Van H. Wanggaard

Wisconsin State Senator

October 19, 2017

Testimony on Senate Bills 303, 304, and 305

Thank you committee members for hearing Senate Bills 303, 304, and 305 today. This package of bills addresses the growing popularity of riots and the damage that they perpetrate in our communities.

Current law addresses the harmful actions that are often associated with rioting only when violating unlawful assembly laws and after refusing to disperse when ordered. In the wake of recent disruptions both in our state and across the nation, it is important to focus on keeping the public safe and holding those responsible accountable.

Wisconsin is one of few states that does not define riot in statute. Under the proposed Substitute Amendment 1 to Senate Bill 303, a person that, as part of an assembly of at least three persons, intentionally commits an act of violence that constitutes a clear and present danger of property damage or personal injury, or threatens to do so, would be guilty a Class I felony.

In addition to damaging property, shutting down major roadways has also become a popular tactic during riots. This is an issue of public safety that affects not only those on the freeways and highways, but first responders trying to get to an emergency, innocent bystanders and even the rioters themselves. Senate Bill 304 addresses this by classifying intentionally blocking a thoroughfare as a Class H felony.

For the safety of everyone, including those involved, we also need to put a penalty on being armed with a firearm while participating in a riot. Riots are already dangerous, and adding a deadly weapon into the mix only increases the likelihood of a tragedy. Senate Bill 305 makes this a Class G felony.

To be clear, the intention of these bills is not to simply punish peaceful protestors participating in lawful gatherings. These bills are meant to address bad actors that seek to damage property, commit acts of violence, and incite other unlawful behavior.

Passing Senate Bills 303, 304, and 305 will insure the safety of our communities and protect the public. This package has the support of several law enforcement groups. I encourage you to support the passage of these bills as well.

Serving Racine and Kenosha Counties - Senate District 21

State Capitol, P.O. Box 7882, Madison, WI 53707-7882 • (608) 266-1832 • Toll-free (866) 615-7510

Sen.Wanggaard@legis.wi.gov • SenatorWanggaard.com

JOHN SPIROS

State Representative • 86th Assembly District

Senate Bills 303, 304, and 305

October 19, 2017

Testimony from Rep. Spiros

Good afternoon, and thank you Chairman and members of the Senate Committee on Judiciary and Public Safety for allowing me to have the opportunity to share my testimony with you today regarding Senate Bills 303, 304, and 305, which address the issue of rioting and provide penalties for participating in a riot.

Our country's first amendment rights and history of peaceful demonstrations have been an important cornerstone of American progress. However, over the last several years we have seen an increase in the number of high-profile, violent riots across the country that have terrorized our big cites, often leaving in their wake damage to businesses and personal property, not to mention the personal injuries and even fatalities that have been inflicted. And despite the increasing number of riots, Wisconsin is still one of just a handful of states that does not provide a penalty for riotous behavior.

Senate Bill 303 would define a riot as "a public disturbance that involves an intentional act of violence, as part of an assembly of at least three persons, that constitutes a clear and present danger of property damage or personal injury or an intentional threat of an act of violence, as part of an assembly of at least three persons having the ability of immediate execution of the threat, if the threatened action would constitute a clear and present danger of property damage or personal injury". The bill would set the penalty for participating in a riot as a Class I felony. This definition was taken directly from the US Code, and is in line with the definition used in 16 other states.

Senate Bill 304 would create a criminal penalty for anyone who blocks or obstructs the lawful use of a private or public thoroughfare or access to entrances and exits of any private or public building or dwelling while participating in a riot. The penalty for this offense would be a Class A misdemeanor, which is consistent with the penalty for committing the same crime in the course of an unlawful assembly.

In addition to the personal and property damage we have seen publicized in riots, we have also seen countless circumstances of rioters shutting down traffic on major roads. Not only does this create an inconvenience for everyone in the area, but also creates a safety risk as emergency vehicles are also prevented from passing through. This is an issue of public safety for everyone, including first responders, bystanders, and even the rioters themselves.

State Capitol Office: Room 17 North • P.O. Box 8953 • Madison, WI 53708-8953
(608) 266-1182 • Fax: (608) 282-3686 • Toll-Free: (888) 534-0086 • Rep.Spiros@legis.wisconsin.gov

JOHN SPIROS

State Representative • 86th Assembly District

Senate Bill 305 would prohibit participating in a riot while armed with a dangerous weapon, including a firearm, and would provide a penalty of a Class G felony. Riots already present an inherent danger to public safety, often resulting in personal and property damage. This risk is exponentially increased when those participating in the riot are using weapons.

