

THE CLIMATE NECESSITY DEFENSE: PROTECTING PUBLIC PARTICIPATION IN THE U.S. CLIMATE POLICY DEBATE IN A WORLD OF SHRINKING OPTIONS

BY
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Scholars have documented how, since 1989, the climate change counter-movement, a densely connected and well-funded network of fossil fuel industry members and their allies, has worked to stymie government action on climate change. Recent allegations that key actors in the climate change counter-movement, including Exxon Mobil, actively misled the public on the science of climate change have given rise to litigation and investigations by states' attorneys general. At the same time, climate protesters have been facing violence, harassment, and legislative crackdowns. Some climate protesters facing criminal charges for civil disobedience are attempting to use the climate necessity defense in court. The essential thrust of the climate necessity defense, an affirmative defense to criminal charges arising from civil disobedience, is that the harm of the defendants' disobedience is far outweighed by the harms being protested. This Essay sketches some initial connections between the influence of the climate change counter-movement, the crackdown on climate protesters, and the importance of the climate necessity defense. In doing so, it highlights the shrinking options available to members of the public to participate in the debate over climate policy, underscoring why some might feel compelled to engage in civil disobedience. Finally, it briefly discusses the climate necessity defense and argues that it is an important tool to help ensure the U.S. public has an effective voice in climate policy.

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I. INTRODUCTION

More than a hundred law professors recently filed an amicus brief in *Minnesota v. Klapstein*, in support of the defendant climate activists' right to present a climate necessity defense.¹ The brief argues that the fossil fuel industry and its allies are using their immense economic advantage to influence climate policy while climate activists encounter violence and harassment in the course of their political protest.² My Essay seeks to more deeply examine the connections between these two phenomena. How does the outsized influence of the fossil fuel industry over climate policy impact the public's ability to protest on climate issues? That is a huge question, requiring comprehensive analysis beyond the scope of this Essay. My Essay will sketch some initial connections between the influence of the climate change counter-movement—a network of fossil fuel industry members and their allies—the crackdown on climate protesters,³ and the importance of the climate necessity defense.⁴ The essential thrust of the climate necessity defense, an affirmative defense to criminal charges arising from civil disobedience, is that the harm of the defendants' disobedience is far outweighed by the harms being protested.⁵ In Part II of my Essay I will describe the climate change counter-movement and detail the tactics used by the movement to shape societal and policy narratives on climate change. Then, I will highlight the crackdown on environmental and climate protesters in the United States, analyzing how such a crackdown might connect to the actions of the climate change counter-movement. Finally, I will describe the climate necessity defense and argue that it is an important tool to help ensure the U.S. public has an effective voice in climate policy.

II. THE INFLUENCE OF THE CLIMATE CHANGE COUNTER-MOVEMENT

Scholars have identified the emergence of a climate change counter-movement (CCCM), composed of a network of stakeholders—including corporations, trade associations, think tanks, advocacy groups, and foundations—with the common goal of entrenching fossil fuel extraction and blocking government action restricting greenhouse gas emissions.⁶ The CCCM coalesced in 1989, right after the Intergovernmental Panel on Climate

¹ State v. Klapstein, No. A17-1650 (Minn. Ct. App. Apr. 24, 2017).

² Brief of Law Professors and Legal Organizations as Amici Curiae in Support of Respondents at 7, 17, State v. Klapstein, No. A17-1650 (Minn. Ct. App. Apr. 24, 2017) [hereinafter Brief of Law Professors].

³ See *infra* Part III.

⁴ See *infra* Part IV.

⁵ William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 11–12 (2003).

⁶ Robert J. Brulle, *Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations*, 122 CLIMATIC CHANGE 681, 682–84 (2014).

Change was created.⁷ Since then, the movement “has not only played a major role in confounding public understanding of climate science, but also successfully delayed meaningful government policy actions to address [climate change].”⁸ How has the climate change counter-movement been successful at confusing the public and slowing government action? Robert Brulle highlights strategies that CCCM organizations have used to argue for inaction on climate change, “including the provision of Congressional testimony, publication of documents on these organizations websites, the publication of conservative anti-climate change editorials, and books critical of the need to address climate change.”⁹ Brulle also notes the significant financial resources CCCM organizations have at their disposal to make these arguments.¹⁰ He found that CCCM organizations operating between 2003 and 2010 had, on average, a total yearly income of more than \$900 million.¹¹ Many of those organizations focused on several advocacy issues, so not all of that income was devoted to climate change communications, but that number gives a sense of the scale of resources available to organizations attempting to block regulation of greenhouse gas emissions.¹²

