UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

[1] SINCERE TERRY, *et al.,* *Plaintiffs*, v. [1] JOHN O'CONNOR, in his official capacity as Oklahoma Attorney General, *et al.,* *Defendants*.	Civil Action No.: 5:22-cv-00521-C

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

I. PRELIMINARY STATEMENT

The Oklahoma "Riot Statute," 21 Okla. Stat. § 1311, unconstitutionally burdens free speech. It is overbroad and vague, sweeping far beyond the narrow exceptions the First Amendment tolerates to restrict speech. The Riot Statute subjects protesters to criminal liability for exercising their constitutionally protected rights to speech and assembly. It is not narrowly tailored to achieve any compelling government interest in preventing riots, violence, or the unlawful use of force. Rather, Defendants have relied upon the statute's overbroad and vague language to advance the improper purpose of silencing protected speech with which they disagree. As a result, the Riot Statute chills core political speech protected by the United States Constitution.

This is not speculation. Defendants have already unconstitutionally suppressed the core political speech of Plaintiffs and other racial justice protesters by charging Plaintiffs with riot-related felonies for protected conduct. The Riot Statute forces Plaintiffs to choose between forgoing exercise of their constitutional rights or facing the possibility of criminal charges for exercising those rights—a choice which has already inflicted, and continues to inflict, irreparable harm. Because the Oklahoma Riot Statute has and will continue to harm Plaintiffs and the public by chilling and criminally punishing the exercise of their constitutional rights, the Court should preliminarily enjoin continued enforcement of the law.

II. STATEMENT OF FACTS

Oklahoma has an extensive statutory framework criminalizing riot, unlawful assembly, and similar conduct. *See* 21 Okla. Stat. §§ 1311–1320.10. In 1910, the

Oklahoma State Legislature defined "riot" as "[a]ny use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law." 21 Okla. Stat. § 1311 (West 2022). To this day, Oklahoma courts consistently interpret Oklahoma's definition of "riot," codified as Section 21-1311, as broadly criminalizing "any threat," as specified by the plain language of the statute. *See Schoolcraft v. State*, 84 Okla. Crim. 20, 39 (Okla. Crim. 1947) (holding that proof of "any threat" was satisfactory for a conviction); *Crawford v. Ferguson*, 115 P. 278, 279 (Okla. Crim. 1911) (same holding).

In response to nationwide racial justice protests that began in 2020, the Oklahoma State Legislature enacted additional laws which significantly expanded the reach of the underlying riot laws ("2021 Amendments").[1] This Court recently enjoined enforcement of these 2021 Amendments.[2] However, the core of Oklahoma's statutory riot framework—the very definition of "riot" itself—remains in effect. Plaintiffs here were not charged under the new amendments. Rather, their charging documents demonstrate that the core of the century-old Oklahoma Riot Statute is used to prevent speech and conduct that is protected by the First Amendment. Exhibit 1, CF-2020-2930 Information Sheet; Exhibit 2, Terry Affidavit and Application for Arrest Warrant; Exhibit 3, Hogsett Affidavit and Application for Arrest Warrant; Exhibit 4, Baker Affidavit and Application for Arrest Warrant; Exhibit 5, Nabors Affidavit and Application for Arrest Warrant;

[1] H.B. 1674, 2021 Leg. Assemb., Reg. Sess. (Okla. 2021), § 1.
[2] *Okla. State Conf. of the NAACP v. O'Connor*, No. CIV-21-859-C, 2021 WL 4992754, *5–6 (W.D. Okla. Oct. 27, 2021).

Exhibit 6, Mack Affidavit and Application for Arrest Warrant. For these reasons, it must be enjoined to prevent further deprivation of Oklahomans' constitutional rights.

In response to the murder of George Floyd by Minneapolis police in 2020, Americans across the country took to the streets to protest police brutality and advocate for racial justice. Plaintiffs participated in and led many of these protests in Oklahoma City. Plaintiffs always protested peacefully and often took leadership roles in these demonstrations. In June 2020, Plaintiffs, along with several others, began to gather downtown nightly in front of the Oklahoma City Police Department ("OCPD") Headquarters to protest. Exhibit 7, Terry Decl. ¶ 9. Plaintiffs attended these protests every night. *Id.*; Exhibit 8, Hogsett Decl. ¶ 8; Exhibit 9, Baker Decl. ¶ 7; Exhibit 10, Nabors Decl. ¶ 6; Exhibit 11, Webb Decl. ¶ 7; Exhibit 12, Mack Decl. ¶ 8. Plaintiffs Terry, Hogsett, and Nabors would lead chants for those in attendance. Terry Decl. ¶ 9; Hogsett Decl. ¶ 8; Nabors Decl. ¶ 6. Plaintiff Baker, owner of the digital news company *The Black Times*, recorded the events and attended as a journalist. Baker Decl. ¶ 2, 7.

