No. 21-6156

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OKLAHOMA STATE CONFERENCE of the NAACP,

Plaintiff-Appellee,

v.

JOHN M. O'CONNOR, in his official capacity, &
DAVID PRATER, in his official capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma
The Hon. Robin J. Cauthron
No. 21-CV-00859-C

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

RULE 26.1 DISCLOSURE STATEMENT

The Oklahoma State Conference of the NAACP is a nonprofit corporation with no parent corporation and no stock.

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INTRODUCTION

In response to recent racial justice demonstrations, Oklahoma passed House Bill 1674, a law with sweeping and indeterminate provisions that threaten peaceful protesters and organizations that organize peaceful protests with severe criminal penalties.

Among other things, the plain language of Section 3 imposes devastating fines on any organization "found to be a conspirator with" individuals who independently and unforeseeably violate certain sections of Oklahoma's laws regarding riots, unlawful assemblies, and other crimes against public peace. And Section 1 criminalizes speech in a traditional public forum by imposing liability for "approaching" vehicles, if doing so would render a roadway "impassable"—even for a moment—or render passage "unreasonably inconvenient"—a term which is neither defined nor tailored. The District Court preliminarily enjoined enforcement of both provisions, finding it likely that both were unconstitutionally vague and violated the First Amendment. Either conclusion provides a basis to affirm.

On appeal, the State's primary contention is that this Court should save the challenged provisions by narrowing them. Indeed, each

of the State's arguments depends critically on its proffered interpretations of Sections 1 and 3. But the State's reading does not comport with the law's text, and it would be improper in any event for a federal court to introduce limitations into a state statute that the state legislature left out. Had the legislature intended such limitations, it would have drafted them into the legislation. Furthermore, any narrowing construction from this Court would not bind state prosecutors, and it would offer no refuge to Oklahoma NAACP and Oklahomans who must choose between their First Amendment rights and avoiding penalties under the literal sweep of the law. When it comes to First Amendment rights, courts "cannot assume that . . . ambiguities will be resolved in favor of adequate protection." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The District Court's preliminary injunction should be affirmed.

STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that Oklahoma NAACP is likely to prevail on its claims that Sections 1 and 3 of HB 1674 are unconstitutionally vague?

2. Did the District Court err in concluding that Oklahoma NAACP is likely to prevail on its claims that Sections 1 and 3 of HB 1674 violate the First Amendment?

3. Did the District Court abuse its discretion by issuing a preliminary injunction?

STATEMENT OF THE CASE

A. Oklahoma NAACP

Plaintiff Oklahoma State Conference of the NAACP ("Oklahoma NAACP") is the oldest civil rights organization in the State. Founded in 1913, the organization's mission has long been to ensure the political, social, educational, and economic equality of all persons, and to eliminate race-based discrimination. Throughout its history, Oklahoma NAACP and its members have fulfilled this mission by organizing and participating in protests, demonstrations, and public gatherings to advocate for racial justice. In fact, members of the Oklahoma NAACP organized some of the civil rights movement's first sit-ins in the 1950s and 1960s to protest segregation. These early demonstrations met with fierce resistance, but they ultimately helped to end *de jure* segregation in Oklahoma City.

Peaceful protests remain central to Oklahoma NAACP's mission today. Demonstrations are vital to the organization's ability to advocate directly for the causes it supports, and they are also critical to Oklahoma NAACP's efforts to rally and recruit new supporters for those causes. Over the past few years, for example, Oklahoma NAACP has held public gatherings to: support striking teachers and advocate for fair pay for school employees; honor Dr. Martin Luther King, Jr.; demand justice for individuals killed by law enforcement in Oklahoma and around the country; and challenge actions taken by the Oklahoma Legislature. Oklahoma NAACP has also encouraged its members to join other organizations' events, and it anticipates that it will continue holding its own public events in the future—some with advanced planning, and others in response to events as they unfold around the State. App. 69–70.[1]

B. Oklahoma House Bill 1674

In the summer of 2020, following the murder of George Floyd, racial-justice demonstrations swept across the country. Participants in these demonstrations called generally for a racial reckoning in the

[1] Citations to "App." refer to the State's Appendix.

United States, and specifically for an end to the disproportionate use of force by police officers against Black and other minority individuals. These protests and marches—in which Oklahoma NAACP participated—were largely peaceful. And to the extent particular individuals engaged in isolated instances of unlawful behavior, Oklahoma had (and has) an extensive statutory framework that criminalizes riot, unlawful assembly, and similar conduct. *See* Okla. Stat. tit. 21, §§ 1311–1320.10. Notwithstanding this existing scheme, however, the Oklahoma Legislature passed House Bill 1674, which the Governor signed in April 2021. *See* 2021 Okla. Sess. Laws ch. 106 (to be codified at Okla. Stat. tit. 21, §§ 1312, 1320.11–.12). HB 1674, which is one of several anti-protest laws enacted by some States in the wake of the summer 2020 demonstrations,[2] goes beyond Oklahoma's already-considerable catalog of proscriptions and creates additional crimes against public peace.

[2] *See* Sophie Quinton, *Eight States Enact Anti-Protest Laws*, Pew (June 21, 2021), https://perma.cc/96PC-8DEB.

Two sections of HB 1674 are relevant to this case. The first is Section 3, which introduces an Organizational-Liability Provision, to be codified as Section 1320.12 of Title 21. Under Section 3:

> If an organization is found to be a conspirator with persons who are found to have committed any of the crimes described in Sections 1311 through 1320.5 and 1320.10 of Title 21 of the Oklahoma Statutes, the conspiring organization shall be punished by a fine that is ten times the amount of said fine authorized by the appropriate provision.

HB 1674 § 3. Sections 1311 through 1320.5 and 1320.10 of Title 21, in turn, criminalize a host of offenses, including: riot; rout; unlawful assembly; refusal to aid in the arrest of a rioter; resisting execution of legal process; incitement to riot; and teaching, demonstrating, or training in the use of certain weapons in furtherance of a riot or civil disorder.

The second section of HB 1674 that is relevant to this case is Section 1, which, among other things, adds a Street-Obstruction Provision to Section 1312 of Title 21. Under this provision:

> 5. Every person who shall unlawfully obstruct the normal use of any public street, highway or road within this state by impeding, hindering or restraining motor vehicle traffic or passage thereon, by standing or approaching motor vehicles thereon, or by endangering the safe movement of motor vehicles or pedestrians traveling thereon shall, upon conviction, be guilty of a misdemeanor punishable by

> imprisonment in the county jail for a term not exceeding one (1) year, or by a fine of not less than One Hundred Dollars ($100.00) and not exceeding Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment. In addition, the person shall be liable for all damages to person or property by reason of the same. As used in this paragraph, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

HB 1674 § 1.[3] As enacted, HB 1674 was set to take effect on November 1, 2021. *See id.* § 4.

C. Procedural History

On August 30, 2021, Oklahoma NAACP filed suit against the Oklahoma Attorney General and Oklahoma County District Attorney, in their official capacities. App. 8. Oklahoma NAACP alleged that Sections 1 and 3 of HB 1674 are unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment, and

[3] The State's Statement of the Case describes an incident that occurred in May 2020, during which a family in a truck was confronted by a group of protestors, and during which the father of the family drove the truck through the group, allegedly injuring several individuals. *See* Appellants' Br. 3 & n.2. Section 2 of HB 1674 introduces a provision, to be codified as Section 1320.11 of Title 21, that would absolve a motor vehicle operator of liability for causing injury or death under certain conditions. *See* HB 1674 § 2. Oklahoma NAACP has not challenged Section 2 in this litigation, and any issues relating to that provision are not before the Court.

unconstitutionally burden First Amendment rights. App. 28–33, ¶¶ 56–73.

Oklahoma NAACP alleged that if HB 1674 were to take effect, the organization and its members would be chilled from organizing or attending demonstrations. App. 11, ¶ 12. Although Oklahoma NAACP and its members have no intention of violating Oklahoma's laws regarding riots and unlawful assemblies, Oklahoma NAACP fears the vague and sweeping language of Sections 1 and 3 could subject its members to criminal penalties, and the organization itself to ruinous financial liability. *Id.* ¶ 11.

