No. 24-6046

In the United States Court of Appeals for the Tenth Circuit

SINCERE TERRY, *et al.*,

Plaintiffs-Appellants,

v.

GENTNER DRUMMOND, *in his official capacity as* Attorney General of the State of Oklahoma, *et al.*,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Western District of Oklahoma,
Honorable Charles Goodwin, District Judge
No. 5:22-cv-521

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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There are no prior or related appeals.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants filed suit for declaratory, injunctive, and nominal relief under 42 U.S.C. § 1983. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). The district court denied preliminary injunctive relief on February 16, 2024, and Plaintiffs-Appellants filed a notice of appeal on March 15, 2024. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Did the district court err in holding that Plaintiffs-Appellants are unlikely to succeed on the merits of their claim that the Oklahoma Riot Statute, Okla. Stat. tit. 21 § 1311, either as written or as construed, violates the First Amendment of the United States Constitution?

2. Did the district court err in holding that Plaintiffs-Appellants are unlikely to succeed on the merits of their claim that the Oklahoma Riot Statute, Okla. Stat. tit. 21 § 1311, as written, violates the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

I. Factual Background

After 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-Appellants are six such individuals who participated in and led many of these protests. In June 2020, Plaintiffs-Appellants, along with several others, began to gather downtown nightly in front of the Oklahoma City Police Department ("OCPD") Headquarters to protest. *See* J.A.(Vol.1).0058.

Plaintiffs-Appellants, along with others, began planning a mural in support of Black lives and racial justice. *See* J.A.(Vol.1).0058. The group obtained permits for the mural in front of OCPD Headquarters and the Oklahoma County Jail and began painting. *See* J.A.(Vol.1).0058. The space was physically blocked off by Oklahoma City employees using traffic barricades. *See* J.A.(Vol.1).0058. On the third day of painting, OCPD Master Sergeant Nicklas Wald ("Sgt. Wald") drove his police cruiser up to one of the barricades. *See* J.A.(Vol.1).0058. Sgt. Wald moved the barricade to drive his cruiser through the mural despite being informed by one Plaintiff-Appellant that Sgt. Wald could not drive through the permitted section of the street. *See* J.A.(Vol.1).0058-59. Other Plaintiffs-Appellants approached the patrol car, began recording the encounter on their phones, and yelling, "f—k the police!" and, "we have a permit!" *See* J.A.(Vol.1).0059. After being presented with

and reviewing the permit, Sgt. Wald drove away from the permitted area. *See* J.A.(Vol.1).0059. Without impeding the cruiser's path, several Plaintiffs-Appellants briefly followed on foot. *See* J.A.(Vol.1).0025. The mural painting continued peacefully after this encounter. *See* J.A.(Vol.1).0026.

While leading another racial justice protest at the Edmond Police Department ("EPD"), Plaintiffs-Appellants learned that they were being charged with felony Incitement to Riot stemming from their encounter with Sgt. Wald during the mural painting. *See* J.A.(Vol.1).0060. News of these riot charges spread quickly through the crowd of protesters, causing Plaintiffs-Appellants and others to disperse and end their EPD protest. *See* J.A.(Vol.1).0060. The nightly protests in front of the OCPD Headquarters ended the day the Incitement to Riot charges were announced. *See* J.A.(Vol.1).0060. From that day on, the Incitement to Riot charges and fear of subsequent arrest and prosecution fundamentally changed the way Plaintiffs-Appellants protest. *See* J.A.(Vol.1).0060. While the charges were subsequently dropped by the District Attorney's Office, J.A.(Vol.1).0034, all Plaintiffs-Appellants have limited their speech out of fear of arrest and prosecution for exercising their First Amendment right to free speech. *See* J.A.(Vol.1).0036-37. For example, Plaintiff-Appellant Sincere Terry no longer takes leadership roles at protests and similar events, because she is afraid that OCPD targets protesters who stand out as leaders and is afraid that she will be arrested again. J.A.(Vol.1).0124. All Plaintiffs-

Appellants have expressed in sworn declarations a present desire to once again engage in racial justice protests in the ways they did in the past, but which they fear will lead to arrest and prosecution under Section 1311. *See, e.g.*, J.A.(Vol.1).0148; J.A.(Vol.1).0132-33; J.A.(Vol.1).0140; J.A.(Vol.1).0155; J.A.(Vol.1).0160

II. Procedural History

Plaintiffs-Appellants brought a facial challenge in the United States District Court, Western District of Oklahoma, alleging that the definition of "riot" as set forth in Okla. Stat. tit. 21 § 1311 ("Section 1311") is unconstitutionally vague and overbroad under the First and Fourteenth Amendments. *See* J.A.(Vol.1).0040-47. The challenged statute defines 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." Okla. Stat. tit. 21 § 1311. In the action below, Plaintiffs-Appellants argued that Section 1311 is overbroad in violation of the First Amendment because it extends far beyond the limited and narrow "true threats" exception to the First Amendment right to freedom of speech, thereby subjecting individuals engaged in protected First Amendment conduct to criminal liability. *See* J.A.(Vol.1).0009; J.A.(Vol.1).0061-69. Plaintiffs-Appellants also argued below that Section 1311 is void for vagueness because it lacks a clear *mens rea* standard: the law's lack of a clear intent standard means that ordinary individuals cannot distinguish between what speech and conduct is

permitted and what the law prohibits and that the law encourages arbitrary and discriminatory enforcement. *See* J.A.(Vol.1).0009; J.A.(Vol.1).0069-73. Defendants-Appellees countered that Section 1311 is in fact narrower, not broader, than the true threat doctrine, and that the law contains a *mens rea* standard sufficient to survive a vagueness and overbreadth challenge. *See* J.A.(Vol.2).0210-21.

After the Parties fully briefed Plaintiffs-Appellants' motion to preliminarily enjoin enforcement of Section 1311 and Defendants-Appellees' motion to dismiss, but before either motion was decided, the United States Supreme Court decided a key case clarifying the true threats doctrine under the First Amendment, *Counterman v. Colorado*, 600 U.S. 66 (2023). *Counterman* held that, in true threats cases, the government must show that the "defendant had some subjective understanding of the threatening nature of his statements." *Id.* at 69. Specifically, the government must satisfy a recklessness standard, showing that "the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* Plaintiffs-Appellants filed a notice of supplemental authority with the district court alerting it to the *Counterman* decision and its implications for their pending action. *See* J.A.(Vol.3).0290.

On February 16, 2024, the lower court denied Plaintiffs-Appellants' motion for preliminary injunction, finding that Plaintiffs-Appellants failed to make the "requisite strong showing of a likelihood of success on the merits" on their

overbreadth and vagueness claims. *See* J.A.(Vol.3).0308. As to Plaintiffs-Appellants' overbreadth claim, the district court found that "it is reasonable and readily apparent that the Oklahoma Court of Criminal Appeals would construe section 1311 to [] require willfulness and a common intent as to 'any threat to use force or violence.'" *See* J.A.(Vol.3).0317. In light of this finding, the lower court construed Section 1311 as:

> Any use of force or violence, or any threat to use force or violence if accompa[ni]ed by immediate power of execution, by three or more persons acting together, *willfully*, without authority of law, *and sharing a common intent to use force or violence or to unlawfully threaten to use force or violence.*

See J.A.(Vol.3).0318 (emphasis added for atextual language). Applying this narrowed construction of Section 1311, the district court found that the statute does not criminalize a substantial amount of protected speech relative to its legitimate sweep and is therefore not unconstitutionally overbroad. *See* J.A.(Vol.3).0318-21.

The district court also found that Plaintiffs-Appellants are unlikely to succeed on the merits of their vagueness claim. *See* J.A.(Vol.3).0321-25. The district court found that its narrowed construction of Section 1311 "provide[s] sufficient notice to peaceful protestors as to what conduct constitutes riot" under the statute. *See* J.A.(Vol.3).0323. The lower court also dismissed Plaintiffs-Appellants' arguments that Section 1311 authorizes or encourages discriminatory enforcement and that the legislative history of the 2021 amendments to the state's riot statute further invites

discriminatory enforcement of Section 1311 and related laws. *See* J.A.(Vol.3).0323-25.

Plaintiffs-Appellants timely appealed the denial of their motion for preliminary injunction to this Court on March 15, 2024. *See* J.A.(Vol.3).0326. Concurrent to the filing of this brief, Plaintiffs-Appellants filed a motion to certify a question to the Oklahoma Court of Criminal Appeals. Defendants-Appellees oppose the requested relief.

STANDARD OF REVIEW

"To succeed on a typical preliminary-injunction motion, the moving party needs to prove four things: (1) that she's substantially likely to succeed on the merits, (2) that she'll suffer irreparable injury if the court denies the injunction, (3) that her threatened injury (without the injunction) outweighs the opposing party's under the injunction, and (4) that the injunction isn't adverse to the public interest." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (citation and internal quotations omitted). A motion for preliminary injunction seeking to "change[] the status quo" is "disfavored" and "must make a 'strong showing'" of likelihood of success on the merits and that the balance of harms favor injunctive relief. *Id.* at 797 (quoting *Fish v. Kobach*, 840 F.3d 710, 724 (10th Cir. 2016)).

This Court reviews the denial of a preliminary injunction for abuse of discretion, examining the district court's factual findings for clear error and legal conclusions *de novo*. *See Free the Nipple-Fort Collins*, 916 F.3d at 796–97. A district court abuses its discretion when it rests on an erroneous legal conclusion or lacks a rational basis in the record. *See id.* at 797; *Fish*, 840 F.3d at 723.

SUMMARY OF ARGUMENT

This appeal centers on the scope of Oklahoma's riot statute, Section 1311, and whether it impermissibly regulates expression in violation of the First and Fourteenth Amendments. While the district court correctly recognized that statutes criminalizing threats must satisfy a heightened recklessness *mens rea* standard in order to satisfy the First Amendment, it erred in concluding that Section 1311 meets this requirement. Specifically, in denying Plaintiffs-Appellant's Motion for a Preliminary Injunction, the district court overlooked the plain language of the statutory text, binding caselaw, and relevant historical context when it concluded that the Plaintiffs-Appellants were unlikely to succeed on the merits of their First and Fourteenth Amendment claims.

First, the district court erred by narrowing Section 1311 in a manner that is unsupported by the text of the statute, decisions from Oklahoma's highest criminal court, or the intent of the Oklahoma Legislature. It was error for the district court to construe Section 1311 in a manner that runs contrary to these fundamental sources

of the meaning of Oklahoma law. Not only does the plain language of Section 1311 broadly criminalize "any threat," but in the cases where Oklahoma's highest court has analyzed the statute, it has interpreted it to apply broadly and not to require a *mens rea* element. Had the district court properly analyzed Section 1311 based on the text, binding case law, and historical context, it would have concluded that Plaintiffs-Appellants are substantially likely to succeed on their overbreadth and vagueness claims against Section 1311 as written.

