**No. 21-6156**

**IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

OKLAHOMA STATE CONFERENCE OF THE NAACP,
*Plaintiff-Appellee*,

v.

JOHN M. O'CONNOR, *in his official capacity*, &
DAVID PRATER, *in his official capacity*,
*Defendants-Appellants*.

*On Appeal from the United States District Court for the Western District of Oklahoma*
*The Hon. Robin J. Cauthron*
*Case No. 21-CV-00859-C*

# BRIEF FOR AMICI CURIAE THE PROTECT DEMOCRACY PROJECT, PEN AMERICA, AND THE NISKANEN CENTER IN SUPPORT OF APPELLEE

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the following persons have or may have an interest in the outcome of this case or appeal, in addition to those listed in Defendants-Appellants' and Plaintiff-Appellee's certificates:

1. Bookbinder, David, Attorney for *Amicus Curiae* The Niskanen Center
2. The Niskanen Center, *Amicus Curiae*
3. Parker, Kristy, Attorney for *Amici Curiae*
4. PEN America, *Amicus Curiae*
5. The Protect Democracy Project, *Amicus Curiae*

Counsel for *amici* certify that *Amici Curiae* PEN America, The Niskanen Center, and The Protect Democracy Project have no parent corporations or any other publicly held corporations that own 10% or more of their stock.

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## INTEREST OF AMICI CURIAE[1]

With this brief, *Amici* seek to assist the Court by explaining the importance of the right to dissent to the framers of our Constitution, the connection between quashing dissent and anti-democratic and authoritarian forms of government, and the robust body of law that protects the right to protest and prohibits enforcement of Oklahoma's House Bill 1674 ("HB1674"), the anti-protest law at issue in this appeal.

*Amici* are nonprofit, nonpartisan public-policy organizations with an enduring interest in protecting the cornerstones of a robust democracy, including the rights to dissent and protest.

The Protect Democracy Project is dedicated to preventing our democracy from declining into a more authoritarian form of government. It challenges abuses of power that violate constitutional protections for dissenters, marginalized communities, politically disfavored groups, and a free press.

PEN America celebrates free expression and fights for the right to criticize governments without retaliation, and for all the rights associated with a free press, both core elements of a democracy and free expression.

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[1] The parties have consented to the filing of this brief *amici curiae*. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No such monetary contributions were made by anyone other than *amici* and their counsel.

The Niskanen Center works to promote an open society: a social order that is open to political, cultural, and social change; free inquiry; individual autonomy; different beliefs and cultures; the search for truth; and a government that protects these freedoms.

## SUMMARY OF ARGUMENT

Appellee Oklahoma NAACP ("NAACP") is challenging HB1674, an anti-protest law the Oklahoma legislature enacted in response to widespread demonstrations advocating police accountability for killing unarmed Black Americans.[2] NAACP thus stands at the center of efforts to protect what the framers of our Constitution viewed as one of the most important pillars of a democracy—the right to dissent. Dissent was the driver of the movement for American independence and protecting the right to dissent was a central concern of those who originally designed our Constitution. Our courts have faced repeated efforts to curtail it—often out of opposition to our most significant movements for democratic expansion.

This brief explains that history; how quashing dissent operates as a tool of authoritarian oppression that is now on the rise both internationally and here at home; and how the law our courts have developed to protect the right to dissent demands that the Oklahoma law be invalidated.

In short, if allowed to go into effect, HB1674, which is both vague and overbroad, will have a chilling effect on the First Amendment rights of the very organizations that have been instrumental in securing and protecting those rights—and so many others—for all Americans. While inspired by protests aimed at police

[2] Alexandra Villareal, *New Oklahoma Law Targets Protesters While Protecting Drivers Who Hit Them*, The Guardian (Apr. 22, 2021) https://www.theguardian.com/us-news/2021/apr/22/oklahoma-law-protesters-drivers.

reform, HB1674 sweeps more broadly, encompassing and chilling virtually all protests for whatever purpose, including protest activity aimed at government mask mandates due to the COVID-19 pandemic, public school curricula, and restrictions on gun ownership. In other words, a law aimed at silencing one end of the political spectrum chills speech all along it. Such a law is not only unconstitutional, but also shreds the right to dissent that is the foundation of our democracy.

