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SLEEP NOW IN THE FIRE:
ANTI-PROTEST LAWS AND THE ENVIRONMENTAL MOVEMENT

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So raise your fists
And march around
Just don't take what you need
I'll jail and bury those committed
And smother the rest in greed[1]

Since 2017, in response to the nonviolent protests against the Dakota Access Pipeline, more than a dozen states across the country adopted legislation limiting citizens' ability to protest against fossil fuel infrastructure projects through means ranging from increased penalties for trespassing to allowing state officials to prohibit public gatherings. Widespread protests and civil unrest during the summer of 2020 in response to racial injustice prompted states across the country to adopt legislation expanding the definitions of terms like "riot" and "unlawful gathering" and providing increased penalties for acts of protest. This comment analyzes three representative statutes from Oklahoma, South Dakota, and Tennessee using a constitutional framework to consider the impacts of these statutes on First Amendment rights, including speech, assembly, and association.

[1] RAGE AGAINST THE MACHINE, SLEEP NOW IN THE FIRE (Epic Records 1999).

I. Introduction

In 2015, 196 countries came together and signed the Paris Agreement, pledging to take affirmative action to limit global warming to two degrees Celsius compared to pre-industrial levels[2] and "[pursue] efforts to limit the temperature increase to 1.5° C."[3] Not only are these goals inadequate to prevent wide-scale human suffering and the worst effects of climate change, but the governments most responsible for climate change are not making any indication that they intend to fulfill their promises.[4] Indeed, in a heading on their website titled "What have we achieved so far?" the United Nations has only reported that "low-carbon solutions" are "becoming competitive."[5] In 2017, the United States announced its intention to withdraw from the Agreement altogether,[6] and formally did so on November 4, 2020.[7] While the new administration was quick to rejoin the Paris Agreement, the world "will likely overshoot 1.5° C unless all emissions can be zeroed out by 2040."[8] Despite the urgent pace of emissions reductions needed to avoid 1.5° of warming, a February 2021 report from the United Nations indicates that the world is "on a path to achieve a less than 1 percent reduction by 2030 compared to 2010 levels."[9] Given the dire consequences of climate inaction and the obvious failure to act on the part of world governments, it is only natural, if not inevitable, that communities around the world will organize, advocate, and—if need be—fight to secure a stable, sustainable, and inhabitable future. Despite this, states have responded to civil disobedience and acts of protest—whether motivated by climate change, police brutality, or racial inequality—with statutes making it harder to organize protests and imposing increased penalties for acts of civil disobedience.[10]

Today, many statutes limit protests involving pipelines and other fossil fuel infrastructure– this trend was sparked largely by the Standing Rock Sioux's resistance to the Dakota Access Pipeline (DAPL) near Cannonball, North Dakota, in 2016.[11] Approved by the U.S. Army Corps

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[2] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].
[3] *Id.*
[4] NAOMI KLEIN, *Let Them Drown: The Violence of Othering in a Warming World*, *in* ON FIRE: THE (BURNING) CASE FOR A GREEN NEW DEAL 149, 165 (2019). ("Not only is [the 1.5-degree target] nonbinding, but it is a lie: we are making no such efforts. The governments that made this promise are now pushing for more fracking and more mining of the highest-carbon fossil fuels on the planet actions that are utterly incompatible with capping warming at 2°C…") [hereinafter *Let Them Drown*].
[5] *The Paris Agreement*, *supra* note 2.
[6] Camila Domonoske and Colin Dwyer, *Trump Announces U.S. Withdrawal From Paris Climate Accord*, NPR (June 1, 2017, 10:54 AM), https://www.npr.org/sections/thetwo-way/2017/06/01/530748899/watch-live-trump-announces-decision-on-paris-climate-agreement.
[7] Lisa Friedman, *U.S. Quits Paris Climate Agreement: Questions and Answers*, N.Y. TIMES (Nov. 4, 2020, Updated Jan. 20, 2021), https://www.nytimes.com/2020/11/04/climate/paris-climate-agreement-trump.html.
[8] Renee Cho, *The U.S. Is Back in the Paris Agreement. Now What?*, COLUMBIA UNIV.: EARTH INSTITUTE (Feb. 4, 2021), https://blogs.ei.columbia.edu/2021/02/04/u-s-rejoins-paris-agreement/.
[9] Press Release, United Nations Framework Convention on Climate Change, Greater Climate Ambition Urged as Initial NDC Synthesis Report Is Published, U.N. Press Release (Feb. 26, 2021).
[10] *See, e.g.*, *US Protest Law Tracker*, INT'L CENTER FOR NON-PROFIT L. (last visited Mar. 14, 2021), https://www.icnl.org/usprotestlawtracker/?status=enacted&type=legislative.
[11] Joe Wertz, *Oklahoma Bill To Protect 'Critical Infrastructure' Could Curb Public Protest, Critics Say*, STATE IMPACT OKLA. (Mar. 2, 2017, 12:09 P.M.), https://stateimpact.npr.org/oklahoma/2017/03/02/oklahoma-bill-to-protect-critical-infrastructure-could-curb-public-protest-critics-say/.

of Engineers in July of 2016, the nearly 1,200-mile long pipeline would have transported crude oil from North Dakota to pipelines in Illinois.[12] The pipeline route was originally supposed to cross the Missouri River near the state capitol at Bismarck but was moved due to concerns that a spill from the pipeline would contaminate the city's drinking water.[13] The pipeline route was changed to cross the Missouri River less than a mile from the Standing Rock River Sioux Reservation. In response, the tribe sued the Corps, [14] citing environmental and health concerns and asserting that the pipeline construction carried "a high risk that culturally and historically significant sites will be damaged or destroyed in the absence of an injunction."[15] Construction near the reservation began in September 2016, before the district court issued its ruling on the tribe's injunction request.[16] Protesters were met with violence by private security forces, and shortly thereafter, North Dakota activated its National Guard.[17] As resistance to the Dakota Access Pipeline mounted, a growing coalition of nearly 100 Native tribes and environmental activists set up two camps to impede its construction.[18] While the protesters engaged in largely nonviolent tactics, they were met with an increasingly militarized police response—including rubber bullets, dogs, armored vehicles, water cannons, and mass arrests—and were subjected to surveillance and monitoring by private military contractors.[19]

Among the nonviolent tactics used by protesters were the creation of roadblocks.[20] In January 2017, the North Dakota legislature introduced HB 1203 in response to protests against the Dakota Access Pipeline. The bill would have allowed "a driver of a motor vehicle who negligently causes injury or death to an individual obstructing vehicular traffic on a public road, street, or highway" to avoid liability for damages.[21] This bill ultimately did not pass, but was the first of many bills introduced in legislatures around the country in response to protests against projects that would contribute to climate change, particularly oil pipelines. These bills took many forms. Some states adopted laws enhancing penalties for trespassing on "critical infrastructure." Oklahoma was the first state to do so, adopting legislation in 2017 that imposes penalties of up to $10,000 and potential felony charges for trespass on property "containing a critical infrastructure