Second, the district court further erred in concluding that 1311, as construed, satisfies the First Amendment. Even if the district court's construction was "reasonable and readily apparent," it lacks both the objective and subjective intent elements required of statutes proscribing threats. The correct true threat standard contains both a subjective component–the defendant's state of mind–and an objective component–the substantial risk that the speech would be viewed as threatening violence. The district court's imputation of the words "willfully" and "common intent" do not satisfy this standard because they do not require (a) that the defendant "consciously disregard" (b) an objectively substantial risk of fear in the victim.

For these reasons, this Court should certify the question of what *mens rea*, if any, is required by Section 1311's threat provision. Absent guidance from

Oklahoma's highest criminal court, this Court should vacate the order below and remand for consideration of the remaining equitable factors.

ARGUMENT

The district court properly recognized that statutes criminalizing threats must include a *mens rea* of at least recklessness, which contains both a subjective and objective component. *See* J.A.(Vol.3).0308. The district court imposed on Section 1311 a construction that supposedly satisfied this constitutional requirement. *See* J.A.(Vol.3).0315-18. But that construction was error, because neither statutory text, binding caselaw, nor historical context support the district court's importation of a *mens rea* into Section 1311. And even if the district court's construction was correct, it nonetheless erred further in concluding that as construed, Section 1311 satisfies the requirements of the First Amendment, because the construed *mens rea* does not contain the subjective and objective elements necessary to cure Section 1311's substantial coverage of protected expression. Plaintiffs-Appellants have shown a strong likelihood of success on the merits of their First and Fourteenth Amendment claims against the statute as written, and the district court's construction is insufficient to save it from Plaintiffs-Appellants' First Amendment claim. This Court should certify the question of whether Section 1311's threat provision requires the conscious disregard of a substantial risk that a communication would be viewed as threatening violence toward another. Absent clear guidance from the Oklahoma

Court of Criminal Appeals ("OCCA") regarding the requisite *mens rea* for threats under Section 1311, this Court should vacate the order below and remand for consideration of the remaining preliminary injunction factors.

I. Plaintiffs Are Likely To Succeed On The Merits Of Their First And Fourteenth Amendment Claims Against Section 1311 As Written.

Statutes are facially invalid under the First Amendment if, "judged in relation to the statute's plainly legitimate sweep," the statute is "substantially" overbroad in its coverage of protected expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The substantial overbreadth doctrine, though "strong medicine," *id.* at 613, is particularly justified where, as here, a plaintiff challenges the statute's coverage of "pure speech," *id.*, and where, as here, the statute "imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Substantial overbreadth requires first, that the statute under review be construed, *United States v. Williams*, 553 U.S. 285, 293 (2008), and then second, that the statutory construction's criminalization of a "substantial amount of protected expressive activity" be measured against its legitimate sweep. *Id.* at 297. At the second step, the absence of a *mens rea* requirement in the challenged statute is fatal. *See Counterman v. Colorado*, 600 U.S. 66, 75 (2023).

Under the First Amendment, the states' power to regulate expression is limited to narrow categories, including "true threats." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). "'True threats' encompass those statements where the

speaker *means* to communicate a *serious* expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added). Therefore, to convict a defendant for an offense criminalizing true threats, "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman* 600 U.S. at 69. This standard requires that defendants be subjectively aware of an objective risk that their communications would be viewed as threats. *United States v. Hunt*, 82 F.4th 129, 134–35 (2d Cir. 2023) (citing, *inter alia*, *Counterman*). The main question in this appeal is whether Section 1311 contains such a requirement.

Statutes are also facially invalid under the Fourteenth Amendment when the statute is impermissibly vague. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality). A statute is unconstitutionally vague where "it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966), or it "encourage[s] arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A vagueness claim may require federal courts to "extrapolate" the meaning of state law in the absence of insight from the state courts. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment,

the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). As under the First Amendment, the absence of a *mens rea* requirement in a statute criminalizing expression is fatal under the Fourteenth Amendment. *Morales* 527 U.S. at 55 (plurality).

The district court's application of these well-settled constitutional standards to Section 1311 tripped at the threshold step of construing the state law. The court neglected well-settled rules governing the relationship between federal and state courts and substituted its own construction for the one most supported by text, caselaw, and history. Properly construed, the statute uncontrovertibly reaches a substantial amount of protected expression, and Plaintiffs-Appellants have therefore demonstrated a strong likelihood of success on the merits of their claims.

A. The District Court's Construction Is Neither Reasonable Nor Readily Apparent From The Statutory Text, Caselaw, Or Historical Context.

The district court erred in applying a narrowing construction unsupported by the text of the statute, decisions from Oklahoma's highest criminal court, or the intent of the Oklahoma Legislature. The district court lacks the authority to construe Section 1311 as it has, and Plaintiffs-Appellants have therefore demonstrated a strong likelihood of success on the merits of their overbreadth and vagueness claims against Section 1311 as written.

The federal courts are bound by principles of federalism and the separation of powers to take state law as it comes. With respect to state law, the federal courts are "'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'" *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999). *See also Phelps v. Hamilton*, 59 F.3d 1058, 1070 (10th Cir. 1995) ("The federal courts do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack."). The state courts' rules of statutory construction and the decisions of their highest court are controlling. *Phelps*, 59 F.3d at 1071 n. 23; *Burleson v. Saffle*, 278 F.3d 1136, 1143–45 (10th Cir. 2002); *Brown v. Buhman*, 822 F.3d 1151, 1160 n. 6 (10th Cir. 2016) ("Even if adopting an alternative construction might avert possible constitutional problems, federal courts must defer to states' interpretations of their own statutes.").

Under Oklahoma law, the "intention of the Legislature" is supreme and "is to be determined first by the plain and ordinary language of the statute." *State v. Farthing*, 328 P.3d 1208, 1210 (Okla. Crim. App. 2014) (summary op.). Okla. Stat. tit. 25 § 1. Historical context may appropriately shed light on textual meaning. *Assessments of Tax Year 2012 of Certain Properties Owned by Throneberry v. Wright*, 481 P.3d 883, 886 (Okla. 2021). Canons of construction, including

constitutional avoidance, do not displace these general rules. *Id.* ("We must hold a statute to mean what it plainly expresses and cannot resort to interpretive devices to fabricate a different meaning."); *Johnson v. State*, 308 P.3d 1053, 1055 (Okla. Crim. App. 2013); *Wallace v. State*, 935 P.2d 366, 370 (Okla. Crim. App. 1997) ("'A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous.'" (quoting *Abshire v. State*, 551 P.2d 273, 274 (Okla. Crim. App. 1976))).

1. The District Court's Construction Is Not Supported By The Text Of Section 1311.

The text of Section 1311 is unambiguous: "any threat" means any threat. The term "any," according to the Oklahoma Supreme Court, means "one indifferently out of a number." *Pioneer Const. Co. v. First State Bank*, 158 P. 894, 894–95 (Okla. 1915) (per curiam); *In re Appeal of McNeal*, 128 P. 285, 291 (Okla. 1912). And as the U.S. Supreme Court has explained, the word "threat," by itself, "speak[s] to what the statement conveys—not to the mental state of the author." *Elonis v. United States*, 575 U.S. 723, 733 (2015). According to definitions contemporaneous with the adoption of Section 1311, the definition of "threat" is capacious indeed, extending even to mere "denunciations." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1502 (1st ed. 1913) ("The expression of an intention to inflict evil or injury on another; the declaration of an evil, loss, or pain to come; menace; threatening;

denunciation.").[1] *See also* 11 OXFORD ENGLISH DICTIONARY 352 (1913) (second definition is "to rebuke, reprove"). Combined, "any threat" reaches well beyond "true threats" and criminalizes such innocuous and protected statements as "f—k the police," *City of Houston v. Hill*, 482 U.S. 451, 458–67 (1987), or "I'm going to shoot the President," *Watts,* 394 U.S. Thus, the plain sweep of Section 1311, without any further gloss, reaches protected expression.

2. The District Court's Construction Is Not Supported By Oklahoma Caselaw.

Oklahoma caselaw regarding Section 1311has not narrowed its scope. In fact, the OCCA has construed Section 1311 broadly and without a *mens rea* element, consistent with Plaintiff-Appellants' reading of the text. The district court's construction, on the other hand, ignored the OCCA's most recent pronouncement of Section 1311's meaning and misread prior caselaw.

The OCCA most recently addressed Section 1311 in *Schoolcraft v. State*, 178 P.2d 641 (Okla. Crim. App. 1947), in which the court clarified the distinction between what was sufficient to charge a defendant with riot and what was necessary to convict. To convict, it is "only *necessary* to show that three or more persons acted together and used force or violence towards someone without authority of law or to

[1] The 1913 Edition of Webster's New International Dictionary was extensively relied upon by Oklahoma courts during the early history of the State and is therefore particularly probative of original public meaning. *See, e.g.*, *Pioneer Const. Co.* at 894–95 (citing Webster's).

show *any threat* to use force or violence accompanied by immediate power of execution." *Id.* at 650 (emphasis added). The district court erred in ignoring this express statement from the court in favor of the charging document cited in the case. For not only does the charging document in this case, as in all other cases, provide weak support for any interpretation of the text, but here, the court for the first time provided a *reasoned* interpretation of the statute. *Id.* ("Under the statutory definition of riot…, it is apparent the intention of the Legislature was to modify the Common Law and make it possible to charge the crime of riot and secure a conviction therefor without either alleging or proving an antecedent unlawful assembly out of which the riot grew.").

The district court's analysis of earlier caselaw erroneously relied on charging documents rather than court opinions and on decisions involving *acts* of violence rather than *threats.* These two problems compound the district court's particular misapplications of precedent to the text of Section 1311 and led the court to adopt a construction that the OCCA discarded in *Schoolcraft*.

First, the district court relied heavily on citations to the charging documents in particular cases, rather than the court's holdings. *See* J.A. (Vol.3).0317, 0318. This evidence is speculative at best. The OCCA often summarily concluded that charging documents with *mens rea* allegations were *sufficient* to charge riot, *see, e.g.*, *Swartzfeger v. Stat*e, 45 P.2d 550, 551 (Okla. Crim. App. 1935), but never

affirmatively held that such allegations were *necessary* to sustain a riot conviction. This distinction is significant, because charging documents may and often do recite more than what is required to *convict* a defendant, which means that convictions could have been obtained without evidence of *mens rea*—precisely the constitutional injury targeted by the Supreme Court in *Counterman*. Indeed, the OCCA articulated this very distinction in *Schoolcraft* when it explained that it was "only necessary" for the State to prove "any threat" to obtain a conviction. And the court has further suggested, in the only approved jury instruction on record, that "plac[ing] [victims] in danger of their lives," without *intending* to do so, is sufficient to convict for riot. *Cochran v. State*, 111 P. 974, 976–77 (Okla. Crim. App. 1910).