Plaintiffs, along with others, began planning a mural in support of Black lives and racial justice. Terry Decl. ¶ 10. Another protester, Brandon Riles, obtained permits for the mural in front of OKCPD Headquarters and the Oklahoma County Jail. *Id.* Oklahoma City employees blocked off space for the mural with traffic barricades. *Id.* On the third day of painting, OKCPD Master Sergeant Nicklas Wald ("Sgt. Wald") drove his police cruiser up to one of the city barricades. *Id.* ¶ 12. As Sgt. Wald moved the barricade to drive his cruiser through the mural, Plaintiff Nabors told the officer he could not move

the barricade. Nabors Decl. ¶ 9. Plaintiffs Terry, Hogsett, and Webb approached, but did not surround, the cruiser. Terry Decl. ¶ 12.

Sgt. Wald continued to move his car towards the Plaintiffs standing in the street. *Id.* ¶ 14. Plaintiffs Hogsett and Baker filmed the encounter on their phones. *Id.* ¶ 13. Plaintiffs Terry and Hogsett yelled, "Fuck the police!" and, "We have a permit!" *Id.* The officer eventually stopped his cruiser about an inch from Plaintiff Terry's legs. *Id.* ¶ 14. Plaintiff Terry yelled, "Hit me if you want to!" *Id.* Riles then showed Sgt. Wald a copy of the permit. *Id.* ¶ 15. After reviewing the permit, Sgt. Wald drove away from the permitted area. *Id.* Without impeding the cruiser's path, Plaintiffs Terry, Hogsett, Baker, Nabors, and Webb briefly followed it on foot as Sgt. Wald drove away from the permitted mural space. *Id.* At no time did Plaintiffs threaten the officer. *Id.* ¶ 16. The mural painting continued peacefully after this encounter. Hogsett Decl. ¶ 16.

The next day, Plaintiffs attempted to file a formal complaint with the OCPD concerning their treatment by Sgt. Wald. Terry Decl. ¶ 17. After being refused entry into the OCPD Headquarters for almost an hour, Plaintiff Terry was arrested outside, while Plaintiffs Hogsett and Baker were arrested inside Headquarters to a round of applause from other officers. *Id.* ¶ 18–19. Plaintiffs Terry, Hogsett, and Baker were charged with Disorderly Conduct and released on bond. *Id.* ¶ 19; Hogsett Decl. ¶ 19; Baker Decl. ¶ 13.

Shortly after Plaintiffs Terry, Hogsett, and Baker were released from jail, Plaintiffs Terry, Hogsett, Baker, Nabors, Webb, and Mack attended another racial justice protest. Terry Decl. ¶ 20. Plaintiffs served in leadership roles throughout the event, helping to redirect vehicles, leading chants, and providing pizza for other protesters. Terry Decl. ¶

20; Hogsett Decl. ¶ 20; Nabors Decl. ¶ 17. Plaintiff Nabors was planning to lead the protest around the police station. Nabors Decl. ¶ 17. However, as the protest got underway, Plaintiffs learned of the felony Incitement to Riot charges against them stemming from their encounter with Sgt. Wald during the mural painting. *Id.* News of these riot charges spread quickly, causing Plaintiffs and others to disperse. *Id.*

The nightly protests in front of the OCPD Headquarters had occurred *every* night for almost a month ended the day the Incitement to Riot charges were announced. Hogsett Decl. ¶ 27. From that day on, the Incitement to Riot charges and fear of subsequent arrest and prosecution fundamentally changed the way Plaintiffs protest. Terry Decl. ¶ 25–26, 29; Hogsett Decl. ¶ 28, 31–32; Baker Decl. ¶ 18–19; Nabors Decl. ¶ 23, 25; Webb Decl. ¶ 21; Mack Decl. ¶ 12–14. All Plaintiffs have limited their speech out of fear of arrest and prosecution for exercising their First Amendment right to free speech.

III. ARGUMENT

Plaintiffs must establish four factors to obtain a preliminary injunction: "(1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001).

A. Plaintiffs Are Likely to Succeed on the Merits.

"Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940). Thus, "we have chosen to afford protection even to 'opinions that we loathe,'" as the best test of truth. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Nearly all speech is protected by the First Amendment, and only certain narrow categories of speech are deemed unprotected. One such narrow exception is true threats. *See Virginia v. Black*, 538 U.S. 343, 344 (2003). Because Section 21-1311 targets "any threat," it can only survive if it meets the high burden of the true threat exception to the First Amendment. On its face, Section 21-1311 cannot meet the high burden of reaching only true threats and instead proscribes a substantial amount of protected speech.

1. Section 21-1311's Definition of Riot Is Overbroad.

Threatening speech may be prohibited only if it constitutes a "true threat." *See Black*, 538 U.S. at 344. A true threat is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group. . . ." *See id.* True threats require that the speaker intend to intimidate the target of the threat. *See id.* "[N]egligence is not sufficient to support a conviction" when analyzing true threats. *See Elonis v. United States*, 575 U.S. 723, 741 (2015). A true threat analysis must consider the mental state of the speaker. *See id.* at 734. True threats are "distinguished from words as mere political argument, idle talk or jest." *See Watts v. United States*, 394 U.S. 705, 708 (1969) (holding

that defendant's statement of "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was not an unprotected true threat and instead was protected political hyperbole); *United States v. Leaverton*, 835 F.2d 254, 256 (10th Cir. 1987).

