IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:23-cv-302

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,

Plaintiff

v.

JOSHUA H. STEIN, in his official capacity as Attorney General of North Carolina; SATANA DEBERRY, in her official capacity as District Attorney of the 16th prosecutorial district; AVERY MICHELLE CRUMP, in her official capacity as District Attorney of the 24th prosecutorial district; and LORRIN FREEMAN, in her official capacity as District Attorney of the 10th prosecutorial district, and as representatives of a class of all district attorneys in the state of North Carolina,

Defendants.

DEFENDANT STEIN'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Joshua H. Stein in his official capacity as Attorney General of North Carolina submits this Memorandum in Support of his Motion to Dismiss with prejudice Plaintiff ACLU-NC's Amended Complaint (Doc. 25).

INTRODUCTION

For 54 years, North Carolina has defined "riot" in its Anti-Riot Act (the Act) 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). All those words amount to a simple meaning: A riot is a type of public disturbance—specifically, a violent one involving three or more persons. Consistent with that meaning, the North Carolina Supreme Court, North Carolina Court of Appeals, and this Court have all rejected facial constitutional challenges to the Act after concluding that a person who has not engaged in or threatened violent conduct has not engaged in a riot.

The American Civil Liberties Union of North Carolina (ACLU-NC) reads the Anti-Riot Act differently. It alleges that the law's definition of "riot" allows the State to prosecute peaceful protestors simply because *other* people at the protest engaged in unlawful violence. And, ACLU-NC alleges, if that reading is correct, the Act is unconstitutionally vague and overbroad. Moreover, ACLU-NC alleges, the risk of prosecution under the Act injures the organization and its members.

ACLU-NC's allegations are puzzling. Although the organization now argues that the Act impairs its mission and infringes its members' constitutional rights, the statute has been on the books for more than fifty years, and ACLU-NC has before never seen fit to challenge it.

But even setting this staleness concern aside, ACLU-NC's concern is misplaced. In *State v. Brooks*, the North Carolina Supreme Court provided an authoritative construction of the word "riot" that precludes ACLU-NC's reading. 215 S.E.2d 111 (N.C. 1975). This construction poses two fatal problems for ACLU-NC.

First, it undermines ACLU-NC's standing. Since ACLU-NC seeks only to engage in peaceful protests, the risk of the Act injuring ACLU-NC or its members is too remote to confer standing. This Court should therefore dismiss the Amended Complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

Second, even if the Court decides to reach the merits, ACLU-NC has failed to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Properly construed, the Act's definition of "riot" requires an act or threat of violence. "The First Amendment does not protect violence[,]" so the definition touches only conduct that falls outside the First Amendment's protections. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Moreover, because "violence" has a well-settled meaning, the violence requirement eliminates any vagueness concerns. *See United States v. Miselis*, 972 F.3d 518, 544-45 (4th Cir. 2020). Finally, even if § 14-288.2(a) were susceptible to ACLU-NC's reading, the North Carolina Supreme Court's contrary reading in *Brooks* binds this Court.

At the absolute least, all of this shows that § 14-288.2(a) is susceptible to a limiting construction. When a limiting construction is available, a court should adopt that construction rather than invalidate the statute.

In sum, because ACLU-NC lacks standing and can allege no set of facts that would entitle it to relief, its Amended Complaint should be dismissed with prejudice. Alternatively, this Court should construe the Anti-Riot Act to avoid any constitutional concerns.

STATEMENT OF THE FACTS

The North Carolina General Assembly enacted the Anti-Riot Act in 1969. Am. Compl. ¶ 43; N.C. Sess. L. 1969-869, § 1. The Act makes it a crime to "willfully engage[] in a riot" or to "willfully incite[] another to engage in a riot" when that inciting results in a riot or the imminent likelihood of a riot. N.C. Gen. Stat. §§ 14-288.2(b), (d).[1] "Mere presence" at a riot, the Act provides, "is not sufficient to sustain a conviction." *Id.*

As for what constitutes a "riot," the Act defines the term to mean "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

[1] The Act previously made it a crime to "urge[] another to engage in a riot" or to create "a clear and present danger of a riot," but the General Assembly eliminated that language from the statute. *See* N.C. Sess. L. 2023-71, § 4(a) (amending N.C. Gen. Stat. §§ 14-288.2(d), (e), (e1)).

to persons or property." N.C. Gen. Stat. § 14-288.2(a). The definition of riot remains unchanged from the Act's initial enactment. Am. Compl. ¶ 46.