Second, as the district court conceded, most of the cases the district court relied on in construing the law involved *acts* of violence, rather than mere *threats* to use force or violence. *See* J.A.(Vol.3).0317. Those cases do not, as the district court assumed, apply to the construction of the threat prong, because conduct may be regulated to a much greater extent than expression, *United States v. O'Brien*, 391 U.S. 367 (1968), and therefore focuses courts on different interpretative canons, background concerns, and assumptions about legislative intent.

Take, for example, *Crawford v. Ferguson*, 115 P. 278 (Okla. Crim. App. 1911). In that case, the OCCA explained that "*it matters not how good their intentions may be*, if three or more persons, without authority of law, combine together, and by

threats to use force or violence, if accompanied by immediate power of execution, seek to accomplish any unlawful purpose, they are guilty under the law of riot." *Id.* at 279 (emphasis added). The district court took this language to require defendants charged under Section 1311 to "seek to accomplish any unlawful purpose." *See* J.A.(Vol.3).0316. But this language sheds no light on the content of a defendant's state of mind because any purpose is deemed unlawful or lawful solely by legislative enactments. It does not articulate any level of *mens rea*. If *mens rea* is meant to "reduce[] the prospect of chilling fully protected expression," *Counterman* 600 U.S. at 75, then this language is wholly insufficient. What is more, this language indicates only what is sufficient to define riot, not what is necessary. And ultimately, the language is dicta, for the court was considering a defendant's petition to change his trial judge on allegations that he had engaged in a riotous "mob" against the defendant. *Crawford* 115 P. at 279.

Or consider *Casteel v. State*, 161 P. 330 (Okla. Crim. App. 1916), the principal case upon which the district court relied. There, the OCCA said that "to have been sufficient to charge a riot, [the information] should have alleged that the defendants . . . did unlawfully assemble with the common intent to use force and violence against the person of another . . . and . . . in furtherance of such unlawful intent, and acting together willfully, unlawfully, and riotously, used force and violence." *Id.* The focus of the case, however, was not on what the charging

document did include, but on what the charging document did *not* include—"common intent." *Id.* That focus again underscores the distinction between what the court deemed sufficient and what it deemed necessary for charging riot. The court spent most of its one-page opinion considering only the element of "common intent." It offered no reasoning for the remainder of the cited statement, and therefore, the court's opinion cannot be read to express any view on the necessity of its remaining components.

Primrose v. State, 222 P. 702 (Okla. Crim. App. 1924), offers no support for the district court's construction, for it is not a decision on the merits. *Id.* Instead, the OCCA dismissed the defendant's appeal on procedural grounds and never opined on the definition of riot. *Id.* The district court's citation to the charging document filed by prosecutors in this case is bare of any explanation for its persuasive force. *Swartzfeger*, 45 P.2d at 551, is similarly situated. And the district court's citation to *Symonds v. State*, 89 P.2d 970, 977 (Okla. Crim. App. 1939), is unavailing: the page cited contains no discussion of the elements of riot, and instead upholds the charging of riot in that particular case as one continuous offense rather than several separate ones. Elsewhere, the court discusses no less than *six* possible definitions of riot, some including a *mens rea* and others not, and without settling on one. *Id.* at 973–74. All three cases involved conduct, not expression, and all suffer acutely from the error of

citing charging documents because they do not recite the elements upon which *convictions* can be had. *See supra.*

Nor does the OCCA's decision in *Wright v. State*, 505 P.2d 507 (Okla. Crim. App. 1973), do the work the district court needed it to. The district court again cited the charging document as authority while acknowledging that the court *expressly* declined to opine on the sufficiency of the charging document or the jury instructions. *Id.* at 514; J.A.(Vol.3).0318. The language that the district court cites instead is found in the portion of the opinion discussing the sufficiency of the *evidence*. *Wright* 505 P.2d at 515. The court's view that the charging document "reflect[ed] all the elements" of riot was immediately followed by a restatement of the statutory language, *id.*, underscoring the crucial logical distinction between necessity and sufficiency.

3. The District Court's Construction Is Not Supported By The Historical Context Of Section 1311.

The historical context surrounding Section 1311 confirms Plaintiffs-Appellants reading. The district court's construction is particularly untenable because, at the time Section 1311 was adopted in 1910, the Legislature would not have understood the First Amendment to apply to its acts, much less the rule announced in *Counterman*. *See Gitlow v. New York*, 268 U.S. 652 (1925) (first case holding that the First Amendment binds the States). In the alternative to the First Amendment, the Oklahoma Constitution's protections of free speech were not

particularly robust. *Compare Thomas v. State*, 244 P. 1116, 1117 (Okla. Crim. App. 1926) (truth is no defense to libel), *with Garrison v. Louisiana*, 379 U.S. 64, 70–73 (1965) (truth is a defense to libel). The Legislature therefore had no reason to draft Section 1311 with the precision that federal courts now understand the First Amendment to require of States. And courts therefore should not too readily assume that the 1910 Oklahoma Legislature acted on the background of the First Amendment.

The district court's analysis gave this history exactly the opposite weight it should have. "The decisions Plaintiffs cite," the district court writes, "are from 1911 and 1947, however, well before the United States Supreme Court developed its caselaw regarding the definition of true threats discussed above." *See* J.A.(Vol.3).0315. But that is exactly the point: Section 1311 has never been tested by the First Amendment's true threats doctrine. And under the First Amendment's true threats doctrine, the Legislature is required to insert a *mens rea*, and one that satisfies *Counterman*, to distinguish between protected expression and proscribable threats.[2] The early Legislature's ignorance of this requirement should not have altered the district court's First Amendment analysis any more than the early

[2] Later, the district court writes "it is not to be expected that the Oklahoma Legislature would have inserted the 'word "true" into the definition of a riot to make it clear that the statute is not intended to cover false or hyperbolic threats.'" *See* J.A.(Vol.3).0315. Of course this is correct, for inserting the word "true" would be neither necessary nor sufficient to save the Act. *See* J.A.(Vol.3).0262.

Congress's ignorance of the viewpoint neutrality requirement would have altered the Supreme Court's First Amendment analysis of the Alien and Sedition Acts, had they subsisted to the present day. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1969) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." (footnote omitted)).

Oklahoma deliberately chose a broader definition of riot and riot-related acts than the common law would have allowed. In *Lair v. State*, the OCCA cited Edward Wise's treatise as authoritative for interpreting the unlawful assembly statute, which incorporates the definition of riot by reference. 316 P.2d 225, 232–35 (Okla. Crim. App. 1957). As that treatise explains, however, there were *two* working positions on the definition of "riot" at common law. EDWARD WISE, THE LAW RELATING TO RIOTS AND UNLAWFUL ASSEMBLIES 4 (1848) (approving as the "better opinion" of the "present day" that proof of joint purpose is not required, as distinguished from the "ancient authorities" who would have required such proof). William Hawkins was the standard bearer for those reformers advocating a broader definition to prophylactically prevent unlawful conduct, while William Blackstone defended the common law's narrower definition targeting almost exclusively conduct. John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 10–11 (2017). As the text of Section 1311 itself indicates, and as OCCA's' citation to Wise's treatise suggests, Oklahoma chose Hawkins' side in the debate. In other words, Oklahoma chose a

definition of riot that omitted several elements that the common law would have built in to protect the rights of Englishmen. *See, e.g.*, *Schoolcraft*, 178 P.2d at 650.

The subsequent statutory history confirms that the Legislature understands Section 1311 to be broad. Riot already serves as a predicate offense for a cascading list of other crimes, including incitement to riot. Okla. Stat. tit. 21 § 1320.2. *See Price v. State*, 873 P.2d 1049, 1054 (Okla. Crim. App. 1994) (holding the incitement to riot statute unconstitutional based on its "plain reading" but curing the defect with narrowing jury instructions). *See also* Okla. Stat. tit. 21 § 1320.3 (unlawful assembly). In 2021, in response to widespread racial justice protests in which Plaintiffs-Appellants participated, the Oklahoma Legislature enacted several amendments that expanded the cascading effect of riot's already broad definition. H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021), § 1. One imposed liability on organizations "found to be a conspirator" with rioters. Okla. Stat. tit. 21, § 1320.12. *See also Okla. State Conf. of the NAACP v. O'Connor*, 569 F.Supp.3d 1145 (W.D. Okla. 2021). Another gave drivers immunity from criminal or civil liability for the injury or death of an individual occurring while the driver "was fleeing from a riot." Okla. Stat. tit. 21 § 1320.11. *See* Kaleigh Ewing, Note, *Driver Immunity Laws: Why They Are More Dangerous Than You Think*, 75 OKLA. L. REV. 355, 362–63, 378–79 (2023) (discussing § 1320.11's legislative history and impact on speech). The district court dismissed the import of these developments, correctly noting that they do not

change the text's meaning. *See* J.A.(Vol.3).0324-25. They do, however, reveal the Legislature's own understanding of the riot statute as a broad, flexible, and helpful tool for targeting expression. J.A.(Vol.1).0057.

Elsewhere, however, the Oklahoma Legislature includes *mens rea* when it means to. In Oklahoma's original version of the stalking statute identical to that at issue in *Counterman*, the Legislature defined "credible threat" in 1992 to include an intent requirement. H.B. 2291, 1992 Leg., Reg. Sess. (Okla. 1992), §§ 1(A), 1(E)(3) (codified as Okla. Stat. tit. 21 § 1173). *But see* Okla. Stat. tit. 21 § 1173(A) (2024) (today, omitting intent requirement and requiring only that a victim actually and reasonably feel threatened, contrary to *Counterman*). Oklahoma has also criminalized only those bomb threats that are made "willfully or maliciously." Okla. Stat. tit. 21 § 1767.1(7).[3]

Absent clarification from the OCCA as to the requisite mens rea under Section 1311, Plaintiffs-Appellants have put forth sufficient evidence of statutory meaning

[3] In Part II, Plaintiffs-Appellants explain that "willfully," by itself, does not satisfy the First Amendment. *Infra* Part II. Where "willfully" has appeared, courts are able to narrowly construe it in light of neighboring provisions. *See, e.g.*, *Watts v. United States*, 394 U.S. 705 (1969) ("willfully and knowingly"); *Bryan v. United States*, 524 U.S. 184 (1998) (interpreting "willfully" in light of neighboring provisions). Oklahoma's bomb threats statute also contains context that might permit a narrowing and identifiable construction. Okla. Stat. tit. 21 § 1767.1 ("willfully *or maliciously*"). But Section 1311 is devoid of any language that could shed light on an identifiable, First Amendment-compliant *mens rea*, and so "willfully," even if it is present in the statute, does not save the statute from this constitutional challenge.

to undermine the district court's construction as "reasonable and readily apparent." The court below gave no weight to unambiguous text. It ignored the state courts' binding language in the only case where they were squarely presented with construction of the Section 1311, choosing instead language from charging documents in other cases in an attempt to save the statute from unconstitutionality, while omitting language that would not have served that purpose. *Compare, e.g.*, *Wright* 505 P.2d at 515 (alleging defendants rioted "in a manner adapted to disturb the public peace and incite public alarm"), *with* J.A.(Vol.3).0318 (containing no such requirement). And it misunderstood the role that history plays in reading statutory language. Even favorable review of the district court's order reveals that, at minimum, it is not the probable reading of the statute. This Court is therefore presented with substantially overbroad statutory text, in violation of the First Amendment, that fails to appropriately distinguish between innocent and guilty conduct, in violation of the Fourteenth Amendment.

