest the Keystone XL pipeline.

52. Plaintiffs are not inciting any individuals to commit imminent violent or forceful actions. To the contrary, Plaintiffs advocate against the use of violence. Plaintiffs plan to advise and encourage others to try to stop the pipeline through peaceful methods.

Dakota Rural Action

53. DRA has also funded, advised, and encouraged individuals to resist the pipeline because DRA members strongly object to TransCanada’s use of eminent domain and the way landowners were threatened with it during the initial proposal for the pipeline. As a result, when the pipeline was initially proposed, DRA helped South Dakota landowners organize the group Protect South Dakota Resources (PSDR) to share the burden of legal expenses and negotiate collectively with TransCanada. PSDR concluded negotiations with TransCanada in early 2011.

54. DRA's position is that tar sands development should be halted. DRA has organized landowners along the Keystone XL route to ensure that land, water, and resources are protected if Keystone XL is constructed in South Dakota. *Found at <https://www.dakotarural.org/issues/keystone-xl-pipeline/>.*

55. DRA educates and organizes the public, including ranchers and environmentalists, regarding the State's permitting process and urges individuals to ask the South Dakota Public Utilities Commission to deny Keystone XL's permit.

56. DRA has been working and continues to work with its landowner members to ensure that the issues and concerns raised by the Keystone XL pipeline proposal are recognized and addressed throughout the state and federal permitting processes, and through local ordinances and state legislation.

The IEN Plaintiffs

57. The IEN Plaintiffs support frontline communities fighting environmental injustice through educational forums, information sharing and trainings on peaceful civil disobedience and they will continue to do more trainings and community awareness workshops along the route of the pipeline.

58. The IEN Plaintiffs have funded travel for individuals who have participated in peaceful protests and they will fund travel for individuals who plan to participate in peaceful protests against the pipeline.

59. IEN is also part of the "Promise to Protect" alliance. Through the Promise to Protect trainings, the IEN Plaintiffs will help to encourage, advise, and train individuals who will set up prayer camps, protests on public highways, and use their bodies to peacefully resist the construction of the pipeline.

The NDN Plaintiffs

60. The three main objectives of NDN Collective are to increase philanthropic and capital investment in Native communities; to use trainings,

leadership development, and education to prepare Indigenous communities to create sustainable outcomes for their people and planet; and to develop a political agenda for activism related to the Indigenous community goals of, among other things, protecting and defending their land, air, water and the planet.

61. The NDN Plaintiffs do not advocate violence. The NDN Plaintiffs promote the use of non-violent direct action, civil disobedience, community organizing, prayer camps, mass mobilizations, media campaigns, canvassing, media messaging, and other forms of advocacy.

62. NDN Collective is one of the original signers of the “Promise to Protect” alliance, a group that is leading training sessions around the country to “educate, empower, and elevate the voices and skills of community members to take back their land and push out extractive oil and gas companies.” *See* Promise to Protect training sign-up description at <https://actionnetwork.org/events/miami-sunday>.

63. NDN Collective has participated in organizing meetings relating to the resistance against the Keystone XL pipeline and has hosted meetings with protesters and organizers.

64. The NDN Plaintiffs plan to continue encouraging and collaborating with protestors. The NDN Plaintiffs will help to encourage, advise, and train individuals who will set up prayer camps, legal protests on public highways, and use their bodies to peacefully resist the construction of the pipeline.

65. The NDN Plaintiffs are raising money to support Native-led resistance to the pipeline and they will employ community organizers to work with communities along the path of the pipeline who are directly impacted by it. NDN Collective’s work in protesting the pipeline is one part of its comprehensive approach to rebuilding Native economies and communities and ensuring that they

have the resources to defend their communities from harmful and exploitative resource extraction.