During the riot that took place in Milwaukee in August 2016, an 18-year-old bystander was shot in the neck by an individual who was participating in the riot and armed with a firearm. During the same riot, firefighters were initially unable to put out fires at local businesses because of shots being fired at them and bricks being thrown at their trucks. Keep in mind that unlike police officers, firefighters aren't armed to protect themselves against this type of violence. In just one night during this riot, Milwaukee's ShotSpotter recorded 30 different instances of gunfire. This type of violent behavior creates a risk for those participating in and witnessing the riot, as well as our law enforcement officers whose job it is to keep the rest of us safe.

As a former law enforcement officer, my priority is public safety. That means protecting the safety of law enforcement, the safety of individuals who have to live and work in the neighborhoods where these riots take place, and the safety of those participating in the riots. Our goal should be to make sure everyone goes home safely at the end of the night, and addressing a problem like rioting, which has grown more and more prevalent in the last few years, is a big step in the right direction.

Many of the public safety bills I introduce are focused on prevention of crime. By setting parameters for what is and is not acceptable behavior during a demonstration, we can encourage demonstrators to remain peaceful, while also giving law enforcement officers and prosecutors the tools they need to properly address these crimes. These bills are in no way meant to suppress peaceful protests or assemblies, but rather to encourage that they remain peaceful. This was the reasoning behind the substitute amendments that further clarify that we are trying to penalize those who actually commit the violent acts or threat of violent acts.

Thank you again for allowing me the opportunity to share testimony in support of these bills.

State Capitol Office: Room 17 North • P.O. Box 8953 • Madison, WI 53708-8953
(608) 266-1182 • Fax: (608) 282-3686 • Toll-Free: (888) 534-0086 • Rep.Spiros@legis.wisconsin.gov

wisconsin DEMOCRACY campaign

203 South Paterson Street, Suite 100 / Madison, WI 53703-3689 / 608 255-4260 / www.wisdc.org

Testimony to the Senate Committee on Judiciary and Public Safety in opposition to "Riot bills" -- Senate Bills 303, 304 and 305

October 19, 2017

Good afternoon, Chairman Wanggaard and other distinguished members of the Committee, it's a pleasure to be with you today.

I'm Matt Rothschild, the executive director of the Wisconsin Democracy Campaign, a nonprofit here in Madison that's been around now for 22 years, advocating for clean and open government and for a fully functioning democracy.

Crucial to our democracy is the right to freedom of speech and assembly and association. It is enshrined in the First Amendment of the U.S. Constitution, and it is enshrined in our Wisconsin Constitution as well. Article I, Section 3, of our state constitution says, "No laws shall be passed to restrain or abridge the liberty of speech or of the press." Article I, Section 4, says, "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

This bill would restrain and abridge our free speech and free assembly and free association rights, and it would do so in a way that is expressly prohibited by the U.S. Supreme Court.

This bill would make it a felony to "riot," and it defines "riot" in a peculiar and unconstitutional way.

On the peculiar side, the bill states that a minimum of three persons assembled together would constitute a group that is capable of engaging in a riot. That seems like an awfully small number.

Then, to qualify as a riot, one of two things must happen, the bill says.

First, there must be "an intentional act of violence by one or more persons" of the group. Note that all three persons (or even all 300 persons if the group was that big) could be found guilty even if just one of them engages in the violence. Plus, the act of violence doesn't have to do actual damage to people or property. It just has to constitute "a clear and present danger of . . . damage or injury to the property of any other person or to another person."

Second, under the bill, even if there is no act of violence at all, you can still be convicted of engaging in a riot so long as a single member of the group issues a threat of violence and so long as you can be said to be intentionally participating in the riot.

And while I do appreciate the willingness of the authors to amend their original bills, and I do appreciate the concern expressed by Representatives Tusler and Thiesfeldt at the Assembly public hearing on Sept. 21 that the bill might sweep up those who were being nonviolent, I do not believe that the amendment solves the problem.

First of all, merely by putting the word "intentional" before the act of violence and the threat of violence doesn't do much, since it's likely that the person engaging in violence or threatening violence had the intent to do so in the first place.

And second, while it's an improvement to add the adverb "intentionally" in this sentence: "Whoever *intentionally* participates in a riot is guilty of a Class I felony," that doesn't really clear things up. What does "intentionally participates" actually mean? It is not defined in SB 303.

It's still possible, once the violent act or violent threat has occurred, that everyone present can be said to be intentionally participating in the riot. There is no requirement that you have to be someone who engages in violence or someone who issues a threat of violence. You just have to be in the group where one person does that. There is no requirement that the police have to notify you to disperse because a riot is under way, and that if you don't disperse, it will be assumed that you are intentionally participating in the riot. Everyone in the group could just be rounded up after the violent act occurs or the threat of violence is issued.