In addition to the strategies already highlighted, the CCCM also uses corporate Political Action Committees (PACs) in an attempt to influence legislative voting on climate policy, and environmental policy more broadly.¹³ Corporate PACs can influence elections and legislative votes “by running advertising campaigns whereby they ‘spend unlimited amounts on behalf of issues and candidates they like or against those they dislike.’”¹⁴ Scholars found that PACs related to the CCCM could significantly affect congressional voting on environmental issues through donations.¹⁵

While many of the strategies employed by the CCCM were and are legal, the legality of several strategies has recently been challenged.¹⁶ Several states’ attorneys general, including Massachusetts Attorney General Maura Healey, are investigating whether Exxon Mobil misled the public in its climate change communications.¹⁷ Shareholders of Exxon Mobil have filed a securities fraud class action against the corporation.¹⁸ As part of their case, shareholders allege that “[f]or many years, despite the overwhelming evidence known to Exxon management—and communicated *from Exxon’s*

⁷ *Id.* at 683.

⁸ *Id.* at 682.

⁹ *Id.* at 683–84.

¹⁰ *Id.* at 685.

¹¹ *Id.*

¹² *Id.* at 682.

¹³ Kerry Ard et al., *Another Avenue of Action: An Examination of Climate Change Countermovement Industries’ Use of PAC Donations and Their Relationship to Congressional Voting over Time*, 26 ENVTL. POL. 1107, 1108 (2017).

¹⁴ *Id.* at 1110–11.

¹⁵ *Id.*

¹⁶ John Schwartz, *Exxon Mobil Fights Back at State Inquiries into Climate Change Research*, N.Y. TIMES (June 16, 2016), <https://perma.cc/77HF-SL7K>.

¹⁷ *Id.*

¹⁸ *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-3111-K, 2018 WL 3862083, at *1 (N.D. Tex. Aug. 14, 2018).

own scientists—the Company did not disclose what they knew to investors in public filings, nor did they tell investors that climate change risks were already impacting Exxon’s business decisions.¹⁹ Their essential claim is that Exxon’s material misrepresentation of how climate change and climate policy would affect its assets led to the artificial inflation of the company’s stock prices.²⁰ Without commenting on the legality of Exxon Mobil’s actions, Geoffrey Supran and Naomi Oreskes concluded that Exxon Mobil did mislead the public about climate change science after conducting an empirical review of the company’s internal and external communications between 1977 and 2014.²¹ They reached this conclusion after finding that Exxon Mobil expressed significantly more doubt about climate science in documents meant for broad public consumptions than it did in internal documents.²² For example, in 1982, Exxon acknowledged in an internal document that “there are some potentially catastrophic events that must be considered. For example, if the Antarctic ice sheet[,] which is anchored on land should melt, then this could cause a rise in sea level on the order of 5 meters.”²³ While in 2000, Exxon’s advertising editorial spoke about climate change in the following terms: “[j]ust as changeable as your local weather forecast, views on the climate change debate range from seeing the issue as serious or trivial, and from seeing the possible future impacts as harmful or beneficial.”²⁴

In sum, the CCCM has systematically influenced public opinion and climate policy over decades, through both legal and potentially illegal means. The CCCM has been exceptionally well-financed in its mission of preventing regulation of greenhouse gas emissions.²⁵ This has undoubtedly narrowed the ability of the U.S. public to both understand the science of climate change and to influence public opinion and climate policy. At the same time, individuals engaging in environmental and climate protests have faced violence and harassment.²⁶ State governments have moved to crack down on peaceful protests.²⁷

¹⁹ Compl. at 157, *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-3111-K, 2018 WL 3862083 (N.D. Tex. Aug. 14, 2018).

²⁰ *Id.* at 2, 161–62.

²¹ Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil’s Climate Change Communications (1977–2014)*, 12 ENVTL. RES. LETTERS, Aug. 2017, at 1, 2, 12.

²² *Id.* at 15.

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ See *supra* notes 10–11 and accompanying text.

²⁶ Brief of Law Professors, *supra* note 2 at 17.

