IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,	)	
Plaintiff,	)	**Civil Action No. 1:23-cv-302**
v.	)	
JOSH STEIN et al.,	)	
Defendants.	)	

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

In response to recent racial justice demonstrations, the North Carolina General Assembly passed House Bill 40 ("H.B. 40"), which amended N.C. Gen. Stat. § 14-288.2 (the "Anti-Riot Act" or "Act"). ECF 1-1. As expanded by H.B. 40, the Anti-Riot Act targets the actions of entirely peaceful protestors, criminalizes a substantial amount of protected speech, and undermines fundamental free speech, assembly, and petitioning rights. The Act is overbroad and vague in violation of the First and Fourteenth Amendments to the U.S. Constitution and article I, sections 12, 14, and 19 of the North Carolina Constitution, and should be preliminarily enjoined by this Court.

The Act is unconstitutional for two reasons. First, the provision defining a riot, which was repeated and re-enacted in H.B. 40, criminalizes entirely peaceful protestors solely because of their proximity to other people's disorderly or violent conduct. *See* N.C. Gen. Stat. § 14-288.2(a) (the "definitional provision"); North Carolina Session Law 2023-6, Section 1 (to be codified as N.C. Gen. Stat. § 14-288.2(a)). Any individual who participates in a demonstration where violence occurs could be prosecuted based on an impermissible "guilt by association" theory of liability, irrespective of their own actions and intent. *United States v. Robel*, 389 U.S. 258, 265 (1967).

Second, the provisions making it a crime to "urge[] another to engage in a riot," including a new provision introduced in H.B. 40, criminalize speech that the First Amendment shields: mere advocacy of unlawful conduct. *See* N.C. Gen. Stat. §§ 14-288.2(d)-(e) (the "urging provisions"); North Carolina Session Law 2023-6, Section 1 (to be codified as N.C. Gen. Stat. § 14-288.2(e)). For this reason, the Fourth Circuit struck down a nearly-identical provision of a federal anti-riot law which proscribed "urg[ing]" a riot. *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020). And, because of the definitional provision's overbreadth, the urging provisions could apply to individuals who encourage peaceful protests which subsequently become violent.

The General Assembly had every opportunity to fix these problems. Throughout the debate over H.B. 40, advocates explained that the Act was overbroad, vague, and conflicted with binding Fourth Circuit and U.S. Supreme Court precedent. Yet rather than draft H.B. 40 to respect the federal and state constitutions, Senate Leader Phil Berger invited North Carolinians to sue, stating "[t]hat's why they build courthouses—to resolve those issues."[1] Accordingly, on April 10, 2023, Plaintiff American Civil Liberties Union of North Carolina ("ACLU-NC") filed a complaint challenging the Anti-Riot Act. ECF No. 1. Now, Plaintiff respectfully asks this Court to enter a preliminary injunction barring enforcement of the Act to preserve Plaintiff's—and all North Carolinians'—fundamental constitutional rights.

FACTUAL BACKGROUND

I. North Carolina's Anti-Riot Act.

The Anti-Riot Act was first enacted at the height of the 1960's civil rights movement and student protests against the Vietnam War. *See* North Carolina Session Law 1969-869. The Act was one of many enacted during this period to restrict protest activities. *See, e.g.*, North Carolina Session Law 1969-740 (act

[1] Laura Leslie, *NC legislature approves riot penalties bill, setting up possible veto showdown with Cooper*, WRAL News (Mar. 9, 2023), https://perma.cc/LUX4-ATDT.

to increase punishment "for demonstrations or assemblies of persons kneeling or lying down"); North Carolina Session Law 1969-860 (act to "restrict the presence of certain persons on the campuses of state-supported institutions of higher learning"). These laws were part of a nationwide backlash against the millions of Americans who demonstrated in the streets during these years, which included passage of a federal anti-riot law co-sponsored by segregationist Senator Strom Thurmond. *See* H.R. 2516, 90th Cong., Amdt. No. 589; Nick Robinson, *Rethinking the Crime of Rioting*, 107 Minn. L. Rev. 77, 101 (2022).

The Anti-Riot Act significantly expanded the definition of a "riot" from prior common law understanding. At common law, a riot offense was "composed of three necessary and constituent elements: (1) unlawful assembly; (2) intent to mutually assist against lawful authority; and (3) acts of violence." *State v. Moseley*, 251 N.C. 285, 288 (1959). The State needed to prove a defendant participated in an unlawful assembly "with a mutual intent to aid and assist . . . others assembled against lawful authority." *State v. Rose*, 251 N.C. 281, 283 (1959).