Shortly after suing, Oklahoma NAACP moved for a preliminary injunction against enforcement of Sections 1 and 3. App. 35. The District Court granted the motion, holding that Oklahoma NAACP was likely to succeed on its claims that Sections 1 and 3 are unconstitutionally vague and violate the First Amendment. Beginning with Section 3, the court explained that the Organizational-Liability Provision is likely vague because it is "readily interpreted" as criminalizing not only conspiracies *to* violate Oklahoma's laws regarding riots and unlawful assemblies, but also conspiracies *with*

individuals who violate those laws—no matter how unrelated or removed the conspiracies. *See* App. 116. The State had argued that "Plaintiff cannot be held liable under HB 1674 for conspiring to commit crimes that do not violate the riot-related laws," App. 115, but the District Court observed that the State's interpretation was "difficult to reconcile . . . with the phrase 'with other persons who are found'" in Section 3, App. 116.[4] "If the only reach of HB 1674 was an organization which conspires with others to riot," the court reasoned, "this language is superfluous." *Id.* For similar reasons, the court held that Section 3 likely violates the First Amendment. *See* App. 120–22; *id.* at 122 ("[T]he organizational liability provision is so overbroad it poses a distinct risk of sweeping and improper application.").

Moving to Section 1, the District Court agreed with Oklahoma NAACP that the Street-Obstruction Provision is likely vague because it "fails to identify with sufficient precision what conduct is targeted" and "creates a legal consequence that is subject to the vagaries of law enforcement or judges without giving a potential offender the

[4] The District Court mistakenly included the word "other" when quoting from Section 3. As discussed below, *see* p. 25 n.9, *infra*, the court's introduction of the word "other" is immaterial to its legal analysis.

opportunity to know beforehand if his/her conduct is improper." App. 119. The State argued that the Street-Obstruction Provision is circumscribed and applies only to rioters because HB 1674 added it to Section 1312 of Title 21, which specifies penalties for those guilty of participating in a riot. But the District Court rejected that reading, explaining that the language in the Street-Obstruction Provision differs in critical respects from all other provisions in Section 1312. App. 118. The District Court rejected a similar argument from the State in concluding that the Street-Obstruction Provision likely violates the First Amendment. *See* App. 123–24. And the court also reasoned that the provision likely violates the First Amendment because "Defendants have failed to articulate the governmental interest it seeks to protect." App. 124. The court explained, for example, that to the extent the State justified the Street-Obstruction Provision by reference to its interest in regulating "passage along its streets, there are ample other laws which serve that purpose." *Id.*

Finally, the District Court held that Oklahoma NAACP had demonstrated that it was likely to suffer irreparable harm, and that the

balance of equities and public interest weighed in its favor. App. 124–26.

The State timely appealed. App. 129. The parties jointly requested that this Court certify questions about the scope of HB 1674 to the Oklahoma Court of Criminal Appeals. A motions panel referred the motion to the merits panel.

SUMMARY OF ARGUMENT

The Organizational-Liability and Street-Obstruction Provisions are both vague and overbroad. They contain poorly defined and undefined terms and impose punishing liability for a potentially staggering amount of constitutionally protected activity. If the challenged provisions are allowed to take effect, they will put an immediate chill on the First Amendment expression and association of Oklahoma NAACP and its members. In particular, they will deter Oklahoma NAACP and its members from organizing and attending protests, demonstrations, and public gatherings—all of which have been fundamental to the organization's mission for over a century. The District Court was correct to enjoin their enforcement.

Beginning with the Organizational-Liability Provision, Section 3 of HB 1674 imposes devastating criminal penalties on any organization "found to be a conspirator with" individuals who violate certain sections of Oklahoma's laws concerning riots and unlawful assemblies. But it does not specify that such an organization must itself conspire to violate those sections. Instead, Section 3 exposes organizations arranging peaceful acts of civil disobedience to the possibility of tenfold liability if participants are independently found to have committed riot-related offenses. The constitutional problems with such a vague prohibition are amplified where, as here, the threat of criminal liability burdens associational rights. Given that Section 3 risks punishing organizations for the misconduct of others, it does not regulate with the precision and clarity demanded by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

Moving to the Street-Obstruction Provision, Section 1 criminalizes standing or approaching a vehicle in a way that "render[s] passage unreasonably inconvenient." But what qualifies as inconvenient is not defined, leaving law enforcement and demonstrators alike to guess at its meaning. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971)

(striking down law prohibiting people from assembling in a way found to be "annoying" to passersby). Further, because the law is a content-neutral restriction that burdens speech in a traditional public forum, the State must demonstrate that it is narrowly tailored to further a significant government objective. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014); *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1220 (10th Cir. 2021). The State has barely acknowledged, much less met, this burden, as more precisely drawn laws abound that meet the State's asserted interest in traffic safety.

The State asks this Court to save the challenged provisions by narrowing them. But federal courts lack the power to impose limiting constructions on state laws. If the Court does not grant the parties' joint request to certify questions about the scope of Sections 1 and 3 to the Oklahoma Court of Criminal Appeals, then it is left with one option: affirm the District Court's injunction against enforcement of HB 1674, "treat the law as a nullity and invite [the Oklahoma Legislature] to try again." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

STANDARD OF REVIEW

This Court "review[s] a district court's decision to grant a preliminary injunction for abuse of discretion." *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). "An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* (internal quotation marks omitted). "Four factors must be shown by the movant to obtain a preliminary injunction: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Id.* (internal quotation marks and alterations omitted).

ARGUMENT

I. HB 1674's Organizational-Liability and Street-Obstruction Provisions Violate Due Process Because They Are Unconstitutionally Vague

The District Court correctly held that Oklahoma NAACP is likely to succeed on the merits of its vagueness claims. As the court recognized, a law fixing criminal penalties or defining the elements of a

crime violates due process if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see* App. 113. Vague laws are unconstitutional for two primary reasons. First, they do not give the average citizen "a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, they "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108–09. These problems are particularly concerning in the First Amendment context, as lack of notice and the prospect of discriminatory enforcement can chill protected speech. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). The risk of chill is heightened even further where, as here, organizations may be engaged in speech critical of the same government actors charged with enforcing the law. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("[H]istory shows that speech is suppressed

when either the speaker or the message is critical of those who enforce the law.").

The State argues that the challenged provisions are not vague because this Court can construe them narrowly. But federal courts cannot impose narrowing constructions on vague state laws. *See City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) ("We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."). When federal legislation is at issue, federal courts can save that legislation from vagueness if a narrowing construction is "fairly possible." *Boos v. Barry*, 485 U.S. 312, 331 (1988). Even then, federal courts "will not rewrite a law to conform it to constitutional requirements," *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and alterations omitted), because "the role of courts under our Constitution is not to fashion a new, clearer law to take its place," *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). When a state statute is challenged as vague, the power of federal courts is limited further still; they can "extrapolate [the statute's] allowable meaning" based on state law sources, but they lack the "power to construe and

narrow state laws." *Grayned*, 408 U.S. at 110. "Extrapolation," moreover, "is a delicate task," *id.*, and only if a saving construction is both "reasonable and readily apparent" can a federal court uphold a state statute alleged to be vague, *Boos*, 485 U.S. at 330.

Here, the State has not advanced such a construction. Although it proposes various narrowing interpretations of the Organizational-Liability and Street-Obstruction Provisions, these interpretations are neither "reasonable" nor "readily apparent." Even after the relevant state law canons of interpretation have been applied, the challenged provisions fail to provide adequate notice to those subject to their regulation, or sufficient guidance to those charged with their enforcement. As a result, both provisions are unconstitutionally vague.

