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 RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

ACLU-NC asks this Court to enjoin the enforcement of North Carolina's Anti-Riot Act, which has banned certain violent and destructive conduct for more than 50 years. ACLU-NC seeks this extraordinary relief even though the North Carolina Supreme Court considered and rejected a similar First Amendment challenge to the law five decades ago in *State v. Brooks*, 215 S.E.2d 111 (N.C. 1975). *Brooks* holds that the Anti-Riot Act must be construed narrowly, so as not to reach "activity protected by the First Amendment." *Id.*

at 401.

Since *Brooks*, moreover, the law has only become more clear in avoiding non-violent, constitutional conduct: earlier this year, the General Assembly added a provision that underscores that "[m]ere presence [at a riot] alone without an overt act is not sufficient to sustain a conviction." N.C. Sess. L. 2023-6, § 1. Together, both *Brooks* and these recent revisions to the law confirm that ACLU-NC is simply wrong to argue that its members could theoretically be prosecuted or convicted for participating peacefully in a protest or assembly.

If this Court grants Defendants' pending motions to dismiss, it need not reach this motion. Regardless, ACLU-NC's motion should be denied for the same reasons that dismissal is appropriate. ACLU-NC cannot establish a likelihood of success on its constitutional claims because the organization lacks standing and because *Brooks* binds this Court and holds that the Act is neither overbroad nor vague.

In a First Amendment case, a plaintiff's failure to establish a likelihood of success on the merits is usually sufficient, standing alone, to doom a motion for a preliminary injunction. But here, the other three elements—irreparable harm, balance of equities, and public interest—also favor Defendants. ACLU-NC cannot establish irreparable injury absent an injunction, because it alleges no intent to violate the Act as appropriately construed. ACLU-NC also cannot establish that the balance of harms of enforcing a constitutional statute favors the organization. The public interest, meanwhile, clearly favors avoiding the kinds of violent outcomes—death, serious injury, assaults of first responders, and significant property damage—that the Act was enacted to prevent.

STATEMENT OF FACTS

The North Carolina General Assembly enacted the Anti-Riot Act in 1969. 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.G.S. §§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 to persons or property." N.C.G.S. §14-288.2(a). The definition of riot remains unchanged from the initial Act. D.E.25 ¶ 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.G.S. §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.G.S. §§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. *See id.* §14-288.2(f). The legislature further clarified that "[m]ere presence [at

[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. *See* N.C. Sess. L. 2023-71, §4(a).

a riot] alone without an overt act is not sufficient to sustain a conviction" under the Act. *Id.* § 14-288.2(g).

In the wake of these amendments, ACLU-NC brought suit under 42 U.S.C. §1983 against the Attorney General and three District Attorneys as representatives of a class. D.E.25 ¶¶ 7, 33-42.

ACLU-NC alleges that the Act impairs the organization's mission and infringes its members' constitutional rights. ACLU-NC, its employees, and its members encourage, organize, and participate in protests and demonstrations. D.E.25 ¶¶ 13-15, 17-21. ACLU-NC, its members, and its employees intend to continue these activities. D.E.25 ¶ 18.

ACLU-NC alleges that due to vagueness, there is a "risk that peaceful protestors could face liability under the Act." D.E.25 ¶ 29. The risk, ACLU-NC further alleges, causes a chill that impedes the organization's ability to protest and demonstrate. D.E.25 ¶ 25. Although ACLU-NC does not allege that its members have been arrested or charged under the Act, ACLU-NC alleges that it would "likely pay" for an employee's defense if needed. D.E.25 ¶ 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. D.E.25 ¶ 26. ACLU-NC, its members, and its employees "will adjust their plans" to engage

[2] On two occasions in the past three years, police have arrested ACLU-NC employees who were participating in public protests or demonstrations. D.E.25 ¶ 31. ACLU-NC does not allege that those two employees were arrested or charged with violating this Act. *See* D.E.25 ¶ 31; *see also* D.E.31-7 ¶ 13 (one employee was arrested for failure to disperse); ¶ 15 (a second employee was arrested for unspecified charges that were quickly dropped).

in peaceful protests and demonstration, and "may choose to forego protesting and demonstrating entirely under certain circumstances." D.E.25 ¶ 27.

In its memorandum, ACLU-NC claims there have been 150 arrests of protesters generally in the last three years, including of peaceful protesters at race-related demonstrations. But the evidence that ACLU-NC relies on does not suggest that anywhere near that number of *peaceful* protesters were arrested—the news articles that ACLU-NC cites explain that many of the arrestees engaged in *violent* conduct. Nor does ACLU-NC's evidence establish that many of the protesters referenced were arrested for violating *the Anti-Riot Act*, as opposed to another law. *See* D.E.31-4, D.E.31-5 & D.E.31-6. Moreover, ACLU-NC states that it has continued to encourage its members and the public to protest. D.E.31-7 ¶ 20.