The Tenth Circuit uses a reasonableness standard to determine whether speech rises to the level of a true threat. *See United States v. Twitty*, 859 Fed.Appx. 310, 316 (10th Cir. 2021). Under this standard, "a true threat prosecution requires proof that a reasonable person would understand the communication to be a threat. [T]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made." *See id.* (citation omitted) (quotations omitted). This analysis requires "a fact-intensive inquiry, in which the language, the context in which the statements are made, as well as the recipients' responses are all relevant." *See Nielander v. Bd. of Cnty. Comm'rs of Cnty. Of Republic of Kansas*, 582 F.3d 1155, 1167–68 (10th Cir. 2009). Context may include "where a statement was made and how an audience reacted." *See United States v. Stevens*, 881 F.3d 1249, 1254 (10th Cir. 2018).

On its face, Section 21-1311 criminalizes speech and expressive conduct that goes far beyond the limited definition of true threats. The Oklahoma Riot Statute prohibits speech which the government cannot regulate – speech protected under the First Amendment – and is thus overbroad. "The first step in overbreadth analysis is to construe the challenged statute [as] it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams,* 553 U.S. 285, 293 (2008). The second step is to assess "whether the statute, as [the court has] construed it, criminalizes a substantial amount of protected expressive activity." *Id.* at 297.

i. Section 21-1311 Encompasses Protected Speech.

To analyze Section 21-1311 under the first step of the overbreadth analysis, the Court should look to both the plain meaning and the manner in which Oklahoma courts have construed the Oklahoma Riot Statute. *Id*.

The Supreme Court of Oklahoma has stated that statutes should be interpreted based on their plain language. *See Justus v. State ex rel. Dep't of Pub. Safety*, 61 P.3d 888, 889 (Okla. 2002) ("[W]here a statute's language is plain and unambiguous, and the meaning clear and unmistakable, no justification exists for the use of interpretative devices to fabricate a different meaning."). Section 21-1311 provides that "any threat to use force or violence if accompanied by immediate power of execution" constitutes riot and may be the basis of riot and riot-related charges. The Supreme Court of Oklahoma has defined "any" as "one indifferently out of a number." *See Pioneer Const. Co. v. First State Bank*, 158 P. 894, 894–95 (Okla. 1915); *In re Appeal of McNeal*, 128 P. 285, 291 (Okla. 1912). A true threat, however, is not simply *any* threat to use violence or force. A true threat cannot be picked out *indifferently* from any given threat. A *true* threat is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group. . . ." *See Black*, 538 U.S. at 344. However, *any* threat includes expressions outside of this definition, such as political hyperbole. The plain meaning of Section 21-1311 encompasses more than true threats and is therefore overbroad.

Far from narrowing the Riot Statute's plain language to apply only to true threats, Oklahoma courts have construed the Statute's "any threat" language to mean just that – "any threat." *See Schoolcraft*, 84 Okla. Crim. at 39 ("In order for the proof of the

State to sustain a conviction for riot, it was only necessary . . . to show any threat to use force or violence."); *Crawford*, 115 P. at 279.

While the Tenth Circuit's true threat analysis requires a clear intent to intimidate, Oklahoma courts do not interpret the Riot Statute to include an intent element. *See Crawford*, 115 P. at 280 (When the statute states that "[a]ny use of force or violence, or any threat to use force or violence . . . is riot . . . it matters not what the intention of the parties who committed the acts may have been . . . ."). Courts do not consider the intention of the speaker or the actual intimidation of the listener of an alleged threat when determining liability under Section 21-1311. This overbroad construction of the Riot Statute criminalizes significant amounts of protected speech, despite the narrow First Amendment exception for true threats requiring "*a serious expression of an intent* to commit an act of unlawful violence . . . ." *See Black*, 538 U.S. at 344 (emphasis added). This also does not fit within the Tenth Circuit's reasonableness standard used to determine whether speech rises to the level of a true threat. *See Stevens*, 881 F.3d at 1253 ("[T]he government must prove the defendant transmitted the communication for the purpose of issuing a threat or with knowledge [it] would be viewed as a threat.").

Section 21-1311 prohibits more speech than is permitted under the First Amendment. The statute's plain language and Oklahoma courts' failure to tailor "riot" to prohibit only the unprotected category of true threats – as opposed to *any* threat – makes it unconstitutionally overbroad. Thus, the first step of the overbreadth analysis demonstrates that Section 21-1311 encompasses significantly more than true threats.

ii. Section 21-1311 Criminalizes a Substantial Amount of Protected Expressive Activity.

