ACLU
AMERICAN CIVIL LIBERTIES UNION
Wisconsin

207 East Buffalo Street, Ste 325
Milwaukee, WI 53202
(414) 272-4032
aclu-wi.org

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Chair Wanggaard, Vice-Chair James, and Honorable Members of the Senate Committee on Judiciary and Public Safety:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide testimony in opposition to Senate Bill 94.

> "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

SB-94 is part of an ongoing trend of attempts by government authorities to limit and intimidate speech, in ways that exceed the boundaries of the First Amendment set out by the U.S. Supreme Court in cases like *Brandenburg*. Over the past 8 years, we've seen over 300 bills introduced nationwide targeting the most impactful protests in recent memory—from racial justice activists calling for an end to police killings, to campus protests, to indigenous and environmental justice protesters demanding no more pipeline construction.

This trend echoes the racist history of federal anti-protest legislation passed in 1968 following mass civil rights demonstrations, marches, and rallies, including the Anti-Riot Act and the Civil Obedience Act. Those laws' legislative histories specifically name civil rights leaders, including Martin Luther King, Jr. as targets, and their subsequent use largely lives up to their terrible origins. The Anti-Riot Act was most famously used to prosecute the Chicago 7—anti-war, counter-culture, pro-youth, and anti-racist activists—and Bobby Seale.

Wisconsin has a robust history of using protest to bring about positive change. Had SB-94 been law during some of the most pivotal moments in our state, the very people who shaped our history for the better may have been deterred from using their voice or even felonized under this harsh and overly broad legislation.

Vel Phillips on hood of a bus next to Father Groppi surrounded by Milwaukee NAACP Youth Council protesters. *University of Wisconsin-Milwaukee, "Phillips, Vel | March on Milwaukee – Libraries Digital Collection."*

In August 1966, two dozen migrant farm workers, mostly Mexican marched from Wautoma, Wisconsin to the Capitol in Madison to draw attention to their demands for a minimum wage for agricultural workers of $1.25 per hour, improved housing, public bathrooms for workers, and a meeting with the Governor's Committee on Migratory Labor. *Wisconsin Labor History Society*

Although the co-sponsorship memo states this bill about paying for destruction caused by violent riots, the real effect of this bill is to chill vigorous speech, especially in public protests. If SB-94 were enacted, most reasonable, law-abiding Americans may well think twice before joining a protest, rally, or demonstration. In an era of historic activism, that response isn't just unconstitutional, it's fundamentally un-American.

We already have remedies for vandalism and criminal destruction of property in the Wisconsin criminal statutes. Persons who are victims of tortious conduct already have the ability to sue for damages to their property. Judges already have the ability to award restitution and impose monetary penalties which can be used to compensate victims.

This bill criminalizes what it calls "riots" – but the definition of a riot is far from the image of a riot involving looting and burning and chaos that you might have in your minds.

The definition of riot requires only three people in a group, only one of whom engages in a violent action to damage property. In other words, 3 children together and one decides to throw a rock on a dare from the others which breaks a window, is a riot under the definition of the statute. But the statute, goes even further – a threat to riot is a crime, "I dare you to throw that rock" – even if the rock is never thrown. And then it goes further yet to make "inciting" that dare a crime – inciting is "urge, promote, organize, encourage, or instigate other persons."

In 1972, hundreds marched from Keshena, Wisconsin to Madison to protest the sale of Menominee land despite treaty restrictions. *University of Wisconsin-Madison Archives.*

This vague and largely unlimited statute gives a free pass to over-zealous policing of protest activities. When marchers protesting wrongful action by their government shout "No Justice – No Peace" – will that protected speech be seen as encouraging or instigating someone (and it only takes one person in a group of three) to take action against a piece of property, however insignificant? The right to assemble is threatened when the law can prosecute an entire group for the actions of a single individual in that group.

Crowds continued to protest restrictions on collective bargaining for public employees at the Wisconsin State Capitol in Madison on March 12, 2011. REUTERS/Darren Hauck

Not only does this bill encourage over-zealous policing of protected protest activity, but the statute creates a civil cause of action, a hammer to wield against not just someone who might have painted a slogan on a wall, but also against anyone who might be in that net of "encouragers." This civil remedy includes not just the costs of repairing property, but additional compensatory damages, plus emotional distress, plus attorney's fees.

Further, the bill also strips local governments of the ability to regulate police conduct at protests. Local leaders often set guidelines to ensure that law enforcement responds to protests in ways that prioritize safety, de-escalation, and accountability. SB-94 takes away that power, leaving communities vulnerable to aggressive law enforcement tactics that have the potential to escalate violence at demonstrations.

The ACLU of Wisconsin urges committee members to oppose SB-94. Dissent is patriotic.