STATE OF SOUTH DAKOTA

OFFICE OF THE GOVERNOR

KRISTI NOEM | GOVERNOR

To: Members of the South Dakota State Legislature; Tribal Leaders; State's attorneys

From: Office of the General Counsel to the Governor

Date: December 13, 2019

Re: Riot crimes and riot boosting legislative briefing packet – UPDATE

On November 15, 2019, this office released a comprehensive legislative briefing packet on the history of the riot boosting legislation, the recently resolved federal litigation, and the status of South Dakota law today.

This updated packet now includes all information previously released, plus two draft bills ahead of the 2020 legislative session.

This office is seeking input on the proposed legislation from stakeholders to ensure that it holds wrongdoers accountable in a way that is consistent with existing First Amendment case law.

The proposed legislation accomplishes three objectives:

1. **Repeal.** Repeal those sections of law that the federal court struck down in its September 18, 2019 memorandum opinion and that the State agreed not to enforce pursuant to the State's subsequent settlement agreement. Repealing those sections ensures that our laws are the most up-to-date with recent litigation.

2. **Replace.** Propose a new definition of the criminal act of incitement to riot that meets the constitutional standard for restricting free speech in an incitement statute, which is known as the *Brandenburg* test, as well as other constitutional principles.

3. **Update.** Update the riot boosting civil action to closely follow the proposed new "incitement to riot" criminal language.

These draft proposals ensure that protesters may have their voices heard in a secure environment, free from the few violent criminals who would seek to abuse their rights.

We welcome your feedback on these proposals. Please submit proposed changes, concerns, or your support of this proposed legislation to PublicinputRB@state.sd.us with subject line "riot legislation" by Friday, January 10, 2020. Comments will be maintained as public records.

STATE OF SOUTH DAKOTA

OFFICE OF THE GOVERNOR

KRISTI NOEM | GOVERNOR

To: Members of the South Dakota State Legislature; Tribal Leaders; State's attorneys

From: Office of the General Counsel

Date: November 15, 2019

Re: Riot boosting/PEACE fund legislative briefing packet

This legislative briefing packet informs on the history of the riot boosting legislation, the recently resolved litigation in federal court, and the status of South Dakota law today.

The 2019 South Dakota State Legislature passed Senate Bill 189 as part of the pipeline funding package. SB 189 created a civil action for riot boosting making those who encourage a riot civilly liable to the state or political subdivision for all damages caused by the resulting riotous conduct. The elements of civil liability for riot boosting were copied word-for-word from the elements of the crimes of "encouraging or soliciting violence in a riot," which had been on the books for decades (*compare* SDCL 22-10-6 and 6.1 *with* SDCL 20-9-54(1) and (2)). The ACLU filed suit in federal court, arguing that these two existing crimes were unconstitutional and that, because the new riot boosting civil action was based on the same elements, it was also unconstitutional.

On September 18, 2019, the South Dakota federal district court issued (1) a temporary injunction of the two longstanding criminal statutes against "encouraging a riot" and (2) a partial temporary injunction that affected two of the three riot boosting civil causes of action and a portion of the damages statute. As of that date, the State was prohibited by court order from enforcing those specific statutes, and later entered into a settlement agreement agreeing to abide by that court order and not enforce those statutes in their present form.

There have been misconceptions about the issues litigated and how the criminal statutes were implicated. This packet provides all the information needed to understand the litigation and the current status of South Dakota law. The ACLU's suit was ultimately based on a constitutional challenge against longstanding criminal riot statutes that were not amended by any 2019 legislation.

To be clear, South Dakota is not a haven for lawlessness. Riot is still a crime in South Dakota. Riot boosting is still in effect and enforceable because one of the three reasons to bring that suit was not enjoined or part of the settlement. South Dakota is a state of law and order where everyone has the right to speak their mind and protest if they choose, but they cannot use violence or harm others or property to do so.

Now that litigation has ended, South Dakota is shifting from litigation to legislation. Please look for further communication prior to the 2020 legislative session about proposed legislation. Drafting is currently underway and being vetted to ensure consistency with existing First Amendment law and holding wrongdoers accountable.

Riot Boosting/PEACE Fund Legislative Briefing Packet

First released: November 15, 2019

Updated: December 13, 2019

1. **2019 Legislation:**
   a. Joint Appropriations Committee Slide Deck
   b. SB 190 PEACE Fund Chart
   c. SB 189 - As enacted (2019)
   d. SB 190 - As enacted (2019)

   Note: No new crimes, no new criminal penalties, and no new criminal amendments in 2019 - riot boosting civil tort based on the text of existing criminal riot statutes.

2. **2019 Post Session Litigation:**
   a. Complaint
   b. Answer
   c. Judge Piersol Order
   d. Settlement Agreement and Letter to State's Attorneys
   e. Order for Dismissal

   Bottom line: Two SD statutes enacted decades ago declared unconstitutional since the development of the modern constitutional law, and riot boosting statute that was based (in part) on those two statutes was also limited.

3. **Post Litigation Settlement Agreement: Where the Law is Today:**
   a. SB 190: PEACE Fund Chart [unaffected by 2019 litigation]
   b. SB 189: Riot Boosting: What's left?
   c. Status of SD criminal Encouraging a Riot statutes:

SDCL 22-10-6	enjoined	SDCL 22-10-6.1	enjoined

   d. Status of SD civil Riot Boosting statutes:

SDCL 20-9-53	unaffected
SDCL 20-9-54	2 of 3 riot boosting actions enjoined
SDCL 20-9-55	unaffected
SDCL 20-9-56	one sentence was stricken and enjoined
SDCL 20-9-57	unaffected

4. **Governor Noem's 2020 Legislative Riot Package: [Updated December 13, 2019]**
   a. Two proposals:
      i. An Act to establish the crime of incitement to riot and to repeal encouraging a riot.
         1. **Repeals** decade old statutes,
         2. **Updates** crime of riot, and
         3. **Replaces** new criminal incitement to riot statute based on modern constitutional law.
      ii. An Act to amend riot boosting civil action.
         1. **Repeals** parts of riot boosting law ordered to be struck, and
         2. **Updates** civil action for riot boosting statute to reflect proposed incitement to riot crime.

Next Generation: Extraordinary expense pipeline funding

Senate Bill 189 and Senate Bill 190

- Pro Economic Development
- Pro Free Speech
- Proactive

GOVERNOR
KRISTI NOEM

2019 Next Generation Pipeline Bill Package

SB 189: Riot boosting civil recovery fund

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.

SB 190: PEACE Fund

Pipeline engagement activity coordination expenses fund

Promote pipeline construction and fiscal responsibility by establishing a fund, to authorize a special fee for extraordinary expenses, to make a continuous appropriation therefor, and to declare an emergency.

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Scope of SB 189 and SB 190

1. No single entity required to pay all the bills
2. Does not stop any pipeline project
3. Does not require any project move forward
4. No restrictions on peaceful protest or peaceful assembly
5. No new crimes created
6. No new criminal penalties
7. No additional jail sentences
8. Does not limit any First amendment rights
9. Does not allow rioters escape financial liability for damages caused

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2019 Next Generation Pipeline Bill Package

This proactive legislative package:

1. Spreads the risk and extraordinary cost of law enforcement for pipeline projects among: the State, counties, federal government, pipeline companies and rioters (SB 190)

2. Creates a fund and legal remedies to pursue out-of-state money funding the riots (SB 189)

The Facts

Senate Bill 189 and Senate Bill 190

- Pro Economic Development
- Pro Free Speech
- Proactive

Current law - Counties: 2 mils + % local effort

1. Emergency declaration
2. 2 mil law: county level
3. 40/60 split thereafter

34-48A-30. Minimum local effort required for state aid. In order to qualify for state financial assistance to meet the costs of an emergency or disaster declared by the Governor, a county shall meet the minimum standard of local effort as specified in subdivision 34-48A-1(7).
Source: SL 1969, ch 247, § 2; SDCL Supp, § 33-15-24.2; SL 1977, ch 271, § 26; SL 1987, ch 29, § 17; SDCL § 33-15-24.1.

Y-20-10

2017 County Two-Mill Assessed Valuation
South Dakota Office of Emergency Management

County Name	Assessed Valuation	Two-Mill Levy	Two-Mill Dollar Amount	County Name	Assessed Valuation	Two-Mill Levy	Two-Mill Dollar Amount
Aurora	776,700,443	0.002	1,553,400.89	Hyde	673,771,267	0.002	1,347,542.53
Beadle	2,363,390,920	0.002	4,726,781.84	Jackson	324,359,492	0.002	648,718.98
Bennett	219,141,115	0.002	438,282.23	Jerauld	566,954,105	0.002	1,133,908.21
Bon Homme	833,353,290	0.002	1,666,706.58	Jones	340,286,275	0.002	680,572.55
Brookings	3,084,561,364	0.002	6,169,122.73	Kingsbury	1,330,393,544	0.002	2,660,787.09
Brown	4,210,153,737	0.002	8,420,307.47	Lake	1,521,363,030	0.002	3,042,726.06
Brule	1,044,807,187	0.002	2,089,614.37	Lawrence	2,547,371,120	0.002	5,094,742.24
Buffalo	186,217,958	0.002	372,435.92	Lincoln	5,651,381,910	0.002	11,302,763.82
Butte	810,521,170	0.002	1,621,042.34	Lyman	797,388,246	0.002	1,594,776.49
Campbell	617,150,670	0.002	1,234,301.34	Marshall	1,008,293,574	0.002	2,016,587.15
Charles Mix	1,351,377,192	0.002	2,702,754.38	McCook	981,346,181	0.002	1,962,692.36
Clark	1,131,118,204	0.002	2,262,236.41	McPherson	749,149,946	0.002	1,498,299.89
Clay	1,158,717,441	0.002	2,317,434.88	Meade	2,259,469,583	0.002	4,518,939.17
Codington	2,577,491,485	0.002	5,154,982.97	Mellette	238,911,653	0.002	477,823.31
Corson	433,255,985	0.002	866,511.97	Miner	738,878,148	0.002	1,477,756.30
Custer	1,010,167,907	0.002	2,020,335.81	Minnehaha	13,857,510,931	0.002	27,715,021.86
Davison	1,676,141,903	0.002	3,352,283.81	Moody	1,009,176,408	0.002	2,018,352.82
Day	1,376,960,809	0.002	2,753,921.62	Oglala Lakota	47,669,005	0.002	95,338.01
Deuel	889,296,026	0.002	1,778,592.05	Pennington	8,754,296,985	0.002	17,508,593.97
Dewey	335,973,925	0.002	671,947.85	Perkins	735,072,096	0.002	1,470,144.19
Douglas	590,680,072	0.002	1,181,360.14	Potter	893,123,693	0.002	1,786,247.39
Edmunds	1,415,223,376	0.002	2,830,446.75	Roberts	941,949,664	0.002	1,883,899.33
Fall River	587,392,087	0.002	1,174,784.17	Sanborn	572,158,293	0.002	1,144,316.59
Faulk	1,105,923,303	0.002	2,211,846.61	Spink	2,061,321,114	0.002	4,122,642.23
Grant	1,100,268,124	0.002	2,200,536.25	Stanley	568,278,116	0.002	1,136,556.23
Gregory	630,414,529	0.002	1,260,829.06	Sully	1,044,412,367	0.002	2,088,824.73
Haakon	573,963,556	0.002	1,147,927.11	Todd	189,704,575	0.002	379,409.15
Hamlin	1,054,838,461	0.002	2,109,676.92	Tripp	1,043,173,620	0.002	2,086,347.24
Hand	1,498,024,837	0.002	2,996,049.67	Turner	1,357,941,078	0.002	2,715,882.16
Hanson	652,879,449	0.002	1,305,758.90	Union	1,965,142,266	0.002	3,930,284.53
Harding	322,891,040	0.002	645,782.08	Walworth	838,936,878	0.002	1,677,873.76
Hughes	1,657,644,180	0.002	3,315,288.36	Yankton	1,976,037,637	0.002	3,952,075.27
Hutchinson	1,340,761,573	0.002	2,681,523.15	Ziebach	285,583,621	0.002	571,167.24

Total Highlighted Pipeline Counties: $32,534,954.20

Current law:
Riot: SDCL 22-10

CHAPTER 22-10

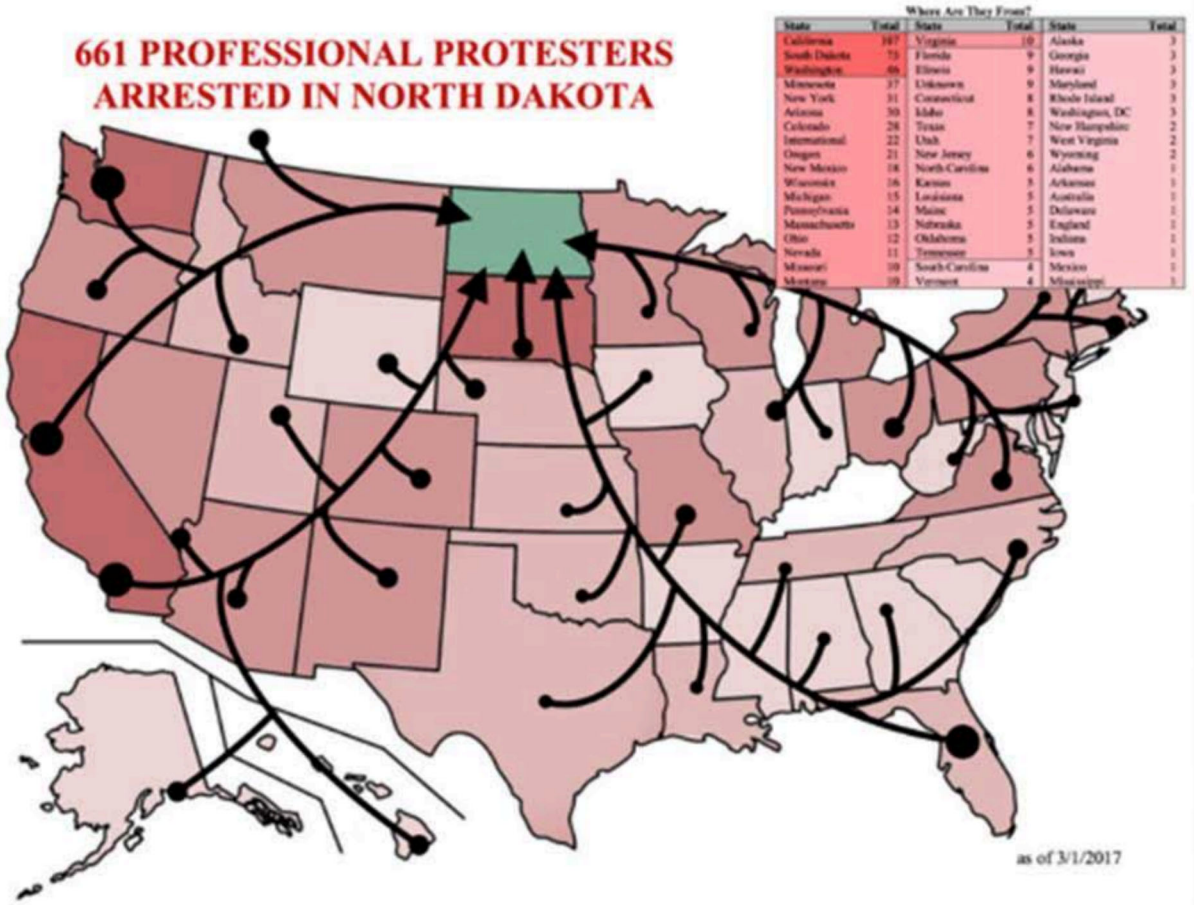
RIOT AND UNLAWFUL ASSEMBLY

22-10-6.1. Encouraging or soliciting violence in riot without participating--Felony. 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.
Source: SL 1976, ch 158, § 10-4; SL 2005, ch 120, § 348.

