IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

[1] OKLAHOMA STATE CONFERENCE of the NAACP

Plaintiff,

v.

[1] JOHN O'CONNOR, in his official capacity as Oklahoma Attorney General,

[2] DAVID PRATER, in his official capacity as District Attorney of Oklahoma County,

Defendants.

Case No. 5:21-cv-00859-C

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

Seeking to avoid the constitutional vagueness and overbreadth problems with HB 1674 that Plaintiff has identified, Defendants urge the Court to interpret the challenged provisions narrowly. Had the legislature adopted the language Defendants propose, this would indeed be a very different case. But, as Oklahoma NAACP established in its opening brief, HB 1674's actual text threatens to sweep much more broadly than Defendants admit. When confronted with a vague law, "the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite [the legislature] to try again." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

In an attempt to cast doubt on the validity of Oklahoma NAACP's facial challenge, Defendants also dismiss the chilling effect that HB 1674 poses to Oklahoma NAACP and others. It is well established that, "[i]f a statute is so vague that it can reasonably be interpreted to prohibit constitutionally protected speech as well as conduct the state may constitutionally forbid, people may choose to refrain from speaking rather than challenge the statute's constitutionality in their criminal prosecution. Thus, freedom of speech will be chilled." *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988). In such a situation, a court must invalidate the offending provision on its face; the First and Fourteenth Amendments do not require Oklahoma NAACP to subject itself to the risk of debilitating fines and simply hope for the best.

ARGUMENT

Defendants' Attempts to Salvage HB 1674 Lack Merit

In an effort to evade Oklahoma NAACP's claims, Defendants in their Response attempt to rewrite HB 1674 by offering a narrow interpretation of the challenged sections, characterize all other interpretations as unreasonable, and contend that a facial challenge is inappropriate. Defendants ask this Court to read the statute as if it contained their newfound interpretation rather than the express language actually used by the legislature. These arguments fail for three reasons: first, this Court cannot adopt a narrowing interpretation to save an unconstitutionally vague or overbroad state law; second, the actual text of HB 1674 is broader than Defendants' narrow interpretation; and, third, it is well established that vague and overbroad laws require facial invalidation, especially where such laws chill core First Amendment activity.

1. To begin, this Court cannot rewrite a vague or overbroad state law to save it. "In our constitutional order, a vague law is no law at all." *Davis*, 139 S. Ct. at 2323. In such a situation, courts "will not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and citations omitted). This principle against judicial revision of vague statutes applies with particular force when a vague law threatens to intrude on activity protected by the First Amendment. As the Supreme Court has explained,

> If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression.

NAACP v. Button, 371 U.S. 415, 432 (1963).

Moreover, even if this Court might favor a narrow interpretation of the statutory language, this Court's interpretation "would fail to bind state prosecutors, leaving the citizens of [the state] 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); *cf. 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."). Oklahoma NAACP and others potentially subject to the law's terms would remain at risk that prosecutors, police, or courts will adopt a broad view.

This risk is particularly acute given that, although Defendants repeatedly suggest that HB 1674 should be interpreted narrowly, they do not actually disclaim the possibility that the law will be used to punish Oklahoma NAACP in circumstances in which the organization does not conspire to commit riot. To the contrary, Defendants assert that, "[i]f 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." Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj. at 12, ECF No. 24 ("Defs.' Opp."); *see also id.* at 11 (acknowledging "'reasonableness' standards might lead to some hard cases"). But even if Defendants were promising not to deploy HB 1674 in the manner in which Oklahoma NAACP fears (a promise that they do *not* make), such an appeal to prosecutorial discretion would be insufficient to save the statute. The Supreme Court has rejected similar arguments in the past, explaining that "the First Amendment protects against the Government . . . . We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

2. In any event, Defendants' interpretations deviate from the actual text of HB 1674, which continues to pose an unacceptable risk of confusion and overbroad or arbitrary enforcement. First, Defendants argue that Section 3 simply "creates [organizational] liability for conspiring to violate Oklahoma's riot-related laws," Defs.' Opp. at 6, but such liability already could be imposed under existing conspiracy law in Oklahoma, as Defendants concede. *See id.* at 5 ("Even before H.B. 1674, it was already possible for an organization to be guilty of conspiracy."). Moreover, HB 1674's plain language is not limited to merely creating an enhanced penalty for organizations that conspire to commit a

riot-related crime. Rather, Section 3 provides a ten-fold penalty when "an organization is found to be a conspirator *with persons who are found* to have committed" the enumerated riot-related crimes. 2021 Okla. Sess. Laws ch. 106 § 3. Had the legislature merely wanted to impose an enhanced penalty on an organization that itself conspires to riot, it could have used the much more natural and obvious textual approach of simply imposing the penalty on "an organization that is found to have conspired to commit" the listed offenses. The legislature instead interjected the phrase "with persons who are found." This additional language creates a two-part inquiry: 1) an organization must be "found to be a conspirator with persons" and 2) those persons must be "found to have committed" a riot-related offense. This Court cannot simply ignore the legislature's choice to add extra words. *See Stump v. Cheek*, 2007 OK 97, ¶ 14, 179 P.3d 606, 613 ("A statute will be given a construction, if possible, which renders every word operative, rather than one which makes some words idle and meaningless."). And this added degree of separation between the organization and the commission of riot leaves open the possibility of enhanced punishment even when the organization itself does not conspire to commit a riot.

