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THE FIRST AMENDMENT & CURRENT STATE-LEVEL LEGISLATIVE REPRESSION

John Loranger^{d1}

INTRODUCTION

Widespread organized and violent public dissent triumphed over authoritarian suppression in the founding struggle of the United States. In a prompt act of historical irony, criticism of the state was quickly outlawed in the Alien and Sedition Acts of 1798. Despite expiring in 1801, the Alien and Sedition Acts introduced a repressive approach to dissent that has persisted throughout U.S. history.¹ Judges took over a century to read meaningful protections into the First Amendment.² Today, there is a right to dissent established in First Amendment doctrine that includes the right to assemble, to engage in protected speech and conduct, and to publish without fear of prior restraint or government reprisal. However, a new wave of repression will test the viability of modern legal standards in an era where the other branches of government are again displaying great hostility

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¹ The extensive political repression carried out by federal and state executive agencies at various points throughout United States history against dissenters should be acknowledged as closely interwoven with the work of the legislative branch. This paper focuses on present-day, state level legislative enabling of repression and potential future responses by the judiciary. For a detailed presentation of an integrated history, *see generally* STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008).

² *See* ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* xiii (2007).

towards free speech rights and many who practice them.

The legal mechanism of repression, the national security state, has grown exponentially in size and power since September 11, 2001, signaling a devaluation of First Amendment protections in favor of notions of security.³ The Patriot Act and dramatic growth of state surveillance, lawful and not, have combined with a more permissive social attitude towards concentrated power in state security agencies, creating the most adverse conditions for dissenters in decades.⁴ Legislation proposed with a public target identified by its authors is deemed content-neutral, and federal courts uphold regulations on demonstration zones they admit resemble “internment camp[s]” and are “offense[s] to the spirit of the First Amendment,” as reasonable time, place, or manner restrictions.⁵ Police departments are armed to the hilt with billions of dollars in military grade equipment.⁶

Despite these conditions, a growing number of social movements are thriving in the face of serious repression. There were over 600 arrests of people resisting the Dakota Access Pipeline in North Dakota alone, including felony charges for civil disobedience such as locking down to construction equipment.⁷ At the presidential inauguration in 2017, over 200 people were arrested and were charged with felonies.⁸ A superseding indictment including new felony charges now places hundreds of people at risk of spending decades in prison.⁹ The Federal Bureau of Investigation’s

³ MICHAEL RATNER & MARGARET RATNER KUNSTLER, *HELL NO: YOUR RIGHT TO DISSENT IN TWENTY-FIRST-CENTURY AMERICA* 26-39 (2011).

⁴ *See id.* at 16-39, for an outline of the conditions of dissent in the United States after September 11, 2001.

⁵ *See* Coal. to Protest Democratic Nat’l Convention v. City of Boston, 327 F. Supp. 2d 61, 74, 76 (D. Mass. 2004).

⁶ *See* Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES (June 8, 2014), <https://perma.cc/N2ZA-2RDW> (“During the Obama administration, according to Pentagon data, police departments have received tens of thousands of machine guns; nearly 200,000 ammunition magazines; thousands of pieces of camouflage and night-vision equipment; and hundreds of silencers, armored cars and aircraft.”); *see also* Christopher Ingraham, *The Pentagon Gave Nearly Half a Billion Dollars of Military Gear to Local Law Enforcement Last Year*, WASH. POST: WONKBLOG (Aug. 14, 2014), <https://perma.cc/DLZ9-MHWF> (“The 1033 program has transferred more than \$4.3 billion in equipment since its inception in 1997.”).

⁷ *See* Colin Moynihan, *A Murky Legal Mess at Standing Rock*, NEW YORKER (Jan. 11, 2017), <https://perma.cc/38RN-E8VS>; Max Grossfeld, *Protester Arrested After Handcuffing Himself to Backhoe to Halt Dakota Access Pipeline Construction*, WEST DAKOTA FOX (Aug. 31, 2016, 10:14 AM), <https://perma.cc/QVX7-Z5MN>.

⁸ Natasha Lennard, *How the Government is Turning Protestors into Felons*, ESQUIRE (Apr. 12, 2017), <https://perma.cc/6UJU-RS2U>.

⁹ Patrick Strickland, *ACLU Sues D.C. Police Over Violence at Anti-Trump Rally*, AL JAZEERA (June 26, 2017), <https://perma.cc/SJ4J-68FM> (“Most of the charges against the

(“F.B.I.”) Joint Terrorism Task Forces, involving an array of federal, state, and local agencies, have turned their attention to social justice movements such as Occupy Wall Street, Black Lives Matter, and #NODAPL.¹⁰ Police departments across the country have been caught spying on Black Lives Matter organizers, often using sophisticated technology such as Sting-Rays to monitor the communications of demonstrators.¹¹ Like the years of COINTELPRO, use of informants and undercover infiltrators is widespread, although revelations of infiltration have centered on local agencies.¹² Law enforcement and military contractors are partnering to suppress domestic movements.¹³ The ascendancy of authoritarian and white nationalist narratives, such as the “paid protester” and “war on police” tropes,¹⁴ have emboldened lawmakers to target dissent.

In this context, legislators in at least twenty-two states across the country are continuing the longstanding U.S. tradition of responding to dissent with repression, proposing a climbing total of over fifty repressive bills since 2016.¹⁵ These bills range from relieving motorists who strike protesters in the roadway of liability to seizing the assets of anyone police can arrest at a protest deemed unlawful.¹⁶ Over a dozen bills have been withdrawn or failed after strong public opposition, underscoring the legal reality: the best opportunity to defeat repressive legislation is often prior to its passage.

defendants carry maximum sentences that range between 70 and 80 years in prison.”).

¹⁰ George Joseph, *Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson*, INTERCEPT (July 24, 2015, 2:50 PM), <https://perma.cc/KTE5-XWR7>; Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, GUARDIAN (Feb. 10, 2017, 6:00 AM), <https://perma.cc/KDX2-JP2R>.

¹¹ See, e.g., Elyssa Cherney, *Chicago Lawyer Files Federal Lawsuit Over Police Cellphone Tracking System*, CHI. TRIBUNE (Jan. 13, 2017, 3:17 PM), <https://perma.cc/P7ZK-7F7P>; Joseph, *supra* note 10; George Joseph, *Undercover Police Have Regularly Spied on Black Lives Matter Activists in New York*, INTERCEPT (Aug. 18, 2015, 5:27 PM), <https://perma.cc/QAM8-N9N2>.

¹² See, e.g., Chris Hawley, *NYPD Monitored Muslim Students All Over Northeast*, ASSOCIATED PRESS (Feb. 18, 2012), <https://perma.cc/QQA3-P3KD> (discussing how the NYPD infiltrated Muslim student groups far outside New York City, even recording how many times a day students prayed).

¹³ Alleen Brown et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to “Defeat Pipeline Insurgencies,”* INTERCEPT (May 27, 2017, 8:04 AM), <https://perma.cc/TS8Y-6NKM>.

¹⁴ See Allie Conti, *Why the Ridiculous ‘Paid Protester’ Myth Refuses to Die*, VICE (Mar. 1, 2017, 7:12 AM), <https://perma.cc/596U-4NYC>; Dan Berger, Op-Ed, *A Brief History of the “War on Cops”: The False Allegation that Enables Police Violence*, TRUTHOUT (July 21, 2016), <https://perma.cc/K9NG-HGFF>.

¹⁵ See *infra* Appendix A.

¹⁶ Traci Yoder, *New Anti-Protesting Legislation: A Deeper Look*, NATIONAL LAWYERS GUILD (Mar. 2, 2017, 12:32 PM), <https://perma.cc/WD6Z-4ZNJ>.

This paper reviews and analyzes a sample of these proposed bills vis-à-vis current First Amendment law. After a brief introduction to relevant law, I will address the most novel and constitutionally suspect measures, which impose major financial liability on demonstrators. Next, bills that create new criminal offenses or increase penalties for extant offenses, which are severe but less constitutionally suspect, will be examined. Then, I will briefly discuss driver liability bills, which have mainly been defeated by public outcry and are legally problematic, before closing with a discussion of recent anti-masking legislation and its historical context. I argue that this legislation is ripe for challenge.