22-10-1. Riot--Felony. 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.
Source: SDC 1939, § 13.1402; SL 1976, ch 158, § 10-1; SL 2005, ch 120, § 345.

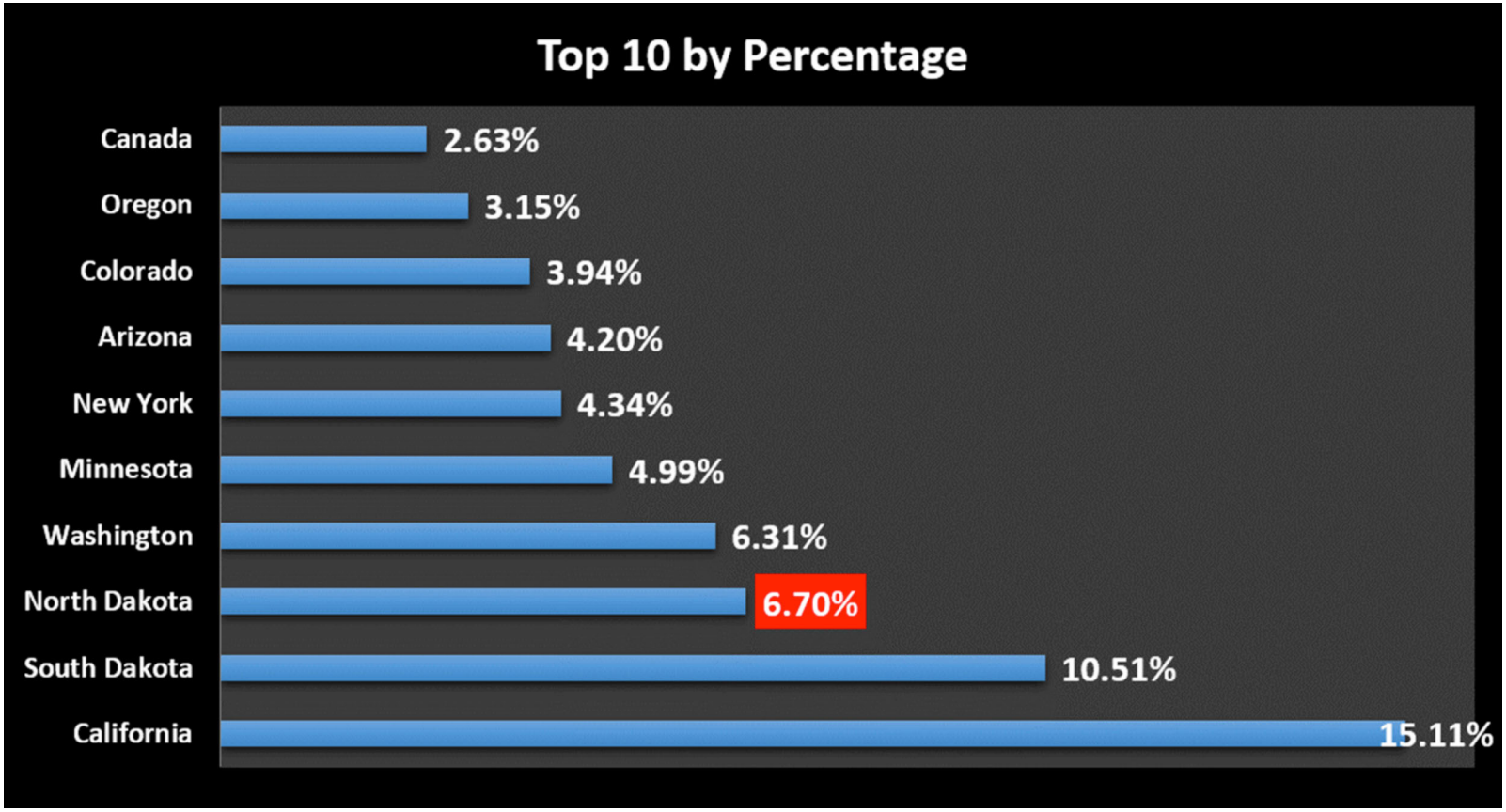
22-10-6. Encouraging or soliciting violence in riot--Felony. Any person who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 2 felony.
Source: SDC 1939, § 13.1404 (4); SL 1976, ch 158, § 10-3; SL 2005, ch 120, § 347.

661 PROFESSIONAL PROTESTERS ARRESTED IN NORTH DAKOTA



State	Total	State	Total	State	Total
California	107	Virginia	10	Alaska	3
South Dakota	73	Florida	9	Georgia	3
Washington	66	Illinois	9	Hawaii	3
Minnesota	37	Unknown	9	Maryland	3
New York	31	Connecticut	8	Rhode Island	3
Arizona	30	Idaho	8	Washington, DC	3
Colorado	28	Texas	7	New Hampshire	2
International	22	Utah	7	West Virginia	2
Oregon	21	New Jersey	6	Wyoming	2
New Mexico	18	North Carolina	6	Alabama	1
Wisconsin	16	Kansas	5	Arkansas	1
Michigan	15	Louisiana	5	Australia	1
Pennsylvania	14	Maine	5	Delaware	1
Massachusetts	13	Nebraska	5	England	1
Ohio	12	Oklahoma	5	Indiana	1
Nevada	11	Tennessee	5	Iowa	1
Missouri	10	South Carolina	4	Mexico	1
Montana	10	Vermont	4	Mississippi	1

North Dakota: DAPL Arrests (90% + out of state)

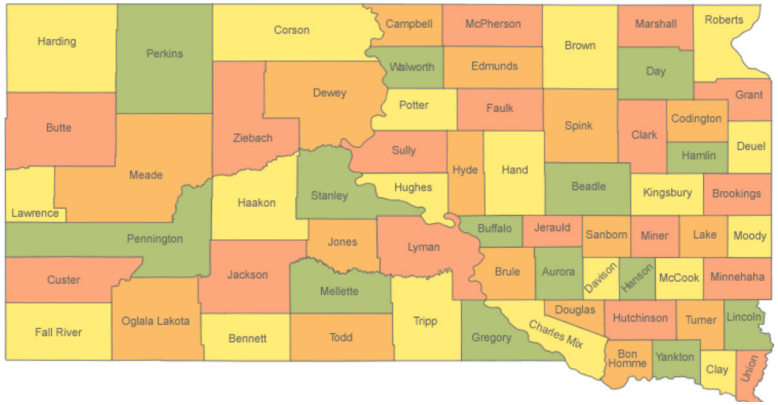


State Perspective

1. Financial controls
2. Law enforcement expertise
3. Need for county coordination
4. Presently: some risk of extraordinary costs
5. Protect constitutional rights
6. Financial: sales and use tax; jobs during construction and increase county property tax base

County Perspective

1. No significant cash reserves
2. Not designed to manage a multi-county project
3. Present law: most risk of extraordinary costs
4. Long term gain in real estate tax base
5. Challenge: no short term revenue sources



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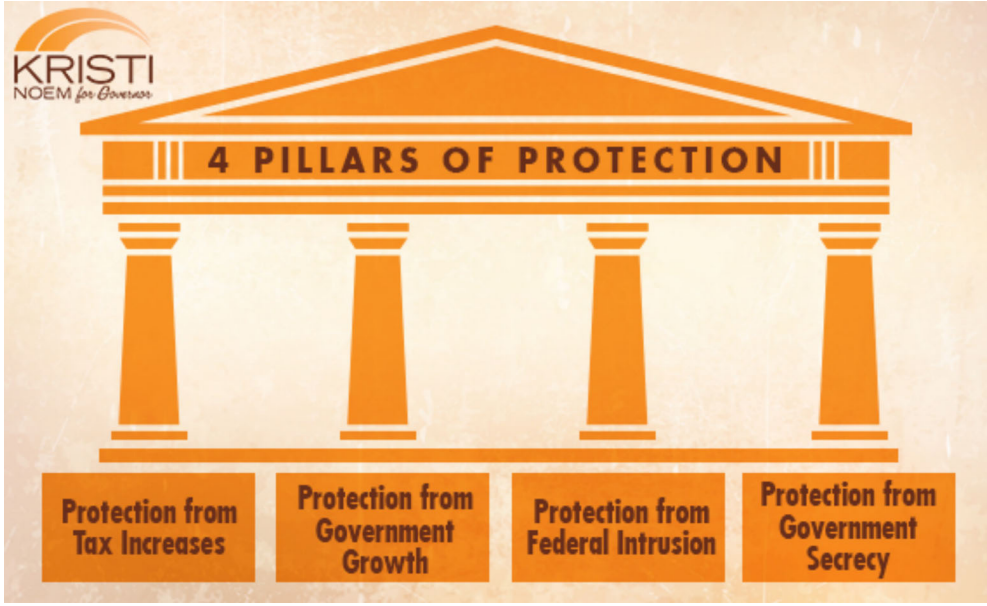
"I support an all-of-the-above energy policy and that includes the ability to safely move energy resources to where they are needed but this national priority could become a flashpoint in my state.

This next-generation pipeline funding model was developed to directly address issues caused by out-of-state rioters funded by out-of-state interests that have attacked nearby projects. The current model for developing major energy infrastructure projects clearly needed an update," continued **Noem**.



Plan Principles

Senate Bill 189 and Senate Bill 190

- Pro Economic Development
- Pro Free Speech
- Proactive

Next Generation Plan Principles

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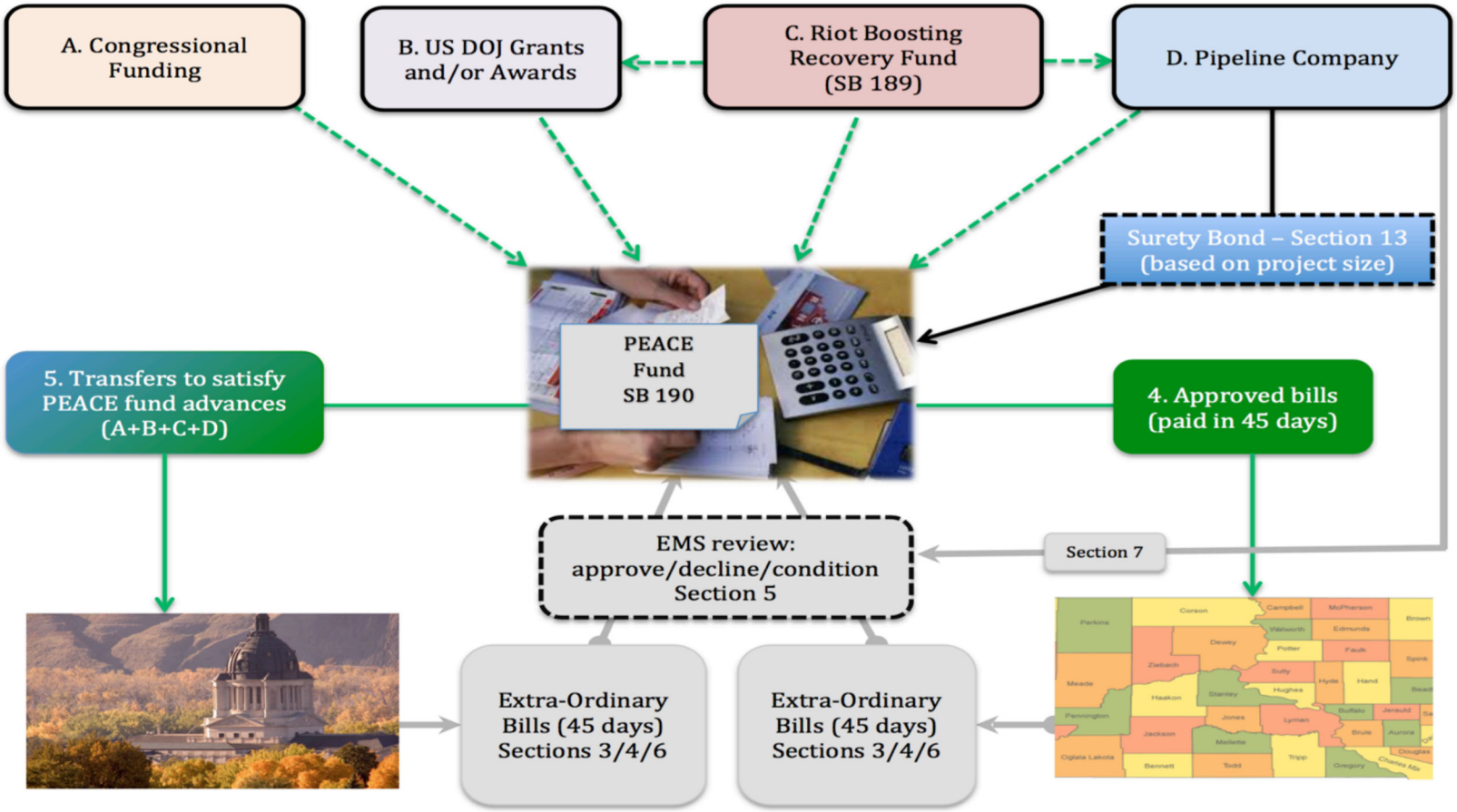
1. Proactive and transparent
2. Coordinated response
3. Protect rights: property, free speech and peaceful assembly
4. Protect taxpayers from extraordinary law enforcement costs
5. Recognize differences of opinion AND the rule of law
6. Rights end when violence begins: rioters do not control economic development
7. Shared cost and risk: state, counties, federal government, pipeline companies and rioters
8. Not to do: no new boards, commissions or taxes

Plan Overview and Details

Senate Bill 189 and Senate Bill 190

- Pro Economic Development
- Pro Free Speech
- Proactive

PEACE fund: Pipeline Engagement Activity Coordination Expenses (continuously appropriated): **SB 190**



Bottom line: State cash flows extra-ordinary expenses, state receives/recovers funds from third parties, and state bills special fee.
Pipeline Funding Diagram (revised 4 March 2019 multi source).docx

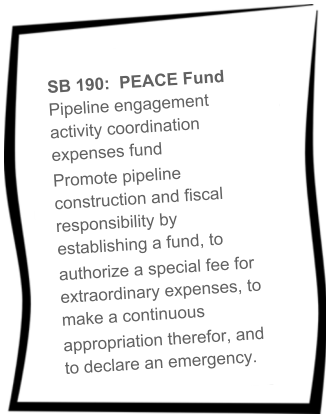
SB 189 - Section by Section

1. Definitions
2. Liability for Riot Boosting (what is it?)
3. Recovery to the State
4. Damages; Treble damages; Attorney fees
5. Creation of the fund
6. Effective date

SB 189: Riot boosting civil recovery fund

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.