B. Plaintiffs Are Likely To Succeed On The Merits Of Their First Amendment Claim Against Section 1311 As Written.

The ordinary meaning of Section 1311, without a *mens rea*, plainly covers protected expression. J.A.(Vol.1).0065-68. Consider, for example, the University of Mississippi coming to Norman, Oklahoma for a football game against the University of Oklahoma, and, during the game, their fans chant "we're gonna beat the hell out of you!" The chant is a "threat to use force or violence" within the meaning of

Section 1311, yelled "without authority of law" by a group of thousands "acting together" with "immediate power of execution" by their sheer numbers and close proximity to the University of Oklahoma players. No objectively reasonable University of Oklahoma football player or fan would view the chant as communicating a threat of violence; however, the University of Mississippi fans could be prosecuted for a felony under Section 1311 for participating in protected speech. *Counterman* 600 U.S. at 69.

The district court's answer to similar hypotheticals offered below depended almost exclusively on its misconstruction of Section 1311. J.A.(Vol.3).0319-20. The hypotheticals qualify at least as an implicit threat to use force or violence based on the original public meaning of "threat." *Supra* Part I(A)(1). And the "immediate power of execution" language in Section 1311 cited by the district court only marginally limits the reach of the statute because in the hypothetical posed above, Mississippi fans in the stadium with the Oklahoma football players and fans would have the power to execute their threat. J.A.(Vol.1).0060-61. The district court's final answer, that none of the hypotheticals satisfy the district court's misconstruction, only confirms that without such a misconstruction, Section 1311 plainly reaches a substantial amount of protected expression. Plaintiffs-Appellants therefore demonstrated a strong likelihood of success on the merits of their First Amendment

claim, and this Court should vacate the contrary order below and remand for consideration of the remaining preliminary injunction factors.

C. Plaintiffs Are Likely To Succeed On The Merits Of Their Fourteenth Amendment Claim Against Section 1311 As Written.

The absence of a *mens rea* in the text of Section 1311 fails to put ordinary Oklahomans on notice of proscribed conduct, J.A.(Vol.1).0069-70, and encourages arbitrary and discriminatory enforcement. J.A.(Vol.1).0070-0073.

Section 1311's lack of a *mens rea* does not apprise Oklahomans of the difference between innocent and guilty conduct. J.A.(Vol.1).0070. Without a *mens rea*, peaceful protesters lack adequate notice of what expression will cross the line from rowdy to riotous. Does "acting together" include peacefully standing on the street as part of a protest in which others turn to violent behavior? Does "any threat" include political hyperbole like "f—k the police" when said to a police officer by three or more people? Section 1311 "leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)). Plaintiffs-Appellants' self-censorship as a result of their uncertainty about the scope of their expressive rights after their arrest, J.A.(Vol.1).0060, demonstrates exactly the kind of harm vague laws beget.

And Plaintiffs-Appellants' own arrests demonstrate the arbitrariness that Section 1311 engenders in its enforcement. J.A.(Vol.1).0071-72. The District Attorney explained to Plaintiff-Appellant Webb that the *reason* they were charged with incitement to riot was for their anti-police speech. J.A.(Vol.1).0072. Thus, the facts of this very case demonstrate that Section 1311 is "a boon to anyone who might wish to quash protest." *Doe v. McKesson*, 71 F.4th 278, 312 (5th Cir. 2023) (Willett, J., dissenting), *cert. denied* 601 U.S. __, 2024 WL 1607734, *2 (2024) (Sotomayor, J., respecting the denial of certiorari) ("Although the Fifth Circuit did not have the benefit of this Court's recent decision in *Counterman* when it issued its opinion, the lower courts now do. I expect them to give full and fair consideration to arguments regarding *Counterman*'s impact in any future proceedings in this case."). In the hands of zealous law enforcement officers, Section 1311 fails to establish minimum guidelines for fair and even-handed application of the law.

The district court failed to adequately consider these claims, ruminating only that the necessary "discernments can be made in many instances, and when they cannot—that is, when the evidence does not support a finding of probable cause such as is required to effect an arrest—law enforcement is not empowered to act." *See* J.A.(Vol.3).0323-24. This conclusion falls far short of the high standard of specificity required in criminal regulations of expression, for the question under the Fourteenth Amendment is not whether a statute *establishes* a distinction between

innocent and guilty conduct—all statutes do—but instead, whether the statute sufficiently *apprises* regulated entities and regulators of this distinction, so as to provide notice and minimize arbitrary enforcement. This Section 1311does not do.

Plaintiffs-Appellants have therefore demonstrated a strong likelihood of success on the merits of their Fourteenth Amendment claim, and this Court should vacate the contrary order below and remand for consideration of the remaining equitable factors favoring a preliminary injunction.

II. Plaintiffs Are Likely To Succeed On The Merits Of Their First Amendment Claim Against Section 1311 As Construed.

The district court further erred in concluding that the statute as construed satisfies the First Amendment. Even if the district court's construction is "reasonable and readily apparent," it lacks both the objective and subjective intent elements required of statutes proscribing threats. Plaintiffs-Appellants therefore have a strong likelihood of success on their First Amendment claim against Section 1311 as construed.

Last year, the Supreme Court explained that proscribable threats require "[t]hat the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman v. Colorado*, 600 U.S. 66, 69 (2023). The standard contains both a subjective component–the defendant's state of mind–and an objective component–the substantial risk that the speech would be viewed as threatening violence. *United*

States v. Hunt, 82 F.4th 129, 134–35 (2d Cir. 2023) (citing *Counterman*). The subjective component has long been beyond dispute. *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Counterman*. To be consistent with *Black* and *Counterman*, a statute must incorporate "not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim." *United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) (quoting *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005)).

The objective component has similarly long been held to be part of the recklessness standard that *Counterman* requires. *See* MODEL PENAL CODE § 2.02(c) (1985) (calibrating the risk component of recklessness to "the standard of conduct that a law-abiding person would observe in the actor's situation").[4] This requirement is crucial in the context of expression, where often the most important distinction between political hyperbole and unprotected expression is whether the speech is reasonably and objectively understood as a threat. *Cf. United States v. Parr*, 545 F.3d 491 (7th Cir. 2008) (suggesting that post-*Black*, it may be that "the statement at issue must objectively be a threat and subjectively be intended as such"). The objective

[4] The Model Penal Code is probative evidence of the meaning of "recklessness" because the Supreme Court in *Counterman* referred to the Model Penal Code's definition of recklessness. *Counterman* 600 U.S. at 79 (quoting *Voisine v. United States*, 579 U.S. 686 (2016) (quoting the Model Penal Code)). The authority of the Model Penal Code is reflected throughout the Supreme Court's First Amendment jurisprudence, *see, e.g.*, *Roth v. United States*, 354 U.S. 476, 487 n. 20 (1957), and is therefore strongly persuasive.

reasonability requirement was determinative in *Watts* because it was the objectively hyperbolic, non-threatening nature of the defendant's speech that warranted reversal. *See Watts,* 394 U.S. at 708 ("Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.").

The statute as the district court construed it does not reflect the subjective and objective standards of culpability as required under *Counterman*, and the district court therefore erred in concluding that it had satisfied the First Amendment. As construed, Section 1311 defines a riot as: "Any 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, *willfully,* without authority of law*, and sharing a common intent to use force or violence or to unlawfully threaten to use force or violence*." J.A.(Vol.3).0318. (emphasis added to demonstrate atextual portions). Neither "willfully" nor "common intent" satisfy *Counterman*'s requirements, acting alone or together, because they do not require (a) that the defendant "consciously disregard" (b) an objectively reasonable, substantial risk of fear in the victim.

A. "Willfully" Contains Neither A Subjective Nor Objective Mental State Component.

The term "willfully" does not satisfy *Counterman* and *Black*'s requirement that a defendant subjectively intend to threaten a victim because, in the context of Section

1311, it requires only that the defendant voluntarily utter a threatening statement. Furthermore, "willfully" does not require that a defendant's statement pose an objectively, substantial risk of being viewed as threatening. Both of these defects were overlooked by the district court, and both are constitutionally fatal.

1. "Willfully" Implies Merely Voluntary Action, Not Subjective Awareness Or Intent.

Even under federal law, "[t]he statutory term 'willfully' is a chameleon, what the Supreme Court has called 'a word of many meanings whose construction is often dependent on the context in which it appears.'" *United States v. Marshall*, 753 F.3d 341, 345 (1st Cir. 2014) (quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998) and *Spies v. United States*, 317 U.S. 492, 497 (1943)). Under Oklahoma state law, the term "willfully" is similarly opportunistic. *See Estes v. Conoco Phillips Co.*, 184 P.3d 518, 525 (Okla. 2008) ("The term willful does not have a uniform meaning throughout our statutes."). And the American Law Institute has declined to adopt "willfully" as a *mens rea*, describing the term as "unusually ambiguous." MODEL PENAL CODE § 2.02 explanatory note (1985).

Where "willfully" has appeared, courts are able to narrowly construe it in light of neighboring text and provisions. *See, e.g.*, *Watts,* 394 U.S. (addressing a statute criminalizing presidential threats made "willfully and *knowingly*"); *State v. Price*, 280 P.3d 943 (Okla. 2012) (addressing a statute criminalizing official misconduct

resulting from "willful *neglect*"); Okla. Stat. tit. 21 § 1767.1(7) (criminalizing bomb threats made "willfully or *maliciously*"). In Section 1311, however, no such context exists with which to limit or clarify the reach of "willful" threats constituting riot. The absence of context compounds the difficulty of interpreting "willfully" without the benefit of its *textual* presence.

What clarity can be gleaned, however, strongly suggests that "willfully" under Oklahoma state law is a lower standard of culpability than recklessness, as that term was used in *Counterman*. As the district court's order itself accepts, J.A.(Vol.3).0323, "willfully" under Oklahoma law is statutorily defined as "simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Okla. Stat. tit. 21, § 92. The application of this standard to criminal statutes in Oklahoma indicates that "willfully" requires merely that a defendant's action be not accidental, at least as held by cases contemporaneous with the statute's adoption, and therefore probative of original public meaning. *Miller v. State*, 130 P. 813, 815 (Okla. Crim. App. 1913) ("It is a synonymous term with intentionally, designedly, without lawful excuse—that is, not accidentally." (quoting *O'Barr v. United States*, 105 P. 988 (Okla. Crim. App. 1909)) (internal quotations omitted)). *See also Wick v. Gunn*, 169 P. 1087, 1087 (Okla. 1917) ("'Willful,' as used in criminal matters, often refers merely to a voluntary act."); *Tarver v. State*, 651 P.2d 1332, 1334–35 (Okla.