Recently, the General Assembly amended the Act to impose harsher criminal penalties on those who brandish a dangerous weapon or use a dangerous substance while rioting. N.C. Sess. L. 2023-6, § 1 (amending N.C. Gen. Stat. § 14-288.2(c)). Those who cause a death, serious bodily harm, or property damage while rioting or inciting a riot also face more severe criminal penalties. N.C. Gen. Stat. §§ 14-288.2(c1), (c2), (e), (e1). Additionally, any such individuals can be held liable for treble damages by anyone whose person or property is harmed by their rioting or incitement. *See id.* § 14-288.2(f).

In the wake of these recent amendments, ACLU-NC brought suit under 42 U.S.C. § 1983 against Attorney General Joshua H. Stein and several District Attorneys as representatives of a class of all the State's elected District Attorneys. Am. Compl. ¶¶ 7, 33-42. In the now operative Amended Complaint (Doc. 25), ACLU-NC alleges that the Act, and specifically its definitional provision, violates the First Amendment (Count II) and Fourteenth Amendment (Count I) of the United States Constitution, as well as Article I, §§ 12, 14, and 19 of the North Carolina Constitution (Counts III, IV, and V). Am. Compl. ¶¶ 82-127.

ACLU-NC further alleges that the Act impairs the organization's mission and infringes its members' constitutional rights. ACLU-NC's "mission is to defend the civil and constitutional rights of all North Carolinians," including rights to free expression. Am. Compl. ¶ 12. To further this mission, ACLU-NC, its employees, and its members

encourage, organize, and participate in public protests and demonstrations against policies that ACLU-NC believes violate North Carolinians civil rights. Am. Compl. ¶¶ 13-15, 17-21. For some ACLU-NC employees, "participating in public demonstrations is a central component of their jobs." Am. Compl. ¶ 21; *see also* Am. Compl. ¶¶ 17-21. ACLU-NC also supports public protests. For example, ACLU-NC employees have conducted "know your rights" trainings for protesters and served as legal observers at protests. Am. Compl. ¶¶ 16, 23. ACLU-NC, its members, and its employees intend to continue these activities in the future. Am. Compl. ¶ 18.

ACLU-NC alleges that because of the vagueness of the definitional provision, there is a "risk that peaceful protestors could face liability under the Act." Am. Compl. ¶ 29. The risk, ACLU-NC further alleges, causes a chill that impedes the organization's ability to engage in protests and demonstration. Am. Compl. ¶ 25. Although ACLU-NC does not allege that its members have been arrested or charged (or threatened with arrest or charge) under the Act, ACLU-NC alleges that it would "likely pay" for an employee's defense if she were charged with violating the Act. Am. Compl. ¶ 30.[2] Additionally, ACLU-NC "has expended and will continue to expend resources to address" its own and its members' and employees' liability under the Act. Am. Compl. ¶ 26. For those reasons, ACLU-NC, its members, and its employees "will adjust their plans" to engage in peaceful protests and

[2] On two occasions in the past three years, police have arrested ACLU-NC employees who were participating in public protests or demonstrations. Am. Compl. ¶ 31. ACLU-NC does not allege that those two employees were arrested or charged with violating this Act. *See* Am. Compl. ¶ 31.

demonstration, and "may choose to forego protesting and demonstrating entirely under certain circumstances." Am. Compl. ¶ 27.

Based on these allegations, ACLU-NC asks the Court to preliminarily enjoin the Act in its entirety. Am. Compl. at 39, Prayer for Relief. Additionally, ACLU-NC seeks a declaration that the statute is unconstitutional and a permanent injunction prohibiting the Act's enforcement. Am. Compl. at 39, Prayer for Relief.