A. The Organizational-Liability Provision Is Unconstitutionally Vague

The District Court correctly held that Oklahoma NAACP is likely to succeed on the merits of its vagueness challenge to Section 3 of HB 1674. Under Section 3:

> If an organization is found to be a conspirator with persons who are found to have committed any of the crimes described in Sections 1311 through 1320.5 and 1320.10 of Title 21 of the Oklahoma Statutes [which prohibit riots and unlawful assemblies], the conspiring organization shall be punished

> by a fine that is ten times the amount of said fine authorized by the appropriate provision.

HB 1674 § 3. This provision is vague because it imposes severe penalties on any organization "found to be a conspirator with" individuals who violate certain sections of Oklahoma's laws concerning riots and unlawful assemblies, but it does not specify whether such an organization must itself conspire to violate those sections. As a result, Section 3 fails to give organizations notice of the conspiracies that it punishes. It also vests law enforcement with unrestrained discretion to decide who should be prosecuted based on the violations of others.

In evaluating the lack of clarity regarding the scope of conspiracies that Section 3 punishes, it is worth noting what the provision does not say. It does not provide, as the State suggests, that an organization will be held liable if it "conspires *with the purpose to have others violate* one of the specifically enumerated anti-riot laws." *See* Appellants' Br. 13 (emphasis added). Nor does it provide that an organization will be held liable if it "conspires to commit," or "conspires with others to commit," violations of Oklahoma's anti-riot laws. The Legislature's decision not to adopt such terminology is significant, as there are many instances in Title 21 where the Oklahoma Legislature

did choose to use such terms. *See, e.g.*, Okla. Stat. tit. 21, § 1265.5 ("If two or more persons *conspire to commit* any crime defined by Sections 1265.1 through 1265.14 of this title, each of such persons is guilty of conspiracy and subject to the same punishment as if he had committed the crime which he conspired to commit, whether or not any act be done in furtherance of the conspiracy." (emphasis added)); *id.* § 1266.4(3) ("It shall be unlawful for any person knowingly or willfully to . . . *[c]onspire with one or more persons to commit* any of the above acts . . . ." (emphasis added)).[5]

Instead, Section 3 imposes liability where an organization "is found to be a conspirator with persons," and where those persons in turn "are found to have committed" certain riot-related offenses. This two-step concept of conspiracy liability has almost no precedent in Oklahoma law. Indeed, there appears to be only one other Oklahoma statute that imposes liability on an organization "found to be a conspirator with persons" who in turn "are found to have committed"

[5] *See also, e.g.*, Okla. Stat. tit. 21, §§ 421(A), 422, 424 (using the "conspire to" construction); *id.* §§ 425(A), 843.4(A)(2), 1663(C)(2), 1674(5), 1742.2(A)(1) (using the "conspire with others to" construction).

certain crimes, and that is Section 1792 of Title 21, which prohibits trespass to critical infrastructure facilities.[6] That provision was enacted in 2017 in response to environmental protests, and it was criticized contemporaneously as an unlawful attempt to restrict speech. *See, e.g.*, Dana McClure, *Sleep Now in the Fire: Anti-Protest Laws and the Environmental Movement*, 11 Ariz. J. Envtl. L. & Pol'y 209, 220 (2021) (describing the conspiracy liability provision of Section 1792 as "directly implicat[ing] the constitutional right to assembly by imposing harsh penalties on organizations that may be only tangentially related to the individual being prosecuted under the statute"). The novel phrasing employed by that provision and Section 3—and only by those two laws—strongly indicates that the Legislature intended to move beyond the types of conspiracies traditionally punishable under Oklahoma law. *See Stump v. Cheek*, 179 P.3d 606, 613 (Okla. 2007) ("A statute will be given a construction, if possible, which renders every

[6] *See* Okla. Stat. tit. 21, § 1792(C) ("If an organization is found to be a conspirator with persons who are found to have committed any of the crimes described in subsection A or B of this section, the conspiring organization shall be punished by a fine that is ten times the amount of said fine authorized by the appropriate provision of this section.").

word operative, rather than one which makes some words idle and meaningless.").

In crafting this new type of conspiracy liability, the Legislature created serious constitutional problems. Even assuming that Oklahoma's substantive anti-riot laws are clearly defined and not otherwise flawed, there are an almost unlimited number of ways in which an organization could conspire with persons who in turn violate those substantive laws. Oklahoma NAACP, for example, regularly organizes peaceful demonstrations, protests, and marches. In doing so, it coordinates with its members and other participants to march through city streets and sidewalks; chant, yell, and sing; and carry banners and flags. On occasion, participants may foreseeably and incidentally violate minor Oklahoma laws, such as prohibitions on walking in the street, *see* Okla. Stat. tit. 47, §§ 11-503, 11-506(a); willfully disturbing the peace by loud noise, *see id.* tit. 21, § 1362; and displaying certain signs on public property, *see id.* § 375.[7] Under Section 3, when Oklahoma NAACP provides sound amplification to

[7] Section 375 of Title 21 is also facially unconstitutional. *See, e.g.*, *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1223–24 (9th Cir. 2003).

participants at its events, it not only risks subjecting itself to liability for conspiring with those participants to disturb the peace, *see id.* § 1362; it also risks the possibility that some of those participants—with whom Oklahoma NAACP has been "found to be a conspirator"—will go on to violate Oklahoma's anti-riot laws, triggering enhanced liability. This is true even if the violations are entirely unforeseen and unintended by Oklahoma NAACP, and even if the violations occur on another day, or in another place. Indeed, Section 3 might even impose liability where Oklahoma NAACP is "found to be a conspirator with" individuals who *previously* (and unbeknownst to Oklahoma NAACP) committed violations of Oklahoma's laws concerning riots and unlawful assemblies.

Making matters worse, Section 3 does not define the term "conspirator," thereby introducing further uncertainty regarding the scope of organizational liability. The State argues that "the concept of conspiracy is settled" under Oklahoma law, *see* Appellants' Br. 21, but Section 421(A) of Title 21 provides a multi-pronged definition that sweeps in an unknowable and potentially staggering amount of conduct. Section 421(A)(5), for example, imposes liability where "two or more

persons conspire . . . [t]o commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws." This definition provides no guidance as to the provision's reach. Indeed, the Supreme Court vacated convictions under a materially identical statute that was challenged as vague in *Musser v. Utah*, 333 U.S. 95 (1948). There the Court explained that the provision "would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." *Id.* at 97. The same is true here, with the added problem that organizations may be subject to tenfold monetary penalties each time Oklahoma's anti-riot

laws are violated by persons with whom those organizations have (unrelatedly) "agree[d] to do almost any act."[8]

Without any indication of the kinds of conspiracies punishable under Section 3, Oklahoma NAACP is left to guess which of its activities might subject the organization to devastating liability. This is the heartland of vagueness, as it violates "the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). This uncertainty also vests law enforcement with near-limitless discretion to decide which organizations to punish for the

[8] The State argues that each conspiracy under Section 3 is punishable by a single fine, and that "only if the organization is found guilty of multiple conspiracies would multiple fines attach." Appellants' Br. 20; *see id.* at 19–21. But this position assumes the State's atextual reading of Section 3 is correct. Reading Section 3 according to its terms, if an organization conspires once with a group of individuals to commit a minor crime (or, under Section 421(A)(5) of Title 21, "[t]o commit any act injurious . . . to public morals"), the organization could be subject to tenfold monetary penalties each time those individuals go on to violate Oklahoma's laws concerning riots and unlawful assemblies. Given that the fines for the enumerated offenses in Section 3 range from $100 to $10,000, the organization could face millions of dollars in liability for a single conspiracy.

unlawful conduct of others. Section 3 "allows policemen, prosecutors, and juries to pursue their personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), beginning with a violation of Oklahoma's laws concerning riots and unlawful assemblies, and ending with any organization that has conspired with the violators, no matter how far removed the conspiracy, or how different in kind. Such unbounded authority is impermissible, the Supreme Court has explained, because "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.*

The State tries to resist this conclusion, but it does so by imposing a narrowing construction on Section 3 that is inconsistent with the law's plain language.[9] According to the State, an organization can be held liable under Section 3 only if it "conspires *with the purpose to have others violate* one of the specifically enumerated anti-riot laws." *See*

[9] The State also criticizes the District Court's opinion for being too short, and for mistakenly quoting Section 3 as including the word "other." *See* Appellants' Br. 6–7 & nn.3, 14, 18. But there is no length requirement for judicial decisions. And the court's introduction of the word "other" is immaterial to its legal analysis. The vagueness in Section 3 inheres in the two-step construction that imposes liability on "conspirators *with* persons *who are found to have committed*" certain crimes, whether those "persons" are "other" or not.