²⁷ See *generally* Letter from David Kaye, Special Rapporteur on the Promotion & Prot. of the Right to Freedom of Op. and Expression, & Maina Kiai, Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Ass’n, U.N. Comm’n on Human Rights, to Theodore Allegra, Chargé d’Affaires ad interim, U.S. Mission to the U.N., OL USA 3/2017 (Mar. 27, 2017), <https://perma.cc/4RMX-ZQ5A> [hereinafter Letter from David Kaye].

III. A CRACKDOWN ON CLIMATE PROTESTERS

In March 2017, the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association sent a letter to the U.S. government warning about a trend of state legislation criminalizing peaceful protest.²⁸ The letter identified proposed bills from sixteen U.S. states that “would severely infringe upon the exercise of the rights to freedom of expression and freedom of peaceful assembly in ways that are incompatible with U.S. obligations under international human rights law.”²⁹ All of the bills were proposed by Republican legislators.³⁰ The Special Rapporteurs were especially concerned that several of the bills were specifically aimed at environmental protesters.³¹ The letter highlights Florida Senate Bill No. 1096, which “provides that ‘a motor vehicle operator who unintentionally causes injury or death’ to a protester interfering with traffic during an unpermitted protest ‘is not liable for such injury or death.’”³² Several other state bills have similar language.³³ Another highlighted bill, Colorado Senate Bill No. 17-035, proposes a harsher penalty for anyone found “obstructing or tampering with oil and gas equipment.”³⁴ The Special Rapporteurs warned that the bill, which was purportedly introduced “to prevent activists from shutting off pipelines[] as part of a national pattern of increased repression of this form of political dissent[,]” would chill freedom of assembly, especially for environmental protests.³⁵ Another bill would punish protesters who engage in “economic terrorism” by obstructing traffic with up to twenty-five months in prison.³⁶

The American Civil Liberties Union (ACLU) argues that these bills are not just incompatible with international human rights law, but that many are incompatible with the First Amendment.³⁷ The ACLU maintains a database of state bills proposed in 2017 that would curtail individuals’ right to protest.³⁸ The database includes pending, proposed, and defeated bills from nineteen states.³⁹ As of the end of June 2017, bills in four states had passed.⁴⁰ This

²⁸ *Id.*

²⁹ *Id.* at 1.

³⁰ *Id.* at 17.

³¹ *Id.* at 18.

³² *Id.* at 3; S.B. 1096, 2017 Leg. Sess. (Fla. 2017).

³³ Letter from David Kaye, *supra* note 27, at 14.

³⁴ *Id.* at 2; S.B. 17-035, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

³⁵ Letter from David Kaye, *supra* note 27, at 3.

³⁶ H.B. 249, Gen. Assemb. of N.C., Session 2017 (N.C. 2017); Letter from David Kaye, *supra* note 27, at 7.

³⁷ *Anti-Protest Bills Around the Country*, AM. CIV. LIBERTIES UNION, <https://perma.cc/8E3V-7L7C> (last visited Feb. 16, 2019) [hereinafter *Anti-Protest Bills*]; Lee Rowland & Vera Eidelman, *Where Protests Flourish, Anti-Protest Bills Follow*, AM. CIV. LIBERTIES UNION (Feb. 17, 2017), <https://perma.cc/HMA5-GQ5G>.

³⁸ *Anti-Protest Bills*, *supra* note 37.

³⁹ *Id.*

⁴⁰ *Id.*

includes two bills from Oklahoma: HB 1123 and HB 2128.⁴¹ HB 1123, which was purportedly introduced in response to Dakota Access Pipeline protests,⁴² punishes those who interfere with “a critical infrastructure facility” with various fines and terms of imprisonment.⁴³ Protesters who “willfully damage, destroy, vandalize, deface or tamper with equipment in a critical infrastructure facility” face a fine of \$100,000 or potentially a ten-year prison term.⁴⁴ HB 2128 “appears to make anyone who is merely arrested for trespass liable for any damages to property caused while trespassing.”⁴⁵

The American Legislative Exchange Council (ALEC) has pulled from Oklahoma’s HB 1123 and HB 2128 to finalize a model bill that would target individuals who protest oil and gas infrastructure.⁴⁶ ALEC was created in 1973 by conservative activists.⁴⁷ It is a membership organization made up of corporate entities and state legislators who work together to create template legislation for ALEC members to then propose or advocate for in state legislatures.⁴⁸ The organization “receives the vast majority of its funding directly from corporations.”⁴⁹ Corporations on ALEC’s board include Koch Companies Public Sector and Exxon Mobil.⁵⁰ Exxon Mobil has been financially supporting ALEC since 1981 and, according to publicly available disclosures, gave at least \$1,730,200 to the organization between 1998 and 2014.⁵¹ According to ALEC’s website, its model bill—the Critical Infrastructure Protection Act—imposes

criminal penalties for a person convicted of willfully trespassing or entering property containing a critical infrastructure facility without permission by the owner of the property, and holds a person liable for any damages to personal or real property while trespassing. The Act also prescribes criminal penalties for organizations conspiring with persons who willfully trespass and/or damage