ACLU-NC asks the Court to preliminarily enjoin the Act in its entirety. D.E.25 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. D.E.25 at 39, Prayer for Relief.

QUESTION PRESENTED

Whether ACLU-NC has established that it is entitled to the extraordinary remedy of preliminary injunctive relief.

LEGAL STANDARD

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief' and may never be awarded 'as of right.'" *Mt. Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353,

366 (4th Cir. 2019) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 24 (2008)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

The plaintiff has the burden to prove each of the *Winter* factors. *Id*. However, in a First Amendment case, likelihood of success on the merits is linked to the other factors. Where the plaintiff establishes a likely constitutional violation, the other three factors are satisfied, because the loss of constitutional freedoms constitutes irreparable injury and the equities favor preventing enforcement of unconstitutional restrictions. *Leaders of a Beautiful Struggle v. Balt. Police Dep't,* 2 F.4th 330, 346 (4th Cir. 2021) (en banc); *see also Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507 (4th Cir. 2002). By contrast, where a statute is likely constitutional, there is no irreparable harm to a plaintiff from its enforcement and the balance of equities favors enforcement. *W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("[P]laintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim").

ARGUMENT

ACLU-NC requests that this Court bar Defendants from enforcing the Act because it purportedly violates ACLU-NC's rights under the United States and North Carolina constitutions. ACLU-NC is unlikely to succeed on its claims, because it lacks standing to sue. Furthermore, when narrowly construed, as binding precedent in North Carolina

requires, the statute is constitutional. Because ACLU-NC cannot establish a likelihood of success and therefore cannot establish irreparable injury or that the balance of harms and public interest favors an injunction, ACLU-NC's request for preliminary injunction should be denied.

I. ACLU-NC CANNOT BASE ITS REQUEST FOR AN INJUNCTION ON THE NORTH CAROLINA CONSTITUTION.

ACLU-NC's claims under the N.C. Constitution provide no basis for the requested relief. The Eleventh Amendment bars federal court injunctions against state officials for violation of state law. *E.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *see also Guseh v. N.C. Cent. Univ.*, 423 F. Supp. 2d 550, 561 (M.D.N.C. 2005). Accordingly, ACLU-NC's allegations that the Act violates the state constitution provide no basis for injunctive relief, and this Court should not consider state law in deciding this motion. Regardless, ACLU-NC's state constitutional claims are also unlikely to succeed for the same reasons the federal constitutional claims fail.

II. ACLU-NC IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS CONSTITUTIONAL CLAIMS.

Defendants have moved to dismiss ACLU-NC's claims. For the reasons stated in support of that motion, ACLU-NC's claims are unlikely to succeed on the merits.[3]

A. ACLU-NC is Unlikely to Succeed on its Claims Because it Lacks Standing.

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

[3] For the Court's convenience, Defendant Stein explains why ACLU-NC is unlikely to succeed here but notes that these arguments mirror the arguments previously made.

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).

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).

Either way, to establish standing, ACLU-NC 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.

1. 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; but the threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 (2013).

In a pre-enforcement challenge like this, 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.*

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).

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* D.E.25 ¶¶ 13, 17, 18, 21. But the Act does not prohibit *peaceful* protests, only riots. *See* N.C.G.S. §14-288.2(b). ACLU-NC alleges that there is a "risk that peaceful protestors could face

liability under the Act." D.E.25 ¶ 29. But a speculative "risk" is not enough. *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. 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). ACLU-NC need not 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, it is unclear how ACLU-NC can trace a sudden chill to the 54-year-old definitional provision. Nor can ACLU-NC blame the more recent 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, ACLU-NC's fears of a chilling effect 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, 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.

Elsewhere, the Amended Complaint alleges that others have been arrested and charged under the Act. D.E.25 ¶ 78. But past prosecutions of individuals whose conduct falls squarely *inside* the scope of the Anti-Riot Act does not establish a likelihood that ACLU-NC members will be prosecuted for conduct falling entirely *outside* the statute's reach. *Ramirez*, 438 F.3d at 99. ACLU-NC does not allege that any of the individuals who have been prosecuted previously were ACLU-NC members or employees. 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 not sufficient to satisfy Article III's requirements.

2. 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. Because ACLU-NC does not allege a substantial risk of prosecution, the costs to mitigate that risk cannot constitute an injury-in-fact.

ACLU-NC alleges that it will incur costs to mitigate liability and will also likely incur costs defending employees who are wrongfully prosecuted under the Act. *See* D.E.25 ¶¶ 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. Thus, for the same reasons that ACLU-NC has failed to allege an imminent injury, 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.