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[12] Michael Kennedy, *The Dakota Access Pipeline*, EARTHJUSTICE (last visited Mar. 14, 2021), https://earthjustice.org/cases/2016/the-dakota-access-pipeline.
[13] Bill McKibben, *A Pipeline Fight and America's Dark Past*, THE NEW YORKER (Sept. 6, 2016), https://www.newyorker.com/news/daily-comment/a-pipeline-fight-and-americas-dark-past.
[14] Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight.
[15] Mot. for Prelim. Inj., Request for Expedited Hearing at 2, Standing Rock Sioux Tribe v. U.S.A.C.E. 255 F.Supp.3d 101 (D.D.C. 2017) (No. 1:16-cv-1534).
[16] McKibben, *supra* note 13.
[17] Hersher, *supra* note 14.
[18] Nicky Woolf, *North Dakota oil pipeline protesters stand their ground: 'This is sacred land'*, THE GUARDIAN (Aug. 29, 2016), https://www.theguardian.com/us-news/2016/aug/29/north-dakota-oil-pipeline-protest-standing-rock-sioux.
[19] *See* Julia Carrie Wong & Sam Levin, *Standing Rock protesters hold out against extraordinary police violence*, THE GUARDIAN (Nov. 29, 2016), https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation; Alleen Brown, Will Parrish, & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies"*, THE INTERCEPT (May 27, 2017), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/.
[20] Emily Dreyfuss, *As Standing Rock Protesters Face Down Armored Trucks, the World Watches on Facebook*, WIRED (Oct. 17, 2016), https://www.wired.com/2016/10/standing-rock-protesters-face-police-world-watches-facebook/.
[21] H.R. 1203, 65th Leg. Assemb., Reg Sess. (N.D. 2017).

facility," as well as an additional provision holding organizations "found to be a conspirator" liable for fines equaling ten times the fine charged to the individual.[22] The Oklahoma statute formed the basis for American Legislative Exchange Council-sponsored legislation[23] that was adopted in a number of states, including Louisiana, Texas, and Tennessee.[24] (Hereinafter, these statutes will be collectively referred to as Critical Infrastructure statutes.) Other statutes, such as South Dakota's SD ST § 5-4-18, allow governors and law enforcement to declare zones where assembling for the purpose of protest will be prohibited.[25] In 2020—in response to widespread civil unrest against racial inequality and police brutality—several states passed legislation providing enhanced criminal penalties for protesters and criminalizing previously allowable actions.[26] Tennessee's HB 8005 was among the most expansive, creating or amending 15 sections of the Tennessee Criminal Code—including sections pertaining to vandalism, assault, disorderly conduct, rioting, obstructing traffic, and camping on state property.[27]

While statutes such as these are couched as necessary to protect public safety or "critical infrastructure," they have the potential to substantially infringe upon constitutionally protected activity.[28] In particular, these statutes threaten to chill activity protected by the First Amendment rights to assembly, association, and speech. As the climate crisis intensifies, it seems inevitable that popular resistance to fossil fuel infrastructure will increase. Assuming for the sake of argument that threats to public safety or critical infrastructure exist, laws that aim to protect those interests must be narrowly tailored in order to not curtail lawful and constitutionally protected activity.

This Note will examine a number of recently enacted anti-protest statutes and analyze the motivation for their passage, the effects they will have on protesters' ability to speak, assemble, and associate, and, ultimately, their constitutionality. Part II will describe the judicial standards for reviewing statutes that affect first amendment rights, particularly expressive conduct and the right to associate, as well as the standards for reviewing emergency orders that impact first amendment rights. Part III will then apply those judicial standards to various statutes that have been recently passed, particularly Oklahoma's OK ST. T. 21 § 1783, which imposes harsh penalties for trespass on property containing "critical infrastructure" and any individual or organization found to be a conspirator in such trespass; South Dakota's ST § 5-4-18, which allows the governor to prohibit large gatherings on public lands; and Tennessee's HB 8005 (2020), passed in response to last summer's Black Lives Matter protests and which redefines a number of existing crimes relating to protest and enhances their penalties.

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[22] OKLA. STAT. tit. 21 § 1792 (2020).
[23] Am. Legis. Exch. Couns., CRITICAL INFRASTRUCTURE PROTECTION ACT (last visited Mar. 14, 2021), https://www.alec.org/model-policy/critical-infrastructure-protection-act/.
[24] Susie Cagle, *'Protesters as terrorists': growing number of states turn anti-pipeline activism into a crime*, THE GUARDIAN (Jul. 19, 2019), https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say.
[25] S.D. CODIFIED LAWS § 5-4-18 (2020).
[26] *See* 2020 TENN. PUB. ACTS ch. 3 (codified as amended in scattered sections of TCA Titles 8, 38, 39, 40), https://publications.tnsosfiles.com/acts/111/2nd%20Extraordinary%20Session/pc0003EOS.pdf.
[27] *Id.*; *HB 8005 Bill Info*, TENN. GEN. ASSEMBLY, https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB8005&GA=111 (last visited Apr. 4, 2021).
[28] Wertz, *supra* note 11.

I. Constitutional Analysis

The First Amendment of the United States Constitution provides broad protections for what can be generally referred to as expressive rights.[29] While the First Amendment explicitly lists some expressive rights, like speech, religion, and peaceable assembly,[30] it also includes implicit rights, like expressive conduct and association.[31] Politically motivated demonstrations implicate several First Amendment rights, and the Supreme Court of the United States has consistently held that nonviolent protests are subject to First Amendment protections.[32] Because multiple rights are exercised in a political demonstration, government actions that impinge on citizens' ability to organize and carry out such protests can be analyzed through multiple lenses.

Before embarking on an analysis of individual statutes, it is necessary to lay out the constitutional framework governing statutes that affect one's protected First Amendment rights. This section will first describe the standards of review employed by the courts in reviewing First Amendment issues. Then it will describe relevant judicial standards for analyzing statutes that affect specific First Amendment rights. The section will conclude with an analysis of court decisions governing emergency orders, which are treated differently than statutes of general applicability.

A. Standards of Review

When the government seeks to regulate speech, the regulation must be "(i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest."[33] Further, the government bears a burden of "demonstrat[ing] its means are 'narrowly tailored' to achieve a substantial government goal."[34]

When analyzing restrictions on speech, the court will first determine if the restriction in question is content-based or content-neutral. A content-based regulation is one that regulates speech based upon either the content or subject matter of the speech.[35] Except for "permissible subject-matter regulations," content-based restrictions on speech are reviewed under strict scrutiny.[36] To survive strict scrutiny, a law must be "a narrowly tailored means of serving a compelling state interest."[37] In the context of strict scrutiny, a restriction is narrowly tailored if no reasonable, less-restrictive alternatives exist.[38]

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[29] U.S. CONST. amend. I.
[30] *Id.*
[31] *See, e.g.* United States v. O'Brien, 391 U.S. 367 (1968); NAACP v. Alabama, 357 U.S. 449 (1958); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 574 (1995).
[32] *See, e.g.* Texas v. Johnson, 491 U.S. 397, 418-19 (1989); N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982); Gregory v. City of Chicago, 394 U.S. 111, 112 (1969).
[33] Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 535 (1980) (Invalidating a New York prohibition on bill inserts discussing "controversial issues of public policy"). Note that the Court uses the word "speech" broadly when analyzing First Amendment issues and the term is not necessarily restricted to oral communication. Here, for instance, the Court was analyzing printed bill inserts under a "speech" analysis. Similarly, this comment will also use terms like "speech" or "expression" as shorthand for a number of First Amendment rights.
[34] United States v. Philip Morris USA Inc., 566 F.3d 1095, 1143 (D.C. Cir. 2009).
[35] *Consol. Edison*, 447 U.S. at 536.
[36] *Id.*
[37] *Id.* at 535.
[38] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

