

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 9, 2026

Christopher M. Wolpert
Clerk of Court

BLACK EMERGENCY RESPONSE
TEAM; UNIVERSITY OF
OKLAHOMA CHAPTER OF THE
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS,

Plaintiffs,

and

OKLAHOMA STATE CONFERENCE
OF THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE; AMERICAN
INDIAN MOVEMENT INDIAN
TERRITORY; PRECIOUS LLOYD, as
next friend of S.L.; ANTHONY
CRAWFORD; REGAN KILLACKEY,

Plaintiffs - Appellants/Cross-
Appellees,

v.

Nos. 24-6139, 24-6140 & 24-6141

GENTNER DRUMMOND, in his
official capacity as Oklahoma
Attorney General; LINDEL FIELDS,
in his official capacity as Oklahoma
Superintendent of Public Instruction;
BRIAN BOBEK; JOHN “WES”
NOFIRE; MIKE TINNEY; RYAN
DEATHERAGE; CHRIS VAN
DEHENDE; BECKY CARSON, in
their official capacities as members of
the Oklahoma State Board of
Education; KEVIN STITT, in his

official capacity as Governor of
Oklahoma,

Defendants - Appellees/Cross-
Appellants,

and

JOHN R. BRAUGHT; ANITA
HOLLOWAY; RICK NAGEL;
ROBERT ROSS; NATALIE
SHIRLEY; ERIC STEVENSON;
KENNETH S. WAITS, in their official
capacities as members of the
University of Oklahoma Board of
Regents; DENNIS CASEY;
COURTNEY WARMINGTON;
STEVEN TAYLOR; TREVOR S.
PEMBERTON; P. MITCHELL
ADWON, JR.; BRIAN BELLER; KEN
LEVIT; JACK SHERRY; MICHAEL
TURPEN, in their official capacities
as the Oklahoma State Regents for
Higher Education; INDEPENDENT
SCHOOL DISTRICT NO. 12 OF
OKLAHOMA COUNTY,
OKLAHOMA, a/k/a Edmond Public
Schools,

Defendants.

OKLAHOMA APPLESEED CENTER
FOR LAW AND JUSTICE;
AMERICAN FEDERATION OF
TEACHERS; AFT-OKLAHOMA;
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.;
SOUTHERN POVERTY LAW
CENTER; NATIONAL ACADEMY
OF EDUCATION; STATE OF SOUTH
CAROLINA; STATE OF ALABAMA;

STATE OF ARKANSAS; STATE OF
FLORIDA; STATE OF GEORGIA;
STATE OF IDAHO; STATE OF
IOWA; STATE OF KANSAS; STATE
OF LOUISIANA; STATE OF
MISSOURI; STATE OF MONTANA;
STATE OF NEBRASKA; STATE OF
NORTH DAKOTA; STATE OF OHIO;
STATE OF SOUTH DAKOTA;
STATE OF TENNESSEE; STATE OF
TEXAS; STATE OF INDIANA;
OKLAHOMA COUNCIL OF PUBLIC
AFFAIRS,

Amici Curiae.

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:21-CV-01022-G)**

Emerson Sykes, American Civil Liberties Union Foundation, New York, New York (Leah Watson and Sarah Hinger, American Civil Liberties Union Foundation, New York, New York; Dariely Rodriguez, Michael Pillera, Maya Brodziak, and Catherine M. Blalock, Lawyers' Committee for Civil Rights Under Law, Washington, District of Columbia; Megan Lambert, Rebecca Barrett, and Travis Handler, American Civil Liberties Union Foundation of Oklahoma, Oklahoma City, Oklahoma; and Douglas Koff, Julia Beskin, Sara Solfanelli, and Kevin Scot Johns, McDermott Will & Schulte LLP, New York, New York, with him on the briefs), for Plaintiffs-Appellants/Cross-Appellees.

Will Flanagan, Assistant Solicitor General (Garry M. Gaskins, II, Solicitor General, and Zach West, Director of Special Litigation, with him on the briefs), Office of the Attorney General, State of Oklahoma, Oklahoma City, Oklahoma, for Defendants-Appellees/Cross-Appellants.

Brent L. Rowland, Oklahoma Appleseed Center for Law and Justice, Inc., Tulsa, Oklahoma, filed an amicus curiae brief on behalf of Oklahoma Appleseed Center for Law and Justice in support of Plaintiffs-Appellants/Cross-Appellees.

Charles G. Moerdler, Harry Sandick, Joshua M. Goldman, and Benjamin T. Seymour, Patterson Belknap Webb & Tyler LLP, New York, New York, filed an amicus curiae brief on behalf of American Federation of Teachers and AFT-Oklahoma in support of Plaintiffs-Appellants/Cross-Appellees.

Stephen G. Masciocchi and Mary Elizabeth Beasley, Holland & Hart LLP, Denver, Colorado, and Amy I. Berman, National Academy of Education, Washington, District of Columbia, filed an amicus curiae brief on behalf of National Academy of Education in support of Plaintiffs-Appellants/Cross-Appellees.

Avatara Smith-Carrington, Jin Hee Lee, and Mide Odunsi, NAACP Legal Defense & Educational Fund, Inc., Washington, District of Columbia, filed an amicus curiae brief on behalf of NAACP Legal Defense & Educational Fund, Inc., and Southern Poverty Law Center in support of Plaintiffs-Appellants/Cross-Appellees.

Alan Wilson, Attorney General; Thomas T. Hydrick, Solicitor General; Joseph D. Spate, Deputy Solicitor General, South Carolina Office of the Attorney General, Columbia, South Carolina; Steve Marshall, Attorney General, State of Alabama; Tim Griffin, Attorney General, State of Arkansas; James Uthmeier, Attorney General, State of Florida; Chris Carr, Attorney General, State of Georgia; Raúl Labrador, Attorney General, State of Idaho; Theodore E. Rokita, Attorney General, State of Indiana; Brenna Bird, Attorney General, State of Iowa; Kris Kobach, Attorney General, State of Kansas; Liz Murrill, Attorney General, State of Louisiana; Catherine Hanaway, Attorney General, State of Missouri; Austin Knudsen, Attorney General, State of Montana; Michael T. Hilgers, Attorney General, State of Nebraska; Drew Wrigley, Attorney General, State of North Dakota; Dave Yost, Attorney General, State of Ohio; Marty Jackley, Attorney General, State of South Dakota; Jonathan Skrmetti, Attorney General, State of Tennessee; and Ken Paxton, Attorney General, State of Texas, filed an amicus curiae brief on behalf of the States of South Carolina, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas in support of Defendants-Appellees/Cross-Appellants.

Ryan Haynie, OCPA Center for Law & Liberty, Oklahoma City, Oklahoma, filed an amicus curiae brief on behalf of Oklahoma Council of Public Affairs in support of Defendants-Appellees/Cross-Appellants.

Before **HARTZ**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

PHILLIPS, Circuit Judge.

Under subsection B of Oklahoma H.B. 1775, public-school employees may not “require or make part of a course” any of eight prohibited “concepts.” Okla. Stat. tit. 70, § 24-157(B)(1). Each concept is a principle that, if taught, would advocate race or sex discrimination.¹ *Id.* § 24-157(B)(1)(a)–(h). If a school employee violates subsection B, his or her license or certificate may be suspended or even revoked. *See* Okla. Admin. Code § 210:10-1-23(j).

Several teachers, students, parents, and their organizations sued, claiming that subsection B is unconstitutional. As they interpret it, subsection B violates students’ First Amendment right to receive information, and it is vague under the Fourteenth Amendment for not specifying what qualifies as a violation.

In an omnibus order resolving several defendants’ dispositive motions, the district court granted judgment on the pleadings in favor of the defendants on the plaintiffs’ right-to-receive-information claims. And in a companion order issued the same day, the court also declined to recognize those claims as a basis for a preliminary injunction, because “no injunction would be appropriate based on” claims the plaintiffs had already lost.

¹ Those eight concepts match eight “[d]ivisive concepts” from an earlier federal executive order, which forbade “promot[ing] race or sex stereotyping or scapegoating in the Federal workforce.” *See* Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020).

The court likewise rejected most of the plaintiffs’ vagueness claims as a basis for a preliminary injunction. But it concluded that the plaintiffs were likely to show vagueness in subsection B’s use of the word “require” and in two of the prohibited concepts. So the court preliminarily enjoined the defendants from enforcing only those three parts of subsection B.

The parties cross-appealed the injunction order. The defendants challenge the court’s rulings that the plaintiffs are likely to show that some parts of subsection B are vague, while the plaintiffs challenge the opposite rulings about subsection B’s remaining language. The plaintiffs also challenge the court’s decision not to enjoin subsection B’s enforcement based on their First Amendment claims.

Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we hold that the district court abused its discretion by enjoining the enforcement of any part of subsection B for vagueness. As we interpret it, subsection B prohibits school employees from teaching the prohibited concepts as correct principles or requiring teachers to do so. For example, a teacher can’t teach that “one race or sex is inherently superior to another race or sex,” and an administrator can’t require a teacher to teach that “an individual’s moral character is necessarily determined by his or her race or sex.” Okla. Stat. tit. 70, § 24-157(B)(1)(a), (e). Though the plaintiffs fear that subsection B prohibits educators from discussing the eight concepts in the abstract or in connection with historical or popular figures, the statute’s language does not support such a broad interpretation.

Under subsection B's plain text, the plaintiffs aren't likely to show that subsection B is vague.

