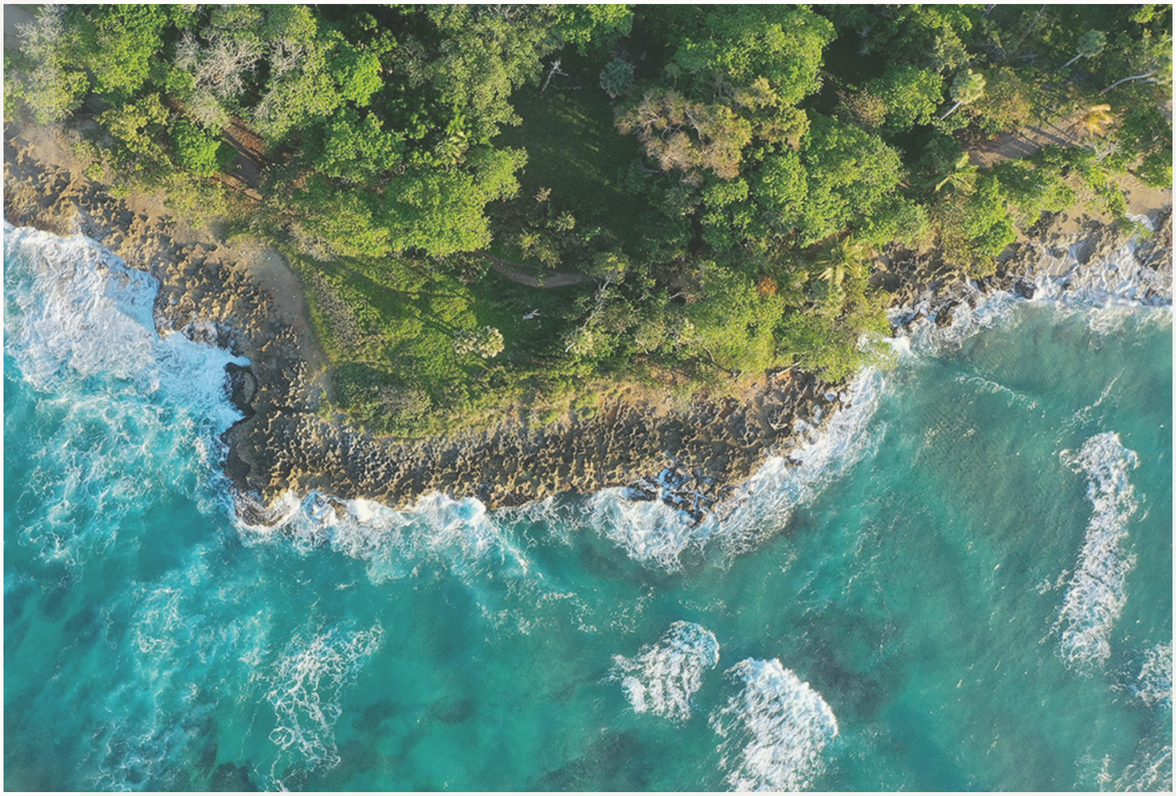
2023 STATEHOUSE REPORT:

Right-Wing Attacks on the Freedom to Invest Responsibly Falter in Legislatures



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This report was written by Connor Gibson and Frances Sawyer for Pleiades Strategy.

EXECUTIVE SUMMARY

In 2023 Republican lawmakers in 37 states introduced 165 pieces of legislation to weaponize government funds, contracts, and pensions to prevent companies and investors from considering basic, common-sense risk factors. The legislation is framed around restricting the use of Environmental, Social, and Governance (ESG) investment criteria, such as the safety and treatment of employees, the diversity of management and workforce, and readiness to withstand the impacts of climate change. Were they to become law, the inevitable result of the bills would be to manipulate the market to favor select industries, particularly the volatile fossil fuel and firearms sectors.

This coordinated legislative effort, commonly referred to as the anti-ESG movement, generated massive backlash from the business community, labor leaders, retirees, and even Republican politicians. It is not an issue that resonates with the public. Despite all the hype, the vast majority of anti-ESG bills failed to progress through legislative chambers, including in ten states fully controlled by Republicans. At present, 21 laws and 6 resolutions in 16 states have made it through legislatures this year. Many of the finalized bills were heavily amended to reduce most of the substantive portions. Broad escape clauses were added to limit the most draconian prohibitions, which experts have warned legally contravene the basic tenets of fiduciary duty, creating a "liability trap."

This report is the first comprehensive look at this legislative campaign and the broad effort to counter it. It follows the general arc of these 165 bills — where they came from, who sponsored them, who supported and opposed them, and how they fared.

As of June, 2023, our tracking has concluded that:

- At least 165 distinct bills (including 9 resolutions) were introduced in 37 states.
- 83 bills are dead, across 23 states:
    - In 17 states where legislation was introduced, no laws passed. 10 of these states are controlled by Republicans.
    - 3 bills were vetoed by the governor in Arizona.
- 42 bills that did not pass will carry over into the 2024 legislative session.
- 22 bills and 6 resolutions were approved by state governments:
    - 19 laws and 6 resolutions have passed in 14 states this year.
    - 3 enrolled bills await governor action in 3 states.
- 12 active bills are pending. 6 have not had committee hearings.

Check out our spreadsheet of all of the anti-ESG bills we tracked in 2023.
Each bill is categorized, and traced to specific model legislation, when relevant.

In this report, we map the coordinated special interest groups that crafted model bills and lobbied for their introduction. We showcase the exceptionally diverse opposition to the bills, including the bankers, businesses, financial officers, labor advocates, and environmentalists who saw the campaign as an attack on the American economy itself. We also provide the first comprehensive analysis of the types of bills introduced, offering a taxonomy of bills, so that readers can understand the tactical options attempted by Republican legislators.

It is safe to assume that the interest groups behind this legislative push are revising their strategies by evaluating the success and failure of the bills so that new versions can be introduced across the country in 2024. To anticipate where this effort may go next, we find it critical to understand the network of actors behind this legislative push, the specific types of bills they proposed, and the ways they were received in the states.

Delaying Climate Accounting — and Action

The climate crisis presents material financial risks across sectors and is increasingly recognized by investors, executives, and regulators as a key threat to economic performance and stability. From floods and fires disrupting supply chains to high heat lowering workforce productivity to stranded asset risk as companies and governments alike set net zero emissions targets, climate risks are shaping economic fortunes today—and threatening long term market value.

Voluntary climate-related risk disclosure has brought significant transparency to these risks, enabling investors to make informed capital allocation decisions as they build a risk-adjusted portfolio that meets their clients' needs. U.S. and European regulators are now proposing mandatory disclosures of these key climate risks, so that investors in public equities have equal access to robust, useful information on which to base their decisions.

As capital and regulators have become more climate-focused, fossil fuel companies recognize climate financial action as a potential threat to continued investment in their firms. The fossil fuel industry and their political allies claim there is "discrimination" against fossil fuel companies, yet to date the companies targeted as "boycotting" fossil fuels include some of the largest investors in fossil fuels worldwide. Bill language and testimony by anti-ESG proponents in several states suggests that these bills were written to prevent companies from taking climate risk seriously and to artificially boost continued investment in the fossil fuel sector.

THE OPPOSITION

Echoing a position taken by state banking associations across the country, Jay Kaprosy of the Arizona Bankers Association said in testimony on Arizona's proposed SB 1138, "What you have in front of you is probably the most anti-free market bill that you'll see this legislative session." Because of the blatantly anti-free market nature of this legislative trend, business groups, chambers of commerce, and trade associations representing the financial sector led the charge against anti-ESG bills. Business lobbyists opposed anti-ESG legislation in at least 17 states: Arizona, Florida, Idaho, Indiana, Kansas, Maine, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, and Wyoming.

> "What you have in front of you is probably the most anti-free market bill that you'll see this legislative session."
>
> JAY KAPROSKY
> ARIZONA BANKERS ASSOCIATION

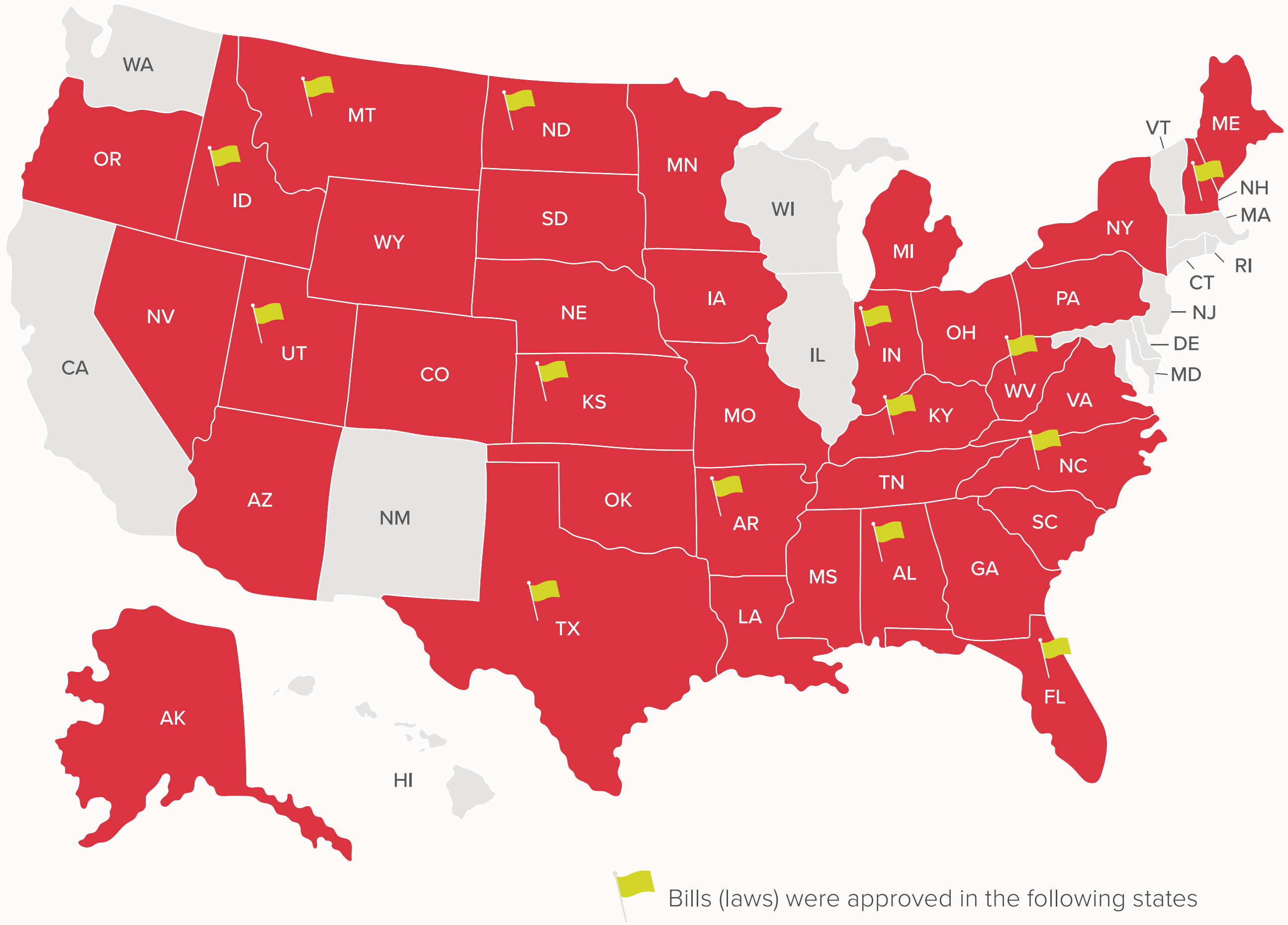
Damning cost estimates shared in testimony and legislative fiscal notes showed how the bills would drive up the costs of borrowing and decrease public pension returns. In multiple states, fiscal notes have shown the bills could cost state investments billions of dollars. In some instances, detailed below, such cost estimates were overlooked, obscured, or even ignored. Other studies found the bills restrict competition in the municipal bond market, costing taxpayers hundreds of millions of dollars. These costs, estimated and real, helped to coalesce a broad opposition early in the legislative cycle in states across the nation.