⁴¹ *Id.*; H.B. 1123, 56th Leg., Reg. Sess. (Okla. 2017); H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017).

⁴² Letter from David Kaye, *supra* note 27, at 8–9; Joe Wertz, *Oklahoma Bill to Protect Critical Infrastructure Could Curb Public Protest, Critics Say*, NAT’L PUB. RADIO (Mar. 2, 2017), <https://perma.cc/XD4N-28B5>.

⁴³ OKLA. STAT. ANN. tit. 21, § 1792 (West 2017).

⁴⁴ *Id.*

⁴⁵ *Anti-Protest Bills*, *supra* note 37; H.B. 2128, 56th Leg., 1st Sess. (Okla. 2017).

⁴⁶ Steve Horn, *ALEC, Corporate-Funded Bill Mill, Considers Model State Bill Cracking Down on Pipeline Protesters*, DESMOGBLOG (Dec. 11, 2017), <https://perma.cc/Y26P-FDPZ> [hereinafter Horn, *ALEC*].

⁴⁷ John Nichols, *ALEC Exposed*, NATION (July 12, 2011), <https://perma.cc/D5TH-D6T7>.

⁴⁸ Gary L. Anderson & Liliana M. Donchik, *Privatizing Schooling and Policy Making: The American Legislative Exchange Council and New Political and Discursive Strategies of Education Governance*, 30 EDUC. POL’Y 322, 326 (2014).

⁴⁹ *Id.* at 327.

⁵⁰ Ctr. for Media & Democracy, *ALEC Corporations*, SOURCEWATCH, <https://perma.cc/R9Q2-9R4X> (last updated Sept. 10, 2011).

⁵¹ Nick Surgey, *ExxonMobil Top Sponsor at ALEC Annual Meeting*, CTR. MEDIA & DEMOCRACY (July 27, 2016), <https://perma.cc/8R6X-HZXE>.

critical infrastructure sites, and holds conspiring organizations responsible for any damages to personal or real property while trespassing.⁵²

Thus, the bill not only targets individual climate protesters, but organizations that “conspire” with climate protesters.⁵³

The proposed and model bills are undoubtedly already having a chilling effect on climate protesters. Given the speed with which this spate of bills has been introduced, it is likely that the public is confused about the state of the law—whether proposed bills have passed and what exactly is prohibited. That effect will be magnified if more proposed bills become law. This is especially troubling, because as the U.N. Special Rapporteurs state in their letter, “the most marginalized . . . often find in the right to assemble the only alternative to express their opinions.”⁵⁴ Such bills exacerbate the already massive power imbalance between members of the public and the organizations and corporate entities involved in the CCCM. They chill protest in at least three key ways: by imposing heavy penalties for civil disobedience, by leaving lawful protesters unsure of the legality of their actions, and by targeting organizations who support protesters.⁵⁵ Much of the language in the bills could apply to climate protesters engaging in civil disobedience.⁵⁶ Civil disobedience is defined as “the intentional violation of a law for reasons of principle, conscience or social change.”⁵⁷ Such intentional violation of the law is different from marching or picketing, which are lawful, constitutionally protected activities.⁵⁸ Civil disobedience has been an important part of American democracy since at least the Boston Tea Party.⁵⁹ As Ryan Kiesel—executive director of the Oklahoma ACLU—notes, it is important for protesters to know,

that if they engage in civil disobedience, that the penalties they face should not be disproportionate. If we chill and keep people home, away from the cameras

⁵² *Critical Infrastructure Protection Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 20, 2018), <https://perma.cc/P44H-M6KE>.

⁵³ *Id.*

⁵⁴ Letter from David Kaye, *supra* note 27, at 18.

⁵⁵ See *infra* notes 61–63, 65–66 and accompanying text.