We don't address the plaintiffs' First Amendment right-to-receive-information claims, because the plaintiffs fail to show that we have appellate jurisdiction to do so. We vacate the preliminary injunction and remand for further proceedings.²

BACKGROUND

I. Legal Background

In 2021, Oklahoma's legislature passed H.B. 1775. 2021 Okla. Sess. Laws Ch. 426 (codified at Okla. Stat. tit. 70, § 24-157). The law became effective in July 2021. *Id.* § 2.

H.B. 1775 consists of subsections A and B. Subsection A applies to higher education and is not at issue in this appeal. This appeal is about subsection B, which applies to elementary-, middle-, and high-school (K–12) education. Okla. Stat. tit. 70, § 24-157(B). Subsection B reads as follows:

- B. The provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.
 - 1. No teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts:
 - a. one race or sex is inherently superior to another race or sex,

² We deny as moot the appellees' motion to file volume II of their appendix under seal.

- b. an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,
 - c. an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,
 - d. members of one race or sex cannot and should not attempt to treat others without respect to race or sex,
 - e. an individual's moral character is necessarily determined by his or her race or sex,
 - f. an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,
 - g. any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or
 - h. meritocracy or traits such as hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.
2. The State Board of Education shall promulgate rules, subject to approval by the Legislature, to implement the provisions of this subsection.

Id.

Subsection B begins with a general statement protecting “the teaching of concepts that align to the Oklahoma Academic Standards.” *Id.* The Academic Standards are “standards for instruction” adopted by the State Board of Education. *Id.* § 11-103.6(A)(1). They “serve as expectations for what students should know and be able to do by the end of the school year.” Okla. State Dep’t

of Educ., *Oklahoma Academic Standards* (last modified July 16, 2026), <https://oklahoma.gov/education/services/standards-learning/oklahoma-academic-standards.html> [<https://perma.cc/88SE-WKG5>]; *see also* Okla. Admin. Code § 210:15-3-1. They do not “dictate how teachers should teach,” “mandate a specific curriculum,” “limit advanced work beyond the standards,” “prescribe all that can or should be taught,” or “limit efforts to prepare students for college, career, and citizenship readiness.” *Oklahoma Academic Standards*, *supra*.

Subsection B ends by authorizing the State Board of Education to implement appropriate rules. Okla. Stat. tit. 70, § 24-157(B)(2). Under that authority, the Board adopted a rule that school employees shall not “require or make part of any Course offered in a Public School” any of subsection B’s eight “discriminatory principles.”³ Okla. Admin. Code § 210:10-1-23(c). If an employee violates subsection B or its implementing rule, the State Board of Education “shall make a determination of whether to initiate proceedings to suspend [the school employee’s] license or certificate.” *Id.* § 210:10-1-23(j)(1). And if the violation is “willful,” the Board “shall initiate proceedings to revoke [the employee’s] license or certificate.” *Id.* § 210:10-1-23(j)(2).

³ “To ensure compliance with” subsection B, the rule also prohibits several additional activities, including “adopting programs or utilizing textbooks, instructional materials, curriculum, classroom assignments, orientation, interventions, or counseling that include, incorporate or are based on” the eight “discriminatory concepts.” Okla. Admin. Code § 210:10-1-23(d)(3).

II. Procedural History

A. Complaint

In fall 2021, seven plaintiffs sued thirty state and local officials in the Western District of Oklahoma. Based on their reading of H.B. 1775 as enacted, the plaintiffs asked the district court to permanently enjoin the statute’s enforcement and to declare the statute and its implementing rule unconstitutional.

Five of the seven plaintiffs sued about subsection B. Those five plaintiffs (“the K–12 plaintiffs”) are

- the Oklahoma State Conference of the NAACP, whose members include students, employees, and parents of students at Oklahoma K–12 public schools;
- the American Indian Movement (AIM) Indian Territory, whose members include parents of students at Oklahoma K–12 public schools;
- Precious Lloyd, on behalf of her daughter S.L., who was then a junior at an Oklahoma public high school; and
- Anthony Crawford and Regan Killackey, two teachers at Oklahoma public high schools.⁴

⁴ The other two plaintiffs were (1) the Black Emergency Response Team, “a group of Black student leaders at [the University of Oklahoma] dedicated to creating a safer and more supportive university experience for Black students,” App. vol. I at 65; and (2) the University of Oklahoma’s chapter of the American Association of University Professors, whose members include faculty and other academic professionals. Both groups sued about subsection A but later voluntarily dismissed their claims.

Fourteen of the thirty defendants were sued at least partly for their alleged roles in enforcing subsection B. Those fourteen defendants were

- Oklahoma’s attorney general;
- Oklahoma’s education superintendent, who is also the president of the State Board of Education;
- the six other members of the State Board of Education;
- Oklahoma’s governor;
- the superintendent of Edmond Public Schools, Oklahoma’s third-largest school district; and
- the four members of the Edmond Public Schools’ Board of Education.⁵

All fourteen defendants were sued in their official capacities. The plaintiffs later amended their complaint to replace the five Edmond Public Schools officials with Independent School District No. 12, Oklahoma County, Oklahoma.

The K–12 plaintiffs brought four claims about subsection B:

- that it is unconstitutionally vague under the Fourteenth Amendment’s due-process clause, facially and as applied;
- that it violates students’ First Amendment right to receive information and ideas, facially and as applied;

⁵ The other sixteen defendants were (1) the nine members of Oklahoma’s State Regents for Higher Education and (2) the seven members of the University of Oklahoma’s Board of Regents. They were sued for their alleged roles in enforcing subsection A. All claims against the University of Oklahoma’s Board of Regents were later dismissed.

- that it is overbroad and viewpoint discriminatory under the First Amendment, facially and as applied⁶; and
- that it violates students’ rights under the Fourteenth Amendment’s equal-protection clause to be free from racial discrimination.

B. Dispositive Motions

All defendants moved either to dismiss the complaint under Federal Rule of Civil Procedure 12(b) or for judgment on the pleadings under Rule 12(c). The district court decided those dispositive motions in a single order. *See Black Emergency Response Team v. Drummond (BERT I)*, 737 F. Supp. 3d 1158, 1182–83 (W.D. Okla. 2024). The omnibus order addressed several parties and claims that aren’t relevant to this appeal. For our purposes, it’s enough to note just three of the court’s rulings.

First, the district court granted judgment on the pleadings against the K–12 plaintiffs on all First Amendment claims challenging subsection B. *Id.* at 1182. The court interpreted subsection B as being “directed to the curricular speech of K-12 teachers.” *Id.* at 1177. After concluding that “such curricular speech is not protected by the First Amendment,” the court ruled that the K–12 plaintiffs had no plausible overbreadth or viewpoint-discrimination claims. *See id.* at 1176–77. The court next ruled that “[t]he right to receive information is a corollary of the speaker’s right to express it.” *Id.* at 1177 n.16. And from that,

⁶ The overbreadth-and-viewpoint-discrimination claim mentions neither subsection B nor the K–12 plaintiffs. But the defendants and the district court appear to have read the claim to apply to both subsections A and B.

the court reasoned, “it follows that there is no plausible claim for a violation of” the K–12 plaintiffs’ right to receive the information described in subsection B. *Id.* At the end of the order, the court stated that “[j]udgment on these claims shall be entered at the conclusion of the litigation.” *Id.* at 1182.

Second, the district court declined to resolve the merits of any Fourteenth Amendment vagueness claims about subsection B, “pending certification of questions of law and a response from the Oklahoma Supreme Court.”⁷ *Id.*; *see also id.* at 1178.

Third, the district court dismissed all claims against Independent School District No. 12. *Id.* at 1183. So the nine remaining subsection B defendants (“the K–12 defendants”) became (1) Oklahoma’s attorney general; (2) Oklahoma’s education superintendent, who is also the president of the State Board of Education; (3) the six other members of the State Board of Education; and (4) Oklahoma’s governor.

C. Preliminary Injunction

Separately, the plaintiffs asked the district court to preliminarily enjoin the statute’s enforcement while the litigation proceeded. The plaintiffs premised their request on their vagueness and First Amendment claims but not on their equal-protection claims. The same day the court ruled on the

⁷ As we address later, because the K–12 plaintiffs had separately sought a preliminary injunction, the district court still needed to determine the K–12 plaintiffs’ *likelihood* of succeeding on the merits of their vagueness claims.

dispositive motions, it preliminarily enjoined the enforcement of parts of subsection B. *See Black Emergency Response Team v. Drummond (BERT II)*, 737 F. Supp. 3d 1136, 1157 (W.D. Okla. 2024).

1. Vagueness

Based on their reading of subsection B, the K–12 plaintiffs argued that each of the eight prohibited concepts was unconstitutionally vague. They also argued that subsection B’s language preceding the eight concepts was vague in its use of “require,” “make part of a course,” and “align to.”