Based on its plain language and how Oklahoma state courts have construed it, the Riot Statute "criminalizes a substantial amount of protected expressive activity." *See Williams*, 553 U.S. at 297. True threats constitute a narrow category of unprotected speech and are included in the statute's "plainly legitimate sweep." *See id.* at 292. Threats which are *not* true threats, however, constitute "protected expressive activity." *See id.* at 297. Section 21-1311 criminalizes *any* threat, which includes protected expressive activity such as political hyperbole. Its overbreadth is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *See id.* at 292.

Section 21-1311 does not contain a clear intent requirement, nor does it narrow its definition of riot explicitly to true threats. In fact, the very language the Plaintiff used here—"Fuck the Police"—is protected speech. Pursuant to the Tenth Circuit's true threats test, a reasonable person would not construe "Fuck the Police" to be a threat. *See Twitty*, 859 Fed.Appx. at 316. The Supreme Court has determined that "the State may not, consistently with the First and Fourteenth Amendments, make [a] simple public display . . . of this single four-letter expletive a criminal offense" as "words are often chosen as much for their emotive as their cognitive force." *See Cohen v. California*, 403 U.S. 15, 16, 26 (1971) (holding that "a jacket bearing the words 'Fuck the Draft'" constitutes protected expressive activity under the First Amendment). "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically

speaking, may often be the more important element of the overall message sought to be communicated." *Id.* at 26. The Sixth Circuit adhered to the Supreme Court's reasoning in holding that "wearing a shirt that said 'Fuck the Police'" to a county fair "was constitutionally protected." *See Wood v. Eubanks*, 25 F.4th 414, 418, 430 (6th Cir. 2022) ("Wood used strong language to criticize the defendants. But '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.'" (quoting *Cohen*, 403 U.S. at 26)). Relatedly, the Eight Circuit interpreted *Cohen* as protecting the speech of a driver that yelled "'f**k you!' out of his car window" to an Arkansas State Trooper. *See Thurairajah v. City of Fort Smith*, 925 F.3d 979, 982, 985 (8th Cir. 2019) ("Criticism of law enforcement officers, even with profanity, is protected speech."). The First Amendment protects Plaintiff's statement of "Fuck the Police" as core political speech.

The District Court for the Western Division of South Dakota recently struck down as overbroad a South Dakota law that is nearly identical to the Oklahoma Riot Statute, and upon which the Oklahoma Riot Statute was based. *See Dakota Rural Action v. Noem*, 416 F.Supp.3d 874, 884–91 (D.S.D. 2019). In the South Dakota statute, riot boosting, as in Section 21-1311, was defined as "*any* threat to use force or violence[.]"[3] *See* S.D. Codified Laws § 20-9-54(3) (emphasis added). Undertaking a true threat analysis, the

[3] In fact, the definition of riot in Oklahoma's statute was derived directly from South Dakota's anti-riot statute. *See Roberts v. State*, 66 Okla. Crim. 371, 378–79 (Okla. Crim. App. 1939) ("The statute under consideration, and under which the information was filed in this case, was taken by this state from [South] Dakota.").

court held that South Dakota's definition of riot boosting was overbroad because it prohibited protected speech that did not rise to the level of a true threat. *See Noem*, 416 F.Supp.3d at 888–89. In doing so, the court addressed a hypothetical in which a rancher saw a Keystone Pipeline truck parked on the rancher's land without permission. *See id.* at 889. The court explained that if the rancher confronted the truck driver with two of his ranch hands and told him, "You'd better get out of here before we kick your butt," the rancher could be liable under the statute. *See id.* Through its hypothetical, the court reasoned that, even though the rancher's speech would be protected under the First Amendment, the speech would have been prohibited under South Dakota's riot statute. *See id.* The court noted that without additional analysis not included in the statute itself, the statute "[wa]s unconstitutional as being too broad because it would encompass many threats that are protected speech." *See id.*

In fact, courts have regularly upheld as constitutionally protected speech that goes far beyond the innocuous "Fuck the Police" statement that Plaintiffs made here. In *United States v. Bagdasarian*, the Ninth Circuit held that an online post about President Obama threatening "he will have a 50 cal in the head soon" does "not constitute a 'true threat,' and [is] protected speech under the First Amendment." *United States v. Bagdasarian*, 652 F.3d 1113, 1115, 1123 (9th Cir. 2011). *See also United States v. Lincoln*, 403 F.3d 703, 705, 708 (9th Cir. 2005) (holding that a letter sent to President Bush threatening "You Will Die too George W Bush real Soon" nevertheless "did not constitute a true threat").