QUESTIONS PRESENTED

I. WHETHER ACLU-NC LACKS STANDING TO BRING A PRE-ENFORCEMENT CHALLENGE OF THE ANTI-RIOT ACT?

II. WHETHER ACLU-NC FAILS TO STATE A CLAIM FOR RELIEF?

STANDARD OF REVIEW

When a defendant moves to dismiss for lack of subject matter jurisdiction based on the insufficiency (rather than the falsity) of the plaintiff's allegations, the Court reviews the plaintiff's complaint as it would if the defendant moved to dismiss for failure to state a claim. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

To survive a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), a complaint must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *accord Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). Although all well-pled allegations are presumed to be true and must be viewed in the light most favorable to the plaintiff, *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008), "[t]hreadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Twombly*, 550 U.S. at 555); *see also Brown*, 716 F.3d at 350. Similarly, a court need not accept as true a plaintiff's legal conclusions and "unwarranted inferences, unreasonable conclusions, or arguments," *Giarratano*, 521 F.3d at 302 (citation omitted) (internal quotation marks omitted).

ARGUMENT

I. ACLU-NC LACKS STANDING TO CHALLENGE THE ANTI-RIOT ACT.

Article III, section 2 of the Constitution limits this Court's jurisdiction to "cases" or "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). "The doctrine of standing gives meaning to these constitutional limits" by ensuring that legal questions are resolved in concrete—not academic—contexts. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014).

An organization like ACLU-NC can establish standing to sue on its own behalf for injuries it suffered, or on behalf of its members—so long as (1) its members would otherwise have standing as individuals, (2) the interests at issue are germane to the organization's purpose, and (3) individual members' participation is not required. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005).

No matter how ACLU-NC chooses to establish standing, though, it must demonstrate three things: (1) it has suffered an injury-in-fact; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision by this Court would redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167,

180-81 (2000). An injury-in-fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1548 (2016)). In other words, ACLU-NC or its members must have "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

Because the Amended Complaint does not (and cannot) sufficiently allege such an injury to ACLU-NC or its members, ACLU-NC cannot establish standing. This Court should therefore dismiss the Amended Complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

A. The Act does not injure ACLU-NC's or its members' constitutional rights.

ACLU-NC has not alleged the kind of injury-in-fact necessary to satisfy Article III. An injury-in-fact cannot be speculative. *Spokeo, Inc.*, 578 U.S. at 339. This requirement does not preclude *threatened* harm from conferring standing; arrest or prosecution is not a prerequisite to a facial challenge. *See Driehaus*, 573 U.S. at 158. But it does mean that the threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 (2013). "[A]llegations of *possible* future injury" will not do. *Id.*

In a pre-enforcement challenge like this, then, a plaintiff must allege either that it intends to engage in constitutionally protected conduct that is arguably proscribed by the statute or that it will need to self-censor to refrain from exposing itself to sanctions. *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018). Additionally, the plaintiff must allege a

"credible threat" of prosecution under the challenged statute. *Id.* The "credible threat of enforcement is critical." *Id.*

ACLU-NC did not allege facts sufficient to satisfy any of these requirements. To start, the Amended Complaint does not adequately allege that ACLU-NC intends to engage in conduct arguably proscribed by the statute. To satisfy this requirement, a plaintiff must point to specific, constitutionally-protected conduct that it engages in that might violate the statute. *Driehaus*, 573 U.S. at 159. A plaintiff need not have a specific intent to violate the statute, but she must at least allege "an intent to engage in conduct that would inevitably" run afoul of the law. *Kenny v. Wilson*, 885 F.3d 280, 290-91 (4th Cir. 2018). For example, in *Virginia v. Am. Booksellers Ass'n, Inc.*, a plaintiff bookseller established standing to challenge a law prohibiting the "display for commercial purposes" of material that is harmful to juveniles by pointing to sixteen books it sold that it believed were covered by the statute. 484 U.S 383, 383 (1988)

