

21-6156

**In the
United States Court of Appeals
For the Tenth Circuit**

OKLAHOMA STATE CONFERENCE OF THE NAACP,

Plaintiff-Appellee,

v.

JOHN O'CONNOR, IN HIS OFFICIAL CAPACITY AS OKLAHOMA ATTORNEY
GENERAL; DAVID PRATER, IN HIS OFFICIAL CAPACITY AS
DISTRICT ATTORNEY OF OKLAHOMA COUNTY,

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 *AMICUS CURIAE* COLLEGIATE FREEDOM
AND JUSTICE COALITION OF OKLAHOMA
IN SUPPORT OF PLAINTIFF-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Collegiate Freedom and Justice Coalition of Oklahoma is not a publicly held corporation and does not have a parent corporation.

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STATEMENT OF INTEREST¹

Amicus curiae Collegiate Freedom and Justice Coalition of Oklahoma (“the Coalition”) is a nonprofit organization dedicated to grassroots organizing and racial justice advocacy. Adriana Laws, the Coalition’s founder, is a college student and a mother who serves many roles in her community in the pursuit of equity and justice. Since the Coalition’s founding in May 2020, it has galvanized civil discourse and public awareness of social injustice, discrimination, and the need for political accountability in Oklahoma. The Coalition’s work often takes the form of organized, issue-specific protests on public streets. The Coalition has organized and led marches to the Oklahoma State Capitol, to the Oklahoma City Police Department, and through affluent Oklahoma City neighborhood Nichols Hills to protest racism and educate bystanders about ongoing injustices facing the community.

The Coalition files this brief in support of Plaintiff-Appellee Oklahoma State Conference of the NAACP (“OK NAACP”). Substantive civil discourse requires effective communication of a message with the public and the means to express dissent or demand change. And this discourse requires access to public streets, long

¹ All parties have consented to the filing of this *amicus* brief. No party’s counsel authored this brief in whole or in part, no party’s counsel contributed money that was intended to fund preparation or submission of this brief, and no person (other than *amicus curiae*, its members, or counsel) contributed money intended to fund preparation or submission of this brief.

recognized as fora for “purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). The Coalition has a strong interest in ensuring that courts uphold its First Amendment right to march on public streets to advocate for equity and justice.

INTRODUCTION

Public streets are fundamental venues for public discourse. From time immemorial, people have taken to the streets to express political dissent, demand social change, and petition the government for a redress of grievances. *See id.* From demands for civil rights or environmental justice to pro-life advocacy or efforts to uphold the Second Amendment, public streets have featured prominently in our collective history of civic action engagement. For example, in 1965, individuals marched fifty-four miles from Selma to Montgomery to raise awareness for racial justice and the need for a national Voting Rights Act, passed later that year.² Accordingly, the courts must continue to protect the fundamental right to assemble and protest in public streets – one of the few “quintessential public fora” for public discourse. *See Verlo v. Martinez*, 820 F.3d 1113, 1138 (10th Cir. 2016) (citation and quotation marks omitted). This discourse is necessary and “essential to the security

² *Selma to Montgomery March*, History (Jan. 28, 2010), <https://www.history.com/topics/black-history/selma-montgomery-march>.

of the Republic, [as it] is a fundamental principle of our constitutional system.”
Stromberg v. People of State of Cal., 283 U.S. 359, 369 (1931).

Oklahoma House Bill 1674 (“HB 1674”) threatens this principle by prohibiting individuals from “unlawfully obstruct[ing] . . . any public street, highway or road.” Okla. Stat. tit. 21, §§ 1312, 1320.11–.12. HB 1674’s authors—and the State—claim this provision is limited to activity connected to a riot,³ but their “interpretation is not consistent with the plain language of the provision.”⁴ Indeed, HB 1674’s plain language prohibits speech on *all* Oklahoma streets *all* the time. As public streets are often the only forum where large groups can gather and effectively communicate their messages, HB 1674 imposes an impermissible time, place, and manner restriction on protected speech, infringes on the “privileges, immunities, rights, and liberties” of individuals, and offends “the interest of [us] all.” *Verlo*, 820 F.3d at 1145 (quoting *Hague*, 307 U.S. at 515–16).

³ See Appellants’ Br. 37–41; *First Regular Session of the 58th Legislature Day 22 Afternoon Session*, Okla. State Legis. (Mar. 9, 2021), at 11:37 PM, <https://bit.ly/3qozLqd>.

⁴ Mem. Op. 7, 13–14, ECF 29.