Aside from the actual statements upon which Plaintiffs' charges were based,[4] it is easy to formulate various other non-speculative instances, as courts do when reviewing First Amendment overbreadth facial challenges, under which Section 21-1311 would criminalize protected speech. For example, consider a large demonstration in Oklahoma City protesting the Riot Statute. If protestor yells that, "the Governor needs to resign, or else!" the participant could be charged for riot as defined by Section 21-1311, regardless of whether the Governor believed the statement to be a threat and regardless of whether the speaker meant it as a threat. If the first protestor's friend yells, "the District Attorney better think twice before trying to prosecute my friend for riot!" the friend could also be liable for riot as defined by Section 21-1311, whether they truly meant the threat or not. Considering the context of such statements as required by the Tenth Circuit's true threats test shows the requisite likelihood that such statements would place the speakers within the broad scope of Section 21-1311's riot definition. On its face, Section 21-1311 criminalizes much of the political hyperbole that occurs in the context of protests and demonstrations.[5] "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

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[4] The charging documents in the Plaintiffs' cases indicate that the words "Fuck the Police" were the basis of their riot related charges, despite the fact that such statements have been upheld as protected speech. *See Thurairajah*, 925 F.3d at 985.

[5] As a result of the statute's overbreadth, speakers at demonstrations have and will restrict their speech, avoiding even constitutionally protected political hyperbole, for fear of prosecution under Section 21-1311. See *infra* Section II's discussion of the statute's chilling effect on speech as a irreparable harm.

Section 21-1311 satisfies the second prong of the overbreadth analysis, as it "criminalizes a substantial amount of protected expressive activity." *See Williams*, 553 U.S. at 297. Section 21-1311 is therefore unconstitutionally overbroad.

2. Section 21-1311's Definition of a Riot is Void for Vagueness.

Section 21-1311's definition of riot is also void for vagueness. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Hunter*, 663 F.3d 1136, 1141 (10th Cir. 2011) (quoting *United States v. Graham*, 305 F.3d 1094, 1105 (10th Cir. 2002) (alteration in original)). A statute must provide sufficient clarity for an ordinary person to understand whether their speech is prohibited. *See Hunter*, 663 F.3d at 1141; *see, e.g., Golicov v. Lynch*, 837 F.3d 1065, 1072, 1075 (10th Cir. 2016) (holding that the Immigration and Nationality Act's definition of "aggravated felony" was void for vagueness because "[f]rom a non-citizen's perspective, this provision substitutes guesswork and caprice for fair notice and predictability." (quoting *Shuti v. Lynch*, 828 F.3d 440, 450 (6th Cir. 2016) (alteration in original))).

i. Section 21-1311's "Acting Together" Language is Unconstitutionally Vague.

Laws that lack a *mens rea* requirement may be unconstitutionally vague because they fail to provide clear notice as to what conduct would result in a criminal conviction. *See City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). A criminal statute "must be drawn in language sufficient to apprise the public of exactly what conduct is

forbidden" and cannot lack an "ascertainable standard for the determination of guilt." *Hayes v. Mun. Ct. of Okla. City*, 487 P.2d 974, 976 (Okla. Crim. App. 1971).

Section 21-1311's "acting together" language does not include a *mens rea* requirement for a person to be held criminally liable for participating in a riot. The Riot Statute's lack of specified intent means the statute does not provide clear notice to the ordinary Oklahoma citizen as to the difference between standing peacefully on the street in a protest that happens to turn violent due to other malicious actors and actually being the actor who throws a Molotov cocktail or smashes a car.

Section 21-1311's lack of clear intent standards does not provide sufficient notice to peaceful protesters exercising their First Amendment rights such that they are "apprise[d] . . . of exactly what conduct is forbidden." *Id*. Therefore, the statute must be found void for vagueness.

ii. Section 21-1311 Encourages Arbitrary and Discriminatory Enforcement.

Vague criminal statutes are invalid if they hold the potential to authorize and foster arbitrary and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Hayes*, 487 P.2d at 979–80 ("[V]ague and overbroad legislation denies equal protection in that it 'makes selective enforcement virtually inevitable. Certain sub-classes of individuals within the general vagrancy statutes are certain to become the targets of selective enforcement.'" (quoting *Goldman v. Knecht*, 295 F. Supp. 897, 907 (D. Colo. 1969))).

The vagueness of Section 21-1311 allows for arbitrary and discriminatory enforcement of the Riot Statute. Section 21-1311 does not contain an intent requirement, allowing law enforcement to enforce the law in an arbitrary and discriminatory manner against Plaintiffs. The law provides no guidance to law enforcement as to who should be arrested under the Oklahoma Riot Statute. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (noting that the most important requirement of the void-for-vagueness doctrine is that the legislature create basic instructions to direct law enforcement). Without a clear requirement of intent, the Riot Statute does not provide clear notice as to what conduct by an innocent participant in a protest would result in criminal conviction. *See Morales*, 527 U.S. at 55–56 (holding that a vague law infringing on a constitutional right may be facially attacked if it does not bear a *mens rea* requirement). A criminal statute "must be drawn in language sufficient to apprise the public of exactly what conduct is forbidden" and cannot lack an "ascertainable standard for the determination of guilt." *See Hayes*, 487 P.2d at 976, 981 (holding that an anti-loitering statute was void for vagueness due to the lack of language distinguishing ordinary standing or strolling in a public street from unlawful loitering). The court in *Dakota Rural Action* analyzed the riot statute's absence of an intent element, noting that "[o]ther related statutes have intent elements." *See* 416 F.Supp.3d at 891 (determining that "the South Dakota Supreme Court . . . not read[ing] an intent element into" the riot statute was evidence that the statute was unconstitutional).

