OVERBROAD PROTEST LAWS

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Protests are woven into the history and social fabric of the United States. Whether the topic involves racial inequity, abortion, police brutality, oil and gas pipelines, war, or allegedly stolen elections, Americans will voice their opposition—occasionally, in frightening or destructive ways. Politicians, in turn, have a history of using their lawmaking power to discourage protest by creating crimes like unlawful assembly, riot, civil disorder, disorderly conduct, trespass, and others. While lawmakers have considerable power to decide what is and isn't legal, they cannot criminalize expression or assembly that the First Amendment protects. But the lines delineating what forms of protest the government can and cannot criminalize are anything but bright.

This Symposium Piece aims to clarify how far lawmakers can go in prohibiting protest. It does so by illuminating a notoriously murky area of First Amendment doctrine: overbreadth. The overbreadth doctrine authorizes courts to strike down laws that are written so broadly as to infringe on constitutionally protected expression. Overbreadth concerns are especially acute in laws used to criminalize protests.

This Piece makes three significant contributions to overbreadth scholarship. First, it analyzes decades of Supreme Court case law addressing overbreadth claims arising from protests and articulates five features of protest-related laws that generate overbreadth concerns. Second, the Piece surveys statutes that lawmakers and law enforcement officials have used to deter protests and, employing the five features of overbroad laws, examines which statutes present overbreadth concerns. Third, the Piece closes with guidelines for correcting (or eliminating, when appropriate) overbroad protest laws.

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INTRODUCTION

Politicians in the United States have a long history of using their lawmaking power to discourage protests.[1] In response to the civil rights movement and race-related uprisings in the 1960s, Congress passed the Civil Rights Act of 1968, which included provisions known as the "Anti-Riot Act,"[2] criminalizing traveling or using interstate commerce with intent to incite, organize, promote, encourage, or participate in a riot.[3] In the 1980s and 1990s, abortion protesters were the concern of choice for many lawmakers, and Congress and several states passed laws designed to prevent people from protesting in front of, or approaching patients near, abortion clinics.[4] In the early 2000s, after Westboro Baptist Church members chose to protest America's "tolerance of homosexuality" by picketing funerals of slain military veterans and chanting antigay slurs, multiple states enacted bills limiting speech near funerals.[5] When protests of oil and gas pipelines became widespread in the mid-2010s, numerous states responded by passing "critical infrastructure" laws that expanded and

1. See Allison M. Freedman, Arresting Assembly: An Argument Against Expanding Criminally Punishable Protest, 68 Vill. L. Rev. 171, 176 (2023) ("[T]he introduction of 'anti-protest' legislation often closely follows major protest events."); Marvin Zalman, The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory, 20 Vill. L. Rev. 897, 910 (1975) ("[L]egislative repression of politically dissident groups has become the Congressional reflex response to extremism, even when the extremist groups do not pose an immediate or serious threat to the stability of the Government."); Timothy Zick, The Costs of Dissent: Protest and Civil Liabilities, 89 Geo. Wash. L. Rev. 233, 236 (2021) [hereinafter Zick, The Costs of Dissent] ("[L]awmakers have historically reacted to disruptive protests by invoking 'law and order' and cracking down on protest activities.").

2. See United States v. Miselis, 972 F.3d 518, 527–28 (4th Cir. 2020) ("Congress passed the Anti-Riot Act as a rider to the Civil Rights Act of 1968, amidst an era, not unlike our own, marked by a palpable degree of social unrest."); Nick Robinson, Rethinking the Crime of Rioting, 107 Minn. L. Rev. 77, 101 (2022) ("In response to race riots during the 1960s and 1970s, several states and the federal government enacted anti-riot legislation."); see also M. Cherif Bassiouni, The Development of Anti-Riot Legislation, *in* The Law of Dissent and Riots 357, 358–64 (M. Cherif Bassiouni ed., 1971) (describing the Anti-Riot Act and First Amendment–based objections to it); Zalman, supra note 1, at 910–16 (arguing that the Anti-Riot Act was passed to "discourage legitimate political dissent").

3. See Civil Rights Act of 1968, Pub. L. No. 90-284, § 104(a), 82 Stat. 73, 75–77 (codified as amended at 18 U.S.C. §§ 2101–2102 (2018)).

4. See, e.g., Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248) (criminalizing, among other things, intimidating or interfering with people attempting to obtain or provide abortions); McCullen v. Coakley, 573 U.S. 464, 469 (2014) (addressing challenges to the constitutionality of a state law that criminalizes obstructing access to abortion clinics); Hill v. Colorado, 530 U.S. 703, 707 (2000) (same); see also Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 371 (1997) (addressing First Amendment challenges brought by anti-abortion protesters against judicial injunctions); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994) (same).

5. See Snyder v. Phelps, 562 U.S. 443, 455, 448–49 (2011) (describing the methods and language Westboro Baptist Church members used to protest a military funeral); Robert F. McCarthy, Note, The Incompatibility of Free Speech and Funerals: A *Grayned*-Based Approach for Funeral Protest Statutes, 68 Ohio St. L.J. 1469, 1474–75, 1486–90 (2007) (describing efforts to restrict speech at funerals in the wake of the Westboro protests).

heightened criminal penalties for trespassing on or near pipelines.[6] After George Floyd's murder in 2020 sparked possibly the largest mass protests in United States history, lawmakers across the country responded with a slew of proposed bills aimed at limiting protest activity.[7]

While the First Amendment does not protect violence, it does enshrine the rights of protesters to speak, picket, march, assemble, and otherwise express political views in sometimes highly unwelcome ways.[8] And though lawmakers have substantial power to decide what behavior is and isn't legal, they cannot criminalize speech or expression that the First Amendment protects.[9] Laws that prohibit protected expression are "overbroad," meaning that they exceed lawmakers' authority and illegally intrude on the rights to free speech, assembly, or association.[10] The overbreadth doctrine authorizes courts to strike down laws that are written so broadly as to infringe on constitutionally protected expression.[11]

Overbreadth concerns have become increasingly acute in recent years in the context of laws used—and even specifically enacted—to criminalize protests. Many of the laws that police officers and prosecutors rely on to arrest and charge protesters, which outlaw behavior like riot, civil disorder, interference, disorderly conduct, trespass, participation in or presence at an unlawful assembly, and more, are so broadly written as to include constitutional behavior.[12] Their breadth gives law enforcement officers discretion to disperse and arrest protesters engaged in expression that is inconvenient or unpopular but not imminently dangerous or destructive.[13] And

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6. See infra section II.A.8.

7. Freedman, supra note 1, at 193–99 & nn.92–113 (surveying numerous proposed antiprotest bills introduced in state legislatures over the past few years); Larry Buchanan, Quoctrung Bui & Jugal K. Patel, Black Lives Matter May Be the Largest Movement in U.S. History, N.Y. Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (on file with the *Columbia Law Review*) (summarizing polling numbers and other data regarding the number of people in the United States who participated in protests after George Floyd's murder); US Protest Law Tracker, Int'l Ctr. for Not-for-Profit L., https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative [https://perma.cc/55RS-VYEM] (last visited Jan. 28, 2025) (tracking more than 300 antiprotest bills proposed by state legislators since 2017).

8. See U.S. Const. amend. I; infra sections I.A–.B.

9. See Broadrick v. Oklahoma, 413 U.S. 601, 613–15 (1973) (holding that the government is "totally forbidden" from enforcing laws that improperly chill constitutionally protected expression); Coates v. City of Cincinnati, 402 U.S. 611, 614–16 (1971) (voiding a law that "makes a crime out of what under the Constitution cannot be a crime").

10. See *Broadrick*, 413 U.S. at 611–12 (explaining how laws that burden the exercise of free expression or association may be overbroad); *Coates*, 402 U.S. at 614–15 (striking down an ordinance as overbroad because it improperly infringed on the right to assemble); see also Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect", 58 B.U. L. Rev. 685, 685, 689–93 (1978) [hereinafter Schauer, Fear, Risk and the First Amendment] (explaining the concept of overbreadth).

11. See infra section I.A.

12. See infra Part II.

13. See infra Part II.

that is exactly what has happened: Officials have used these laws to arrest and sometimes prosecute protesters who may have been part of a crowd involving isolated violence but who themselves were engaged only in peaceful and constitutionally protected expression.[14]

Theoretically, overbreadth challenges are powerful tools to contest these antiprotest laws. But while the Supreme Court first recognized the overbreadth doctrine more than eighty years ago and has historically used it to invalidate laws targeting protesters,[15] the Court's jurisprudence has not been a model of clarity, especially when laws regulate expressive conduct rather than words alone.[16] Additionally, many protest-related arrests involve low-level criminal charges that get dismissed or otherwise resolved outside of the litigation process, leaving few opportunities for precedential rulings addressing the overbreadth of a particular statute.[17] The line between what lawmakers can criminalize and what the First Amendment protects is, therefore, notoriously fuzzy. As the United States enters another era of frequent and mass protests—and correspondingly, as the number of people arrested and criminally charged in protests grows[18]—a

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14. See, e.g., Tabatha Abu El-Haj, How the Liberal First Amendment Under-Protects Democracy, 107 Minn. L. Rev. 529, 530 (2022) (describing the First Amendment rights of protesters in modern America as "shockingly weak"); John Inazu, Unlawful Assembly as Social Control, 64 UCLA L. Rev. 2, 28–29, 33 (2017) [hereinafter Inazu, Unlawful Assembly as Social Control] (detailing how unlawful, broadly written assembly statutes give law enforcement officials authority to disperse protests, even when protesters' behavior would likely not result in successful prosecutions); Dawn C. Nunziato, First Amendment Protections for "Good Trouble", 72 Emory L.J. 1187, 1219 (2023) ("[T]he right to protest on the streets and to associate for purposes of protest . . . [is] under sharp attack today.").

15. See infra section I.B.

16. See R. George Wright, The Problems of Overbreadth and What to Do About Them, 60 Hous. L. Rev. 1115, 1116 (2023) ("Few important areas of the law exhibit the unpredictability of free speech overbreadth cases."); Zick, The Costs of Dissent, supra note 1, at 260 (opining that, when it comes to First Amendment limits on laws aimed at chilling protest activities, "officials need more concrete guidance" and "[t]he Supreme Court has not provided much"); Brian J. Murray, Note, Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms, 75 Notre Dame L. Rev. 691, 694 (1999) ("The line between protected and unprotected protest is vague . . . ."); see also Tabatha Abu El-Haj, Defining *Peaceably*: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly, 80 Mo. L. Rev. 961, 963 (2015) [hereinafter Abu El-Haj, Defining *Peaceably*] (reasoning that Supreme Court jurisprudence on the right to assemble has left "lower courts confused about how to decide what level of public disruption the Constitution requires officials to tolerate"); Jenny E. Carroll, Policing Protest: Speech, Space, Crime, and the Jury, 133 Yale L.J. 175, 180–81 (2023) (acknowledging that "questions linger" about what protest-related expression the First Amendment protects).

17. See Carroll, supra note 16, at 193 (pointing out that low-level criminal offenses rarely result in contested litigation and thus "hide in plain sight as mechanisms to suppress speech"); Freedman, supra note 1, at 212 (discussing the limited number of challenges raised against antiprotest laws in the past several years).

18. See Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 Yale L.J. 2497, 2511 (2023) (listing many of the mass protests of the past fifteen years in the United States); Frank D. LoMonte & Paola Fiku, Watch Where You Chalk, 'Cause the Sidewalks Talk: The First Amendment and Ephemeral "Occupations" of

better understanding of the boundaries of protected expression in the contexts of protests is crucial for judges, litigators, legislators, law enforcement, and activists alike.

This Symposium Piece aims to bring much-needed clarity to the question of how far lawmakers can go in criminalizing protest. It makes three significant contributions to the overbreadth doctrine in the context of protests. First, this Piece analyzes decades of Supreme Court case law addressing overbreadth claims in the context of protests and articulates five ways that protest-related laws may violate the overbreadth doctrine.[19] Second, this Piece presents an array of statutes that have been used in recent years to arrest and charge protesters and, employing these five features of potentially overbroad laws, examines which laws do and do not present overbreadth concerns. Third, this Piece closes with a series of guidelines for correcting (or, when appropriate, eliminating) overbroad protest laws.

Part I begins with an introduction to the overbreadth doctrine, explaining its intended purpose as a tool for challenging government overreach in the form of laws that deter constitutionally protected speech and conduct.[20] After defining overbreadth in section I.A, section I.B then explains the Court's at-times opaque jurisprudence in this area, from the Court's first use of the overbreadth doctrine in a case involving a peaceful protester, through a series of protest-related cases from the Civil Rights era, and finally to more recent applications.[21] Drawing lessons from this jurisprudence, section I.C articulates five ways that protest-related laws may run afoul of the overbreadth doctrine.[22]

Public Property, 47 Vt. L. Rev. 487, 488 (2023) (describing the current era of protest in the United States as "a time of great political volatility when protesters are regularly occupying public spaces in droves"); Nick Robinson & Elly Page, Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection, 107 Cornell L. Rev. 229, 231 (2021) ("The last decade has been an era of protests in the United States."); Zick, The Costs of Dissent, supra note 1, at 235 (noting "Americans' increased interest in public protest participation" in recent years); Buchanan et al., supra note 7 (describing a 2020 poll in which approximately nineteen percent of respondents described themselves as "new to protesting"); Isabelle Taft, Alex Lemonides, Lazaro Gamio & Anna Betts, Campus Protests Led to More Than 3,100 Arrests, but Many Charges Have Been Dropped, N.Y. Times (July 21, 2024), https://www.nytimes.com/2024/07/21/us/campus-protests-arrests.html (on file with the *Columbia Law Review*) (reporting that more students were arrested protesting on college campuses in 2024 than in any year since 1969).

19. See infra section I.C.

20. Although the First Amendment's text protects "freedom of speech," the Supreme Court has long interpreted this clause as protecting expressive conduct in addition to speech alone. See, e.g., Texas v. Johnson, 491 U.S. 397, 404 (1989) (noting that the free speech clause also protects conduct engaged in for the purpose of expression); see also infra notes 24–29 (explaining the Court's conduct-related First Amendment jurisprudence in more detail).

21. See infra section I.B.

22. See infra section I.C.

Part II discusses the underlitigated overbreadth of laws that have been used in recent years to criminalize protesters across the political and ideological spectrum. Section II.A provides a wide range of examples—from laws targeted at environmental protesters; to unlawful assembly, riot, and civil disorder statutes used to arrest police brutality protesters; to the statute criminalizing obstruction of official proceedings that the DOJ used to charge hundreds of participants in the January 6, 2021, insurrection at the U.S. Capitol.[23] Section II.A highlights overbreadth challenges to these laws when they have occurred and also discusses many problematic laws that are frequently used but rarely challenged as overbroad. Section II.B then offers examples of potentially overbroad laws that legislatures recently enacted in response to protests.[24] Using the five features of overbroad laws that section I.C lays out, Part II analyzes each of these statutes for overbreadth concerns.[25]

Part III discusses the harms of overbroad protest laws, with a focus on four primary harms. First, overbroad laws authorize unjust arrests and prosecutions for constitutionally protected expression.[26] Second, overbroad laws grant power to the police when they should not have it and thus make the trauma and violence that often accompany arrest more likely to occur without justification.[27] Third, overbroad laws deter constitutionally protected expression and, therefore, quash legitimate efforts to voice concerns on matters of political and social import.[28] Fourth, overbroad laws give government officials too much discretion to prosecute speech and conduct that officials dislike, deepening distrust in government actors by embroiling them in social controversies.[29]

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23. See infra section II.A. This Piece does not claim that everyone who illegally entered the U.S. Capitol on January 6 engaged in constitutionally protected behavior: Many committed assaults, property damage, and other crimes that fall well outside First Amendment protection. See, e.g., Scott Pelley, U.S. Attorney Explains Jan. 6 Capitol Riot Prosecutions, CBS News (Sept. 15, 2024), https://www.cbsnews.com/news/us-attorney-explains-jan-6-capitol-riot-prosecutions-60-minutes-transcript/ [https://perma.cc/L4BN-3WPV] (explaining that more than one thousand people were convicted of crimes for their conduct inside the Capitol on January 6, 2021, and describing some of the illegal behavior); Press Release, U.S. Atty's Off., D.C., 43 Months Since the Jan. 6 Attack on the Capitol (Aug. 6, 2024), https://www.justice.gov/usao-dc/43-months-jan-6-attack-capitol [https://perma.cc/U27M-BWSW] (providing a detailed account of the charges and convictions against participants in the January 6 insurrection). President Donald Trump has since pardoned all January 6 defendants, and the DOJ has removed all press releases related to their convictions. Scott MacFarlane, Judges in Jan. 6 Cases and Watchdog Groups Recoil at Justice Department's Deletion of Records, CBS News (Feb. 1, 2025), https://www.cbsnews.com/news/jan-6-judges-react-doj-deleting-records/ (on file with the *Columbia Law Review*). The release remains accessible via the permalink included above.

24. See infra section II.B.

25. See infra sections II.A–.B.

26. See infra section III.A.

27. See infra section III.B.

28. See infra section III.C.

29. See infra section III.D.

This Piece closes in Part IV by offering guidelines for "rightsizing" overbroad laws that have been (or could be) used to deter protest-related protected expression. Section IV.A offers a conceptual framework for legislators and judges to employ when assessing overbreadth concerns in proposed or enacted laws.[30] Lastly, given the harms that an arrest can cause—and the practical limitations of litigating overbreadth challenges post-arrest—section IV.B urges greater use of preemptive civil lawsuits to challenge overbroad laws.[31]

I. THE OVERBREADTH DOCTRINE

A. *Overbreadth: Definition and Application*

The overbreadth doctrine's basic premise is that a law is facially invalid if it criminalizes substantial amounts of constitutionally protected speech or expression.[32] Overbroad laws may target speech or conduct that the government has the right to criminalize, but they also sweep in expression that the Constitution protects.[33] In other words, overbroad laws are those in which the government "has gone too far."[34] Out of deference to lawmakers, courts will not strike down a statute as impermissibly overbroad unless its overreach is "not only . . . real, but substantial as well."[35]

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30. See infra section IV.A.

31. See infra section IV.B.

32. See, e.g., United States v. Stevens, 559 U.S. 460, 473 (2010) (indicating that a law is unconstitutionally "overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep'" (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008))); Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 863 (1991) (concluding that a law is overbroad if it substantially impinges on speech or associational interests that the First Amendment protects); see also Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 1 [hereinafter Monaghan, Overbreadth] (reasoning that the overbreadth doctrine allows litigants to challenge the "facial validity of rules which burden expressive interests").

33. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (stating that an overbroad statute risks chilling constitutionally protected speech or conduct because it criminalizes both constitutionally protected and unprotected behavior); Martin H. Redish, The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine, 78 Nw. U. L. Rev. 1031, 1035–36 (1983) (reasoning that the overbreadth doctrine allows courts to invalidate laws that criminalize both protected and unprotected expression); see also Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (holding that a statute is "unconstitutionally broad" if it "authorizes the punishment of constitutionally protected conduct"). For more discussion of concerns with laws that chill constitutionally protected conduct, see generally Schauer, Fear, Risk and the First Amendment, supra note 10.

34. Redish, supra note 33, at 1035.

35. New York v. Ferber, 458 U.S. 747, 770 (1982) (internal quotation marks omitted) (quoting *Broadrick*, 413 U.S. at 615). The Court has never precisely defined the "substantial" requirement. Instead, it has simply said that a person challenging a law as overbroad must

The overbreadth doctrine stems from the First Amendment, and the Supreme Court has explained that overbreadth concerns are "predicated on the sensitive nature of protected expression."[36] Protected expression includes, among other things, the rights to freedom of speech, association, and assembly.[37] "Speech" includes activity or conduct, as long as that conduct is engaged in for the purpose of expression, and the Court has explicitly held that overbreadth claims may be raised in the context of laws regulating expressive conduct.[38] The Court has historically been reluctant,

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show "a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 14 (1988); see also Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (concluding that the "substantial" standard requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections" (internal quotation marks omitted) (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984))); *Ferber*, 458 U.S. at 769 (justifying the substantiality requirement by reasoning that overbreadth has the "wide-reaching effects of striking down a statute on its face" and therefore should be applied "with hesitation"); Stuart Buck & Mark L. Rienzi, Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes, 2002 Utah L. Rev. 381, 387 (attempting to explain the "substantial" overbreadth standard). Several scholars have criticized the Court's failure to clearly define the substantiality requirement. See, e.g., Fallon, supra note 32, at 894 (positing that the Court's "substantial" overbreadth requirement leaves judges to engage in "speculation . . . at best"); Steven G. Gey, A Few Questions About Cross Burning, Intimidation, and Free Speech, 80 Notre Dame L. Rev. 1287, 1318 (2005) (complaining that the Court "has never even attempted to articulate clear rules about exactly how much of an unconstitutional effect is enough to render a statute 'substantially' overbroad" (quoting *Broadrick*, 413 U.S. at 615)).

36. *Ferber*, 458 U.S. at 768; see also Fallon, supra note 32, at 863–64 (describing the early history of the overbreadth doctrine and the Court's "striking receptiveness" to legal challenges to laws that infringed on expression).

37. See U.S. Const. amend. I (enshrining the rights to free speech, assembly, and association); Buckley v. Valeo, 424 U.S. 1, 24–25 (1976) (per curiam) (describing freedom of association as a basic right "closely allied to freedom of speech" (internal quotation marks omitted) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960))); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (labeling the right to peaceable assembly as "equally fundamental" as the right to free speech).

38. See *Broadrick*, 413 U.S. at 613 (listing multiple cases that support this rule); see also 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023) ("[T]he First Amendment protects acts of expressive association."); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive."); Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."); Melville B. Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. Rev. 29, 30 (1973) (noting that "freedom of speech" within the First Amendment has long been interpreted as including expressive conduct); Timothy Zick, Arming Public Protests, 104 Iowa L. Rev. 223, 230 (2018) [hereinafter Zick, Arming Public Protests] ("Our First Amendment has been interpreted to cover conduct with an expressive element."). For additional scholarship on the justification behind including expressive conduct within the First Amendment, see Louis Henkin, Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 79 (1968) (positing that a "speaker, a means of communication, a place, a context, all . . . modify the words" and thus are part of what the First Amendment must protect); Eugene Volokh, Symbolic Expression and the Original Meaning of the First Amendment, 97 Geo. L.J. 1057, 1059–63 (2009)

however, to embrace overbreadth claims asserted against "ordinary criminal laws that are sought to be applied to protected conduct."[39]

Despite some hesitancy in employing overbreadth to invalidate conduct-based laws, the Supreme Court has repeatedly recognized protest activity—by both individuals and crowds and in the form of picketing,[40] marches,[41] boycotts,[42] placards,[43] flag-burning,[44] and more—as a form of protected expression.[45] If a law banning certain conduct is "related to the suppression of free expression," the Court will apply the "more demanding standard" that it applies to laws infringing on free speech.[46] In contrast,

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(arguing that equating symbolic expression with speech is consistent with an originalist understanding of the First Amendment).

39. *Broadrick*, 413 U.S. at 613.

40. See, e.g., Thornhill v. Alabama, 310 U.S. 88, 99 (1940) (recognizing picketing as protected under the First Amendment).

41. See, e.g., Cox v. Louisiana, 379 U.S. 536, 545–46 (1965) (holding that a group march down to a courthouse was protected activity under the First Amendment).

42. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) (noting that boycotts are a form of speech the First Amendment traditionally protects).

43. See, e.g., Boos v. Barry, 485 U.S. 312, 318, 329 (1988) (invalidating a law that banned displays of certain placards or signs within five hundred feet of foreign embassies and noting that protest is "classically political speech" that "operates at the core of the First Amendment").

44. See, e.g., Texas v. Johnson, 491 U.S. 397, 399, 404 (1989) (overturning the conviction of a man charged with desecrating the American flag and citing protesting as a category of symbolic speech).

45. For an additional explanation of how and why the First Amendment has been interpreted as protecting many forms of protest, see Jones v. Parmley, 465 F.3d 46, 56 (2d Cir. 2006) (labeling political demonstrations and protests as "activities at the heart of what the Bill of Rights was designed to safeguard"); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1786 (2004) (reasoning that the First Amendment protects speech or conduct aimed at "self-expression, individual autonomy, dissent, democratic deliberation, the search for truth, tolerance, [and] checking governmental abuse" (footnotes omitted)).

46. *Johnson*, 491 U.S. at 403; see also id. at 406 (indicating that the government generally has greater power to restrict expressive conduct than speech but that it may not "proscribe particular conduct *because* it has expressive elements"); Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973) ("[O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner."); id. at 615 ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well . . . ."); United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). But see Spence v. Washington, 418 U.S. 405, 409–10 (1974) (per curiam) (holding that the act of displaying an American flag upside down was constitutionally protected expression); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (holding that wearing a black armband in silent protest of the Vietnam War was constitutionally protected expression). Multiple scholars have criticized the Court's attempts to distinguish between pure speech and expressive conduct, noting that conduct can often more effectively communicate a message than words alone. See Henkin, supra note 38, at 79 ("A constitutional distinction between speech and conduct is specious."); Nimmer, supra note 38, at 33 ("Any attempt to disentangle 'speech'

if the law imposes only incidental restrictions on expression, the Court will apply a "less rigid" standard.[47]

The fact that speech or expression may be upsetting or offensive does not render it unprotected.[48] To the contrary, speech remains protected even if it causes emotional and psychological distress, unless the government shows it is both directed toward and likely to produce or incite "imminent lawless action."[49] The Court excludes actual violent acts from First Amendment protection, though, stating that "violence has no sanctuary in the First Amendment."[50] When the violence occurs within a larger context of protected constitutional expression (such as a mass protest in which the majority of people are marching peacefully, but a few are throwing rocks), government regulations must be sufficiently precise so as not to infringe on protected expression.[51]

As for the rights to associate and assemble, the Court has recognized that these rights often enhance speech, in that effective advocacy of a particular point of view "is undeniably enhanced by group association."[52] Because these rights are "closely allied to freedom of speech," restrictions on them are generally subject to the same levels of scrutiny as restrictions

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from conduct which is itself communicative will not withstand analysis."); see also Note, Symbolic Conduct, 68 Colum. L. Rev. 1091, 1104–17 (1968) (offering guidelines for assessing what type of symbolic conduct deserves First Amendment protection).

47. *Broadrick*, 413 U.S. at 614 (noting that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment," provided the statutes regulate conduct "in a neutral, noncensorial manner"); see also *O'Brien*, 391 U.S. at 376 (finding that when a law regulates both speech and "nonspeech," "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

48. For a deeper dive into what types of speech the First Amendment does and doesn't protect, see Counterman v. Colorado, 143 S. Ct. 2106, 2113–14 (2023) (describing categories of speech that fall outside First Amendment protections); Virginia v. Black, 538 U.S. 343, 359–62 (2003) (same); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 194–96 (1983) (labeling certain categories of speech as having little or no First Amendment value).

49. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam); see also Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (concluding that states may not criminalize expressive conduct simply because it instigates "condition[s] of unrest" (internal quotation marks omitted) (quoting Terminiello v. Chicago, 337 U.S. 1, 5 (1949))); *Terminiello*, 337 U.S. at 4 (reasoning that speech "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"); Frederick Schauer, Harm(s) and the First Amendment, 2011 Sup. Ct. Rev. 81, 96 ("[A]ny robust free speech principle will protect speech not (only) because it is harmless, but despite the harm it may cause.").

50. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (internal quotation marks omitted) (quoting Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)).

51. See id. at 916–18 (noting that when violence occurs in the context of otherwise protected expression, "the presence of activity protected by the First Amendment imposes restraints" on who can be held accountable).

52. Id. at 908 (internal quotation marks omitted) (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958)).

on speech itself.[53] All of these rights are "fundamental to the conduct of a free society," and the overbreadth doctrine exists "to ferret out laws that unduly impair" their functioning.[54]

When determining whether a statute is overbroad, courts first review the statute to assess what speech or expressive conduct it restricts.[55] If the law restricts "a substantial amount of constitutionally protected conduct," it is overbroad.[56] Deciding what is constitutionally protected can be complicated, requiring courts to assess whether the law at issue is viewpoint-based, content-based, or content-neutral; what type of forum the law regulates; what governmental interest is at stake; and whether the law is appropriately tailored to protect that interest without unduly restricting constitutional expression.[57]

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53. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (internal quotation marks omitted) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)); see also *Patterson*, 357 U.S. at 460–61 (describing the "close nexus" between freedoms of speech, assembly, and association); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."). Some scholars take issue with jurisprudence that collapses the right of assembly into the right to free speech and have argued that the right to assemble deserves its own protections independent of the right to free speech. See, e.g., John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly 2 (2012) (arguing that relying on the right to free speech as implicitly protecting the right to assemble is "misguided"); Tabatha Abu El-Haj, The Neglected Right of Assembly, 56 UCLA L. Rev. 543, 547 (2009) (arguing that courts and scholars have failed to appreciate the independent significance of the right to assemble); Tabatha Abu El-Haj, A Right of Peaceable Assembly, 125 Colum. L. Rev. 1049, 1136 (2025) [hereinafter Abu El-Haj, A Right of Peaceable Assembly] ("The development of an independent Assembly Clause doctrine is essential. It may once have been possible to dismiss the consequences of ignoring the textual right of assembly. This is no longer true. Neglect of the right has significant contemporary consequences for political protests."). That debate is beyond the purview of this Piece.

54. See Redish, supra note 33, at 1041–42.

55. United States v. Stevens, 559 U.S. 460, 474 (2010) ("[T]he first step in overbreadth analysis is to construe the challenged statute . . . ." (internal quotation marks omitted) (quoting United States v. Williams, 553 U.S. 285, 293 (2008))).

56. Boos v. Barry, 485 U.S. 312, 329 (1988).

57. See Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383–85, 2387–88 (2021) (discussing and defining the different tailoring standards applicable in First Amendment challenges); United States v. Nassif, 97 F.4th 968, 974–75 (D.C. Cir.) (delineating the standards applicable to public and nonpublic forums), cert. denied, 145 S. Ct. 552 (2024) (mem.); Fallon, supra note 32, at 865 (describing standards applicable to content-based and content-neutral regulations on speech); see also Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 299 (1978) (describing the Supreme Court's First Amendment jurisprudence as creating a "climate of uncertainty and intellectual disorder that permeates the concept and implementation of freedom of speech"); Alexander Tsesis, Levels of Free Speech Scrutiny, 98 Ind. L.J. 1225, 1254–55 (2023) (critiquing the Court's standards for analyzing free speech rights).

Laws that regulate speech or expression on the basis of viewpoint or content—for example, a law that prohibits people from wearing any political apparel inside a polling place—are presumptively unconstitutional.[58] Courts generally apply a strict scrutiny standard to content-based restrictions, which requires the government to show that it has adopted "the least restrictive means of achieving a compelling state interest."[59]

"Content-neutral" laws—otherwise known as time, place, and manner restrictions—ban speech or conduct in certain areas or at certain times. For example, they may prohibit noise at a certain volume or billboards in a particular part of town.[60] These are not as suspect as content-based laws but are still subject to "close" scrutiny.[61] The state has the burden to prove

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58. See Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); see also Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (noting that the "government has no power" to prohibit expression because of its message (citing Police Dep't v. Mosley, 408 U.S. 92, 92 (1972))); Stone, supra note 48, at 198 ("Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment except, perhaps, in the most extraordinary of circumstances."); Zick, Arming Public Protests, supra note 38, at 231 (noting that the "government is generally prohibited from denying access or regulating speech based on its subject matter or viewpoint").

59. *Ams. for Prosperity*, 141 S. Ct. at 2383 (internal quotation marks omitted) (quoting McCullen v. Coakley, 573 U.S. 464, 478 (2014)); see also Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (describing a compelling state interest as an "interest[] of the highest order" (internal quotation marks omitted) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))); *Reed*, 576 U.S. at 163 (deciding that content-based laws "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991))); *Mosley*, 408 U.S. at 93, 95, 99 (invalidating a law that prohibited picketing near schools but contained an exception for "peaceful picketing of any school involved in a labor dispute" because it did not merely regulate time, place, and manner but instead censored content, which is "never permitted" (quoting Chi., Ill., Mun. Code ch. 193-1(i) (1972))).

60. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that a ban on noise exceeding certain decibel levels in a park bandshell was content-neutral); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (concluding that a municipal ordinance banning posting signs on public property was content-neutral because it banned all signs rather than those that communicated a specific message).

61. *McCullen*, 573 U.S. at 486 (holding that a content-neutral law must still demonstrate a "close fit between ends and means" and be "narrowly tailored to serve a significant governmental interest" (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 796)); Alan K. Chen, Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose, 38 Harv. C.R.-C.L. L. Rev. 31, 38 (2003) (noting that the government has more leeway to regulate speech in a traditional public forum if the regulations are "reasonable, content-neutral restrictions on the time, place, or manner of the speech"); Stone, supra note 48, at 190 (describing the balancing test applicable to content-neutral laws as measuring the substantiality of the government's interest against the severity of the restrictions on expression). Some commentators have criticized applying a lower level of scrutiny to content-neutral laws, because those laws may limit even more speech and expressive activity than content-based laws. See, e.g., Aaron Johnson, Interning Dissent: The Law of Large Political Events, 9 Duke J. Const. L. & Pub. Pol'y 87, 89 (2013) ("[C]ontent-neutral speech restrictions can, in practice, be incredibly burdensome on free expression.").

that such laws accomplish a legitimate, nondiscriminatory governmental interest unrelated to the suppression of speech, and the laws may not "burden substantially more speech than is necessary" to achieve that interest.[62]

The location that the law regulates also impacts its constitutionality because courts apply lower standards of scrutiny to laws regulating speech in nonpublic forums.[63] The government may regulate speech in nonpublic forums "as long as the regulation 'is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view.'"[64] Although reasonability is a low standard, it has its limits: The Supreme Court has, for example, struck down as overbroad a complete ban on First Amendment activities in an airport, reasoning that even if the airport was a nonpublic forum, the government had "no conceivable . . . interest" to justify such an expansive ban.[65] More recently, the Court held unconstitutional a Minnesota law that prohibited all "political" buttons, badges, or insignia inside a polling place,[66] noting that although the polling place was a nonpublic forum, the law banned so much expression that it failed even the more forgiving reasonability standard.[67]

Anyone charged under a potentially overbroad law can raise an overbreadth challenge, even if their own speech is not protected.[68] Because striking down a law entirely is a far-reaching remedy, the Court has indi-

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62. *McCullen*, 573 U.S. at 486 (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 799); see also Texas v. Johnson, 491 U.S. 397, 406–11 (1989) (holding that a content-neutral law that restricts expression must have a valid purpose unrelated to suppressing expression); Chen, supra note 61, at 38 (explaining standards for content-neutral regulation); Stone, supra note 48, at 192–93 (same).

63. Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987).

64. Id. (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983)); see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) ("The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." (citing *Perry*, 460 U.S. at 46)).

65. See *Jews for Jesus*, 482 U.S. at 575.

66. See Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888–89 (2018).

67. See id. at 1885–86, 1888–91.

68. See Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) ("[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties . . . ." (citing Grayned v. City of Rockford, 408 U.S. 104, 114–21 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Schneider v. State, 308 U.S. 147, 162–65 (1939); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938))); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); Brandice Canes-Wrone & Michael C. Dorf, Measuring the Chilling Effect, 90 N.Y.U. L. Rev. 1095, 1096, 1098 (2015) ("The overbreadth doctrine permits litigants whose own conduct is not constitutionally protected to challenge a law on the ground that it chills the exercise of free speech rights by persons not before the court.").

cated that a litigant who believes their speech or conduct was constitutionally protected should begin by raising an as-applied challenge, in which the challenger argues that the law cannot be applied to their own protected behavior, rather than that the law must be invalidated entirely.[69] If that claim fails—or if the litigant has no argument that their expression was constitutionally protected—they may raise a facial overbreadth challenge.[70]

People who are at risk of prosecution under an arguably overbroad law can also challenge the law pre-enforcement, in a civil action requesting either a declaratory judgment invalidating the statute or injunctive relief precluding future enforcement.[71] If a court deems a challenged statute overbroad, the law is facially invalid and cannot be enforced unless the court finds the unconstitutional portion of the statute can be severed.[72] If a court can strike overbroad portions of the statute—or plausibly interpret the statute in a way that avoids overbreadth concerns—the constitutional portions of the statute may be saved.[73]

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69. See Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 483–85 (1989) ("It is not the usual judicial practice . . . to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.").

70. See id. at 483–85 (indicating that litigants may attack a law as facially overbroad even if it can be validly applied to their own conduct); Canes-Wrone & Dorf, supra note 68, at 1096, 1098 (describing the standing requirement for overbreadth challenges). Academic commentators have devoted extensive space to debating whether the practice of allowing people whose expression is not constitutionally protected to nonetheless raise facial overbreadth challenges creates a standing doctrine unique to overbreadth. See, e.g., Gey, supra note 35, at 1313–15 (labeling standing rules in the context of overbreadth claims as "counterintuitive"); Toni M. Massaro, Chilling Rights, 88 U. Colo. L. Rev. 33, 57 (2017) (describing standing in the First Amendment context as having "a looser grip than in other areas of constitutional law"); Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 278, 282–86 (1984) (disagreeing with commentators who espouse a "special" standing doctrine for overbreadth cases); Note, Overbreadth and Listeners' Rights, 123 Harv. L. Rev. 1749, 1751–61 (2010) (summarizing academic debates on this topic). That debate is tangential to this Piece.

71. See Police Dep't v. Mosley, 408 U.S. 92, 93–94 (1972) (permitting a preemptive challenge to an overbroad Chicago ordinance); see also Buck & Rienzi, supra note 35, at 425–46 (explaining opportunities for challenging overbroad laws via requests for declaratory judgment or injunctive relief).

72. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506–07 (1985) (stating that, when only a specific portion of the statute is overbroad and that portion can be excised or severed, the remainder of the statute may be saved); New York v. Ferber, 458 U.S. 747, 769 (1982) (noting that enforcement of the overbreadth doctrine typically results in facial invalidation of the law and thus is "strong medicine" (internal quotation marks omitted) (quoting *Broadrick*, 413 U.S. at 613)); *Broadrick*, 413 U.S. at 613 (concluding that enforcement of an overbroad statute is "totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression").

73. See, e.g., Boos v. Barry, 485 U.S. 312, 330–31 (1988) (concluding that the text of a Washington, D.C., statute was facially overbroad but that the lower court's narrowing construction alleviated that concern); People v. Tolia, 631 N.Y.S.2d 632, 636 (N.Y. App. Div. 1995) (construing New York's incitement to riot statute as requiring proof of both intent

B. *Overbreadth in Protest Jurisprudence*

The overbreadth doctrine arose from the Supreme Court's 1940 decision in *Thornhill v. Alabama*, which involved an employee of a company plant who participated in a strike and was convicted under a state law that barred picketing "for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise."[74] Though the Court did not use the term overbreadth in that decision, it concluded that the law was facially invalid because it failed to limit the criminalized picketing to conduct that presented "clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace."[75] Instead, it criminalized a wide array of protected expression, such as walking back and forth with a sign conveying a message the company disfavored.[76]

That same year, the Court also addressed a Connecticut "breach of the peace" statute used to convict a Jehovah's Witness who had gone around town communicating an anti-Catholic message that outraged several listeners.[77] The Court in *Cantwell v. Connecticut* held that, because the statute did not limit its proscription to expression that presented a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order," it swept in too much protected conduct and was therefore unconstitutional.[78]

Within a couple of decades of *Thornhill*, the Court had employed the overbreadth doctrine in multiple cases to invalidate criminal charges

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and "clear and present danger," even though the statute does not explicitly contain either element, so as to avoid violating the First Amendment (internal quotation marks omitted) (quoting Schenck v. United States, 249 U.S. 47, 52 (1919))).

74. 310 U.S. 88, 91 (1940) (internal quotation marks omitted) (quoting Ala. Code § 3448 (1928)).

75. Id. at 97, 99, 105.

76. See id. at 97, 99, 103–05.

77. Cantwell v. Connecticut, 310 U.S. 296, 300–03 (1940).

78. Id. at 308. *Cantwell* involved an as-applied challenge, so the Court did not strike down the law as overbroad. Id. at 303. Although a few courts still use the "clear and present danger" test, the Court replaced this test in its 1969 decision in *Brandenburg v. Ohio*, which held that the right to free speech prohibits a state from punishing speech that advocates violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969) (per curiam); see also Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg* Concerto, 22 Stan. L. Rev. 1163, 1164–73 (1970) (explaining the Court's trajectory from the clear and present danger standard to the imminence standard); Alexander Tsesis, Incitement to Insurrection and the First Amendment, 57 Wake Forest L. Rev. 971, 999 (2022) [hereinafter Tsesis, Incitement to Insurrection] (explaining that the imminence test in *Brandenburg* was intended to clarify the clear and present danger test). But see Frederick Schauer, Free Speech Overrides, 2020 U. Chi. Legal F. 255, 262–66 [hereinafter Schauer, Free Speech Overrides] (arguing that the clear and present danger test still survives in limited contexts).

against people engaged in protest-related activity.[79] In *Cox v. Louisiana*, a Black reverend was convicted under a Louisiana "disturbing the peace" law after he helped lead a group of approximately two thousand peaceful protesters—mostly Black—who stood across the street from a courthouse in a predominantly white area of town, sang and chanted, and refused to leave when ordered to by a sheriff.[80] Although several witnesses testified that they were worried "violence was about to erupt" at the protest or that "the situation was getting out of hand," the protesters themselves neither acted violently nor threatened violence.[81]

Louisiana's statute stated that someone disturbs the peace if he "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregat[es] with others [in a public area and] . . . refuses to disperse and move on . . . when ordered so to do by any law enforcement officer."[82] The Court held that the statute was "unconstitutionally vague in its overly broad scope" because it allowed the state to punish people "merely for peacefully expressing unpopular views" and therefore infringed on the constitutional rights to free speech and assembly.[83] The Court rejected Louisiana's claim that the observers' fears of possible violence were sufficient to establish a disturbance of the peace, since the protesters themselves had not engaged in or threatened violence.[84]

A few years after *Cox*, the Court decided *Brandenburg v. Ohio*, in which the leader of a Ku Klux Klan (KKK) rally was convicted under an Ohio statute that criminalized "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[85] At the rally, Brandenburg gathered with hundreds of other KKK members, wore a KKK robe and hood, used racial and ethnic slurs, opined that Black and Jewish people should be "returned" to other countries, and proposed "revengeance" if the government continued to "suppress the white, Caucasian race."[86] The Court struck down the statute as overbroad because the government has no right to prohibit speech advocating force "except where

79. See Nunziato, supra note 14, at 1196 (detailing multiple cases in which the Court invalidated criminal laws "wielded by government officials to restrict First Amendment freedoms of civil rights activists").

80. See 379 U.S. 536, 540–44 (1965).

81. Id. at 550 (internal quotation marks omitted).

82. La. Stat. Ann. § 14:103:1 (1962).

83. *Cox*, 379 U.S. at 551–52.

84. See id. at 545, 550.

85. Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (per curiam) (alteration in original) (internal quotation marks omitted) (quoting Ohio Rev. Code Ann. § 2923.13 (1958)).

86. Id. at 446–47 (internal quotation marks omitted).

such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[87]

In a later case addressing a breach of the peace charge against a protester who burned an American flag, *Texas v. Johnson*, the Court cited *Brandenburg* in affirming that the government cannot condemn speech or expressive conduct merely because it causes "serious offense" or anger.[88] The Court noted that seriously offending people does not rise to the level of breaching the peace and that courts must instead assess, per *Brandenburg*, whether the statute is limited to expressive activity that is intended to and likely to result in imminent lawless action.[89]

In *Coates v. City of Cincinnati*, the Court struck down as overbroad a statute making it unlawful for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by."[90] The three appellants in *Coates* were all convicted after engaging in protests or demonstrations.[91] The Court held that the statute was unconstitutionally overbroad because, while city officials have authority to regulate non-expressive behaviors like assault and littering, they cannot enact laws "whose violation may entirely depend upon whether or not a policeman is annoyed."[92] The Court condemned the statute as invoking "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because [of] their ideas, their lifestyle, or their physical appearance."[93]

In *Virginia v. Black*, the Court addressed a challenge to a Virginia statute that criminalized burning crosses with the intent to intimidate.[94] The Court held that the government can ban cross-burning with the intent to intimidate because such activities create legitimate fear of bodily harm.[95] But the Court struck a portion of the statute that made the cross-burning itself *prima facie* evidence of intent to intimidate as overbroad because it swept in people who may have legitimate, non-threatening reasons to burn crosses.[96]

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87. Id. at 447–49. For commentary explaining the First Amendment implications of *Brandenburg*'s imminent lawless action test and criticizing courts' application of it, see generally Marc Rohr, Grand Illusion? The *Brandenburg* Test and Speech that Encourages or Facilitates Criminal Acts, 38 Willamette L. Rev. 1 (2002).

88. See 491 U.S. 397, 408 (1989).

89. Id. at 409 (internal quotation marks omitted) (quoting *Brandenburg*, 395 U.S. at 447).

90. 402 U.S. 611, 611 (1971) (internal quotation marks omitted) (quoting Cincinnati, Ohio, Code 901-L6 (1956)).

91. Id. at 612.

92. Id. at 614.

93. Id. at 616.

94. See 538 U.S. 343, 347–48 (2003).

95. See id. at 363–67.

96. See id.

All four of these decisions—*Cox*, *Brandenburg*, *Coates*, and *Black*—struck down criminal laws against protesters as overbroad at least in part because the statutes criminalized expressive activity that was neither violent nor threatening, nor an incitement to immediate violence.[97] But the Court has on other occasions upheld laws that criminalized nonviolent expressive activity if the laws were appropriately tailored to a significant governmental interest in maintaining order. In contrast to the disturbing the peace statute the Court in *Cox* deemed overbroad, in a separate appeal brought by the same defendant, the Court rejected a facial challenge to a Louisiana statute criminalizing picketing or parading in or near a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice."[98] The Court concluded this statute was appropriately narrow in that it proscribed specific, limited conduct (picketing or parading) in "a few specified locations" (courthouses) and applied only to those who intended to interfere with or impede the administration of justice.[99] Because the state had a significant interest in protecting its judicial system from the pressures of picketing, and the law was narrowly tailored to criminalize only those who intended to interfere with the administration of justice, the statute did not unduly constrict free speech or the right to assemble.[100]

Similarly, in *Cameron v. Johnson* the Court rejected an overbreadth challenge to Mississippi's antipicketing law, passed in 1964 in response to protests surrounding the voter registration process for Black Mississippians.[101] The statute prohibited "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" county courthouses.[102] The Court concluded that, because the statute did not ban picketing generally and instead only applied to picketing that unreasonably obstructed access to courthouses, it did not substantially implicate freedom of expression.[103]

Decades later, the Court in *Hill v. Colorado* addressed an overbreadth challenge to a Colorado law making it a crime for anyone within one hundred feet of a health care facility to "'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral

97. See id. at 363–67; *Coates*, 402 U.S. at 614; Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (alterations in original); Cox v. Louisiana, 379 U.S. 536, 551–52 (1965).

98. *Cox*, 379 U.S. at 560 (internal quotation marks omitted) (quoting La. Stat. Ann. § 14:401 (1962)).

99. See id. at 562, 564.

100. See id.

101. See 390 U.S. 611, 614 (1968).

102. Id. at 616 (alteration in original) (internal quotation marks omitted) (quoting Miss. Code Ann. § 2318.5 (1966)). The current version of the statute is Miss. Code. Ann. § 97-7-63(1) (2024).

103. *Cameron*, 390 U.S. at 617.

protest, education, or counseling with such other person.'"[104] A group of abortion protesters filed suit requesting injunctive relief preventing enforcement of the bill.[105] The protesters argued, and the state did not dispute, that legislators passed this law to deter anti-abortion protesters who approached people entering abortion clinics and engaged in "often confrontational" efforts to deter people from having abortions.[106] The Court also determined that the sidewalk outside health clinics was a "quintessential" public forum.[107]

Although the bill was drafted to deter anti-abortion protests, the majority held that the statute was nonetheless content-neutral because the ban on approaching people could have applied to any type of protest.[108] The Court ultimately rejected the overbreadth challenge, concluding that the government had a significant interest in protecting medical patients' privacy and freedom from unwanted communication and the eight-foot restriction on approaching patients was narrowly tailored to advance that right.[109]

Lastly, the Court has applied minimal scrutiny to content-neutral regulations that have only a tangential effect on speech or expression, such as a general trespassing law that applies to all people entering a particular area, regardless of purpose.[110] In *Virginia v. Hicks*, the Supreme Court rejected an overbreadth challenge to a local housing authority policy prohibiting any unauthorized person from entering the property without a "legitimate business or social purpose."[111] The Court theorized that an overbreadth challenge would "[r]arely, if ever . . . succeed against a law or

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104. 530 U.S. 703, 707 (2000) (quoting Colo. Rev. Stat. § 18-9-122 (1999)).

105. See id. at 708–09.

106. See id.

107. See id. at 715 (internal quotation marks omitted).

108. See id. at 719–25.

109. See id. at 717–18, 729–32. The *Hill v. Colorado* decision has been criticized for its failure to recognize that, in affirming ostensibly viewpoint-neutral language, the Court upheld a statute targeted at a particular form of protest and swept within its broad purview speech and conduct about the quintessentially political and social issues that the First Amendment typically protects. See Chen, supra note 61, at 61–64. The Supreme Court recently denied certiorari on a petition asking the Court to overrule *Hill*, although Justice Samuel Alito noted publicly that he would have granted cert and Justice Clarence Thomas wrote a dissent arguing that the Court should have taken the opportunity to "set the record straight on *Hill*'s defunct status." See Coal. Life v. City of Carbondale, 145 S. Ct. 537, 537 (2025) (mem.); id. at 537–42 (Thomas, J., dissenting from the denial of certiorari).

110. See Virginia v. Hicks, 539 U.S. 113, 122, 124 (2003) (rejecting an overbreadth challenge to a housing authority trespass policy that only tangentially affected expression and placing the burden on the claimant to show substantial overbreadth); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572, 576–77 (1991) (Scalia, J., concurring in the judgment) (arguing that, because the public indecency law at issue regulated conduct and was not directed toward expression, it was "not subject to First Amendment scrutiny at all").

111. *Hicks*, 539 U.S. at 122 (internal quotation marks omitted).

regulation that is not specifically addressed to speech or to conduct necessarily associated with speech."[112] But the Court also acknowledged that the clause's exceptions for people entering the property for a "legitimate business or social purpose," coupled with testimony from the housing property manager that people attempting to enter for leafleting or demonstrations were allowed as long as they obtained permission in advance, helped save the policy from First Amendment interference.[113]

C. *Features of Overbroad Protest Laws*

Many scholars have criticized the Court's protest-related overbreadth jurisprudence, reasoning that the Court has applied the doctrine in a manner that leaves people guessing about what expressive conduct is protected.[114] This Piece proposes that, while the Court's overbreadth case law has not always been a model of clarity, it does articulate several boundaries regarding what lawmakers can and cannot criminalize in the context of protests. The following are five features of potentially overbroad laws drawn from the Court's overbreadth jurisprudence. Protest-related laws need not contain all five features to be overbroad: One or more of these features may be sufficient for a law to chill protected expression and thus be found facially unconstitutional.

1. *Criminalizing Speech or Expressive Conduct With No Causal Connection to Imminent Danger of Violence or Property Damage. —* *Brandenburg* held that speech-based laws cannot prohibit violent rhetoric—even rhetoric that advocates illicit force or violence—unless the speech is likely to incite imminent lawless action.[115] While the *Brandenburg* Court was primarily concerned with speech, it twice noted that its holding applied equally to the right of assembly and that the government has no right to criminalize assemblies that advocate violence unless they also involve "incitement to imminent lawless action."[116] *Cox*, *Coates*, and *Black* all involved laws that targeted expressive conduct more than speech, and all three decisions condemned laws that criminalized behavior lacking an explicit causal connection to violence.[117]

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112. Id. at 124; see also Akindes v. City of Kenosha, No. 20-CV-1353-JPS-JPS, 2021 WL 4482838, at *8 (E.D. Wis. Sept. 30, 2021) (rejecting protesters' overbreadth challenge to a curfew ordinance imposed after protests against police brutality and noting that the curfew "does not plainly regulate expressive conduct").

113. See *Hicks*, 539 U.S. at 122–24 (internal quotation marks omitted).

114. See supra note 16 (quoting various scholars' criticisms of the Supreme Court's overbreadth jurisprudence in the context of protests).

115. See Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam).

116. See id. at 449 n.4.

117. See Virginia v. Black, 538 U.S. 343, 363–67 (2003) (rejecting as unconstitutional a jury instruction allowing jurors to presume that cross burning occurred with the intent to intimidate and thus fell outside First Amendment protection); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (holding that a law prohibiting annoying behavior violated the

A connection to imminent violence is not an absolute prerequisite for a valid law: *Cox*, *Cameron*, and *Hill* collectively indicate that the state may, in certain spaces like courthouses and medical clinics, have a particularly strong interest in ensuring unobstructed access or privacy to an area, and that interest may justify more stringent restrictions on speech or assembly that is merely obstructive, rather than violent.[118] But read together, these cases suggest that statutes criminalizing expression without a clear connection to imminent danger of violence or damage are likely overbroad unless limited to banning expression in particularly sensitive locations.

2. *Using Overly Expansive Definitions for Otherwise Unprotected Expression.* — In some cases the government may attempt to regulate speech that the First Amendment does not protect—such as true threats or advocacy accompanied by imminent danger of lawless action—but define those types of speech too broadly, so that the law infringes on both protected and unprotected expression.[119] Two federal circuit courts have recently struck down as overbroad specific portions of the federal Anti-Riot Act, concluding that although the government can legitimately criminalize violent rioting or organization of such riots, the law defined incitement broadly to include speech that merely encouraged rioting, rather than speech that created an imminent danger of rioting.[120] Renowned First Amendment scholar Frederick Schauer once explained that *Brandenburg*'s imminent danger requirement means that laws prohibiting threats of violence must make "a showing of gravity, immediacy, and specificity" to survive constitutional challenge.[121] When a statute does not require evidence that speech or expressive activity exceeds what the First Amendment protects, it is likely overbroad.

First Amendment); Cox v. Louisiana, 379 U.S. 536, 551–52 (1965) (holding that a law criminalizing behavior that disturbed, interrupted, and agitated the peace was "unconstitutionally vague in its overly broad scope").