By way of contrast, a content-neutral restriction on speech consisting of "a reasonable time, place, or manner restriction" [39] is reviewed according to the forum in which the speech takes place.[40] The same type of content-neutral restriction would be analyzed differently if used to restrict speech at a public park or state capitol building, rather than a post office or some other government building that is not traditionally used for public expression.[41]

Additionally, the Supreme Court has held in a number of cases that expressive conduct is also protected by the First Amendment.[42] When a statute seeks to restrict expression, "It is… not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid."[43]

B. Incidental vs. Intentional Restrictions on Speech

United States v. O'Brien provides the basic framework for analyzing statutes that create "incidental limitations on First Amendment freedoms" by restricting conduct that could be considered expressive.[44] After burning his draft card in protest of American involvement in the Vietnam War, David O'Brien was convicted of burning his Selective Service registration certificate in violation of the Universal Military Training and Service Act of 1948 (Service Act).[45] Under the act, it was unlawful to "forge, alter, knowingly destroy, knowingly mutilate, or in any manner change any such certificate."[46] During his arrest, O'Brien stated, "that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law."[47] At trial, he testified "that he burned the certificate publicly to influence others to adopt his antiwar beliefs… so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."[48] At trial and on appeal, O'Brien argued that the 1965 amendment to the Service Act prohibiting the knowing destruction of draft cards under which he was charged was an unconstitutional infringement upon free speech.[49]

While the Supreme Court acknowledged that expressive conduct could be protected by the First Amendment, it was hesitant to extend First Amendment protection to "an apparently limitless variety of conduct."[50] Recognizing that a "sufficiently important governmental interest" could

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[39] *Consol. Edison*, 447 U.S. at 535.
[40] *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45–46 (1983) (Content-neutral time, place, manner restrictions in "quintessential public forums" or designated forums must be "necessary to serve a compelling state interest" and be "narrowly drawn to achieve that end." However, content-neutral restrictions on speech on public property that is not "by tradition or designation" must be "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view.").
[41] *Id.*
[42] *See* United States v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397 (1989).
[43] *Johnson*, 491 U.S. at 406-07.
[44] *O'Brien*, 391 U.S. at 376.
[45] *Id.* at 369-70.
[46] *Id.* at 370 (citing Universal Military Training and Service Act, 50 U.S.C. § 462(b)(3) (1965) (current version at Military Selective Service Act, 50 U.S.C. §3811(b)(3)).
[47] *Id.* at 369.
[48] *Id.* at 370.
[49] *Id.*
[50] *Id.* at 376.

justify restrictions on conduct that had "incidental limitations on First Amendment freedoms,"[51] the Court provided a four-part test for analyzing a content-neutral law that burdens speech:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental 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.[52]

Applying this test to the case before it, the Court found that the Service Act was well within Congress's power to raise and support armies, and that the government had a substantial interest in efficient operation of the Selective Service Program.[53] The Court also found that the Service Act was narrowly tailored to further this substantial government interest that "condemns only the independent noncommunicative impact of conduct within its reach."[54]

Around twenty years later, the Supreme Court decided *Texas v. Johnson*, which provided a higher standard of scrutiny for laws that primarily served to restrict expressive activity. In 1984, Gregory Johnson participated in a protest against the Republican National Convention in Dallas, which was mostly nonviolent, but did include acts such as "spray-paint[ing] the walls of buildings and overturn[ing] potted plants."[55] Per the account of the Court, "The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire… No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning."[56] Johnson was the only participant who was charged with a crime, and at trial, he was convicted of "the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989)."[57, 58] On appeal, the Texas Court of Criminal Appeals reversed the conviction, finding that "Johnson's conduct was symbolic speech protected by the First Amendment."[59] In opposition, the State asserted "preserving the flag as a symbol of national unity and preventing breaches of the peace" as State interests justifying a conviction.[60]

Reiterating that the *O'Brien* Test only applies "to those cases in which "the governmental interest is unrelated to the suppression of free expression," the Court first analyzed the two interests asserted by the state of Texas.[61] The State's first interest in preventing breaches of the peace was not implicated in the case at hand because no such breach actually occurred, and the expression in question was not shown to have been "directed to inciting or producing imminent lawless action

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[51] *Id.*
[52] *Id.* at 376-77.
[53] *Id.* at 377-82.
[54] *Id.* at 382.
[55] Texas v. Johnson, 491 U.S. 397, 399 (1989).
[56] *Id.*
[57] *Id.* at 400.
[58] TEXAS PENAL CODE ANN. § 42.09 (1989) (amended 1994 as § 42.11) (*invalidated* by State v. Johnson, 425 S.W.3d 542 (Tex.App. 2014)) provided in relevant part: "(a) A person commits an offense if he intentionally or knowingly desecrates… (3) a state or national flag… (b)'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action…"
[59] *Johnson*, 491 U.S. at 400.
[60] *Id.*
[61] *Id.* at 407.

and is likely to incite or produce such action."[62] The Court then found the state's second interest, "reserving the flag as a symbol of nationhood and national unity," was "related to the suppression of free expression within the meaning of *O'Brien*," thereby rendering the *O'Brien* test inapplicable.[63] Instead, the state's interest here was found to be a content-based regulation of speech, which must be subjected to "the most exacting scrutiny."[64] Reviewing decades of precedent, the Court held that "nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it."[65] "[T]he government may not prohibit expression simply because it disagrees with its message, [this lesson] is not dependent on the particular mode in which one chooses to express an idea."[66]

C. Protests and Organizations

In *NAACP v. Claiborne Hardware Co.*, the Court reviewed a Mississippi Supreme Court decision imposing joint and several liability on approximately 92 defendants, including the National Association for the Advancement of Colored People (NAACP) and Mississippi Action for Progress (MAP), for damages arising from a multi-year boycott of white-owned businesses in Claiborne County, Mississippi.[67] After establishing that while isolated incidents of violent and unlawful activity did occur, the boycott itself was lawful and "that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly,"[68] the Court engaged in a more substantive analysis of the right to associate. "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[69] Drawing on *Mine Workers v. Gibbs* and *Construction Workers v. Laburnum Construction Corp.*, the Court held that where a concerted effort entails both lawful and unlawful conduct, the state may only punish unlawful conduct;[70] damages may only be awarded for harms that were proximately caused by a defendant's unlawful conduct;[71] and "Civil liability may not be imposed merely because an individual belonged to a group... For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[72]

Applied here, it was improper for the Mississippi Supreme Court to impose joint and several liability on MAP or the NAACP for harms caused by the unlawful acts of specific individuals.[73] There is no evidence on the record that unlawful acts were so much as discussed, nonetheless endorsed or directed, at any NAACP meeting leading up to or during the boycott.[74] Where the evidence shows that individuals engaged in unlawful activity, however, the Court noted

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[62] *Id.* at 409. (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
[63] *Id.* at 410.
[64] *Id.* at 412. (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).
[65] *Id.* at 415.
[66] *Id.* at 416.
[67] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982).
[68] *Id.* at 903.
[69] *Id.* at 908.
[70] *Id.* at 918 (citing Mine Workers v. Gibbs, 383 U.S. 715 (1966); Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954)).
[71] *Id.*
[72] *Id.* at 920.
[73] *Id.* at 924.
[74] *Id.* at 923.

they "may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained."[75] In its conclusion, the Court remarked:

> The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.[76]

Under *Claiborne*, organizations cannot be held liable for the unlawful activities of their members without a specific showing that the organization directed the activity or a showing that "presence of violence justified an injunction against both violent and nonviolent activity."[77] To impute liability to an organization that is not engaging in or directing illegal activity is an unconstitutional restriction on the First Amendment right to association.

