STATE OF MINNESOTA
COUNTY OF HUBBARD

DISTRICT OF MINNESOTA
NINTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

CASE FILE NO. 29-CR-21-830

Vs.

DEFENDANT'S MOTION TO DISMISS ON THE GROUND OF FIRST AMENDMENT VIEWPOINT DISCRIMINATION

JERALYN LISA MORAN,

Defendant.

MOTION TO DISMISS ON THE GROUND OF
FIRST AMENDMENT VIEWPOINT DISCRIMINATION

Defendant, **JERALYN LISA MORAN**, by and through her attorneys, **THOMAS ANTHONY DURKIN**, **BERNARD E. HARCOURT**, and **TIMOTHY M. PHILLIPS,** respectfully submits this Motion to Dismiss on the ground that the State of Minnesota's deployment of the Minnesota Anti-Terrorism Act as applied to Ms. Moran's case is unconstitutional. The anti-terrorism statute was used to target Ms. Moran's expressive conduct—protesting the construction of the Line 3 expansion on the grounds of the pipeline construction site. Ms. Moran was charged under this statute because of her specific viewpoint opposing the construction of the Line 3 pipeline, in violation of her right to Free Speech under the First and Fourteenth Amendments to the United States Constitution and Minnesota law.

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FACTS

In 2014, Enbridge Inc., a Canadian pipeline company, proposed the construction of the Line 3 pipeline expansion—a project that would entail building an extensive oil pipeline that would cross through significant portions of territory in Northern Minnesota belonging to several Native American tribes. Enbridge's proposal to build the Line 3 pipeline through local native territory not only stands in violation of treaties with the Ojibwe, Anishinaabe, and Chippewa tribes, but also poses significant health and environmental risks for the area and the people residing there. The proposed pipeline is located in the watershed of many wild rice waters, which is a sacred and economic resource for the Anishinaabe people. Not only would this pipeline be an unlawful invasion onto tribal territory and violation of treaty rights, but it would also cause significant pollution in the area that would affect the environment and the surrounding community. Kevin Whelan, *The Fight to Stop the Line 3: Big Oil's Last Stand in Minnesota*, STOP LINE 3, https://www.stopline3.org/chronicles (last visited Oct. 20, 2021). Due to the injustice and potentially catastrophic environmental impact of this project, tribal nations, along with environmental and community groups, have been opposing the construction of this pipeline from its inception. *Id.*

On June 7, 2021, Jeralyn Moran and a group of approximately three hundred protesters gathered to protest the construction of the Line 3 Pipeline Replacement Project by Enbridge Inc.. Complaint at 2, *State of Minn. v. Moran* (Minn. 9th Jud. Dist. Ct) (No. 21CR00783). Activists organized the protest to combat the construction of the Line 3 pipeline due to the inevitable water pollution the pipeline would cause and the violation of the tribal treaty rights. Police, financed by Enbridge Inc. (*see* Motion to Dismiss on Due Process Grounds Because a Foreign Private Corporation is Financing These Prosecutions, incorporated herein) and having been made aware

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of the protest prior to the assembly, arrived on the scene of the protest and arrested Ms. Moran and others. Moran was charged with a gross misdemeanor under Minnesota Statute 609.6055.2 regarding trespass on critical public service facilities, pipelines, and utilities.

The trespass law that was used against Ms. Moran was enacted as part of the Minnesota Anti-Terrorism Act of 2002, an anti-terrorism initiative that was developed in the wake of the September 11th attacks. Like most other states at the time, the Minnesota legislature drafted this Act to complement the analogous federal Homeland Security Act intended to combat and prevent further terrorist action. *See* Anti-Terrorism Act of 2002, Minn. Sess. Law Serv. Ch. 401 (2002). After the attacks, many state legislatures were concerned about protecting the nation's existing transportation and utility infrastructure from potential terrorist attacks. *Id*. Along with the aforementioned trespass to critical infrastructure elements, the Act also included statutes establishing a Minnesota Homeland Security Advisory Council and other anti-terrorism related policies. *Id*.