118. See Hill v. Colorado, 530 U.S. 703, 717–18, 729–32 (2000) (upholding restrictions on protest activity near medical facilities); Cameron v. Johnson, 390 U.S. 611, 617 (1968) (rejecting a challenge to a law that banned picketing that obstructed access to courthouses); *Cox*, 379 U.S. at 562, 564 (rejecting a challenge to a law that banned picketing and parading near a courthouse).

119. See Fallon, supra note 32, at 866 (theorizing that a statute may be overbroad if it "purport[s] to regulate a category of speech based on the belief that the category is constitutionally unprotected" but "defin[es] the unprotected category more broadly than the Constitution permits"). For example, the Court struck down as overbroad a child pornography law because it went too far in banning depictions of adults who appeared to be minors, rather than limiting its scope to obscene depictions of children. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40, 252–55 (2002).

120. See United States v. Rundo, 990 F.3d 709, 717–18 (9th Cir. 2021) (per curiam); United States v. Miselis, 972 F.3d 518, 525–26, 530 (4th Cir. 2020); see also infra section II.B (discussing these cases in more detail).

121. Schauer, Free Speech Overrides, supra note 78, at 259–60; see also id. at 260 ("[E]ven harmful speech is routinely protected, and the import of the clear and present danger idea is that the harms must be especially great and especially immediate for the protection typically available for harmful speech to be forfeited.").

3. *Prohibiting More Expression Than the Governmental Interest Warrants.* — A law may also be overbroad if it infringes on more expressive activity than the governmental interest at stake merits.[122] In *Shelton v. Tucker*, for example, the Supreme Court held that an Arkansas law requiring public school teachers to annually disclose all organizations to which they belonged was overbroad.[123] Although the government had a legitimate interest in ascertaining the "fitness and competence of its teachers," the requirement that teachers disclose all organizational affiliations—some of which had "no possible bearing upon the teacher's occupational competence"—went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[124]

Similarly, the Court in *Board of Airport Commissioners v. Jews for Jesus, Inc.* struck down as overbroad a resolution that banned all "First Amendment activities" in the Los Angeles airport.[125] The Court noted that the resolution was overbroad in part because it was not limited to, for example, speech or conduct that unduly disrupted airport operations but instead extended to expressive speech or conduct like passing out literature or wearing symbolic clothing, which swept well beyond any legitimate interest in ensuring smooth operations of the airport.[126] This is consistent with *Hill* and *Cameron*, both of which rejected overbreadth claims to laws that banned First Amendment activity like picketing or approaching patients because those laws were limited to specific locations like courthouses and medical facilities in which the governmental interest in protecting courthouse operations or patient privacy was especially high.[127]

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122. See Fallon, supra note 32, at 865–66 ("Obviously, however, laws of this kind could be written to reach more speech and expressive activity than the compelling interest in avoiding corruption would warrant.").

123. 364 U.S. 479, 481–84 (1960).

124. Id. at 485, 488, 490; see also United States v. Robel, 389 U.S. 258, 259–66 (1967) (striking down as overbroad a federal statute prohibiting members of communist organizations from working in defense facilities because, although the government has a substantial interest in preventing sabotage and espionage, the statute indiscriminately proscribed all membership without requiring that members intended to further the organization's unlawful goals); Keyishian v. Bd. of Regents, 385 U.S. 589, 607–09 (1967) (invalidating a New York statute as overbroad because it extended beyond the state's legitimate interest); NAACP v. Button, 371 U.S. 415, 419, 438–44 (1963) (deciding that, although the state has a legitimate interest in regulating lawyers' professional conduct, a law criminalizing "improper solicitation" was overbroad because it abridged the valid practice of advising Black litigants about their right to raise civil rights claims (internal quotation marks omitted)).

125. 482 U.S. 569, 571, 574–75 (1987).

126. Id.; cf. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992) (holding that a ban on solicitation in a specific portion of an airport terminal was reasonable given the risk of disruption to travelers and flights).

127. See Hill v. Colorado, 530 U.S. 703, 717–18, 729–32 (2000) (affirming restrictions on protests near medical facilities); Cameron v. Johnson, 390 U.S. 611, 617 (1968) (affirming restrictions on protests near courthouses).

Even laws that appear facially unrelated to expression—such as prohibiting trespass on certain properties or presence in certain locations—may present overbreadth concerns if they limit activity in a way that restricts speech or assembly rights without a sufficient governmental interest.[128] Overbreadth claims are more tenuous in the context of statutes that do not specifically target expression because the Court applies a deferential reasonability standard when assessing overbreadth of a law that only tangentially affects expressive activity.[129] But some laws that appear unrelated to expression still do substantially restrict expression: For example, a trespass law might prevent activities like protesting outside a political office, a classic example of otherwise protected speech.[130] Or, lawmakers might ban presence in a certain area, knowing well that prohibiting people from accessing the area will so significantly displace protesters as to make their protest unavailing.[131]

These restrictions are facially content-neutral and may not even mention expressive activity, but they nonetheless significantly limit expression. Professor Timothy Zick has reasoned that laws banning presence in a certain area "substantially burden rights of association and expression" because they "rob speakers of proximity and immediacy that is critical to

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128. See Fallon, supra note 32, at 866 (noting that laws may be invalidated for overbreadth even when they "infringe speech interests only incidentally"); see also Monaghan, Overbreadth, supra note 32, at 27 (expressing concern that, while statutes such as trespass generally regulate "nonspeech," they could also be applied to a diverse range of speech-related activities, such as "solicitation and contribution of money, picketing, mass demonstrations, [and] expressive conduct" (internal quotation marks omitted)).

129. See Virginia v. Hicks, 539 U.S. 113, 122–24 (2003) ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).").

130. See Monaghan, Overbreadth, supra note 32, at 28–29 (suggesting that a trespass statute may run afoul of the First Amendment if it prohibits expressive speech in certain contexts); see also White Hat v. Landry, No. 6:20-CV-00983, 2024 WL 1496889, at *6 (W.D. La. Apr. 5, 2024) (reasoning that the fact that a Louisiana trespass statute targeted conduct rather than speech "does not end the [overbreadth] inquiry because conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the [First Amendment]'" (second alteration in original) (quoting Spence v. Washington, 418 U.S. 405, 409–11 (1974) (per curiam))).

131. See Timothy Zick, Speech and Spatial Tactics, 84 Tex. L. Rev. 581, 583 (2006) [hereinafter Zick, Speech and Spatial Tactics] (arguing that "[p]urportedly neutral restrictions on place can and do cancel expressive and associative rights" and citing examples of laws limiting spaces where people can gather to protest as examples); id. at 591–94 (providing multiple examples of location-based restrictions on protests, such as politicians creating "free speech zones" outside political conventions that restrict protest to certain areas far from the main crowd (internal quotation marks omitted)); see also Kevin Francis O'Neill, Disentangling the Law of Public Protest, 45 Loy. L. Rev. 411, 430–33 (1999) (providing examples of how location-based restrictions on protest can operate as content-based restrictions).

their message . . . [and] substantially burden, if they do not entirely prohibit, face-to-face speaker and listener interaction."[132] Because such laws impose a substantial burden on speech and expression, they present overbreadth concerns unless they are limited to burdening only such speech as is reasonably related to a legitimate governmental interest.

4. *Failing to Distinguish Between Individual and Group Conduct.* — In *NAACP v. Claiborne Hardware Co.*, the Court addressed a lawsuit by white business owners against Black Mississippians who had been involved in a boycott of white businesses that had ignored protesters' demands for racial integration.[133] The parties vigorously contested how peaceful the boycott was, although some participants were involved in acts of violence, intimidation, and threats.[134] After the Mississippi Supreme Court found nearly one hundred of the defendants jointly liable for business losses that the plaintiffs incurred, the Supreme Court granted certiorari to decide whether this finding violated the First Amendment rights of the boycott participants who had not engaged in violence or threats.[135] The Court rejected the state court's theory of joint liability and instead provided specific rules for assessing whether one member of an association can be held responsible for the acts of others.[136] The Court began by noting that the right of association "does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[137] It then reasoned that an individual cannot be held responsible for the acts of a group unless there is evidence "that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[138] While those who engaged in violence could be held liable, evidence "that violence occurred or even that violence contributed to the success of the boycott" was insufficient to create legal responsibility for those who did not engage in or incite violence themselves.[139]

While *Claiborne Hardware* did not directly involve a question of overbreadth, its analysis of what conduct can serve as the basis for criminal or civil liability is directly applicable to the overbreadth analysis. As Part II will explain in more detail, many laws that criminalize protest are targeted at

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132. Zick, Speech and Spatial Tactics, supra note 131, at 601; see also John D. Inazu, The First Amendment's Public Forum, 56 Wm. & Mary L. Rev. 1159, 1165 (2015) (decrying "physically distant and ironically named 'free speech zones'" that restrict protesters to locations far from the context they wish to protest).

133. 458 U.S. 886, 889–90 (1982).

134. See id. at 916, 921.

135. See id. at 890–91, 895–96.

136. Id. at 908, 926.

137. Id. at 908.

138. Id. at 920; see also id. at 919 ("[T]o punish association with such a group, there must be 'clear proof that a defendant "specifically intend[s] to accomplish [the aims of the organization] by resort to violence."'" (second and third alterations in original) (quoting Scales v. United States, 367 U.S. 203, 229 (1961))).

139. Id. at 933.

group activity and expression: Unlawful assembly and riot laws, for example, specifically penalize actions that occur within groups of two or more people and are inapplicable to people acting alone.[140] Some of these laws impose liability against anyone associated with a group that violates the law, without assessing whether individual people themselves engaged in criminal activity.[141] These laws run afoul of *Claiborne Hardware*'s prohibition against guilt by association.

5. *Lacking Clear Standards for Administration.* — While many people associate laws that are difficult to follow with the void for vagueness doctrine, these laws also present overbreadth concerns when their ambiguous text invests law enforcement with too much discretion in administration.[142] The statute the Court struck down as overbroad in *Coates* criinalized assemblies of three or more people that conducted themselves in an "annoying" manner.[143] The Court noted that, while some annoying behavior might also be criminal, this statute infringed on the right to assemble because it left the decision of which behaviors were too annoying—and therefore which assemblies could be dispersed and when participants could be criminally charged—up to the preferences of law enforcement.[144] This allowed law enforcement to "make[] a crime out of what under the Constitution cannot be a crime."[145]

Coates is far from the only First Amendment case to express concern over the lack of clear administrative standards. In *Cox*, the Supreme Court criticized a statute that prohibited "[o]bstructing [p]ublic [p]assage" because, though the state has the right to regulate use of public streets in a nondiscriminatory way, the statute in question allowed government officials "unfettered discretion" in deciding who could use the streets and for what purposes.[146] Similarly, in *Shuttlesworth v. City of Birmingham*, the Court vacated a conviction under a municipal ordinance criminalizing participating in a public demonstration without first obtaining a permit from the city.[147] The Court held that, because the ordinance conferred on city officials "virtually unbridled and absolute power" to decide who could obtain

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140. See infra sections II.A–.B.

141. See infra sections II.A–.B.

142. The void for vagueness doctrine, grounded in the Fourteenth Amendment's due process clause, requires criminal laws to be sufficiently clear for ordinary people to understand them. See Kolender v. Lawson, 461 U.S. 352, 357 (1983). While vagueness is beyond the purview of this Piece, one challenge does not preclude the other: Litigants may raise overbreadth and vagueness claims in the same case. See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 614–16 (1971) (considering overbreadth and vagueness challenges to the same ordinance).

143. See 402 U.S. at 612.

144. See id. at 615–16.

145. Id. at 616.

146. See Cox v. Louisiana, 379 U.S. 536, 553–58 (1965). The Court ultimately did not rule on whether the statute was facially overbroad, but it vacated the defendant's conviction as unconstitutional as applied to his conduct. Id. at 558.

147. See 394 U.S. 147, 148, 159 (1969).

a permit, it unconstitutionally infringed on free speech by allowing city officials to enforce the ordinance in a viewpoint-discriminatory manner.[148] Professor Richard Fallon, Jr. has also noted that ostensibly content-neutral laws can be overbroad when they do not contain clear standards for administration because they grant law enforcement authorities too much discretion to enforce the laws in a way that discriminates against certain viewpoints.[149]

While overbreadth can be a complex doctrine, these five features reveal that laws are overbroad when they reach too far: that is, when they criminalize too much expression, target too many people, or grant too much discretion in enforcement. Many protest-related laws present one or more of these five features of overbreadth.[150] The Court has not invalidated a criminal law as overbroad in the context of a protest-related prosecution in many years and has cautioned that courts should do so rarely because invalidating an entire statute is a strong remedy and "not to be 'casually employed.'"[151] But while this language has caused some scholars and litigators to shy away from overbreadth arguments, nearly all the current justices have demonstrated a continued willingness to employ the doctrine.[152] In the 2014 decision *McCullen v. Coakley*, which involved a challenge to a Massachusetts law aimed at preventing abortion protesters from approaching people near clinics, all nine Justices held that the law violated First Amendment protections (though on varied grounds), and two separate concurrences expressed concerns about the law's overbreadth.[153] In 2019, the Court struck down a portion of the Lanham Act (which denied trademarks for concepts that were "immoral or scandalous") as overbroad

148. Id. at 150, 153–58. The Court did not strike down the ordinance as overbroad because the Alabama Supreme Court afforded it a narrowing construction that prohibited viewpoint discrimination. See id. at 153 (noting that the state court "performed a remarkable job of plastic surgery upon the face of the ordinance"). However, the Court vacated the petitioner's conviction because the ordinance was applied to him in an illegal manner. Id. at 159.

149. See Fallon, supra note 32, at 866.

150. For more detailed discussion, see infra Part II.

151. See United States v. Hansen, 143 S. Ct. 1932, 1939 (2023) (quoting United States v. Williams, 553 U.S. 285, 293 (2008)) (cautioning against the casual application of overbreadth); see also Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (labeling overbreadth as a "last resort"); Schauer, Fear, Risk and the First Amendment, supra note 10, at 685–86 (bemoaning in the late 1970s that the Supreme Court had moved away from concerns regarding the chilling effect of overbroad laws).

152. See infra notes 150–154. Justice Sonia Sotomayor is the only sitting Justice for whom the author could not find any recent written opinions endorsing some form of overbreadth analysis.

153. See 573 U.S. 464, 491 n.8, 497 (2014) (referencing the "vagueness and overbreadth problems of the sort noted by" Justice Antonin Scalia's concurrence); id. at 512 (Alito, J., concurring in the judgment) (agreeing with the overbreadth concerns that the majority identified); id. at 503, 509–10 (Scalia, J., concurring in the judgment) (noting that a First Amendment analysis must assess whether the statute suppresses more speech than necessary, and in this case it did).

because determinations about immorality and scandal undoubtedly swept in speech that the First Amendment protects.[154] In 2021, the Court invalidated as overbroad a California law requiring charities to disclose to the IRS the names and addresses of major donors because the law unnecessarily chilled freedom of association without sufficient tailoring to a government interest in administering charities and investigating fraud.[155] And in 2024, the Court rejected a DOJ argument that a federal statute prohibiting state and local officials from accepting bribes also criminalized acceptance of gratuities, noting that such an interpretation of the law would present overbreadth concerns.[156] Additionally, multiple members of the current Court have expressed concerns over the perceived overbreadth of laws in concurring or dissenting opinions.[157] Overbreadth lives on, and the time is ripe for more overbreadth challenges to laws being applied to quash the expression of peaceful protesters.

II. CURRENT OVERBREADTH CONCERNS IN LAWS EMPLOYED AGAINST PROTESTERS

As this Piece's introduction illustrates, the United States has a long history of political protest, and of lawmakers and law enforcement authorities using their powers to stifle protests.[158] Part II analyzes overbreadth

154. See Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (striking down a portion of 15 U.S.C. § 1052(a) (2018)). While this Piece discusses overbreadth primarily in the context of criminal charges, the doctrine also applies to civil laws that implicate First Amendment rights, such as the Lanham Act, which was at issue in *Iancu*. See id.

155. See Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2386–87 (2021) (striking down, in an opinion written by Chief Justice John Roberts and joined by Justices Neil Gorsuch and Brett Kavanaugh, California's registration requirements for charities and noting that "the Attorney General's disclosure requirement is overbroad").

156. Snyder v. United States, 144 S. Ct. 1947, 1957 (2024) (noting "the overbreadth problems" that would arise from "reading § 666 to create a federal prohibition on gratuities").

157. See, e.g., Fischer v. United States, 144 S. Ct. 2176, 2193–94 (2024) (Jackson, J., concurring) (reasoning that concerns about broad interpretations of criminal statutes become more acute when charges carry serious penalties and rejecting the government's interpretation of a felony obstruction statute as "breathtakingly broad"); Allen v. Milligan, 143 S. Ct. 1487, 1541 (2023) (Thomas, J., dissenting, joined by Gorsuch & Barrett, JJ.) (voicing frustration over "extreme overbreadth" in a portion of the Voting Rights Act); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2398–99 (2020) (Kagan, J., concurring in the judgment, joined by Breyer, J.) (expressing the belief that a provision of the Affordable Care Act was overbroad); see also Garcia v. Stillman, No. 22-CV-24156-BLOOM/Otazo-Reyes, 2023 WL 5507735, at *2 (S.D. Fla. Aug. 25, 2023) (reviewing recent overbreadth cases in the Supreme Court and concluding that the overbreadth doctrine is "alive and well" (citing United States v. Hansen, 143 S. Ct. 1932, 1939–40 (2023))).

158. See supra text accompanying notes 1–7; see also Samuel W. Buell, The Upside of Overbreadth, 83 N.Y.U. L. Rev. 1491, 1499 (2008) (arguing that "[n]obody with power" has any incentive to curb overcriminalization because expanding criminal liability is generally easier and more politically popular than limiting it); Freedman, supra note 1, at 188–99 (detailing antiprotest bills between 2016 and 2021); Zachary Price, The Rule of Lenity as a

concerns in common antiprotest laws. Section II.A identifies eight types of laws that are frequently used as the basis for arrests of and charges against protesters and provides specific examples of federal or state statutes that have been employed against protesters in recent years. To the extent that litigants have challenged these laws as overbroad, section II.A highlights existing jurisprudence addressing those overbreadth challenges. Many of these laws, however, have survived with few constitutional challenges and minimal judicial scrutiny. Using the features of overbroad protest laws discussed in section I.C, section II.A analyzes which laws present overbreadth concerns and ultimately concludes that many of these underexamined laws are overbroad—and have been used to chill constitutionally protected expression.

Section II.B then provides examples of several state laws enacted or amended within the past few years in explicit or apparent response to protests. Most of these laws have not yet been challenged in court. Again relying on the features of overbroad laws discussed in section I.C, section II.B examines these new laws for potential overbreadth concerns and concludes that several are ripe for challenge.

A. *Frequently Used Antiprotest Laws*

1. *Unlawful Assembly.* — The Supreme Court has labeled the right to protest against police "one of the principal characteristics by which we distinguish a free nation from a police state."[159] The weeks following May 25, 2020—the day former Minneapolis police officer Derek Chauvin murdered George Floyd[160]—put that ideal to the test. While protests against police misconduct had previously occurred in a more localized fashion,[161] Floyd's murder gave rise to what many believe was the largest mass protest

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Rule of Structure, 72 Fordham L. Rev. 885, 911 (2004) ("Legislators face intense pressure to expand the reach of criminal law.").

159. City of Houston v. Hill, 482 U.S. 451, 462–63 (1987).

160. See Brandt Williams, Jon Collins, Nina Moini & Matt Sepic, The Murder of George Floyd, MPR News, https://www.mprnews.org/crime-law-and-justice/killing-of-george-floyd (on file with the *Columbia Law Review*) (last visited Mar. 5, 2025) (discussing George Floyd's murder on May 25, 2020, and providing a timeline of related events since his murder).

161. A few well-known examples include the protests in Los Angeles after Los Angeles Police Department officers assaulted Rodney King in 1992; in Ferguson, Missouri, after officer Darren Wilson killed Michael Brown in 2014; and in Baltimore after Freddie Gray died in police custody in 2015. See Critical Response Initiative, DOJ, After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri, at xiii, 3 (2015), https://ric-zai-inc.com/Publications/cops-p317-pub.pdf [https://perma.cc/GZ2R-K875] [hereinafter DOJ, After-Action Assessment] (describing protests after Michael Brown's death); German Lopez, The Baltimore Protests Over Freddie Gray's Death, Explained, Vox, https://www.vox.com/2016/7/27/18089352/freddie-gray-baltimore-riots-police-violence [https://perma.cc/UVV5-F7DV] (last updated Aug. 18, 2016) (describing protests after Freddie Gray's death); Jeff Wallenfeldt, Los Angeles Riots of 1992, Britannica, https://www.britannica.com/event/Los-Angeles-Riots-of-1992 [https://perma.cc/U3F2-TSHS] (last updated Apr. 22, 2025) (describing protests after Rodney King's beating).

movement in United States history.[162] The vast majority—approximately ninety-five percent—of these protests were nonviolent.[163] Nonetheless, thousands of people were arrested and charged with crimes.[164] One of the charges frequently used as a basis to arrest protesters was unlawful assembly.[165]

Unlawful assembly statutes had a precarious history well before 2020. Professors Tabatha Abu El-Haj and John Inazu, two of the country's most prominent scholars on the right to assemble, have both criticized unlawful

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162. See Buchanan et al., supra note 7.

163. See Roudabeh Kishi & Sam Jones, Armed Conflict Location & Event Data, Demonstrations & Political Violence in America: New Data for Summer 2020, at 2 (2020), https://acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED_USData Review_Sum2020_SeptWebPDF_HiRes.pdf [https://perma.cc/U52S-4FPL] (collecting data indicating that, of more than ten thousand protests between late May and August 2020 in the United States, approximately 5% involved some violence); Erica Chenoweth & Jeremy Pressman, This Summer's Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds, Wash. Post (Oct. 16, 2020), https://www.washingtonpost.com/politics /2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/ [https://perma.cc/A23F-BK8M] (analyzing data indicating that 96.3% of Black Lives Matter protests in 2020 "involved no property damage or police injuries" and that 97.7% of events involved no reports of injuries by participants, bystanders, or police).

164. See Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, Swept Up by Police, Wash. Post (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ [https://perma.cc/6QFY-PU4V] (gathering data indicating that within the first two weeks of George Floyd's murder, police in cities with the fifty largest protests had arrested more than seventeen thousand people, with a review of fifteen of those cities showing that the vast majority of those arrested were charged with "nonviolent misdemeanors"); Anita Snow, AP Tally: Arrests at Widespread US Protests Hit 10,000, AP News (June 4, 2020), https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7 [https://perma.cc/F4YH-UYWW] (stating that approximately one week after George Floyd's murder, police had arrested more than ten thousand people during protests across the United States).

165. See Rilyn Eischens, One Year Later, Few Charges for the Arson and Destruction, Minn. Reformer (May 27, 2021), https://minnesotareformer.com/2021/05/27/one-year-later-few-charges-for-the-arson-and-destruction/ [https://perma.cc/ESN7-SK8Q] (describing hundreds of protesters arrested for unlawful assembly, among other charges); Kornfield et al., supra note 164 (discussing protesters arrested for unlawful assembly); Sam Levin & Maanvi Singh, America's Protest Crackdown: Five Months After George Floyd, Hundreds Face Trials and Prison, The Guardian (Oct. 27, 2020), https://www.theguardian.com/us-news/2020/oct/27/americas-protest-crackdown-five-months-after-george-floyd-hundreds-face-trials-and-prison [https://perma.cc/R8HY-YPGB] (describing a protester's unlawful assembly arrest in Arizona); Some N.Y.C. Protests Ended Quietly. Others Ended in Arrests, N.Y. Times (June 5, 2020), https://www.nytimes.com/2020/06/05/nyregion/nyc-protests-george-floyd.html (on file with the *Columbia Law Review*) (last updated Dec. 18, 2020) (describing arrests of protesters for unlawful assembly); 6 Arrested for Unlawful Assembly While Protesting George Floyd's Death in Oakdale, CBS News (May 28, 2020), https://www.cbsnews.com/minnesota/news/6-arrested-for-unlawful-assembly-while-protesting-george-floyds-death-in-oakdale/ [https://perma.cc/ESN7-SK8Q] (describing unlawful assembly arrests in protests following George Floyd's murder); see also DOJ, After-Action Assessment, supra note 161, at 1, 64 (detailing arrests of protesters for unlawful assembly in the aftermath of Michael Brown's killing in 2014).

assembly statutes for their lack of clarity and their use by government officials to criminalize protesters engaged in protected expression.[166] According to Professor Inazu, modern unlawful assembly statutes violate the right to assemble when they allow law enforcement officials to disperse or criminalize assemblies involving no reasonable fear or likelihood of imminent force or violence.[167]

During the civil rights era, multiple state and federal courts struck down as overbroad unlawful assembly statutes that required no showing that the assembly—and specifically, the people arrested and prosecuted for unlawful assembly—had involved either violence or conduct creating a reasonable fear of imminent violence. In 1969, the U.S. Court of Appeals for the Ninth Circuit concluded in *Comstock v. United States* that Washington's unlawful assembly statute, which defined an unlawful assembly as occurring when three or more people assembled "with intention . . . [t]o carry out any purpose in such manner as to disturb the public peace," was overbroad because it failed to provide any limiting definition of disturbing the peace.[168] The court held that, without a "suitably restrictive construction"[169] requiring the assembly to present a "clear and present danger to a substantial interest of the State," the statute ran the risk of improperly criminalizing protected expression.[170]

In 1971, the Virginia Supreme Court similarly invalidated as overbroad an unlawful assembly statute that criminalized assembling "for the purpose of disturbing the peace or exciting public alarm or disorder."[171] The statute intruded on First Amendment rights because it contained no requirement of "clear and present danger of violent conduct" or "other immediate threat to public safety, peace, or order."[172] Just two years later,

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166. See Abu El-Haj, Defining *Peaceably*, supra note 16, at 967 (noting that the answer to what constitutes an unlawful assembly is not at all clear); Inazu, Unlawful Assembly as Social Control, supra note 14, at 7 ("[M]odern approaches to unlawful assembly have gone well beyond . . . measured restrictions and have instead opened the door to arbitrary enforcement by government authorities."). Professor Abu El-Haj's contribution to this Symposium also addresses the right of assembly in the context of protests. See Abu El-Haj, A Right of Peaceable Assembly, supra note 53.

167. See Inazu, Unlawful Assembly as Social Control, supra note 14, at 35; see also id. at 38 ("[G]overnment officials must exercise restraint in their regulation of expressive freedoms unless the exercise of those freedoms threatens imminent harm."); Zick, Arming Public Protests, supra note 38, at 271 (arguing that First Amendment protections extend to protest "that causes significant discomfort or raises serious safety concerns").

168. 419 F.2d 1128, 1129–30 (9th Cir. 1969) (alteration in original) (internal quotation marks omitted) (quoting Wash. Rev. Code § 9.27.060 (1951)).

169. Id. at 1130.

170. Id. (internal quotation marks omitted) (quoting Garner v. Louisiana, 368 U.S. 157, 202–03 (1961) (Harlan, J., concurring)).

171. Owens v. Commonwealth, 179 S.E.2d 477, 480–81 (Va. 1971) (internal quotation marks omitted) (quoting Va. Code § 18.1-254.1(c) (1970)).