## ARGUMENT

### I. Public Protests Are Fundamental to Our Political and Constitutional History

The right to protest is rooted in the First Amendment's speech, assembly, and petition clauses, underscoring its importance to the framers of our Constitution. The framers included these rights in the Bill of Rights out of a recognition that public assemblies and protests had been critical features of colonial self-government and drove the movement to declare independence from the British Crown. The framers designed the right to freely gather and speak to maximize opportunities for dissenting and disfavored groups to meaningfully participate in the democratic process and check political power, thus furthering core values of democratic self-determination.

In the centuries since the Bill of Rights was ratified, the fundamental right to assemble in protest has been a pillar of our democracy and an engine of its development. But especially when exercised by disfavored groups, the right has also been uniquely vulnerable to mob and state repression. At key inflection points of

social and political change, from the movement to abolish slavery to the twentieth-century civil rights movement and beyond, protest movements have challenged and shaped the conscience of the American people. And since the middle of the last century, our courts have become protectors of these most precious of rights. The following discussion traces our country's history of protest and dissent, the weaving of the lessons from that history into the framing of the First Amendment, and the courts' reliance on history in their interpretation of its reach.

### A. Assembly and protest in the Colonial Era

More than a century before the American Revolution, colonists gathered in local and provincial assemblies to deliberate on public affairs and govern themselves.[3] Efforts by the British Crown to suppress these town assemblies and other public protests helped inspire the independence movement. Colonists began assembling in earnest to contest taxes levied without representation through the Sugar Act of 1764, the Stamp Act of 1765, and the Townshend Acts of 1767 (public protest over which led to the Boston Massacre of 1770); protests eventually led to these laws' repeal.[4]

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[3] *See* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1663-85 (2021).

[4] *A Report of the Record Commissioners of the City of Boston: Containing the Boston Town Records, 1758-1769* 122, 152 (Boston: Rockwell and Churchill 1886); Robert J. Chaffin, *The Townshend Acts Crisis, 1767-1770*, *in A Companion to the American Revolution* 134 (Jack P. Greene & J.R. Pole eds., 2000).

In January 1773, Massachusetts Governor Thomas Hutchinson condemned the colonists for "having assumed the Name of legal Town Meetings" in assembling to challenge British rule.[5] In March of that year, Hutchinson reiterated that it was illegal "for the Inhabitants of Towns, in their Corporate Capacity, to meet and determine upon Points which the Law gives them no Power to act upon."[6] The colonists disagreed, responding that "it is the indisputable Right of all or any of his Majesty's Subjects in this Province, regularly and orderly to meet together to state the Grievances they labor under; and to propose and unite in such constitutional Measures as they shall judge necessary or proper to obtain Redress."[7]

The colonial protest movement surged with the defiant Boston Tea Party. "This was the boldest stroke which had yet been struck in America," Governor Hutchinson wrote disapprovingly.[8] And it provoked an authoritarian response from Parliament through the Intolerable Acts, which sought to punish Americans by ending local self-governance, violating rights and liberties, and shutting down commerce.[9]

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[5] Thomas Hutchinson, Speech at the Massachusetts House of Representatives (Jan. 6, 1773), *in* 49 *Journals of the House of Representatives of Massachusetts 1772-1773*, at 6.

[6] *Id.* at 114, 116-117.

[7] Committee of the House of Representatives, Response to Hutchinson *in* 49 *Journals of the House of Representatives of Massachusetts 1772-1773,* at 90-91.

[8] Thomas Hutchinson, *The History of the Province of Massachusetts Bay, from the Year 1750, Until June, 1774* 439 (London, John Murray 1828).

[9] 17 *The Parliamentary History of England* 1193 (London, T.C. Hansard 1813) (summarizing the speech of Lord North on March 28, 1774); Boston Port Act 1774, 14 Geo. 3 c. 19 (Eng.).

Against this backdrop, colonists organized the First Continental Congress in 1774 and acted to protect the right to protest. In its Declaration of Rights, the Congress objected that "[a]ssemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances."[10] The Declaration further proclaimed: "That [American colonists] have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."[11]

**B. Including the right to protest in the Constitution**

Following the Revolutionary War and the failure of the Articles of Confederation, enshrining rights protecting protest was a central feature of the debates surrounding the content of the new Constitution. In 1789, James Madison offered the constitutional amendments that would become the Bill of Rights, including an amendment protecting free speech, assembly, and petition rights.[12]

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[10]1 *Journals of the Continental Congress 1774-1789*, at 63, 66-67 (Worthington Chauncey Ford ed., 1904) (declaration and resolves of the First Continental Congress (October 14, 1774)).

[11] *Id.* at 70.