D. Emergency Orders

State and municipal governments often respond to protests or acts of civil disobedience with emergency orders.[78] Recently, in response to the demonstrations at Standing Rock, some states have passed legislation making it easier to issue emergency orders.[79] States and municipal governments have relatively broad discretion to respond to emergencies and may "restrict[] activities that would normally be constitutionally protected" in the exercise of emergency powers.[80] However, emergency actions that limit normally protected activities under the constitution must still be narrowly drawn to be "reasonably necessary for the preservation of order."[81] While the circumstances that constitute an "emergency" have been greatly expanded in

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[75] *Id.* at 926.
[76] *Id.* at 934.
[77] *Id.* at 923; Milk Wagon Drivers v. Meadowmoor Dairies, Inc, 312 U.S. 287, 292 (1941). The court analyzed a situation in which a union used violence in response to a labor dispute which included "window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings." The organized violence employed by the union rose well beyond the instances of isolated violence that occurred during the boycott in Claiborne, Mississippi. In upholding Illinois' injunction against all protest activity by the union, the Supreme Court emphasized the organized and widespread nature of the violence. *Id.* at 295. There, the Court was not analyzing isolated incidents of violence sparked in the heat of the moment, but rather an organized campaign of industrial sabotage and intimidation. *Id.* at 291–2.
[78] *See, e.g.*, City of Seattle, Resolution 30099 (Dec. 6, 1999), https://www.seattle.gov/Documents/Departments/CityArchive/DDL/WTO/1999Dec6.htm (Issued in response to WTO protests in Seattle); North Dakota, Executive Order 2016-04 (Aug. 19, 2016) (Dalrymple Declares an Emergency exists in Southwest and South Central North Dakota); North Dakota, Executive Order 2016-07 (Nov. 28, 2016) (Dalrymple Orders Emergency Evacuation To Safeguard Against Harsh Winter Conditions), https://www.governor.nd.gov/executive-orders (Author's note: The North Dakota Officer of the Governor's website does not provide archived copies of Executive Orders issued prior to 2017. *See Executive Orders*, N.D. Off. Of the Governor, https://www.governor.nd.gov/executive-orders (last visited Apr. 4, 2021).); City of New York, Emergency Executive Order No. 117 (June 1, 2020), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-117.pdf (Imposed curfew in New York City in response to demonstrations against police brutality and racial injustice).
[79] *See* S.D. CODIFIED LAWS § 5-4-18 (2021).
[80] United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971).
[81] *Id.*

the last several decades,[82] state and municipal governments do not have unlimited power to curtail First Amendment rights to restore order in the face of an emergency.

Drawing from Aaron Perrine's *The First Amendment Versus the World Trade Organization*, municipalities have used emergency orders to restore law and order in a variety of situations.[83] The article specifically looks at the emergency order issued by the city of Seattle (Order 3) during the 1999 World Trade Organization (WTO) meeting and analyzes the constitutionality of Order 3 in the context of other emergency orders. Of particular interest here is the discussion of the diverging standards of judicial review different circuits have applied to emergency orders.

In reviewing an appeal from a conviction for unlawful possession of a firearm, which was seized by police during a search of a vehicle operated at night during a curfew imposed by emergency order during a race riot, the court in *United States v. Chalk* stated:

> A curfew, like ordinances restricting loudspeaker noise and limiting parade permits, doubtless has an incidental effect on First Amendment rights. The standard [that] has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction on First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected."[84]

While this would appear to set up a basis for heightened judicial scrutiny, the court went on to say shortly thereafter:

> [W]e think the scope of our review in a case such as this must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order… We think it would be highly inappropriate for us… to substitute our judgment of necessity for his.[85]

This standard ultimately applied by the Fourth Circuit appears to be much closer to the lenient rational basis standard of review and affords broad deference to state officials. A number of courts have followed the Fourth Circuit's analysis, and only appear to limit emergency orders to the extent that "emergency orders must not be vague or overbroad, nor encourage arbitrary enforcement."[86]

An alternative standard of review can be found in *Collins v. Jordan.*[87] There, the Ninth Circuit analyzed an emergency order issued by San Francisco officials in the wake of the Rodney King verdicts prohibiting "all demonstrations, peaceful or otherwise"[88] and found the order was unlawfully issued.[89] Specifically, the Court held that "enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and

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[82] Aaron Perrine, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. Rev. 635, 652 (2001).
[83] *See Id.*
[84] *Chalk*, 441 F.2d at 1280 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968))
[85] *Id.* at 1281.
[86] Perrine, *supra* note 83, at 655.
[87] Collins v. Jordan, 110 F.3d 1363, 1369 (9th Cir. 1996).
[88] *Id*.
[89] *Id.* at 1371.

present danger is presumptively a First Amendment violation."[90] Per Perrine, "*Collins* established that emergency orders must be tailored to address current crises, and cannot be used to preempt the future exercise of First Amendment rights."[91]

The Ninth Circuit distinguished *Collins* in *Menotti v. City of Seattle*.[92] There, the court held that the no-protest zones imposed in Seattle during the WTO conference were distinguishable because the Seattle protests were more demonstrably violent, and the no-protest zones were relatively small compared to the county-wide ban imposed in *Collins*.[93] In particular, the *Menotti* court pointed out that a "small but dedicated group of violent protestors" "were able to elude capture due to the tens of thousands of nonviolent protestors in the downtown area."[94] Despite the court's upholding of Order 3 as constitutional, the Ninth Circuit still applies a higher level of scrutiny to emergency orders that limit normally protected activities than courts that follow the analysis set forth in *Chalk*. So long as violence is not widespread, emergency orders must be limited in their scope and area. However, it does not appear that many other courts have used the Ninth Circuit's analysis.[95] Accordingly, it is likely that emergency orders issued outside the Ninth Circuit will be reviewed under the deferential standard articulated by the Fourth Circuit, which avoids second-guessing state officials who respond to emergencies in their official capacities.