The Oklahoma Riot Statute has already been enforced in an arbitrary and discriminatory manner against Plaintiffs. OCPD officers already knew who Plaintiffs were before their arrest, making statements such as, "we know who you are," and, "we've

seen your pictures and videos." Hogsett Decl. ¶ 19. One officer asked Plaintiff Baker whether he was "the kid that's always recording." Baker Decl. ¶ 13. When Plaintiffs Hogsett and Baker were arrested in OCPD Headquarters, officers standing on the upper floors of the building applauded while looking down into the lobby. *Id.* These officers made clear that they were eager to arrest Plaintiffs for their participation in the local racial justice protests.

As evidence of the arbitrary and discriminatory enforcement at the heart of the Court's concerns in *Morales,* Defendant Prater used Section 21-1322 in a viewpoint discriminatory manner against Plaintiffs by charging them with Incitement to Riot for speech with which he disagrees: speech critical of law enforcement. In a conversation with Plaintiff Webb about why Prater brought Incitement to Riot Charges against Plaintiffs, Defendant Prater explained that he was "angry" and "pissed off" at the things Plaintiffs said to Sgt. Wald during the mural painting. Webb Decl. ¶ 20. When asked about his decisions to criminally charge protesters as "terrorists" and "rioters," a journalist quoted Prater as stating, "This is not Seattle . . . . We're not putting up with this lawlessness here."[6]

The legislative history of the 2021 Amendments to the Riot Statute, House Bill 1674 ("H.B. 1674"), reveals animus toward racial justice protesters and invites discriminatory enforcement of the Riot Statute and related laws. Statements from the co-

[6] Nolan Clay, *Some OKC Protestors Charged with Terrorism, Rioting, Assault*, The Oklahoman (Jun. 27, 2020), https://www.oklahoman.com/story/news/columns/2020/06/27/protesters-charged-with-terrorism-rioting-assault/60394429007.

authors of these House Bills reveal disdain for the views of Black Lives Matter ("BLM") protestors and their allies. The swift timing of the introduction of such starkly anti-protestor and pro-law enforcement bills demonstrates the Oklahoma State Legislature's objective to prevent protestors from exercising their First Amendment rights. *See Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994) (noting that "suspicious timing" could serve as evidence of intentional discrimination). The co-authors clearly intended for the 2021 Amendments to bolster Section 21-1311 in disfavoring protestors like Plaintiffs. The timing of the bills' introduction and the co-authors' statements demonstrate that these House Bills are a direct response to racial justice protests in Oklahoma. Even if the Court construes Section 21-1311 to prohibit only true threats as defined by the Tenth Circuit, the result would still allow for arbitrary and discriminatory enforcement.

Section 21-1311 does not establish minimal guidelines for law enforcement to properly distinguish an innocent participant of a public demonstration that turns violent from the participant who intentionally uses violence or force. Nor does it provide sufficient clarity for the public to know how to avoid criminal liability under Section 21-1311. The lack of an intent requirement to guide law enforcement in making arrests creates a strong possibility that police officers will arrest innocent and peaceful protestors, such as Plaintiffs, who are merely related to organizations disliked by public officials. Such discriminatory enforcement further underscores the Riot Statute's infringement on First Amendment freedoms.

B. Plaintiffs Will Continue to Suffer Irreparable Harm Without an Injunction.

In the wake of their arrests, Plaintiffs have already suffered irreparable harm due to the Riot Statute's chilling effect. In the absence of an injunction barring enforcement of Section 21-1311, Plaintiffs will continue to suffer irreparable harm. Since their arrests and riot-related criminal charges last year, Plaintiffs are justifiably afraid to organize or lead peaceful demonstrations meant to further their objectives of social justice and community engagement. Terry Decl. ¶ 25–26, 29; Hogsett Decl. ¶ 28, 31–32; Baker Decl. ¶ 18–19; Nabors Decl. ¶ 23, 25; Webb Decl. ¶ 21; Mack Decl. ¶ 12–14. "[A] First Amendment plaintiff who faces a credible threat of future prosecution suffers from an 'ongoing injury resulting from the statute's *chilling effect* on his desire to exercise his First Amendment rights.'" *See Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (quoting *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987)). Moreover, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the chilling of Plaintiff's free speech is an irreparable harm. *See Elam Const., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) (holding that if the statute at issue is "to remain in effect [it] will result in a chilling effect on plaintiffs' First Amendment rights, constituting an irreparable harm to their interests"). "[W]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012).