⁵⁶ See Letter from David Kaye, *supra* note 27, at 3; Alleen Brown, *Oklahoma Governor Signs Anti-Protest Law Imposing Huge Fines on ‘Conspirator’ Organizations*, INTERCEPT (May 6, 2017), <https://perma.cc/2Q4D-VGKJ> (stating that an Oklahoma statute aimed at suppressing protests is “part of a nationwide trend in anti-protest laws meant to significantly increase legal penalties for civil disobedience”); Amanda Erickson, *Donald Trump is Threatening US Citizens’ Right to Peaceful Protest, Warns UN*, INDEPENDENT (Apr. 3, 2017), <https://perma.cc/XK5L-RG6E> (stating that the basic principle of civil disobedience is under attack and that nineteen states proposed bills attempting to criminalize protest).

⁵⁷ Quigley, *supra* note 5, at 15.

⁵⁸ Barbara J. Katz, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 905 (1985) (stating that “the purposeful violation of an otherwise valid law is what generally differentiates civil disobedience from forms of dissent such as picketing or holding a public march, activities that are considered lawful and that do have the protection of the First Amendment”).

⁵⁹ Quigley, *supra* note 5, at 20.

and away from the public they are trying to wake up on any number of issues, we are doing a real disservice to our democracy.⁶⁰

In addition to harshly penalizing protesters who engage in civil disobedience, the bills leave lawful protesters in a difficult position.⁶¹ Some include provisions carving out protections for the valid exercise of constitutional rights.⁶² But many include vague definitions and broad discretion for government actors, potentially leaving protesters unsure of the legality of their actions and chilling their protest. For example, the Special Rapporteurs are concerned that the vague definition of “tampering with equipment associated with oil or gas gathering operations” in Colorado Senate Bill No. 17-035 “could be interpreted very broadly, therefore encompassing a wide range of situations, such as a peaceful protest near the concerned area[.]”⁶³ Moreover, given that protests are often large and chaotic, lawful protesters might fear being misidentified as civil disobedients and subjected to heavy criminal and financial sanctions.⁶⁴ They may even fear being falsely charged.⁶⁵ Finally, in addition to chilling the activity of civil disobedients and lawful protesters alike, some bills, like the ALEC model bill, target the activity of organizations that support or mobilize protesters.⁶⁶ Non-profit and community organizations play an important advocacy, information-gathering, and policy-making role in democratic societies, and they can be key champions for marginalized voices.⁶⁷ By targeting these organizations in legislation, governments can stifle vital critique and threaten the ability of organizations to advocate for society’s most disadvantaged.⁶⁸

Environmental protesters are not just facing an onslaught of legislative activity that could chill their attempts to challenge government and corporate action on climate change. In their amicus brief in *Minnesota v. Klapstein*, law professors allege that climate protesters “face violence, harassment, or intimidation by those whose policies they criticize.”⁶⁹ One

⁶⁰ Horn, *ALEC*, *supra* note 46.

⁶¹ See H.B. 1123, 56th Leg., Reg. Sess. (Okla. 2017) (punishing those who interfere with “a critical infrastructure facility” with various fines and terms of imprisonment); see also H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017) (imposing liability on any person who is arrested for or convicted of trespass for any damages to property while trespassing).

⁶² Letter from David Kaye, *supra* note 27, at 2; S.B. 550, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (exempting individuals who validly exercise rights guaranteed by the Constitution from a proposed “mass picketing” law).

⁶³ See Letter from David Kaye, *supra* note 27, at 2–3; S.B. 17-035, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

⁶⁴ Timothy Zick, *Protests in Peril: The Prosecution of Inauguration Day Protesters is a Chilling Assault on Free Speech*, U.S. NEWS & WORLD REP. (Nov. 20, 2017), <https://perma.cc/XH6L-SCYX>.

⁶⁵ *Id.*

⁶⁶ *Critical Infrastructure Protection Act*, *supra* note 52.

⁶⁷ Emily Howie, *Anti-Protest Legislation and the Chilling of Free Speech*, PRECEDENT, Sept.–Oct. 2016, at 26, 28.

