

STATE OF MINNESOTA
COUNTY OF HUBBARD

DISTRICT OF MINNESOTA
NINTH JUDICIAL DISTRICT

STATE OF MINNESOTA,
Plaintiff,

CASE FILES NOS. 29-CR-21-914
29-CR-21-916
29-CR-21-931
29-CR-21-913
29-CR-21-830
29-CR-21-801
29-CR-21-798

Vs.

**DEFENDANT'S MOTION TO DISMISS
ON DUE PROCESS GROUNDS BECAUSE
A FOREIGN PRIVATE CORPORATION IS
FINANCING THESE PROSECUTIONS**

JOHN HUDSPETH,
RALPH KING,
JOSHUA MARXEN,
YOSEPH MEIER SCHWAB,
JERALYN LISA MORAN,
JOHN STUART, and
JAMES THOMPSON,
Defendants.

**MOTION TO DISMISS ON DUE PROCESS GROUNDS BECAUSE
A FOREIGN PRIVATE CORPORATION IS FINANCING THESE PROSECUTIONS**

Defendants **JOHN HUDSPETH, RALPH KING, JOSHUA MARXEN, YOSEPH MEIER SCHWAB, JERALYN LISA MORAN, JOHN STUART, and JAMES THOMPSON,** by and through their attorneys, **THOMAS ANTHONY DURKIN, BERNARD E. HARCOURT,** and **TIMOTHY M PHILLIPS** respectfully submit this Motion to Dismiss on Due Process grounds because Enbridge, a Canadian private corporation, is financing this prosecution in violation of the Fourteenth Amendment to the United States Constitution and state law.

FACTS

In November 2020, Aitkin County Sheriff’s Deputy Aaron Cook bought a rifle for \$725. Deputy Cook informed the seller in an email that “Our budget took a hit last week, so that’s all we will be ordering for now, [but] I’m hoping the pipeline will give us an extra boost to next year’s budget which should make it easy for me to propose an upgrade/trade to your rifles rather than a rebuild of our 8 Bushmasters.”¹

By October 5, 2021, the Enbridge corporation, a Canadian oil company rebuilding the pipeline in question, had disbursed to Minnesota sheriffs departments and law enforcement \$2.4 million.² These funds were largely used to carry out a police crackdown on persons who oppose the reconstruction of the Line 3 Pipeline—to police, arrest, book, charge, and prosecute persons opposed to the pipeline. In addition to the establishment of direct financial relations between Enbridge and Minnesota law enforcement since May 2020, Enbridge has consolidated significant political power over local government in Minnesota.

The emerging—and unconstitutional—public-private partnership extends much further than mere informal arrangements and mutual feelings of solidarity. The Public Safety Escrow Account and Public Safety Liaison were created in Sections 5.5, 5.5.1 and 5.5.2 as Construction Conditions of the permit for Enbridge to build Line 3, formally entitled “Pipeline Routing Permit for Construction of a Large Crude Oil Pipeline and Associated Facilities in Kittson, Marshall,

¹ Alleen Brown, *Minnesota Police Expected Pipeline Budget Boost to Fund New Weapons*, The Intercept (July 22, 2021), <https://theintercept.com/2021/07/22/minnesota-pipeline-line-3-police-budget-boost-enbridge>.

² Hillary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protestors*, The Guardian (October 5, 2021), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

Pennington, Red Lake, Polk, Clearwater, Hubbard, Wadena, Cass, Crow Wing, Aitkin, St. Louis, and Carlton Counties Issued to Enbridge Inc.”³ The Public Utilities Commission (‘PUC’) granted this permit on October 26, 2018. The Public Safety Liaison is selected by the PUC’s Executive Secretary and works with the PUC, Enbridge, and the Local Government Units (‘LGUs’) to make sure all public safety and private security provisions of the permit are executed.