The Sierra Club

66. Sierra Club does not condone, engage in, or advocate for any acts of violence or property destruction and never has. Sierra Club has participated in Board-approved non-violent civil disobedience on several occasions, including a 2013 protest against Keystone XL in front of the White House and a non-violent protest against the Line 3 pipeline in Minnesota in 2018. In the future, Sierra Club expects to consider participation in other such non-violent civil disobedience actions from time to time as part of its overall advocacy efforts. Furthermore, Sierra Club and its members engage in and promote numerous forms of lawful speech in opposition to the Keystone XL pipeline and similar projects. Those include, but are not limited to: submitting comments to government agencies, speaking at public hearings, and encouraging members of the public to do the same; educating the public about the risks and impacts of Keystone XL through social media, online materials, newspaper op-eds, etc.; organizing or participating in peaceful and lawful public protests or rallies; and providing funding and other support to non-profit organizations that share Sierra Club's commitment to opposing Keystone XL through all lawful means available. Sierra Club would be hesitant to engage in many of these forms of protected speech if South Dakota's "riot boosting" laws stand, because it would risk being exposed to civil and criminal liability should authorities or even pipeline companies subjectively decide that the speech somehow contributed to violence. Similarly, the vague wording of the South Dakota laws would leave Sierra Club unsure about what speech is permissible, such that it would err on the side of curtailing protected speech.

The Challenged Laws' Harm to Plaintiffs

67. Due to their activity, Plaintiffs now fear prosecution under the criminal statutes, and imposition of civil liability under the Act.

68. The trainings, funding, and other support Plaintiffs have planned for the anti-pipeline protests could, if carried out, violate the Challenged Laws. Plaintiffs all “encourage” or “advise” participation in protests. Of course, any protest can erupt into a riot—without any intent by Plaintiffs. At those protests, perceived unlawful violence, acts of force, or arrests may occur, even violence perpetrated by law enforcement or pipeline employees.

69. Plaintiffs fear liability under the Act and criminal statutes notwithstanding their lack of intent to cause a riot or to incite violent or forceful activity.

70. Plaintiffs must choose between encouraging and advising pipeline protestors, on the one hand, and exposing themselves to prosecution and civil liability under the Challenged Laws, on the other. Refraining from encouraging and advising protestors constitutes self-censorship and a loss of Plaintiffs' First Amendment rights.

71. The Challenged Laws chill the free speech and expression of Plaintiffs and others who wish to engage in trainings, encouragement, and advising on why and when to protest the completion of the pipeline because they must refrain from such expressive activity to avoid the risk of prosecution.

V. OTHER SOUTH DAKOTA STATUTES THAT PREVENT RIOTS AND VIOLENCE

72. The Act and the criminal statutes are not narrowly tailored to achieve the government interest of preventing violence. Unwarranted violence is already illegal under South Dakota law.

73. The government's purported interest in preventing riots is already served by the South Dakota statute making riot a Class 4 felony. *See* S.D.C.L. § 22-10-1 ("Any use of force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law, is riot. Riot is a Class 4 felony.").

74. The government's purported interest in preventing problems caused by "out-of-state rioters funded by out-of-state interests" is already addressed by the crime of "solicitation" in the criminal code, which includes an intent element and is defined as "[a]ny person who, with the intent to promote or facilitate the commission of a crime, commands, hires, requests, or solicits another person to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense, is guilty of criminal solicitation." *Id.* § 22-4A-1.

75. South Dakota also already criminalizes unlawful assembly. In contrast to the Challenged Laws, South Dakota's unlawful assembly law explicitly contains an intent requirement. *Id.* §22-10-9 (establishing that a person who is present at an assembly and remains there "*with intent to advance*" an unlawful purpose is guilty of unlawful assembly) (emphasis added).

76. South Dakota's stated interest in preventing disruption is already addressed by the crime of "disorderly conduct," which is defined as "[a]ny person who intentionally causes serious public inconvenience, annoyance, or alarm to any other person, or creates a risk thereof by: (1) Engaging in fighting or in violent or threatening behavior; (2) Making unreasonable noise; (3) Disturbing any lawful assembly or meeting of persons without lawful authority; or (4) Obstructing vehicular or pedestrian traffic Disorderly conduct is a Class 2 misdemeanor." *Id.* § 22-18-35.

77. The State has already criminalized protests that block traffic and has made it a misdemeanor to “stand upon the paved or improved or main-traveled portion of any highway with intent to impede or stop the flow of traffic. A violation of this section is a Class 1 misdemeanor.” *Id.* § 22-18-40.

78. South Dakota’s stated interest in preventing disruption is also achieved by its criminalization of refusals to obey law enforcement during a riot. *Id.* § 22-10-11 (“Any person who, during a riot or unlawful assembly, intentionally disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot, is guilty of a Class 1 misdemeanor. A public safety order is any order, the purpose of which is to prevent or control disorder or promote the safety of persons or property, issued by a law enforcement officer or a member of the fire or military forces concerned with the riot or unlawful assembly.”).