II. Statutory Analysis

Since November 2016, 45 states have considered legislation that would restrict the First Amendment rights of protesters, including the rights to peaceful assembly and expression, or otherwise inhibit protesters' ability to organize, with 15 states actually enacting such legislation.[96] These statutes have taken many forms, including "critical infrastructure" statutes based on Oklahoma's OK ST T. 21 § 1792, and later pushed by the American Legislative Exchange Council, and statutes limiting or removing liability for drivers who strike protesters with their vehicles. In addition to statutes that were passed in the wake of the Standing Rock protests, last summer's Black Lives Matter protests in response to police brutality and racial inequality saw state legislatures respond by introducing bills that expand the definitions of existing crimes, like rioting, unlawful gathering, and camping, and provide increased penalties for such conduct. The January 6th storming of the United States Capitol building has also prompted legislative responses, including an Oklahoma statute which takes effect November 1, 2021 that adds 'unlawful assemblies' to the offenses that can be prosecuted as 'racketeering activity' under Oklahoma's RICO statute."[97] Despite their various motivations and effects, these laws have the strong potential to be used against nonviolent demonstrators exercising their First Amendment rights to challenge and protest against injustices. This section will analyze a sampling of these statutes using the constitutional standards discussed above in light of their potential impacts on First Amendment rights, such as speech, assembly, and association. Specifically, this section will analyze Oklahoma's OK ST T. 21 § 1792, South Dakota's SD ST § 5-4-18, and Tennessee's HB 8005 (2020).

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[90] *Id.*
[91] Perrine, *supra* note 83 at 656.
[92] Menotti v. City of Seattle, 409 F.3d 1113, (9th Cir 2005).
[93] *Id.* at 1132-36.
[94] *Id.* at 1132-33.
[95] Citing References for Collins v. Jordan, WESTLAW, http://www.westlaw.com (last visited Apr. 4, 2021).
[96] *US Protest Law Tracker*, *supra* note 10.
[97] *Id.; See* OKLA. STAT. tit. 22 § 1402.

A. Critical Infrastructure Statutes

Oklahoma's OK ST T. 21 § 1792 was passed in 2017 and formed the basis for model legislation circulated by the American Legislative Exchange Council (ALEC).[98] In relevant part, the statute imposes increased penalties for trespass on "property containing a critical infrastructure facility" (including potential felony charges); felony charges for willfully damaging equipment in such a facility; and imposes liability on any organization "found to be a conspirator with persons who are found to have committed any of the crimes described in… this section."[99] The statute provides a long list of facilities that qualify as "critical infrastructure facilities," including "Any aboveground portion of an oil, gas, hazardous liquid or chemical pipeline, tank, railroad facility or other storage facility that is enclosed by a fence, other physical barrier or is clearly marked with signs prohibiting trespassing, that are obviously designed to exclude intruders."[100] Since Oklahoma first passed its critical infrastructure statute in 2017, at least twelve other states have adopted similar legislation.[101] Since the ALEC model bill that was circulated to state legislatures is based in part on Oklahoma's critical infrastructure statute,[102] the Oklahoma statute will be largely representative of laws in other states.

The enhanced trespass penalties and conspirator liability provisions provide two separate areas of analysis. While the enhanced trespass provisions are certainly troubling and arguably were enacted specifically to chill speech in violation of *Texas v. Johnson*, the vicarious liability provisions more directly implicate the constitutional right to assembly by imposing harsh penalties on organizations that may be only tangentially related to the individual being prosecuted under the statute. Without clear definitions of what qualifies as a conspiracy in this context, organizations engaged in otherwise lawful activity who merely affiliate with individuals who are convicted under the statute run the risk of being held liable for the actions of those individuals, in clear violation of *NAACP v. Claiborne Hardware Co.*[103]

1. Enhanced Trespass Penalties

While protests were underway in North Dakota against the Dakota Access Pipeline, Oklahoma approved and began construction on the Diamond Pipeline running from "the pipeline

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[98] Am. Legis. Exch. Couns., *supra* note 23.
[99] OKLA. STAT. tit. 21 § 1792 (2021).
[100] *Id.*
[101] Dan Shea, *Balancing Act: Protecting Critical Infrastructure and Peoples' Right to Protest*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 21, 2020), https://www.ncsl.org/research/energy/state-policy-trend-protecting-critical-infrastructure-and-peoples-right-to-protest-magazine2020.aspx.
[102] Am. Legis. Exch. Couns., *supra* note 23. (The ALEC model bill also includes provisions drawn from OK ST T. 76 § 80.1, which provides that "A person who is arrested for or convicted of trespass may be held liable for any damages to personal or real property while trespassing," and assigns vicarious liability for such damages to any "person or entity that compensates… a person for trespassing." OK ST T. 76 § 80.1 is outside the scope of this comment, but it is worth noting that this bill poses similar concerns regarding its basis for liability. During floor debate, the bill's sponsor refused to elaborate on what "compensate" meant in the context of the bill, stating "It means just what we want it to on this bill. How about that?" and "That would be for the courts to decide." Dan Trotter, *House Approves Bill to Address Perceived Threat of Paid Protesters*, TULSA PUBLIC RADIO, (May 4, 2017), https://www.publicradiotulsa.org/post/house-approves-bill-address-perceived-threat-paid-protesters#stream/0.
[103] "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982).

crossroads of the world" in Cushing, Oklahoma, to Memphis, Tennessee.[104] The pipeline, completed in 2017,[105] crosses through approximately 500 waterways, including 11 sources of drinking water,[106] as well as sacred Native American sites along the Trail of Tears.[107] Native tribes and environmental activists in Arkansas and Oklahoma announced their intention to protest the pipeline shortly after it was announced.[108] HB 1123 was introduced in the Oklahoma House of Representatives in anticipation of potential protests against the Diamond Pipeline, and its sponsor, Scott Biggs, specifically cited protests in North Dakota against the Dakota Access Pipeline as motivation for introducing the legislation, stating, "Across the country, we have seen time and time again these protests have turned violent, these protests have disrupted the infrastructures in those other states… This is a preventative measure … to make sure that doesn't happen here."[109]

The first part of the bill, which became law on May 3, 2017, imposes increased penalties on any person who "willfully trespass[es] or enter[s] property containing a critical infrastructure facility," including fines of at least $1,000 or 6 months of jail time.[110] Further penalties of fines of at least $10,000 are imposed "If it is determined the intent of the trespasser is to willfully damage, destroy, vandalize, deface, tamper with equipment, or impede or inhibit operations of the facility."[111] Lastly, if one "willfully damage[s], destroy[s], vandalize[s], deface[s] or tamper[s] with equipment in a critical infrastructure facility" a fine of up to $100,000 or ten years of jail time is imposed.[112] Critical infrastructure is broadly defined and includes facilities such as refineries, power facilities, electric power lines, cell phone towers, dams, "below or aboveground" petroleum pipelines, or "any aboveground portion of an oil, gas, hazardous liquid or chemical pipeline, tank, railroad facility or other storage facility," so long as the infrastructure is enclosed by a fence or marked by a sign.[113]

Oklahoma's Critical Infrastructure statute presents a number of issues that have the potential to impact the expression of First Amendment rights. First, the statute only requires one to enter property *containing* a fenced-off critical infrastructure facility. There does not appear to be anything in the statute requiring one to actually breach the fence to be liable. This definition is, in fact, so broad, that protesting at the state capitol without permission is a felony, as the Oklahoma state capitol has active oil wells on the complex.[114] Given that Oklahoma contains more

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[104] Alleen Brown, *Oklahoma Governor Signs Anti-Protest Law Imposing Huge Fines on "Conspirator" Organizations*, THE INTERCEPT (May 6, 2017), https://theintercept.com/2017/05/06/oklahoma-governor-signs-anti-protest-law-imposing-huge-fines-on-conspirator-organizations/.

