

No. 21-2548

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESSICA RAE REZNICEK,
Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Iowa, Central Division
Hon. Rebecca Goodgame Ebinger, United States District Judge
DC No. 4:19-CR-00172-001

**BRIEF OF *AMICI CURIAE*
WATER PROTECTOR LEGAL COLLECTIVE AND
NATIONAL LAWYERS GUILD
IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL**

NATIONAL LAWYERS GUILD
Andrew B. Reid, Esq.
Reid.Law, LLC
1075 Waite Drive
Boulder, CO 80303
(303) 437-0280
andrew@reid.law

*Counsel for Amici Curiae
National Lawyers Guild*

WATER PROTECTOR LEGAL COLLECTIVE
Natali Segovia, Esq.
P.O. Box 37065
Albuquerque, NM 87176
(701) 566-9108
defense@waterprotectorlegal.org

*Counsel for Amici Curiae
Water Protector Legal Collective*

DISCLOSURE STATEMENT

Pursuant to [Federal Rule of Appellate Procedure 26.1](#), *amici curiae* certify:

(1) *Amici* Water Protector Legal Collective and National Lawyers Guild are each not-for-profit organizations.

(2) The above organizations are not publicly held companies; as such, they have no parent corporations, issue no stock, and have no financial interest in the outcome of this litigation.

TABLE OF CONTENTS

DISCLOSURE STATEMENT.....i

TABLE OF AUTHORITIES..... iii

INTEREST OF *AMICI CURIAE*1

INTRODUCTION3

ARGUMENT4

 I. The Terrorism Sentencing Enhancement Applied in This Case Sets a Dangerous Precedent That Could Have a Disproportionate Impact on Indigenous Peoples and Frontline Communities Most Affected By Extractive Industry. 4

 II. Corporate-Construed Language of "Eco-Terrorism" Contributes to the Criminalization of Water Protectors and Frontline Human Rights Defenders. 6

 A. Towards An Appropriate Use of Terminology: Who is the Terrorist?7

 B. 1990s-Present: Industry-Coined Language of “Eco-Terrorism”9

 C. Weaponization of the Law: Corporate-funded Prosecution, Surveillance, Infiltration, and Criminalization of Water Protectors14

 III. The Illegal Operation of the Dakota Access Pipeline—Which Has Caused Actual Harm to People, Water, and the Earth—Should Be Considered a Mitigating Factor in the Court's Sentencing Decision 20

 A. The Dakota Access Pipeline and Climate Terror21

IV. Application of a Terrorism Sentencing Enhancement with the Aim of Specific Deterrence Fails in the Midst of a Climate Crisis Where Pipelines and Extractive Industry Pose Greater Threat to Human Life Than Property Damage Caused by Ms. Reznicek's Actions. 26

 A. Necessity to Act in Self-Defense Against the Terror of Climate Crisis27

CONCLUSION31

CERTIFICATE OF COMPLIANCE32

CERTIFICATE OF SERVICE.....33

TABLE OF AUTHORITIES

Cases

<i>California v. Bernhardt</i> , 472 F.Supp.3d 573 (N.D.Cal. 2020)	25
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 255 F.Supp.3d 101 (D.D.C. 2017)	22
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 440 F.Supp.3d 1 (D.D.C. 2020)	22
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 471 F.Supp.3d 71, 87-88 (D.D.C. 2020)	22
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , ___ F.Supp.3d ___, 2021 WL 2036662 (D.D.C. 2021)	22
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 985 F.3d 1032 (D.C. Cir. 2021)	22
<i>United States v. Gifford</i> , 2007 WL 2601424 (E.D. Cal. 2007)	28
<i>United States v. Kpomassie</i> , 323 F.Supp.2d 894 (W.D. Tenn. 2004)	28
<i>United States v. Leahy</i> , 169 F.3d 433 (7th Cir. 1999)	8
<i>United States v. Tankersley</i> , 537 F.3d 1100 (9th Cir. 2008)	8
<i>United States v. Wright</i> , 747 F.3d 399 (6th Cir. 2014)	8
<i>Utah Phys. for a Healthy Env't v. U.S. Bureau of Land Management</i> , ___ F.Supp.3d ___, 2021 WL 1140247 (D.Utah 2021)	25

WildEarth Guardians v. Bernhardt,
502 F.Supp.3d 237 (D.D.C. 2020) 25

WildEarth Guardians v. Zinke,
368 F.Supp.3d 41 (D.D.C. 2019) 25

Statutes and Rules

18 U.S.C. § 1864(a)(2) 11

18 U.S.C. § 2331(5) 7

18 U.S.C. § 2332b(g)(5) 7

Fed. R. App. P. Rule 29(a) 1

Fed. R. App. P. Rule 29(a)(4)(E)..... 1

Other Authorities

Acts of Ecoterrorism by Radical Environmental Organizations, Hearing Before the Subcomm. On Crime of the H. Comm. On the Judiciary, 105th Cong. 62 (June 9, 1998). 11, 18

Eco-Terrorism and Lawlessness on the National Forests, Hearing Before the Subcomm. On Forests and Forest Health of the H. Comm. On Resources, 107th Cong. 83 (February 12, 2002). 12

Eco-Terrorism Specifically Examining the Earth Liberation Front and Animal Liberation Front, Hearing Before the S. Comm. On Environmental and Public Works, 109th Cong. (May 18, 2005). 13

Eco-Terrorism, Hearing Before the S. Comm. On Environmental and Public Works, 109th Cong. (October 26, 2005). 30

“Intelligence Activities and the Rights of Americans,” Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (“Church Committee”), Book II. 18

U.S.S.G. § 3A1.4 7-8

UN General Assembly, *The human right to water and sanitation*, 3 August 2010, A/RES/64/292 24

UN General Assembly, December 9, 1994, A/RES/49/60 8

UN Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment*, 5 October 2021, A/HRC/48/L.23/Rev.1 28

United Nations Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Doc. A/HRC/42/42 (July 9, 2019) 17

Publications

Allan M. Jalon, A Break-In to End All Break-Ins, L.A. Times, Mar. 8, 2006 18

Alleen Brown, “Oil Company Official Overseeing Crackdown on Pipeline Resistance Cut Teeth at Amazon and Exxon,” *The Intercept*, Sept. 17, 2021. 16

Alleen Brown, “In the Mercenaries’ Own Words: Documents Detail TigerSwan Infiltration of Standing Rock,” *The Intercept*, Nov. 15, 2020. 17

Angus Stevenson, ed., OXFORD ENGLISH DICTIONARY, “terrorism” (2010) 8

Bill Berkowitz, *Terrorist Tree Huggers: Ron Arnold, Father of the ‘Wise Use’ Movement, Sets His Sights on ‘Eco-Terrorists,’* Working Assets, July 7, 2004. 9

Danielle Quichocho and Burton St. John, III, *The Standing Rock Protests against the Dakota Access Pipeline*, in COMMUNICATING CLIMATE CHANGE (2021)..... 26