SB 190: Section by Section



1. Definitions
2. Creation of the Fund
3. Claims
4. Pre-Approval of Claims
5. Review of Claims
6. Claim Timeline
7. Communications with pipeline company
8. Offset language
9. Dispute resolution
10. Initial deposit: 5% of bond
11. Special Fee
12. Lien
13. Bond: $1 million for each 10 miles
14. Cease and Desist from Secretary of DPS
15. Release of bond
16. Secretary Discretion
17. Agreements permitted
18. Rule Promulgation
19. Repealer: June 30, 2025
20. Effective Date

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Top Two Concerns:

Timing of introduction. Why week 9?

1. New administration: week 9
2. First in nation - new approach
3. National discussion
4. Take the time to do it right
5. Months of collaboration and research

Limit on Free Speech? No.

State v. Bad Heart Bull, 257 N.W.2d 715 (S.D. 1977): "...the crime of riot in South Dakota is violence or the immediate threat thereof. As such, it relates to and prohibits certain defined conduct rather than forms of expression.

Laws of this nature are needed and necessary to preserve good order and to protect all persons and all property from the violence of a few. They **do not violate the constitutional rights of free expression and assembly as those rights end when violence begins."**

GOVERNOR
KRISTI NOEM

Safeguards: SB 189 and SB 190

As to third parties:

1. Riot litigation: proceeds to State of SD
2. Riot litigation: name of State only
3. Bond by pipeline company
4. Additions to bond
5. Cease and desist order by DPS Secretary
6. Communication within EMS
7. Appeal
8. Circuit Court action
9. Discretion granted to Secretary (section 16)
10. Riot litigation: optional

Statutory Legislative Oversight:

1. SB 189: informational budget (p 3, line 13)
2. SB 190: informational budget (p 4, line 12)
3. Executive Board: release bond (p 11, line 5)

SB 189 and SB 190: Next Generation Funding Plan

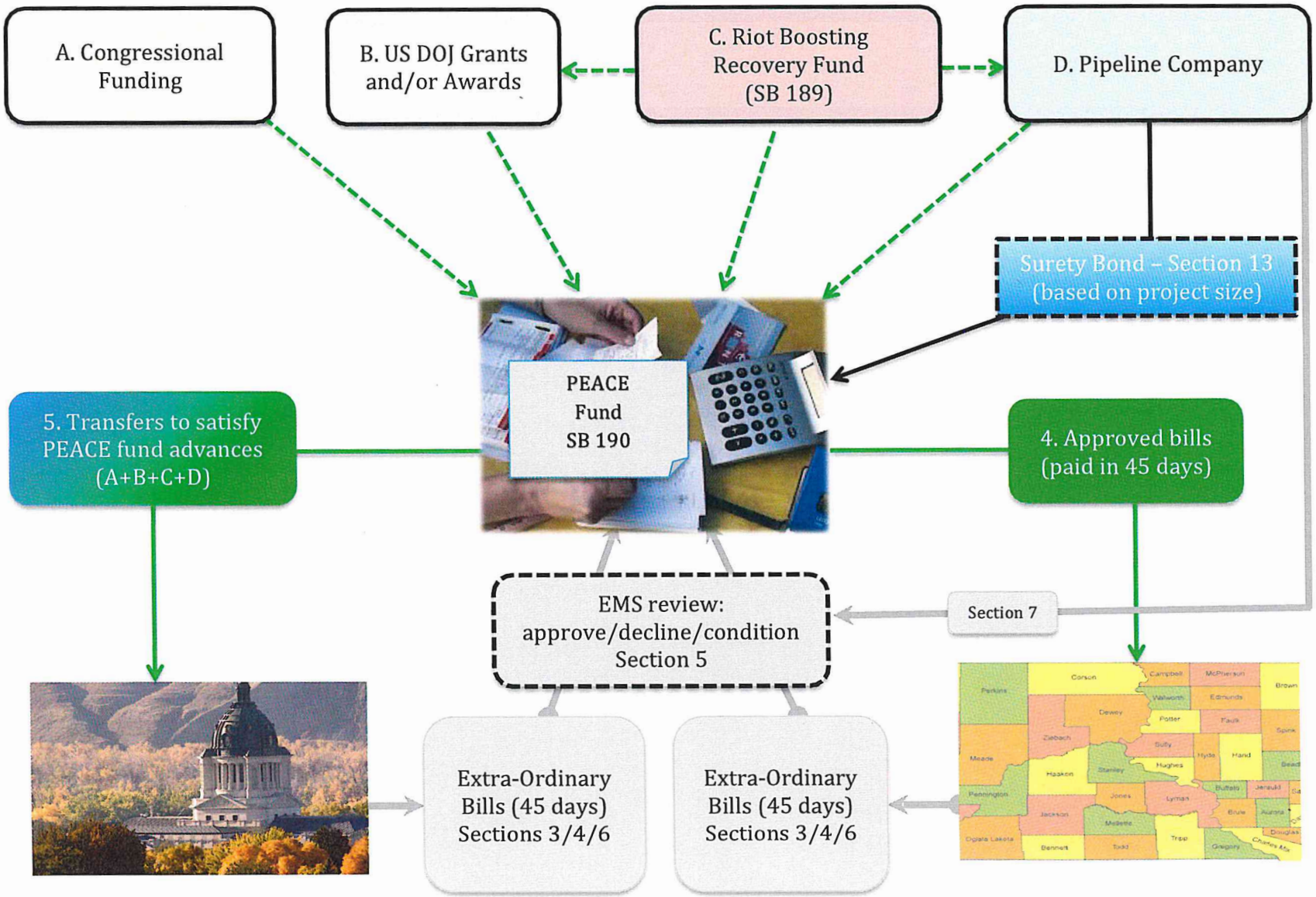
1. Construction of a pipeline: not an emergency
2. Pipeline companies: not the enemy
3. Peaceful protestors: not the enemy
4. Challenge: law breakers and rioters
5. Opportunity for South Dakota:
    a. Pro economic growth
    b. Pro business environment
    c. Protect safety, security and rights
    d. Low taxes and regulation
    e. Proactive funding package

Next Generation: Extraordinary expense pipeline funding

Senate Bill 189 and Senate Bill 190

- Pro Economic Development
- Pro Free Speech
- Proactive

PEACE fund: Pipeline Engagement Activity Coordination Expenses (continuously appropriated): **SB 190**



Bottom line: State cash flows extra-ordinary expenses, state receives/recovers funds from third parties, and state bills special fee.

Pipeline Funding Diagram (revised 4 March 2019 multi source).docx

State of South Dakota

NINETY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2019

400B0866

SENATE BILL NO. 189

Introduced by: The Committee on Appropriations

FOR 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:

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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.

State of South Dakota

NINETY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2019

400B0865

SENATE BILL NO. 190

Introduced by: The Committee on Appropriations

FOR AN ACT ENTITLED, An Act to promote pipeline construction and fiscal responsibility by establishing a fund, to authorize a special fee for extraordinary expenses, 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 the code be amended by adding a NEW SECTION to read:

Terms used in this Act mean:

(1) "Action notice," the director's communication of a decision on a claim;

(2) "Civil recoveries," funds received by the state or a political subdivision from a third party, other than a pipeline company, as a result of violations of the law and transferred to the fund from the riot boosting recovery fund;

(3) "Claim," an invoice submitted to the director of the PEACE fund by the state or a political subdivision for an extraordinary expense;

(4) "Department," the Department of Public Safety;

(5) "Director," the director of the Division of Emergency Services within the Department of Public Safety;

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(6) "Extraordinary expense," a reasonable and legitimate cost incurred by the state or a political subdivision to prepare for, respond to, or which arises from opposition to a project that would not have been incurred but for pipeline construction, and is incurred due to the:

(a) Performance of activities of law enforcement officers as defined in § 23-3-27;

(b) Performance of functions arising from pipeline construction that are included in § 34-48A-1 notwithstanding the lack of an emergency declaration; or

(c) Prosecution of criminal offenses, including the cost of pretrial confinement and post-conviction sentences in a county jail facility.

The term does not include any expense incurred by a private cooperative or business entity; workers' compensation or disability benefits for employees of this state or political subdivisions arising out of injuries incurred in the course of employment; or costs associated with or resulting from the call to active duty, mobilization, or service of the National Guard;

(7) "Oil product," any oil, including unrefined oil, oil produced from oil sand deposits, diluted bitumen, or crude oil;

(8) "PEACE fund," the pipeline engagement activity coordination expenses fund;

(9) "Pipeline," all parts of physical facilities through which any oil product is carried within this state, including pipe, valves, other appurtenances attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies;

(10) "Pipeline company," a person or entity who is the owner of a project or holds a permit from the Public Utilities Commission for a project;

(11) "Pipeline construction," the engagement in any activity following the project

commencement date in furtherance of a project by a pipeline company, or those acting on its behalf, within this state;

(12) "Political subdivision," a county or municipality;

(13) "Project," the installation of a pipeline greater than twelve inches in diameter, or the construction of a supporting facility in furtherance of carrying any oil product by a pipeline company. The term does not include routine maintenance of a pipeline or supporting facility in operation at the time of the effective date of this Act;

(14) "Project commencement date," the date that occurs after:

(a) A project receives its regulatory permit;

(b) No court-imposed impediments on the project exist; and

(c) Preparation of the pipeline right-of-way or the ground for a supporting facility commences.

Notwithstanding subsections (a) to (c) of this subdivision, the secretary may issue an administrative notice, which is not reviewable, deeming pipeline construction to have begun for purposes of this Act;

(15) "Project completion date," the date on which pipeline construction concludes so that any oil product carried through a pipeline from an originating station fills the entire length of a completed pipeline and permanent pump stations within this state;

(16) "Secretary," the secretary of the Department of Public Safety;

(17) "Special fee," a fee billed to and paid by a pipeline company to defray administrative costs and extraordinary expenses;

(18) "State," this state or any agency of the state that is vested with the authority to exercise any portion of the state's sovereignty or with law enforcement authority;

(19) "Supporting facility," a structure necessary and ancillary to a pipeline, including a

pressure pump station, housing facility for project personnel, storage area for tangible property, or other temporary structure of a pipeline company or its agent.

Section 2. That the code be amended by adding a NEW SECTION to read:

There is established in the state treasury the PEACE fund. Money in the fund may be used to pay administrative costs and extraordinary expenses incurred by the state or a political subdivision, arising out of or in connection with pipeline construction. Any interest earned on money in the fund shall be credited to the fund. The fund is continuously appropriated to the department.

The department shall administer the fund and maintain separate accounts for each project. The secretary shall approve vouchers and the state auditor shall draw warrants to pay administrative costs and extraordinary expenses in accordance with this Act. All money received by the department for the PEACE fund shall be set forth in an informational budget pursuant to § 4-7-7.2 and be annually reviewed by the Legislature.

Section 3. That the code be amended by adding a NEW SECTION to read:

The state or a political subdivision may submit a claim for extraordinary expense to the director for disbursement from the PEACE fund in accordance with this Act. Each claim under this section shall be accompanied by a statement of the basis on which it is made, and true and accurate records and books of account regarding the extraordinary expense claimed, including copies of checks, vouchers, warrants, sales receipts, invoices, billings, payroll records, or similar documents for each extraordinary expense in sufficient detail to allow the director to reasonably review the claim.

The state or a political subdivision receiving a disbursement from the fund for an approved claim under this section shall keep and maintain true and accurate records and books of account consistent with government accounting standards and in the same manner and for the same

period as required by law and shall be available for inspection by the director and a duly-authorized representative of the pipeline company.

On or before the first of February of each year, the director shall provide statements of claim activities for the preceding calendar year to the secretary, any applicable political subdivision, and the pipeline company.

Section 4. That the code be amended by adding a NEW SECTION to read:

The state or a political subdivision may submit a request for pre-approval of an anticipated claim for extraordinary expense to the PEACE fund in accordance with this Act. Each request for pre-approval submitted under this section shall be accompanied by a statement of the basis on which the request is made and a description of the anticipated extraordinary expense in sufficient detail to allow the director to reasonably review the request.

If a request submitted under this section is approved, the state or political subdivision shall provide the director with the same documentation as required for a claim submitted under section 3 of this Act after the extraordinary expense is incurred. The director shall review the documents provided under this section to determine whether the expenditure is consistent with the pre-approval decision and issue an action notice regarding the director's determination.

Section 5. That the code be amended by adding a NEW SECTION to read:

The director shall approve or deny, in whole or in part, any claim submitted under section 3 of this Act or any request submitted under section 4 of this Act. The director may condition any claim for extraordinary expense at the director's discretion.

The director shall issue an action notice to the state, political subdivision, and the pipeline company of the approval or denial, in whole or in part, of a claim within ten days of receiving the claim under section 3 of this Act, or of a request within ten days of receiving claim documentation as required under section 4 of this Act. The action notice shall include all

approved and denied portions of the claim, and the rationale for the approval or denial, in sufficient detail to allow the secretary, political subdivision, and the pipeline company to review the decision. An action notice may be accompanied by the records submitted in accordance with section 3 of this Act.

A claim submitted by the state or a political subdivision is not payable from the PEACE fund until the claim is approved by the director. The director shall authorize disbursements from the fund for payment of an approved claim to the state or a political subdivision within forty-five days from the date of the action notice.

Section 6. That the code be amended by adding a NEW SECTION to read:

A claim under section 3 of this Act may be submitted to the director only after the project commencement date. A request under section 4 of this Act may be submitted on or after the effective date of this Act.

A claim under section 3 of this Act shall be submitted to the director within forty-five days of the date the extraordinary expense is incurred.

Notwithstanding any other provision of this Act, the director may not approve any claim or any request for pre-approval that will not be incurred within one year after the project completion date, subject to section 16 of this Act.

Section 7. That the code be amended by adding a NEW SECTION to read:

The department shall communicate with the pipeline company to review any claim or request for pre-approval made to the PEACE fund under section 3 or 4 of this Act. A pipeline company shall designate in writing three official representatives who are authorized to coordinate with the department. Any one official representative's concurrence with the director's action notice approving a claim is a waiver of the right of that pipeline company to contest the action notice and is a waiver of the informal review process by the secretary.

Section 8. That the code be amended by adding a NEW SECTION to read:

If the state or a political subdivision receives payment from the PEACE fund for an extraordinary expense, and subsequently receives reimbursement through restitution, judgment, settlement, contribution, or other funding for the expense from any other source, except civil recoveries, the reimbursement shall be deposited into the fund. The reimbursement deposited into the fund is a credit to a pipeline company and shall be used to offset the next special fee calculated under section 11 of this Act. Any reimbursement from federal sources or civil recoveries shall be deposited only as allocated by the secretary.

Section 9. That the code be amended by adding a NEW SECTION to read:

A pipeline company that disputes the approval or denial, in whole or in part, of a claim under section 5 of this Act may, within ten days of the date of the action notice, submit its objection in good faith, together with a statement of the basis for the objection, and request a review from the secretary. The secretary shall make an expeditious review of the director's action notice and may approve, modify, condition, or deny the claim, in whole or in part. The secretary's review must be exhausted before any appeal to the Office of Hearing Examiners.