For fear of criminal liability under Oklahoma's riot laws, Plaintiffs and other individuals that planned and participated in public demonstrations have drastically reduced the frequency, size, and scope of their events and/or participation. Plaintiffs' nightly protests ended the very night Plaintiffs were charged with Incitement to Riot. Hogsett Decl. ¶ 27. That night, nearly a month of nightly protests outside OCPD Headquarters from 7:00 pm to around 7:00 am, organized and led by Plaintiffs, came to a halt. *Id.* The charges ended a protest in real time.

Now—since learning of their Incitement to Riot charges—when Plaintiffs protest, they do so in a fundamentally different manner, no longer taking leadership roles or making themselves visible. Terry Decl. ¶ 25–26, 29; Hogsett Decl. ¶ 28, 31–32; Baker Decl. ¶ 18–19; Nabors Decl. ¶ 23, 25; Webb Decl. ¶ 21; Mack Decl. ¶ 12–14. They now stay out of the streets, remaining on sidewalks; they do not lead marches; they no longer speak over megaphones; they do not lead chants; they do not engage in dialogue with police officers. Terry Decl. ¶ 25–26, 29; Hogsett Decl. ¶ 28, 31–32; Baker Decl. ¶ 18–19; Nabors Decl. ¶ 23, 25; Webb Decl. ¶ 21; Mack Decl. ¶ 12–14. All Plaintiffs have limited their speech and changed the way they protest out of fear of arrest and prosecution.

On August 3, 2020, Plaintiff Terry participated in a rally outside the Oklahoma County courthouse to protest cash bail and Defendant Prater's decision to criminally charge protesters. Terry Decl. ¶ 27. While other protesters went inside the courthouse, Plaintiff Terry remained outside. *Id.*

On September 23, 2020, Plaintiff Hogsett attended a protest of the "not guilty" verdict for the officers who killed Breanna Taylor, but she stayed on the sidewalk, too afraid of arrest to join other protesters in the street. Hogsett Decl. ¶ 29.

In 2021, Plaintiff Hogsett attended several peaceful protests downtown, but stayed on the sidewalk, too fearful to venture into the street. *Id.* ¶ 31. She stayed several blocks away from the main groups of protestors out of fear of arrest. *Id.* ¶ 31–32. She did not lead or participate in any chants. *Id.* ¶ 28, 32. Plaintiff Hogsett no longer uses the words "fire" or "burn" or even the fire emoji when posting on social media, and she does not post anything overtly critical of the police, for fear of arrest and prosecution. *Id.* ¶ 31. Plaintiff Hogsett now only attends protests when she has been assured by organizers that all permits have been acquired and that the event will remain calm. *Id.* She no longer feels safe attending many protests criticizing the police and advocating for racial justice due to fear of arrest. *Id.* ¶ 28, 32.

In 2021 and 2022, Plaintiff Terry continued attending protests; however, she is still scared that she will be arrested again. Terry Decl. ¶ 29. She no longer leads chants on the megaphone. *Id.* ¶ 26. She no longer directs the progression or stands in the front of marches. *Id.* She stays in the back and tries not to draw any attention to herself because she believes the State targets protesters who stand out as leaders. *Id.* ¶ 29.

In November 2021, Plaintiff Mack participated in numerous protests, vigils, and events in support of the commutation of the execution of Julius Jones. Mack Decl. ¶ 13. Mack participated cautiously, refraining from organizing any of these events and declining to play any leadership roles for fear of arrest and prosecution. *Id.*

Plaintiff Baker limits his attendance at protests to events where he knows the organizers personally, out of fear that something unpredictable may happen and the police will arrest him for his presence or for filming. Baker Decl. ¶ 19. He keeps his distance from police officers whenever he attends a protest. *Id.* ¶ 18. He no longer feels safe attending protests criticizing the police and fighting for racial justice. *Id.* ¶ 18–19.

Plaintiff Webb continues to protest but does not use a megaphone and does not play a visible role anymore out of fear of arrest and prosecution. Webb Decl. ¶ 21. He only participates in protests from the sidelines and makes sure to stay away from police. *Id.* When other protesters say, "Black Lives Matter," he instinctively moves away from them out of fear. *Id.*

Plaintiff Nabors still participates in protests but does not organize them. Nabors Decl. ¶ 24–25. He does not speak over the megaphone or lead chants. *Id.* ¶ 25. He does not direct the progression of marches and does not stand near the front of protests. *Id.* He stays on the sidewalk, afraid that he could be arrested for standing in the street with other protesters. *Id.* He no longer speaks to police during protests. *Id.* He is careful not to take any leadership roles during protests, fearful that being the face of a movement or action will again make him a target for arrest and prosecution. *Id.*

While Plaintiffs continue to engage in peaceful protesting, they do so not as outspoken leaders but as cautious participants under the ever-present fear of arrest and criminal prosecution. The "*mere threat* of unfounded liability" results in irreparable injury, as it creates a chilling effect on important public discussions protected by the First Amendment. *See Gaylord Entertainment Co. v. Thompson*, 958 P.2d 128, 140 (Okla.

1998). Factoring in the extensive irreparable harm Plaintiffs are currently suffering and would continue to suffer weighs heavily in favor of granting the preliminary injunction.