Advocates for pension beneficiaries and working families spoke out at length against the legislation in numerous states. From Florida to Ohio to Texas, labor unions fought to protect the financial security of public sector pension beneficiaries by ensuring their ability to invest with asset managers that charge lower fees and offer higher yield. They also reminded legislators of their members' right to invest *their own money* in ways that would benefit—and not harm—themselves and their communities. Investor advocates saw the bills as restrictive of their values and strategies, while environmental advocates saw them as an indirect subsidization of dirty energy and an attempt to delay solutions to the climate crisis.

While lawmakers sometimes worked with corporate lobbyists behind the scenes to prevent the most dangerous bill provisions from becoming law, it is important to understand that even watered down bills will exact costs on the public. Weakened bills still pose threats to public revenue and pensions. In some states, bills restricting the activity of pension fund managers passed despite cost estimates in the millions of dollars, a direct threat to the hardworking public employees who rely on public pensions for their financial security.

Whether through losses to public investments, or the forced investment in industries that carry heightened financial risks, anti-ESG laws could lead to reduced prosperity for the residents of states subject to them.

2023 ANTI-ESG BILLS AND LAWS



THE COORDINATED NETWORK STAGING THE FIGHT

Corporate disclosures of risk factors enable prudent risk management by investors and improve the stability of financial systems. "Anti-ESG" bills muddy this basic principle of business, in order to shield risky industries from prevailing market trends. The campaign to target "Environmental, Social, and Governance" factors, or ESG, as a culture-war bogeyman is modeled on the fabricated hysteria over "critical race theory." The strategy was designed to serve billionaire donors and fossil fuel companies. It has provided Republican lawmakers another platform to advance racist, transphobic, anti-Semitic, and climate change-denying rhetoric.

A network of right-wing organizations have long coordinated to stifle corporate action on climate change. As an extension of this movement, organizations like the American Legislative Exchange Council (ALEC), the Heritage Foundation, the Heartland Institute, and the Foundation for Government Accountability (FGA) crafted and circulated model bills that form the basis of the anti-ESG legislative strategy. Advocacy for the legislation has predominantly been conducted by the Texas Public Policy Foundation (TPPF), the Opportunity Solutions Project (OSP), and Heritage Action. Consumers' Research has lobbied behind the scenes and waged complementary campaigns against companies and banks. Most of these groups are affiliated with the State Policy Network.

Organizations representing elected officers have also instructed members to push this legislative agenda. The corporate-backed State Financial Officers Foundation (SFOF) encouraged member treasurers and comptrollers to support anti-ESG legislation and use executive powers to advance complementary strategies. Similarly, state attorneys general appear to be coordinating legal pressure through groups like the Republican Attorneys General Association and the Rule of Law Defense Fund.

While many of these organizations' finances are obscured through donor-advised funds, there are clear connections between anti-ESG legislation, the fossil fuel industry, and right-wing figures. Fossil fuel companies, executives, consultants, and trade groups have advocated for the legislation detailed in this report. Involved right-wing activist groups have received funding from foundations controlled by executives from Koch Industries, which has significant fossil fuel operations. Many have received substantial funding from organizations controlled by Leonard Leo, including the Marble Freedom Trust, the 85 Fund and the Concord Fund. In potential violation of IRS nonprofit laws, Leo's for-profit consulting firm, CRC Advisors, is a top contractor for many of the organizations. The founders of struggling "anti-woke" exchange traded funds, including Vivek Ramaswamy and activist businessman Andy Puzder, have also advocated for bills that could boost their businesses' profits.

Through consistent investments in lobbying, campaigns, advocacy, and policy development, this coordinated network has pushed legislation forward that undermines conservative free-market ideology, works against the public interest, and is unpopular with the public. Despite the sheer danger and poor logic underpinning it, this trend illustrates how right-wing influence groups are capable of steering Republican priorities in state legislatures, regardless of the impacts or popularity of their ideas.

THE REAL COSTS

Evidence suggests anti-ESG bills impose real costs on Americans

Bills that punish financial institutions for using ESG metrics are predicted to cost millions or even billions of dollars, according to in-house legislative analysts and pension fund managers. Already, the negative effects of laws passed in 2021 and 2022 are becoming clear. Texas and Oklahoma now pay increased municipal bond rates because of contracting restrictions, and a similar impact is anticipated in Florida.

The cost to the public is dependent upon the specifics of any given bill. But in reviewing press, fiscal notes, and state house testimony, we found several trends of anti-ESG bills increasing contracting costs (especially for municipalities), lowering pension fund returns, raising management fees, and imposing administrative burdens on government agencies.

HIGHER COSTS TO MUNICIPALITIES

Municipal officials have a duty to spend tax dollars wisely. Bills that weaponize state treasuries by targeting state investment contractors essentially force those officers to violate this duty. After Texas passed a pair of anti-ESG laws in 2021, five of the largest bond underwriters were forced out of the market, resulting in an estimated $303 million to $532 million in higher interest payments on municipal bonds.

An Econsult study extrapolated the methodology to six other states and found similar bills would cost taxpayers up to $700 million if they were to become law. One of the states considered in the study was Oklahoma. In 2022, Oklahoma passed HB 2034, which instructs the state's Treasurer to create and maintain a financial blacklist that blocks the state from contracting with businesses that limit engagement with the fossil fuel sector. The Econsult study estimated that a boycott identical to Texas' would cost Oklahoma $49 million annually in bond interest.

It seems that costs are already accumulating in some of the state's municipalities. Earlier this year, Stillwater, Oklahoma negotiated to borrow $13.5 million from Bank of America to make city improvements, including to traffic lights and water infrastructure. However, on May 3, Oklahoma State Treasurer and SFOF member Todd Russ included Bank of America on his blacklist under HB 2034. Suddenly unable to contract with Bank of America, Stillwater's next best option would cost an additional $1.2 million due to higher interest rates, resulting in less ambitious plans for infrastructure improvements.

LOWER PENSION RETURNS AND HIGHER BUREAUCRATIC COSTS

Public worker pensions are a key target of many anti-ESG bills. Bills targeting pension management have threatened to impose a massive toll on state investments, the people managing them, and the people depending on them.

The same bill in Oklahoma that drove up lending costs for Stillwater, HB 2034, could likewise produce negative impacts for Oklahoma's pensions. The state's blacklist could cost state retirement systems millions of dollars by forcing rapid pension divestment from asset managers offering services at lower cost. The blacklist includes large asset managers that currently manage almost two thirds of the Oklahoma Public Employees Retirement System's (OPERS) assets. OPERS' investment committee declared that the rapid divestment would violate fiduciary duty.

Retirees' pension funds stood to lose billions of dollars due to reckless Republican bills in Texas (at least $6 billion over the next decade), Indiana ($6.7 billion) and Kansas ($3.6 billion). The Texas bill failed, and the bills in Indiana and Kansas were amended to exempt pension fund managers from some of the most harmful limitations.

But even after amendments, bills that became law in Indiana and Kansas are still expected to force states to waste millions of dollars in administrative costs in upcoming years, bloating the government in the name of an unpopular culture war. In a study of SB 224, Kansas determined it would need $300,000 per year for three full-time positions to implement the bill. SB 224 was a precursor bill to HB 2100, which became law after a fiscal note estimated annual costs of $915,000, a figure that has gone unreported. New administrative expenses or lower returns are expected in other states that passed laws, like Arkansas and Florida.

These increased costs likely contributed to the demise of bills in states like Wyoming and North Dakota. North Dakota estimated it would have needed at least 25 new full time employees to implement HB 1469, at a cost of $10.2 million per year. HB 1469 ultimately failed. North Dakota also recognized the steep price of establishing a blacklist in the fiscal note for HB 1283, which also failed. The bill's financial analysis estimated that the state would spend $1.5 million biennially to establish and maintain a list of offending companies, plus an additional one-time setup cost of $172,734.

Along with bloated administrative costs, anti-ESG proponents have inserted themselves into state advisory and proxy voting practices. The Indiana Public Retirement System's (INPRS) Tony Green revealed that the system hired Strive Advisory, a consulting firm co-founded by Vivek Ramaswamy, to advise on its proxy voting strategy. Ramaswamy's rate was set at $4,000 per hour. Democratic Representative Greg Porter, who sits on the financial committee, said, "One has to wonder whether the hysteria over ESG–in no small part manufactured and fanned by Strive Asset Management and Vivek Ramaswamy–is nothing more than a pretense to grift public retirement systems like ours."

The full costs of these bills will be learned through additional experience in the states that have passed laws. But we already have sufficient evidence that anti-ESG bills directly harm workers, taxpayers, companies, and municipalities by politicizing state investments, blacklisting select financial firms, and hurting workers' retirement security.

THE PLAYBOOK: A FLOOD OF BILLS

The architects of the anti-ESG campaign drafted model bills that change aspects of state financial regulation in order to prevent companies from advancing civil rights or responding to climate change as a matter of business strategy. These tactics range from limiting state contracting authority, restricting pension management, forcing disclosures under threat of liability, and combatting federal investment rules. Many states saw multiple bills introduced this session and while a majority of bills were not finalized, the bills that survived were often revised.

Missouri provides an example. This session, Missouri Republicans, who have a legislative supermajority, introduced 13 anti-ESG bills, none of which passed. One nonbinding resolution opposing federal ESG rules was approved. The 13 dead bills in Missouri included model legislation circulated by the American Legislative Exchange Council (ALEC), The Heritage Foundation, and the Heartland Institute, including those affecting pensions, contracts, proxy voting, and financial advisors. Multiple anti-ESG bills advanced through committee, where they were met with opposition from the Missouri Chamber of Commerce. One consolidated bill, HB 863, was approved by the House, but died in the Senate when the legislature adjourned.

In the following sections, we outline broad categories of legislation, along with distinct model bills, aimed to limit investor freedom and choice. These categories help chart the flow of ideas from organizations like ALEC, the Heritage Foundation, and The Foundation for Government Accountability into the halls of state power. The typologies that follow are meant to help understand the 2023 legislative session by identifying patterns within the legislation, its projected impacts to real people, and the support and opposition it drew.