The district court concluded that the K–12 plaintiffs were likely to succeed on some, but not all, of their vagueness claims. *See id.* at 1149–56. The court first considered the prohibition that no school employee “shall require or make part of a course the following concepts.” Okla. Stat. tit. 70, § 24-157(B)(1). The court saw no vagueness in the wording of “make part of a course.” *BERT II*, 737 F. Supp. 3d at 1150. It explained that when “read in conjunction with the eight prohibited concepts,” the term’s “plain and ordinarily understood meaning” was “to prohibit school personnel from directly endorsing, promoting, or inculcating any concept as a normative value.” *Id.*

But the court struggled to make sense of “require . . . the following concepts.” Okla. Stat. tit. 70, § 24-157(B)(1). In parsing this, the court gleaned “an illogical mismatch between verb and object.” *BERT II*, 737 F. Supp. 3d at 1150. As the court put it, for subsection B “to generally direct that a *concept* may not be *required* opens the statute to a variety of interpretations.” *Id.* So the

court concluded that subsection B was likely “unconstitutionally vague as to the term ‘require’ in the introductory verb clause.” *Id.*

The court then examined the text of the eight prohibited concepts. *See* Okla. Stat. tit. 70, § 24-157(B)(1)(a)–(h). The court decided that six of the eight concepts—(a), (b), (e), (f), (g), and (h)—were “sufficiently clear.” *See BERT II*, 737 F. Supp. 3d at 1151, 1153–54. But it concluded that the K–12 plaintiffs were likely to show that the words “treatment” and “treat” in concepts (c) and (d) rendered those concepts vague.⁸ *See id.* at 1152–53.

In the court’s view, “treatment” and “treat” were “expansive in scope”—broad enough to prohibit a teacher from “making part of a course ideas that are subjects of current political debate” (like the propriety of race- and sex-based affirmative action) and from “endorsing ideas that are widely accepted and are reflected in current law” (like gendered sports leagues for children). *See id.* at 1152–53. Though the court recognized that “[i]n some instances, that type of broad scope might be merely broad and not also ambiguous,” it held that “the totality of [H.B. 1775] reflects that these provisions are simply unclear.” *Id.* at

⁸ Again, concept (c) reads that “an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex.” Okla. Stat. tit. 70, § 24-157(B)(1)(c). And concept (d) reads that “members of one race or sex cannot and should not attempt to treat others without respect to race or sex.” *Id.* § 24-157(B)(1)(d).

1152. The court also described concept (d)’s wording as “cumbersome” for its “rarely seen triple negative.”⁹ *Id.* (citation omitted).

Finally, the court considered subsection B’s protection for “the teaching of concepts that align to the Oklahoma Academic Standards.” Okla. Stat. tit. 70, § 24-157(B). The court read this provision as “expressly protecting the teaching of ‘concepts that align to’ listed topics that include, and reasonably require discussion of, past and present race and sex discrimination.” *BERT II*, 737 F. Supp. 3d at 1155. Though the court didn’t interpret “align to,” it concluded that the Academic Standards “largely if not entirely embrace the topics identified by Plaintiffs as potentially affected by” the six concepts other than (c) and (d). *Id.*

After ruling that the K–12 plaintiffs were likely to succeed on some of their vagueness claims, the court ruled that the K–12 plaintiffs also met the other requirements for preliminary injunctive relief. So the court enjoined the K–12 defendants from enforcing (1) “the word ‘require’ in [subsection B’s] introductory verb clause,” (2) prohibited concepts (c) and (d) “in their entirety,” and (3) subsection B’s implementing rule, “to the extent [the rule is] inconsistent with this Order.” *Id.* at 1157.

⁹ In context, concept (d) reads that “[n]o [school employee] shall require or make part of a course the . . . concept[] . . . [that] members of one race or sex cannot and should not attempt to treat others without respect to race or sex.” Okla. Stat. tit. 70, § 24-157(B)(1), (1)(d).

2. First Amendment

The district court declined to preliminarily enjoin subsection B’s enforcement based on the K–12 plaintiffs’ First Amendment claims. *See id.* at 1156. Referring to its companion order, *BERT I*, the court noted that it “ha[d] determined . . . that Plaintiffs’ claims based on the First Amendment should be dismissed because Plaintiffs have not shown that [subsection B] infringes on their First Amendment rights.” *Id.* “Therefore,” the court declared, “no injunction would be appropriate based on Plaintiffs’ claims challenging [subsection B] as violative of the First Amendment.” *Id.*

D. Appeal & Cross-Appeal

The K–12 plaintiffs timely appealed *BERT II*’s partial denial of a preliminary injunction on the remainder of their vagueness claims and on all their First Amendment right-to-receive-information claims.¹⁰ That appeal is docketed as No. 24-6139.

The K–12 defendants timely appealed *BERT II*’s partial grant of a preliminary injunction for vagueness in the above three parts of subsection B. That appeal is docketed as No. 24-6141.

We consolidated those appeals, along with a third brought by some non-K–12 defendants, which is docketed as No. 24-6140. After several voluntary dismissals in the district court, including dismissals of certain claims related to

¹⁰ The K–12 plaintiffs didn’t appeal *BERT II* as it applied to their combined First Amendment overbreadth-and-viewpoint-discrimination claims.

subsection A, the parties agree that only subsection B is before us and that the relevant appellate parties are the K–12 plaintiffs and the K–12 defendants.

E. Certification

Two months after ruling on the motion for a preliminary injunction, the district court certified six questions to the Oklahoma Supreme Court. *See Black Emergency Response Team v. Drummond*, No. CIV-21-1022, 2024 WL 5715864, at *3–4 (W.D. Okla. Aug. 27, 2024). Three of those questions concerned the parts of subsection B that the district court ruled were likely vague. *See id.* at *4. Specifically, the court asked the Oklahoma Supreme Court “what . . . it mean[s]” (1) to “‘require’ an identified ‘concept,’” (2) to “make part of a course the concept [that] an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,” and (3) to “make part of a course the concept [that] members of one race or sex cannot and should not attempt to treat others without respect to race or sex.” *Id.* (citation modified).

The Oklahoma Supreme Court declined to answer those three questions. *Black Emergency Response Team v. Drummond*, 571 P.3d 135, 141 (Okla. 2025). It noted that “[c]ertification is useful where an interpretation of state statutory law can potentially eliminate the need to address a federal question.” *Id.* But because defining the disputed terms “in the abstract” would not “avoid or alter the constitutional challenge,” the court declined to do so, observing that “[f]ederal courts bear a duty to decide questions of state law when necessary to

render a judgment.” *Id.* at 142. The court added that because “even an implicit resolution by a state court of a federal constitutional claim is not binding on the federal courts,” “any holding . . . would be, at most, advisory in nature.” *Id.*

STANDARD OF REVIEW

We review for abuse of discretion a district court’s grant or denial of a preliminary injunction. *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 796 (10th Cir. 2019). A court abuses its discretion when its decision “rests on an error of law or a clearly erroneous finding of fact” or “manifests a clear error in judgment.” *United States v. Kirby*, 161 F.4th 1208, 1213 (10th Cir. 2025) (citation modified).

DISCUSSION

We interpret subsection B as prohibiting school employees from teaching, or requiring teachers to teach, the eight discriminatory concepts as correct principles. That being so, we reverse the district court’s rulings that the K–12 plaintiffs are likely to show that some parts of subsection B are vague under the Fourteenth Amendment. For lack of briefing on appellate jurisdiction, we decline to review the K–12 plaintiffs’ First Amendment right-to-receive-information claims. We vacate the preliminary injunction and remand for further proceedings.

I. Fourteenth Amendment Vagueness Claims

“A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in

the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). “An injunction can issue only if each factor is established.” *Denv. Homeless Out Loud v. Denver*, 32 F.4th 1259, 1277 (10th Cir. 2022).

No party challenges the district court’s rulings about irreparable harm, the balance of equities, or the public interest. *See generally BERT II*, 737 F. Supp. 3d at 1156–57. So we consider only the rulings about the likelihood of the K–12 plaintiffs succeeding on the merits of their vagueness claims. Within our abuse-of-discretion analysis for preliminary injunctions, the likelihood of showing vagueness is a legal question that we review de novo. *See Derma Pen, LLC v. 4EverYoung Ltd.*, 773 F.3d 1117, 1119–20 & n.2 (10th Cir. 2014); *United States v. Jimenez-Marquez*, 171 F.4th 1204, 1209–10 (10th Cir. 2026).

We interpret subsection B as prohibiting school employees from teaching the eight discriminatory concepts as correct principles or requiring teachers to do so. So we agree with the district court that the K–12 plaintiffs are unlikely to show vagueness in concepts (a)–(b) and (e)–(h) or in the wording of “make part of a course.” But we disagree that the K–12 plaintiffs are likely to show

vagueness in concepts (c) and (d) and in the word “require.” On those points, the court abused its discretion in enjoining subsection B’s enforcement.¹¹

A. Vagueness Defined

A law can be unconstitutionally vague “for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1233 (10th Cir. 2023) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

“Where a law deals with areas of First Amendment import,” we apply “stricter standards of permissible . . . vagueness.”¹² *Dr. John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006) (citation modified). We also allow

¹¹ Because it wouldn’t change our conclusion, we need not decide whether the district court “erred in declining to treat [the K–12 plaintiffs’] request as a disfavored injunction” for disturbing the status quo. Defs.’ Resp. & Open. Br. at 64; *see BERT II*, 737 F. Supp. 3d at 1145–46. We also need not decide whether the court erred in not limiting the injunction to subsection B’s enforcement against the K–12 plaintiffs. *See BERT II*, 737 F. Supp. 3d at 1157. Finally, we don’t address the scope of subsection B’s implementing rule or whether that rule is itself unclear. *See generally* Okla. Admin. Code § 210:10-1-23. By hinting at these issues for the first time in their reply brief, the K–12 plaintiffs waived any argument about them. *See United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019).

