IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

21-2548

UNITED STATES OF AMERICA,

Appellee,

v.

JESSICA RAE REZNICEK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
HONORABLE REBECCA GOODGAME EBINGER, U.S. DISTRICT COURT JUDGE

APPELLANT'S BRIEF

Heather Quick
FEDERAL PUBLIC DEFENDER'S OFFICE
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
PHONE: (319) 363-9540
FAX: (319) 363-9542

ATTORNEY FOR APPELLANT

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Defendant, Jessica Reznicek (hereinafter "Reznicek"), pleaded guilty to one count of conspiracy to damage an energy facility. At sentencing, the district court determined, over her objection, that a Chapter Three guideline enhancement applied for having committed a federal crime of terrorism, and that the government only needed to prove the facts supporting that enhancement by a preponderance of the evidence. The district court imposed a 96-month sentence, a downward variance from the enhanced guideline range of 210–240 months but still substantially above what the guideline range would have been had the enhancement not applied (37–46 months).

On appeal, Reznicek argues 1) that the enhancement for committing a federal crime of terrorism was wrongly applied, 2) that the government should have had to prove facts supporting the enhancement by clear and convincing evidence, and 3) that the sentence imposed was substantively unreasonable. She recognizes that the second argument is foreclosed by *United States v. Villareal-Amarillas*, 562 F.3d 892 (8th Cir. 2009), and raised that argument to preserve it. She requests 10 minutes for oral argument.

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JURISDICTIONAL STATEMENT

The decision appealed: Reznicek appeals from the judgment of conviction and sentence entered against her on June 30, 2021, in the Southern District of Iowa, on a charge of conspiracy to damage an energy facility. Reznicek was sentenced to 96 months of incarceration, and appeals her sentence.

Jurisdiction of the court below: The United States District Court had jurisdiction over Reznicek's federal criminal prosecution pursuant to 18 U.S.C. § 3231: "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

Jurisdiction of this court: This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

Reznicek filed a timely notice of appeal on July 13, 2021, from the judgment formally entered June 30, 2021. *See* Fed. R. App. P. 4(b)(1)(A)(i).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN APPLYING THE ENHANCEMENT FOR FELONIES INVOLVING A FEDERAL CRIME OF TERRORISM.

1. USSG § 3A1.4(a)

2. 18 U.S.C. § 2332b(g)(5)

3. *United States v. Mohamed*, 757 F.3d 757 (8th Cir. 2014)

II. WHETHER THE DISTRICT COURT ERRED IN FAILING TO REQUIRE THE GOVERNMENT TO PROVE UNDERLYING FACTS BY CLEAR AND CONVINCING EVIDENCE.

1. *United States v. Villareal-Amarillas*, 562 F.3d 892 (8th Cir. 2009)

III. WHETHER THE DISTRICT COURT'S SENTENCE WAS SUBSTANTIVELY UNREASONABLE.

1. 18 U.S.C. § 3553(a)

2. *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020)

3. *United States v. Jeffries*, 615 F.3d 909 (8th Cir. 2010)

STATEMENT OF THE CASE

Nature of the Case: This is a direct appeal by defendant, Jessica Reznicek, following judgment and sentence in the Southern District of Iowa on a charge of conspiracy to damage an energy facility. Reznicek appeals her sentence.

Factual and Procedural Background: The Dakota Access Pipeline (DAPL) is a "nearly 1,200–mile pipeline designed to move more than half a million gallons of crude oil from North Dakota to Illinois every day." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 114 (D.D.C. 2017). 1,172 miles long, it runs from the shale oil fields of the Bakken formation in North Dakota, through South Dakota, through Iowa, to an oil terminal in southern Illinois. *Dakota Access Pipeline*, Wikipedia, https://en.wikipedia.org/wiki/Dakota_Access_Pipeline (visited October 6, 2021). The DAPL is owned by a business—Energy Transfer, LLC. PSR ¶ 31.[1] Over significant public outcry, the Iowa Utilities Board approved the plans for DAPL's Iowa portion by a 3-0 vote in early 2016. William

[1] In this Brief, the following abbreviations will be used:
"DCD" – district court clerk's record, followed by the docket entry and, where noted, page number;
"PSR" –final presentence report, followed by the page number or, where noted, paragraph number; and
"Sent. Tr." – Sentencing hearing transcript, followed by page number. References to the presentence report are to the final revised report, DCD 121.

Petroski, *Bakken pipeline firm seeks expedited construction permit*, Des Moines Register, https://www.desmoinesregister.com/story/news/politics/2016/03/17/bakken-pipeline-firm-seeks-expedited-construction-permit/81931804/ (Mar. 17, 2016). Construction commenced in 2016, and the first oil was delivered through the pipeline on May 14, 2017. Jarrett Renshaw, *East Coast refiner shuns Bakken delivery as Dakota Access Pipeline starts*, Reuters, https://www.reuters.com/article/us-north-dakota-pipeline-pes-idUSKBN17L0BJ (Apr. 18, 2017).