Appellants' Br. 13 (emphasis added). As noted above, this is not what the law says. The State nevertheless argues that its atextual interpretation is compelled by various Oklahoma canons of construction. *See id.* at 11–13, 15–18. And even if these canons are not dispositive, the State contends, Oklahoma NAACP's vagueness challenge should fail because courts "'must begin with "the presumption that [a] statute comports with the requirements of federal due process and must be upheld unless satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution."'" *Id.* at 10 (quoting *United States v. Hunter*, 663 F.3d 1136, 1141 (10th Cir. 2011)).

The State's argument suffers from several flaws. As a preliminary matter, the State incorrectly suggests that federal courts should not sustain a vagueness challenge to a state law "before it was ever enforced or interpreted by the state judiciary." Appellants' Br. 15. As indicated in the parties' joint motion for certification, Oklahoma NAACP agrees that the resolution of this case would be aided by the Oklahoma Court of Criminal Appeals' definitive interpretation of Section 3. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988). There is no requirement, however, that federal courts allow an

unconstitutional law to go into effect in the hopes that a state court might eventually narrow its terms. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459, 472 (1974).

Furthermore, the State misinterprets the above quotation from *Hunter*—that courts "must begin with the presumption that [a] statute comports with the requirements of federal due process," 663 F.3d at 1141—to mean that vagueness challenges fail whenever a statute is susceptible to a constitutionally compliant interpretation. Contrary to the State's understanding, the presumption in favor of a law's constitutionality "does not apply when"—as here—"the challenged statute infringes upon First Amendment rights." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012). Instead, "though duly enacted laws are ordinarily presumed constitutional, when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." *Ass'n of Cmty. Orgs. for Reform Now, (ACORN) v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir. 1984).

In addition, the State's interpretation of *Hunter* would doom nearly all vagueness challenges, because few laws linguistically

foreclose a permissible narrowing construction. As the Supreme Court explained in *Boos v. Barry*, 485 U.S. 312 (1988), even where a federal court evaluates a vagueness challenge to a federal law, the law can be upheld only where a saving construction is "*fairly* possible," *id.* at 331 (emphasis added). When state legislation is at issue, the bar is higher still, and a saving construction must be both "reasonable and readily apparent" for the statute to be upheld. *Id.* at 330.

The State offers no such construction. Despite its reliance on an assortment of canons of interpretation, the State is unable to achieve what the Oklahoma Legislature did not: an Organizational-Liability Provision that punishes only conspiracy to commit riot-related offenses. The State argues, for example, that statutory context and legislative intent compel its reading of Section 3 because the provision adds language to the portion of Oklahoma law regarding "Riots and Unlawful Assemblies," and because conspiracies to riot were "'the evils intended to be avoided' when the Legislature enacted this law." Appellants' Br. 15–16 (first quoting Okla. Stat. tit. 21, Ch. 55 (Chapter Title); then quoting *AMF Tubescope Co. v. Hatchel*, 547 P.2d 374, 379 (Okla. 1976)). But the State offers no reason to believe the Legislature's goal was

solely to punish conspiracies to riot, as opposed to punishing a broader range of conduct by organizations affiliated with rioters. Furthermore, "[t]he Legislature is presumed to have expressed its intent in the text of the statute," *W.R. Allison Enters., Inc. v. CompSource Okla.*, 301 P.3d 407, 411 (Okla. 2013), and here the text is not confined to conspiracies to riot, which, as the State notes, were already prohibited under Oklahoma law, *see* Appellants' Br. 22.

The State also asserts that "[s]ettled conspiracy law"—which the State lists as its own canon—supports its reading of Section 3, and that a broader interpretation "would require assuming the Legislature *sub silentio* created a conspiracy crime that functions differently from all other conspiracy crimes under Oklahoma law." *Id.* at 16–17. As discussed above, however, Section 3 *is* different textually from all other conspiracy crimes under Oklahoma law. Aside from the prohibition on trespass to critical infrastructure facilities discussed above, *see* Okla. Stat. tit. 21, § 1792(C), which was recently enacted and raises similar problems to Section 3, there appear to be no other Oklahoma statutes that impose liability on an organization "found to be a conspirator with

persons" who in turn "are found to have committed" certain crimes. *See* pp. 19–21, *supra*.

Finally, the State's reliance on the cannons of absurdity, lenity, and constitutional avoidance is misplaced. There is nothing absurd about an interpretation that gives meaning to each word in Section 3, and that distinguishes between an organization "found to be a conspirator with persons who" violate laws concerning riots and unlawful assemblies, on the one hand, and an organization that "conspires with the purpose to have others violate" those laws, on the other. To the contrary, the District Court correctly concluded that the text of Section 3 is "readily interpreted as argued by Plaintiff," but is "difficult to reconcile [with] Defendants' interpretation." App. 116. Because the State's interpretation is inconsistent with the text of Section 3, lenity and constitutional avoidance are also unhelpful. "[T]he 'rule of lenity[]' requires that [courts] construe statutes strictly against the state and liberally in favor of the accused," *Newlun v. State*, 348 P.3d 209, 211 (Okla. Crim. App. 2015), but it does not displace the background presumption that "[a] statute should be given a construction according to the fair import of its words taken in their

usual sense, in connection with the context, and with reference to the purpose of the provision," *State v. Davis*, 260 P.3d 194, 195 (Okla. Crim. App. 2011). And constitutional avoidance has limited utility when applied by federal courts evaluating vagueness challenges to state laws. As explained above, federal courts can uphold state statutes only where a permissible limiting construction is "reasonable and readily apparent." *Boos*, 485 U.S. at 330. A court cannot rely on state constitutional avoidance doctrines to save a statute where, as here, the proposed interpretation is unmoored from the statute's text.[10]

For these reasons, the State has failed to offer a construction that saves the Organizational-Liability Provision from vagueness. Furthermore, even if the State were to offer such a construction, and

[10] The State argues that the District Court's analysis is internally inconsistent because even if the statute is construed broadly, it still provides notice of the conduct that it prohibits. *See* Appellants' Br. 7, 19. But this is incorrect for the reasons discussed above. *See* pp. 21–25, *supra*. If, as Oklahoma NAACP argues, Section 3 is not limited to conspiracies to commit riot-related offenses, then organizations are left with no guidance as to which conspiracies could subject them to ruinous financial liability. *See id.* Indeed, if the interpretation advanced by Oklahoma NAACP (and adopted by the District Court) is correct, then the Organizational-Liability Provision punishes conspiracies under Section 421(A)(5) of Title 21, which is itself unconstitutionally vague. *See* pp. 22–24, *supra*.

even if this Court were to adopt it, it "would fail to bind state prosecutors, leaving the citizens of [Oklahoma] vulnerable to prosecutions under the actual language of the statute." *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1194–95 (10th Cir. 2000). Rather than expose Oklahoma NAACP and its members to this risk, the Court should affirm the District Court's order enjoining enforcement of Section 3.

B. The Street-Obstruction Provision Is Unconstitutionally Vague

The District Court also correctly held that Oklahoma NAACP is likely to succeed on its vagueness challenge to Section 1 of HB 1674. As relevant, Section 1 adds the following provision to Section 1312 of Title 21:

> 5. Every person who shall unlawfully obstruct the normal use of any public street, highway or road within this state by impeding, hindering or restraining motor vehicle traffic or passage thereon, by standing or approaching motor vehicles thereon, or by endangering the safe movement of motor vehicles or pedestrians traveling thereon shall, upon conviction, be guilty of a misdemeanor punishable by imprisonment in the county jail for a term not exceeding one (1) year, or by a fine of not less than One Hundred Dollars ($100.00) and not exceeding Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment. In addition, the person shall be liable for all damages to person or property by reason of the same. As used in this

> paragraph, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

HB 1674 § 1. This Street-Obstruction Provision is vague because several of its terms fail to provide sufficient guidance as to their scope. In addition, the provision lacks a scienter requirement, which exacerbates the vagueness problems created by its imprecise terms. The State argues that the provision is not vague because it applies only to individuals who have participated in a riot. But the State's interpretation of the statute is incorrect, and it would not save the provision from vagueness even if the Court were to accept it.