By contrast, the statutory definition broadly subjects participants in a demonstration to criminal penalties based on the disorderly or violent conduct of others. Under the Act, a "riot" is redefined as

> a public disturbance *involving* an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, *results in* injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

N.C. Gen. Stat. § 14-288.2(a) (emphasis added). Unlike at common law, this statutory definition is unconcerned with the lawfulness of the assemblage, the alleged perpetrator's intent, or the alleged perpetrator's connection to disorderly or violent acts that have occurred.

II. The Black Lives Matter movement and the crackdown on racial justice protests.

In 2020, thousands of North Carolinians mobilized to publicly protest racial injustice. The immediate catalyst for these demonstrations were the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd. Across the world, communities organized in support of the Black Lives Matter ("BLM") movement, calling attention to police violence directed at Black communities.

The vast majority of people who joined BLM demonstrations protested peacefully.[2] However, there were isolated incidents of violence and property damage, sometimes perpetrated by outsiders aiming to disrupt demonstrations

[2] *See Demonstrations and Political Violence in America: New Data for Summer 2020*, The Armed Conflict Location & Event Data Project (ACLED) (Sep. 3, 2020), https://perma.cc/P69V-QJ5T.

by provoking violence.[3] Some politicians seized upon these incidents to discredit the BLM movement, describing protestors as "thugs" and "vermin" out to "destroy our nation."[4]

In response, North Carolina's General Assembly turned to a familiar playbook. As in the 1960s, legislators targeted dissent under the guise of preventing civil disorder. Their first attempt, 2021's House Bill 805, would have amended the existing Anti-Riot Act to increase criminal penalties and authorize a private cause of action for treble damages. Governor Cooper vetoed the bill, describing it as "unnecessary and . . . intended to intimidate and deter people from exercising their constitutional rights to peacefully protest."[5]

North Carolina legislators returned to the Act in early 2023 with H.B. 40, the contents of which were largely identical to 2021's House Bill 805. Advocates again argued that the bill was an unnecessary and unconstitutional

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[3] *See, e.g.*, Rachel Olding, *Far-Right Boogaloo Admits Shooting Up Cop Station Amid Floyd Protests*, The Daily Beast (Oct. 3, 2021) (agitator "admitted he traveled from Texas to Minneapolis . . . and purported to be a Black Lives Matter supporter while wreaking havoc on the city"), https://perma.cc/AS9B-YT9M.

[4] *See* James Walker, *In North Carolina, Key 2020 Swing State, GOP Lawmaker Calls BLM 'Vermin'*, Newsweek (June 17, 2020), https://perma.cc/FTV5-8YCY; Carolina Forward, *The dark, sad swamp of Bob Steinburg's Facebook Page* (June 29, 2020), https://perma.cc/QJ9K-3BAJ.

[5] *Governor Roy Cooper Veto Message: House Bill 805* (Sep. 10, 2021), https://perma.cc/P5T3-H48Z.

attempt to stifle dissent. They contended that the Act chilled fundamental constitutional rights by sweeping in peaceful protestors and targeting speech shielded by the First Amendment. Ex. 1, Letter Opposing H.B. 40.

H.B. 40's supporters ignored these concerns. Legislators tabled an amendment that would have removed the existing urging provisions, and doubled down by adding another similar provision. ECF No. 1-1. Ultimately, Governor Cooper allowed H.B. 40 to become law without his signature, citing "continuing concerns about the erosion of the First Amendment and the disparate impacts on communities of color."[6]

The re-enactment and expansion of the Anti-Riot Act acutely threatens North Carolinians who wish to exercise their protest rights. There have been more than 150 arrests under the Act over the past three years. *See* Ex. 2, Legislative Incarceration Fiscal Note: H.B. 805, pp. 4; Ex. 3, Legislative Incarceration Fiscal Note: H.B. 40, pp. 2. This includes the arrest of protestors at racial justice demonstrations. *See, e.g.*, Ex. 4, Triad City Beat Article on Graham Protests; Ex. 5, WFAE Article on Charlotte Protests; Ex. 6, News & Observer Article on Raleigh Protests; ECF 12-2, WRAL Article on Durham Protests. Peaceful protestors have been arrested under similar laws elsewhere.

[6] *Governor Cooper Lets Two Bills Become Law* (Mar. 17, 2023), https://perma.cc/6MU3-LHL5.