On the evening of November 8, 2016, well before the DAPL began pumping oil, Reznicek and her codefendant, Ruby Montoya, set a fire at a then-unoccupied DAPL worksite in Newell, Iowa.[2] PSR ¶ 14. They used accelerant and motor oil poured into plastic coffee cans, and ignited them inside or near John Deere and Caterpillar excavating equipment at the site. *Id.* On or about March 13, 2017, Reznicek and Montoya used a blowtorch to cut a small hole in the side of the DAPL in Mahaska County, Iowa. *Id.* ¶ 15. On March 17 and 18, 2017, similar blowtorch damage to the DAPL was discovered at other sites, also caused by Reznicek and Montoya. *Id.* ¶¶ 16–19. Specifically, damage was discovered near the Iowa towns of Paulina, Alton (two separate locations), and Pilot Mound, and also near Canton, South Dakota. *Id.* At the Pilot Mound site, Reznicek and Montoya spray-painted

[2] Montoya has yet to be sentenced by the district court. Montoya is currently seeking leave to withdraw her plea of guilty. DCD 176.

on a small shed the statements: "OIL is DEATH," "ur children need water," and "Mni Wiconi," a Lakota saying meaning "water is life." *Id.* ¶ 19. On or about April 9, 2017, Reznicek and Montoya set fire to tires underneath instrument and electrical fixtures at a DAPL site in Wapello County, Iowa. *Id.* ¶ 22. On or about April 27, 2017, Reznicek and Montoya again ignited tires underneath equipment at a DAPL site in Buena Vista County, Iowa. *Id.* ¶ 23. On May 2, 2017, an individual appearing to be Montoya broke into a DAPL site near Humboldt, South Dakota, and was then seen fleeing to a car apparently driven by Reznicek, carrying what looked to be an acetylene torch. *Id.* ¶ 24. Finally, on or about May 2, 2017, Reznicek and Montoya attempted to cut a hole in the DAPL at a site in Hedrick, Iowa. *Id.* ¶ 25. Energy Transfer, LLC, estimated the damage to equipment on November 8, 2016, and other dates to be approximately 2.5 million. Sent. Tr. 21:4–14.

On July 24, 2017, unprompted by police investigation, Reznicek and Montoya issued a statement at a news conference claiming responsibility for sabotaging the pipeline. PSR ¶ 27. Their statement, quoted in full in the presentence report, depicts the pair's interventions as prompted by government inaction. *Id.* A relevant portion reads:

> Federal courts gave permission to lie and withhold information from the public resulting in a complete media blackout. So, after being called by the Intercept, an independent media organization, regarding illegal

> surveillance by the Dakota Access Pipeline and their goons, we viewed this as an opportunity to encourage public discourse surrounding nonviolent direct action as well as exposing the inadequacies of the government and the corporations they protect.
>
> After having explored and exhausted all avenues of process, including attending public commentary hearings, gathering signatures for valid requests for Environmental Impact Statements, participating in civil disobedience, hunger strikes, marches and rallies, boycotts and encampments, we saw the clear deficiencies of our government to hear the people's demands.
>
> Instead, the courts and public officials allowed these corporations to steal permissions from landowners and brutalize the land, water, and people. Our conclusion is that the system is broken, and it is up to us as individuals to take peaceful action and remedy it, and this is what we did, out of necessity.

Id. Reznicek and Montoya describe their actions as a "peaceful direct-action campaign" addressed directly at DAPL real property and fixed capital, expressly intended to avoid violence or injury to persons. *Id.* The pair described "stop[ping] construction at [one] site for a day" as the intended and successful outcome of the action. *Id.* They went on:

> What we did do was fight a private corporation that has run rampantly across our country seizing land and polluting our nation's water supply. You may not agree with our tactics, but you can clearly see the necessity of them in light of the broken federal government and the corporations they continue to protect.

Id.

Reznicek and Montoya were charged in a nine-count indictment with conspiracy to damage an energy facility, in violation of 18 U.S.C. § 1366(a); four

counts of use of fire in commission of a felony (that is, the conspiracy in Count I), in violation of 18 U.S.C. §§ 844(h) and 2; and four counts of malicious use of fire in damaging property in violation of 18 U.S.C. §§ 844(i) and 2. DCD 1, 2. On January 6, 2021, Reznicek pleaded guilty to the conspiracy count pursuant to a plea agreement which called for dismissal of the other counts at sentencing. DCD 89, 90, 91.

A presentence report was prepared. Reznicek was assessed a base offense level of 23, because the offense conduct involved arson or property damage by use of explosives, and involved loss exceeding $550,000. PSR ¶ 35; USSG §§ 2B1.1, 2K1.4. However, 12 points were added because the presentence report determined the offense was a felony that involved or was intended to promote a federal crime of terrorism. PSR ¶ 37; USSG § 3A1.4. With an adjusted offense level of 35, reduced by three points for acceptance of responsibility, the total offense level was 32. PSR ¶¶ 40, 42–44. Reznicek scored three criminal history points, placing her in criminal history category II. PSR ¶ 73. This resulted in an advisory guideline range of 210–240 months, with 240 the statutory maximum sentence for the offense. *Id.* ¶ 127. Reznicek objected to the assessment of the 12-point enhancement under 3A1.4, and objected that the government should have to prove the facts used to support the enhancement by clear and convincing evidence. DCD 127 at 5–13. Reznicek also moved for a downward departure or variance based upon her personal

history and characteristics and the nature and circumstances of the offense. *Id.* at 14–27; *see* 18 U.S.C. § 3553(a); USSG § 5K2.0(a)(3).

The matter proceeded to sentencing. The district court overruled Reznicek's objections but varied downward, sentencing Reznicek to 96 months of incarceration. Sent. Tr. 63:10–65:23. In overruling Reznicek's objection to the terrorism enhancement, the district court noted that in its view, Reznicek's offense was both calculated to influence or affect the conduct of government, and was intended as retaliation against government conduct. Sent. Tr. 38:5–39:14. Although the district court did not believe the government was required to prove supporting facts by clear and convincing evidence, the district court stated: "The evidence here is not only established by a preponderance but would also meet the clear and convincing evidence standard." *Id.* at 39:15–17.