Beginning with the terms of the Street-Obstruction Provision, Section 1 defines "obstruct" in part as to "render passage unreasonably inconvenient." This definition is vague because it does not give adequate notice regarding the kinds of conduct that might inconvenience motorists or pedestrians, let alone to such a degree as to be considered unreasonable. As noted above, *see* pp. 3–4, *supra*, Oklahoma NAACP organizes peaceful demonstrations during which its members and other participants march through city streets and sidewalks. When those demonstrations become crowded, participants may sometimes be required to walk alongside traffic, and they may also

occasionally approach motor vehicles and pedestrians to distribute leaflets and spread their message. *See* App. 51. Certainly, some individuals will find this behavior inconvenient, but Oklahoma NAACP and the participants in its demonstrations will have no way of knowing when their actions are inconvenient enough to create liability. That decision will instead be made by "relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 139 S. Ct. at 2325.

The Supreme Court considered a similar law in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), and held that it was unconstitutionally vague. The provision at issue in that case was a Cincinnati ordinance that made it a crime for "three or more persons to assemble on any of the sidewalks and there conduct themselves in a manner annoying to persons passing by." *Id.* (internal quotation marks and alterations omitted). Noting that "[c]onduct that annoys some people does not annoy others," the Court explained that the ordinance was vague because it imposed "an unascertainable standard." *Id.* at 614. As a result, individuals were required to "guess at its meaning," *id.* (internal

quotation marks omitted), and police officers were left with unbounded discretion. The Seventh Circuit's decision in *Bell v. Keating*, 697 F.3d 445 (7th Cir. 2012), is also on point. There the court held to be vague a Chicago ordinance that criminalized failure to obey a dispersal order "where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause . . . serious inconvenience, annoyance or alarm." *Id.* at 450 (internal quotation marks omitted). The court reasoned that the term "serious inconvenience" "does not identify what nuisances amount to such inconvenience that First Amendment rights constitutionally give way," *id.* at 462, and the term "annoy" "predicates penalty on an inscrutable standard, which is no standard at all," *id.* (citing *Coates*, 402 U.S. at 614). Absent clearer guidance, the court concluded, the Chicago ordinance failed to give individuals sufficient notice and was susceptible to discriminatory and arbitrary enforcement. *See id.* at 462–63.

The term "unreasonably inconvenient" is no clearer than the terms "serious inconvenience" or "annoy." The State responds that the phrase is not vague because liability under Section 1 of HB 1674 "attaches only when 'passage' is 'unreasonably inconvenient,' by

'impeding, hindering or restraining motor vehicle traffic or passage thereon, by standing or approaching motor vehicles thereon, or by endangering the safe movement of motor vehicles or pedestrians traveling thereon.'" Appellants' Br. 26 (quoting HB 1674 § 1). And the State contends that these latter terms provide "a 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Id.* (quoting *United States v. Hunter*, 663 F.3d 1136, 1142 (10th Cir. 2011)). The State argues that the District Court erred by reading the terms of Section 1 in isolation, and that once these terms are read in context, the alleged vagueness of the Street-Obstruction Provision disappears. *See id.* at 25–26.

The problem with this argument is that the purportedly limiting context on which the State relies simply describes ways in which one might "obstruct the normal use of any public street, highway or road." HB 1674 § 1. And "obstruct" is defined in part as to "render passage unreasonably inconvenient." So regardless of whether Oklahoma NAACP and the participants in its demonstrations are "impeding," "hindering," or "restraining," they will still be required to guess—and law enforcement will still be permitted to decide—whether they are

doing so in a way that renders the use of roadways "unreasonably inconvenient." As a result, even with the State's limiting context, individuals will lack sufficient notice of the conduct proscribed by Section 1, and liability "may entirely depend upon whether or not a policeman is annoyed." *Coates*, 402 U.S. at 614.

The State goes on at some length about how "reasonableness" standards are common in the law, and about how other traffic-related laws have been upheld against vagueness challenges. *See* Appellants' Br. 26–28 (discussing *Hunter*, 663 F.3d 1136, and *Langford v. City of St. Louis*, 3 F.4th 1054 (8th Cir. 2021)). But the problem just discussed regarding the definition of "obstruct" is not that it uses the word "unreasonably"; it is that it relies on the term "inconvenient." And the laws at issue in the cases raised by the State do not include that term (or any other synonym of "annoy"). *See Hunter*, 663 F.3d at 1141 (upholding statute providing that "a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (internal quotation marks omitted)); *Langford*, 3 F.4th at 1057 (upholding ordinance prohibiting individuals

from standing "in such a manner as to obstruct, impede, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic" (internal quotation marks omitted)).[11]

The term "approaching" in Section 1 is also vague. The statute does not specify how close someone must come to a car before he or she might violate the law. Under the undefined term, a person a block away but walking toward a vehicle could be found to be "approaching." Stacking one vague term on another, the State argues that "[t]he statute does not penalize every approach to a vehicle," but that it instead criminalizes only certain approaches, such as those that "render

[11] In addition to the issues presented by the term "unreasonably inconvenient," the word "obstruct" is also vague because it is defined in part as "to render impassable." This phrase creates further problems because it does not specify the amount of time that a road must be "impassable" before liability attaches. The State asserts that "[t]he criminal code . . . is replete with crimes that lack temporal components without raising constitutional concerns," and it argues by analogy that "there is no specified time a burglar needs to spend in a home—or a rioter needs to riot—to violate the law." Appellants' Br. 28. But the crimes of burglary and rioting are completed the moment their elements are satisfied, suggesting that the State would hold participants in Oklahoma NAACP's demonstrations liable if they walked in front of a car for even an instant. Thus, under the State's argument, the police have unfettered discretion to determine how fast persons must walk to avoid criminal liability, with liability possibly attaching within a fraction of a second.

passage unreasonably inconvenient or hazardous." *Id.* at 29 (quoting HB 1674 § 1). The provision cannot be saved by arguing that this Court should use one vague term to help define another. If anything, doing so only compounds the vagueness.

Section 1's vagueness is made worse by its lack of a scienter requirement. The State responds that the absence of a scienter requirement does not by itself render a statute unconstitutional. *See id.* at 27. But this Court and the Supreme Court have said that failure to include such a requirement is relevant to the vagueness analysis. In *Hill v. Colorado*, 530 U.S. 703 (2000), for example, the Supreme Court explained that the alleged failure of a state statute to provide notice of the conduct it prohibited was "ameliorated by the fact that [it] contain[ed] a scienter requirement," *id.* at 732. And in *Galbreath v. City of Oklahoma City*, 568 F. App'x 534 (10th Cir. 2014), this Court allowed a vagueness challenge to proceed against a disorderly conduct ordinance in part because "the ordinance lacks a scienter requirement, which could have mitigated the indefiniteness of the other terms," *id.* at 541; *see United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988) ("[A] scienter requirement may mitigate a criminal law's vagueness by

ensuring that it punishes only those who are aware their conduct is unlawful."). The State cannot argue that Section 1's failure to include a scienter requirement is irrelevant to its vagueness; at a minimum, the lack of a *mens rea* element exacerbates the vagueness problems created by the statute's other terms.