ACLU-NC has not pointed to any planned conduct that would violate the Act. ACLU-NC alleges that its members intend to engage in non-violent protests. *See* Am. Compl. ¶¶ 13, 17, 18, 21. But the Act does not prohibit *peaceful* protests, only riots. *See* N.C. Gen. Stat. § 14-288.2(b). ACLU-NC alleges that there is a "risk that peaceful protestors could face liability under the Act." Am. Compl. ¶ 29. But a speculative "risk" is not enough, even in the more permissible context of a constitutional challenge. *See Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011). The risk must be "substantial." *Clapper*, 568 U.S. at 416. A pre-enforcement challenge requires even more: The plaintiff's

planned conduct must *inevitably* violate the law. ACLU-NC does not allege an intent to engage in conduct that inevitably violates the Act. *Cf. Ramirez v. Sanchez Ramos*, 438 F.3d 92, 99 (1st Cir. 2006) (finding that a plaintiff who alleged an intent to engage in peaceful protest did not allege an intent to engage in activity proscribed by the federal Anti-Riot Act).

Nor does the Amended Complaint adequately allege that ACLU-NC is reasonably self-censoring in response to the Act. A plaintiff can establish an injury-in-fact by alleging facts that demonstrate that she has been "chilled from exercising her right to free expression." *See id.* But the chilling must be objectively reasonable. *Cooksey v. Futrell*, 721 F.3d 226, 236 (4th Cir. 2013). In *Cooksey*, for example, a dietician who regularly provided personal dietary advice on his website stopped doing so after the State Board of Dietetics/Nutrition warned him that it was monitoring his speech. *Id.* at 236-37. ACLU-NC need not, like Cooksey, cease expressive activities to demonstrate an injury-in-fact, but it must show that the Act would likely "deter a person of ordinary firmness from the exercise of First Amendment rights." *Benham*, 635 F.3d at 135.

The Amended Complaint does not meet this standard. First, ACLU-NC's self-censorship allegations are far less definite than the self-censorship allegations that the Fourth Circuit has previously found constituted an injury-in-fact. In *Cooksey*, the plaintiff "actually ceased expressing opinions." 721 F.3d at 236. And in *N.C. Right to Life, Inc. v. Bartlett*, the injured plaintiff "refrained from disseminating its [voter] guide" for fear of violating a state statute. 168 F.3d 705, 709-10 (4th Cir. 1999). ACLU-NC, meanwhile,

alleges that it will "adjust" its plans, and "may choose to forego protesting and demonstrating entirely under certain circumstances." Am. Compl. ¶ 27. ACLU-NC fails to specify in what way it will adjust its plans or under what "circumstances" it "may" forego protesting. It is unclear how ACLU-NC can trace this chill to the 54-year-old definitional provision. Nor can ACLU-NC blame enhanced penalties under the Act for any decisions not to protest, as those enhancements relate to specific conduct (e.g., causing harm to first responders) that ACLU-NC has expressed no intent to undertake.

Second, insofar as ACLU-NC fears a chilling effect, its concerns are not objectively reasonable. *See Cooksey*, 721 F.3d at 236. North Carolina's courts have squarely held that the Act cannot be enforced in the way that ACLU-NC fears. *Cf. Kenny*, 885 F.3d at 288 (considering whether state supreme court's narrowing construction eliminated threat of harm to plaintiff). In *Brooks*, the North Carolina Supreme Court rejected a facial challenge to the definitional provision. 215 S.E.2d at 119. In affirming defendant's conviction, the state supreme court construed the definitional provision to require a showing that the defendant engaged in or threatened violence. *Id.* That showing was required, *Brooks* explained, because the definitional provision defines "riot" as a type of "public disturbance." *Id.* Thus, to engage in a riot is to engage in that special type of public disturbance. "[N]o matter how noisy or boisterous" the public disturbance, *Brooks* continued, it "cannot, under the statutory definition, be a riot unless violence or the threat of immediate violence which poses a clear and present danger to persons or property is present." *Id.*