See State v. Bearrunner, 921 N.W.2d 894, 898 (N.D. 2019) (vacating riot conviction because defendant's "act of locking arms and resisting arrest with other protesters does not rise to the commonly understood definition of violence"). H.B. 40 magnifies these consequences by subjecting violators to enhanced criminal penalties (including a felony conviction with up to 63 months in prison and significant fines), civil liability for treble damages, and an extended pre-trial detention period. North Carolina Session Law 2023-6, Sections 1 and 4 (to be codified as N.C. Gen. Stat. § 14-288.2(f), § 15A-534.8(b)).

III. H.B. 40's impact on Plaintiff.

Plaintiff is a non-profit membership organization with approximately 21,000 members and thousands of other supporters across the state dedicated to defending the civil and constitutional rights of all North Carolinians through education, legislative advocacy, and mass mobilization. Ex. 7, Decl. of Chantal Stevens at ¶ 2. In furtherance of this mission, Plaintiff, its employees, and its members regularly participate in public demonstrations throughout North Carolina. *Id.* ¶¶ 6-12, 17-21. Plaintiff routinely calls on its members, employees, and the broader public to engage in peaceful public demonstrations in their own communities. *Id.* ¶¶ 8, 21; *see also* Ex. 8, ACLU-NC Social Media Posts. Employees conduct "know your rights" trainings, serve as legal

observers, and supply protestors with t-shirts, flyers, posters, and refreshments. *Id.* ¶ 9.

Plaintiff devotes significant resources to protest activities in the form of staff time and funding. *Id.* ¶ 19. Plaintiff frequently uses social media to encourage its members and the broader public to join demonstrations, including recent and upcoming events in support of abortion and immigrant rights. *Id.* ¶¶ 20-21; *see also* Ex. 8. For some ACLU-NC employees, participating in and urging others to participate in protests are central components of their jobs. *Id.* ¶ 7. Over the past three years, ACLU-NC employees have been arrested while protesting on at least two occasions. *Id.* ¶¶ 13-15. In one instance, Plaintiff allocated thousands of dollars to provide an employee with legal representation after concluding the employee was wrongfully arrested at a protest. *Id.*

Plaintiff has advocated against recent efforts to expand the Anti-Riot Act, including H.B. 40. *Id.* ¶ 22; *see also* Ex. 1. Plaintiff has done so because of to its commitment to defending North Carolinians' constitutional rights, and because organizing and engaging in public protests is a principal tactic Plaintiff deploys to advance its mission. Ex. 7 ¶¶ 3-4, 22-24. H.B. 40 directly threatens Plaintiff's capacity to continue this work due to the risk the Act will be applied to peaceful protestors, including its employees, members, and

supporters. *Id.* ¶¶ 24-30. The Act will require Plaintiff to adjust assignments and expectations for staff, reevaluate its indemnification policy, and assess its potential liability anytime it intends to utilize mass mobilization tactics. *Id.*

QUESTIONS PRESENTED

1. Does Plaintiff demonstrate a likelihood of success on its claims that:
    a. The Anti-Riot Act as applied through the definitional provision, N.C. Gen. Stat. § 14-288.2(a), is overbroad and vague in violation of the First and Fourteenth Amendments and article I, sections 12, 14, and 19 of the North Carolina Constitution.
    b. The urging provisions of the Act, N.C. Gen. Stat. §§ 14-288.2(d)-(e), are overbroad in violation of the First and Fourteenth Amendments and article I, sections 12 and 14 of the North Carolina Constitution.
2. Does Plaintiff demonstrate a likelihood of irreparable harm if preliminary relief is denied?
3. Does the public interest, including the likelihood of harm to Defendants if preliminary relief is granted, weigh in favor of issuing preliminary relief?
4. Should Fed. R. Civ. P. 65(c)'s security requirement be waived in this case, which involves protecting fundamental constitutional rights?

ARGUMENT

In deciding whether to issue a preliminary injunction, courts consider (1) the likelihood plaintiffs will succeed on the merits of their claims, (2) the likelihood of irreparable harm to plaintiffs absent an injunction, (3) potential harm to defendants, and (4) the public interest. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1992). Plaintiff satisfies these requirements for the issuance of preliminary relief.

I. Plaintiff is likely to succeed on the merits.

The Anti-Riot Act encompasses and penalizes constitutionally protected speech and expressive activity. Through the definitional provision, the Act criminalizes entirely peaceful protests. Through the urging provisions, the Act punishes mere advocacy of unlawful conduct. The Act is overbroad and vague in violation of the federal and state constitutions.