C. The Balance of Harms Favor Plaintiffs' Constitutionally Protected Rights.

The balance of equities also favors Plaintiffs because the irreparable injury Plaintiffs continue to suffer far outweigh any marginal burden on Defendants. The State's interest in prohibiting lawlessness through the Riot Statute is weak, as Oklahoma already has an extensive statutory scheme criminalizing related conduct to advance this interest. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (A state's "interest in protecting its citizens from crime" does not outweigh the "significant public interest in upholding First Amendment principles" where the state "can still employ other methods" to achieve the same goal). For example, Section 21-1378 prohibits "threaten[ing] an act of violence that is intended to cause severe bodily harm or death to another person." *See* 21 Okla. Stat. § 1378 (West 2022). Moreover, the State's animus against racial justice protesters suggests that an interest in prohibiting lawlessness is a pretextual justification for the State's true and improper purpose of silencing messages critical of law enforcement.

Section 21-1311 targets Plaintiffs' constitutionally protected speech. "When a constitutional right hangs in the balance . . . 'even a temporary loss' usually trumps any harm to the defendant." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). Allowing the law to stay in effect would continue to impair Plaintiffs' ability to convey their constitutionally protected opinions through the threat of criminal liability. An injunctive relief in this case would allow Plaintiffs to resume their

participation in the long tradition of enriching public debate on important issues without fear of prosecution for exercising their First Amendment rights.

D. An Injunction Is in the Public Interest.

Finally, the injunction Plaintiffs seek supports the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *See Awad,* 670 F.3d at 1132. Specifically, "[v]indicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005). The ability to discuss public issues is "integral to the operation of the system of government established by our Constitution." *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976). "[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The State may claim a public interest in preserving tax dollars from being spent on repairing property damage from riots. The court in *Dakota Rural Action* rejected similar reasoning. *See* 416 F.Supp.3d at 893. Noting that while "[c]oncern for the possible effect on taxpayers of those counties is a true concern if it comes to pass . . . that concern is speculative while the impact upon the Plaintiffs is not speculative as they are being precluded from presently desired free speech activity." *Id.* Additionally, the State has demonstrated its ability to charge people responsible for property damage with crimes outside the Riot Statute and unaffected by the unconstitutional definition of riot.[7] Given

[7] On June 26, 2020, Defendant Prater brought criminal felony charges against several protesters for activities during the May 30 and 31, 2020 George Floyd protests in

the immediate and demonstrated harm to Plaintiffs and the citizens of Oklahoma, the State may not rely on hypothetical reasons for denying constitutional rights provided by the First Amendment.

Through its riot statute, Oklahoma is depriving the public of the benefits that a full and complete discourse bring to important issues. *See Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) ("[A] principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949))); *Sullivan*, 376 U.S. at 270. Injunctive relief would serve the public interest by allowing Plaintiffs to resume their participation in enriching public debate through expressive activities.

IV. CONCLUSION

Oklahoma has enacted an overbroad and vague Riot Statute that punishes speakers regardless of intent and has enforced the statute against protesters critical of law enforcement. Section 21-1311 has already succeeded in chilling the protected speech of Plaintiffs. Plaintiffs and the public will continue to suffer irreparable harm if the Oklahoma Riot Statute is left standing any longer. Accordingly, Plaintiffs are entitled to a preliminary injunction.

Oklahoma City, including five Terrorism, five Riot, seven Disorderly Conduct, an Arson, and an Assault and Battery charges. Nolan Clay, *Some OKC Protestors Charged with Terrorism, Rioting, Assault*, The Oklahoman (Jun. 27, 2020), https://www.oklahoman.com/story/news/columns/2020/06/27/protesters-charged-with-terrorism-rioting-assault/60394429007/.

Respectfully submitted,

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Dated: June 30, 2022

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

[1] SINCERE TERRY, *et al.,* *Plaintiffs*, v. [1] JOHN O'CONNOR, in his official capacity as Oklahoma Attorney General, *et al.,* *Defendants*.	Civil Action No.: 5:22-cv-00521-C

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and Local Rule 7.1, Plaintiffs Terry, et al. respectfully move the Court for the entry of a preliminary injunction against the enforcement of Section 21-1311, codified as Okla. Stat. tit. 21 § 1311. Section 21-1311 is overbroad and vague, infringing on crucial First Amendment rights and effectively chilling the speech of protesters.

As more fully set forth in Plaintiffs' Memorandum of Support, Plaintiffs are likely to succeed on the merits of their claims and will suffer irreparable harm from the enforcement of Section 21-1311 in the absence of preliminary relief. The balance of harms favor Plaintiffs' constitutionally protected rights, and an injunction is in accord with the public interest.

Wherefore a preliminary injunction should issue.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2022, I electronically filed the foregoing Motion for a Preliminary Injunction & Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction with the Clerk of Court using the CM/ECF system. The following, who are not registered participants of the Electronic Case Filing System, will be served by U.S. Mail:

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