Subsequent decisions from the North Carolina Court of Appeals confirm that ACLU-NC has no sound basis for self-censorship, given its role as a nonviolent protestor. In *State v. Riddle,* the North Carolina Court of Appeals again rejected a facial challenge to the Act. 262 S.E.2d 322, 325 (N.C. Ct. App. 1980). *Riddle* cited *Brooks* for the proposition that "mere presence at the scene of a riot may not alone be sufficient to show participation in it." *Id.* at 324. In *State v. Mitchell*, the North Carolina Court of Appeals held that the statute required "active participation by the defendant in the riotous activity." 429 S.E.2d 580, 582 (N.C. Ct. App. 1993). That court concluded that evidence of the defendant's violent conduct, which included an "apparent assault" on a police officer and an attempt to knock an officer off a table, satisfied the active participation requirement. *Id.* These decisions, which make clear that peaceful protestors cannot be charged with rioting, establish that ACLU-NC's fear of chilling is not objectively reasonable.

Finally, even if the Amended Complaint did adequately allege an intent to engage in conduct arguably proscribed by the statute or self-censorship (or both), ACLU-NC still has not alleged a credible threat of prosecution. "The most obvious way to demonstrate a credible threat of enforcement in the future, of course, is an enforcement action in the past." *Abbott*, 900 F.3d at 176 (citing *Driehaus*, 573 U.S. at 164). ACLU-NC, however, does not allege a single instance where its employees or members have been arrested for violating the statute. True, ACLU-NC alleges that its employees "have been arrested while participating in public protests or demonstrations on at least two occasions over the past

three years." Am. Compl. ¶ 31. But, because ACLU-NC does not allege that its employees were arrested for violating *this* Act, those arrests cannot be traced to the Act.

Elsewhere, the Amended Complaint alleges that others have been arrested and charged under the Act. Am. Compl. ¶ 78. Some of those charges, ACLU-NC alleges, were dismissed. Am. Comp. ¶ 78. But past prosecutions for violations of the Act—even prosecutions that were dropped—cannot establish a likelihood that ACLU-NC will be prosecuted for conduct falling entirely outside the statute's reach. *Ramirez*, 438 F.3d at 99 ("It is simply too much of a stretch to posit that the government's decision to prosecute a Riot Act charge" arising from a protest march "indicates a willingness to prosecute entirely peaceful First Amendment expression."). Moreover, ACLU-NC does not allege that any of those prosecuted were ACLU-NC members. ACLU-NC cannot ask this Court to redress grievances belonging to others or the general public. *Dep't of Educ. v. Brown*, Slip Op. at 9-10 (U.S. 2023).

At bottom, the harm that ACLU-NC alleges amounts to a fear that prosecutors may start enforcing the Anti-Riot Act in a manner that is contrary to the law's plain text, controlling state-court precedent, and historical practice. That kind of speculative "injury" is simply not sufficient to satisfy the requirements of Article III.

B. The Act does not injure ACLU-NC's organizational interests.

The same flaw plagues ACLU-NC's attempt to establish harm to its organizational interests. ACLU-NC alleges the Act forces it to expend resources mitigating the risk that its employees or members will be prosecuted under the Act. Because ACLU-NC does not

allege a substantial risk that its employees or members will be prosecuted under the Act, the costs they incur to mitigate that risk cannot constitute an injury-in-fact.

ACLU-NC alleges that it will incur costs to mitigate its liability and the liability of its employees and members under the Act; and will also likely incur costs defending employees who are wrongfully prosecuted under the Act. *See* Am. Compl. ¶¶ 26, 28, 30–31. But costs incurred to avoid a harm that "is not certainly impending" do not constitute an injury-in-fact. *Clapper*, 568 U.S. at 416. Were it otherwise, a plaintiff could "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* For the same reasons that ACLU-NC has failed to allege an imminent injury to its own or its members' expressive rights, it has failed to allege that there is a substantial risk of the harm it claims to have incurred costs to mitigate.