172. Id. (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)); see also Thomas v. City of Danville, 152 S.E.2d 265, 269 (Va. 1967) (striking down as unconstitutional an injunction preventing protesters from "holding unlawful assemblies such as to unreasonably

the California Supreme Court recognized that California's unlawful assembly statute, which barred two or more people from acting "in a violent, boisterous or tumultuous manner," was overbroad unless construed as "limited to assemblies which are violent or which pose a clear and present danger of imminent violence."[173] The court reasoned that, although large assemblies espousing unpopular ideas may strike fear in some people, "such an apprehension does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable and the assembly poses a threat of violence."[174]

These cases all stand for the proposition that unlawful assembly statutes are unconstitutional if they criminalize assemblies posing no immediate threat of violence. Yet other similar statutes have survived with little or no scrutiny despite their continued use by law enforcement. In Minneapolis, for example, law enforcement officers arrested hundreds of protesters for unlawful assembly in the days following George Floyd's murder, and again following protests after Derek Chauvin was released on bail pending trial.[175] Minnesota's unlawful assembly statute—which was first enacted in 1963, during the height of the Civil Rights era—reads:

> When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is:
>
> (1) with intent to commit any unlawful act by force; or
>
> (2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace; or
>
> (3) without unlawful purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public peace.[176]

Minnesota's unlawful assembly statute is constitutionally problematic for the same reason as the statutes that the Ninth Circuit and the Virginia and California Supreme Courts found overbroad: It does not require the government to show that the assembly involved an imminent threat of force, violence, or property damage, and thus it falls squarely within the first feature of overbroad protest laws.[177] Section 3 permits prosecution for

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disturb or alarm the public within the City of Danville" (internal quotation marks omitted) (quoting the lower court's injunction)).

173. In re Brown, 510 P.2d 1017, 1024 (Cal. 1973) (internal quotation marks omitted) (quoting Cal Penal Code § 407 (1969)).

174. Id.

175. Eischens, supra note 165; Anna Granias, Ryan Evans, Daniel Lee, Nicole MartinRogers & Emma Connell with Jose Vega, An External Review of the State's Response to the Civil Unrest in Minnesota From May 26–June 7, 2020, at 12–13 (2022), https://www.wilder.org/sites/default/files/imports/DPS_StatesResponseToCivilUnrest_Report_03-22_updated.pdf [https://perma.cc/5ARS-F9PG] (describing mass arrests of "largely amicable" protesters in Minneapolis after George Floyd's murder).

176. Minn. Stat. § 609.705 (2024).

177. See Comstock v. United States, 419 F.2d 1128, 1129–30 (9th Cir. 1969) (striking down unlawful assembly statutes similar to Minnesota's as overbroad); *Brown*, 510 P.2d at

assemblies that merely "disturb or threaten the public peace," without any language requiring that the disturbance be violent or limiting what type of disturbance runs afoul of the statute.[178] Section 2 is even more problematic: It does not require a disturbance of the peace at all, and instead criminalizes gatherings in which some people intend to disturb the peace.[179] Section 1 has at least a tenuous connection to force or violence, in that it criminalizes people assembling with the intent to break the law by force, but it may still intrude on the right to assemble since it does not require the state to show that any actors took any affirmative steps to make their unlawful acts imminent.[180]

Despite hundreds of arrests for this charge in 2020 alone, the Minnesota Supreme Court has considered (and rejected) an overbreadth challenge to the unlawful assembly statute just once, more than fifty years ago.[181] In a brief 1973 opinion that entirely neglected to address the statute's failure to require any imminent threat of harm or violence—it is unclear whether the litigants even challenged the statute on that basis—the Minnesota Supreme Court concluded that the statute was not overbroad because "the only misbehavior intended to be prohibited is that which disturbs or threatens the public peace."[182] But criminalizing disturbing the peace, without defining what speech or conduct constitutes a disturbance, improperly allows the police to disrupt assemblies and arrest participants without assessing whether the assemblies present an immediate threat to public safety.

Minnesota's statute also contains two overbreadth concerns not discussed in *Comstock*, *Brown*, or *Owens*: failing to distinguish between individual and group conduct[183] and lacking clear standards for administration.[184] First, the statute does not require any individualized proof of culpability but instead criminalizes "each participant" in the assembly as long as "the

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1024 (same); *Owens*, 179 S.E.2d at 480–81 (same); see also Jones v. Parmley, 465 F.3d 46, 57 (2d Cir. 2006) ("[P]olice may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety." (quoting *Cantwell*, 310 U.S. at 308–09)); supra section I.C.1 (identifying the first feature of an overbroad protest law as one that criminalizes speech or expressive conduct without any causal connection to imminent danger of violence or property damage).

178. Minn. Stat. § 609.705(3).

179. See id. § 609.705(2).

180. See id. § 609.705(1); see also Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (noting the "wide difference" between merely assembling for an "evil" purpose and actually taking steps to accomplish that purpose), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

181. See State v. Hipp, 213 N.W.2d 610, 615 (Minn. 1973). In 2020, the Minneapolis City Attorney's Office dismissed many of the unlawful assembly charges after protesters were arrested, which is one reason these charges were scarcely litigated. See Eischens, supra note 165.

182. *Hipp*, 213 N.W.2d at 614–15.

183. See supra section I.C.4; supra text accompanying notes 132–138.

184. See supra section I.C.5; supra text accompanying notes 139–146.

assembly" has an unlawful intent or "the participants" are disorderly.[185] As the Supreme Court recognized in *Claiborne Hardware*, "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[186] Accordingly, before the government can impose liability on the basis of association alone, it must "establish that the group itself possessed unlawful goals *and* that the individual held a specific intent to further those illegal aims."[187]

Much like the protesters in *Claiborne Hardware*, a small percentage of people involved in assemblies in Minneapolis and other cities across the country during the summer of 2020 engaged in violence themselves, which the First Amendment does not protect.[188] Those people could be, and in some cases were, individually prosecuted.[189] But Minnesota's unlawful assembly statute fails to distinguish between those who personally engaged in violence or disturbed the peace and those who were simply present. It thus improperly attributes the guilt of a few to everyone involved in the assembly, sweeping in legitimate peaceful protest.[190] Unsurprisingly, that is exactly what happened during the protests after George Floyd's murder. A team of experts hired after the protests to conduct an external audit of law enforcement's response concluded that, "On several occasions, law

185. See Minn. Stat. § 609.705.

186. 458 U.S. 886, 908 (1982).

187. Id. at 920 (emphasis added); see also Orsolya Salát, Peaceful Intentions, Peaceful Conduct, *in* The Oxford Handbook of Peaceful Assembly (Tabatha Abu El-Haj, Michael Hamilton, Thomas Probert & Sharath Srinivasan eds., forthcoming Aug. 2025) (manuscript at 10) (on file with the *Columbia Law Review*) (explaining that, in international human rights law, courts protect the right to peaceful assembly by directing police to focus on violent individual participants rather than dispersing or criminalizing the entire group based on the violence of a few).

188. See Kishi & Jones, supra note 163, at 2; Chenoweth & Pressman, supra note 163.

189. See *Claiborne Hardware*, 458 U.S. at 933; see also, e.g., Associated Press, Texas Man in 'Boogaloo' Movement Pleads Guilty to Firing at Police Station During Floyd Protest, NBC News (Oct. 1, 2021), https://www.nbcnews.com/news/us-news/texas-man-boogaloo-movement-pleads-guilty-firing-police-station-floyd-rcna2499 (on file with the *Columbia Law Review*) (describing a guilty plea by a man who fired thirteen gunshots during protests following George Floyd's murder); Press Release, U.S. Atty's Off., Dist. of Minn., Illinois Man Sentenced to Prison for Arson of Minneapolis Cell Phone Store During Summer 2020 Civil Unrest (Aug. 10, 2021), https://www.justice.gov/usao-mn/pr/illinois-man-sentenced-prison-arson-minneapolis-cell-phone-store-during-summer-2020-civil [https://perma.cc/YM4K-XZY4].

190. Cf. *Claiborne Hardware*, 458 U.S. at 920 (rejecting a statute that imposed civil liability based on association with a group of which "some members" engaged in violence); id. ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

enforcement did not successfully differentiate between lawful and unlawful protesters."[191]

Second, Minnesota's unlawful assembly statute provides no standards for when law enforcement authorities may declare an assembly unlawful, and it does not require authorities to warn the assembly participants before arresting them for unlawful assembly.[192] It thus gives law enforcement too much discretion in deciding when to disperse assemblies and arrest protesters. As discussed in section I.C, the Supreme Court has emphasized that statutes giving law enforcement too much discretion to decide when a law is violated risk chilling constitutionally protected expression by allowing officials to enforce the laws discriminatorily on the basis of content or viewpoint.[193] Minnesota's statute allows police officers to decide whether an assembly has a collective intent to disturb the peace and then to arrest anyone present at the assembly without any individualized assessment of guilt.[194] It also does not require law enforcement officers to give well-intentioned assembly participants an opportunity to leave before being arrested.[195] Many courts have held that demonstrators have a right to fair warning and an opportunity to disperse before arrest.[196] Even when some assembly participants engage in violent or dangerous behavior that justifies dispersing the assembly, police must still give warning before arresting participants.[197] Some states build this requirement into their

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191. Granias et al., supra note 175, at 3, 33–34; see also id. at 6, 38–39 (recommending that city officials learn to "[d]ifferentiate peaceful protestors from those engaging in unlawful activities").

192. See Minn. Stat. § 609.705 (2024).

193. See Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971) (holding that an ordinance violated the rights of free assembly and association because its text created an "obvious invitation to discriminatory enforcement"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150 (1969) (holding that a law giving city officials "unbridled and absolute power" to issue parade permits violated the First Amendment); Cox v. Louisiana, 379 U.S. 536, 556–58 (1965) (reversing the appellant's conviction because the city's practice of giving law enforcement authorities "unbridled discretion" to enforce the law invited selective enforcement and violated the right to freedom of expression); see also supra section I.C.5.

194. See Minn. Stat. § 609.705.

195. See id.

196. See, e.g., Vodak v. City of Chicago, 639 F.3d 738, 745–47 (7th Cir. 2011) (holding that police erred in arresting protesters for failure to disperse without first ensuring that the protesters had been adequately warned about the need to disperse); Jones v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006) (same); Barham v. Ramsey, 434 F.3d 565, 575 (D.C. Cir. 2006) (ruling that police were not justified in arresting a mass of protesters without first providing a lawful order to disperse and time to comply with that order); see also Caleb Hayes-Deats, Demonstrators' Right to Fair Warning, 13 First Amend. L. Rev. 140, 149–69 (2014) (explaining the history of the right to fair warning).

197. See *Parmley*, 465 F.3d at 60 (concluding that even after some participants in an assembly broke the law, the other participants "enjoyed First Amendment protection, and absent imminent harm, the troopers could not simply disperse them without giving fair warning" (citing City of Chicago v. Morales, 527 U.S. 41, 58 (1999))); Hayes-Deats, supra note 196, at 197 ("[C]ourts enforcing the right to fair warning exhibit the same concern for the protection of potentially innocent conduct as courts engaged in overbreadth review.").

unlawful assembly statutes by limiting criminal liability to someone who "intentionally fails or refuses to withdraw from an unlawful assembly which the person knows has been ordered to disperse."[198] Minnesota does not.

Although Minnesota provides an especially stark example of an overbroad unlawful assembly statute, it is not alone. Iowa's unlawful assembly statute—which the state enhanced in 2021 from a simple to an aggravated misdemeanor—defines an unlawful assembly as "three or more persons assembled together, with them *or any of them* acting in a violent manner, and with intent that they *or any of them* will commit a public offense."[199] A person can be found guilty of unlawful assembly in Iowa without committing any unlawful activity themselves if they knowingly fail to disassociate themselves from a group in which at least one person is acting violently.[200] During protests in Iowa after George Floyd's murder, police officers relied on this law to pepper-spray, tackle, and arrest, among others, a photojournalist covering the protests when he failed to leave the scene after officers issued a dispersal order.[201] Although multiple people arrested during these protests filed civil lawsuits against the police, no court was asked to address the constitutionality of the unlawful assembly statute.[202]

Similarly, St. Louis has a city ordinance that defines unlawful assembly as follows:

> Any two persons who shall, in this City, assemble together, or, being assembled, shall act in concert to do any unlawful act with force or violence, against the property of this City, or the person or property of another, or against the peace or to the terror of others, and shall make any movement or preparation therefor, and every person present at such meeting or assembly, who shall not endeavor to prevent the commission or perpetration of such unlawful act, shall be guilty of a misdemeanor.[203]

Like Minnesota's statute, this ordinance improperly criminalizes all participants in an assembly without an individualized determination of guilty intent or action and gives police almost limitless discretion to declare an assembly unlawful. During protests in 2017 following the acquittal of the St. Louis police officer who shot and killed Anthony Lamar

198. E.g., Wis. Stat. & Ann. § 947.06(3) (2025).

199. Iowa Code § 723.2 (2025) (emphasis added).

200. See id. (requiring proof of only one person acting unlawfully or having an unlawful intent); see also Nieters v. Holtan, 83 F.4th 1099, 1106 (8th Cir. 2023) (reasoning that a person can join an unlawful assembly by "knowingly joining or remaining with the group assembled after it has become unlawful" (internal quotation marks omitted) (quoting White v. Jackson, 865 F.3d 1064, 1075 (8th Cir. 2017))), cert. denied, 144 S. Ct. 1349 (2024) (mem.).

201. See *Nieters*, 83 F.4th at 1104.

202. See id.; see also Dunn v. Does 1–22, 116 F.4th 737, 746 (8th Cir. 2024) (involving, similarly, a civil lawsuit filed against Des Moines police officers alleging wrongful arrests during protests); Sahr v. City of Des Moines, 666 F. Supp. 3d 861, 869 (S.D. Iowa 2023) (same).

203. St. Louis, Mo., City Ordinance § 15.52.010 (2025).

Smith, St. Louis police used this ordinance to declare unlawful assemblies, disperse protesters, and arrest some participants.[204] In subsequent litigation, the St. Louis police lieutenant in charge of the "Civil Disobedience team" testified that his department allowed officers to rely on their own discretion to declare an unlawful assembly, did not require evidence of force of violence before declaring an unlawful assembly, and had no "guidelines, rules, or written policies with respect to when an unlawful assembly should be declared."[205]

2. *Riot and Incitement to Riot.* — While some riots are violent and destructive, the word riot—and the accusation of rioting—has also been used "to discredit largely peaceful protest movements, tainting them with the implications of violence, mayhem, and disorder."[206] Most states have laws that criminalize rioting, and many of these laws implicate one or more of the five features of overbroad protest laws discussed in section I.C.[207]

First, many riot laws—like the unlawful assembly statutes discussed in section II.A.1—fail to distinguish between individual and group conduct by sweeping in people who "engage in no violence themselves, but are simply part of a crowd that is deemed to be 'rioting.'"[208] North Dakota's riot statute epitomizes this type of overbreadth. North Dakota defines a riot as "a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function."[209] Much like Minnesota's unlawful assembly statute, North Dakota's riot statute does not require the government to prove that the specific person prosecuted under this law intended to engage in riot or acted violently.[210]

North Dakota courts have never addressed an overbreadth challenge to this statute, although the North Dakota Supreme Court did recently

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204. See Ahmad v. City of St. Louis, No. 4:17-CV-2455-CDP, 2017 WL 5478410, at *1–5 (E.D. Mo. Nov. 15, 2017).

205. Id. at *6; see also Melina Delkic, Stockley Verdict: City Withheld Evidence, Lawyer Says, Newsweek (Sept. 19, 2017), https://www.newsweek.com/jason-stockley-verdict-evidence-withheld-smith-family-lawyer-667144 [https://perma.cc/768A-NC4V] (providing more details about how St. Louis officer Jason Stockley shot and killed Anthony Lamar Smith).

206. Robinson, supra note 2, at 81; see also Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 406 n.1 (2018) ("[T]he term riot suggests chaos . . . .").

207. See supra section I.C.

208. Robinson, supra note 2, at 82; see also supra section I.C.4 (noting that failing to distinguish between individual and group conduct is a common feature of overbroad protest laws); section II.A.1 (discussing overbreadth concerns in unlawful assembly statutes).

209. N.D. Cent. Code § 12.1-25-01 (2024).

210. Compare Minn. Stat. § 609.705 (2024) (criminalizing "each participant" in an assembly if the assembly as a whole intends "to commit any unlawful act by force"), with N.D. Cent. Code § 12.1-25-01 (criminalizing the act of "[i]ncit[ing] or urg[ing] five or more persons to create or engage in a riot" or "[g]iv[ing] commands . . . in furtherance of a riot").

overturn a protester's riot conviction under this statute.[211] During protests against the construction of the Dakota Access Pipeline in 2017, some people were convicted of rioting for declining police orders to leave and then locking arms with each other when police moved to arrest them.[212] In *State v. Bearrunner*, the defendant challenged the riot law as applied to his conduct, and the state supreme court vacated his conviction because the state introduced no evidence that anyone in the group acted violently.[213] The court did not assess the constitutionality of the statute.[214]

Kentucky's definition of riot similarly fails to require any individualized proof of violent conduct. Mirroring the language of North Dakota's riot statute, the law defines riot as "a public disturbance involving an assemblage of five . . . or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function."[215] People are guilty of riot—a felony in Kentucky—if they knowingly participate in an "assemblage," even if their own conduct was neither violent nor tumultuous.[216]

No Kentucky appellate court has opined on the constitutionality of this statute. During the protests after Louisville police killed Breonna Taylor in 2020, Louisville officers charged the state's only Black female legislator, Attica Scott, with riot after a group of protesters—not including Scott—broke the windows of a restaurant near where she was standing.[217] Video of the incident purportedly showed Scott attempting to leave and asking police officers where she should go.[218] The law's broad sweep—

211. See State v. Bearrunner, 921 N.W.2d 894, 898 (N.D. 2019).

212. See id.

213. See id.

214. See id.

215. Ky. Rev. Stat. Ann. § 525.010 (West 2024).

216. See id. § 525.020; see also id. cmt. 1974 (noting that Kentucky's riot statutes "do not specify that the rioters must 'act together' in a conspiracy sense" and, consequently, that "it is not necessary to prove that the actor participated with allies in the prohibited course of conduct"). In contrast to Kentucky, at least one court has interpreted Tennessee's similarly worded riot law as requiring proof of individual violence to avoid overbreadth concerns. See Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89, 93–94 (W.D. Tenn. 1970) ("[W]e conclude that a reasonable construction of [Tennessee's riot law] is that in referring to 'any person participating in a riot,' it includes only those persons who actually are participating in the acts of violence . . . ." (quoting Tenn. Code Ann. § 39-5102 (1970))).

217. Elizabeth Joseph, Kentucky's Only Black Female Legislator Arrested in Breonna Taylor Protest, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/us/attica-scott-arrest-breonna-taylor-protest/index.html [https://perma.cc/TTL9-R6KK] (last updated Sept. 26, 2020).

218. Id. Prosecutors later dismissed the charge, acknowledging that they had no evidence Scott engaged in violent or tumultuous conduct. Tessa Duvall, Charges Dropped Against Rep. Attica Scott, 17 Others in Breonna Taylor Protest Arrest, Louisville Courier J. (Nov. 16, 2020), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/11/16/attica-scotts-charges-dropped-in-breonna-taylor-protest-arrest/6312545002/ [https://perma.cc/6MPK-QGBU] (last updated Nov. 17, 2020).

effectively holding all participants in an assembly criminally responsible for the misconduct of a few—makes it difficult for peaceful protesters participating in a large protest involving isolated violence by other participants to know whether their own protest is protected—and thus potentially chills peaceful expression and assembly.[219]

Similarly, Minnesota's third-degree riot laws provides: "When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant therein is guilty of riot."[220] After police officer Jeronimo Yanez shot and killed Philando Castile in 2017, police in St. Paul, Minnesota, charged more than forty protesters with rioting during a highway protest in which a handful of people threw rocks and bottles at police.[221] Although Minnesota's statute does not require evidence of individualized violence, a judge nonetheless dismissed charges against thirty-eight protesters who had not themselves engaged in any non-peaceful conduct.[222] No Minnesota appellate court has addressed a challenge to the constitutionality of this statute.

Second, some states define riot too broadly by criminalizing conduct that presents no imminent threat of force or violence.[223] Arkansas, for example, defines riot as "knowingly engag[ing] in tumultuous or violent conduct that creates a substantial risk of . . . [c]ausing public alarm."[224] The statute does not define "tumultuous," and the "or" clause, which exempts the state from proving that any alleged rioter acted violently, renders it susceptible to enforcement against people who engage in nonviolent conduct that causes no physical harm. The statute also invites discriminatory enforcement against people expressing unpopular views, in that it criminalizes conduct that creates "substantial risk" of "public alarm," rather than applying more narrowly to tangible harms like damage to property or injury to people.[225] No state appellate court has addressed a challenge to the statute's constitutionality.

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219. See Robinson, supra note 2, at 109–10 ("[A] broad interpretation of rioting can leave those in a crowd confused about their potential criminal liability. It also provides law enforcement extensive leeway to designate a gathering or protest a riot and engage in mass arrests for rioting, even if there is only isolated property destruction or violence . . . .").

220. Minn. Stat. § 609.71(3) (2024). North Carolina's riot statute contains a similar provision. See N.C. Gen. Stat. § 14-288.2(a)–(b) (2025).

221. See Randy Furst, Riot Charges Thrown Out Against Castile Protesters on I-94 in July, Minn. Star Trib. (Jan. 12, 2017), http://www.startribune.com/judge-throws-out-riot-charges-against-july-freeway-protesters/410459215/ (on file with the *Columbia Law Review*).

222. See id.

223. See supra section I.C.2; see also Robinson, supra note 2, at 109.

224. Ark. Code Ann. § 5-71-201(a)(1) (2025); see also id. § 5-71-201(b)(2) (amending the statute after the protests of 2020 to include a mandatory minimum penalty of thirty days in jail).

225. Cf. Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971) (condemning broadly written laws that invite discriminatory enforcement); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 148 (1969) (same); Cox v. Louisiana, 379 U.S. 536, 553–58 (1965) (same).

Third, some riot laws target speech that allegedly incites, encourages, or urges others to participate in a riot without requiring proof that the speech created an imminent danger of violence or harm.[226] The federal Anti-Riot Act, for example, criminalizes traveling or using interstate commerce with intent:

> (1) to incite a riot; or
>
> (2) to organize, promote, encourage, participate in, or carry on a riot; or
>
> (3) to commit any act of violence in furtherance of a riot; or
>
> (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot . . . .[227]

Two recent federal cases involved overbreadth challenges by members of a white supremacist group who participated in the 2017 Unite the Right rally in Charlottesville, Virginia.[228] On appeal, the U.S. Courts of Appeals for the Fourth and Ninth Circuits invalidated portions of the Anti-Riot Act as overbroad because they criminalized speech that merely urged, encouraged, or promoted a riot.[229] Relying on *Brandenburg*, the courts held that, because these portions of the Anti-Riot Act criminalized mere advocacy in support of rioting without requiring proof that the advocacy created a clear and imminent danger, they infringed on First Amendment rights.[230] But the courts upheld portions of the Act that criminalized inciting a riot, reasoning that those provisions satisfied *Brandenburg*'s imminence requirement.[231] The courts disagreed on whether the statutory provision prohibiting "organiz[ing]" a riot is overbroad; the Fourth Circuit held that organization requires substantive activity beyond mere advocacy

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226. See Nancy C. Marcus, When "Riot" Is in the Eye of the Beholder: The Critical Need for Constitutional Clarity in Riot Laws, 60 Am. Crim. L. Rev. 281, 284 (2023) ("Riot statutes are often so vague and overbroad as to threaten the constitutional rights of those who might be made criminals under them . . . ."); cf. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (rejecting a speech-based law as overbroad because it did not require proof that the speech created a danger of imminent lawless action); Robinson, supra note 2, at 109 (criticizing anti-riot laws that "capture those who do not engage in violence").

227. 18 U.S.C. § 2101(a) (2018).

228. See United States v. Rundo, 990 F.3d 709, 717–18 (9th Cir. 2021) (per curiam); United States v. Miselis, 972 F.3d 518, 525–26, 530 (4th Cir. 2020).

229. See *Rundo*, 990 F.3d at 717–18; *Miselis*, 972 F.3d at 525–26, 530.

230. Compare *Rundo*, 990 F.3d at 716–17, 720–21 (severing as unconstitutional portions of the federal anti-riot law that criminalize speech with no clear connection to imminent danger), and *Miselis*, 972 F.3d at 525–26, 536–39 (same), with Ark. Code Ann. § 5-71-203 (2025) (criminalizing knowingly using speech or conduct to urge others to participate in a riot "under circumstances that produce a clear and present danger that they will participate in a riot").

231. See *Rundo*, 990 F.3d at 716–17; *Miselis*, 972 F.3d at 536, 538.

and thus can properly be criminalized, while the Ninth Circuit held this provision overbroad.[232]

Before these decisions, federal prosecutors used the Anti-Riot Act to charge nearly two hundred people involved in protests surrounding Donald Trump's 2017 inauguration.[233] Although some of those charged engaged in violence and property damage, the government admitted it had no evidence of violence by most of the charged protesters.[234] Ultimately, after two group trials that resulted in acquittals for most defendants and a hung jury on a few charges, the government dismissed charges against nearly every defendant.[235] Federal prosecutors have also used the Anti-Riot Act to charge several people with incitement to riot based on social media posts alone, including one former Ferguson activist who was indicted based solely on allegedly inflammatory social media posts against police officers in the aftermath of George Floyd's murder.[236] The government dismissed the charge several weeks later.[237]

Shortly before the Fourth and Ninth Circuit decisions in *United States v. Miselis* and *United States v. Rundo*, a federal district court struck down similar provisions in South Dakota's riot statutes for being overbroad; these provisions criminalized advising, encouraging, or soliciting other

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232. Compare *Miselis*, 972 F.3d at 537–38 ("[S]peech tending to organize a riot serves not to persuade others to engage in a hypothetical riot, but rather to facilitate the occurrence of a riot that has already begun to take shape . . . and may thus be proscribed without reference to *Brandenburg*."), with *Rundo*, 990 F.3d at 717 ("[T]he use of the verb 'organize' . . . punishes protected speech."). Other courts have acknowledged overbreadth concerns about the statute. See United States v. Dellinger, 472 F.2d 340, 360–62 (7th Cir. 1972) (rejecting an overbreadth challenge to the "organize, promote, encourage" portions of the Anti-Riot Act but acknowledging that "the case is close" (internal quotation marks omitted) (quoting 18 U.S.C. § 2101(a)(1))); United States v. Massey, No. 21-CR-142, 2022 WL 79870, at *2–3 (N.D. Ill. Jan. 7, 2022) (rejecting the defendant's overbreadth claim based on *Dellinger* but acknowledging the contrary opinions in *Miselis* and *Rundo*).

233. See Tim Ryan, Riot Charges Dropped Against 129 Inauguration Day Protesters, Courthouse News Serv. (Jan. 19, 2018), https://www.courthousenews.com/riot-charges-dropped-against-129-inauguration-day-protesters (on file with the *Columbia Law Review*).