Eugene R. Milhizer, <i>Justification and Excuse</i> , 78 St. John’s L. Rev. 725 (Summer 2004).....	28
Hijun Song, et al., <i>Thresholds of temperature change for mass extinctions</i> , 12 Nature Communications, Article number 4694 (August 4, 2021)	25
Hiroko Tabuchi, Brad Plumer, <i>Is This the End of New Pipelines?</i> New York Times (July 8, 2020).....	26
Hugo Tremblay, <i>Eco-terrorists Facing Armageddon: The Defense of Necessity and Legal Normativity in the Context of Environmental Crisis</i> , 58 McGill L. J. 321 (December 2012)	29
Indigenous Environmental Network and Oil Change International, <i>Indigenous Resistance Against Carbon 2021 Report</i> , pg. 2.	4, 16
IPCC, 2021, <i>Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change</i>	25
John Knox, <i>Policy Brief: Environmental Human Rights Defenders – A Global Crisis</i> (Versoix, Switzerland, Universal Rights Group, 2017	14
John Lemons and Donald A. Brown, <i>Global climate change and non-violent civil disobedience</i> , 11 Ethics Sci. Environ. Polit. 3 (2011).	28
Jonathan Fine, <i>Political and Philological Origins of the Term “Terrorism” from the Ancient Near East to Our Times</i> , 46(2) MIDDLE EAST STUDIES 271-288 (2010)	8
Joseph Rausch, <i>The Necessity Defense and Climate Change</i> , Columbia Journal of Environmental Law, Vol. 44:2 (2019), pg. 553-602.	27
Julian Burger, Directorate-General for External Policies of the Union, <i>Indigenous Peoples, Extractive Industries and Human Rights</i> , at 8-14, EXPO/B/DROI/2013/23 (Sept. 18, 2014).	5

Matthew Bennett O’Brien, <i>Practical necessity: a study in ethics, law, and human action</i> , U. of Tex. (May, 2011).....	28
Michael Rubinkam, <i>Pipeline developer charged over systematic contamination</i> , AP (October 5, 2021)	24
OECD, <i>Definition of terrorism by country in OECD countries</i> (2016).....	9
Onder Bakircioglu, <i>The Right to Self-Defense in National and International Law</i> , 19 Ind. Int’l & Comp. L. Rev. 1 (2009).....	28
Pennsylvania Attorney General, <i>Mariner East Presentment</i> (October 15, 2021).....	24
Peter Knauer, <i>The Hermeneutic Function of the Principle of Double Effect</i> , Notre Dame Law School Natural Law Forum 132 (January 1, 1967)	28
Phil McKenna, <i>Standing Rock Asks Court to Shut Down Dakota Access Pipeline as Company Plans to Double Capacity</i> , Inside Climate News (August 20, 2019).....	23
PHMSA, <i>Pipeline Incident 20 Year Trends</i> (February 17, 2021)	23
Rebecca K. Smith, “Ecoterrorism”?: A Critical Analysis of the Vilification of Radical Environmental Activists As Terrorists,” <i>Environmental Law</i> , 38.2 (2008), 537-77.	10-11, 13-14, 18, 27, 30
Ron Arnold, Center for the Defense of Free Enterprise, <i>Subverting Development: America’s Industrial Strength At Risk 2</i> (2006).	10
Sharon, <i>For 15 Years, Energy Transfer Partners Pipelines Leaked an Average of Once Every 11 Days</i> , DeSmog (April 17, 2018).....	24
“SLAPPED But Not Silenced,” Business and Human Right Resource Centre, June 2021 Report	19
Timothy Egan, <i>Fund-Raisers Tap Anti-Environmentalism</i> , N.Y. Times, Dec. 19, 1991, at A18.	9

The Double Life of International Law: Indigenous Peoples and Extractive Industries, 129 *Harvard Law Review* 1755 (2016). 5

US Army Corps of Engineers, *Project Background* 21

US News, *More Oil Shipped as Dakota Access Pipeline Expansion Starts* (August 6, 2021)..... 23

William Petroski, *Iowa’s Pipeline Safety Record Spotty*, Des Moines Register (Mar. 5, 2017) 23

Will Potter, *What Is the Green Scare?* GreenIsTheNewRed.com, Sept. 1, 2008 14-15

World Meteorological Association, *State of Global Climate 2021, WMO Provisional report* (October 31, 2021)..... 25

INTEREST OF AMICI CURIAE

Amici curiae are two legal human rights organizations with particular expertise and relevant experience regarding the case at issue and who also have an interest in fair sentencing in domestic jurisprudence.

Amici submit this brief to ensure a proper understanding of the context and legal issues relevant to this case. Specifically, *Amici* address the dangerous precedent set by the District Court's application of the terrorism sentencing enhancement which will have a disproportionate impact on Indigenous peoples and frontline activists.

Amici request leave to file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. *Amici* have obtained consent from counsel for all parties to file this brief.¹

The Water Protector Legal Collective (“WPLC”) is an Indigenous-led legal non-profit organization that began in 2016 as the on-the-ground legal team at Oceti Sakowin camp at Standing Rock in defense of Water Protectors in frontline resistance to the Dakota Access Pipeline. The Water Protector Legal Collective

¹ *Amici* hereby certify that no party or person other than counsel for *amici* Water Protector Legal Collective and the National Lawyers Guild authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief. [Fed. R. App. P. 29\(a\)\(4\)\(E\)](#).

provides legal support and advocacy for Indigenous Peoples and Original Nations, the Earth, and climate justice movements.

The National Lawyers Guild (“NLG”), founded in 1937, is a progressive public interest association of lawyers, law students, paralegals, and others dedicated to promoting human rights and the rights of ecosystems over property rights. The National Lawyers Guild has been involved in key social justice struggles throughout its history and works to advance social justice against entrenched inequalities throughout the globe.

INTRODUCTION

The purpose of this brief is to bring to the Court's attention the context and legal issues relevant to this case that were not considered by the District Court but are necessary for fair sentencing of Defendant-Appellant. The District Court's application of a terrorism sentencing enhancement to Ms. Reznicek's charges will set a dangerous precedent and disproportionately impact Indigenous Peoples and frontline activists, as well as encourage an alarming trend of criminalization of those engaging in nonviolent direct action or civil disobedience. Ms. Reznicek's case fits within that trend of criminal cases brought to protect corporate interests.

In assessing whether the District Court erred in its application of a terrorism sentencing enhancement to conduct stated by Ms. Reznicek to be specifically aimed at stopping the Dakota Access Pipeline—*not* aimed at influencing or affecting government conduct nor in retaliation to government conduct—the Court should consider the great, actual harm posed by the illegal operation of the Dakota Access Pipeline itself. Last, this Court should also consider that application of a terrorism sentencing enhancement with the aim of specific deterrence will not achieve that objective in the midst of a Climate Crisis where extractive industry poses an objectively greater threat to life than the damage to corporate property caused by Ms. Reznicek's actions.

ARGUMENT

The Court should reverse and remand Ms. Reznicek's case for sentencing.