Because ACLU-NC has failed to establish an injury-in-fact traceable to the Act's definitional provision and redressable by this Court, ACLU-NC lacks standing to challenge the Act. This Court therefore lacks jurisdiction over ACLU-NC's Amended Complaint and should dismiss the Amended Complaint with prejudice. Fed. R. Civ. P. 12(b)(1).

II. ACLU-NC FAILS TO ALLEGE SUFFICIENT FACTS TO ESTABLISH THAT THE ANTI-RIOT ACT IS UNCONSTITUTIONAL.

Even if ACLU-NC had standing to challenge the Act, the Amended Complaint fails to adequately allege that the Act is unconstitutional. ACLU-NC launches only facial challenges at the Act. Facial challenges are "disfavored" because they "rest on speculation," ask courts to anticipate constitutional questions not necessarily raised, and

"short circuit the democratic process." *United States v. Chappell*, 691 F.3d 388, 392 (4th Cir. 2012). Even in the First Amendment context, facial challenges are "strong medicine" that should be employed "with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982) (cleaned up). Thus, to prevail on a facial challenge, a plaintiff must show "that no set of circumstances exists under which the Act would be valid," or, at the very least, that the statute is unconstitutional "in a substantial number of its applications." *Miselis*, 972 F.3d at 530 (cleaned up). ACLU-NC cannot make that showing here.

A. The definition of "riot" is not overbroad.

ACLU-NC alleges that the Act infringes free expression rights because it threatens criminal and civil liability on individuals peacefully exercising their expressive rights near someone who is violating the law. Am. Compl. ¶ 94. Properly construed, the Act does no such thing. And even if the Act did reach *some* expressive conduct, it is a negligible amount, especially compared to the Act's plainly legitimate sweep. Accordingly, ACLU-NC's overbreadth claim fails.[3]

[3] Sections 12 and 14 of the North Carolina Constitution provide similar rights as those provided by the First Amendment of the United States Constitution. *See State v. Petersillie*, 432 S.E.2d 832, 840 (N.C. 1993). Thus, ACLU-NC fails to allege that the Act is overbroad in violation of either the First Amendment or the North Carolina Constitution. Moreover, the Eleventh Amendment precludes Plaintiff from asserting state constitutional claims against state officials sued in their official capacity in federal court. *See, e.g.*, *Guseh v. N.C. Cent. Univ.*, 423 F. Supp. 2d 550, 561 (M.D.N.C. 2005) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103-17 (1984)).

The First Amendment explicitly protects individuals' speech and assembly rights. *See* U.S. Const., amend. I. Implicit in those protections is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). This right to associate "does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected." *Claiborne Hardware Co.*, 458 U.S. at 908. Thus, "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another." *United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004) *vacated* 543 U.S. 1097 (2005) *op. reinstated in relevant part* 405 F.3d 1034 (4th Cir. 2005).

But "[t]he First Amendment does not protect violence." *Claiborne Hardware Co.*, 458 U.S. at 916. Nor does any "federal rule of law restrict[] a State from imposing tort liability" on those who cause damage by violence or threats of violence. *Id.* Instead, a state may proscribe unlawful conduct occurring in the context of constitutionally protected activity, so long as it does so with "[p]recision of regulation." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

A statute is facially overbroad only if a provision of the statute, properly construed, "criminalizes a substantial amount of protected expressive activity" and that provision cannot be severed from the statute's legitimate portions. *United States v. Williams*, 553 U.S. 285, 297 (2008).

The first step in the overbreadth analysis is to construe the statute. ACLU-NC alleges that "[u]nder the definitional provision, an individual who encourages, organizes, or participates in a protest . . . may be held liable under the Act if they are in proximity to an act of violence or property destruction." Am. Compl. ¶ 94. ACLU-NC is incorrect.