ARGUMENT

I. **HB 1674’s Traffic Obstruction Provision Triggers At Least Intermediate Scrutiny**

Public streets are “quintessential public fora” that have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Id.* at 1129, 1138 (citations and quotation marks omitted). In traditional public fora, the government’s right to “limit expressive activity [is] sharply circumscribed.” *Id.* at 1129 (citations and quotation marks omitted). In public fora, the government may only impose reasonable time, place, and manner restrictions that are justified “without reference to the content of the regulated speech, [] narrowly tailored to serve a significant governmental interest, and [] leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations and quotation marks omitted).

Content-based restrictions on protected speech in traditional public fora are presumptively invalid and garner strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Content-neutral restrictions on protected speech in these fora receive intermediate scrutiny. *See Brewer v. Albuquerque*, 18 F.4th 1205, 1220–21 (10th Cir. 2021). Content-neutral restrictions are those “justified without reference to the content of the regulated speech.” *Id.* (citations and quotation marks

omitted). HB 1674 fails under both standards of review, as a law that fails intermediate scrutiny necessarily fails strict scrutiny.

HB 1674’s legislative history, the speculative nature of the government’s stated interest, and the logical inconsistencies apparent in the law show that HB 1674 is a content-based restriction aimed at restricting the speech advocating for racial justice. HB 1674 should therefore be subject to strict scrutiny. However, even if this Court does not find that HB 1674 is content-based, the law still fails to pass constitutional muster because it is an impermissible time, place, and manner restriction that fails under intermediate scrutiny.

II. HB 1674’s Traffic Obstruction Provision Fails Intermediate Scrutiny

A. HB 1674’s Traffic Obstruction Provision Substantially Burdens Protected Speech

The Coalition’s racial justice and civil rights protests in public streets are fully protected by the First Amendment. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 471, 497 (2014) (protecting right to remain on “public way or sidewalk” adjacent to reproductive healthcare facility); *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (“[S]peech on matters of public concern . . . is at the heart of the First Amendment’s protection.”) (citations and quotation marks omitted); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (defining as matter of public concern “any matter of political, social, or other concern to the community”). HB 1674 substantially burdens the right to protest by prohibiting individuals from speaking in public streets. Public streets are

both a quintessential public forum for public discourse and the forum best suited for large numbers of speakers and listeners. Streets often serve as the forum most suitable for protestors to gather in significant numbers and reach the widest possible audience. *See Verlo*, 820 F.3d at 1129, 1138. Streets are a longstanding, high-yielding forum for protected speech. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). The Supreme Court has found unconstitutional restrictions or punishments of speech in significantly narrower circumstances than those which HB 1674 imposes: for example, within 1,000 feet of funerals or 35 feet of abortion clinics. *Snyder*, 562 U.S. at 457; *McCullen*, 573 U.S. at 464, 487. HB 1674 goes much further: it eliminates streets altogether as a space for protected public discourse, with no temporal or geographic limitations. HB 1674 bans all speech, from all streets, all the time.

B. HB 1674's Traffic Obstruction Provision Is Not Justified by a Significant Government Interest in Traffic Safety

Since HB 1674 substantially burdens protected speech, the State must prove that the law is narrowly tailored to serve a significant government interest. *See Ward*, 491 U.S. at 791 (citations and quotation marks omitted). The State cannot overcome this burden, as its true purpose for passing HB 1674 is improper viewpoint-based discrimination. HB 1674's timing, the isolated harms the law seeks to prevent, and the authors' hostility to the Black Lives Matter ("BLM") movement reveal that the

law’s authors were motivated to restrict political speech and protests, specifically those advocating for racial justice. Additionally, the State’s proffered interest in traffic safety is weak and speculative. The record is “devoid of evidence” supporting this interest, illustrating that traffic safety is nothing more than a “hypothetical concern.” *See McCraw v. City of Oklahoma City*. 973 F.3d 1057, 1072 (10th Cir. 2020). This purported interest is also contradicted by HB 1674’s exception to criminal and civil liability for motor vehicle operators who cause injury or death while “fleeing from a riot.” Okla. Stat. tit. 21, § 1320.11. The State’s proffered interest in traffic safety is neither genuine nor significant.

1. The True Government Interest Is Viewpoint-Based Speech Discrimination

Oklahoma’s stated interest of traffic safety is a pretextual justification for a law intended to restrict speech, as demonstrated by the bill’s suspect timing, the isolated and collateral harm the bill seeks to prevent, and the authors’ hostility to the BLM movement. Together, this evidence proves the law was passed to silence one viewpoint – that of racial justice protesters.

A determination of whether a government’s proffered interest is mere pretext “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 964 (D. Ariz. 2017) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266

(1977)). In *Arlington Heights*, the Court deemed relevant the historical background of the challenged decision, the sequence of events leading to the challenged action, the defendant's departures from standard procedures or substance, and legislative history. 429 U.S. at 266–68. Once a discriminatory purpose is shown, the burden shifts to the government to establish that it would have reached the same decision “even had the impermissible purpose not been considered.” *Arlington Heights*, 429 U.S. at 270 n.21.