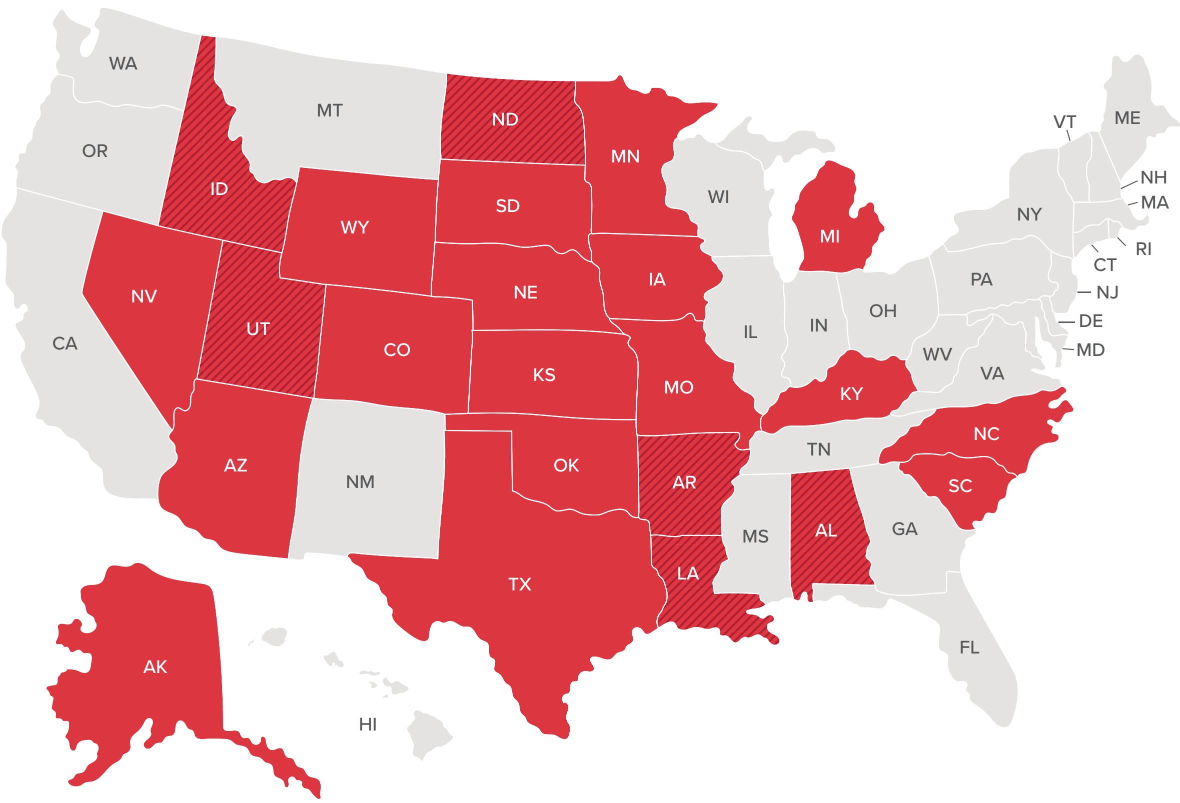
PART ONE

WEAPONIZING STATE CONTRACTS

In 2023, Republican lawmakers introduced 42 bills to block states and local governments from contracting with financial institutions that limit engagement with certain industries by categorizing this refusal as a "boycott" or "discrimination." These industries all donate disproportionately to Republican politicians, including fossil fuels, mining, agribusiness, timber and firearms. Many contracting bills direct a state authority to create a blacklist of financial institutions engaging in discrimination or boycotts and then subsequently ban the state from contracting with institutions taking such actions. Some versions of the bills even bar states from continuing existing contracts with blacklisted institutions.

BILLS WEAPONIZING STATE CONTRACTS

42 BILLS WERE CONSIDERED IN 23 STATES THIS YEAR



6 LAWS AND ONE RESOLUTION PASSED IN 6 STATES

Alabama SB 261
Arkansas HB 1307 + SB 62
Idaho H 190
Louisiana HCR 70 *(resolution)*
North Dakota HB 1429
Utah SB 97

Contracting bills leverage state contracting authority to control private sector decisions. Sweeping definitions of “boycott” or “discrimination” obscure the fact that many of the largest banks and asset managers continue to hold massive investments in fossil fuels.

Rather than respond to actual developments, these bills appear to attempt to preemptively chill climate action. From banking, to insurance, to asset managers, the combined pressure of the US anti-ESG movement has tempered ambition on corporate net zero pathways and even helped contribute to the weakening of voluntary net zero alliances.

These bills present costs to state residents. In many cases, they raise the cost of borrowing money on the municipal bond market and decrease returns on state investments. If a bond underwriter is blacklisted, then states and municipalities cannot contract with that underwriter. Similarly, states cannot invest with any blacklisted asset managers. These costs are detailed thoroughly in sections above.

Across the country, business groups and banking associations opposed contracting bills, describing them as anti-free market and harmful to small businesses. At least nine of these bills in as many states were of explicit concern to business lobbyists, in Alabama, Arizona, Idaho, Iowa, Kansas, Missouri, North Dakota, South Dakota, Utah, and Wyoming.

Like other anti-ESG legislation, contracting bills are tied to dark money operatives. Both the Opportunity Solutions Project and the Texas Public Policy Foundation publicly testified in support of these laws in multiple states. ALEC, the Heritage Foundation, and the Foundation for Government Accountability wrote or circulated model legislation that appeared to influence the text of many bills.

MODEL BILL:

Energy Discrimination Elimination Act

The Energy Discrimination Elimination Act is the name given to an ALEC-circulated model bill based on a 2021 Texas law. Co-opting language of "discrimination," the bills ignore actual discrimination in the financial sector, and instead attempt to make the case that financial institutions are "boycotting" proponents' preferred industries at both the state and national level.

While no laws of this kind were approved in 2023, five states followed Texas and passed laws similar in previous years. In 2021, the first bills of this kind were introduced by legislators in North Dakota (SB 2291), Oklahoma (HB 2034), and Texas (HB 2189, SB 13), respectively. North Dakota was the first state to pass legislation, although it amended into a de-fanged study bill. Then in June, 2021, Texas Governor Greg Abbott signed SB 13 into law. It barred state investments with businesses that "discriminate" against fossil fuel companies and became the basis for the Energy Discrimination Elimination Act model.

Affiliates of the Texas Public Policy Foundation (TPPF) claimed a central role in writing SB 13. A 2021 TPPF report by billionaire fracking tycoon Bud Brigham called "energy discrimination" the "greatest threat to capitalism." TPPF's Jason Isaac circulated the bill text within ALEC at its December, 2021 summit. While the ALEC board of directors did not approve the model bill text, it was widely circulated. In the year that followed, Kentucky, Oklahoma, Tennessee, and West Virginia enacted similar legislation.

This model bill is now generally disfavored in comparison to the more expansive Eliminate Economic Boycotts Act, detailed below.

9 BILLS WERE CONSIDERED IN 6 STATES THIS YEAR:

Arizona
Minnesota
North Carolina
Oklahoma
South Carolina
Texas

NO LAWS PASSED

MODEL BILL:

Eliminate Economic Boycotts Act

At the end of 2022, the organizations behind the Energy Discrimination Elimination Act (above) expanded the focus of their strategy. In the 2023 legislative session, ALEC and the Heritage Foundation circulated new model bills titled the Eliminate Economic Boycotts Act, which broadened the scope of the original Energy Discrimination Elimination Act to protect the mining, agriculture, and timber industries.

Activist businessman Andy Puzder and the TPPF promoted the new model bill through ALEC and the Heritage Foundation, two organizations with a long history of collaboration. As with the model Energy Discrimination Elimination Act, while ALEC task forces approved the proposed model, the ALEC board ultimately rejected it, reportedly amid opposition from banking lobbyists. Nonetheless, the model legislation was circulated to state lawmakers.

The ALEC and Heritage versions of the Eliminate Economic Boycotts Act are similar, but the Heritage version specifically includes firearms among favored industries, along with energy, mining, agriculture, and timber. The Heritage model also includes language condemning the refusal to finance companies that decline to “facilitate access to abortion, sex or gender change, or transgender surgery” in its definition of “economic boycott.” Notably, the model text does not include a blacklist clause, even though such language was included in many of the state bills.

Four states – Arkansas, Idaho, Utah, and Alabama– passed laws in 2023 resembling the Eliminate Economic Boycotts Act that bar their state from contracting with certain firms. Hearings in Arkansas, Idaho, and Utah garnered little public business opposition. In Alabama, business leaders lobbied against the bill and the governor and state’s financial department gave a Democratic senator an amendment that exempted the municipal bond market from the bill’s provisions. North Dakota also saw a transformed bill. After business opposition, initial blacklist and boycott language was removed from HB 1429 and the final version no longer resembled the Eliminate Economic Boycotts Act bill.

31 BILLS WERE CONSIDERED IN 18 STATES THIS YEAR

Alaska
Alabama
Arkansas
Colorado
Idaho
Iowa
Kansas
Kentucky
Michigan
Minnesota
Missouri
Nevada
Oklahoma
South Carolina
South Dakota
Texas
Utah
Wyoming

5 LAWS PASSED IN 4 STATES

Alabama SB 261
Arkansas HB 1307 + SB 62
Idaho H 190
Utah SB 97

In other states with substantial business opposition, no laws were passed. South Dakota's HB 1208 failed to advance after it was opposed by at least seven local business associations, including lobbyists representing electric utilities, bankers, retailers, and the state chamber of commerce. South Dakota legislators sided against the bill's proponents, which included the National Shooting Sports Foundation and the State Freedom Caucus Network, in a twelve to one vote.

MODEL BILL:

Protecting Free Enterprise and Investments Act

The Foundation for Government Accountability, a Florida-based conservative think tank funded by Leonard Leo and allied foundations, circulated this model in 2022. The bill combines aspects of the ALEC and Heritage Foundation model contracts bills (detailed above) and the ALEC and Heritage Foundation model pension bills (detailed below). To track this bill, we identified a limited number of unique phrases and particular combinations of provisions.

Similar to ALEC's Energy Discrimination Elimination Act, this model calls for states to stop contracting with financial institutions engaging in so-called "boycotts of energy companies." This model calls on state treasurers to create a blacklist of such firms, as opposed to the model Eliminate Economic Boycotts Act, which excluded the blacklist provision. The model uses the distinct phrase "pecuniary factors" that is otherwise unique to the ALEC State Government Employee Retirement Protection Act (detailed below). It also uses a unique phrase, "reasonable business purpose," as opposed to the "ordinary business purpose" referenced in other models.

> These provisions attempt to block state-contracted pension fund managers from voting for a wide range of shareholder resolutions intended to combat corporate negligence against employees, ecosystems, or shareholders.

A block of text applying restrictions on proxy votes and proxy advisors is almost identical to similar sections in the pension-focused model bills published by ALEC and the Heritage Foundation (detailed below). These provisions appear to be an attempt to block state-contracted pension fund managers from voting for a wide range of shareholder resolutions intended to combat corporate negligence against employees, ecosystems, or shareholders.