234. See id.

235. See id. The government ultimately did not prevail in any trial, but approximately twenty people had already pleaded guilty by the time the government dismissed the final remaining charges. See id; see also Associated Press, Government Drops Charges Against All Inauguration Protesters, NBC News (July 6, 2018), https:// www. nbcnews.com/news/us-news/government-drops-charges-against-all-inauguration-protesters-n889531 [https:// perma.cc/K7A5-DJGV].

236. See Cyrus Farivar & Olivia Solon, FBI Trawled Facebook to Arrest Protesters for Inciting Riots, Court Records Show, NBC News (June 19, 2020), https://www.nbcnews.com/tech/social-media/federal-agents-monitored-facebook-arrest-protesters-inciting-riots-court-records-n1231531 [https://perma.cc/M8ZU-53HA].

237. See Rebecca Rivas, Feds Dismiss Incitement Charge Against Michael Avery, St. Louis Am. (June 17, 2020), https://www.stlamerican.com/news/local-news/feds-dismiss-incitement-charge-against-michael-avery/ [https://perma.cc/8J87-ATFE].

people to engage in riots.[238] In a lawsuit brought by prospective pipeline protesters requesting injunctive and declaratory relief against enforcement of the riot statutes, the district court agreed with the protesters, holding that South Dakota's laws extended beyond the government's authority to prohibit force or violence in a riot and instead suppressed protected speech.[239]

Other incitement to riot statutes bear the same constitutional infirmities as the recently invalidated provisions of the federal Anti-Riot Act and South Dakota's riot statutes.[240] Kentucky's statute provides that people commit incitement to riot if they "incite[] or urge[] five . . . or more persons to create or engage in a riot," without any assessment of whether the speech created any imminent danger of an actual riot.[241] No Kentucky court has addressed an overbreadth claim to this statute.[242] Similarly, the District of Columbia municipal code criminalizes anyone who "willfully incites or urges other persons to engage in a riot," without requiring any proof that the urging either caused a riot or created imminent danger of a riot.[243] These laws present the same overbreadth concerns that have caused courts to strike down other laws, but so far they have not been challenged.

Lastly, some riot laws arguably define riot too broadly by criminalizing threats of violence without an accompanying requirement that the speaker be aware of and consciously disregard the threatening nature of their speech.[244] Oklahoma, for example, defines a riot as involving three or more people acting together to commit "[a]ny use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution."[245] In some ways this appears to be an exemplary statute: Its scope is limited to acts or speech involving force or violence, rather than mere disturbance, and in contrast to the incitement statutes that criminalize encouragement or advocacy without clear and imminent danger, Oklahoma's statute only criminalizes speech when accompanied by

238. See S.D. Codified Laws §§ 22-10-6, 22-10-6.1 (repealed 2020); Dakota Rural Action v. Noem, 416 F. Supp. 3d 874, 882, 884–85 (D.S.D. 2019).

239. See *Dakota Rural Action*, 416 F. Supp. 3d at 882, 883–85.

240. See, e.g., Ky. Rev. Stat. Ann. § 525.040 (West 2024) (criminalizing urging people to riot without any evidence that the speech caused an imminent danger of riot).

241. Id.

242. In 2018, the Sixth Circuit Court of Appeals addressed a civil lawsuit by three protesters at a Trump rally who were pushed and shoved by rally attendees after then-candidate Trump told the crowd to "[g]et [the protesters] out of here." See Nwanguma v. Trump, 903 F.3d 604, 606 (6th Cir. 2018) (internal quotation marks omitted) (quoting Trump). The Sixth Circuit concluded that the incitement to riot statute can only comply with *Brandenburg* if its application is limited to speech that urges "the imminent use of violence or lawless action." Id. at 609.

243. See D.C. Code § 22-1322(c) (2025).

244. See supra section I.C.2 (noting that defining criminal speech or conduct more broadly than the First Amendment permits is a feature of overbroad protest laws).

245. Okla. Stat. tit. 21, § 1311 (2025).

"immediate power of execution."[246] Nonetheless, the threats portion of the statute potentially runs afoul of the First Amendment because it does not require proof that defendants made the threats recklessly.[247] In *Counterman v. Colorado* the Supreme Court held that, to punish threatening speech, the government must prove that the person making the threat was aware of and consciously disregarded the risk "that others could regard his statements as threatening violence."[248] Oklahoma's law, enacted well before *Counterman* was decided in 2023, contains no such requirement.[249]

In early 2024, a federal district court rejected an overbreadth challenge to this law by a group of racial and social justice activists in Oklahoma City.[250] Plaintiffs sought a preliminary injunction barring enforcement of the law, arguing that the phrase "any threat" was not limited to true threats—in part because it lacked the required mens rea of recklessness—and thus improperly criminalized protected expression.[251] Relying on Oklahoma case law from the early twentieth century, the district court held that the statute should be read as implicitly requiring the intent or will to use or threaten force or violence, which the court found sufficient to conclude that the statute was likely not overbroad because it did not prohibit a substantial amount of protected expression.[252] An appeal is currently pending in the United States Court of Appeals for the Tenth Circuit.[253] Because the text of Oklahoma's statute contains no mens rea requirement for a prosecution based on threats, plaintiffs have a viable claim that the law is broader than the true threat doctrine requires. But situations in which three or more people together make a threat of violence accompanied by immediate power of execution but are unaware of the risk that their speech would be interpreted as a threat are likely to be fairly rare. As

246. See id.

247. Cf. Counterman v. Colorado, 143 S. Ct. 2106, 2114–17 (2023) (holding that a statute criminalizing threatening speech must contain a mens rea of at least recklessness).

248. Id. (internal quotation marks omitted) (quoting Elonis v. United States, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part)).

249. See Okla. Stat. tit. 21, § 1311 (noting that the law was enacted in 1910).

250. See Terry v. Drummond, 717 F. Supp. 3d 1106, 1109, 1116 (W.D. Okla. 2024).

251. See id. at 1112–13.

252. See id. at 1112–15.

253. Terry v. Drummond, No. 24-6046 (10th Cir. docketed Mar. 15, 2024). The Tenth Circuit has certified to the Oklahoma Criminal Court of Appeals the question of whether Oklahoma's riot statute requires "the State to prove the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence toward another." See Terry v. Drummond, No. 24-6046, 2025 WL 707451, at *1 (10th Cir. Mar. 3, 2025). The Tenth Circuit is holding a final decision on the overbreadth claim in abeyance until this certified question is answered. Id. at *10.

such, plaintiffs may have an uphill battle proving that the law is "substantially" overbroad.[254]

3. *Obstruction of Official Proceedings.* — After thousands of people participated in the insurrection at the U.S. Capitol building on January 6, 2021, the DOJ prosecuted several hundred protesters under a federal witness tampering statute.[255] The relevant portion of the statute provides:

> (c) Whoever corruptly–
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> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.[256]

In contrast to unlawful assembly and riot statutes enacted with protests in mind, this statute was originally passed as part of the Sarbanes–Oxley Act of 2002 in response to financial corruption and the Enron scandal.[257] Until the January 6 prosecutions, the government had never used this law to prosecute protesters.[258] The government charged the January 6 defendants under section (c)(2), alleging that they obstructed (or attempted to obstruct) official proceedings by forcing their way into the Capitol and interfering with the proceedings to certify the presidential election votes.[259]

Rather than challenging the law as overbroad, several defendants charged with obstructing official proceedings, including James Fischer, filed motions to dismiss, arguing that the "otherwise" clause of section (c)(2) must be read narrowly in conjunction with section (c)(1), so that the statute could only apply to people who obstructed or impeded official proceedings by hindering access to documents or other evidentiary

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254. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[P]articularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

255. See Spencer S. Hsu, U.S. Begins Dropping Jan. 6 Obstruction Charges for Some Proud Boys, Others, Wash. Post, https://www.washingtonpost.com/dc-md-va/2024/07/16/jan-6-defendants-obstruction-charges-drop/ (on file with the *Columbia Law Review*) (last updated July 16, 2024) (indicating that several hundred January 6 defendants were charged under the obstruction statute). The government pursued different charges against hundreds of other participants. Id.

256. 18 U.S.C. § 1512(c)(1)–(2) (2018).

257. See Fischer v. United States (*Fischer II*), 144 S. Ct. 2176, 2186 (2024) (describing the history of the law's passage in connection with the Enron scandal).

258. United States v. Fischer (*Fischer I*), 64 F.4th 329, 339 (D.C. Cir. 2023), vacated 144 S. Ct. 2176 (2024).

259. *Fischer II*, 144 S. Ct. at 2182.

items.[260] The government argued for a broader interpretation, reasoning that the "otherwise" clause encompassed all types of obstructive conduct other than that specifically identified in (c)(1).[261]

The U.S. Court of Appeals for the D.C. Circuit concluded that section (c)(2) was not restricted by section (c)(1) and that the "natural, broad reading of the statute" encompassed "all forms of obstructive acts."[262] A single-judge concurrence recognized the breadth of this reading but joined the court in reasoning that any concerns regarding the breadth of (c)(2) were alleviated by the requirement that a defendant have a "corrupt" mental state.[263] The dissenting judge criticized the court's reading as creating unconstitutional overbreadth that "would sweep in advocacy, lobbying, and protest—common mechanisms by which citizens attempt to influence official proceedings."[264]

The Supreme Court granted certiorari, and on appeal Fischer—although challenging the D.C. Circuit Court's broad interpretation of the statute as applied to his alleged conduct—again did not raise a facial overbreadth claim.[265] Many amici did, however.[266] The amici challenged as overbroad both the requirement that the defendant act "corruptly" and the appellate court's reading of section (c)(2) as encompassing all obstructive acts.[267] Amici claimed that the word "corruptly" was susceptible to so many definitions that it could include conduct that was not illegal but simply immoral or distasteful.[268] They also argued that the prohibition on obstructing or influencing "any" official proceeding precluded a "veritable definition of First Amendment activity," including people protesting

260. *Fischer I*, 64 F.4th at 333–34.

261. Id. at 335.

262. Id. at 337.

263. Id. at 351–52 (Walker, J., concurring in part and concurring in the judgment).

264. Id. at 378 (Katsas, J., dissenting).

265. See Brief for Petitioner at 7–8, *Fischer II*, 144 S. Ct. 2176 (2024) (No. 23-5572), 2024 WL 382461 ("[B]ecause Section 1512(c)'s text, structure, and history leave no doubt that it applies only to evidence spoliation involving a congressional inquiry or investigation, Section 1512(c)(2) does not extend to Mr. Fischer's alleged conduct.").

266. See, e.g., Amicus Brief of the American Center for Law & Justice in Support of Neither Party at 3, 8–18, *Fischer II*, 144 S. Ct. 2176 (No. 23-5572), 2024 WL 495641; Brief Amicus Curiae of America's Future et al. in Support of Petitioner at 20–29, *Fischer II*, 144 S. Ct. 2176 (No. 23-5572), 2024 WL 495535; Amicus Curiae Brief in Support of Appellant Fischer From FormerFeds Group Freedom Foundation, and Members, et al. at 29–34, *Fischer II*, 144 S. Ct. 2176 (No. 23-5572), 2024 WL 460307; Amicus Curiae Brief of Liberty Counsel Action, Inc. in Support of Petitioner at 25–29, *Fischer II*, 144 S. Ct. 2176 (No. 23-5572), 2024 WL 495637; Brief of U.S. Senator Tom Cotton et al. as Amici Curiae in Support of Petitioner Joseph W. Fischer at 16–24, *Fischer II*, 144 S. Ct. 2176 (No. 23-5572), 2024 WL 495645.

267. FormerFeds Group Freedom Foundation, supra note 266, at 29–30.

268. Id. at 27–29 (arguing that the definition of "corruptly" is too broad and varied to have an ordinary meaning (internal quotation marks omitted)); see also American Center for Law & Justice, supra note 266, at 14–18 (arguing that the mens rea "corruptly" was not sufficient to narrow the overbroad statute).

for the purpose of influencing politicians.[269] Such a broad definition turned the statute into a "weapon for selective prosecution against disfavored political conduct."[270]

The Supreme Court's majority sided with Fischer and against the government's broad reading, reasoning that section (c)(2) must be "defined by reference to (c)(1)" and that the statute only prohibited obstructive conduct related to destroying or impairing access to evidence.[271] In a concurrence, Justice Jackson criticized the government's "breathtakingly broad" reading of the statute and noted that, though section (c)(2)'s text covered a "broad conception" of obstruction, section (c)(1)'s limiting language made clear that the statute's "drafters did not intend for that term to take on its most expansive meaning."[272]

Although the Court did not decide an overbreadth claim, the majority's interpretation of the statute likely avoids any future overbreadth concerns as it limits the statute's application to obstructive conduct specifically involving tampering with or impairing access to evidence.[273] Nonetheless, the statutory text itself, coupled with the government's use of this statute to charge people whose conduct did not involve obstructing access to evidence, illustrates the First Amendment concerns that broadly written statutes create. As the majority acknowledged, were the text of section (c)(2) not constrained by (c)(1)'s reference to obstruction of evidence, it would potentially infringe on an exceptionally broad array of legal and protected expression.[274] The fact that the statutory text arguably encompassed common lobbying behaviors but had never been used to prosecute political activity before the January 6 attacks also illuminates the dangers of statutes written so broadly that they lack clear standards for administration.[275]

4. *Interference With a Peace Officer.* — Many states and municipalities have laws criminalizing interference with peace officers.[276] Although the

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269. American Center for Law & Justice, supra note 266, at 3.

270. U.S. Senator Tom Cotton et al., supra note 266, at 16.

271. *Fischer II*, 144 S. Ct. at 2185.

272. Id. at 2191–94 (Jackson, J., concurring).

273. See id. at 2190.

274. See id. at 2189 (majority opinion) (reasoning that the government's interpretation "would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison"); supra section I.C.2 (explaining that defining criminal speech or conduct too broadly is a feature of overbroad protest laws).

275. Cf. Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971) (expressing concern over overbroad statutes that leave charges largely up to the whims of law enforcement); supra section I.C.5 (explaining that laws lacking clear standards for administration are potentially overbroad).

276. See, e.g., Conn. Gen. Stat. Ann. § 53a-167a (West 2025) ("A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . in the performance of such peace officer's . . . duties."); Or. Rev. Stat. § 162.247 (2024) ("A person commits the crime of interfering with a peace officer . . . if the person, knowing that another person is a peace officer . . . intentionally or knowingly acts in a manner that prevents, or attempts to prevent, the peace officer . . . from performing

laws apply beyond the protest context, they are often invoked to arrest protesters perceived as noncompliant in some way with police orders.[277] These laws are likely constitutional if they apply only to physical conduct that prevents or significantly hinders officers from performing lawful duties.[278] But they are vulnerable to overbreadth concerns when they allow charges based on speech alone, are not limited to interference with "lawful" or "official" duties, or allow prosecution for expressive conduct that only minimally interferes with an officer's duties.

In *City of Houston v. Hill*, the Supreme Court struck down as overbroad a Houston ordinance that criminalized "interfering with policemen" by making it unlawful to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty."[279] The Court began by reasoning that the First Amendment protects "a significant amount of verbal

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[their] lawful duties . . . ."); St. Louis Cnty., Mo., Mun. Ordinance § 701.110 (2025) ("It is unlawful for any person to interfere with or obstruct any officer of the St. Louis County Police Department . . . in the performance of such officer's duties."); Utah Code § 76-8-305 (2024) ("An actor commits interference with a peace officer if the actor: knows . . . that a peace officer is seeking to effect a lawful arrest . . . [and] interferes with the arrest . . . .").

277. See Molly Harbarger, Hundreds of Protesters Have Been Charged With Interfering With a Peace Officer. But Should It Remain a Crime?, The Oregonian (Aug. 30, 2020), https://www.oregonlive.com/crime/2020/08/hundreds-of-protesters-have-been-charged-with-interfering-with-a-peace-officer-but-should-it-remain-a-crime.html [https://perma.cc/XG5V-G9TP] (last updated Aug. 17, 2022) (describing interference with a peace officer as "by far the most common protest-related charge" in Portland during the summer of 2020); Jonathan Levinson, Oregon Lawmakers Seek Changes to Law Used Against Unhoused, Protesters, OPB (Feb. 24, 2021), https://www.opb.org/article/2021/02/25/oregon-lawmakers-unhoused-protesters-portland-police/ [http://perma.cc/NPA7-6DRL] (last updated Feb. 25, 2021) (reporting that Portland police officers "made 830 arrests for interfering with a peace officer during protests" between May 2020 and February 2021, which state lawmakers characterized as "often a misapplication" of the statute); Nathaniel Rosenberg, Yale Police Violently Arrest Four Pro-Palestine Protesters, Yale Daily News (May 2, 2024), https://yaledailynews.com/blog/2024/05/02/yale-police-violently-arrest-four-pro-palestine-protesters/ [http://perma.cc/7H8D-PRSV] (describing the arrests of protesters charged with interference with a peace officer); Shelby Slaughter, Protesters Arrested at Portland State University in Court on Trespass, Other Charges, NBC 15 (May 3, 2024), https://mynbc15.com/news/nation-world/protesters-arrested-at-portland-state-university-millar-library-appear-in-court-occupation-free-palenstive-israel-hamas-gaza-palestine-palestinian [http://perma.cc/PA2A-CDDH] (last updated May 4, 2024) (reporting the arrests of thirty protesters who had occupied Portland State University's library); University of Utah Police Charge 9 Students for Interfering With Police at Protest, Univ. Dep't of Pub. Safety (Dec. 15, 2023), https://publicsafety.utah.edu/home-safety-news/university-of-utah-charges-8-students-for-interfering-with-police-at-protest/ [http://perma.cc/4CJN-Y4L5] (reporting that nine protesters were charged with, among other misdemeanors, interference with a peace officer).

278. See Colten v. Kentucky, 407 U.S. 104, 109 (1972) (rejecting a First Amendment claim by a protester who interfered with a police officer's efforts to issue a citation and refused to leave when ordered to disperse because physically refusing an officer's lawful orders is not protected First Amendment activity).

279. 482 U.S. 451, 455, 461 (1987) (internal quotation marks omitted) (quoting Hous., Tex., Code of Ordinances § 34-11(a) (1984)).

criticism and challenge directed at police officers."[280] The Court then held the law overbroad for two reasons: First, it criminalized speech rather than conduct alone and was not limited to unprotected speech like fighting words or obscenities; and second, its broad language gave police "unconstitutional discretion in enforcement."[281]

Although *Hill* was decided in 1987, some jurisdictions still use—or until very recently used—interference laws with similarly expansive language. Until 2019, the interference with a peace officer ordinance in St. Louis County, Missouri, made it unlawful to "interfere in any manner with a police officer . . . in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty."[282] During a protest after a grand jury declined to indict a white police officer who killed a Black man in 2017, police arrested nearly one hundred protesters and charged them under this ordinance.[283] Several of the defendants filed motions to dismiss alleging the ordinance was overbroad, but the trial court rejected their arguments.[284] On appeal, the Missouri Court of Appeals denied the overbreadth claim, reasoning that the terms "interfere" and "obstruct" should be read as referring only to physical acts, rather than verbal challenges to police authority, and thus did not implicate a substantial amount of protected expression.[285] The state supreme court declined to hear the case, and St. Louis County amended its ordinance in 2019 to remove the "in any manner" clauses.[286]

A similarly worded Connecticut statute states that a person commits interference "when such person obstructs, resists, hinders or endangers any peace officer or firefighter in the performance of such peace officer's

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280. Id. at 461.

281. See id. at 464–67; see also Dorman v. Satti, 862 F.2d 432, 434–37 (2d Cir. 1988) (holding that a Connecticut statute that prohibited interfering with or harassing hunters was unconstitutionally overbroad in part because it did not provide a limiting definition for what could constitute interference); Landry v. Daley, 280 F. Supp. 968, 970–71 (N.D. Ill. 1968) (noting that legitimate exercises of speech or expression can "interfere[]" with others' conceptions of peace and order); State v. Smith, 671 N.E.2d 594, 598 (Ohio Ct. App. 1996) (interpreting a state obstruction statute as applying only to acts rather than speech alone, in part because a law that criminalized speech directed toward police officers "would likely be susceptible to charges of overbreadth for prohibiting a substantial amount of constitutionally protected conduct").

282. St. Louis Cnty., Mo., Mun. Ordinance § 701.110 (2017) (amended 2019).

283. See Bennett v. St. Louis County, 542 S.W.3d 392, 395–96 (Mo. Ct. App. 2017) (describing St. Louis County police officers' arrest of appellants for violating the ordinance); see also Mariah Stewart & Ryan J. Reilly, Dozens of Ferguson Protesters Were Charged Under a Bad Law. Now They Could Be Arrested Again., HuffPost (June 1, 2016), https://www.huffpost.com/entry/ferguson-protesters-st-louis-county-municipal-court_n_574855bfe4b055bb1171e652 [https://perma.cc/AGW3-QQGT] (describing the arrests of at least ninety-five protesters for interference with a peace officer).

284. *Bennett*, 542 S.W.3d at 396.

285. Id. at 401–03.

286. See id. at 392 (noting the denial of appellants' application for transfer to the state supreme court); see also St. Louis Cnty., Mo., Mun. Ordinance § 701.110 (2025).

or firefighter's duties."[287] The law does not specify whether speech alone could serve as a basis for prosecution. (In contrast, some states like Texas create an explicit statutory defense for interference charges based on speech alone.[288]) Only one Connecticut appellate court has ever addressed an overbreadth claim to this statute, finding in a single paragraph and with very little analysis that there was "no merit" to the overbreadth claim.[289] Broad language that criminalizes "hinder[ing]" an officer, without clarifying whether speech alone could qualify as a hindrance, grants police officers tremendous discretion in enforcement and leaves the statute vulnerable to content-based enforcement based on activities the police simply dislike (for example, arresting someone who approaches an officer to record on their phone while the officer is making an arrest).[290]

In addition to concerns about criminalizing speech or annoying conduct, laws that are not limited to interference with "lawful" duties, like Connecticut's and St. Louis's, risk criminalizing people who disobey unlawful orders. In *Landry v. Daley*, a federal district court struck down as overbroad a Chicago ordinance that made it a crime to "resist any officer of the police department in the discharge of his duties, or . . . in any way interfere with or hinder or prevent him from discharging his duty as such officer" because the ordinance "would cover unauthorized or excessive action by a peace officer," rather than applying to lawful activities alone.[291] Such laws could criminalize, for example, people who choose to stay at a peaceful and constitutionally protected protest after an officer gives an unlawful order to disperse.

Because interference with a peace officer is an ostensibly "neutral" law that applies to settings outside the free speech context, some courts will likely look skeptically on overbreadth challenges to this type of law.[292] But *Hill* also involved an "ordinary" interference statute, that the Court nonetheless struck down as overbroad given its substantial application to

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287. Conn. Gen. Stat. Ann. § 53a-167a (West 2025).

288. See Tex. Penal Code Ann. § 38.15(d) (West 2025).

289. See State v. Weber, 505 A.2d 1266, 1271 (Conn. App. Ct. 1986).

290. See, e.g., Aracely Rodman, Comment, Filming the Police: An Interference or a Public Service, 48 St. Mary's L.J. 145, 149–56 (2016) (describing First Amendment concerns in interference arrests for recording police); John Doran, Woman Will Not Be Charged for Recording Lawrence Police Within 25 Feet, WTHR (Oct. 6, 2023), https://www.wthr.com/article/news/crime/woman-will-not-be-charged-for-filming-police-within-25-feet/531-9295e586-4e7e-426c-b494-b9864d174732 [https://perma.cc/39FT-ZRMQ] (last updated Oct. 8, 2023) (describing a wrongful arrest under a similar statute of a woman who filmed police during an arrest); Harbarger, supra note 277 (discussing the frequent use of interference charges that did not require evidence that the arrestee "use or threaten any physical action toward the officer, damage property or trespass").

291. 280 F. Supp. 968, 972–73 (N.D. Ill. 1968).

292. See Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct.").

First Amendment contexts.[293] Particularly in jurisdictions like St. Louis, where law enforcement has relied on interference laws to make mass protest-related arrests, litigants should not be afraid to raise overbreadth challenges to laws that apply both within and outside the protest context.

5. *Civil Disorder.* — The federal "civil disorder" statute says that people commit civil disorder—a felony—if they:

> [C]ommit[] or attempt[] to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects . . . the conduct or performance of any federally protected function . . . .[294]

The statute defines civil disorder as "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual."[295]

This statute presents fewer overbreadth concerns than the interference laws described in the section above because it applies only to actions, rather than "any manner" of interference, and also specifies that the officer must be "lawfully engaged in the lawful performance" of his duties.[296] It still runs the risk of discriminatory enforcement, however, in that it allows officers to arrest for conduct that "in any way or degree . . . affect[s] . . . any federally protected function."[297]

In a question of first impression regarding the statute's overbreadth, the Eleventh Circuit Court of Appeals recently rejected a challenge by a protester convicted of civil disorder.[298] *United States v. Pugh* involved a woman who, after George Floyd's murder, attended a protest in Mobile, Alabama, in which she and a group of protesters attempted to walk onto a highway ramp.[299] Police blocked access to the ramp and eventually used tear gas to disperse the protesters.[300] At some point during this commotion, Pugh smashed the window of a police car with a baseball bat and was charged with civil disorder.[301] She moved to dismiss the indictment on the grounds that the statute was overbroad, arguing that the law could be used

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293. See City of Houston v. Hill, 482 U.S. 451, 461 (1987).

294. 18 U.S.C. § 231(a)(3) (2018).

295. Id. § 232(1).

296. See supra section II.A.4 (discussing overbreadth concerns in laws criminalizing interference with peace officers).

297. 18 U.S.C. § 231(a)(1).

298. See United States v. Pugh, 90 F.4th 1318, 1323, 1328–32 (11th Cir.), cert. denied, 145 S. Ct. 236 (2024) (mem.). Several federal district courts have rejected overbreadth challenges to this statute, mostly in unpublished opinions. See United States v. McHugh, 583 F. Supp. 3d 1, 28–29 (D.D.C. 2022) (listing cases).

299. 90 F.4th at 1323.

300. Id.

301. Id.

to impermissibly restrict substantial amounts of protected speech, such as recording officers during a protest, yelling at them in an attempt to prevent an arrest, or using profanities that distract the officers.[302] The Eleventh Circuit rejected these arguments, finding that the statute did not "affect[] much speech at all."[303] The court concluded that the prohibitions against obstructing, impeding, and interfering primarily targeted conduct rather than speech, and it opined that these types of activities were "obvious[ly]" not protected expression.[304] The Supreme Court denied Pugh's petition for writ of certiorari.[305]

6. *Disorderly Conduct.* — Disorderly conduct is an "extremely broad" offense that law enforcement officials frequently employ against protesters.[306] All fifty states and the District of Columbia have disorderly conduct laws, and they typically read something like this:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor . . . .[307]

Many disorderly conduct laws specifically condemn speech alone, which can range from "unreasonable noise" to abusive, offensive, or annoying language.[308] The breadth of these laws renders them vulnerable

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302. See id. at 1324, 1329.