¹² Though we decline to address the K–12 plaintiffs’ First Amendment right-to-receive-information claims, we assume that subsection B “deals with areas of First Amendment import,” warranting “a more stringent vagueness test.” *Dr. John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006) (first quote); *Wyo. Gun Owners*, 83 F.4th at 1234 (citation omitted) (second quote); *see, e.g., Epperson v. Arkansas*, 393 U.S. 97, 104–05 (1968).

two kinds of vagueness challenges: facial and as applied. *See United States v. Walker*, 74 F.4th 1163, 1184 (10th Cir. 2023).

Under those standards, a law is facially vague if it is “vague in the vast majority of its applications,” such that “vagueness permeates [its] text.”¹³ *Dr. John’s*, 465 F.3d at 1157 (citation modified). A law isn’t saved from facial vagueness “merely because there is some conduct that clearly falls within [its] grasp.” *Johnson v. United States*, 576 U.S. 591, 602 (2015). Still, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *United States v. Williams*, 553 U.S. 285, 304 (2008) (citation omitted). If the law “has a plainly legitimate sweep” or “communicates its reach in words of common understanding,” it isn’t facially vague. *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 (2008) (citation modified) (first quote); *Boos v. Barry*, 485 U.S. 312, 332 (1988) (second quote).

¹³ The K–12 defendants ask us to use the “no set of circumstances” test from *United States v. Salerno*, 481 U.S. 739 (1987). That test requires a facial challenger to show “that no set of circumstances exists under which [a law] would be valid.” *Id.* at 745. But we entertain facial challenges in two situations: (1) when a law “deals with areas of First Amendment import,” *Dr. John’s*, 465 F.3d at 1157; and (2) when a law is challenged before its enforcement. *Walker*, 74 F.4th at 1184. And we apply the “no set of circumstances” test only for laws exclusively in the latter category—*i.e.*, laws that are challenged before their enforcement but that don’t potentially implicate the First Amendment. *See Dias v. City & Cnty. of Denv.*, 567 F.3d 1169, 1179–80 (10th Cir. 2009); *see generally Johnson v. United States*, 576 U.S. 591, 602–03 (2015) (describing the test as inconsistent with the Supreme Court’s facial-vagueness holdings even in cases with no First Amendment implications).

By contrast, for a law to be vague as applied, it must be “[un]clear in light of the conduct to which it was applied.” *Fabrizius v. Dep’t of Agric.*, 129 F.4th 1226, 1238 (10th Cir. 2025) (citation omitted). Because an as-applied challenge attacks a law “as applied to particular parties in particular circumstances,” such a challenge necessarily “involve[s] a factual dimension.” *Wyo. Gun Owners*, 83 F.4th at 1234 (citation omitted).

For both types of vagueness, “the Constitution does not impose impossible standards of specificity.” *Id.* at 1233 (citation modified). After all, “general statements of the law are not inherently incapable of giving fair and clear warning.” *Id.* (citation omitted). A law isn’t vague just because it raises “borderline” factual questions. *Fabrizius*, 129 F.4th at 1238 (citation omitted); *see also Williams*, 553 U.S. at 306.

Likewise, “because the consequences of imprecision are qualitatively less severe,” we “express[] greater tolerance of enactments with civil rather than criminal penalties.” *Fabrizius*, 129 F.4th at 1238 (citation omitted). “[A] scienter requirement may [also] mitigate a law’s vagueness, especially with respect to the adequacy of notice . . . that [one’s] conduct is proscribed.” *Bushco v. Shurtleff*, 729 F.3d 1294, 1306 (10th Cir. 2013).

Finally, when deciding a state law’s constitutionality, we interpret the law as the state’s supreme court would, using that state’s approach to statutory interpretation. *United States v. Gaudreau*, 860 F.2d 357, 361 (10th Cir. 1988); *Stokes v. United States*, 967 F.3d 1034, 1040 (10th Cir. 2020). We limit

ourselves to “extrapolat[ing] [the law’s] allowable meaning,” because it is generally “not within our power to . . . narrow state laws.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (citation omitted). At the same time, when the state’s own courts haven’t yet interpreted the law, “principles of federalism require us to tread especially carefully” in declaring the law unconstitutionally vague. *Green Room LLC v. Wyoming*, 157 F.4th 1196, 1215 (10th Cir. 2025) (citation omitted). We will declare the law unconstitutionally vague only if the law is not “readily subject” to a constitutional interpretation. *See id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)).

B. Oklahoma’s Rules of Construction

When interpreting Oklahoma statutes, Oklahoma courts aim “to ascertain and follow the intent of the Legislature.” *Black Emergency Response Team*, 571 P.3d at 139. That means starting with a statute’s text. *McNeill v. City of Tulsa*, 953 P.2d 329, 332 (Okla. 1998); *see Toch, LLC v. City of Tulsa*, 474 P.3d 859, 866 (Okla. 2020). Oklahoma courts give statutory language “[its] plain and ordinary meaning unless it is clear the legislature intended a different [one].” *Black Emergency Response Team*, 571 P.3d at 139. In doing so, they can rely on dictionary definitions. *Brassfield v. State*, 544 P.3d 938, 941 (Okla. 2024). They read a statute’s language not in isolation but as part of a cohesive scheme. *McNeill*, 953 P.2d at 332. And they give the statute “a reasonable and sensible construction, avoiding absurd consequences.” *Black Emergency Response Team*, 571 P.3d at 139. If, after all that, the statute is “plain and unambiguous,”

they apply it as written without resorting to other rules of construction. *Lang v. Erlanger Tubular Corp.*, 206 P.3d 589, 591 (Okla. 2009) (citation omitted).

C. Teaching the Prohibited Concepts

1. “Make Part of a Course”

The K–12 plaintiffs aren’t likely to show that the term “make part of a course” is vague, facially or as applied. Even if a law has multiple reasonable interpretations, for showing a likelihood of success on the merits, what matters is the law’s most *likely* interpretation. *See, e.g., Trump v. Illinois*, 607 U.S. ----, 146 S. Ct. 432, 434 (2025). And we think “make part of a course” most likely means teach as correct principles or require teachers to do so.

To start, consider the surrounding sentence’s subject-actor: a “teacher, administrator or other [school] employee.” Okla. Stat. tit. 70, § 24-157(B)(1). Only someone in those roles can “make” a prohibited concept “part of a course.” What’s more, a “course” is “[a] series of lectures, lessons, or instructional sessions in a particular subject”—in other words, something that is taught. *Course*, Oxford English Dictionary, def. V.26.a, https://www.oed.com/dictionary/course_n1 [<https://perma.cc/2MZM-MKX4>]; *cf.* Okla. Admin. Code § 210:10-1-23(b)(1)(B) (defining “course” as “any program or activity where instruction or activities tied to the instruction are provided by or within a Public School”). So “mak[ing]” a concept “part of a course” means teaching the concept or requiring a teacher to teach it.

The term’s broader context leads us to the same conclusion. Recall how subsection B begins: “The provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.” Okla. Stat. tit. 70, § 24-157(B). This “teaching of concepts” language appears in the same breath as “make part of a course.” *See id.* § 24-157(B)(1). And to us, that further confirms that subsection B’s focus is teaching.

The K–12 plaintiffs say it is unclear whether “mak[ing] part of a course” includes reading “texts . . . that directly mention” the prohibited topics or allowing student-initiated discussions “about these topics in response to readings and instruction on current events.” *See* Pls.’ Open. Br. at 37.

We disagree that subsection B is unclear on those points. Sure, we could debate the contours of “make part of a course”—in other words, what it means to “teach.” *See* Dissenting Op. at 1. But that debate would be meaningless in the context of this statute. Whether we read “make part of a course” broadly or narrowly, a teacher would not violate subsection B unless the teacher taught race or sex discrimination as specified in the concepts. And a teacher won’t do that by accident. To see why, consider the eight concepts’ plain language, paying close attention to the verbs and their auxiliaries:

- a. one race or sex *is* inherently superior to another race or sex,
- b. an individual, by virtue of his or her race or sex, *is* inherently racist, sexist or oppressive, whether consciously or unconsciously,

- c. an individual *should be* discriminated against *or receive* adverse treatment solely or partly because of his or her race or sex,
- d. members of one race or sex *cannot and should not* attempt to treat others without respect to race or sex,
- e. an individual's moral character *is* necessarily determined by his or her race or sex,
- f. an individual, by virtue of his or her race or sex, *bears* responsibility for actions committed in the past by other members of the same race or sex,
- g. any individual *should feel* discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or
- h. meritocracy or traits such as hard work ethic *are* racist or sexist *or were* created by members of a particular race to oppress members of another race.

Okla. Stat. tit. 70, § 24-157(B)(1) (emphasis added).

Those verbs and their auxiliaries show that subsection B prohibits teachers from instructing students that any of the eight concepts is correct. Rather than “rewrit[ing] [the] statute[] to save [it] from vagueness,” Dissenting Op. at 1, we apply the statute’s plain language. Each prohibited concept is an unqualified racist or sexist assertion. That means to violate subsection B, a teacher must present the concepts as fact, just as the statute does. So a teacher would not violate subsection B by instructing about a historical or popular figure’s beliefs, nor by encouraging discussion about current events and ideas.

But a teacher would violate subsection B by instructing students that any of the eight racist or sexist concepts is correct.¹⁴

The statute’s plain text eliminates any concerns about chilling instruction on historical events, social theories, or public policy. For example, the dissent worries that in instructing about the Tulsa Race Massacre, “the teacher has likely taught, and endorsed as correct, the view that the Massacre was indeed horrific, and students may honestly believe that the message conveyed is that they ‘bear responsibility,’ and should feel ‘discomfort, guilt, or anguish.’” *Id.* at 10 (citation modified). But under the statute’s plain text, the teacher is free to instruct about the massacre. The teacher is prohibited only from interjecting “thus, white people are inherently superior to black people,” or “thus, black people are inherently superior to white people,” or “thus, those of you who are white should feel discomfort, guilt, or anguish,” and so on.