One unique clause in this model threatens to revoke an investment professional's occupational registrations if they give investment advice based on factors outside the model's definition of "pecuniary." The clause mirrors a provision of Florida law, Chapter 517.161. Similar text appeared in Oklahoma's 2023 SB 985, which was not heard in

16 BILLS WERE CONSIDERED IN 10 STATES THIS YEAR

Arkansas
Arizona
Iowa
Idaho
Kansas
Louisiana
North Dakota
Oklahoma
Utah
Wyoming

3 LAWS AND ONE RESOLUTION PASSED IN 4 STATES

Arkansas HB 1307
Idaho H 190
Louisiana HCR 70
Utah HB 499

committee hearings but remains active for the 2024 legislative session.

Another unique clause explicitly empowers state attorneys general to investigate "any person, company, or financial institution found to be... restrain[ing] the trade or commerce of energy companies..." and empower any person whose business or property is harmed by such actions to file a civil lawsuit in the state circuit courts. Parts of the provision are similar to Utah's unique HB 449 (as amended), which was sponsored by a longtime ALEC member, Representative Ken Ivory.

Arkansas legislators approved HB 1307, which appears to include parts of both the FGA and Heritage Foundation model contracts bills, along with provisions affecting retirement funds. Sponsoring Representative Jeffrey Wardlaw described the bill as an effort "to make sure that we're following our beliefs in the state and making sure that nobody's discriminating against the industries that are important to Arkansas." In a committee hearing, Republican Senator Bryan King asked the sponsor for information on the bill's fiscal impact: "Is it too much to ask for financial impact? I mean, if it's gonna have an impact, I'd like to know what it is before I vote on it. [...] That's not a hard question to ask. If you can't know the answer, why would I want to vote on it?" Republicans wound up approving the bill, rejecting the findings of a disfavorable fiscal impact after it was published.

> "When you reduce markets, when you reduce competition, you increase costs."
>
> JONATHAN OPPENHEIMER
> IDAHO CONSERVATION LEAGUE

Idaho legislators approved H 190, which included an escape clause allowing the state treasurer to continue doing business with credit unions that "boycott" certain industries if doing otherwise is "inconsistent with the constitutional or statutory duties" of the state. In the Senate State Affairs committee hearing on March 21, 2023, Jonathan Oppenheimer of the Idaho Conservation League warned legislators the bill could expose state banks and credit unions to litigation. Oppenheimer flagged that the bill's accompanying fiscal analysis came to the implausible conclusion that the bill posed no cost to the state: "When you reduce markets, when you reduce competition, you increase costs," he said.

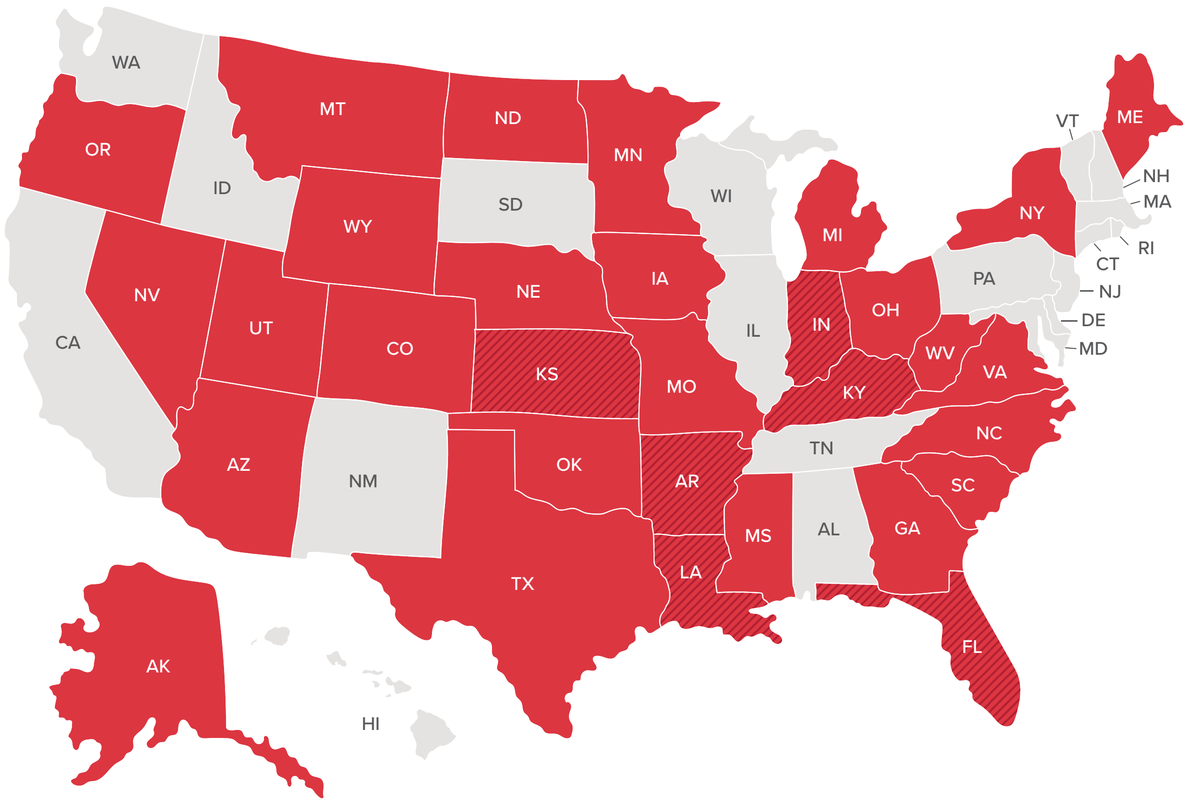
PART TWO

WAGERING RETIREE PENSIONS

US public pension funds manage an estimated $5.6 trillion in assets. The largest subset of anti-ESG bills in 2023 sought to leverage state retirement funds to artificially favor investments in fossil fuels, mining, agriculture, and weapons manufacturers, regardless of their long-term investment risk. These bills prevent state and municipal retirement systems from investing funds with specific asset managers. Some bills that generally targeted state investment contractors (detailed above) also included provisions implicating state pension funds.

BILLS TARGETING RETIREE PENSIONS

59 BILLS WERE CONSIDERED IN 30 STATES THIS YEAR



11 LAWS AND ONE RESOLUTION PASSED IN 10 STATES

Arkansas HB 1253 + HB 1307
Florida HB 3 + SB 110
Indiana HB 1008
Kansas SB 2100
Kentucky HB 236
Louisiana HCR 110 *(resolution)*
Montana HB 228
North Carolina H 750
Utah SB 96
West Virginia HB 2862

Pension fund bills come in two main varieties of model legislation, written and promoted by the American Legislative Exchange Council (ALEC) and the Heritage Foundation. Both models focus on blocking fund investors from considering risks posed by pollution and other corporate practices. They both apply limitations on shareholder proxy voting, an attempt to block shareholder resolutions intended to combat corporate harm against employees, ecosystems, or shareholders. Much like the model contract bills (detailed above), these models carry the threat of enforcement actions by state attorneys general. Beyond these shared provisions, there are other clauses unique to each model bill, as detailed in the sections below.

High Costs to Pensions Garner Pushback

Fiscal analyses have shown that anti-ESG pension bills cost states, municipalities, and pensioners enormous sums. This legislation can drastically decrease pension funds' projected returns, foist higher management fees onto funds, and raise administrative costs. When these or other factors cause public retirement systems to lose money, their assets to liability ratio decreases, which can raise required employer contributions. This year, multiple legislators had to amend anti-ESG pension bills after untenable fiscal assessments garnered national public scrutiny. In some cases, the bills' fiscal notes failed to include massive anticipated losses to investments. Even when bills contained escape clauses allowing exceptions to investment restrictions, state investment officers warned that they still threatened to impose substantial costs on retirement systems. Anti-ESG attacks on pension funds are part of a political war of attrition on pension programs and other retirement benefits. This longstanding war has already had disastrous consequences, like the 2014 pension crisis in Kansas.

These bills were most successful in states with Republican trifectas: Arkansas, Florida, Indiana, Kansas, Kentucky, Montana, Utah and West Virginia all passed anti-ESG pension laws. More pension bills that made progress in Republican-controlled states like Georgia, Iowa, Nebraska, Oklahoma, and South Carolina will carry over to the 2024 legislative session. However, in two other Republican-controlled states, North Dakota and Wyoming, anti-ESG pension bills failed after state investment officials and business interests opposed them (detailed in the case studies, below).

Dark money groups provided support to anti-ESG pensions bills, but public testimony from out-of-state groups affiliated with the State Policy Network (SPN) does not seem to have improved pension bills' reception. With the exception of Indiana HB 1008, supported by the Texas Public Policy Foundation (TPPF), and Montana HB 228, supported by the Florida-based Opportunity Solutions Project, we are unaware of any pension laws that passed with the support of out-of-state SPN affiliates—noting that lobbying disclosure on specific state bills is usually insufficient.

Republican lawmakers generally ignored concerns about anti-ESG legislation posed by pension fund managers and unions. In at least 13 states – Arkansas, Colorado, Indiana, Iowa, Kansas, Maine, Missouri, Nebraska, North Dakota, South Carolina, Texas, West Virginia, and Wyoming – representatives from public pension systems raised concerns or outright opposed anti-ESG bills targeting pensions. Michael Payne of the West Virginia Investment Management Board warned legislators that HB 2862 "likely would have a dampening effect on certain sections of our investments to perform as well as they did in the past…I just want to say, if it ain't broke, don't fix it." Legislators did not heed Payne's advice, and HB 2862 became law with the governor's signature.

Several major unions opposed bills restricting pension investments on the grounds that they threaten workers' retirement funds. State and local chapters of the Service Employees International Union (SEIU), American Federation of Teachers (AFT), National Education Association (NEA), the American Federation of State, County and Municipal Employees (AFSCME), and the AFL-CIO testified against bills in Florida, Indiana, Kansas, Maine, Missouri, Ohio and Texas. Jeff Derringer of SEIU District 1199 testified against SB 6 in Ohio, telling legislators that "this bill would cast a cloud of uncertainty and confusion and jeopardize returns by investors fearing subjective interpretation." Rich Templin of the Florida AFL-CIO said in opposition to HB 3, "Our real concern here is what this is going to do to the way that our public pension funds invest and make money for their participants." Tim Graham of the Kansas Education Association was more blunt: "I hate to sound provocative, but when it comes to our pensions, keep your culture wars out of them."

"I hate to sound provocative, but when it comes to our pensions, keep your culture wars out of them."

TIM GRAHAM
KANSAS EDUCATION ASSOCIATION

MODEL BILL:

State Government Employee Retirement Protection Act

The State Government Employee Retirement Protection Act is an ALEC model bill. It hinges upon narrowly-defined “pecuniary factors” as the means to limit certain risk assessments that might dissuade investment in certain industries. Pension managers have an existing legal duty to manage funds in their membership’s sole interest. This model bill does not actually offer any new protections to pension funds. Instead, it provides a definition “pecuniary” that politicizes fund managers’ risk assessment process and could complicate their ability to deliver the best returns for their members.