Given the vagueness of the Street-Obstruction Provision, it is no wonder that even members of the Oklahoma Legislature could not explain what conduct would violate the law. During floor debate, one of the bill's principal authors struggled to articulate a fact pattern that might result in liability, but he admitted that mere jaywalking might be sufficient. HB 1674 Floor Debate, Okla. Senate, Reg. Sess., 10:17:05–10:20:48 (Apr. 14, 2021) (statement of Sen. Standridge), https://bit.ly/3KlMkdl. When pressed on what might render "unreasonably inconvenient" the normal use of a road, he stated that it is a "high standard," but could not explain further. *Id.* at 10:13:45–10:14:38.

Seeking to sidestep the problems above, the State argues that Section 1 is constitutional because it applies only to individuals who have first been found guilty of participating in a riot. *See* Appellants'

Br. 22–24. If the State's interpretation of the law were correct, then the provision would be less concerning, as Oklahoma NAACP and its members do not engage in riot.[12] The provision would still be vague, however, for the reasons already discussed. Even if an individual has been found guilty of participating in a riot, Section 1 still provides insufficient guidance as to what it means to "render passage unreasonably inconvenient," or to "approach[] motor vehicles." And the lack of a scienter requirement still adds to the uncertainty regarding the provision's scope.

Furthermore, the State's interpretation of Section 1 is wrong. As the District Court explained, "Defendants' argument that the street obstruction provision only applies where there is first a riot is unsupported by the text of the statute." App. 118. It is true that the Street-Obstruction Provision was added to Section 1312 of Title 21,

[12] For this reason, too, Oklahoma NAACP believes that resolution of this case would be aided by the Oklahoma Court of Criminal Appeals' definitive interpretation of Section 1. Oklahoma NAACP also notes that the State's reading of the provision would still be concerning to the extent that organizations could be held liable under Section 3 for engaging in unrelated conspiracies with individuals who violate Section 1.

which begins with the opening clause: "Every person guilty of participating in any riot is punishable as follows . . . ." HB 1674 § 1. But unlike every other provision in Section 1312, the Street-Obstruction Provision makes no reference to such "person" or to the "riot" described in the opening clause. *See* Okla. Stat. tit. 21, § 1312(1) (imposing principal liability on "such person" where "any murder, maiming, robbery, rape or arson was committed in the course of such riot"); *id.* § 1312(2) (imposing enhanced penalties on "such person" where "the purpose of the riotous assembly was to resist" or obstruct); *id.* § 1312(3) (imposing enhanced penalties where "such person carried at the time of such riot" certain weapons or was disguised); *id.* § 1312(4) (imposing enhanced penalties where "such person directed, advised, encouraged or solicited other persons, who participated in the riot to acts of force or violence"). Instead, the Street-Obstruction Provision imposes liability on "*[e]very person* who shall unlawfully obstruct the normal use of any public street, highway or road." HB 1674 § 1 (emphasis added). The Legislature was capable of reiterating the language that it used in every other provision, but it chose not to, and the Court should assign weight to that decision. *Cf. Russello v. United States*, 464 U.S. 16, 23

(1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and alteration omitted)).

The upshot is that the Street-Obstruction Provision is unbounded by any requirement that individuals first engage in riot to be subject to liability. And even if it were so limited, it would still be rendered vague by its imprecise terms and its failure to include a scienter requirement. Rather than accept the State's invitation to rewrite the law through the application of various briefly mentioned canons, *see* Appellants' Br. 30, this Court should "treat the law as a nullity and invite [the Oklahoma Legislature] to try again," *Davis*, 139 S. Ct. at 2323.[13]

[13] As noted above, *see* pp. 31–32, *supra*, even if the Court were to accept the State's invitation, the Court's interpretation of Section 1 "would fail to bind state prosecutors." *Citizens for Responsible Gov't State Pol. Action Comm.*, 236 F.3d at 1194. This is particularly concerning in the context of the Street-Obstruction Provision, as the State has suggested that it may test the limits of the law. *See* Appellants' Br. 30 ("If situations arise where it is difficult to discern whether a particular act falls within the ambit of the statute, it will be up to later courts to engage in the usual application of statutory construction . . . .").

II. HB 1674 Also Violates the First Amendment

The District Court also properly concluded that Oklahoma NAACP is likely to prevail on its First Amendment challenges to Sections 1 and 3 of HB 1674. The Organizational-Liability Provision is invalid because it impermissibly burdens Oklahoma NAACP's First Amendment rights by imposing enhanced criminal liability based on association alone. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982). And the Street-Obstruction Provision fails intermediate scrutiny because it restricts the First Amendment activities of Oklahoma NAACP without being narrowly tailored to achieve a substantial government interest. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 477 (2014); *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1220 (10th Cir. 2021). The State bears the burden of proof to demonstrate HB 1674 complies with the First Amendment's demanding standards, *see Brewer*, 18 F.4th at 1217, and the District Court did not err in concluding that Oklahoma NAACP is likely to prevail. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (plaintiff "must be deemed likely to prevail" in First Amendment case unless government meets its burden).

The State does not meaningfully grapple with these standards. Instead, it premises its argument that HB 1674 does not infringe First Amendment rights on an assumption that this Court will accept its narrowed construction of the statute. As demonstrated above, the State's atextual interpretation of HB 1674 is not a reasonable one, let alone the right one.

In any event, courts "cannot assume . . . ambiguities will be resolved in favor of adequate protection of First Amendment rights." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Indeed, it is no coincidence that much of modern First Amendment doctrine was developed in cases involving States trying different methods to deter the advocacy activities of the NAACP. The freedoms on which the NAACP relies "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (reversing convictions for refusing to turn over NAACP membership list); *see also Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First

Amendment rights."). A broadly worded statute "may easily become a weapon of oppression, however evenhanded its terms appear." *Button*, 371 U.S. at 436. Therefore, "in the context of constitutionally protected activity, . . . precision of regulation is demanded." *Claiborne Hardware*, 458 U.S. at 916 (internal quotation marks omitted). "If the line drawn by [a law] between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, [courts] will not presume that the statute curtails constitutionally protected activity as little as possible." *Button*, 371 U.S. at 432. Even if this Court were to conclude that HB 1674 is not unconstitutionally vague, the existence of ambiguity poses a separate and distinct First Amendment problem. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("Regardless of whether the [challenged law] is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."). On its face, HB 1674 goes beyond what the First Amendment allows, and the District Court properly issued a preliminary injunction.

A. The "No Set of Circumstances" Test Offered by the State Does Not Apply

Citing *United States v. Salerno*, 481 U.S. 739 (1987), the State argues that Oklahoma NAACP cannot prevail on its constitutional challenge unless there is "no set of circumstances" in which the challenged law can be validly applied. Appellants' Br. 31–32. The State repeats this premise throughout its argument. But this is the wrong test.

As the District Court explained, this is a First Amendment case, and "[i]n the First Amendment context," the Supreme Court "ha[s] recognized a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (internal quotation marks omitted). The State argues that this standard applies only when the text of the challenged statute itself targets speech. Whether a statute's text targets speech overtly is relevant to whether strict or intermediate scrutiny applies, *see, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015), but courts recognize that even statutes that do not mention speech can have a

silencing effect. As discussed below, *see* pp. 55–56, *infra*, courts regularly entertain facial challenges to laws that do not explicitly target speech, without requiring that the laws be invalid in every instance. *See, e.g.*, *McCullen*, 573 U.S. at 471 (striking down, as facially unconstitutional, content-neutral state law that prohibited people from "remain[ing] on a public way or sidewalk" near abortion clinics (internal quotation marks omitted)). HB 1674's terms sweep broadly and put Oklahoma NAACP's and others' First Amendment activities at risk, and the *Salerno* standard therefore does not apply.

Furthermore, as this Court made clear in *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012), "*Salerno* is correctly understood not as a separate test applicable to facial challenges, but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework." In other words, before a court begins to speculate as to whether a hypothetical set of circumstances exists in which a restriction might be validly applied, it must first "apply the appropriate constitutional test to determine whether the challenged restriction is invalid on its face (and thus incapable of any valid application)." *Id.* at 1122. In this case, the

appropriate tests applicable to Sections 1 and 3 are those described in cases like *McCullen* and *Claiborne Hardware*, respectively. For the reasons discussed below, the challenged provisions fail those tests on their face, and thus in every application.