The legislative purpose of the Act indicates that none of its provisions were ever intended to serve as anti-pipeline anti-protest laws at its inception, including the trespass statute. The law was not passed as the result of any protests, as these protests arose many years later in specific opposition to the construction of the Line 3 replacement project. Moreover, the Minnesota legislature itself has publicly voiced opposition to the construction of this Line 3 replacement pipeline. *See* Letter from Minnesota State Representatives and Senators to President Joseph R. Biden (Feb 5. 2021). On February 5, 2021, thirty-four Minnesota legislators wrote to President Biden asking him to stop construction of the Line 3 replacement project, stating that the pipeline would cut through treaty territory where Ojibwe people hold rights to hunt, fish, and gather. Legislators acknowledged that these rights extend beyond individual reservation boundaries and

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are enumerated specifically in treaties with the United States, and as such, they are the "supreme law of the land." U.S. CONST. art. VI, cl. 2.

Nothing in the subsequent legislative history of the Anti-Terrorism Act would indicate that it was intended to serve as an anti-protest law. The only amendment made to 609.6055 was in 2008, where Minnesota legislators added a provision regarding underground structures. *See* S.F. 2828, 85th Leg., 2008 Reg. Sess. (Minn. 2008). No further updates to the law were made in response to the Line 3 protests, indicating that the Minnesota legislature had no intention of impeding the right of citizens to protest the pipeline construction project. Despite the clear intentions of the Minnesota legislature with regard to the anti-terrorism trespass statute, Enbridge-financed law enforcement chose to transform the law into an anti-protest statute in order to impose harsh penalties on pipeline protesters, like Ms. Moran, for exercising their First Amendment right to free speech and daring to oppose the destructive Line 3 project.

ARGUMENT

The application of the Minnesota Anti-Terrorism Act of 2002 to Ms. Moran's case violates the First Amendment because it was specifically applied to target Ms. Moran's expression of opposition to the construction of the Line 3 pipeline, which is not in accordance with the government's purpose for the statute and represents an unconstitutional infringement on free speech protections. Insofar as the Anti-Terrorism Act is being deployed in Minnesota solely to punish the expression of protest against the Line 3 pipeline, the state's action represents viewpoint discrimination, which is the worst form of speech infringement and is putatively unconstitutional. Furthermore, even if the law was determined to be content-neutral as applied to Ms. Moran's case, the application of the law against Ms. Moran was incidentally restrictive of her freedom of expression and unconstitutional.

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I. THE APPLICATION OF THE MINNESOTA ANTI-TERRORISM ACT TO MS. MORAN'S CONDUCT IS UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION

a. The First Amendment Prohibits Viewpoint Discrimination

The First Amendment protects citizens from government encroachment on their right to free speech and other expressive activities, regardless of viewpoint. Justice Thurgood Marshall wrote that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of City of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). Laws that implicate the First Amendment through restrictions on speech or other expressive activities are typically analyzed by courts using a strict scrutiny standard—requiring a significant government interest and sufficiently narrow tailoring for the law to be valid. Specifically, when restrictions are *viewpoint discriminatory*—meaning that they regulate expression of certain viewpoints and not others—the restrictions are presumptively unconstitutional under the First Amendment.

The Supreme Court has held that "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is . . . blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 827 (1995). Viewpoint-discriminatory laws "raise[ ] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The Supreme Court established that the principle against viewpoint discrimination applied even to some expressive actions that were otherwise excluded from First Amendment protection. *R.A.V. v. City*

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of St. Paul, 505 U.S. 377, 384 (1992). For example, although libel laws are permissible restrictions on speech, the government "may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.*

With regard to viewpoint discrimination, the Supreme Court has stated that "the danger [of content and viewpoint censorship] . . . is at its zenith when the determination of who may speak and who may not is left to an official's unbridled discretion. Even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on . . . [an] official's boundless discretion." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 751 (1988); *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002); *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Cox v. State of La.*, 379 U.S. 536, 557–58 (1965). When a law "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," and has a "close enough nexus to expression, or to conduct commonly associated with expression," then it can be challenged as viewpoint discriminatory. *City of Lakewood*, 486 U.S. at 759. Furthermore, "the existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Leg. Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). Because of the significant burden such laws have on the First Amendment right to free speech, "in the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011).