The ALEC model’s unique approach is to establish a narrow definition of “pecuniary,” rooted in an attempt to redefine the well-established concept of materiality. Together, the two definitions preclude pension managers from considering risks that are “systemic” or “involve a high degree of uncertainty regarding what may or may not occur in the distant future.” Climate change relates to both of these kinds of risk assessments, according to the Financial Stability Board and other key financial decision-making bodies.

The ALEC model also dissuades the participation of financial institutions in industry working groups on topics that present material portfolio risks. Participation in such organizations may be used as evidence of basing a responsible decision on a “non-pecuniary” factor.

Across the country, bills influenced by this model garnered opposition for the costs and risks they forced on state retirement systems. In places where the bills did pass, they often did so despite warnings from retirement systems, pensioners, and unions. In West Virginia, Craig Slaughter, the Executive Director of the state’s Investment Management Board, told legislators that HB 2862, which is now law, would force his office to make politicized decisions, which “undercuts returns.” As Slaughter warned the state House Judiciary Committee, “You’re starting to put handcuffs on us.” In Florida, the AFL-CIO and Amalgamated Transit Union testified against HB 3, which appears to be based on provisions from the ALEC model, as well as the Heritage model pension bill (below).

33 BILLS WERE CONSIDERED IN 18 STATES THIS YEAR

Arizona
Arkansas
Florida
Georgia
Iowa
Kentucky
Maine
Michigan
Minnesota
Mississippi
Montana
North Carolina
North Dakota
Oklahoma
Oregon
South Carolina
Texas
West Virginia

7 LAWS PASSED IN 6 STATES

Arkansas HB 1253
Florida HB 3 + SB 110
Kentucky HB 236
Montana HB 228
North Carolina H 750
West Virginia HB 2862

In addition to Florida, laws influenced by this ALEC model were passed amid opposition from banking lobbyists in Indiana, Kansas, New Hampshire, North Dakota, and South Carolina. In opposition to the original version of HB 457, Kristy Merrill of the New Hampshire Bankers Association warned legislators, "We think that the fiscal note on the legislation, particularly the part by the New Hampshire retirement system…describe[s] the language used in the bill as being vague and undefined, and that will be nearly impossible to enforce." The New Hampshire bill was later gutted and replaced with unrelated language before it passed. The head of the South Carolina Bankers Association explained in a committee hearing on H 3690 that it would forbid basic loan making criteria, concluding that the bill was "just is unworkable for the banking industry."

> "The way the bill is written, it just is unworkable for the banking industry."
>
> FRED GREEN
> SOUTH CAROLINA
> BANKERS ASSOCIATION

The South Carolina bill was supported by a high-profile politician from outside of the state's borders. Vivek Ramaswamy, the founder and top shareholder of a right-wing asset management firm, helped introduce H 3690. More out-of-state interest groups were at work in North Dakota, where Brent Bennett of the Texas Public Policy Foundation testified in support of North Dakota HB 1469. State Securities Commissioner Karen Tyler and Todd Steinwand of the Bank of North Dakota reminded legislators that unlike Texas, North Dakota needs significant outside capital investment to build up carbon capture infrastructure. The Executive Director of North Dakota's Retirement and Investment Office, Jan Murth, also contradicted Bennett's testimony, explaining to legislators how Bennett greatly underestimated the costs of legislation by focusing on irrelevant data. Neither the North Dakota nor South Carolina bills passed, although the latter bill will carry over into 2024.

MODEL BILL:

State Pension Fiduciary Duty Act

States have introduced 21 bills incorporating aspects of the Heritage Foundation's State Pension Fiduciary Duty Act. The Heritage model uses a restricted definition of "fiduciary commitment" to accomplish the same goal as the ALEC model pension bill: forcing investors to ignore certain risks in order to be eligible to contract with state pension funds. It explicitly targets companies deemed to support "access to abortion" or "transgender surgery" among prohibited non-financial investment considerations, demonstrating how Republican lawmakers are adapting model bills to incorporate up-to-the minute culture war signaling. The Heritage model also includes unique liabilities for companies that could be forced to pay specific damages to the state.

In 2023, the bills carried price tags so enormous that they generated widespread negative headlines for Republican state legislators. Estimated lost investment returns reached the billions in states like Indiana, Kansas, and Texas. All of these bills bore a resemblance to the Heritage model pension bill. As detailed in sections above, the laws that passed continue to threaten pensions with lower returns and higher administrative costs even after significant amendments were made.

There was a breadth of opposition to these bills. In Kansas, the bills that culminated into HB 2100 were opposed by the state's largest pension fund. They were even a source of concern for the SFOF-affiliated State Treasurer, Steven Johnson, as well as the Kansas Bankers Association. After estimated losses of $3.6 billion and other extreme provisions created resistance to HB 2436 and SB 291, a final compromise was created by inserting softened language into a previously-unrelated bill, HB 2100. It passed with no further opportunity for opponent testimony. HB 2100 became law without the governor's signature. The bill's final fiscal note estimated $915,000 in additional annual costs.

In Nebraska, conservative legislators expressed skepticism over LB 743, which did not advance out of committee before the session adjourned. Leadership at the Nebraska Investment Council chided legislators for not providing sufficient time to assess the bill's impact in a fiscal note. The Council's State Investment Officer, Michael Walden-Newman, urged the legislature to pause on the bill and allow his office time to assess its

21 BILLS WERE CONSIDERED IN 15 STATES THIS YEAR

Colorado
Florida
Indiana
Kansas
Mississippi
Missouri
Nebraska
Nevada
Ohio
Oklahoma
South Carolina
Texas
Utah
Virginia
Wyoming

4 LAWS PASSED IN 4 STATES

Indiana HB 1008
Florida HB 3
Kansas SB 2100
Utah SB 96

impact on state retirement funds. LB 743 faced outright opposition from the Nebraska Independent Community Bankers Association, the Nebraska Insurance Federation, and the Nebraska Bankers Association, whose lobbyist noted the estimated $6.7 billion in lower returns from a similar bill proposed in Indiana. Amy Thompson, a utilities lobbyist representing the Omaha Public Power District and Nebraska Power Association, warned that the bill could prohibit public funds from limiting high-risk investments: “in other words, to be forced to make imprudent investment decisions.”

“

We're worried that conflicts in the bill would keep us from partnering with some of the best investment managers in the world over issues such as violation of fiduciary duty and protecting competitive advantage."

AMY BISHOP
TEXAS COUNTY DISTRICT RETIREMENT SYSTEM

Amy Bishop, Executive Director of Texas County District Retirement System (TCDRS), told lawmakers that a bill resembling the model Heritage Foundation pension bill, SB 1446, could result in a loss of $6 billion to TCDRS. As Bishop summarized in a previous Senate committee hearing, “We’re worried that conflicts in the bill would keep us from partnering with some of the best investment managers in the world over issues such as violation of fiduciary duty and protecting competitive advantage.”

PART THREE

OBSTRUCTING NORMAL BUSINESS PRACTICES WITH BANS, LIABILITY THREATS, AND REQUIRED DISCLOSURES

This year, bills affecting liability and disclosures drew significant pushback. These model bills have not passed in any jurisdiction, even though 25 bills were introduced in 18 states. These bills open a distinct new front in the anti-ESG trend. While bills targeting state contracting authority or pension management leveraged funds directly managed by the government, these bills explicitly target private sector decisions between financial firms and the companies and individuals they do business with.

Like blinders on a horse, these bills seek to prevent private financial institutions from considering certain types of information when evaluating the bankability or credit-worthiness of individuals and businesses. These bills greatly limit the considerations a financial institution can use in making a lending decision, and so effectively restrict or ban bankers' professional discretion. Some versions of these bills require public disclosures by any firm utilizing any "nonfinancial, nontraditional, and subjective measures," including ESG factors or Diversity, Equity and Inclusion (DEI) metrics in their decision making. This disclosure can include pre-scripted disclaimers that must be signed by customers.

There is a wide range of proposed language in these bills. Most of them share language to ban banks from utilizing thorough risk analyses to guide their business decisions. This opens new liabilities for businesses seeking to analyze risks that could be construed as political, such as climate risk, labor standards, or DEI practices. Ignoring these risks could leave firms exposed to significant short-, medium-, and long-term risks. Some of the bills are also accompanied by enforcement provisions that encourage civil litigation against financial institutions — or even make it a crime if institutions repeatedly utilize banned factors in their analyses.

Business lobbyists and state investment officers warned that these bills would increase the cost of doing business in the state by adding administrative burdens, open up liability to "frivolous lawsuits," and prohibit basic considerations for lenders and insurers. As Jay Kaprosy of the Arizona Bankers Association said in testimony against Arizona's proposed SB 1138, "What you have in front of you is probably the most anti-free market bill that you'll see this legislative session."

MODEL BILL:

Fair Access to Financial Services Act

As of June, 2023, no state has passed a version of the Fair Access to Financial Services Act. Only two states moved a version of these bills through one legislative chamber: Arizona and Missouri. In both states, the bills failed to advance after opposition from local business lobbyists. Private sector lobbyists exhibited particular vigor against these bills, opposing at least ten of them in nine states: Arizona, Kansas, Maine, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Utah.

The first bill of this kind was New Hampshire's HB 1469, introduced in 2022. It received favorable testimony from the Heartland Institute's Bette Grande, before being replaced entirely by a study bill. The Heartland Institute is perhaps best known for denying climate change science and comparing those who accept it with Ted Kaczynski, the terrorist known as the Unabomber. Heartland is circulating a version of the model bill copied and pasted from North Dakota's 2023 HB 1283, which Grande provided the language for (see video at 8:08:53). In addition to Heartland, the supporters of these bills include firearms lobbyists and the Opportunity Solutions Project.

Republican sponsors of these bills have argued in committee that the legislation prevents discrimination. The title of these bills appears to be copied verbatim from congressional bills sponsored by Democrats in 2020 and again in 2022. The federal bills sought to prevent racist discrimination in the financial sector, based on real-world evidence. The Republican state legislation could have the opposite impact by using "subjective" ESG or DEI investment criteria as a means to impose liability on private investment managers, advisors, and financial institutions.

Business and banking associations have strenuously opposed versions of this bill in hearings across the country. In Maine, Nebraska, and Tennessee, the bills failed to advance after vocal opposition from businesses and state investment officers. Some lobbyists compelled legislators to gut the original language in these bills before passing laws with entirely different text. The original version of Utah HB 449 was replaced with substitute language at the behest of the Utah Bankers Association. In Montana, a draft bill was discarded in favor of an unrelated non-binding resolution, at the request of the Montana Bankers Association.

25 BILLS WERE CONSIDERED IN 18 STATES THIS YEAR

Arizona
Arkansas
Kansas
Maine
Minnesota
Missouri
North Carolina
North Dakota
Nebraska
New Hampshire
Oklahoma
Pennsylvania
South Carolina
South Dakota
Tennessee
Texas
Utah
West Virginia

NO LAWS PASSED

In Missouri, the state Chamber of Commerce opposed HB 863 which would mandate that customers of any financial services firm utilizing “subjective” factors, like ESG, to sign a disclosure form stating that the institution’s product will not be focused on maximizing returns. The Chamber’s Director of Legislative Affairs, Philip Arnzen, told legislators in a Senate Insurance committee that businesses would respond with excess caution and excess bureaucracy: “many financial firms which are risk averse are just going to mandate that these [disclosure] forms be signed by every customer, regardless of what the investment strategy is. So we believe that it would be costly and will put a new mandate on any financial firm that does business in Missouri.”