In short, subsection B prohibits teachers from proselytizing students to accept certain racist or sexist creeds as truth. Apart from any prohibited racist or sexist editorializing, teachers remain free to instruct about historical or popular issues, and students remain free to draw their own conclusions.

¹⁴ For that reason, we reject the K–12 plaintiffs’ argument that subsection B is vague for lacking a scienter requirement. It is hard to imagine how someone could unintentionally teach, or require to be taught, eight discriminatory concepts as correct principles. And besides, lacking a scienter requirement doesn’t *make* a law vague; rather, having a scienter requirement “mitigates” vagueness that already exists. *Bushco*, 729 F.3d at 1306 (citation omitted).

2. “Require”

The K–12 plaintiffs aren’t likely to show that “require . . . the following concepts” is vague, either. As used here, “require” means “[t]o demand or call for . . . as appropriate or suitable in a particular case.” *Require*, Oxford English Dictionary, def. II.7.a, https://www.oed.com/dictionary/require_v [<https://perma.cc/6N24-6CAS>]. And in this context, that means an “administrator or other [school employee]” demanding that a teacher teach the eight prohibited concepts as correct principles. *Id.*; see *Course*, Oxford English Dictionary, *supra*. So even though “require . . . the following concepts” is awkward, we read it as specifying how administrators could “make” the concepts “part of a course.” See Okla. Stat. tit. 70, § 24-157(B)(1).

* * *

Because we read “make part of a course” and “require” as meaning teach as correct principles or require teachers to do so, the K–12 plaintiffs are unlikely to show that either term is vague. “[P]eople of ordinary intelligence” can understand what it means to teach or require teachers to teach concepts like “one race or sex is inherently superior to another race or sex.” See *Wyo. Gun Owners*, 83 F.4th at 1233 (citation omitted) (first quote); Okla. Stat. tit. 70, § 24-157(B)(1)(a) (second quote). And as we interpret them, both terms are

specific enough to discourage “arbitrary and discriminatory enforcement.”¹⁵

Wyo. Gun Owners, 83 F.4th at 1233 (citation omitted). So we affirm the district court’s ruling about “make part of a course,” and we reverse its ruling about “require.”

D. The Prohibited Concepts

We now turn to the eight concepts that subsection B prohibits from being taught in the classroom as correct principles.¹⁶ The K–12 plaintiffs aren’t likely to show that these concepts are vague. We give each concept its plain meaning. Using only “words of common understanding,” *Boos*, 485 U.S. at 332, each concept states as correct a discriminatory principle about race or sex. *See* Okla. Stat. tit. 70, § 24-157(B)(1). We see no vagueness in any of them.

Our conclusion does not change for the words “treatment” and “treat” in concepts (c) and (d). The district court saw those words as vague for their

¹⁵ We need not decide whether Oklahoma’s past enforcement actions are consistent with our reading of subsection B. But we note that a law isn’t vague just because “the boundaries of [its] restrictions will be clarified on the ground” through enforcement proceedings. Pls.’ Open. Br. at 51 (citation modified). The important thing is that “it is clear what the [law] as a whole prohibits.” *Grayned*, 408 U.S. at 110.

¹⁶ The K–12 defendants say that the K–12 plaintiffs “did not specifically challenge the vagueness of [concepts] (b), (c), (e), or (h), so those arguments should be waived.” Defs.’ Resp. & Open. Br. at 60. We disagree. The district court addressed all eight concepts in its injunction ruling. *See BERT II*, 737 F. Supp. 3d at 1151–54. And when a court “explicitly resolves an issue of law on the merits,” an appellant may appeal that ruling “on the ground addressed by the district court,” even if the appellant didn’t raise the issue before. *Good v. Dep’t of Educ.*, 121 F.4th 772, 817 n.31 (10th Cir. 2024).

breadth—that is, because they reached “subjects of current political debate” and “ideas that are accepted by a significant number of people and are reflected in current law,” like affirmative action and gendered sports leagues. *BERT II*, 737 F. Supp. 3d at 1152–53. But breadth alone doesn’t make a law vague. *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1254 (10th Cir. 2023). And again, when read in context, concepts (c) and (d) prohibit only teaching as correct principles that someone “*should be* discriminated against *or receive* adverse treatment solely or partly because of his or her race or sex” or that “members of one race or sex *cannot and should not* attempt to treat others without respect to race or sex.”¹⁷ Okla. Stat. tit. 70, § 24-157(B)(1)(c)–(d) (emphasis added).

We also disagree that subsection B’s protection for teaching topics that “align to” Oklahoma’s Academic Standards “deepens the [law’s] vagueness.” Pls.’ Open. Br. at 47 (citation omitted). The Academic Standards don’t change the eight prohibited concepts. The standards specifically protect some topics

¹⁷ We agree that concept (d)’s triple negative is “cumbersome.” *BERT II*, 737 F. Supp. 3d at 1152. But “[s]tatutes do not become unconstitutionally vague just because they require judicial interpretation.” *Green Room*, 157 F.4th at 1215 (citation modified). And “it has long been a convention of the English language . . . that two negatives make a positive.” *United States v. Jereb*, 882 F.3d 1325, 1340 (10th Cir. 2018) (citation modified). So we can eliminate two of the negatives, leaving us with a straightforward prohibition: “No [school employee] shall [teach or require to be taught as a correct principle] . . . [that] members of one race or sex [*must or should*] attempt to treat others [*with*] respect to race or sex.” See Okla. Stat. tit. 70, § 24-157(B)(1)(d).

for teaching, but that is a wholly separate consideration from what the eight concepts *prohibit*. See Okla. Stat. tit. 70, § 24-157(B).

In sum, the concepts’ plain language and context “provide people of ordinary intelligence a reasonable opportunity to understand” what the concepts prohibit. *Wyo. Gun Owners*, 83 F.4th at 1233 (citation omitted). No party contends that Oklahoma teachers have taught or been required to teach, as correct principles, any of the eight concepts as we interpret them. And under our interpretation, each concept is specific enough to discourage “arbitrary and discriminatory enforcement.” *Id.* (citation omitted). So we reverse the district court’s rulings about concepts (c) and (d), and we affirm its rulings about the other six concepts.¹⁸

¹⁸ The K–12 plaintiffs and the dissent cite several decisions declaring similar language vague or likely vague. See, e.g., *Loc. 8027 v. Edelblut*, No. 21-cv-1077, 2024 WL 2722254, at *1–3, *18 (D.N.H. May 28, 2024), *appeal argued*, No. 24-1690 (1st Cir. Apr. 8, 2025); *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 528, 543–45 (N.D. Cal. 2020); *Honeyfund.com v. DeSantis*, 622 F. Supp. 3d 1159, 1168–69, 1180–84 (N.D. Fla. 2022), *aff’d on other grounds*, 94 F.4th 1272, 1282 & n.6 (11th Cir. 2024); *Pernell v. Fla. Bd. of Gov’rs*, 641 F. Supp. 3d 1218, 1231, 1245, 1278–86 (N.D. Fla. 2022), *aff’d on other grounds*, 181 F.4th 1135, 1164 & n.17, 1166 (11th Cir. 2026); *Tenn. Educ. Ass’n v. Reynolds*, 732 F. Supp. 3d 783, 793–94, 806–16 (M.D. Tenn. 2024); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 599–600, 604 (1967); *Jackson Fed’n of Teachers v. Fitch*, 799 F. Supp. 3d 571, 585–88 (S.D. Miss. 2025), *appeal docketed*, No. 25-60496 (5th Cir. Sept. 17, 2025); *Mae M. v. Komrosky*, 332 Cal. Rptr. 3d 682, 688, 695–701 (Cal. Ct. App. 2025). But from what we see, none of those decisions considered, let alone rejected, our plain-text reading of subsection B. So none persuades us that subsection B is vague.

II. First Amendment Right-to-Receive-Information Claims

Everyone agrees that the order on appeal is *BERT II*, the district court’s order partly granting and partly denying a preliminary injunction. Everyone also agrees that we have appellate jurisdiction to review *BERT II* under 28 U.S.C. § 1292(a)(1).

As part of our review of *BERT II*, the K–12 plaintiffs ask us to review that order’s denial of a preliminary injunction based on their First Amendment right-to-receive-information claims. But as the K–12 defendants observe, those claims were decided in *BERT I*, which hasn’t been appealed. 737 F. Supp. 3d at 1182. The K–12 plaintiffs respond with a single paragraph asserting that (1) they sought a preliminary injunction partly on those claims and (2) *BERT I*’s deciding those claims under Rule 12(c) isn’t yet appealable as a final order.¹⁹

Appellants have the burden of showing appellate jurisdiction. *SeedX, Inc. v. Lincoln Strategy Grp. LLC*, 158 F.4th 1166, 1171 (10th Cir. 2025). “Absent an assurance that jurisdiction exists, [we] may not proceed in a case.” *Chieftain Royalty Co. v. SM Energy Co.*, 100 F.4th 1147, 1161 (10th Cir. 2024) (citation omitted). And where the appellants “fail[] to lead, we have no duty to follow. It

¹⁹ Again, after deciding the First Amendment right-to-receive-information claims on the pleadings, the district court declared that “[j]udgment on these claims shall be entered at the conclusion of the litigation.” *BERT I*, 737 F. Supp. 3d at 1182. The K–12 plaintiffs never asked the court to make its decision appealable, either by certifying an appeal under 28 U.S.C. § 1292(b) or by entering final judgment under Rule 54(b).

is [their] burden, not ours, to conjure up possible theories to invoke our legal authority to hear [their] appeal.” *Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011).