Crim. App. 1982) ("willfully" is the equivalent of "knowingly"), *overruled by McCarty v. State*, 41 P.3d 981, 984 n. 3 (Okla. Crim. App. 2002) ("…awareness is not required by the statutory language of § 713, and is not an essential element of the crime.").

That conclusion is fortified by the very case that the district court cites, where the OCCA held voluntary intoxication was not a defense to a crime where the *mens rea* required was "willfully or maliciously." *Fairchild v. State*, 998 P.2d 611, 619 (Okla. Crim. App. 1999). For "recklessly," on the other hand, at least as necessary for the federal First Amendment, voluntary intoxication *may* sometimes be a defense. *See, e.g.*, MODEL PENAL CODE § 2.08(2) (1985). In other words, when a crime merely requires that a person act voluntarily—but not necessarily intend to break the law or injure someone—intoxication is not enough to suggest they did not know what they were doing, but when a crime requires that a person not only knew what they were doing but also did so while disregarding a risk of illegality or injury to others, in line with *Counterman*, it may.

2. "Willfully" Contains No Requirement That A Statement Be Objectively Threatening.

The Oklahoma Court of Civil Appeals has previously upheld punishment for a "willful threat" that would not satisfy the requirement that the targeted expression be objectively threatening. In *Lowe v. Crabtree*, the Oklahoma Court of Civil Appeals affirmed the dismissal of an as-applied constitutional challenge to a prison

disciplinary hearing. 990 P.2d 320 (Okla. Civ. App. 1999). The plaintiff was incarcerated by the Department of Corrections ("DOC") and had sent a letter to DOC Assistant General Counsel, stating: "Should the litigant [Lowe] be forced to terminate the life of one of the 'minority' cell partners that the Department of Corrections believes that the litigant can and will tolerate, the litigant will ensure that one (1) or more officials from the Department are similarly prosecuted for 'depraved indifference' or 'reckless endangerment' capital murder." *Id.* at 321 (internal quotations omitted). DOC took this letter to be a willful threat to people who might be incarcerated with Lowe, constituting "menacing" under DOC regulations and punished Lowe accordingly. *Id.* But though Lowe's "threat" was never made *to* an intended victim and therefore placed no victim in fear of injury, the court upheld the punishment because "[i]t was no stretch to find his letter was a willful threat to injure another." *Id.*

As the dissent in *Lowe* points out, however, it is impossible to square the letter with the requirement that a threat be objectively threatening. *See id.* at 322 (Hansen, J., dissenting) ("It is equally clear the intended victim cannot form a well-founded apprehension of immediate peril if he or she is unaware of the threatening conduct."). And the result in *Lowe* is contrary to cases applying the objectively-threatening-language requirement. In *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011), for example, the Ninth Circuit reversed the conviction of a defendant charged

with a threat offense for incendiary comments online about shooting President Obama. The Ninth Circuit based part of its reversal on the lack of "any perception that [the] statements made…were serious expressions of intended violence." *Id.* at 1121. And Oklahoma knows how to include an objective requirement where it means to. *See, e.g.*, Okla. Stat. tit. 21 § 1173(A)(1) (stalking); Okla. Stat. tit. 21 § 1398(A)(2) (workplace harassment). Section 1311 does not reflect the requirement that a threat be a "serious expression of intended violence," *id.*, and therefore erodes the Constitution's protections of expression.

B. "Common Intent To…Unlawfully Threaten" Does Not Limit The Scope Of Section 1311.

That leaves the "common intent" language to do the remaining work of lifting Section 1311 to constitutional muster. But "common intent to…unlawfully threaten" sheds no light on the question of *mens rea*. "Unlawfully" is merely duplicative of "without authority of law," *Fooshee v. State*, 108 P. 554, 555 (Okla. Crim. App. 1910) (describing them as "full equivalent[s]"), which is already present in Section 1311 and which no one has argued provides a mental state requirement.

"Common intent," while clarifying that intent must be shared amongst putative rioters, does not clarify *what level* of intent (e.g., voluntary, recklessly, or knowingly) is required to compose a threat. "Common intent" reflects the statutory requirement that putative rioters be "acting together." *See Proctor v. State*, 115 P. 630, 632 (Okla. Crim. App. 1911). In other Oklahoma statutes from the same time

period, "common intent" was accompanied by other textual adverbs that indicated *mens rea*. *Hendrix v. State*, 129 P. 78 (Okla. Crim. App. 1913) (an accomplice was one who "knowingly, voluntarily, and with common intent with the principal offender" commits a crime). Reading, as the Oklahoma courts do, each word to have independent meaning, *State v. District Court of Okla. Cnty.*, 154 P.3d 84, 86 (Okla. Crim. App. 2007), "common intent" must do some work other than provide *mens rea*. "Common intent" is therefore agnostic about the level of intent required to make threats constituting riot and requires simply (but importantly) that such an intent be shared. *See Hawkins v. State*, 216 P. 166, 169 (Okla. Crim. App. 1923) (common intent part of the crime of conspiracy). *Cf. Selby v. Lindstrom*, 158 P. 1127, 1128 (Okla. 1916) (common intent not necessary for joint liability).

Beyond the "*common* intent to *unlawfully* threaten" language of the district court's construction itself, the cases supporting it also do not demonstrate a First Amendment-compliant standard. Language from *Crawford*, for example, that defendants must "seek to accomplish any unlawful purpose," 115 P. at 229, speaks neither to the objectively threatening nature of expression nor the defendant's awareness of it. The same is true for *Casteel*'s "common intent" to threaten language. The remaining cases are similarly devoid of any supportable reference to the components of mental state required by *Counterman*, even if they could together fashion *some* mental state. And this want for *Counterman*-compliant language in the

cases is explained by their ultimate defect: they nearly all concern acts, not threats. *See supra.*

C. The District Court's Construction Fails To Satisfy The First Amendment.

In light of these Oklahoma rules for construing "willfully" and "common intent", the district court's construction lacks what *Counterman* requires. The term "willfully" does not require a substantial and objective risk that a victim fears an act of force or violence. *Watts* 394 U.S. at 708. The term also does not require that a defendant be subjectively aware of such a risk and consciously disregard it nonetheless. It requires simply that the defendant has uttered the threat voluntarily. "Common intent" carries only the mental state requirements of its surrounding text and supplies no such requirement itself. That standard falls far short of what *Counterman* and *Black* require. *Hunt*, 82 F.4th at 134; *Cassel*, 408 F.3d at 631. Section 1311, even as construed, is substantially overbroad.

For example, without a subjective state-of-mind requirement beyond voluntariness, Section 1311 reaches "a drunken joke." *Counterman*, 600 U.S. at 87–88 (Sotomayor, J., concurring) (internal quotation marks omitted). *See also Perez v. Florida*, 580 U.S. 1187 (2017) (Sotomayor, J., concurring), *denying cert. to* 189 So.3d 797 (Fla. Dist. Ct. App. 2016) (per curiam). It extends also to protected online expression, where heated rhetoric is often interpreted without the benefit of context. *Counterman* 600 U.S. at 87 (Sotomayor, J., concurring) ("Online communication

can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression."). The omission of an objectively-threatening-language requirement further extends Section 1311's coverage of protected expression to the kind of political hyperbole at issue in *Watts* and increases the possibility that enforcement of Section 1311 against some expression—rap lyrics, e.g.—will be shaped by personal perceptions or biases rather than an objective standard of risk. *See, e.g.*, *Commonwealth v. Knox*, 190 A.3d 1146, 1165 (Pa. 2018) (Wecht, J., concurring in part, dissenting in part).

The insufficiency of the district court's construction warrants vacatur. The court below did not seriously contend with the scope of its own construction. Without explanation, it conclusorily dismissed Plaintiffs-Appellants' hypotheticals as not covered by the district court's unforeseen construction. J.A.(Vol.3).0319-20. But on close inspection, it becomes apparent that much more than Plaintiffs-Appellants' hypotheticals are covered by Section 1311. Everything from political hyperbole, to rap lyrics, to drunken indiscretion, to innocuous online expression is on the line. Judged by the "plainly legitimate sweep" of the statute as construed, Section 1311 reaches a substantial amount of protected expression. Plaintiffs-Appellants have therefore demonstrated a strong likelihood of success on the merits of their First Amendment claim, and this Court should vacate the order below and

remand for consideration of the remaining equitable factors favoring a preliminary injunction.

CONCLUSION

The district court's job in this case was difficult. It was called to consider the constitutionality of an overbroad and vague state statute on which there was little or conflicting authority from the state courts. But precisely for that lack of conclusive insight from the state courts, the district court was ill-equipped to render the construction it did. "The [district court's] proposed constructions are insufficient, and it is doubtful that even a remarkable job of plastic surgery upon the face of the [statute] could save it." *City of Houston v. Hill*, 482 U.S. 451, 469 (1987). "[T]he plain and precise language of [Section 1311] makes it impossible to narrow its overly broad scope to the prohibition of [true threats] without exceeding the limits of the judicial reshaping of legislative enactments by substantially rewriting the [law]." *Conchito v. City of Tulsa*, 521 P.2d 1384, 1388 (Okla. Crim. App. 1974). Furthermore, under existing applications of terms like "willfully" and "common intent" in Oklahoma law, the district court's construction does not satisfy the First Amendment. This Court should certify the question of what *mens rea*, if any, is required for a threat conviction under Section 1311. Absent clear guidance from the OCCA on this central issue, this Court should vacate the order below and remand for consideration of the remaining equitable factors.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 9,455 words.

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

/s/ Megan Lambert
Megan Lambert

STATEMENT REGARDING ORAL ARGUMENT

Absent certification, oral argument will significantly aid the decisional process of the appeal. Fed. R. App. P. 34(a)(2). Clarifying the First Amendment standard set in *Counterman* by applying it to this case would affect other cases beyond this appeal. Setting the appropriate bounds for federal courts to construe state law when presented with a constitutional challenge to state law would similarly affect cases beyond this appeal. And beyond these important ramifications, this case would be the first time, to Plaintiffs-Appellants' knowledge, for this Court to apply *Counterman*. This appeal would therefore benefit from oral argument.

If, however, Plaintiffs-Appellants' Motion to Certify is granted and the appeal is abated, oral argument need not be permitted because the dispositive issues on appeal will have been certified for resolution to the OCCA. Fed. R. App. P. 34(a)(2)(B).