The State of Minnesota encouraged the creation of the escrow account in order to have Enbridge fund the cost of law enforcement. They cite the fact that in other parts of the country, local law enforcement has been burdened with costs during pipeline protests and argue that this escrow account will defray that cost.⁴ The Enbridge escrow account was thus created to enable Enbridge to pay Minnesota law enforcement for the costs of a number of pipeline-related enforcement activities. To this end, Local Government Units (‘LGU’) would submit written, itemized requests to the Public Safety Liaison “sufficient to recommend to the Commission’s Executive Secretary whether the services rendered were additional municipal services uniquely provided as a result of construction of the pipeline during the term of this permit in addition to being reasonable and appropriate.”⁵ The covered additional municipal services include services provided by LGUs for “public safety, public health regulation, planning and other services uniquely provided as a direct result of the pipeline construction during the term of this permit for activities in and around the construction site,”⁶ at minimum including:

- Public safety and emergency responder related coordination services;

³ In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, PUC Docket No. PL-9/PPL-15-137.

⁴ Alleen Brown, *Minnesota Police Want a Pipeline Company to Pay for Weapons Claimed as PPE*, The Intercept (February 10, 2021), <https://theintercept.com/2021/02/10/police-minnesota-enbridge-pipeline-ppe>.

⁵ In the Matter of the Application of Enbridge Energy, *supra*, at p. 26.

⁶ *Id.*, at p. 26.

- Public safety related costs for maintaining the peace in and around the construction site;
- Review and oversight of any private security services;
- Public emergency management services;
- Transportation management parking and traffic control services;
- and any other emergency first responder, public safety, public works, and public health regulation services provided as a direct result of the construction of the pipeline occurring in and about the construction site⁷

The result is an entirely impermissible and unusual arrangement. “It’s common for protestors opposing pipeline construction to face private security hired by companies, as they did during demonstrations against the Dakota Access Pipeline” says Hillary Beaumont of the *Guardian*. “But in Minnesota, a financial agreement with a foreign company has given public police forces an incentive to arrest demonstrators.”⁸

This financial incentive impermissibly biases law enforcement against the constitutional rights and interests of protesters by two principal means. In the short term, if law enforcement engages in pipeline-related enforcement activities, they receive Escrow account funds in addition to whatever funds they receive by other government channels which they would receive from other enforcement activities. Actress Jane Fonda reported at a press conference opposing Line 3 that the Escrow account has “provided a big financial incentive to police officers to spend time harassing,

⁷ *Id.*, at p. 26-27.

⁸ Hillary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protestors*, *The Guardian* (October 5, 2021), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

arresting, strip searching and caging people who are only trying to save their lands and waters.”⁹ Giniw Collective Founder Tara Houska reported hearing comments to this effect from officers on being arrested. “The police who were standing around as we’re wearing zip ties are talking about how much fun they had, and that they hoped we came back real soon, and that they’re going to get time and a half,” Houska said. “We’re sitting there, hurt, and unable to open our eyes because we have so much mace in them, and they’re laughing at us.”¹⁰ In addition to these short-term incentives to over-enforce against protestors, the Construction Permit arrangement gives the police long-term interests in ensuring the construction of the pipeline.

Sensing the danger of the conflict of interest, government officials tried to erect some safeguards against the further extension of Enbridge’s power over the police force; however, Enbridge has circumvented—and in many cases outright flouted—these checks, often with the consent and cooperation of state parties.

1. Equipment Expenses Amendment and Personal Protective Equipment

In October 2020, the PUC amended the permit to address “concerns about the type of equipment that might be used to ensure peace and safety in and around the construction and removal sites.”¹¹ The amendment notes that “the Public Safety Escrow account may not be used to reimburse expenses for equipment, except for personal protective gear for public safety personnel.”¹² In theory Enbridge was limited to the provision of personal protective equipment

⁹ Timothy E. Wilson, *Canadian Pipeline Giant Accused of Paying U.S. Police to Harass Activists*, Canada’s National Observer (April 19, 2021), <https://www.nationalobserver.com/2021/04/19/news/enbridge-accused-paying-us-police-harass-activists>

¹⁰ Audrey Carleton, *An Oil Company Paid Police \$2 Million to Defend Its Pipeline From Protests*, Vice (August 9, 2021), <https://www.vice.com/en/article/4avp3w/an-oil-company-paid-police-dollar2-million-to-defend-its-pipeline-from-protests>.