The district court based its variance on Reznicek's "post-sentence rehabilitation," Sent. Tr. 63:21, as well as what it viewed as her "laudable, though ultimately misguided, motivations in terms of a desire to help clean water," *id.* at 64:1–2. The district court stated:

> I note that the sentence I have imposed of 96 months is sentenced taking into consideration both the applicable guideline range without the terrorism adjustment and with the terrorism adjustment and would be the same sentence imposed if the Court did not apply the terrorism adjustment in this case because of the applicable 3553(a) factors.

Sent. Tr. 65:3–8. Reznicek now appeals.

SUMMARY OF THE ARGUMENT

The district court erred by applying the enhancement for felonies involving or intended to promote federal crimes of terrorism. Reznicek's offense did not qualify as a federal crime of terrorism because it was not calculated to influence or affect the conduct of government by intimidation or coercion, and was not retaliation against government conduct. The district court also erred by failing to require the government to prove facts supporting the enhancement by clear and convincing evidence. Finally, the sentence was substantively unreasonable.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE ENHANCEMENT FOR FELONIES INVOLVING A FEDERAL CRIME OF TERRORISM.

Standard of Review:

In reviewing imposition of the terrorism enhancement under 3A1.4, the Court "review[s] factual findings for clear error and the construction and application of the advisory sentencing guidelines *de novo*." *United States v. Ali*, 799 F.3d 1008, 1029 (8th Cir. 2015).

Merits:

If a felony offense for which a defendant is sentenced "involved, or was intended to promote, a federal crime of terrorism," the guidelines mandate either a twelve-level increase to the offense level or an offense level of 32, whichever is greater. USSG § 3A1.4(a). Under such circumstances, a defendant's criminal history category is also increased to VI. *Id.* § 3A1.4(b); *cf* USSG § 4B1.1 (career offender enhancement, which operates similarly). "Federal crime of terrorism" has the meaning given at 18 U.S.C. § 2332b(g)(5). USSG § 3A1.4 cmt. n.1. That meaning is an offense that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and is a violation of certain listed statutes, including 18 U.S.C. § 1366(a).

The question is not whether Reznicek's offense of conspiracy to damage an energy facility was intended to promote a federal crime of terrorism, but whether it was itself such a crime.[3] USSG § 3A1.4(a). The district court correctly analyzed section 2332 as listing two alternative ways in which an offense might qualify: either as an offense calculated to influence or affect the conduct of government by intimidation/coercion (the "influence or affect" prong), or as on offense intended to retaliate against government conduct (the retaliation prong).

Other circuits have held that a defendant's intent under either prong must be specific intent, and the Eighth Circuit appears to have adopted this reasoning as well. *See United States v. Mohamed*, 757 F.3d 757, 760 (8th Cir. 2014) (noting that other circuits have interpreted 2332b(g)(5)'s language as imposing a specific intent requirement and then concluding that the defendant's "admission shows the requisite specific intent"); *United States v. Wright*, 747 F.3d 399, 408 (6th Cir. 2014) (describing the requisite mental state as "the purpose of influencing or affecting government conduct"); *United States v. Hassan*, 742 F.3d 104, 148–49 (4th Cir.

[3] One might also productively analyze the offenses listed in Counts II through IX of the indictment, the constitutive conduct of which Reznicek admitted in her plea agreement, as offenses intended to be promoted by the conspiracy count, I, to which Reznicek pleaded guilty. *See* USSG § 3A1.4(a). However, the distinction would not result in a meaningful difference in the analysis, which concerns whether Reznicek and Montoya's actions, planned or committed through the scope of the conspiracy, met the definition of a federal crime of terrorism as either intended to influence or retaliate against government conduct.

2014) (specific intent required); *United States v. Siddiqui*, 699 F.3d 690, 709 (2d Cir. 2012) (same). Specific intent, roughly equivalent to purpose in the language of the Model Penal Code, means "the intent to accomplish the precise criminal act that one is later charged with." *United States v. Robertson*, 606 F.3d 943, 954 (8th Cir. 2010) (quoting *Cherichel v. Holder*, 591 F.3d 1002, 1012 (8th Cir. 2010)) (cleaned up). "A person acts purposefully when he 'consciously desires' a particular result." *Borden v. United States*, 141 S. Ct. 1817, 1823 (2021) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)).

The starting place for analysis of subsection 2332b(g)(5)'s scope is its plain language. *See United States v. Talley*, 16 F.3d 972, 975 (8th Cir. 1994) ("In determining the proper scope of a statute, we start with its plain language."). Qualifying offenses, as the district court recognized, may fall under one or both prongs.

A. Retaliation

Reznicek and Montoya did not "retaliate against" government conduct. Although they conceived of their actions as at least partly conditioned by government inaction—"government conduct"—they did not act against that conduct, but against a private company building a pipeline. They did not target, vandalize, or damage any government property. *See retaliate*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/retaliate (visited

Oct. 6, 2021) ("to return like for like"); *against*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/against (visited Oct. 6, 2021) (1a, "in opposition or hostility to"). The immediate occasion of their action was a private company's privately financed and executed building of a private pipeline. Thus, Reznicek's actions were neither directly occasioned by government conduct nor did they target government conduct. They occurred in the absence of and in a significant sense were intended to supplant *missing* government conduct, in the form of closer regulatory oversight or more meaningful avenues for democratic participation in the process of approving the pipeline. Reznicek's action was thus occasioned by government conduct only in the minimal sense that government inaction was arguably one of the contributing factors causing Reznicek to believe her own actions were necessary.