PART FOUR

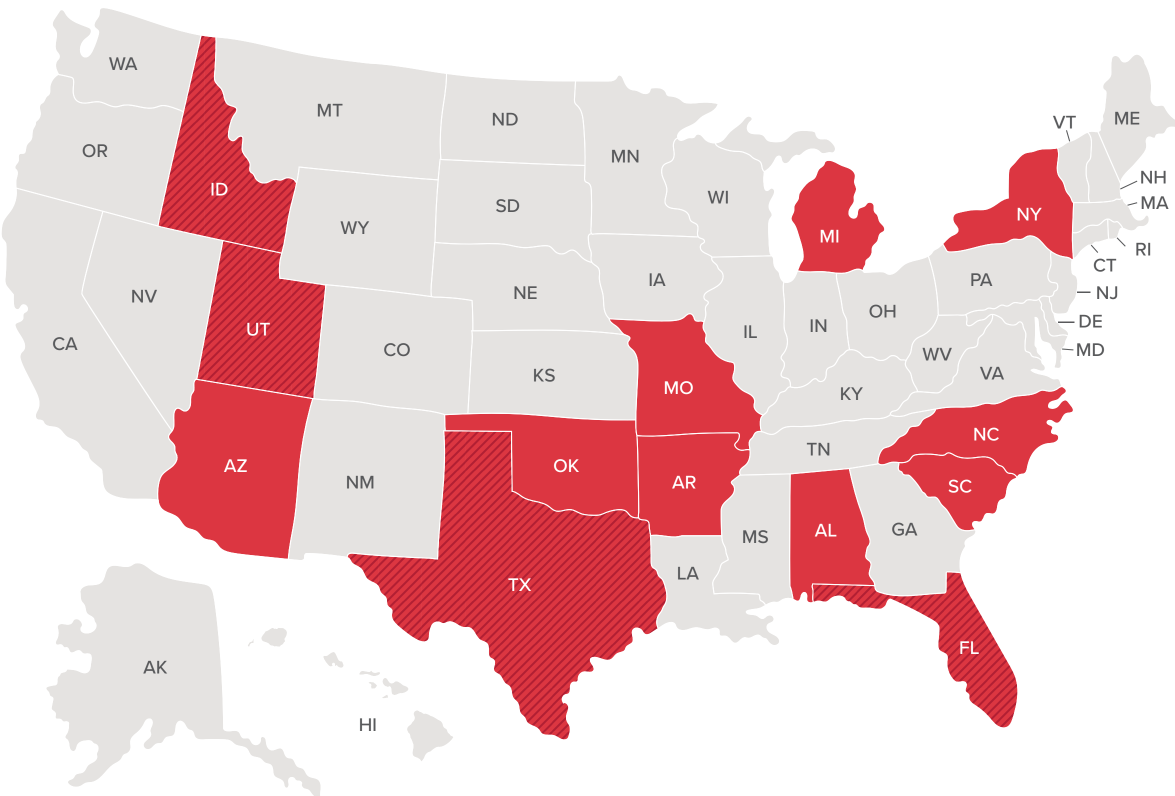
STOKING FEAR THROUGH ESG SCORES

Model legislation for a variety of bills banning the use of ESG "scores" has not yet been identified. Conspicuously similar bills in many states indicate that models are being circulated.

These bills target state and local governments, as well as the private sector. Many of the bills introduced this session focused on forbidding state governments from using ESG criteria in the selection of contractors. Some bills would preclude companies engaged in using ESG criteria from government procurement contracts. Other bills proposed bans on the use of ESG criteria by private companies as part of risk assessment before lending money, providing insurance, or making procurement decisions.

BILLS TARGETING ESG SCORES

23 BILLS WERE CONSIDERED IN 13 STATES THIS YEAR



5 LAWS PASSED IN 5 STATES

Florida HB 3
Idaho H 191
Texas SB 833
Utah HB 281
North Carolina H 750

This year, four states passed laws with unique variations of this approach. Florida's HB 3 is a broad law that affects pensions, but it also prohibits government bond issuers from entering "into a contract with any rating agency whose ESG scores for such issuer will have a direct, negative impact on the issuer's bond ratings." A law passed in Idaho, H 191, prohibits government contractors from being selected using ESG criteria. Texas SB 833 forbids the use of ESG criteria for private insurance companies. Utah HB 281 appeared to be a rhetorical exercise, conflating quantitative summaries of ESG analysis and data with conspiracy theories about "social credit scores."

Misinformation was a common feature of advocacy in support of these kinds of bills. The specter of personal ESG Scores are being used as a way to engage the grassroots in this fight, as exemplified in the Heritage Action video, "DENIED: Is Your Credit Score Woke Enough?" In statehouses, bill sponsors insinuated that financial institutions collected personal data to discriminate against individual people based on political ideology. In an introduction of two bills attacking the intentionally misused concept of ESG, Texas Senator Bryan Hughes said, "[ESG] has become the shorthand nomenclature for scoring or evaluating how 'good' a company is, not unlike a social credit score in communist China."

Government agencies expressed concern over many of the bills focused on prohibiting ESG criteria by governments, because they anticipated decreased contracting opportunities and increased costs. Robin Hillyard of the Arizona County Supervisor Association warned that SB 1611 could be responsible for "delaying our procurement contracts," due to the complications of verifying compliance. The bill was one of three bills vetoed by Democratic governor Katie Hobbs after being approved by the Republican-controlled legislature.

In Missouri, government employees flagged that several of the bills–all of which ultimately failed–could force them to pay higher contract fees. A fiscal note for SB 177 revealed that officials from Kansas City believed the bill could negatively impact that city's finances. Fiscal notes for HB 770, SB 50, and SB 316, flagged that the bills could block the state from continuing to do business with firms it already contracted, reducing the competitive pool, increasing costs, and lowering the quality of services. Similar concerns were unveiled in Idaho, where the fiscal note for H 191 contained glaring omissions: The Idaho Conservation League's Jonathan Oppenheimer warned legislators, "I fear that the fiscal note for this bill only addressed the potential fiscal impact to the general fund, yet it applies to all units of state government."

PART FIVE

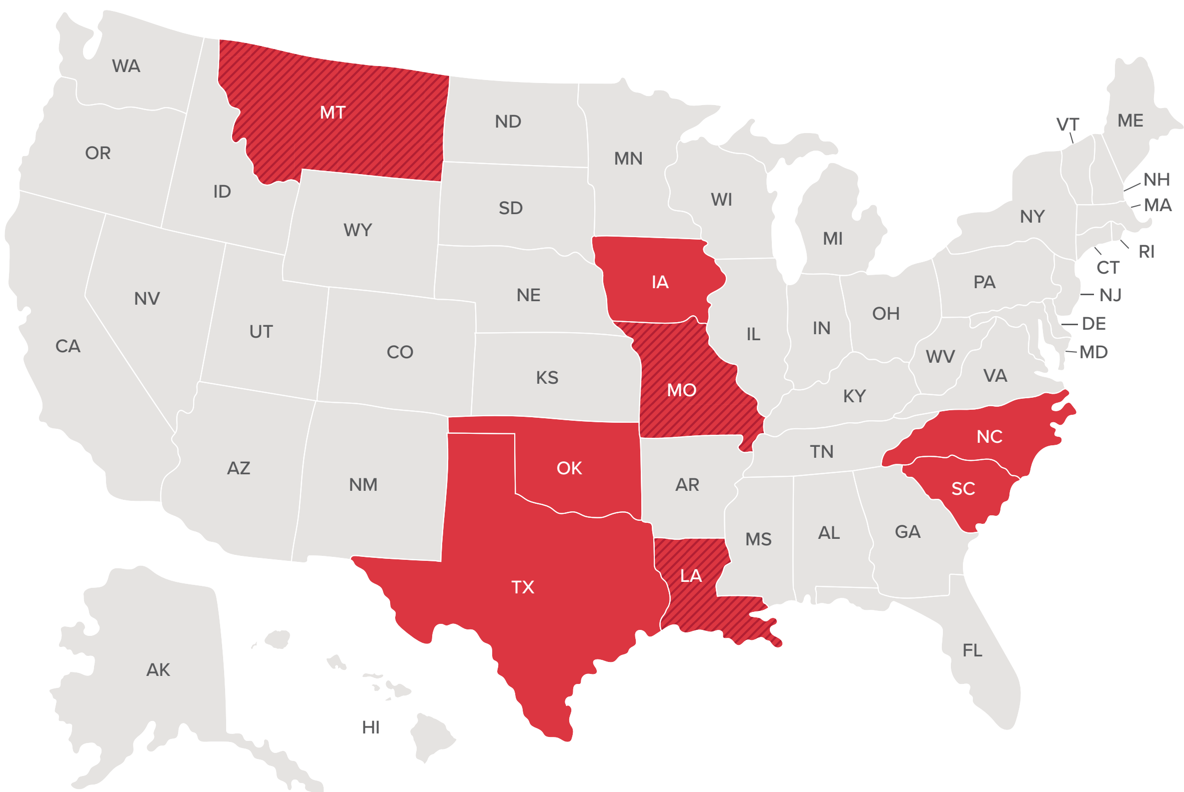
OPPOSING FEDERAL RULES

State lawmakers have also introduced bills and resolutions aimed at positioning their states against a variety of federal rules, including those perceived to involve ESG. While no bills in this category passed in 2023, Louisiana, Missouri, and Montana have passed nonbinding resolutions that focus on the US Securities and Exchange Commission climate disclosure rule.

All seven of the other bills shared language that appears to have been copied verbatim from a model bill, though it is unclear where the model came from and who might be circulating it. Texas SB 242 appears to have been prefiled before the other bills, in mid-November, 2022, with Missouri and South Carolina pre-filing similar bills in the weeks that followed.

BILLS OPPOSING FEDERAL RULES

10 BILLS & RESOLUTIONS WERE CONSIDERED IN 8 STATES



NO LAWS PASSED. THREE RESOLUTIONS WERE APPROVED:

Louisiana HCR 59 **Missouri** HR 12 **Montana** HJ 11

The bills and resolutions are typically broad enough to stage resistance to other relevant federal rules, such as a recent Department of Labor rule that "confirms that fiduciaries should consider ESG factors in investment decisions just as they would any other financially relevant factor," as Ceres summarized. This rule was challenged by Republicans in Congress under the Congressional Review Act, engendering the first presidential veto by the Biden Administration.