[12]1 *Annals of Congress* 451-53 (1789) (Joseph Gales ed., 1834) ("The people shall not be deprived or abridged of their right to speak, or to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, remonstrances, for redress of their grievances.").

The debates in Congress on the enactment and meaning of the First Amendment demonstrate an intent to ensure broad protections for public protest.[13] This is especially apparent in the debates on the Assembly Clause and whether the right to assemble would be limited to situations where the purpose of assembly was "for the common good," as Madison's proposed amendment provided. During the House debates, one representative argued that a right of assembly limited by a popular notion of the "common good" risked leaving dissenters or other politically disfavored people out of its constitutional protection.[14] The final version of the amendment embraced a broad right to dissent by omitting the "common good" language.

Congress also debated whether a distinct right to assembly was even required, given its inseparability from free speech. Representative Theodore Sedgwick moved to strike the Assembly Clause on the ground that it was redundant and subsumed within the right to free speech.[15] In rebuttal, Representative John Page underscored the significance of specifying a right of assembly:

> [Sedgwick] supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not, but let me observe to

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[13] *Cf. Bridges v. California*, 314 U.S. 252, 265 (1941) ("No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."); Michael McConnell, *Freedom by Association*, First Things (Aug. 2012), https://www.firstthings.com/article/2012/08/freedom-by-association (The "declaration [in the Bill of Rights] of a freedom of assembly was a break from [English] history," because in Britain, "the people were not free to assemble in the streets and parks without official permission.").

[14] 1 *Annals of Cong.* 760 (1789).

[15] *Id.* at 759 (statement of Representative Sedgwick).

> him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.[16]

After Page's speech, the House rejected Sedgwick's motion to excise the Assembly Clause by "a considerable majority."[17]

### C. Importance of protest in the abolition movement and political backlash

Dissent and protest drove key social and political change throughout the nineteenth century, bending public opinion toward justice even as the state establishment was slow to give force to protesters' First Amendment rights.

Government attempts to suppress antislavery activists' speech and assembly exemplified the vulnerability of politically disfavored expression. In the 1830s, abolitionists began organizing societies to launch a public campaign to end slavery.[18] The movement rapidly grew, the number of societies increasing from one in 1833 to

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[16] *Id.* at 760. Page's allusion to a man's "right to wear his hat" carried significant and immediate weight with his fellow members of Congress—"equivalent to half an hour of oratory"—as a reference to the 1670 trial of William Penn, in which he was convicted of contempt of court for refusing to remove his hat in court out of religious commitment. Irving Brant, *The Bill of Rights: Its Origin and Meaning* 55-56 (1965); *see also* John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 24-25 (2012).

[17] 1 *Annals of Cong.* 761 (1789).

[18] Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785, 798 (1995).

1,006 by 1837.[19] In addition to organizing new societies, abolitionists held public meetings and conventions, mass-mailed antislavery literature to the South, and petitioned Congress.[20] With their energetic organizing and explicit call for immediate abolition, the antislavery societies faced enormous backlash in both the North and the South.[21] Mob violence, typically led by "community leaders ... of property and standing" and implicitly sanctioned by those in authority, prevented or disrupted abolitionist assemblies.[22]

For example, in 1835, an Oneida County, New York, antislavery society secured a courtroom to host an organizational meeting,[23] but the local government withdrew permission in response to public disapproval.[24] A mob forced the abolitionists out of their backup location, a church.[25] A mob also descended on the office of a local abolition-supporting newspaper, throwing the paper's type into the street.[26] Members of Congress expressed approval of mob violence to silence the

[19] *Id.* at 800.
[20] *Id.*
[21] *Id.* at 800-02.
[22] *Id.* at 801.
[23] 49 *Niles' Wkly. Reg.* 145, 146 (1835).
[24] Curtis, *supra* note 18, at 809.
[25] *Id.* at 809-10.
[26] *Id.* at 810.

abolitionists' protest.[27] President Jackson encouraged Congress to pass legislation to ban mailing abolitionist publications to the South.[28]

Despite persistent government-approved efforts to subdue antislavery protest, broad social support for free speech values overcame the opposition from mobs and other suppressors, including those backed by political leaders.[29] A quarter century later, the Republican party's 1860 platform called for abolition.[30]

In the antebellum South, meanwhile, state lawmakers who recognized the significance of protest to self-governance sought to deny Black Americans' exercise of assembly and expression.[31] An 1804 Virginia law, for example, declared any meeting of enslaved people at night as an unlawful assembly.[32] And by 1835, most southern states had forbidden free Black citizens from assembling and organizing.[33]

Reconstruction Era lawmakers responded to this anti-democratic suppression by recognizing the fundamental liberties of newly emancipated Black citizens through the Fourteenth Amendment.[34] Yet political violence and other attempts to deny Black

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[27] *Id.* at 810-11; *see also, e.g.*, *Cong. Globe*, 24th Cong., 1st Sess. 78 (1836).