Had Congress intended to sweep in as "retaliation" not just an offense that targeted the government and its actions, but also any offense whose but-for (or even contributing) cause was government action, it could easily have done so. Congress could have done so by including crimes committed "because of" government action, instead of, more restrictively, crimes committed in retaliation against. *Cf. Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020) ("[A]s this Court has previously explained, 'the ordinary meaning of "because of" is "by reason of" or "on account of."'") (quoting *University of Tex. Southwestern Medical Center v. Nassar*,

570 U.S. 338, 350 (2013))). Instead, though, the statute speaks more narrowly of retaliation against the government.

Although the retaliation prong is less commonly analyzed than the influence-or-affect prong, courts that have done so have adopted a restrictive reading of its scope. The Tenth Circuit has held that "the conduct that the defendant retaliates against must objectively be government conduct." *United States v. Ansberry*, 976 F.3d 1108, 1129 (10th Cir. 2020). Ansberry attempted to detonate a bomb in front of a police station because, decades previously, the town's marshal had killed his friend. *Id.* at 1112. The Tenth Circuit reversed application of the terrorism enhancement, reasoning first that the marshal's action had not been objectively government conduct, because not officially done, and second, that because it was not, Ansberry's actions, however he conceived of them, were not retaliation against government conduct. *Id.* at 1126–27. Thus, Ansberry's actions were retaliatory, but not against qualifying conduct.

Reznicek's and Montoya's actions, to the extent they were retaliatory, were occasioned by private conduct as well (the building of the pipeline). They were even less related to government conduct than Ansberry's actions, however, in that they also targeted only private corporate conduct and property, both in fact and in Reznicek's and Montoya's own understanding of their actions. *See United States v. Alhaggagi*, 978 F.3d 693, 703–04 (9th Cir. 2020) (finding that district court erred

in determining defendant's opening of six social media accounts on two occasions for people he understood to be ISIS sympathizers was sufficient "evidence that the defendant intended to respond to specific government action"); *United States v. Tubbs*, 290 F. App'x 66, 68 (9th Cir. 2008) (affirming application of 3A1.4 for retaliatory targeting by ecological activists of federal facilities they believed were responsible for degradation of the environment, tree harvesting, and cruel treatment of animals); *United States v. Harris*, 434 F.3d 767, 774 (5th Cir. 2005) (evidence sufficient to support 3A1.4 enhancement on a retaliation theory where defendant threw a Molotov cocktail into a municipal building and had been arrested twice within a few days prior by the municipal police force and threatened to kill a police officer). Appeals courts do not appear to have analyzed cases where, as here, the purportedly retaliatory offenses targeted only private property, but the logic of the cases cited suggests that such targeting cannot qualify as retaliation against government conduct.

Because Reznicek and Montoya did not target government property or, by extension, conduct, and because their actions were only minimally occasioned by government inaction, there is no sense in which they retaliated against government conduct. It is insufficient to observe, as the district court did, that the two women saw themselves as acting where the government did not, because doing so does not meet the definition of retaliation, in language or law. *See* Sent. Tr. 40:1–6.

B. Influencing or Affecting

i. Reznicek's Actions were not Calculated to Influence or Affect Government Action.

As Reznicek and Montoya explained at length in their written statement, their actions were calculated to affect DAPL and its corporate sponsors, not the United States government or the government of the state of Iowa, because the United States government and the government of Iowa had themselves failed to prevent construction of the pipeline. *See* PSR ¶ 27 ("[T]he courts and public officials allowed these corporations to steal permissions from landowners and brutalize the land, water, and people. Our conclusion is that the system is broken, and it is up to us as individuals to take peaceful action and remedy it, and this is what we did, out of necessity."). In the gulf created by government *inaction*, Reznicek and Montoya took action that government authorities would not. Rather than attempting to influence or affect the conduct of government, it was the starting point of Reznicek and Montoya's actions that government had definitely resolved not to act, and could not be induced to act.

Reznicek and Montoya never claimed or professed to believe that their actions would cause government actors that had before stood by to step in and act as they should have done initially. Rather, Montoya and Reznicek had three stated aims: marginally increasing the cost of pipeline construction in Iowa by destroying the

fixed capital of the company building the pipeline, slowing construction of the pipeline itself by damaging the pipeline, and raising public awareness. Although one might infer that "raising public awareness" could ultimately cause government to act, thus "influencing" or "affecting" government action, Reznicek and Montoya's statement makes clear that any such effect was not their specific intent, and would have to be well downstream of their purpose of raising public awareness. Specific intent, as a standard of mens rea, excludes consequences that are merely possible, or desirable but potentially likely to occur only as a distant or attenuated result of an action. *See Robertson*, 606 F.3d at 954; *see also United States v. Leahy*, 169 F.3d 433, 436 (7th Cir. 1999) (holding defendant lacked specific intent to influence government conduct where he possessed ricin, a toxin, and planned to mail it to his enemies).