Pretext can be shown by “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [] proffered legitimate reasons” such that “a reasonable factfinder could rationally find them unworthy of credence.” *See Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1206 (10th Cir. 2000). Applying this analysis here leads to the inescapable conclusion that HB 1674’s traffic safety rationale is pretext for viewpoint discrimination.

First, the temporal relationship to the summer of 2020’s BLM movement unveils HB 1674’s true purpose. “[S]uspicious timing” may serve as evidence of intentional discrimination. *See Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994). The Oklahoma State Legislature introduced and passed HB 1674 in response to the nationwide protests triggered by George Floyd’s murder. In 2020,

the State Legislature adjourned its regular session on May 22.⁵ Three days after the Oklahoma Legislature adjourned for the year, George Floyd was killed in Minneapolis, Minnesota.⁶ Protests began in Oklahoma shortly after news broke of Mr. Floyd's death.⁷ On May 31, nine days after the Legislative Session adjourned, a pickup truck pulling a horse trailer drove through a crowd gathered on a Tulsa interstate to protest George Floyd's death; several individuals were injured and one man was paralyzed ("Tulsa Incident").⁸

HB 1674's eleven co-authors wasted no time introducing the bill in 2021. The Oklahoma Legislature reconvened on February 1,⁹ and HB 1674's First Reading was

⁵ *2020 Oklahoma Legislative Session*, Ballotpedia, https://ballotpedia.org/2020_Oklahoma_legislative_session (last visited Mar. 28, 2022).

⁶ See Minneapolis Fire Dep't, Incident Report #20-0018197 (May 25, 2020), <https://web.archive.org/web/20200604091049/http://www.minneapolismn.gov/www/groups/public/@mpd/documents/webcontent/wcmsp-224680.pdf>.

⁷ See Okla. City Police Dep't, 2020 Protest/Civil Unrest Presentation, YouTube (Feb. 26, 2021), <https://www.youtube.com/watch?v=qQtMNeKIIcg>.

⁸ See Mike Stunson, *Protester Paralyzed From 20-Foot Fall After Truck Rams into Oklahoma Crowd, Family Says*, Kansas City Star (June 9, 2020), <https://www.kansascity.com/news/nation-world/national/article243395556.html#storylink=cpy>.

⁹ *2021 Oklahoma Legislative Session*, Ballotpedia, https://ballotpedia.org/2021_Oklahoma_legislative_session (last visited Mar. 28, 2022).

that same day.¹⁰ Governor Stitt signed HB 1674 into law in April 2021.¹¹ The short period of time in which this legislation was introduced, passed, and signed into law following the George Floyd protests helps point to Oklahoma’s true purpose – to silence those demanding racial justice.

Second, the law is logically inconsistent. Within HB 1674, the driver liability exemption under which “[a] motor vehicle operator who unintentionally causes injury or death to an individual shall not be criminally or civilly liable . . . [while] fleeing from a riot” demonstrates that the law’s true purpose is not traffic safety. Okla. Stat. tit. 21, § 1320.11. Far from promoting safety on public streets, HB 1674 emboldens motorists to make life-or-death decisions with a one-sided, subjective view of complex facts and fails to provide guidance on when a motor vehicle operator is “fleeing from a riot” or has “exercised due care.” *See id.* This exemption jeopardizes the safety of protesters. Even the Nichols Hills Police Department expressed concerns. Following HB 1674’s enactment, the Coalition organized a march through Nichols Hills. According to Coalition organizers, police officers insisted on accompanying the march to protect demonstrators and preempt motorists, with their new immunity, from ramming into the march. An interest in traffic safety

¹⁰ *Bill Information for HB 1674*, Okla. State Legis., <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1674&Session=2100> (last visited Oct. 21, 2021).

¹¹ *Id.*

cannot rationally be achieved by allowing vehicle operators to injure or kill another with impunity. If HB 1674’s co-authors intended to address traffic safety, no logical reason exists why the same law provides impunity to motorists who injure or kill people in the roadway. This logical inconsistency demonstrates that HB 1674’s purpose is not traffic safety. Rather, its true purpose is to silence those engaging in protests on matters with which HB 1674’s co-authors disagree politically.¹²

In addition to HB 1674, the Oklahoma State Legislature simultaneously introduced other bills targeting protesters, evidencing a broader effort to crack down on the previous year’s large protests.¹³ At the same time, the State Legislature introduced and passed laws to protect law enforcement. For example, on the day that