¹¹ Alleen Brown, *Minnesota Police Want a Pipeline Company to Pay for Weapons Claimed as PPE*, The Intercept (February 10, 2021), <https://theintercept.com/2021/02/10/police-minnesota-enbridge-pipeline-ppe>.

¹² *Id.*

(PPE). This amendment threatened both the interests of law enforcement, which could no longer secure funding for non-PPE equipment, and Enbridge, which would no longer be able to provide for law enforcement's equipment needs.

Enbridge has gotten around this barrier in a variety of ways with the cooperation of law enforcement. In Hubbard County, Enbridge donated cutting tools to the police separately from its escrow account. In addition, local law enforcement has pushed the boundaries of this limitation. The escrow account manager has received requests that framed chemical munitions as PPE. The manager rejected the request for reimbursement, leaving the officers without their desired funds but with a new stock of chemical munitions to unleash on the public. An invoice from the Sheriff's office of Beltrami county requested a reimbursement for nearly \$72,000 worth of riot gear and more than \$10,000 worth of "less than lethal" weapons.¹³

Other attempts to expand the scope of PPE have been successful. Alleen Brown of *The Intercept* found that of the more than \$190,000 expenses that the Beltrami County Sheriff's office invoiced to the escrow account, \$130,000 could be considered equipment. Less than \$20,000 of this sum consisted in protective suits and shields. This is unsurprising for two reasons. The commissioners did not define the term "personal protective gear," and the escrow account manager, Richard Hart, a 30-year law enforcement veteran, exercises significant discretion in determining where to allocate reimbursements.¹⁴

Officially, the Escrow Account Manager is an independent party selected by an independent government panel. In a statement, PUC spokesperson Will Seuffert said, "Enbridge

¹³ *Id.*

¹⁴ *Id.*

had no input into the Escrow Account Manager selection.”¹⁵ The panel that made the appointment included two commission staff members and one from the Minnesota Department of Public Safety who worked “without any involvement from Enbridge, or any other parties,” he said. Unofficially, law enforcement has strongly implied that Enbridge had its hand in the selection process.¹⁶

2. Enbridge Influence on Escrow Operation

In June 2020, the Northern Lights Task Force, an inter-county law enforcement coalition designed to respond to protestors, exchanged a series of emails discussing the appointment of a new escrow account manager. In this e-mail chain, Sheriff Brian Smith of Carlton County indicates concern over the appointments process, stating, “I think we need to let the PUC know that the person selected needs to be someone that we also agree upon.” Sheriff Dan Guida of Aitkin County responds with words of reassurance: “I had a discussion with Tony Kirby (Enbridge Chief of Security) this morning, and expressed concern over that position and the escrow account. He indicated that they have some influence on the hiring of that position and that he would be involved to ensure we are taken care of, one way or another.”¹⁷

Enbridge’s involvement in police action goes deeper than its influence on the escrow account however. Records show that Enbridge has used its influence over Minnesota police to enlist them in extensive collaborative efforts designed to stamp out protests. These efforts include initiatives in planning, surveillance, and arrests.

A. Planning

¹⁵ Alleen Brown, *Local Cops Said Pipeline Company Had Influence over Government Appointment*, The Intercept (April 17, 2021), <https://theintercept.com/2021/04/17/enbridge-line-3-minnesota-police-protest>.