79. Preventing anti-pipeline protests that seek to end or slow the construction of the pipeline is not a valid government interest.

CLAIMS FOR RELIEF

I. FIRST AMENDMENT – SPEECH AND EXPRESSIVE CONDUCT

80. The Challenged Laws target and impermissibly burden protected speech, including speech that opposes the construction of the pipeline.

81. The Challenged Laws are content-based regulations that prohibit constitutionally-protected speech meant to accomplish a political goal, including Plaintiffs’ planned encouragement and advising of pipeline protests.

82. The Challenged Laws and are not narrowly tailored to serve a substantial governmental interest.

83. The Challenged Laws reach far beyond the type of expression that a state may legitimately punish. They suppress provocative speech and do not comply with the Supreme Court's holding in *Brandenburg*, thereby "impermissibly intrud[ing]" upon the First Amendment rights of speakers. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1966).

84. The Challenged Laws fail to include a specific intent requirement or to require that the prohibited speech be likely to produce imminent lawless action.

85. The Act makes organizations liable for their association with individuals who may be arrested at a riot, even if the organization itself does not possess unlawful goals and individuals in the organization do not possess the intent to commit an unlawful act.

86. The Act makes organizations liable for their association with and speech regarding individuals who may be arrested at a riot. Getting arrested is not an unlawful act. The state may limit unlawful acts, but by limiting speech and conduct related to lawful action that leads to arrest, the Act reaches a substantial amount of protected speech and association.

87. In addition, the threat of organizational liability attaches even if the organization's association with an individual who is subsequently arrested was not imminently related to the individual's arrest because there is no temporal limit on an organization's funding or encouragement of protest and a protester's eventual arrest. In effect, the Act creates a perpetual threat of liability to Plaintiffs and others in the event that anyone Plaintiffs trains or assists is arrested at any point in the future. Therefore, the Act restricts protected speech and association.

88. The potential liability to organizations prevents them from effectively advocating for their views even though group association enhances their advocacy.

89. The Defendants are authorized to enforce the Challenged Laws.

90. As such, the Riot Boosting Act, S.D.C.L. §§ 22-10-6 and 22-10-6.1, are unconstitutional facially and as applied to the planned, peaceful speech and expressive conduct of the Plaintiffs.

II. FOURTEENTH AMENDMENT – DUE PROCESS

91. The Challenged Laws, which prohibit encouraging and advising persons participating in a riot to engage in acts of force or violence, are, on their face, void for vagueness.

92. The Challenged Laws fail to give fair notice to reasonable individuals about what conduct constitutes “riot boosting” or violation of the criminal law. Because of this, they cannot be enforced in a consistent manner, they invite arbitrary and discriminatory enforcement, and they deter constitutionally-protected speech. They thus violate the Due Process Clause of the Fourteenth Amendment.

III. PRAYER FOR RELIEF

93. Plaintiffs respectfully request that this Court:

A. Pursuant to 28 U.S.C. §§ 2201 and 2202, declare that the Riot Boosting Act is unconstitutional on its face and as applied to Plaintiffs;

B. Pursuant to 28 U.S.C. §§ 2201 and 2202, declare that South Dakota’s criminal riot statutes are unconstitutional on their face and as applied to Plaintiffs;

C. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoin Defendants and all persons acting in concert with them from enforcing portions of the Act and the criminal riot statutes against Plaintiffs and others, specifically:

a. Section 2 of the Riot Boosting Act, which attaches liability for individuals who direct, advise, encourage, or solicit other persons at a riot to acts of violence or force;

b. Section 4 of the Riot Boosting Act, which makes “[a] defendant who solicits or compensates any other person to commit an unlawful act or to be arrested” subject to three times a sum that would compensate for the detriment caused.

c. S.D.C.L. §22-10-6 ; and

d. S.D.C.L. § 22-10-6.1.

D. Award to Plaintiffs their costs and reasonable attorneys’ fees in this action; and

E. Grant such other and further relief as to the Court appears just and proper.

Dated this 28th day of March, 2019.