A. The Anti-Riot Act is overbroad because it punishes entirely peaceful protestors.

The First Amendment does not permit "arresting an individual engaged in protected expressive activity in conjunction with another person simply because the second person's behavior . . . may be unprotected and unlawful." *Santopietro v. Howell*, 857 F.3d 980, 989–90 (9th Cir. 2017). "'[G]uilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to

deny First Amendment rights." *Healy v. James*, 408 U.S. 169, 186 (1972) (quoting *Robel*, 389 U.S. at 265). Yet, through the definitional provision, the Act punishes individuals who peacefully participate in public demonstrations based on the conduct of others.

The definitional provision does not require proof of someone's own violent or disorderly conduct, or their intent to support unlawful actions, to sustain a conviction. Anyone who incites, urges, or willfully engages in any public protest where violence occurs may be prosecuted, even if that person's conduct was entirely peaceful, they lacked any intent to help others defy the law, and the assemblage was otherwise lawful. Peaceful protestors could be prosecuted solely because they "belonged to a group [of protestors] some members of which committed acts of violence [or property damage]," without evidence of those protestors' "specific intent to further [the group's] illegal aims." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).[7]

H.B. 40's clarification that "[m]ere presence alone without an overt act is not sufficient to sustain a conviction" does not solve this problem. ECF No.

[7] To address this issue, other states' anti-riot laws require proof of a "common purpose or agreed-upon course of action" to engage in unlawful conduct. *People v. Barnes*, 89 N.E.3d 969, 980 (Il. App. Ct. 2017); *see also State v. Chakerian*, 325 Or. 370, 375 n.8 (1997) ("[A] person does not commit the crime of riot if he or she merely is part of a group and five *other* members of that group engage in tumultuous and violent conduct.").

1-1; North Carolina Session Law 2023-6, Section 1 (to be codified as N.C. Gen. Stat. § 14-288.2(g)). The Act still fails to specify that an overt act *of disorderly or violent conduct* is required. This provision protects the businesswoman who inadvertently crosses paths with a protest on her walk home from work, but not the protestor who peacefully participates in a demonstration that has been infiltrated by outsiders who later engage in violence.

For similar reasons, federal courts have enjoined a spate of recent anti-riot laws in other states. In *Dream Defenders v. DeSantis*, the district court enjoined a Florida law which applied to anyone who "willfully participates in a violent public disturbance . . . acting with a common intent to assist each other in violent and disorderly conduct." 559 F. Supp. 3d 1238, 1283 (N.D. Fla. 2021) (quoting Fla. Stat. Ann. § 870.01).[8] Unlike the Anti-Riot Act, Florida's law contained an intent requirement, but the law was still overbroad because it "consume[d] vast swaths of core First Amendment speech," such as "continuing to protest after violence occurs, even if the protestors are not involved in, and do not support, the violence." *Id.* Absent an injunction, "the lawless actions of a few rogue individuals could effectively criminalize the

[8] The Eleventh Circuit subsequently certified the question of how to interpret this provision to Florida's Supreme Court, which has yet to issue an interpretation. *Dream Defs. v. Governor of the State of Fla.*, 57 F.4th 879, 890 (11th Cir. 2023).

protected speech of hundreds, if not thousands, of law-abiding Floridians." *Id.* at 1284.

Similarly, in *Oklahoma State Conference of NAACP v. O'Connor*, a district court enjoined an Oklahoma law imposing liability on any organization "found to be a conspirator with persons who" perpetrate a riot. 569 F. Supp. 3d 1145, 1150 (W.D. Okla. 2021) (quoting 2021 Okla. Sess. Law Ch. 106 § 3).[9] The law made it "impossible for Plaintiff to undertake its clearly protected activities of protesting and associating" due to the "very real threat" that it would "be[] fined for non-sanctioned activities of those persons with whom it has associated for a legitimate First Amendment action." *Id* at 1152.

Like these laws, the Anti-Riot Act is unconstitutionally overbroad. It criminalizes "a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118–119 (2003) (cleaned up). Anyone who peacefully exercises fundamental protest rights at a public demonstration could be prosecuted based solely on the disorderly or violent conduct of others. This "deter[s] or 'chill[s]'" protected

[9] The Tenth Circuit subsequently certified questions regarding the proper interpretation of the laws to the Oklahoma Court of Criminal Appeals, *Oklahoma State Conference of NAACP v. O'Connor*, No. 21-6156, 2022 WL 1210088 (10th Cir. Apr. 21, 2022), which construed the laws narrowly to avoid constitutional issues, *O'Connor v. Oklahoma State Conf. of NAACP*, 516 P.3d 1164, 1167 (Okla. Crim. App. 2022).

speech, undermining constitutional rights and the "uninhibited marketplace of ideas." *Id.* at 119.