[105] Energy Services South, LLC, *ESS Completes Diamond Pipeline Project* (last visited Mar. 14, 2021), https://energyservicessouth.com/ess-completes-diamond-pipeline/

[106] Leslie Newell Peacock, *The Diamond Pipeline*, ARK. TIMES (Nov. 26, 2015), https://arktimes.com/news/arkansas-reporter/2015/11/26/the-diamond-pipeline?oid=4181722.

[107] Jordan Lucero, *Oklahomans Join Protest Against Pipeline That Will Cross Trail of Tears*, OKCFOX (Jan. 30, 2017), https://okcfox.com/news/local/oklahomans-join-protest-against-pipeline-that-will-cross-trail-of-tears.

[108] *Id.*

[109] Laura Eastes, *Anti-protest bills could curb freedom of speech or provide protection in Oklahoma*, OKLA. GAZETTE (Mar. 15, 2017), https://www.okgazette.com/oklahoma/anti-protest-bills-could-curb-freedom-of-speech-or-provide-protection-in-oklahoma/Content?oid=2979832.

[110] OKLA. STAT. tit. 21 § 1792 (2021).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Chuck Ervin, *Oil wells at state Capitol refurbished*, TULSA WORLD (updated Feb 27, 2019), https://tulsaworld.com/archives/oil-wells-at-state-capitol-refurbished/article_023b7db5-3be9-5ba7-9341-2b5b8534fc11.html.; Julie Jarnagin, *Oklahoma Boasts a One-of-a-Kind State Capitol*, IDEAL HOMES BLOG (July 12, 2019), https://www.idealhomes.com/blog/oklahoma-boasts-a-one-of-a-kind-state-capitol/.

than 68,000 miles of pipelines,[115] it is not unforeseeable that one could willfully enter property containing pipeline infrastructure or other critical infrastructure without knowing that such infrastructure exists. Additionally, the statute does not criminalize any new conduct on its face. Trespass, vandalism, and destruction of property are already crimes in Oklahoma.[116] Despite this, the critical infrastructure statute substantially and disproportionally increases the penalties for these crimes.[117]

While Representative Biggs has insisted that the statute was not intended to target protesters,[118] given its timing vis-à-vis the Diamond Pipeline, and Biggs' reference to Standing Rock as reason to pass the bill, it is arguable that the statute goes beyond a mere incidental limitation on expressive conduct and is in fact intended to limit expressive conduct. Where a statute is determined to specifically target expressive conduct, it is to be reviewed under "the most exacting scrutiny."[119] When the statute was passed, no protests had actually begun in Oklahoma.[120] However, the statute's sponsor had received nearly $14,000 in political donations from the oil and gas industry between 2015 and 2017.[121] Just like the statute examined in *Texas v. Johnson*, the activity criminalized in OKLA. STAT. tit. 12 § 1792 is already criminalized in other statutes.[122] In Biggs' own words, the statute "is a preventative measure … to make sure [violent protests don't] happen here."[123] Such a statement would appear on its face to indicate that the statute is intended to prevent demonstrations against pipeline infrastructure, in violation of *Texas v. Johnson*.

Even under the lesser degree of judicial scrutiny described in *O'Brien*, the statute still seems to run afoul of the First Amendment. While *O'Brien* applies when a "sufficiently important governmental interest" has "incidental limitations on First Amendment freedoms," those limitations must still be "no greater than is essential to the furtherance of that interest." [124] Even assuming that protecting "critical infrastructure" is an important governmental interest, a statute that allows the imposition of a $100,000 penalty or a ten-year jail term[125] for conduct that would otherwise be classified as misdemeanor vandalism[126] can hardly be said to be narrowly tailored.

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[115] *Pipelines*, OKLA. HIST. SOC'Y (last visited Mar. 14, 2021), https://www.okhistory.org/publications/enc/entry.php?entry=PI012.

[116] *See* OKLA. STAT. tit. 21 §§ 1760 (vandalism and destruction of property), 1835 (trespass)

[117] *Compare* OKLA. STAT. tit. 21 § 1792's imposition of fines of up to $100,000 *with* § 1760's determination of punishment based on the aggregate value of the damage done.

[118] Eastes, *supra* note 110 ("This bill doesn't say you cannot protest. All this bill says is you cannot trespass onto private property or damage critical infrastructure.").

[119] Texas v. Johnson, 491 U.S. 397, 412 (1989). Under strict scrutiny, a law must be "a narrowly tailored means of serving a compelling state interest."; Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 535 (1980). A restriction is narrowly tailored if no reasonable, less-restrictive alternatives exist.; United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

[120] Wertz, *supra* note 11.

[121] *Legislation in Oklahoma Aims to Protect Critical Infrastructure in Wake of Environmental Protests*, THE FREE SPEECH PROJECT (June 24, 2019), https://freespeechproject.georgetown.edu/tracker-entries/legislation-aims-to-protect-critical-infrastructure-in-wake-of-environmental-protests/; *See also* Oklahoma Watch, *Oil and Gas Donations to Legislators*, OKLA. WATCH, (May 23, 2017), https://tulsaworld.com/news/capitol_report/bill-stemming-from-pipeline-protests-passes-oklahoma-house-committee/article_1b76f635-ad72-5619-9c85-3cd16a6ed57d.html.

[122] *Johnson*, 491 U.S. at 410 ("Texas already has a statute specifically prohibiting breaches of the peace… which tends to confirm that Texas need not punish this flag desecration in order to keep the peace."). *See also* OKLA. STAT. tit. 21 §§ 1760 (vandalism and destruction of property), 1835 (trespass).

[123] Eastes, *supra* note 110.

[124] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[125] OKLA. STAT. tit. 21 § 1792 (2021).

[126] OKLA. STAT. tit. 21 § 1760 (2021).

2. Conspirator Liability Provision

In addition to the increased penalties that may be levied against individuals for trespassing on property containing critical infrastructure, Oklahoma's critical infrastructure statute also provides that an organization "is found to be a conspirator with persons who are found to have committed any of the crimes described" above, "the conspiring organization shall be punished by a fine that is ten times the amount of said fine."[127] This provision, in particular, appears to be the most constitutionally questionable. Under *Claiborne*, organizations cannot be held liable for the unlawful activity of their members without a specific showing that they "authorized or ratified" the activity in question or that violence is "pervasive."[128] Some organizers in Oklahoma believe that the statute is worded so broadly that they could be held liable for the actions of individuals they are only tangentially related to.[129] Other commentators have suggested that "under the threat of liability, organizations would opt not to organize demonstrations."[130]

Like the other provisions of Oklahoma's critical infrastructure statute, the conspirator provision is unclear as to what conduct constitutes a violation. The Oklahoma statute criminalizing "conspiracy" states in relevant part, "If two or more persons conspire… [to commit any of the prohibited acts] they are guilty of a conspiracy."[131] This definition could potentially have the effect of imposing conspiratorial liability on any organization a given defendant is a member of. Opponents of the bill in the Oklahoma legislature argued that the language in the provision was unclear and could open many individuals and organizations to liability.[132] Better guidance as to what "conspiracy" means could perhaps be found in other Oklahoma statutes, such as Title 21 § 988, which defines conspiracy for the purposes of the gambling code.[133] While better-defined provisions exist in the Oklahoma criminal code, they typically include clauses limiting their applicability to specific circumstances.[134]