B. ACLU-NC is Unlikely to Succeed on its Facial Constitutional Claims.

ACLU-NC is also unlikely to succeed for another reason: 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." *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, 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." *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020) (cleaned up). ACLU-NC cannot make that showing.

1. 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. D.E.25 ¶ 94. Properly construed, the Act does no such thing. Accordingly, ACLU-NC's overbreadth claim fails.

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...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." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982). 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." *NAACP 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." D.E.25 ¶ 94. ACLU-NC is incorrect.

According to the statute, a riot requires a "public disturbance." N.C.G.S. §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). 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 protestors, the Act does not infringe protected association.[4]

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 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

[4] This is consistent with *NAACP v. Clairborne*, 458 U.S. 886 (1982), cited by ACLU-NC, in which the Supreme Court held that individuals who organized a boycott could not be liable for acts of physical force and violence undertaken by boycott participants.

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. *Cf. Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (adopting narrowing construction). Thus, at the very least, ACLU-NC's claims are likely to fail because this Court can construe the definitional provision to avoid constitutional concerns.

2. 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. D.E.25 ¶¶ 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." D.E.25 ¶ 86. This argument, too, is unconvincing.

The Fourteenth Amendment does not permit the State to impose criminal penalties through vague laws. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute is void for vagueness if it does not "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 the statue "restrict[s] expressive activity." *Williams*, 553 U.S. at 304. Instead, it merely demands "statutory definitions, narrowing context, or settled

legal meanings," that ensure the law does not tie criminal culpability to "wholly subjective judgments." *Id.* at 306.

The Anti-Riot Act easily satisfies this threshold. Numerous courts 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.

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 544-45. "[V]iolence," *Miselis* explained, has a "settled and objective meaning," so its inclusion in the definition of riot "serves to exclude a wide range of conduct that might constitute a 'public disturbance' judged subjectively." *Id.* at 545

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 property 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 is therefore also likely to fail.

3. The binding construction in *Brooks* meaningfully distinguishes this case from the two cases relied upon by ACLU-NC.

ACLU-NC relies on two cases in which courts purportedly have enjoined similar laws in other states. But in each of those cases, a federal appellate court certified a question regarding the challenged statute's construction to a state court, suggesting that a limiting construction that renders the statute constitutional would warrant a different result. Here, the North Carolina Supreme Court has already supplied a limiting construction.

In *Dream Defenders v DeSantis*, the district court enjoined Florida's anti-riot act.[5] 559 F. Supp. 3d 1238, 1283 (N.D. Fla. 2021). But on appeal, the Eleventh Circuit certified the question of how to interpret the law to the Florida Supreme Court. *Dream Defenders v. Governor of Fla*., 57 F.4th 879, 890 (11th Cir. 2023) The Eleventh Circuit explained that determining the likelihood of success of the plaintiffs' vagueness and overbreadth claims required the state court's interpretation of what the statute covers. *Id.* The Court noted that certification would provide the Florida Supreme Court with an opportunity to interpret the law in a constitutional manner. *Id.*

Similarly, in *Oklahoma State Conference of NAACP v. O'Connor,* the district court enjoined an Oklahoma law imposing liability on organizations that conspire with persons found to have violated one of Oklahoma's anti-riot laws. 569 F. Supp. 3d 1145 (W.D. Okla. 2021). Subsequently, however, the Tenth Circuit certified the question of how to construe the law to an Oklahoma state court. *Okla. State Conf. of the NAACP v. O'Connor,* 2022 U.S. App. LEXIS 11299 (10th Cir. 2022).

Here, the North Carolina Supreme Court has already provided a binding, limiting construction of the Act that is constitutional. Although ACLU-NC does not discuss the

[5] ACLU-NC contends that the Florida law was enjoined even though it was less vague and overbroad because it contained an intent requirement. But the North Carolina Anti-Riot Act repeatedly uses the word "willfully" to describe the conduct criminalized by the statute. *See* N.C.G.S. §§14-288.2(b)-(e1). Willfully, of course, is an intent requirement. *E.g., State v. James,* 184 N.C. App. 149, 152 (2007). Indeed, North Carolina Courts have interpreted "willfully" to require evidence that the defendant not only intended to commit an offense, but committed the offense "purposely and deliberately in violation of law." *State v. Lamp*, 884 S.E.2d 623, 629 (N.C. 2022). The inclusion of an intent requirement is thus not a distinction between the North Carolina and Florida laws.

Brooks decision, its claim that the North Carolina Court of Appeals has merely "gestured toward limits" is misleading. D.E. 31 at 16. As discussed above, the North Carolina Supreme Court's binding construction in *Brooks* appropriately limits the Act and renders it constitutional.