I. The Terrorism Sentencing Enhancement Applied in This Case Sets a Dangerous Precedent That Could Have a Disproportionate Impact on Indigenous Peoples and Frontline Communities Most Affected By Extractive Industry.

For many Indigenous Peoples and communities most affected by extractive industry and mass development projects in the United States and around the world, resistance is a matter of survival extending to future generations. Accordingly, advocacy “to prevent the extraction, production, processing, and release of carbon” informed by an Indigenous worldview of rights and responsibilities, “is based not solely on the notion of inherent rights, but on responsibility and obligations of Indigenous Peoples [to] the land itself.”²

The terrorism sentencing enhancement applied in Ms. Reznicek's case for avowedly nonviolent climate action attempting to slow fossil fuel extraction through property damage to the Dakota Access Pipeline, resulted in an upward departure from the sentencing guidelines from 37-46 months to 210-240 months, and an ultimate sentence of 96 months in federal prison. *See* 21-2548 *United States v. Reznicek*, Brief of Defendant-Appellant at 29-30, 32.

² Indigenous Environmental Network and Oil Change International, *Indigenous Resistance Against Carbon 2021 Report*, pg. 2.

A large portion of the world’s remaining natural resources—including minerals, water, and potential energy sources—are located on Indigenous lands, “which means natural resource extraction increasingly occurs in or near traditional [I]ndigenous areas.”³ Extractive industries are thus “associated with a vast number of rights abuses perpetrated against [I]ndigenous peoples,” including “violations of the right to life (for example, via direct violence resulting in death or environmental degradation), land and resource-development rights (via forced displacement), cultural rights (via deprivation of land rights, which often undermines traditional belief systems and coherence of community, rights to free expression (via violent repression), and key procedural rights recognized in the [UN Declaration on the Rights of Indigenous Peoples], in particular the right to prior consultation and free prior and informed consent to development activities on indigenous land.”⁴

Because extractive industry and the climate crisis have a disproportionate effect on Indigenous Peoples and lands, the sentence applied in Ms. Reznicek’s

³ *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 *Harvard Law Review* 1755 (2016), <https://harvardlawreview.org/2016/04/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/>.

⁴ *Id.*; see also Julian Burger, Directorate-General for External Policies of the Union, *Indigenous Peoples, Extractive Industries and Human Rights*, at 8-14, EXPO/B/DROI/2013/23 (Sept. 18, 2014).

case could have a disproportionate impact on Indigenous frontline defenders struggling to protect the water, Earth, and cultural survival of their communities, traditional lands, and sacred sites. The District Court’s imposition of the heavy sentence in Ms. Reznicek’s case is intended to deter others from engaging in acts of civil disobedience to curb the impact of pipelines on the Earth. Sentencing Tr. 62:6-9. This will inevitably have a chilling effect on protected political participation and protest.

II. Corporate-Construed Language of “Eco-Terrorism” Contributes to The Criminalization of Water Protectors and Frontline Human Rights Defenders.

In Ms. Reznicek’s case, the Government argued in its Sentencing Memorandum that “subsequent to [her] attempts to sabotage” the Dakota Access Pipeline, Ms. Reznicek sought to “inspire and encourage other would be terrorists” by embarking on a speaking tour. U.S. Sentencing Memorandum at 11. While some forms of direct action are unlawful and civil disobedience disobeys laws by definition, direct action and civil disobedience do not in themselves, amount to “terrorism,” which is a legal term of art. Ms. Reznicek’s conduct broke the law—she admits as much and the lawfulness of her actions is not at issue—but her conduct was never intended to affect or retaliate against government conduct. Rather, it focused exclusively on property damage to corporate infrastructure belonging to Energy Transfer, the company behind Dakota Access Pipeline. The

Government's use of language in Ms. Reznicek's case was either deliberately misused to construe acts of environmental civil disobedience as equivalent to terrorism or fails to understand the necessary elements of a federal crime of terrorism under [18 U.S.C. § 2332b\(g\)\(5\)](#). The use and misuse of language by government and corporate actors is addressed here.

A. Towards An Appropriate Use of Terminology: Who is the Terrorist?

In applying US Sentencing Guidelines Section 3A1.4 "terrorism" enhancement to Ms. Reznicek's sentence, the District Court ruled that her single crime of "conspiracy to damage an energy facility" by engaging in direct action, attempting to interfere with the flow of dirty, tar sands oil through the Dakota Access Pipeline by causing physical damage to equipment used in the construction of the Pipeline, fell within the definition of a "federal crime of terrorism" under [18 U.S.C. § 2332b\(g\)\(5\)](#). Section 2332b(g)(5) requires the crime to be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The definition of "domestic terrorism" under [18 U.S.C. § 2331\(5\)](#) requires that the crime appear to be intended "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping...."

The term “terrorism” carries a historical context from the Latin, *terror*, meaning “great fear.”⁵ It was first used after the 1789 French Revolution during the state’s “Reign of Terror.”⁶ The UN General Assembly has described “terrorism” as “[c]riminal acts intended or calculated to provoke *a state of terror in the general public...*”⁷ Thus, the focus of the conduct of terrorism is the creation of a “state of terror”, “a great fear”, “in the general public.” Or, as expressed in the U.S. domestic terrorism statute, “to intimidate or coerce a civilian population” or “a government” by causing “a state of great fear.” Conduct within the definition, and § 3A1.4 is not directed at an inanimate object, or a corporation, but at the general public or government. For example, in *United States v. Wright*, [747 F.3d 399, 408](#) (6th Cir. 2014), the Court opined:

[T]he terrorism enhancement has been held inapplicable to a defendant who aimed to victimize only private persons, even though his actions might have indirectly affected government operations. *See United States v. Leahy*, [169 F.3d 433, 445-48](#) (7th Cir. 1999).

Accord., *United States v. Tankersley*, [537 F.3d 1100, 1102-03, 1114](#) [16](#) (9th Cir. 2008).

There has been a shifting definition of terrorism in state politics over the past

⁵ Jonathan Fine, *Political and Philological Origins of the Term “Terrorism” from the Ancient Near East to Our Times*, 46(2) MIDDLE EAST STUDIES 271-288 (2010).

⁶ Angus Stevenson, ed., OXFORD ENGLISH DICTIONARY, “terrorism” (2010).

⁷ UN GA Res. 49/60 (Dec. 9, 1994), <https://undocs.org/en/A/RES/49/60>.

several decades.⁸ In 2001, after the attacks of 9/11, Congress passed the USA Patriot Act and the Homeland Security Act, which respectively, defined domestic terrorism as “acts dangerous to human life” and actions “dangerous to human life or potentially destructive of critical infrastructure or key resources.” In 2002, the FBI defined terrorism more broadly as “the unlawful use, or threatened use, of violence...committed against persons or property to intimidate or coerce a government [or] the civilian population [in] furtherance of political or social objectives.” Despite changes in politics, the legal definition of a federal crime of terrorism requires a clear, specific intent to affect government conduct by intimidation or to retaliate against government conduct. Such specific intent is notably absent from Ms. Reznicek’s actions.