Overall, while First Amendment frameworks exist to mount a strong challenge to many of the most authoritarian of the proposed measures, critical doctrinal safeguards have been eroded. Two major areas of concern are the content-based inquiry and the narrow tailoring requirement of incidental burdens on protected speech and time, place, or manner restrictions. In a broader social and political context where growing dissent is countered by official claims that it is disloyal and specious, history illustrates that the First Amendment cannot be relied on as a bulwark to blunt repression in a systematic or effective way.

BRIEF INTRODUCTION TO LEGAL ANALYSIS

The First Amendment was incorporated through the Fourteenth Amendment and made applicable to the states in 1925.¹⁷ Ideally, people are protected by the First Amendment even when their speech makes them unpopular with leaders of the state or a majority of the public: “The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”¹⁸ This can be true even when speech provokes a condition of unrest. In *Terminiello v. City of Chicago*, the Supreme Court wrote:

The vitality of civil and political institutions in our society depends on free discussion. . . . The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

¹⁷ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁸ *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (overturning convictions of Black citizens demonstrating against discrimination for breach of the peace after they refused to disperse from Capitol grounds and instead sat and sang songs).

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.¹⁹

As a corollary, the government must be prevented from inhibiting speech merely because it finds doing so convenient: “the prime objective of the First Amendment is not efficiency.”²⁰

Another pillar of First Amendment doctrine is the prohibition on government regulation of expression due to its message, ideas, or subject matter, known as the requirement of content-neutrality.²¹ Statutes that are not content-neutral are presumptively unconstitutional and subject to strict scrutiny; they therefore “must be the least restrictive means of achieving a compelling state interest.”²² Facially content-based laws are immediately subject to strict scrutiny, and a facially neutral law will be adjudicated as content-based and subject to strict scrutiny if it cannot be justified absent reference to the content of the regulated speech, or is enacted due to disagreement with the content of speech subject to regulation.²³ If a facially

¹⁹ *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (citations omitted).

²⁰ *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014).

²¹ *See id.* at 2529-30.

²² *Id.* at 2530 (citation omitted).

²³ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989)). Here, a majority of the Court backed a more rigorous inquiry into the question of facial neutrality, finding Gilbert’s sign code made facial distinctions and failed strict scrutiny for its underinclusion. *Id.* In overturning

neutral law is demonstrated to favor or facilitate a certain speaker while stopping others when it is applied, this is impermissible viewpoint discrimination, an “egregious form of content discrimination.”²⁴

Far from all speech is protected. Fighting words, true threats, fraud, defamation, and obscenity are all categorically excluded from the First Amendment’s umbrella.²⁵ Even if expressive conduct falls outside one of these categories, it may not be considered speech within the ambit of protection. The test is whether the speaker engaged in the expressive conduct with the “intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”²⁶

Furthermore, “incidental limitations” on protected expression are justified when expressive and non-expressive actions are combined in a single course of conduct and the government has a “substantial or important” interest at stake.²⁷ In such cases, assuming the underlying power to regulate, the action is constitutional when “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.”²⁸ In the case that established this doctrine, *United States v. O’Brien*, the preservation of draft cards to ensure their “continued availability” for the smooth functioning of the Selective Service system was facially unrelated to expressive conduct and served “a legitimate and substantial purpose in the system’s administration.”²⁹ Finally, the Court could “perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful

the Ninth Circuit decision that found the code facially content-neutral and constitutional, Reed signals the possibility of a less bleak path for challenges to arguably facially discriminatory statutes. *See id.* at 2227-31.

²⁴ Coakley, 134 S. Ct. at 2532-33 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

²⁵ *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (internal citations omitted).

²⁶ *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (overturning as a violation of right to free speech student’s conviction for hanging an American flag with an upside-down peace symbol attached outside of window of apartment in wake of the killing of students at Kent State University by the National Guard and the U.S. invasion of Cambodia).

²⁷ *See United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

²⁸ *Id.* at 377.

²⁹ *Id.* at 377-78.

mutilation or destruction.”³⁰

As technological capacity and resources for state security forces to suppress dissent increased dramatically in the twentieth century, the Supreme Court declared those who wish to express their views in public are worthy of receiving the height of constitutional protection.³¹ The Court reasoned that traditional sites of public dialogue, known as public forums, occupy a “special position in terms of First Amendment protection.”³² These spaces, such as streets and parks, “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³³ Due to their central importance in the free exchange of ideas the First Amendment protects, in these places, “the government's ability to permissibly restrict expressive conduct is very limited.”³⁴

Despite lofty rhetoric, extensive and severe regulations on speech activity in streets and other public fora may be upheld as legitimate time, place, or manner restrictions, for example under the doctrine governing competing uses of public space.³⁵ These regulations are constitutional if they “are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest,” and the regulation leaves “open ample alternative channels for communication of the information.”³⁶ To satisfy the narrow tailoring requirement, the regulation cannot “burden substantially more speech than is necessary to further the government’s legitimate interests,” which could range from ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, to protecting women’s freedom to access pregnancy related services.³⁷ If there are alternative measures that “burden substantially less speech,” the government must show those alternative measures “would fail to achieve the government’s interests, not simply that the chosen route is easier.”³⁸

³⁰ *Id.* at 381.

³¹ See *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”).

³² *United States v. Grace*, 461 U.S. 171, 180 (1983).

³³ *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939).

³⁴ *Grace*, 461 U.S. at 177.

³⁵ See *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring).

³⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

³⁷ *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).

³⁸ *Id.* at 2540.

PROTESTER LIABILITY & ASSET SEIZURE STATUTES

Relatively few bills regarding protester liability and civil asset seizure exist, but the proposals are draconian. While many have been defeated, in August 2017, Pennsylvania Republicans proposed a bill making protesters liable for police overtime, medical and emergency response, and other “public safety response costs” if they are convicted of a felony or misdemeanor stemming from the demonstration.³⁹ Across the country in Arizona, S.B. 1142, which was propelled through the State Senate in the 2016-2017 legislative year by Republicans who claimed that people are paid to riot, would have made riot a racketeering offense.⁴⁰ This would have allowed police to arrest organizers *prior* to a protest, or to subject them to liability for damages caused by others.⁴¹ The bill was publicly shelved by Arizona’s Speaker of the House after mass outcry.⁴² In North Carolina, H.B. 249, entitled “Economic Terrorism,” proposes sweeping changes to the criminal code.⁴³ Among them is liability for all “public safety response costs” incurred for anyone convicted of obstructing traffic or participation in an unlawful assembly.⁴⁴ Similarly, Washington State Senator Doug Ericksen introduced S.B. 5009, a sweeping bill enhancing penalties for crimes involving “economic disruption.”⁴⁵ Ericksen first promised a measure to fight “economic terrorism,” but retreated from this language after condemnation by the local media, civil society, and advocates.⁴⁶ The bill essentially creates a new offense of “economic disruption,” which operates as a mandatory sentencing enhancement if the prosecution alleges, and the judge finds, by a preponderance of the evidence the underlying offense was committed to cause an economic disruption.⁴⁷ Restitution may be ordered up to “double the amount of the defendant’s gain or victim’s

³⁹ S.B. 754, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017); *see also* Zaid Jilani, *New Bill Would Force Arrested Protesters to Pay Police Overtime, Other Fees*, INTERCEPT (Aug. 23, 2017, 4:12 PM), <https://perma.cc/RTH8-HXCU>.

⁴⁰ S.B. 1142, 53rd Leg., 1st Reg. Sess. (Ariz. 2017).

⁴¹ *See* Ray Stern, *Plan a Protest, Lose Your House: Arizona Senate Passes SB 1142 Charging ‘Provocateurs’ With Racketeering*, PHOENIX NEW TIMES (Feb. 23, 2017, 11:06 AM), <https://perma.cc/EBQ5-UTRE> (discussing implications of S.B. 1142, a bill written by a former police officer and motivated by the idea of the paid protestor).

⁴² *See id.*

⁴³ H.B. 249, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

⁴⁴ *Id.*

⁴⁵ S.B. 5009, 65th Leg., Reg. Sess. (Wash. 2017).

⁴⁶ Jim Brunner, *Trump Supporter in State Senate Says Some Protests Are ‘Economic Terrorism,’ Should Be Felonies*, SEATTLE TIMES (Nov. 16, 2016, 8:33 PM), <https://perma.cc/LA2Y-M28R>.