Dated the 8th day of May 2024

/s/ Megan Lambert
Megan Lambert

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2024, I filed a true and correct copy of the foregoing with the Clerk of the United States Court of Appeals for the Tenth Circuit by using the appellate case filing CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Megan Lambert
Megan Lambert

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SINCERE TERRY et al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	
	)	**Case No. CIV-22-521-G**
GENTNER DRUMMOND, in his official capacity as Oklahoma Attorney General, et al.,	)	
	)	
	)	
	)	
Defendants.[1]	)	

ORDER

Now before the Court is a Motion for Preliminary Injunction (Doc. No. 10), filed by Plaintiffs Sincere Terry, Mia Hogsett, Tyreke Baker, Preston Nabors, Trevour Webb, and Austin Mack. In their Motion, Plaintiffs seek a preliminary injunction enjoining the enforcement of Oklahoma's Riots and Unlawful Assemblies Statute, Okla. Stat. tit. 21, §§ 1311-1320.10, during the pendency of this lawsuit. Defendants, Oklahoma Attorney General Gentner Drummond and Oklahoma County District Attorney Vicki Behenna, have submitted a Response in Opposition (Doc. No. 18), and Plaintiffs have submitted a Reply (Doc. No. 23).

I. Background

Shortly after statehood, the State of Oklahoma adopted a statute criminalizing riot, unlawful assembly, and rout. *See* Okla. Stat. tit. 21, §§ 1311-1320.10 (1910) (the "Act").

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Oklahoma County District Attorney Vicki Behenna is automatically substituted in her official capacity in place of former Oklahoma County District Attorney David Prater as a defendant in this lawsuit.

5IF "DU QSPIJCJUT QBSUJDJQBUJPO JO B SJPU, EFGJOFE BT "<B>OZ VTF PG GPSDF PS WJPMFODF, PS BOZ UISFBU UP VTF GPSDF PS WJPMFODF J G BDDPNQBOJFE CZ JNNFEJBUF QPXFS PG FYFDVUJPO, CZ UISFF PS NPSF QFSTPOT BDUJOH UPHFUIFS BOE XJUIPVU BVUIPSJUZ PG MBX." *Id.* f 1311; *see also id.* f 1320.M. 5IF "DU GVSUIFS QSPIJCJUT QBSUJDJQBUJPO JO BO VOMBXGVM BTTFNCMZ, EFGJOFE BT FYJTUJOH

> <X>IFSFWFS UISFF PS NPSF QFSTPOT BTTFNCMF XJUI JOUFOU PS XJUI NFBOT BOE QSFQBSBUJPOT UP EP BO VOMBXGVM BDU XIJDI XPVME CF SJPU J G BDUVBMMZ DPNNJUUFE, CVU EP OPU BDU UPXBSE UIF DPNNJTTJPO UIFSFPG, PS XIFOFWFS TVDI QFSTPOT BTTFNCMF XJUIPVU BVUIPSJUZ PG MBX, BOE JO TVDI B NBOOFS BT JT BEBQUFE UP EJTUVSC UIF QVCMJD QFBDF, PS FYDJUF QVCMJD BMBSN.

Id. f 1314. 5IF "DU XBT BNFOEFE JO 1969 UP BEEJUJPOBMMZ QSPIJCJU "*ODJUFNFOU UP 3JPU," EFGJOFE UP FYJTU XIFO

> B QFSTPO PS QFSTPOT, JOUFOEJOH UP DBVTF, BJE, PS BCFU UIF JOTUJUVUJPO PS NBJOUFOBODF PG B SJPU, <EPFT> BO BDU PS FOHBHF<T> JO DPOEVDU UIBU VSHFT PUIFS QFSTPOT UP DPNNJU BDUT PG VOMBXGVM GPSDF PS WJPMFODF, PS UIF VOMBXGVM CVSOJOH PS EFTUSPZJOH PG QSPQFSUZ, PS UIF VOMBXGVM JOUFSGFSFODF XJUI B QPMJDF PGGJDFS, QFBDF PGGJDFS, GJSFNBO PS B NFNCFS PG UIF 0LMBIPNB /BUJPOBM (VBSE PS BOZ VOJU PG UIF BSNFE TFSWJDFT PGGJDJBMMZ BTTJHOFE UP SJPU EVUZ JO UIF MBXGVM QFSGPSNBODF PG IJT EVUZ.

Id. **f 1320.2 (FGG. .BS. 25, 1969).**

1MBJOUJGGT BSF ZPVOH QFPQMF GSPN UIF 0LMBIPNB $JUZ BSFB FOHBHFE JO SBDJBM BOE TPDJBM KVTUJDF BDUJWJTN. *See* $PNQM. (%PD. /P. M) ff 14-26. "GUFS B QPMJDF PGGJDFS XJUI UIF .JOOFBQPMJT 1PMJDF %FQBSUNFOU NVSEFSFE (FPSHF 'MPZE, BO VOBSNFE #MBDL NBO, JO MBUF .BZ PG 2020, QSPUFTUT BEWPDBUJOH BHBJOTU QPMJDF CSVUBMJUZ BOE GPS SBDJBM KVTUJDF PDDVSSFE BDSPTT UIF 6OJUFE 4UBUFT. 1MBJOUJGGT QBSUJDJQBUFE JO BOE MFE QSPUFTUT JO 0LMBIPNB $JUZ. *See*

Pls.' Mot. (Doc. No. 10) at 8; Terry Deel. (Doc. No. 10-7) ,nr 3-4; Hogsett Deel. (Doc. No. 10-8) ,i 4.

In June of 2020, Plaintiffs and other persons gathered nightly in front of the Oklahoma City Police Department ("OCPD") Headquarters to protest. Terry Deel. 8-9. During these nightly protests, Plaintiffs and other persons began planning a mural outside of OCPD Headquarters that would "depict a series of flags honoring Black Lives and symbolizing solidarity, community, and shared struggles." Hogsett Deel. ,i 9. A protester obtained permits to paint the mural on Shartel Avenue between Colcord Drive and West Main Street, outside of the OCPD Headquarters. *See* Pls.' Mot. Ex. 2 (Doc. No. 10-2) at 2. Following issuance of the permit, municipal employees blocked off space for the mural on Shartel Avenue with traffic barricades. *Id.* Plaintiffs and other protesters began painting the mural on June 21, 2020. Baker Deel. (Doc. No. 10-9) ,i 9.

On the third day of painting, an OCPD officer moved a barricade in order to access the OCPD Headquarters with his vehicle, resulting in a disagreement between Plaintiffs and the officer regarding the appropriate barricade position. *See* Pls.' Mot. at 8-9; Pls.' Mot. Ex. 2, at 3-6. Some facts regarding this encounter are disputed, such as whether Plaintiffs surrounded the officer's vehicle and then pursued the vehicle on foot when the officer attempted to drive away from the area. *Compare* Pls.' Mot. Ex. 2, at 4-5, *with* Terry Deel. mf 13-16. It does not appear to be disputed that Plaintiffs stood near and around the officer's vehicle, which was occupied by the officer and another person, with their fists

raised and shouted, "Fuck the police!," "Hit me if you want to!,n and "Now who got a motherfuckingbarricader' Pls.' Mot. Ex. 2, at4-5; TerryDecl. ,rn 13-14.

Following this encounter, Plaintiffs were charged in Oklahoma County District Court with Incitement to Riot in violation of title 21, section 1320.2 of the Oklahoma Statutes. *See* Pls.' Mot. at 1O; Pls.' Mot. Ex. 1 (Doc. No.10-1). As a result of these charges, Plaintiffs represent that they have "limited their speech out of fear of arrest and prosecution for exercising their First Amendment right to free speech." Pls.' Mot. at 10.

On June 23, 2022, Plaintiffs initiated this action in federal court pursuant to 42 U.S.C. § 1983, alleging that the Act is facially unconstitutional under the First and Fourteenth Amendments because the definition of riot set out in section 1311 of the Act is overbroad and vague. *See* Compl. ,i,i 127-150. Plaintiffs now seeka preliminary injunction enjoining enforcement of the Act during the pendency of this lawsuit. *See* Pls.' Mot. at 6.

II. Applicable Legal Standards

Federal Rule of Civil Procedure 65 allows a district court to issue a preliminary injunction. *See* Fed. R. Civ. P. 65. "Because a preliminary injunction is an extraordinary remedy never awarded as of right, the movant must make a clear and unequivocal showing it is entitled to such relief." *Colorado v. U.S. Env't Prot. Agency,* 989 F.3d 874, 883 (10th Cir. 2021) (citation and internal quotation marks omitted). As explained by the Tenth Circuit,

> Ordinarily, a movant seeking a preliminary injunction must establish (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

> PVUXFJHIT UIF JOKVSZ UP UIF QBSUZ PQQPTJOH UIF QSFMJNJOBSZ JOKVODUJPO; BOE (4) UIF JOKVODUJPO XPVME OPU CF BEWFSTF UP UIF QVCMJD JOUFSFTU.

***Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 '.3E 1149, 1154** (10UI $JS. 2001). *O UIF DPOUFYU PG DPOTUJUVUJPOBM DMBJNT, UIF TFDPOE GBDUPS "DPMMBQTFT" JOUP UIF GJSTU, BT "<N>PTU DPVSUT DPOTJEFS UIF JOGSJOHFNFOU PG B DPOTUJUVUJPOBM SJHIU FOPVHI BOE SFRVJSF OP GVSUIFS TIPXJOH PG JSSFQBSBCMF JOKVSZ." ***Free the Nipple-Fort Collins v. City o fFort Collins*, 916 '.3E 792, 805-06** (10UI $JS. 2019). 5IF UIJSE BOE GPVSUI QSFMJNJOBSZ JOKVODUJPO GBDUPST NFSHF XIFO UIF HPWFSPNFOU JT UIF QBSUZ PQQPTJOH UIF JOKVODUJPO. ***See Aposhian v. Ba"*, 958 '.3E 969, 978 (10UI $JS. 2020).**

"<$>PVSUT EJTGBWPS TPNF QSFMJNJOBSZ JOKVODUJPOT BOE TP SFRVJSF NPSF PG UIF QBSUJFT XIP SFRVFTU UIFN." ***Mrs. Fields Franchising, LLCv. MFGPC*, 941 '.3E 1221, 1232 (10UI** $JS. 2019) (JOUFSOBM RVPUBUJPO NBSLT PNJUUFE).

> %JTGBWPSFE QSFMJNJOBSZ JOKVODUJPOT EPOhU NFSFMZ QSFTFSWF UIF QBSUJFTh SFMBUJWF QPTJUJPOT QFOEJOH USJBM. *OTUFBE, B EJTGBWPSFE JOKVODUJPO NBZ FYIJCJU BOZ PG UISFF DIBSBDUFSJTUJDT: (1) JU NBOEBUFT BDUJPO (SBUIFS UIBO QSPIJCJUJOH JU), (2) JU DIBOHFT UIF TUBUVT RVP, PS (3) JU HSBOUT BMM UIF SFMJFG UIBU UIF NPWJOH QBSUZ DPVME FYQFDU GSPN B USJBM XJO. 5P HFU B EJTGBWPSFE JOKVODUJPO, UIF NPWJOH QBSUZ GBDFT B IFBWJFS CVSEFO PO UIF MJLFMJIPPE-PG-TVDDFTT-PO-UIF-NFSJUT BOE UIF CBMBODF-PG-IBSNT GBDUPST: 4IF NVTU NBLF B TUSPOH TIPXJOH UIBU UIFTF UJMU JO IFS GBWPS.