A pipeline company may appeal the secretary's decision, if the pipeline company has properly preserved its appeal by giving written notice to the secretary within ten days of the date of the secretary's decision.

The pipeline company may commence one administrative appeal annually arising out of all decisions, joined for judicial efficiency, dated during the preceding calendar year from which the pipeline company wishes to appeal. The pipeline company shall file a written notice of appeal with the Office of Hearing Examiners. Copies of the written notice must be served on the secretary and any other interested party no later than the first of March or the appeal is barred. A written notice of appeal shall identify each disputed and properly preserved claim with

a decision in the prior calendar year.

An appeal under this section shall be conducted by a hearing examiner in accordance with chapter 1-26D. The hearing examiner, after hearing the evidence, shall make proposed findings of fact and conclusions of law, and issue a proposed decision. The secretary shall accept, reject, or modify the hearing examiner's findings, conclusions, and decision, which then constitutes the final agency decision. Alternatively, the secretary may appoint the hearing examiner to make the final agency decision. The secretary may arrange for assistance from private counsel throughout the administrative appeal process. The final agency decision may be appealed to circuit court in accordance with chapter 1-26. A pipeline company has standing to appeal under this section.

The appeal under this section is the exclusive remedy of a pipeline company regarding the disbursement of a claim of extraordinary expense and constitutes a limited express waiver of sovereign immunity only to the extent necessary under this section. The venue for any disputed claim and appeal under this section is Hughes County. Pre-judgment interest shall accrue from the date of the secretary's final decision on all disputed claims at the Category B rate of interest specified in § 54-3-16.

Section 10. That the code be amended by adding a NEW SECTION to read:

Within twenty days of a project commencement date, the pipeline company shall make an initial deposit to the PEACE fund equal to five percent of the bond required under section 13 of this Act. The project account and fund may only be used in accordance with this Act, and any remaining balance shall be remitted to the pipeline company no later than eighteen months after the project completion date less the amount equal to unresolved disputed claims under section 9 of this Act.

Section 11. That the code be amended by adding a NEW SECTION to read:

On a monthly basis, the Department of Public Safety shall calculate the special fee from the total approved claims paid from the fund during the prior calendar month. The total extraordinary expenses shall include the interest computed at the federal short-term applicable rate as set forth under 26 U.S.C. § 6621(b)(3), and in effect on January 1, 2019. The department shall exclude disputed and properly preserved claims under section 9 of this Act and account for the remaining initial deposit under section 10 of this Act.

On or before the twentieth day of each month, the secretary shall bill the pipeline company for the total net special fee computed under this section, which is due on the tenth day of the following month.

If a disputed claim under section 9 of this Act is resolved in favor of payment from the fund, the department shall include the amount of the claim, including any pre-judgment interest, in the following month's special fee to be billed under this section.

If funds are received and deposited into the PEACE fund after special fees have been fully paid, the secretary shall disburse any remaining unobligated funds to the federal government agency that made contribution to the fund and the pipeline company on a pro rata basis until contributions are returned, and any remaining amounts deposited into the state general fund.

Section 12. That the code be amended by adding a NEW SECTION to read:

Any special fee billed under section 11 of this Act, including any computed interest, is a continuing lien on all property owned by the pipeline company within this state until the total special fee is paid in full or otherwise finally resolved. The secretary of the Department of Revenue shall file a notice of the lien describing the property against which the lien applies in the office of the register of deeds in the county where the property is located. Upon the filing of notice under this section, the lien is attached to all property of the pipeline company within this state and has priority over all other claims or liens on the property.

Section 13. That the code be amended by adding a NEW SECTION to read:

A pipeline company shall furnish a surety bond to the Department of Revenue written by a company authorized by the Division of Insurance to write surety bonds, in an amount of one million dollars for every ten miles affected by a project, but not in excess of twenty million dollars for each project. The surety bond furnished under this section is due to the Department of Revenue twenty days after the project commencement date. The surety bond shall name the state as the assured and shall be deposited with, and in a form and on terms approved by, the secretary of the Department of Revenue.

A pipeline company shall increase the surety bond above the initial surety bond amount by increments of twenty-five percent of the initial surety bond amount within ten days following each instance in which the department issues written notice that the incremental amount of all disputed and properly preserved claims under section 9 of this Act equals twenty-five percent of the initial surety bond amount.

A political subdivision does not have standing to make a claim against the surety on a surety bond under this section. The state may file a claim against the surety if a pipeline company is in violation of this Act.

Section 14. That the code be amended by adding a NEW SECTION to read:

In addition to any other remedy provided by law, if a pipeline company fails to meet the requirements of this Act, the secretary may order the pipeline company, and any person acting on the pipeline company's behalf, to issue a full, partial, or conditional cease and desist from all pipeline construction. An order to cease and desist under this section is effective upon service to the pipeline company and remains effective and enforceable until further order of the secretary. An appeal from the order shall be filed in accordance with chapter 1-26D.

Section 15. That the code be amended by adding a NEW SECTION to read:

All right and title in any surety bond furnished under section 14 of this Act is vested with the state. The surety bond does not constitute an asset of a pipeline company that is required to furnish the surety bond under section 14 of this Act, and may not be canceled, assigned, revoked, disbursed, replaced, or allowed to terminate, without the recommendation of the commissioner of Bureau of Finance and Management and the approval of the Executive Board of the Legislative Research Council. The surety bond may not be assigned for the benefit of creditors, attached, garnished, levied, executed on, or subject to process from any court, except for the purpose of enabling the state to recover moneys advanced by the PEACE fund.

Section 16. That the code be amended by adding a NEW SECTION to read:

The secretary may instruct the director to:

(1) Withhold, delay, suspend, or reduce any monthly billing to a pipeline company, if the secretary has cause to anticipate the receipt of an additional deposit from a source other than a pipeline company;

(2) For good cause shown, review any claim that is submitted to the director more than forty-five days from the date the extraordinary expense was incurred; or

(3) For good cause shown, subordinate the lien under section 12 of this Act.

Section 17. That the code be amended by adding a NEW SECTION to read:

Nothing in this Act prevents the state and a pipeline company from entering into any contract or other agreement, provided the terms of the contract or agreement are not inconsistent with this Act.

Section 18. That the code be amended by adding a NEW SECTION to read:

The secretary may promulgate rules in accordance with chapter 1-26 to implement the provisions of this Act.

Section 19. This Act is repealed on June 30, 2025.

Section 20. 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.

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 Ravnsborg 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 Ravnsborg 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 Envtl. 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 protesters 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)

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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

Dakota Rural Action, Dallas Goldtooth, Indigenous Environmental Network, NDN Collective, Sierra Club, and Nicholas Tilsen

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

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Brendan V. Johnson, Erica A. Ramsey, and Timothy W. Billion
ROBINS KAPLAN LLP, 140 North Phillips Avenue, Suite 307, Sioux Falls, SD 57104, Telephone (605) 335-1300

DEFENDANTS

Kristi Noem, Jason Ravnsborg, and Kevin Thom,

County of Residence of First Listed Defendant Hughes
(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
- ❒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 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)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

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

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 485 Telephone Consumer Protection Act
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State 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)***:
42 U.S.C. § 1983

Brief description of cause:
Seeking declarative and injunctive relief based on unconstitutionality of Riot Boosting Act and criminal riot statutes

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
03/28/2019

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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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 statue.

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.

==========

I certify that the attached Act originated in the

SENATE as Bill No. 189

_____
Secretary of the Senate

_____
President of the Senate

Attest:

_____
Secretary of the Senate

_____
Speaker of the House

Attest:

_____
Chief Clerk

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

==========

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

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS GOODTOOTH, 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.	)	Civ. 5:19-cv-5026-LLP **ANSWER OF STATE DEFENDANTS**

COME NOW, Defendants South Dakota Governor Kristi Noem, and South Dakota Attorney General Jason Ravnsborg, in their official capacities (collectively, Defendants), by and through their counsel of record, and hereby submit the following Answer to the Complaint and state as follows:

a. Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted against Defendants.

b. Defendants deny each and every allegation contained in Plaintiffs' Complaint except as otherwise specifically admitted herein, and remit Plaintiffs to a strict proof thereof.

The paragraph numbers below correspond with the numbered paragraphs in Plaintiffs' Complaint.

INTRODUCTION

1. Paragraph 1 is a summary of Plaintiffs' case to which no response is necessary. To the extent an answer is required, the paragraph is denied.

2. Paragraph 2 makes legal assertions to which no response is necessary.

3. As to Paragraph 3, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation.

4. As to Paragraph 4, Defendants admit that Senate Bill No. 189 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" ("S.B. 189" or "The Act") was passed to address acts of force or violence during potential protests. Defendants deny the remainder of Paragraph 4.

5. Defendants deny Paragraph 5.

JURISDICTION AND VENUE

6. As to Paragraph 6, Plaintiffs make a legal assertion to which no response is necessary.

7. As to Paragraph 7, Plaintiffs make a legal assertion to which no response is necessary.

8. As to Paragraph 8, Plaintiffs make a legal assertion to which no response is necessary.

9. Defendants deny Paragraph 9.

PARTIES

10. As to Paragraph 10, Defendants admit that Dakota Rural Action, Inc. is a South Dakota corporation with its principal place of business in Brookings, South Dakota. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the paragraph.

11. As to Paragraph 11, Defendants lack knowledge or information sufficient to form a belief about the truth of the statement regarding Dallas Goldtooth. Defendants deny that Plaintiff Indigenous Environmental Network ("IEN") is an organization registered in Minnesota. Defendants admit that a business named Indigenous Educational Network of Turtle Island is registered in Minnesota. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the paragraph.

12. As to Paragraph 12, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation.

13. As to Paragraph 13, Defendants lack knowledge or information sufficient to form a belief about the truth of the statement regarding Nicholas Tilsen. Defendants admit that NDN Collective, Inc. is a corporation registered in South Dakota. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the paragraph.

14. Defendants admit that Kristi Noem is the Governor of the State of South Dakota and the Complaint lists her as being sued in her official capacity.

The remainder of Paragraph 14 is a legal assertion to which no response is necessary.

15. Defendants admit that Jason Ravnsborg is the Attorney General of the State of South Dakota and the Complaint lists him as being sued in his official capacity. The remainder of Paragraph 15 is a legal assertion to which no response is necessary.

16. Defendants admit that Kevin Thom is the Sheriff of Pennington County and the Complaint lists him as being sued in his official capacity. The remainder of Paragraph 16 is a legal assertion to which no response is necessary.

STATEMENT OF FACTS

I. THE "RIOT BOOSTING" ACT

17. Defendants admit Paragraph 17.

18. Defendants admit that Paragraph 18 (a) and (b) contain portions of The Act. Defendants deny that these portions represent The Act in total or that such portions are more relevant than other non-cited portions of The Act.

19. Defendants admit Paragraph 19.

20. Defendants deny Paragraph 20.

21. Defendants deny Paragraph 21.

22. Defendants deny Paragraph 22.

23. Defendants admit that an individual need not be physically present during a riot to be covered by The Act. Defendants deny the remainder of Paragraph 23.

24. Defendants deny Paragraph 24 to the extent that it implies The Act is unconstitutional. Defendants admit that a criminal conviction is not necessary to enforce provisions of The Act.

25. As to Paragraph 25, Defendants admit the title of The Act in cludes the words "a fund to receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefore, and to declare an emergency." Defendants deny the title should be used for interpretive purposes or that the title encompasses the entirety of The Act's purpose. SDCL 2-14-9 (stating titles "constitute no part of any statute").

26. As to Paragraph 26, Defendants admit The Act, in part, creates the "riot boosting recovery fund." Defendants deny the remainder of paragraph 26.

27. As to Paragraph 27, Defendants admit The Act, in part, provides "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."

28. As to Paragraph 28, Defendants admit that Governor Noem held a press conference regarding The Act. Defendants admit that George Soros was given as an example of an individual commonly-known as one who funds protests. Defendants deny that Plaintiffs' excerpt of that press conference accurately portrays the intent of The Act. Defendants further answer that statements made by Defendants describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839,

845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

29. As to Paragraph 29, Defendants admit that Governor Noem held a press conference regarding The Act. Defendants admit that the quoted words were said during that press conference. Defendants deny that Plaintiffs' excerpt of that press conference accurately portrays intent of The Act. Defendants further answer that statements made by Defendants describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

30. As to Paragraph 30, Defendants admit that Governor Noem's outside legal counsel testified regarding The Act. Defendants admit that, as part of that testimony, legal counsel mentioned professional protestors. Defendants deny that Plaintiffs' excerpt of that testimony accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants or their agents describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839,

845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

31. As to Paragraph 31, Defendants admit that a protest occurred in North Dakota regarding the pipeline. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the first sentence. Defendants admit that during Governor Noem's outside legal counsel's testimony regarding The Act, a slide was shown which was a reproduction of a graphic prepared by the North Dakota State Government, ND Response, which stated "661 professional protestors arrested in North Dakota." Defendants deny that Plaintiffs' excerpt of that testimony accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants or their agents describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

32. As to Paragraph 32, Defendants admit that testimony before the Legislature included the quoted language. Defendants deny that Plaintiffs' excerpt of that testimony accurately portrays the intent of The Act. Defendants

further assert that statements made by Defendants or their agents describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

33. As to Paragraph 33, Defendants admit that Governor Noem held a press conference regarding The Act. Defendants admit that the quoted words were said during that press conference. Defendants deny that Plaintiffs' excerpt of that press conference accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

34. As to Paragraph 34, Defendants admit that Governor Noem issued a press release regarding The Act. Defendants admit that the quoted words are present as part of that press release. Defendants deny that Plaintiffs' excerpt of that press release accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants describing The Act, or in

support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

35. Paragraph 35 is denied. All citizens of the state, including tribes, tribal members, and environmental groups, were equally allowed to participate in the legislative process.

36. As to Paragraph 36, Defendants admits the quoted language appears in The Act. Defendants deny the remainder of Paragraph 36.

37. As to Paragraph 37, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

II. THE CRIMINAL STATUTES

38. As to Paragraph 38, Defendants admit that SDCL 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" and that SDCL 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."

39. Defendants admit Paragraph 39.

40. Defendants admit Paragraph 40.

41. Defendants deny Paragraph 41.

42. Defendants deny Paragraph 42.

43. Defendants deny Paragraph 43.

44. Defendants deny Paragraph 44.

III. THE KEYSTONE XL PIPELINE

45. As to Paragraph 45, Defendants admit that TransCanada intends to build a pipeline known as the "Keystone XL" pipeline to carry crude oil. Defendants admit that the Keystone XL route is planned to begin in Canada, passing through the provinces of Alberta and Saskatchewan, and then extend south through the states of Montana, South Dakota, and Nebraska. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of Paragraph 45.

46. As to Paragraph 46, Defendants admit that one of the planned routes shows the Keystone XL pipeline passing through portions of the following South Dakota counties: Harding, Perkins, Butte, Meade, Pennington, Haakon, Jones, Lyman, and Tripp.

47. As to Paragraph 47, Defendants admit that the cited case states, in part, that former "Secretary of State John Kerry denied TransCanada's application on November 6, 2015."