⁴⁷ S.B. 5009, 65th Leg., Reg. Sess. (Wash. 2017).

loss.”⁴⁸ Senator Ericksen stated that the main targets of his bill are members of the climate movement, specifically those who block oil trains.⁴⁹

On May 15, 2017, Oklahoma’s governor signed H.B. 2128.⁵⁰ The law is aimed at people accused of trespass and anyone who “compensates . . . or remunerates” trespassers, a testament to the potency of the paid protester trope.⁵¹ People arrested or convicted of trespassing are now liable for any “damages to personal or real property while trespassing.”⁵²

Minnesota’s legislature is considering measures that could, theoretically, quickly push even well-heeled demonstrators into bankruptcy: H.F. 322 and corresponding S.F. 679. The bills would make any person convicted of participating in, or being present at, an “unlawful assembly,” or of committing a “public nuisance” civilly liable for “public safety response costs.”⁵³ The text does not delineate any share or apportionment of costs, implying each person could be held liable for the entire sum.⁵⁴ Public safety response costs generally run into the tens of thousands, if not hundreds of thousands of dollars. The Bloomington police, for instance—a single agency of several that responded—logged \$25,000 in personnel and overtime costs alone responding to a December 2014 Black Lives Matter protest at the Mall of America.⁵⁵ The bill’s author, former law enforcement official and sponsor of other legislation targeting protest, Nick Zerwas, explained that his constituents’ feelings motivated him to introduce H.F. 322: “I have an entire constituency that feels as though protesters believe that their rights are more important than everyone else’s. . . . Well, there is a cost to that. Rosa Parks sat in the front of the bus. She didn’t get out and lay down in front of the bus.”⁵⁶ Misrepresenting the nature of the Civil Rights

⁴⁸ *Id.*

⁴⁹ Essex Porter, *Protest Bill Creates Crime of ‘Economic Terrorism’*, KIRO 7 (Nov. 18, 2016, 9:41 AM), <https://perma.cc/G8EY-4ER9>.

⁵⁰ See H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017).

⁵¹ *Id.*

⁵² *Id.*

⁵³ H.F. 322, 90th Leg., Reg. Sess. (Minn. 2017); S.F. 679, 90th Leg., Reg. Sess. (Minn. 2017).

⁵⁴ S.F. 679, 90th Leg., Reg. Sess. (Minn. 2017); see also H.F. 322, 90th Leg., Reg. Sess. (Minn. 2017).

⁵⁵ State Representative Nick Zerwas, Press Release: Rep. Zerwas Introduces Legislation Relating to Unlawful Assembly, MINN. HOUSE OF REPRESENTATIVES (Mar. 10, 2016), <https://perma.cc/3QVE-RTG7>; see also Associated Press, *Chanting ‘Black Lives Matter,’ Protesters Shut Down Part of Mall of America*, N.Y. TIMES (Dec. 20, 2014), <https://perma.cc/KUH4-A4FR>. Representative Zerwas is the son of a long-serving Minnesota police chief and worked as a print examiner in a forensics crime lab prior to being elected. See *About Nick Zerwas*, ZERWASFORHOUSE.COM, <https://perma.cc/Q248-Y6TT> (last visited Nov. 18, 2017).

⁵⁶ Jared Goyette, *Minnesota Bill Would Make Convicted Protestors Liable for Policing Costs*, GUARDIAN (Jan. 25, 2017, 8:54 AM), <https://perma.cc/EX2Y-5T2S> (quoting

Movement, while nodding to the legitimacy of protest, Zerwas weaponized history in his attempt to justify severe penalties for modern civil and human rights activists.

Regardless of any difference in liability imposed among the bills, one avenue for immediately challenging any of these bills is that they are unconstitutionally overbroad, inevitably ramming headlong into not only lawful but especially protected First Amendment activity. The U.S. Supreme Court has recognized that a law may be facially invalid against the First Amendment if “a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.”⁵⁷ There is a “plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms, which ‘need breathing space to survive.’”⁵⁸

There are arguments against Oklahoma’s bill on these grounds if it can be effectively demonstrated a far larger amount of protected activity is punished than what is legitimately targeted. Liability is not moored to proven illegal conduct, but only an accusation in the form of an arrest; under the new law, people may be sued for damages from a crime the criminal court finds they did not commit. More people are arrested for trespass than are convicted.

Furthermore, people who have never set foot on the property in question could be lawfully sued for damages if they have “compensated or remunerated” people who did cause the damage for trespassing or people the state accuses, but never proves, caused the damage (people arrested but never convicted).⁵⁹ Many environmental organizations and unaffiliated groups of activists set up online fundraising pages to fund their campaigns, which often include notice of the group’s intent to engage in civil disobedience such as trespassing on company easements to lock down to construction equipment. Thousands of people donate to these pages; if a donor’s money is distributed to individuals arrested for trespassing on a natural gas pipeline construction site in Oklahoma, and damage is caused, it seems that under this scheme, a donor who has “compensated or remunerated” the arrestee for the trespass could be amenable to a civil suit; thus, a person in Alaska could be sued by an oil company in Oklahoma for

Representative Nick Zerwas).

⁵⁷ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

⁵⁸ *Cox v. Louisiana*, 379 U.S. 559, 574 (1965) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

⁵⁹ *See* H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017).

giving money online for “legal support” to an environmental activist through a third party, who declared their intent to use civil disobedience to fight a pipeline, without any further knowledge about the campaign or the activist’s specific plans. A reasonable person would not be aware of such liability. This “compensation” provision is almost certainly an unconstitutionally overbroad restriction on the rights to free speech and association given the vast amount of lawful conduct it opens to liability.

Despite the Oklahoma law’s end run around the proof required for the “beyond a reasonable doubt” standard, its individual liability section is likely to withstand facial challenge on overbreadth grounds as, on its face, civil liability for individual trespassers has little to no impact on protected speech. The legislature seems to do be doing little more than codifying the common law tort of trespass. However, it is worth noting that under current law, property owners may be compensated for damages by trespassers through criminal court-ordered restitution as part of a plea or sentencing, and under this law, individuals who were wrongfully arrested could find themselves defending against civil suits merely because they were easily identifiable to a property owner.

In Minnesota, H.F. 322, if passed, should be found unconstitutional as a content-based statute that fails strict scrutiny as underinclusive. While facially neutral, its main sponsor justifies the bill with reference to certain content of speech that will be burdened outside the four corners of the document. Examining the “subjective” motives behind H.F. 322,—like the sponsor’s stated intent—leads to a more accurate, honest assessment of content-neutrality than an “objective” one focused on the literal phrasing of the statute or the legislative history. This is especially true when motive is used as a threshold issue in determining how to examine the government’s proffered justifications.⁶⁰ Besides his quip about Rosa Parks, Zerwas has made multiple comments demonstrating that he is targeting the Black Lives Matter movement and advocates for police accountability, despite averments of neutrality.⁶¹ If the content-based distinction was a meaningful safeguard, H.F. 322 would need to survive strict scrutiny—a nearly impossible task given “it must be the least restrictive means of achieving a

⁶⁰ See Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 967-81 (1987) (arguing for a balancing model for questions of free speech where a holistic, subjective motive inquiry is a threshold question for determining burdens, by asking whether improper motivations played a substantial part in the government’s decision to regulate).

⁶¹ See, e.g., State Representative Nick Zerwas, *supra* note 55 (referencing three Black Lives Matter-affiliated protests as the impetus for the bill); Tim Nelson, *Activists, DFLers Push Back Against Bill to Hold Protestors Liable for Costs*, MPRNEWS.ORG (Jan. 24, 2017, 10:20 AM), <https://perma.cc/F352-WVYB> (“Zerwas cited protests at the Mall of America, the Minneapolis-St. Paul International Airport and on interstates 35W and 94.”).

compelling state interest.”⁶²

Even accepting fiscal responsibility as a compelling interest, holding individual protesters convicted of misdemeanors liable for massive sums of aggregate costs far beyond what they can be reasonably responsible for is not a narrowly tailored way of addressing said interest. There are many other ways the municipality could choose to save money to help with public safety response costs. Most directly and effectively, law enforcement could stop responding to demonstrations with staggeringly expensive numbers of police officers, especially where the demonstration includes civil disobedience.⁶³ Deploying police in such large numbers often leads to the intensification of conflict, cycles of escalation, and the perceived need for additional expenditure.⁶⁴ H.F. 322 contributes directly to this problem because it incentivizes police to declare protests to be unlawful assemblies and subsequently arrest as many people as possible in the hopes of securing convictions and, thus, imposing liability. In other words, the bill opens the door to policing protests for profit, a potentiality ripe for abuse.⁶⁵ This incentivization is compounded by the reality that the police themselves are presently the focus of sustained protected speech campaigns, including those highly critical of police departments, the criminal justice system, and elected officials. The bill thus represents a serious threat of chilling speech because of the supposed benefits of repression to state apparatus in this context.⁶⁶ The bill is also glaringly underinclusive—practically all crimes have public safety response costs associated, yet the bill singles out three, all closely associated with protesting. Given this, the serious incidental impacts and potential for abuse, and the less burdensome alternatives, the means chosen do not narrowly fit the stated goal.