In this case, the state of Minnesota is deploying an anti-terrorism law as a form of anti-protest law only to persons, like Ms. Moran, who are opposing the Line 3 Pipeline, a specific viewpoint that Enbridge-backed law enforcement sought to silence. This form of viewpoint

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discrimination is the worst type of infringement of First Amendment rights and is blatantly unconstitutional. Although it did not serve to completely ban Ms. Moran's speech, "the distinction between laws burdening and laws banning speech is but a matter of degree" and "the Government's . . . burdens must satisfy the same rigorous scrutiny as its . . . bans." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 812 (2000). As was done here in Ms. Moran's case, authorities "may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 571. Because the application of the anti-terrorism law in Ms. Moran's case was government suppression of disfavored speech and her act of protesting at the pipeline construction site is conduct commonly associated with expression, it was viewpoint discriminatory. *City of Lakewood*, 486 U.S. at 759.

b. The Application of the Anti-Terrorism Act to Ms. Moran Was Suppression of Disfavored Speech

"When the government discriminates against speech because it disapproves of the message conveyed by the speech, it discriminates on the basis of viewpoint." *Sorrell*, 564 U.S. at 571. With regard to the standard laid out in *City of Lakewood*, the application of the trespass statute in this case gave government officials unbridled discretion to discriminate against Ms. Moran's viewpoint and attempt to suppress her "disfavored" speech. Laws that leave the determination of who may or may not speak up to government officials are unconstitutional. *See City of Lakewood*, 486 U.S. at 763-64.

That is exactly what occurred when law enforcement sought to target Ms. Moran with a gross misdemeanor to suppress her anti-pipeline viewpoint and discourage others from expressing opposition to the Line 3 pipeline project. Law enforcement penalized anti-pipeline protesters specifically for their viewpoint in a way that they would not have if these protesters were pro-

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pipeline. Upon information and belief, in the entire history of the Act, it has never been applied to pipeline supporters in the way that it has been deployed against anti-pipeline protesters.

c. Ms. Moran's Conduct Is Commonly Associated with Expression

Satisfying the second factor in *City of Lakewood*, it is undeniable that Ms. Moran's protest activity on the site of the Line 3 construction ground is conduct that is commonly associated with expression. The right for citizens to peaceably assemble is a core protection of expression by the First Amendment. *See* U.S. CONST. Amend. I. Ms. Moran and her fellow activists were protesting on the grounds of the Line 3 pipeline, specifically, in order to express their fierce opposition to the construction of the pipeline and bring public awareness to their cause. This expression of opposition was exactly what law enforcement intended to silence when they charged Ms. Moran with a gross misdemeanor under an anti-terrorism statute that bore no true relation to Ms. Moran's conduct.

Law enforcement sought to use an anti-terrorism statute to suppress Ms. Moran's lawful expression of her viewpoint because they disapproved of her message. Similar to the libel example used by the court in *R.A.V.*, while trespass laws generally do not implicate a First Amendment violation, its application in this context was a proxy to suppress the disfavored viewpoint of opponents of the pipeline construction. Because both *City of Lakewood* factors are met in this case, law enforcement's application of the law to Ms. Moran's actions was viewpoint discriminatory. Though the State of Minnesota may argue that there was a reasonable ground for applying this statute to Ms. Moran's activity, any supposedly reasonable ground they may offer would only be a "façade for viewpoint-based discrimination" and, therefore, unconstitutional. *Cornelius*, 473 U.S. at 811.

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II. THE APPLICATION OF THE ANTI-TERRORISM TRESPASS STATUTE IN MS. MORAN'S CASE IS ALSO INCIDENTALLY RESTRICTIVE AND UNCONSTITUTIONAL

a. The First Amendment Prohibits Some Content-Neutral Restrictions

Even when a court determines that a statute involves content-neutral restrictions, it may still find that these restrictions, as applied, were administered in a discriminatory manner, in violation of the First Amendment—particularly when they indicate an impermissible government motive. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 CHI. L. REV. 413, 499 (1996). Content-neutral restrictions may either directly or incidentally restrict speech or other expressive activity. Direct restrictions target expression alone, while incidental restrictions target actions that apply to both non-expressive and expressive activity. *Id* at 491. While direct content-neutral restrictions are presumptively unconstitutional and warrant First Amendment strict scrutiny, the court must complete additional analyses to determine if certain incidental restrictions warrant the same level of scrutiny. When the application of a law is triggered by expressive activity, the expression and the legal violation become intertwined—a linkage that is often less visible and less tangible when that application of the law merely burdens expression rather than outright bans it. *Id*. Though not presumptively unconstitutional like direct restrictions, some incidental restrictions can lead to discriminatory enforcement. Because the danger of an impermissible government motive is heightened by the link between the legal sanction and expression, discriminatory enforcement of incidental restrictions can shift the appropriate constitutional standard and can be found unconstitutional. *Id* at 498-99.

The Supreme Court applies First Amendment scrutiny to laws "regulating conduct which has the incidental effect of burdening the expression of a particular political opinion." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702 (1986) citing *United States v. O'Brien*, 391 U.S. 367 (1968).