¹² Commentators believe the viewpoint-discriminatory purpose is a “cold calculus” that disfavors antiracism efforts. See Jess Bidgood, *In Harm’s Way: The Car Becomes the Weapon*, Boston Globe (Oct. 31, 2021), <https://apps.bostonglobe.com/news/nation/2021/10/vehicle-rammings-against-protesters/tulsa/>. In states like Oklahoma, where “politicians portrayed the protesters as lawless rioters,” commentators see driver liability exemptions as endorsement of “driver[s] [] intending to intimidate and coerce people from exercising their First Amendment rights” *Id.* Crucially, this cold calculus is “licensing folks to use their vehicle as a weapon.” *Id.*

¹³ See HB 1565, 58th Leg., 1st Reg. Sess. (Okla. 2021) (providing for termination of government employees convicted of incitement to riot or unlawful assembly); HB 1578, 58th Leg., 1st Reg. Sess. (Okla. 2021) (proposing felony penalties for vandalism during a riot); HB 2095, 58th Leg., 1st Reg. Sess. (Okla. 2021) (adding “unlawful assemblies” to “racketeering activity” list under Oklahoma’s RICO statute); HB 1822, 58th Leg., 1st Reg. Sess. (Okla. 2021) (proposing restrictions applicable to “all demonstrations or events” on Oklahoma State Capitol grounds).

he signed HB 1674 into law, Governor Stitt also approved HB 1643, prohibiting Oklahomans from publishing law enforcement officers' identifying information with an intention to "threaten, intimidate, or harass." Okla. Stat. tit. 21, § 1176. In the months after the 2020 protests, the State's introduction and passage of bills that burden the right to protest and protect law enforcement illustrates that HB 1674 is a viewpoint-based regulation targeted at racial justice protesters.

The logical inconsistencies surrounding HB 1674 were clear to members of the Oklahoma State Legislature during floor debate. Courts recognize that legislative history "may be highly relevant, especially where there are contemporaneous statements by members of the decisionmaking body." *Vill. of Arlington Heights*, 429 U.S. at 268. As the Supreme Court has explained, floor statements about a bill are a persuasive form of legislative history because "the legislators who heard or read those statements presumably voted with that understanding." *Dist. of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (citation and quotation marks omitted). Several co-authors directly tied the purpose of the bill to the events of 2020. For example, when asked about the precise need for the bill, Senator Rob Standridge responded that around the country there were "massive riots" over the prior six to twelve

months.¹⁴ Notably, when justifying this bill, no co-author pointed to the events at the U.S. Capitol on January 6, 2021. Instead, the co-authors used the Tulsa Incident to justify the bill. Their selective justification suggests that BLM protests are the type of protests with which they are concerned. In response to concerns that HB 1674 was a reaction to the BLM protests, Representative Kevin McDugle cited “pro-life rall[ies]” and “pro-Trump rall[ies]” as examples of peaceful protests which HB 1674 was not intended to target, before referencing peaceful protests in general.¹⁵

Finally, statements by HB 1674’s co-authors reveal contradictory justifications for the law’s passage and demonstrate that traffic safety is a mere pretext. The Supreme Court has struck down statutes based on “openly available data” that “supported a commonsense conclusion that [an impermissible motive] permeated the government’s action.” See *McCreary Cty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 863 (2005).

¹⁴ *First Regular Session of the 58th Legislature Day 41 Morning Session*, Okla. State Legis. (Apr. 14, 2021), at 10:03 AM, <https://bit.ly/34Y4bYG>

¹⁵ *First Regular Session of the 58th Legislature Day 22 Afternoon Session*, Okla. State Legis. (Mar. 9, 2021) *supra*, at 11:37 PM.

Here, the “openly available data” consists of statements from HB 1674’s co-authors who expressed disdain for the views of BLM protestors and their allies.¹⁶ For example, Senator Rob Standridge posted on social media that the BLM movement is a “leftist political group” that “many” would call a “terrorist group.”¹⁷ These statements reveal that the law targets racial justice protesters.

“The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539 (1993). HB 1674’s co-authors cite the Tulsa Incident as motivation for the bill. Their description of the incident, in which the driver sped through the crowd for his own safety, ignores pertinent facts: witnesses report that the driver placed a gun on his dashboard and threatened protesters before making “an intentional effort to drive through [the crowd].”¹⁸ The Tulsa Incident is not, as the co-authors suggest,

¹⁶ See, e.g., Destiny Washington, *Rep. Roberts Questions Tax Credit for OKC Thunder If Players Choose to Kneel*, Fox 25 (KOKH) (July 31, 2020), <https://okcfox.com/news/local/rep-roberts-questions-tax-credit-for-okc-thunder-if-players-choose-to-kneel> (“[Kneeling] makes clear the NBA’s support of the Black Lives Matter group and its goal of defunding our nation’s police, its ties to Marxism, and its efforts to destroy nuclear families.”).

¹⁷ Senator Rob Standridge, Facebook (May 30, 2021), <https://www.facebook.com/page/395511077198384/search?q=black%20lives%20matter>.