[28] Andrew Jackson, Seventh Annual Message to Congress, *in* 3 *A Compilation of the Messages and Papers of the Presidents 1789 -1897* 147, 176 (James Richardson ed., 1896).

[29] Curtis, *supra* note 18, at 866.

[30] *National Party Platforms 1840-1964*, at 32 (Kirk Porter & Donald Johnson eds., 1956).

[31] *See* Inazu, *supra* note 16, at 30-33.

[32] June Purcell Guild, *Black Laws of Virginia: A Summary of the Legislative Acts of Virginia Concerning Negroes from Earliest Times to the Present* 71 (1936).

[33] *See* Inazu, *supra* note 16, at 32.

[34] *See* Ashutosh Bhagwat, *Associational Speech*, 120 Yale L.J. 978, 992 (2011).

Americans their legal rights by groups such as the Ku Klux Klan underscored the ongoing threat to the assembly rights of anyone challenging the status quo. In 1866, for instance, when Louisiana Republicans convened a constitutional convention to enfranchise Black citizens, a mob of police and white Louisianans fired into the convention building, and pursued, shot, clubbed, and beat delegates and their supporters, killing 40 and wounding another 136.[35]

In the aftermath of such violence and intimidation, Congress passed the Enforcement Acts of 1870 and 1871.[36] The 1870 Act criminalized, among other things, conspiracy "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[37]

In 1875, however, the Supreme Court severely curtailed the reach of the federal government's power to protect Black citizens' constitutionally guaranteed civil rights. In *United States v. Cruikshank*, the Court overturned the convictions of white vigilantes that, in an armed mob of former Confederate soldiers and Ku Klux Klan members, massacred scores of Black Americans.[38] 92 U.S. 542 (1875). The Court held that the

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[35] Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 136 (1986).

[36] Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

[37] § 6, 16 Stat. at 141.

[38] *See also* Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, Smithsonian Magazine (Apr. 13, 2016), https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/.

First Amendment "right of the people peaceably to assemble for lawful purposes" applied only against the federal government. *Id.* at 551-52. More than six decades would pass until the Court would incorporate the First Amendment's right of freedom of assembly against the states. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

Thus, while protest throughout the nineteenth century helped propel the abolition of slavery, the need for legal tools to enforce the First Amendment's protection against incursions by mobs and speech-suppressing efforts by lawmakers became ever more apparent.

### D. Twentieth-century development of a protest rights jurisprudence

Throughout the twentieth century, states attempted to use criminal law enforcement to stem the tide of protest movements for social change. The Supreme Court, slowly but surely, responded by developing a jurisprudence recognizing and enforcing the First Amendment rights supporting a robust right to protest.

In 1927, the Supreme Court upheld the conviction of Anita Whitney under California's Criminal Syndicalism Act for participating in a convention of the Communist Labor Party. *Whitney v. California*, 274 U.S. 357, 372 (1927) , *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969). Unable to persuade a majority of his colleagues to uphold freedom of speech and assembly in that case, Justice Brandeis famously wrote:

> Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

*Id.* at 375 (Brandeis, J., concurring).

Ten years later, in *De Jonge v. Oregon*, the Supreme Court took up Justice Brandeis's invitation and unanimously overturned a conviction under a state criminal syndicalism statute for holding an open Communist Party meeting in the middle of a bitter maritime strike. 299 U.S. 353 (1937). Acknowledging that the freedoms of speech, press, and assembly may be abused "to incite to violence and crime," and that legislatures may criminalize that abuse, the Court instructed that such "legislative intervention ... can find constitutional justification only by dealing with the abuse," rather than preemptively curtailing constitutional rights. *Id.* at 364-65. The Court denounced a guilt-by-association approach to addressing criminality at otherwise peaceable assemblies:

> [P]eaceable assembly for lawful discussion cannot be made a crime…. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted ... But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

*Id.* at 365.