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In *Arcara*, the court established two scenarios where First Amendment scrutiny applies to laws of general application with incidental effects on expressive conduct. The court held in this case that First Amendment scrutiny applies to situations "where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity." *Arcara*, 478 U.S. at 706-707. For example, in *O'Brien*, the court found that First Amendment scrutiny was warranted because O'Brien's burning of his selective service registration certificate was conduct with a significant expressive element that carried a message of his opposition to the draft and the Vietnam War. *O'Brien*, 391 U.S at 376. The second *Arcara* scenario was present in *Minneapolis Star and Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 581 (1983), where the court found that the taxes imposed on paper and ink products, though based on non-expressive activity, had the inevitable effect of singling out newspapers, which were engaged in expressive activity and disproportionately burdened by the tax.

If either of the two prongs from *Arcara* apply, the court then analyzes the challenged law under the four-part *O'Brien* test. In *O'Brien*, the court established that an incidental regulation is justified if (1) "it is within the constitutional power of the Government;" (2) "it furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 376-377. The *O'Brien* analysis suggests that the Court "will apply strict scrutiny to a law of general application when either the asserted justification or the only rational justification for the law (or an application of [the law]) relates to the communication of a message." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 CHI.

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L. REV. 413, 500 (1996). If the only rational interest for the government's application of a law relates to the expression of a message or viewpoint, "a court can assume that the official taking the action indeed considered the desirability of restricting certain messages [a]nd . . . the probability is high that bias tainted the decision." *See id.*

In *O'Brien*, the court considered the legislative history of the statute and the situation in which the law was enforced in determining whether there was a First Amendment violation. The court further applied this test in several cases like *Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 567 (1991), *U.S. v. Eichman*, 496 U.S. 310, 314 (1990), *U.S. v. Albertini*, 472 U.S. 675, 688 (1985), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984). In *Albertini*, the court found that the arrest and conviction of protesters who "engaged in a peaceful demonstration criticizing the nuclear arms race" on a military base—in violation of a statute making it unlawful to reenter a military base after being ordered not to reenter—triggered a First Amendment analysis under *O'Brien*. *Albertini*, 472 U.S. at 688. In *Clark*, the *O'Brien* analysis was triggered where demonstrators sleeping in a park in order to call attention to the plight of the homeless were charged with violating a National Park Service regulation prohibiting camping in certain parks. *Clark*, 468 U.S. at 293. In *Barnes*, the court evaluated whether there was a First Amendment violation where a general public indecency law was used to prohibit the expressive conduct of nude dancing at adult establishments. *Barnes*, 501 U.S. at 567. In *Albertini*, *Clark*, and *Barnes*, the court ultimately held that there was no First Amendment violation. However, in *Eichman*, the Supreme Court invalidated a Texas flag-burning statute because "the [g]overnment's interest [could not] justify its infringement on First Amendment rights." *Eichman*, 496 U.S. at 311. The court held in *Eichman* that "[a]lthough the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's

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asserted interest is related to the suppression of free expression." *Id* at 315. In cases where both the *Arcara* and *O'Brien* factors are satisfied, the court may find that a content-neutral law unconstitutionally burdens freedom of expression.

b. The Application of the Anti-Terrorism Trespass Statute in Ms. Moran's Case Is Incidentally Restrictive and Unconstitutional

The application of the anti-terrorism statute against Ms. Moran for protesting the pipeline construction is incidentally restrictive of her expressive activity and satisfies both the *Arcara* and *O'Brien* tests. This case satisfies both of the *Arcara* factors because the conduct that Ms. Moran engaged in, and was charged for, had a significant expressive element and has been particularly targeted at opponents of the Line 3 pipeline. In further applying the *O'Brien* factors, the government motive is not sufficient to justify the application of the Anti-Terrorism Act to Ms. Moran because its motive was related to the suppression of free speech. This incidental restriction on free speech, in Ms. Moran's case, is greater than what was essential for the enforcement of this anti-terrorism law.

i. Ms. Moran's protest at the Line 3 pipeline construction site had a significant expressive element

Ms. Moran's conduct easily falls under the first *Arcara* factor in that it had a significant expressive element. Ms. Moran was protesting on the Line 3 construction site specifically to express her opposition to the construction of the Line 3 pipeline. Like the protesting on the military base in *Albertini*, Ms. Moran's protest at the pipeline construction site carried a message and her legal sanction under the trespass statute resulted directly from this expressive protest activity. Ms. Moran's protest activity was expressive of her viewpoint on the development of the pipeline project and she was charged under this trespass statute specifically because of that expressive conduct.