¹⁸ Staff Reports, *Pickup Rolls Through Protesters Gathered on Interstate 244; State Troopers Questioning Driver*, Tulsa World (June 1, 2020),

emblematic of a threat to families; it is emblematic of the threats protesters face. The co-authors' version exemplifies an isolated collateral harm.

Taken together, the law's logical inconsistencies, suspect temporal relationship to BLM protests and other legislation, and contradictory justifications reveal the State's true purpose in passing the law is improper viewpoint-based discrimination against racial justice protesters.

2. A Speculative Interest in Traffic Safety Is Not Significant

The State's purported interest in HB 1674 is also insignificant. In fact, the State has failed to clearly articulate the interest that it intends to protect. In its opening appellate brief, the State mentions an interest in traffic safety only once.¹⁹ State legislators failed to articulate this interest throughout the entire legislative process. However, even assuming this interest is genuine, it is not significant because it is unsupported by evidence. *McCraw*, 973 F.3d at 1072 (finding the government's proffered interest insignificant because the government lacked "objective evidence"). The State's utter lack of empirical data to justify HB 1674

https://tulsaworld.com/news/local/pickup-rolls-through-protesters-gathered-on-interstate-244-state-troopers-questioning-driver/article_f6703c70-2c6d-5455-85cb-ea41373fc7e8.html.

¹⁹ Appellants Br. 38.

reveal that traffic safety is, at best, a speculative interest.²⁰ A speculative interest does not pass constitutional muster.

The State's claimed interest in HB 1674 is weak. Representative Kevin West, a bill co-author, stated the purpose of HB 1674 was to keep protests peaceful.²¹ Representative West's rationale does not pass even a cursory inspection; protests in Oklahoma in 2020 were overwhelmingly peaceful.²² Further, during floor debate, when a representative asked Representative McDugle, another HB 1674 co-author, why he was introducing a bill about something that "isn't happening" in Oklahoma, he said it was because of events in other states.²³ Thus, even HB 1674's authors

²⁰ The State has not provided empirical evidence of a traffic safety concern. The only evidence of traffic safety concerns at protests of which the Coalition is aware are reports of vehicle-ramming incidents that place protesters, not drivers, in jeopardy. *See Bidgood, supra*. This *Boston Globe* report found that vehicles rammed into protest crowds at least 139 times between May 25, 2020, and September 30, 2021, typically orchestrated by white drivers at anti-racism protests. *Id.* However, HB 1674 facilitates, rather than penalizes, these vehicle rammings.

²¹ *See Carmen Forman, Gov. Kevin Stitt Signs Bill to Protect Drivers Who Hit Protesters While Fleeing from Riots, Oklahoman* (Apr. 21, 2021), <https://www.oklahoman.com/story/news/2021/04/21/oklahoma-kevin-stitt-signs-bill-protecting-drivers-who-hit-protesters/7284339002/>.

²² *See Report on the 2020 Protests & Civil Unrest*, Major Cities Chiefs Ass'n. Intel. Commanders Grp. (Oct. 2020), at 8, <https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf>.

²³ *First Regular Session of the 58th Legislature Day 22 Afternoon Session*, Okla. State Legis. (Mar. 9, 2021), at 11:37:55 PM–11:38:10 PM, http://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20210726/-1/28567#agenda_.

admit that the bill is not designed to address any problem that actually exists in Oklahoma.

HB 1674 suffers from the same weaknesses as the “Revised Ordinance” in *McCraw*. See 973 F.3d at 1072. In *McCraw*, a panel of this Court found that Oklahoma City, despite touting an interest in protecting pedestrians from accidents on public medians, provided “no objective evidence” that pedestrians were “getting hurt or hurting others.” *Id.* The panel was “baffled as to why there [was] no ‘impersonal hard evidence’” of the alleged harm. *Id.* Here, as in *McCraw*, HB 1674’s record is “devoid of evidence” of an actual harm to be addressed – the law’s purported purpose is nothing more than “a hypothetical concern.” See *id.* According to an empirical study conducted by the *Washington Post*, “in 97.7 percent of events [during the summer of 2020], no injuries were reported among participants, bystanders or police.”²⁴ Thus, HB 1674 warrants similar incredulity.

²⁴ Erica Chenoweth & Jeremy Pressman, *This Summer’s Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, Wash. Post (Oct. 16, 2020), <https://www.washingtonpost.com/politics/2020/10/16/this-summer-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/>; see also Roudabeh Kishi *et al.*, *A Year of Racial Justice Protests: Key Trends in Demonstrations Supporting the BLM Movement*, The Armed Conflict Location & Event Data Project (May 2021), at 1 (noting that a vast majority of Black Lives Matter protests have remained peaceful but faced “violent intervention” from opposition and “heavy-handed crackdown by law enforcement”); *Report on the 2020 Protests & Civil Unrest*, *supra*, at 8 (showing dearth of evidence of violent protests in Oklahoma City in 2020).