However, as a general matter, courts have found targeted laws to be

⁶² *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

⁶³ *See, e.g., Rocco Parascandola & Barry Paddock, Police Protests Have Cost City \$22.9M Overtime for NYPD, Bill Bratton Says*, N.Y. DAILY NEWS (Dec. 16, 2014, 2:52 AM), <https://perma.cc/V22P-QDS5>; *Thomas Dresslar, How Many Law Enforcement Agencies Does It Take to Subdue a Peaceful Protest*, ACLU (Nov. 30, 2016, 5:30 PM), <https://perma.cc/U6R6-4LD8>.

⁶⁴ *See* MIKE KING, WHEN RIOT COPS ARE NOT ENOUGH: THE POLICING AND REPRESSION OF OCCUPY OAKLAND 23-46 (2017).

⁶⁵ *See, e.g., DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 2-3 (2d ed. 2015), <https://perma.cc/W254-FX2K> (documenting the explosive growth of civil asset forfeiture after Congress, in 1984, gave agencies a financial stake in forfeiture by permitting revenue to flow back to individual departments).

⁶⁶ *See Minneapolis NAACP condemns HF322*, MINN. NAACP (Jan. 26, 2017), <https://perma.cc/7WAR-WYXL> (pointing out that Minnesota is home to some of the country’s most severe racial disparities and condemning H.F. 322 as an attempt to silence those fighting to close that gap).

content-neutral after cursory analysis.⁶⁷ In doing so, they decline to engage in any type of holistic inquiry into legislators' motives, mainly because of the difficulty of proof and judicial reticence to attribute constitutional insufficiency to individual lawmakers.⁶⁸

While "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . [a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."⁶⁹ This can be true even where the motive of the bill's main sponsor is suppression based on content of speech: in evaluating whether the law is justified without reference to content, the court can focus on the asserted governmental purpose in the most general sense, not the justifications provided by individuals that compose the government and who may have written the law. The legislature is easily able to re-package an individual lawmaker's malicious or suppressive intent into a legitimate public policy goal while the court turns its eye to the possibility of unconstitutionality. For example, in *O'Brien*, the Court found that the governmental interest was content-neutral and unrelated to the communicative aspect of O'Brien's act of burning his draft card, let alone to the suppression of free expression. They derided the idea of motive analysis in the circumstances:

What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.⁷⁰

⁶⁷ See, e.g., Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protect Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1368-72 (2006); see also Leslie Gielow Jacobs, *Clarifying the Content-based/Content-neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 602-606 (2003).

⁶⁸ See Zacharias, *supra* note 60, at 946 (noting that the application of motive analysis has been inconsistent across contexts: in *O'Brien*, perhaps representing the context of street protest, the Court has foresworn subjective motive analysis for the objective purpose inquiry, but in the context of draft reclassifications cases such motive analysis was a controlling factor, and in the whistleblower context it has played a limited but clear role).

⁶⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁷⁰ *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

The Court was not interested in including Congressional speeches about the need to punish hippies and draft dodgers in its analysis in any substantive manner.⁷¹

The court hearing a challenge to H.F. 322 could easily proceed in this manner and find the legislation content-neutral. It would then likely analyze it under *O'Brien* and its progeny as a government regulation that incidentally burdens protected activity. The first issue would be whether the law was unrelated to the suppression of speech based on its effect and degree of impact.⁷² Minnesota would certainly argue that any incidental burden on speech due to a vague chilling effect would be minor, and the government's interest in addressing the rising fiscal cost of protests is substantial and legitimate, just like the smooth operation of the Selective Service system in *O'Brien*. However, the potential chilling effect of such a law is enormous given the lack of control a single individual has over whether the police declare a protest a nuisance or unlawful assembly, and also given the criminal and financial penalties for anyone convicted of a minor misdemeanor stemming from such a declaration. However, similar arguments have a mixed record of moving the needle to a finding of purposeful suppression in this context.⁷³ Ultimately, a court would balance the deterrent effect of the law on protected activity with the weight of government interests, and likely conclude the law is sufficiently unrelated to suppression.⁷⁴ The final hurdle would be finding the scheme appropriately narrow, or whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."⁷⁵ While the language of the test sounds promising for challengers to such an underinclusive statute, in truth this would not be much of a hurdle at all because this prong (and indeed the entire test) has devolved into a form of much more lenient scrutiny, akin to rational basis review.⁷⁶ On this track, it is not a far stretch to conclude that H.F. 322, like the regulation prohibiting the destruction of selective service cards, is one focused solely on the

⁷¹ See *id.* at 383 ("Inquiries into congressional motives or purposes are a hazardous matter.").

⁷² See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-15 (1982).

⁷³ See Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1484-85 (2013).

⁷⁴ See *id.* at 1494.

⁷⁵ *O'Brien*, 391 U.S. at 377.

⁷⁶ See David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 506-29 (1988), for a detailed discussion of this deterioration. See also *Rumsfeld v. Forum for Acad. And Inst. Rights, Inc.*, 547 U.S. 47, 67 (2006) (citation omitted) ("We have held that 'an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'").

noncommunicative, criminal aspect of a protester's conduct, and any incidental burdens on speech are not greater than necessary to further the government interests in both fiscal health and lawful behavior.⁷⁷

In analyzing S.B. 5009 in Washington State, what should be noted first are the mandatory, inalterable sentencing enhancements to be “served in total confinement” for crimes attempted or committed with an intent to cause “economic disruption.”⁷⁸ The bill would amend state restitution law to allow for up to “triple the amount of the offender’s gain or victim’s loss” to be charged to any person who is “convicted of or pleads guilty to a criminal offense in which there has been a special allegation that the person committed the offense to cause an economic disruption.”⁷⁹ According to the bill, a person attempting to or causing an economic disruption intends to:

- (a) Influence the policy of a government by intimidation or coercion; and
- (b) Obstruct, hinder, or delay the passage of any train, truck, car, ship, boat, aircraft, or other vehicle or vessel engaged in the carriage, hauling, transport, shipment, or delivery of goods, cargo, freight, or other item, in commerce; or
- (c) Interferes with, tampers with, damages, or obstructs any pipeline facility, bulk oil terminal, marine terminal, tank car, waterborne vessel or barge, or power plant.⁸⁰

There is a strong argument that the law is unconstitutional under the First Amendment as overbroad due to the sweeping breadth of the definition of “economic disruption.” The bill’s backers certainly anticipate First Amendment challenges and have inserted several disclaimers they hope will assuage concerns courts may entertain. For example, the bill’s first section states: “The legislature recognizes and fully supports the ability of individuals to exercise their rights of free speech, press, and peaceful assembly The legislature finds, however, that there is no right to harm another person or prevent another person from exercising his or her

⁷⁷ See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200-10 (1996) (discussing *O’Brien*’s incidental burden doctrine on the right to speech and fundamental rights in general).

⁷⁸ S.B. 5009, 65th Leg., Reg. Sess. (Wash. 2017).