B. The Anti-Riot Act is unconstitutionally vague because it fails to specify whether peaceful protestors are liable for the actions of others.

The Anti-Riot Act is also vague in violation of the Due Process Clause of the Fourteenth Amendment. Vagueness doctrine "is principally concerned with providing individuals with adequate notice of what conduct they cannot engage in and with delineating clear limits on the enforcement power of the state." *United States v. Comer*, 5 F.4th 535, 541 (4th Cir. 2021). A criminal law "must give a person of ordinary intelligence adequate notice of what conduct is prohibited and must include sufficient standards to prevent arbitrary and discriminatory enforcement." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019) (en banc).

Where, as here, vagueness "threatens to inhibit the exercise of constitutionally protected rights . . . . a more stringent vagueness test" applies. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982). Courts must "take into account possible applications of the statute in other factual contexts" to assess whether the law could sweep in protected speech. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432–33 (1963).

The Act is unconstitutionally vague because it is not "reasonably definite" regarding what conduct it encompasses. *United States v. Chatman*, 538 F.2d 567, 569 (4th Cir. 1976). It is unclear whether, and under what circumstances, a protestor could be liable for participating in a demonstration where violence occurs. Under the definitional provision, the Act could apply to:

- anyone who incites, engages in, or urges others to engage in a public demonstration where violence or property damage occurs;
- anyone who incites, engages in, or urges others to engage in a public demonstration *after* violence or property damage has occurred;
- anyone who incites, engages in, or urges others to engage in a public demonstration *with the intent to* further illegal aims; or
- those who *personally* incite, engage in, or urge others to engage in violence or property damage during a public demonstration.

This ambiguity grants the state "unbridled discretion" to choose how to enforce the Act, engendering a risk of discriminatory enforcement. *11126 Baltimore Blvd., Inc. v. Prince George's Cnty.*, 58 F.3d 988, 994 (4th Cir. 1995).[10]

[10] This risk is significant given examples of law enforcement officers targeting peaceful protestors during BLM demonstrations. *See, e.g.*, *Epps v. City & Cnty. of Denver*, 588 F. Supp. 3d 1164, 1176 (D. Colo. 2022) (evidence suggested "[m]any officers used force in situations that support an inference of retaliatory motive, such as tear gassing kneeling protestors chanting 'Hands Up Don't Shoot' or shooting a plaintiff through her 'Black Lives Matter' sign").

The district court's analysis in *Dream Defenders* is again apposite. There, the court identified multiple readings of what Florida's anti-riot law prohibited: the law could apply to only those individuals actively engaged in violence or to anyone who participated in a demonstration in any manner after violence occurred. 559 F. Supp. 3d at 1281. As a result, "individual[s] of ordinary intelligence could read the [statute] and not be sure of its real-world consequence." *Id.* They would not know whether, when peacefully protesting, the law imposed "a duty to stop expressing their views and leave the scene at the first sign of a potential riot," or whether they could "remain[] at the scene of a protest turned violent to film the police reaction" or "hold up [a] protest sign . . . [after] violence erupts." *Id.* at 1283.

North Carolinians face the same challenge when assessing their risk under the Anti-Riot Act, especially because the General Assembly failed to narrow the definition of "riot" when it expanded the statute in H.B. 40. To be sure, prior to H.B. 40, North Carolina courts gestured towards limits on the Act's reach. In dicta, North Carolina's Court of Appeals, while noting that "case law interpreting [the Act] is sparse," suggested that "the legislature contemplated active participation by the defendant in the riotous activity" to convict someone for "willfully engaging" in a riot. *State v. Mitchell*, 110 N.C. App. 250, 254 (1993).

But neither the Court of Appeals in *Mitchell* nor any other state court decision has specified what "active participation" in a riot entails. "Active participation" could mean personally engaging in violence or merely participating in a demonstration while violence is ongoing. Further, it is unclear what intent, if any, someone must act with to be convicted. *Mitchell*'s "active participation" requirement also does not (and logically cannot) apply to the Act's urging and inciting provisions.