Typically, appellate courts have affirmed application of the terrorism enhancement only where individuals have directly targeted or harmed governments in an effort to affect their behavior, or have had changing government behavior a clear, specific aim of the criminal actions taken against private people or entities. *See Wright*, 747 F.3d at 405, 410 (plan to bomb bridge owned by state of Ohio with belief that doing so would cause government to respond by placing security at bridges around the country was calculated to influence or affect government conduct); *United States v. Dye*, 538 F. App'x 654, 666 (6th Cir. 2013) (firebombing

of a building containing judge's chambers and bailiff's office was intended to affect the operations of court he was set to appear before); *United States v. McDavid*, 396 F. App'x 365, 368 (9th Cir. 2010) (conspirators who targeted several facilities for bombing, including a federal facility for tree genetics, and a federal dam and a fish hatchery, had expressly intended to disrupt the government by targeting federal facilities); *United States v. Christianson*, 586 F.3d 532, 535 (7th Cir. 2009) (Earth Liberation Front members who destroyed several U.S. Forest Service research projects, including chopping down trees at a research station and vandalizing government property, intended to coercively affect government conduct); *Tubbs*, 290 F. App'x at 68 (no plain error in district court's determination burning down a ranger station was intended to influence government conduct); *United States v. Mandhai*, 375 F.3d 1243, 1248 (11th Cir. 2004) (finding substantial evidence supporting retaliatory or influence-and-affect terrorism where defendant's "goal was to bomb and disable public utilities in the hopes that power outages would lead to civil strife and upheaval on the streets of Miami" and "planned to demand the release of Muslim prisoners and changes in the government's foreign policy after the bombings").

One recent case appears to diverge from the judicial consensus in favor of a narrowly-construed targeting requirement. The Tenth Circuit held earlier this year that defendants who planned to bomb an apartment complex and mosque in Garden

City, Kansas were properly sentenced under the terrorism enhancement. *United States v. Stein*, 985 F.3d 1254, 1267 (10th Cir. 2021) (cert petition docketed). The Tenth Circuit rejected appellants' arguments that the enhancement should not have applied because "the primary target of their offense was a civilian population." *Id.* The court reasoned that "[w]hile it is true that defendants were motivated by a strong anti-Muslim sentiment, there is ample evidence demonstrating that defendants' offenses were also calculated to influence or retaliate against government conduct." *Id.* While impliedly conceding that "strong anti-Muslim sentiment" itself was insufficient to establish calculation to influence or affect, the court nevertheless concluded that such calculation existed because 1) defendants wrote a manifesto addressed to the U.S. government and intended to "wake up the American people" to a "tyrannical government"; 2) defendants had several ambient complaints about government immigration policy; and 3) evidence at trial repeatedly suggested the immigration policy of the federal government was a "motivating factor" for the attack. *Id.* Such evidence was missing in Reznicek's case.

However, to the extent *Stein* is analogous to the instant case, it was wrongly decided, and this Court should decline to accord it persuasive weight, for at least two reasons. First, it confuses the "calculation" required by 18 U.S.C. § 2332b(g)(5) with motive. *See United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010) ("Calculation may often serve motive, but they are not, in fact, identical. Section

2332b(g)(5)(A) does not focus on the defendant but on his 'offense,' asking whether it was calculated, i.e., planned—for whatever reason or motive—to achieve the stated object."). Anti-government motive is insufficient; the question is what the defendants knew, reasonably believed, or should have known to be the likely actual effect of the criminal acts. *See id.* ("'Motive' is concerned with the rationale for an actor's particular conduct. . . . 'Calculation' is concerned with the object that the actor seeks to achieve through planning or contrivance." (internal citations omitted)). Second, to the extent the planned bombings were intended to "wake up" the American people, the *Stein* court omitted to conduct any analysis of whether the actions taken were calculated to do so, and whether, had the American people been "woken up," such awakening would a) constitute an influence or effect on government conduct or b) whether such an outcome would have had sufficiently close relation to the bombing contemplated to count as the specific intent of that action.

In sum, *Stein* does appear to hold that any political act addressed to some extent to an attendant American public qualifies as terrorism under the much more specific, limited language of 2332b(g)(5). That is wrong. *Stein*, an outlier based on flawed reasoning, should not alter this Court's analysis under the great weight of countervailing precedent.

A limited exception to the general rule that influence-and-affect terrorism must narrowly target government conduct appears in so-called "material support" cases, where courts have found a defendant's knowing and intentional donation of money or resources to avowedly terrorist organizations under 18 U.S.C. § 2339A can be calculated to influence or affect government conduct without itself having been a direct targeting of such conduct. *See, e.g., United States v. Van Haften,* 881 F.3d 543, 544 (7th Cir. 2018) (supporting application of the enhancement where defendant attempted to give material support to ISIS by joining it, and "[t]he record contain[ed] overwhelming evidence that [he] sought revenge against the U.S. government" by doing so); *Mohamed*, 757 F.3d at 760 (affirming application of enhancement where defendant assisted men traveling to Somalia to fight against the "internationally-recognized Transitional Federal Government"); *United States v. Jayyousi*, 657 F.3d 1085, 1115 (11th Cir. 2011) (affirming application to material support convictions where "'the defendants' support activities were intended to displace 'infidel' governments that opposed radical Islamist goals"); *Awan*, 607 F.3d at 317–18 (reversing district court's determination that providing money to organizations whose "objective . . . was to influence the Indian government through violence" did not meet definition of terrorism); *see also United States v. Chandia*, 514 F.3d 365, 376 (4th Cir. 2008) (reversing district court for failing to make any factual findings in support of applying terrorism enhancement in material support

case and noting that the enhancement does not automatically apply to 2339A convictions). *But see Alhaggagi*, 978 F.3d at 701–02 (opening social media accounts for use by supposed ISIS sympathizers did not sufficiently demonstrate specific intent to influence or affect government conduct).

In these cases, however, defendants are guilty of intentionally promoting the anti-government actions of terrorists or terrorist organizations under section 2339A, and those actors and organizations are invariably concerned with influencing and affecting the conduct of government. The anti-government, terrorist aims of the political actors serve as a proxy, imputing an intent to influence or affect government actions to those giving material support, in much the same way that donating to a politician or organization may reasonably be understood as an attempt by the donor to further the actions of the politician or organization. In such cases there is no dispute that the actions of the organizations defendants support are intended to influence or affect the conduct of government, just whether the nexus between the defendant's support or donation and the recipient organization is tight enough to show specific intent. These cases are therefore distinguishable from cases like Reznicek's, where the question is whether *any* actions, done or supported, meet the definition of terrorism under 18 U.S.C. § 2332b(g)(5).