III. THE OTHER FACTORS WEIGH AGAINST AN INJUNCTION.

The failure to establish likelihood of success, alone, dooms ACLU-NC's motion. But each of the remaining factors weighs against an injunction as well.

A. ACLU-NC Cannot Demonstrate That It Will Suffer Irreparable Harm If Injunctive Relief Is Not Granted.

The second factor of the *Winter* test requires that plaintiffs demonstrate they will suffer irreparable harm if an injunction is not issued. *Winter*, 555 U.S. at 20. Because ACLU-NC cannot show likelihood of success on the merits, it cannot establish irreparable harm. Enforcement of a constitutional statute does not inflict any injury. *W.V. Ass'n of Club Owners & Fraternal Servs., Inc.*, 553 F.3d at 298.

Furthermore, as discussed above, ACLU-NC has not established any harm or threat of harm from the Act's enforcement. While ACLU-NC alleges that two of its employees have been arrested for protesting generally, ACLU-NC does not allege that any of its employees or members have been arrested (or threatened with arrest) for violating this Act. D.E.31-7, ¶¶ 13, 15. Significantly, ACLU-NC has not alleged that it intends to engage in any conduct actually proscribed by the statute. Instead, ACLU-NC emphasizes its commitment to protesting and fails to disclaim an intent to continue. D.E.31-7 ¶ 20. Thus, ACLU-NC does not establish that enforcement of the Act will irreparably harm ACLU-

NC (or its members or employees).

Nor can ACLU-NC establish irreparable harm based on enhanced penalties where ACLU-NC has established no threat that they would be subject to them. For example, ACLU-NC contends that the enhanced penalties are overly harsh as they could result in felony convictions and prison time, but the felony category is only for conduct that involves brandishing a weapon or using a dangerous substance; assault on emergency personnel; or significant property damage, serious bodily injury, or death. N.C.G.S. §§14-288.2 & 14-288.9. ACLU-NC cannot establish that it (or its members or employees) will be subject to any of these penalties or otherwise suffer irreparable harm without an injunction.

B. The Equities to the Parties and the Public Interest Weigh Against an Injunction.

The final two *Winter* factors require ACLU-NC to demonstrate that the equities tip in its favor and that an injunction is in the public interest. *Id.* at 20. In cases involving challenges to governmental action, courts typically consider the balance of the equities and the public interest factors together. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

Furthermore, the State had specific harms it intended to remedy with the Act, as amended. As noted in the title of Session Law 2023-6, the amendments were intended to increase penalties for—and thus deter—damage to property, serious bodily injury, and

death, and assault of emergency personnel during a riot or other emergency. *See* N.C. Sess. L. 2023-6. It is well established that these aims are a compelling governmental objective. The Supreme Court has recognized "legitimate and compelling state interest in protecting the community from crime." *Schall v. Martin,* 467 U.S. 253, 264 (1984). In addition, it has held that the Government's interest in protecting the safety and lives of its citizens are "legitimate and compelling." *United States v. Salerno*, 481 U.S. 739, 750 (1987). The Fourth Circuit concurs. *See, e.g.*, *Kolbe v. Hogan,* 849 F.3d 114, 139 (4th Cir. 2017) (a state's "interest in the protection of its citizenry and the public safety is not only substantial, but compelling."); *United States v. Hosford,* 843 F.3d 161, 168 (4th Cir. 2016) ("[I]nterests in public safety and preventing crime are indisputably substantial governmental interests.").

CONCLUSION

For the foregoing reasons, ACLU-NC's motion for a preliminary injunction should be denied.

Respectfully submitted, this the 28th day of July, 2023.

JOSHUA H. STEIN
Attorney General

/s/ Stephanie Brennan
Special Deputy Attorney General
N.C. Bar No. 35955
sbrennan@ncdoj.gov

/s/ Matthew Tulchin
Special Deputy Attorney General
N.C. Bar No. 43921
mtulchin@ncdoj.gov

/s/ South A. Moore
South A. Moore
Assistant General Counsel
N.C. Bar No. 55175
smoore@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629
Tele: (919) 716-6920
Fax: (919) 716-6764

CERTIFICATE OF COMPLIANCE WITH RULE 7.3(d)

Undersigned counsel certifies that the present filing is in compliance with Local Rule 7.3(d) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina including the body of the brief, heading and footnotes, and contains no more than 6250 words as indicated by Word, the program used to prepare the brief.

Respectfully submitted this the 28th day of July, 2023.

/s/ Stephanie A. Brennan
Stephanie A. Brennan
Special Deputy Attorney General