⁶⁸ *Id.*

⁶⁹ Brief of Law Professors, *supra* note 2, at 17.

example included in the brief is pipeline developer Energy Transfer Partners hiring private security firm TigerSwan to conduct surveillance and counterintelligence strategies against people protesting the Dakota Access Pipeline.⁷⁰ The company targeted Native American protesters, organizations like Black Lives Matter and 350.org, and activists as young as seventeen.⁷¹ Legal experts opined that such strategies would probably be illegal if undertaken by law enforcement.⁷² Civil rights attorney Jeff Haas described the tactics in the following terms: “[i]t’s like a big brother society, with a private corporation—with even less restraints than the government—totally interfering with our right to privacy, free speech, assembly, and religious freedom.”⁷³

Another tactic used to intimidate climate protesters is to label them as domestic terrorists. In October 2017, more than eighty congressional representatives signed a letter to U.S. Attorney General Jeff Sessions querying whether members of the public who disrupt pipeline operations could be charged with committing an act of terrorism under the Patriot Act.⁷⁴ Reports suggest that fossil fuel industry groups bolstered the letter from early stages, and such groups have been publicly supportive of the letter.⁷⁵ In August 2017, Energy Transfer Partners, owners of the Dakota Access Pipeline, filed a complaint in the United States District Court for the District of North Dakota against Greenpeace and several others.⁷⁶ Energy Transfer Partners describes Greenpeace and other activists as “rogue eco-terrorist groups”⁷⁷ and alleges that they participated in “a pattern of racketeering activity”⁷⁸ and “incited and perpetrated acts of terrorism in violation of the U.S. Patriot Act.”⁷⁹ The fossil fuel company also alleges that it has suffered at least \$300 million in damages.⁸⁰ The profoundly charged language of domestic terrorism and the threat of massive legal damages create additional barriers for individuals to participate in climate protest.

It is critical to begin drawing connections between this kind of intimidation of climate protesters and the fossil fuel industry’s decades-long role in misleading the public over climate science. The U.S. public’s

⁷⁰ Antonia Juhasz, *Paramilitary Security Tracked and Targeted DAPL Opponents as ‘Jihadists,’ Docs Show*, GRIST (June 1, 2017), <https://perma.cc/YV5P-5EVY>; Brief of Law Professors, *supra* note 2, at 18.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Steve Horn, *Congress Works with Big Oil on Letter Suggesting Anti-Pipeline Activists Face Terrorism Charges*, DESMOGBLOG (Nov. 3, 2017), <https://perma.cc/3KNR-RJK6>; Letter from Members of Congress to Jeff Sessions, Attorney General (Oct. 23, 2017) (inquiring whether “attacks against the nation’s energy infrastructure . . . fall within the DOJ’s understanding of” the Patriot Act) [hereinafter Horn, *Congress Works with Big Oil*].

⁷⁵ Horn, *Congress Works with Big Oil*, *supra* note 74.

⁷⁶ Complaint at 1, *Energy Transfer Equity, L.P. v. Greenpeace Int’l*, No. 1:17-cv-00173-CSM, 2017 WL 3616360 (D.N.D. Aug. 22, 2017).

⁷⁷ *Id.* at ¶ 1.

⁷⁸ *Id.* at ¶ 371.

⁷⁹ *Id.* at ¶ 380.

⁸⁰ *Id.* at ¶ 364.

understanding and acceptance of climate science has long lagged behind that of experts: in 2012 “[o]nly 45% of the U.S. public accurately reported the near unanimity of the scientific community about anthropogenic climate change.”⁸¹ Scholars have conducted analyses demonstrating that a key element driving the public’s confusion is the actions of the CCCM.⁸² It is not just the public that the CCCM has influenced. A 2001 memorandum from a senior U.S. State Department official states that President George W. Bush abandoned the Kyoto Protocol partly in response to the lobbying efforts of the CCCM.⁸³ It has been twenty-eight years since the emergence of the CCCM, twenty-eight years during which the counter-movement has worked to delay and undermine government regulation of greenhouse gas emissions and a transition away from fossil fuels.⁸⁴ Now, scientists say the climate situation is dire and governments must take bold action to avert irreversible disaster.⁸⁵ This is the landscape climate protesters face—decades of deliberate strategies to confuse the public and influence government decision makers,⁸⁶ hundreds of millions of dollars in corporate funding to delay or prevent government action on climate change,⁸⁷ crackdowns on peaceful protest,⁸⁸ and scientific research saying the world is on the brink of disaster.⁸⁹ It is not hard to see how such climate protesters would feel like their options for effectively challenging the CCCM’s framing of climate change and spurring public and government interest have been dramatically narrowed. Or how protesters might feel it is necessary to engage in more impactful civil disobedience to protect themselves and their fellow citizens from climate disaster.