⁷⁹ *Id.*

⁸⁰ *Id.*

rights.”⁸¹ Later, after setting out the sentencing enhancements provision, the bill concludes that section with another disclaimer:

This offense does not include any activity that is reasonably construed as persons engaged in lawful activity including: Law enforcement activity; construction; repair; maintenance; utility work; a lawful strike or picketing; peaceful protest; other authorized or properly permitted conduct; or persons investigating or reporting criminal conduct or illegal activity to proper authorities.⁸²

The state would certainly argue that these disclaimers defeat accusations of overbreadth by narrowing the legitimate sweep of the statute. While challengers on overbreadth grounds bear a heavy burden⁸³ of showing “substantial overbreadth,” even a prohibition on unprotected speech (or conduct) cannot save a statute that prohibits or chills a substantial amount of protected speech.⁸⁴ In *Ashcroft v. Free Speech Coalition*, the Court was very clear: “The Government may not suppress lawful speech as the means to suppress unlawful speech.”⁸⁵

The main issue is whether the statute actually prohibits (here, punishes) protected speech. The answer must unequivocally be yes, and a substantial amount. First, it is practically impossible to imagine a scenario in which this enhancement stems from an arrest made anywhere but some type of protest, demonstration, or other politically motivated action. Second, Ericksen’s own admission that the bill is inspired by climate justice activists confirms the legislation is aimed at political speech and other First Amendment protected activity.⁸⁶

Consider the following common scenario: A demonstrator at a Black Lives Matter demonstration in Seattle is charged with misdemeanor assault

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (dictum) (“Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).”).

⁸⁴ “[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

⁸⁵ *Id.*

⁸⁶ Porter, *supra* note 49.

on a police officer, and the prosecutor alleges the crime was committed with an intent to cause economic disruption because the demonstrator intended to influence the policy of the federal government by intimidation or coercion. This intent can be inferred from the defendant's allegedly violent conduct at a demonstration. First, even if the court declined to make such a finding, if the defendant pleaded guilty to the assault, they would be liable for triple restitution because they assaulted a police officer at a political demonstration and not randomly on the street. This is the baseline fact giving the prosecutor ammunition to make the allegation. Thus, the enhancement illicitly punishes protected speech alongside unprotected conduct.

In the second scenario, the demonstrator goes to trial to fight the charge. She is in the profound bind of defending against the assault charge, while also affirmatively proving to the judge that if the assault were committed, it was not with the intent to cause an economic disruption. Perhaps the defense is misidentification—the defendant simply did not do it. In this case, the defendant must waive any opportunity to present evidence to the judge regarding her intent because her argument against the main charge is that she never had any. Alternatively, if the defendant acted in self-defense, while she will have the opportunity to present evidence of a wholly different intent to the judge, she runs the high risk of being perceived by the jury in a highly negative light, undermining her ultimate chance of acquittal. If the defendant is ultimately convicted, she will face the sentencing enhancement and triple restitution upon a judicial finding of economic disruption by a preponderance of the evidence. This result could be reasoned as simply as: Because the defendant was present at a demonstration with the goal of influencing government policy, and was convicted of a crime reasonably construed as intimidating or coercive, the crime was more likely than not committed with the intent to cause economic disruption. In other words, the statute encourages the conflation of an individual's perceived motivation for engaging in protected political activity with their intent while engaging in unlawful action. Thus, the statute places a burden on these hypothetical defendants to prove their speech is not unlawful, a constitutionally dubious situation.⁸⁷ Such conflation of this double *mens rea* requirement is even easier when the offense is something like pedestrian interference or obstruction, two other common protest related charges, and the theory is economic disruption through the blocking of some vehicle of commerce.

Thus, without even addressing the chilling effect of the statute, the court should find it void for overbreadth.

⁸⁷ Ashcroft, 535 U.S. at 255 (“The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.”).

Challengers could also argue that the law is facially content-based and thus deserving of strict scrutiny because the sentencing enhancement for crimes intended to cause economic disruption is predicated on the abstract beliefs of the defendants—essentially any belief that would drive someone to engage in public political action.⁸⁸ The government would maintain that the law is content-neutral, analogizing to *Wisconsin v. Mitchell*, and argue the sentencing enhancement does not represent punishment of protected beliefs, but rather “special harms distinct from their communicative impact.”⁸⁹ In *Mitchell*, a defendant faced a hate-crime sentencing enhancement because he selected his victim on account of race. The Court, noting that motive is a traditional and proper factor for sentencing judges to consider, reasoned that the Wisconsin legislature’s desire to address special harms perceived from the commission of bias-motivated crimes, such as increased likelihood of criminal retaliation, the infliction of distinct emotional harm, and the stirring of community unrest, provided “an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.”⁹⁰ Perhaps tellingly, rather than focus on such special harms in the first section of the bill, Ericksen solemnly swore S.B. 5009 does *not* target protected activity.⁹¹ Regardless, the government could argue that these special harms include economic losses, incitement to community unrest, and others. Despite the seeming absurdity of comparing the broader effects of crimes motivated by bigotry against individuals to crimes committed while demonstrating or protesting, the special harms could certainly be accepted.⁹² If the law is found to be content-neutral, it will likely survive under incidental regulation analysis, and if it is found to be content-based, it will very likely fail strict scrutiny.

In conclusion, the bills creating some form of liability for protestors in Oklahoma, Minnesota, and Washington, while rife with serious constitutional issues, are by no means guaranteed to sink under the weight of First Amendment challenges.

⁸⁸ See *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (“[A] defendant’s abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.”) (citing *Dawson v. Delaware*, 503 U.S. 159 (1992)).

⁸⁹ *Id.* at 484 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984)).

⁹⁰ *Id.* at 488.

⁹¹ See Porter, *supra* note 49.

⁹² See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). The Court seems to closely analogize “special harms” to “secondary effects” that also serve as justifications for the neutrality of content-based regulations. *See id.*

THE CREATION OF OFFENSES AND INCREASED PENALTIES

Perhaps the greatest threat to the right to dissent exists in the realm of increased penalties for already extant offenses and the creation of new ones.⁹³ Including the overlapping Washington and North Carolina statutes discussed above, at least eighteen states have proposed over thirty bills either creating new offenses, increasing penalties, or both. The most creatively punitive was Oregon's S.B. 540, which would have required public colleges and universities to expel any student convicted of riot, and failed in committee.⁹⁴ However, due to the continued relevance of public streets and highways as sites of high profile discourse on matters of public concern,⁹⁵ state legislators have focused heavily on regulating demonstrators in the streets, and specifically on those blocking traffic.⁹⁶

Generally, state legislatures have wide latitude to codify criminal offenses and set penalties. While challenges are certainly possible, many of the still active or signed bills are very likely to be upheld, such as the ones increasing penalties for existing obstruction laws. "Aggravated offenses" with higher penalties for crimes against law enforcement or other public officials are common and well within the power of the legislature, meaning Georgia's "Back the Badge Act of 2017" is likely constitutional.⁹⁷ Of the fourteen bills in this category that have already failed or been tabled or withdrawn, many had strong chances of being upheld, such as increased penalties for unlawful assembly, or making it a felony to tamper with oil and gas equipment. The mass picketing bills, such as the North Dakota bill⁹⁸ creating the felony of direct or indirect economic harm and the South Dakota bill⁹⁹ requiring the elimination of "no-go zones," were much more suspect due to their potential overbreadth and high burdens on protected activity.

⁹³ See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.").

⁹⁴ S.B. 540, 79th Leg. Assemb., Reg. Sess. (Or. 2017).

⁹⁵ See, e.g., Emily Badger, *Why Highways Have Become the Center of Civil Rights Protest*, WASH. POST: WONKBLOG (July 13, 2016), <https://perma.cc/BJS2-A7VT> (discussing the blocking of highways across the United States by racial justice advocates in protest of recent police brutality, especially against Black youth).

⁹⁶ Thirteen states have passed legislation that regulates demonstrators that block traffic. See *infra* Appendix B.

⁹⁷ S.B. 160, 2017 Gen. Assemb., Reg. Sess. (Ga. 2017).

⁹⁸ H.B. 1193, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

⁹⁹ H.B. 1145, 2017 Legis. Assemb., 92nd Sess. (S.D. 2017).