B. 1980s-Present: Industry Coined Language of “Eco-Terrorism”

We want to destroy environmentalists by taking their money and their members . . . No one was aware that environmentalism was a problem until we came along.⁹ Facts don’t matter, in politics, perception is reality.

Ron Arnold, Father of the Wise Use Movement and Creator of the Term “Eco-terrorism”¹⁰

⁸ See e.g., OECD, *Definition of terrorism by country in OECD countries*, <https://www.oecd.org/daf/fin/insurance/TerrorismDefinition-Table.pdf>.

⁹ Timothy Egan, *Fund-Raisers Tap Anti-Environmentalism*, N.Y. Times, Dec. 19, 1991, at A18.

¹⁰ Bill Berkowitz, *Terrorist Tree Huggers: Ron Arnold, Father of the ‘Wise Use’ Movement, Sets His Sights on ‘Eco-Terrorists,’* Working Assets, July 7, 2004, <http://www.commondreams.org/views04/0707-12.htm>.

Industry-coined terminology referring to “eco-terrorism” has been prevalent since at least the 1980s. Propagated by property rights interest groups, the term “eco-terrorist” has been deployed to silence environmental activists, Water Protectors, Earth Defenders, and frontline human rights defenders in the United States and around the world.¹¹

Ron Arnold, Executive Vice President of the Center for the Defense of Free Enterprise (CDFE), coined the term “eco-terrorist” in a 1983 article.¹² The CDFE has “advocated for opening seventy million acres of federal wilderness to commercial development, allowing mining in national parks, increasing logging and oil production in Alaska, logging of old growth forests.”¹³ The group has referred negatively to environmental legislation, calling the National Environmental Policy Act (NEPA) a “procedural, bureaucratic, punitive, dangerous obstruction to the social and economic requirements of present generations of Americans.”¹⁴

¹¹ See Rebecca K. Smith, “Ecoterrorism”?: A Critical Analysis of the Vilification of Radical Environmental Activists As Terrorists,” *Environmental Law*, 38.2 (2008), 537-77.

¹² *Id.* at 545.

¹³ *Id.*

¹⁴ Ron Arnold, Center for the Defense of Free Enterprise, *Subverting Development: America’s Industrial Strength At Risk* 2 (2006), <http://www.cdfef.org/Subverting%20Development.pdf>

In 1988, during a congressional hearing addressing the Anti-Drug Abuse Act, Senator James McClure, unprompted and with virtually no corroborating evidence, analogized Earth First! activists with “eco-terrorists” who were “just as dangerous and deadly as the drug producers.” (Cong. Rec. 30811). Senator McClure asserted that Earth First! activists were part of a “‘terrorist encampment,’ training each other to monkeywrench (i.e. place spikes in trees, disable machinery, and other acts of vandalism against property).”¹⁵ Following the hearing, Congress enacted [18 U.S.C. § 1864\(a\)\(2\)](#), criminalizing use of hazardous or injurious devices on federal land with the intent to obstruct harvesting of timber.¹⁶

A decade later, on June 9, 1998, the House Judiciary Committee’s Subcommittee on Crime held a hearing addressing “Eco-terrorism by Radical Environmental Organizations.” During the hearing, Ron Arnold defined eco-terrorism for the Committee as “a crime committed to save nature” including every crime from trespass to murder.¹⁷

On February 12, 2002, the House Resources Committee held a hearing on “Eco-Terrorism and Lawlessness on the National Forests.” James F. Jarboe, Domestic Terrorism Section Chief of the FBI Counterterrorism Division, testified

¹⁵ *Smith, supra* note 11, at 547.

¹⁶ [18 U.S.C. § 1864\(a\)\(2\)](#) (2000).

¹⁷ Acts of Ecoterrorism by Radical Environmental Organizations, Hearing Before the Subcomm. On Crime of the H. Comm. On the Judiciary, 105th Cong. 62 (June 9, 1998).

on the rise of “extremist groups” by “disaffected environmentalists” since 1977. While Mr. Jarboe acknowledged that most environmental and animal rights activists engaged in activities “protected by constitutional guarantees of free speech and assembly” and discouraged “acts that harm any animal, human, and nonhuman,” the “volatile talk” sometimes transgressed “into unlawful action” resulting in property damage.¹⁸ The FBI further defined “eco-terrorism” as “the use or threatened use of violence... against innocent victims or property by an environmentally-oriented, subnational group for environmental-political reasons.”¹⁹

During the same hearing, Craig Rosebraugh, Former Press Officer of Earth Liberation Front (ELF), addressed the impact of branding environmental activism as “eco-terrorism”:

By attaching a label such as ‘terrorism’ to the activities of [environmental groups to protect the Earth], the public is left with little choice but to give into their preconceived notions [about the legitimacy of the tactics that are] negatively associated with that term.... Terrorism usually is connected with violence, with politically motivated physical harm to humans.”²⁰

¹⁸ Eco-Terrorism and Lawlessness on the National Forests, Hearing Before the Subcomm. On Forests and Forest Health of the H. Comm. On Resources, 107th Cong. 83 (February 12, 2002).

¹⁹ *Id.*

²⁰ *Id.*

On May 18, 2005, a subsequent Senate hearing was held on “Eco-terrorism Specifically Examining the Earth Liberation Front and the Animal Liberation Front.”²¹ After testimony focused on the “threats” of “eco-terrorist groups,” Senator Frank Lautenberg asked the Committee to “keep things in perspective,” remembering the Oklahoma City bombing and September 11 attack, stating: “[a]ll of these cases involved the loss of human life. To date, not a single incident of so-called environmental terrorism has killed anyone.”²² Then-Senator Barack Obama urged the Committee to focus on the larger environmental threats, such as the high levels of lead found in the blood of thousands of children.²³ Notably, Congressman Bennie Thompson, the ranking member of the House of Representatives Homeland Security Committee, was denied the right to testify. Congressman Thompson had “prepared a report which highlighted the failure of the Department of Homeland Security to assess the threat posed by right-wing domestic terrorist groups, [urging] the Department [to] not focus on eco-terrorism at the expense of domestic terrorist groups such as the KKK, right wing militias, abortion clinic bombers, and skinheads.”²⁴

²¹ Eco-Terrorism Specifically Examining the Earth Liberation Front and Animal Liberation Front, Hearing Before the S. Comm. On Environmental and Public Works, 109th Cong. (May 18, 2005).

²² *Id.* at 5-7 (Statement of Sen. Frank Lautenberg).

²³ *Id.* at 37 (Statement of Sen. Barack Obama).

²⁴ *Id.* at 4 (Statement of Sen. James M. Jeffords); *see Smith, supra* note 11 at 557.

C. Weaponization of the Law: Corporate-funded Prosecution, Surveillance, Infiltration, and Criminalization of Water Protectors

Terrorism is anything that stands in the face of what we want to do . . . people's movements of resistance against deprivation, against unemployment, against the loss of natural resources, all of that is termed 'terrorism.'