As a final point, the State obliquely calls into question whether Oklahoma NAACP is a proper party to bring this case, and it contends that the organization's "unsubstantiated fears and unreasonable constructions of state law are insufficient to support a preliminary injunction on facial grounds, despite the overbreadth doctrine being an exception to the normal rules of standing." Appellants' Br. 33. The State is correct that overbreadth doctrine is sometimes used to allow individuals to bring First Amendment challenges to laws that may be constitutionally applied to them. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). But that is not how Oklahoma NAACP employs overbreadth here. Instead, Oklahoma NAACP asserts its own interests in expression, as well as those of its members, and that is sufficient to establish standing under the "normal rules." *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–62 (2014) (to bring a pre-enforcement challenge, a plaintiff must allege "an intention to engage in

a course of conduct arguably affected with a constitutional interest . . . [that is] arguably proscribed by the statute they wish to challenge" (internal quotation marks and alterations omitted)).

B. The Organizational-Liability Provision Violates the First Amendment by Imposing Liability Based on Protected Association

The District Court properly concluded that Oklahoma NAACP is likely to prevail on its challenge to Section 3, which imposes tenfold liability on any organization "found to be a conspirator with persons who are found to have committed" specific offenses against public peace. HB 1674 § 3.

As discussed above, the language of the Organizational-Liability Provision is so capacious that, even though Oklahoma NAACP has no intention of violating Oklahoma's anti-riot or unlawful assembly laws, the organization could be deemed a "conspirator" with demonstrators who independently commit those crimes and could thus be subject to multiplied penalties. Accordingly, Section 3 would effectively punish Oklahoma NAACP for the riot-related crimes of others without a showing that Oklahoma NAACP specifically intended that those others commit those crimes. This threat of liability for others' misdeeds poses

an unallowable burden on Oklahoma NAACP's constitutional right to arrange and conduct peaceful demonstrations.

The Supreme Court's decision in *NAACP v. Claiborne Hardware* controls on this point. There, the NAACP led a constitutionally protected boycott against white-owned businesses in Mississippi to protest various forms of racial injustice. 458 U.S. at 907–08. Some boycott participants also committed acts of violence, which the NAACP did not condone and over which it had no control, and the NAACP was sued and held liable for the businesses' lost earnings attributable to the boycott. *See id.* at 889–96, 930–31. The Supreme Court concluded that the organization could not be made responsible for the violent acts of third parties who had participated in the boycott, reasoning that, given the First Amendment interests at stake, "liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920. Instead, the Court explained, "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Id.* And the "specific intent" envisioned by the *Claiborne*

Hardware Court is a demanding standard, "judged according to the strictest law." *Id.* at 919 (internal quotation marks omitted). As the District Court correctly found in this case, the text of the Organizational-Liability Provision sweeps more broadly than *Claiborne Hardware* permits.[14]

In response, the State renews its argument that the provision implicitly requires that a conspiracy be formed with the specific intent to commit one of the enumerated offenses against public peace. But Section 3 imposes liability on an organization "found to be a conspirator with persons" who commit specific crimes; the textual bridge between the organization and the conspiracy is "persons," not crimes. As explained above, *see* pp. 18–19, *supra*, this construction stands in sharp relief with that used in other statutory provisions that textually limit their scope to conspiracies to commit particular crimes. *See, e.g.*, Okla. Stat. tit. 21, § 1265.5. Oklahoma NAACP need not risk exposure to drastic consequences on the mere hope that prosecutors will exercise

[14] Even a mandate to purchase liability insurance to cover the acts of people participating in a parade can impermissibly burden the right to associate, *iMatter Utah v. Njord*, 774 F.3d 1258, 1270 (10th Cir. 2014), and HB 1674's imposition of criminal penalties renders it much more problematic.

restraint in enforcing the law or that, in a future prosecution, a court will interpret the provision narrowly. *See Claiborne Hardware*, 458 U.S. at 921 (ambiguity in state court's findings were "inadequate to assure the 'precision of regulation' demanded" by the First Amendment (quoting *Button*, 371 U.S. at 438)).

The State's repeated arguments that there is no constitutional right to engage in violence or rioting are irrelevant. Appellants' Br. 34–35. Indeed, they fail to appreciate the constitutional rights at stake. Oklahoma NAACP's peaceful demonstrations undoubtedly fall within its and its members' "rights of free speech, free assembly, and freedom to petition for a redress of grievances." *Claiborne Hardware*, 458 U.S. at 909. "[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means," *id.* at 933, and this right "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," *id*. at 908. Oklahoma NAACP's interest in the core constitutional rights associated with peaceful protests cannot be brushed aside in the face of a law whose literal scope threatens to

impose liability on it for the misconduct of others.

C. The Street-Obstruction Provision Does Not Withstand Intermediate Scrutiny Under the First Amendment

The District Court also correctly concluded that Oklahoma NAACP is likely to prevail on its argument that Section 1's Street-Obstruction Provision violates the First Amendment. Again, that provision criminalizes "obstruct[ing] the normal use of any public street"—including by "standing" or "approaching" cars—where "obstruct" is defined as rendering the street "impassible" or "render[ing] passage unreasonably inconvenient." HB 1674 § 1. As noted above, *see* pp. 33–39, *supra*, these terms are so broad that they threaten to sweep in all manner of First Amendment activity in which Oklahoma NAACP's members regularly engage, including walking toward cars to distribute leaflets or share their message with drivers.

"Consistent with the traditionally open character of public streets and sidewalks, . . . the government's ability to restrict speech in such locations is 'very limited.'" *McCullen*, 573 U.S. at 477 (citation omitted). As a content-neutral restriction on speech in a traditional public forum, the Street-Obstruction Provision is unconstitutional unless the State

demonstrates that it is narrowly tailored to achieve a substantial government interest. *Id.*; *accord, e.g.*, *Brewer*, 18 F.4th at 1220.

The relevant standard for scrutinizing a content-neutral law comes from *McCullen* and *Brewer*. In *McCullen*, the Supreme Court struck down a state law that made it a crime to stand on a "public way or sidewalk" within 35 feet of a facility that performs abortions. The government asserted an interest in "the unobstructed use of public sidewalks and roadways," and the plaintiffs challenging the law "d[id] not dispute the significance of these interests." 573 U.S. at 486 (internal quotation marks omitted). But the Court nevertheless held that the law was insufficiently tailored because the government had failed to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 495.

In *Brewer*, this Court applied the intermediate scrutiny standard articulated in *McCullen* as well as Circuit precedent to an ordinance that banned: 1) congregating on certain medians; and 2) exchanging items between pedestrians and vehicles near highway exit ramps. The government argued the restrictions were needed to promote traffic

safety, but this Court—like the Supreme Court in *McCullen*—explained that simply identifying the interest was not enough. Rather, the government needed to "show that its recited harms, specifically defined, are real and that the Ordinance will in fact alleviate them in a direct and material way." 18 F.4th at 1227 (internal quotation marks and alterations omitted). And the government was "obligated to show that it *seriously considered* less-restrictive means." *Id.* at 1255 (emphasis in original). Because the government had failed to prove that it "*seriously considered* less-restrictive means," such as limiting the ordinance to particularly dangerous medians, it failed to demonstrate narrow tailoring. *See id*. at 1256.

The State does not try to explain how it has met (or will meet) its evidentiary burden under *McCullen* and *Brewer*. Indeed, the State ignores these cases altogether. As explained above, Section 1's vague terms encompass a substantial amount of expressive activity and are not drafted to minimize intrusion on First Amendment rights. Moreover, Oklahoma has several existing laws that advance the same purported interests that the Street-Obstruction Provision serves. *See McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1076 (10th Cir. 2020)

(law not narrowly tailored where "City has existing laws that could advance [the same] interest"). These laws include a criminal prohibition on "knowingly and willfully obstruct[ing]" roadways, Okla. Stat. tit. 21, § 1754, and an extensive statutory regime criminalizing riots and unlawful assemblies, *id.* §§ 1311–1320.10.