Several of the bills in the category of increased penalties and new offenses appear especially susceptible to First Amendment challenges. One example is Florida's S.B. 1096, a restriction on political speech in a traditional public forum, that would have made it a misdemeanor to interfere with or impede the flow of traffic on any road or highway during an unpermitted march or demonstration.¹⁰⁰ The bill, which failed in committee in May 2017, thus functionally prohibited all unpermitted marches or demonstrations in the streets and facially implicated First Amendment protected activity.¹⁰¹

South Dakota's S.B. 176 ("the Act"), signed into law on March 13, 2017, is another one in the group that appears especially open to First Amendment challenges.¹⁰² One avenue is an overbreadth and vagueness challenge.¹⁰³ Content-based arguments are also available. Most likely, the bill will be analyzed as a content-neutral time, place, or manner restriction. The first section of the Act is the most suspect, allowing the county commissioner to deny use of public lands under their control if they, along with the governor and sheriff, deem it necessary "to preserve the undisturbed use of the land by the lessee or if the land may be damaged by the activity."¹⁰⁴ A challenger could argue that this is a *de facto* permitting scheme, based on undefined notions of a danger of damage to the land.¹⁰⁵ South Dakota has not articulated specific factors for government officials to consider when making such a decision. Instead, the law creates a sweeping mechanism through which the governor, sheriffs, and county land commissioners have nearly unbridled discretion to shut down all activity, including First Amendment speech, by groups of more than twenty people on public lands, a scheme the Court recognizes as ripe for unconstitutional

¹⁰⁰ S.B. 1096, 2017 Leg., Reg. Sess. (Fla. 2017).

¹⁰¹ *See id.*

¹⁰² S.B. 176, 2017 Leg. Assemb., 92nd Sess. (S.D. 2017).

¹⁰³ *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992) ("[T]he Court has permitted a party to [facially] challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker."); *see also United States v. Williams*, 553 U.S. 285, 304 (2008) ("Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.") (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

¹⁰⁴ S.B. 176, 2017 Leg. Assemb., 92nd Sess. (S.D. 2017).

¹⁰⁵ *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.")

abuse.¹⁰⁶ While such discretionary schemes and prior restraints are by no means automatically void, there is a strong presumption of invalidity against them.¹⁰⁷ According to the Act itself, it is “necessary for the immediate preservation of public peace, health, or safety,” and an “emergency” exists by its declaration.¹⁰⁸ Yet there is no actual emergency cited or described by the bill—indeed there is none available for reference. The law is in anticipation of protests that “need to be controlled,” as Governor Dennis Daugaard’s Chief of Staff, Tony Venhuizen, explained to the Associated Press.¹⁰⁹ Even assuming the blanket significance of government interests in protecting the use of the lessee or preventing public land from damage, the section should not be found to be narrowly tailored.¹¹⁰ The sections granting powers to the Secretary of Transportation are attackable from similar angles. Finally, individual rules promulgated under the Act may provide additional material for challenges in short order. However, it is very plausible a court would decline to find that S.B. 176 is a *de facto* licensing scheme. Under existing precedent, it might not be too far of a reach to conclude that it is constitutional as either an incidental burden, or a content-neutral, time, place, or manner restriction.

DRIVER LIABILITY BILLS

Besides Florida, four other states have considered bills relieving drivers of liability for striking demonstrators: North Dakota,¹¹¹ Tennessee,¹¹² Texas,¹¹³ and North Carolina.¹¹⁴ These bills have received sharp public outcry and all appear to be floundering, especially after anti-racist protester Heather Heyer was killed by a neo-Nazi car attack in Charlottesville,

¹⁰⁶ See *id.* at 97-98 (“[A] statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.”).

¹⁰⁷ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

¹⁰⁸ S.D. S.B. 176.

¹⁰⁹ *North Dakota Pipeline Protest Spurs South Dakota Legislation*, CBS MINN. (Feb. 15, 2017, 8:03 PM), <https://perma.cc/97HY-VFA9>.

¹¹⁰ See *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256 (2004) (“Excessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring.”).

¹¹¹ H.B. 1203, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

¹¹² H.B. 668, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); S.B. 944, 110th General Assemb., Reg. Sess. (Tenn. 2017).

¹¹³ H.B. 3432, 85th Leg. Sess., Reg. Sess. (Tex. 2017).

¹¹⁴ H.B. 330, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

Virginia, on August 12, 2017.¹¹⁵

North Carolina's H.B. 330, the only bill that appears to have a chance of becoming law after passing the North Carolina House, is susceptible to a strong challenge as a content-neutral regulation that "incidentally" burdens protected speech. The bill should fail even the *Rumsfeld / Albertini* iteration of the *O'Brien* test because it cannot be said that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."¹¹⁶ This is because North Carolina adheres to a pure contributory negligence rule. If the injured party is found to be responsible for any fault in a negligence action, the defendant will not be liable for damages. Thus, the bill does nothing to advance any assumedly legitimate government interest in protecting drivers who exercise due care from civil liability. Because the bill does not impact the current operation of North Carolina law, but burdens protected speech in a severe manner, an inference should arise that the bill is at its core related to the suppression of free expression. For failure on both these prongs, it should be found unconstitutional.

ANTI-MASKING STATUTES

Missouri and North Dakota are the two most recent states adding or considering criminal penalties for wearing a mask. Missouri's H.B. 179, in committee, makes it a class A misdemeanor to conceal one's identity during an unlawful assembly or riot "by the means of a robe, mask, or other disguise."¹¹⁷ North Dakota's Governor signed H.B. 1304 into law on March 2, 2017.¹¹⁸ It outlaws the wearing of a "mask, hood, or other device that covers, hides, or conceals any portion of that individual's face:

- a. With the intent to intimidate, threaten, abuse, or harass any other individual;
- b. For the purpose of evading or escaping discovery, recognition, or identification during the commission of a criminal offense;

¹¹⁵ Lauren McGaughy, *Texas Lawmaker: Bill to Protect Drivers Who Hit Protesters Would Not Apply to 'Jackass' Charged in Charlottesville Murder*, DALLAS NEWS (Aug. 14, 2017), <https://perma.cc/6YHQ-F7SC>.

¹¹⁶ See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) ("We have held that 'an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'") (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

¹¹⁷ H.B. 179, 99th General Assemb., Reg. Sess. (Mo. 2017).

¹¹⁸ H.B. 1304, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

or

c. For the purpose of concealment, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense.”¹¹⁹

Its main sponsor, Republican Representative Al Carlson, maintained the bill was concerned with safety, stating, “I would be the first to defend your right of free speech . . . I’m always concerned when there’s a reason that . . . may be used to hide your identity when you’re creating some kind of disturbance.” He cited examples of people fighting the Dakota Access Pipeline by “cutting razor wire and burning tires,”¹²⁰ and maintained no protest with masked people could be peaceful: “That’s not a peaceful protest It might be legal in Baghdad but not in Bismarck.”¹²¹

Anti-masking statutes have existed in many states for decades and are also known as “KKK laws,” referencing the Ku Klux Klan (“KKK”). In 1951, Georgia made it illegal to wear a mask on public property, or while on private property without permission. The statute was upheld against a First Amendment challenge by the Georgia Supreme Court in 1990.¹²² Applying the *O’Brien* framework regarding regulation of mixed speech and non-speech elements, the court found that the law was passed to protect Georgia’s citizens from violence and terror at the hands of the Klan, restore confidence in law enforcement, and safeguard civil rights—these interests were not only substantial but compelling and the constitutional duty of the state.¹²³ It found the law was content-neutral, proscribing “menacing conduct without regard to the particular message of the mask-wearer.”¹²⁴ However, the statute outlaws, without any further qualifications, wearing a mask on public property or private property without permission.¹²⁵ It does not require an intent to intimidate, harass, or threaten. This means the court must conclude that wearing a mask outside one of the named exemptions is

¹¹⁹ N.D. CENT. CODE § 12.1-31-15 (2017).

¹²⁰ John Hageman, *Constitutionality of Mask Bill Debated in North Dakota Legislature*, WEST FARGO PIONEER (Jan. 24, 2017, 4:53 PM), <https://perma.cc/BGD2-2T6C>.

¹²¹ Nick Smith, *Bill Would Ban Protesters from Using Face Masks*, BISMARCK TRIBUNE (Jan. 17, 2017), <https://perma.cc/HS69-L8FW>.

¹²² *State v. Miller*, 260 Ga. 669 (1990).

¹²³ *Id.* at 672-73.

¹²⁴ *Id.* at 673.

