



ANTI-PROTESTER LEGISLATION & PREEMPTION: AN OVERVIEW¹

Since 2016, there has been a growing body of anti-protest state legislation, with at least 24 bills enacted in 15 states.² This onslaught emerged in many states following Keystone XL pipeline protests and the distribution of an [ALEC model bill](#) targeting anti-pipeline protesters.³ But bills targeting protestors more broadly have also emerged as states see increased protest activity on a wide range of issues, such as the protests following President Trump’s Muslim ban and the protests spurred by the killing of Philando Castile in Minnesota by police.⁴

In the wake of recent demonstrations against racist police and vigilante violence against Black communities, particularly following the killings of George Floyd in Minnesota and Breonna Taylor in Kentucky in the spring of 2020, we are already seeing increased legislative attacks on protesters. As you plan for 2021 state legislative sessions, please be aware of the following anti-protest policy trends that may impact local authority and communities’ ability to exercise local democracy.

Expanding ‘Riot’ and Trespass Related Offenses

A number of recent state bills heighten criminal and civil liability for offenses related to riots or trespass in order to target protesters. In some states, broad definitions of riot offenses allow for protests to become easily classified as riots. This is likely to be a growing trend in 2021 legislative sessions.

In September 2020, Governor DeSantis of Florida announced a new bill to be debated in the 2021 legislative session that would increase penalties for protesters and waive sovereign immunity for local governments so that “a victim of a crime related to a violent or disorderly assembly” can sue a local government for damages if the government is “grossly negligent in protecting persons and property.”⁵

¹ The information provided in this document does not, and is not intended to, constitute legal advice. Individuals and organizations should contact an attorney licensed to practice in their state to obtain advice with respect to a particular legal matter.

² International Center for Not-For-Profit Law, *US Protest Law Tracker* (June 8, 2020).

³ Alleen Brown, *Pipeline Opponents Strike Back Against Anti-Protest Laws*, The Intercept, May 23, 2019, <https://theintercept.com/2019/05/23/pipeline-protest-laws-louisiana-south-dakota/>.

⁴ Lee Rowland and Vera Eidelman, “Where Protests Flourish, Anti-Protest Bills Follow,” ACLU, Feb. 17, 2017, <https://www.aclu.org/blog/free-speech/rights-protesters/where-protests-flourish-anti-protest-bills-follow?redirect=blog/speak-freely/where-protests-flourish-anti-protest-bills-follow>.

⁵ Kirby Wilson, *Ron DeSantis: Any Municipality That ‘Defunds’ Police Will Lose State Funding*, Tampa Bay Times, Sept. 21, 2020, <https://www.tampabay.com/news/florida-politics/2020/09/21/ron-desantis-any-municipality-that-defunds-police-will-lose-state-funding/> (linking to bill description). The bill number is pending.

In 2018, West Virginia, for example, enacted a bill ([HB 4618](#)) expanding and reaffirming an existing law against rioting. The law impacts local authority and discretion when it comes to protests. It requires that all members of West Virginia State Police, the Division of Protective Services, all sheriffs within their respective counties, and all mayors within their respective jurisdiction to suppress riots and unlawful assemblies. The law expressly permits state law enforcement and local governments to use extreme measures, such as curfews and warrantless searches, in order to disperse a riot or unlawful assembly. Additionally, if any member of the West Virginia State Police, the Division of Protective Services, sheriff, or mayor has a riot or unlawful assemblage in their jurisdiction and fails to exercise his or her authority for suppressing it and arresting the offenders, they are subject to a fine. The law eliminates officer and mayoral liability for death or injury that occurs while dispersing a riot—this may create issues of preemption for localities wishing to increase officer liability for protest-related deaths.

Similar Bills Pending and Enacted

- Pending: NJ ([AB 3760](#)); NY ([AB 10603](#))
- Enacted: ND ([HB 1426](#), 2017); ND ([HB 1293](#), 2017); OK ([HB 2128](#), 2017); SD ([HB 1117](#), 2020); SD ([HB 1199](#), 2020); WV ([HB 4618](#), 2018); TN ([SB 8005](#)/HB 8005)⁶

Offenses for Blocking Traffic

These laws create offenses and/or increase penalties for protesters who block traffic. Some bills apply only to highways while others would apply more broadly to most public roads. These bills make certain conduct unlawful, as state laws may generally do, but, indirectly, they limit the type of conduct that can take place on local streets. So, while these bills do not appear to include a “preemption” component per se, they do interfere with the way in which localities may wish to allow for public protests on their city streets, particularly where localities have historically allowed protests along public streets leading to the obstruction of traffic. This is an area likely to see increased activity during 2021 sessions since recent protests routinely block traffic, either intentionally or inadvertently due to the massive scale of the demonstrations.