48. As to Paragraph 48, Defendants admit that Paragraph 48 provides a summary of a portion of the previously cited case and that cited case provides, in part, "The State Department issued the accompanying Presidential Permit on April 4, 2017."

49. As to Paragraph 49, Plaintiffs make legal assertions to which no response is necessary.

IV. PLANNED ACTIONS OF PLAINTIFFS

50. As to Paragraph 50, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

51. As to Paragraph 51, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

52. As to Paragraph 52, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

Dakota Rural Action

53. As to Paragraph 53, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

54. As to Paragraph 54, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

55. As to Paragraph 55, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

56. As to Paragraph 56, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The IEN Plaintiffs

57. As to Paragraph 57, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

58. As to Paragraph 58, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

59. As to Paragraph 59, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The NDN Plaintiffs

60. As to Paragraph 60, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

61. As to Paragraph 61, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

62. As to Paragraph 62, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

63. As to Paragraph 63, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

64. As to Paragraph 64, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

65. As to Paragraph 65, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The Sierra Club

66. As to Paragraph 66, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The Challenged Law's Harm to Plaintiffs

67. As to Paragraph 67, Defendants deny that any objectively reasonable fear of prosecution for protected speech would arise under the application of The Act. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of this paragraph.

68. As to Paragraph 68, Defendants deny that any objectively reasonable fear of prosecution for protected speech would arise under the application of The Act. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of this paragraph.

69. As to Paragraph 69, Defendants deny that any objectively reasonable fear of prosecution for protected speech would arise under the application of The Act.

70. Defendants deny Paragraph 70.

71. Defendants deny Paragraph 71.

V. OTHER SOUTH DAKOTA STATUTES THAT PREVENT RIOTS AND VIOLENCE

72. The first sentence of Paragraph 72 is a legal statement for which no response is necessary. To the extent a response is necessary, Defendants deny the first sentence of Paragraph 72. Defendants admit certain acts of violence are currently illegal under South Dakota law.

73. As to Paragraph 73, Defendants admit that SDCL 22-10-1 provides, "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." Defendants deny the remainder of Paragraph 73.

74. As to Paragraph 74, Defendants admit that SDCL 22-4A-1 provides, "Any 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. Criminal solicitation is a:

(1) Class 1 felony if the offense solicited is a Class A, B or C felony;

(2) Class 2 felony if the offense solicited is a Class 1 felony;

(3) Class 3 felony if the offense solicited is a Class 2 felony;

(4) Class 4 felony if the offense solicited is a Class 3 felony;

(5) Class 5 felony if the offense solicited is a Class 4 felony;

(6) Class 6 felony if the offense solicited is a Class 5 felony; or

(7) Class 1 misdemeanor if the offense solicited is a Class 6 felony."

Defendants deny the remainder of paragraph 74.

75. As to Paragraph 75, Defendants admit that SDCL 22-10-9 provides, "Any person who assembles with two or more persons for the purpose of engaging in conduct constituting riot or aggravated riot or who, being present at an assembly that either has or develops such a purpose, remains there, with intent to advance that purpose, is guilty of unlawful assembly. Unlawful assembly is a Class 1 misdemeanor." Defendants deny the remainder of Paragraph 75.

76. As to Paragraph 76, Defendants admit that SDCL 22-18-35 provides, "Any 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; is guilty of disorderly conduct. Disorderly conduct is a Class 2 misdemeanor. However, if the defendant has been convicted of, or entered a plea of guilty to, three or more violations of this section, within the preceding ten years, the defendant is guilty of a Class 1 misdemeanor for any fourth or subsequent offense." Defendants deny the remainder of Paragraph 76.

77. As to Paragraph 77, Defendants admit that SDCL 22-18-40 provides, "Unless otherwise directed by law enforcement or other emergency personnel or to seek assistance for an emergency or inoperable vehicle, no person may 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." Defendants deny the remainder of Paragraph 77.

78. As to Paragraph 78, Defendants admit that SDCL 22-10-11 provides, "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." Defendants deny the remainder of Paragraph 78.

79. As to Paragraph 79, Defendants deny The Act is unconstitutional.

CLAIMS FOR RELIEF

I. FIRST AMENDMENT – SPEECH AND EXPRESSIVE CONDUCT

80. Defendants deny Paragraph 80.

81. Defendants deny Paragraph 81.

82. As to Paragraph 82, Plaintiffs make a legal assertion to which no response is necessary. To the extent a response is required, Defendants deny Paragraph 82.

83. As to Paragraph 83, Plaintiffs make a legal assertion to which no response is necessary. To the extent a response is required, Defendants deny Paragraph 83.

84. As to Paragraph 84, Plaintiffs make a legal assertion to which no response is necessary. To the extent a response is required, Defendants deny Paragraph 84.

85. Defendants deny Paragraph 85.

86. Defendants deny Paragraph 86.

87. Defendants deny Paragraph 87.

88. Defendants deny Paragraph 88.

89. As to Paragraph 89, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation.

90. Defendants deny Paragraph 90.

II. FOURTEENTH AMENDMENT – DUE PROCESS

91. Defendants deny Paragraph 91.

92. Defendants deny Paragraph 92.

III. PRAYER FOR RELIEF

93. Paragraph 93 is the Prayer for Relief for which no response is necessary.

AFFIRMATIVE DEFENSES

1. Defendants affirmatively allege that Plaintiffs have failed to state a claim upon which relief can be granted.

2. Defendants affirmatively allege Plaintiffs lack standing to bring this action.

3. Defendants affirmatively allege the matter is not ripe for review.

4. Defendants affirmatively allege that this action against them in their official capacities is barred by the Eleventh Amendment to the United States Constitution.

5. Defendants affirmatively allege that the action against them is barred by the doctrine of sovereign immunity, and that sovereign immunity has not been waived by the State of South Dakota, its public entities or employees for suits in federal court. SDCL 3-21-7 and 3-21-10.

6. Defendants affirmatively allege that this action is barred by Article III, § 27 of the South Dakota Constitution, SDCL 21-32-17 and 21-32A-2, and by the Eleventh Amendment to the United States Constitution.

7. Defendants are duly elected officials for the State of South Dakota, acting wholly within the scope of their office and entitled to qualified immunity.

8. Defendants affirmatively allege that this action is barred against them to the extent that they were acting only in a supervisory capacity. Defendants affirmatively allege that Plaintiffs are not entitled to recover damages against them to the extent they were only acting in a supervisory capacity. The doctrine of *respondeat superior* does not apply to actions brought pursuant to the provisions of 42 USC § 1983.

9. Defendants affirmatively allege that they possess only a general duty to see the laws of the state are implemented and that such a generalized duty does not subject Defendants to liability under 42 U.S.C. § 1983.

10. Defendants affirmatively allege that they possess only a general duty to see the laws of the state are implemented. Without a specific connection between a named defendant and the challenged statute, the challenge is in fact against the State and 11th Amendment immunity applies. Additionally, under 11th Amendment immunity, the State itself is not subject to injunctive relief.

11. Defendants affirmatively allege that the Court should abstain from hearing this matter under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Younger v. Harris*, 401 U.S. 37 (1971).

WHEREFORE, Defendants pray that Plaintiffs' Complaint be dismissed on the merits, that Defendants recover reasonable attorney fees, costs and

disbursements, and for such other and further relief that the Court deems proper and just.

JURY TRIAL DEMAND

Defendants demand trial by Jury.

Dated this 16th day of April, 2019

/s/ *Richard M. Williams*
Deputy Attorney General
Mickelson Criminal Justice Center
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
rich.williams@state.sd.us

Attorney for Governor Noem and Attorney General Ravnsborg

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

DAKOTA RURAL ACTION; DALLAS GOLDTOOTH; INDIGENOUS ENVIRONMENTAL NETWORK; NDN COLLECTIVE; SIERRA CLUB; and NICHOLAS TILSEN;	*	CIV 19-5026
Plaintiffs,	*	
vs.	*	ORDER
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.	*	

Plaintiffs have brought suit challenging the constitutionality under the Constitution of the United States of a riot boosting statute passed in 2019 by the South Dakota Legislature, Senate Bill 189, and two felony riot statutes, SDCL § 22-10-6 and § 22-10-6.1. Plaintiffs request injunctive and declaratory relief.

BACKGROUND

The riot boosting statute was introduced and passed in the final week of the 2019 legislative session with an emergency clause to make it immediately effective. The publicly made claims by the Governor and others were that the legislation was to address costs of various persons and entities from anticipated rioting as a result of the building of the Keystone XL pipeline through South Dakota. The pipeline is to carry petroleum product from Canada though Montana, North Dakota, and South Dakota to connect with another pipeline in Nebraska which will take product to shipment though the Gulf of Mexico. Extensive protests did occur during Keystone pipeline construction in

North Dakota. The project was stayed by a federal court order in Montana, *Indigenous Environmental Network v. U.S. Dept. of State*, 369 F.Supp.3d 1045 (D. Mont. 2018); *see also* 317 F.Supp.3d 1118 (2018), 347 F.Supp.3d 561 (2018) (same case). The appeal from that decision was dismissed as moot on June 6, 2019 by the Ninth Circuit Court of Appeals as President Trump had issued a new permit for the construction on March 29, 2019. The new permit is now the subject of litigation requesting an enjoining of the project. A motion to consolidate the two cases is pending in *Indigenous Environmental Network v. Trump, et al.*, Civ 4:19-cv-000028 (D.Mont. 2019).

At the hearing on June 12, 2019, the parties represented that construction is not now under way in South Dakota as the owner has reported that it is too late in the construction season to commence work in South Dakota this year. Pre-construction activities are, however, apparently in progress. Sioux Falls Argus Leader, July 1, 2019, page 2A. Plaintiffs and others claim by affidavit that they do in various ways intend to protest and otherwise provide and seek and provide support, financial and otherwise, for resistance, including protests, to the building of the pipeline in South Dakota. As a result of the threat presented by the riot boosting and criminal riot statutes, the Plaintiffs and others claim these laws have a chilling effect on their free speech and association rights and they are prevented from soliciting support or contributing or otherwise supporting peaceful protest of the construction of the project as they are afraid of criminal prosecution as well as substantial and unwarranted damage awards against them.

STANDING TO SUE

Standing issues were not raised by the parties except as to the claims against Kevin Thom in his official capacity as Sheriff of Pennington County. By separate Order, that claim is dismissed for lack of standing. The Court will address that issue as to the remaining parties as it can be raised at any time.

Governor Noem and Attorney General Ravnsborg do not contest Plaintiffs' standing in this case. The Court will address, however, why standing is appropriate against those defendants because Article III standing to bring a First Amendment free speech challenge is "an inescapable threshold

question," *Advantage Media, L.L.C. v. Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006), and it "requires a showing that each defendant caused [the plaintiff's] injury and that an order of the court against each defendant could redress the injury." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017); *see Lujan v. Defenders of Wildlife*, 504 U.S. 556, 560 (1992) (a plaintiff must establish "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.").

In the Order granting Defendant Kevin Thom's Motion to Dismiss, the Court determined that Plaintiffs have alleged an injury in fact that meets the first requirement of standing. For the following reasons, Plaintiffs also meet the causation and redressability requirements as to Governor Noem and Attorney General Ravnsborg.

"[W]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Calzone*, 866 F.3d at 869 (citing *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957–58 (8th Cir. 2015)). Whether a defendant possesses enforcement authority sufficient for standing purposes turns on whether he or she has "some connection with the enforcement of [the] state law." *Dig. Recognition Network*, 803 F.3d at 957 (citation and quotation marks omitted).

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the plaintiffs challenged a state constitutional amendment stating that only marriage "between a man and a woman" was valid. The Eighth Circuit concluded that the Nebraska Attorney General's and Governor's broad power to enforce Nebraska's constitution and statutes was a sufficient basis to satisfy causation and redressability elements of standing. *Id.* at 864. The Eighth Circuit concluded that injunctive relief restraining the Attorney General and the Governor from enforcing the statute would redress at least part of the Plaintiffs' alleged injury. *See id.* Thus the "case or controversy requirement of Article III" was satisfied. *Id.*

Similarly, the Court concludes in this case that the general enforcement powers of the South Dakota Attorney General and Governor[1] meet the causation and redressability requirements, and Plaintiffs have standing to assert their claims for injunctive relief against Governor Noem and Attorney General Ravnsborg.

DISCUSSION

The 2019 riot boosting statutes are additions to Chapter 20-9 of South Dakota Codified Laws. Chapter 20-9 is entitled "Liability for Torts." Senate Bill 189 is now codified as SDCL § 20-9-53 through SDCL § 20-9-57. These civil law additions borrow heavily from the felony riot statutes in Chapter 22-10, entitled "Riot and Unlawful Assembly."

For purposes of this analysis, protected speech can be speech and other expressive activity including money or other material contributions as well as statements of support by speech or written word including ads, e-mail, texts and personal participation in protest. A person's support of a cause can be protected speech and also protected by the right of assembly in the First Amendment.

There are criminal statutes in South Dakota defining and punishing anyone convicted of rioting. South Dakota law specifies four riot felonies.

SDCL § 22-10-1 defines riot as:

> 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.

SDCL § 22-10-5 states:

> Any person who carries a dangerous weapon while participating in a riot is guilty of aggravated riot. Aggravated riot is a Class 3 felony.

SDCL § 22-10-6 states:

> 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.

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[1] *See* S.D. Const. art. 4, § 3; SDCL § 1-11-1(2).

SDCL § 22-10-6.1 states:

> 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.

Standard of Review

Defendants urge an intermediate scrutiny standard of review, relying upon *United States v. Daley*, 378 F.Supp.3d 539, 553 (W.D. Va. 2019), appeal docketed, *United States v. Gillen*, No. 19-4553 (4th Cir. Jul. 30, 2019). Plaintiffs claim the standard of review should be strict scrutiny. This Court is guided in part by *Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017) (*en banc*) which applied an intermediate standard of review to Nebraska's Funeral Picketing Law. That law provided for criminal misdemeanor punishment. *Phelps-Roper* involved a determination of whether the Picketing Law dealt with true threats, which are not constitutionally protected.

In determining the standard of review the *Phelps-Roper* court stated:

> The constitutionality of a statute regulating the exercise of protected speech in a public forum depends in large part on whether it is content based or content neutral. A statute is content neutral so long as it is justified without reference to the content of regulated speech. Content based regulations, such as those which impose special prohibitions on those speakers who express views on disfavored subjects, are presumptively invalid, are subject to the most exacting scrutiny, and must be narrowly tailored to serve a compelling government interest. In contrast, content neutral time, place, or manner regulations must be narrowly tailored to serve a significant governmental interest and allow for ample alternative channels for communication.

Phelps-Roper, 867 F.3d at 892.

Both the criminal statutes at issue are on their face content-neutral. Those statutes do not impose special prohibitions on speakers or actors on disfavored subjects, such as peacefully resisting a pipeline.