Notably, the General Assembly did not add any language limiting the reach of the Act to "active participation" when it enacted H.B. 40. Instead, it reiterated the prior, broad definition of riot and excluded only "mere presence alone" from its reach. ECF No. 1-1; North Carolina Session Law 2023-6, Section 1 (to be codified as N.C. Gen. Stat. § 14-288.2(g)). In the absence of a narrowing state court interpretation that clarifies the meaning of the law, the Act is impermissibly vague. *Carolina Youth Action Project D.S. by & through Ford v. Wilson*, 60 F.4th 770, 783 (4th Cir. 2023).[11]

C. The urging provisions directly target speech protected by the First Amendment.

[11] This indeterminacy illustrates the Act's overbreadth: when assessing overbreadth claims, courts "evaluate the ambiguous as well as the unambiguous scope of the [challenged] enactment." *Vill. of Hoffman Ests.*, 455 U.S. at 495 n.6.

The First Amendment protects "abstract advocacy of lawlessness." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997). This "right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty," for "[w]ithout the freedom to criticize that which constrains, there is no freedom at all." *Id.* Some of this nation's most stirring calls for change were expressed in these terms: Dr. Martin Luther King Jr.'s "Letter from a Birmingham Jail," Malcolm X's demand for justice "by any means necessary," and the ubiquitous chant of "no justice, no peace" all utilized this rhetoric to emphasize the magnitude of a wrong and the urgent need for action. This form of advocacy is protected by the First Amendment and cannot be the basis of criminal or civil liability. *Cf. Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 885 (D.S.D. 2019).

Protection of abstract advocacy of lawlessness traces back to the U.S. Supreme Court's plurality opinion in *Brandenburg v. Ohio*, where the Court reviewed a statute prohibiting "advocat(ing) . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism." 395 U.S. 444, 444–45 (1969) (alterations in original). The Court held this statute invalid under the First Amendment because it "punish[es] mere advocacy and . . . assembly with others merely to advocate [unlawful] action." *Id.* at 449. The

law penalized both "incitement to imminent lawless action" and "mere advocacy," the latter of which is protected by the First Amendment. *Id.*

The urging provisions of the Anti-Riot Act prohibit "willfully incit[ing] or urg[ing] another to engage in a riot." N.C. Gen. Stat. §§ 14-288.2(d)-(e). The clauses prohibiting "incit[ing]" permissibly criminalize "incitement" as defined in *Brandenburg*. *Cf. State v. Brooks*, 287 N.C. 392, 401 (1975) ("The advocacy of imminent lawless action . . . is the only type of speech that can come within the purview of [N.C. Gen. Stat.] § 14-288.2."). So, the phrase "urges another to engage in a riot" must mean something else. *See Maryland Psychiatric Soc., Inc. v. Wasserman*, 102 F.3d 717, 720 (4th Cir. 1996) (courts cannot read one provision to render another superfluous). That meaning necessarily encompasses substantially more speech than *Brandenburg* allows North Carolina to prohibit.

The Fourth Circuit addressed nearly-identical language in *United States v. Miselis*, where it considered provisions of the federal anti-riot law making it a crime to "a) 'incite'; or b) 'organize, promote, encourage, participate in, or carry on'" a riot, and which defined the term "encourage" to include "urge." 972 F.3d at 534 (quoting 18 U.S.C. § 2101(a)). The court construed the "incite" provision to "encompass no more than unprotected speech under *Brandenburg*." *Id. at* 536. But the "urge" provision swept broader: to "urge"

meant "to 'encourage,' 'advocate,' 'recommend,' or 'advise . . . earnestly and with persistence.'" *Id.* at 538 (quoting *Urge*, Encarta Webster's Dictionary of the English Language (2d ed. 2004) (alterations in original)). Because "earnestness and persistence don't suffice to transform [mere advocacy] into speech that is likely to produce imminent lawless action," this provision was overbroad. *Id.*

So too with North Carolina's urging provisions. The plain meaning of "urge" as used in the Act is no different than under the federal law. These provisions "sweep[] up a substantial amount of protected advocacy"—encouraging someone else to engage in unlawful conduct—"cover[ing] the whole realm of advocacy that *Brandenburg* protects." *Id.* at 541. Moreover, because a lawful assembly can be a riot under the Act, anyone who encourages others to join a demonstration which turns violent could be held liable. Someone who posts on social media exhorting others to attend a protest that subsequently devolves into violence, or who gives water to a protestor who later commits an assault, could be prosecuted.

Other courts have reached the same conclusion when examining similar laws. In *Dakota Rural Action*, a district court enjoined a North Dakota law prohibiting "advising, encouraging or soliciting" others to riot. 416 F. Supp. 3d at 885. The statute was overbroad because it did not require "the direction or

control of an activity that results in the use of force or violence." *Id.* at 884. It could apply to Dr. Martin Luther King Jr. for "agreeing with Aristotle that 'an unjust law is no law at all,'" *id.* at 889, or to mundane acts like "[h]olding up a sign in protest on a street corner" if violence occurred nearby, *id.* at 886.