¹⁶ *Id.*

¹⁷ *Id.*

The Intercept has uncovered records revealing that Enbridge has provided repeated anti-protest trainings for officers. Enbridge collaborated with the Northern Lights Task Force on several of these trainings, the largest of which was in Bemidji, Minnesota. An email sent out the day before the event included a series of “Incident Briefing Maps” detailing scenarios in which Enbridge and law enforcement would cooperate. All these scenarios involved protests.¹⁸ In another training, “Operation River Crossing” officers practiced responding to a “civil unrest situation” along Line 3.¹⁹

Sheriff Dan Guida denies that there is anything unusual about this relationship, stating, “When there is illegal activity around — it doesn’t matter what movement you’re involved in — we focus energy on it. That’s our job.”²⁰ The “focus” of these trainings, however, was set by Enbridge, a company for whom “what movement you’re involved in” is a matter of decisive importance.

B. Surveillance

Persons who dissent from the pipeline have become the object of law enforcement scrutiny in more ways than one. Private and public law enforcement from a number of states have engaged in a coordinated effort to collect personal information on anti-pipeline activists. Enbridge’s private security and investigation units keep tabs on protestors and report their findings to state fusion centers, state information collection centers originally designed to respond to terror threats.

Recently these fusion centers have received FOIA requests for the information they have gathered on anti-pipeline activists. In an unprecedented move, they blocked the request citing concerns about the information falling into criminal or terrorist hands. Nonetheless law

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

enforcement has repeatedly expressed interest in sharing information on protestors with Enbridge and its affiliates. St. Louis County Emergency Management Coordinator Duane Johnson has even sent email requests that Enbridge Line 3 security attend regular intelligence meetings with law enforcement.²¹

C. Arrests

According to *The Guardian*, as of October 5, 2021, police have arrested over 900 demonstrators opposing Line 3 and its impact on climate and indigenous rights. Enbridge told *The Guardian* that the police make independent decisions as to when protestors are breaking the law. In fact, though, Enbridge has significant decision power over arrests. The non-profit group, Humanizing Story, has posted a letter which local law enforcement circulated to a group of protestors prior to forcibly evacuating them from the premises. The letter was written by Richard Kern of Enbridge corporation. It states that Enbridge no longer will allow this particular group of protestors on Enbridge property. It then urges the police to circulate the letter as notice prior to carrying out arrests under MINN. STAT. §609.605, an anti-trespassing statute and MINN. STAT. §609.6055 a critical infrastructure protection statute. The police, sharing close communication and strong economic ties with Enbridge, obliged Enbridge's requests.²²

In sum, the PUC encouraged the creation of an escrow account out of a concern for pipeline-related law enforcement costs. The result has been an unconstitutional and unusual working relationship between Enbridge and Minnesota law enforcement.

²¹ *Id.*

²² Hillary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protestors*, *The Guardian* (October 5, 2021), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

ARGUMENT

This public-private law enforcement arrangement violates federal Fourteenth Amendment due process and equal protection provisions. Enbridge's practice of providing funding to local police forces on the condition that they engage in pipeline-related activity undermines the executive independence of local law enforcement. It systematically encourages them to engage in arbitrary and discriminatory behavior favoring Enbridge's private interests, in clear violation of Section 1 of the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV, §1. Due Process invalidates state actions that amount to arbitrary and discriminatory enforcement.

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), defendants challenged a City of Chicago ordinance which allowed law enforcement to disperse and arrest suspected gang members congregating in public areas. The Supreme Court of the United States found that the Fourteenth Amendment voided such ordinances as arbitrary and discriminatory. The court explained that a criminal law may be void for either of two independent reasons: it may fail to give citizens reasonable notice of prohibited conduct or it "may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 59 (1999). The Court identified arbitrary and discriminatory enforcement as implicating Fourteenth Amendment concerns.