Edward Said, Columbia University Professor²⁵

The language of “eco-terrorism” has fueled the weaponization of the law against Water Protectors and frontline defenders. Recent studies by the United Nations Special Rapporteur on the Situation of Human Rights Defenders (A/71/281), the Special Rapporteur on Human Rights and the Environment (John Knox, *Policy Brief: Environmental Human Rights Defenders – A Global Crisis* (Versoix, Switzerland, Universal Rights Group, 2017)) and Special Rapporteur on Indigenous Peoples (A/HRC/39/17) have raised alerts over a “global crisis” of attacks against environmental human rights defenders and defenders belonging to Indigenous communities and those that stand with them.

Aside from a “Green Scare,” the branding of environmental and animal rights activists as “eco-terrorists” has led to legislative and legal repercussions.²⁶ On the legislative front, activists are specifically targeted by statutes imposing

²⁵ *Smith, supra* note 11 at 539.

²⁶ Will Potter, *What Is the Green Scare?* GreenIsTheNewRed.com, Sept. 1, 2008, <http://www.greenisthenewred.com/blog/green-scare/>.

heightened penalties for nonviolent interference with operations.²⁷ On the legal front, climate activists have been targeted for prosecution under such legislation and are subject to domestic terrorism enhancement statutes leading to disproportionate sentences up to four times higher than otherwise warranted.²⁸

Between April 2016 and February 2017, over 15,000 Indigenous peoples and allies from around the world gathered at the Standing Rock Sioux Reservation and surrounding lands of the Oceti Sakowin to support the grassroots, Indigenous-led opposition to the Dakota Access Pipeline, united to protect sacred lands, the Earth, and water for future generations. Those months evidenced the criminalization of the right to protest, with over 800 criminal cases brought against Water Protectors by the state.

The Water Protector Legal Collective was formed in response to the need for legal representation. The full court dockets resulted in relaxation of *pro hac vice* admission rules to allow for defense counsel from across the country to take on cases. Many of those who answered the call to provide legal representation were

²⁷ See e.g., *Id.*; Critical Infrastructure bills have also been passed since the 2016 Standing Rock protests in order to protect corporate property interests.

²⁸ *Id.*

members of the National Lawyers Guild.²⁹ Of the hundreds of criminal cases that flooded the North Dakota courts, most were dismissed.

The language of terror has also resulted in the increased militarization of corporate response to protests against extractive industry, including the use of tactics employed in war and counter-insurgency by extractive industries.³⁰

At Standing Rock, in response to perceived “security threats” against Dakota Access, Energy Transfer contracted a private security company, TigerSwan, that in coordination with law enforcement and a “task force” that included agents from the state and FBI, employed counter-insurgency tactics including disruption of communications, aerial surveillance, intimidation via heavily armed personnel, infiltration, and excessive use of force to quell the Water Protector movement.³¹ TigerSwan communications described Water Protectors as “jihadists” and

²⁹ As organizations that provide legal support for people in social justice movements, neither WPLC nor NLG direct, instruct, or otherwise provide training on direct action tactics or civil disobedience. Among the forms of legal support, NLG works to provide legal observation during protests, and both organizations provide “Know Your Rights” trainings, and direct legal representation, when appropriate.

³⁰ See e.g., Alleen Brown, “Oil Company Official Overseeing Crackdown on Pipeline Resistance Cut Teeth at Amazon and Exxon,” *The Intercept*, Sept. 17, 2021, <https://theintercept.com/2021/09/17/enbridge-line-3-pipeline-amazon-security-exxon/>.

³¹ See Indigenous Environmental Network and Oil Change International, *Indigenous Resistance Against Carbon 2021 Report*, pg. 4 (describing military tactics used to suppress public protest and intimidate Water Protectors).

“terrorists” as a form of dehumanization of those engaged in prayer and peaceful protest.³²

In 2019, the UN Working Group on the use of mercenaries as a means of violating human rights, addressed the relationship between private security companies and the extractive industry.³³ The report noted that safeguards must be provided to human rights defenders protesting the impacts of extractive industry, since “extractive industry constitutes an important client base for [private security] companies, and has been associated with allegations of serious human rights abuses and violations for many years.”

In addition, the report noted concern that “the daily situation reports of [TigerSwan] suggested it had used infiltration techniques to sow discord and monitor actions of protestors in an attempt to thwart protest activity and to identify threats to the pipeline.”³⁴

³² *Id.*

³³ United Nations Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Doc. A/HRC/42/42 (July 9, 2019), http://ap.ohchr.org/documents/dpage_e.aspx?si+A/HRC/42/42; see also Alleen Brown, “In the Mercenaries’ Own Words: Documents Detail TigerSwan Infiltration of Standing Rock,” *The Intercept*, Nov. 15, 2020, <https://theintercept.com/2020/11/15/standing-rock-tigerswan-infiltrator-documents/>.

³⁴ *Id.*

Surveillance of this kind by corporate-funded security acting in coordination with state and federal law enforcement is concerning given the FBI's well-documented history of repression of political dissent and civil rights movements through COINTELPRO, the counter-intelligence program that included wiretapping, infiltration, and media manipulation intended to discredit, destabilize, and demoralize dissenters.³⁵ From 1956 until 1974, targets of the COINTELPRO program included Martin Luther King, Jr. and the Black Panther Party, left student activists, and "radical" professors, among many others.³⁶ Nearly 20 years ago, the FBI described the growth of its counterterrorism programs from 1993 to 2003, by approximately 224 percent, such that nearly 16 percent of all FBI Special Agents focused on counterterrorism.³⁷ Although COINTELPRO was formally ended in 1974, congressional hearings showed that the FBI and other intelligence agencies engaged in actions "which had no conceivable rational relationship to either national security or violent activity".³⁸ The use of

³⁵ Allan M. Jalon, *A Break-In to End All Break-Ins*, L.A. Times, Mar. 8, 2006, http://uniset.ca/terr/news/lat_fbibreakin.html; see *Smith*, *supra* note 11 at 571.

³⁶ *Id.*

³⁷ Testimony of FBI Domestic Terrorism Section Chief, James F. Jarboe, Acts of Ecoterrorism by Radical Environmental Organizations, Hearing Before the Subcomm. On Crime of the H. Comm. On the Judiciary, 105th Cong. 62 (June 9, 1998).

³⁸ "Intelligence Activities and the Rights of Americans," Senate Select Committee to Study Government Operations with Respect to Intelligence Activities ("Church Committee"), Book II.

“eco-terrorism” to describe environmental activists only encourages use of disruptive tactics such as these.

Finally, in a multi-year study between January 2015 and May 2021, research conducted by the Business and Human Rights Centre (BHRC), documented more than 3,100 judicial attacks worldwide against those raising concerns about business operations and human rights.³⁹ The report’s foreword by Mary Lawlor, UN Special Rapporteur on the situation of human rights defenders, notes:

Human rights defenders are not anti-development, but they are often painted as such [for] speaking up against business-related human rights harms... The criminalization of defenders and judicial harassment – [via] a range of legal tactics used by states and business actors to violate the rights of defenders – is a growing problem worldwide [which include] strategic lawsuits against public participation (SLAPPs).