The Supreme Court has also emphasized the constitutional protections afforded groups disfavored by majority norms or marginalized by the ruling authority, recognizing that a function of free discussion in our democracy is "to invite dispute," so "[i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

Decisions handed down during the mid-century civil rights movement to end Jim Crow laws and secure equal rights for Black Americans underscored this point. For example, in *Edwards v. South Carolina*, the Court overturned the criminal convictions of 187 Black high school and college students who had marched to the South Carolina State House grounds in protest of segregation laws. 372 U.S. 229 (1963). The Court stressed that the Constitution forbids a state "to make criminal the peaceful expression of unpopular views." *Id.* at 237. Here, South Carolina had permitted conviction if protesters "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." *Id.* at 238 (quoting *Terminiello*, 337 U.S. at 5). Similarly, in *Garner v. Louisiana*, the Supreme Court reversed disturbing-the-peace convictions of Black protesters who engaged in sit-ins at a segregated restaurant counter. 368 U.S. 157 (1961). The Court held that conviction based on law enforcement's opinion that it was a breach of the peace for peaceful protesters simply to break existing custom violated protesters' constitutional rights. *Id.* at 174.

As our constitutional history demonstrates, the American people's faithfulness to democratic aspirations has synchronously ebbed and flowed with legal protections for the right to protest. The colonists' struggle for independence was triggered by the Crown's failure to respect their right to peaceable assembly and public deliberation. In response, the framers enshrined the right to public protest in our Constitution by including strong protections of freedom of speech, assembly, and petition in the First Amendment. In the nineteenth century, abolition began as a protest movement, and proponents of slavery reacted with mob violence and by passing laws curtailing the right to protest. And in the twentieth century, staring down the Red Scare and the backlash to the civil rights revolution, the Supreme Court stepped up and crafted a jurisprudence of public protest that protected free speech and peaceable assembly while understanding that protest movements can involve conduct that is appropriately criminalized.

## II. Quashing Dissent Is a Staple of the Authoritarian Playbook

While American history illustrates the centrality of protest and free assembly to realizing the promise of our democratic system of government, authoritarian suppression of protest rights overseas shows how quashing dissent is a critical component of authoritarians' playbook of social control. And unfortunately, Oklahoma is not the only American state seeking to replicate that playbook.

### A. Other nations have criminalized peaceful protest as an authoritarian response to social unrest

#### 1. Hong Kong

Following 156 years of British rule in Hong Kong, China reclaimed control of the territory in 1997.[39] The current "one country, two systems" governing principle grants Hong Kong a degree of autonomy and protects residents' democratic and civil rights, including the right to protest.[40]

China, however, has exerted increasing social control. In 2020, China imposed a new national security law in Hong Kong designed to restrict the right to protest.[41] The law allows authorities to prosecute anyone who "organises, plans, commits or participates" in acts aimed at "committing secession or undermining national unification" or "subverting the State power."[42] Those found guilty face up to life in prison.

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[39] Edward A. Gargan, *China Resumes Control of Hong Kong, Concluding 156 Years of British Rule*, N.Y. Times (July 1, 1997), https://www.nytimes.com/1997/07/01/world/china-resumes-control-of-hong-kong-concluding-156-years-of-british-rule.html.

[40] *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, 1399 U.N.T.S. 33 (entered into force May 17, 1985); The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1997) (H.K.).

[41] Grace Tsoi & Lam Cho Wai, *Hong Kong Security Law: What Is It and Is It Worrying?,* BBC News (June 30, 2020), https://www.bbc.com/news/world-asia-china-52765838.

[42] *In Full: Official English Translation of the Hong Kong National Security Law*, Hong Kong Free Press (July 1, 2020), https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law.

The vagueness of these provisions allows broad discretion for authorities to quash protests and infringe upon protest rights. These provisions have been used to disband pro-democracy organizations critical of the Chinese government and arrest pro-democracy activists, such as organizers of peaceful candlelight vigils to commemorate the 1989 Tiananmen Square massacre.[43] As of November 2021, more than 150 people had been arrested under suspicion of breaking the new law.[44] At minimum, such apparently boundless provisions have forcefully chilled protest organization and participation.[45]

### 2. India

While still a multiparty democracy, India has experienced severe democratic decline over the past decade. Under the rule of Prime Minister Narendra Modi and his Hindu-nationalist Bharatiya Janata Party (BJP), the government has restricted political

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[43] *National Security Law: Hong Kong Rounds Up 53 Pro-Democracy Activists*, BBC (Jan. 6, 2021), https://www.bbc.com/news/world-asia-china-55555299; *Hong Kong Police Arrest Defiant Leaders of the Tiananmen Square Vigils,* NPR (Sept. 8, 2021), https://www.npr.org/2021/09/08/1035105536/hong-kong-activists-arrested-tiananmen-democracy.