The inquiry does not in some instances stop with the determination that the statutes are content-neutral on their face. The Supreme Court recognized in *Reed v. Town of Gilbert, Ariz.*, –

U.S. –, 135 S. Ct. 2218, 2227 (2015):

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

The felony statutes were enacted years ago and without the same intent as the 2019 riot boosting statutes and are subject to intermediate rather than strict scrutiny. The felony laws do burden speech and other expressive conduct. A statute survives intermediate scrutiny:

> if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. Dinwiddie, 76 F.3d 913, 923-24 (8th Cir. 1996) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

The state has a substantial government interest in criminalizing participation in a riot with acts of force or violence. However, SDCL § 22-10-6 and SDCL § 22-10-6.1 go far beyond that appropriate interest and, as will subsequently be discussed with the same language in the riot boosting statutes, do impinge upon protected speech and other expressive activity as well as the right of association.

The next inquiry is "if the governmental interest is unrelated to the suppression of free expression." *Dinwiddie,* 76 F.3d at 923. The governmental interest in criminalizing acts of force or violence in a riot is not related to the suppression of free expression. However, the challenged criminal statutes taken in their entirety meet but, as later discussed, most portions exceed that goal and do then relate to the suppression of free expression.

Finally is "the incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that interest[?]" *Dinwiddie*, 76 F.3d at 923-24. Taking the challenged felony statutes each as a whole, SDCL § 22-10-6 and SDCL § 22-10-6.1 go beyond what is essential to be able to punish by felony conviction those who in a riot commit acts of force or violence.

As a result of this inquiry, the two criminal statutes taken each as a whole do not pass intermediate scrutiny. Even if these statutes passed intermediate scrutiny, they fail to meet the *Brandenburg v. Ohio,* 395 U.S. 444 (1969), requirements.

The felony statutes, SDCL § 22-10-6 and SDCL § 22-10-6.1, taken as a whole regulate and criminalize much beyond the use of force or violence and do in part restrict free speech. As a result, neither of the two felony statutes are narrowly tailored to further the government's interests. The possibility of severability to save a portion of both of those statutes will be discussed later.

By comparison, the riot boosting statutes are aimed at pipeline protests. SDCL § 20-9-57 provides in part: "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.... All civil recoveries shall be deposited in the fund."

The reason for the introduction of the riot boosting legislation was also clearly stated by the Defendant Governor:

> This package creates a legal avenue, if necessary, to go after out-of-state money funding riots that go beyond expressing a viewpoint but instead aim to slow down the pipeline build. It allows us to follow the money for riots and cut it off at the source.

Noem Introduces Pipeline Legislative Package, South Dakota State News, https://news.sd.gov/newsitem.aspx?id=24203 (last visited Sept. 17, 2019).

The lobbyist for the Governor's Office before the Joint Committee on Appropriations testified that what was driving Senate Bills 189 and 190 was the experience of North Dakota with outside professional protesters. *See* "Hearing on SB 189 and 190" found at https://sdlegislature.gov/Legislative Session/Bills/Bill.aspx?Bill=SB189&Session=2019. The 2019 riot boosting statutes are subject to strict scrutiny.

BRANDENBURG, OVERBREADTH AND VAGUENESS

The next consideration is the claims that the criminal statutes and the civil riot boosting statutes are vague and overbroad. A statute can be vague or overbroad or both, or neither. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 948-49 (3d ed. 2006). "A statute is unconstitutionally overbroad if it reaches a substantial number of impermissible applications." *Dinwiddie*, 76 F.3d at 924, (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)).

South Dakota Codified Law § 22-10-6 has been in existence at least since the recodification in 1939, so it predates the overbreadth doctrine.[2] There is no grandfather exemption to the overbreadth doctrine and the statute would have been enacted without consideration of the overbreadth doctrine. The overbreadth doctrine's origin is traced to *Thornhill v. Alabama*, 310 U.S. 88 (1940). In 1976, SDCL § 22-10-6.1 used the language of SDCL § 22-10-6 and simply dropped the qualifier of "participates in any riot."

The verbs directs, advises, encourages, or solicits are common to all of the statutes.

To "direct" here is used as a verb even though it can be an adjective or an adverb. The Oxford English Dictionary, now online in Lexico, Oxford English Online Dictionary. 2019. https://www.lexico.com/en (16 Sep. 2019) has the following primary definitions:

direct: "Control the operations of; manage or govern."

advise: "Offer suggestions about the best course of action to someone."

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[2] The riot statutes have been part of South Dakota's penal code since 1877. *See Bad Heart Bull*, 257 N.W.2d 715, at 720-21 (S.D. 1977).

encourage: "Give support, confidence, or hope to (someone)."

solicit: "[with object] Ask for or try to obtain (something) from someone."

To "direct" involves control while each of the other terms do not involve control. To solicit is to ask for something and to advise, encourage and solicit are all passive in that they do not involve control. None of those three terms involve the direction or control of an activity that results in the use of force or violence. Even though each of those three terms do not involve control, they encompass much, to give hope, or suggestions or to ask for something from someone. Each of those three terms involve expressive activity of many kinds, expressive activity that is protected speech.

Even if the encouragement to protesters is in forceful language as was demonstrated by Charles Evers' speech summarized in part in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 900 n.28 (1982) (Evers told the assembled black people that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. This was directed at all 8,000 black residents of Claiborne County.), that is protected speech. None of these three terms encompass fighting words – or true threats – words that provoke immediate violence and are not protected by the First Amendment. *See id.* at 927 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). So, "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware,* 458 U.S. at 927; *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973). The many words or expressive activities that arise within these three terms, to advise, encourage or solicit, might in some instances be offensive to some or to many people, but they are protected by the First Amendment and cannot be the subject of felony prosecution or of tort liability and damages. Felony or tort liability for one who advises, encourages or solicits is overbroad. Felony or tort liability for one who directs other persons participating in the riot to acts of force or violence is not overbroad.

"To survive a vagueness challenge, a statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited' and 'provide explicit standards for those who apply [the statute].' " *Dinwiddie*, 76 F.3d at 924 (citing *Video Software Dealers Ass'n v. Webster*,

968 F.2d 684, 689 (8th Cir. 1992)) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

The giving of direction to persons participating in a riot to do acts of force or violence is a common thread throughout both the felony statutes and then borrowed into the riot boosting statutes. "To direct" is not vague. The "to direct" provision is not essentially and inseparably connected in substance to the other provisions of advising, encouraging or soliciting. Those three later provisions each stand alone as does direction, they are not modifiers of each other. The prohibition against directing other persons participating in a riot to use force or violence can stand on its own without advising, encouraging or soliciting. As a result, severability must be considered.

> Under South Dakota law, a court must uphold the remaining sections of a statute if they can stand by themselves and if it appears that the legislature would have intended the remainder to take effect without the invalidated section. This rule applies whether or not the statute contains a severability clause. The form of the statute is not determinative; the issue turns on whether its provisions are essentially and inseparably connected in substance. DM&E bears the burden of showing that the legislature would not have enacted the statute without the invalid portions.

Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota, 362 F.3d 512, 518-19 (8th Cir. 2004) (citations and quotations omitted).

The riot boosting bill contained no severability clause. That is not fatal as the Defendants have met their burden of showing that the legislature would have enacted the statute without the invalid portions.

The legislature was strongly motivated to pass the riot boosting legislation. The bill was introduced in the last week of the session, long after the deadline for introducing legislation. The bill advanced to votes with only one hearing and the bill contained an emergency clause to make it immediately effective. There is no doubt that the legislature would have passed the riot boosting legislation with only the divisible admonition against directing even without the offending admonitions against advising, encouraging or soliciting.

Given the divisibility of the criminal and civil laws in question, the court finds that each admonition against directing another person participating in a riot to perform acts of force or violence is not vague nor is it overbroad.

By comparison to direction, the court finds the separate admonitions, whether criminal or civil, against advising, encouraging or soliciting to be vague in part because of their very breadth.

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

Plaintiffs claim the riot statutes and the riot boosting statutes are unconstitutional under the Constitution of the United States. The *Bad Heart Bull* decision considered the South Dakota constitution but not the constitutionality of riot statutes under the United States Constitution. *Brandenburg v. Ohio* was not discussed. The parties agree that *Brandenburg* is applicable to this litigation. *Brandenburg* has three criteria a state riot statute must contain for federal constitutional review as summarized by the Sixth Circuit Court of Appeals in an *en banc* decision in 2015:

> The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.

Bible Believers v. Wayne County, Mich., 805 F.3d 228, 246 (6th Cir. 2015) (citing *Brandenburg*, 395 U.S. at 477).

The scope of protected speech from *Brandenburg* was discussed and applied in *N.A.A.C.P. v. Claiborne Hardware Co.* In that case white merchants who had been damaged as a result of civil rights boycotts sued both the participants in the boycott and civil rights organizations that supported the boycotts. The state court granted an injunction and awarded damages. The Supreme Court held that boycott activity which was not itself violent was constitutionally protected and that persons who participated in the boycott who were not shown to have participated in the violent activity or to have ratified it could not be held liable. The Court further held that in the absence of showing that violent activity followed the speeches, the organizer who made impassioned speeches which contained references to violence against those who did not participate could not be held liable, and persons who could be held liable were responsible only for the damages resulting from the violent activity, not for all damages resulting from the boycott. There was no basis for imposing liability on the civil rights organization that supported the boycott of the businesses.

The first of the three bases for tort liability under the South Dakota riot boosting act, SDCL § 20-9-54(1), provides for liability 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;

This provision based upon SDCL § 22-10-6, a class 2 felony, speaks as a first requirement that the person "Participates in any riot. . . ." That provision is too broad by having participated in any riot as a predicate for liability. The provision of "any riot" is not vague but it does suffer from overbreadth. The provisions of "advises, encourages, or solicits" are vague and overbroad as previously discussed.

The Defendants at the argument stated that this provision only applied to participation in the same one riot. That would be correct if the word "any" was stricken and replaced by "the." That, however is not the fact, and the "participating in any riot" language is of no assistance in meeting the requirements of *Brandenburg*.

In addition, "advises," "encourages," or "solicits" do not meet the *Brandenburg* imminency

requirement. In *United States v. Sineneng-Smith*, 910 F.3d 461, 480 (9th Cir. 2018), the Court did not find words like "encourage" or "induce" to meet the imminence requirement. The finding was that a statute which made it a crime to "encourage" or "induce" an alien to reside in the country did not require that an alien imminently violate immigration law.

There is however another consideration, that is that "directing . . . any other person participating in the riot to acts of force or violence" is different than advising, encouraging or soliciting. Directing a participant, even if from afar, does meet the *Brandenburg* imminency requirement. The predicate for liability of having participated in any riot is, however, not necessary for liability in the case of one who directs a participant in a riot to acts of force or violence.

The second of the three bases for liability under the riot boosting act, SDCL § 20-9-53(2) provides if the person:

> (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;

The predicate of having participated in any riot is gone from SDCL § 20-9-53(2), but the remaining comments as to SDCL § 20-9-54(1) apply. As a result, the only portion of SDCL § 20-9-53(2) that meets the *Brandenburg* imminency requirement is liability to a person who "directs . . . other persons participating in the riot to acts of force or violence." Here we must look at the facts of *Brandenburg* as well as its holding. *Brandenburg* precluded the punishing of advocacy of illegal action as compared to the incitement to imminent lawless action, with only the former being protected speech. In other words, sections (1) and (2) of SDCL § 20-9-54 do not meet the imminency requirement of *Brandenburg*. Without the imminency requirement, Section (2) is unconstitutional under the United States Constitution. Mere advocacy, even if distasteful, is protected speech as distinguished from incitement to immediate lawless action. In *Brandenburg* a large wooden cross was burned at a Ku Klux Klan gathering where some had weapons but the speaker did not. The speaker said, in part:

> We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might

> have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are divided into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi.

Brandenburg, 395 U.S. at 446. The speech was held to be protected and Ohio's Criminal Syndicalism Act was held to be unconstitutional under the United States Constitution. The Ohio Supreme Court held the Ohio Act to be constitutional. *Id.* at 444.

The third of the three bases for liability under the riot boosting act, SDCL § 20-9-54(3) provides liability if the person:

> (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.

The first portion of (3) provides separately for liability if the person "Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence." The court must consider this portion of (3) separately regarding its constitutionality as it is divisible from the rest of (3). *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d at 518; *City of Sioux Falls v. Sioux Falls Firefighters, Local 814*, 234 N.W. 2d 35, 38 (S.D. 1975). That separate first portion of (3) is not protected speech and could properly subject the person using force or violence to tort liability under this riot boosting statute for the damages he proximately caused. The same liability could attach under existing tort law, even though the measure of potential damages is significantly enhanced under the riot boosting statute, SDCL § 20-9-56. This first portion of SDCL § 20-9-54(3) is not unconstitutional under the Constitution of the United States.

The second portion of (3) provides for liability if a person "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." This separate provision in SDCL § 20-9-54(3) invites a different analysis, one not suggested by any of the parties. This analysis can be further discussed by the

parties in the proceedings requesting a permanent injunction. The analysis is a "true threats" analysis. "True threats" do not have constitutional protection. The Eighth Circuit has a multi-factor test as to whether speech constitutes a true threat. The non-exhaustive factors set forth by Judge Richard Arnold in *United States v. Dinwiddie*, 76 F.3d 925, are:

(1) The reaction of the recipient of the threat and of other listeners.
(2) Whether the threat was conditional.
(3) Whether the threat was communicated directly to its victim.
(4) Whether the maker of the threat had made similar statements to the victim in the past.
(5) Whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

A further reflection will illustrate the complexities of free speech law. The second portion of SDCL § 20-9-54(3) establishes a cause of action for a person who "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." A "true threat" is not protected speech under the Constitution. A threat that meets the requirements of the second portion of SDCL § 20-9-54(3) might or might not be protected speech. Whether or not the prohibited threat in SDCL § 20-9-54(3) is not a true threat and thus entitled to constitutional protection will require the application of the *Dinwiddie* factors. How can SDCL § 20-9-54(3) with the *Dinwiddie* factors added possibly meet the test of vagueness? Adding the *Dinwiddie* factors to the second portion of SDCL § 20-9-54(c) to preserve its constitutionality is a stretch too far. A statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited' and 'provide explicit standards for those who apply [the statute].' " *Dinwiddie*, 76 F.3d at 924. Very few lawyers know of the *Dinwiddie* test, let alone the remainder of the population. The second portion of SDCL § 20-9-54(3) with the *Dinwiddie* test added is void because it is vague. Few would know what is prohibited. The *Dinwiddie* test is used after an incident to determine if something that was said was a true threat or speech that has constitutional protection. The *Dinwiddie* factors were applied under existing tort law in *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002) (*en banc*) (eighth grade student allegedly threatened a schoolmate and was expelled for what was determined on appeal to be a true threat). The second portion of SDCL § 20-9-54(3) without the *Dinwiddie* factors added

is unconstitutional as being too broad because it would encompass many threats that are protected speech.