B. South Dakota's SD ST § 5-4-18

During the same time period that Oklahoma passed its Critical Infrastructure statute, the South Dakota legislature introduced Senate Bill 176. This bill amended several sections of South Dakota law to allow the governor and state law enforcement to prohibit large gatherings on public lands. In relevant part, SD ST § 5-4-18 allows the governor to "prohibit any group larger than twenty persons from congregating upon any tract of land under the supervision of the

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[127] OKLA. STAT. tit. 21 § 1792 (2021).
[128] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 923, 931 (1982).
[129] Brown, *supra* note 105 (Per Johnson Bridgwater, head of the Oklahoma chapter of the Sierra Club, "We don't necessarily know everyone who's attending the events… There is a strong and real fear that this could be used as an attempt to crush a group or a chapter of Sierra Club unfairly.").
[130] Eastes, *supra* note 110 (citing attorney Doug Parr).
[131] OKLA. STAT. tit. 21 § 421 (2020).
[132] Randy Krehbiel, *House passes 'critical infrastructure' protection bill*, TULSA WORLD (Mar. 1, 2017), https://tulsaworld.com/news/local/house-passes-critical-infrastructure-protection-bill/article_330ee3aa-8c63-5b92-b094-3202b4bd103a.html.
[133] OKLA. STAT. tit. 21 § 988 (2021) ("A conspiracy is any agreement, combination or common plan or scheme by two or more persons, coupled with an overt act in furtherance of such agreement, combination or common plan or scheme, to violate any section of this act").
[134] *See, e.g.*, OKLA. STAT. tit. 21 §§ 988, 1265.5 (limiting conspiracy punishable under this section to "any crime defined by Sections 1265.1 through 1265.14) (2021).

commissioner of school and public lands."[135] The bill also included amendments to the criminal code that would increase penalties for trespassing in areas designated under the Emergency Management Code and criminalizing actions that "impede or stop the flow of traffic."[136]

SD ST § 5-4-18 allows the governor to prohibit gatherings if "necessary to preserve the undisturbed use of the land by the lessee or if the land may be damaged by the activity."[137] The statute contains no provision requiring any damage actually needs to occur before such a prohibition may be imposed, however, because the prohibitions directly inhibit the exercise of the First Amendment right of association and implicate restrictions on speech, prohibitions on public gatherings declared under the statute are analogous to emergency orders. Neither the Tenth Circuit, where South Dakota sits, nor any South Dakota state courts have cited to either *United States v. Chalk* or *Collins v. Jordan* in the context of emergency orders, [138] so it is difficult to guess which standard would be used to analyze SD ST § 5-4-18.

Under the standard set forth in *Collins*, "enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation."[139] The *Collins* court further noted, "[T]he occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day."[140] Accordingly, under that standard, a given prohibition in South Dakota would have to be reviewed in the specific factual context that led to the prohibition. Absent widespread or organized violence on the part of protesters, as was discussed in *Menotti v. City of Seattle*,[141] it would likely be difficult for the state to defend a prohibition on gathering under SD ST § 5-4-18.[142]

By way of contrast, the standard of review set forth in *Chalk* focuses on "whether the… actions were taken in good faith and whether there is some factual basis for [the] decision that the restrictions… imposed were necessary to maintain order."[143] While this standard is considerably more deferential, it is not inconceivable that a prohibition issued before any violence, disorder, or property damage has occurred could be found unconstitutional under the *Chalk* standard. For context, the decision in *Chalk* was issued against appellants who were arrested for violating a curfew imposed after a race riot, which banned possession of "dangerous weapons, explosives, or ammunition."[144] When arrested, the appellants possessed a firearm, ammunition, and "a combination of materials from which an incendiary bomb could be readily produced."[145]

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[135] S.D. CODIFIED LAWS § 5-4-18 (2021).
[136] S.D. CODIFIED LAWS §§ 22-35-8, 22-18-40 (2021).
[137] S.D. CODIFIED LAWS § 5-4-18 (2021).
[138] *See* Citing References for Collins v. Jordan, WESTLAW, http://www.westlaw.com (last visited Apr. 4, 2021); Citing References for United States v. Chalk, WESTLAW, http://www.westlaw.com (last visited Apr. 4, 2021).
[139] Collins v. Jordan, 110 F.3d 1363, 1371 (9th Cir. 1996).
[140] *Id.* at 1372.
[141] Menotti v. City of Seattle, 409 F.3d 1113, 1135 (9th Cir. 2005).
[142] While Courts frequently point to the presence or absence of violence when analyzing emergency orders (*See, e.g.* United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); *Collins*, 110 F.3d 1363; *Menotti*, 409 F.3d 1113), there does not appear to be a large degree of discussion as to how these types of prohibitions would be handled when violence is instigated by the police or private security, as was largely the case at Standing Rock. Resolution of this ambiguity is outside the scope of this comment, but it could prove useful to establish a difference in treatment based on who instigates the violence the state purports to respond to.
[143] *Chalk*, 441 F.2d at 1281.
[144] *Id.* at 1278.
[145] *Id.* at 1278-79.

Challenging the validity of the curfew to avoid a conviction does not seem to be an effective means of advancing First Amendment arguments, and in light of this context, the Fourth Circuit's deference to the curfew is understandable. Despite the Court's deference in *Chalk*, municipalities are not free to issue emergency orders without impunity. The Fourth Circuit iterated that "the incidental restriction on First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected."[146] In the context of emergency orders, "the restrictions imposed pursuant to [an emergency order] must appear to have been reasonably necessary for the preservation of order."[147] Even under *Chalk,* an emergency order issued pre-emptively or absent any widespread or organized violence on the part of demonstrators could still conceivably be held unconstitutional if it is found to be overbroad or disproportionate to the asserted state interest.

C. Tennessee's HB 8005

HB 8005/SB 8005 (2020) created or amended 15 sections of the Tennessee criminal code ranging from increased penalties for "vandalism offenses involving government property" and "participation in a riot," to an expanded definition and penalties for "camping."[148] The provision elevating "camping" from a misdemeanor to a felony is particularly troubling, as convicted felons in Tennessee lose their right to vote.[149] Analysis of this statute will be fundamentally different because it was motivated by protests against racial injustice and police brutality rather than a desire to protect fossil fuel infrastructure, however, there are a number of reasons for its inclusion in this discussion. First, racial justice and environmental justice go hand in hand.[150] In the United States, people of color are more likely to be exposed to pollution, and toxic facilities like fracking wells are more likely to be sited in communities of color than in majority-white communities.[151] Further, it is well-established that the countries weathering the harshest effects of climate change are located in the Global South and are not contributing to climate change on anything resembling the same scale as the industrialized nations of the Global North.[152] Second, the provisions of the bill could just as easily be applied to environmental protest as to any other kind of protest. Third,