In this case, defendants challenge the arbitrary and discriminatory application of the law on them by local law enforcement. The close collaboration between Minnesota law enforcement and Enbridge corporation, resulting from Minnesota law enforcement's deeply entrenched economic dependence on Enbridge, has led law enforcement to engage in content-based viewpoint discrimination against individual's who oppose the construction of the Line 3 pipeline. (*See*

Defendant Jeralyn Lisa Moran’s Motion to Dismiss on the Ground of First Amendment Viewpoint Discrimination, Court File No. 29-CR-21-830, incorporated herein by reference). These law enforcement activities jeopardize defendants’ First and Fourteenth Amendment rights.

Prior caselaw reflects clearly these concerns of enforcement discrimination. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), plaintiff was imprisoned under a San Francisco ordinance prohibiting the operation of laundries in wooden buildings. The plaintiff in error petitioned the Supreme Court of the United States on a writ of *habeas corpus*. The Court found that the plaintiff, as a Chinese citizen, was wrongly subjected to selective prosecution. The discriminatory manner in which this law was applied violated petitioner’s rights regardless of whether the ordinance itself was constitutional.

The Fourteenth Amendment protects against arbitrary and discriminatory application of the law by the executive branch of state government. In this case, law enforcement has systematically violated these constitutional protections. On these grounds alone, defendants are legally entitled to a dismissal.

Due Process also enjoins state and federal governments to employ a variety of procedural safeguards to protect citizens’ liberty interests from arbitrary and discriminatory infringement. The first and foremost safeguard is a structural protection: Due Process implies independence of the executive branch from the other branches and from private citizens such that it can carry out enforcement independently of external influence.

To this end, for example, the United States Constitution vests all executive powers in the President. It further requires that “He shall take care that the laws be faithfully executed.” U.S. CONST. art. II, §1. The Minnesota Constitution contains an identical requirement for its Governor. MINN. CONST. art. V, §3. Both constitutions make the executive branch a distinct branch from the

legislature and judiciary and charge a single head of the executive with the execution of laws. An implication of this vesting clause is that officials of the executive branch exercise their executive powers under the independent direction of the executive branch without external interference from either the judiciary or the legislature.

Thus, in *United States v. Cox*, the Fifth Circuit considered whether a grand jury could require a state prosecutor to draft and sign an indictment. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965). The court concluded that the “the Attorney general is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed... It follows, as an incident of the constitutional separation of powers that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” *Cox*, 342 F.2d at 171. The constitutional principle of separation of powers demands that courts protect the executive branch’s free exercise of discretionary powers from outside interference.

Courts have applied the same separation of powers principles implicated in *Cox* when considering matters of arbitrary and discriminatory enforcement. Consistent with a constitutional concern for executive independence, courts have consistently applied a high burden of proof to constitutional challenges to executive enforcement decisions out of a desire to preserve the independence of the executive branch.

In *Armstrong v. United States*, for instance, the defendants were indicted on charges of conspiring to possess and distribute more than 50 grams of cocaine base and federal firearm offenses. *Armstrong v. United States*, 517 U.S. 456 (1996). The defendants filed a motion for discovery or dismissal on equal protection grounds claiming that the prosecutor had discriminated against them on the basis of race. The court denied both motions. The court acknowledged that

arbitrary and discriminatory enforcement implicates constitutional concerns independent of the content of the written laws being enforced. The defense is equally “not a defense on the merits of the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” *Armstrong v. United States*, 517 U.S. 456, 463 (1996). If a party met the requisite burden for proving such enforcement patterns, as in *Yick Wo*, they would be constitutionally entitled to a relief.

Sin v. Wittman presents another dispute over allegedly arbitrary and discriminatory action by law enforcement. *Sin v. Wittman*, 198 U.S. 500 (1905). On a writ of habeas corpus, arrestee, Ah Sin, claimed that law enforcement violated his Fourteenth Amendment rights to Due Process and Equal Protection in their arbitrary and discriminatory enforcement of the law. The court treated the constitutional concern as analogous to that presented in *Yick Wo* and so derived its standards from that case. *Ah Sin v. Wittman* demonstrates that arbitrary and discriminatory law enforcement activity raises the same constitutional issues as arbitrary and discriminatory prosecution. It should be dealt with in an analogous manner.

