



**MEMORANDUM**

**To: Kerwin Olson, Executive Director, Citizens Action Coalition**

**From: Jessica Wegg, Saeed & Little, LLP**

**Re: SB 471**

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SB 471 seeks to add new sections to the Indiana Criminal Code (Title 35 of the Indiana Code) for certain acts committed on and/or against “critical infrastructure,” which is newly defined in broad terms to encompass most, if not all, energy and utility related facilities and equipment (*proposed* IC § 35-46-10-1). The proposed act also aims hefty fines at organizations found to conspire with those convicted under it. Legislation such as this has been proposed in legislatures across the country and, almost certainly, is intended to chill the exercise of First Amendment rights of speech and assembly by environmental protestors.

This memorandum focuses on these three related issues:

1. Conspiracy
  2. First Amendment implications
  3. Private property implications
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**1. Conspiracy – How This Proposed Legislation Seeks To Punish Organizations**

Tucked neatly into the penultimate section of this proposed legislation is this:

Sec. 4. Except as provided in IC 35-50-2, if an organization is found to be a conspirator with a person who is convicted of an offense described under section 2 or 3 of this chapter, the conspiring organization shall be punished by a fine not to exceed one hundred thousand dollars (\$100,000).

There are several immediately obvious problems with this section. In order of their appearance, they are: (a) the reference to IC 35-50-2, (b) the word “organization”, (c) the word “found”, and (d) the word “conspirator.” Following a brief discussion of these problems, a potential response is provided.

**(a) Reference to IC 35-50-2**

IC 35-50-2 concerns “Death Sentence and Sentences for Felonies and Habitual Offenders”; for level 4, level 5, and level 6 felonies, it limits the fine to “not more than ten thousand dollars (\$10,000).” IC 35-50-2-5.5, -6, and -7.) Given that, under IC 35-41-5-2(a), “[a] conspiracy to commit a felony is a felony of the same level as the underlying felony[.]” and that under the proposed legislation, the highest level of felony possible is a 4, under what circumstances would it be legally possible for an organization to be subject to a fine greater than \$10,000? IC 35-50-2 seems to entirely prohibit this punishment.

**(b) The word “organization”**

What constitutes an “organization” for the purposes of this section? How many people are required to form an “organization”? Is a Facebook group of concerned community members an “organization” subject to a \$100,000 fine, or does the “organization” have to be incorporated and registered with the Secretary of State? Note that a conspiracy can involve as few as two people.

**(c) The word “found”**

What does “found” mean in this context? Does it mean “discovered,” “charged,” or “convicted”? What about “liable” under a civil conspiracy rubric (with its lower burden of proof)?

**(d) The word “conspirator”**

What does it take for an organization to “conspire” with a person convicted under the act? Is the word used with reference to criminal conspiracy, which is defined in IC 35-41-5-2 (“A person conspires to commit a felony when, with intent to commit the felony, the person agrees with another person to commit the felony. . . . The state must allege and prove that either the person or the person with whom he or she agreed performed an overt act in furtherance of the agreement.”)? Again, though,

**(e) Response to these problems**

SB 471 seems unconstitutionally vague, and could be challenged on those grounds. “To satisfy the demands of due process, ‘a penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.’” *Trustees of Indiana University v. Prosecutor of Marion County Indiana*, 289 F.Supp.3d 905, 916 (S.D. Ind. 2018) (quoting *Skilling v. United States*, 561 U.S. 358, 402-03 (2010)). “The Constitution tolerates a lesser degree of vagueness in enactments with criminal rather than civil penalties because the consequences are more severe.” *Id.* (quoting *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999)). Further, “[t]he most important factor affecting the degree of clarity necessary to satisfy the Constitution is whether constitutional rights are at stake. When a law threatens to inhibit the exercise of constitutionally protected rights, such as the present case, the Constitution demands that courts apply a more stringent vagueness test.” *Karlin*, 188 F.3d at 458.

## **2. First Amendment Implications**

SB 471 has the obvious intent to chill the exercise of the First Amendment rights of speech and assembly, but it also has the curious language, “This chapter does not apply to conduct protected under the Constitution of the United States, the Constitution of the State of Indiana, or a state or federal law or rule . . . .” *Proposed IC 35-46-10-0.5*. So it is likely a *defense* that certain conduct is protected under the constitution, but are environmental protestors able to risk arrest records, jail time, fines, and attorneys fees? Will an unsophisticated county judge make the correct assessment of whether a certain act is protected by the constitution?

Here is the other way that First Amendment rights are chilled by these changes – through the civil courts. IC 35-43-4-2 is amended by SB 471 to remove the phrase “key facility” and replace it with “critical infrastructure facility.” The change within IC 35-43 is important because, if a *civil* lawsuit is filed to recover for violations of this portion of the *criminal* code, the consequences can be severe: treble damages, costs, attorneys’ fees, travel expenses, lost time, direct and indirect expenses, and “all other reasonable costs of collection.” IC 34-24-3-1.

A lawsuit challenging this prior restraint on speech may be necessary.

## **3. Private Property Implications**

Finally, what are the implications of SB 471 for private property owners? Easements for building “critical infrastructure” on or through private property will likely be drafted to limit the private property owner’s ability to allow the full use and enjoyment of his or her land. Theoretically, a farmer (for example) who has an LLC for his business could be charged with conspiracy if he allows protesters access to his land.

SB 471 should be challenged if it passes. There are already trespass and property damage laws on the books to discourage this type of behavior. The special interests of “critical infrastructure” companies should not be permitted to outweigh Hoosiers’ constitutional rights of speech and assembly.