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[146] *Id.* at 1280.
[147] *Id.* at 1281.
[148] 2020 TENN. PUB. ACTS ch. 3 (codified as amended in scattered sections of TCA Titles 8, 38, 39, 40), https://publications.tnsosfiles.com/acts/111/2nd%20Extraordinary%20Session/pc0003EOS.pdf. Because this bill modified several sections of the Tennessee Criminal Code, it will generally be referred to by its Bill Number rather than by its statutory designations.
[149] *Id.; See also* Equal Access to Public Property Act, TEN. CODE ANN. § 39-14-414 (2021) (camping provisions); TENN. CONST. art. IV, § 2 (Disqualification for commission of crime, "Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.").
[150] *See Let Them Drown*, *supra* note 4; *Environmental & Climate Justice*, NAACP (Mar. 21, 2016), https://naacp.org/issues/environmental-justice/.
[151] Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism is Real*, THE ATLANTIC (Feb. 28, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/; Raven Rakia, *Fracking waste more likely to be located in poor communities and neighborhoods of color*, GRIST (Feb. 3, 2016), https://grist.org/climate-energy/fracking-waste-more-likely-to-be-located-in-poor-communities-and-neighborhoods-of-color/.
[152] *The global injustice of the climate crisis*, DEUTSCHE WELLE [German Wave], (Aug. 28, 2019), https://www.dw.com/en/the-global-injustice-of-the-climate-crisis-food-insecurity-carbon-emissions-nutrients-a-49966854/a-49966854.

Tennessee also has a Critical Infrastructure statute.[153] The enhanced penalties and expanded definitions of illegal activity provided in HB 8005 have a strong potential to coincide with the conduct prohibited by Tennessee's Critical Infrastructure statute.

Unlike Oklahoma's OKLA. STAT. tit. 21 § 1792, HB 8005 was not pre-emptively passed in anticipation of potential protest activity, but rather was passed by a special legislative session in response to active protests outside the state capitol organized in response to the murder of George Floyd.[154] The bill's sponsor in the General Assembly asserted that the bill was targeted at "criminal elements," and stated that the bill was intended to protect law enforcement officers and public property.[155] While these circumstances would likely provide the "substantial government interest" required by *O'Brien*,[156] the Lieutenant Governor and Speaker of the Senate stated in a news conference, "[The bill] is to prevent what has happened in other cities like Portland and Washington, DC."[157] This statement would seem to violate the Supreme Court's command in *O'Brien* that a government interest must be "unrelated to the suppression of free expression." [158] Additionally, *O'Brien* provides that any restrictions on First Amendment freedoms be "no greater than is essential to the furtherance of that interest."[159]

Beyond the statements made by the Lieutenant Governor, the slew of new felonies created by HB 8005 coupled with the accompanying loss of voting rights for any individual convicted of a felony would seem to be in substantial part related to the "suppression of free expression," particularly given the timing of the bill. Once a statute is determined to be related to the suppression of free expression, it moves out of the ambit of *O'Brien* and is instead analyzed under *Texas v. Johnson*.[160] Additionally, HB 8005 is not narrowly tailored, as required by the Supreme Court when the government seeks to regulate speech.[161] The potential loss of voting rights for political demonstrations that are inconvenient to the government is not a proportionate response.[162] This is particularly true in a state with a history of racially motivated voter suppression[163] when

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[153] TEN. CODE ANN. § 39-14-411 (2019). Notably, Tennessee's Critical Infrastructure lacks the trespass and conspirator liability provisions of other Critical infrastructure statutes, instead only imposing felony charges on "A person who knowingly destroys, injures, interrupts, or interferes with critical infrastructure or its operation."

[154] Adrian Mojica, *Tennessee lawmakers debate bill to clamp down on some protesters*, FOX17 NASHVILLE (Aug. 10, 2020), https://fox17.com/news/local/tennessee-lawmakers-debate-bill-to-clamp-down-on-some-protesters-nashville-capitol-governor-bill-lee.

[155] *Id.*; Kelly Mena, *New Tennessee law penalizes protesters who camp on state property with felony and loss of voting rights*, CNN (Aug. 22, 2020), https://www.cnn.com/2020/08/22/politics/tennessee-felony-camping-law-right-to-vote/index.html.

[156] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[157] Mena, *supra* note 156 (referring to the creation of "autonomous zones" in other cities).

[158] *O'Brien*, 391 U.S. at 377.

[159] *Id.*

[160] Texas v. Johnson, 491 U.S. 397, 410 (1989) ("These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related 'to the suppression of free expression' within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.").

[161] *O'Brien*, 391 U.S. at 377. *See also* Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 535 (1980) (Regulations restricting speech regulation must be "(i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest."); *Johnson*, 491 U.S. 397.

[162] *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[163] *See* Keeda Hanyes, *Taking away protesters' right to vote is a fear tactic Tennessee is all too familiar with*, TENNESSEAN (Sep. 22, 2020), https://www.tennessean.com/story/opinion/2020/09/22/tennessee-has-long-history-suppression-voting-rights/5866479002/.

the bill in question is passed in response to protests against racial inequality. Beyond this, activists assert that the bill's effects would extend beyond the protests at the state capitol and, in particular, would affect Tennessee's unhoused population by making it a felony for an unhoused person to sleep on state property, thereby "forcing unhoused people onto private property."[164]

Given the broad range of statutes amended or created by HB 8005, it is unlikely that the entire bill can be challenged on First Amendment grounds. However, it seems likely that the provisions that specifically target common protest tactics, such as camping,[165] roadblocks,[166] or "disrupting a lawful meeting"[167] run afoul of both *United States v. O'Brien* and *Texas v. Johnson*.

III. Conclusion

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[168] In the struggle against climate change and mass extinction, there is too much to lose by waiting for a government that is not simply unresponsive but is, in fact, actively making things worse to realize the error of its ways. [169] Urgent action is needed now if the worst effects of climate change are to be averted. As pressure mounts from climate change, racial injustice, and economic austerity, acts of protest and civil disobedience will inevitably become more frequent. Demands for justice are not acts of violence. They are responses to violence. When the consequences for inaction are as dire as they are in the context of climate change, it is beyond unrealistic to expect people to passively wait for better legislation. When systemic and deep-seated institutional violence and discrimination are used by the state to enforce racial, climate, and economic injustice, it is beyond unrealistic to expect people to passively wait for better legislation. Speech, association, and expressive conduct—all elements of politically motivated protests and demonstrations—are protected by the First Amendment. Laws that are designed to prevent disruptive activity before it even begins cannot be allowed to stand when their effects suppress protected conduct. Struggles against climate change, racial injustice, and economic austerity threaten power in a very real way. They directly challenge systems of oppression and exploitation that benefit those in power. Therefore, it is crucial that laws designed to restrict challenges to these systems, particularly those that restrict constitutionally protected freedom of expression, be challenged at every opportunity to ensure that struggles against injustice are not criminalized or used as a pretext for violent suppression. Justice demands it.

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[164] Sanya Monsoor, *New Tennessee Law Severely Sharpens Punishments for Some Protesters, Potentially Endangering Their Voting Rights*, TIME (Aug. 23, 2020), https://time.com/5882735/tennesee-law-protest-voting-rights-felony/.
[165] Equal Access to Public Property Act, TEN. CODE ANN. § 39-14-414 (2021).
[166] TEN. CODE ANN. § 39-17-307 (2021).
[167] TEN. CODE ANN. § 39-17-306 (2021).
[168] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
[169] *Let Them Drown*, *supra* note 4, at 165.