¹²⁵ *See* GA. CODE ANN., § 16-11-38 (West 2017). The statute includes exemptions for holidays, Mardi Gras celebrations, masquerade balls, sports, and state activities such as emergency response drills. *See id.*

inherently menacing.¹²⁶

Such a sweeping assumption is faulty ground from which to build strong legal analysis and could be disproven by a challenger that does not belong to the KKK but wears a mask as expressive conduct.¹²⁷ Further, under North Dakota's statute, demonstrators committing no independent crime, but who are wearing a bandanna at a march on the sidewalk, could be arrested under the anti-masking statute as acting with intent to intimidate law enforcement under subsection (a). The law gives prosecutors an additional charge that increases a potential sentence used as leverage to make defendants plead out or cooperate. These facts point to a strong chilling effect that can be leveraged against the law in overbreadth and void for vagueness challenges.

In New York, anti-masking legislation has been on the books since land revolts prior to the Civil War during which tenant farmers would wear masks in their appropriation and defense of land from the owners of "vast manorial estates."¹²⁸ Well over a century later, KKK members attempting to hold a rally in full regalia brought a facial challenge to the present version of that legislation, New York Penal Law §240.35(4), after they were informed by the NYPD in response to their permit application that their plans to wear masks would violate the criminal code.¹²⁹ The District Court found that the wearing of masks was protected by the right to anonymous speech, grounded in *NAACP v. Alabama*, and thus the regulation had to face strict scrutiny, which it failed.¹³⁰ The Court also applied *O'Brien* analysis and found the statute was not narrowly tailored to a significant or substantial government interest because the statute was not tied to criminal conduct by the wearer.¹³¹ It also found the statute facially invalid as a content-based regulation that applied to political speech but not masks for entertainment.¹³² Finally, the U.S. District Court for the Southern District of New York concluded that New York City engaged in viewpoint discrimination by applying the statute to the Klan but not similarly situated

¹²⁶ See Miller, 260 Ga. at 671-72 ("A nameless, faceless figure strikes terror in the human heart. But, remove the mask, and the nightmarish form is reduced to its true dimensions.").

¹²⁷ See Monika Nickelsburg, *A Brief History of the Guy Fawkes Mask*, MENTAL FLOSS (Nov. 5, 2015), <https://perma.cc/7BQE-CJGN> (providing a brief history of the symbolism of the Guy Fawkes mask, including their widespread use at Occupy protests as a symbol of anti-authoritarianism and of everyday people resisting a tyrannical government).

¹²⁸ See Church of the Am. Knights of the KKK v. Kerik, 356 F.3d 197, 203-05 (2d Cir. 2004) (overviewing a brief history of anti-masking legislation).

¹²⁹ Church of the Am. Knights of the KKK v. Kerik, 232 F. Supp. 2d 205 (S.D.N.Y. 2002), *rev'd and remanded*, 356 F.3d 197 (2d Cir. 2004).

¹³⁰ *Id.* at 213-15.

¹³¹ *Id.* at 217.

¹³² *Id.* at 218-19.

groups.¹³³

The Second Circuit reversed, finding that while the regalia of the KKK—the robe, mask, and hood—were indeed expressive conduct that qualified for protection, the mask itself was optional for group members and therefore not an integral part of the expression.¹³⁴ Rather, it was “redundant,” and had no independent message, and “where . . . a statute banning conduct imposes a burden on the wearing of an element of an expressive uniform, which element has no independent or incremental expressive value, the First Amendment is not implicated.”¹³⁵ Thus, an *O’Brien* analysis was unnecessary.

Future challengers to anti-masking statutes, perhaps Occupiers wearing Guy Fawkes masks, might be able to effectively distinguish *Kerik*, because the analysis is tied so closely to the specific expressiveness of the entire KKK uniform.¹³⁶ This would open the door to the various arguments the District Court made against the validity of the statute vis-à-vis the First Amendment. However, in *Kerik*, because the Knights’ wearing of the masks (alone) was not expressive conduct, and the statute only concerned itself with wearing masks in groups “rather than pure speech,” it was not invalid as a content-based regulation because no First Amendment protected activity was implicated.¹³⁷ For the same reasons, there could be no basis to find viewpoint discrimination.¹³⁸ Finally, the Second Circuit also rejected the District Court’s finding that the statute was invalid under the right to anonymous speech.¹³⁹ Noting that neither the Supreme Court, nor any Circuit Court, had ever extended the protections against compelled disclosure of names in various other circumstances to one’s identity at a protest, the Court found the right to anonymous speech was not implicated.¹⁴⁰

Under these precedents, challengers to new or old anti-masking statutes face an uphill climb. However, there is solid ground on which to distinguish the expressive nature of anti-capitalist protesters identifiable solely and immediately by their Guy Fawkes masks from Klansmen in full hooded regalia, at least in as-applied challenges. A key could be proving the mask

¹³³ *Id.*

¹³⁴ Church of the Am. Knights of the KKK v. Kerik, 356 F.3d 197, 206-07 (2d Cir. 2004).

¹³⁵ *Id.* at 206, 208.

¹³⁶ See Nick Thompson, *Guy Fawkes Mask Inspires Occupy Protests Around The World*, CNN (Nov. 5, 2011), <https://perma.cc/3LNG-Y8AM> (describing instances of Occupy Wall Street demonstrators wearing Guy Fawkes masks).

¹³⁷ Church of the Am. Knights of the KKK, 356 F.3d at 209-10.

¹³⁸ *Id.* at 210.

¹³⁹ *Id.* at 208-09.

¹⁴⁰ *Id.* at 209.

itself is speech under the requirements of the *Spence* test—the mask’s message is particular, with a great likelihood it will be understood by viewers. If this can be accomplished, *Miller*, where the mask is inherently a symbol of malicious intent, and *Kerik*, where the mask is redundant, are much less potent hurdles. The exceptions in the laws also allow for arguments that they are facially content-based regulations focused on political speech only and should fail under strict scrutiny, an argument with increased potency in light of *Reed v. Town of Gilbert, Arizona*.

CONCLUSION

Nick Zerwas made an unmistakable reference when he remarked on the cost that Black demonstrators exercising their First Amendment rights must pay to secure the guarantees of the Fourth, Fifth, and Fourteenth Amendment rights, among others. States have historically imposed a repressive toll—surveillance, infiltration, jail time, and blood—on political organizing and activity, especially by systemically oppressed groups. The First Amendment, for most of United States history, offered very little protection for people who fought for greater autonomy and equality by openly organizing and taking to the streets. Over the last hundred years, the Supreme Court, recognizing the utility of a vent in releasing increased pressure, has imbued the First Amendment, and other fundamental rights, with more robust safeguards against government infringement as the power of states and the federal government has increased exponentially. In recent decades, however, the growth of state police power has eclipsed the trajectory of the First Amendment as a guard of the right to dissent.

A cursory analysis of a sample of the proposed legislation and how it has fared in the process shows the First Amendment is not the strongest tool those hoping to redirect trajectories of power, and win more control over their bodies, lives, and communities, possess to protect themselves from legislative repression. Early intervention has already proven far more effective—and efficient—than constitutional challenges will likely be. Bills increasing penalties for obstruction related offenses, trespassing, and so forth are unlikely to fail constitutional muster. While some of the harshest bills are much more suspect, activists are already facing decades in prison for engaging in protected activities and civil disobedience. The First Amendment in its modern form has not stopped the authoritarian creep of the last several decades, and cannot be expected to stem the latest wave of repression.