At the hearing in the present case the Court suggested one scenario: a rancher and a couple of his ranch hands see that a Keystone Pipeline truck is on some of the rancher's rangeland without permission. The three of them confront the truck driver and they know they are going to give him some clear instruction to get off the ranch, but not fighting words to get off the ranch, and they are not going to do anything physical even though they could. Nonetheless, this scenario could subject the rancher who did the talking to liability under this second portion of SDCL § 20-9-54(3). The cowhands could also be jointly and severably liable under the second portion of that statute. More facts would have to be known to apply the *Dinwiddie* multi-factor test to determine whether their specific instructions to the truck driver were true threats or constitutionally protected speech. Even if additional facts showed their statements to not be true threats but instead constitutionally protected speech, these actors would still be liable under the latter section of SDCL § 20-9-54(3) as it is written without *Dinwiddie* being applied. That portion of the statute cannot attach liability to constitutionally protected speech and in that as-applied example, that portion of SDCL § 20-9-54(3) is unconstitutional. And how would the rancher and his ranch hands reasonably anticipate their liability? "To survive a vagueness challenge, a statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply the statute." *Dinwiddie*, 76 F.3d at 924. The language in the second portion of SDCL § 20-9-54(3) does not meet the vagueness test and is too broad in that it attaches liability in all non-threatening instances to protected speech.

Another scenario comes to mind. Imagine that if these riot boosting statutes were applied to the protests that took place in Birmingham, Alabama, what might be the result? Dr. Martin Luther King, Jr. was the President of the Southern Christian Leadership Conference with headquarters in Atlanta, Georgia. Dr. King personally took part in peaceful demonstrations in Birmingham, Alabama, against segregation. While jailed, Dr. King wrote his public "Letter from Birmingham Jail." Dr. King wrote regarding the Birmingham demonstrations, "You express a great deal of

anxiety over our willingness to break laws." And Dr. King goes on to explain in agreeing with Aristotle that "an unjust law is no law at all," and then on to say "to deny citizens the First Amendment privilege of peaceful assembly and peaceful protest, then it [permitting] becomes unjust." Dr. King and the Southern Christian Leadership Conference could have been liable under an identical riot boosting law for the many types of damages which could be claimed under SDCL §§ 20-9-54 and 20-9-56 for soliciting, advising or encouraging another person to break the law. SDCL § 20-9-56 also creates a separate civil cause of action for soliciting or compensating any other person to commit an unlawful act or to be arrested. Dr. King and the Southern Christian Leadership Conference could be liable for treble damages under that separate cause of action. The separate cause of action in SDCL § 20-9-56 is not vague but it is unconstitutional in that it does not meet the *Brandenburg* requirements and infringes on protected speech and association.

Solicitation in SDCL § 20-9-56 refers to a narrower category of speech than the solicitation used in SDCL § 20-9-54. This prohibition is still overbroad as the illustration with Dr. King demonstrates. The government can prohibit the solicitation of unlawful acts, but the Supreme Court also held that the First and Fourteenth Amendments protected the NAACP's solicitation of clients for challenge litigation. *NAACP v. Button*, 371 U.S. 415, 429 (1963). Soliciting another to be arrested is also too broad. To be arrested is not a crime. An arrest is only an accusation and not even evidence of guilt. *Davis v. United States*, 229 F.2d 181, 185 (8th Cir. 1956).

Compensating another to be arrested is also overbroad even though not vague. In *NAACP v. Claiborne Hardware Co.*, the Court rejected an organization's liability for providing legal counsel and bond to protesters during a boycott. 458 U.S. at 931 n.78. SDCL § 20-9-56 provides too broadly for liability for treble damages for expressive activity that is protected activity according to *Claiborne*. As was argued, our First Amendment "freedoms are delicate and vulnerable, as well as extremely precious." *Button*, 371 U.S. at 433. Because they "need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* The overbreadth of SDCL § 20-9-56 causes this separate cause of action within SDCL § 20-9-56 to be invalid. The remainder of SDCL § 20-9-56 is a matter of state policy. The measures of damages are generous but those

determinations are for the state to decide.

Finally, one of the three *Brandenburg* requirements is that of intent. Neither SDCL § 22-10-6 nor 22-10-6.1 nor the causes of action in SDCL § 20-9-54(1), (2), and the second part of (3), nor the cause of action in SDCL § 20-9-56 have an intent element. The first portion of SDCL § 20-9-54(3) need not have an intent element because that person is personally using force or violence in a riot, and that is not protected speech or assembly.

In *State v. Bad Heart Bull*, the South Dakota Supreme Court inferred criminal intent to Ms. Bad Heart Bull. 257 N.W.2d at 719. She was convicted of the aggravated crime of riot where arson is committed. In discussing the constitutionality of riot statutes, the South Dakota Supreme Court quoted SDCL § 22-10-3 which provides:

> Participant in riot as guilty of felony committed in course of riot. If any murder, maiming, robbery, rape, or arson was committed in the course of a riot, every person guilty of participating in such riot is punishable in the same manner as a principal in such crime.

The Supreme Court went on to state:

> When arson, or any other felony recognized by our statute, is committed in the course of a riot, each rioter may be found guilty of the aggravated crime as a principal. Consequently, in the present case the state was not obligated to show that every rioter committed, or intended to commit, arson.

257 N.W.2d at 719.

SDCL § 22-10-3 was repealed in 1976.

Bad Heart Bull was followed in *State v. Kane*, 266 N.W.2d 552 (S.D. 1978), but that was with regard to 1974 events and to *Bad Heart Bull* overbreadth determinations on SDCL § 22-10-1 and SDCL § 22-10-5 as applied to SDCL § 22-10-4 (repealed in 1976).

Other related statutes have intent elements, such as intentional damage to property, which can be either a misdemeanor or a felony, SDCL § 22-10-1, as do the arson felonies, SDCL

§ 22-33-9.1, SDCL § 22-33-9.2, and SDCL § 22-33-9.3.

The Court also notes that there is no South Dakota Pattern Jury Instruction for the various riot felonies. However, the South Dakota Pattern Jury Instruction for "Disorderly Conduct – Elements" 3-23-31, has an intent element which requires that "[t]he defendant intentionally caused..." as does the misdemeanor disorderly conduct statute: "[a]ny person who intentionally causes serious public inconvenience." SDCL § 22-18-35.

This Court concludes that the South Dakota Supreme Court would not read an intent element into any of the statutes in question.

Another of the three requirements of *Brandenburg* is an immediacy requirement. There is no immediacy requirement in any of those statutes with one exception in common with all of the statutes. The exception is where the statutes attach criminal or civil liability to a person who "directs . . . any other person participating in the riot to acts of force or violence;" in each such instance, the requirement of immediacy is met.

With the exceptions noted, all of the statutes discussed fail to meet the *Brandenburg* test and are unconstitutional under the First Amendment of the United States Constitution.

MOTION FOR CERTIFICATION

Defendants urge that the Court certify a question to the South Dakota Supreme Court pursuant to SDCL Chapter 15-24A. The request to certify is denied for two reasons.

First, neither the question urged nor any other question would meet the requirement of SDCL § 15-24A-1 that the answer to the question certified would "be determinative of the cause pending before the certifying court."

Next, as the Eighth Circuit Court of Appeals said in *Planned Parenthood, Sioux Falls Clinic*

v. Miller, 63 F.3d 1452, 1465 (8th Cir. 1995):

> We conclude that the South Dakota Supreme Court would not read a scienter element into the plain language of this statute. Since this statute is unambiguous and not easily susceptible to a limiting construction, we find no reason to certify this issue.

The same is true in the present case. The statutes are clear, there is no scienter element, and a limiting construction would not be of assistance.

INJUNCTION CONSIDERATIONS

In determining whether to grant a preliminary injunction a court considers (1) the probability of the movant's success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of the preliminary injunction is in the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*). The Eighth Circuit has placed a heightened standard for enjoining state statutes. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008) (*en banc*) (reaffirming "that a party seeking a preliminary injunction of the implementation of a state statute must demonstrate more than just a 'fair chance' that it will succeed on the merits. We characterize this more rigorous standard, drawn from the traditional test's requirement for showing a likelihood of success on the merits, as requiring a showing that the movant 'is likely to prevail on the merits.'"). The Plaintiff bears the burden of proof concerning the four factors. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The court balances the four factors to determine whether a preliminary injunction is warranted. *Dataphase*, 640 F.2d at 113; *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986). "A district court has broad discretion when ruling on preliminary injunction requests[.]" *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 782 (8th Cir. 2004) (citing *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998)).

Likelihood of Success on the Merits

As is shown above, the Plaintiffs are likely to prevail on most of their challenges to the riot boosting act with the possible exception for direction of another person participating in a riot to use

force or violence. Plaintiffs are likely to prevail on their other challenges to two of the felony riot statutes, SDCL § 20-10-6 and SDCL § 20-10-6.1, and the riot boosting laws, SDCL § 20-9-53 through SDCL § 20-9-57.

Irreparable Harm

The threat of irreparable harm to the movants is clear and substantial. For the protests, planning and seeking public support, must take place now, before and in anticipation of the next construction season. Also, fund-raising must be done now to further planning and preparation for the protests. If those things are not done now, resources are not available in advance of the next construction season. Once the construction starts, the protests must at the latest be ready. The protesters desire to be active in advance of the construction season as opposed to waiting for construction to happen. If public opinion is to be swayed, it should be done before further construction takes place. Those in favor of the pipeline should also have opportunity to respond rather than having all confrontation taking place during actual construction.

Balance of Harms

The state of balance between the harm and the injury that granting the injunction will inflict on the other parties litigant weighs in favor of the Plaintiffs. Only state officials, the Governor and the Attorney General are the remaining Defendants, with the Sheriff of Pennington County having been dismissed from this lawsuit. If the riot boosting act enforcement is enjoined with the exceptions noted, the Legislature meets next January and it could pass legislation to meet federal constitutional requirements if it wishes to supplement what remains of the riot boosting statutes. The Plaintiffs and others are currently precluded by the chilling effect of the riot boosting legislation from protesting and supporting peaceful protest against the Keystone Pipeline being built through South Dakota. If enforcement of the current riot boosting statute is enjoined, there has been no showing of any activity that would have been the subject of claims under the riot boosting statute. Further, the riot boosting law was passed with an emergency clause so it has been in effect since March of 2019. The Court is unaware of any claims being made under the riot boosting statutes. The statement of the Defendant Governor at the introduction of the legislation was in part:

> This package creates a legal avenue, if necessary, to go after out-of-state money funding riots that go beyond expressing a viewpoint but instead aim to slowdown the pipeline build. It allows us to follow the money for riots and cut it off at the source.[3]

Allegedly, significant costs were incurred by North Dakota counties where the Keystone Pipeline protests occurred. Whether that will also be the case in South Dakota remains to be seen. The harm to the Defendants for granting the injunction is slight. The injury to movants in not granting the preliminary injunction is substantial.

Public Interest

In whose favor do the public policy considerations weigh? Is one goal to keep outsiders out? If so, that is not a laudable goal as we are a nation of 50 states with each citizen in any state having the same rights of free speech and assembly in every state. However, no one has the right to start or participate in a riot. Another goal was to assist the nine counties through which the pipeline will pass in South Dakota. The only affected county with a significant population is Pennington County with about five miles of pipeline through it. Some of the other counties have a lot more pipeline going through with a small county tax base. For example, Jones County has an estimated population of between 740 and 928 with a per capita income of $15,896. However, it is not known what expenses will be incurred by each county that are proximately caused by protestors. Concern for the possible effect on taxpayers of those counties is a true concern if it comes to pass. That concern is speculative while the impact upon the Plaintiffs is not speculative as they are being precluded from presently desired free speech activity. The damage provisions are very broad and also encompass other persons and entities other than counties. For example, given the wording of the riot boosting statutes, Keystone Pipeline could recover its attorney fees as well as other internal expenses from pursuing a riot boosting action, with the damages being trebled and with punitive damages also allowed. These extraordinarily broad tort damages which could also include Keystone personnel time, do not meet the public policy concerns that are applicable to the taxpayers of the involved counties. By comparison, the freedom of speech and association are constitutional rights that are

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[3] *Noem Introduces Pipeline Legislative Package*, South Dakota State News, https://news.sd.gov/newsitem.aspx?id=24203 (last visited Sept. 17, 2019).

central to all citizens of our country. Those rights will be thwarted if the unconstitutional portions of the riot boosting legislation remain in effect. The public policy concerns weigh in favor of the Plaintiffs.

After weighing all four *Dataphase* factors the Court finds that a preliminary injunction is warranted.

On the basis of the above discussion,

IT IS HEREBY ORDERED:

I. That the Motion for Preliminary Injunction, Doc. 8, is granted as follows:

1. The application and enforcement of SDCL § 20-9-54 is temporarily enjoined except for the portion of the statute which provides:

> 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:
> (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence.

2. SDCL § 20-9-56 remains in effect except for the sentence which provides: "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." The just quoted sentence is temporarily enjoined.

3. SDCL § 20-9-55 remains in effect.

4. SDCL § 20-9-57 remains in effect.

5. The application and enforcement of SDCL § 22-10-6 is temporarily enjoined.

6. The application and enforcement of SDCL § 22-10-6.1 is temporarily enjoined.

II. That the Motion for Judgment on the Pleadings or, in the Alternative, for Certification to the South Dakota Supreme Court, Doc. 27, of Defendants Kristi Noem and Jason Ravnsborg is denied.

Dated this 18th day of September, 2019.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN CLERK

UNITED STATES DISTRICT COURT
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-5026-LLP **STIPULATED SETTLEMENT AGREEMENT**

1. Plaintiffs filed a Complaint in the United States District Court for the District of South Dakota, Western Division. [Doc. 1].

2. On April 9, 2019, Plaintiffs filed a Motion for Preliminary Injunction. [Doc. 8].

3. Following briefing by the parties and a hearing on June 12, 2019, the District Court entered a Memorandum Opinion and Order on September 18, 2019, granting Defendant Kevin Thom's Motion to Dismiss. [Doc. 49].

4. Also on September 18, 2019, the District Court entered an Order granting Plaintiffs' motion for a preliminary injunction against the remaining Defendants, Kristi Noem, in her official capacity as Governor of the State of South Dakota, and Jason Ravnsborg, in his official capacity as Attorney General (the "State Defendants"). [Doc. 50].

5. In the District Court's Order [Doc. 50, pg. 23], the Court granted Plaintiffs' Motion for Preliminary Injunction [Doc. 8] as follows:

    a. The application and enforcement of SDCL § 20-9-54 is temporarily enjoined except for the portion of the statute which provides:

EXHIBIT 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:
>
> (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence.

b. SDCL § 20-9-56 remains in effect except for the sentence which provides: "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." The just quoted sentence is temporarily enjoined.

c. SDCL § 20-9-55 remains in effect.

d. SDCL § 20-9-57 remains in effect.

e. The application and enforcement of SDCL § 22-10-6 is temporarily enjoined.

f. The application and enforcement of SDCL § 22-10-6.1 is temporarily enjoined.

6. Subsequent to the issuance of the Order [Doc. 50], counsel for Plaintiffs and State Defendants have discussed resolution of the matter, and as a result, by and through counsel, have entered into this Stipulated Settlement Agreement (the "Agreement").