The balance of case law therefore sensibly excludes from the specific intent requirement acts that are merely political, or can be understood as having social

consequences, but do not specifically aim to influence or affect the conduct of government, as distinct from the conduct of other actors in the public sphere. The district court's preferred reading of the enhancement would permit punishment of any action whose purpose could, very broadly, be understood as political. This is both divergent from the statutory text and risks sweeping in all political crimes as "terrorism."

Because Reznicek and Montoya did not target government property or, by extension, conduct, and because their actions were only minimally occasioned by government inaction, there is no sense in which their actions were intended to influence or affect government conduct.

ii. Reznicek's Actions Did Not Constitute Intimidation or Coercion.

Offenses calculated to influence or affect the conduct of government only qualify as terrorist acts if calculated to do so "by intimidation or coercion." 18 U.S.C. § 2332b(g)(5).

It is not immediately obvious how these terms should be defined, as "intimidation" and "coercion" are typically understood either, in the context of the criminal law, as describing concepts applicable to crimes against the person, or, in commercial law, as describing the purposes of actions taken in a contractual setting between arms-length commercial actors. *See, e.g., United States v. Wilson,* 880

F.3d 80, 87 (3d Cir. 2018) (holding in the context of bank robbery, 18 U.S.C. § 2113(a), that the statute's intimidation requirement requires knowing commission of an act that would intimidate an objectively reasonable bank teller and is thus categorically a crime of violence); *Blackwell v. Kenworth Truck Co.*, 620 F.2d 104, 106 (5th Cir. 1980) (reinstating jury verdict against defendant automobile wholesaler because it had, in its negotiations with plaintiff automobile dealership, used coercion and intimidation in violation of the Automobile Dealers' Franchise Act by demanding capital improvements and other changes in operations in advance of any renewed contract between the parties).

The relatively poor fit between the legal concepts of intimidation and coercion and acts of vandalism or property damage conducted against a private corporation highlights the general inapplicability of these concepts to such actions. It is clear how acts or threats of violence levied against government targets or a civilian population might intimidate or coerce that civilian population or its government representatives. Intimidation and coercion are concepts that have their origin in criminal law in crimes against the person. *See, e.g.*, W. LaFave, Substantive Criminal Law § 17.3(d) (3d ed. 2018) (2020 Update) (subsection discussing coercion form of imposition sufficient to constitute rape). When extrapolated to crimes committed against private corporations, however, there must be some further

showing that the corporate "victim" has been intimidated or coerced, or that such intimidation or coercion was attempted.

Inflicting property damage and costing Energy Transfer Partners money would also, perhaps even more efficaciously, have been accomplished by a boycott or by democratic action that rendered their investment in DAPL less profitable or unprofitable. It would not be appropriate to describe such conduct as intimidating or coercive, however. The mere use of vandalism to accomplish this end does not automatically transform the crimes in questions into coercive or intimidating crimes; more is required. Reznicek's comparatively limited degradation of Energy Transfer Partners' capital did not qualify as coercion or intimidation. *See* Energy Transfer Partners, Wikipedia, https://en.wikipedia.org/wiki/Energy_ Transfer_Partners (visited Oct. 21, 2021) (reflecting $38.94 billion in 2020 revenue and $95.144 billion in total assets).

iii. The Guideline Commentary Notes Suggest Reznicek's Actions Fell Well Outside the Scope of "Terrorism."

The guidelines themselves make clear that Reznicek's actions not only did not fall within the ambit of "terrorism" under U.S.C. § 2332b(g)(5), but also fall far outside the heartland of the general kind of conduct aimed to be additionally punished by section 3A1.4.

The guidelines recognize the narrow scope of 18 U.S.C. § 2332b(g)(5). The commentary note to the terrorism enhancement provides:

> By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which . . . the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

USSG § 3A1.4 cmt. n.4. The guidelines thus recognize that acts calculated[4] to influence or affect civilian populations through intimidation or coercion, but not aimed at government targets, may warrant an upward departure, but fall outside the ambit of the guideline definition and the statutory definition the guidelines

[4] Notably, the commentary quoted here begs the question about what "terrorism" is. Terrorism is defined by 18 U.S.C. § 2332b(g)(5) as an enumerated offense calculated to influence or affect, or retaliate against, government conduct by intimidation or coercion, but the note proceeds to refer to a "terrorist motive . . . to intimidate or coerce a civilian population." Other issues exist with the guideline formulation quoted. If a "terrorist" act need not be directed at the conduct of government, it is unclear what the enumerated offense could be intimidating or coercing the civilian population to do. And as many courts have noted, 2332b is unconcerned with motive, but the commentary note refers only to "the terrorist motive [sic]." The commentary note seems to invite an application of the label "terrorism" to any listed offense based on criteria that are at best unspecified, expressly or by reference, and to encourage application of the label "terrorism" based on unstated assumptions. To the extent the commentary is a) explanatory of the guideline or statute itself and b) a plainly erroneous reading of those texts, it is not authoritative. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

incorporate. (Reznicek notes that although the district court did not conduct a separate departure analysis under the commentary note, the note would not apply to her, as her actions were not calculated to "intimidate" or "coerce" a civilian population.)