...SLAPPs have become a staple in the manipulation of the judicial system by business actors to stop legitimate human rights work, restrict civic space, and repress dissenting voices.⁴⁰

SLAPPs and similar tactics used by corporate actors are an abuse of the legal system to intimidate human rights defenders. The BHRC report indicated that Energy Transfer, the company behind Dakota Access, was among those corporate actors. In 2017, Energy Transfer filed a federal SLAPP suit against Greenpeace

³⁹ “SLAPPED But Not Silenced,” Business and Human Right Resource Centre, June 2021 Report, <https://www.business-humanrights.org/en/from-us/briefings/slapped-but-not-silenced-defending-human-rights-in-the-face-of-legal-risks/>.

⁴⁰ *Id.* at 4.

and other non-profit organizations that were at Standing Rock, echoing the “eco-terrorist” narrative and raising frivolous allegations against legitimate environmental organizations. The district court dismissed the case in 2019; Energy Transfer has since re-filed its state claims in North Dakota state court.⁴¹

In the matter at bar, Ms. Reznicek’s conduct was directed at a pipeline and a private corporation, not at the government or the general public. There is no evidence in the record below of any intent by Ms. Reznicek to create by her conduct a state of terror in the government or the general public, or, for that matter, in the private pipeline company or oil industry. On the contrary, her clearly stated intent was solely to act to stop the flow of oil through the Dakota Access Pipeline.

III. The Illegal Operation of The Dakota Access Pipeline—Which Has Caused Actual Harm to People, Water, and The Earth—Should Have Been Considered a Mitigating Factor in The Court’s Decision.

The Court should consider as a mitigating factor in Ms. Reznicek’s sentencing, the May 2021 DC Circuit opinion which invalidated key easements of the Dakota Access Pipeline and the fact that the pipeline continues to operate

⁴¹ In the interest of transparency and counsel’s duty of disclosure, in connection with the state SLAPP suit, *Energy Transfer LP, et al., v. Greenpeace International, et al.*, Case 30-2019-CV-00180, N.D. Dist. Court (2019), Energy Transfer has issued several third-party subpoenas for information related to allegations of “eco-terrorist” acts of Greenpeace and other named defendants at Standing Rock. The Water Protector Legal Collective has received one such subpoena and has filed an objection in response in North Dakota state court.

illegally. The Dakota Access Pipeline has caused actual harm to the water, to Indigenous Peoples and communities dependent on the Mni Sose (Missouri River) for water, and to the Earth itself.

A. The Dakota Access Pipeline and Climate Terror

As discussed in detail in the *amicus curiae* of the Climate Defense Project in this matter, which *Amici* hereby join, it was and is the flow of oil through the Pipeline itself, which presents extremely great risks of leaks and contamination of public water resources.

Beginning in 2016, the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and others filed challenges to the granting of a federal easement to Dakota Access for the Pipeline contending, among other things, that the pumping of large amount of oil through the Pipeline posed extreme risks to the water resources of the Tribes and others.

On February 8, 2017, the U.S. Army Corps of Engineers terminated its intent to perform an Environmental Impact Statement (EIS) granted the Pipeline easement to Dakota Access allowing the completion of the Pipeline.⁴² The Pipeline was completed and commercial operation began on June 1, 2017.

Less than two weeks later, District Court Judge James E. Boasberg ruled that

⁴² US Army Corps of Engineers, *Project Background*, <https://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Oil-and-Gas-Development/Dakota-Access-Pipeline/>.

the Corps failed to adequately consider the impacts of a spill from the Pipeline but did not enjoin the operation of the Pipeline. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, [255 F.Supp.3d 101](#) (D.D.C. 2017). On remand, the Corps again decided not to issue an Environmental Impact Statement. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, [440 F.Supp.3d 1, 7-8](#) (D.D.C. 2020). Upon further review, Judge Boasberg found that too many unanswered questions remained regarding the Pipeline’s safety, and ordered the Corps to prepare an EIS. *Id.*, [225 F.Supp.3d at 17-27](#). Judge Boasberg then vacated the Corps’ decision to grant the easement and ordered the shutdown of the Pipeline, given “the seriousness of the Corps’ NEPA error” and “the potential harm each day the pipeline operates”. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, [471 F.Supp.3d 71, 87-88](#) (D.D.C. 2020).

On appeal, the Court affirmed the District Court’s orders requiring an EIS and vacating the easement as an unlawful agency action. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, [985 F.3d.3d 1032, 1050-53](#) (D.C. Cir. [2021](#)). However, the Court left it up to the Corps’ discretion whether the Pipeline would remain operational pending the completion of the EIS. *Id.*, [985 F.3d at 1054](#); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, ___ F.Supp.3d ___, [2021 WL 2036662](#) (D.D.C. 2021).

In August 2021, despite the illegality of the Pipeline, Energy Transfer

announced the expansion of the pumping of crude oil through the Pipeline from 570,000 to 750,000 barrels of oil per day – almost 300 million barrels of oil per year.⁴³ The oil and gas pipeline industry’s extraordinary history of frequent leaks and accidents has resulted in almost 6,000 incidents—over 1,000 injuries and 256 deaths between 2001 and 2020—as recorded by the Pipeline and Hazardous Materials Safety Administration.⁴⁴ In the decade prior to 2017, the Iowa Department of Natural Resources reported over 100 pipeline accidents which spilled over 420,000 gallons of hazardous liquids.⁴⁵

In the few years that the Dakota Access Pipeline has been in operation, over 10 spills have been reported.⁴⁶ Energy Transfer, LLP, the Pipeline owner and operator, has a particularly egregious history of spills, over 500 from 2002 to 2017

⁴³ US News, *More Oil Shipped as Dakota Access Pipeline Expansion Starts* (August 6, 2021), <https://www.usnews.com/news/us/articles/2021-08-06/more-oil-shipped-as-dakota-access-pipeline-expansion-starts>.

⁴⁴ PHMSA, *Pipeline Incident 20 Year Trends* (updated February 17, 2021), <https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends>.