7. **Plaintiffs and State Defendants, by and through their counsel, hereby stipulate and agree to this Agreement as follows:**

a. SDCL § 20-9-54, in its present form, will not be enforced except for that portion of the statute which provides:

> 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:
>
> (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence.

b. SDCL § 20-9-56, in its present form, may be enforced, except for the sentence which provides:

> "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."
>
> Such sentence, in its present form, will not be enforced.

c. SDCL § 22-10-6, in its present form, will not be enforced.

d. SDCL § 22-10-6.1, in its present form, will not be enforced.

e. The Agreement will be attached to and incorporated into an Order of Dismissal with prejudice which allows the Federal District Court to maintain jurisdiction over the enforcement of the Agreement.

f. The State Defendants will author a letter to the State's Attorney for each County in South Dakota advising them of the Agreement between Plaintiffs and State Defendants, pointing out the Agreement regarding the particular statutes.

g. A copy of this letter intended to be sent will be attached to this Agreement.

h. This letter will be posted on the South Dakota State News website at https://news.sd.gov.

i. This letter will be sent to the State's Attorney in each County within seven (7) days after an Order of Dismissal is signed and filed by the Court, and Plaintiffs will be advised of the date it was sent.

j. In the letter, the State Defendants will direct the State's Attorney to advise law enforcement within their jurisdiction of the Agreement and direct that those statutes, in their present form, are not to be enforced.

k. In the event of alleged noncompliance with the terms of the Agreement:

    i. The Plaintiffs will give written notice to the State Defendants, through counsel in writing, of the alleged noncompliance, which written notice will outline the specific grounds and facts upon which Plaintiffs allege noncompliance with the identified provisions of this Agreement.

    ii. Unless the parties agree to a longer period and upon such other conditions agreed upon in writing, after the passing of twenty four (24) hours from providing the written notice as above, the Plaintiffs may seek relief with the Court by submitting the dispute to the Honorable Lawrence L. Piersol, who shall have the authority to enforce the terms of this Agreement in his capacity as a Federal District Court Judge. In the event Judge Piersol is not available, the dispute may be submitted to another Article III judge of the District Court of South Dakota.

    iii. If it becomes necessary to resolve the dispute by submission to the Federal District Court Judge and Plaintiffs prevail in such dispute, they may seek

reasonable attorney fees subject to the State Defendants being able to contest such attorney fee request.

l. The relief granted in this Agreement shall terminate when and if each of the referenced statutory provisions that are agreed will not be enforced, are substantially revised by legislative action.

m. The parties will attempt to come to an agreement on a total amount of attorney fees to be awarded to Plaintiffs in this matter. It is acknowledged that, for purposes of this Agreement, Plaintiffs are the prevailing party.

n. If Plaintiffs and State Defendants are unable to come to an agreement on the amount of attorney fees within 10 business days of the execution of this Agreement by counsel, the Plaintiffs may submit their attorney fee request to the Court for determination of reasonable attorney fees.

o. The Plaintiffs' attorney fee submission shall be filed within 21 days after the Court enters the Order of Dismissal, subject to the State Defendants' ability to contest the attorney fee request.

p. Plaintiffs and State Defendants each retain their right to appeal the Court's ultimate attorney fee determination.

q. The undersigned counsel represent that they have authority to enter into this Agreement on behalf of their respective clients.

8. Therefore, in consideration of these terms and conditions, the parties to this Agreement hereby stipulate and agree that an order shall be entered dismissing this case with prejudice.

[The Remainder of This Page Left Blank – Signature Pages to Follow]

Dated this 23rd day of October, 2019.

Brendan V. Johnson (SD Bar # 3263)
Erica A. Ramsey (SD Bar # 4901)
Timothy W. Billion (SD Bar # 4641)
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Attorneys for Dakota Rural Action, Dallas Goldtooth, Indigenous Environmental Network, NDN Collective, Sierra Club, And Nicholas Tilsen.

Dated this 24th day of October, 2019.

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Attorneys for Dakota Rural Action, Dallas Goldtooth, Indigenous Environmental Network, NDN Collective, Sierra Club, And Nicholas Tilsen.

Dated this 23rd day of October, 2019.

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Attorneys for Governor Noem and Attorney General Ravnsborg

Dated this 23rd day of October, 2019.

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Special Assistant Attorney General
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bobmorris@westriverlaw.com

Attorneys for Governor Noem and Attorney General Ravnsborg

October 25, 2019

Honorable _____
_____ County State's Attorney
[Address]
[City], SD [ZIP]

To the Honorable _____ County State's Attorney:

The Governor and the Attorney General are writing to inform you of the status of certain riot-related laws in South Dakota. Recently, in *Dakota Rural Action v. Noem, et al.*, the Honorable Lawrence Piersol, District of South Dakota, issued an order temporarily enjoining two criminal statutes and parts of two civil statutes. The parties to that lawsuit have entered a settlement agreement that prohibits the enforcement of these statutes pursuant to the court's order, and the case is dismissed. The agreement requires the parties to inform state's attorneys of this agreement. Please advise law enforcement within your jurisdiction of the following:

1. SDCL § 20-9-54, in its present form, will not be enforced except for that portion of the statute which provides: "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: . . . (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence."

2. SDCL § 20-9-56, in its present form, may be enforced, except for the sentence which provides: "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." Such sentence, in its present form, will not be enforced.

3. SDCL § 22-10-6, in its present form, will not be enforced.

4. SDCL § 22-10-6.1, in its present form, will not be enforced.

Thank you for your service and protection of the citizens of South Dakota.

Governor Kristi Noem

Attorney General Jason Ravnsborg

STATE OF SOUTH DAKOTA

OFFICE OF THE GOVERNOR

KRISTI NOEM | GOVERNOR

October 30, 2019

Honorable John Steele
Aurora County State's Attorney
PO Box 577
Plankinton, SD 57368

To the Honorable Aurora County State's Attorney:

The Governor and the Attorney General are writing to inform you of the status of certain riot-related laws in South Dakota. Recently, in *Dakota Rural Action v. Noem, et al.*, the Honorable Lawrence Piersol, District of South Dakota, issued an order temporarily enjoining two criminal statutes and parts of two civil statutes. The parties to that lawsuit have entered a settlement agreement that prohibits the enforcement of these statutes pursuant to the court's order, and the case is dismissed. The agreement requires that the parties inform state's attorneys of this agreement. Please advise law enforcement within your jurisdiction of the following:

1. SDCL § 20-9-54, in its present form, will not be enforced except for that portion of the statute which provides: "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: . . . (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence."

2. SDCL § 20-9-56, in its present form, may be enforced, except for the sentence which provides: "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." Such sentence, in its present form, will not be enforced.

3. SDCL § 22-10-6, in its present form, will not be enforced.

4. SDCL § 22-10-6.1, in its present form, will not be enforced.

Thank you for your service and protection of the citizens of South Dakota.

Governor Kristi Noem

Attorney General Jason Ravnsborg

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

****

DAKOTA RURAL ACTION; DALLAS GOLDTOOTH; INDIGENOUS ENVIRONMENTAL NETWORK; NDN COLLECTIVE; SIERRA CLUB; and NICHOLAS TILSEN;	*	CIV 19-5026
Plaintiffs,	*	
vs.	*	ORDER FOR DISMISSAL
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.	*	

****

This matter having come before the Court on the Stipulated Settlement Agreement between these parties filed in this matter, and the Court having found good cause, and the Court also applauding all parties for reaching agreement:

IT IS HEREBY ORDERED that the parties consent to, and the Court hereby agrees to accept, continuing jurisdiction to enforce the terms of the Stipulated Settlement Agreement; and

IT IS HEREBY ORDERED that the above-entitled action is dismissed with prejudice pursuant to the Stipulated Settlement Agreement, which is hereby incorporated by the Court.

Dated this 29th day of October, 2019.

BY THE COURT:

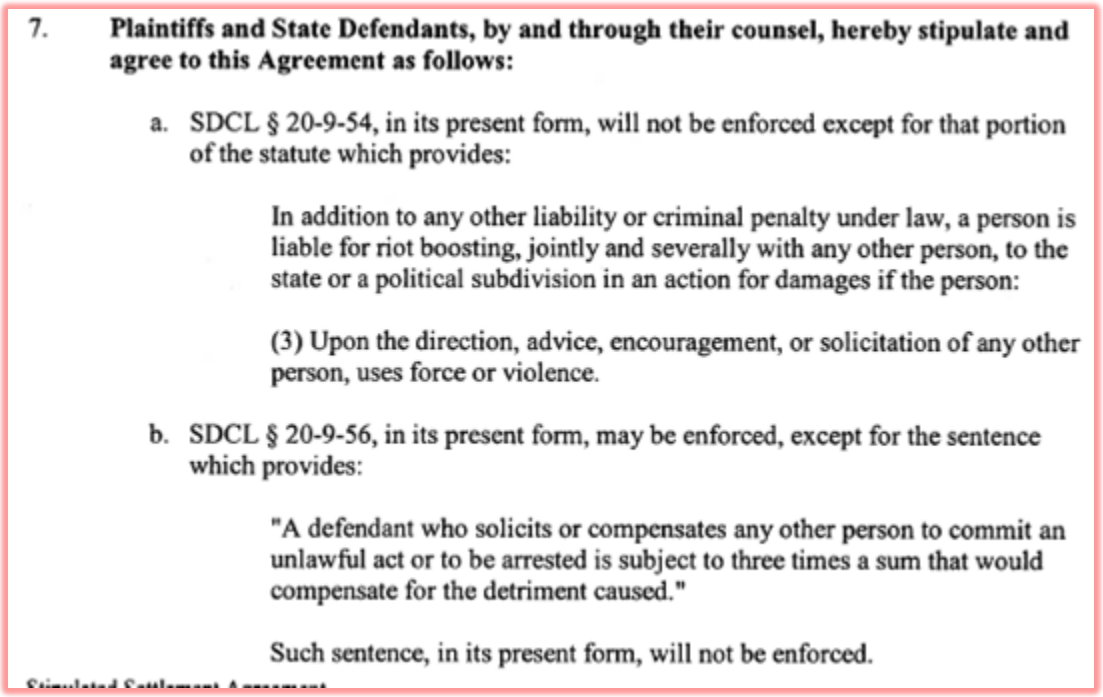
Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN CLERK

PEACE Fund Chart

See PDF Page 26 – no change

Effect of Settlement Agreement (24 October 2019) as applied to 2019 Riot Boosting law:



7. **Plaintiffs and State Defendants, by and through their counsel, hereby stipulate and agree to this Agreement as follows:**

a. SDCL § 20-9-54, in its present form, will not be enforced except for that portion of the statute which provides:

> 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:
>
> (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence.

b. SDCL § 20-9-56, in its present form, may be enforced, except for the sentence which provides:

> "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."
>
> Such sentence, in its present form, will not be enforced.

Stipulated Settlement Agreement

SD law below is enforceable after the settlement agreement, except as indicated by overstrikes:

20-9-53. Definitions pertaining to riot boosting. Terms used in §§ 20-9-53 to 20-9-57, inclusive, 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 § 20-9-54;

(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.

Source: SL 2019, ch 104, § 1, eff. Mar. 27, 2019.

20-9-54. Liability for riot boosting. 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~~.

Source: SL 2019, ch 104, § 2, eff. Mar. 27, 2019.

Updated: October 24, 2019 (1:10 PM CT)

Effect of Settlement Agreement (24 October 2019) as applied to 2019 Riot Boosting law:

20-9-55. Action for riot boosting--Evidence--Procedure. 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 § 20-9-54 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 § 20-9-54.

Source: SL 2019, ch 104, § 3, eff. Mar. 27, 2019.

20-9-56. Damages for riot boosting. 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 § 20-9-54.

Source: SL 2019, ch 104, § 4, eff. Mar. 27, 2019.

20-9-57. Riot boosting recovery fund established. 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 §§ 20-9-53 to 20-9-57, inclusive.

Any civil recoveries shall be deposited in the fund.

Source: SL 2019, ch 104, § 5, eff. Mar. 27, 2019.

22-10-6. Encouraging or soliciting violence in riot--Felony. 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.

Source: SDC 1939, § 13.1404 (4); SL 1976, ch 158, § 10-3; SL 2005, ch 120, § 347.

22-10-6.1. Encouraging or soliciting violence in riot without participating--Felony. 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.

Source: SL 1976, ch 158, § 10-4; SL 2005, ch 120, § 348.

20-9-53. Definitions pertaining to riot boosting. Terms used in §§ 20-9-53 to 20-9-57, inclusive, 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 § 20-9-54;

(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.

Source: SL 2019, ch 104, § 1, eff. Mar. 27, 2019.

20-9-54. Liability for riot boosting. 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.

Source: SL 2019, ch 104, § 2, eff. Mar. 27, 2019.

20-9-55. Action for riot boosting--Evidence--Procedure. 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 § 20-9-54 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 § 20-9-54.

Source: SL 2019, ch 104, § 3, eff. Mar. 27, 2019.

20-9-56. Damages for riot boosting. 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 § 20-9-54.

Source: SL 2019, ch 104, § 4, eff. Mar. 27, 2019.

20-9-57. Riot boosting recovery fund established. 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 §§ 20-9-53 to 20-9-57, inclusive.

Any civil recoveries shall be deposited in the fund.

Source: SL 2019, ch 104, § 5, eff. Mar. 27, 2019.

An Act to establish the crime of incitement to riot and to repeal encouraging a riot.

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

Section 1. That § 22-10-1 be AMENDED:

22-10-1. Riot—Felony.

As used in this chapter, ~~Any~~ any intentional 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, to cause any injury to a person or persons or any damage to property is riot. ~~Riot~~ A violation of this section is a Class 4 felony.

Section 2. That § 22-10-6 be REPEALED.

22-10-6. Encouraging or soliciting violence in riot--Felony.

Section 3. That § 22-10-6.1 be REPEALED.

22-10-6.1. Encouraging or soliciting violence in riot without participating--Felony.

Section 4. That a NEW SECTION be added:

22-10-17. Incitement to riot—Felony.

Any person who, with the intent to cause a riot, urges three or more people, acting together and without authority of law, to use force or violence to cause any injury to a person or persons or any damage to property, under circumstances where such force or violence is imminent and such urging is likely to incite or produce the use of such force or violence, is incitement to riot. Urge includes instigating, inciting, directing, threatening, or other similar conduct, but may not include the mere oral or written advocacy of ideas or expression of belief that does not urge the commission of an act or conduct of imminent force or violence. This section shall not be construed to prevent the peaceable assembling of persons for lawful purposes of protest or petition. A violation of this section is a Class 5 Felony.

An Act to amend riot boosting civil action.

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

Section 1. That § 20-9-54 be AMENDED:

20-9-54. Liability for riot boosting. 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~~ with the intent to cause a riot, urges three or more people, acting together and without authority of law, to use force or violence to cause any injury to a person or persons or any damage to property, under circumstances where such force or violence is imminent and such urging is likely to incite or produce the use of such force or violence~~, is incitement to riot~~; or

~~(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)~~ (2) Upon the ~~direction, advice, encouragement, or solicitation~~ urging 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.~~ to commit riot defined under § 22-10-1.

As used in this chapter, urge includes instigating, inciting, directing, threatening, or other similar conduct, but may not include the mere oral or written advocacy of ideas or expression of belief that does not urge the commission of an act or conduct of imminent force or violence. This section shall not be construed to prevent the peaceable assembling of persons for lawful purposes of protest or petition.

Section 2. That § 20-9-56 be AMENDED.

20-9-56. Damages for riot boosting. 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 § 20-9-54.