303. Id. at 1329.

304. Id. at 1330–31.

305. Pugh v. United States, 145 S. Ct. 236, 236 (2024) (mem.).

306. See Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1643 (2021) (describing disorderly conduct statutes as "often extremely broad"); see also, e.g., Abu El-Haj, Defining *Peaceably*, supra note 16, at 976 (criticizing "the overuse of broad, catchall crimes, such as disorderly conduct," to prosecute Ferguson protesters); Independent Videographer Thrown to Ground, Arrested at NYC Protest, U.S. Press Freedom Tracker (May 18, 2024), https://pressfreedomtracker.us/all-incidents/independent-videographer-thrown-to-ground-arrested-at-nyc-protest/ [https://perma.cc/R39Z-7R2F] (last updated Aug. 7, 2024) (describing the disorderly conduct charge against an independent journalist who was covering a Nakba Day gathering in May 2024); Dave Lindorff, Keeping Dissent Invisible, Salon (Oct. 16, 2003), https://www.salon.com/2003/10/16/secret_service/ [https://perma.cc/XH77-QDJA] (describing the disorderly conduct arrest of a peaceful protester against President George W. Bush who refused to move his protest to an enclosed "free speech area" (internal quotation marks omitted)); Paul T. Rosynsky, Most Arrested in Occupy Oakland Protests Never Charged, Mercury News (Oct. 24, 2012), http://www.mercurynews.com/2012/10/24/most-arrested-in-occupy-oakland-protests-never-charged/ [https://perma.cc/2MWY-MSDB] (last updated Aug. 12, 2016) (citing disorderly conduct as one of the charges most frequently levied against Occupy Wall Street protesters).

307. Fla. Stat. Ann. § 877.03 (West 2025). For an exhaustive list of state disorderly conduct laws, see Rachel Moran, Doing Away With Disorderly Conduct, 63 B.C. L. Rev. 65, 71–75 (2022).

308. See, e.g., Ala. Code § 13a-11-7(a)(3) (2025) (criminalizing the public use of "abusive or obscene language or . . . obscene gesture[s]"); La. Stat. Ann. § 14:103.3(A) (2024)

to the first two features of overbroad protest laws: They criminalize both speech and expressive conduct that presents no risk of violence or property damage and they define criminal speech too broadly.[309] These laws are particularly problematic in the context of protests because protests often involve speech or expressive conduct that is loud, annoying, or offensive and that may affect the peace and quiet of people who witness the protests.[310] But that is the core of what the First Amendment protects: expression that invites dispute, "induces a condition of unrest," and even "stirs people to anger."[311] Although the Supreme Court has struck down multiple disorderly conduct laws because of their infringement on free speech, many remain problematic.[312]

In early 2024, the Kansas Supreme Court invalidated portions of a Wichita disorderly conduct ordinance criminalizing "noisy conduct tending to reasonably arouse alarm, anger or resentment in others" as overbroad.[313] The defendant in *City of Wichita v. Griffie* helped organize a protest against police brutality in response to George Floyd's murder, which

("No person shall petition, picket, demonstrate, or assemble with other persons within fifty feet of an individual's residence in a manner which interferes, disrupts, threatens to disrupt, or harasses the individual's right to control or use his residence."); Mont. Code Ann. § 45-8-101(1) (2024) (defining disorderly conduct as, among other things, "making loud or unusual noises," "using threatening, profane, or abusive language," and "creating a hazardous or physically offensive condition by any act that serves no legitimate purpose").

309. See supra section I.C.1–.2 (discussing these two features of overbroad protest laws).

310. One example is Urbanski v. Blunck, No. 3:22-cv-01483-X, 2023 WL 2801212 (N.D. Tex. Apr. 5, 2023). The plaintiff in *Urbanski* was using a megaphone outside a Methodist church to protest the "false idol" of Santa Claus when police responded to a noise complaint and arrested him for disorderly conduct. Id. at *1 (internal quotation marks omitted) (quoting Original Complaint at 4, *Urbanski*, No. 3:22-CV-1483-X); Original Complaint at 5–7, *Urbanski*, No. 3:22-cv-01483-X (describing plaintiff's protest and arrest for disorderly conduct); see also Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89, 92 (W.D. Tenn. 1970) (concluding, after civil rights protesters in Tennessee were arrested for disorderly conduct, that a disorderly conduct statute which criminalized "rude, boisterous, offensive," or "blasphemous" speech was overbroad and "susceptible to no construction which will relieve it of [its] constitutional infirmities" (internal quotation marks omitted) (quoting Tenn. Code Ann. § 39-1213 (1970))).

311. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

312. See Moran, supra note 307, at 66–67 ("All fifty states and many municipalities have disorderly conduct laws that criminalize a wide swath of poorly defined activities . . . . Courts have declared these statutes unconstitutional or construed them narrowly . . . . [But] law enforcement still utilize these laws to charge and prosecute hundreds of thousands of people every year."); see also Morgan, supra note 306, at 1654–76 (criticizing disorderly conduct laws for criminalizing a wide array of speech and conduct and thus inviting discriminatory enforcement).

313. City of Wichita v. Griffie, 544 P.3d 776, 779 (Kan. 2024) (internal quotation marks omitted) (quoting Wichita, Kan., Mun. Code of Ordinances § 5.24.010(c) (2024)).

involved several dozen people who marched down a street chanting slogans, some of which were derogatory toward police.[314] A few of the speakers had megaphones.[315] Police later charged Griffie with unlawful assembly, predicated on the theory that she assembled with others for the purpose of engaging in "conduct constituting disorderly conduct."[316] A jury found her guilty at trial, and she appealed on grounds that the disorderly conduct ordinance was overbroad.[317] The state supreme court agreed, reasoning that the ordinance's prohibition on noisy conduct tending to alarm or anger others banned quintessentially protected expression such as chanting during a protest.[318]

The court in *Griffie* correctly recognized that Kansas's disorderly conduct statute criminalized expressive activity that the First Amendment protects and thus was substantially overbroad.[319] But Griffie's ability to contest the matter in the state supreme court is fairly rare. Due to the misdemeanor or petty nature of most disorderly conduct laws, they are infrequently litigated.[320] By defining criminal speech and conduct too broadly, these laws allow for the prosecution of speech and conduct that may be annoying but present no threat of harm or violence, and thus are a worthy subject of additional overbreadth litigation.[321]

7. *Unlawful Activities.* — The DOJ charged some defendants involved in the January 6, 2021, insurrection at the U.S. Capitol under an "unlawful activities" statute that prohibits people from "willfully and knowingly . . . parad[ing], demonstrat[ing], or picket[ing] in any of the Capitol Buildings."[322] At least one defendant challenged this law as overbroad. The D.C. Circuit recently rejected that argument in *United States v. Nassif*, concluding that the interior of the Capitol is a nonpublic forum and therefore the regulation of conduct in that area need only be reasonable.[323] Given

314. Id. at 780.

315. Id.

316. Id. (emphasis omitted) (internal quotation marks omitted) (quoting City of Wichita v. Griffie, No. 124,412, 2022 WL 17072292, at *2 (Kan. Ct. App. Nov. 18, 2022), rev'd, 544 P.3d 776 (Kan. 2024)).

317. Id. at 781.

318. Id. at 787.

319. See id. at 787–89.

320. See Moran, supra note 307, at 93–96 (providing examples of how disorderly conduct laws have been used to quash unpopular expression); Morgan, supra note 306, at 1652–54 (same); Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1335, 1348 (2012) (detailing the lack of litigation in misdemeanor cases and citing disorderly conduct as creating one of the highest risks of wrongful conviction); Jenny Roberts, Crashing the Misdemeanor System, 70 Wash. & Lee L. Rev. 1089, 1090–99, 1105 (2013) (describing the indigent defense crisis that has contributed to minimal litigation of misdemeanor charges, including disorderly conduct).

321. See supra section I.C.1.

322. See United States v. Nassif, 97 F.4th 968, 974 (D.C. Cir.) (alterations in original) (internal quotation marks omitted) (quoting 40 U.S.C. § 5104(e)(2)(G) (2018)), cert. denied, 145 S. Ct. 552 (2024) (mem.).

323. See id. at 974–78.

the content-neutral nature of this ban and Congress's interest in ensuring that members of Congress and their staff can carry out their work, the Court held it was reasonable to prevent parading, demonstrating, and picketing inside the building.[324] The Supreme Court denied Nassif's petition for writ of certiorari.[325]

This statute presents fewer overbreadth concerns than those discussed in the sections above because, like the picketing bans in *Cox* and *Cameron*, it is limited to specific activities that present a risk of obstructing work in a particularly sensitive area.[326] An argument could be made, however, that the ban on picketing or demonstrating throughout all the Capitol Buildings—which include not just the Capitol itself and Senate and House office buildings but also garage space, a power plant, subways and passageways that connect the buildings, and other property—is, like the ban on First Amendment activity in the entire Los Angeles airport, an overly broad restriction of expressive activity across an unreasonably large swath of space.[327] As Part I discusses, even content-neutral bans on expression are subject to a balancing test, and the government must be careful not to ban more expression than the governmental interest warrants.[328] This expansive ban of expressive activity on Capitol property may deter more expression than the government can justify.

8. *Critical Infrastructure Trespassing.*— In the mid-2010s, oil and gas companies began pursuing massive pipeline projects to funnel crude oil across the United States.[329] Protests followed, led by people concerned about the environmental and property impacts of the pipelines. The Standing Rock protests—named after the Standing Rock Sioux Reservation, located near the site of the Dakota Access Pipeline Project[330]—attracted the most attention, but smaller-scale environmental

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324. Id. at 978–80.

325. *Nassif*, 145 S. Ct. 552.

326. Cf. Cameron v. Johnson, 390 U.S. 611, 616–17 (1968) (rejecting a constitutional challenge to a statute that prohibited picketing in a manner that interfered with entering or exiting a courthouse because the statute was a valid exercise of the state's interest in regulating courthouses); Cox v. Louisiana, 379 U.S. 536, 562, 564 (1965) (holding that a law prohibiting picketing or parading in or near a courthouse was appropriate because the state had a legitimate interest in protecting its court system from the pressures such behavior might create).

327. See Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987) (holding that a complete ban on expressive activity in the Los Angeles airport was overbroad).

328. See supra text accompanying notes 60–66; supra section I.C.3 (explaining how banning more expression than the governmental interest warrants is one feature of overbroad protest laws).

329. See Ryan W. Miller, How the Dakota Access Pipeline Battle Unfolded, USA Today (Dec. 2, 2016), https://www.usatoday.com/story/news/nation/2016/12/02/timeline-dakota-access-pipeline-and-protests/94800796 [https://perma.cc/P98Z-TMYC] (last updated Dec. 4, 2016).

330. For consistency across this Piece, the people who opposed the Dakota Access Pipeline Project are called "protesters," as with every other person this Piece mentions who has been charged with a protest-related crime. Some Native Americans, however, have

protests occurred in many other pipeline locations around the country.[331] These protests disrupted pipeline construction in some places.[332] In response, legislators who supported the pipelines began proposing new laws aimed at deterring environmental protesters.[333] These laws expanded the definition of "critical infrastructure," to which the public is not permitted access, and heightened penalties for trespassing on critical infrastructure.[334]

In 2017, Oklahoma passed a critical infrastructure trespassing bill,[335] and the principal author of the bill described it as an effort to prevent

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expressed a preference for the label "protector" or "water protector." See Iyuskin American Horse, 'We Are Protectors, Not Protesters': Why I'm Fighting the North Dakota Pipeline, The Guardian (Aug. 18, 2016), https://www.theguardian.com/us-news/2016/aug/18/north-dakota-pipeline-activists-bakken-oil-fields [https://perma.cc/XA4U-75A8]; Allison Herrera, Standing Rock Activists: Don't Call Us Protesters. We're Water Protectors, The World (Oct. 31, 2016), https://theworld.org/stories/2016/10/31/were-water-protectors-not-protestors [https://perma.cc/4X48-Q83Y].

331. See, e.g., Spoon v. Bayou Bridge Pipeline, LLC, 682 F. Supp. 3d 594, 599–600 (M.D. La. 2023) (describing protests around the Bayou Bridge Pipeline in Louisiana); Karen J. Pita Loor, When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power, 43 Seattle U. L. Rev. 1, 8–10 (2019) (describing the context behind the Standing Rock protests and subsequent arrests); Zoë Carpenter & Tracie Williams, Photos: Since Standing Rock, 56 Bills Have Been Introduced in 30 States to Restrict Protests, The Nation (Feb. 16, 2018), https://www.thenation.com/article/archive/photos-since-standing-rock-56-bills-have-been-introduced-in-30-states-to-restrict-protests/ [https:// perma.cc/H67J-RJHV] (describing various pipeline protests across the United States); Jack Healy, North Dakota Oil Pipeline Battle: Who's Fighting and Why, N.Y. Times (Aug. 26, 2016), https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html (on file with the *Columbia Law Review*) (providing a history of the battle over the Dakota Access Pipeline Project); Nina Lakhani & Hilary Beaumont, 'Fear and Intimidation': How Peaceful Anti-Pipeline Protesters Were Hit With Criminal and Civil Charges, The Guardian (Sept. 27, 2024), https://www.theguardian.com/us-news/2024/sep/27/mountain-valley-pipeline-protest [https://perma.cc/F82X-YJSW] (describing pipeline protests and subsequent arrests in West Virginia).

332. See Alleen Brown, Ohio and Iowa Are the Latest of Eight States to Consider Anti-Protest Bills Aimed at Pipeline Opponents, The Intercept (Feb. 2, 2018), https://theintercept.com/2018/02/02/ohio-iowa-pipeline-protest-critical-infrastructure-bills [https://perma.cc/Z4BE-HQLT] ("Iowa . . . was a center of anti-pipeline protests in 2016 and 2017. The state saw several incidents of property destruction carried out by pipeline opponents, but more common were trespassing arrests during demonstrations meant to halt construction."); 141 Arrested at Dakota Access Pipeline Protest as Police Move In, ABC News (Oct. 28, 2016), https://abcnews.go.com/US/tensions-mount-protesters-police-controversial-pipeline/story?id=43078902 [https://perma.cc/4XNX-43KN] ("Three protesters had used devices to attach themselves to objects, presumably so they could not be moved from the site by officers . . . .").

333. See Brown, supra note 332 (discussing antiprotest bill proposals); Carpenter & Williams, supra note 331 (same).

334. See Robinson & Page, supra note 18, at 244–46 (describing newly enacted critical infrastructure laws and the penalties associated with them); Jenna Ruddock, Comment, Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws, 69 Am. U. L. Rev. 665, 667–68 (2019) (same).

335. See 2017 Okla. Sess. Law Serv. Ch. 190 (West) (codified at Okla. Stat. tit. 21, § 1792 (2025)).

protests like those at Standing Rock and elsewhere that "disrupted the infrastructure" in those states.[336] Louisiana followed with a substantial expansion of its own critical infrastructure laws in 2018,[337] and law enforcement officers began arresting environmental protesters under the new law within days of its passage.[338] Between 2015 and 2020, fourteen states passed laws creating or expanding punishments relating to trespass on critical infrastructure, and another nineteen bills were proposed but not enacted.[339]

Louisiana's statute, which makes trespassing on critical infrastructure a felony punishable by up to five years in prison, provides in relevant part:

> A. Unauthorized entry of a critical infrastructure is any of the following:
>
> (1) The intentional entry by a person without authority into any structure or onto any premises, belonging to another, that constitutes in whole or in part a critical infrastructure that is completely enclosed by any type of physical barrier.
>
> . . .
>
> (4) The intentional entry into a restricted area of a critical infrastructure which is marked as a restricted or limited access area that is completely enclosed by any type of physical barrier when the person is not authorized to enter that restricted or limited access area.[340]

The bill defines "critical infrastructure" as:

> [A]ny and all structures, equipment, or other immovable or movable property located within or upon chemical manufacturing facilities, refineries, electrical power generating facilities, electrical transmission substations and distribution substations, water intake structures and water treatment facilities, natural gas transmission compressor stations, liquified natural gas (LNG) terminals and storage facilities, natural gas and hydrocarbon storage facilities, transportation facilities, such as ports, railroad switching yards, pipelines, and trucking terminals, water control structures including floodgates or pump stations, wireline and wireless communications and data network facilities, or any site where the

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336. Joe Wertz, Oklahoma Bill to Protect 'Critical Infrastructure' Could Curb Public Protest, Critics Say, NPR (Mar. 2, 2017), https://stateimpact.npr.org/oklahoma/2017/03/02/oklahoma-bill-to-protect-critical-infrastructure-could-curb-public-protest-critics-say [https: // perma.cc/T72B-62RQ].

337. See 2018 La. Sess. Serv. Act 692 (West) (codified as amended at La. Stat. Ann. § 14:61 (2024)).

338. See Spoon v. Bayou Bridge Pipeline, LLC, 682 F. Supp. 3d 594, 603, 614 (M.D. La. 2023) (describing arrests made under the new law within approximately one week of its enactment); John Haughey, Pipeline Protesters' Trespassing Arrests Are First Test of State's New Felony Law, Ctr. Square (Sept. 24, 2018), https://www.thecentersquare.com/louisiana/pipeline-protesters-trespassing-arrests-are-first-test-of-state-s/article_61ea48b2-c036-11e8-ad1d-3b9e6054cd9e.html [https://perma.cc/S6X5-7ZHG].

339. See Freedman, supra note 1, at 209.

340. La. Stat. Ann. § 14:61(A).

> construction or improvement of any facility or structure referenced in this Section is occurring.[341]

The bill does not apply to "[l]awful assembly and peaceful and orderly petition, picketing, or demonstration for the redress of grievances or to express ideas or views regarding legitimate matters of public interest."[342]

People arrested under this law include environmental protesters who entered onto private property with the permission of landowners whose property the pipeline passed through and then interfered with construction workers by, for example, locking or climbing on construction equipment.[343] In a lawsuit challenging the statute as overbroad, plaintiffs in *White Hat v. Landry* argued that the statute's definition of "critical infrastructure" includes too much property (both public and private), much of which is not clearly marked, and thus provides insufficient guidance to both protesters and law enforcement authorities about when a trespass has occurred.[344] Additionally, plaintiffs argued that the law is overbroad because it punishes trespassers who have no intent to cause damage, harm, or violence.[345] A federal district court recently rejected these issues of first impression, concluding that the law did not regulate speech "in the traditional sense" of written or spoken words but addressed only conduct.[346] Even if the law impacted some expressive conduct, the court reasoned that it was content-neutral and narrowly tailored to advance the government's significant interest in protecting critical infrastructure and thus did not "sweep too broadly."[347] An appeal to the Fifth Circuit Court of Appeals is currently pending.[348]

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341. Id.; see also, e.g., Iowa Code § 716.11 (2024) (defining critical infrastructure as, among other things, "[a]ny land, building, conveyance, or other temporary or permanent structure whether publicly or privately owned, that contains, houses, supports, or is appurtenant to any critical infrastructure").

342. La. Stat. Ann. § 14:61.

343. See White Hat v. Landry, No. 6:20-CV-00983, 2024 WL 1496889, at *1 (W.D. La. Apr. 5, 2024); Travis Lux, Tougher Laws on Pipeline Protests Face Test in Louisiana, NPR (Sept. 19, 2018), https://www.npr.org/2018/09/19/648029225/tougher-laws-on-pipeline-protests-face-test-in-louisiana [https://perma.cc/5VZL-KMU4].

344. *Landry*, 2024 WL 1496889, at *3; see also Ruddock, supra note 334, at 692 (arguing that critical infrastructure laws cover so much ground, including both publicly accessible land and private land to which landowners have granted access permission, that they "implicate substantially more protected First Amendment expression than typical trespass statutes"); Press Release, Ctr. for Const. Rts., New Lawsuit Challenges Anti-Protest Trespass Law (May 22, 2019), https://ccrjustice.org/home/press-center/press-releases/new-lawsuit-challenges-anti-protest-trespass-law [https://perma.cc/T7MP-YAJA] (pointing out that Louisiana has more than 125,000 miles of pipeline across the state, some of which are underground or underwater, and arguing that this makes Louisiana's definition of critical infrastructure trespassing overbroad because "it is impossible to know when and where one is trespassing").

345. *Landry*, 2024 WL 1496889, at *3.

346. Id. at *5.

347. Id. at *12.

348. White Hat v. Murrill, 24-30272 (5th Cir. docketed Apr. 23, 2024).

Any overbreadth challenge to a trespassing law faces an uphill battle in that—as the district court recognized in *Landry*—it does not explicitly target speech or expressive conduct but simply regulates presence on specific property.[349] In *Virginia v. Hicks*, the Supreme Court rejected an overbreadth challenge to a trespass policy in part because it primarily regulated nonexpressive conduct (entering onto a named property) and applied equally to anyone entering the property, not merely to those who sought to engage in expressive conduct.[350] The *Hicks* majority suggested that overbreadth challenges will "[r]arely, if ever . . . succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech."[351]

Despite this foreboding language, overbreadth challenges to trespassing laws could potentially still succeed if the challenger can show that the laws are related to the suppression of expression and more than incidentally impact such expression. In *United States v. O'Brien,* the Court reasoned that laws targeting conduct unrelated to the suppression of expression must still advance an important governmental interest and may only impose "incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that interest."[352] Additionally, in *Spence v. Washington*, the Court noted that even laws regulating conduct rather than speech are subject to overbreadth if they prohibit conduct "sufficiently imbued with elements of communication."[353]

Professor Jenny Carroll has argued that trespass laws infringe on First Amendment expression because they "curtail access to spaces" where expressive conduct is likely to occur.[354] For many protesters—like those who express their opposition to the construction of a pipeline by linking arms at the site of the pipeline—"location is more than a mere place that speech occurs. It *is* the speech."[355] As Carroll has explained, trespass laws are used to restrict access to a wide variety of spaces where expressive conduct may occur, whether that involves broadly defining the location of critical infrastructure or barring protesters outside a political convention from demonstrating near the site of the convention.[356] Especially when the laws are specifically enacted to hinder protest, one could argue that the

349. See *Landry*, 2024 WL 1496889, at *5 (reasoning that Louisiana's critical infrastructure bill "does not regulate speech in the traditional sense—i.e., written or spoken words—but addresses purely conduct").

350. See 539 U.S. 113, 124 (2003).

351. Id.

352. See 391 U.S. 367, 377 (1968).

353. 418 U.S. 405, 409 (1974) (per curiam).

354. Carroll, supra note 16, at 188.

355. Id. at 187 (emphasis added); see also id. at 197 ("[C]riminal laws that purport to protect property rights by regulating access to places are seen as regulating where speech occurs and not speech itself. This Feature pushes back on that classification, arguing that presence is sometimes the message.").

356. See id. at 209, 214, 236.

laws are in fact related to the suppression of expression even though they do not textually target expression.[357]

In addition to the argument that trespass laws deliberately target—and more than incidentally impact—expression, critical infrastructure laws may also be overbroad because they prohibit entry onto huge amounts of property, arguably more than is necessary to protect the governmental interest in securing pipelines.[358] As the Court in *O'Brien* explained, even laws unrelated to the suppression of expression must still not impact First Amendment freedoms more "than is essential to the furtherance of [an important governmental] interest."[359] While the state has clear authority to charge people who damage critical infrastructure property or physically impede access to equipment, laws that ban mere presence in an area may hinder expression without a sufficiently strong governmental interest to survive an overbreadth challenge.

B. *Recently Enacted Protest Laws*

Within the last few years, lawmakers across the United States have responded to protests by proposing even more new laws specifically targeted at criminalizing common protest-related activities.[360] In 2021 alone, legislators across thirty-five states introduced at least ninety-two antiprotest

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357. Cf. *Spence*, 418 U.S. at 409–10 (recognizing that some conduct has communicative significance even though not articulated "through printed or spoken words").

358. See White Hat v. Landry, No. 6:20-CV-00983, 2024 WL 1496889, at *3–5 (W.D. La. Apr. 5, 2024) (summarizing plaintiffs' assertions that "there are over 125,000 miles of oil and gas pipelines in Louisiana that cut through private and public land" and thus challenging the law as overbroad); see also Ruddock, supra note 334, at 692–93 (arguing that critical infrastructure definitions are so broad that they risk criminalizing people who accidentally stray too close to a pipeline); Press Release, Ctr. for Const. Rts, supra note 344 (discussing Louisiana's thousands of miles of pipeline, some of which are underground or underwater); supra section I.C.3 (identifying laws that restrict more expression than a governmental interest warrants as potentially overbroad). But see La. Stat. Ann. § 14:61(A) (2024) (banning only entry onto property that is "completely enclosed" or "marked as a restricted or limited access area").

359. See United States v. O'Brien, 391 U.S. 367, 377 (1968).

360. The International Center for Not-for-Profit Law, which maintains a "US Protest Law Tracker," asserts that between 2017 and July 2024, states considered 305 proposed bills restricting the right to peaceful assembly and enacted forty-nine of those bills. See US Protest Law Tracker, supra note 7; see also Freedman, supra note 1, at 188–99 (describing state legislative efforts to enact antiprotest laws); Nunziato, supra note 14, at 1237 (same); Nora Benavidez, James Tager & Andy Gottlieb, Closing Ranks: State Legislators Deepen Assaults on the Right to Protest, PEN Am., https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest/ [https://perma.cc/EHK5-2RTJ] (last visited May 19, 2023) (documenting over 100 antiprotest bills proposed after George Floyd's murder); Press Release, Off. of the UN High Comm'r for Hum. Rts., UN Rights Experts Urge Lawmakers to Stop "Alarming" Trend to Curb Freedom of Assembly in the US (Mar. 30, 2017), https://www.ohchr.org/en/press-releases/2017/03/un-rights-experts-urge-lawmakers-stop-alarming-trend-curb-freedom-assembly (on file with the *Columbia Law Review*) ("Since the Presidential Elections in November, lawmakers in no fewer than nineteen states have introduced legislation restricting assembly rights by various degrees.").

bills, though only twelve were enacted.[361] Using section I.C's features of overbroad protest laws as its guide, this section analyzes a sample of four laws enacted since 2020 to assess them for potential overbreadth. While most of these laws have not yet been the subject of litigation, several present overbreadth concerns.

1. *Florida's Anti-Riot Statute*. — After the police brutality protests of 2020, the Florida legislature, with support from Governor Ron DeSantis, passed a law titled the Combatting Violence, Disorder, and Looting and Law Enforcement Protection Act, which redefined the crime of riot.[362] The new law presented similar concerns as several of the riot laws critiqued in section II.A of this Piece, in that it appeared to sweep in people who participated in a group protest without any consideration for whether those people personally engaged in violent behavior.[363] Specifically, the law says that people commit a riot if they:

> [W]illfully participate[] in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in:
>
> (a) Injury to another person;
>
> (b) Damage to property; or
>
> (c) Imminent danger of injury to another person or damage to property.[364]

The statute specifies that it does not "prohibit constitutionally protected activity such as a peaceful protest."[365]

Multiple organizations sued after the law was enacted, arguing that the new law criminalized people whose own conduct did not involve violence or imminent danger.[366] A federal district court granted a preliminary injunction on the basis of overbreadth, finding that the law could plausibly be read to criminalize people engaged in peaceful and protected expression merely because violence had broken out elsewhere in the protest.[367] On appeal, the Eleventh Circuit declined to decide whether the law was overbroad, instead asking the Florida Supreme Court to first "determine precisely what conduct the definition prohibits."[368]

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361. See Freedman, supra note 1, at 193–99 & nn.92–113.

362. 2021 Fla. Sess. Law. Serv. Ch. 2021-6 (West) (codified at Fla. Stat. Ann. § 870.01 (West 2025)); see also Dream Defs. v. Gov. of Fla. (*Dream Defs. II*), 57 F.4th 879, 883 (11th Cir. 2023) (describing the history behind the law's enactment), certified question answered sub nom. DeSantis v. Dream Defs. (*Dream Defs. III*), 389 So.3d 413 (Fla. 2024).