I've been at rallies where a person made violent threats, and that person was booed for doing so. Would the people who booed be also guilty of a felony because they didn't leave the scene after the threat was issued, when in fact they were urging nonviolence? What if a fight broke out, and people were begging those who were fighting to cut it out? Would they, too, be guilty of a riot? Or would just those being violent? If the latter, we don't need this bill, since fighting is already a crime.

So what does "intentionally participates" in a riot actually mean? It's unclear. And because it's unclear, an over-zealous prosecutor could scoop up everyone and slap the riot charge on them all.

Here's another serious problem with SB 303: The definition of the threat of nonviolence in SB 303 is itself unconstitutional.

The bill states that it's a riot when there is "an intentional threat of the commission of an act of violence by one or more persons that are part of an assembly of at least three persons having, individually or collectively, the ability of immediate execution of the threat, if the performance of the threatened act of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person to another person."

But what constitutes a "threat"? How explicit does it need to be? The U.S. Supreme Court has already weighed in on these questions. It has ruled on several occasions that vague threats of violence are protected under the First Amendment. In the landmark U.S. Supreme Court case *Brandenburg v. Ohio* in 1969, the court ruled in defense of the First Amendment rights of a Klansman who spoke at a rally and urged vengeance, in a vague way, upon Jews and African Americans. The Court ruled that such speech was protected. It said the Klansman was prosecuted for "mere advocacy not distinguished from incitement to imminent lawless action," and that he was also wrongly prosecuted for "assembly with others merely to advocate the described type of action."

This bill's language on the threat of violence has the same infirmities as the overturned Ohio law in the *Brandenburg* case. Nothing in this Wisconsin bill stipulates that the threat must be "imminent" or "likely to incite or produce" an act of violence. All it says is that at least one person in the group has "the ability" to immediately execute the threat. That's quite different. It also would criminalize "assembly with others" who are merely advocating a vague action.

Here's an example: At a rally of 300 people where there a lot of speakers, one speaker says, "If this injustice goes on much longer, we should go break some windows." Under the bill before you, not just the speaker but all the other 299 people in the assembled group could be guilty of a Class 1 Felony and face three and a half years in jail and be fined $10,000 because at least one of them, and probably most of them, could throw something through a window (thus meeting the bill's requirement to have "the ability of immediate execution of the threat").

But under *Brandenburg*, that is not sufficient, since the threat itself isn't "imminent."

Nor would this bill's prohibition of threats pass muster under other U.S. Supreme Court rulings, such as the 1969 case, *Watts v. United States*. In the *Watts* case, 19-year-old Robert Watts was convicted in the lower courts of threatening the President of the United States. Watts was speaking at a rally at the Washington Monument, and was vowing to resist the draft, saying: "I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle, the first man I want to get in my sights is LBJ." And Watts even made a gesture about aiming a rifle. But the U.S. Supreme Court overturned his conviction, saying it wasn't a direct threat but only "a kind of crude offensive method of stating a political opposition to the President." As Justice William O. Douglas wrote pointedly in his concurring opinion in *Watts*, "Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution."

That is what this bill is all about: suppressing the freedom of speech.

It's also about suppressing the freedom of assembly and association, as it reeks of guilt by association.

The U.S. Supreme Court ruled in *NAACP v. Claiborne Hardware Co.* in 1982 that "the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." It also said: "The

right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."

That pretty much blows a hole in these bills, and you're likely to face expensive litigation in the courts trying to defend these unconstitutional bills, which is not a wise use of the taxpayer's money.

What's more, these bills are totally unnecessary.

Violent acts are already crimes.

Damage to property is already a crime.

Direct, imminent threats to specific persons are already crimes.

Disorderly conduct is already a crime.

Conspiracy is already a crime.

Unlawful assembly is already a crime, and it already includes, in the Wisconsin statutes, "blocking or obstructing the lawful use by any other person, or persons of any private or public thoroughfares, property or of any positions of access or exit to or from any private or public building." So why do we need SB 304?

Failure to disperse is already a crime. And please note that SB 304, unlike the statute on unlawful assembly, doesn't even offer the people in a crowd "an order to disperse."

We don't need more criminal statutes that cover essentially the same ground.

I urge you to vote no on these unnecessary and unconstitutional bills.

I thank you for considering my views, and I welcome any questions you might have.