Without the K–12 plaintiffs offering a persuasive basis for appellate jurisdiction over their right-to-receive-information claims, we aren’t “comfortable guessing for ourselves . . . what the answer might be to th[at] complex question.” *Id.* The K–12 plaintiffs can appeal the district court’s decision about those claims after the court renders final judgment. *See* 28 U.S.C. § 1291. We dismiss the portion of this appeal that seeks a different outcome on that issue.

CONCLUSION

We affirm the district court’s rulings that, for some parts of subsection B, the K–12 plaintiffs aren’t likely to show vagueness. Otherwise, we reverse. We vacate the preliminary injunction and remand for further proceedings.

24-6139, 24-6140, 24-6141, *Black Emergency Response Team v. Drummond*

MORITZ, Circuit Judge, dissenting.

In a brief analysis that primarily quotes Okla. Stat. tit. 70, § 24-157(B)(1) and declares it not vague, the majority holds that plaintiffs aren't substantially likely to prevail on their constitutional vagueness challenge. In so doing, the majority grafts onto the statute a limiting principle, holding that the phrase "require or make part of a course" means only "teaching the prohibited concepts as correct principles." Maj. Op. 6. But courts aren't permitted to rewrite statutes to save them from vagueness. And the majority's limiting principle neither appears in the statute's plain language, nor can it be gleaned from the verbs used in the banned concepts.

Although I agree that "make part of a course" likely means "to teach," the term "teaching" is far broader in scope than dispensing a sterile set of correct-or-incorrect facts to students—teaching involves responding to questions, leading open-ended discussions, and exploring real-world parallels to, and the legacies of, historical events. These many instructional activities, particularly when combined with the statute's supposed safe harbor for teaching within Oklahoma's Academic Standards, make it substantially likely that this law is unconstitutionally vague. And although I write alone in this case, I am far from alone in reaching this conclusion: every other court facing vagueness challenges to similar laws has found those laws vague. For these reasons, I respectfully dissent.¹

¹ I agree that we lack appellate jurisdiction over plaintiffs' First Amendment claim, so I join the majority in dismissing that portion of the appeal.

As the majority explains, “[a] statute is unconstitutionally vague for one of two reasons: it either ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’; or it ‘authorizes or even encourages arbitrary and discriminatory enforcement.’” *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1158 (10th Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). The majority also correctly notes that when conducting a vagueness inquiry, we may only “‘extrapolate [a statute’s] allowable meaning’”—we lack the “power to construe and narrow state laws.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (quoting *Garner v. Louisiana*, 368 U.S. 157, 174 (1961) (Frankfurter, J., concurring)). In other words, when a legislature “passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite [the legislature] to try again.” *United States v. Davis*, 588 U.S. 445, 448 (2019).

Whether a law is vague isn’t a mechanical inquiry: “[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). For this reason, both criminal laws and laws that “threaten[] to inhibit the exercise of constitutionally protected rights” (such as free speech) are subject to “a more stringent vagueness test.” *Id.* at 499. Although the majority assumes that a stricter test applies here based on First Amendment concerns, it’s sufficient for my purposes to assume the

contrary.² For the reasons that follow, plaintiffs are likely to prevail even under baseline vagueness standards.³

I begin with the umbrella language of § 24-157(B)(1), which states that no school personnel “shall require or make part of a course” the eight banned concepts. At the outset, I’m persuaded by the majority’s conclusion that the purpose of the word “require” is to make clear that administrators and other school employees, as

² That said, I agree with the majority that a stricter test should apply—but for a different reason. The majority’s First Amendment rationale ignores the district court’s separate ruling (not at issue in this appeal) that this law doesn’t implicate First Amendment rights. *See Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1158, 1176–78 & n.16 (W.D. Okla. 2024). In my view, a stricter vagueness test is warranted here because of the severity of losing one’s professional teaching license as a penalty for violating the statute. *See Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring) (recognizing that civil “remedies that strip persons of their professional licenses and livelihoods” are often a “graver” consequence than misdemeanor punishment). Though plaintiffs do not need the stricter standard to prevail, the facts call for it.

³ I depart from one further portion of the majority’s legal framework: whether plaintiffs face a higher preliminary-injunction burden because they request a disfavored injunction that would change the status quo. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258–59 (10th Cir. 2005). The majority declines to answer this question. I would hold that plaintiffs’ requested injunction doesn’t change the status quo. “[T]he status quo is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing.” *Id.* at 1260 (cleaned up) (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001)). Here, where plaintiffs moved to preliminarily enjoin a law shortly after it became effective, that uncontested status is the time before the legislature enacted the challenged statute. *Cf. Terry v. Drummond*, No. 24-6046, 2026 WL 2164884, at *3, *5, *13 (10th Cir. July 28, 2026) (applying heightened standard where plaintiffs sought to preliminarily enjoin law that had existed for over 100 years). And contrary to the State’s position, it’s irrelevant that the district court didn’t rule on plaintiffs’ motion until June 2024. “[T]he last uncontested status” continues “until the outcome of the final hearing,” which hasn’t yet occurred here. *Schrier*, 427 F.3d at 1260 (quoting *Dominion*, 269 F.3d at 1155). So no heightened preliminary-injunction burden exists on the ground that the injunction would alter the status quo.

well as teachers, are covered by the statute. Specifically, administrators and school employees are prohibited from “requiring”—that is, “making,” in some manner—the banned concepts part of classwork. So I frame the vagueness inquiry around the key question of what it means to prohibit “teacher[s], administrator[s, and] other employee[s] of a school” (who I collectively refer to as “teachers”) from “making” these numerous banned concepts “part of a course.” § 24-157(B)(1). And as I see it, the phrase “make part of course” equates to “teaching,” in all its senses.

Yet in an effort to narrow and clarify the statute’s broad scope, the majority goes one step further, as the district court did. According to the district court, the phrase “make part of a course” plainly and ordinarily “prohibit[s] school personnel from directly endorsing, promoting, or inculcating any concept as a normative value.” App. vol. 3, 134. The majority adopts a similar interpretation of “make part of a course”: “teaching the prohibited concepts as correct principles.” Maj. Op. 6. But nothing in the plain text of § 24-157(B)(1) indicates that “teaching” means teaching *as correct principles*. As plaintiffs argue, nothing about “require or make part of a course” indicates that it’s inherently limited to endorsing, promoting, inculcating, or teaching as a correct principle *any* of the banned concepts. Indeed, the district court provided no support for its rationale, and the State offers little to none in its briefing.⁴

⁴ At best, the State suggests that the word “require” supports limiting the meaning of “make part of a course.” But I agree with the majority that “require” in this context acts to widen the scope of the statute beyond teachers to encompass administrators and other school employees. The State also broadly argues that the phrase isn’t vague because it “uses ‘words of common understanding.’” Aplee. Br. 38 (quoting *Fabrizius v. Dep’t of Agric.*, 129 F.4th 1226, 1238 (10th Cir. 2025)). This is a red herring, and one that not

Left on its own, the majority looks for support beyond the phrase “make part of a course,” landing on the verbs used in the eight banned concepts: “is,” “should be . . . or receive,” “cannot and should not,” “bears,” “should feel,” and “are . . . or were.” Maj. Op. 26–27 (quoting § 24-157(B)(1)(a)–(h)). But the majority offers scarce explanation, merely italicizing these verbs and then declaring that they “show that subsection B prohibits teachers from instructing students that any of the eight concepts is correct.” *Id.* at 27. The majority seems to infer that because the verbs are generally expressed in the present tense, the statute primarily prohibits teaching the concepts as presently accurate.

But for obvious reasons, this is an unjustified leap. If “make part of a course” essentially means “teach,” as the majority and I accept, then the law prohibits far more than reciting a series of banned principles as “correct” or “as fact.” That’s because “teach” includes many different instructional techniques. *Teach*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/teach> (last visited August 13, 2026) (listing, among other definitions, “to cause to know *something*,” “to cause to know *how*,” “to accustom to some action or attitude,” “to guide the

even the majority adopts. Using common language doesn’t automatically render a law understandable. *See Johnson v. United States*, 576 U.S. 591, 593 (2015) (finding phrase “conduct that presents a serious potential risk of physical injury to another” unconstitutionally vague). Finally, the State’s invocation of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, 600 U.S. 181 (2023), is even further afield. *SFFA* is not a vagueness case—it held that two universities violated the Equal Protection Clause by “mak[ing] admissions decisions that turn on an applicant’s race.” *Id.* at 208. That *SFFA* and § 24-157 both concern issues of race doesn’t mean the former provides any meaningful guidance on the latter.

studies of,” “to impart the knowledge of,” and “to instruct by precept, example, or experience” (emphases added)). Simply stated, the mere fact that the banned concepts are expressed in the present tense doesn’t permit us to narrow these meanings or choose among them.