In fact, it is not surprising that the legislative record here is devoid of traffic safety evidence because Oklahoma actually has “a lower proportion of demonstrations involving violent or destructive activity than most other states.”²⁵ The potential harm of a protest turning into a riot—a major concern of HB 1674’s co-authors—is isolated and collateral. Without objective evidence of protesters causing injury to passersby or evidence of protests transforming into riots with any regularity, the harm HB 1674 seeks to prevent must be isolated, if not entirely absent. The “impersonal hard evidence” unequivocally shows violent protests are not a problem in Oklahoma. The concern of HB 1674’s co-authors, like the concern of the authors of the “Revised Ordinance” in *McCraw*, is *at best* hypothetical. *See* 973 F.3d at 1072 (noting absence of evidence “is insufficient to demonstrate that the [government’s] recited harms are real”) (quotation marks omitted). Oklahoma’s inability to provide any empirical data to support its proffered purpose for HB 1674 illustrates that Oklahoma’s purported interest in traffic safety is weak and “unworthy of credence.” *See Pastran*, 210 F.3d at 1206 (citation and quotation marks omitted).

Inconsistencies in the State’s proffered reasons for HB 1674 are further evidence that Oklahoma’s interests are “unworthy of credence” to a “reasonable factfinder.” *See id.* HB 1674’s co-authors could not agree on the focus of their

²⁵ *Kishi et al., supra*, at 10.

narrative while advancing HB 1674; the proffered “legitimate interest” depends on which co-author is asked. Senator Standridge, a co-author, claimed the bill is about “the kids [who] cowered in the back seat because they feared for their lives,” during the Tulsa Incident.²⁶ On appeal in this case, Oklahoma asserts that HB 1674 was introduced to improve traffic safety.²⁷ Despite this assertion, the law’s co-authors failed to mention “traffic safety” at all during debates within the State Legislature. Instead, the co-authors repeated that this bill was about “the freedoms of others who are trying to go to and from home, to and from their business, [to] have nothing to do with the protest.”²⁸ The minor inconvenience of re-routing one’s drive cannot outweigh the compelling interest in ensuring that core First Amendment speech is protected. The pretextual nature of Oklahoma’s interest in HB 1674 is discerned from a lack of “impersonal hard evidence” supporting the State’s position. *See McCraw*, 973 F.3d at 1072. The traffic safety interest is speculative at best.

²⁶ Sean Murphy, *Oklahoma Legislature OKs Bill to Crack Down on Protesters*, ASSOCIATED PRESS (Apr. 14, 2021), <https://apnews.com/article/legislature-police-oklahoma-legislation-police-brutality-f938df121ef6fcd514df3e7ba58a59cb>.

²⁷ Appellants Br. 38.

²⁸ *First Regular Session of the 58th Legislature Day 22 Afternoon Session*, Okla. State Legis. (Mar. 9, 2021), at 11:32:14 PM, http://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20210726/-1/28567#agenda_.time.

The narrative spun by HB 1674’s co-authors lacks any supporting evidence. Conversely, evidence shows that Oklahoma’s proffered interest is isolated, speculative, and pretextual. Due to the weakness, inconsistency, contradiction, and implausibility of Oklahoma’s proffered interest in traffic safety, this Court should affirm the District Court’s finding that the OK NAACP is likely to succeed on the merits of its First Amendment claim because the State has not—and cannot—demonstrate a significant government interest.²⁹

III. HB 1674’s Traffic Obstruction Provision Is Not Narrowly Tailored

Even if this Court finds that the interest in traffic safety is genuine and significant, the traffic obstruction provision still fails to pass intermediate scrutiny due to inadequate tailoring. HB 1674 is both over- and underinclusive, while also failing to undertake less restrictive alternatives.

A. HB 1674’s Traffic Obstruction Provision Is Impermissibly Overinclusive

HB 1674 is significantly overinclusive; it prohibits more speech than necessary to achieve the State’s purported interest in traffic safety. In *McCraw*, a panel of this Court explained that “restrictions on speech are not permitted when either the harms or the remedial effects of the government’s restrictions are supported only by speculation or conjecture, or when the regulation burdens

²⁹ Mem. Op. 13.

substantially more speech than is necessary to further the government’s legitimate interests.” 973 F.3d at 1071. The law prohibits speech on all streets, rather than exclusively in areas posing a heightened traffic concern, such as highways, intersections, or crowded streets. Similarly, the law could have prohibited certain speech on streets during the busiest times of day, like rush hour. Instead, HB 1674 is a sweeping restriction on speech, on all streets, all the time. Although Oklahoma could have limited the amount of prohibited speech to narrowly tailored the restriction to their proffered interest in traffic safety, they did not. The regulation burdens significantly more speech than necessary.