Appendix A — Legislation by State¹⁴¹

Arizona

S.B. 1142 (died in House Rules committee after passing Senate)

Arkansas

S.B. 550 (vetoed by Governor)

H.B. 1756 (sent to Governor 4/03/17)

Colorado

S.B. 35 (passed Senate and failed in House Committee on State, Veterans, & Military Affairs)

Florida

S.B. 1096 (died in Criminal Justice Committee)

Georgia

S.B. 1 (passed Senate & failed on House vote)

S.B. 160 (signed by Governor sans traffic related provisions on 05/08/17)

Indiana

S.B. 285 (passed Senate & referred to House Committee on Rules & Legislative Procedures)

Iowa

S.F. 111 (introduced in Transportation Committee)

Michigan

H.B. 4643 (passed House & tabled in Senate)

H.B. 4630 (passed House & tabled in Senate)

Minnesota

H.F. 34 (introduced in Public Safety & Security Policy & Finance Committee)

S.F. 148 (in Committee)

S.F. 184 (introduced in Judiciary & Public Safety Finance and Policy Committee)

H.F. 55 (introduced in Transportation & Regional Governance & Policy Committee)

H.F. 322 (introduced in Public Safety & Security Policy & Finance Committee)

H.F. 390 (introduced in Public Safety & Security Policy & Finance Committee)

S.F. 676 (introduced in Judiciary & Public Safety Finance & Policy Committees)

S.F. 679 (introduced in Judiciary & Public Safety Finance & Policy Committee)

S.F. 918 (introduced in Judiciary & Public Safety & Finance & Policy Committee)

H.F. 1066 (introduced in Public Safety & Security Policy & Finance Committees)

Mississippi

S.B. 2730 (died in Judiciary Committee)

Missouri

H.B. 179 (died in Local, State, Federal Relations and Miscellaneous Business Committee)

H.B. 826 (died in Crime Prevention & Public Safety Committee)

New York

S.B. 2492 (Passed Senate & referred to Assembly Governmental Operations Committee on 03/08/17)

S.B. 2493 (Passed Senate; in Assembly Committee)

S.B. 4837 (Passed Senate; in Assembly Committee)

North Carolina

H.B. 249 (in Committee)

H.B. 330

North Dakota

H.B. 1193 (Passed House; Failed in Senate)

H.B. 1203 (Failed in House)

H.B. 1293 (Effective 3/02/17)

H.B. 1304 (Effective 3/02/17)

H.B. 1426 (Effective 3/02/17)

S.B. 2302 (Effective 3/01/17)

Oklahoma

H.B. 1123 (signed by Governor on 05/03/17)

H.B. 2128 (signed by Governor on 5/15/17)

Oregon

S.B. 540 (died in Education & Judiciary Committees)

Pennsylvania

S.B. 754 (introduced in State Government Committee)

¹⁴¹ Information current as of December 2017.

South Dakota

S.B. 176 (signed by Governor on 03/27/17)

H.B. 1145 (withdrawn from Judiciary Committee)

Tennessee

H.B. 668 (died in House Civil Justice Committee)

S.B. 902 (signed by Governor on 04/12/17)

S.B. 944 (introduced in Judiciary Committee)

H.B. 1051 (signed by Governor on 04/12/17)

Texas

H.B. 250 (pending in Judiciary & Civil
Jurisprudence Committee)

Virginia

S.B. 1055 (failed on Senate vote)

S.B. 1056 (died in Committee for Courts of
Justice)

S.B. 1057 (died in Committee for Courts of
Justice)

S.B. 1058 (failed on Senate vote)

H.B. 1791 (vetoed by Governor)

Washington

S.B. 5009 (introduced in Law & Justice
Committee)

Appendix B — Legislation by Category¹⁴²**Anti-BDS Legislation**

New York S.B. 2492 (passed Senate & referred to Assembly Governmental Operations Committee)

New York S.B. 2493 (passed Senate & referred to Assembly Higher Education Committee)

New York S.B. 4837 (passed Senate & referred to Assembly Higher Education Committee)

Anti-Masking Offense

Missouri H.B. 179 (new misdemeanor) (died in Local, State, Federal Relations and Miscellaneous Business Committee)

North Dakota H.B. 1304 (new misdemeanor) (signed by Governor on 02/23/17)

Citizen or Organization Liability

Arizona S.B. 1142 (died in House Rules committee after passing Senate)

Minnesota H.F. 322 / S.F. 679 (introduced in House Public Safety & Security Policy & Finance Committee & Senate Judiciary & Public Safety Finance & Policy Committee)

Oklahoma H.B. 1123 (signed by Governor on 05/03/17)

Oklahoma S.B. 2128 (signed by Governor on 05/03/17)

Pennsylvania S.B. 754 (introduced in State Government Committee)

Driver Immunity Statutes

Florida S.B. 1096 (died in Criminal Justice Committee)

North Carolina H.B. 330 (passed House & referred to Senate Committee on 04/27/17)

North Dakota H.B. 1203 (failed on vote)

Tennessee H.B. 668 / S.B. 944 (died in House Civil Justice Committee & introduced in Senate Judiciary Committee)

Texas H.B. 250 (pending in Judiciary & Civil Jurisprudence Committee)

“Economic Terrorism” (ET), Trespass & Interfering with Industry Related Offenses

Colorado S.B. 35 (upgraded existing misdemeanor to felony) (Passed Senate and failed in House Committee on State, Veterans, & Military Affairs)

Georgia S.B. 1 (expanded existing felonies) (passed Senate & failed on House vote)

North Carolina H.B. 249 (failed in Committee on Rules, Calendar, and Operations; re-introduced in Judiciary Committee)

North Dakota 1193 (new felony) (failed on Senate vote after passing House)

Oklahoma H.B. 1123 (new felonies and misdemeanor) (signed by Governor on 05/03/17)

South Dakota S.B. 176 (new misdemeanors) (signed by Governor on 03/27/17)

Washington S.B. 5009 (new felony) (introduced in Law & Justice Committee)

Unlawful Assembly & Riot Related Offenses

Arizona S.B. 1142 (new felonies) (died in House Rules committee after passing Senate)

Minnesota H.F. 34 / S.F. 184 (expanded felony) (introduced in House Public Safety and Security Policy & Finance Committee & Senate Judiciary & Public Safety Finance & Policy Committee)

Missouri H.B. 826 (new misdemeanor and felony) (died in Crime Prevention & Public Safety Committee)

North Dakota H.B. 1426 (upgraded misdemeanor and felonies) (signed by Governor on 02/23/17)

Oregon S.B. 540 (increased penalty for existing offense) (died in Education & Judiciary Committees)

South Dakota H.B. 1145 (withdrawn from Judiciary Committee)

Virginia S.B. 1055 (upgraded misdemeanor) (failed on Senate vote)

Virginia S.B. 1056 (upgraded misdemeanor) (died in Committee for Courts of Justice)

Virginia S.B. 1057 (upgraded felony) (died in Committee for Courts of Justice)

Virginia S.B. 1058 (new felony) (failed on Senate vote)

Virginia H.B. 1791 (new felonies) (vetoed by Governor)

Traffic & Roadway Related Offenses

Arkansas S.B. 550 (new misdemeanor) (vetoed by Governor)

Arkansas H.B. 1756 (expanded misdemeanor) (sent to Governor 4/03/17)

¹⁴² Information current as of December 2017. Legislation that fits multiple categories appears in duplicate.

Florida S.B. 1096 (new misdemeanor) (died in Criminal Justice Committee)

Georgia S.B. 160 (mandatory minimums for existing offenses) (signed by Governor sans traffic related provisions on 05/08/17)

Indiana S.B. 285 (new violation) (passed Senate & referred to House Committee on Rules & Legislative Procedures)

Iowa S.F. 111 (new felony) (introduced in Judiciary Committee)

Minnesota S.F. 148 / H.F. 55 (new misdemeanor) (introduced in Senate Judiciary & Public Safety & Finance & Policy Committee & Senate Transportation & Regional Governance & Policy Committee)

Minnesota H.B. 390 / S.F. 676 (upgraded misdemeanors) (introduced in House Public Safety & Security Policy & Finance Committee & Senate Judiciary & Public Safety & Finance & Policy Committees)

Minnesota S.F. 918 / H.F. 1066 (new misdemeanor) (in Committee) (introduced in Senate Judiciary & Public Safety & Finance & Policy Committee & House Public Safety & Security Policy & Finance Committee)

Mississippi S.B. 2730 (new felony) (died in Judiciary Committee)

Missouri H.B. 826 (new felony and misdemeanors) (died in Crime Prevention & Public Safety Committee)

North Carolina H.B. 249 (upgraded misdemeanor) (failed in Committee on Rules, Calendar, and Operations; re-introduced in Judiciary Committee)

South Dakota S.B. 176 (new misdemeanors) (signed by Governor on 03/27/17)

Tennessee S.B. 902 / 1051 (upgraded misdemeanor) (signed by Governor on 04/12/17)

Virginia S.B. 1058 (new felony) (died in Committee for Courts of Justice)
Mass Picketing and Strike Related Offenses and Laws

Arkansas S.B. 550 (new misdemeanors) (vetoed by Governor)

Michigan H.B. 4630 (increasing fines for existing misdemeanors) (passed House & tabled in Senate)

Michigan H.B. 4643 (passed House & tabled in Senate)

Mass Picketing and Strike Related Offenses and Laws

Arkansas S.B. 550 (new misdemeanors) (vetoed by Governor)