The majority’s leap from “teaching” to “teaching as correct principles” or “teaching as fact” also ignores Oklahoma’s Academic Standards. Many of those standards “focus on deep thinking, conceptual understanding, and real-world problem-solving skills.” Okla. State Dep’t of Educ., *Oklahoma Academic Standards* (July 16, 2026), <https://oklahoma.gov/education/services/standards-learning/oklahoma-academic-standards.html> [<https://perma.cc/AKY6-RN7N>] (last visited September 8, 2026). And they encourage “creating opinions and arguments.” *Id.* As the standards make plain, teachers “teach” without labelling every concept conveyed as correct or incorrect or as fact or fiction. In other words, “[t]eachers often integrate concepts into their courses *without* endorsing, promoting, or inculcating them as normative values.” American Federation of Teachers (AFT) Amicus Br. 8 (emphasis added). And teachers are not always in control of what students take away from—or bring to—the material they teach. So teachers may “make” a banned concept “part of a course” unintentionally, through discussion, by responding to questions, and in myriad other ways, any one of which could violate the law. All those considerations preclude any easy jump between the verb tense of the banned concepts and what it means to “make [a banned concept] part of a course.” § 24-157(B)(1). In making such a leap, the majority impermissibly “fashion[s] a new,

clearer law.” *Davis*, 588 U.S. at 448; *see also Grayned*, 408 U.S. at 110. As written, the law is vague.

Supreme Court case law supports this conclusion. In *Keyishian v. Board of Regents of University of State of New York*, the Court considered university policies aimed at “prevent[ing] the appointment or retention of subversive persons.” 385 U.S. 589, 591–92 (1967) (cleaned up). In part, the Court found the policies vague based on language barring employment of anyone who “advocates, advises[,], or teaches the doctrine of forceful overthrow of government.” *Id.* at 599–600 (cleaned up). As to the word “teaches,” the Court noted the lack of clarity about whether “the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate[s] this prohibition.” *Id.* at 600. Notably, the Court did not attempt to limit or narrow the definition of “teach” to clarify the policy and avoid the obvious vagueness issue.

The broad phrase “require or make part of a course” in § 24-157(B)(1), which again, the majority and I both understand to mean “teach,” presents the same lack of clarity and mandates the same conclusion.⁵ Several hypotheticals illustrate this point. Does a teacher who informs her class about the Three-Fifths Compromise, or the precepts of Critical Race Theory or affirmative action, violate the law’s prohibition on making part of a course the banned concept that “one race . . . is inherently

⁵ Tellingly, the majority buries *Keyishian* in a footnote that otherwise cites nonbinding district-court decisions, and the State attempts to distinguish it on its facts. But *Keyishian* plainly supports the conclusion that “require or make part of a course” is vague in the same way that “teach” is vague.

superior to another race,” § 24-157(B)(1)(a), or the banned concept that “members of one race or sex cannot and should not attempt to treat others without respect to race or sex,” § 24-157(B)(1)(d)? What if a teacher informs her class about the women’s suffrage movement? Has she made part of a course the banned concept that “one . . . sex is inherently superior to another,” § 24-157(B)(1)(a), given that this concept undergirds the need for the movement in the first place? Does teaching about the horrors of the Trail of Tears or the Tulsa Race Massacre violate the law if a white student initiates a classroom discussion about feeling some “responsibility for actions committed in the past by other members of the same race,” § 24-157(B)(1)(f), or “guilt . . . on account of his or her race,” § 24-157(B)(1)(g)? Is a teacher permitted to inform the student that many people do feel genuine guilt? The reality is that an ordinary teacher doesn’t know the answers to these questions and that Oklahoma could plausibly prosecute the teachers in each of these hypotheticals for violating the law.⁶

For contrast, consider *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015). There, the plaintiffs challenged a state law that aimed to dismantle a Mexican American Studies program by prohibiting instruction that was “designed primarily for pupils of a particular ethnic group.” *Id.* at 973 (quoting Ariz. Rev. Stat. Ann. § 15-112(A)). The law also prohibited schools from including “courses or classes that . . . [p]romote

⁶ None of these hypotheticals are far-fetched—most are topics pulled directly from the Oklahoma Academic Standards, which § 24-157(B) purports to be “align[ed] to.” *See infra* pp. 11–12.

resentment toward a race or class of people . . . [or] [a]dvocate ethnic solidarity instead of the treatment of pupils as individuals.” *Id.* (quoting § 15-112(A)). The Ninth Circuit rejected a vagueness challenge to these phrases, emphasizing that in context, the word “promote” indicated intention and the word “advocate” likewise “imply[ed] an affirmative act and intent,” especially when combined with the statute’s use of the phrase “instead of treating pupils as individuals.” *Id.* at 988–89 (cleaned up).

Oklahoma’s law conspicuously lacks these clarifying features—§ 24-157(B), as written, neither uses the words “promote” or “advocate” nor includes an “instead” formulation. It simply prohibits “mak[ing] part of a course” (that is, “teaching”) any of the eight banned concepts, regardless of the teacher’s intent. The majority attempts to align itself with *Arce* (albeit without mentioning that case) by amending the statute to read “make part of a course as a correct principle.” But that amendment does nothing to correct the vagueness of the statute. That’s because the vagueness is caused by the phrase “make part of a course,” which means “teaching”—and that vagueness, as *Keyishian* declared, can’t be fixed.⁷

Even the majority’s limiting principle does not fully resolve the vagueness problem. To begin with just one example from above, regarding the Tulsa Race

⁷ In fact, this case presents an even stronger case of vagueness than *Keyishian* because there, the policy at issue *included* more specific terms: “advocates, advises[,] or teaches.” 385 U.S. at 599 (emphasis added). And yet, because the policy included the vague term “teach,” the Court found it unconstitutional. Here, the policy *only* includes the vague term “make part of a course” (that is, teach)—the majority’s efforts to add words to the statute notwithstanding.

Massacre, the teacher has likely taught, and endorsed as correct, the view that the Massacre was indeed horrific, and students may honestly believe that the message conveyed is that they “bear[] responsibility,” and should feel “discomfort, guilt, [or] anguish,” § 24-157(B)(1)(f), (g). So, in a plausible sense, the teacher has made the banned concept part of the course “as fact” or as a “correct principle”—if the event itself was horrific, guilt is an understandable response. But has the teacher violated the law under the majority’s interpretation? I’m not sure. Suppose instead that a student asks about reparations or affirmative action, inherently concepts that involve one racial group accepting “responsibility” for past actions of that racial group. § 24-157(B)(1)(f). Must the teacher in either case inform the class that belief in affirmative action or reparations is “incorrect” or risk having made the banned concept part of the course “as fact” or as a “correct principle”? Even more confusingly, what if a teacher affirms that one of the banned concepts *was once correct* but *currently* is not? For instance, what if a teacher argues, for purposes of a debate in a government course, that meritocracy *was once* an oppressive concept, but now that the United States has developed, it no longer is? Has that teacher taught “as *presently* correct” or “as fact” the banned concept that “meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race,” § 24-157(B)(1)(h)? Maybe. But then again, maybe not. Despite this lack of clarity, the majority’s decision ensures that tens of thousands of teachers across Oklahoma will have to answer such questions, on the fly, every single school day. What’s more, they must do so knowing their livelihoods

may depend on their answers.⁸

Further, contrary to the State’s position (and the district court’s rationale), the statute’s “safe harbor” provides neither clarity nor comfort for confused teachers.⁹ Instead, the supposed safe harbor is nothing short of a minefield. Recall that the safe harbor expressly states that § 24-157(B) “shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.” Yet, at the same time, § 24-157(B)(1) prohibits the teaching of certain banned “concepts” that implicitly “align to” teaching the standards. *Id.* In short, teachers are both permitted to teach certain “concepts” and simultaneously banned from teaching very similar, if not the same, “concepts.”

The safe harbor expressly permits teachers to continue teaching from the standards by covering, for instance, the history of slavery in America. That might provide some clarity for teachers if § 24-157(B)(1)(a) didn’t simultaneously prohibit teaching as “part of a course” the “concept[]” that one race is inherently superior to another race—a concept implicit in any instruction about the historical justification for slavery. Compounding such issues, the standards are permissive rather than mandatory. They explicitly *don’t* “dictate how teachers should teach” or “mandate a

⁸ Nor can teachers rely on the State’s purported promise not to enforce the law in a manner that prohibits the mere mention of the banned concepts. The State’s disavowal, like the majority’s view, is premised on adding language to the statute that doesn’t exist. But for the reasons already discussed, the text plainly permits the State to enforce the law based solely on mere mention of the banned concepts.

⁹ Indeed, the majority tellingly fails to address the safe-harbor provision in connection with what it means to make a concept part of a course.

specific curriculum.” Okla. State Dep’t of Educ., *Oklahoma Academic Standards* (July 16, 2026), <https://oklahoma.gov/education/services/standards-learning/oklahoma-academic-standards.html> [<https://perma.cc/AKY6-RN7N>] (last visited September 8, 2026). As a result, teachers have no way of distinguishing between apparently permissible teaching of “concepts” outlined in the standards and impermissibly making part of a course one of the banned concepts. As the AFT puts it, the Academic Standards place teachers “in a double bind by compelling [them] to discuss perilous topics, but without specifying *how* to cover them in class in [a] manner that does not break the law.” AFT Amicus Br. 25.

Nor does § 24-157(B)(1) include a scienter requirement that might undercut its vagueness. *See Vill. of Hoffman*, 455 U.S. at 499 (“[A] scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”). The State disingenuously points out that the law’s implementing rules state that a license may only be *revoked* based on a willful violation. *See* Okla. Admin. Code § 210:10-1-23(j)(2). Yet neither the law nor its regulations include any scienter requirement for the *suspension* of a teaching license. *See* § 210:10-1-23(j)(1). And the majority’s point that “[i]t is hard to imagine how someone could unintentionally teach, or require to be taught, eight discriminatory concepts” isn’t persuasive. Maj. Op. 28 n.14. As the extensive hypotheticals above demonstrate, it’s not at all hard to imagine.