The urging provisions target the same protected advocacy. Anyone who "urges" another person to undertake unlawful conduct, or who "urges" others to join a lawful demonstration that turns violent, violates the Act for communicating "the sort of advocacy that *Brandenburg* 'jealously protects.'" *Miselis*, 972 F.3d at 533 (quoting *Rice,* 128 F.3d at 262). Because these provisions "encompass[] *all* hypothetical efforts to advocate for a riot, including the vast majority that aren't *likely* to produce an *imminent* riot (even assuming they're directed to producing a riot)," they are overbroad in violation of the First Amendment. *Id.* at 536.

D. The Anti-Riot Act violates article I, sections 12, 14, and 19 of the North Carolina Constitution.

Because the Anti-Riot Act is overbroad and vague in violation of the First and Fourteenth Amendments, it violates article I, sections 12, 14, and 19 of the North Carolina Constitution. Regardless, even if Plaintiff does not prevail on its federal claims, the Act violates the broader provisions of the state Constitution.

1. The Act violates Plaintiff's free speech, assembly, and petitioning rights under article I, sections 12 and 14.

Article I, sections 12 and 14 of the North Carolina Constitution offer more expansive protections than the federal constitution. Both are textually broader than the First Amendment. The former provides that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." The latter states that "[f]reedom of speech" is a "great bulwark[] of liberty and therefore shall never be restrained." The fact that these provisions are "textually distinct from the [First Amendment] suggests that the people of North Carolina intended to provide a distinct set of protections in the North Carolina Constitution." *State v. Kelliher*, 381 N.C. 558, 579–80 (2022).

These provisions are part of North Carolina's Declaration of Rights, which "[p]redat[es] the federal Bill of Rights." *Cheryl Lloyd Humphrey Land Inv. Co.*, 377 N.C. 384, 389 (2021). The rights they guarantee are "'connect[ed] with the mechanics of popular sovereignty:'" they protect North Carolinians' ability to express views about matters of public importance and hold elected leaders accountable. *Id.* (quoting John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 58 (2d ed. 2013) (alterations in original)). Courts "consistently interpret[] the North Carolina Constitution to provide the utmost

protection for the[se] foundational democratic freedoms." *Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 55 (2011) (Newby, J., dissenting).

The Act infringes upon rights secured by these state constitutional provisions. Article I, section 12 protects "the ability of [North Carolina's] citizenry to be informed about government action and to express their views about that action." *Common Cause v. Forest*, 269 N.C. App. 387, 393 (2020). This is a "fundamental right" because "[e]xpressing one's views to government officials is foundational to [North Carolina's] political system." *Cheryl Lloyd Humphrey Land Inv. Co.*, 377 N.C. at 384. Article I, section 14 is "a direct personal guarantee of" free speech, *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 781 (1992), which includes the right to "protest against the administration of public affairs," *State v. Wiggins*, 272 N.C. 147, 157 (1967). These are "fundamental right[s] . . . cherished in this State since long before the adoption of the Fourteenth Amendment." *Id.*

The Anti-Riot Act criminalizes forms of advocacy integral to realizing North Carolina's "commitment to free and open debate." *Cheryl Lloyd Humphrey*, 377 N.C. at 388–89 (cleaned up). It dissuades North Carolinians from exercising their right to assemble and publicly protest, and criminalizes speech North Carolinians' have a constitutional right to communicate. Because

the Act burdens Plaintiff's fundamental rights, strict scrutiny applies. *Rhyne v. K–Mart Corp.*, 358 N.C. 160, 180 (2004).

The Act fails strict scrutiny. The State's "interest in protecting speakers who engage in controversial but constitutionally permissible speech is even more substantial" than its "overwhelming" interest in protecting against the potential consequences of controversial speech. *State v. Taylor*, 379 N.C. 589, 600 (2021).[12] The latter interest "may seem remote when the speech at issue appears . . . crude, caustic, or fantastical, but [North Carolina's] system functions best when citizens are 'active, collective, disrespectful, and even sometimes incendiary.'" *Id.* at 618 (quoting Ashutosh Bhagwat, *The Democratic First Amendment*, 1098 Nw. U. L. Rev. 1097, 1123 (2016)). Plaintiff is likely to succeed on its claims arising under article I, sections 12 and 14 of the North Carolina Constitution.