B. HB 1674’s Traffic Obstruction Provision Is Impermissibly Underinclusive

HB 1674 is also significantly underinclusive, going so far as to create additional traffic safety risks. Insufficient tailoring “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 802 (2011).

HB 1674 fails this tailoring test. Namely, Oklahoma’s choice to absolve motorists who injure or kill protesters illustrates the poor tailoring to the State’s proffered interest in protecting public streets. HB 1674 is significantly underinclusive in enhancing traffic safety, as the driver liability exemption removes

incentives for motorists to consider consequences before driving through protesters. The law fails to provide any guidance on when a vehicle operator is “fleeing from a riot” or has “exercised due care.” *See* Okla. Stat. tit. 21, § 1320.11. There is no logical reason why a law that purports to advance traffic safety also provides vehicle operators with impunity to injure or kill people in the roadway. This tension suggests that HB 1674 furthers a different goal: to silence the protesters with whom HB 1674’s co-authors disagree. Thus, HB 1674 is underinclusive in its efforts to advance traffic safety.

C. The State Has Not Seriously Undertaken Less Restrictive Alternatives or Demonstrated That Pre-Existing Alternatives Do Not Work

To prove that a regulation is narrowly tailored to a purported government interest, the State must “show[] that it seriously undertook to address the problem with less intrusive tools readily available to it” and “that alternative measures that burden substantially less speech would fail to achieve the government’s interests.” *McCullen*, 573 U.S. at 494–95. Oklahoma has not established that pre-existing measures maintaining traffic safety were ineffective.

The State Legislature can improve traffic safety and driver convenience without substantially burdening speech, as it has done in the past. For example, Oklahoma prohibits pedestrians from crossing the street “other than within a marked crosswalk.” Okla. Stat. tit. 47 § 11-503. Further, when sidewalks are unavailable,

pedestrians must “walk only on the left side of the roadway or its shoulder.” *Id.* § 11-506. As these existing measures promote driver convenience and traffic safety without substantially burdening speech, Oklahoma could have furthered their purported interest without circumscribing speech on all public streets.

Further, the State did not consider less-restrictive traffic laws to address any legitimate safety concerns. For example, all pedestrians crossing the road are required to “yield the right-of-way to all vehicles” and “not cross at any place except in a marked crosswalk.” *Id.* § 11-503. If existing traffic laws were insufficient to maintain safe roadways, lawmakers failed to consider new traffic laws that would improve safety while burdening less speech. Even if this Court finds the State’s traffic safety justification is genuine, pre-existing measures and less restrictive alternatives could have satisfied these interests while burdening less speech.

IV. No Adequate Alternative Channels for Communication Exist

To pass constitutional muster, in addition to being narrowly tailored, time, place, and manner restrictions, government restrictions on speech must “leave open ample alternative channels for communication of [] information.” *Ward*, 491 U.S. at 791 (1989). Despite the importance of public streets as “quintessential public fora,” HB 1674 prohibits protesters from standing in all public streets all the time. *Perry Educ. Ass’n*, 460 U.S. at 45. To determine if a regulation leaves open ample alternative channels for communication, courts “ask whether, given the particular

[governmental interest], the geography of the area regulated, and the type of speech desired, there were ample alternative channels of communication.” *McCraw*, 973 F.3d at 1078 (citations and quotation marks omitted) (alteration in original). This inquiry must include an assessment of the speakers’ “ability to reach [their] intended audience,” considered from the speakers’ point of view. *See id.* HB 1674’s extensive prohibition from standing on “any public street, highway, or road” does not provide protesters adequate alternative channels for them to communicate. Okla. Stat. tit. 21, § 1312(5).

The breadth of HB 1674’s prohibition forecloses protesters’ ability to gather in alternative venues. Unlike the prohibition in *Evans v. Sandy City* that prohibited standing on unpaved medians narrower than thirty-six inches and left open all other medians, HB 1674 leaves no public street untouched. *See* 944 F.3d 847, 860 (10th Cir. 2019). The year after deciding *Evans*, a panel of this Court held that a prohibition from sitting, standing, or staying on most medians “has taken the extreme step of closing a substantial portion of a traditional public forum to all speakers . . . without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes.” *McCraw*, 973 F.3d at 1078 (citations and quotation marks omitted) (alteration in original). Oklahoma’s law goes even further than that deemed unconstitutional in *McCraw*. On its face, HB 1674 prohibits peaceful protest on “any public street, highway or road.” Okla. Stat. tit. 21,

§ 1312(5). Beyond what Oklahoma City attempted to do by limiting median use, the State prohibited the use of all public streets. If this law takes effect, peaceful political protests will be all but banned in Oklahoma, and groups like the Coalition will be left without the ability to exercise their basic democratic rights and responsibilities under the First Amendment.