[44] Rhoda Kwan, *Explainer: Hong Kong's National Security Crackdown – Month 17*, Hong Kong Free Press (Dec. 2, 2021), https://hongkongfp.com/2021/12/02/explainer-hong-kongs-national-security-crackdown-month-17.

[45] *See* Javier C. Hernández, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong's Security Law Explained,* N.Y. Times (Oct. 11, 2021), https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html.

rights and civil liberties, particularly for minorities and opposition groups.[46] While the right "to assemble peaceably and without arms" is enshrined in the Indian constitution, it is subject to certain constitutional limitations meant to maintain a "harmonious balancing" between individual liberty and social control.[47]

Prime Minister Modi and the BJP have exploited these limitations to suppress dissent. Section 144 of the Indian Code of Criminal Procedure provides that a magistrate may "direct any person to abstain from a certain act ... if such Magistrate considers that such direction is likely to prevent, or tends to prevent ... a disturbance of the public tranquillity, or a riot, or an affray." Indian officials have commonly invoked this law to prohibit assemblies in public spaces.

The Modi government also uses this sweeping power to target disfavored ethno-religious minorities. For example, in 2019, India passed the Citizenship (Amendment) Act to provide a pathway to citizenship for numerous persecuted religious minorities—excluding Muslims.[48] The law precipitated widespread protests challenging its violation of India's constitutional "[p]rohibition of discrimination on

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[46] *Freedom in the World 2021: India*, Freedom House, https://freedomhouse.org/country/india/freedom-world/2021 (last visited Feb. 2, 2022).

[47] India Const. art. 19, cl. 1(b); *KK Kochunni v. State of Madras,* AIR 1960 SC 1080 (1959) (India); *Mazdoor Kisan Shakti Sangathan v. Union of India*, Para 54, (2018) 17 SCC 324 (India); *see also* India Const. art. 19, cl. 3 (listing as reasonable restrictions those imposed in the interest of (i) protecting the sovereignty of India, (ii) protecting the integrity of India, or (iii) preserving public order).

[48] Citizenship (Amendment) Act, 2019, Bill No. 370 of 2019 (Dec. 4, 2019).

grounds of religion."[49] Officials then invoked Section 144, preemptively banning protest by dissenters.[50] Police detained thousands of peaceful protesters exercising their fundamental rights in defiance of this abuse of power in places like Bangalore, which had had no recent history of political violence.[51]

### B. U.S. state legislatures have succumbed to temptation to mimic these authoritarian tactics, as well as to revive the worst aspects of our own speech-suppressive past

The lure of authoritarianism is on the rise here at home, too.[52] As our history has shown, during times of social unrest, such as now, even those who espouse democratic values can make decisions or craft legislation that chips away at fundamental freedoms in the name of social order. Since 2017, 45 state legislatures have introduced 245 bills to restrict protest rights, with 38 becoming law.[53] This trend,

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[49] India Const. art. 15.

[50] Soutik Biswas, *Citizenship Act Protests: How a Colonial-era Law Is Being Used in India*, BBC (Dec. 20, 2019), https://www.bbc.com/news/world-asia-india-50849909.

[51] *Id.*

[52] In a 2021 report, the nonpartisan pro-democracy group Freedom House marked 2020 "the 15th consecutive year of decline in global freedom" and noted that the health of American democracy has been in decline since at least 2010. Freedom House publishes its *Freedom in the World* report annually and rates the level of freedom in countries on a 100-point scale based on various criteria. The United States' aggregate *Freedom in the World* score declined from 94 in 2010 to 83 in 2020. Sarah Repucci & Amy Slipowitz, Freedom House, *Freedom in the World 2021: Democracy Under Siege* 1, 10 (2021), https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf.

[53] *US Protest Law Tracker*, Int'l Ctr. for Not-for-Profit Law, https://www.icnl.org/usprotestlawtracker/ (last updated Mar. 16, 2022); *see also* Nora Benavidez & James Tager, PEN America, *Arresting Dissent: Legislative Restrictions on the*

including HB1674, continues into 2022. Restrictive, unconstitutional anti-protest laws in Wisconsin and Florida exemplify this retrenchment in respect for dissent.