IV. THE CLIMATE NECESSITY DEFENSE: AN IMPORTANT TOOL

Some activists who have engaged in civil disobedience as part of their climate protests are attempting to use the defense of climate necessity against subsequent criminal charges.⁹⁰ The climate necessity defense is an affirmative defense to criminal charges in which a defendant “asserts that breaking the law was justified in order to avert a greater harm that would

⁸¹ Brulle, *supra* note 6, at 681.

⁸² *Id.* at 682.

⁸³ John Burritt McArthur & Rick Harper, *Global Warming, the Regulations Ahead, and the Oil and Gas Industry*, 48 NAT. RESOURCES J. 745, 813 (2008).

⁸⁴ Brulle, *supra* note 6, at 683.

⁸⁵ See, e.g., Justin Worland, *We Only Have 3 Years Left to Prevent a Climate Disaster, Scientists Warn*, TIME (June 29, 2017), <https://perma.cc/6A8J-J94C> (on the dangers of climate change and need for renewable energy and decreasing reliance on coal-fired power plants).

⁸⁶ See *supra* notes 81–83 and accompanying text.

⁸⁷ See *supra* notes 10–11 and accompanying text.

⁸⁸ See Letter from David Kaye, *supra* note 28, at 1 (recognizing the creation of various state bills that are criminalizing peaceful protest).

⁸⁹ See Worland, *supra* note 85 (portraying climate change as an irreversible disaster if greenhouse gas emissions are not reduced by 2020).

⁹⁰ See CLIMATE DEF. PROJECT, CLIMATE NECESSITY DEFENSE CASE GUIDE: A GUIDE FOR ACTIVISTS AND ATTORNEYS 1 (2017), <https://perma.cc/CJS7-TUQY>.

occur as a result of the government policy the offender was protesting.”⁹¹ In the United States, the exact elements of the defense vary with state law but “usually require a showing that the defendant a) faced an imminent danger, b) took action to prevent that danger through less harmful means, c) reasonably anticipated that the action would prevent the danger, and d) had no reasonable legal alternative to the action.”⁹² No judge has yet allowed a jury to consider necessity defense testimony in the United States,⁹³ although that may soon change.⁹⁴ Because of precedents like the 1992 case of *United States v. Schoon*,⁹⁵ it is essentially impossible to present a political necessity defense in U.S. federal court. *Schoon* defined indirect civil disobedience as “violating a law or interfering with a government policy that is not, itself, the object of protest” and then held as a matter of law that defendants could not successfully present a necessity defense after engaging in indirect civil disobedience.⁹⁷ One of the key legal hurdles imposed by *Schoon* is its holding that there are always legal alternatives to indirect civil disobedience. The court wrote that “legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action.”⁹⁸

Although state courts have often taken a similar position, drawing from *Schoon*’s reasoning,⁹⁹ in several recent cases state courts have shown themselves open to considering the presentation of a climate necessity defense.¹⁰⁰ As activists continue to request the right to present the climate necessity defense to juries, it is critical that courts consider the larger social and political landscape of climate policy and protest described above in deciding whether to allow the presentation of the defense. There are real questions about whether climate harms *can* be effectively mitigated by congressional action. Not only is the CCCM funding legislators’ campaigns and working with them to create model legislation, the counter-movement has poured hundreds of millions of dollars into confusing the public about

⁹¹ John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111 (2007).

⁹² CLIMATE DEF. PROJECT, *supra* note 90, at 1.

⁹³ Lance N. Long & Ted Hamilton, *Case Comment—Washington v. Brockway: One Small Step Closer to Climate Necessity*, 13 MCGILL J. SUSTAINABLE DEV. 153, 153 (2017).

⁹⁴ See, e.g., *Washington Court Issues Written Decision Allowing Necessity Defense*, CLIMATE DEF. PROJECT (Mar. 18, 2018), <https://perma.cc/5E4U-A8FL> (announcing a Washington trial court’s decision to allow defendant to assert the climate necessity defense); *Recognizing Strength of Activists’ Case, Minnesota Judge Issues First-of-its-Kind Written Decision Allowing Presentation of Climate Necessity Defense in a Jury Trial*, CLIMATE DEF. PROJECT (Oct. 14, 2017), <https://perma.cc/5MNB-GQUX> (announcing a Minnesota decision in which the plaintiff met the pre-trial burden for the climate necessity defense).

⁹⁵ 971 F.2d 193 (9th Cir. 1991).