According to the statute, a riot requires a "public disturbance." N.C. Gen. Stat. § 14-288.2(a). A "public disturbance" is "[a]ny annoying, disturbing, or alarming act or condition exceeding the bounds of social tolerance" that occurs in a public place or a place to which a substantial group of people have access. *Id.* § 288.1(8). But a riot is not just any public disturbance. No, a riot is a special type of public disturbance marked by two features: (1) it is an assemblage of three or more people; and (2) that assemblage engages in or threatens disorderly and violent conduct of such severity that that it results in or creates a clear and present danger of injury or damage to persons or property. *Id.* § 14-288.2(a). Thus, to engage in a riot, an individual must be one of three or more people *violently* creating an "annoying, disturbing, or alarming" condition. A peaceful protestor cannot be charged under the law because even if her protest is in public and annoying (such that it is a public disturbance) and involves many people (such that it is an assemblage of three or more people), it would not be *violent*. Section 14-288.2(g) reinforces this conclusion, providing that "[m]ere presence alone without an overt act is not sufficient to sustain a conviction pursuant to this section." Because the Act cannot apply to peaceful protestor who happens to find herself near an act of violence, the Act does not infringe protected association.

The North Carolina Supreme Court confirmed this plain reading of the Act's text in *Brooks.* 215 S.E.2d at 118-19. That opinion binds this Court. *Toghill v. Clarke*, 877 F.3d 547, 558 (4th Cir. 2017) (cleaned up); *see also Button*, 371 U.S. at 432 ("For us, the words of [a state]'s highest court are the words of the statute."). In *Brooks*, the state supreme court rejected a criminal defendant's facial challenge to the Act. 215 S.E.2d at 118. Like ACLU-NC, the defendant argued that the definition of riot was overbroad. *Id.* The North Carolina Supreme Court disagreed, holding that the definition of riot did not reach any "activity protected by the First Amendment" or "infringe[] upon the freedom of nonviolent assemblage." *Id.* at 118, 119. That is because, the North Carolina Supreme Court explained, "[a] public disturbance involving three or more people, no matter how noisy or boisterous, cannot, under the statutory definition, be a riot unless violence or the threat of immediate violence which poses a clear and present danger to persons or property is present." *Id.*

Relying on *Brooks*, North Carolina's lower courts have consistently required the State to produce evidence that a defendant personally engaged in conduct not protected by the First Amendment to support a conviction for violating the Act. *See Mitchell*, 429 S.E.2d at 582 (holding that the statute requires "active participation by the defendant in the riotous activity"); *Riddle,* 262 S.E.2d at 324 ("[M]ere presence at the scene of a riot may not alone be sufficient to show participation in it.").

If nothing else, these decisions demonstrate that the Act is susceptible to a narrowing construction that assuages constitutional concerns. Federal courts frequently uphold statutes that are susceptible to narrowing, constitutionally-compliant constructions.

Am. Booksellers Ass'n, Inc., 484 U.S at 397. Thus, at the very least, ACLU-NC's claims fail because this Court can construe the definitional provision to avoid constitutional concerns.

Properly construed, the definitional provision does not reach protected expressive conduct (either because the Act's plain text does not reach expressive conduct, *Brooks* interpreted the Act not to reach expressive conduct and that interpretation is binding, or the Act is susceptible to a limiting construction). Accordingly, ACLU-NC has failed to adequately allege that the Act is overbroad.

B. The definition of "riot" is not vague.

Finally, ACLU-NC argues that the Anti-Riot Act violates the Fourteenth Amendment's Due Process Clause because the Act's definitional provision is vague. Am. Compl. ¶¶ 82-90. ACLU-NC alleges that the definition of riot "fails to provide fair notice to ordinary people seeking to exercise their right to protest regarding their exposure to potential criminal and civil liability by merely being a part of a demonstration where violence or property destruction occurs." Am. Comp. ¶ 86. Like ACLU-NC's overbreadth argument, this one, too, is unconvincing.