Madison Chapter
http://nlgmadison.org

COMMENTS ON SB 303 AND SB 304
October 19, 2017

CONTACT: Patricia Hammel, pkhammel@yahoo.com (608) 257-1369

The Madison chapter of the National Lawyers Guild opposes the proposals to further criminalize public protest which are the basis for SB 303 and 304, the "riot" act and adding penalties for blocking access to streets and buildings. This legislation is unnecessary and constitutionally overbroad in sweeping protected speech and assembly into the criminal code and making felons of law abiding citizens.

To be clear, threatening an act of violence against a person is already a crime. Section 947 of the Wisconsin Statutes already prohibits disorderly conduct (misdemeanor), disrupting a funeral or memorial service (misdemeanor or felony for repeat offenders), intimidation or harassment including by use of a computer (forfeiture to felony), threats of bombs or biological or toxic substance release (felonies) terrorist threats (felony since 2015) and unlawful assemblies (misdemeanor) including blocking entrances to buildings and failing to disperse when ordered, with additional punishments for University of Wisconsin students and employees.

Causing damage to property is also currently a crime in Wisconsin pursuant to sec. 943 of the statutes with enhanced penalties (felony) for damage to roads, public utility property and archeological or cultural sites. Assault against another person is also a crime under sec. 940 of Wisconsin's statutes; battery is generally a felony now, with increasing penalties for battery to vulnerable individuals and special provisions for vulnerable individuals, and law enforcement officers (threats are also felonies).

So what do SB 303 and 304, adding the "riot" provision and singling out groups of three or more (?) accomplish? They make "Whoever participates in a riot" in which someone else, who may be completely unknown or even adverse to the person being charged, a felon by association.

These proposals are unnecessary and unconstitutional. It is worth remembering that the State has lost challenges to overbroad penalties against groups of four assembling in the Capitol without a permit as recently as 2013. U.S. District Court Judge William Conley issued an injunction against enforcement of the Wisconsin Administrative Code and Capitol Access policies on July 8 2013, finding that the Dept. of Administration's assembly permitting scheme was improperly content based and overly broad, and that the plaintiff Michael Kissick had shown a likelihood of success in his case against DOA Secretary Huebsch and Capitol Police chief Erwin. .

To be constitutional, a statute limiting First Amendment rights of speech and assembly must be narrowly drawn to achieve a legitimate objective. A statute criminalizing the mere presence of a person with two or more others who are violent or threatening violence is NOT narrowly drawn. It is overly broad. It chills protected conduct by imposing a potential felony charge on someone who is not doing anything wrong, and may be participating in activity that deserves the highest level of constitutional protection.

A felony charge is a serious matter. The number of attorneys who take cases of people charged with felonies is relatively limited because these are serious charges that can affect a person's access to jobs. housing, education and the right to vote. Retainers for attorneys in a felony case are in the thousands of dollars. The State Public Defender's office is underfunded and the number of attorneys who take private appointments has declined because private attorneys can't keep their doors open getting $35 an hour.

You may say that other states have "riot" bills so we should have one too. Those states (North Dakota being the one I am most familiar with) do not have unlawful assembly bills and the penalty for participating in a "riot" is a misdemeanor there.

1. *This crime is a B misdemeanor*

North Dakota has three levels of misdemeanors: Class A, Class B, and Class C. A class B misdemeanor carries a Maximum penalty of 30 days in prison, a $1,500 fine, or both. N.D. Cent. Code Ann. § 12.1-32-01 (West).

2. *The terms of the crime*

A person is guilty of Engaging in a Riot if he participates in "a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function." N.D. Cent. Code Ann. § 12.1-25-03 (West). N.D. Cent. Code Ann. § 12.1-25-01 (West)."

Most of the people charged with "riot" in North Dakota last year have had their charges dismissed. Merely being there has not been found sufficient reason to sustain a misdemeanor charge. Wisconsin does not need a "riot" statute and people who assemble to exercise their free speech rights should not face felony charges. There are already penalties for committing acts of violence or being parties to such activity, and for blocking streets, and escalating penalties that adequately address any illegal activity.

The Madison Mass Defense group, involving attorney and legal worker members of the National Lawyers Guild, ACLU and others concerned about federal and state constitutional rights to petition and protest the government, represented over 100 defendants given over 330 tickets in the "crackdown" ordered by Capitol Police Chief Erwin since he became chief in 2013. Only one case went to a jury trial resulting in a guilty verdict, nearly all of them were dismissed by the prosecuting Wisconsin Attorney General's office after every Dane County judge assigned to the cases dismissed them.

The Madison Chapter of the National Lawyers Guild is the local arm of the national organization of lawyers, legal workers, law students, and jailhouse lawyers. The National Lawyers Guild represents progressive political movements, and its motto is that human rights are more sacred than property interests.

###