Notably, at least one proponent of Texas SB 242 appeared to encourage the consideration of violence at scale between states and the federal government. Chuck DeVore, a former California state legislator working at the Texas Public Policy Foundation, told members of the Senate State Affairs Committee, "Without the enforcement authority of state and local governments, the federal government is virtually powerless to work its will on the states and on the people. There's approximately 1.2 million state and local law enforcement personnel versus about 137,000 at the federal level." When asked to clarify his comments contrasting the size of federal and local law enforcement, DeVore repeated the statistics, and elaborated, "there's no way that the federal government by itself can enforce all of these edicts that come down from the federal level."

DeVore attempted to contrast his logic to escalation tactics used by Antebellum South enslavers in preparation for the Civil War. "Some critics have likened this to nullification…it is not at all like the situation that led to the nullification crisis in 1828 through 1832." DeVore is affiliated with the Claremont Institute. Claremont is known for laundering "white supremacist ideas," and it is actively organizing sheriffs in politics. Claremont affiliates have stated that "we are in a kind of cold civil war," and outright civil war is something the group's leaders have predicted.

WHAT HAPPENS NEXT

In 2024, Republican state lawmakers across the country will undoubtedly introduce more of the model bills discussed above, as well as new iterations. Understanding what happened in the 2023 legislative sessions helps us understand what is likely to come next.

We will be watching these developments:

CONGRESS

This fight is headed to the Hill. Members of Congress have introduced legislation, as detailed in the case study, above. Aspects of these bills are similar to some of the model bills discussed in this report. Within the span of a month, in the spring of 2023, there were two House Oversight hearings on ESG practices. Republican members of Congress offered anti-ESG advocates a national platform to reinforce the same manufactured narrative being pushed in the states.

In both hearings, witnesses for the minority and moderate and progressive Democratic members delivered complementary messages about fiduciary duty, the need for corporate transparency, the dark money origins of anti-ESG, the importance of environmental and social responsibility, and the emptiness of Republican culture war signaling. Democratic members are demonstrating that this is an issue they can find common ground on, strike a variety of crucial points, and dismantle Republican witnesses and arguments with a broad array of messaging centered on extremist Republican attacks on freedom. At the second of these hearings, very few Republican committee members even attended to speak on behalf of the agenda their party set.

THE STATES

This fight will accelerate in the states in the run-up to the 2024 legislative session. A majority of states operate on two year legislative calendars, and 42 bills that did not pass in 2023 could carry over into the 2024 legislative session. In addition, bill authors will likely resubmit revised bills or submit new legislation. The consolidation and watering-down of bills may have the effect of weakening the business coalition that opposed bills in 2023. However, weakened bills are still a threat to state finances, local and small businesses, clean energy development, racial and LGBTQIA justice, and gun control. Their full expected financial impact remains unknown.

Additionally, this continues to be a topic lawmakers know little about. As we saw in legislatures around the country, in some cases, even bill sponsors do not know how to defend the bills they introduced. This is the moment for lawmaker education, so that elected officials understand the broad threats of these bills. As lawmakers have a better understanding of these laws' potential impacts, legislative dynamics will adjust to reflect that reality. These fights will only be supercharged in a presidential election year where most state legislators are also up for election, and we have every indication that anti-ESG and woke capitalism will be at the center of the Republican platform.

INSURANCE

Multiple organizations helping to craft and circulate anti-ESG legislation – including ALEC and Heritage – have long histories of successfully advancing their preferred policies through experimental state legislation. We expect that these architects of this anti-ESG effort will continue to find new ways to legislate against sustainable business practices, and we expect insurance will be a critical new battleground. States may decide to follow Texas, which passed a law restricting insurance this year. Boldness from industry will be crucial to countering these bad bills.

The insurance industry is on the front lines of the climate crisis, and anti-ESG advocates are likely to expand their efforts targeting the sector. Anti-ESG attacks on actuarial duty are not simply attacks on the industry, they also degrade the ability of vulnerable communities to find and afford coverage, starting with those directly in the way of climate impacts. This is especially true in states where topics related to insurance are at the top of the political conversation, including the states of the Gulf South.

With 50 U.S. states, the fossil-fuel funded interests behind this campaign were able to experiment, mounting multiple attacks on sustainable finance in a variety of political, economic, and regulatory contexts this year. Consistently, their efforts were marked by division, contention, and uncertainty— often within their own party and in confrontation with traditional political allies. Going forward, we expect these attacks will be turbocharged by the broader financial and political conversation in the months to come.

The fate of 2024 state legislation — and broader campaign to weaponize state financial regulation to protect preferred industries — will be determined by the continued strength of the broad and diverse opposition speaking out against this manufactured crisis and standing up, from a variety of viewpoints, against the attacks on the freedom to invest and high costs these attacks would impose on the American economy.

CASE STUDY

TEXAS

Texas Republicans introduced 21 anti-ESG bills in 2023, one of which passed. The numerous forms of legislation proposed in Texas this year show the broad scope of ambition to coerce financial institutions to invest in coal and oil and gas. As part of the blitz, Texas lawmakers introduced an array of creative strategies to restrict the options of local governments and financial institutions, in addition to variations of most of the model bills detailed above.

Texas legislators field-tested a number of unique bills, most of which made no progress:

HCR 38 called for a Congressional investigation into BlackRock CEO Larry Fink.

HB 2752 proposed state-enforced noncompliance with rules established by the National Association of Insurance Commissioners.

HB 3661 attempted to require companies to report their use of ESG criteria to the Texas Comptroller, SFOF member Glenn Hagar, as the basis for publishing a database.

HB 4794 attempted to give shareholders more power to challenge companies for incorporating ESG metrics into business decisions.

SB 1060, a proposed prohibition on "political" shareholder proposals for insurance companies, was approved by the Senate.

Many sponsors and supporters of the bills plainly stated their intent to favor the fossil fuel industry. State Senator Bryan Hughes indicated to members of his committee that a partisan strategy to protect fossil fuels was the motivation for two of his bills: "Companies are 'encouraged' to support liberal social positions and developing technologies and discouraged from traditionally conservative positions and disfavored technologies, like oil and gas."

Fossil fuel lobbyists at the Permian Basin Petroleum Association and two of the state's oil and gas royalty owners associations testified in support of various bills using ESG as rhetorical leverage. But the most consistent and vocal proponents of the numerous kinds of bills were the Texas Public Policy Foundation (TPPF) and the Florida-based Opportunity Solutions Project (OSP). As Chase Martin of the OSP testified in support of SB 1060: "We think it's an amazing bill that we'll hope to essentially push back against discrimination against companies, especially Texas oil and gas."

Texas Republican state senators were so committed to passing bills favoring fossil fuel companies that they overlooked evidence about major anticipated costs to the state and its retirees. This was illustrated in the deliberations over SB 1446, a bill based on the Heritage Foundation's State Pension Fiduciary Duty Act, which was approved by the Senate. Amy Bishop of the The Texas County and District Retirement System (TCDRS) told the legislature that SB 1446 would cost the state's public funds $6 billion over the next decade. Bishop told the legislature that the bill would force the system to divest from multiple asset managers and therefore lower TCDRS's projected return on investment by 1.5%. These staggering estimates were not mentioned in the bill's official fiscal note.

Only one Texas law passed in the 2023 regular session. SB 833 is an attempt to bar nearly the entire insurance industry, including health and property, from considering environmental or social concerns in their underwriting. Predictably, the insurance industry, which requires clear-eyed consideration of material risks to even function, did not favor the legislation.

The House companion to SB 833, HB 1239, was opposed by several business interests in a House committee hearing. The Reinsurance Industry Association of America's Paul Martin told the committee that greenhouse gas emissions and the resulting consequences of climate change are material considerations for insurers. LeeAnne Alexander of the American Property Casualty Insurance Association (APCIA) said the bill language "would not allow companies actually to use those actuarially justified factors when deciding whether to offer coverage, or how to write coverage if offered," a sentiment echoed by other insurance lobbyists. HB 1239 was abandoned in favor of SB 833.

The final language of SB 833 included multiple escape clauses allowing use of ESG criteria if it is consistent with "sound actuarial principles," based on an "ordinary business purpose," or coincidental to risk assessment criteria. Even with these changes, the APCIA remained opposed to the law. Experts in global insurance markets predict that companies attempting to comply with SB 833 could lose access to vital reinsurance on the global market, complicating recovery efforts for natural disasters.

SB 833 was the last bill approved by the Texas legislature on May 24th, before the chaotic session adjourned at midnight. After the session concluded, Lieutenant Governor Dan Patrick sent Governor Greg Abbott a list of bills he wanted to revive in a special session, including the three bills that failed after being approved by the Senate: SB 1060, which limits shareholder activities, SB 1446, which restricts pension investments, and SB 2530, which restricts contracting.

INDIANA

In 2022, Indiana failed to pass a bill that attempted to leverage state retirement funds against financial institutions deemed to be engaged in "boycotts" of energy companies. In 2023, state Republicans resumed the attack, introducing three more bills that all resembled the Heritage Foundation's State Pension Fiduciary Duty Act.

One of the bills, HB 1008, became law, but only after amendments were added to lower the bill's projected cost of $6.7 billion in lost pension fund returns over a decade. Indiana State Treasurer Dan Elliot, an SFOF member, supported the bill at its first public hearing. In the same initial House hearing, Tony Green of the Indiana Public Retirement System (INPRS) provided testimony in which he raised concerns over "unintended consequences" of the legislation. Green revealed that the system had hired Strive Advisory–an anti-ESG firm co-founded by Vivek Ramaswamy–to advise on its proxy voting strategy. Ramaswamy's rate was later revealed to be $4,000 per hour.

The original version of HB 1008, before amendments, was supported by gun lobbyists, several fossil fuel companies and affiliated advocacy groups. The coal mining companies Alliance Resource Partners and Hallador Energy supported the legislation in its first hearing. Reliable Energy, a coal trade association formed by consultants at Catalyst Public Affairs on behalf of Alliance and Hallador Energy, also supported the original bill. Supporters from the oil industry included Pioneer Oil and the Indiana Oil and Gas Association.

Out of state policy groups financed by fossil fuel fortunes came into Indiana to provide testimony as well, including the Texas Public Policy Foundation (TPPF) and Heritage Action, the lobbying arm of the Heritage Foundation. Supporter Eric Bledsoe of the Opportunity Solutions Project previously worked for the Charles Koch Foundation.

Public opposition to the bill increased in early February after INPRS released a fiscal note estimating that HB 1008 would diminish state pension system returns by $6.7 billion over the next ten years. The Indiana Chamber of Commerce tweeted: "Safe to say we still oppose H.B. 1008." Writers at many publications cited the $6.7 billion statistic, while opponents of similar bills cited the fiscal note during testimony in numerous other states.

After the backlash to the original bill's estimated costs, legislators made two rounds of amendments to HB 1008. The amended bill exempted private equity managers from certain provisions. It cut out restrictions on external fund managers that are unrelated to pension investments and allowed pension funds to hold disfavored investments if no "comparable" alternative was available.

However, the amended bill's final fiscal note underplayed the anticipated negative effects of slightly lessened divestment. The final note did not account for how INPRS would complete an increased workload, and it assumed that INPRS could make up the costs of rapid divestment by simply finding new asset managers with lower fees and higher rates of return. While administrative costs to INPRS were estimated to increase by about $5.5 million, it is impossible to measure the bill's intentional chilling effect aimed at investors and fund managers.