Similar Bills Pending and Enacted

- Pending: IA ([SF 286](#)); MA ([HB 1428](#); [HB 3284](#))
- Enacted: SD ([SB 176](#), 2017); TN ([SB 0902](#), 2017)

⁶ This bill originally also authorized the attorney general to investigate and prosecute violations of state criminal law when the district attorney general indicates “an intent not to investigate or prosecute” and various other conditions are met (e.g., the victim is a state employee acting in their official capacity at the time of the violation; state property was damaged or destroyed). This portion of the bill was removed by amendment prior to final passage. See Tennessee General Assembly, SB 8005 Bill Summary, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB8005>.

Targeting Masked Protesters

Pre COVID-19, a number of states introduced measures that target masked protesters. These bills arose in opposition to Antifa protesters who conceal their faces.⁷ Bills vary—some make it illegal to wear a mask to a protest, others increase penalties for individuals wearing masks during the commission of an offense. Some of these measures could present issues of preemption in local jurisdictions that now require masks in public. The bills do not generally appear to leave room for masks worn for public health reasons.

A bill still pending in Massachusetts, for example, compels authorities (explicitly including “the mayor and each of the aldermen of such city, each of the selectmen of such town, every justice of the peace living in any such city or town, any member of the city, town, or state police and the sheriff of the county and his deputies”) to disperse any assembly of 5 or more masked individuals.

Similar Bills Pending and Enacted

- Pending: MA ([HB 1588](#)); OH ([HB 362](#))
- Enacted: AZ ([HB 2007](#), 2018 - bill amended to have minimal impact); ND ([HB 1304](#), 2017)

Authorizing State Attorney General to Investigate/Prosecute When Local District Attorney Chooses Not to Pursue

State legislatures are introducing bills that would allow the state’s attorney general to override a district attorney’s decision not to prosecute in certain cases. For example, in Missouri, HB 2 would have allowed the state’s attorney general to prosecute homicide cases in the City of St. Louis. The bill was passed by the Senate but not the House.⁸ A pending Pennsylvania bill, [SB 1321](#), would give the state’s attorney general authority to prosecute a case involving the “desecration of a public monument” if the district attorney elects not to prosecute.

- Pending: TN ([HB 8004](#)); PA (SB [1321](#))

While these bills may not appear to directly target protesters, they have the potential to be applied in situations when a district attorney may choose not to prosecute protesters.

⁷ Luke Barnes, *Anti-Antifa bill would punish masked protesters with up to 15 years in prison*, Think Progress, July 11, 2018, <https://archive.thinkprogress.org/anti-antifa-bill-8127044240ad/>.

⁸ HB 2 in Missouri was passed by the Senate but failed to pass the House. See Christian Gooden, *Lawmakers Give Parson Win on Vetoes, Loss on Legislation Targeting Gardner*, St. Louis Post-Dispatch, Sep. 17, 2020, https://www.stltoday.com/news/local/govt-and-politics/lawmakers-give-parson-win-on-vetoes-loss-on-legislation-targeting-gardner/article_d24c0aaf-304d-5445-967a-81394ae4514f.html?utm_source=St.%20Louis%20Post-Dispatch&utm_medium=referral&utm_campaign=Breaking%20News; HB 2 (100th Gen. Assembly, 1st Extraordinary Session).

Prohibiting Local Governments from Prohibiting or Preventing Law Enforcement or Fire and Rescue Services from Accessing Areas During Public Demonstrations

At least one state (TN) has enacted legislation that prohibits local governments from preventing law enforcement or fire and rescue services from accessing areas during a public demonstration unless “replaced by like services.” That law makes local governments liable for “damages, injury, or death proximately caused by the governmental entity intentionally prohibiting or preventing law enforcement or fire and rescue services” from accessing an area during a demonstration. This type of legislation ultimately deprives local governments of using their discretion to determine what kind of law enforcement or other services are appropriate for different types of public actions.

- Enacted: TN ([SB 8001/HB 8006](#))