The Fourteenth Amendment prohibits the State from imposing criminal penalties through vague laws. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).[4] "[A]n

[4] Section 19 of the North Carolina Constitution provides similar rights as those provided by the United States Constitution's Fourteenth Amendment. *State v. Bryan*, 614 S.E.2d 479, 485 (N.C. 2005). Thus, in addition to failing to adequately allege that the Act is vague in violation of the Fourteenth Amendment, ACLU-NC also fails to adequately allege that

enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* The State must therefore "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). But the Fourteenth Amendment does not demand "perfect clarity" or "precise guidance," even when a statute "restrict[s] expressive activity." *Williams*, 553 U.S. at 304. Instead, it merely demands "statutory definitions, narrowing context, or settled legal meanings," that ensure a law does not tie criminal culpability to "wholly subjective judgments." *Id.* at 306.

The Anti-Riot Act easily satisfies this threshold. Numerous courts at both the state and federal levels have rejected vagueness challenges to statutes with identical or nearly identical definitional provisions. *Miselis*, 972 F.3d at 544-45; *see also Abernathy v. Conroy*, 429 F.2d 1170, 1176 (4th Cir. 1970); *Douglas v. Pitcher*, 319 F. Supp. 706, 711 (E.D. La. 1970); *United States v. Matthews*, 419 F.2d 1177, 1181 (D.C. Cir. 1969); *Heard v. Rizzo*, 281 F. Supp. 720, 740 (E.D. Penn. 1968) *aff'd* 392 U.S. 646 (1968); *People v. Bridges*, 620 P.2d 1, 4 (Colo. 1980). As those courts have explained, anti-rioting laws that include a requirement of violence or threat of violence are sufficiently narrow to eliminate the risk of subjective enforcement. *Miselis*, 972 F.3d at 544-45; *see also Abernathy*, 429 F.2d at 1176 (rejecting vagueness challenge to South Carolina's definition of riot because it included a violence requirement).

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the Act is vague in violation of the North Carolina Constitution. And, again, the Eleventh Amendment bars this claim. *See supra* note 3.

In *Miselis*, for example, the Fourth Circuit rejected a criminal defendant's vagueness challenge to the federal Anti-Riot Act's definition of "riot" because the definition's requirement of "an act or threat of *violence* renders the scope of proscribed conduct significantly more definite." 972 F.3d at 545. "[V]iolence," *Miselis* explained, has a "settled and objective meaning," so its inclusion in the definition "serves to exclude a wide range of conduct that might constitute a 'public disturbance' judged subjectively." *Id.*

The Anti-Riot Act is wholly consistent with cases like *Miselis*. As previously explained, the statute's definition of "riot" requires an act or threat of violence. *See Brooks*, 215 S.E.2d at 118-19. The definition is therefore not vague as to whether peaceful protestors can be prosecuted or held liable for violating the Act. They plainly cannot.

North Carolina's definition of riot also includes other features that *Miselis* held further ameliorated the risk of subjective enforcement. For example, the Act's requirement that the public disturbance constituting a riot include three or more people helps eliminate vagueness because it ensures that "ordinary [public disturbances], accomplished by less than a crowd of three, don't rise to the level of riotous conduct." *Miselis*, 972 F.3d at 545. The Act's requirement that the violent public disturbance result in bodily injury, property damage, or a clear and present danger of bodily injury or property damage, meanwhile, "exclude[s] violence that entails an insignificant or remote risk of harm to others." *Id.*

The Anti-Riot Act provides clear notice to protestors regarding the kind of conduct that might give rise to prosecution: If you "willfully engage[ ]" in or "incite[ ]" a "public disturbance" that causes or threatens "injury or damage," you can be prosecuted. As the

North Carolina Supreme Court has explained, "[t]hese are not words so vague and imprecise that men of common intelligence and understanding must guess at their meanings." *Brooks*, 215 S.E.2d at 400. ACLU-NC's vagueness challenge therefore fails.

CONCLUSION

For all of the reasons detailed above, the Attorney General respectfully requests that the Court grant his Motion to Dismiss.

Respectfully submitted, this the 20th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Local Rule 7.3(d) because, excluding the parts of the brief exempted by Rule 7.3(d) (cover page, caption, signature lines, and certificates of counsel), this brief contains fewer than 6,250 words. This brief also complies with Local Rule 7.1(a).

/s/ South A. Moore
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2023, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT STEIN'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties' attorneys as registered CM/ECF users:

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