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ii. The use of the anti-terrorism law in this context, against protestors, is clearly targeted at opponents of the Line 3 pipeline construction

The second *Arcara* prong is also satisfied in this case because when the anti-terrorism trespass statute is applied in the context of pipeline protestors, it is necessarily targeted at only the opponents of the Line 3 pipeline because they would never have the necessary authority to be on the property, unlike those who may support the construction. This situation is similar to that of the newspapers in *Minneapolis Star*, who would have been the only ones significantly burdened by the paper and ink tax by the very nature of their business. Allowing this trespass statute to be used against anti-pipeline protestors specifically targets only the pipeline opponents and burdens only *their* ability to express their viewpoint regarding the Line 3 pipeline project effectively.

iii. The Government cannot satisfy the O'Brien factors

Because both *Arcara* factors are satisfied, the *O'Brien* factors can then be applied to this case. With regard to the first prong, it is acknowledged that the trespass regulation is within the constitutional power of the Government to protect critical infrastructure from terrorist activity. Furthermore, with regard to the second prong, the statute can be said to further a government interest in anti-terrorism as it is intended to protect critical infrastructure from potential attacks. However, this prong is not satisfied because, as it is applied to Ms. Moran's case, the government's interest in anti-terrorism could not justify its infringement on Ms. Moran's First Amendment rights in this instance—as there is no evidence, aside from her simple presence on the grounds, that she was engaging an any terrorist activity. The government's only interest in applying the anti-terrorism statute to Ms. Moran's case is to suppress her expression of her anti-pipeline viewpoint. This is analogous to the *Eichman* case, where the court found that the government's interest in protecting the integrity of the flag could not justify its encroachment on free speech. In *Eichman*, the court struck down the flag-burning law because the "[government's] asserted interest is related

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to the suppression of free expression and concerned with the content of such expression." *Eichman*, 496 U.S. at 310.

Additionally, the Government cannot satisfy the third or fourth factors of the *O'Brien* test. With regard to the third prong, the application of the anti-terrorism trespass statute in Ms. Moran's case is directly related to the suppression of her free speech. Ms. Moran was charged with trespass on critical infrastructure because of her protest activity at the site of the pipeline and not because law enforcement believed she had genuinely been engaging in terrorist activity. Specifically, the harsher charge of gross misdemeanor that is attached to this statute was used specifically to discourage Ms. Moran and other anti-pipeline protestors from continuing their protest activity—with specific intent to suppress their freedom of speech and their opposition to the pipeline. Lastly, with regard to the fourth prong, it is clear that applying the trespass statute in Ms. Moran's case does not implicate its anti-terrorism purpose at all. The arresting officers did not indicate that they suspected the protestors were related to any terrorist activity and, furthermore, were explicitly aware that protesters were there to oppose the construction of the pipeline. In *Speet v. Schuette*, 889 F. Supp. 2d 969 (W.D. Mich. 2012), *aff'd*, 726 F.3d 867 (6th Cir. 2013), the court held that "the government can and does prohibit fraud, assault, and trespass. But what the government cannot do without violating the First Amendment is categorically prohibit the speech and expressive elements that may sometimes be associated with the harmful conduct; it must protect the speech and expression, and focus narrowly and directly on the conduct it seeks to prohibit." The conduct that this law was intended to prohibit is not implicated in Ms. Moran's case and, therefore, the application of the law here is unconstitutional. Law enforcement effectively attempted to utilize the anti-terrorism statute outside of its legislative intent in order to discourage the protestors' ability to express opposition to the pipeline construction.

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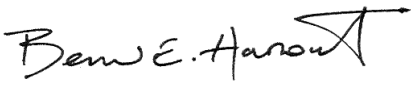
CONCLUSION

Based on applicable First Amendment doctrine and relevant case law, the enforcement of an anti-terrorism measure, Minnesota statute 609.6055, against Jeralyn Moran is unconstitutional under state and federal law. The government's use of the statute in this case was targeted at Ms. Moran's anti-pipeline viewpoint—intended to suppress her expressive activity. The application of the statute in this case did not align with the government's clear intent behind the statute. For these reasons, the criminal complaint against Moran for gross misdemeanor for trespass to critical infrastructure should be dismissed.

Respectfully submitted,



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