⁴⁵ William Petroski, *Iowa’s Pipeline Safety Record Spotty*, Des Moines Register (Mar. 5, 2017), <https://www.desmoinesregister.com/story/news/investigations/2014/09/07/iowa-pipeline-safety-spotty-records-large-scale-disasters-spills-since-bakken-oil-propane-natural-gas-anhydrous-ammonia/15230791/>

⁴⁶ Phil McKenna, *Standing Rock Asks Court to Shut Down Dakota Access Pipeline as Company Plans to Double Capacity*, Inside Climate News (August 20, 2019), <https://insideclimatenews.org/news/20082019/standing-rock-dakota-access-pipeline-impact-assessment-court-double-capacity/>.

releasing some 3.6 million gallons of crude oil and other hazardous liquids.⁴⁷ Just last month, the Pennsylvania Attorney General, following grand jury findings, filed 48 criminal charges against Energy Transfer for the illegal release of industrial waste in its facilities across the state, contaminating wetlands, a stream and a lake, and ruining the drinking water of at least 150 families.⁴⁸ Not only do these water contaminations violate state and federal environmental laws, they further violate the recognized human right under international law to clean and safe drinking water.⁴⁹

The Pipeline's extreme threat to water resources and the environment is magnified by its contribution to the global climate crisis—the burning of 750,000 barrels of oil per day that are pumped through the pipeline. On August 9, 2021, a few months prior to the 26th Meeting of the Conference of the Parties of the United Nations' climate body (COP26), the Intergovernmental Panel on Climate Change

⁴⁷ Sharon Kelly, *For 15 Years, Energy Transfer Partners Pipelines Leaked an Average of Once Every 11 Days: Report*, DeSmog (April 17, 2018), <https://www.desmog.com/2018/04/17/energy-transfer-partners-pipelines-leaked-once-every-11-days-greenpeace-report/>.

⁴⁸ Michael Rubinkam, *Pipeline developer charged over systematic contamination*, AP (October 5, 2021), <https://apnews.com/article/business-pennsylvania-philadelphia-environment-crime-20c337b3e287091c7f7fb6f62156b6e1>; Pennsylvania Attorney General, *Mariner East Presentment* (October 15, 2021), <https://www.attorneygeneral.gov/wp-content/uploads/2021/10/2021-10-05-Mariner-East-Presentment.pdf>.

⁴⁹ UN General Assembly, *The human right to water and sanitation: resolution / adopted by the General Assembly*, 3 August 2010, A/RES/64/292, <https://undocs.org/A/RES/64/292>.

(IPCC) released its sixth report once again reporting accelerating climate changes unprecedented across every region of the globe caused by greenhouse gas emissions, particularly fossil fuel carbon emissions, with expectations of global environmental catastrophes.⁵⁰ Scientists predict that the global Climate Crisis may result in a Sixth Great Extinction where over 50% of the Earth's species may well go extinct within the next 100 years.⁵¹ Courts and federal agencies are now unable to overlook the great threat of fossil fuel projects to the global climate crisis. *See, e.g., Utah Physicians for a Healthy Environment v. U.S. Bureau of Land Management*, ___ F.Supp.3d ___, [2021 WL 1140247](#), *3-7 (D.Utah 2021); *WildEarth Guardians v. Bernhardt*, [502 F.Supp.3d 237, 247-56](#) (D.D.C. 2020) (cumulative impacts); *California v. Bernhardt*, [472 F.Supp.3d 573, 622-26](#) (N.D.Cal. 2020) (cumulative impacts); *WildEarth Guardians v. Zinke*, [368 F.Supp.3d 41, 67-77](#) (D.D.C. 2019).

Thus, the real “great fear” or “terror” of the general public, is not the conduct of Ms. Reznicek, but of Dakota Access and Energy Transfer, the billions

⁵⁰ IPCC, 2021, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, <https://www.ipcc.ch/assessment-report/ar6/>; *see also*, World Meteorological Association, *State of Global Climate 2021, WMO Provisional report* (October 31, 2021), https://library.wmo.int/doc_num.php?explnum_id=10859.

⁵¹ Hijun Song, et al., *Thresholds of temperature change for mass extinctions*, 12 *Nature Communications*, Article number 4694 (August 4, 2021), <https://www.nature.com/articles/s41467-021-25019-2>.

of barrels of oil that will flow through the Pipeline and inevitably leak into water, the environment, or burned as fuel, and their contributions to the global Climate Crisis. It is precisely this very great public fear of the systemic Pipeline-oil-spill risks and the fossil fuel induced global Climate Crisis that manifested in the immense public outcry specifically against the operation of the Pipeline and globally against the fossil fuel industry and Climate Change.⁵²

IV. Application of a Terrorism Sentencing Enhancement with the Aim of Specific Deterrence Fails in the Midst of a Climate Crisis Where Pipelines and Extractive Industry Pose Greater Threat To Human Life Than Property Damage Caused by Ms. Reznicek's Actions.

The Court should render its decision for Defendant-Appellant in light of the context of the Climate Crisis through which the world traverses. After years of litigation to stop Dakota Access, and despite a May 2021 ruling by the DC Circuit Court ruling the operation illegal due to invalid easements, permits and lack of an adequate EIS, oil still flows through the pipeline. Under such a scenario where every legal avenue has been explored but has failed, it is unlikely that the Court's

⁵² See, Danielle Quichocho and Burton St. John, III, *The Standing Rock Protests against the Dakota Access Pipeline*, in COMMUNICATING CLIMATE CHANGE (2021); Hiroko Tabuchi, Brad Plumer, *Is This the End of New Pipelines?* NY Times (July 8, 2020), <https://www.nytimes.com/2020/07/08/climate/dakota-access-keystone-atlantic-pipelines.html>.

aim of specific deterrence in imposing a harsh sentence against Ms. Reznicek will keep others from engaging in nonviolent direct action.

This past month, the United Nations Human Rights Council issued a declaration recognizing the human right to a clean, healthy, and sustainable environment.⁵³ The detrimental effects of collective human lifestyle on the planet which have led to environmental devastation, extinction of species, deterioration of the ozone layer, acid rain, and toxic substances poisoning our drinking water, food, blood, and our air, are but examples—the complete extent of the current crisis is probably impossible to fully document or even comprehend.⁵⁴ Nevertheless, “the scientific certainty of anthropogenic climate change continues to grow.”⁵⁵ The Court should consider Ms. Reznicek’s actions against this cumulative backdrop.

A. Necessity to Act in Self-Defense Against the Terror of Climate Crisis

The philosophy of law recognizes the principle of double effect according to which it is sometimes permissible to cause a harm as a side effect (or “double effect”) of bringing about a good result even though it would not be permissible to

⁵³ UN Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment*, 5 October 2021, A/HRC/48/L.23/Rev. 1, <https://undocs.org/a/hrc/48/1.23/rev.1>.

⁵⁴ See e.g., *Smith*, *supra* note 11 at 541.

⁵⁵ Joseph Rausch, *The Necessity Defense and Climate Change*, *Columbia Journal of Environmental Law*, Vol. 44:2 (2019), pg. 553-602.

cause such a harm as a means to bringing about the same good end.⁵⁶ The principle manifests in current domestic and international laws on the right to “self-defense,” and has given rise to defenses in both civil and criminal law of justification and excuse.⁵⁷ A further outgrowth of this principle forms the basis for the “choice of evils” or “necessity” defense. *See United States v. Kpomassie*, [323 F.Supp.2d 894](#) (W.D. Tenn. 2004); *United States v. Gifford*, [2007 WL 2601424](#) (E.D. Cal. 2007).⁵⁸

Ten years ago, due to the continuing and persistent abject failure of governmental action—and ongoing government inaction to correct course in the face of ever-increasing threats to water and climate by extractive industry—climate scientists and academics argued for the necessity of mass popular action.⁵⁹

Within this context, the conduct of Ms. Reznicek did not constitute acts of terrorism rather, were acts of necessity and self-defense in response to actual harm

⁵⁶ *See*, Peter Knauer, *The Hermeneutic Function of the Principle of Double Effect*, Notre Dame Law School Natural Law Forum 132 (January 1, 1967), http://scholarship.law.nd.edu/nd_naturallaw_forum/127.

