

CONGRESSIONAL TESTIMONY

Protecting Americans' Right to Peaceful Assembly From "Critical Infrastructure" and Other Anti-Protest Laws

ORAL TESTIMONY OF

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PRESENTED TO

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Good morning Chairman Raskin, Ranking Member Mace, and Members of the Subcommittee. My name is Elly Page. I am a Senior Legal Advisor at the International Center for Not-for-Profit Law (ICNL) where we work to create a supportive legal environment for civil society in the U.S. and around the world.

Today I'd like to share with you why we at ICNL and many others are concerned that "critical infrastructure" laws threaten Americans' First Amendment rights.

In recent years, people across the country have turned out to protest new pipeline projects: Floridians worried about how pipelines will affect their drinking water. Farmers in Illinois concerned about their fields. Indigenous leaders in Minnesota wanting to protect tribal lands. Fishermen in Louisiana fearing the loss of livelihoods. In response, many states have introduced laws that can criminalize nonviolent protests around pipelines.

Oklahoma was the first of these. In 2017, the state enacted a law creating new felonies that can cover protesters near "critical infrastructure." Under the law, "critical

infrastructure” was defined to include pipelines and a variety of other fossil fuel facilities. That same year, the American Legislative Exchange Council (ALEC), which has ties to fossil fuel companies, began circulating a model bill based on Oklahoma’s law. Since then, at least 16 other states have enacted similar laws.

Supporters of the laws say they’re needed to protect infrastructure from damage by bad actors. But let’s be clear: These laws are unnecessary. In most if not all states, existing law already criminalizes conduct that can end up damaging our nation’s infrastructure. When the Governor of Minnesota vetoed a critical infrastructure bill, he said that was why: Existing state law on trespass and property damage was sufficient.

Instead, these new laws—many adopted with fossil fuel industry’s explicit support—can be used to target pipeline protesters by criminalizing and chilling nonviolent protest activity. They do so in three key ways.

- **First:** The laws create extreme penalties. Under Arkansas’ critical infrastructure law, a protester can face six years in prison for peacefully trespassing onto a pipeline construction site. In several states, those found guilty under critical infrastructure laws can also be sued by pipeline companies, opening them up to costly civil lawsuits. We at ICNL have heard from folks on the ground who want to protest lawfully but are afraid of getting caught up in these penalties, who have stayed home instead of speaking out.
- **Second:** The laws are overbroad and vague. North Dakota’s law bans “inhibiting” or “impeding” pipeline construction. Such broad language covers constitutionally protected speech. It could seemingly even cover a lawful protest that is far from any pipeline, but that delays pipeline equipment. Louisiana’s law, meanwhile, bans “unauthorized entry” onto pipelines. But it’s not clear what that means in a state with over 125,000 miles of pipeline, much of which isn’t marked, or even visible. So it’s not clear where individuals can and can’t be legally present. And the stakes are high: 5 years in prison.
- **Third:** In many cases, the laws make protesters and organizers liable for other peoples’ unlawful conduct. They effectively codify “guilt by association.” Under Oklahoma’s law, if a church group organizes a protest and one person at the protest trespasses, the group could be charged as part of a criminal conspiracy and fined \$1 million.

Critical infrastructure laws are extreme, overbroad, and unnecessary. Advocates have successfully challenged parts of these laws, and courts have found them to be unconstitutional. But most remain on the books and continue to be used to target and harass nonviolent protesters.

Congress can take action to protect Americans’ First Amendment rights: First, ensure that federal energy legislation doesn’t unintentionally strengthen enforcement of

critical infrastructure laws, but instead includes safeguards for peaceful protests. Second, encourage the Department of Justice to file amicus briefs in support of litigation against critical infrastructure and other anti-protest laws. Third, enact legislation like a federal anti-SLAPP law that can help protect protesters from being silenced by industry-backed lawsuits.

Thank you, and I would be happy to answer any questions.