The operation of a general constitutional principle favoring the active judicial preservation of the independent decision-making power of the executive from the corroding influence of private and public interests alike runs consistently through prior caselaw. Executive officers must be shielded in their decision-making power, not only from the judiciary and legislature, but from private citizens.

In *Imbler v. Pachtman*, the Supreme Court of the United States considered a civil rights action brought against a state prosecuting attorney seeking damages for loss of liberty by allegedly unlawful prosecution. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The court affirmed the District Court’s dismissal of the case on grounds that the public prosecutor enjoyed immunity from civil

suit as the official's actions were within the scope of immunity. The court explained that the doctrine of qualified immunity for public officials stems from the common law. The rationale for this doctrine rests on "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgement required by his public trust." *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). By implication, if the prosecutor failed to exercise independence of judgement, he would violate the public trust. To prevent such a situation, common law courts erected a barrier of qualified immunity between private interests and such public functionaries as public prosecutors and law enforcement. *Imbler* demonstrates that the court's approach to the constitutional principle of executive independence has not merely been one of passive non-interference. The logic underlying the doctrine of qualified immunity for executive agents is one of active preservation of executive independence.

Under *Imbler's* reasoning, this case presents a flagrant violation of the independence of judgement required by the public trust. Enbridge has formed formal financial ties and a close working relationship with state law enforcement. It has also instilled a sense of mutual interest between law enforcement and the corporation. As in *Imbler*, the threatened intervention originates in private parties, but is facilitated by government mechanisms. In this case, the PUC oversaw the creation of the escrow account, a formal economic transaction which cemented Enbridge's control over the police. As in *Imbler*, due process concerns urge the court to actively preserve the independence of the executive. The due process concerns laid out in *Imbler* urge the court to apply a different evidentiary standard than that applied in *Yick Wo*, *Ah Sin*, and *Armstrong*. Where outside parties disfavoring the free exercise of certain individuals' constitutional liberties have

systematically interfered with law enforcement's independent decision-making obligations, law enforcement's application of the law is arbitrary and discriminatory.

To the extent that policy concerns of executive independence can be separated from constitutional concerns, this case does not implicate many of the policy concerns which normally counsel in favor of judicial deference to the executive. Chief among these is difficulties inherent in close judicial oversight of the executive. Courts do not want to intrude on the inner workings of the executive branch, both because such intervention raises political and constitutional issues and because it raises many thorny questions best left to the independent discretion of the executive. The Court in *Ah Sin*, was thus hesitant to "interfere with the course of criminal justice of a State."

Inmates of Attica Correctional Facility v Rockefeller, a Second Circuit case addresses these concerns. This case involves a prosecutorial discretion issue analogous to *Cox* explains that "The primary ground upon which this traditional judicial aversion to compelling prosecutors has been based is the separation of powers doctrine." *Inmates of Attica Correctional Facility v Rockefeller*, 477 F.2d 375, 379 (1973). It cites *United States v. Cox* as exemplary of this traditional approach. However, in addition the court cites a number of problems inherent in judicial compulsion of prosecution, such as when the prosecutor would be entitled to call a halt to further investigation as unproductive, what evidentiary standard would be used to decide whether prosecution would be compelled among other problems.

It is notable that the present case implicates none of these concerns. The judiciary need not take an involved role in the inner workings of the executive. It need only enforce the executive independence so fundamental to American constitutional due process. This is because the activity of the executive in this case is drastically different from those in which constitutional considerations counsel judicial deference.

The prior federal line of caselaw reflects a due process concern over private interference with executive independence. This is because courts are consistently concerned with keeping executive functions out of the hands of external interests.