So too, to the extent the commentary note is an authoritative interpretation of the outer boundaries of 3A1.4, it is important that corporate "victims" are omitted from its mention. The commentary note does not suppose that crimes aimed to retaliate against or affect the actions of for-profit corporations might merit upward departure even though they do not meet the statutory definition of terrorism. This reflects an implied (and correct) judgment that offenses calculated to influence the conduct of government or to intimidate or coerce a civilian population are more culpable than the guidelines would otherwise allow for, because of the strong public goods implicated in the free and orderly operation of the people's government and public life. The unenhanced guidelines, by contrast, are sufficient to protect and deter against politically motivated acts of vandalism against private corporations. *See* USSG § 3A1.4, cmt. n.4. There is no public good inherent in the courts' enhanced use of the criminal sanction merely to defend the interests of capital.

iv. Harmless Error

The error was not harmless. Although the district court stated that it would have imposed the same sentence regardless of whether its application of the § 3A1.4 terrorism enhancement was erroneous, the assertion cannot withstand scrutiny.

Although a district court has substantial discretion in fashioning and imposing a sentence under 18 U.S.C. § 3553(a), that discretion is not unlimited. *See United States v. Martinez*, 821 F.3d 984, 990 (8th Cir. 2016) (noting that major departures from the guideline range must be justified by more significant justifications than minor ones, and remanding because the district court erroneously determined defendant was a career offender and justified its "alternative sentence" insufficiently by reference to the law and the record in the case); *Gall v. United States*, 552 U.S. 38, 50 (2007). The district court's 96-month sentence was, as argued above, more than twice the top of the high end of the correct guideline range. The district court justified this massive upward variance from the correct range by stating that, if the guideline range were 37–46 months, the upward variance would have been justified "because of the applicable 3553(a) factors," without further explanation. Sent. Tr. 65:8. Those factors, as discussed by the district court earlier in the hearing, were the "risk to others" created by Reznicek's actions, *id.* at 60:3–10; the temporal scope and the number of individual acts of vandalism, *id.* at 60:3–10; Reznicek's evinced belief that her actions were not morally wrong, *id.* at 61:1–4; the need to deter others from taking similar action, *id.* at 62:6–9; and Reznicek's apparent wish that other

people would use vandalism to protest the destruction of the environment, *id.* at 62:1–9.

Here, as in *Martinez*, the dramatic departure from the appropriate guideline range is unsupported by facts in the record. Reznicek's guideline range already incorporated many of the features the district court appears to have viewed as particularly aggravating, including the use of arson or explosives and the fiscal scale of the damage. PSR ¶ 35; USSG § 2B1.1(c)(2). The district court did not explain how the particular instance of arson here was twice as dangerous as others contemplated by the applicable guideline, and its reference to danger to first responders or pipeline workers is unsupported in the record beyond the mere fact that arson was used. Therefore, any alternative sentence is substantively unreasonable.

It is insufficient simply to state that the sentence would have been the same absent the miscalculation. The difference in the guideline range was massive, and that correctly calculated range is one of the factors the district court is required to consider.[5] 18 U.S.C. § 3553(a). Resentencing is required given the magnitude of the error.

[5] The district court treated Reznicek as if she had a criminal history category VI rather than II. USSG § 3A1.4. Had the district court erred in its arithmetic scoring and attribution of criminal history points by four criminal history categories, it would not be credible to claim that the error was insignificant or its effect on the sentence

II. THE DISTRICT COURT ERRED IN FAILING TO REQUIRE THE GOVERNMENT TO PROVE UNDERLYING FACTS BY CLEAR AND CONVINCING EVIDENCE.

Standard of Review:

The Court reviews constitutional challenges, including challenges to the constitutionality of the standard of proof required at sentencing, de novo. *See United States v. Villareal-Amarillas*, 562 F.3d 892, 895 (8th Cir. 2009).

Merits:

The Ninth Circuit has held that a defendant's right to due process under the Fourteenth Amendment requires proof by clear and convincing evidence of facts used to support a sentencing factor that has an "extremely disproportionate" effect on a defendant's ultimate sentence. *United States v. Jordan*, 256 F.3d 922, 926–30 (9th Cir. 2001); *see Alhaggagi*, 978 F.3d at 700–01 (applying this standard to application of the terrorism enhancement under 3A1.4). In applying this standard, the Ninth Circuit looks at several factors, including whether the enhanced sentencing guideline range more than doubles the length of the sentence authorized by the initial guideline range, and whether the increase in levels is less than or equal to four. *Jordan*, 256 F.3d at 928. Because Reznicek's guideline range was increased by application of the terrorism enhancement from 37–46 months to 210–240 months,

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imposed trivial. The district court's claim here is effectively this.

Reznicek urges this Court to adopt the Ninth Circuit's reasoning and hold that such an enhancement violates due process if not supported by facts found by clear and convincing evidence.

Reznicek acknowledges that this argument is squarely foreclosed by this Court's holding in *Villareal-Amarillas*. *See Villareal-Amarillas*, 562 F.3d at 894–98. She raises the argument in order to preserve it.

III. REZNICEK'S SENTENCE WAS SUBSTANTIVELY UNREASONABLE

Standard of Review: Reznicek challenges her sentence as substantively unreasonable. "A defendant need not object to preserve an attack on the length of the sentence imposed if he alleges only that the district court erred in weighing the 3553(a) factors." *United States v. Miller*, 557 F.3d 910, 916 (8th Cir. 2009). However, because Reznicek requested a sentence lower than the one ultimately imposed, this Court reviews the district court's judgment for abuse of discretion. *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766–67 (2020).