Finally, Defendants fail to grapple with the fact that Oklahoma law provides not one statutory definition of "conspiracy" that tracks the common law, but a multi-pronged definition, one component of which is identical to a conspiracy provision that the Supreme Court previously indicated was unconstitutionally vague. *See, e.g.*, Okla. Stat. tit. 21, § 421(A)(1) (defining "conspiracy" to mean when "two or more persons conspire . . . [t]o commit any crime"); *id.* § 421(A)(5) (also defining "conspiracy" to mean when "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"); *Musser v. Utah*, 333 U.S. 95, 97 (1948) (vacating on vagueness grounds convictions under a conspiracy statute worded identically to subsection (A)(5) and explaining 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"). Even if Defendants were correct (and they are not) that an organization could be liable under Section 3 based on § 421(A)(1)'s definition of "conspiracy" only by itself conspiring to commit a riot-related offense, that atextual narrowing construction does nothing to limit organizations' potential liability based on § 421(a)(5)'s sweepingly broad and unconstitutionally vague conspiracy definition. Pl.'s Mot. Prelim. Inj. at 9–10, ECF No. 15 ("Pl.'s Mot.").

Defendants also propose a narrowing construction of Section 1's street obstruction provision. The provision states:

> 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.

2021 Okla. Sess. Laws ch. 106 § 1. Again ignoring the text of the statute, Defendants argue that, because the provision will be codified in Title 21 section 1312, which contains other provisions imposing penalties on persons who commit riot, the provision does not create a standalone crime but is simply a specific penalty provision for someone who has *already* been found guilty of rioting. That is not what the actual language of the provision says. Nothing in the provision itself references a riot. Moreover, its plain language refers to "[e]very person," not "every person who, in the course of a riot," engages in the prohibited conduct. Thus, it stands in marked contrast to the other paragraphs of 1312, each of which starts with a conditional "If" and explicitly provides for penalties that are triggered in the context of a riot. *Compare, e.g.*, Okla. Stat. tit. 21, § 1312(1) ("If any murder, maiming, robbery, rape or arson was committed in the course of such riot, such person is punishable in the same manner as a principal in such crime."). The legislature was capable of reiterating the language used in other provisions, but chose drastically different language for the street obstruction provision, directing it to "[e]very person" and omitting any language limiting its scope to a riot. That legislative choice undermines Defendants' interpretation. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here 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 citations omitted)).

Defendants' proffered narrowing of Section 1 is not only untenable, but it is also irrelevant to the vagueness challenge. Even if the section were just a penalty provision as Defendants suggest, vagueness "principles apply not only to statutes defining elements of

crimes, but also to statutes fixing" punishments. *Johnson v. United States*, 576 U.S. 591, 596 (2015). A penalty provision that uses unconstitutionally vague language must be invalidated even when the underlying crime is clearly defined. As discussed in Oklahoma NAACP's opening brief, Section 1's phrasing "to render impassable or to render passage unreasonably inconvenient" is too subjective and open-ended to stand. Pl.'s Mot. at 11–14.

3. Finally, Defendants incorrectly claim that Oklahoma NAACP cannot satisfy the standard for a facial challenge. As an initial matter, Defendants misstate the standard for facial challenges in the First Amendment context. Citing *United States v. Salerno*, 481 U.S. 739, 745 (1987), Defendants assert that Oklahoma NAACP "must establish that no set of circumstances exists under which the Act would be valid." Defs.' Opp. at 13. But *Salerno* did not involve a First Amendment challenge, and "[i]n the First Amendment context, . . . [the Supreme] Court recognizes 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.'" *Stevens*, 559 U.S. at 473 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)). For the reasons explained in its opening brief, Oklahoma NAACP has satisfied that standard.

Defendants argue that a First Amendment facial challenge is appropriate only when the text of the challenged statute itself targets speech. Defs.' Opp. at 14. That, too, is incorrect. Courts recognize that laws that do not expressly target speech can pose an unconstitutional threat to speech. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 471 (2014)

(striking down, as facially unconstitutional, content-neutral state law that prohibited people from "remain[ing] on a public way or sidewalk" near abortion clinics); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1061 (10th Cir. 2020) (facially invalidating law prohibiting standing, sitting, or lingering on certain medians).

In addition, Defendants erroneously claim that Oklahoma NAACP's allegations that HB 1674 will chill the organization's First Amendment activities are insufficient to sustain a facial challenge. Defs.' Opp. at 16. But courts have long permitted pre-enforcement challenges in circumstances, like this one, where a plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (internal quotation marks omitted); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (same). Defendants' view that Oklahoma NAACP must risk financial devastation before it may challenge HB 1674 is wrong as a matter of law. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

This reasoning applies with even more force in the First Amendment context, where case-by-case adjudication in "this sensitive field" is precisely what the vagueness and overbreadth doctrines protect against. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Given the interests at stake, courts are particularly wary of "the danger of tolerating, in the area of First Amendment freedoms, the existence of a [punitive] statute susceptible of sweeping and improper application." *Button*, 371 U.S. at 433. "These

freedoms are delicate and vulnerable, as well as supremely precious in our society." *Id.* Because "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," facial challenges to vague and overbroad laws have long been permissible. *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant Oklahoma NAACP's Motion for a Preliminary Injunction.

Respectfully submitted,

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