### 1. Wisconsin

Wisconsin's Senate Bill 296, passed January 25, 2022 and pending before Governor Evers, seeks to newly define "riot" under Wisconsin law to threaten peaceful protesters with criminal penalties.[54] Wisconsin law currently defines "unlawful assembly" as a group of three or more people who cause a "disturbance of public order" and make it "reasonable to believe" the group will damage property or people.[55] SB296 states that an "unlawful assembly" constitutes a "riot" if at least one person commits an "act of violence" that creates a "clear and present danger" of property damage or injury; or threatens to commit such an act and has the ability to do so; or commits an "act of violence" that "substantially obstructs" some governmental function.[56] Under the bill's plain meaning, anyone who "intentionally

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*Right to Protest* 1, 4 (2020); Nora Benavidez et al., PEN America, *Closing Ranks: State Legislators Deepen Assaults on the Right to Protest*, https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest.

[54] S.296, 105th Leg., Reg. Sess. (Wis. 2021) [hereinafter SB296]; Adam Rogan, *Wisconsin GOP's Anti-Riot Bill Viewed as a Breach of the First Amendment by Some,* Journal Times (Jan. 26, 2022), https://journaltimes.com/news/local/govt-and-politics/wisconsin-gops-anti-riot-bill-viewed-as-a-breach-of-the-first-amendment-by-some/article_4c91ccef-8154-572a-a1dc-422b297c5825.html.

[55] Wis. Stat. § 947.06 (2012).

[56] SB296 § 4.

participates" in a gathering that becomes a "riot," even without the participant's fault or awareness, could face criminal charges.[57]

### 2. Florida

In April 2021, the Florida legislature enacted HB1 ("Combating Public Disorder"). As Florida Governor Ron DeSantis bluntly explained, the law's design is "pro-law enforcement": it is intended to deter protests against police misconduct.[58] Prior to HB1's passage, Florida law already criminalized rioting, or "inciting or encouraging a riot." Fla. Stat. § 870.01 (1971). Because that statute does not define the term riot, Florida courts have relied on the common-law definition of riot. *See State v. Beasley*, 317 So. 2d 750, 752 (1975). Under this definition, a riot occurs when "three or more persons act[] with a common intent to mutually assist each other in a violent manner to the terror of the people and a breach of the peace." *Id.* at 753.

HB1 amended section 870.01 by inserting vague language that sweeps in anyone who "*participates* in a violent public disturbance *involving*" such a common-law riotous assembly. Fla. Stat. § 870.01(2) (2021) (emphasis added). By criminalizing mere "participation" in peaceful protests that may turn violent—through no fault or even awareness of most participants—the law gives citizens who wish to exercise their First

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[57] *Id.* § 7.

[58] Paul Leblanc & Maria Kartaya, *Florida Governor Signs Controversial 'Pro-Law Enforcement' Law Cracking Down on Riots*, CNN (Apr. 19, 2021), https://www.cnn.com/2021/04/19/politics/ron-desantis-signs-combating-public-disorder-act/index.html.

Amendment rights no warning of what conduct might be punished and allows law enforcement to arrest peaceful protesters for exercising their constitutional rights.

As in this case, a federal court preliminarily enjoined provisions of HB1 as constitutionally infirm. *Dream Defenders v. DeSantis*, No. 4:21-cv-00191-MW-MAF, 2021 WL 4099437, at *34 (N.D. Fla. Sept. 9, 2021), *appeal docketed*, No. 21-13489 (11th Cir. Oct. 13, 2021).

Such restrictions on the right to protest may be the norm in authoritarian regimes but should not stand in the United States. Unfortunately, when faced with prolonged exposure to tactics from the authoritarian playbook, democratic polities can and have been lost to democratic backsliding. As the American experience in the last century shows, when state legislatures fail to honor the protest rights of unpopular groups and causes, the burden falls to the courts to step in to preserve democracy.

## III. Contemporary Supreme Court Doctrine Prohibits Vague and Overbroad Anti-Protest Laws like Oklahoma's HB1674

As illustrated by the history set out in Part I, the United States has a mixed record in honoring our foundational rights to dissent and protest. In times of social turmoil, neither the federal nor state governments have been above using criminal laws and threats of their enforcement to deter marginalized people—especially racial, religious, and political minorities—from exercising their First Amendment rights.

While they have not always moved in a straight line toward progress, beginning in the mid-twentieth century, our courts have answered those efforts by developing vagueness and overbreadth doctrines. These doctrines revolutionized constitutional challenges to efforts to curtail protest by providing litigants with a robust set of tools. They also provide a context to explain why Oklahoma's HB1674 so threatens our democratic values and why current Supreme Court precedent demands that it fall.