363. See supra section II.A.2; see also supra section I.C.4 (highlighting that failing to distinguish between group and individual conduct is a feature of an overbroad protest law).

364. Fla. Stat. Ann. § 870.01(2).

365. Id. § 870.01(7).

366. See *Dream Defs. II*, 57 F.4th at 883.

367. See id. at 886.

368. Id. at 893.

The Florida Supreme Court answered this question in June 2024, holding that the newly created riot statute does not apply "to a person who is present at a violent protest, but neither engages in, nor intends to assist others in engaging in violent and disorderly conduct."[369] The court interpreted the statute as requiring both that the public disturbance be "violent" and that anyone prosecuted must both willfully participate and share in a common intent to assist in the violence.[370]

While the text of this riot law presents potential overbreadth concerns,[371] the Florida Supreme Court's definition, which explicitly exempts peaceful protesters from prosecution,[372] likely obviates these concerns. The Eleventh Circuit subsequently held as much, concluding in October 2024 that, because the statute only applies to people who intentionally engage in violent behavior themselves, it was not overbroad.[373] While this holding may put an end to the litigation in *Dream Defenders*, the court's narrowing interpretation could serve as a useful guide for litigants challenging other similarly worded riot laws, who seek to limit the application of those laws to people who engage in or share a common intent to commit violence or property damage.

2. *Utah's Disorderly Conduct Expansion.* — In early 2020, as the Utah legislature was considering legislation relating to the development of a port near Salt Lake City, environmental protesters held several rallies at or around the state capitol to protest the proposed port.[374] A few weeks later, the Utah legislature expanded its disorderly conduct statute to criminalize disturbance of public meetings.[375] While an array of organizations, including a professional journalist association and the Salt Lake City mayor's office, opposed the bill on grounds that it could chill political speech, its sponsor—who reportedly owned property around the port authority boundaries—stated that the bill was "not necessarily" a response to these protests, but intended simply to ensure "civility" in public meetings.[376] The

369. *Dream Defs. III*, 389 So.3d 413, 416 (Fla. 2024).

370. Id. at 421–25.

371. See Dream Defs. v. DeSantis (*Dream Defs. I*), 559 F. Supp. 3d 1238, 1287 (N.D. Fla. 2021) (analyzing the statute prior to the Florida Supreme Court's clarification that the statute exempted nonviolent protesters and concluding that it "casts a broad net" and potentially chills substantial amounts of protected expression), rev'd and remanded sub nom. Dream Defs. v. Gov. of Fla. (*Dream Defs. IV*), 119 F.4th 872 (11th Cir. 2024).

372. See *Dream Defs. III*, 389 So.3d at 421–25.

373. See *Dream Defs. IV*, 119 F.4th at 879–80 (concluding that any overbreadth concerns were alleviated because the Florida Supreme Court definitively interpreted the statute as requiring intentional violence and the First Amendment does not protect violence).

374. See Taylor Stevens, Inland Port Opponents Ramp Up Campaign to 'Stop the Polluting Port', Salt Lake Trib. (Feb. 3, 2020), https://www.sltrib.com/news/politics/2020/02/04/inland-port-opponents/ [https://perma.cc/EFG9-BV5F] (last updated Feb. 4, 2020).

375. See S.B. 173, 63d Leg., Gen. Sess. (Utah 2020) (enacted).

376. See Emma Coleman, Cracking Down on 'Disruptions' of Government Meetings, Route Fifty (Mar. 6, 2020), https://www.route-fifty.com/management/2020/03/utah-

amended bill criminalizes people who, "intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk of public inconvenience, annoyance, or alarm, . . . make[] unreasonable noises in a public place or an official meeting."[377] Official meetings include those held by any entity associated with the state legislative branch, state constitution, state code, administrative agencies, and other committees.[378] The statute does not define what constitutes an unreasonable noise.[379]

In the only state court decision addressing the constitutionality of Utah's disorderly conduct statute, a Utah court of appeals held that the statute's previous version, which criminalized unreasonable noises in public places, was not overbroad because it was content-neutral and primarily regulated volume, rather than speech itself.[380] Although the amended statute is still content-neutral, it now targets public meetings, which are quintessentially public places where political speech is likely (and intended) to occur. It also leaves tremendous discretion to government officials to ban loud expressions that present only a "risk of inconvenience, annoyance, or alarm."[381] Because the statute lacks clear standards for administration and potentially infringes on more expression than the governmental interest in civil meetings merits, the statute is ripe for additional overbreadth litigation.[382]

3. *Louisiana's Disturbing the Peace Statute.* — In June 2024, the Louisiana legislature enacted a slate of antiprotest laws, including a new disturbing the peace statute targeted at protest activity near residences.[383] The statute provides in relevant part: "No person shall petition, picket,

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protest-legislation/163589/ [https://perma.cc/US3W-AELQ] (internal quotation marks omitted) (quoting Utah State Senator Don Ipson); see also Mori Kessler, Bill Aims to 'Create Civility' in Public Meetings by Increasing Penalties for Disruptive Behavior, St. George News (Mar. 10, 2020), https://www.stgeorgeutah.com/news/government-news/bill-aims-to-create-civility-in-public-meetings-by-increasing-penalties-for-disruptive-behavior/article_effeccf0-49bd-5cf0-967d-08a89a78bcee.html (on file with the *Columbia Law Review*) (discussing the history behind the proposal of the amended disorderly conduct bill).

377. Utah Code § 76-9-102(2) (2025).

378. See id. § 76-9-102(1)(a).

379. See id. § 76-9-102(1).

380. See Layton City v. Tatton, 264 P.3d 228, 232 (Utah Ct. App. 2011); see also Utah Code § 76-9-102 (2008).

381. See Utah Code § 76-9-102(2)(b) (2025).

382. See supra sections I.C.3, I.C.5 (arguing that statutes that unduly infringe on protected expression and lack clear standards for administration present overbreadth concerns).

383. See 2024 La. Sess. Law Serv. No. 661 (West) (codified at La. Stat. Ann. § 14:103.3 (2024)); see also Wesley Muller, Louisiana Passes Bill to Outlaw Protests Near Residences, La. Illuminator (May 30, 2024), https://lailluminator.com/2024/05/30/louisiana-passes-bill-to-outlaw-protests-near-residences/ [https://perma.cc/W2JV-PMAQ] (providing more detail on various antiprotest laws passed in Louisiana).

demonstrate, or assemble with other persons within fifty feet of an individual's residence in a manner which interferes, disrupts, threatens to disrupt, or harasses the individual's right to control or use his residence."[384]

As of December 2024, this statute is not yet the subject of any litigation. But it presents several overbreadth concerns. First, the fifty-foot enforcement zone risks banning a substantial amount of public speech or assembly, particularly in high-density residential areas where one may have to travel significant distances to get fifty feet away from a residence.[385] While the Supreme Court has previously upheld bans on expressive activity in particularly sensitive locations like courthouses and medical facilities, a broad ban on expressive activity near residences appears less merited.[386] Additionally, the ban on assemblies that merely "threaten[] to disrupt" residents—a far lower standard than conduct creating an imminent danger of violence or harm—risks violating *Brandenburg*'s "imminent danger" standard and invites discriminatory enforcement by officials who perceive unpopular protests as threatening disruption.[387]

The Supreme Court has previously upheld a ban on picketing in residential areas, but that ban appears to have been more limited than Louisiana's.[388] In *Frisby v. Schultz*, the Court addressed a Wisconsin town ordinance that banned picketing "before or about the residence or dwelling of any individual in the Town of Brookfield."[389] While the Court ultimately rejected the overbreadth challenge, it did so only after accepting the town's narrowing construction that the ordinance only banned picketing "focused on, and taking place in front of, a particular residence" and

384. La. Stat. Ann. § 14:103.3.A (2024).

385. See McCullen v. Coakley, 573 U.S. 464, 486 (2014) (holding that content-neutral time, place, and manner restrictions must still be narrowly tailored and not "burden substantially more speech than is necessary to further the government's legitimate interests" (internal quotation marks omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989))); Hill v. Colorado, 530 U.S. 703, 715 (2000) (labeling public sidewalks and streets as "'quintessential' public forums for free speech").

386. Compare *Hill*, 530 U.S. at 729–32 (upholding restrictions on speech near medical clinics), and Cameron v. Johnson, 390 U.S. 611, 617 (1968) (upholding a law regulating protests near courthouses), with *McCullen*, 573 U.S. at 469, 487, 497 (rejecting a thirty-five-foot buffer zone around an abortion clinic in part because it imposed "serious burdens" on expressive activity); see also supra section I.C.3 (noting that banning more expression than the governmental interest warrants is a feature of an overbroad protest law).

387. See Brandenburg v. Ohio, 395 U.S. 444, 449 & n.4 (1969) (per curiam); see also United Food & Com. Workers Loc. 99 v. Bennett, 934 F. Supp. 2d 1167, 1204 (D. Ariz. 2013) (striking down as overbroad an Arizona law that criminalized using "language or words . . . designed to incite fear in any person attempting to enter or leave any property" because the statute was not limited to proscribing speech or behavior that constituted a true threat (alteration in original) (internal quotation marks omitted) (quoting Ariz. Rev. Stat. Ann. § 23-1327(A)(4) (2013))); supra section I.C.1 (describing the lack of both a causal connection to imminent violence and clear standards for administration as features of overbroad protest laws).

388. See Frisby v. Schultz, 487 U.S. 474, 488 (1988).

389. Id. at 477 (internal quotation marks omitted) (quoting App. to Juris. Statement A–28).

"directed at" that single residence.[390] The Court also construed the ordinance as inapplicable to general marching or assembling in residential neighborhoods.[391] Because the ordinance allowed for "ample alternative channels" of protest within residential areas, it was not overbroad.[392] Louisiana's statute does not on its face contain any of this limiting language and thus may be subject to an overbreadth claim.

4. *Louisiana's Simple Obstruction of a Highway of Commerce Statute.* — Among its slate of antiprotest bills in the late spring of 2024, Louisiana also expanded its obstruction of a highway statute to include those who conspire, aid, or abet in obstruction of a highway.[393] The constitutionality of the prior statute, consisting only of section A(1). below, had never been litigated. The amended statute now reads:

> A. Simple obstruction of a highway of commerce is either of the following:
>
> (1) The intentional or criminally negligent placing of anything or the intentional or criminally negligent performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.
>
> (2) The conspiracy or aiding and abetting of other individuals to commit either the intentional or criminally negligent placing of anything or the intentional or criminally negligent performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.[394]

The state has a legitimate interest in regulating use of its public highways and streets to protect the people using them.[395] That interest, however, must be balanced against "the concomitant right of the people of free speech and assembly."[396] As for those countervailing rights, the Supreme Court has recognized that streets are public forums that have historically been used as a site of public protest and the government may limit expression on streets "only for weighty reasons."[397]

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390. See id. at 482–83.

391. See id. at 483.

392. Id. at 484.

393. See 2024 La. Sess. Law Serv. Act 542 (West) (codified as amended at La. Stat. Ann. § 14:97 (2024)).

394. Id.

395. See Cox v. Louisiana, 379 U.S. 536, 554–55 (1965) (recognizing that the government has both the responsibility and the authority to make its streets accessible for movement).

396. Id.

397. See Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (reasoning that public streets have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly" (internal quotation marks omitted) (quoting Kunz v. New York, 340 U.S. 290, 293 (1951))).

An overbreadth challenge to this law faces multiple hurdles, given that the law on its face applies to conduct rather than speech and is an "ordinary," neutrally applicable statute that prohibits acts beyond the protest context.[398] The law arguably extends substantially beyond the state's right to regulate public streets, however, in that it is not limited to specifically dangerous locales like highways, but instead applies to "any act" on "any . . . thoroughfare."[399] The Supreme Court has recognized that public streets are "the archetype of a traditional public forum" and have long been used as sites of protest.[400] Louisiana's law also does not require a showing of danger to pedestrians or drivers, but instead sweeps in any activity that makes movement "more difficult."[401] Lastly, the law encompasses not only those whose activities make movement more difficult but also anyone who aids and abets someone—even unintentionally—in making movement on public streets more difficult.[402] As such, it appears to apply to virtually any act of protest on a public street, including quintessential acts of protest like marches that briefly interfere with traffic. Because the law may burden more expressive conduct than is necessary to protect a government interest in the safety and use of its streets, it is ripe for an overbreadth challenge.[403]

III. THE HARMS OF OVERBROAD LAWS

While subverting the Constitution is harmful in itself, overbroad laws create additional tangible harms to both individuals and society at large. This Part identifies four harms of overbroad laws in the context of protest-related arrests and prosecutions. First, because overbroad laws authorize law enforcement to arrest and charge people for constitutionally protected expression, they sweep innocent people into an unjustly criminalized mass, with the accompanying traumas and challenges that arrests and criminal records bring.[404] Second, overbroad laws expand police authority

398. See Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (stating that overbreadth claims are generally limited when applied to the criminalization of certain conduct).

399. See La. Stat. Ann. § 14:97 (2024).

400. See Frisby v. Schultz, 487 U.S. 474, 480 (1988); see also Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("Even in the modern era, [public streets] are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.").

401. See La. Stat. Ann. § 14:97. But see Langford v. City of St. Louis, 3 F.4th 1054, 1057–59 (8th Cir. 2021) (rejecting an overbreadth challenge brought by Women's March protesters against a similar St. Louis ordinance proscribing standing or positioning oneself "in any public place in such a manner as to obstruct, impede, interfere, hinder or delay the reasonable movement of . . . traffic" because the ordinance was primarily aimed at conduct, not speech (internal quotation marks omitted) (quoting St. Louis, Mo., City Ordinance § 17.16.275(A)(2021))).

402. See La. Stat. Ann. § 14:97(A)(2).

403. See supra section I.C.3 (arguing that burdening more expression than the governmental interest warrants is a feature of an overbroad protest law).

404. See infra section III.A.

to intervene in protests and thus enable the violence that often accompanies police intervention.[405] Third, overbroad laws discourage both speech and thought on important social and political topics.[406] Fourth, overbroad laws give government officials too much power to prosecute speech and conduct that officials deem unwelcome, delegitimizing government actors by embroiling them in social controversies.[407] This Part discusses each of these harms in turn.

A. *Unjust Arrests and Charges*

Because they condemn innocent conduct, overbroad laws unjustly criminalize people "who are not blameworthy."[408] This occurs when laws criminalizing riots and unlawful assemblies fail to require any individualized assessment of violent or threatening conduct and instead allow police to arrest anyone present during an assembly involving a threat of disorder or violence by a limited number of people.[409]

Innocent protesters routinely get swept up in mass arrests. In *Barham v. Ramsey*, a group of protesters who had been involved in demonstrations against World Bank meetings in Washington, D.C., sued an assistant police chief for violating their First Amendment rights after he ordered the arrests of nearly four hundred people in a park, without attempting to distinguish between people who had committed illegal activity in the park and those who had not.[410] In St. Paul, Minnesota, police arrested and charged thirty-eight people under the state's rioting law after a protest in which some people threw bottles and rocks at police, even though the state produced no evidence that the arrested people participated in the assault.[411] Within months of George Floyd's murder, prosecutors across the country had dismissed thousands of charges improperly levied against peaceful protesters.[412] In Tampa, Florida, after police charged sixty-seven people with unlawful assembly, the state's attorney dismissed all charges, stating that the evidence showed all sixty-seven were protesting peacefully

405. See infra section III.B.

406. See infra section III.C.

407. See infra section III.D.

408. See Buell, supra note 158, at 1492.

409. See supra sections II.A.1–.2 (discussing overbreadth concerns with unlawful assembly and rioting laws); see also Vodak v. City of Chicago, 639 F.3d 738, 750 (7th Cir. 2011) ("Nothing is more common than for mass arrests in riots or demonstrations to net a sizable percentage of innocents."); Robinson, supra note 2, at 113 (bemoaning riot laws that create "unconstitutional guilt by association").

410. See 434 F.3d 565, 568, 570 (D.C. Cir. 2006) (noting undisputed evidence that the police "arrested an undifferentiated mass of [protesters] on the basis of crimes committed by a handful of individuals who were never identified").

411. See Furst, supra note 221.

412. See, e.g., Neil MacFarquhar, Why Charges Against Protesters Are Being Dismissed by the Thousands, N.Y. Times (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html (on file with the *Columbia Law Review*) (last updated Feb. 11, 2021).

without any threat to law enforcement, the public, or property.[413] In Minneapolis, Minnesota, a city attorney acknowledged that her office had dismissed nearly six hundred protest-related charges they received from law enforcement in the days following George Floyd's murder.[414]

An arrest for innocent conduct is itself harmful. But arrests frequently involve additional harms, like time spent incarcerated and sometimes out of contact with friends or family, as well as criminal records, which create barriers to employment and housing.[415] Even if judges or prosecutors later dismiss a criminal charge, many of these harms have already occurred. Overbroad laws that enable police to make arrests without individualized proof of misconduct propound these harms.

B. *Enabling Police Intrusion and Violence*

Police intervention in protests is often violent.[416] Sometimes that may involve lawful use of force against people who are themselves engaged in violence or destruction. But when criminal laws are written so broadly as to allow police to break up constitutionally protected protest, they enable police intrusion and violence against people whom the law should be protecting.

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413. See Dan Sullivan, Hillsborough Declines to Prosecute 67 Arrested in Protests, Tampa Bay Times (June 15, 2020), https://www.tampabay.com/news/hillsborough/2020/06/15/hillsborough-declines-to-prosecute-67-arrested-in-protests/ [https://perma.cc/6BCX-4ZBQ].

414. See MacFarquhar, supra note 412 (noting that "prosecutors declined to pursue many of the cases because they concluded that the protesters were exercising their basic civil rights").

415. See, e.g., *Barham*, 434 F.3d at 568, 570 (referencing protesters' claims that they were "taken into detention and held overnight in punitive conditions, restrained and contorted in stress and duress positions" and falsely arrested for up to thirty hours (internal quotation marks omitted) (quoting Plaintiffs' Brief at 4, *Barham*, 434 F.3d 565 (No. 04-5388))); MacFarquhar, supra note 412 (interviewing protesters unjustly arrested in Louisville who described the experience of being thrown on the ground and taken to jail as "scary" (internal quotation marks omitted) (quoting Matt Kaufmann)); see also Moran, supra note 307, at 44–46 (describing the harms of unlawful arrests and charges).

416. See, e.g., Jones v. Parmley, 465 F.3d 46, 53 (2d Cir. 2006) (detailing violent behavior by state troopers in response to peaceful protest); Ahmad v. City of St. Louis, No. 4:17-CV-2455-CDP, 2017 WL 5478410, at *1–2, *5 (E.D. Mo. Nov. 15, 2017) (recounting testimony from peaceful protesters who said that police maced and knocked them over without warning); DOJ, Investigation of the Louisville Metro Police Department and Lousiville Metro Government 55 (2023), https://www.justice.gov/crt/case-document/file/1572951/dl?inline= [https://perma.cc/4XEH-Z6ZU] (describing inappropriate uses of force by Louisville police officers in breaking up peaceful protests); Shawn E. Fields, Protest Policing and the Fourth Amendment, 55 U.C. Davis L. Rev. 347, 349–50, 358–59 (2021) (describing multiple instances of police officers using excessive force in response to peaceful protesters); Justin Hansford & Meena Jagannath, Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson, 12 Hastings Race & Poverty L.J. 121, 131–36 (2015) (describing "egregious acts of excessive force by law enforcement" in Ferguson in response to protests after Ferguson officer Darren Wilson killed Michael Brown).

Laws enacted to deter protest also incidentally authorize police to invade civilians' lives beyond the protest context. Professor Amber Baylor has described how many laws used to suppress protest apply broadly to other contexts, effectively operating as public order maintenance laws allowing police intrusion in low-income neighborhoods or against people who simply disagree with police.[417] Statutes that define riot and unlawful assembly typically require very few participants (as little as two) to trigger criminal liability and thus could be used to charge even a small group of friends whom the police deem disorderly or disruptive.[418] Meanwhile, charges of interfering with police officers or obstructing traffic are "commonly brought against people that argue peaceably or question police orders."[419] As Baylor has explained, "protest-related laws limit expression, free movement and assembly, autonomy and safety—all outside of the traditional context of mass protest."[420]

C. *Quashing Efforts to Voice Concerns on Important Topics*

Expressive activity—from civil rights marches, to die-ins at shopping centers, to camping on college campuses—is a way to raise awareness and spark change.[421] Free expression, assembly, and association are also central to both human dignity and autonomy—and to democratic government. Laws that chill these rights "give[] rise to extraordinary constitutional concern."[422]

Overbroad laws negatively affect discourse and democracy because they are particularly prone to use (and abuse) against dissenting or unpopular viewpoints.[423] When laws give police broad discretion to declare a riot or make arrests for disorderly conduct, for example, Professor Kenneth Karst has noted that police "who look charitably on a postgame victory celebration in the streets of a college town may not feel the same

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417. See Amber Baylor, Unexceptional Protest, 70 UCLA L. Rev. 716, 719–23 (2023) ("For individuals living in neighborhoods with a constant police presence, everyday components of life and community building are susceptible to antiprotest laws.").

418. See id. at 719; see also, e.g., Ariz. Rev. Stat. Ann. § 13-2902(A)(1) (2025) (stating that unlawful assembly involves a gathering of "two or more" people); Minn. Stat. § 609.71 (2024) (stating that "three or more" people can constitute a riot); Va. Code § 18.2-406 (2024) (requiring "three or more" people to constitute an unlawful assembly).

419. Baylor, supra note 417, at 719.

420. Id.

421. See Carroll, supra note 16, at 179 (describing a variety of historical protests in the United States and how they served as a catalyst for change).

422. Fallon, supra note 32, at 884.

423. See Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 38 (1975) (expressing concern that overbroad laws are prone to selective enforcement against unpopular expression); Arielle W. Tolman & David M. Shapiro, From City Council to the Streets: Protesting Police Misconduct After *Lozman v. City of Riviera Beach*, 13 Charleston L. Rev. 49, 58 (2018) (illustrating how overbroad laws empower police to retaliate against people expressing views the police do not endorse).

way about an antiwar demonstration."[424] Professor Inazu has also argued that unlawful assembly laws operate primarily as a means of "social control" over particular gatherings, and "a protest by African Americans against allegedly discriminatory or abusive police tactics differs from a crowd of teenagers gathered on Halloween."[425] While police may see no threat from an unruly and disorderly gathering of teens on Halloween, they may witness similarly unruly but nonviolent behavior in a gathering of people protesting policing and choose to disrupt that expressive activity because it "challenges the legitimacy of their authority or their own individual actions."[426]

At least one older study suggests that police historically dispersed protests more quickly and used force more aggressively against Black protesters than against white protesters.[427] More recently, several studies have gathered evidence suggesting that police intervene more frequently and forcefully against left-leaning protests, including protests against police brutality.[428]

Regardless of political or racial disparities in policing, people in power—whether law enforcement officials themselves or politicians providing orders to those officials—are often unnerved by disruptions to

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424. Karst, supra note 423, at 38.

425. Inazu, Unlawful Assembly as Social Control, supra note 14, at 34.

426. Id.

427. See Christian Davenport, Sarah A. Soule & David A. Armstrong, II, Protesting While Black?: The Differential Policing of American Activism, 1960 to 1990, 76 Am. Socio. Rev. 152, 153, 162–63 (2011) (finding, in a study of more than fifteen thousand protests between 1960 and 1990, that Black protesters were "more likely to draw police presence and that once police are present they are more likely to make arrests . . . and use force and violence in combination with arrests at [Black] protest events"). The racial disparities were more pronounced during the first eleven years of the study (1960–1971), however, and largely dissipated after 1971, except for a few scattered years in the 1970s in which police were more likely to arrest protesters at majority-Black events. See id. at 167–68.

428. See Heidi Reynolds-Stenson, Protesting the Police: Anti-Police Brutality Claims as a Predictor of Police Repression of Protest, 17 Soc. Movement Stud. 48, 49, 56–57 (2018) (analyzing more than seven thousand protests between 1960 and 1995 and concluding "that police respond to protests making anti-police brutality claims more aggressively than other protests"); Maggie Koerth, The Police's Tepid Response to the Capitol Breach Wasn't an Aberration, FiveThirtyEight (Jan. 7, 2021), https://fivethirtyeight.com/features/the-polices-tepid-response-to-the-capitol-breach-wasnt-an-aberration [https://perma.cc/RW6W-ELYK] (describing statistics suggesting that police respond more harshly to left-wing protests); see also Tolman & Shapiro, supra note 423, at 52 (warning that police being asked to supervise demonstrations against themselves "creates a temptation for police to retaliate against protesters"); Tim Craig, Proud Boys and Black Lives Matter Activists Clashed in a Florida Suburb. Only One Side Was Charged, Wash. Post (Feb. 4, 2021), https://www.washingtonpost.com/national/florida-protest-bill-unequal-treatment/2021/02/01/415d1b02-6240-11eb-9061-07abcc1f9229_story.html [https://perma.cc/F6NJ-6ZKS]; Brittany Shammas, Timothy Bella & Meryl Kornfield, None of the Cuba Protesters Who Closed Miami Highway Cited Under GOP-Backed Anti-Rioting Law, Wash. Post (July 14, 2021), https://www.washingtonpost.com/nation/2021/07/14/cuba-protest-florida-anti-rioting-law [https://perma.cc/SS5T-65V2] (describing concerns over discriminatory applications of Florida's new anti-riot law).

the status quo, which can motivate them to shut down public expressions of dissent more readily than expressions of support.[429] While a core purpose of the First Amendment is to deny government officials "the power to determine which messages shall be heard and which suppressed," overbroad laws weaken that purpose by empowering law enforcement officials with excessive discretion to deter peaceful protest.[430]

D. *Deepening Distrust in Government Actors*

Because overbroad laws create opportunities for discriminatory and inconsistent enforcement, they consequently deepen distrust of government actors who may enforce those laws selectively.[431] Trust in government actors is low, and the causes of that distrust are many.[432] But politicized responses to protests certainly contribute to the trust deficit. Professor Edward Maguire has theorized that during the Occupy Wall Street movement, viral photos and videos of police abusing peaceful protesters "generated substantial legitimacy costs for the American police."[433] Concerns

429. See Gey, supra note 35, at 1373 ("[R]adical dissent has a way of making those associated with the status quo very nervous . . . ."); Karst, supra note 423, at 26 ("It is no accident that strains on the system of freedom of expression typically come from the disadvantaged.").

430. See Karst, supra note 421, at 28; see also Overbreadth and Listeners' Rights, supra note 70, at 1763 (positing that the First Amendment is intended to protect open public discourse on controversial topics).

431. See Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (warning that overbroad laws carry a risk of "harsh and discriminatory enforcement"); Fallon, supra note 32, at 884 (cautioning that overbroad laws expose themselves to discriminatory enforcement); see also Chen, supra note 61, at 42 ("If the Constitution permits broadly worded statutes that sweep a great deal of protected speech within their provisions, officials have unbridled discretion to arrest and prosecute speakers based on the government's disagreement with their messages or content.").