Id. (DJUBUJPOT BOE JOUFSOBM RVPUBUJPO NBSLT PNJUUFE).

#FDBVTF 1MBJOUJGGTh .PUJPO BTLT UIF $PVSU UP FOKPJO FOGPSDFNFOU PG B TUBUF MBX UIBU IBT CFFO PO UIF CPPLT GPS PWFS 100 ZFBST BOE UIFSFGPSF DIBOHF UIF TUBUVT RVP, 1MBJOUJGGT

seek a disfavored injunction. Accordingly, the heightened standard articulated above applies.

Ill. Discussion

Plaintiffs contend that the statutory definition of riot articulated in section 1311 of the Act is both unconstitutionally overbroad and vague on its face. *See* Pls.' Mot. at 30. The Court has considered the potential for success of Plaintiffs' claims for overbreadth and vagueness and concludes that Plaintiffs have not made the requisite strong showing of a likelihood of success on the merits on either claim.

A. Overbreadth

Plaintiffs argue that the language of section 1311 is overbroad because rather than criminalizing only "true threats," this provision criminalizes *"any* threat to use violence or force," and so encompasses protected speech. Pls.' Mot. at 13-14.

"The First Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges." *Virginia v. Hicks,*539U.S.113, 118 (2003). "The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 118-19 (citation and internal quotation marks omitted).

The overbreadth analysis first requires the court 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). After

construing the statute, the court then considers whether the statute, as construed, "criminalizes a substantial amount of protected expressive activity" relative to its legitimate sweep. *Id.* at 297.

In construing a state statute, a federal court must remain cognizant that "state courts are the final arbiters of state law." *United States v. DeGasso,* 369 F.3d 1139, 1145 (10th Cir. 2004). "Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do." *Id.* (alteration and internal quotation marks omitted). A federal court, however, is "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Stenberg v. Carhart,* 530 U.S. 914, 944 (2000) (internal quotation marks omitted); *see also E-rznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts and it.s deterrent effect on legitimate expression is both real and substantial." (citation omitted)).

1. Section 1311 Construed

Plaintiffs argue that section 1311 is overbroad on it.s face because the statute "criminalizes speech and expressive conduct that goes far beyond the limited definition of true threats." Pis.' Mot. at 12. "True threats" of violence is a historically unprotected category of communications. *Counterman v. Colorado,* 600 U.S. 66, 74 (2023).[2] "The 'true' in that term distinguishes what is at issue from jests, 'hyperbole,' or otherstatements

[2] The Supreme Court issued its opinion in *Counterman* after the parties fully briefed Plaintiffs' Motion for Preliminary injunction. *See* Doc. No. 29.

that when taken in context do not convey a real possibility that violence will follow (say, 'I am going to kill you for showing up late')." *Id.* True threats instead "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black,* 538 U.S. 343,359 (2003).

"Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat " *Counterman,* 600 U.S. at 74. "The existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end." *Id.* (internal quotation marks omitted). The United States Supreme Court has recently clarified that the *mens rea* required to be proved to show a true threat is recklessness, meaning that "a speaker is aware that others could regard his statements as threatening violence and delivers them anyway." *Id.* at 79 (internal quotation marks omitted).

Plaintiffs first argue that "Oklahoma courts have construed [section 1311's] 'any threat' language to mean just that-'any threat,'" and so section 1311 encompasses and criminalizes communications beyond true threats. Pls.' Mot. at 13-14 (citing *Schoolcraft v. State,* 178 P.2d 641, 650 (Okla. Crim. App. 1947); *Crawford v. Ferguson,* 115 P. 278, 279 (Okla. Crim. App. 1911)). The decisions Plaintiffs cite in support of this proposition are from 1911 and 1947, however, well before the United States Supreme Court developed its caselaw regarding the definition of true threats discussed above. Thus, as noted by Defendants, it is not to be expected that the Oklahoma Legislature would have inserted the "word 'true' into the definition of a riot to make it clear that the statute is not intended to

DPWFS GBMTF PS IzQ FSCPMJD UISFBUT." %FGT.h 3FTQ. (%PD. /P. 18) BU 11. 5IF $PVSU DPODMVEFT UIBU UIF BCTFODF PG UIF XPSE "USVF" GSPN TFDUJPO 1311 EPFT OPU, CZ JUTFMG, SFOEFS UIF TUBUVUF PWFSCSPBE. *See Williams*, 553 6.4. BU 304 ("<1>FSGFDU DMBSJUZ BOE QSFDJTF HVJEBODF IBWF OFWFS CFFO SFRVJSFE FWFO PG SFHVMBUJPOT UIBU SFTUSJDU FYQSFTTJWF BDUJWJUZ." (JOUFSOBM RVPUBUJPO NBSLT PNJUUFE)).

1MBJOUJGGT GVSUIFS DPOUFOE UIBU TFDUJPO 1311 EPFT OPU FYQSFTTMZ DPOUBJO BO JOUFOU FMFNFOU BOE IBT CFFO DPOTUSVFE CZ 0LMBIPNB DPVSUT UP OPU SFRVJSF BO JOUFOU FMFNFOU. *See* 1MT.h .PU. BU 14. 1MBJOUJGGT, JO TVQQPSU PG UIJT BTTFSUJPO, DJUF B 1911 DBTF JO XIJDI UIF 0LMBIPNB $PVSU PG $SJNJOBM "QQFBMT ("0$$"") TUBUFE UIBU "JU NBUUFST OPU XIBU UIF JOUFOUJPO PG UIF QBSUJFT XIP DPNNJUUFE UIF <SJPUPVT> BDUT NBZ IBWF CFFO." *Crawford*, 115 1. BU 280; *see also* 1MT.h .PU. BU 14. 8JUI UIBU TUBUFNFOU, UIF 0$$" XBT OPU SFKFDUJOH BO JOUFOU SFRVJSFNFOU GPS SJPU VOEFS TFDUJPO 1311. 3BUIFS, BT JT DMFBS GSPN UIF JNNFEJBUFMZ QSFDFEJOH QBTTBHF, UIF 0$$" XBT JOTUSVDUJOH UIBU BDUJPOT VOEFSUBLFO GPS HPPE BOE OPCMF QPMJUJDBM SFBTPOT NBZ TUJMM DPOTUJUVUF BO VOMBXGVM SJPU: "*U NBUUFST OPU IPX HPPE UIFJS JOUFOUJPOT NBZ CF, JG UISFF PS NPSF QFSTPOT, XJUIPVU BVUIPSJUZ PG MBX, DPNCJOF UPHFUIFS, BOE CZ UISFBUT UP VTF GPSDF PS WJPMFODF, JG BDDPNQBOJFE CZ JNNFEJBUF QPXFS PG FYFDVUJPO, TFFL UP BDDPNQMJTI BOZ VOMBXGVM QVSQPTF, UIFZ BSF HVJMUZ VOEFS UIF MBX PG SJPU "

Crawford, 115 1. BU 279-80.

*OEFFE, JO *Crawford* BOE MBUFS DBTFT UIF 0$$" IBT JOUFSQSFUFE TFDUJPO 1311 UP SFRVJSF FMFNFOUT SFHBSEJOH JOUFOU UIBU BSF OPU FYQSFTTMZ TUBUFE JO UIF TUBUVUF. *See* %FGT.h 3FTQ. BU 13-14. *O *Crawford*, UIF 0$$" TQFDJGJFE UIBU UP CF HVJMUZ PG SJPU, UISFF PS NPSF QFSTPOT BDUJOH UPHFUIFS NVTU "TFFL UP BDDPNQMJTI BOZ VOMBXGVM QVSQPTF." 115 1. BU 279.

Several years later, the OCCA specified that an information charging riot must allege all required elements of the offense and that it was not enough to simply recite the language of the statute. *See Casteel* v. *State,* 161 P. 330,330 (Okla. Crim. App. 1916). Specifically, the OCCA instructed that the charging document should allege that the defendants charged with riot acted together willfully and with a common intent to use force or violence. *See id.* ("We are of the opinion the information, to have been sufficient to charge a riot, should have alleged that the defendants (naming them) did unlawfully assemble with the *common intent to use force and violence* against the person of another (naming him), and then and there, in furtherance of such unlawful intent, and *acting together willfully, unlawfully, and riotously,* used force and violence against the person named[.]" (emphasis added)). Other opinions from the OCCA also support the proposition that those charged under section 1311 must share a common intent to use force or violence and must act willfully. *See Swartzfeger* v. *State,* 45 P.2d *550,* 551 (Okla. Crim. App. 1935) ("The information in this case charges the defendants with a common intent to use force and violence against [the victim] and with the unlawful, riotous, and wrongful intent to do him great bodily harm. This information sufficiently charges the offense of riot."); *see also Symonds* v. *State,* 89 P.2d 970, 977 (Okla. Crim. App. 1939); *Primrose* v. *State,* 222 P. 702, 702 (Okla. Crim. App. 1924).

While the facts of the cases cited above involved the use of force and violence, it is reasonable and readily apparent that the OCCA would construe section 1311 to likewise require willfulness and a common intent as to "any threat to use force or violence." Okla.

Stat. tit. 21, § 1311; *see Stenberg,* 530 U.S. at 944.[3] Affording section 1311 its plain meaning and applying the intent elements articulated by the OCCA, the statute defmes the offense of riot as follows: Any 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, willfully, without authority of law, and sharing a common intent to use force or violence or to unlawfully threaten to use force or violence. *See Casteel,* 161 P. at 330.

2. Whether Section 1311 Encompasses a Substantial Amount of Protected Speech Relative to Its Legitimate Sweep

Having construed the statute, the Court must now consider whether section 1311, as construed, criminalizes a substantial amount of protected expressive activity relative to its legitimate sweep. *See Williams,* 553 U.S. at 297. Plaintiff argues that section 1311 "criminalizes any threat, which includes protected expressive activity such as political

[3] In *Schoolcraft,* decided in 1947, the OCCA stated that "[i]n order for the proof of the State to sustain a conviction for riot, it was only necessary to show that three or more persons acted together and used force or violence towards someone without authority of law or to show any threat to use force or violence accompanied by immediate power of execution." *Schoolcraft,* 178 P.2d at 650. Later, in *Wright* v. *State,* decided in 1973, the OCCA found that the "charging portion of the information reflect[ed] all of the elements set out under [section 1311]." *Wright, 505* P.2d 507,515 (Okla. Crim. App. 1973). This Court does not read either of these statements as invalidating prior decisions interpreting section 1311 as requiring willfulness and a common intent to use force or violence, or as suggesting that the OCCA would not similarly require proof of a common intent to unlawfully threaten to use force or violence. In *Schoolcraft,* the charging document-which the OCCA found to be improper as a result of duplicity and not for failure to adequately charge riot-alleged that the defendants had acted "willfully" and "with a common design and intent." *Schoolcraft,* 178 P.2d at 643. Similarly, while the OCCA did not conduct an in-depth analysis of the sufficiency of the information in *Wright* as the defendant had waived such a challenge to a defect in the charging document, the information alleged that the defendants acted "conjointly and together" and "wilfully, unlawfully, and feloniously." *Wright,* 505 P.2d at 514-15.

hyperbole." Pls.' Mot. at 15 (emphasis omitted). Plaintiffs offer several examples of hyperbole that they argue would constitute riot under section 1311, including yelling, while attending a demonstration or protest: "Fuck the Police,"[4] "the Governor needs to resign, or else!," and "the District Attorney better think twice before trying to prosecute my friend for riot!" *Id.* at 15, 18.