Minnesota courts as well have identified due process concerns where private individuals attempt to usurp traditional public executive functions. In *Wild v. Otis*, a private citizen filed a complaint against defendants alleging a violation of criminal laws. *Ex Rel. Wild v. Otis*, 257 N.W.2d 361 (1977). The Supreme Court of Minnesota considered the issue of whether private citizens may commence and maintain a criminal prosecution. The court held that they may not. It explained that there was no statutory or other legal basis under which plaintiff could bring the instant actions. The court explained that “This is not surprising because to permit such prosecutions would entail grave danger of vindictive use of the process of the criminal law and could well lead to chaos in the administration of criminal justice.” *Ex Rel. Wild v. Otis*, 257 N.W.2d 361, 365 (1977). The plaintiff could not sue because of a lack of statutory basis for the action, but as the court explained the lack of statutory basis was not merely the result of lack of legislative will. It was a safeguard against grave danger of vindictive use of the process of the criminal law that could well lead to chaos in the administration of criminal justice. In other words, a statute authorizing such an action would implicate constitutional due process concerns because it would give private citizens access to powers which should belong exclusively to the public.

The private actions at issue in this case not only raise the same due process concerns as *Wild*, they are equally lacking in statutory basis as were the private party actions in *Wild*. As we have seen, Enbridge, a private corporation has acquired significant financial influence over public law enforcement. To permit this state of affairs could well lead to chaos in the administration of criminal justice. The practices at issue here are equally lacking as they were in *Wild*.

Finally, the Ninth Circuit decision in *Weyerhaeuser Co. v. Klamath County* is instructive. In *Weyerhaeuser*, the plaintiff, a private corporation, entered into a series of agreements with Klamath County and the Klamath County Sheriff to provide “specialized law enforcement services on Weyerhaeuser’s land.” *Weyerhaeuser Co. v. Klamath County*, OR 151 F.3d 996, 997 (9th Cir. 1998). The court held that neither the sheriff, nor the county had the authority to enter into such an agreement. Klamath County is “a creature of statute” with enumerated powers, the court held. Klamath County had the power to make “necessary contracts” to provide law enforcement services to the public. However, the court would not construe this power as extending to security agreements with private parties. As a result, the court failed to see how entering into “an agreement to provide security services to a private entity which are not available to all residents and visitors, is ‘a necessary contract.’” *Weyerhaeuser Co. v. Klamath County*, OR 151 F.3d 996, 1001 (9th Cir. 1998). The principle of construction which the court employed in *Weyerhaeuser* reflects the same reluctance against allowing private parties to meddle in the affairs of the executive which guided *Wild*.

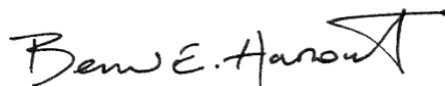
In this case, the Public Safety Escrow Account was established by the PUC as part of the permitting process for the pipeline construction project. This agreement is identical in effect to that which the Ninth Circuit found void in *Weyerhaeuser*. Law enforcement provides special protection to Enbridge, a private corporation, in exchange for money. The PUC is a creature of statute with enumerated powers; one with the power to “order the issuance of franchises, permits or certificates of convenience and necessity,” but without any power to authorize financial transactions between private companies and the police. MINN. STAT. § 216A.05. Enbridge, the PUC, and Minnesota law enforcement have all acted in a manner that does not and cannot have any statutory basis. The result of this systematic interference with the activities of law enforcement

has been an arbitrary and discriminatory application of the law to the detriment of American citizens.

CONCLUSION

This case presents a new threat to the constitutional rights of all American citizens. A foreign private corporation has funded and closely collaborated with local law enforcement with the aim of quelling protestors' free speech rights. Defendants were subject to arbitrary and discriminatory application of the law in violation of their Fourteenth Amendment Rights and are entitled to relief under the United States and Minnesota Constitutions.

Respectfully submitted,



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