432. See Jeffrey M. Jones, Americans Trust Local Government Most, Congress Least, Gallup (Oct. 13, 2023), https://news.gallup.com/poll/512651/americans-trust-local-government-congress-least.aspx [https://perma.cc/42QB-DCQF] (reporting that less than one-third of surveyed Americans express trust in Congress); Stephen Kehoe, Trust in Government: A Stark Divide, Edelman (Jan. 20, 2022), https://www.edelman.com/trust/2022-trust-barometer/trust-government-stark-divide [https://perma.cc/A9UL-PRHP] (describing low government trust metrics in many countries, including the United States); Public Trust in Government: 1958–2024, Pew Rsch. Ctr. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/ [https://perma.cc/V7QT-FL9P] (finding that as of spring 2024, approximately twenty-two percent of Americans say they trust the federal government to "do what is right").

433. See Edward R. Maguire, New Directions in Protest Policing, 35 St. Louis U. Pub. L. Rev. 67, 67, 85–86 (2015).

about unfair enforcement of protest laws have arisen in contexts as disparate as protests related to abortion,[434] police brutality,[435] oil pipelines,[436] United States policies toward Cuba,[437] and the conflicts in Israel and Palestine.[438] Professor Abu El-Haj has argued that "a citizen's right to come out to protest—or merely express solidarity with others—in response to a current event depends significantly on local officials' tolerance for inconvenience and disorder."[439]

Even when law enforcement authorities have no intent to discriminate against particular people or viewpoints, the lack of clear standards that many overbroad laws suffer from can lead to unintentional inconsistencies in enforcement.[440] Most police officers do not have law degrees and may not be well versed in the intricacies of free speech and assembly rights.[441] Laws that offer little guidance—by, for example, leaving officers to determine whether "the assembly" intends to "carry out any purpose in such manner as will disturb or threaten the public peace"[442]—lend themselves to inconsistent enforcement that depends heavily on the perceptions and instincts of individual officers.

Lack of trust in government officials may be deserved for a variety of reasons and this Piece does not presume that trust is always good—or even appropriate. But the inability to trust government officials has many consequences, including ongoing hostility between civilians and public servants, dissatisfaction with government services, difficulty assessing the veracity of government officials' claims, and withdrawal or lack of participation in

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434. See, e.g., McCullen v. Coakley, 573 U.S. 464, 497 (2014) (Scalia, J., concurring in the judgment) (complaining that the Court had a "practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents" and positing "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion").

435. See, e.g., Craig, supra note 428 (describing the uneven treatment of Black Lives Matters and Proud Boys protesters).

436. See, e.g., Robinson & Page, supra note 18, at 233 (expressing concerns about disparate enforcement of pipeline trespass laws).

437. See, e.g., Shammas et al., supra note 428 (describing police officers' failure to use an anti-riot law to cite Cuba protesters for blocking traffic on a major highway).

438. See, e.g., Corina Knoll, U.C.L.A. Removes Police Chief in the Wake of a Protest Melee, N.Y. Times (May 22, 2024), https://www.nytimes.com/2024/05/22/us/ucla-police-chief-removed.html (on file with the *Columbia Law Review*) (describing controversy around the police response to attacks on pro-Palestine protesters).

439. Abu El-Haj, Defining *Peaceably*, supra note 16, at 966.

440. See supra section I.C.5.

441. See Christie Gardiner, Cal. State Univ. Fullerton Ctr. for Pub. Pol'y, Policing Around the Nation: Education, Philosophy, and Practice 32 fig. 19 (2017), https://www.policinginstitute.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation_10-2017_Final.pdf [https://perma.cc/XAV9-3SS3] (showing that only 0.3% of sworn officers and 3.0% of police chiefs and sheriffs hold a doctorate degree).

442. See Minn. Stat. § 609.705(2) (2024).

activities like voting or other forms of democratic engagement.[443] These consequences can manifest in tangible harms, as with the January 6 protesters who inflicted terror and violence on the Capitol in part because many of them believed the presidential election was stolen,[444] or when people outraged over biased policing destroy private and public property as an expression of that anger.[445] Today's polarized American society is at least partly a result of the profound lack of trust that many have in government officials.[446] Some of that distrust is the natural consequence of authorities on all ends of the political spectrum acting to quash dissent from people with whom they disagree.

IV. RIGHTSIZING PROTEST LAWS

If, as Parts I and II of this Piece suggest, many of the laws used to arrest and charge protesters are overbroad and unenforceable, how then may government officials properly regulate protests? Professor Alexander Tsesis has reasoned that properly policing protests requires the government to carefully balance First Amendment rights against the state's responsibility to "preserve domestic tranquility" and protect public safety, and that these two priorities "often come into conflict."[447] Criminal laws should generally allow the government to intervene in protests and make arrests when necessary to prevent imminent danger or destruction but otherwise leave intact the right of peaceful protesters to assemble, associate, and advocate even unwise or unpopular views. This Part offers guidelines for reconciling this conflict. Section IV.A first offers a conceptual framework for "rightsizing" overbroad laws to avoid infringing on constitutional rights. Section IV.B then acknowledges that criminal prosecutions are not always an apt context for litigating overbreadth challenges and discusses

443. See C.R. Div., DOJ, Investigation of the Ferguson Police Department 28 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/MLL9-SC3G] (noting that police officers in Ferguson exacerbated community hostilities by unconstitutionally quashing protests); Tom Christensen & Per Lægreid, Trust in Government: The Relative Importance of Service Satisfaction, Political Factors, and Demography, 28 Pub. Performance & Mgmt. Rev. 487, 490–91 (2005) (describing the relationship between satisfaction or dissatisfaction with public services and trust in government). For a description of the effects of trust or lack thereof on societal institutions, see Ben Seyd, Trust: How Citizens View Political Institutions 147–82 (2024).

444. See, e.g., Ryan J. Reilly, For Jan. 6 Rioters Who Believed Trump, Storming the Capitol Made Sense, NBC News (June 20, 2022), https://www.nbcnews.com/politics/donald-trump/jan-6-rioters-believed-trump-storming-capitol-made-sense-rcna33125 (on file with the *Columbia Law Review*) (interviewing multiple people charged in the January 6 insurrection who said they stormed the Capitol because they believed the election was stolen).

445. See, e.g., Wallenfeldt, supra note 161 (detailing the massive property damage that occurred during riots after the acquittal of the white Los Angeles police officers who severely injured Rodney King, a Black man).

446. See supra note 432 (discussing Americans' pervasive distrust in government).

447. See Tsesis, Incitement to Insurrection, supra note 78, at 974.

the importance of challenging overbroad laws before they are used to arrest and charge protesters.

Although section IV.A offers guidelines for rightsizing protest laws, many protest laws do not need to be rightsized—in fact, they don't need to exist at all. Scholars, judges, and practitioners across the ideological spectrum agree that American criminal codes are already too lengthy.[448] Many laws aimed at suppressing protest are partially duplicative of other laws that could easily be used to charge people whose expressive activity falls outside what the First Amendment protects.[449]

Take, for example, the January 6 protesters who attacked police officers inside the Capitol[450] or the protesters in Minneapolis who burned down a police precinct building after George Floyd's murder.[451] Police and prosecutors had—and used—plenty of options to prosecute these people for charges like assault, arson, damage to property, theft, and more.[452] Many states and the federal government also separately criminalize threatening speech that creates or incites imminent danger.[453] Given these (and many

448. See GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson & Liya Palagashvili, Heritage Found., Count the Code: Quantifying Federalization of Criminal Statutes 1–2 (2022), https://www.heritage.org/sites/default/files/2024-05/SR251.pdf [https://perma.cc/7ZTT-89AU] (providing a conservative argument that federal crimes are too diffuse and numerous for the average citizen to understand); Robert Leider, The Modern Common Law of Crime, 111 J. Crim. L. & Criminology 407, 419 (2021) (noting the "sheer breadth" of American criminal laws); Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. Rev. 112, 116 (2023) (characterizing the American legal system as "defined by widespread criminalization" (internal quotation marks omitted) (quoting Benjamin Levin, Mens Rea Reform and Its Discontents, 109 J. Crim. L. & Criminology 491, 521 (2019))); Neil Gorsuch & Janie Nitze, America Has Too Many Laws, The Atlantic (Aug. 5, 2024), https://www.theatlantic.com/ideas/archive/2024/08/america-has-too-many-laws-neil-gorsuch/679237/ [https://perma.cc/6RBE-LKAC] (bemoaning the proliferation of criminal statutes).

449. See infra text accompanying notes 450–453.

450. See, e.g., Michael Kunzelman, 'Militia Enthusiast' Gets Over 4 Years in Prison for Attacking Police With Baton During Jan. 6 Riot, AP News, https://apnews.com/article/matthew-kroll-militia-sentence-capitol-riot-3fabdbebfe992d818e36eac6699a6e5d (on file with the *Columbia Law Review*) (last updated Dec. 15, 2023) (describing a January 6 protester who was convicted of assaulting a police officer); Press Release, U.S. Atty's Off., Washington, D.C., Three Years Since the Jan. 6 Attack on the Capitol, https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0 [https://perma. cc/656U-CTA4] (last updated Jan. 5, 2024) (reporting that as of January 2024, at least eighty-nine people had pled guilty to assaulting police officers during the insurrection at the Capitol).

451. See, e.g., Phil Helsel, Man Pleads Guilty in Minneapolis Precinct Arson After George Floyd Death, NBC News (Jan. 23, 2021), https://www.nbcnews.com/news/us-news/man-pleads-guilty-minneapolis-precinct-arson-after-george-floyd-death-n1255424 (on file with the *Columbia Law Review*).

452. See id.; Kunzelman, supra note 450; Press Release, U.S. Atty's Off., Washington, D.C., Nine Months Since the Jan. 6 Attack on the Capitol, https://www.justice.gov/usao-dc/nine-months-jan-6-attack-capitol [https://perma.cc/LBU6-X5J4] (last updated Oct. 12, 2021) (describing a variety of charges filed against January 6 defendants).

453. See, e.g., 18 U.S.C. §§ 1503, 1505, 1512 (2018) (prohibiting various types of threats); Colo. Rev. Stat. § 18-3-602 (2025) (same).

other) criminal laws at law enforcement's disposal, judges can strike down overbroad laws without fear of leaving the government powerless to intervene in violent or damaging protests. And legislators, when considering how to rewrite overbroad laws, should first ask themselves whether the laws are needed at all or whether they risk preserving an appearance of domestic tranquility at an unfair cost to First Amendment rights.[454]

To the extent that protest-targeted laws must be preserved, section IV.A provides a framework for avoiding overbreadth concerns in such laws.

A. *A Conceptual Framework for Avoiding Overbreadth*

As discussed in section I.C, overbroad protest laws typically have one or more of the following five problematic features:

1. Criminalizing speech or expressive conduct that has no causal connection to imminent danger of violence or property damage.

2. Using overly expansive definitions for otherwise unprotected expression.

3. Prohibiting more expression than the governmental interest warrants.

4. Failing to distinguish between individual and group conduct.

5. Lacking clear standards for administration.[455]

Right-sized protest laws must avoid these features. Laws criminalizing unlawful assembly, riot, and civil disorder—or any other criminal law that predicates liability in part on presence or participation in a group event—should require individualized proof of reckless, knowing, or intentional participation in violence, destruction, threats of imminent harm and violence, or, in limited contexts, disturbance to public order.[456] Requiring proof of a culpable mental state of at least recklessness is consistent with the Supreme Court's recent decision in *Counterman v. Colorado*, which involved a defendant prosecuted for sending threatening messages to a stranger via social media and resolved the question of whether the First Amendment required proof that the defendant knew his words were threatening.[457] Although the Colorado threats statute did not have a mens

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454. Cf. Tsesis, Incitement to Insurrection, supra note 78, at 974 (emphasizing that the First Amendment's protections for free expression must be balanced with the government's duty to ensure public safety).

455. See supra section I.C.

456. See Robinson, supra note 2, at 133 (recommending that rioting laws permit criminal liability only for people who "themselves engage in an underlying offense involving violence or property destruction as part of a larger group engaged in such conduct"); see also Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89, 93–94 (W.D. Tenn. 1970) (avoiding an overbreadth challenge to a riot law by reading the law as requiring individualized proof of violence); Inazu, Unlawful Assembly as Social Control, supra note 14, at 29 (reasoning that unlawful assembly statutes may be unconstitutional if they criminalize behavior that does not involve force or violence, likelihood of severe harm, or fear of harm).

457. See 143 S. Ct. 2106, 2112 (2023).

rea requirement, the Court held that, to find people criminally liable for threatening speech, the government must prove that they were, at a minimum, aware of the threatening nature of their communications and consciously disregarded the risk that their statements would harm the recipient.[458] The Court reasoned that requiring the government to show "a culpable mental state" is an "important tool" for avoiding any chilling of constitutionally protected expression.[459]

Requiring proof of individualized misconduct, rather than mere presence at an assembly in which other people may have engaged in criminal behavior, is also consistent with concerns the Court recently expressed about the need for statutes to clearly define what conduct is illegal.[460] In *Snyder v. United States*, the Court held that a federal statute banning government officials from corruptly soliciting or accepting "anything of value" applied only to the acceptance of bribes, and it rejected the government's more expansive interpretation that would have applied to acceptance of gratuities.[461] The Court reasoned that the government's broader reading would leave officials "entirely at sea to guess about what gifts they are allowed to accept under federal law."[462] In a concurrence, Justice Neil Gorsuch noted that when a statute leaves the reader with doubt about whether their conduct is criminal, the rule of lenity requires courts to interpret the statute in favor of the accused.[463] The same reasoning applies to protest laws: Laws that leave protesters guessing as to whether their presence at a gathering could lead to arrest or criminal charges based solely on the activities of other participants are unconstitutionally expansive because they risk chilling the expression of peaceful participants.

Assembly-based laws should also only permit police to disperse an assembly that presents an imminent danger of violence or property destruction (rather than a mere risk of disturbing the peace), unless it interferes with operations or privacy in particularly sensitive locations like the courthouse in *Cameron* or the private residence in *Frisby*.[464] Some protest laws authorize police to declare assemblies unlawful when they simply disturb or threaten to disturb public peace or order, without requiring any showing of violence or property damage.[465] These laws potentially run

458. See id. at 2112, 2117–18.

459. Id. at 2115.

460. See Snyder v. United States, 144 S. Ct. 1947, 1957 (2024) (rejecting the government's broad reading of a solicitation statute because it would offer "no guidance" for people attempting to comply with the law).

461. See id. at 1953, 1957–58 (internal quotation marks omitted) (quoting 18 U.S.C. § 666(a)(1)(B) (2018)).

462. Id. at 1958.

463. See id. at 1960 (Gorsuch, J., concurring).

464. See Frisby v. Schultz, 487 U.S. 474, 484–86 (1988) (upholding a ban on "focused picketing" of particular residences); Cameron v. Johnson, 390 U.S. 611, 612–14 (1968) (upholding a ban on picketing outside courthouses).

465. See, e.g., Minn. Stat. § 609.705(2)–(3) (2024); see also supra sections II.A.1–.2.

afoul of three features of overbroad laws: They criminalize expression with no connection to violence or property damage; they infringe on more protected expression than the governmental interest warrants by allowing police to disperse assemblies that pose minimal threat to public safety; and they grant too much discretion to law enforcement to decide which types of assemblies pose a threat to public peace and order.[466] Unless the law regulates expression in a particularly sensitive area, it should not authorize arrests of assemblies that pose no imminent danger of violence or destruction.

Additionally, if the laws criminalize failure to disperse from an assembly that police have declared unlawful, they should explicitly require police to provide fair warning and an opportunity to depart to those assembled and should permit criminal charges only against those who knowingly ignore a lawful order to disperse.[467]

With respect to speech-based laws like incitement to riot (as well as some forms of disorderly conduct or disturbing the peace) rightsizing such laws requires criminalizing only speech that is either truly threatening or directed at inciting imminent lawless action and likely to incite that action.[468] Mere support for (or advocacy to) lawlessness is not enough to defeat First Amendment protection, nor is speech that is annoying or disturbing but does not rise to the level of true threats.[469]

Laws that criminalize interference with peace officers or other government officials should likewise focus on acts that actually and substantially obstruct officers, rather than speech or expression that may simply irritate or offend. They should also be limited to acts that knowingly or recklessly obstruct officers' lawful activities, rather than broad language criminalizing interference "in any manner whatsoever" that invites biased or illegal enforcement.[470] Iowa's "interference with official acts" statute

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466. See supra sections I.C.1, I.C.3, I.C.5.

467. See Vodak v. City of Chicago, 639 F.3d 738, 745–47 (7th Cir. 2011) (discussing the need for police to declare assemblies unlawful and ensure protesters have both heard and had an opportunity to disperse before police make arrests); Jones v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006) (noting that police must provide fair warning before dispersing or arresting protesters); Barham v. Ramsey, 434 F.3d 565, 575 (D.C. Cir. 2006) (holding that police may legally detain a crowd of protesters "only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order").

468. See Counterman v. Colorado, 143 S. Ct. 2106, 2113 (2023) (reiterating that speech that creates a true threat of violence is not protected if the speaker was aware that their communication was threatening); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that the government may not criminalize speech that supports violence or illegal conduct unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

469. See *Counterman*, 143 S. Ct. at 2114 (noting that the First Amendment does not protect true threats that subject people to a real fear of violence); *Brandenburg*, 395 U.S. at 447–49 (concluding that mere teaching of or support for violence cannot be criminalized unless it is directed at producing imminent unlawful action and likely to incite that action).

470. See, e.g., supra note 283 and accompanying text.

provides an example of a right-sized law: It applies only to a person who "knowingly resists or obstructs anyone known by the person to be a peace officer . . . in the performance of any act which is within the scope of the lawful duty or authority of that officer."[471] Even more importantly, the law explicitly exempts from prosecution "verbal harassment unless the verbal harassment is accompanied by a present ability and apparent intention to execute a verbal threat physically."[472]

Lastly, location-based laws that effectively criminalize protest based on presence in a specific location—like the critical infrastructure trespassing laws that many states adopted within the past several years or Louisiana's new disturbing the peace or simple obstruction of a highway statutes that restrict speech or conduct in part based on its location near a residence or on a street[473]—must not ban more expression than the governmental interest at stake justifies. Proponents of the trespass and obstruction laws in particular will argue that the laws are effectively immune to overbreadth challenges because they do not on their face target expression but rather simply ban presence or activity in certain areas.[474] (Louisiana's disturbing the peace law, in contrast, directly targets expression.[475]) As discussed in Part II, however, many of these laws were passed in direct response to expressive activity like protests and cover such wide swaths of property that they effectively restrict significant amounts of expression.[476] When laws more than incidentally impact expression in public areas—as Louisiana's disturbing the peace statute unquestionably does and the trespassing and obstruction of a highway statutes arguably do—rightsizing requires limiting the bans to locations no greater than necessary to protect a legitimate governmental interest.[477] Even if laws only restrict expressive activity in nonpublic forums, they still must be reasonably related to a legitimate governmental interest.[478]

B. *Raising Preemptive Challenges*

As a practical matter, rightsizing protest laws will likely also require more preemptive challenges to these laws, rather than waiting until after

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471. Iowa Code § 719.1(1)(a) (2025).

472. Id. § 719.1(3).

473. See supra sections II.A.8, II.B.4.

474. See Virginia v. Hicks, 539 U.S. 113, 124 (2003) (suggesting that an overbreadth challenge is unlikely to succeed against a law that only tangentially impacts expression).

475. See supra section II.B.3; see also supra text accompanying notes 58–60 (discussing the "close" scrutiny applicable to content-neutral bans in public places).

476. See supra section II.A.8.

477. See supra section I.A.; supra text accompanying notes 58–60 (describing the standard that the Court uses for assessing the constitutionality of content-neutral laws that restrict expression in public forums).

478. See supra section I.A.; supra text accompanying notes 60–65 (describing the standard that the Court uses for assessing the constitutionality of content-neutral laws that restrict expression in nonpublic forums).

people are arrested and charged.[479] This is because protest laws—particularly those that authorize police to break up gatherings—are often used to quash expression by dispersing protests and making arrests, and the consequent disruption of protected expression occurs regardless of whether a prosecutor ever pursues charges.[480] This happened across the country during the protests following George Floyd's murder: Prosecutors dismissed thousands of charges police had levied against mostly peaceful protesters (leaving protesters no avenue in criminal court to contest the charges), but the chilling of expression through dispersal and arrest had already occurred.[481] Even apart from quashing speech and expression, the harms and trauma of arrest have also occurred, and post hoc litigation seeking to invalidate a statute does not negate those harms.[482]

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479. Standing to file such a lawsuit requires an intent to engage in conduct that is arguably constitutionally protected but prohibited by statute and "a credible threat of prosecution" under the challenged statute. See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59 (2014) (internal quotation marks omitted) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)); see also id. ("[W]e do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." (internal quotation marks omitted) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007))). Establishing a credible threat of prosecution can be satisfied by, for example, a showing of previous arrests or prosecution for similar conduct by other people, warnings by government officials that they plan to prosecute certain conduct, or prior conduct by the plaintiff that is now punishable under the challenged law. See *Susan B. Anthony List*, 573 U.S. at 158–63 (discussing preemptive challenges that met the standing bar). Mere speculation about possible future injury, without credible evidence that the threat will be carried out, is likely insufficient. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013). For a sampling of recent preemptive overbreadth challenges brought by prospective protesters or organizations involved in protest activity, see Okla. State Conf. NAACP v. O'Connor, 569 F. Supp. 3d 1145, 1149 (W.D. Okla. 2021) (bringing an overbreadth challenge against the organizational liability and street obstruction provisions of an Oklahoma law); supra notes 249–252 and accompanying text (discussing Terry v. Drummond, 717 F. Supp. 3d 1106 (W.D. Okla. 2024)); supra notes 364–366 and accompanying text (discussing *Dream Defs. II*, 57 F.4th 879 (11th Cir. 2023)).

480. See Inazu, Unlawful Assembly as Social Control, supra note 14, at 29 ("From a First Amendment perspective, a successful prosecution is not the only harm that arises from a dispersal and arrest."); see also id. at 35 (noting that the government successfully controls an assembly by making arrests, not necessarily by pursuing criminal charges after the fact).

481. See supra notes 412–414 (describing the dismissal of thousands of cases after protest arrests in late spring 2020); see also Abu El-Haj, Defining *Peaceably*, supra note 16, at 974 (opining that from a First Amendment perspective, the fact that a charge may later be dismissed "provides little comfort" because improper arrests "take protestors off the streets, rendering their formal constitutional rights meaningless").

482. See Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 820–26 (2015) (describing the many social harms stemming from arrests, even without subsequent prosecution); Tolman & Shapiro, supra note 428423, at 54 ("Even if the authorities drop charges against a protestor, the arrest itself can be a humiliating, dangerous event with long-term consequences."); Melissa Chan, These Black Lives Matter Protesters Had No Idea How One Arrest Could Alter Their Lives, Time (Aug. 19, 2020), https://time.com/5880229/arrests-black-lives-matter-protests-impact/ [https://perma.cc/CYA4-8AS5] (describing the harms that Black people suffered after arrests during protests of George Floyd's murder).

Preemptive litigation can also sidestep the practical difficulties of litigating constitutional issues as a criminal defendant even when prosecutors do pursue charges. Many of the arguably overbroad laws discussed in this Piece are misdemeanor-level offenses.[483] Defendants in misdemeanor cases are often either unrepresented or have assigned public defenders or contract attorneys with little time for extensive motions practice.[484] Even when defendants are vigorously represented, prosecutors regularly offer agreements to resolve low-level charges that are more appealing to individual clients than protracted litigation.[485] Misdemeanor cases frequently resolve short of litigation and trial,[486] meaning that appeals and precedential opinions on the constitutionality of the statutes used to prosecute are even more rare.

Anyone who plans to engage in protest and faces a credible threat of being prosecuted for that protest can challenge the law that could be used to prosecute them, seeking declaratory relief on grounds that the statute is overbroad.[487] Lawsuits seeking injunctive relief—asking a court to intervene and prevent law enforcement from using an overbroad statute as a basis for arrests or charges—are also appropriate in the case of ongoing protests.[488] Either type of challenge creates an opportunity for a court to

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483. See, e.g., La. Stat. Ann. §§ 14:97, 14:103.3 (2024); Minn. Stat. § 609.705 (2024); St. Louis Cnty., Mo., Code of Ordinances §§ 701.110, 701.120 (2025); Utah Code § 76-9-102(4) (2025).

484. See Erica Hashimoto, The Problem With Misdemeanor Representation, 70 Wash. & Lee L. Rev. 1019, 1032–38 (2013) (describing barriers misdemeanor defendants face to accessing adequate legal representation); George C. Thomas III, How *Gideon v. Wainwright* Became Goldilocks, 12 Ohio St. J. Crim. L. 307, 310–11 (2015) (describing how public defenders are often too overburdened to provide effective representation); see also Eve Brensike Primus, The Problematic Structure of Indigent Defense Delivery, 122 Mich. L. Rev. 207 (2023) (discussing problems with indigent defense services that lead to excess workloads and poor litigation of cases).

485. See, e.g., Sandra G. Mayson & Megan T. Stevenson, Misdemeanors by the Numbers, 61 B.C. L. Rev. 971, 987 (2020) (observing, in a large empirical study of misdemeanor cases, that "[n]early all misdemeanor cases" were dismissed or resolved by guilty pleas and that agreements like diversion or deferred adjudication to avoid trial were "prevalent").

486. See id.; see also Carroll, supra note 16, at 221 ("[E]nforcement of [protest-related] regulations may elude review, even if an arrest is made or a charge is brought.").

487. See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–60 (2014) ("[A] Plaintiff [can] bring a preenforcement suit when he 'has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979))). Declaratory relief, in this context, would be a judicial decision that the statute is overbroad and cannot be enforced. See, e.g., Steffel v. Thompson, 415 U.S. 452, 459 (1974) (finding declaratory judgment an appropriate remedy when plaintiffs were threatened with criminal prosecution for hand billing in front of a shopping center); Zwickler v. Koota, 389 U.S. 241, 254 (1967) (concluding that requests for "declaratory judgment that a state [criminal] statute is overbroad on its face" are appropriate and must be considered independently of requests for other remedies).

488. See Allee v. Medrano, 416 U.S. 802, 815 (1974) ("Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate.").

preemptively assess the statute's constitutionality before arrests are made. That preemptive analysis could protect prospective protesters' rights to express themselves and spare both individual protesters and society the harms that come from enforcing overbroad laws.[489]

CONCLUSION

The trajectory of protest policing in the United States—mass protests followed in quick succession by lawmakers attempting to stifle those protests with new laws criminalizing or increasing penalties for expressive speech and behavior—shows no signs of abating. Some overbroad protest laws were enacted decades ago but were rarely challenged and are still used to quash protest today. A new crop of protest laws have also sprouted in the past decade, authored by lawmakers unhappy with protesters' expressions of dissent or alarmed by the unrest that protest can create. These laws often stand in tension with First Amendment rights to expression, assembly, and association. But judges, law enforcement officials, and lawmakers struggle to understand the boundaries of what the First Amendment protects and when the government can abridge that expression in the name of public safety or order.

More understanding—and more litigation—is needed on this critical question. This Piece has contributed to the understanding of the overbreadth doctrine in the context of protests by proffering five features of overbroad laws that litigants, law enforcement officials, lawmakers, and judges can use in assessing whether a law unconstitutionally chills protected expression. Using these features to analyze existing and prospective protest laws will bring clarity to the crucial but often-muddled question of when the government can and cannot intervene in protests.

489. See supra Part III.