What the State offers instead is a bare assertion that it has a "legitimate interest in preventing street obstructions." Appellants' Br. 38. But identifying a significant government interest is only the *first* step in the intermediate scrutiny analysis, not the end of it. *See, e.g.*, *Brewer*, 18 F.4th at 1226 ("[W]hile the [government's] 'interest in public safety is clearly significant,' it is 'not enough for the City to use broad safety justifications' to establish the [law's] necessity." (citation omitted)). Instead, the State must also demonstrate (rather than speculate) that the law in question furthers its interest in real and significant ways, and that it seriously considered narrower alternatives that could further that interest as well. The State did none of this. It did not, for example, offer any evidence that people approaching vehicles is a significant problem in Oklahoma. Nor did the State explain why its existing traffic-obstruction laws were insufficient.

Furthermore, the State's generic desire to avoid street obstructions does not justify the breadth of a provision that criminalizes any action that renders passage "inconvenient." "The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring); *see also McCullen*, 573 U.S. at 495 ("[T]he prime objective of the First Amendment is not efficiency.").

The State also suggests that, apart from traffic safety, it has an interest in preventing drivers from being unwillingly exposed to speech. Appellants' Br. 39–40. This is not a legitimate interest at all. Given "the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas,'" the fact that "on public streets and sidewalks" one cannot "turn the page, change the channel, or leave the Web site" to avoid "speech he might otherwise tune out" is "a virtue, not a vice." *McCullen*, 573 U.S. at 476 (citation omitted). A law that exists to protect listeners from unwelcome speech that "caused offense or made listeners uncomfortable" is subject to the even more demanding burden of strict scrutiny. *Id.* at 481. Far from supporting the validity of the

Street-Obstruction Provision, the State's argument highlights the problem with the law's expansive and subjective "inconvenience" standard.

Rather than point to evidence of any kind attempting to carry its narrow-tailoring burden, the State cites a handful of cases in which courts have rejected First Amendment challenges to other traffic-safety laws. *See* Appellants' Br. 40–41. But the State "cannot justify [a] particular provision simply by citing [another court decision]; rather, it is required to come forward with some evidence" to meet its burden. *Brewer*, 18 F.4th at 1243. The State has not done so here. In any event, the cases cited by the State are inapplicable. For example, in *Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1200 (10th Cir. 2005), this Court concluded that the government had sufficient evidence to justify a policy restricting unauthorized signs on highway overpasses in light of its "interest in traffic safety and in the avoidance of interference with official traffic control devices." The policy applied to one type of location—overpasses—and one type of expression—that which was "visible to traffic below and potentially disruptive to that traffic on the underpass." *Id.* at 1198. Section 1, by contrast, applies to "*any* public

street, highway or road," HB 1674 § 1 (emphasis added), and it applies to *any* type of expression in which one could engage while "standing or approaching motor vehicles thereon." *Id.* Similarly, *Langford v. City of St. Louis*, 3 F.4th 1054, 1057 (8th Cir. 2021), involved a challenge to an ordinance that made it a crime "to obstruct, impede, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic." Section 1 goes much further, because it criminalizes not just actual obstruction, but also mere "inconvenience." That the policies in *Faustin* and *Langford* were sufficiently narrow says nothing about whether Section 1 can be justified by the State's interest in ensuring that streets remain unobstructed. The State does not, and cannot, demonstrate that the broader language of Section 1 is narrowly tailored to further the State's interests.

To the extent that the State argues that Section 1 is not subject to intermediate scrutiny because it does not explicitly mention speech, that argument is foreclosed by *McCullen*, *Brewer*, and numerous other cases applying intermediate scrutiny to similar laws. *See, e.g.*, *McCullen*, 573 U.S. at 471 (standing on "public way or sidewalk"); *Brewer*, 18 F.4th at 1209 (standing on median). As the Court said in

McCullen, "even though the Act says nothing about speech on its face, there is no doubt . . . that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny." 573 U.S. at 476. The State does not dispute that Section 1 applies to traditional public fora, or that Oklahoma NAACP's speech, assembly, and association are protected by the First Amendment.

In sum, as was true below, the State makes no meaningful attempt to show it can meet its burden under intermediate scrutiny. The District Court properly determined that Oklahoma NAACP is likely to prevail on its First Amendment challenge to Section 1.

III. The District Court Did Not Abuse Its Discretion in Weighing the Remaining Factors

The remaining equitable factors favor Oklahoma NAACP, and the District Court did not abuse its discretion by issuing a preliminary injunction. In addition to demonstrating a likelihood of success on the merits, "[a] plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The last two "factors merge when the

Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The District Court correctly concluded that a violation of Oklahoma NAACP's First Amendment rights constitutes irreparable harm. This Court has made clear that "[a]ny deprivation of any constitutional right" renders an injury "irreparable." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). This principle applies with greatest force in the First Amendment context, where even "minimal" harm is considered irreparable, because courts must "treat alleged First Amendment harms gingerly." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003).

HB 1674's threat to constitutional rights is far from minimal. By exposing Oklahoma NAACP and other civil rights organizations to severe fines—and failing to provide adequate notice of what conduct is actually proscribed—HB 1674 threatens organizations with bankruptcy for engaging in First Amendment activity. It is an existential threat to Oklahoma NAACP and similar organizations. The result will be an obvious and impermissible chilling effect. Oklahoma NAACP, its

members, and other advocates will have no choice but to significantly curtail political speech and refrain from: organizing or attending certain protests, demonstrations, and public gatherings; associating with other organizations and individuals; and engaging in expressive activity such as leafletting in public streets. App. 69–70. This type of advocacy has a long history of inspiring powerful change. And it has an equally long history of facing heavy-handed state action, which is why federal courts carefully scrutinize state restrictions that burden the core right of the people to speak, petition their government to redress grievances, peacefully assemble, and otherwise associate. A threat to those constitutional rights is precisely the kind of irreparable injury that justifies a preliminary injunction.

The State nevertheless argues that there is "no irreparable harm because the laws [Oklahoma NAACP] challenged each referenced the anti-riot laws that have violence as an element," and Oklahoma NAACP disclaims any intent to engage in or advocate violence. Appellants' Br. 41. Once again, the State relies on its constricted interpretation of HB 1674, which has not been ratified by any state court and is inconsistent with the law's plain language. But even under the State's proffered

reading, it is incorrect that violence is a necessary element of every law referenced by HB 1674. For example, the Organizational-Liability Provision imposes tenfold criminal penalties based on conspiracy with someone who committed "any of the crimes described in Sections 1311 through 1320.5 and 1320.10 of Title 21 of the Oklahoma Statutes." HB 1674 § 3. This includes a range of offenses against public peace that can be committed without violence, such as provisions prohibiting unlawful assembly, Okla. Stat. tit. 21, § 1314, failure to disperse, *id.* § 1316, or even refusing to aid in the arrest of another, *id.* § 1318.

In contrast to the irreparable harm to Oklahoma NAACP, the harm to the State is minimal, and the balance of equities and public interest thus favor a preliminary injunction as well. "When a constitutional right hangs in the balance . . . even a temporary loss usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (internal quotation marks omitted). Although the State complains that it is not allowed to immediately implement its new law, "Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). And the State's claim to harm is belied by the

wide range of other statutes on the books that it can use to deal with riots, unlawful assemblies, and street obstruction. Indeed, under the State's proffered interpretations of Sections 1 and 3, the challenged provisions are merely penalty enhancements for pre-existing offenses, which are untouched by the injunction. The balance of equities and public interest thus favor the preliminary injunction. Far from abusing its discretion, the District Court's decision was correct.

CONCLUSION

The District Court properly issued a preliminary injunction against enforcement of Sections 1 and 3 of HB 1674. Its order should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oklahoma NAACP does not oppose the State's request for oral argument and defers to the Court's discretion regarding whether oral argument will aid the Court.

/s/Joseph W. Mead
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 12,976 words, excluding the parts of the document exempted by Rule 32(f), and was prepared in fourteen-point Century Schoolbook font, a proportionally spaced typeface, using Microsoft Word.

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