Respectfully submitted,

/s/ Brendan V. Johnson
Brendan V. Johnson (SD Bar # 3263)
Erica A. Ramsey (SD Bar # 4901)
Timothy W. Billion (SD Bar # 4641)

ROBINS KAPLAN LLP
140 North Phillips Ave, Suite 307
Sioux Falls, SD 57104
Tel: 605-335-1300
BJohnson@RobinsKaplan.com
ERamsey@RobinsKaplan.com
TBillion@RobinsKaplan.com

Courtney Bowie*
American Civil Liberties Union of South
Dakota
P.O. Box 1170
Sioux Falls, SD 57101
Tel.: 201-284-9500
cbowie@aclu.org
** To be admitted pro hac vice*

Vera Eidelman*
American Civil Liberties Union Foundation
Speech, Privacy, and Technology Project
125 Broad St.
New York, NY 10004
Tel.: 212-549-2500
veidelman@aclu.org
**To be admitted pro hac vice*

Stephen Pevar (SD Bar #1364)
American Civil Liberties Union Foundation
765 Asylum Avenue
Hartford, CT 06105
Tel.: 860-570-9830
spevar@aclu.org

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

Handwritten signature of the attorney.

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT A

AN ACT

ENTITLED, An Act to establish a fund to receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefor, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 20-9 be amended by adding a NEW SECTION to read:

Terms used in this Act mean:

- (1) "Civil recoveries," funds received by the state from any third party as damages resulting from violations of chapter 22-10 that cause the state or a political subdivision to incur costs arising from riot boosting under section 2 of this Act;
- (2) "Person," any individual, joint venture, association, partnership, cooperative, limited liability company, corporation, nonprofit, other entity, or any group acting as a unit;
- (3) "Political subdivision," a county or municipality;
- (4) "Riot," the same as the term is defined under § 22-10-1; and
- (5) "Secretary," the secretary of the Department of Public Safety.

Section 2. That chapter 20-9 be amended by adding a NEW SECTION to read:

In addition to any other liability or criminal penalty under law, a person is liable for riot boosting, jointly and severally with any other person, to the state or a political subdivision in an action for damages if the person:

- (1) Participates in any riot and directs, advises, encourages, or solicits any other person participating in the riot to acts of force or violence;
- (2) 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; or
- (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate

power of execution, by three or more persons, acting together and without authority of law.

Section 3. That chapter 20-9 be amended by adding a NEW SECTION to read:

A person is subject to the jurisdiction of the courts of this state for riot boosting that results in a riot in this state, regardless of whether the person engages in riot boosting personally, or through any employee, agent, or subsidiary.

Evidence is not admissible in an action for riot boosting action that shows that any damages, in whole or in part, were paid by a third party. Notwithstanding any other law, any action arising under section 2 this Act is governed by the procedural and substantive law of this state.

Any action for riot boosting shall be for the exclusive benefit of the state, political subdivision, or an otherwise damaged third party, and shall be brought in the name of the state or political subdivision. 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.

Section 4. That chapter 20-9 be amended by adding a NEW SECTION to read:

The plaintiff in an action for riot boosting may recover both special and general damages, reasonable attorney's fees, disbursements, other reasonable expenses incurred from prosecuting the action, and punitive damages. A defendant who solicits or compensates any other person to commit an unlawful act or to be arrested is subject to three times a sum that would compensate for the detriment caused. A fine paid by a defendant for any violation of chapter 22-10 may not be applied toward payment of liability under section 2 of this Act.

Section 5. That chapter 20-9 be amended by adding a NEW SECTION to read:

There is established in the state treasury the riot boosting recovery fund. Money in the fund may be used to pay any claim for damages arising out of or in connection with a riot or may be transferred

to the pipeline engagement activity coordination expenses fund. Interest earned on money in the fund established under this section shall be credited to the fund. The fund is continuously appropriated to the Department of Public Safety, which shall administer the fund. All money received by the department for the fund shall be set forth in an informational budget pursuant to § 4-7-7.2 and be annually reviewed by the Legislature.

The secretary shall approve vouchers and the state auditor shall draw warrants to pay any claim authorized by this Act.

Any civil recoveries shall be deposited in the fund.

Section 6. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

An Act to establish a fund to receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefor, and to declare an emergency.

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I certify that the attached Act originated in the

SENATE as Bill No. 189

Secretary of the Senate

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President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 189
File No. _____
Chapter No. _____

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Received at this Executive Office this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor

=====

The attached Act is hereby approved this _____ day of _____ , A.D., 20____

Governor

=====

STATE OF SOUTH DAKOTA,
ss.

Office of the Secretary of State

Filed _____ , 20____
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State