### A. The vagueness and overbreadth doctrines underscore the importance of the right to dissent

Vagueness doctrine, rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments, requires criminal statutes to give citizens "fair notice" of what conduct violates the law and to be written in a way that prevents arbitrary and discriminatory enforcement by police officers and prosecutors. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "When speech is involved, rigorous adherence [to these requirements] ... is necessary to ensure that ambiguity does not chill protected speech." *Id.* As the Supreme Court explained in *NAACP v. Button*, "[t]hese freedoms are delicate and vulnerable, as well as *supremely precious in our society*. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 371 U.S. 415, 433 (1963) (emphasis added).

Overbreadth doctrine recognizes the same overriding importance of First Amendment freedoms. "The First Amendment needs breathing space," which requires statutes restricting speech or expression to "be narrowly drawn and represent

a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). The Supreme Court has thus not required litigants to wait to be prosecuted before allowing them to challenge allegedly overbroad laws.

In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), for example, the Court addressed threatened prosecutions of James A. Dombrowski, the executive director of the Southern Conference Education Fund (SCEF), and others under the Louisiana Subversive Activities and Communist Front Control Law. 380 U.S. at 482. The SCEF was a civil rights advocacy group whose mission was to advocate for the expansion of rights for Black citizens. *Id.* In October 1963, Dombrowski and two other SCEF employees were arrested, and their homes and offices were searched pursuant to warrants alleging their engagement in "subversive activities." *Id.* at 487. While Dombrowski and his associates got the warrants quashed, local authorities convened a grand jury to consider additional charges. *Id.* at 487-88. Dombrowski filed a lawsuit in federal court seeking to enjoin the impending prosecution and have the law declared unconstitutional. *Id.* at 481-82. In a landmark ruling, the Supreme Court allowed the facial challenge to the law on behalf of parties not yet subject to prosecution. *Id.* at 489-90. The Court did so because the danger to free expression from the mere threat of prosecution under a vague or overbroad law demands immediate action from the courts. *Id.* at 492.

In *Dombrowski*, as in so many other cases, the Court expanded protection for free expression in the context of a government effort—through criminal law enforcement—to curtail the activities of a group challenging the status quo and seeking to enforce civil rights for long-disfavored groups. In this respect, the history of First Amendment jurisprudence coincides with the history of the struggle to achieve full equality for all Americans and shows our courts' recognition of the indispensable role free expression has played in our collective efforts to perfect our union.

### B. In this context, HB1674 is legally infirm, part of a long and dangerous history, and should be enjoined and invalidated

HB1674's vagueness and overbreadth are fatal, and the District Court's order enjoining it should be upheld. The law subjects organizations to severe fines for associating with third parties charged under Oklahoma's existing anti-riot and unlawful assembly laws. 2021 Okla. Sess. Law Ch. 106 § 3. Such penalties may be incurred if the organization is deemed a "conspirator." But the law does not define the term conspirator, nor is it limited to conspiracies to engage in riot-related crimes. The law thus fails to give notice of what conduct is unlawful.

The law also employs vague language in criminalizing the obstruction of streets in a manner that renders them "impassable" or renders passage "unreasonably inconvenient." *Id.* § 1. The vagueness of this provision allows it to be applied to expressive conduct protected by the First Amendment. For example, the uncertainty

of the phrase "unreasonably inconvenient" means First Amendment action, such as walking in the street or approaching a car with a leaflet, may be criminalized simply because it is inconvenient to an undefined person or persons in an undefined and unpredictable way. This concern is particularly acute given that violation of the obstruction provision may trigger organizational liability.

If this law is not enjoined, it will ensnare dissenters advocating for all manner of causes. As we have seen throughout our history, it is easy for the perpetrators of violence to disrupt otherwise nonviolent and protected First Amendment activity. No one, regardless of their views, is safe from being prosecuted under this statute if they exercise their rights or safe from being chilled from attempting to do so. In a democracy, we can disagree on the substance of laws or policies, but we cannot abide laws that prevent us from having those disagreements. This is one of those laws. The District Court's ruling saying so should be upheld.

## CONCLUSION

For the foregoing reasons, *Amici* urge this Court to affirm the District Court.

Dated: March 31, 2022

Respectfully submitted,

*s/ Kristy Parker*

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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6379 words.

Dated: March 31, 2022

*s/ Kristy Parker*
Kristy Parker

## CERTIFICATE OF SERVICE

I, Kristy Parker, counsel for Amici Curiae and a member of the Bar of this Court, certify that on March 31, 2022, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Kristy Parker*
Kristy Parker