The amendments did not quell opposition from business leaders and unions in the bill's final Senate committee hearing on April 5th. Sally Sloan with the AFT said the bill was "a solution in search of a problem" and that "our members would be most comfortable if we left investing to the professionals." Jerrel Blakely of the Indiana State Teachers Association condemned the "demonization" of ESG policies, and asked legislators why the bill sought to change such a successful pension system model: "By all accounts our state pension system is a model to replicate."

The Indiana Chamber of Commerce opposed the bill throughout the entirety of the legislative session. At the April 5th Senate committee hearing, the Chamber's lobbyist, Greg Ellis, said, "We believe [the bill] is anti-free markets and anti-free enterprise." Ellis objected to Section 6 of the bill, which listed a wide variety of published materials politicians considered evidence of an "ESG commitment." Ellis warned, "We think that this bill might have a chilling effect on the Indiana economy. If you look at some of the recent investments in Indiana such as around the electric vehicle [manufacturing in the] Kokomo area…we think this is an issue." That text remained in the final version of the law.

CASE STUDY

NORTH DAKOTA

In North Dakota, Republican legislators and a variety of interest groups appeared poised to fast-track a barrage of bills targeting banks, credit unions, and financial advisors for holding vague affiliations with ESG investment metrics. All five of the bills introduced were scheduled in committee hearings in the first two months of 2023.

One by one, the bills were eviscerated by business lobbyists, state investment officers, and skeptical Republicans. By the end of the legislative session, only one heavily-amended bill was enrolled and sent to the governor. The general failure of anti-ESG bills in North Dakota is illustrative of a trend in Republican trifecta states in which persistent and coherent pushback from industry groups was enough to push legislatures to reject these bills.

The first bill to fail was HB 1347, an attempt to restrict state investment contracts with language similar to the Foundation for Government Accountability's model bill, the Protecting Free Enterprise and Investments Act. HB 1347 proposed a controversial blacklist of "restricted financial institutions." In a January hearing, the chair of the House Industry, Business and Labor committee declared the bill "unworkable" after opponent testimony from the state financial institutions commissioner and the North Dakota Bankers Association. The House voted the bill down two weeks later.

The next bill to falter was HB 1283, a version of the model Fair Access to Financial Services Act. The bill's text was provided by the Heartland Institute's Bette Grande. The bill's primary sponsor, Representative Anna Novak, indicated to the committee that her bill was about justice: "I believe that every single person in this room, and in the legislature, is opposed to discrimination in any form." The majority of the hearing featured vigorous united opposition from the state's financial institution commissioner, insurance commissioner, and multiple banks and credit unions. Rick Clayburgh of the North Dakota Bankers Association appeared to invoke Nazi Germany's branding of Jewish-owned businesses: "it reminds me of, you know, let's put a star in the window of the institution if it's doing something legal, but you just don't like what they're doing." The committee disapproved of the bill, and the House voted it down a month later.

A pensions-focused bill, HB 1469, resembled the American Legislative Exchange Council (ALEC) model State Government Employee Retirement Protection Act. HB 1469 was voted down by the House along with HB 1283. In a House committee hearing, the state Director of Financial Institutions, Lise Kruse, told the legislature, "It's my duty under law to let you know if there's anything that could hamper the safety and soundness of our institutions, so that's why I'm here today." This warning was consistent with one from the bill's own sponsor, Representative Anna Novak, who told the committee, "There's a pretty large fiscal note attached to this bill. Honestly when I saw it, I about fell off my chair." Despite attempts from the Texas Public Policy Foundation (TPPF) and Western Dakota Energy Association to support the bill, the committee was persuaded to reject HB 1469.

Two bills managed to make it out of the House, both of which were heavily amended after aggressive pushback to specific provisions of the original bill text, including blacklist mandates. HB 1278 was initially an attempt to block the state Investment Board from affiliating with groups deemed to be opponents of fossil fuels and agriculture. The bill received unflattering testimony from multiple state investment officers, including the state treasurer, Thomas Beadle, despite his membership in the State Financial Officers Foundation. Similarly, after pushback from state investment officers and banking lobbyists, HB 1429 was amended to remove language resembling the model "Eliminate Economic Boycotts Act."

Due to the similarities between both bills, HB 1278 was abandoned in favor of HB 1429, the only law North Dakota passed in 2023. Making minor amendments to a similar law from 2021, HB 1429 forbade state funds from using ESG or "social investments" unless they offered a "superior rate of return" or were part of a "prudent" risk assessment. The law added restrictions on proxy voting activity involving state investments, and it delegated a study on anti-ESG policy options to the Bank of North Dakota in preparation for the 2024 legislative session.

During comments in a Senate committee hearing, Jan Murtha of the state Retirement and Investment Office said the final version of HB 1429 simply codified her office's current practices. Murtha noted that her office already provided proxy voting disclosures upon request, explicitly correcting the TPPF's Brent Bennett, whom she said never attempted to contact her office to obtain such disclosures.

WYOMING

Wyoming Republicans, who control all branches of state government, turned out to be more skeptical of the impact of this legislative trend than North Dakota. Of the three bills considered in 2023, none became law, following a torrent of practical concerns from the state's top investment officers, bankers, municipalities, and even the state petroleum association.

While one of the bills targeting the state's investment contracts never advanced out of committee (HB 210), two more bills were approved by the state Senate before faltering in the House. SF 159 was very similar to the Heritage Foundation's model Eliminate Economic Boycotts Act, attempting to leverage state contract investments against financial institutions disfavored by Republicans. SF 172 was similar to the Heritage Foundation's model State Pension Fiduciary Duty Act, focused on leveraging the state's pension funds against the same disfavored financial institutions. Each of the bills were sponsored by state senator Bo Biteman, a landman with experience working for fossil fuel companies.

SF 159 and SF 172 were both supported by the National Shooting Sports Foundation, the Texas Public Policy Foundation (TPPF), and the Wyoming Mining Association. A bombardment of pointed criticism was offered by municipalities, pension fund officers, and the petroleum lobby. Most damning was the testimony delivered by members of the state treasurer's office, including concerns voiced by Wyoming State Treasurer Curtis Meier. In his criticism of the contracts bill, SF 159, Meier was openly concerned about alienating himself from the State Financial Officers Foundation.

Treasurer Meier left the most pointed criticism to his Chief Investment Officer, Patrick Fleming, who provided a litany of specific examples of how the bill could hamper the state's investments. Fleming pointed to Johnson & Johnson as a typical Fortune 500 company that the state invests in. Referencing the company's hundreds of subsidiaries in dozens of countries around the world, Fleming asked, "What would be the possibility of one of these entities doing something that goes against this bill?" Consequently, Fleming said, "we would basically have to divest from most of these entities," selling them at a significant loss of 10% under market value or even up to 25% "during a time of stress," according to two brokers he spoke with.

Fleming rebuffed the false notion that asset managers like BlackRock "boycott" fossil fuels, a myth attempted by the TPPF's Jason Isaac. Fleming repeatedly told legislators that Blackrock had $292 billion in exposure to energy producing companies, as the company told him directly. Fleming warned that the bill's liability provisions would scare away the most attractive investment contracts. "Bottom line… it would probably cause us to sell just about everything we have other than US Treasuries," Fleming stated in a Senate hearing presided over by Senator Biteman, the bills' sponsor. "Mr. Chairman, please do not shoot the messenger," Fleming told a frustrated Senator Biteman, assuring him that he was relaying concerns from experts.

In the subsequent House hearing, Fleming said that even with "escape clauses," the liability risks posed by SF 159 could result in losing the largest, most cost-effective contracted fund managers. "JP Morgan is only really one of two large managers that could do the work that we do for a $25 billion entity. It's not like just going out and getting somebody else to do this," he said. This point was reinforced by Scott Meier of the Wyoming Bankers Association, who told House committee members, "I listened to Mr. Fleming and I had to laugh a little bit to myself...None of your Wyoming banks, your community banks, can backfill on this baby. It's just too big. So we have to rely on the big banks to take care of that. We just don't have the capacity to do that."

In stark contrast to the fossil fuel salute expressed in Senator Biteman's bills, Fleming told legislators that the pension-focused bill, SF 172, could have blocked state retirement investments in Peabody Energy, simply for publishing material about reducing greenhouse gas emissions. Peabody is the world's largest private coal mining company, and it operates three large mines in Wyoming's Powder River Basin. Ironically, the bill was supported by the Energy Policy Network, a Peabody-funded front group that was established by one of the company's longtime lobbyists.

Fleming's concerns were shared by other lobbyists attending the hearings. Pete Obermueller of the Petroleum Association of Wyoming (PAW) told state representatives that many of PAW's member companies had prominently published ESG commitments. Obermueller provided three examples of companies that were making efforts to monitor and reduce methane emissions, or were recognized for ESG compliance, which could result in significant consequences if Biteman's bills became law.

By the end of a House Appropriations committee hearing on the bills, the committee's chairman and other Republicans were skeptical. After surprising Senator Biteman with substitute language that gutted both of his bills, Biteman was incredulous: "To say I'm disappointed is an understatement. To treat a sitting fellow legislator like this in a public committee—which is actually a public execution, not a public committee—but nonetheless, to spring a substitute bill on me in committee without me even knowing about it, seeing it...I just say shame on you." Both bills received a do not pass vote and proceeded no further.

CASE STUDY

FEDERAL

Congressional Republicans have emulated their state-level counterparts' attacks on socially responsible investing. Particularly as federal financial regulators have taken steps to acknowledge climate change as an "emerging and increasing threat" to the financial system, the federal-level campaign against ESG has sought to undermine steps taken to monitor and regulate systemic risks.

In February, congressional Republicans approved a Congressional Review Act (CRA) resolution to overturn a rule by the Department of Labor (DOL) that allows— but does not require— investment plans to consider ESG factors. The DOL rule expressly called for "appropriate regulatory neutrality" with respect to ESG considerations, yet was portrayed by congressional Republicans as forcing the pursuit of a "political agenda" through retirement plans. President Biden vetoed the CRA resolution.

In 2023, Congressional Republicans have introduced several pieces of federal legislation that strongly resemble model restrictions on the freedom to invest at the state level. US Representative Andy Barr (R-KY) has introduced the Fair Access to Banking Act. The bill would amend the Federal Reserve Act to deny large financial institutions who refuse to offer financial services to a business that is in compliance with the law access to key programs, such as the Federal Reserve's discount window. This sweeping approach would potentially restrict banks from making sound business decisions about exposure to physical, transition, and liability risks related to climate change.

Another example is Representative Barr's Ensuring Sound Guidance Act, which would modify the Employee Retirement Income Security Act of 1974 to ban retirement plan trustees from considering ESG factors. The legislation mimics the approach taken through numerous model state bills by requiring investment advisers to consider only "pecuniary factors" when making investment decisions. As legal scholars David Webber, David Berger, and Beth Young have pointed out in "The Liability Trap," this bill creates an unworkable definition of what is considered pecuniary and non-pecuniary, and purports to focus investment advisers only on factors that have a "material effect" on firm values, even though ESG factors have had a demonstrated material effect on firm value over time.