⁵⁷ Onder Bakircioglu, *The Right to Self-Defense in National and International Law*, 19 Ind. Int’l & Comp. L. Rev. 1 (2009); Eugene R. Milhizer, *Justification and Excuse*, 78 St. John’s L. Rev. 725 (Summer 2004).

⁵⁸ *See* Matthew Bennett O’Brien, *Practical necessity: a study in ethics, law, and human action*, U. of Tex. (May, 2011), <https://repositories.lib.utexas.edu/handle/2152/ETD-UT-2011-05-3257>.

⁵⁹ John Lemons and Donald A. Brown, *Global climate change and non-violent civil disobedience*, 11 Ethics Sci. Environ. Polit. 3 (2011).

caused by corporate environmental terror.⁶⁰ In light of legal remedies that were inadequate and failed to halt the Dakota Access Pipeline from being operational, Ms. Reznicek was faced with a choice of evils: she could obey the law, accept oil flow through the Pipeline, and endure the inevitable risks of water contamination and climate change, or she could attempt to halt the oil by damaging the Pipeline or the equipment used to maintain it. Ms. Reznicek's property damage caused harm to the Pipeline and equipment, but this was certainly far less than the harm the Pipeline posed to public water resources, climate, public health, and future generations.⁶¹

The outpouring of public support for Ms. Reznicek and public outcry at the 96-month prison term for acts of property damage aimed exclusively at stopping the Dakota Access Pipeline, shows that the Court's aim of deterrence at sentencing was misplaced, and only serves the interests of private industry, not that of the general public. As the climate crisis becomes more of a widely accepted, scientific certainty—with the United States rejoining the Paris Accords and expressing its commitment to curbing carbon emissions at the recent COP26 Climate Conference

⁶⁰ See, Hugo Tremblay, *Eco-terrorists Facing Armageddon: The Defense of Necessity and Legal Normativity in the Context of Environmental Crisis*, 58 McGill L. J. 321 (December 2012).

⁶¹ Because Ms. Reznicek admitted to her actions and took a plea, rather than proceeding to trial, justification defenses, including necessity, were not available to Ms. Reznicek.

in Glasgow—people across the U.S. and the world feel the urgency of the climate crisis.

Ms. Reznicek’s overly harsh sentence highlights the U.S. government’s bi-partisan tolerance of the oil industry harming the climate and protection of corporate “victims”, while bringing the full force of the law against those who oppose them. It further shows the injurious effects of use of language. As one U.S. Senator stated during an “eco-terrorism” hearing: “[i]n our current state of fear, it is easy to get headlines by using the term ‘terrorism.’ But sometimes a criminal is just a criminal.”⁶²

The law requires a precise use of language. There is no question that Jessica Reznicek broke the law, damaged corporate property to stop the Dakota Access Pipeline, and openly admitted to doing so—but “if a pejorative label is necessary for law-breaking activists, let it be law-breakers, criminals, trespassers, vandals, saboteurs, or arsonists, but not ‘terrorists.’”⁶³ As NASA climate scientist, Peter Kalmus, said of Ms. Reznicek on Twitter: “Jessica was sentenced to 8 years for protecting all of us from climate and ecological breakdown. She acted from necessity and love . . . #FreeJessica.”

⁶² Eco-Terrorism, Hearing Before the S. Comm. On Environmental and Public Works, 109th Cong. (October 26, 2005) (testimony of Sen. James M. Jeffords).

⁶³ *Smith, supra* note 11 at 576.

CONCLUSION

For the foregoing reasons, *amici* request this Court vacate the sentence imposed by the District Court and remand the case for new sentencing proceedings.

Date: November 11, 2021

Respectfully submitted,

/s/ Andrew B. Reid
NATIONAL LAWYERS GUILD
Andrew B. Reid, Esq.
Reid.Law, LLC
1075 Waite Drive
Boulder, CO 80303
(303) 437-0280
andrew@reid.law

Counsel for Amici Curiae
National Lawyers Guild

/s/ Natali Segovia
WATER PROTECTOR LEGAL COLLECTIVE
Natali Segovia, Esq.
P.O. Box 37065
Albuquerque, NM 87176
(701) 566-9108
defense@waterprotectorlegal.org

Counsel for Amici Curiae
Water Protector Legal Collective

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(g) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 6,492 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word, Office version 2011, in 14-point Times New Roman style type.

3. This brief has been scanned for viruses and is virus-free.

Date: November 11, 2021.

/s/ Andrew B. Reid
NATIONAL LAWYERS GUILD
Andrew B. Reid, Esq.
Reid.Law, LLC
1075 Waite Drive
Boulder, CO 80303
(303) 437-0280
andrew@reid.law

*Counsel for Amici Curiae
National Lawyers Guild*

/s/ Natali Segovia
WATER PROTECTOR LEGAL COLLECTIVE
Natali Segovia, Esq.
P.O. Box 37065
Albuquerque, NM 87176
(701) 566-9108
defense@waterprotectorlegal.org

*Counsel for Amici Curiae
Water Protector Legal Collective*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion for Leave to File *Amicus Curiae* Brief and Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on November 11, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

Date: November 11, 2021

/s/ Andrew B. Reid
NATIONAL LAWYERS GUILD
Andrew B. Reid, Esq.
Reid.Law, LLC
1075 Waite Drive
Boulder, CO 80303
(303) 437-0280
andrew@reid.law

Counsel for Amici Curiae
National Lawyers Guild

/s/ Natali Segovia
WATER PROTECTOR LEGAL COLLECTIVE
Natali Segovia, Esq.
P.O. Box 37065
Albuquerque, NM 87176
(701) 566-9108
defense@waterprotectorlegal.org

Counsel for Amici Curiae
Water Protector Legal Collective

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

November 12, 2021

Mr. Andrew B. Reid
REID LAW OFFICE
1075 Waite Drive
Boulder, CO 80303-0000

Ms. Natali Segovia
WATER PROTECTOR LEGAL COLLECTIVE
P.O. Box 37065
Albuquerque, NM 87176

RE: 21-2548 United States v. Jessica Reznicek

Dear Counsel:

The amicus curiae brief of Water Protector Legal Collective and National Lawyers Guild has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

HAG

Enclosure(s)

cc: Ms. Virginia Bruner
Mr. Jason T. Griess
Mr. Ben Hachten
Mr. Alexander Ian Marquardt
Ms. Heather Quick
Mr. William P. Quigley

District Court/Agency Case Number(s): 4:19-cr-00172-RGE-1

44 of 44