Before concluding, it’s worth mentioning that although we are the first circuit court to rule on the vagueness of this language, we are far from the first court to

encounter the issue. That’s not surprising: § 24-157(B)(1) is modeled on (indeed, is nearly identical to) a 2020 executive order, *see* Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020), and at least 12 other states and one locality have enacted similarly inspired laws, *see Tenn. Educ. Ass’n v. Reynolds (Reynolds II)*, No. 23-cv-00751, 2025 WL 1145260, at *3 n.1 (M.D. Tenn. Apr. 17, 2025) (unpublished) (listing state laws modeled after same executive order). Nevertheless, the majority not only fails to note that we are deciding an issue of first impression, it relegates the decisions of these other courts to a string cite in a footnote, accompanied by the conclusory comment that “none of those decisions considered, let alone rejected, [its] plain-text reading of subsection B.” Maj. Op. 32 n.18.

But it makes sense that those decisions neither considered nor rejected the majority’s reading, which goes well beyond § 24-157(B)(1)’s plain text, and I would not be so quick to dismiss these other decisions. Except for the district court below and the majority here, *every* court that has ruled on the vagueness of these types of laws—that is, those inspired by the 2020 executive order—has concluded that they are vague in full. The list begins with the district court that preliminarily enjoined the original executive order. *See Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543–45 (N.D. Cal. 2020).¹⁰ It continues with district courts and one state appellate court finding similar laws unconstitutionally vague:

¹⁰ The 2020 ruling in *Santa Cruz* was functionally the end of the matter because shortly thereafter, the Biden Administration revoked the executive order at issue. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

- New Hampshire: *Local 8027 v. Edelblut*, No. 21-cv-1077, 2024 WL 2722254, at *8–15 (D.N.H. May 28, 2024) (unpublished), *argued*, No. 24-1690 (1st Cir. Apr. 8, 2025).
- Florida: *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1278–86 (N.D. Fla. 2022), *aff'd*, 181 F.4th 1135 (11th Cir. 2026); *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1180–84 (N.D. Fla. 2022), *aff'd*, 94 F.4th 1272 (11th Cir. 2024).¹¹
- Tennessee: *Tenn. Educ. Ass’n v. Reynolds (Reynolds I)*, 732 F. Supp. 3d 783, 806–16 (M.D. Tenn. 2024), *dismissed*, *Reynolds II*, 2025 WL 1145260.¹²
- Mississippi: *Jackson Fed’n of Tchrs. v. Fitch*, 799 F. Supp. 3d 571 (S.D. Miss. 2025), *argued*, No. 25-60496 (5th Cir. Aug. 31, 2026).
- California: *Mae M. v. Komrosky*, 111 Cal. App. 5th 198, 203–04, 217 (Cal. Ct. App. 2025).

Of course, these are not binding decisions. But much of their analyses and the weight of their consensus support my plain-text reading of § 24-157(B)(1) as unconstitutionally vague. *See, e.g., Edelblut*, 2024 WL 2722254, at *12–13 (finding law vague in part because it “lack[s] clarity as to what it means to ‘teach’ a banned concept” and describing examples related to affirmative action); *Reynolds I*, 732 F. Supp. 3d at 808 (finding law vague in part based on language prohibiting “including” concepts “as part of a course of instruction,” which was compounded by supposed safe harbor for “impartial” instruction, itself an ambiguous term); *Pernell*, 641 F. Supp. 3d at 1281–84 (explaining vagueness created by supposed safe harbor for

¹¹ In *Pernell* and *Honeyfund*, the Eleventh Circuit affirmed solely on First Amendment grounds—the law at issue there applied to universities and private employers, not K–12 teachers—and thus did not reach vagueness. *See Pernell*, 2026 WL 1955783, at *1, *17 n.17; *Honeyfund*, 94 F.4th at 1275, 1283 n.6.

¹² The Tennessee district court ultimately dismissed for lack of standing under the Sixth Circuit’s strict test for pre-enforcement challenges (in a ruling that was not appealed), but not before expressing significant vagueness concerns. *See Reynolds II*, 2025 WL 1145260, at *13–14.

discussion “in an objective manner without endorsement”); *Honeyfund*, 622 F. Supp. 3d at 1183–84 (same); *cf. Santa Cruz*, 508 F. Supp. 3d at 544 (finding original executive order unconstitutionally vague due to lack of clarity between permissible “informing” and impermissible “teaching or implying”).

In sum, though I appreciate the majority’s attempt to rescue an obviously vague statute by adding a limiting principle, the majority’s interpretation of § 24-157(B)(1) is untethered from the statute’s plain language and impermissibly rewrites the statute. As written, § 24-157(B)(1) is unconstitutionally vague. Accordingly, plaintiffs are substantially likely to succeed on their Fourteenth Amendment claim. I would therefore affirm the district court’s preliminary injunction but reverse in part to expand the scope of that injunction to enjoin enforcement of § 24-157(B)(1) in full.¹³

¹³ The State’s brief includes a passing request to limit any “preliminary injunction to the actual [p]laintiffs, rather than the universal relief the court granted below.” Aplee. Br. 61. In support, the State cites *Trump v. CASA, Inc.*, which held that universal injunctions “prohibit[ing] enforcement of a [federal] law or policy against *anyone* . . . likely exceed the equitable authority that Congress has granted to federal courts.” 606 U.S. 831, 837 (2025). But the State’s single sentence and case citation are insufficient to adequately present this argument. *See Pharm. Care Mgmt. Ass’n v. Mulready*, 78 F.4th 1183, 1204–05 (10th Cir. 2023). For instance, the State fails to address whether there’s a meaningful distinction between a nationwide injunction and a statewide injunction. *See, e.g., Sanderson v. Hanaway*, No. 23-cv-1242, 2026 WL 1505958, at *1–2 (E.D. Mo. May 29, 2026) (concluding that *CASA* didn’t upset availability of statewide injunctions). It likewise ignores that even under *CASA*, “courts generally ‘may administer complete relief *between the parties*,’” one of which, in this case, is functionally the State of Oklahoma. *CASA*, 606 U.S. at 851 (quoting *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 507 (1928)). I would therefore leave this issue for the district court to decide on remand. *See Iowa Migrant Movement for Just. v. Bird*, 157 F.4th 904, 930–31 (8th Cir. 2025) (remanding for district court to decide proper scope of injunction following *CASA*).

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Byron White United States Courthouse

1823 Stout Street

Denver, Colorado 80257

(303) 844-3157

Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

September 09, 2026

Ms. Rebecca Alyss Barrett
ACLU of Oklahoma Foundation
Legal Department
P.O. Box 13327
Oklahoma City, OK 73113

Ms. Julia Beskin
McDermott Will & Schulte
919 Third Avenue
New York, NY 10022

Catherine McCann Blalock
Lawyers' Committee for Civil Rights Under Law
1500 K Street NW, Suite 900
Washington, DC 20005

Garry Michael Gaskins II
William Patrick Flanagan
Zachary Paul West
Office of the Attorney General for the State of Oklahoma
313 Northeast 21st Street
Oklahoma City, OK 73105

Mr. Travis Handler
ACLU of Oklahoma Foundation
Legal Department
P.O. Box 13327
Oklahoma City, OK 73113

Ms. Sarah A. Hinger
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Mr. David Hinojosa
National Center for Youth Law

2300 18th Street NW
P.O. Box 21156
Washington, DC 20009

Douglas Koff
Kevin S. Johns
McDermott Will & Schulte
919 Third Avenue
New York, NY 10022

Ms. Megan Lambert
ACLU of Oklahoma Foundation
Legal Department
P.O. Box 13327
Oklahoma City, OK 73113

Dariely Rodriguez
Michael Joseph Pillera
Lawyers' Committee for Civil Rights Under Law
1500 K Street NW, Suite 900
Washington, DC 20005

Ms. Sara Solfanelli
McDermott Will & Schulte
919 Third Avenue
New York, NY 10022

Emerson Sykes
Leah Watson
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Tina Sharell Ikpa
Martin Daniel Weitman
University of Oklahoma
Office of Legal Counsel
660 Parrington Oval, Suite 213
Norman, OK 73019

**RE: 24-6139, 24-6140, 24-6141, Black Emergency Response Team, et al v.
Drummond, et al**
Dist/Ag docket: 5:21-CV-01022-G

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Christopher M. Wolpert', with a long horizontal flourish extending to the right.

Christopher M. Wolpert
Clerk of Court

cc: Rebecca Alyss Barrett
Mary Elizabeth Beasley
Amy Berman
Julia Beskin
Catherine McCann Blalock
Justin C Cliburn
Taylor Alexis Dumpson
William Patrick Flanagan
Fred Andrew Fugitt
Garry Michael Gaskins II
Travis Handler
Ryan Haynie
Sarah A. Hinger
David Hinojosa
Tina Sharell Ikpa
Kevin S. Johns
Douglas Koff
Megan Lambert
Jin Hee Lee
Stephen G. Masciocchi
Charles G. Moerdler
Ayomide Odunsi

Michael Joseph Pillera
Dariely Rodriguez
Brent Rowland
Harry Sandick
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Avatara Antoinette Smith-Carrington
Sara Solfanelli
Joseph David Spate
Emerson Sykes
Leah Watson
Martin Daniel Weitman
Zachary Paul West

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