2. <u>The Act violates Plaintiff's due process rights under article I, section 19.</u>

The Act is also vague in violation of article I, section 19 of the North Carolina Constitution, which provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or

[12] There is no adequate state law remedy for an infringement of fundamental individual rights other than a direct constitutional claim. *See Corum*, 330 N.C. at 783.

exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." This clause is "the basis for due process in North Carolina." *State v. Guice*, 141 N.C. App. 177, 186 (2000). "It is axiomatic that [North Carolina's] '[s]tate constitutional due process requirements may be more expansive than the minimal due process requirements of the United States Constitution.'" *Id.* at 187 (quoting *Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 650 n.1 (1981)).

The text of a criminal law cannot be "so general and indefinite" that it could plausibly be read to encompass conduct that cannot be made criminal. *State v. Graham*, 32 N.C. App. 601, 607 (1977). A law is unconstitutionally vague if it "(1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'; or (2) fails to 'provide explicit standards for those who apply [the law].'" *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 556 (2001) (quoting *State v. Green*, 348 N.C. 588, 597 (1998)); *see also State v. Sanders*, 37 N.C. App. 53, 55 (1978) (invalidating statute banning "[o]pposite Sexes occupying same bedroom at hotel for immoral purposes").

The Act as applied through the definitional provision fails both prongs. As explained above, an ordinary person cannot ascertain whether someone who peacefully participates in a demonstration could be prosecuted based on the

violent acts of others. This lack of notice gives "unbridled" discretion to the officials tasked with enforcing the Act, who may do so based on their own "value judgment[s]." *Allen v. Rupard*, 100 N.C. App. 490, 495 (1990). The Act is unconstitutionally vague because it requires North Carolinians bound by it to "guess at their peril as to its true meaning." *Graham*, 32 N.C. App. at 607.

II. Plaintiff is irreparably harmed.

Because Plaintiff is likely to succeed on the merits of its constitutional claims, Plaintiff will be irreparably harmed absent preliminary relief. "[I]t is well-established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)) (alteration in original); *see also Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right . . . constitutes irreparable harm."); *N. Carolina Ass'n of Educators, Inc. v. State*, 241 N.C. App. 284, 292 (2015), *aff'd as modified*, 368 N.C. 777 (2016) (violation of state constitutional right is irreparable harm).

III. The public interest favors issuing preliminary relief.

Defendants are "in no way harmed by issuance of a preliminary injunction which prevents [them] from enforcing a [law], which . . . is likely to be found unconstitutional." *Newsom ex rel. Newsom v. Albemarle Cnty. Sch.*

Bd., 354 F.3d 249, 261 (4th Cir. 2003). And "upholding constitutional rights is in the public interest." *Legend Night Club*, 637 F.3d at 303. Not only would an injunction preserve constitutional rights, it would also prevent unlawful arrests and prosecutions, reducing the associated burdens on judicial officials, prosecutors, public defenders, and jails.

IV. The Court should waive the requirement to provide security.

Rule 65(c) of the Federal Rules of Civil Procedure provides that "a court may issue a preliminary injunction . . . only if the movant gives security." However, "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). The purpose of the security requirement is to ensure that an enjoined party is compensated for harm it suffers as a result of an improper injunction. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). Because Defendants have no legitimate interest in enforcing an unconstitutional law and retain the authority to enforce other laws prohibiting violent and disorderly conduct, and because this case implicates fundamental constitutional rights, waiver is appropriate. *See, e.g.*, *Middleton v. Andino*, 488 F. Supp. 3d 261, 304 (D.S.C. 2020) (no bond in voting rights case "given the significance of this matter of local, national, and international public

concern"); *Hassay v. Mayor*, 955 F. Supp. 2d 505, 527 (D. Md. 2013) (nominal bond in First Amendment challenge).

CONCLUSION

This Court should enter a preliminary injunction prohibiting all Defendants, and all members of the proposed Defendant District Attorney Class, as described in Plaintiff's Motion for Class Certification (ECF 11), from enforcing the Anti-Riot Act.

Respectfully submitted this 8th day of May 2023 by:

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CERTIFICATE OF WORD COUNT

Pursuant to L.Cv.R. 7.3(d), I hereby certify that this brief is less than 6,250 words, as calculated by the word processing software used to prepare this brief.

ACLU OF NORTH CAROLINA LEGAL FOUNDATION

/s/ Samuel J Davis

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** was this day filed in in the Middle District of North Carolina using the Clerk's CM/ECF system, which will send notification of this filing to the parties. In addition, I will serve counsel for Defendants Deberry, Crump, and Freeman by email and certified U.S. mail at the address listed below:

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