Public streets are the ideal—and perhaps only—location in which large protests can gather. Some estimate that the 2020 racial justice protests made up the largest movement in American history, with fifteen to twenty-six million participants in the movement’s first month alone.³⁰ Protests of this magnitude may not be able to gather in locations other than public streets. However, even if protesters in a rural location could find a public venue able to accommodate their size, the alternative channel must also be adequate. *McCraw*, 973 F.3d at 1078–79 (holding that roadsides and sidewalks were constitutionally inadequate alternatives to medians). A protest in a park is not an adequate alternative to a public street. Protesters cannot reach the same intended audience; in parks, there are fewer passersby than there are along public streets. Given the size of racial justice protests

³⁰ Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

and protesters' desire to share their messages with the public and the media, the ability to protest freely on public streets is crucial to effectively communicate the underlying messages.

Requiring protesters to obtain permits does not present an adequate alternative channel for communication. The bill's co-authors suggested that, despite HB 1674's broad language, protesters could continue to stand in public streets if they obtained a permit to do so.³¹ However, permits do not constitute an adequate alternative to protesting freely in the streets, as there is a time limit attached to a permit requirement, hindering protests that occur organically in response to breaking news.³²

HB 1674 includes no language regarding permits. Thus, it is not clear if permits would be approved and under what conditions. Without greater clarity, the

³¹ See Wayne Greene, *SQ 816 Seeks to Overturn Oklahoma Law that Protects Drivers Who Hit Protesters Obstructing Roads*, Tulsa World (June 25, 2021), https://tulsa-world.com/opinion/columnists/wayne-greene-sq-816-seeks-to-overturn-oklahoma-law-that-protects-drivers-who-hit-protesters/article_4fe47156-d393-11eb-b33e-53581a82ae4e.html (reporting that Representative West explained that protesters can “do the right thing” by securing parade permits).

³² See, e.g., *Regulations Related to Demonstrations*, City of Tulsa, at 3, <https://www.cityoftulsa.org/media/16284/demonstration-permits-and-regulations-final-april-2021.pdf> (stating that the City shall “take action upon the application” for a demonstration permit within ten business days of filing or two business days “where the purpose of such event is a spontaneous response to a current event”) (last visited Mar. 28, 2022).

process of providing permits could become viewpoint-based depending on protests' messages. With arbitrary discretion, the inherent risk of discrimination or abuse in such discretion permits "eva[sion] and in effect nullif[ication] [of] the provisions of the national constitution." See *Yick v. Hopkins*, 118 U.S. 356, 356 (1886) (denouncing discretion placed in the hands of low-level administrators). Specifically, courts "have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Otherwise, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citations and quotation marks omitted).

Here, there is no uniform standard under which administrators in Oklahoma grant permits. As control over public streets is held by cities and municipalities, the discretion available to administrators across the state varies greatly.³³ Additionally, as established previously, the government interest here is minimal due to the lack of

³³ See, e.g., *Special Event Permit*, Okla. City, <https://www.okc.gov/home/showdocument?id=2884> (providing that Oklahoma City staff can revoke permits for "imminent threat to public health, safety and/or welfare," without defining these terms) (last visited Mar. 28, 2022).

evidence regarding a need to address traffic safety and strong evidence that this purpose is pretextual. Therefore, it is not apparent how administrative officials could decide to grant or withhold permits considering this proffered interest. As HB 1674 itself is a vehicle for viewpoint discrimination, an ambiguous permit regime compounds “the danger of censorship and of abridgment of our precious First Amendment freedoms.” *Forsyth Cnty.*, 505 U.S. at 131.

Given the breadth of the prohibition, HB 1674’s mandate ultimately fails to “leave open ample alternative channels for communication of [] information.” *Ward*, 491 U.S. at 791. As quintessential public fora, public streets are set aside specifically “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Verlo*, 820 F.3d at 1129, 1138 (citations and quotation marks omitted). Oklahoma must not fully close off public streets to protesters for that same purpose. Without access to public streets, large gatherings of protestors will be unable to meet in an adequate alternative forum in which they can similarly reach their intended audience. *See McCraw*, 973 F.3d at 1078–79. Requiring protesters to obtain permits does not establish an adequate alternative channel, as permits are time-limited and granted with variable discretion. Without ample alternative channels for communication, HB 1674 must be invalidated.

CONCLUSION

For these reasons, *amicus curiae* urge this Court to affirm the District Court's order granting OK NAACP's motion for a preliminary injunction.

COLLEGIATE FREEDOM AND JUSTICE
COALITION OF OKLAHOMA

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 6,239 words, and has been prepared in a Times New Roman, 14-point font.

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