Under the facts of the hypotheticals Plaintiffs offer, these statements would be protected under the First Amendment as political hyperbole.[5] But contrary to Plaintiffs' assertions, none of these hypotheticals would constitute actionable riot under section 1311. First, none of the hypotheticals offered includes, by its express language, a threat to use force or violence. Second, none of the hypotheticals offered indicates that the communications are accompanied by immediate power of execution of a threat to use force or violence. And finally, none of the hypotheticals indicates that the statements were made

[4] Plaintiff states that "Fuck the Police" was one of the statements "upon which Plaintiffs' charges were based." Pis.' Mot. at 17-18. Defendants disagree with this allegation. *See* Defs.' Resp. at 9-10. As this action is a facial challenge to section 1311, the Court need not determine whether this statement was a basis for Plaintiffs' Incitement to Riot charges. The Court notes that by itself such a statement would constitute protected speech, as a reasonable person would understand the statement to be political hyperbole. *See Thurairajah* v. *City of Fort Smith,* 925 F.3d 979, 985 (8th Cir. 2019) ("Criticism of law enforcement officers, even with profanity, is protected speech.").

[5] Threats may be implied, however. The Court offers an obvious example: a protester at a demonstration shouts, "the Governor needs to resign, or else!" or "the District Attorney better think twice before prosecuting my friend!" while carrying a rifle with the Governor or District Attorney within sight. With this additional factual context, such a statement would likely constitute a true threat, as the speaker should be aware that under the circumstances "others could regard his statements *as* threatening violence," but he "delivers them anyway." *Counterman,* 600 U.S. at 79 (internal quotation marks omitted). Accordingly, this speech would likely not be protected under the First Amendment.

by three or more persons acting together, willfully, without authority of law, and with a comm.on intent to use force or violence or unlawfully threaten to use force or violence. Accordingly, these hypotheticals do not establish that section 1311 criminalizes a substantial amount of protected expressive activity.

Plaintiffs also offer another hypothetical. A rancher spots a truck parked on his land without permission, and so the rancher confronts the truck driver with at least two of his ranch hands and tells the truck driver, "You'd better get out of here before we kick your butt." Pis.' Mot. at 17.[6] This statement, though, would likely constitute an unprotected true threat under the circumstances Plaintiffs articulate because it meets the recklessness standard of *Counterman-that* is, the rancher should have known that the truck driver could regard his statement as threatening violence and delivered it anyway. *See Counterman,* 600 U.S. at 79. And whether the hypothetical posed would constitute riot under section 1311 depends on facts that Plaintiffs do not provide, such as whether the ranch hands were interacting with the rancher willfully and with a common intent to use force or violence or

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[6] Plaintiffs assert that, under the facts articulated in this hypothetical, the District Court for the District of South Dakota 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." Pls.' Mot. at 17 (citing *Dakota Rural Action v. Noem,* 416 F. Supp. 3d 874, 889 (D.S.D. 2019)). Plaintiffs expound significantly upon the scenario the court posed, however. In its opinion, the court articulated the rancher hypothetical as follows:

> [A] rancher and a couple of his ranch hands see that a Keystone Pipeline truck is on some of the rancher's rangeland without permission. The three of them confront the truck driver and they know they are going to give him some clear instruction to get off the ranch, but not fighting words to get off the ranch, and they are not going to do anything physical even though they could.

Dakota Rural Action, 416 F. Supp. 3d at **889.**

unlawfully threaten to use force or violence.[7] Accordingly, this hypothetical also does not support the proposition that section 1311 criminalizes a substantial amount of protected speech.[8]

Plaintiffs, as the party seeking a disfavored injunction, bear the burden of making a "strong showing" of a likelihood of success on the merits. *See Mrs. Fields Franchising,* 941 F.3d at 1232. Plaintiffs have not offered a hypothetical under which section 1311, as construed, would criminalize protected speech. Accordingly, Plaintiffs have not made a strong showing of a likelihood of success on the merits as to their overbreadth challenge.

B. Vagueness

Plaintiffs also argue that the Court should enjoin enforcement of section 1311 because the law is unconstitutionally vague. *See* Pls.' Mot. at 20-23. Vagueness is a due process issue. *See Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v.*

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[7] Plaintiffs cite *Dakota Rural Action,* in which a federal district court enjoined portions of South Dakota's Riot Boosting Statute, adopted in 2019, in support of their motion for injunction. *See* Pls.' Mot. at 17; *Dakota Rural Action,* 416 F. Supp. 3d at 894. One portion of the law enjoined therein contained language almost identical to that in section 1311 by establishing liability for a person who "makes 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." *Dakota Rural Action,* 416 F. Supp. 3d at 888. Notably, however, the South Dakota court applied no limiting construction like the kind found to be applicable in this case---i.e., that section 1311 requires willful action and the common intent to use force or violence or to unlawfully threaten to use force or violence.

[8] In their Reply, Plaintiffs offer additional hypotheticals in which they contend that constitutionally protected speech would be criminalized as riot under section 1311 regardless of the speaker's intent. None of these additional hypotheticals takes into account this Court's construction of section 1311 to require willfulness and the common intent to unlawfully threaten to use force or violence, however.

Button, 371 U.S. 415, 432 (1963). In a facial challenge for vagueness, a plaintiff "must show, at a minimwn, that the challenged law would be vague in the vast majority of its applications; that is, that 'vagueness permeates the text of [the] law.'" *Dr. John's, Inc.* v. *City of Roy,* 465 F.3d 1150, 1157 (10th Cir. 2006) (alteration in original) (quoting *City of Chicago* v. *Morales,* 527 U.S. 41, *55* (1999)); *see also Johnson* v. *United States, 516* U.S. 591, 602-03 (2015) (explaining that the Court's "holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp" (emphasis omitted)).

A law may be unconstitutionally vague in two instances. *See Harmon* v. *City of Norman,* 61 F.4th 779, 797 (10th Cir. 2023). '"First, ifit fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."' *Id.* at 797-98 (quoting *Jordan v. Pugh,* 425 F.3d 820, 824-25 (10th Cir. 2005). "Because we can never expect mathematical certainty from our language, a court deciding whether a challenged statute provides fair notice often considers factors such as the enactment's purpose, the harm it attempts to prevent, whether there is a scienter requirement, and the interpretations of individuals charged with enforcement." *Jordan,* 425 F.3d at 825 (citation and internal quotation marks omitted).

Plaintiffs first argue that section 1311 is void for vagueness because the provision's "acting together" language does not contain a *mens rea* element and so "does not provide sufficient notice to peaceful protesters exercising their First Amendment rights such that they are apprised of exactly what conduct is forbidden." Pls.' Mot. at 20 (alteration,

omission, and internal quotation marks omitted). As explained previously, however, applying the decisions of the OCCA, this Court construes section 1311 to require that a group of three or more people must act together willfully[9] and with a common intent to use force or violence or unlawfully threaten to use force or violence. These requirements provide sufficient notice to peaceful protesters as to what conduct constitutes riot under section 1311. Plaintiffs have therefore not demonstrated that section 1311 is vague for a lack of a *mens rea* or intent requirement.

Plaintiffs also argue that section 1311 authorizes or encourages arbitrary and discriminatory enforcement. *See id.* at 20-23. Specifically, Plaintiffs argue that section 1311 "does not establish mimmal 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." *Id.* at 23. It is true that in some circumstances it will be difficult for an observer to immediately discern whether a specific participant in a protest intended to unlawfully threaten violence, just as it is true that in some circumstances it is difficult to discern whether a specific participant in any common criminal activity shared a common intent with another person to commit a crime. But those discernments can be made in many instances, and when they cannot-that is, when the

[9]"By statutory definition, '[W]illfully when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another ....." *Fairchild v. State,* 998 P.2d 611, 620 (Okla. Crim. App. 1999) (alteration and omission in original) (quoting Okla. Stat. tit. 21, § 92).

evidence does not support a finding of probable cause such as is required to effect an arrest-law enforcement is not empowered to act.

Additionally, in support of their argument that section 1311 authorizes or encourages arbitrary and discriminatory enforcement, Plaintiffs argue that the statute "has already been enforced in an arbitrary and discriminatory manner against Plaintiffs," pointing to the statements and conduct of police officers and former District Attorney Prater following Plaintiffs' arrests. *See id.* at 21-22. The Court does not here comment on the propriety or impropriety of any of the cited comments or actions. The Court does, however, note that the Complaint alleges that the probable cause affidavits and application for arrest of Plaintiffs include "factually inaccurate claims about Plaintiffs' conduct," suggesting that certain facts contained in the affidavits and application were either embellished or fabricated. Compl. ir,r 101-109. Even assuming that the alleged comments and conduct of law enforcement evidence a discriminatory animus, the fact that Plaintiffs allege that law enforcement had to embellish or fabricate facts in order to manufacture probable cause to support Plaintiffs being charged with Incitement to Riot undermines the contention that the statute itself authorizes or encourages arbitrary and discriminatory enforcement.

Finally, Plaintiffs argue that "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." **Pis.'** Mot. at 22. Those amendments did not change the language of the provision at issue in this

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C. Summary

Plaintiffs therefore have not D:Ulde,a:.strong .showing of a likelihood. of BUCCOSl on themeri.tswi'th regardtoeither,0Jtheir FirstAmendment c1aun.$, andso theComt need not analyze the remajning p:reliminmy injun.Qti'<mn:q ents. Consequently, the Court '10D.ohutes lhat Plaintiffs ue not entitled to,a limimvy inJunotion.

OONCLUSI0l\l

For the reuon.s stated hentln, Plaintiffs' Motion for Preliminary hljnnctim, (Doo. "No. 1Q.)i1tD.ENIEO:

IT ISSO ORDERED this t6th dayofE bruary ,2024,

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[10] hi a sep :chall , ajudge of 11:rit Court pteliminaril}' enjoined portion& of HOlise Bill 1674 from i:akulg effect, and m:i -State's interlocµ't.()ry appeal the Tenth C t ¢-que, qpsqf \a law to IJ!.e OCG,A. perijes tbe_n_fli e4. th di mwill,1 of the pase and the disso1utiQn pf the H:miuaxy injUD.Ption. *Site Okla .St.ale Col)/. of NAACP v. O'Connor,* No. CIV 21..;g59 c(W.I). Okla:); H..-J3'.1674, 202f **Leg., 58th** Sess., (Okla. ZOZl).