Reznicek's sentence is reviewed for reasonableness in light of the factors set forth in 18 U.S.C. § 3553(a). *United States v. Jeffries,* 615 F.3d 909, 910 (8th Cir. 2010); *United States v. Miner*, 544 F.3d 930, 932 (8th Cir. 2008); *United States v. Pizano*, 403 F.3d 991, 995 (8th Cir. 2005); *see United States v. Green*, 691 F.3d 960, 966 (8th Cir. 2012) ("We review the substantive reasonableness of a sentence under

a deferential abuse-of-discretion standard."); *accord United States v. Manning*, 738 F.3d 937, 947 (8th Cir. 2014). This "narrow and deferential" review means that only an "unusual case" will warrant a finding of a substantively unreasonable sentence. *United States v. Shuler*, 598 F.3d 444, 447 (8th Cir. 2010).

However, substantive reasonableness review is not a "hollow exercise." *United States v. Kane*, 639 F.3d 1121, 1135 (8th Cir. 2011); *see also United States v. Dautovic*, 763 F.3d 927, 934–35 (8th Cir. 2014) (finding 20-month sentence substantively unreasonable). An extreme sentence that reflects an "unreasonable weighing" of the relevant sentencing factors remains subject to correction on appeal. *Id.* at 934.

"A district court abuses its sentencing discretion and imposes an unreasonable sentence when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors." *Miner*, 544 F.3d at 932. When a sentence has been imposed outside of the advisory guideline range, the appellate court may not apply a presumption of reasonableness to the district court's sentence. *United States v. Grimes*, 702 F.3d 460, 471 (8th Cir. 2012). "Where the district court imposes a sentence outside the guidelines range, [the appeals court] 'may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent

of the variance.'" *United States v. Never Misses A Shot*, 715 F.3d 1048, 1054 (8th Cir. 2013) (quoting *Gall*, 552 U.S. at 51).

Merits: Reznicek respectfully submits that her 96-month sentence is substantively unreasonable.

Reznicek and Montoya attempted to increase the costs to build and hinder the deployment of a pipeline. However, and *pace* the district court's concerns about injury to persons, Reznicek and Montoya harmed no one and aimed to harm no one. Reznicek and Montoya were attempting to slow fossil fuel extraction through property damage and raising political awareness about that, and along the way specifically and successfully sought not to injure anyone. PSR ¶ 27.

The district court's stated focus on deterrence as the basis for Reznicek's sentence is troubling. The district court construed Reznicek's and Montoya's statements to others regarding the desirability of climate protest and avowedly nonviolent climate action as aggravating factors, and sought to punish Reznicek disproportionately severely for this reason. The obvious outcome is a chilling effect on speech, protest, and political mobilization.

As the district court noted, Reznicek is also an admirable, kind, and selfless person. Over the last decade she has worked as a resident staff member at the Des Moines Catholic Worker. PSR ¶ 112. In exchange for room and board there, she worked ten hours a day serving the community in which she lived, helping

vulnerable residents, and providing mentorship to students displaced from campus dormitories during the recent pandemic. *Id.* Recently, she also served as a resident staff member at the St. Scholastica Monastery in Duluth, Minnesota, visiting elderly sisters in the infirmary, serving as a greeter and hospitality minister, working outdoors, accompanying sisters to medical appointments, and providing accommodations to retreatants. *Id.* ¶ 115. Since her early thirties, she has been involved in political activism in service of environmental causes. *Id.* ¶¶ 58–71. Reznicek has devoted her life to the welfare of others, both those in her community and that she will never meet. Fifty letters of support attesting to her personal qualities were written and submitted by members of her community.

She deserved better. Her sentence was unreasonable. Remand is appropriate.

CONCLUSION

For all the above reasons, Reznicek respectfully requests that this Court reverse and remand for resentencing.

Respectfully submitted,

/s/ Heather Quick
Heather Quick, Asst. Federal Defender
Federal Public Defender's Office
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
PHONE: (319) 363-9540
FAX: (319) 363-9542

CERTIFICATE OF FILING AND SERVICE

I certify that on November 4, 2021, I electronically filed the foregoing brief and addendum with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users were served by the CM/ECF system. The brief and addendum were scanned for viruses using Symantec Endpoint Protection 12.1.4013.4013. I also certify that after receipt of notice that the brief and addendum are filed, I will serve a paper copy of this brief on defendant-appellant by mailing him a copy at FCI Waseca, Federal Correctional Institution, P.O. Box 1731, Waseca, MN 56093. I further certify that after receipt of notice that the brief and addendum are filed, I will transmit10 paper copies of the brief and addendum to the Clerk of Court via Federal Express and 1 paper copy to the appellee via regular mail as noted below.

Respectfully submitted,

/s/ Heather Quick

Heather Quick, Asst. Federal Defender
Federal Public Defender's Office
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
P: (319) 363-9540 F: (319) 363-9542

Copy to:
Jason Griess, AUSA
U.S. Attorney's Office
110 E. Court Avenue, Suite 286
Des Moines, IA 50309

Fed. R. App. P. 32(a)(7) AND 8th CIR. RULE 28A(c) CERTIFICATION

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). The brief uses a proportional space, 14 point New Times Roman font. Based on a line count under Microsoft Word Version 16.0.4849.1000, the brief contains 713 lines and 7,614 words, excluding the table of contents, table of authorities, any addendum, and certificates of counsel.

Respectfully submitted,

/s/ Heather Quick

Heather Quick, Asst. Federal Defender
Federal Public Defender's Office
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
PHONE: (319) 363-9540
FAX: (319) 363-9542