⁹⁶ Long & Hamilton, *supra* note 93, at 162.

⁹⁷ *Schoon*, 971 F.2d at 196.

⁹⁸ *Id.* at 198.

⁹⁹ Long & Hamilton, *supra* note 93, at 161–62.

¹⁰⁰ See, e.g., *State v. Brockway*, No. 76242-7-I, 2018 WL 2418485, at *3, *5 (Wash. Ct. App. May 29, 2018) (affirming the appropriateness of the trial court’s consideration of testimony with regard to defendant protestors’ necessity defense, but ultimately affirming the trial court’s holding that defendants did not meet all requirements of the defense).

the science of climate change for almost three decades.¹⁰¹ Legislators might themselves have been misled about the science of climate change, and certainly their constituents will have been subject to the CCCM's campaign of misinformation. As previously mentioned, states' attorneys general are investigating the legality of tactics used by the fossil fuel industry to mislead the public.¹⁰² Such realities challenge *Schoon's* reasoning that those who engage in indirect civil disobedience always have alternative legal options to remedy their identified harms. If it emerges that fossil fuel industry members acted fraudulently over decades to mislead members of the public and government decision makers, *Schoon's* conclusion about the possibility of congressional remedy is especially problematic.

One of the most powerful and effective ways for protesters to communicate these stark realities to the broader public is through being able to present the climate necessity defense to the jury. As the law professors write in their amicus brief, the "necessity defense is among the few tools available to political protest defendants that allow them to shine a light on the abuses of power that motivated their protest."¹⁰³ If given the chance to present the defense, defendants would use expert testimony to help prove each of the elements of the defense.¹⁰⁴ This testimony has in the past included evidence on the local health impacts and consequences of climate change.¹⁰⁵ It could also include evidence on the CCCM's influence, which has so constricted the ability of the public to effectively participate in the climate policy debate.¹⁰⁶ That influence has been pervasive but subtle, and largely outside of the public eye. The CCCM's role in influencing state governments to crackdown on climate protesters has also largely gone under the radar. Presentation of the climate necessity defense would allow members of the public to tell this story, connect these dots, in one of the very few remaining public forums left to them. It seems like the public responds to this presentation. After initially hearing evidence on the climate necessity defense in *State v. Brockway*,¹⁰⁷

three members of the jury admitted they would have acquitted the defendants had they received a necessity instruction from the judge. They also thanked the defendants for giving them an education on climate change, agreed to support the Climate Disobedience Center in future cases, and signed up with defendant Abby Brockway to lobby the state on oil trains.¹⁰⁸

The defense is thus a critical opportunity to publicly challenge the CCCM narrative and work to correct decades of misinformation.

¹⁰¹ See *supra* notes 11, 82, and accompanying text.

¹⁰² See *supra* note 17 and accompanying text.

¹⁰³ Brief of Law Professors, *supra* note 2, at 10.

¹⁰⁴ Long & Hamilton, *supra* note 93, at 171.

¹⁰⁵ See *id.*

¹⁰⁶ See *supra* notes 81–84 and accompanying text.

¹⁰⁷ No. 76242-7-I, 2018 WL 2418485 (Wash. Ct. App. May 29, 2018).

¹⁰⁸ Stephen Quirke, *Delta 5 Defendants Acquitted of Major Charges*, EARTH ISLAND J. (Jan. 28, 2016), <https://perma.cc/46GK-D6MY>.

V. CONCLUSION

In sum, for at least the last three decades members of the fossil fuel industry and their allies in the CCCM have systematically worked to prevent or delay government action on greenhouse gases. A key part of that strategy was undermining the science of climate change. Scholars have linked the counter-movement's efforts to the U.S. public's continued confusion and doubt about climate science.¹⁰⁹ The CCCM's decades-long campaign has made it difficult for members of the U.S. public to effectively participate in the climate-policy debate. At the same time, climate protesters have been facing intimidation, harassment, and legislative attempts to crackdown on environmental protests.¹¹⁰ It is critical that state courts consider this broader context facing climate protesters when deciding whether to allow the presentation of the climate necessity defense to the jury. In a world of shrinking options for protesters, the climate necessity defense is an important tool for the public to challenge the CCCM's narrative and inform the wider public about the actions of the CCCM and the urgency of the climate threat.

¹⁰⁹ See *supra* note 82 and accompanying text.

¹¹⁰ See Brief of Law Professors, *supra* note 2, at 7.